
LAW 108C | private law: torts
midterm outline | 2012-2013

John Bullock

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RESPONSES TO HARM

DEFINITIONS

- Conduct (includes acts and omissions) that interferes with **legally protected interests** of others without lawful justification.
- Gives rise to **personal actions** in which plaintiff (P) seeks a **remedy** for unlawful interference with their legally protected interests
- **Proof of harm not always required** - though generally require fault (intentional or negligent)
 - *Torts actionable per se*: Some torts are actionable without proof of damage.
 - e.g. trespassory torts – battery, assault, false imprisonment, trespass to land, trespass to chattels, and defamation.
 - *Torts actionable only upon proof of actual damage*: resulting from defendant's conduct (may not be wrongful but requires due care).
 - e.g. negligence actions and intentional infliction of mental distress.
- **3 types of relief from tort action:**
 - declaration of tort action – determination of boundaries
 - monetary compensation – damages
 - injunction – prohibition of conduct that interferes with interest of P or compelling D to remedial action

TWO BASES OF TORT LIABILITY

- **Fault**: central to modern tort law in Canada; evidence of wrongdoing condition for liability
- **Strict**: rare; liability imposed w/o fault unless valid defence; applied to activities that are inherently dangerous (nuisance, defamation, vicarious liability)

TORT LAW AS SOCIAL CONSTRUCT

- Only certain undesirable conduct falls within the ambit of tort law
- Tort law remedies are limited to the protection of certain interests – those that have been recognized as deserving of protection
- **Factors that influence scope of tort law:**
 - Proximity
 - Common law precedent
 - Implications of recognizing (or not) certain conduct as a tort
 - Societal interests/norms
 - Alternatives available

THEORETICAL BASES FOR TORT LIABILITY

- **Essentialist/Moralist**
 - Corrective justice
 - Focus on immediate litigant
 - Purpose = to restore equilibrium between parties caused by D's wrongdoing

- Tort an end to itself; compensation incidental
- **Critique:**
 - Doesn't recognize socio-economic sources integral to success, presumes between parties, ignores social context/background of parties

- **Instrumentalist/Functional**
 - Distributive justice
 - System of loss distribution
 - Goals = compensation, education, deterrence, loss spreading, psychic benefits
 - Provides compensation to victims at D's expense
 - **Critique:**
 - No compensation if D has no \$, burden on victim, tortfeasor often no on paying (insurance, vicarious liability), deterrence overstated

DETERMINING LIABILITY

- **Joint Tortfeasors** (*Cook v. Lewis* ruled no, but ratio = *When there are two parties, and it is proven that one of them caused harm in their actions but it cannot be proven which party actually did it, then both of them are liable for the resulting damages.*)
 1. Encouragement or instigating?
 2. Principle/agent relationship?
 3. Employee/Employer relationship?
 4. Residual fact-specific category - Guilt by Participation? (catch all)
 - (Last para. of *Cook v Lewis* – anticipation of other’s action?, control over other’s action?, assistance or encouragement of other’s action? right to interfere with other’s action?)
- **Independent Tortfeasors** (aka. several, concurrent)
 - Operate independently - but consequences of their separate acts harm plaintiff
- **Vicarious Liability** (type of strict liability)
 - **See hospitals and parents for special ‘exceptions’*
 - 1) **Sagaz Test** – Employee/employer (requisite) relationship? Independent Contractor?
 - i. Level of control over worker’s activities
 - ii. Worker hires own helpers?
 - iii. Worker provides own equipment?
 - iv. Worker’s degree of financial risk?
 - v. Worker’s degree of self-investment, management?
 - vi. Worker’s opportunity for profit?
 - vii. Other: own insurance, multiple bosses, benefits, etc.
 - 2) **Salmond Test**
 - To determine vicarious liability:
 - Requires trial judges to investigate the employee’s specific duties and determine whether they gave rise to special opportunities for wrongdoing.
 - **Test:**
 1. Is it authorised by the employer? (if yes, employer is VL)
 2. Are unauthorised acts so connected with authorised acts that they may be regarded modes, although improper modes, of doing an authorised act.
 - Is the court controlled by unambiguous precedent? If yes, apply it, otherwise...
 - Policy Reasons
 - Just and practical remedy, and deterrent of future crime
 - E.g. Bouncer *roughly* throws a girl out of a bar. Authorised to remove from bar, but not in that manner.
 - If employee was off on his own, vicarious liability could not be attached to the employer.

- 3) **Second Part of Salmond Test > Bazley Factors** (non-exhaustive list) used to determine policy reasons– **even if** first two are not there, can still prove liability with Bazley Factors. (enterprise risk test)
 1. **Are there any cases that provide precedents?**
 2. **If not, should VL be imposed having regard to bigger policy goals of CL? (Deterrence, Compensation – fair recover)**
 - i. Opportunity for employee to abuse power
 - ii. Extent that wrongful act furthers employer’s aim (limited)
 - iii. How much confrontation & intimacy inherent in enterprise
 - iv. Extent of employee’s power
 - v. Vulnerability of the victim
- According to Kodar – start with Salmond test, and the Bazley Factors test is an articulation of how to operationalize the second branch of the Salmond test.
 - *Residential schools application*: 1) Precedent? 2) If no, must balance rules.
 - Test should focus on operational characteristics of activity, not just specific tasks of the employee (dissent – *Oblates*)
 - **Joint and Several Liability**
 - Two or more parties commit tortious acts to P
 - Can go after each one separately for 100% of damages
 - Each is liable for whole thing independently (unless *Contributory Negligence – BC Negligence Act s. 4(2)*)
 - **Contributory Negligence**
 - “Reasonably prudent person” test
 - 1) Accident
 - 2) P puts his or her self in foreseeable harm
 - 3) P fails to take protective measures
 - Reduces P’s claimable damages, apportionment (*BC Negligence Act s. 1(1)*)
 - **Note on Parental Liability**
 - Parents not vicariously liable for children’s wrongdoing
 - There is some Parental Liability Legislation (BC, MB, ON)
 - Parents are not liable, but there is legislative override up to \$10,000 when child commits intentional wrong; under Parental Responsibility Act, parents are assumed liable unless they can show that they were exercising reasonable responsibility and did what they could to prevent harm.

TORTS IN SMITH V. INCO, 2011 ONCA 628

- Inco operated nickel refinery in Port Colborne until 1985
- Nearby property owners have high levels of nickel in their soil, incorrectly reported in 2000 as being a threat to human health
- Property owners claim that their properties have lost value as a result
- Class action of property owners sues Inco in Ontario under four torts:
 - *Private Nuisance*
 - *Rylands v Fletcher*
 - Trespass
 - Public Nuisance
- Ontario Superior Court finds Inco liable for \$36 million in damages under private nuisance and *Rylands v Fletcher* (no finding of trespass or public nuisance)
 - Inco appeals to the Ontario Court of Appeal
 - Court of Appeal allows the appeal, finds no private nuisance or *Rylands v Fletcher* claim is made out
 - **What is the difference between nuisance and negligence? (Fault vs. effect)**
 - Negligence: have to prove fault and that the defendant was behaving in an unreasonable manner.
 - Nuisance: just have to show that the defendant created something that interfered with reasonable use and enjoyment. Don't have to prove fault, just that they did it.

PRIVATE NUISANCE IN OSBORNE

- Did the defendant “unreasonably interfere with the plaintiff’s use, enjoyment, and comfort of land”?
 - **Categories of Nuisances:**
 - *Physical damage to land*
 - Must not be trivial
 - Plaintiff’s damage must not be a result of unusual use (e.g. keeping a supply of very delicate paper)
 - Unless defendant knew about it in advance
 - If first two conditions are met, strict liability
 - *Interference with comfort and enjoyment of land*
 - Property owners are expected to put up with some amount of interference, defendant’s interference must be unreasonable to be actionable
 - Court tries to balance rights of various property users
 - Court looks at several factors, not definitive/exhaustive:
 - Character of the neighbourhood
 - Intensity of the interference
 - Duration of the interference
 - Time of day and day of the week
 - Zoning designation
 - Utility of the defendant’s conduct
 - Nature of the defendant’s conduct
 - The sensitivity of the plaintiff
 - *Non-intrusive nuisances*

- Non-intrusive nuisances don't cause smells, sounds, or objects to go onto the plaintiff's property
- Usually the Court does not allow claims for non-intrusive nuisance
 - E.g. blocking someone's sunlight or view
- Exceptions are often made when defendant's conduct is malicious, negligent, or illegal
- **Who can be sued in private nuisance?**
 - *Always: the creator of the nuisance*
 - Usually this is the landowner
 - Sometimes this is someone who commits the tort on another person's land or on public property
 - *Sometimes: the landowner who did not create the nuisance*
 - If they were negligent in preventing it
- **Who can sue in private nuisance?**
 - *Must have a proprietary interest in the land*
 - This is a tort to land, not to the person
 - Can be owner, tenant, or occasionally a permanent occupant
- **What are the defences to private nuisance?**
 - *Statutory authority*
 - Limited protection, just because it's legal doesn't make it okay
 - *Statutory immunity*
 - Government passes statute to protect a particular activity
 - *Consent*
 - *Prescription*
 - Defendant has carried on this activity continuously for 20 or more years, and plaintiff knew about it for that long
 - *Contributory Negligence*
- **What are the remedies the Court can order?**
 - *Injunction* – stopping from doing
 - *Damages* - compensation
 - *Abatement* – reduction or diminution

PRIVATE NUISANCE IN *SMITH V. INCO*

- Trial judge finds that the nickel particles in the soil were physical damage
 - Finds that it was more than trivial because it affected property values
- Court of Appeal
 - Rejects the trial judge's finding that a change in the chemical composition of the soil constitutes physical damage (para 55)
 - Physical damage would have been found if the nickel particles had posed a risk to human health, which they did not (para 67)

THE RULE IN *RYLANDS V. FLETCHER* IN *OSBORNE*

- Defendant is strictly liable for damages if, during a non-natural use of their land, something escapes from their property that is likely to do mischief
 - Note on non-natural use of land

- In modern times, is taken to mean use that is dangerous, extraordinary, special, and of no general benefit to the community
- **Elements of the Rule:**
 - Non natural use of the land (*Osborne 344*)
 - Two types: things that are dangerous *all the time* (water in bulk, storage natural gas), things that are dangerous *only in the circumstances* (degree of danger of land use, time and place)
 - Escape of something likely to cause mischief (*Osborne 347*)
 - Needs to escape from the defendant's premises. The dangerousness of it must escape (mischief is basically covered by the non-natural use).
 - Damage was caused to the plaintiff's property as result of the escape (*Osborne 348*)
 - Proof of harm to the plaintiff
 - Remoteness rule though: *reasonable foreseeability* of the harm (like neg)
- Defences:
 - Consent – if both knew, remained in place of danger
 - Mutual benefit
 - Default of plaintiff
 - Act of a stranger and act of God
 - Statutory authority
 - Like in private nuisance, Court has narrowed this defence

THE RULE IN *RYLANDS V. FLETCHER* IN *SMITH V INCO*

- Court notes that the on-going use of this rule as separate from private nuisance and negligence is a subject of controversy
- Trial judge finds that Inco's use of their land as a nickel refinery was a special use that brought extra dangers
 - Further stated that the nickel particles constituted an escape
- Court of Appeal does not accept that Inco's refinery was non-natural use
- Court of Appeal also dislikes the imposition of strict liability for ultra-hazardous activities, wants this to be in Parliament's bailiwick

TRESPASS IN *OSBORNE*

- **Trespass: Direct, intentional or negligent, physical interference with land**
- **Actionable without proof of damage**
- **Trespass to land is committed in three ways:**
 - It is trespass to enter a plaintiff's land without permission
 - It is trespass to place objects on the plaintiff's property
 - It is trespass if the plaintiff revokes the defendant's permission to be on the property, and the defendant does not leave within a reasonable amount of time
- **The tort protects three interests:**
 - Possessor's ability to freely use their land
 - Possessor's ability to recover damages to their land
 - Possessor's privacy
- **Defences to trespass**

- Consent
- Necessity
- Legal authorisation
- (Mistake is not a defence)
- **Remedies**
 - Damages
 - Injunctions
 - Allowed to use reasonable force to eject trespassers who have been asked to leave

TRESPASS IN *SMITH V INCO* (SUPERIOR COURT)

- Good description of trespass (para 37) from *Grace v Fort Erie (Town)*
 - “Any direct and physical intrusion onto land that is in possession of the plaintiff; The defendant’s act need not be intentional, but it must be voluntary; Trespass is actionable without proof of damage; and while some form of entry onto, or contact with, the plaintiff’s land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto, the plaintiff’s land.”
- Trial judge finds that Inco’s intrusion onto the land was indirect, and thus not trespass
 - Difference between spraying nickel onto someone’s property and operating a refinery that emits nickel smoke

PUBLIC NUISANCE IN OSBORNE

- Typically an action brought by the AG, unless citizen is granted special standing
 - Only certain circumstances in which they can be granted status.
- Not properly a tort subject, is *criminal* in nature
 - Tort action can be brought if there are special damages to a particular individual
- Section 180(2) of the Criminal Code of Canada defines public nuisance:
 - Everyone commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby:
 - Endangers the lives, safety, health, property or comfort of the public, or
 - Obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.
- Suggestion in Osborne that private nuisances become a public nuisance when they affect a class of persons or a neighbourhood
 - Seems to directly conflict with *Smith v Inco*
- Remedies:
 - Damages
 - Injunction
- Osborne also includes a note on *Smith v Inco*, but only has the information from the Superior Court judgment, so assumes claim for private nuisance and *Rylands v Fletcher* were successful

PUBLIC NUISANCE IN *SMITH V INCO* (SUPERIOR COURT)

- “A public nuisance refers to a criminal or quasi-criminal offence which involves actual or potential interference with public rights, not private rights. Public nuisance involves

interference with public health, public morals or public comfort, or the use of a public place.”
(para 70)

- Trial judge finds that the plaintiff’s claim is about a bundle of individual property rights, not about public property, public morals, or public comfort, and therefore is not a public nuisance

FALSE IMPRISONMENT

- **Right Protected:** Individual Liberty (*Osborne*)
- **Actionable:** Without proof of damage (*Osborne*)
 - Nominal awards may be given when actual damages cannot be established (*Lumba v. The Secretary of State*)
- **Required Elements:**
 - Must be a detention AND
 - Detention must be false (unlawful) (*Osborne*)
- **False Imprisonment can be Either Intentional or Negligent.**
 - There are no reported cases of negligent false imprisonment (Kodar, Nov 22, 2012)
 - Example: A manager might lock someone who lawfully entered a bank vault in the vault when they closed it without checking. (Example given by Kodar, Nov 22, 2012)
- **Form of Imprisonment:**
 - Physical
 - Detention must be complete (*Bird v. Jones*)
 - as long as there is an available and safe way to escape it is not a complete detention (*Osborne*)
 - Physiological
 - Threat of physical harm or show of authority (*Osborne*)
- **The Test is Mostly Subjective:**
 - That a reasonable person in that person's circumstances would do/ think (Kodar, Nov 22 2012)
- **Reverse Onus:**
 - The defendant must prove that any detention was not 'false,' that it was done for a lawful purpose. They may also prove that the action were neither intentional nor were they negligent. (*Osborne*)
- **Police and Identity:**
 - It is not false imprisonment if police have reasonable grounds to believe that you are the correct person when you are arrested. However, they must check your ID and take reasonable steps to confirm your identity. (Paraphrased from Kodar, Nov 22, 2012)
- **Notes on Lawful Authority:**
 - There is no Canadian Authority as to whether a person must be aware of his imprisonment and there for it is likely that a remedy would be available to infants and adults who are unaware of their detention because of limited mental capacity. (*Osborn*)
 - **Three factors in determining lawfulness of a detention allowed by administrative directive:** "First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations." (*Lumba v Secretary of State*)

LUMBA V. SECRETARY OF THE STATE FOR THE HOME DEPT. 2011, UK

- **Summary:**
 - Plaintiffs were foreign national prisoners (FNP) detained pending deportation (Lumba -June 2006-present; Mighty - May 2006-July 2008)
 - Secretary of State's published policies at the time favoured a presumption in favour of releasing FNP who were to be deported; discretion to detain available...
 - Under the published policy both plaintiffs could have been detained pending deportation because of their criminal records (discretionary)
 - April 2006 - Secretary of State discloses he had instead adopted an unpublished policy with a blanket presumption in favour of detention of FNP
- **Majority:**
 - Their detainment was unlawful because it wasn't a decision of lawful authority but rather of the unpublished/unlawful policy
 - Differed on damages - no damages incurred (result was nominal damages of £1) vs. unlawful use of government power (dissent)
- **Minority:**
 - Conceded that they could have been lawfully detained under the current policy

ASSAULT, BATTERY AND NEGLIGENCE

Assault and battery are from the family of writs called trespass. The other torts from this family are trespass to land and taking of goods. Battery is also covered under medical consent and fiduciary duty.

- Assault and battery are trespass torts protecting physical security and integrity.
- Elements: (*Kodar class notes*)
 - **Direct**
 - Actionable without damages
 - “Intentional” or negligent
 - Onus of proof:
 - Plaintiff must prove defendant directly interfered with plaintiff
 - Once they have proved this, the court assumes defendant liable
 - Then defendant must raise a defence (necessity maybe) or they can show they didn’t intentionally interfere **and** didn’t negligently interfere

ASSAULT

(Kodar class notes, Osborne pp. 256-9)

- Reasonable apprehension of immediate or imminent battery (offensive *direct* physical contact)
- Legal wrong = disturbing sense of security
- Defendant must have, or appear to have, ability to follow through with threat
- Plaintiff must be aware of threat.
 - Fear is not necessary, nor any physical damage (*Osborne pp. 257*)
 - Threat of future violence doesn’t count (*Osborne pp. 257*)
 - Rare to see assault action on its own

BATTERY

(Kodar class notes, Osborne pp. 253-6)

- *Direct*, offensive physical contact
- Legal wrong = violating bodily security
- Contact does not have to be person-to-person, e.g. shooting, throwing, knocking object out of hand (“interference”)
- Must be non-trivial, things in everyday life – (*Scalera*)
- “Offensive” contact does **not** have to be harmful
- Plaintiff does **not** have to be aware of battery

DIRECTNESS

- **“But for” test.** Ask yourself “would the result have occurred *but for* the intervention of another person? Defendant’s action = result – an injury is directly produced by the defendant’s conduct if it flows naturally from it, without the necessity of intervention by an independent actor
- Directness requirement consistent with idea that trespass torts protect security of the person

and inviolateness of the body – rights-based tort. That is why there is liability without damages.

ONUS OF PROOF FOR TRESPASS

Outlined in *Cook v. Lewis* – adopted 1951

- **Trespass**
 - Plaintiff must prove *interference*
 - Defendant must have legally-recognised defence, or that acted without intention *and* without negligence (partial reverse onus)
- **Negligence**
 - Plaintiff must prove *all* elements

NON-MARINE UNDERWRITERS, LLOYD'S OF LONDON V. SCALERA (SCC 2000)

- **Significance:**
 - Onus of proof remains on the defendant for trespass torts
- **Facts:**
 - Plaintiff in another case is suing five defendants for sexual battery; one is Scalera, who has home insurance policy – not insured for claims of bodily injury caused by intentional act
- **Issue:**
 - Should traditional onus change for sexual batteries?
- **Held:**
 - No. Should remain the same for ALL trespass torts (i.e., burden of proof should remain on the defendant). McLachlin has 3 reasons:
 - Affirms *directness* requirement: in trespass actions resulting in injury, there is a direct flow from defendant's actions to plaintiff's injury that doesn't necessarily exist in negligent acts (para 11)
 - Practical: Since injuries direct, *defendant may have evidence that is unavailable to plaintiff* that will be uncovered in the case (para 12)
 - Effect of shifting onus – Plaintiff would have to prove interference **and** that plaintiff didn't consent – "*high demoralization costs*" (para 14 quoting Sullivan)
 - These three factors support making the defendant explain his behaviour. Tort of battery's goal is to guard "personal autonomy," not fault. Compensation stems from its violation. (para 15)
 - Because of partial onus, more plaintiffs will sue – because you can choose trespass or negligence in cases of direct interference, and trespass is easier for the plaintiff to prove.
 - Another advantage of trespass: if defendant is liable, defendant is liable for **all** the damages resulting from action. In negligence, court could say damages too remote.

NEGLIGENT TRESPASS

- In Canada you can sue for negligent trespass.
 - Negligent battery will generally involve disregarding a risk (this often comes up in shooting or sporting accidents, *Osborne pp. 254*).

- Negligent assault might be, e.g., if defendant rushed into what defendant thinks is an empty room with a gun.
- You don't need damages or onus of proof, but you must show necessary components of negligence action (*CPI pp. 65*):
 - *Assumed preliminary component of all negligence actions: Plaintiff has suffered damages*
 - 1. Duty of care
 - 2. Breach of the standard of care required by duty
 - 3. Breach of duty cause the harm plaintiff suffered
 - 4. Harm can't be too remote from the breach of duty.
 - *Sometimes* law may consider defences of illegality/voluntarily assumption of risk
- Canadian position towards torts of trespass [Kodar class notes]
 - Maintains direct/indirect distinction
 - Intent is not intent to harm, it's just to commit the interference
 - Trespass can be negligent or intentional
 - Defendant must prove absence of intent and negligence
 - So can try to say it was necessary or that there was consent
- **Negligent battery**, throw a bowling ball down the street and it hurts someone.

F.A. TRINDADE, “INTENTIONAL TORTS: SOME THOUGHTS ON ASSAULT AND BATTERY”

- Assault and battery, and imprisonment constitute trespass; not commonly used torts – why?
 - Wrongs are also crimes and tried as such
 - Confusion about essentials of assault and battery
- Sometimes the tort of trespass is the only possible action
- Criminal injury compensation schemes don’t always measure up.

| Battery | Assault |
|--|---|
| <i>Direct act by defendant – contact with body of plaintiff without plaintiff’s consent</i> | <i>Direct threat by defendant that makes plaintiff apprehensive of contact by defendant or person/thing in defendant’s control</i> |
| <p>Direct Act</p> <ul style="list-style-type: none"> • Essential element • Can be one event that causes the contact, or a series of events, eg, you strike a horse that the plaintiff is sitting on, horse kicks plaintiff off, may have committed battery • Directness requirement sometimes removes need for doctrine of transferred intent | <p>The Meaning of Direct Threats</p> <ul style="list-style-type: none"> • Act or words and act that leads to reasonable apprehension of contact • Words alone that lead to reasonable apprehension of contact • It can’t be a threat of <i>indirect</i> bodily contact • Threatening to shoot burglar is not assault, but probably “lawful threats of force” |
| <p>Intentional Act</p> <ul style="list-style-type: none"> • Must first be a voluntary act (sleepwalker steps on your face-not voluntary) • If contact is certain to occur even though person who initiates it isn’t directing it at anyone, the defendant can still have intentionally done it, legally speaking • Reckless acts being treated as intentional acts – best in cases of transferred intent (eg, you hit an innocent bystander in the course of a fight and injure them sufficiently) | |
| <p>Contact with the Body of the Plaintiff</p> <ul style="list-style-type: none"> • This can be “hand to hand” or something less direct, such as a forcible x-ray or grabbing something out of someone’s hands • Reasonably necessary contact will not constitute battery, eg: holding someone back who is about to go back inside a burning house | <p>Reasonable Apprehension</p> <ul style="list-style-type: none"> • Fear is not necessary (this would hinge too much on the type of person the plaintiff is) • Reasonable: “If it is quite clear that the person making the threat has the present actual ability to carry out that threat then the apprehension is reasonable” -> many cases |
| <p>Knowledge of the Contact:</p> <ul style="list-style-type: none"> • <i>Not necessary</i>, though it is usually the case • Sometimes plaintiff won’t know (eg: wrong surgery performed on you when under anaesthetic); sometimes defendant won’t know (eg: defendant throws TV from rooftop and hits plaintiff below on street) | <p>Knowledge of the Threat</p> <ul style="list-style-type: none"> • Unlike battery, <i>plaintiff needs to have knowledge of the threat.</i> |
| <p>Consent</p> <ul style="list-style-type: none"> • Arguments both ways for who (plaintiff or defendant) needs to prove or disprove consent. | |

INTENTIONAL INFLICTION OF MENTAL SUFFERING

A hybrid tort that allows a plaintiff to recover damages in situations where a tort-feasor has intentionally caused mental distress.

- “Case” – early form of writ that was called “trespass on the case”.
 - This early form of action was what grew into negligence.
 - Developed in response to the rigidity of the trespass system.
 - Before *Wilkinson*, someone could frighten another person and cause mental harm without incurring liability, *as long as* they didn’t first cause apprehension of imminent harm.
- **Three elements to the tort:**
 - *Needs to be an act or statement.*
 - Outrageous or extreme, bullying, harassment, etc.
 - *Has to be intended or calculated to produce harm.*
 - Therefore infringe on person’s right to safety.
 - Court can construct intent - *constructive intent*.
 - Do so by using the reasonable person:
 - If they behave in such a fashion, a reasonable person would have been harmed.
 - *Needs to be harm.*
 - Has to be substantial.
 - Until recently, courts seem to require expert evidence, or some sort of diagnosis.
 - i.e. – something that had a name.
- **Court combines elements of trespass and case.**
 - Trespass tort elements that are evident.
 - From negligence:
 - Proof of harm.
 - Plaintiff has to prove everything.
 - Causation can be indirect.
 - Before this tort, and subsequently, courts were quite reluctant to recognise tort related to emotional distress. Worried about floodgate opening.
 - **Concerns:**
 - False, trivial and numerous actions.
 - Unusually sensitive persons.
 - Conduct that would be socially acceptable, generally speaking, that causes harm to people with particular sensitivities would be generally actionable.
- **Control mechanisms**, control recovery, ensure it’s not open to every claim involving statements.
 - *Reasonableness*
 - Determined on an objective standard.
 - Unusually sensitive persons won’t have a claim, if their reaction is unreasonable by this standard.
 - *Unless* the defendant knew about their sensitivity. (same as thin skull argument)
 - *Proof of Harm Requirement*
 - More recently courts have been relaxing the requirement that there be corroborating evidence for the plaintiff’s claims.
 - More willing to accept plaintiff’s evidence of the claims without extra evidence – when the conduct is sufficiently outrageous.
- **Elements of an infliction of mental suffering:**
 1. An act or statement.
 2. Intended/calculated to produce harm.
 3. Actual harm.

- **Three ways to recover psychiatric harm.**
 1. D acts negligently and P suffers physical harm and psychological harm.
 2. D acts negligently and P suffers only psychological harm.
 3. D causes physical injury to someone related to A.

WILKINSON V. DOWNTON

- **Summary:**
 - Plaintiff suffers severe mental distress because of a prank the defendant had committed against her.
- **Facts:**
 - Wilkinson, husband of plaintiff, went to a race-meeting.
 - Same day the defendant came to the plaintiff's house and represented to her that her husband had both legs broken.
 - Plaintiff became seriously ill from a shock to her nervous system.
 - Also incurred a small expense in that she sent persons on the train to Leytonstone to see her husband.
- **Arguments:**
 - There was no apprehension of an imminent battery, therefore no avenue at that time for plaintiff to go after defendant.
 - This was a case of intentional conduct causing harm that was not assault.
 - As there was no current tort, defendant thought case should just be thrown out.
 - Plaintiff thought they could extend it to a case on fraud.
 - When damages are paid, they're dependent on the plaintiff acting upon the fraudulent information.
 - Plaintiff's damages are not based upon acting upon the fraudulent information.
 - Injury occurred when the statements themselves were made her ill.
- **Court Ruling:**
 - Another ground for recovery is proposed:
 - Defendant wilfully did an act to cause harm to the plaintiff, and has caused harm.
 - Court says that proposition, without more, is a good cause of action (*creates new tort*).
 - Element of intention is made out in case, because defendant wanted some sort of shocking result.
- Awarded compensation for both the railway expense and for the injury from the shock.
- Injury compensation was paid because *reasonable person would suffer grave effects* from hearing the news.

NEGLIGENCE AND PSYCHIATRIC INJURY

- In *Wilkinson* the Court held that the defendant was liable for causing harm to the plaintiff by means of an act that was plainly calculated to bring about such harm.
- Liability was recognised even though it was not a physical harm – psychiatric or mental in nature.
- Later cases have distinguished between psychological harm or illness and mere emotional distress.
- Individuals who have suffered psychiatric harm have tried to bring an action in negligence with mixed results.
- **Must show that:**
 - Suffered harm

- That the defendant owed to the plaintiff a duty to take a measure of care to prevent such harm from occurring
- That the defendant failed to take the required care
- That the harm suffered by the plaintiff can be causally traced to the defendant's failure.
- That the linkage between the failure and the harm is not too remote
- **Examples:**
 - *Hussack* - Exposed to unjustifiable risk of physical harm and harm has occurred along with consequential psychiatric harm, courts have no hesitation in holding the defendant liable
 - *Mustapha* – Exposed to unjustifiable risk of physical harm but the plaintiff *only* suffered psychiatric harm, liability is only found if a person of ordinary fortitude would have suffered harm.
 - *Devji v. Burnaby (District)* - If a defendant has negligently caused physical harm to one person, he or she may also be held liable for psychiatric illness suffered by individuals who are closely connected to the victim and who witnessed the events or their immediate aftermath but only if a person of ordinary fortitude would.

CONSENT TO MEDICAL PROCEDURES

MALETTE V. SHULMAN – 1990

- Plaintiff brought to hospital unconscious with severe injuries after car accident;
- Necessary medical intervention is blood transfusion
 - Prior to this being done, nurse searching plaintiff's purpose found a card indicating that the plaintiff does not want blood transfusions for religious reasons;
- Defendant doctor ignores and performs blood transfusions anyway, even after plaintiff's daughters arrive and confirm patient's refusal to blood transfusions;
- Doctor argues that plaintiff is not conscious to hear the actual benefits/risks of blood transfusions first hand -> this is something that relying off the card alone would neglect to consider
- Plaintiff recovers: sues doctor for **battery**; court finds in favour of plaintiff, awards damages

MULLOY V. HOP SANG (1935):

- Plaintiff asked defendant surgeon *not* to amputate his hand while under anaesthesia
- Surgeon had no chance to examine hand until patient was under anaesthesia
- Upon examination while patient was under anaesthetic, surgeon discovered risk of blood poisoning and deemed it necessary to amputate hand
- Plaintiff patient sued defendant doctor when he had found out what happened
- **Held:** Judgment awarded for plaintiff and damages charged against defendant

EXPLANATION

- Ruling upholds most important precept as being **the autonomy of each person regarding their own body**:
 - “The doctrine of informed consent has developed in the law as the primary means of protecting a patient’s right to control his or her medical treatment. **Under the doctrine, no medical procedure may be undertaken without the patient's consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options.**” (*Malette v. Shulman*, 1990 OCA, at para 69);
- In this case, evidence of the card in the patient’s bag is sufficient evidence to suggest she had not given consent (and in fact, refused) the application of blood products.
 - “The doctrine presupposes the patient's capacity to make a subjective treatment decision based on her understanding of the necessary medical facts provided by the doctor and on her assessment of her own personal circumstances.” (*Malette v. Shulman*, 1990 OCA, at para 70)
- Presupposition applied to the clear directive stated on the card that was found in patient’s bag prior to being given the transfusion
 - “For this freedom to be meaningful, people must have the right to make choices that accord with their own values, regardless of how unwise or foolish those choices may appear to others....” (*Malette v. Shulman*, 1990 OCA, at para 70)

- Right to autonomy over body trumps the apparent absurdity present in refusing a medical treatment that may result in patient's death.
- **Rule:**
 - **No consent, or a refusal of procedure, combined with performance of that procedure = claim for battery.**
- **Exception:**
 - Exception to this rule is the **emergency doctrine**: if medical intervention is
 - i) *urgently necessary* and the plaintiff is
 - ii) *unconscious/unable to give consent* and
 - iii) *there are no advanced directives*, the doctor will be shielded from liability based upon their actions (*Kodar*, Nov. 8)
- Doctors use consent forms in order to shield themselves from liability regarding treatment options; *consent forms must be clear, specific and the patient signing it must be clear-minded and able to give informed consent.* (*Kodar*, Nov. 8)
- Some provinces, like BC, have moved to codify their medical consent laws.
 - Including requirements like being informed and who can be informed, (substitute) decision maker; see the *Health Care (Consent) and Care Facility (Admission) Act*.

WHEN YOU CAN SUE:

- If you have consented to the treatment but haven't been informed of all the risks and one of the risks materialises (even if the procedure/treatment is done perfectly), you can bring a *negligence* action (not battery).
- If patient gives consent but is not told of all risks and one of those risks materialises, must bring an action in negligence; to allow a battery claim in cases like these is incompatible with the elements of battery
 - "... where the allegation is that attendant risks which should have been disclosed were not communicated to the patient and yet the surgery or other medical treatment carried out was that to which the plaintiff consented ..., *I do not understand how it can be said that the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity.* (*Reibl v. Hughes* SCC 1980, CB at 58)

DOCTRINE OF INFORMED CONSENT TO MEDICAL CARE

- Old authoritarian model: physician dictates, newer model: participatory (lots of info for patient!)
- **Duty of Care**
 - Doc has to answer questions and give info about how bad the illness is, pros and cons of proposed treatment as well as alternative treatments, what'll happen if you do nothing, anything that goes wrong during treatment, and treatment results
- **Standard of Care**
 - *Reibl v. Hughes* adopted "full disclosure" standard – this doesn't mean exhaustive list
 - Doc has to make sure the patient understands (offering explanatory materials is prob not enough)
 - Have to tell patients about alternatives

- Doc may have “therapeutic privilege” – avoiding bad psych consequences by glazing over some things – courts generally don’t want to favour this privilege bc it takes away from patient “self determination”
- Doc doesn’t have to give advice, just info (modern model – patient decides)
- Duty to inform goes for semi-medical types as well (e.g., chiropractors) and a bit to nurses
- Sometimes docs will need to warn about inadequate health care resources or detail one’s own medical record, successes, failures, etc.
- **Causation** (Would the patient have chosen the procedure if the doc had properly informed them?)
 - Subjective test: what would this patient have done?
 - Objective test: what would a reasonable person have done?
 - Reibl v. Hughes uses “modified objective test” (reasonable person in plf’s particular circumstances)
 - Problems with this test as well: How do you properly take into account this patient’s circumstances?

FOR MEDICAL NEGLIGENCE, PATIENT MUST PROVE:

1. Medical practitioner did not sufficiently inform of the material risks inherent in the medical procedure AND
2. One of these risks materialised (even if the procedure/treatment was performed perfectly) AND
3. That a reasonable person in the plaintiff’s particular circumstances would not have consented if they had been properly informed of the risks (often difficult to prove)

REIBL V. HUGHES

- **Significance:** Failure to disclose risks goes to negligence, not battery. Modified objective test for causation. Case determines heavy onus of proof for patients in such cases.
- **Facts:** Plf had elective surgery to reduce risk of future stroke. Plf had massive stroke during surgery – permanent and serious disability. Plf not told by dft of risk from surgery. Plf either wouldn’t have consented in the first place, or wouldn’t have consented at that time; Plf wanted entitlement to full pension, so he would have waited to have procedure until after his pension “bested” had he been informed of risk. Failure to disclose risks goes to doctor’s standard of care.
- **Issue:** How specific must be the information about the risks of a medical procedure to enable a person to make an informed choice between surgery and no surgery?
- **Held:** Full disclosure required. Surgeon liable in negligence for not getting proper informed consent.
- **Reasoning:**
 - Battery should only be assigned where: a) no consent whatsoever or b) treatment beyond that covered by consent [barring emergency situations] (CPI 78-9)
 - “unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than to battery” (79)
 - Consent is not vitiated by incomplete disclosure of risks
- **Outcome:** Plf must prove [Kodar class notes Nov. 13]:

- Doctor or other practitioner gave insufficient information of substantial risks inherent in procedure.
- AND
 - Must apply the modified objective test and prove that the answer would be “no”.

SEXUAL BATTERY

- There is no limitation period. If there’s a power dependency relationship (fiduciary relationship), there is a reverse onus. – *Norberg v. Wynrib* (McLachlin in dissent).
- **Consent and Sexual Assault**
 - Charter has limitations; Growing interest in using trespass torts to address historical disadvantages
 - Offensive sexual conduct can cover range of things: isolated incident, series of incidents, etc., can be accompanied by other abuses (emotional, cultural)
 - Generally abuses indicative of systemic problem against vulnerable people
 - Often involved breach of trust, involving professionals or family members
 - Sexual abuse in any context constitutes the elements of tort of battery
 - Limitation period: time after which you’re no longer allowed to bring a tort action (BC generally 2 yrs)

CIVIL ACTIONS TO REDRESS SEXUAL WRONGDOING – *KODAR NOV. 13*

- **Advantages for Plaintiff**
 - Greater involvement in process
 - Less demanding burden of proof
 - Possible therapeutic effect (think back to instrumentalist view of tort law)
 - Access to compensation for harm suffered
- **Disadvantages for Plaintiff**
 - Cost
 - Adversarial process
 - Possible counter-therapeutic effects
 - Compensation may be illusory unless other parties can be brought in (VicLia?)

FIDUCIARY RELATIONSHIP

- Someone puts trust in another; the one owing the fiduciary duty that arises is expected to act in interests of beneficiary without self-interest
- This can be contractual relationship, setting up a duty of care; when this is the case, suing for breach of fiduciary duty is preferred course of action – why?
 - Strict obligations for fiduciary’s behaviour
 - If defendant is deemed fiduciary, there may be longer limitation period
 - Might get more in remedies for breach of fiduciary duty (equity) than for breach of contract or for tort (*Norberg*)

NORBERG V. WYNRIB – SCC 1992

- **Significance:** Landmark case in law's recognition of power and abuse, in professional context and particularly in doctor/patient relationships. Minority judgment has had a lasting effect on jurisprudence that followed – evolution of sexual wrongdoing tort actions.
- **Facts:** Plf prescription drug addict who sought out doctor to get drugs. Doctor provided in exchange for sex. Did not help treat her addiction. Actions for battery, negligence, breach of fiduciary duty and contract.
 - Trial: she consented; dismissed negligence because no damages; fiduciary duty breached but no damages because *ex turpi causa*.
 - Appeal: upheld decision; not a breach of fiduciary duty - "participants in a joint criminal activity do not owe a duty to each other"
- **Issue:** "The central issue is whether the defence of consent can be raised against the intentional tort of battery in such circumstances" (para 1); Battery – sexual assault
- **Held:** Reversed in split decision – doctor liable, but for 3 different reasons (2 discussed in class):
- **Reasoning:**
 - *La Forest (majority):*
 - Battery. Develops 2-part test for genuine consent based on K law's idea of unconscionable transactions (para 40):
 - Special power/dependency relationship (Plf: young woman, limited education, addiction limits capacity to make a real choice; Dft: doctor, professional, inherently powerful position)
 - Proof of exploitation - Doc used knowledge about her addiction and drug to exploit plf for own purposes – test – is sexual relationship one that is sufficiently divergent from community standards of conduct? (community would not consider sex-for-drugs relationship initiated by a doctor acceptable)
 - No genuine consent because:
 - unequal power relationship, exploitative: removed possibility of providing meaningful consent
 - Π particularly vulnerable – addiction affected her ability to choose
 - Δ powerful position – inequality arose from Π's addiction to painkillers
 - Δ had knowledge of Π's medical problem (and skills to help) but instead acted to satisfy his personal sexual interest – person with this addiction cannot withdraw without professional assistance (exploitation)
 - No *ex turpi causa* – no connection between double doctoring and harm suffered
 - ANY sexual activity btwn doc and patient is exploitative
 - \$20,000 damages; \$10,000 punitive damages
 - **Sopinka** also judged and found in favour of plf, but took issue with majority's use of K law; focused on failure of doc to treat plf properly
 - *McLachlin (minority):*
 - Liability based on breach of **fiduciary duty** [civil claim independent of tort and K] – doctor/patient inherently fiduciary
 - Fiduciary relationships: where one party exercises power over another and pledges to act in latter's best interests. 3 characteristics (Frame v. Smith quoted at para 69):
 - fiduciary has scope for the exercise of power
 - fiduciary can unilaterally exercise that power to affect beneficiary's interests
 - beneficiary is particularly vulnerable to/at mercy of fiduciary holding power

- adopts broader notion of fiduciary duty – says it is best way to address harm of Π (tort and K ill-fitting molds to fit facts into); only ground for action
- says that Π consented BUT irrelevant: focus on fiduciary's conduct, not beneficiary's
- Fid duty analysis puts problems in structure of relationship rather than in the relationship btwn particular parties – Δ owed Π all duties associated with fid relationship, including:
- Para 70 ... “the duties of “loyalty, good faith and avoidance of a conflict of duty and self-interest” (quoting Wilson J. in Frame v. Smith)
- Damages \$20,000 for prolonged addiction; \$25,000 for sex. exp. and \$25,000 punitive --> Damages in equity, bc K and tort damages don't include “wrongful sexual exploitation”