

Intentional Torts

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1. Tort

1.1 Assault

D intentionally & directly creates in the mind of another the reasonable apprehension imminent contact of a harmful or offensive nature (Mainland Sawmill v USW)

Elements P must prove:

- Directness
- Reasonable apprehension
- Imminent contact
- Harmful or offensive nature

Interests being protected:

- Absolute right to bodily sovereignty
- Therefore, “harmful or offensive” can simply mean an unwanted touch (depending on the context)

Required:

P aware of threat		
Apprehension is reasonable in context	<i>Ward v Vancouver</i>	“We can do this the hard way or the easy way” in response to request for lawyer did not suggest imminent harm.
Apprehension not reasonable if D states he <u>will not</u> hurt P while looking threatening	<i>Tuberville v Savage</i>	D put hand on sword and said “If it were not assize-time, I would not take such language from you”.
Words alone not enough	<i>Mainland Sawmill v USW</i>	Banging sticks, hammers etc. give substance to the threats, therefore = assault
Blocking someone’s passage is assault	<i>Bruce v Dyer</i>	D attempted to pass P on the highway, but P accelerated and would not let D in, so D entered the lane behind P. Some ways down the highway, P stopped his car, motioned for D to do so as well, and emerged from the car, shaking his fist. A fight ensued, in which D broke P’s jaw. P brings an action of assault and battery against D, but D claims self-defence on the basis that P’s conduct on the highway constituted an assault.

Not Required:

Fear on part of victim	<i>Freitas v Defraga</i>	P = trained in martial arts & unafraid; D liable nevertheless
Opportunity to follow through on threat	<i>Stephens v Myers</i>	D threatened to hit P, but restrained. P wins
Unconditional threat	<i>Mainland Sawmill v USW</i>	Threat of violence would only be carried out <u>if</u> P didn’t cross picket doesn’t make threat less imminent, b/c P had right to do so.
That D approach P	<i>Mainland Sawmill v USW</i>	Didn’t advance toward P, but would have if P had crossed picket.

1.2 Battery

Intentional infliction upon the body of another of a harmful or offensive contact – objective standard – *Bettel v Yim*

Required:

More than trivial contact (e.g., being jostled in a crowd → implied consent)	<i>Non-Marine Underwriters v Scalera</i>
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Protected interests:

"The fundamental principle, plain & incontrovertible, is that every person's body is inviolable"	<i>Non-Marine Underwriters v Scalera</i>
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Irwin:

- Offensive can include insults to dignity and honour (e.g. to cut a person's hair, to spit on a person, to throw a cream pie in a person's face, to push a person away rudely, or to hit a person with a snowball).
- The status of borderline conduct such as an unsolicited hug or an uninvited social kiss on the cheek depends upon the relationship between the persons, the surrounding circumstances, and the shifting tides of social convention and propriety.
- Not a battery to poison a person's food or to lay a trap for a person, because lacks directness.

1.3 Sexual Misconduct

No limitation period:

- "Reasonable discoverability":
 - *M. (K.) v. M. (H.)* (1992) SCC
 - Incest victim's case against father upheld in spite of the fact that it occurred 18 years earlier. SCC found that she only connected the harm she suffered with the incest in the course of therapy, and that the clock should start when this discovery was made.
- In BC, there is no limitation period on sexual misconduct with a minor or sexual assault of anyone
 - *Limitation Act* (3)(1) SBC 2012

Vicarious liability:

- Suits brought against institutions or persons that enabled sexual battery (e.g. government and church for residential schools; mothers who did not prevent abuse by fathers). Not very successful strategy in residential school cases.

Consent:

- Consent not available as a defence to **sexual battery** of young person (*M(K) v M(K)*)

1.4 Intentional Infliction of Mental Suffering

Flagrant or outrageous conduct calculated to produce harm and resulting in a visible and provable illness

Requirements:

Articulated in *Prinzo v Baycrest Centre*; followed in *Piresferreira v Ayotte*

A. Flagrant or outrageous conduct

B. Calculated to produce harm (see table) → objective

- Known to D or substantially certain to follow (*Prinzo*)
- More than reckless disregard for emotional wellbeing (*Piresferreira v Ayotte*)
- **Extent** of the harm need not be anticipated (*Wilkinson v Downton*)

1. Results in a visible and provable illness

- Harm must be a recognizable physical or psychological harm (*Frame v Smith*)

More than reckless disregard for emotional wellbeing	<i>Piresferreira v Ayotte</i>	Failed on this element (trial judge incl. recklessness)
- Extent of the harm need not be anticipated. - Kind of harm must have been intended or known to be substantially certain to follow.	<i>Wilkinson v Downton</i>	Woman told husband is injured, suffers nervous shock
- Knew statement would reach P - Reasonable person would have known statement would harm P	<i>Bielitski v Obadiak</i>	D told a friend that another friend, Steve, had hanged himself. After a number of repetitions, rumours reached Steve's mother.
D had intention to punch, should have foreseen consequences of punch	<i>Purdy v Woznesensky</i>	D knocked out P, whose wife suffered severe shock

1.5 False Imprisonment

Requirements:

Deprivation of liberty through:

- **Physical restraint:**
 - No reasonable prospect of escape (*Bird v Jones*)
 - Not enough that you can't move in the direction you want to go (*Bird v Jones*)
- **Psychological compulsion:**
 - Belief you cannot leave because authority figure tells you to stay (*Chaytor*)

Confinement for a short period is sufficient (*Chaytor*)

Physical restraint: no reasonable prospect of escape	<i>Bird v Jones</i>	Guy trying to cross the bridge; not enough that you can't move in the direction you want to go
OR		
Psychological compulsion: belief you cannot leave because authority figure tells you to stay	<i>Chaytor</i>	Store spies

1.6 Invasion of Privacy

Intentional/reckless intrusion, physical or otherwise, upon the seclusion of another or her private affairs or concerns, is subject to liability to the other for invasion of her privacy, if the invasion would be highly offensive to a reasonable person

No common law tort in BC.	<i>Demcak v Vo</i> (BC); <i>Ari v ICBC</i> (BC)	
Statutory tort: <i>BC Privacy Act</i> .	<i>Demcak v Vo</i> (BC)	City inspectors search vehicle. No breach of statute, because they were authorized to do so.
Statutory tort: <i>Freedom of Information and Privacy Protection Act</i> .	<i>Ari v ICBC</i> (BC)	?
Exists in Ontario	<i>Jones v Tsige</i> (ON)	Bank account snooping
<i>Personal Health Information Protection Act</i> is not an exhaustive code; room for common law tort.	<i>Hopkins v Kay</i> (ON)	PHIPA does not always provide remedies to individual complainants, so common law should fill the gap. In this case, elements of common law tort more difficult to prove than statutory tort.

1.7 Discrimination

Not a tort. (*Bhadauria v Seneca College*)

2. Directness

Intermediate Agent

Would the result have occurred had it not been for the intervention of another independent agency?

There is no set rule about when an intermediate agent breaks a chain of directness. However, in general:

Chain Maintained:

- “Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant.”
(*Scalera*)
- There is no intermediate agent
- The intermediate agent is following the request of the defendant and doesn't do anything illegal or malicious in the process
 - E.g. police, security guards in *Chaytor*

Chain Broken:

- If the intermediate agent does something that is a tort (unless tort is done under direction of original agent)
- If the result is too remote from the original action:
 - *Hoffman v Monsanto*: GMO canola seed deposited on organic farmer's land is insufficiently direct to make a claim of trespass against Monsanto, who merely produced and marketed the seed.

3. Volition

Exercising control over physical actions. Voluntary means that the act or conduct must be conscious; the defendant's mind must prompt and direct such act or conduct.

Volition does exist:

Mistakes/ignorance	<i>Basely v Clarkson</i>	D mistakenly cut P's grass
	<i>Costello v Calgary</i>	Calgary mistake on paperwork P sues for trespass
Threat of force	<i>Gilbert v Stone (1648)</i>	Gunpoint trespass

Volition does not exist:

Children	<i>Tillander v Gosselin</i>	2 y/o incapable of acting w/volition
	<i>Parental Liability Act (BC)</i>	Parents may be liable if child intentionally takes, damages or destroys property. <ul style="list-style-type: none"> ▪ Defences: <ul style="list-style-type: none"> ○ Reasonable supervision ○ Reasonable effort to discourage activity.
Mentally ill	<i>Lawson v Wellesley Hospital</i>	No intention if someone is incapable of appreciating the [moral] <u>quality</u> of their acts; therefore, no tort.
	<i>Gerigs v Rose</i> → LIMITS LAWSON	By reason of mental infirmity, unable to appreciate the nature and <u>consequences</u> of his acts → doesn't matter if D knows act is right or wrong, just whether he knows whether he was going to do it. Knew he would injure, did it anyway.
D is physically unable to prevent his body from doing tort	<i>Smith v Stone</i>	D carried onto land; no trespass
PURE ACCIDENT/REFLEX		

4. Intent

Need not intend harm, just contact.

To be intentional, an act must be voluntary.

NB: onus on defendant to prove lack of intent (*Goshen v Larin*)

Actual intent	Desire to bring about results or consequences of the act		
Constructed intent	No desire that X occur, but intended to do an act and knew the act was substantially certain to lead to X	<i>Garratt v Dailey</i>	5 y/o moves chair w/o intent to injure
Transferred intent	D intends to commit an intentional tort against one party, but unintentionally commits a tort against another OR intends to commit one tort, accidentally commits another.	<i>Carnes v Thompson</i>	Swings at husband, hits wife with pliers
Reasonable Foreseeability of Outcome	IRRELEVANT. An individual is liable for all harm that flows from his or her conduct even where the harm was not intended.	<i>Bettel v Yim</i>	Head breaks nose

5. Defences

5.1 Consent

Objective test: overt acts showing withholding of consent?	<i>O'Brien v Cunard</i>	Vaccinations on ship - doctor could not have known she did not consent, because she acted as if she did.
Onus to demonstrate consent on <u>defendant</u> on BOP.	<i>Scalera</i>	Rationale: victim's interests supersede defendant's
1. Consent must be ' genuine ' (not obtained by force or threat of force or be given under the influence of drugs) 2. Inequality of position and exploitation (together) can vitiate consent.	<i>Norberg v Wynrib</i>	Pills-for-sex exchange
Consent can be vitiated by fraud or deceit as to the nature of the defendant's conduct	<i>R v Cuerrier</i>	Failure to disclose HIV status = lack of consent

Consent & The Young

- Consent not available as a defence to **sexual battery** of young person (age not defined; probably 15-16) (*M(M) v K(K)*)
- May legally give consent in medical context (*Johnston v Wellesley Hospital*)

Consent: Sporting Context

- Participants considered to have assumed risks of participation or waived claims (*Agar v Canning*)

Limitations:

- Where D showed resolve to injure P (even if there was provocation in heat of game) (*Agar v Canning*)
- Where violence is beyond ordinary standards of sport (*Colby v Schmidt*)

Consent: Fighting

- If a fight is consensual, cannot sue for injuries (*Charland v Cloverdale*)
- EXCEPT when 1 party deploys unnecessary/excessive force (other party can sue)
- Exception to the exception: if 2nd party responds to excessive force with excessive force, cannot sue.

Consent: Medical Context

In an emergency, a doctor's actions are privileged by reason of necessity.

Malette v Shulman test:

1. Patient is unconscious/incapable of making a decision;
2. Time is of the essence;
3. No one legally authorized to act as agent is available (could they call someone to get consent?), and;
4. Under the circumstances a reasonable person would consent

Examples:

Liable where consent is expressly denied, even to save a life	<i>Malette v Shulman</i>	Jehovah's Witness refuses blood. Court: " certain aspects of life are properly held "
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		to be more important than life itself"
Emergency justifies action	<i>Marshall v Curry</i>	Hernia/testicle operation; meets <i>Malette</i> emergency criteria (predates that case).

Consent & The Young in a Medical Context

Children may give consent w/o guardian if they appreciate the nature/consequences of operation	<i>Johnston v Wellesley Hospital</i>	NB: woman was 20.
NOTE: College of Phys. rules dictate 15+		

Consent & The Mentally Disabled Youth in a Medical Context

Mentally disabled youth: Parents can't withhold life-saving treatment	<i>Re. Supt. Of Fam. & Child Service and Dawson</i>	Life of disabled person should be viewed as inherently valuable
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5.2 Self-Defence

Criteria: *Onus is on D*

Cockcroft v Smith:

1. No gap in time between initial event and the act of self-defence
2. Act was necessary for the defendant's safety

Mann v Balaban:

3. The response was not made with unreasonable force (NB: *Bruce v Dyer* – can batter in response to assault)

Extent of protection:

- Can kill the attacker if necessary to preserve one's life or to avoid serious bodily injury (*R v Smith*)
- No 'retreat' is necessary if one is defending own home (*R v Hussey*)
- Can cover instances wherein you reasonably believe that someone else is being attacked/under imminent threat of attack
- **The reasonable belief that one is in danger constitutes an assault. When a person is assaulted, he may strike back. (*Bruce v Dyer*)**

5.3 Provocation

Not a complete defence. Only limits damages.

Requirements:	<i>Bruce v Coliseum Management</i>
1. The conduct of the P was such as to cause the D to lose his power of self-control. → "Where clear evidence of provocative behaviour by a victim of assault is present, the loss of self-control on the part	

<p>of the assailant may be inferred”</p> <ol style="list-style-type: none"> The P's provocation occurred at the time or shortly before the assault. Cannot coolly and deliberately plan to take revenge on another and expect to rely on provocation as a mitigating factor. Prior incidents are relevant only to the extent that they enhanced the effects of the provocation. 	
<p>If provocation is established:</p> <ol style="list-style-type: none"> Punitive damages are unavailable. Compensatory damages may be reduced. Liability for general damages will be apportioned according to the relative fault of each party. 	<p><i>Pacheco v Degife</i> <i>BC Negligence Act, s. 1(1)</i></p>

5.4 Necessity

Harm D seeks to avert must be proportional to the harm D purports to inflict.

<p>If no reasonable alternative but to commit a tort, no liability. Very limited circumstances: must be true emergency.</p>	<p><i>Dwyer v Staunton</i></p>	<p>Use of private road where there was no reasonable alternative.</p>
<p>Must consider implications of finding "necessity"</p>	<p><i>Southwark London Borough Council v Williams and Anderson</i></p>	<p>Squatters argue living in unoccupied home = necessity. Not allowed, because this would allow reallocation of property.</p>

5.5 Legal Authority

Legal authority = statutory authority to do something that would otherwise be a tort. E.g.: police officer.

1. Authorization granted through valid legal instrument?
2. What is D authorized to do under that authority?

6. Limitation Period

General limitation period: 2 years

Exceptions: BC *Limitations Act*, 3(1) provides that there is no limitation period for:

- Misconduct of a sexual nature where claimant was a minor at time of misconduct
- Sexual assault;
- Assault or battery where claimant was:
 - A minor
 - In an intimate relationship with, or financially, emotionally, physically or otherwise dependent upon a person who performed, contributed to, consented to or acquiesced in the assault or battery

Negligence CAN

- NEGLIGENCE CAN** **1**

- LIMITATION PERIOD** **4**

- DUTY OF CARE** **5**

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Discoverability Rule: MK v MH

Duty of Care

Two ways to create a duty:

1. Established/analogous category + reasonable foreseeability = duty ([Haskett](#))
2. Reasonable foreseeability + proximity + residual policy considerations ([Cooper](#))

Reasonable Foreseeability

Would a reasonable person, in the position of the D, have foreseen that his activity might cause damage to a person in the position of the P? ([Donoghue – desiccated snail](#))

- NB: This is examined on the level of classes of persons/parties
- It can be broken down into two questions:
 - i) Is it reasonable to say that a party in the position of the defendant should have been aware of the risk of harm generated through its activities?
 - ii) Is it reasonable to say that the defendant should have been aware that someone like the plaintiff might be injured as a result of the risk they created?

Neighbour Principle

([Donoghue v Stevenson – desiccated snail](#)):

- The general rule of negligence is that everyone must take reasonable care to avoid acts or omissions which they can reasonably foresee would be likely to injure their “neighbour.”
- Neighbours are “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected in this way when I am directing my mind to the acts or omissions which are called into question.”
- Examples:
 - Advertising agency (Hedley Bryne) asks bank (Heller) to check if a client is solvent. Says that it is without properly investigating. Heller ought to have considered Hedley’s loss when investigating. ([Hedley Bryne v Heller](#))
 - Detainees in the detention centre (Home Office) escape and cause damage to yacht club (Dorset). Centre should have considered that failure to keep kids under control could create problems for nearby businesses. ([Home Office v Dorset Yacht](#))

The Unforeseeable Plaintiff

- If harm suffered by the P is not reasonably foreseeable, their injuries are not compensable. ([Palsgraf v Long Island Railway](#))
- Harm suffered by A as a result of B’s breach of duty owed to C is not compensable. ([Hay v Young – woman sees accident, gets nervous shock](#))

Established categories (Haskett):

Physical harm to persons or property

- If D does an act that causes physical harm to P or her property, there is a duty.
- Exception: if the D didn't do an act that caused physical harm, but stood by while some other thing caused it, must fit into an affirmative duty.
- Food manufacturer-consumer ([Donoghue – snail in ginger beer](#))

Psychological harm without physical injury

Requirements ([Devji](#))

- The shock must be foreseeable
 - There must be a recognizable psychiatric injury (not just an emotional upset). Must be serious and prolonged ([Mustapha](#))
 - The plaintiff must have been him/herself endangered or have witnessed a traumatic accident with his/her own senses (or been there at the immediate aftermath)
 - The relationship to an injured party should be close: mere bystanders are unlikely to recover.
- No SCC case on this, so parameters are unclear

Public Authority Liability

Statutory Limitations on Tort Liability

1. If the statute specifies that a civil action is **created**, you look to the statute to see what the action would look like.
2. If the statute specifies that civil actions are **displaced or eliminated**, the no civil action is possible.
 - Municipalities now exempted from liability for failure to inspect buildings ([Local Governments Act](#)).
3. If the statute is **silent** on civil actions, the issue is whether a common law duty arises between the regulator and the party harmed.

Proximity

Government liability is further curtailed by the requirement of proximity. In [Taylor](#), the court found that for proximity to be established, the relationship between the regulator and the plaintiff distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's work.

The court in [Fullowka](#) set out three factors to determine whether there is sufficient proximity between the public authority and the injured party.

- 1) Is the group to which the legislative regime is directed reasonably contained and defined?
 - Yes: people working in mines → smaller and more defined than Cooper ([Fullowka](#))
 - No: to the public at large (all clients of all mortgage brokers) ([Cooper](#))

- 2) What is the nature of the actual interactions between the regulator and the class of parties that might be injured?
 - “Once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk.” (Heaslip)
 - Yes: inspectors were at mine daily during strike (Fullowka)
 - No: regulator of mortgage brokers never met investors (Cooper)
- 3) Do the statutory duties actually relate to the class of parties who might be injured?
 - Yes: duties were related to the miners (Fullowka)
 - No: trying to regulate mortgage brokers (not clients) (Cooper)

Are public duties consistent with private law duty of care? (Taylor)

- Yes: Imposing a duty to investors would come at the expense of efficiency and public confidence in the system as a whole (Cooper)
- No: Duty to the public is to investigate in accordance with the law (Hill)

Policy-Operational Distinction

Just v British Columbia

Governments may not be held liable for “core” matters of policy. However, they may be held liable for negligent implementation of that policy (Just v BC)

- Policy: If impugned act is an expression of policy: no liability
 - Core policy matters: “discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations” (Imperial Tobacco)
 - E.g. of policy decision: representation that low-tar cigs are safe by gov’t to tobacco industry. Crown had weighed social and economic considerations and decided, in interests of safety, to promote the smoking of low-tar cigarettes. (Imperial Tobacco)
 - NB: some policy decisions can still be challengeable, should they be shown to be “... irrational [or] taken in bad faith” (Imperial Tobacco)
- Operational: If impugned act is implementing the policy that has been passed: liability. (Just: *failed to abide by standards set for road safety*)

Charter Breach

Test to determine if a remedy for a Charter violation should be awarded (Vancouver v Ward)

1. Establish a Charter right has been breached
2. Show why damages are a just and appropriate remedy. Will generally fall under 3 headings:
 - a. Compensation for injury
 - b. Vindication (‘Charter rights must be maintained, and cannot be allowed to be whittled away by attrition’) → want to ensure that Charter rights are enforced.
 - c. Deterrence (aimed at ‘influencing government behaviour’)
3. Examine whether the state can show damages are not functionally appropriate or are unjust
4. Quantify damages

Negligent Misrepresentation

Duty of Care ([Hedley Bryne v Heller](#))

- Economic loss is sufficient to ground a claim in negligence.
- To create a duty of care by giving advice, you must “undertake” a responsibility.
- If you know/ought to know that your advice will be relied on and give it anyway, you are deemed to have taken on that responsibility.
- Statement that refuses responsibility will prevent the creation of a duty (e.g. “without responsibility on the part of X.”)

Elements of NM ([Queen v Cognos](#))

1. Duty of care must exist based on a “special relationship” between the representor and the representee.
 - a. Special relationship exists where ([Hercules Management v Ernst & Young](#))
 - i. The defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and
 - ii. Reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. Indicia of reasonableness (not a strict test):
 1. The D had a direct or indirect financial interest in the transaction in respect of which the representation was made.
 2. The D was a professional or someone who possessed special skill, judgment or knowledge.
 3. The information was provided in the course of the D’s business.
 4. The information was given deliberately, and not on a social occasion.
 5. The information was given in response to a specific enquiry or request.
2. Representation was untrue, inaccurate, or misleading;
3. Representor acted negligently in making misrepresentation;
4. Representee relied, in a reasonable manner, on misrepresentation
5. Reliance resulted in damages

To prevent indeterminate liability ([Hercules](#)):

1. Did the defendant know the identity of either the plaintiff or the class of plaintiffs who would rely on the statement?
2. Did the losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made?

Statements can be made to 3rd party ([Haskett](#))

Negligent performance of a service

[BDC v Hofstrand Farms](#) – no duty

Proximity analysis:

- Is the class of possibly affected parties limited (so that the defendant-appellant could have had them in mind when acting)?
- Is there reliance or an undertaking?

Examples:

Drafting a will;

Defective/dangerous structures/products

Duty restricted to ([Winnipeg Condo v Bird Construction](#)):

- Buildings/products that are dangerous, not merely shoddy
- Parties: subsequent purchasers, inhabitants of the building;
- Damages: reasonable cost of repairing dangerous defects; and,
- Timeframe: useful life of the building

→ These limitations prevent indeterminate liability

Relational economic loss

D negligently causes harm to a 3rd party, which causes pure economic loss to P.

Two-stage analysis for compensability ([Bow Valley Husky v Saint John Shipbuilding](#))

General exclusionary rule: no duty exists in cases of relational economic loss.

- Policy reasons:
 - Puts incentives on parties to act to minimize losses
 - Only one party has to purchase insurance
 - Will save judicial time and resources
 - Eliminate worry about impecunious defendants, who might be forced to pay both the primary party damaged and other 'relational' parties
 - Rule is clean and definite (and exceptions allow for justice in other clear cases)

To establish an exception:

- 1. Does case fit into an exception from the exclusion of duty for relational economic loss?**
 - a. Third party has a **possessory or proprietary interest** in the thing that was damaged.
 - b. **General averaging cases** (relates exclusively to maritime law)
 - c. **Joint venture**: an association of persons, natural or corporate, who agree by contract to engage in some common undertaking for joint profit by combining their respective resources without forming a legal relationship or corporation.
- 2. If no, then use *Cooper* test to determine whether a new exception should be created**
 - a. Argue on policy basis why there should be a duty. Focus on indeterminate liability.

Positive Duties

The court is generally unwilling to find a duty of care in situations which involve an obligation to positively act, however there are several exceptions.

There is a key underlying distinction:

- a) Situations in which the defendant comes upon a plaintiff “in peril from a source completely unrelated to the defendant”: NO DUTY, even where little risk or effort would be involved in assisting. ([Horsley](#))
- b) Situations in which the defendant is at least partly responsible for the situation of risk within which the plaintiff finds himself.

Rescuer’s Liability

- No liability for aid given in emergency situation (except where gross negligence). Exception: rescuer was employed expressly as a rescuer, or rescues with a view to gain. ([Good Samaritan Act](#))
- In Ontario: a rescuer does not owe a duty to the rescuee unless s/he makes the situation of the rescuee worse (has not been considered by SCC) ([Horsley v MaClaren](#))

Relationships of economic benefit

The court will impose a positive obligation in situations of economic benefit where there is an inviter-invitee relationship as well as knowledge of the situation and its dangers ([Jordan House](#)).

Pubs are under a positive duty of care to patrons and 3rd where they know of a patron’s intoxication. ([Jordan House v Menow](#): *drunk bar patron injured walking home*).

- Serving past intoxication is not sufficient; knowledge of intoxication/unsafe route home also required ([Stewart v Pettie](#))

Focus is on **commercial environment** ([Crocker v Sundance](#): *inebriated tubing race; competition run for profit*)

- Does not apply to social host ([Childs v Desormeaux](#)), because:
 - **Monitoring** alcohol consumption is both easier for commercial hosts and expected of commercial hosts
 - **The regulatory regime** imposes special responsibilities
 - Seller is **perversely incentivized** to overserve

Social host liability?

Social hosts may owe a duty of care to 3rd parties who are injured as the result of a negligent guest, whose actions were impaired by alcohol consumed at the social host's residence ([Childs v. Desormeaux](#), *BYOB party car accident*). Liability may arise where the social host had reasonable foreseeability of harm and sufficient proximity: that is, they knew that an intoxicated guest was driving and did nothing to protect innocent 3rd parties. Factors to consider include (fact-driven):

- Did social host directly serve the guest?
- Did social host know how much alcohol the guest had consumed?

- Did social host know that the guest was impaired when he left?

However, social host liability may be negated by **policy concerns**: increase homeowners insurance premiums // inordinate burden on social hosts // unclear social host obligations

In [Childs](#) Desormeaux's drinking history was not a sufficient basis to impose a duty on the Zimmerman social hosts to monitor that guest's drinking at a BYOB party where alcohol was neither provided nor served by the hosts.

Relationships of control/supervision

Those who enter these relationships generally do so willingly, knowing the situation may require them to positively act to assist others. Generally, the autonomy of the party that might require assistance is restricted or controlled by the one who might fall under a legal obligation.

Examples:

- teacher/pupil
- employer/employee
- carrier/passenger
- prison/inmate
- landlord/tenant
- hospital/patient

Creation of dangerous situations

If you create a situation of danger, even if you do it non-negligently, you are obliged to act to mitigate danger ([Oke v Weide](#) – driver knocked over a post non-negligently has duty to fix it)

Reliance and undertakings

If you undertake a task, even if under no duty to undertake it, you are seized by a duty of care ([Horsley v MacLaren](#))

Examples:

- Store owner undertakes to provide medical care ([Zelenko v Gimbel \[US decision\]](#))
- Government agency installed harbour lights have duty to maintain ([R v Nord-Deutsche](#))
- [Horsley v MacLaren](#)

Duty to warn

[Hollis v Dow Corning](#)

Source/rationale of duty

- the reliance consumers justifiably place in manufacturers to produce safe products
- imbalance in knowledge between the two, and

- the need consumers have to be able to make informed decisions

Nature of duty

- To provide clear communication, describing any specific dangers arising from ordinary use of product
- The greater the danger, the more detailed and forceful the warnings must be
- Duty persists over time (so new discoveries would compel company to issue new warnings)
- Generally, medical products to be 'ingested, consumed or otherwise placed in the body' are seen to be of significant risk, and so higher standard applies to them
- May be discharged by informing a **learned intermediary**

Causation: Subjective (i.e.

Policy: c.f. doctor's duty to warn, where causation is tested on modified objective. Why?

- Manufacturers likely to overemphasize value and underemphasize risk. Holding the manufacturer to a strict standard of warning consumers of dangerous side effects to these products is therefore desirable.

Negligent investigation

(Hill)

Novel Relationship: Cooper Test

First stage: onus on P

1. **Foreseeability:** Was the damage reasonably foreseeable?
2. **Proximity:** Is the relationship between the kinds of parties sufficiently “close and direct” to make it “just and fair” to impose liability? Factors to consider:
 - a. Expectations
 - b. Representations
 - c. Reliance
 - d. The property or other interests involved
 - e. Spatial/temporal closeness
 - f. Policy considerations that suggest there is insufficient proximity.

NB: not an exhaustive list! Bring up anything that demonstrates fairness of imposing burden.

Second stage:

Residual policy concerns which justify denying liability → onus on D

What will the effect of recognizing a duty of care be on other legal obligations, the legal system, and society? Factors to consider:

1. **Remedy:** Does the law already provide an adequate remedy?
Note that the remedy must be adequate: in Jones v Tsige, the court considered the statutory remedy that existed under the Privacy Act, and decided that it was not adequate because of low \$ cap.
2. **Unlimited liability:** Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class?

Other: Are there other reasons of broad policy that suggest the duty of care should not be recognized?

Standard of Care

Summary of current approach ([Ryan v Victoria](#)):

To avoid liability, a person must act to prevent a foreseeable risk if the risk is such that an ordinary, reasonably, and prudent person would regard that risk as material ([Vaughan, Blyth, Bolton](#)). The measure of what constitutes a material risk and the care that must be taken to avoid it is based on three factors:

- a. The likelihood of a known or foreseeable harm
- b. The gravity of that harm
- c. The burden or cost which would be incurred to prevent the injury.

([Bolton](#); [Ryan](#))

Material Risk Test

([Bolton v Stone](#))

A person should act to prevent a foreseeable risk if the risk is such that a **reasonable person**, careful of the safety of his neighbor, would regard that risk as **material/substantial**.

Considerations for determining whether a risk is material:

1. How **remote (i.e., unlikely)** the chances are that X might come to pass
2. How **serious the consequences** would be if it did
 - a. Disability can increase seriousness ([Paris v Stepney](#))

The Reasonable Person

- The standard of care “requires in all cases a regard to caution such as a man of ordinary prudence would observe.” Objective: does not import characteristics of particular D. ([Vaughan v Menlove](#))
- Changed to “prudent and reasonable man” ([Blyth v Birmingham](#))

Exceptions

Social Utility

Where the act has social value, it may be immunized from liability in negligence. ([Priestman v Colangelo](#))

- **Police officer in high-speed pursuit**, leaned out the window to shoot at tires of car. Car hit a bump, causing bullet to hit the driver in the head. Car spun out of control, hit and killed a person. Police officer not negligent b/c his acts were “reasonably necessary in the circumstances and no more than was reasonably necessary.” **Purpose** of act was to apprehend criminal before he reached a crowded intersection. Because purpose has social value, act is immunized from negligence. ([Priestman v Colangelo](#))

- **Firemen needed jack** to rescue a woman pinned under a vehicle. Only vehicle that could safely transport the jack was in use. Instead, used vehicle that jack could not be secured to. On the way, jack slipped off the truck and injured the P. Must balance the risk against the end to be achieved. The saving of life or limb justified taking considerable risk. Firemen not liable. ([Watt v Herforshire](#))

Statutory Protection of Police Negligence

- S 25 of the *Criminal Code* does not protect from negligence. [There is some suggestion in the law that the degree of negligence will need to be higher in police than in general public \(I think???\)](#).
- BC *Police Act* (s. 21) protects individual police officers from regular negligence, but not gross negligence.
 - Municipalities/districts/ministers are not protected by the *Act*.

Exception: Physical Disability

- Visually impaired (and other disabled) must take care to avoid special risks incurred as a result of their disability. ([Carroll and Carroll v Chicken Palace](#))
- Reasonable person must take into account the needs of people with disabilities. ([Haley v London Electricity](#))

Role of Custom

Local Custom

([Waldrick v Malcolm](#))

1. Compliance with a “general local custom” is not sufficient if custom is unreasonable.
2. Where custom is relied upon in a party’s argument (whether as proof of negligence or as a shield against it), that party bears the onus of demonstrating that the custom exists.

Industrial Custom

([Warren v Camrose](#))

- Consensus of experts/uniform practice of an industry provides strong evidence of reasonableness.
- The court can override industrial custom where it is unreasonable/“offends logic or common sense.”

Note exception in case of doctors and lawyers.

Statutes and Statutory Standards

3 types of situations arise where a statute is involved:

1. Statute explicitly precludes a civil action for breach;
2. Statute explicitly creates a civil action for breach (e.g. the Privacy Act);
3. Statute is silent on civil actions. This category is problematic: how should the law of negligence interact with statutory duties?

Breach of statute as evidence of SOC

(Saskatchewan Wheat Pool)

The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

Limitations on use of breach of statute as evidence:

Statute actually has to speak to the thing that is complained of ([Gorris v Scott](#))

- Accident must be of type statute was meant to prevent
- Claimant must be someone whom the statute was designed to protect ([Kelly v Henry Muhs](#))
- Conduct in violation of the enactment must cause the injury

Compliance with statute as defence

([Ryan v Victoria](#))

- Compliance with a statute may be evidence of reasonable care, but is not sufficient to demonstrate lack of negligence.
- The more specific a statute is in terms of conduct required/the less discretion it permits, the more likely it is that the courts will find compliance to be sufficient.

Exceptions to the Objective Standard of Care

The Young

(Heisler v Moke)

Two-step analysis:

1. **Is the child capable of being found negligent?**
 - Does this individual child have the abilities required to know what duties are expected of him/her, and how to discharge these duties?
 - Does it make sense to hold this child responsible for his/her acts?
 - Factors: age, intelligence, and experience, general knowledge, and alertness. Highly subjective.
 - Note that children of “tender age” (undefined, but probably up to 5 or 6) are totally immune from liability (from notes, not case)
2. **Was the child negligent? (McEllistrum v. Etches)**
 - What would a reasonable child of like age, intelligence, and experience be expected to do and foresee under those circumstances? → quasi-objective standard.

Exception: adult activities

When children engage in ‘adult’ activities (e.g. driving) they are held to standard objective reasonable person test.

Mental Disability

Test for Liability (Fiala v. Cechmanek)

D must show either of the following on a balance of probabilities:

1. As a result of his mental illness, the D could not understand or appreciate the duty of care owed at the relevant time;
2. As a result of mental illness, the D was unable to discharge duty of care as he had no meaningful control over his actions at the time of the breach of his duty.

Doctor’s Standards

Test for negligence in the medical context

Challand v Bell:

1. The surgeon undertakes that he possesses the skill, knowledge, and judgment of the average.
2. In judging that average, regard must be had to the special group to which he belongs. From a general practitioner at a rural point, a different standard is exacted than from a specialist at an urban point.
3. If the decision was the result of exercising that average standard, there is no liability for an error in judgment.

NB: The law only requires that *some* experts agree that a doctor's course of action was reasonable under the circumstances.

NB: junior doctors are held to the same standard of the competent professional (because they cause a disproportionate number of injuries, and victims must be compensated)

Medical Industry Practice

[ter Neuzen v. Korn](#)

Adhering to standard medical practice is usually sufficient to avoid liability. Courts will only challenge standard practice if it is readily apparent to a layperson that it failed to incorporate obvious precautions.

Duty of Disclosure

[Reibl v Hughes](#)

- Doctors have a duty to warn patients about material risks
 - 'Material risks' = significant risks that pose a real threat to the patient's life, health or comfort. Factors to balance: severity and likelihood of harm.
- Must also disclose unusual or special risks (= uncommon, but serious)
- Doctors must consider the impact of failure to warn of particular risks in relation to the particular patient they have before them. "What the doctor knows or should know that the patient deems relevant to a decision whether to undergo prescribed treatment goes equally to his duty of disclosure as do the material risks recognized as a matter of required medical knowledge."

Causation: Did failure of disclosure create harm to P?

→ Modified objective test ← ([Arndt v Smith](#))

Use to determine whether the failure to disclose *actually* caused harm to P.

- Consider what the reasonable patient *in the circumstance of the plaintiff* would have done if faced with the same situation.
- Take into consideration any "particular concerns" of the patient and any "special considerations affecting the particular patient" in determining whether the patient would have refused treatment if given all the information about the possible risks.
- Incorporates the patient's reasonable beliefs, fears, desires, and expectations.
- Patient's expectations and concerns will usually be revealed by the questions s/he posed at the time of consultation with doctor.

Lawyers

[Brenner v Gregory](#)

A lawyer "will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made it or shown it."

Obligation to exercise due care "will have been discharged if he has acted in accordance with the general and approved practice followed by solicitors unless such practice is inconsistent with prudent precautions against a known risk."

Issues around Proof of Negligence

Onus of Proof on P

Wakelin v The London

On the P to prove his version of events.

- If there is no of direct proof of what happened, and the circumstantial evidence is equally consistent with the allegation of the P as with the denial of the D, the P's claim fails.

Statutory Shift in the Onus of Proof

- Onus falls on owner or driver to disprove negligence when vehicle in involved in an accident ([Highway Traffic Act](#))

Circumstantial Evidence Only

Fontaine v ICBC

- Weigh the circumstantial evidence to determine whether on BOP there is a prima facie case of negligence:
 - Is it reasonably *possible* to make an inference to negligence based on the circumstantial evidence?
 - If yes, can one infer negligence based on the circumstantial evidence?
- Once the plaintiff has established a prima facie case, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

Multiple Negligent Parties

Wotta v Haliburton

Where:

- There are two negligent parties
- One of them must have been negligent for the accident to occur in the way it did
- One possibility is the that both parties were negligent
- The court cannot conclusively determine which party was negligent

Both can be found liable???

Causation

But for test

The plaintiff must show that the injury would not have occurred but for the negligence of the defendant ([Kauffman v TTC](#)). In the absence of proof that the D's negligence did not cause the P's injury, "an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced" ([Snell v Farrell](#)). It is not necessary that it be shown the defendant is the sole cause of the injury. The plaintiff only need show the defendant is a necessary cause, not show the defendant is a sufficient cause ([Athey v Leonati](#)).

Thin Skull Doctrine

Makes the tortfeasor liable for the P's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take the victim as he finds him, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person. ([Athey v Leonati](#))

- **NB:** intersects with the question of the person of "ordinary fortitude" in **remoteness** analysis ([Mustapha v Culligan](#))
- **Note Crumbling Skull Rule:** The D is liable for the injuries caused, even if they are extreme, but need not compensate the P for any debilitating effects of the pre-existing condition that the P would have experienced anyway. Recognizes that the pre-existing condition was inherent to the P's original position. ([Athey v Leonati](#))

Material Contribution Test

Did the D's actions materially contribute to the risk of harm to the P?

The court should apply a "material contribution" test when two requirements are met ([Resurface](#)):

- 1) It must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test.
 - Definition of impossibility: The P's loss would not have occurred "but for" the negligence of multiple tortfeasors, each of whom is an independent sufficient cause, BUT cannot prove which one in fact caused the injury because each can point the finger at the other ([Clements: motorcycle; nail in tire](#)).
 - Impossibility does not include situations that are impossible to prove, only logical impossibilities.
- 2) It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.

- In other words, the injury must fall within the ambit of risk created by the defendant's breach.

1. The P is unable to show that any one of the possible tortfeasors in fact was the necessary cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.
→ **NB: this means that each must be an independent sufficient cause**

Two Negligence Defendants But Only One Cause of Accident

If both parties were negligent, and it is impossible to demonstrate which party caused the P's injury, the onus shifts to the guilty person to bring exculpatory evidence. ([Cook v Lewis](#))

English Mesothelioma Cases (Fairchild v Glenhaven)

Where:

1. C was employed at different times and for different periods by both A and B;
2. A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma;
3. Both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that C inhaled excessive quantities of asbestos dust;
4. C is found to be suffering from a mesothelioma;
5. Any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted; and
6. C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A and B taken together,

C is entitled to recover damages against both A and B.

Why?

- There are policy considerations on both sides:
 - It is unjust to hold an employer liable for damage that he did not cause.
 - It is unjust to deny the P a remedy for greivous harm when his employers owed them a duty to protect them against that harm, the harm can only have been caused by the breach of that duty, and science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm.
- The injustice to the employee is greater than the injustice to the employer.

Remoteness

Not always an element, but will come up where there is a lack of proportionality between their negligence and the harm suffered by the P.

Reasonable foreseeability

- Type of harm must be reasonably foreseeable to create liability ([Wagon Mound No. 1/2](#))
- Liable for acts that create a real risk of harm that would not be brushed aside as far-fetched. Above the de minimus range. ([Mustapha v Culligan](#))
- The type of harm must be foreseeable, NOT the extent of the harm or the precise way in which the harm happens. ([Hughes v Lord Advocate](#))
- Not conditional upon foreseeability of the precise manner or sequence of events harm occurs, just dangerous consequences likely to flow from negligent act ([Lauritzen v Barstead](#): *drunk guy pulls wheel, leads to worst night ever*)
 - **NB:** flexible test. All depends on how the type of harm is characterized: broad/general = easier to establish liability; narrow = difficult to establish liability.
 - Narrow characterization: [Tremain v Pike](#): illnesses caused by rat urine distinguished from those caused by rat bites
 - Broad characterization: ???

Thin Skull Rule

- As long as type of harm was foreseeable, liable for its full extent.
 - [Smith v Leech Brain](#): b/c of thin skull, full extent of lip burn is cancer, death.
 - [Marconato v Franklin](#): car accident causes slight physical injury, which leads to extensive psychiatric issues b/c of “eggshell personality”.

Psychiatric damage without physical injury

[Mustapha v Culligan](#)

- Purely psychological harm is unlikely to be compensable unless it is something that a person of ordinary fortitude would have suffered.
- If the same harm is suffered after a physical injury, it is compensable under the eggshell personality rule
- Why? Because the type of harm was not foreseeable and is not an extension of the original harm.

→ NB: psychiatric harm stemming from physical injury is compensable ([Marconato](#))

Second Accident Caused by First Accident

Wieland v Cyril

- If injuries from original negligence cause further accidents, negligent party is liable

Novus Actus Interveniens

An act which causes or contributes to P's injury after the D's breach

- For an act to intervene such as to trigger this argument, it must break the chain of causation and be a fresh, independent cause of the damage.
- To establish whether the intervening act was a fresh cause, consider whether it is "fairly to be regarded as within the risk created by D's negligence." (Bradford: *grease buildup, fire, someone shouts "gas"*)
- If the P takes an unreasonable risk given his disability from the original accident, the D will not be liable for the result even if the result was foreseeable (McKew: *guy is injured, walks down the stairs carelessly, falls*)
- Although McKew suggested that an NAI could break the chain of causation in spite of foreseeability, subsequent cases have suggested that it applies only where a reasonable person in the position of original defendant could reasonably anticipate the interventions claimed to be new causes of damages incurred (Bradford)

Intervening Medical Error

- Test for liability of original tortfeasor (Mercer v Gray)
 - Was the harm suffered at the medical facility reasonably foreseeable?
 - Was the medical treatment so "negligent as to be actionable"?
 - If yes, it is a novus actus interveniens and the original tortfeasor is not liable
- Onus (Papp v Leclerc)
 - Original tortfeasor is presumptively liable.
 - On original tortfeasor to show medical treatment = novus actus interveniens

Intervening Criminal Acts

- Test: was this criminal act reasonably foreseeable?
 - Harris v TTC – *boy sticks arm out of bus window, driver hits it into pole* → liable
 - Hewson v Red Deer – *D leaves keys in earthmover, someone else runs it into P's house* → liable

Intervening Negligence

- Test (Bradford v Kanellos – *grease buildup, fire, someone shouts "gas"*):
 - i. Is the person an NAI? Must be a fresh, independent cause of the damage.

1. No: continue to second question
 2. Yes: not liable.
- ii. If no, were the actions of the intervening actor reasonably foreseeable?
1. No: not liable.
 2. Yes: liable.

Intermediate Examination/Inspection

Ives v Clare Bros

Furnace sold w/defect, inspected, defect not caught → carbon monoxide poisoning)

- No rule that negligent intermediate inspection will relieve a manufacturer of liability for harm caused by negligently produced product.
- Rather, there are multiple negligent defendants.

Warnings and the Learned Intermediary

Hollis v Dow Corning – knowledge of breast implant defect not passed on

- “Learned intermediary” allows a manufacturer to discharge its duty to warn by providing adequate warnings to a doctor.
- Manufacturer must put the learned intermediary in the same state of knowledge they are in vis-à-vis material dangers/risks.
- The P does not have to show that the doctor would actually have passed information along. Presumed that s/he would do so.

Defences

Contributory Negligence

Deals w/apportionment of liability only.

Three possible scenarios where contributory negligence is raised:

- 1. Plaintiff contributes to accident that caused injuries**
- 2. Plaintiff exposes him/herself to risk of being involved in an accident**
 - Negligent in creating the risk
 - E.g. [Rautins](#): plaintiff allegedly exposed herself unreasonably to risk of being involved in accident by going into and remaining in crosswalk in intersection with malfunctioning traffic lights, at dusk, with darker clothes on]
- 3. Plaintiff fails to take reasonable precautions to minimize injuries should an accident occur**
 - There is a duty on passengers and drivers to wear seat belts ([Yuan](#)).
 - Policy: failure to do so generally increases severity of injuries and rate of fatalities.
 - Elements of the seatbelt defence:
 - a) P was not wearing seat belt
 - b) Injuries would have been prevented or lessened if the seat belt had been worn.
 - However, the driver of a vehicle has an obligation to ensure a child (under 16) has their seat belt on, even if they are not their parent and even if the actual parent is present in the vehicle. If parent is present, liability may be shared. ([Galaske](#))

HISTORY:

- Complete defence: very harsh to P ([Butterfield](#): riding horse “violently,” so unable to see pole across road)
- Led to the development of the last clear chance doctrine: even if P was negligent, he can collect if the D was the person with the last clear chance to prevent the harm. ([Davies](#))
 - This is to prevent D from failing to take preventative steps to avoid obvious harms created by P’s negligence
 - This has been “statutorily abolished” by the Negligence Act ([Scurfield](#))

Voluntary Assumption of Risk

Volenti non fit injuria

Test for volenti defence ([Hambley v Shepley](#): police-cruiser-hit-by-D):

1. P knew risk
2. P accepted risk

Acceptance requires that “the plaintiff consented not merely to the risk of injury, but to the lack of reasonable care which may produce that risk”

May arise in sporting context.

Illegality

Ex turpi causa non oritur actio

Defence is available only where (Hall v Hebert):

1. “to allow the plaintiff’s tort claim would be to permit the plaintiff to profit from his or her wrong”, and
2. when “profit” refers to “direct pecuniary reward for an act of wrong-doing”

Examples:

- One bank robber negligently misrepresents situation to second bankrobber, and second bankrobber attempts to sue for economic loss
- When plaintiff physically injured, and under heads of damage argues for ‘loss income’ where income is normally procured illegally
- Where plaintiff physically injured (while engaged in illegal activity), defendant acted (arguably) egregiously, and plaintiff argues for exemplary damages

Where it does not work (BC v Zastowny):

- Compensation for lost income for time in jail → would permit criminal to benefit from crime.

Defamation

- GENERAL INFO** **2**

- TYPES OF DEFAMATION** **2**

- ELEMENTS OF DEFAMATION** **2**
 - 1. Statements Are Defamatory** **2**

 - 2. Material was about the Plaintiff** **3**

 - 3. Statements were published or disseminated** **3**
 - Test for publication 3
 - Republication 4
 - Publisher’s liability 4

- DEFENCES** **5**
 - 1. Justification/Truth:** **5**

 - 2. Absolute Privilege:** **5**

 - 3. Qualified Privilege:** **6**
 - 1. Reciprocal duty 6
 - 2. No malice 6
 - 3. Statements do not exceed the occasion of privilege 6
 - Situations that can attract privilege 6
 - A. Protection of one’s own interests 6
 - B. Common interest or mutual concern 6
 - C. Moral or legal duty to protect another’s interest 7
 - D. Public Interest 7

- 4. Responsible Communication on a Matter of Public Interest** **7**

- 5. Fair Comment** **8**

General Info

Interests protected: Affords common law protection of reputation and dignity.

Countervailing interests: Freedom of expression (Grant v Torstar)

Plaintiff may be a natural or corporate person.

Burden

- Law presumes that defamatory statements are false (with the defendant charged with the burden of showing, if s/he can, that they were in fact true)
- Strict liability, unless a defence is used that incorporates malice.

Types of Defamation

Libel: Defamation in physical form (often written, but can be other, e.g. [Vander Zalm](#): caricature found to be defamatory)

- Proof of damages not needed
 - It's more permanent than slander → this is often the dividing line between libel and slander.
 - It's more deliberate than slander
- Includes radio broadcasts, because the broadcasters are saying words that were originally written
 - In statute: "Defamatory words in a broadcast are deemed to be published and to constitute libel" (libel and slander act, s 2).

Slander: Verbal defamation

- In most cases, proof of damages required
 - E.g. loss of business caused by the publication of the statement.

Elements of Defamation

**** WHAT IS THE "STING"?****

1. Statements Are Defamatory

Objective test: "Injury exists where an ordinary person believes that the remarks made, when viewed as a whole, brought discredit on the reputation" of the victim ([Bou Malhab](#))

- NB: the ordinary person is aware of the circumstances of the defamer, defamee, and audience
- As a result, determination of whether words are defamatory "may depend to a great extent on the circumstances and context of a particular publication" ([Rapp v McClelland](#))

Innuendo

- Defamatory nature can be shown through the literal ("plain and ordinary") sense of the statements, OR through:

- **Legal or true innuendo:** those receiving the statements know of extraneous circumstances that would give the publication a defamatory meaning. Audience would know these circumstances.
 - E.g. “family values campaigner entered a home on Birch street”, and the reader knows that the home is a brothel
- **Popular or false innuendo:** if an ordinary individual receiving the statements would be able to infer something defamatory beyond the plain and literal meaning.
 - E.g. “The man is a snake” → no outside knowledge required to understand the meaning (which is not the literal meaning that the man is a snake).

2. Material was about the Plaintiff

- Question of law: can the statement be regarded as *capable* of referring to the plaintiff? ([Knuffer v London Express](#))
- Question of fact: does the statement *in fact* (in the minds of reasonable people, who know the plaintiff) refer to the plaintiff? ([Knuffer v London Express](#))
 - “The question is not so much who was aimed at as who was hit.” ([Corrigan v Bobbs-Merrill Co](#)) → US case
 - E.g. [Hulton v Jones](#): P wrote a fictitious account of the salacious exploits of “Artemus Jones.” Unbeknownst to them, there is a real person called Artemus Jones, who sues in libel
 - E.g. [Cassidy v Daily Mirror](#): P is the wife of Mr. Cassidy. The D published a photo of Mr. Cassidy and a woman (not the P) with a caption describing her as his wife. Some people took this to mean that the P was living in sin w/Cassidy.
- Can a group be defamed? [Bou Malhab](#): statements made about taxi drivers.
 - Yes, if there is a “personal injury”. Statement needs to be such that it individuals will be picked out and defamed. Factors to consider:
 - i. Size of the group
 - ii. How organized and homogenous it is
 - iii. Whether the defamatory material targeted members of the group
 - iv. Whether the defamatory material might lead people to try to identify particular individuals within the group (or, conversely, not to care much about this), and
 - v. Whether the defamatory statements are plausible and/or convincing

3. Statements were published or disseminated

Publication = communication to a third party.

Test for publication

McNichol

1. Did the defendant intend that anyone but the plaintiff should hear his/her defamatory utterances?
2. Was publication the natural and probable consequence of his/her act in the circumstances?

- a. If the statement is *only* heard by accident (such that defendant could not have normally anticipated a third person heard the statements being made), that is not communication (objective)
- b. If statement is noticed by a third party in circumstances defendant would not normally have anticipated, that is not communication (objective)

Example:

- E.g. [McNichol v. Grandy](#): two people have a loud argument in a closed room at a pharmacy. But there is a hole in the wall, so a third party overhears. The natural consequence of raising voices in a room with thin walls was being overheard. Ergo, he published the statements.

Republication

- Liable for defamation: “Any act which has the effect of transferring the defamatory information to a third person constitutes a publication”
- Exception: enabling access to defamatory statements (through links or footnotes) is not republication and does not constitute republication. Rule: not republication if the third party must do work to access the defamatory material. ([Crookes v. Newton](#))

Publisher’s liability

- Publishers not liable where: ([Meneer v. Miguna](#), expanding [Viztelly v Mudie’s Select Library](#) to apply to publishers)
 - He was innocent of any knowledge of the libel contained in the work;
 - That there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and
 - That when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel.

Defences

1. Justification/Truth:

Defamatory statements are presumptively false. Burden on P to establish truth of statements on BOP.

- Not sufficient: D believed the statement to be true
 - **Hulton v Jones**: “A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under these circumstances he has no defence...”
- The fact that the statements are literally true may not be a defence if statements were presented in a way that created a false implication.
 - **Bank of British Columbia v. Canadian Broadcasting Corporation** (not in text)
 - CBC publishes a story about a bank’s financial trouble. Says that the bank may need to close as a result. Uses the truth defence: the story relied on evidence from a bank analyst, who had said the bank could close.
 - Problem: CBC had edited an interview with bank analyst to take statements out of context. Analyst has speculated about the unlikely possibility of banks closing. By rearranging comments, CBC gave audience the impression that he was definitively asserting that the bank was in financial trouble.

2. Absolute Privilege:

If you have an occasion that fits into one of these categories, it is impossible to win a suit in negligence. There is no exception. Statement could be clearly defamatory, but privilege negates liability.

Applies to three situations:

- i. **Statements made by executive officers (‘high officials’) relating to the affairs of state**
 - a. Not always clear who is an executive officer/who the absolute privilege applied to.
 - b. E.g.: **Dowson v the Queen**: “agents” of sufficiently high officials are protected by privilege (in this case, RCMP Chief Superintendent and Acting Assistant Deputy Attorney-General)
- ii. **Statements made during Parliamentary proceedings**
- iii. **Statements made in the course of judicial and quasi-judicial proceedings**
 - a. Test: **Hung v. Gardiner**:
 - i. “The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which courts act.” Key attributes or functions of a court-like body include those of determining legal rights and affecting the status of parties appearing before it.
 - ii. In this case, Law Society is found to be a protected quasi-judicial body, because it can affect Hung’s legal right to practice law.

3. Qualified Privilege:

1. Reciprocal duty

2. No malice

- **Onus** on P to establish malice
- Carries its normal meaning: “not necessarily personal spite or ill-will; it may consist of some indirect motive not connected with the privilege” ([Sun Life Assurance](#))
- 3 categories: (Hill)
 1. Spite or ill-will
 2. The primary purpose of statements is ulterior to duty that creates privilege
 - Can have secondary purpose that is not related to duty.
 - E.g.: [C \(LG\) v C \(VM\)](#): Daughters claim the father abused them. Father suggests that they said this to access his pension by making this claim. P wins: not primary purpose.
 3. Defendant spoke dishonestly or with reckless disregard for the truth
 - Does not apply if speaker honestly believed statements were true. ([Smith](#))
 - E.g: [Smith v Cross](#) (not in text)
 - Facts: Smith is on the Abbotsford school board. Cross is an upset parent. Cross alleges in emails to MLAs that Smith had not done enough to bring allegations of abuse to attention of the College of Teachers.
 - In this case, the emails were published with reckless indifference to the truth b/c Cross did not hold a subjective belief in the truth of the statements.

3. Statements do not exceed the occasion of privilege

- Did the communication exceed the purpose of the privilege? Was there a way for the D to discharge duty to communicate that would not require defamatory statements?
- E.g. [Pleau](#): Notice telling cashiers to detain Pleau if he tried to pay with a cheque was posted next to register. Question: is it too public? No, but if it was, it might have exceeded the privilege by communicating to parties who do not have a reason to receive it.
- E.g. [Hill v Church of Scientology](#): Lawyer exceeded privilege by acting in a “high handed and careless” manner and therefore exceeded the occasion of privilege. He didn’t need to act the way that he did. There were ways that he could have acted that would not have defamed the guy.

Situations that can attract privilege

A. Protection of one’s own interests

- “Statements which are fairly made by a person in the conduct of his own affairs in matters where his own interest is concerned are prima facie privileged.” [Sun Life Assurance](#)
 - Includes economic & personal interests and employer’s interests.

B. Common interest or mutual concern

A communication is protected by QP if it is made in furtherance of a common or mutual interest shared by the publisher and recipient of the communication ([Bereman, Union Paper Defames Scabs, 1933](#))

- E.g. [Bereman](#): defaming someone as a labour spy in a union newsletter was protected by privilege.
- Other examples:
 - Shareholders communicating about employees or customers
 - Creditors of the same debtor/lawyers defending against the same plaintiff can exchange information in furtherance of interest
 - Families and/or therapists concerning allegations of sexual abuse

C. Moral or legal duty to protect another's interest

- “Where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication” ([Watt v Longsdon: D show's P's wife letter containing allegations that husband was cheating/all around bad guy](#))
- Moral duty: “a duty recognized by English people of ordinary intelligence and moral principle” ([Watt](#))

D. Public Interest

- Does not work well for the media
- [Globe and Mail v Boland](#): privilege should be used very sparingly. Category cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, “to the world”
- [Parlett v. Robinson](#): narrows Boland rule: can publish to the public generally if it has a bona fide interest in the matter communicated. In this case, “the group that had a bona fide interest in the matter was the electorate in Canada. Hence the privilege was not lost.”

4. Responsible Communication on a Matter of Public Interest

- Because there are so few Ds for media, there is a chilling effect: people are scared that they will be sued
- Problem: the Charter protects free speech, and the balance between free speech and reputation has gone too far toward reputation.

Elements of Responsible Communication ([Grant v Torstar \(2009 SCC\)](#)):

- The publication must be on a matter of public interest (not what interests the public)
- D must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances. Considerations (non-exhaustive):
 - Degree of diligence should increase in proportion to seriousness of potential effects on person defamed
 - The more ‘public importance’ increases the more a jury may be warranted in finding communication was responsible
 - As urgency of getting information to public increases the need to verify information decreases (but this requires caution – this will not simply provide an excuse for irresponsible reporting)
 - The degree to which a source is un/reliable affects degree of diligence (in finding, for example, other sources)

- The reporter should diligently seek the position of the plaintiff and accurately report this position
- Degree to which the allegedly defamatory material was *necessary* (as part of the information provided in order to communicate matter of public interest) can determine whether including it was responsible
- Statements made should be matters of ‘reportage’ (i.e., where the public interest is in the fact *something was said*, so the press are simply reporting on that fact (and not simply repeating the defamatory material))
 - I.e., the public interest must lie in the fact that someone said something. “The premier of the province said x about y” is okay; adding in additional comments that are defamatory is not.
 - Can only report what’s happening.

APPLIES ONLY TO REPORTING (including blogging/alternative media outlets), not to op eds.

5. Fair Comment

- Typically applies only to the media
- About commenting, not reporting.
- We want people to be able to voice their opinions in a democracy.
- As long as a comment is fair, it is protected.
- Therefore, it all comes down to the question of what is fair.

Elements of Fair Comment (**WIC Radio Ltd. v. Simpson**)

- Comment must be on a matter of public interest
- Comment must be based on fact
- Comment can be recognized as comment (not statements of fact) – may include inferences of fact
- Comment is fair:
 - Objective test: could any person honestly believe the (defamatory) opinion, given the established facts?
 - Note that this test does not bring in the reasonable person. Comment can be unreasonable, as long as at least one person can reasonably believe the statement.
- No malice: Defence defeated by proof of express malice

Strict Liability

RYLANDS V FLETCHER: ELEMENTS	2
INCREASED DANGER/EXTRA-HAZARDOUS ACTIVITY REQUIREMENT	2
DEFENCES TO RYLANDS V FLETCHER	3
Consent	3
Actions of the plaintiff (“default”)	3
Act of God	3
Deliberate act of a third party	3
Statutory or legislative authority	3
FIRES	5
ANIMALS	5

Creates liability for harm caused by something brought onto land for a non-natural use and it escapes. Does not require proof that the D acted with intent or negligence: liability imposed upon proof of elements.

Elements

[John Campbell](#):

- a) D made a non-natural use of his land. Test in [Tock](#):
 - Not the ordinary use of the land;
 - Not for the general benefit of the community.
 - → Standard shifts over time. Planning legislation helps determine ordinary use.
- b) D brought onto his land something which was likely to do mischief if it escaped;
- c) Substance escaped. What is an escape? [Smith v Inco](#):
 - Not restricted to one-time events. Can have happened gradually over many years.
 - Does not include instances where the party wants the substances to escape. Must be unintentional to be escape. → This is odd, because it is in some ways worse to have it be intentional.
- d) Damage was caused to the plaintiff's property (or person) as a result of the escape

Increased danger/extra-hazardous activity requirement

- Courts sometimes require this, but not consistently.
- Some argue this helps to underpin or strengthen the rationale for this regime of strict liability – those who bring onto land thing(s) that pose an extra-hazardous risk or peril to those around should bear the costs of remediation, regardless of whether they acted reasonably in attempting to control the thing(s)
- There has been a suggestion that Canadian courts ought to expand *Rylands v. Fletcher*, using the core of the approach to open up a broader form of liability (one focused **primarily** on those activities that involve extra-hazardous risks and dangers)
- [Smith v Inco](#) declines to follow this approach. Court finds it should be left to the legislature.

Defences to Rylands v Fletcher

Consent

- Easy cases: explicit consent given
- Harder cases: implicit consent
 - It can be found when it seems the plaintiff benefits from the presence of the mischievous thing that subsequently escaped (and no evidence plaintiff complained before escape)
- Onus on D to show P consented to the activity on defendant's land that led to escaped-mischievous substance harming plaintiff's interests
- E.g. of implicit consent: *Rickards v. Lothian*: D wins, because P implicitly consented to the presence of the building's water-system because he benefited from it and he did not object to its presence.

Actions of the plaintiff ("default")

Cowles v Balac

Akin to "contributory negligence"

- P did something that contributed to the harm in a causal sense.
- Doesn't need to be negligence (but often is)
- Not a complete D; just apportioning damages through liability

Act of God

Generally restricted to extraordinary acts of nature which are not reasonably foreseeable (at the time)

- Contained within *Rylands* itself
- Shouldn't make D liable for a thing that was going to happen
- Why? Because the idea is to make Ds strictly liable in order to make them think carefully about how to prevent thing from escaping. If they couldn't have foreseen the event that caused the escape, liability won't serve this purpose.

Deliberate act of a third party

- Requires the defendant show the third party acted deliberately to do that thing that caused the escape/harm (*Rickards v Lothian*)
- E.g. *Rickards v Lothian*: a third party had deliberately plugged the wash-basin on the upper floor, causing the water to escape and flood the lower floors

Statutory or legislative authority

Elements:

- The statutory provision explicitly authorized the particular activity in question. (*Ryan v Victoria*)
- The escape was an inevitable and necessary consequence of doing the thing that s/he was authorized to be by statute. (*Tock*)
 - D must show that there was no other way to do the thing the statute authorized.

- E.g. [Ryan](#): D argues that guy getting his wheel caught in track was the inevitable consequence of doing what they are allowed to do under the statute. In this case, there was another option: to use a wider flangeway. But it was cheaper not to, so they didn't.

Fires

- Generally dealt with under [Rylands](#) if they escape. Can also argue negligence, if the fires were started negligently.
- Challenge: showing that the use of land that led to the fire was non-natural.
- **Rebuttable presumption:** escaping fire was an “act of God” or an “act of a stranger” ([Fires Prevention \(Metropolis\) Act](#))

Animals

Ferae naturae: animals deemed dangerous as a group

- Strict liability applies
- Meaning of “escape” in this context: the animal is out of the control of the owner. ([Cowles](#))

Mensurae naturae: individual animals deemed to be dangerous

- **Scienter action:** if this individual animal is known to be dangerous and injures the plaintiff, then strict liability imposed.
- **Onus:** On P to show that there was evidence that the animal had a propensity to harm humans.

Vicarious Liability

[Proceedings Against the Crown Act](#): establishes vicarious liability for the Crown for torts committed by servants or agents of the Crown.

Step 1: Precedent

Determine whether the issue is unambiguously determined by the precedents ([Fulowka](#)).

Are there “precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls” ([Bazely](#))

Three categories of precedent ([Bazely](#))

1. Employee acting in furtherance of employer’s aims
2. Employer’s creation of a situation of friction
3. Employee theft or fraud
 - → These cases tied together by “the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer’s enterprise creates or exacerbates”
 - Suggests that the tortious act must be tied to the employment context.
 - Justification for this approach: connected closely to the notion that the **employer should be held responsible (when it seems just and fair to impose vicarious liability) for materially increasing the risk that led to the tortious act** (the employer put the enterprise into the world, expecting to reap its benefits, and so should equally be held liable for its ‘costs’).

The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation

Step 2: Determine relationship of tortious actor to the VL party

Issue: Is the relationship sufficiently close for the imposition of vicarious liability to be appropriate?

- Assess the ‘closeness’ **in terms of the policy goals** that imposition is meant to further
 1. Fair and effective compensation
 2. Deterrence of future harm
- “The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account.”
- Factors:
 - The level of control the employer has over the worker’s activities.
 - Whether the worker provides his or her own equipment,
 - Whether the worker hires his or her own helpers,
 - The degree of financial risk taken by the worker,
 - The degree of responsibility for investment and management held by the worker, and
 - The worker’s opportunity for profit in the performance of his or her tasks

- This is a non-exhaustive list

Step 2.5: Non-delegable duties

→ Responding to problem of government avoiding liability by contracting out responsibilities.

- Where there is an independent contractor/other party whose actions are insufficiently close to establish vicarious liability, look at the statutes to determine whether the government imposed duties on itself in relation to the action.
- Government cannot raise the defence that it had delegated the responsibility for taking due care to an independent contractor (KLB)
- Non-delegable duty as a duty “not only to take care, but to ensure that care is taken (KLB)
- The non-delegable duty “adds another obligation: the duty to ensure that the independent contractor also takes reasonable care” (Lewis)

Example:

- E.g. of a non-delegable duty: Lewis: Government has “a **statutory duty to personally direct**” the construction, repair, and maintenance of highways
- E.g. KLB: In this case, the statute seems to indicate that once the child is placed, the government has divested itself from its duties (i.e., the duties are delegable) → majority says that “the Act does not suggest that the Superintendent is responsible for directing this day-to-day care and for ensuring that no harm comes to the children in the course of this care”

Dissent in KLB:

- Suggests that the questions asked/factors considered at the first stage needs to vary based on the context. Sagaz factors relate to the risk of profit or loss, which is only relevant in the commercial context.

Step 3: Connection between tortious act and VL party

Issue: is there a “significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom”? (Bazely)

Factor to consider (non-exhaustive) (Bazely):

- Opportunity the enterprise offered employee to abuse his/her power
- The extent to which the wrongful act furthered employer’s ends
- Extent to which wrongful act related to friction, confrontation, or intimacy inherent in employer’s enterprise
 - E.g. Bazely: part of what’s expected is that there is a close and intimate relationship. Not merely after-hours care, but bathing, tucking in, etc. Wrongful acts happened in this context.
 - C.f. Jacobi, where this intimacy does not exist.
- Extent of power conferred on employee in relation to victim, and
- Vulnerability of potential victims to wrongful exercise of employee’s power

If the answer isn’t clear, a court can “determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.”