**DEFENCES**

**3 main forms of defenses: Consent, Defences related to protection of person and property and defences arising from legal authority.**

**Duress** is never a defence to Intentional Torts but can deal with consent.

Mistake = intend the consequences but consequences have different factual or legal significance than contemplated.

**Provocation** (*Miska v Sivec*): Not a defence but can affect damages awarded.

1. Losing self-control: Subjectively (I lost my power to self-control), but objectively also (a reasonable person would have lost control)
2. Immediately-just prior to tort

Inevitable accident = no intent at all, unintentional and without negligence.

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| Defence | Requirements | Cases |
| Provocation | 1. Conduct of Plaintiff must be such as to cause defendant to lose all power of self-control (would a reasonable person have lost self-control) 2. And must have occurred at time or shortly before assault (Miska v Sivec)   In Ontario only reduces punitive and aggravated not regular compensatory damages! |  |
| Consent | -Consent can be defined as the voluntary assumption of risk  -Consent must be framed narrowly in terms of whether P consented to the specific act that gave rise to his or her tort action.  -Consent may be given by P explicitly (words, writing, gesture) or implicitly (demeanor, behavior).  -When a person consents to an act, he or she is generally viewed as consenting to the risks normally inherent in the act, but this can be difficult to apply to all cases.  -In terms of potentially violent/dangerous group activities like sports, the courts have held that normally, those engaging in a sport imply their consent to the ordinary risks of the sport (*Wright)*, however, where the conduct exceeds consent (i.e an intent to injure)*,* this defense is not likely to succeed (*Agar)*.  **Competency to Consent**  -In order for consent to be valid, the person giving it must be capable of **appreciating the nature** and **consequences of the act** to which it applies.  -if person cannot make such a determination due to age, phys/mental illness, intoxication or other factors, consent will be invalid.  -fact that courts may view someone’s decision as unreasonable is not necessarily relevant.  This is a broad requirement, so as to safeguard autonomy.  -In some cases, statutes deem certain individuals to lack capacity to give valid consent for specific purposes (ie *Criminal Code* for minors-sexual assault etc.). | **Implied Consent:**  *Wright v McLean (1956)kids playing*  *Those engaging in* ***sport*** *imply their consent to the ordinary risks of the* sport.  *Nelitz v Dyck (2001, CA)*  “*from Objective manifestation of consent, consent can be implied”*  *Elliot and Elliot v Amphitheatre*  You consented by being there and knowing about the risk (P amateur hockey player).  **Exceeding Consent:**  ***Agar v Canning (1965), 54 WWR 302 (Man QB)*** *hockey game*  *Consent does not give blanket immunity from liability if there is deliberate intent to cause injure*  Basically can’t consent to this kind of serious bodily harm.  *Jobidon*: Consent to assault in a fight vitiated if serious bodily harm is [both intended] and caused. |
| **FACTORS VITIATING CONSENT**  Once D establishes that the P consented to the act giving rise to the tort, P may raise factors that vitiate his or her consent. If consent is vitiated, D will be held liable as if no consent |  |
| 1. **FRAUD**   where the defendant knowingly makes a false statement; makes a statement in total disregard as to its truth; or knowingly creates a misleading impression by omitting relevant information. (dishonest act)  **Modified** **Test** **for Fraud (***Mabio*r): 1) **Dishonest act** (lie or omission) 2) **deprivation to victim** (Now includes risk of serious bodily harm)  **To be vitiated**:   1. Must establish that the Defendant was aware of/responsible for P’s misapprehension 2. Fraud will only negate consent if it goes to the nature and quality of the act (construed narrowly – includes serious bodily harm)   **Fraud vitiates consent when:**   * Goes to the nature and quality of the act (Williams) * Deals with the identity of the accused (Crangle) * Or poses a risk of serious bodily harm. (Mabior)   **Sexual Acts**: As long as the P is consenting to a sexual act, there is valid consent (*Hutchinson*), however, it can be negated by the fraud. | **FRAUD:**  HIV cases - *Cuerrier ->* updated by *Mabior* – fraud as to the possible harmful consequences of an act will negate consent if the fraud physically harmed the complainant and exposed them to a serious risk of bodily harm.  *R v Williams*  Singing teacher made student perform oral sex saying it would help her singing. (nature and quality of the act)  *R v Hutchinson* (2014)  Accused poked holes in the condom and the complainant became pregnant. The SCC unanimously upheld the accused’ conviction for aggravated sexual assault, but on different bases.  Majority: Consent to physical act -> deception negated consent -> took away her choice to become preg - serious bodily harm from pregnancy – went to nature and quality of act as well  Minority: no consent 2 unprotected sex -> no consent -> H guilty. |
| **Mistake:**  Situation 1: D had mistaken belief that there is consent  Situation 2: consent given based upon mistaken belief | Situation1 case  *Toews (Guardian ad Litem of) v. Weisner (2001, BCSC):* Nurse thought plaintiff’s mother had consented for vaccination. P awarded $1000.00 for battery (no harm)  Situation 2 case: *Guimond v Laberge [1956] Ont CA ”*  **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. |
| **c)DURRESS**  Duress is NOT a defence but can (*Latter)* Instead it is a factor that can vitiates consent. | **DURRESS:**  ***Latter v Braddell [1880]:* Maid forced to undergo pregnancy exam. Sued for battery. D claims consent.**  **Majority: did not find duress**  **Minority: duress vitiated consent**  **Probably would be decided differently now.** |
| **d)PUBLIC POLICY**  The courts have increasingly recognized public policy considerations in negating the defense of consent*)*.  *Nelitz v Dyck (2001, CA)***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)  *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. | **PUBLIC POLICY:**  *Norberg v Wynrib* [1992]–doctor offered to supply an addicted patient with prescription narcotics if she submitted to his sexual advances. She reluctantly agreed after failing to secure the drugs.  Majority: this is a BATTTERY power balance in this unequal relationship -> made it impossible to meaningfully consent  Minority 1: breach of contract  Minority 2: breach of doctors fiduciary duties |
| **Consent to Treatment, Counselling, and Care**  **If someone isn’t consenting with full information = negligence**  **If there is no consent at all = Battery**  -General rule, health, counselling and care professionals must obtain consent to initiate any physical examination, test, procedure, surgery, or counselling. The *Health Care Consent Act (1996)* codifies common law treatment for consent  s. 26 – accepts that people can ahead of time accept not to receive treatment  s. 11(3) lays out what needs to be disclosed  **1)**The consent must be obtained in advance.  \*Patients can express a wish ahead of time. Jehovah witness cards, DNR’s, etc s.26 HCCA.  **2)**The consent must be for the specific procedure/treatment But must also cover related issues like records.  **3)**if patient competent to give valid consent, then only their consent required. Consent of next-of-kin only required if patient incapable of consenting. (even here there are limits) see below.  **4)**consent must be given voluntarily – as in must be product of patient’s conscious mind. If patient in a lot of pain or intoxicated this can be example of lack of volition.  **5)**In CL consent had to based on full frank disclosure of nature of intervention and its risks (these are things very likely to happen). But increasingly discussion of risks/benefits of alternatives is also required.  **6)** Consent can be given explicitly or implicitly (by participation, behavior or demeanor)-that fact that patient makes appnt and comes to it is a broad measure of consent.  **7)**Patients can seek treatment but expressly limit scope of their consent. Patients prohibition cannot be ignored.  **a)Exceptions**  Traditionally, the courts have relaxed the strict requirement of consent in three situations:   1. Unforeseen medical emergency where it is impossible to obtain patient’s consent (Marshall v Curry)    1. Healthcare professional can intervene w/o consent (ie in emergency room)    2. Applies to public first aid responders 2. General consent to a course of treatment, a treatment plan or an operation    1. A patient will be viewed as implicitly consenting to the agreed course of treatment, treatment plan, or operation    2. However implied consent is negated if patient expressly objects 3. Controversial. Healthcare profs have a right to withhold information from a patient if its disclosure would undermine the patient’s morale and discourage him or her from having needed treatment or surgery. “therapeutic privilege to withhold info” – paternalistic.    1. In two conflicting cases, the SCC cast doubt on the continued existence of the privilege (*Hopp v Lepp* [1980] and *Riebel v Hughes* [1980]    2. May apply in cases where patient says please don’t tell me.    3. Been rejected as per Meyer Estate or narrowed by Pittman estate   **b)Burden of Proof**  For the healthcare professional to prove on a balance of probabilities that they consented.  Use forms – but forms can be not useful if individual did not understand the nature and consequences of having/refusing treatment.  Common law threshold: **ability** to understand **nature and consequences** of having or receiving treatment.  No Age of Consent but different provinces have different rules.  can also be problematic if P is intoxicated, drugged, or in severe pain while signing the form.  **c)Competency/capacity to consent**  -The CL test focuses on patients’ **ability** to understand the **nature** of proposed treatment and its risks. We don’t look at their ability to make a prudent decision. This is to safeguard individual autonomy.  -If the patient is competent to give consent, it is only his or her consent that is required.  -Competency is decided on a case-by-case basis, given risks of treatment. Patient may be competent to make some treatment decisions but not others. Similarly patient may be competent to make some treatment decisions but not others.  -The patient may be competent even if intoxicated, young, immature, or rash; broad common law test. Patients may be competent at one time, but not another.  -Just because someone has a mental illness does not mean that they cannot consent.  i)Minors:  While there is no minimum age of consent at common law for medical treatment, almost all of the reported cases involve patients who are at or above the age of puberty. If a young person is able to understand the nature of the proposed procedure and its risk, his or her consent is valid and parental consent is not required or relevant. Health professionals can encourage a competent youth to involve his or her parents, but cannot disclose information to the parents without the youth’s consent, except in narrowly defined circumstances. Some courts use the “**mature minor rule”,** which relies on indicia of independence and maturity as a guide to the youth’s competency (*Wren)*. Some provincial statutes contain minimum age requirements for consent to specified procedures, tests, and counselling (*AC v Manitoba)*. Court decisions have come down on both sides of the issue, as it is difficult to balance the competing interests to determine the best interests of the child. The contrasting *Wren* and *Manitoba* display that these parties include child welfare authorities, courts, healthcare professionals, and parents.  \*\*Ontario maintains mature minor rule – practically speaking however they probably involve parents in discussion.  If child is not competent, then their substitute decision maker is most likely their parents. But a child can challenge assessment that they are not competent. The Consent and Capacity Board will deal with this.  ii)Adults  -most often arises when patients have mental illnesses, or something like. However, the patients may not necessarily lack competency to consent, or to refuse consent. Healthcare profs must start from the assumption that the patient is competent then assess their competence wrt specific treatment decision.  -these principles apply equally to those in custody or other legal restraints unless statutory auth says otherwise.  **d)Substitute Consent:**  Some patients, such as young children, are clearly incapable of giving valid consent to treatment. The practice in such cases has been for healthcare professionals to obtain substitute consent from patient’s next-of-kin. The courts have upheld the validity of consent provided a**) the patient was incompetent, b) the next-of-kin acted in good faith and c)the decision was in the patient’s best interests.** In terms of fetus’, in Canada, it held that they have no independent legal personality.  \*if sub decision maker does not consent – e.g. is a Jehovah’s witness, child services can assign child as a temporary ward of the state. Usually when the SDM is making a decision where child’s life is at risk. | **Consent to Treatment, Conselling, and Care:**  Exceptions  ***Marshall v Curry***  **Facts:** C operated on M to cure a hernia. During the operation, C found problems with M’s left testicle and decided to remove it to save him. M sued C in battery for removing the testicle.  **Ratio*:*** In a medical emergency where it is impossible to obtain a person's consent, health care professionals may intervene to save that person's life.  ***Malette v Shulman(1987 – SCC)***  **Facts:** M is injured in a car accident, and is unconscious. Dr. S administers blood transfusions to save her life, despite being aware of M’s religious objections to blood transfusions as a Jehovah’s Witness.  **Holding:** D liable – He knew beforehand; she was carrying a card showing her beliefs  **Ratio:** when you consent courts care about if you understand consequences but don’t care about the wisdom of those decisions. Respects bodily autonomy.  --  Competency  ***C v Wren (1986), 35 DLR (4th) 419 (Alta CA)***  ***Facts:*** About the competency of the expectant mother to consent to the proper procedure: 16-year old girl became pregnant by her boyfriend while living at home. She moved out of her home, and saw a physician to see about getting an abortion. Her parents sued the doctor.  ***Ratio:*** Age is not a barrier to consent; all that matters is that **the person is able to understand the risks and benefits of treatment**. “Mature minor rule”  ***Analysis:*** Kerans J: Parental rights to control their child diminish as the child ages and becomes capable of making his or her own decisions (the "age of discretion"), and when the child achieves sufficient understanding and intelligence to understand fully what is proposed. In his context understand fully means understanding things likes obligation to parents as well as medical matters.  *A C v Manitoba* (contrast with *Wren) (goes against general rule) (SCC)*  *Statue trump common law*  **Facts:** P had Crohn’s disease -> internal bleeding -> 14 y old. Drs said he needed blood transfusion. She was a Jehovah’s witness, a religion that forbids blood transfusion. Both her and her parents objected. Passed ‘mature minor’ competency test. Was passed by 3 psychiatrists that she was competent to consent.  *Child and Family Services Act* s. 25(8)set out different rules for children under 16 and over 16. Below 16, the court can order treatment in the **best interests of the child**.  **Ratio***:* a province can change the rules accordingly.  *Hamilton Health Services Corp v D.H (2014)*  **Facts:** the mother of 11 yr oldAboriginal child with cancer withdrew child from chemo treatment and took her to florida for alternative treatments. Young child -> issue with child welfare -> was the mother making the correct decision for the child?  **Court**: mother acting in a culturally appropriate way and was was loving -> child should not be a ward of the state / S.35 of constitution -> aboriginal rights  There has been a lot of criticism because is one culture better than others? This is a leeway given to aboriginal people.  In Canada, we don’t go against the wishes of the mother to save the baby. In America they will. (ex. get a c-section)  Ex. James schizophrenic she refuses medicine becasueshe forgets and tells to force wheed when in episode   * Controversial because health services act only talks about anticipatory refusal to consent not an anticipatory yes, so can she consent? * Need power attorney or substitute decision maker. |
| Protection of Personal Property | Self-Defense  Establish on a balance of probabilities:  a) They honestly and reasonably believed that they were about to be struck (reasonably necessary)  b) The amount of force that they used to protect themselves was reasonable in all circumstances (reasonably proportionate – however does not have to be in exactitude or nicety (Wackett))   * An individual’s right to invoke self defense ends once the danger has passed. This is a complete defense, Once successfully invoked, D is absolved of liability * Has to be for protection not revenge. * When can you use lethal force? When reasonable in circumstances. In USA, you can use it in your house but not in Canada. * Criminal Code s. 34 – look to size, age, gender + physical capabilities for defense. * Pre-emptive Force? When it is reasonably believed you’re about to be stuck. (Lavalle) * When looking at proportionality, we’re only looking at actions not the results (Brown)   Defense of Third Parties:  You can intervene if   1. you see a stranger about to be harmed and you honestly (though can be mistaken and somewhat reasonable) believe that the other person is in imminent danger (Gambriell). 2. Force must be proportional and reasonable   In other words: Necessity of the intervention AND reasonableness of the force employed is for the trier of fact to decide (*Gambrielli****)***  Discipline:  Although attitudes and values change over time, common law still recognizes a defense of discipline that parents and guardians can invoke to privilege the use of force in dealing with children. A similar defense to criminal liability exists for parents, guardians, and educators in s. 43 of the *Criminal Code***.** Courts have largely assumed that s.43 covers both the criminal and the civil defenses of discipline.  Needs to be by way of correction not to be used as punishment.  Test:  1)was it by way of correction,  2) was the force used reasonable in the circumstances.  To determine if it’s reasonable look to nature of offence, age + maturity of child, effect of this on kid, potential for injury. (Dupperon).  Teachers, parents and people standing in loco parentus can use this defence. But in light of SCC decision, **only parents** should really use this defense. Teachers can use battery to break a fight though.  Teachers under the *Education Act* have significant powers, more so than allowed under the crim code provision (s.43)  Parents can rely on the principle of de minimus – basically use minimal force. | ***Wackett v Calder (1965), 51 DLR (2d) 598 (BC CA)***  ***Facts:*** Wackett attached Calder outside a bar. C retaliated with 1 punch; turned to go back inside but got attacked again by W. C retaliated with 2nd punches, one of which was fairly injurious to W. C remained unharmed. W sued C for battery  ***Issue(s):*** Did C act in self-defence? Was it a reasonable use of force?  ***Ratio:*** **An act of repelling an (apprehended) attack does not need to be measured with complete exactitude or nicety. (tends to be spur of the moment thing)**  ***Holding:*** Appeal allowed. C acted in self-defence.  ***Brown v Wilson (BC Superior Court) (1975)***  We don’t care about the resultant injuries we’re just looking at if the force was excessive.  ***R v Lavallee (1990) Supreme Court***  Battered woman shot her partner as he was leaving a room. She said he’d beat her if she didn’t kill her because he had said “I’ll kill you if you don’t kill me.” Psychiatrist said that a battered woman like her was making a desperate plea to get out of this situation because she thought she’d be killed. On that basis they acquitted her.  -----  ***Gambriell v Caparelli***  ***Facts:*** C’s son was attacked by G. G was restraining and choking him when C (mother) discovered the assault. She grabbed the nearest object (garden tool) and struck G with it until he started bleeding and stopped choking C’s son. This resulted in serious injury, so G sued C for battery  **Held**: for C. was a cool and collected women, used reasonable force, G did not suffer much harm. Judge said even if had found for G, would have awarded only $1.  ***Ratio:*** Defence of third parties is a defence at common law, if th**e opposing force is reasonable in the circumstances.**  --------  ***R v Dupperon***  **Facts:** D, a father, appealed his conviction for assault causing bodily harm of his 13-year-old son. He hit son with leather belt 10 times on butt causing bruising. Found guilty. The issue was whether the father was justified in his use of force.  **Held:** CA dismissed: substituted verdict to assault causing bodily harm. Judge “10 strokes is severe beating, particularly in this circumstance when it was on an emotionally disturbed boy” so force used not reasonable.  ***R v Wetmore 1996***  **Facts**: Wetmore taught 10th grade, several students obnoxious and disruptive. W held karate brown belt, called troublemakers in front of class-said he was going to do a demo. Threw kicks and punches at students, there was some touching but contact was minimal with no harm. Charged w/ assault.  **Held**: A acquitted, actions were reasonable given troublemakers conduct, and need to teach them respect for authority.  ***Constitutional challenge to s.43 in Canadian Foundation of Children & Law (SCC)***  **Held:** that was constitutional  **s.12:** (cruel and unusual punishment): does it apply as its parents punishing and not the state? M, Binnie, Arbour, Deschamps all held that it didn’t violate s.12.  **s.7:** crown conceded that s.7 was infringed, but in line with PFJ. M for majority spent time setting parameters for when discipline can be use, so s.43 is not vague or overbroad**. E.g. cant strike children with implements, cant strike older teens as does not have disciplinary purpose and causes antisocial behaviour, has to be minimal.** .**Can’t strike children under age 2 because cannot be corrected**. Arbour disagreed, said should look at what provision says and not write it up.  s.15: on the face of it provision seems to discriminate against young people. But equal treatment under law does not mean same treatment. McLachlin said young children need correction. Binnie disagreed, said s.15 violated, but saved by s.1 for parents only.. Deschamps focused on de minimus principle – minor incidents of battery against kids don’t matter. |
| Protection of Real Property | -Honestly believed about to be an issue (reasonably) – from self- defense  somewhat like self-defence except law more stringent with amount of force. Has to be justifiable, proportional, and protect occupier of property (does not need to be owner).  - can have overlap with self-defense e.g. intruder in your house.  **Available when**: Defendant is lawful occupier of property, can be used to eject trespasser or to prevent entry of trespasser, superseded by public necessity.  **Request to leave?**  If trespasser is peaceful: must make request to leave.  If trespasser forcibly entered: Don’t need to make request to leave.  **Can force be used?**  If trespasser is peaceful, he/she must be given a reasonable opportunity to leave. (Hees)  There is a common humanity duty for even trespassers. You can’t have lethal force to protect property. (*Bird*)  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.  **1)**Trespasser cannot be forcibly repelled or ejected until they are requested to leave and reasonable opportunity to do so has been given to them.  **2)**Even then the amount of force has to be reasonable. (*Hees*)  When intruder enters forcefully, the **occupier** may use force immediately (*Macdonald v Hees)*. | ***MacDonald v Hees (1974), 46 DLR (3d) (NS TD)***  **Facts:**  P claims against D for injury, loss, and damage from assault. P while looking for D knocked on door, thought he was invited in, entered the premise and without hesitation was forcibly ejected by D. While being ejected he was pushed back such that his head broke the screen door glass, cutting the back of his head. D in his defence, denied any assault; and if he did use force, it was justified in law due to the unlawful entry of the P and invasion of D’s privacy.  **Held**: for P, as force used was excessive, and P not even given a reasonable opp to leave.  Ratio: **1)**Trespasser cannot be forcibly repelled or ejected until they are requested to leave and reasonable opportunity to do so has been given to them. **2)**Even then the amount of force has to be reasonable.  ***Bird v Holbrook (1828), 4 Bing 628, 130 ER 911***  ***Facts:***  Holbrook (D) had a walled garden with valuable tulips. It had previously been vandalized, so D set up a spring gun with trip wires in the garden. D had no notice of danger posted. He kept it secret "lest the villain should not be detected." Bird (P), in attempting to retrieve a lost hen, climbed the wall and called to D. Having heard no answer, P jumped down and was seriously wounded by the spring gun.  **Held: that D was not trying to protect property, but hurt ppl**  **Ratio: You have a duty of common humanity so can’t have lethal force and if force is preventative have a sign of warning. (beware of dogs, etc/ )** |
| Defense of Chattels | Basically apply when trying to get something that belongs to you back, immediately and have to use reasonable force to do so.  The legal principles governing the defence of real property generally apply to the defence of chattels. In order to invoke defence, D must be:   * + Attempting to immediately regain possession, or   in hot pursuit of a person who has just taken the chattel  You must request for it back if they took it from you innocently.  Force is allowed but it needs to be reasonable in the circumstances.  if someone lawfully comes into possession of your chattel (e.g. you loaned it to them) you have to use peaceful means to get it back which includes a request.  However, if a person grabs the chattel out of the defendant’s hand, the defendant can use force to retrieve it without first making a request for its return.  -The specific facts of the case dictate whether the possessor is privileged to use force and whether the force used was reasonable.  --Lawful possession does NOT turn into unlawful possession if you request the thing back.  -Right to use force limited to when an indiv who wrongfully gained possession refuses to hand it over after being requested to do so.  -Once you are dispossessed for a while you cannot use force to get your chattel back. Then have to use remedy of recaption. |  |
| Defense and Recaption of Chattels | Places the dispossessed owner in the role of a potential aggressor who is attempting to regain possession of the goods from another person  -As a result, this remedy is narrowly defined -> may only be invoked by an individual who has an immediate right to possession, and then only after a request has been made for the chattels’ return  **When to Use?**  After defendant has been dispossessed of the chattel  Not available against third-party who has come into possession of property in good faith  **Request?**  Even if unlawfully possessed.  **Force?**  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).  There is a common law privilege to enter another’s land to recapture chattels in limited circumstances:   * + If the chattel came onto the land **accidentally** or was left there by a wrongdoer, the owner could enter the property to retake his or her chattel, provided he or she did not use force or cause a **breach of the peace**   + But if you cause damage to that person’s property while retrieving your property, you are responsible   + If the occupier of the land came into possession of the chattel **unlawfully,** its owner **could make a forced entry** if his or her request for its return has been denied | *Cresswell v Sirl* [1948] - the court held that the defendant would be privileged in shooting a dog if he had no other practical means of protecting his livestock from attack (from notes) |
| Public Necessity | The defense of public necessity allows an individual to intentionally interfere with the property right of another to save lives or to protect the public interest from external threats of nature, such as fires, floods, and storms.  -The necessity of something must be **clearly present** BUT what the defendant does in respect is regulated by judgment (*Surrocco v Geary*)  -this action must be “**truly necessary**” to avoid imminent peril (*Surroco v Geary)*.  -If a reasonable mistake depending on the circumstances is made, then no liability follows. (*Surroco*)  It also needs to be a somewhat proportional response (*Surrocco*) ex. if it’s a small fire, can’t blow up the house.  -Public necessity provides a **complete defense** privileging both the interference with the plaintiff’s legal rights to property and any damages resulting from it.  **\*tricky matter, in that whose version of necessity applies, but necessity must clearly be shown**  \*Cant kill someone for public necessity though. (Stevenson) | ***Surocco v Geary (1853):*** P’s house and property were destroyed when they were blown up during fire. Judge noted clear evidence that if the house not been blown up the street would have been consumed by fire. D destroyed property to prevent fire from spreading. In this case, the action was clearly necessary; also, the property inside was not recoverable, its removal would have delayed demolition.  *Lapierre v A.G. Que SCC 1958*  **Facts**: 5 yr old totally incapacitated after reaction to mandatory immunization program.  **Held**: neither manufacturer not administrator of serum negligent – girl’s actions dismissed.  **Reason**: program as a whole saves lives and reduces illnesses caused by infectious diseases. – govt successfully argued public necessity. However, in this case gave damages for the loss.  W v Stevenson – ate their friend for “necessity” they claimed because were stranded somewhere. |
| Private Necessity | -The defence of private necessity can be used against charges of trespass where a defendant interferes with a plaintiff's property in an emergency to protect an interest of his own.  -Private necessity does **not** serve as an absolute defense to liability for trespass. It serves as a partial defence.  -you are required to compensate to some extent the P, whose private property you used. (*Vincent*)  -Moreover, is only a defense if peril is imminent; and if you preserve your property at the expense of another person's property without “threat or menace from the plaintiff’s property or an unavoidable incident due to the act of god”, that constitutes trespass and you are liable for the damage. An issue that can be considered is if the defendant took reasonable care (*Vincent v Lake Erie)*  In shipping cases generally, when have to throw stuff overboard, try to equalize it between everyone. | ***Vincent v Lake Erie Transportation Co***  ***Facts:*** D owned “Steamship Reynolds”, moored in P’s dock to unload cargo. A storm developed, by the time unloading finished, it was violent with 50 mph winds and continued to grow. Navigation was practically suspended for over 24 hrs. D had tried to secure the tug after unloading, but could not due to the storm. D decided to keep lines fast to the dock. The ship was violently thrashing and damaged the dock. At trial, the jury awarded $500 for damage to dock.  ***Analysis:***  O'Brien J: → It would have been highly imprudent for D to attempt to leave the dock or permit the vessel to drift away. → D was not required to use the highest human intelligence, nor to resort to every possible experiment which could be suggested for the preservation of their property. The **standard is ordinary prudence and care --** holding the vessel to the dock met that standard. → Ordinary rules regulating property rights were suspended by forces beyond human control. → If boat had not been lashed but thrown into the dock, D would not have been liable; if while attempting to hold the ropes had broken and ship damaged other dock/boat, D would not have been liable. → However, **because D was holding the boat to the dock, and it damaged the dock to preserve the boat, its owners should be responsible for the damage.**  Lewis J (dissent): → Boat was in lawful position when the storm broke. → D could not leave the position without subjecting his boat to the hazards of the storm, and the damage to the dock was the result of inevitable accident. → D exercised due care, not his fault. → If one cannot, while exercising reasonable care, anticipate the severity of the storm and sought safe place before it became impossible, why should he be required to anticipate the storm? |
| Legal Authority | -Most commonly associated with false imprisonment but may also be raised in actions for battery, trespass to chattels, conversion, trespass to land, and other intentional torts.  -For these IT’s, the remedy is damages as of right, and can be substantial.  -The defence of legal authority is also largely brought in response to a claim under the *Charter* under s.8 (unreasonable search and seizure), s.9 (arbitrary detention), and s.10 (rights on arrest and detention) a) right to know the charge b) right to counsel.  -The remedy here is sought under s.24(1) “if charter rights are infringed, an **appropriate and just** remedy is given.” Under s. 24(2) **exclusion of evidence**, when evidence is gathered in violation of your charter rights. It’s more of a balancing act. And finally, s.52 which is the supremacy clause. Anything against it is of no force or effect.  \*general rule in Canada is that you need a warrant for search/seizure unless there is stat authority stating otherwise. S.8  \*s.9 detention is defined broadly. Could last for 10 mins and still be detention.  Defence of Legal Authority   1. Was D’s act legally authorized?  * Either through statute (Crim Code) or common law * See ss. 494, 495 (on page 265)  1. Was the D legally privileged (protected from both civil and criminal liability)?  * Excessive force would come into play here (may have authority but level of force not privileged) * S. 25 🡪 protects peace officer from civil actions if i)reasonable grounds, and ii)use reasonable force (see next column for deets) * Were there reasonable grounds for using the force? * Okay if use reasonable force and come to unreasonable outcome – can still use this defence  1. Did the D meet all other obligations imposed upon him or her in the process (required elements)? E.g. tell them what they were charged with etc.   **Charter Violation**   1. Plaintiff Establishes Charter Violation   A *Charter* violation is a tort in the sense that it is a wrong, but it is not the same as other personal injury torts. *Vancouver (City) v. Ward* (2010) SCC provides the framework for how to establish this tort:   1. Show that a *Charter* right has been violated, 2. Defendant has to show that not saved under s.1 3. Damages exist:   On a functional approach the damages must serve a useful and functional purpose (compensation, vindication, deterrence)  Notably, Charter damages are typically much less than tort damages.   1. Defendant may use Defense of Legal Authority   3) Remedies the Courts may apply if Defence fails:  S. 24(1) – appropriate remedy for breach of *Charter* rights 🡪 can include damages (overlap with tort), declaration  S. 24(2) – exclusion of evidence  S. 52 – constitutional supremacy clause – can be used to declare laws “of no force and effect”  Section 24(1):  If a person’s *Charter* rights are violated, they may seek a remedy under s. 24(1). Unlike in a common law tort action, an aggrieved party has no right to a damage award under s. 24(1), rather it is simply one of the remedies that a judge may consider granting However, serious *Charter* violations resulting in significant harm will give rise to substantial damage awards (*McTaggart v. Ontario* – Officers intentionally hid evidence that would have proved innocence)  Charter Damages(Vancouver v Ward)   1. Must advance Charter Goals – compensation, vindication, deter future violations 2. State may raise countervailing factors (effect on public purse) 3. Good faith of plaintiff   Based on Textbook:   1. his or her charter rights violated 2. damage award must advance Charter goals by compensating plaintiff for a personal loss resulting from violation, vindicating breach, deterring future violations. 3. May attempt to establish countervailing actor warrants refraining from awarding damages    1. Another remedy    2. Unduly interfere with good governance 4. Amount should reflect purpose of award having regard to impact of breach on plaintiff   Section 24(2):  A person can seek a claim under s.24(2) to have evidence excluded if their *Charter* rights are violated. This has commonly been done under s.8 claims, where evidence is obtained by unreasonable search or seizure (*Caslake*).  In Canada, evidence is not excluded often. The courts attempt to balance the unreasonableness of the search with the administration of justice.  The only time it is usually excluded is if it is bodily invasion.  Section 8:  When evaluating the validity of s.8 (unlawful search and seizure) claims, courts can look at whether there was common law power to search pursuant to lawful arrest  Common law Power to Search Pursuant to a Lawful Arrest  **1)**Must be pursuant to lawful arrest – basically can’t be arrested w/o warrant or unless there were reasonable grounds.  2) the search is discretionary, police have no obligation to search someone on arrest  3)must have valid obj relating to crim justice e.g. safety, safeguard evidence, prevent escape. Cannot be to humiliate someone. Cannot be conducted abusively, must use reasonable force. Just because someone is arrested does not mean that they lose all their rights. (Caslake)  **Now that common law authority established, can resort to the remainder of the test for Legal Authority**  Section 52:  Section 52 provides that any law that is inconsistent with the *Charter* will be of no force and effect to the extent of the inconsistency.  Initially, the courts were reluctant to award damages for the *Charter* violation itself, and required the plaintiff prove an actual loss. More recently, it has been held that proof of actual loss is not required. This does not apply to private actors.  **Auth and privilege to arrest w/o a warrant**  -in such cases peace officers and private citizens have to prove the specific act that gave rise to the tort action was authorized by CL or statute.  -such authority is not granted lightly. Indivs have no general obligation to stop, id themselves etc. or co-operate  -Indivs are allowed to use force to resist unauthorized police conduct, but this carries legal risks. If police action is lawful, then indiv may be criminally liable for resisting under ss. 129(a) and 270(1)(a)  - This usually comes up in battery claims and false imprisonment  **A Peace Officer’s Power to Arrest Without a Warrant**  -Under s. 2 of CC the term “peace officer” is defined to include police, sheriffs, mayors, commercial pilots, fishery officers and others. Does not include security guards or private investigators.  -They are entitled to invoke powers in both ss. 494 and 495. -Given broader authority than private citizens.  -**S. 495(1)(a)** authorizes arrest of anyone whom PO’s have **reasonable** **grounds** to believe **has committed or** **is about to commit an indictable offence**. In this, s.495 has a preventative function.  -s.495 also allows PO’s to arrest w/o warrant a person **“found committing**” a **criminal** offence  *-Biron* caused SCC to interpret “finds committing” to include **“apparently finds committing”,** giving PO’s more power to act where they have reasonable grounds to suspect criminal conduct.  - You are under no obligation to cooperate with a police officer (Koechlin)  - in Biron stated that peace officer whose actions were not authorized may nevertheless be privileged under s. 25(1) if he or she made a mistake of fact and acted on reasonable grounds.  Frey said not privileged if made mistake of law.  **Now that statute authority established, move on to the rest of the test of legal Authority**  Police officer right to use lethal force  1) Only on a fleeing dangerous suspect who cannot be stopped by less lethal means  2) Must have reasonable belief suspect going to cause imminent harm  3) only for dangerous criminals  **A Private Citizen’s Authority and Privilege to Arrest Without a Warrant**  -For private citizens, the most important provision is s. 494 of CC: which is considerably narrower than powers of police officer.  -the courts are more stringent about citizen’s arrest, there is a higher standard of correctness required.  -Citizen’s arrest was canvassed in *Chen*, following with parliament legislated with *Citizen’s arrest and self-defence act.* (see the next column)  3 situations under which citizen’s arrest: CC 494  1)if someone is found commiting indictable offence. Find committing is “apparently” usually but in citizen arrest you need to be more certain (Biron)  2)reasonable belief committed criminal offence and is escaping from and freshly pursued by persons who have lawful authority to arrest that person.  3) offence on your land  Added to the third part after R v .Chen   1. They make that arrest at that time 2. They make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the request.   You need to hand them over to the authorities right away!  **Now that statute authority established, move on to completing rest of test for legal authority.** | *Vancouver v Ward*  **Fact:** P was at a parade. Police had tip that someone would throw pie in prime minister’s face. P mistakenly suspected. When police tried to stop him he tried to run away. He was in lockup, standard policy of strip-search observed. He brought s.8 claim for damages under 24(1)  **Ruling**: cops following established policy, ward unsuccessful.  **Ratio**: principles of charter damages in such cases established  *R v Biron SCC* - Finds committing = “apparently finds committing”  **Facts:** B was charged with creating a disturbance in a public place (dismissed at trial) and resisting a peace officer. B was a patron in a bar that police raided. B refused to cooperate by verbally abusing them and refusing to give his name. B was arrested in the bar and taken outside where refused to get into the police wagon and had an altercation with another police officer.  **Note**: Laskin strongly dissented, that majority’s position unnecessarily expanded police powers.  ***R v Chen*, 2010 ONCJ 641 “finds committing’**  **Facts:** C and 2 employees working at store. A criminal stole his plants and escaped on bike. He came back 1 hour later. They caught him. Tied him up. But him in back of truck. Called cops – they were arrested for forcible confinement. Argued = citizens arrest.  **Analysis**: Not guilty. C was authorized to arrest thief because he was committing an ongoing theft when arrested.  Finds Committing has been broadened because of technology. You can remotely see the theft in progress. (continuation of original transaction)  Was the Force Excessive? The typing up may have been unnecessary.  After this case there was amendment to 494(2) to includd offences on property at time of or within reasonable time after/ police officer cannot make it.  And must give to authorities right away  ***Elmardy v Toronto Police Services Board*,**  **Facts:** 2 officers were driving cruiser. Saw P. walking while black -> assumed “he must be violating bail/carrying weapon cause hands in pockets!” -> Pulled him over. He declined to take hands out of pockets. Cop punched him twice. Knocked down, handcuffed, left lying on wood deck covered in ice. Searched and emptied his pockets. Found nothing. He sued for assault, battery, unlawful arrest, and charter violation.  He was racially motivated but trial judge had originally not recognized it.  **Held:** $4,000 in Charter damages, $5,000 for battery and $18,000 in punitive damages.  **Search pursuant to lawful arrest**  **R v Caslake – s.8 search and seizure**  **Facts:** man urinating by side of road, bag of weed found next to him. Car towed for other reasons. Six hours after arrest for marijuana possession, accused’s car was searched w/o warrant and cash and cocaine were discovered.  **Issue:** Does vehicle search constitute unreasonable search or seizure contrary to s. 8 of the *Charter*? Should cocaine be excluded form evidence  **Analysis** Automobiles are legitimately the objects of search incident to arrest, as they attract no heightened expectation of privacy that would justify an exemption from the usual CL principles   * **Search is only justifiable if the purpose is related to the purposed of arrest** * ***This is not as standard of reasonable and probable grounds* 🡪 just must be some reasonable basis for doing was police officer did**   No different for automobiles than any other place  Right to search incident to arrest and scope of the search will depend on number of factors, including basis for arrest, location of motor vehicle in relation to place of arrest, etc  **Held: violated s.8 of the charter, but courts decided it was okay to admit evidence here anyway, even though it was not obtained properly. The question to ask is, is the administration of justice going to be brought into disrepute?**  ***Koechlin v Waugh and Hamilton***  **Facts**: Defendants were stopped to be questioned and the defendants asked for identification of the police officers. Were not cooperating. Defendants fell into ditch and charged with assault of police officer but were not told their charge. Were also not allowed to speak to their family and relatives.  **Ratio**: You are under no obligation to cooperate with the police and they cannot use force to make you cooperate. However, there are statutory provisions that counter this in some instances like highway traffic act, and common law authority to stop and question for investigatory purposes.  ***Citizen’s arrest and self-defence act – came into force March 2013***  Citizen’s may arrest suspect immediately or within reasonable time after the offence provided they reasonably believe that it is not feasible for police to make the arrest in the circumstances.  ***S.25 Crim code***  **Courts have held that PO’s may be privileged even if they are not authorized or required by law to do the act giving rise to the tort.**  **In *Biron*, Laskin stated that a PO who’s actions are not authorized may still be privileged if they made a mistake of fact and acted on reasonable grounds.**  **In *Frey* courts held that the same is NOT true for mistakes of law.** |

**494 (1)** Any one may arrest without wararant:

1. a person whom he finds committing an indictable offence or
2. a person who on reasonable grounds he believes
   1. has committed a crim office and
   2. Is escaping from and freshly pursued by persons who have lawful authority to arrest that person

* (2) **(2)** The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and
  + **(a)** they make the arrest at that time; or
  + **(b)** they make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.
* (3)  Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

**495** (1) A peace officer may arrest without warrant

* (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
* (b) a person whom he finds committing a criminal offence; or
* (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

**25** **(1)** Every one who is required or authorized by law to do anything in the administration or enforcement of the law

* + **(a)** as a private person,
  + **(b)** as a peace officer or public officer,
  + **(c)** in aid of a peace officer or public officer, or
  + **(d)** by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.