

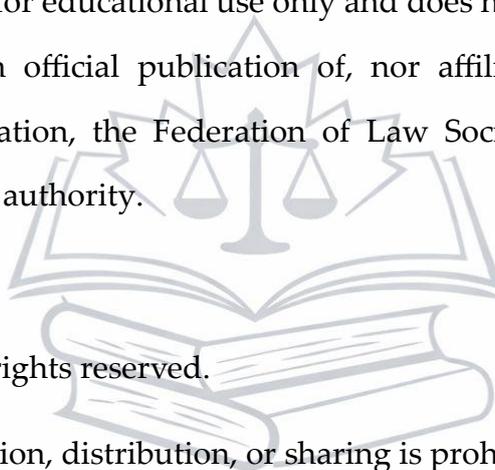
## PREVIEW COPY

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## SECTION A: INTRODUCTION TO TORTS

### Chapter 1: The Concept of Torts

Torts law is said to be difficult to define but is generally concerned with things that have gone wrong or a breach of obligations. A tort is regarded as a legal wrong or a breach of obligations one person owes to another. There is, however, a distinction between public wrong indicated in criminal law where the wrong is taken to have been committed against the society and prosecuted by *Regina* – a Latin word for Queen – and punishment is imposed on the wrongdoer. On the other hand, tort law deals with wrongs committed against individuals in which case the wrong is prosecuted by the individual, as the plaintiff, against the wrongdoer, as the defendant. Here, the focus is on the plaintiff's loss and, where the defendant is found liable, the plaintiff may be awarded a remedy that is commensurate with the wrong. In the same light, some private wrongs may fall outside torts and come within the ambit of the law of contract.

However, there are significant overlaps between these areas of law: the same set of facts may lead to criminal prosecution as well as a civil claim in tort; the same situation may give rise to liability in either tort or contract. Both tort and contract share the same basic structures in terms of primary and secondary obligations. Primary obligations tell people how to act while secondary obligations provide remedy where the primary obligation has been broken. A victim is generally allowed to explore all available options to seek remedies, e.g., in tort and contracts at the same time. But he can only choose a remedy in one as he cannot be allowed double recovery.

Notwithstanding the shared similarities, tort and contract are different in many respects, viz:

- I. the source of primary obligations in tort arises from the law while in contract, it generally arises from the agreement between parties (save some statutory impositions, e.g., Sale of Goods Act).
- II. the doctrine of privity of contract applies in contract as no outside party can sue based on a breach, even if affected. In torts, generally, parties can sue one another even if they are complete strangers.

- III. while compensation is available in both tort and contract, compensation in tort looks backwards and seeks to put back the victim in the position he was before the breach. On the other hand, compensation in contract looks forward and seeks to put the victim in the position he would have been had the breach not occurred.

### **1.1 Nature and History of Torts**

The history of tort law is that of the separation of public and private wrongs, leading to the emergence of a general body of civil wrongs. Originally, during the Anglo-Saxon age in England, there were no divisions between crime and tort and any wrongdoer was required to pay a *bot* to appease the wronged clan and pay *wite* to the King for the breach of peace. This was the practice in place until the Norman Conquest when William the Conqueror imposed a uniform set of laws throughout England, primarily to ease the collection of taxes. This body of law came to be known as common law, with its procedural formality of commencement of action via writs issued by Chancery clerks. These were standard pleadings and any allegation of wrongdoing must fit into an existing writ. A plaintiff who could not get his claim within the scope of an existing writ would not get his grievances heard, unless on rare occasions when Chancery officials prepared and issued new writs.

Initially, the only complaints heard by the King were violent acts done with force of arms and against the King's peace, i.e.: *vi et armis et contra pacem regis*. Wrongs like assault, battery, trespass to land, taking of goods and other causes we now know as torts were grouped into a family of writs known as trespass. (Till today, these writs are still referred to by their names as in the original writ). Therefore, to bring a complaint within the limited available writ and to have access to the King's courts and jurisdiction, plaintiffs had to plead *vi et armis* in their facts even where no force or breach of peace was involved. Eventually, however, the King assumed jurisdiction over most civil wrongs and, by 1300, there was no need to further plead *vi et armis*.

Though the writ system still remained, there developed three versions of it, as follows:

- Trespass *vi et armis* – when the defendant's conduct affected the victim's person;
- Trespass *de bonis asportatis* – when the defendant improperly handled, damaged or destroyed the plaintiff's goods; and,
- Trespass *quare clausum fregit* – when the defendant improperly entered onto the victim's land.

All these three forms of trespass required proof that defendant had used force directly on the plaintiff's person, goods or land otherwise the King's court would not assume jurisdiction. They were all actionable *per se* without any proof of any actual damage. Nonetheless, the narrow scope of these writs necessitated the creation of newer writs that could accommodate defendant's act that were outside these three varieties of writs. This led to the creation of the *writ of trespass on the case* to cover harms that were inflicted not by force or directly. With this new writ came the requirement that the plaintiff can only succeed if she can establish that she suffered damage, unlike the previous writs system where only the proof of force is required. More on this below.

However, by the 19th century, judges began to develop the idea of fault or moral blameworthiness. They began to require proof that the plaintiff's loss was caused by the defendant's intentional wrongdoing or carelessness. Eventually, the writ system was abolished by the Judicature Act in the 1870s, with similar legislation in other common law countries, including Canada. With this abolition, a plaintiff does not have to fit his claim into an existing writ. A case would be heard once the facts of his case justified any relief under any recognized cause of action.

By the end of the 19th century, academics and scholars had begun to call for the recognition of torts as a distinct branch of law. Writers such as F. Pollock argued that the law of torts was based upon the single unifying principle that all harms were tortious unless justified. J. Salmon argued in contrast as to whether there was a general principle of tort liability, and contended that tort law was merely a patchwork of distinct causes of action, each protecting different interests and based on separate principles of liability. Even in the courts, the debate as to whether there is a general theory of tort liability persisted and the dilemma was whether, confronted with new claims in the growing area of negligence, tort liability should be expanded and if yes, on what ground. See *Donoghue v. Stevenson (1932)* where Lord Atkin suggested

that the court will expand the scope of recovery, at least in the tort of negligence. This debate has continued till today and the courts will consider legal, social, economic and

philosophical circumstances prevalent at a particular time to consider whether to expand or narrow the scope of liability. For instance, if the court fears that liability is killing the insurance industry and may lead to crisis, it may narrow the defendant's duty of care. Conversely, the courts may expand the scope of liability if there's concern that the insurance industry is unduly profiting at the expense of the injured consumer.

## Historical Roots: Trespass and Case

Here, we will further examine the history of the emergence (and the differences in the application) of the two forms of action: *Trespass*, and *Trespass on the case* (or *action on the case*, or *case*). This is a follow up on our earlier discussion above about the topic. Remember we noted that the writs of trespass (Trespass) and Trespass on the case developed as the only two forms for tort actions under English common law. Trespass involves *trespass* against the person. *Action on the case* involves trespass against anything else which may be actionable but is yet to be an established category. As earlier stated, initially, Writs of Trespass could be litigated in the royal courts only if the plaintiff alleged that the defendant used —force and arms, hence the title *trespass vi et armis* that encompasses the three versions of trespass at that time. So, to enable their cases to be heard, the plaintiffs falsely alleged force and arms under one of the three versions. See e.g., *Rattlesdene v. Grunstone (1317)* which was merely a dispute on allegation of adulteration of wine with salt water. In the writ, however, and to allow for the matter be heard in the Royal Courts, the defendant was alleged to have, —with force and arms, namely with swords and bows and arrows, drew off a great part of the wine from the aforesaid tun and instead of the wine so drawn off they filled the tun with salt water so that all the aforesaid wine was destroyed.

The turning point was the case of *Waldon v. Mareschai (1369)* where it was alleged that the defendant had negligently treated the plaintiff's horse. The Court of Common Pleas accepted that in such a situation, an allegation of force and arms in a writ would not be appropriate. This marked the recognition of the emergence of the writ of trespass on the case wherein the plaintiff does not have to prove force and arms to bring the writ.

So, in addition to the historical significance, the above is basically just another method of classifying tort which has survived to this day: that is, whether the harm to the plaintiff was caused directly or indirectly.

Therefore, wrongful conduct can generally be actionable in the following manner:

- *Writ of Trespass*: this required proof that the defendant had used force directly applied to the plaintiff's person, goods or land. These were actionable without proof of damage.
- *Writ of Trespass on the Case*: this covers harm inflicted by the defendant on the plaintiff neither by force nor directly. Here, plaintiff would only succeed if he can establish that damage had been suffered. *Scott v. Shepherd (1558)*

So, under this writ system, the plaintiff must choose which writ to use, and choose correctly, otherwise she would lose even if the court thought that the defendant would have been held liable had a different writ been chosen.

Do remember that the writ system has now been abolished and a plaintiff does not have to choose one specific cause of action. Notwithstanding, modern torts still follow this historical distinction, such that, any wrongful act following from the original *trespass*, e.g., battery, assault, trespass to chattels, still require direct consequences before the plaintiff would succeed. On the other hand, modern torts following from *trespass on the case* cover indirect consequences, most notably negligence, and they are wider in scope.

Nonetheless, the distinction between direct and indirect consequences are not always easy to make, as the case below will demonstrate.

- *Scott v. Shepherd (1558)*

The defendant, a child, threw a lit squib (firework) into a crowded marketplace which landed on Y's stall. To prevent damage to his stall, Y quickly threw the squib which landed at W's stall who also threw it at R's stall. R then threw the squib to another part of the market where it landed and exploded in the plaintiff's face, blinding an eye.

The plaintiff then sued the child for trespass against the person. the defendant argued that he could not be held liable since it was R, not him, that actually threw the squib that struck the plaintiff. the issue here was whether the action of third-party R rendered the defendant non- liable.

Two of the judges held that the plaintiff's injuries were sufficiently direct to fit within the category of trespass, while the third judge dissented, ruling that the injuries were indirect injuries and that if he had sued on trespass on the case, he would have succeeded, rather than trespass *vi et armis*.

Per Nares J.:

I am of the opinion that trespass could well lie in the present case. The natural and probable consequence of the act done by the defendant was injury to somebody, and, therefore, the act was illegal at common law. The throwing of squibs has by ... the Fireworks Act, 1697... been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. YEAR BOOK 21 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass....The principle I go on is what is laid down in Reynolds v. Clarke (1725) ... that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in Y.B. 12 Hen. 4, ... trespass lay for stopping a sewer with earth so as to overflow the plaintiff's land... I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient.... He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it until the explosion. No newer power of doing mischief was communicated to it by [W or R]. it is like the case of a mad ox turned loose on a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of [W and R] will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages ....

Blackstone J. in his dissenting opinion argued that the defendant's acts were too indirect and non-immediate to constitute trespass against the claimant. He noted that the actions of the third parties were sufficiently voluntary to break the chain of causation. He concluded that, the solid distinction is between direct or immediate injuries on the one hand and mediate or consequential on the other, and trespass never lay for the latter. This case in itself shows that the judges even in those days never agreed on what constituted direct and indirect injuries.

## Distinction between Trespass and Action on the Case

The judgment in the case below explains more the distinction between Trespass and the Case as well as the applicable principles.

- **Leame v. Bray (1803)**

On a dark night, the defendant had driven his horse-drawn carriage on the wrong side of the road. The plaintiff, sensing danger had jumped from his own carriage and broke the collar of his neck. The plaintiff then sued the defendant for trespass. The court held that the only blame the defendant had was his manner of driving, which was negligent, and the injury having happened from negligence, and not willfully, the proper remedy was by an action on case and not of trespass *vi et armis*.

Per Lord Ellenborough CJ:

If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass. Where one accidentally drove his carriage against another's, the remedy is trespass and not case, the injury being immediate from the act done, though he were no otherwise blame-able than driving on the wrong side of the road in a dark night.

The distinction is that, where the injury is immediate from an act of force done by the defendant the remedy is in trespass; where the injury is only consequential to an act before done by the defendant, there an action on the case lies.

The true criterion seems to be whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action in trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be willful or not.

... [H]ere the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore, there being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass, and willfulness is not necessary to constitute trespass.

## 1.2 Functions of Tort Law

Some of the functions of torts law have been said to include the following:

- 1) Compensation: the main feature that distinguishes torts from criminal law is that its remedies are restorative in nature. They seek to restore the plaintiff back to the position he was prior to the injury or loss caused by the defendant. However, some award of damages in tort could be punitive or exemplary, and not necessarily compensatory. This type of damages is designed to punish the wrongdoer or make an example of him, and bears little relation to the loss or harm suffered by the injured party. Some, however, view compensation as not being exclusive to torts, as victims may receive compensations under schemes such as workmen compensation, no-fault automobile insurance scheme, etc. To others, tort is not effective in the area of compensation due to many factors including: difficulties and costs of hiring a lawyer, problems of evidence and proof, defendant's potential inability to pay, etc.
- 2) Deterrence: tort is said to also have deterrent effect in that it establishes standards expected of a civilized, reasonable society and with which everyone is expected to comply if people are to live together in a harmonious, safe and functional society. So, in imposing liability for breaches of these standards, tort does deter people from committing breaches. Some have however doubted this deterrence feature of torts in situations like vicarious liability where the principal is liable and is the one that actually pays for the wrongdoings of her agent who may not make any contribution towards such payment and this therefore has no deterrence effect on him.
- 3) Appeasement and vindication – imposing tortious liability may vindicate and appease the injured party who may not necessarily seek monetary compensation. In the context of nominal damages, an amount as small as \$10 may be sought/awarded against the wrongdoer, which is merely symbolic, and to appease the injured party. The cost and expenses of litigation has however made the award of nominal damages no longer attractive.
- 4) Punishment – as noted above, a court may award punitive damages against a defendant whose conduct is found to be vicious, egregious and outrageous. This feature of tort law is a trace of its historical antecedents which it shared with criminal law before now.

- 5) Market deterrence – this argument is more from economists than lawyers; they argue that tort law is a system of loss allocation. For instance, some jurisdictions impose strict product liability on manufacturers for injuries caused by their defective products; they in turn are forced to increase prices of their product in order to be able to pay claims; the higher prices in turn have the effect of reducing the purchasing power of the consumer, leading to fewer products being sold. Then, the fewer the products sold, the fewer the product-related accidents recorded. But since the consumers continue to purchase the product in spite of the high price, they believe that the benefits they derive from the products exceed the costs of the accidents it generates. Therefore, this allocation of accident costs enables the society to experience only the minimum number of accidents.
- 6) Justice: some scholars focus attention on justice as the underlying function of tort. Justice here can take the shape of retributive justice, distributive justice, or corrective justice. Some have however countered that justice is the general purpose of all laws, not just tort.

### 1.3 Theoretical Approaches

Above, we have summarized the functions of tort law to include repairing losses, punishing wrongful acts, deterring future conduct, promoting economic efficiency, etc. These functions broadly portray tort law as either a compensatory mechanism that provides relief from losses or a regulatory regime aimed at shaping social behaviour.

Nowadays, however, there is the growing theory which seeks to view tort law in the concept of a right. This is a rights theory which views the private transactions between two parties in terms of correlative rights and obligations: and where the defendant fails to honour her obligation, this results in the breach of the plaintiff's right. Therefore, the liability imposed on the defendant is not for the purpose of alleviating the plaintiff's financial burden or penalizing the defendant for the breach, but rather as a recognition, enforcement and vindication of the individual's rights.

There are many variations of the theoretical approaches, as follows:

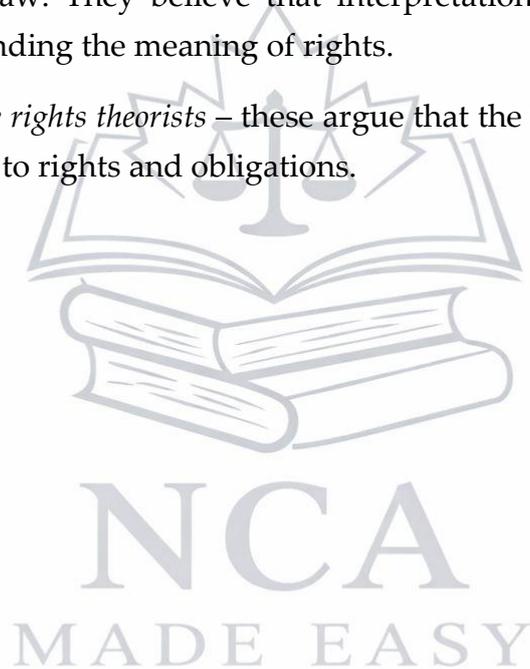
- I. Rights theory or rights-based analysis (normative): as explained above. However, this theoretical approach to tort has been criticised as potentially misleading, because the right-based analysis is not unique to torts. It cuts across all other private law jurisprudence like contract, property, trusts, unjust enrichment, etc. While it is true that violation and vindication of rights is most

pronounced in tort law, which of course makes it dominate than in other subjects, yet, right-based analysis are present in those other subjects. For example, in conversion or trespass to property, the plaintiff may not have actually suffered any physical damage or harm to justify compensation. Nonetheless, the court may award nominal damages because compensation is one of the functions of torts. But to the right theorists, the plaintiff should be entitled to substantial damages, in recognition of her rights to the property that was violated. This is because the defendant has breached an obligation owed the plaintiff, and whether or not the plaintiff suffered any physical loss or damage, the award of substantial damages should be a vindication of the plaintiff's rights that were violated by the defendant. Here, the monetary compensation only acts as a substitute for the right that was violated.

- II. Functional (Instrumentalist) Objectives – this theory says that the most important function of tort law is corrective justice, i.e., to restore the plaintiff back to his original position.
- III. Non-instrumentalist – says that private law doesn't exist to promote external goals like compensation or deterrence.
- IV. Structuralist – says rights don't exist merely as incidents of a larger enterprise; rather they inform the entire subject, and there's no way to understand torts apart from the viewpoint of rights.
- V. Formalist – contrary to the view that judicial decision-making is invariably influenced by extra-legal factors, (personality and policy rather than precedent and principles), rights theorists maintain that rules must govern.
- VI. Individualist – in contrast to the belief that litigation between private parties generally provide an avenue of changing the world, rights theorist believe that violation and vindication of rights are squarely between a plaintiff and a defendant. Even if the cumulative effect of imposition of liability extends farther, the focus is primarily the narrow relationship between the instant

In addition, three identified thoughts of rights theorists dominate, even though they all share a set of fundamental beliefs. These include:

- a. *Analytical rights theorists* – they seek to understand the nature of rights and to explain the ensuing implications. In relation to tort law, they seek to draw a distinction between legal rights and strictly moral rights, or between a right that prevents another person from activities that may intentionally imperil and a right that entitles the injured victim to receive some benefits.
- b. *Interpretive rights theorists* – they study the relationship between human rights and interpretation and aim to provide a coherent account of the existing law. They believe that interpretation is a necessary tool for understanding the meaning of rights.
- c. *Normative rights theorists* – these argue that the law ought to develop by reference to rights and obligations.



## NCA SAMPLE EXAM ANSWER SCRIPT

### PART ONE (15 marks; 30 answer blanks)

Fill in the blanks in the following paragraphs with a word or phrase. In some of the blanks, there are synonymous words or similar phrases that could be used; what's important is to show that you understand the concept even if you might use different words. Where a case name is required, provide the full case name but not the citation, as no marks are allocated for that. Please write your answers on the writing pad provided with the exam using the letters associated with each blank.

### Sample Answer

#### Concept: Malicious Prosecution

1. In Canada, the Crown is generally **immune** (a) from civil liability for malicious prosecution. However, as explained by the Supreme Court of Canada in **Nelles v. Ontario** (b), that is not so for the **Crown prosecutor** (c) and his or her agents, known as **Crown attorneys** (d). In this regard, they are just like others who may be held liable for this tort.

To succeed in a malicious prosecution action for a prior proceeding, the plaintiff must first show that the proceeding was **initiated** (e) by the defendant and, second, that it **ended** (f) in the plaintiff's **favour** (g). These are low thresholds to meet. For example, in **Proulx v. Quebec (Attorney General)** (h), the Supreme Court held that when the defendant attended before a magistrate to swear **an information** (i) against the plaintiff, that sufficed to satisfy the first element; the Court also held that the second element was met when the defendant later **withdrew the charges** (j).

The third element that the plaintiff must prove is that the defendant lacked **reasonable and probable grounds** (k) for commencing, or perhaps continuing, the prior proceeding. In the general case, the test has both a subjective component, meaning that the defendant **honestly believed** (l) in the allegations, and an objective component, meaning that **the belief** (m) was reasonable in the circumstances. In the specific case of a Crown prosecutor, the Supreme Court changed the test so that only the objective component is relevant. The rationale given was that Crown prosecutors must act solely as professionals in the public interest when deciding whether to initiate or continue prosecutions: see **Miazga v. Kvello Estate** (n).

The fourth element that the plaintiff must prove is **malice** (o), which in legal terms means **an improper purpose** (p). See, e.g., **Nelles v. Ontario** (q), where the defendant initiated false charges of **theft** (r) against an employee to set an example for other employees. At this fourth stage, the subjective component mentioned above can also become relevant. For example, if a Crown prosecutor didn't believe that there was reasonable cause to commence a prosecution, that could be evidence of malice. However, malice should not be inferred solely from a lack of belief in reasonable and probable grounds, as the latter is equally consistent with prosecutorial conduct that is not **intentionally wrongful** (s), such as negligence.

The fifth element that the plaintiff must prove is **damages** (t). For example, the plaintiff may have had to incur substantial **legal** (u) costs in defending the prior proceeding, or the proceeding may have harmed the plaintiff's **reputation** (v) in the community, or his or her ability to be gainfully **employed** (w).

Finally, while the name of this tort is malicious prosecution, there is an argument to be made that what we are seeing in Canadian law is the development of a cause of action for what might be better called **abuse of process** (x), which has both a malicious and a non-**malicious** (y) branch. The first branch is the traditional tort and applies to both **private** (z) parties and Crown prosecutors; the second branch applies only to Crown prosecutors and does not require proof of the fourth element. Instead, what the plaintiff must show is that the Crown prosecutor has, in breach of his or her **duty of disclosure** (aa), harmed the plaintiff. In **Proulx v. Quebec (Attorney General)** (bb), the one case to develop this new branch of the cause of action, the harm was caused by Crown prosecutors intentionally **withholding evidence** (cc) that was material to the plaintiff and impinged on his ability to **defend himself** (dd) in the prior proceeding.

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## List of Topics covered in NCA Torts Law IRACs

### 1. Negligence – Duty of Care & Framework

Covers:

- Neighbour principle (*Donoghue v Stevenson*)
- Foreseeability & proximity
- *Cooper v Hobart* / *Anns* framework
- Novel duty analysis
- Policy considerations

### 2. Negligence – Breach of Standard of Care

Covers:

- Reasonable person standard
- *Bolton v Stone* risk balancing
- Probability, seriousness, cost of prevention, social utility
- Special standards:
  - Professionals
  - Children
  - Persons with disabilities

### 3. Negligence – Causation & Remoteness

Covers:

- But-for test (*Barnett*)
- Material contribution (*Clements*)
- Intervening acts / novus actus
- Remoteness (*Wagon Mound No. 1*)
- Scope of risk

#### 4. Negligence – Defences

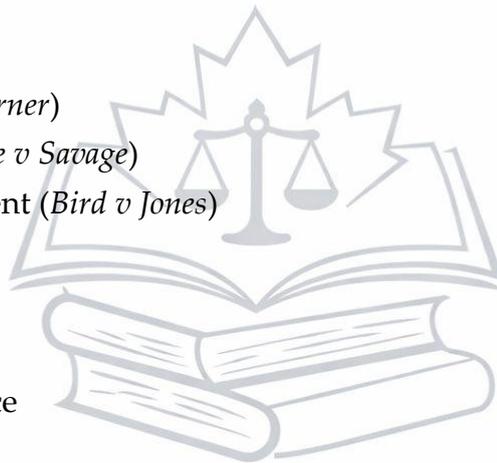
Covers:

- Contributory negligence (*Bow Valley Husky*)
- Voluntary assumption of risk (*volenti*)
- Illegality (*ex turpi causa*)
- Thin skull rule (*Smith v Leech Brain*)

#### 5. Intentional Torts – Trespass to Person

Covers:

- Battery (*Cole v Turner*)
- Assault (*Tuberville v Savage*)
- False imprisonment (*Bird v Jones*)
- Defences:
  - Consent
  - Necessity
  - Self-defence



#### 6. Trespass to Land & Trespass to Chattels

Covers:

- Trespass to land (*Entick v Carrington*)
- Trespass to chattels (*Fouldes v Willoughby*)
- Actionable per se vs proof of damage
- Conversion (overlap handling)

#### 7. Private & Public Nuisance

Covers:

- Private nuisance (*Antrim Truck Centre*)
- Substantial interference
- Reasonableness balancing
- Public nuisance + special damage requirement

## 8. Strict Liability – Rylands v Fletcher

Covers:

- Non-natural use of land
- Dangerous substances
- Escape
- Defences:
  - Act of God
  - Third-party acts
  - Statutory authority

## 9. Vicarious Liability

Covers:

- Employer–employee relationship
- “Close connection” test (*Bazley v Curry*)
- Intentional wrongdoing by employees
- Policy rationale

## 10. Negligent Misrepresentation & Economic Loss

Covers:

- Special relationship (*Hercules Managements*)
- Reasonable reliance
- Pure economic loss
- Limits on indeterminate liability

## 11. Duties to Act, Control & Warn

Covers:

- No general duty to rescue (*Matthews v MacLaren*)
- Duty to control others (*Childs v Desormeaux*)
- Duty to warn (*Hollis v Dow Corning*)
- Creation of danger & special relationships

## 12. Public Authority Liability

Covers:

- Policy vs operational distinction (*Welbridge Holdings*)
- Negligent inspections
- Government liability limits
- Charter-adjacent fact patterns (tort lens only)

## 13. Damages in Tort

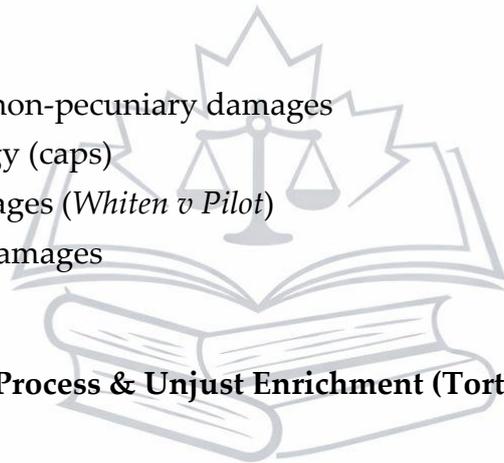
Covers:

- Pecuniary vs non-pecuniary damages
- *Andrews* trilogy (caps)
- Punitive damages (*Whiten v Pilot*)
- Aggravated damages
- Mitigation

## 14. Illegality, Abuse of Process & Unjust Enrichment (Tort-adjacent)

Covers:

- *Ex turpi causa*
- Abuse of process logic
- Conversion vs unjust enrichment
- Public policy bars to recovery



## 1. Negligence – Duty of Care & Framework

### Issues:

1. Did the defendant owe the plaintiff a duty of care in negligence based on reasonable foreseeability and proximity?
2. Does a prima facie duty of care arise under the Cooper v Hobart / Anns framework, particularly where the duty may be novel?
3. Are there residual policy considerations that negate or limit the imposition of a duty of care?

### Rules:

#### 1. Neighbour Principle – Foundational Duty of Care

The modern law of negligence originates from *Donoghue v Stevenson*, which established the neighbour principle.

A duty of care exists where the defendant can reasonably foresee that their acts or omissions may cause harm to persons who are closely and directly affected by their conduct.

This principle introduces two core requirements:

- Reasonable foreseeability of harm, and
- Proximity between the plaintiff and defendant.

#### 2. Modern Duty of Care Test – Cooper v Hobart / Anns Framework

The governing Canadian framework is set out in *Cooper v Hobart*, which refined the earlier *Anns v Merton London Borough Council* approach.

The test involves two stages:

Stage One – Prima Facie Duty

A prima facie duty of care exists where:

1. Harm to the plaintiff was reasonably foreseeable, and ( CONTINUED... )