

# **Law 108C Torts Midterm Outline**

**Fall 2013 – Professor McDorman**

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## Joint Tortfeasors

- Definition: When two or more people act together to commit a tort they can all be found liable regardless of who actually committed the tort.
- *Cook v. Lewis* factors to consider:
  - Agree upon a common course of action, which leads to the tort
  - Control over the other's behaviours
  - Encouragement
  - Possible anticipation of the other's negligence
  - Employer / employee type relationship
- *Fish & Fish* Requirements: a common design (which can be implied) and actions that furthered the common design.
  - Common design can be a tacit agreement
  - Things that do not imply a common design: Facilitation such as selling someone something, a close relationship such as shareholders, looking on with approval
  - Joint tortfeasor does not need to be present if they played a significant role

## Vicarious Liability

- Seen in employer / employee relationships – though it is not automatic
  - This is a form of liability without fault – Strict liability
- Policy reasons:
  - Employer can control employees to minimize risk
  - Employer receives profits and should therefore also bare responsibility for the wrongs of people who are a part of the business
  - Employer is in a better position to provide compensation
  - Deterrent: encourages employers to properly train employees and to minimize potential risks
- Does the necessary relationship actually exist?
  - Vicarious liability exists for employees, but not for independent contractors
  - *Sagaz* factors to determine if someone is an employee – Is the person in business for their own account?
    - Control – historically this was the only factor
    - Ownership of the tools
    - Chance of profit
    - Risk of loss
    - Hiring of helpers
  - *Yepremian v. Scarborough General Hospital*: doctors who have privileges only are not employees of the hospital
- What sort of conduct gives rise to vicarious liability?
  - Outdated *Salmod* Test: Is the act authorized by the employer or if it is unauthorized is it so connected to authorized acts that there is no clear distinction.
  - *Bazley* strong connection test applied in *Oblates* was developed for sexual assault but applies to all situations:
    - Employment provided the opportunity for abuse of power
    - The extent to which the act furthers the employers aims
    - How the act relates to conflict or intimacy of the relationships encouraged by employment
    - Power given to the employee over the victim
    - Vulnerability of the potential victims

## Legislation

- *BC Parental Responsibility Act*: parents are liable for damage or loss caused by their children up to \$10 000.
  - This is based on a presumption of parental fault not on vicarious liability and lays out potential defences
  - At common law parents are not vicariously liable for the torts of their children
- *Negligence Act*:
  - Joint and several liability (s4): when there are multiple people at fault and the court divides damages the tortfeasors are required to indemnify each other.
  - There is not joint and severable liability when the plaintiff is contributorily negligent
  - See s1 and s2 for apportionment and awarding damages (CB 42)

## Protecting Property Interests

### Nuisance

**Private Nuisance:** Indirect interference with property, land or the use of the land.

- Can only be brought by someone who has a property interest in the land, which would include renters or others who live on the land but not visitors
- The fact that the defendant behavior complied with all laws is not a defense to nuisance – ex. amenity nuisance cases. It is the affect of the conduct that matters not the cause (*Smith v. Inco*)
- Two-part test set out in *Antrim Truck*: the interference must be substantial and unreasonable
- When it is brought for physical damage to land there must be a detrimental affect, not just a change (*Smith v. Inco*)
- Based on a balancing of who should bare the loss.
- The fact that a project is for the public good does not automatically out weigh the loss to the plaintiff. Here the test is whether the individual should be expected to bare the cost alone for the public good (*Antrim Truck*)

**Rylands v. Fletcher Rule** [~1850]: Similar to private nuisance but sets out strict liability for ultra-hazardous activities. Has four requirements (set out in *Smith v. Inco*):

- “Non-natural” use of the land
- Bring something likely to cause mischief to the land if it escaped
- The thing actually escapes
- Damage to the plaintiff’s property was caused by the escape

**Public Nuisance:** When the nature of the consequences of an event affect a large group of people. It is a very narrow tort.

- Usually brought by the AG. Can be brought by an individual if they are especially affected by a large event
- Is a criminal or quasi-criminal offence that affects public welfare (*Smith v. Inco*)
- *Smith v. Inco* states that it cannot apply to a large group of individual property rights (Ted says this is wrong)

### Trespass to Land

- Described in *Smith v. Inco*
- Trespass is an intentional tort and must therefore involve a voluntary and direct physical intrusion onto the land
- Can involve placing something or propelling something onto the land
- Like all intentional torts it does not require damages
- Fails in *Smith v. Inco* because of the lack of directness – described as being closer to stone from an old chimney falling onto the land (nuisance) than throwing stones onto the land (trespass).

## Intentional Torts – Trespass to the Person

- The intentional torts are very old
- Previously the plaintiff only had to prove that the action occurred allowing for very few defenses – strict liability
- Now there is an intent and a directness requirement
- Because they are based on protection of bodily integrity damages are not necessary (although this would lead to minimal damages being awarded).

## Assault and Battery

### Assault

- Defined as the creation of immediate apprehension of unwanted physical contact.
- An assault could be committed negligently.
- Based on a reasonable apprehension – objective standard. Doesn't require actual fear, but does require plaintiff to have been aware of the assault.
- If the impending battery actually occurs action proceeds in it alone.
- There were no cases for this.

### Battery

- Battery requires conduct that is harmful or offensive and now what could be expected with the ordinary course of activities. (*Scalera*)
- Onus of proof: Plaintiff must prove that force was applied to him/her by the defendant. Defendant must then show a defense such as consent. (*Cook v. Lewis*)
  - It was suggested in *Scalera* that the onus of proof should shift so that the plaintiff must show fault (lack of consent) for sexual battery, which the Court rejected
    - These are rights based torts, which is why fault should not be at issue. Directness requirement is enough.
    - The defendant is in the best position to give evidence on what was in the defendant's mind.
    - For sexual battery specifically this would result in more emphasis being placed on the victim's conduct rather than the defendant's which can lead to victim blaming
- Consent has not been given if it would fail the contract's test for unconscionability (*Norberg v. Wynrib*):
  - Power dependency relationship
  - Proof of exploitation
- Overall test:
  - Direct
  - Intentional – can be negligent battery, where you are doing an act you know is likely to cause harm
  - Contact with the plaintiff's body
  - Plaintiff does not need to have knowledge of the contact (ie. Still battery if the plaintiff was sleeping)
  - Consent as a defense, and maybe *ex turpi causa*
- *Ex turpi causa* is potential defense – one cannot profit for criminal activity through tort
  - Failed in *Norberg v. Wynrib* because Ms. Norberg's offence was not directly related to the harm that was done to her

### Medical Battery

- Like everyone else Doctors must have consent to touch a patient for treatment purposes.
- Patients always have the right to refuse treatment and informed consent does not extend to informed refusal (*Malette v. Shulman*)

- There is an emergency exception to informed consent in medical settings: when the patient's life or limb is at risk and they are incapable of giving consent it is assumed (*Malette v. Shulman*).
  - However this cannot go against an advance directive
  - Also there is now an Act covering what is required for an advanced directive.
- Medical battery is limited to when there is no consent at all. Whether consent was sufficiently informed can only be tested in negligence (*Reibl v. Hughes*).
- *Health Care (Consent) and Care Facility (Admission) Act* changes the common law on consent from *Reibl v. Hughes* stating that where consent does not meet the requirements on s. 6(e) it is deemed to not be consent (CB 103-109)

### **Fiduciary Duty – Not really a tort**

- Elements of a fiduciary relationship (McLachlin J. in *Norberg v. Wynrib*)
  - The beneficiary gives up power and trusts that the fiduciary will act in his/her best interest.
  - Fiduciary has discretionary power that can be used unilaterally to affect the beneficiary
  - There is an inherent power inequality
  - Prior to this case this only applied to confidentiality, now applies to all Dr.-patient relationships.
  - Consent is NOT a defense to an intentional tort committed through breach of a fiduciary duty.
- Doctors can breach this through a failure to treat patients and by using power to exploit them (ie sexual battery)
- Finding a breach here usually leads to more damages than in intentional torts alone – gives damages in equity.

### **Intentional Infliction of Mental Suffering**

- Only case is *Wilkinson v. Downton* – so cite it for everything to do with this
- Hybrid tort – elements from intentional torts and negligence
- Elements of the tort (all of which must be proved by the plaintiff):
  - Defendant did an act or statement that was outrageous or extreme
  - There was an intent to cause harm of some type (doesn't have to be the harm that actually occurred)
  - Must show actual harm occurred – usually needs to be medically psychological damage. Cannot recover for physical damages here.
- Does not cover particular sensitivities or socially acceptable conduct.

### **False Imprisonment**

- Requires: one person without lawful authority restrains a person from going where they are legally entitled to go. (*Lumba v. Secretary of the State for the Home Department*)
  - Can be physical or psychological restraint
  - Must be direct
  - Defense is lawful authority
- When a person is restrained using an unlawful policy, even if there was a lawful one that could have been used the condition for the defense is not met (*Lumba*)
- There must be total restraint of liberty, if there is an easy way out known to the plaintiff then there was no imprisonment (*Bird v. Jones*).

## Full Case Briefs

### Cook v. Lewis

#### Facts:

- Cook, Lewis, Akenhead and others were hunting together.
- Cook and Akenhead fired in the same direction when they believed the dog was pointing at grouse.
- One of them shot Lewis in doing this but it is not known who did.
- It had previously been found that no one was acting negligently

#### Issue:

- Are Cook and Akenhead joint-tortfeasors?

#### Held:

- For the defendant, Cook. They are not joint-tortfeasors and because it is unclear who shot Lewis neither can be liable in tort.

#### Reasons:

- It would set a problematic precedent if all members of a hunting party were liable for the actions and negligence of one member
- There was no control or encouragement, and neither could have anticipated the negligence of the other

### Fish & Fish Ltd v. Sea Shepherd UK & Ors (“Fish & Fish”)

#### Facts:

- SSCS cut nets to free tuna in Libyan waters on a Maltese vessel.
- The boat used by SSCS was Dutch but owned by SSUK.
- SSUK also provided funds for the mission (and is the only group to have any money).

#### Issue:

- Are SSCS and SSUK joint-tortfeasors?

#### Held:

- They were joint tort-feasors. SSUK is therefore liable to Fish & Fish

#### Reasons:

- Met the requirements of a common design and doing something to further that common design.
  - A tacit agreement was found to meet this requirement.
- Some inconsistency in how the test laid out is applied here.
- Likely to be a political statement about vigilantism which the courts do not like and do not want to encourage.

### 671122 Ontario v. Sagaz Industries Canada Inc (“Sagaz”)

#### Facts:

- The plaintiff lost a Canadian Tire contract to Sagaz because Sagaz’s contractor Landow/ AIM bribed Canadian Tire
- Landow and Sagaz’s employees attended meetings with CT together and Landow used Sagaz’s letter head
- AIM was on commission and had their own offices and paid their own business costs

#### Issue:

- Does Aim/Landow count as an employee of Sagaz for the purpose of vicarious liability?
- Liability had already been found for the tort here, but issue is now who is liable.

#### Held:

- Sagaz is not vicariously liable
- Landow/AIM were an independent contractor and not an employee.

#### Reasons:

- Employers are not vicariously liable for independent contractors
- AIM met all of the requirements of a contractor: they had their own business and did not have the power to bind Sagaz

## **EB v. Order of the Oblates of Mary Immaculate (“Oblates”)**

### **Facts:**

- Repeated sexual assault of a student in a residential school by Saxey, a labourer employed by the school.
- He supervised children in the bakery and operated the boat on and off the island that the school was located on
- It was not explicitly in Saxey’s job description that he was to supervise the children unattended but it likely happened and children were expected to listen to any adult staff member

### **Issue:**

- Is Oblates, who ran the residential school vicariously liable for Saxey’s actions?

### **Held:**

- Oblates was not found to be vicariously liable.

### **Reasons:**

- There was no connection between what the employer asked of Saxey and the assault. Saxey was not given tasks which increased the risk of assault
- Did not look at the institutional setting just the specific tasks
- Saxey was not conferred power over the children
- Lesser factors: separate living quarters, there was another staff member there when he drove the boat

### **Dissent (Abella J.):**

- Would have found Oblates vicariously liable
- Looked to the importance of the intimacy and power structure of this school
- Power was conferred on all employees over the students who were especially vulnerable
- Found that the chance of the tort was enhanced by Saxey’s employment

## **Smith v. Inco**

### **Facts:**

- Inco’s nickel refinery eliminated nickel oxide from smoke stacks for many years.
- Nickel oxide in the soil in the town is clearly from the refinery.
- Inco did not violate any laws or policies during operation.
- No proof that nickel oxide poses any health risk to people at all.
- Class Action Suit is based on drop in property values due to public concern about the affects of nickel oxide.

### **Issue:**

- Is Inco liable in:
  - Private nuisance
  - Trespass
  - Public nuisance
  - Rylands v. Fletcher

### **Held:**

- Inco is not liable at all.

### **Reasons:**

- Private nuisance: requires the affect to be unreasonable. Use and enjoyment in no way affected.
- Trespass: Intrusion was indirect therefore not an intentional tort.
- Public nuisance: Was a group of property rights not a public health issue.
- Rylands v. Fletcher: Never adapted in Canada and refining nickel is not an ultra-hazardous even if it had been.
- Best case would have been in private nuisance.

## **Antrim Truck Centre v. The Queen (“Antrim”)**

### **Facts:**

- Highway construction project permanently changed access to plaintiff’s business – its no longer accessible
- Claim is for loss of income

### **Issue:**

- Is this loss of income an unreasonable interference with the plaintiff’s property?

### **Held:**

- For the plaintiff. Found private nuisance.

### **Reasons:**

- Interference was both substantial and unreasonable.
- An individual should not have to bare a large expense alone for the public good.
- A permanent loss of business and huge decrease in property value is worthy of compensation.

## **Non-Marine Underwriters, Lloyd’s of London v. Scalera (“Scalera”)**

### **Facts:**

- Scalera had home insurance, which covered bodily injury on and off the property with a duty to defend.
- There was an exclusion clause for intentional or criminal acts, which Scalera did not want to apply but the insurance company did.
  - Bad for public policy to provide funds to defend against sexual assault.
- The victim is not involved in these proceedings at all.
  - However this creates a difficult situation for the victim: if the exclusion clause applies there is not much money, but if it does not there is no cost to the defendant.

### **Issue:**

- Should sexual battery be its own tort with the onus on the plaintiff to prove there was no consent?

### **Held:**

- Classical battery is best for sexual assault (and in general). Defendant must still prove consent.

### **Reasons:**

- To preserve bodily integrity it is best to assume no consent except for trivial bodily contact – sexual contact is about as far from this as you can get.
- No need to discourage plaintiff from lying by making this change as there are already sanctions for bad claims.
- The defendant is in the best position to say whether be belived there was consent and on what grounds.
- Switching the burden of proof puts all of the emphasis on the plaintiff’s conduct not on the defendant
  - This can encourage victim blaming.
  - The criminal law and parliament already try to avoid this showing that it is not unique to tort.

## **Malette v. Shulman**

### **Facts:**

- Following a car accident in which the plaintiff’s husband died, she is brought to the hospital unconscious and in serious condition. The defendant is her doctor.
- Plaintiff had an unsigned Jehovah’s Witness card in her purse stating that she did not want a blood transfusion.
- Defendant does all non-transfusion treatment possible but her condition worsens so he gives the transfusion.
- Defendant truly believed it was his duty to treat her and other medical professionals agree that the plaintiff would have died without the transfusion.

### **Issue:**

- Was the Jehovah’s Witness card enough for an unconscious patient to refuse life saving treatment?

### **Held:**

- For the plaintiff.
- This was a battery; however, the plaintiff did not receive costs showing the courts disapproval with suing someone for saving your life.

### **Reasons:**

- Medical contact is non-trivial.
- The doctrine of informed does not extend to informed refusal. A patient may refuse care for any reason at all.
- The card was made exactly for this sort of situation. It was very clear and contained nothing to indicate that the plaintiff did not understand what it meant.
- Confirms the emergency exception to consent to medical treatment when there is no advanced directive or substitute decision maker.

## **Reibl v. Hughes**

### **Facts:**

- Plaintiff was less than a year from retirement.
- He had surgery to help with headaches and prevent a stroke.
- Doctor told him it was better to have the surgery than not. Did not mention risk of stroke, paralysis and death.
- Plaintiff has a stroke in the operating room and ends up with a permanent and serious disability.
- If the plaintiff had known the risks he would have waited until after retirement.

### **Issue:**

- Did the plaintiff give informed consent if it was not sufficiently informed?

### **Held:**

- Damages in negligence not battery.

### **Reasons:**

- Battery does not look to how sufficient the consent was.
- Seen as a pro-doctor case as negligence requires proof of fault.
- Brings into question how consent works generally.

## **Norberg v. Wynrib**

### **Facts:**

- The plaintiff became addicted to painkillers following surgery.
- She went to the defendant, a physician, to try to get more painkillers.
- The defendant figures out that the plaintiff is addicted and rather than treat her he offers her drugs in exchange for sex.
- She initially resists but eventually gives in.
- When she asks him for help he tells her just to quit.
- Later the plaintiff successfully enters treatment and remains drug free.

### **Issue:**

- Is the doctor liable in battery, negligence or breach of fiduciary duty?

### **Held:**

- He is liable in battery. \$20 000 dollars of general damages and \$10 000 punitive damages.

### **Reasons:**

- No consent due to unconscienability from contract law which requires: power dependency and proof of exploitation
  - Community standard used here
- Looks to the College which has a strict zero tolerance policy for sexual activity with patients.
- *Ex turpi causa* does not apply. He is not cleared because she committed a separate crime.

### **Dissent (McLachlin J.)**

- Would have found the defendant liable in breach of fiduciary duty and awarded equitable damages of \$20 000 for prolonging her addiction, \$25 000 for sexual exploitation, and \$25 000 punitive damages.
- Finds that neither battery nor negligence properly address the situation and doesn't like the contracts analogy.
- Finds that Doctors are in a huge position of trust in our society and that this plaintiff was especially vulnerable which fits well with fiduciary duty. Also encompasses that he had a duty to treat her.

### **Wilkinson v. Downton**

#### **Facts:**

- The defendant lying to the plaintiff for a prank tells her that her husband is seriously injured and that she must go to him at once.
- She suffers a nervous shock which is not from a preexisting condition and results in continued health problems

#### **Issue:**

- Can she sue for fraud?

#### **Held:**

- For the plaintiff. However, this is not fraud so a new tort of intentional infliction of mental suffering.

#### **Reasons:**

- The defendant clearly intended to cause the plaintiff harm.
- This is a hybrid tort: requires outrageous statements, intention to harm, and actually damages.

### **Lumba v. Secretary of State for the Home Department (“Lumba”)**

#### **Facts:**

- Was detained prior to deportation due to an unwritten blanket policy to do so.
- The plaintiff had a criminal record and could have been held under the written policy anyway.
- Blanket policies without exception are illegal.

#### **Issue:**

- Is the State guilty for holding the plaintiff using an illegal policy when the legal policy would have given the same result?

#### **Held:**

- For the plaintiff but only 1 pound of damages.

#### **Reasons:**

- Defense of lawful authority when the detention was based on an unlawful policy.
- Because this is an intentional tort damages are not required – this is why the existence of the lawful policy does not change liability (only damages).
  - Also goes back to first principle about liberty and trespass.