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Preface

Welcome to the September 2024 version of my Notes on the Law of Torts.

The need arose to update the notes because NCA decided to update the syllabus on Torts sometime in September 2024. The updates to the syllabus were massive: more in restructuring than in contents. Only a few items were removed/added with plenty renaming. The previous syllabus had eight sections while this new one has only six. Honestly, however, I won't be able to describe the extent of the restructuring because virtually all the topics and sub-topics got shifted and re-arranged.

If you ask me, I'd say the updates were totally necessary. The previous syllabus on Torts was unwieldy and disorganized, with many sub-topics coming under different categories. I remember discussing this with a candidate that the structure of that syllabus itself would make understanding the subject very difficult for many candidates. Seems NCA equally realised this anomaly and reviewed the syllabus to make it more user-friendly. I've gone through the new syllabus and I can say it is now more organized and will make the course a lot easier to understand.

In updating my notes, therefore, I have strictly followed the structure and format of the new syllabus. I have arranged the topics under each section as they are contained in the updated syllabus. This is to make it easier to follow through, and to ensure that all the topics in the syllabus are covered. So, don't be surprised/confused when you see that each section starts with a new chapter one. To make it easier for you during the exam, I suggest you make a separate/extra copy of the table of contents of this note. This will enable you to easily locate any topic or sub-topic you want to write about, without flipping through countless pages.

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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.

Again, 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 six sections (A – F) as per the syllabus and grouped the topics under each section, as listed in the syllabus.

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

1) Robert M Solomon, Mitchell McInnes, Erika Chamberlain and Stephen GA Pitel, *Cases and Materials on the Law of Torts*, 11th Ed (Toronto, ON: Carswell, 2023) ISBN 978-0-7798-9966-1, and

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 like Erika Chamberlain & Stephen GA Pitel, eds, *Introduction to the Canadian Law of Torts*, 4th Ed (Toronto: LexisNexis, 2020) ISBN 978-0-433-50488-7, and others too numerous to list here, both in soft and hard formats, as well as many online resources. In particular, I must not fail to mention that the CanLII portal was my regular go-to for resources on cases too many to mention. In making use of these resources, however, 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 but very relevant to the topic.

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.

Best of luck!

- Manuel

SECTION A

INTRODUCTION TO TORTS

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 1.1 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.

Take note also of the discussions on standard of proof and burden of proof in Chapter 3.

Exam Tips:

As we all know, torts exam questions are almost always fact-based. So, questions on Chapters 1 - 3 of this Section may be rare because they would ordinarily involve essay questions. Albeit, it is necessary for you to get familiar with the contents of those Chapters as they will form the foundation of your understanding of the principles of torts. In particular, knowledge of the bases and scope of liability in tort, as well as of the standard of proof and burden of proof in tort is very essential, as these concepts will be common features in virtually all the topics under torts.

Chapter 1

The Concept of Torts

Torts law is said to be difficult to define but is generally concerned with things that have gone wrong or a breach of obligations. A tort is regarded as a legal wrong or a breach of obligations one person owes to another. There is, however, a distinction between public wrong indicated in criminal law where the wrong is taken to have been committed against the society and prosecuted by *Regina* – a Latin word for Queen –

and punishment is imposed on the wrongdoer. On the other hand, tort law deals with wrongs committed against individuals in which case the wrong is prosecuted by the individual, as the plaintiff, against the wrongdoer, as the defendant. Here, the focus is on the plaintiff's loss and, where the defendant is found liable, the plaintiff may be awarded a remedy that is commensurate with the wrong. In the same light, some private wrongs may fall outside torts and come within the ambit of the law of contract.

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

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

i. the source of primary obligations in tort arises from the law while in contract, it generally arises from the agreement between parties (save some statutory impositions, e.g., Sale of Goods Act).

ii. the doctrine of privity of contract applies in contract as no outside party can sue based on a breach, even if affected. In torts, generally, parties can sue one another even if they are complete strangers.

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

1.1 Nature and History of Torts

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

within the scope of an existing writ would not get his grievances heard, unless on rare occasions when Chancery officials prepared and issued new writs.

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

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

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

By the end of the 19th century, academics and scholars had begun to call for the recognition of torts as a distinct branch of law. Writers such as F. Pollock argued that the law of torts was based upon the single unifying principle that all harms were tortious unless justified. J. Salmon argued in contrast as to whether

there was a general principle of tort liability, and contended that tort law was merely a patchwork of distinct causes of action, each protecting different interests and based on separate principles of liability. Even in the courts, the debate as to whether there is a general theory of tort liability persisted and the dilemma was whether, confronted with new claims in the growing area of negligence, tort liability should be expanded and if yes, on what ground. See *Donoghue v. Stevenson (1932)* where Lord Atkin suggested that the court will expand the scope of recovery, at least in the tort of negligence. This debate has continued till today and the courts will consider legal, social, economic and philosophical circumstances prevalent at a particular time to consider whether to expand or narrow the scope of liability. For instance, if the court fears that liability is killing the insurance industry and may lead to crisis, it may narrow the defendant's duty of care. Conversely, the courts may expand the scope of liability if there's concern that the insurance industry is unduly profiting at the expense of the injured consumer.

Historical Roots: Trespass and Case

Here, we will further examine the history of the emergence (and the differences in the application) of the two forms of action: *Trespass*, and *Trespass on the case* (or *action on the case*, or *case*). This is a follow up on our earlier discussion above about the topic. Remember we noted that the writs of trespass (Trespass) and Trespass on the case developed as the only two forms for tort actions under English common law. Trespass involves *trespass* against the person. *Action on the case* involves trespass against anything else which may be actionable but is yet to be an established category.

As earlier stated, initially, Writs of Trespass could be litigated in the royal courts only if the plaintiff alleged that the defendant used "force and arms," hence the title trespass *vi et armis* that encompasses the three versions of trespass at that time. So, to enable their cases to be heard, the plaintiffs falsely alleged force and arms under one of the three versions. See e.g., **Rattlesdene v. Grunstone (1317)** which was merely a dispute on allegation of adulteration of wine with salt water. In the writ, however, and to allow for the matter be heard in the Royal Courts, the defendant was alleged to have, "with force and arms, namely with swords and bows and arrows, drew off a great part of the wine from the aforesaid tun and instead of the wine so drawn off they filled the tun with salt water so that all the aforesaid wine was destroyed!"

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

So, in addition to the historical significance, the above is basically just another method of classifying tort which has survived to this day: that is, whether the harm to the plaintiff was caused directly or indirectly. Therefore, wrongful conduct can generally be actionable in the following manner:

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

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

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

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

- **Scott v. Shepherd (1558)**

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

  The plaintiff then sued the child for trespass against the person. the defendant argued that he could not be held liable since it was R, not him, that actually threw the squib that struck the plaintiff. the issue here was whether the action of third party R rendered the defendant non-liable. Two of the judges held that the plaintiff's injuries were sufficiently direct to fit within the category of trespass, while the third judge dissented, ruling that the injuries were indirect injuries and that if he had sued on trespass on the case, he would have succeeded, rather than trespass *vi et armis*.

  Per Nares J.:

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

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

Distinction between Trespass and Action on the Case

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

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

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

  Per Lord Ellenborough CJ:

> If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass. Where one accidentally drove his carriage against another's, the remedy is trespass and not case, the injury being immediate from the act done, though he were no otherwise blame-able than driving on the wrong side of the road in a dark night.
>
> The distinction is that, where the injury is immediate from an act of force done by the defendant the remedy is in trespass; where the injury is only consequential to an act before done by the defendant, there an action on the case lies. (Underlining added)
>
> The true criterion seems to be whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action in trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not.
>
> … [H]ere the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore, there being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass, and wilfulness is not necessary to constitute trespass.

1.2 Functions of Tort Law

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

1) Compensation: the main feature that distinguishes torts from criminal law is that its remedies are restorative in nature. They seek to restore the plaintiff back to the position he was prior to the injury or loss caused by the defendant. However, some award of damages in tort could be punitive or exemplary, and not necessarily compensatory. This type of damages is designed to punish the wrongdoer or make an example of him, and bears little relation to the loss or harm suffered by the injured party. Some, however, view compensation as not being exclusive to torts, as victims may receive compensations under schemes such as workmen compensation, no-fault automobile insurance scheme, etc. To others, tort is not effective in the area of compensation due to many factors including: difficulties and costs of hiring a lawyer, problems of evidence and proof, defendant's potential inability to pay, etc.

2) Deterrence: tort is said to also have deterrent effect in that it establishes standards expected of a civilized, reasonable society and with which everyone is expected to comply if people are to live together in a harmonious, safe and functional society. So, in imposing liability for breaches of these standards, tort does deter people from committing breaches. Some have however doubted this deterrence feature of torts in situations like vicarious liability where the principal is liable and is the

one that actually pays for the wrongdoings of her agent who may not make any contribution towards such payment and this therefore has no deterrence effect on him.

3) Appeasement and vindication – imposing tortious liability may vindicate and appease the injured party who may not necessarily seek monetary compensation. In the context of nominal damages, an amount as small as $10 may be sought/awarded against the wrongdoer, which is merely symbolic, and to appease the injured party. The cost and expenses of litigation has however made the award of nominal damages no longer attractive.

4) Punishment – as noted above, a court may award punitive damages against a defendant whose conduct is found to be vicious, egregious and outrageous. This feature of tort law is a trace of its historical antecedents which it shared with criminal law before now.

5) Market deterrence – this argument is more from economists than lawyers; they argue that tort law is a system of loss allocation. For instance, some jurisdictions impose strict product liability on manufacturers for injuries caused by their defective products; they in turn are forced to increase prices of their product in order to be able to pay claims; the higher prices in turn have the effect of reducing the purchasing power of the consumer, leading to fewer products being sold. Then, the fewer the products sold, the fewer the product-related accidents recorded. But since the consumers continue to purchase the product in spite of the high price, they believe that the benefits they derive from the products exceed the costs of the accidents it generates. Therefore, this allocation of accident costs enables the society to experience only the minimum number of accidents.

6) Justice: some scholars focus attention on justice as the underlying function of tort. Justice here can take the shape of retributive justice, distributive justice, or corrective justice. Some have however countered that justice is the general purpose of all laws, not just tort.

1.3 Theoretical Approaches

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

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

the plaintiff's financial burden or penalizing the defendant for the breach, but rather as a recognition, enforcement and vindication of the individual's rights.

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

i. Rights theory or rights-based analysis (normative): as explained above. However, this theoretical approach to tort has been criticised as potentially misleading, because the right-based analysis is not unique to torts. It cuts across all other private law jurisprudence like contract, property, trusts, unjust enrichment, etc. While it is true that violation and vindication of rights is most pronounced in tort law, which of course makes it dominate than in other subjects, yet, right-based analysis are present in those other subjects. For example, in conversion or trespass to property, the plaintiff may not have actually suffered any physical damage or harm to justify compensation. Nonetheless, the court may award nominal damages because compensation is one of the functions of torts. But to the right theorists, the plaintiff should be entitled to substantial damages, in recognition of her rights to the property that was violated. This is because the defendant has breached an obligation owed the plaintiff, and whether or not the plaintiff suffered any physical loss or damage, the award of substantial damages should be a vindication of the plaintiff's rights that were violated by the defendant. Here, the monetary compensation only acts as a substitute for the right that was violated.

ii. Functional (Instrumentalist) Objectives – this theory says that the most important function of tort law is corrective justice, i.e., to restore the plaintiff back to his original position.

iii. Non-instrumentalist – says that private law doesn't exist to promote external goals like compensation or deterrence.

iv. Structuralist – says rights don't exist merely as incidents of a larger enterprise; rather they inform the entire subject, and there's no way to understand torts apart from the viewpoint of rights.

v. Formalist – contrary to the view that judicial decision-making is invariably influenced by 'extra-legal' factors, (personality and policy rather than precedent and principles), rights theorists maintain that rules must govern.

vi. Individualist – in contrast to the belief that litigation between private parties generally provide an avenue of changing the world, rights theorist believe that violation and vindication of rights are squarely between a plaintiff and a defendant. Even if the cumulative effect of imposition of liability extends farther, the focus is primarily the narrow relationship between the instant 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

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 torts 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.

f. 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.

g. 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.