Torts 2020-21 [LAW 430]

Glossary

Anticipatory injunction: anticipates and prevents some future harm that hasn't happened yet *(see Shuttleworth and Laws)*

Battery: Battery def'n: 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 (*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 in the course of ordinary life is prima facie offensive. Doesn't have to result in actual damage; D is liable for all harm resulting from battery.

Coming to the 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 was temporary.

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

Future nuisance: a nuisance that hasn't happened yet but is a real danger and has a strong probability, amounting to 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.

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 P for D's personal gain or interest]

Local standard of comfort: what is considered acceptable given the character of 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. The court first looks at the age—mature minors are children of at least 14 years old (usually 16). Second, they look at the seriousness of the proposed medical treatments—the more serious, the greater level of maturity required.

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

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

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

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

Introduction to Torts

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

- Plaintiff focused & arose out of a gap in law: if there was no contract present, how can P be compensated?
- Most torts require proof of injury
- Goal of tort law: compensate P for wrongful conduct against them and deter society from wrongful conduct.
- Torts apply to everyone and everything.
- Burden of proof = balance of probabilities

Types of Torts

1. Intentional: compensates P for something done to them with some level of intent (tortfeasor knew actions would result in some type of harm)
   E.g., battery, nuisance, trespass, vicarious liability, defamation.
2. Negligence: D/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: Get P as close as possible to their original, pre-injury position. Make them whole.
- Types of compensation:
  - Damages and injunctions most common
  - Punitive is very rare (aims to punish the defendant).

- Compensation focuses on the plaintiff and looks to the past.
- Determining damages is based on:
    - Dollar value of loss incurred by victim.
    - Cost of fixing damage done by the tort.
    - Lost earnings.
    - Pain and suffering.

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

- Only legally protected rights can be interfered with in nuisance. If something isn't legally protected, there can't be a nuisance.

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

Ratio: **Smell can constitute a legal nuisance if it's unreasonable and substantial.**
Facts: D's manufacturing process creates a disagreeable odor. P sues for nuisance. Several neighbours testify in support of P.
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?
Rule: It depends on the degree and **local standard of comfort** (i.e., character of neighbourhood).
Analysis: The odor is unreasonable and sufficient to interfere with use and enjoyment of land.
Conclusion: Because the odor doesn't fit the local standard of comfort, it is a nuisance. Claim allowed, 6 month delayed injunction granted for D to attempt to remove odor. .

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: D worked at a church and rang the bells several times a day. P was recovering from sunstroke and had convulsions as a result of the bells. D refused to stop ringing bells at P's request.
Issue: Can a person sue for nuisance if they are especially susceptible to a negative reaction stemming from lawful use of a property?
Rule: D's right to make noise for a proper purpose is to be measured in reference to the degree of annoyance which the average person may be reasonably required to endure.
Analysis: No evidence of malice on the part of D (church didn't know about P's susceptibility and didn't expect P to have a seizure) because P's condition is presumably temporary. Note that malice isn't

sufficient to yield nuisance, but can be taken into account to determine whether interference on P's rights was unreasonable.
Conclusion: Claim denied.

Compare: *Appleby* and *Rogers*

- In *Rogers*, only one person injured by the noise. In *Appleby,* several injured by odor.
- Court always considers balance of rights: can consider susceptibility of P *and* whether D knew about the susceptibility. Could D have easily avoided injury to P?

Desire to Harm Through Nuisance

Should it matter whether the defendant was motivated by a desire to harm the plaintiff? → In cases to do with noise, malice became a relevant factor to consider in nuisance after Hollywood Silver Fox Farm

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: D interfered with P's fox breeding by internationally shooting guns on his own property
Issue: Is malice of D 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.
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: D building a hotel that would block sun of pool/deck of P's hotel, impacting their business.
Procedural history: Trial judge granted injunction for material/substantial interference, applying the maxim that no one has the right to use his property to injure lawful right of others.
Issue: Are sunlight and air legally protected rights?
Analysis: A landowner does not have a legal right to the free flow of light and air across the land of his neighbor. Does not matter if the intent was malicious. Where a structure serves a useful and beneficial purpose, cutting off light and air from neighbor does not lead to cause of action. For a claim on nuisance, a right needs to be recognized by law – at this time, a landowner has no legal 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 P's purposes.
Facts: D proposes to build property that will block sunlight and therefore interfere with solar panels that power P's home.
Issue: Can the owner of a solar-heated property claim access to unobstructed light from neighbour's property?
Analysis: Owners do not have unlimited property rights. Access to sunlight can be a legally protected right if necessary for purpose of P's claim.
Conclusion: Claim allowed.

Compare: *Fontainebleau* and *Prah*

Although both cases deal with interference with access to unobstructed light, *Prah* departs because the solar panels were used as a source of energy necessary for P's home.

Aldred's Case (1619)

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

Future Nuisance: requires remedy of an anticipatory injunction (anticipates and prevents some future harm that hasn't happened yet).

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: P claims neighbouring infectious disease hospital for children erected by D constitutes a nuisance. Requests injunction.
Issue: Does this *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, P must prove:

1. Actual and real danger.
2. Strong probability amounting to moral certainty that nuisance will occur.

Analysis: P claims loud crying of children will constitute noise, court rejects due to lack of evidence. P claims view will constitute nuisance, court says this is mere sentiment (*Fontainebleau)*. P claims danger of infection, court says no proof just fear. P claims depreciation, court says this is merely a sentiment of danger.
Conclusion: P 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 Florinplace (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: D will operate porn shop in neighbourhood. P complains shop will offend their sensibilities, and may result in danger and undesirability of neighbourhood.
Issue: Does this *quia timet* action constitute a nuisance?
Rule: For an anticipatory nuisance, P must prove:

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

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

Compare: *Shuttleworth* and *Laws*

- *Laws* used a lower standard of evidence required.

- Social utility played a role in anticipatory injunction in *Laws*, where D's conduct has lower social utility than a children's hospital in *Shuttleworth.*

Bamford *v Turnley (1862)* / public benefit, "live & 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's good for all individuals on the balance of loss and gain to all.
Facts: D runs brick-making operation that produces noxious fumes, burns weeds, empties cesspools, makes noise. P sues for nuisance.
Issue: Can an act that constitutes a nuisance be made lawful by the fact that it is a public benefit?
Rule: 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")
Analysis: In this case the facts were not usual, but didn't constitute a common and ordinary use of the land (not reciprocal because P 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.
The only reason not to compensate P is if public benefit greatly outweighs harm.
Conclusion: 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. 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: P, a physician, builds a consulting room that shares a wall with D's confectionary. Noise from D's business constitutes a nuisance. D says he has acquired the right to impose the inconvenience through an easement, because the noise has been taking place for over 20 years.
Issue: Can prior long-term use excuse nuisance? Does 'coming to the 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 D from liability.
Analysis: A man cannot consent to a neighbor'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 didn't constitute a nuisance before, but now it does and outweighs the continued use by the 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 neighbor's reasonable use of land into an actionable nuisance.
Facts: P moves adjacent to cricket field. Cricket balls damage P's house. D offers to pay for damage, but no human damage. P 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 D from liability.

Analysis:
Lord Denning dissents on liability, majority on remedy. Because cricket was played before P'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 liability for nuisance, he still orders D to pay damages to P'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 a 12 month delayed injunction.
Lord Cumming majority on both liability and remedy. Argues injunction is inappropriate because of interests of the cricket playing public, but damages should be awarded.
Conclusion: Claim allowed. P awarded damages for past or future damage. Note that 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 neighbor 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: P inherits new house knowing that there have been boat races for several years. Frequency and noise gradually increases. P sues in nuisance for injunction.
Issue: Does the public interest of boat races prevail over an individual's private interest?
Analysis: D 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 P's private interest.
Conclusion: Claim allowed. 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

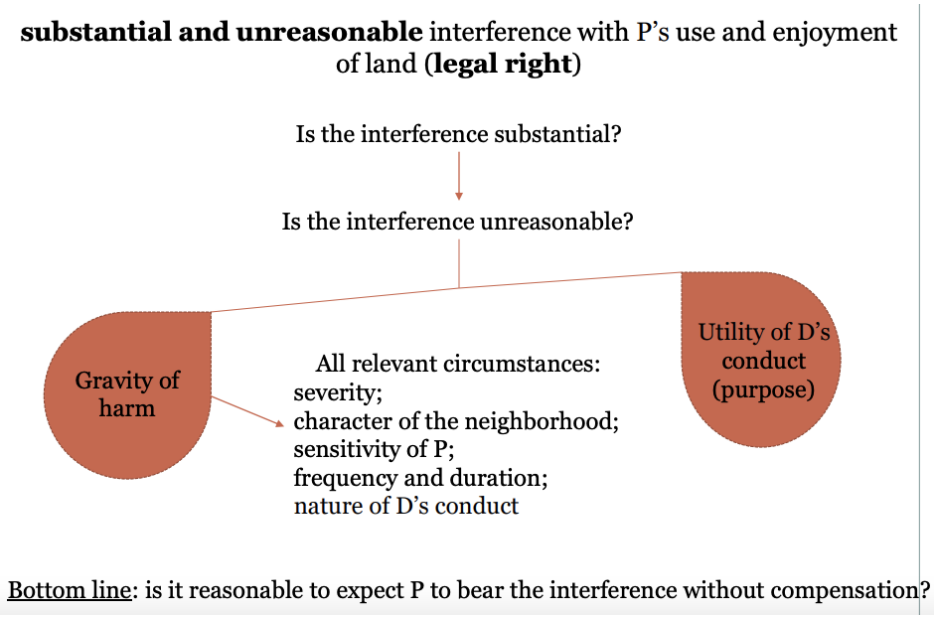
Antrim *Truck Centre Ltd v Ontario (Transportation)(2013)* / test for private nuisance, private v public interest

Ratio: Liability test for private nuisance emerges.
Fact: Government reroutes highway and truckstop, owned by appellant, goes out of business.
Procedural history: 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 character of the neighborhood and the 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 caused 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***)

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)
            1. If unreasonable, balance Utility & public benefit
            2. Utility: the utility (public benefit) of the defendant's conduct must be considered in light of other relevant factors and should not be weighed equally with the harm.
            3. Gravity: the seriousness on the individual (e.g., severity, character of neighbourhood, sensitivity of P, frequency & duration, nature of D's conduct).
            4. Note that gravity must receive more weight than utility (because if utility is weighed more 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. D's actions constituted a nuisance.
Issue: When can damages be ordered instead of an injunction?
Rule: Shelfer rule + circumstance
Analysis: Court looked at the Shelfer rule to determine if P 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 Rule was once strict, but now it can be seen more of a set of guidelines.
Damages may be granted where…

1. The injury to P'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 D to grant an injunction
    a. E.g., public interest factor: relevant if D's business may shut down.
    b. E.g., planning permission factor: if permission has been given for planning which happens to cause nuisance, may need to look at damages instead of injunction.
    c. E.g., are many in the community also affected by the nuisance, or just one individual?
    d. E.g., financial implications on D and whether it would be disproportionate to harm done to P if P received damages.

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

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

Black v Canada Copper Co / Shelfer Rule Application

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

Boomer v Atlantic Cement Co / Shelfer Rule Application

P alleged harm due to D's cement plant. Court focused on the disparity in economic consequences that would result from ceasing operations (negative impacts on D if there was an injunction but no negative impacts for P 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

P owned land on a river, D operated pulp and paper mill. D's operation polluted river and a nuisance was established. Went all the way to the SCC where court ordered damages and injunction. Government amended the *Lakes and Rivers Improvement Act* that stated an injunction could be refused in cases like this. 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. P's could continue to get damages, but not injunctions.

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

D constructed sewage disposal plant on river and P (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 so as to interfere with private rights of individuals unless legislature decrees otherwise). Legislation intervened with Ontario *Public Health Amendment Act* which dissolved injunction against D 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

Battery: direct and intentional harmful or offensive physical contact (to which P hasn't consented)

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

Ratio: D liable for all damages resulting from their action.
Facts: D grabbed P and shook him. D inadvertently hit P's nose with D's head while shaking P. Led to P receiving more serious injury (broken nose) than D claimed he intended P to suffer.
Issue: Should D be 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 actually happened, not what D intended. P doesn't need to show physical harm, just that the physical contact was offensive to their dignity (e.g., spitting or taking finger prints seem trivial but held harmful or offensive).
Application: Court said that the grabbing and shaking was intentional, physical contact, direct, & harmful or offensive. Even if it didn't lead to a broken bone, it still would've been battery.
Elements of battery were satisfied.
Conclusion: D held liable.

Malette *v Shulman* / informed consent in 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 make a decision *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; and,**

3. **under the circumstances a reasonable person would consent and the probabilities are that the patient would consent.**

Facts: P was JW. Carried a card that said that as a matter of religious belief she would not take blood transfusions. She was in a car accident and doctor did a blood transfusion (as was the proper medical procedure in cases of this nature). D administered blood transfusion knowing of P's objection to transfusion (nurse found the card). P's life saved but P sued nonetheless because she argued she suffered mental and emotional harm. No physical harm, but as def'n of battery communicates, it can be offensive or harmful to a person's *dignity*.

Procedural history:

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

Issue: Should Shulman (D) be held liable? i.e., can it be considered harmful or offensive for the purposes of establishing battery if the blood transfusion saved P's life but resulted in mental/emotional harm?

Application:

- Ultimately, patients 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. W/o consent, D liable for battery even if the procedure was done perfectly and benefitted P. 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. Ppl should be able to make choices in alignment w/ 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 to make decision *and* was there no agent legally authorized to decide on their behalf?
   a. Malette was unconscious and no agent was available.
2. Was time of the essence?
   a. 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. A reasonable person would consent; however, the probability is that the patient would not have consented given what was written on her JW card found by the nurse.

Conclusion: Doctrine of emergency treatment failed; probability that patient would not have consented. D liable.

Nancy B v Hotel-Dieu de Quebec

Ratio: An injunction can be a remedy in cases of battery if the battery is ongoing.

Facts: Case emerged a few years after Malette. Nancy B could only breathe on respirator and hospital refused to remove her because she would die, but P wanted to be removed. P applied for injunction to cease use of respirator.

Issue: Can an injunction be granted in cases of battery?

Analysis: P has right not to be kept on respirator. At the time assisted death was illegal, but court determined this was different because P did not require active steps to lead to her death (e.g., no medication needed to be given to kill her) but negative steps were required (i.e., taking her off life support.

Conclusion: Injunction ordered. P taken off life support.

Determining consent to medical treatment for children and the mentally ill

Children

- No general age of consent to medical treatment in Canada.

- Generally speaking, a child can consent if they are a **mature minor**. Even though the child is legally a minor, they are mature enough to understand the nature of the treatment, its consequences, and the risk of not having the medical procedure.
    - If the child is considered 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 first looks at the child's age. While there is no set age, 16 has been the threshold for maturity while no case law has recognized a child under the age of 14 to be a mature minor. Second, the court looks at the seriousness of the proposed medical treatment. The greater the level of seriousness, the greater the level of maturity required to consider a child a mature minor.
- Mature minors can only consent to procedures that would benefit them. This is not the case for non-necessary treatments (e.g., plastic surgery).

Mentally Ill

- Substitute Decision Maker (SDM) → when someone is unable to make decisions for themselves because they are incapable to make a decision for themselves 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: D bears the burden of proving that P consented or that a reasonable person in their position would have thought that s/he consented.
Ratio: In cases of sexual battery, P needs only to tender evidence of force applied directly to them, while D must tender consent.
Ratio: P 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 D).
Facts: Bus driver of school children sexually assaults P on the bus. P is the insurance company that represents D's job (instead of the person assaulted). The insurance terms stipulated that insurance would not cover an intentional tort (only non-intentional torts, i.e., negligence). If this is an intentional tort (i.e., battery), then the insurance company wouldn't cover liability (D would have to cover liability)
Issue: Which party has the burden of proof to prove consent?
Analysis:
<u>Majority opinion</u>

- P 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 D).
- Rule: All contact outside the exceptional category of contact that is generally accepted in the course of ordinary 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 it is prima facie offensive regardless of consent. Therefore, P doesn't have to show that it's non-consensual because any sexual contact is prima facie offensive

Secondary opinion

- Minority requires P to provide an allegation of lack of consent—this could include something as minor as just stating that there wasn't consent. Following this, burden would move to D to show that on a *balance of probabilities* P consented.

Conclusion: Court unanimously agreed on liability, but there was a separate opinion that divided the court on legal reasoning.

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: P addicted to a medication and D was doctor & prescribed that medication in exchange for sexual contact.

Procedural History: Trial judge found addiction didn't impact ability of P to consent.

Court of Appeal held trial judge's decision.

Issue: Does addiction render consent invalid?

Analysis: Court unanimously agreed on liability and that defence of consent was not available to D, but the reasoning and damages were different among three groups of judges.

Majority Opinion → attempts to answer 'what types of consent do [not] exist that would be acceptable as a defence for battery?'

1. Consent can be express or implied → i.e., failure to resist or protest *or* if a reasonable person who is aware of the consequences and capable of protest would voice their objection both indicate implied consent.
    a. In the present case, implied consent was satisfied and not actionable as battery.
2. Consent must be genuine → i.e., voluntary, not obtained by force or threat of force, not obtained when under influence of drugs, not related to fraud or deceit.
    a. Court found this satisfied because the sexual contact was voluntary, not forced, did not happen when P was under the influence of drugs, and did not relate to fraud or deceit.
3. Consent is based on the freedom to choose → two prong test to determine **legally ineffective consent**, finding it present in this case.
    i. Proof of an inequality between the parties
        i. Doctor-patient relationship is unequal
    ii. 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 → rejected battery as grounds for holding D liable. Argued that while it may have been contrary to P's wishes, there was still valid consent because she agreed voluntarily. Instead, these justices argue D is liable because of the breach of duty as P's doctor. B/c sexual activity happened when D was treating P, this is a breach of professional duty in failing to provide her with required medical treatment to try and cure her addiction rather than promoting it. Consent is not a breach here. To this justice, sexual contact was part of the failure to treat.

Third Opinion → argue that there was a breach of fiduciary obligation (i.e., one party in power takes responsibility of the other and undertakes to act in the party's interest). Consent is not a defence available to breach of fiduciary duty.

Conclusion: Reversed lower court's finding that defence of consent wasn't applicable. All conclude D liable.

Majority remedy → calls for all three types of damages in battery (general, aggravated, and punitive). They applied aggravated damages because the battery occurred in harmful/undignified circumstances. Applied punitive damages because the conduct was reprehensible because it violated community standards and they didn't want other 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 that is does not need to be punished.
Third remedy → breach of fiduciary duty can give rise to higher damages. They would have awarded $20K for breach of duty, $25K for sexual exploitation (b/c it did psychological damage and robbed P of her dignity), and $25K in punitive damages.

Fraud Vitiating Consent

Hegarty *v Shine* / narrow fraud vitiating consent

Test for FVC: **Consent can be vitiated by fraud if the D lies/deceives P about either:**

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

Analysis:

- Introduces a narrow view of the cases in which fraud can vitiate 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.
- Court holds that lying about a medical condition is not enough to vitiate consent.

R v ***Mabior*** *(2012)* / broad FVC / HIV

*this case changes the definition of FVC 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: D did not disclose that they had HIV.
Issue: Was consent vitiated by fraud (i.e., was consent vitiated because D did not disclose their HIV+ status)?
Analysis:

- While the old common law rule (*Hegarty*) did not vitiate fraud outside of fraud about (1) who the person actually is and (2) the sexual nature of the act, the SCR uses the *Charter* and recent changes to the *Criminal Code* to inform their approach to FVC.
- Court determines that there are circumstances in which lying about a health condition **could** amount to fraud vitiating consent depending on contextual factors (e.g., level of transmissibility, use of contraception to prevent transmission).

PP v DD / current test for FVC

Ratio: Current test for FVC based on the ratio of *Hegarty* and *Mabior*:

1. **Is there fraud about the character of the sexual act (i.e., the nature and quality of the act and/or the 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 D fraudulently told him she was taking birth control even though she wasn't. D got pregnant, had a kid, and now wants child support. P believes fraudulent claim that P took birth control vitiated his consent.
Issue: Was P's consent vitiated by D's fraudulent claim that she took birth control?

Analysis: not every fraud, deceit, or lying vitiates consent. To find out whether D's claim constitutes FVC, the court proposes a test based on the criteria set out in *Hegarty* and *Mabior.*

1. Is there fraud about the **character of the sexual act** (i.e., the **nature** and **quality** of the act and/or the **identity** of the sexual partner?
    a. The sexual act will remain valid if the fraud doesn't relate to the nature and quality of the sexual act and the 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.

Conclusion: D not liable.

Informed Consent

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.

Reibl *v Hughes*

Ratio: there are only three circumstances in which informed consent to medical treatment is not available to D:

1. **no consent at all (excl. emergencies).**
2. **treatment beyond what informed consent was obtained for (excl. 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)**

Facts: P underwent surgery and suffered a stroke as a result of the surgery that left him paralyzed. P formally consented to the surgery, but argued that this consent was not informed because D didn't make P aware of all the risks of the surgery. P wasn't eligible for workplace benefits as a result of the paralysis and sued for damages, claiming that he wouldn't have had the surgery if he had been properly informed.
Issue: Is informed consent to medical treatment available to D?
Analysis:
Court states that we can only find a lack of informed consent to medical treatment in 3 circumstances (closed list):

1. there was no consent at all (other than in emergencies)
2. treatment was performed beyond what informed consent was obtained for (other than in emergencies)
3. misrepresentation of the treatment for which consent was given and a different treatment was carried out

Conclusion: There was informed consent. D not liable for battery.

Battery Summary

1. Battery def'n: 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 in the course of ordinary life is prima facie offensive. Doesn't have to result in actual damage; D is liable for all harm resulting from 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 s/he consented. (***Scalera***)
    a. Consent: can be express or implied but must be voluntary (not obtained 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 (general, aggravated, and/or punitive)

Vicarious Liability

Definition: Vicarious liability is not a discrete tort. P does not need to show that D did anything. Instead, vicarious liability stands for the responsibility that one person may have for the tort committed. P tries to hold D liable for the original tort that another person committed because of the relationship between the two defendants.

Elements:

1. P has to show tort was committed by D1 (tortfeasor) (***Jones***)
2. P has to show that D1 is an employee of D2 (the employer) (***Jones; Sagaz***)
3. P has to show that the tort was committed in the course of employment (***Jones***; **CPR**)
    a. Does it relate to the <u>what</u>? (i.e., what the person was hired to do) (**CPR**)
    b. Does it relate to the <u>how</u>? (i.e., how the person did the job they were hired to do) (**CPR**)

Jones *v Hart* / whoever employs another is answerable for him

Test: 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 the course of employment
Facts: pawn shop owner lost P's goods that had been entrusted to the owner. P sued for tort of conversion (i.e., 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 of vicarious liability:

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

Ratio: whoever employs another is answerable for him.

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 to consider: level of control, provision of equipment, hired help, financial risk, responsibility for investment, and opportunity for profit.

Issue: Is the person performing the services independently or as part of the 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 (not determinative, but should be balanced):
    - 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

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

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 the prohibition concerns *how* the work was to be done, then it is likely the employer will be liable for VL.**

Facts: employee was a 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 didn't 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 the 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's likely that VL will be found because it was in the normal course of employment.

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

London Drugs / policy rationales for VL

1. **Fair compensation for P.**
2. **Deterrence:**
    a. The employer is the one running the business, so 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 guidelines into place to **prevent employees from committing torts**.

Independent Contractors

- Contrast: employees vs independent contractors
- **General rule**: someone who employs a general contractor does not have VL for the general contractor's tort.
- **2 Categories of exception to the general rule:**
  1. When the situation concerns non-delegable duties of the employer arising from some relation toward the public or a particular plaintiff.
     - Non-delegable duties: duty that the employer owes to either the public at large or a P in a particular situation. These duties cannot be delegated.
     - Even though the person may be an independent contractor, VL may still be established because the 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 a tort.
  2. The situation concerns work that is specially, peculiarly, or inherently dangerous.
     - Example: Contractor hired subcontractor to use dynamite to blast a mine

Bazley *v Curry* / factors for establishing VL

Ratio: Bazley factors (i.e., 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 by the employer** → More than a 'mere' opportunity; must ***materially enhance the risk***
2. **The extent of furthering the employer's aims** → signals whether the tort is sufficiently connected to the risk created by the employer's business
3. **Relation to friction, confrontation, or intimacy** → does what the employee was hired to do relate to friction, confrontation, or intimacy?
4. **The employee's power** → the more power the employee has, the higher the connection between creation of risk and the tort
5. **The vulnerability of potential victims** → how vulnerable would victims be to an improper use of power?

Facts: D operated residential care facilities for children and its employees acted, effectively, as substitute parents. One of the employees, tortfeasor Curry, was a pedophile but the non-profit did not know when he was hired. Curry sexually assaulted Bazley. This is the first case when the tort of sexual battery was before the courts in a VL context.

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

Issue 1: Is the non-profit VL for the sexual battery committed by their employee, Curry.

Issue 2: If they are VL, does the fact that the employer was a non-profit exempt them from VL?

Analysis:

- Issue 1: SCC calls on ***CPR*** to find VL:
  1. Employee acts authorized by the employer
  2. Unauthorized acts so connected with authorized acts that they may be regarded as modes of doing the authorized activity.
     a. VL has been found where the employee's conduct was "closely tied to a risk that the employer's enterprise has placed in the community."
- Issue 2: Must determine whether VL should be imposed in light of broader policy rationales → fair compensation & deterrence

- Argument 1: it's not fair to impose liability on non-profits 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) & they want to prevent these torts (deterrence)
- Argument 2: non-profits usually work with volunteers, so they are less able to supervise/have fewer resources/etc. → court rejects, stating it's the organization's responsibility to control its operations.
- Argument 3: VL will put non-profits out of business if they have to pay this compensation → court rejects, stating that the non-profit introduced the risk & had an opportunity to prevent the tort & its better to hold them accountable than to leave the victim without compensation.

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

Jacobi v ***Griffiths***

Facts: non-profit provided behavioural guidance to children and employed Griffiths who was tasked with developing a rapport with the club members. Plaintiffs (2 siblings) participated in club activities. Griffiths invited Ps to his home and sexually abused them. Tort of sexual battery established, status as employee established.
Issue: Was the tort committed in the course of employment? Can the non-profit be held liable?
Analysis: Application of Bazley factors:

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

Dissent: the fact that assaults took place off-site doesn't make them unrelated to the scope of employment. Dissent disagrees that the risk afforded was small and thinks that there was intimacy.
Held: Majority dismissed action against non-profit, finding no sufficient connection between work and Griffith's actions.

Lister *v Helsey Hall*

Facts: D worked at nonprofit boys' home. Tort of sexual battery took place.
Issue: were the actions so connected with employment that it holds nonprofit VL?
Analysis: Facts resemble Bazley more than Griffith. Warden lived in the home with the boys, could spend time around them, was hired to be in close contact with the boys which created a sufficient connection.
Held: Sexual battery was sufficiently linked with the warden's duties.

Summary: Vicarious Liability

Must show 3 elements:

1. A tort (***Jones***) → An injury other than a breach of contract which the law will redress with damages.
2. Tortfeasor must be an employee & not a general contractor (***Jones***; ***Sagaz***)
    a. General rule: the employer of an independent contractor has no VL for the latter's torts

        i. Exception I: Non-delegable duties (When the situation concerns non-delegable duties of the employer arising from some relation toward the public or a particular plaintiff)
        ii. Exception II: The situation concerns work that is specially, peculiarly, or inherently dangerous.
3. Tort must be committed in the course of employment (***Jones***; ***CPR***)
    a. Authorized acts by the employer (***CPR***)
    b. Unauthorized acts so connected that they may be regarded as modes of doing an authorized act. (***CPR***)
        i. Factors (***Bazley,*** **reinforced in** ***Griffiths*** **and** ***Lister***):
            1. Opportunity afforded by the employer (mere opportunity not enough, must materially enhance the risk)
            2. Extent of furthering the employer's aims
            3. Relation to friction, confrontation, or intimacy
            4. The employee's power
            5. The vulnerability of potential victims
        ii. Is the connection between the employer's creation or enhancement of the risk and the employee's tort sufficiently strong? (determined through ***Bazley*** factors)
        iii. Policy considerations: fair compensation & deterrence (***London Drugs***)
        iv. No exception for non-profit employers (***Bazley***)