

# BU 231

## Business Law Notes

### Section 1: The Law of Torts

by Andy Chang

Version 3.0 - August 16, 2024

#### Contents

1. The Law of Torts .....	2
1.1. What is a Tort? .....	2
1.2. Liability, Defenses, and Damages .....	2
1.3. Intentional Torts .....	4
1.4. Unintentional Torts (Negligence) .....	7
1.5. Other Unintentional Torts .....	9
1.6. Business-Related Torts .....	10
1.7. Liabilities Part 2 .....	11
1.8. Fun Facts .....	12

These are my compiled notes for **BU 231 - Business Law, Spring 2024** with Keith Masterman. These notes represent mostly material from lecture slides and lectures themselves, and content from the textbook. Some internet sources were used to complement certain content.

To the above, the usefulness of each note may vary - I have tried my best to highlight important bits with bold or italic font, but ultimately please use your own discretion. Another important thing to note is that **no case-specific information** is included here unless the case is super important.

I absolve myself from being liable for any negligent misrepresentation or omissions that may occur from using these notes. If something is wrong, or if you feel something is missing, please tell me and I will update it whenever I get around to it.

These notes were written up in Typst.

## 1. The Law of Torts

### 1.1. What is a Tort?

#### 1.1.1. Definitions

A **tort** is a wrongful act done to the property or person of another, recognized by law to be as such. Its main use is to **determine and allocate compensation** for **harm that has occurred**.

The **tortfeasor** is the person who commits a tort. Usually, they are being sued and are the Defendant.

Torts usually appear in civil cases where the burden of proof isn't absolute - instead, the evidence of proof is a **balance of probabilities** - usually > 50% chances.

Torts usually result from the Courts - so the perpetual question is, "**Did the Courts get it right?**" The legislation can sometimes disagree with the courts - they can then make their own torts lol

#### 1.1.2. Intentional VS Unintentional Torts

Torts come in 2 flavours, **intentional torts** and **unintentional torts**. Intentional torts require that the action that *causes* the tort be done intentionally, and harm to have occurred. However, the tortfeasor doesn't necessarily need to wish for the tort to occur.

#### 1.1.3. How Torts are Made and Change

Torts are recognized by law - the Courts have judged this matter before and decided that "**society's values have shifted such that this tort should be sueable**". If a tort doesn't exist, the Courts must be sufficiently convinced to add it as a new tort!

As society's values change, torts can be added and removed at will to best fit!

## 1.2. Liability, Defenses, and Damages

### 1.2.1. Liability and Fault

**Liability** is well-named. Who is liable for compensation related to a tort?

#### 1.2.1.1. Strict Liability

Liability is based on causation, regardless of blame or motive. If you were ultimately the person who caused damage to occur, then you're liable.

#### 1.2.1.2. Fault

Fault is unjustifiable injurious conduct that intentionally or carelessly disregards the interests of others. If you have fault, you are liable! This was created to help deter such faulty behaviour from happening; however it is sometimes defective in undercompensating if fault cannot be shown, and sometimes overcompensation too. Also takes more time to litigate, and so on.

#### 1.2.1.3. Vicarious Liability

**Vicarious Liability** states that employers (any supervisor) are generally liable for torts their employees committed while employed. The employee is not freed from liability - both victim and employer can sue. This applies to any **reasonably foreseeable torts** committed by employees.

#### 1.2.1.4. History of Liability in Torts

Strict Liability used to be how all torts operate - regardless of blame or intention, if you did the damage, you were liable. No matter what. eventually, we moved on and started using fault for some torts, although others still operate with strict liability, notably public/private nuisance.

#### 1.2.2. Defenses for the Tortfeasor

The tortfeasor has a few defenses against torts (negligence or intentional or otherwise). The judge however can only pick ONE defense. This changes the decision, so the judge decides how harsh to be!

##### 1.2.2.1. Contributory Negligence

This defense says that Plaintiff in part contributed to their own injuries and thus Defendant isn't *fully* at fault. The plaintiff cannot recover damages fully - up to a % of rewards, decided when the judge/jury **apportions liability**. If they are unable to apportion it, it defaults to 50/50 though!

##### 1.2.2.2. Voluntary Assumption of Risk

The defense says that Plaintiff knew **both physical and legal** risks (they'll get hurt + waived the right to sue) and **voluntarily** assumed the risk. Then Plaintiff is barred from recovery (zero compensation!)

##### 1.2.2.3. Ex turpi causa (from a dishonorable cause)

If the Plaintiff's injuries occurred while performing an illegal activity, they are awarded zero. However, this defense is controversial and **rarely** used since judges are not supposed to judge morals.

##### 1.2.2.4. Consent

If the Plaintiff **informed consents** to a tortious action, no wrong is done and no recovery is possible.

##### 1.2.2.5. Self Defense

This defense is usually seen in intentional torts (like assault and battery). This happens when the Plaintiff took **only reasonable steps** to prevent harm to themselves, and only when it's the **last resort** and they have no other options to get out.

#### 1.2.3. Types of Damages

Damages refer to the compensation that is awarded to the Plaintiff to offset their injuries from the tort.

##### 1.2.3.1. Special (Pecuniary) Damages

These are **quantifiable** damages that can be claimed - extra expenses otherwise not incurred, loss of wages, any bills, funeral costs - as long as it's reliably quantifiable, it would fall under this.

##### 1.2.3.2. General Damages

These are **non-quantifiable**, like damages for pain & suffering, loss of future earning capacity, etc.

##### 1.2.3.3. Punitive (Rare) Damages

These technically do not correlate to any injury suffered by the Plaintiff; instead, the Courts are **punishing** the Defendant for egregious behaviour to make sure it doesn't happen again. This happens more in the US, with larger punitive damages as well.

### 1.3. Intentional Torts

As mentioned earlier, intentional torts require the tortious action to be **intended** (though the tort itself can be unintended). In addition, harm **must** be caused.

Each tort has **elements** that define it. All elements of the tort **must be present** for the claim to succeed; the onus is on the plaintiff to prove the elements exist.

#### 1.3.1. Assault

This is intending to cause a trespass to the person. This is usually found together with battery.

1. **Intentionally**
2. Uttering a **threat**
3. Likely to cause a **reasonable apprehension** of imminent physical harm
4. Against a **person or an identifiable group**

#### 1.3.2. Battery

Actually committing violence that was threatened in the assault tort.

1. **Intentionally**
2. Applying **unlawful force**
3. **Without Consent**

Interesting examples include Nonconsensual Doctoring - if a doctor operates on you without your consent, each instance they touch you counts as a battery! Another example is in sports - if there is deemed to be "too much contact" it could be a battery.

Common defenses to this tort are that it was **consented to**, explicitly or implicitly.

#### 1.3.3. Intentional Infliction of Mental Distress

A relatively new tort that recognizes acts that lead to physical/psychopathological harm. This tort **requires intent to cause harm**, but actual harm caused does not need to be the harm intended.

1. Defendant's Conduct was **flagrant and outrageous**
2. Defendant calculated their actions will **harm the Plaintiff** (aka, they intended to harm)
3. Defendant's Conduct caused Plaintiff to **suffer visible and provable illness**.

#### 1.3.4. False Imprisonment

Restraining/Confining someone against their will unlawfully. It **need not be physical** (psychological OK too! (like threats I guess)) It is not false imprisonment if the police lay charges, so when in doubt just **call the police** instead of doing a citizen's arrest or something.

1. **Intentional**
2. **Total Confinement** of a person against their will
3. **Without Lawful Justification**

There is a relatively new defense to this - **Shopkeeper's Privilege**. If you are **very reasonably** sure that someone is committing a crime (for instance, a shoplifter in ye shoppe), you could use this as a defense in court, even if the person ended up being innocent! However, to be clear, you still did the tort.

### 1.3.5. Malicious Prosecution

As described - reporting a person to the police when there is no good reason to believe that person committed a crime.

1. A Proceeding **initiated by the tortfeasor** so that:
  1. They withheld exculpatory information from the police
  2. They undermined the independence of the police investigation
  3. They communicated with police so that it misled them not to conduct an indep. investigation
  4. They undermined the indep. of the decision-making process to lay charges and prosecute
2. The Proceeding terminated **in favour of the plaintiff** (no charges laid)
3. Undertaken **without reasonable and probable cause** to commence/continue the investigation
4. **Motivated by malice** or some other reason other than carrying the law into effect.

### 1.3.6. Defamation

Making **untrue** statements that cause injury to the reputation of another. Can either be **slander** (spoken) or **libel** (written). Notably, **they assume that harm is done**.

1. **Defamatory material** that lowers the plaintiff's reputation in the eye of a *reasonable* person
2. Material must **refer to the plaintiff**
3. The material must be communicated or published to **at least 1 other person**

There are cases where defamation is not possible:

- In court and legislation, defamation is not possible as the speaker has **absolute privilege**
- When the speaker has a responsibility to provide a statement, and it was without malice and within the relationship or job scope, the speaker has **qualified privilege**.

### 1.3.7. Trespass

The act of entering another's land without their consent. It is important that **harm needs to be done**.

1. **Intentionally**
2. **Entering Property**
3. **Without Consent**

In law, your land stretches up towards the heavens and down towards the earth's center. Back then, this meant that people could (and did!) sue for airplanes trespassing on their skies lol.

### 1.3.8. Public Nuisance

This tort is **strict liability**. It is interference with the use of public lands, often quasi-criminal. For example, occupation of public spaces, etc. The only defense is to show damages were **trifle**.

### 1.3.9. Private Nuisance

This tort is **strict liability**. Interference with an occupier's use and enjoyment of their land. It includes both physical nuisance but also **amenities nuisance**, interfering with the use of amenities on the property. Like with Public Nuisance, the only defense is to show damages were **trifle**.

**1.3.10. Intrusion on Seclusion**

An important extra tort to know in Ontario at least; it involves **breaking the rights of privacy** and **causing harm**.

**1.3.11. Negligent Investigation**

An example of a new tort - a mix of classic negligence with a focus on Crown/police investigations

**1.3.12. Dog Owner's Liability Act**

An example of a strict liability tort - in legislation, dog owners are strictly liable for dog bites/damage!

**1.3.13. Wrongful Birth**

This tort exists - you can sue your doctor if they failed to advise against your birth, given extreme circumstances and lifelong suffering and the like.

## 1.4. Unintentional Torts (Negligence)

Negligence is the biggest type of Unintentional Tort out there - so much so that it *could* cover all.

### 1.4.1. Definitions

**Negligence** is the *careless causing of harm* to the person or property of another. It has 4 elements:

1. The defendant owed the plaintiff a **duty of care**
2. The duty of care was breached as the defendant **fell below the standard of care**
3. **Harm/Damages Occurred**
4. The defendant's actions **caused** the harm/damages.

### 1.4.2. History

In the past, around the Industrial Era, there was (of course) horrible mistreatment of workers, sending workers to die in the mines in droves. Workers tried to sue for Duty of Care, however back then Duty of Care was outlined in the contract - and since no contract was signed, they can't sue! Employees used to not have a duty of care to workers aside from what the contract says. Thanks capitalism.

But this all changed in the fateful **Donoghue v. Stevenson (1932)** case. Donoghue had bought a ginger beer from Stevenson, which apparently contained a decomposed snail. She got ill and sued. After lots of failure in the lower courts (since there's no direct intent to tort), this eventually got to the highest courts, who said "Nah wait sec hold on a moment". They expanded and established the General Principles of Duty of Care significantly, and the principle of "Neighbours in Law"

### 1.4.3. Duty of Care

A **duty of care** is any relationship to which one could foreseeably cause harm to another. As outlined by Donoghue v. Stevenson, "**You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour**" - you should think of them!

A **neighbour in law** is anyone who is closely and directly affected by one's actions; such that one should reasonably have thought they'd be affected when performing the negligent act.

The general test (also called the "Anns Test") has 2 steps:

1. Is there a sufficiently **close relationship** between the parties such that the damages caused by carelessness from one of the parties is **reasonably foreseeable**?
2. Are there any policy concerns or considerations that should limit the **scope**, the **class of persons** to which it is owed, or the **damages** that a breach of it should give rise to?

### 1.4.4. Falling Below a Standard of Care

In general, falling below a standard of care means that you did not do what a **reasonable ordinary person** would have done in the scenario; thus the negligence! There are some exceptions:

- Professionals have additional standards they are held to, and must act like a **reasonable and competent person in their profession** if the negligent act requires specialized skill/ knowledge.
- Professionals must also **avoid conflicts of interest** as part of their standard of care.
- Specialists in a field are held to a higher standard than generalists - surgeons v. the family doctor.

- Children are held to the standard of a reasonable child of the **same age**; unless they are engaged in an adult activity (like driving), then it's a reasonable adult.

#### 1.4.5. Injury and Causing Said Injury

Harm or Loss must occur for negligence to occur, but did the defendant *cause* it to happen?

##### 1.4.5.1. The “But For Test”

This test simply states, “**but for** the conduct of the tortfeasor, would the harm/injury have happened?” If yes, then this is the cause of the loss or harm! Essentially, outcomes that would have been inevitable cannot be sued for - the acts of the defendant must have caused it.

Note that the defendant does not need to be the *sole* cause of harm - it is sufficient to show the defendant's conduct, in part, was **a cause** for the harm.

##### 1.4.5.2. Res Ipsa Loquitur (the thing speaks for itself)

This is a doctrine that allows judges to make a “Quantum Leap of Logic” to automatically deduce liability regardless of evidence, since the sheer fact that this accident occurs implies negligence. Usually seen in manufacturing. Formally, it has these parts:

1. The injury would not have occurred (or is really unlikely) if no one was negligent
2. The defendant (usually the manufacturer) was likely the negligent party
3. The plaintiff did not **voluntarily** contribute to the accident occurring
4. There is no other evidence that explains how the accident occurred

##### 1.4.5.3. Malfeasance and Nonfeasance

**Nonfeasance** refers to failing to provide a positive act (for example, not saving a dying person). In Ontario, it is **not punishable**, unless explicitly stated to be in statute.

**Malfeasance** says that if a positive act was provided, but done negligently, the actor is liable for any **additional damages caused** (like saving a drowning person but dragging their face across the rocks and giving them head trauma). The positive act fell below a certain standard, and thus there is liability.

Interestingly, Google distinguishes **malfeasance** and **misfeasance** - misfeasance states that the damages caused was **unintentional**; while malfeasance states that it was **intentional**.



## 1.5. Other Unintentional Torts

### 1.5.1. Product Liability

In short, the plaintiff must prove that the product **fell short of reasonable standards**, thus harmful.

#### 1.5.1.1. Subcategories to Product Liability

- **Negligent Design:** When the product itself was designed badly (i.e. exploding Ford Pinto)
- **Negligent Manufacture:** A glaring mishap in the manufacturing process (like a snail in ya soda)
- **Failure to Warn:** Failing to warn consumers about faulty products (not sending recalls, not putting safety warnings, etc.)

#### 1.5.1.2. Ongoing Duty to Warn

For some products, manufacturers have an **ongoing** duty to warn users of the risks of using its products, and send notice to them if something comes up (if that advice is heeded is not their responsibility - that's then voluntary assumption of risk).

This applies to dangerous products (cigarettes, explosives, corrosives), products found to be defective, and new scientific or technological advancements. This especially applies to any **unexpected risks**.

### 1.5.2. Occupier's Liability

This outlines that people who occupy/own (tenant/owner) a property **owe a duty of care** to anyone who enters those premises. An occupier is any person who has control over the property. Essentially, people entering your property should not die or get injured due to the condition of the property.

A separate duty of care is also owed to *trespassers* - they are still owed a **duty of general humanity** and thus you **cannot set traps** - you **cannot create harm**. Otherwise, the standard of care is minimal.

If signage is placed, it depends on the ambiguity of the wording and if a notion of consent exists. Also, if the sign is visible (and for that matter, if the plaintiff can read).

### 1.5.3. Failure to Supervise

An interesting new tort: says that people have a duty to supervise children, and if the child causes or incurs damages, the supervisor can be liable. This includes babysitters, teachers, etc.

## 1.6. Business-Related Torts

### 1.6.1. Passing-Off

This is essentially forgery, when you attempt to “pass off” one of your products as those of another party, unfairly taking advantage of their brand power and misleading consumers.

### 1.6.2. Product Defamation

Defamation but for someone’s property. Not much to say here.

### 1.6.3. Inducing Breach of Contract

Occurs when the tortfeasor knows of a contract signed between 2 parties and takes **active** steps to break said contract. For example, stealing employees from one of your competitors. Not cool.

### 1.6.4. Unlawful Interference with Economic Relations

Here, unlawful is the true meaning of the word - doing something genuinely criminal or quasi-criminal, with intention to injure/interfere with someone’s ability to do business or earn a living. (Ex. Bribery)

1. There is an existing business relationship the defendant **knew about**
2. The defendant **intended** to act to interfere with it
3. Acts taken to interfere are **illegal**
4. This interference caused a **loss**

### 1.6.5. Negligent Misrepresentation

A tort that was conceived in *Hedley Byrne & Co. Ltd v. Heller and Partners*, [1964], A.C. 465.

Though the Plaintiff lost the courts still decided to start recognizing this and became formal in 1971.

**Representation** is any statement - written, verbal, or action. **Misrepresentation** is thus any untrue statement. Negligent Misrepresentation covers cases where it was untrue due to carelessness.

Especially important for professionals - you’re responsible for **not doing this!**

1. A statement is made that is **false**
2. The statement Maker owes the statement Hearer a duty of care (subject to policy considerations to limit liability - are you an actual client, etc? Important due to internet info spread - it could potentially open up unlimited liability to all, which is absurd)
3. The statement fell **below the standard of care**
4. The Hearer **reasonably acts** on the Statement and suffers a **loss** as a result of the action taken.

### 1.6.6. Fraudulent Representation

Established in the same case above, it comes misrepresentation that is **intentionally untrue**, so lying.

1. A statement is made that is **false**
2. The statement Maker knows the statement is false (They’re lying!!!)
3. The Hearer **reasonably acts** on the Statement and suffers a **loss** as a result of the action taken.

Fraudulent misrepresentation often has higher damages than negligent ones - the court could rescind the contract and/or award extra damages - **or** for negligent; but **and** for fraudulent. Thus fraudulent misrepresentation is the better recourse if possible.

## 1.7. Liabilities Part 2

### 1.7.1. Fiduciary Duty

A **fiduciary duty** is an overarching “super duty” that if X breaches, X is liable. A hybrid between tort and contract that applies in certain scenarios. Please don’t try to find fiduciary duty everywhere - this only applies to certain scenarios with imbalanced power.

A **fiduciary** stands in a **special relationship of trust to another**. They are the dominant party to a subservient party, who relies on them. Fiduciaries also apply to some professionals who act in a “trust” relationship with their clients.

A previous court case *Frame v. Smith*, [1987] SCR 99 at 136 defines a **fiduciary** as follows:

1. Has the scope to **exercise some discretion or power**
2. Able to **unilaterally exercise power** to affect beneficiary legally or practically
3. The beneficiary is **particularly vulnerable to/at the mercy of** the fiduciary

Some in-class examples include: the director of a company to the company; a husband holding assets for a wife; an old woman relying on only 1 banker ever; and pension investors to pensioners apparently??? (even if they never even met!) Relationships can change from contractual to fiduciary - if 1 party becomes heavily reliant or vulnerable in a way that only the other party can protect them.

As a fiduciary, your duties include (**in addition to the normal duty of care**):

1. Place the beneficiary’s interests **above all** (except for the law)
2. **No conflicts of interest allowed**

### 1.7.2. Professional Liability

The modern-day definition of a professional is **anyone with specialized knowledge that the general public relies on**. As mentioned earlier, professionals have a higher standard of care, equivalent to any other reasonable professional in the field, and scales depending on their specialization. They also need to avoid conflicts of interest and so on.

But who do they owe a Duty of Care to? As the General Public relies on these professionals, there could be **unlimited liability** as anyone who even happens on your work (like a published financial report from an analyst on the internet) could claim a Duty of Care and ask for damages. (3rd Party Liability)

This obviously isn’t good, since you would owe a Duty to Care to an absurd number of people. This is why Duty of Care for professionals often is dealt with on a **case by case basis** and is subject to lots of **policies** to limit liability - for the latter, recall the Anns test, which lets us limit liability due to policy reasons.

Here are some common ways to limit professional liability:

- Utilize Policy Reasons to limit Duty of Care: you could argue that the plaintiff is not your client
- **Retainer agreement**: A contract stating you will do exactly what is contracted of them to do and nothing more; anything else that occurs is not your problem and thus you are not liable for it.

## 1.8. Fun Facts

### 1.8.1. How long can you wait to sue someone after a tort?

In general, 6 years after a tort occurred; unless you are a child at the time, then 6 years after adulthood.

### 1.8.2. Tort of Harassment?

There is a tort of harassment in the US, but not in Canada, mainly due to the problem of intention - was the harassment intended, I guess?

### 1.8.3. Defamation and Anti-SLAPP Laws

Defamation leads to interesting free speech issues, especially when it comes to media coverage. News agencies might just find themselves being sued for exposing things, and then be silenced since the Plaintiff has lots of money to throw. This is called **strategic lawsuits against public participation (SLAPP)** and they intimidate and silence criticism by dragging critics through legal hell.

Anti-SLAPP laws try to remedy this. If the defendant makes a motion to dismiss the case since “this is a matter of public interest and this trial is frivolous”. The plaintiff then needs to show they ain’t bluffing - show the case has merit, with actual evidence that will cause irreparable damage to them. If they can’t do this the suit is dismissed instantly!

In summary, Anti-SLAPP laws help news organizations protect themselves from being bullied with defamation lawsuits.

### 1.8.4. The Thin-Skulled Plaintiff

This is a principle or law that says that tortfeasors “take their victim as they find them” - if the Plaintiff suffers injuries or damages that are unexpectedly severe due to some precondition or vulnerability, they are still liable even if the damages are higher than if the victim were an “average person”.

### 1.8.5. The Courts do not want you to sue people

They are trying to minimize the number of cases they have by limiting liability (so you can’t sue everyone). In doing so, they are sometimes unfair and favour those who can pay for lawyers. They’re trying their best.