Legal Fundamentals for Canadian Business (Canadian) 4th edition Yates Solutions Manual

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Instructor's Manual
Chapter 2
Torts and Professional Liability

Teaching Suggestions

I usually have only two hours of lecture time to devote to the subject of torts and must be selective in what I cover. The key to teaching this subject is to use lots of examples. Whether you use actual cases or created scenarios, nothing illustrates the material or contributes to student understanding of torts better than practical examples of each rule or principle. I start off by defining what a tort is: a social or civil wrong remedied through a civil action where a plaintiff sues a defendant seeking damages or some other remedy. I contrast a tort to a criminal wrong or breach of contract by pointing out that a criminal wrong involves an offence against the state and the process is a prosecution rather than civil litigation. This is a good opportunity to review the criminal versus civil process discussed in the first chapter. I also point out that the same conduct may result in a criminal prosecution as well as a civil action by using motor vehicle accidents with criminal charges and civil liability as an example. For contract law I point out that there is nothing inherently wrong with failing to do the action required in the contract, rather it is the failure to honour the promise that is actionable. Then I approach a student with a clenched fist and ask if there is anything inherently wrong with me hitting that student and they get the distinction. I then list the different types of torts including assault and battery, trespass, false imprisonment, fraud, defamation, nuisance and negligence. I also point out that this is not a complete or closed list. Finally, I emphasize the requirement of fault with respect to torts, either taking the form of an intention to do the act complained of or failure to live up to a required duty of care.

I then take time to explain the concept of the reasonable person and point out that while it is used in many areas of law, it is vital especially in the field of negligence. Students usually think of the reasonable person test as the application of an average and I have developed the analogy to par in a golf game to emphasize the difference between a standard based on the reasonable and the average. Par is an imperfect analogy but it usually gets students away from equating reasonableness with average. I also take time at this stage to discuss vicarious liability: the idea that an employer is responsible for the wrongful conduct of an employee committed in the course of his employment. The main goal here is to get across the idea that vicarious employer liability does not excuse the employee from liability (a mistake often made by students). Rather, I emphasize that both the employer and the employee are liable, although it is usually the employer who pays since they usually have the deeper pockets.

I then spend the rest of the time going over specific individual torts and what I cover here depends to some extent on the specialty of the students. For example, if I am teaching broadcast or journalism students we spend more time on defamation whereas with mixed business students the emphasis is on negligence. In any case, the first thing I do is distinguish between intentional torts and negligence. As far as intentional torts are concerned I usually concentrate on assault and battery because the students like the

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illustrations and conflict. Time limitations usually require me to leave the other forms of intentional torts to be studied independently by the student. With assault and battery I explain that battery requires actual contact whereas assault involves the perceived threat on the part of the victim of imminent physical contact. I talk about the importance of words and how they can make an innocent action threatening and what appears to be a threatening action innocent. I often spend most of my time talking about defenses. I explain what reasonable force means when discussing self-defense and also look at consent. Here I concentrate on medical treatment. I always deal with the ***Malette v. Shulman*** case (see cases for discussion) where a medical doctor ignored the notice that an unconscious patient was a Jehovah Witness and contrary to her written stated instructions gave her a needed blood transfusion, which saved her life. I ask for a show of hands if the students are sympathetic to the doctor and why. A lively discussion usually follows and I can discuss the right of an individual to make their own decisions with respect to what kind of interference they wish to permit to their own bodies. We also usually discuss children and I point out that this right doesn't always extend to making those same decisions on behalf of others they are responsible for. If I have time I will mention what false imprisonment is and explain the nature of trespass, nuisance, fraud and defamation. Time usually limits the depth of explanation I can provide. I often just require the students to read the material in the text. I discuss as much of this in the first hour as I can and then turn my attention to negligence.

The second hour is always devoted entirely to a discussion of negligence. I introduce negligence by pointing out that it is not a state of mind and not carelessness in that sense. Rather it involves a relationship between people where one fails to live up to required level of behaviour towards another, causing injury or damage. I then summarize what has to be established: that a duty to be careful was imposed (there is no general duty to be careful to everyone); what standard of behaviour was required; that damage or injury took place caused by the conduct complained of; and finally I look at the effect of contributory negligence. When discussing duty the most important case is *Donoghue v. Stevenson*, which establishes the principle of reasonable foreseeability. I usually go through this case quite carefully. I also take the time at this stage to point out that there are some difficult situations where the presence and nature of a duty to be careful is not always apparent. This involves the problem of careless words rather than careless deeds where this test can result in open ended liability. I also point out the problem of remoteness where the connection between action and result seems strained or just weird or unexpected. This used to be a difficult problem, but today both are dealt with by the principles set out in the *Anns* case. It is important to point out that most normal cases will be dealt with simply by applying the reasonable foreseeability test developed in *Donoghue v. Stevenson*, but in problematic situations the Supreme Court has declared that the *Anns* case principles will apply. The first part of the *Anns* test applies reasonable foreseeability (called proximity here) to determine whether a duty to take care exists. It is the second part that is unique. The second part asks the question of whether there is any reason to reduce or change the nature of the duty. That is an application of social policy. By way of example, I then take a few minutes here to look at the *Haig v. Bamford* and *Hercules* cases.

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The examination of what standard of care is required is much more straightforward. I again explain what the reasonable person test means and how it works and point out that reasonable here does not mean average. I also explain that it is the reasonable person in the circumstances of the situation being examined: e.g. a reasonable doctor, a reasonable lawyer etc. I point out that the courts will look at risk of damage and the potential seriousness of those damages as well as the costs incurred in prevention in determining just what a reasonable person would have done in the circumstances. The best way to approach this is to give brief summaries of cases and examples to illustrate the points. I also discuss statutory modification of this standard by looking at the occupier's liability acts and innkeeper's acts in place in most jurisdictions.

When discussing the requirement of damage it is important to emphasize causation here as well. That is, was actual injury caused by the conduct complained of? I use the example of someone driving without illuminated rear tail lights and getting into a head on accident. It may have been careless to drive without the working rear tail lights but that did not cause the damage or accident.

It is also important to discuss the broadening out of the type of damages that are recoverable. In the past there had to be some sort of physical injury for damage to the person or property, but now economic loss and mental injury will also entitle the victim to compensation. I also review remoteness here and review the application of the *Anns* case tests to these situations. I also discuss the thin-skull rule here; that you take your victim as you find him. Although you couldn't anticipate that the person whose hands you injured was a concert pianist, you are responsible for the greater damage nevertheless. Contributory negligence is also important to discuss. In the past it was all or nothing, but all jurisdictions, through statutory amendment, require that the responsibility for the accident be apportioned according to fault. This means that an injured party will face a reduction in their claim for damages in proportion to their own carelessness/contributory negligence. For example, if a pedestrian is equally at fault for stepping into the path of an oncoming car, the pedestrian will face a reduction of 50% in the amount of damages they are entitled to. Similarly, if the car in the collision suffered damage due to the collision, the owner/driver will face a reduction of 50% in their claim to recover the cost to repair that damage from the pedestrian.

I also talk about the defence known as “voluntary assumption of risk”. This defence arises when a person voluntarily puts themselves in harm’s way and suffers harm. Until recently, if it was shown that a person did “assume the risk” then such a person’s claim would be dismissed. Because this is an all or nothing approach the Supreme Court of Canada has more recently ruled that such a defence is quite limited. To now succeed with the defence of voluntary assumption of risk the defendant must show not only that the plaintiff assumed the physical risk but also the legal risk by clearly waiving his legal rights (usually by signing a written waiver or release document before participating in the activity giving rise to the harm).

If there is time I talk about product liability but I will be dealing with this subject more extensively under the Sale of Goods Act discussion later.

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I find myself hard pressed to cover this much in a two-hour class and leave the students to read the rest of the chapter including the discussion of various types of business torts and insurance.

Chapter Summary

Introduction
A tort is a private or civil wrong
Tort as distinguished from crime and contract
Employer can be vicariously liable

Intentional torts
Deliberate conduct

Assault and battery
Intentional torts involve deliberate acts
Battery involves physical contact
Assault involves apprehended physical contact
Threatened contact must be immediate, possible, and unwanted
Informed consent is an effective defence
Self-defence using reasonable force is an effective defence
There are a number of criminal offences that correspond to assault and battery
Consent or self-defence will not always justify the use of physical force

False imprisonment
Complete restraint without authority is an actionable tort
Restraint can be physical or submission
No false imprisonment where there is authority to arrest

Trespass
Trespass involves voluntary conduct without authority.
Trespass may take place directly or indirectly
Trespassers may be ejected using reasonable force
Trespass may also be criminal
Responsibility to trespassers modified by statute.
Injunctions can be used to stop trespassers

Nuisance
Nuisance involves unusual use of property interfering with a neighbour.

Defamation
Defamation involves a published derogatory false statement
Defamation may involve innuendo
Slander is verbal; libel is written and easier to prove
Broadcasted defamation is libel by statute

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Derogatory statements made in Parliament or courts are protected (Absolute privilege)
Derogatory comments made pursuant to duty are protected (Qualified privilege)
Derogatory comments made as fair comment on public matter are protected
Libel may also be criminal

Negligence
Negligence involves inadvertent conduct causing loss
Reasonable person: better than average but less than perfect
Negligence requires duty of care
Existence of duty determined by reasonable foreseeability
Note application of *Anns* case principles
The standard of conduct required is determined by reasonable person test.
Reasonable care is determined by risk, cost, and potential of loss
Expertise claimed effects reasonableness of conduct.
Note the use of circumstantial evidence
Special standards imposed by statute or common law
Breach of duty must have led to loss or damage.
Where the victim is also negligent, loss is now apportioned
Where the victim voluntarily assumed both the physical and legal risk, there is no remedy
Where the connection is tenuous or the results unexpected, social policy may be applied to reduce or modify duty
Responsibility can be imposed even where an unusual occupation or condition causes victim greater loss than normal
When a manufacturer is sued, negligence must be established

Product Liability
Advantage of strict liability when suing in contract but note privity problem
Manufacturer can be sued in negligence.
But breach of standard of care must be established
Circumstantial evidence often used to show carelessness
In some jurisdictions manufacturer can also be sued in contract
Note prevalence of class actions in product liability cases

Professional Liability
Professional liability to clients based on contract.
Professional liability to others based on tort and *Anns* case test
Duty may now be modified or eliminated on policy considerations.
Court unwilling to expose professionals to unlimited liability
Higher standard of conduct required of experts
Standard practice of profession may not be good enough
Fiduciary duty requires good faith and clients' interests to be put first
Disciplinary bodies subject to rules of "due process"
Professional risk is reduced by insurance.
Negligence may also be criminal

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Other Business Torts
Other business torts include:
- Fraud
- Product defamation
- Inducing breach of contract
- Passing Off
-Trespass to chattels and conversion
Note increased emphasis on privacy rights

Questions for Review

1. What is a tort? Distinguish between a tort and a crime and explain when a tort can also constitute a crime.

Answer: A tort is a civil wrong actionable through civil litigation. A crime also involves wrongful conduct but offends society and is prosecuted criminally. A breach of contract involves conduct that is not inherently wrongful but made wrong by a party failing to perform a term of the agreement made between the parties.

2. Explain vicarious liability and any limitation on its availability.

Answer: Vicarious liability holds an employer responsible for torts committed by an employee along with that employee. The employer is responsible only for those torts committed in the course of the employment.

3. Distinguish between intentional and inadvertent torts.

Answer: Intentional torts such as assault and battery trespass and false imprisonment involves conduct that is voluntary in the sense that the wrongdoer intends to do what is done (though not necessarily the consequences). An inadvertent tort involves conduct that is not intentional but rather accidental where the accused did not intend to do what he did.

4. Explain what is meant by a reasonable person and the reasonable person test.

Answer: The concept of the reasonable person is used in many situations. Usually the concept is used to determine a standard of conduct by which a party's actions are judged to determine liability. The standard imposed does not require perfection, but is a higher standard than average. It can be said to be the conduct expected from a prudent person being careful.

5. Distinguish between assault and battery, and explain any defences.

Answer: Battery involves unwanted physical contact whereas assault involves the apprehended threat of such contact. If the parties engaging in the conduct have consented to the activities, no battery or assault has occurred as the conduct cannot be said to be "unwanted". The defence of "self-defence" permits the victim to use as much force as is

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necessary or reasonable to defend themselves from such a threat or actual contact. If excessive force is used that action constitutes an actionable battery.

6. Explain what is required to establish a false imprisonment.

Answer: For a false imprisonment to take place there must be complete confinement of the victim against their will and for no lawful purpose (e.g. not a lawful "citizen's arrest"). This confinement can take the form of physical restraint or by a person submitting to the authority and control of the other party. In the latter case no cell, handcuffs, or other forms of confinement are required.

7. Why is trespass to land considered an intentional tort? Under what conditions does a trespass occur? What is a continuing trespass?

Answer: Trespass to land involves a willful act in that the defendant must have intended to be where they were. It is not required that the trespasser knew that he was on another's property or that he was trespassing, only that his conduct of getting to that location was the result of willful and voluntary conduct on his part. He must have intended to be where he was whether or not he knew he was trespassing. Trespass can occur when an individual comes on another's property or indirectly when something is thrown on another's property, or if a building is built on another's property. This latter situation is called a continuing trespass.

8. Explain the obligation of an owner or occupier of land for injuries suffered by a trespasser and others using that land.

Answer: At common law the landowner was only responsible to injuries to a trespasser when those injuries were inflicted intentionally or recklessly on the trespasser. Unlike trespassers, at common law an owner had a duty to take "reasonable steps" to ensure that others using the land with the permission and knowledge of the owner were either clearly warned of any potential hazards or steps were taken to guard any such hazard. Most provinces have passed statutes extending an owner's "common law" responsibility to both trespassers and permitted guests in their occupier's liability acts.

9. Under what circumstances might one neighbour sue another for nuisance?

Answer: A nuisance takes place where one neighbour uses his properly in such a way as to interfere with his neighbour's use of his. This might be allowing bees, fumes, noise or smoke to escape making it impossible for the neighbours to enjoy their patio.

10. What is meant by defamation? What is an innuendo?

Answer: Defamation is a false and derogatory statement about another to their detriment. An innuendo is an implied or hidden meaning which when combined with known facts makes an otherwise innocent statement defamatory

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11. Distinguish between libel and slander. Why is the distinction important?

Answer: Generally, libel is written and slander is spoken. Broadcasted defamation is usually made libelous by statute. It is easier to prove libel since you must not only prove that slander took place but that it resulted in some actual, measurable monetary loss.

12. Explain the difference between absolute and qualified privileged, and when these defences will be used. What is fair comment?

Answer: Absolute privilege means that the words cannot constitute defamation no matter how false and derogatory or what the motive. Absolute privilege applies only to words spoken in courts and parliament. Qualified privilege is also protected but only if the words were spoken believing they were true with no ulterior motive and with a duty such as an employment obligation to speak the words. Fair comment allows critics or others to make disparaging or critical comments about matters of public interest and so long as they are opinions that can be held and drawn from the known facts and there is no ulterior motive they are protected.

13. Explain the role of fault with respect to the tort of negligence.

Answer: The fault here is inadvertent not intentional. The fault is failure to live up to a standard of conduct deemed acceptable by the law (determined by applying the reasonable person standard).

14. What must be established in order to successfully sue for negligence?

Answer: Four elements are required: that there was a duty to be careful; that the defendant failed to meet the required standard of care; that the complained of conduct caused damage or loss to the defendant; and that the loss was not too remote. Note that contributory negligence or voluntary assumption of risk on the part of the plaintiff might affect the outcome.

15. Explain the role of the *Donoghue v Stevenson* and *Anns* cases in determining duty of care.

Answer: In the case of *Donoghue v Stevenson* (the snail in the ginger beer case) the court held that the test for determining whether a duty was owed was to determine whether a loss or injury to the plaintiff was reasonably foreseeable by the defendant. This has been modified to a limited extend by the *Anns* case test which adds a second part to the question and asks whether there is any good policy reason to reduce or modify that duty

16. Explain what is meant by strict liability and when it might be imposed on an occupier of property. Explainhow the standard of care imposed on occupiers been modified by statute?

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Answer: Strict liability means that the defendant will be liable no matter how careful he was. The rule in *Rylands v. Fletcher* imposes strict liability on an occupier of property who stores something dangerous on that property and it escapes causing injury or loss to a neighbour (see footnote 20). The primary effect of occupier liability statutes is to change the obligation owed to people using the land with permission (licensees). An occupier owes a duty to take reasonable steps to protect those using their property whether they are there for a business purpose (invitees) or there simply with the occupiers permission (licensees). The duty owed to a trespasser is often increased as well, although it remains minimal in most cases.

17. How have the principles of contributory negligence and voluntary assumption of risk been modified in recent times?

Answer: The presence of contributory negligence on the part of the plaintiff used to be a complete bar to recovery, but now by statute the court must apportion the loss between the parties on the basis of what portion each contributed to the loss. Voluntary assumption of risk used to simply refer to the plaintiff putting themselves in harms way, but now it must be shown that they have voluntarily assumed not only the physical risk but the legal risk as well.

18. Explain how the problems with remoteness in a negligence action have been substantially resolved in recent times.

Answer: The approach taken today is to apply the two step test used in the *Anns* case. That is to determine the degree of proximity - reasonably foreseeability test, and then determine whether there is any good reason – based on social policy considerations, to reduce or modify that duty.

19. If I were to carelessly injure the hand of a musician, on what basis would damages be determined, given the victim's occupation?

Answer: We must take our victim as we find them. The damage or loss of a concert pianist would be much greater than a normal person and we are responsible to compensate for that greater loss.

20. Why are manufacturers usually sued for negligence rather than for breach of contract? Why is an action in contract preferable for the victim?

Answer: The victim of a manufacturer's negligence is normally the consumer and normally there is no contract between them, the product having passed through a retailer. In those few cases where the manufacturer sells directly it is better to sue in contract since there is no need to demonstrate fault, only that the product caused the damage.

21. Explain when a professional's liability will be based on contract and when it will be based on tort. How is the standard imposed with respect to tort determined?

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Answer: If the person suing is the actual client of the professional, the relationship will be primarily contractual and the action can be brought in contract. Where the expectations are not specifically spelled out in the contract a claim alleging "professional malpractice" often requires the determination of whether the professional has acted within an acceptable standard, and the test to determine an acceptable standard will be the same as that used in a negligence action. If the person suing is not the client, as would be the case where investors sue because of an auditor's mistake, then the action has to be based on negligence since there is no privity of contract between the parties.

22. Explain what is meant by fiduciary duty and when such a duty arises.

Answer: A fiduciary duty means that one person owes an obligation to the other to act in the best interests of that person to the extent of putting their own personal interests second. Usually the duty of a fiduciary is imposed where one person is in the service of the other in such a way that there is a great deal of vulnerability if there is any wrongdoing. Agents owe fiduciary duties to their principals, and that applies in employment, corporations, partnerships and other situations where an agency relationship exists.

23. Explain the nature of the following torts: deceit, product defamation, inducing breach of contract, passing off, trespass to chattels, and conversion.

Answer: Deceit involves knowingly making a false statement (see fraudulent misrepresentation). Product defamation involves someone, usually a manufacturer or seller, making false and damaging claims with respect to a product produced by another (usually a competitor). Inducing breach of contract often involves one employer persuading an employee to leave his employment and work for the new employer breaching his contract of employment in the process. Passing off involves a business producing a product or service in such a way as to lead the consumer to believe they are dealing with another well-known business. This is often done by using a similar logo or name. Trespass to chattels includes any kind of damage or interference intentionally done to tangible, movable goods belonging to someone else. Conversion is where one person takes goods belonging to another as their own. A conversion action is brought by the proper owner to recover those goods.

Questions for Further Discussion

1. Individuals are sometimes convicted of a crime and then sued in tort for the same conduct. Is it fair or just for one person to face trial twice for the same thing?

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Comment: It is important to point out the difference between a crime and a civil tort action. It is through a tort action that the victim receives compensation from the wrongdoer. It is also important to point out that a different standard of proof applies. It is much more difficult to prove that a person has committed a crime. As for the question of whether it is fair or not, that depends on the point of view of the those discussing the question, but the answer should be viewed from the perspective of the objectives of the criminal law compared to what society views as the purposes of a civil action. Certainly the differences in the approach and difficulty of proof should be taken into consideration.

2. Is the reasonable person test appropriate for determining what standard of behaviour should be imposed in a negligence action? Would it be more appropriate to determine negligent conduct on the basis of the average person or some other test?

Comment: The argument is that society is served by demanding a higher standard of behaviour from individuals than mere average when determining fault and who should be held responsible for injuries and losses suffered. In a negligence action it must first be established that some injury or loss was suffered. That means that someone will have to bear the loss. The question then is who should be responsible: the victim or the person who caused that injury? When looked at from the point of view of determining which person must bear the loss, the victim or the person who caused it, it is much easier to accept the higher standard of fault imposed with the reasonable person test. In fact the discussion will often go further and ask whether merely establishing that a person caused the loss of another should be enough no matter how careful they were. This is the argument for strict liability

3. In Canada, when someone produces a defective product or performs an imperfect service, he or she must be shown to have been careless—to have fallen below a community-established standard of behaviour (the reasonable person test)—before he or she can be found liable for negligence. When a person is suing for breach of contract, it is unnecessary to establish fault; the breach is enough. Consider whether the requirement to establish fault where someone's conduct causes another injury ought to be abandoned in a tort action. In other words should it be enough to show that one person caused the injury for him or her to be liable?

Comment: This question is an extension of the one above but directed specifically towards product liability. Should the seller or producer of a defective product be responsible for any injuries or loss caused by the defect whether they can be shown to be careless or not? Should they be held strictly liable for loses or injuries caused by the product? This is a good opportunity to point out the difference between contract law and tort law. As well, this is a good opportunity to show how legislation is often introduced to change the standards imposed. This is common in product liability situations. It is also a good opportunity to point out how in some situations it can be very difficult to show that one of the parties was indeed careless. Although *res ipsa loquitur* is no longer good law in Canada, the Supreme Court did point out that they could draw the same conclusion on the basis of circumstantial evidence.

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4. Our constitution guarantees freedom of expression. Yet when people criticize public officials and other public figures, they can be sued for defamation, even if they believe what they say is true. Do you think we should adopt an approach similar to that in the United States and take the position that it is more important to have a frank debate with respect to such public matters, a debate free of the chill imposed by the threat of legal action? Should the protections of privileged communications be applied to all such discussions of matters of public interest, whether the statements are accurate or not? Should the media enjoy special protection in such matters? Consider the appropriateness of the new "responsible communication" defence in your discussion.

> Comment: This is a very controversial problem and can lead to a heated discussion. Media people feel strongly that they are performing a public service and that anything of public interest is fair game. Most strongly believe that they should be exempt from defamation actions. The threats of being sued for defamation, according to these people, creates a libel chill, in effect suppressing a fundamental aspect of our democracy, the freedom of the press. The US has taken the position that the press must be free to report on public matters including matters relating to public officials and even people who are simple public figures. Until very recently the law in Canada rejected that approach and considered defamation laws a reasonable limitation on freedom of the press and freedom of expression. In 2009 the Supreme Court of Canada modified this limitation on "freedom of the press". The Court recognized the defence of "responsible communication" and ruled that comments on matters of public interest are protected so long as the person making the comment made diligent and reasonable efforts to confirm the truth of the facts being put forward. If those facts were later found to be untrue or incorrect the person making the comments based on those assume facts was protected from a defamation claim. In recognizing the "new defence" the Court realized it is important to strike a balance between the public's right to know, the press' so called duty to report, and an individual's right to protect his reputation when wrongly attacked.

Cases for Discussion

1. **Epstein v. Cressey Development Corp.** (1992) 89 DLR (4^{th}) 32 BCCA

Cressey Development Corporation excavated a lot next to property owned by Mr. Epstein and asked permission to drive supports under Epstein's property to support that excavation. Epstein refused. After unsuccessfully trying other methods to shore up the excavation, Cressey drove the supports under the property anyway. When Epstein found out, he sued for trespass. Does this conduct constitute a trespass? What defenses are available to Cressey? What else could Cressey have done? Explain the likely outcome.

Decision: This case is a good illustration of the risk a business takes in deliberately ignoring the rights of another party in its actions. The actions of Cressey clearly amount

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to an actionable trespass onto Mr. Epstein's property. The Court of Appeal confirmed the trial award of $25,000.00 for compensatory damages. The Court of Appeal also confirmed the trial award of "exemplary damages" of $45,000.00 to "punish" Cressey for the high handed fashion in which it disregarded Mr. Epstein's lawful refusal of permission despite the fact that the shoring work actually interfered very little with her use and enjoyment of the property. Faced with the original refusal of Mr. Epstein, Cressey may have been able to avoid this outcome by approaching Mr. Epstein again and negotiating further (i.e. offering more money) for permission to carry out the work. It is impossible to know whether Mr. Epstein would have relented once advised of the failure of all other efforts, but attempting to do so would go a long way to diminish the apparent "high handedness" of Cressey's actions and reduce the amount of exemplary damages ultimately awarded.

2. **Resurfice Corp. v. Hanke** 2007 SCC 7, [2007] 1 S.C.R. 333 (S.C.C.).

Hanke was the operator of an ice-resurfacing machine and was filling it with water when an explosion injured him. The water tank and the gasoline tank were similar and located in close proximity and he made the mistake of filling the gasoline tank with water from a hose. When the water filled the tank, the gasoline escaped and an overhead heater ignited the resulting fumes. He sued the manufacturer and distributor of the machine for negligence. Explain the arguments available on both sides and the likely outcome including the calculation of damages, if appropriate. Would it make any difference to your answer to know that Hanke testified that the two tanks did not confuse him?

Decision: This is a good case explaining how all elements of negligence must be proven in order to establish a successful claim. The Court recognized that the poor design of having the fill caps for two similar looking tanks in close proximity could lead a reasonably competent person to make the mistake Mr. Hanke did. However, in this particular case Mr. Hanke was fully aware of the difference between the two tanks despite the close proximity of both fill caps and it was solely his own carelessness that caused him to mistakenly fill the gas tank with water. As such, his claim was dismissed as the design "flaw" was not the cause of the accident.

3. **Kralik v. Mount Seymour Resorts Ltd.** 2008 BCCA 97, 78 B.C.L.R. (4th) 313.

Mr. Kralik was skiing on Mount Seymour when he fell from a ski lift. He was about to get on the chair when he found ice on it and tried to remove it as the chair moved onto the boarding ramp. As it started to leave, he grabbed onto the chair, but realizing he couldn't get on he let go and in the process fell about three meters, causing him serious injury. There was a lift attendant present whose job was to ensure that the skier mounted the chair properly. Kralik sued claiming that the lift attendant had failed in his duty and that the employer was also liable. Explain what arguments the defendants could raise, and indicate the likely outcome and how damages would be calculated if appropriate.

Decision: This case provides a good contrast to the *Resurfice* case noted above. The Court rejected the resort's suggestion that Mr. Kralik was entirely responsible for his

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mishap as he failed to pay attention to the moving chair and that was the sole cause of the mishap. Instead, the Court ruled that both Mr. Kralik and the lift attendant shared legal responsibility for the accident occurring: negligence by the lift attendant in not keeping reasonable watch on riders such as Mr. Kralik and contributory negligence by Mr. Kralik for not paying sufficient attention to the moving chair as he tried to remove the ice. As both parties appeared to be equally "at fault", Mr. Kralik's damages were reduced by 50%. As Mr. Kralik's injuries caused him "pain and suffering" and a loss of income due to his absence from work while recovering, the amount awarded for these two losses were reduced accordingly.

4. **Babiuk v. Trann 2005 SKCA 5 (CanLII), (2005) 248 DLR (4th) 530 (Sask. CA)**

Shawn Babiuk and Cory Trann were on opposing teams in a rugby league. At one point in the game Trann's teammate was on the ground and Babiuk, an opposing player, was stepping on his face. Trann stepped forward and struck Babiuk in the face breaking his jaw. This action was brought by Babiuk seeking compensation for those injuries. Explain what tort Babiuk is claiming was committed by Trann, what defences Trann might raise, and the likely outcome of the case.

Decision: This case nicely illustrates the concepts of "defence of another" and what degree of force may be used in doing so. The Court concluded that Babiuk intentionally stepped on the downed teammate of Trann and was committing the tort of battery in doing so. The evidence accepted at trial was that the downed teammate cried out in pain as a result of Babiuk's initial act and that Babiuk continued to step on the player even after the referee had "whistled down" the play and indicated that the players were to disperse. The Court concluded that although rugby is a rough and violent sport, Babiuk's actions were well outside the bounds of rought play permitted even in that sport. As such, Trann raised the defence of "defence of another" in the face of Babiuk's claim that he was the victim of Trann's battery of himself. The Court confirmed that even in sporting situations carried out under the supervision of a referee, the circumstances in this situation allowed Trann to raise that defence. The Court then went on to rule that Trann's single blow to Babiuk was not "unreasonable" force given all the circumstances, including Babiuk's continued actions towards the downed player after the whistle had been blown.

5. **McGarrigle v. Dalhousie University 2007 NSSC 85 (CanLII), [2007] N.S.J. No. 10**

Mr. McGarrigle, the coach of the Dalhousie University basketball team, had improperly allowed an academically ineligible player to play in five basketball games in violation of the CIS rules governing the sport. When this happens, there is an obligation upon the institution to disclose the violation by submitting an appropriate letter to the governing sports body Canadian University Sports (CIS), with the result that the games involved would be forfeited. The letter was also sent to the officials of Atlantic University Sports, which had no direct role in the disciplinary process but did need to know why Dalhousie was forfeiting the specified

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games. Assuming some of the words in the letter were defamatory, what would be the best defense for Dalhousie in these circumstances? Explain why or why not that defence would be effective.

Decision: In both instances of publication (to CIS and AUS) Dalhousie raised the defence of qualified privilege. That is, Dalhousie claimed that both organizations had a valid reason for receiving the information about using an ineligible player and both organizations would need to act on the matter. CIS would need to investigate the circumstances giving rise to the use of the player and sanction Dalhousie accordingly. AUS would need to alter the league standings and know the reason for doing so. The more difficult question was whether the AUS needed to know all of the circumstances leading to the school allowing an ineligible player to play in those games instead of simply being advised of that event having occurred. Ultimately the Court ruled that sending an identical copy of the letter to AUS as sent to CIS provided much more information than AUS needed for their particular purposes. However, the Court ruled that in all the circumstances, the surplus information was still warranted as the recipient at AUS would expect an explanation of the matter as part of the information that organization customarily expected. As a result, the defence of qualified privilege was deemed appropriate for both publications. Interestingly, the claim was being heard by a Court composed of a Judge and (civil) Jury. The presiding Judge left the Jury with the task of determining whether the Dalhousie Athletic Director acted with "malice" in providing an identical copy of the letter to AUS given his strained and acrimonious relationship with Mr. McGarrigle.

Sample Examination Questions

Multiple Choice Questions

1. Jim was assigned to a different workroom at the factory. During the day he became increasingly upset with one of his new co-workers, Mr. Saur, who criticized everything he did. After several hours of this, Jim said, "I could do a little better in here if you kept your mouth shut." Saur answered, "you young @#$%%, you make me sick," and with that he intentionally knocked over a machine that would have hit Jim if he hadn't jumped out of the way. Jim picked up a paper cup of water and threw its contents at Saur saying, "cool down, old man." Some of the water hit Saur who then ran over and hit Jim hard with a piece of pipe. Charlie, another worker, grabbed Jim by the hair and pulled him out of the room, away from Saur. On these facts, which of the following is true?

a. Jim could not sue Saur for assault because Jim was not hurt by the falling machinery.
b. If Jim sues Saur for battery, Saur could defend successfully on the ground of self defense.
c. If Jim sues Saur for battery, he will have to prove his case "beyond a reasonable doubt".
d. If Saur sued Jim for battery, Jim could defend successfully on the ground of provocation.

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e. Charlie could be sued successfully for battery even though he was acting in Jim's best interest.

Answer: E

2. A seven-year-old boy followed his dog into Mr. Howe's backyard. He fell into a large hole dug by Mr. Howe in preparation for a tree that had been ordered. The boy broke his arm in the fall. At the hospital the boy was treated by a doctor employed there for four years. The doctor did not set the boy's arm because he made a mistake in reading the x-ray. Because the arm was not treated correctly, it healed improperly. When the boy kept complaining, his mother took him to their family doctor who discovered the error. The boy had to have his arm rebroken so that it could be set properly. On these facts, which of the following is true?

a. The owner of the land owed no duty of care to the boy or anyone else on his property without his permission.
b. The case law that developed over hundreds of years on the duty of care owed by occupiers of land has priority over any subsequent legislation on the point.
c. The doctor owed a duty of care to the boy but he only had to meet the standard of care expected of the average man.
d. The hospital, not the doctor, would be solely liable for any harm suffered due to the negligence of a doctor on the job.
e. In an action against the land owner, if the boy were found to be partially at fault for his injury, the court would apportion the award of damages as it apportioned the fault.

Answer: E

3. A person could be liable for the tort of trespass:

a. If, in the middle of the night, he was carried onto the neighbour’s property and thrown in their pool.
b. If he lost control of his bike and accidentally went onto his neighbours property and into their pool.
c. If he stood in the lane and threw a tire in the pool.
d. For swimming in the pool with the owner’s permission.
e. For delivering a package to the owner at pool side as instructed by the owner.

Answer: C

4. Beth and Alan had just left Logan Drugs Ltd. when they were stopped by the store detective who told them he was going to detain them until a policeman came to charge them with theft for stealing a radio. In fact, nothing at all had been stolen by anyone. Beth was upset, felt compelled to wait and did wait. Alan, however, just walked away and left on a bus. On these facts, which of the following is true?

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a. Because the detective did think a theft had taken place he could not be successfully sued.
b. Because the detective wanted to hold them both, both Beth and Alan could sue him for nuisance.
c. Because there was no crime committed, both Beth and Alan could sue the detective for false imprisonment.
d. Beth could successfully sue both the store detective and Logan Drugs, Ltd.
e. Alan could sue the detective for false imprisonment but not Logan Drugs, Ltd. Because only the detective committed a tort, not Logan Drugs, Ltd.

Answer: D

5. After the McLeans filled their swimming pool, recently built in their backyard, swarms of bees came regularly for water. The bees stung everyone including the dog and made it impossible for the McLeans to enjoy the use of their pool. Unknown to the McLeans when they had the pool installed, their neighbour Springborn had bee hives on his property. On these facts, which of the following is true?

a. McLeans have an action against Springborn for nonfeasance.
b. McLeans have an action against Springborn for nuisance
c. McLeans have an action against Springborn under the occupier's liability act
d. Both b and c are true
e. Springborn would successfully use the defence of absolute privilege.

Answer: B

6. Paul invited several friends over to celebrate Ann's birthday. About an hour before the guests arrived Paul bought some sparkling wine and put it in his refrigerator. When all the guests were assembled, Paul lifted the chilled bottle of wine from its gift box. Before it was completely out of the box, the bottle exploded sending glass in all directions. The glass cut Paul's hand and also the eye of one of his guests, Joan. No one else was hurt at all. Assuming all these facts could be proved, which of the following is true?

a. Because Joan did not buy the wine, she has no cause of action against anyone.
b. Joan could sue Paul successfully for the tort of negligence for buying and serving sparkling wine.
c. All the guests, including Joan, could successfully sue the manufacturer for negligence; they need only prove that the explosion was the fault of the manufacturing process.
d. If Joan sued the manufacturer for negligence, the court could rely on circumstantial evidence to determine negligence on the part of the manufacturer.
e. A manufacturer owes a duty of care only to its customers, the ones paying for the product.

Answer: D

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7. A truck was driven right into the family room of a home causing $14,000.00 worth of damage. The driver was impaired so the owners called the police. The driver was arrested and charged with an offence under the Criminal Code, convicted and sentenced. Which of the following is false?

a. In the criminal proceeding, the prosecutor had to prove the case beyond a reasonable doubt.
b. In the criminal action, the Crown, not an individual, is taking the action against the accused.
c. The owners cannot sue the driver in a civil action because he has been convicted in the criminal action and the same behaviour cannot be subject matter of both types of actions.
d. In a civil action, the plaintiff must prove his case on the balance of probabilities.
e. A civil action is a private action in which the plaintiff's primary purpose, generally, is to seek compensation.

Answer: C

Short Answer Questions

1. Joe was drunk driving his car when he saw Sam on the side of the road hitch-hiking. Joe stopped, opened the door and offered Sam a lift. Sam got in despite the fact the he could smell liquor on Joe's breathe. Subsequently, Joe was in an accident and Sam was injured. Sam has sued him for negligence. Indicate what likely defence Joe would use in these circumstances and whether it would be successful?

Answer: Voluntary Assumption of Risk and it would not be successful, because in these circumstances Sam assumed the physical risk but not the legal risk. There is no indication by Sam in these circumstances that when he got into that car he was absolving Joe of responsibility for any injury that might result.

2. Mary was driving down the road when Sam came out from a side road, went through a stop sign without stopping and struck the side of her car. Upon later examination of Mary's car, it was determined that the brakes were worn down beyond the point of safety. Sam sued her for negligence. Explain the likely result?

Answer: If Mary didn't notice Sam and didn't touch the brakes then her poor brakes had absolutely nothing to do with the accident and did not cause it. It was Sam's negligence that caused the accident by going through the stop sign. If, however, she did see Sam coming through the stop sign and was unable to stop because of her defective brakes she at least contributed to the accident by her negligence.

3. Joe was driving his automobile when Sam came from a side street, went through a stop sign without stopping almost causing an accident. Joe swerved to avoid and

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was successful in doing so. He wrote down Sam's license number, and sued Sam for his negligent driving. Indicate the expected result?

Answer: He will fail because there was no material loss as there was no collision.

4. Explain how the standard of care imposed varies when particular expertise is involved (e.g. a doctor)?

Answer: The reasonable person test is really the reasonable person in the circumstances. Therefore, the standard imposed with medical malpractice is what a reasonable doctor would have done in those circumstances. With other professions the question becomes what would a reasonable accountant or reasonable plumber or electrician have done in the circumstances.

5. Explain how the courts determine whether a duty of care exists in a negligence action?

Answer: The test of reasonable foreseeability applies: that is, could a reasonable person have anticipated that his conduct could cause harm to another. If the answer is yes, the duty exists. Note however that today because of the *Anns* case there may be some factors to reduce or alter the nature of that duty.

6. Following a broadcast on the TV station the night before about a councilman having been pulled over for drunk and driving, Joe, a political cartoonist, drew a political cartoon of a local city councilman, obviously drunk and with his clothes in disarray having difficulty walking down a straight line on the road with a sober police officer looking on. This was published the next day in the paper for which Joe works. The city councilman involved had disagreements with Joe in the past and intensely disliked him. It turned out that the story published by the TV was an error, but the city councilman chose not to sue the TV reporter and the station, rather he sued Joe for defamation. What would Joe's best defence be and indicate the likely outcome?

Answer: As it does not appear that Joe made diligent and reasonable efforts to ensure the program was about the local councilman, Joe's best defence would be fair comment. Unfortunately for Joe, the fact upon which the comment or opinion is made must be correct and here it was not. As such, he would be liable for defamation. It doesn't matter that the city councilman chose to sue Joe instead of the TV station, he has that right. It would be no defence for Joe that the city councilman was motivated by malice against him because the city councilman was defamed.

7. Will anything short of complete restraint amount to imprisonment?

Answer: Yes, when one person surrenders to the control or authority of another voluntarily thinking that they have no choice, an imprisonment has taken place even though there is no physical restraint.

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8. Joe wandered onto Sam's land not realizing that he crossed the property line. In the process he trampled Sam's prize rose bush. Sam found him there and sued him for trespassing. Explain the likely outcome?

Answer: It is no excuse to say that you didn't know that you were on the other person's land. So as long as you intended to be where you were, it is trespass if you were on another's land without authority. Joe is a trespasser and liable for the damage.

9. When a doctor treats or operates on a patient, explain why that patient cannot sue for battery?

Answer: The patient has consented to the procedures; therefore, it is not actionable.

10. Explain what is meant by vicarious liability and when it is available?

Answer: An employer can be held responsible for the acts of an employee committed during the course of the employment. This is referred to vicarious liability. An employer is only responsible for those acts of an employee committed during the course of the employment.

Essay Topics

1. Explain what must be established in order to succeed in a negligence action.

2. Discuss how legislation has impacted the field of negligence.

3. Indicate why the *Donoghue v. Stevenson* case (the snail in the ginger beer bottle) was so important in the development of negligence law.

4 Discuss the position of a doctor when faced with a patient refusing lifesaving medical treatment.

5 Discuss the position of a political cartoonist in terms of defamation law. Consider the conflict between public interests in this kind of dispute.

6 Discuss the various different kinds of remedies that are available in tort actions, and in your answer, discuss any limitations on the availability of those remedies.

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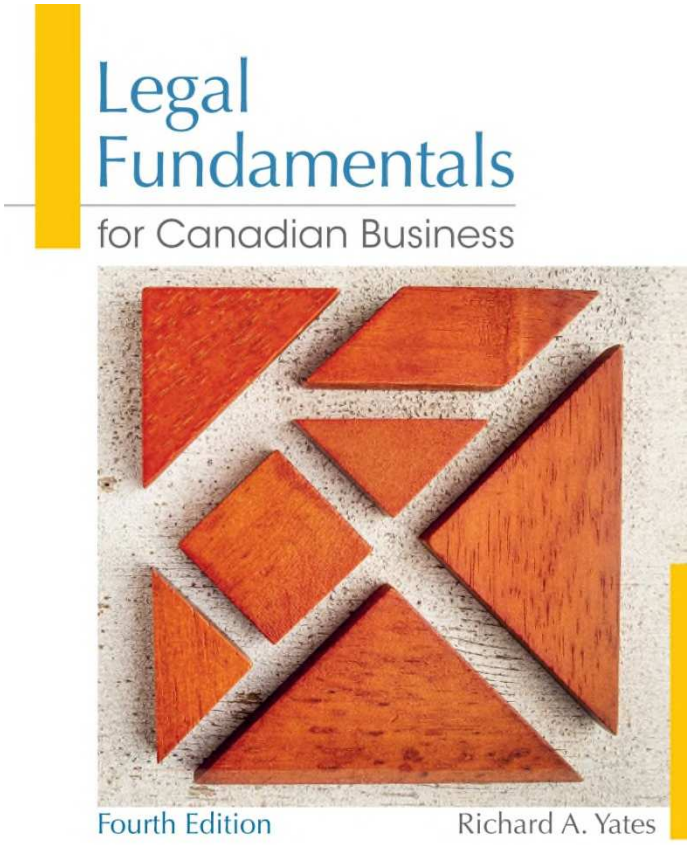
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Legal Fundamentals for Canadian Business

Fourth Edition

Chapter 2

Torts and Professional Liability



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Learning Objectives

- Define and differentiate a tort from a crime
- Identify several types of intentional torts
- List the elements required to establish negligent conduct
- Outline defences available to alleged tort

(*Continued*)

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Learning Objectives
(Continued)

- Consider the significance of finding a duty of care
- Trace the development of law related to product liability
- Apply tort principles to professional conduct
- Identify a number of business-related torts

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Tort

- Private or civil court action where the injured party sues wrongdoer for compensation for wrongful conduct
- In criminal matters, society (through a crown prosecutor) brings the action to punish the offender
- Wrongful conduct may be both a crime and a tort

(*Continued*)

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Tort
(Continued)

- Contract actions are brought by a party because the agreement has been breached
- Employers are vicariously liable for all torts committed by employees during the course of their employment
  - While doing what employed to do

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Intentional Torts

- Must be a deliberate act
- Need only intend the conduct, not the results
- If conduct is accidental, it would be negligence, rather than an intentional tort

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Assault and Battery

- An intentional tort
- Intentional physical interference with another person
- Some forms of assault and battery may also be criminal offences

(*Continued*)

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Assault and Battery
(Continued)

- Assault
  - Threat to harm another (from victim's perception)
    - Must be immediate
    - Must be physically possible to carry out
    - Need not be harmful, just unwanted
  - Intentional
  - Physical contact not required

(*Continued*)

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Assault and Battery
(Continued)

- Battery
  - Intentional
  - Unwanted
  - Involves physical contact
    - Even if contact is beneficial (such as medical treatment), if it is unwanted, it is still battery

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Defences to Assault and Battery

- Consent
  - Must be informed consent
  - Conduct must not exceed consent
- Self-defence
  - May use reasonable force in response
  - Must be in response to immediate threat

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False Imprisonment

- Unlawful restraint
  - May be physical
  - May be simply compliance if victim thinks there is no choice
- Arrest by private citizen when no crime has taken place

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Trespass

- Coming onto another's property without permission or authority
  - Mistake as to property line is no defence
  - If permission revoked, must give person opportunity to leave
    - If refusal, may eject using reasonable force
- Intentional
  - Need only intend the activity

(*Continued*)

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Trespass
(Continued)

- Damage not required
- Duty to trespassers minimal, but greater if a child
- Indirect trespass – throwing something onto another's property
- Continuing trespass – building, fence, etc.
- Only defence for trespass: Intruder had no control over where he/she was

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Nuisance

- Private nuisance
  - Using your property so as to substantially interfere with your neighbour's use of his/her property
  - Must be inappropriate use of your property
  - Interference must have been reasonably foreseeable
  - Remedies: damages or an injunction

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Defamation

- Derogatory false statement to detriment of a person, company, or product
- Libel – written defamation
  - Also includes broadcasted defamation
- Slander – spoken defamation
- May involve innuendo

(*Continued*)

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Defamation
(Continued)

- Must refer to the plaintiff
- Must be published
  - Communicated to a third party
- Mistake is no defence
- Libel may also be criminal
- Internet communications now an important cause of defamation actions

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Defences to Defamation

- Justification
  - Substantially true
  - Defendant must prove statement was true
- Absolute privilege
  - Statements made on floor of legislature or Parliament, in senior government committees, or while giving testimony in trial

(*Continued*)

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Defences to Defamation
(Continued)

- Qualified privilege
  - If statement made pursuant to a duty, person cannot be sued if it turns out to be false
  - Allowed if person who made statement thought it was true, made statement without malice, and only communicated it to those with need to know

(*Continued*)

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Defences to Defamation
(Continued)

- Fair comment and Responsible Communication
  - Defences used mostly by the media
  - Fair Comment is expression of opinion about public figures, works, etc.
  - Must be based on true facts known to public
  - Must be made without malice
  - Responsible Communication protects media if reasonable diligence used to verify facts even if facts turn out not to be true

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Summary

Table 2.1 Intentional Torts

Intentional Torts	Nature	Defences
Assault and Battery	Assault: threatened battery	Consent: must be informed and complete
	Battery: intentional hitting	Self-defence: must be reasonable force
		Accident but not a mistake
False Imprisonment	Complete physical or mental restraint without authority	No actual confinement or submission
		Had authority to imprison
Trespass	Coming on to or putting something on another's land without authority	Had authority to do so
		Had consent
		Accident but not a mistake
Nuisance	Use of property so that it interferes with neighbour's use	Appropriate use of property for area
		Not foreseeable outcome
Defamation	A published false and derogatory statement: spoken (slander) or written (libel)	Truth, absolute privilege, qualified privilege, fair comment, and reasonable communication

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Negligence

- Involves inadvertent or careless conduct causing injury or loss to another
  - Duty of care must exist
  - Conduct must fall below standard of care
  - Injury or loss must result from conduct
- Reasonable person test
  - Behaviour that is higher than average, but less than perfect

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Duty of Care

- Reasonable foreseeability test
  - Duty of care owed to anyone we can reasonably foresee would be harmed by what we do
  - *Donoghue* v. *Stevenson* established test to determine if duty of care is owed
  - *Anns* case led to two-stage test
    - Degree of proximity between parties
    - Reasons to allow court to modify nature of duty

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Standard of Care

- Required standard of care is determined by reasonable person test
- Level of risk, cost, and potential loss are important factors to be considered
- Experts held to standard of a reasonable person in their profession

(*Continued*)

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Standard of Care
(Continued)

- Circumstantial evidence may lead to finding of negligence
- Special standards may be set by statute
  - Occupiers' liability acts
  - Innkeepers
  - Common carriers
- Insurance to avoid risks of tort liability

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Causation and Damage

- Conduct complained of was cause of injury or damages

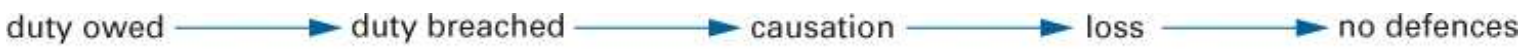


Figure 2.2 Negligence

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Defences to Negligence

- Contributory negligence
  - If plaintiff contributed to own loss, he/she must bear some responsibility
  - Most jurisdictions have a *Contributory Negligence Act,* allowing courts to assign proportional liability

(*Continued*)

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Defences to Negligence
(Continued)

- Voluntary assumption of risk
  - Deliberately putting oneself in harm's way disqualifies one from suing for injury or loss that results
  - Plaintiff has assumed both physical risk of activity as well as legal risks
  - Must be clear that plaintiff absolved the other party of responsibility; very difficult to prove

(*Continued*)

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Defences to Negligence
(Continued)

- Remoteness
  - *Mustapha* case
  - Must determine whether a particular injury was reasonably foreseeable
  - If connection between the conduct and injury was too indirect or unexpected, no liability will be imposed
  - If legal causal connection is found, victims must be fully compensated, even if more vulnerable to loss than usual

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Product Liability

- Must show defendant failed to live up to standard of reasonable manufacturer
- May use *prima facie* case of negligence (circumstantial evidence)
- In some jurisdictions, manufacturer has increased liability through statute

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Professional Liability

- Duty of care to third parties who rely on work of professionals and are caused loss as a result
- Formerly claims required party to suffer some manner of physical loss or damage
- However, since the decision of *Haig* v. *Bamford* claims allow recovery for pure economic loss

(*Continued*)

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Professional Liability
(Continued)

- *Anns* case is test for new or unique situations where duty of care must be determined
  - Degree of proximity between the parties
  - Any reason to allow court to modify (or not impose) the duty or limit the class to whom duty is owed

(*Continued*)

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Professional Liability
(Continued)

- Professional expected to have degree of expertise of a reasonable professional in that field
- Inexperience is no defence
- Standard practice of the profession may not be enough

(*Continued*)

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Professional Liability
(Continued)

- Fiduciary duty – duty to act in best interests of client
  - Involves loyalty and good faith
  - All funds are held in trust
- Subject to rules of professional associations
- Liability insurance may reduce risk
- Negligence may also be criminal

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Other Business Torts

- Fraud or deceit
  - Intentionally misleading another
- Injurious falsehood or product defamation
  - Spreading false information about a product
- Inducing breach of contract
  - Employer "stealing" an employee from a competitor

(*Continued*)

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Other Business Torts
(Continued)

- Passing off
  - Misleading public by using similar name, logo, etc.
- Trespass to chattels
  - Damaging or interfering with personal property
- Conversion
  - Taking property of another
- Privacy violations
  - May be regulatory or tort by statute

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