



Canadian Law 12

Negligence and Other Torts

What is Negligence?

- Someone who commits a careless act that creates harm to another person is **negligent**.
- Over the past several years, **negligence** has become the most common area of tort law.
- **Negligence** has 3 key characteristics:
 - The action is not intentional.
 - The action is also not planned.
 - Some type of injury is created.

Elements of Negligence

- **Negligence** is proven by using a series of criteria:
 1. Duty of care
 2. The reasonable person
 3. Foreseeability
 4. Causation
 5. Burden of proof

Duty of Care

- In a **negligence** lawsuit, the plaintiff must demonstrate the defendant owed him or her a **duty of care**—a specific legal obligation to not harm others or their property.
- **Duty of care** can be highly specific or apply more generally to the public.
- Example: each motorist owes everyone a **duty of care** while driving.
- If the court decides the defendant did not meet his or her **duty of care**, the defendant can be found in “*breach of duty of care.*”

The Reasonable Person

- When determining if a defendant is in *breach* of **duty of care**, the court uses the “reasonable person test” to determine the level or **standard of care** that should be expected.
- A **reasonable person** is defined as an “ordinary adult” without any disabilities.
- Although this person does *not* actually exist, the reasonable person is thought to be careful and considerate.
- The definition of a **reasonable person** may also depend on location. For example, what is considered reasonable in a rural area may not be so in an urban area and vice versa.

Youths

- Similar to the *Youth Criminal Justice Act*, a young person is not judged in the same manner as an adult for **negligence**.
- There is no legislation regarding youth and torts in Canada. Courts deal with torts that involve youth on a case by case basis.
- Children who are 6 or 7 years old are not held liable for any negligent actions.
- However, if youth participate in an adult activity, such as hunting, they are generally held to an adult's **standard of care**.

Foreseeability & Causation

- Part of the *reasonable person test* involves **foreseeability**—a person’s ability to anticipate the specific result of an action.
- If a court decides that **a reasonable person** should have been able to predict, or **foresee**, the injury created, the defendant can be found liable, or in *breach of his or her duty of care*.
- **Causation** occurs when the defendant was in breach and the defendant’s actions directly led to the plaintiff’s injuries or loss.

Proving Harm or Loss

- For a **negligence** suit to be successful, plaintiffs must prove they suffered real injury or economic loss.
- The following questions are asked to prove **negligence** and harm:
 1. Does the defendant owe the plaintiff a **duty of care**?
 2. Did the defendant breach the **standard of care**?
 3. Did the defendant's actions **cause** the plaintiff's injury or loss?
 4. Was there a direct connection between the defendant's actions and the plaintiff's injury or loss (**causation**)? Furthermore, was it **foreseeable**?
 5. Did the plaintiff *actually* suffer harm or loss?

Burden of Proof

- In a civil trial, the **plaintiff** is responsible for proving that **negligence** occurred.
- Similar to a criminal trial and any other civil trial, defendants do not have to actually prove anything, though many decide to present evidence on their behalf regardless.
- Proof is determined using **the balance of probabilities**.
- If a plaintiff successfully meets the **burden of proof** for negligence, it means the court believes the plaintiff's version over the defendant's.

Defences for Negligence

- There are three common **defences** to negligence:
 1. Contributory negligence
 2. Voluntary assumption of risk
 3. Inevitable accident

***The best possible defence to **negligence** is to argue that *no negligent action occurred at all*.

Contributory Negligence

- If both the plaintiff and defendant are found to be negligent, any damages or blame will be divided between them.
- **Contributory negligence** occurs when the alleged victim created *at least part* of the harm that he or she ended up suffering.
- This **defence** is often used in lawsuits involving motor vehicle accidents. For example, if one driver was speeding and another ran a stop sign, *both* drivers are **negligent**.
- Courts use actual percentages to determine responsibility in contributory negligence cases.



Voluntary Assumption of Risk

- *Knowingly accepting* factors that may cause harm or injury leads to this **defence**.
- In certain situations and activities, people are aware of the risks involved.
- Common examples include contact sports, extreme sports, and stunts.
- For many high-risk activities, a **waiver** is required to minimize potential lawsuits.
- A **waiver** is a document that *releases or excuses* a party from liability if an accident or injury occurs (e.g. a hockey league makes players sign a **waiver**).

Inevitable Accident

- Also referred to as “act of God,” this **defence** is used to argue that although an accident occurred, it was not anyone’s fault.
- Example: If an accident occurs after a vehicle or plane is struck by lightning, it is difficult to assign blame or argue that the resulting harm was **foreseeable**.
- **Inevitable accident** means that the harm *could not* have been reasonably prevented.

Motor Vehicle Negligence

- There are several possible negligent acts that involve motor vehicles.
- Violating any section of a provincial *Highway Traffic Act* can be seen as negligence.
- In **motor vehicle accidents**, the **burden of proof** can be shifted to the defendant. For example, once the plaintiff has proven that he or she was hit by a car, it is then up to the defendant to argue why the defendant is not liable.
- If **contributory negligence** exists, any damages awarded to the plaintiff will be reduced.

Vicarious Liability

- This type of liability occurs when a person is held responsible for another person's actions.
- Example: If a father allows his son to drive the family car and the son causes an accident, the father may also be held partially responsible because he owns the car.
- Parents are commonly found to be **vicariously liable** for their children's torts.
- Vicarious liability is very common in the workplace as employers are usually held responsible for their employees' actions.

Occupiers' Liability

- An **occupier** is a person who controls and supervises an establishment or property.
- A **duty of care** is owed by an **occupier** to any guests who may enter or visit the property.
- A **licensee** is someone who visits a property for *social* reasons (e.g. dinner, a party).
- An **invitee** is someone who visits a property for more *formal* reasons (e.g. work, school, to shop).
- **Licensees** and **invitees** have permission to enter a property and as a result are owed a **duty of care** by the **occupier**.
- Most provinces have *Occupiers' Liability Acts*.

Commercial Hosts

- In tort law, there are two types of hosts: **commercial** and **social**.
- A **commercial host** usually operates a hospitality business, such as a bar or restaurant.
- **Commercial hosts** have a specific **duty of care** to monitor intoxicated customers.
- If a customer appears to be drunk, the **host** becomes responsible for protecting that customer's safety (e.g. not letting him or her drive, cutting him or her off from further liquor service).

Reducing Liability

- There are several measures **commercial hosts** can take to try and reduce their liability:
 - ensure that all servers are properly trained (e.g. SmartServe certified)
 - monitor patrons' consumption of alcohol
 - cut people off from liquor service if they are drunk
 - arrange transportation home for a patron
 - take away a patron's car keys
 - alert the police
 - contact the patron's family members or friends

Social Hosts

- A **social host** has many of the same liabilities as a commercial host, but *does not receive any financial benefit*.
- Example: If a couple throws a party at their house, they are **social hosts** who are responsible for their guests in the same way that **commercial hosts** are responsible for their paying customers.
- Similar precautions must be taken regarding the guests' safety.

Medical Malpractice

- **Malpractice** occurs when someone receives improper or **negligent** professional treatment.
- The most common type is **medical malpractice**, which occurs when a health care professional fails to provide appropriate treatment.
- It may also occur if the patient has not agreed to a particular treatment or action. This is known as **informed consent**. A patient must completely understand the risks involved.
- The only exception is a life-threatening emergency.

Trespassing

- Torts can be unintentional, like negligence, or they can be **intentional**.
- The main **intentional torts** are:
 - Trespass to another person (assault and battery; false imprisonment)
 - Trespass to land 90
 - Nuisance
- **Trespass** can be defined as being present or interfering with another's property *without* that person's consent or legal right.

Trespass to Person: Assault and Battery

- In civil law, an **assault** occurs when there is a simple threat of danger or violence.
- A person may be sued for **assault** if he or she *intended* to create fear in someone else.
- Example: John tells Hilary that he will stab her.
- **Battery** is the intentional physical contact or harm caused to another person.
- A person may be sued for **battery** if he or she directly touches someone without that person's permission (similar to the way **assault** is treated in criminal law).
- Example: John grabs Hilary after she asks him to stop.

Trespass to Person: False Imprisonment

- If someone is falsely confined or restrained in a specific area, that person may file a lawsuit for being **falsely imprisoned**.
- The confinement may involve being held in a prison, but is not limited to that.
- Common false imprisonment lawsuits involve people who have been falsely arrested. They may sue for **wrongful/false arrest** and **false imprisonment** at the same time.
- Being **falsely detained** may also be interpreted as false imprisonment. Physical restraint does not have to exist.

Negligent Investigation

- The newest type of tort in **negligence**, this tort allows someone to sue police for conducting an improper investigation.
- **Negligent Investigation** was established in Canada following the Supreme Court precedent in the case *Hill v. Hamilton-Wentworth Regional Police Services Board, 2007*.
- In that case, Jason Hill was falsely convicted in a series of bank robberies. He spent nearly two years in jail before new evidence cleared his name and he was released. He filed a **negligence** suit against police for the way in which they conducted their investigation.

Trespass to Land

- The act of entering or crossing onto another person's land *without* that person's permission or legal authority is **trespass to land**.
- This includes throwing an object onto someone's land or bringing an object onto his or her land and then not removing it.
- In rental situations, occupier or tenant rights are enforced by provincial landlord and tenant laws, which prohibit landlords from entering tenants' residences *without their permission* unless there is an emergency.

Nuisance

- In civil law, a **nuisance** occurs when a person's unreasonable use of land interferes with the enjoyment of adjoining land by others.
- **Nuisance** may be intentional or unintentional.
- A **private nuisance** involves personal property. If someone's property is being interfered with *consistently* in a way that produces harm, the property holder may initiate a lawsuit for **nuisance**.
- A **public nuisance** involves the rights of the public. It is not necessary to prove that everyone is being harmed, just a majority.
- **Public nuisance** suits are usually brought forward by the government on behalf of citizens.

Defences for Trespass

- There are a number of common defences used against trespass lawsuits:
 1. Consent
 2. Self-defence, defence of others, and/or property 90
 3. Legal authority
 4. Necessity

Consent

- A common defence in **trespass** lawsuits, particularly *trespass to person* cases, is **consent**.
- A defendant must establish that he or she had **consent** to physically touch someone (like in contact sports, for example) or enter onto someone's land.
- This defence is very similar to **voluntary assumption of risk**.

Self-Defence

- As in criminal law, **self-defence** may be used in **trespass** cases if the defendant can establish that his or her use of force was reasonable, necessary, and not excessive.
- Defendants may also come to the **defence of others** or **defend their property** using the same criteria for the use of force.
- In defending their property, people cannot set traps or harm trespassers on purpose.

Legal Authority & Necessity

- Similar to the criminal law defence of legal duty, a police officer may use the defence of **legal authority** in lawsuits for assault and battery or false imprisonment.
- This includes having to use force against people (arrests, detainments) or entering onto their property (search warrants).
- Certain situations may exist in which a defendant can argue that an act of **trespassing** occurred out of **necessity**.
- This includes emergencies (going for help) or reclaiming his or her belongings.

Defamation

- Injuring a person's character or reputation is known as **defamation**.
- There are two basic types of defamation in civil law: **slander** and **libel**.
- There are also several basic defences used in defamation cases: **truth**, **absolute** and **qualified privilege**, and **fair comment**.
- In a **defamation** case, a plaintiff must prove:
 - The words used by the defendant were false.
 - The words used referred specifically to the plaintiff.
 - The words were read or heard by a third party.
 - The words caused harm and/or economic loss.

Slander & Libel

- **Slander** occurs when a person's character has been defamed *verbally*.
- This includes spoken words, gestures, sounds, and even facial expressions.
- **Slander** is often difficult to prove as the action is not recorded in any way.

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- **Libel** occurs when a person's character has been defamed *in written form*.
- This includes permanent visual and audio recordings, publications, and memos.
- Over the past several years, there has been a significant increase in **libel** cases as a result of the Internet.

Truth & Fair Comment

- If a defendant can prove that the comment he or she made or wrote about the plaintiff **was in fact true**, the defendant may be found not liable in a **defamation** case, even if the plaintiff's reputation was damaged.

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- Many media critics may also use the defence of **fair comment**, which allows them to criticize the work of artists for the general public (e.g. movie or food critics).
- Critics are supposed to focus on the work and avoid personal attacks on the artist.

Privilege

- **Absolute privilege** is a defence against defamation that is used by people in public roles, such as politicians and judges.
- Example: Politicians cannot be sued for comments they make inside the House of Commons, even if they accuse other politicians of lying. 90
- **Qualified privilege** is a defence against defamation that is used by people who express an honest opinion as part of their job.
- Example: A teacher writes a negative comment about a student's progress on the student's report card.

Liability Insurance

- Injury costs associated with motor vehicle accidents are usually very high.
- As a result, it is the law in Canada that all motorists must purchase **liability insurance** to cover potential liabilities that they may not be able to personally afford.
- Many businesses and doctors also purchase their own versions of **liability insurance** to protect themselves against personal bankruptcy if they are sued by clients, employees, or patients.