

TRESPASS TO PERSON – DAMAGE REQUIRED

Malicious Prosecution (*Nelles; Miazga*)

- Tension b/w public interest in effective & uninhibited prosecution of criminal wrongdoing AND freedom of individuals from groundless criminal prosecutions
- Tort strongly favours public interest (high standards for the cause of action)

1. D initiated proceedings against P

- D must have been actively instrumental in bringing the prosecution
- Restricted to criminal proceedings
- Merely providing info to police not sufficient unless false report deliberately given to police for purpose of prompting wrongful prosecution

2. Proceedings terminated in P's favour

- Conviction will prevent action for malicious prosecution b/c indicates that there was reasonable & probable cause for proceedings

3. No reasonable and probable cause for proceedings

- P must prove this element (absence of subjective/objective belief) – now only need objective
- **P must show either:**
 - a. D didn't honestly believe P was guilty; or
 - b. No reasonable person would have come to the conclusion that P was guilty**
- Subjective & objective (now just objective): subjective: actual belief in guilt; objective: rational basis for that belief
- *Miazga v Kvello Estate 2009 SCC:*
 - Court looked @ subjective element
 - RPGs concerned w Crown's professional, not personal view of merits of case
 - Lack of subjective belief of Ps guilt is inconsistent w the role of a public prosecutor in upholding the public interest
 - In reviewing whether there were RPGs, court should only consider facts available @ time
- **RULE: Don't need to consider subjective belief**

4. Malice on part of D

- Primary purpose other than of carrying law into effect; includes spite, ill will, & vengeance; also includes improper purpose
- *Miazga v Kvello Estate 2009 SCC:*
 - Malicious intent requires improper purpose that was inconsistent w the Office of the Crown Attorney
 - Honest but mistaken belief that there were RPGs doesn't support finding of malicious intent
 - Lack of subjective belief of RPGs is relevant in determining malice but doesn't automatically equate malice

5. Damage

- Loss of reputation, liberty, financial loss

Arguments for freestanding tort of stalking:

- Person knowingly (intentionally) or recklessly harasses another person in a manner that leads that other person to fear for her own safety
- No independent common law tort
- Current, piecemeal approach doesn't address the nature of the wrong
- Focus on the discrete acts may lead to the appearance that the actions themselves are insignificant, even though when look at as a whole they aren't

Intentional Infliction of Nervous Shock (*Wilkinson; Rahemtulla*)

1. Outrageous/Extreme Conduct

- Q of fact, measured against reasonable person
- Court more likely to find conduct is outrageous if P was vulnerable & D was aware of vulnerability
- Can be a course of conduct (*Clark v R*)

2. Intent (or constructive intent) to cause

- "As if" intent – treat D as if they had intended b/c reasonable person would have realized that could be the consequence
- Ds conduct must have been intended to have serious consequences for Ps psychological health & well-being
- Intent is often inferred from seriousness of Ds conduct & may also be inferred where mental distress to D was reasonably foreseeable – may also be inferred from extent & duration of harassment (*Clark*)

3. Nervous Shock

- Recognizable psychiatric illness or physical harm
- *Rahemtulla*: can have IINS even if no medical evidence of mental illness exists, provided that there are symptoms of depression present & the behaviour of D is 'outrageous'
- Must not have predisposed susceptibility to nervous shock
- Anguish, worry, emotional distress not enough
- Psychological injuries don't have to be linked to physical injury/symptoms (*Radovskis v Tomm; Rahemtulla*)
- Courts more willing to recognize severe emotional distress, particularly as Ds conduct is more outrageous
- The conduct actually has to cause the injury
- Limits (*Radovskis v Tomm 1957*):
 - P failed claim due to lack of evidence: no evidence of the distress she described

Arguments for freestanding tort of harassment

- Where conduct seriously annoying, distressing, pestering & vexatious
- Ex. minor sexual harassment, bullying, harassment by creditors or government officials, abusive or racist communications
- Key: activities are disturbing and upsetting
- Problem: this conduct not really covered by traditional intentional torts
- Courts only really willing to consider the Q of harassment where the P is the clear target of the harassment & suffers severe mental distress
- *Chapman v 3M Canada*:
 - No cause of action – ON human rights code provides exhaustive & exclusive scheme of adjudication & redress
- Critique of statutes: they are static – in tort law, would be able to grow

Arguments for freestanding tort of discrimination

- Would compliment equality provisions in existing human rights legislation
- Key challenge would be to balance equality w other legitimate legal interests, such as freedom of contract
- For now, SCC unwilling: *Seneca College v Bhaduria*:
 - Overturned ONCA decision that recognized a claim, b/c ON human rights code already provided comprehensive & exhaustive protection against discrimination so no need to recognize & develop complementary tort remedy
 - Laskin CJC: Code forecloses possibility of recognizing common law right/cause of action
- *Seneca* only excludes tort actions founded on breach of Human Rights Code
- Possible to argue that action based on independent tort such as an assault or IINS should be able to proceed

Arguments for:

- Having civil route available in tort can give more people access to the court, because human rights tribunal decides which cases to take & is underfunded
- If you establish it through tort, it will have capacity to grow

Counterargument:

- Judges should keep w intent of Parliament – if Parliament wanted to expand it, they would have

TRESPASS TO PERSON – ACTIONABLE PER SE

Assault (*Holcombe; Ireland*)

- Direct & intentional act that causes a person to apprehend immediate harmful or offensive bodily contact

1. Direct

- P must prove that interference is direct consequence of D's act
- Directed @ person who apprehends it
- **Immediate cxn b/w assaulter's act & person being assaulted**

2. Intentional

- Have to intend the Act, not the consequences
- Sufficient that D has apparent intent & capacity to carry it out
- Once P has proved direct act, up to D to prove that he didn't intend to cause P to apprehend immediate harmful or offensive bodily contact
- Can be transferred intent (ex. "Im here to kill David")

3. Causes Apprehension of imm. harmful/offensive bodily contact

- Causes: but/for actions of D would P have immediately apprehended harmful/offensive conduct?

- Immediate: act & apprehension sufficiently close in time – P must be able to prove that they expected the act or contact to happen immediately following the threat (threat must be capable of being carried out at once)

- Threats of future violence not sufficient (*Holcombe v Whitaker* 1975)

- Apprehension: was the apprehension reasonable?; P doesn't have to be afraid

- Harmful/offensive conduct: passive conduct can be enough

- Note: the less direct the act, the harder to prove causation

- Cdtl threat can be assault if in position to carry it out (*Holcombe v Whitaker*)

- *R v Ireland* (England) 1997:

- psychiatric injury can be bodily harm; words alone or silence can be assault
- Feared possibility of immediate personal violence due to caller's imminent arrival @ her door

Battery (*Bettel*)

- Direct & intentional act that causes harmful or offensive (reasonable person standard) physical interference.

1. Direct

- Same as for assault
- The less direct, the harder to prove

2. Intentional

- Basic intent: need to intend act that causes the physical interference, not the consequences
- Once directness established, D must prove absence of intent
- If violate person's bodily integrity, you have to bear the consequences even if they're greater than you had expected (*Bettel*)

3. Physical Interference

- Low threshold – physical contact sufficient (bodily contact not required, grabbing clothing can suffice)
- P doesn't have to be aware of the battery when it takes place (ex. giving blood transfusion to unconscious person – *Malette v Shulman* 1990)

4. Harmful/Offensive

- The harm doesn't need to be physical
- Aim is to protect dignity, so harm to one's sense of bodily integrity suffices

False Imprisonment (*Bird; Campbell*)

- Direct & intentional imprisonment of another person

- Protects right to liberty

1. Direct

- Same as assault & battery

2. Intentional

- P must prove intent
- Intend to do the act that gave rise to the wrong – must also intend the false restraint
- Has to be positive act on part of D where they have to be aware of the possibility of imprisoning someone

3. Complete Restraint

- Must be a complete restriction of P's physical liberty (*Bird v Jones*) - If reasonable means of escape, then not imprisoned

- Restraint can be by barriers, implicit/explicit threat of force, explicit assertion of legal authority (*SS Kresge Co*)

- Imprisonment can be psychological (ex. asked to accompany store security or police for questioning BUT if person goes voluntarily, then no imprisonment)

- No CDN authority on whether P must be conscious of their imprisonment – but reasonable to assumed on English law that awareness of confinement not necessary

- Fact that imprisonment was lawful treated as defence, not part of elements of offence

- Indirect false imprisonment? – ex, if E tells police to apprehend P, degree to which person who order police can make that decision speaks to their liability

Sexual Battery

- No distinct tort of sexual battery in CDA – instead, use traditional battery – in battery of sexual harm, D has to prove consent (in battery, don't normally have to prove lack of consent – just a defence)

Non-Marine Underwriters, Lloyd's of London v Scalera 2000 SCC:

- P in sexual battery case must prove that there has been physical contact of sexual nature, but not required to prove lack of consent (absence of consent presumed)
- D bears onus of proving consent – clear that D's fault arises from intentional violation of P's bodily security
- McLachlin: b/c purpose of battery is to protect personal autonomy rights, would be wrong to expect P to then have to prove the contact was non-consensual – this marks a rejection of formal equality of Ps and Ds & recognized power imbalance present in sexual abuse, as well as its gendered nature, inherent wrong to victims of sexual abuse, & persons who have suffered intentional invasion of their personal autonomy & dignity
- When clear evidence absent, can refer to **constructive consent** (objective test): whether Ps conduct lent itself to reasonable inference of consent to sexual contact – court will consider Ps demeanor & surrounding circumstances @ time of alleged assault
- Constructive intent: are there reasons to act as if P consented?
- Therefore, Court rejected idea that honest mistaken (but unreasonable) belief could be defence

Scalera Approach Problematic:

- Because didn't go into great detail on Q of constructive consent:
- Unclear whether D needs to adduce evidence about reasonable efforts to ascertain claimant's consent
- Objective approach makes Ps perception of events & experience of sexual violation irrelevant provided D can show there is a reasonable basis for their belief
- Constructive consent (CC) can lead to victim blaming for behaving in way that induced D into believing consent was present or for failing to resist where reasonable person would – often turns into assessment of whether P created the situation in which the D thought consent was given; may bring sexual history/conduct to issue
- CC premised on common sense idea about normal/reasonable behaviour/responses to unwanted sexual advance
- D could honestly believed the P was consenting & still found liable
- Rebuttal: reasonable person standard: society expects you to conform to minimum standards of conduct
- My idea: strikes proper balance: places responsibility on both parties to demonstrate consent/no consent

Solution?: New Tort of Sexual Battery

- Wouldn't allow for defence of implied consent
- ex. approach taken in *R v Ewanchuk* 1999 SCC: mistaken belief in consent can only negate MR for sex assault where D can show they believed the P communicated consent to the sexual contact in question
- Moving in that direction would harmonize it w criminal law & help w unsure boundaries of what constitutes CC
- Would lead to labeling the harm more appropriately
- Advantages:**
- P can control the case: choose facts brought before courts & what expert evidence presented
- Civil approach may have therapeutic/healing effects
- Disadvantages:**
- Can make things worse: cost/delay/stress can undermine therapeutic benefit
- When action defended, risk 2ndary victimization
- Expense, & P may not receive damages
- My idea: if lose, can be re-victimized (for 3rd time?)

TRESPASS TO PROPERTY

- Can be circumstances where you can bring an action in all 3
- **Trespass:** damages; **Detinue:** Want item back; **Conversion:** If want full value (forced Sale)

Trespass to Chattels (*Fouldes v Willoughby*)

- Protects possession rather than ownership – person in wrongful possession may bring action in trespass
- Actionable per se

1. Direct

2. Intentional/Negligent

- Once interference established, D must prove absence of intent
- Mistake is not a defence
- Knowledge that interference wrongful not required

3. Interference w Chattel in Possession of P

- Includes damage, destruction, taking, movement
- Remedy for trespass --> award of damages

Detinue

- Available where P – who has a right to the imm. Possession of the chattel – has asked the D to return it and the D refused
- Sue in detinue when you **want the item back**
- Damages assessed at time of judgment
- Action will fail if D returns the chattel before judgment given (but can award damages for detention)
- Main remedies are order from court requiring D to return chattel or award of damages for its value & detention

2 Other Ways to Recover Chattels (not torts):

1. **Replevin** – procedure by which court can order return of a chattel prior to resolution of an action in tort (typically ordered where P has right of immediate possession)
2. **Recaption** – legal right: person who has strongest right to possession can use reasonable means to recover the chattel; ex. if see your bike being stolen can use reasonable force to prevent theft or recover the bike

Remedy of Distress Damage Feasant:

- Occupier of land can seize chattel that's on his land if it has caused or is causing damage
- Chattel can be held until compensation paid
- Occupier can't sell the chattel, only hold it

Conversion

- D intentionally interferes w chattel in such a way as to seriously harm the Ps rights to it
- Ex. taking, destroying, or refusing to return the chattel
- **Act must so seriously interfere w P's rights** to the chattel that the D should be held liable for its full value (*Fouldes v Willoughby*)
- In assessing if interference serious enough to warrant conversion, court will assess: duration/kind/purpose of interference and amount of damage inflicted.
- Mistake is no defence
- Damages assessed @ time of conversion or when P becomes aware of it
- P must attempt to mitigate loss by replacing chattel as soon as practical
- P seeks damages, not return of item
- Not available for negligent interferences

Defences:

A. Consent

- No liability where possessor has consented to another entering his land (license)
- License can be express or implied (express can be contractual or gratuitous)
- If person fails to leave w/in reasonable time, can use self-help to eject (force has to be reasonable & proportional)

B. Necessity

- Emergency where necessary for D to trespass in order to prevent harm to themselves, the public, the possessor of the land, or 3rd party
- Peril must be immediate; must be no immediate alternatives
- D must be able to show that danger significantly outweighed the damage/loss caused to P

C. Legal Authority

- Authorized by statute (ex. search warrant)

Trespass to Land: (*Turner*)

- Actionable per se
- Purpose: to protect safety & privacy; property right is contingent on the right to exclude others

1. Direct

- Intrusion must be a direct result of the actions of the D
- If indirect then nuisance

2. Intentional/Negligent

- Burden of proof is on D
- Intention to intrude on to the land or interfere w it (even if you don't realize you were intruding)
- Mistake is no defence – ex. if you thought you had permission to enter or that it was yours, still liable (*Turner v Thorne*)

3. Physical Intrusion

- Has to be some physical contact of land by D

4. Onto Land in Possession of Another

- **Need to be in possession** to sue – wouldn't apply to nanny or hotel guest, who only have licenses to be on the property
- Doctrine of trespass by relation: P can sue in trespass even if they weren't in possession of land @ time of interference – provided no one else was in possession & they subsequently take possession – ex. D trespasses onto vacant land owned (but not controlled by) P – once P retakes possession, can sue in trespass
- Land: includes physical land & things affixed to it
- **Possession involves an element of control** of the property
- 3 main ways to commit:
 - a. Enter Land in possession of P w/o permission
 - b. Place object on P's property (doctrine of continuing trespass)
 - c. Possessor of land revokes visitor's permission or license to be on the property
 - *Harrison v Carswell* (1976) – possessory interest in common areas held by mall owner: private owner has absolute right to deny entry & revoke license of entry

Nuisance:

- Substantial & unreasonable interference w use & enjoyment of land in possession of another – requires proof of loss
- Protects equality of possession – liability may be imposed even if D's conduct was neither intentional or negligent

INTENTIONAL TORTS - DEFENCES

- Once P has established that tort committed, D has opportunity to raise defences before liability imposed
- A D can raise a number of defences simultaneously

1. Consent (*Non-Marine v Scalera*)

- Complete defence
- Since in CDA it's a defence, not element of offence, D has to plead & prove
- **D will have to prove that P consented to the specific act that gave rise to tort**
 - When person consents to an act, generally assumed that they have also consented to the risks normally associated w it
- Can be **explicit or implicit** (*Wright*)
- Implied consent:
 - Act/behaviour or lack thereof
 - Look at all facts of case before deciding whether implied consent present
 - If not malice, anger, mutual ill will, assumed that those participating in sports consent to ordinary risks associated w it (*Wright v McLean*)
 - Q of whether implicit consent will depend on whether the P was aware of the risks & protections customarily provided (*Elliott*)
- Exceeding consent:
 - Action goes beyond what was agreed to
 - General rule (Agar): when playing sport, consent to ordinary risk of injury; game conduct unpremeditated and passionate so don't judge by standards of polite social intercourse – look @ facts of each case to determine whether conduct went beyond what normally expected
- Competency to consent:
 - Person giving consent **must be capable of understanding the nature & consequences** of the act (issues of age, physical/mental illness, intoxication)
- Consent **can be invalidated** as a result of D's actions:
 - a. Fraud** (*R v Williams*)
 - i. D must have been aware of/responsible for P's misapprehension;
 - ii. Fraud must be directly related to the nature of the act (not a collateral matter)
 - *R v Williams* – 16 year old didn't realize she was engaging in sexual act
 - *R v Cuerrier* 1998 SCC – fraud vitiates consent where there is concealment of a significant risk of serious bodily injury (ex. HIV)
 - b. Mistake** (*Toews*)
 - Only if D is responsible for creating the mistaken belief
 - Difference b/w mistaken belief & when D mistakenly believes P consented
 - *Toews v Weisner* 2000 BCSC – mistaken belief → still liable (believed parents had consented to medicine)
 - c. Duress**
 - Consent procured as a result of duress not valid (*Latter v Braddell*)
 - d. Public Policy**
 - Can't consent to being killed or seriously injured (*Lane; Jobidon*)
 - 2 part test to determine whether power imbalance vitiates consent (*Nelitz v Dyck*)
 - i. Proof of inequality: power dependency relationship; and
 - ii. Proof of exploitation: concerns type of relationship in light of community standards

2. Protection of Person or Property

a. Self-Defence (*Wackett; Lavallee*)

- Complete defence
- Bodily integrity is important right; social contract: in exchange for protection from state give up right to solve disagreements by force – where state not able to protect, the right reemerges
- D must establish on BOP that:
 - i. Honestly & reasonably believed that assault was imminent** (needs to be immediate response to active threat); and
 - ii. Amount of force used to avert risk was reasonable in the circumstances**
 - Courts look @ nature of force & all surrounding circumstances – force should be proportionate to the threat or likely harm
 - D not required to consider how hard their blows are (*Wackett*)
 - Provided force reasonable, D not responsible for consequences (*Brown v Wilson*)
 - Subjective & objective test (*Beckford v R*)

- **D can act pre-emptively:** if someone is trying to batter you, you can react – if they have prior history of violence, that can be considered when deciding to act pre-emptively – problematic b/c both parties could claim self-defence in a fight

- No requirement to walk away

b. Defence of Another/3rd Parties (*Gambriell*)

- Same as self-defence w added requirement that use of force be reasonable & belief be reasonable (*Gambriell v Caparelli*)
- Appropriate for jury to consider women's experience & perspective when deciding on what constitutes a reasonable person's standard for self-defence (*R v Lavallee*) – exposes gendered reasonable victim
- **Battered women:**
 - Experience of immediacy is different
 - Serial abuse
 - Diminished responsibility defences are response of victim, not mad woman
 - Experience provocation differently → slow burn
 - Has to do w how law characterizes women, victimhood, reasonableness

- Provocation: it would cause reasonable person to lose self-control & D did (imm. After provoking conduct); partial defence (excuse) – CDN courts not sympathetic to provocation defence

c. Defence of Discipline (*CDN Foundation for Children*)

- Parents/guardians can use force when dealing w children; D must establish 1) corrective & 2) reasonable
- To be assessed in light of prevailing social standards, not D's standards (*R v Baptiste* 1980)
- *CDN Foundation for Children:*
 - i. Use of force must be sober, reasoned; child must have capacity to understand benefit (not <2 yrs)
 - ii. Must be transitory & trifling; not harmful/degrading, not based on gravity of wrongdoing
 - iii. No objects & not to head
 - iv. Corporal punishment not reasonable in schools – teacher can use force to eject from class

3. Defence of Legal Authority

- Statutory: everyone who is required or authorized by law to do anything in admin. Of law (incl. private person) if acts on RPGs & justified in doing what authorized can use as much force as necessary for purpose
- CCC 25(1) Police (or anyone assisting) can use reasonable force in doing what they are authorized to do
- *Koechlin v Waugh:* failure to inform of reason for arrest can be false imprisonment; then entitled to resist

ECONOMIC INTERESTS & DEFAMATION

- Modern tort law based on the idea that law should stay out of the market & doesn't seek to provide remedies for losses that arise from ordinary business practices or relationships
- This is contrary to position that torts is about corrective justice

Deceit (Derry)

1. D made false statement

- Liability can be imposed for misleading action (*Abel v McDonald*)
- Silence not actionable but in some cases law imposes obligation to speak up (ex. house that's unsafe)

2. D knew or was objectively reckless that statement false

- **P needs to show that D acted dishonestly**
- Proving someone was objectively reckless as to the truth of a statement can satisfy the requirement (*Derry*)
- Mistaken belief can be a defence (& doesn't have to be reasonable mistake) (*Derry*)

3. D made statement w intention of misleading P; and

- **Intention to mislead**, don't need intention to cheat or injure (merely suspecting that they will rely on statement not enough)
- Where event is reasonably foreseeable result, likely that court will assume that D intended the consequence

4. P suffered loss as result of reasonably relying on it

- Court will ask whether a **reasonable person** would have relied on the statement
- Reasonable people: know that salespeople exaggerate, less likely to rely on predictions about future, less likely to rely on opinions
- If D can show P would have acted in the same way even if no fraudulent representation, action dismissed (attempt to deceive must be successful)
- No requirement that the representation is the sole statement on which the P relied – but it must make a material contribution to his actions/decisions

Intimidation

1. D threatened to commit unlawful act

2. D's threat was effective

- Induced someone to act in particular way – objective test
 - Court doesn't need to be satisfied that D actually carried out the threat – only that it was made
- #### 3. P consequently suffered a loss

Conspiracy (*Allen v Flood*)

- General principles: not tortious to deliberately destroy someone's business, BUT if 2 people act together for same purpose, may be conspiracy (*Allen v Flood*)
- 2 types (planning is the tortious activity):
 - a. Conspiracy to injure
 - b. Conspiracy to commit an unlawful act
- Liable if unlawful (doesn't have to be tortious) and:
 - i. Scheme directed at P; and
 - ii. Ought to have known that scheme might hurt P
- Conspiracy may include social or family settings

Defamation uses civil juries:

1. Helps guard against prospect of indirect censorship by state (where P is public official); and
2. Necessary b/c these actions frequently demand reference to community standards & reasonable person standards

Passing Off (*Ciba*)

- Purpose is to protect P's business & protect reputation & goodwill of producers, & to prevent customers from being deceived

1. Existence of goodwill

- Power to attract & retain customers
- Exists where goods/services can be identified as belonging to P
- Only exists where goods identifiable (not generic)

2. Deception of public due to misrep

- Doesn't need to be intentional, just need an act of passing off – presenting your goods as being associated w or from the P
- Lord Denning: not if moron in a hurry

3. Actual or potential damage to P

Defences to Defamation

- Burden on D to establish defence on BOP

1. Justification (complete defence)

- If can show statements were true
- The whole of the defamatory matter is substantially true (*Meier*)

2. Absolute Privilege (complete)

- If can show falls into one of the categories:
 - a. By executive officer relating to affairs of state
 - b. During Parliamentary proceedings; or
 - c. Made in course of judicial or quasi-judicial proceedings

3. Qualified Privilege (complete)

- If can show that had moral, social, or legal duty to make the statement
- Fair & accurate reporting (*Hill v Church of Scientology*)

4. Fair Comment

- If comment made honestly & in good faith, based on true facts on a matter of public interest

5. Respnble Comm. on Matters of Public Interest

6. Consent (complete)

- Statements originated w P or someone acting on P's behalf

Defamation (*Sim v Stretch*)

- Purpose is to protect reputation
- Slander: words; Libel: concrete forms of expression
- P must prove elements on BOP
- Doesn't require proof of intention (Strict liability)

1. Defamatory Statement

- Once P proves D's statements defamatory, they are presumed to be false & burden shifts to D
- 3 ways to establish:
 - a. Allege that literally defamatory
 - b. Legal/true innuendo: by reference to matters beyond publication that are known to receiving publication & would give it a defamatory meaning
 - c. False innuendo: Ordinary person would infer defamatory meaning from statement even w/o special knowledge of the P or their circumstances (*Sim*)

- Q: **would the words tend to lower the P in the estimation of right thinking members of society?** (*Sim v Stretch*)
- Whether material capable of being defamatory is question of law:

1. Judge decides whether there is evidence of tort;
2. Jury decides whether material is defamatory in the particular case

- When considering whether defamatory court will look @ **context** of words & mode of publication (*Slim*)

- If radio/TV broadcast, will consider gestures, facial expressions, & tone (*Vogel*)
- Not relevant that not intended (*Dennis*)
- Critique: "right-thinking" test impractical in pluralistic society - CDN courts have replaced it w ordinary person test

2. Reference to P (*Knuppfer*)

- P must show on BOP that defamatory statement made reference to the P
- If doesn't refer to P by name, court will ask:
 - a. Capable of referring to P?
 - b. Would reasonable person conclude that about P?

3. Published

- P must show on BOP that communicated to 3rd party who understood the statement
- Every repetition is new actionable publication (*Lambert*)
- No publication where makes derogatory remark about spouse (*Wennhak*)
- No publication if overheard by accident (*McNichol*)

REMEDIES

Judicial:

1. Damages

- Usually to return P to position before (corrective justice)
- 2 types:

a. General

- For non-monetary harms (pain/suffering etc.)
- **Critique:** subjective experience or loss – could lead to arbitrariness

b. Specific

- To compensate for quantifiable monetary losses (lost earnings, damage to property, etc.)

i. Nominal

- Usually for torts that are actionable per se
- **Critique:** transaction costs outweigh value of damages awarded

ii. Compensatory

- Try to put P in same position as before
- Aggravated damages:
 - Awarded to compensate P for additional injuries to dignity etc resulting from D's reprehensible conduct
 - For intangible emotional injury resulting from D's conduct (*TWNA v Clark*)
 - Augment award of compensatory damages for non-pecuniary loss (*Vorvis*)
 - 2 requirements:
 1. P suffered damage to feelings as a result of the tort; and
 2. D's conduct was highly offensive or repugnant (courts usually infer 1st requirement from this one)
- Is it a subjective test? – would make sense but *Rookes* suggests feelings hurt must be reasonable

iii. Punitive

- Where conduct is of such nature that it merits punishment (*Vorvis*)
- Increasingly awarded as deterrent
- Rare; only awarded if award of compensatory & aggravated damages is insufficient to punish D

iv. Disgorgement

- Have to give up the profits

2. Injunction

- Court order requiring person to do something:
 - a. Prohibitive – stop doing something
 - b. Mandatory – do a particular act
- Equitable remedy: discretionary, clean hands principle, not granted where damages are adequate remedy
- **Critique:** can go to jail for contempt: criminal-type punishment w/o rigorous standards of criminal law

3. Declaration

- Court issues formal statement setting out a person's legal rights – only in specific circumstances

4. Order of Specific Restitution

- Court makes an award that aims @ preventing someone from profiting from a wrong (based on idea of unjust enrichment)

Extra-Judicial:

1. Recapture of Chattels

- P allowed to use reasonable force to regain or recapture personal property
- Can't do more harm than necessary to recapture

2. Re-entry onto land

- P allowed to use reasonable force to re-enter land where D has, by trespass, entered & taken possession of the land

3. Abatement of nuisance

- P may use reasonable force to prevent or stop nuisance
- Must be exercised w/in reasonable time & P should give notice to D
- P obliged to avoid any unreasonable or unnecessary damages

1 - Duty of Care (General)

1. Is there a recognized duty of care?

- Duty to rescue (CHART 2)
- Voluntary assumption of responsibility (CHART 2)
- Special Duties (CHART 2)
- Pure Economic Loss (CHART 3)
- Negligent Misrepresentation (CHART 3)

1a. Go through specific DOC analysis

- Duty to rescue (CHART 2)
- Voluntary assumption of responsibility (CHART 2)
- Special Duties (CHART 2)
- Pure Economic Loss (CHART 3)
- Negligent Misrepresentation (CHART 3)

Duty of care is the primary instrument of control over the extent of negligence liability

Duty of care is a question of law: answered by judge

***Foreseeability runs through everything but considered differently at different stages**

2a. Was the harm reasonably foreseeable? - Onus on P (*Childs*)

- Probability alone not determinative - consider **probability** and **risk** (*Haley v London Electricity*)
- Would a **reasonable person** (obj. standard) **anticipate it** as a probable consequence? (*Moule*)
- If events very **unlikely**, then less foreseeable (*Moule*)
- tort liability should only be imposed if you can deter harmful conduct & not just because there is a deserving P (*Nova Mink*)

Psychiatric injury (deal w it @ duty stage) - can potentially deal w this at remoteness but wherever you choose to deal w it explain why dealing w it there

- was the **P reasonably foreseeable**? (*Mustapha 2006*)
- were they a person of **ordinary fortitude**? (*Mustapha 2006*) - note: **thin skull** rule can still apply as long as they are a person of ordinary fortitude

No Duty of Care

Duty of Care

2b. Was there a sufficient degree of proximity b/w the parties?

- (*Cooper v Hobart*); Onus on P (*Childs*)
- not liable if not foreseeable (*Palsgraf*)
 - **particular P** has to be foreseeable, not world in general (*Amos*)
 - **relevant factors**: expectations, representations, reliance (*Cooper*)
 - proximity: **close & direct** relationship (*Cooper*)
 - does the relationship have a closeness such that it would be fair & just to impose a DOC in law upon the D?

Psychiatric Injury: need (*Alcock*):

- **relational proximity**: close ties of love & affection (ex. parent/child, spouses presumed - others (siblings): close ties of love & affection have to be proved by P)
- **locational proximity**: secondary victim must view shocking event w unaided senses
- **temporal proximity**: shock must be sudden (not gradual result on P's nervous system)

3. Should a new DOC be recognized? - residual policy considerations

- (*Cooper v Hobart*); Onus on D to rebut DOC for policy reasons (*Childs*)
- what is the likely **effect** of recognizing a DOC on other **legal obligations**, the **legal system**, and **society more generally**? (*Amos*)
 - a) **Does the law already provide a remedy?**
 - b) **Problem of unlimited/indeterminate liability?**
 - c) **Broad policy reasons to deny duty?**
 - Govt can make policy decisions not to implement certain policy, but if they commit to a certain policy (**operational decision**), then actions **implementing the policy** can't be negligent (*Just v BC*)

2 - Special Duties

1. DUTY TO RESCUE:

1. Is there a duty to rescue established by statute?

(*Matthews v Maclaren; Horsley v Maclaren*)

- ex. CDN Shipping Act: captain of boat has duty to attempt rescue when can be done w/o jeopardizing safety of vessel, crew & passengers

2. Was a rescue attempt made?

(*Matthews v Maclaren; Horsley v Maclaren*)

- **voluntary assumption** of responsibility

No Duty to Rescue

- can't be negligent in fulfilling it - burden on P to show that D's negligence was effective cause of harm (*Matthews v Maclaren; Horsley v Maclaren*)
- this DTR formed b/c when begin rescue, necessary relationship created

Duty to Rescue

- Courts open to possibility of recognizing DTR provided it can be based on some pre-existing obligation or relationship created by actions of 1 of the parties (*Matthews v Maclaren; Horsley v Maclaren*)

Note: **no CL duty to rescue** (*Osterlind*) - law of torts takes autonomy very seriously

CL generally doesn't make ppl liable for failure to act (non-feasance); for 3 reasons:

1. Offends personal autonomy
2. Commitment to capitalist notions of choice & min. legal interference w individual choices
3. More intrusive than obligations not to act

Arguments for general DTR:

1. Reflects commonsense understanding of morality
2. Removes inconsistency (why penalize those who voluntarily assumed duty and not those that didn't act in first place?)
3. Utilitarian: benefit outweighs cost to rescuer

2. DUTY TO PROTECT/WARN:

- **No duty to protect**

- **Duty to warn:** depends on facts of the case - must be very specific P group w very specific risk (*Jane Doe*)

VOLUNTARY ASSUMPTION OF RESPONSIBILITY:

3. Responsibility for the Intoxicated

- key: social v comm. host

No general duty of care wrt intoxicated individuals (*Jordan House*)

1. Is there a pre-existing relationship?

(*Jordan House*)

- ex. invitor/invitee; or D created particularly dangerous situation such that owe DOC to intoxicated participants (*Crocker*)

D owes DOC

Note: Social hosts different from comm. hosts (*Childs*):

1. Lesser ability to monitor consumption
2. Not heavily regulated
3. Don't profit from sale

2. Is P intoxicated due to breach of statutory requirement by D?

(*Jordan House*)

No DOC

4. Duty owed to rescuers (*Horsley v Maclaren*)

- Did D's negligence attempt @ rescuing 3rd party create a **new & distinct** danger that induced P to act?

5. Health Professional's Duty to Inform (*Haughian*)

- Doctors have duty to inform patients of **risk associated** w particular treatment (*Haughian*):
- **material risks** (big harm/low risk or low harm/high risk) and **non-material risks** that might be of **particular concern** to a particular patient
- **Onus on patient** to show that **reasonable person** would have refused treatment if aware of risks

6. Manufacturers Duty to Warn (*Hollis*)

- warning must be clearly communicated as to **risks related to normal use**
- manufacturer in better position to know risks - so have a duty to be **forthright as to all risks** (greater risk = higher duty to warn)
- **learned intermediary rule**: intermediary must be brought up to level of knowledge of manufacturer

7. Duty of Care Owed by Barrister (*DeMarco*)

- Attorney must exercise **reasonable care, skill & knowledge** in conduct of litigation & must be **properly diligent** in the prosecution of the case

5. Duties to Unborn Children

a) Pre-conception Wrongs (*Paxton*)

- where D carelessly causes injury to parent that then causes harm to subsequently conceived/born child → **no DOC to unconceived child** (*Paxton*)

- **no DOC owed by physicians to future children** of their female patients (*Paxton*)

- **Women don't owe DOC to future children** (*Paxton*)

b) Wrongful Birth & Wrongful Life

- liability arises where **physician carelessly fails to inform** woman that she faces **unusually high risk of giving birth to child w disabilities & denies** the mother opportunity to make informed decision

- usually dealt w in terms of **general DOC** owed by DRs to patients and in particular, duty to inform patients of risks

c) Wrongful Pregnancy

- typically carelessly performed abortions & sterilizations

- **disabled children:** parents entitled to damages for non-pecuniary loss for **pain & suffering** associated w giving birth to & raising disabled child (*Krangle*)

- can be awarded damages for **cost of caring for healthy children** (*Joshi; Suite*)

d) Pre-natal Injuries

- **"born alive"** rule: pretend that unborn child was already an independent legal person @ time carelessness act committed (*Duval*)

- **BUT mother doesn't owe DOC** to unborn child (*Dobson*)

- Pregnant women are foreseeable Ps (*Duval*)

3 – Duty of Care: Pure Economic Loss

Generally, law expects business people to manage their affairs to protect themselves from unanticipated losses through the use of Ks and insurance

5 CATEGORIES – Not closed but court reluctant to expand (*Martel Building*)

1. Negligent Misrepresentation

1. Did the Ds owe the Ps a prima facie DOC? (*Hercules*)

- was it **reasonably foreseeable** that someone would **rely on the statements** to their **detriment**?
- **proximity based on reliance**, when:
 - a) D ought reasonably to foresee that P will rely on his/her representation; and
 - b) Reliance by P would, in particular circumstances of the case, be reasonable
 - **factors** that indicate reasonable reliance:
 - i. D had direct/indirect financial interest in the transaction
 - ii. D was a professional or possessed special skill, judgment, or knowledge
 - iii. Advice/info provided in the course of D's business
 - iv. Info/advice given deliberately & not on a social occasion
 - v. Info/advice given in response to specific inquiry/request
- * deal w foreseeability of particular P & nature of losses in 2nd stage (policy)

No DOC

Note: can sue in tort and K on basis of negligent misrep; parties should limit their liabilities in their Ks if that's their intention (*BG Checo*)
- different if misstatement occurs during course of contractual negotiations (*Cognos*) → pre-*Hercules* so no longer good law?

2. Were there policy reasons for restricting/denying DOC? (*Hercules*)

- **balance deterrence** of negligent conduct against **socially undesirable** consequences to which imposition of indeterminate liability might lead
- will only owe DOC to someone that belongs to **class of persons** that might rely on the advice
- in *Hercules*: purpose of statements isn't to inform personal investment decisions

DOC Exists

Why negligence shouldn't be extended to pre-contractual negotiations

(*Martel Building*):

1. In negotiations someone wins & other loses – no real economic loss to society
2. Could discourage economically efficient & useful social conduct
3. Torts shouldn't be insurance for unsuccessful negotiations
4. Would result in courts examining details of pre-contractual negotiations – there are already K doctrines to deal w this (UI & Economic Duress)
5. May encourage unnecessary litigation

2. Negligent Performance of a Service (*Hofstrand Farms*)

- apply *Cooper* test
- at policy stage, consider: was there either detrimental reliance or voluntary assumption of responsibility? – if either present, recovery should be allowed

3. Negligent Supply of Shoddy Goods/Services (*Winnipeg Condominium*)

- usually where P can't show privity of K
- apply *Anns* test:
 1. Sufficient relationship of proximity b/w P & D such that D should reasonably have known that carelessness would result in damage to P?
 - when defect dangerous, proximity made out more easily – more likely for Court to find DOC (& Court won't be concerned about indeterminacy in the same way)
 2. Do policy issues negate finding of liability?

4. Relational Economic Loss (*Bow Valley Husky*)

- pure economic loss resulting from injury to property/person of 3rd party
- apply *Anns* test but consider categories in policy stage – recoverable only in circumstances (categories not closed):
 - a) where claimant has possessory or proprietary interest
 - b) general average cases (shipping context – goods overboard)
 - c) joint venture

5. Independent Liability of Statutory Public Authorities (*Wellbridge*) – ON

- EXAM: deal w this @ duty: can this public authority owe duty for these types of decisions?
- **ON EXAM**: 1st establish that they are public authorities then what type of authority they are exercising, then rest of analysis
 - **EXAM TIP**: if asked to advise public authority, try to characterize it as legislative or judicial rather than administrative decision
 - govt depts., elected officials, and bodies exercising delegated govt authority
 - key is **type of authority** they're exercising: public authorities can only be held liable in tort for losses resulting from negligent exercise of **administrative powers**; in other words, can only hold public authorities liable in negligence for results of **operational** as opposed to policy/judicial **decisions**
 - **2 types operational decisions**:
 - a) **Made to fulfill statutory public duty**
 - if no discretion as to how to fulfill it, then no liability from proper exercise of the duty
 - BUT if performs task carelessly or fails to perform the duty, liable for losses resulting from their negligence
 - b) **Made under statutory discretionary power**
 - look @ all surrounding circumstances (incl. budgetary restrictions, availability of qualified personnel & equipment) when determining appropriate standard of care (*Just v BC*)
 - instead of focusing on who makes the decision, consider whether decision-maker must take into account social, political, economic, financial, personnel & union considerations – these factors point to policy decision (*Brown v BC*)
 - **judicial immunity**: judges not liable (*BC Provincial Court Act*) – GOULD finds this problematic: seems to read that even if act maliciously, NOT liable; ALSO, judges should be subject to more scrutiny (and deference is a way of hiding the problem)

4 – Standard of Care

Standard of care: the behaviour required by D to satisfy DOC (questions of law & fact so answered by judge & jury)

1. Did the D act according to the SOC expected of a reasonable person in the circumstances? (*Arland*)

- consider 3 factors:

a) Probability & severity of harm (*Bolton; Paris*)

- the **greater the risk & potential harm**, the higher the SOC (*Bolton*)
- as probability increases, degree of harm can decrease and still be liable (*Bolton*)
- **test** (*Bolton*): **not liable in negligence if take all precautions a reasonable person would take in the same circumstances to prevent damage likely to arise from his/her actions**
- not reasonable to expect people to guard against risks that are **fantastic & far-fetched** (*Bolton*)
- where there is a **reasonable probability of harm & injury** resulting from it is **severe**, there is unreasonable risk (*Paris*)

b) Cost of risk avoidance (*Vaughn; Paris*)

- if cost of precaution is low, more likely to find negligence

c) Social utility/value of the conduct (*Watt*)

- even if probability & severity of potential loss high, D may be excused if activity is socially important

- acting in accordance w **standard practice is indicative of acting non-negligently** (*Gray v Stead*) BUT this is just another factor to consider, NOT a trump card (*Paris*)

Criticisms of common/general SOC:

- reasonable men test: middle-class white male (problematic in cases of harassment, discrimination, sexual assault, etc.)
- objectivity critique:
 1. some ppl may not be able to meet the standard – assumptions of what constitutes reasonableness isn't representative of certain groups of ppl
 2. Hides values & presumptions of Court in the term "reasonableness"
 3. Morally innocent & may be liable – may have made every effort to meet SOC & still fall short
 - didn't intend, mean, or have knowledge of doing
 - held liable for things they didn't mean to do
- social utility/value of conduct may disguise value judgments about what is valuable and what isn't

Special Standards of Care:

A. SOC Expected of Children (*Heisler*)

- liability depends on **capacity rather than age** – distinguish b/w younger children (tender age) & older children:
 - **tender age** (*Tillander*): **not** capable of **appreciating reasonable risk**, so not liable in tort
 - **above tender age**: **modified objective** test: did D exercise the care expected of a child of that **age, intelligence & experience**?
- **exception**: child involved in **adult activity** (ex. hunting, driving, snowmobiling) has to meet SOC of reasonable adult (*Ryan v Hicksson*)
- Typically, parents/guardians/supervisors **not vicariously liable for torts** committed by children under their care, but will be liable if **injury results from their failure to control/monitor** child's conduct (*Thomas*)

B. SOC Expected of Ppl w Disabilities (*Carroll*)

- **physically disabled** required to meet **SOC of reasonable person w same disability** (person w physical disability required to recognize limitations & not take unreasonable risks)
- applies to **mental illness** as well (*Fiaki*); where D suddenly & w/o warning struck w mental illness, will be absolved of liability if can show, on BOP:
 - a) As a result of the mental illness, had no capacity to understand or appreciate the DOC owed @ relevant time; OR
 - b) As a result of mental illness, was unable to discharge DOC b/c had no meaningful control over their actions @ time relevant conduct fell below objective SOC

C. SOC Expected of Professionals

- professional judged by **SOC of his profession** (*White*)
- GP held to SOC of reasonable, competent GP, incl. knowing when patient needs specialist (*Layden*)
- standard of DR is prudent & diligent DR in same circumstances – so **specialist can be held to standard of specialist** (*Ter Neuzen*)

5 – Causation & Remoteness

CAUSATION

Difference b/w factual & legal causation

ON EXAM: use BUT-FOR whenever possible; if use any other test for causation, have to make policy-based arguments for using it – say that courts will be reluctant to do that outside of the scenarios in the cases we've discussed

Problems w BUT-FOR test:
 - requires you to speculate what would have happened if that person had done the thing that they were supposed to have done
 - not how the real world works

1. Would loss of P have occurred but for the negligence of D? (*Kauffman; Barnett*)

CAUSATION MET

2. Exceptions?

a) Evidential Insufficiency (*Walker Estate; Cook*)

- when impossible to determine, on available, evidence, whether P's injury was but-for consequence of D's negligence as opposed to another non-tortious factor
 - **test** (*Walker Estate*): **material contribution**: did D's negligence materially contribute to the harm (outside the *de minimis* range)? – D's actions don't have to be sole cause of damages

- **ONLY use material contribution if 2 requirements met** (*Hanke*):

- P must establish that it's impossible to prove causation using but-for test & that this results from factors beyond P's control (ex. current limits of scientific knowledge)
- P must establish that D breached SOC & that his/her injuries fell w/in ambit of risk created by D's breach

b) Materially Increased Risk (*Hanke*) – use material contribution

- where P suffers injury (such as disease) that **may have** been caused by negligent actions of D – but may be **difficult to prove** that injury **wouldn't have resulted** but-for the actions of D
 - where you've materially **increased the risk of a particular injury**, that will be sufficient – but the extent to which you increased the risk might bear on how much compensation is provided (*McGhee*)
 - **causation inferred** in the absence of conclusive scientific proof – if D provides evidence to contrary, inference can only be made if weight of combined evidence supports inference of causation

c) Multiple Insufficient Causes (*Athey*)

- where **several factors contribute** but no single factor is but-for cause
 - apply **thin skull rule**: law doesn't exclude D from liability simply b/c other causal factors for which he isn't responsible helped produce the harm

d) Multiple, Independent Sufficient Causes (*Lambton*)

- each independent act was **capable** of causing a loss **on its own**
 - **substantial factor test**: if acts of one D would have led – by themselves – to the loss, then the D will be held liable

Note: no loss of chance in Canada: where sue for the chance to find out whether you'd be in the % category that recovers (ex. 25%)

CAUSATION NOT MET

* can deal w intervening cause in causation or remoteness but explain why you're dealing w it at the stage you are

REMOTENESS

A means by which courts seek to limit implications of a finding of factual causation (usually for reasons of policy & general fairness); role of remoteness is to ensure that liability is kept w/in fair & reasonable bounds

1. Was the outcome a reasonably foreseeable consequence of the D's negligence?

 (*Wagon Mound No 1*)

- only the type of harm suffered needs to be reasonably foreseeable, not the exact manner in which it occurred (*Hughes*)
 - can break causal sequence into discrete steps each of which is a reasonably foreseeable consequence of the last (*Greater Winnipeg Gas*)
 - psychiatric injury: was the harm reasonably proximate? (*Mustapha* 2008)

2. Was there an intervening act?

- intervening act is one that causes or contributes to P's loss after D's breach has taken place (Solomon)
 - CDN courts divide into 3 (Artificial) categories:
 1. Naturally occurring/non-culpable (ex. rain in Vancouver) – doesn't break COC
 2. Negligent intervening acts – can break COC & absolve original tortfeasor
 3. Deliberately wrongful/illegal acts – break COC unless original tortfeasor had specific duty to prevent the act

3. Was the intervening act w/in the scope of the risk created by the D's negligence?

 (*Bradford*)

- original tortfeasor can still be liable if **both subsequent negligent act & resulting additional harm** were a **reasonably foreseeable** consequence of original negligence (*Price*)
 - where intervening act **deliberate**, Court reluctant to hold original D liable
 - **Act of 3rd party still needs to be foreseeable** (*Hewson* → where act of 3rd party wasn't intervening cause b/c it was foreseeable that someone might be tempted to drive it)
 - **BUT contrast w Bradford**: for intervening act to break COC, needs to be unforeseeable
 - **ALERT**: unsettled area of law – may want to consider *Hewson* CA decision, or *Lamb* decision (English case), for *Lamb*, mention that it's not necessarily persuasive in CDA
Lamb v London (1981) ER CA: reasonable foreseeability not appropriate for all cases involving deliberate intervening acts of 3rd parties: may extend D's liability "beyond all reason," and lead to "bizarre and ludicrous" results
 - *Hewson AB CA*: no evidence to support conclusion that bulldozer being put in motion was reasonably foreseeable: no effective steps could have been taken to prevent 3rd parties tampering with it if they wanted to so it broke COC

History: directness (*Polemis*) → foreseeability (*WMI*) → 4thly type of harm (*Hughes*)

Where unfair or disproportionate to hold D liable, limit liability w remoteness

DUTY involves foreseeability of parties;
 REMOTENESS is foreseeability of damage

a) Initially, **directness test** (*Polemis*): loss isn't too remote if damage is direct result of D's carelessness
 - tries to bring factual & legal causation together but problematic b/c doesn't consider disproportionality
 - also, why would you deny liability for an indirect harm you could foresee?
 b) THEN, last wrongdoer doctrine

TOO REMOTE

NOT TOO REMOTE

It has become easier for Ps to establish that damage suffered wasn't too remote:

- Shift in focus from manner of accident to type of harm (*Hughes*)
 - critique (Robert Stevens): no right/obvious answer as to what constitutes same type of damage: frostbite classified as same as common cold, dead pigs same type of damage as sick pigs
- Willingness to treat accidents as sequence of discrete events & ask whether each step foreseeable (*Greater Wpg Gas*)
- Focusing on fairness when deciding on limits of foreseeability
 - Osborne: Court tends to favour P in the remoteness analysis
 * traditionally courts dealt w psychiatric injury at duty stage – today at remoteness stage

Note: GOULD likes Tony Weir's idea that the injury/harm complained of has to be somehow a **normal consequence** of the act complained of and not so abnormal that no one would have thought it could have resulted
 - essence: desire of courts to ensure that finding of causation (Factual & legal) is not so at odds w what we would ordinarily expect that is somehow offends against

Note: don't lose sight of value of arguing on causation – great policy area wrt proximity/remoteness

6 - Defences

Burden of proof is on the D, and they can argue multiple defences simultaneously

1. Contributory Negligence

- can give rise to apportionment even where no statutory scheme in place (Bow Valley Husky)
- D must show:
 - a) P didn't take reasonable care;** and
 - key Q: what is reasonable care?
 - a person who doesn't exercise all precautions as a **person of ordinary prudence** would observe, in accordance w prevailing safety standards, is contributorily negligent (*Beaulieu*)
 - in **emergency situation**, test is whether P did what an ordinarily prudent person might reasonably have done under the stress of the moment (*Walls*)
 - b) the lack of care contributed to the injury**
- if successful, Court will apportion liability (*Negligence Act 1996*)
- BC's Negligence Act: apportionment is on basis of fault – where distribution of fault can't be determined, liability split equally (s.1); damages can be offset if both parties are at fault (s.2); liability for legal costs allocated according to relevant degree of fault (s. 3)

Don't forget about limitation periods
- may want to mention on exam

2. Voluntary Assumption of Risk

- *volenti*: to one who is willing, no harm is done
- where a person engages in activity & **knowingly accepts accompanying risks**, they can't sue in negligence if subsequently injured
- can be by express (often K) or implied agreement
- **complete defence** – precludes recovery
- rare b/c courts prefer to apportion damages (today only arises in context of sports & interpreted very narrowly)
- elements:
 - a) D must prove P knew of & understood the risk he was incurring (precise risk, not just general risks);** and
 - need to consent to both physical and legal risk (*Dube*) – knowledge hard to prove
 - b) That P voluntarily assumed the risk**

3. Participation in a Criminal or Immoral Act (*Hall*)

- generally, no cause of action in tort where P is participating in illegal act
- can only be a defence to negligence where:
 - a) P stands to profit from his criminal behaviour;** OR
 - b) Compensation would amount to avoidance of criminal sanction**
- almost NEVER available

4. Inevitable Accident (*Rintoul*)

- if can show accident inevitable, D not held liable – BUT D would need to show **that couldn't have been prevented even w exercise of reasonable care**
- you'd almost never get to this because would fail causation or SOC

7 - Occupiers' Liability

Determines level of care owed by those persons who control land (occupiers) to visitors who enter on to that land (premises)

In BC, statute governs liability but look to CL to interpret statute; use statute for DOC and SOC then proceed w rest of negligence calculation

1. Is the place a premises? (s. 1)

- *Occupiers' Liability Act*: defined broadly; includes **land & buildings**, but also moveable places like cars, ships & aircraft (although only when not in operation) (s. 1)

2. Is the person an occupier? (s.1)

- *Occupiers' Liability Act* (s. 1): person w either:
 (1) **physical possession** of premises; OR
 (2) **responsibility for & control over** the condition of the premises, the activities conducted on the premises, and the persons allowed on the premises
 - key: w control comes responsibility - so don't have to be owner or even in physical possession of it, since all that has to be shown is that you had **control** over the premises; possible to have >1 occupier
 - **landlord** is occupier for purpose of Act, provided they have a duty to maintain & repair premises under terms of lease - but P can only recover if show that injury was result of landlord's failure to carry out repairs as specified in lease (s. 6)

Not Occupiers' Liability, Consider Regular Negligence Test

3. Was the Requisite SOC Met? (s. 3(1))

- CL replaced w **general standard of reasonable care** that **reasonably safe** (endorses same SOC as that found in tort of negligence)
 - under Act, SOC **applied broadly & relevant to**:
 a) foreseeability of damage
 b) degree of risk of injury
 c) gravity of threatened injury
 d) kind of premises
 e) burden of preventive measures
 f) practice of other occupiers
 g) purpose of visit

Note: occupier may also be subject to other acts that may impose higher SOC (ex. health & safety)

GO TO CAUSATION (Chart 5)

DOC Discharged

4. Do Any Exceptions Apply?

- Note: general duty of care also owed to **trespassers** except those w criminal intent or an **agricultural or rural land** - just can't injure them intentionally or act in reckless disregard for their safety
 - Occupiers can **restrict, modify, or negate** statutory DOC by express agreement or notice; w limitations (s. 4):
 a) reasonable notice must be given & only those privy to express agreement are subject to restricted standard
 b) can't be restricted/modified wrt those who are empowered to enter w/o occupiers' consent
 c) where occupiers bound by terms of K to allow entry to parties who aren't parties to the K (ie. 3rd parties), those entrants owed usual SOC & not subject to exclusions in K
 - DOC owed to **independent contractors** (s. 5): occupier not liable for acts provided it was reasonable to have retained independent contractor to do the work and reasonable care was taken in their selection & supervision

Common Law:

- who is an occupier?: control test: who has control rather than ownership (*Palmer*) - b/c occupier is in better position to know of dangers; to provide incentive to maintain safe premises, want to place liability on person in position to know about dangers & remedy them - this is about allocating that responsibility in the right place
- CL approach: graduated SOC based on the status of the visitor who was injured - occupier owes different SOC to different types of entrant:
 - a) **Licencees** - visitor who had express or implied permission to be on land
 - Occupiers' responsibility: to prevent injury from **hidden dangers** of which the occupiers had actual knowledge (relatively low SOC)
 - occupier must take reasonable care to protect licensee from an unusual danger that the occupier either knows of or ought to know of (*Bartlett*)
 - b) **Invitees** - visitor who had express or implied permission to be on land, AND occupier had economic interest in them being on the premises
 - Occupiers' responsibility: take reasonable care to **prevent unusual dangers** that the occupier either knew about or ought to have known about (higher than standard owed to licensees)
 - c) **Contractual entrants** - visitors whose right to enter land based on contract
 - Occupiers' responsibility: typically governed by the K but also **implied warranty** that premises were as **safe as reasonable care could make them**
 - d) **Trespassers** - someone who had no express or implied permission to be on the land
 - Occupiers' responsibility: no duty to make premises safe for trespasses **BUT couldn't intentionally or recklessly injure** a trespasser they knew was on the land
 - BUT over time, courts relaxed rules, making them **friendlier to Ps**:
 1. treat child trespassers as licensees on basis of fictionalized consent
 2. distinguish b/w different types of trespassers
 - **THEN**: occupier who **knows of presence** of trespasser or **that it's likely**, must act w/in what is called **common humanity to prevent injury** resulting from **dangers of which he is aware** (*Veinot*); not especially onerous:
 1. No duty to inspect the property for danger;
 2. Duty id dependant on variety of factors w/in the discretion of the Court, such as:
 - i. degree of danger on the land
 - ii. age of trespasser
 - iii. reason why trespasser was on land
 - iv. knowledge & resources of occupier
 - v. cost of preventive measures

8 - Nuisance

A. Public Nuisance (typically deals w rights of way etc) – s. 180 CCC

B. Private Nuisance

1. Did the conduct of D cause physical damage to P's land?; 3 elements:

elements:

a) Physical damage

- strict approach: almost always seen as unreasonable interference
- no need that continual – isolated incident caused physical damage suffices (*Tock*)

b) Damage not trivial

- beyond bounds of reasonable tolerance

c) No abnormal sensitivity (*Robinson v Kilvert*)

- BUT cause of action can exist where D knew the land was particularly sensitive & acted w **malice or spite** (*Hollywood Silver Fox Farm*)
- **malice** requirement may no longer be necessary (*MacGibbon v Robinson*)



2. Did the conduct of D interfere w P's enjoyment of their land?

- Courts expect landholders to be fairly tolerant of occasional interference w enjoyment of their land – especially in an urban environment where a certain amount of give & take is expected
- can also have non-intrusive interference (ex. removal of H2O) (*Pugliese*)
- BUT ultimately question of whether there has been unreasonable interference **will depend on all of the circumstances** of the particular case @ hand; **factors** to consider (*340909 Ont v Huron Steel*):

a) Character of neighbourhood

- generally, interference in rural neighbourhoods viewed as more significant

b) Intensity of interference

- must be of sufficient intensity to be intolerable to ordinary Canadian citizen (no liability for occasional loud noises, barking of a dog, smoke from BBQ, or transient bad smell)
- smells can be actionable if ordinary person would describe them as nauseating, sickening, very offensive, or absolutely horrible (*Appleby*)

c) Duration of interference

- more than temporary & short-lived

d) Time of day & day of week

- particularly relevant for noise – reasonable 4 ppl to expect less noise @ night

e) Zoning designations

- compliance w zoning regulations not a defence to private nuisance BUT can be referred to when determining character of neighbourhood & appropriate standard of tolerance to be applied

f) Utility of D's conduct

- fact that D's conduct/use of land is beneficial to public isn't defence to private nuisance, BUT can be taken into acct when court determines whether it should be tolerated and therefore whether interference is reasonable

g) Nature of D's conduct

- less likely to protect land use of a D who acts unreasonably & is motivated by desire to cause discomfort or annoyance

h) Sensitivity of P

- no liability if P abnormally sensitive – standard reasonable ordinary resident in same geographic area

Not Private Nuisance

Private Nuisance

Nuisance & Negligence – Difference

1. In negligence, Court will look to reasonableness of D's conduct; in nuisance, will look to reasonableness & effects of D's conduct
2. In negligence, proximity & limit of liability determined by general requirement of neighbourhood; in nuisance: proximity & limit of liability determined by need for physical neighbourhood
3. GOOLD: nuisance is like an un-evolved negligence action: prior to negligence, needed physical neighbourhood to ground nuisance – arguments for rolling nuisance into negligence

Note: can use nuisance to maintain status quo of neighbourhood

Aim is to protect 's interest in & enjoyment of land from unreasonable interference

Nuisance & Trespass to Property – Difference

- trespass: direct interference & intention; nuisance: don't need intent
- injunction is available in nuisance, not in trespass to land (**so if want injunction, go through nuisance**)
- **benefit** of going through **trespass to land**: don't need to prove actual damage or harm
- if using trespass to land, have to show directness but not physical damage piece
- **critique**: to bring action in nuisance need to have an interest in land (socioeconomic, class problems – wealthy people can maintain particular uses of land against others – this could also exclude a whole class of Ps)

Not Nuisance:

- blocking view
- blocking or changing circulation of air to P's property
- building an ugly house
- leaving a neighbourhood property in unused or untidy
- rise of traffic & undesirable people

Defences to Private Nuisance:

1. Statutory Authority & Immunity

- have to prove that the nuisance was an **inevitable & unavoidable** part of the activity (*Ryan v Victoria*)

2. Consent

- rarely successful
- applies where you can show that **D consented** to the conduct or activity engaged in

3. Prescription

- where D has carried out the activity **continuously & uninterrupted for >20 years** & **P has been aware** of the activity & didn't take steps to prevent it

4. Contributory Negligence

- very rare
- Courts generally **unwilling to require P to take steps to reduce the nuisance**
- Not a defence to say **P came to nuisance** (*Sturges*)

Remedies for Private Nuisance:

1. Injunction

- most common; courts will consider all circumstances in deciding whether to impose
- a) Prohibitory** – requires D completely stop the activity
- b) Mandatory** – requires D adjust activity to reduce or eliminate nuisance
- c) Interlocutory** (interim injunction) – issued prior to hearing the case – P typically has to show that there are serious issues to be tried & that they will suffer irreparable harm if injunction not granted

2. Damages

- most often awarded where nuisance has ended, but can be combined w injunction – can be awarded for both past and future losses

3. Abatement

- self-help remedy
- where requires entry onto D's property (ex. to put out fire), P must give proper notice unless there is an emergency (ex. fire threatens lives or property)

9 – Strict and Vicarious Liability

Liability can be imposed without the need for proof of fault

Strict Liability for Escape of Dangerous Substances (*Rylands*)

1. Was there a non-natural use of the land?

- must show that use was **dangerous, extraordinary**, and of **no general benefit** to community; key Q: did particular use of the land create increased danger?
- some **activities** are so **inherently dangerous** that it will be **assumed** that the use of the land is **non-natural**: storage of water in bulk, manufacture & use of explosives, storage of nuclear materials, storage/use of biological agents
- in **other instances** (where danger less obvious), courts will assess dangerousness according to **factors** that include (similar to assessment of fault in negligence):
 - degree of danger of land use
 - utility & normality of land use
 - circumstances of time & space

2. Was there an escape of something likely to cause mischief?

- requires: **mischief & escape**
- if establish non-natural use based on dangerous, then it almost inevitably follows that the thing capable of causing mischief
- requirement of **escape strict**: so can't claim if injured on D's land (*Read*)

3. Was damage caused?

- no liability for unforeseen consequences of a non-natural use (*Cambridge Water*)

4. Are any defences available to the D?

- Consent** – P expressly/impliedly consented to D's non-natural use land; sufficient to show that P knew of dangerous use & entered or remained in place of danger
- Mutual Benefit** – where activity of benefit to D, court less likely to view as non-natural use (*Tock*)
- Default of P** – where escape partly b/c o P, no liability – complete bar
- Act of Stranger or God** – intervening events must be so unforeseeable that D couldn't have guarded against them (seems to contradict strict liability piece)

**D
Liable**

**D Not
Liable**

Vicarious Liability

Not a separate tort, but a demonstration that in certain situations law of torts holds one person strictly liable for acts of another (typically employer-employee relationships)

1. Was the individual who caused harm an employee and not an independent contractor?

- employee is someone under **direct control and supervision** of employer → look for evidence that employer was empowered to tell employee how, when, and where to do the work
- Courts have supplemented it w other tests:
 - Entrepreneur test**: consider ownership of tools, chance of profit, risk of loss (*Montreal Locomotive*)
 - Organization test**: focus is on extent to which employee has been integrated into employer's business organization
- central Q is whether the person who has been engaged to perform the service is **performing them as a person in business on his own** (*Sagaz Industries*); look to (*Sagaz Industries*):
 - level of control employer has over activity
 - whether worker provides own equipment
 - whether worker hires own helpers
 - degree of financial risk assumed by worker
 - degree of responsibility for investment/mgmt. by worker
 - workers' opportunity for profit in performance of the

2. Was the harm caused by the employee in the course of his or her employment?

- employer only liable when some **cxn b/w wrongdoing & employment** relationship
- even if conduct unauthorized may still be held to be w/in course of employment if carried out for purpose of employment
- fact that the conduct expressly prohibited by employer doesn't rule out liability
- **express prohibitions** that forbid any work being done are **effective**, but **prohibitions on the way in which the work is done are not** (*Canadian Pacific*)

Vicarious Liability

No Vicarious Liability

* Consider Baxley