

Torts

TABLE OF CONTENTS

1. Introduction to Tort Law	e. Negligence and Contract or Business Relations	b. Trespass to Property or Goods
2. Negligence	3. Negligence and Contract in Business Relations	c. Intentional Business Torts
a. Duty of Care	a. Product Liability	d. Defences
b. Standard of Care	b. Negligent Misrepresentation	5. Intrusion upon Seclusion
c. Breach of Standard of Care Causing Injury or Harm to the Plaintiff—Causation	c. Occupiers' Liability	6. Nuisance
d. The Loss or Injury Was Foreseeable to the Defendant—Remoteness	4. Intentional Torts	7. Strict Liability and the Rule in Rylands v Fletcher
	a. Trespass to the Person	8. Remedies

1. Introduction to Tort Law

“Tort,” meaning “wrong” or “fault,” comes to us from French so that tort law is, in a sense, the “law of wrongs that are someone’s fault.” Tort doctrine applies to a wide range of legal disputes involving injuries to people or damage to property, usually outside the context of contract. Because of the breadth of the doctrine, tort law is divided into subcategories, the most important of which are **negligence** and **intentional tort**. The defendant in a tort suit is often called the tortfeasor (i.e., wrongdoer) and the remedy sought by a tort plaintiff is almost always damages. **Damages** is a term of dual meaning; it is used to describe the nature and extent of harm resulting from a tort, as well as the measure of compensation (i.e., money) sought or awarded as remedy.

All torts require proof of fault as a basis for the imposition of liability, although fault is measured differently for different classes of tort. The most important distinction between negligence (i.e., unintentional tort) and intentional tort is the presence or absence of intent.

Intentional tort is where the injury is deliberately caused to a plaintiff, and unintentional tort is injury that is inadvertently caused to a plaintiff by the defendant. Where there is intent, the general principles of intentional tort will apply, but where there is only recklessness, carelessness, or negligence, the principles of negligence will govern. Finally, there are other torts that cannot readily be classed in either category; these include nuisance and strict liability.

2. Negligence

The traditional law of negligence operates independent of both contract and property rights and is grounded in those rights flowing from relationships between people. The duty of care is the central

principle of negligence law, without which there cannot be any liability on the part of the defendant (i.e., tortfeasor), irrespective of how badly he or she acted. The English case of *Donoghue v Stevenson*, [1932] UKHL 100, was the basis for the law of negligence. In that case, Mrs Donoghue drank a bottle of ginger beer that had a dead snail in the bottle. She became sick and sued the manufacturer, Mr Stevenson. The House of Lords found that the manufacturer owed a duty of care to Mrs Donoghue as it was reasonably foreseeable that harm would result if product safety was not properly addressed. This case established the concept that everyone has a legal obligation not to harm others as a result of a careless act.

In simple terms, negligence results when a person commits a careless act without intending to harm another. The harm results from the tortfeasor’s failure to meet the duty of care (i.e., the legal duty owed by one person to another) in accordance with a “standard of care” applicable in the particular situation. The “standard of care” is the degree of care a person must take to prevent harm to another.

For example, a store owner has a duty of care to ensure that customers do not slip on a wet floor, and he or she must exercise this duty in accordance with a certain degree of care that a reasonable person must take to prevent harm to others (i.e., standard of care). In order to establish negligence, the plaintiff must show that:

1. the defendant owed the plaintiff a duty of care;
2. the defendant breached the standard of care that was reasonable in the situation;
3. breach of the standard of care caused the plaintiff’s loss or injury (i.e., causation); and
4. the loss or injury was foreseeable to the defendant (i.e., remoteness).

a. Duty of Care

One party's duty of care to another party is the foundation on which fault is established in a negligence action. In the absence of a duty of care, there is no liability in negligence.

In order to prove that the defendant owed a duty of care, the plaintiff must prove:

1. that the defendant acted despite a reasonably foreseeable risk of injury; and
2. that the plaintiff was within the scope of foreseeable victims of that injury.

If the defendant, in committing the tort, could reasonably foresee that a particular person or class of persons might be injured by his or her actions, then the defendant is said to have had a duty of care to that person or class of persons. For example, a store owner who did not clean up a spill has a duty of care to his or her customers, as it would be reasonably foreseeable that customers could slip and injure themselves as a result of the spill.

The test as to whether the tortfeasor could reasonably foresee a risk of injury to a person is determined by asking whether a reasonable person, in the same situation as the tortfeasor, would have foreseen that injury or harm could be caused to another person as a result of his or her actions. This ensures that even in cases where a tortfeasor does not think about others, and states that he or she could not foresee that injury would result, the determining factor as to whether something was foreseeable is based on an objective test, which is the "reasonable person" standard.

A "reasonable person" is defined as an individual who acts in accordance with generally acceptable business practices and conducts his or her affairs in a manner generally acceptable by society. It is a fictional person used to determine whether the tortfeasor had a duty of care, as well as the appropriate standard of care.

b. Standard of Care

Once a duty of care has been established, the court is faced with the challenge of determining whether that duty has been met. To do that, the court would have to determine the legal standard of care that the tortfeasor had to use in the particular situation. The reasonable person test is used to determine the appropriate legal standards of care.

Thus, in order to determine the legal standards of care, the court would need to determine what a reasonable and prudent person would have done to prevent the harm that resulted in the specific case, if faced with identical circumstances.

For example, a toy manufacturer would have a duty to place warnings on certain toys stating that there is a risk of choking for small children. However, the degree of care that the toy manufacturer would need to take to prevent potential harm (i.e., legal standard of care) would be determined based on the reasonable person test. The court would ask what a reasonable and prudent toy manufacturer would do in these circumstances and then determine whether the actual toy manufacturer measured up to those standards.

c. Breach of Standard of Care Causing Injury or Harm to the Plaintiff—Causation

Many mishaps involve the convergence of unfortunate circumstances. Multiple tortfeasors acting independently may contribute to one set of injuries, and the victim may even be partially at fault. It is up to the court to allocate fault (and liability) among the different parties according to the rules of causation.

In order to get compensation for negligence, the plaintiff must prove that the breach of the duty of care and the standard of care, caused or contributed to the injury or harm suffered by the plaintiff. The plaintiff must demonstrate that the actions of the defendant were, in fact, the cause of that injury or, in circumstances where multiple factors caused the injury or harm, that the tortfeasor's actions were a significant and substantial factor in causing the injury.

To establish causation, the court will use the "but for" test. The court will ask whether the injury or harm would have occurred "but for" the actions of the defendant.

In some cases, causation is straightforward (e.g., a repairperson fixing a fridge incompetently and the food spoils as a result of this repair). However, when there are several factors that may cause the injury or harm, the court must review each individual action in isolation to determine which action or actions of one or more tortfeasors caused the injury or harm. In addition to the "but for" test, the court must also ask whether there was a substantial connection between the action and the injury.

For example, a sharp piece of plastic is found in an ice cream container. The consumer buys the ice cream and cuts her tongue on the plastic. She requires stitches. On investigation, it is found that the plastic came from the manufacturer of the container, and the ice cream manufacturer did not notice that the plastic was inside the container before filling it up with ice cream. The court would have to ask:

1. whether, but for the actions of the manufacturers of the plastic and ice cream, the consumer would have suffered the injury; and
2. whether there is a substantial connection between the actions of the manufacturers and the injury.

The answer is "yes" because both manufacturers caused the injury.

Once the tortfeasors are identified as making significant and substantial contribution to the harm, like in the example above, the court must allocate liability among them. If the individual causes are found to be divisible, each defendant will be responsible for a portion of the damages. In the example above, it is likely that the causes will be divisible.

If the causes are indivisible, or if the tortfeasors are found to be "joint tortfeasors" (i.e., members of a group acting in concert to contribute to an end which results in harm), the defendants will be found "jointly and severally" liable for the harm. In joint and several liability, each tortfeasor, and all tortfeasors, are accountable for all of the harm, and the default of one must be borne by the others.

In some cases, the plaintiff may be found to have contributed to his or her own injury. One of the most familiar examples is that of the car accident victim whose injuries are aggravated by the failure to wear a seat belt. In such a case, the plaintiff will be said to have been “contributorily negligent.”

In some cases, the multiple causes of an injury will not occur simultaneously. A minor injury may predispose a victim to a future, much more serious injury, or a later injury may compound an earlier one. For example, a slip and fall on a wet floor in a grocery store causing the customer to have a bad sprain later resulted in long-term hip pain. In such cases, the law dictates that tortfeasors should only be held responsible for foreseeable damage substantially connected to their own actions. Therefore, the tortfeasor in the above example would potentially be responsible for the hip pain if the customer could prove that the hip pain was a result of the slip and fall. If the customer already had a hip problem which was aggravated by the slip and fall, the court may not hold the tortfeasor responsible for the hip pain. To do so, the court will usually seek to determine which portion of the injuries proven at trial would have subsisted absent the tortfeasor’s negligence and will not hold the tortfeasor liable for that portion unless a rule, such as the thin skull rule, dictates otherwise.

d. The Loss or Injury Was Foreseeable to the Defendant—Remoteness

One tortious action may trigger a long chain of different kinds of damage. Not every kind of damage in the chain will have been a consequence that the tortfeasor might have foreseen, and the severity of damage may also exceed all normal expectations.

The plaintiff would therefore have to prove that the injury or harm suffered was foreseeable (i.e., predictable) by the tortfeasor. The test would be whether a reasonable person could predict that the injury or harm would follow from his or her actions. As long as the defendant could have anticipated that injury or harm in general could occur, he or she would usually be held responsible for all the injury or harm that results, irrespective of whether the injury or harm was small or large.

Before liability will be imposed, it must usually be shown that the defendant was capable of foreseeing each type of harm proven. For example, a tortfeasor who runs over a poodle may be responsible for the dog’s vet bills, and even for the tranquilizers required to calm down the distraught owner, but will likely not be responsible for losses associated with the dog’s ruined TV commercial career, unless he or she runs over the dog while driving the clean-up cart in the TV studio.

In some personal injury situations, the courts have used the thin skull rule to modify the normal rules of remoteness. This rule applies in circumstances where the plaintiff suffers from an unusual physical or mental condition which may not be easily detectable but which predisposes him or her to unusually serious injury (a famous example is a plaintiff with a very fragile skull which fractured as a result of a minor blow). A tortfeasor, in injuring such a plaintiff “takes the victim as he or she finds

him,” and may be liable for damages beyond that which would be foreseen by a reasonable and prudent person.

3. Negligence and Contract in Business Relations

Product liability and occupiers’ liability are negligence claims that are found in business relationships and may be referred to as “contract torts.” Business relations, like social relations, can create duties of care, and a layer of negligence responsibility underlies many contracts. Even virtual strangers, bound only by the simplest terms of bargain and sale, may owe a duty of care to each other (the law of product liability is a good example). When contracts fail and are set aside, parties are often left standing on tort ground and must recast their relations into the language of tort if they wish to recover damages.

a. Product Liability

Liability occurs when a defective or dangerous product causes harm to people or property. The manufacturer, designer, or supplier of the product owes a duty of care to anyone who can be reasonably foreseen as using the product. A purchaser is one such user. There are other users who are not parties to the purchase contract (e.g., a friend of the purchaser riding in the car). These users cannot sue for breach of contract but they can sue for product liability. The purchaser can also sue under this category in addition to breach of contract.

As in negligence, the plaintiff must establish the four items described above to prove liability (e.g., duty of care, standard of care).

b. Negligent Misrepresentation

Another contract tort is that of negligent statement, or negligent misrepresentation. Contracts based on misrepresentations can be voided based on contract law. Negligence law can take resolution one step further by imposing liability for negligent statements that impede or destroy business relations. As in all negligence cases, liability depends on proof of a duty of care between the party making the negligent statement (who need not be a party to the contract) and the party injured by reliance on it. The normal tests for duty of care apply and not all business people will be found to owe a duty of care to each other.

c. Occupiers’ Liability

Occupiers (people having control over land or buildings, whether they are owners or tenants) have long been attributed a duty of care with respect to others invited or even trespassing onto property. The control required to form the basis of occupiers’ liability does not have to be permanent or exclusive (e.g., there may be multiple occupiers on one parcel of property, and an occupier’s tenure as such need last only as long as the incident attracting tort sanction).

i. Common Law Position

While an occupier owes a duty of care to each person entering the land, the common law standard of care (i.e., how much and what type of care an occupier needs to take to protect visitors) depends on the type of visitor.

There are three types of visitors:

- 1. Invitees**—people who come on the property for business purposes, such as customers or suppliers. They are entitled to the highest standard of care. Invitees should be protected from unusual dangers that the occupier knew or ought to have known about (e.g., water on the floor of a supermarket).
- 2. Licensees**—people who come on the property with the permission of the occupier but not for business purposes, such as social visitors. They receive a slightly lower standard of care, such as protection against known hazards (e.g., warning of having to step down when entering the building).
- 3. Trespassers**—people who come on the property without being invited and may be there for an illegal purpose. They are entitled to the lowest standard of care. Trespassers must be treated humanely and the occupier must not wilfully disregard their safety (e.g., putting a fence around a large hole in the ground while doing construction in an area to which a trespasser may potentially have access).

Visitors are subject to the normal principles of contributory negligence and may be required to share the burden of their own losses if they are found to have contributed to their injuries.

ii. Codification in Provincial Statutes

Several Canadian provinces, including Ontario, have adopted statutory modifications to the common law of occupiers' liability. In most cases, these modifications dispense with historical distinctions between classes of visitors and apply a scheme based on negligence concepts of liability. In Ontario, this statutory codification is found in the *Occupiers' Liability Act*, RSO 1990, c O.2.

4. Intentional Torts

Intentional torts are distinguished from negligence in that they are committed by a tortfeasor who intends to cause harm. A tort will be an intentional tort as long as the tortfeasor foresaw the occurrence of the relevant consequences as substantially certain and nonetheless committed a harmful act. More remote consequences may still attract liability, but it will be of a different character (e.g., recklessness or simple negligence).

a. Trespass to the Person

Intentional acts by a tortfeasor of unwanted physical contact with another person constitute battery. Assault occurs when a tortfeasor threatens another person with physical harm and the person receiving the threat perceives the harm to be imminent and that the tortfeasor has the ability to carry out the threat. This could be expressed in words or in physical action (e.g., pulling out a knife or shaking a fist in anger). Because assault and battery are often present together, there is some blurring of the boundaries between the two; however, it should be remembered that each is a separate tort, and assault alone can attract liability (although quantifying damages for an assault alone may be more difficult).

Another intentional tort is false imprisonment, which is unlawfully restricting another person's freedom of movement. This could be a momentary detention by any person (not just by police) and does not have to result in the person being placed in jail. It may be difficult to prove damages if the detention was momentary, even though it would be seen as false imprisonment.

b. Trespass to Property or Goods

Trespass occurs when a tortfeasor comes onto a landowner's property without permission. Any unauthorized entry constitutes trespass, regardless of whether or not there is any resulting damage. Trespass to real property is probably the most familiar form, but trespass to personal property (often described as theft or conversion) is also actionable in tort and can attract damages unavailable in a criminal action for theft.

In Ontario, there is the *Trespass to Property Act*, RSO 1990, c T.21, which deals with illegal entry into private and public property. The Act was created to try and codify the common law principles of trespass. As this is a provincial act, it is subject to quasi-criminal enforcement. This Act is mostly used by private property owners. In accordance with the Act, an owner of private property must post a "no trespassing" sign to prevent trespassers from coming onto his or her property.

c. Intentional Business Torts

Business torts include fraud, conspiracy, passing off, and interference with economic relations.

Two of such torts are:

- 1. Passing off**—this is an intentional tort where, for example, a manufacturer uses a name for its product that is similar to another popular name in the market (e.g., a car manufacturer calls its car Bentlie).
- 2. Interference with economic relations**—an intentional tort where a person uses illegal methods to intentionally harm a party's ability to make money. The plaintiff has to show an intention on the part of the tortfeasor to injure his or her business, interference by illegal means with the business' mode of earning money, and quantifiable harm.

d. Defences

There are numerous defences in tort law, such as the plaintiff failing to prove that the tort occurred, proving that the plaintiff contributed to his or her injuries or harm, proving that the plaintiff consented to the action, and self-defence by the defendant. Other defences include legal licence or authority, and necessity. It is beyond the scope of this outline to discuss these in detail.

5. Intrusion upon Seclusion

In the 2012 case of *Jones v Tsige*, 2012 ONCA 32, the Ontario Court of Appeal recognized a new tort for invasion of personal privacy called "intrusion upon seclusion."

In this case, Tsige accessed Jones' personal bank accounts at least 174 times from her workplace computer for personal reasons and without permission. In brief, the Court of Appeal held that the tort arises when there is intentional intrusion upon another person's

private affairs which would be highly offensive to a reasonable person. The tort includes examination of private bank accounts, opening another person's mail, etc., whether or not that information was used in the public sphere or in any other manner.

The tort is still valid even if there is not monetary loss. However, the Court of Appeal set \$20,000 as the upper limit in awarding damages. Ontario is the only province that recognizes such a tort.

6. Nuisance

The doctrine of nuisance deals with unintentional interference with the property owner's right to use and enjoy his or her property. In order to constitute nuisance, interference need not be intentional, or even negligent. As long as the possibility of an impact on the plaintiff's use is foreseeable to the defendant before the action is taken, that action can constitute nuisance. Nuisance does not need to involve an entry by the tortfeasor onto the plaintiff's land. It may instead be the result of the tortfeasor's ostensibly legitimate use of his or her own private property which may negatively affect the plaintiff's use of his or her property. For example, loud noises, bad odours, and shade from a new shed cast over a neighbour's cabbage patch may constitute nuisance.

In assessing damages, the court can award a remedy for almost any kind of interference (temporary or permanent) with the owner's use and enjoyment of his or her property. In establishing an owner's use and enjoyment, the court will look to the owner's past use and to future uses with realistic potential. Any interference beyond that which would not be tolerated by the "ordinary occupier" in the position of the plaintiff will be compensable in damages.

7. Strict Liability and the Rule in *Rylands v Fletcher*

Unlike other torts which require that the tortfeasors intended to cause harm or that they were negligent, the common law concept of strict liability imposes liability on tortfeasors without the need to prove intentional harm or negligence.

The English case of *Rylands v Fletcher*, [1868] UKHL 1 provides the basis for strict liability in certain cases involving the escape of water, chemicals, or other dangerous forces from one property onto another. In these cases, the damage to the victim's property does not need to be intentional or negligent—the fact that damage occurred will be sufficient to establish liability. The exception would be cases involving an "act of God."

In *Rylands v Fletcher*, the tortfeasor owned a reservoir that burst. The owner did not know that the water flowed through another channel which resulted in damage to the neighbouring property. The court found the owner was strictly liable for the damage.

The principle behind the imposition of strict liability is that there is a social benefit in requiring those who make risky or dangerous use of their own land to account for even the non-negligent consequences of that use because they are presumably the parties most able to control the danger.

In addition to the common law concept of strict liability, there are environmental statutes that hold present occupiers liable for expensive environmental damage caused by their predecessors.

8. Remedies

When the court finds that a tortfeasor is liable for a tort, the goal of the law is to compensate the plaintiff for the injury and/or loss and to attempt to restore the plaintiff to the position he or she was in prior to suffering the injury and/or loss.

The most common remedy is damages (i.e., financial compensation that the court orders the tortfeasor to pay to the plaintiff). Damages may be pecuniary (e.g., losses that can easily be quantified in money, such as medical bills) and non-pecuniary (e.g., losses that are not easily quantified in money, such as pain and suffering).

Finally, in determining damages, the court looks at whether the plaintiff tried to mitigate (i.e., minimize) his or her damages. For example, if a trespasser damages a sprinkler system, the plaintiff is expected to fix the sprinklers to avoid having a flood on his or her front lawn and incurring more damages. If the plaintiff does not fix the sprinkler system and further harm results, then the compensation may not include the harm that could have been reduced (i.e., mitigated).

Selected Terms

Contributory Negligence

Will be found where the conduct of the victim was a contributing factor in his or her own injury.

Damages

Describes the nature and extent of a loss or injury, and the monetary compensation awarded by the court as compensation for a loss or injury.

Joint and Several Liability

Where each tortfeasor, and all tortfeasors, are held liable for all of the damages, and the default of any one of the tortfeasors must be borne by the others.

Negligence

Failing to do something that a reasonable person would do, or doing something that the reasonable person would not do. Conduct that falls below the requisite standard of care.

Strict Liability

Describes liability imposed automatically on proof of consequences or action, without reference to fault.

Thin Skull Rule

Applies to impose liability for unforeseeable harm in circumstances where the personal injury tort plaintiff suffered from an unusual mental or physical vulnerability that predisposed him or her to unusually serious or unexpected injury.

Tort

Derived from the French language meaning "wrong" or "fault."

Tortfeasor

A person who has committed a tort. Literally meaning "wrongdoer."