

## Intentional Torts to the Person (and Related Actions)

### Introduction

a default hierarchy of protected interests      check again for essay question

### Battery

**Def** Battery is any act of the defendant that **directly** and **intentionally** (or perhaps negligently) causes some **physical contact** with the person of the claimant **without the claimant's consent**.  
(1) Directness (2) intentionality (3) physical contact, (4) absence of consent

#### 1) Directness (of physical contact)

Def	<b>Direct &gt; trespass (immediate wrong) ;</b> <b>vs indirect &gt; non-trespass</b>	If a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must maintain an action on the case; because it is only prejudicial in consequence. (Fortescue J)	Reynolds v Clarke
	<b>Contacting surface is not of a concern:</b> <b>Extension as direct contact:</b>	D's hitting P while wearing a glove counts as battery e.g., striking someone with a sword, shooting someone are also direct	
CL	there can be a battery even if the application of force is <b>not completely direct</b> and there is <b>a delay between the defendant's actions and force being applied to the victim</b> (note: this is a criminal case)		DPP v K - Child taking sulphuric acid in hand drier

#### (2) State of Mind (intentionality)

##### (a) Intention and negligence?

Old law	<del>both intentional and negligent acts</del> could result in liability in battery so long as there was a <b>direct violation</b> of P's bodily integrity Intentional conduct encompasses <u>deliberate, reckless or negligent</u> action	Holmes v Mather
Law now	<u>Law in a muddled state</u> : no overlaps in tort of battery and negligence The law on trespass to the person (battery) has been narrowed: <b>does not include negligence</b> , but <b>only intentional</b> ones	Letang v Cooper

##### (b) Actions must be intended (not outcomes)

Law	<b>Only the act is relevant:</b> It is the <b>act not the injury</b> which must be <b>intentional</b> . An intention to injure is not essential in an action for trespass to the person. It is the <b>mere trespass by itself</b> which is the offence	Wilson v Pringle; Weaver v Ward; Leame v Bray
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#### Transferred intent case: **Analogy** taken from criminal law cases in tort of trespass: **intention can be transferred**

CL	The throwing on was classed as a <b>continuation of D's action</b> , which was intended.  even if there was <u>no physical application of force directly from the man</u> to the physical body of the victim, the <b>direct application of force could be applied through a medium</b> that is <b>controlled through the actions of a person</b> <b>The doctrine of transferred malice</b> applied to the tort of battery	throwing of firework, no. of people picked up the firework and eventually injured P  D punched a woman holding a baby > baby dropped & injured > D liable  D shot A but hit B instead > D liable	Scott v Shepherd - firework  Haystead v Chief Constable of Derbyshire  Bici v MOD
Controv.	P had not been the intended target and that he had been hit accidentally > D still held liable in this case (can be challenged)		Livingstone v MOD

### (c) Harm and Hostility

Law	<b>Harm is not required</b> for a battery; it is a tort that is <b>actionable per se</b> —ie, <b>without proof of any injury or damage to C</b> .	Yu Ka Yui v Chong Chi Fai
Law	Hostility is context-dependent: "The least touching of another in anger is battery [but] if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery" (Holt CJ). [He had in mind jostling in a crowd.]	Cole v Turner
[check]	[check] Doctor acting in patient's best interest? Who cannot give consent due to the patient's inability?	West Berkshire Health Authority
	<b>Hostility is not required</b> , only <b>evidence to contrary to P's freedom requiried</b>	Although it has been said that an element of hostility is required for battery, such <b>hostility is not to be equated with ill-will</b> , but <b>evidence is required of an act contrary to the claimant's freedom</b> from unwarranted physical contact.
		HK: Saeed v Secretary for Justice

### (3) Absence of consent

<b>Burden of proof</b> on P to show that there is no consent to the act	Freeman v Home Office (No 2)
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### Assault

Def	An assault is any act of D that <b>directly</b> and <u>intentionally</u> causes P <b>reasonably</b> to <b>apprehend the imminent infliction</b> of a battery. <b>3 classic trespass</b> (torts of battery, assault & false imprisonment) <b>can occur in conjunction with one another</b> : e.g., a gang of people surrounding you within a very close space, not allowing you to escape and causing you fearful about being battered	Street of tort
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### Reasonableness (Fear must be reasonable)

Test:	<b>Objective test</b> : whether such act would put a <b>reasonable person</b> in fear of physical violence	Stephens v Myers HK: Chan Norman
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### Imminence of battery

Law	<b>"Here and now" requirement</b> : The <b>tort of assault</b> is not, in my view, committed, unless the capacity in question is <b>present at the time the overt act is committed</b> (Threat of battery must be existed here and now)	Thomas v NUM
CL	<b>Strong presence of police force &gt;no assault</b> Strong police presence to prevent the battery: apprehension of the would-be offender before they got the chance to really commit the offence > <b>no prospect of battery being committed</b>	Thomas v NUM
CL	Can be an assault if the circumstances are right, e.g. - P can have <b>easy access</b> - P could <b>foresee battery could be here anytime</b> - P <b>having no other ways out</b> , sufficiently imminent in this case	"The plaintiff ... could easily have access to and did on a number of occasions visit the property, absolutely uninvited" Wong Kwai Fun v Li Fung
cf	<b>Case of very near future treats might be an exception</b> , can be an argument to immanent enoug arguable against Thomas v NUM rule	Wong Wai Hing v Hui Wei Lee
Law	If <b>gestures</b> are accompanied by <b>words that negate the apparent threat</b> in the gestures, there will, again, be <b>no assault</b> .	Tuberville v Savage

## Intentional Infliction of Harm

Def	<ul style="list-style-type: none"> <li>Neither battery nor assault, but protects the same two interests</li> <li>Different from battery and assault: <b>Does not require the directness</b> as in tort of battery or assault: just <b>conduct &amp; intention to cause harm</b></li> </ul>	
Old law	<p>Actionable when [D had] <b>wilfully</b> done an act <b>calculated to</b> (objectively likely to) <b>cause physical harm</b> to the plaintiff ... which <u>in fact caused physical harm</u> to her. (Wright J.)</p> <ul style="list-style-type: none"> <li>Calculated to = objectively likely to</li> <li>Imputed intention (rejected in O v Rhodes)</li> </ul>	Wilkinson v Downton
Law now	<i>O v Rhodes</i>	O v Rhodes [2016] AC 219
<b>3 elements in Wilkinson</b>		
1	<p><b>Conduct element</b></p> <p>"The conduct element requires <b>words or conduct directed towards the claimant</b>, for which there is <u>no justification or reasonable excuse</u>."</p>	no justification or reasonable excuse in tort law (unlike criminal law), as both parties' interests as view them as equally important
2	<p><b>Mental element</b></p> <p>"[The] necessary mental element is <b>intention</b> to cause <b>physical harm</b> or <b>severe mental or emotional distress</b>."</p>	<b>Such harm must be intended:</b> Distress relevant to the mental element, but not tort of distress despite it being mentioned
3	<p><b>Consequence element</b></p> <p>"[The consequence element requires] <b>physical harm</b> or [a] <b>recognised psychiatric illness</b>."</p>	only when there is consequence there can be such tort; reject the notion of imputed intention to cause harm
<b>Imputed intention rejected</b>		
<b>Not superseding law of negligence</b>		
	Not a tort of distress despite it being mentioned: tort of assault is a separate tort that covers physical harm and psychiatric harm in its way	
	Cannot sue for distress	Wainwright v Home Office

## Harassment

Not an defined tort in HK		
Recognised	<p>I shall take the term 'harassment' to mean a course of conduct by a person, whether by <b>words or action, directly or through third parties, sufficiently repetitive</b> in nature as would cause, and which he ought reasonably to know would <b>cause, worry, emotional distress or annoyance</b> to another person. (Chan J.)</p>	<p>Conduct intended to cause harm; <b>lacks element of directness</b> as in battery and assault</p>
Cf	No tort of harassment recognised in other cases	Lau Tat Wai v Yip Lai Kuen Joey  Chan Norman

## False imprisonment

Def	<p>All that a claimant has to prove in order to establish false imprisonment is that he was <b>directly</b> and <b>intentionally imprisoned</b> by the defendant, whereupon the <b>burden shifts to the defendant</b> to show that there was <b>lawful justification</b> for doing so. (Lord Dyson.)</p> <p>Usually, when there is a false imprisonment, there will also be an assault or battery, too.</p>	<ul style="list-style-type: none"> <li>Protects fundamental interest in liberty; in freedom of movement</li> <li><b>Directness and intentionality</b></li> </ul> <p>E.g. a gang of ppl surrounding &amp; not allowing one to escape (false imprisonment), causing one fearful of battery (assault)</p>
		Lumba

## 1. D's State of Mind and Directness

	This tort must be <b>intentional</b> in the sense that the <b>defendant must intend to do an act</b> which is at least <b>substantially certain to effect the confinement</b> .		
cf	<b>Intention to the outcome (to deprive the person's liberty)</b> in false imprisonment but not just the act	the claimant must show not merely an intentional act or omission ... but also an <b>intention to deprive the claimant of his liberty</b>	arguable as to the outcome or the act  Iqbal v Prison Officers Association

## 2. Restraint

### (a) Total Restraint

<b>Only total restraint of the person could lead to false imprisonment</b>	<ul style="list-style-type: none"> <li>Partial obstruction and disturbance does not constitute imprisonment</li> <li>The act must completely prevent the claimant from leaving the area</li> </ul> -> If there is <b>reasonable means of egress</b> (way of getting out), it would not be restraint	Bird v Jones
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### (b) Length of Restraint

<b>Restraint need not be for a long time.</b>	[I]mprisonment is, as I apprehend, a total restraint of the liberty of the person, <b>for however short a time</b> (Lord Denman CJ).	Bird v Jones
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### (c) (P's) Knowledge of Restraint

<b>P does not need to know the restraint</b> , the tort is <b>actionable per se</b> Principle of fundamentality of a person's liberty	The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable (Lord Griffiths). Trespassory torts (such as false imprisonment) are <b>actionable per se regardless of whether the victim suffers any harm</b> . An action lies even <b>if the victim does not know</b> that he was imprisoned (Lord Dyson). - Lumba	Murray v Ministry of Defence (note obiter) Lumba (note: criminal case); recognised in HK: A-G v Chan Luen Yung (criminal case)
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### (d) Imprisonment by Omission?

	If there is <b>no duty</b> to provide facility to prevent detention (mere omission) > <b>not liable for imprisonment</b>	Herd v Weardale Steel, Coal and Coke Co (crim case)
vs	<u>If there is duty to confer liberty on P</u> > <u>there can be false imprisonment</u> for the failure to release someone (e.g., at the end of P's shift; prisoner at end of their serve term)	Governor of Brockhill Prison, ex p Evans (crime case)

## Damages (see later notes)

## Defences

### 1. Self-defence

#### (a) Proportionality

Law	D's response must be <b>reasonable</b> and <b>proportionate</b> (about <u>temporality (response to here and now)</u> & <u>the magnitude of the response</u> )	Context-dependent, question of fact	Cockcroft v Smith
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#### (b) Mistakes as to a Threat and Self-defence

Law	Self-defence can be used in <b>anticipation of a battery</b> , as a response of a perceived act (depiste mistaken) & strike first
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Test	Whether or not you could ever mistaken the treat where there is no real threat <b>Must <u>honestly</u> and <u>reasonably</u> believed</b> that the person poses a treat and lead	In tort, genuine belief is not enough, it ought also to be reasonable <b>Context-dependent test</b>	Ashley v Chief Constable of Sussex
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## 2. Lawful Arrest

### (a) Common Law Power

Def	a power vested in anyone—police and citizens alike—to <b>effect a lawful arrest of anyone committing a breach of the peace.</b>	
CL	When there is (reasonable or actual) <b>presence of a breach of the peace</b> , general power to <b>take reasonable steps</b> to prevent so Reasonable steps: the duty to prevent breaches of the peace must be <u>kept within</u>	every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will.
		R (Laporte) v Chief Constable of Gloucestershire HK: Chan Kwai Hung

### (b) Arrests under Statute

#### (i) Police arrests

##### Police arrests under warrant

Magistrates can grant a power of arrest by s 31 of the Magistrates' Ordinance (Cap 227).

If a police officer acts in accordance with a power of arrest thus granted, that officer is not responsible for any errors or irregularities in the warrant: s 60 of the Police Force Ordinance (Cap 232).

The mistake by the Magistrate would be irrelevant: police still obtain the power to arrest even if the the ground for the grant is not rooted

##### Police arrests without warrant

The Criminal Procedure Ordinance (Cap 221), s 101(2)-(5) confers this general power.

(2) Any person may arrest without warrant any person whom he may **reasonably suspect of being guilty of an arrestable offence.**

(3) Any person to whom any **property** is offered to be sold, pawned, or delivered, and who has **reasonable ground to suspect** that any **arrestable offence has been or is about to be committed** on or with respect to such property, may, and, if he can, shall, without warrant, apprehend the person offering the same and take possession of the property so offered.

(4) Every person who finds any person **in possession of any property** which he, on **reasonable grounds**, suspects to have been **obtained by means of an arrestable offence** may arrest such last-mentioned person without warrant and take possession of the property.

police officers can arrest people committing crimes or doing things that they **reasonably believe to be crimes.**

#### (i) Citizens' powers of arrest

General power of arrest without warrant under the Criminal Procedure Ordinance

Important qualification in section 101(5):

Every person who arrests any person under any of the provisions herein contained shall (if the person making the arrest is not himself a police officer) **deliver the person so arrested, and the property**, if any, taken possession of by him, to some police officer in order that he may be conveyed **as soon as reasonably** may be before a magistrate, to be by him dealt with according to law, or himself convey him before a magistrate, as soon as reasonably may be, for that purpose

the citizen, has to hand the arrestee over to a police officer or a magistrate where reasonably practicable.

Section 101A: **reasonable force may be used** in effecting arrests.

CL	<b>Requirement of reasonableness</b>	You look at all the circumstances of the case and ask yourself whether reasonable precautions or unreasonable precautions or unnecessary measures are taken	Crawley v A-G - excessive force to handcuff an old lady A-G v Kong Chung Shing
		Could be <b>unlawful arrest &gt; battery</b> <u>if force not reasonable</u>	

## Consent

Law	<b>Consent generally operates as defense:</b> If A consents to the risk of a touch from B (eg, a careless foul in football match) there can be no battery	Chan Kin Bun v Wong Sze Ming
	<b>Distinguish consent from <i>volenti non fit injuria</i></b>	essay Q, check later, see note
Elements	<b>(1) P must be competent to form such a view; (2) the view expressed must be genuine.</b>	
Prob.	(1) P <u>lacks competence</u> ; (2) P's consent was <u>procured by fraud</u> ; (3) P's consent was <u>procured by duress</u>	

## Consent obtained by Fraud

Law	<b>No valid consent</b> when P's consent has been obtained by <b>fraud</b>	Appleton v Garrett; HK: Chan Wai Hung
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## Consent obtained by duress

Law	<b>No valid consent</b> when P's consent has been obtained by <b>duress</b>	Freeman v Home Office (No.2)
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## Consent to Medical Treatment (Capacity/competence issue, when P lacks competence) - draw distinction between **adults & children**

### (i) Adults

Treatment may not be given to an adult in absence of <b>lawful justification</b>	Every human being of <b>adult</b> years and <b>sound mind</b> has a right to determine what shall be done with his own body. (if not adult, or not with sound mind > need to have lawful justification: otherwise it would be battery)	F v West Berkshire Health Authority - woman w/ low mental capacity, mother sought declaration
Consent valid when patient <b>informed in broad terms</b> of the the <b>nature of the procedure</b>	Realistic stance taken as to how much one needs to know to make the consent valid, <b>need not to know every details/mechanics of the procedure</b> ; note: doctor needs to also <u>fulfill duty of care of negligence</u> (otherwise can sue on negligence)	Chatterton v Gerson; HK: Tai Kut Sing v Choi Chun Kwan

### (ii) Children

Law	Court has the capacity to grant consent for children to protect children	Re P (A Minor)
	But <u>in some circumstances</u> <b>a minor would be able to give consent in their own right</b> , without the knowledge or approval of their parents:	Gillick v West Norfolk and Wisbech A - <b>13-yr-old child</b> , court dismissed declaration
Test	<b>a minor will be able to consent</b> to treatment if they <b>demonstrate "sufficient understanding and intelligence to understand fully what is proposed"</b> ; As Children <b>acquired a capacity to grant a valid consent</b> as they <u>get progressively older</u> that would <u>happen gradually</u>	

## Necessity (a separate defence in medical treatment, in interest of a patient where patient is unable to consent)

### (a) Common Law

in limited circumstances, recognition may be given to a need, <b>in the interests of the patient</b> , that <b>treatment should be given</b> to him in circumstances <b>where he is (temporarily or permanently) disabled from consenting</b> to it. It	F v West Berkshire AHA
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### (b) Mental Health Ordinance (Cap 136), s 59ZA

Where someone is mentally incapacitated for the purposes of this Ordinance, treatment may be given:	
(a) to <b>save their life</b> ; (b) <b>prevent damage or deterioration</b> in their mental or physical health; (c) <b>effect an improvement</b> in their mental or physical health	

## PRIVATE NUISANCE

### Definition

Def	"A <b>substantial and unreasonable interference</b> with a <b>person's land or the use or enjoyment of that land</b> ".	Murphy, The Law of Nuisance
CL	Private nuisance is a tort protecting property rights. It is concerned with the activities of the owner or occupier of property within the boundaries of his own land which may harm the interests of the owner or occupier of other land.	Leung Tsang Hung
e.g.,	Noise, smoke, fumes/bad smells, root encroachments, removal of supports and intrusive viewing.	

### ELEMENT 1 "Substantial Interference"

Interference needs to be <b>substantial</b> : Distinguish <b>habit &amp; interference</b>	[O]ught this <b>inconvenience</b> to be considered..., as an <b>inconvenience materially interfering with the ordinary comfort</b> physically of human existence, <u>not merely according to elegant or dainty modes and habits of living</u>	Walter v Selfe; Fearn
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### Factors to identify substantial interference:

#### 1. Unusual Sensitivity of Plaintiff

Law	<b>If a plaintiff is abnormally sensitive</b> , this may be an indication that, <u>although P is greatly irritated or affected</u> , this may still <b>not amount to a material interference</b> .	Robinson v Kilvert; Hunter v Canary Wharf
Test	<b>Objective test</b> : the law <u>measures the extent of the interference</u> by <b>reference to the sensibilities of an average or ordinary person</b> <b>Context-dependent</b> : look at <b>way of ordinary people live</b> in HK, consider whether interference is reasonable	Fearn Capital Prosperous Ltd v Sheen Cho Kwong (11pm shower)

### NB: Different Approach for Sensitive Buildings

<b>Court tolerate claim of sensitivity building</b> : the <u>characteristic of the building</u> itself could <u>confer more interference</u> ; on the basis that ppl having the <b>freedom to build any kind of building in their own land</b> > <b>basic right of entitlement to enjoy their land</b> e.g., building with high visibility due to design of the window (that viewing from the balcony could be more intrusive compared to other types of building > D cannot argue on this point that it is the sensitivity of P's building causing the interference	Fearn
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#### 2. Location of Plaintiff's Premises

Law	The relevance of P's neighbourhood is that <b>P's legitimate expectations in terms of comfort, peace and quiet</b> will <u>vary according to where he lives</u> .	Sturges v Bridgman
Test	whether what is being done interferes with the plaintiffs in the comfortable and convenient enjoyment of their land, regard being had ... to the character, as proved, of the neighbourhood (Evershed MR)  What is <b>reasonable</b> according to <b>ordinary usages</b> of mankind living in a particular society; take into account the <b>particular habits of Hong Kong people</b>	Thompson-Schwab v Costaki  Tam Seen Mann Estefania v Chan Norman and Another

### NB Locality is not relevant in cases of property damage.

Law	<b>Any damages to property are always substantial</b> , location of the premise is nor relevant; <b>Focus only on material physical question</b> but not the locality of premise (e.g., cannot argue property is reasonable and likely to be damages in industrial area)	St Helens Smelting Co; HK: ACL Electronics (HK) Ltd
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## ELEMENT 2 "Unreasonable Interference"

Def a description of the **nature of the effect on P/the nature of the interference** (rather than a characterisation of the way that D behaves);  
Concerned only whether the interference described is a reasonable one

### Factors to consider to determine reasonableness

#### 1. Seriousness of the Interference

##### (a) Duration

**The longer an interference > more serious > more unreasonable** Recognised the necessity of work (that interference can be inevitable); but the duration of the nuisance is a relevant consideration Matania v National Provincial Bank

##### (b) Character of the Harm

**Harm to amenity** (enjoyment of the property) vs. **Harm to the property itself**: It is generally **more difficult to justify physical damage to P's land** than amenity nuisance & **locality has no exculpatory value in property damage cases**. (locality is not relevant in property damage cases) St Helens Smelting Co v Tipping

#### 2. Character of the Defendant's User (D's conduct or use of land)

Def **Unreasonableness of one's behaviour** provides a way to determine the consequences of the act and interference; But not itself determine the reasonableness of the tort (vs above the Q being whether the nature of the interference is the only thing to consider)

2 **What a reasonable user entails**: The **two conditions** of [reasonable user are whether] ... the acts 1. whether the act is a necessary, common & ordinary thing to do; Fearn - D was providing the public with the chance to  
condition complained of were 2. Conveniently done: done in a way that intrusively view the Ps that its  
s/elements (i) **necessary for the common and ordinary use and occupation of land**, and people usually would do it and expect user > unnecessary & uncommon  
to satisfy (ii) **"conveniently done"** - that is to say, **done with proper consideration for the interests of** others to do the same to do > unreasonable.  
neighbouring occupiers.

### Factors to determine the reasonableness of D's user/conduct

#### (a) D's malicious activities

The **malice in D's user can be a material consideration** as an **inference to draw to unreasonableness**; (if D's user is malicious, he can never justify the interference thereby caused, even if the act itself is a reasonable thing to do) Hollywood Silver Fox v Emmett  
Where **noise is created deliberately and maliciously** for the **purposes of causing annoyance**, its **mala fides character alone** would **render** Pong Seong Teresa v Chan Norman  
**it an actionable nuisance** even if it would otherwise have been legitimate. (Linda Chan SC.)

#### (b) Locality in which D's activities occur

D's location relevant to the issue of **"what is it acceptable for D to do?"** e.g., Unreasonable to keep horse in a residential area - Ball v Ray

#### (c) Fault on D's part is not required (D can have no fault but still be unreasonable in his conduct)

Private nuisance as a **strict liability tort** where **negligence/fault on D's part is not required**:  
Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many **negligence in the narrow sense is not essential**. An occupier may incur liability for the [e]mission of noxious fumes or noise although he has used the utmost care in building and using his premises ... [And yet] although negligence may not be necessary, **fault of some kind is almost always necessary** and **fault generally involves foreseeability**. even if D has exercised reasonable care and skill to prevent the nuisance (no negligence in a narrow sense/fault here), but nonetheless nuisance still occurs > this is no defence to the nuisance caused to P The Wagon Mound (No 2)



It is settled law that the **exercise of care and skill** by a competent contractor or every effort made by the Defendant to **prevent a nuisance** **afford no defence to an action on nuisance**. (Wong J.)

Lau Chun Wing Rod v  
Incorporated Owners of Po On

#### NB Water leakage case

a plaintiff must show, besides the seepage itself and the issue of causation, that **(i) the defendants actually or constructively knew that the water originated from their premises**; and **(ii) remedial action was not taken within a reasonable time** (Li J).

Tin Kin Ka Clara v Chan Koon  
Cheong

#### (d) The practicability of avoiding an interference

If D could have taken simple steps to avoid causing disturbance, the fact that he or she does not take those steps may be taken by the courts to support a finding of unreasonable interference.

Leeman v Montagu

#### Who Can Sue in Private Nuisance?

P must have a **proprietary interest in the land** affected in order to sue in private nuisance  
(e.g., mere licensee or rental resident on the land has no proprietary right to sue)

Hunter v Canary Wharf; HK: Ng  
Hoi Sze v Yuen Sha Sha

#### Recognised Heads of Loss in Private Nuisance

##### Physical damage

St Helens

##### Amenity nuisances

annoyances like noise, bad smells

including **intrusive viewing of a person in their home** (viewed as relevant to **amenity value of property**: freedom to conduct your life in your own home without being constantly watched and photographed by strangers)

Fearn

#### A. Personal Injury

Can sue on personal injury on ground that the nuisance **affects the amenity value of the land** as to the **capacity of enjoying the land without suffering from personal injury**

the harm from which the law protects a claimant is **diminution in the utility and amenity value of the claimant's land**, and not personal discomfort to the persons who are occupying it. (Lord Leggatt).

Fearn v Board of Trustees of Tate  
Gallery

#### B. Damage to Chattels

**Recoverable** on the same ground above: **diminution in the utility and amenity value of the claimant's land**

cf **Cannot sue for mere damage if chattel can be replaced** (if not fixed to the land/property) > to chattel as this would be irrelevant to the utility and amenity value of the land

Anglian Water Services Ltd

#### C. Economic Loss

**Consequential economic loss** so long as it derives from interference with land's amenity is recognised as **recoverable**:

Hunter; Andrae v Selfridge

#### Who Can be Sued?

##### A. Creator of the nuisance

- 1) The primary D: **the person who causes the nuisance** (e.g., tenant)
- 2) Second possible D: **Owner of the occupier of the land who authorise the act** (e.g., landlord)

Southwark LBC v Mills; Loke Yuen  
Jean Tak Alice v Wong Kit Ying

## B. Occupiers

Occupier may be liable, even though they did not themselves create the nuisance where:

### 1) They have adopted or continued the nuisance created by another, or by natural processes

**Adopt:** One adopts a nuisance when one makes use of the state of affairs comprising the nuisance.

**Continue:** One continues a nuisance where one **fails to abate a nuisance** where one has **actual or constructive knowledge of the nuisance**.  
(An occupier of land “continues” a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take reasonable means to bring it to an end when he has ample time to do so)

Sedleigh-Denfield v O’Callaghan; Leakey v National Trust - created by natural processes;

### 2) They have **control over the creator of the nuisance**

liability for acts done by those over whom owner/occupier had control: independent contractors in this case

Loke Yuen Jean Tak Alice v Wong Matania v National Provincial Bank

**Summary** [An owner-occupier] can plainly be expected to have effective control, both physically and legally, over the property in question. Such an owner-occupier is subject to a duty to nullify the hazard **if he knows or ought to know** of its existence, **even though he has done nothing to create it**. The hazard may have been created by a trespasser or a by “a secret and unobservable operation of nature” but his **omission to neutralize the hazard within a reasonable time after acquiring the requisite knowledge or presumed knowledge is actionable** (Li CJ).

Leung Tsang Hung v Incorporated Owners of Kwok Wing House

## Defences

### A. Prescription

**No defence of prescription of right** when there is **change in circumstances** (e.g., increase in noise level or susceptibility to noise);

The effect of doing the same thing would be enough to constitute a nuisance

**Q of when it starts to be a substantial and unreasonable interference**

Sturges v Bridgman; Coventry v Lawrence

### B. Statutory Authority

If D is authorised by statute to do a thing, then D is immune from suit for any disturbance caused.

But depends on **interpretation of the statute** of what exactly is permitted: appropriate interpretation of the statute in a way **as much as possible to limit interference/least intrusive to the neighbours**

Allen v Gulf Oil Refining Ltd

if the effect of **nuisance is evitable**, D still need to do the thing in a manner that **minimise the interference to others**

Lam Yuk Fong v A-G

### Cf Planning Permission

Court takes account the location/**source of the permission**, to **see the if it is substantial and unreasonable interference**; **Not as a defence** but **merely a relevant consideration**

Coventry v Lawrence

### C. Acts of God/Strangers

**Inevitable accidents of nature and nuisances created by third parties** which are **neither adopted nor continued by D** (in the senses discussed above) will not support an action in nuisance against D.

Sedleigh-Denfield v O’Callaghan

## Remedies

### A. Injunctions

presumption in nuisance cases is that an injunction will be granted, but not as right

Might not be granted where the injury to the plaintiff's legal rights is (i) small; (ii) capable of being estimated in money; (iii) can be adequately compensated by a small money payment, and (iv) where the case is one in which it would be oppressive to the defendant to grant an injunction. (Smith LJ.) - Only exceptionally no injunction granted (injunction not as a right) Shelfer v City of London Electric Lighting Co

#### Factors to consider when granting injunction:

##### Gravity of interference

if interference is minor/not substantial, was accidental and occasional > no injunction granted Cooke v Forbes

##### Public interest/public resource

**relevant to the question of which type of remedies is appropriate** (public interest is not a factor justifying nuisance, once reach the threshold of being a substantial and unreasonable interference (still the ingredient to satisfy, public interest is not a factor here) > consider public interest & ask what remedy to grant Fearn

### B. Damages

Even if an injunction is refused (considering effect of granting injunction on the public), D may still have to **pay damages in lieu** Coventry v Lawrence; Lo Yu Chu

To pay to P the **difference** between the **value of the protected interest before and after the nuisance.** Andreae v Selfridge & Co

In cases of **physical loss**, damages are measured in two ways: **(1) cost of repair** or **(2) drop in property value** (whichever is lower). Wong Shiu Hung v Lui Kuo

## PUBLIC NUISANCE

Def	For there to be a public nuisance, there must be an <b>infringement of a public right</b> . And this tallies with the fact that public nuisances are, first and foremost, crimes; <b>a common injury to a broad class</b> <b>Many individual private wrong does not equal to public rights</b> (Public nuisances have at their heart public rights; private nuisances have at their heart, private rights)	R v Rimmington; R v Goldstein Cf A-G v PYA Quarries: <b>wrong</b>
<b>Proprietary interest of P or D not required</b>		
	No requirement of land ownership of land in public nuisance, for both P and D	Gillingham BC v Medway (Chatham) Dock
<b>It must affect a broad range of people</b>		
	public nuisance is a nuisance which is <b>so widespread in its range</b> or <b>so indiscriminate in its effect</b> that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the <b>responsibility of the community at large</b> . (Denning LJ.)	Require <b>sufficiently broad effect</b> , analyse <b>contextually</b> ; no precise no. of ppl for the ans A-G v PYA Quarries; HK: Shek Sze Ming v Yiu Yuet Sim
<b>Particular damage suffered by P</b>		
1	P show that s/he was a <b>member of the relevant class</b>	
2	P must also show that the <b>damage suffered went above and beyond</b> that suffered by the other members of the class. - Referrable to the <b>extent of the loss suffered by P by comparison with others</b> also affected by the nuisance (a relative concept); - The loss P suffers must be exceeding the extent of what other suffers, need to be <b>substantially more</b>	Tate & Lyle Industries Ltd v Greater London Council; Trevett v Lee
NB	<b>Compare to members of the same class</b> Arguable decision here: Need to show as a road user that suffers a greater extent than the other road users; but the shop owner is not using the road,	Wilkes v Hungerford Market
<b>Personal injury claimable</b>		
	Although the tort of private nuisance will not tolerate claims for personal injury per se (see Hunter v Canary Wharf, supra) public nuisance will permit such claims.	In re Corby Group Litigation; HK: Chung Man Yau v Sihon Co Ltd
<b>Who is Liable for a Public Nuisance?</b>		
(a) <b>Creator of the nuisance</b>		
(b) <b>if one does so inadvertently</b> one can still be liable if one ought to have known (or did know) that a public nuisance would result		
	If D has <b>foreseen</b> or <b>ought to have (reasonably) foreseen</b> the result, D liable even he does not deliberately do this	R v Goldstein
	D can be liable for <b>continuing/adopting public nuisances</b> (having actual or constructive knowledge of the nuisance)	Wandsworth LBC v Railtrack

## The Rule in *Rylands v Fletcher*

### Definition: A strict liability tort

The person who for his own purposes brings on his land and **keeps and collects** there **anything likely to do mischief if it escapes, must keep it in at his peril** (strict liability) and is *prima facie* answerable for all the damage which is the **natural consequence of its escape** (Blackburn I).

Rylands v Fletcher

No requirement to show negligence > strict liability tort

Transco plc v Stockport MBC

### ELEMENTS OF THE RULE

#### Element 1: "Non-natural Use"

[It is] **some special use** bringing with it **increased danger to others**, and must not merely be the ordinary use of land or such use as is proper for the general benefit of the community

Rickards v Lothian; Cambridge Water Co. (chemical spill)

Defendant's use needs to be **extraordinary or unusual**, (whether the use was ordinary in time and place; determine contextually)

Transco plc

#### Factors to determine "extraordinary or unusual"

##### 1. Determined Contextually, as a Question of Fact and Degree

Consider e.g., **character of the neighbourhood** (industrial or residential), **time and place**;  
Matter of **facts and degree**, look at the **quantity** of a thing

*Read v Lyons* - explosives at war time; *Wayfoong Credit Ltd* - inflammable plastic dolls in industrial building; *Wong Ching Chi* - abnormal amount of water in industrial

##### 2. Social Utility

**Social utility of D's enterprise** (a factor to consider) might give hints to whether there had been a natural use

Rickards

cf However, **social utility is not sufficient of itself to establish a particular use** as constituting a natural or ordinary use of land.

Cambridge Water

#### Element 2: "D Brings onto his Land and Keeps/Collects there..."

It is not a case of *Rylands v Fletcher* if D did not consciously setting out to collect the seeds of weeds (but weeds are naturally grown)

Giles v Walker

#### Element 3: Escape

There must be an **escape from D's land** (if the thing does not escape but stays in D's premise, where P got injured > this rule does not apply)

Read v Lyons

**The thing that escapes must be the thing brought onto the land.** (furniture is the thing D kept & collected, but fire is the thing that escapes)

Chung Wah Steel Ltd

#### Element 4: "Liable to do Mischief if it Escapes"

**The thing need not be dangerous in itself**, relevant to consider its ability to do damage upon its **escape in vast quantities**

Rylands; ACL Electronics (HK)

#### Element 5: Foreseeability of Harm

**D is only liable for foreseeable forms of harm:** Same remoteness/foreseeability test applies as in negligence case (Wagon case) - The damage must be of a kind that is reasonably foreseeable; not concern with foreseeability of the specific type of damage  
If event is too remote or not foreseeable > D not liable (case: was too remote as it was not possible for the D to reasonably foresee a spillage which would eventually lead to contamination of a water borehole so far away.

Cambridge Water

The Wagon Mound (No 1) - Remoteness of Damage

### Protected interests

**1. Land** (*Rylands v Fletcher*); **2. Chattels** (*Jones v Festiniog Rly*; *Wong Ching Chi*); **3. Personal Injury** (*Hale v Jennings*)

### DEFENCES

1)	<b>Act of God</b>	Natural events that occur that is extraordinary event & it is not reasonably foreseeable.	Nichols v Marsland
2)	<b>Unforeseeable act of a "Stranger"</b>	Act of a TP that D has no control of & act is not foreseeable	Perry v Kendrick
3)	<b>Consent of the Claimant</b>	Where P consented to accumulation (e.g., water storage for all occupants to use)	Carstairs v Taylor
4)	<b>Statutory Authority</b>	This operates in the same way we saw in the context of nuisance.	Green v Chelsea Waterworks
5)	<b>Default of Plaintiff</b>	If P was the cause of the escape, then P cannot claim.	R v F

## VICARIOUS LIABILITY

<b>Def</b>	A person is liable not only for torts committed by himself, but also sometimes for the torts of others via his vicarious liability. That is: D pays for a tort committed by X against C. > <b>strict liability</b>	
<b>Old Law</b>	Applies only in <b>employment, employees and employer</b> ; not in respect of the acts committed by one's independent contractors.	Cassidy v Ministry of Health
<b>Law now</b>	<b>"the law of vicarious liability" is on the move: 2-stage approach</b> <b>1st stage:</b> consider the <u>relationship of D1 and D2</u> to see whether it is one that is capable of giving rise to vicarious liability <b>2nd stage:</b> <u>connection</u> that links the <u>relationship between D1 and D2</u> and <u>the act or omission of D1</u> (No longer applied only to employment relationship, but also <b>relationship akin to a contract of employment</b> )	Catholic Child Welfare Society and Others; Cox v Ministry of Justice
<b>Dual Vicarious Liability</b> (Another incidence of the law on the move)	In some case, the courts are unable to decide which of employer A or employer B should be held vicariously liable > <b>both employers liable</b>	Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd
<b>STAGE 1: Which Relationships Warrant the Application of Vicarious Liability?</b>		
<b>1. Relationship of Employer and Employee</b>		
<b>Test</b>	<b>"Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"</b> (whether somebody doing the thing on his account, but not of other who directed him)	Lee Ting Sang v Chung Chi Keung
<b>Single biggest factor: control</b>	(amounts of control exercisable over them by the employer) <b>Look at substance and not form:</b> Contract <b>description of "independent contractor" is inconclusive</b> , he can be "employee" instead	Wong Wai Ming
cf	Control is <b>not the decisive factor</b> , i.e., employee can be doing their act when there is no exercise of control > <b>take a balance approach</b>	Lai Wing Shun
<b>2. Partnership and Agency</b>		
	a principal will be liable for the torts of his or her agent & a partnership (eg, of solicitors) can be liable for the torts of fellow partners	Cox
<b>3. Relationship Akin to a Contract of Employment (where just and reasonable)</b>		
<b>Relationships having the same incidents to contract of employment</b> > akin to contract of employment		Catholic Child Welfare Society; E
1	<b>D can direct what T does</b> (similar to control)	v English Province of Our Lady of Charity; Cox v Ministry of Justice
2	<b>The tortfeasor does it for the benefit of the defendant's (ie, D2's) organisation.</b> (organisation getting profits bc of T)	
3	The immediate tortfeasor's (ie, D1's) activity <b>forms an integral part of D2's activities or purposes.</b>	
<b>Law stops at independent contractor</b>		
	Lady Hale never recognised the liability in the context of independent contractor: <b>Classic distinction</b> between <u>employment and relationships akin or analogous to employment</u> , and <u>the relationship with an independent contractor</u> (rationale see note)	Barclays Bank v Various Claimants
<b>The five policy factors in Cox (Under fair, just and reasonable principle) see note</b>		
<b>STAGE 2: Which Acts will attract the application of Vicarious Liability?</b>		
<b>Old law</b>	<b>Salmond test:</b> Was this tort committed in the course of D1's employment? (1) (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act [that has been] authorised by the master. > <u>see note for deficiency of this test &amp; shift to the law now</u>	

CL	<b>Draw analogy from these cases</b> (not overruled) when apply the new test: Whatman v Pearson; Storey v Ashton (unauthorised mode, but an authorised act); Rose v Plenty (effect of prohibition)	
CL	<b>Prohibitions can (but do not necessarily) impact upon the present question:</b> prohibition does not change the fact that D is still doing what he is engaged to do, with aid of someone else <b>does not change the fact that the act is connected to his employment; As long as D is broadly speaking doing the act engaged by the employer to do</b>	Young Conqueror Co Ltd v Commercial Union Assurance Co Plc
<b>Law now 'Close Connection Test': Connection between D1's Tort and the Relationship between D1 and D2</b>		
Q1	<b>what functions or 'field of activities'</b> have been <b>entrusted by the employer</b> to the employee/what was the <b>nature of his job?</b>	Mohamud v WM Morrison Supermarkets plc;
Q2	Whether there was a <b>sufficient connection</b> between the <b>position in which he [the employee] was employed</b> and his <b>wrongful conduct</b> to make it right <b>for the employer to be held liable under the principle</b> [of vicarious liability].  No guidance on the type or degree of connection which will normally be regarded as sufficiently close > consider <b>fair, just &amp; reasonable</b> <b>Test can apply to other torts</b> e.g., <b>negligence</b> (Ming An Insurance Co), <b>fraud</b> perpetrated by an employee (Ronia Ltd v Clarke).	cf: WM Morrison Supermarkets plc [2020] - no close connection Dubai Aluminium

## NON-DELEGABLE DUTIES

Def	Wrong to think an employer is generally immune from liability: An employer can be liable for damage caused by the acts of his <b>independent contractors</b> where there was some <b>obvious negligence</b> on the part of the employer. It is <b>a question of law whether a non-delegable duty is owed</b> : if duty owed, <b>employer unable to delegate the legal responsibility</b> for the performance of the task.	Cassidy v Ministry of Health; Shan He Electronics (examples); Wilsons and Clyde Co; General Cleaning Contractors
Rationale	see note for justification regarding <b>assumptions of responsibility</b> & the <b>presence of an affirmative duty "negligence" as one of the elements</b> > <b>not strict liability tort</b>	Woodland v Swimming Teachers Association

## DEFENCES

### Distinguishement between Consent/Volenti Non Fit Injuria

<b>Consent</b>	consenting to sth more <b>certain</b> (injury that with a very high degree of risk), required virtual certainty	
<b>Volenti</b>	P's consent to run the <b>risk of injury</b> at D's hands knowing of the nature and the extent of the risk > voluntarily assumed the risk of injury  Understood as P agreeing to waive any claims of negligence (note: can be challenged not tally with people's mind) <b>Defence not available</b> as it need to be consenting to sth more certain (injury that with a very high degree of risk); car crash case	Nettleship v Weston Dann v Hamilton
cf	<b>Applicable</b> if there was a <b>genuine full agreement</b> , <b>free from any kind of pressure</b> , <b>to assume the risk of loss</b> . (Lord Pearce.)	ICI v Shatwell (exception)

### Statutory limitations

Control of Exemption Clauses Ordinance (Cap 71)  
Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap 272)

### Illegality (see note for policy reasons & two part test)

P has done sth wrong > cannot have use this as the basis for the claim (as p did sth wrong being used as the platform for his claim) Patel v Mirza



## REMEDIES

### Types of damages

#### 1. Compensatory Damages

General damages: losses the courts presume will occur which cannot be calculated with precision  
Special damages: awarded for a loss that P must specifically prove (eg, pre-trial medical expenses).

#### 2. Nominal Damages

Awarded to make a moral point: (1) To vindicate P's right, (2) To get at aggravated damages, (3) As a sort of declaration of rights  
They cannot be awarded in negligence because negligence requires proof of loss/harm. Constantine v Imperial Hotels;  
Hon Empire Investments Ltd

#### 3. Aggravated Damages

cannot sue for those aggravated damages in respect of a freestanding infringement of your dignity; recoverable when on top of other harm >  
**able to sue for injury to dignity (dignitary interest) + some other consequential loss/wrong**  
such damages represent **serious aggravation of the injury to P's dignity and pride.** Rookes v Barnard

#### 4. Exemplary Damages

Or punitive damages, the accent is upon the **behaviour of the wrongdoer**, not P's loss; accept and recognise that in some circumstances they are allowed, but only allowed in three circumstances: **The "three types of case" rule**

1	(a) <u>Oppressive, arbitrary or unconstitutional</u> action by <b>government servants</b>	Rookes v Barnard; Allan v Ng & Co (a firm)
2	(b) <b>D's conduct calculated make a profit exceeding a compensatory award payable to P</b>	Thompson
3	(c) Cases in which <b>exemplary damages are allowed by statute</b>	Cassell v Broome

Bars      exemplary damages would only be available in relation to torts where there was a pre-1964 precedent for them being granted under a particular tort: this was the so-called **cause of action restriction. (only when there are precedents can grant such award)** Rookes; A.B. v South West Water Services Ltd (apply bar)

cf      **Bar removed in Kuddus:** doubt on (cat.1) distinction between government officials and companies and individuals & (cat.2) no reason why exemplary damages should not be available to malicious motive Kuddus

#### 5. Damages arising out of a death

1. **Survival Action:** Law Amendment and Reform Ordinance (Cap 23): the action to survive after the death of the victim
2. **Fatal Accident Ordinance** (Cap 22): (i) **The dependency action** - sum for enjoyment also claimable; (ii) **The bereavement action;** (iii) **Funeral expenses**

#### 6. Vindictory Damages (Not yet in HK, but we currently call them licence fee damages, mark the infringement of fundamental rights)

#### 7. Licence Fee and Disgorgement Damages

### Principles Governing Compensatory Damages

#### (a) Duty to Mitigate

Fu Yick Fai v Chan Wai Hung

#### (b) Heads of Loss

(i) **Special damages:** to compensate, measurable, past losses, include pre-trial financial losses

(ii) General damages

**Future financial losses:** multiplier method & Deductions for calculation

**Non-financial losses:** (1) Physical Injury, (2) Pain and Suffering (Wise v Kaye; West v Shepherd), (3) Loss of Amenity (loss of capacity to enjoy life)

**Contributory Negligence**

Statute **Section 21(1)** of Law Amendment and Reform Ordinance (Cap 23): Where any person suffers damage as the result **partly of his own fault** and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the **damages recoverable** in respect thereof shall be **reduced** to such extent as the **court thinks just and equitable** having regard to the claimant's share in the responsibility for the **damage**.

**1. Plaintiff's Fault**

Section 21(10) states that "fault" means "negligence, breach or statutory duty or other act or omission which gives rise to a liability in tort, or would, apart from this section, give rise to the defence of contributory negligence". **(mere act of genuine self-disregard > regarded as fault here)**

**s 21(10) that "contributory negligence" is notionally different from the idea of "negligence" within the tort of negligence** (ie, D's negligence).

NB **The Relevance of Minority:** Where children are concerned, a lower standard of care will be required.

Gough v Thorne; Leung Sze Nok

**2. Apportionment of Damages**

**Consider 2 factors: (1) The moral blameworthiness of P's act or omission; (2) The causative potency of P's act or omission.**

Stapley; Hsu Li Yun (75% reduction); Froom v Butcher (seatbelt case, 15% reduction)

cf Contributory negligence does not apply to the intentional torts

Alliance & Leicester Building Society v Edgestop Ltd

**Injunctions**

**Prohibitive:** often sought in connection with private nuisance and harassment

**Mandatory:** could also be used in nuisance; one of those exceptions to the rules against liability for omissions (e.g., non-delegable duty to provide a safe workplace)