

TORTS OUTLINE – ANDREA LUTSCH FALL 2014

Tort → a civil wrong (other than k) for which you can claim damages

- Evidence of wrongdoing: a condition for liability (Burden of Proof = 51% - except strict liability)

Strict liability: liability imposed w/out fault (applied to nuisance and vicarious liability- dangerous activities) (*Rylands v. Fletcher*)

Wrongdoing and Responsibility

Joint Tortfeasors

- Multiple people can be responsible for the single tortious act of one
- Plaintiff proves one tort, all group members are then liable
- JT's are jointly (together) and severally (separately) liable for plaintiff's loss
- The remedy can be sought from any one of the JT's
- A JT can be found 100% liable for the actions of another

Examples: 2 people agree on a common action, employee commits T in the scope of employment, agent commits act for principal (*Cook*)

Cook v. Lewis:

- Independent but parallel acts do not constitute JT's (defendants must have acted together to cause the T)
- Notion of mental concurrence: working together to a common end

TEST: *Fish & Fish v. Sea Shepherd UK*

1. There was a common design
2. There were acts in furtherance of the common design (The JT doesn't have to play a significant role- but must further the common design)

→ **not** enough to: Facilitate a tortious act; Sell the product; Be two closely related entities; Look on with approval

Vicarious Liability

- Vicarious liability is a type of JT
- A person will be responsible for the torts of another because of the relationship b/w them (*Ontario Ltd. v. Sagaz*)
- Is a form of **strict** liability: person liable did not commit the tort
Policy: The employee may be judgement proof (cannot pay). Fair for fault to fall on the employer (insurance, can address cost by raising prices). Deterrence: employer will work to prevent it happening again.

TEST: Does the requisite relationship exist between the tortfeasors and the person sought to be vicariously liable? If so, was the T committed in the course of employment, or did the employment create the risk of T?

- Part 1: Requisite relationship (*Sagaz*)
 - Control: was employee under the control of the employer (or are they an independent contractor) Who controls how/what work is done?
 - Entrepreneur test: are they doing business on their own account? Own tools, chance of profit, risk of loss?
 - Organization test: degree of integration, of responsibility for management. The autonomy between parties.
- Part 2: **Salmond test**- was the T committed in the course of employment (*Danicek*)
 - Was the act authorized by the employer? OR
 - Unauthorized act so connected with the types of acts authorized by the employer that they can be considered modes of doing what was asked

Three types of cases fall under this “unauthorized act” stage (McLachlin)

1. Act that furthered the employer's aim
2. Employer created a situation of friction (created a situation that would reasonably give rise to employees committing tortious acts ex. bouncer)
3. Dishonest employees (stealing from the employer- cannot be further their aims) Courts still find vicarious liability.

Policy concern: this cannot apply to something like sexual assault where the employer would never authorize it.

Modification to the Salmond test: (*Bazley v. Curry*)

- The employer must have materially enhanced the risk and there is a connection between employment tasks and the tort

TEST: did the employer create enterprise risk (enhanced risk that will hold the institution/enterprise liable)

- Opportunity for employee to abuse power?
- Extent to which the act furthers the employers aims
- Intimacy of relationships
- Extent of power of the employee over the victim
- Vulnerability of potential victims

Hospitals and Doctors:

- Hospitals may be vicariously liable for the tortious conduct of their staff but not for those with “hospital privileges”
- Courts are now starting to look more at the overall context as perceived by the patient

Policy: vulnerability of patients. Reliance on hospitals. No way for them to tell who is an employee or who has hospital privileges.

Parental Liability

- Parents are not vicariously liable for the torts of their child
However:

Parental Liability Act: In circumstances of intentional property damage parent can be held vicariously liable up to \$10 000

- Assumed to be liable unless they can prove otherwise: reasonable supervision, efforts to discourage

Joint and Several Liability: Multiple Defendants

- The legislation now allows us to sue multiple parties in a single action - *Negligence Act s.4*
- Courts find damages (assign % liability to the parties), but the plaintiff can decide who to take the damages from (all from one or how much from each)
 - **Not** available if there was contributory negligence on the part of the plaintiff

Contributory Negligence

- Occurs where the plaintiff contributed to the tort (plaintiff's negligence caused the accident, but the actions of the plaintiff put themselves in a position of foreseeable harm, and they failed to take protective measures in the face of reasonably foreseeable danger)
- Because of the *Negligence Act* if a plaintiff contributed in some way to the accident it will not constitute a full defense for the defendant
- Courts now determine apportionment- where %'s of faults lie (*Negligence Act s.1(1), 1(2)*)
 - BC: the plaintiff can only collect from the tortfeasors what they are liable for (joint and several liability does **not** work)

Actionable Harm

Protecting Property Interests – interference can take 2 forms: physical injury to land, interference with the use and enjoyment of land (amenity nuisance)

TEST for Physical Damage to Property: (*Smith v. Inco*)

- It is more than trivial (is material damage)
- Has occurred, not just has the potential to occur (is actual damage)
- Can be observed and measured (is ascertainable damage)
- Is unreasonable (puts a disproportionate burden on one party) (*this consideration- (*Antrim Truck Centre v. The Queen*))

Private Nuisance

- Plaintiff **must** have a land interest (includes renters but not visitors)
- Importance is on the effect of the conduct, not the conduct itself (*Smith v. Inco*)
- Standard: an ordinary person and reasonable person (objective test)
- To have a successful PN claim for **physical damage** to the land: must show the action caused the damage, and it passed the above test (*Smith v. Inco*)
 - cannot be based on something like public concern.
- To have a successful PN claim for **amenity nuisance**: must balance interests of the two parties (which party should shoulder the greater burden than it would be reasonably expected for individuals to bear w/o compensation) (is it just a cost of living in organized society or more than that?) (*Antrim*)
 - Ex. clear causation between a road built and loss of commercial property

TEST for Private Nuisance Amenity Claims:

- Interference is **substantial** (considerations: severity of interference, character of neighbourhood, frequency, duration)
- Interference is **unreasonable** (as above)

Note: **Do not need to prove fault** here (ex. *Inco* did not do anything wrong, “injury” to the land happened years after closure, they followed all regulations)

Note: conduct for the private good does not mean there can be no private nuisance claim.

Rylands v. Fletcher Rule

Strict liability tort (no need to prove any wrongful (intentional or negligent) conduct.

- Is it's own tort- quite narrow
- Can be brought along with nuisance and negligence claims
- Can be applied where:

1. There is a non-natural use of the land

- Can be things that are dangerous all the time, or things that are dangerous only in the circumstances
- Dangerous, extraordinary, special, of no general benefit to the community
- Something brought onto the land that wouldn't be there otherwise

Note: if it is a natural use of land: private nuisance

2. There is escapement (of something likely to cause mischief)

- Escape is **unintended/accidental**
- It got outside of the area of control
- Can be continuous (not necessary for it to be a single event)

3. There is damage

- Caused to the plaintiff's property as a result of the escape
 - Need to show causation (“but for” this would not have happened) (usually easy to prove once #1 is met)
- Usually applied to cases where something unintended has happened: floods, fires, escapements, etc.

Policy for strict liability: victim assured of recovery, if automatically liable

people will be more careful (deterrence) and will account for it (insurance)
Smith v. Inco → not Rylands and Fletcher, use of the land was natural

Trespass

Note: includes entering land w/out permission, placing objects on land, or refusing to leave when consent to be on the land has been revoked
Essential Characteristics:

- **Direct** physical intrusion onto land
- Voluntary, but need not be intentional (do not have to intend to trespass, but had to voluntarily do the actions that led to it)
- Actionable without proof of damage (meant to protect privacy etc.)
- May involve placing/propelling an object or discharging a substance onto a plaintiff's land (it is **not** trespass to do something which consequentially results in the entry of the objects)

Smith v. Inco → not a trespass, intrusion was not direct

Note: **Negligence**- plaintiff proves all elements of the T (duty of care, breach, causation). **Trespass** - all they have to prove is causation (that the defendant interfered directly w/ their property/person.) Once proven the defendant must prove they weren't intentional and weren't negligent.

*Trespass: easier to prove, no limit on damages.

Protecting Physical Security and Integrity

→ Intentional torts

Policy: protecting bodily security, freedom from threats of violence, liberty of the person

- Actionable without damage (however in order to get compensation, may need to show damages)
- Must be a **direct** interference, but it can be negligent or intentional (*Non-Marine Underwriters*)
 - Interference is direct if it is an immediate consequence of a force set in motion by an act of the defendant
- The onus of **proof** is partially reversed → it falls to the defendant to show the act was unintentional and w/out negligence for a defence (all the plaintiff must show is that there was a direct interference)
 - o McLachlin in *Scalera* - no intention of changing intentional torts to require the plaintiff to prove fault

Policy for the onus of proof: plaintiff's rights to physical integrity are above the defendant's freedom to act. Defendant is in the best position to explain their actions. Focus does not shift to the plaintiff and their actions.

Purpose of trespass actions in battery and assault: protect physical and mental security from unwarranted interferences (*Scalera*)

Defence: consent is a complete defence to action and negates battery-no civil liability

- o **Burden is on the defendant to show consent**
- o Presumption of the courts: no consent unless it is trivial everyday contact
- o Consent must be: free, full, informed (*s6*)
- Other defences: unintentional, consent, self-defence, emergency (necessity), legal authority.
- Partial defences: provocation, contributory negligence

Assault: a **direct and intentional** act that causes a person to **apprehend** immediate harmful or offensive bodily contact

- Defendant must have (or appear to have) ability to carry out the threat & plaintiff must be **aware** of the threat
- Can be intentional or negligent
- If intentional: intent of the defendant must have been that they were reasonably certain it would create apprehension

Battery: a **direct, intentional physical interference** with another that is harmful or offensive to another reasonable person

- There is a legal wrong, does not have to be person to person (can be a shooting etc.)
- Plaintiff does not need to be aware of the battery at the time it's committed (ex. in surgery)

Informed Consent to Medical Treatment (Adults)

Informed consent: primary means of protecting patient's rights to control medical treatment.

Health Care (Consent) and Care Facility (Admission) Act → *s16: list of decision makers*

For a claim: no requirement of fault (is not negligence). Defendant must prove consent (can be withdrawn by plaintiff)

→ Exception: consent needed unless emergency situations where there is no advanced directive (unconscious/can't make a decision, time is of the essence, reasonable person would have consented under the circumstances) (*s5*)

- One can refuse consent for **any** reason (*Malette v. Shulman*) (*s4*)
- A clear card with patient's intent: no informed refusal (overrides emergency situation exception) = battery (*Malette v. Shulman*) (*s19-follow directives if there are any*)
- Common law: people have a large allowance of self-determination

Reibl v. Hughes

- A doctor who did not fully disclose risks can be held liable for negligence but not for battery (consent for the touching was there)
 - o Note: negligence is harder to prove (patient must now show breach of duty and standard of care, material risk, reasonable person would not have consented)
 - o Standard of care: full disclosure. Don't need to warn against all

possible risks of surgery, but do for specific risks. (*s.6e*)

- This case: makes it harder for a plaintiff to raise a battery case when there is consent for the nature of contact

Consent to Medical Treatment (Children) → legislature can protect a child who is endangered by their refusal to accept treatment (child must know risks and it must be in their best interest)

Mature minor rule: if a child understands, has the capacity to decide-can provide consent. No set age. Must know the risks. *Infants Act & Child, Family and Community Service Act:* statute this rule. (*IA s19*)

- *S29(1) CFCSA:* If there is a **refusal** of consent: can overrule the mature minor principle. (Legislation trumps common law) (*S.J.B. v. BC*) → The courts can step in as a guardian (sovereign guardian/protector) - best interests of the child are supreme

Consent to Contact in Sport

There is implied consent to contact in sports that are inherently violent.

- If there was intention to harm/a violent hit: battery (*Colby v. Schmidt*)
- Punitive damages should only be awarded for actions that are "inexcusable" or "reprehensible" - beyond reasonable scope of game

Consent to Sexual Contact

- Advantages to a tort claim rather than crim: greater control, greater involvement- plaintiff brings case, lower burden of proof, access to compensation, possible therapeutic effects
- Disadvantages: costly, time consuming, stressful, adversarial process (revictimization), compensation may be illusory (judgment proof defendant - leads to vicarious liability cases (*Bazley v. Curry*))

Fiduciary Duty: beneficiary has placed reliance, trust, power, confidence in the hands of the fiduciary - gives rise to strict obligations

TEST for Fiduciary Duty: (*Norberg v. Wynrib*)

- Fiduciary has some capacity of discretion
 - Fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiaries legal or practical interest
 - The beneficiary is particularly vulnerable, is at the mercy of the fiduciary
- must show the fiduciary acted disloyally or for their own interests

Norberg v. Wynrib

- Majority: found for battery

Two step test for consent to a sexual assault (battery)

1. Proof of inequality b/w the parties (education differences, positions of power, etc.)
 2. Proof of exploitation (proof of someone taking advantage of other)
 - o Exturpi causa: not applicable - no causal connection b/w torts
- Doctor owed a duty of care, actions were intentional (there was no consent). Sexual assault: ALWAYS an intentional claim.

- Minority: breach of fiduciary duty

Lasting impact on extending the FIDUCIARY DUTY → **battery and breach of fiduciary duty are often now claimed together**

Protecting Mental and Emotional Security and Integrity

Intentional Infliction of Mental Suffering

- Must be **outrageous or extreme** conduct (*Wilkinson v. Downton*) (*Boucher v. Walmart*)
 - o An act or statement w/ **intent** to cause harm (intent can be actual or constructive - can't be proven but is obvious, court constructs it- would a reasonable person think there was intent)
 - o **Harm** requirement: plaintiff must prove nervous shock or a recognizable physical harm
 - o **Reasonable requirement:** plaintiff can't have predisposition to shock (unless D knew this)

Protecting Liberty Interests

False Imprisonment

No requirement to prove damage. Proof of unlawful imprisonment is sufficient.

- Imprisonment must be **intentional**
- Do not need to prove awareness of false imprisonment (but will likely receive minimal damages)
- Once you prove confinement (no reasonable alternative route of escape - physical or psychological) the defendant must disprove one of: unlawful, imprisonment, intentional
- Must be **full** confinement- a total and direct restraint of liberty (*Bird v. Jones*)
- Unlawful confinement but could have been lawful - minimal damages (*Lumba v. Secretary of the State for the Home Department*)
- Example of unlawful confinement (psychological- door wasn't locked, but impression was that it was) (*Jeeves v. Swanson*)

Limitation Act: A limitation period (set time in which to bring a claim)
Outside= a complete defence.

Policy: *Certainty, evidentiary, diligence*

→ Starts on the date of discovery (when the person notices the damage) (typically have 2 years after discovery) *s6 (1)*

→ Does not apply to claims of a sexual nature *s12*, if claimant was a minor at the time or was in an intimate/dependent relationship *s3*