



# TORTS

March 2020

## CONTENTS

### I. TRESPASS AND INTENTIONAL INTERFERENCE WITH THE PERSON .....6

1. GENERAL PRINCIPLES .....	6
<i>Intent</i> .....	6
<i>Transferred intent</i> .....	6
<i>Directness</i> .....	6
<i>Volition</i> .....	6
<i>Capacity</i> .....	6
2. ASSAULT .....	6
<i>Intent</i> .....	6
<i>Act</i> .....	6
<i>Harmful or offensive contact</i> .....	7
<i>Threat</i> .....	7
<i>Conditional assault</i> .....	7
3. BATTERY .....	7
<i>Intent</i> .....	7
<i>Contact</i> .....	7
<i>Harmful or offensive</i> .....	7
4. FALSE IMPRISONMENT .....	7
<i>Total confinement</i> .....	7
<i>Physical or psychological</i> .....	7
<i>Knowledge</i> .....	7
5. MALICIOUS PROSECUTION.....	7
6. ABUSE OF PROCESS.....	8
7. INTENTIONAL INFLICTION OF MENTAL SUFFERING .....	8
<i>Flagrant and outrageous act or statement</i> .....	8
<i>Intended to produce harm</i> .....	8
<i>Damage</i> .....	8
8. INVASION OF PRIVACY .....	8
<i>Intrusion into seclusion</i> .....	8
<i>Appropriation of personality</i> .....	8

### II. TRESPASS AND INTENTIONAL INTERFERENCE WITH LAND AND CHATTELS .....9

1. TRESPASS TO LAND.....	9
<i>Possession</i> .....	9
<i>Interference</i> .....	9
<i>Intent</i> .....	9
<i>Commencement</i> .....	9
<i>Damage</i> .....	9
<i>Land</i> .....	9
2. PROTECTION OF PROPERTY ACT, RSNS 1989, c 363 .....	9
<i>Penalty</i> .....	9
<i>Civil remedy</i> .....	9
3. TRESPASS TO CHATTELS.....	9
<i>Possession</i> .....	10

<i>Intent</i> .....	10
<i>Damage</i> .....	10
4. DETINUE.....	10
<i>Better right to possession</i> .....	10
<i>Demand and refusal</i> .....	10
<i>Remedies</i> .....	10
5. CONVERSION.....	10
<i>Right to possession</i> .....	10
<i>Substantial interference</i> .....	10
<i>Remedies</i> .....	11
<b>III. DEFENCES TO TRESPASS AND INTENTIONAL INTERFERENCE .....</b>	<b>11</b>
1. CONSENT.....	11
<i>Implied consent</i> .....	11
<i>Sports</i> .....	11
<i>Medicine</i> .....	11
<i>Scope</i> .....	11
2. SELF-DEFENCE.....	11
<i>Threat</i> .....	11
<i>Reasonable force</i> .....	11
<i>Means of avoidance</i> .....	11
<i>Mistake</i> .....	12
3. DEFENCE OF OTHERS.....	12
<i>Scope</i> .....	12
4. DEFENCE OF PROPERTY.....	12
<i>Reasonable force</i> .....	12
<i>Warning</i> .....	12
<i>Deterrants</i> .....	12
5. NECESSITY.....	12
<i>Alternatives</i> .....	12
<i>Incomplete privilege</i> .....	12
6. LEGAL AUTHORITY.....	13
<i>Statute</i> .....	13
<i>Owner of property</i> .....	13
<i>Common law</i> .....	13
<i>Civil debt</i> .....	13
7. PROVOCATION.....	13
<i>Reasonableness</i> .....	13
<i>Mitigation</i> .....	13
<b>IV. NEGLIGENCE .....</b>	<b>14</b>
1. GENERAL.....	14
2. DUTY OF CARE.....	14
<i>Question of law</i> .....	14
<i>Test</i> .....	14
<i>Unforeseeable plaintiff</i> .....	14
<i>Failure to act</i> .....	14
<i>Pure economic loss</i> .....	15
<i>Negligent infliction of mental injury</i> .....	16
3. STANDARD OF CARE.....	17
<i>Reasonable person</i> .....	17
<i>Unreasonable risk</i> .....	17
<i>Personal attributes</i> .....	17
<i>Established practice</i> .....	19
<i>Statutory standards</i> .....	19
<i>Professional standards</i> .....	19

4. CAUSATION.....	20
<i>“But for” test</i> .....	20
<i>Material contribution to risk test</i> .....	20
<i>Inferring causation</i> .....	20
<i>Multiple causes</i> .....	21
<i>Consecutive injuries</i> .....	21
5. DAMAGE.....	21
6. ONUS OF PROOF AND RES IPSA LOQUITUR.....	21
<i>Basic onus</i> .....	21
<i>Res ipsa loquitur</i> .....	21
7. REMOTENESS.....	21
<i>Type of injury</i> .....	21
<i>Chance of injury</i> .....	22
<i>Thin skull</i> .....	22
<i>Intervening cause</i> .....	22
<b>V. DEFENCES TO NEGLIGENCE.....</b>	<b>23</b>
1. GENERAL.....	23
2. SEAT-BELT DEFENCE.....	23
3. VOLUNTARY ASSUMPTION OF RISK.....	23
<i>Elements</i> .....	23
<i>Consequence</i> .....	23
4. ILLEGALITY.....	23
<i>Elements</i> .....	23
<i>Consequence</i> .....	23
<b>VI. STRICT LIABILITY.....</b>	<b>24</b>
1. RULE IN RYLANDS V. FLETCHER (1868), LR 3 HL 330.....	24
<i>Non-natural use</i> .....	24
<i>Likely to cause mischief</i> .....	24
<i>Escape</i> .....	24
<i>Strict liability</i> .....	24
2. LIABILITY FOR ANIMALS.....	24
<i>Ferae naturae</i> .....	24
<i>Mansuetae naturae</i> .....	24
<i>Control</i> .....	24
3. VICARIOUS LIABILITY.....	24
<i>Employer/employee relationship</i> .....	25
<i>Course of employment</i> .....	25
<i>Unauthorized intentional wrongdoing</i> .....	25
<i>Recovery</i> .....	25
4. WORKERS' COMPENSATION.....	25
5. PRODUCT LIABILITY.....	25
<b>VII. NUISANCE.....</b>	<b>26</b>
1. PRIVATE NUISANCE.....	26
<i>Substantial</i> .....	26
<i>Unreasonable</i> .....	26
<i>Ordinary use and enjoyment</i> .....	26
<i>Interest in land</i> .....	26
2. PUBLIC NUISANCE.....	26
<i>Property</i> .....	26
<i>Interference</i> .....	26
<i>Intent or negligence</i> .....	26
<i>Special damage</i> .....	26

3. DEFENCES TO NUISANCE .....	27
<i>Statutory authority</i> .....	27
<i>Prescription</i> .....	27
<i>Consent</i> .....	27
<b>VIII. OCCUPIERS' LIABILITY .....</b>	<b>28</b>
1. OCCUPIER .....	28
2. PREMISES .....	28
3. NATURE OF DUTY .....	28
4. EXCEPTIONS .....	28
5. LIMITATIONS AND EXPANSIONS .....	28
<b>IX. DEFAMATION.....</b>	<b>29</b>
1. GENERAL .....	29
2. PUBLICATION .....	29
3. COMMUNICATION .....	29
4. DEFAMATORY .....	29
5. OF AND CONCERNING THE PLAINTIFF .....	29
<i>Intent</i> .....	29
<i>Group defamation</i> .....	29
6. DEFENCES .....	29
<i>Justification</i> .....	29
<i>Absolute privilege</i> .....	30
<i>Qualified privilege</i> .....	30
<i>Fair comment</i> .....	30
<i>Responsible communication on matters of public interest</i> .....	30
<i>Consent</i> .....	30
7. DEFAMATION ACT, RSNS 1989, c 122 .....	31
<i>Legislative and other proceedings</i> .....	31
<i>Court proceedings</i> .....	31
<b>X. BUSINESS TORTS .....</b>	<b>31</b>
1. DECEIT .....	31
<i>Knowledge</i> .....	31
<i>Directness</i> .....	31
<i>Fraud</i> .....	31
<i>Reliance</i> .....	31
<i>Detriment</i> .....	31
2. INTERFERENCE WITH CONTRACTUAL RELATIONS .....	31
<i>Intent</i> .....	32
<i>Interference</i> .....	32
<i>Justification</i> .....	32
3. INTIMIDATION .....	32
<i>Threat</i> .....	32
<i>Unlawful act</i> .....	32
<i>Intent</i> .....	32
<i>Damage</i> .....	32
4. CONSPIRACY .....	32
<i>Agreement and execution</i> .....	32
<i>Unlawful purpose of injury</i> .....	32
<i>Conspiracy to use unlawful means</i> .....	33
<i>Damage</i> .....	33
5. UNLAWFUL MEANS TORT .....	33
<i>Unlawful means by defendant</i> .....	33
<i>Intention</i> .....	33

6. BREACH OF CONFIDENCE .....	33
<b>XI. REMEDIES.....</b>	<b>33</b>
1. INJUNCTION .....	33
<i>Definition</i> .....	33
<i>Types</i> .....	34
<i>Equity</i> .....	34
2. COMPENSATORY DAMAGES.....	34
<i>Special damages</i> .....	34
<i>General pecuniary damages</i> .....	34
<i>Non-pecuniary damages</i> .....	34
<i>Aggravated damages</i> .....	34
3. PUNITIVE DAMAGES.....	34
<i>Application</i> .....	35
4. NOMINAL DAMAGES .....	35
<i>No damage</i> .....	35
<i>Unreasonable lack of quantification</i> .....	35
<b>XII. APPORTIONMENT OF LIABILITY.....</b>	<b>35</b>
1. CONTRIBUTORY NEGLIGENCE .....	35
<i>Degree</i> .....	35
<i>Apportionment</i> .....	35
<i>Indeterminable</i> .....	35
2. MULTIPLE TORTFEASORS .....	35
<i>Indivisible damage</i> .....	35
<i>Contribution</i> .....	36
<i>Apportionment</i> .....	36
<b>XIII. LIMITATION OF ACTIONS.....</b>	<b>36</b>
1. GENERAL .....	36
2. TIME LIMITS .....	36
3. DISCOVERABILITY .....	36
4. DISCRETION .....	36
5. DISABILITY .....	36
6. NO LIMITATION PERIODS .....	36
<b>XIV. FATAL INJURIES.....</b>	<b>37</b>
1. GENERAL .....	37
2. TORT .....	37
3. ENTITLEMENT .....	37
4. DAMAGES .....	37
5. APPORTIONMENT.....	37
6. LIMITATION PERIOD.....	37

## I. TRESPASS AND INTENTIONAL INTERFERENCE WITH THE PERSON

### 1. *General principles*

#### **Intent**

The intentional torts require that the defendant either desire the physical consequence or believe with substantial certainty that such consequence would occur. Mistake as to the legal or factual effect is not a defence, and motive is irrelevant.

#### **Transferred intent**

Intent can be transferred from one person to another and from one of the trespass torts to another. For example, if the defendant strikes at one but hits another, or intends a battery but commits an assault, false imprisonment, trespass to land or to chattels, intent is deemed to be present.

#### **Directness**

Torts descended from trespass *vi et armis* – assault, battery, false imprisonment, trespass to land or to chattels – require that the interference be direct, and damage need not be shown. A result is found to be direct when it occurs without the necessity of an intervening or independent factor or force. Intentional infliction of mental suffering and malicious prosecution may be indirectly committed and damage must be shown.

#### **Volition**

Where the defendant acts under complete loss of consciousness or with total loss of control, at law no tort has been committed.

#### **Capacity**

Where a child is too young to have the mental ability to appreciate the real nature of the tortious act, there is no tort liability. Likewise, if the defendant due to mental illness cannot appreciate the nature or quality of her act, the intent element is missing due to lack of capacity.

### 2. *Assault*

The intentional creation of the apprehension of imminent harmful or offensive bodily contact.

#### **Intent**

The defendant need not actually intend to make physical contact; look to the reasonable apprehension of the plaintiff that contact is imminent.

#### **Act**

The defendant need not have the actual ability to carry out the threat; again, look to the reasonable apprehension of the plaintiff.

**Harmful or offensive contact**

The plaintiff need not be fearful of the defendant; it is sufficient if he apprehends imminent harmful or offensive contact.

**Threat**

Words can negate an assault (*e.g.*, a statement that one is *not* going to use the sword), or can alone constitute assault (*e.g.*, I'm about to detonate the dynamite in your house).

**Conditional assault**

A threat with a condition attached (*e.g.*, your money or your life) can constitute an assault if the defendant is not legally entitled to impose the condition.

**3. Battery**

The intentional infliction of harmful or offensive bodily contact.

**Intent**

One must intend to make physical contact but not necessarily to cause harm.

**Contact**

The contact must be physical, and can be with the plaintiff's body or with items closely connected to the body, *e.g.*, something the plaintiff is holding.

**Harmful or offensive**

The contact need not cause injury; contact that is offensive to the reasonable plaintiff will suffice. Look to societal standards of acceptable conduct.

**4. False imprisonment**

The intentional confinement of another within fixed boundaries.

**Total confinement**

Where the plaintiff (to her knowledge) has a reasonable means of escape available, or an alternate route available, she is not imprisoned.

**Physical or psychological**

The restraint can be either by physical or psychological means, *e.g.*, threat or fear of embarrassment.

**Knowledge**

The plaintiff need not be conscious of the confinement.

**5. Malicious prosecution**

The initiation or continuation of legal proceedings without reasonable cause and with malice. Where the directness element of false imprisonment is absent, the plaintiff may sue for malicious prosecution. As well as damage, all of the following must be established:

- Proceedings initiated by the defendant.
- Proceedings terminated in favour of the plaintiff.
- The proceedings must have been instituted without reasonable cause.
- The defendant must have been malicious, defined as having a motive other than the pursuit of justice.

### ***6. Abuse of process***

Use of the criminal or civil law process for an improper purpose, accompanied by a definite act or threat in furtherance of that purpose.

- The plaintiff need not prove that proceedings terminated in his favour, or that the defendant lacked reasonable grounds for proceeding.
- There must be proof of either an act or threat by the defendant, furthering the improper purpose.

### ***7. Intentional infliction of mental suffering***

An extreme and outrageous act or statement, calculated to produce harm, resulting in recognizable physical or psychopathological harm.

#### **Flagrant and outrageous act or statement**

Can be indirect. It must be flagrant and outrageous, beyond accepted community standards of tolerance and morality.

#### **Intended to produce harm**

As with other intentional torts, the defendant must have desired the consequences or believed with substantial certainty that such consequences would result. Although sometimes meant as a practical joke, motive is irrelevant.

#### **Damage**

Damage is required, either physical or psychological.

### ***8. Invasion of privacy***

#### **Intrusion into seclusion**

The existence of the tort of intrusion upon seclusion (or invasion of privacy) was recognized in principle in *Trout Point Lodge Ltd. v. Handshoe*, [2012 NSSC 245](#). To attract liability, the defendant's conduct must be an intentional invasion, without lawful justification, into the plaintiff's private affairs or concerns, that a reasonable person would find highly offensive, causing distress, humiliation or anguish. Proof of harm to a recognized economic interest is not required. See *Jones v. Tsige*, [2012 ONCA 32](#).

#### **Appropriation of personality**

This is the commercial exploitation of the plaintiff's name or likeness by the defendant.



---

## II. TRESPASS AND INTENTIONAL INTERFERENCE WITH LAND AND CHATTELS

### *1. Trespass to land*

The intentional, direct interference with land in possession of the plaintiff.

#### **Possession**

Possession (control and intent to control) by the plaintiff is required, even if without legal title or right.

#### **Interference**

Must be direct, positive and physical, either by a person or an object. The trespass continues for the length of time the object is there.

#### **Intent**

The defendant need not be aware the land is in possession of the plaintiff; innocent mistake is not a defence.

#### **Commencement**

Entry with consent becomes a trespass once the defendant is ordered to leave, and given sufficient time to do so.

#### **Damage**

The plaintiff need not show damage, and is entitled to refuse entry for any purpose.

#### **Land**

Possession includes the core of earth under the surface. Rights to airspace are limited. If the intrusion is permanent, the right is to be free of intrusion or infringement on actual or potential use and enjoyment of the land. For transient intrusion, *e.g.*, by aircraft, the right may be limited to actual use and enjoyment.

### *2. Protection of Property Act, RSNS 1989, c 363*

Provides the occupier with a statutory remedy for trespass.

#### **Penalty**

If found guilty, the trespasser is liable to be fined up to \$500 ([s.4](#)), and may have to pay restitution up to \$2,000 for damage caused ([s.11](#)).

#### **Civil remedy**

Civil remedies for trespass to property are preserved ([s.14](#)).

### *3. Trespass to chattels*

An intentional, direct interference with the plaintiff's actual possession of a chattel.

**Possession**

Requires physical control and intent to control. An owner who does not have possession at the time of the interference cannot sue in trespass unless the chattel is in possession of his agent, servant or bailee at will and the owner has an immediate right to possession.

**Intent**

Motive is immaterial, and mistake is no defence.

**Damage**

Damage is not required where there has been a taking of possession, but mere interference without dispossession, *e.g.*, touching the chattel, may require damage.

**4. Detinue**

The wrongful detention of a chattel from the person who, *vis-a-vis* the defendant, has the right to immediate possession of the chattel. Suing in detinue allows a plaintiff to seek recovery of the actual chattel as opposed to damages.

**Better right to possession**

The plaintiff need not have the best rights in the world, only a better right to possession than the defendant.

**Demand and refusal**

The plaintiff must demand return of the chattel and be refused, after allowing a sufficient period of time for the defendant to verify the rights. Allowing the plaintiff reasonable access to remove the chattel does not constitute refusal unless the defendant has previously agreed to deliver the chattel.

**Remedies**

Valuation is customarily at the date of judgment. Up to then the defendant can return the chattel. The court may order return of the chattel if it is not an ordinary article of commerce, or payment of its assessed value, along with consequential damages.

**5. Conversion**

A positive and intentional act of substantial interference with the plaintiff's legal possession or right to immediate possession of the chattel.

**Right to possession**

A plaintiff may sue if he was either in possession or had a right to immediate possession at the time of conversion.

**Substantial interference**

There must be a positive act of dominion or control which is so serious an interference as to warrant payment of the full value of the chattel. Factors include the defendant's good faith, the extent and duration of dominion or control and of the resulting interference, the damage to the chattel, and the expense and inconvenience caused to the plaintiff.

**Remedies**

Damages for the converted goods is usually valued at the date of conversion.

**III. DEFENCES TO TRESPASS AND INTENTIONAL INTERFERENCE**

The onus is on the defendant to raise and establish a defence.

**1. Consent**

Willingness that the act occur.

**Implied consent**

Consent may be express or implied by conduct; look to the reasonable interpretation of the defendant's actions in the circumstances.

**Sports**

On entering a sporting activity, one is taken to consent to the ordinary risks and contacts involved, but not to conduct that is outside the bounds of fair play or malicious and out of the ordinary. Similarly for mutual fights, look to the unwritten rules; force that is unreasonable or excessive is not consented to.

**Medicine**

A non-consented-to medical procedure is a battery. Limited exception is made in case of an extreme emergency where the patient's wishes are unknown and intervention is necessary to save life or preserve health.

**Scope**

Consent is vitiated if the act exceeds or differs from that to which consent was given, is obtained by fraud, misrepresentation, duress, force or threat of force, or where a power imbalance between the parties renders the weaker party unable to choose freely.

**2. Self-defence**

A person threatened with harm by another is entitled to use reasonable force in self-protection.

**Threat**

The defendant must reasonably believe that an attack is imminent; if so, she can strike the first blow.

**Reasonable force**

Force used must be roughly proportionate to the threat, but need not be measured with accuracy.

**Means of avoidance**

The defendant must take reasonable means of avoidance where available, except perhaps in defence of his house.

**Mistake**

A mistaken but reasonably held belief in the threat will suffice.

**3. Defence of others**

The defendant may use reasonable force to protect another from threatened imminent harm.

**Scope**

While the requirements are similar to self-defence, courts are cautious due to the greater possibility of error. This defence was originally limited to family and master-servant relations but is no longer so limited.

**4. Defence of property**

Reasonable force may be used to defend one's property, real or personal, from threatened interference with possession.

**Reasonable force**

Reasonableness of force is more limited than for defence of persons, for example, shooting a thief in the back would be unjustified in the absence of threat to a person.

**Warning**

In the absence of forcible entry, the trespasser must be asked to leave and given a reasonable period of time to do so.

**Deterrents**

The use of reasonable deterrents to warn intruders and prevent entry is acceptable, but devices used to trap or injure them after they have entered are illegal.

**5. Necessity**

In a situation of great and imminent danger to life or property, the defendant may be justified in sacrificing the plaintiff's lesser interests.

**Alternatives**

As in criminal law, this defence is likely limited to circumstances where no reasonable alternative exists.

**Incomplete privilege**

The law is unclear as to whether a successful defence of necessity is a complete privilege, or whether it exonerates the defendant but leaves him liable for damage caused. Distinction is sometimes made between public necessity (if done for the common good, no need to compensate) and private necessity (if for personal interest, pay for actual damage caused).

## ***6. Legal authority***

Otherwise tortious behaviour may be excused if legally authorized.

### **Statute**

If a federal or provincial statute grants power, *e.g.*, that of arrest, civil courts uniformly accept this as authorization. Examine the specific wording for compliance, and ask whether the force used was reasonable. The [\*Criminal Code\*](#) distinguishes police and private citizen powers of arrest.

### **Owner of property**

An owner or possessor of property or a person authorized by the owner or possessor (*e.g.*, a security guard) may arrest without a warrant a person committing a criminal offence in relation to the property if they make the arrest at the time or in a reasonable period afterwards, reasonably believing that it is not feasible to call the police to make the arrest. (*Criminal Code*, RSC 1985, c C-46, s. 494 (2)).

### **Common law**

Common law powers of entry, search and seizure by police officers also furnish the defence of legal authority.

### **Civil debt**

A creditor is not entitled to detain a debtor for non-payment of a bill; nor are police authorized to arrest the debtor.

## ***7. Provocation***

Conduct by the plaintiff causing the defendant to lose her power of self-control, occurring at the time of or shortly before the defendant's tortious act. This is not a defence, but may mitigate damages.

### **Reasonableness**

The conduct must not only have caused the defendant to lose control but would cause the reasonable person in the shoes of the defendant to lose control.

### **Mitigation**

There is uncertainty as to whether provocation reduces punitive damages only or compensatory damages as well.

## IV. NEGLIGENCE

### 1. General

Each of the elements of a cause of action for negligence (duty of care, breach of standard of care, causation, damage, and remoteness or proximate cause) must be established on the balance of probabilities by the plaintiff.

### 2. Duty of care

#### Question of law

Whether or not a duty of care is owed is a question of law and not fact, decided by the judge and not by a jury.

#### Test

The *Donoghue v. Stevenson*, [\[1932\] AC 562](#) (HL) neighbour principle, as modified by *Anns v. Merton London Borough Council*, [\[1978\] AC 728](#), and adopted by SCC in *Kamloops v. Nielsen*, [\[1984\] 2 SCR 2](#) involves a two-step analysis, as set out by the SCC in *Cooper v. Hobart*, [2001 SCC 79](#)

Part 1: Is the harm complained of a reasonably foreseeable consequence of the defendant's actions? Is there sufficient proximity between the parties such that it is just and fair to impose a duty of care on the defendant?

Part 2: If so, are there any broad policy considerations which ought to negate or limit:

- the scope of the duty,
- the class of persons to whom it is owed, or
- the damages to which a breach of it may give rise?

Part 1 examines the reasonable foreseeability of injury to the plaintiff. Foreseeability alone is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity. Part 2 looks at policy reasons to limit duty of care, primarily in the areas of pure economic loss, negligent infliction of psychiatric injury, and negligence of public authorities.

#### Unforeseeable plaintiff

A duty is owed not to the world at large but to persons reasonably foreseeable to be injured by one's negligence. The unforeseeable plaintiff cannot rely on a wrong foreseeable *vis-a-vis* another.

#### The fetus

The fetus is considered within the range of reasonable prevision of harm, whose rights in negligence crystallize on live birth.

#### Failure to act

There is no common law duty to come to the aid of another, but a series of exceptions have arisen wherein a positive duty to act has been found. A positive duty of care may exist if

harm if foreseeable and other aspects of the relationship between the plaintiff and defendant establish a special link or proximity. The theme of reasonable reliance unites and underpins these three categories. In *Childs v. Desormeaux*, [2006 SCC 18](#), the Supreme Court of Canada described these three categories as follows:

***Public function or commercial enterprise***

Defendants who exercise a public function or engage in a commercial enterprise have a positive duty to those who use their services. For example, a commercial host who serves alcohol must take steps to prevent reasonably foreseeable harm to patrons or third-party users of the highway.

***Relationship of control or supervision***

Those who are in paternalistic relations of supervision and control, the classic examples being parent-child or teacher-student relationships, owe a positive duty of care to the vulnerable over whom they exercise power. Other dominant-subservient situations where a duty is owed include hospital-patient, employer-employee, carrier-passenger and prison-inmate.

***Creator of dangerous situation***

When a defendant intentionally attracts and invites third parties to an inherent and obvious risk that she has either created or controls, positive duties may arise. For example, the operator of a dangerous inner-tube sliding competition owes a duty to exclude those who cannot participate safely.

*Volunteer Services Act*, RSNS 1989, c 497 renders the volunteer providing emergency aid to an ill, injured or unconscious victim liable only for gross negligence in so doing ([s.3](#)).

***Statutory duty***

Courts sometimes rely in part on a statutory duty to act to establish a positive duty at common law, *e.g.*, a police duty to warn or protect foreseeable victims, or a public duty to report child abuse.

**Pure economic loss**

Historically, no duty of care was owed in tort to those incurring pure economic loss (financial detriment unaccompanied by personal injury or property damage to the plaintiff) as a result of negligence. Limited recovery is now permitted in the following situations:

***Parasitic damage***

Where personal injury or property damage has been incurred, related economic losses are compensable as long as they are not seen as too remote.

***Negligent statement***

Where an untrue, inaccurate or misleading statement is negligently made by a defendant in a special relationship with the plaintiff, and the plaintiff reasonably relies on the statement to his financial detriment, liability ensues.

**Special relationship**

Look for a relationship of trust wherein the defendant should reasonably foresee reliance by the plaintiff. Factors include the relative skill of the advisor and advisee on the topic and the seriousness of the circumstances in which advice was proffered.

**Inaccurate and negligent statement**

Assess whether untrue, inaccurate or misleading at the time the statement is made. For negligence, look to reasonable care in the circumstances; there is no guarantee of accuracy.

**Reliance and damage**

There must be actual reliance on the statement resulting in financial detriment.

***Negligent performance of a service***

The same requirements as above generally apply, *e.g.*, re insurance and real estate agents, but reliance is not a requirement for the potential beneficiary of a negligently drafted will.

***Relational economic loss***

Where a plaintiff has suffered pure economic loss as a result of property damage to a third party, there may in limited circumstances be recovery. A split SCC in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [\[1992\] 1 SCR 1021](#) found liability for relational economic loss, three of the judges in majority relying on a close proximity between the negligent actor and the plaintiff, on the facts akin to a joint venture. A strong dissent would have denied tort liability by considering this a contractual issue. The tie-breaker judgment for the majority based liability on knowledge of the specific plaintiff that would foreseeably suffer loss.

***Pure economic loss caused by a dangerous product or structure***

Where a dangerous product or structure results not in physical injury but in preventative costs of repair for a subsequent purchaser, the creator of the danger is liable for such costs. Look for a dangerous defect as opposed to merely shoddy manufacture.

**Negligent infliction of mental injury**

Recovery for mental injury in negligence now requires proving the same elements as in any negligence claim, namely duty, breach of standard, damage, factual and legal cause on the balance of probabilities. Liability for compensable mental injury does not require proof of a recognized psychiatric illness. Recovery for a mental injury requires the plaintiff to establish on the evidence that the mental disturbance is serious and prolonged and rises above the common anxieties and fears that occur in society. Claims for personal injury, whether mental or physical, receive identical treatment in the law of negligence. (*Saadati v. Moorhead*, [2017 SCC 28](#); *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#)).



## **Negligence of public authorities**

Historically the Crown had complete immunity in tort. It is now capable of being sued as though it were a person ([Crown Liability and Proceedings Act, RSC 1985, c C-50](#), and [Proceedings against the Crown Act, RSNS 1989, c 360](#)), as are municipalities, but limitations are placed on the duty of care.

### ***Statutory exemption***

Clear and precise statutory wording exempting the authority from liability for negligence will be upheld.

### ***Policy or operational***

The authority is exempt from liability for policy decisions unless made in bad faith or so irrational as to constitute an improper exercise of governmental discretion. The operational aspect of carrying out the policy decision does attract liability. To distinguish a policy from operational decision, look for degree of discretion involved, budgetary elements, level of decision-making, and political constraints.

## **3. Standard of care**

### **Reasonable person**

The objective test is whether the defendant's conduct has fallen below the standard expected of the reasonable person.

### **Unreasonable risk**

In asking whether the standard of the reasonable person was breached, one test utilized is whether the risk taken by the defendant was unreasonable in the circumstances. Factors are the probability and gravity of injury, weighed against the social utility of the conduct and the cost of prevention. High utility is attributed to police activities.

## **Personal attributes**

### ***Mental disability***

When a defendant experiences, suddenly and without warning, a mental illness and is unable therefore to appreciate the duty of care owed at the relevant time he will be relieved of liability in negligence, because of the absence of capacity.

There is also no liability where the acts complained of are not directed by a conscious mind, i.e. non-volitional acts.

### ***Physical disability***

Physical disability may lead to a relaxing of the reasonable person standard, but case law is meagre on this point. Persons with a disability have been held liable in negligence for engaging in activities they reasonably should have avoided.

### ***Children***

The two-part test inquires:

- Does the child have the legal capacity to commit a tort? If yes,
- Did the child fall below the standard of care expected of a child of like age, intelligence and experience?

**Exception**

Children engaged in adult activities, such as operating motor vehicles, are held to the objective reasonable person standard.

**Parents**

Parents may be found liable for a negligent act of their child because of their own negligent failure to provide adequate instruction or to supervise or control the activity.

**Established practice**

Evidence that the defendant was conforming to or deviating from established practice is persuasive in assessing reasonableness. The party relying on customary practice must first establish its widespread existence. The court may still find an established practice to fall below the requisite standard of care. Medical and other professional practices are accorded greater deference than lay practices, in that adherence to an established practice exclusively in the professional domain will generally not be found to be negligent even where there is a competing body of professional opinion.

**Statutory standards*****Application***

Where a statute specifies its effect on civil liability, such provision prevails. Where conduct is merely proscribed and a penalty stated, evidence of breach may be introduced in a tort trial. The statutory standard may aid the court in formulating the requisite standard of care in negligence, but is not conclusive and does not create a new duty of care. The sole identified exception is breach of industrial safety legislation, for which liability is absolute.

***Requirements***

The activity constituting statutory breach must have caused the injury, the injury must be of a kind the statute seeks to prevent, and the plaintiff must belong to the group the statute aims to protect.

**Professional standards**

The professional is held to the standard of the reasonably prudent practitioner in that specialty.

***Locality***

The locality in which the professional operates may be found to be relevant to the standard of care expected.

***Beginners***

The standard is not lowered due to inexperience; the beginner is held to the standard of the reasonably prudent professional in similar circumstances.

***Lawyers***

To establish negligence in a lawyer's handling of litigation, the plaintiff must establish that the outcome would have been more favourable if handled competently.

### *Doctors*

- Doctors owe a duty to disclose all material risks, any special or unusual risks, and the gravity of a proposed treatment, as well as answering specific questions asked by the patient before obtaining consent. Where this standard has not been met and injury results from the treatment, the court must decide whether the reasonable patient in the plaintiff's position, if fully informed, would have opted to forego the proposed treatment; otherwise causation fails.
- The scope of disclosure required is partially dependent on the doctor's knowledge of the particular patient and the therapeutic or cosmetic nature of the procedure.
- Where there is an apparent withdrawal of consent, the doctor must ascertain anew whether consent is present. If withdrawn, he must halt the procedure, inform the patient of any significant change in the risks or circumstances of the procedure, ensure the patient understands, and get fresh consent before continuing the procedure.
- In an action against a manufacturer that has failed in its duty to disclose material risks to the doctor, the test is subjective, *i.e.*, would this patient have refused treatment if fully informed of the risks?

## **4. Causation**

The plaintiff must establish on a balance of probabilities that the defendant's behaviour was causally connected to the plaintiff's injury. There can be more than one cause.

### **“But for” test**

If the plaintiff shows that but for the defendant's act, she would not have suffered injury, causation is established. This is the basic test for establishing causation and applies to multi-cause injuries. The test should be applied in a robust, pragmatic and common sense fashion.

### **Material contribution to risk test**

In *Clements v. Clements*, [2012 SCC 32](#) the Supreme Court of Canada clarified that in special and limited situations a supplementary test for causation is available where: (a) the plaintiff establishes that the loss would not have occurred “but for” the negligence of two or more tortfeasors, each of whom is possibly in fact the cause of the loss; and (b) the plaintiff, through no fault of his or her own, is unable to prove that any one of the tortfeasors in fact was the necessary cause of the loss, because each tortfeasor can point to the other as the possible necessary cause, thereby defeating a finding of causation on the balance of probabilities using the “but for” test against anyone.

### **Inferring causation**

Proof of causation is particularly difficult for the plaintiff to establish in certain situations, medical malpractice lawsuits for example. Where scientific proof is weak, and the facts lie mostly within the knowledge of the defendant, little evidence is required from the plaintiff to establish an inference of causation. The defendant can then adduce evidence to the contrary.

### **Multiple causes**

Where the acts of two or more negligent actors combine to cause a loss that is not practically divisible, the plaintiff may proceed against either defendant for the whole of the loss, or recover part of the damages from one and part from the other up to the full extent of the damages awarded. The defendants are jointly and severally liable.

### **Consecutive injuries**

The first defendant is liable for injuries as they would have been calculated just before the second injury; the second defendant is liable only for additional damage caused by the second injury.

## **5. Damage**

Damage is an essential element of a cause of action for negligence.

## **6. Onus of proof and *res ipsa loquitur***

### **Basic onus**

The plaintiff must prove all the factual requirements for his cause of action, and the defendant must prove the facts for an applicable defence. Proof is on a balance of probabilities; thus if the evidence is exactly equal, the party carrying the onus or burden fails.

### **Res ipsa loquitur**

This maxim used to provide that in the absence of direct evidence, breach of the standard of care could be inferred where there was no other reasonable explanation for the accident. A series of procedural rules would then come into play. The Supreme Court of Canada in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 SCR 424 has now eliminated its application. The trier of fact is simply to weigh the circumstantial and direct evidence (if any) of negligence, decide whether a *prima facie* case has been established on a balance of probabilities by the plaintiff, and then determine whether the defendant has produced evidence negating that of the plaintiff. In other words, the court is called upon, at the close of all the evidence, to decide whether the plaintiff has met her burden of proof on the balance of probabilities standard.

## **7. Remoteness**

The policy question of remoteness or proximate cause asks how far the defendant's liability will extend.

### **Type of injury**

Where the type or kind of injury being claimed was a reasonably foreseeable result of the negligence, liability ensues, even if the extent of injury and its manner of occurrence were not foreseeable.

**Chance of injury**

The degree of probability that satisfies the reasonable foreseeability requirement has been described as a “real risk”, *i.e.*, one that would occur to the mind of a reasonable person in the position of the defendant and not be brushed aside as far-fetched.

**Thin skull**

If the type of injury is foreseeable in a person of reasonable fortitude, but the plaintiff suffered more extensive physical or psychiatric damage than anticipated due to a predisposition or pre-existing disability, the defendant is liable for the full extent of injury.

**Intervening cause*****Responsibility for acts of a third party***

Where the defendant owes a duty to control the acts of a third party, and as a result of the breach of that duty the third party causes injury to the plaintiff, liability will attach if the type of misconduct and injuries caused by the third party were reasonably foreseeable.

***Rescuers***

Where the defendant's negligent act injures a victim, she is liable to persons injured in attempting to rescue the victim as long as there was reasonably perceived danger and the rescue attempt was not foolhardy. If not quite foolhardy, contributory negligence may be assessed against the rescuer.

***Second accident***

If the plaintiff injured due to the defendant's negligence suffers a second accident, the defendant may be liable for the exacerbation of injury if the second accident was within the risk set in motion by the defendant, *i.e.*, reasonably foreseeable. If not, it is a *novus actus interveniens* legally severing the causal connection.

***Subsequent medical treatment***

The original defendant remains liable for the results of errors in subsequent medical treatment, with the exception of gross negligence by the physician.

***Suicide***

Where negligently inflicted injury leads the victim to commit suicide, the defendant may be liable if the injury adversely affected the victim's sanity or rationality. If the victim is considered sane when he commits suicide, this act is a *novus actus interveniens*.

## V. DEFENCES TO NEGLIGENCE

### 1. General

There are few complete defences. Issues of contributory negligence other than the seat belt defence are covered in the *Apportionment* section of these materials, *infra*. The defendant carries the onus of proof for defences.

### 2. Seat-belt defence

Liability is frequently reduced by a range of 15-25 per cent if the defendant can establish that the plaintiff's unreasonable failure to wear a seat belt contributed to his injuries. The seat-belt defence is a specific instance of contributory negligence.

### 3. Voluntary assumption of risk

*Volenti non fit injuria* means no duty is owed to one who consents to a risk, but its application is very limited:

#### Elements

The defendant must establish that both parties understood that the plaintiff was assuming not only the physical but also the legal consequences of the risk. Look for full knowledge of the risk and an express or implied agreement by the plaintiff to exempt the defendant from liability.

#### Consequence

*Volenti* is a complete defence.

### 4. Illegality

The defence of *ex turpi causa non oritur actio*, that the plaintiff cannot recover for illegal activity, is likewise very limited.

#### Elements

Look for a situation that would undermine the integrity of the justice system, allowing the plaintiff either to profit from his illegal or wrongful act (not just be compensated for injuries), or to evade a criminal punishment.

#### Consequence

*Ex turpi* is a complete defence.

## VI. STRICT LIABILITY

### ***1. Rule in Rylands v. Fletcher (1868), LR 3 HL 330***

Where there is the non-natural use of land with a substance likely to cause mischief if it escapes, the defendant will be held strictly liable for injury to person or property caused by escape of the substance.

#### **Non-natural use**

Sometimes limited to dangerous or hazardous activities (*e.g.*, spraying of herbicide), sometimes further restricted to unusual or special as well as dangerous uses of the land (*e.g.*, storm sewers and wood stoves not unusual uses).

#### **Likely to cause mischief**

Most dangerous or hazardous uses involve substances likely to cause mischief if they escape, so this requirement seldom limits the tort.

#### **Escape**

The substance must have escaped to a place outside the defendant's occupancy or control.

#### **Strict liability**

The defendant is liable for non-negligent conduct, but has available the defences of consent, act of God or of the plaintiff, the deliberate and unforeseeable act of a third party, and legislative authority.

### ***2. Liability for animals***

The keeper of a dangerous animal is strictly liable for injuries caused by its escape from control.

#### **Ferae naturae**

Animals classed as inherently wild, *e.g.*, lions, tigers and bears are irrebutably presumed to be dangerous.

#### **Mansuetae naturae**

The keeper of an animal classed as domesticated but known to its keeper to have vicious or mischievous propensities will be strictly liable for injuries caused by those propensities.

#### **Control**

The animal must have escaped from control of its keeper, though not necessarily escaped from the keeper's land.

### ***3. Vicarious liability***

An employer is held strictly liable to third parties for the tortious conduct of an employee committed in the course of employment.



**Employer/employee relationship**

Look to control of the employer over the employee, ownership of tools, and risks of profit and loss in determining whether the tortfeasor is an employee or an independent contractor. There is no vicarious liability for the act of an independent contractor.

**Course of employment**

Look to the time, place and other circumstances of commission of the tort.

**Unauthorized intentional wrongdoing**

Vicarious liability will likely be imposed even for intentional wrongdoing by an employee where there is a significant connection between the risk created or enhanced by the employer's enterprise and the loss that occurs.

**Recovery**

The employer who is not partially at fault may be able to recover losses from the employee.

***4. Workers' Compensation***

The [\*Workers' Compensation Act, SNS 1994-95, c10\*](#) renders negligence of the employer or employee irrelevant to injuries sustained by an included employee for an accident arising out of and in the course of employment. The right to sue civilly is removed and replaced with a mandatory limited compensation scheme, except in certain third party claims where a worker can elect between claiming Workers' Compensation benefits and pursuing an action against a third party tortfeasor. A written notice of election to bring such an action must be made to the Board.

***5. Product liability***

Canadian courts have declined to adopt the strict liability approach of American courts in cases of liability for defective products; standard negligence principles are applied.

## VII. NUISANCE

### *1. Private nuisance*

Substantial and unreasonable interference with the plaintiff's ordinary use and enjoyment of land.

An intentional or negligent act is not required, and the damage can be caused directly or indirectly.

#### **Substantial**

The interference must be more than trivial.

#### **Unreasonable**

The unreasonable criterion requires balancing the gravity of the harm against the utility of the defendant's conduct. In relation to gravity, courts will look at the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff, among other factors. With respect to utility, a finding that the defendant's conduct was malicious or careless will be significant. A finding that the defendant's conduct was reasonable will also be significant, although such a conclusion does not preclude liability. Although reasonableness is to be assessed in all cases, when there is significant and permanent harm caused by the interference, the analysis may be very brief.

#### **Ordinary use and enjoyment**

The plaintiff's unusual property use, and his peculiar sensibility, will not be protected.

#### **Interest in land**

The plaintiff requires proprietary or possessory interest in the land, or right of occupation; a mere licensee cannot sue.

### *2. Public nuisance*

An activity that unreasonably interferes with the public's interest in health, safety, morality, comfort or convenience. Suit may be brought by the Attorney General or by private individuals who have suffered damage over and above that suffered by the general public.

#### **Property**

No property interest is required.

#### **Interference**

The interference must be substantial and unreasonable, considering the same factors as for private nuisance.

#### **Intent or negligence**

Intentional or negligent creation of the nuisance is required.

#### **Special damage**

The private individual can only sue in public nuisance if she has suffered damage different than that suffered by the general public. The law is unsettled as to whether the damage

must be different in kind and not just in degree. Personal injury or damage to property constitutes special damage.

### ***3. Defences to nuisance***

#### **Statutory authority**

Strict interpretation of the authorizing statute will be applied, and to succeed as a defence, the damage must inevitably flow from the exercise of legislative power.

#### **Prescription**

Where an activity has been carried on continuously and openly for 20 years, a prescriptive right to continue the nuisance may be acquired. This is only relevant to a private nuisance, and the activity must be capable of constituting an easement, *e.g.*, the discharge of rain from an overhang.

#### **Consent**

Active encouragement or overt consent, in contrast to mere passive acquiescence, constitutes the defence of consent.

## VIII. OCCUPIERS' LIABILITY

The *Occupiers' Liability Act*, [SNS 1996, c 27](#) replaces the common law duty of care owed by an occupier to persons entering the premises for damage to their person or property.

### ***1. Occupier***

Includes a person in physical possession of premises and one with responsibility and control over their condition, the activities conducted, or who is allowed to enter therein. There may be more than one occupier, and exclusive control is not needed.

### ***2. Premises***

Includes water and ships, and railway cars, vehicles and aircraft except while in operation.

### ***3. Nature of duty***

The duty is that of reasonableness in the circumstances to see that each entrant and their property is reasonably safe while on the premises. Relevant factors include occupier's knowledge of likelihood of entry, circumstances of entry, age and ability of entrant to appreciate danger, warning supplied, and whether the risk ought reasonably to be protected against.

### ***4. Exceptions***

For each of the following, the duty owed is to not create a danger with reckless disregard or with the deliberate intent to harm:

- where the entrant willingly assumed both physical and legal risk of entry,
- where entry is without permission in order to commit a criminal offence, and
- agricultural, forested, undeveloped rural, or wilderness land, or closed recreational facilities.

### ***5. Limitations and expansions***

The occupier may by express agreement or notice extend, restrict, modify or deny the duty owed, where reasonable to do so, by taking reasonable steps to notify the entrant.

Liability of the occupier is negated by the sole negligence of a reasonably selected independent contractor doing work that reasonably should have been done.

## IX. DEFAMATION

### *1. General*

Defamation is the publication to a third person of a defamatory communication of and concerning the plaintiff.

### *2. Publication*

The defamatory remark must be communicated to a third person and not solely to the plaintiff. The defendant is exonerated if she establishes both lack of intent to be overheard, and that it was not reasonably foreseeable that the remark would be overheard.

### *3. Communication*

Libel is a defamatory communication in written or other concrete form (film, pictures or statues); slander is either oral or otherwise transitory. Slander, unlike libel, requires proof of pecuniary loss unless the statement imputes to the plaintiff the commission of a crime, a loathsome disease, a woman's unchastity, or unfitness to practice one's trade or profession.

### *4. Defamatory*

That which would lower the reputation of the plaintiff in the eyes of the reasonable person. Intent to defame and knowledge that the communication is defamatory are irrelevant except on the part of an innocent secondary distributor (*e.g.*, a newspaper vendor).

### *5. Of and concerning the plaintiff*

Ask whether the reasonable person would believe that the communication was about the plaintiff.

#### **Intent**

It is irrelevant that the defendant intended to refer to someone else or was unaware of the plaintiff's existence. Statutorily reversed in case of an innocent publication where all reasonable care was taken and an offer of amends was made upon notification (*Defamation Act*, [RSNS 1989, c 122, s 16](#)).

#### **Group defamation**

Still ask whether the reasonable person would believe the statement was about the plaintiff, as a member of the group. Consider the size of the group and the generality of the statement.

### *6. Defences*

#### **Justification**

The defendant must establish the truth of the substance of the statement. Reasonable belief in its truth is insufficient for this defence.

**Absolute privilege**

An absolute privilege is granted to participants in judicial proceedings, statutory tribunals, parliamentary proceedings, government executive communications, and interspousal communications.

**Qualified privilege**

Publication made in the reasonable course of duty in the absence of malice is privileged. The duty can be legal, moral, or social and can be exercised for the protection of one's own or another's interest, a mutual interest of publisher and recipient, or the public interest. The defence fails where the defendant exceeds the purpose of the qualified privilege or acts with malice (malice involves spite or ill will and also may include an ulterior or improper purpose for making the statement. Further, malice can be found when a statement made is known to be false).

**Fair comment**

Must be a fair comment or opinion as opposed to a statement of fact, reasonably based on fact, on a matter of public interest. The comment will not be fair if based on untrue facts, and the facts must be identified in the communication. The following objective test is applied: Could any person honestly express that opinion on the proven facts? Proof of malice defeats the defence.

**Responsible communication on matters of public interest**

Journalists and others who publish matters of public interest are protected by privilege if they were diligent in trying to verify the accuracy of the statements made. Various factors will be considered to determine if the publisher was appropriately diligent in trying to verify the statements, including: the urgency of the matter, the reliability of the source, and whether the plaintiff's side of the story was sought and reported accurately.

**Consent**

This defence applies where the plaintiff instigated, procured or invited the defamatory publication, but must be established for each publication.

## **7. Defamation Act, RSNS 1989, c 122**

Primarily codifies the common law, but also clarifies the law in the following situations:

### **Legislative and other proceedings**

A fair and accurate report of a legislative, municipal council, board, commission or public proceeding is granted qualified privilege, *i.e.*, if published without malice, for the public benefit, and not seditious, blasphemous or indecent. If requested, the defendant must publish a reasonable explanation or contradiction by or on behalf of the plaintiff ([s.13](#)).

### **Court proceedings**

A fair and accurate report of public court proceedings published in a newspaper or by broadcasting is privileged if the report is contemporaneous, without comment, and not seditious, blasphemous, or indecent. If requested, the defendant must also publish or broadcast a reasonable explanation or contradiction by or on behalf of the plaintiff. Privilege is then absolute ([s.14](#)).

## **X. BUSINESS TORTS**

### ***1. Deceit***

A fraudulent misrepresentation made by the defendant with the intention to deceive the plaintiff, which results in detrimental reliance by the plaintiff.

#### **Knowledge**

The defendant must either know the representation is false or act recklessly without regard for its truth or falsity.

#### **Directness**

The representation need not be made directly to the plaintiff, as long as it is made with intention to deceive the plaintiff.

#### **Fraud**

Active non-disclosure as well as incomplete disclosure will suffice if the intention is to deceive.

#### **Reliance**

If the defendant can prove that the plaintiff did not actually rely on the misrepresentation, the tort fails.

#### **Detriment**

Damages are calculated to place the plaintiff in the position she would be in had the misrepresentation not been made.

### ***2. Interference with contractual relations***

The intentional interference with the performance of a contract with the plaintiff, causing damage to the plaintiff.

**Intent**

Where the defendant is not aware that a contract exists or that his conduct would reasonably interfere with it, the action fails.

**Interference**

The interference can be either direct or indirect, by rendering performance of the contract impossible. If indirect, the means used must be unlawful.

**Justification**

Moral duty to intervene, and equal or superior rights of the defendant, justify interference with contractual relations.

**3. Intimidation**

Threat of an unlawful act intended to coerce the recipient to do something that damages either the recipient or a third party.

**Threat**

Can be express or implied by conduct.

**Unlawful act**

The act threatened must be unlawful, and can be a crime or a tort. Threat of breach of contract will suffice in three-party intimidation (C is injured due to threat made by A to B). Where a contracting party asserts an apparent right based on a reasonably held belief, the tort fails.

**Intent**

Deliberate interference with the plaintiff's interests will suffice for intent even if the predominant purpose was not injury but self-interest.

**Damage**

The recipient must have complied with the threat, and damage must follow as a result, or causation fails.

**4. Conspiracy**

Where two or more persons agree either to effect the unlawful purpose of injuring the plaintiff, or to use unlawful means to legally injure the plaintiff, and such injury results.

**Agreement and execution**

There must be a joint plan or common design to act together, followed by execution of the agreement. Mere knowledge, acquiescence, or even approval will not suffice without cooperation.

**Unlawful purpose of injury**

For this type of conspiracy, the predominant purpose must be to injure the plaintiff as opposed to furthering one's own interests.



**Conspiracy to use unlawful means**

This second type of conspiracy requires that the defendants combine to commit an illegal act, directed toward the plaintiff, which they should know is likely to and does result in injury to the plaintiff. Although the defendants must know injury to the plaintiff would likely ensue, this need not be their predominant purpose.

**Damage**

Damage must ensue as a result of the conspiracy.

**5. Unlawful means tort**

(formerly called “intentional interference with economic relations” or “interference with economic relations by unlawful means”)

The tort creates a type of “parasitic liability” in a three-party situation: “it allows a plaintiff to sue a defendant for economic loss resulting from the defendant’s unlawful act against a third party (para. 23). Two core components:

**Unlawful means by defendant**

The defendant’s conduct must be an actionable civil wrong or conduct that would be actionable if it had caused loss to the person at whom it was directed (para. 5).

**Intention**

The defendant must have intended to cause economic harm to the plaintiff by the use of unlawful means. Foreseeability alone is insufficient (para. 5).

*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#).

**6. Breach of confidence**

The tort of breach of confidence involves the unauthorized use of confidential information, and thereby causing harm to the disclosing party. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [\[1989\] 2 SCR 574](#). The three requisite elements of the tort are:

- a) confidential information;
- b) disclosed in circumstances indicating an obligation of confidence; and
- c) unauthorized use of that information to the detriment of the party communicating it.

**XI. REMEDIES****1. Injunction****Definition**

This discretionary remedy is available primarily to abate a nuisance or redress a trespass where substantial injury is established and damages would be an inadequate remedy.

**Types**

Can be prohibitory (ceasing or preventing an activity) or mandatory (*e.g.*, ordering the removal of a structure); interlocutory (*e.g.*, until there can be a full hearing) or permanent; immediate or delayed (allowing time to abate the nuisance); full or partial (*e.g.*, ordering a reduction in emissions along with damages); remedial or preventative.

**Equity**

Since this is an equitable remedy, in nuisance the court balances the rights of both parties, including whether damages would not suffice and irreparable harm would ensue, and the balance of convenience for the parties. However, in trespass an injunction ordinarily is granted as of right, even if damages would suffice.

**2. Compensatory damages**

Basic principle is *restitutio in integrum*. The plaintiff is to be restored to the position he would be in had the injury not occurred, to the extent that damages can do so. Following are the general categories for personal injury compensation:

**Special damages**

These are pre-trial monetary losses, capable of relatively precise calculation. Included are pre-trial loss of earnings or profits, medical expenses, property loss, and pre-trial increase in living expenses due to the injury.

**General pecuniary damages**

This head includes damages for loss of future earning capacity, cost of future care, loss of future valuable services and loss of shared family income. Adjustment may be made for contingencies, inflation and interest.

**Non-pecuniary damages**

Pain and suffering, loss of life's amenities, and loss of expectation of life are considered incapable of translation into monetary terms, but some award under this head is justified. In 1978 the SCC decided a global sum of \$100,000 was the upper limit for the most serious non-pecuniary loss; awards have since increased to accord with inflation, with the upper limit being approximately \$391,000.

**Aggravated damages**

This branch of non-pecuniary loss compensates the plaintiff for injured feelings or distress caused by the quality of the defendant's misbehaviour. Aggravated damages are most frequently awarded for intentional torts.

**3. Punitive damages**

Also called exemplary damages, their goal is to punish the defendant for high-handed and egregious behavior, to deter the defendant, to promote general deterrence and to prevent undue profit from wrongdoing.

**Application**

Punitive damages are most frequently applied to intentional torts, and may not be awarded where the defendant has served a criminal sentence for the act.

**4. Nominal damages**

A trivial sum of money awarded either to establish legal rights or as a peg on which to hang costs in one of the following situations:

**No damage**

The plaintiff who has not suffered damage can recover nominal damages for any tort that does not require damage as an essential element.

**Unreasonable lack of quantification**

Where damage is present but the plaintiff unreasonably fails to produce evidence of its quantification, nominal damages may be substituted.

**XII. APPORTIONMENT OF LIABILITY****1. Contributory negligence**

Where the plaintiff has negligently contributed to her loss, liability is apportioned between the plaintiff and defendant(s): [Contributory Negligence Act, RSNS 1989, c 95](#).

**Degree**

The court is to determine the degree of fault of each party ([s.4](#)).

**Apportionment**

Liability is in proportion to the degree to which each party was at fault ([s.3](#)).

**Indeterminable**

Where different degrees of fault are impossible to determine, liability is apportioned equally ([s.3](#)).

**2. Multiple tortfeasors**

Where more than one tortfeasor causes indivisible damage, or where one is vicariously liable for the act of another, the plaintiff may elect to sue one or more of the tortfeasors: [Tortfeasors Act, RSNS 1989, c 471](#).

**Indivisible damage**

Where each tortfeasor caused separate damage, each is liable for the amount of that damage; only where damage is practically speaking indivisible does tortfeasor legislation apply.

**Contribution**

Where indivisible damage is caused by more than one tortfeasor, one tortfeasor may be found liable for the total damage but can then recover contribution from any other tortfeasor responsible for the same damage (s.3).

**Apportionment**

The amount of contribution is assessed based on the extent of that person's responsibility for the damage (s.4).

**XIII. LIMITATION OF ACTIONS*****1. General***

Many statutes contain specific provisions restricting the time period during which a claim may be brought for commission of a tort. This section discusses only the limitation provisions in the *Limitation of Actions Act*, SNS 2014, c 35. Note that these provisions are overridden by specific statutory limitations (s. 6).

***2. Time limits***

Section 8 sets out a two-year limitation period for all civil claims, and a 15-year ultimate limitation period. The two-year limitation period begins on the day the claim is discovered. The 15-year ultimate limitation period begins on the day when the act or omission on which the claim is based occurred.

***3. Discoverability***

A claim is discovered when the claimant knew or ought to have known that the injury, loss or damage had occurred and was caused by an act or omission of the defendant that was sufficiently serious to warrant a proceeding (s.8).

***4. Discretion***

Within two years after the expiration of the limitation period, the court has discretion to waive the effect of its expiration after weighing the equities involved and the prejudice to each party (s. 12). Note that section 12 applies only to claims for personal injury damages: s.12 (2).

***5. Disability***

The limitation period does not run while the claimant is a minor (s. 18), or is incapable of bringing a claim because of a physical, mental or psychological condition (s.19).

***6. No Limitation Periods***

Section 11 exempts from all limitation periods claims in relation to assault or battery, if the claim is based on misconduct of a sexual nature, the claimant was dependent financially, emotionally or physically on one of the defendants, and claims where one of the defendants was living with the claimant in an intimate relationship.

## **XIV. FATAL INJURIES**

### ***1. General***

Specified relatives of a person whose death was caused by the wrongful act, neglect or default of the defendant may be able to sue for damages: *Fatal Injuries Act*, RSNS 1989, c 163.

### ***2. Tort***

The act or default must be one for which the deceased could have maintained a tort action had he lived ([s.3](#)).

### ***3. Entitlement***

Only one action can be brought, and may be on behalf of children, stepchildren, grandchildren, spouse, common-law spouse, parents, stepparents, and grandparents (ss. 2, [5](#) & 10).

### ***4. Damages***

Both pecuniary and non-pecuniary losses can be claimed, including loss of dependency on income, services and wealth; funeral expenses; pre-death pecuniary expenses, including travel, housekeeping and nursing services; and loss of guidance, care and companionship ([s.5](#)).

### ***5. Apportionment***

The court is to apportion damages amongst the relatives entitled to compensation (s.5 & 9).

### ***6. Limitation period***

Action must be commenced within 12 months after death (s.10).