

# CLAW 122 Notes

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## Chapter 1: Risk Management And Sources Of Law

- ✓ Why study law?
  - § Law can both hurt and help a business
  - § **Contract:** a legal concept that allows people to create enforceable promises
- **Risk management:** the process of identifying, evaluating, and responding to the possibility of harmful events (Example on Pg.3)
  - § Legal education plays a critical role in risk management
  - § Strategies for certain circumstances:
    - **Risk avoidance:** Risks that are so serious that they should be avoided altogether i.e. Defects in automobiles that need to be recalled
    - **Risk reduction:** risk that can be reduced to an acceptable level through precautions i.e. Bank that mortgages instead of lending \$500,000 to manufacturer because it realizes that the loan may not be repaid if the economy goes into a recession
    - **Risk shifting:** two types (*insurance and exclusion clauses*), involves shifting responsibility to another third-party i.e. Hiring independent workers to operate the crane so that in case of accident, the independent worker is the one who is liable
    - **Insurance:** a contract in which one party agrees, in exchange for price, to pay a certain amount of money if another party suffers a loss
      - § Two types of insurances (Liability insurance and Property insurance), millions of people in CAN buy insurance but only a fraction is used, this spreads out the cost of the liability over the entire group
    - **Exclusion or limitation causes:** contract with clauses that may attempt to exclude all risk of liability, or it may exclude liability for certain types of acts or certain types of losses, or it may limit the amount of compensation that is available
    - **Risk acceptance:** when it is appropriate to simply accept the risk
    - **Incorporation:** used for the significant benefit of Limited liability where in case of a lawsuit, the company is held liable and not the individual shareholders, employees, directors etc.
  - Risk management is not required you to be a lawyer but it may require you to hire a lawyer
  - Some businesses have a in-house counsel in which they are a permanent legal department and are readily available at any time
- ✓ Introduction to the legal system
  - Nature of law
    - § It is difficult to distinguish the difference between moral obligations and legal obligations
    - § **Law:** A rule that can be enforced by the courts
  - A Map of the law
    - § In Canada, it is necessary to distinguish between civil law and common law
    - § **Civil law:** Systems trace their history to ancient Rome
    - § **Common-law:** Systems trace their history to England
    - § **Jurisdiction:** A geographical area that uses the same set of laws

- Québec has a different jurisdiction from the rest of Canada, however they do have the same criminal and constitutional laws as the rest of Canada
- § Fig 1.1 (Pg. 8) represents the CDN common law system
- 1. **Public Law:** concern with governments and the ways in which they deal with their citizens
  - This includes constitutional, administrative, criminal and tax laws
  - **Constitutional law:** provide the basic rules of our political and legal system
    - § Determine who is entitled to create and enforce laws, and establishes the fundamental rights and freedoms that Canadians enjoy
  - **Administrative Law:** concern with the creation and operation of administrative agencies and Tribunals
    - § When the company creates agencies to deal with certain issues such as the human rights Tribunal to handle human rights issues
    - § Fig 1.2 (Pg. 9) lists different admin bodies affecting businesses
  - **Criminal law:** deals with offenses against the state
    - § White-collar crime is when a businessman steals money from the business
    - § Corporate crime occurs when companies adopt a policy that is guilty of fraud i.e. rolling back odometers on vehicles in a used auto dealership
  - **Tax law:** concern with the rules are used to collect money for the purposes of public spending
- 2. **Private law:** concerned with the rules that apply in private matters
  - Private law can also be applied to the government
  - Pvt. Lives using divided into three main parts: *law of torts, law of contracts and the law of property*
  - **Tort:** a private wrongdoing
    - § Three categories (1) *intentional torts i.e. assault* (2) *business torts i.e. conspiracy and* (3) *negligence i.e. when one person carelessly hurts another*
  - **Law contracts:** concerned with the creation and enforcement of agreements
    - § Contracts that involves: (1) *sale of goods* (2) *negotiable instruments i.e. cheques* (3) *real estate transactions* (4) *operation of corporations* (5) *employment relationship*
  - **Law property:** concerned with the acquisition, use, and disposition of property
    - § Divided into three categories: (1) *real property i.e. Land and things that are attached to the land* (2) *personal property i.e. items that can be moved from one place to another* (3) *intellectual property i.e. ideas*
    - § Law of succession –deals with that distribution of a person property after death (I.e. will)
    - § Law of trust –deals with a situation in which one person holds property on behalf of another
- 3. Overlap
  - Single event can trigger more than one set of rules and liabilities
  - Some situations involve of various types of multiple laws
- ✓ Sources of law
  - § There are three sources: constitution, legislation and the courts
  - **Constitution:** the document that creates a basic rules for Canadian society, including its political and legal systems
    - § Most important source of law
    - § Provides the foundation for everything else has two significant consequences
      1. First, every other law in the country must be compatible with it

- Section 52 of the Constitution states: *"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."*
- 2. Second, the Constitution is very difficult to change
  - Constitution can only be changed to a special *amending formula*
  - This requires the consent of Parliament plus the legislature of at least two thirds of the provinces, where those consenting provinces represent at least 50% of the country's population
  - Changes in constitutional amendments are rare
- *Division of Powers* –Canada is a country with two levels of government (Concept summary Pg. 13 shows the division of powers)
  - § Federal –Parliament of Canada governs the country as a whole
    - It is composed of two parts, the House of Commons which consists of members of Parliament (MPs) and the Senate consisting of Senators
    - The queen of England remained our head of state
  - § Provincial and territorial –politicians who are elected by Canadians to represent them within their own provinces and territories
  - § Living in Canada, you are subject to two sets of law: the federal and provincial laws however is generally one law to reduce confusion
  - § **Division of powers:** States that areas in which each level government can create laws
  - § **Residual power:** gives the federal government authority over everything that is not specifically mentioned
  - § Ultra Vires (Beyond the power) –when the government tries to create laws outside of its own area but not really laws at all because they are "no force or effect"
  - § **Doctrine of federal paramountcy:** determines which law is preeminent based on the Constitution division of powers (Basically if the court finds two statutes that are conflicting, they decide which one should be used)
- *Charter of Rights and Freedoms* (Pg. 15)
  - § Part of the Constitution
  - § The Charter protects a large number of rights and freedoms
  - § Charter does not contain property rights or economic rights
  - § **Property rights:** Rights to enjoy property
  - § **Economic rights:** Rights to carry on economic activities
  - § Charter excluded property rights because they believed it would give the government little control on the ability to protect the environment, regulate the use of property, control resource-based industries, or restrict foreign ownership of Canadian land
  - § They also worried that economic rights would allow the wealthy individuals to frustrate the government policies aimed at helping the less fortunate
  - § There are restrictions that revealed a great deal about the Charter's role in society are:
    - *Government action* –the charter of rights and freedoms have full effect only if a person is complaining about the government behavior
    - *Corporations* –the charter generally does not apply against private corporations but it does not apply in favor of them either rather it depends on the circumstances
    - *Reasonable limits* –section 1 of the charter states "such reasonable limits prescribed by the law as can be demonstrably justified in a free and democratic

society. "This states that it is occasionally acceptable to violate a person's rights (i.e. closing down a porn shop because it sold violent pornography which was degrading, dehumanizing and harmful to women)

- *Notwithstanding clause* –section 33 may allow Parliament or a legislature to create and enforce a law notwithstanding the fact that it violates the charter (**Rarely used**)
- *Charter remedies*
  - § Declaration –when the court declares that the charter has been violated
  - § Injunction - the court takes a more active role and imposes an injunction that requires the government to address the problem in a certain way
  - § Striking down –when the court may strike down or eliminate a statute that violates the charter
  - § Severance, reading down, reading in –A court may save a statute by rewriting part of it that is offensive
  - § Damages –when the plaintiff who wins a private lawsuit usually receives damages for injuries or losses
  - § **Parliamentary supremacy:** means that while judges are required to interpret constitutional and statutory documents, they must also obey them
- **Legislation:** laws created by Parliament or Legislature
- *The legislative process*
  - § A bill is first introduced into the House of Commons by an MP
  - § If the majority of MPs support it, it passes the first reading, usually without much discussion
  - § It then goes for a second reading where MPs debate about it
  - § Third reading is when the MPs vote on it
  - § If the bill passes, it goes to senate where the 3 step process is repeated
  - § If all goes well, it goes to the Parliament
  - § It then goes to the Governor General (Appointed by the Queen) for final approval
- *Subordinate legislation and municipalities*
  - § **Subordinate legislation:** the term given to rules that are created with the authority of Parliament or the legislature (I.e. CRTC controlling what is shown on TV)
  - § **Municipalities:** A town or city
  - § **By-Laws:** A type of subordinate legislation that is created by a municipality
- The courts
  - § Judges must interpret and apply the words that appear in the Constitution and in legislation
- *Common Law* (Fig 1.3 Pg. 22 shows the Common Law system)
  - § Common law can refer to 3 things: (1) *System of Law* (2) *Sources of Law* or (3) *Types of Courts*
  - 1. System of Law –Quebec uses civil laws however, the rest of CAN uses a common set of laws
  - 2. Sources of Law –Refers to the rules that are created by the judges rather than the legislators or the drafters of the constitution
  - 3. Types of Courts –Court of law = Common Laws and Court of Equity = Equity
- *Law and Equity*
  - § **Equity:** A general sense, fairness
  - § Nature of equity –concept of equity no longer gives judges to make decisions about cases based on equity

## Chapter 2: Litigation and Alt. Dispute Resolution (ADR)

- ✓ The Litigation Process
  - § **Litigation:** System of resolving disputes in court
  - § Many types of issues and disputes are not taken to court, but rather to administrative tribunals
  - § Very few cases actually go to trial
  - § Fewer than 1% of private disputes are decided by judges
- Who can sue and be sued?
  - § Unincorporated organizations such as clubs and church groups are not classified as legal persons therefore they cannot sue or be sued
  - § Instead it is necessary to sue the individual members of the organization
  - § In some provinces, trade unions although are unincorporated organizations, they can be sued or sue directly
  - § Special rules can be applied when the government is sued
- **Class Actions:** allows a single person, or a small group of people, to sue on behalf of a larger group of claimants
  - § Class actions are becoming increasingly common in Canada
  - § Concept summary 2.1 (pg. 31) lists situations where class actions are popular
  - § The primary action is obvious: it allows small individual to take on larger organizations
  - § Basic ideas of class actions:
    - Common issues –there must be a common issue amongst the various members of the class
    - Representative plaintiffs –plaintiff must qualify as representative plaintiff and he or she must demonstrate a workable plan for fairly representing the interests of the class members (all claimants must benefit)
    - Notification –the representative plaintiff must have a workable plan for notifying potential class members
    - Preferable procedure –the court must be convinced that class action is a preferable procedure for dealing with the claims (i.e. Determining if class actions will become too complicated and whether there are enough similarities between the class members)
    - **Certification** (represent the court's decision to allow the various claims to be joined together into a class action) –all previous requirements are met the actions will be certified. This is generally the most important step in the entire process because it allows the court to determine if there is a genuine cause for concern
      - § Class actions are possible in jurisdictions that have not yet enacted legislation
- Legal representation
  - § This is an important risk management issue because the determines who will argue for your side
- *Self representation*
  - § Individuals have the right to represent themselves
  - § While it is expensive to hire a lawyer, it may be far more expensive in the long run to lose a lawsuit because of your lack of experience
- *Lawyers*

- § The legislation restricts the practice of laws to people who have met certain requirements
- § A person cannot act as the lawyer until he or she has graduated from law school, completed an apprentice period known as a period of articles, and passed the bar by successfully writing a number of examinations
- § The Law Society regulates the profession
- § They impose codes of conduct and punish members who act improperly
- § Every lawyer must hold a professional liability insurance meaning if your lawyer acts carelessly, and you suffer a loss as a result, you may sue you for professional negligence
- § **Professional liability insurance:** allows the client to receive compensation for lawyers insurance company if the lawyer has acted carelessly
- § **Assurance fund:** provide compensation to people who are hurt by dishonest lawyers
- § An advantage of hiring a lawyer is conversation with the lawyer are generally confidential and privileged
- **Paralegals:** a person who is not a lawyer, but who provides legal advice and services
  - § Paralegals are particularly common in small claim court and landlords and tenants tribunals
  - § Hiring a paralegal is controversial at times because they traditionally have no formal training because they have not been regulated by a governing body, have not been governed by a detail code of conduct and have not been required to carry liability insurance
  - § As a result of those issues, the Law Society of upper Canada has licensed paralegals in Ontario since 2007 to correct those issues
  - § Paralegals are confined to certain types of work such as administrative tribunals, the small claims court, the Ontario Court of Justice under the provincial offenses act & criminal cases for the maximum penalty is less than six months in jail
- **Pleadings:** documents that are used to identify the issues and clarify the nature of a dispute
  - § They can be prepared by a plaintiff where others come from the defendant
  - § **Plaintiff:** the person who is making the complaint
  - § **Defendant:** the person about whom the complaint is being made
  - § **Limitation periods:** a period of time within which an action must be started (See Pgs. 34-35 for general observations)
    - Limitations are necessary because for two reasons
    - First first-time memories fade and evidences are loss and the courts do not want to resolve disputes on the basis of unreliable information
    - Second it would be unfair to allow the plaintiff to hold the threat of litigation over the defendant forever
  - § **Statement of claim:** a document in which the plaintiff outlines the nature of the complaint (Can be a starting point for a lawsuit)
    - Once a party is served with the statement of claim, they must react quickly
    - If the defendant does not do anything within the relevant period, the plaintiff may go to court alone and received at default judgment
  - § **Statement of defense:** a document in which the defendant sets out it version of the facts and indicate how it intends to deny the claim (used if defendant intends to deny liability)

- § **Counterclaim:** a document that the defendant makes against the plaintiff (can be included with a statement of defense)
  - § **Reply:** a document in which a party responds to a statement of defense (statement of defense to the counterclaim used if the plaintiff received a counterclaim and wants to reply to it)
  - § **Demand for particulars:** requires the other side to provide additional information (use when other side is not entirely sure what the other side is having mind)
- Pretrial activity
  - § **Examinations for discovery:** a process in which the parties ask each other questions in order to obtain information about their case (used once pleadings have closed/ completed)
  - § **Settlement:** occurs when the parties agreed to resolve their dispute out of court
  - § **Pretrial conference:** a meeting that occurs between the parties and judge (both sides outline their positions and the judge may indicate which side is most likely to win if they go to court)
  - § **Mediation:** a process in which a neutral person called a mediator helps the parties reach an agreement
  - § The mandatory mediation program (MMP) States that the parties are required to meet with the mediator within 90 days after the defense has been filed and they cannot go to trial until they have gone through mediation
  - § A party who refuses to cooperate may for instant be required to pay costs
- Trial
  - § Civil litigation is almost always decided by a judge alone
  - § The court will hear from plaintiffs first then the defendant
  - § **Evidence:** consists of the information that is provided in support of an argument
  - § In order to get evidence in the front of the court, each side will call witnesses
    - Ordinary witnesses testify evidence they know firsthand
    - Expert witnesses provide information based on evidence
    - Examination in chief is the process where parties who call on particular witnesses and ask questions
    - Cross-examine is the process in which the opposite party asks questions to the same witness
  - § The courts generally insist upon direct evidence that are admissible
  - § **Hearsay evidence:** information that when is heard from another person rather than directly from the source (not accepted in courts)
  - § Defendant is only liable if the scale is slightly tipped him that plaintiff's favor, if the skill is tipped in the defendant's favor or even, the defendant is not liable
  - § In criminal cases, the crown has to prove the accused guilty beyond a reasonable doubt
- The remedy
  - § (See Pg. 38 for punishment of crimes)
- Enforcement
  - § **Judgment debtor:** a defendant who has been found liable and ordered to pay money to the plaintiff
  - § In case of instances where the defendant cannot pay fees, a seize and sell some of the judgment debtor's asset may occur
- Appeals

- § Alawsuit does not necessarily an end after trial as the losing party is often entitled to appeal to a higher court within 30 days after the trial came to a decision
- § **Appeal court:** they decide whether a mistake was made in the court below
- § **Appellant:** the party who attacks the decision of the lower court
- § **Respondent:** the party who defends the decision of the lower court
- § Appeals are often in front of 3 or more judges
- § Appellate courts do not listen to witnesses or receive evidence but rather simply hear and read arguments from the parties or their lawyers
- § Appellate courts deals with the law , not facts
- § They correct mistakes that the trial judge made regarding the law
- § They only overturn the call a finding fact only in the trial judge made a palpable and overriding error
- § Majority rules in appellate court
- § Affirms = when no mistakes, Reverse = when the find an error (can be good or bad for plaintiff/ defense and Re-trial = when not enough info to make the right decision
- **Costs:** Expenses that a party incurred during litigation
  - § Costs are generally awarded to whichever side loses the case
- Contingency fees
  - § **Contingency fee agreement:** requires a client to pay its lawyer only if lawsuit is successful
  - § When the client may not be required to pay any fees if the case is lost, it will be required to pay much more than usual if the case is won
- ✓ The court system
  - Supreme Court of Canada
    - § The highest court in the country
    - § The selection process of the Chief Justice is highly secretive to the public
    - § In rare occasion , it appeals only if it hears from the appellate courts
    - § If you want to take your case to supreme court, you must apply for *leave*
  - Court of Appeal (Pg. 43 for Court Names)
    - § Members are appointed by the federal government, not provincial or territorial government
  - Superior Court (Pg. 43 for Court Names)
    - § The federal government appoints members to the Superior Court
    - § Their main job is to hear trials
    - § Occasionally they hear appeals from lower courts
  - Federal court
    - § Deals only with cases that affect the federal government
    - § Tax Court allows a person to dispute the government's demand for the payment of a tax
    - § Trial division of the federal court hears trials concerning issues that the Constitution assigns to the federal government such as copyright, bills of exchange and telecommunications
    - § Appeal division of the federal court hears appeals from its own trial division and from the tax court
  - Provincial court
    - § Provincial government appoints the members of provincial courts
    - § This are trial courts

- § They generally deal with (1) small claims, which are private disputes involving small amounts of money, (2) Family matters (3) youth matters, and (4) Most criminal cases
- § More serious trials are using moved up to the Superior Court
- **Small claims court:** A type of provincial court that deals with disputes involving limited amounts of money (Concept summary 2.4 Pg. 44 shows Common Business Disputes)
  - § Small claims court are very popular with business people because they're faster, simpler and less expensive than regular courts
  - § (Concept Summary 2.5 Pg. 46 shows the maximum amount of money at stake for either sides)
- Court hierarchy (Fig 2.1 Pg. 46 shows the hierarchy)
  - § **Hierarchy:** court arranged according to their importance
  - § **Doctrine of Precedent:** requires a court to follow any other court above it in a hierarchy
  - § The Supreme Court of Canada does not have to obey to any other court but is required to obey the Constitution and legislation
  - § **Rule of law:** States that disputes should be settled on the basis of laws, rather than personal opinions
- ✓ **Administrative tribunals:** a body, somewhere between a government and the court, that resolves issues and disputes that arise in administrative law
  - § They are known to be Quasi-Judicial because they can make binding decisions that can affect legal rights
  - § **Privative clause:** A statutory provision that tends to prevent a court from exercising judicial review over a Tribunal decision
- ✓ **Alternative dispute resolution (ADR):** process that allows the parties to resolve the dispute without going to court
  - § ADR is voluntary but also required in some situations (Examples of ADR in business disputes)
  - § There are three major types of ADR: (1) negotiation, (2) mediation, and (3) arbitration
- 1. **Negotiation:** a discussion aimed at settling a dispute
  - Most common form of ADR
  - Advantages and disadvantages found on pg. 52
- 2. **Mediation:** process in which a neutral party, called a mediator helps the parties reached an agreement
- 3. **Arbitration:** process in which a neutral third person, call an arbitrator in poses a decision on the parties

### Chapter 3: Introduction to Torts

- ✓ Introduction to Tort Law
  - § **Torts:** generally consist of a failure to fulfill a private obligation that was imposed by law
- Torts and Crimes
  - § Torts can refer to the breach of private investigation
  - § **Tortfeasor:** person who is committed a tort
  - § Tort can be compared to a crime
  - § Tort = breaks of private investigation
  - § Crime = breaks of public investigation

- § Concept Summary 3.1 (pg. 61) shows the differences between torts and crimes
- § Torts and crimes can arise in the same occasions i.e. hitting someone is the tort of battery and the crime of assault
- Torts and Contracts
  - § *Structure*: both torts and contracts involve primary and secondary obligations
  - Primary –tell people how they should act i.e. I will not touch a person in any offensive way
  - Secondary –are remedial, they tell people how they must react after the primary obligations is broken i.e. paying money to plaintiff for compensation of wrong doing
  - § *Sources of Primary Obligations*: Obligations of tort is imposed by the law whereas obligations of contracts are created by the parties i.e. the obligation of delivery of a product
  - § *Privity*: the relation of two parties that is recognized by law once two people enter a contract. However, law of torts are imposed by law so there is no need for a special relationship to be created between parties
  - § *Compensation*: Available in both tort and contract
  - Purpose of compensation in tort is to prevent harm
  - Purpose of compensation in contract is to provide benefits/ fulfilling promises
  - § *Risk Management*: Since law imposes torts, they may take some people by surprise and they may require more than a person is actually capable of providing. Contracts are created voluntarily so they should never take anyone by surprise. They should also never require more than the parties believe they can actually make
- § Concept Summary 3.2 (pg. 63) compares torts and contracts
- Types of Torts
  - § Includes almost every sort of private law wrong outside of breach of contract
  - § Tort law has to strike a balance between competing interests
  - § Tort law tries to respect freedom of choice, but also wants to discourage dangerous behavior
  - § A strategy used to handle challenges of balance is called *mental culpability* which tries to find proof that the defendant acted with a *guilty mind*
  - § Three possibilities to show the defendant acted with a guilty mind are:
    1. *Intentional torts* –occurs when a person intentionally acts a certain way
    2. *Negligence torts* –occurs when a person acts carelessly
    3. *Strict liability torts* –occurs when a person does something wrong without intending to do so and without acting carelessly
- § Concept Summary 3.3 (pg. 64) classifies the different types of torts
- *Strict liability*
  - § Strict liability torts create special problems for risk management
  - § By “strict ”we mean **liability without intention or negligence**.
  - § Tort law is dominated by intentional and negligence torts
  - § Strict liability is rare as, in most situations, it is unfair to impose liability on someone who did not intentionally or carelessly cause the plaintiff’s injury
  - § Example of strict liability that a court can impose liability for is the owner of livestock is strictly liable for any damages that the animals cause by trespassing on someone else’s property
- ✓ General Principles of Tort Law
  - § Three general principles that apply throughout tort law are: (1) liability insurance, (2) vicarious liability and (3) remedies

- **Liability Insurance:** a contract in which insurance company agrees, in exchange for a price, to pay damages on behalf of a person incurs liability (Fig 3.1 pg. 66 shows an illustrations of liability insurance)
  - § **Duty to Defend:** requires the insurance company to pay the expenses that are associated with lawsuit brought against the insured party
  - § Liability Insurance contributes to the *compensatory function* of torts
  - **Compensatory function:** aims to fully compensate people who are wrongfully injured
  - § But it also undermines the tort law's *deterrence function*
  - **Deterrence function:** discourages people from committing torts by threatening to hold them liable for the losses they cause
  - If the defendant knows that the insurers will pay for all the damages they have caused, people will have less reason to be afraid about their wrongdoing
- **Vicarious Liability:** occurs when an employer is held liable for a tort that was committed by an employee
  - § Liability insurance is important for businesses with employees
  - § Doctrine of Vicarious liability may be justified on a number of grounds:
    - Serves tort law's compensatory function by allowing the plaintiff to claim damages for both the employee and employer
    - Serves tort law's of deterrence function by encouraging employees to avoid unusually hazardous activities and to hire the best people available
    - Requires a business to bear responsibility for the losses that its activities create, even if the losses are caused by misbehaving employees
  - § Employer is not liable every time for an employee wrongdoing
  - § I.e. if an employee's tort occurred completely outside of the employment relationship
  - § Employers are also not liable for independent workers
  - § **Independent contractor:** a worker who is not as closely connected to the employer's business as is an employee
  - § Courts are more inclined to find a person is an employee if:
    1. The employer generally controls what is done, how it is done, when it is done and where is done
    2. Worker is paid appropriately wage or salary rather than a lump sum at the end of each project
    3. Worker uses the employer's equipment and premises
    4. Worker is integrated into the employer's business and is not in their own business
  - § Vicarious liability does not relieve the employee of the responsibility
  - § It allows the plaintiff to sue both the employer and employee
  - § If the employer actually pays damages to the plaintiff, is usually entitled to claim the amount from the employee
  - § However this is rare because it is unlikely employee has the money and employer's usually realize that morale will decrease if the employees were worried about being held liable
  - § Fig 3.2 (pg. 69) shows an illustration of Vicarious Liability
- Remedies
  - § Important possibilities of remedies are (1) compensatory damages, (2) punitive damages, (3) nominal damages and (4) injunctions

- *Compensatory damages*
  - § Compensation of contract is usually designed to put the plaintiff forward into the position that the party expected to enjoy after the contract was performed
  - § The plaintiff can sue in both tort and contract
  - § However, the plaintiff can recover damages for any one of those actions (generally the one with most money)
  - § *Remoteness*
    - **Remote:** a loss is remote if it would be unfair to hold the defendant responsible for it
    - The court will not award damages if the connection between the tort and the loss is too remote
    - No liability if the loss was reasonably unforeseeable by defendant (but: the remoteness rule does not apply to intentional torts)
  - § **Mitigation:** occurs when the plaintiff takes steps to minimize the losses that result from the defendant's tort
  - § Limited liability if some of the loss could have been reasonably avoided by plaintiff
  - § The four aspects of mitigation are:
    1. The plaintiff is responsible only for taking reasonable steps to mitigate a loss
    2. A plaintiff is not required to mitigate however, the plaintiff will be denied compensation for losses that could have been reasonably avoided
    3. Damages are denied only to the extent that plaintiff unreasonably failed to mitigate
    4. Plaintiff can recover the costs associated with mitigation
- **Punitive damages:** intended to punish the defendant
  - § If the defendant has done something particularly outrageous or reprehensible, the court may impose compensatory damages and punitive damages
  - § Punitive damages are only offered in exceptional circumstances
  - § The Supreme Court of Canada has said that, in addition to committing a tort, the defendant must have acted in a harsh, vindictive, reprehensible and malicious manner
- **Nominal damages:** symbolically recognize that the defendant committed a tort even though the plaintiff did not suffer any loss
  - § Awarded in very small sums
  - § Generally restricted to torts that are actionable per se
- **Injunctions:** court order that requires the defendant to do something or refrain from doing something
  - § The court may award an injunction for damages that are inadequate because they cannot be truly replaced what the plaintiff has lost i.e. killing another person's beloved horse
  - § Concept Summary 3.4 (pg. 75) shows the tort law remedies
- **Alternative compensation schemes:** a system that allows a person who had suffered an injury to receive compensation without bringing an action in tort
  - § Provide compensation based on injury rather than wrong
  - § Compensation is paid by central fund rather than tortfeasor examples
    - Workers' compensation schemes (all provinces)
    - Automobile accident schemes (some provinces)/ no fault insurance
  - § Schemes involve a variety of trade-offs
  - § Workers generally lose the right to sue in tort for workplace injuries, but instead they receive worker's compensation

- § Loss of tort law is the price that workers pay to enjoy access to a far simpler and much quicker system of compensation
- § Employers are required to contribute to the compensation fund, they escape the risk of being held liable for workplace injuries
- § In Ontario, the no fault system prevents an action in tort unless the victim's losses are especially serious
- § Advantages and disadvantages of ACS and tort law below

Alternative compensation schemes	Tort Law
<p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>· Compensation available without proof of wrong</li> <li>· Quicker and less expensive process</li> </ul>	<p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>· Full compensation for wrongful losses</li> <li>· Deterrence: misconduct identified and blamed</li> </ul>
<p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>· Generally less than full compensation</li> <li>· No deterrence of blame worthy behaviour</li> </ul>	<p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>· Compensation limited to wrongfully occurring losses</li> <li>· Expensive and time-consuming process</li> <li>· Payment not guaranteed</li> </ul>

## Chapter 4: Intentional Torts

- ✓ Introduction
  - § **Intentional tort:** involve intentional, rather than merely careless, conduct
  - Assault and battery
    - § In torts, assault and battery have very different meanings
    - § **Assault:** occurs when the defendant intentionally causes the plaintiff to reasonably believe the offensive bodily contact is **imminent**
      - A tort is not based on physical contact, but rather based on a **reasonable belief** that such contact will occur
      - Punching someone from behind does not mean they committed a tort of assault because the person did not know the blow was coming
      - It is enough if the plaintiff **reasonably believe** the bodily contact would occur (i.e. pointing a unloaded gun to someone's face, in which the person did not know it was unloaded, is committing an assault)
      - Chances are, threatening someone two weeks ago of bodily harm would not be a form of assault as a threat must be more immediate
      - Assault can occur even if the plaintiff was not frightened (i.e. a smaller person threatening a bigger person)
    - § A claim for assault is usually joined with a claim for battery
    - § **Battery:** consist of offensive bodily contact
      - Bodily contacted be defined as something, such as a knife or a bullet, to touch the plaintiff even if it only touches the plaintiff's clothes or something he was holding

- Contact can be offensive even if it is not harmful (i.e. A physician performing a life saving blood transfusion against the patient's wishes)
- § The concept of reasonable force is important in other situations as well
- § You may be entitled to make a citizen's arrest or remove it just passing from your property but you cannot set actively try to catch a burglar or viciously beat a bike thief as that is considered to be excessive force
- ✓ Invasion of privacy
  - § There is no general tort of invasion of privacy
  - § Businesses that own land next to a racetrack are entitled to erect a high platform, watch the races and broadcast the event over the radio because people are not required to look away or to keep quiet about what they see
  - § Courts have been traditionally reluctant to recognize the tort of invasion of privacy
  - § This is because they want to support freedom of expression and freedom of information
  - § They are also reluctant to award damages in favor of celebrities who seek publicity but then complain when they're showing up at light
  - § It is difficult to calculate compensatory damages for the kinds of harms, such as embarrassment, that invasion of privacy usually causes
  - § Privacy is *indirectly* protected by several torts
    - A peeping Tom would be committing the tort of *trespass to land*
    - Employee who publishes embarrassing details about their employer's private life maybe liable for *breach of confidence* (i.e. Unauthorized photographs taken by guests at a private wedding between two Hollywood heavyweights)
    - A tort can also be abuse of *private information* (i.e. A newspaper publishing information on a celebrity who confessed during a narcotics anonymous meeting)
    - Company using unauthorized use of celebrity image to sell its own products may commit a tort of *misappropriation of personality*
    - A newspaper that ignores the judge's instructions and publishes the name of the police officer who have been assaulted during an undercover investigation may have committed the tort of *negligence*
  - § Section 162 of the criminal code states that a crime of *voyeurism* is committed by secretly observing a recording a person's circumstances that give rise to reasonable expectation of privacy (i.e. if a person is engaged in sexual activities or is partially or fully nude)
  - A crime is also committed if said person prints, sells, copies, publishes, distributes, sells, circulates, advertises or makes available of a prohibited recording
  - § A person is held liable if the person willfully violates another's privacy by doing something that they know is wrong
  - § Definition of privacy has been intentionally left open because it allows the courts to have flexibility to respond to different types of situations
- ✓ False imprisonment
  - § **False Imprisonment:** occurs when a person is confined within a fixed area without justification
  - An actual prison is not necessary as the tort can be committed if a person is trapped in the car, locked in a room or set adrift in a boat
  - A tort is not committed if the plaintiff can easily escape
  - Physical force is not necessary as detention maybe psychological

- A business person may reduce the risk of liability by calling a police officer instead of directly arrested a suspect
- However this does not eliminate the risk because the business may still be liable if it directed the officer to make an arrest without merely stating the facts and allowing the officer to draw a conclusion
- Even if the business did not direct the police officer to make an arrest, it may be liable for the tort of *malicious persecution*
- **Malicious persecution:** occurs when the defendant improperly causes the plaintiff to be persecuted
- Malicious prosecution is hard to determine as the court must satisfy that
  1. The defendant started the proceedings
  2. Out of malice, or for some improper purpose
  3. Without honestly believing on reasonable grounds that a crime had been committed
  4. The plaintiff was especially acquitted of the alleged crime
- § The defendant will not be held liable of false imprisonment if the plaintiff agreed to be confined
- § **Consent** is a complete defense to all intentional torts
- § A false imprisonment is false only if it is done **without authority**
- § Rules for when authority can make an arrest are found in the Criminal Code
- Please officer may arrest anyone who is (1) reasonably suspected of being in the act of committing a crime or (2) 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
- Rules are much narrower for private citizens including security guards.
- A private citizen is entitled to make an arrest only if a crime is actually being committed by the suspect
- If no crime was committed the private citizen may be held liable even if they acted honestly and reasonably
- The law generally favors a customer's freedom of movement rather than a store's desire to protect their property
- § Rules that apply to private citizens often create difficulty for business people such as a customer refusing to pay for a bill is usually committing a breach of contract but not a crime
- § The court may decide to allow the business to detain the customer until it receives payment (however, this violates the customer's freedom of movement) or allow the business to sue the customer for breach of contract
- § The restaurant is entitled to take down the name and patron but it is liable for false imprisonment if they try to detain the customer
- √ Trespass to land
  - § **Trespass to land:** occurs when the defendant improperly interferes with the plaintiff's land
  - § Trespass to land could also mean if I were to go into your property to retrieve a football I kicked into your yard
  - § Trespass to land requires intention to do the act even if I do not intend to do wrong or caused damage
  - § Businesses tend to invite the customers onto the property however they can usually revoke consent as long it does not violate human rights legislation
  - § Legislation allows for making an arrest on the basis of trespassing only if reasonable force was used

- § Remedies for trespass can include
  - Compensation for damages (compensatory, nominal or punitive)
  - Injunctions for preventing ongoing trespassing or to remove trespassing structures (i.e. toolshed built on neighbor's property)
- √ Interference with Chattels
  - § **Chattels:** movable form of property (i.e. horses, cars, etc.)
  - § Tort laws also protect chattels
  - § Concept Summary 4.2 (pg. 89) shows the intentional interference of chattels
  - § **Trespass to Chattels:** occurs when the defendant interferes with chattel in the plaintiff's possession
    - Trespassing can be if the defendant merely touches the plaintiff's goods
  - § **Tort of conversion:** occurs when the defendant interferes with the plaintiff's chattel in a way that is serious enough to justify a forced sale
    - I.e. if the defendant takes, contains, uses, buys, sells, damages or destroys the plaintiff's property
    - It is difficult to know whether the defendant's actions are serious enough to justify a forced sale. The courts usually consider all the facts including:
      1. Extent to which the defendant exercises ownership or control of the Chattel
      2. Extent to which the defendant intended to assert a right that was inconsistent with the plaintiff's right to the property
      3. Generation of the defendant's interference
      4. Expense and inconvenience caused to the plaintiff
    - Conversion is clearly committed if he steals my property or if a vandal destroys it
    - An innocent purchaser of goods may be held liable however an innocent purchaser of money has nothing to fear (i.e. a thief stealing a watch and selling it to you for hundred dollars you have committed a tort vs. a thief giving a \$100 bill and selling it to you in exchange for your own watch is not liable for conversion)
  - § **Tort of Detinue:** occurs when the defendant fails to return a chattel that the plaintiff is entitled to possess
    - The tort comes to an end as soon as the defendant returns the property to the plaintiff. At that point, the plaintiff is normally limited to compensation for losses suffered during the detention, as well as for any harm done to the item
    - The property has not been returned by the time of trial, the plaintiff can ask the court to compel the defendant to do so
  - § **Recaption:** allows a person to take their own property back
  - § A store owner is entitled to recaption if the shoplifter is trying to leave the store with an unpaid item
- √ Defenses to intentional torts (Concept Summary 4.3 pg. 95 shows examples)
  - **Complete defenses:** protect the tortfeasor from all liability
    - § There are four defenses of complete defense
      1. **Consent:** exist if a person voluntarily agrees to experience an interference with their body, land or goods
        - Consent must be free and informed
        - Consent is revocable and most circumstances
        - Content can only be given to persons with legal capacity
      2. **Legal authority:** provides a person with a lawful right to act in a certain way
      3. **Self-defense:** consists of the right to protect oneself from violence and the threat of violence
      4. **Necessity:** applies if the defendant's act were justified by an act on an emergency

- **Partial defenses:** allows the court to reduce damages on the basis of the plaintiff's own responsibility for loss or injury
  - § There are two types of partial defenses:
    1. **Provocation:** consist of words or actions that cause a reasonable person to lose self-control
    2. **Contributory negligence:** occurs when the plaintiff is partially responsible for the injury that the defendant tortiously caused

## Chapter 5: Miscellaneous Torts Affecting Business

- ✓ Conspiracy
  - § **Conspiracy:** occurs when two or more defendants agreed to act together with the primary purpose of causing the plaintiff to suffer a financial loss
  - § There is no tort of conspiracy if one person deliberately causes economic injury on another
  - § However this same act may trigger liability if performed by several people working together
  - § Tort of conspiracy is hard to prove
  - § Courts are reluctant to find that the defendant co-operated for the primary purpose of hurting the plaintiff
  - § A number of people organize a consumer boycott of a paper company's products to draw attention to aboriginal claims. The protestors were not held liable for their actions because the courts claimed the protester's main purpose was not to hurt the company but to raise public awareness of a political issue
  - § Plaintiff must prove if conspiracy to commit lawful act defendants' primary purpose was to hurt plaintiff
  - § Plaintiff must prove if conspiracy to commit unlawful act defendants should have known risk of harm
- ✓ Intimidation
  - § **Intimidation:** when the plaintiff suffers a loss as a result of the defendant's threat to commit an unlawful act against either the plaintiff or a third-party
  - § Tort of intimidation has two branches (Fig 5.1 pg. 103):
    1. **Two-party intimidation:** occurs when defendant directly coerces the plaintiff into suffering loss (i.e. a large retail chain physically threatening a small biz to get them to close their store)
    2. **Three-part intimidation:** occurs when the defendant coerces a third-party into acting in a way that hurts the plaintiff (i.e. a third party threatening the company to strike if they did not fire an employee)
      - § Plaintiff must prove in the case of intimidation that:
        - There was a threat to break duty in tort, contract, or crime
        - The intimidated party submitted to the threat
        - The plaintiff suffered loss
- ✓ Interferes with contractual relations
  - § **Interferes with contractual relations:** relations occur when the defendant disrupts a contract that exist between the plaintiff and a third-party
  - § There are two forms of interference with contractual relations (Fig 5.2 pg. 104 shows an illustration):
    1. **Direct inducement to breach of contract:** occurs when the defendant directly persuades a third-party to break its contract with the plaintiff
      - Liability requires 4 factors:

- § The defendant knew about contract (defendant does not need to know all about contract)
- § The defendant intended to cause breach of contract (Defendant does not have to intend to hurt plaintiff)
- § The defendant actually caused breach of contract
- § The plaintiff suffered loss
- 2. **Indirect inducement to breach of contract:** occurs when the defendant indirectly persuades a third-party to break a contract with the plaintiff
  - I.e. preventing the plaintiff to go to work by stealing tools they need for the job
  - Liability depends on the same four factors above and with the proof that the defendant's actions were themselves unlawful
- ✓ Unlawful interference with economic relations
  - § **Unlawful interference with economic relations:** occurs if the defendant commits an unlawful act for the purpose of causing the plaintiff to suffer an economic loss
  - § 3 requirements to this tort are:
    1. There was an intent to injure (sufficient that there was an act directed to injure the plaintiff)
    2. There must be an unlawful or illegal act (broad)
    3. Plaintiff must suffer an economic loss
  - § Concept Summary 5.1 (pg. 107) shows a summary of biz torts
- ✓ Deceit
  - § **Deceit:** occurs that the defendant makes a false statement, which knows to be untrue, with which it intends to mislead the plaintiff and which causes the plaintiff to suffer a loss
  - § Tort of deceit encourages ethical behaviour in the biz world
  - § There are four parts to deceit:
    1. The defendant makes a false statement
      - Sufficient if half truth
      - Sufficient if failing to update info
      - Sufficient if there is a duty to disclose and silence
      - Caveat emptor (buyer beware) but there exception i.e. defects of house must be told to buyer or else seller is liable
    2. Defendant knew the statement was false
    3. Defendant intended to mislead the plaintiff
    4. Plaintiff suffered a loss as a result of reasonably relying on the defendant's statement
  - § Only applies to the past and present, not future because reasonable people do not heavily rely on predictions
- Remedies of Deceit
  - § Deceit is a tort rather than breach of contract
  - § Tort damages look backward
- ✓ Occupiers liability
  - § **Occupiers liability:** requires an occupier of premises to protect visitors from harm
  - § **Occupier:** any person who has substantial control over premises
    - Critical element is control not ownership as a tenant can control an apartment
  - § **Visitor:** any person who enters onto premises
  - § **Premises:** include more than land
  - § Occupiers liability is differs between jurisdictions

- § Legislation has been enacted in all jurisdictions except for Newfoundland and Labrador, Saskatchewan and the territories
- Common Law Rules
  - § Consist of 4 categories of visitors: trespassers, licensees, invitees and contractual entrants (Pg. 110)
  - § Many issues exist because of the traditional system
    - Is a child a trespasser if he curiously walked into a site?
    - It is often difficult to distinguish between the different categories
    - Visitors may change from one status to another
    - Is danger hidden or unusual?
  - § Many jurisdictions which still use common law have modernized them to reduce these difficulties mentioned above
  - § Some additional information that have been modernized are:
    - Occupier's obligations are determined by factors such as the age, reason and nature of danger of trespassers
    - Also the occupier's knowledge of danger and the cost for the occupier of removing the danger
    - Licensees and invitees are now generally treated the same
    - An occupier must protect them both from unusual dangers
- ✓ Statutory Rules (Occupiers' Liability Act in Ontario)
  - § The duty applies to the condition of the premises and activities on premises
  - § Duty of reasonable care for all visitors (regardless of classification)
    - Specific requirements reflect circumstances of case
    - Some exceptions for adult trespassers
  - § Duty can be modified by warning signs (ie. ski resort sign –assume all risk etc.)
  - § Landlord will be liable for failure to make repairs under a lease.
- ✓ Nuisance
  - § **Nuisance**: occurs when defendant unreasonably interferes with plaintiff's use and enjoyment of his own land
  - § Forms of nuisance: physical damage (vibrations causing a house's foundation to crack), impaired enjoyment (loud music disrupting neighbours) and non-intrusive (brothels attracting criminals to the neighbourhood)
  - § Activities that generally do not support the claim in nuisance are: defendant building property on own land that ruins the plaintiff's view of ocean etc. or defendant paints their house that reduces the market value of plaintiff's house
  - § Nuisance occurs only if interference is **unreasonable** (ie. physical damage always unreasonable)
  - § Relevant factors in deciding what is "reasonable":
    - Nature of the neighbourhood
    - Time and day of the interference
    - Intensity and duration of the interference (if common)
    - Social utility of the interference
    - The defendant's motivation
- Defences of Nuisance
  - § Consent to activity
  - § **Statutory Authority**: the defendant caused a nuisance while acting under legislation
  - § Defendant is not relieved of liability because the nuisance existed when the plaintiff moved into the neighbourhood

- Remedies of Nuisance
  - § Compensatory damages and injunctions
  - § Courts may be reluctant to ensue an injunction if the nuisance causes very little damage to plaintiff, creates an intolerable hardship for defendant or community or if the town's economy revolves around the single factory
- √ The rule in Rylands versus Fletcher
  - § **The rule in Rylands versus Fletcher:** defendant can be held strictly liable for a non-natural use of land if something escapes from its property and injures the plaintiff
  - § Three aspects of this rule are:
    1. The defendant made a non-natural use of its land
      - Creation of special or unusual danger
    2. An escape from the defendant's land (explosives igniting)
    3. Loss or injury caused to plaintiff
  - § Defence that can be (but hard) available could be the plaintiff consented the activities, natural forces that make it impossible for the defendant to guard against or activities the defendant was statutory authorized to do
  - § Concept summary 5.3 (pg. 116) shows the torts involving the use of land
- √ Defamation
  - § **Defamation:** a false statement that may damage reputation
  - § Plaintiff must prove the following:
    1. Statement reasonably refers to plaintiff
      - Irrelevant that the defendant did not intend reference
      - Plaintiff must be a living person
      - Group statement must refer to plaintiff specifically
    2. Statement could hurt plaintiff's reputation
    3. Statement was published to third party Injurious falsehood
  - § **Slander:** a defamatory statement that is spoken
  - § **Libel:** a defamatory statement that is written
  - § **Publication:** occurs when a statement is comm. to a 3<sup>rd</sup> party
- Defences to Defamation
  1. **Justification:** occurs if the defendant's statement is true
    - Statement must be actually true
    - Honesty and reasonable belief is not sufficient
  2. **Privilege:** Immunity from liability
    - Absolute privilege –complete immunity; even if statements made in bad faith for malicious purpose
    - Used to encourage people to comm. without the fear of being sued
    - Absolute privilege is generally limited during: parliamentary hearings, between high gov. officials dealing with gov. businesses and between spouses
    - Qualified privilege is the obligation to speak to someone with duty to hear and may be held liable if statement is in bad faith
    - **Public interest responsible journalism:** occurs when a journalist, despite getting some facts wrong, acted in accordance with the standards of responsible journalism in publishing a story that the public was entitled to hear
    - 10 factors that guide the factors of whether a defence ought to apply in a particular case (pg. 119)
  3. **Fair comment:** an expression of an opinion regarding a matter of public importance
    - An honest opinion on matter of public importance

- As long as the defendant did not act maliciously, the defence may apply if the court is satisfied on three elements:
    - § Expression of an informed opinion on a matter of public importance
    - § Defendant's opinion must concern an issue of public interest
    - § Honestly held by the defendant
  - Remedies for defamation
    - § Compensation
    - § Very rarely will the courts impose an injunction to prevent a person from making those statements
  - ✓ Injurious Falsehood
    - § **Injurious Falsehood:** occurs when defendant makes a false statement, out of malice, about the plaintiff's business that causes a loss
    - § **Plaintiff must prove:**
      - The defendant made **false** statement
      - The defendant acted out of **malice** (broadly defined)
      - The false statement caused **loss**
    - § Forms of injurious falsehood
      - Slander of title: statement that plaintiff does not own land for sales
      - Slander of quality: statement that plaintiff's products are shoddy
      - Other situations: e.g. statement that house for sale is haunted
- Concept summary 5.4 (pg. 122) shows the elements of biz torts

## Chapter 6: Negligence

- ✓ Introduction
  - § Negligence is the most important tort
  - § **Tort of negligence:** determines whether the defendant can be held liable for carelessly causing injury to the plaintiff
  - § 4 stages of negligence analysis (3 for Plaintiff, 1 for Defendant)
  - § Plaintiff *must* prove:
    - Duty of care
    - Breach of standard of care
    - Causation of harm
  - § Defendant *may* prove:
    - Defences (possibilities such as contributory negligence, voluntarily assumed the risk of being injured or plaintiff was engaged in some form of illegal behaviour)
  - § Fig 6.1 (pg. 129) illustrates the Cause of Action in Negligence
  - § Negligence is flexible
  - § In some situations, the court may award compensation to the plaintiff that was caused, carelessly, harm
  - § In other situations, the courts may protect some activities from liability so it does not discourage of socially useful activities
    - This is because judges do not want to discourage doctors from practicing in risky areas
- ✓ Duty of care
  - § **Duty of care:** exist if the defendant is required to use reasonable care to avoid injuring the plaintiff
  - § Without a duty of care, there cannot be liability
- Test for determining the existence of duty of care

- § The criteria of duty of care are:
1. *Reasonably foreseeable* (was it reasonably foreseeable that the plaintiff could be injured by the defendant's carelessness?)
    - This test is **objective**
    - Would a reasonable person have foreseen that its activities might injure plaintiff?
    - Unfair to deny compensation simply because the defendant was unaware of any danger
  2. *Proximity* (get the parties share relationship of sufficient proximity)
    - A duty of care will not be recognized if there was not a relationship of proximity
    - There must somehow be a close and direct connection between the parties
    - Types of proximity can include (w/ examples): physical (being hit by a bat), social relationship (parent is required to be looking after a child, not a stranger), direct causal connection (parties of business transaction) and/or reliance (reasonable use of financial services)
    - Concept of proximity often plays a crucial role in determining whether or not duty of care exists
    - *Negligent statements*: common business risk
    - Inevitability, some of the statements made by professionals will be inaccurate and causing consumers and clients to suffer as a result
    - Law negligence needs to strike balance between the need to compensate people hurt by negligent statements and the need to protect businesses
    - **Special rules are needed because careless statements are different from careless actions** in a few ways:
      - *A duty of care exists for a careless statement, there is a possibility of "liability in an indeterminate amount for an indeterminate time to an indeterminate class"*
      - *Careless statements usually result in **pure economic losses** however, the law is reluctant to provide compensation for pure economic losses than for property damage or injuries*
      - Liability for negligent statements is more likely if:
        - *Defendant claimed special knowledge*
        - *Statement communicated on serious occasion*
        - *Statement made in response to inquiry*
        - *Defendant received financial benefit*
        - *Statement of fact rather than pure opinion*
      - But liability is less likely if there was a disclaimer
      - A defendant is not liable if the plaintiff does not use the reasonable reliance for the intended purpose
  3. *Policy* (judge may still deny a duty of care on the basis of policy reasons despite an injury being caused by the aforementioned criteria)
    - Policies override considerations
    - Duty of care can be rejected for external reasons
- ✓ Breach of standard of care (Second element of determining negligence)
- § **Standard of care**: tell the defendant how it should act
- § **Reasonable person test**: requires the defendant to act in the same way that a reasonable person would act in a similar circumstance
- § Reasonable person Test gives the Court flexibility in determining whether the defendant acted carelessly
- § A reasonable person test has objective and its components are:
- Defendant cannot hide behind own deficiencies
  - Plaintiff entitled to expect reasonable conduct

- Standard applied at time of alleged breach (no hindsight)
- § Factors to consider in the formulation of a standard of care:
  - Reasonable foreseeability of risk (Any realistic risk may require precaution)
  - Likelihood and severity of loss (More care if great danger of great harm)
  - Affordability (More care if inexpensive precaution)
  - Social utility (Less care if socially valuable activity)
  - Sudden peril doctrine (Less care if emergency)
- Standard Of Care For Professionals: Professional Negligence
  - § Factors the court used to pay special attention to dealing with professionals include:
    1. Must act as the reasonable professional would act in similar circum.
      - Professional people must live up to training that they received or claimed to have received
      - Special allowances are not made for beginners (must conform to the standard of all reasonably competent and experienced professional)
      - Enhanced standard for specialists
      - No allowance for exaggerated credentials
    2. Upon information available at the time of accident (No hindsight)
    3. Carelessness is different than error in judgement (ie. Surgeon would not be held liable for choosing a procedure over another that a reasonable physician might have done the same)
    4. Usually met if followed established requirements/ approved practice (courts do not have expertise)
    5. A statutory standard may protect a defendant
- Standard Of Care For Manufactured Products: Product Liability
  - § **Product Liability:** can occur when a person is injured by a product
  - § Liability for breach of contract is **strict**
  - § Plaintiff does not have to prove the defendant carelessly provided a defective product, it is enough that the contract was defective in away that caused harm
  - § Tortious liability for defective products is **not strict** in Canada but strict in USA
  - § In Canada, the manufacturer is only liable for a careless defect
  - § Many believe CAN should adopt a strict policy because: (See pg. 140)
    - It ensures consumers will be compensated for the loss they suffered because of a defect
    - Encourage manufacturers to develop safer products
    - Require manufactures to pay for losses that they caused as a result of selling their product and earning profits
  - § Concerns about adopting a strict policy would be:
    - It would unfairly require a manufacturer to pay for losses even though it had used reasonable care
    - Increase number of lawsuits against manufacturers
    - Increase the cost of liability insurance for the manufacturers
    - Eventually increasing the price of goods
  - § A person who wants to sue in tort for product liability must use the action in negligence
  - § Types of Product liability
    - Careless manufacture of specific item
    - Careless design of product line
    - Careless failure to warn of risk of harm
  - § Manufacturer, seller or installer can all be liable

- § Learned intermediary rule (i.e. warnings for prescription drugs) is appropriate in some situations (manu. Providing all disclaimers)
- ✓ Causation of harm
  - § Even if: i) it owed a duty of care *and* ii) breached the standard of care defendant **will not be held liable unless its carelessness caused plaintiff to suffer a loss**
  - § Issue of causation is easy decided about that but ~~for~~ test
  - § **But-for test:** requires the plaintiff to prove that it would not have suffered a loss *but-for* the defendant's carelessness
    - If the defendant had not acted carelessly, would the plaintiff have still suffered the same loss?
    - If yes, defendant cannot be liable but if no, the defendant may be liable (Concept Summary 6.1 Pg. 144 shows a But-for test)
  - § There are several other things to know about causation of harm
    1. Proof on balance of probabilities (at least 51%)
    2. All-or-nothing approach
      - Full compensation if probable causal connection (>51%)
      - No compensation if not probable causal connection (<51%)
    3. Breach as a cause –not necessarily only cause
    4. Several defendants may cause single injury
      - Joint and several liability to plaintiff (can choose to recover damages from either defendant)
      - Proportionate contribution between defendants (when the courts decide say how much percentage each person is to blame is also proportionate to the amount they should pay)
  - § The courts may sometimes reject a but-for test if it would lead to an unfair result
- Remoteness
  - § **Remote:** if it would be unfair to hold the defendant responsible for it
  - § If defendant caused the plaintiff to suffer a loss, liability will not be imposed if the loss was too remote
  - § **Thin Skull Case:** occurs if the plaintiff was unusually vulnerable to injury
    - Not responsible at all if normal person would not have suffered any harm
    - But fully responsible for *all* losses if it was reasonably foreseeable that a normal person would have suffered *some* damage
  - § There is no equivalent "thin wallet principle"
  - § **Intervening Act:** is an event that occurs after the defendant's carelessness and that causes the plaintiff to suffer an additional injury
    - I.e. breaking someone's leg which causes the plaintiff to break their other leg when they fall down the stairs while on crutches
    - The defendant in this case will be **factually responsible** for the 2<sup>nd</sup> leg
    - Courts will determine if they are legally responsible
    - Courts will determine if second injury is too *remote* from the carelessness; is it reasonably foreseeable that the initial carelessness would cause the later injury
- ✓ Defenses (Concept Summary 6.2 Pg. 147 shows Defenses to Negligence)
  - § Three defenses against liability of negligence:
    1. **Contributory Negligence:** the loss is caused partly by the defendant's carelessness and partly by the plaintiff's own carelessness
      - Forms of contributory negligence:
        - a. Unreasonably enter into dangerous situation
        - b. Unreasonably contribute to creation of accident
        - c. Unreasonably contribute to extent of injury

- Modern legislation allows for apportionment, where courts decide the percentage of blame each party holds (plaintiff usually has 30%)
- 2. **Voluntary Assumption of Risk:** applies if plaintiff freely agreed to accept a risk of injury
  - This is a complete defence; court interprets very narrowly
  - Defendant must prove that agreed to accept both the physical and legal risk of injury (plaintiff gives up the right to sue for negligence) ie. Hang gliding
  - From risk management: make plaintiff sign an exclusion clause
- 3. **Illegality:** may apply if plaintiff suffered a loss while participating in illegal act
- 4. Unpopular with the court because it is a complete defence
- 5. Does not allow for the apportionment of liability