Torts
2019-2020

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TORTS

ALWAYS ESTABLISH LIABILITY, THEN DEFENCE, THEN REMEDIES

Introduction to Torts

- A tort indicates an injury other than a breach of contract, which the law will redress with damages
- Torts apply to everything and everyone, act to shift a loss suffered by the plaintiff to the defendant
- No consent needed as duties are pre-existing and continuous
- Jail time is never considered. Only remedies are damages or an injunction
- Standard of proof on a balance of probabilities
- Goals:
  1) Compensate for a loss resulting from wrongful conduct (fault/negligence) of another
  2) Individual and market deterrence
  3) Education
  4) Psychological comfort to the injured
  5) Advance legislative policies

Types of torts

Intentional	**Negligent**	**Strict Liability**
Cause intentionally by the tortfeasor (e.g. battery)	Caused when the tortfeasor does not mean to do any harm, but fails to act reasonably in a given situation and causes harm to another	Tortfeasor causes harm in particular circumstances even without fault (e.g. dangerous animals)

Compensation

- Almost always punished with damages or an injunction
  - Main purpose is to get those who have suffered damages by the defendant back to their original position, not to a better position than originally
  - Focuses on the plaintiff. The same tort could differently affect different plaintiffs
  - Torts look to the past
- The amount of damages awarded by the court is based on one or more of the following:
  - Dollar value of the loss incurred by the victim
  - Cost of fixing the damage done by the tort
  - Lost earnings
  - Pain and suffering
  - Punitive damages: intended to punish the defendant, legally capped. Punitive is the only one that does not fall under the category of ‘compensatory damages’

Nuisance

- **Nuisance**: an unreasonable and substantial interference with the plaintiff's use and enjoyment of land

Protecting Interests in land

Appleby v Erie Tobacco Co (1910)

- Keys: local standard of comfort, material discomfort, differing standards
- Facts: Plaintiff alleged that the manufacturing of tobacco taking place on the defendant's premises constitutes a nuisance because of the harsh odour
- Issue: does the interference of the defendant's tobacco manufacturing constitute a material discomfort and render the plaintiff's premises less fit for the ordinary purposes of life?
- Analysis: This depends on circumstances. Question of degree and depends on the local standard of comfort
    - The addition of fresh noises could be a legal nuisance
    - Local standards exist and do matter (objectively) but don't excuse unreasonable acts – can still constitute a nuisance regardless
- Decision: Court issued an injunction
    - Can't cause material discomfort and annoyance
    - Use of land is not reasonable if it causes substantial damages to others/property in a material way
    - Does not have to be an actual danger to health to be a nuisance
    - Who arrived first is relevant but not determinative

Rogers v Elliot (1888)

- Keys: Sensitivities, average person, malice
- Facts: Defendant worked at a church and rang the church bells several times a day. Plaintiff was recovering from sunstroke and his doctor told him the convulsions he was having was due to the bells. Asked the defendant to stop ringing the bells but he refused
- Issue: By what standard and against the interests of another person, is one's right to use his own property to be measured?
- Analysis: The standard for determining reasonableness is based on the average person, not someone who is especially susceptible
    - Defendant's right to make noise for a proper purpose should be measured in reference to the degree of annoyance that others can reasonably be required to endure
    - Focus on plaintiff and if they are suffering what is an unreasonable use or interference (always depends on circumstances)
    - If the defendant knows about the plaintiff's condition this could affect their liability
    - Malice is not sufficient to be evidence of nuisance but can be taken into account in determining whether interference of the plaintiff's rights was unreasonable
- Decision: In favour of defendant

Contradictory cases:

The Mayor, etc of Bradford v Pickles (1895)

- Defendant reduced the amount of water flowing from their land into the plaintiff's. Plaintiff's alleged this was done to inure them, sought an injunction
- Court ruled that malice here was irrelevant. Whether legal or illegal, malice didn't matter
- Malic is not determinative

Hollywood Silver Fox Farm Ltd v Emmett (1936)

- Noise nuisance case, defendant interfered with plaintiff's fox breeding by intentionally shooting guns on his own property
- Court says it is necessary to look at all of the circumstances, it is not sufficient to show malice to demonstrate nuisance
- Motive must be taken into consideration in determining whether property was used in a legitimate and reasonable manner
- No one has an absolute right to make noise on their land

Fontainebleau Hotel Corp v Forty-Five Twenty-Five (1959)

- Keys: lawful rights
- Facts: The defendant was building a hotel that would block the sun on the pool/deck of the plaintiff's hotel. Trial judge had granted an injunction for material/substantial interference.
    - Law originally applied the maxim that no one has the right to use his property to the injure the lawful rights of others
    - This means that whatever the claimed nuisance is has to be protected under nuisance law
- Issues: Are sunlight and air legally protected rights?
- Analysis: A property owner can put their property to any reasonable and lawful use as long as they don't thereby deprive the adjoining landowner of any right of enjoyment that is recognized and protected by law (as long as this use isn't a nuisance)
    - Distinguished between a property right that injures one's neighbor and one that injures the rights of one's neighbor
- Decision: Court ruled that sunlight and air are not legally protected rights, and thus the land owner has no legal right to unobstructed light, air, or view

Prah v Maretti (1982)

- The plaintiff's access to sunlight for solar energy was blocked by his neighbor's proposed construction of a residence
- Courts protected the right to sunlight here because it was for solar energy
- Courts distinguished between past and present (sunlight was only for aesthetic or for light), previously less protection of rights and more protection of owners

Elder's Case (1619)

- Cannot take legal action for blockages of view. This has existed for the past 400 years, view has never been protected by nuisance and can't be legally protected in this way

Shuttleworth v Vancouver General Hospital (1927)

- Keys: anticipatory nuisance
- Facts: Plaintiffs alleged that the infectious diseases hospital owned by the defendants would be an anticipatory nuisance
- Issues: Does this *quia timet* action (an injunction to restrain wrongful acts that are threatened or imminent but haven't happened yet) constitute a nuisance?
- Analysis:
    - An injunction for an anticipatory nuisance requires:
        - Proof by the plaintiff of a well-founded apprehension of injury (proof of actual and real danger)
        - A strong probability amounting to moral certainty that an actual nuisance would occur
    - The burden of proof falls on the plaintiff
    - A sentiment of danger and dislike (even a depreciation of property) will not discharge the burden of proof or justify a precautionary injunction
- Decision: court rules in favour of the defendant

Laws v Florinplace Ltd (1981):

- Keys: Anticipatory injunction
- Ten residents brought a motion to restrain by interim injunction the continued operation of a pornography shot opened in their area. Claimed it was a nuisance because:
    - The nature of the business would be apparent to residents and offend their sensibilities, and because of this was a reasonable interference with their enjoyment of their property
    - The business would attract undesirable clients who could potentially harm local girls
- Shows that there can be nuisance where the use made by the defendants of their property is an affront to the reasonable susceptibilities of ordinary people and where this use is apparent to residents
    - Anticipatory injunction granted

Bamford v Turnley (1892)

- Keys: live and let live, reciprocity, rejection of public benefit defence
- Facts: Plaintiff alleged that the defendant's adjacent brick making operation constituted a nuisance
- Issues: Can an act that constitutes a nuisance be made lawful by the fact that it is a public benefit?
- Analysis: Court says that acts that are necessary for the common and ordinary use and occupation of land are not actionable as nuisance ("live and let live")
    - In this case the facts were not usual, but didn't constitute a common and ordinary use of the land (not reciprocal because the plaintiff would not do the same
    - The factory argued they were contributing to society and the economy, so the court would be prioritizing individual rights over public benefit
- Decision: Court rejects the defence of public benefit. Rules that a thing is for the public benefit only when it is good for all individuals on the balance of loss and gain

Sturges v Bridgeman (1879)

- Keys: coming to the nuisance
- Facts: Plaintiff was a neighbor with the defendant, a confectioner, for 20 years. The plaintiff expanded his business by creating a new room and sued the defendant for nuisance due to the noise that came from the defendant's machines
- Issues: Can prior long time use excuse a nuisance?
- Analysis: It is not a defence to come to the nuisance
    - Court says that it is logical the plaintiff didn't complain for the last 20 years because he didn't hear the noise, so he can't be said to have consented for that time
    - A person cannot be said to consent or acquiesce to something that amounts to a nuisance he wasn't aware of, which he contests, or which was temporary
- Decision: Courts ruled in favour of the plaintiff. Held that the noise didn't constitute a nuisance before, but now it does and outweighs the continued use by the defendant

Miller v Jackson (1977)

- Keys: Private vs. public interests, coming to the nuisance
- Facts: A housing development was completed very close to where a cricket field had been located for over 70 years. The owners of one of the houses sought, and were granted, an injunction to stop the playing of cricket so that the balls no longer went into their property. Windows had been broken in the past and the plaintiffs saw the field as a potential safety risk. The trial court granted this injunction
- Issues: Can prior long term use excuse a current nuisance?
- Analysis:
    - Denning: since cricket had been played before the plaintiff's house was built the test is whether the use by the defendant's of the ground for playing cricket was reasonable according to the ordinary usages of people. He found the public at large as those who play cricket, held that their interests should be given priority over the interests of the plaintiffs (distinguished from *Sturges*)
    - Lane: found similarities to *Shuttleworth* (looking for an injunction based on something that hasn't caused harm yet), but found nuisance.
        - Issue settled in *Sturges* (binding) because you <u>can't find that its not a nuisance because the defendant was operating before the nuisance arose</u>
        - Damages insufficient in light of the risk of physical injury and property damage – injunction granted but stayed for 12 months
    - Cumming: concurred with Lord Lane other than on the issue of remedy, but focus here the court considering the interests of the public when deciding whether to grant an injunction
- Conclusion: Defendant liable, only damages awarded

Kennaway v Thompson (1980)

- Keys: Expressly disagrees with Denning in *Miller,* public interest not over private interest
- Facts: Plaintiff inherited a property on a lake where a club had organized boat racing for years. Although she was aware of the problem she decided to build a house there. Problems and noise gradually became worse. Plaintiff brought an action in nuisance and sought an injunction.
- Issues: Does public interest prevail over an individual's private interest?

- Analysis: Plaintiff proved that the club had caused a nuisance that interfered in a substantial and intolerable way with the use of her house
- Conclusion: Court held that the activities were a nuisance and granted a creative injunction that placed restrictions on the boat club (e.g. time, number of boats). Didn't place public interests over the plaintiff's private interest

Antrim Truck Centre Ltd v Ontario (Transportation) (2013)

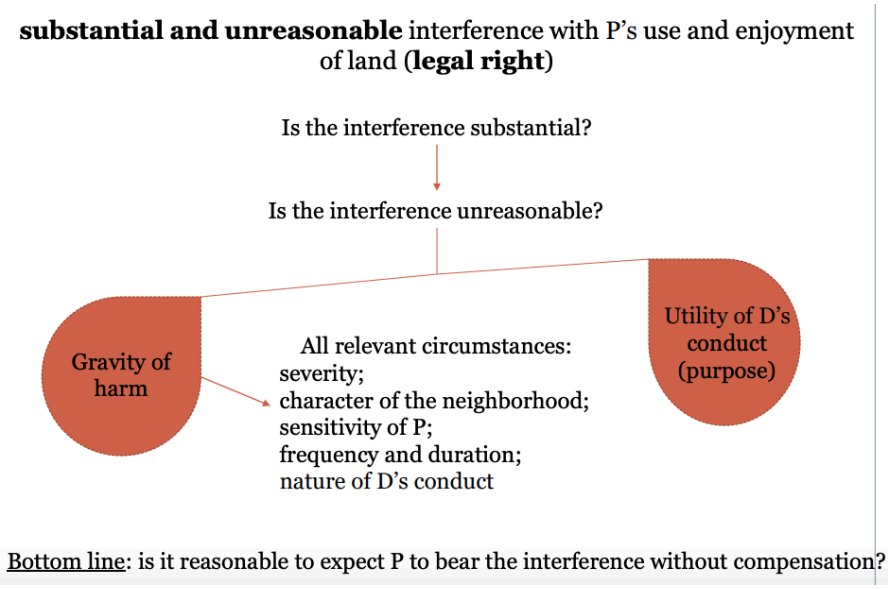
- Keys: This is the Canadian authority on the test for private nuisance in Canada
- Facts: Appellant owned and operated a truck shop. The respondent province configured highways into the area, thus putting the appellant out of business because drivers couldn't easily reach the property. Appellant applied to the Ontario Municipal Board under the *Expropriations Act* and the Board awarded compensation. This award was then set aside by the Court of Appeal on the grounds that the Board failed to consider:
    - The character of the neighborhood and the sensitivity of the complainant
    - Failed to recognize the elevated importance of the utility of the defendant's conduct where the interference is the result of an essential public service
- Issues: Was there substantial and unreasonable interference?
- Analysis: See below for test
    - Substantial interference was found
    - Unreasonable interference was found. Needs to be based on the standard of an ordinary person, balances the harm to the plaintiff against the utility of the defendant's conduct. The harm to the plaintiff was found as unreasonable and he should not have to bear this cost for the sake of the public good
- Conclusion:

Test for Nuisance (from *Antrim*)

1) Is there **substantial and unreasonable** interference with the plaintiff's use and enjoyment of land?
    a. Substantial: non-trivial, amounts to more than a slight annoyance or trifling interference (turns on the facts)
    b. Unreasonable: assessed on all relevant circumstances in order to determine whether it would be unreasonable to require the plaintiff to suffer the interference without compensation
        i. All relevant circumstances: need to balance the gravity of the harm to the plaintiff and the utility (purpose) of the defendant's conduct (e.g. character of the neighborhood, sensitivity of the plaintiff, length and duration)
        ii. Focus is on the reasonableness of the interference suffered by the plaintiff and not the reasonableness of the defendant's conduct – although this can be a consideration (e.g. malice)

- Utility: the utility of the defendant's conduct must be considered in light of other relevant factors and should not be weighed equally with the harm
    - This is because virtually all public purposes would be seen as outweighing harm
- Public benefit: public benefit will override compensation for individual harm where, in light of all circumstances, it is reasonable to expect the plaintiff to bear the interferences without compensation

- E.g. if reciprocal, if mitigating steps have been taken, short duration of interference
- Bottom line: is it reasonable to expect the plaintiff to bear the interference without compensation?



Remedies

- Only once liability has been determined do courts discuss remedies – should always be discussed on exams
- Two options: Injunctions or damages – can have either or both granted

Coventry v Lawrence (2014)

- Keys: ***Shelfer* rule**, applied to every nuisance case to find a remedy
  - Where a plaintiff has established that the defendant's activities constitute a nuisance, *prima facie* the remedy (in addition to damages for past nuisance) is an injunction. The court still has the power to award damages instead of an injunction.
- The principles governing the exercise of the court's jurisdiction to award damages instead of an injunction is based on **the *Shelfer* rule**. Damages may be granted where:
  1) The injury to the plaintiff's legal right is 'small'
  2) It can be estimated in money (e.g. hard to put a price on land)
  3) It can be adequately compensated by a small money payment
  4) It would be oppressive to the defendant to grant an injunction (e.g. public benefit/welfare, this is a way to take public benefit into account in a greater way)
     a. Public interest is always relevant
     b. The grant of planning permission for a particular activity may provide strong support for the contention that the activity is of benefit to the public (shows that it is clear it is really doing something for the public benefit, sways the court to grant damages)
     c. The fact that it is a single individual does not mean they will be outweighed by the public benefit

- Under *Coventry,* the Shelfer rule is no longer understood as strict. All conditions do not need to be satisfied
- Court can decide based on the circumstances and facts
    - If all elements are satisfied it is unlikely the courts will grant an injunction, but just because all elements aren't satisfied does not mean an injunction should be granted
    - Injunction is still the default
    - Greater the injury, higher possibility of an injunction

Principles governing the measure of damages:

1) Damages should not always be limited to the reduction in the value of the claimant's property
    a. Need to take into account that the plaintiff did not receive the remedy they are entitled to and that the defendant has been spared (loss of claimant's ability to enforce her rights)

2) Application of the ***Shelfer* rule:** cases related to this include *Canada Paper Co v Brown; Black v Canadian Copper Co; Boomer v Atlantic Cement Co* – these cases grant damages instead of an injunction for public benefit
    a. ***Canada Paper*:** the fact that the defendant might be operating in the public benefit does not mean we should not give protection to the individual's private property rights
    b. ***Black:*** UK case where there was harm caused to the plaintiff from mines in the area. The court ruled that in some circumstances individual rights cannot outweigh an entire community (nuisance, but granted damages instead of an injunction)
    c. ***Boomer:*** Defendant operated a cement plant; plaintiff alleged there was harm caused. Focus on the disparity in economic consequences that would result from ceasing operations. Even though a nuisance existed, damages were granted instead of an injunction

Legislative protection of the public welfare

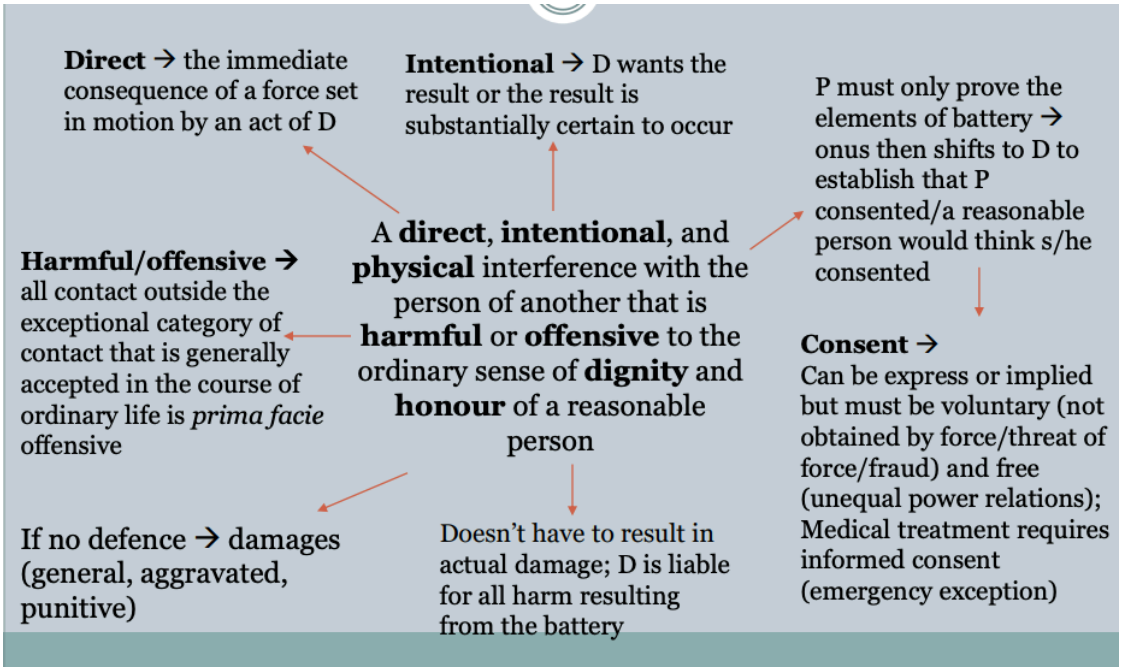
- Very rare, this is when the courts essentially overturn injunctions because of legislation

1. ***KVP Co Ltd v McKie et al:*** Plaintiffs were individual landowners on a river, defendant operated a pulp and paper mill. Plaintiff's land was used for many reasons, including agriculture. Refuse discharge polluted the river and it was alleged that offensive smells substantially interfered with the plaintiff's use and enjoyment of their properties
    a. Legal route didn't help the defendant, an injunction was ordered by the trial court
    b. Was awarded damages and an injunction
    c. After there was an amendment to the *Lakes and Rivers Improvement Act* stating that an injunction could be refused even if the river was being polluted in this way
    d. The SCC held that the amended statute did not affect the present litigation because it was not an enactment declaratory of what the law was deemed at the Court of Appeal decision

2. ***Stephens v The Village of Richmond Hill:*** defendant municipality constructed a sewage disposal plant on the river, and the plaintiff (who had a property on the river) brought an action for infringement of her riparian rights, claimed damages and an injunction
    a. Granted damages, also held that she was entitled to an injunction on the ground that public works must not be executed so as to interfere with the private rights of individuals unless the legislature decrees otherwise
    b. Not the place of the judiciary to intervene
    c. Enactment of the Ontario *Public Health Amendment Act* – this Act dissolved the injunction against the defendant municipality and retroactively deemed the sewage plant to have been constructed, maintained, and operated by the statutory authority

Intentional Torts: Battery

- Intentional torts: intentional interferences with interests that the law protects
- Intent: plaintiff has to show that the defendant wants the result or the result is substantially certain to occur
    - Intent distinguished from motive
    - Intent needs to be distinguished from volition - being voluntary is not enough to establish intent
        - E.g. if you commit a battery while sleepwalking, probably not going to show intent
- **Battery**: direct and intentional harmful or offensive physical contact to which the plaintiff hasn't consented
    - Plaintiff has to show that there was a lack of consent
    - Defendant has to be aware that there would be no consent to what they are doing
    - Not necessary for the body of the defendant to touch the body of the plaintiff to cause harm/battery
    - How far 'direct' extends is based on common sense and what is reasonable



STEPS FOR ADDRESSING BATTERY

1) Definition: a direct, intention, and physical interference with the person of another that is harmful or offensive to the ordinary sense of dignity and honour of a reasonable person
    a. Need to argue on the facts every element, and if it is established or not established
    b. **Direct**: the immediate consequence of a force set in motion by an act of the defendant
    c. **Intentional:** the defendant wants the result, or the result is substantially certain to occur
    d. **Harmful/offensive:** all contact outside the exceptional category of contact that is generally accepted in the course of ordinary life is *prima facie* offensive
2) Doesn't have to result in actual damage. Defendant is liable for all harm resulting from the battery
3) Plaintiff must prove the elements of battery, then the onus shifts to the defendant to establish that the plaintiff consented/a reasonable person would think they consented
    a. **Consent:** can be express or implied but MUST be voluntary (not obtained by force/threat of force) and free (unequal power relations)
        i. **Medical treatment** requires informed consent (**emergency exception**)
4) **Damages:** if no defence, then damages (but still talk about damages regardless)

Bettel v Yim (1978)

- Facts: Defendant owned a store, plaintiff was a boy who lit something in his store on fire. The defendant grabbed the plaintiff and shook him to force a confession, but when he was doing this he hit the plaintiff's nose with his head - but didn't intend to do this
- Issue: Can the defendant also be held liable for the unintentional contact with the plaintiff's nose?
- Reasons:
    - Doesn't have to result in actual physical harm, but sufficient that its offensive to honor and dignity
    - Harm does not need to be foreseeable - defendant can be liable for unintended harm as well
    - In this case the nose injury was unintentional, but this does not matter for liability. Only the shaking needs to be intentional
- Ratio: Defendant can also be held liable for consequences which he didn't intend since the legal inquiry is in the intentional interference with the plaintiff's body through non-consensual touching
    - **Wrongdoer can be can be held liable for unintended harm through transferred intent**
    - Logical test is whether the defendant was guilty of deliberate, intentional and unlawful violence or threats of violence- if more serious harm happens than was intended, the plaintiff must bear these consequences

Malette v Shulman

- Facts: Plaintiff was a Jehovah's Witness and carried a card that said she refused blood transfusions. When she was in the hospital after a car accident the doctor gave her a blood transfusion even though they found the card
- Issue: Although the process was medically necessary but against the plaintiff's wishes, does this still constitute battery?
- Reasons:
    - **Any intentional non-consensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable; no exception is made for medical care (except in emergencies)**
    - **Doctrine of informed consent**: no medical procedure can be undertaken without the patient's consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options
    - **Exception of medical emergency** - requirements for emergency medical treatment without consent (all of these elements are required):
        i. Patient must be unconscious or without capacity to make a decision **and** there is no agent legally authorized to decide on their behalf
        ii. Time must be of the essence in the sense that it must reasonably appear that the delay would subject the plaintiff to a risk of serious bodily injury or death which prompt action would avoid
        iii. Under the circumstances a reasonable person would consent **and** the probabilities are that the patient would consent
    - Have to follow individual freedom of choice over sanctity of life and integrity of the medical profession
    - A child is capable of consenting if they are capable of appreciating the nature of the consequences and the consequences of not going through with the procedure (mature minor)
        - If under the age of 14 the guardian usually decides
    - A mentally incapacitated person (or unconscious) has a substitute decision maker (usually legislated who this person is)
        - Order is usually spouse, child, grandparent, grandchild – spectrum of family relatives that would be able to make the decision
        - Personal directive – nominates the person that they want to make these legal decisions for them

SEXUAL BATTERY

Non-Marine Underwriters, Lloyd's of London v Scalera

- Fact: Defendant was a bus driver who sexually assaulted the plaintiff on his bus. The driver was insured (as long as the claim falls under the policy, they have a duty to defend). There was an exception in the policy saying that any intentional torts would not be covered. Question became if this was battery because battery is an intentional tort. If this is the case then the insurer does not have a duty to insure
- Issue: what is the role of consent in sexual battery? Is it the same as battery? Who bears the onus of it there was consent?
    - Or, should the consent be another element that the plaintiff needs to show, instead of the defendant showing as a defence?
- Reasons (majority):

    - The burden of proof in battery generally is that the plaintiff needs only to tender evidence of force applied to her – so force in the context of sexual battery is physical context of a sexual nature
    - Unless the defendant disputes that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented
    - **The element of consent remains a defence to a sexual battery charge just the same. Consent is a defence and not an element of sexual battery that the plaintiff needs to show** – rationale of this is about protecting bodily autonomy
        - Should not be changed for sexual assault because you still have to show direct interference and it makes practical sense because the defendant is more likely to be able to explain what they were thinking and show evidence of this, rather than the plaintiff proving that he should have known etc.
    - Plaintiff must prove the element of 'harmful or offensive' contact, but this does not mean the plaintiff must prove that the contact was non-consensual
    - All contact outside the exceptional category of contact that is generally accepted in the course of ordinary life is *prima facie* offensive, including sexual contact
        - Because its not something that just happens to you in ordinary life
    - Special rules for sexual battery would shift the focus to the plaintiff's character - can lead to victim blaming
- Reasons (separate opinion, agree that it was battery):
    - For intentional battery, must prove that 1) defendant intended to do the action, and 2) the action is harmful or offensive
    - In the context of sexual battery, 'harmful or offensive' equals non-consensual. The plaintiff must prove that a reasonable person would have known that she didn't consent
    - Here they don't change the rule about general battery - the mere intention to apply force that is offensive is sufficient to show the harmful or offensive element of battery
    - Sexual activity is not seen as harmful, so in order for the plaintiff to show it was harmful the plaintiff needs to show it was not consensual (burden of proof on the plaintiff) –much more difficult to prove battery here
    - Say that the burden of proof is not BARD, instead is on the balance of probabilities - really means that the defendant will have to show evidence that they consented, plaintiff will have to show evidence that they didn't consent, comes down to evidence as a whole
        - This would have been very influential if this opinion carried the day because it would have distinguished sexual battery from general battery
- Holding: **Majority holds that the role of consent is the same, no reason to change the elements or definition of the tort when you're talking about sexual battery vs battery**
    - This is the case that stands for that the elements of sexual battery are the same as the elements of battery. The defendant has the onus of showing the defence of consent

Norberg v Wynrib (1992)

- Facts: Doctor prescribed an addicted woman drugs in exchange for sexual contact. Trial judge recognized as a matter of law that consent cannot be obtained from an individual under the influence of drugs, but still found that this didn't interfere with her capacity to consent. The sexual contact seen as consensual to the effect that it was not rape.
- Issue: whether the woman validly consented to the sexual contact in light of the fact that she was addicted to drugs and this was the only way she could get them
- Reasons: 3 way split in the SCC – all agreed on result, different reasons
    - Consent can be **express or implied.** Failure to resist or protest is an indication of consent if a reasonable person who is aware of the consequences and capable of protest or rejection would voice his objection
    - Rules for what consent requires:
        - Consent must be **genuine:** voluntary, not obtained by force/threat of force or given under the influence of drugs, or due to fraud/deceit as to the nature of the defendant's conduct
        - Consent is **based on the freedom to choose:** this is untenable in certain circumstances such as unequal power relations between the parties
            - There is inherent inequality of power in a fiduciary relationship
    - Two-step process for determining legally ineffective consent: (both steps required!)
        - Proof of inequality between the parties
        - Proof of exploitation (this focuses on the type of relationship and what the community standard is in terms of conduct)
    - In this case the court said there was inequality in respect to the power of the parties. This diminished her ability to make a real choice in the fiduciary relationship. Exploitation was found because he exploited info (her addiction) to pursue his own interest. This diverges from what the community would have found to be acceptable. NO LEGALLY EFFECTIVE CONSENT
- Damages:
    - In battery there are ONLY monetary damages. Types of these:
        - **General damages**: basic damages, an amount of money the court determines on the basis of all circumstances of the case
        - **Aggravated damages**: Court can increase the amount of general damages if there is justification to award aggravated damages. They can be awarded (as part of general damages) if the battery occurred in humiliating or undignified circumstances. Still intended to compensate the plaintiff
        - **Punitive damages:** awarded to punish the defendant and deter others. Only awarded where conduct is harsh, vindictive, reprehensible, or malicious, extreme in nature and such that by any reasonable standard is deserving of condemnation and punishment
            - Awarded very rarely in Canada! Especially in tort because the purpose is to compensate, not to punish
- Separate opinion (Sopinka J.):
    - Does find the defendant liable, but not for sexual battery as such - says that the plaintiff participated in the sexual activity in order to obtain drugs; while it was contrary to her wishes, it wasn't without her consent

        - This makes it sufficient to reject the battery claim - if he can show a defence of consent that's the end of it (shows a very narrow view of consent)
    - Plaintiff consented to the sexual encounters, but not the breach of duty arising out of the doctor-patient relationship
    - The defendant's liability arises from a breach of professional duty in failing to cure the plaintiff of her addiction and promoting it instead
- Separate opinion (McLachlin and L'Hereux Dube JJ.):
    - Say this isn't a tort or contract issue, rather focused on the doctrine of fiduciary obligation (where one party exercises party on behalf of another and pledges to act in the best interest of the other, very strong relationship in law)
    - Defendant was in a position of unilateral power, he owed her fiduciary duty
    - Awarded punitive damages
- Holding: the court held that there was inequality in respect to the power of the parties, this diminished her ability to make a real choice within the context of the doctor-patient relationship. His medical knowledge and his knowledge of her addiction gave him power over her
    - Awarded general and punitive damages
- Ratio: **Consent can be express or implied. It must be genuine and based on the freedom to choose. The two step process for determining legally ineffective consent requires proof of inequality between the parties, and proof of exploitation. Courts can award general damages (sometimes including aggravated damages) and punitive damages**

FRAUD VITIATING CONSENT

- Certain types of fraud can vitiate consent, not only in a fiduciary relationship but also generally
- The older rule from ***Hegarty v Shine*** takes a narrow view of fraud vitiating consent:
    - The plaintiff was a domestic servant, sued after contracting venereal disease from the defendant, the master of the house. Trial judge instructed the jury that if the defendant induced the plaintiff to have sexual relations by concealing his condition, the fraud vitiated the plaintiff's consent
    - This case held that consent can be vitiated by consent, but it must be fraud by:
        - **Sexual nature of the act** (e.g. consented to the medical examination but not to the nature of the act), OR
        - **The identity of the person**
    - Says these are the only forms of fraud that could invalidate consent – it was NOT enough that the person lied about their health

R v Mabior

- Non-disclosure of HIV status to a partner – **this case changes the rules to a broad view of fraud vitiating consent**
- Because of the amendments to the CC which amended the definition of fraud and made it much broader and because of the Charter, this narrow view of fraud vitiating consent is no longer applicable

- This case stands for the law that failure to disclose may amount to fraud – other requirements as well, need a realistic possibility of transmission and need to show that lack of disclosure of the disease would vitiate consent

PP v DD

- Plaintiff alleged that the defendant fraudulently misrepresented that she was taking birth control pills. She became pregnant and had a child, then claimed child support. He claimed that the misrepresentation of birth control vitiated his consent
- Analysis:
    - Two questions: 1) did the plaintiff validly consent to the sexual activity to begin with?
        - Court will look at the nature and quality of the act/identity of the partner
        - E.g. complainant mistakenly believes it was her boyfriend but was actually his brother
    - 2) If so, are there any circumstances that may vitiate the plaintiff's apparent consent?
        - E.g. dishonesty and serious bodily harm (has to be dishonest that results in serious bodily harm)
- Holding: In this case the court didn't find deception, or serious bodily harm. Financial deprivation or mere sadness is not found to be sufficient. No violation to the plaintiff's physical or sexual autonomy
- Ratio: Court held **that not all forms of fraud will undermine consent to sexual contact**
    - Key question is **whether the deceit goes to the "nature and quality of the act"** - although this has changed over time

Note:
Parens Patriae: Gives the courts jurisdiction where the individual has no capacity to consent for themselves, usually to something like medical treatments. In some cases, allows for the courts to consent for them

- Only applicable in very rare situations

E v Eve

- Facts: Eve was considered to have mild to moderately limited mental capacities. Her mother went to the court to gain their consent, on behalf of her daughter Eve, to sterilize her. This is an irreversible procedure being done not to treat any medical condition. It was to be performed for the purpose of preventing Eve from becoming pregnant to "save her from the possible trauma of giving birth" and the obligations as a parent (although there is no evidence that giving birth for her would be more difficult than for any other woman). Its other intended effect was to relieve Mrs. E of anxiety about the possibility of Eve's becoming pregnant and having to care for any child she might have
- Issue: When can the *parens patriae* jurisdiction be used?
- Reasons:
    - *Parens patriae* jurisdiction is the person vested with the care of mentally incapacitated people, and founded on the necessity of the need to protect them, since they may not always be able to care for themselves

    - This scope/sphere of the jurisdiction is virtually unlimited, this does not mean that the discretion to exercise it is unlimited
    - Must be exercised in accordance with its underlying principle - that the discretion is to be exercised for the benefit of that person, not for the benefit of others, and with caution
        - Historical problems, e.g. sterilization laws
        - Large implications of sterilization on an individual
    - This procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction given the grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent
- Holding: This jurisdiction should not be used on Eve, as it would constitute an intrusion onto her rights and cause possible physical damage
- Ratio: **The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, and it not to be used to relieve those who may have the burden of caring for them**
    - This is an area that the legislature should legislate if sterilization is to be a public policy
    - **The procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction**

In Re B

- Facts: Appellate case of a mentally handicapped young woman, for whom the state was seeking sterilization
- Issue: Should sterilization be allowed?
- Analysis:
    - Factors: B's vulnerability, urgent need for protection, the impossibility of her ever being able to exercise informed consent, and the 'potentially frightening consequences of her becoming pregnant
    - Court considered two medical options:
        - Safe, certain, and irreversible sterilization
        - Speculative, possibly damaging, and requiring discipline - other contraceptives
        - Allowing her to get pregnant was not an option (as it was in E v Eve)
    - Her right to reproduce seen as only available when she can choose, which she can't here
    - Evidence indicate that she will never desire a child and that reproduction would be very harmful to her
- Holding: Sterilization is allowed
- Ratio: **The court does not see a reason to distinguish between therapeutic and non-therapeutic measures - the only thing that should matter is the welfare and benefit of the individual in question**
    - Changes the ruling from *E v Eve*

Informed Consent

Battery and Informed Consent

- Battery protects patients rights to be free from touching of a substantially different nature and character from that to which they consented to and to not be misled as to the nature and character of the intended touching
- The legal wrong to the plaintiff in battery cases is the battery itself (which is why the plaintiff has a lower burden) - all that needs to be shown is that what was done differed substantially from that to which consent was given
- When the case involved no substantial misunderstanding of the nature and character of the touching but the plaintiff claims not to be fully/correctly informed as to the risks of the procedure, then the case gives rise to a claim in negligence

Reibl v Hughes (1980)

- Facts: Plaintiff underwent a serious surgery, which was competently performed by the surgeon and to which the plaintiff had given formal consent. During or immediately after the surgery the plaintiff had a massive stroke which left him paralyzed on the right side of the body, and impotent. The plaintiff alleged that this was not an "informed consent", sued for damages and recovered on this ground in both battery and negligence
- Issue: what is required for a doctor to establish informed consent?
- Analysis:
    - Exception to consent in the medical context is an emergency (test in *Norberg*) - but this was not an emergency
    - Doctors have a duty to disclose to patient 'all material risks' of a procedure (duty to inform)
    - **Battery in respect of lack of informed consent to medical treatment is confined to cases where:**
        i. There was no consent at all, other than in emergencies
        ii. The treatment was performed beyond that to which there was consent, other than in emergencies, or
            1. E.g. they did the treatment 'and then some', like removed something more than they were supposed to
        iii. There was a misrepresentation of the treatment for which consent was given and a different treatment was carried out
            1. E.g. consent was given to cure a hernia and the doctor removed a testicle
    - Need one of these three to give rise to battery, otherwise the case goes to negligence
    - This form is used because it is easier to show battery than negligence - don't need to show causation, responsible for all harm caused even if not foreseeable, actual damage, etc.
    - A failure to disclose the risks of a treatment without anything more goes to negligence and not battery
    - For midterm: just know the extent to which consent can be vitiated, the kind of consent doctors need to get for a charge of battery
- Ratio: SCC distinguished between the kind of consent needed for battery and that the informed consent needed for negligence

- Defines where battery in respect to lack of informed consent to medical treatment can be used

White et al v Turner et al

- The plaintiff had a breast reduction and ended up with badly scarred and lopsided breasts
- A doctor's failure to disclose the gravity of the proposed procedure, any material risks, and any special or unusual risks attendant upon the performance of the procedure falls under negligence, and not battery
- **Battery is to be used where there is a 'real lack of consent'**: this means that there is no consent at all, the treatment goes beyond what was consented to, or the consent was obtained by misrepresentation or fraud
  - Again, need one of the three to show battery, otherwise it is negligence
- Crucial element is whether testimony by medical experts is required to establish the defendant's wrongful act:
  - In battery cases the factual issue is simple - did the physician leave the patient with substantial misunderstanding as to the general nature and character of the touching the patient was to undergo? (does not require expert knowledge)
    - All that needs to be shown is that what was done differed substantially from that to which consent is given
  - In medical negligence, the question is not whether the defendant conveyed a clear impression of the nature and character of the intended touching - it is assumed that he did. The question is whether the defendant violated his obligation to the patient to describe collateral consequences that might ensue as a result of the intended and permitted touching
    - Plaintiff must show that if he had been fully advised as to the collateral risk, he would not have submitted to the procedure

Strict Liability

Strict liability: where liability is the result of the defendant's causation of harm under particular circumstances rather than the defendant's culpability

- In this case the plaintiff doesn't need to prove all the factors of negligence or nuisance, they happen automatically

Difference between strict liability and nuisance:

- Strict liability doesn't need to happen multiple times, once could be enough (isolated occurrence)
- Focus is on how the defendant used their land (non-natural use)

Rylands v Fletcher – rule for strict liability!

- Facts: Plaintiff had mines on his property that were damaged as a result of a reservoir built on the defendant's property. The defendant wasn't even aware the plaintiff had mines on his property. Contractors were negligent, didn't provide enough supports for the reservoir

- Issue: what is the legal obligation of a person who legally brings something onto his land, which though harmless while it remains there, would cause damage if it escapes?
    - Does he have an absolute duty to keep the water on his land? If he does, then once it escapes, he is liable no matter what even if reasonable precautions were taken (strict liability)
- Reasons:
    - **If a person brings or accumulates anything non-natural on his land which, if it escapes, may cause damage to his neighbour, he does so at his own risk. The person is responsible no matter how careful they were and no matter what precautions were taken**
        - E.g. if it was something natural like rain that accumulated and flooded the mines, then the defendant would not be liable
        - Main requirement here to show is the "non-natural" element
    - This includes everything not naturally found on your property
    - The plaintiff didn't take any risk on himself arising from the use of the defendant to have a reservoir, so the plaintiff should recover
    - **Exceptions**: showing that the escape was owing to the plaintiff's default, or that the escape was the consequence of an act of God
    - It does not matter whether there was negligence or not
    - It does not matter if reasonable precautions were taken to prevent the damage
        - BUT only in the case of the non-natural user of land is the liability absolute
- Ratio: a person who brings something on their property that is likely to do mischief if it escapes is prima facie answerable for all the damage which is the natural consequence of its escape

Powell v Fall

- Injury was done to the plaintiff's hay by sparks escaping from the defendant's train engine. Court holds that the owner should pay, not fair to make the public pay the costs inflicted
- This shows an expansion of *Rylands* – shows how the rule can be interpreted too broadly

Losee v Buchanan

- Steam boiler explodes and harm the plaintiff's land
- In the absence of proof of negligence the plaintiff was unsuccessful in suing for damages. Court refused to follow *Rylands,* held that it must be applied contextually
- If a person lives near somewhere this is expected to happen, it is not applicable
- Exception for animals: if it is a tame animal that acts unexpectedly, the owner is not liable unless he knew about this propensity
- Shows a narrowing of the rule in *Rylands*

Smith v Inco Limited – gives some criteria to what is non-natural use of land

- Facts: Plaintiff sued the defendant for a refinery that they used to operate. Plaintiff wanted to sell their property, and claimed there was a decrease in the property because of the nickel that the factory emitted and moved into the plaintiff's land
- Issue: Does this count as non-natural use of land?

- Reasons:
    - *Tock:* The *Rylands* rule isn't aimed at all risks associated with carrying out an activity, but rather with the risks associated with accidental and unintended consequences of engaging in an activity
        - *Tock* foreclosed treating strict liability under Rylands v Fletcher as referable to all "hazardous" or "ultra hazardous" activities
        - Not intended to deal with regular, anticipated activities/consequences associated with an activity
    - Where a defendant engages in certain kinds of activities, the defendant will be held strictly liable for damages that flow from mishaps or misadventures that occur in the course of that activity
    - The risk is a limited one, imposing strict liability for things that go wrong and produce unintended consequences that damage the property of another
    - Rylands rule involves escape - not enough for it just to be hazardous (non natural does not equal hazardous)
        - Need to have non-natural, and need to have escape
    - **What is "non-natural use" / non "ordinary" use?**
        - There's no connection between things found naturally on the property and the potential application of the rule (origin of the substance doesn't have to be on the land)
        - Depends on the place where the use is made, the time when the use is made, and the manner of the use
        - Planning legislation and other government regulations are relevant - harder to show it is non-natural when there are government regulations
        - The nature and degree of risk is important but not determinative
        - Foreseeability of escape is not required, but there are "compelling reasons" to require foreseeability of the kind of damages alleged to have been suffered by the plaintiff (objective foreseeability)
        - The rule isn't limited to a single isolated escape – can also be repeated and cumulative effects of the movement of a substance from the defendant's property onto the property of others
    - The non-natural use requirement of *Rylands* serves a similar role to the "give and take between neighbours" principle - what should the community tolerate as a whole, where should the burden associated with the accidental consequences fall on the neighbour?
- Holding: Held for Inco. Judge erred in finding them liable under the rule in *Rylands*
- Ratio: Gives some criteria to non-natural use of land. Strict liability in *Rylands* does not include all "hazardous" activities

Note:

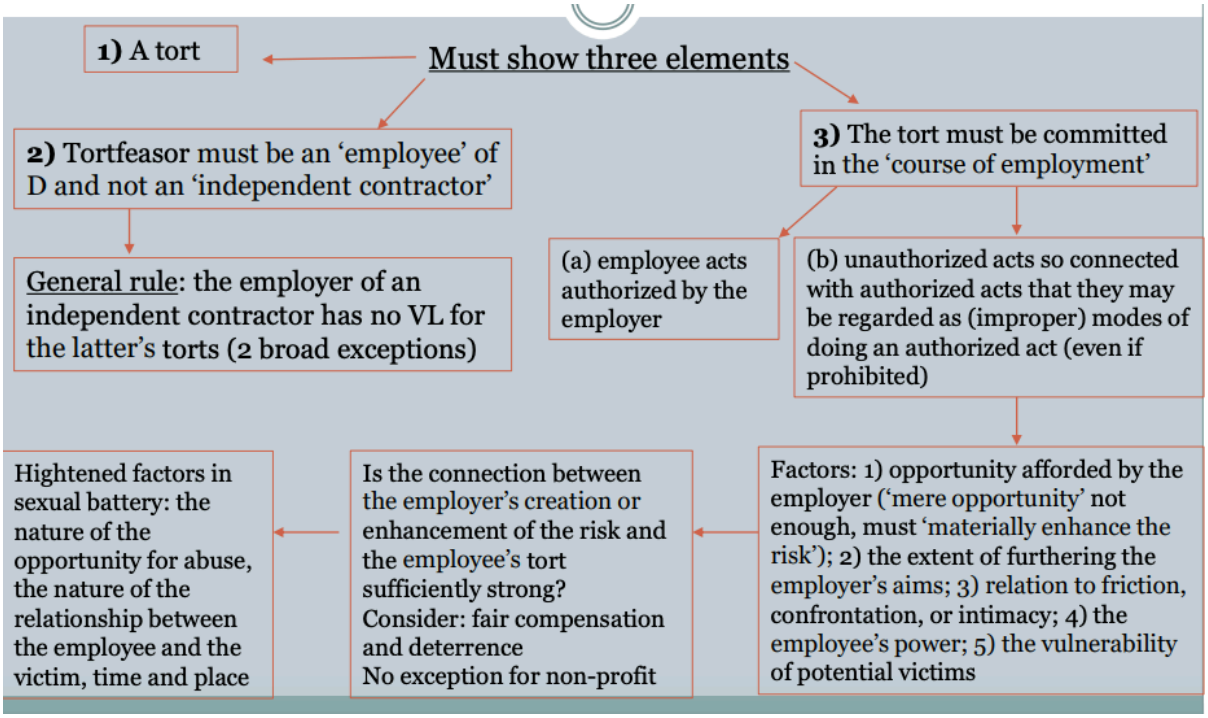
- There are separate statutes for dangerous animals – DON'T claim these under *Rylands*

Vicarious Liability

- **Vicarious liability:** An obligation arising from a parties' relationship with one another

- Not a discrete tort, but a way to give rise to liability for a tort, even though the defendant didn't commit the tort
- If the person who committed a certain kind of relationship, you may be able to go after the employer for the employee's tort
    - Can do this in addition to going after the tort, sometimes in combination
- Requires the establishment of the requisite relationship between the defendant and the tortfeasor (e.g. employer-employee)
- It does NOT:
    - Displace the personal liability of the tortfeasor
    - Exclude the direct liability of an employer for the breach of duty owed directly to the plaintiff (in failing to do something that they should have done)

STEPS FOR ADDRESSING VICARIOUS LIABILITY



1) Must show three elements:
    a. A **tort** (committed by the employee
    b. A **tortfeasor must be an employee of the defendant** and NOT the independent contractor
        i. **General rule:** the employer of an independent contract has no vicarious liability for the latter's torts
            1. 2 exceptions to this: The situation concerns non-delegable duties of the employer arising from some relation towards the public or the particular plaintiff OR The situation concerns work that is specifically, peculiarly, or inherently dangerous
    c. The tort must be committed in the course of employment. 2 categories:
        i. Employee acts authorized by the employer

ii. Unauthorized acts so connected with authorized acts that they may be regarded as (improper) modes of doing an authorized act (even if they are prohibited)

2) Factors to decide if the acts are connected (*Bazley* factors)
   a. Opportunity afforded by the employer ('mere opportunity' is not enough, must show materially enhanced risk)
   b. The extent of furthering the employer's aims
   c. Relation to the friction, confrontation, or intimacy
   d. The employee's power
   e. The vulnerability of potential victims (enhanced for sexual assault)
3) Is the connection between the employer's creation or enhancement of the risk and the employee's tort sufficiently strong?
   a. Consider: fair compensation and deterrence
   b. No exception for non-profits!
   c. Heightened factors for sexual battery: nature of opportunity for abuse, the nature of the relationship between the employee and the victim, time and place

Jones v Hart (1968)

- Facts: The servant of the defendant who was a pawnbroker lost the plaintiff's goods. Plaintiff sued the employee and the owner of the pawnshop
- Issue: Is the employee liable for his servant's actions?
- Reasons:
  - Whoever employs a person is answerable for them. The act of the servant is the act of the master when he acts by the master's authority. This is an example of the common law doctrine of *respondeat superior* (means 'let the superior answer')
  - Three elements of vicarious liability today:
    - **The employee must have committed the tort**
      - The employer can be held liable even if they were not at fault, but must still show a tort was committed
      - Not strict liability - actually need to establish the full tort first (e.g. battery)
    - **The person committing the tort must be an employee of the defendant and NOT an independent contractor**
      - Depends on the total relationship of the parties – if the person who committed the tort is working on their own behalf or if they are working as a part o the defendant's organizational machinery
      - Different tests for this, but the question is whether the degree of independence overall is sufficient to establish that a person is working on his own behalf rather than acting as the servant of another
    - **The tort must have been committed in the course of employment**
      - If what they did had nothing to do with employment, then vicarious liability doesn't apply
      - If there is a mere deviation from the task, there is a good argument that vicarious liability applies

- Although the employer can be liable even if the accident arose out of prohibited conduct (*Canadian Pacific Railway v Lockhart* where the employee was a carpenter who contrary to a written policy used his own uninsured car to travel from one of his employer's properties to another and negligently injured the plaintiff during the trip)

- Ratio: the employer is liable for torts committed by his or her employee in the course of employment

EMPLOYEES

671122 Ontario Ltd v Sagaz Industries Canada Inc.

- SCC held that there is no conclusive test to determine whether someone is an employee or an independent contractor
- To determine if someone is an employee**: focus on whether the person is performing the services as a person in business on his own account. Need to consider:**
    - Level of control of the employer
    - Who provides the equipment
    - Who hires helpers
    - Degree of financial risk
    - Degree of responsibility for investment
    - Opportunity for profit
- The less control the employer has on the alleged employee, the more likely it is they are an independent contractor

Canadian Pacific Railway v Lockhart

- This case addresses what happens when the employer prohibits a tort but the employee does it anyways
- A carpenter used his own uninsured car during the course of employment. The employer had a prohibition in place against using uninsured vehicles, but not against using personal vehicles generally
- JCPC held that an employee is liable for acts which he hasn't authorized, so long as they are connected with acts that he has authorized – so they may rightly be regarded as modes of doing them (the act does have to be connected in some way)
    - Need to ask what the employee was supposed to do, and go from there
- Where a prohibition merely limits the way in which the employee is to execute the work which he was employed to do, the employer may be liable
    - Only the how, not the what that you are authorized to do
    - If he was doing something completely different than what he was supposed to be doing, then this is not under vicarious liability
- In this case the employer was held liable because the basic act was authorized
- Ratio:
    - An employer is liable for acts which he hasn't authorized as long as they are connected with acts that he has authorized
    - Where a prohibition merely limits the way in which the employee is to execute the work which he was employed to do, the employer may be liable

London Drugs Ltd v Kuehne & Nagle International Ltd* - La Forest J describes the policy concerns that he thinks underlie *respondeat superior:

- Allows the plaintiff to obtain compensation from someone who is financially capable of satisfying a judgment (plaintiff benefits here, allows access to 'deep pockets' of the company)
- A person (typically a corporation) who employs others to advance its own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of enterprise
- Promotes a wide distribution of tort losses since the employer is a most suitable channel for passing them on through liability insurance and higher prices
- Perspective of deterrence - more incentive to encourage employees to perform well and discipline those who don't
- Dissent: says that not allowing the employer the right to have indemnity places the burden on the correct place, the employer

Konradi v USA – operation of deterrence in vicarious liability

- While driving to work, the defendant's employee, a rural mailman, struck the car of the plaintiff and killed him
- This case contemplates whether an employee can be within the scope of his employment while commuting, and under what particular circumstances. The court also uses an alternative definition of "scope of employment" by considering to what extent employer liability would create beneficial (safer) changes in employee activity
- Focus shifts from changes in care to changes in activity to prevent accidents
- The scope of employment can thus be functionally defined by reference to the likelihood that liability would induce beneficial changes in an activity

INDEPENDENT CONTRACTORS

- **General rule: the employer of an independent contractor has no vicarious liability for the latter's tort**
- Two categories of exception:
    - The situation concerns non-delegable duties of the employer arising from some relation towards the public or the particular plaintiff
        - Usually statutory
        - Example: statutory duties of governments to maintain highways - even if the gov't hires independent contractors, still doesn't release them from vicarious liability
    - The situation concerns work that is specifically, peculiarly, or inherently dangerous
- An employer who is liable under the doctrine of *respondeat superior* has a right to indemnity from the employee
- Takeaway – DON'T ASSUME that just because someone isn't an employee, that there won't be vicariously liability

Bazley v Curry – shows that vicarious liability can arise in the extreme situation of sexual battery

- Facts: Defendant was a non-profit organization for emotionally troubled children tasked with caring for the children (indicates the level of proximity and closeness).

Plaintiff was a child in a facility. The defendant hired Curry without knowing he was a convicted pedophile. He sexually abused the plaintiff. It was accepted at trial that the defendant was not negligent in hiring him (failed to show negligence because they went through all of their procedures)

- Issues:
    - Was vicarious liability an option in sexual battery cases? (This was the first case in Canada where it was argued as the basis for vicarious liability)
        - Answer: yes, sexual battery just like any other intentional tort, can give rise to vicarious liability
    - Should a non-profit employer be exempt?
        - Answer: no, just as liable as a for-profit business
- Employees are vicariously liable for 1) employee acts authorized by the employer, or 2) unauthorized acts so connected with the authorized act that they may be regarded as modes of doing an authorized act (albeit improper) (*Canadian Pacific*)
    - **Two steps to determine whether there was an unauthorized mode of performing an authorized act:**
        - **1)** Examine whether there are precedents which have determined this in the particular case – DON'T DO THIS STEP ON THE EXAM
        - **2)** Determine whether vicarious liability should be imposed in light of broader policy rationales (**fair compensation and deterrence)**
            - Always need to look at this!
            - Fair compensation – more likely to recover from an employer (deep pockets). Are they in the best position to distribute the losses? Need to look at policy implications
            - Deterrence – employers can decrease torts by instruction, communication, and encouraging employees to take steps to discourage employee wrongdoing
        - No vicarious liability where employees committed acts during employment, but are unconnected. Would be unreasonable to hold the employer liable in these cases because they didn't create the risk – needs to be materially and closely related
    - **In determining whether an employer is vicariously liable where precedent is inconclusive, courts follow these principles:**
        1. Confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct"
        2. Fundamental question is whether the wrongful act sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Need a significant connection. Serves policy considerations.
        3. In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. Bazley factors!
    - **Bazley factors: factors to consider in determining the sufficiency of the connection between the employer's creation of the risk, and the tort:**
        1. Opportunity afforded by the employer ('mere opportunity' doesn't suffice)
        2. The extent of furthering the employer's aims – if nothing to do with the employer's aims, then less likely the connection is sufficient
        3. Relation to friction, confrontation, or intimacy
        4. The employee's power
        5. The vulnerability of potential victims

    - There must be a strong connection between the wrongful act, and what the employer asked the employee to do!
    - In sexual assault cases there are additional factors set out by the court, including:
        - The nature of the opportunity for abuse
        - Specific duties
        - Intimate activities
        - Nature of the relationship between employee and child
        - Time and place (e.g. closed facility, on or off the premises)
- Holding: Vicarious liability is an option in sexual assault cases

Takeaways from Bazley:

- To determine vicarious liability, must determine whether the employee's wrongful act was so closely connected to the employment relationship that the imposition of liability is justified
- A prime indicator is whether the employer created or materially enhanced the risk of the wrong that occurred, such that policy considerations of fair recovery and deterrence are engaged
- For this, must consider how the employer's enterprise increased opportunity to commit the wrong
- There is no special rule for non-profit organizations

Jacobi v Griffiths (companion case to Bazley - distinguished on the facts)

- Facts: Defendant was a non-profit club. Griffith was a club supervisor. In this case it is a voluntary activity that the parents/child chose to attend. Griffith invited plaintiffs to his home and sexually abused them there
- Issue: Was the club vicariously liable?
- Majority:
    - Have to look at the characteristics of the particular enterprise (Bazley factors)
    - The opportunity that the club afforded Griffith to abuse his power was slight and didn't confer any meaningful 'power' over the plaintiff's, so no vicarious liability
    - The Club provided the employee with an opportunity to meet the children but offered this in a public setting with other persons. Griffiths had no job-created authority to insinuate himself in their lives
- Dissent:
    - Spatial and temporal factors must be considered with all other relevant factors, and aren't determinative - because it took place after hours and somewhere else doesn't matter
    - Compensation for the harm may fairly be viewed as a cost of the club's operation (deep pockets)
    - Acts were sufficiently linked to employment, policy rationales (fair compensation and deterrence) support vicarious liability
- Holding: Defendant was not vicariously liable

Lister v Hesley Hall

- The warden for a boarding house with boys with emotional and behavioural problems sexually abused the residents

- The employers should be liable for the way in which he behaved towards them in his capacity as warden
- Incidental connection is not enough – here his position created a sufficient connection between the abuse and the work which he was employed to do for the boarding house to be held liable

Blackwater v Plint

- Facts: Students from Alberni Indian Residential Schools (AIRS) were claiming damages for sexual assault and other harms that occurred during their attendance there - cut off from families, cultures, subject to corporeal punishment and sexual assault
- Issue: Is the Church liable to Aboriginal students who attended residential schools operated by them in BC in the 1940s-1960s, and if so, how is it apportioned? (The gov't had already been held vicariously liable)
- Reasons:
    - Used the 5 Bazley factors
    - The Church was one of Plint's employers in every sense of the word and should be held vicariously liable for the assaults - played a significant role in the running of the school, including hiring, firing, and supervising. Did this not just for the government, but also to promote a Christian education
    - The Church ran the dormitory and other parts of the school - does not matter that Plint's employment fell outside of the only area in which the Church was mandated to make decisions
    - No reason why two defendants can't be held vicariously liable - there was a partnership between the two, it would undermine the principles of fair compensation and deterrence to arbitrarily hold only one employer liable
- Damages:
    - Unequal apportionment of responsibility is appropriate in cases of vicarious liability because parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact
    - Since the relationship between Canada and the Church was not that of principal-agent or employer-employee, one party is not excluded to the joint enterprise as being more senior or exercising more control - in these circumstances unequal apportionment is appropriate
- Holding: the trial judge was correct in concluding that both the Church and Canada are vicariously liable for the wrongful acts of Plint. Damages apportioned 75% to Canada and 25% to the Church
- Ratio:
    - If there is a partnership, and not each party acting independently of another, there is no reason why two defendants cannot be held vicariously liable
    - If one party is not more senior or exercising more control over the other, unequal apportionment of responsibility is appropriate in cases of vicarious liability because parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact

Joint and Severable Liability

- Two employers in a partnership that can be jointly and severally liable for an employee's torts
- **Jointly liable**: no apportionment for fault, they are liable for 100% of the plaintiff's loss
- **Severally liable**: each one is liable for a portion decided by the court. Plaintiff can only go separately after them for that percentage
- **Jointly and severally liable:** plaintiff can go after them jointly; each is liable for 100%. But between themselves they are severally liable - they can go after each other if one had to pay more

EB V Order of the Oblates of Mary Immaculate in the Province of British Columbia

- Facts: The appellant attended a residential school for First Nations children run by the respondent. He suffered sexual abuse at the hands of a lay employee, Saxey, also of First Nations origin, who worked in the school. While the direct care of the children and educational functions were performed by religious personnel, the maintenance services and physical operation of the school were in the hands of First Nations staff
- Issue: Is the appellant vicariously liable?
- Reasons:
    - A wrong that is only coincidentally linked to the activity of an employer cannot justify the imposition of vicarious liability on the employer (*Bazley)*. The connection has to be made between the tort and the risk created by the enterprise, and the nature of the risk created by the enterprise must be considered in relation to the wrong done by Saxey to the appellant (need to look at job created power and duties)
    - There was a degree of geographic separation between Saxey and the appellant, the Bazley factors were applied, the wrongful acts had nothing to do with furthering the respondent's aims. It must be possible to say that the employer significantly increased the risk of harm by putting the employee in their position and requiring them to perform the assigned tasks - this isn't the case here
    - The appellant did not establish a strong connection between what the employer was asking the employee to do, and the wrongful act - analysis of operational characteristics is more properly undertaken in relations to claims of direct liability
- Dissent (Abella): Although mere opportunity is insufficient to support a finding of vicarious liability, the link between the opportunity and the tort in this case is particularly strong (relationships with lay staff, lived near each other, children not always carefully supervised). Saxey did not have clearly delineated official duties, and this served to increase his authority.
- Holding: Appeal dismissed. Strong connection test cannot be met
- Ratio: leading case on employment matters and vicarious liability. The holding was strongly criticized

Defamation

- **Defamation**: protects peoples' personal interest in reputation
- **A defamatory statement**: A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, which lowers him in the estimation of the right thinking members of society, and in particular which causes him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or esteem
    - Doesn't have to be an individual - can be a corporation to protect business reputation
    - Public and elected officials can also sue
    - The government CANNOT sue for defamation
    - An action cannot be brought to protect the reputation of a deceased person
- Defences don't come just from case law, also come from the *Defamation Act*
- Libel vs. slander: no distinction between the two anymore
    - Libel used to be written and slander was spoken
- Defamation covers movies, ratio, emails, etc. - can cover virtually everything
- Almost all uncomplimentary comments are defamatory
    - Includes allegations of disorderly conduct, remarks about a person's character, fitness for public office, ties with organizations, etc.
- Public interest in defamation is to protect people's reputation balanced with freedom of expression/the press
- Low threshold for the plaintiff to establish a *prima facie* cause of action in defamation- almost anything with a slight ring of negativity could potentially give rise to an action

MAKE SURE THAT ELEMENTS ARE ENTIRELY DISTINCT FROM DEFENCES! NEED TO ESTABLISH ELEMENTS FIRST!

ELEMENTS – if one element fails, the test fails

1. **A defamatory statement**: any communication that reduces the esteem or respect in which the plaintiff is held by others in the community (objective test)
    a. Would have this effect in the reasonable and ordinary members of the public
    b. That the statement was false doesn't matter at this stage - this is a defence
    c. Don't have to show that in actuality you have lost esteem - because it is objective (e.g. don't need to get a witness to show this)
2. **Reference to the plaintiff:** the defamatory communication must be reasonably understood as referring to the plaintiff
    a. A reasonable person would believe that the words refer to them (threshold is low)
    b. Could be referred to by name, image, or context
    c. Can bring evidence of surrounding circumstances that even if they weren't specifically named, they are implicated
    d. Needs to refer to each individual member - so if it is brought against a group, has to refer to every person
3. **Publication:** the communication must be published to a third person who heard/read it and understood it
    a. This is what makes it actionable

b. To say this statement to yourself is not defamation. At least one other person has to hear it
c. Does not have to be formal
d. Liability of the person who gave the statement ends with their statement - they aren't liable for everyone else who repeated it
e. Innocent person can do this (e.g. person selling magazines)

Note:
Accidental defamation: there is some element of fault that is required. If they didn't intend publication and it couldn't have avoided publication by reasonable care, they aren't liable. Some element of care needed. Publication must be intentional or due to lack of care to give rise to liability

DEFENCES

Onus is on plaintiff. Burden of proving defences is on defendant

1. **Justification:** need to show proof that the defamatory factual statement is true (defence of truth)
   a. This applies only to factual statements - can't objectively prove that your opinion is true
   b. Cannot be negated by showing malice
   c. Needs to be substantially true, doesn't need to be entirely true
2. **Privilege:** based on the public interest in promoting full and frank conversations between individuals. This defence attaches to certain occasions/relationships, not to a particular speaker or message. Refers to the circumstances that protect the speaker - must be one where its necessary in the public interest to speak honestly and candidly
   a. **Absolute:** complete immunity even if the statement is made with malice (statements known to be untrue or that are made with reckless disregard for the truth, made with spite)
      i. Designed to facilitate the operation of branches of government (Parliamentary proceedings, provincial legislature, judicial proceedings, client and counsel, counsel and witness, spouses/common law)
   b. **Qualified:** protects *bona fide* (good faith) and honest statements
      i. Unlike absolute where it doesn't matter how mean spirited the person was, here you have to show that it was an honest statement
      ii. Must be a compelling public policy reason to protect your statement. Usually is that there is some duty based on moral/social obligations
      iii. E.g. parents and children, if your mother tells you that your boyfriend is horrible - saying it because she honestly thinks you shouldn't be dating him, negative reference letter from prof,
      iv. Arises in a relationship where the defendant feels they have some duty to say what they're saying, to someone who they think has an interest in hearing it
      v. Statements that are not relevant for the purposes which they are given are NOT covered by this
3. **Fair comment on a matter of public interest:** most commonly used by journalists, must be one of comment of opinion, NOT for purely factual statement and be interpreted as such by the average reader or listener.
   a. The statement must be one of comment or opinion
   b. The comment must be based on a foundation of fact

i. Means that it's not a pure figment of the defendant's imagination, some basis of fact. Not necessary that all the facts be included in the publication. Requirement is that there is enough information to identify the basis on which the comment is being made. Must have been put forward to the reader or be common knowledge

c. The comment must be made on a matter of public interest
   i. Public or segment of the public has an interest in - broadly defined
d. The comment must be fair (honest)
   i. Low threshold - test is whether an honest person anywhere in the world, sane or insane, could make the statement on the proven facts regardless of how prejudiced, exaggerated, or outrageous their views might be
   ii. Answer is almost always yes
e. This defence is negated by proof of malice

REMEDIES

- Usually damages, sometime an injunction
- Damages 'at large' - means no cap - and presumed
  - Harm to reputation is presumed from the elements - don't have to show actual harm for this
- Factors to consider in determining quantum:
  - Plaintiff's position and standing in the community - better reputation, more harmful the statement would be to them
  - Nature and seriousness of the defamatory statement - how bad does it make the plaintiff look
  - Mode of publication - said to one person vs. posted on Twitter
  - Lack of apology/retractment of statement
  - Conduct and motive of defendant
  - Evidence of aggravating or mitigating circumstances

1. **Aggravated damages**
   a. May be awarded where defendant's conduct has been particularly high handed and oppressive
   b. Assessment requires looking at the defendant's conduct throughout the entirety of the process
2. **Punitive damages**
   a. May be awarded in situations where the defendant's conduct is so oppressive it offends the court's sense of decency
   b. Not about compensating the plaintiff, rather to punish the defendant to deter the defendant and others from acting this way
   c. Only where the combined general and aggravated are still not enough
3. **Injunctive relief**
   a. If the statement can be taken back, an injunction may be used (unlike if it was something said which cannot be retrieved)

Hay v Platinum Equities Inc.

- Facts: Action for defamation arising out of reports allegedly signed by the plaintiff, who was an accountant. The defendant's company wanted to use these to get a loan from the bank. Defendant thought they were forged so they felt compelled to report the reports to the regulative body. Plaintiff claimed that he was defamed, the complaint filed against him was defamatory
- Issues:
    - Were the Hays defamed as a result of the submission of the RERs to the bank?
    - Were the Hays defamed as a result of Chandran and Platinum's letter to the ICAA?
    - Did the preparation and submission to the bank of the forged RERs under the Hays name constitute the tort of appropriation of personality?
- Reasons:
    - Were the Hays defamed as a result of the submission of the RERs to the bank?
        - **3 elements to the tort of defamation: (1) that the words complained of are defamatory; (2) that the words complained of refer to the plaintiff; (3) that the words complained of were published to a third person**
    - Only disputed issue here is whether or not the words were defamatory. Test is - would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?
        - A publication may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the reader, which give it defamatory meaning
- Holding: Court found that the report was not defamatory because the letter did not have a tendency to lower the estimation in the opinion of reasonable persons in the community. Letter is protected by absolute and qualified privilege
    - Absolute privilege - can attach to documents that are incidental to the proper initiation of judicial or quasi-judicial proceedings such as complaints by which the quasi-judicial proceedings are initiated
    - Qualified privilege - the communication must have been made on an occasion where the person who makes the communication has an interest or duty, legal, social or moral, to make it to the person to whom it was made, and the person to whom it is so made has a corresponding duty or interest to receive it

WIC Radio Ltd v Simpson

- Facts: Radio talk show hosted by the appellant, the respondent was the target of his editorial. The context was the public debate over the introduction of materials dealing with homosexuality in public schools. Host targeted the plaintiff and said she would condone violence. The respondent, Simpson, claimed that these words in the broadcast were defamatory in their ordinary and natural meaning
- Issue: Were the comments defamatory?
- Reasons:
    - Law: if a plaintiff shows the defendant published something harmful to his or her reputation then both falsity and damage are presumed, and the onus shifts to the defendants to establish an applicable defence, including the defence of fair comment

- **Elements of fair comment:**
  - Comment must be based on a matter of public interest
  - The comment must be based on fact
  - The comment (thought it can include inferences of fact) must be recognizable as comment
  - Even though the comment satisfied the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice
- **Imputations of fact versus comment:**
  - Words that may appear to be statements of fact may, in pith and substance, be properly construed as comment- especially in editorial settings
  - What is comment and what is fact must be determined from the perspective of a reasonable viewer or reader
  - The applicable defence was fair comment here
  - The facts must be sufficiently stated or otherwise be known to listeners, so that listeners are able to make up their own mind on the merits of the comment. If the factual foundation is unstated, unknown, or turns out to be false, the fair comment defence is not available
- Honest belief requirement: the test is whether anyone could have honestly expressed the defamatory comment on the proven facts
- Balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements
- The word 'fair' refers to limits to what any honest person, however opinionated or prejudiced, would express on the basis of the relevant facts
- Malice does not provide an adequate substitute for the honest belief component of the fair comment defence

- Holding:
  - The remarks were defamatory - that is, damaging to S's reputation - but they qualify as fair comment even without subjective honest belief. Honest belief is important in defining fair comment, but because of the importance of freedom of expression, it is appropriate that subjective honest belief should not always be absolutely necessary
  - "Honest belief" test is modified to apply if any person, not necessarily the speaker, could honestly express the opinion - an "objective" honest belief standard instead of a "subjective" one