

CHAPTER 3 INTRODUCTION TO TORTS

CONTENTS

Teaching Approach

1. Tort Law and the Nature of Wrongdoing
2. Tort Law and the Balancing of Interests
3. Risk Management

Additional Teaching Suggestions

1. Compensation and Fault
2. Exceptional Measures of Damages

Discussion Boxes

1. Ethical Perspective 3.1—*Bazley v Curry*
2. Business Decision 3.1—Vicarious Liability and Personal Liability
3. You Be the Judge 3.1—Compensation in Tort and Contract

Review Questions

Cases & Problems

Case Briefs

TEACHING APPROACH

This is the first “substantive” chapter. Consequently, before turning to the material itself, it seems appropriate to provide a few remarks on pedagogy. Every instructor, of course, must develop his or her own style. Nevertheless, it is important to appreciate that this text reflects a particular approach that we have found very effective over the years. We believe that the pedagogic value of a course is directly related to the level of student interest and activity. As lecturers, we see it as our job to generate enthusiasm and to make students want to learn. By conveying our own belief that business law is a fascinating subject, it has been possible to instill in our students the same sense of excitement and curiosity. Likewise, we see it as our job to foster involvement. Students enjoy a much better learning experience if they are active participants, rather than passive recipients. For that reason, each chapter in this text contains a generous number of Discussion Boxes, Review Questions and Cases & Problems. (Complete model answers appear in this manual.) Whenever possible, we suggest teaching the material through the use of examples, rather than straight lectures. Students will prepare more thoroughly and perform better if they feel that they are part of a collaborative exercise.

Assuming that the chapters are being taught sequentially, this chapter on the Introduction to Torts therefore is doubly important. It provides the essential information on the topic. But it also provides an introduction to the development of analytical skills. As explained in Chapter 1, the goal of this text is *not* to train business students to “think like lawyers” (to use the common phrase). Nevertheless, anyone seriously interested in the law must understand that legal rules are formulated and applied in accordance with certain principles. The use of examples and exercises will help students to begin to internalize

those principles. Through participation, the students will acquire not only the ability to parrot back reasons and rules, but also the ability to properly apply their knowledge to new situations.

This is the first of four chapters on torts:

- Chapter 3 (the current chapter) provides a general introduction to tort law.
- Chapter 4 examines the traditional intentional torts.
- Chapter 5 examines a variety of business torts.
- Chapter 6 examines the tort of negligence, with a special emphasis on the concept of professional negligence.

Tort Law and the Nature of Wrongdoing

As reflected in the opening pages of this chapter, it is important for students to understand the nature of torts and the nature of legal wrongdoing in general. As discussed in Chapter 1, students sometimes assume that every “wrong” must have a legal remedy. Of course, that is not true. Many acts or omissions that most Canadians would consider “wrong” receive no formal sanction at all. That proposition is illustrated throughout this Part. In the next chapter, for instance, we see that Canadian courts have yet to recognize a general tort of invasion of privacy. There is, consequently, no law against snooping on a neighbour. Nor, as we saw in Chapter 1 and as we will see again in Chapter 6, is there a general duty to rescue. In the absence of exceptional circumstances, I am legally entitled to watch a person drown even if I could easily save them.

With those considerations in mind, this chapter opens with an examination of the differences between tort law and criminal law on the one hand, and tort law and contract law on the other. Students should appreciate that “wrongdoing” is legally relevant only if it can be expressed through the medium of a recognized cause of action or criminal prohibition. They should also appreciate that the classification of a wrong has practical consequences. The same set of events may involve a crime, a tort, and a breach of contract. The manner in which that event is analyzed will be important both procedurally and substantively.

- A crime is a public offence, committed against the community as a whole. Consequently, legal action generally is taken not by the individual victim, but by the Crown prosecutor. Furthermore, the usual remedies focus on punishment of the criminal. That person may be fined or imprisoned, for instance.
- In contrast, a tort or a breach of contract is a private wrong, committed by one person against another. Consequently, action is taken by the victim personally. Furthermore, the remedies that are imposed on the defendant generally reflect the private nature of the proceedings. The plaintiff is usually entitled to compensatory damages for losses that he or she suffered as a result of the wrong. And finally, while compensation is available in both tort and contract, it is calculated differently depending upon the operative cause of action. Because a contract is based on the parties’ voluntary promises about the future, compensation is forward-looking. It monetarily provides the plaintiff with the expected benefit of the agreement. In contrast, because a tort obligation is imposed by law, generally without regard to the defendant’s volition, compensation is backward-looking. It

monetarily places the plaintiff in the position that existed before the wrong was committed.

Tort Law and the Balancing of Interests

In many respects, in comparison with contract, tort is surprisingly open-ended. Because of the need for commercial certainty, the law has tried, with considerable success, to make contractual liabilities predictable. Unusual circumstances aside, it is usually fairly easy to determine whether or not an enforceable agreement exists, and, moreover, to predict the consequences of breach. The business world could not smoothly operate if it were otherwise.

Tort law, in contrast, often strikes students as frustratingly indeterminate. The rules themselves are frequently vague. Furthermore, it is often difficult to predict exactly how a court will decide a particular dispute. (All of that is particularly true with respect to the action in negligence, which is examined in Chapter 6.) There are at least two reasons for that distinction.

- First, in contrast to contract, tort law is not intended to be used primarily as a mechanism for *future* planning. It is more concerned with redressing wrongs in the *past*. (Admittedly, of course, tort law's deterrent function does look forward to preventing future harm at the same time that it imposes a sanction upon the defendant with respect to the past.) Consequently, it does not create the same commercial need for certainty.
- Second, as compared with contract, tort law is more obviously concerned with balancing competing social interests. That proposition is again especially clear in the context of the tort of negligence, which is discussed in Chapter 6, but it is also true with respect to some of the torts examined in this chapter. The legal system's ambivalence regarding protection of privacy is illustrative. While the courts and legislatures recognize the personal value of privacy, they also recognize that wide-ranging rules may, for instance, intolerably chill the investigation and publication of socially useful information. The courts similarly have struggled with the concept of vicarious liability. It is difficult to strike an appropriate balance between the desire to compensate the victim of a tort, the desire to motivate employers to establish safe practices, the desire to compel an enterprise to accept responsibility for the costs associated with its operation, the desire to refrain from punishing one person for the wrong of another, the desire to force wrongdoers to bear individual responsibility for their actions, and so on.

For the preceding reasons, it is important to alert students at the outset to the need for flexibility. They must appreciate that tort law is very much an exercise in balancing competing interests. If they lose sight of that basic idea, they may become unnecessarily frustrated with the subject.

Risk Management

It is also important to alert students at the outset to the fact that tort law creates risk management issues that generally are not seen in contract. Tort has a tendency to take people by surprise in a way that contract does not. Several examples can be cited.

- Contractual obligations are generally voluntarily and expressly created by the parties. Tort obligations, in contrast, are generally imposed by law. They exist regardless of volition or even knowledge. They are therefore more difficult to predict, identify, and manage.
- It would be natural to assume that intentional torts can only be committed if the defendant actually intended to do wrong. As discussed in the text, however, tort law has a surprisingly broad notion of “intention.” It is sufficient if the defendant intended to act in a certain manner, even if he or she did not recognize that that action was wrongful. In that respect, the tort of conversion is a trap for the unwary – and even for the wary. The defendant may be held liable for buying stolen goods, even if he or she acted honestly and reasonably in the belief that the property truly did belong to the thief.
- Students and business people might also be surprised to learn the potential scope of the doctrine of vicarious liability. It may seem odd that an employer can be held liable for an employee’s conduct, even if the employee was acting entirely contrary to express instructions.

Because tort law often takes business people by surprise, there is a heightened need for risk management. Consequently, students should appreciate the need for a basic understanding of tort liability. They should also appreciate the need for liability insurance.

ADDITIONAL TEACHING SUGGESTIONS

Compensation and Fault

The text discusses two alternative compensation schemes: workers’ compensation schemes and no-fault automobile accident schemes. That discussion contains the seeds of a larger issue: the extent to which society as a whole should assume responsibility when a person suffers a loss or injury.

Fifteen years ago, there was a common suggestion, at least in academic circles and especially in the United States, to the effect that tort law should be scrapped in favour of a general no-fault compensation scheme. That proposal was based on various observations.

- Tort law is, by most accounts, inefficient. A large proportion of the resources contained within the tort system go not toward injured victims, but rather toward lawyers and legal costs.
- Tort law is selective – perhaps unfairly selective – in terms of the people that it compensates. The plaintiff must prove that the defendant was at fault, in the sense of having wrongfully caused the relevant loss. From a personal and social perspective, however, the plaintiff’s condition is largely the same whether it was caused by a tort or whether it arose innocently. For example, a person may be equally incapacitated and unable to work because she was the victim of a battery or because she suffers from a congenital birth defect. An argument can be made to the effect that society’s obligation toward her should be the same in either instance.

- That proposal draws further support from the fact that compensation is, to a large extent, funded by the community as a whole whether it comes in the form of tort damages or some alternative scheme. In either case, the burden of the assistance is apt to be spread very widely. For instance, workers' compensation schemes are financed by compulsory contributions from employers. Of course, employers do not personally pay those contributions. They pass the expense on to employees in the form of lower salaries and wages, or on to customers in the form of higher prices, or both. But a similar process also occurs in most significant tort cases. Few individual tortfeasors have the financial ability to satisfy large damage awards. Liability is usually borne by the tortfeasor's insurer. (Indeed, there often is no point in suing unless the defendant does carry liability insurance.) Once again, however, the insurance companies do not directly bear the burden of damages. They shift that expense onto their customers in the form of premiums. And since liability insurance is very prevalent, the actual source of a plaintiff's compensation is a very large segment of the community as a whole (*ie* those members of the community who bought insurance).

Against that backdrop, it might be argued that the tort system should be scrapped and that its resources should be funneled toward a system that would more widely help people in need. That proposal has not, however, been adopted in any modern legal system – and perhaps for good reason. New Zealand introduced a generalized no-fault compensation scheme during the 1970s. Significantly, however, it did not purport to provide *full* relief for *all* injuries and disabilities. It excluded many types of losses and it offered less than complete compensation. Even so, it was found to be largely infeasible. There simply is too much hardship and misery. Consequently, unless Canadians are willing to accept a substantially new way of life, they cannot afford to repair every loss. Furthermore, a generalized no-fault scheme would require Canadians to accept a diminished role for individual responsibility. Even if a tortfeasor enjoys the protection of liability insurance, there may still be a salutary effect in singling him or her out for blame.

Students could be encouraged to discuss and debate the relative merits of tort law and no-fault schemes.

Exceptional Measures of Damages

The text discusses three types of damages: compensatory, nominal, and punitive. Those possibilities cover most cases. In some situations, however, a court may (or may appear to) calculate relief on some other basis.

First, *aggravated damages* may be awarded if the defendant acted reprehensibly in committing the tort and thereby caused the plaintiff to suffer mental anguish. Aggravated damages are often linked to punitive damages because both are premised upon the defendant's unusually bad behaviour. In fact, however, aggravated damages are a form of compensation. They are intended to compensate the plaintiff for the fact that he or she suffered additional mental distress as a result of the defendant's tort. That might be true, for instance, if the defendant not only committed the tort of battery, but also beat the plaintiff in a particularly humiliating manner (*eg* in front of his family).

Second, “*restitution damages*” or *disgorgement* is available with respect to some, but not all, torts. The usual remedy for a tort is compensation. Relief is calculated to reflect the *plaintiff’s loss*. Exceptionally, however, the court may calculate relief to reflect the *defendant’s gain*. Suppose, for instance, that the parties own adjacent properties. A fabulous cave lies beneath them both. The only entrance to the cave, however, is located on the defendant’s land. The defendant earns a great deal of money by conducting guided tours of the cave. The plaintiff can sue for trespass to land to the extent that the tours occurred underneath her land, but she cannot recover compensatory damages. After all, she suffered no loss. The tours caused her no harm. She can, however, recover “restitutionary damages” or disgorgement. Even though she suffered no loss, she can compel the defendant to give up an appropriate share of his profits. After all, he earned those profits by trespassing on the plaintiff’s underground property: *Edwards v Lee’s Administrator* (1936) 96 SW 2d 1028 (Ky CA).

It is important to note three points about “restitutionary damages” or disgorgement.

- First, the phrase “restitutionary damages” is placed in quotation marks to stress that it is something different than the remedy of restitution that responds to the cause of action in unjust enrichment. Restitution and unjust enrichment were discussed in Chapter 12. As we saw, that action requires proof that the defendant received *from the plaintiff* a benefit that cannot in justice be retained. Restitution requires the defendant to give the benefit *back* to plaintiff. In other words, restitution is limited to reversing a transfer of wealth. In the present context, however, “restitutionary damages” are not necessarily concerned with reversing a transfer of wealth. If a benefit was acquired as a result of wrongdoing, the court may order the defendant to give it up, even if it did not originally come from the plaintiff. The preceding example is illustrative. The plaintiff was entitled to money that the defendant acquired from the tourists. For that reason, it is better to use the term “disgorgement,” which means to *give up*, rather than to *give back*.
- Second, not all torts support the remedy of disgorgement. Although the law on point is frustratingly unclear, it may be that only proprietary torts allow the plaintiff to demand the defendant’s gain. Consequently, disgorgement has been awarded for trespass to land and conversion (torts which are intended to protect the plaintiff’s property interests), but not negligence (which is more generally concerned with careless conduct) or defamation (which is concerned with the plaintiff’s reputation): M McInnes “Disgorgement for Wrongdoing: An Experiment in Alignment” [2000] Restitution L Rev 516.
- Finally, although the law traditionally insisted that gain-based relief was not available for the wrong of breach of contract, the position appears to be changing. The rules have not yet been clearly articulated, but both the House of Lords and the Supreme Court of Canada have accepted that in “exceptional circumstances,” the defendant may be required to disgorge an ill-gotten gain: *Attorney General v Blake* [2001] 1 AC 268 (HL); *Bank of America Canada v Mutual Trust Co* (2002) 211 DLR (4th) 385 (SCC).

The issue of disgorgement could be introduced by presenting students with an example in which the defendant clearly profits from the commission of a tort, but does not impose a loss upon the plaintiff in the process. That exercise would require students to appreciate the flexibility of tort law. It would also require them to “think outside of the box” in a way that would deepen their understanding of the legal system in general. If a serious social problem exists, then, subject to countervailing considerations, the law perhaps should formulate a solution.

DISCUSSION BOXES

Ethical Perspective 3.1

1. This question asks students to consider justifications for the concept of vicarious liability. Students should be encouraged to evaluate those grounds with a view to the dual functions of tort law: compensation and deterrence.

- Vicarious liability serves the compensatory function by allowing the victim to claim damages from an employer, which is more likely to have money or liability insurance than an employee.
- Vicarious liability may serve the deterrence function of tort law by providing employers with an incentive to avoid unusually hazardous activities and to hire the best people available.
- As a matter of fairness, it is perhaps justifiable that a business should take responsibility for the losses that its activities create, even if those losses are caused by employees who misbehave.

Students should be asked to reflect on the relative merits of each of the foregoing grounds. Class discussion may focus on whether we should be more concerned with individual responsibility or with facilitating compensation for the injured.

2. This question merely focuses students’ attention on the fact that an employer may be held vicariously liable despite the fact that it was entirely innocent itself. In *Curry*, for instance, the employer was held vicariously responsible even though it acted reasonably when it hired the individual wrongdoer by conducting a careful investigation.

Business Decision 3.1

Vicarious Liability and Personal Liability

1. This question requires students to appreciate the “deep pockets” theory of tort law. The primary goal of litigation is to recover as much money as possible. Consequently, when in doubt, it is prudent to sue as many different people as reasonably possible. Both Alberto and the resort should be sued. First, a court might find one, but not the other liable. Second, even if both defendants were held liable, one might not have enough money to fully satisfy judgment.

2. Several points should be noted.

- Alberto alone would be required to pay damages if he alone was held liable. Likewise, the resort alone would be required to pay damages if it alone was held liable.
- If the defendants were held jointly and severally liable, the plaintiff could choose to enforce some or all of the judgment against one or both of them.

- If the plaintiff looked exclusively to one defendant, that defendant could seek contribution from the other. Suppose, for instance, that a court held Alberto 40 percent responsible and the resort 60 percent responsible. If the plaintiff recovered 100 percent of the damages from the resort, that defendant could in turn demand reimbursement from Alberto for his 40 percent share.
- If the resort's liability was based entirely on its vicarious liability (rather than its personal liability), it could demand full reimbursement from Alberto if the plaintiff chose to satisfy judgment against it. The resort might, however, choose to not exercise that right against Alberto. It might, for instance, realize that he has no money with which to pay. Alternatively, it might realize that its other employees might be demoralized if they knew that Alberto was required to personally bear the full cost of his carelessness.
- Finally, it should be noted that whether the plaintiff recovers damages from either Alberto or the resort, the payment might actually be made by the defendant's insurer. That is more likely to be true in the case of the resort than in the case of Alberto. A business is more apt than an employee to buy liability insurance.

You Be the Judge 3.1

Compensation in Tort and Contract

1. Compensatory damages in *contract* are intended to place the plaintiff in the position that she would have enjoyed if the defendant properly performed and if the contract unfolded as expected.¹ Contractual damages, in other words, are *forward-looking*. They aim to create the situation that the plaintiff *expected* to enjoy in the future, once the contract was fulfilled.

Because *expectation damages* are designed to fulfill the contract (through the proxy or substitute of damages, rather than actual performance), they are calculated as the value that the plaintiff expected to enjoy *minus* the costs (including the purchase price) that the plaintiff expected to incur in exchange. (As explained in Chapter 12, it may be necessary to consider other factors, such as mitigation and remoteness, but those issues can be ignored for now.)

On the facts, Pippa expected to exchange the purchase price of \$5000 for an item that she could re-sell for \$7000. She therefore had an expectation interest of \$7000. Damages therefore must be calculated to ensure that Pippa eventually holds value worth \$7000. Since she currently holds an item that is worth only \$2000, she is entitled to receive expectation damages of \$5000 from David. (It does not matter that Pippa expected to hold \$7000 in cash at the end of the episode. Once the damages are paid, she will have cash worth \$5000 and an item that she could sell in order to generate an additional fund of \$2000.)

2. Compensatory damages in *tort* are intended to place the plaintiff in the position that she would have occupied if the defendant had not acted wrongfully. Tort damages, in other words, are *backward-looking*. They generally aim to go back in time, by creating the situation that the plaintiff would have enjoyed if life had unfolded without the defendant's tort.

¹ As explained in Chapter 12, contractual compensation may come in the form of *reliance damages*, but in the vast majority of cases, the plaintiff instead receives *expectation damages*.

Because tort damages are designed to eliminate the effects of the wrong, they are calculated as the value that the plaintiff would have held if the defendant had not acted tortiously. The court therefore determines the value of the losses that the plaintiff experienced as a result of the breach.

On the facts, David's tort of deceit caused Pippa to enter into the contract. If she had not entered into the contract, she would never have exchanged the price for the item, and she therefore would still hold the original \$5000. In fact, because she was led into the contract, she exchanged the purchase price for an item that actually is worth only \$2000. She therefore has suffered a loss of \$3000 and that is the amount that David must pay as damages.

3. Since the forward-looking expectation damages in contract (valued at \$5000) are worth more than the backward-looking tort damages (\$3000), Pippa will opt for the former.

REVIEW QUESTIONS

1. While it is difficult to precisely define the term, we can say that a tort generally consists of a failure to fulfill a private obligation that was imposed by law. Somewhat more specifically, we can say, with a few exceptions (such as equitable wrongs), that a tort is the breach of a private obligation — other than a breach of contract. As the following questions suggest, it is also important to distinguish between a tort (which is a private wrong) and a crime (which is a public wrong).

The word “tort” is derived from the French word “*tort*” (meaning “wrong”) which came from the Latin word “*tortus*” (meaning “twisted or crooked”).

2. The two parts of the question are closely related. The primary obligation in tort law is owed to a particular private person. If that primary obligation is broken, then the tortfeasor may be sued by the person to whom the duty was owed. In contrast, the primary obligation underlying a crime is owed to society as a whole. That is true even if, as usually occurs, the commission of a crime hurts a particular person. Because the criminal obligation is public, the case is prosecuted not by the personal victim, but rather by the Crown, on behalf of society as a whole.

3. It is not uncommon for the same set of events to constitute both a crime and a tort. The reason is simple: tort law and criminal law share many of the same concerns regarding bad behaviour. For instance, a person who punches another is not only liable for the tort of battery, but also subject to criminal prosecution for the crime of assault. The fact that that person has already been held responsible in one area of law does not provide an immunity under the other head of law.

4. A single set of events often can be analyzed as both a tort and a contract. If so, it generally is desirable for the claimant to sue in tort and contract. Although the plaintiff will not be entitled to recover in full under both heads of liability, there may be several advantages to pursuing the possibility of alternative liability. Many of those reasons will

be discussed in later chapters and therefore cannot be expected of students at this point. Chapter 3 does discuss one important difference between tort and contract, however.

While both types of claim will support compensatory damages, compensation generally is different in tort and contract. Tort damages look backward. Because the primary obligation is to refrain from inflicting harm, compensation naturally requires the defendant to monetarily place the plaintiff in the position that the plaintiff would have enjoyed if the tort had not occurred. The primary obligation in a contract, in contrast, is based on a promise of future performance. For that reason, compensation usually looks forward. The defendant must monetarily fulfill the plaintiff's expectation by placing the plaintiff in the position that would have been enjoyed if the contract had been performed.

- 5. The statement is not true. Most torts require proof of a “guilty mind.” That is true of the torts of negligence. In such cases, the plaintiff must prove that the defendant acted *carelessly*. The defendant's mind is “guilty” in the sense that it did not sufficiently account for the plaintiff's interests before choosing a course of action. A “guilty mind” would also appear to be required for the “intentional torts.” As discussed in another chapter, however, the element of “intention” is odd. It is enough that the defendant intended to do a particular act (such as walk on a particular piece of ground), even if the defendant did not know that that property belonged to the plaintiff and that the act therefore would constitute trespass. A “guilty mind” most clearly is not required for “strict liability” torts. In such cases, the defendant has engaged in an especially hazardous activity. The law allows the defendant to do so, but as a cost, it holds the defendant liable if anything goes wrong in a way that injures the plaintiff—even if the defendant did not intend to cause harm and even if the defendant did not act carelessly.

6. The owner of an animal may be liable if the animal causes damage. The law, however, draws a distinction between wild animals and tame animals. Because they are especially dangerous, wild animals attract strict liability. The owner generally is liable anytime that the wild creature inflicts loss. In contrast, an owner normally is liable for damage inflicted by a tame animal only if the animal was known to be unusually dangerous. That rule is known as the “one free bite” rule. The first bite shows that the animal is dangerous. The owner should then be on alert, because the next bite will bring liability. Some provinces, however, have enacted legislation that exposes the owner to liability for any damage done by a tame animal.

7. Liability insurance is a contract in which an insurance company agrees, in exchange for a price, to pay damages on behalf of a person who incurs liability. It is a critically important form of risk management. Carrying on business creates a risk of being held liable in damages for a tort or for breach of contract. In some situations, a business might be able to pay those damages and to carry on — albeit less profitably than hoped. In other situations, however, the risk of liability threatens not only profits, but also the very existence of a business. A judge may require the payment of damages in an amount that exceeds the value of the business's assets. If the business does not have

liability insurance — and the ability to effectively shift the financial burden of liability onto the insurer — it will be wiped out.

8. In addition to potentially requiring indemnification for a loss, liability insurance imposes a *duty to defend* on the insurer. A duty to defend requires the insurance company to pay the expenses that are associated with lawsuits brought against the insured party. That is significant. As we saw in the last chapter, litigation costs can be very high, even if you win your case.

9. Liability insurance is a contract in which an insurance company agrees, in exchange for a price, to pay damages on behalf of a person who incurs liability. In that way, liability insurance protects business people from torts that often occur unexpectedly. Liability insurance contributes to the compensatory function of tort law. It increases the possibility that the victim of a tort will receive compensation. On the other hand, liability insurance undermines the deterrence function. The deterrence function of tort is based on the assumption that people will act more safely for fear of incurring liability. However, if damages are paid by a tortfeasor's insurance company, that tortfeasor has little to fear. While its insurance premiums may be marginally increased, it will not bear anything close to the full burden of the losses that it wrongfully inflicted. It is important to note, however, that the tortfeasor will not always be covered by insurance. Sometimes, insurance has not been purchased. And in other cases, the insurance policy will be inapplicable if the wrongdoer's actions were not only tortious, but criminal as well.

10. Liability insurance provides protection against liability. If the person who purchased the policy is sued for a tort, the insurer has a duty to defend, which means that the insurance company must pay the expenses required to defend the claim. The insurance policy also requires the insurance company to pay damages on behalf of the insured party if the court holds that person liable. Liability insurance therefore shields the policyholder from the effect of tort. While that generally is acceptable, the courts have decided that a person sometimes must *personally* face the consequences of wrongdoing. Case Brief 3.2, dealing with *Non-Marine Underwriters, Lloyd's of London v Scalera*, provides an example. The defendant was accused of committing the tort of battery by having sexual relations with a child. The Supreme Court of Canada held that the defendant's insurer did not owe a duty to defend because the defendant was accused of committing a tort with the intention of hurting the girl.

11. Personal liability occurs when the obligation to pay damages is imposed upon the very person who acted wrongfully and inflicted the injury upon the plaintiff. Vicarious liability occurs when one person is held responsible for the actions of another. The most common example arises when an employer is held liable for torts that were committed by an employee. In that situation, the employee will be personally liable and the employer will be vicariously liable. Finally, it is important to note that a person can be held personally liable and vicariously liable with respect to the same accident. That would be true, for example, if an employee carelessly caused an accident and if that carelessness was caused in part by the fact that the employer had not properly trained the employee.

The employer would be held personally liable for its own wrong (*ie* failing to properly train the employee) and vicariously liable for the employee's wrong.

12. The doctrine of vicarious liability may be justified on a number of grounds.
- It serves the compensatory function of tort law because it allows the plaintiff to claim damages from both an employee (who may not have any money) and an employer (which is more likely to have money or, at least, liability insurance).
 - Vicarious liability may serve the deterrence function of tort law by providing employers with an incentive to avoid unusually hazardous activities and to hire the best people available.
 - As a matter of fairness, it may be appropriate to require a business to take responsibility for the losses that its activities create, even if those losses are caused by employees who misbehave.

13. An employer will be held vicariously liable for acts that it authorized an employee to do and other closely connected acts. It will not, however, be held vicariously liable if an employee commits a tort completely outside the scope of employment. An employer will not be held vicariously liable for the torts committed by its independent contractors. Significantly, the distinction between employees and independent contractors is often difficult to draw. A worker is more likely to be considered an employee if:

- the employer controls what is done, when it is done, how it is done, and where it is done,
- the worker uses the employer's equipment and premises,
- the worker is paid a regular wage or salary, as opposed to a lump sum at the end of each project, and
- the worker is integrated into the employer's business and not in business for him or herself.

14. The vicarious liability of an employer does not relieve the employee of responsibility. Vicarious liability allows the plaintiff to sue both the employer and the employee, and to recover some or all of its damages from either defendant. Assuming that the employer actually pays damages to the plaintiff, it is usually entitled to recover that amount from the employee. However, employers seldom do so for two reasons. First, the employee is unlikely to have much money, and, second, staff morale would probably decrease if employees were worried about being held liable.

15. Compensatory damages are *not* calculated in the same manner in both tort and contract. In contract, the court usually awards expectation damages, which are forward-looking. They are intended to place the plaintiff in the position it expected to be in after the defendant properly performed. In tort, compensatory damages are backward-looking. They are intended to place the plaintiff in the position that it enjoyed before the defendant committed a wrongful act. The reason for the difference is largely due to the source of obligation in each case. In contract, the defendant voluntarily agreed that he would do something in the future. In tort, however, an obligation is not created voluntarily. It is imposed by law. The defendant therefore cannot be forced to improve the plaintiff's position. Rather, the defendant can only be compelled to undo any harm it may have

caused. In some situations, the plaintiff may be able to sue in tort and in contract. Significantly, the plaintiff will only be entitled to recover damages for one of those actions, even if both are successful.

The damages in tort and contract have one feature in common. They are both generally limited by the principles of remoteness and mitigation. There is one exception. The principle of remoteness does not apply to intentional torts because people who intentionally do wrong do not deserve leniency.

16. Compensation is not available for *every* loss that the plaintiff suffered. First, the defendant is only responsible for losses that its tort in fact *caused*. Second, even if the defendant's tort caused the plaintiff to suffer a loss, the court will not award damages if the connection between the tort and the loss is too *remote*. A loss is remote if it would be unfair to hold the defendant responsible for it. The judge will ask whether a reasonable person in the defendant's position would have realized that a particular activity might cause the sort of harm that the plaintiff suffered. There is, however, an important limitation on the remoteness principle. The concept of remoteness applies to most types of torts, but not to intentional torts. People who intentionally do wrong do not deserve any leniency in tort law.

17. The statement is spectacularly wrong. (1) The duty to mitigate applies to plaintiffs and not to defendants. If the defendant has wrongfully caused the plaintiff to suffer a loss, the plaintiff cannot simply sit back, allow losses to accumulate, and sue for the full sum. The plaintiff must instead take reasonable steps to stem the flow of losses. For instance, if a physical injury has occurred, the plaintiff must seek medical attention to prevent the injury from getting worse. (2) The duty to mitigate applies to compensatory damages and not to punitive damages. The concept is aimed at limiting the losses that occur as a result of a tort. Such losses are redressed through compensatory damages. Punitive damages, in contrast, are awarded in addition to compensatory damages. They are intended not to repair an injury, but rather to punish the tortfeasor and deter potential wrongdoers. The duty to mitigate therefore has nothing to do with punitive damages.

18. "Damages" are awarded by a court when it orders the defendant to pay money to the plaintiff. Three types of damages—each measured in a different way—are available in tort. (1) *Compensatory damages* are the most common type of remedy in tort. They are measured by the loss that the defendant caused the plaintiff to suffer. In tort, compensatory damages are intended to place the plaintiff back into the position that he or she would have enjoyed if the tort had not occurred. (2) *Punitive damages* are awarded in addition to compensatory damages. Punitive damages are not intended to compensate the plaintiff. Instead, they are intended to punish the defendant for committing a tort in an outrageous manner and to deter potential tortfeasors. (3) *Nominal damages* are not awarded to compensate or punish. Instead, they are awarded to symbolically vindicate the plaintiff's rights. They are used when the defendant has committed a tort against the plaintiff, but the plaintiff has not suffered any loss as a result. That generally is possible

only if the relevant tort is actionable *per se*—ie if proof of the tort does not require proof of a loss. Because they are purely symbolic, they are awarded in small amounts (say, \$10).

19. Damages require the defendant to pay a certain sum of money to the plaintiff. Compensatory damages are intended to provide a monetary substitute for the thing (eg a reputation, an arm, a business deal) that the plaintiff actually lost. An injunction, in contrast, requires the defendant to do something other than pay money. The aim is usually to provide direct protection of the plaintiff's interests (rather than merely a monetary substitute for that interest). Suppose, for instance, that the defendant committed a nuisance by operating a foul-smelling pig farm near the plaintiff's property. The court might award damages to reflect the value that the plaintiff's property has lost. Alternatively, it might impose an injunction that requires the defendant to close down the pig farm and therefore stops the nuisance from occurring. (A court might also give damages for the plaintiff's *past* losses and an injunction to prevent further losses in the *future*.)

20. Workers generally lose the right to sue in tort for workplace injuries, but in exchange, they gain the right to claim compensation from a fund without having to prove that anyone was at fault for their injuries. The loss of tort law is the price that workers pay to enjoy access to a far simpler and much quicker system of compensation. Likewise, while employers are required to contribute to the compensation fund, they escape the risk of being held liable in tort for workplace injuries. Furthermore, while the employers' compulsory contributions undoubtedly are substantial, they generally can be passed onto consumers in the form of higher prices.

CASES & PROBLEMS

1. Francesca is correct: the facts reveal that Ned has committed both torts against her and crimes against society.

- *Torts* A tort generally consists of a failure to fulfill a private obligation that was imposed by law. In this case, Ned was subject to two obligations: (i) he was required to refrain from committing the tort of trespass to land by entering onto Francesca's land without permission, and (ii) he was required to refrain from committing the tort of conversion by seriously interfering with her right to her portable CD players. Because those obligations were owed to Francesca personally, she is the person who is entitled to sue Ned in tort. She will most likely be entitled to monetary damages equal in value to the losses that she suffered.
- *Crimes* A crime consists of the breach of a public obligation that was imposed by law. In this case, Ned committed two crimes: (i) the crime of breaking and entering, and (ii) the crime of theft. Because the underlying obligations were owed to society as a whole, Francesca generally does not have the right to commence criminal proceedings. Instead, the prosecution will be performed by the Crown (the government). If Ned is convicted, he may be punished in a variety of ways (eg a fine, imprisonment, an order requiring the restoration of Francesca's property).

As the preceding discussion suggests, there is considerable overlap between tort and contract. That is not surprising. Those two areas of law share a common history. Every society has to deal with misconduct. Those responses tend to become more sophisticated over time. For instance, the common law long ago abolished the rule of *blood feud*, which allowed the family of a murder victim to take revenge by killing the murderer or someone in his family. In place of that rule, local communities began the practice of requiring a murderer to pay money to the victim's family. The same process also applied to other types of wrongs (such as breaking a person's arm or killing his horse). Over time, those basic ideas branched off in two directions. The idea of allowing a victim to demand compensation from a wrongdoer developed into the system of private tort law. And the idea of allowing the community to punish a wrongdoer developed into the public system of criminal law.

2. Jackson is wrong. He will be required to reimburse Kwik Office Supplies for the compensation that the company provides to the customer. This question requires a consideration of two concepts that are discussed in the chapter: (i) vicarious liability, and (ii) the source of contractual and tortious obligations.

- *Vicarious Liability* As the company concedes, it is vicariously liable for the losses that the customer suffered as a result of the tort that Jackson committed in the course of his employment. Significantly, however, vicarious liability does not *shift* the ultimate burden onto the employer — it merely provides the tort victim with an *alternative target*. Consequently, Jackson will not be relieved of his personal responsibility simply because Kwik Office Supplies honours its vicarious liability. Just as the customer could have chosen to pursue Jackson rather than the company, Kwik Office Supplies is entitled to pursue reimbursement from Jackson.
- *Source of Obligations* Jackson's misunderstanding stems from the fact that not all obligations are voluntarily assumed — some are imposed by law. Contractual obligations arise from the parties' agreement. Tort duties, in contrast, are imposed by law. Consequently, we all have a duty to refrain from fraud, even though few of us have ever promised to behave in that way. Jackson's duty to reimburse Kwik Office Supplies may be seen as an outgrowth of that tort duty. Alternatively, although the issue is not explained in the text, his duty to reimburse may be explained as an obligation that is imposed by the law of unjust enrichment (rather than the law of tort). The action in unjust enrichment requires proof of three elements: (i) Jackson was *enriched* because he was relieved of the need to pay compensation to the customer, (ii) Kwik Office Supplies suffered the *corresponding deprivation* because it compensated the customer, and (iii) there is an *absence of juristic reason* for that enrichment because, as between the two parties to the employment contract, there is no reason why the employer should have to pay for the employee's torts.

3. Rochard probably is not correct in believing that he is immune from liability. Most torts do, of course, require proof that the defendant acted either intentionally or carelessly (negligently). And if those torts applied to these facts, Sarah would find it

impossible to fix Rochard with responsibility for her injuries. The key to the question, however, is that tort liability occasionally is strict. In other words, the defendant may be held liable despite the fact that he did not act intentionally or carelessly — it is sufficient that he had control over a situation that resulted in the plaintiff's injury.

There are very few strict liability torts. The courts are reluctant to impose liability without some sort of "fault." Moreover, that generally is true of domestic animals, such as dogs. While some jurisdictions have legislated a more stringent rule, the common law normally would not hold a dog owner liable unless the dog had previously demonstrated a propensity for biting. The facts in this case, however, go further. Rochard already knew that Sid was aggressive and dangerous. Consequently, Sarah would be entitled to hold Rochard liable on a strict basis.

4. The insurance policy is important for two reasons. First, assuming that the Blue Jays claims fall within the scope of the policy, ING will have a duty to defend. That means that it will have to pay to defend Sportsco against the Blue Jays' claims. Second, if the courts decide that Sportsco is liable to the Blue Jays, ING will have to pay damages on behalf of Sportsco.

[Based on *ING Insurance Company of Canada v Sportsco International LP* (2004) 12 CCLI (4th) 86 (Ont SCJ)]

5. The usual remedy in tort is an award of *compensatory damages*. The goal is to monetarily place the plaintiff in the position that would have been enjoyed if the defendant had not acted wrongfully. On the facts of this case, a court consequently would begin by calculating the value of the loss that Skool and Law have suffered as a result of ADI's tort of trespass.

Compensation is not the only possible remedy, however. Because ADI's behaviour was not only tortious, but also outrageous and reprehensible, a court quite likely would award *punitive damages* as well. Punitive damages require the defendant to pay an additional amount, over and above compensation, as punishment.

Finally, if damages are an inadequate remedy, and if the circumstances allow, a court may respond to a tort by imposing an *injunction*. An injunction is a court order that requires the defendant to act in a certain way. In this case, it unfortunately is too late for a court to prevent ADI from clearing away Skool's trees and, given the inevitable delays in reforestation, there would be little point in compelling ADI to replant the area. In contrast, it is very likely that the court would order ADI to remove the fence that it deliberately built on Law's property.

6. Dave's position is not as secure as he believes. He is relying upon the doctrine of vicarious liability. As a result of that doctrine, the driver of the other car has an option. She may sue Dave personally *or* EconoCar vicariously as Dave's employer *or* both. Given that the company is far more likely to have resources than Dave, the plaintiff will almost certainly choose either the second or the third option.

Significantly, however, even if the plaintiff does sue EconoCar, and even if she decides to collect all of her damages from the company, Dave is not necessarily “off the hook.” The doctrine of vicarious liability allows the plaintiff to sue the individual tortfeasor’s employer — but it does not relieve the individual tortfeasor of responsibility. Consequently, if EconoCar paid all of the plaintiff’s damages, it could in turn sue Dave for the same amount.

In practice, however, employers rarely exercise their right to demand payment from employees who commit torts and trigger the doctrine of vicarious liability. Such a practice is bad for morale — it tends to make employees unhappy and nervous. More importantly, employees often simply do not have enough money to satisfy the demand. In that case, the company simply throws good money after bad by trying to squeeze its loss out of the employee. And finally, the employment contract may prohibit the employer from demanding reimbursement.

7. The question requires students to apply various rules regarding the doctrine of vicarious liability.

The first case is the simplest. For a number of policy reasons, the law generally holds an employer liable for the torts committed by an employee. That rule applies only if the employee’s tort was committed “in the course of employment,” but that requirement is satisfied on these facts. Harrison is personally liable for the damage that he caused. Since he is employed by Walrus Music (rather than by Paul), the company is vicariously liable as well. The plaintiff will sue both and can recover from either. Because it is much simpler, however, the plaintiff likely will demand payment from the company, which undoubtedly is covered by insurance. If the company pays, it could demand reimbursement from Harrison, but it is unlikely to do so.

While employers are vicariously liable for employees, they generally are not liable for torts committed by independent contractors. The facts explicitly state that Stella was an independent contractor when she provided services to Walrus Music. The company therefore cannot be held vicariously liable on that basis. Vicarious liability, however, may be imposed on a variety of grounds. It is likely that the events occurred in a province that has legislation that imposes vicariously liability upon the owner of a vehicle with respect to accidents caused by a driver who borrowed the vehicle with permission. Since Paul consented to Mimi’s use of his car, he probably can be held liable for the damage to the fence.

Likewise, Paul probably is vicariously liable for the tort committed by Stella. Although she is not his employee, she is a family member who caused damage while using his car.

8. This case is based on a decision of the Ontario Court of Appeal in *Braiden v La-Z-Boy Canada Ltd.*² The tort claim has been added to the facts in order to bring the situation more clearly in line with the contents of Chapter 3.

The foundational issue concerns the distinction between an *employee* and an *independent contractor*. That distinction is important in this case for three reasons. (1) If Brick served as an employee, then the company presumptively is vicariously liable for any torts that he committed in the course of employment. If Brick served as an independent contractor, then the doctrine of vicarious liability is inapplicable, and the tort victim will be entitled to claim damages from Brick alone. (2) The actual dispute in *Braiden v La-Z-Boy* turned on the severance package to which the worker was entitled. As in our case, the worker was entitled to only two months' notice (or payment in lieu) if classified as an independent contractor. In contrast, if classified as an employee, the worker was entitled to eighteen months' notice (or payment in lieu). (3) Although many students may overlook the matter, the characterization of Brick's service also will affect the company's liability to the Employer Health Tax and Workplace Safety and Insurance Board schemes. Liability will arise if services were provided under employment, but not if services were provided under independent contract.

It often is difficult to determine the classification of a worker. That is true in this case, as well. As always, the court must consider the real nature of the parties' relationship. In that regard, a judge would ask, among other things, if (1) the employer generally controls what is done, how it is done, when it is done, and where it is done, (2) the worker uses the employer's equipment and premises, (3) the worker is paid a regular wage or salary rather than a lump sum at the end of each project, and (4) the worker is integrated into the employer's business and is not in their own business. In this case, those factors generally point to Brick serving as an employee. Both before and after the parties' signed their new agreement, La-Z-Boy effectively controlled most of his sales activities.

The issue was further complicated in *Braiden*, and in our case, by the fact that the parties expressly stated that services were provided by an independent contractor and not by an employee. The *ratio* of the Ontario Court of Appeal's decision, however, is that classification must be based on substance, rather than form. Especially in light of workers' vulnerability and relative lack of bargaining power, the courts will not allow a company to falsely characterize service as an independent contract in order to avoid the consequences of employment (*eg* vicarious liability, extended notice period, employer liability for contribution to employee benefit programs).

9. The facts of this question, which are based on the leading case of *McAuley v London Transport Executive*,³ raise the issue of *mitigation* of damages. As a tortfeasor, Arnold presumptively is liable for all of the injuries that he wrongfully inflicted upon Syd. Syd nevertheless has a "duty to mitigate." That phrase is misleading insofar as it suggests that Syd has an obligation to act in a certain way. In fact, the doctrine of mitigation merely indicates that, while a tortfeasor generally must accept responsibility for wrongfully-inflicted injuries, the victim is expected to act reasonably by taking steps

² (2006) 294 DLR (4th) 172 (CA).

³ [1957] 2 Lloyd's Rep 500 (CA).

to stem the flow of losses. Compensatory damages accordingly are reduced *to the extent that* the plaintiff fails to mitigate a loss.

The doctrine of mitigation merely expects the plaintiff to adopt *reasonable* steps to minimize losses. As always, reasonableness is a function of the circumstances. In the case on which this question is based, the court held that if surgery is reasonably required to facilitate the recovery process, then the claimant is expected to undergo an operation. As in *McAuley v London Transport Executive*, Syd has acted unreasonably in refusing surgery and in thereby extending the period during which he is unable to work.

The doctrine of mitigation does not, however, entirely eliminate the right to damages. It merely bars recovery with respect to losses that were reasonably avoidable. Consequently, on the facts of this question, Syd *is* entitled to compensation for the losses that he would have suffered even if he had undergone the surgery. That includes, for instance, damages for loss of income that Syd would have experienced with the surgery—*ie* damages for lost income up to the time of the surgery and for a reasonable recovery period thereafter. Damages are not available, however, with respect to income that Syd loses after that recovery period if, because he opts against the surgery, he still cannot work.

10. This question is based on the doctrine of remoteness. Compensation is not available for *every* loss that the plaintiff suffered. First, the defendant is only responsible for losses that it in fact *caused*. Second, even if the defendant's tort caused the plaintiff to suffer a loss, the court will not award damages if the connection between the tort and the loss is too *remote*. A loss is remote if it would be unfair to hold the defendant responsible for it. The judge will ask whether a reasonable person in the defendant's position would have realized that a particular activity might cause the sort of harm that the plaintiff suffered.

In the circumstances of this case, the scientific evidence *at the time of the accident* indicated that Flamonol could not be ignited. It therefore was not reasonably foreseeable that the captain's initial carelessness in ramming into the dock would set into motion a sequence of events culminating in the dock being destroyed by fire. (It is irrelevant that that scientific belief turned out to be incorrect.) Consequently, Dominion Tankship's liability to Mortimer Docking would be limited to the initial damage and would not extend to the fire damage.

[Based on *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388 (PC)]

11. This question involves three concepts in tort law: (i) punitive damages, (ii) vicarious liability, and (iii) liability insurance.

- *Punitive Damages* Punitive damages are intended to punish the defendant. If the defendant has done something particularly outrageous or reprehensible, the then court may impose both compensatory damages *and* punitive damages. That might well be possible in this case. Jessica's attack on Simone not only

constituted a tort (of battery), but was also malicious insofar as it was unprovoked and presumably pre-meditated. (By way of punishment, Jessica may also be charged with the crime of assault. If so, she will be subject to criminal prosecution, in addition to Simone's civil action.)

- *Vicarious Liability* In some situations, an employer may be held vicariously liable for a tort committed by an employee. That is true, however, only if the employee either: (i) committed the tort in the course of employment, or (ii) committed the tort in a way that was “closely connected” with the employment duties, as long as the employment increased the risk that the employee would act tortiously. Pony Express obviously did not employ Jessica for the purpose of attacking Simone. More significantly, however, even though the attack occurred during work hours, a court would likely conclude that Jessica's tort was not closely connected to her employment with Pony Express and that her job did not increase the risk that she would assault Simone. If so, then Pony Express would not be vicariously liable to Simone.
- *Insurance Liability* Liability insurance requires an insurance company to pay damages on behalf of a person who purchased a policy and who is held liable. As the Supreme Court of Canada explained in *Non-Marine Underwriters, Lloyd's of London v Scalera* (Case Brief 3.2), however, liability insurance is not available with respect to “intentional or criminal acts.” Consequently, even though Jessica has liability insurance, her insurer will not be required to pay damages on her behalf to Simone.

The final result illustrates a common problem in tort law. Simone will have a right to recover damages from Jessica. Jessica, however, does not have enough money to satisfy judgment. Furthermore, in the circumstances, the court will not extend liability to Pony Express through the doctrine of vicarious liability and the insurance company will not incur any obligation. As a result, Simone presumably will not receive all of the money to which she is entitled.

12. This question draws on two concepts affecting the measure of relief in a case of trespass to chattels (a tort that will be examined in the next chapter): the quantification of damages and mitigation of damages.

- *Damages for Trespass to Chattels* — DeNiro committed the tort of trespass to chattels (and possibly the tort of conversion). In that situation, the defendant is required to pay compensatory damages equal to the value of the plaintiff's loss. Significantly, however, the plaintiff is only entitled to be put back into the position that it actually enjoyed before the tort occurred. It is not entitled to the value of a *new* car simply because the defendant damaged an *old* car. Damages are usually measured as the lesser of: (i) the cost of repair, or (ii) the loss of value.
- *Mitigation* — As a general rule, damages are limited by the principle of mitigation. Mitigation occurs when the plaintiff takes steps to minimize the losses that flow from a tort. The plaintiff is under a “duty to mitigate” in the sense that damages will be denied to the extent that the plaintiff failed to take a reasonable opportunity to mitigate.

Those principles can be applied to the facts. At the time of the accident, the value of the plaintiff's cab was reduced from \$7000 to \$5000. The cost of repairs at that time would have been \$3000. The defendant is therefore liable for \$2000 (the lesser of the reduced value or the cost of repair). It is irrelevant that, because of the rust damage, the value of the car has now dropped to \$2000. Responsibility for that *additional* damage will be attributed to the plaintiff's unreasonable failure to mitigate, rather than the defendant's tort.

There are two other possible heads of damages. First, the plaintiff might claim compensation for the fact that it lost profits because it could not use the taxi after it was damaged. Once again, however, compensation for loss of profits would be limited by the principle of mitigation. The plaintiff could have put the car back into business if it had repaired it promptly. Second, given her appalling behaviour, the defendant might be held liable for punitive damages.

CASE BRIEFS

Scott v Wawanesa Mutual Insurance Co (1989) 59 DLR (4th) 660 (SCC)—note 16

The plaintiff bought a home insurance policy from the defendant company. That policy excluded liability for losses arising from the “wilful act of the Insured.” The policy also defined “insured” to include the plaintiff and any of the plaintiff's children who were under 21 and living in the house. The plaintiff's 15 year old son destroyed the house by intentionally setting a fire. The question was whether the plaintiff was entitled to a benefit under the policy, or whether the exclusion clause was effective. The Supreme Court of Canada denied liability. It rejected the plaintiff's argument that the exclusion clause was inapplicable because the son's “insurable interest” was limited to his personal belongings, whereas the plaintiff's “insurable interest” extended to the entire house and its contents. (The concept of an “insurable interest” is considered in greater detail in Chapter 17.)

It is well established that an insurer's duty to defend is a reflection of the insured's “insurable interest.” Since the exclusion clause would defeat any claim arising from the plaintiff's insurable interest, there was no duty to defend.

Jacobi v Griffiths (1998) 174 DLR (4th) 71 (SCC)—note 20

The defendant was the Boys & Girls Club. The Club hired Griffiths to act as its program director. In that capacity, Griffiths met the plaintiffs, who were brother and sister. Griffiths sexually assaulted the children after hours in his own home. The children alleged that the Club was vicariously liable for Griffiths' attacks. A majority of the Supreme Court of Canada disagreed. In contrast to *Curry*, there was not a sufficient connection between the nature of the employer's enterprise, the tasks assigned to Griffiths, and the sexual assaults. Griffiths had not been hired to act as a surrogate parent for the children. His job duties were of a much more limited nature. He was essentially expected to act merely as a friend and adult role model. Furthermore, the majority was concerned that the imposition of vicarious liability would jeopardize the future of organizations like the Boys & Girls Club. Liability would lead to increased insurance

premiums, and at some point, organizations would simply lose the financial ability to carry on.

In dissent, McLachlin J (L’Heureux-Dubé and Bastarache JJ concurring) held that the facts were sufficiently close to *Curry* as to warrant vicarious liability. The Club had placed Griffiths in a position of authority over vulnerable children.

***Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 (SCC)—note 21**

The plaintiff hired the defendant lawyer to act in the purchase of shares. As part of that task, the defendant was required to arrange a mortgage. Because of its carelessness, the mortgage that the defendant arranged for the plaintiff was void. The plaintiff therefore suffered an economic loss on the deal. The plaintiff wanted to sue the defendant in the tort of negligence. The defendant, however, argued that the claim properly arose in contract and that the tort action was barred by the statutory limitation period in any event.

The Supreme Court of Canada held that the same set of facts can support concurrent actions in tort and contract, and that the plaintiff has a generally unfettered discretion to sue for one or the other or both (subject, of course, to the rule against double recovery). On the facts, the defendant had breached its contractual promise to act with appropriate skill and care. It also committed the tort of negligence by carelessly failing to secure a valid mortgage for the plaintiff.

The concurrency of actions is, however, subject to an important qualification. The plaintiff cannot use an action in tort to circumvent an exclusion or limitation contained in a contract. For instance, if a contract allowed liability only if the defendant acted with “gross negligence,” the plaintiff could not succeed in tort on the basis of a claim for simple negligence.

Finally, the Court held that the statutory limitation period is subject to the “discoverability rule.” The lower court had rejected the plaintiff’s claim on the ground that too much time had passed between the commission of the tort and commencement of the law suit. The Supreme Court of Canada, however, held that the limitation period did not begin to run until the plaintiff reasonably could have discovered all of the facts that were essential to its claim. On the facts, the plaintiff sued the defendant many years after the defendant’s actual act of negligence. Nevertheless, liability was imposed because the plaintiff had sued within six years from the date of discoverability.

***Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388 (PC)—note 24**

The defendant spilled fuel oil into Sydney Harbour. The plaintiff was repairing its ship nearby. Sparks from the plaintiff’s welder ignited a rag that was soaked with the oil that the defendant had spilled into the water. The fire substantially damaged the plaintiff’s ship. The defendant’s carelessness clearly was a factual cause of the plaintiff’s loss. The question for the court, however, was whether the carelessness and the loss were too remote such that the defendant should not be held legally responsible. The Privy Council decided that the issue of remoteness should be decided on the basis of a “reasonable

person” test. Liability would arise if, but only if, a reasonable person would have realized that the defendant’s carelessness could result in the plaintiff’s loss. The Court also held that a loss may be considered to be reasonably foreseeable even if it was not likely or probable to occur. It is sufficient if the possibility of loss was not far-fetched. On the facts, however, the Court denied liability. The evidence indicated that the fire was not reasonably foreseeable.

Interestingly, precisely the same events gave rise to another case in the Privy Council: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd, The Wagon Mound (No 2)*. The same defendant was sued by another plaintiff, whose ship was also damaged in the fire. In that case, however, liability was imposed. The difference between the decisions turned on the evidence. The evidence in *Wagon Mound (No 1)* indicated that the possibility of a fire was not reasonably foreseeable. The evidence in *Wagon Mound (No 2)*, in contrast, indicated that there *was* a possibility of fire “in very exceptional circumstances.” That was enough to justify liability.

The difference between the two cases usefully illustrates the importance of good evidence. It also illustrates the difference between actual fact and legal fact. The actual facts were identical in both cases. There was, however, a significant difference in the legal facts as found by the judges.

Tremain v Pike [1969] 3 All ER 1303 – note 25

The plaintiff, who worked on the defendant’s farm, contracted Weil’s disease as a result of coming into contact with rat urine. The plaintiff alleged that the defendant was responsible because it carelessly failed to control the farm’s rat population. The judge held that the defendant had not been negligent. He further held that even if the defendant had been careless, the injury was too remote. While it was reasonably foreseeable that a rampant rat population would cause injuries by biting workers, it was not reasonably foreseeable that their urine would cause Weil’s disease, which is a very rare condition.

Bettel v Yim (1978) 88 DLR (3d) 543 (Ont Co Ct)—note 26

The plaintiff, a child, and his friends threw lit matches into the defendant’s store. One of the matches caused a bag of charcoal to catch fire. The defendant grabbed the plaintiff and began to shake him with the intention of extracting a confession. The defendant’s head accidentally came into contact with the plaintiff’s nose and caused an injury. The defendant clearly committed the tort of battery because he intentionally made offensive contact with the boy when he shook him.

The question, however, was whether the defendant was liable for the injury to the plaintiff’s nose. The evidence indicated that the defendant did not intend to head butt the child, nor to inflict serious harm. The judge nevertheless imposed liability. The injury that occurred was clearly a foreseeable result of shaking the plaintiff. Moreover, the decision would have been the same even if the injury had not been reasonably foreseeable. The concept of remoteness is appropriate for the tort of negligence, in which the law is expected to strike a balance between the parties’ competing interests. In such circumstances, merely careless conduct should not expose the defendant to liability for all

of its consequences. The situation is different, however, with an intentional tort, like battery. In such circumstances, there is no need to strike a delicate balance. By intentionally interfering with the plaintiff, the defendant exposed himself to liability for all of the resulting harm, even if that harm was not reasonably foreseeable under the concept of remoteness.

McAuley v London Transport Executive [1957] 2 Lloyd's Rep 500 (CA)—note 28

The defendant caused an accident that resulted in plaintiff's ulnar nerve being severed. If the plaintiff had undergone surgery as recommended by the medical evidence, there would have been a 90 percent chance of recovering the use of his fingers. He refused, however, to undergo that operation. He therefore was awarded damages for lost income only up until the time that he would have recovered from the surgery. He was denied damages with respect to the subsequent period. That decision was based on the plaintiff's unreasonable refusal to mitigate his damages by having an operation.

Norberg v Wynrib (1992) 92 DLR (4th) 449 (SCC)—note 29

The plaintiff was a young woman who was addicted to prescription drugs. The defendant, an elderly doctor, agreed to improperly provide her with drugs in exchange for sexual favours. Although the plaintiff initially complied, she subsequently sued the defendant. The Supreme Court of Canada unanimously held in her favour, but for different reasons. LaForest J (Gonthier & Cory JJ concurring) held that the defendant had committed battery. Although consent normally is a defence to an intentional tort like battery, the plaintiff's apparent consent was vitiated by her drug dependency. Sopinka J held that the plaintiff had consented to the sexual activity, notwithstanding her addiction, but imposed liability under the tort of negligence because the defendant doctor failed to meet the professional standard of care. Finally, McLachlin J (L'Heureux-Dube J concurring) imposed liability on the ground that the defendant had breached a fiduciary duty that he owed toward the plaintiff. That action was thought to better capture the essence of the claim (*ie* that the defendant had improperly exploited a vulnerable person).

All of the judges, except Sopinka J, awarded \$20 000 in punitive damages, in addition to compensatory damages, because of the outrageous and egregious nature of the defendant's actions.

Roose v Hollett (1996) 139 DLR (4th) 260 (NS CA)—note 29

A 13 year old female delinquent was confined to a residential school that was run by the province. A counsellor at the school became sexually involved with her. Despite serious complaints, that counsellor was not fired from his job for many months. After he was fired, he helped the girl escape from the school. She then lived with him in an abusive relationship for some time. Years later, after the plaintiff became an adult, she sued the province (as well as the counsellor). The Court of Appeal held that the province had been more than merely negligent. Its failure to protect the plaintiff from the counsellor was reckless and inexcusable. The court therefore awarded both compensatory damages and \$35 000 in punitive damages.

Horseshoe Bay Retirement Society v SIF Development Corp (1990) 66 DLR (4th) 42 (BC SC)—note 29

The defendant wanted to develop properties adjacent to the plaintiff's land. A number of large trees on the plaintiff's property blocked what otherwise would have been a delightful view of the ocean from the defendant's new development. Consequently, despite knowing that it was not entitled to do so, the defendant entered the plaintiff's property, without the plaintiff's permission or knowledge, and cut down a number of trees. The court held the defendant liable for trespass to land and awarded compensatory damages with respect to the plaintiff's losses. In addition, the court awarded punitive damages. It calculated those damages at something in excess of the additional profit that the defendant expected to earn from its development as a result of the enhanced view. The court reasoned that merely requiring the defendant to disgorge its wrongful gain would not be enough to discourage other developers from committing similar wrongs in the future. Any economically rational actor would, after all, discount the risk of disgorgement by the possibility of escaping liability.

Whiten v Pilot Insurance Co (2002) 209 DLR (4th) 257 (SCC)—note 30

The plaintiff purchased house insurance from the defendant. The plaintiff's house was destroyed by fire, thereby triggering the defendant's obligation to pay a benefit. The defendant nevertheless refused to pay that benefit. While its own investigations established that the cause of the fire was innocent, it accused the plaintiff of arson. It did so in part because it recognized that she was vulnerable and it believed that she was not in a position to litigate the matter.

At trial, the defendant was held liable for breach of contract and the jury awarded \$1 000 000 in punitive damages, in addition to compensatory damages. The Ontario Court of Appeal reduced the punitive damages to \$100 000.

The Supreme Court of Canada restored the jury's verdict and reinstated the award of \$1 000 000. In doing so, it reiterated its earlier view (*Vorvis v Insurance Corp of British Columbia* (1989) 58 DLR (4th) 193 (SCC)) that punitive damages generally should be available for breach of contract only if the defendant acted in an outrageous manner *and* committed an independently actionable wrong. The defendant argued that there was no independently actionable wrong because it had not committed a tort. The Court therefore clarified its earlier position. An independent actionable wrong may be a tort, but it may also be another breach of contract or some other breach of a civil obligation. On the facts, the primary breach of contract arose from the fact that the defendant wrongfully refused to pay a benefit to the plaintiff under the policy. The defendant also independently committed another breach of contract by acting in bad faith. (Under an insurance contract, the insurer is contractually obliged to act in good faith. Insurance is usually purchased for "peace of mind." Consequently, the insurer must act honestly and fairly with the insured if a claim is made.)

Bowen Contracting Ltd v BC Log Spill Recovery Co-operative Assn (2009) 99 BCLR (4th) 59 (BC CA)—note 31

The defendant inadvertently trespassed, without causing any damage, on a portion of the plaintiff's private road which was not posted as private property. At trial, the plaintiff was awarded \$1 in nominal damages and its punitive damage claim was dismissed. The trial judgment was upheld on appeal.

Beliveau St Jacques v Federation des Employees et Employes de Services Publics Inc (1996) 136 DLR (4th) 129 (SCC)—note 32

Workers' compensation schemes operates on the "exclusivity principle." In exchange for the ability to claim compensation, for workplace injuries, on a no-fault basis, workers must give up the usual right to sue in tort for wrongfully-inflicted injuries. The WC scheme provides the *exclusive* source of compensation.

This case involved a challenge to the exclusivity principle in the context of Quebec's workers' compensation scheme. A worker alleged workplace discrimination and sought punitive damages against the employer. As against the exclusivity principle, the claimant insisted that since the WC scheme did not include provision for such relief, the traditional right to sue in tort must continue to exist.

L'Hereux-Dube J, in dissent, agreed with the claimant's distinction between compensatory damages and "exemplary damages," and further agreed that since the latter did not appear in the WC legislation, the employee's traditional right to sue in tort must persist.

The majority of the Supreme Court of Canada, however, adopted a robust conception of the exclusivity principle and rejected the claim. Gauthier J explained that the legislation created a compromise, under which the worker's traditional civil rights of action were given up in exchange for "partial, fixed-sum compensation that did not necessarily correspond to the prejudice they had suffered." He further explained that, in abolishing fault, the legislative scheme also abandoned the notion of liability in a larger sense. The worker simply has no right to sue an employer or a co-worker for injuries sustained on the job.