

Table of Contents

<i>Preface</i>		iii
<i>Table of Cases</i>		xxi
<i>Chapter 1</i>	The Characteristics of Torts	1
	1. Introduction	1
	2. Compensation.....	2
	(a) The Central Role of Damages in Tort	2
	(b) Compensation Distinguished from Punishment.....	2
	(c) Damages not an Exclusive Remedy.....	4
	(d) Gain-based Damages	4
	(e) Compensation without Tort.....	5
	3. Imposed by Law	7
	(a) Scope.....	7
	(b) Contract and Tort	9
	4. Private Law Wrongs	11
<i>Chapter 2</i>	The Foundations of Liability	15
	1. Causation and Fault	15
	2. Function and Purpose.....	17
<i>Chapter 3</i>	The Essential Features of Trespass	23
	1. Varieties of Trespass	23
	2. Common Elements	23
	(a) Force.....	23
	(b) Voluntariness.....	24
	(c) Directness.....	25
	(d) Intention and Fault	27
	(e) Actionable <i>per se</i>	29
	(f) Defences	29
	3. The Consequences of Trespass	32
<i>Chapter 4</i>	Trespass to Land	35
	1. Ingredients of Liability	35
	(a) The Defendant's State of Mind.....	35
	(b) Plaintiff's Standing to Sue.....	39
	(c) Land (Surface, Subsoil, and Airspace)	45
	(d) Trespassory Acts.....	48
	(i) <i>General Requirements</i>	48
	(ii) <i>Continuing Trespass</i>	52

	(iii) <i>Trespass ab initio</i>	54
	2. Defences	55
	(a) Necessity	55
	(b) Entry as of Right.....	57
	(c) Consent	57
	(d) Justification	60
	(e) Legality under Statute.....	63
	(f) Entry by Police.....	65
	3. Remedies	68
	(a) Self-Help	68
	(b) Damages.....	69
	(c) Injunction.....	72
Chapter 5	Trespass to the Person	75
	1. Forms of Trespass to the Person.....	75
	(a) Battery	76
	(b) Assault	80
	(c) False Imprisonment	81
	(d) Intentional Infliction of Emotional Distress.....	86
	2. The Defendant's State of Mind.....	91
	(a) Intention and Negligence	91
	(b) Mistake	95
	(c) Mental Disorder	96
	(d) Minority	99
	3. Defences	101
	(a) Protection of Property	101
	(i) <i>Trespassers</i>	101
	(ii) <i>Recovering Goods</i>	102
	(b) Self-Defence.....	102
	(c) Provocation	104
	(d) Necessity	107
	(e) Consent	109
	(i) <i>Generally</i>	109
	(ii) <i>Sports</i>	111
	(iii) <i>Fights</i>	112
	(iv) <i>Medical Treatment</i>	113
	(f) Statutory Authority	116
	(i) <i>Generally</i>	116
	(ii) <i>Force under the Criminal Code</i>	117
	(iii) <i>Lawful Arrest</i>	119
	(g) Discipline.....	125
	(h) Illegality of Plaintiff.....	126
	(i) Previous Criminal Proceedings	126

	4. Damages.....	128
	(a) In General	128
	(b) Aggravated Damages.....	129
	(c) Punitive or Exemplary Damages	130
<i>Chapter 6</i>	Trespass to Goods.....	131
	1. Elements of the Tort.....	131
	(a) An Act of Trespass.....	131
	(b) Subject Matter: Chattels	132
	(c) Standing to Sue: Possession	134
	(i) <i>Actual Possession</i>	134
	(ii) <i>Right to Possession</i>	138
	2. Defences	139
<i>Chapter 7</i>	Non-Trespassory Wrongs to Goods	143
	1. Conversion	143
	(a) History	143
	(b) Defendant's Mental State: Intention	144
	(c) Act Requirement	146
	(i) <i>Transfer</i>	146
	(ii) <i>Destruction or Damage</i>	147
	(iii) <i>Possession</i>	147
	(iv) <i>Use or Misuse</i>	149
	(v) <i>Assertion of Ownership</i>	152
	(vi) <i>Detention</i>	153
	(d) Subject Matter	155
	(e) Standing to Sue	157
	(f) Defences	160
	(g) Remedies	163
	(i) <i>Damages</i>	163
	(A) <i>Time for assessment</i>	163
	(B) <i>Assessment</i>	164
	(C) <i>Mitigation</i>	166
	(D) <i>Punitive damages</i>	168
	(E) <i>Effect of judgment</i>	168
	(ii) <i>Specific Restitution</i>	170
	2. Detinue.....	170
	(a) Differences between Detinue and Conversion and Trespass	170
	(b) Wrongful Detention.....	171
	(c) Plaintiff's Entitlement to Sue	172
	(d) Remedies	173
	(i) <i>Damages</i>	173
	(ii) <i>Specific Relief</i>	174
	(e) Defences	175

	3. Replevin	175
	(a) Nature	175
	(b) Scope and Plaintiff's Entitlement to Sue ...	177
	(c) Effect	179
	4. Recaption	179
<i>Chapter 8</i>	Nuisance	181
	1. Definition of Nuisance	181
	2. Private Nuisance	183
	(a) The Right to Sue	184
	(b) Private Nuisance by Damage	186
	(c) Private Nuisance by Interference	189
	(i) <i>Substantial Interference</i>	190
	(ii) <i>Unreasonable Interference</i>	195
	(d) Harm	196
	(i) <i>The Locality Principle</i>	196
	(ii) <i>The Sensitive Plaintiff</i>	199
	(iii) <i>Intensity and Duration</i>	201
	(e) Utility	202
	(i) <i>Public Benefit</i>	202
	(ii) <i>The Nature of the Plaintiff's</i> <i>Conduct</i>	203
	(iii) <i>Motive, Intention, and Knowledge</i> ...	206
	(f) Additional Bases of Liability	208
	(g) Defences	213
	(i) <i>Prescription</i>	213
	(ii) <i>Coming to the Nuisance</i>	215
	(iii) <i>Consent</i>	217
	(iv) <i>Statutory Authority</i>	218
	(h) Remedies	222
	(i) <i>Damages</i>	222
	(ii) <i>Injunctions</i>	224
	(iii) <i>Abatement</i>	227
	3. Public Nuisance	230
	(a) What is Public Nuisance?	230
	(b) Remedies for Public Nuisance	233
	(c) Private Actions for Public Nuisance	235
<i>Chapter 9</i>	Rylands v. Fletcher	239
	1. Introduction	239
	(a) Strict Liability	239
	(b) Origins and Characteristics	241
	(c) Relationship to Other Torts	244
	(d) Scope	246
	2. Required Elements	249

	(a) Non-natural Use.....	249
	(b) Collection or Accumulation	252
	(c) The Defendant's Own Purposes	253
	(d) Dangerous Objects.....	255
	(e) Escape	257
	3. Defences	259
	(a) The Plaintiff's Conduct	259
	(b) Act of God	261
	(c) Act of Stranger.....	262
	(d) Statutory Authority	263
<i>Chapter 10</i>	Liability for Animals.....	267
	1. Introduction	267
	2. Cattle Trespass	268
	(a) Liability.....	268
	(b) Legislation.....	271
	(c) Remedies	272
	3. The <i>Scienter</i> Doctrine	273
	(a) Common Law.....	273
	(i) <i>The Doctrine Stated</i>	273
	(ii) <i>Animals within the Doctrine</i>	275
	(iii) <i>Dangerous Propensity</i>	277
	(iv) <i>Knowledge of the Propensity</i>	279
	(v) <i>Ownership or Control</i>	280
	(vi) <i>Loss of Control</i>	281
	(vii) <i>Police Dogs</i>	282
	(viii) <i>Defences</i>	284
	(b) Under Statute	287
	4. Negligence	289
	(a) In General	289
	(b) Accidents on the Highway	292
	(i) <i>Negligence on the Highway</i>	292
	(ii) <i>Escape onto the Highway</i>	293
<i>Chapter 11</i>	Vicarious Liability	297
	1. Responsibility for Others	297
	(a) Direct and Vicarious Liability Distinguished.....	297
	(b) Rationale of Vicarious Liability	300
	(c) Categories of Vicarious Liability.....	305
	(d) Special Problems.....	313
	(i) <i>Hospitals</i>	313
	(ii) <i>The Crown</i>	317
	(iii) <i>Motor Vehicles</i>	320
	(iv) <i>Borrowed Employees</i>	325

	2. The Scope of Liability	331
	(a) Agents and Employees.....	331
	(b) Special Problems.....	337
	(i) <i>Non-sexual Battery</i>	337
	(ii) <i>Sexual Battery</i>	341
	(iii) <i>Fraud</i>	348
	(c) Independent Contractors	352
<i>Chapter 12</i>	The Duty of Care	361
	1. Introduction to Negligence	361
	2. The Duty of Care	365
	(a) Origins.....	365
	(b) Canadian Approaches to the Duty of Care	367
	(c) Foreseeability	369
	(d) Proximity.....	371
	(e) Policy	374
	(f) The Canadian Approach in Comparative Perspective.....	376
	3. The Application of <i>Anns/Cooper</i>	381
	(a) Public Authorities.....	381
	(b) Unborn Children	389
	(c) Rescuers	394
	(d) Psychiatric Harm	399
<i>Chapter 13</i>	Special Duties of Care: Economic Loss	409
	1. Introduction	409
	2. The Modern Canadian Approach	411
	(a) Negligent Misrepresentation.....	412
	(i) <i>Elements of the Duty of Care</i>	418
	(A) <i>Foreseeable reliance</i>	418
	(B) <i>Reasonable reliance</i>	420
	(C) <i>Purpose or scope of the</i> <i>defendant's undertaking</i>	423
	(D) <i>Illustrations</i>	425
	(ii) <i>A Misrepresentation</i>	426
	(iii) <i>Negligence</i>	429
	(iv) <i>Actual Reliance</i>	429
	(v) <i>Damage or Detriment Caused by</i> <i>Reliance</i>	430
	(vi) <i>Contributory Negligence</i>	432
	(vii) <i>Negligent Misrepresentation and</i> <i>Contract</i>	433
	(b) Negligent Performance of a Service.....	436

	(c) Negligent Supply of Shoddy Goods or Structures	440
	(d) Relational Economic Loss	447
	(e) New Duties of Care in Pure Economic Loss.....	454
<i>Chapter 14</i>	The Standard of Care	459
	1. The Content of a Duty	459
	2. Unreasonable Conduct	462
	3. Foresight and Severity of Harm.....	464
	4. Failure to Take Precautions.....	468
	5. Risk Versus Purpose	472
	6. Special Standards of Care.....	474
	7. Customary Practices	480
	8. Gross Negligence.....	484
<i>Chapter 15</i>	Proof of Negligence	487
	1. Onus on Plaintiff.....	487
	2. <i>Res Ipsa Loquitur</i>	488
	3. The Situation Before <i>Fontaine</i>	492
	(a) The Legal Character of <i>Res Ipsa Loquitur</i>	492
	(b) Scope of the Doctrine	493
	(c) The Applicability of the Doctrine	495
	(d) The Effect of <i>Res Ipsa Loquitur</i>	498
	4. The Situation After <i>Fontaine</i>	500
<i>Chapter 16</i>	Factual Causation	503
	1. Introduction	503
	2. Factual Causation.....	504
	(a) The “But for” Test.....	505
	(b) Recognized Exceptions to the “But for” Test	510
	(i) <i>Multiple Tortious Defendants and the Rule in Cook v. Lewis</i>	511
	(ii) <i>The Learned Intermediary Rule</i>	512
	(iii) <i>Informed Consent</i>	513
	(c) Alternative Tests.....	514
	(i) <i>Material Contribution to Risk</i>	514
	(ii) <i>Loss of Chance</i>	523
	(iii) <i>Toxic Torts</i>	525
	3. Conclusion	526
<i>Chapter 17</i>	Remoteness	529
	1. Introduction	529
	2. <i>Polemis</i> and the Directness Test.....	531

	3. <i>Wagon Mound (No. 1)</i> and the Foreseeability Test	532
	4. The Effect of Extrinsic Factors	536
	(a) The “Thin Skull” Principle	537
	(b) A Subsequent Injury	539
	(c) An Independent Subsequent Act of a Third Party.....	543
	(d) An Independent Subsequent Natural or Non-human Event	547
	(e) An Intervention by the Plaintiff.....	549
	(f) The SAAMCO Principle.....	555
<i>Chapter 18</i>	Defences to Negligence	559
	1. Inevitable Accident	559
	2. Illegality	563
	3. Consent	570
	(a) Meaning and Effect	570
	(b) Elements.....	572
	(c) Express Consent	574
	(d) Implied Consent	577
	(i) <i>Knowledge</i>	577
	(ii) <i>Agreement</i>	579
	(e) Particular Situations	580
	(i) <i>Employment</i>	580
	(ii) <i>Rescuers</i>	582
	(iii) <i>Games and Sports</i>	583
	(iv) <i>Impaired Driving</i>	586
	4. Contributory Negligence	587
	(a) Operation of the Defence.....	587
	(b) The Meaning of Contributory Negligence	589
	(i) <i>Negligence</i>	589
	(ii) <i>Causation</i>	594
	(iii) <i>A Sole Cause?</i>	597
	(iv) <i>Remoteness</i>	599
	(c) Contributory Negligence Legislation	600
<i>Chapter 19</i>	Damages for Negligence	607
	1. Introduction	607
	2. Damage to Real Property	610
	3. Damage to Chattels	613
	(a) Repair	614
	(b) Value.....	615
	(c) Loss of Use	617
	4. Personal Injuries	619

	(a) General Principles.....	619
	(b) Loss of Future Earnings	624
	(c) Pre-trial Care.....	629
	(d) Future Care.....	631
	(e) Non-pecuniary Losses.....	634
	(f) Other Losses.....	638
	(g) Collateral Benefits	639
	(h) Mitigation	644
	(i) Aggravated Damages.....	646
	(j) Punitive Damages.....	647
	5. Fatal Injuries.....	650
	(a) Claims by the Victim’s Estate	650
	(b) Claims by Dependants.....	654
<i>Chapter 20</i>	Liability for Dangerous Chattels	663
	1. A Brief History.....	663
	(a) Before 1932	663
	(b) Since 1932	665
	2. Who Owes the Duty	667
	3. To Whom the Duty is Owed.....	670
	4. To What the Duty Applies	672
	5. The Duty’s Content	674
	(a) Avoidance of Defective Design	674
	(b) Avoidance of Defective Manufacture.....	675
	(c) Duty to Warn.....	676
	6. What Counts as Damage?.....	683
<i>Chapter 21</i>	Occupiers’ Liability	689
	1. Introduction	689
	2. The Common Law.....	691
	(a) Distinctions	691
	(i) <i>Occupation and Ownership</i>	691
	(ii) <i>Conditions of Premises and</i> <i>Activities Conducted on Premises</i>	694
	(iii) <i>Lawful and Unlawful Visitors</i>	694
	(iv) <i>Historical Differentiation of</i> <i>Duties</i>	695
	(b) The Common Law Duties.....	696
	(i) <i>Contractees</i>	697
	(ii) <i>Invitees</i>	699
	(iii) <i>Licensees</i>	703
	(iv) <i>Trespassers</i>	707
	3. The Statutes	710
	(a) Replacement of the Common Law.....	710
	(b) Scope.....	712

	(i) <i>Occupiers</i>	712
	(ii) <i>Premises</i>	713
	(iii) <i>Visitors</i>	714
	(c) The Duty	715
	(d) Defences	722
	(i) <i>Assumption of Risk</i>	722
	(ii) <i>Contributory Negligence</i>	725
	(e) Landlords	726
<i>Chapter 22</i>	Employers' Liability	729
	1. Duty of Care	729
	2. Application of the Duty	733
	(a) Employees	733
	(b) Transferred Employees	734
	(c) Volunteers	735
	(d) Apprentices	736
	3. Standard of Care	736
	4. Defences	740
	(a) <i>Volenti</i>	740
	(b) Contributory Negligence	741
	(c) Common Employment	741
<i>Chapter 23</i>	Breach of Statute	743
	1. Introduction	743
	2. The Former Action for Breach of Statutory Duty	743
	3. <i>Saskatchewan Wheat Pool</i>	748
	4. The Effect of the Decision	751
<i>Chapter 24</i>	Defamation	759
	1. Introduction and Changing Context	759
	2. Libel and Slander	762
	3. Elements	764
	(a) A Defamatory Statement	764
	(b) What is Defamatory	766
	(c) Reference to the Plaintiff	772
	(d) Publication	774
	4. Parties	778
	(a) Who May Sue	778
	(b) Who May Be Sued	780
	5. Defences	780
	(a) Justification	780
	(b) Privilege	782
	(i) <i>Absolute Privilege</i>	783
	(ii) <i>Qualified Privilege</i>	786

	(c) Responsible Communication on Matters of Public Interest	795
	(d) Fair Comment	797
	(e) Consent	802
	6. Remedies	804
	(a) Damages.....	804
	(i) <i>Common Law</i>	804
	(ii) <i>Statutory Provisions Affecting Damages</i>	807
	(iii) <i>Punitive Damages</i>	809
	(b) Injunctions	811
Chapter 25	Invasion of Privacy	813
	1. The Concept of Privacy	813
	2. Recognized Privacy Torts	814
	(a) Intrusion on Seclusion	814
	(b) Public Disclosure of Embarrassing Private Facts	817
	(c) Appropriation of Personality	819
	(d) Other Possible Actions.....	822
	3. Statutory Provisions	824
Chapter 26	Interference with Family Relationships	829
	1. Spouses.....	829
	2. Parent and Child	831
	(a) Action by Parent	831
	(b) Action by Child.....	832
Chapter 27	Loss of Services	835
	1. The Action <i>Per Quod Servitium Amisit</i>	835
	(a) Origins, Nature and Effect.....	835
	(b) A Relationship of Employer and Employee.....	836
	(c) Scope of the Action	839
	2. What is Recoverable	840
	3. Limitations on Liability	842
	(a) Death	842
	(b) Termination.....	843
	(c) No Cause of Action.....	844
	4. Conclusion	844
Chapter 28	Deceit	847
	1. Evolution and the Effect of Fraud	847
	2. Elements.....	851
	(a) A Representation of Fact	856

	(b) The Representation is False	862
	(c) Knowledge that the Representation is False.....	865
	(d) Intention to Induce Reliance.....	871
	(e) Reliance on the Representation.....	874
	(f) Damage.....	880
	3. Damages.....	883
	4. Defences.....	890
<i>Chapter 29</i>	Conspiracy	893
	1. Nature and Scope.....	893
	2. Elements.....	899
	(a) Agreement.....	899
	(b) Intention.....	901
	(c) Unlawful Acts	904
	(d) Participation.....	906
	(e) Damage.....	908
	3. Defences.....	910
	(a) Justification.....	910
	(b) Statutory Protection of Trade Unions.....	912
<i>Chapter 30</i>	Intimidation	913
	1. Origin and Evolution.....	913
	2. Problems.....	915
	3. Elements.....	921
	(a) Threat.....	921
	(b) Unlawful Act.....	924
	(c) Intention.....	932
	(d) Submission to the Threat.....	935
	(e) Damage.....	936
	4. The Defence of Justification	938
<i>Chapter 31</i>	Inducing Breach of Contract	941
	1. Origins and Nature.....	941
	2. Rationale.....	944
	3. Elements.....	949
	(a) Existence of a Valid Contract and its Breach.....	952
	(i) <i>Existence</i>	952
	(ii) <i>Breach</i>	954
	(b) Knowledge.....	955
	(c) Intention to Procure a Breach.....	959
	(d) Inducement or Procurement of Breach.....	964
	(i) <i>What is Inducement or Procurement?</i>	965

	(ii) <i>Causation Aspects of Inducement or Procurement</i>	972
	(e) Damage.....	973
	4. The Defence of Justification	975
Chapter 32	Causing Loss by Unlawful Means	983
	1. Emergence and Evolution	983
	2. Elements.....	987
	(a) Unlawful Means	988
	(b) Intention.....	1003
	(c) Harm or Loss	1008
	3. The Defence of Justification	1012
Chapter 33	Injurious Falsehood	1015
	1. Origins and Development	1015
	2. The Scope of Liability	1017
	(a) Different Forms.....	1017
	(b) Slander of Title.....	1019
	(c) Slander of Quality	1019
	(d) Extension.....	1020
	3. Requirements of Liability	1022
	(a) Disparagement.....	1022
	(b) Falsity	1023
	(c) Malice	1023
	(d) Damage.....	1025
	4. Absolute Privilege.....	1027
Chapter 34	Passing Off	1029
	1. Introduction	1029
	2. Common Law.....	1030
	(a) History	1030
	(b) Rationale.....	1032
	(c) Essential Elements	1034
	(i) <i>Reputation and Goodwill</i>	1035
	(A) <i>Scope of goodwill</i>	1035
	(B) <i>Reputation or trade in jurisdiction?</i>	1037
	(C) <i>Generic descriptors</i>	1039
	(D) <i>Personal names</i>	1039
	(E) <i>Functionality</i>	1040
	(F) <i>Identifiers other than words</i>	1041
	(ii) <i>Misrepresentation and Confusion</i>	1042
	(A) <i>Manner of misrepresentation</i>	1043
	(B) <i>“The public”</i>	1044
	(C) <i>Confusion</i>	1045

	(iii) <i>Damage</i>	1046
	(d) Remedies	1048
	(i) <i>Monetary Relief</i>	1048
	(ii) <i>Non-monetary Relief</i>	1050
	(e) Modern Expansion	1052
	3. Statute	1056
	(a) <i>Trademarks Act</i>	1056
	(b) Relationship Between Common Law and the Statute	1056
	(c) Jurisdiction and Constitutionality	1058
<i>Chapter 35</i>	Abuse of Legal Procedure	1061
	1. Introduction	1061
	2. Malicious Prosecution	1061
	(a) Nature and Scope	1061
	(b) Elements	1065
	(i) <i>Initiation of Proceedings</i>	1066
	(ii) <i>Termination in the Plaintiff's Favour</i>	1068
	(iii) <i>Lack of Reasonable and Probable Cause</i>	1069
	(iv) <i>Malice</i>	1074
	(c) Role of the Judge and the Jury	1076
	(d) Damage	1078
	3. Abuse of Process	1079
	4. Immunity from Being Sued	1082
	(a) Judges	1082
	(b) Public Prosecutors	1085
	5. Maintenance and Champerty	1087
	6. Spoliation	1091
<i>Chapter 36</i>	Misfeasance in a Public Office	1095
	1. Introduction	1095
	2. Requirements for Liability	1100
	(a) Public Office	1100
	(b) Deliberately Unlawful Conduct	1102
	(c) State of Mind	1104
	(i) <i>Malice</i>	1105
	(ii) <i>Knowledge</i>	1106
	(d) Material Damage	1109
	3. Importance of the Tort	1110
<i>Chapter 37</i>	Multiple Tortfeasors	1111
	1. Types of Multiple Tortfeasors	1111
	(a) Joint Tortfeasors	1111

(b) Several Tortfeasors	1114
(c) Concurrent Tortfeasors	1115
2. The Extent of the Defendants' Liability	1117
(a) Apportionment	1117
(b) Effect of a Judgment	1120
(c) Effect of a Release	1122
3. Contribution Between Tortfeasors	1123
(a) At Common Law	1123
(b) Statutory Provisions	1124
(c) Interpreting the Statutes	1126
(i) <i>Scope</i>	1126
(ii) <i>Effect</i>	1128
(iii) <i>Claiming Contribution</i>	1128
(iv) <i>Limitation Periods</i>	1129
Index	1131