

# CHAPTER 2

## Tort Law



### LEARNING OBJECTIVES

After reading this chapter, you will understand:

- What tort law is and its application to personal and business conduct.
- The most notable types of torts and the legal test for each.
- The available defences for the commission of a tort.
- The remedies for the victim of a tort.

### CHAPTER OUTLINE

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**tort**

private law because it is concerned with the rights, duties, and liabilities of persons to each other

## Introduction

**Torts** is a branch of private law governing personal conduct, including the conduct of corporations, who are considered in law to have the status of a “natural person.”<sup>1</sup> It is private law because it is concerned with the rights, duties, and liabilities of persons to each other, rather than the rights, duties, and obligations of persons to the state or government.

## What Is a Tort?

Attempts to define tort law have been elusive and variable. A deductive approach describes a tort as a breach of a legal duty that does not fall under some other recognized branch of private law, such as contract law, and where the primary remedy is damages. It may also be described as a violation of a legally imposed code of personal conduct—a failure to fulfill a private duty resulting in some form of loss, damage, or injury to another party. Irrespective of how it may be defined, the primary function of tort law is to deter socially unacceptable personal conduct and to compensate those who have suffered loss, damage, or injury as a consequence of socially unacceptable conduct.

Tortious conduct is primarily based on the common law. Torts have arisen from decisions of the courts, particularly those of the higher appellate courts. I say “primarily,” because certain torts have been created by provincial legislatures in exercising their constitutional authority over property and civil rights under the *Constitution Act, 1867*.<sup>2</sup> The only exception is where the subject matter falls within the exclusive jurisdiction of Parliament. For example, tortious liability arising out of navigation is governed by federal law.<sup>3</sup> These statutory torts will be discussed later.

The courts have demonstrated a willingness to introduce new torts in an attempt to stay abreast of social change. A recent example is the 2012 Ontario Court of Appeal decision in *Jones v Tsige*,<sup>4</sup> discussed later on. By this decision, the court of appeal created the tort of “intrusion upon seclusion,” which, in essence, is invasion of privacy. In its judgment, the court of appeal indicated that the creation of this new tort reflected its desire to stay abreast of social change, particularly the increasing threat to privacy from our use of and dependency on digital technology.

Torts may be categorized or distinguished in various ways. For our purposes, they are categorized as intentional, negligence, nuisance, strict liability, and statutory torts. Each has certain unique characteristics. I will not address all torts, only those of particular relevance to hospitality and tourism.

## Vicarious Liability

Before considering the various tortious categories, it is important to understand the doctrine of **vicarious liability**. Vicarious liability provides for liability to be assessed against one party for the wrongful act of another party. Examples include the liability of the Church for the wrongful behaviour of predatory priests, and most relevant for our purposes, the liability of employers for torts committed by their employees. This liability applies even though the employer did nothing wrong and did not condone or approve the tortious act of its employee.

The Supreme Court of Canada addressed the test for an employer’s vicarious liability in *Bazley v Curry*.<sup>5</sup> Curry was employed by a charitable organization as a substitute parent at a residential care facility for emotionally troubled children. His work included such normal parental functions as bathing the children and putting them to bed. Although the charity performed reasonable background checks on new employees, they failed to discover that Curry was a pedophile. He sexually assaulted a number of the children, and one of them sued the charity on the basis of vicarious liability. In other words, the charity was alleged to be legally liable for Curry’s sexual assaults. The charity defended the action on the grounds that it committed no fault in

**vicarious liability**

provides for liability to be assessed against one party for the wrongful act of another party

hiring or supervising Curry and, of course, it did not countenance his conduct. The Supreme Court stated that the relevant test for determining vicarious liability was the so-called “Salmond Test” set out in *Salmond and Heuston on the Law of Torts*. The authors of this book state that an employer is vicariously liable for employee torts falling within the “scope of employment,” and acts are within the scope of employment where they were authorized by the employer, or are so closely connected to the authorized acts of the employer that they are modes, however improper, of what has been authorized.

While it was readily acknowledged that the charitable organization did not authorize or condone the sexual assaults, the Supreme Court said that the question to be answered is whether the nature of the charity’s activities and the authority given Curry materially increased the risk of the sexual assaults. The Supreme Court concluded that it did. In the words of McLachlin JJ writing for the court at paragraph 58 of the judgment, “The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition the sexual abuse. The employer’s enterprise created and fostered the risk that led to the ultimate harm.”

## Intentional Torts

As the name suggests, the characteristic feature of an **intentional tort** is that the offending party (the “**tortfeasor**”) intended to commit the act or cause the consequences of the act. For certain intentional torts (e.g., battery, trespass to land), the act may also be a criminal act, and the tortfeasor may be subject to criminal prosecution by the state as well as to a civil action in tort by the affected party.

Intentional torts can be broadly described as addressing personal interference, interference with property, or interference with economic interests. What follows is a brief description of some of the more notable intentional torts. Additional intentional torts are summarized in Table 2.1.

### intentional tort

a tort resulting from an intentional act on the part of the tortfeasor; a wrongful act done by one to another

### tortfeasor

the offending party who commits a tort

**TABLE 2.1 Intentional Torts**

Intentional Tort	Description
Assault	<ul style="list-style-type: none"> <li>Victim has a reasonable apprehension of imminent physical harm from the offending party.</li> <li>May be a precursor to the tort of battery, but it is separate from battery.</li> </ul>
False Imprisonment	<ul style="list-style-type: none"> <li>Offending party restrains the movement of the victim.</li> <li>Restraint can be physical or psychological.</li> <li>Once imprisonment proven, onus is on the offending party to prove it was legally justified.</li> </ul>
Trespass to Chattels (movable property)	<ul style="list-style-type: none"> <li>Interference with another party’s movable property without consent or legal authority.</li> </ul>
Deceit	<ul style="list-style-type: none"> <li>Offending party makes a false statement of fact knowing it to be false.</li> <li>Offending party intends to mislead victim.</li> <li>Victim relies on the false statement of fact.</li> <li>Victim suffers a consequential loss.</li> </ul>
Interference with Prospective Contractual Relations	<ul style="list-style-type: none"> <li>Offending party intends to cause economic harm to the victim by committing an unlawful act against a third party.</li> <li>Victim suffers a consequential loss.</li> </ul>

Intentional Tort	Description
Defamation	<ul style="list-style-type: none"> <li>Offending party makes a false statement to a third party about the victim that could cause a reasonable person to have a lower opinion of the victim.</li> <li>Defences to an action for defamation include: (1) statement was truthful; (2) immunity based on a recognized privilege (e.g., statements in Parliament or provincial legislature); and (3) fair comment regarding a matter of public importance, provided it was an informed opinion, honestly held, and not motivated by malice.</li> </ul>
Interference with Contractual Relations	<ul style="list-style-type: none"> <li>Also called inducing breach of contract.</li> <li>Offending party knowingly causes a third party to breach its contract with the victim.</li> <li>Victim suffers a consequential loss.</li> </ul>

### Battery

The tort of battery is the infliction of intentional, offensive physical contact by the tortfeasor on the affected party. The tort does not require that the tortfeasor intended to harm or injure the affected party, nor that the affected party suffered harm or injury. The intentional contact can be by an object (e.g., knife, bullet), and it excludes normal or incidental physical contact, such as a tap on the shoulder.

Examples of the tort of battery in the hospitality sector may be found in those activities involving the use of security personnel and bouncers. In *Vasey v Wosks Ltd*,<sup>6</sup> the affected party got into a shouting match with a bartender after having too much to drink. The bartender told the bouncer employed by the pub to remove him. As the bouncer was doing so, the affected party intentionally collapsed and bit the bouncer on the inside of his thigh. The bouncer responded by punching the plaintiff, shattering his glasses. Pieces of the shattered glass lodged in the affected party's eye and cut the side of his face. The British Columbia Supreme Court found that the bouncer committed the tort of battery by the use of excessive force, although the award of damages was reduced to reflect the bouncer having been provoked by the affected party. The case is also instructive on the doctrine of vicarious liability, as the employer pub was found vicariously liable for the battery committed by the bouncer.

### Trespass to Land

**trespass to land**  
improper interference with  
another person's property

The tort of **trespass to land** addresses the improper interference with another person's property. It does not include lawful interference, such as the right of a local utility to come on to your property to read the meter, or the express or implied consent for another party to come on to your property. A restaurant, hotel, or nightclub grants implied consent for the general public to enter its premises. This implied consent can be revoked at any time; for example, a nightclub can refuse admittance to someone who was previously disruptive. For the purposes of this tort, the concept of "land" includes the air above to a reasonable height and the ground beneath to a reasonable depth. So, whereas the tort of trespass to land would include a drone coming into your backyard at rooftop level, it would not include an airplane flying overhead. As with battery, there is a reasonableness test to the tort. A real estate agent knocking on a homeowner's door to ask if they are interested in selling their home would not be trespassing, unless the agent did so repeatedly after being told by the homeowners that they are not interested.



For the removal of someone who has trespassed, the provinces have legislation describing the authority of the police, owners, and occupiers to arrest a trespasser. As indicated in Table 2.2, the power of arrest varies, with some provinces restricting it to police officers, and others extending the right of arrest to owners and occupiers.

**TABLE 2.2 Trespass to Premises Statutes**

Province	Statute	Arrest Authorization
British Columbia	<i>Trespass Act</i> , RSBC 2018, c 3	<ul style="list-style-type: none"> <li>• May be apprehended without warrant by a peace officer.</li> <li>• “Peace Officer” defined to include conservation officer under the <i>Environmental Management Act</i>.<sup>7</sup></li> </ul>
Alberta	<i>Trespass to Premises Act</i> , RSA 2000, c T-7	<ul style="list-style-type: none"> <li>• May be apprehended without warrant by any peace officer or the owner or an authorized representative of the owner of the premises.</li> <li>• Where arrested by the owner or their representative, must be delivered to a peace officer as soon as practicable.</li> </ul>
Saskatchewan	<i>The Trespass to Property Act</i> , SS 2009, c T-20.2	<ul style="list-style-type: none"> <li>• A peace officer may arrest without warrant any person found in or on premises if the peace officer believes on reasonable grounds that the person is in contravention of the Act.</li> </ul>
Manitoba	<i>The Petty Trespasses Act</i> , CCSM, c P50	<ul style="list-style-type: none"> <li>• May be apprehended without warrant by any peace officer or the owner, tenant or occupier, or their representative.</li> <li>• Where arrested by the owner, tenant or occupier, or their representative, must be delivered to the nearest justice as soon as practicable to be dealt with under law.</li> </ul>
Ontario	<i>Trespass to Property Act</i> , RSO 1990, c T.21	<ul style="list-style-type: none"> <li>• May be apprehended without warrant by any peace officer or the occupier or an authorized representative of the occupier of the premises.</li> <li>• Where arrested by the occupier or their representative, must promptly request the assistance of a peace officer and deliver the person into the custody of the peace officer.</li> </ul>
New Brunswick	<i>Trespass Act</i> , RSNB 2012, c 117	<ul style="list-style-type: none"> <li>• Owner or occupier of premises, forest land, or other prescribed land may require a person they reasonably believe may have breached the statute to identify themselves.</li> <li>• If the person fails or refuses to identify himself or herself, or if there are reasonable grounds to believe that the identification given is false, the owner or occupier may arrest the person without warrant to establish his or her identity.</li> <li>• Where arrested by the owner or occupier, the person must be delivered to a peace officer as soon as practicable.</li> </ul>
Nova Scotia	<i>Protection of Property Act</i> , RSNS 1989, c 363	<ul style="list-style-type: none"> <li>• A police officer may arrest and detain a person in custody for an offence under this Act if on reasonable and probable grounds he or she believes it is necessary to prevent continuation or repetition of the offence, or to identify the person.</li> </ul>
Prince Edward Island	<i>Trespass to Property Act</i> , RSPEI 1988, c T-6	<ul style="list-style-type: none"> <li>• A police officer may arrest and detain a person in custody for an offence under this Act if on reasonable and probable grounds he or she believes it is necessary to prevent continuation or repetition of the offence, or to identify the person.</li> </ul>
Newfoundland and Labrador	<i>Petty Trespass Act</i> , RSNL 1990, c P-11	<ul style="list-style-type: none"> <li>• May be apprehended without warrant by any peace officer or the owner or occupier of the premises, or an authorized representative of the owner or occupier of the premises.</li> <li>• Where arrested by the owner or occupier, the person must be taken before a provincial court judge to be dealt with under law.</li> </ul>



### Invasion of Privacy

Does the common law provide a civil remedy for invasion of privacy? The answer was “no” until the 2012 decision of the Ontario Court of Appeal in *Jones v Tsige* (see Box 1.6 in Chapter 1). Winnie Tsige and Sandra Jones were employed by the same bank. Winnie Tsige, without lawful authority or the consent of Sandra Jones, accessed the banking information of Sandra Jones at least 174 times over a four-year period. There was no evidence that she attempted to access any of the funds in the account or manipulate the account in any manner. Once she discovered the activity, Sandra Jones commenced a legal action for the tort of invasion of privacy. On a motion by counsel for Winnie Tsige, the action was dismissed on the grounds that Ontario law did not recognize the tort of invasion of privacy. On appeal to the Ontario Court of Appeal, the decision was overturned, as the Court of Appeal recognized a new tort for invasion of privacy to be called “intrusion upon seclusion.”

The constituent elements of the tort are: (1) the tortfeasor has invaded the victim’s affairs or concerns without lawful justification; (2) the conduct was intentional or reckless; and (3) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation, or anguish. Proof of economic loss or other harm is not necessary, although if there is no harm, the court indicated that an award of damages would not exceed \$20,000. In describing the impetus for this new tort, Sharpe JA, at paragraph 65, stated, “Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.”

As *Jones v Tsige* is a decision of the Ontario Court of Appeal, the tort of intrusion upon seclusion is binding only on the courts in Ontario. As of this date, no other court in Canada has recognized the tort of intrusion upon seclusion; it remains an Ontario-only tort. The provinces of Newfoundland and Labrador, Manitoba, Saskatchewan, and British Columbia, however, have exercised their constitutional right under the *Constitution Act, 1867*<sup>8</sup> to legislate for a statutory tort of invasion of privacy. A brief description of these statutory invasion of privacy torts is captured in Table 2.3.

**TABLE 2.3 Invasion of Privacy Statutes**

Province	Statute	Description
British Columbia	<i>Privacy Act</i> , RSBC 1996, c 373	<ul style="list-style-type: none"> <li>• s 1(1) Wilful violation, without lawful right, of another’s privacy.</li> <li>• Nature and degree of the entitled privacy dependent on the circumstances.</li> <li>• Regard must be given to nature, incidence, and occasion of the act and relationship between the parties.</li> <li>• Includes violation by surveillance or eavesdropping.</li> <li>• No proof of damage required.</li> </ul>
Saskatchewan	<i>The Privacy Act</i> , RSS 1978, c P-24	<ul style="list-style-type: none"> <li>• s 2 Wilful, without a claim of right, violation of the privacy of another person.</li> <li>• Nature and degree of the entitled privacy that is reasonable in the circumstances.</li> <li>• Regard will be given to the nature, incidence and occasion of the act, and relationship between the parties.</li> <li>• Includes violation by surveillance, listening to or recording conversation, unauthorized use of name, likeness or voice of affected person, use of letters, diaries, and other personal documents.</li> <li>• No proof of damage required.</li> </ul>
Manitoba	<i>The Privacy Act</i> , CCSM, c P125	<ul style="list-style-type: none"> <li>• s 2(1) A person who substantially, unreasonably, and without claim of right violates the privacy of another person.</li> <li>• Includes violation by surveillance, listening to or recording conversation, unauthorized use of name, likeness or voice of affected person, use of letters, diaries, and other personal documents.</li> <li>• No proof of damage required.</li> </ul>

Province	Statute	Description
Newfoundland and Labrador	<i>Privacy Act</i> , RSNL 1990, c P-22	<ul style="list-style-type: none"> <li>• s 3(1) Wilful, without a claim of right, violation of the privacy of an individual.</li> <li>• Nature and degree of the entitled privacy dependent on the circumstances.</li> <li>• Regard will be given to the nature, incidence and occasion of the act, and relationship between the parties.</li> <li>• Includes violation by surveillance, listening to or recording conversation, unauthorized use of name, likeness or voice of affected person, use of letters, diaries and other personal documents.</li> <li>• No proof of damage required.</li> </ul>

### Defences to Intentional Torts

There are various defences that may be raised in response to a claim of an intentional tort. These include the partial defence of provocation. As already mentioned in the case of *Vasey v Wosks Ltd*, although the bouncer, and the bouncer's employer, were found liable for the tort of battery, the damages were reduced in acknowledgment of the affected party having provoked the bouncer.

Primary grounds for a complete defence include consent, legal authority, self-defence, and necessity. Consent refers to a person voluntarily consenting to the prospect of an otherwise tortious act. It must be voluntary and expressed or implied by circumstances. For example, participation in a recreational activity involving bodily contact arguably implies consent to otherwise tortious physical contact that may result in injury.

Legal authority means that the person had the lawful right to perform an otherwise tortious act. Police officers have legal authority to arrest and detain people under certain circumstances; otherwise, the detention may be false imprisonment. And certain public officials have legal authority to come on to a person's property to read the meter or perform some other lawful duty, an act that otherwise may be trespass to land.

Self-defence is usually restricted to intentional torts such as assault and battery. A person may commit an otherwise tortious act to defend herself, himself, or another person from threatened or actual physical violence. For other intentional torts, such as trespass to land, it may be a defence, but to a lesser standard since property interests are accorded a lower value than physical security. In all cases, the act of self-defence must be reasonable and proportional. Causing injury or even death in response to an actual or threatened trespass to land or chattels will not typically be justifiable.

The defence of necessity means that the otherwise tortious act was justified by an emergency. It is rarely invoked, and the test for necessity is not certain. If successful, it provides a complete defence.

## Negligence

Broadly stated, the tort of **negligence** is a careless act causing loss, damage, or injury to another party. Whether the offending party intended the action or meant to cause loss, damage, or injury is *not* relevant. The test, however, for a finding of negligence is more rigorous than merely carelessness. The test, founded on the common law, requires the claimant to prove, on a balance of probabilities, that: (1) the offending party owed the affected party a duty of care; (2) the offending party breached a reasonable standard of care in its act or behaviour; and (3) as a consequence of doing so, the offending party caused reasonably foreseeable loss, damage, or injury to the affected party.

### Duty of Care

At the heart of the negligence claim is whether the offending party owed the affected party a **duty of care**. The contemporary concept of the duty of care was established by the House of Lords in *Donoghue v Stevenson*.<sup>9</sup> May Donoghue and a friend journeyed from Glasgow to Paisley, where they visited the Wellmeadow café. Her friend ordered and paid for an ice cream drink.

### negligence

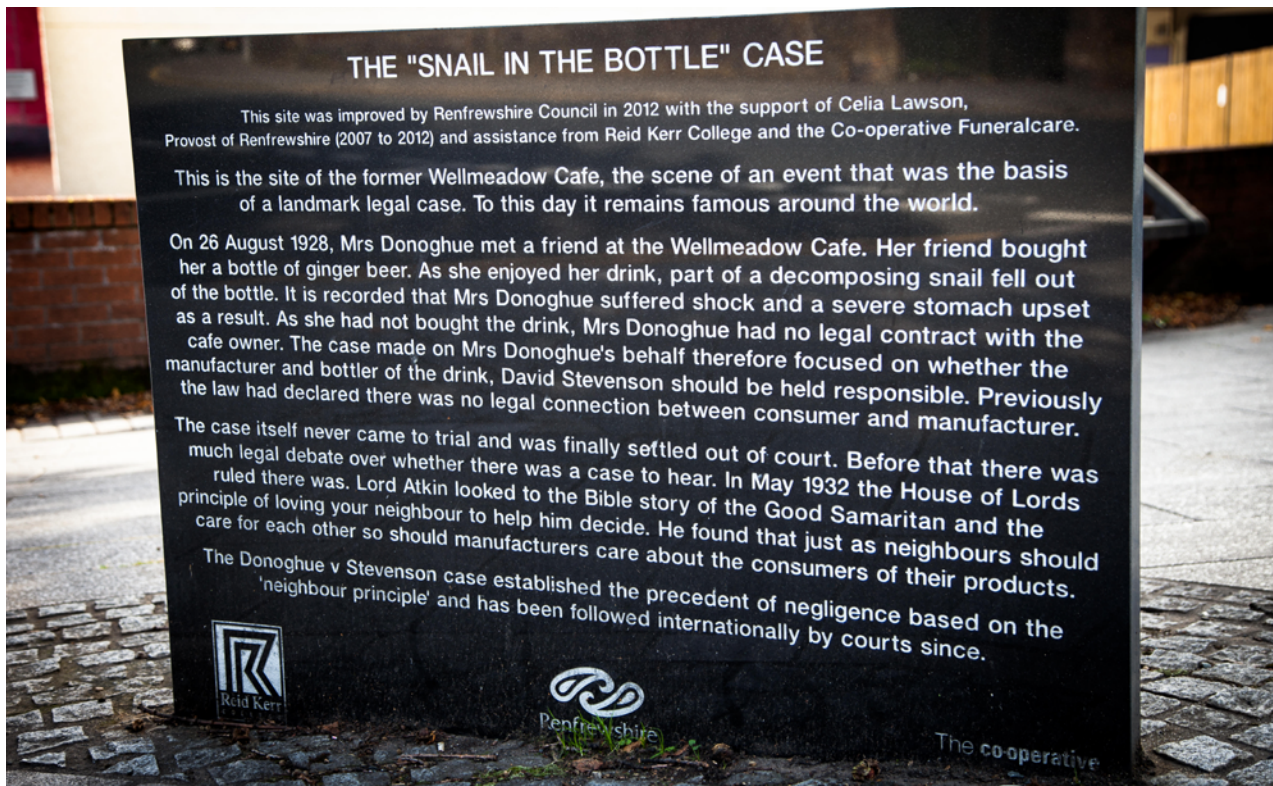
a tort involving a careless act causing loss, damage, or injury to another party

### duty of care

responsibility or legal obligation of a person or organization to avoid acts or omissions that could likely cause harm to others

The owner of the café poured part of an opaque bottle of ginger beer into a tumbler containing ice cream. Donoghue drank some of the contents.

As her friend poured the rest of the ginger beer into the tumbler, the remains of a decomposed snail dropped from the bottle into the tumbler. May Donoghue brought a claim of negligence in the Scottish Court of Sessions (Scotland's supreme civil court) against the manufacturer of the ginger beer, alleging that her drinking from the tumbler caused nervous shock and gastroenteritis. The court denied her claim on the grounds that the manufacturer did not owe her a duty of care. The court found that a duty of care was limited to specific circumstances, such as a contractual relationship between the parties or where the manufacturer was making an inherently dangerous product or acting fraudulently. This decision was appealed ultimately to the House of Lords, the highest court in the United Kingdom. The House of Lords decided in favour of May Donoghue by greatly expanding the scope of the duty of care. The leading judgment delivered by Lord Atkin famously invoked the "neighbour" principle, declaring that a duty of care is owed to those who are our "neighbours." In his words "Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question." In other words, a duty of care is owed to anyone who may reasonably be affected by what you do. It does not matter what you are doing, or whether you know them or have any relationship with them. And so, for May Donoghue, the House of Lords determined that a manufacturer of products such as ginger beer, which was intended to reach the consumer in the form in which it was manufactured, owes a duty of care in its manufacture to anyone who may consume it.



Plaque marking the site of a landmark "duty of care" case in Paisley, Scotland.



### Breach of a Reasonable Standard of Care

Having determined that the offending party owed the affected party a duty of care, the affected party must prove that the actions of the offending party breached a reasonable standard of care. This invokes the reasonable person test, which varies with the activity or circumstance.

The standard of care, however, is not perfection. Allowance must be made for honest errors of judgment or mistakes. For professionals, the standard is that of a reasonably competent person with the training and expertise of that profession. For example, the standard of care for an optometrist is that of a normal and prudent optometrist under comparable circumstances, based on the information and knowledge reasonably available to him or her at that time. Specialists will be held to a higher standard of care than non-specialists. They will be required to display the knowledge and skill of ordinary, reputable specialists practising in that field at that time.<sup>10</sup> No lower standard or exception is granted due to inexperience.<sup>11</sup>

In *Ter Neuzen v Korn*,<sup>12</sup> a patient who participated in an obstetrician and gynecologist's artificial insemination program sued him for negligence when she contracted human immunodeficiency virus (HIV). She claimed that he breached a reasonable standard of care by failing to warn her about the possibility of contracting HIV. The patient participated in the artificial insemination program from 1981 until January 1985 and became infected with HIV as a result of the final procedure. The first documented case in the world of HIV transmission through artificial insemination was published in the popular media in July 1985 and in a medical journal in September 1985. Although the obstetrician knew that HIV could be transmitted by sexual intercourse, he was not aware that it could be transmitted by artificial insemination until July 1985. The court noted that for an obstetrician and gynaecologist, the standard of care is that of *other ordinary specialists with a reasonable level of knowledge, competence, and skill of professionals in Canada in that field at that time*. The Supreme Court of Canada dismissed her claim. According to the court, it was not possible for a jury acting judicially to find that the obstetrician and gynecologist ought to have known of the risk of transmission of HIV by artificial insemination during the period of time that she participated in the program. In all of the circumstances, he had not breached a reasonable standard of care.

### Causation

Finally, a successful claim of negligence requires proof, on a balance of probabilities, that the failure of the offending party to meet a reasonable standard of care caused the affected party reasonably foreseeable loss, damage, or injury. **Causation** is determined by the answer to the “but for” question: “But for the failure of the offending party to meet the required standard of care, would the affected party have suffered the alleged loss, damage or injury?” As illustrated in Table 2.4, if the answer is “yes,” the offending party is not liable, and if the answer is “no,” the offending party is liable. In *Barnett v Chelsea & Kensington Hospital Management Committee*,<sup>13</sup> a man went to the hospital complaining of stomach pain. The attending physician determined there was nothing seriously wrong with him and sent him home. Later, the patient died of arsenic poisoning and the autopsy concluded that the poisoning had so progressed when he went to the hospital that he would have died even if he had been correctly diagnosed. The court found the hospital not liable, even though the attending physician arguably failed to meet a reasonable standard of care, because even with a proper diagnosis, the patient would have died. In other words, there was no causation.

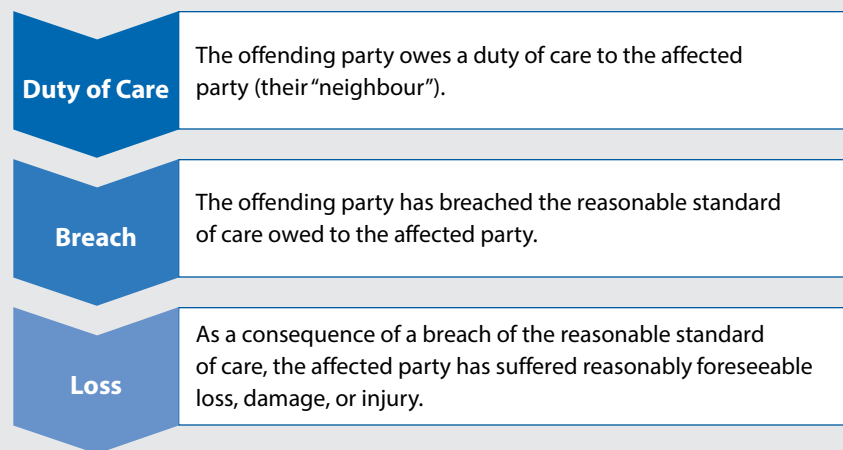
#### causation

a cause and effect relationship between an act or omission

**TABLE 2.4 “But for” Question**

Question	Possible Answer	Result in Fact	Result in Law
But for the failure of the offending party to meet the required standard of care, would the affected party have suffered the alleged loss, damage, or injury?	<b>Yes:</b> The affected party would have suffered the loss, damage, or injury <i>even if</i> the offending party had not acted carelessly.	The offending party <i>did not cause</i> the affected party's loss.	The offending party <i>is not liable</i> for negligence.
	<b>No:</b> The affected party <i>would not have suffered the loss, damage, or injury if</i> the offending party had not acted carelessly.	The offending party <i>did cause</i> the affected party's loss.	The offending party <i>is liable</i> for negligence.

The analytical process for determining negligence is summarized in the following process diagram (Figure 2.1). As a reminder, all three stages of the test *must* be satisfied for a claim of negligence to be sustained. The failure to satisfy any stage will be fatal to the claim.

**FIGURE 2.1 The Analytical Process for Determining Negligence**

### Defences to Negligence

Contributory negligence may be argued as a partial defence to a claim of negligence, as well as to an intentional tort or breach of the duty of care under the applicable *Occupiers’ Liability Act* (discussed below). The tortfeasor argues that the affected party contributed to, or is partially responsible for, their own loss, damage, or injury. In *Marshall v BC (Govt)*,<sup>14</sup> the plaintiff was skiing at Cypress Bowl, a ski facility owned by the province of British Columbia. On descending the hill and approaching the chair lift at the bottom, the plaintiff, wanting to avoid a line-up of skiers, went off the groomed run and into a nearby ravine, seriously injuring his left ankle. The

edge of the ravine was not marked with a warning fence or barrier. Any skier using reasonable care, however, could have detected the existence of the ravine from a distance of between 10 and 20 feet. The court found the ski facility at fault for failing to mark the edge of the ravine with a warning fence or barrier, and the plaintiff contributorily negligent, as he should have detected the existence of the ravine in sufficient time to stop or turn aside.

The defence of voluntary assumption of risk offers a complete defence to a claim of negligence. For success, it requires proof, on a balance of probabilities, that the affected party voluntarily accepted the personal and legal risk of any loss, damage, or injury associated with the activity. This may be satisfied by a waiver signed by the affected party describing the inherent risk in the activity and his or her unqualified acceptance of any loss, damage, or injury associated with the risk. For example, in *Marshall v BC (Govt)*, a properly drafted waiver clearly and conclusively waiving any liability of the ski facility for injury to the skier, irrespective of the circumstances, may have avoided the award of damages.

The defence of remoteness addresses the causation requirement for a finding of negligence. The tortfeasor is liable to the affected party for any *reasonably foreseeable* loss, damage, or injury arising out of its failure to meet a reasonable standard of care in its action or behaviour. In *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*,<sup>15</sup> the defendant, through its admitted negligence, spilled fuel oil into Sydney harbour. A ship in the harbour was under repair, and sparks from a welding torch ignited a rag that was soaked with the oil spilled into the harbour. The resultant fire caused considerable damage to the ship. Was the damage caused to the ship too remote for the defendant to be held responsible? The Judicial Committee of the Privy Council, the highest court for Australia at that time, determined that it was too remote. The series of events from the spillage of oil into the harbour; the worker on the ship dipping his rag into the water, not knowing there was oil on the water; the worker being a welder; and a spark from his welding torch landing on his rag and causing a great fire on the ship were not reasonably foreseeable. In the judgment, the court said that the test for reasonable foreseeability was whether the consequence of a careless act was “too farfetched.”

## Nuisance

The tort of **nuisance** is the unreasonable interference with the affected party’s use and enjoyment of its property. Nuisance may range from physical damage to offensive odour or noise. In assessing the claim, relevant factors include the time, intensity, and duration of the offending activity, the nature of the neighbourhood, the offending party’s motivation, and any resultant physical damage.

The activity or behaviour must not simply be annoying. As noted by Lord Justice Chitty, it must be of a “serious nature.”<sup>16</sup> In his words, “True it is that every annoyance is not a nuisance; the annoyance must be of a serious character, and of such degree as to interfere with the ordinary comforts of life.”

In *Martin v Lavigne*,<sup>17</sup> the claimants brought an action for nuisance. The claimants were owners of a ground floor condominium unit and were in a dispute with the governing council of the condominium, of which the offending party was a member. They alleged that the offending party, as part of a daily walking routine, “stared” into their living room from the sidewalk in an intimidating way. The offending party never smiled or spoke or made any threatening or other gestures. The claimants estimated that he did so 100 to 200 times over the course of a year. The claim was dismissed on the grounds that it did not meet the required test for nuisance. The alleged staring into their living room did not rise to the level of a “substantial and serious” interference with the use or enjoyment of their property. Their unit was ground level, with floor to ceiling windows, and situated adjacent to a public walkway. In these circumstances, the claimant’s expectation of privacy would be significantly less than if they had lived in an above-ground unit.

### nuisance

a tort involving the unreasonable interference with the affected party’s use and enjoyment of its property

## Strict Liability Torts and the Rule in *Rylands v Fletcher*

The common law provides for certain situations in which a party can be found liable in tort even if they neither intended the wrongful act nor were negligent. These are categorized as strict liability torts. The most notable circumstance giving rise to strict liability is the possession or responsibility for dangerous animals or substances. The basis for strict liability in regard to dangerous substances is the “rule” articulated in the United Kingdom in 1868 by the House of Lords in *Rylands v Fletcher*.<sup>18</sup> This case is summarized in Box 2.1 and stands for the proposition that, when you bring a dangerous substance onto your property, you are strictly liable if it escapes and causes damage to a neighbour’s property. It is no defence for you to say you did not intend for it to escape or that you took all reasonable precautions to prevent its escape.

### BOX 2.1 » Case Law Highlight

#### *Rylands v Fletcher*, 1868 UKHL 1

Rylands engaged contractors to build a reservoir on his property. The contractors discovered a series of old coal shafts improperly filled with debris. They did not properly block them. The reservoir later burst and flooded a neighbouring mine run by Fletcher. The House of Lords found Ryland liable in damages and, in so doing, introduced the “Rule in *Rylands v Fletcher*.” The rule states that “the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.”

## Occupiers’ Statutory Duty of Care

Although tort law is rooted in the common law, provincial legislatures have exercised their constitutional authority under section 92.13 of the *Constitution Act, 1867* to create certain statutory torts.<sup>19</sup> One example already discussed are the privacy statutes enacted by the provincial legislatures of British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador. Another is the statutory duty of care imposed on “occupiers” of “premises” under the *Occupiers’ Liability Acts* of British Columbia,<sup>20</sup> Alberta,<sup>21</sup> Manitoba,<sup>22</sup> Ontario,<sup>23</sup> Nova Scotia,<sup>24</sup> and Prince Edward Island.<sup>25</sup> This statutory duty of care substitutes for the duty of care under the common law tort of negligence. In other words, a claim in negligence against an occupier is not available in these provinces to a visitor who alleges having suffered an injury or loss or damage to property on the premises of the occupier.

The statutory definition of “occupier” and “premises” is broad. The terms encompass anyone having possession, control, or responsibility for land or structures, including buildings (residential and commercial), ships, trains, aircrafts, and other vehicles, except when they are in operation. And so, it would include such hospitality venues as hotels, resorts, nightclubs, and restaurants.

The prescribed duty of care is essentially the same under each statute and is described in Table 2.5. For each, an occupier of premises has a duty to take reasonable care that visitors to the premises and their property are safe while on the premises. This duty extends not only to the condition of the premises but to any activities on the premises.



**TABLE 2.5 Occupiers' Duty of Care**

Province	Occupiers' Liability Act	Duty of Care
British Columbia	<i>Occupiers Liability Act</i> , RSBC 1996, c 337	s 3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
Alberta	<i>Occupiers' Liability Act</i> , RSA 2000, c O-4	s 5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.  s 14(1) Subject to subsections (2) to (4), the liability of an occupier under this Act to a visitor or trespasser extends to destruction or loss of, or damage to, property brought on to the occupier's premises by the visitor or trespasser, as the case may be, whether or not it is owned by the visitor or trespasser or by any other person.
Manitoba	<i>The Occupiers' Liability Act</i> , CCSM, c O8	s 3(1) An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises.
Ontario	<i>Occupiers' Liability Act</i> , RSO 1990, c O.2	s 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
Nova Scotia	<i>Occupiers' Liability Act</i> , SNS 1996, c 27	s 4(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
Prince Edward Island	<i>Occupiers' Liability Act</i> , RSPEI 1988, c O-2	s 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons, are reasonably safe while on the premises.

### **Exceptions, Restrictions, and Limitations to the Occupiers' Duty of Care**

The statutes provide for certain exceptions, limitations, and restrictions to the occupiers' duty of care. Prominent among them is the exemption of liability for the occupier where the loss, damage, or injury to a visitor, or the property of a visitor, on the premises was caused by the negligence of an independent contractor. The common caveat to this exemption is that it was reasonable for the occupier to entrust the work to the independent contractor.<sup>26</sup> And so, if a visitor to a restaurant on a cold January morning slips on the icy restaurant parking lot ("premises") and injures herself, the restaurant operator ("occupier") may claim no liability for her injury under the *Occupiers' Liability Act* if he or she had reasonably contracted out responsibility for the clearance of snow and ice from the parking lot to a snow and ice removal company.

The statutes, except for that of Manitoba, exempt an occupier from a duty of care to trespassers, or those on the premises intending to commit a criminal act,<sup>27</sup> and for those participating in any recreational activities on the premises for which there is no entry fee.<sup>28</sup>

An occupier is also exempt from a duty of care for risks willingly assumed by a visitor to the premises, with the caveat that there was no intent or recklessness by the occupier in the creation of any danger or causation of harm to the visitor. This is comparable to the previously discussed voluntary assumption of risk defence for a claim of negligence.<sup>29</sup>

All statutes provide that an occupier may by agreement or notice restrict, modify, or even exclude its statutory duty of care. Examples include restrictive or exclusionary language on a parking ticket or on a sign or poster on the premises. To be legally effective, the wording of the restrictive or exclusionary language must be clear and unambiguous, leaving no reasonable doubt as to the nature and scope of the restriction or exclusion of liability, and a reasonable effort must have been made to bring the restriction or exclusion of liability to the attention of the visitor.<sup>30</sup>

And finally, the previously described defences of contributory negligence and remoteness also apply to claims that an occupier failed to meet its duty of care under an *Occupiers' Liability Act*.

These are the most prominent exceptions, limitations, and restrictions to the occupiers' statutory duty of care. The reader, however, should consult the relevant *Occupiers' Liability Act* for any other restriction or exclusion of liability applicable to that jurisdiction.

## Remedies

The primary remedy for the party affected by a tort is damages. The affected party, as far as possible by an award of damages, is to be returned to the position they were in prior to commission of the tort. The categories or types of damages to be taken into account are the following:

### Special Damages

Special damages compensate the affected party for any consequential loss of income or expenses. For example, in *Doucet v Bourque*,<sup>31</sup> as a consequence of the staph infection resulting from hip surgery, the plaintiff was permanently partially disabled and not able to return to work as a registered nurse. Although she may have been able to perform some other type of work, it was unlikely that she would obtain future employment. The court awarded her 50 percent of the amount claimed (\$92,330) for loss of income.

An award of special damages, as previously noted, is subject to a defence of remoteness and the obligation of the affected party to take reasonable steps to minimize their loss. In *Rothwell v Raes*,<sup>32</sup> an infant suffered brain damage after receiving a vaccination. The physician was not liable for negligence, as it was the practice of the medical profession to recommend vaccination without reference to the remote possibility of damaging effects. In *McAuley v London Transport Executive*,<sup>33</sup> the refusal of the injured party to have the recommended surgery to repair the ulnar nerve in his forearm, and thereby recover the use of his fingers, was a failure to take reasonable steps to mitigate his loss. Consequently, the award in damages for negligence against the party who caused the injury did not extend beyond the time the injured party would have recovered from the surgery.

### General Damages

The injured party may also claim for non-pecuniary loss such as pain and suffering. The Supreme Court considered the appropriate approach to damages for pain and suffering in *Andrews v Grand & Toy Alberta Ltd.*<sup>34</sup> The injured party was rendered a quadriplegic as a consequence of a traffic accident, and in addition to special damages calculated to address his future care requirements, the court said it was appropriate to consider policy issues for an award of general damages. In that regard, general damages are intended to provide the injured party with solace for their misfortune. Money becomes a substitute for the pleasure and enjoyment that has been lost.

### Aggravated and Punitive Damages

The Supreme Court of Canada defined and distinguished between aggravated damages and punitive damages in *Vorvis v Insurance Corp of British Columbia*.<sup>35</sup> Aggravated damages are for mental anguish or suffering. The injured party must present evidence, usually of a medical nature, in support of any claim for aggravated damages. Punitive damages, on the other hand, are not intended to compensate the injured party for any incurred loss but, rather, to punish the offending party. As stated by Binnie J in *Whiten v Pilot Insurance Co*,<sup>36</sup> punitive damages are for a separate actionable wrong by the offending party that the court determines to be high-handed, malicious, arbitrary or highly reprehensible, and that departs significantly from ordinary standards of decent behaviour.

### Injunction

The alternative to damages as a remedy is an injunction. Injunctive relief is an order that the tortfeasor do something or, more typically, discontinue doing something. As a rule, the court will grant an injunction only where damages are not a satisfactory remedy. For example, a successful claim in nuisance against a neighbouring farm for the excessive foul smell emanating from its slaughter of pigs may be grounds for an injunction ordering it to cease. An award of damages would not be an effective remedy.

## QUESTIONS FOR REVIEW AND DISCUSSION

### Scenario 1

The offending party knocked over a post on the highway and left it protruding from the ground. The affected party was killed when he drove over the post as it penetrated the floor of his car and impaled him. His car was particularly vulnerable to penetration because the engine was in the rear.

Question: Was the offending party liable for the death of the affected party on the ground of negligence?

### Scenario 2

The safari park is a popular tourist attraction. Visitors can view exotic animals, including lions and tigers, from their own vehicles or from buses operated by the safari park. To ensure a safe environment, the safari park clearly informs visitors to keep the windows of their vehicles closed at all times and not to feed the animals. As well, a park guideline requires a designated employee to keep the passenger side of all vehicles and the big cats in sight after the visitors enter the carnivore section of the park. Victims A and B visited the safari park in Victim A's car, which was equipped with power windows operable from the driver's side. They drove into the carnivore section of the park with the windows closed. Two Bengal tigers came into contact with the

car, one on the driver side and the other on the passenger side. The forceful contact against the car by one of the tigers caused the driver to inadvertently lower the windows on both sides. Both Victim A and Victim B were severely mauled by the tigers. The park employee responsible for keeping the passenger side of the vehicle and the big cats in sight did not do so. As well, just prior to the car entering the carnivore section, a park employee had removed a tiger cub from the carnivore section and drove in the vicinity of adult tigers with the cub in her vehicle.

Question: Was the safari park liable for the injuries to Victims A and B?

### Scenario 3

There was a backup in a sewer line, causing raw sewage to enter the premises of the Royal Anne Hotel. The village of Ashcroft was responsible to maintain the sewer line. The hotel claimed the village was liable in negligence and nuisance for the resultant damage. As the court found no liability in negligence, the question remained whether the village was liable for nuisance.

Question: Was the village of Ashcroft liable to the hotel in nuisance?

### Scenario 4

Tenzin lives on Wolfe Island in the St. Lawrence River and travels each day on the Frontenac Islands Ferry to and from work in Kingston, Ontario. The ferry is owned and operated by the City of Kingston, which is responsible for all facets of its operation, including the docks at both ends. The city has contracted out the maintenance and repair of the docks on both ends of the ferry service to the Frontenac Islands Docks Corporation.

Tenzin had dinner with a colleague from work and boarded the ferry in Kingston late one evening to return home. Tired from a long day and having shared a bottle of wine at dinner with his colleague, he fell asleep during the trip and was awakened only when the ferry docked at

Wolfe Island. As he disembarked, his foot slipped on a loose board on the dock, causing him to fall and injure himself. Tenzin later admitted that he was still pretty tired and groggy, and that he stepped off the ferry before it was completely connected to the dock.

Tenzin's ferry ticket has a notice in bold and all caps on the back stating that the City of Kingston has no liability for any loss or damage incurred by passengers, including any loss or damage arising from the negligence of the city or any of its employees.

Question: What is the claim that Tenzin can bring against the City of Kingston for his injury, and what are the arguments for and against liability?

### KEY TERMS

causation, 35  
duty of care, 33  
intentional tort, 29

negligence, 33  
nuisance, 37  
tort, 28

tortfeasor, 29  
trespass to land, 30  
vicarious liability, 28

### NOTES AND REFERENCES

- 1 All corporate law statutes state that a corporation has the rights, powers, and capacity of a natural person. An example is s 15(1) of the *Canada Business Corporations Act*, RSC 1985, c C-44.
- 2 (UK), 30 & 31 Victoria, c 3, s 92.13.
- 3 *Ibid*, s 91.10.
- 4 2012 ONCA 32.
- 5 [1999] 2 SCR 534, 1999 CanLII 692 (SCC).
- 6 1987, 12 ACWS (3d) 392.
- 7 SBC 2003, c 53.
- 8 *Supra* note 2, s 92.13.
- 9 1932, AC 562 HL.
- 10 *Quintal v Datta*, 1988 CarswellSask 315; 1988, 6 WWR 481; 1988, SJ No 771; 12 ACWS (3d) 139; 68 Sask R 104, leave to appeal refused 1989; 76 Sask R 80 (note) SCC.
- 11 *McKeachie v Alvarez*, 1970, CarswellBC 257, 17 DLR (3d) 87.
- 12 [1995] 3 SCR 674, 1995 CanLII 72 (SCC).
- 13 1969, 1 QB 428.
- 14 1988, CanLII 2984 BC CA.
- 15 1961, UKPC 2 (“The Wagon Mound [No 1]”).
- 16 *J Lyons & Sons v Wilkins*, 1899, 1 Ch 255 (Eng CA), at 271-72.
- 17 2011 BCCA 104 (CanLII).
- 18 1868 UKHL 1.
- 19 “In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ... 13. Property and Civil Rights in the Province.”
- 20 RSBC 1996, c 337.
- 21 RSA 2000, c O-4.
- 22 CCSM, c O8.
- 23 RSO 1990, c O.2.
- 24 SNS 1996, c 27.
- 25 RSPEI 1988, c O-2.
- 26 The independent contractor exemption is found in the following sections of each statute: *Occupiers Liability Act*, RSBC 1996, c 337, s 5; *Occupiers' Liability Act*, RSA 2000, c O-4, s 11; *The Occupiers' Liability Act*, CCSM, c O8, s 5; *Occupiers' Liability Act*, RSO 1990, c O.2, s 6; *Occupiers' Liability Act*, SNS 1996, c 27, s 8; *Occupiers' Liability Act*, RSPEI 1988, c O-2, s 6.



- 27 The statutory exemption from liability for trespassers is found in the following sections of each statute: *Occupiers Liability Act*, RSBC 1996, c 337, s 3(3.1); *Occupiers' Liability Act*, RSA 2000, c O-4, s 12; *Occupiers' Liability Act*, RSO 1990, c O.2, s 4(3); *Occupiers' Liability Act*, SNS 1996, c 27, s 5; *Occupiers' Liability Act*, RSPEI 1988, c O-2 ss 4(2), (3).
- 28 The statutory exemption from liability for those participating in a recreational activity on the premises for which there is no fee is found in the following sections of each statute: *Occupiers Liability Act*, RSBC 1996, c 337, s 3(3.2); *Occupiers' Liability Act*, RSA 2000, c O-4, s 6.1; *Occupiers' Liability Act*, RSO 1990, c O.2, s 4(3); *Occupiers' Liability Act*, SNS 1996, c 27, s 6; *Occupiers' Liability Act*, RSPEI 1988, c O-2 s 4(3). Although *The Occupiers Liability Act* of Manitoba does not include a general exemption for those participating in recreational activities, it does provide an exemption for an occupier of recreational trails for those persons on the recreational trail (s 3(4.1)).
- 29 The statutory exemption from liability for risks willingly assumed is found in the following sections of each statute: *Occupiers Liability Act*, RSBC 1996, c 337, s 3; *Occupiers' Liability Act*, RSA 2000, c O-4, s 7; *The Occupiers' Liability Act*, CCSM, c O8, s 3(3); *Occupiers' Liability Act*, RSO 1990, c O.2, s 4; *Occupiers' Liability Act*, SNS 1996, c 27, s 5; *Occupiers' Liability Act*, RSPEI 1988, c O-2, s 4.
- 30 The statutory exemption from liability by agreement or notice by the occupier is found in the following sections of each statute: *Occupiers Liability Act*, RSBC 1996, c 337, s 4; *Occupiers' Liability Act*, RSA 2000, c O-4, s 8; *The Occupiers' Liability Act*, CCSM, c O8, s 4; *Occupiers' Liability Act*, RSO 1990, c O.2, s 5; *Occupiers' Liability Act*, SNS 1996, c 27, s 7; *Occupiers' Liability Act*, RSPEI 1988, c O-2, s 5.
- 31 1999 CanLII 32446 (NB QB).
- 32 1990 CarswellOnt 1062; 1990 OJ No 2298; 24 ACWS (3d) 708; 2 OR (3d) 332; 76 DLR (4th) 280.
- 33 1957 2 Lloyds Rep 500 (CA).
- 34 1978 CarswellAlta 214; 1978 CarswellAlta 295; 1978 1 WWR 577; 1978 1 ACWS 218; 1978 2 SCR 229; 1978 SCJ No 6; 19 NR 50; 3 CCLT 225; 83 DLR (3d) 452; 8 AR 182.
- 35 1989 CarswellBC 704; 1989 CarswellBC 76; 1989 1 SCR 1085; 1989 4 WWR 218; 1989 SCJ No 46; 16 ACWS (3d) 17; 25 CCEL 81; 36 BCLR (2d) 273; 42 BLR 111; 58 DLR (4th) 193; 90 CLLC 14,035; 94 NR 321; JE 89-810; EYB 1989-66980.
- 36 2002 CarswellOnt 537; 2002 CarswellOnt 538; 2002 SCC 18; 2002 CSC 18; 2002 1 SCR 595; 2002 ILR I-4048; 2002 SCJ No 19, 111 ACWS (3d) 935; 156 OAC 201; 209 DLR (4th) 257; 20 BLR (3d) 165; 283 N 1, 35 CCLI (3d) 1; 58 OR (3d) 480 (note); JE 2002-405; REJB 2002-28036.

