FALL 2022 | TORTS | LAW 430

GLOSSARY

Anticipatory Injunction: anticipates and prevents some future harm that hasn't happened yet (see *shuttleworth and laws*).

Battery: Direct, intentional, and physical interference with the person of another that is harmful or offensive to ordinary sense of dignity and honour of a reasonable person (*Bettel)*

Direct: the immediate consequence of a force set in motion by an act of D
Intentional: D wants the result, or the result is substantially certain to occur
Harmful/Offensive: all contact outside the exceptional category of contact that is generally Accepted during ordinary life is prima facie offensive. Doesn't have to result in actual damage, defendant is liable for all harm resulting from battery

Coming to Nuisance: a person cannot be said to consent or acquiesce to something that amounts to a nuisance which he wasn't aware of, which he contests, or which is temporary.

Damages: include general, aggravated, and punitive (see *Norgerb v Wynrib)*

General Damages for non-monetary losses suffered by a plaintiff
Aggravated Damages are awarded if the battery occurred in humiliating or undignified circumstances (as part of general damages)
Punitive Damages are only where conduct is harsh, vindictive, reprehensible, or malicious and extreme in nature. Meant to punish the breaching actor to make an example out of them and penalize the defendant for particularly egregious conduct.

De Minimus Non Curat Lex: the law does not deal with trivial matters.

Fiduciary Duty: you put the interests of the client paramount ahead of your own, ie. Doctor owes a fiduciary duty to his patient (*Norberg v Wynrib)*

Fraud Vitiating Consent: when lies or deception are sufficient to retroactively 'kill' consent (For test see *Hegarty, Mabior, and PP).*

Future Nuisance: a nuisance that hasn't happened yet but is a real danger and has a strong probability, amounting to a moral certainty of a nuisance occurring (see *Shuttleworth* and *Laws)*

Informed Consent: specific to the medical context. Under the doctrine, physicians have a duty to inform patients about the risks of treatments or a lack thereof.

Interlocutory Appeal: ruling by a trial court is appealed while other aspects of the case are still proceeding.

Interlocutory Injunction: temporary injunction, you can temporarily suspend an action while the lawsuit is in progress. The individual cannot wait for litigation and needs the action to stop right now.

Legally ineffective consent: consent is not a legal defence available to a defendant if (a) a doctor-patient relationship is unequal and (b) there is proof of exploitation (of relationship with plaintiff for defendant's personal gain or interest).

Local Standard of Comfort: what is considered acceptable given the character of the neighbourhood.

Mature Minor: children who are considered mature enough that parental consent is not required for a medical treatment and cannot override the child's decision regarding a treatment.

Age of 16: at 16 courts generally recognize this as the age of maturity to make decisions with regard to treatment
Age of 14: no case law has ever allowed anyone underage of 14 to make their own decisions, courts will take a 14-year-olds opinion into account, but it may not be determinative
Age of 12: under 12 the decision is left entirely to the parents

Nuisance: unreasonable and substantial interference with plaintiff's legally protected rights to use and enjoyment of land.

Parens Patriae: parent of the nation, role of the sovereign was traditionally to care for the mentally incompetent. The jurisdiction is founded on necessity, for the need to act for protection of those who cannot care for themselves.

Public Benefit: when something is good for all individuals on a balance of loss and gain to all.

Quia timet action: injunction to restrain wrongful acts that are threatened or imminent but haven't happened yet.

Reciprocity Principle: some people should bear annoyances because everyone does them.

***Respondeat Superior*:** let the superior answer (*jones v hart).*

Sic utere tuo ut alienum non laedas: no one has the right to use their property to injure another (*fontainebleau hotel corp. v forty-five twenty-five*).

Unconscionability: inequality in bargaining powers of parties, is an unconscionable transaction if there is such an inequality in the bargaining powers of the parties.

INTRODUCTION TO TORT LAW

Tort: An injury other than a breach of contract, which the law will redress with damages

- The goal of tort law is to compensate and deter wrongful conduct
- The burden of proof = balance of probabilities

Types of Torts

1. Intentional: compensates the plaintiff for something done to them with some level of intent (tortfeasor knew actions would result in some type of harm)
    - Ex. Battery, nuisance, trespass, vicarious liability, defamation
2. Negligence: tortfeasor did not intend to cause harm but failed to act reasonably in the eye of the law, thereby causing harm
3. Strict liability: tortfeasor didn't intend to cause harm and wasn't negligent, but legislation imposes immediate liability

Tort Compensation

- Purpose of compensation: to get the plaintiff back in the position they were in before the tort occurred
    - The goal is not to punish
- Types of compensation:
    - Damages
        - Damages are determined based on:
            - Dollar value of loss
            - Cost of fixing damage done
            - Lost earnings
            - Pain and suffering
        - Types of damages:
            - General damages
            - Special damages
            - Punitive damages (rare)
    - Injunctions

Hall v Hebert (1993)

- Torts are distinct from crimes
    - Criminal law designed to provide security for citizens through punishment and/or deterrence, while tort law is focused on compensation.
- Torts are not contractual

    - Contract law is forward-looking while tort law is backward-looking. Contract is a voluntary obligation while tort law doesn't require voluntary obligation.
- Tort law is purposed to adjust for losses and injuries to individuals via compensation.

NUISANCE

Nuisance: an **unreasonable** and **substantial** interference with the plaintiff's **legally protected** rights to the use and enjoyment of land.

- Only legally protected rights can be interfered with in nuisance.

Appleby v Erie Tobacco Co (1910) / local standard of comfort

Ratio: smell can constitute a legal nuisance if unreasonable and substantial (renders the premises less fit for the ordinary purposes of life)
Facts: Defendant's manufacturing of tobacco resulted in a disagreeable odour. The plaintiff sued for nuisance. Several neighbours testified in support of the plaintiff.
Issue: Does the interference constitute a material discomfort and render the plaintiff's premises less fit for the ordinary purposes of life?
Rule: It depends on the degree of the **local standard of comfort** (ie. Character of the neighbourhood)

- "Odours cause material discomfort and annoyance and render the premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood"

Analysis: The odour is unreasonable and sufficient to interfere with use and enjoyment of land. It depends on the circumstances and is a question of degree – local standard of comfort depends on reasonable vs unreasonable.
Conclusion: The odour doesn't fit the local standard of comfort, so it is a nuisance. Found for the plaintiff, 6-month delay in granting injunction for defendant to attempt to remove the order (sympathy for defendant).

Rogers v Elliot (1888) / noise, sensitivities, and the average person

Ratio: the standard for determining reasonableness is based on the average person and not one with special susceptibilities/sensitivities. The right to make a noise for a proper purpose must be weighed against the degree of annoyance others may reasonably be required to submit to.
Facts: Defendant rings church bells several times a day, the plaintiff was recovering from sun stroke and suffered convulsions that his doctor attributed to the noise of the bell. Defendant refused to stop ringing the bells at the plaintiff's request, so he sued the defendant in nuisance.
Issue: Can a person sue for nuisance if they are especially susceptible to a negative reaction stemming from lawful use of a property?
Rule: Defendants right to make noise for a proper purpose is to be measured in reference to the degree of annoyance which the average person may reasonable be required to endure.
Analysis: no evidence of malice on part of the defendant. Note that malice is not sufficient to yield nuisance but can be considered to determine whether interference on plaintiff's rights was unreasonable.
Conclusion: claim denied

Comparing Rogers and Appleby → In Rogers, only one person injured by noise, in Appleby several injured by odour. Court considers balance of rights: can consider susceptibility of P and whether D knew about that susceptibility…could D have easily avoided injury to P?

Bradford v Pickles (1895) / malicious intent in legal activity

Ratio: one has the right to use his land as he wishes, malicious intent does not make a legal action illegal.
Facts: defendant reduced the amount of water flowing to the plaintiff's land, plaintiff claimed that the defendant acted out of malice and sought an injunction in nuisance.
Issue: Can a use of property which would be legal if due to a proper motive become illegal because it is prompted by a motive which is malicious?
Rule: if you have a right to take an action on your property, there is no way that can be converted into an illegal action, no matter what the motive is.
Analysis: motive does not matter; defendant had a legal right to do what he was doing.
Conclusion: appeal dismissed with costs, refused to grant injunction

This concept was overruled in Hollywood Silver Fox Farm → in cases to do with noise, malice became a relevant factor to consider in nuisance.

Hollywood Silver Fox Farm v Emmett (1936) / intent and noise

Ratio: in an action for nuisance by noise, intent must be considered in determining if one is using the property in a legitimate and reasonable manner.
Facts: defendant interfered with the plaintiff's fox breeding enterprise by purposefully shooting guns on his own property.
Issue: is malice of defendant sufficient to determine presence of nuisance?
Rule: malice alone cannot determine nuisance; all circumstances must be considered
Analysis: any right to property is qualified by the condition that it must not be exercised to the nuisance of neighbours or public. The motive was less than honourable, and an injunction was granted due to the fox breeding and commercial interests. Essentially overturned the ruling in Bradford v Pickles.
Conclusion: claim allowed. Injunction granted.

Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc (1959) / air and lawful rights

Ratio: a landowner has no legal right to unobstructed light, air, or view.
Facts: defendant constructed a 14-story addition to their hotel, blocked the sunlight from the plaintiff's hotel and plaintiff stated that this made the hotel unfit for its guests. There was alleged malice on part of the defendant.
Procedural history: Trial court granted the injunction, applying the maxim that no one has the right to use his property injury lawful rights of other (*sic utere tuo ut alienum non laedas*). They believed that construction was malicious or deliberate for the purpose of injuring the plaintiff.
Issue: Are sunlight and are legally protected rights? What are the limits of the prohibition not to use one's property in a way that injures another?
Legal Rule: the property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law.
Analysis: A landowner does not have a legal right to the free flow of light and air across the land of his neighbour. Does not matter if the intent was malicious. Where a structure serves a useful and beneficial purpose, cutting off light and air from neighbour does not lead to cause of action. For a claim on nuisance a right need to be recognized by law, currently a landowner does not have a right to unobstructed air, sunlight, or view.
Conclusion: appeal allowed; injunction removed.

Prah v Maretti (1982)

Ratio: new meaning to access to sunlight when necessary for the plaintiff's purposes.
Facts: defendant proposed to build property that would block sunlight and interfere with solar panels that power the plaintiff's home.
Issue: can the owner of a solar-heated property claim access to unobstructed light from neighbour's property?
Legal Rule: policy changes have resulted in the law changing, access to sunlight has taken on new significance in recent years as it is now a source of energy for homeowner.
Analysis: owners do not have unlimited property rights. Access to sunlight can be legally protected if necessary for purposes of plaintiff's claim. This case departs from the ruling in Fontainebleau because the solar panels are used for energy in the plaintiff's home.
Conclusion: claim allowed; injunction granted.

Aldred's Case (1619)

Ratio: things of delight are not legally protected rights and are not protected by nuisance

Shuttleworth v Vancouver General Hospital (1927) / future nuisance

Ratio: proof of (1) actual and real danger and (2) strong probability of future nuisance is required in anticipatory nuisance claims. Mere feelings are not sufficient.
Facts: plaintiff claims that neighbouring infectious disease hospital across the street from his house constitutes a nuisance, requests an anticipatory injunction to stop from doing anything further.
Issue: does the *quia timet* action (injunction to restrain wrongful acts that are threatened or imminent but haven't happened yet) constitute a nuisance?
Rule: for an anticipatory nuisance, plaintiff must prove:

1. Actual and real danger
2. Strong probability that nuisance will occur

Analysis: Plaintiff claims that children will cry constituting noise, court rejects this due to lack of evidence (no strong probability or moral certainty). Plaintiff claim's view will constitute nuisance, court says this is mere sentiment (Fontainebleau). Plaintiff claims danger of infection, court says no proof just fear, no physician came to testify to this. Plaintiff claims depreciation in value of property, court says this is related to the danger of infection which was not proven.
Conclusion: plaintiff cannot prove actual and real danger and there is not a strong probability that nuisance will occur, simply a feeling or sentiment of danger. Claim dismissed with costs.

Laws v Florenplace (1981) / future nuisance and reasonable susceptibilities

Ratio: there can be nuisance when the use of property is an affront to the reasonable susceptibilities of ordinary people and where this use is apparent to residents and visitors. To establish future nuisance, plaintiff must prove actual and real danger, or a strong probability amounting to moral certainty.
Facts: defendant will operate a porn shop in a neighbourhood. Plaintiff complains that the shop will offend their sensibilities and may result in danger and undesirability in the neighbourhood.
Issue: Does this quia timet action constitute a nuisance?
Rule: for an anticipatory nuisance, plaintiff must prove:

1. Actual and real danger
2. Strong probability that nuisance will occur

Analysis: Nuisance can occur if there's an affront to the reasonable susceptibilities of ordinary people. Even if business is carried on discreetly, its nature must be obvious enough to get customers. The chance that a small number of undesirables is a risk that must be considered.
Conclusion: claim allowed; anticipatory injunction granted.

Comparing *Shuttleworth* and *Laws* → *Laws* used a lower standard of evidence required, social utility played a role in the anticipatory injunction, where defendant's conduct has lower social utility than a children's hospital in *Shuttleworth.*

Bamford v Turnley (1862) / public benefit, 'live and let live'

Ratio: acts that are necessary for the common and ordinary use and occupation of land are not actionable as nuisance.
Ratio: a thing is for the public benefit only when it is good for all individuals on the balance of loss and gain to all.
Facts: defendant runs a brick-making operation, was burning bricks in a kiln and creating noxious fumes and makes noise. Plaintiff and neighbours sue for nuisance.
Issue: can an act that constitutes a nuisance be made lawful by the fact that it is a public benefit?
Rule: acts that are necessary for the common and ordinary use and occupation of land are not actionable as nuisance ('live and let live')
Analysis: Brick making exercise was a private exercise, there was nothing to suggest that it was for the public benefit, this does not justify harm to an individual without compensation. Defendant is taking the plaintiff's ordinary use and enjoyment, and this is not justified because public only benefits when everyone has the potential to benefit. Only reason not to compensate the plaintiff is if public benefit greatly outweighs the harm.
Conclusion: court rejects the defence of public benefit. Claim allowed.

Sturges v Bridgman (1979) / coming to the nuisance

Ratio: A person cannot consent or acquiesce to something that amounts to a nuisance which he wasn't aware of, or which was temporary.
Ratio: Coming to the nuisance doesn't negate liability.
Facts: Defendant was using his home as a confectionary for the past 20 years, the plaintiff moved in next door and build a consulting room, he then complained of the noise made by the defendant and brought an action in nuisance. Defendant says he acquired the right to impose the inconvenience through an easement, because the noise took place for over 20 years.
Issue: Can prior long-term use excuse nuisance? Does coming to nuisance negate it?
Rule: Just because an action didn't constitute a nuisance before doesn't mean it can't constitute a nuisance at present → coming to nuisance can't release the defendant from liability.
Analysis: A man cannot consent to a neighbour's easement if he has no knowledge, actual or constructive, if he tries to interrupt, or which he temporarily gives. Would be unfair public policy if a person's actions could restrict the right of another

to enjoy his land, without recourse to the law. This principle may cause individual hardship, but not using it would cause even more individual hardship and discourage the development of land for residential purposes.
Conclusion: Appeal dismissed with costs. Courts ruled in favour of the plaintiff. Held that the noise doesn't constitute a nuisance before, but now it does and outweighs the continued use by defendant.

Miller v Jackson (1977) / coming to the nuisance

Ratio: although coming to nuisance is insufficient to remove liability, it can influence the remedy.
Ratio: a person cannot turn his neighbour's reasonable use of land into an actionable nuisance.
Facts: Plaintiff moves adjacent to cricket field. Cricket balls damage plaintiff's house. Defendant has been playing cricket on that land for more than 70 years, and offered to pay for the damage, but there was no human damage. Plaintiff sues for negligence and nuisance, seeking injunction.
Issue: Can prior long-term use excuse a nuisance?
Rule: just because an action didn't constitute a nuisance before doesn't mean it can't constitute a nuisance at present, coming to nuisance can't release the defendant from liability.
Analysis:

- *Lord Denning* dissents on liability, majority on remedy, because cricket was played before plaintiff's house was built, then the rule should be about if use was reasonable according to 'ordinary uses of mankind living in a particular society'. According to Denning, there is a public benefit that outweighs individual interest of P. Even though he didn't find the liability for nuisance, he still orders defendant to pay damages to plaintiff's property because they previously offered.
- *Lord Lane* majority on liability, dissenting on remedy. Argues there is a real risk of future serious physical injury. For remedies, he argues they can't disregard ruling in Sturges (coming to the nuisance doesn't negate liability), real risk of serious injury justifies injunction instead of damages (Shuttleworth), and creative injunction (Appleby), therefore argues for 12 month delayed injunction.
- *Lord Cumming* majority on both liability and remedy. Argues that injunction is inappropriate because of interests of the cricket playing public, but damages should be awarded.

Conclusion: Claim allowed. Plaintiff awarded damages for past or future damage. Although coming to nuisance is insufficient to remove liability, it can influence the remedy.

Kennaway v Thompson (1980) / private v public interest

Ratio: A person cannot stop his neighbour from activities of which it is not reasonable to complain about.
Ratio: Frequency and duration of a noise can make an otherwise benign occurrence into an actionable nuisance.
Ratio: Creative injunctions are allowed.
Facts: Plaintiff inherited land near a lake where a club had been water skiing for a period, and she was aware of that (nearly 20 years). After moving in the motorboat and water skiing got more frequent and noisier, she was aware that she was moving to nuisance, but got worse as time went on. Plaintiff applied to the court for an injunction.
Issue: Does the public interest of boat races prevail over an individual private interest?
Analysis: Defendant interfered in a substantial and intolerable way with the use and enjoyment of her land and was entitled to have it stopped by injunction. Court disagrees with Miller v Jackson, refusing to allow the public interest to prevail over plaintiff's private interest.
Conclusion: Claim allowed. Court held that activities were a nuisance and granted a creative injunction that placed restriction on the boat club (ex. Time, number of boats). Didn't place public interests over the plaintiff's private interest.

Antrim Truck Centre Ltd v Ontario Transportation (2013) / test for private nuisance, private v public interest

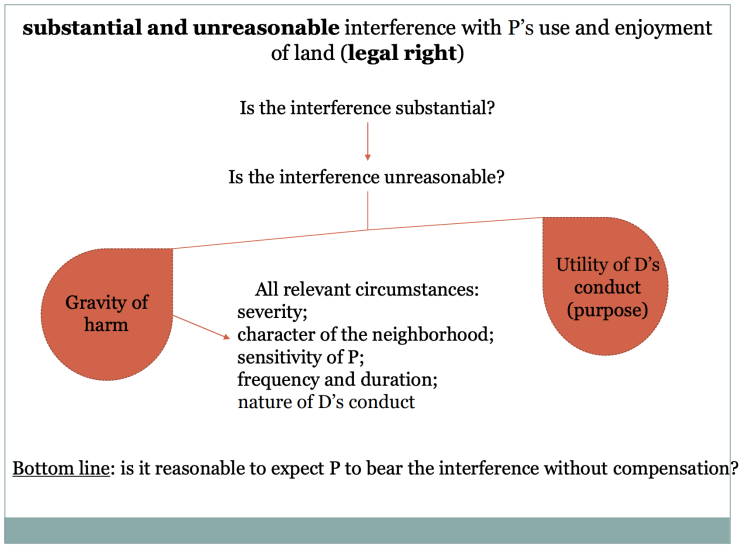
Ratio: Liability test for private nuisance emerges.
Fact: Government reroutes the highway and truck stop, owned by appellant, goes out of business.
Procedural History: Appellant applied to Ontario Municipal Board under the Expropriation Act and the Board awarded compensation. This award was set aside by the Court of Appeal on the grounds that the Board failed to consider character of the neighbourhood and sensitivity of the complainant and 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.
Issue: How is reasonableness assessed in the context of interference cause by projects that further the public good?
Rule: A person shouldn't be disproportionately, negatively impacted by something designed for public benefit.
Analysis: Substantial interference was found, and 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. Test for unreasonableness is whether plaintiff should suffer interference without compensation, not based on public utility of the conduct.
Even if interfering conduct is for the public good, the plaintiff should not need to suffer a disproportionate amount of the burden without compensation.
Conclusion: Appeal allowed.

TEST FOR LIABILITY OF NUISANCE (ANTRIM)

Is there a substantial and unreasonable interference with the plaintiff's use and enjoyment of land?

1. **Substantial:** non-trivial, amounts to more than a slight annoyance or trifling interference (turns on the facts)
2. **Unreasonable**: assessed on all relevant circumstances to determine whether it would be unreasonable to require the plaintiff to suffer the interference without compensation.
    a. **All relevant circumstances**: need to balance the gravity of the harm to the plaintiff and the utility of the defendant's conduct (ex. Character of the neighbourhood, sensitivity of the plaintiff, length, and duration)
    b. 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
        i. If unreasonable, balance utility and public benefit
        ii. Utility: the utility of the conduct must be considered considering other relevant factors and should not be weighed equally with the harm
        iii. Gravity: the seriousness on the individual (ex. Severity, character of neighbourhood, etc.)
        iv. Note that the gravity must receive more weight than utility (because if utility is weighed more highly then public utility would always win)



****Note for exams**: always discuss remedy (even if you think there is no liability)

Coventry v Lawrence (2014) / shelfer rule, injunction v damages

Ratio: The shelfer rule is no longer understood as strict; all conditions needn't be satisfied to grant damages instead of an injunction.
Facts: Landowner living near a motocross stadium filed a nuisance action against the stadium owners complaining of excessive noise and dust. Defendant's actions constituted a nuisance.
Issue: When can damages be ordered instead of an injunction?
Rule: Shelfer rule + circumstances
Analysis: Court looked at the Shelfer rule to determine if plaintiff should get damages and decided that even though not all conditions were satisfied, they should.
Conclusion: Prima facie remedy for nuisance is an injunction, but the court can order damages instead.

SHELFER RULE (TEST FOR REMEDIES – COVENTRY)

The Shelfer Rue was once strict but now it is more of a set of guidelines.
Damages may be granted where….

1. The injury plaintiff's legal right is 'small'
2. It can be estimated in money
3. It can be adequately compensated by a small money payment
4. It would be oppressive to defendant to grant an injunction
    - Ex. Public interest factor: relevant if defendant's business may shut down
    - Ex. Planning permission factor: if permission has been given for planning which happens to cause nuisance, may need to look at damages instead of injunction.
    - Ex. Are many in the community also affected by the nuisance, or just one person?
    - Ex. Financial implications on defendant and whether it would be disproportionate to harm done to plaintiff if plaintiff received damages.

Canada Paper Co v Brown (1922) / Shelfer Rule Application

Mill with toxic fumes harmed Plaintiff. Toxic fumes were new despite the mill being there for many years. Court refused to override the individual right of Plaintiff and granted an injunction (protects property rights from invasion and in public benefit)

Black v Canada Copper co / Shelfer Rule Application

Mine operation with toxic fumes impacting the plaintiff. Court rules that in some circumstances individual rights cannot outweigh an entire community and the public good afforded by mines (don't destroy the mining industry even if it harms a few farms). Court granted damages, but not an injunction.

Boomer v Atlantic Cement Co / Shelfer Rule Application

Plaintiff alleged harm due to defendant's cement plant. Court focused on the disparity in economic consequences that would result from ceasing operations (negative impacts on defendant if there was an injunction but no negative impacts for plaintiff if no injunction). Court provides damages instead of an injunction.

LEGISLATIVE PROTECTION OF PUBLIC WELFARE

Legislation can step in if an injunction was ordered to undo the injunction for the public good.

KVP Co Ltd v McKie et al. / legislative protection of public welfare

Plaintiff owned land on a river, defendant operated pulp and paper mill. Defendant's operation polluted river and a nuisance was established. Went all the way to the SCC where court ordered damages and an injunction. Government amended the *Lakes and Rivers Improvement Act* that stated an injunction could be refused in cases like this. The SCC held that amended statute did not affect present litigation because it was not an enactment declaratory of what the law was deemed at the court of appeal. Government creates new act (KVP Co Ltd Act) that retroactively disallowed the injunction. Plaintiffs could continue to get damages but not injunctions.

Stephens v Village of Richmond Hill / legislative protection of public welfare

Defendant constructed sewage disposal plant on river and plaintiff (who had property on river) sued for infringement of riparian rights, claimed damages, and an injunction (on the ground that public works must not be executed to interfere with private rights of individuals unless legislature decrees otherwise). Legislation intervened with Ontario Public Health Amendment Act, which dissolved injunction against the defendant and retroactively deemed sewage plant to have been constructed, maintained, and operated by statutory authority, injunction dissolved, but damages still stood.

INTENTIONAL TORTS – BATTERY

GENERAL BATTERY

Direct and intentional harmful or offensive physical contact (to which the plaintiff has not consented)

- Law of battery comes from old English cause of action called trespass
- The actual physical touching is the battery, not the same as assault

Law of intentional torts with respect to battery arises out of the right to say and control what happens to your own body

- *De minimus non curat lex* = law does not deal with trivial matters
    - Trifling matters such as a tap on the shoulder will not be held liable under battery, de minimus may be used as an argument in court

Bettel v Yim / liability for all damages resulting from an action

Ratio: Defendant liable for all damages resulting from the action
Ratio: If defendant was guilty of deliberate, intentional, and unlawful violence or threats of violence and a more serious harm befalls the plaintiff than was intended, defendant must bear responsibility for the result.
Facts: D grabbed P and shook him after P started a fire in his store. D inadvertently hit P's nose with his head while shaking him. Led to P receiving a more serious injury (broken nose) than D claimed he intended P to suffer.
Issue: Should D be held liable for the more serious injury of P that he supposedly did not intend to happen?
Rule: We are concerned with what harmful or offensive thing happened; not what D intended. P doesn't need to show physical harm, just that physical contact was offensive to their dignity. Foreseeability of harm is not considered when dealing with effects of battery.
Application: Grabbing and shaking was intentional, physical contact, direct, and harmful or offensive. Even if it didn't cause physical harm, it would still be battery.
Conclusion: Defendant held liable

Malette v Shulman / informed consent in a medical context

Ratio: Informed consent may be absent for an emergency medical treatment if and only if:

1. **Patient must be unconscious or without capacity to decide and there's no agent legally authorized to decide on their behalf;**
2. **Time must be of the essence in the sense that it must reasonably appear that delay would subject P to a risk of serious bodily injury or death which prompt action would avoid;**
3. **Under the circumstances, a reasonable person would consent, and the probabilities are that the patient would consent.**

Facts: Plaintiff was a Jehovah's witness. Was taken to the hospital after a very serious car accident and the nurse discovered a card in her purse saying that as a matter of religious beliefs, she would not take blood transfusions. The doctor administered a blood transfusion knowing of the objection to transfusion. Doctor saved the plaintiff's life, but she sued nonetheless because she argued that she suffered mental and emotional harm. No physical harm, but as the definition of battery communicates, it can be offensive or harmful to person's dignity.
Procedural History:

1. Trial judge found it constituted battery and awarded $20,000 damages. TJ determined that the rights of P over her body to decide that she didn't want blood transfusions was the right Dr violated. The fact that the Dr believed the treatment was medically necessary didn't relieve him of interference with P's body.
2. CoA upheld the trial judge's decision

Issue: Should the defendant be held liable? (Can it be considered harmful or offensive for the purposes of establishing battery if the blood transfusion saved the plaintiff's life but resulted in mental/emotional harm?)
Application: Patient's have a right to self-determination/right to decide for themselves what they want done to their bodies. They have the right to refuse medical care. Without consent, defendant is liable for battery even if procedure was done perfectly and benefitted the plaintiff. *Doctrine of Informed Consent* is meant to ensure that people can make choices about their own medical care, just as they can make choices about their bodily integrity. People should be able to make choices in alignment with their own beliefs, religion, etc. However, there are emergency situations in which informed consent is not necessary (see ratio).

1. Was Malette unconscious or w/o capacity and was there no agent legally authorized?
    - Malette was unconscious and no agent was available
2. Was time of the essence?
    - Yes, doctor believed she would have died without immediate treatment
3. Would a reasonable person consent and are the probabilities such that the patient would consent?
    - A reasonable person would consent; however, the probability is that the patient would not have consented given the JW card found by the nurse.

Conclusion: Doctrine of emergency treatment failed; probability that the patient would not have consent. Defendant held liable and patient awarded $20,000.

Nancy B v Hotel-Dieu de Quebec

Ratio: injunction can be a remedy in cases of battery if battery is ongoing.
Facts: Case emerged after Malette. Nancy B could only breathe on respirator and hospital refused to remove her because she would die, but she wanted to be removed from the respirator. She applied for an injunction to cease use of respirator.
Issue: can an injunction be granted in cases of battery?
Analysis: plaintiff has a right not to be kept on the respirator. At the time assisted death was illegal, but court determined that this was different because plaintiff did not require active steps to lead to her death and nature would be taking its course.
Conclusion: Injunction ordered; plaintiff taken off life support.

MEDICAL CONSENT IN CHILDREN AND THE MENTALLY ILL

Children

- No general age of consent to medical treatment in Canada
- A child can generally consent if they are a **mature minor.** Even though the child is legally a minor, they are mature enough to understand the nature of treatment, its consequences, and the risk of not having the procedure.
    - If the child is a mature minor, parental consent is not required and cannot override the child's decision.
- To determine whether a child is a mature minor the court looks to the child's age first. While there is no set age, 16 has often been the threshold for maturity. No case law has recognized a child under 14 to be the age of a mature minor. Second, the court looks at the seriousness of the proposed treatment. The great level of seriousness, the more maturity they require.
- Mature minors can only consent to procedures that would benefit them and not unnecessary treatments.

Mentally Ill

Substitute Decision Maker (SDM) → when someone is unable to make decisions for themselves because they are incapable of making a decision due to mental illness, it is necessary to contact an SDM.

- Legislation regulates this.

SEXUAL BATTERY

Non-Marine Underwriters, Lloyd's of London v Scalera / elements of [non-]sexual battery, burden of proof in consent

Ratio: Defendant bears burden of proving that plaintiff consented or that a reasonable person in their position would have thought they consented
Ratio: In cases of sexual battery, plaintiff needs only to tender evidence of force applied directly to them while defendant must tender consent.
Ratio: Plaintiff needs only to tender evidence of force applied directly to her (where 'force' = physical contact of a sexual nature which is neutral in terms of consent, where 'direct interference' = if it is the immediate consequence of a force. Set in motion by an act of the defendant)
Facts: Bus driver of school children sexually assaults plaintiff on the bus. Plaintiff is the insurance company that represents defendant's job (instead of person assaulted). The insurance terms stipulated that insurance would not cover an intentional tort (non-intentional torts only). If this is an intentional tort (ex. battery) then the insurance company wouldn't cover liability and defendant would have to.
Issue: which party has the burden of proof to prove consent?
Analysis:
<u>Majority Opinion</u>

- Plaintiff needs only tender evidence of force applied directly to her, in line with the traditional approach
- Defendant has the burden to his defence, and consent is one of those defences.
- Rule: all contact outside the exceptional category of contact that is generally accepted in the course of life is prima facie offensive.
    - According to the majority, sexual battery isn't a consequence of general human activity or interaction, so you cannot imply consent

- Sexual contact doesn't fall under the exceptional category so is prima facie offensive regardless of consent. Plaintiff doesn't have to show that it is non-consensual because any sexual contact is prima facie offensive.

Secondary Opinion

- Plaintiff is required to provide an allegation of lack of consent – this could include. Something as minor as stating that there wasn't consent. Following this the burden would move to the defendant to show that on a balance of probabilities the plaintiff consented.

Conclusion: Court unanimously agreed on liability, but there was a separate opinion that divided the court on legal reasoning. Defendant is liable, appeal dismissed with costs.

Norberg v Wynrib / defining consent, damages in an action for battery

Ratio: Test to determine legally ineffective consent: (1) proof of an inequality between the parties; (2) proof of exploitation
Facts: Plaintiff addicted to a medication and defendant was doctor, doctor prescribed medication in exchange for sexual contact.
Procedural History: Trial judge found addiction didn't impact the ability of the plaintiff to consent and CoA held trial judge's decision.
Analysis: Court unanimously agreed on liability and that defence of consent is not available to defendant, but the reasoning and damages were different among three groups of judges.
Majority Opinion → Majority takes the contract approach and says there is a power imbalance. They state the consent should be express or implied, must be genuine, and is based on freedom to choose.

1. Consent can be express or implied → failure to resist or protest or if a reasonable person who is aware of the consequences and capable of protect would voice their objection both indicate implied consent.
    a. In the present case, implied consent was satisfied and not actionable in battery.
2. Consent must be genuine → voluntary, not obtained by force or threat, not obtained under influence of drugs, not related to fraud or deceit, etc.
    a. In the present case, the court found that this was satisfied because the contact was voluntary, not forced, did not happen when plaintiff was under influence of drugs, and was not related to fraud or deceit.
3. Consent is based on freedom to choose → two prong test to determine legally ineffective consent, finding it in the present case:
    a. Proof of inequality between the parties
        i. Doctor-patient relationship is unequal
    b. Proof of exploitation [of relationship with P for D's personal gain or interest]
        i. D exploited relationship in order to get sex for their own personal gain.

Second Opinion → Second opinion takes the tort approach. Rejected battery as grounds for holding defendant liable. Argued that while it may have been contrary to p's wishes, there was still valid consent because she agreed voluntarily. Instead, they argued that defendant was liable due to a breach of duty as p's doctor. Sexual activity happened when he was treating the plaintiff, this is a breach of professional duty in failing to provide her with proper medical treatment and care to try and cure her addiction instead of promoting it. Consent is not breached here, sexual contact was part of failure to treat.
Third Opinion → Argues that there was a breach of fiduciary duty. Physician owed the patient classic duties associated with a fiduciary relationship – loyalty, good faith, avoidance of conflict of duty and self-interest. Consent is not a defence available to breach of fiduciary duty.
Conclusion: reversed the lower court's finding that defence of consent wasn't applicable. All conclude that the defendant is liable.
Remedies:
Majority Remedy → calls for all three types of damages in battery (general, aggravated, and punitive). They applied aggravated damages because battery occurred in harmful/undignified circumstances. Applied punitive damages because the conduct was reprehensible because it violated community standards and they don't want doctors doing the same.
Second Remedy → agrees with general and aggravated damages but argues that punitive damages shouldn't be applied because the sexual conduct was a failure to treat and does not need to be punished.
Third Remedy → breach of fiduciary duty can give rise to higher damages. Would have awarded $20,000 for suffering and loss during period of prolonged addiction, $25,000 for sexual exploitation under general damages, and $25,000 as punitive damages.

FRAUD VITIATING CONSENT

Hegarty v Shine / narrow fraud vitiating consent

Test for fraud vitiating consent, consent can be vitiated by fraud if the defendant lies/deceives plaintiff about either:

1. **Who they are**
2. **The sexual nature of the act**

Analysis:

- Introduced a narrow view of the cases in which fraud can vitiate consent.
- The plaintiff was a domestic servant, sued after contracting venereal disease from defendant. Trial judge instructed jury that if the defendant induced the plaintiff to have sexual relations by concealing his condition, the fraud vitiated consent.
- Court holds that lying about a medical condition is not enough to vitiate consent.

R v Mabior (2012) / broad fraud vitiating consent

*Case changed the definition of fraud vitiating consent to make it more broad and encompass transmissible disease

Ratio: Fraud can vitiate consent to a sexual act if:

1. **D lies about who they are or about the nature of the sexual act (*Hegarty*)**
2. **D lies about/does not disclose a sexually transmissible disease (*Mabior*)**

Facts: Defendant did not disclose that they had HIV.

Issue: Was consent vitiated by fraud (ie. Was consent vitiated because defendant did not disclose their HIV status?)

Analysis:

- While the old common law rule from Hegarty did not vitiate fraud outside of fraud about who the person was and the sexual nature of the act, the SCR uses the Charter and recent changes to the Criminal Code to inform their approach to fraud vitiating consent
- Court determines that there are circumstances in which lying about a health condition could amount to fraud vitiating consent depending on contextual factors (ex. level of transmissibility, use of contraception to prevent transmission)

PP v DD / current test for fraud vitiating consent

Ratio: current test for fraud vitiating consent based on the ratio from Hegarty and mabior:

1. **Is there fraud about the character of the sexual act (ex. nature and quality of act and/or identity of the sexual partner)?**
2. **Does the dishonesty result in serious bodily harm?**

Facts: P sued D. Had a romantic relationship and P claimed that D fraudulently told him she was taking birth control even though she wasn't. D got pregnant, had a child, and now wants child support. P believes fraudulent claim that P took birth control vitiated his consent.

Issue: Was Plaintiff's consent vitiated by Defendant's fraudulent claim that she took birth control?

Analysis: not every fraud, deceit, or lying vitiates consent. To find whether the claim constitutes fraud vitiating consent, the court proposes a test based on the criteria from Hegarty and mabior:

1. Is there fraud about the **character of the sexual act** (ex. nature and quality of the act and/or the identity of the sexual partner)?
    a. The sexual act will remain valid if fraud doesn't relate to the nature and quality of the act and identity of the partner
    b. In this case, there was no deception of the nature and quality of the act and no deception of the identity of the sexual partner
2. Does the **dishonesty** result in **serious bodily harm?**
    a. There was dishonesty, but in order to vitiate consent, the dishonesty needs to result in serious bodily harm.
    b. There is a profound risk of bodily harm to the woman in that situation but not to the man, this only applies to women who can get pregnant in this situation

Conclusion: Defendant not liable

INFORMED CONSENT

Is specific to the medical context.

- Under the doctrine, physicians have a duty to inform patients about the risks of treatments or a lack thereof.

Mrs. E v Eve / narrow interpretation of parens patriae jurisdiction

Ratio: Non-therapeutic surgeries can never be determined to be for the benefit of a person who is incapable of giving informed consent.
Ratio: Only the best interests of the disabled person are of importance under parens patriae jurisdiction, not the concerns of others.
Facts: Eve was a mentally retarded woman living with a condition that made it very difficult for her to communicate with others. Her mother brought an application to have her daughter sterilized. The daughter did not have the capability of giving informed consent.
Procedural History: Permission was denied for the sterilization at trial but was granted at the CoA.
Issue: Can the court consent on the behalf of Eve for a sterilization she is unable to consent to herself?
Legal Rule: Under the parens patriae jurisdiction, they must do what is necessary for the protection of the person for whose benefit it is exercised. Is to be exercised for the full benefit of the individual and not the benefit of others.
Analysis: The procedure is serious and irreversible; the sterilization is not sought for any medical condition. Sterilization is being sought to deprive Eve of the capacity to get pregnant to save her from potential trauma of giving birth and resultant obligations, additionally to relieve Mrs. Eve of anxiety about the possibility of Eve becoming pregnant. This should never be considered in a case such as this, need only consider the benefit to the individual it is being exercised for. For the argument, it must be found that stress of giving birth is much greater in mentally handicapped than others and this is not the case. Court cannot deprive a woman of giving birth for purely social or other non-therapeutic purposes without her consent.
Conclusion: Appeal allowed

In Re B / broad interpretation of parens patriae jurisdiction

Ratio: Non-therapeutic surgeries on disabled patients can be allowed to proceed in cases where the procedure is in the best interest of the individual concerned
Facts: Caregivers sought to sterilize a 17-year-old girl who is severely disabled. From a young age, it was apparent that she would have very limited intellectual development, would never be able to care for herself, and had moderate degree of mental handicap.
Issue: Can non-therapeutic sterilization never be allowed for patient's incapable of giving informed consent, even when it is in the best interest of the individual?
Analysis: The case is solely about the best interests of the young woman and how she can be protected for future wellbeing so she can lead as a full of a life as her intellectual capacity allows. The risks of her going full term are serious, she has no maternal feelings and antipathy to small children, and she can only care for herself at the most basic level so the child would have to be put up for adoption. Non-invasive birth control methods are not possible in this case. The finding in Eve is in contradiction to the welfare principle that should be the first and foremost consideration in wardship cases – the distinction of therapeutic and non-therapeutic is of no use in this case.
Conclusion: Appeal dismissed

Reibl v Hughes / battery in a medical context

Ratio: there are only 3 circumstances in which informed consent to medical treatment is not available to the defendant

1. **No consent at all (excluding emergencies)**
2. **Treatment beyond what informed consent was obtained for (excluding emergencies) (doing something that was consented to 'and then some')**
3. **Misrepresentation of treatment for which consent was given and a different treatment was carried out (doing something that is totally different than what was consented to)**

Ratio: doctor must inform patients of all material risks before the patient can give consent, including serious outcomes even if they are very remote
Ratio: the test to see if enough information was given is objectively asked: would a reasonable person in the plaintiff's shoes have decided to have the surgery or not if they were given all the information?
Facts: Plaintiff underwent surgery and suffered a stroke because of the surgery that left him paralyzed. Plaintiff formally consented to the surgery but argued that this consent was not informed because defendant didn't make him aware of all the

risks. Plaintiff wasn't eligible for workplace benefits because of paralysis and sued for damages. He claimed that he wouldn't have had the surgery if he had been properly informed.
Procedural History: Plaintiff was successful at trial and received $225,000. A new trial was awarded upon appeal.
Issue: How specific must the information about the risks of a medical procedure be to enable a person to make an informed choice between surgery and no surgery?
Rule of Law: Unless there has been misrepresentation or fraud to secure consent, a failure to disclose attendant risks should go to negligence rather than to battery
Analysis: The defendant fell short in that he did not take sufficient care to communicate the purpose of the operation and plaintiff gave assent to an operation which he would not have given assent to. The standard is objective, what a reasonable person in the plaintiff's position would have done if there had been proper disclosure of attendant risks. Court states that we can only find a lack of informed consent to medical treatment when there was:

1. No consent at all
2. Emergency situations aside when treatment or surgery was performed beyond that to which there was consent
3. There was a misrepresentation or fraud of the treatment for which consent was given and a different treatment was carried out

A reasonable person in the plaintiff's position would have delayed the surgery if they had known all the information.
Conclusion: Doctor was negligent; appeal allowed with costs and trial judgment restored.

White v Turner / summary of reibl

The judge summarized the law resulting from *Reibl v Hughes:*

- These problems are clearly to be analyzed with negligence theory rather than battery
- Use of battery must be limited to cases involving a real lack of consent to the operation

The test to be employed is the reasonable patient standard in assessing whether a patient would have consented to the operation

- Battery does not require proof of actual damage, while negligence law requires actual loss to plaintiff

In battery you do not need to prove damages, it is enough to establish that plaintiff would have refused treatment if they had been fully informed

- Court must also be satisfied that a reasonable patient in the same position would have done so

BATTERY SUMMARY

1. Battery: direct, intentional, 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 (***Scalera***)
    a. Direct: the immediate consequence of a force set in motion by an act of D (***Scalera***)
    b. Intentional: D wants the result, or the result is substantially certain to occur (***Scalera***)
    c. Harmful/offensive: all contact outside the exceptional category of contact that is generally accepted during ordinary life is prima facie offensive. Doesn't have to result in actual damage, D is liable for all harm from the battery.
2. P must prove the elements of battery, but the onus shifts to D to establish that P consented, or a reasonable person would think they consented (***Scalera***)
    a. Consent: can be express or implied but must be voluntary (not by force/threat of force/fraud) and free (unequal power relations) (***Norberg***); medical treatment requires informed consent (emergency exception) (***Malette, Reibl***)

*If no defence, then damages are granted (***Norberg***)

- General
- Aggravated
- Punitive

STRICT LIABILITY

Strict liability is liability without fault

- A situation where defendant is found liable but has not been negligent
- Incidents where strict liability could potentially be found are isolated (not recurring activities for a long period of time)

Is about cases where the defendant brings something on their land that is inherently or potentially dangerous

Can still be liable for acts that were not negligent or intentional

- Under the concept of *Rylands v Fletcher* you can still be liable even if you are not negligent
- You do not have to show the Antrim factors (substantial and unreasonable interference with use of land, so it is not nuisance)

Rylands v Fletcher / classic case for strict liability

Ratio: If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbour, he does so at his peril

- **If it escapes and causes damage he or she is responsible, however careful they may have been and whatever precautions they may have taken to prevent the damage**

Facts: Defendant built a reservoir underneath property, but unknown to him there was a shaft from an old coal mine (had no knowledge of the shaft, in no way negligent)

- He filled the reservoir with water and the water flooded the plaintiffs land

Procedural History:

1. Trial level held for defendants: no negligence, no nuisance, no intention
2. Exchequer chamber (court of appeal): overturned the lower courts decision, held for plaintiff

Issue(s): What is the obligation on a person who lawfully brings on his land something harmless while it remains there that naturally does mischief if it escapes his land?

Rule of Law: The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not he is prima facie answerable for all damages which are the natural consequence of the escape

Analysis/Decision: If defendants used their land for non-natural use, then they are liable for injuring the plaintiff

- What the defendants were doing was at their own peril and was a non-natural use of their land
- If in the course of their actions the evil arose (escape of water) and injured the plaintiff, then they are liable for those consequences

Conclusion: Defendants held liable

Powell v Fall / affirming rylands

It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions

- Affirmed *Rylands*

Losee v Buchanan / contrasting with rylands

Facts: Steam boiler used by defendant manufacturer exploded, no negligence found

- Courts refused to follow *Rylands*

Decision: We must have factories, dams, railroads, etc. based on wants of mankind

- If one has these on his land and they are not a nuisance and not managed to become such, then you are not responsible for any damage they accidentally and unavoidably do to your neighbour

Conclusion: In absence of proof of negligence, plaintiff was unsuccessful

- Tried to argue *Rylands* but was unsuccessful

Notes: This was in the American courts, British courts applied *Rylands* in *Powell*

- Look to what was going on in America at the time – tremendous industrialization shows rationale for the decision

Smith v Inco / application of rylands

Facts: Inco is a large nickel producing company with a plant in Ontario, Smith was a resident of the town and sued with other residents.

- Based their case in strict liability
- Asserted that Inco was liable on basis of Rylands v Fletcher

Issue: Did the trial judge err in holding Inco liable under Rylands v Fletcher?

Analysis: The trial judge did not explain why he concluded that the refinery was considered to be 'extra-hazardous'

- Defendant must be using land in a non-natural way as a precondition of court finding strict liability, trial judge held that Inco's use was extra hazardous but does not define it (CA said this had not been proven in any event)

- Strict liability under Rylands aims not at all risks associated with carrying out an activity but risks associated with accidental and unintended consequences of engaging in an activity
    - Ex. Floods, gas leaks, chemical spills, sewage overflows, etc.
    - The escape requirement connotes something unintended and speaks to the nature of the risk to which strict liability attaches
- Trial judge said that Inco's use was non-natural because it brought nickel onto the property but this was tied to whether substance was found naturally on property, just because you bring something to the property and engage in a hazardous activity does not mean there is a prohibition

<u>Rylands v Fletcher application:</u>

1. A user inappropriate to the place
    - Something is being done that is inappropriate to the particular place
2. Changing patterns of existence
    - Something that could be at one time naturally existing but at another time is non-naturally existing
    - Distinction between natural and non-natural use cannot be made exclusively by reference to the origin of the substance
        - Natural use of land can occur even when stuff is brought onto it
3. To decide whether use is non-natural, have regard to place use is made, manner of use, and time when use is made; and
4. Planning legislation – legislation and other government regulations controlling when/how activities can be carried out (compliance with legislation is not a defence but an important consideration)

Decision: Inco's plant not dangerous, operation was not extraordinary or unusual

- Plaintiff failed to establish that the plant was a non-natural use of its land, it's use was natural
- Inco had followed the rules for 60 years, there was no mishap resulting in accident or damages, emissions posed no health risks, no nickel particles cause damage to soil or have effects on others use of their properties, no real damages

Notes:

1. Foreseeability of escape – plaintiff does not need to prove the foreseeability of escape in this analysis, but in the proof of DAMAGES there are compelling reasons to require foreseeability of what they would be (ex. If you prove liability, were your damages foreseeable?
2. The rule isn't limited to a single isolated escape, can go on for a long time, may need to reach certain 'destinations or accumulations'

VICARIOUS LIABILITY

Vicarious liability is not a separate tort – it is a question of who is liable for the tortious activity

- Who is at fault?
- Is a description of the responsibility that someone else may have for your activities or that you may have for the activities of another
- Is imposing liability on someone who may have no clue as to what happened due to the closeness of the relationship

Vicarious liability is about the relationship that exists between the parties, have to prove a relationship

- The closest vicarious liability relationship is between employer/employee
- Vicarious liability does not replace personal liability

<u>3 Elements of Vicarious Liability:</u>

1. There must be a tort
2. The person committing the tort must generally be an employee of D and not an independent contractor
3. The tort must be committed in the course of employment, within the nature and scope of employment
    a. Does it relate to the what? (what the person was hired to do)
    b. Does it relate to the how? (how the person did the job they were hired to do)

Respondeat superior = let the superior answer

Jones v Hart / whoever employs another is answerable for him

Ratio: Whoever employs another is answerable for him

- **3 elements of vicarious liability:**
    1. **Must be a tort**
    2. **Person committing tort must generally be an employee of D**
    3. **Tort must be committed in court of employment**

Facts: Pawn shop owner lost P's goods that had been entrusted to the owner. P sued for tort of conversion (wrongful taking of property). P also showed that conversion was committed by an employee and then went after shop owner for the tort committed by the employee.

Analysis: Three elements for vicarious liability:

1. There must be a tort → if there is no tort against employee, employer cannot be held liable.
2. The person committing the tort must generally be an employee of D (and not an independent contractor) → If someone is an independent contractor, it is tough to hold employer liable because they simply hired another employer
3. The tort must be committed 'in course of employment' → there has to be a sufficient connection between wrongdoing/tort and employment relationship

671122 Ontario Ltd v Sagaz Industries Canada Inc / determining an employee

Ratio: We can determine if someone is an employee by seeing if they are performing the services as a person in business on his own account or if he is simply part of the organizational machinery of the employer. List of factors for consideration: level of control, provision of equipment, hired help, financial risk, responsibility for investment, and opportunity for growth.

Issue: Is the person performing the services independently or as part of organizational machinery of the employer?

Analysis: While there isn't a clear way to determine if someone is or isn't an employee we can analyze a list of factors and come to a conclusion:

- Factors to consider include:
    - Level of control of employer over employee (has always been a factor)
    - If worker provides their own equipment
    - Whether worker hires his or her own helpers
    - Degree of financial risk taken by worker
    - Degree of responsibility for investment and management held by worker
    - Worker's opportunity for profit in performance of his/her tasks

Takeaway: Question of the level of control, look at entire relationship

Canadian Pacific Railway (CPR) v Lockhart / what & how test

Ratio: An employer is liable for unauthorized cats so long as they are sufficiently connected with authorized acts so that they may rightly be regarded as modes of performing authorized acts

Test: What/how test

1. **What did the employee do? Was it in the scope of what they were employed to do?**
2. **How did the employee do it? If prohibition concerns how the work was to be done, then it is likely the employer will be liable for VL**

Facts: Employee was carpenter who used his own uninsured vehicle to travel during his employment. Employer had a prohibition against using uninsured vehicles for employment purposes but he did not have a prohibition against using private vehicles generally. Employee hit the plaintiff in an uninsured car during work and the plaintiff sued the employer.

Issue: Does the employee performing an action the employer prohibited negate vicarious liability?

Analysis:

- Employer is liable even for acts which they did not authorize so long as those acts are sufficiently connected with acts that they did authorize
    - Because employees were allowed to use private cars, it was irrelevant that employee used his car in a prohibited manner
- What/how distinction:
    - **What did the employee do?** → we first ask if employee did something within the scope of what they were employed to do. If so, then we proceed to the second question.

- **How did the employee do it?** → we next ask how they did it. Even if they did the work in a prohibited way, it is likely that VL will be found because it was in the normal course of employment.

London Drugs v Kuehne & Nagle Intentional / policy rationales for VL

Ratio: Policy considerations for VL include

1. **Fair compensation for P.**
2. **Deterrence;**
    a. **Employer is the one running the business, they have an economic interest/make a profit from the business. We want to transfer the risk created by the business to the business itself (because they benefit from the economic interest)**
    b. **In turn, the risk of VL will make employers encourage their employees to do their jobs well without harming anyone. It will also make employers put guideiens into place to prevent employees from committing torts.**

Facts: Transformer got dropped and cost London Drugs a lot of money, they sued Kuehne and Nagle

- Limitation of liability clause in contract that was entered into for a transformer
- Kuehne and Nagle said they were not at fault and if they were they agreed to pay $40

Issue:

- Whether employees of a warehouse could take advantage of a limitation of liability clause that their employer had with London Drugs?

Analysis:

The regime allows plaintiff to obtain compensation for someone who is financially capable of satisfying a judgment

- Regime promotes a wide distribution of tort losses since employer is almost suitable channel for passing them on through liability insurance and higher prices
- Insurance spreads the risk

Vicarious liability is a coherent doctrine from perspective of deterrence

- Ability to discipline or fire employee remains with the company
- The employer has every incentive to encourage employees to perform well on the job and discipline those who are guilty of wrongdoing
- Increases the safety aspect on the job for defendant

INDEPENDENT CONTRACTORS

General Rule: Employer of an independent contractor has no vicarious liability for the latter's tort

- Converse of employer's vicarious liability for torts of an employee is that doctrine that employer of independent contractor has no vicarious liability for independent contractor's torts

Categories of Exceptions to the General Rule:

1. Non-delegable duties of employer arising out of some relation toward the public or particular plaintiff
    - Non-delegable duties: duty that the employer owes to either the public at large or a P in a particular situation. Duties cannot be delegated.
    - Even though a person may be an independent contract, VL may still be established because tort relates to a non-delegable duty.
    - Example: Provincial government has a non-delegable duty to maintain highways, even if they hire independent contractors, they could still be VL for the tort.
2. The situation concerns work that is specially, peculiarly, or inherently dangerous
    - Example: Contractor hired subcontractor to use dynamite to blast a mine

Negligence of employer in selecting, instructing, or supervising the contractor

- Is another broad exception, however, employer held directly liable in negligence and not vicariously liable

INDEMNIFICATION

Indemnification is compensation for loss or harm

An employer who is liable under doctrine of *respondeat superior* has a right to indemnity from the employee

- In an event of a finding of VL, the innocent employer is found vicariously liable and may have a right of indemnification over against the employee
- Employer can seek indemnification from employee (Ex. RCMP employee commits sexual assault, employee held liable and employer held vicariously liable – the RCMP can then come after employee for any indemnification if they have to pay anything, looks to employee for financial contribution)

In the event of vicarious liability, there may be indemnification on behalf of the client

Bazley v Curry / factors for establishing VL

Ratio: Created the Bazley Factors (Factors to consider in determining the sufficiency of the connection between the employer's creation of the risk and the tort; not determinative)

1. **Opportunity afforded to employee to abuse his or her power** → More than a 'mere' opportunity; must materially enhance the risk
2. **Extent to which wrongful act may have further the employer's aims** → Signals whether tort is sufficiently connected to the risk created by the employer's business
3. **Extent to which wrongful act related to friction, confrontation, or intimacy** → Does what the employee was hired to do relate to friction, confrontation, or intimacy?
4. **Power conferred to employee in relation to victim** → the more power the employee has, the higher the connection between creation of risk and the tort
5. **Vulnerability of potential victims to wrongful exercise of employees power** → how vulnerable would victims be to an improper use of power?

Ratio: Test for vicarious liability should focus on whether employer's enterprise materially increased the risk of the tort and hence the harm

- **The test should not be applied mechanically but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence**

Facts: Curry was employed from 1966-1980 with the Children's foundation

- In 1980, he was dismissed from employment because of complaints of his behaviour
- He was effectively operating as a substitute parent in this position for children with emotional issues
- There was no suggestion that the foundation knew he was a pedophile when they hired him
- He was convicted of 19 counts of sexual abuse and the foundation and Curry were sued
    - Curry passed aware and lawsuit against foundation continued

Issues:

- May employers be held vicariously liable for their employees' sexual assaults on clients or persons within their care? **YES**
- If so, should non-profit employers be exempted from liability? **NO**

Procedural History: Accepted at trial that non-profit hired Curry and was not negligent in hiring him. Therefore, the only way to continue would be via VL. Trial judge found that non-profit was VL for sexual battery committed by Curry.

Legal Principles: Courts should first consider precedent and policy considerations in determining whether vicarious liability should be imposed.

Precedent: the court considers three categories of previous decisions to be looked into including (1) cases based on rationale or furtherance of employer's aims (2) creation of a situation of frictions and (3) dishonest employee
Policy Considerations: *Fleming Test:* two fundamental concerns underlying imposition of vicarious liability are (1) provision of a just and practical remedy for harm, fairness and compensation are considered (2) deterrence of future harm

From Precedent and Policy to Principle

Court says that when precedent is inconclusive the following principles should guide the decision:

1. They should openly confront the question of whether liability should lie against employer rather than obscuring the decision under semantics (moves beyond *Salmond*)
2. Vicarious liability is generally appropriate where there is significant connection between the creation or enhancement of the risk and the wrong it accrues from it even if unrelated to employers desires (must be sufficient connection)
3. To determine sufficiency of connection a number of subsidiary factors may be considered:
    a. Opportunity afforded to employee to abuse his/her power
    b. Extent to which the wrongful act may have further employer's aims
    c. Extent to which wrongful act related to friction, confrontation or intimacy

d. Power conferred on employee in relation to victim
e. Vulnerability of potential victims to wrongful exercise of employees power

Application:

For the first issue, SCC calls on CPR to find VL

a. Employee committing acts authorized by employer
b. Unauthorized acts so connected with authorized acts that they may be regarded as modes of doing an authorized act
    i. VL has been found where emmployee's conduct was closely tied to a risk that the employer's enterprise has placed in the community

For the second issue, must determine whether VL should be imposed in light of broader policy rationales → fair compensation and deterrence

a. Argument 1: It's not fair to impose liability on non-proftis when they didn't do anything wrong and they provide necessary services to community → court says benefit of service should be balanced with needs of child (compensation) and they want to prevent these torts (deterrence)
b. Argument 2: non-profits usually work with volunteers so they are less able to supervise/have fewer resources → court rejects, stating that it is the organization's responsibility to control its operations
c. Argument 3: VL will put non-profits out of business if they have to pay compensation → court rejects, stating non-profit introduced risk and had an opportunity to prevent the tort, it is better to hold them accountable than leave victim without compensation

Holding: non-profit liable because there is a sufficient connection between authorized and unauthorized acts and policy rationales are still relevant for non-profit defendants.

Jacobi v Griffiths / application of bazley

Facts: Defendant was a non-profit club providing behavioural guidance to children, Griffiths was obliged to develop relationships with the children, but it was very different to the relationship in Bazley.

- In Bazley v Curry, Curry stood in *loco parentis* (in place of the parent)
- Griffiths did not stand in place of parent, was program director and plaintiffs were brother and sister
- The abuse occurred in Griffiths residence
- Level of intimacy was not contemplated by his employment

Issue: Was the tort committed in course of employment? Can non-profit be held liable?

Rule of Law: Once materiality is established under the 'strong connection test' the imposition of no-fault liability is justified under the second phase of the analysis with policy considerations of compensation and deterrence

- Does the employer increase the risk? Is there a strong connection between employment and tortious activity?

Analysis: Griffiths had no job created authority to insinuate himself into the intimate lives of these children, unlike in Bazley.

- Emphasis was on creating horizontal relationships with the children (friendships) and not vertical relationships (parental, supervisory)
- The key to the case is clubs 'enterprise' the opportunity afforded to Griffiths to abuse his power was slight
    - Sexual abuse only became possible when he managed to subvert public nature of his activities
    - Club did not cloak Griffiths with authority of a parent

<u>Application of Bazley Factors:</u>

1. Opportunity afforded by employer → club provided Griffiths opportunity and authorized him to develop rapport, this did not materially enhance the risk because the duties were in public and did not include physical contact.
2. Extent of furthering employer's aims → he was not hired to entertain children after hours or off premises, did not further their aims
3. Relation to friction, confrontation or intimacy → not present
4. Employee's power → Griffiths did not have power over the children like in Bazley
5. Vulnerability of victims → children are vulnerable, but their mother gave them permission to go to Griffith's house.

Holding: Majority dismissed action against non-profit, no sufficient connection between work and Griffiths actions.

Dissent: the fact that the assaults took place off-site does not make them unrelated to the scope of employment. Dissent disagrees that the risk afforded was small, thinks there was intimacy and special responsibilities/powers. The club created the risk and sustained the risk.

Lister v Hesley Hall / application of bazley

Facts: D worked at non-profit boys' home. Tort of sexual battery took place. D was responsible for care and safekeeping of boys in a boarding home.
Issue: Were the actions so connected with employment that it holds nonprofit VL?
Analysis: Question is whether torts were so closely connected with employment that it would be just and fair to hold employer's VL.

- The opportunity provided by the club to establish friendship did not constitute sufficient connection
- Opportunity to be at the premises does not in itself constitute sufficient connection
- However, in position as warden and close contact with boys this created a sufficient connection between the acts of abuse and the work which he had been employed to do
- He had general authority in management of house and care/supervision over boys

Held: Sexual battery sufficiently linked with warden's duties, employer should be held vicariously liable.
Dissent: Does not agree Bazley should be followed, exposition of policy reasons for a rule is no the same as defining criteria for its application. Legal rules require greater clarity and definition that is provided by simply explaining reasons for its existence and social need for it.

KEY TAKEAWAYS

Bazley, Jacobi, and Lister are all very fact specific

- They can fall along a continuum
- In all 3 cases, issue boils down to how much intimacy (parental intimacy) the tort feasor had with the children
    - What kind of relationship did they have?
    - In Bazley, the relationship was a result of demands of employment, but this was not the case in Jacobi

JOINT & SEVERAL LIABILITY

Joint Liability

- Is often seen in negligence cases
- If two or more defendants are sued and there was joint liability, it effectively means that 100% of the damages can be recovered against any one of the defendants
- Ex. If you own a home with your spouse you own it in joint tenancy, joint tenancy means you each own 100% of the property
    - Both own the whole thing
    - That is the same with joint liability

Several Liability

- Is proportionate
- Can seek liability on basis of both joint and several liability
- Each party liable only for its own specified obligations

Blackwater v Plint / vicarious liability in a partnership

Ratio: Two employers in a partnership can be jointly and severally liable for an employee's torts

- **Damages and fault can be apportioned accordingly**

Facts: Appeal arises from 4 actions commenced in 1996 by 27 former residents of Alberni Indian Residential School claiming damages for sexual abuse and other harm

- Children were taken from their families pursuant to the Indian Act and sent to the school established by the United Church's predecessor
- Children were cut off from their families, made to speak English, disciplined by corporeal punishment, and some were repeatedly sexually abused

Plint's first assault took placed in Blackwater's second year, he took him into his office and sexually assaulted him

- He repeatedly assaulted him under different circumstances

Issue: Can the employer's both be held vicariously liable?
Procedural History: Plint was held liable to 6 plaintiff's for sexual assault, Canada and the Church were found to be jointly and vicariously liable (75% Canada and 25% Church).

- The trial judge made 8 findings to support that the church was Plint's employer:

1. Principal who was responsible for hiring and supervising dorm supervisors was hired by the Church subject to Canada's approval
2. Principal's understanding was that Church hired and fired him
    - Church was direct supervisor and controlled his salary
3. Church was involved in all aspects of operation and management
4. Church manages a pension plan for lay employees, though the employer's contributions were paid by Canada
5. Principal's authority to dismiss employees was subject to review of the Church
6. Church made periodic grants to the school's operation
7. Church inspected school annually
8. Church appointed an advisory committee to ensure the Church policies were being carried out

Issues: Are the government of Canada and the United Church of Canada liable to Aboriginal students who attended residential schools operated by them in BC in the 40s, 50s and 60s?

- On what legal basis are they liable and how should liability be apportioned between them?
- How should damages be awarded?

Analysis: The COA re-evaluated the evidence and decided the church did not have sufficient control for vicarious liability on reasoning of:

1. Inappropriate given degree of control over operations exercised by government
    - SCC rejects this, reality is church played significant role in running the school
    - Canada's role does not negate the church's role and vicarious liability created
2. The employment fell outside the only area in which the church was mandated to make decisions, the provision of Christian education
    - SCC says this is not true in reality, church ran dormitory and other parts of the school
3. Discomfort with idea that two defendants can be vicariously liable for same conduct
    - There is no reason why two employers should not be jointly employing a servant, this would normally be the case in a partnership
    - Vicariously liability acceptable for a partnership

Apportionment of Damages: Issue is whether either party can be completely or partially indemnified by the other.

- Parties can be more or less vicariously liable, degree of fault may vary
- Unequal apportionment of damages is appropriate
- Trial judge found Canada was in better position to supervise and prevent loss, this finding is grounded in evidence and is correct
    - If it is not possible to apportion fault, damages should be split evenly

Holding: The Government of Canada and the Church are jointly and severally liable. Damages should be apportioned 75% for Canada, 25% for the Church.

EB v Order of Oblates of Mary Immaculate in the Province of BC / application of bazley

Facts: Appellant attended residential school for First Nations run by respondent Order of Oblates of Mary Immaculate in BC.

- He suffered sexual abuse at hands of a lay employee who worked in the school bakery and operated the school motorboat.
- During the relevant period the educational and social functions of school were under direction of Oblates assisted by different orders of nuns.
- The maintenance and physical operation of school was by First Nations staff
- The employee who abused the plaintiff resided upstairs in a building on the school grounds
    - When appellant was in his second year the employee lured him with the promise of candy to his room
    - Appellant testified he went with him because he felt threatened

Issue: Can the Order of Oblates of Mary Immaculate be held vicariously liable for the employee's actions?

Majority Analysis: The connection has to be made between tort and risk created by enterprise, must also establish and examine job-created power and duties given to Saxey, recognizing the environment they were discharged in. Majority went through the Bazley factors:

1. Respondent provided Saxey with opportunity to come into contact with children, Saxey only permitted or required to be with children on the motor boat
2. Wrongful acts had nothing to do with furthering respondent's aims
3. The intimacy required in a residential school was not involving Saxey
    - He was expected to devote himself to baking, maintenance, driving the boat

4. Respondent did not confer any power on Saxey in relation to the appellant
5. Students in any residential school are vulnerable and require protection, it is the nature of the residential institution rather than the power conferred to Saxey that fed the vulnerability

Majority Holding: Appellant did not establish a strong connection between what employer was asking the employee to do and the wrongful act. While nature of the relationship provided opportunity, the assigned role fell short of what is required for VL.

Dissenting Analysis: The dissent stated that the events occurred in context of a residential school, in which children were forcibly removed and segregated from their families. Few environments are more conducive to vulnerability of children. Dissent went through the Bazley analysis:

1. Saxey had unrestricted access to everywhere children may be found playing, his home was within access, school permitted children to form casual relationships with lay staff, children not always carefully supervised
2. No evidence the acts furthered the employer's aims
3. The power structure greatly increased the level of friction and confrontation, the discipline at the school was strict, harsh, and order maintained through fear. The students repeatedly were told to obey the staff.
4. The ambiguity surrounding the duties of Saxey was exacerbated by the fact that work assignments were entirely verbal. Everyone was expected to contribute to all tasks, all staff would help supervise the children.
5. Children profoundly vulnerable

Dissent Holding: Strong connection between job duties and job-related powers given to Mr. Saxey and the tort committed.

VICARIOUS LIABILITY SUMMARY

To establish VL, plaintiff must show 3 elements:

1. A tort → Injury other than a breach of contract which law will redress with damages
2. Tortfeasor must be an employee & not a general contractor
    a. General rule: employer of independent contractor has no VL for the latter's torts
    b. Exceptions to the rule:
        i. Non-delegable duties (when situation concerns non-delegable duties of employer arising from some relation toward the public or a particular plaintiff)
        ii. Situation concerns work that is specially, peculiarly or inherently dangerous
3. Tort must be committed in course of employment
    a. Authorized acts by the employer
    b. Unauthorized acts so connected with authorized acts that they may be regarded as improper mode of doing authorized act
        i. *Salmond Test*
        ii. Bazley Factors:
            1. Opportunity afforded by employer (must materially enhance risk)
            2. Extent of furthering employer's aims
            3. Relation to friction, confrontation, or intimacy
            4. Employee's power
            5. Vulnerability of potential victims
        iii. Is the connection between the employer's creation or enhancement of the risk and the employee's tort sufficiently strong? (considered through Bazley factors)
        iv. Policy considerations: fair compensation and deterrence
        v. No exception for non-profit enterprises

Bazley Test on Exam

First consider precedent like the court did, but still proceed with the 5 Bazley factors.