# Classifications of Damages

1. **Pecuniary (monetary)** 
   1. **Special damages** are those which can be exactly quantified at time of trial
2. **Non-pecuniary (non-monetary)  -$300,000 CAP**
   1. **General damages** are those which are incapable of such quantification at time of trial
   2. Monetary evaluation of non-penuniary losses is more a philosophical and policy exercise: not logical but awarded must be fair and reasonable (*Andrews v. Grand & Toy Alberta Ltd*, [1978] SCC)

## Four basic categories of Damages

1. **Nominal Damages**

* **Small sum to redress a violation of a legal right that the law deems worthy of protection even without harm**
* **Nominal damages does not necessarily mean a small amount, but speaks to the purpose of the damages (The Medina)**

1. **Compensatory Damages**

* **"So far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained" (Dodd Properties)**
* **That sum of money which will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation” (Livingstone)**

1. **Aggravated Damages**

* **When D’s conduct is so outrageous that the harm done is worse than it otherwise would have been=compensate injury to dignity**
* **Especially situations where there is a gross breach of trust or authority (BP v BW)**

1. **Punitive Damages**
2. **To provide punishment and deterrence, but should be awarded only if it is demonstrably necessary to deter or denounce beyond what compensatory damages already does (Whiten v Pilot Insurance)**
3. **Should not punish civilly if already punished by criminal court**

**Other Considerations**

* Liable only when conduct is both **voluntary** and **intentional (actual intent, imputed intent, transferred intent)**
  + **Actual Intent: an** actor’s desire to bring about the results or consequences of his or her act, not desire to do the act itself
  + **Imputed (Constructive) Intent:** D did not desire the consequences to occur, but certain or substantially certain to result from his or her act
  + **Transferred Intent:** D intends to commit an intentional tort against one party , but unintentionally commits an intentional tort against another

**DURESS**

* Duress is not a defense for trespass(May get you out of punitive, but not compensatory damages)

**PROVOCATION**

* Provocation only relevant for assessing damages (compensatory and punitive). Conduct of P must have been such as to cause D to self-control and there needs to be temporal proximity

**MISTAKE OF LAW**

* Mistake of law is not a defence (does not negate intention), but is relevant for assessing damages

**MISTAKE OF FACT**

* Mistake of fact is not a defence

# Intentional Interference with the Person

* Derived from the writ of Trespass (Direct Interference with the person): Battery, Assault, False Imprisonment
* Derived from action on the case (Indirect Interference with the person): Malicious Prosecution, Intentional Infliction of Nervous Shock

## Battery

**Definition: Intentional infliction upon the body of another of a harmful or offensive contact. *Actionable Per se (No need to prove damages)***

* **Must be aware or ought to be aware that the contact was harmful or offensive**
  + ***P only needs to prove D directly interfered with his person and the burden of proof then shifts to the D to prove that his conduct was neither intentional nor negligent.***
* **D doesn’t have to be aware that the contact occurred**
* **If physical contact was intended, then the fact that the magnitude of its consequences exceeded the expectation (or what was intended) is irrelevant. D must bear the burden of responsibility (Bettel v Yim)**

**Defences**: Consent, self defense, defense of 3rd party, defense of property, necessity, and legal authority

## Assault

**Definition:** **Intentional** **creation in the mind of another of a reasonable apprehension of immediate physical contact *(actionable per se)***

* **D must have intended to create that apprehension or at least do an act that in reasonable people would create that apprehension**
* **Requires P to have an apprehension of immediate physical contact and that apprehension must be reasonable in those circumstances**
* **Conditional threats can be assaults (Police v Greaves)**
* **Both threatening words, and actions that make them plausible are necessary for assault (HolCombe)**

**Subjective/ Objective Apprehension Test:** Did P in fact apprehend the immediacy of the physical contact, and was that apprehension reasonable?

**Defenses:** Consent, self-defense, defense of 3rd party, defense of property, necessity, and legal authority

## False Imprisonment

**Definition**: **Situations in which an individual's movement is intentionally (totally) restrained against their will *(actionable per se)***

* **There needs to be an act intended to confine**
* **Can be physical or psychological (D must have intended to give the impression that P was not free to go)**
* **May be imposed by physical means, an implicit or explicit threat of force, or an implicit or explicit assertion of legal authority (Campbell)**
* **There is no false imprisonment for partial obstructions or disturbances (there needs to be a total restraint of movement) (Bird v Jones)**
  + **If there is a reasonable route of escape, there is no false imprisonment**
* **False imprisonment can occur without the knowledge of P at the time**

**False Arrest (One category of False Imprisonment): Imposed by an assertion of legal authority**

* False arrest actions can be brought against peace officers and private citizens who implicitly or explicitly assert legal authority in detaining others.

**Defence**: Legal authority, Consent (Herd v Weardale), Having witnessed the offence being committed

**Damages:** Punitive damages increasingly being awarded

## Malicious Prosecution

* **Definition:** improper initiation of criminal proceedings against an individual ***(not actionable per se)***

**4 necessary elements (Nells v Ontario):**

**1) The proceedings must have been initiated by the defendants (Not liable for merely providing info to the police/testifying in court)**

**2) The proceedings must hav**e **terminated in favour of the plaintiff**

**3) The absence of reasonable and probable cause**

* **Reasonable and probable cause has been defined as "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 ordinary 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 (Different test for Public v. Private Prosecutor See Mizaga)**

**Public prosecutor: Whether there were reasonable grounds to initiate and continue prosecution**

**Private prosecutor: standard is whether they reasonable believed the accused is guilty.**

**4) Malice or a primary purpose other than that of carrying the law into effect**

* + **The equivalent of "improper purpose”.**

**Nelles denied the existence of a common law immunity protecting the AG and Crown prosecutors**

## The Tort of Abuse of Process (Civil action of malicious prosecution)--bringing of a civil action

**Definition: Focuses on the misuse of civil proceedings for collateral or illicit purpose other than the resolution of the claim *(not actionable per se)***

**Plaintiff must prove 4 elements:**

**1) That the defendant brought a civil action**

**2) That the defendant did so for some extrinsic purpose**

**3) That the defendant undertook, or threatened to undertake some overt act, other than the litigation itself, in order to further the improper purpose**

**4) That the plaintiff consequently suffered a loss**

## Intentional Infliction of Nervous Shock

**Definition: Intentionally causing** another person **severe mental suffering or something that is bound to cause such harm** (psychiatric injury) ***(Not actionable per se)***

***Required Elements:***

1. **Intentional and “outrageous” conduct (actual or imputed intent)**
2. **Designed to inflict emotional distress or that a reasonable person would have known would cause emotional distress;**
   1. **D need not to intend nervous shock. Sufficient that D acted in reckless disregard for this possibility, or was foreseeable that profound distress would ensue.**
   2. **More harm was done than was anticipated is irrelevant (Wilkinson)**
3. **That causes a visible and provable illness—there must be some physical or psychological manifestation of injury (Radovskis)**

**Discussion:**

Canadian courts have expanded the definition to “visible and provable” illness (some indication that something less than illness may be accepted-Mustapha)

* Absence of expert medical evidence is not fatal to the claim (Rahemtulla v. Vanfed Credit Union)
* P may be entitled to recover for emotional harm falling short of a psychiatric condition (Tran v. Financial Debt Recovery)

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| **Samms v. Eccles (Utah Case in U.S)—More flexible definition—kind of like a Tort of Embarrassment** |

**Facts:** D attempted to solicit sex from a co-worker. P declines, D becomes more insistent, showing up at her house showing genitals. P brings action against him for severe emotional distress. P won.

**Ratio: Where the defendant intentionally engaged in some conduct toward the plaintiff**

**a) With the purpose of inflicting emotional distress or**

**b) Where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.**

## Privacy

**Statutory Tort:** *(s.1 and s.3 Privacy Act)*

* ***Privacy Act: (s.1):*****It is a tort actionable without proof of damage for a person willfully and without a claim of right to violate the privacy of another**
* ***“Willfully” applies narrowly to the intention to do an act which the person doing the act knew or should have know would violate the privacy of another (Hollingsworth)***
* ***“Without right of claim” means an “honest belief in a state of facts which, if it existed, would be legal justification or excuse” (Hollingsworth)***

**Common Law Tort**: Intentional act with awareness of its nature *(Jones and Tsige)*

* + **Appropriation of Personality: Common law tort**
    - Tort action for the appropriation of personality for the unauthorized use of a person's name or likeness.

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| **Jones v. Tsige (2012 ONCA) –Common Law Tort of Intrusion upon Seclusion (probably not much diff than s.1)** |

**Facts:** Jones discovered Tsige looking at banking records. Bank disciplined D with suspension, P claimed privacy had been invaded and claimed damages.

**Elements of the tort:**

* 1. **D’s conduct must be Intentional or reckless**
  2. **D must have invaded, without lawful justification, P’s private affairs or concerns and that a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.**

**Also identified three privacy related torts:**

1. **Public Disclosure of embarrassing private facts** 
   1. Covered by ***Hollinsworth*** and ***S.1 Privacy Act*** perhaps by ***Breach of Confidence*** as well
2. **Publicity which places the plaintiff in a false light in the public eye**
   1. May or may not be covered—some cases would be covered by defamation. U.S. more readily accepts these as torts
3. **Appropriation of the plaintiff’s name and likeness**
   1. Clearly covered by s.3 of the Privacy Act and common law recognizes “appropriation of personality”.

**Defenses:** No reasonable expectation of privacy, right of claim, legal justification

**Damages:** Sharpe suggests that the cap should be around $20,000, and damages are for the BREACH, not necessarily the effects of the breach of privacy

## Breach of Confidence

**Definition:** Tort action used to protect the privacy of both sensitive business and personal information.

**To recover for breach of confidence, the plaintiff has to establish:**

* 1. **The information was confidential nature**
  2. **It was disclosed in circumstances creating an obligation of confidentiality**
  3. **Its unauthorized use was detrimental to the confider**

## Intentional Interference with Chattels

## Trespass to Chattels

**Definition:** Trespass to chattels is where the defendant **directly and intentionally** interferes with a chattel **in the possession of the plaintiff**. **Only intent required is the intent to do the act (Protects possession rather than ownership)**

### Key points about the tort:

**(1)** **Any direct interference with a chattel is actionable, with the result that damage, destruction, taking, or movement of the chattel can all provide a basis for the tort—there is no requirement to make further use of the chattel**

**However**: In practice, trespass is most commonly used where a chattel has been damaged or where there has been some minor unauthorized use or movement of the chattel.

**(2)** Once the plaintiff has established that there was an interference with possession, then it for the defendant to prove an absence of intent.

**(3)** **Knowledge that the interference is wrongful is not required.** **Mistake is no defence.** *(Cameron v Morang (1978))*

**(4)** The **remedy for trespass to chattels is an award of damages**. The measure of damages for a damaged chattel is the **reduction in its market value** or the cost of repairs (where that is less). An alternative to claiming compensation could be to receive the defendant’s gains. (*Neate v Harding (1851))*

## (2) Detinue

**Definition:** Detinueis available where P who has a right to the immediate possession of the chattel has asked the defendant to return it. **(*Actionable per se****)*

* **Note: Not every refusal to return will trigger liability-depends on grounds to refuse return—the nature of act depends on the D’s purpose—warehouse storing goods and refuses to return goods claiming that it’s not yours on good faith.**
* **Detinue Sur Bailment:** Bailor suing the bailee for return of the goods. **Bailee is estopped from saying that he does not have the chattel**. He can only get off in saying that the items were gone with no fault of him
* **Detinue Sur Trover:** Right to possession person suing the person who has got the goods (wrongful possession)

### Key points about the tort:

1. Plaintiff must first ask for the item back (and the defendant must refuse) before the action can be brought before the court (Baud Corp. NV v Brook (1973) 12 AR 311 (CA)
2. Main remedies are an order from the court (requiring the defendant to return the chattel) or an award of damages for its value (and detention). **There is no right to the chattel, it is up to the court to make the order.** *(Cf Schentag v Gauthier (1972))*

**Three Main Remedies** *(Gen & Finance Facilities LTD v. Cooks Cars (Romford) LTD. [1963]*

1. **Value of the chattel (at time of trial) + damages for detention**
2. **Return of the chattel + damages for detention**
3. **No return, just value (at the time of trial)**

**When should a plaintiff sue in detinue rather than conversion or trespass to chattels?** Where the good in question is unique or not easily replaced – i.e. an heirloom, jewellery, or unique industrial or commercial machinery.

**Note:** An action in detinue will fail if the defendant returns the chattel before judgment is given.

**Also**: Because the tort is a continuing one arising out of the persistent failure of the defendant to comply with the request to return the chattel, **damages** for the value of the chattel are **assessed at the time of judgment** rather than the date of the initial refusal to return it. *(Gen & Finance Facilities LTD v. Cooks Cars (Romford) LTD. [1963 1W WLR 644 (CA))* **Contrast this with the general rule in conversion that damages should be assessed at the time of the conversion.**

## (3) Conversion

**Definition:** **Conversion is where the defendant intentionally interferes with the chattel in such as way as to seriously harm the plaintiff’s rights to it (person doesn’t have to have the property) and intends to exercise dominion over the property.**

**Examples of conversion** (**Solomon**, pages 125-126): **Taking possession, without holding possession, transferring possession (NEMO DAT RULE APPLIES)**

### Key Rules

**(1)** The tort is restricted to intentional interferences with possession (or an immediate right to possession). As a result, the tort of conversion is not available for negligent interferences.

**(2)** The act of conversion must be one that so seriously interferes with the plaintiff’s rights to the chattel that the defendant should be held liable for its full value. Some authorities say that it is not actionable unless plaintiff establishes existence of a loss. (various law reform reports and torts textbooks)*, historically actionable per se.*

**In effect:** Conversion allows for the **forced judicial sale of the chattel to the defendant.** This explains why orders for the return of the chattel are not made in a conversion action. The defendant is treated as if he had bought the chattel and he can keep it.

**(3)** **Mistake is no defence to conversion**. *(Irvington Holdings ltd. v. Black (1987))* However, can’t be liable if you were **authorized** to deal with property.

**Therefore:** **An innocent seller of stolen goods and the innocent purchaser can both be liable in conversion**. (NEMO DAT)

**However: There are various exceptions to this rule (involuntary bailee)** *(Hollins v. Fowler)*:

* + - **Packing, storing, or carrying goods for someone who lacks title to the goods will not give rise to conversion provided the person responsible is not aware of the lack of title.**

**(4) Damages are assessed at the time of conversion or when the plaintiff became aware of the conversion + consequential damage (or increase in value after conversion) *(Aitken v. Gardiner)***

**(5)** **Plaintiff must attempt to mitigate his loss by replacing the chattel as soon as is practical**

**(6)** **If the goods are returned after mistakenly taken it will result in nominal damages** *(Mackenzie v Scotia Lumber co)*

**When can you go for Detinue AND Conversion?**

* When D still has the chattel and D refuses to give it back, so there is both conversion and detinue
* If D has parted with property, then unless if the D is a bailee, Conversion only

# Intentional Interference with Real Property

## Trespass to Land

**Definition:** The **direct and intentional physical intrusion** onto the land in the **possession** of another (also includes houses, structures, and trees, anything else affixed to it) ***(Actionable per se)***

* **Only intention necessary is the intention to do the act (D does not have to be aware that he is trespassing)** 
  + - Can also be propelling an object or third person onto property
    - Failing to leave after permission to enter has been terminated
    - **Wrongfully failing to remove an object off P’s property** (continuous tort)(Turner v Thorne)
    - **Once established that D is a trespasser, he/she is liable for all the consequences of the trespass, whether or not they are intended or foreseeable (Turner v Thorne)**

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| **Defences of Trespass to Land** |

* Accident is a defence (means no intent), Right granted to you by an authority (Entick)
* Duress is not a defense, Mistake is not a defence, Just tertii is not a defence unless that third party authorized D’s entry

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| **Trespass Act RSBC 1996** |

* **Trespass Prohibited**: Section 4
* **Defences to trespass**: 4.1
* Courts may order compensation: s.11

# The Defense of Consent

**D has the burden to plead and prove consent by P** (*Non-Marine Underwriters v Scalera*, [2001] 1 S.C.R. 551)

* + Can be **explicitly** through words or in writing, or **implicitly** through participation or behavior.
  + **Failure to resist or protest is an indication of consent** “if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection”
* **Consent is about consenting to the activity and the reasonable consequences.** Unreasonable or unforeseeable consequences may exceed or vitiate consent.

## Implied Consent

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| **Wright v. Mclean [1956] BCSC** |

**Facts:** Children playing by throwing lumps of clay and mudballs at each other. P is injured.

**Implied consent to the ordinary risks and pains by entering activity: only when play is fair and according to the rules (i.e. no malice, anger, etc.)**

## Exceeding Consent

If a defendant exceeds the consent provided by the plaintiff the case will be treated as if no consent was given.

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| **Agar v. Canning (1965) 54 WWR. 302 (Man. Q.B.).** |

**Facts:** P suing D for injuries that resulted from hockey game. P allegedly provoked D. D was found liable, but he was provoked so reduced damages.

**Ratio: Actions go beyond what was consented to: there is a limit on a player’s immunity (Conduct of player judged on the standard of the game)**

* **R.v. McSorley—**judge found that **some forms of conduct are too dangerous for the players to consent to**
* **R.v. Cey [1989] SASK CA**: “It cannot be assumed that (hockey) players implicitly consent to a specific type of assault simply because it occurs with some frequency in the sport”.

## Factors Vitiating Consent: Fraud, Mistake, Duress, and Public Policy

**Even in situations where D establishes that P consented to the act giving rise to the tort, P may raise factors that vitiate consent (Consent must be genuine and voluntary)**

## Fraud

**P must establish:**

1. **That the defendant was aware of, responsible for, the plaintiff’s misapprehension ; and**
2. **That the fraud relates to the nature and quality of the act as opposed to a collateral matter**

**Three part test where harmful consequences flow from the act. The Crown/PL must show:**

* + 1. **That the accused was dishonest, which could include not only lying but also non-disclosure; &**
    2. **The D’s dishonesty resulted in a deprivation, which could consist of actual harm or exposing a person to a significant risk of bodily harm; and**
    3. **That the dishonesty induced the complainant to consent to the dangerous activity when he would not have otherwise done so.**
* ***R v Williams [1925]:*** consent to sex vitiated where the (16 year old) PL was not aware of the sexual nature of the act.
* ***Papadimitropoulos v R [1958]:*** consent to sex upheld where the D deceived PL about whether they were married. Whether the parties were married or not was a collateral matter that did not pertain to the nature and quality of the act.
* ***R v Cuerrier [1998]*** SCC criminal trial: HIV positive man who lied about status to sexual partners. Fraud that relates to the harmful consequences of the act can vitiate consent.

## Mistake

The fact that P’s consent was induced by a **mistaken belief will vitiate consent only if D was responsible for creating P’s misapprehension**

* **Like Fraud, consent will only be vitiated if the mistaken belief goes to the nature or quality of the act, or presents the possibility of a significant risk of a serious physical harm (as outlined in R.v. Cuerrier)**
* **D’s mistaken belief that P consented is no defense**

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| **Reibl v. Hughes** |

* **It is only a battery if the Doctors really left you with a misunderstanding of the procedure. That is, you didn’t realize what you were consenting to at all.**
* **If you don’t know all the risks that you are consenting to, that is not Battery it is negligence**

## Duress

**Consent secured by force or threat of force (duress) is not valid. However duress does not seem to include psychological duress. Minority judgment disagreed. (Latter v Braddell)**

## Public Policy

**Consent obtained by abuse of a power imbalance would not be valid defence to a battery claim on grounds of public policy. (Norberg)**

* **If consent is procured in a particularly bad way, we may disregard it on policy grounds**

**To show that the consent given was not legally effective PL must provide:**

**1. Proof of inequality between the parties, which will ordinarily occur within the context of a special “power dependency” relationship.**

**2. Proof of exploitation (measured by “community standards”)**

# Consent to Treatment, Counselling, and Care

**Health professionals and counselors must obtain consent in advance before they initiate any kind of physical exam, test, procedure, surgery or counseling.**

**A minor’s consent to medical procedure is regulated in B.C. by s.17 of the *Infants Act***

**Consent to medical treatment generally, is codified in the *Health Care (Consent) and Care Facility (Admission) Act***

* Section 4-9 deal with consent, how it is given, and when patient is incapable of giving consent
* Section 10-11 deal with consent by a substitute decision-maker, guardian, or representative
* Temporary substitute decisions makers defined by s. 16, who must be sought out, if possible, to give consent to emergency or major or minor health care as defined in ss. 12, 14 and 15.

**To be valid, the consent must:**

1. **Have been given voluntarily (without duress or fraud).**
2. **Relate to the specific procedure or treatment that is undertaken.**
3. **Be based on a full and frank disclosure of the nature of the intervention and its risks.**
   * **The fact that a plaintiff makes an appointment and comes for treatment provides strong evidence of implied consent**

**Substitute Consent**

* **In situations where the patient cannot consent, because of intellectual disability, mental illness or age, substitute consent can be obtained from the patient’s next of kin.**
  + **Mrs E v Eve (SCC, 1986):** **For substitute consent the following three requirements must be met:**

1. The patient must be incompetent;
2. The next of kin must have acted in good faith;
3. The procedure must be in the patient’s best interests.

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| **Marshall v Curry [NSSC] 1933** |

**Facts**: Testicle taken out as a bonus to a hernia operation; while under Anesthetic, Dr. Took out Testicle as part of Hernia operation.

**Ratio: Where a general consent has been provided, the patient will be treated as having implicitly consented to any subsequent sessions, tests etc that are incidental to the agreed treatment.**

**Now dealt with in s. 12 of *Health Care (Consent) and Care Facility (Admission) Act—Emergency Situations***

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| **Malette v. Shulman (1987) 63 OLR (2d) 243 (H.C.)** |

**Facts:** P was injured in a car accident. P is a Jehovas Witnesses gets a blood transfusion that saves her life, even though she had a card in her pocket prohibiting the procedure. She sues for battery and negligence. P wins because Dr. operated without consent—there was no evidence of the contrary that she would consent to blood transfusion.

**Ratio: Any treatment outside of consent is tortious—doesn’t matter if patient doesn’t understand the risks. Patients assumes the risk by using the card.**

**s. 12.1 *Health Care (Consent) and Care Facility (Admission) Act* only need reasonable grounds that the patient refused treatment**

**s.29 of Child, Family and Community Services Act allows director to apply for court order if parents refuse**

# Defences Related to the Protection of Person and Property

## Self-Defence (complete defence)

The **burden of proving self-defence falls on the party invoking the defence** (Mann v Balaban [1970] SCC).

**To invoke self-defence, D must establish on the balance of probabilities that:**

1. **Was D (or 3rd party) threatened enough to justify some physical response (Subjective but needs to be reasonable); and**
2. **The force used to avert the risk was reasonable in all the circumstances (Liberal scale)** 
   * **Defensive Force is reasonable if:**
     + **(a) it is not greater than necessary for the purpose of preventing the attack; or**
     + **(b) not disproportionate to the threat being counteracted.**

**In other words, acts of self-defence must be both reasonably necessary (ie, there was no reasonable alternative), as well as reasonably proportionate to the harm being threatened (ie, not excessive).**

## Defence of Real Property

**If person enters peacefully and initial entry is lawful, must ask them to leave and give them a reasonable opportunity to leave. If they refuse to leave or initial entry was unlawful/forceful (hostile), may use reasonable force. Unreasonable force is battery.**

* **\*Note: Recent case rules that you can’t use deadly force to protect property. Courts also will not permit an occupier to use force that is likely to cause death or serious bodily harm solely for the purpose of ejecting a trespasser who cannot be induced o leave by less violent means (p.232)**
* **No man can do indirectly that which he is forbidden to do directly.**

## Defence and Recaption of Chattels

* **In order to invoke this defence, the defendant must: 1) be in possession of the chattel, 2) attempting to immediately regain possession or 3) be in hot pursuit of the person who had just taken the chattel**
* If a person innocently picks up D’s chattel, D must request its return before using any force
* If a person grabs chattel out of the hands of D, D can use force to retrieve it without first making request to return
* **Only peaceful means** can be used to recapture a chattel from a person who came into possession lawfully.
* The **right to use force is limited** to circumstances in which an individual who wrongfully gained possession refuses to hand over the chattel after being requested to do so
* There is a **common law privilege to enter another’s land to recapture chattels in limited circumstances**
  + If the chattel came onto the land accidentally or was left there by wrongdoer, the owner can enter the property to retake his chattel, provided no use of force or cause a breach of peace
  + If occupier of the land came into possession of the chattel unlawfully, its owner could make a forced entry if his request for its returned has been denied

## Defence of Public Necessity (complete defence)

**Allows an individual to intentionally interfere with the property rights of another in order to save lives or to protect the public interest from external threats of nature, such as fires, floods, and storms.**

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| **Surocco v. Geary 3 Cal. 69 (Cal S.C. 1853)** |

**Facts:** D had destroyed P’s house in an effort to save many more buildings from a fire. P sued to recover for the damages to his property. D was privileged to destroy the house to stop the spread, D wins.

**Ratio: Otherwise tortuous acts may be rendered non-tortious when necessity dictates that they be undertaken for the greater interests of society. Must be able to show necessity.**

* **A reasonable and bonafide mistake of fact as to the apparent necessity will not negate the defence**
* **Imminent peril + harm done to P must not be disproportionate to the benefit to be gained**

## Defence of Private Necessity

**Private Necessity, unlike public necessity, is not a not a complete privilege: still liable for damage done**

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| **Vincent v. Lake Erie TPT. Co. 124 N.W. 221 (Minn S.C. 1910)** |

**Facts:** P’s ship moored to Ds dock to unload cargo--storm came and ship damaged dock. D claimed private necessity

**Ratio: D under private necessity is liable incurred to the property of others. Not damages, but compensation**

Held: D took affirmative action to preserve his ship at the expense of P’s dock.

* **Note 8: Property owner wanted to evict squatters. Squatters said here out of necessity. CA said no, anarchy would result if we allowed that.**
* **Note: Munn v. Sir John Crosbie [1967] distinguished Vincent by saying D took no affirmative action**

## Apportionment of Fault (Bell Canada v. Cope, indicate legislation may apply to int. Torts)

* **Joint Tort**: Two or more people commit one tort (liable because each of them did the tort)
* **Several Concurrent Tort**: Two or more people commit separate torts that, combined, caused indivisible harm

*Common law did not work out a way of sharing liability among the Defendants.* ***Now S.4(1)Negligence Act***

* **Judge decides the degree of fault--Can sue one D and D can claim other Defendants.**
* **Plaintiff has the right to get full amount from any Defendant.**
* The judge/jury to apportionment of fault is a question of fact (s.6)—determining blameworthiness
* **IF P is also at fault, (S.*1 Negligence Act*) says liability is several and not joint. So if more than 2 D’s and P is also at fault, Ds are only severally liable (for their own portions) and P cannot claim 100% damages from 1 D.**

# The Defence of Legal Authority

1. **Did D have legal authority to undertake the act that have rise to the tort in issue?**
2. **Was D legally privileged in doing the act? (immune from civil and criminal liability)**
3. **Did D meet all the other obligations imposed upon him or her in the process? (Did they do something the wrong way? (Cambie Canada Line Case-*Susan Heyes Inc. v. South Coast B.C. Transportation Authority*, 2011 BCCA)**

## Authority and Privilege to Arrest without a Warrant

s. 494 (anyone) and 495 (peace officer) of the Criminal Code sets out the provisions

* Basically, **summary offences** can only be **peace officer who “finds committing” (s.495(1)(b))**
* **Indictable including Hybrid offences** can be **citizen who “finds committing” (s.494(1)(a) or peace officer who on reasonable grounds believes has committed or is about to commit (s.495(1)(a)**
* **Reasonable Grounds** means “Individual must subjectively believe that the person committed the offence and that belief must be objectively reasonable”.
* **“Justifying Provision in s.25 CC** (Courts generally say that s.25 is independent and can protect you even you acted without legal authority as long as you acted on reasonable grounds)
* **Peace Officers:** Police Officers, Sheriffs, Mayors, Commercial Pilots, Fishery Officers, and others
* ***R.v. Biron [1976] SCC***: “Finds Committing” means both actually finds committing and apparently committing
* Mere suspicion is not enough (p.255 notes)

## Privilege or Justification under the Criminal Code

* **“Justified”** in s.25 means protected from criminal and civil liability
* Canadian Courts held that **Peace Officers** **can be privileged under s.25 even if not authorized by law** if he or she made a mistake of fact and acted on reasonable grounds
* In ***Frey v. Fedoruk***, court held that a person who was not authorized would not be privileged under s.25 if he or she had made a mistake of law

## A Private Citizen’s Authority and Privilege to Arrest without a Warrant

* s.494 in Criminal Code
* **Does not authorize private citizens to arrest for past crimes, regardless of reasonableness *(R.v. Abel, 2008)***
* ***R.v. Chen***: Arrested a thief that stole something earlier in the day. Courts ruled that it was “an ongoing offence”

## Rights and Obligations in the Arrest Process

**Reasons for the Arrest**

**Some rules that emerge from this case:**

1. **Police do not have general right to ask people to ID themselves. They must rely on a recognized power, such as that inferred from S.450 of CC (need to have reasonable and probable grounds to suspect individual questioned).**
2. Police need to tell individual why they’re being arrested.
3. **Failure to give reasons for arrest can give rise to false imprisonment claim.**
   * + - 1. **Even if they had grounds for arrest, and they didn’t tell them the reason, it may give rise to a false imprisonment claim.**
4. If the individual is not informed, they are entitled to resist the unlawful arrest.

**The Use of Reasonable Force**

* Common law and Criminal Code gives those with legal authority broad powers to use force
* **As a general rule, suspects must be given an opportunity to submit peacefully before any force is used**
* If suspect resists, then as much force as reasonably necessary may be used
* A reasonable and bona fide mistake of fact as to the need of force will not defeat the assertion of the right to use force
* **s.25 (1) gives privilege to those authorized to use reasonable force**
* **s.25 (3) limits use of force that is intended or likely to cause death or grievous bodily harm**
* **s.25 (4) permits peace officers to use force likely to cause death or grievous bodily harm** to apprehend a fleeing suspect who cannot be stopped in a less violent manner. Must have reasonable grounds that such force is necessary, must be able to arrest without a warrant, and must have reasonable grounds that such force is necessary to protect himself or third person from imminent or future death or grievous bodily harm.

# Duty of Care

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| **Cooper v Hobart (2001) SCC [Public Authority Cases & New Types of Duties of Care]** |

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| **Established Proximate Relationships (NOT EXHAUSTIVE) Proximity that arises from foreseeability of harm** |
| 1. **Where D’s act forseeably causes physical harm to P or P’s property** 2. **Misfeasance (an affirmative action) in public office** 3. **A duty to warn of risk of danger** 4. **A duty to inspect without negligence** 5. **A duty to conduct work undertaken in a non-negligent manner** 6. **Relational economic loss related to a contract’s performance (in some defined situations)** |

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| **ANNS/COOPER TEST (For NEW types of claims for non-physical damage and cases involving Government)** |
| 1. **Preliminary: Is alleged duty of care within/analogous to an established category?**  * **If yes, duty of care exists. Policy considerations will rarely arise.**  1. **Stage 1(a): Was there foreseeable risk of injury? (to a specific P or a class of persons)**  * **Consider: P’s ability to handle situation – either through youth, intoxication, or incapacity** * **At the time of the alleged tort, was it reasonably foreseeable to a person in D’s position that carelessness on his or her part could create a risk of injury to the plaintiff?**  1. **Stage 1(b): Was there a sufficient relationship of proximity between parties? (Policy considerations with respect to the relationship)**  * **Consider: Expectations, representations, and reliance; types of interests involved (physical, economic, emotional, etc.), physical closeness, and any statutory or contractual framework (not exhaustive list)**  1. **Stage 2: Policy considerations to negative/limit scope of duty of care? (More related to systemic problems)(Burden of Proof on D)**  * **Concerned with effect of imposing duty of care (i.e. is it a policy/operational)** * **Consider: Alternative remedy available? Spectre of unlimited liability?** |

### Duty to Rescue

**At common law, there is no duty to come to people’s assistance, even if you have special skills that are of aid, unless D created the situation of peril (Osterlind)**

* **However, if you make things worst you are liable (distinction between failing to make things better and making things worst)**
* **By beginning the rescue process, D assumed duty to act and will be liable for negligence in the process of rescuing (Matthews v Maclaren)** 
  + **There may be special relationships (ship master-passenger, boat renter-drowner) which may call upon a duty to rescue (Osterlind, Matthews)**

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| **Good Samaritan Act [Section 2(1)]** |

* **Only liable if you are GROSSLY NEGLIGENT**

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| **B.C. Family Compensation Act (Section 2 & 3)** |

* **At common law, tort claims die with the person—no one can sue you and you cannot sue anyone, but legislation says your estate is liable.**
* **Your dependents have a statutory claim against the wrongdoer in B.C. Family Compensation Act (Section 2)**
  + **Action must be for the benefit for spouse, parent, child of deceased**
  + **Have to show injury to the parent, spouse, child (A loss of financial benefit)**
* **No Punitive or Aggravated Damages because those damages are personal to the victim**

### Duty to Control the Conduct of Others

***Child v Desormeaux (SCC):*** **Social host DO NOT owe duty to 3rd parties that are injured by their drunken guests.** **Social hosts are not proximate enough with 3rd party because of their a) ability to monitor alcohol consumption b) inability to supervise how much they drink**

***Stewart v Pettie***: **BAR has a duty of care to stop drunken patron from driving. OWNER OF A CAR has a CL duty not to allow a drunk to drive**.

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| **Crocker v Sundance (1988) (SCC)** |

**Facts:** Tubing competition. Sundance saw Claims negligence—resort failing to prevent Crocker from entering into the race when he was intoxicated. Is there duty of care between resort and participant? YES—There is a duty to intervene, comes from the fact that you created the whole situation.

* **There is a duty of care between a proprietor to an intoxicated patron, when the proprietor is aware of P’s intoxication and participated in getting him to that point.**
* **Generally, not liable for accidents occurring during sports**

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| **Jane Doe v. Metropolitan Toronto Commissioners of Police [Duty to Protect Others Can Arise]** |

**Facts: Police were aware of the rapist. Did not warn potential future victims. It was held that there was a duty of care and the plaintiff.**

* **Police have a duty to prevent crime/a duty to warn about crime where P falls within a particular definable group who is at serious risk (Proximate Foreseeable Victim)**

**Duty to Perform Gratuitous Undertakings**

**There has to be a duty to act arising from something other than the mere existence of a K or a gratuitous promise**

* **Generally, a mere failure to act for someone’s benefit is not a tort**
* **However, if you make someone's situation worst, there is a duty to act--misfeasance/nonfeasance distinction (Zelenko)**

### Duty of Care Owed to Rescuers

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| **Horsley v Maclaren (1972) SCC** |

* **If one by his fault creates a situation of peril, he has a duty of care to anyone who attempts to rescue the person who is in danger (Horsley v Maclaren)**

### Duties to the Unborn

**Pre-conception wrongs:** where D carelessly causes a parent to suffer an injury that detrimentally affects a subsequently conceived child. Typically involve the mother or father being exposed to chemicals that harm their reproductive health.

• **A duty can arise in cases of pre-conception wrongs, if foreseeability is sufficient and there are no public policies against it. *Paxton v. Ramji***

**Wrongful Birth & Wrongful Life:** Arises when a doctor carelessly fails to inform a woman that she faces an unusually high risk of giving birth to a child with a disability, or when a doctor negligently performs tests that are designed to detect foetal abnormalities.

* A **claim brought by a parent is “wrongful birth”** and a **claim brought by the child is “wrongful life”.**
* **A physician does not owe a duty of care to a child to provide its mother with information that would lead to an abortion**. *Jones v. Rostvig* [1999] BCSC

• **Courts will recognize a mother’s wrong birth claim, but she must show that had the physician’s duty been appropriately performed, a RESONABLE PERSON IN THE PLAINTIFF’S POSITION would have terminated the pregnancy.** ***Arndt v. Smith* [1994] BCSC**

* Courts have been OK with giving damages for the extra costs associated with a child with disabilities or medical needs, on the basis that those are distinct from the compensating benefit of having a child *per se.*

**Wrongful Pregnancy**: Medical negligence cases where parents have taken medical steps to prevent pregnancy or childbirth (vasectomy, abortion), but **due to the negligence of a doctor, a pregnancy occurs or continues.** However, the situation becomes more complicated when the woman decides not to terminate the unwanted pregnancy, and then sues after the child is born. For what is the doctor liable?

• Traditionally, **Canadian courts have permitted wrongful pregnancy claims but have limited damages to lost earnings consequential to the pregnancy and delivery, damages for emotional consequences of dealing with an unplanned pregnancy, and any costs specific to raising a child with a disability or because the parents are themselves disabled.**

• Court has also held that damages could be awarded for the cost of raising a healthy child, but only where the parents’ primary motivation for wanting to limit the size of their family was financial. *Kealey v.Berezowski* [1996] ONSC

**Pre-natal Injuries:** Where a child, now born, sues in negligence for injuries sustained *in utero*.

• **The courts have recognized that a person may owe a duty of care to a foetus to avoid careless actions before birth that may result in a loss upon birth.**

* **However, the claim does not crystallize until the birth of the child.**

• For reasons of **public policy**, **the Court should not impose a duty of care upon a pregnant woman towards her foetus or subsequently born child. To do so would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women** *Dobson (Litigation Guardian of) v. Dobson* [1999] SCC

### Psychiatric Harm

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| **Mustapha v. Culligan of Canada Ltd. (2006 Ont CA)** |

**Facts: Mustapha suffers from nervous shock from seeing a fly in his soda bottle**

**English Position**

**Primary Victim (People placed in physical danger): Liability for psychiatric injury is possible as long as it was reasonably foreseeable that the plaintiff might suffer physical injury as a result of the defendant’s negligence, even if the foreseeable injury never materializes.**

**Secondary Victim (People not placed in physical danger): Cannot recover for the careless infliction of nervous shock unless psychiatric illness itself was reasonably foreseeable and Alcock’s three-part test is satisfied.**

**Canadian Position**

**Canadian courts reject this distinction between primary and secondary victims**

**General: Is it foreseeable that a reasonably robust person MIGHT suffer this type of injury? If this standard is met, the thin skull rule applies.**

**Bystander: Is it foreseeable that a reasonably robust person MIGHT suffer this type of injury PLUS Proximity.**

**RELATIONAL PROXIMITY (ALCOCK):**

**1) Bystander had an emotional stake in what happened (Child, Spouse, Parent, Some Siblings)—Relational Proximity (Based on Love and Affection)**

**2) Bystander was close in time and space to the accident (At the Scene/Live TV) –Direct/Immediate sight or hearing not required (Locational Proximity)**

**3) Bystander actually saw or heard the shock-causing accident or aftermath—Means by which shock is caused (Distinction between finding out or witnessing the event) –Psychiatric Injury must be caused by direct perception of the accident or its immediate aftermath, and not after hearing about it from someone else (called “Temporal Proximity”.**

**Devji v Burnaby: One distinction in controlling the limits of liability with regards to psychiatric harm is the distinction between learning about the accident and witnessing the accident. The former being outside the reach of liability.**

### Health Professional’s Duty to Inform

**If a Health Professional does something without consent, it is Battery, unless it is an Emergency (Marshall Case)**

**If consented, but was misinformed about the nature of the operation or procedure, it is Battery**

**But if Doctor did not tell you about the risk then it is Negligence, so have to satisfy the elements of the Tort of Negligence**

**DUTY: This is not an issue**

**BREACH: Dr has to provide ALL relevant information regarding risks of procedure, non-treatment, alternate treatment. What is relevant is determined based on the circumstances, but statistical probability is not an excuse for non-disclosure if it is relevant to that patient. (Haughian v Paine)**

**CAUSATION: (Modified Objective Test)—Have to show failure to inform caused harm. Would a reasonable patient in the position of the plaintiff not to have surgery?**

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| **Haughian v Paine (1987) (SASK CA)** |

**Facts:** P argues that he did not give informed consent, because Doctor did not provide sufficient information—no advice on alternative treatment, did not warn of medical risk of paralysis (1 in 500 chance), and risks of non-treatment. Court ruled that a reasonable person in that position would not choose to have operation.

### A Manufacturer’s and Supplier’s Duty to Warn of Risks Using the Product

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| **Hollis v Dow Corning Corp. (1995) SCC** |

P undertook Breast implants. P has to undergo subsequent operations because they burts. Sued manufacturer for negligence. Court ruled that the Manufacturer has a duty to warn the doctor about the post-surgery risk of rupture even without physical impact, even though they have received reports of ruptures. Manufacturers have a high standard of care to the consumer.

* **General Rule: The Duty to Warn is owed directly by the manufacturer to the ultimate consumer to provide clear, complete, and current information concerning the dangers inherent in the ordinary use of their product.**
* **Exception: Informational duty to consumer may be satisfied in exceptional circumstances by providing warning to a “learned intermediary”**

**Causation: SUBJECTIVE TEST: WOULD SHE HAVE UNDERGONE THE SURGERY KNOWING THE RISK? Subjective test, because not trying to protect doctor but a manufacturer who is trying to sell a product.**

* **Walker v York-Finch Gen. Hospital: Donating blood without proper blood screening: Court said Material Contribution to Risk and not the “but for” standard (Liable if the evidence shows that by not using adequate screening methods, it at least the risk that the donor would not be warned off donating blood**

### Special Duties of Care: Negligent Misrepresentation

**Tort of Deceit is an intentional tort:** Needs knowledge of, or recklessness, in relation to the falsity of the statement (Derry v Peek)

**Negligent Misstatement:** Requires the **maker of the statement or giver of the advice be negligent**. **Also covers opinions or advice that is negligently given** but not false in the “factual” sense (Can be an opinion that is relied upon)

**Five General Requirements for Negligent Misrepresentation:**

1. **There must be a duty of care based on a “special relationship” OR (Post-Cooper) A Prima Facie Duty of Care (Mention Hercules)**

**Prima Facie Duty of Care TEST (HERCULES): 1) Reasonable Foreseeable Reliance 2) Reliance itself has to be Reasonable**

**STAGE 2 (POLICY): SCC also said in Hercules that only when these requirements are met that policy considerations will NOT trump prima facie DOC (because of indeterminate liability:**

* + 1. **D knows the identity of either the P or the class of P who will rely on the statement**
    2. **Reliance losses claimed by the P stem from the particular transaction in respect of which the statement was made**

1. **The representation must be untrue, inaccurate, or misleading**
2. **Representor must have acted negligently in making said representation (ought to have know)**
3. **Reliance must have been detrimental to the representee in the sense that damages resulted**

**Causation/Damages: What would have happened “but for” the Negligent Misstatement. Must mitigate own damages.**

* **Kripps Case (Causation): Court ruled that P did not have to prove “but for” the misrepresentation, they would not have undertook. It is sufficient to prove that the misrepresentation was “material” in your decision.**

### Negligent Misrepresentation and Contract

**Central Trust Case:** Lawyers negligently prepared a mortgage and eventually their client (the lender) lost out. Claimed misstatement actionable in Tort, because limitation period in K. [Contract 🡪 Time of Breach] [Tort 🡪 Time of Damage]

* **Courts say can pick a claim in either Tort or K. Tort Duty was not precluded or limited by Contract that was made afterwards.**
* **Because they have contract, there is no Duty Issue: Typical special relationship and would meet the Hercules Test too in that there is no determinacy problem.**

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| **BG Checo v BC Hydro (1993) SCC** |

**Facts:** Checo bided for Hydro tender, but when engineer flying over land it was not clear. They assumed clearing would be taken care of by Hydro as per the K, but did not turn out to be the case. Statement was negligent: Said right of way would be cleared when they ought to have known that it wouldn’t.

* **Majority: Tort Liability and Contract Liability are not mutually exclusive. Have to look at whether the K limits the Tort liability. Private ordering can exclude Tort liability. P can sue in either Torts or Contract.**
* **Causation/Damages:** 🡪 What would P have done “but for” the Tort? They probably would have increased their bid. SCC agreed that had the tort not been committed, the company would have still bided on the K.

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| **Queen v Cognos Inc (1993) SCC** |

**Facts:** Interviewer made representations about employment (6-year project).But funding wasn’t approved and employee is terminated. If suing in K, you would have to sue for wrongful dismissal, but K said can terminate on 1 month notice, so no claim in K. Argued Tort claim, He said they negligently induced him to leave his job is Calgary and as a result, he lost money.

**Contractual provisions about termination have no bearing on the pre-contractual statements about the nature of the employment opportunity. Contract terms did not exclude or limit Tort duty.**

### Special Duties of Care: Recovery of Pure Economic Loss in Negligence

**5 categories of claims: 1. Negligent Misrepresentation 2. Independent Liability of Statutory Public Authorities 3. Negligent Performance of Service 4. Negligent supply of shoddy goods or structures 5. Relational Economic Loss**

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| **Martel Building Ltd. V Canada (2000) SCC** |

**Facts:** P leased building to D. D led P to believe that it would be amenable to renewing the lease on certain terms. When P extended the offer, D rejected and eventually did not renew its lease with P. P claims breach of duty of care to negotiate i such a way as to avoid causing the plaintiff pure economic loss.

**ANNS TEST:**

* **Stage One:** There is Prima Facie Duty of Care (Foreseeability and Proximity)
* **Stage Two (Policy):** Held against a duty of care to conduct negotiations with reasonable care so as to not injure the financial position of the opposite party. Various policy considerations against recognizing such a duty (Parties who are in negotiations are looking after their own interests, not each others, and a tort duty would be inconsistent with that basic stance).
* **Other Possible Policy considerations:** Economic interests are less compelling than bodily security, indeterminate liability, economic losses often arise in commercial context as inherent business risk

### Negligent Performance of a Service [Pure Economic Loss] Anns Test

**Anns/Cooper Test + Either Detrimental Reliance OR Voluntary Assumption of Responsibility**

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| |  | | --- | | **BDC LTD v. Hofstrand Farms LTD. (SCC)** |   **Facts: BDC was a courier company. Hofstrand was waiting for a document to register interest, but delivery was late and hence suffered economic loss. SCC held that that there is no duty because there is no proximity.**   * **P must come within a limited class in the reasonable contemplation of a person in the position of the appellant. (First stage of Anns Test)**  |  | | --- | | **James v British Columbia (2005) BCCA** |   **Facts: P’s employer held a licence from B.C. which contained a provision that would have prevented the employer’s sawmill from being closed. On a renewal of the license, the protective clause was inadvertently omitted. Court essentially finds a relationship of proximity because**   * **Relationship of Proximity does not necessarily require reliance or any action on the part of the plaintiff, voluntary assumption of responsibility of D is enough**   **Currently: Apply *Cooper*. Policy stage: reliance or assumption? If either, should allow recovery.** Negligent Supply of Shoddy Goods or Structures [Pure Economic Loss] **Historically, if plaintiff suffers pure economic losses as a result of the defendant’s carelessness but is unable to establish privity of contract, losses were generally not recoverable.**   |  | | --- | | **Winnipeg Condominium Corp v Bird Construction (SCC)** |   **Facts: P took ownership (a subsequent purchaser) of a condo that D built under contract with a 3rd party. Problems arose with the exterior walls and P had to repair it. P is suing in negligence.**  **Ratio: Where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants**   * **Defect must pose a “real and substantial danger to consumers” , but uncertain whether non-dangerous defects are covered but subsequent cases have stuck with the dangerous defect requirement**   **The builder of a structure, or the maker of a chattel, owes a tort duty of care in respect of pure financial loss suffered by a subsequent owner of the property as a result of having to deal with an unknown (when they bought the property), dangerous defect. Though the court left it open whether tort law might give a remedy in respect of non-dangerous defects, courts have not (so far) gone that route (and deciding what is an appropriate standard of quality, in such a tort claim, would be an issue).**  **ANNS/COOPER TEST:**  **STAGE ONE: FORESEEASBILITY AND PROXIMITY**   * **Is there a relationship of Proximity: Yes, because it is foreseeable that defects will cause injury, and the lack of contract privity does not change foreseeability**   **STAGE TWO: Are there residual policy considerations to negate/limit tort liability? No**  (1) No risk of indeterminate amount: limited to reasonable amount to fix building defects.  (2) No risk of indeterminate time: limited to life of building. Eventually age will be blame and it will be more difficult to establish causation   * **🡪** Caveat emptor doesn’t apply, purchaser not in best position to bear risks of emergent defect.  Relational Economic Loss (Anns Test) **Relational Economic Loss= D as a result of negligently damaging property belonging to a third party, also causes a pure economic loss to P with whom the third party had a relationship.**  **Basically, this is a category where there is no DOC unless there are circumstances that take it outside the rule of non-liability.**   |  | | --- | | **Bow Valley Husky LTD v Saint John Shipbuilding Ltd. (SCC)** | |
| **Relational Economic Loss is NOT RECOVERABLE, subject to certain exceptions due to Policy Considerations:**   1. **Claimant has interest in damaged property (not really an exception because it is consequential do P’s property)** 2. **General average cases (maritime law concept where cargo owners all have to chip in when only a portion of the cargo is damaged, so each cargo owner is considered as having a reasonable claim against the wrongdoer that caused the damage)** 3. **Claimant and property owner in joint-venture (relates to the Norsk Pacfic Decision-CNR could sue Norsk Pacific—held to be a joint venture so can recover its pure economic loss)** 4. **Other exceptions may be recognized using Anns Test (Not Closed Categories but incremental approach required—Use Anns Test but be restrictive in Policy Stage**   **Application of Anns Test:**   * **Stage One: Yes, Prima Facie Duty of Care: Foreseeable injury and should have been mindful of P** * **Stage Two: Negatived by countervailing policy considerations—Indeterminate Liability (limited class of claimants) and D’s ability to arrange its financial affairs so as to deal with the risk to the 3rd party’s injury.** |
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| **Note 2 (p491): Generally accepted that a solicitor may be held liable to an intended beneficiary who is deprived of a bequest because of a lawyer’s negligence**  **New Category: University of NFL—Student wrote an essay and the prof took the essay to be a confession of the truth. Told authorities and they acted and she could not find a job as a result (Young v Bella)** |

### Standard of Care

**Standard of care:** Refers to behaviour required of D to satisfy DoC. Determines how D ought to act.

**(i) The General Standard of Care**

**Basic rule**: D must act according to SoC expected of a **reasonable person**.

Early statement of the rule found in ***Blythe v Birmingham Waterworks* (1856)**: **An act/omission to do something a reasonable man would do or doing something a reasonable/prudent man wouldn’t do.**

**Would a reasonable person in position of D have acted same way?** In Canada, leading case is ***Arland v. Taylor* [1955] -** affirms ***Blythe****.*

**3 main factors** in finding the **standard of care:**

**(1)** The **probability and severity** of the harm;

**(2)** The **cost** of risk avoidance; and

**(3)** The **social utility** or value of the conduct

**🡪 Qualifications** on general reasonable person test, to be considered in assessing df’s conduct.

🡪 Determine **limits of reasonableness**, define reasonable behaviour in circumstances of case.

**(ii) The Probability and Severity of the Harm.**

**Basic rule**: **Greater the risk/harm associated with a particular activity, higher the SoC.**

**(a) *Bolton v. Stone* [1955] 🡪 PROBABILITY**

When determining whether df failed SoC to be expected, court should consider **following test**:

🡪Was **risk of damage was so small** that reasonable person in D’s position considering matter from point of view of safety **would have thought it ok to not take steps** **to prevent danger**?

***Bolton****:* Not liable if you take all precautions a reasonable person would take in circumstances to prevent damage likely to arise. Not reasonable to expect you to guard against **“fantastic and far-fetched”** risks.

**Few important points to take away from this case:**

1. Life requires judging risks. No one can avoid creating some risks and accepting others.
2. If risk associated with an activity is high/unavoidable, may be reason to prohibit it altogether.

**(b) *Paris v. Stepney Borough Council* [1951] 🡪 SEVERITY**

Affirmed ***Bolton*,** said if probability of harm/injury resulting is **severe**, there is **unreasonable risk**.

🡪 you must consider not only the risk of the injury but the severity of it as well

**(iii) The Cost of Risk Avoidance and the Social Utility of the Conduct**

**Basic rule:** When determining SoC, consider **cost of risk reduction** & **social value of the conduct**.

🡪 Ev**en if probability/severity of potential loss are high, D may be excused if activity is socially important.**

***Vaughn v. Halifax-Dartmouth Bridge Comm.* (1961): 🡪 If cost of precaution is low, more likely to find negligence.**

***Law Estate v Simice (1994): 🡪 Patient’s health is higher priority than the cost to Tax-Payers so even test was expensive, Dr was still negligent in failing to order the expensive test).***

***Watt v. Hertfordshire County Council* [1954]: Whether a person is negligent involves taking into account their particular situation and balancing their need to do their (public) duty while at the same time avoiding undue risks to others, whether to employees (Watt) or Bystanders (Priestman). In this regard, it is** permissible for D to run high risk b/c social utility of conduct outweighed costs of D’s conduct. **Denning, L.J.:** “In measuring due care you must balance the risk against measures needed to eliminate the risk. You must balance the risk against the end to be achieved.”

### An Economic Analysis of the Standard of Care

***United States v Carroll Towing Co.***

**Negligent if [Burden < Injury x Probability]** There is a moral aspect to it, but also for reasons of social order and humanity.

### Standard of Care Expected of People with Disabilities

**Physical disability:** Physically disabled person is required to meet SOC of reasonable person with same disability (Carroll v Carolla)

**Mental disability:** If D is suddenly and without warning struck with mental illness, they are absolved of liability if they show on BOP: **(1)** because of illness, D had no capacity to understand DOC owed at that time; OR **(2)** D was unable to discharge DOC as they had no meaningful control over their actions at the time the relevant conduct fell below the SOC. (Fiala)

### Standard of Care Expected of Children

**(1) Standard of care expected of children**

***McEllistrum v. Etches* [1956]**: **children should be held to a modified SoC – court (or jury) should ask whether child exercised care to be expected of child of like age, intelligence and experience. (below 5, no negligence)**

🡪 Endorsed in ***Joyal v Barsby* (1965).** Cite this case for like age/intelligence/experience. **However, children are not held liable if they were incapable of understanding or observing the standard of care.**

### Standard of Care Expected of Professionals

**(2) Standard of care expected of professionals.**

***White v. Turner* (1981) (Ont. C.A.)**: **Professional should be judged by SoC of his profession**. The standard of care is higher than that of the reasonable, but unskilled person. The SOC appropriate to that profession must be observed. Determining what this standard is often established only by expert evidence.

***Ter Neuzen v. Korn* [1995]:** SoC expected is that of a prudent & diligent doctor in same circumstances. **Specialists**: Assessed in light of conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field—they must exercise the degree of skill of an average specialist in his field.

***If the professional standard is proved, however, a judge or jury cannot say it was inadequate unless the issue is something even lay people can appreciate.*** That is, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.

# Causation

**General Test:** Whether a particular injury was caused by the tort is but-for; compare the (real) post-tort situation with the (hypothetical) non-tort situation, and if the injury would not have occurred, but-for the tort, causation is proved.

**Single Defendant Causing One Injury**

**When you do not know what “in fact” caused the Injury 🡪 An inference may be drawn if no conclusive scientific proof exists. It must be able to say that the particular inference is the most likely. If D gives evidence to contrary, inference can only be made if weight of combined evidence supports inference of causation (Snell v Farrell [1990]).**

**When you know what brought the accident (but don’t know what would have happened if the tort hadn’t been committed) 🡪 Have to say that it is more probable than not that the negligence would have caused the injury. It is still the “but for” test (Clements SCC)**

* + - * **If there are other (insufficient) non-tortious causes, D will bear entire burden (Thin Skull Principle)**
      * **If the tort caused the injury but would have happened in any event, D is liable for a percentage. If P has a 30% chance of being injured in any event, D is only liable for 70% of the injury (Crumbling Skull Principle)**
      * **If the tort caused the injury, but other (sufficient) non-tortious factor also actually caused same injury, then damages are reduced (Penner Case)**
      * **If the claim is about the loss of chance/gain, P recovers only upon proof that there was a better-than-even chance of avoiding the loss (then P gets compensated for the whole loss)**

**Multiple Defendants**

**Separate Ds , separate Torts 🡪 divisible injury to P**

* **Each is liable for the injury that they themselves caused.**
* **D 1 is liable for entire damage that D1 cause, D2 is liable for damage his tort caused**

**Separate Ds 🡪 Injury to P overlaps (cumulative)**

* **D1 liable for whole damage he himself did, D2 liable for the additional damage he did**

**Separate Ds, one indivisible injury to P**

* **These are several concurrent tortfeasors and are jointly and severally liable for the loss from the injury, and they are entitled to contribution and indemnity as against each other as pursuant to s.4 Negligence Act.**
* **However, if P is contributorily negligent, they are only severally liable, each for the proportion of the loss equal to the proportion of that D’s fault.**
* **“But For” Test applies to each D 🡪 (would P’s loss occur “but for” THAT D’s tort)**

**Seperate Ds, one injury to P (Injury could have been caused by either or but not both)**

* **Liability can be based on each D’s having materially contributed to the risk of injury, because holding each D liable is better than P going uncompensated (only applies where the circumstances make it impossible to prove which D’s tort in fact caused the injury).**
* **🡪 Both Ds held liable**
* **Basically, Cook and Lewis: Jointly and severally liable and court can apportion fault (s.4 Negligence Act)**
* **SCC said that the same logic cannot be used as between a D and an alternative non-tortious source of injury (e.g. exposure to asbestos).**

**Joint Ds, one injury to D**

* **Two or more Ds commit one tort together acting together**
* **Liability is joint and several and the court can apportion fault**
* **If P gets judgment against one of several joint Ds, P is precluded from starting an action against any other joint Ds because the tort is a single cause of action**
* **“but for” the joint Ds 🡪 would not have sustained injury 🡪 both liable**

### Remoteness of Damage

* Defendant is **only liable for reasonably foreseeable consequences of his negligence** **(Wagon Mound 1).** Have to decide whether the damage suffered is **different in kind** from the **foreseeable kind**.
  + However, it is **NOT necessary for the precise manner of the accident to be foreseeable**. Instead **foreseeability relates to the type of harm suffered by P** **(Hughes)**
  + **Any foreseeable physical injury makes D liable for all physical injury (Smith v Leech Brain) and psychiatric consequences that P suffers (Marconto).**
    - **If there is no physical injury at all**, psychiatric injury is considered too remote if it is such that a person of reasonable fortitude wouldn’t have suffered it **(Mustapha)**
* **D is liable for all “possible consequences” if a reasonable person would have taken it into account** **(Wagon Mound 2).**
  + This means that a serious risk will not be too remote even if there is a statistically very small chance of happening. It is sufficient to fix liability if one could foresee in a general way the sort of thing that happened **(Assiniboine South School)**

### Intervening Causes

**Two related issues:**

**Causation:** Is it fair to say that D’s negligence caused the other person to act?

**Remoteness:** Was it reasonably foreseeable to D that the negligence could lead to the ultimate injury suffered by P?

**Test for Intervening Cause: Bradford v Kenellos (1973)**:

**If intervening act is broadly within scope of foreseeable risk created by df’s negligence, then he will remain liable for resultant damage. If intervening act is not foreseeable, then D is not liable. Some courts, however, look at whether the losses caused by the intervening act were within the scope of risk created by the original tortfeasor.**

**🡪 Price v Milawsky (1977) (Multiple Tortfeasors)**

**Held: Both D liable.** **First tortfeasor still liable if both the subsequent negligent act & resulting additional harm were reasonably foreseeable consequence of original negligence (can also be held responsible for his own acts and acts of the second person, when negligence of 2nd person were reasonable foreseeable as a possible result of his own negligence.** **However,** **courts are reluctant to hold original defendant liable for negligence where intervening act is deliberate.**

**🡪 However, consider Hewson v Red Deer (1976) 🡪 supports the argument for the general rule of foreseeability still applies. If the actions of the 3rd party is foreseeable, even if it is intentional, D is still liable. In a failing-to-prevent case, forseeability of the 3rd party’s act decides the three elements of the breach, causation, and remoteness of damage all at once.**

### Defences of Negligence

**Participation in Criminal or Immoral Act – *Ex turpi causa non oritur actio***

**Basic Rule:** No cause of action is available in tort where the plaintiff is participating in an illegal act

**However**: Because it is a complete defence, the courts have tended to interpret it very narrowly.

**Hall v. Hebert (1993) – SCC**. Pf and df (both drunk) drive car, and have accident.

🡪 P claims D should not have let him drive; D claims P acted illegally and cannot sue.

Majority held that **ex turpi** can be a defence to negligence, but **only available where**:

1. The P stands to **profit** from his illegal activity; or
2. Compensation would amount to lessening the punishment for that activity

Cory J. argued that illegality should be dealt with at **duty stage**. Majority rejected this on grounds that by keeping ex turpi as a defence, desirable degree of flexibility maintained in application of the principle.

### Contributory Negligence

### Self-explanatory

### Voluntary Assumption of Risk (Volenti non-fit injuria)

### Only time you can raise this is when P has explicitly waived their rights (Sundance)

### Burden of Proof in Negligence

**General Rule:** **Burden of proof is on the plaintiff to prove each element of the tort of negligence**,

* + - * However, where two Δs are simultaneously negligent but only one of them could have caused the injury, the court in effect put the onus on Δs to prove it was not their shot that hit Π. **(Cook v Lewis)** Clements reinterpreted the case as one in which a material contribution to risk was sufficient to establish causation

### Negligence Liability of Public Authorities

**Municipalities get the benefit of special limitation periods under ss. 285-286 of the Local Government Act (supp.) and s. 294(1)-(2) of the Vancouver Charter (supp.)**

**Basic Rule for liability of public authorities:**

Only liable for **administrative**/**operational** (**not policy**) decisions: ***Wellbridge Hld v Winnipeg* (1970).**

2 types of op. decisions: made (1) to fulfil statutory public duty & (2) under statutory discretionary power.

**General Rule:** If duty has no discretion, authority not liable for damages from proper exercise of the duty.

**However**: If they perform task carelessly/fail to fulfil the duty, they can be liable for resulting losses.

**(2)** Decisions that are made under a statutory discretionary power (2nd Stage of Anns Test)

**General Rule:** Won’t review **policy** decision but will review **operational** decision.

**Key case:** ***Just v. British Columbia* (1989)**

**Majority**: Argued for **narrow definition** of policy decisions, referred to “true policy decisions” – normally involve broad allocation of funding at high level of government.

**Key**: claim concerned **manner** inspections were done – frequency; how and when

🡪 Court said this was policy implementation 🡪 **operational** decisions.

**However**: Must look at all circumstances in determining SoC for DoC for operational decisions.

🡪 Especially **budgetary restrictions**, availability of qualified personnel/equipment.

**Note**: Commentators argued ***Just*** shows willingness by SCC to expose government decision-making to greater levels of judicial scrutiny than has been the case in the past.

**Misfeasance in public office – *Odhavji Estate v Woodhouse***

**🡪 Requires an element of bad faith or dishonesty.**

**Two types of misfeasance:**

1. Conduct specifically intended to injure a person or class of persons
2. Conduct where the officer knows their action is outside of the power granted to them by public office and is likely to injure the plaintiff.

**In both cases, pf must prove that the public officer must have:**

1. Engaged in deliberate & unlawful conduct in his capacity as a public officer; and
2. Been aware that his conduct was unlawful and likely to inure the plaintiff

**Now**: In (1) cases, proof of intention to harm will usually be taken by the court as proof of (i) and (ii)

**However**: In cases of Type (2), plaintiff will have to prove both (i) and (ii) independently

***Cooper v Hobart***: Policy in 2nd stage of *Cooper*. Even if it is foreseeable and proximate, can decline DoC b/c it was policy decision. Policy can also=not proximate. Cooper=restriction on pub. auth. liability.

### Statutory Provisions and Tort Liability

**Two** main ways in which statutory provisions can affect tort liability:

1. **By creating an independent cause of action**

Statute creates cause of action in tort – specifies DoC owed. Typically, gives SoC & remedy too.

🡪 KEY: Based on statute, NOT the common law. Constrains judge’s ability to interpret.

1. **By creating, changing or limiting the operation of a common law duty or tort**

Statute **creates**, **modifies** or **restricts** scope of a common law duty tort, usually **indirectly**.

🡪 KEY: Requires judicial interpretation if it’s indirect.

**🡪** SCC in ***Sask. Wheat Pool* (1983)**: courts can’t create implied statutory causes of action. **If D broke a statutory obligation, it can be evidence of negligence but has no other civil liability consequences (unless the statute says it does). Likewise, compliance with statutory regulations does not absolve liability (unless it says it does)** **Ryan v Victoria**

### Occupiers Liability

**Definition of Occupier:** A person with either 1) Physical possession of the premises; or 2) responsibility for—and control over—the condition of the premises, the activities conducted on the premises, and the persons allowed on the premises

**Definition of Premises:** Defined broadly - not only land/buildings, also **movable** places like cars (when not in operation).

**KEY: Section 3:** Replaces the common law with a **general standard of reasonable care.**

**S. 3(1): occupier owes duty of reasonable care to see visitor – as well as any accompanied or unaccompanied property – is reasonably safe.**

Act is attempt to bring occupiers’ liability in line with law of negligence –endorses the same SoC as CL.

**Effect:** Increases level of care to trespassers+licensees, reduces level to contractual entrants

Note that under the Act, the standard of care is applied **broadly**, and is relevant to:

1. The foreseeability of damage **(2)** Degree of risk of injury **(3)** gravity of threatened injury **(4)** The kind of premises **(5)** The burden or preventive measures **(6)** The practice of other occupiers **(7)** The purpose of the visit

**Section 4**: **Allows occupiers to restrict, modify, or negate statutory DoC by express agreement or notice**

There are, however, a number of **limitations** on this:

1. Reasonable notice must be given of changes, only for people privy to express agreement.
2. Can’t exclude/modify duty for those empowered to enter premise w/o occupiers’ consent
3. Where occupier bound by K to allow entry to persons who are not parties to K (3rd parties), those entrants are owed usual SoC – aren’t subject to exclusionary words in the K

### Nuisance

**Private Nuisance: Interfering unreasonably with use or enjoyment of public space**

**Public Nuisance: Interfering unreasonably with the use or enjoyment of your own property**

* **The interference does not have to be intentional or negligent, just unreasonable in light of the character of the neighbourhood.**

### Strict Liability for escape of dangerous substances (Rylands Tort)

* **If a person brings or accumulates on his land which, though harmless whilst it remains there, will naturally do mischief if it escapes, he does so at his peril. If it causes damage, he is prima facie answerable for all damages which is a natural consequence of its escape. It doesn’t matter how careful he may have been.**

**Restrictions on the rule:**

* + Statutory authority may limit liability
  + **Excludes liability for acts of God**
  + **Malicious Act of Third Party**, escape for common reasons (vandalism)
  + Excludes liability for claim wholly on land of single occupier, death, personal injury
  + Exception for "natural" uses of land

### Defamation

**Slander:** Verbal statements; to succeed must show special damages ***(not actionable per se)***

**Libel:** Print/Written or recorded in some permanent form; to succeed, do not have to show damages ***(actionable per se)***

**Defamation:** Pf must prove on **balance of probabilities** impugned statements were (***Sims v Stretch***):

**(1) Defamatory;**

-Statements were defamatory in the plain and ordinary sense OR;

-Reference to circumstances known to those receiving the publication which would give it a defamatory meaning OR;

-Establish that ordinary person would infer a bad from the statement, without special knowledge

**Test for determining if material is defamatory**: “Would the words tend to lower the plaintiff in estimation of right thinking members of society?” (Question of Law)

**(2) Made reference to the plaintiff (only protects individuals); and**

-Statement either made reference to the plaintiff; if it doesn’t then ask 2 questions;

-**Can statement be regarded as capable of referring to P**? (Question of Law)

-**Would reasonable person who knows P conclude it refers to him**? (Question of Fact)

**(3)** **Were published or disseminated**

-Defamatory remarks not actionable unless communicated to someone other than the Plaintiff

-P must show on a BOP, statement was communicated to 3rd party who understood it

-Does not include eavesdropping

-Every repetition is a new publication and thus actionable

P does not have to prove that defamation was intentional or negligent as defamation is a strict liability tort

### Defences to Defamation (Burden on D)

1. **Absolute Privilege** for **members of Parliament and the BC Legislature**
   1. Dealt with in s.1(1) of the *Legislative Assembly Privilege Act*
   2. Absolute privilege also attaches to certain fair and accurate **reports of judicial proceedings** by virtue of s.3 of *the Libel and Slander Act*
2. **Qualified Privilege** if D can show that **they had a moral, social or legal duty to make a statement to another who has a corresponding interest or duty to receive it**; reciprocity must be present. **Statement must also have been made without malice** (i.e. where D has a legitimate reason for discussing P with a particular audience, D should not be liable even if the statements turned out to be untrue—these statements are usually private or confidential in nature.
   1. Note the statutory qualified privilege for certain fair and accurate reports of a public meeting, in s. 4 of the *Libel and Slander Act* (supp.). Note the rule in subs. (3) that the privilege is lost if the publisher of the fair and accurate report refuses to publish a reasonable letter or statement by way of contradiction or explanation of what’s in the report.
3. **Justification:** Justification is established if D proves (to the satisfaction of the jury or judge) that the **defamatory statement is true**. D does not have to prove the truth of all possible defamatory interpretations of a single statement, just the truth of any reasonable defamatory interpretation.
4. **Fair Comment: Speaking on matters of public interest**

The D must establish that the:

1. The material was a **comment and not an *accusation or an allegation of fact*.**
2. Which any person could **honestly believe** (objective as per WIC Radio, no need for subjective belief.)
3. The material is **based on facts that are** **true**
4. There is a **public interest** in hearing the comment
   1. Section 6.1 of the *Libel and Slander Act* (supp.) had reversed the honest belief requirement of the *Cherneskey* case (now overruled by *WIC*), but only in respect of publication of someone else’s opinion (the actual facts in *Cherneskey*), not the defendant’s own (the situation in *WIC*). On the pleading requirements for fair comment, see Supreme Court Civil Rule 3-7 (21)(b) (supp.).

The **defence of Fair Comment can be defeated by malice**, but the onus is on P to prove affirmatively that the commentator was actuated by malice

1. **Responsible Communication on a Matter of Public Interest (D has to prove elements)**

1. **Was the publication on a matter of public interest?**  
   There is no bright line test: “inviting public intention, 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” Have to consider the publication as a whole.   
   It is not confined to government matters, but does not include prurient interest.
2. **Was the publication/communication responsible?**
3. How important is this story (national security v scandal)?
4. How urgent is it that it be published now? If taking a reasonable amount of time, given the urgency, would reduce the amount of damage, this will work in the P’s favour.
5. How far did they go to investigate? Did the journalist rely on sources that they should have known were unreliable?
6. Did you ask the P for their side of the story? This bolsters the fairness and accuracy of the report (why they always say: asked for comment but did not return our calls).
7. Was the defamatory statement necessary? If you provide more defamation or detail than you actually need, to communicate the information to the public, you will be liable.

**ALL OF THE ABOVE ARE MEASURED WITH THE AMOUNT OF DAMAGE TO THE P. IF THE ALLEGATIONS WILL HAVE A SIGNIFICANT IMPACT ON THEIR CAREERS, THEN THE STANDARD OF CARE IS HIGHER.**

**RULE of reportage: if you report someone else’s libel, you are not liable:**

1. The report must attribute the libel to someone;
2. It must state the truthiness of the matter is unknown;
3. The report must set out both sides of the dispute fairly; AND
4. The report must provide the context in which statements were made.

### Remedies for Defamation

**Damages in defmation are awarded at large In Hill, they awarded general damages, aggravated damages, and punitive damages.**

**No cap to defamation damages, because the non-physical damages are the whole damages**

* CAP applies only to non-pecuniary damages in negligence and intentional torts ($300,000)
  + Note that newspapers, periodicals and broadcasters **can plead a prompt apology in mitigation of damages** (s. 6 of the *Libel and Slander Act* (supp.)), and the plaintiff can recover **only actual damages/actual losses (compensatory) if the defendant shows (*inter alia*) the article was published or the broadcast was made in good faith and an apology was promptly published** (s. 7). Section 10 provides all defendants with the right to adduce, in mitigation of damages, evidence that they made or offered to make a written apology to the plaintiff.

**Hill v. Church of Scientology**

1. **General damages are damages at large to repair the injury to the reputation of the plaintiff**.

* **There is no guideline – whatever the jury thinks is appropriate** **and represents the long-term harmful effects of the defamatory words**
* The only time the court can overrule the jury is if the judgment “shocks the conscience of the court.”
* The court notes that the memory of the defamation may linger in the minds of the public, especially when there is a large media report. As such the jury should not be too stingy.
* In this case, the court also noted that young lawyers make their way through reputation.

1. **Aggravated damages**

* **These are available were the defendant’s conduct has been particularly high-handed or oppressive, thereby increasing the P’s anxiety and humiliation.**
* **There must be a finding that malice** (as defined as any ulterior motive) was the actual motive and that the damage was increased either by a) increasing humiliation b) increasing the diffusion of the information.
* An apology and retraction would go very far as a counter argument against malice.

1. **Punitive damages**

* “**so offensive, oppressive and high handed that it offends the court’s sense of decency**.” They bear no relation to what the P should receive for compensation. **Their aim is not to compensate but rather to punish.**
* The **purpose is deterrence**. In this case, scientology was obviously not deterred even by the large award at trial. There is no reason not to give large punitive damages.