NOTES ON LAW OF TORTS

(For NCA Candidates)

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All our Materials have been independently but specifically prepared for Candidates taking the National Committee on Accreditation (NCA) Examinations. They are all updated to the current NCA Syllabi.

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Preface

I welcome you to my notes on the Law of Torts for NCA candidates. Finally!!

This has been long in coming. And I have been overwhelmed by the sheer number of demands and requests for my notes on Torts. Many candidates have waited endlessly for these notes, confiding in me that they found my study materials extremely helpful and they couldn't do without using them. They told me that they found my ways of writing my notes unique, in that I speak directly to the readers and engage them in simple language that makes the topics easily understandable. Some vowed to hold on with their NCA Torts exam until my notes were ready. Others also informed me that there is a dearth of helpful and affordable study materials on Torts which they could use for the exams, aside the required texts.

I did sympathize with the scores of my readers who had waited for these notes on Torts, particularly those who had no other option than to make do with other resources, just to get along. I felt pained that some of them who had waited several months for me had no choice but to look for other materials, albeit unwillingly. I am sorry about the delay. It wasn't intentional but the pressure of work and my tight schedule prevented me from coming out with these notes before now. Again, my sincere apologies to all my users who might have been affected or disappointed one way or the other by the delay in publishing these torts notes.

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As usual with me, my notes on Torts have been prepared in line with the current NCA syllabus on the subject. And as I have assured with my other notes, I intend to regularly update these notes in line with any update from NCA, so that the candidates will be rest assured that they are using the current materials for their exams.

In preparing these notes, I have followed the NCA syllabus and extracted all of the topics as listed in the current syllabus, verbatim. In addition, I have separated this note into several sections, following the syllabus, and I have ensured that each topic under each section is adequately covered. With this method, I have ensured that *all* topics listed in the NCA syllabus have been dealt with. This also makes it easier for you to cross check any topic in the syllabus with the corresponding topic in my notes.

Unfortunately, tried as much as I did, I couldn't reduce the pages beyond what it is at the moment without the note losing its value. Because this note was specifically designed for NCA candidates, most of whom

I'm aware have to combine study and work/family, I sure do recognize the fact that you need something as concise as possible. But I couldn't go lesser than this. This is primarily because the topics under the current syllabus are so many – well over 42 major topics with numerous sub-topics. And this note won't serve its purpose of helping you pass the exam if I don't cover all these topics.

In arranging the chapters of this note, I have endeavoured to follow the outline of the syllabus. I divided the note into eight sections (A – H) as per the syllabus and grouped the topics under each section, as listed in the syllabus. So, each section starts with Chapter 1. This is to make it easy for candidates to make easy cross-references with the syllabus.

In preparing these notes, I have made extensive and generous use of the required texts as listed in the NCA syllabus, viz:

- Robert M Solomon, Mitchell McInnes, Erika Chamberlain and Stephen GA Pitel, *Cases and Materials on the Law of Torts*, 10th Ed (Toronto, ON: Carswell, 2019) ISBN 978-0-7798-9137-5, and
- Erika Chamberlain & Stephen GA Pitel, eds, *Introduction to the Canadian Law of Torts*, 4th Ed (Toronto: LexisNexis, 2020) ISBN 978-0-433-50488-7

I declare that I have quoted from, paraphrased and referred generously to the contents of these texts.

I have also made good use of plenty other resources, too numerous to list here, both in soft and hard formats, as well as many online resources. In doing this, I have remained conscious of the fact that I must limit myself to the contents of the NCA syllabus as a guide, since this is what NCA will test the candidates on. So, don't be surprised if you find additional resources not found in the required materials.

The bottom line is to give you a note that will see you through to success in your exam. I earnestly hope this note does just that.

- Manuel

SECTION A

INTRODUCTION

As the title implies, this section introduces you to the general concept of torts law. This is important, particularly for those studying law of torts for the very first time.

The section begins with the nature and history of torts and then seeks to explain those elements that make torts what it is. Please take note of the concept of intention in torts, as it serves as the basis for liability. Although, there are some aspects of torts that do not require intention, e.g., strict liability or absolute liability; yet, the greater majority of torts require intent, that is, the state of mind of the defendant to bring about a desired consequence.

Some of the topics in this introductory section are explained in more details in later sections.

Please take note of the historical roots of torts in Chapter 6 of this section, because you will need to remember some of the terms used there, as they will continue to recur throughout the note. This is where the origins of trespass and action on the case came from and you will regularly need to keep the distinction in mind.

Please take note also of the discussions on standard of proof and burden of proof in Chapter 7.

Exam Tips:

It is recommended that you get familiar with the discussions on remedies in Chapter 4. This is an important topic, one which you are most likely to come across in answering your exam questions. Please know the difference among the 5 heads of damages and when they will be awarded.

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.

a. 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 unto 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.

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 are unduly profiting at the expense of the injured consumer.

b. 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.

c. 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 – say rights don't exist merely as incidents of a larger enterprise, but rather they inform the entire subject, and there is no way to understand torts apart from the viewpoint of rights.

v. Formalist – contrary to the view that judicial decision-making are 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 plaintiff and her defendant.

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

i. *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.

ii. *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.

iii. *Normative rights theorists* – these argue that the law ought to develop by reference to rights and obligations.

Chapter 2

Bases and Scope of Liability, Parties to an Action

The use of the plural form, law of torts, indicates that there are many different types of torts – battery, assault, negligence, etc. This classification is said to be of practical utility but lacking in theoretical analysis and insight.

The second method of classification of torts is by reference to interests and rights considered worthy of recognition and protection by the law. Mind you, various types of interest have been recognized in various times in history while other interests will continue to be recognised as the law develops.

The third method of classifying torts is by reference to direct and indirect harm. This is determined by reference to whether the harm was caused to the plaintiff directly or indirectly.

A fourth and alternative method of classification of torts is to group them into liability based on fault and liability in absence of fault. This is because some torts can only be committed:

- intentionally,
- some intentionally or carelessly,
- others can only be committed carelessly.

So, using this fourth method, the broad classification of torts is as follows:

a. Fault or intentional torts – these are torts in which intention and carelessness are essential elements of liability. So, for the wrongdoer to be liable, there must be intention or carelessness. The two elements may be explained further as follows:

   i. *Intention* – the determinant factor here is whether defendant intended the consequences of which the plaintiff complained, i.e., the consequences of a deliberate, formulated aim or purpose. Therefore, the law is concerned with the defendant's subjective intent to cause certain consequences; to succeed, the plaintiff must prove actual negligent intent on the defendant's part. Here, it is not enough to prove that defendant did cause the consequences or did so carelessly. The subjective intent to cause the consequences is vital and this is evident in the intention requirement of torts like assault, battery and false imprisonment.

Meanwhile, please note that there is a difference between intention and malice. Even though interrelated, the roles of each are different. Malice could either mean that the wrongdoer acted out of spite or some other improper motive (malice in fact) or acted with the intent to commit a tort (malice in law).

In the same light, not all intentional acts may result in liability, e.g., where the defendant is able to present a defence to her acts. This is not because what the defendant did is not a tort, but because she is able to justify her acts on an available defence that will relieve her of liability. Similarly, not all intentional acts that are harmful to the plaintiff may cause liability. An example is the competitor that sets up a rival business close to another, to sell cheaply with the intention to drive that other person into bankruptcy. The competitor may not be found liable even though her intention was to cause the other person economic losses.

ii. *Carelessness* – a careless conduct, also called a negligent conduct, is one that involves a failure to act with such care as would normally be expected in the circumstances.

English law, from the 14th century began to make references to negligent conducts and negligent behaviour as basis of liability. Subsequently, recognition of liability was given in cases of negligence but with significant limitations against recognition of a more general notion of liability for careless conduct. These limitations were: (1) the doctrine of privity of contract which limited liability to only parties to the contract and thus led to the question of who was entitled to sue in torts; (2) the confusion of courts between direct and indirect injuries because common law only recognised harm that immediately and directly linked to defendant's conduct, and (3) the issue of remoteness of damage as the courts were at that time still uncertain about causation and the scope of liability for careless conduct. They were only focused on a select group of negligence in which liability for carelessness was narrow. From the mid-19th century, English law gradually began to move beyond these limits and recognize a broader notion of liability. This was the situation until the decision in *Donoghue v. Stevenson* where the court encouraged the use of a more generalized tort of negligence, not limited to particular fact situations but applicable to any set of facts. This led to the development of more important elements of liability.

So, it is necessary today to separate the tort of negligence from the more general concept of negligence as carelessness. Hence, to say someone is negligent is not just to say that she acted

without due care but that all elements of the torts of negligence are present. Negligence here is then a legal conclusion, not just a description though both terms are generally used in description. But the core element of the requirement to take care and avoid carelessness is for the person to behave as a reasonable person would in the circumstances.

b. Strict liability – this is the category of torts in which the wrongdoer will be liable, regardless of whether he acted intentionally or carelessly. Here, liability is based upon causation rather than fault, though there are some limited defences available to the wrongdoer.

There are several instances of strict liability but most cases fall under one of the following two instances:

i) *The doctrine of Rylands v. Fletcher* – which deals with the escape of a dangerous thing. The House of Lords established the rule that the defendant will be liable if, as a result of her non-natural use of the land something escapes therefrom and injures or causes loss to the defendant. The plaintiff need not prove intentional act or negligence. But defences may be available to the defendant if, for instance, the escape of that thing was caused by a third party, an unavoidable act of God or because the plaintiff's loss was as a result of the defendant's performance of a statutorily authorized activity.

ii) *Vicarious liability* – which deals with the defendant's liability for the wrong committed by another person. This is known as the rule of respondent superior, e.g., employer is held liable for employee's conduct.

Please note that the scope of strict liability remains narrow because the courts prefer to base liability on fault. For example, in **Canada v. Saskatchewan Wheat Pool (1983),** a grain dealer, who was an agent of the Board, supplied infested grain contrary to an existing statute. The vessel that loaded the grains had to be diverted, unloaded, reloaded, fumigated and the owner compensated. The Board now seeks to recover damages from the agent, not pleading negligence but that the agent was strictly liable for breach of the statute. The issue at the Supreme Court of Canada (SCC) was, where A has breached a statutory duty causing injury to B, does B have a civil cause of action against A? If so, is A's liability absolute, in the sense that it exists independently of fault, or is A free from liability if the failure to perform the duty is through no fault of his? The Court was unwilling to expand the scope of strict liability and held that the civil consequences of breach of statute should be subsumed in the law of

negligence. The Court rejected the notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages, as well as the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability. Here, the Board did not claim in negligence and there was no evidence at trial of any negligence or failure to take care on the agent's part. On the contrary, the agent demonstrated that it had operated its terminal up to the accepted standards of the trade.

c. Absolute Liability – here, the defendant is held liable simply because she carried out the prohibited conduct and caused the plaintiff harm as a result. The plaintiff does not have to prove that the defendant's act was intentional or negligent: all she needs do is to establish that it was the conduct of the defendant that caused her harm or loss. So also, the defendant does not have recourse to exculpatory defences.

   Absolute liability is similar to strict liability but the major difference lies in the fact that the defendant may enjoy some defence under strict liability while no defence is available under absolute liability.

d. Negligence – this happens when the defendant fails to take reasonable care to prevent foreseeable harm or loss to another person. The plaintiff bears the burden of proving the defendant's negligence, though in some instances of negligence, this burden of proof may shift to the defendant which may make the claim look similar to that of strict liability. But negligence can be differentiated from strict liability via this illustration: in a product liability claim, the plaintiff must prove that the defendant, in making that product, failed to take reasonable care to prevent the defect that caused her the loss or injury. On the other hand, for strict liability, all the plaintiff needs prove is merely that the defect caused her loss or injury.

e. Intentions – as discussed above, intention is an element to establish the fault of the defendant. There are several legal rules to help the plaintiff establish that the defendant acted with actual subjective intent, e.g., the doctrine of imputed intent which automatically ascribes to the defendant the required intention and saves the plaintiff the burden of establishing intent.

f. No liability – there are some types of tort that are not recognized under the rules of tort liability, even if the defendant acted intentionally or negligently. The defendant cannot be sued in torts even if there is a causal connection between the defendant's act and the plaintiff's harm. An example is of the competitor who sold at reduced prices in order to run a rival business into bankruptcy or out

of business. No cause of action in tort lies against such a competitor, so long as she acts lawfully, even if intentionally or maliciously. For the Canadian example, see ***Dobson v. Dobson (1999)*** where a pregnant mother was negligently involved in a vehicle accident that caused prenatal injuries of permanent mental and physical impairment to her foetus. In an action by the child against the mother, the issue was whether the mother was liable in tort for damages to her child arising from the alleged prenatal negligent act which injured the foetus. The SCC dismissed the claim, holding that the public policy concerns raised in this case are of such a nature and magnitude that they clearly indicate that a legal duty of care cannot, and should not, be imposed by the courts upon a pregnant woman towards her foetus or subsequently born child. However, unlike the courts, the legislature may enact legislation in this field, subject to the limits imposed by the Charter. Moreover, the judicial recognition of this cause of action would involve severe psychological consequences for the relationship between mother and child, as well as the family unit as a whole. The imposition of tort liability in this context would have profound effects upon every pregnant woman and upon the Canadian society in general. So, while a child born with injuries sustained during pregnancy may generally proceed in negligence against the tortfeasor, no such cause of action lies if the injuries were caused by the mother's carelessness during pregnancy.

Parties to an Action

Since there are almost always only two sides to a legal dispute, for and against, discussions about parties to an action in tort will therefore relate essentially to the capacity to sue and to be sued.

a. Capacity to sue – this is to determine who has the legal capacity to sue, and they include:

   i. *Natural persons:* all persons are protected in tort law from their moment of birth and throughout their lifetimes. They therefore have the legal capacity to initiate an action in tort for any wrong done to them, regardless of their age, sex, mental capacity, location or citizenship. Note though that special requirements may exist for commencement of actions by an infant, a person lacking mental capacity, lives outside the province or who is an undischarged bankrupt.

   Common law and legislation have developed to also include persons yet to be born and persons who have died in the category of natural persons. Thus, liability can now be imposed for a tortious wrong done to a foetus before being born, (though in some cases, there is the requirement that the child must subsequently be born alive). Secondly, the rule that a dead person cannot make an

action in tort as a claim in tort dies with the person has now been modified by legislation. Barring some exceptions, legislation generally permits the executor or administrator of the estate of a deceased person to institute actions in tort for the wrong that caused that person's death or even for a tortious act committed against her before her death.

The law has also recognised the capacity of a person to sue in a class proceeding for tort committed against many people who cannot sue separately due to litigation cost or the difficulty associated with access to justice. This is common in cases of product liability or negligent misrepresentation involving a large number of people, in which case, the court may approve only one individual to initiate the action in tort on behalf of the class of individuals without the need to individually identify them.

ii. *Juristic persons*: the law recognises the legal personality of two types of corporations to sue, viz:

1. *Corporation sole*: this is a human being recognised as having a distinct legal personality that is separate and apart from her personality as a human being. An example of this is the Crown, in which the human occupying the throne is treated as distinct from the constitutional sovereign that has been personified by law. Hence, a tort may be committed against the Queen in any of her capacities and for which she can sue. In jurisdictions like Canada where there are various representations of the Crown, i.e., in the right of Canada or in the right of the province, each of them is a separate corporation sole against whom a tort may be committed, or who may even commit a tort against one another, and they can sue.

2. *Corporation aggregate*: these on the other hand is an entity created by a number of human beings or juristic persons and which is recognised as being separate from the persons who created them or who are comprised in that entity. An example here is a corporation created either under the federal or provincial laws which has the legal capacity to commence an action in tort, just like a natural person. A corporation aggregate may even in some circumstances have the legal capacity to commence an action for personal torts, e.g., libel or slander, so long as the defamation affects the reputation of the corporation and causes it financial losses.

   Both a corporation sole and corporation aggregate are legal persons who have the capacity to sue for tortious acts done against them. However, there is a class of torts, e.g., trespass to the person, that has been recognized as not possible to be committed against either a corporation sole or a corporation aggregate.

Please note that an unincorporated association (e.g., a private members' club, a trade union, a syndicate of individuals) does not have the capacity to sue as a corporation aggregate. The law only allows such unincorporated association to bring an action by one member in a representative capacity on behalf of the other members.

b. Capacity to be sued – this is to determine the person against whom an action in tort can legally be commenced. Here also, we shall consider the two categories, as follows:

i. *Natural persons*: all human beings who have committed a wrong in tort can be sued. Under common law, however, one spouse cannot sue the other in tort while an action in tort cannot also be maintained against a dead person. These rules of common law have now been reversed by legislation. See e.g., The Equality of Married Persons Act, and the Trustee Act respectively.

Please note, however, that some categories of persons cannot also generally be sued for torts committed by them. These include foreign sovereigns, certain diplomatic representatives and certain functionaries of the United Nations. Ambassadors or similar-level representatives cannot be held liable for torts personally committed by them, but this immunity does not extend to lower levels of diplomatic staffs. By virtue of the State Immunity Act, such immunity is not absolute and does not cover some categories of claims in torts e.g., claims for death, personal injury or property damage that occurs in Canada, as well as some commercial activities.

A person under disability, e.g., a minor or a person who lacks mental capacity, may be sued in torts although special requirements mandate their defence to be managed by an adult with capacity. The plaintiff may apply for a court order for this if defendant refuses to arrange one.

ii. *Juristic persons:* the categories of corporation sole and corporation aggregate we discussed above also apply here and they can be sued for torts committed by them, in this manner:

- *Corporation sole*: the traditional rule of "the King can do no wrong" that shields the corporation sole from liability for the acts of its agents and employees have now been majorly replaced by legislation. Today, in Canada, the Crown may be held liable for a tort committed by her agent or employee if the wrong would make an employer liable under the doctrine of vicarious liability. The Crown may also be held liable for torts resulting from property ownership, possession or control or for the performance of any duty imposed by law on an officer of the Crown except for judicial duties.

- *Corporation aggregate*, e.g., a business corporation, may be directly liable if the tortious act was expressly ordered by an agent, officer, the governing body or an individual agent of the corporation. On the other hand, the corporation will be vicariously liable if the tortious act was committed by the agent or employee of the corporation in the course of her employment or within the scope of her authority.
- *Unincorporated association*: this cannot be sued in the group name since it is not incorporated and lacks such legal capacity. A plaintiff against whom the wrong is committed by all the members may have to sue them separately. However, the rules of court permit such a plaintiff to apply to court for a representative order that will permit one member to be sued on behalf of all the members.

Chapter 3

Intention and Related Concepts

The element of intentional tort include volition, which is the voluntary exercise of control over the act, i.e., in the physical sense. To be liable for intentional tort, the defendant's conduct must be voluntary and intentional. Here, volition is defined to mean the exercise of control over one's physical actions. In **Smith v. Stone (1647),** defendant was carried unto plaintiff's land by the force and violence of others, not voluntarily. In an action by plaintiff for trespass to land, defendant argued that the trespass was involuntary. The court held that there cannot be trespass without intent (volition) as an involuntary trespass is not actionable. The court compared the instant case with the hypothetical situation of a person driving cattle unto another person's land, stating: "that it is the trespass of the party that carried the defendant upon the land, and not the trespasses of the defendant: as he that drives my cattel into another man's land is the trespassor against him, and not I who am the owner of the cattel".

We shall consider intention below and the other concepts related to it.

a. Intent

In torts, intention is the desire of the tortfeasor to bring about the consequences of her action. This should be distinguished from the desire to do the physical act itself. An example is when John intended to throw a stone at James but the stone hit Alice instead. Throwing the stone was John's desire, the intended physical act, but hitting Alice was not the intention because that was not the consequences desired by John.

The fact that he threw the stone is not relevant to the issue of desire, as a single act may bring about several consequences, some of which may be intentional but only one of which will be relevant to the tort claim. As in our example above, if Alice decides to sue John for the tort of battery, the relevant issue will be whether John intended to cause the offensive and harmful contact by hitting her with the stone. Alice may fail if the intention cannot be established since battery is an intentional tort.

Please note that the important issue here is whether the defendant desired to bring about the specific consequences of the tortious act. The intent may not be hostile or otherwise blameworthy, and the fact that the defendant had the intent may not make him liable because intent is only one of the elements of an

intentional tort. The other elements of the action and any available defence must be analysed before we can come to the conclusion whether the defendant is liable.

Note though that the mere fact that the defendant did not desire the consequences of his action may not automatically resolve the question of intent, as the plaintiff may still establish intent under the doctrines of imputed or transferred intent, as follows:

1) Imputed (Constructive) Intent: this applies where the defendant did not actually desire the consequences that occurred but which were nevertheless certain to occur or subsequently certain to occur due to the circumstances. The doctrine is founded on the notion that a person who acts with knowledge of a substantial certainty that a consequence will occur will be taken to have intended that consequence. Using our illustration above, assuming John hurled the stone at James who was standing in a crowded mall or train station and it struck Alice. That John did not intend the stone to hit Alice will not be a justification; the intent will be imputed to him since it was certain that throwing a stone in such crowded location was certain to hit someone or that injuries were certain to subsequently follow the act.

2) Transferred Intent: this applies where the defendant intends to commit an intentional tort against one person but unintentionally commits an intentional tort against another person, or where the defendant intended to commit a particular type of intentional tort against the plaintiff but ended up unintentionally committing another tort. Therefore, if a defendant meant to cause harm but caused a different type of harm or damage or hurt an unintended victim, he will nonetheless be liable. In our illustration, assuming John merely intended the stone to hit James bag but it hit James on the head or hit Alice's car, the intention to cause the injury or harm will be transferred. This doctrine is historically limited to the intentional torts derived from trespass *vi et armis*, i.e., battery, assault , false imprisonment, trespass to chattels or trespass to land, and it's uncertain if Canadian courts will allow it to apply in other types of tort claims.

b. Related Concepts

The following are concepts that are related to intent in torts:

1) Motive: motive is irrelevant in tort as the court will not inquire into the motive of the defendant before finding him liable, neither does the plaintiff have to establish a blameworthy motive. Your friend who

moves your property to avoid it being damaged by the snow and the thief who takes it away all have the same intent in trespass to chattel but have different motives.

Please note that the concept of motive is very broad, and in some cases derived from the writ of *trespass on the case*, e.g., malicious prosecution, where the plaintiff must establish that the defendant acted with malice or improper motive. In some instances too, motive may be relevant in deciding the award of damages. For instance, the court may award aggravated or punitive damages against a defendant found to be highly blameworthy.

But again, generally speaking, the reason of wanting to do an act or wanting a particular result to happen is not relevant to the finding of liability in tort. And the courts have devised particular responses to the question of motive, as follows:

i. *Duress*: a defendant that acted under duress will not be allowed to escape liability as this will not negate her volition or intent. Unlike in criminal law, duress is not a defence in tort law. Thus a defendant may still be liable so long as the act was done with volition and intent, even if done under duress. See:

- **Gilbert v. Stone (1648)** – the plaintiff sued the defendant for trespass and taking of his horse. The defendant pleaded that he had to do so because of twelve armed men who threatened to kill him if he did not go to plaintiff's house and take the horse. The court rejected the defendant's plea, holding that it is not permissible to do trespass to one out of fear of threatening by another.

ii. *Provocation*: the test for provocation is whether the plaintiff's conduct caused the defendant, as a reasonable person to lose his power of self-control. Generally, the courts will confine provocation to situations in which the plaintiff's provocative acts occurred at the same time or immediately before the defendant's alleged wrongful conduct. Even in appropriate circumstances, evidence of previous bad feelings or prior incidents between the parties may be taken to trigger or enhance the defendant's loss of self-control.

- **Miska v. Sivec (1959):** - M sued S for injuries sustained when S shot him. S raised the defence of provocation alleging that M had blocked his car and approached him armed with an iron bar and a knife, upon which he had to retreat to his house and retrieved his gun with which M was shot. At the trial, the court found evidence of previous bad blood between the parties going back over a period of about nine months.

  Court held that to be capable of being considered provocation, the conduct of the plaintiff must have been such as to cause the defendant to lose his power of self-control and the conduct must have

occurred at the time of or shortly before the assault. In this case, the defendant had had time to successfully retreat to his house and took position at an open window from where he fired at the plaintiff. He did not say that at that time, he was annoyed or provoked. The court found that his conduct was deliberate and belied the existence of any sudden and uncontrolled passion. The court also refused to consider evidence of previous incidents between the parties as they were not immediate and there was no evidence that they did enhance the effect of the immediate provocative acts to inflame the defendant's passion.

Unlike in most other provinces, Ontario courts have held that a finding of provocation cannot reduce compensatory damages but may be relevant in precluding or reducing aggravated or punitive damages. See **Shaw v. Gorter (1977)**. It is left to the SCC to make a pronouncement on this.

2) *Mistake* – Mistake occurs in tort law when a defendant intends the consequences of her conduct but those consequences have a different factual or legal significance than the one contemplated. Note though that mistake is not relevant in establishing the elements of a cause of action because mistake has no effect on intent. Mistake of fact or mistake of law is no defence to intentional tort but may only mitigate damages by giving insights to the defendant's acts. See instances of mistake of law in *Hodgkinson v. Martin* and mistake of fact in *Ranson v. Kitner* below:

- **Hodgkinson v. Martin** – Appellant laid hands on Respondent and wrongfully put him out of the office premises without use of any more force than was necessary. Appellant was of the sincerely mistaken belief that he was justified in doing so in the protection of the Crown so as to retain access to the premises. In an action for trespass to the person, the court held that Appellant's sincerely held mistaken belief is no excuse but it is a mitigation of his liability and this must be taken into consideration more so when no harm had been occasioned to the Respondent's person, clothing or reputation. Nominal damages was therefore awarded.

- **Ranson v. Kitner** – defendants killed plaintiff's dog while hunting, under the mistaken belief that it was a wolf. Plaintiff sued for value of dog. Defendant disclaimed liability on grounds that they did not intend to kill the dog, it was an accident, they acted in good faith and that the dog had uncanny resemblance to wolf. Court rejected defendants' argument and held them liable because the animal's wolf status was not relevant. All that was needed was that the defendants admitted the intent to kill it, and this caused damages to plaintiff.

3) *Inevitable Accident* – this applies where defendant can prove that the plaintiff was injured unintentionally and without negligence on the defendant's part. Therefore, a defendant cannot be held liable in intentional torts for injuries caused the defendant by accident. Absence of intent here is what distinguishes mistake from accident.

4) *Liability of Children and those with Mental Illness* – remember that the accepted tests in intentional torts are volition and intent, but in cases involving children and those with mental illness, Canadian courts have inexplicably departed from these tests and rather adopted the criminal law test specified in s. 16(1) of the Criminal Code, to wit: whether the defendant was capable of "appreciating the nature and quality" of her acts. See **Tillander v. Goselin (1967)** where a 3-year old child who had removed an infant from her carriage and dragged her for 100 feet was held not liable in battery because he did not have "the mental ability to appreciate or know the real nature of the act he was performing."

   At common law, a parent cannot be held vicariously liable for the conduct of the children under their care. However, adults who supervise children can be held liable if they are a party to the child's wrongdoing or in negligence if they fail to monitor or control the child. many provinces have enacted legislation known as the "parental responsibility" laws but these have also only limited the liability of parents to negligence in supervising the child.

   It is in the same light that doctors, nurses and other health workers who are treating or supervising a patient with mental illness cannot be held vicariously liable for the acts of the patient, unless they are a party to the wrongful act or are negligent in treating or supervising the patient.

Chapter 4

Remedies

In any action based on tort, the issue of the applicable and appropriate remedies always comes last. This is because the plaintiff must first prove all the elements of the tort and if the defendant cannot establish a defence to disclaim it or if she admits the torts, then the next issue is to consider the appropriate remedy that will apply in the case. It is however necessary to discuss about remedies at this stage so you may understand that the type of available remedy may influence the plaintiff in her decision to sue, and also that understanding remedies at this stage will put most of the discussions following hereafter in proper perspectives.

In tort, two broad categories of remedies are recognised, as follows:

1) *Judicial remedies*: these are the most important, the most complex and the most common and are the types of remedies granted by a court to the successful plaintiff. They include award of damages, injunctions (prohibitive and mandatory), declarations and order of specific performance. (An additional remedy is that provided under s. 24(1) of the Canadian Charter of Rights and Freedom (Charter) which empowers the court to, among others, issue declarations or award compensatory, aggravated or punitive damages to a victim of Charter abuse).
2) *Extra-judicial remedies:* these are self-help efforts by the plaintiff without recourse to the courts or state officials and may include recapture of chattel, re-entry onto land and abatement of nuisance.

Damages

These are monetary awards made to a successful plaintiff who is able to successfully establish that she had suffered injuries or losses from the plaintiff's actions. Therefore, before damages can be awarded, the plaintiff must convince the court that a wrong has been done. Please note that the overriding purpose of awarding damages in an action in tort is not to punish the wrongdoer but to compensate the injured person, to give her financial compensation for the damage, loss or injury suffered as a result of the defendant's conduct.

So, in classifying damages, a claim may be pecuniary, i.e., made to recover monetary losses and is calculable in dollars and cents. This may include expenses to repair a car, loss of earnings or income,

medical bills incurred or costs of repairs. A court can also compensate for other types of losses known as non-pecuniary. Damages for non-pecuniary (non-monetary) claims are the kinds of damage/injury/harm that have no monetary equivalent or cannot be ascertained in specific terms and this may include award of damages for physical pain, injury to feelings, humiliation and disfigurement. In these instances, money is awarded not for what has been lost but as an attempt to provide money to make the real loss or injury somewhat easier to bear. See ***Muir v. Alberta (1996).*** More on these below.

Damages may also be classified into special or general damages. A plaintiff may in her pleadings classify her losses into general and/or special damages depending on the facts and circumstances of the case. While special damages are for the losses that can be quantified or calculated in monetary terms, general damages are for those that cannot be quantified. Therefore, general damages are speculative in nature and while the plaintiff must specifically plead and strictly prove special damages, there is no such requirement for general damages. A plaintiff's claim may include both special and general damages or any of them.

In intentional torts, damages are usually classified according to the purpose for which they were awarded, hence we have four basic categories of damages intended to serve four different purposes, viz: nominal (token), compensatory, punitive (retributive, vindictive or exemplary), and disgorgement of gains. Let's now devote more attention to each classification of damages.

a. Nominal and Contemptuous Damages

A court may award nominal damages where the plaintiff suffers no actual harm from the tort committed by the defendant. This applies where, for example, the defendant trespassed on the plaintiff's land by walking/driving across the land without causing any physical or actual damage, as in **Bowen Contracting Ltd v. B.C. Log (2009)** where the court awarded $1 for the defendant's conduct. Here, the court recognises the plaintiff's right to the property and that defendant committed a tort by wrongfully driving through it; however, the plaintiff was held not entitled to punitive or compensatory damages because they did not suffer any actual loss or harm from defendant's act. Besides, as the court found, "No damage to the plaintiff's land was pleaded or proved."

Therefore, nominal damages serve to vindicate plaintiff's rights when compensation is not necessary. It is a small amount of money and can only be awarded in either of the following two situations:

- where plaintiff has successfully established a cause of action but suffered no actual damage or loss. An example here is trespass. See *The Mediana (infra)*; or
- where, even though the plaintiff has suffered actual loss or damage, no evidence was placed before the court to establish the damage or from which to assess an amount to prove the loss. In **Syniuk v. Kornberger, (2013),** the Sask Court of Appeal made a further distinction of this second situation, i.e., (1) where assessment of damages was difficult due to the nature of the damages, and (2) where absence of evidence made it difficult/impossible to assess damages.

From the above, you see that nominal damages could be a mere symbolic recognition of the violation of the plaintiff's right which may make the award sum quite small, though not necessarily so. Note also that it is not all small amounts that are automatically nominal damages as some compensatory damages may equally be very small. You must therefore be able to distinguish whether the award of a small amount in damages is nominal or compensatory, and the only way to do this is to look at the purpose for which the award was given, not the actual amount. Please read the decision in *Mediana* case below for a better understanding of this.

- **The Mediana**

  Facts: By negligence, Ship A rammed into Ship B that was being used as a lightship for navigation. The owners of Ship B then deployed Ship C to replace Ship B while the latter was being repaired. Ship C would have however remained idle as it was merely kept for emergencies and for situations like this. Owners of Ship A paid the cost of the repairs of Ship B. Owners of Ship B then brought this action claiming, among others, damages for the loss of revenue by Ship B while under repairs.

  The House of Lords (HL) held that a claim for loss of use will lie (at least potentially) whenever a chattel is damaged. The court put it this way:

  > Where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages . .. the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except – and this I think has been the fallacy running through the arguments at the bar – when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage.

  On nominal damages, the HL, per Earl of Halsbury, explained thus:

  > … I wish … to remark upon the difference between damages and nominal damages. "Nominal damages" is a technical phrase which means that you have negative anything like real damage, but that you are affirming by your nominal damages that there is an infraction

of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.