Torts Summary Paragraphs 2010 Fall

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# Assault

Assault is an intentional tort which is sometimes blurred and may include battery as well when we speak of assault (Gambriell v Caparaelli). The tort of assault requires proof of the following elements: 1. the act complained of was direct and intentional; 2. It caused the plaintiff to apprehend immediate harm or offensive bodily contact (Holcombe v Whitaker – the case where conditional threats were made “if the wife does X”).

Direct/Intentional

In terms of directness, the plaintiff must prove the interference was an immediate result of the defendant’s actions, which is usually very obvious and easy to prove. The defendant’s intent is a reverse-onus which is for the defendant to disprove based on a balance of probabilities that it was neither intentional nor negligent. The idea of transferred and constructive intent will apply. The defendant is judged from a reasonable standard whether they can have intent and capacity to carry out the act (Kennedy v Hanes – the fake gun bus hijacking case).

Causation, Immediacy, Harm

In terms of causation is usually simple to prove using a but-for test, would the plaintiff have apprehended harm but-for the defendant’s actions? Actually being terrified is not necessary (Brady v Schatzel) and passive conduct will usually not be seen to satisfy the causation requirement.

For immediacy, the plaintiff must prove that the act was capable of being carried out, from a reasonable point of view. Usually future violence will not suffice but conditional threats coupled with physical presence could amount to assault (Holcombe supra).

The harm sustained by the plaintiff does not need to be physical and could be any part of the body including the nervous system (R v Chan-Fook). Psychiatric injury can be actionable according to R v Ireland (1997)(making silent phone calls to scare people), but not including mere feat, distress or panic. Whether words or silence can constitute assault is still an unsettled field of jurisprudence.

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# Battery

The tort of battery contains 4 elements as set out in Bettel v. Yim (the case where a teen was shaken by the defendant and caused more harm than the defendant intended), some of the elements are the same as in assault. The elements are physical interference, directness, intention and harm. Battery is actionable per se. It can also be committed intentionally or negligently (Cook v Lewis).

Physical Interference

Physical interference is not the same as physical injury in the case of battery. It is worthy to mention that not every single act can be battery. For example in the English courts (Wilson v Pringle [1986] CA), there is implied consent in certain day-to-day social interactions and plaintiff has to establish hostility in those cases. The physical interference need not be actually touching the body, grabbing someone’s clothing or hair can also be battery (Forde v Skinner (1830)). The plaintiff does not need to be aware of the physical interference at the time (Malette v Shulman).

Directness

In terms of directness, the plaintiff must prove the interference was an immediate result of the defendant’s actions, which is usually very obvious and easy to prove. Traditionally traps or poisoining is not covered by battery, but in the USA there is a more liberal move towards including those as battery (Morgan v Loyacomo, Donald v Sebastian).

Intention

The intention element is the same as in assault. The defendant’s intent is a reverse-onus which is for the defendant to disprove based on a balance of probabilities that it was neither intentional nor negligent once directness is established (Dahlberg v. Naydiuk (1969)). The idea of transferred and constructive intent will apply. The defendant only need to intend physical contact, not actual bodily harm because of a person’s right to bodily integrity. The level of physical contact exceeding what was intended does not matter (Bettel supra) and the concept of forseeability from negligence cannot be imported. If the chain of events is set off by the defendant and something unintended occurs, it is not an accident (Gary v Barr), too bad for the defendant….

Harm

Harm does not need to be physical. As the aim of the tort is to protect dignity, harm to one’s sense of bodily integrity will be enough. (*Culter v Smith; Malette).*

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# Sexual Battery

There is no distinct tort of sexual battery in Canada and thus the traditional battery elements apply. [insert battery discussion]. The SCC has considered whether to create a distinct tort in Non-Marine Underwriters case (the case where insured wanted the insurance companies to defend for sexual battery lawsuits). The case decided that the plaintiff only need to prove sexual contact and not need to prove lack of consent, lack of consent is presumed. The onus is on the defendant to prove consent which is in line with NZ and England cases (Ceristopherson v Bare). However, in Australia it is the opposite (Sibley v Miltinovic). The courts also look at whether there could be constructive consent, reasonable for the defendant to believe that the plaintiff consented. This is from an objective standpoint. There is some danger here as the defendant’s perception of events is irrelevant. The courts should adopt a similar solution as they did for criminal sexual assault by not allowing the defense of implied consent (Ewanchuk – criminal case dealing with consent for sexual assault under the Criminal Code).

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# False Imprisonment

False imprisonment is the direct and intentional and complete restriction of someone’s physical liberty. The direct and intentional elements are the same as in other torts (battery and assault)[copy and paste]. The tort is actionable without proof of damage.

Complete Restriction

Restriction on physical liberty does not require imprisonment in a room or building, it can be imposed by barriers, threats, explicit assertion of legal authority, and also psychologically (Campbell v SS Krege – the falsely reporting of a shoplifter case). A partial obstruction where the person needs to detour is insufficient (Bird v Jones – the case where a portion of the road was fenced off and the plaintiff refused to detour). There must be a lack of a reasonable means of escape (such as crossing a 3rd party’s land, as in Wright v Wilson). Whether a reasonable means of escape is available is determined by the courts (Hanson v Wayne’s Café Ltd). Whether a person needs to be aware of being imprisoned is an unanswered question in Canada (mentioned in J.(M.I.) v Grieve). There are English and USA cases that say awareness is not necessary (Murray v Ministry [1998]). One can also be held liable for false imprisonment if they ordered a person to do so, and the person had no discretion/control (Reid v Webster (1966) PEISC).

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# Malicious Prosection

Malicious prosecution is a field which has been reviewed recently by the Canadian and English courts. The courts are very very careful in this area because they want prosecutors to be able to conduct their work without being second guessed consistently by the courts and fear repercussions all the time. The court’s objective is to balance the freedom of citizens from groundless criminal prosecutions and public interest in uninhibited prosecutions.

The leading case in this area used to be Oniel v Metropolitan Toronto Police Force, but has since been revised in Miazga v Kvello Estate [2009] SCC 1 (case where the prosecutor prosecuted 2 parents for sexual assault but turns out the kids lied through their teeth). The plaintiff must prove the following 5 elements: 1. Defendant initiated the proceedings (actively instrumental in bringing a prosecution); 2. Proceedings terminated in the plaintiff’s favour; 3. There was no reasonable and probable cause for the proceedings; 4. There was malice on the part of the defendant; 5. The plaintiff suffered damage. #1 and 2 are usually not contentious points and very obvious and easy to prove. #5 requires proof of actual damage such as loss of reputation/liberty and financial loss. Therefore #3/#4 are the most important points that needs to be proven.

Reasonable and Probable Cause

Traditionally (under Oniel) there was a subjective and objective component and has been changed in Miazga. The courts abolished the subjective requirement and we only need to look at objective at this stage. The key at this stage was whether there was “reasonable and probable grounds” with the Crown’s professional, not personal belief about the merits of the case. The information available to the Crown at the decision making stage needs to be taken into account, not the info that came to light after. Once this point is proven, we move to the next step, malice. Otherwise, the tort fails.

Malice on the Defendant

Malice usually includes notion of spite, ill will and vengeance. This also includes any improper purpose, inconsistent with the Office of the Crown, that the Crown prosecutor may have in achieving a personal objective. An absence of a reasonable and probably cause does not itself allow the courts to draw an inference of malice. An honest or negligent but mistaken belief of reasonable/probable grounds is not a support for the finding of malice. This is a very heavy burden which the plaintiff must satisfy for the tort to be successful. There are some US jurisdictions that put the burden of proving malice on the defendant and the plaintiff only need to show there was some other motive other than justice, but this is not the case in Canada nor England (Moulton v Chief Constable of the West Midlands).

If plaintiffs are unsuccessful with malicious prosecution, there is also a separate tort of negligence investigation which the SCC approved of and is less burdensome than malicious prosecution (Hill v Hamilton-Wentworth Police [2007] SCC 41).

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# Intentional Infliction of Nervous Shock

This tort requires proving the following elements: outrageous or extreme conduct, with intent (of constructive intent) to cause nervous shock (Wilkinson v Downton). The test was articulated slightly differently in the USA where the tort consists of conduct towards the plaintiff with the purpose of inflicting emotional distress where any reasonable person would have known that would result; and his actions are of such a nature to be considered outrageous and intolerable (Samms v Eccles Utta SC).

Outrageous/Extreme Conduct

The conduct need not be an isolated incident and could be a serious of events that caused the shock (Clark v R. – a female police officer being sexually harassed). The courts will be more likely to find outrageous conduct if the plaintiff was vulnerable and the defendant was aware of it. This is assessed from a reasonable person’s perspective.

Intent

Intent can include constructive intent (Wilkinson supra). The defendant must have intended serious implications on the plaintiff’s psychological well-being. The defendant does not need to subjectively foresee the psychological injury as long as it is reasonably forseeable (Clark supra).

Nervous Shock

Nervous shock needs to be recognizable psychiatric illness and the courts do not take into account the special circumstances of the defendant, such as people who are easy to shock, age and gender. Anguish and worry should not be able to support an action of IINS (Heighington v Ontario) and there needs to be evidence of the shock (Radovskis v Tomm). The courts are sometimes willing to allow symptoms of depression + outrageous behavior of D to prove nervous shock, even without medical evidence of a shock (Rahemtulla – bank teller innocently blamed for stealing money).

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# Stalking

Stalking is where someone intentionally or recklessly harass another person that leads the other person to fear for their safety, also covered under s.264 of the Criminal Code under criminal harassment. There is currently no independent common law tort of stalking. In theory, the victim can sue under separate torts like trespass, IINS, battery, etc. This has the disadvantage of focusing on the discrete acts and ignoring the complete pattern of unacceptable behavior. However, in England, Protection From Harassment Act 1997 (1997, c.40) was enacted to create an offense of harassment. The Act defines what is harassment in Section 1 and 1A and in my view provides significant protection because it is an offense if a person pursues conduct which he OUGHT to KNOW amounts to harassment, which is an objective standard. They also provide protection for putting people in fear of violence for more than 2 occasions (ie. Stalking). This unifies individual assault claims into another tort of harassment. In Canada, we have not gone to that extent yet.

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# Harassment

Harassment is different from stalking in that stalking requires causing fear for safety whereas harassment does not. Harassment usually includes conduct which are seriously annoying, distressing, pestering or vexatious. The conduct is usually disturbing and upsetting, but not necessarily frightening. The courts have previously approached this by basing liability on a previously recognized tort. It is unclear whether the courts will fully recognize a tort of harassment. Courts are usually willing to act only when the plaintiff is a clear target and suffers mental distress. However, in England, Protection From Harassment Act 1997 (1997, c.40) was enacted to create an offense of harassment. The Act defines what is harassment in Section 1 and 1A and in my view provides significant protection because it is an offense if a person pursues conduct which he OUGHT to KNOW amounts to harassment, which is an objective standard. They also provide protection for putting people in fear of violence for more than 2 occasions (ie. Stalking). This unifies individual assault claims into another tort of harassment. In Canada, we have not gone to that extent yet.

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# Discrimination

There is currently no freestanding tort for discrimination. Usually this is covered under the current human rights legislation of the provincial and federal government. The court in Senaca College explicitly denied extending the common law into this field and felt that the statutory protection would suffice. Some courts might sidestep and try to provide a remedy via other torts such as IINS (Keays v Honda Canada). In theory a discrimination case might be actionable as separate torts of assault or IINS.

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# Intentional Interference with Land

Trespass to land can be committed in 3 usual ways: person physically entering land without permission, person placing objects on someone else’s property (continuing trespass, Johnson v BC Hydro (1981)), where the possessor of land revokes a visitor’s permission/license. This tort protects possession of land and not ownership. The elements of the tort include (Turner v Thorne – postal worker delivering parcels into garage case): 1. Direct intrusion onto the land, 2. Negligent/intentional interference, 3. Physical interference.

Direct

The intrusion must be a direct result of the defendant’s actions. Indirect actions (ie. Indirect trespasses) like oil spills are better dealt with under nuisance. (Anderson v Skender (1993)). The next element, intention/negligence, is a reverse-onus on the defendant to disprove based on balance of probabilities.

Negligent or Intentional

The intent need not be the specific intent to cause harm, but simply a general intent to intrude onto land. Mistake is not a defense (Basely v Clarkson;Turner supra). This appears to be the same view in the USA where mistake does not relive liability (Kopka et ux v. Bell Telephones Co. of Pennsylvania (1952)). Trespassers are liable not only for direct/proximate personal injuries but also indirect and consequential results (Turner supra).

Physical Interference

Trespass is actionable without proof of damage, but the interference must be of a physical nature. Smog, smoke, noise, odor, radio waves, wireless waves, etc are better dealt with under nuisance.

Defenses

This tort allows for 3 possible defenses: consent, necessity, and legal authority. Consent is usually a complete defense and can be express, implied, contractual or gratuitous. According to Osborne, such licenses are not revocable unless the person breaks the rules of the land set by its owner (*Davidson v Toronto Blue Jays)*.

Necessity may not be a complete defense. If invoked, it will have the effect of making it a nominal (or insignificant) damage being awarded. Necessity is usually when there is an emergency and there needs to be protection of themselves, public, the land owner, or a third party. This requires a balance between the danger being avoided vs the loss suffered by the plaintiff.

Legal authority is where entry is authorized by the law (common law or statute law), such as s488 of the criminal code.

Side Note

In particular, some provinces have codified the tort of trespass such as “Trespass Act [RSBC 1996] CHAPTER 462” which creates many definitions of trespass and reiterates the common law defences. One point that caught my attention was that it is trespass if you do not leave if asked by the occupier. It is silent on whether a license can be revoked if the defendant didn’t break any rules set by the land owner, contrast this with the common law rule where the license cannot be easily revoke (*Davidson v Toronto Blue Jays).*

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# Trespass to Chattels

UK Jurisprudence

Trespass and conversion has been codified by Torts (Interference with Goods) Act 1977 c. 32 as “wrongful interference with goods”. Detinue has also been abolished explicitly. The Act codifies many of the rules with respect to the damages available and double liability.

In Canada, this is still a common law tort. Trespass to chattels is where the defendant directly and intentionally (or negligently) interferes with a chattel in the possession of the plaintiff. This protects possession not ownership (Penfolds Wines case (1946) – the wine bottle case where the bottle manufacturer sued). Even a person in wrongful possession can sue except against an owner with immediate right to possession, trustees, and franchise owners (Law of Torts, Fleming 9th ed). The defendant’s awareness of the wrongfulness is not an element that needs to be proven.

Any direct interference that results in damage, destruction, taking or movement are actionable (Foulds v Willoughby (1841) – the horse and ferry case where the defendant was found not liable for conversion). However, the tort is most commonly used where there is damage to the chattel or when used/moved without authorization. Destruction of the chattel is better remedied through conversion. The defendant has a reverse-onus of disproving intent, like many intentional torts. Mistake is usually no defense (Cameron v Morang). It is unclear whether the tort is actionable without proof of damage. English authorities seems to say it is actionable per se (William Leitch & Co v. Leydon [1931] AC 90 HL), but the US jurisprudence is the opposite (Intel v Hamidi – the trespass to the computer servers case; Restatement of Torts 1965).

The remedy in this tort is an award of damage equivalent to the reduction in market value or the cost of repairs, whichever is less. It is also possible to claim the defendant’s gains (Neate v Harding).

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# Detinue

UK Jurisprudence

Trespass and conversion has been codified by Torts (Interference with Goods) Act 1977 c. 32 as “wrongful interference with goods”. Detinue has also been abolished explicitly. The Act codifies many of the rules with respect to the damages available and double liability.

In Canada, this is still a common law tort. It protects plaintiffs that have right to immediate possession and is actionable per se (Williams v Peel River Land & Mineral Co (1886)). The court can order return of the chattel or an award of damages for its value, assessed from the time of judgment rather than return date (Gen & Finance Facilities LTD vv. Cooks Cars [1963] w WLR 644 (CA)). There is no automatic right to the chattel, it is up to the court to make the order (Cf Schentag v Gauthier (1972)). It is also possible to seek the defendant’s gains as compensation (Lord Denning in Strand Electric & Engineering Co. v. Brisford Entertainments). It is uncertain how authoritative this view of compensation is because Denning is frequently described as having a very special way of approaching issues that are not acceptable to some judges.

The tort allows the plaintiff to regain possession of the item. It requires that the defendant reject the request to return, unless it is clear that the demand would be refused (Baud Corp. NV v Brook (1973) 12 AR 311(CA)).

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# Conversion

UK Jurisprudence

Trespass and conversion has been codified by Torts (Interference with Goods) Act 1977 c. 32 as “wrongful interference with goods”. Detinue has also been abolished explicitly. The Act codifies many of the rules with respect to the damages available and double liability.

Conversion is where the defendant intentionally interferes with the chattel to seriously harm the plaintiff’s rights (ie. Destroying, taking, refusing its return, etc). The defendant should have intened some use to be made of it (Foulds v Willoughby, the horse pushed off the ferry and onto the dock case). This overlaps with trespass to chattels and detinue. The damages for conversion are calculated based on the TIME OF CONVERSION, not judgment date. It is historically actionable per se but some textbook authorities are stating otherwise. Tort of conversion can be seen as a forced judicial sale of the chattel. Mistake by the defendant is usually not a defense for conversion (Irvington Holdings v. Black (1987), with some exceptions like involuntary bailees (Hollins v Fowler). It the goods are mistakenly taken and returned, it will usually be nominal damages only (Mackenzie v Scotia Lumber). The plaintiff must have mitigated their loss in some way and not sit there to wait for compensation of their chattel. The surrounding circumstances are taken into account to consider whether the tort is committed: Duration of interference, kind of interference, purpose, amount of damage.

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# Deceit

The tort of deceit contains 4 elements that needs to be proven: the defendant must have made a false statement, knew it was false (or objectively reckless to its truth) and intended to mislead the plaintiff(or substantial certainty that the plaintiff will be deceived) and plaintiff suffers a detriment as a result of relying on the statement (Derry v Peek).

False Statement

This usually requires spoken or written statements but sometimes can include misleading actions. In Abel v McDonald [1964], the seller through actions prevented the buyer from inspecting the house. It was found to be a deceit. Silence is usually not deceit unless there is a legal obligation imposed on the defendant to speak up. The statement must have made material contribution to the plaintiff’s actions.

Knowledge of False Statement

Courts use a reasonable perspective to see if the person actually honestly believe the statement (Derry supra). Objectively reckless to the truth also satisfy this element.

Intention to Mislead

The defendant does not need a specific intent to mislead for a specific purpose. A general intent to mislead is sufficient (Derry supra). The courts usually will not find intent unless it was subjectively or objectively foreseeable.

Detriment Suffered

Once plaintiff establishes the false statement was made with intention to deceive, defendant must prove it was no relied upon. *Sidhu Estate v Bains (1996) 25 BCLR 93d) 41 (CA))*Court will ask whether a reasonable person would have relied on the statement in question. If the plaintiff would have acted the same way, then there is no deceit.

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# Passing Off

The tort of passing off is meant to protect the plaintiff’s business (specifically reputation and goodwill) by preventing the defendant from presenting their goods and services as being those of the plaintiff (Ciba-Geigy Canada v Apotex (1992) SCC). The plaintiff can demand either compensation or paying up of wrongful gains, but not both (Draper v Trist (1939)). The tort acts as a method of protecting unregistered trademarks. Trademarks in Canada are governed by the Trademarks Act. A trademark owner (whether registered or unregistered) can also seek assistance from the police when they suspect counterfeit goods being sold. Counterfeit goods are punishable under the criminal code. In addition, the plaintiff can seek assistance from border services agency to stop the import of counterfeit items.

In terms of tort, the plaintiff must establish the following elements (Apotex supra): 1. Existence of goodwill, 2. Deception of the public due to a misrerepresentation and 3. Actual/potential damage to the plaintiff.

Existence of Goodwill

Goodwill is defined as the power to attract customers and the power to retain loyal customers. Is held to exist where goods or services can be identified as belonging to the plaintiff.

Deception of the Public due to a Misrepresentation

This tort is a strict liability tort and intention is not necessary. From a public policy perspective, this is a good idea because it places burden on the defendant to do some due diligence to make sure they are not selling counterfeit Apricot branded computers. ☺

This element requires that the plaintiff presenting the goods as those associated with the plaintiff. There must be a line drawn between marketing and deceiving. The courts usually ask “Did the defendant present his goods as being associated with the plaintiff?” Courts will not see it as deceptive if only ignorant people are mislead (Morning Star Cooperative Society v Express Newspapers).

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# Defamation

The purpose of this tort is to protect a person’s reputation and balance with the protection of free speech. Traditionally there has been a favor towards protection of reputation at the expense of free speech. This might have changed in the past years due to the Charter requirements. Defamation, in general, is communication that would cause the plaintiff to lose respect or esteem in the eyes of others. This tort is unusual and usually uses juries to stop the state from censorship and to get a reasonable perspective. Corporations can sue for defamation because of business reputation loss. Governments usually cannot sue but individual public officials can. There is no cap on general damages (Hill case).

The elements of the tort are: 1. Defamatory statement; 2. Reference to the plaintiff; 3. Publication (Hill v. Church of Scientology [1995]). In addition, when the plaintiff proves that it is a defamatory statement, it is presumed to be false and left to the defendant to prove otherwise. Defamations are further broken down into libel (written) and slander (spoken). The key is that written is actionable without proof of special damage and slander is actionable only on proof of special damage. Special damage includes material/financial loss, not including embarrassment or emotional distress. There are some exceptions where slander can be actionable without proof of special damage. The situations are imputations of the following: serious criminal wrongdoing, unchastely in a woman, an infectious disease and statements reflecting adversely on a person’s character with respect to her trade or profession.

Defamatory Statement

To establish this element, there are 3 options: plain meaning, legal innuendo (reference to extraneous circumstances known to recipients so it will enable them to understand the defamatory statement), false innuendo (where a reasonable member of society would understand it as defamatory; example Sim v Stretch). Simply impolite statements are not defamatory (Sim supra – the boss leaving a telegram for the maid’s old boss about money borrowed). The key to this element is an objective test which asks “would this have the effect of lowering esteem or respect for the person in the right-thinking members of society’s minds?” (Color Your World v CBC (1998)). The test involves a question of law (whether the material is capable of being defamatory) and a question of fact (if it is in fact defamatory in this particular case). Courts will use a community standard to decide whether a statement is defamatory (Walden v Mitchell (1692) 86 ER 431 KB). The statements are considered as a whole and includes the mode of communication and facial expressions/tone if applicable (Slim v Daily Telegraph [1968] 2 QB 157 CA, Vogel v CBC 1982).

It doesn’t matter if the defendant was unaware of the defamatory meanings of the statement or merely repeating them (E. Hulton & Co v Joanes [1910] AC 21 HL).

Reference to the Plaintiff

The courts will ask 2 questions to answer this element (Knupffer v London Express Newspaper). Is the statement capable of referring to the plaintiff? This is a question of law. If the defamation is about a group of persons will depend on whether or not the words can reasonably be interpreted to refer to individual members *(Knupffer supra; affirmed in Canada in Booth v BCTV (1982).* Then there is the question of fact, “would a reasonable person know it refers to the plaintiff?” It is not enough to show the plaintiff believed he was referred to, must show that a reasonable person would believe it was plaintiff (*Willows v Williams (1950) 2 WWR (NS) 657)*.

Publication

The statement must be published to a third party who heard it/read it and understood it. It must be proved based on a balance of probabilities. Each repetition is considered a new publication and independently actionable (Lambert v Thomson [1937] OR 341). Innocent disseminators may also be liable, for example intermediaries such as web forum owners. The liability for these intermediaries is still a developing area in the law. There is BC jurisprudence to show that these innocent disseminators are different and depend upon proof of fault to establish liability (Carter v BC Federation of Foster Parents). So in other words, if the web forum owner was not aware of it and had no control they might be able to escape liability. Defendant is not normally responsible for the republication of a defamatory statement by another person, unless they intend for it to be republished. Accidental publication is not actionable (*McNichol v Grandy [1931] SCR 696)* – this also applies to information read by accident by someone that is not intended to read it. So if someone TRULY left defamatory brochures at a photocopying place, they might be able to escape liability. Statements to a spouse are not considered a publication (Wennhak v Morgan (1888)). This is likely due to the fact that the law recognizes spouses traditionally as a single legal person.

**Defenses**

Justification

Proof that the statement is true is a complete defense (Courchene v Marlborough Hotel Co). The whole of the matter must be substantially true. (Meier v Klotz (1928)). The defendant can introduce evidence of facts that help justify the defamatory words in a wider meaning (*Williams v Reason)*. However, if a claim of justification fails, it might increase damages. It is important to note that malice and intention is not relevant for this defense. So someone can maliciously say something that ruins another’s reputation, as long as it is true and they can justify it.

Absolute Privilege

Privileges are attached to the occasion, not the persons (*Adam v Ward [1917] AC 309 HL)*. It must be one where it is necessary in the public interest to speak without threat of liability. The statements are protected under this defense, a complete defense, if it is one of the following: statement by an executive officer relating to the state affairs; statements in parliamentary proceedings; statements in judicial/quasi-judicial proceedings. Malice is also irrelevant for this defense.

Qualified Privilege

Privileges are attached to the occasion, not the persons (*Adam v Ward [1917] AC 309 HL)*. It must be one where it is necessary in the public interest to speak without threat of liability. Qualified privilege protects honest and bona fide statements and there is no immunity for malice (unlike absolute privilege) (Horrocks v Lowe [1975] AC 135 HL). There is no protection for statements known to be untrue or made recklessly. This is also a complete defense and requires showing moral, social or legal duty to make the statement. This is about striking the balance between the interest in free speech ought vs the interest in individual reputation.

This is usually available where statements are made to protect one’s own interest, other people’s interest or public interest (*Adam v Ward [1917] AC 309 HL)*. The communicated must be reasonably appropriate in the context of the circumstances on the occasion *(Hill v Church of Scientology)*. Hills case also affirmed the fact that defamation should develop in line with Charter values (ie. Freedom of expression) and require active malice in cases of defamation.

Fair Comment

According to Slim v Daily Telegraph, the following elements needs to be established to be fair comment: 1. A comment; 2. Made honestly in good faith (which means there is honest belief in it); 3. Based on true facts; and 4. Matter of public interest.

Defendant must first establish the statement would be interpreted as a comment or opinion by the ordinary reader. In terms of public interest, it includes public figures or person under public spotlight (Pound v Scott [1973]), but ONLY their public dimensions (Vander Zalm v Times Publishers (1980)). According to Cherneskey v Armadale, this defense is lost if malice can be proven or if the defendant had no honest belief in the statement. There has been legislative reaction to this in some provinces which allow this defense if the comment is one that an honest person might hold. The legislation also does not require there to be an honest belief on the defendant.

Consent

The defendant will have a defence of consent (complete defence) if they can show that the statements originated with the plaintiff, or by someone acting on the plaintiff’s behalf. Defence will apply if the statements were made in response to the plaintiff (i.e. where they were instigated by the plaintiff).

Apology & Retraction

This is a partial defense. Apology is a mitigating factor in common law. Retraction is a statutory concept that applies to newspapers/broadcasters. After a retraction, only actual damages can be claimed.

International Development

In England the Reynolds v Times Newspaper case extended qualified privilege to cover info of public importance that the press was under a professional duty to report and in the interest of public to receive. This protects honest mistakes and attaches the privilege to the information rather than the occasion. This didn’t receive much traction in Canada (Lee v Globe and Mail (2001)), but Canada should change to stay in line with the commonwealth.

# Remedies

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## General (non-pecuniary) Damages

These are damages for non-monetary harms – aim to compensate the claimant for such things as pain, suffering and loss of amenity arising from the tort. Examples include physical or emotional pain and suffering, disfigurement, loss of reputation, loss or impairment of mental or physical capacity, loss of enjoyment of life, etc.

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## Special (pecuniary) Damages

These are damages for monetary losses – aim is to compensate the claimant for the quantifiable monetary losses suffered as a result of the tort. Typically, special damages aim to compensate for lost earnings and, cost of repairing (or replacing) damaged property. Special damages can be divided further into: nominal, compensatory, aggravated, punitive, and disgorgement damages.

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## Injunction

Courts can issue an order to stop someone from doing something (prohibitive injunction) or a mandatory injunction (an order to do something). Failure to comply with an injunction places a person in contempt of court, which can in turn lead to imprisonment. Because injunctions are an equitable remedy, they are subject to the principles of equity which means the remedy is discretionary, plaintiff must have clean hands, and a case where damages is an inadequate remedy.

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## Aggravated Damages

Aggravated damages are a form of compensatory damages that are awarded to compensate the plaintiff for additional injuries to dignity and similar feelings arising from the defendant’s reprehensible conduct. It compensates intangible and emotional injury caused by high handed conduct (TVNA v Clark 2003 BCCA). Courts conduct a 2 part test for awarding this remedy: 1. Plaintiff suffered additional injuries to their feelings? (subjective); 2. Defendant’s conduct highly offensive or repugnant, not simply tortuous (objective). The courts usually assume #1 is true and start with number 2. However, according to Rookes case, it says that we have to look at the plaintiff’s proper feelings of dignity and pride. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages are punitive in nature and only employed where the conduct is of such nature that it merits punishment (Vorvis v. Insurance Corp. of British Columbia [1989]).

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## Punitive Damages

Punitive damages are punitive in nature and only employed where the conduct is of such nature that it merits punishment (Vorvis v. Insurance Corp. of British Columbia [1989]). Punitive damages are rarely awarded and only if compensatory and aggravated damages are insufficient as punishment. In awarding punitive damages, the court must be careful not to create a situation of double jeopardy (B.(P.) v. B.(W.) (1992)). Justice Binnie also made general pointers on punitive damages in Whiten v Pilot Insurance which puts general restraints on when it is appropriate to award this damage.

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## Declaration

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

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## Order of Specific Restitution

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

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# Extra-judicial remedies

## Recapture of chattels

Basic rule is that a plaintiff is allowed to use reasonable force to regain or recapture his or her personal property when the defendant tortuously took the chattel from the plaintiff’s possession, or obtained it as a result of duress or fraud.

## Re-entry onto land

Basic rule is that a plaintiff is allowed to use reasonable force to re-enter land where the defendant has - by way of trespass – entered and taken possession of the land.

## Abatement of nuisance

Basic rule is that a plaintiff may use reasonable force to prevent or stop a nuisance. Note that the privilege must be exercised within a reasonable time, and that the plaintiff should give notice to the defendant. Plaintiff is also obliged to avoid any unreasonable or unnecessary damages.

# Defenses

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## Consent

Consent is usually a freestanding defense which is a complete defense. The defendant must prove that the plaintiff consented to the specific act complained of. Consent can be explicit or implied. Implied consent will depend on whether the plaintiff was aware of the risks involved and the protections customarily provided (Wright v McLean – mud ball fight; Elliot – puck hitting spectator in hockey rink). It must take into account participation, demeanour and behavior.

Consent can be exceeded when it goes beyond what was agreed upon (Agar). The person must also be capable of understanding the nature and consequence of the act when they consent. There may also be conduct that is too dangerous for people to consent to. (R v. Bertuzzi (2004)). Consent is negated when there is force causing serious harm with intention. (R v Jobidon [1991] 2 SCR 714, R v Paice). Deceit related to the nature of the act can negate consent according to R v Williams (singing teacher convicted of rape). Mistake is also factor that can negate consent (Toews v. Weisner). Consent procured as a result of duress (i.e. the use of force) is not valid (Latter v. Braddell (1880)).

Consent can be vitiated in some cases for reasons of public policy. For example, a person cannot consent to being killed or seriously injured (Lane v. Holloway; R. v. Jobidon). Also, a person cannot consent to someone exploiting a position of authority (as in the case of sex with parents, doctors, teachers, etc.) (M.(M.) v. K.(k.) (1989 38 BCLR (2d) 273 (CA)).

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## Self-Defense

Self-defence requires defendant to establish on a balance of probabilities that: 1. He or she honestly and reasonably believed that as assault was imminent; and 2. That the amount of force that he or she used to avert the risk was reasonable in all of the circumstances. Pre-empting an attack can be used as self defense and a plaintiff’s reputation for violence can be used as justification. (R v Scopelliti (1981)). And Bona fide mistake of fact can still use self-defence as a defence (R v Reilly [1984] 2 SCR 396).We take into account the reasonable defendant IN THAT CIRCUMSTANCE (R v Lavalee [1990] 1 SCR 852 – battered women syndrome).

When determining whether the force used was reasonable or not, courts will look at the nature of the force used, and all of the surrounding circumstances. If the force was reasonable, the defendant is not responsible for the consequences (Brown v Wilson).

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## Defense of Third Parties

The same rules in self-defense apply. In particular the part about reasonable force. A key case is Gambriell (defending son in a fight with the neighbor).

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## Defense of Discipline

Key point here is that the child must also have the capacity to understand and benefit from the correction. As a consequence, force against children under two (or those with particular disabilities) cannot be justified under Section 43. The defendant needs to prove the force was by way of correction(to the children’s benefit) and force was reasonable in the circumstance (Dupperon (strapping 13 year old kid). Force must not be applied using objects and teachers may not use corporal punishment (Canadian Foundation for Children case).

## Defense of Legal Authority

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