**Introduction to the Law of Torts**

**Definitions of Tort Law**

**Torts as a Wrong**

* Torts as the area of law dealing with wrongdoing – some problems w/ this definition:
	+ Doesn’t distinguish b/t moral and legal wrongs
	+ Doesn’t distinguish from other areas of law also concerned w/ wrongdoing : contractual or criminal wrongs
	+ The definition is too general: the law imposes a lot of obligations on people that are not tortious

**Torts in terms of public vs. private law**

* Criminal law is concerned w/ public wrongs: wrongs against society
* Tort law is concerned with private wrongs: wrongs against individuals
* Problems
	+ Doesn’t account for a number of key elements of tort law
		- Ex. strict liability is imposed in the absence of any prior relationship, so torts is not limited to intentional acts between private individuals

**Definitions to Consider**

* Wittgenstein: Torts is the area of law recognized by the courts as constituting torts. It deals with the topics that have historically been recognized by the courts as constituting law of torts.
* Private wrongs: Area of law concerned with private wrongs other than those arising from contracts
* Aims and objectives: Torts is the area of law concerned w/ compensating people for private wrongs committed against them by other individuals

**Comparing and Contrasting w/ Criminal and Contract Law**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Torts** | **Crim** | **Ks** |
| **Function** | * Tort law is largely about restitution, compensatory damages.
* Obligations imposed by law on the basis of circumstance.
* Typically imposed to prevent harm and restore the state of affairs.
* Backward looking: It exists to take the victim back to where they would be if the act had never happened.
 | Criminal law is about punishment.  | * Enforcement of contracts
* Voluntary obligations
* Subject to privity, so only those involved can sue.
* Forward looking: put you where you would be if K had been executed
 |
| **Protects** | * Interests of individual claimants
* Tort obligations apply even if parties do not know each other
 | * Protect and represent community at large
 | * Those party to contract can sue and only if K is breached
 |
| **Aims and objectives** | * Compensation
* Deterrence
* Accountability
* Corrective justice
* Vengeance
* Education
 | * Punishment
* Deterrence
* Retribution
* Restitution (re-assert rights of victims)
 |  |
| **Standard of Proof** | * Balance of probabilities
* 51% likely that what one side is saying is true to satisfaction of trier of fact
 | * Beyond a reasonable doubt
* Consequences are higher
* Insuring quality of arms: restrain powers of state against the citizen because they have more power
 |  |

**Foundations and Objectives of Tort Law**

**Things you assume about how law works:**

* Notions of justice, equity
* Laws made in hard cases
* It guides behaviour: educational, aspirational
* Highly procedural
* Winners and losers: legal rules inherently favour one set of interests over another

**Descriptive Account**

* Aims that tort law pursues, and what tort law does in practice
* Compensation
	+ Most important function of tort law: compensate for losses caused by conduct courts regard as below acceptable standards
	+ Purpose is to restore person to original state of affairs if tort had not been committed
	+ Rule of law: for a law to be just, it must be knowable and predictable 🡪 allows people to organize own behaviour
	+ Compensation is useful b/c you know that if your things are damaged unfairly, you will be compensated
	+ Can be reflective of broader commitment to corrective justice
		- Corrective justice: individual has a duty to repair the wrongful losses that his conduct causes
		- Corrective justice views tort law as a system of first- and second-order duties
			* First order: duty not to injure – establish norms of conduct
			* Second order: duty of repair – arise upon breach of first order duties (corrective element).
		- For a loss to be wrongful in the relevant sense, wrongdoer does not have to be morally to blame. Loss is incidental to violation of right not to be injured – correlative to wrongdoer’s first-order duty not to injure
	+ Arguments against compensation:
		- Is it just distributive?
		- Time frame 🡪 takes a long time to remedy the situation (BUT often, torts is about reassertion of rights rather than compensation)
* Punishment
	+ One of the main functions of tort law is to express societal disapproval of conduct of wrongdoers who cause harm to other citizens
	+ Damages are also intended to sanction the defendant
	+ Acknowledge people as moral agents: recognize that they make choices and hold them accountable for their decisions.
	+ Kantian ideas of punishment:
		- Consequentialist: you do things b/c it brings about good outcomes
		- Non-consequentialist: you shouldn’t do something because it is bad.
			* You aren’t punishing to deter, you are punishing because what they did was wrong.
* Deterrence
	+ Influence the conduct of citizens. Promote certain social goals
	+ Specific: Deter a person from doing that specific act again 🡪 Change the behaviour of the defendant who is the subject of the particular tort action
	+ General: Deter the general public from doing a harmful action
		- Change behaviour of class of potential defendants with a view to preventing future harms
			* Ex. Decisions in relation to medical negligence frequently aim to send a message to the profession as a whole about standards of care and conduct expected
	+ Market: Aim to reduce costs of accidents – change behaviour of producer of goods. Ensure producers properly internalize costs
	+ Critique:
		- Assumes that a person is a rational actor. It only works with a certain type of behaviour
		- You have to know the rule and you have to alter your behaviour for deterrence to occur
		- A lot of things that generate liability in torts are not deliberate, but are accidental. You aren’t thinking about deterrence.
		- Best form of deterrence is to punish innocent people
* Education
	+ Easy to confuse with deterrence
	+ In its educative role, torts aims to influence behaviour of society at large, not just actions of potential defendants

**Normative Account**

* Aims tort law could pursue, and what tort law should do in practice
* Distributive justice
	+ Critiques corrective justice
	+ It is about the distribution of resources proportional to the merits of the person
	+ Richard Posner: the purpose of tort law is to make sure that it should aim at minimizing the cost of litigation. Economic criteria are the only ones that are objective. Moral reasoning is subjective, and should have no place in the law. Anything that maximizes what is good for all of society economically is better.
	+ **Key argument**: tort law should pay more attention to principles of distributive justice and be less sympathetic to the claims of those who already have a great deal.
* Retributive theory
	+ Torts should be about recognizing and responding to moral wrongs
	+ You did something wrong so you should suffer
	+ Problem: Lots of things we think of as torts don’t involve morally blameworthy conduct
* Economic theory
	+ Torts should aim to minimize costs of accidents and the costs of avoiding them
	+ Tort liability should only be imposed where it leads to rational economic behaviour and an efficient allocation of resources

**Basic Principles of Liability for Intentional Torts**

**Intentional Torts and Negligence**

* Significant differences in form, substance, and policy between these two regimes of tortious responsibility

|  |  |
| --- | --- |
| **Intentional Torts** | **Negligence** |
| * Long history – static and unchanging
* Relatively stable over time
* Closely defined fact patterns and particular categories of damage
* Defined by rules that tend to be precise, narrow, and rigid
* Characterized by convention, orthodoxy, and conservatism
* Operates more as a conventional loss shifting system
* Conventional loss-shifting system emphasizing corrective justice and allocating responsibility b/t individual litigants
 | * Fairly modern torts
* State of development
* Negligence is governed by general principles and use of discretionary principles such as reasonableness and foreseeability
* Dynamic, expansionary, largely reflective of current public attitudes and policies
 |

**Intention, volition, and motive**

* Osborne: Intent typically refers to a subjective desire on the part of the defendant to bring about a particular consequence by his or her actions
* Solomon: “Intent is used to refer to an actor’s desire to bring about the result or consequences of his act, rather than his desire to do the physical act itself.”
	+ A intended X when he wanted X to result from his actions
* **Key point**: When dealing w/ intentional torts, central issue is usually whether defendant desired to bring about specific consequence that gives rise to tort in question
	+ Intent does not have to be hostile or otherwise blameworthy. There is no accommodation in the structure of torts for motive.
* Distinguish from voluntary: a voluntary act is a deliberate action, it was willed. Torts assumes you must at least establish the action was voluntary before you can even look at intention.
	+ Volition is not enough to establish liability, except where there is strict liability
	+ **Smith v Stone (1647)**: Stone trespassed, but argued he was not on the land voluntarily as he had been chased onto it against his will. Court found in his favour.
* Distinguish from motive: Intentional torts don’t typically require knowledge of motive. Plaintiff will almost always have to prove intent on part of defendant, but don’t have to prove motive.
	+ Motive may come up in a case of duress: “yes I intended to do the thing, but…”
	+ **Gilbert v Stone (1648):** if motive allowed as defence, they would end up depriving the innocent plaintiff of a remedy.
		- Only where there is extreme duress can you use motive as a defence

**Constructive and Transferred Intent**

* Constructed (imputed) intent: It was substantially certain that X would happen, and that is sufficient to make the act intentional (Bettel v Yim – responsibility for unintended consequences)
	+ To excuse the defendant from liability would reward stupidity and exclude extremely dangerous and morally culpable conduct form the reach of the intentional torts
	+ Intent not only includes desired consequences, but unintended consequences that are substantially certain to result from conduct
	+ **Problems**:
		- Allows us to hold people responsible for things they may not have intended
		- How substantially certain does it need to be?
			* **Rebuttal:**
				+ Need to protect plaintiffs and public at large from people who don’t give enough thought to likely consequences of their actions
				+ Would a reasonable person have realized what the possible/likely consequence was?
		- Objective vs. subjective approaches:
			* Court may consider expertise in a situation (ex. navy seal shooting into crowd)
			* Objective approach is difficult morally b/c you are penalizing someone even if they didn’t think about it
			* Subjectively, you are penalizing them because they foresaw risk and acted anyway
			* We tend to choose objective approach for public protection because it protects against thoughtless acts (ie. people who fire rifles without thinking about consequences)
* Transferred intent: A intends to shoot B but misses and hits C. It considers the serious moral culpability of the defendant’s behaviour and the complete innocence of the plaintiff.
	+ Defendant intends to commit intentional tort against one party, but unintentionally commits a tort against another (the plaintiff)
	+ Also applies where defendant intends to commit one kind of intentional tort but ends up committing another
	+ Justification: Conduct is culpable, plaintiff is innocent 🡪 we should respond to wrongful intention and harm caused even if defendant does not achieve his aim

**Capacity**

* A defendant cannot be held liable in tort if he or she did not understand the nature and quality of their act
* A defendant can be held liable even if they didn’t realize the act in question was wrong or unlawful

**Epstein / Simmonds Discussion – Strict Liability**

* Epstein: strict liability is not amoral. It clarifies persons of liability in a way that makes people more morally responsible for their actions. It puts people on notice that they will be held morally accountable for tortious actions
	+ Is there injury? Is there cause?
* Simmonds: Actually, the moral distinctions tort law draws are quite clear. Torts is not entirely without a blame function.
* Simmonds thinks that the first question (injury) is easy, but how do you decide which ones are remedy-worthy and which are not?
* Epstein wants a neat, unified theory, while Simmonds says that its just really messier.

**Intentional Interference with the Person**

* Tort intended to protect plaintiff from intentional interference with the person.
	+ Battery – bodily security
	+ Assault – freedom from threats of violence
	+ False imprisonment and malicious prosecution – liberty
	+ Intentional infliction of nervous shock – psychological security
	+ Invasion of privacy

**Assault**

* An assault is **(1)** any direct and intentional act that **(2)** causes a person to apprehend immediate harmful or offensive bodily conduct.
* Actionable without proof of physical damage
* Only immediate threats can constitute assaults

**Elements**

* **Direct and intentional act:** R v Ireland [1997]
	+ Directness is not usually contested.
		- Plaintiff must prove interference is direct consequence of defendant’s action
		- Once directness proved, **triggers reverse onus of proof**: defendant must prove he did not intend to cause defendant to apprehend immediate harmful or offensive bodily contact
			* **N.B.**: Transferred intent applies here. If A says “I’m here to kill David” and there are two Davids, both can sue for assault
		- Where a plaintiff misapprehends the defendant’s intention: If there is apparent intent and apparent capacity as interpreted by a reasonable person to carry out threat, then it can be treated as if they had real intent and they are liable
	+ Intention is more difficult to prove: must intend the direct act that causes apprehension of immediate harmful or offensive bodily contact.
* (**1) Caused apprehension of (2) immediate (3) harmful or offensive bodily contact**: Holcombe v Whitaker
	+ Cause apprehension
		- Not usually hard to prove.
		- Standard is “but for causation” 🡪 “but for the cause of the defendant’s actions, would the consequences have happened?”
		- Fear is not required. Plaintiff only has to believe that harm or offensive bodily contact will occur.
	+ Immediacy
		- Expect attack or contact to happen immediately following threat
		- Threat must be capable of being carried out at once
		- Must be **reasonable** apprehension. Threats of **future** violence will not suffice
	+ Harmful or offensive bodily contact

**R v Ireland [1997 Eng. CA]**: Caused apprehension of immediate offensive bodily harm or contact

|  |  |
| --- | --- |
| **Facts** | D made series of silent phone calls to 3 different women over 3 months. He was sentenced to 3 yrs imprisonment for causing victims to suffer psychiatric illness. He appealed contending that silence cannot amount to an assault and that psychiatric injury is not bodily harm. |
| **Ratio** | * No rigid distinction between mind and body.
* Words alone can constitute an assault. If the purpose is to protect plaintiff from fear, the mechanism through which it is achieved is secondary.
* By the same logic, silence, where it creates apprehension, should also constitute an assault.
 |
| **Obiter** | * Law is unclear in Canada regarding whether words constitute an assault
* Psychiatric injury capable of being bodily harm
* Assault requires fear of immediate application of force. Such fear could have existed if victim of silent caller feared possibility of immediate personal violence due to caller’s imminent arrival at her door.
 |
|  |  |

**Holcombe v Whitaker [1975 SC Alabama:** Directness, immediacy (pounding on door)

|  |  |
| --- | --- |
| **Facts** | Defendant repeatedly made a series of conditional threats to kill the plaintiff, the last of which included action (pounding on door). |
| **Ratio** | * Words alone **can** constitute assault. This wasn’t even an issue, because conduct included action.
* You can look at the entire pattern of behaviour to decide what words mean: look at words in context of the thing complained about
 |
| **Obiter** | * D cannot compel P to buy safety by complying w/ a condition he has no legal right to impose
* Words standing alone do not constitute assault, but they may give meaning to an act
 |

**Battery**

* Direct, intentional, and physical interference with the person that is either harmful or offensive to a reasonable person.
* Actionable **per se**, without proof of damage 🡪 injured the right to be free from interactions
* Whether it is battery depends on context: must be justification such as consent of plaintiff
	+ D must prove conduct was neither intentional nor negligent, or that some legally recognized defence applies
* Actual bodily contact is **not** essential to establish battery
* Plaintiff does not need to be aware of the battery when it takes place
* **Burden of proof** is on the defendant. P only has to prove that his person was directly interfered with in a harmful or offensive way
* **Foreseeability** does not restrict liability: liable for all consequences of battery, justified on the ground that the D’s conduct being intentional, carries the stain of moral culpability
* **Purpose**: protect the fundamental right of bodily integrity.
* Day-to-day unavoidable human contact cannot be considered battery 🡪 implied consent

**Elements**

* **Physical interference**: Malette v Shulman
	+ There must be some form of physical contact, not limited to touching the person (bodily contact). Grabbing clothing or snatching something from them is sufficient.
* **Directness**
	+ Same general meaning as in assault.
	+ Traps or deliberately poisoning someone’s food cannot be battery
* **Intention**: Bettel v Yim
	+ Same meaning as assault
	+ Only have to intend to bring about physical contact, not intent to cause harm or be socially offensive
	+ Defendant must prove absence of intent once directness established
* **Harmful or offensive contact**: Bettel v Yim
	+ Harm to bodily integrity is enough, doesn’t have to be physical harm

**Accepted Defences**

* Consent
* Self-defence
* Defence of property
* Necessity and legal authority

**Malette v Shulman (1990 Ont CA)**: Physical interference

|  |  |
| --- | --- |
| **Facts** | M injured in car accident. Doctor administered blood transfusion, despite card explicitly stating she was a Jehovah’s Witness and did not want blood transfusion. When she recovered, she sued for battery. |
| **Ratio** | * Generally, doctrine of necessity can protect doctor if they cannot consult patient.
* Here, there is written evidence of patient’s wishes.
* Protect right to bodily integrity and self determination: entitled to reject blood transfusion
 |
| **Obiter** | * She did not suffer physical harm. Interference is not the same as injury.
 |

**Bettel v Yim (1978 Ont. Co. Ct.):** Intention; harm

|  |  |
| --- | --- |
| **Facts** | P and friends lit matches and threw them into the store, setting bag of charcoal on fire. D removed bag unassisted by P. When P tried to leave, D grabbed him. P denied setting the fire and D grabbed him by the collar with both hands and began shaking him. D’s head came down and hit P’s nose accidentally, and P fell to the floor. |
| **Ratio** | * He intended to bring about offensive or harmful contact to extract confession
* You are responsible for all the intentional and unintentional consequences of your intentional act
 |
| **Obiter** | * No liability for pure accident.
* Actions for injures “require proof of intent to inflict them or of failure to exercise proper care”
 |

**Sexual Battery and the Role of Consent**

**Feldthusen: Civil Action for Sexual Battery**

* No distinct tort of sexual battery in Canada, consequently where offensive or harmful conduct is sexual in nature, it is dealt with according to the traditional rules of battery in torts
	+ **Absence of consent is presumed. Defendant bears onus of proving consent, constructive or otherwise** (Adjin-Tettey)
* Sexual battery cases tend to fall into two types:
	+ Exploitation: abuse of power-imbalanced relationships
	+ Negligence: 3rd party breached duty to protect victim from sexual battery
* **Reasons for a sexual battery action:**
	+ Sexual battery is not simply a species of traditional battery, but is qualitatively different from the latter with respect to who is targeted, decision to prosecute, credibility issues, and the effect on victims (Adjin-Tettey)
	+ Tend to be consistent w/ corrective justice system
	+ Part of the healing process: vindication, appeasement, retribution
	+ Accused is at the centre of the criminal justice system, whereas victim is central to civil suit
	+ **Tort actions are important because** criminal prosecution may not always be available, or may not adequately provide the kind of personal remedy desired by the victim (Adjin-Tettey)
	+ Civil system is premised on equality of plaintiff and defendant
		- Litigants must perceive that they have been fairly treated
		- They can participate, have a voice, or have control
		- Ties into the first principle of recovery: empowerment of the survivor
			* Tort suit can have specific and general therapeutic benefits 🡪 Access to a tort remedy is important for victims of sexual wrongdoing and women’s equality (Adjin-Tettey)
		- Recognition and restitution are imperative to rebuild victim's sense of order and justice
	+ BARD vs balance of probabilities

**Adjin-Tettey: Constructive Consent in the Tort of Sexual Battery**

* Constructive consent is to be objectively determined based on whether complainant’s conduct lent itself to a reasonable inference of consent to sexual contact
	+ “A reasonable person in the D’s position should have believed the P consented to sexual contact in the particular circumstances” (objective determination)
		- Must be a reasonable belief that there is consent to sexual contact
		- Court will consider plaintiff’s demeanor as well as surrounding circumstances at timeo f alleged assault
* Constructive consent actually makes it harder to receive a civil remedy
	+ Raises threshold for liability in civil cases relative to criminal standard, which would be contrary to limitations on the use of implied consent in criminal law
* Possibility of a successful defence of constructive consent, coupled w/ myths and stereotypes about women’s sexual behaviour, could put a civil remedy beyond the reach of many victims
	+ Actually undermines the autonomy and dignity of women in context of sexual battery
	+ Only voluntary and affirmative consent should be accepted as a valid defence to claims of sexual wrongdoing
* **Historical context of tort liability**
	+ Premised on theory of strict liability
	+ Defendant’s fault is not traditionally a relevant consideration for determining liability
	+ Presumption of fault arises against D upon proof of interference w/ Ps bodily autonomy
		- Can only escape liability by disproving fault – that is, a lack of intent and negligence, or by establishing a valid defence

**Decision in Scalera**

* P in a sexual battery case must prove that there has been physical contact of a sexual nature, but is not required to prove lack of consent
* Confirms that absence of consent is **presumed** in sexual battery cases
* Defendant’s fault arises from the intentional violation of the plaintiff’s bodily security, so **defendant** bears onus of proving consent
* McLachlin J: wrong to recognize new tort of sexual battery requiring P to prove lack of consent
	+ Purpose of battery is to protect personal autonomy rights
	+ Wrong to expect person whose bodily integrity has been violated in such a fundamental way to then have to prove contact was non-consensual
	+ Decision considered a victory for feminists. McLachlin notes there is often a power imbalance.
		- Rejects formal equality of plaintiffs and defendants that underlies most civil litigation
		- Explicitly recognizes power imbalance present in sexual abuse as well as its often gendered nature, the inherent wrong to victims of sexual abuse, and more generally, persons who have suffered intentional invasions of their personal autonomy and dignity
	+ Court rejects subjective assessment of belief, and rejects idea that honest, mistaken (but unreasonable) belief could be defence
* It can be argued that b/c Scalera did not go into great detail on the question of constructive consent, there are a number of problems with this approach:
	+ Unclear as to whether the defendant needs to **adduce evidence** about reasonable efforts to ascertain the claimant’s consent
	+ Objective approach means that the plaintiff’s perception of events is **irrelevant** provided the defendant can show that there is a reasonable basis for their belief in consent
	+ Victims may in effect find themselves being blamed for behaving in ways that **induced** the defendant into believing consent was present, or for **failing to resist** in circumstances where a reasonable person would have protested
	+ Constructive consent is premised on common sense ideas about “normal” or “reasonable” behaviour or responses to unwanted sexual advances

**Advantages and Disadvantages of suing for sexual battery in tort**

* **Advantages:** There is the sense that in a criminal trial, the victim gets relegated. They have no control over the process.
	+ Some people claim criminal law “steals conflicts”. The victim doesn’t get to control the way the conflict is resolved, denying them the possibility of closure. The victim gets revictimized, this time by the legal system as they have to relive the process as a witness.
		- If court can be convinced that a reasonable person in that situation would have protested 🡪 this critiques behaviour of the victim, which is problematic especially in the scientific study of sexual assault, most people shut down so you wouldn’t respond.
	+ In torts, victim gets more control and gets a “reclaiming of their rights”.
		- Plaintiff controls the case, choose what facts are brought before the courts, and what expert evidence is presented
		- Civil approach may have therapeutic benefits. Probably best captured by the idea that the defendant gets “their day in court”
* **Disadvantages**
	+ Civil litigation can make things worse. Cost, delay, and stress may undermine the therapeutic benefit of civil litigation.
	+ If it is defended, there is high possibility of secondary victimization
	+ Civil litigation is expensive, and the plaintiff may not receive full, or even partial damages

**Should there be a new tort of sexual battery**:

* Mirrors approach taken in the criminal law
* Does not allow for defence of implied consent: **Ewanchuk**
	+ Severely limits the situations where an accused person can claim an honest but mistaken belief in consent to sexual contact
	+ Where complainant says it was non-consensual, court will accept unless they find complainant not to be credible
	+ Defendant must show they took reasonable steps to show there was consent: be clear about consent being given
	+ **Rule**: mistaken belief in consent can only operate to negate the mens rea required for sexual assault where the accused can show that they believed the complainant communicated consent to the sexual contact in question

**Non-Marine Underwriters (R) v Scalera (A):** *tort of sexual battery – consent = defence, proven by defendant*

|  |  |
| --- | --- |
| **Facts** | A plaintiff sued 5 BC Transit bus drivers, including the appellant. A’s homeowner insurance policy issued by R, included coverage for compensatory damage because of bodily injury BCSC dismissed R’s request for declaration it not be required to defend the appellant against the plaintiff’s claims. Court of Appeal allowed the respondent’s appeal; appeal dismissed. |
| **Significance** | * In the tort of sexual battery, consent operates as a defence and must be proven by the defendant
* Exclusion in the policy should be interpreted as requiring an intent to injure. In an allegation of sexual battery, courts will presume that defendant intended harm
* McLachlin: if the D does not deny that sexual contact occurred, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented
* Case law: settled rule that requires P in a battery case to show only contact through a direct, intentional act of the defendant and places the onus on the defendant of showing consent or lawful excuse, including actual or constructive consent
* **Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant**
* “Sex is not an ordinary casual contact which must be accepted in everyday life, nor is it the sort of contact to which consent can be implied”
 |

**False Imprisonment**

**Definition**: False imprisonment is the direct and intentional imprisonment of another person.

* Actionable *per se*, without proof of damage

**Elements**

* **Direct and intentional**
	+ Plaintiff must prove directness 🡪 once established, D carries burden of showing actions unintentional or not negligent
	+ Defences: consent, legal authority
* **Imprisonment of another person**
	+ There must be complete restriction on plaintiff’s physical liberty: Bird v Jones
		- Restraint may be imposed by barriers, an implicit or explicit threat of force, an explicit assertion of legal authority
		- Psychological imprisonment: person intimidated by show of authority, fear of consequences of refusal, apprehended use of force, or sought solely to avoid public embarrassment: Campbell v S.S. Kresge
		- Reasonable means of escape: anything that puts the plaintiff in risk of serious personal injury is not escape. Anything that forces plaintiff to commit trespass is also not an escape
		- Traditionally, awareness of confinement unnecessary
			* No Canadian authority on whether or not plaintiff must be conscious of his imprisonment
		- Indirect false imprisonment (Roberts v Buster’s Auto Towing Service):
			* B falsely imprisons C, but on the basis of info provided by A
			* If B has individual discretion (choice) about following guidance provided by A, then A cannot be liable.
			* If B has no discretion and must act on basis of A’s information, then A can also be liable for false imprisonment

**Bird v Jones (1845 Eng.)**: There must be total physical restraint

|  |  |
| --- | --- |
| **Facts** | P wanted to enter public road that had been closed. D (police) prevented him from doing so. D allowed him to remain where he was and to leave, but P refused to leave. P sued D for false imprisonment.  |
| **Issue** | Can a party be liable for false imprisonment if he only partially restricts the movement of another? |
| **Ratio** | * P could have left, but chose not to
* D did not totally restrict his movements, merely did not allow P to go where he wanted to go
 |
| **Dissent** | * Even if one only partially contains another party and prevents him from going where he wants, this is enough for an action of false imprisonment.
 |

**Roberts v Buster’s Auto Towing Service Ltd. (1976 BCSC)**: Directness; indirect false imprisonment

|  |  |
| --- | --- |
| **Facts** | E reported incident to police and asks them to apprehend P. Police apprehend P. |
| **Ratio** | * False imprisonment b/c E directed police to apprehend P, police had little or no discretion
 |
| **However** | * E gives info to justice of the peace who orders P to be held in custody. No false imprisonment by E because JP exercised discretion. BUT, E could be liable for malicious prosecution
 |

**Campbell v S.S. Kresge Co. (1976 NS TD)**

|  |  |
| --- | --- |
| **Facts** | A customer told D (she thought P had shoplifted. D confronted P w/ badge, asked that she come into his office to avoid embarrassment to them both. D couldn’t see witness, and told P she was free to go. |
| **Ratio** | * False Imprisonment from when she was confronted outside until told she was free to go
* She did not consent to go but went out of fear of consequences
* D had no reasonable or probable grounds b/c he did not personally witness her taking sth
 |

**Malicious Prosecution**

**Balance of competing interests**

1. Freedom of individual citizens from groundless criminal prosecutions that may result in damage to reputation, a loss of liberty, and financial loss
2. Public interest in effective and uninhibited prosecution of criminal wrongdoing
* Tort of malicious prosecution strongly favours public interest by protecting prosecutors from liability unless the prosecution was brought maliciously and without reasonable and probable cause
	+ P must prove malice. Incompetence is insufficient.
	+ Traditional: imposing liability on private prosecutors might inhibit voluntary and cooperative conduct
	+ Modern: all prosecutors subject to liability under malicious prosecution
* Liability in malicious prosecution doesn’t preclude finding of liability in alternative causes of action including conspiracy, abuse of process or intentional infliction of harm

**Elements** (*Nelles v Ontario*)

Plaintiff must prove that:

* **D initiated proceedings against plaintiff**
	+ D was actively instrumental in bringing a prosecution
	+ Merely providing info to police is not normally sufficient unless false report is deliberately given for purpose of prompting wrongful prosecution
* **Proceedings terminated in plaintiff’s favour**
	+ Conviction indicates reasonable and probable cause for proceedings
	+ Claim of innocence is foundation of action
		- Discharge, stay of prosecution, successful appeal, or an acquittal on a technicality
		- Exoneration
* **No reasonable and probable cause:** Miazga v Kvello Estate
	+ Subjective: actual belief in guilt (in Miazga, ruled not necessary to consider)
	+ Objective: rational basis for belief
	+ P must prove absence of at least one element
		- D did not honestly believe (assuming facts of case are true) that P was guilty
		- No reasonable person placed in position of D would have come to conclusion that P was guilty
	+ Most difficult element to prove: you can only get to the objective element if you satisfy the subjective element:
		- Prosecutor believes guilt, reasonable person would believe guilt, but prosecutor doesn’t believe jury would convict 🡪 purpose of trial is not conviction, but to lay out the facts: Nelles v Ontario
* **Malice on the part of the defendant**
	+ Rule: Malice includes spite, ill will, vengeance, and extends to any improper purpose
		- Proper purpose: bring offender to justice and to enforce criminal law
		- Improper purpose: securing private collateral benefit, coercing person into desired course of conduct, shift blame for causng damage to property to an innocent person
	+ Malicious intent requires an improper purpose that was inconsistent w/ the office of the Crown attorney
		- Honest, but mistaken belief that there were reasonable and probable grounds does not support a finding of malicious intent
		- Lack of subjective belief of reasonable and probable grounds is a relevant factor in determining malice, but does not automatically equate with malice.
			* Inexperience, incompetence, negligence, or gross negligence are not the same as malicious intent
			* Requires an improper purpose that was inconsistent with the office of the Crown attorney: Miazga
			* Burden is on plaintiff: very good policy reasons not to put additional burden of proof on police
* **Plaintiff sustained damage**
	+ Malicious prosecution is not actionable without proof of actual damage
	+ Includes: loss of reputation, loss of liberty, financial loss

**False Imprisonment and Malicious Prosecution**

* Mutually exclusive causes of action
* False imprisonment – derived from action in trespass, which requires a direct act
* Malicious prosecution derives from action on the case that addresses indirect acts

**Malicious Procurement and Execution of a Search Warrant**

* Similar to malicious prosecution: deals with intentional abuse of processes of court
* Requires plaintiff to establish:
	+ D made successful application for search warrant
	+ D had no reasonable and probable cause to do so
	+ D acted with malice
	+ P suffered damage

**Abuse of Process**

* Improper use of civil litigation process
* Four elements
	+ D must have brought civil action or process
	+ Collateral and improper purpose
	+ Evidence of some overt act or threat to secure D’s improper purpose
	+ P must prove damage

**Nelles v Ontario (1989 SCC):** Reasonable and probable cause; malice

|  |  |
| --- | --- |
| **Facts** | P charged with first-degree murder in deaths of four babies at the Hospital for Sick Children in Toronto. Charges dropped after preliminary hearing due to lack of evidence. P sued police officers, Ont. AG, and Crown for false imprisonment, malicious prosecution, negligence, and violation of Charter Rights  |
| **Issue** | Are the AG and Crown immune to suits of malicious prosecution |
| **Ratio** | * Sets out the elements of malicious prosecution (D initiates / P wins / absence of reasonable and probable cause / malice)
* **Reasonable and probable cause test** has both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances.
* **Malice** = improper purpose
* No absolute immunity for Crown
 |
| **Dissent** | * Burden is on the plaintiff to prove AG perpetrated a fraud on process of criminal justice
* Advocates of absolute immunity: encourages public trust and confidence on the impartiality of prosecutors 🡪 But what happens when he does abuse the process?
 |

**Miazga v Kvello Estate [2009 SCC]:** reasonable or probable cause; malice

|  |  |
| --- | --- |
| **Facts** | Prosecutor (M) prosecuted two parents for sexual assault who had been accused by their children. M had doubts about children’s credibility, but head office advised him to continue prosecution if he believed essential elements of story. Parents were convicted, but later it emerged that children had lied. Parents were exonerated. Parents sued M for malicious prosecution and M was convicted. He appealed to SCC. |
| **Ratio** | * Reasonable and probable cause test is focused on a prosecutor’s professional, not personal judgment. There are a lot of times where a person in a professional capacity cannot express their personal opinion because it is not appropriate.
* Prosecutor does not decide guilt, simply decide if there is enough evidence to justify bringing case to court
* In reviewing reasonable and probable grounds, court should only consider facts available at the time of prosecution, not facts that emerged later
* It is about the reasonable probability of guilt, not the likelihood of conviction
 |
| **Rule** | * No need to consider subjective belief
 |

**Proulx v Quebec (2001 SCC)**

|  |  |
| --- | --- |
| **Ratio** | Test for malicious prosecution:1. Respondent initiated prosecution
2. Prosecution resulted in appellant’s acquittal
3. Crown did not have reasonable and probable cause upon which to found charges against appellant
4. Prosecution motivated by improper purpose
 |
| **Significance** | Department of AG and its prosecutors are not above the law. This is one of the exceptional cases in which Crown immunity for prosecutorial misconduct should be lifted |
|  |  |

**Intentional Infliction of Nervous Shock**

* Tort usually defined in terms of its elements
* Traditionally law does not like nervous shock because it has no physical harm
	+ Causation is difficult to prove
	+ A single act can affect an indeterminate number of plaintiff’s simultaneously 🡪 courts don’t like expansive liability

**Elements** (Wilkinson v Downton)

Plaintiff must prove:

* **Outrageous and extreme conduct**
	+ Would the average person regard the conduct as outrageous or extreme? => very subjective
	+ Likely to find outrageous conduct if P was vulnerable, and D aware of vulnerability
	+ Can be a course of conduct, not an isolated incident: Clark v R
* **Actual or constructive intent to cause severe impact on plaintiff’s psychological well-being**
	+ Intent to cause nervous shock, nervous breakdown
	+ Constructive intent: reasonable person would foresee this would happen
		- Not necessary to foresee full amount of injury, merely some sort of psychological harm
		- Intent to inflict mental distress can be inferred from extent and duration of harassment: Clark
* **Nervous shock**
	+ Recognizable psychiatric illness or physical harm
	+ Insufficient: anguish, worry, emotional distress: Radovskis v Tomm
	+ P must not have particular predisposition or susceptibility to shock 🡪 average mental sturdiness
	+ Where there is no medical evidence of mental illness, can still find IINS provided there are symptoms of depression present and the behaviour of D is outrageous: Rahemtulla v Vanfed Credit Union
		- **Exception**: marriage breakdown and consequential custody and access disputes. There is a high risk of vindictive and extortionate litigation.

**Wilkinson v Downton [1897 QB]:** willfully cause harm; foreseeability; outrageous conduct; nervous shock

|  |  |
| --- | --- |
| **Facts** | D played a practical joke and told P her husband was in an accident and she was to go at once to get him. This statement caused a violent shock to the plaintiff’s nervous system. She had no previous ill-health and no predisposition to nervous shock |
| **Ratio** | * Such a statement made suddenly and seriously would produce grave effects under the circumstances to anyone except an exceptionally indifferent person
* A party may seek recovery for outrageous conduct that causes physical harm or mental distress
* Downton willfully performed act which caused harm
* Foreseeable that it could cause harm, so intention is established
 |

**Clark v R**

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

**Radovskis v Tomm (1957 Man. QB):** evidence of illness; anguish, worry, and emotional distress insufficient

|  |  |
| --- | --- |
| **Facts** | Father of infant P raped by D brought action to recover damages for trespass to her person, recover hospital and medical expenses, loss of wages, and for “worry and inconvenience”. Mother brought action to recover damages for nervous shock alleged to have been sustained by her |
| **Ratio** | * No visible and provable illness
* Guay v Sun Publishing Co: A state of mind such as fear or acute grief is not measurable damage. There must be visible and provable illness as a natural consequence of violent emotion
* Though she had some symptoms, no evidence of underlying illness
 |

**Rahemtulla v Vanfed Credit Union (1984 BCSC):** Even if no medical evidence of mental distress, there can be IINS where there are symptoms of depression and behaviour of D is outrageous

|  |  |
| --- | --- |
| **Facts** | D dismissed P after one month on grounds of stealing. P was humiliated and so depressed she couldn’t leave her house. She also suffered from insomnia, stopped eating, had blackouts and headaches. |
| **Ratio** | * Wilful infliction of mental distress: it was foreseeable that accusations of theft would cause plaintiff profound distress
* Visible and provable illness: P suffered depression and symptoms of physical illness
 |
| **Significance** | * Court didn’t ask for medical info. They said that the plaintiff had clearly suffered a mental shock. This indicates a softening of the courts’ position towards nervous shock.
 |

**Discrimination**

**Discrimination: should there be a freestanding tort?**

* Advantages:
	+ Complement existing equality protections established by federal and provincial human rights legislation
	+ Tort actions are commenced and controlled by P rather than being dependent upon gov’t bureaucracy charged w/ enforcing the code
	+ Compensatory remedies may be more generous under tort system (statutes generally have caps)
* Key challenge: balance equality (right to be free of discrimination) against other legitimate legal interests, such as freedom of contract
	+ Osborne: existing legislation could serve as guide to courts when it comes to balancing process
* Bhadauria decision:
	+ Wilson J. at Ont CA cites Prosser’s Handbook of the Law of Torts (1971): “The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant the mere fact that the claim is novel will not of itself operate as a bar to the remedy”
	+ **Key point**: At trial, court said no cause of action, struck out the statement of claim. At CA, held plaintiff had CL right not to be discriminated against. At SCC, overturned CA saying that OHRC already provided comprehensive and exhaustive vehicle for protection against discrimination, so there was no need to recognize and develop a complementary tort remedy
		- Only excludes tort actions founded on breach of human rights code. Possible to argue an action based on an independent tort such as an assault or intentional infliction of nervous shock

**Seneca College v Bhaudauria (1981 SCC):** no distinct tort of discrimination

|  |  |
| --- | --- |
| **Facts** | P, highly educated E. Indian woman, applied and was refused teaching position multiple times without an interview nor reason for rejection. P claims discrimination since they hired less qualified candidates who were not of E. Indian descent. |
| **Issue:** | Should an intentional tort of discrimination be recognized? Can a breach of the Code be sufficient to establish civil liability without calling in common law principles relating to intentional invasions of legally protected interests? |
| **Ratio** | Discrimination does not give rise to a common law tort, especially where the HR code provides for an administrative inquiry and remedial relief and allows a wide appeal to the Court on both law and fact |
| **Obiter** | * Code is comprehensive in its administrative and adjudicative functions
* Code forecloses any civil action based directly upon a breach of the Code, and excludes any CL action based on an invocation of the public policy expressed in the Code.
 |
| **Significance** | * If there is protection from discrimination at statute, no point in finding a tort
* Goold: SCC treats rights as interests and often balances them when they shouldn’t be
 |

**Stalking**

* Person knowingly (intentionally) or recklessly harasses another person in a manner that leads the other person to fear for her own safety
	+ S.264(1) CC: criminal harassment
* No independent common law tort of stalking
* A stalker may commit a number of torts such as assault, battery, IINS, trespass to land, nuisance, or defamation for which liability may be imposed
	+ This is a piecemeal approach that does not address the real nature of the wrong
	+ Focusing attn on various discrete acts which may appear relatively insignificant examined in isolation from a complete behavioural pattern
	+ Stalking is a substantial and unreasonable invasion of another’s privacy

**Harassment**

* Distinction b/t stalking and harassment is that where conduct causes a person to fear for her own safety, it will be stalking. Where conduct is seriously annoying, distressing, pestering, vexatious – it is harassment
	+ Disturbing and upsetting, but not necessarily frightening
* Minor sexual harassment, bullying, harassment by creditors or gov’t officials, abusive or racist communications
* No discrete tort of harassment. Courts have mostly tried to compensate the individual through some other tort, but have shied away from recognizing it as an independent tort: Chapman v 3M.
	+ **Key point**: Courts are only really willing to consider the question of harassment where plaintiff is clear target of harassment and suffers sever mental distress. Even where this is the case, approach taken varies between:
		- Basing liability on a previously recognized tort
		- Providing a remedy through consumer protection legislation
		- Recognizing a new tort of harassment
* Sexual harassment in the workplace:
	+ Janzen v Platy Enterprises Ltd.: any sexually oriented practice that endangered an individual’s continued employment, negatively affected work performance, or undermined sense of personal dignity
		- Not appealed, only applies in Manitoba

**Chapman v 3M (1995 Ont CA)**

|  |  |
| --- | --- |
| **Facts** | P brought action for sexual harassment, amongst a number of other things. |
| **Ratio** | Applies Seneca College: HR Code provides exhaustive and exclusive scheme of adjudication and redress for such claims. There is no room for development of an independent tort of sexual harassment. |

**Intentional Interference With Land**

* Trespass to land: direct, intentional (or negligent) and physical interference with land in the possession of the plaintiff
	+ Osborne: developed to protect landholders from violent intrusion or eviction, interest in peaceful enjoyment of property
* Modern justifications:
	+ Protects possessor’s interest in freedom of land use
	+ Plays a conventional compensatory and deterrent role when an intruder damages land or destroys premises
	+ Important role in protection of privacy interests
	+ Adjunct of the law of real property: plays a role in determining competing land claims and settlement of boundary disputes
	+ Complement property law; actionable without proof of damage, mistake is no defence
* **Three ways to commit the tort**
	1. Person enters land in possession of plaintiff without permission
	2. Where a person places objects on plaintiff’s property
		+ Continuing trespass: new cause of action daily until object removed
		+ Adv: plaintiff’s trespassory remedies are protected from limitation periods and subsequent possessors may also have a remedy
	3. Where possessor of land revokes visitor’s permission or licence to be on the property
		+ There are rules about the time limit people have to leave when licence revoked 🡪 “reasonable”
* **Who is entitled to sue?**
	+ Anyone in legal possession of land 🡪 actual possession, not ownership
	+ **Possession:** Occupation and control of land + intention to exclude others (**right to exclude is test**)
	+ People who cannot sue:
		- Owner of leased property (effectively surrendered possession to tenant for term of lease)
		- Person who only has a licence to be on the property (live-in nanny or hotel guest)
		- Intended to protect possession against forcible intrusion or eviction (so not ownership)
	+ **Exception**: Doctrine of trespass by relation – P can sue in trespass even if they were not necessarily in possession of the land at the time of interference, provided no one else was in possession and they subsequently take possession.
		- D trespasses onto vacant land owned but not occupied or controlled by P. Once P retakes possession, they can sue in trespass.
		- **Owner (out of possession) who has a right to immediate possession:**
			* Can bring an action for recovery of land
			* Request may be made of person in wrongful possession to leave: peaceable entry onto land
			* Reasonable force may be used to eject that person
			* Trespass by relaton: to have been in possession since the right to immediate possession arose:
				+ They have cause for action to damages (*mesne profits*) to be brought for damages suffered during period of wrongful occupation

Economic loss from loss of use of land

Damage to, or deterioration of land

Costs of regaining possession

* + Even structures that are semi-permanent are considered “land” including a vehicle on the property.
	+ Defendant may not raise a *jus tertii* (a right in the third person) in defence to an action for trespass to land

**Elements of Liability**:

* **Intrusion onto land must be direct**
	+ Direct result of actions of D
	+ Cannot sue for oil spills or where something washes up onto their land
	+ Damage caused by indirect interference may be actionable as nuisance
* **Interference must be intentional or negligent**: Turner v Thorne
	+ Burden of proof on defendant.
	+ P only has to prove direct interference w/ land 🡪 intent to cause harm is not necessary, only intent to intrude onto land or interfere w/ it
	+ Mistake is no defence
		- Doesn’t matter if you thought land was yours or that you had permission to enter
	+ Osborne: You don’t ever really see negligent trespass to land. Usually, will have intended to do the thing that caused trespass.
* **Interference must be physical**
	+ Intrusions caused by smog, chemical fumes, smoke, noise, or odour are unlikely to satisfy this element
	+ Likely to be dealt with via tort of private nuisance

**Turner v Thorne**

|  |  |
| --- | --- |
| **Facts** | D (deliveryman) mistakenly entered P’s garage and left packages due to confusing sign. P later tripped on boxes and injured himself. Claimed trespass. |
| **Issue** | Can there be trespass even though it was unintentional? Is defence a mistake? |
| **Ratio** | Lack of intention or mistake of fact are not defences to trespass. Trespassers are liable for all consequences of their trespass, not just foreseeable consequences. Strict application. |

**Defences to Intentional Interference with Land**

**Consent**

* No liability where possessor has consented to another entering his land
* Licence may be express or implied, contractual or gratuitous, and given to an individual, a group, or the world
	+ Implied: construed through actions, etc.
	+ Gratuitous: you don’t set the terms, no conditions for entry
		- Revocable at will, unlike contractual licence.
		- Revocation of contractual licence depends on terms of K, and there must usually be a breach of K for revocation
* If given for a particular purpose, abuse of purpose may terminate licence
	+ Abuse of purpose is anything beyond the terms of the licence

**Necessity**

* Trespass may be justified where there is an emergency and it is necessary for defendant to commit trespass to prevent harm to the public, to the trespasser, to the possessor of the land, or to a third party
* Wrongful act must be prompted by imminent peril and must be necessary in light of advantage to be gained and absence of other available options
	+ Danger must significantly outweigh damage or loss caused to innocent plaintiff by trespass

**Legal Authority**

* Where entry onto land is authorized by statute (such as by virtue of a search warrant, s.488(15)CC), there is no trespass:
	+ R v Cornell (2010 SCC)
		- Police executed search warrant, entered house with battering ram without knocking.
		- Court split 4-3 saying this is reasonable and legally authorized.
		- Goold agrees with minority that this is not legal authority. Says majority is badly reasoned
* Range of other legislation which permits public officials to enter premises for a variety of purposes, including determining land valuation for taxation purposes and checking compliance with health regulations and building codes
* *Trespass ab initio* 🡪 entry is deemed to be wrongful from moment of entry if person who enters onto property with legal authority abuses or exceeds his authority

**Remedies**

* Where actual loss has been caused, damages are not restricted to the reasonably foreseeable consequences of the loss. Defendant will be held liable for all direct consequences of trespass: Turner v Thorne
* Injunctive relief from continual and continuous acts of trespass
	+ Equitable remedy granted at discretion of court
	+ Prohibitory: defendant must cease continual acts of trespass
	+ Mandatory: take positive steps to terminate continuous trespass
* Injunction may be withheld if damages would be adequate remedy, or where trespass is trivial and injunction would create substantial hardship to defendant

**Trespass to Land and Shopping Malls**

* Shopping malls are privately owned. Owner normally remains in possession of all areas
* Mall has some characteristics of public property
* Trespass to land doesn’t require landholder to have a good reason (or any) to exclude a person from his property.

**Harrison v Carswell [1976 SCC]**

|  |  |
| --- | --- |
| **Facts** | Employee participated in peaceful picket on sidewalk. She was invited to leave b/c picketing not permitted in mall. She refused, and was charged and convicted under Manitoba *Petty Trespasses Act* |
| **Ratio** | Confirmed right of private property owner to control his property and to exclude anyone from it |
| **Dissent** | * It is semi-public property, not private property. It shouldn’t trump the right to picket.
* Modern shopping mall far removed from paradigm of private property 🡪 some restrictions on power of exclusion is appropriate
* Members of the public should only be excluded for legit reasons like disorderly conduct, illegitimate activities, or other activities that interfere with effective, profitable, and peaceable operation of the mall
 |
| **Obiter** | * Right to picketing is secondary to private property
* Goold thinks that law bends over backwards to give individuals private property rights
 |

**Trespass to Airspace**

* Possessor of surface of land also has possessory rights to all that lies below the surface and all the airspace above
* Three kinds of airspace interference:
	+ Permanent intrusion at relatively low level
	+ Temporary intrusion into airspace by means other than by aircraft
	+ Intrusion by aircraft
* Intrusions of this nature (permanent low-level) are actionable, and compensatory and injunctive relief available without proof of damage
* Trespassory remedies available only for intrusion by aircraft within surface owner’s zone of effective possession
	+ Extends to height necessary to protect P’s current or future enjoyment, comfort or use of land
* **Intentional Interference with Chattels**

**Trespass to Chattels**

* Oldest of torts of intentional interference w/ chattels
* Defendant directly and intentionally (or negligently) interferes with a chattel in the possession of the plaintiff
	+ Protects possession rather than ownership
	+ Even a person in wrongful possession may bring an action in trespass (except against owner w/ right to immediate possession)
* Very broad: any interference with a chattel is actionable
	+ Damage (most common)
	+ Unauthorized movement (most common)
	+ Destruction (usually conversion)
	+ Taking (usually conversion)

**Elements**

* Direct and intentional
	+ Once P establishes there is interference with possession, D must prove absence of intent
	+ Mistake is not a defence.
		- Not necessary for D to know interference is wrongful
		- Actionable per se, no damage required
		- You are protecting a person’s rights to goods, ex. preventing people from touching valuable art
* Interferes w/ chattel in possession of plaintiff

**Two main views to actionability**

1. Traditional rule: no proof of damage required. It is useful in preventing people from touching valuable artwork or museum pieces. Also ensures remedy for the unauthorized moving or temporary use of chattels
2. Unless goods are taken, damage should be essential element of liability: there is dignitary interest in the inviolability of chattels
	1. Not actionable per se 🡪 Goold disagrees

**Remedy**

* Award of damages:
	+ Reduction in market value
	+ Cost of repairs (where that is less)

**Trespass to chattels to online interference w/ computer systems**

* Not yet dealt with by Canadian courts
* Issues: meaning of property, intangible interference, is harm an essential element

**Intel Corp v Hamidi [2003 California]**

|  |  |
| --- | --- |
| **Facts** | P sued D for trespass to chattel as D was spamming people over inter-office email system. |
| **Ratio (Werdegar)** | It did not constitute trespass to chattel because no harm. Case differs from CompuServe case where bulk emails were interfering with computer system/server. No problems caused with Intel’s server.There is no trespass to chattel if you cannot show real harm or damage |
|  | *Criticism*Brown (dissenting)* The time required to review and delete Hamidi’s messages diverted employees from productive tasks and undermined the utility of the computer system
* Use of Intel’s property to display Hamidi’s messages

Mosk (dissenting)* Misappropriation of Intel’s private computer system contrary to its intended use and against Intel’s wishes
* Expenditure of company resources to block the emails and address employee concerns regarding the messages
 |

**Detinue**

* Plaintiff w/ right to immediate possession of chattel has requested D to return it
* Action is available where D has lost chattel as a result of his wrongful act
* “The give me my stuff back tort”
	+ Protects P’s right to chattel
	+ Focuses on D’s denial of P’s rights by refusing to return it
	+ Protects interests in having the specific chattel back, not the financial value of it

**Elements**

* Demand and refusal
	+ Must be element of opportunity to return the good before you can succeed in action of detinue
	+ Practical effect: tort will fail as soon as D returns the goods
* Remedied by order from the court requiring D to return the chattel or an award of damages for its value and detention
	+ Possibility of ordering return of chattel is what distinguishes tort from trespass and conversion
* Sue in detinue rather than conversion or trespass to chattels when the good in question is unique or not easily replaced, and your primary objective is to get it back.
* Detinue is a continuing tort arising out of the persistent failure of the D to comply with request to return chattel. Damages for the value are assessed at the time of judgment rather than the date of the initial refusal to return it. (Compared to conversion, where damages assessed at time of conversion

**Conversion**

* Defendant intentionally interferes with chattel in such a way as to seriously interfere or harm with plaintiff’s rights to it: *Fouldes v Willoughby*
* P is seeking damages, as opposed to return of chattels (detinue)
* Examples:
	+ Taking possession
	+ Witholding possession
	+ Transferring possession:
		- A, acting as agent of B, buys goods from C (which were originally stolen from D. If A delivers them to B, then A and C liable for conversion.
	+ Destruction

**Elements**

* Restricted to intentional interferences with possession (or immediate right to possession). Not available for negligent interferences (key difference from trespass).
	+ Protects persons in possession of chattel or who have right to immediate possession
* Must be one that so seriously interferes with plaintiff’s rights to chattel that D should be held liable for full value
	+ Forced judicial sale of chattel to D: D is treated as if he had bought the chattel and he can keep it
* Mistake is no defence to conversion: *Mackenzie v Scotia Lumber*
	+ Innocent seller of stolen goods and innocent purchaser can both be liable for conversion
	+ **Exception:** Packing, storing, or carrying goods for someone who lacks title to goods will not give rise to conversion provided person responsible is not aware of the lack of title
* Damages are assessed at time of conversion or when P became aware of conversion
* P must attempt to mitigate loss by replacing chattel as soon as it is practical
	+ Ex. if you take his laptop on Monday and he has an assignment due the following Monday. If he didn’t do anything to mitigate the loss (like get a replacement), you aren’t responsible for loss from incomplete assignment
* When considering whether temporary taking, movement or use of chattel is a conversion, court will look at surrounding circumstances:
	+ Duration of interference, kind of interference
	+ Purpose
	+ Amount of damage inflicted
	+ **Key test:** whether interference was sufficiently serious to warrant a forced sale of the chattel to the defendant
		- Where the interference is of a short duration, and the chattel is returned unharmed, unlikely to be held a conversion: *Mackenzie v Scotia Lumber*
* Conversion may also be committed by refusing to comply with request to return a chattel to its rightful owner
	+ Differs from detinue: single cause of action arising from refusal to return; damages calculated at time fo conversion and only damages can be awarded

**Fouldes v Willoughby [1841 Eng. Ex. Ct.]**: If a temporary taking, mvmt, or use of chattel is sufficiently serious to warrant a forced sale of the chattel to D, then there is a conversion

|  |  |
| --- | --- |
| **Facts** | P came into steam-boat with two horses and behaved improperly. D said he would not carry the horses over, and he must take them on shore. P refused, so D took horses to the landing slip and turned them loose. P told he could have the horses after he paid for their keep, or else they would be sold to pay the expense of it. |
| **Reasoning** | Transportation of chattel is not sufficient to establish conversion. The simple fact of putting the horses on shore did not amount to conversion of them for his own use. |
| **Ratio** | * In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them by himself or by those for whom he acts; or that owing to his act, the goods are destroyed or consumed to the prejudice of the lawful owner.
 |

**Mackenzie v Scotia Lumber (1913 NS SC):** One who mistakenly takes the property of another, but returns it immediately can be held liable for conversion, but only for nominal damages

|  |  |
| --- | --- |
| **Facts** | P owned a raft which drifted away from its moorings and became attached to two rafts belonging to D, which had also gone adrift. D’s servants found three rafts together and supposed that all three belonged to D and brought them to the mill. Upon discovery of mistake, returned immediately to rightful owner. |
| **Ratio** | * P should have full value of the property which was returned to him, but he cannot have both property and full damages for conversion
1. Refers to *Fouldes v. Willoughby*: “Any asportation of chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.”
2. Makes no difference that taking was under the honest, but mistaken belief that the raft was the property of D
 |

**Reversionary Interest**

* P can bring action on the case to protect reversionary interest when chattel has been destroyed or permanently damaged by the intentional or negligent act of the defendant
	+ A leases X to B. B is in possession of X, and C interferes with it
* Protects P who doesn’t have possession or immediate right to possession, but nonetheless wants to protect goods from possible destruction or damage
* Most frequently: unexpired bailment for a fixed term
	+ Bailor has neither possession not a right to immediate possession
* **Mears v London & South Western Ry. Co.**: Defendant negligently caused serious damage to a barge owned by the plaintiff, but leased to a third party.
	+ P succeeded on proof of permanent damage to P’s reversionary interest
	+ Rarely used b/c destruction typically the consequence of negligence

**Penfolds Wines Pty. Ltd. V Elliott (1946 HCA)**

|  |  |
| --- | --- |
| **Facts** | P sold wine to customers in returnable bottles that remained in ownership of P. D refilled some of these bottles w/ his own wine. D objected to this usage |
| **Ratio** | 1. Trespass: no trespass b/c surrendered possession, but not ownership
2. Detinue: no detinue because plaintiff made no demand for bottles
3. Conversion: D did not act in defiance of ownership rights, nor was use of bottles a sufficient interference to warrant forced judicial sale
4. Reversionary interest: bottles not damaged or destroyed
 |

**Recovery of Chattels**

* Usually only possible through action for detinue; others only by damages
* **Replevin**
	+ Procedure where court orders return of a chattel prior to resolution of the action in tort
	+ Typically ordered by the court in cases where plaintiff has an apparent right to immediate possession
	+ P may be ordered to post security to protect the D from any loss if claim is w/o merit
* **Recaption**
	+ This is a legal right: person with the strongest right to possession is allowed to use reasonable means to recover the chattel
	+ Some reluctance in permitting physical foce to be used to recapture chattels, but person can use reasonable force to recapture chattel wrongfully taken from him.
	+ Greater licence in respect of trespass to land

**Defences**

* Defences arising from trespass to land apply to trespass to chattels
* Consent, legal authorization, legal authority, necessity (narrow circumstances)

**Remedy**

* Distress Damage Feasant
	+ An occupier of land can seize a chattel that is on his land if it has caused or is causing damage
	+ Chattel can be held until compensation for loss is paid
	+ Occupier of land is not allowed to sell the chattel, only hold it 🡪 effectively convert the chattel without being open to tort
* **Intentional Interference with Economic Interests**

It is not the role of tort law to provide compensation for losses where intentionally causing economic harm to rivals is in most circumstances perfectly legitimate in a free market economy. The market is about winners and losers, and the courts are cautious about distorting the market.

Remedies are available for serious misconduct which disrupts the efficient operation of the marketplace

The policy behind deceptive market practices: there is a sense of fundamental fairness, judicial antipathy to those who have secured an unjust enrichment at the expense of another by deception, and the goal of promoting an efficient marketplace.

**Deceit**

Deceit occurs whenever a person has made a fraudulent statement that intentionally causes another person to rely on it to her detriment.

**Elements**

* **Misrepresentation: defendant must have made a false statement**:
	+ Statement must be untrue
	+ Liability can be imposed for verbal or written misrepresentation, as well as misrepresentation by conduct: Abel v McDonald
	+ Reasonable person would rely on this statement
	+ Silence not generally actionable
	+ No liability for failure to disclose facts unless there is a duty to do so
* **Fraud: D knew statement was false or was objectively reckless to the truth or falsity of the statement**
	+ P must prove D acted dishonestly in order to succeed: Derry v Peek
	+ Proving someone was objectively reckless as to the truth of a statement can satisfy this requirement
		- If you are reckless or careless as to the truth, then it flows you couldn’t have believed it was true
	+ Honest belief: they will actually question reasonableness to determine likelihood of what you said being true
		- Full defence
* **Reliance: D made statement with intention of misleading the P, or was substantially certain statement would deceive P**
	+ Merely has to be intention to mislead. There doesn’t have to be intention to cheat or injure the person to whom the statement was made: Derry v Peek
	+ P must prove D intended for P to act or rely on their false statement
	+ Where an event is a reasonably foreseeable result, it is likely that a court will assume D intended consequence
* **Damage: P must have suffered a loss as a result of reasonably relying on the statement**
	+ Reasonable reliance: would a reasonable person have relied on statement in question?
		- Recognize that salespeople exaggerate. Reasonable people are less likely to rely on predictions about the future and on opinions (subjective and open to interpretation)
	+ Damages put P in position he would have been if misrepresentation hadn’t been made

**Other**:

* If D can show P would have acted in the same way even with no fraudlent representation, action will be dismissed. Rule is that the attempt to deceive must be successful
* No requirement that representation is the sole statement on which P relied, but it must make a material contribution to action

**Derry v Peek (1889 HL)**: Where a person makes a statement and honestly believes it to be true, they will not be held liable to action in deceit.

|  |  |
| --- | --- |
| **Facts** | D issued prospectus representing that the company had legislative permission to use steam power, but this was a mistaken belief. The Board of Trade did not consent to allow them to use steam power, and company went into liquidation. P bought stock on strength of prospectus |
| **Ratio** | 1. To establish a cause of action resulting in damages for misrepresentation, statement must be false, or made recklessly (no care for truth or falsity)
2. Statement made by a person honestly believing it to be true will not expose the maker to an action in deceit
3. Must be clear in distinguishing b/t statement that is false due to a lack of care and statement that is false and made without care.
4. If you are careless about the way you came to the belief, but you still believe it, then it is not deceit
 |
| **Obiter** | 1. Establishes test for deceit
2. Subsequently, develops doctrine of negligent misrepresentation
 |

**Injurious falsehood**

* Lie disparagingly about business/trade of others
* Emerged to protect against a broad range of false statements which are disparaging of a P’s trade, business, or property in a way that leads to other persons not to deal with him

**Elements**

* False statement concerning P’s business/trade/property
	+ Onus of proof on plaintiff
* Publication of statement to a third person
	+ To current or future customers
	+ Establish that losses caused by D’s statements in the absence of proof that 3rd parties were aware
* Malice
	+ Spite, ill will, intention to damage
	+ Probably sufficient: knowledge that statement was false or reckless as to veracity
* Actual pecuniary loss
	+ Evidence of broken Ks or loss of LT customers
	+ Where there is only a general decline of revenue, P must clearly show that losses caused by statements and not extraneous business contingencies
* Justification is a defence to the action

**Passing Off**

Tort exists to protect P’s business by preventing D from presenting their g+s as being those of the plaintiff. It specifically aims to protect the reputation and goodwill of producers and to prevent customers from being deceived.

It protects unregistered trade marks. It prevents those who try to benefit by associating their goods or services with those of the plaintiff.

**Elements** (Reckitt & Colman Products Ltd v Borden Inc, as cited in CIBA-Geigy Canada Ltd)

Plaintiff must establish:

* Existence of goodwill in the plaintiff
	+ Goodwill: power to attract customers and retain loyalty of existing customers
	+ Acquired by quality g+s which are identified by their distinctive brand name, logo, labeling, pckging
* Deception of the public due to misrepresentation
	+ Does not need to be intentional. Only requires you to present goods as being associated w/ or from P
	+ Deception will not apply where the only person likely to be misled is a “moron in a hurry”
* Actual or potential damage caused by diversion of customers or injury to P’s reputation
	+ Potential loss: can ask for injunction

**Examples**

Misrepresentation that the goods of a trader are the goods of the plaintiff

Misrepresentation as to origins of goods

Misrepresentation that a trader’s goods are of the same standard as the goods of the plaintiff

Misrepresentation that trader has a business relationship with the plaintiff

Misrepresentation that plaintiff’s goods or services are those of the trader

**Damages:**

* Court can order them to pay profits they made off of you
* Delivery up – they have to give you the products
* Injunction to stop

**Ciba-Geigy Canada v Apotex (1992 SCC):**  Three requirements for successful passing-off action: existence of goodwill, deception of public due to misrepresentation, actual or potential damage

|  |  |
| --- | --- |
| **Ratio** | 1. A manufacturer that wishes to succeed in a passing-off action must show that its product has acquired a secondary meaning with its customers and that the competing product is likely to create a risk of confusion in the public mind
2. Final consumer of a product must be taken into account in determining whether the tort of passing-off has been committed
 |

**Misappropriation of Personality**

* Lie that your G+S are endorsed or used by an identified person
* Requires intentional use of plaintiff’s name or likeness or other recognizable aspect of her personality (voice, visual image), and the unauthorized use of same to promote D’s commercial interests
* Damages: FMV of use of P’s name or likeness
* Primary purpose: protect P’s right to publicity by preventing unauthorized commercial exploitation of personality

**Improper Market Practices**

* **Conspiracy**
	+ 2+ persons entered into and acted upon agreement to cause economic loss to another person
	+ Simple conspiracy
		- Lawful means to cause economic loss to P
		- Intended to act together in a planned, concerted action to damage P
		- Tort arises once they have acted pursuant to agreement and have caused harm
		- Elements: (1) proof of purpose to injure P rather than to promote own legit interests
	+ Conspiracy to injure by unlawful means
		- 2+ persons agree to act unlawfully
		- Predominant purpose to harm P, or that conduct is directed at P and harm is likely to result
	+ Defences
		- Justification 🡪 unlikely
* **Intimidation** (Rookes v Barnard)
	+ Where D threatens to use unlawful means to coerce a third person to damage P or threatens unlawful acts that directly compel the P to act to his detriment
	+ 3 Party intimidation:
		- Coercion by threat of unlawful conduct
		- Intention to injure P
		- Damage
	+ 2 Party intimidation
		- P is person who suffers loss and who is threatened
		- Coercion by threats of unlawful acts
		- Intention to inure
		- Damage
	+ Defences
		- Justification 🡪 limited role due to illegal activity
		- Narrow scope: achieve some compelling and beneficial social purpose
* **Inducement to Breach a K**
	+ Direct inducement
		- Direct inducement to breach K – any conduct evidencing intention to encourage, persuade, cajole, or convince person to breach K is sufficient
			* Leniency for professional duties
		- Knowledge of contractual link on the part of the D
		- Intention to secure a breach of K
			* Actual or constructive. No need to prove intention to harm.
		- Damage
			* Loss of contractual bargain
			* Recoverable against K breaker
		- Defence
			* Justification
			* Narrow scope
			* Absence of malice or bad faith insufficient
			* Motive and objective for procuring breach of K
	+ Indirect inducement
		- Indirect inducement by independently illegal means and that breach of K is a necessary consequence of D’s illegal activity
			* Since conduct is indirect, must have clear proof to show contractual default caused by D’s illegal conduct and that breach was unavoidable
		- Knowledge of K
		- Intention to cause breach
		- Damage

**Posluns v TSE (1964 Ont. HC)**: Neither good faith nor the mode of procedure of the Board had been successfully

impugned

|  |  |
| --- | --- |
| **Ratio** | 1. Russell v Russell: “no man should be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence.”
2. Ridge v Baldwin: “If an officer or body realizes that it has acted hastily and reconsiders that whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid”
 |
| **Facts** | 1. TSE finds out about illegal trades of P - gets P's employer to fire him
 |

* **Intentional Torts: Defences**

Defendant has an opportunity to raise defences before imposition of liability.

There are three types of defences: **(1)** consent, **(2)** protection of person(s) or property, and **(3)** legal authority.

These defences are not mutually exclusive. It is possible that the defendant can rainse a number of defences simultaneously. The burden of proof to establish complete or partial defence is on the defendant.

**Consent**

* **Consent tends to be treated as a freestanding defence rather than an element of a particular tort.** It speaks to the right of an individual to exercise his or her autonomy and consent to the intentional interference with his or her person. It was established in *Non-Marine Underwriters* that consent is a defence in “traditional” battery cases. It is for the D to plead and prove consent as a defence. P is not required to prove that there was an absence of consent.
* The defence of consent is typically **framed in terms of the tort complained of**. D will have to prove that P consented to the specific act that gave rise to the tort action. When a person consents to an act, it is generally assumed they consent to all risks which are normally associated with the act.
* It is a **complete** defence.
* Consent must be freely and voluntarily given. It may be explicit (writing, verbal consent, consent by way of gesture). IT can also be given implicitly through participation, demeanor, or behaviour.
	+ A reasonable person would believe the plaintiff had given consent.
	+ Consent is vitiated by drug use, violence, threat of violence, duress, etc.

**Implied Consent**

* Occasionally, the participation, demeanour, or behaviour of the plaintiff can provide the basis for a claim of implied consent. This may include failure to object to an act, failure to withdraw from an act, or passivity.
* There is no clear rule to determine implied consent, rather the courts will look at all the facts before finding implied consent.

**Wright v McLean (1956 BCSC)**: Those engaging in a sport or game consent to the ordinary risks associated with the activity

|  |  |
| --- | --- |
| **Facts** | 1. D and P having a mud fight. D threw a mud ball with a rock in it, seriously injuring P. D unaware of rock in mudball (not malicious).
 |
| **Ratio** | 1. Provided there is no malice, anger, or mutual ill will, the court will assume that those participating in a sport or game consent to the ordinary risks associated with that activity
 |

**Spectators**

* Do spectators implicitly consent to injuries sustained while watching sporting matches?
* **Rule**: Implicit consent depends on whether the plaintiff was aware of the risks and the protections customarily provided.

**Elliott [1934]**: Where the P is aware of risks, there is implicit consent

|  |  |
| --- | --- |
| **Ratio** | 1. P was an amateur hockey player who was struck by a puck.
2. He was aware of the risk when he attended the game
 |

**Exceeding Consent**

* Whether participation in a game or sport can be implied consent to certain kinds of conduct outide reasonable constraints of the game
* Generally in sporting cases, where there is a determination of whether participation in a game amounts to implied consent to certain types of conduct outside the ordinary rules of the game
* **Rule:** Someone who plays a sport is assumed to be consenting to the ordinary risk of injury. There is implied consent of participants to physical interference that is an integral part of the sport: Agar v Canning
	+ Conduct of a player in the heat of a game is often instinctive and unpremeditated, and it should not be judged by the standards of polite social intercourse.
	+ **Limit:** limit on immunity from liability is such that contact sport is not a licence to inflict serious harm on an opponent. The Court will look at the case facts to determine whether the conduct exceeded normal expectations.

**Agar v Canning (1965 Man.****QB)**: Consent does not give unlimited immunity to liability. Conduct exceeding consent (breach of rules, intention to injure) renders D liable for resulting injuries

|  |  |
| --- | --- |
| **Facts** | 1. P slashed D in the back of the neck, so D slashed P in the face. P lost all vision in right eye
 |
| **Ratio** | 1. General rule: consent to ordinary risk of injury.
2. In hockey, must accept risk of accidental harm and waives claims against trespass to person. There is clearly implied consent to be hit by other players or puck.
3. There must be limits on players’ actions: injuries inflicted in circumstances which show intent to cause serious injury exceed what was consented to.
4. Is more pro-defendant, may reflect conecern for chilling effect of extensive liability on amateur sport
 |
| **Holding** | 1. Unfair to hold player in heat of game to standards of polite social intercourse 🡪 provocation taken into account when assessing damages
 |

**Zapf v Muckalt (1996 BCCA)**: Standard of care test: what would a reasonable competitor, in his place do or not do? 🡪 This is a negligence based approach to consent in contact sports

|  |  |
| --- | --- |
| **Facts** | 1. D checked P into boards from behind in a Junior A game. P rendered quadriplegic.
 |
| **Ratio** | 1. Court has tended to reject the narrow approach to the standard of care where only intentional or reckless infliction of harm will ground liability. Instead, based ont eh evidence, decide what risks are assumed and what a reasonable competitor would do in the circumstances of each case.
2. May reflect growing concern about safety in sports, is more pro-plaintiff.
 |
| **Holding** | 1. Found liability on a reasonable basis
 |

**Competence**

* To have valid consent, the person giving it must be capable of understanding the consequences of the act.
* Consent is not valid if, due to age, mental disability, inebriation, etc., they cannot be found to have given consent
* The underlying idea is the respect of individual autonomy and right to make choices
* In certain circumstances, valid consent may be vitiated as a result of the defendant’s actions
	+ Fraud:
		- D must have been aware of or responsible for plaintiff’s misapprehension
		- Fraud must be directly related to the nature of the act and not related to a collateral matter.
		- Ex: *R v Williams* [1923]: Singing teacher was convicted of rape for convincing a student to have sex with him on the grounds that it would improve her singing voice. He deceived her as she was not aware the act was sexual in nature.
		- Consent to sex: In *R v Cuerrier (1998)*, SCC held that consent to sex is vitiated when the defendant has an undisclosed HIV status in the criminal context. Fraud vitiates consent where there is concealment of “a significant risk of serious bodily injury”.
	+ Mistake
		- P’s consent is only vitiated by a mistaken belief if the D is responsible for creating that belief
	+ Duress
		- Where consent is obtained through duress or coercion, it is vitiated.
	+ Public Policy
		- Consent can be vitiated under certain circumstances for reasons of public policy. You cannot consent to being killed, seriously injured, or having sex with a person exploiting a position of authority
		- *Nelitz v Dyck*: Ont. CA laid out a two part test to determine where a power imbalance vitiates consent. There must be:
			* Proof of inequality, usually in the context of a ‘power dependency’ relationship
			* Proof of exploitation – consider the type of relationship in light of community standards

**C v Wren (1986 Alta CA)** Age is not a barrier to consent. All that matters is that the person is able to understand the risks/benefits of treatment

|  |  |
| --- | --- |
| **Facts** | Minor’s consent to abortion – considered ethical problems with parents, but disagreed. She had sufficient intelligence and understanding to make her own decision about it. |
| **Ratio** | Parental rights to control child diminish as child ages and becomes capable of making their own decision. Concept of an “age of discretion”. |

**Self Defence**

* Complete defence: negates all liability and allocates loss to innocent plaintiff
* Incomplete defence: excuses wrongfulness of act, disallows any self-help remedy, prevents an award of nominal or punitive damages. It also requires defendant to pay compensation for any damage caused to plaintiff

Self defence is considered a complete defence as it provides justification for the defendant’s conduct. In contrast, a partial defence invokes excuse, where the conduct of the defendant is wrongful but excusable.

To invoke this defence, the defendant must establish on a balance of probabilities that:

* He or she honestly and reasonably believed that an assault was imminent; and
* That the amount of force that he or she used to avert the risk was reasonable in light of all the circumstances
	+ To determine if reasonable force used to repel actual violence or threat of immediate violence
		- Consider: nature of attack, size and strength of opponent, force needed to repel attack, use of weapons, availability of non-violent means of defence

In *Wackett v Calder*, the court was clear that D is not required to weight the niceties of the blow, recognizing that there may not be much time for reflection given the immediacy of the threat. it is unclear as to whether the defendant has to consider the injuries likely to result from the use of force. In *Brown v Wilson*, the Court held that provided the force was reasonable, the defendant is not responsible for the force of the consequences.

The test for reasonable force has both an objective and subjective dimension. The situation needs to be examined from the perspective of the D, and then judged as to whether a reasonable person would have used the same level of force: *Beckford v R. (1987)*.

* Subjective: respect for autonomy, choice matters if people have honest beliefs, individualism
* Objective: ensure public protection, element of deterrence

**Wackett v Calder (1965 BCCA)**: Repelling an (apprehended) attack does not need to be measured with complete exactitude or nicety.

|  |  |
| --- | --- |
| **Facts** | First blow by C was insufficient to stop W. Second, more forceful, blow was successful. |
| **Ratio** | This was a reasonable use of force, though it was clearly not measured with nicety. It is not necessary to use an exit option. |

**Defence of Property**

In some circumstances, the possessor of land may use physical force to protect his property from unlawful entry by another.

Peaceable entry: must request trespasser to leave. If he refuses, then you may use reasonable force.

Forcible entry: no requirement to make preliminary request.

**MacDonald v Hees (1974 NSSC)**: Use of force to defend property can be justified, **but** it must be reasonable and only after the intruder has been given the opportunity to leave. Exception is when intruder entered forcefully, in which case force can be used immediately.

|  |  |
| --- | --- |
| **Ratio** | * People can defend their property with force, but they must apply force only if entry was forceful OR if entry was not forceful, must first ask the trespasser to leave.
* There must always be time or notice given for the trespasser to leave. Use of force must be reasonable.
 |

**Defence of another / Third Parties**

The same rules as in self defence, with the requirement that the use of force be reasonable: *Gambriell v Caparelli (1974) (Ont.Co.Ct.)*

**Gambriell v Caparelli**

|  |  |
| --- | --- |
| **Facts** | D’s son and P got into a brawl. D feared her son was being choked, and hit P over the head with a garden cultivator. |
| **Ratio** | Where the person is intervening to rescue another and holds an honest, though possibly mistaken, belief that the person is in imminent danger, they can use reasonable force to accomplish the rescue. |
| **Obiter** | Although C used a dangerous weapon, C was a much weaker party than G (old, weak, no English), so use of force reasonable in the circumstances. More moderate conduct may have been insufficient to protect her son. |

**Expert evidence** can be adduced where jury could be swayed by dangerous misconceptions.

**R v Lavalee (1990):** admission of battered wife syndrome evidence.

|  |  |
| --- | --- |
| **Ratio** | Expert evidence on battered wife syndrome was admissiple. Expert evidence may be adduced where jury may be inclined to refer to myths and stereotypes.He also argued that it is appropriate for the jury to consider a woman’s experience and perspective when deciding on what constitutes a reasonable person’s standard for self-defence |

**Defence of Discipline**

* At common law, there is privilege on the part of parents and guardians to use reasonable force to discipline children. Canadian courts have tended to assume that s.43 of CC governs both the civil and criminal defences of discipline.
* s. 43 of the CC should be interpreted in light of prevailing social standards and customs, rather than those of the D: *R v Baptiste (1980)*.

The test set out in *R v Dupperon* is that the defendant must establish:

* 1. Force was used solely for the purposes of correction (ie to benefit the education of the child)
	2. The force was objectively reasonable in the circumstances

**R v Dupperon (1984 Sask.CA)**: Discipline of minors is a defence to battery IF the force is both (1) corrective and (2) reasonable.

|  |  |
| --- | --- |
| **Facts** | Parents acted to correct boy’s behaviour, BUT corrective force was unreasonable in the circumstances (very severe beating, child was old and already emotionally disturbed)Correction – for the benefit of the education fo the child. |

**Canadian Foundation for Children, Youth, and the Law (2004 SCC)**

|  |  |
| --- | --- |
| **Ratio** | * S.43 is constitutional
* To fall within scope, force must be sober, reasoned, and address actual behaviour.
* It must be intended to restrain, control or express symbolic disapproval. The child must have the capacity to understand and benefit from the correction. So force applied to children under 2 or with particular disabilities cannot be justified.
* Force must be transitory and trifling, must not harm or degrade the child, and must not be based on gravity of the wrongdoing. Force should not be used in relation to teenagers, as there is a risk it will induce aggressive or antisocial behaviour.
* Force may not be applied using objects (such as rulers or belts) or applied ot the head
* Corporal punishment is not reasonable in schools although teachers may use force to remove children from classrooms or to ensure they follow instructions.
 |

**Legal Authority**

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

IT is largely statutory in nature, and is used to protect officials such as the police or governmental officials for actions in tort. For example, under s.495(1)(b) of the CC, peace officers are authorized to arrest (without a warrant) anyone whom they have reasonable grounds to believe has committed or is about to commit an indictable offence.

Under Charter ss.8-9, if the gov’t violates those rights, they must justify their actions under s.1

* S. 8: right to be secure against unreasonable search and seizure
* S.9: right not to be arbitrarily detailed or imprisoned.
* If not satisfied under s.1 requirements, judge may grant a remedy under s.24(1) or exclude evidence under s.24(2).

**Koechlin v Waugh and Hamilton (1957 Ont CA)**: rights and obligations in the arrest process

|  |  |
| --- | --- |
| **Facts** | * P brought action for damages alleged for unlawful arrest and imprisonment – dismissed w/ costs
* P and friend stopped by plain clothes police who asked for ID. P refused to give his ID unless officer first identified himself. Even after officer provided badge, P continued to refuse to ID himself. During a scuffle, P fell into a ditch. Force was then used to put P into a police car.
 |
| **Ratio**  | * No general right to ask individuals to identify themselves.
* Police can rely on a recognized power, such as that inferred from S.450 of the CC (need to have reasonable and probable grounds to suspect the individual being questioned).
* Police need to tell the individual why they are being arrested. They are entitled to know on what charge or on suspicion of what crime they are being arrested.
* Failure to inform the individual of the reasons for arrest can give rise to a claim for false imprisonment
* If the individual is not informed, they are entitled to resist the unlawful arrest.
* Person in custody should never be denied the right to communicate with relatives at the earliest reasonable opportunity so that he may avail himself of their advice and assistance
 |

Amount of force that can be used to affect an arrest is stipulated in s. 25(1) of CC

However, consider:

* S. 25(3) – Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm
* S. 25(4) – A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner
* Courts have held that police may be entitled to use deadly force to prevent escape of a fleeing suspect (Solomon)

**Eccles v Bourque (1974 SCC)**: Entry may be made against the will of the householder only if (1) there are reasonable and probable grounds for the belief that the person sought is within the premises and (b) proper announcement is made prior to entry

|  |  |
| --- | --- |
| **Facts** | * Constables had reasonable and probable belief to apprehend Cheese in the apartment.
 |
| **Ratio** | * Police constables discharged the duty which rested upon them: gave notice before forcing entry
* There are occasions when private interest in security of house must yield to public interest
 |

**R v Caslake (1998 SCC)**

|  |  |
| --- | --- |
| **Facts** | * Peace officer observed car by side of highway and accused standing in tall grass. After accused drove away, officer searched area and found garbage bag with 9 lbs of MJ. Officer arrested accused, and while he was in custody, his car was searched without warrant or permission.
 |
| **Ratio** | * CL right to search arises pursuant to the arrest itself, so it need not meet the usual requirements for a reasonable search because the arrest to which it is attached must either be based on reasonable or probable grounds under s.494 or authorized by a warrant.
* To be compliant w/ s.8 of the Charter, a search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner.
* A warrantless search has been held to be prima facie unreasonable
* Once the accused has demonstrated that the search was warrantless, Crown must prove that search was reasonable on a balance of probabilities
 |

* **Remedies**

**Judicial Remedies** are ordered by the court.

1. **Damages**
	1. Available in most tort actions. Damages are usually awarded in order to return the claimant to the position they would have been in had the tort not taken place (corrective justice)
	2. General (non-pecuniary) damages are awarded for non-monetary harms. They aim to compensate the claimant for things like pain, suffering, loss of amenity (reduction in one’s ability to do something), disfigurement, loss of enjoyment of life, etc.
		1. It is meant to symbolically reassert the position of the plaintiff.
	3. Special (pecuniary) damages are awarded for monetary losses. They aim to compensate the claimant for the quantifiable monetary losses suffered as a result of the tort
		1. Compensate hospital bills, lost earnings, cost of repairing or replacing damaged property
		2. Can be: nominal damages, compensatory damages, aggravated damages, punitive damages, or disgorgement (restitutionary) damages.
2. **Injunction**
	1. Prohibitive: requires a person to stop doing a particular act
	2. Mandatory: requires person to do a particular act. Similar to order of specific performance in K law.
	3. Failure to comply with an injunction places a person in contempt of court, which may lead to imprisonment. It is typically granted in cases of nuisance, or where there has been some sort of ongoing trespass to land/chattels.
	4. These are equitable remedies, so they are subject to the principles of equity.
		1. Remedy is discretionary: Court is not obliged to impose an injunction, even where there is liability
		2. Clean hands principle: court will not assist a claimant who is himself in the wrong or acting for improper motives
		3. An injunction will not normally be granted where damages would be an adequate remedy
3. **Declaration**
	1. Court issues a formal statement setting out a person’s rights and legal status. It is only granted in very specific circumstances, and is not usually seen in torts.
4. **Order of Specific Restitution**
	1. Court makes an award that aims at preventing someone from profiting from a wrong. The profit may exceed the amount that would have been paid in damages

**Extra-Judicial Remedies**

* **Recapture of Chattels**
	+ P allowed to use reasonable force to regain or recapture his personal property when D tortuously took the chattel from P’s possession, or obtained it as a result of duress or fraud
* **Re-entry onto land**
	+ P is allowed to use reasonable force to re-enter land where D has, by way of trespass, entered and taken possession of land
* **Abatement of nuisance**
	+ P may use reasonable force to prevent or stop a nuisance
	+ Must be exercised w/i a reasonable time, and that the P should give notice to D
	+ P is obliged to avoid any unreasonable or unnecessary damages

**Nominal Damages**

* Symbolic damages, not a large amount
* Meant to recognize that the other person was wrong.
* The primary purpose is the reassertion of rights.

**The Mediana (1900 HL)**

|  |  |
| --- | --- |
| **Facts** | * Lightship damaged by negligence. P harbour board kept ship ready for emergencies, and consequently damaged ship replaced with spare during repair.
 |
| **Ratio** | * Nominal damages is a technical phrase meaning that you have negatived anything like real damage, but you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you not right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.
 |
| **Obiter** | * Compensatory damages: broad principle seems to be quite independent of the particular use of the thing that was taken, except when you are endeavouring to establish the specific loss of profit or of something that you would otherwise have got which the law recognizes as special damage
 |

**Aggravated Damages**

* Compensatory damages that recognize that the malicious, high-handed, and outrageous nature of the D’s conduct may add a degree of humiliation, loss of dignity, and embarrassment to P.
* They are awarded to compensate for “intangible emotional injury” where there has been aggravation of an injury by the D’s high-handed conduct: *T.W.N.A. v Clark (2003 BCCA)*
* To award aggravated damages, the Court must be satisfied that:
	+ The plaintiff has suffered some damage to his or her feelings as a result of the tort
	+ The D’s conduct was not merely tortious, but also highly offensive or repugnant
		- Courts will tend to infer (1) from (2) 🡪 if particularly outrageous, assume feelings injured
* Aggravated damages are compensatory in nature and may only be awarded for that purpose: *Vorvis v ICBC [1989]*

**Vorvis v ICBC (1989 SCC)**: Punitive damages may only be used in circumstances when conduct is of such nature that it merits punishment; aggravated damages are compensatory in nature and may only be awarded for that purpose.

|  |  |
| --- | --- |
| **Facts** | * Vorvis’ supervisor was dissatisfied with the pace of his work, and their weekly productivity meetings degenerated into inquisitions. A was dismissed without any precipitating event.
 |
| **Ratio** | * Aggravated damages are awarded to compensate, and take into account intangible injuries, on top of normally assessed damages
* Punitive damages punish extreme conduct worthy of condemnation; rarely awarded in cases of breach of K because the K is the only link between the parties
 |

Aggravated damages should probably be based on subjective assessment of P’s losses, if you consider the fact that the aim is to compensate for additional harm caused to P’s feelings.

In **Rookes v Barnard**, endorsed in Vorvis, it is held that you have to look at the damage to the plaintiff’s proper feelings of dignity or pride 🡪 suggests there must be some sense of reasonableness

**Punitive Damages**

* According to Vorvis:, punitive damages are “punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment”
* This reflects the traditional approach to punitive damages taken by Canadian courts, which have tended to limit punitive damages to situations where D’s conduct warrants punishment
* It could be argued that courts are increasingly coming to see punitive damages has having a deterrence function.
* As a general rule, punitive damages are awarded very rarely, and only if the award of compensatory and aggravated damages is insufficient to punish the D.

Consider *B(P) v. B(W)*:

* Although questions of aggravation can be taken into account when determining the amount of non-pecuniary general damages, they can also be considered separately
* In awarding punitive damages, court must be careful not to create situation of double jeopardy – must avoid punishing D for something they have already received criminal sanction for

**B(P) v B(W) (1992 Gen. Div.)**: Where courts want to draw particular attention to something, they will differentiate between non-pecuniary and aggravated damages. Where tortious acts are also criminal, and conduct has already been sanctioned, awarding punitive damages would amount to double jeopardy.

|  |  |
| --- | --- |
| **Facts** | P subjected to sexual assault by D, her father. D raped P when she was 20, in addition to other incidents of violence and threats of violence. P’s doctor testified she was the most traumatized sexual assault victim he had ever seen. It was highly unlikely she would ever be able to function in normal relationships. |
| **Ratio** | * Non-pecuniary damages of $100K for victimization/harm to self-esteem and self-worth
* Aggravated damages ($75K) – may be taken into account in overall assessment of non-pecuniary general damages, but where there is a gross breach, it will be dealt with separately for symbolic purposes
* Punitive damages: $50,000 for unsanctioned rape
 |

**Whiten v Pilot Insurance (2002 SCC)**

|  |  |
| --- | --- |
| **Facts** | SCC reviewed availability of punitive damages. |
| **Ratio (Binnie)** | * Punitive damages are not limited to certain types of cases or scenarios. They can be awarded to punish, deter, or denounce the defendant (and others), or strip the defendant of profits
* Punitive damages are awarded where D’s conduct merited condemnation by the Court
* It is clear that only very serious misconduct warrants punishment or deterrence – and therefore punitive damages
* Most likely to be awarded in intentional torts, but can also be used in nuisance, negligence, and other torts
* The fact that the defendant may also have received a criminal sanction does not preclude an award of punitive damages
* They should be awarded with restraint, and only if compensatory and aggravated damages are insufficient to punish the defendant
* No cap on punitive damages, but award must be based on the underlying goal. IT should be the lowest sum necessary to accomplish that end.
* Juries should be well informed of the function of punitive damages, as well as the factors determining the award and final amount of the damages
* Appellate courts can intervene if an award of punitive damages “exceeds the outer bounds of a rational and measured response to the facts of a case.”
 |

* **Defamation**

The basic purpose of this tort is to protect reputation from unjustified attacks.

Based on:

* *Slander*: confined to words (spoken defamation)
	+ Was only actionable on proof of damage, though certain types were actionable per se (such as imputation of the commission of a crime, infection with a loathsome disease, lack of chastity, and unfitness to practice a trade or profession)
* *Libel*: “concrete forms of expression” (Solomon) such as written defamation, films, pictures
	+ Was generally actionable per se

**Elements**

P must prove on BOP that impugned statements were:

* + - 1. Defamatory
			2. Made reference to P
			3. Were published or disseminated

From *Hill v. Church of Scientology*: once P proves D’s statements were defamatory, they are presumed to be false and burden of proof shifts to D (to prove otherwise). This tort does not require any proof of intention (is in effect a tort of strict liability).

This tort is unusual in that it continues to make use of civil juries. Justified on 2 grounds (Solomon):

* Helps guard against prospect of indirect censorship by state (where P is a public official)
* Is necessary given that defamation actions frequently demand some reference to community standards and the question of whether D’s remarks would have damaged P’s reputation “in the eyes of a reasonable person”

**Defamatory Material**

There are three ways that material can be defamatory:

* Defamatory in plain and ordinary sense
* Defamatory by reference to extraneous circumstances (matters beyond the publication) that are known to those receiving the publication and which would give it a defamatory meaning
	+ Legal innuendo or true innuendo
* Establishign that an ordinary person would infer a defamatory meaning from the remarks or statement even without special knowledge of the plaintiff or their circumstances 🡪 **False** innuendo
	+ Sim v Stretch (1936): Would the words tend to lower the P in the estimation of right thinking members of society?
	+ If yes, then first element (defamatory statement) is established.
	+ There are actually 2 questions:
		- Law: is the material capable of being defamatory?
		- Fact: Jury decides if facts are defamatory
	+ Test has been criticized because impractical in modern society. What is the community standard?

**Sim v Stretch (1936 HL)**: Protection undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character; and are treated as actionable wrongs.

* General test for defamation: words expose P to hatred, ridicule, and contempt
* Test for present case: would the words tend to lower the P in the estimation of right-thinking members of society generally?
	+ “Right-thinking” interpreted as being someone whose views are in keeping with those of the wider community
	+ Idea has been criticized on grounds that it is impractical in modern pluralistic society (Solomon)
	+ Osbourne: argues Canadian courts have replaced “right-thinking” test with an ordinary person test
* Alleged innuendo is fantastic and the words used in their ordinary meaning are incapable of being understood by reasonable persons as conveying an imputation upon P’s financial credit
* Judge must decide whether the words are capable of defamatory meaning (is there evidence of a tort); if they are capable, then jury has to decide whether they are in fact defamatory
* Judge doesn’t see why a person’s character should be lowered in anyone’s estimation if he/she has borrowed from a domestic servant
* From Brett LJ in *Nevill*: “It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document.”
* This is a case where there is only one reasonable meaning which is harmless, and where the defamatory meaning can only be given by inventing a state of facts which are not disclosed, and in fact non-existent

When considering whether material is defamatory:

* Court will look at both the context of the words and mode of publication; will normally focus on publication as a whole rather than focus on isolated pages (Solomon; *Slim v. Daily Telegraph*)
* When defamatory remarks are made as part of a radio/tv broadcast, court will consider gestures, facial expressions, and tone of voice (*Vogel v. CBC*)
* Fact that D may not have intended the statement to be defamatory is irrelevant, as is the existence of a good motive (*Dennis v. Southam*)

**Reference to Plaintiff**

P must show that, on BOP, the defamatory statement made reference to P. If no reference by name, court will ask 2 Qs (*Knuppfer*):

* Can the statement be regarded as capable of referring to P? (Q of law)
* Would the statement in fact lead a reasonable person (who knows P) to conclude that it does indeed refer to him? (Q of fact)

**Publication**

Defamatory remarks are not actionable unless they are communicated to someone other than P. P must show that, on BOP, the statement was communicated to a third party who understands the statement.

* Every repetition of a defamatory remark is considered to be a new publication and independently actionable (*Lambert v. Thompson*)
* If you repeat defamatory statement made by someone else, you may also be held liable
* Any party who played a part in communication of defamatory statement may also be held liable.
* Person who made original statement only liable for these repetitions if it can be shown that:
	+ They gave express or implied authority for the remarks to be republished
	+ They made the remarks to someone who had a moral, legal, or social obligation to republish them or
	+ They republication is a natural and probable consequence of the original publication
* There is no publication:
	+ Where a person makes a derogatory remark about his/her spouse (*Wennhak v. Morgan*)
	+ If the statement is overheard entirely by accident (*McNichol v Grandy*)

**Defences to Defamation**

Burden of proof is on D to establish defence on BOP

(1) *Justification –* (complete defence) if they can show that the statements, although defamatory, were true; intention isn’t relevant

(2) *Absolute privilege* – (complete defence) if they can show that the statements fall into one of three protected categories:

 (i) Statement by an executive officer relating to affairs of state

 (ii) Statement made during parliamentary proceedings

 (iii) Statement made in the course of a judicial or quasi-judicial proceeding

(3) *Qualified privilege* – (complete defence) if they can show they had a moral, social, or legal duty to make the statement. Situations such as (Solomon):

* Where the statements made by P in order to protect his own interests (i.e. to defend reputation)
* Where statements made to protect interests of another person
* Where statement is in public interest
* Additional form of qualified privilege – “fair and accurate reporting” – defence applies to proceedings that are open to the public, and is available so long as the reporting is fair and accurate (Solomon)

*Hill v. Church of Scientology*: SCC reaffirmed decision in *RWDSU v. Dolphin Delivery* and argued that although common law had to develop in line with Charter values, did not need to follow US approach and require active malice in cases of defamation

(4) *Fair comment* – (complete defence) if they can show that the material in question was:

 (i) A comment (as apposed to an accusation or allegation of fact)

 (ii) Made honestly and in good faith

 (iii) Based on facts that are true

 (iv) On a matter of public interest

*Cherneskey v. Armadale Publishers* – defence of fair comment unavailable as editors did not agree with opinion expressed in letter, and was no evidence to suggest that the authors of letter submitted it in good faith

🡪 However, Dickson in dissent argued that it was unrealistic to expect newspapers to only publish opinions they agree with, and that imposing such a requirement could have a negative effect on the “free and general discussion of public matters”

(5) *Consent* – (complete defence) if they can show that the statements originated with P, or by someone acting on P’s behalf. Defence will also apply if statements made in response to P (i.e. where they were instigated by P)

**Williams v Reason (1983 CA)**

*D in defamation entitled to introduce evidence of other facts capable of justifying defamatory words in a wider sense than that pleaded by P provided that the words D sought to justify were capable of bearing that wider meaning*

* Only in clear cases would the court allow an unsuccessful litigant to adduce fresh evidence which he had not attempted to obtain before the trial of the action
* In this case, a new trial would be ordered, and at the new trial the parties could call any relevant evidence
* Evidence of P’s receipt of boot money might be thought by jury to justify charge of shamateurism; so, boot money evidence was admissable

**Hill v Church of Scientology (1995 SCC)**

*Charter does not protect individuals from tort of defamation. The tort must be in line with Charter values.*

* The appellants impugned the character, competence and integrity of the respondent himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity
* The common law must be interpreted in a manner which is consistent with Charter principles; common law strikes an appropriate balance between the twin values of reputation and freedom of expression
* Where the occasion is shown to be privileged, the bona fides of the D is presumed and D is free to publish, with impunity, remarks which may be defamatory and untrue about P. The privilege is not absolute, however, and can be defeated if the dominant motive for publishing the statement is actual or express malice
	+ The fact that the occasion is privileged does not necessarily protect all that is said or written on that occasion
* Appellant should have taken steps to confirm the allegations that were being made; he was duty bound to wait until the investigation was completed before launching such a serious attack on the respondent’s professional integrity
* Appellant’s conduct defeated the qualified privilege that attached to the occasion

**Cherneskey v Armadale Publishers (1979 SCC)**

*Defence of fair comment is not possible when the editors themselves did not agree with the opinion of the letter and when there was no evidence that the authors of the letter submitted the letter in good faith*

* A defence of fair comment is dependent upon the fact that the words in issue represent an honest expression of the real view of the person making the comment. In the present case the evidence was clear that the letter complained of did not represent the honest expression of the real views of either the owner and publisher of the newspaper or of its editor
* No evidence to show that the material published, which the jury found to be defamatory, represented the honest opinion of the writers of the letter, or that of the officers of the newspaper which published it
* Brownridge JA: A newspaper cannot publish a libelous letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper

*Criticism*

* A defendant should succeed on a defence of fair comment if he shows that the comment was objectively fair and the P does not establish malice on the part of the individual D