**TORTS-FALL (2019)**

**Rights theory of Tort**: compensatory mechanism that provides relief from losses. A regulatory regime aimed at shaping social behavior. In recent years, seen a rise of rights theory. Instead of means to an end Torts law is seen in terms of rights. Noe seen as relationship of correlative rights and obligations. A tort consists of defendant’s failure to honour an obligation and the concomitant breach of the plaintiff’s right. Liability is imposed not in the aim of fulfilling some extraneous goal, but as a vindication of parties’ moral relationship. Tort law is concerned with recognition, enforcement and redress of the individual rights………….

Torts based upon Trespass *vi et armis* such as battery and trespass to land actionable per se. Torts based upon Trespass such as torts based upon negligence, malicious prosecution on case not actionable per se. Plaintiff must establish loss in these cases or there is no cause of action.

# Intentional Torts:

 Prove Volition: This would rarely be a problem

 Prove Intention:

**Accident**

Has to prove absence of intent and negligence. No liability for accident.

*Holmes v. Mather*: Trying to redirect runaway horses, knocking plaintiff: no intent or negligence (carriage accident), so no tort.

## Battery

* Battery is the intentional infliction of harmful or offensive contact with another person.
* Actionable per se, does not have to suffer harm in *Malette v Shulman(1990, Ont CA)* plaintiff (Jehovah’s witness) got awarded $20,000.00 for administration of blood.
* **Once direct injury established, onus on the defendant to prove absence of intent and negligence.**
* The contact, but not the harm or offense, must be voluntary and intended. It must be beyond the inevitable jostling in a crowd, etc.
* Contact may be with something the P is carrying or wearing or riding on(*Morgan v Loyacomo*) and by something D is carrying or has thrown.
* **D is liable for unintended consequences (“thin-skulled plaintiff”, *Bettel v. Yim*).**
* Surgery or blood transfusion are battery if performed without consent. If the victim isn’t aware, e.g. something done while they were unconscious, the cause of action arises when they become aware.
* Is protecting dignity and bodily autonomy, someone punched in the arm by friend will receive less in damages despite more physical pain than someone slapped or touched in sexually inappropriate way
* In sport, intentional violence far outside the normal rules of the game is battery.

Damages?

**Early cases under trespass:**

In *Scott v Shepherd* (Indirect Injury) intervening parties redirected squib. “But he who does the first wring should be answerable for all the consequential damages” (now it might be treated as negligece)

In *Leame v Bray*, no intent but negligence (wrong side of road): actionable per se.

***Cook v. Lewis*** (1952): Hunting expedition, trying to shoot bird, shot at plaintiff, who was behind the bush. Once direct injury established, onus on Ds to prove absence of intent and negligence. Held jointly liable.

*Miska v. Sivec* (1959): **Provocation** can only reduce damages and Defendant must be loose self-control and the resulting act should be immediate. Court held that prior incidents between parties can be considered if they trigger or enhance defendant’s loss of self -control stemming from immediate provocation.

*Hodgkinson v. Martin* [1929] “**Mistake** of fact”. Appellant put respondent out of office on mistaken belief and without unnecessary force. No lasting damage, nominal award of $10 given.

***Bettel v. Yim* (1978)** p. 58: “**Unintended Consequences”** Child P Bettel misbehaving in D’s store. D grabbed P and shook him, accidentally banged head. As Cook v. Lewis, onus on D to disprove intent or negligence. D is liable for unintended consequences (think skull kinda principle).

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| **Defences:**  | Consent, self-defence, defence of third party, Discipline, defence of property, legal authority, necessity, recaption of chattles |

##### Consent: (consenting to the normal risks associated with that act)

#####  Was plaintiff capable to consent (person must be capable of appreciating the nature of the act, if person incapable (due to age, illness, intoxication etc.)

##### Did plaintiff consent to the specific act that gave rise to his or her tort action.

#####  Mode of consent (verbal, writing, nodding, but failure to physically resist is not consent)

1. Was it given under fraud, mistake, duress, public policy

\*\*\* Defendant has to prove there was consent, plaintiff can prove that it was but then it was vitiated

\*\*\*\* Defendant’s mistaken belief that there was consent is no defence *Parmey v Parmey (*1945, SCC)

**Implied Consent**

***Wright v McLean***

Mud throwing case, implied consent

***Nelitz v Dyck (2001, CA)***

“from *Objective manifestation of consent, consent can be implied”*

**Facts:** P claiming chiropractor costs. Insurance company sends to their chiropractor. P not informed she could refuse. P made no indication she did not consent. Later claimed injured by D

### Court: Held that P had consented, “A valid consent can be given without uttering a word. Unexpressed private feelings if not communicated do not govern, whereas the objective manifestation of consent does. “D is entitled to rely upon what any reasonable man would understand from the P’s conduct.” No Power imbalance found. two-part test to determine where a power imbalance vitiates consent

1) proof of inequality (usually power dependency) 2) proof of exploitation (in light of community standards)

##### Consent in Sport:

#####  Wright v McLean (1956 BCSC) (Implied consent: mud-throwing-boys-hit-in-head)

CONSENT TO AN ACTIVITY IS VIEWED AS CONSENT TO THE NORMAL RISKS OF THAT ACTIVITY.

 **Facts:** Boys were throwing mud at each other; P drove by on his bike and stopped to join “want to fight?”; boys continued throwing mud at each other. P was hit in the head with something; undetermined if it was a mud ball or rock. How narrowly is consent construed? Harm suffered when consented to, within limits is not a cause of civil action.

**Held**: P voluntarily participated in mud fight; **no ill will, malice** on the part of the Ds and acts were ‘within the limits of the game’.

*Elliot and Elliot v Amphitheater* (1934 K.B) (As a Amateur should know about risks)

**Facts:** In a hockey game a spectator gets hit by a hockey punk and sued the Amphitheater,

**Court**: As an amateur Hockey player, so you knew the risks.

\*\*\*Consenting if there are reasonable safety measures, not so much consenting if the required or reasonable safety measures were not taken.

##### Agar v Canning (1965 Man QB) (Exceeding consent: hockey-game-injured-eye)

“*Players engaged in sport accept risks of the activity. however, some limit must be placed on the immunity of players on a case and fact specific basis – definite resolve to cause injury not covered by consent”.*

 **Facts:** Hockey game, D took possession of puck, P attempted to hook him and in doing so, hit D in the back of the neck. D retaliated by hitting P with blade of stick between nose and eye. Are torts within sports covered by implied consent?

**Court:** Those engaged in sport generally accept the risk of injury (Wright) and waive their rights to action, provides immunity to players engaged in sporting events. Circumstances showing a definite resolve to cause injury should not fall within scope of implied consent.

\*\*\* provocation was not pleaded but judge found it and reduced the damage award by one-third.

**Consent in consensual fist-fights**

##### R v Jobidon (1991) SCC (Vitiating consent)

COMBATANT’S VITIATED CONSENT IF THEY “INTENTIONALLY APPLY FORCE CAUSING SERIOUS OR NON-TRIVIAL BODILY HARM TO EACH OTHER”

**Facts:** Accused charged with manslaughter when he kept of throwing blows even when his fellow combatant became unconscious, victim died.

**Court**: Manslaughter conviction based upon the fact that consent vitiated when intentional application of force causing serious bodily harm

*R v B(K) (2002, ABPC)* (vitiating of consent only when intent to cause serious harm in consensual fight)

**Facts**: Consensual fight between teenagers, one, dies with the first blow which ruptured his artery.

**Court**: Accused lacked the necessary intent to cause serious harm so acquitted.

##### R v Paice (2005) SCC (Narrowing Jobidon test to say serious)

**Facts:** Accused did not start the flight and did not want to fight but ended up killing the victim. **Court**: Consent will only be negated if the accused both intends and causes serious bodily harm. Accused can not raise the defence of consent even in a fair fight if serious harm was intended and caused.

*R v. MacDonald* (problems in applying Jobidon and Paice)

 Facts: In a consensual fight MacDonald put the victim in headlock position, he lost consciousness and fell on the floor and sustained permanent brain injuries. First convicted and then overturned due to problems with judge’s jury instructions re consent.

**Consent to Medical Treatment:**

*Reibl v. Hughes*: It’s only a battery if the information led to misunderstanding of nature of procedure. If you just didn’t know all the risks it’s not battery, may be negligence.

*Marshall v. Curry* (1933) **p. 224**: “Not having consent is okay, in case of emergency”

**Facts:** D is a surgeon who did hernia operation on P, during which he found a testicle was diseased and needed to be removed.

**Court:** Where consent can be had it must be. But, surgeon acted in his patient’s interests in unforeseen circumstances and it would be unreasonable to wait for consent.

*Malette v. Shulman* **(1987)**: “ clear card from client of non-consent, cannot be ignored”

***Facts*:** P was injured in a car accident; card was found in her wallet refusing blood on religious grounds. D Dr. gave blood to save her life. Daughter confirmed her mother’s views and ordered transfusions stopped, but D only stopped after condition stabilized.

**Court**: Card was clear, no reason to believe that it does not represent current wishes and must be taken as refusal of consent.

**Damages**: $20,000.00 in general damages

**Mistaken ,negates consent**

*Toews (Guardian ad Litem of) v. Weisner (2001, BCSC):* “*Mistaken belief that there is consent”*

**Facts**: Defendant a public nurse was told by 11-year-old girl that her parents did not want her to get vaccinated for Hepatitis B and the consent form was not signed. Nurse mistakenly belief that Geogia’s mother has consented.

**Court:** Held liable in battery for $1000.00, Although it was a goof faith belief and no harm resulted.

## *Guimond v Laberge [1956]Ont CA* “Consent given based upon mistaken belief caused by Defendant is vitiated”

**Facts:** Dentist phrased question poorly, mistakenly took out **P**’s teeth.

**Court:** Judgement for plaintiff. If defendant was responsible for the mistaken belief based upon which plaintiff gave consent. Consent is vitiated.

 **Fraud negates consent:**

Test for fraud

1. If defendant knowingly makes false statement or omit to reveal information
2. Fraud relates to the nature and quality of the act and not a collateral matter.
3. **Currier test:** consentobtained though fraud will be **negated if fraud physically harmed the person or exposed him/her to significant risk of serious bodily harm**.

*R v Cuerrier (1998, SCC)*

**Facts:** Plaintiff was HIV positive, had sex with two women, did not disclose his status to them

**Court:** Consent obtained through fraud, so it will be negated, accused charged with aggravated sexual assault. \*\*\*\* if he practiced safer sex, he was fine.

*\*\*\*\*\*R v Mabior* (2012, SCC)

**Facts:**Mabior charged with 9 counts of aggravated sexual assault for failing to disclose his HIV positive status.

**Court:** Clarified rule in ***Cuerrier*** stating that consent obtained though fraud will be **negated if fraud physically harmed the person or exposed him/her to significant risk of serious bodily harm**. Significant risk of serious bodily harm exists unless there is low viral load and person is wearing a condom. Some courts have said only one is enough but this SCC judgement stands.

*R v. Hutchinson* (2014, SCC)

**Facts:** Complainant consented to sexual intercourse but insisted on condom. Accused poked homes in it, she became pregnant.

**Court:** Consent obtained through deceit, and “risk of becoming pregnant” is as serious as “risk of serious bodily harm” so consent negated. Charged for aggravated sexual assault.

*R v Williams (1923, CA)*

Facts: **Music teacher** convinced 16-year-old for intercourse pretencing it will improve her singing voice.

Court: Convicted of Rape, as the girl did not know that she was engaging in a sexual act (nature of the act).

*Papadimitropoulos v R*

**Facts:** Accused fraudulently convinced an illiterate lady to have intercourse telling her that they are married.

**Court:** Acquitted from charges of rape because woman was aware of the nature of the act(sexual)

**Public policy can negate consent**

*Norberg v. Wynrib* (1992, SCC) CONSENT NEGATED

**Facts:** Doctor offered to provide addicted patient prescription narcotics if she submits to his sexual advances. Failing to secure it from another source, she reluctantly agreed. Later sued for battery, breach of fiduciary duty.

**Court: (**LaForest, Gontheir and Cory JJ): Liable in battery, because of uneven bargaining power and exploitive nature of the relationship made it difficult to have “meaningful consent”

(Sopinska J): consent not negated but Doctor liable for negligence for prolonging her addiction rather than treating her.

**(**McLachlin and L’ Heureux-Dube JJ) Breach of fiduciary duty.

**Duress Negates Consent**

**Self-Defense**

 **(a) Honest belief that they are about to be struck (b) the amount of force used was reasonable in all the circumstances**

*Wackett v. Calder (1965)* **p. 217**:

**Facts**: P kept trying to fight D ineffectually, D hit him once, P got back up as D was turning back to go and attacked again, and D hit him again, knocking him down and breaking a bone in his cheek.

**Court:** Bull JA: The force used by the defendant was not excessive or unreasonable, because

1. Defendant **was not required to measure the nicety of his blows (*R v Ogal (1928))***
2. When acting is self-defence one is entitled to **return blows with blows** without measuring the nicety of them. (repel force with force)

Maclean JA (dissenting): Deference to trial judge, D could have avoided by walking away and force used was excessive.

defend oneself than walking away.

\*\*\*2018 in Canada Crown acquitted two homeowners who shot unarmed indigenous men who were stealing or rummaging through a vehicle of the homeowner.

**Defence of Discipline**

*R v Dupperon (1984, Sask CA)*

**Facts:** Defendant assaulted his 11-year-old son with 10 strokes of belt, leaving bruises for being disobedient.

**Court:** held defendant responsible in assault (not assault causing bodily harm). Court accepted that force used was for correctional purpose but held that it was unreasonable under the circumstances.

**Defense of third Parties**

*Gambriell v. Caparelli (1974)* **p. 251:**

**Facts:** D Caparelli was washing car when P hit it. Fight ensued, D grabbed P but P threw first punch. P had D on car and hands around neck when old italian mom grabbed a garden tool and hit him first on shoulders then on head, stopping the assault. No substantial lasting injury.

Person intervening to rescue in honest (though mistaken) belief of imminent danger is justified in using reasonable force. She had little choice, couldn’t intervene without a weapon. If he’s wrong, would assess damages at $1.

**Defense of Property**

*MacDonald v. Hees* (1974) **p. 230**:

***Facts***: P knew D and that he would be at a hotel, thought he was invited in, entered room, saw D in bed and said who it was. D threw him out through the storm door. Not self-defense. Defense of property must use minimum force and must first ask them to leave peacefully. If he has broken in, can eject him without asking. Here the force used was unjustified and excessive.

*Bird v. Holbrook* (1828) **ER p. 233:**

**Facts:**D set spring gun in garden, without warnings as he wanted to catch trespasser. P entered for innocent reason. P was only a trespasser and D wouldn’t be authorized even in taking him into custody, if he were present. No man can do indirectly that which he is forbidden to do directly.

**Defence and recaption of Chattles**

**Damage Award:**

 Nominal, Compensatory, aggravated, punitive.

Provocation if proved can only reduce punitive damages *Shawn v. Gorter* (1977, Ont. CA)

## Assault

Conduct which intentionally causes an apprehension of an imminent battery constitutes assault. It has been stated that the conditional threat, future threats and words alone without some overt act cannot constitute assault. However, Canadian courts have reconsidered these limitations and increasingly focus instead on the impression created in the plaintiff’s mind. Sometimes assault is the main part of the tort, because it is creating insecurity and fear on the mind of plaintiff. Threat to not do something plaintiff has a legal right to do is assault.

*Holcombe v. Whitaker* (1975) p. 71

***“***Words alone without some overt action cannot give rise to assault, they may give meaning to an act and taken together, may constitute assault”. Threatening some one to not do what they have legal right to do is assault.

**Facts:** On two different occasions defendant committed an assault First threating with “If you take me to court, I will kill you”, second time he went to her apartment, beat her door, tried to pry it open and threated with the same words. D argued conditional threat don’t constitute assault.

**Court:** Banging on the door. Attempting to go in and threatening, enough to cause apprehension of harm.

Words alone can not constitute assault theory ahs been accepted in insulting and abusive language use, but has been criticized in cases where it was intended and in fact caused reasonable apprehension of imminent physical contact.

*Fogden v Wade (*1945, NZ) *Words alone can constituted criminal* assault.

Accused convicted of criminal assault when he approached a woman and when close enough to touch her “Don’t go in yet, you have got time for a quick one”. Woman screamed and he ran off.

*Police v. Greaves* [1964] NZLR p. 72

***“****Conditional threats can be considered assault, if defendant has means to carry out the threat”*

*“If other condition of assault after met there is no reason why a conditional threat cannot constitute assault”*

**Facts:** Respondent was drunk and had a knife, threatened to stab two officers if they came closer. The threat is an assault as is eg. “your money or your life.” The police were doing lawful business, shouldn’t be barred.

*Stephens v Meyers (1830) Future threats can be assault if capable of being carried out immediately (courts have relaxed immediacy requirements)*

*Warman v Grosvenor (2008, SCJ) Broadening the assault liability*

**Facts:** D posted threatening messages on internet, telling public to harass and physically assault plaintiff, provided his phone number and address. Said he has bullets with plaintiff’s name on it.held liable in defamation and assault

Damage Award

Traditionally small, if unaccompanied by battery. But in *Mahal v Young* (1986. BCSC) court awarded $6000.00 for assault arising from defendant’s unprovoked threat to kill plaintiff. They worked together and defendant can readily carry out the threat.

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| **Defences:**If assault happened to defendant it may provide grounds for consent, self-defence or provocation**.**  | Consent, self-defence, defence of third party, discipline defence of property, legal authority, necessity (double check all the defences)!!!!!!! |

**Defences**

**Self-defence**

*Bruce v Dyer*

 *“It is reasonable to strike the first blow if fear of an imminent assault.”*

Facts: P and D are driving, Road rage ensues, P stops the card, waves at D with a fist. Defendant strikes the plaintiff who has a diseased jaw. Plaintiff sues for assault.

Court: Assault or imminent assault can be tackled with assault (it is reasonable to strike back rather than just warding back)

**Duress (may not) Negate Consent:**

*Latter v. Braddell* (1880 CP) pg**. 213:**

**Facts**: D in response to a false rumor that P, her maid, was pregnant, fired her and ordered her to submit to a doctor’s examination. The doctor used verbal coercion but not physical force to make her submit to the exam.

**Court:** There was no physical threat to the maid, and she did not physically stop him from performing the test There has to be either (threat of) force or violence

Lindley J (**Lopes J dissenting**): consent is the absence of physical resistance. In common law, threat of physical violence is clearly duress, but anything short is doubtful.

## False Imprisonment

False imprisonment is the intentional confinement of another person within fixed boundaries without lawful justification. It could be in an open space, if there is no reasonable means of escape (P isn’t required to jump out a window or a moving car, but if there’s a second door available they aren’t confined). A person who voluntarily boards a boat or train is not unlawfully confined if not let out before the trip is over. Miner case. It is false imprisonment if the P goes “voluntarily” to avoid embarrassment.

*Bird v. Jones* (1845) Eng QB **p. 75**

 ***It’s only imprisonment if there is complete restrain of movement***

**Facts:**  P was trying to pass through a public highway when D tells him that he cannot go that way, could be expected to use force to back up commands.

**Court**: P could have left in another direction, so not imprisonment.

*Wright v Wilson (1699)*

***Court did not held defendant liable in Imprisonment, even when plaintiff could only escape though trespassing on third party’s property.***

*Hanson v Wayne’s café Ltd*. (1990, QB)

false imprisonment takes place only when one is totally prevented from leaving the place, any actions will fail if an alternative route is available

*J(MI) v Grieve (1996)*: ***You can be falsely imprisoned without knowing it.***

*Hill v BC (1997):* Being wrongly put in segregation while already in prison is a tort in Canada.

**Consensual Restraint**

*Herd v. Weardale Steel* [1915]:

***“If you insert yourself in a situation consensually under certain terms, can not claim false imprisonment if you violate these terms and are denied escape”***

**Facts:** Herd was a miner who refused dangerous work in a coal mine and demanded to be brought up in the cage, but was refused for 20 minutes until the end of the shift.

**Court**: He had implicitly agreed by accepting work to be in the mine until the end of the shift, so could be held to that without any reason. Compared to demanding to be let off a train between stops.

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| **Defences:**  | Consent, Discipline, legal authority, Defence of protection of property can not necessarily be invoked for false imprisonment (*Ball v Manthorpe*(1970, BC Co. Ct) |

## False Arrest

* When false imprisonment is brought about by asserting legal authority. Courts are more concerned with civil liberties after the Charter.
* Usually large damage awards particularly in intimate searches and use of physical force
* *Nagy v Canada (2006, ABCA)*, plaintiff strip searched, arrested and then cavity searched in hospital. Sued in battery, false imprisonment and false arrest. All damages upheld on appeal
	+ - General Damages $150,000.00 (Police officer + Doctor)
		- Additional General damages $30,000.00 (Police officer for cavity search + Initial Imprisonment)
		- Punitive Damages $50,000.00.
* Peace officer needs to have reasonable and probable grounds to arrest,
* Citizen’s arrest requires that they be found committing the offense.
* Even if the plaintiff willingly goes with a store’s security officer, they can be held liable for subsequently detaining them (*Twan v Hudson’s Bay Company*)
* Person can be held liable for not only restraining the plaintiff but also ORDERING another person to do so *(Lebrun v High-Low Foods Ltd.)*. But if a manager only provides information, and the police officer assesses it and decides to make the arrest. Only police officer is liable.

***Campbell v. S.S. Kresge Co. (1976*), 74 D.L.R. (3d) 717 (N.S.S.C. (T.D.)**

*“Imprisonment does not need physical barriers, can be psychological”*

**Facts:** Witness told the police officer working as security guard that P was shoplifting at K-mart. He stopped her in the parking lot, told her to come with him to avoid embarrassment and this constitutes a kind of *psychological imprisonment*. She did so, but then challenged him and then as the witness had left he released her. She was given the impression that she was not free to go. Minor inconvenience & upset so **$500.00 in damages**

*Ball v Manthorpe*(1970, BC Co. Ct)

*Taking a trespasser in custody with a view of ejecting him is not reasonable grounds for false imprisonment*

**Facts:** Defendants Manthorpe and Witzke were security guards of corporate defendant. Plaintiff was once ejected from defendant’s corporate bld in the morning for creating some trouble, in the afternoon he was found again in the basement (area open to public) in line for refreshment. Defendants laid hands on him and took him to a private officer on another floor through ppl. Court held they were justified in removing him from the scene in anticipation of further trouble, especially given his past behaviour. Court concluded that they had no right to imprison him for 20 minutes (merely taking a trespasser into custody with a view of ejecting him is not arrest). If he was not under arrest then he was falsely imprisoned.

**Damages**: Cost award and $50.00 in damages

*Twan v Hudson’s Bay Company (2008)*

***“Even if plaintiff willingly goes with store’s security officer still can be held liable for false imprisonment”***

**Facts:** Ms. Twan was held by an undercover security guard as she came out of Bay store without paying $0.65, and did not sign the trespass notice. Ms. Twan won **$4,500 in damages, plus $1,500 in prejudgment** interest and costs for unlawful arrest.

*Lebrun v High-Low Foods Ltd. (1968, BCSC)*

 **“One can be held liable for false imprisonment also for ORDERING another person to do so”.**

**Facts**: Store manager called police to say he suspects customer had stolen cigarettes. Police stopped the customer in parking lot and searched his car for cigarettes, could not find anything

**Court**: Store manager held liable for false imprisonment.

*Koechlin v. Waugh and Hamilton (1957) Ont CA*:

**Facts:** Stopped by police and P Koechlin refused to give ID. Scuffle, P fell in a ditch and was forcibly arrested with no reason given. His father was informed, came to station where they refused to let him see his son until morning, told him it was for assaulting an officer but wouldn’t say what happened. Not released on bail until the next evening, and the charge was later dismissed.

Under certain circumstances an officer can require certain information and arrest for failing to provide it. But here no reasonable grounds to think he had or would commit an offense. He was also entitled to know what charge or suspicion he was being arrested for. Must inform of true reason for arrest (not required if circumstances are such that he must know); if not, policeman liable for false imprisonment; substance is important, not precise language. D can’t complain if he makes it impossible to inform him (counter-attacks, runs away).

Should not be held incommunicado. He was justified in resisting false arrest, so his resistance can’t be the reason for the arrest. Appeal allowed.

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| **Defences:**  | legal authority, common law power, Some provincial statues authorize police and occupier to arrest of trespasser, who they have reasonable ground to believe is trespassing |

## Defense of Legal Authority

Defense where statute authorizes the conduct, eg. a peace officer making a lawful arrest. The Criminal Code permits a peace officer to arrest without warrant anyone he reasonably believes has committed an indictable offense or finds committing any offense

A private citizen may arrest someone he finds committing an indictable offense or reasonably believes has committed one and who is escaping arrest and freshly pursued by police officers. Security officers are private citizens.

It is sufficient to carry out actions such as public works in the best reasonable way (Susan Heys Cambie merchant case, city authorized by statute and needn’t spend a lot more money to decrease inconvenience). A test for legal authority:

1. Was D acting pursuant to legal right or duty?
2. If so, does authorizing legislation expressly or impliedly exempt D from tort (or other) liability?
3. Did D lose protection by failing to do actions in correct manner?Intentional Infliction of Nervous Shock

Performing an act or making a statement (probably false) calculated to cause mental anguish to P and which in fact causes it (*Wilkinson v Downton*, D told P her husband was injured and P became seriously ill).

***Radovskis v. Tomm* (1957) p. 90**: 5-year-old child was raped by D, parents sued for medical expenses, lost wages, mother’s nervous shock. Fear or acute grief can’t be assessed as damages.

***Samms v. Eccles* (1961) Utah SC p. 91**: D persistently annoyed P with indecent proposals, causing anxiety, fear for safety and emotional distress. Found that a reasonable person would know emotional distress would result, so action can be pursued. Solicitation of sexual intercourse is not a tort in itself (“it doesn’t hurt to ask”), but the circumstances here are aggravated. Note that the action here is not claimed to have made her sick or done physical harm.

***Mustapha* v. Culligan of Canada Ltd. [2008]:** (see p. 620, though ¶ 9 isn’t reproduced) P was not compensated for his unusual sensitivity to flies in water bottle. However, it seems that the SCC might be willing to see psychological harm as compensable even if it falls short of the “illness” standard.

## Invasion of Privacy

Legislations related to Privacy

* PHIPA, FIPPA Regulatory statues
* Criminal Code (Interception of communication)
* Voyeurism
* Cyber-bullying legislations
* Charter- Section 8 (right against unlawful searches), Freedom of Religion , Freedom of expression
* Provincial Privacy statues

1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

 (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

 (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

 (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

2 Exceptions [consent, lawful, incident to lawful authority, fair comment, privilege

3 Unauthorized use of name or portrait of another

In common law, 4 privacy torts identified by Prosser and approved in *Jones v. Tsige* para 18:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

The first is considered and found that the action should be 1) intentional or reckless; 2) without lawful justification; and 3) highly offensive causing distress, humiliation or anguish in the eyes of a reasonable person (para 71).

***Motherwell v. Motherwell* (1976) Alta SC p. 99**: Mentally unstable D harassed Ps, her family, by phone and mail. They sued for invasion of privacy and nuisance seeking nominal damages and injunction. D claims no tort for invasion of privacy.

Clement JA adds new tort for invasion of privacy by abuse of telephone system. For phones to work, they must ring and people must answer. Offensive mail did not constitute a nuisance. Criticized by the house of lords as doesn’t fit well into nuisance as they didn’t own land.

***Hollinsworth v. BCTV* [1999] BCCA:**

***Was there reasonable belief that they can release the information* (Under statutory provision of BC)**

P Hollinsworth signed release for Dr to film for educational purposes only. BCTV sought tape from Dr. Williams, who sent them to Mr. vS for tape, assured them patient had consented, and said he did not know patient’s whereabouts.

P sued all for defamation, breach of privacy, breach of BC Privacy Act. Dismissed as against BCTV, but $15,000 awarded against Look and van Samang. BCTV not liable in defamation, having made no false statement. Nor did they breach any confidence. Re. privacy, statute says it is a tort “wilfully and without a claim of right, to violate... privacy”. Wilful taken in narrow sense that they knew (or should have) that they were violating privacy--they didn’t. Claim of right = honest belief in a state of facts which would be legal justification--here it was both honest and reasonable. Dismissed.

**BCTV had a reasonable belief that patient had consented, so they were absolved of liability**

**Look International did not have reasonable belief**, so they were held liable.

***Watts v. Klaent* (cited in *Jones v. Tsige*)**: Neighbour listened in on cordless phone conversations, heard mother warn that she will be investigated for welfare fraud. Neighbour tells ministry and gets mother fired. Mother sues neighbour for violation of privacy. Judge couldn’t give damages for lost job because she rightly lost it, but her privacy was seriously violated so he gave $30,000 damages.

***Silber v. BCTV:*** (may not be in book). Silber scuffling with people in parking lot of his store during a labour dispute, was filmed from the street. Sued under privacy act, denied because it was a public place, no reasonable expectation of privacy.

***Jones v. Tsige* (2012) OCA**: D bank employee looked at P’s bank records repeatedly for improper purpose. New “intrusion upon seclusion” tort. No loss, but $10,000 awarded.

**Breach of Confidence**

1. Has to be confidential information
2. Shared in some kind of circumstances that created obligation of confidence and privacy**.** (Express or implied)
3. Unauthorized use to the detriment of the plaintiff

**Damages**: Disgorgement damages.

Wrongful Interference with Chattels

Three types: trespass to chattels, detinue and conversion. All are intentional interference with chattels owned by or in lawful possession of another person, with or without damage. It is wrongful to unlawfully take a chattel or to unlawfully keep it if obtained lawfully. Unintentional interference is negligence.

## Trespass to Chattels

Improper touching is a trespass to chattels, with or without damage. Trespass is a wrong against possession, not ownership. The remedy is damages equal to the decreased value or P’s interest in them as a result of the trespass. Subject to obligation to mitigate.

***Ranson v. Kitner* (1889) p. 54**: Appellants were hunting for wolves and accidentally shot appellee’s dog, which looked like a wolf. Liable for their mistake, judgement for $50 value of dog.

## Trespass to land (Actionable per se)

* Trespass to land involves the intentional interference with land owned by or in **lawful possession of another person**.
* Historically common law was very well protected
* It is committed when D enters the land owned by or in lawful possession of another without consent or lawful justification.
* Even where entry was lawful, D must leave when ordered by the owner or lawful possessor.
* Trespass to land may be committed by placing or throwing an object on the land (delivery case).
* Does not include land only but also other structures, trees and anything that is affixed to the land (*Horseshoe Bay Retirement Society*)
* Can be committed by
	+ Entering the land in person
		- Propelling an object or third person
			* Placed or thrown
	+ Failing to leave after permission is revoked
	+ **Continuing process of trespass**, if you don’t move the object, will affect damage award (*William v Mulgrave; every day is a new trespass*), or even disgorgement idea (Car rent idea)
	+ Bringing an object to the plaintiff’s land and failing to remove it (Continuing Trespass) ***Williams v Mulgrave***
	+ Requires possession of the land (not necessarily legal title) at the time of intrusion **(***Townsview Properties Ltd*)
	+ **Squatters** only possess the area they occupy and can maintain an action against a **subsequent trespasser** (Penney v Gosse)
	+ Trespass protects possessory right more than title.
	+ Actual possession is good against all except those who can show better right of possession in themselves. (*Swaile v Zurdayl, (1924, Sask CA)*
	+ Possession of crown land is not sufficient interest to maintain trespass action.
	+ Doctrine of trespass by relation; plaintiff with an immediate right of possession when the trespass occurs can bring an action when they regain actual possession
	+ Must be a direct intrusion on the land of another (Hoffman v Monsanto Canada)
	+ Trespasser to land if liable for all consequences of trespass, foreseeable or not (Wyant v Crouse), but in Mayfair Ltd. v Pears, absolved of liability because of unforeseeable consequences.
	+ Jus tertii is not a defence to trespass (unless that 3rd party authorized entrance), but is to ejectment
	+ Mistake of fact is not a defence to trespass (*Turner v Thorne*), strict liability

***Smith v. Stone* (1647)**: D was carried onto P’s land by force. Trespass was by whoever carried him, not D.

***Gilbert v. Stone* (1648)**: D claims he was forced by 12 armed men to trespass on P’s land and steal a gelding, under pain of death. Armed men did not trespass so P has no cause of action against them, therefore D must be held liable. **Duress** is not a defense.

***Entick v. Carrington* (1765) p. 155**: D broke into P’s house and took some papers, claiming to have a warrant from the Secretary of State. Trespass is actionable per se, so it is up to the D to prove justification (which apparently, he did not in this case).

***Turner v. Thorne* (1960) p. 155**:

 Mistake is not a defence

Trespasser is responsible not only from injuries resulting directly from the trespass but also from indirect and consequential

Co-D’s were the owner and driver of a delivery service. Mistakenly delivered packages to a garage where he had delivered before, left packages in unlocked garage. P returned and tripped over them in the dark and was injured. Continued presence was a trespass for which mistake is not a defense, so D liable and trespasser is responsible for indirect injuries. Trespass by not only trespassing in person but also for leaving stuff.

Damage cost in turner case $9626.00

***Williams v Mulgrave (Town), 2000 NSCA 24***

***Claim statue barred***

Defendant ran a drain across plaintiff’s property, drain caused flooding but plaintiff took no action for years even after discovering. Trial judge said that trespass claim is statue barred due because plaintiff started it 6 years after knowing. Court of Appeal overturned the decision saying a new cause of action started each day that defendant left the drain on plaintiff’s land. She was entitled for damages for six years preceding the commencement of her action.

***Townsview Properties Ltd v. Sun Construction and Equipment Co. Ltd.***

Plaintiff action failed because wrongful excavation took place before it acquired possession

***Penney v Gosse (Nfld SC)***

Squatter has rights against subsequent squatter, so long as possession is clear and exclusive, and excecised with intention to possess, it is sufficient to bring an action against wrongdoer.

***Hoffman v Monsanto Canada (2007, SKCA)***

*Has to be direct intrusion to land*

Genetically modified seeds “found their way” on the neighboring organic farms. Plaintiff not held liable.

***Mayfair Ltd. v Pears (NZ, 1987)***

***Escape of fire from a chattel, so absolved of liability***

**Facts:** Brian Pears parked his car on a parking deck of a Wellington building, without the permission of the building’s owner, Mayfair Limited, effectively trespassing. Later that night, for unknown reasons, the car mysteriously exploded, starting a fire in the building, causing $8,475.81 in damage to the building.

**Court**: The court ruled that whilst there was strict liability in tort for the escape of fire, the court limited this to cases where the escape of fire was from land or buildings. Here the escape of fire was merely from a chattel (a car), meaning there was no strict liability for the resulting damage, and as the fire was not attributed to any negligence on his part, Mayfair's claim was struck out

***Horsford v. Bird (Antigua and Barmuda, 2006)***

Defendant had a costly boundary wall that incorporated 455 square feet of the plaintiff’s property. Plaintiff’s injunction request to have the part of the wall demolished and rebuilt was rejected but Trial court awarded $75,000.00 including unspecified amount of aggravated damages. Appeal court said aggravated damages were inappropriate and property was evaluated at $13,650.00, based upon underdeveloped land. Privy council agreed with appeal court that aggravated damages are inappropriate but doubled the value of the property to show the value of the land to the defendant. Also awarded plaintiff mesne profit for defendant’s use of the property.

***Nantel v Parisien (1981, Ont)***

**Facts**: Employees of corporate defendant **broke into plaintiff’s business to demolish** the property. Plaintiff had valid lease and lawful possession.

 Defendant had to pay **$35,000.00 in punitive damages**

**Horseshoe Bay retirement Society v S.I.F Development Corp. (1990, BCSC*)***

Defendant was made to pay **$100,000.00 in punitive damages** for cutting down plaintiff’s trees to enhance value of development lots.

***Harrison v Carswell***

***In situation of conflicting rights courts will prefer property rights***

**Facts:** Defendant was picketing in the mall, against her employer. Mall owner asked her to leave. Defendant’s argument was that it was an open area, ppl can enter and remain there freely. A mall owner can not kick ppl out in a whim. Labour code say that she can picket any place the public has access to.

Mall owner say they have a policy saying picketing is not allowed, I can not make is discriminatory on racial grounds but other than that I get to decide who comes and go.

**Court:** It is a private property, so it is trespass (petty trespass act). Change should come from legislature and not us.

Dissent (Justice Laskin): Mall is more like a public property, especially like parking lot and stuff, Mall owner is not worried about privacy like a private property owner. For ejecting ppl out, you have to have a logical reason.

***Russo v Ontario Jockey Club (1987, Ontario)***

Facts: Plaintiff was abettor who won considerable money on defendant’s race tracks. Defendants served her with a notice that she will be arrested in trespass if she returned to any of the defendant’s properties. Plaintiff brought the claim. Court said as property owner defendant has right to deny entry to anyone under both common law and trespass legislation

***Bracken v Fort Erie (Town) (2017, ONCA)***

Bracken arrested for trespassing for protesting outside townhall. Banned from all town property for 1 year. Successfully challenged the ban under s. 2(b) of the charter.

***Costello v Calgary (1997, Atla CA)***

City expropriated plaintiff’s land and took possession of it, without giving him a valid notice. He sued . Court held invalid expropriation. He then sued the city for trespass for improperly possessing his land for 11 years. Again judgement in plaintiff’s favor

**Defences**

|  |
| --- |
| Defence of legal authority, recaption of chattels, public and private necessity |
|  |

**Trespass and Nuisance**

* Private nuisance: substantial and unreasonable interference with the use and enjoyment of land in the possession of another; Requires proof of loss; protects quality of possession
* **Trespass and Nuisance**

|  |  |
| --- | --- |
| **Trespass** | **Nuisance** |
| Actionable *per se* | Requires proof of loss, actual damage |
| Protects fact of possession | Protects quality of possession |
| Nature of defendant’s conduct | C |

* In Nuisance, courts see if the damage was foreseeable or not. (*Doucette v* Parent: no nuisance, as it was not foreseeable)
* Substantive and unreasonable interference is one that is offensive and unreasonable for normal person. (*Angerer v Cuthbert, 2017 YKSC*)
* Does not have to be mistake of the defendant (*Kerr v Revelstoke*)

***Kerr v Revelstoke Bldg. materials ltd. (1976, Alta SC)***

*“Finding of nuisance does not require negligence of the defendant”*

**Facts:** Plaintiff opened a motel business Because of nuisance from defendant’s sawmill and chipper operations, he had to close. He brought an action for injunction, trespass and nuisance.

**Court:** Defendant was not negligent, so no injunction can be granted. They have entitled to succeed in nuisance and trespass (wood chips and ash).

***Execotel Hotel Corp. v. EB Eddy Forest Products Ltd. (Ont HC, 1988)***

Court held that airborne particles and woodchips setting on plaintiff’s property is **not trespass**, because there is **no direct and intentional intrusion**.

***Angerer v Cuthbert, 2017 YKSC*)**

***Doucette v Parent (1996, Ont Gen Division)***

*“Natural use of land with* ***no foreseeable*** *risk is not nuisance”*

Defendant’s tree that showed minimum sign of disease fell on plaintiff’s property. Court absolved defendant from any liability. Natural use of a defendant’s land that do not pose foreseeable risk do not give rise to nuisance

***Martin v Reynolds Metal Co*** (US CASE)

“Physical intrusion of invisible particles can give rise to nuisance per US authorities, Canadian courts have not dealt with this issue”

Defendant manufacturer was held liable because its operations caused fluoride particles to settle on plaintiff’s land, making it unfit for cattle.

Physical intrusion of invisible particles can give rise to nuisance per US authorities.

\*\*\* Remedy asked for nuisance is usually is injunction. Generally, courts are reluctant to give injunction in nuisance than in trespass.

**Trespass to Airspace**

* Column of property rights versus Limited Column of property rights

***Atlantic Aviation v NS Light & Power Co. (1965, NSSC)***

*Aviators don’t have right to prevent property owner to put a bld or transmission wires that impede flights near airports.*

If the flights don’t interfere with reasonable enjoyment of land and are for legitimate purpose, they are fine

***Bernstein v Skyviews & General Ltd.***

*Current law in Canada so*

**Facts**: Lord Bernstein brought an action against Skyview for flying over his property and taking pictures of his house. His argument was that one owns the sky above his house.

**Court**: landowner had rights in airspace to such as height necessary for ordinary enjoyment of the land

**Trespass to Subsoil**

* US authority, landowner’s title to subsoil only extends to reasonable depth of use (Boehringer v Montalto)
* Damage not necessary, landowners can deny entry for any reason and have no obligation to accommodate (Austin v Rescon Construction)

## Nuisance

Nuisance is unreasonable and substantial interference with a landowner’s use or enjoyment of land as a result of unreasonable actions on neighbouring land. It is intentional use of land in a way that interferes with neighbour’s use of land. It can be used for noise, pollution, odours, pollution.

***Kerr v Revelstoke Bldg. materials ltd. (1976, Alta SC)***

*“Finding of nuisance does not require negligence of the defendant”*

**Facts:** Plaintiff opened a motel business Because of nuisance from defendant’s sawmill and chipper operations, he had to close. He brought an action for injunction, trespass and nuisance.

**Court:** Defendant was not negligent, so no injunction can be granted. They have entitled to succeed in nuisance and trespass (wood chips and ash).

#  DEFENCES

## Consent/Duress/Capacity

Express or implied (by conduct) consent, freely given, is a defense. For medical treatment, the patient’s consent should be free, full and informed. Consent in an emergency is implied unless there is evidence that they refuse. For medical treatment, sports, and duress cases see Battery and see Assault. Consent, including sexual, is to be proved by the defendant.

Consent from someone too intoxicated, too young, or mentally incapable of consent is invalid. A child will not normally be held to the standard of care of a “reasonable person” and will be compared to a “reasonable child” of similar age, intelligence, experience, etc.

##### Consent

* Main defence for intentional torts.
* Tension in law between **individual autonomy and protection of vulnerable people**.
* There is some debate whether consent is a **defence or an element** of a tort. SCC says defence.
* Courts tend to place the **burden of proof** regarding consent on the **defendant**
* Relevant question re consent is whether or not the P consented to the activity that now form the basis of her claims
* Consent may be given explicitly through words or in writing, or implicitly through participation, demeanor or other behavior.
* Consent to an act generally extends to **risks normally inherent in that act**. Consent is about consenting to the activity and the reasonable consequences. Unreasonable or unforeseeable consequences may exceed or vitiate consent.
* Consent can: not be given, expressly given, implied, given but it doesn’t hold for the particular activity (e.g. exceeded or vitiated – fraud, mistake, duress and public policy (serious physical or moral harm caused))
* Was plaintiff capable to consent (person must be capable of appreciating the nature of the act, if person incapable (due to age, illness, intoxication etc.)

Implied Consent

***Wright v McLean***

Mud throwing case, implied consent

***Nelitz v Dyck (2001, CA)***

“from *Objective manifestation of consent, consent can be implied”*

**Facts:** P claiming chiropractor costs. Insurance company sends to their chiropractor. P not informed she could refuse. P made no indication she did not consent. Later claimed injured by D

### Court: Held that P had consented, “A valid consent can be given without uttering a word. Unexpressed private feelings if not communicated do not govern, whereas the objective manifestation of consent does. “D is entitled to rely upon what any reasonable man would understand from the P’s conduct.” No Power imbalance found. two-part test to determine where a power imbalance vitiates consent

1) proof of inequality (usually power dependency) 2) proof of exploitation (in light of community standards)

##### Consent in Sport:

#####  Wright v McLean (1956 BCSC) (Implied consent: mud-throwing-boys-hit-in-head)

“consent to an activity is viewed as consent to the normal risks of that activity. Here there was no ill will or malice”

 **Facts:** Boys were throwing mud at each other; P drove by on his bike and stopped to join “want to fight?”; boys continued throwing mud at each other. P was hit in the head with something; undetermined if it was a mud ball or rock. How narrowly is consent construed? Harm suffered when consented to, within limits is not a cause of civil action.

**Held**: P voluntarily participated in mud fight; **no ill will, malice** on the part of the Ds and acts were ‘within the limits of the game’.

*Elliot and Elliot v Amphitheater* (1934 K.B) “As an Amateur should know about risks”

**Facts:** In a hockey game a spectator gets hit by a hockey punk and sued the Amphitheater,

**Court**: As an amateur Hockey player, so you knew the risks.

\*\*\*Consenting if there are reasonable safety measures, not so much consenting if the required or reasonable safety measures were not taken.

##### Agar v Canning (1965 Man QB) (Exceeding consent: hockey-game-injured-eye)

“*Players engaged in sport accept risks of the activity. however, some limit must be placed on the immunity of players on a case and fact specific basis – definite resolve to cause injury not covered by consent”.*

 **Facts:** Hockey game, D took possession of puck, P attempted to hook him and in doing so, hit D in the back of the neck. D retaliated by hitting P with blade of stick between nose and eye. Are torts within sports covered by implied consent?

**Court:** Those engaged in sport generally accept the risk of injury (Wright) and waive their rights to action, provides immunity to players engaged in sporting events. Circumstances showing a definite resolve to cause injury should not fall within scope of implied consent.

\*\*\* provocation was not pleaded but judge found it and reduced the damage award by one-third.

Consent in consensual fist-fights

##### R v Jobidon (1991) SCC (Vitiating consent)

“Combatant’s vitiated consent if they “intentionally apply force causing serious or non-trivial bodily harm to each other”

**Facts:** Accused charged with manslaughter when he kept of throwing blows even when his fellow combatant became unconscious, victim died.

**Court**: Manslaughter conviction based upon the fact that consent vitiated when intentional application of force causing serious bodily harm

*R v B(K) (2002, ABPC)*

“vitiating of consent only when intent to cause serious harm in consensual fight”

**Facts**: Consensual fight between teenagers, one, dies with the first blow which ruptured his artery.

**Court**: Accused lacked the necessary intent to cause serious harm so acquitted.

##### R v Paice (2005) SCC (Narrowing Jobidon test to say serious)

**Facts:** Accused did not start the flight and did not want to fight but ended up killing the victim. **Court**: Consent will only be negated if the accused both intends and causes serious bodily harm. Accused can not raise the defence of consent even in a fair fight if serious harm was intended and caused.

*R v. MacDonald* (problems in applying Jobidon and Paice)

 Facts: In a consensual fight MacDonald put the victim in headlock position, he lost consciousness and fell on the floor and sustained permanent brain injuries. First convicted and then overturned due to problems with judge’s jury instructions re consent.

**Consent to Medical Treatment:**

*Reibl v. Hughes*: It’s only a battery if the information led to misunderstanding of nature of procedure. If you just didn’t know all the risks it’s not battery, may be negligence.

*Marshall v. Curry* (1933) **p. 224**: “No consent is okay, in case of emergency”

**Facts:** D is a surgeon who did hernia operation on P, during which he found a testicle was diseased and needed to be removed.

**Court:** Where consent can be had it must be. But, surgeon acted in his patient’s interests in unforeseen circumstances and it would be unreasonable to wait for consent.

*Malette v. Shulman* **(1987)**: “ clear card from client of non-consent, cannot be ignored”

***Facts*:** P was injured in a car accident; card was found in her wallet refusing blood on religious grounds. D Dr. gave blood to save her life. Daughter confirmed her mother’s views and ordered transfusions stopped, but D only stopped after condition stabilized.

**Court**: Card was clear, no reason to believe that it does not represent current wishes and must be taken as refusal of consent.

*Toews (Guardian ad Litem of) v. Weisner (2001, BCSC):* **Mistaken consent**: Bodily autonomy is worth protecting

**Facts**: Defendant a public nurse was told by 11-year-old girl that her parents did not want her to get vaccinated for Hepatitis B and the consent form was not signed. Nurse mistakenly belief that Geogia’s mother has consented.

**Court:** Held liable in battery for $1000.00, Although it was a goof faith belief and no harm resulted.

 **Fraud**

Test for fraud

1. If defendant knowingly makes false statement or omit to reveal information
2. Fraud relates to the nature and quality of the act and not a collateral matter.
3. **Currier test:** consentobtained though fraud will ONLY be **negated if fraud physically harmed the person or exposed him/her to significant risk of serious bodily harm**.

*R v Cuerrier (1998, SCC)*

**Facts:** Plaintiff was HIV positive, had sex with two women, did not disclose his status to them

**Court:** Consent obtained through fraud, so it will be negated, accused charged with aggravated sexual assault. \*\*\*\* if he practiced safer sex, he was fine. Currier test

* Dishonest act
	+ Could be deception or omission
* Deprivation
	+ Significant risk of serious bodily harm

*R v Mabior* (2012, SCC)

**Facts:**Mabior charged with 9 counts of aggravated sexual assault for failing to disclose his HIV positive status.

**Court:** Clarified rule in ***Cuerrier*** stating that consent obtained though fraud will be negated if fraud physically harmed the person or **exposed him**/her to significant risk of serious bodily harm. Significant risk of serious bodily harm exists unless there is low viral load and person is wearing a condom. Some courts have said only one is enough but this SCC judgement stands.

*R v. Hutchinson* (2014, SCC)

**Facts:** Complainant consented to sexual intercourse but insisted on condom. Accused poked homes in it, she became pregnant.

**Court:** Consent obtained through deceit, and “risk of becoming pregnant” is as serious as “risk of serious bodily harm” so consent negated. Charged for aggravated sexual assault.

*R v Williams (1923, CA)*

Facts: **Music teacher** convinced 16-year-old for intercourse pretencing it will improve her singing voice.

Court: Convicted of Rape, as the girl did not know that she was engaging in a sexual act.

*Papadimitropoulos v R*

**Facts:** Accused fraudulently convinced a illiterate lady to have intercourse telling her that they are married.

**Court:** Acquitted from charges of rape because woman was aware of the nature of the act(sexual)

**Mistaken negates consent**

* Less deceptive situation
* Good faith but incorrect interpretation of the situation.

*Toews (Guardian ad Litem of) v. Weisner (2001, BCSC):* “*Mistaken belieft that there is consent”*

**Facts**: Defendant a public nurse was told by 11-year-old girl that her parents did not want her to get vaccinated for Hepatitis B and the consent form was not signed. Nurse mistakenly belief that Geogia’s mother has consented.

**Court:** Held liable in battery for $1000.00, Although it was a goof faith belief and no harm resulted.

## *Guimond v Laberge [1956] Ont CA* “Consent given based upon mistaken belief”

**Facts:** Dentist phrased question poorly, mistakenly took out **P**’s teeth.

**Court:** Judgement for plaintiff. If defendant was responsible for the mistaken belief based upon which plaintiff gave consent. Consent is vitiated.

**Duress (may not) Negate Consent**

*Latter v. Braddell* (1880 CP) pg**. 213:**

**Facts**: D in response to a false rumor that P, her maid, was pregnant, fired her and ordered her to submit to a doctor’s examination. The doctor used verbal coercion but not physical force to make her submit to the exam.

**Court:** There was no physical threat to the maid, and she did not physically stop him from performing the test There has to be either (threat of) force or violence

Lindley J (**Lopes J dissenting**): consent is the absence of physical resistance. In common law, threat of physical violence is clearly duress, but anything short is doubtful.

**Public policy can negate consent**

Three considerations

* + Are you able to consent to physical harm
	+ Exploitation of trust / authority
	+ Clear power imbalance

*Lane v Holloway (1968, QB)*

Court denied defence of consent because elderly plaintiff was no match for young defendant.

*R v Paice (2005, SCC)*

Court denied defendant defence of consent in a consensual fight because serious physical harm was intended and caused.

*MMR v KK (1989,BCLR)*

Court rejected defence of consent raised by foster father who had sex with 15 year old foster daughter, although she initiated and consented to it. Court held that father was in breach of trust, and breach of his duty to act in the best interest of the plaintiff.

*Norberg v. Wynrib* (1992, SCC) “Consent negated: uneven bargaining power & exploitive nature”

**Facts:** Doctor offered to provide addicted patient prescription narcotics if she submits to his sexual advances. Failing to secure it from another source, she reluctantly agreed. Later sued for battery, breach of fiduciary duty.

**Court: (**LaForest, Gontheir and Cory JJ): Liable in battery, because of **uneven bargaining power** and **exploitive nature** of the relationship made it difficult to have “meaningful consent”

(Sopinska J): consent not negated but Doctor liable for negligence for prolonging her addiction rather than treating her.

**(**McLachlin and L’ Heureux-Dube JJ) Breach of fiduciary duty.

**Damages** : $20,000 in general damages, **$10,000.00 in punitive** damages

*Nelitz v Dyck (2001, CA) “*Consent not negated, not uneven bargaining power or exploitive nature”

“from *Objective manifestation of consent, consent can be implied”*

**Facts:** P claiming chiropractor costs. Insurance company sends to their chiropractor. P not informed she could refuse. P made no indication she did not consent. Later claimed injured by D

### Court: Held that P had consented, “A valid consent can be given without uttering a word. Unexpressed private feelings if not communicated do not govern, whereas the objective manifestation of consent does. “D is entitled to rely upon what any reasonable man would understand from the P’s conduct.” No Power imbalance found. two-part test to determine where a power imbalance vitiates consent

1. proof of inequality (usually power dependency) 2) proof of exploitation (in light of community standards)

**Consent to Treatment, Counselling and Care**

* As **general rule,** health care prof. or counselor need to get consent before examination, procedure etc.
* Consent must be obtained in advance and cover not only intervention but also related issues re record keeping, disclosure about alternative treatments etc.
* Patient may consent implicitly by behaviour, demeanor, or explicitly either orally or in writing. Fact that patient comes for treatment is measure of **implicit consent**.
* Consent must be **related to specific procedures or treatment**.
* To be valid consent must be **voluntary**.
* Consent must be **based on full and frank disclosure** of **nature of intervention and risks**. Increasingly remote risks must be disclosed.
* Practitioner is increasingly expected to put treatment in context of risks and benefits. Has been increased in info must provide patient
* **Courts have relaxed strict requirements for consent in 3 EXCEPTIONS:**
	+ **Unforeseen medical emergency** where impossible for patient to give consent. Health care prof. can intervene without consent. Biggest exception. Although next of kin may be consulted their consent is irrelevant.
	+ Patients who have given **general consent in course of counseling**, treatment etc. Patient will be viewed as implicitly consenting to any subsequent counseling or subordinate tests and procedures necessarily incidental to agreed treatment. Implied consent negated if patient objects. Currently, Dr does have to be pretty detailed re incidental procedures etc.
	+ At one time could withhold info that would **undermine patient’s morale** and discourage from having treatment.

*Reibl v. Hughes*: It’s only a battery if the information led to misunderstanding of nature of procedure. If you just didn’t know all the risks it’s not battery, may be negligence.

*Marshall v. Curry* (1933) **p. 224**: “Not having consent is okay, in case of emergency”

**Facts:** D is a surgeon who did hernia operation on P, during which he found a testicle was diseased and needed to be removed.

**Court:**

* In ordinary situation if there is the opportunity to get consent it must be had. Even if that means stopping surgery, waking up and asking
* But, surgeon acted in his patient’s interests in unforeseen circumstances and it would be unreasonable to wait for consent.
* Can have implied consent but increasingly difficult. Consent may be implied based on conversations before the surgery or antecedent circumstances. If you have consented to multiple stages of treatment and have to advance to next stage unexpectedly then likely okay b/c implied consent based on general course of treatment.

*Malette v. Shulman* **(1987)**: “ clear card from client of non-consent, cannot be ignored”

***Facts*:** P was injured in a car accident; card was found in her wallet refusing blood on religious grounds. D Dr. gave blood to save her life. Daughter confirmed her mother’s views and ordered transfusions stopped, but D only stopped after condition stabilized.

**Court**:

* Card was clear, no reason to believe that it does not represent current wishes and must be taken as refusal of consent.
* Card was a legitimate restriction. Purpose of card was to speak for patient, is she could not give/deny consent. From looking at card should have known no consent. It is best indicator while unconscious.
* No such thing as doctrine of informed refusal. Can refuse without knowing consequences of your refusal.
* Next of kin confirmed no blood transfusion. Dr. should have listened to this.

*Murray v McMurchy (1949, BCSC)*

 **Facts**: Surgeon tied patients’ fallopian tubes during c-section, discovering tumors on the walls of the uterus.

**Court:** The health hazard posed by tumors in the event of subsequent pregnancy did not warrant the drastic reaction.

### a) Burden of proof and Consent forms

* Health professionals have the burden of proving consent on the balance of probabilities.
* Signed consent form provides some evidence, not conclusive proof.
* Issue is whether patient understood procedures, risks etc.
* Consent form is only as good as the info in it. Can’t have a really broad (i.e. not id procedures) or really detailed and confusing consent form (e.g. jargon). Can’t be presented as mere formality or in circumstances were there is no opportunity to read it. Problems arise if patient intoxicated, drugged or in severe pain. Literacy can also be issue.

### b) Competency to Consent

* To be valid, consent must be given by patient who is legally competent.
* Focus on patient’s **ability to understand nature of proposed treatment and its risks**, not ability to make a reasoned and prudent decision.
* Common law defines competency broadly to protect autonomy.
* Doctor makes assessment whether someone is competent to consent; also Board to help decide

**Minors**

* No single recognized age of consent for medical treatment.
* Courts assess whether patient capable of understanding nature of proposed procedure and risks. If yes only patient’s consent is irrelevant.
* Some **statutes** that may impose minimum age requirement for consent to specific procedures.

*C v Wren (1986, AR) Age does nor matter as long as patient is consenting*

**Facts:** 16-year-old became pregnant, she wanted to get abortion. there was disagreement between parents and doctor. Parents were seeking injunction from doctor for preventing him from performing the abortion

**Court Held**: 16-Year-old has the autonomy to decide what she wants done with her body.

*Re Duek (1999, Sask. QB)*

Facts: 13-year-old boy refused chemotherapy, believing his father’s faith in alternative treatment. Psychologist and psychiatric said no developmental impairment but less mature for his age and father is the dominating figure in the house. Court said if child was mature his wished would be respected, in concluding this court considered boys age, maturity, extend of dependence on parents and complexity of the treatment. Proceedings halted as boy’s cancer spread to lungs.

## Self-Defence

## (a) Honest belief to be proved by defendant that they are about to be struck (b) the amount of force used was reasonable in all the circumstances. *Mann v Balaban (1970, SCC)*

\*\*\*20 American states has law “stand your ground law”, which allows use of deadly force to defend oneself than walking away. In Canada is has to be reasonable force under given circumstances.

*Wackett v. Calder (1965)* **p. 217**:

*“****Blow for blow, not required to measure the nicety of the blows”***

**Facts**: P kept trying to fight D ineffectually, D hit him once, P got back up as D was turning back to go and attacked again, and D hit him again, knocking him down and breaking a bone in his cheek.

**Court:** Bull JA: The force used by the defendant was not excessive or unreasonable, because

1. Defendant **was not required to measure the nicety of his blows (*R v Ogal (1928))***
2. When acting is self-defence one is entitled to **return blows**
3. **with blows** without measuring the nicety of them. (repel force with force)

Maclean JA (dissenting): Deference to trial judge, D could have avoided by walking away and force used was excessive.

*Bruce v Dyer* (1966, ON SC)

 *“It is reasonable to strike the first blow if fear of an imminent assault.”*

**Facts**: P and D are driving, Road rage ensues, P stops the card, waves at D with a fist. Defendant strikes the plaintiff who has a diseased jaw. Plaintiff sues for assault.

**Court:** Assault or imminent assault can be tackled with assault (it is reasonable to strike back rather than just warding back)

*R v Forde (2011, ONCA)*

**Facts:** Accused killed someone in self defence who attached him with a knife. Trial jury rejected self defence claim, jury was instructed to consider his failure to retreat from his home.

**Appeal Court**: Appeal court ordered a new trial based upon the facts that the jury was mis directed.

*Brown v Wilson* (1975, BCSC)

“In determining if the force was excessive, court should look at the nature of the force and the circumstances not necessarily the resulting injuries.

**Facts:** Defendant picked up plaintiff who was about to hit him in a bear hug, defendant slipped and plaintiff’s head hit the concrete floor and died later

**Court:** Use of force was reasonable in self-defence.

SELF-DEFENCE IN PROPERTY RELATED TORTS/CRIMES

\*\*\*2018 in **Canada Crown acquitted two homeowners on self-defence basis** who shot unarmed indigenous men who were stealing or rummaging through a vehicle of the homeowner. In one case defendant said he was using the gun to scare and his friend misfired and in the other case defendant pleaded that they thought deceased had a weapon. (Victims were committing property offences) Gerald Stanley acquitted in the death of Colten Boushie

In Canada courts don’t permit use of deadly force in self-defence when intrusion is on property

Veinot v Veinot (1977,

“Just because altercation is taking place on their private property, defendant is not justified in using lethal force”.

**Facts:** Plaintiff trying to get into the house to see his ex-wife, defendant shot at unarmed plaintiff. Defendant argued self-defence.

**Court:** Excessive force was used and not justified.

*R v Lavalle (1990, SCC)*

Facts: Woman kills her husband in the backof the head while he is leaving the room. He was abusive and violent and threated her that night that he will her, if she did not kill him. Based upon psychiatric testimony SCC aquitted on the base of her reasonable belief that killing him was the only way to save her life.

*R v Whynot (1983, NSR CA)*

*“No person has the right in anticipation of assault that may or may not happen to apply force to prevent the assault.”*

## Woman shot common law spouse, who was drunk and passed out. There was history of violence but nothing to suggest that there was an immediate threat.

## Defense of others (Third party)

*R v Duffy* (1967, Q.B): there is a general liability of people to prevent felony (not limited to family, can be raised for anyone)

*Gambriell v. Caparelli (1974)* **p. 251:**

**Facts:** D Caparelli was washing car when P hit it. Fight ensued, D grabbed P but P threw first punch. P had D on car and hands around neck when old italian mom grabbed a garden tool and hit him first on shoulders then on head, stopping the assault. No substantial lasting injury.

 **Court**: Person intervening to rescue in honest (though mistaken) belief of imminent danger is justified in using reasonable force. She had little choice, couldn’t intervene without a weapon. If if the judgement was in favor of the plaintiff will not award damages more than a $1.00

*Cachay v Nemeth* (1972, Sask QB) “Force used Excessive”

**Facts:** Plaintiff attempted to kiss defendant’s wife on neck. Defendant who was trained in karate, struck the plaintiff fracturing his lower jaw and breaking two teeth. Acted in defence of wife.

**Court:** Use of force was not reasonable in the circumstances

*Babiuk v Trann* (2005, Sask. CA) “ Force used reasonable”

**Facts**: Plaintiff stepped backward onto the face of one of the team members if defendant. After whistle ended the defendant punched plaintiff, whose jaw broke in two places. He argued that it was to prevent further injuries to his team mate.

**Court:** Reasonable force used; plaintiff’s claim denied.

## Defence of Discipline

Common law defence for parents and guardians for use of Reasonable force. Ship captains, pilots, and other sin similar position also have common law right to use physical force to maintain discipline.

R v Dupperon (1984, Sask. CA) Excessive force

“court will consider subjectively and objectively nature of the offence calling for correction, age, character and likely effect on correction of the child, circumstances, degree and gravity of the punishment to determine reasonableness”

**Facts:** A 13-year boy who first misbehaved with his father on couple of occasions. He was stroked by his father 10 times on his bare buttocks by a leather belt leaving 4-5 bruises of four inch long.

**History:** Trial judge found that father committed assault, causing harm to the son and fined him $400.00 and 18 months in probation.

**Held**: Appeal court found that the force was used by the way of correction but the use of force was excessive in the circumstances on the following principles:

*Canadian Foundation for children, youth and the Law v. Canada (Attorney General), [2004]*

**Supreme Court** upheld the constitutional validity of section 43 but narrowed its scope to a great length.

1. Force can be used only as corrective purpose, designed to retrain or control the child or express symbolic disapproval (not out of anger or to punish the child)
2. Child must be able to under why the force is being used and able to benefit from it (defence does not apply to children under 2 and other who because of a disability are incapable of learning from the incident.
3. S. 43 does not apply to the use of force that harms or could reasonably harm or expected to harm the child. Also does not apply when children are hit with rulers, belts and other such objects or if they are hit or slapped on the head
4. S. 43 does not apply to the use of force that is cruel and degrading.
5. Defence can not be invoked to justify the corporal punishment of teenagers because research indicates that this only generates harmful or antisocial behavior.
6. Teachers may use reasonable force to remove a child from classroom or secure compliance with instructions, they can not use force merely as corporal punishment

*R v Wetmore* (1996, QB) Reasonable force used

**Facts:** 10th grade student being disruptive, teacher who was black belt in Karate provided Karate demonstration to class, some incidental touching but no harm

**Court:** Acquitted under S. 43 defence that actions were reasonable in light of troublemakers’ conduct and need to teach them respect for authority.

*R v. Swan (2008, Ontario SCJ)*  SCC has not put a age limit on the use of reasonable force

 **Facts:** Defendant used force on his teenage daughter who left to meet her boyfriend at a party despite being told that she could not do so. This boyfriend had a history of violence and drug use. Parents have previously found drug in their daughter’s bedroom and a note by the boyfriend suggesting that she kills her parents. When she refused to leave the party, he physically apprehended her which was the reason of his conviction. She brought an action of assault.

**History:** Trial judge convicted the father with assault.

**Held:**  acquitted of assault.

**Reasoning:** There is no age limit in s. 43 and the Supreme court if Canada had not prohibited from using reasonable force to restrain or control unruly teenagers. Accused reasonably believed that physically apprehending her was necessary for her safety.

*R v JMG (1986, CA)*

“In order to maintain discipline principle has right to investigate any credible allegation of illicit drug or other violations of school rule.”

R v Ogg-Moss (1984, SCC)

“S. 43 defence is for parents, teachers and other standing in position of parent, counsellor in residential facility can not invoke this power.”

**Defence of Real Property**

\*\*\*\*Recent caselaw prohibit the use of deadly force to simply protect property.

Things to consider:

**1. Not Forceful Entry**: If someone is trespassing the property, one can not use force to eject the person until he has been requested to leave the premises, even when force has to be applied it has to be just enough to eject the person and no more than that.

**2. Forceful Entry:** you can use reasonable force to eject the person, but no more force than reasonably required to eject the person (minimum necessary force) Must not include beating, wounding or any other physical injury.

*Macdonald v. Hees* (1974, NSSC)

“**Use of force** in ejecting someone is **only acceptable if there is a forced entry** and even then, the force used should not be excessive of what is truly required to eject the trespasser”

**Facts**: Defendant was staying at a motel. Plaintiff went to see Defendant at his motel, both were not completely known. He erroneously assumed that he is being called in and entered the room. Defendant threw him back right away, plaintiff sustained injuries. Plaintiff sued in assault; Defendant argued defence of real property.

**Held**: Defence is not established. Parties were not strangers; it was not forced entry and use of force excessive.

*Bird v. Holbrook*

“no man can do indirectly which he is not authorized to do directly, use of excessive force”

**Facts**: Defendant had put up a fence on his property to protect tulips. He put up spring guns in his backyard and no sign. Plaintiff climbed his fence, trying to protect the peahen and got shot by the spring guns and sued the defendant. Asked by the judge why the defendant didn’t put a notice, he said that then the trespasser would not be caught.

**Held:** Decision in favor of the plaintiff.If defendant just wanted to protect his property, he could have out warning signs. Even if defendant was present, he could not have arrested plaintiff.

*Veinot v Veinot* (1977, NSR)

“Use of deadly force is not permitted”

Defendant shot unarmed plaintiff in order to trying to get him to leave

*Revill v Newbery* (1996, CA)

“threatening a trespasser with loaded gun or weapon is permissible”

*Dunn v Dominion Atlantic Railway Co* (1920, SCC)

“Tolerate the presence of trespasser if removing him pose foreseeable risk of physical injury”

\*\*\* in Common law occupiers are authorized to damage other person’s property if doing so is necessary to protect their own property, and damage is reasonable compared to the interest protected. Also they can seize and keep the chattle that caused damage to their property until they have been compensated *Arthur v Ankel (1996, CA)*

In defense of property, generally obliged to ask them to leave first before using minimal required force to eject them. If they break in or enter for criminal purpose, don’t have to ask. Dogs or barbed wire fences should be used to keep people out, not to capture them.

|  |  |  |  |
| --- | --- | --- | --- |
| Defence | When Available? | Is Request Required? | Can Force Be Used? |
| Defence of Real Property | Defendant is lawful occupier of propertyCan be used to eject trespasser or to prevent entry of trespasserSuperseded by public necessity | Yes, if the trespasser is peacefulNo, if the trespasser enters the property forcibly | If trespasser is peaceful, he/she must be given a reasonable opportunity to leave.Force should be minimum required to remove the trespasser from the property (does not include beating or wounding).If force is preventive, warning must be provided (*Bird v Holbrook*). Duty of common humanity.Lethal force cannot be used simply to protect property. |
| Defence of Chattels | Defendant seeking to immediately regain possession of chattel or in hot pursuit of person who dispossessed him/her of the chattel (includes *bona fide* mistake) | Only if person innocently took the chattel from the defendant | Yes, but must be reasonable in the circumstances |
| Recaption | After defendant has been dispossessed of the chattelNot available against third-party who has come into possession of property in good faith | Always | Only if the person wrongfully came into possession of the chattel and refuses to return it after request. Force must be reasonable and must not breach the peace.No force can be used against someone who legitimately came into possession of chattel (eg bailee).  |

## Defense and Recaption of Chattels

* Same principles as defense of land:
* D is in possession, **attempting to immediately regain possession**,
* or in hot pursuit of someone who has just taken the chattel.
* Can not invoke this defence once dispossessed.
* If it was **taken innocently, D must ask before using force.**
* If grabbed from D’s hand, they can use **reasonably required force** immediately.
* Facts of the case will decide how much force can be used
* There is a common law privilege to enter land **without using force**
	+ to recover a chattel that came there accidentally or was left by a wrongdoer. (bike)
	+ If the **occupier got the chattel unlawfully** and has **denies its return**, the owner could make a **forced entry**.
* Use of force in defending chattels is privileged under section 35 the criminal code.
* Once you are dispossessed, then probably don’t use force to get it back. Bring a legal action “conversion”. But if not, then there is a self-help remedy. If not for this remedy it will put original owner into the position of aggressor.
* If you accidently throw something on the other land, I can trespass to another person land to get it back. (Frisbee)
* Owner who recaptures a chattel does not need to pay for any improvements other party has made on it, even if the other party acted in good faith. But if the owner recovers the chattel through court actions he may need to pay for the improvements. Better view is owner can be held liable of unjust enrichment in both cases.
* If the originally were lawful possessor then later plaintiff can not use force to get it back, has to ask for use legal action.

*Creswell v Sirl (1948, CA)* Court held that defendant was privileged in shooting a dog if he had no other practical means of protecting his livestock from the attack.

##  Defence of Necessity

1. **Public Necessity (Apply typically to property and not people)**

Allows an individual to **intentionally interfere with the property rights** of another in order to **save lives or to protect the public interest** from external threats of nature like fire, floods and storms. It is a complete defence, no need to pay plaintiff anything.

***Surocco v. Geary (1853) US*? p. 266:** D destroyed P’s house, with good faith and apparent necessity to prevent the spread of a fire.Private interests are subordinate to the public interest, though **necessity must be clearly shown (necessity to be doing something has to be clearly shown, but in terms of the what you need to do, some leaveway as to what actually has to be done, has to be proportional)**. Court says it cannot be plaintiff who has to show there was necessity cos he will be favoring that it was not necessary. Plaintiff also could not recover for goods, which they otherwise might have saved.

***Lapierre Decision***: Plaintiff suffered severe reaction to an immunization and sued the government for damages. SCC refused compensation based upon Defence of public necessity.

1. **Private Necessity**

***Vincent v. Lake Erie Tpt. Co.* (1910) p. 240:** D moored boat at P’s dock to unload, storm developed, dock damaged. Even when the ropes were breaking, they kept tying ropes back to the dock. P respondent claims negligent in using exposed portion of dock and staying there through storm, claimed damages.

**Court (Majority**): We are not blaming you (actions were not blameworthy because of situation was beyond defendant’s contro)l. Necessity can override private property rights, but person doing so should compensate resulting damage. This is an incomplete defense: have a right but must compensate. Not certain what a Canadian court would do in these circumstances.

Lewis J dissents: If boat was lawfully in position then adding extra ropes does not make D liable for damage. Dock owner assumes risk when they hire out the dock. No Need to pay, it was an inevitable accident.

\*\*\*\* some ppl will also bring in disgorgement damages kind of the thing.

\*\*\*\*\* Duress phenomenon somewhat consistent with this concept.

***London Borough of Southwark v. Williams* [1971] Eng CA p. 239**: Homeless squatters can’t use necessity to justify entering vacant houses.

## Legal Authority

Courts routinely second guess police decisions and hold them to rigorous standards, especially after the charter

Criminal standard of arrest and civil standard of false imprisonment are different.

 Arrest: Touching a person body with a view of detention.

 False Imprisonment: Can even be impression created on the mind of the plaintiff that he cannot leave.

S. 32 of the charter says that it is only applicable on government actions and conduct of government department, agencies and officials.(police arrest: charter applicable, citizen arrest: not applicable)

Once a person proves charter violation, it is upto government to justify under s. 1. If it can not be justified under s. 1, then ind. Can pursue charter remedies

24(1) Any remedy considered appropriate by court: *Vancouver v Ward (2010, SCC)* court held arrest (for breach of peace) to be lawful, but for violation of charter rights (strip search and detention) awarded $100 (car search) and $5000.00 (strip search).

Initially courts were reluctant to award damages for charter violation, but *Ward* indicated that Charter damages can be actionable per se.

Courts can award substantial amounts for serious charter breaches in *Henry v British Columbia (Attorney General) (2015, SCC),* Plaintiff got awarded $8 million ($7.5 million for vindication and deterrence) for being wrongfully convicted for almost 27 years.

24(2) Exclusion of evidence in criminal cases

Section 52 consideration: if Police officer arrests under a particular provision of CC code that has been struck down for being unconstitutional, police officer has no defence.

**A test for legal authority:**

Authority and Privilege:

1. Did D have **legal authority** to undertake the act that gave rise to Tort?

Usually comes from

494(1) **Anyone can arrest** without warrant, a person whom they **find committing**, or has **reasonable ground to believe** **has committed** a indictable offence or escaping from a person who has lawful authority to arrest.

(2) **Person in legal possession** of the property or person authorized by a person in lawful possession of the property, can arrest of they find a person **committing a criminal offence** ON OR IN RELATION TO THAT PROPERTY

1. They can make the arrest at the time
2. Within a reasonable time after the arrest if they believe on reasonable grounds that it is not feasible in the circumstance for a peace officer to make the arrest.

(3) Anyone other than a police officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

495 (1) **A peace officer** (S.2 CC, police officers, sheriffs, mayors, commercial pilots but not security guard and private detectives) can arrest without warrant

1. A person who has committed an indictable offence or who, on **reasonable grounds, he believes** **has committed** or **about to commit** an indicatable offence
2. A person whom he **finds committing** a criminal offence

 (*R v Biron (1976, SCC)*: finds committing also means apparently finds committing)

(*R v PST (2009, NSCA)* “officer must be present and actually observe or detect the commission of offence and have objective basis for concluding that an offence is being committed).

1. A person in regards to whom he has reasonable grounds to believe that a warrant of arrest is in force within territorial jurisdiction in which the person is found.

*R v Burke (2009, SCC):* case of mistaken identity, court concluded not reasonable ground to arrest because did not investigate accused’s claim of mistaken identity.

1. Is defendant **legally privileged** that is protected from both civil and criminal liability in doing the act that gave rise to Tort?
2. Did D meet all the other **obligations** imposed upon him on the process (civil liability if they failed to inform the reason of the arrest and used excessive force)?

## Limitation Period

The basic limitation period in BC is 2 years after the day on which the claim is discovered (*Limitation Act*, SBC 2012, c. 13, s. 6(1)). There are special rules for torts against minors or otherwise lacking capacity.

# Damages

## Judicial and Extra-Judicial Remedies

* Injunction to stop an ongoing tort, eg. nuisance.
* *Quia timet* (“wherefor it is feared’) anticipatory injunction, often used to stop potential strikes
* Injunctions are equitable remedies, so discretionary, may not be granted if damages are an adequate remedy.
* Mandatory injunction--force someone to do something
* Specific restitution--give the property back
* “Self help” remedies, normally not encouraged by law

**Trifling Damages**: You should not have wasted anyone’s time with it, so court is not happy. Plaintiff is awarded like 50 cents, and no cost is awarded to the plaintiff even if he wins.

**Nominal (Token damages):** nominal actually means that its is just an acknowledgment of wrongdoing of defendant and vindication of the same. Awarded when the legal right is worthy of protection even in the absence of actual harm.

*Hodgkinson v. Martin [1929]* **Battery case** “Mistaken belief of fact”. Appellant put respondent out of office on mistaken belief and without unnecessary force. No lasting damage, nominal award of $10 given

**Compensatory** damages make good a loss. General objective of assessment damages is to put plaintiff in a position he was before he was wronged (Dodd Properties (Kent) Ltd. v Canterbury CC[1980].

They include:

1. **Special**, which have a precise amount, before trial cost.
2. **General damages** which have to be proved, eg. future income, pain and suffering.
	1. **pecuniary** losses (money, eg. lost income)
	2. **non-pecuniary** (capped at $300,000) losses, such as emotional pain & suffering, lost expectation of life, and loss of amenities.

**Punitive damages** are exceptional; the D must have done something really reprehensible, not just negligence. The judge alone decides.

*Whiten v pilot:* Insurer refused to pay plaintiff’s claim when their house destroyed by fire, saying that they have intentionally burned it down. This case stated

1. Punitive damages can be given in any category of tort
2. Only very serious misconduct warrants punishment, deterrence or denunciation and thus punitive damages.
3. Most likely to be awarded in intentional tort but can also be awarded in negligence, nuisance and other tort actions.
4. The fact that defendant has been punished criminally, does not preclude punitive damages, but rather it’s only a factor to be considered.
5. Should be awarded with restraint and then only if the award of compensatory and aggravated damages is not sufficient to accomplish the specific goal.
6. No fixed Ratios between compensatory and punitive damage and no cap on them, should be based upon the underlying goal.
7. Juries should be informed of the functions of punitive damages and the factors that govern the award and assessment.
8. Appellant courts can intervene if the amount is unreasonable (lowest amount possible to achieve the result)
9. This can be awarded under S. 24(1) of the charter if the court deems appropriate.

**Aggravated** damages: compensatory damage, but like punitive it is triggered by egregious acts. The way the D acted toward the P was so bad that it added to the additional injuries to feeling and similar feelings. Corporate clients not awarded aggravated damages as corporate plaintiff can not suffer from mental distress.

*Thomas Management Ltd. v Alberta (Minister of Environment Protection)* (2006, ABCA)

*Inform Cycle Ltd. v Rebound Inc.* (2008, ABQB)

***B.(P.) v. B.(W.)* (1992)**: D had sexually assaulted P, his daughter, through her childhood from age 5 and raped her when she was 20. D had pled guilty to incest but rape charges were stayed. Permanent emotional damage. Cunningham J awarded $100,000 non-pecuniary general damages, $75,000 aggravated damages, awarded $50,000 punitive damages because D had not been punished criminally for certain offences--criminal sanction and civil punitive damages would be double jeopardy.

***The Mediana* [1900]**: Mediana, a ship, hit a lightship which was replaced with a spare--minimal damage. Claimed for repair but also for cost of keeping a spare on hand. “Nominal damages” doesn’t just mean a small amount. In this case there was real loss, albeit small, so not nominal. Nominal damages would be a recognition of a tort even though there was no loss.

**Disgorgement Based** (Defendant centre but focused on gain he made): Return the profits you made off the use of plaintiff, even if plaintiff actually did not suffer any real loss. A tortfeasor should not profit from his own wrongdoing and the concept here is not the recovery for plaintiff but striping defendant from his profits. Typically, some kind of commercial gain, such as someone reading your personal diary and sell it as tell all book. You can allege both compensatory and Disgorgement but can get only one. Plaintiff can get a windfall. To Deter Behaviour.

*Edwards v Lee’s Administrators (1936)*: Cave business on plaintiff’s property, he Brought action for trespass and injunction to stop. Court held D as trespasser, gave injunction and asked him to share percentage of his benefits. “People should not profit from their own wrongdoing” (Attorney General v. Guardian Newspapers (No. 2), [1990] 1 A.C 109 at 286

*Penarth Dock Engineering Co. Ltd v Pounds* (1963): Plaintiff sold a pontoon and defendant didn’t pick it up for about 9 months. P sought disgorgement.

**Court**: No damage suffered by the plaintiff but the test of measurement of damages is not what plaintiff lost but what benefit the defendant obtained.

**Restitution or unjust enrichment**: Separate cause of action, neither a type of tort nor category of contract. If accidently you are profited by plaintiff’s mistake and plaintiff is able to prove that a) there was enrichment of the defendant b) there was corresponding deprivation of the plaintiff c) the absence of any juristic reason for enrichment (it was a mistake). The defendant will have to give back what he gained and plaintiff can not get back anything more than what he lost.