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# Elements in an action for negligence:

1. **The Duty of Care**
   1. Did the defendant owe a duty of care to the plaintiff?
2. **The Standard of Care and Breach** 
   1. What was the standard of care owed by the defendant to the plaintiff, and did the conduct in question fall short of that standard?
3. **Causation**
   1. Was the breach of the standard of care the cause of the plaintiff’s loss?
4. **Remoteness of Damage**
   1. Was the loss suffered sufficiently proximate? Was the loss reasonably foreseeable?
5. **Actual Loss**
   1. Wasthe loss recognized by the courts as recoverable?
6. **Defences**
   1. Isthere a defence available to the defendant?

# The Duty of Care

**Two main functions**:

1. Provides an overall framework for the broad range of situations in which liability for careless conduct may arise
2. Acts as a limit on liability and sets the boundaries within which one person can be held liable to another for the consequences of careless behaviour.

* *Who should bear the consequence of a particular risk? Should potential claimants or potential defendants bear the risk of injury occurring?*
* The duty of care is just a mechanical device for which helps judges decide on how risks should be allocated.

### Donoghue v Stephenson (1932)

* **Lord Aitken:**
  + **Neighbour Principle of Duty:** You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.
  + **Who is your Neighbour?** A person who is so closely and directly affected by your act. Liability is limited: Only certain classes of people and certain actions will raise liability for negligence.
* **Two questions to ask:**
  + That the person in question must be someone the defendant ought reasonably to have in their contemplation – that is, they must be reasonably foreseeable
  + That the person was someone who would be closely and directly affected by the act
  + **Mere foreseeability** can never be enough to establish the existence of a duty of care. In addition, a plaintiff will need to show that they were sufficiently proximate to the defendant, such that they should have considered them.
  + **The plaintiff cannot be too removed from the defendant.**
* **Dissent** 
  + **Buckmaster –** floodgates argument
  + **Tomlin –** concerns based on concern with the scope of liability/remoteness
* **Two ways to avoid the concerns of Buckmaster/Tomlin:**

1. Base liability on the failure to meet a pre-existing duty or obligation; or
2. Base liability on some other limiting factor, such as an interest in land

* The revolutionary aspect of Aitkin’s judgment is that he finds a basis of liability not based on physical neighbourhood. On the idea of the foreseeable claimant – i.e. **anyone who is reasonably foreseeable as someone who could be harmed by my negligence is a potential plaintiff.**

### Anns v. Merton London Borough Council [1978]

***Anns* Test:**

1. **There is a ‘sufficient relationship of proximity based upon foreseeability**
2. **There are no principled reasons why the court should not recognise a duty of care.**

Now, the key to understanding the approach taken by the court in ***Anns*** is to recognise that the test is not really a test at all, or at least it is not a test in the normal sense.

* **sets out an approach for *analysing existing categories* of negligence and *recognising new categories* in novel situations.**
* Test creates a presumption in favour of the recognition of new duties of care, and therefore opens the **floodgates** to a whole raft of new categories of negligence.

### Kamloops (City) v. Nielsen [1984] – Canadian endorsement of Anns

1. Is there a sufficiently close relationship between the parties … so that, in the reasonable contemplation of the defendant, carelessness on might cause damage to the plaintiff?
2. Are there any considerations which ought to negative or limit the (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach may give rise?

### Cooper v. Hobart (2001) – Backing away from Anns?

1. Was the harm in question reasonably foreseeable and is there a sufficient degree of proximity between the plaintiff and the defendant to justify the imposition of a duty of care
2. Is the situation in question one in which a new duty of care should be recognised?

* Can argue that this approach is different from that that adopted in ***Kamloops*** in that it combines the questions of foreseeability and proximity into the first stage of the test (note that the test in ***Kamloops*** makes no specific reference to the idea of proximity), and then leaves questions of policy to the second limb.
* Practical effect of this? **Places the burden of arguing that there should be a duty of care firmly on the plaintiff.**
* Note also that according to ***Cooper***, the court should begin by asking whether the case **falls within an** **existing category**. If the answer to this is yes – either directly or by analogy – then a duty of care will apply on the facts.

## Forseeability

***Foreseeability of harm is relevant to three elements of a negligence action: duty, standard of care, and remoteness of damage.***

1. A court will impose a duty of care only if the defendant’s conduct created a **foreseeable risk of injury** to the plaintiff
2. The **probability of injury is one of several factors** considered in determining whether the defendant breached the standard of care
3. The plaintiff’s losses will be held to be **too remote if they were not a foreseeable** result of the defendant’s breach of the standard of care.

### Moule v. N.B. Electric (1960) – No forseeability

* **Facts:** Tree covered power lines, another tree had a ladder and bridge between them. Child climbed up, crossed bridge and stepped on rotten branch and was electrocuted.
* **Issue:** Was this reasonably foreseeable to allow damages?
* **Reasons:** No, too many factors including bridge, ladder, etc. Company had cleared branches and done what it could.
  + **UNLIKELY =/= UNFORESEEABLE**

### Amos v. N.B. Electric (1976) – Forseeability established

* **Facts:** Wires ran through tree, boy climbed, was electrocuted.
* **Issue:** Was this reasonably foreseeable to allow damages?
* **Reasons:** Yes – the tree was hiding the wires, no trimming was done, made perfect screen. Electric company held liable.

# Special Duties of Care

## Affirmative action (I.e. duty to rescue)

* Common law has generally shied away from making people liable for failures to act (non-feasance). Three main justifications for this:
  + offended against allegedly English notions of **personal autonomy**
  + That the rule against nonfeasance reflected a broader ideological commitment to **capitalist notions of choice** and minimal legal interference with individual choices.
  + That positive obligations are necessarily more intrusive than negative obligations not to act

### Osterlind v. Hill (1928) No duty to rescue

* However – two major situations in which an affirmative duty to rescue might be imposed:
  + Where the duty is established by statute

**Some reasons in favour of a general duty to rescue:**

* Reflects common sense understanding of moral duties to one another
* Why penalize people who have voluntarily engaged in a social good but not those who choose to do nothing?

**Some reasons not to have a duty to rescue:**

* Encouraging self-reliance
* Avoiding the legal enforcement of morality
* Protecting innocent persons from harm (the incompetent rescuer)
* Crowded Beach Problem: How to decide who has an obligation to help?
* Media Frenzy Problem: May not really be a widespread problem
* Meddling Amateur: Allowing trained professionals to do their work
* Hard to define the rule governing gratuitous aid (impending death? Bodily harm? Little or no danger to yourself? Inaction will worsen situation? Criminal liability? Compensation?)

### Matthews v Maclaren; Horsley v Maclaren - once a rescue is undertaken, rescuer has duty to act/complete the rescue

* + - Burden is on plaintiff to show that defendant’s negligence was the effective cause of the harm
  + Where there has been some voluntary assumption of responsibility on the part of the defendant

### Jordan House v. Menow (1973) – commercial invitor/invitee relationship

* + - **Facts:** M often drank at JH. The patrons were aware he was a bad drunk and cut him off. He got in an accident on his way home
    - **Issue:** Does JH have a duty of care to their patrons?
    - **Reasons:**
      * JH had particular knowledge of his intoxication.
      * They also had background knowledge of his propensity for being a bad drunk.
      * There is statutory regulation of drinking
      * There is a relationship of invitor/invitee commercial relationship
      * This leads to a requisite level of forseeability to establish a duty of care.

### *Crocker v. Sundance Resorts* (1988) – Liability for the Intoxicated

* **Facts:** S put on a tube race. C got drunk and despite warnings after an injury on his first run, participated and became a quadriplegic.
* **Issue:** Does Sundance have a duty of care to Crocker?
* **Reasons:**
  + S knew C was drunk
  + C was wearing a tubing bib while drinking
  + S made some effort to stop C
  + S knew the activity was dangerous b/c someone else had been injured – created a dangerous situation
  + This creates an invitor/invitee relationship (like Jordan House), and results in a duty of care upon S.
  + Voluntary assumption of risk irrelevant here – he didn’t read it

### Childs v. Desmoreaux

* **FACTS:** D held a BYOB party. A drunk driver leaving the party hits and injures Childs.
* **ISSUE:** Are the social host D’s liable? NO
* **REASONS:**
  + This was a novel situation which required an application of the cooper test.
  + There was no training on how to serve, no regulation, and insufficient proximity. This negates finding a duty of care.
* **NOTE:**
  + The door wasn’t closed on finding social hosts liable.

**Differences between the social host and commercial host**

* control over liquor
* drinking with guests
* familiarity with patrons
* professional staff (***Kelly v. Gwinnell,* New Jersey SC)**

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,*** *drunk driver hits Zoe Childs, 2004, OCA*). 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.

**Social Host Liability as Deterrence?** Doubtful that SH liability would deter drunk drivers. Gov't has financial resources & legislative ability to regular social host responsibility & victim compensation.

## Police duty to warn

### Jane Doe v. Metropolitan Toronto Police (1998)

* **FACTS:** A serial rapist followed a pattern of breaking onto women’s second story balconies in a specific geographical region. The police didn’t warn for fear of causing hysteria; they said they didn’t warn for policy reasons.
* **ISSUE:** Did the police have a duty of care over Jane Doe?
* **REASONS:**
  + Statutory obligation to control/prevent crime
  + Statute not the only source of obligations – should be used as tools to find obligations, but not the limit
  + Causation not really proven here – even with warning the injury may have occurred
  + The police needed to have some knowledge for the duty to arise.This creates forseeability
  + Here, there was sufficient knowledge, which gives rise to a duty.
  + **Must be a very specific plaintiff group with a very specific risk – as is the case here**

## Duties owed to unborn children

## Pre-conception wrongs

* The defendant carelessly causes an injury to a parent that then causes harm to a subsequently born child.
* Child **has not been conceived** at the time of the alleged negligence. **Child has to be born in order for there to be a claim.**

### Paxton v. Ramji (2008):

* **Facts:** Woman took medication that was harmful to children; husband had vasectomy, child born anyways with disabilities.
* **Issue:** Was doctor negligent in not recommending additional birth control?
* **Reasons:** No, doctor did not fall below standard of care when vasectomy taken into consideration.
  + Physicians never owe a duty to the future children of their female patients
  + Women do not owe a duty to their future children.
  + There is insufficient proximity between the physician and the potential child, who is not a separate legal entity until it is born
  + There is a unique relationship between a woman and her potential child, in that the law specifically recognizes a woman’s complete autonomy over her body

***Based on:*** Winnipeg Child and Family Services v. G. [1997]

**McLachlin:**

Before birth the **mother and unborn child are one** in the sense that “[t]he ‘life’ of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman” … It is **only after birth that the foetus assumes a separate personality**. Accordingly, the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn foetus therefore posits the anomaly of one part of a legal and physical entity suing itself.”

## Wrongful birth and wrongful life

* Physician carelessly fails to inform a woman that she faces an unusually high risk of giving birth to a child with disabilities, and denies the mother opportunity to make an informed decision.
* **Rule:** Usually dealt with In terms of the general duty of care owed by doctors to patients, and in particular the duty to inform patients of risks.

### Arndt v. Smith (1994) – Attempted Wrongful life, unsuccessful

* **Facts:**  A mother contracted chicken pox and wasn’t warned of the potential harm to her unborn child by doctor.
* **Reasons:**
  + Physician found to be negligent for not warning but:
    - Court wouldn’t find wrongful life in B.C. – said no action existed here
    - Causation not established for mother’s claim of additional money to raise disabled child – could not prove reasonable woman would not have had child under circumstances of the small chance of injury

## Wrongful pregnancy

* Cases typically involve carelessly performed abortions or sterilization, and liability will be based on general principles of medical negligence. Key questions include:
* Note the initial reaction of most Canadian courts in wrongful birth cases was that it would be contrary to public policy to award damages for the cost of caring for a **healthy child**.
* This position changed in Canada in the 90’s (although much earlier, with a number of Canadian cases awarding substantial damages under this head (see: ***Joshi v. Wooley* (1995)**; ***Suite v. Cooke* [1995]**)
* With regards to disabled children**,** the key case is ***Krangle v. Brisco* [2002]** 
  + Parents were entitled to damages for **non-pecuniary loss for the pain and suffering associated with giving birth to, and raising, a disabled child**

## Pre-natal injuries

### *Duval v. Seguin* [1972] - pregnant women are foreseeable.

**However – child must be born for any injuries to be actionable.**

### *Dobson v. Dobson* (1999) – mother has no duty to unborn child

* **Facts:** Mother negligently caused accident which injured unborn child, litigation guardian of child sued mother for insurance recovery
* **Issue:** Is a duty of care owed by mother for unborn child?
* **Reasons:**
  + No duty exists due to policy concerns despite prima facie duty.
  + Would hurt women’s autonomy if every action subject to review by the court – would impede on her rights.
  + There is no deterrent effect in enforcing this duty, relationships are more important.

## Health Professional’s Duty to Inform

### Haughian v. Paine (1987) – must tell of all reasoanble alternatives/risks affiliated

* **Facts:** Patient suffered small risk of serious consequences – paralyzed after back disc surgery.
* **Issue:** Should doctor be held liable for not informing patient of alternatives to surgery?
* **Reasons:** 
  + Doctors must tell patients of all reasonable alternatives, and their risks – conservative management was available, patient may have improved on his own
  + Both material risks and non-material (that may be of particular concern to plaintiff) risks must be disclosed. Doctor must give patients all available options! Patient in control!
  + Doctor held liable – patient did not give informed consent
    - Note – patient must be able to show that a reasonable person would have refused treatment if aware of the risks

## Manufacturers Duty to Warn

Even if due care was used in the making of a product, a manufacturer still has a duty to warn its users of the appropriate uses or the risks associated with the use. The manufacturer **knows or ought to know** the dangers associated with its product.

* **All Users:** Duty is owed to all users who may be reasonably affected by potentially dangerous products - even if the users were not privy to the contract of sale
* **Duty extends to** (1) dangers inherent in ordinary intended uses & (2) risks which flow from foreseeable (not necessarily unintended) uses
* **Proportionality:** Adequacy of warning must be proportional to the gravity of risk of danger
* No duty to warn of obvious and apparent risks
* **Continuing Duty to Warn:** Duty can be triggered by information which is known after the product is put into use
* **Clear Warning:** Warning must be clear and understandable as to nature/extent of risks. Warning must be reasonably communicated and must clearly describe any specific dangers that arise from the ordinary use of the product (***Hollis***, *Breast Implants Rupture, 1995*)
* Court notes that the policy is to **shift risk from the consumer to the manufacturer**, as the manufacturer is in a better position to know risks
* Since the **manufacturer is in a better position to be aware of the risks**, they have a duty to be forthright as to **all** the risks (Greater risk=higher duty to warn)

### *Hollis v. Dow Corning Corp* (1995) – Learned intermediary rule

* **Facts:** Breast implant manufactured by D ruptured in patient. D had no direct relationship with the P.
* **Issue:** Is there sufficient proximity between the manufacturer and consumer to create a duty to warn?
* **Reasons:**
  + A manufacturer has a continuing duty to clearly communicate dangers arising ordinary use of a product. The duty to warn persists over time if new dangers are discovered. The greater the danger, the greater the duty to warn. There is a higher standard for products that will be placed in a body.
  + A duty to warn exists, but may be discharged by a third party practitioner.
  + The third party must be as fully informed about the dangers as the manufacturer.
  + In this case, the doctors weren’t fully informed, meaning the duty wasn’t discharged, Dow Corning held liable.
  + Policy concern: Companies may underemphasize risks to sell products, need to ensure they do not do this at expense of consumers.

## Negligent Misrepresentation

Traditionally, courts have been unwilling to compensate plaintiffs for losses resulting from negligent misstatements, primarily for because of alleged problems of proximity and fears about the indeterminate liability question.

* They were unwilling because the main type of damages claimed was likely to be pure economic loss. Two reasonsfor this**:**
  + The **indeterminancy problem is particularly acute in cases of pure economic loss**. For example, imagine A gives B negligent advice, which causes B to make a bad business decision and lose money. B then orders less of a particular good from supplier C. Should C have a claim against A?
  + Raised the prospect of **tort law interfering in the market**, with a view to compensating for losses that are really just part of everyday business life.
* **Key Point here:** The law expects business people to manage their affairs to protect themselves from unanticipated losses through the use of contracts and insurance.

**Five-stage test for negligent misrepresentation (*Hedley)*:**

1. There must be a duty of care based on a “special relationship” between parties
   * 1. Note: this is answered by going through the three-stage Reid test
        1. Possession of a special skill by the defendant
        2. Reliance on the exercise of that skill by the plaintiff
        3. Knowledge or awareness of the possibility of reliance on the part of the defendant
2. The representation must be untrue, inaccurate or misleading
3. The representor must have acted negligently in making the representation
4. The representee must have relied on the representation
5. The reliance must have resulted in detriment, and damages resulted.

### Hedley Byrne v. Heller & Partners (1963)

* **Facts:** Advertising agency extended credit on basis of bank recommendation, company went under, agency sued bank.
* **Reasons:**
  + Words have greater durability and portability than actions – may repeatedly inflict harm.
  + It is possible to recover for pure economic loss in the case of negligent misrepresentation – a new direction for Tort law.
    - Reasonable reliance emphasized – P can sue when D gave information that P should/could be expected to rely upon

### *Queen v. Cognos Inc.* (1993) – Limit recovery to ‘known class of persons’

* **Facts:** Appellant moved family to Ottawa for what he thought was long-term position, fired after 18 months.
* **Issue:** Was there negligent misrepresentation in the interview to allow damages for A’s pure economic loss?
* **Reasons:**
  + Falls into pre-contractual misrepresentation category, alleged misrep. was during interview
  + Court had to decide whether there was a duty of care owed and whether there was a breach of the standard of care – rest not in doubt
  + Respondent argued there was a disclaimer
  + Court found duty of care was owed, it was reasonable for A to rely upon the representation, interviewer misrepresented the nature and existence of the employment opportunity offered
  + The disclaimer was not relevant – was not specific to the interview process

However, recovery may be limited to cases where the statements are made to a known class with a known purpose. Otherwise, the liability is indeterminate and policy considerations must negate this *prima facie* duty of care. In ***Hercules Managements Ltd. v. Ernst & Young*** (*Investors-rely-on-Bad-Auditors-Report,* 1977, SCC), the court found a special relationship and reasonable reliance, but found that indeterminate liability negated the recovery.

### Hercules Management v. Ernst & Young (1997) 🡪 Neg Misrep negated for policy reasons

* **Facts:** E&Y provided audited financial statements to Hercules, who used them to decide on how much more money to invest in the company
* **Issue:** Should E&Y be held liable for their representations?
* **Reasons:**
  + Apply Anns/Kamloops approach (pre-Cooper): is it reasonably foreseeable that P would rely on statements?
  + Must ask from both sides—was it reasonable for P to rely? Was it reasonable for D to expect reliance?
    - Yes, audited reports usually relied upon – Duty exists
  + Policy concern: opening up unlimited liability on auditors which would increase cost of doing business – this overrides prima facie duty of care
  + If statements were for a particular transaction known by the D, policy concerns might not come into play, but here E&Y didn’t know the reports were going to be used this way
    - General statutorily required reports, too broad

### Haskett v. Equifax Canada Inc. 🡪 New neg. misrep duty found using Anns

* **Facts:** Haskett cannot get credit due to a past bankruptcy, sues credit bureau (Equifax) for what it says are negligently prepared credit reports
* **Issue:** Does Equifax owe Haskett a duty of care?
* **Reasons:**
  + Relationship somewhat distant, no info. exchanged between parties directly
  + At trial: major policy concern: indeterminate liability
  + Alternatives available to Tort: statutory provisions of Consumer Reporting Act
  + Although alternatives available, they are difficult to use, insufficient remedy available
  + Haskett situation somewhat analogous to negligent misrepresentation category
  + Just because statutes exist doesn’t mean Tort law won’t find a duty of care
  + Court of Appeal finds no overriding policy concerns
  + Court allows appeal, finds duty of care using Anns/Cooper test

### Martel Building v. Canada (2000) 🡪 New category of ec. loss, negated on Policy

* **Facts:** D led P to believe that it would renew lease under certain terms, delayed process and eventually leased to another party.
* **Issue:** Is D liable for the economic loss of the lack of opportunity of renewing the lease? Is there a duty of care owed in negotiations?
* **Reasons:**
  + Novel claim, new category would be formed – does not fit into 5 categories of pure economic loss (categories are not closed)
  + Concern: Negotiations are taken for mutual expectations of economic gain, but loss of one party is inevitable
  + Previous contractual relationship gives rise to proximity
    - BUT: would hurt business negotiation proceedings to extend a duty of care
      * Tort law should not be an insurance policy
      * Would introduce regulatory function to courts
      * Court does not want multiplicity of claims

## The question of concurrent liability

### BG Checo International Ltd. v. BC Hydro & Power Co. (1993)

Whether Checo had the right to sue in both tort and contract.

* The negligent misrepresentation was also a contractual term – because the representation was part of the contract, does that cancel the ability to also sue in tort?
* The contract did not limit the duty of care owed by Hydro to Checo. Nor did Checo waive its right to sue in tort.
* **Parties should limit liabilities in their contracts if that is their intention.** Majority of the Supreme Court held that Checo could sue in both tort and contract on the basis of the negligent misrepresentation

# The Standard of Care

* The **standard of care** refers to the behaviour required of the defendant to discharge or satisfy the duty of care. Put another way, it determines how the defendant ought to have acted
* When considering the **standard of care**, we ask:
  + What do I need to do?
  + How should I act towards my neighbour?
* There is also an important distinction when it comes to answering these questions. Questions about the duty of care are questions of **law**, and therefore answered by the **judge** alone.
* Questions of standard are typically a **combination of questions of law and questions of fact**, and therefore are answered by the **judge** and (where there is one) the **jury**.

## The General Standard of Care

* The basic rule is that the defendant must act according to the standard of care expected of a **reasonable person**.

**Three main factors:**

1. The probability and severity of the harm;
2. The cost of risk avoidance; and
3. The social utility or value of the conduct

## The Probability and Severity of the Harm.

**The basic rule**: The greater the risk associated with a particular activity increases, the higher is the standard of care. Equally, the greater the potential harm associated with the risk, the higher is the standard of care.

### Bolton v. Stone [1951]

* **Facts:** A cricket ground was encircled by a fence. From time to time (about 6x in 30 years), a cricket ball would go over the fence. One did so and hit the plaintiff.
* **Issue:** What is the standard of care? Should the defendants have taken action to prevent balls hitting a passerby?
* **Reasons:**
  + The defendant must take reasonable care to avoid acts or omissions which could foreseeably injure one’s neighbour- Donoghue v. Stevenson.
  + Here, a ball had only been hit onto the road 6 times in 30 years.
  + Therefore, forseeability is not a sufficient test. People shouldn’t have to be concerned with potential “fantastic” consequences.
  + Two things should be considered:
    - Probability of harm (how remote the chance is that the person might get hit).
    - Severity of consequences.
  + Here, the probability of injuries was very low. The injury was borderline. Therefore, there was no breach

**Important points to take away from this case:**

* + The court also noted that if the risk of associated with an activity is **high and unavoidable**, this may be a reason to **prohibit the activity altogether**.
  + Court acknowledged that **life is necessarily about judging risks.** Lord Reid observed that “[i]n the crowded conditions of modern life, even the most careful person cannot avoid creating some risks and accepting others.”

### *Paris v. Stepney Borough Council* [1951]

* **Facts:** A one eyed worker went blind because no goggles were supplied by his employer.
* **Issue:** Is there a higher standard of care owed to a one eyed man?
* **Reasons:**
  + If A and B do the same kind of work and run the same risk of an accident, but if the damage that would occur from an accident would be more serious to A than to B, precautions which would be adequate for B may not be adequate for A.
  + The severity of the injury is higher to a one eyed man.
  + Therefore, the standard of care is higher – take into account the actions of a reasonable person considering all circumstances
* **Note:** Implies that fixing the standard of care in certain circumstances is as much an art as it is a science.

## The Cost of Risk Avoidance and the Social Utility of the Conduct

**The basic rule:** When determining the standard of care to be applied, the court should consider the **cost of risk reduction** and **the social value of the conduct in question**.

* Even if the probability and severity of the potential loss are high, the defendant may be excused if the activity is socially important.

### USA v. Carroll Towing Co. [1947] 🡪 Econ. Analysis of the Standard of Care test.

* **Reasons:**
  + Economic formulation of the test. P= probability L=loss/injury B=burden
  + If P (probability) x L (injury) > B (Burden), then you will find in favour of the plaintiff.
  + This is essentially a cost/benefit analysis: weigh cost of risk avoidance and probability of injury
* **NOTE:** Ignores social utility

**Learned Hand (judge’s name) Test****:** In ***U.S. v. Carroll Towing***:

* If (Burden < Cost of Injury x Probability of occurrence), then the accused will not have met the standard of care required.
* If (Burden ≥ Cost of injury x Probability of occurrence), then the accused may have met the standard of care.

### Watt v. Hertfordshire County Council [1954]

* **Facts:** Firemen responded to emerg call using a special jack. Used a truck that was unfit for carrying the jack, the driver braked suddenly and the jack became dislodged and seriously injured the plaintiff.
* **Issue:** Does the fact that the risk taken was in order to save lives absolve the fire dept of liability?
* **Reasons:** (taken from judge Learned Hand in *Carroll Towing)***:** 
  + Is B [burden of preventing injury] less than PL [probability of harm times severity of loss]
  + On some rare occasions the B side should also take into account the ‘object’ or ‘purpose’ of the acts.In this case, object was to save life and limb, justifies taking considerable risk
  + Court held that it was permissible for the defendant to run a high risk because the social utility of the conduct (fighting fires in this case) far outweighed the costs of the defendant’s conduct.

### *Vaughn v. Halifax-Dartmouth Bridge Comm.* (1961)

* wind causes paint to splatter from bridge being painted to car park below  
  held: defendant negligent
* although painting season is short, and damage minimal, cost of risk avoidance (ie posting sign) so low that it should have been undertaken
* **Cost of precaution is low, more likely to find negligence.**

### Priestman v. Colangelo [1959]

* **Facts:** Police fired at car during chase, car killed two bystanders.
* **Reasons:**
  + There was an important social function or public purpose to the task that caused the injury/death.
  + In an economic analysis, this could be factored into the burden—it would be a public burden if the criminal went free.
  + Court reasoned that the officers were under a *positive* duty to apprehend the subjects and were justified in using “reasonably necessary”
    - Public service mandate – more latitude permitted

# Special Standards of Care

## Children

**Three categories of capacity** for young tortfeasors (***Heisler v. Moke*****,** *child-jumping-caused-tractor-accident):*

1. **Tender Age (~<5):** Child is too young to be negligent (no capacity)
2. **Above Tender Age (6-12)**: **Modified objective standard** which considers the behaviour of a child of "**like age, intelligence and experience**" in the same situation (***McEllistrum v. Etches***, 1956, SCC).\*
3. **Teenagers**: Reasonable person standard (objective test).

### McEllistrum v. Etches [1956]

* Children should be held to a modified standard of care
* Court (or jury) should ask whether the child exercised the care to be expected of child of like **age, intelligence and experience**.

### Joyal v. Barsby (1965)

* **Facts:** A 6 year old girl crossed a highway and was hit by a car sustaining severe injuries.
* **Issue:** Is the girl contributorily negligent, in consideration of factors such as her knowledge of the dangers of the highway?
* **Reasons:**
  + Very young children typically aren’t capable of negligence, but a child of 6 likely can be
  + TEST (subjective):
    - Look at the particular child and ask if s/he is capable of being held as negligent.
    - If affirmative, **did the child act as would a child of like age, intelligence, and experience**, if so, would they be found as negligent and to what degree?
* Upholds *McEllistrum v Etches*

**Child involved in an adult activity** – such as driving a car, hunting, or snowmobiling – will be required to meet the standard of care expected of a **reasonable adult** (see ***Ryan v. Hicksson* (1974)** – accident caused by negligence of children on snowmobiles)

**Parental Liability**: Although parents, guardians, and other supervisors are **not usually held to be vicariously liable** for torts committed by children under their care, they **will be held liable if the injury is a result of their failure to control or monitor the child’s conduct**. Standard here is of a reasonable parent of ordinary prudence. See ***Thomas v. Hamilton (City) Board of Education* (1994), (B.C. C.A.)**

## People with disabilities

### Carroll and Carroll v. Chicken Palace Ltd. [1955]

* Blind man trips down unfamiliar stairs
* The physically disabled are required to meet only the standard of care of a reasonable person with the same disability.
* a person with a physical disability also has to recognize limitations and not take unreasonable risks.

### Fiala v. Cechmanek (2001) – (Current Test) 🡪 Current mental disability view

* **Facts:** While out for a run, D experienced a manic episode, never previously diagnosed, and caused a car accident by breaking through the sunroof of a car and strangling the driver.
* **Issue:** Can someone who was out of control of their actions, with no prior knowledge of their disability be held liable for the damage they caused?
* **Reasons:**
  + Tort law is concerned with both fault and compensation
  + Here, there are two “innocent” parties—victims and the disabled, fault is still an essential element of Tort Law.
  + In order to be relieved of liability when suddenly and unexpectedly afflicted w/ a mental illness, burden is on defendant to show either of the following on a balance of probabilities:
    - As a result of the illness, D had no capacity to understand the duty of care at the relevant time. OR
    - As a result of the mental illness, D was unable to discharge his duty of care as he had no meaningful control over his actions.

**Mentally disabled defendants must prove, on a balance of probabilities:**

1. **No Capacity:** As a result of his mental illness, the defendant had **no capacity** to **understand or appreciate the duty of care** owed at the relevant time
2. **No Control:** As a result of his mental illness, the defendant was **unable to discharge his duty of care** as he had **no meaningful control** over his actions at the time the relevant conduct fell below the objective standard of care.

**Additional Comments:**

**No Capacity/Volition****:** A negligent act "must be shown to have been the conscious act of the defendant's volition". Otherwise, there is no liability (**Slattery v. Haley**, Sudden-Unconsciousness-causes-driver-to-injure-kid, 1922). Likewise, the defendant in **T.T.C. v. Smith Transport Ltd.** (Remote Control Trucker's Delusion, 1946) was acquitted on the grounds that he did not understand his duty nor was he able to discharge it.

**Mental Disability versus Heart Attacks:** There is no distinction between **Slattery** and **Fiala**. Just as a mentally disabled person escapes liability by not being conscious of their actions, a person who is overcome by an **unforeseen** heart attack also escapes liability.

**No Control****:** The driver in **Roberts v. Ramsbottom** (driver-has-previous-strokes-before-getting-into-accident) was found liable for negligence as a reasonable person would have foreseen a probable risk to others due to his pre-existing condition. **Nothing less than total loss of consciousness will exclude liability.**

## Negligence of Professionals

### White v. Turner (1981)

* a professional should be judged by the standard of care of his profession.

### Layden v. Cope (1984)

* General practitioners are required to exercise the standard of care of a reasonable, competent general practitioner, including knowing when a patient needs a specialist.

### Ter Neuzen v. Korn (1995)

* **Facts:** Plaintiff contracted HIV as a result of artificial insemination in 1985.
* **Issue:** The defendant doctor was responsible for screening semen donors, and had adopted standard medical practices; does the standard practice itself fall short of the standard of care?
* **Reasons:**
  + When there are customary behaviours in a certain field, courts should respect them as appropriate standards of care.
  + The more technical the field, the more likely the court will accept the custom as the standard of care 🡪 Common practice may be considered negligence if fraught with obvious risks.
  + Standard expected of a doctor is that of a prudent and diligent doctor in the same circumstances. As a result, **specialists** must be assessed in light of the conduct of other ordinary specialists

### Reibl v. Hughes (1980) – Doctor’s duty to disclose

* It can be important to determine what action the patient would have taken if they had have been informed of other options
* The reasonable person test may apply - would the reasonable person have made a different choice if they were fully informed?
  + This test doesn’t account for individual preference and circumstances.
* A modified-objective standard should therefore be applied—what would the reasonable person in the position of the plaintiff have done?
* **RATIO:** If a doctor fails to disclose all information necessary for a patient to make their decision, there is negligence. Settled doctor battery debate.
  + Doctors must disclose material risks – this includes serious problems with low probability of occurring and non-serious problems with a high probability of occurring.
  + Can also include a non-material risk that this particular patient would care about.

# Causation

## Cause-in-fact v. Cause-in-law

**Cause-in-fact (factual causation):** to the fact that the plaintiff must be able to prove that the defendant’s negligence caused his or her loss. Cause-in-fact focuses on the connection between the plaintiff’s act and the defendant’s loss, and provides a justification for the imposition of liability.

**Cause-in-law (legal causation)**: this is the idea that there may be good reasons to limit liability for reasons of fairness, even though the defendant may have been the factual cause of the loss. This is what we are talking about when we consider questions of remoteness. Also sometimes referred to as proximate cause.

**CAUSATION IS AN ON-OFF SWITCH (yes or no)**

* Cannot apportion causal responsibility. **Either the defendant(s) were causally responsible or they were not**. Dividing up causation would allow the tortious defendant to escape full liability even though s/he materially caused or contributed to the plaintiff's injuries. **But you can apportion liability for damages.**

## The But-for Test

“Would the loss to the plaintiff have occurred **but for** the negligence of the defendant?”

### Kauffman v. TTC (1959) 🡪 The but-for test is the standard test in causation

* **Facts:** K tried to argue that improper handrails caused her to fall dand sustain severe and permanent injuries after those on an escalator in front of her fell into her.
* **Reasons:**
  + The but-for test is applied—would the injury have no occurred but-for P’s negligence?
  + In this case, there is no evidence that the handrails played any role in causing the fall

**Tortious and non-tortious causes****:** You must use the "but for" test to determine whether the tortious actor is causally responsible for the plaintiff's injuries (***Kauffman***)

## Exceptions to the But-for Test

**Four basic types of causal indeterminacy problem:**

1. The problem of evidential insufficiency (the “evidential gap”)
2. The problem of multiple insufficient causes
3. The problem of multiple sufficient causes
4. The problem of materially increased risk

## Material Contribution Test: *multiple tortious actors*

The **"but for"** test is unworkable where there are **multiple tortious actors**. Multiple tortfeasors occur where each defendant's actions (on their own) materially & negligently injure the plaintiff.

**Material Contribution Test:** Does the tortious actor's conduct fall outside the **de minimis** range? (*Walker Estate v. York Finch General Hospital*, *CRCS-pamphlets-HIV+-donor.*

* **Focus on individual tortfeasor:** Were the actions of each individual tortfeasor sufficient to cause the injuries on their own by contributing materially to the outcome? A contributing factor is material if it falls outside the **de minimis range.** (***Bonnington Castings Ltd v. Wardlaw***)

## Evidential gap/insufficiency

* Impossible to determine whether – on the available evidence – the plaintiff’s injury was actually the but-for consequence of the defendant’s negligence as opposed to another **non-tortious** factor.

### Walker Estate v. York-Finch General Hospital [2001]

**Facts**: Three Ps infected with HIV from transfusions of Red Cross blood. Donor was given the warning used in 1983 with no specific reference to HIV risk factors/symptoms. In 1984 the warning was changed to include mention of the risk of male-male sex with multiple partners. Donor testified that he thought it was safe to give blood as he had stopped having sexual relations with men two years before. Also claimed that had he been given the 1984 warning, he would have talked to the nurse about being gay (and then possibly not given blood). Red Cross sued for negligent screening.

**Held**: Judgement for P upheld (trial found for P, then reversed on appeal). Although the but-for test remains the general test for causation, it is unworkable in some situations. Test for causation in negligent donor screenings is whether D’s negligence **materially contributed to the harm**. “Material” here meant outside “de minimis” range.

**Now**: The approach adopted in ***Walker*** is usually referred to as the **material contribution test.** According to this approach, it is not necessary for the defendant’s actions to be the **sole cause of the damages** suffered by the plaintiff. Instead, a material contribution is established if their actions caused or contributed to the damages.

## Multiple insufficient causes

This second causal indeterminacy problem arises where several factors combine to cause the plaintiff’s loss, but where **no single factor** is itself the but-for cause.

### Athey v. Leonati (1996)

**Facts**: P (with **pre-existing** back problems) is injured in a car accident. On advice from his doctor, he later resumes exercise and sustains a herniated disk. Trial judge found that D materially contributed to the injury, but then only held D 25% liable (due to the pre-existing condition).

**Held**: D was found to be fully liable. Court argued that if the one of the acts contributing to the loss is tortious, it would then be wrong to apportion liability for the portion that is non-tortious. Furthermore, the court concluded that while the trial judge was correct in holding that D materially contributed to the injury, she erred in holding D only 25% responsible.

**Instead**:Court held that the **thin skull rule applied**, on the grounds that but for the accidents the injury would not have occurred.

**Rule**:The law does not exclude D from liability simply because other causal factors for which he is not responsible helped produce the harm

Thin Skull Rule:The defendant "must take their plaintiff as they find them". Where the plaintiff has a pre-existing condition, the thin skull rule applies. A defendant cannot deny responsibility for their negligence simply because the plaintiff has a weak back/neck/whatever. (***Athey v. Leonati****)*

Apply the but-for test. If it shows causation, then there will be liability.

* + **Pre-Existing Condition Trumps?** The defense can argue that the pre-existing condition would've caused the injuries all by itself without the defendant's tortious actions

## Multiple, independent sufficient causes

Plaintiff’s loss arises from two independent acts, each of which was capable of causing the loss. Typical example is where two different bullets, each of which is fired negligently by two independent defendants, hit the plaintiff.

In these kinds of cases, the courts have tended to apply what is known as the **significant or substantial factor test**. If it can be concluded that the acts of one defendant would have led – by themselves – to the loss, then that defendant will be held liable (***Lambton v. Mellish***)

### Lambton v. Mellish [1894]

* **Facts:** Mellish and Cox were rival contractors. Played organs for 3+ months in the summer 8 hrs a day. P moved against each contractor for an injunction.
* **Issue:** Can two wrongs make a right?
* **Reasons:** apply the material contribution test.
  + Each person is separately liable, and thus are both held responsible.

## Materially increased risk

Plaintiff suffers an injury (such as a disease) that may have been caused by the negligent actions of the defendant. Problem here is that it may be extremely difficult to prove that the injury would not have resulted but for the actions of the defendant (because with complex conditions like diseases it is often impossible to identify the cause with even partial certainty).

### Snell v. Farrell (1990)

**Facts**: D performed cataract surgery on P’s eyes. Hemorrhage occurred, increasing risk of stroke in optic nerve. D ought to have halted surgery, but continued on, in breach of the standard of care. Months later P suffered stroke in optic nerve, becoming blind. Medical evidence could not conclusively show whether the stroke was a result of the negligent surgery or from natural causes.

**Key Issue**: Should the burden of proof for causation shift to D (to disprove a medical causal link)? If the burden remains on P can causation be inferred without conclusive medical evidence?

**Held**: Court found for the plaintiff and concluded that the but-for test is **inappropriate** in medical malpractice cases where it is scientifically impossible to prove causation and the medical knowledge rests with the D. Court held that although it is for the plaintiff to prove causation, an **inference of causation** may be drawn in the absence of conclusive scientific proof. If D provides evidence to the contrary, the inference can only be made if the weight of the combined evidence supports an inference of causation.

# Remoteness

**Breach of duty and causation are not enough to establish liability**. Plaintiff must also be able to establish that the damage complained of was not too remote, and that there were not intervening events or acts that should prevent the defendant from being found liable.

* **Means by which the courts seek to limit the implications of a finding of factual causation**, usually for reasons of **policy** and general **fairness**.
* Comes down to common sense, pragmatics and policy

1. Limitations based on concerns about the scope of negligence (the duty problem)
2. Limitations based on a concern with the logical implications of strict adherence to factual causation.

Foreseeability (current Cdn standard) relates to the **type of harm suffered by the defendant.**

### Re Polemis & Furniss, Withy & Co Ltd [1921]

* **Directness** (no longer used by Canadian courts)
* According to the directness rule, a defendant is liable for all of the direct consequences of his or her negligence.
* Also important to note that when applying this rule, the courts were careful to distinguish between:
  + **Foreseeability** was relevant to breach and duty
  + **Remoteness** was relevant to the extent of liability
* The distinction was based on the idea that questions of wrongfulness should be confined to the duty and breach stage of the calculus, while more practical questions of the extent of liability should be dealt with at the causation stage.

### The Wagon Mound (No. 1)

* **FACTS:** An oil spill in Sydney Harbour caused a slick of bunker oil to spill across the harbour, absorb into a wharf, and after some metal from some welders falls through, ignites a rag which ignites the oil, which catches the wharf on fire.
* **Issue:** What to do about ***unlikely and unforeseeable*** damage?
* **Reasons:**
  + *Re Polemis* (directness)no longer the effective test.
  + Reasonable Foreseeability becomes new test for remoteness
  + Here, if something is a **probable consequence** of the specific act to the specific party, then the test will be met.

**Reasonable Foreseeability (Probability) Test**(***Wagon Mound #1,*** *1961*)

If defendant is negligent, he is only liable for the probable consequences which were reasonably foreseeable.

* "Probable" not clearly defined.
* Key here is that the court established a new test based not on directness but on **foreseeability**.
* Court argued that the new approach was fairer, simpler, and less weighted towards the defendant.
* But also important to note that the court was keen to ensure that defendant’s didn’t escape liability just because the damage in question was indirect.
* The defendant will only be liable for the reasonably foreseeable consequences of his or her negligence.

**Note:** The courts have taken an increasingly flexible approach to the question of foreseeability and remoteness, with the result that it has arguably become easier and easier for plaintiffs to establish that the damage suffered was not too remote.

### Wagon Mound #2: Overseas Tankship (U.K.) LTD v. Miller Steamship Co. Pty [1967] 🡪 TEST IN AUSTRALIA

* **Facts-** Arose from the same incident as *Wagon Mound #1.* Plaintiffs are owners of boats that were damaged in the fire.
* **Issue:** what to do with *degrees of foreseeability?*
* **Reasons:**
  + If something seems almost impossible, reasonable people aren’t expected to act to prevent the harm—(*Bolton v. Stone*)
  + In Wagon Mound #1, it was found that D’s are only responsible for the probable consequences of their acts. Therefore, you will only be liable for anything with more than a 50% likelihood of occurrence.
  + In Bolton v. Stone, the test was that anything that poses any kind of a material risk should have been prevented.
  + This is the test that should have been used—those consequences that pose a real and substantial risk of occurring should be prevented—ie- **reasonable possibilities, not probabilities.**
  + A reasonable and alert chief engineer would have realised a real risk, and so the respondents are entitled to succeed.

**Type of Injury Test**(***Hughes v. Lord Advocate,*** *1963, Uncovered Manhole Burned Child)*

If the defendant could reasonably foresee the type of damage, they are liable for all resulting consequences, no matter how outlandish. The extent of the damage and manner of its occurrence are irrelevant. Pro-plaintiff.

* *Example:* There was reasonable foreseeability of someone being burned by the paraffin lamp, therefore, the defendants in ***Hughes*** are liable for any resulting burn injuries - even if those burns occurred in a ridiculous explosion.

### Hughes v. Lord Advocate [1963] 🡪 The Kind of Injury

* **Facts:** A boy knocks a lamp into a manhole, which causes an explosion. The boy falls into a hole and is badly burned
* **Reasons:**
  + The exact circumstances (the explosion) that created the burns were not foreseeable
  + However, the kind of injury- burning- was foreseeable, even if by other circumstances.
  + Therefore, liability will result because the type of damages was foreseeable. The precise circumstances giving rise to the harm are irrelevant.
    - Known source of danger behaved in unpredictable manner
* **NOTE:** Here the court tells the story from a vague POV to make their finding

## Intervening Causes

* an intervening act is one that causes or contributes to the plaintiff’s loss after the defendant’s breach has taken place.

**Historically**, courts tended to treat the intervening cause as a break in the chain of causation – with the result that the original tortfeasor would be relieved of responsibility

* This approach was often referred to as the **last wrongdoer doctrine**, in that that last tortfeasor in the chain of causation was held solely responsible for the loss suffered by the plaintiff.
* Very easy to see that the doctrine of the last wrongdoer – and the idea of the **novus actus interveniens** (intervening act) – is also a product of a very artificial way of looking at the world.

**Canadian courts abandoned this approach**, and tried to develop other ways of dealing with the problem of intervening causes in the context of the but-for test

Argued that it was possible to distinguish between different types of intervening acts, based on the question of whether the act in question could be regarded as naturally occurring or morally blameworthy.

**Three kinds of intervening acts**:

1. Subsequence acts that could be considered **naturally occurring** General rule here was that provided the intervening act was not too unusual, it would not break the chain of causation.
2. Subsequent **negligent acts of a third party**. General rule here was that such acts could break the chain of causation.
3. Subsequent **intentional, wrongful (or illegal) acts**. General rule here is such acts would always break the chain of causation.

**This approach was then abandoned** in favour of principles that now govern the idea of remoteness, and the **courts adopted a new test based on foreseeability.**

**Test**: If the intervening act was broadly within the **scope of the foreseeable risk** created by the defendant’s negligence, then he or she will remain liable for the resultant damage.

### Bradford v. Kanellos

* **FACTS:** A grease fire in a restaurant caused a fire suppression system to go off. It made a hissing/popping sound, that led a customer to yell “fire” and a stampede out of the restaurant injured P.
* **REASONS:**
  + If the defendant creates an area or scope of risk in which the intervening act would fall, then they will be liable.
  + Here, someone yelling fire did not fall within the area of risk, so there is no liability
  + Majority of the court (as expressed in the decision of Maitland J.) agreed with the view of the Court of Appeal and held that the intervening act was **unforeseeable**, and that that the defendant was not liable to the plaintiff.

**Note:** Despite the decision in ***Bradford***, it is important to note that the Canadian courts have continued to adopt a fairly conservative, classification-based approach in cases involving intervening acts of medical negligence.

### Price v. Milawski

* **FACTS:** The first doctor conducted improper x-rays ,which led the specialist to make more errors
* **REASONS:**  If it’s foreseeable that there could be subsequent negligence as a reasonable result of one’s own negligence, they that person will be held liable.

**Intentional intervening cause:** Courts have been reluctant to hold the original defendant liable, as it makes no real sense given the act of the third party was an intentional wrong.

### Hewson v. Red Deer (1976) 🡪 Exception to the intentional intervening act rule

* **Facts:** Employee leaves tractor unattended with keys in ignition and doors unlocked. Unknown person comes and illegally starts it and lets it run down the hill into someone’s house.
* **Issues:** Should the employee be held liable?
* **Reasons:** 
  + It was reasonably foreseeable that someone could come and attempt to use the tractor (university nearby)
  + Very easy for the employee to have locked up the tractor and and prevented it
  + Intervening cause maxim not applicable due to the negligent action of the employee and the reasonable foreseeability of the intervening act, employee was under duty to take steps to prevent it.

## Nervous Shock and the Thin Skull Rule

Whether plaintiffs should be allowed to recover for psychiatric injuries suffered as a result of the defendant’s negligent act.

Important to note that traditionally the courts have been extremely reluctant to allow recovery in such cases, for a variety of distinct reasons.

1. Concerns about floodgates
2. The problem of processing and testing the validity of psychiatric claims
3. The continuing stigma attached to mental illness.

**Current Approach: Plaintiff must be able to show:**

1. The type of psychiatric injury complained of must fall into the category of nervous shock
   1. There is no liability in negligence for psychiatric injury unless it satisfies the legal concept of nervous shock.
   2. Defined as a severe **emotional trauma that manifests itself in a physical disorder** or in some **recognisable psychiatric illness**, such as clinical depression or post-traumatic stress disorder.
   3. **Does not include** things such as emotional upset, mental distress, grief, sorrow, anxiety, worry, or other supposedly transient or more minor psychiatric injuries.
2. The injury must be reasonably foreseeable and there must be a sufficient degree of proximity
   1. The defendant will only be liable if it was reasonably foreseeable that the negligent act would produce nervous shock in a person of average psychological resilience
   2. No recovery is permitted if the injury is triggered by an abnormal sensitivity on the part of the plaintiff or a predisposition to psychiatric illness or injury

The more difficult cases are those where the plaintiff is a **secondary victim**, and suffers nervous shock as a result of the defendant causing some harm to a third party. Often refer to such victims as **relational victims**.

* The most typical scenario is where the relational victim suffers from nervous shock as a result of **seeing, hearing, or being told** of a tragic or horrifying event.
* Generally speaking, the courts rejected them. Refused to recognise them on the grounds that such plaintiffs weren’t foreseeable, and that there were compelling policy reasons to deny recovery (floodgates arguments)
* Over the course of the last fifty years, the courts have gradually begun to take a different approach.
  + Have argued that provided the injury is foreseeable and the relational plaintiff is sufficiently proximate, then they can recover.

### Alcock v. Chief Constable of South Yorkshire Police [1991]

**Facts**: 96 [Liverpool](http://en.wikipedia.org/wiki/Liverpool_F.C.) fans died in a massive crush during the [FA Cup](http://en.wikipedia.org/wiki/FA_Cup) Semi Final at[Hillsborough Stadium](http://en.wikipedia.org/wiki/Hillsborough_Stadium) in [Sheffield](http://en.wikipedia.org/wiki/Sheffield). The accident was caused by the police negligently allowing too many supporters to crowd in one part of the stadium. Many saw their friends and relatives die in the crush and suffered psychiatric harm or [nervous shock](http://en.wikipedia.org/wiki/Nervous_shock) after the incident.

* Laid down a **number of conditions** that has to be met in cases of nervous shock to relational victims:
  + - **Relational proximity** –The plaintiff must be able to show a "sufficiently proximate" relationship to that person injured or killed as a result of the defendant’s negligence. The courts referred here to the need for a "close tie of love and affection", **presumed to exist only between parents and children, as well as spouses and fiancés**. (Any **other relationship needs to be proven** by the plaintiff)
    - **Locational proximity** – The secondary victim must view the "shocking event" with his or her own **unaided** senses. In practice, this means they must be either be an eyewitness to the event, or hear the event in person, or view its immediate aftermath.
      * **Goal**: prevent floodgates (TV viewers, etc.)
    - **Temporal proximity** – The shock must be a sudden, and not the result of what the court described as a "gradual" assault on the claimant's nervous system.

**Court also argued that the plaintiff can only recover if was reasonably foreseeable that a person of "normal fortitude" would also have suffered psychiatric damage.**

Note also that the **thin skull rule** was also held to apply in nervous shock cases – that is, once it is established that some **recognised psychiatric damage was foreseeable**, it does not matter that the claimant was particularly susceptible to that particular psychiatric illness.

### Mustapha v. Culligan Canada (2008) – SCC comment on Nervous Shock

* **Facts:** M saw a dad fly in some fresh, unopened, bottled water. As a result, he suffered major psychiatric trauma. Trial awarded significant damages, appealed to SCC.
* **Reasons:**
  + There is no novel category of duties here (Court of Appeal said there was and used Anns/Cooper). A duty exists as per Donoghue (don’t injure your neighbours), a manufacturer has a duty of care to consumer.
  + Culligan breached duty of care, and caused the harm, but is it too remote/unforeseeable?
  + Case fails on remoteness:
    - P failed to prove that his reaction was foreseeable
    - P had a “subjectively and objectively bizarre” reaction that was not probable – a reasonable person would not have acted in this way.
    - Culligan’s breach was too unrelated to allow P to fairly recover.

## Thin Skull

General principle from ***Leech Brain***: If the **injury suffered the plaintiff was foreseeable**, then the plaintiff can recover in full even if they suffered greater damages than an ordinary plaintiff (due to a pre-existing condition or vulnerability).

**DIFFERENT FROM “CRUMBLING SKULL”!!!!**

## Crumbling skull rule

Where the onset or deterioration of a condition is hastened by the defendant’s negligence, they will only be responsible to the extent that they worsened the condition

# Defences in Negligence

**Four main defences available in negligence**

1. Contributory negligence
2. Voluntary assumption of risk
3. Public policy and illegality
4. Inevitable accident

**Burden of proof is on the defendant**, and that they **can argue multiple defences** simultaneously

## Contributory Negligence

**Defence of Contributory Negligence:** Unreasonable conduct on the part of the plaintiff which, along with the defendant's negligence, has in law caused the plaintiff's own injuries.

* **Victims owe a duty to themselves**: Standard of care to be applied for plaintiff is the same as the standard owed by the defendant to the plaintiff
* Examine whether the plaintiff's negligence contributed to the injuries:
  1. By contributing to the accident itself
  2. By exposing the plaintiff to risk of involvement in the defendant's negligent actions

[example: *Rautins v. Starkey*, Ont. S.C.J. 2004 – 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]

* 1. By failing to take precautions to minimize possible injuries

**Last Chance Doctrine:** Allowed a negligent victim to recover at common law if it was proven on BOP that defendant might have prevented the injury by exercising reasonable care (***Davies v. Mann***, *Bad Donkey Killed by Defendant Wagon, 1842*)

* “If the defendant could have avoided the consequences, then there was a ***last clear chance*** that needs to be considered. “
* **As a test of causation:** Was the plaintiff a proximate cause of the injury?
* **As a test of comparative fault:** Who was more at fault?

***Negligence Act* abolished the Last Chance doctrine & Common Law Rule**. The Act governs all apportionment of liability based on fault, even in the event of contributory negligence

* Allows victim to recover partially even when there is contributory negligence. As long as the defendant was "material cause" of the plaintiff's loss, the plaintiff can recover (***North King Lodge v. Gowlland Towing,*** *Ship Tied to Boom Sinks, 2004*)
* **Onus of Proof:** Defendant must prove, on BOP, that (1) plaintiff was negligent and (2) the negligence caused/contributed to the injuries which were sustained. The injuries must relate to the injuries caused by the original tortfeasor.
* **Last Clear Chance Doctrine Abolished:** The act applies even if a party had the opportunity to avoid the injury and negligently failed to do so.
* **Obvious and Avoidable Risk:** In BC, a plaintiff can be held completely liable for their contributory negligence where the plaintiff is aware of the risk, has the time to contemplate the risk, and decides to proceed anyway (***Scurfield v. Cariboo Heli Skiing,*** *Plaintiff killed in Avalanche, 1993*.

**Seatbelt Defence:** There is a general duty on all vehicle occupants to wear seatbelts (***Galaske v. O'Donnell***). The defendant's liability may be reduced if the plaintiff's failure to use his seatbelt was (1) unreasonable and (2) a contributing cause to the plaintiff's injury. A successful seatbelt defence generally reduces the plaintiff's damages by 25%.

1. **Failure to use seatbelt may or may not be unreasonable, depending on the facts/excuses**
   1. There is a general duty on all occupants of a car to wear their seatbelt, but this duty may be negated by the circumstances
   2. Established duty on passengers/drivers to wear seat‑belts; failure to do so generally increased severity of injuries and rate of fatalities (***Yuan v. Farstad*)**
2. Failure to use seatbelt must be **causal factor** in plaintiff's injuries
3. Proof that failure to use seatbelt breached a **statutory requirement is not conclusive evidence** of contributory negligence - but it helps
4. **Failure of parents or drivers to ensure that children are buckled up may be negligent**, depending on circumstances
   1. Drivers always have a duty to ensure that passengers under 16 are wearing their seatbelts. Duty may be shared by other passengers (i.e. parents), but the presence of others does not negate the duty of the driver, since the duty is in control of the car (***Galaske v. O'Donnell,*** *Child Injured While Not Wearing Seatbelt, 1994*)

The main things to note in the BC **Negligence Act** are:

* Apportionment is on the basis of fault. Note that where the distribution of fault cannot be determined, then liability is split equally (Section 1)
* Damages can be offset if both parties are at fault (Section 2)
* Liability for legal costs are apportioned according to the principles set out in Section 1 (Section 3)

## Voluntary assumption of risk

According to the principle of **volenti non fit injuria** (“to one who is willing, no harm is done”), where a person engages in an activity and knowingly accepts the accompanying risks, they cannot sue in negligence if subsequently injured.

Two main categories:

* There there has been **express agreement** – most common in cases where there the plaintiff enters into a contract and expressly assumes the risk.
* Where there has been an **implied agreement** – where there is no express consent

Important to note two things when considering the defence of **volenti**:

* It is a complete defence, and precludes recovery;
* It is very hard to establish, mainly because the courts prefer to apportion damages in such situations according to the principles of contributory negligence.

As the textbook notes, the **defence now really only ever arises in the context of sports, and even then it is usually interpreted very narrowly.**

Elements:

(1) Defendant must prove that the plaintiff knew of and understood the risk he was incurring (the precise risk – not just the general activity risk)

(2) That the plaintiff voluntarily assumed the risk

***Key issue is usually #1.***

### *Dube v. Labar* (1986) – SCC.

Here the court held that in order to establish the defence of volenti, the defendant must prove that the plaintiff consented to both the **physical and legal risk**

## Participation in Criminal or Immoral Act

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

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

### Hall v. Hebert (1993)

Plaintiff and defendant (both equally drunk) get in and drive a muscle car, and have an accident. P claims D should not have let him drive; D claims P acted illegally and cannot sue.

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

1. The P stands to profit from his criminal behaviour; or
2. Compensation would amount to an avoidance of criminal sanction

Note that Cory J. argued that the question of illegality should be dealt with at the **duty stage**. The majority rejected on grounds that keeping ex turpi as a defence, maintains desirable degree of flexibility in the application of the principle.

## Inevitable accident

If you can show that the accident was inevitable, then the defendant will not be held liable

### Rintoul v. X-Ray and Radium (1956) – SCC

**Facts**: Car brakes failed, D applied hand brake, then crashed. D argued that the accident was inevitable and that he did everything he could to avoid it

**Court**: Held that the D would need to show that the failure of the brakes could not have been prevented **even with the exercise of reasonable care.**

* Person relying on a defence of inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill.
* Court concluded D didn’t establish this was the case.

# Basic Principles of Liability for Intentional Torts

## Intention, volition, and motive

**Basics:**

* **Must be intentional and voluntary!**
* Intent typically refers to a subjective desire on the part of the defendant to bring about a particular consequence
  + Important to note that the defendant’s intent does not need to be **hostile** or otherwise **blameworthy**.
  + You don’t have to intend to bring about the consequences so long as you **intended to do the action**
* **Voluntariness isn’t sufficient** for most torts (except – strict liability, like speeding), there is an **additional mental element** required.

**Constructive Intent:**

* This is the idea that the concept of intent includes not only the desired consequences of the act, but also the **unintended** consequences that are certain or substantially certain to result from it.
* – ‘as if’ intent. We will treat you as if you intended the consequences. (*Maloney* case where dad says shoot me and son does then blows daddy’s head off… court says, regardless of arg that you didn’t intend to kill, we will treat you as if you intended to, given that you should have been aware of the certain consequences of the act)
* However, objective standards are often hard to justify in all cases given the potential for different perspectives/degrees of certainty

**Transferred Intent:**

* The question of intent is the question of intending to do X to someone, it doesn’t matter who the someone is. So you unintentionally commit a tort against Y having intended to commit a tort against X. We then transfer the intent to the harmed party.
* The reason for it is grounded in a prohibition of the act itself, regardless of who is negatively affected.

# Assault and Battery

## Assault

**Any direct and intentional act that causes a person to apprehend immediate harmful or offensive bodily contact.**

**Plaintiff must prove:**

1. The act complained of was **direct** and **intentional**
   1. interference was an **immediate result** of the defendant’s action (direct consequence of the defendant’s act)
   2. If plaintiff proves that there was a direct act, **defendant** must prove that he did not intend to cause the plaintiff to apprehend immediate harmful or offensive bodily contact. (reverse onus)
   3. Transferred intent can apply here
2. Caused the plaintiff to **apprehend immediate harmful or offensive bodily contact**
3. **Caused** the plaintiff to apprehend
4. **Immediate**
5. **Harmful** or **offensive** bodily contact

**Two important points:**

1. The apprehension must be **reasonable**; and
2. Threats of **future** violence will not suffice

### R. v. Ireland (1997). (UK Case)

This case is interesting because the court held that:

* Psychiatric injury was capable of being bodily harm.
* Words alone (and silence in some circumstances) can constitute an assault.
* Assault requires fear of an immediate application of force. Such fear could have existed in this case if for example the victim of the silent caller had feared the possibility of immediate personal violence due to the caller’s imminent arrival at her door.

**Not yet adopted in Canada**, though belief that similar standard probably would be held in Canada if appropriate case came along.

## Battery

According to **Osbourne**, battery is a **direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person.** Can break this definition down into four key elements:

1. Physical interference
   1. has to be some form of contact or physical interaction with the plaintiff.
      1. Interference with the bodily integrity of the person
   2. Plaintiff doesn’t need to be aware of the battery at the time (i.e. asleep)
2. Directness
   1. interference was an **immediate result** of the defendant’s action (direct consequence of the defendant’s act)
   2. If plaintiff proves that there was a direct act, **defendant** must prove that he did not intend to cause the plaintiff to apprehend immediate harmful or offensive bodily contact. (reverse onus)
3. Intention
   1. only have to intend to bring about **physical contact** – you don’t have to intend to cause harm or be socially offensive (***Bettel v Yim****)*
      1. ***Bettel*** - D shakes P to see if P will admit to throwing matches into store, headbutts P in process, since battery protects bodily integrity, if committed, D liable for all subsequent damages
   2. **defendant** to prove an absence of intent once directness has been established.
4. Harm
   1. harm to one’s sense of bodily integrity will be enough
   2. does not need to be physical

# Sexual Battery

No distinct tort of sexual battery in Canada. Dealt with according to the **traditional rules of battery**.

### Non-Marine Underwriters, Lloyd’s of London v. Scalera [2000]

Plaintiff in a sexual battery case must prove that there has been physical contact of a sexual nature, but is not required to prove lack of consent.

* confirms absence of consent is **presumed** in sexual battery cases
* court made clear that the defendant's **fault arises from the intentional violation** of the plaintiff's bodily security
  + **defendant** bears the onus of proving consent.
* **McLachlin** - wrong to recognize a new tort of sexual battery requiring the plaintiff to prove lack of consent.
  + purpose of battery is to protect personal autonomy rights
  + wrong to expect a person whose bodily integrity has been violated in such a fundamental way to then have to prove the contact was non-consensual.
  + rejection of the formal equality of plaintiffs and defendants that underlies most civil litigation – recognizes the historical inequality of women in sexual battery cases

Potential problems: (Elizabeth Adjin-Tettery talks about the problems with **constructive consent**)

* Unclear as to whether the defendant needs to **adduce evidence** about reasonable efforts to ascertain the claimant's consent.
* Objective approach means = plaintiff’s perception of events is **irrelevant** provided the defendant can show that there is a **reasonable basis** for their belief in consent.
* Victims may in effect find themselves being blamed for behaving in ways that **induced** the defendant into believing consent was present, or for **failing to resist** in circumstances where a reasonable person would have protested.
* Constructive consent is premised on common sense ideas about **'normal' or 'reasonable' behaviour** or responses to unwanted sexual advances.
  + Bad for minority narratives, etc.

## Advantages/Disadvantages to civil suit for sexual battery (Feldthusen)

**Advantages:**

1. The plaintiff can control the case,
2. Taking a civil approach may have therapeutic benefits for the plaintiff, and promote healing.

**Disadvantages:**

1. **Cost**, delay and stress may undermine the therapeutic benefit of civil litigation.
2. When the action is defended, there is a real risk of **secondary victimization**.
3. Civil litigation is expensive, and the **plaintiff may not receive full, or even partial, damages**

## New tort of sexual battery?

Mirrors the approach taken in the criminal law – i.e. does not allow for the defence of implied consent (as per the decision of the Supreme Court in ***Ewanchuk*** **[1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193)**.

* ***Ewanchuk*** severely limits the situations where an accused person can claim an honest but mistaken belief in consent to sexual contact.
* can only operate to negate the mens rea required for sexual assault where the accused can show that they **believed the complainant communicated consent to the sexual contact in question.**
* **Adjin-Tettery** (article) argues that a new tort of sexual battery would reflect the qualitative difference between the bodily invasion of rape from other forms of battery
  + Sexual wrongdoing violates rights to self-determination, privacy, and mental security
  + Wrongdoing is deliberate, targeted, gendered, and an act of control to humiliate and dehumanize women
* The hypothesized tort of sexual battery should **remove the defense of constructive consent**
  + Might appear harsh on the alleged perpetrators, but the complainant’s right to personal inviolability, human dignity, and autonomy should trump the rights of “morally innocent” accused persons
    - Particularly given that the accused should actively ensure that their sexual partner is giving consent
    - Moreover, they did voluntarily engage in an act, knowledgeable of the risks

# False Imprisonment and Malicious Prosecution

## False Imprisonment

**Direct** and **intentional imprisonment** of **another person.**

* The tort is actionable without proof of damage (actionable *per se)*
* There must be a complete restriction on the plaintiff’s physical liberty. (*Bird v Jones* – partial restriction is insufficient)

Physical imprisonment in a room or a building is **not necessary**. Restraint may be imposed by:

* Barriers
* An implicit or explicit threat of force
* An explicit assertion of legal authority (*Campbell v S.S. Kresge* – felt forced to comply with security guard)
* **NO** Canadian authority on whether the person must be aware of the imprisonment, but in UK you **don’t** need to be aware. Reasonable to assume awareness =/= req

### Bird v. Jones

* Bird wanted to enter enclosed area but refused to pay admission, snuck in
* Once found inside, Jones prevented Bird from going across a bridge but found that he could have gone by other means
* Bird sued for false imprisonment
  + Jones not found to be liable because Bird could have left
  + Establishes that there must be full restriction of movement

### Campbell v S.S. Kresge

* + Campbell went to Kmart and tried to buy things but couldn’t get an attendant so she left the cart full and left the store
  + Witness approaches security guard and says that believes Campbell put something in her pocket
  + Sec guard asks Campbell to re-enter store, witness can’t be found, Campbell eventually allowed to leave
  + Campbell successfully sues Kmart company for false imprisonment, though gets minimal damages due to short period and the fact that court didn’t buy that it was very stressful
    - Establishes that even short duration imprisonment is sufficient for action
    - Establishes that voluntarism doesn’t matter if it was coerced by authority/fear of consequences

### Herd v. Weardale Steel

* + Appellant was prevented from using the cage to get out of the mine by his manager, the respondent
  + Respondent argues that it was justified as appellant had refused to do work he was contracted for
  + “maxim volenti non fit injuria” (That to which a man consents can’t be considered an injury)
  + Appellant was contracted to work for a length of time, said work was dangerous and wanted out. Manager wouldn’t permit him to leave prior to prescribed time. Had no obligation to go above and beyond the
  + No false imprisonment

## Malicious Prosecution

* Trying to resolve a tension between two interests:
  + - That citizens should be **free from arbitrary/unlawful prosecution**
    - Those responsible for upholding the law should have **strong and relatively uninhibited powers to fulfill their mandate** (Don’t tie the hands of those responsible for the justice system)

**Test used (*Nelles*):**

* + - **1) Defendant initiated proceedings**
    - **2) Plaintiff acquitted/found not guilty (in favour of plaintiff)**
    - **3) Prosecutor lacked reasonable or probable cause**
    - **4) Prosecutor had an improper motive/malicious intent in prosecuting**
      * notion of spite, ill will, and vengeance
      * improper purpose (substantial departure from typical prosecutorial purpose)
    - **5) Must be actionable (show some harm/damage)**
      * I.e. Loss of reputation, Loss of liberty, Financial loss
  + Difficulty of proving + systematic protections in civil procedure make this sufficient to ensure that the important public duties of the prosecutors will not be hindered

### Nelles v. Ontario – the MP test

* Nelles sued Crown, AG, Crown Attorneys for malicious prosecution
  + Court finds that the AG and Crown Attorneys are not immune from suits for malicious prosecution because could pose a threat to the individual rights of citizens who are malicious and wrongly prosecuted
  + **Five part test (see above)**

### Proulx v. Quebec (AG) – MP succeeds

* + Overturned prosecution of Proulx on lack of credible evidence
  + Court allows appeal
  + Though the court should be slow to second-guess a prosecutor’s judgment call, this seems to be an example of the exceptional 4-part circumstance from *Nelles* in which prosecutorial immunity should be lifted
  + Dissent disputes that this case meets the last 2 criteria from *Nelles*

### Miazga v. Kvello Estate – no req’d subjective belief of guilt

* + No requirement for a public prosecutor to have a subjective belief that an accused is guilty (can objectively assess that there was a lack of reasonable or probable grounds for prosecution)
  + However, malice cannot be inferred from an objectively determined lack of reasonable and probable grounds
    - Honest but mistaken belief that there were reasonable and probable grounds does not support a finding of malice
  + Miazga found not guilty for lack of malicious/improper intent

### Roberts v. Buster’s Auto Towing Service Ltd. (1976) – Indirectness

**Facts**: Employee (E) reports incident to the police, and asks them to apprehend the plaintiff (P). Police apprehend plaintiff and take him to the police station.

* Potential false imprisonment because E **directed** the police to apprehend P – argument seems to be that the police had little or no **discretion** as regards the question of whether to apprehend or not.
* E gives information to justice of the peace (JP) who then orders P be held in custody.
  + No false imprisonment by E because JP **exercised their own discretion** when deciding whether to place P in custody or not.
* E **could be liable for malicious prosecution**.

# Intentional Infliction of Nervous Shock

Usually defined in terms of its elements. According to **Osbourne**, the plaintiff must prove:

* **Outrageous or extreme conduct**
  + determined by the court with reference to the standards of reasonable people.
* **Intent (or constructive intent) to cause**
  + Intent is often **inferred** from the seriousness of D’s conduct (***Clark***)
* **Nervous shock (recognizable psychological illness – not mere anguish, etc.)**

### Clark v. R

* Court held that a series of incidents involving the sexual harassment of a female police officer by her male colleagues and supervisors which caused her to suffer from her nervous could be enough to warrant imposing vicarious liability on the Crown.
* Intent to inflict mental distress may also be inferred from the extent and duration of harassment

### Radovskis v. Tomm:

* Plaintiff failed in claim for IINS against an offender who had committed a serious sexual assault on her five-year-old daughter
  + she presented **no evidence of illness**.

### Rahemtulla

**Facts:** P wrongly fired by D after a false accusation of theft. P suffered mental anguish because she could not obtain subsequent employment (as a result of defamation). Medical evidence to support plaintiff’s claim was not introduced.

**Held:** Can have IINS even if no medical evidence of mental illness exists, provided that there are **symptoms of depression present and the behaviour of D is “outrageou**s”

* May be **in tension with normal IINS standard/Radovskis**?

# Stalking, Harassment, and Discrimination

## Discrimination

**There is no tort of ‘discrimination’**

some courts have been attracted to the idea because it would complement existing equality protections established by federal and provincial human rights legislation.

* Need balance equality (and the right to be free from discrimination) with other legitimate legal interests, such as freedom of contract

### Seneca College of Applied Arts & Technology v. Bhadauria – Human Rights Codes

**Trial** - court upheld an application to strike out the statement of claim as disclosing no cause of action

**OCA** - held that the plaintiff had a common law right not to be discriminated, which was independent of statutory obligations and remedies

**SCC** – Overrules OCA - Ontario Human Rights Code already provided a comprehensive and exhaustive vehicle for protection against discrimination, and that as a result there was **no need to recognize and develop a complementary tort remedy.**

## Stalking

Person knowingly (i.e. intentionally) or recklessly harasses another person in a manner that leads that other person to fear for her own safety – referred to as **criminal harassment** in the Criminal Code and prohibited by under section 264(1).

* **No independent common law tort of stalking.** 
  + Possibly sue in tort for assault, battery, intentional infliction of nervous shock, trespass to land, nuisance, or defamation
  + Argued that this **piecemeal approach** does not really address the real nature of the wrong.
  + disadvantage of focusing attention on the various discrete acts of the stalker, and this may have the result of making them appear relatively insignificant when examined in isolation from the complete pattern of behaviour.

## Harassment

Distinction between stalking and harassment:

* **Stalking** - conduct causes a person to **fear for her own safety (More serious!)**
* **Harassment -** conduct is seriously annoying, distressing, pestering, and vexatious
  + **disturbing and upsetting**, but not necessarily frightening
    - Minor sexual harassment
    - Bullying
    - Harassment by creditors or governmental officials
    - Abusive or racist communications

Courts are only really willing to consider harassment where the plaintiff is the **clear target of the harassment** and suffers **severe mental distress**. However, even where this is the case, the approach taken varies between:

* Basing liability on a previously recognized tort
* Providing a remedy through consumer protection legislation
* Recognizing a new tort of harassment.

### Chapman v. 3M Canada Inc

The appellant’s claims of sexual harassment and discrimination on the basis of sex were within **the exclusive jurisdiction of the Ontario Human Rights Code and that the claim under the Occupiers' Liability Act disclosed no reasonable cause of action.**

# Intentional Interference with Land

* **Definition**
  + **Direct and intentional physical** intrusion onto the land/possession of another
    - Can be either you directly **entering on to land**, or the **placement of an object**
      * The continued presence of you/an object of yours on the land of another is viewed as a continuous act
    - Once the license to be on land is revoked (if originally permitted then asked to leave), the visitor must leave within a reasonable period… after which it becomes a trespass
* The meaning of land
  + The surface of the land and all affixed things + reasonable and ordinary use of airspace + the soil below excluding certain minerals (or as excluded by statute)
* Who can sue?
  + The possessor of the property
  + Not just the owner, but the **occupier/legal possessor of the land**
  + i.e. if you rent out your house, and he/she is in possession – only the renter can sue
* The elements of the tort
  + Intrusion must be a **direct result of the actions of the defendant**
    - I.e. can’t sue for something washing up on your land
  + The **interference must be intentional** (or negligent, but ignore this component!)
    - Once the plaintiff has proved direct interference, there is a **presumption of intentionality –** up to the **defendant to disprove (reverse onus)**
    - Not required to prove that there was intent to do harm, just **intent to do that act that led to the trespass**
  + Intrusion must be physical
* The **three basic forms**:
  + Where a person enters land in possession of the plaintiff without permission.
  + Where a person places objects on the plaintiff’s property.
  + Where the possessor of land revokes a visitor’s permission or licence to be on the property.
* **Doctrine of trespass by relation**:
* Plaintiff can sue even if they were not in possession of the land at time of the interference – provided that **no one else was in possession and they subsequently take possession.**

**Defences**

**Three** main defences:

1. **Consent**
   1. no liability in trespass to land where the possessor has consented to another entering his land (defendant holds **license** (explicitly or implicitly given))
2. **Necessity**
   1. emergency and it is necessary for the defendant to trespass in order to prevent harm to themselves, the public, the possessor of the land, or a third party.
   2. danger significantly outweighed the damage or loss caused
3. **Legal authorization**
   1. authorized by statute – for example, by virtue of a search warrant issued under Part XV of the Criminal Code

### Entick v. Carrington (1765) – Reverse onus on defendant

* + Early case on trespass
  + Property protection as reason for entering society – fundamental right
  + Reverse onus – defendant must establish he had right to be there or a lawful excuse for the intrusion

### Turner v. Thorne (1960) – D liable for consequences of a trespass

* + D went on to property as part of his delivery business and left packages in the garage of P, who was not home at the time
  + P didn’t know the packages were there, tripped over the and was injured
  + Found that trespasser is liable for a harm to the trespassee suffered as a consequence of that trespass

### Harrison v. Carswell (1976)

* + Carswell protested peacefully in Harrison’s mall (Polo Park Shopping Centre)
  + Was charged with trespass, as PPSC did not permit leaflets/protesting on grounds
  + Court upholds convictions under Manitoba *Petty Trespass Act*, finds that if a person is requested not to enter private property, they may not, regardless of public interest’s desire to allow employees to protest to their employees.
* The right to protest would be powerful on public property, but not on private property
* Carswell tried to argue that the mall was at least semi-public property, but the court did not agree
* Laskin’s dissent supports Carswell’s claim that the publicly accessible parts of the mall are semi-public spaces and should not be treated analogously to private space.
  + If it is desirous to change this law, must be done by the legislature, not court interpretation

### Bernstein v. Skyviews

* + Facts: D took aerial photography of P’s house and offered it to P for sale. P alleged trespass into his airspace and invasion of privacy.
  + Issue: Is movement of a plane through airspace considered trespass?
  + Holding: there is no trespass
  + Analysis: does not overrule *Kelsen,* distinguishes it based on height and ordinary usage, balancing the rights of the owner and the public
* **Trespass to Airspace/Subsoil**
* Intrusion into one’s airspace is not permitted, though subject to reasonable use limitations to permit air traffic, etc.
* Debate over whether such incursions are trespass or nuisance

# Intentional Interference with Chattels

**There are four intentional torts to protect interests in chattels:**

1. Trespass to chattels
2. Detinue
3. Conversion
4. Action on the case to protect a reversionary interest

**Defences – SEE ‘TRESPASS TO LAND’**

**Additional Defence:**

**Remedy of distress damage feasant**:

* Occupier of land can seize a chattel that is on his land if it has caused or is causing damage. Chattel can be held until compensation is paid. Not allowed to sell the chattel – only hold it.

## Trespass to Chattels

Defendant directly and intentionally (or negligently) interferes with a chattel in the possession of the plaintiff. Protects **possession** rather than **ownership**.

* Even a person in wrongful possession may bring an action in trespass (except against an owner with a right to immediate possession).

**(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.

**(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.**

**(4)** Not clear if trespass to chattels is still actionable without proof of damage.

* Argument for: No damage should be required, as making the tort actionable per se enables it to play a role in preventing people from touching valuable art and museum pieces. Also ensures that there is a remedy for the unauthorized moving or temporary use of chattels.
* Argument against: Unless goods are taken, damage should be an essential element of liability (there is dignitary interest in the inviolability of chattels).

**(5)** 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).

## Detinue

Plaintiff – who has a right to the immediate possession of the chattel – has **asked the defendant to return it**. Also available where the defendant has lost the chattel as result of his wrongful act.

Protects the plaintiff’s right to the chattel and **focuses on the defendant’s denial of the plaintiff’s rights** by refusing to return it.

**Rules:**

* Plaintiff must **first ask for the item back** (and the **defendant must refuse**) before the action can be brought before the court.
  + Action will fail if defendant gives back chattel before matter gets to court
* Main **remedies** are an **order from the court** (requiring defendant to **return chattel**) or an **damages** for its value (and detention).
  + Ordering return of chattel is what differentiates detinue from trespass/conversion
  + Damages are assessed at the time of the judgment as detinue is a continual wrong against the plaintiff(‘s right to the good)

**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.

## Conversion

**Defendant intentionally interferes with the chattel in such as way as to seriously harm the plaintiff’s rights to it** – i.e. by taking, destroying, or refusing to return the chattel

* + Relatively new tort, and has **gradually expanded in scope** so that it now covers many situations that would have previously been dealt with by trespass to chattels and detinue
  + Seeking Ordering return of chattel is what differentiates detinue from trespass/conversion
  + Seeking **damages**

**Rules:**

**Key: Was the interference was sufficiently serious to warrant forced sale to the defendant???**

* 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**.
* 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**.
* Essentially a **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.**
* **Mistake is no defence** to conversion.
  + An innocent seller of stolen goods and the innocent purchaser can both be liable in conversion.
    - Exceptions:
    - Packing, storing, or carrying goods for someone who lacks title to the goods provided the person responsible is not aware of the lack of title.
  + Damages are **assessed at the time of conversion** or when the plaintiff became aware of the conversion
  + Plaintiff must attempt to mitigate his loss by replacing the chattel as soon as is practical
  + Court will look at all of the surrounding circumstances, including:
    - The duration of the interference
    - The kind of interference
    - The purpose of the interference
    - The amount of damage inflicted

## Action on the case to protect a reversionary interest

Plaintiff can bring an action on the case to **protect their reversionary interest** when the chattel has been **destroyed or permanently damaged** by the **intentional or negligent** act of the defendant. (**Rarely used in Canada**)

**Reversionary interest** – doesn’t have immediate possession but has future right to posses. Acting to protect that interest.

## Alternative Ways to Order Chattel Return – Replevin/Recaption

**Replevin:**

* Not a tort - a procedure by which the court can order the return of a chattel **prior to the resolution of an action in tort.**
* Typically ordered by the court in cases where the plaintiff has an **apparent right to immediate possession.**

**Recaption:**

* Not a tort - a **legal right**.
* Person who has the strongest right to possession is **allowed to use reasonable means to recover the chattel.**
* **I.e.** Owner sees his bicycle being stolen can use reasonable force to prevent the theft or recover it.

# Intentional Interference with Economic Interests

Often referred to as **business torts**.

Modern tort law is based on the idea the law should, wherever possible, **stay out of the market** and **not seek to provide remedies for losses that arise from the ordinary business** practices or relationships. (Runs contrary to the broader proposition that torts is about **corrective justice**.)

## Deceit

**Four** elements:

1. Defendant made a **false statement**
   1. Must be untrue.
   2. Usually spoken/written, but actions may be included based on circumstances
   3. Silence not actionable but some circs mandate speaking up (like disclosing defects in a house (***Abel v McDonald***)
2. Defendant must have **known the statement was false** (or was **objectively reckless** to the truth or falsity of the statement) (***Derry***)
   1. Note: **mistaken belief** can be a defence – if genuine/provable.
3. Defendant made the statement with **intention of misleading** the plaintiff (or have been substantially certain that the statement would deceive the plaintiff)
   1. Doesn’t require intention to harm, just intent to deceive (***Derry***)
   2. P must **prove that D intended them to rely** on statement
   3. **Attempt to deceive must be successful** – if D can show that P would have made the same choice without the misleading information, the action will fail
      1. D’s statement must have made a **material contribution** to P’s decision
4. **Plaintiff must have** **suffered a loss** as a result of reasonably relying on the statement.
   1. Court limits this to reasonable losses

### Abel v. McDonald [1964]

Seller of a property knew that damage had occurred to the premises after the making of the contract for sale. Later **actively prevented that knowledge from coming to the notice of the purchaser**, by refusing to let the purchaser inspect the premises. This was **held to be deceit.**

## Passing off

Protect a plaintiff’s business by **preventing the defendant from presenting their goods and services as being those of the plaintiff**. Protects the **reputation and goodwill** of producers, and to prevent customers from being deceived.

Essentially - protects **unregistered trade marks**. Trader must not sell their own goods under the pretence that they are the goods of another trader.

**Elements:**

Lord Oliver in ***Reckitt & Colman Products Ltd. v. Borden Inc.* [1990]** (as cited in ***Ciba-Geigy Canada Ltd.***), the plaintiff must establish:

1. The existence of goodwill
   1. Power to attract/retain customers – requires that goods be identifiable as the plaintiff’s
2. **Deception of the public** due to a misrepresentation
   1. **Need not be intentional**
   2. Must be misleading to reasonable person not ‘moron in a hurry’ (***Morning Star***)
3. Actual or potential damage to the plaintiff

# Defences

Plaintiff has establishes tort has been committed. **Defendant has opportunity/onus to raise defences** before liability will be imposed.

**Three** main categories:

1. Consent
2. Protection of person or property
3. Assertion of legal authority

**Defence can raise multiple defences simultaneously**

## Consent (Overview)

**Basic principles:**

* Freestanding defence, **not an element of a particular tort**. (***Non-Marine Underwriters***)
  + Means that **burden of proving consent is on defendant**
* Defendant must show that plaintiff **consented to the specific tortuous act** in question, not the general activity, etc.
* **Complete defence**
* Can be **explicit** (writing/verbal/head nod, etc) or **implicit** (demeanour, participation, etc.)
  + **Implicit consent**
    - More difficult to determine than explicit consent
    - Failure to withdraw, or participartion in an activity can be taken as consent

### Non-Marine Underwriters [2000]

**Supreme Court unanimously agreed that consent is a defence in “traditional” battery cases. (Not an element of the tort)**

### Wright v. McLean (1956)

* + P and D engage in mudball fight, and D unknowingly hurls mud w/ rock, injures P
  + participating in activity **implicitly gives consent to risks** associated
  + consent valid as long as **playing within confines of rules** of game, and no malice

### Elliot

* + Do spectators consent to getting hit with a puck at a sporting event?
    - * Court found that he was an amateur hockey player and he **should have known** that pucks come off the ice and hit people. So awareness and still doing it is tantamount with consent.
  + **Knowledge and expectation** can inform understandings of consent

## Exceeding consent

Situation where there is clearly consent, but where the action complained of allegedly **goes beyond what was agreed to.**

### Agar v. Canning (1965)

* + Hockey game, where P hits neck w/ stick, D retaliates by smashing stick into P's face, Canning loses sight in his right eye
  + one can **only consent to reasonable expectations** **of risks** in game
  + when malice is involved (i.e. intention to injure), consent no longer implied
  + No duty to protect each other, and the context must be understood as a ‘hockey’ context (not serving tea), but there must be limitations on consent/expectations
  + Interesting note on damages: damages were reduced on grounds that there was provocation (stick to the neck/hooking)
  + Courts have been very reluctant to apply to criminal (and to a lesser extent tort) law to sporting engagements
    - However, courts are become more willing to intervene than they had in the past (Bertuzzi crim case)

## Competency to consent

* In order for consent to be valid, the person giving it must be capable of **understanding the nature and consequence** of the act.
* **Age, physical/mental illness, intoxication** (can be muddier), or other incapacitating factors may invalidate consent
* **Statute may categorically exempt certain persons** from consenting, i.e. persons under 14 to sexual acts

## Consent - Fraud (Deceit)

**Two** main requirements:

1. The defendant must have been **aware of (or responsible for) the plaintiff’s misapprehension**
2. The fraud must be directly **related to the** **nature of the act**, not a “collateral matter”.
   1. Must be at the core of the impugned act

### R. v. Williams [1923]

* Accused convicted of rape for convincing girl intercourse would improve her singing voice
* victim did not know she was engaging in a sexual act
* fraud (would help voice) was **directly linked to the tort** (rape) itself

### Hegarty v. Shine (1878)

* + - You can’t vitiate consent based on collateral consequences
      * Like getting a venereal disease from consensual sex
    - Traditionally, fraud as to harmful consequences did not vitiate consent
      * however this position has since been overturned in ***Cuerrier*** (HIV case)\*\*\* though not totally clear

### R. v. Cuerrier (1998)

* + - D, HIV-positive, lied to first woman, stayed silent to 2nd, had unprotected sex w/ both
    - even though deceit was collateral matter, it resulted in deprivation to victim
    - deprivation led to actual harm or significant risk of harm, that could have been reduced
    - consent might not have been given if the truth were revealed

## Consent - Mistake

P’s consent only vitiated by mistaken belief if **defendant is responsible for creating that belief**.

### Toews v. Weisner (2001) – Mistake not successful

* P told nurse D P's parents didn’t want her vaccinated, but D mistakenly thought mom agreed
* D's mistake in thinking consent was given is **not valid defence**, even if acted in good faith

## Consent - Duress

Consent procured as a result of duress (i.e. the use of force) is not valid

### Latter v. Braddell (1880)

* majority held that yielding to examination because of fear of force or being overpowered by violence does not constitute consent, but minority argued that there is no distinction between consent and reluctant obedience.

## Consent - Public Policy

Consent can be vitiated in some cases for reasons of public policy.

* I.e. a person cannot consent to being killed or seriously injured (***Lane v. Holloway*; *R. v. Jobidon***).
* Person cannot consent to someone exploiting a position of authority (as in the case of sex with parents, doctors, teachers, etc.)

### Nelitz v. Dyck (2001)

**Facts:** N was insured by Gore, who was paying for chiropractic treatments. Gore grew suspicious of the treatments, and made an appointment for N to see another chiropractor, D. N went to D’s office and submitted to the examination, though she didn’t sign any consent forms. Later, she sued Gore and D for battery.

**Two-part test**. Must prove:

* **Proof of inequality**, usually in the context of a “**power dependency**” relationship; and
* **Proof of exploitation** – considers the **type of** relationship in light of community standards.

## Protection of person or property (ppp)

## PPP – Self-defence

* **Defendant** must establish on a **balance of probabilities** that:
* He or she **honestly and reasonably believed that as assault was imminent**
  + Requirement of **immediacy**
  + Assessed **subjectively**
* That the **amount of force used to avert the risk was reasonable** in all of the circumstances.
  + Assessed **objectively**
* **Complete defence – a justification** 
  + **Justification** for a criminal offense is one in which a defendant claims that his action was **necessary** to protect himself or others from harm.
  + **Excuses**, on the other hand, are those in which a defendant admits to a criminal act, but claims that he is **not responsible** for his actions. An example of an excuse is the insanity defense
  + **Justified as a reassertion of right to bodily integrity**

### Wackett v. Calder (1965)

* + **Pre-emptive self-preservation, so long as it’s reasonable is permissible**
    - You are not obligated to take abuse
  + If he had right to defend himself, doesn’t have to respond necessarily with an exactly proportionate force, however can’t be excessive/beyond reasonable
    - In this case, found to be excessive
    - Excessive force needs to be understood contextually, trial judging makes finding
    - “More than was reasonably necessary”
  + Dissent says “could have walked away” – majority places greater value on right not to have to take abuse

### Brown v. Wilson (1975)

Suggests that provided the force was reasonable, the defendant is not responsible for the consequences.

### Beckford v. R [1987]

Thetest has both an **objective** and a **subjective** dimension. Need to look at the situation from the perspective of the D, and then judge **whether a reasonable person would have used the same level of force.**

## PPP - Defence of third parties

Same rules as in self defence, with the requirement that the use of force be reasonable.

### Gambriell v. Camparelli (1974)

* + Plaintiff hit Caparelli’s car (neighbours) while backing out of driveway.
  + Degenerates into a fight, Caparelli claims that plaintiff choked him
  + Mother of Caparelli notices, hits plaintiff with a culvirator
  + Where a person intervenes with the genuine (though mistaken) belief that someone is in imminent danger of harm they are justified in using reasonable force.
    - Reasonableness to be assessed by the **trier of fact**
  + Judge finds that force was reasonable (evidence such as lacerations as opposed to a skull fracture)

### R v. Lavallee [1990]

* Held that expert evidence **on battered wife syndrome** was admissible.
* Wilson J: **expert evidence can be adduced where the jury may be inclined to refer to myths and stereotypes**.
* Argued that it is appropriate for the jury to consider a **woman's experience and perspective** when deciding on what constitutes a **reasonable person's standard** for self-defence.

## PPP – Defence of Real Property

### Macdonald v. Hees

* Defendant forcibly ejected the plaintiff from a motel room
* Defendant claimed that if he did assault the plaintiff, justified by defence of property from unlawful entry/invasion of privacy
* Trespasser can’t be forcibly removed until he has been requested to leave and given reasonable opportunity to do so
  + **Reasonable initial force is permitted if trespasser enters forcibly**

**Found not to be the case here – plaintiff did not use force to enter.**

### Bird v. Holbrook

* Defendant placed a secret spring gun to prevent his prized tulips from further damage
* Plaintiff jumped fence to retrieve a bird, set off the trip gun and was hurt
* Court finds that not giving notice as to protective and potential harmful measures like a trip gun is not permissible
* Moreover, “protection” of property would mandate using the trip gun as a deterrent, which would necessarily require people to know about it
  + This was **clearly designed to hurt and capture trespassers – not a “defensive” action**

## PPP - Defence and Recaption of Chattels

* Defence of property principles general extend to defence of chattels
* Must request it be returned before force can used, unless the plaintiff uses force to take it (i.e. grabs it out of the defendant’s hand)
  + Context/case-specific determination
* Once a defendant is dispossessed, should use court action (or possibly recaption – which requires post-reclamation court proceedings) to
  + Defendant must first request possession be returned
  + Force may be justified if plaintiff ignores request
* Common law privilege to enter on someone else’s land to recapture stolen chattels (very limited right!)

## Public and Private Necessity

## Public Necessity – Complete privilege

* Allows for intentional interference with property rights of another to save lives/serve the public interest from external threats (fire, flood, etc.)
* Complete defence

### Surocco v Geary

* + Blowing up a house to prevent spread of fire found to be justified
  + Necessity must be demonstrated to the court, but if it is demonstrated no liability will be extended to the defendant

## Private Necessity – Incomplete privilege

### Vincent v. Lake Erie Tpt. Co.

* **Facts:** A steamship owned by Lake Erie Transportation Co. (D) was moored at Vincent’s (P) dock to unload cargo. A storm arose and the vessel was held secure to the dock causing $500 in damage to the dock. Vincent sued to recover damage to the dock and the jury decided in favor of Vincent. D appealed, alleging that it was not liable under the defense of private necessity.
* **Issue:** Is a party acting under private necessity liable for resulting damage to the property of others?
* **Holding and Rule:** Yes. The ship was secured to the dock deliberately to avoid damage to the ship resulting in damage to the dock. The court held that while D cannot be held liable for trespass due to private necessity, D used P’s property to preserve his own and D is therefore liable for resulting damages to P. If the boat had remained secured to the dock without further action by D, D would not have been liable. D was held liable because affirmative measures were taken to secure the boat.
* **Disposition:** Affirmed.

## Defence of discipline

At **common law**, parents and guardians can use force when dealing with children.

Common law rule is mirrored in **Section 43** of the Criminal Code, which states:

*“Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.”*

**Elements (*Dupperon*)**

* That the force was used “**by way of correction**” – i.e. that it was for the benefit of the education of the child; and
* That the forced used was **reasonable** in the circumstances.

### R v Dupperon (1984)

* Teenager was being very badly, father hit him with leather strap approx. 10 times (intended to be fewer but foul language prompted more)
* S. 43 of the Code justifies force “by way of correction”
  + Corrective force must be for the benefit of the education of the child
* TJ, upheld by appeal court, found that multiple lashing on bare buttock was too severe to be justified – defence of discipline not accepted

### Canadian Foundation for Children, Youth and the Law [2004]

SCC considered **whether Section 43 is unconstitutional** on the grounds that it violates a child’s right to security, their right to equality, or constitutes cruel and unusual punishment.

**The majority held that Section 43 was constitutional:**

**Key findings:**

* In order to be within the scope of Section 43, the use of force must be **sober, reasoned, and address actual behaviour**. In addition, it must be intended to restrain, control, or express symbolic disapproval.  Key point here is that the **child must also have the capacity to understand and benefit from the correction**. As a consequence, **force against children under two (or those with particular disabilities) cannot be justified under Section 43.**
* In order to be “reasonable under the circumstances”, the **force must be transitory and trifling, must not harm or degrade the child, and must not be based on the gravity of the wrongdoing.**
* Force **should not be used in relation to teenagers**, as there is a danger that it will induce aggressive or antisocial behaviour.
* Force **may not be applied using objects** (such as rulers or belts) or applied to the head.
* **Corporal punishment is not reasonable in schools**, although teachers may use force to remove children from classrooms or to ensure that they follow instructions.

## Defence of Legal Authority

Defence of legal authority can be raised in response to actions in battery, trespass to chattels, trespass to land, conversion, and other intentional torts.

**Statutory origins:**

* Section **495(1)(b) of the *Criminal Code*** authorises peace officers (as defined in Section 2 of the *Code*)to arrest (without a warrant) anyone whom they have reasonable grounds to believe has committed or is about to commit and indictable offence.
  + If a peace officer violates a *Charter* right – such as **Section 8** (right to be secure against unreasonable search and seizure) or **Section 9** (right not to be arbitrarily detailed or imprisoned) – then it is for the government to justify that violation under **Section 1**.
    - If the government cannot satisfy the requirements of Section 1, open to the judge to grant a remedy under **Section 24(1)** or exclude evidence under **Section 24(2).**

**Section 24:**

1. Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
2. Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

### Koechlin v. Waugh and Hamilton (1957)

* Plain clothes officers asked Koechlin and his friend for ID, Koechlin asked the officers for their ID before providing it, things escalated and the plaintiff ended up forcibly refusing to identify himself, was arrested and hurt in the process, told he was being charged with assaulting a police officer
  + Charge was eventually dismissed
* Court finds that the reasons that informed the officers belief that Koechlin was/had committed an offence were insufficient (how they were dressed/sauntering)
  + Given an absence of justification for arrest/detention, police has no right to use force to force an innocent citizen to identify himself

**Rules that emerge from this case:**

* The police **do not have a general right to ask individuals to identify themselves**. Instead they must rely on a recognized power, such as that inferred from Section 450 of the *Criminal Code* (need to have reasonable and probable grounds to suspect the individual questioned).
* Police need **to tell the individual why they are being arrested** – i.e. they are entitled to know on what charge or on suspicion of what crime they are being arrested.
* **Failure to inform the individual of the reasons for arrest can give rise to a claim for false imprisonment**.
* **If the individual is not informed, they are entitled to resist** the unlawful arrest.

**Amount of force that can be used to affect an arrest - Section 25(1) of the *Criminal Code*.**

**Section 25(1):** Every one who is required or authorized by law to do anything in the administration or enforcement of the law

**(a)** as a private person,

**(b)** as a peace officer or public officer,

**(c)** in aid of a peace officer or public officer, or

**(d)** by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

**Important to note the qualifications provided in subsections (3) and (4):**

**25(3)** Subject to subsection (4), a person is not justified for he purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

**25(4)** A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

**Courts have held that the police may be entitled to use deadly force to prevent the escape of a fleeing suspect.**

# Remedies

## Judicial remedies

## Damages

Usually awarded in order to **return the claimant to the position they would have been in** had the tort not taken place. **Corrective justice**.

Usually divided into **two** different types:

* Pecuniary (monetary)
  + Those that can be determined in dollars and cents – lost earnings, medical bills, repair costs
* Non-pecuniary (non-monetary)
  + Pain, humiliation, disfigurement – have no monetary equivalent/can’t be exactly calculated

**Can divide the class of special damages into five main headings:**

1. **Nominal damages**
2. **Compensatory damages**
3. **Aggravated**
4. **Punitive Damages**
5. **Disgorgement (restitutionary) damages**

### B(P) v B(W) (1992)

* Plaintiff sexually assaulted by father (defendant) age 5-18, raped when she was 20
* Charge with incest, but charges related to the rape were dropped
* Judge finds that defendant is “most traumatized sexual assault victim he had ever seen”
* Defendant didn’t defend suit for assault and battery, issue at trial exclusively damages
* Damage assessed in three categories:
  + **Non-pecuniary general damages**
    - $100,000
  + **Aggravated damages**
    - Judge decides that in this case aggravated damages should be assessed separated from non-pecuniary general damages
    - Assess $75,000 in aggravated damages for the gross breach of trust
  + **Punitive damages**
    - Where tortious actions are also crimes, to assess punitive damages would be redundant
    - Because not all of the alleged harms received criminal sanction, ounitive damages for the rape are appropriate - $50, 000

### Whiten v Pilot [2002]

* Reviewed punitive damages
* Defendant insurance company refused to pay out because they alleged that plaintiff had burned down their own house (despite all evidence to the contrary – when their own adjuster recommended paying the claim, they replaced him)
* Court awarded $1,000,000 in punitive damages, **Binnie provides comprehensive review**:
  + Not limited to certain categories (like the UK), can be awarded to punish or deter or denounce the defendants in any case
  + Only **serious malicious misconduct** warrants punishment/deterrence/denunciation
  + **Most likely to be awarded in intentional torts, but sometimes in nuisance, negligence, contracts**
  + **Criminal punishment doesn’t preclude punitive damages**, but is a factor to be considered
    - Changes court stance in B(P) v B(W)
  + Should be awarded with restraint, and then **only** if compensatory (including aggravated) damages are insufficient to accomplish the goals of the damages
  + No fixed ratios between compensatory and punitive damages, nor is the latter capped. Should be the **lowest sum necessary to accomplish desired end**.
  + **Juries should be informed** of functions and factors of punitive damages
  + Appellate courts can **intervene if punitive damages exceed “outer bounds of a rational and measured response”**
  + **S. 24(1) of the *Charter* allows for awarding of damages if *Charter* rights are violated** (both compensatory and punitive)

## Nominal damages:

* Small sum awarded to redress violation of a legal right, even in absence of actual harm
* The courts don’t encourage people to pursue nominal damages – often given as a fuck you. (Accompanied with an award of costs)
* Only awarded for torts that are actionable *per se* (i.e. can be actionable without proof of loss) (i.e. derived from trespass *vi et armis* like battery/trespass to land)

## Compensatory Damages:

* By way of monetary award, goal is to place the plaintiff in the position which he would have occupied if he had not suffered the wrong
* Can be very difficult to calculate

## Aggravated damages

* Form of compensatory damages which are awarded to compensate the plaintiff for **additional injuries to dignity** and similar feelings arising from the **reprehensible** conduct
* **Plaintiffs must establish** that they **suffered additional injuries** to their feelings
* The defendant ‘s conduct must be **highly offensive or particularly repugnant**, not just tortious
* Courts will often **infer the first requirement (establishing additional harms) from the second…to the effect that it’s more so about punishing the egregious act**
  + HOWEVER – **Court in *Vorvis* says that aggravated damages are NOT about punishing the offender but about COMPENSATING the victim**
* How do we assess these additional non-pecuniary harms?
  + In *Vorvis*, established that the approach is **subjective** not objective

### T.W.N.A v Clark

* **“intangible emotional injuries where the injuries are the result of the defendant’s high-handed conduct”**
* Non-pecuniary compensation in addition to pecuniary damages

## Punitive Damages

(Retributive, vindictive, exemplary)

* You can **cite *Vorvis*** for any definition of the types of damages as it offers a good discussion
* *Vorvis* says that punitive damages are for:
  + **Punishing things that merit punishment**
  + Doesn’t this fly in the face of corrective justice and seem more like a crim purpose?
    - Debatable!
* Traditionally, Canadian courts limited punitive damages to situations where defendant’s conduct warranted punishment
* Recently, courts have recognized that awards have **dual purpose: punishment and deterrence**

## Disgorgement Damages

(Restitutionary)

* Intended to **strip defendants of benefits they obtain as a result of their wrongdoing**
* Sometimes called restitutionary but **disgorgement is preferable term**
  + - Restitution means to “give back”
    - Disgorge means to “give up” – more appropriate because it means to give up regardless of source of intake
* Some torts support disgorgement, others don’t
  + - Typically proprietary torts (trespass to land, conversion, passing off) – breach of contract
    - Usually not available for assault, battery, false imprisonment

## Injunction

* Court order that directs a party to act in a particular manner
* Many types:
  + Prohibitive injunction preventing from doing something
  + Mandatory injunction compelling defendant to do something (i.e. tear down a sign)
* Person who violates an injunction may be found in contempt of court or imprisoned
* Injunctions originate in equity
  + **Discretionary**, not governed by the rules of the common law
  + You have to come with **clean hands** – only the wronged party can come (designed to protect the innocent). Even if someone wronged you, if it turns out that you also did something wrong, you won’t be able to use equity.
  + Courts have the **authority to grant both legal and equitable** responses
    - Equitable relief generally remains discretionary and **dependent upon whether a damage award would provide adequate relief**
      * So, for example if some is playing loud music every night so you can’t sleep….pretty useless to have them pay you for that harm. It still doesn’t help you sleep – you end up basically getting paid to suffer (i.e. **damages insufficient – need injunction/equitable remedy)**
* Granted for **continuing torts** (i.e. continuing trepass – get them out!)
* Granted often for nuisance (see example re: music)

## Declarations

Court issues a **formal statement setting out a person’s rights legal status**. Also referred to as a declaratory judgment. Note that declaratory relief is **usually only granted in very specific circumstances** – for example, where there is dispute over paternity in a family law case, or a question of whether a particular event is covered by an insurance policy. Don’t usually see this remedy in torts.

## Order of Specific Restitution

* Court makes an award that aims at **preventing someone from profiting from a wrong**.
* Based on the idea of **unjust enrichment**, a **restitutionary** award may be granted where the defendant has profited as a result of the tort
* Profit may exceed the amount that would have been paid in damages.

## Extra-judicial remedies

* **Recapture of chattels**
  + Plaintiff is allowed to use **reasonable force** to **regain or recapture his or her personal property** **when the defendant tortuously took the chattel** from the plaintiff’s possession, or obtained it as a result of duress or fraud.
* **Re-entry onto land**
  + Plaintiff is allowed to use **reasonable force to re-enter land where the defendant has - by way of trespass – entered and taken possession of the land**.
* **Abatement of nuisance**
  + Plaintiff may use **reasonable force to prevent or stop a nuisance**. Note that the privilege must be **exercised within a reasonable time**, and that **the plaintiff should give notice to the defendant**. Plaintiff is also obliged to **avoid any unreasonable or unnecessary damages.**

# Nuisance

Aim of the law of nuisance is to protect a plaintiff’s interest in and enjoyment of land from **unreasonable interference**

Two main ways in which nuisance differs from negligence:

1. In **negligence**, the court will look to the reasonableness of the defendant’s **conduct**. In **nuisance**, the court instead looks to the reasonableness of the **effects** of the defendant’s conduct.

* In **negligence**, the question is: Did the defendant behave unreasonably?
* In **nuisance**, the question is: Was the interference with the plaintiff’s enjoyment of land unreasonable?

1. In **negligence**, the question of proximity and the limit of liability is determined by a **general requirement of neighbourhood** (based on foreseeability). In nuisance, the question of proximity and the limit of liability is determined the by the need for **physical neighbourhood**

**Two types** of nuisance: **private** nuisance and **public** nuisance

**Private nuisance** is concerned with protecting people from interferences with their use and enjoyment of land

**Public nuisance** primarily protects the rights of the public at large from interference – mostly relates to things like rights of passage on public highways and rivers

## Private nuisance

Two basic situations:

1. **Where the conduct of the defendant causes physical damage to the plaintiff’s land**
   1. Courts tend to take a **very strict approach** to physical damage to property
   2. No need for the interference to be continual (***Tock v. St John’s (City) Metropolitan Board* [1989]**)
   3. Mere proof of physical damage is not enough to succeed in an action, must also prove that:
      1. The damage is not trivial – that is, it is beyond what the courts have often referred to as the bounds of reasonable tolerance. Put another way, the courts will not hold that the interference is unreasonable where the damage is minor
      2. The damage is not a result of the abnormal sensitivity of the plaintiff’s land
         1. I.e. ***Robinson v Kilvert (1889)*** – destroyed special paper; not found to liable: damage was result of abnormal sensitivity
         2. However, if the defendant is aware of the sensitivity and exploits it (particularly if done maliciously), court is willing assign liability (***Hollywood Silver Fox Farm Ltf. v Emmett [1935]***)
         3. BCCA further pushed liability for special sensitivity even in the absence of malic. In ***MacGibbon v Robinson [1953]*** found that D chose to blast stumps during fur-bearing mating season and could have waited a month at no personal inconvenience.
2. **Where the conduct of the defendant interferes with the plaintiff’s enjoyment of their land**
   1. Courts generally expect landowners to be tolerant of minor and occasional interference with their property. What constitutes “unreasonable interference” is a fact-specific determination.
   2. ***340909 Ont. Ltd. v. Huron Steel Products (Windsor) Ltd.* (1990)** sets out several factors to consider in determing ‘reasonability’:
      1. Character of the neighbourhood
         1. Rural/urban expecations
      2. Intensity of the interference
         1. No liability for occasional loud noises, bad smells, BBQ smoke, etc.
      3. ***Appleby v Erie Tobacco Co.* (1910)**: smells that the ordinary person would describe as “nauseating”, “sickening”, “very offensive” or “absolutely horrible” may amount to nuisances
      4. Duration of interference
         1. More than temporary or short-lived
      5. Time/day of the week
      6. Zoning
         1. Not determinative, but can help to assess the character of the neighbourhood/community standards
      7. Utlity of defendant’s conduct
         1. Social utility is not a defence, though it may influence whether the court finds that the behavior should reasonably be tolerated
      8. Nature of conduct
         1. A plaintiff that is being a dick will probably be treated less favourably, etc.
      9. Sensitivity of the plaintiff
         1. Standard is that or reasonable and ordinary resident – no liability for very sensitive plaintiffs (i.e. light sleepers)

**Non-intrusive interference**

***Pugliese v. Canada (National Capital Commission)* (1977)**

D’s construction of a sewer collector lowered the water table under the plaintiff’s land, which caused it to subside and harmed houses on the land.

**Point**: D was held liable in private nuisance even though the interference was caused by the removal of water rather than the invasion of some substance on to the property

**Note**: Courts are quite reluctant to find for the plaintiff in cases of non-intrusive interference

**General comments:**

**No private nuisance for:**

* Blocking a plaintiff’s view or preventing sunlight to enter the land
* Blocking of changing the circulation of air into the plaintiff’s property
* Building an ugly house or leaving a neighbouring property in disrepair or untidy

**Defences to Private Nuisance**

1. **Statutory authority and immunity**

* Where the conduct complained of is being carried out according to statute, there is no liability for nuisance.
* ***Took*** revised the rule
  + statutory authority will only be a defence in cases where the statute gives no discretion to the defendant as to the **time, location, or performance** of the statutory duty
  + Approach was criticised for being too uncertain – given that most statutory authorities are discretionary, hard to imagine a situation in which the defence would apply
* Resolved by the Supreme Court in ***Ryan v. Victoria (City of)* [1999]** – Court held that in order for the defence to apply, the defendant must show that it was practically impossible to avoid creating a nuisance
  + Not enough to show that reasonable care had been taken, but rather had to prove that the nuisance was an **inevitable and unavoidable part of the activity**
* **Note**: **Statutory immunity** refers to the situation where a statute specifically abolishes liability in private nuisance for a certain activity

1. **Consent**

* Although very unusual for this defence to succeed, it is a defence to nuisance if you can show that the **defendant consented to the conduct or actively encouraged it**

1. **Prescription**

* Where a defendant has carried out the activity continuously and uninterrupted for more than twenty years – and the plaintiff has been aware of the activity for that time and has not taken any steps to prevent it - then there is the defence of prescription
* This amounts to the court recognising and **protecting an easement** to carry out the activity

1. **Contributory negligence**

* Extremely rare to see this defence – plaintiff is usually not in a position to move away or do anything about the nuisance. Also, courts have been very unwilling to require the plaintiff to take steps to reduce the nuisance (such as keeping windows closed etc)
  1. It is no defence to claim that the defendant came to the nuisance (***Sturges v. Bridgeman* (1879) HL**)

**Remedies for Private Nuisance**

1. **Injunction**

* This is the most common remedy in nuisance cases, and courts look to all the circumstances when making a decision as to whether to impose an injunction
* **Three** basic forms of injunction:
  1. **Prohibitory:** Requires the defendant to **completely stop the activity**
  2. **Mandatory:** Requires the defendant to **adjust their activity** to reduce or eliminate the nuisance
  3. **Interlocutory**: Often also referred to as interim injunctions – issued prior to the hearing of the case – normally requires the plaintiff to show that there are serious issues to be tried, and that they will suffer irreparable harm if the injunction is not granted

1. **Damages**

* Most often awarded where the nuisance has ended, although can also be awarded in combination with an injunction. Can be awarded for both past and future losses.

1. **Abatement**

* This is essentially a self-help remedy. Courts have held that in certain circumstances a plaintiff can take matters into his own hands and take steps to reduce or eliminate a nuisance (especially where the nuisance is relatively trivial)
  1. Where abatement requires entry into the defendant’s property (i.e. to unblock a drain or to put out a fire), the plaintiff must give proper notice unless there is an emergency (like a fire or something else that threatens life or property)

# Defamation

The tort of defamation

* The function of the tort
  + Protect one’s reputation from unjustified attacks. Damage to one’s reputation can often be irremediable.
  + Aimed at compensating the plaintiff for damage to her personal/professional reputation AS WELL as vindicating the plaintiff’s reputation and deterring future defamatory publications
* The distinction between libel and slander
  + Slander – spoken defamation
    - Historically slander was considered to be less damaging because it’s transitory and thus less actionable
  + Libel – written defamation
    - Damage is presumed in cases of libel
  + Several Canadian jurisdictions have removed the distinction between libel and slander
* Defamation actions are still evaluation by **civil juries**
  + Evaluation by community (because the tort has a community-standards/perception element)
  + To prevent indirect censorship by the State

***The elements of defamation***

* + **Plaintiff** must prove on the **balance of probabilities** that the impugned statements:

1. Were defamatory
   * + - Not hard to prove – few actions fail at this stage
       - Plaintiff may allege that the statements are defamatory in their literal meaning
       - OR circumstances extraneous to the publication may give the statement defamatory meaning (either legal or true innuendo)
         * i.e. photo of a man and a woman – defamatory if it’s a married perhaps
       - OR if plaintiff can establish that an ordinary person would infer something defamatory from the remarks, without special circumstantial knowledge (either fale of popular innuendo)
         * I.e. Sim v Stretch
         * Not an intentional tort
       - Court will look at both the context of the words and the mode of publication. According to **Solomon** (page 935), the courts will normally focus on the publication as a whole, rather than focus on isolated pages (see: ***Slim v. Daily Telegraph Ltd.* [1968]**).
       - Where defamatory remarks are made as part of a radio or television broadcast, the court will consider gestures, facial expressions, and tone of voice (see: ***Vogel v. Canadian Broadcasting Corporation* [1982]**).
       - The fact that the defendant may not have intended the statement to be defamatory is irrelevant, as is the existence of a good motive (see: ***Dennis v. Southam Co.* (1954)**).
       - Things the court has found ARE defamatory:
         * Saying someone has a venereal disease;
         * Calling someone dishonest;
         * Calling a doctor a “quack”
         * Calling someone ugly
         * Claiming that a politician is habitually drunk
2. **Made reference to the plaintiff**
   * + - Historically known as “colloquium”
       - Must this be direct or is implication/membership of implicated group sufficient?
3. **Were published or disseminated**
   * + - Defamatory remarks are not actionable unless they are communicated to someone other than the plaintiff
       - Publication is satisfied so long as the statement is communicated to a third party who understands the statement
       - Anyone who had a part in communicating the defamation may be held liable
         * Every repetition of a defamatory remark is a new defamation (***Lambert v. Thomson* [1937])**.
       - No publication where a person makes a derogatory remark about the plaintiff to his or her spouse (***Wennhak v. Morgan* (1888)**).
       - No publication if the statement is overheard entirely by accident (***McNichol v. Grandy* [1931]**).

# Defences to Defamation

* **Justification**
  + Once plaintiff proves that statements made by defendant are defamatory, the court will presume that the statements are false.
  + Defendant must prove that the statements are true to use this defence
  + Complete defence to defamation
  + Key here is that the defendant must be able to show that the “whole of the defamatory matter is substantially true” (***Meier v. Klotz* (1928)**).
* **Absolute privilege**
  + Provides complete immunity in tort for statements falling within the privilege
  + Three categories of privilege:
    - Statements by executive officers relating to state affairs
    - Statements made during parliamentary proceedings
    - Statements made in course of judicial or quasi-judicial proceedings
* **Qualified privilege**
* No clear rules as to where this applies but generally must argue that you did it for social, moral, or socially-valuable reasons
  + Protects defamatory materials that are communicated on certain occasions, even if the statements are untrue.
    - Does NOT apply if the statements were made maliciously (unlike absolute privilege)
  + Applies to statements made by the defendant in protection of his or her interests
    - Person who is having his/her character attacked may defend themselves and have their comments covered by qualified privilege
    - Protected unless excessive or irrelevant to the original attack on the defendant
  + Applies in situations where the defendant publishes the relevant statements in order to protect the interests of another
    - Defendant must show there was a moral, legal or social duty to communicate the information
  + Applies to protect communications made in the furtherance of a common interest, a long as there is a reciprocity of interests
    - i.e. physician uses the defence to protect statements made in course of duty to examine prospective job candidates for the government (*McLoughlin v Kutasy*)
  + Applies to statements made in the protecton of the public interest
    - Some political speech
    - Communication between public officials over matters of public interest
* **Fair comment**
  + Provides a defence to those who comment fairly on matters of public interest
  + Defendant must show that the impugned material was:
    - A comment
    - Based on true facts
    - Pertaining to a matter of public interest
    - Malicious intent will generally invalidate the defence
    - Generally no need to show that the comments were “fair”, but of a titular misnomer
  + Reflects the importance of free speech in Canada
* **Consent**
  + Based on the *volenti non fit injuria* maxim
  + Applies when statements have been put into circulation by the plaintiff his/himself or by someone acting on his/her behalf
  + Also applies to situations where reasonable to conclude that the plaintiff consented to publication (can be express or implied consent, but typically construed narrowly
    - If defendant exceeds the scope of plaintiff’s consent, defence will not holdhat

### Sim v Stretch

* Housemaid works for defendant and then plaintiff and then the defendant again. Gets telegram that basically implies that the defendant is poor and irresponsible (doesn’t pay his housemaid)
* Lord Aitken
  + Two questions/stages:
    - Judge: Is it capable of being defamatory (question of law)
      * If yes, put it to the jury
    - Jury: Is it actually defamatory? (question of fact)
  + “**Right thinking person**” – not a test of reasonability, but a person who thinks in a way that reflects the community standard of opinion
  + Expressed the view that the definition in Parmiter v Coupland was probably too narrow and that the question was complicated by having to consider the person or class of persons whose reaction to the publication provided the relevant test. He concluded this passage in his speech:
    - '. . . after collating the opinions of many authorities I propose in the present case the test: **would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'**

### Williams v Reason

* **Facts**:
  + A sports correspondent on a national newspaper published two articles that accused a well-known Welsh rugby international, JPR Williams, of abusing his amatuer status by writing a book for money.
  + The particulars of Claim alleged that the Claimant was guilty of 'shamatuerism' (playing as an amateur when he was receiving payments or benefits).
  + The Defendants pleaded justification and both parties put forward conflicting interpretations of the International Rugby Football Board's regulations on amateurism
* **Issue**:
  + Whether a new trial should be ordered on the basis that the judge had misdirected the jury regarding the IRFB regulations
  + leave should be given to adduce fresh evidence that the Claimant had accepted cash payments for wearing a manufacturer's boots when playing, evidence which could have reasonably be obtained before trial and which the Claimant contended was inadmissible if used to justify the charge of abusing his amatuer status by writing a book for money.
* **Held:** Allowing the appeal
  + Only in a clear case would a court allow an unsuccessful litigant to introduce fresh evidence that could, with reasonable diligence, have been introduced before trial.
  + A new trial would be ordered because the judge had erred in ruling conclusively on the meaning of the IRFB regulations on amateurs and had interpreted the regulations incorrectly. At the new trial, parties could call any relevant admissible evidence that had not been called at the previous trial.
  + A Defendant is entitled to introduce evidence of other facts capable of justifying defamatory words in a wider sense than as pleaded by the Claimant provided those words were capable of bearing the wider meaning.
  + Notwithstanding the refusal of leave to call fresh evidence, the Defendants were entitled to call the boot money evidence at the new trial as it went to the sting of the libel, the allegation of shamateurism.
* Speaks to the need to **provide evidence for the defence of justification** in defamation suit

### Hill v Church of Scientology

* **Facts**:
  + Church of Scientology, held a press conference on the courthouse steps.
  + Read notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent, Hill (a Crown attorney.)
  + The notice of motion alleged that the respondent had misled a judge and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or his imprisonment.
  + At the contempt proceedings, the allegations against the respondent were found to be untrue and without foundation.
  + He commenced an action for damages in libel against the appellants.
  + Both appellants were found jointly liable for general damages in the amount of $300, 000 and Scientology alone was found liable for aggravated damages of $500, 000 and punitive damages of $800, 000. (Largest libel award in Canadian history)
  + Judgment was affirmed by the Court of Appeal/SCC
* **Issues**:
  + Whether the common law of defamation is consistent with the Canadian Charter of Rights and Freedoms and whether the jury's award of damages can stand.
* **Held**:
  + The Charter cannot rewrite the common law, though the common law should be interpreted according to general Charter principles. Applied ***Dolphin Delivery***. This did not mean that the Court had to adopt the American [jurisprudence](http://en.wikipedia.org/wiki/Jurisprudence) "actual malice" standard of libel.
  + Cory J (for the majority) quotes Diplock:
    - *Freedom of speech, like the other fundamental freedoms,is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual . . . whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand . . . the right of the public . . . to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.*
  + L’Heureux-Dube reaffirms Dolphin Delivery and Dagenais in her concurring opinion:
    - The Charter does not directly apply to the common law unless it is the basis of some governmental action. *(Dolphin Delivery)*
    - Even though the Charter does not directly apply to the common law absent government action, the common law must nonetheless be developed in accordance with Charter values. *(Dagenais)*

### Cherneskey v Armadale Publishers

**Facts**:

* As a result of a letter written by two law students and published in the correspondence column of the Sas­katoon Star-Phoenix, the appellant (an alderman and a practising [sic] lawyer in Saskatoon) brought an action for libel against the publisher of the paper and its editor.
* The letter concerned a petition which was presented to the Saskatoon City Council and which was apparently drafted with the assistance of the appellant.
* The petition presented on behalf of 54 citizens was directed against the establishment of an alcoholic rehabilitation centre in what was alleged to be a residen­tial section of Saskatoon and the report of its presenta­tion to council as published in The Star-Phoenix referred in particular to Indians and Metis whose use of the centre was alleged to be detrimental to the area.
* The only express reference made to the appellant in this report was contained in the last paragraph reading: "Ald. Morris Cherneskey told council he did not think the zoning laws of the area envisioned 15 people living in one place, and until it is fully clarified it should not operate as an alcoholic rehabilitation centre when the citizens of the neighborhood are concerned."
* Having read this article, the two law students pro­ceeded to write the letter in question to The Star-Pho­enix.
* The letter was published in a column headed "Editor's Letter Box" and was itself headed "Racist Attitude".
* The appellant alleged that the tenor of the letter was such as to charge him with being "racist" and with conduct unbecoming a barrister and solicitor. He claimed that the heading and the letter would tend to lower him in the estimation of right-thinking members of society generally and the citizens of Saskatoon in particular and that the words were defamatory.
* The trial judge refused to put to the jury the defence of fair comment on the ground there was no evidence that the words complained of expressed the honest opin­ion of anyone, either the writers of the letter, or any member of the editorial staff of the paper, or its publish­er.
* The judge was of the view that without such honest opinion he could not tell the jury that the defence of fair comment was available to the defendants.

**Issue**:

* Fair comment, jury direction

**Procedural History/Holding:**

* The jury found in favour of the plaintiff and awarded him $25,000 damages.
* On appeal, the Court of Appeal by a majority allowed the defendants' appeal and ordered a new trial.
* SCC overturned Court of Appeal decision and restored trial judgment
* Majority:
  + A **defence of fair comment is dependent upon the fact that the words in issue represent an honest expression of the real view of the person making the comment.** In the present case the evidence was clear that the letter complained of did not represent the honest expression of the real views of either the owner and publisher of the newspaper or of its editor.
  + The writers of the letter were not called to give evidence, and so **there was no evidence to prove that the letter was an honest expression of their views.** The only evidence available was that the editor said, with refer­ence to the writers, "we figured that was their opinion or their view or their observations".
  + This was not a sufficient basis to enable the respond­ents to rely upon the defence of fair comment. In these circumstances the trial judge was properly entitled to decide not to put the defence of fair comment to the jury.
  + **This does not mean that freedom of the press to publish its views is in any way affected, nor does it mean that a newspaper cannot publish letters expressing views with which it may strongly disagree.** Moreover, nothing that was said here should be construed as meaning that a newspaper is in any way restricted in publishing two diametrically opposite views of the opinion and conduct of a public figure.
  + As stated by Brownridge (dissent at Court of Appeal – quoted by SCC), "**what it does mean is that a newspaper cannot publish *a libellous*letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper."**