

CHAPTER 4 INTENTIONAL TORTS

CONTENTS

TEACHING APPROACH

ADDITIONAL TEACHING SUGGESTIONS

1. Invasion of Privacy

DISCUSSION BOXES

1. Business Decision 4.1—False Imprisonment and Detention by Security Guards
2. You Be the Judge 4.1—Trespass to Land and Injunctions
3. Ethical Perspective 4.1—Conversion and Innocent Purchasers

REVIEW QUESTIONS

CASES & PROBLEMS

CASE BRIEFS

TEACHING APPROACH

In the first edition, this chapter and the last chapter were pieced together into a single, large chapter dealing with Introduction to Torts and Intentional Torts. The combination was never comfortable, however, and we ultimately were persuaded by comments of reviewers and lecturers and that it would be better to present the two topics as separate chapters. Intentional Torts consequently now stand alone in this chapter, in a somewhat expanded form.

ADDITIONAL TEACHING SUGGESTIONS

Invasion of Privacy

As noted in the text, Canadian courts continue to struggle with the concept of invasion of privacy. The Ontario Court of Appeal has held that there is no “free-standing” tort of that name, but lower courts clearly are moving in the direction of a new tort. One such case in *Somwar v McDonald’s Restaurants of Canada Ltd.*¹ A company obtained a credit check on an employee without his consent. The employee sued on a number of grounds, including invasion of privacy. On the defendant’s motion to strike the claim as disclosing no cause of action, Stinson J refused, finding that it was not “plain and obvious” that the claim would fail. In the course of reaching that conclusion, the judge usefully canvassed the recent developments. That discussion warrants lengthy quotation.

8 I begin my analysis with this question for the simple reason that if the answer is “yes” that is the end of the plaintiff’s case.

9 In a law review article written in 1960, the leading American torts scholar, William Prosser, listed four distinct kinds of invasion of privacy interests as follows: (i) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (ii) public disclosure of embarrassing private facts about the plaintiff; (iii)

¹ (2006) 263 DLR (4th) 752 (Ont SCJ).

publicity which places the plaintiff in a false light in the public eye; and (iv) appropriation, for the defendant's advantage, of the plaintiff's name or likeness: see William L. Prosser, "Privacy" (1960) 48 Cal. L. Rev. 383 at 389. Although Dean Prosser's article was intended as an overview of the American jurisprudence in this area, his analytical framework is helpful in trying to understand the approaches taken by Canadian courts when dealing with these types of claims.

10 The complaint in the case at bar concerns the conduct of a credit bureau check on an employee by his employer, without the employee's consent. This complaint falls within Prosser's first category of invasion of privacy, *i.e.* "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs." Prosser further described such intrusion as follows:

- there must be something in the nature of prying or intrusion;
- the intrusion must be something which would be offensive or objectionable to a reasonable person;
- the thing into which there is prying or intrusion must be, and be entitled to be, private; and
- the interest protected by this branch of the tort is primarily a mental one. It has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.

11 In *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) G.H.L. Fridman discussed different classifications of torts and observed that courts, in the limited circumstances where damages are awarded for "invasion of privacy", tend to treat such invasion as an intentional tort. At pp. 20-21 he wrote:

Acceptance by the courts ... of the possibility of liability for certain kinds of "invasion of privacy," limited though this may be, suggests that the courts are groping their way towards the idea that, where one person acts in a manner that is known and intended to be injurious to another, liability should ensue, even though no nominate tort such as ... intimidation, trespass, or defamation, has been committed, unless the circumstances reveal that there was what can be accepted as a lawful reason, justification or excuse for the perpetration of the act and the infliction of the harm.

12 Based on Prosser's description of intrusion of privacy interests and Fridman's observations on treatment of "invasion of privacy" by courts, I conclude that the plaintiff's complaint concerning the invasion of his privacy could be categorized as an intentional tort.

13 The potential existence of a common law intentional tort of invasion of privacy has been discussed on various occasions in the jurisprudence of the courts of Ontario. Many of these cases involved intrusion into the plaintiff's seclusion or

private affairs and thus fall within Prosser's first category of invasion of privacy interests.

14 In *Capan v. Capan*, [1980] O.J. No. 1361 (H.C.J.), the plaintiff commenced an action against her husband for damages for continuing mental and physical harassment and invasion of privacy. The defendant allegedly stalked the plaintiff during a separation, harassed her with persistent telephone calls at home and at her work place, and forced his way into her apartment. The defendant moved to strike out the plaintiff's statement of claim based on the absence of a reasonable cause of action. Osler J. dismissed the motion stating (at paras. 14-15):

What is complained of here is, in its very essence, an abuse of personal rights to privacy and to freedom from harassment. ... [I]t has not been demonstrated that the rights referred to will not be recognized by our courts nor that their infringement will not found a cause of action. In my view, it would not be right, on a motion of this kind, for the court to deprive itself of the opportunity to determine, after hearing the evidence, whether such right exists and whether it should be protected.

15 In *Saccone v. Orr* (1981), 34 O.R. (2d) 317 (Co. Ct.), the defendant recorded a private telephone conversation with the plaintiff without the plaintiff's consent. The defendant then played the tape at a municipal council meeting. A transcript of the tape was subsequently published in a local newspaper. The court rejected the defendant's argument that no tort of invasion of privacy existed in Ontario common law. Jacobs Co. Ct. J. said:

[I]t's my opinion that certainly a person must have the right to make such a claim as a result of a taping of a private conversation without his knowledge, and, as against the publication of the conversation against his will or without his consent. Certainly, for want of a better description as to what happened, this is an invasion of privacy and despite the very able argument of defendant's counsel that no such action exists, I have come to the conclusion that the plaintiff must be given some right of recovery for what the defendant has in this case done.

16 In *Roth v. Roth* (1991), 4 O.R. (3d) 740 (Gen. Div.), the court held that the defendants' acts such as locking a gate on an access road, interfering with and blocking the use of the road by the plaintiffs in getting to and from their cottage, and removing a shed, pump and dock with the concomitant shutting off of electricity in the plaintiffs' cottage at a time when they were not there constituted a harassment of the plaintiffs in the enjoyment of their property. Mandel J. also found that the defendants' actions amounted to an invasion of the plaintiffs' privacy. He further rejected the view that privacy flowed from property rights. He wrote (at p. 758):

In my view, whether the invasion of privacy of an individual will be actionable will depend on the circumstances of the particular case and the conflicting rights involved. In such a manner the rights of the individual as well as society as a whole are served.

It is also noteworthy that Mandel J. reached the foregoing conclusion after he observed that there is no legislated remedy for invasion of privacy in Ontario, unlike some other provinces.

17 In *Lipiec v. Borsa*, [1996] O.J. No. 3819 (Gen. Div.), the defendants' counterclaim against the plaintiffs was based on nuisance and trespass. The plaintiffs and the defendants were owners of adjoining residential properties. The court found that the plaintiffs had greatly reduced the defendants' enjoyment of their property by removing the fence between the two properties and erecting a commercial type surveillance camera aimed at the defendants' yard. McRae J. noted that intentional invasion of privacy had been recognized as actionable in Ontario in several cases. He found that there was intentional invasion of the defendants' right to privacy and awarded damages to the defendants.

18 In *Tran v. Financial Debt Recovery Ltd.*, [2000] O.J. No. 4293 (S.C.J.) (reversed on other grounds, [2001] O.J. No. 4103 (Div. Ct.)), the plaintiff had outstanding student loans. Employees of the defendant debt collection agency began calling the plaintiff about the loan, several times an hour, at work. The plaintiff disputed the amount outstanding, but he was never provided with particulars. Despite the plaintiff's request to be contacted at home, the defendant's employees continued to call him at work. The court found that the defendant had invaded the plaintiff's privacy by placing repeated and vexatious calls to the plaintiff's place of employment. Molloy J. awarded damages to the plaintiff for the torts of defamation, intentional interference with economic interests, intentional infliction of emotional suffering, and invasion of privacy.

19 Other cases in which trial judges have found liability based on invasion of privacy falling within Prosser's first category include *Garrett v. Mikalachki*, [2000] O.J. No. 1326 (S.C.J.) and *Rathmann v. Rudka*, [2001] O.J. No. 1334 (S.C.J.).

20 The courts of Ontario have not been unanimous concerning the existence of a common law tort of invasion of privacy. In *Haskett v. Trans Union of Canada Inc.* (2001), 10 C.C.L.T. (3d) 128 (Ont. S.C.J.), aff'd 15 C.C.L.T. (3d) 194, (Ont. C.A.), the plaintiff alleged that the defendant credit-reporting agencies had unlawfully included his pre-bankruptcy debts in consumer reports and incorrectly reported them as collectible debts. He sought to bring a class proceeding against the defendants for damages based on breach of fiduciary duty, invasion of privacy, and negligence. The defendants moved to strike the statement of claim on the ground that it did not disclose a reasonable cause of action. With respect to invasion of privacy, Cumming J. found that it was plain and obvious that the

complaint of wrongful inclusion of inaccurate information in a credit report did not amount to a reasonable cause of action in tort. Cumming J. quoted with approval from Professor Klar in his text *Tort Law* (Toronto: Carswell, 1991) where he stated at p. 56 as follows:

Despite some encouraging suggestions from a few courts, it would be fair to say that the Canadian tort law does not yet recognize a tort action for invasion of privacy per se. Rather “privacy” rights have been protected under the umbrella of other traditional tort actions, and by legislative interventions.

Cumming J. acknowledged, however, that “more recently, there has been some recognition of invasion of privacy as an embryonic tort where there is harassing behaviour or an intentional invasion of privacy.” [Emphasis added.] On appeal, the appellant limited his claimed cause of action to negligence. Thus, the Court of Appeal did not address the ruling of the motion judge with respect to the issue of invasion of privacy.

21 In *T.W. v. Seo*, [2003] O.J. No. 4277 (Ont. S.C.J.) (varied on other grounds at [2005] O.J. No. 2467 (C.A.)), the defendant was an ultrasound technician who videotaped the plaintiff while she was in the change room. The plaintiff’s claim included a claim for damages based on the tort of invasion of privacy. Siegel J. refused to put any questions to the jury relating to this cause of action as he found that “insofar as a common law tort of invasion of privacy was recognized in Canada, it did not extend to these facts.”

22 In light of the trial decisions listed in this brief survey of Ontario jurisprudence, and the absence of any clear statement on the point by an Ontario appellate court, I conclude that it is not settled law in Ontario that there is no tort of invasion of privacy.

Case Brief 4.2 discusses the more recent decision in *Jones v Tsige*. In that case, the court rejected a claim for invasion of privacy, finding that there is no such tort in Ontario. The judge referred to *Somwar v McDonald’s Restaurants of Canada Ltd*, but declined to follow it. In contrast to the plaintiff in *Somwar*, the plaintiff in *Jones v Tsige* suffered no loss as a result of the alleged wrong. More importantly, the court in *Jones v Tsige* believed that it was bound by the Ontario Court of Appeal’s finding in *Euteneier v Lee*² that there is “no ‘free-standing’ right to dignity or privacy.”

DISCUSSION BOXES

Business Decision 4.1 The Lucky Moose Case: *R v Chen* 2010 ONCJ 641 (Ont CJ)

As a preface to the questions, it can be noted that although the actual case of the Lucky Moose was addressed in the criminal courts, precisely the same issues would have arisen in civil proceedings. If applicable, s 494(1) of the *Criminal Code* provides authority for

² (2005) 260 DLR (4th) 123 at 140 (Ont CA).

acts that otherwise would constitute assault (or battery) and false imprisonment in both criminal law and tort law.

It also can be noted that the Lucky Moose case prompted two private member's bills in Parliament. In each instance, the proposed legislation would have entitled a private citizen to arrest within a reasonable time after a person was found committing a crime. Both bills died when Parliament was prorogued. Future governments may introduce similar legislation.

1. A plain reading of the *Criminal Code* would seem to indicate that Mr Chen was *not* entitled to arrest Mr Bennett. Regardless of the fact that Mr Bennett had stolen from the Lucky Moose an hour earlier, it is strongly arguable that neither branch of s 494(1) applied in favour of the shopkeeper. When confronted by Mr Chen, Mr Bennett was intending to steal more goods, but he had not actually begun to do so. Accordingly, it would seem that, under s 494(1)(a), Mr Chen did not “find” Mr Bennett “committing an indictable offence.” And though there certainly were reasonable grounds to believe that Mr Bennett had “committed a criminal offence” for the purpose of s 494(1)(b), the arrest was not made at a time when Mr Bennett was “escaping from and freshly pursued by persons who have lawful authority to arrest.” While undoubtedly sympathetic, the law appeared to say that Mr Chen acted without authority, and hence unlawfully, when he arrested Mr Bennett.

The trial judge, however, held differently. The judgment makes for very interesting reading from a number of perspectives. Most importantly for present purposes, Khawly J explained that s 494(1) must be read flexibly and purposively in light of modern conditions. On that basis, he found that Mr Chen *was* authorized to arrest Mr Bennett.

48 What conclusion could a reasonable observer arrive at standing in Mr. Chen's shoes? Let us set the scene:

1. Viewing his surveillance camera sometime after Mr. Bennett's alleged theft, Mr. Chen can clearly see a black man on a bicycle with fairly distinctive clothing load up a bike with plants and depart.

2. Within an hour and in the flesh this time Mr. Chen sees a man matching the same description on a similar bicycle arrive to the same area. The only change in clothing is that he is now wearing shorts and carrying a backpack. He still sports the same shirt with an emblem and the same baseball cap. Clearly that man is not there to chat or pass the time. It should be a 'no brainer' to infer that he is there for an illegal purpose. More cogently one can reasonably infer from his return that BUT FOR a lack of carrying space on his bicycle, he would have taken more plants earlier. He is back to continue his illegal activity. To categorize this as a new incident — while likely technically correct — is putting the intention of Parliament in a straight jacket. Parliamentarians expect judges who are the custodians of society's

rules of conduct to evolve with the times and to interpret the sections of the criminal code through that prism. Otherwise the criminal code would become a dead document requiring constant revision.

3. Part of those new times is ubiquitous cameras, smart phones with lens and other such devices which capture our every action. All this should provide greater elasticity to the words “finds committing” in s. 494. Those gadgets allow one to remotely see a theft in progress. If I accept the restrictive definition of “finds committing” as urged by the prosecution, query whether one could make a citizen's arrest when the thief is only seen on a video screen in a backroom. By necessity a delay ensues. Realistically by the time it registers on the store owner that it is a theft in progress and the owner then makes it to the location, the theft is already completed and the person may even be — by then — away from the store. Would the Crown still argue that the owner cannot make a citizen's arrest? If the response is that this is not the situation here, I firmly disagree.

4. The one hour delay is a red herring — common sense informs here the words “finds committing.” This was a continuing theft pure and simple. To further confirm this, can one really say that the subsequent decision by Mr. Bennett to drop his bike and run away is due to fear for his safety? Again the video is instructive. It shows Mr. Chen approaching him in a non threatening manner. At one point Mr. Chen places a hand on his shoulder in a gesture that people from demonstrative cultures would view as a friendly means of relaxing someone. Interestingly the Crown sees it as an aggressive action and refers to it as “grabbing his shoulder.” I do not see it in that light. There was no reason to run away and doing so anchors the continuing aspect of this theft.

49 Accordingly, I find that this is in fact the same transaction, the same delict, separated only in time by the lack of carrying capacity on his bike and therefore meets the requirements of s. 494.

50 If I am incorrect in my assessment then another interesting issue arises. If one is to take a strict constructionist approach then how do you square it with Bennett's admission in Court? On such an approach, are we not really saying “tough luck, that's just too bad for Chen but the law is the law.” Would not that kind of rigidity lead the public to believe that the justice system is out of touch with everyday life and that the law can indeed lead to perverse results?

51 In light of my comments above, I come to the conclusion that Chen *et al* were making a s. 494 sanctioned arrest.

Khawly J further found that there was at least reasonable doubt as to whether, when viewed in context, Mr Chen’s actions came within the scope of “reasonable force.” He and his colleagues consequently were acquitted of the charges against them. (The judge, however, explained that, if possible — as in Scots law — he would have preferred to enter a verdict of “not proven.”)

2. This question asks students to consider the position of shopkeepers confronted with incorrigible shoplifters. It appears that Mr Chen’s actions were motivated not only by Mr Bennett’s earlier theft, but by the perception that such crimes, though very common, attract little police attention. It is entirely possible that if Mr Chen simply had called the police, the officers would have taken considerable time responding to a non-emergency call and, once there, would have assigned a low priority to the location and apprehension of Mr Bennett. That is not intended as a criticism of the police. They operate under limited resources and seemingly unlimited demands. It nevertheless seems true that certain categories of crime are routinely all but ignored.

3. This question adds an extra layer of complexity. In this instance, it is not even clear that a crime has been committed. If not, then neither the store nor its security guard has authority to make an arrest. An unauthorized arrest would expose the store to the risk of both criminal prosecution and tort liability. Of course, if the suspect has stolen something, a simple call to the police is unlikely to prove effective.

Students could be asked to reflect further on the balance that the legal system has struck between the right of a business to protect itself from theft and the right of an individual to be free from unwarranted restrictions on liberty. Students could also be asked to suggest risk management techniques. For example, even if the suspect was allowed to leave the store with stolen goods, he might be incriminated by video surveillance evidence. The store keeper therefore might consider installing security cameras.

4. “Feasibility” is a subjective and relative concept. It obviously was possible for Mr Chen to call the police and, at least in theory, the police could have apprehended Mr Bennett when he returned to the store. Part of Mr Chen’s frustration, however, was based on his belief that the police do not such matters seriously and that they seldom respond promptly to a call for assistance with a shoplifter. Mr Chen therefore might be able to prove, in accordance with s 494(2)(b) that he had reasonable grounds for believing that an arrest by a police officer was not feasible.

You Be the Judge 4.1

Trespass to Land and Injunctions

1. To answer this question, students must choose between Paolo’s property interests and the economic waste of tearing down a substantial part of Vista Inc’s building. In making that decision, the courts consider a number of factors, including: (i) the costs associated with removing the trespass, (ii) the extent to which monetary damages would adequately protect the plaintiff, and (iii) the defendant’s motivation in committing the wrong. Each of the following scenarios focuses more closely on one of those factors.

2. The courts are eager to protect an individual's property rights. That is particularly the case when the cost of removing the trespass is relatively insignificant. It seems much less likely that a court would be willing to grant an injunction if the cost of removing the trespass is considerably more than the loss that the plaintiff suffers.

3. If Paolo suffered no financial loss as a result of the trespass, nominal damages may be awarded to vindicate his rights.

Quite clearly, the greater the financial loss to the plaintiff, the more likely it will be that a court will order an injunction. That is particularly the case if the cost of removing the trespass is significantly less than the loss that the plaintiff would suffer.

If Paolo was simply very upset that his rights had been violated, and there was no high-handed behaviour on the part of Vista Inc, the court would probably only award nominal damages. Students should be encouraged to reconsider the danger of bringing an action solely for nominal damages. In this case, since Vista Inc offered to pay either damages or the market value of the land, a judge might require Paolo to pay the costs associated with the trial. The value of the costs would be much greater than the value of the nominal damages that Paolo would be entitled to receive from Vista Inc.

4. If Vista knew at the outset that it was committing a tort, a court would probably take a very dim view of the matter. In order to protect Paolo's property rights and the integrity of the justice system, the court therefore might award punitive damages. To determine whether or not to order an injunction, the court would consider all of the usual factors. Under these circumstances, however, the fact that Vista Inc acted in such a high-handed fashion would weigh in favour of tearing down the offending portion of the building.

5. This question requires students to think of the law—even a court order—from a business perspective. If a court granted an injunction, it effectively would put Paolo in a very powerful bargaining position in comparison to Vista. Paolo could threaten to enforce his injunction unless Vista paid a substantial sum of money. That sum almost certainly would exceed Paolo's actual losses and Vista, as an economically rational actor, might be willing to pay anything less than the full cost of actually tearing down its building.

The possibility of such a development, in fact, would be a good reason for the court refusing to award the injunction. As Lord Westbury explained that point in *Isenburg v East India Estate House Co Ltd*.³

I hold it to be the duty of the Court ... not, by granting a mandatory injunction, to deliver the defendants over to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may possibly make.

Ethical Perspective 4.1

Conversion and Innocent Purchasers

³ (1863) 3 De G J&S 263 at 271, 46 ER 637 at 641.

1. This question asks students to reflect on the fairness of the rules underlying the tort of conversion. That consideration should lead them, in turn, to consider the competing values that the tort of conversion attempts to resolve.

- Liability may seem unfair from the innocent purchaser's perspective. After all, the purchaser acted in good faith and undertook a reasonable investigation before buying the herd. Furthermore, unlike the situation with some chattels (*eg* cars), there is no central registry that would have allowed the purchaser to check official ownership records. Indeed, the purchaser may have done everything reasonably possible.
- On the other hand, Kathleen is more likely to perceive the rules underlying the tort of conversion as being fair. While the purchaser acted innocently, so too did she. There is nothing to suggest that she in any way facilitated the theft. Furthermore, even if she did somehow carelessly contribute to the theft (*eg* by leaving a gate unlocked), the fact remains that the herd belongs to her. The right of ownership, upon which the commercial world operates, would be very fragile, and hence ineffective, if it could be so easily defeated by theft. A person would have little assurance that their belongings would continue to be their belongings for very long. Furthermore, if Kathleen could not rely on the legal system to protect her right of ownership, she might have felt compelled to spend a great deal of money protecting her cattle herself. Such expenditures might be economically inefficient. They might far outweigh the costs associated with a tort law that strongly protects property rights and therefore occasionally (as in this instance) imposes a hardship upon an innocent purchaser.

2. Several answers to this question have already been mentioned. They focus on the fact that the legal system has decided to generally prefer the rights of an owner over the rights of an innocent purchaser.

Another reason is implicit in the text. Students should have noticed that there is no *right* in tort law to receive a judicial order allowing a person to recover property from a tortfeasor. That is even true with respect to detinue, where the court merely has a discretion to compel the defendant to return a chattel to the plaintiff. An owner therefore is almost always vulnerable to losing the item itself. That rule probably reflects the same idea that underlies the general denial of specific performance in contract. In the business world, with which the common law was largely concerned, proprietary relief is disruptive. It forces the defendant to set aside a valuable piece of property pending the resolution of a legal dispute. Furthermore, in most instances, the plaintiff's loss can be adequately redressed through an award of damages. The owner of property therefore is vulnerable to losing the item itself. As a trade-off for that vulnerability, the owner is allowed, through the strict liability of conversion, to demand compensatory damages in almost all cases.

REVIEW QUESTIONS

1. Generally speaking, intentional torts involve intentional, rather than merely careless, conduct. The plaintiff does not have to prove that the defendant intended to cause harm or commit a tort. It is enough to say that the defendant knew that a particular

form of behaviour would have particular physical consequences. For instance, you may commit the tort of trespass to land merely because you intended to stand on a particular piece of ground, even if you did not know that that land actually belongs to me rather than you. The courts adopt a broad definition of “intention” because they want to strongly protect the interests that people have in themselves and their property.

2. Assault consists of an act that causes a person to experience a reasonable apprehension of imminent harm or offensive bodily contact. Battery consists of offensive bodily contact. You may commit an assault, but not a battery, against me by swinging your fist at me without actually touching me. In contrast, if you punch me from behind, you will have committed the tort of battery, but not assault, unless I somehow knew that the blow was coming.

3. A business is entitled to remove a trespasser. In doing so, however, it must not use anything more than “reasonable force.” If the business stays within that limit, then it cannot be successfully sued by the trespasser who was removed. If, however, the business uses more than reasonable force, then it commits the tort of battery and may be held liable in tort to the trespasser. (Depending upon the circumstances, a person who uses excessive force may also be convicted of a crime.) That rule is especially important for businesses (such as taverns and stadiums) that hire security guards to protect their premises and remove unwanted trespassers.

4. The statement is incorrect. The tort of battery is not limited to actions that cause harm or injury. Instead, the tort is formulated more broadly to protect the plaintiff’s right to physical integrity. The threshold is set much lower not only because small incidents may easily escalate into large disputes that do result in physical injury, but also because physical integrity is important in itself. The individual’s body is inviolate.

Because the tort of battery is defined broadly, it may be committed by acts that cause no harm. Normal social interaction, such as a tap on the shoulder or a light jostle on a crowded bus, are excepted from liability. Nevertheless, a simple kiss, if unwanted, constitutes a battery. Indeed, in *Non-Marine Underwriters, Lloyd’s of London v Scalera*,⁴ it was suggested that, regardless of context, every act of sexual intercourse presumptively is battery. It is only the fact of consent that saves the parties from tortious liability.

Going even further, battery may consist of acts that are enormously beneficial to the claimant. Accordingly, liability was imposed upon a physician who performed a life saving blood transfusion despite knowing that the patient, as a Jehovah’s Witness, did not consent to the procedure.⁵

5. The statement is partly false. The tort of false imprisonment occurs whenever a person is confined within a fixed area without justification. The fixed area need not be a prison. However, it is not true to say that the defendant must *physically* detain the

⁴ (2000) 185 DLR (4th) 1 (SCC).

⁵ *Malette v Shulman* (1990) 67 DLR (4th) 321 (Ont CA).

plaintiff. The tort certainly may be committed by the use of physical force. The courts also have recognized, however, that the tortious detention may be *psychological*. That may be the case if a security guard, without placing hands on the plaintiff, asks or directs the plaintiff to a back room. The circumstances may be such that the plaintiff felt compelled to comply with the security guard's instructions. In that situation, a court will ask whether the plaintiff complied voluntarily (in which case there is no tort) or by reason of psychological force (in which case the defendant may be held liable).

6. Even though the courts appear to be slowly creating a new tort for invasion of privacy, several provincial legislatures have enacted statutes to protect privacy interests. The legislation varies from jurisdiction to jurisdiction. However, it generally allows liability to be imposed on a person who wilfully violates another's privacy by doing something that it knows to be wrong. The provincial legislatures have left the definition of "privacy" open to ensure that the courts have the flexibility needed to respond to different types of situations.

7. The courts have used a number of existing torts to protect privacy interests.
- A person commits trespass to land if, for instance, he enters another's property without permission to obtain candid photographs.
 - An employee may be held liable for breach of confidence if, for instance, he publishes details about his employer's private life.
 - A company may commit the tort of misappropriation of personality if, for instance, it makes unauthorized use of a celebrity's image.
 - A newspaper may have to pay compensatory and punitive damages for negligence if, for instance, it ignores a judge's orders and publishes private and personal information about an individual.

8. It is *not* true that a business person can use any amount of force to remove or arrest an undesirable customer. A business person is entitled to use reasonable force only.

As a matter of risk management, a business person should consider several factors before attempting to forcibly remove an undesirable customer. Most of those factors pertain to the danger that something might go wrong, either physically or legally. Forcible ejection, for instance, may injure the unruly customer, the business person, employees, or bystanders. Moreover, injury or improper action may result in litigation.

In most situations, a business person should try to calm the situation while calling the police. If a situation requires more immediate action, the business person should, if practicable, first ask the customer to leave voluntarily. If that request is ineffective or obviously pointless, then the business person should use only as much force as is reasonably necessary to remove the customer. Although a court will not require a business person to delicately weigh the strength of each blow, it will impose liability if the amount of force is excessive in the circumstances. Excessive force may result in both civil liability in tort and criminal liability.

In *R v Asante-Mensah*, the Supreme Court of Canada found that Ontario's *Trespass to Property Act* allows an occupier to use reasonable force when arresting a trespasser. That is true even though, as the trial judge noted, the statute does not expressly allow for the use of force. On appeal, however, Binnie J held that the legislature must have intended to protect people who reasonably use the statute's special power of arrest.

9. The statements are false.

Police officers may be held liable for the tort of *negligent investigation*. (The same is true of private investigators.) The plaintiff must prove that the police officers acted carelessly or negligently. The tort of negligence is examined in Chapter 6.

A private citizen *can* be held liable under the tort of *malicious prosecution*. Even though a criminal prosecution is usually performed by a Crown prosecutor, a private citizen can lay the groundwork for a prosecution against the plaintiff. The plaintiff must satisfy the court that (i) the defendant started the proceedings, (ii) out of malice, or for some improper purpose, and (iii) without honestly believing on reasonable grounds that a crime had been committed, and that (iv) the plaintiff was eventually acquitted of the alleged crime.

10. Malicious prosecution occurs when the defendant improperly causes the plaintiff to be prosecuted. The focus is on the fact that he or she was subject to criminal proceedings. That might be true, for instance, if a business concocted a story about shoplifting and persuaded the government to lay charges against the plaintiff. Malicious prosecution is, however, difficult to prove. The court has to be satisfied that: (i) the defendant started the proceedings, (ii) out of malice, or for some improper purpose, and (iii) without honestly believing on reasonable grounds that a crime had been committed, and that (iv) the plaintiff was eventually acquitted of the alleged crime.

The tort of malicious prosecution needs to be distinguished from the tort of false imprisonment. False imprisonment occurs when a person is confined within a fixed area without justification. The focus is not on the improper commencement of criminal proceedings, but rather on an actual detention.

11. Police officers, security guards, and private citizens do *not* have the same rights when it comes to arresting criminals and suspected criminals.

- A police officer is permitted to arrest anyone who is: (i) reasonably suspected of being in the act of committing a crime, or (ii) reasonably suspected to have committed a serious crime in the past.
- Private citizens, including security guards, can only arrest a person who is actually committing a crime. Unlike police officers, private citizens and security guards therefore can be held liable for false imprisonment if they detain a person, even if they honestly and reasonably believed that that person was in the act of committing a crime.

Consequently, as a matter of risk management, business people should not detain a suspected shoplifter unless they are quite certain the crime has been committed. In any other situation, the safest measure is to call the police and inform them of the facts. The police will be protected from liability, even if the suspect was actually not shoplifting, so long as they relied upon reasonable grounds when they detained that person.

12. Generally speaking, a restaurant owner cannot detain a customer who refuses to pay the full amount of the bill. The reason is that the failure to pay a bill is often a breach of contract, but not a crime. Consequently, detaining the customer may lead to false imprisonment. To protect itself from tort liability, the restaurant owner should simply sue the customer for the amount that is owed.

13. The right of arrest differs depending upon whether the person making the arrest is a police officer or a private citizen (including security guards).

Under s 495 of the *Criminal Code*, a *police officer* may arrest anyone who is reasonably suspected of (i) being in the act of committing a crime, or (ii) having committed a *serious* crime in the past. If that test is satisfied, the police officer cannot be held liable, even if the person who was arrested was actually innocent.

The *Criminal Code* also provides a power of arrest to private citizens. Section 494, however, is drawn much more narrowly than s 495. A private citizen is entitled to make an arrest only if a crime is *actually being committed* by the suspect. If, in fact, no crime was being committed, the arrest is unjustified. And whoever made the arrest may be held liable in tort, even if they acted honestly and reasonably. The law generally favours a customer's freedom of movement over a store's desire to protect its property.

A private citizen may enjoy a separate power of arrest by virtue of provincial legislation dealing with trespass to land. In most provinces, occupiers (and their agents, such as security guards) are entitled to remove trespassers who refuse to leave after being given a reasonable opportunity to do so. The scope of that right varies widely, however. It is non-existent in some provinces. In others, the power of arrest belongs only to the police. In Alberta and Manitoba, an occupier's power of arrest exists only if the detained person actually is a trespasser. Most broadly of all, in Ontario and New Brunswick, an occupier (or an occupier's security personnel) is entitled to arrest anyone believed, "on reasonable and probable grounds" to be a trespasser.

14. The statement is not true. A trespass to land occurs when the defendant improperly interferes with the plaintiff's land. As a land owner, the plaintiff is entitled to decide who can and cannot be on the premises. Furthermore, the plaintiff may change his or her mind even after the defendant has lawfully entered onto the premises. If the plaintiff withdraws consent or permission, the defendant becomes a trespasser. If the defendant fails to use a reasonable opportunity to leave the property, the plaintiff may use reasonable force to remove the defendant.

15. As a general rule, a trespass to land is committed every time that the defendant interferes with the plaintiff's property without permission. There are, however, exceptions to that rule. Public officials (*eg* meter readers) are entitled to enter onto private property for the purpose of doing their jobs. In other situations, the law assumes that a property owner has consented to behaviour that would otherwise constitute a trespass. There is, for instance, an assumption that property owners have consented to everyday forms of interaction (*eg* door-to-door solicitors). The situation is even clearer with respect to businesses, which not only permit, but *invite*, people onto their premises for the purposes of doing business. In that situation, however, the land owner is generally entitled to revoke its consent and to bar certain individuals from entering, or remaining, on its premises. In doing so, however, it must respect human rights laws that preclude discrimination on certain grounds (such as race).

16. The statement is not true. Lawyers previously considered land ownership in terms of the “giant carrot” theory, which meant that the owner possessed rights not merely to the surface of the land, but to a slice of the universe running from the centre of the Earth, up through the relevant surface territory, and forever into the skies. That view was captured by the Latin phrase “*cuius est solum, eius est usque ad coelum et ad inferos*,” which means “whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell.”

Today, in contrast, a landowner is entitled to the ground beneath and the air above only to a reasonable extent. As a result, a trespass probably is not committed merely because a jet flies harmlessly overhead. A tort may be committed, however, if a crane on a neighbouring property swings over the plaintiff's land. Likewise, damages may be available if the defendants, in an effort to prop up a building on their own land, insert rods into the plaintiff's sub-surface property. The precise limits of the land owner's rights have not been settled.

17. A trespass to land occurs when the defendant improperly interferes with land that the plaintiff possesses. If the defendant's wrong is of a continuing nature, a court will often impose an injunction. In some circumstances, however, the courts must choose between protecting the plaintiff's property interests and avoiding economic waste. In deciding whether or not to grant an injunction, a judge will consider a number of factors, including the defendant's motivation in committing the wrong, the extent to which monetary damages would adequately protect the plaintiff, and the costs associated with removing the trespass.

18. The tort of conversion occurs when the defendant intentionally interferes with chattels that the plaintiff possesses in so serious a manner as to warrant a forced sale. As a matter of risk management, business people should be aware that the tort of conversion can be committed simply by exercising control over property, even if they thought they

were entitled to do so. Business people therefore should make every reasonable effort to ensure that the person selling the goods to them was actually entitled to do so. Unfortunately, even that may not be enough to protect business people from liability. Because the courts want to strongly protect the plaintiff's property rights from interference, the tort of conversion is "strict." That means that liability may be imposed even if the defendant did not know (and had no way of knowing) that it was improperly interfering with the plaintiff's property.

19. The statement is true. The tort of conversion occurs when the defendant interferes with the plaintiff's chattels in a way that is serious enough to justify a forced sale. Interestingly, although conversion is considered an "intentional tort," the plaintiff does not have to prove that the defendant intended to cause harm or to commit a tort. It is enough that the defendant intended to act in a certain way, as long as the effect of those actions amounts to a serious interference with the plaintiff's property rights.

Because the tort of conversion is defined so broadly, it may be committed "innocently." For instance, if the defendant, acting in good faith and proceeding with every reasonable precaution, buys property that actually had been stolen from the plaintiff, then the court will impose liability. It is no defence for the defendant to say that the thief genuinely and reasonably appeared to be the owner.

The tort of conversion therefore can be unusually harsh. In the business world, however, it is subject to one very important exception. While an innocent purchaser of goods (such as cattle or cars or jewelry) may be held liable, an innocent purchaser of money has nothing to fear. For example, if a thief steals my watch and sells it to you for \$100, you have committed a tort against me. But if a thief steals my \$100 bill, and sells it to you in exchange for your own watch, you are not liable for conversion.

There is a very good reason why the law treats money differently than other assets. It does so to ensure that money flows freely through our economy. The business world quickly would grind to a halt if every shopkeeper felt compelled to ensure that every customer actually owns the money being offered as payment.

20. A *complete defence* entirely exonerates the defendant from liability. Even though the plaintiff has demonstrated the existence of a tort, the defendant will not be held responsible. The four complete defences are *consent*, *legal authority*, *self-defence*, and *necessity*.

- *Consent* is the most important defence for the purposes of the intentional torts. It exists if a person voluntarily agrees to experience an interference with his or her body, land, or goods. Consent may be *express* or *implied*, but in either event, it must truly be *free and informed* in the sense that it must not be the product of coercion or deception. Consent also requires mental capacity. Finally, consent generally is *revocable*.
- *Legal Authority* provides a person with a lawful right to act in a certain way. Acts that are legally authorized cannot lead to liability in tort. The authority may be provided by the common law (*ie* judge-made law) or legislation.

- *Self-defence* consists of the right to protect oneself from violence and the threat of violence. The courts strike a balance between respecting the natural reaction to fight back and the danger of giving people an excuse to cause harm. The defence therefore is entirely defensive. It is available only if a person was at immediate risk. Acts of self-defence must be reasonable, in light of all of the circumstances. Although there are very few cases on point, the same rules generally apply if the defendant, having been sued for battery or assault, pleads *defence of a third party*. In contrast to the situation in which a person is at risk, the rules of self-defence are very narrow if a threat merely imperils property. It is never reasonable to deliberately cause death or serious injury in order to protect property.
- *Necessity* exists if the defendant's actions were justified by an emergency. The concept is restricted to situations in which immediate action is required in order to avoid some calamity. The court must consider all of the circumstances and decide whether the benefits flowing from the defendant's conduct outweigh the harm that was caused. Although the defence of necessity generally is classified as a complete defence, the defendant sometimes may be required to pay compensation for any loss or damage that is created in responding to a necessity.

A *partial defence* allows a court to reduce damages on the basis of the plaintiff's own responsibility for a loss or an injury. Even though the defendant committed a tort, the plaintiff is partly to blame. *Provocation* and *contributory negligence* are partial defences.

- *Provocation* The concept of *provocation* is closely tied to the torts of assault and battery. Provocation consists of words or actions that would cause a reasonable person to lose self-control. In a typical case, the defendant "snaps" after being taunted and insulted by the plaintiff. The defendant is held liable for the physical attack, but the plaintiff is not entitled to full compensation. The defence therefore strikes a balance. Because the legal system cannot condone violent behaviour, it imposes liability. Nevertheless, because the legal system recognizes that the plaintiff's boorish behaviour caused the attack and that even a reasonable person can be pushed only so far, it reduces damages.
- *Contributory Negligence* Provocation is often seen as a narrower version of the general defence of *contributory negligence*. As explained in more detail in Chapter 6, contributory negligence occurs when the plaintiff is partially responsible for the injury that the defendant tortiously caused. Because responsibility is shared between the parties, the defendant is held liable, but damages are reduced to reflect the plaintiff's contribution to the injury. That defence, however, is not equally available across the country. Different legislation exists in each province and territory. Some statutes *apportion*, or divide, responsibility on the basis of the parties' "fault." That term is broad enough to cover every type of tort. Other statutes refer instead to the parties' "negligence." And since that term does not naturally fit the intentional torts, some courts have found it difficult to apply the defence of contributory negligence to cases of battery, trespass, and so on.

CASES & PROBLEMS

1. The facts raise difficult moral and legal issues. The moral issues must turn on the individual student's perception of the relative importance of religious freedom and preservation of life.

From a legal perspective, the analysis is simpler insofar as the issues have been settled by Canadian courts. A blood transfusion constitutes a serious interference with bodily integrity. The tort of battery holds that such interference is tortious in the absence of consent. In this case, the card found in Marjorie's purse, if reliable, specifically negates consent.

The somewhat surprising result is that Dr Curtis will be held liable if he provides a blood transfusion without Marjorie's consent. The facts of this case are very similar to those in *Mallette v Shulman* (discussed below under the heading of "Case Briefs"), where the Ontario Court of Appeal upheld liability. It was entirely irrelevant that the defendant's actions were beneficial or that the defendant was pleased to have survived. The same principle is supported by *Hobbs v Robertson* (also discussed below under the heading of "Case Briefs"), where a trial court in British Columbia rejected a claim brought by the family of a Jehovah's Witness who had died following a physician's refusal to perform a blood transfusion.

2. Deb might sue for the tort of *battery* as a result of having been touched by the security guard. A battery consists of offensive bodily contact. That claim, however, would likely fail. Not every form of physical contact constitutes a battery. There is no liability for contact that occurs in the course of ordinary living. In this instance, the security guard merely touched Deb lightly on the shoulder in order to get Deb's attention.

The tort of *false imprisonment* is a much better bet from Deb's perspective. That tort may occur if the defendant confines the plaintiff within a fixed area without justification. A classic instance of the tort occurs when the defendant literally imprisons the plaintiff in a jail. Similarly, liability may be imposed if, without a jail, the defendant *physically* detains the plaintiff. There is no evidence of physical restraint in this case. A false imprisonment, however, may also be committed *psychologically*. In this instance, Deb would argue that, in light of the circumstances, she believed that she had no choice but to comply with the security guard's command to return to the store.

The tort of false imprisonment also requires proof that the "imprisonment" was "false" or *unjustified*. For that purpose, the security guards are classified as private citizens, rather than police officers. Under section 494(1) of the *Criminal Code*, a private citizen has the right to make an arrest (1) if the accused was committing a crime, or (2) if there were reasonable grounds for believing that the accused had committed a crime and was being freshly pursued by a person authorized to make an arrest. Deb had not committed any crime and the security guards did not have reasonable grounds to believe that Deb was being freshly pursued following the commission of a crime. Their actions therefore were unjustified.

The most difficult part of Deb's case arises from the fact that a false imprisonment occurs only if the plaintiff was in fact detained, either physically or psychologically. In the actual case upon which this exercise is based, the court held that although Deb felt compelled to comply with the guards' command, she ultimately returned to the store *voluntarily*. Liability accordingly was denied. The facts provided in the hypothetical, however, fall within a grey area and it is entirely possible for a student to provide sufficient reasons for concluding that Deb did not consent to the temporary psychological detention.

If liability is available, Deb could take action against both the individual security guards and the store. The guards would be *personally* liable for the tort of false imprisonment. Stylz would be *vicariously* liable as the guards' employer. Since the incident clearly occurred within the employees' course of duty, the employer would be responsible. Vicarious liability supports tort law's compensatory function by increasing the likelihood that the plaintiff will actually recover upon a judgment.

Finally, if liability is imposed, damages probably would be limited to compensatory damages. Deb would receive monetary reparation for her losses, including her embarrassment. Since there is no evidence that the guards acted for an ulterior purpose or executed their duties with excessive force or vigour, punitive damages almost certainly would be denied.

[Based on *Naujokaitis v Dylex Ltd* (Unreported, 17 March 1982, Ont Co Ct.)]

3. Jasmine has two possible actions in tort against the attendant: false imprisonment and malicious prosecution.

- *False Imprisonment* Jasmine might try to sue the attendant for false imprisonment. That action would fail, however, because the attendant was unable to actually confine Jasmine within the compound after she collected her car. Jasmine might also sue for false imprisonment on the basis that that Buster's Towing had taken her car and refused to return it until she paid the towing charges. And indeed, the courts have held that the tort may be committed if the defendant detained the plaintiff's valuable property, rather than the plaintiff. On the facts, however, it probably is true that Buster's had the authority to do so by virtue of a by-law and an agreement with the city. If so, then Buster's actions were authorized by law and therefore incapable of forming the basis of a tort.
- *Malicious Prosecution* Jasmine would probably win if she sued the attendant for malicious prosecution. That tort requires proof that: (i) the defendant started the proceedings, (ii) out of malice, or for some improper purpose, and (iii) without honestly believing on reasonable grounds that a crime had been committed, and that (iv) the plaintiff was eventually acquitted of the alleged crime. Although the case would depend upon the evidence, those elements appear to be met: (i) the attendant instigated the criminal proceedings by contacting the police and swearing out a statement, (ii) it appears that the attendant did so out of malice or anger, (iii) since the judge in the criminal case found that the whole

story had been fabricated, the attendant did not honestly believe the allegation on reasonable grounds, and (iv) Jasmine was acquitted of the criminal charges.

4. The facts raise the issues of trespass to land, power of arrest, battery, and false imprisonment.

Trespass A trespass to land occurs when the defendant improperly interferes with the plaintiff's land. In theory, that may be true anytime that one person enters onto another's land without permission. As a matter of common sense and commercial reality, however, the rules are formulated to allow, in the absence of indications to the contrary (eg a "No Trespassing" sign), a person to approach a building and knock on the door. Even more clearly, with respect to a commercial property, such as a shopping mall, people generally are entitled to be on the premises during normal business hours. Their right to do so may be terminated, however, if the occupier indicates that they no longer are welcome and provides a reasonable opportunity to exit. Any person who remains on the property, despite being told to leave, is a trespasser.

Arrest The rules regarding the right of arrest follow a similar pattern. Under the *Criminal Code*, a private citizen is entitled to make an arrest only if a crime is *actually being committed* by the suspect. In Ontario (and some other jurisdictions), provincial legislation further states an occupier is entitled to arrest anyone who is believed, on reasonable and probable grounds, to be trespassing and who has not departed when asked to do so. That same right extends to the occupier's agent, such as a security guard.

Reasonable Force on Arrest In *R v Asante-Mensah*, the Supreme Court of Canada confirmed that an occupier who enjoys a power of arrest also enjoys the right to use reasonable force in dealing with trespassers. At the same time, however, he issued a stern warning.

Many trespasses are of trivial importance. . . They are best handled by means short of arrest. . . . An arrest is a grave imposition on another person's liberty and should only be attempted if other options prove ineffective. Further, an arrest may lead to a confrontation that is more serious than the initial offence of trespass. . . . Excessive force, or improper use of the arrest power, may leave the occupier . . . open to both criminal charges and civil liability.

Battery and False Imprisonment A battery consists of offensive bodily contact. A false imprisonment occurs when a person is confined within a fixed area without justification. The latter tort need not involve physical force. In some circumstances, it is enough that the defendant psychologically detained the plaintiff.

Battery and false imprisonment are "intentional torts." That means that the plaintiff must prove that the defendant intended to perform the act in question. It is not necessary, however, for the plaintiff to show that the defendant intended to either inflict harm or commit a wrong.

Neither tort is committed if the plaintiff consented to the acts in question or if the acts in question were justified by law. Justification often takes the form of a lawful power of arrest or detention.

Analysis Applying those propositions to the facts, there are several possibilities. If Reverend Baldasaro and Reverend Tucker truly were trespassers, and if they truly did refuse to leave after being asked to do so, then the security guards, as the occupier's agents, *may* have been justified in making an arrest. Furthermore, if the security guards were justified in making an arrest, then they *may* have been justified in using reasonable force.

Alternatively, if the Reverends were not trespassing, or if they were not vulnerable to the occupier's arrest, then the security guards might well be liable for the torts of battery and false imprisonment.

A crucial factual question therefore must be answered before the case can be resolved. Given the disparity in the parties' evidence, the court would need to determine whether or not Reverend Baldasaro and Reverend Tucker were asked to leave the mall, but refused to do so. If not, then the security guards' actions were unjustified and hence tortious.

Finally, even if the Reverends were trespassers, and hence vulnerable to the occupier's arrest, the circumstances may not have justified the use of *any* force by the security guards. As the Supreme Court of Canada emphasized in *R v Asante-Mensah*, force ought to be last resort. Given the apparently peaceful nature of the Reverend's activities, and given the apparent immediate availability of the police officer, it is doubtful that the security were entitled to use *any* force, let alone sufficient force to cause Reverend Tucker considerable pain and injury. That is the view taken by the Ontario Court of Appeal in the decision on which this case is based.

[Based on *Tucker v Cadillac Fairview Corp* (2005) 220 OAC 140 (Ont CA)]

5. It is very unlikely that the man will be able to successfully sue for invasion of privacy. First, although the case law is somewhat ambiguous, the general view is that no such action yet exists as a separate tort. Second, although the courts are in the process of developing such a tort, they will certainly take care to ensure that it does not intolerably restrict freedom of expression. Third, the Supreme Court of Canada's decision in *Aubry v Éditions Vice-Versa Inc* (which is not directly applicable outside of Quebec) indicates that the publication of a photograph will constitute an invasion of privacy only under certain conditions. Unlike the situation in *Aubry*, the photo that was published by the Blacksox merely featured the man as a member of a crowd, rather than as the specific subject of the picture. Moreover, it may not have been feasible for the club to obtain consent from every person in the picture, especially if the photo was one of many taken during the game. Finally, because the events occurred in Alberta, it is not governed by any privacy statute.

6. Indira is personally liable for the tort of trespass to land. Speedit Delivery is vicariously liable as her employer. While the courts are willing to recognize that a homeowner generally provides implied consent to the receipt of deliveries, that consent does not extend to deliveries that are made to the wrong address. Moreover, it is irrelevant that Indira honestly believed that she was acting properly.

[Based on *Turner v Thorne* (1960) 21 DLR (2d) 29 (Ont HC)]

7. Given the factors that the courts normally consider in determining whether or not an interference with chattels is serious enough to warrant a forced sale, it is unlikely that Elaine committed the tort of conversion when she borrowed Latka's car. She borrowed it for a brief duration, she did not purport to exercise permanent ownership, she apparently did not cause any harm to the vehicle, and she apparently did not cause any expense or inconvenience to Latka. A court is much more likely to hold that Elaine merely committed the tort of trespass to chattels. On that basis, she probably will be held liable for nominal damages only. If she did any damage to the car or caused any loss to Latka, she will be responsible to provide compensation accordingly. In contrast, if she is held liable in conversion, she will be forced to buy the car by paying its market value to Latka. There is almost no chance that Latka would be awarded punitive damages. Elaine's conduct was not so outrageous as to warrant punishment.

8. Peter has committed the tort of trespass to land against Elizabeth. A trespass to land occurs when the defendant improperly interferes with the plaintiff's property. The interference here is physical, substantial, and lasting. The tort is not committed if the land owner consents to the defendant's actions, but in this instance, the brother knew full well that the plaintiff had expressly refused permission.

As in the actual case upon which this problem is based, a variety of remedies are likely available to the plaintiff. A court probably would issue a mandatory injunction requiring Peter to fill in the pond in order to reverse the trespass and remove the part of the pond that infringes Elizabeth's rights. If a mandatory injunction is refused, or if it could not be fulfilled (*eg* because the relevant local authority refused to license the work), the plaintiff would be entitled to compensatory damages reflecting the damage to her land (calculated in the actual case at \$23 000). Finally, given the high-handed and arrogant manner of the breach, Peter might well be liable for punitive damages. In the case of *Zambri v Grammelhofer*, the Ontario Court of Appeal upheld the trial judge's award of \$19 000.

[Based on *Zambri v Grammelhofer* 2009 CanLII 65373 (Ont SCJ), *aff'd* 2010 ONCA 780 (Ont CA)]

9. This is a difficult question that requires students to extrapolate from the principles contained in the text and to develop new principles governing remedies in tort.

The parties' leasing agreement, which required the defendant to pay a total of \$10 000, expired after two weeks. At that point, the defendant no longer had any right to retain

possession of the switchboard. Its refusal to return the equipment to the plaintiff consequently constituted a proprietary tort. The precise nature of that tort is somewhat debatable. The defendant certainly committed a trespass (improper interference) and a detinue (wrongful detention). Given the length of the defendant's wrongful possession, however, a court might find a conversion as well (serious interference justifying forced sale).

Non-financial Loss

Whatever the precise nature of the tort, the more interesting issue pertains to the plaintiff's remedy. The defendant has argued that, since the plaintiff would not have rented the switchboard to another customer during the period in question, no compensable loss was suffered. That argument undoubtedly has some intuitive appeal. In a sense, the defendant's tort did not inflict any positive harm upon the claimant.

The defendant's theory nevertheless is flawed. It assumes that every compensable loss mistake the form of a positive economic injury. Ownership entails certain rights. Among those rights is the right to control access and use of the asset. That right would be rendered largely meaningless if a defendant could escape liability simply by showing that, regardless of a wrongful possession or detention, the owner would not have put its property to profitable use.

That proposition was explained in the famous case of *Watson Laidlaw & Co Ltd v Pott Cassels and Williamson*.⁶ Lord Shaw contemplated a case in which A "keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out." If A subsequently recovers the horse, but nevertheless seeks compensation for the interference, B is apt to say, "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse for wear; it is better for the exercise."⁷ That is defendant's position exactly: While B presumably has gained, A has not suffered any deprivation. In *Watson Laidlaw*, however, Lord Shaw actually disagreed, as the remainder of his comments makes clear.

[W]herever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under ... the principle ... of price or of hire.⁸

The Earl of Halsbury expressed the same sentiment in *The Mediana*.⁹ "What right has a wrongdoer to consider what use you are going to make of your [property]?" he asked. Imagining a case in which "a person took away a chair out of my room and kept it for twelve months," he rejected the possibility that the defendant could "diminish the damages by shewing that [the owner] did not usually sit in that chair, or that there were plenty of other chairs in the room."¹⁰ The legal result, he said, is "quite independent of

⁶ (1914) 31 RPC 104. (HL)

⁷ (1914) 31 RPC 104 at 119 (HL).

⁸ (1914) 31 RPC 104 at 119 (HL).

⁹ [1900] AC 113 (HL).

¹⁰ [1900] AC 113 at 117 (HL).

the particular use the [owner was] going to make of the thing that has been taken.”¹¹ Moreover, while acknowledging the “very difficult task” of calculating damages in such circumstances, he knew “very well that as a matter of common sense an arbitrator or a jury [would adopt] a perfectly artificial hypothesis and say, ‘Well, if you wanted to hire a chair, what would you have to give for it for the period.’” That inquiry would “come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner.”¹²

Our hypothetical dispute is based on the facts of a third case: *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*.¹³ The majority of the Court of Appeal in that case likewise held that the plaintiff was entitled to substantial damages, reflecting the price at which the defendant could have rented the switchboard, even without proof of an actual loss of rental.

Disgorgement

Taking the matter one step further, students might be asked whether substantial relief could be awarded even if, for some reason, compensation was not available. And, in fact, *Strand Electric* is a leading authority for the proposition that the victim of a proprietary tort is entitled to claim, in the alternative, compensation of its loss *or* disgorgement of the defendant’s gain. (The idea of disgorgement was discussed in Chapter 3 of the *Instructors’ Manual*.)

Whereas his colleagues held the defendant liable for compensation, Denning LJ in *Strand Electric* preferred to conceptualize the remedy in terms of “restitution” of the defendant’s gain.

If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire. ...

I am here concerned with the cases where the owner has in fact suffered no loss, or less loss than is represented by a hiring charge. In such cases if the wrongdoer has in fact used the goods he must pay a reasonable hire for them. ... The claim for a hiring charge is ... not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for

¹¹ [1900] AC 113 at 117 (HL).

¹² [1900] AC 113 at 117 (HL).

¹³ [1952] 2 QB 246 (CA).

restitution rather than an action of tort. But it is unnecessary to place it into any formal category. The plaintiffs are entitled to a hiring charge for the period of detention, and that is all that matters. I can imagine cases where an owner might be entitled to the profits made by a wrongdoer by the use of a chattel, but I do not think this is such a case.

On that analysis, the defendant in our hypothetical case undoubtedly would be liable to the plaintiff for the market value of the benefit that the defendant has enjoyed (*ie* three weeks use of switchboard, valued at \$5000 per week).

The final sentence in Denning LJ's judgment raises the prospect that the plaintiff also might be entitled, not merely to the market rental rate, but to the defendant's actual profit (or some proportion of it). Measured in that manner, the remedy would reflect not the benefit that the defendant wrongfully obtained from the plaintiff, but rather the benefit that the defendant obtained from third parties (*ie* the audience at its second concert) as a result of the wrong committed against the plaintiff.

However, although Denning LJ did not address the point, there is a qualitative difference between a gain-based remedy that reverses a wrongful subtraction of wealth and a gain-based remedy that strips all profits.¹⁴ As a matter of precedent, the latter has been available only in exceptional circumstances (*eg* breach of fiduciary duty, deliberate breach of confidence). It therefore should not be possible for the plaintiff to claim the defendant's profit of \$50 000.

10. Madeleine is entitled to exercise the right of recaption in order to take back her property. She also is entitled to arrest Hugh, who is in the act of committing a serious crime. In either event, however, she must not use anything more than reasonable force. If she exceeds that limit, she can be held liable for battery.

11. A number of torts may have been committed by the parties.

- If Shelley in fact stole something from the store, she committed the torts of trespass to chattels and conversion against Mary.
- Shelley did not commit the tort of trespass to land merely by walking into Mary's store after school. A shopkeeper impliedly consents to customers coming onto her property. However, when Shelley later returned and threw a garbage can through the store window, she did commit the tort of trespass to land.
- Frank probably did not commit the tort of false imprisonment. Although some of his actions may have pointed in that direction, the fact remains that Shelley was not in fact imprisoned, physically or psychologically, at any time.
- Shelley may have committed the tort of assault against Mary. A resolution of that issue would require a decision as to whether or not Shelley's words, "I'll smack you silly," would have caused a reasonable apprehension of offensive bodily contact. Given the circumstances, the most reasonable interpretation of that

¹⁴ M McInnes, "Book Review of J Edelman *Gain-Based Remedies*" (2004) 39 Can Bus LJ 146.

statement might be that Shelley was not really threatening to make contact with Mary.

- It appears that Frank committed the tort of battery against Shelley. He would, however, have a defence if Shelley actually was in the act of shoplifting. In that situation, Frank would be entitled to use reasonable force to arrest and detain her.
- It should be noted that Mary would be held vicariously liable for any torts committed by Frank.

12. This case requires students to reflect upon the need for privacy and upon the difficulties associated with recognizing a tort of invasion of privacy.

The discussion must begin with the fact that the courts traditionally have been reluctant to become involved in the area. That is true for a number of reasons. (i) The courts want to protect freedom of expression and freedom of information. (ii) They are concerned about the difficulty of formulating a principle of privacy that strikes a fair balance between the competing interests. (iii) They are reluctant to award damages in favour of celebrities who seek out publicity, but then complain when they are shown in a bad light. (iv) And they find it difficult to calculate compensatory damages for the kinds of harm, such as embarrassment, that an invasion of privacy usually causes. Although some of those factors are not directly relevant in this case, the judge would have to be concerned about setting a precedent that would be applied in other circumstances.

Against that backdrop, HHF's claim in this case is not particularly strong. Most significantly, it is seeking merely to protect the privacy of its business operations. In the case upon which this case is based, the High Court of Australia rejected the company's application for an injunction. The court recognized that the common law appears to be moving in the direction of a right of privacy that can be protected through tort law. At the same time, however, the court also insisted that any such right ought to be aimed at protecting human dignity and that it ought not to be available for purely commercial purposes.

[Based on *ABC v Lenah Game Meats* (2001) 208 CLR 199 (HCA)]

CASE BRIEFS

Cook v Lewis [1952] 1 DLR 1 (SCC)—note 1

The plaintiff was hunting with the two defendants. The defendants both simultaneously and carelessly shot toward the plaintiff. The plaintiff was hit by one shot. The harmful shot was obviously discharged by one of the defendants, but the evidence could not indicate which defendant actually caused the injury.

Under the usual rule of causation, the plaintiff would be denied recovery altogether. He could not prove, on a balance of probabilities (*ie* at least 51 percent), that the first defendant was responsible. Nor could he prove, on a balance of probabilities (*ie* at least 51 percent), that the second defendant was responsible. There was an equal (*ie* 50 percent chance) that each defendant was responsible. The Supreme Court of Canada nevertheless imposed liability on both defendants. Both defendants had acted carelessly. Moreover,

their carelessness was such that they precluded the plaintiff from satisfying the usual rules of causation. The Court therefore created an exception to the usual rule.

The Court also held that the plaintiff is *prima facie* entitled to succeed in the tort of battery by simply proving that the defendant directly interfered in a harmful or offensive manner. The burden then shifts to the defendant to prove that the impugned action was neither intentional nor careless (or that some defence applies).

Malette v Shulman (1990) 67 DLR (4th) 321 (Ont CA)—note 3

A woman suffered horrendous injuries in a traffic accident and was taken unconscious to a hospital. The attending surgeon realized that she would die unless she received a blood transfusion. However, he also knew that the woman's purse contained a card that identified her as a Jehovah's Witness and that she objected to such treatment. The surgeon decided to administer the transfusion anyway. The procedure was successful and the woman recovered. Nevertheless, while she was grateful to be alive, she sued the doctor for battery. The plaintiff was awarded \$20 000 for the mental distress that she suffered as a result of receiving the transfusion. It was irrelevant that the defendant acted in her best interests and that he probably saved her life. Although the court accepted that a physician can usually presume that a person would want to receive full treatment, it also stressed the patient's right to control her own body. Accordingly, since there was no reason to doubt the authenticity of the card, the defendant could not act contrary to the plaintiff's wishes.

Hobbs v Robertson (2004) 243 DLR (4th) 700 (BC SC)—note 3

Daphne Hobbs suffered massive blood loss during a hysterectomy operation. A blood transfusion probably would have saved her life. As a Jehovah's Witness, however, she had given instructions that she did not wish to receive such treatment and signed a waiver of liability. She consequently died. Her husband and children brought an action for wrongful death under s 2 of the *Family Compensation Act*, RSBC 1996, c 126. The claim was denied. The court held that there had been medical negligence. Nevertheless, it also held that, given the patient's instructions and waiver, the doctor was not liable for failing to provide a blood transfusion.

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 459 (HCA)—note 4

The plaintiff operated a race course. It sued three defendants: (i) a neighbour who erected a high platform on his own land, (ii) a sportscaster who sat on the platform and described the events, and (iii) a radio station that broadcast those comments. The High Court of Australia rejected the claim. It held that there is no "property in a spectacle." Latham CJ further explained:

"The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make

defamatory statements, infringe the law as to offensive language, etc., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects.”

Wainwright v Home Office [2004] 2 AC 406 (HL)—note 5

Mr Wainwright was in prison. His mother and brother came for a visit. Before being allowed access, they were strip searched together in a room. The search did not follow the prison’s own guidelines. The room was open and it had an uncovered window. The two visitors were virtually naked together in the same room. And while the guards did not touch the mother, they did lift the brother’s foreskin while searching for drugs.

The mother and brother subsequently sued on a number of grounds. By physically touching the brother’s genitals, the guards committed the tort of battery. Far more significantly, however, the House of Lords rejected the claimants’ invitation to create a general tort of privacy. Lord Hoffmann recognized that “[s]trip searching is controversial because having to take your clothes off in front of a couple of prison officers is not to everyone’s taste.” He nevertheless held that, given the complexity of the issue, it would be inappropriate for the courts to intervene. Far better, he thought, to leave the matter to Parliament.

Stephens v Avery [1988] Ch 449 (Ch)—note 7

Mr Telling murdered his wife after discovering her in a “compromising position” with another woman. The identity of the “other woman” was not disclosed at the murder trial. That “other woman” was, in fact, Rosemary Stephens. Stephens disclosed that fact to her friend, Anne Avery. Avery subsequently sold that information to a newspaper that published a sensational item entitled “Rosemary’s Story.” Stephens then sued Avery and the newspaper for breach of confidence. The defendants brought a motion to strike out the statement of claim on the basis that it did not disclose a valid cause of action. The court refused to grant that order. In particular, it rejected the argument that a duty of confidence cannot be owed with respect to information concerning “sexual misconduct.”

This case therefore involved confidential information imparted within a friendship. The scope of the court’s reasoning applies *a fortiori* to information within a contractual employment relationship.

Douglas v Hello! Ltd [2001] QB 969 (CA)—note 8

Michael Douglas and Catherine Zeta-Jones, Hollywood heavyweights, were married in a lavish ceremony. They sold the right to publish wedding photos to a third party. The defendant magazine scooped that third party by rushing to print with unauthorized photos that had been taken by a paparazzo who had somehow avoided security in order to attend the affair. The newlyweds successfully sued for breach of confidence. The Court of Appeal held that since the wedding was a private ceremony, it had a sufficient air of confidentiality, and that by attending the wedding, the paparazzo became subject to a duty of confidentiality.

As the court recognized, however, the action for breach of confidence would have failed if the plaintiffs had been unable to establish a confidential relationship with the photographer (*eg* if the photos were taken with a high-powered lens from far away). Consequently, the court went on in *dicta* to suggest that such circumstances might nevertheless constitute a separate tort of mis-use of private information. That *dicta* was subsequently taken up and applied in *Campbell v Mirror News Group*.

Campbell v Mirror News Group [2004] 2 AC 457 (HL)—note 9

Naomi Campbell is a supermodel. Contrary to her own declarations, she was addicted to illegal drugs. She sought help for her addiction by attending therapy sessions with Narcotics Anonymous. The defendant newspaper published a photograph of her as she stood in a public area outside of one of those sessions. The caption that ran alongside the photo fully explained the circumstances, much to the subject's embarrassment. Campbell agreed that the defendant was entitled to contradict her earlier statements about being drug-free. She nevertheless claimed that the defendant had gone too far and she sued for mis-use of confidential information. The House of Lords found in her favour. That decision is significant because: (i) the photograph was taken while the claimant was on a public street, and (ii) the court held the defendant liable even if though the plaintiff could not establish the existence of a confidential relationship.

Athans v Canadian Adventure Camps Ltd (1977) 80 DLR (3d) 583 (Ont HCJ)—note 10

The plaintiff was a famous water-skier. He used a distinctive photograph of himself water-skiing for commercial purposes. A public relations firm copied that photo and made a line drawing out of it. It then used that drawing in a brochure that it prepared for a camp that operated summer camps for children. The brochure did not identify the plaintiff by name. Nor did it try to associate the plaintiff with the camp. The brochure was merely intended to inform the public that water-skiing was one of the activities that it provided at its camps. Nevertheless, the drawing would be recognizable as the plaintiff to a number of people.

The defendants were liable in tort for appropriating the plaintiff's personality. The reproduction of the drawing for commercial advantage was an invasion of the plaintiff's exclusive right to market his own personality. Damages were awarded for the amount that the plaintiff could have charged the defendants in exchange for his permission to use the photograph.

LR v Nyp (1995) 25 CCLT (2d) 309 (Ont Gen Div)—note 11

The plaintiff was an undercover police officer who had been sexually assaulted during an investigation. At the trial of the accused criminal, the court imposed a publication ban that prohibited the media from disclosing the plaintiff's identity. The defendant publisher chose to ignore that ban. It printed a story, written by the defendant reporter, that named the plaintiff and gave specific details of the offence. The court held that the defendants were liable for the tort of negligence. A newspaper has a duty of care to treat victims of sexual assault in a sensitive manner. The plaintiff was awarded compensatory damages of \$12 000. Furthermore, because the defendants had deliberately ignored the publication ban, the court awarded punitive damages of \$5000.

Hosking v Runting [2005] 1 NZLR 1 (CA)—note 12

The plaintiff was a celebrity television presenter in New Zealand. He and his wife took their infant children for a walk on a busy street. The defendant snapped a picture of the family and published it in a magazine. The plaintiff sued for invasion of privacy. On the facts, the New Zealand Court of Appeal dismissed the claim on the grounds that the plaintiff had earlier courted publicity and the picture was taken on a busy street. The court nevertheless recognized in *dicta* that the time had come for the adoption of a new tort of invasion of privacy.

ABC v Lenah Game Meats (2001) 208 CLR 199 (HCA)—note 13

Lenah Game Meats (LGM) operated a slaughterhouse. An unknown person secretly installed video cameras in the abattoirs ceiling and walls. The end product was a video of the gruesome process of killing and butchering possums. That film was then passed onto an animal liberation organization, who in turn passed it on to ABC, an Australian television station. LGM applied for an injunction to prevent ABC from showing the film on television.

The application was denied on three grounds. First, the court held that although the abattoir was located on private property, the activities were not “confidential.” Second, the court held that although the video recording was made illegally (because the unknown operative had trespassed on LGM’s property), it was not “unconscionable” for ABC to broadcast the film. And third, the court held that while it might be prepared to create a new tort of invasion of privacy, any such action would be designed to protect human dignity and therefore would not be available to corporations like LGM.

Lipiec v Borsa (1996) 31 CCLT (2d) 294 (Ont Gen Div)—note 14

Jan and Irene Lipiec had lived in their house since 1961. David Borsa and Mary Novak moved into the house next door in 1984. The Lipiecs soon became obsessed with their new neighbours. When Borsa and Novak began to renovate their backyard, the Lipiecs removed a fence that had separated the properties and installed a commercial quality surveillance camera that continuously monitored Borsa and Novak’s backyard. Borsa and Novak proved that their enjoyment of their backyard was completely ruined. While the judge was reluctant to impose liability for surveillance alone, he cited Fleming *The Law of Tort* (8th ed 1992) at 604 for the proposition that “there is considerable authority which could support redress for overlooking or spying on the others for the sole purpose of causing annoyance.” He therefore awarded damages of \$3000.

Caltagirone v. Scozzari-Cloutier (Unreported, 21 Sept 2007, Ont SCJ)—note 15

A young man named Orazio Caltagirone was HIV positive. He also was diagnosed with cancer. Although he was unprepared to tell his parents or immediate family of the former condition, he did disclose his HIV to his aunt. She realized that that communication was confidential. Nevertheless, while subsequently engaged in an argument with the young man’s mother, the aunt callously revealed the information with the intention of causing as

much psychological pain as possible. In time, the young man's HIV positive status became known in his neighbourhood.

The young man sued his aunt for, *inter alia*, breach of privacy. Criger DJ found “no case which sets out principles which might form a framework for a tort of breach of privacy.” And in “the absence of binding principles,” he believed himself free to develop the law on his own. Because it provides a possible model for future development, the reasons are worth quoting at length.

14 Anything which involves the regulation of information flow also involves a balance between competing private and public interests. Even the most private of information (e.g. one's HIV-positive status) must sometimes be disclosed (e.g. to a public health agency) in the service of a broader public good.

15 Some examples of private interests in information are:
a. keeping sensitive information confidential
b. freedom from harassment or nuisance, caused by persons misusing private information
c. profit from use of the information.

16 Some examples of public interests in information are:
a. public health interests
b. criminal investigation interests
c. interests related to the civil legal process, e.g. discovery interests
d. public information interests, e.g. news reporting.

17 Not all information about a person is private. To be protected, information must be of a kind that a reasonable person would accept as private: one's credit history (*Somwar*); one's telephone records (*Shred-Tech*); the content of a conversation taped without the speaker's consent (*Saccone v. Orr*); or one's health status (this case). The test is objective.

18 Once information is characterized as private, the Plaintiff's right to maintain privacy must be balanced with any legal process reason or public interest reason the Defendant raises for acquisition or collection of such information. If there is no legal process or public interest reason for acquisition or collection, then the Plaintiff's privacy interest should be energetically protected. If there is a legal process or public interest reason for collection or acquisition, then the degree of protection afforded to the Plaintiff's privacy interest decreases, as the importance of the legal process reason or public interest reason for collection or acquisition increases.

19 The same balance is present with respect to disclosure or publication of private information. I consider them separately, as acquisition and disclosure occur separately, sometimes widely separated in time. Legitimate acquisition can occur, followed by non-legitimate disclosure, either by the same actor, or by different actors.

20 In the absence of a legal process or public interest reason which outweighs the individual's interest in keeping his or her own information private, information about the individual which a reasonable person would consider private should be accessible to no one without the individual's informed consent. This appears to be the overall theme of the statutes already in place.

21 With this preliminary framework in mind, the tort could be structured through answers to the following questions:

1. Is the information acquired, collected, disclosed or published of a kind that a reasonable person would consider private?
2. Has the Plaintiff consented to acquisition or collection of the information?
3. If not, has the information been acquired or collected for a legal process or public interest reason? If so, what is that reason?
4. Has the Plaintiff consented to disclosure or publication of the information?
5. If not, has the information been disclosed or published for a legal process or public interest reason? If so, what is that reason?
6. Is the legal process or public interest reason put forward for acquisition, collection, disclosure or publication one that a reasonable person would consider outweighs the interest of the individual in keeping the information private?

22 If, at the end of the analysis, one finds either no legal process or public interest reason for acquisition, collection, disclosure or publication of the information, or the legal process or public interest reason is outweighed by the private interest, then an actionable breach of privacy has occurred.

On the facts, the trial judge found that the defendant aunt had violated the plaintiff nephew's privacy. He nevertheless denied liability. Although the claimant suffered a nervous breakdown during the period in question, Criger DJ (somewhat surprisingly) found that the defendant's tort did not rise above the *de minimis* level in terms of causation.

Regardless of whether or not liability was warranted on the facts, the decision is controversial for two reasons. First, recognition and formulation of a new tort of invasion of privacy might be expected to be undertaken at a more senior level of court. Second, while it is not clear why the case was not pleaded in breach of confidence, the trial judge's test for the purported new tort of invasion of privacy substantially overlaps with that action. It will be necessary, in the future, for the courts to clarify the relationship between those two types of claim.

Heckert v 5470 Investments Ltd (2008) 299 DLR (4th) 689 (BC SC)—note 20

The plaintiff was a tenant in an apartment building. The building was owned by the defendant. Because it suspected that the plaintiff's apartment was being used for drug

dealing, the defendant installed a video surveillance camera in the hallway outside the plaintiff's apartment, but not elsewhere in the building. The plaintiff's apartment door consequently was constantly monitored. The suspicious activity stopped and undesirable people no longer were loitering in the building. The plaintiff, however, sued the defendant under British Columbia's *Privacy Act*. The court held that although the apartment building hallway was a public space, the plaintiff had a reasonable expectation of privacy and the defendant had a corresponding duty. That duty was willfully breached. The court explained that the defendant's actions were excessive and placed an unreasonable burden upon the plaintiff. Damages were assessed at \$3500.

Wasserman v Hall (2009) 87 RPR (4th) 184 (BC SC)—note 20

The parties were neighbours in a rural area. The defendant began to build a fence between the two properties. The plaintiff suspected — correctly — that the fence encroached upon his property. The defendant refused a request to move the fence posts. The relationship then deteriorated. The plaintiff installed surveillance cameras, ostensibly to monitor the fence construction, but in effect to harass the plaintiff. A court held that the defendant's use of the cameras was a willful violation of the plaintiff's right to privacy under British Columbia's *Privacy Act*. Although there was no reasonable expectation of privacy along the fence line, some of the cameras captured images of the plaintiff's yard and house. Damages were assessed at \$3500.

Chaytor v London, New York & Paris Assoc of Fashion Ltd (1961) 30 DLR (2d) 527 (Nfld SC TD)—note 21

The plaintiff worked for a department store. She entered the premises of the defendant, which operated a competing department store, for the purposes of "comparison shopping" (*ie* she was trying to determine how much the defendant was charging on certain products). The defendant's manager noticed her, accused her of being a "spy," and directed a police officer to arrest her. The plaintiff "voluntarily" accompanied the police to the police station and was detained for about 15 minutes. She then sued the defendant for false imprisonment.

The trial judge held that there was a "psychological" imprisonment. Although the defendant argued that the plaintiff "voluntarily" went to the police station, the evidence indicated that she did so only in order to avoid public embarrassment.

The case is also useful insofar as it demonstrates that calling the police will not always protect a store from liability. The defendant was liable for false imprisonment because it "ordered" the police to arrest the plaintiff.

Naujokaitis v Dylex Ltd (Unreported, 17 March 1982, Ont Co Ct)—note 22

The plaintiff, a young woman, went shopping with her mother at Fairweather's clothing store. When she entered the store, a theft alarm at the front of the store set off an alarm. The plaintiff noticed two security guards looking at her, but she did not otherwise stop at that time. The claimant and her mother did not buy anything at the store. When they left the premises, the alarm once again sounded. Several steps outside of the store, a security guard tapped the plaintiff on the shoulder and asked her to return. She briefly considered

refusing the request, but ultimately felt like she had no choice. Once inside the store again, the woman complied with a series of requests to hold open her coat, empty her purse, and walk through the detection device. A police officer stood nearby, but did not intervene in the episode. It eventually was determined that the alarm was triggered because the plaintiff's coat, which had been purchased several weeks earlier at another store in the same chain, still contained a security tag.

The plaintiff sued for false imprisonment. While recognising that some of the facts supported liability, the trial judge ultimately dismissed the claim on the ground that the plaintiff had voluntarily complied with the security guards' requests. The judge was particularly influenced by the facts that (1) the plaintiff was never expressly accused of any crime, (2) the plaintiff knew that the alarm had been set off when she earlier *entered* the store, (3) there was no evidence that the security guards would have prevented any attempt by the claimant to escape.

Valderhaug v Libin (1954) 13 WWR 383 (Alta CA)—note 23

The plaintiff bought a radio at the defendant's store. In payment, he provided a trade-in and a cheque for \$75. The bank refused to honour the cheque because it was poorly drafted (*eg* the writing was illegible and the account number was not inserted). The defendant then informed the police that the plaintiff had committed a crime of fraud by creating an ineffective cheque. Some time later, however, the defendant received information from the bank that indicated that the defective nature of the cheque was attributable to sloppiness, rather than wrongdoing. He nevertheless failed to contact the police to rescind his earlier complaint. The police therefore arrested the plaintiff and detained him for several hours. Upon his release, the plaintiff sued the defendant for false imprisonment. The court allowed that claim. First, by the time of the actual arrest, the defendant could not have had any reason to believe that the plaintiff had committed a crime. Second, although the arrest was made by the police, they acted on the defendant's directions. This was not a case in which the defendant simply provided facts to the police and then allowed them to exercise their own judgment, after an investigation, as to the plaintiff's supposed guilt.

Lebrun v High-Low Foods Ltd (1968) 69 DLR (2d) 433 (BC SC)—note 23

The defendant store incorrectly told a police officer that the plaintiff had stolen a carton of cigarettes. The police officer stopped the plaintiff in the store's parking lot and asked to search the vehicle for stolen goods. The plaintiff "consented" and the officer found nothing. When the plaintiff subsequently sued the store, the judge held that the plaintiff's apparent consent was not the product of free choice, but rather arose only because the plaintiff believed that he had no real choice. The store was therefore liable for false imprisonment.

Roberts v Buster's Auto Towing Service Ltd (1976) 70 DLR (3d) 716 (BC SC)—note 24

The plaintiff rented a car. The defendant company towed that car to its compound as a result of a parking violation. The plaintiff retrieved the vehicle and was about to exit the defendant's lot. The defendant's employee, however, pushed a button to close a gate. Both the car and the gate were damaged in the accident that followed. A short time later,

the defendant's employee swore out information to the effect that the plaintiff had *wilfully* damaged the gate. The employee in fact had no reason to believe — and did not truly believe — that that was true. The false allegation nevertheless resulted in the plaintiff being arrested by the police and charged by the prosecutor.

The plaintiff was eventually cleared of any criminal wrongdoing, and the defendant was held liable for both false imprisonment and malicious prosecution. The false imprisonment occurred because the defendant's employee closed the gate and prevented the plaintiff from leaving the lot. The malicious prosecution occurred because the defendant's employee maliciously lied to the police in order to cast blame onto the plaintiff, and because the plaintiff was later acquitted of the alleged crime.

McNeil v Brewers Retail Inc (2008) 66 CCEL (3d) 238 (Ont CA)—note 24

Suspecting that one or more of its employees was guilty of theft from its store, the defendant corporation set up a complicated and secret surveillance camera system. The system recorded images of the plaintiff that were both inculpatory and exculpatory. For example, the plaintiff was seen taking money from a cash register and later returning money to the till. On the basis of that information, the company reported the plaintiff to the police. Because the surveillance equipment was complicated, and because neither the Crown nor the police were able to operate it for themselves, they relied upon the footage and summaries provided by the defendant company. The authorities therefore never knew of the exculpatory materials. The plaintiff was duly convicted of theft and fired from his job.

The plaintiff subsequently filed a grievance regarding the termination of his job. During that process, he discovered the exculpatory footage. He relied upon that information in both successfully appealing his conviction and suing the defendant for malicious prosecution. The case was successful and the defendant was held liable for over \$2 000 000.

The court found that (1) the defendant had deliberately concealed the exculpatory information for over a decade, (2) the police and Crown, as the defendant knew, could not, through due diligence, discover the information by themselves, and (3) in the circumstances, the police did not conduct an “independent investigation,” but rather acted on the defendant's instructions or information.

Correia v Canac Kitchens (2008) 294 DLR (4th) 525 (Ont CA)—note 25

Because the defendant company suspected that some of its employees were involved in theft and drug trafficking, it hired a private investigation firm called Aston Associates Investigations Ltd. Aston placed an undercover agent in the workplace. After investigating, the agent reported that a worker named “Jaoa Corriero” or “Jaoa Carriera” was the culprit. At that point, the plaintiff, Jaoa Correia, was called into a manager's office, accused of theft, and fired. He was then taken to another office, where he was handed over to the police, who arrested him.

The authorities eventually realized that the private investigation firm had committed a series of errors that resulted in the plaintiff, a 60-year-old, being confused for 20-year-old Jaoa Carriero. The young man may have been the real culprit, but the much older plaintiff certainly was innocent of any wrongdoing. As a result of the error, the plaintiff suffered major depression and was unable to accept the employer's offer of reinstatement.

The plaintiff then started a number of actions against his former employer, the private investigations firm, the police, and several individuals. An important preliminary question concerned the availability of the tort of negligent investigation against the ex-employer and the private firm.

In 2007, in *Hill v. Hamilton-Wentworth Regional Police Services Board*,¹⁵ the Supreme Court of Canada held that a police force may be liable if its negligent investigation causes a suspect to suffer a loss. In *Correia v Canac Kitchens*, the Ontario Court of Appeal held that the new tort extends to those parties as well.

As the private sector becomes more and more involved in activities that were traditionally within the sphere of public policing, the greater the likelihood that their negligence could lead to wrongful arrests and even convictions. We see no incoherence in requiring a private investigator to be careful in its investigation; surely the client would expect nothing less from the investigator.¹⁶

Significantly, however, the Ontario Court of Appeal held that the new tort does *not* apply to employers. It reached that conclusion on two grounds.

- The Court of Appeal was concerned that recognition of such a duty might have a “chilling effect” on employers who suspect employee misconduct and otherwise would be inclined to call in the police.
- The court also found that recognition of a duty of care would be inconsistent with the nature of the employment relationship. As explained by the Supreme Court of Canada in *Wallace v United Grain Growers Ltd.*,¹⁷ it is important to safeguard the right of both parties to terminate the employment relationship without intolerable fear of liability. Accordingly, while an employer must provide reasonable notice, or payment in lieu, the courts have refused to impose a duty of good faith dismissal. The court in *Carriea* concluded that a tort obligation to carefully investigate would upset the sensitive balance that has been struck between the competing interests.

The plaintiff's action for negligent investigation against his former employer therefore was dismissed at a preliminary stage. The Court of Appeal nevertheless did allow him to proceed with a number of other claims, including an allegation of intentional infliction of mental distress against both his former employer and the person who served as head of human resources.

Nelles v Ontario (1989) 60 DLR (4th) 609 (SCC)—note 26

¹⁵ (2006) 285 DLR (4th) 620 (SCC).

¹⁶ (2008) 294 DLR (4th) 525 at 551 (Ont CA).

¹⁷ (1997) 152 DLR (4th) 1 (SCC).

The plaintiff was charged with first degree murder in the deaths of four babies at the Hospital for Sick Children in Toronto. After a lengthy and extremely well-publicized preliminary hearing, all of the charges were dropped against her because of a lack of evidence. She sued a number of police officers, the Ontario Attorney General and the Crown for a number of torts, including malicious prosecution. On a preliminary motion, the lower courts struck out that claim on the ground that the defendants enjoyed an absolute immunity from the threat of liability. The case was further appealed to the Supreme Court of Canada. That court formulated the four requirements that appear in the text. And on the facts of the case, it held, in a break with the past, that while the Crown itself enjoys an absolute immunity, the Attorney General does not. The claim was therefore allowed to proceed against that individual.

Kvello Estate v Miazga (2009) 313 DLR (4th) 330 (SCC)—note 26

Three siblings made allegations of horrific sexual abuse against their foster parents, their biological parents, and their mother's boyfriend. Although the evidence was frail and the allegations turned largely on the children's credibility, the Crown prosecutor decided to proceed to trial. The biological parents and the mother's boyfriend were convicted at trial. The foster parents entered a plea under a plea bargain after being urged by the judge to spare the children the torment of further testimony. The convictions were upheld by the Saskatchewan Court of Appeal, but overturned by the Supreme Court of Canada.

The children recanted their allegations several years later. The foster parents, having previously entered into a plea bargain agreement, sued for malicious prosecution against the investigating police officer, a child therapist, and the Crown prosecutor. All of the defendants were held liable at trial. The judge found that the children's initial allegations of abuse were so outrageous and absurd that no reasonable person—including a Crown prosecutor—could have believed them. The prosecutor therefore was deemed to have acted maliciously.

The police officer did not appeal and the liability of the child therapist was set aside on appeal. The current proceedings concern the Crown prosecutor's appeal. By a majority, the Saskatchewan Court of Appeal found that the trial judge erred in various ways, but upheld his decision on the ground that the Crown prosecutor could not possibly have held a subjective belief that the children's story was true. The dissenting judge, in contrast, held that liability for malicious prosecution cannot be based on a simple finding that the defendant could not have believed the truth of the allegations. Liability instead was said to require proof of a prosecution for an improper purpose or motive. The dissenting judge also pointed out that the children's allegations—which the trial judge and majority in the Court of Appeal deemed to be so patently absurd as to be unbelievable—had in fact been believed by a number of judges during the earlier criminal proceedings.

The Supreme Court of Canada set aside the Crown prosecutor's liability to the foster parents. The court stated that while a subjective/objective assessment of the defendant's culpability is appropriate in an action of malicious prosecution between private citizens, an objective standard was appropriate with respect to Crown prosecutors. Since prosecutors act solely in the public interest, their subjective feelings should be irrelevant.

Liability therefore turns on an objective assessment as to whether there were reasonable grounds to prosecute. The court also stressed, however, that Crown prosecutors must have a broad discretion in deciding whether or not to bring criminal charges to court.

Martin v Berends [1989] OJ No 2644 (Ont Prov Ct)—note 27

An express bus ran from York University to Wilson Avenue in Toronto. As the defendant knew before getting on the bus, there were no scheduled stops along the way. He nevertheless insisted upon being let off the bus part way through the journey, closer to his final destination. When the driver refused, a scuffle ensued. The bus driver subsequently sued for battery. The defendant attempted to avoid liability by arguing that he had a right to dis-embark, and that since the driver would not allow him to do so, he had committed the tort of false imprisonment. The court rejected that argument. In the absence of an emergency, the driver was within his rights to refuse to make an unscheduled stop. The defendant was therefore liable for battery.

Herd v Weardale Steel, Coal & Coke Co Ltd [1915] AC 67 (HL)—note 28

The plaintiff worked in the plaintiff's coal mine. As a result of a contractual dispute the plaintiff refused to complete a shift and demanded that he be lifted out of the mine and back to the surface immediately. The defendant refused to do so, but relented twenty minutes later. The plaintiff sued for false imprisonment. The court refused liability. By entering into the employment contract, the plaintiff had agreed to remain underground until the end of his shift. His detention in the mine therefore was not without authority.

Hayward v FW Woolworth Co Ltd (1979) 98 DLR (3d) 345 (Nfld SC TD)—note 32

The plaintiff left the defendant's store with a watch in his pocket. He was apprehended by the defendant's employees, who accused him of theft. They subsequently released him, however, when he produced a sales receipt. Although the evidence was very confusing, the trial judge held that there was no proof that the plaintiff had actually stolen the watch. The judge also held that the defendants were liable for false imprisonment. They could have avoided that result only by proving that the plaintiff had committed a crime and that they had acted in the reasonable belief that that offence had occurred.

Bahner v Marwest Hotel Ltd (1969) 6 DLR (3d) 322 (BC SC)—note 36

The plaintiff was entertaining friends at the defendant's restaurant. At 11:30 pm, the waiter asked the plaintiff if he wanted another bottle of wine. The plaintiff said yes. The waiter then brought a bottle to the table and opened it. At 11:50, the waiter informed the plaintiff that, by law, the bottled had to be consumed by midnight. The plaintiff said that that was impossible and he refused to pay. When the plaintiff tried to leave, the restaurant's security officer detained him. The plaintiff offered to leave his name, but the restaurant insisted on calling the police. The plaintiff was then taken to the police station and temporarily detained. Upon his release, he sued the defendant for false imprisonment. That claim was successful. The restaurant had no right to detain him merely because he refused to pay for the wine.

Interestingly, the police officer was also held liable for a separate false imprisonment. The officer quickly realized that the plaintiff had not committed the crime of obtaining

goods by false pretences, as the restaurant alleged. The officer nevertheless detained the plaintiff on the grounds of intoxication. The officer knew that that charge was entirely groundless. He therefore was liable for compensatory damages and punitive damages.

Perry v Fried (1972) 32 DLR (3d) 589 (NS SC TD)—note 36

The plaintiff was a customer in the defendant's restaurant. A waitress removed a number of unconsumed drinks from the table at 2:30 am, as required by law. The plaintiff refused to pay for those drinks when presented with the bill. He tried to leave the premises after giving his name and address to the defendant. He was prevented from doing so by one of the defendant's security personnel. Furthermore, the defendant called the police and directed them to arrest the plaintiff. The police did so. The court held both the defendant restaurant and the arresting officer liable for false imprisonment. It was clear to both defendants that the plaintiff had not committed the criminal offence of obtaining goods by false pretences. The court said that there is no grounds for arrest when a customer simply disputes the legitimacy of a bill.

Davidson v Toronto Blue Jays Baseball Ltd (1999) 170 DLR (4th) 559 (Ont Gen Div)—note 39

The plaintiff bought a ticket to see the Blue Jays in the SkyDome. During the game, he left his seat and visited a restaurant in the stadium. When he left the restaurant and tried to return to his seat, he was asked to show his ticket. He refused. The dispute escalated. He was then arrested by an off-duty police officer. That arrest purportedly occurred under the *Trespass to Property Act*. That Act states that an offence is committed if a person who is "not acting under a right or authority conferred by law" refuses to leave a property after being asked to do so.

The plaintiff subsequently sued the baseball team for false imprisonment. The key question was whether the plaintiff had a right to remain in the premises without showing his ticket. If so, his action would succeed. The judge held that the plaintiff's rights were governed by the contract that was created when he purchased his ticket. Under the terms of that contract, the plaintiff received a licence to be in the SkyDome during the game. An express term of that contract stated that the licence could be revoked if the ticketholder broke any law. There was no evidence that the plaintiff had done so. The contract also carried an implied term that the ticketholder was required to show the ticket when entering the building, when initially taking a seat, and in the event of a dispute with another patron regarding the same seat. None of those situations had arisen. The plaintiff therefore was legally entitled to remain in the building for the duration of the game. He was not under any obligation to show his ticket upon demand. The defendant did not have the right to revoke his licence arbitrarily and at will.

Atlantic Aviation Ltd. v NS Light & Power Co (1965) 55 DLR (2d) 554 (NS SC)—note 38

The plaintiff land owner complained that the defendant's flights occurred overhead. The court held that the defendant technically committed a trespass, but withheld liability on the basis of an implied license to fly at a reasonable height and for a legitimate purpose in a way that did not cause damage.

Austin v Rescon Construction (1984) Ltd (1989) 57 DLR (4th) 591 (BC CA)—note 38

In order to support its building, the defendant inserted three metal rods, at unspecified depths, into the ground beneath the plaintiff's land. The insertion caused some vibration, but the plaintiff suffered no loss or damage as a result of the trespass. The court imposed liability on the defendant and awarded \$30 000 in damages. That award reflected the fact that the plaintiff was absolutely entitled to determine what happened to his land and was not required to compromise with the defendant's plans or intentions.

Bocardo SA v Star Energy UK Onshore Ltd [2011] AC 380 (UK SC)—note 38

The plaintiff company is owned by Mohammed Al-Fayed. He is the billionaire proprietor of Harrod's in London, and it was his son, Dodi, who was with Princess Diana when she was killed. The plaintiff company owned a luxury estate in Surrey. In the course of a drilling program, the defendant oil company, from a neighbouring property, drilled a pipeline beneath the plaintiff's land. The plaintiff suffered no loss or damage. The trial judge found a trespass and awarded £620 000 in punitive damages. That amount was reduced to £1 in the Court of Appeal. The new United Kingdom Supreme Court (successor to the House of Lords) affirmed the Court of Appeal's decision. The Supreme Court did not support the giant carrot theory, but it did find that the defendant's actions occurred within the "reasonable depth" to which the plaintiff was entitled to assert a proprietary interest.

Harrison v Carswell (1975) 62 DLR (3d) 68 (SCC)—note 40

The accused was employed by a store that was located in Polo Park Shopping Mall in Winnipeg. The accused became involved in a labour dispute with her employer. She therefore tried to picket within the mall. The owner of the mall objected to the picket and charged her under the *Petty Trespass Act* when she refused to stop. An offence was in fact committed unless the accused had a legal right to picket within the mall. A majority of the Supreme Court of Canada held that she had no such right. The owner of a mall issues an unrestricted invitation for people to visit the premises. Nevertheless, under traditional property rights, it also retains the ability to control activities on its premises and to exclude trespassers. It was irrelevant that the accused was involved in a labour dispute with her employer. Although traditional property rights could be modified so as to allow picketing in such circumstances, that change had to be introduced by the legislature. A court is not in a position to properly weigh the competing social values.

Russo v Ontario Jockey Club (1987) 46 DLR (4th) 359 (Ont Hcj)—note 41

Barbara Russo was an exceptionally skilled bettor. She had won a great deal of money at horse race tracks operated by the defendant. One day while she was at Woodbine Race Track in Toronto, she was served with a notice by the defendant. That notice required her to leave the premises and further said that if she returned to any of the defendant's properties, she would be charged as a trespasser. Russo brought an action to determine the legality of that notice.

The court held that the defendant, as the owner of private property, had an "absolute right," at common law and under the *Trespass to Property Act*, to refuse entry to anyone.

The court also rejected Russo's claim that the defendant's actions violated her rights under s 15 of the *Charter*. That argument was rejected on the basis that the case did not involve any government action. It was simply a dispute between two private parties (even though the defendant operated its betting business by virtue of a statute).

Aspden v Niagara (Regional Municipality) Police Services Board [2005] OTC 187 (Ont SCJ)—note 42

The plaintiff attended the "Event in the Tent" during the Niagara grape and wine festival. After she had become drunk, she left the tent to get some air. While she was out there, she noticed a large sign that said "NO RE-ENTRY." When she tried to re-enter the tent, an off-duty police officer, who had been hired by the event organizers as security, prevented her from doing so. A few moments later, when the officer's attention was distracted, the plaintiff sneaked back into the tent. The officer then arrested and handcuffed her before taking her to the police station. At the station, she fell and suffered facial bruises and chipped teeth. She sued the police officer and the event organizer.

The court held that the plaintiff became a trespasser when she re-entered the tent without permission. The officer was then entitled, on the organizer's behalf, to ask her to leave and, if she refused to do so, to arrest her under the *Trespass to Property Act*. If the officer had followed that procedure, then the subsequent events would have been lawful and the plaintiff's claim would have failed.

The court imposed liability, however, because the plaintiff was never given an opportunity to voluntarily leave the premises after being ordered to do so. As a result, the arrest and detention were unlawful and she was entitled to damages for her injuries.

Canadian Orchestrphone Ltd v British Canadian Trust Co [1932] 2 WWR 618 (Alta CA)—note 48

The plaintiff owned certain equipment that was in the possession of a debtor. The debtor became bankrupt. The defendant was appointed as trustee in bankruptcy and in that capacity acquired control over property in the debtor's possession. The plaintiff demanded recovery of the equipment from the defendant. The defendant refused. The plaintiff then sued for conversion.

The court discussed the rules that determine whether or not a conversion has occurred. It held that a tort is *not* committed every time that one person simply exercises control over another's property. At the same time, it also held that it is not necessary for the plaintiff to prove that the defendant actually purported to exercise ownership. The key question is whether the defendant has acted in a way that was inconsistent with the plaintiff's right of ownership. The plaintiff satisfied that test on the evidence. While the defendant, as trustee in bankruptcy, was entitled to temporarily retain all of the property in the debtor's possession, it was not entitled to maintain that position by insisting that the plaintiff had no right to the equipment.

Nilsson Bros Inc v McNamara Estate [1992] 3 WWR 761 (Alta CA)—note 51

The facts are substantially similar to those that appear in Ethical Perspective 4.1.

R v McSorley 2000 BCPC 116 (BC Prov Ct)—note 56

During an earlier stage of a game, Marty McSorley, a player with the Boston Bruins, fought with Donald Brashear, a player with the Vancouver Canucks. Brashear taunted McSorley after that altercation and otherwise riled his opponents. Late in the game, McSorley, having grown frustrated, approached Brashear from behind and swung his stick, baseball bat style, until it connected with Brashear's head. Brashear fell heavily to the ice and suffered a concussion. McSorley was suspended by the NHL and criminally charged.

In entering a conviction, Kitchen J, of the British Columbia Provincial Court, observed that players and officials are guided not only by the official rule book, but also by a set of informal rules. Those rules indicate that fighting, under certain circumstances, is a well-accepted part of hockey, to which participants consent.

The judge, however, also observed that there are rare instances in which violent behaviour transcends the formal and informal rules of the game. In those situations, the assailant's conduct is not subject to consent. Brashear, in this case, did not voluntarily agree to the risk of being hit in the head with a hockey stick from behind. Although that conclusion was reached in criminal proceedings, the same would be true in a tort case.

R v Bertuzzi (2004) 26 CR (6th) 71 (BC Prov Ct)—note 56

During an earlier game, Steve Moore, of the Colorado Avalanche, injured Markus Naslund, of the Vancouver Canucks, with a clean check. When the teams next met, Todd Bertuzzi, Naslund's team mate on the Canucks, sought revenge by fighting Moore. Moore declined the invitation. Bertuzzi consequently attacked Moore from behind, without warning, with a punch to the head, Moore fell to the ice and suffered significant head injuries.

Bertuzzi was convicted of criminal assault, but because of his "good character," he received a conditional sentence. In entering that conviction, the trial judge observed that Bertuzzi's actions "clearly went beyond the reasonable limits of the game," and were not subject to Moore consent.

Moore has sued Bertuzzi, and several other members of the Canucks organization. That case has not yet been resolved.

Wackett v Calder (1965) 51 DLR (2d) 598 (BC CA)—note 58

The plaintiff, being drunk and aggressive, repeatedly insulted, provoked, and struck out at the defendant. The defendant responded with physical force. In the course of explaining the right of self-defence, the court insisted that excessive force was impermissible, but also said that a person under attack "is not required to 'measure with complete nicety' the force necessary to repel the attack." Although the trial judge awarded damages against the defendant, the appellate court reversed that decision.