

Overview of a Torts Case - steps

1. offense
2. P visits lawyer to inquire about suing under tort
3. potential of case is looked at by lawyer: issue of limitation period, which court
4. P files a Statement of Claim (file and serve)
5. D files a Statement of Defense
6. prospect of settlement
7. trial and costs - onus of proof is on P but BoP, not BRD, each tort established by certain elements, evidence, defenses - broad duty to disclose, damages
8. appeals in errors of law (errors of fact/errors in amount of damages difficult to appeal)

Chapter 3: INTENTIONAL INTERFERENCE WITH THE PERSON (45)

1. **Introduction - Intentional Torts** - intentional interference with a person (derived from writ of trespass) (tort law has high respect for personal autonomy)

CRIMINAL	TORT
the state (Crown) charges	private law suit by individual
the criminal proceeding may not give you what you want	you can ask for what you want
not focused on monetary damages	focus on DAMAGES and compensation
Can't guarantee there will even be a criminal charge - the Crown decides	YOU decide to charge
criminal case may be weaker	case may be stronger
BRD (beyond reasonable doubt)	Balance of Probabilities
tighter exclusions, rules, standards	looser system

2. Basic Principles of Liability (45)

- a. **VOLITION** - Is the conduct voluntary? The defendant must have had control over his or her physical actions, directed by his or her conscious mind (ie sleepwalking) - very rare occasions - usually with children or those with a mental illness

SMITH v. STONE (1647) - not trespass because D carried on to land (no volition)

- b. **INTENT** - Did the person intend to do the prohibited conduct? - actor's desire to bring about the results or consequences of his/her act
 - i. **Objective Intent** - would a reasonable person foresee this? (should have known)
 - ii. **Subjective Intent** - did THIS person intend the conduct?
 - iii. Imputed Intent - D did not intend consequences but they were certain to result
 - iv. Transferred Intent - intends v. one party but unintentionally commits on another

3. Related Issues: Motive, Mistake and Accident (48)

- a. **MOTIVE** - P must prove D's conduct was intentional, but does not need to establish motive was blameworthy
- b. **DURESS** - not a defense in tort law, but used to assess damages
GILBERT v. STONE (1648) - D feared for his life (trespass because of threats by 12 armed men) but duress is NOT a defense
- c. **PROVOCATION** - NOT a defense but used to mitigate damages - shows motive - must be very sudden reaction to sudden provocation - no time lapse
MISKA v. SIVEC (1959) - D intentionally shot P (cut off in car, threatened with knife, chased to his house), self-defense argument not allowed since D's actions were "careful and deliberate and belied the existence of any sudden and uncontrolled passion"
- d. **MISTAKE** - D intended consequences of act but consequences have different factual or legal significance than they thought - NOT a defense but relevant in mitigating damages - imp. we want people to know the law, not remain ignorant
HODGKINSON v. MARTIN [1929] - D thought he had authority to remove P from office premises - unlawful act of trespass but done in "sincere mistaken belief" so \$10 damage

4. INTENTIONAL TORT OF BATTERY (58)

- intentional physical interference of a person, offensive to the reasonable person
- BETTEL v. YIM (1978)** - shaking meets basic elements of the tort; defense? his own testimony says he was shaking him to get a confession out of him, therefore, not self-defense; provocation used for mitigating damages only
- ISSUE: How much of the injury is D responsible for? How far does intent have to go? Did all of the consequences need to be intentional?*
- PRECEDENT = You are responsible for any event that happens as a result of your intentional act (causative rel'p - head butt happened because of shaking)- protects P

5. ISSUE OF CONSENT - if the conduct complained of was consented to, no tort est.

1. Actual Consent
2. Mistake - person did not consent, but D made an honest, reasonable, but mistaken assumption that the person consented (i.e. in wrong place - body checking rink v. non-body checking rink)
3. Implied Consent
D must prove defense of consent (BoP), if not brought up by D, court need not consider
Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 1 S.C.R. 551 - D tries to argue that for sexual battery cases, P should have to prove lack of consent - courts reject this (D must defend their act, re-victimization, not inherently consensual, no evidence for flood-gates argument)

6. INTENTIONAL TORT OF FALSE IMPRISONMENT (70)

- where defendant intentionally imposes a complete restriction on an individual's liberty, without legal justification (not just severe inconvenience) - need not show damages
- BIRD v. JONES (1845)** - person being blocked off from going across bridge is NOT complete restriction (other avenues, no boundaries) - dissenting voice says too loose

- court may have to determine if there was a **reasonable** means of escape known to P - need not risk physical injury but some inconvenience expected

Why consider the DISSENT?

- 1) time can come where previous dissenting voice should now represent majority
- 2) dissenting voice helps with allowing appeals to higher up courts
- 3) other court (CA, etc.) may use it since not bound to follow majority
- 4) signals that if there are more extreme cases which may result from majority, minority could be more reasonable
- 5) part of oath to be honest about their own opinion
- 6) gives guidance to legislatures who wish to change the law
- 7) concurring judgment - different reasoning or "in this case, I agree, however, if in other situations..."

a) FALSE ARREST - one category of F.I. in which restraint is imposed by an assertion of legal authority - *Charter* demands high standards for those who detain, arrest, etc.

CAMPBELL v. S.S. KRESGE CO. (1976) - police officer acting as security guard for K-Mart imprisoned P (for short time) - use of badge seen as threat (she felt had no choice)

b) CONSENSUAL RESTRAINT - P agreed to restraint

HERD v. WEARDALE STEEL [1915] - the refusal to bring mine worker back up until end of shift did not amount to false imprisonment - he agreed to terms

Defense of Justification for Tort of False Imprisonment

- the right of a police officer to detain - Was detention justified in law? Proper grounds?

s. 9 "Everyone has the right not to be arbitrarily detained or imprisoned."

s. 8 "Everyone has the right to be secure against unreasonable search or seizure." -

Were your basic *Charter* rights respected?

Basic Standard of When a Detention is Unreasonable or Not (policy balance)

1. When a police officer is going to arrest someone - there must be **reasonable and probable grounds** that they have committed an offense

a) officer must have subjectively believed it is reasonable and probable grounds

b) objective requirement - would a reasonable police officer believe it too?

c) not suspicion, even a high degree of suspicion (ie huddled in alley)

d) arrest power allows searching for weapons, evidence, etc.

e) can pass special laws to increase search and arrest powers due to circumstances

2. When a police officer must do an investigative detention - allows them to detain someone with lower grounds for detention - must be "**reasonable suspicion that a person has committed an offense**" - to "freeze the scene" - only temporary, no search for evidence, just pat down for weapons, not if only pure hunch

WARD v. CITY OF VANCOUVER 2007 BCSC 3 - this Vancouver lawyer's rights under s.8&9 were infringed - original detention only to be temporary, because of P's actions, he was arrested for breach of the peace - should have not been kept in jail after PM left the scene, should not have been strip searched (unreasonable search for breach of peace, no probable grounds to arrest for assault)

7. MALICIOUS PROSECUTION (79)

A formally accused suing for improper prosecution

Why receiving high profile/raised in importance?

- 1) Criminal prosecution process brings stigma - impact on freedom, money, reputation

2) Special role of Crown prosecutor as “minister of justice” - required to provide fair hearing - goal is not to obtain conviction but to see that justice is done

3) Recognition of string of wrongfully convicted cases & analysis of them - need remedy
NELLES v. ONTARIO [1989] 2 S.C.R. 170 - nurse convicted of 1st degree murder of 4 children, charges dropped due to lack of evidence, she sued for malicious prosecution

Required Elements of this Tort

1. Proceedings must have been initiated by D
2. Proceedings must have terminated [strongly] in favour of P - acquittal, dropped
3. Absence of reasonable and probable cause - Would a reasonable prosecutor have believed there was reasonable and probable cause? - not perfect case but must believe that they are guilty and will be convicted

“Reasonable and probable cause has been defined as ‘an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed’” (Hicks v. Faulkner (1878) at p.171, Hawkins J. at p 80 in text)

4. Malice, or improper purpose (abuse of office) - *“wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage”* (Fleming)

Supreme Court of Canada not sure what to do with this 4th requirement:

option 1: leave it as it is (no immunity)

option 2: get rid of it (partial immunity)

option 3: strengthen it - you can't sue Crown prosecutors (full immunity)

Concept of **IMMUNITY** - policy reasons (i.e. can't sue judges, what is said in leg.debate)
SCC took middle ground

9. RIGHT TO PRIVACY (98)

- fundamental pillar of a free and democratic society, zone of privacy not absolute due to s.1 of Charter - not clearly established tort

MOTHERWELL v. MOTHERWELL (1976), 73 D.L.R. (3d) 62 (Alta. S.C. (A.D.))

Facts: Mentally unstable D harassing Ps (siblings), making false accusations by phone and mail. Action: invasion of privacy and **nuisance** (interference with use and enjoyment of property). ISSUE: draw distinction between nuisance and invasion of privacy (beyond mere inconvenience) - Rs have valid claims in private nuisance for the invasion of their privacy through abuse of the telephone system - TJ upheld

- in BC, we have a statutory tort on the right to privacy

- also Charter - relates to freedoms in s.2 and legal rights in ss.7 to 15, *Criminal Code*

HOLLINSWORTH v. BCTV [1999] 6 W.W.R. 54 (B.C.C.A)

Facts: P consented to video being used for instructional purposes only (hair treatment), no consent of it being widely used **BC Privacy Act** Section 1 (p 107): *1(1) It is tort, actionable with proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another*

- also asks “Did you have a reasonable expectation of privacy?” and includes eavesdropping and surveillance, whether or not accomplished by trespass

a) **Wilfully** = must prove double intent:

Step 1: an intentional act that has the effect of violating privacy

Step 2: an intention to do an act which the person doing the act knew or should have known would violate privacy (reasonable man)

- b) **Without Claim/Colour of Right** = without the defense that you made an **honest** mistake in a state of facts which, if they existed, would be a legal justification/excuse

Chapter Six: THE DEFENSE OF CONSENT (177)

2. General Principles of Consent

(a) **Introduction** - established by D on BoP

- i. some societal limitations as to what a person can consent to
- ii. limit on the scope of consent - was the conduct within the consent of person or not?
- iii. apparent consent undermined by certain other factors: person in authority, consent based on deliberate misinformation, not informed consent (need certain knowledge)

(b) **IMPLIED CONSENT**: when you join a certain activity, there may be implied consent to the expected conduct that is going to occur, what was reasonable to expect?

WRIGHT v. McLEAN (1956), 7 D.L.R. (2d) 253 (B.C.S.C)

Facts: boys throwing mudballs, D invited to join in, P hit by mudball (maybe rock?) & injured - defense of consent stands

Ratio: *In sport where there is no malice, no anger and no mutual ill will, combatants consent to take the ordinary risks of the sport in which they are engaged.*

Factors in Judges' Ruling: no malice, mistake of fact (didn't know rock), implicit invitation to join game, no hard feelings afterwards (no ill will), age, fair play

(c) **EXCEEDING CONSENT**:

AGAR v. CANNING (1965), 54 W.W.R. 302 (Man.Q.B)

Facts: hockey game: D body-checked P, P hooked D at neck, in retaliation, D hit P in face with stick, unconscious, game terminated. Hockey necessarily involves violent bodily contact and blows however, scope of consent is exceeded because of intent to seriously harm.

Ratio: *Injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.* Damages lowered b/c great provocation.

(d) **COMPETENCY TO CONSENT**

3. FACTORS VITIATING CONSENT (184)

(a) If P's consent established by D, P can raise factors vitiating his or her consent

(b) **FRAUD (DECEIT)**: Must be established that D was aware of, or responsible for, P's apprehension, fraud must relate to the nature and quality of the act, not "collateral" matter, includes situations where D either knowingly deceives P or acts in total disregard to the truth - i.e. **R v. Cuerrier [1998]** - D knew was HIV+, did not inform P

(c) **MISTAKE**: consent induced by a mistaken belief only vitiated if D was responsible for creating P's misapprehension

(d) **DURESS (COERCION)**: person in authority (power relationship)

NORBERG v. WYNRIB [1992] 2 S.C.R. 226

Facts: A addicted to pain killers, D (new doctor) implies "if I was good to him, he would be good to me", A looks for drugs elsewhere but goes back to him - he feeds her addiction in exchange

for sexual favours. TJ & CA found A's implied consent was voluntary, no force or threats, no fraud or deceit. SCC find this approach to consent too limited in this case - no consent defense
Reasoning: "A man cannot be said to be 'willing' unless he is in a position to choose freely; and freedom to choose predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will." Must consider power relationship between the parties - could A choose freely?

Ratio: *In certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely (supported by Criminal Code s.265)*

Conclusion: The unequal power between parties and exploitative nature of rel'p removed the possibility of A providing meaningful consent to the sexual contact.

5. CONSENT TO TREATMENT, COUNSELING AND CARE (197)

(a) **General Principles of Consent** - protecting your personal autonomy, explicit (signed form) or implicit (emergency) consent, capacity issues, duress, fraud - is it genuine consent?, added element of **fully-informed consent** in medical arena brings challenges if life-saving ER situation OR during operation add procedure

(b) Exceptions to the General Principles

- i. In unforeseen medical emergency, where impossible to obtain consent, healthcare professional is allowed to intervene without consent to preserve patient's health or life
- ii. Patient who have given general consent to a course of counseling, treatment or operation, is implicitly consenting to any subsequent sessions or procedures
- iii. Previously courts held that healthcare pros had a right to withhold info from patient if disclosure would undermine patient's morale and discourage patient from having needed treatment or surgery. SCC cast doubt on this privilege in 1980...

MARSHALL v. CURRY [1935] 3 D.L.R. 260 (N.S.S.C.) - removal of gangrenous testicle w/o express consent during course of hernia operation - "higher ground of duty" if 1) unforeseen, unanticipated emergency; 2) in interest of the patient; 3) for protection of patient's health and possibly life - no consent needed

MALETTE v. SHULMAN (1987), 63 O.R. (2d) 243 (H.C.) - doctor told about JW's "give no blood" card in patient's wallet, confirmed by daughter, gave blood transfusion anyways - liable for battery? Court says message was clear and unqualified and does not exempt life threatening perils, no case support for the argued concept of informed refusal to treatment (just informed consent), patient's right to self determination upheld

(c) **Burden of Proof and Consent Forms** - Onus of proof on healthcare workers on BoP, consent forms only of limited value

(d) Competency to Consent

i) **MINORS** - no recognized age of consent, if minor is capable of understanding the nature of the proposed procedure and its risks, his or her consent is valid and parental consent is not required or relevant

C. v. WREN (1986), 76 A.R. 115 (C.A.)

Facts: C, a pregnant 16-year-old girl, abruptly left home and made arrangements for an abortion. The parents, morally opposed to the abortion, sought to prevent the procedure by challenging C's capacity to consent. The Court sympathized with both the parents and their daughter in this painful dispute. Nonetheless, the legal issue was clear — *could this 16-year-old girl give a valid consent to a therapeutic abortion?* The Court concluded that C understood

the nature of the procedure and its risks. Consequently, she was competent to give a valid consent and her parents' wishes were not relevant.

Re Dueck (1999)

Facts: 13 year old boy refused chemo and surgery (believed his father who told him God would heal him through Mexican treatment). Given the profound influence of the domineering father and his misguided faith in a non-existent cure, the boy was not able to understand the relevant medical information or appreciate the consequences of the proposed treatment. Consequently, the boy was not a mature minor and an order was made extending the Minister's authority to make medical decisions on the boy's behalf.

ii) **ADULTS** - Case by case basis-most often arises w/ respect to mentally ill, but what about an alcoholic, a sedated patient, or a patient in severe shock?

ISSUE OF DETERMINING CREDIBILITY

1. Judge must determine basic facts of case - divergent stories
2. in accepting a defense, is the testimony credible?
3. Help judge by putting people under oath, evidence led by your lawyer asking non-leading questions, cross-examine allowed to put leading questions to attack story (attack credibility) (I suggest to you that...you couldn't see...)

How does judge assess credibility?

1. look at the **logic of the story** - does it make sense?
2. **demeanor** of the witness while on the stand (but don't make assumptions on style)
3. whether the witness has made **prior inconsistent statements** (prior to trial)
4. bias - friend or family of one party, tension, benefit if one side wins
5. **extent to which the evidence is consistent or inconsistent with other evidence**
6. **also can attack their reliability** - could be honest but problem (glasses, far away, drunk or drugged, etc.)

Chapter Seven: Defences Related to the Protection of Person and Property (217)

2. SELF-DEFENSE (217)

a full defense - 3 requirements (subj.& obj.):

- 1) you reasonably believe you are being assaulted or are about to be assaulted - response to aggression, not simply out of anger
- 2) did you have a reasonable alternative to using force? proximity, etc.
- 3) amount of force is reasonably proportional

WACKETT v. CALDER (1965), 51 D.L.R. (2d) 598 (B.C.C.A.)

Facts: Fight outside of bar. TJ found excessive force and reasonable alternative. CA overturns.

- 1) credible threat even though intoxicated, real attack
- 2) were attempting to avoid confrontation, on way back into hotel - credible testimony
- 3) first blow insufficient to stop attack, second more forceful blow justified - not vicious - look at force uses, not the resulting harm, although result can help indicate force level

"An attacked person defending himself and confronted with a provoking situation is not held down to measure with exactitude or nicety the weight or power of his blows."

POLLARD v. SIMON 2009 BCPC 190

Facts: Ferry line up, 2 different stories

"Tort law does not stay the hand until a battery has actually be [been] committed, for if it did it might "come too late afterwards" to do any good. A person may, therefore, strike the first blow

and still claim the privilege of self-defence, as long as the purpose of the blow is to halt future or further aggression and not to punish the attacker for his past aggression. In short, "self-defence means defence, not counter-attack." (p26 of case)

D's version of the story is found to be more credible and reliable - why?

- 1) P's more general conduct before and after (anger, sense of entitlement) - road rage, motive (P admits to being quite upset) consistent with aggressive description
- 2) D's earlier conduct and mindset - non-aggressive, calm, let him in lineup
- 3) D's version supported by testimony of his son (found son credible because story differed slightly, honest witness, upset by incident [demeanor], same perception)
- 4) evidence does not support a finding of more than one blow (glasses, etc.)

Applies facts to the law regarding self-defence - reasonably believed he was about to be hit, no alternative route, single blow in anticipation, as a deterrent, not excessive force

3. DEFENSE OF THIRD PARTIES (221)

Elements:

- 1) honest (though mistaken) belief that the other person is in imminent danger of injury
- 2) reasonable force is used
- 3) no necessary relationship between 3rd party and person (stranger) - although rel'p may affect the "reasonableness" of the action

GAMBRIELL v. CAPARELLI (1974), 54 D.L.R. (3d) 661 (Ont.Co.Ct.)

Facts: D's son (age 21) parked car in laneway to wash it, P hit car backing out of his lot, D's son said he was going to call police (arguing, screaming), P started to get back in his car, D's son grabbed P who hit D's son in the face with fist. Blows exchanged, P choking him on hood of car (P said he never touched boy's throat), D (mother) saw P holding son by the neck (thought being choked), she yelled STOP!, she struck P 3 times with garden tool on shoulder and head (nearest implement), when P saw blood flowing from his head, he let go of boy - only lacerations show not excessive force

Ratio: *Where a person in intervening to rescue another holds an honest (though mistaken) belief that the other person is in imminent danger of injury, he is justified in using force, provided that such force is reasonable.*

4. DEFENSE OF DISCIPLINE (224)

Common law still recognizes a defense of discipline that parents and guardians can invoke to privilege the use of force in dealing with children.

Also Criminal Code, s.43: *"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."*

R v. DUPPERON (1984), 16 C.C.C. (3d) 453 (Sask.C.A.)

Facts: TJ convicted father of assault on son causing harm contrary to s.245(1)(b) of CC. 13 year old son caught smoking & grounded, foul language & grounded, left home, D strapped son - bare buttocks with leather belt approx 10 times leaving bruises

Force used for correction (disagreed with TJ) but not reasonable force (sever beating inflicted on emotionally disturbed boy. Convicted of assault, same sentence as TJ.

Factors to look at from obj. & subj. standpoint:

- 1) nature of the offense calling for correction
- 2) the age and character of the child
- 3) likely effect of the punishment on this particular child
- 4) degree of gravity of the punishment

- 5) the circumstances under which it was inflicted
- 6) the injuries, if any, suffered

Challenge was made to this defense under section 7 of the Charter (the right to life, liberty and security of person) Does this violate fundamental justice?

1. Try to establish a Fundamental Principle of Justice = laws that impact children must be in the child's best interest - significant but not universal standard constitutionally
2. Establish that the law is too vague to constitutional - need a "certain level of clarity when read" - "reasonable under the circumstances" is not too vague in conjunction with:
 - a. force can only be used for a corrective force of a transitory & trifling nature - not anger or punishment
 - b. child must be capable of understand why force is being used and capable of benefiting from it (not used on children under 2 or disabilities)
 - c. does not apply to the use of force that harms or could reasonably be expected to harm a child
 - d. no force that is cruel or degrading
 - e. not to justify corporal punishment of teenagers - generates harmful or antisocial behaviour

Court upheld the law but put some new limits on it

5. DEFENCE OF REAL PROPERTY (230)

Recognizes importance of personal property - also privacy and security

MACDONALD v. HESS (1974), 46 D.L.R.(3d) 720 (N.S.C.) - assault causing injury

Facts: D in motel room, P knocks on door to introduce politicians, thinks he is allowed in (hears voice), enters room, D forcibly ejects P from a motel room during the early morning, D denies assault and argues that if he used any force, he was justified in law due to unlawful entry of P and invasion of D's privacy

Does the defense of real property apply?

In order to meet the defence, must establish:

1. must ask them to leave
2. must give them an opportunity to leave
3. reasonable force used to eject them, not excessive

However, if it's forcible entry, don't need to request they leave but "can lay hands on him immediately."

Conclusion: in this case, no forcible entry, did not give opportunity to leave, excessive force

EVIDENTIARY ISSUES IN TORTS

1. SIMILAR FACT EVIDENCE

- critical in determining result, not uncommon in torts, often used to help establish IDENTITY

The PROBATIVE VALUE (relevance, help in determine some issue in case) must be balanced against the PREJUDICE (hurting search for truth, wastes time, confuses or prejudices jury)

General Bad Character Evidence - prejudicial effects:

- 1) will judge based on type of person not the evidence
- 2) may want to punish A for something they did in the past, even if not convinced of this case
- 3) may serve to lower the standard of proof - don't deserve BoP only mere possibility
- 4) this type of evidence has been linked to wrong results
- 5) don't want general good character evidence either - long waste of time

Is it probative over prejudicial to hear that someone did something similar in the past?

General Exclusionary Rule - evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible - "general" disposition

Narrow Exception of Admissibility - "evidence of previous misconduct may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse" (Handy at 23)

Questions for Admissibility:

1. Does the outside act only indicate a general propensity to do bad conduct in question?
inadmissible
2. Are the similarities between the 2 incidents so compelling that it shows a specific propensity to the conduct? admissible

Potential for Collusion: drawing some link between P and the SF witness - does collaboration cause inadmissibility? big debate!

1. Mere evidence that there was contact or discussion does not go to admissibility
2. If actual evidence of potential tainting that happened through contact (even subconscious), now an admissibility issue - if can show an "air of reality", then other must show on BoP that it is not collusion

R v Handy, [2002] 2 SCR 908

Facts: A charged with sexual assault causing bodily harm. His defense was that the sex was consensual. C consented to vaginal sex but not hurtful or anal sex. Crown sought to introduce SFE from A's former wife that he had propensity to inflict painful sex. Argument of collusion.

Test for Admissibility:

Step 1: Determine the Probative Value of the Evidence

- a) potential for collusion
 - b) identification of the "the Issue in Question"
 - c) similarities and dissimilarities
1. PROXIMITY IN TIME of similar facts - pattern or reformed?
 2. EXTENT SIMILAR IN DETAIL - details of the conduct, spin "found a readily available weapon"
 3. BROADER CIRCUMSTANCES - relationship between P and R, surrounding circumstances compelling, used to have to be "the signature", now can add up
 4. # of OCCURRENCES - look at them individually, but # lowers threshold a bit
 5. Any distinctive feature(s) unifying the incidents - "the signature"
 6. Intervening Events
 7. Any other factors which would tend to support or rebut the underlying unity of the similar acts
- d) strength of the evidence that the similar acts actually occurred

Step 2: Assessment of the Prejudice

- a) Moral Prejudice - actions judged based on character, how bad is the content
- b) Reasoning Prejudice - distraction of jury from proper focus due to consumption of time in dealing with allegations

Step 3: Weigh up Probative Value v. Prejudice

2. HEARING MOTIONS (can be long process of pre-trial hearings)

- a) Summary Trial (Rule 18A) - rules of court allow for the entire case to be heard & ruled on in a mini-court setting before trial - witnesses by affidavit only
- b) Striking Out Part of a Claim - to narrow the issues (wrong person, destined to fail, barred by statute)
- c) Disputes over documents - obligation to provide relevant documents to each side, exception to rule situations (solicitor/client privilege)

Baiden v. Argent 2003 BCSC 1341

Facts: negligence & battery, 911 call for break in at bakery, police use “unnecessary force”
2 applications

1. **By P to get documents that Ds are not providing:** employment records of POs (could be a stepping stone to finding SFE), all manuals, protocols and training materials with respect to use of force by the police department, and dialogue between POs and 911 operator

P used broad def’n of relevance - see ratio below

Ds claim info is not relevant but P is on a “fishing expedition” -expense, privacy issues, baseless
Ruling: release the documents! upholds low threshold/broad def’n of relevance

Ratio: Every document that relates to the matters in question in the action which not only would be evidence upon any issue but which it is reasonable to suppose contains information which may, not must, either directly or indirectly enable the party requiring the evidence to advance their own case or to damage the case of its adversary, must be disclosed.

- remember this does not mean the documents are admissible in court - must meet threshold

2. **Ds seek to strike out part of the claim** Rule 19(24) - grounds: 1) no reasonable claim or defense, 2) unnecessary, scandalous, frivolous or vexatious, 3) may prejudice, embarrass or delay the fair trial, 4) otherwise an abuse of the court process

Policy Concerns if Broad Power	Policy Concerns if Narrow Power
judging the trial before even having a trial - need full flavour	efficiency of the court
evidence might be more powerful when actually heard & cross-examined	preserving the integrity of the process
could create a new tort or distinguish your case from the presumed law	don’t want “bad character evidence” snuck in
could argue against presumed law (doesn’t work in today’s world)	privacy, expense, time, etc.

Plain and Obvious Test: “Assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action?”

3. Other Claims: Claim of Negligence - does not make sense, reasonable allowance of force in this circumstance, however, there is no radical defect in this claim at this point

“Plaintiff must be given the benefit of any doubt on this issue, the relative strength or weakness of P’s case is not the test. The test is, as with Rule 19(24)(a), whether it is “plain and obvious” that the elements in these subsections are of application.”

Chapter 27 DEFAMATION (1001)

1. **Introduction:** relates to privacy - protection of your psychological well being and reputation -used to be looked at as slander (oral) and libel (written) - now melded into defamation

Growing Area: Why?

1. constant multiplication of forums where comments can be published
 2. tabloidization of the media
 3. high profile cases bring this tort into the view of everyday people
 4. justified and necessary - great impact of false info on individual and family - lingering effect
- But can have potential clash with freedom of expression rights, therefore, numerous defenses

2. Elements of a Defamation Suit

In order to succeed, the P must prove on BoP that the impugned statements (i) were defamatory, (ii) made reference to the plaintiff, and (iii) were published or disseminated.

(a) DEFAMATORY MATERIAL

SIM v. STRETCH [1936] 2 All E.R. 1237 (H.L.)

Facts: housekeeper worked for one family, moved to another, back to first. Telegram sent "Please send her possessions and the money you borrowed, also her wages"

Are these words capable of being defamatory? NO!

Test: would the words tend to lower the P in the estimation of right-thinking members of society generally? P argues comments infer they were so broke that had to borrow from the maid - no Def'n of defamatory - argued conventional phrase exposing P to hatred, ridicule and contempt is too narrow, but needs to be more than just breach of conventional etiquette

(b) REFERENCE TO THE PLAINTIFF - direct or indirect, not extremely vague

However, vague statements can still be seen as an attack on a specific group - any one of this group could sue you (i.e. prison guards called "goons")

Minimum requirement = is there a reasonable link between the words and the P, is it capable of referring to P?

Knupffer v. London Express Newspaper, Lt. [1944] A.C. 116 (H.L.)

Facts: Young Russians group - article published saying one of them would be selected as a "puppet fuehrer" by Hitler to head up fascist Russia, published in Britain, P is leader of B branch

Issues: 1) can the article be regarded as capable of identifying this person (objectively)?

2) does the article lead reasonable people who know the person to know who it is? (ask 2nd)

-not capable of targeting P (no mention of P, no mention of British group)

(c) PUBLICATION - not actionable unless they are communicated to someone other than P,

every repetition of a defamatory statement is considered a new publication that is independently actionable - thus someone who repeats a statement that originated with someone else may be held liable (even if believed statement to be true)

3. DEFENSES TO DEFAMATION

(a) JUSTIFICATION or TRUTH - Are the statements true?

"What is true cannot be defamatory" (Courchene v. Marlborough Hotel (1971))

- D can even succeed on a defence of justification if the statements were made maliciously

- D pleading justification must show that "the whole of the defamatory matter is substantially true" (not literal truth of every detail) (took steroid, took HGH) (addicted to cocaine, addicted to painkillers - too different) - use principle level

- needs to prove the truth of the statements that comprise the "sting" of the defamation

Williams v. Reason (1983), [1988] 1 All E.R. 262 (C.A.)

Facts: amateur rugby player accused of “shamateurism” (accepting \$ from outside sources, therefore, a professional) in a national newspaper. P successful at trial, but on appeal D requested a new trial with new evidence of “boot” money” from Adidas

Issue: Would such new evidence be relevant to the D's plea of justification?

Look at the sting of the allegation and whether or not it is true (not exact words) - yes to new evidence here as sting of allegation is true (just new situation of receiving \$)

(b) **ABSOLUTE PRIVILEGE** - simply cannot sue in certain circumstances

- 1) Executive Officers - relating to affairs of the State
- 2) Parliamentary Privilege - provides immunity for defamatory statements made during parliamentary proceedings, but not if repeated outside of assembly
- 3) Judicial Proceedings - absolute privilege for statements made in the course of proceedings - judge, jury, counsel, parties and witnesses - trial proper and pre-trial proceedings - even if statements are made maliciously and without justification

Hung v. Gardiner (2003), 227 D.L.R. (4th) 282 (BCCA)

Facts: A is member of Law Society and CGA Association, Investigation/reprimand from her boss at accounting firm. Her conduct is reported to Bar Association and CGA Ass. (report of the investigation), sues for defamation

Can a person who provides info to a professional disciplinary body about a member's conduct be liable? try to distinguish this from report to police (judicial v administrative)

Ratio: Absolute privilege applies to complaints to quasi-judicial bodies - no CoA available

(c) **QUALIFIED PRIVILEGE** - protects defamatory materials communicated on certain occasions. Applies if statements are untrue but not if established they were made maliciously

1. statements made by D in protection of his or her own interests (if being attacked, defend)
2. D publishes the relevant statement in order to protect the interests of another person - must show he or she had a legal, social or moral duty to communicate the info (ex. character ref)
3. communications made in the furtherance of a common interest, if reciprocity of interests
4. statements made in the protection of the public interest - includes some political speech, comm. among public officials, health or safety, municipal politics

Speaker has a “duty” to report and the hearer has a “duty” to receive it.

Hill v. Church of Scientology [1995] 2 SCR 1130

Facts: D intends to initiate contempt of court proceedings against P (Crown attorney, Casey Hill), alleging he had misled a judge and opened sealed documents pertaining to D. Before filing the notice of motion, D organizes a press conference on the steps of Osgoode Hall and reads out notice, including the specific allegations. P exonerated and then brought defamation claim.

Does qualified privilege apply in this case? yes, documents filed in judicial proceedings generally qualify for privilege (open process - public has a right to know) - found even though they had not yet filed the papers

However, if yes, do either of the exceptions apply? yes, the SCOPE EXCEPTION APPLIES!

- 1) **Scope Exception** - limits of the duty of interest have been exceeded, went beyond what was “germane and reasonably appropriate”
- 2) **Malice Exception** - actual or express, any indirect motive, spoke dishonestly, or in knowing or reckless disregard for the truth

This case set a record for damages (\$300,000 cap for pain and suffering does not apply in defamation cases)

(d) **FAIR COMMENT** - public will understand this is just a comment, not a statement of fact
WIC RADIO LTD. v. SIMPSON [2008] 2 S.C.R. 420

Facts: “shock jock” radio talk show host Rafe Mair makes comments implying that P would condone violence (“sting”) to gay people, Kari (P) had made many statements v. the school curriculum, using “war” language - TJ finds she has been defamed since she was addressing political process, not violence

Issue - Does the defense of fair comment stand?

Threshold for Fair Comment:

- 1) Must be recognizable as comment, not fact
- 2) Must be on a matter of public interest
- 3) Must be based on a factual foundation - allowing the listener to judge the facts themselves
“If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defense is not available” (1038)

These provide a **sufficient launching pad** for the defense of fair comment. Then:

- 4) Honest belief requirement/reasonable person - needs restrictions?
- 4) **NEW TEST:** What any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.
- 5) Malice

(e) **RESPONSIBLE COMMUNICATION ON MATTERS OF PUBLIC INTEREST** - new in 2009

-balancing free expression of the media with harm of defamatory comments

-this defense comes up in 2 situations:

- 1) an investigative article or story that makes certain allegations itself
- 2) a news story reporting that someone is making allegation “unsuccessful bidder is alleging”

GRANT v. TORSTAR CORP. [2009] 3 S.C.R. 640

Facts: story reports allegations being said about Grant

Were the comments justified? New trial ordered to consider new defense

-difficulty bringing justification defense because hard to prove on BoP that statements are true

-difficult bringing qualified privilege defense because media does not have a duty

Defining New Defense:

1. Publication must be on a matter of public interest (not just what interests the public)
2. D must show publication was responsible - factors in determining strictness of this:
 - a) seriousness of allegation/degree of privacy invaded
 - b) public importance of the matter - more leeway if important
 - c) urgency of the matter
 - d) due diligence in status and reliability of the source (corroboration)
 - e) due diligence in thoroughness - was P’s side of story sought and accurately reported?
 - f) was the defamatory material direct or indirect?

Exception to the repetition rule is the reportage rule:

- a) report attributes the statement to a person, preferably identified
- b) report indicates that its truth has not been verified
- c) reports sets out both sides of the dispute fairly
- d) report provides the context in which the statements were made

(f) **CONSENT** - P puts the statements in circulation himself or by someone acting on P's behalf OR statements have been invited or elicited from D at P's instigation in situations where it is reasonable to conclude that P consents to their publication

JONES v. BROOKS (1974), 45 D.L.R. (3d) 413 (Sask.Q.B.)

Facts: suspected Ds were circulating defamatory remarks about him, sent PIs under guise to get statements

Issue: Did P invoke the comments, thereby consenting to their publication? **yes!**

NEGLIGENCE - not responsible for this in December 2011 exam - clarify details

BURDEN OF PROOF - Standard of Proof in Tort Law = BoP

F.H. v. McDougall, 2008 SCC 53

Facts: P sexually and physically assaulted (strapped) in residential school as a child. TJ found him to be a credible witness despite inconsistencies in testimony. CA overturned s.a. decision.

Issue 1: Is there an elevated, tougher standard than BoP for serious misconducts, such as sexual assault?

Options:

1. RD - most elevated standard, between BoP and Absolute Certainty but much closer to AC

2. something between the 2

3. use BoP but require special evidentiary standard - greater care, more cogent

Court rejects the elevated standard - same standard of BoP applies - Is it more likely than not?

Why? 1) policy: doesn't make sense from victim's perspective, 2) State not involved, indifferent,

3) practical problem of defining this, and 4) BoP standard not easy to meet, great care always

Appeal courts CAN overturn findings of credibility (as CA did here) but SCC says TJ has best

advantage in assessing facts and credibility (common sense analysis) and test is not "what

would I have done with this if I was the TJ" but instead "could a reasonable trier of fact have

come to this conclusion?" - only overturn if overwhelming evidence to the contrary

SCC says TJ did not err, no "palpable and overriding error"

Issue 2: Is there a general corroboration requirement related to credibility? **NO!**

Corroboration: witness, SFE, certain behaviour following abuse that witness saw

No, don't even have this in criminal law, may not be available due to private nature of the

offense, but corroborative evidence does have a role in strengthening or weakening case

Issue 3: Should we have some steps in determining credibility between 2 parties?

-argue for criminal law W.D. 3-step charge:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

However, this was developed specifically so that jury would not slip into BoP analysis when

BRD was required - in BoP it is appropriate to ask "who do I believe more?" - makes no sense

Issue 4: Are there certain standards required of a judgement (ground of appeal) that relate to insufficient reasons? - didn't articulate properly how it go to result

Problems with Short Judgement (no reasons)

- 1) civil system of judgement needs a basic level of public support and confidence
- 2) losing party may have some level of acceptance if know WHY they lost
- 3) subsequent cases need precedent
- 4) lose ability to appeal because there are no grounds on which to appeal - not letting CA do their duty
- 5) can be a benefit to the decision-maker to articulate why coming to a decision
BUT
- 6) requiring long, reasoned decisions in every case lacks efficiency
- 7) can't have a perfection standard or everything is appealable because some small part of analysis was left out

Functional Approach (flexibility)

- 1) judgements only necessary on issues raised
 - 2) not required to set out all the evidence
 - 3) an issue of dispute could be dealt with in summary manner - go back to the record
- This judge did articulate the reasons he found one party to be credible in appropriate manner

VICARIOUS LIABILITY

K.L.B. v. British Columbia, [2003] 2 S.C.R. 403 (paras. 1-29)

Facts: siblings abused in various foster care arrangements, ability to obtain damages from 1st Ds (foster parents) is limited, unique on the facts because there was evidence of being dangerous environments when placed (repeated warnings, serious concerns), little follow up

Issue: Can you sue the government for the wrongdoing of the foster parents? If the government was not found to be negligent, could they be responsible under doctrine of vicarious liability?

1st line of attack - **direct negligence** - TJ found this here, but in most cases there is difficult to establish: must adopt reasonable care level "of the day" (not now)

2nd line of attack - **vicarious liability** - this can bypass directly suing for negligence - makes another party responsible for acts of "employees" (including intentional torts)

Must establish:

Step One: Show a sufficiently close relationship between the tortfeasor and the person (policy goals of employment rel'p are fair and effective compensation and deterrence of future harm - imposing VL can deter harms) - **is it more analogous to an employer/employee rel'p (control, closeness) or an independent contractor (limited control)** - look at actual essence of the rel'p not the labels used

Factors Relevant in Evaluating the Type of Relationship

- 1) level of control
- 2) do they provide their own equipment
- 3) do they hire their own helpers
- 4) do they have managerial responsibilities

Step Two: Was the tortious action "within the course of employment"?

Sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise

In KLB determined foster parents were hired as independent contractors, limited control
Contrasted with Bazley situation (residential care facility), One judge disagreed