**TORTS CAN**

**\*\*REMEMBER\*\***

* **Volition and intent required for ALL intentional torts**
* **Read the question 🡪 what, specifically is being asked**
* **If battery occurs, was there also an assault?**
* **Apply to facts in detail 🡪 why was conduct harmful/offensive/reasonable in circumstance/etc**

**TORT LAW:** aims to put plaintiff back in position they were in before the tort 🡪 looks backwards

**BURDEN OF PROOF:** balance of probabilities 🡪 plaintiff must show likelihood over 50%

**ACTIONABLE PER SE:** actionable without proof of damage (some torts require an actual loss)

*Morland-Jones v Tarek*: Case with neighbors making ridiculous complaints; **tort law focused on legal wrongs** and does not provide compensation for “stress-causing and nasty conduct that individuals may suffer at the hands of another”

**VICARIOUS LIABILITY:** liability for a tort committed by another; employer liable for the torts committed by an employee during the course of employment 🡪 employer liable for acts that 1) they authorized EE to do OR 2) are closely connected to employment

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**ELEMENTS OF AN INTENTIONAL TORT**

1. **Volition (voluntariness) 🡪** a defendant’s act is voluntary if it is directed by their conscious mind
2. **Intent 🡪** an individual’s desire to bring about the consequences of their act, rather than their desire to do the physical act itself (subjective desire to cause consequences of one’s actions)

**Volition:**

*Smith v Stone*: Stone trespassing involuntarily because he was carried onto Smith’s land; a person cannot be liable in an intentional tort for an involuntary act (NO VOLITION)

**Intent:**

* Imputed/constrictive intent: arises when consequences not desired but substantially certain to result from defendant’s conduct
* Transferred intent: invoked when defendant intends to commit intentional tort against one party but unintentionally commits intentional tort against the plaintiff
  + Can also transfer from one intentional tort to another 🡪 intention to shoot a person (battery) but actually shooting a car (trespass to chattel)

Motive**:** not generally relevant/required to prove liability in tort 🡪 may be relevant WRT damages or specific torts (ex: malicious prosecution)

*Gilbert v Stone*: action against Stone for trespass and taking gelding; Stone took because of fear for his life; motive doesn’t defend against liability; Stone = liable; duress doesn’t negate volition or intent nor serve as defence; may be considered WRT damages (VOLITION & INTENT – MOTIVE not a defence)

Mistake: no affect on intent; not recognized as a defence; note: accident ≠ mistake

*Hodgkinson v Martin*: defendant mistakenly removed plaintiff from office – mistake of law; no injury to plaintiff’s person/reputation; nominal damages awarded (VOLITION & INTENT – MISTAKE not a defence)

*Ranson v Kitner*: K mistakenly killed R’s dog – mistake of fact; defendants liable – upheld on appeal (VOLITION & INTENT – MISTAKE in good faith not defence)

**Youth:**

* No general rule excusing liability of intentional torts by youth
* Likely liable if child is able to understand nature and quality of act 🡪 intention & volition = key
* Parents NOT vicariously liable for torts of their children but may be liable in negligence

**BATTERY**

**Battery = the intentional infliction of harmful or offensive contact on the body of another**

* Actionable per se (*Bettel v Yim*)
* Defendant must have intent to bring about physical contact 🡪 need not have intent to harm/offend 🡪 foreseeability is irrelevant (*Bettel v Yim*)
* Need not be direct 🡪 indirect interferences (ex: spitting on someone)
* May also be liable in battery for direct and intentional physical interference with something a plaintiff is carrying, wearing or riding on

**Elements of Battery:** (confirmed in *Bettel v Yim*)

1. Volition
2. Intent
3. Harmful or offensive contact

*Bettel v Yim*: Yim thought Bettel attempted to start fire in store; Yim shook Bettel 2-3 times, accidentally struck Bettel’s nose and caused bleeding; can an intentional wrongdoer be held liable for consequences which he did not intend 🡪 YES. 3-part test met 🡪 Yim acted voluntarily (1), intended to bring about physical contact (2), caused harmful and offensive contact (3). RATIO: defendant liable for all damages, foreseeable or not, that arises from committing tort of battery

**ASSAULT**

**Assault = intentional creation in the mind of another of a reasonable apprehension of immediate physical contact**

* Actionable per se
* Reasonable belief of the plaintiff (not the defendant)
* A show of force accompanied by a threat of battery unless unlawful or unjustifiable conditional threats are met constitutes assault 🡪 (*Holcombe v Whitaker*)
* Conditional threat = assault if threat of violence exhibits an intention to assault and a **present ability** to carry out the threat (*Police v Greaves*)

**Elements of Assault:** (*Holcombe v Whitaker* and *Police v Greaves*)

1. Volition
2. Intent
3. A show of force or overt act
4. Ability to execute OR a reasonable belief that the actual ability is there
5. Credible and imminent threat

*Bruce v Dyer*: if assault is preclude to battery, court may ignore or only superficially discuss the assault and may not consider it in assessing damages; may still colour court’s interpretation of the events 🡪 assault may provide ground for defences of consent, self-defence, or claim of provocation

*Holcombe v Whitaker*: defendant told plaintiff he would kill her if she took him to court and went to her house and pounded on the door; defendant argued doesn’t constitute assault because merely conditional threat of violence with no overt act; words alone do not constitute assault but may give meaning to an act – taken together can constitute assault; defendant’s words were combined with aggressive conduct 🡪 liable in assault

*Police v Greaves*: police came to door in response to call from Greaves’ wife; Greaves opened door holding knife and threatened to stab if police moved; conditional threat constituted assault because the threat of violence exhibited intention to assault and present ability to carry out threat

**FALSE IMPRISONMENT**

**False imprisonment = where an individual’s movement is intentionally and totally restrained**

* Actionable per se
* Imprisonment = total restraint of liberty of a person, not a partial obstruction (*Bird v Jones*)
* Not necessary that the person is touched (*Bird v Jones*) BUT can include physical restraint
* Can be for however short a time (*Bird v Jones*)
* Total confinement extends to forced movement in one direction (*Bird v Jones*)

*Bird v Jones*: Bird unable to continue down highway in desired direction because Jones blocked highway; Bird brought action for false imprisonment; Bird free to go in other direction, no threat of force; not false imprisonment because only a partial obstruction

False Arrest:

* Where total restraint of movement is brought about by implicit or explicit assertion of legal authority (*Campbell v S.S. Kresge Co.*)

*Campbell v S.S. Kresge Co*: Campbell shopping at K-Mart, abandoned cart with items, patron reported Campbell to security guard who was an **off-duty** police officer; officer followed her out of store, showed police badge, told her to come to store to avoid embarrassment – Campbell felt she had no choice; was this false arrest? Officer’s conduct demonstrated authority that he didn’t have in the context (no defence of legal authority) – Campbell was imprisoned; defendant liable

Citizen’s Arrest:

* Private citizens can only make arrest if a crime is actually committed – liable in tort if no crime committed even if they act honestly and reasonably; must make arrest within reasonable time after crime is committed, call police and deliver arrested person without delay

*R v Chen*: Citizen caught serial shoplifter, chased after him, hog-tied him, charged with assault and false imprisonment – overturned

**MALICIOUS PROSECUTION**

**Malicious prosecution = indirect interferences that result from the improper initiation of criminal proceedings against an individual**

* Requires proof of loss/harm
* Strongly favours public interest (prosecutors)

**Elements of Malicious Prosecution:** (*Nelles v Ontario*)

1. The proceedings must have been initiated by the defendant
2. The proceedings must have terminated in favour of the plaintiff
3. The absence of reasonable and probable cause
4. Malice, or a primary purpose other than that of carrying law into effect 🡪 improper purpose

*Nelles v Ontario*: plaintiff charged with first degree murder and charges later dropped; sued for false imprisonment, malicious prosecution, negligence and violation of charter right; four elements of malicious prosecution laid out; AG and Crown should not have absolute immunity WRT malicious prosecution but should have high standard to prove

**SELF DEFENCE**

**Self Defence = complete defence**

* May use force to combat battery or assault
* Right to invoke ends once danger passes
* An act of repelling an apprehended attack does not need to be measured with complete exactitude or nicety (*Wackett v Calder*)

**To invoke defence of self-defence, defendant must establish:** (*Wackett v Calder*)

1. They honestly and reasonably believed that they were about to be struck (subjective), AND
2. Amount of force used to protect themself was reasonable in all of the circumstances (objective)

*Wackett v Calder*: Wackett and Calder in bar fight; Wackett made first hit – Calder hit back knocking Wackett down; Wackett got up and hit Calder again – Calder hit back again, harder, causing damage; Calder walked away with Wackett still trying to fight 🡪 self-defence applicable? YES – force used not greater than necessary, reasonable to belief Wackett could hurt Calder (he was drunk, reasonably sized, etc.); RATIO: act of repelling need not be measured with complete exactitude/nicety

**DEFENCE OF THIRD PARTIES**

**Defence of third parties = complete defence**

* May use reasonable force to defend a third party from battery or assault
* Stronger case where there is a special relationship between rescuer and endangered person

**Elements Required for Defence of Third Parties:** (*Gambriell v Caparelli*)

1. Defendant had a reasonable (even if mistaken) belief that a third party was, or was imminently about to be, the victim of a trespass to their person by the plaintiff
2. The amount of force used to protect the third party was reasonable in the circumstances

*Gambriell v Caparelli*: Gambriell and Caparelli’s son got into altercation and fought physically – Gambriell grabbed her son’s neck and held; Caparelli saw Gambriell choking her son, yelled for him to stop; when he didn’t stop she grabbed nearby garden tool, struck him on shoulder and then on head when he still didn’t stop; strike to head caused bleeding and Gambriell let go; sued in battery 🡪 defence of third parties applicable? YES – Caparelli honestly believed son was in imminent danger and used reasonable force because she said stop, then hit o shoulder, then hit on head and only caused lacerations

**PROVOCATION**

**Provocation = not a complete defence**

* Considered WRT mitigation of damages
* Conduct closely related in time to the tortfeasors act which would cause a reasonable person to lose self-control and act out of anger or frustration
* Can include speech, obscene gestures, outrageous conduct targeted at family member

*Miska v Sivec*: M and S involved in road range incident; S ran home with M chasing him – S went inside and shot M, injuring him; S charged and appealed citing provocation; provocation confined to situations in which act occurs shortly before alleged tort and where reasonable person would lose control 🡪 defendant’s conduct = measured, careful, happened after he was safely inside 🡪 NOT PROVOCATION

**DEFENCE OF DISCIPLINE BY PARENTS AND TEACHERS**

**Defence of discipline = invoked by parents/guardians**

* Does not justify force used on children under two, teenagers, or those with particular disabilities
* Use of objects or blows to head always unreasonable
* Less support for teachers to use physical punishment today

**Defendant must prove:**

1. Force was used as correction for the benefit of the education for the child
2. Force was reasonable in the circumstances

**DEFENCE OF CONSENT**

**Consent = complete defence**

* Must be freely and voluntarily given
* Standard = reasonable person would believe the plaintiff was consenting to the interference
* Must be framed narrowly 🡪 plaintiff consented to specific act that gave rise to tort action
* Consent may be given in writing, verbally or by gesture
* Consent = express or implied (given implicitly through participation, demeanor, etc.)
* Consenting to an generally act viewed as consenting to risks normally inherent in that act (*Wright v McLean* and *Agar v Canning*)

**Consent for intentional interference generally arises in 4 contexts:**

1. Interpersonal violence 🡪 fighting
2. Contact sports 🡪 players protected from liability by implied consent that all players consent to some intentional bodily interference expected as part of the game 🡪 NOT free license for players to intentionally and seriously harm others
3. Medical treatment
4. Sexual relationships

Implied Consent:

*Wright v McLean*: Parties in a mud fight (McLean invited to join “want to fight”); McLean accidentally threw a rock and hit Wright; fight stopped when Wright expressed pain; liable for hitting during consensual fight? NO – combatants consent to take ordinary risks of the sports engaged; McLean stopped immediately after plaintiff was injured and had no intent to cause harm; action dismissed; RATIO: consent goes to “ordinary risks of the sport” where play is fair (no ill will) and according to rules

Exceeding Consent:

*Agar v Canning*: altercation during hockey match; Agar hit Canning painfully on neck, Canning retaliated hitting Agar between nose and eye; part of the normal course of the hockey game? NO – injuries in circumstance show defendant had resolve to cause serious injury – retaliation beyond what plaintiff consented to BUT defendant was provoked; in favour of plaintiff but damages reduced due to provocation; RATIO: scope of consent implied in contact sports can be exceeded if beyond accidental harm or normal risks of sport; intent to cause harm limits players’ immunity

Duress or Coercion:

*Latter v Braddell*: plaintiff was domestic servant for defendant; defendant had doctor examine plaintiff to determine pregnancy, didn’t use excessive force, plaintiff did not say she didn’t want exam; consent under duress? NO – no explicit threat/violence, no evidence of force; plaintiff had authority to comply or not; RATIO: economic duress is not necessarily sufficient to vitiate otherwise valid consent (duress can vitiate consent but VERY high bar)

**BATTERY AND CONSENT IN MEDICAL SETTINGS**

**Principle of consent in medical settings = voluntary** (*Battrum v BC*) **and informed**

* Must be obtained by health, counseling and care professionals to initiate physical examination, test, procedure, surgery, or counseling
* Should be obtained in advance
* Must relate to the specific procedure or treatment (including no treatment)
* Based on a full and frank disclosure on nature of the intervention and its risks 🡪 should explicitly set out benefits and risks of procedure
* Silence is NOT consent
* Note: courts will look at lack of consent as negligence before battery 🡪 battery claim limited to cases when patient didn’t consent at all, consent exceeded, or consent obtained fraudulently 🡪 otherwise, negligence for failure to disclose risks
* Statute defines consent – where there is ambiguity the statute governs (*Cuthbertson v Rasouli*)
* Underlying principle = respect for patient autonomy

**Exceptions to common law principles of consent:**

1. Unforeseen medical emergencies where impossible to obtain patient’s consent
   1. Patient is unconscious/unable to make decision,
   2. Time is of the essence, AND
   3. Under circumstances, a reasonable person would consent – doctor must reasonably believe patient would have consented
2. Patient viewed as implicitly consenting to subordinate tests and procedures necessarily incidental to an agreed course of treatment, treatment plan, or operation (unless patient expressly objects)
3. Right to withhold info from patient if disclosure would undermine morale and discourage needed surgery 🡪 recent cases reject this right or narrow scope (*Hopp v Lepp*)

Unforeseen Emergency:

*Marshall v Curry*: Marshall consented to ordinary hernia operation; Curry had to perform differently due to unforeseen weakness of abdominal muscles – in the process discovered diseased testicle; Curry removed testicle believing medically necessary to avoid blood disease; express or implied consent for removing testicle OR legal justification in absence of consent? YES – couldn’t determine if there was implied consent (definitely no express consent) BUT in cases of emergency if patient agrees to operation and surgeon discovers another condition requiring operation, surgeon has duty to save life; RATIO: in a medical emergency where it is impossible to obtain a person's consent, health care professionals may intervene to save that person's life

No Consent:

*Malette v Shulman*: Shulman administered blood to Malette while she was unconscious although knew she was Jehovah’s Witness and did not want blood; continued giving transfusions after Malette’s daughter confirmed Jehovah’s witness status and asked him to stop; claimed unsure card in wallet was valid and if it applied in life threatening situations; battery or negligence? YES battery (not negligence) – no reason to think card was invalid – clearly purpose of card was to speak on behalf of patient, daughter confirmed status; RATIO: doctrine of informed consent does not extend to informed refusal – doctor cannot ignore patients instructions

**Consent forms:**

* Health professionals have burden of proving consent on balance of probabilities
* Consent may be given orally or in writing 🡪 signed consent form only as good as info it contains
* Key = whether patient understood nature of proposed procedures and associated risks

**Capacity to consent:**

* Consent must be given by legally competent patient to be valid
* Common law test of competency focuses on patient’s ability to understand nature of proposed treatment and risks 🡪 NOT on ability to make reasoned/prudent decision (*C v Wren*)
* No minimum age of consent for medical treatment 🡪 usually around age 16 but just requires person be able to understand nature of procedure and risks 🡪 if so, parental consent irrelevant
* SCC has ruled minors should have opportunity to make medical decisions but court must have power to intervene when human life is in danger

**Substitute consent requirements:**

1. Patient is incompetent
2. Next of kin acting in good faith
3. Procedure in best interest of the patient

Age and Consent:

*C v Wren*: C’s daughter wanted abortion, C disagreed; C brought action against Wren, daughter’s doctor, alleging lack of informed consent; dismissed at trial, C appealed; Did C’s daughter give informed consent to abortion? YES – surgeon may proceed with surgical procedure immune from an action for assault/battery if they have informed consent from patient; informed consent doesn’t require patient to consider ethics of decision; no evidence of lack of informed consent; C’s daughter was of normal intelligence and understanding to make decision; RATIO: age not a barrier to consent; individual must have sufficient understanding and intelligence to enable them to understand what is proposed

Implied Consent to Treatment:

*Battrum v BC*: Battrum injured herself and called ambulance; was attended to and had vitals assessed; paramedic immobilized arm in splint; brought action for battery against plaintiff claiming didn’t consent to be treated at accident scene or in ambulance; did she consent to treatment by paramedic? YES – called ambulance for purpose of going to hospital for treatment, consent implied when she called ambulance – reasonable to believe paramedic would touch her, etc.

Physician Assisted Suicide:

*Carter v Canada*: Physician assisted suicide 🡪 patient must: 1) clearly consent to the termination of life and 2) have a grievous and irremediable medical condition – causes incredible suffering – limits it to medical condition causing a reasonably foreseeable death

**BC Health Care (Consent) and Care Facility (Admission) Act:**

Section 9: How consent is given and scope of consent

1. Consent to health care may be expressed orally or in writing or may be inferred from conduct.
   1. For the purposes of sections 5 and 6, and despite section 6 (e) and (f), an adult may give or refuse consent to health care in an advance directive, except that an adult may not give consent in an advance directive to any health care for which a person chosen under section 16 could not give substitute consent under section 18 (1).
   2. If a capable adult gives or refuses consent to health care, the consent or refusal is not affected by any subsequent incapability.
2. Consent to health care applies only to the specific health care that an adult has consented to.
3. As an exception to subsection (2), a health care provider may provide additional or alternative health care to an adult if
4. the health care that was consented to is in progress,
5. the adult is unconscious or semi-conscious, and
6. it is medically necessary to provide the additional or alternative health care to deal with conditions not foreseen when consent was given.
7. If an adult who consents to health care stipulates that the health care must be provided by a named health care provider, no one else may provide the health care without first obtaining the adult's consent unless
8. the health care is in progress, or
9. delay is likely to put the adult's life or health at risk.

Section 10: Same rules apply to substitute consent

Sections 6, 7, 8 (a) and 9 apply when a decision about whether to give or refuse substitute consent is sought or made under section 11, 14 or 15.

Section 11: Exception — if a substitute decision maker, guardian or representative consents

A health care provider may provide health care to an adult without the adult's consent if

1. the health care provider is of the opinion that the adult needs the health care and is incapable of giving or refusing consent, and
2. the adult's personal guardian or representative
3. has authority to consent to the health care,
4. is capable of giving consent, and
5. gives substitute consent.

Section 12: Exception — urgent or emergency health care

1. A health care provider may provide health care to an adult without the adult's consent if
   1. it is necessary to provide the health care without delay in order to preserve the adult's life, to prevent serious physical or mental harm or to alleviate severe pain,
   2. the adult is apparently impaired by drugs or alcohol or is unconscious or semi-conscious for any reason or is, in the health care provider's opinion, otherwise incapable of giving or refusing consent,
   3. the adult does not have a personal guardian or representative who is authorized to consent to the health care, is capable of doing so and is available, and
   4. where practicable, a second health care provider confirms the first health care provider's opinion about the need for the health care and the incapability.
2. For the purpose of this section, a personal guardian or representative is available if it is possible for the health care provider, within a time that is reasonable in the circumstances,
   1. to determine whether the adult has a personal guardian or representative, and
   2. to communicate with the adult's personal guardian or representative.
3. If a personal guardian or representative becomes available or a person is chosen under section 16 after a health care provider provides health care to an adult under this section, the personal guardian, representative or person chosen under section 16 may refuse consent for continued health care, and, if consent is refused, the health care must be withdrawn.

*Cuthbertson v Rasouli*: Rasouli unconscious for 3 years alive by life support; doctors (including Cuthbertson) wanted to end life support because there was no medical benefit to continuation; Rasouli’s wife refused to consent and applied for restraining order; physicians cross-applied for declaration that consent wasn’t required WRT permanent vegetative state; issue was weather the Ontario Healthcare and Consent Act governs the withdrawal of life support (consent to withdrawal required and refusal challenged only before the Board) OR if it didn’t apply, whether life support could be removed without consent; *Reibel v Hughes* – common law requires medical caregivers to obtain patients consent to administration of medical treatment; physicians argued withdrawal of life support doesn’t constitute treatment under the HCCA; SCC determined the consent regime imposed by the HCCA applied (therefore didn’t make ruling on common law question); treatment requires consent of patient or substitute decision maker – definition of treatment under the act includes the withdrawal of life support therefore requires consent; RATIO: consent required to withdraw end of life treatment; HCCA decision maker must follow prior expressed wishes or where unclear/non-existent, must follow best interests of patient \*\*ONTARIO CASE\*\* 🡪 BC requires consent for treatment or healthcare (which includes withdrawal of end of life treatment) therefore *Cuthbertson* is persuasive in BC but there is no equivalent care and consent board – challenge would be determined by the court

**INTENTIONAL INFLICTION OF NERVOUS SHOCK**

**Intentional infliction of nervous shock = intentionally causing mental distress/psychiatric harm**

* Nervous shock recognized as a psychiatric illness today
* Requires proof of loss/harm
* Must be an intentional act
* Harm can be indirect
* Practical joke is not a defence (*Wilkinson v Dowton*)

**Elements of IINS** (tort created by *Wilkinson v Dowton* and confirmed in *Piresferreira v Ayotte*)

1. Flagrant or outrageous conduct
2. Calculated to produce harm 🡪 can be indirect via reckless disregard for possibility of harm that is substantially certain to occur (*Pinzo* test 🡪 actor must desire to produce the consequences that follow, or consequences must be known by the actor to be substantially certain to follow)
3. Resulting in a visible and provable illness

*Wilkinson v Dowton*: D told W joke that her husband was injured; wasn’t true – caused violent shock on W’s nervous system for weeks (no pre-disposition to nervous shock); can W recover for nervous shock? YES – person who makes a false statement that they intend someone to act on should be liable for resulting damages; defendant does not need to intend nervous shock – sufficient to act in reckless disregard for its possibility 🡪 foreseeable that profound distress would result here; constructive or imputed intent is sufficient; can recover for nervous shock even if no injury; RATIO: to establish cause of action in IINS plaintiff must establish defendant calculated or intentionally caused harm to plaintiff

*Clarke v Canada*: female RCMP harassed by male constables for ongoing period; suffered IINS; defendant liable for IINS? YES – *Wilkinson* principle: defendant willfully did an act calculated to cause physical harm to plaintiff; conduct towards Clarke extreme and calculated to produce some of effect that was produced; affirmed *Wilkinson*, adopted test from *Rahemtulla* (actual harm occurs in form of illness); RATIO: ongoing process calculated to achieve a certain end meets requirements for IINS

*Piresferreira v Ayotte*: plaintiff was 60 and had worked for Bell for 10 years; plaintiff consistently received positive reviews until 2004 when her manager (defendant) showed range of aggressive behaviour towards her; D gave P negative performance review, criticized her, and pushed her when she tried to show her an email; D refused to apologize, put her on a PIP; P left work, diagnosed with PTSD and MDD; trial judge found D liable for battery, IINS and negligent infliction of mental suffering – D appealed; is D liable? YES for battery and constructive dismissal, NO for IINS and negligent infliction of mental suffering (negligent infliction of mental suffering does NOT apply to employment relationship); IINS finding overturned because didn’t meet first two elements – not flagrant, D didn’t intent to cause suffering or know it would happen; confirmed elements of IINS – 1) Flagrant or outrageous conduct, 2) calculated to produce harm, 3) resulting in a visible and provable illness

**TRESPASS TO CHATTELS**

**Trespass to chattels = when defendant interferes with chattels within the plaintiff’s possession – damages, destroys, takes, or uses plaintiff’s goods**

* Actionable per se
* Trespass to chattels DIFFERENT than conversion and detinue
* Trespass = interference with the chattel
* Conversion = wrongful disposal of plaintiff’s rights/wrongful use of goods
* Detinue = wrongful holding

**Elements in trespass to chattels:**

1. Chattel is in plaintiff’s legal possession when trespassed on and is in defendant’s possession at time of bringing action
2. Plaintiff does not need to prove loss
3. Mistake is not a defence

Conversion: (*Fouldes v Willoughby* and *Mackenzie v Scotia Lumber Co*)

* Voluntary act by one person inconsistent with the ownership rights of another – intent to deprive owner of possession of the property 🡪 wrongful disposal
* Differs from theft because doesn’t require dishonesty or motive
* Two elements:
  + 1. Plaintiff has clear ownership or right to possession when conversion occurs
  + 2. Defendant’s conversion is by wrongful act or by disposing of plaintiff’s rights

Detinue:

* Wrongful holding of a chattel that the plaintiff has possession of
* Occurs when defendant fails to return chattel that plaintiff has right to possess
* Tort ends as soon as defendant returns property to plaintiff – limited to compensation for suffering during time chattel was detained and any damage to it
* Ff defendant not in possession of chattels then plaintiff must claim conversion

*Fouldes v Willoughby*: F boarded W’s boat with two horses; W refused to carry the horses, F refused to take them on shore; W took horses to the landing, let them loose with his brother; F stayed on board and didn’t try to get horses back; is W liable for conversion or trespass? NO conversion, YES trespass – was a simple removal with no plans to enjoy/use; removal of a chattel does not amount to conversion; RATIO: to constitute conversion party taking the goods should intend to make some use of them or destroy/consume them

*Mackenzie v Scotia Lumber Co*: P and D’s rafts both drifted; D’s servants were sent to get only their rafts but thought all rafts were D’s; D returned P’s raft as soon as they realized; D liable for conversion even though they mistakenly took property and immediately returned it? YES – but only nominal damages; servants acting on D’s behalf within scope of employment therefore liable for any torts; servants converted property but because they returned it immediately after realizing the plaintiff cannot recover full damages and have the property; RATIO: innocent mistake not a defence for conversion

**TRESPASS TO LAND**

**Trespass to land = direct and intentional physical intrusion onto the land in possession of another**

* Actionable per se (*Entick v Carrington*)
* Act of entering land of another without express or implied consent of the person in possession
* Every invasion of property is a trespass (*Entick v Carrington*)
* Trespass can involve leaving an item on someone’s property (*Turner v Thorne*)
* Trespass may be committed by entering plaintiff’s land in person, propelling an object or third party onto property, failing to leave once permission is revoked, or failing to remove an object
* Limited to direct intrusions onto land (snow blown by wind onto land NOT trespass while snow blown by snow blower IS trespass)

*Entick v Carrington*: defendant’s broke into plaintiff’s house claiming authority under warrant and carried away papers; is invasion of property trespass? YES – every invasion of property is trespass; no legal authorization or justification for entering plaintiff’s property because no authority for issuing warrant; RATIO: every invasion of property is actionable in trespass unless there is a legal justification for the invasion – no damages required

*Turner v Thorne*: Driver for Thorne’s company made delivery to Turner and unloaded boxes into garage when nobody answered door – made deliveries to garages before but not here (assumed it was fine); Turner came home after dark, tripped on boxes and seriously injured; Thorne liable for trespass? YES – trespass resulting from mistake still leads to liability; in trespass to land trespasser is liable for direct and indirect personal injuries resulting; RATIO: mistake not a defence; trespass can be a “thing”

*Harrison v Carswell*: Carswell picketing in lawful labour strike on sidewalk outside of mall operated by Harrison; asked to leave or face charge of trespass; Carswell liable for trespass OR was mall not truly private property? YES to trespass 🡪 common law always protects pirvate property unless statute applies that takes away the rights; relied on *Peters*; mall common area is private property under control of mall owner; RATIO: common law protects property rights unconditionally unless overriding statute

Note: *Harrison* is valid but weak authority (Manitoba case, later cases distinguish based on facts)

\*\*Right to enjoy property\*\*

**TRESPASS TO AIRSPACE**

**Trespass to airspace = similar elements to trespass to land 🡪 direct intentional physical intrusion into airspace above plaintiff’s land**

* Now some distinction WRT flights, etc.
* Right of landowners in airspace above land restricted to height necessary for ordinary use and enjoyment of the land/structures upon the land (*Bernstein v Skyviews & General Ltd*)

*Bernstein v Skyviews & General Ltd*: P alleged D flew over their land and took aerial photo; D says took photo but didn’t enter the airspace OR if they did enter airspace had implied permission; is taking photo by aircraft over P’s land trespass? NO – no authority for view that landowner’s rights to airspace extend to an unlimited height; generally comes down to whether aircraft is so low that it affects use of surface land; D’s aircraft did not infringe on any rights in P’s airspace; RATIO: rights of landowners in airspace above land is restricted to height necessary for ordinary use and enjoyment of land/structures upon it

**DEFENCE OF REAL PROPERTY**

**3 Basic Principles:**

1. Lawful for owner/occupier of land to use reasonable force (*Macdonald v Hees*) to prevent trespasser from entering or attempting to
2. Cannot repel or eject a person until a request made to trespasser to leave and there has been a reasonable opportunity to leave
3. If person seeks to enter or enters property by force, can eject person using force without waiting but only if amount of force is reasonable

*Macdonald v Hees*: M tried to enter H’s hotel room and mistakenly thought he heart a response after knocking; H had not expressly invited M in and forceibly removed him, causing him to fall and hit his head; M brought action against H for injuries; was H justified in application of force due to trespassing? NO – plaintiff did not forcibly enter, defendant didn’t request that he leave, and use of force was therefore not justified; even if it had been justified, amount of force used was excessive; RATIO: use of force only justified when reasonable AND after intruder given opportunity to leave (unless intruder enters forcefully)

*Bird v Holbrook*: H has walled garden set up with spring gun and trap wires; B went into garden to retrieve animal and set of spring gun, getting seriously wounded; is H liable for B’s injuries? YES – cannot set spring guns without notice; H clearly intended gun to hit victim if discharged; RATIO: force not justified when used for an improper purpose 🡪 cannot use force without warning/threat of force

**DEFENCE OF NECESSITY**

**Only applies in situations of imminent peril to property or to the person**

**Public necessity = complete defence**

* Allows individuals to intentionally interfere with the property rights of another in order to save lives or protect public interest from external threats of nature (*Surocco v Geary*)
* Ex: trespasser enters private pool to save someone from drowning
* Limited to interference with property interests (i.e. not injuring a person for greater good)

*Surocco v Geary*: S’s house was on fire and G blew it up claiming necessity to avoid adjacent buildings from catching fire and to stop spreading; can G use defence of public necessity? YES – individual rights of property give way to higher laws of impending necessity; blowing up house was necessary and it would have been consumed regardless; plaintiff cannot recover for value of goods that may have been saved – also subject to necessity; RATIO: necessary intentional interference with property rights allowable to save lives or protect public interest from impending external threats

**Private necessity = where defendant acts to protect a private interest (rather than a public one)**

* As long as no damage caused, can intrude on another’s private property to preserve one’s own life/health/property
* Where intrusion causes a loss, issue of compensation arises
* Law conflicts on this – some authority that property damages inflicted to preserve human life or property of greater value = complete defence of necessity; other authority for only partial defence – person who received benefit must pay for loss (*Vincent v Lake Erie TPT Co*)
* Must argue on the facts to determine whether private necessity is a complete or partial defence in Canada 🡪 no clear authority

*Vincent v Lake Erie TPT Co*: D stayed moored on P’s wharf due to storm; wharf damaged by force of boat; can appellant invoke defence of private necessity? NO – D required to use ordinary prudence and care; D chose to hold boat to dock, wasn’t due to natural effects therefore should be liable for damage; RATIO: necessity is only a defence if peril is imminent 🡪 if you preserve your property at expense of another person’s property, this constitutes trespass and you are liable for the damage (note: USA case)

**DEFAMATION AND DEFENCES**

**Defamation = written, printed, spoken words/acts which tend to lower person in estimation of others**

* Requires proof of loss/harm
* Primary purpose = protect reputation and compensate for harm that results
* Can be any form of communication
* Note: can cite PPT slides from class for this!!

**Requirements for Defamation:**

1. Is the statement defamatory?
   1. *Sim v Stretch* – defamation is a statement that tends to lower plaintiff in the estimation of right-thinking members of society generally
2. Does the statement refer to/reference the plaintiff?
   1. If plaintiff not specifically identified, must show the reference would be reasonably understood to refer to the plaintiff
3. Was the statement communicated to a third party?
   1. Must be communicated to someone OTHER THAN the person being defamed
   2. If defamatory statements are made in presence of others, must show that the other person both heard and understood (*Sim v Stretch*)

**Defences to Defamation:**

1. Justification: truth of the statement 🡪 defendant must prove on balance of probabilities that statement was true or substantially true
2. Absolute privilege: statements made in legislative or judicial proceedings are protected 🡪 communication of statement must be necessary for that proceeding
3. Qualified privilege: limited to a legal, social or moral duty to make statement to a person who has a legitimate interest in receiving it (ex: employment reference) 🡪 cannot be malicious
4. Fair comment: protects opinion fairly made on a matter of public interest 🡪 statement of opinion based on a PROVEN fact 🡪 cannot be done maliciously
5. Responsible communication on matters of public interest: 1) matter must be of public interest and 2) the defendant must show that he acted responsibly in that he showed due diligence in attempting to verify the alleged defamatory comments, having regard to the totality of the circumstances (*Grant v Torstar Corp*)

* Partial defences include apology or retraction which can reduce damages

*Sim v Stretch*: Edith worked for Stretch then Sim then back to Stretch; Stretch sent telegram to Sim asking for rest of Edith’s possessions, money borrowed (small amount to pay a bill when Sim didn’t leave enough) and wages; were words used by Stretch in the telegram defamatory? NO – words were used in their ordinary meaning and the ordinary meaning is incapable of being understood by reasonable person as having negative imputations; RATIO: test for defamation = would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally

*Grant v Torstar Corp*: Torstar published story concerning proposed development of golf course on Grant’s land that contained some critical comments of plaintiff re: using political influence to gain permission to build golf course which had environmental concerns; Grant declined to comment on request from Torstar; should there be a defence of responsible communication of public interest? YES – established new defence to defamation, new trial ordered; RATIO: created defence of responsible communication on matters of public interest

**NUISANCE**

**Nuisance = substantial and unreasonable interference with use and enjoyment of pubic/private land**

* Requires proof of loss/harm
* Substantial and unreasonable interference is one that is offensive and inconvenient to a reasonable person
* Unreasonableness assessed in terms of plaintiff’s use of his/her property and the relative interests of the defendant and the plaintiff
* Nuisance law supplemented by legislation (Highways Act, Environmental Protection Act, etc.)
* Dependent on circumstances/degree of the interference
* Remedies available = damages to compensate for loss or injury and injunction to stop future loss/injury

|  |  |  |
| --- | --- | --- |
|  | **Trespass** | **Nuisance** |
| Definition | Direct and intentional intrusion on P’s possession of land; wrongful interference | Substantial and unreasonable interference with the use and enjoyment of land in the possession of another |
| Liability | Actionable per se | Requires actual harm and unreasonable interference |
| Protects | Possession per se | Quality of possession |
| Policy | Inviolability of P’s possession of land; keeping the peace; privacy; property rights | Effect of D’s conduct on the P’s use and enjoyment of land and liability may be imposed without intent or negligence |
| Examples | Boundary and title disputes; privacy; peaceful use of land | Seeping sewage; foul odors; barking dogs; bright lights; traffic vibrations; industrial pollution |

Private Nuisance:

* Defendant unreasonably interferes with plaintiff’s use and enjoyment of own land
* Two aspects:
  + 1. Actual harm to property or persons
  + 2. Unreasonable interference which involves balancing of numerous factors
* Unreasonableness determined by:
  + 1. Severity of the interference, having regard to its nature, duration and effect
    - Nature: does it materially and substantially interfere with ordinary comfort of human existence?
  + 2. Character of the locale
    - Character of the neighborhood 🡪 what is the appropriate standard of tolerance
  + 3. Utility of D’s conduct
  + 4. Sensitivity of the use interfered with

*Kerr v Revelstoke Bldg. Materials Ltd*: Kerr alleged trespass, nuisance and negligence 🡪 was running motel and defendant lumber company began operating mill leading to smoke, dust and noise; Kerr had to close motel; can Kerr recover for trespass, nuisance or negligence? YES to trespass and nuisance, no to negligence; physical invasion of property by ash and dust = trespass; indirect invasion of noise, dust and smoke = nuisance 🡪 interfered with Kerr’s enjoyment and use; damages suffered – anxiety, loss of renters, closed motel; RATIO: action in trespass can only be found when substances are deposited on one’s private property while noise and smoke = nuisance; nuisance established on proof of loss; negligence focuses on reasonableness of defendant’s reckless or carless conduct while nuisance focuses on reasonableness of the interference

*Antrim Truck Centre v Ontario (Trans)*: P operated truck stop on major highway; reconfiguration of highway system by D essentially put P out of business; was this a private nuisance? YES – nuisance consists of interference with use or enjoyment that is 1) substantial and 2) unreasonable; judgment of unreasonability must be based on whether interference suffered by P is unreasonable, not whether nature of D’s conduct is unreasonable; RATIO: set out legal framework for injurious affection and nuisance claims resulting from activity of public authority 🡪 unreasonableness is a balancing act between the gravity of the interference and the utility of the public authority’s conduct

Public Nuisance:

* Attack on rights of the public generally to live unaffected by inconvenience and discomfort
* Takes into account the two factors from private nuisance (substantial and unreasonable interference) but puts more weight on social utility when considering reasonableness
* Two forms
  + 1. Common interests: where defendant’s conduct unreasonably interferes with rights, resources or interests common to an entire community
  + 2. Private interests combined: where defendant’s conduct unreasonably interferes, on a large scale, with use and enjoyment of private property, the private parties can together in an action for public nuisance

*AG Ont v Orange Productions Ltd*: D was planning to hold outdoor rock concert – evidence that prior concerts had drug use, open alcohol, public sex and trespassing; sufficient amount of private interests to bring action in public nuisance? YES – problematic for everyone in the neighborhood; considered social disaster of noise and dust, lack of proper sanitation or crowd control, and the strong public discontent; RATIO: public nuisance = nuisance so widespread in range or indiscriminate in effect that it would not be reasonable to expect one person to take on

*Ryan v Victoria (City)*: Ryan injured when thrown from motorcycle crossing train tracks on street; front of motorcycle trapped in gap between track and street – sued railway and city; liable in public nuisance? YES – public nuisance is any activity which unreasonably interferes with publics interests WRT health, safety, morality, comfort, convenience; it was NOT practically impossible for railways to avoid the nuisance 🡪 chose to exceed the minimum gap and didn’t install gap fillers; turned on the facts

**REMEDIES**

**Types of Judicial Remedies:**

1. Damages
2. Inunction 🡪 court order that directs party to do or refrain from doing something
3. Declarations
4. Orders of specific restitution 🡪 directs party to restore pre-existing condition or return item

**Categories of Damages:**

1. Nominal (token)
   1. Indicates plaintiff’s rights have been infringed but no loss or injury
   2. *The Medina* – stands for proposition that nominal damages may be awarded where there was a tort but no loss 🡪 nominal damages do not mean small damages
2. Compensatory
   1. Goal = to put plaintiff in position they would have been in had tort not been committed 🡪 make plaintiff whole 🡪 backwards looking
   2. Two types main 🡪 pecuniary and non-pecuniary (including aggravated damages)
   3. Pecuniary (special damages): can be monetized 🡪 ex: property damage, loss of earnings; aim to compensate plaintiff for quantifiable monetary loss as result of tort
   4. Non-pecuniary: cannot be monetized 🡪 ex: pain and suffering, humiliation
      1. Cap imposed by SCC in 1978 for non-pecuniary damages 🡪 $100,000 (more today because of inflation) 🡪 note: cap is only a limit WRT compensation for pain and suffering, doesn’t affect award for cost of future care or loss of income
   5. Aggravated damages: form of compensatory damages awarded to compensate plaintiff for additional injuries to dignity and similar feelings arising from defendant’s reprehensible conduct; two requirements:
      1. Plaintiffs must establish they have suffered additional injuries to their feelings
      2. Defendant’s conduct must be highly offensive or particularly repugnant
3. Punitive
   1. Where defendant’s reprehensible conduct warranted punishment
   2. Purpose = to punish defendant, deter defendant and others, denounce defendant’s conduct, strip defendant of profits their outrageous conduct generated
4. Disgorgement (gain-based)
   1. Defendant shouldn’t benefit from wrongdoing

**SLAPPs**

**SLAPP = strategic litigation against public participation**

* Used by plaintiff against individuals or groups that speak out/take position of public interest to intimidate them, deplete their resources and reduce their means of action
* Purpose = to deter criticism, not to win
* Brought for an improper purpose: no reasonable expectation that the claim will succeed at trial AND a principle purpose of the claim is to dissuade the defendant or others from engaging in public participation

**Arguments Against SLAPPs:**

1. Chill expressive activities
2. Chilling effect arises from *process* of litigation not *outcome*
3. Power and economic imbalance between parties
4. Drain on judicial resources

When Defendant argues that Plaintiff brought the tort for an improper purpose:

* If balance of probabilities met = case dismissed, Plus:
  + Possibility of all costs paid and punitive damages
* If only a realistic possibility = burden of proof shifts to P to prove it was not an improper purpose at trial, Plus:
  + Possibility of all costs paid and punitive damages at trial
  + Financial security by P
  + Court supervision, if P drops the case or D decides to settle
* If no realistic possibility = case proceeds as an ordinary tort case