

Law for Professional Engineers and Professional Geoscientists

Torts

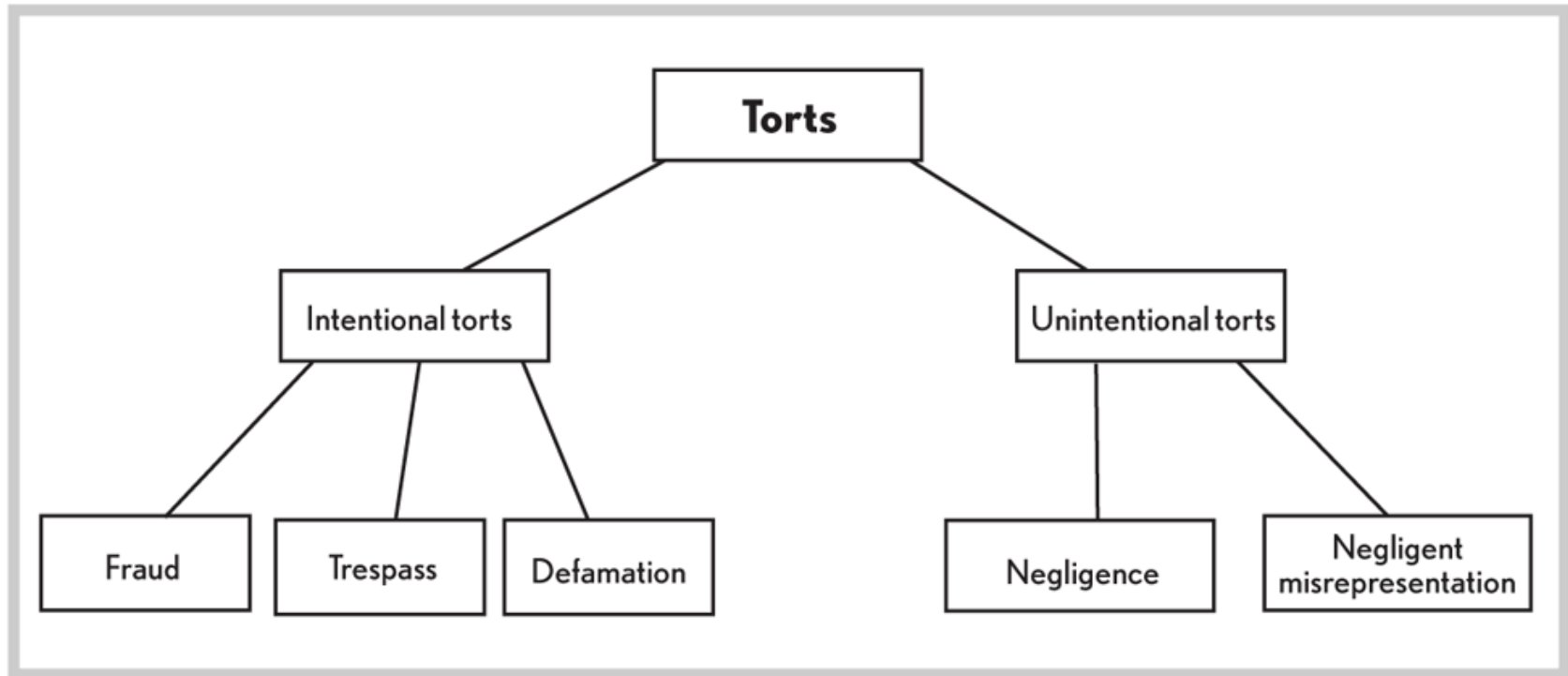
Law and Ethics Seminar
Fall 2018

Overview

- Tort is the breach of a duty of care owed to another party that causes injury or loss to that other party
- Negligence is the tort engineers and geoscientists are most commonly sued for
- Two categories of tort: intentional and unintentional
- Tort law evolves continually as new cases are decided
 - ex. – new common law tort of “invasion of privacy” (Ontario CA in *Jones v. Tsige*; but not in BCSC in *Demcak v. Vo*)

Categories of Tort

FIGURE 12-1 Types of Tort



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Overview of Negligence

- Negligence is an unintentional tort
- Basic elements:
 - The defendant owed the plaintiff a **duty of care**
 - The defendant **breached that duty**
 - The **plaintiff suffered a loss**
 - The breach of duty by the defendant was the **proximate cause** of the plaintiff's loss
- Negating any element will be a complete defence to a claim of negligence

Duty of Care

- Duty of care is an unsettled area of law
- Whether a duty exists is based on **reasonable foreseeability**
- A duty of care is more likely to exist where there is a pre-existing relationship between the parties
- A tort duty of care can co-exist with a contractual duty of care

Duties of Care for Architects and Engineers

- Professionals owe a tort duty of care to the owner even if there is no contractual relationship with the owner e.g. when an engineer is hired by the architect
- A consultant who prepares specifications owes a duty of care to bidders
- Generally, consultants hired by the owner do not have a duty of care to the contractor, or to the contractor's employees, but if the consultant supervises the construction, such duties may arise
- Third parties to the construction process may have tort claims against consultants if the harm was foreseeable

Pure Economic Loss

- Pure economic loss is financial loss without any associated personal injury or damage to property
- Historically, courts in Canada have barred negligence claims for pure economic loss because of the large amount of liability that would result if such claims were allowed
- Exceptions: pure economic loss can be recovered for some torts e.g. negligent misrepresentation, dangerous defects
 - (5 categories see: Design Services Ltd. v. Canada)

Reducing the Risk of Negligence Claims

- Contractual limitation clauses can limit tort duties of care
- Contractual limitations only apply between the parties to the contract, but may be relevant to whether a party to the contract owed a duty of care to a third party e.g. if the owner's contract with the consultant states that the consultant is not responsible for work methods, it is less likely that the consultant owes a duty to a person injured by dangerous work methods

Breach of Duty

- A breach of duty occurs when the standard of care is not met
- The standard of care is defined by what a reasonable and competent member of that occupation would have done in the situation
- Expert evidence is used to establish the standard of care in a particular case
- The standard of care is determined considering the state of the art **at the time of the alleged breach**

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Breach of Duty (continued)

- Commonly practiced norms are relevant to, but not determinative of, the standard of care
- Professionals who hold themselves out as specialists will be held to a higher standard of care
- Most breaches of duty occur due to lack of care, not incompetence
- Continuing professional education programs guard against incompetence
- Checklists and other quality control procedures should be used to prevent lack of care

Causation

- Only losses caused by the defendant's breach of duty are recoverable i.e. losses which, **but for the breach**, would not have occurred
- The loss must also be proximate to (not too remote from) the breach
- The plaintiff must prove causation on a balance of probabilities

Negligent Misrepresentation

- Misrepresentation is a false statement
- Negligent misrepresentation is a false statement made in breach of a duty of care
- A duty of care is owed to those who it is reasonably foreseeable will rely on the statement; but the duty is limited by proximity
- Causation is established by proving reliance on the misrepresentation
- Pure economic loss is recoverable for negligent misrepresentation

Fraud

- Fraud is an intentional tort
- Fraud is also known as deceit
- Where there is a positive obligation to disclose information, a fraudulent misrepresentation can occur by omission
- Negligent statements may be made carelessly, without an intention to deceive, but fraudulent statements are those made intentionally, with knowledge that they are untrue

Fiduciary Duty

- A fiduciary duty exists when there is a special relationship of trust in which the party owing the duty (the fiduciary) is required to put the interests of the party owed the duty (the beneficiary) ahead of its own interests
- The categories of relationship in which fiduciary duties exist are not clearly defined, although they often exist in particular cases e.g. doctor-patient, lawyer-client

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Fiduciary Duty (Continued)

- The following are indicia of fiduciary relationships:
 - The fiduciary has the ability to exercise discretion or power
 - The fiduciary can unilaterally exercise that power so as to affect the beneficiary
 - The beneficiary is peculiarly vulnerable to the power of the fiduciary
- Fiduciary relationships do not normally exist between arm's length commercial parties

Trespass

- Trespass is unauthorized entry onto the land of another person
- Trespass is a strict liability tort: the plaintiff is not required to prove intention or neglect
- Property rights extend from below the surface of the land up into the sky above the land → use of rock anchors and tower cranes may lead to a claim of trespass
- Also be aware of *The Trespass to Property Act in Saskatchewan*

Rylands v. Fletcher

- *Rylands v. Fletcher* is a land-related strict liability tort
- *Rylands v. Fletcher* arose from a case where water escaped onto neighbouring property
- Elements of *Rylands v. Fletcher*
 - Defendant made a non-natural use of his land
 - Defendant bought something onto his land which was likely to do mischief if it escaped
 - Escape occurred
 - Damages resulted to the plaintiff's property

Duty to Warn

- A tort duty that obliges professionals to warn others of impending damage to persons or property
- Professionals are held to a high standard, especially when there is a danger to persons
- The duty is fulfilled by taking reasonable steps to warn the appropriate persons of the danger

Products Liability

- The liability of the manufacturer to a consumer for a defective product
- Used when the consumer does not have a direct contractual relationship with the manufacturer; which is the case for most products
- Consumers may have a cause of action for negligent manufacture and / or duty to warn
- Learned intermediary rule: when the person dispensing the product (e.g. a doctor) has a duty to warn the consumer of the dangers associated with the product

Concurrent Liability in Contract and Tort

- Historically, it was not possible to sue in tort when the parties had a contract covering similar duties
- *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147: a duty in tort can co-exist with a duty in contract so long as the contract does not define the nature and scope of the duty of care
- Therefore, if the parties want to control the rights between them, they should exhaustively define the duty of care in their contract

Questions

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