CHARACTERIZATION OF TORTS

1. General classification

a. *Definition* - Based on the nature of liability on the part of the tortfeasor.

b. Strict liability

i. *Definition* - No onus relating to fault, only damage must be proved. Nuisance is a strict liability tort. Torts where fault is not required in order for the plaintiff to be owed compensation, liability is incurred solely through the causation of damage. We hold someone accountable to another individual, while conceding that they are not at fault.

c. Rights-based torts

i. *Definition* - Defensible strict liability; D. must prove that they are NOT at fault. Fault onus on D (unlike intention / negligence - fault onus on Plf.). Defensible strict liability torts. There are defences - for instance, if the defendant proves that they are not at fault - for instance, if every possible care has been taken (burden of proof on defendant to prove that they are not at fault).

d. Negligence

i. *Definition* - Fault onus based. Plf. must prove that D. IS at fault. Onus on Plf. Predominant tort. Where on fails to reach the standard of care that a reasonable person would have produced within the same circumstances. Adequate care or respect that one is entitled to within society was not satisfactory. Fault based. Tort law is like a cuckoos nest; we have lots of little eggs, but one dwarfs all the others; the law of negligence. While there are many forms of liability, it is negligence which is predominant.

e. Intentional torts

i. *Definition* - Mental state; liability stems from conscious dishonesty or malicious behaviour. Plf. must prove that D. desired consequences. However, If one *imputes* the notion of intention into violent cases, there will be cases where the *action should be successful in accordance with social desirability*, but may fail due to the inability to prove intentionality. Therefore, Canada has *moved away from the intentionality distinction.*

ii. Types of intentionality

1. *Actual intent* - occurs where the actor desired the consequences of the action directly.

2. *Constructive intent* - occurs where consequences are substantially certain to arise from conduct, and therefore intentionality is presumed. Also called imputed intent. Again a *legal fiction*; the person's activity may be seen as so improper or negligent,

although it doesn't technically meet standard of intention, the Court will construct intent (eg. it will follow the bullet). For instance, if one fires a bullet into a crowd - substantially certain that someone will be injured. So, intent to harm will be built on one's behalf.

3. *Transferred intent* - occurs where *constructive intent* does not apply due to inability of actor to foresee consequences - however, liability is established through *legal fiction* regarding intent, as serious moral culpability of actions weigh poorly against the complete innocence of the victim. Between the actor and the victim, it is in fairness the former who should bear the weight of the loss as a result.

iii. ALSO, *intentionality transformed, mistake of fact not a defence* - Previous to *Scalera*, case law concerning trespass torts (and particularly, battery) dealt extensively with transferred and constructive intent. *Had to use categorization and legal fictions* in order to stretch intent sufficiently far to deal with cases coming before the courts, in order to reject defences which the Court found unacceptable or repugnant. However, following Scalera, this type of *analysis is no longer required*; - mistake of fact is not a satisfactory defence (eg. because mistake concerning facts could have been formed negligently). Therefore, D. must produce a positive and acceptable claim. Further, trespass can be committed negligently - intent is not required.

iv. ALSO, *voluntary* - intentional conduct must be voluntary. Human *action* and human *movement* are differentiated. One cannot be held liable for involuntary movement (for instance, be held liable for trespass when involuntarily dragged onto the property of another). This is a defence - and must be established by the defendant during the course of the trial in order to avoid liability.

v. ALSO, *capacity,* one cannot be held liable for an intentional tort if one is not able to understand the nature and quality of one's actions due to a mental incapacity or other obstacle to comprehension.

1. ALSO, *no age minimum for tortfeasor* - Criminal law has minimum age of 12 for culpability; no lower age limit in intentional torts; age relevant only in *conception of intentionality*. {JHO}

    a. ALSO, even though child does not understand *severity of consequences* / level of harm, this does not undo liability of child in commission of battery tort. {JHO}

    b. ALSO, age of the actor can only be considered to be relevant in a determination as to *whether that actor possessed the capability* to form intent for the actions. Put another way, the actor must be able to understand the nature and quality of their actions in order to form intent, and thus be held liable. {JHO}

c. ALSO, battery is *not a causally based tort*; it is sufficient to have battered someone for liability to be established, regardless of consequence. {JHO}

vi. BUT, *separate meaning* to intent itself; not only does it involve the awareness of one's body / actions, it also involves awareness of circumstances and how the world works - if one fires a weapon into a crowd, intent follows the bullet (constructive and transferred intent)

vii. BUT, *conservative and orthodox* in nature, reluctant to accept novel fields, and therefore leave gaps which have had to be filled by legislation, in fields such as privacy and equality. Operate as a loss shifting system, as insurance rarely covers intentional conduct, so allows for victims of intentional torts to recover their losses.

2. Alternate classification

a. *Definition* - through damages, the nature of the plaintiff's interest - what is it that the plaintiff is asserting that they have lost? However, one does not teach criminal law by simply advancing through the criminal code, offence by offence. The nature of the liability on the part of the defendant is probably a more meaningful way to elucidate the field.

b. *Defamation*

i. Libel and slander; someone's reputation is at stake. This tort is qualified not through liability of defendant, but rather through the loss of reputation on the part of the plaintiff.

c. *Economic torts*

i. Occurs where people have lost money. For instance, negligent misrepresentation - purport to be a financial wizard, give bad advice causing clients to lose money.

d. *Mental stability*

i. Torts relating to intentionally interfering with mental stability - for instance, telling someone that their husband is deceased, thereby causing mental stress.

e. *Property interference*

i. Trespass on land, taking away goods (chattel trespass).

3. Acts which may give rise to distinct torts

a. *Racial discrimination*

i. *Definition* - Has been put forward that racial discrimination should be a separate tort; that the harm caused by racial discrimination is worse than mere psychological harm.

The courts have refused to make this move, as there is already an adequate institutional means for dealing with this issue (human rights tribunals, for instance). Therefore, setting out separate torts for this issue would be an overreaction, although this may change if public becomes dissatisfied with HRT.

b. *Stalking*

i. *Definition* - Refers to activity of knowingly and recklessly harassing others in a manner which leads them to fear for their own safety. Not an independent tort, but includes a number of actions (eg. assault, intentional infliction of nervous shock) which are independently actionable. To this end, focuses on discrete acts, which unfortunately may be viewed as insignificant when examined in isolation; nature of stalking best represented by own tort. The new tort of privacy may offer the holistic approach necessary to deal with stalking properly. However, common law will likely extend existing statutory initiatives, not new tort.

c. *Harassment*

i. *Definition* - Refers to activity of of knowingly and recklessly harassing others in a manner which is annoying, distressing, pestering, and vexatious. In other words, upsetting, but not frightening. Common in debt collection, employer, romance. Like stalking, consists of series of discrete incidents, but accumulated in this case under single tort.

1. ALSO, Discrete harassment tort does not onerously intrude on free speech, and ensures that victims are protected from extreme behaviour. Will also be relevant to nascent field of cyber-bullying. Current situation is uncertain, and often confused with intentional infliction of nervous shock which has a higher standard than severe mental distress.

2. BUT, SCC has waffled on matter, holding that OHRC exhaustive in employer sexual harassment in Ontario (Chapman), therefore harassment tort does not apply. However, in Janzen, recognizes the tort as sexually oriented practice which negatively affects employment, performance, dignity.

CLASSIFICATION OF TORTS

Battery & Sexual Battery

1. *Definition* - Requires direct, intentional interference with the person of another which is either harmful, or offensive to a reasonable sense of dignity.

2. *Source* - trespass

3. *Type* - intentional; Liability in battery is established through harm or interference, and not through defendant culpability (read: intentionality). {JHO}

4. *Interest* - Protects a person's physical and mental security from unwarranted interferences; interference with autonomy, security, psychic, and liberty interests.

5. *Actionability - Actionable per se.* As the interference itself is considered harmful, they do not require tangible proof of harm to the Plf. The wrongful act and the harm are identical, and the wrongful act requires redress without proof of harm.

6. *Onus - traditional view* of battery tort holds that the onus is on D. to raise an affirmative defence, prove that the trespass was utterly without his fault. Must show that the act was both unintentional and without negligence. {Scalera} Contact or interference is prima facie offensive, unless it is proven to be consented. {JHO}

    a. ALSO, *smoke out* - it makes practical sense for the Court's to incentivize the production of all evidence by the D., and this end is accomplished through retaining the onus of proof for defence of battery with the D (GWB's "smoke out") {Scalera}

    b. BUT, *question of shifting onus?* there is a view that tort of battery should be altered to reflect developments in UK and elsewhere, shifting the burden of proof onto the Plf. Particularly relevant to sexual battery cases. {Scalera}

        i. BUT, there are two situations (*extraordinary category*) in which it would make sense to shift onus in battery to Plf.; sexual battery fits within neither, ergo onus on D.

            1. *Implied consent* - where nature of activity such that consent is automatically implied (eg. touching someone to pass them a handout) {Scalera}

            2. *Exception theory* - there is a category of activity in which falls within contact that is acceptable generally in ordinary life (jostled in a crowd) {Scalera}

        ii. BUT, this *suborns the Plf.'s right to integrity* to D.'s freedom to act. Not consistent with closeness between D.'s actions and results. {Scalera}

iii. BUT, *traditional approach to liability does not impose liability without fault in any case.* Fault is found in the violation of another person's right. {Scalera}

iv. BUT, there is a highly *demoralizing cost* where a victim of a direct attack is unable to garner recourse through the law; the *principle* principle. There is further psychological impact of the law not supporting one who has been directly wronged w/ battery injury, particularly where this involves violence, or sexual violence. {Scalera}

7. *Requirements*

a. *Intentional* - actor must meet one of the three standards of intentionality - actual, constructive, or transferred (however, Larin case holds that unintentionality and non-negligence must be required as a defence).

b. *Harmful or offensive - contact plus* is the modern formulation. Must interfere with a person in a way which is either harmful (eg. a punch) or offensive (eg. a pie in the face). Should not be trivial, *de minimis*. However, emotional response of individual Plf. is critical to this end - but not determinative.

i. BUT, battery is not a *causally* based tort; it is sufficient to have battered someone for liability to be established, regardless of consequence. {JHO}

c. *Non-consensual* - must be intentional on part of actor, and must not be consensual on the part of victim (eg. actor desires, victim does not desire).

i. ALSO, reflects a change from previous conceptions, where absent force, violence, or other illegal act or threat, that the victim had the ability to comply, regardless of whether the victim was aware of this. *Latter*{Housemaid}

d. *Contact* - actual physical contact is not required, and actions such as grabbing clothing are sufficient. Definition of a person's body is not strict within the battery paradigm - touching clothes is an invasion of space, touching a car is not. Lines cannot be drawn hypothetically - concrete application necessary.

e. *Awareness* - it is not required that the victim be aware of the battery in order for it to be actionable (can be battered when unconscious, asleep, medicated, etc.).

f. *Directness* - there must be an immediacy of action; it is not a battery to poison food, as this action is not sufficiently immediate - this will fall under other torts. Canada has decided to retain directness, although other jurisdictions have found that it is not a useful tool.

g. Temporality - Often, claims relating to sexual abuse / incest will have a time limit, based on the age of majority. However, this often does not fit the pattern of damage experienced by victims of such batteries, as the damage may not actually be recognized or linked to the battery until well into adulthood. Therefore, these limitations have been circumvented by

the Courts in some such circumstances.

i. ALSO, limitation only begins to run out after the victim is able to comprehend wrongfulness of abuse, and causal link between abuse and damage suffer. This could occur in adulthood. Must overcome symptoms to extent that trust can be placed in authorities, self esteem sufficient to warrant actions not encouraged by society, and recognition that victim is not blameworthy themselves.

8. *Policy*

a. *Directness* - Tort law is about compromising interests. Public interactions must be governed to the end of ensuring a balance between the rights of individuals in pursuit of their own goals, versus the effects that this pursuit will have on other people and their interests. However, there are certain situations where the law disallows compromise - one cannot sacrifice the bodies of other people in order to achieve one's goals. There are some invasions which are so direct where a balance is not possible - some rights cannot be compromised. This is the case with violent, immediate interference with personal autonomy.

b. *Intentionality* - Court in Larin holds that the defence against battery tort requires establishment of both non-negligence and unintentionality must be established. This being the case - if a defendant can be held liable under battery where they have acted negligently, but not intentionally, then it is difficult to say that intentionality is part of the definition. However, leading authorities in UK and US hold that intentionality is required in battery; this element of Larin was a mistake; therefore, Canadians follow these authorities.

c. *Battery v. negligence* - battery preferable where it is anticipated that negligence will be difficult to prove, and therefore technicalities of battery will be more useful in securing a favourable outcomes. This cannot be used in automotive accidents, however. Further, it should also be said that liability in battery is not limited to the foreseeable consequences, but rather to all consequences of battery. This relates to the idea that intentional action bears higher moral culpability, and therefore more extensive responsibility.

d. *Battery (particularly sexual) in context of fiduciary relationships* - Such a relationship imposes an obligation to act in the best interests of the beneficiary; as parent-child is one such relationship, sexual assault of one's child constitutes a grievous breach. This effectively lowered the bar for victims in bringing such actions, easier than an action in negligence or battery. {Norberg}

i. ALSO, Negligence, battery, etc. look on Plf. and D. as equal actors, and this not the case in doctor-patient relationship. Ergo, *fiduciary responsibility* correct approach. {Norberg}

1. ALSO, *power imbalance* in doctor-patient relationships means that sexualization of that relationship is *always a breach of trust*; avoidance of breach always with doctor. Obligation of doctor is to heal; to use this to do otherwise is a breach. {Norberg}

2. ALSO, can't fully compensate for the wrong by focusing merely on sexual battery, but rather *must take into account breach of relationship, failure to treat.* {Norberg}

3. BUT, concerns that society will treat all exploited*/vulnerable people as incapable of consent,* attach this to consent to treatment, etc {Norberg}

    a. BUT, sexual battery in context of fiduciary responsibility doesn't open floodgates, as within existing principles - doctors already fiduciary. {Norberg}

Medical Battery

1. *Definition - Key rule* is that medical treatment presumed to be actionable battery unless there is evidence that medic pro obtained consent of patient. Cannot rely on patient's failure to refuse (*passive*); must waive protection of law (*active*). Reflects unfettered power of patient to consent or refuse treatment; can be revoked, conditional, etc. Any intentional, nonconsensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable, even in medical context. {Malette}

2. *Source* - trespass

3. *Type* - intentional

4. *Interest* - The right of self-determination; the same right underlies the doctrine of informed consent, the right to refuse treatment and revoke consent. Self-determination trumps the paternalistic desire to heal people; if one's freedom to act is subordinate to another's personal integrity, then certainly one's paternalistic desire is also such.

    a. ALSO, The right to consent, consent conditionally, or revoke consent is *not mere formality*. Relates to fundamental right of control over own body, integrity. {Allan}

    b. ALSO, Right to refuse treatment is component of the supremacy of patient's right over own body. This holds true even where perceived as *foolish or harmful*. {Malette}

5. *Actionability - Actionable per se.* As the interference itself is considered harmful, they do not require tangible proof of harm to the Plf. The wrongful act and the harm are identical, and the wrongful act requires redress without proof of harm.

6. *Onus* - on defendant to prove that the Plf. did in fact consent to the medical treatment performed.

    a. ALSO *capacity* - Where the patient does not have the capacity to consent to treatment, either statute (DNR or other advance orders) or common law (close family member decides in accordance with past wishes, good faith) will provide guidance. System of substitute decision makers is appointed where there is incapacity. Two factors can impede the ability of a person to consent to treatment:

        i. *Mental state* - some persons may not have the mental capacity to consent, due to mental illness or other incapacitation.

        ii. *Age* - common law rule holds that mature minors have the power to consent or refuse treatment. If they can understand the nature, risks, and benefits of treatment, then they can consent to or refuse that treatment.

            1. BUT, the *Infants Act* allows minors to consent to health care, without need for guardian or parent. Applies regardless of age if minor, whereas other provinces

differentiate (usually older or younger than 16).

a. ALSO, Applicable where:

    i. Doctor explains and minor understands the nature and consequences of the health care, and the foreseeable risks and benefits; and,

    ii. Doctor takes reasonable efforts to determine whether it is in the minor's best interests to take a particular treatment path.

b. ALSO, Where legislation provides complete code for dealing with consent/ refusal of treatment by minors, this legislation supersedes common law. {SJB}

c. ALSO, *Parens patriae* jurisdiction does not apply to mature minors; state has no right to interfere, any more than parent, in health of mature minor. {Walker}*

    i. BUT, If child refuses consent in life threatening situation, state is obligated to exercise *parens patriae*. The jurisdiction of the Courts is not deposed by his refusal, and can be reinstated in a life-threatening situation. {Walker}*^

    ii. BUT, *not followed in BC* - Legislative definition of child and youth is above the common law idea of mature minor. However, both are subordinate to *parens patriae*. {SJB}

d. ALSO, The right to informed consent subsumes the right to refuse consent; they are not separate rights, granted individually, but rather are the same. {Walker}*

e. BUT, problematic, in that determination as to whether course of treatment is in best interests would usually involve asking parents. Capacity not based on intellectual understanding of what is at stake, but rather this is subordinate to doctor's interpretation of what is best interest of child; doctor will only weigh medical factors, cannot understand the extent to which religious or moral factors will weigh in.

b. ALSO, *revocation* should be immediately adhered to by physician, unless doing so would endanger the health of patient severely, immediately. Revocation must not brushed aside as pain or anxiety. In order to defeat liability for medical treatment, medical professional must prove that consent was obtained.

c. ALSO, *consent forms* - such forms are common, and can be considered evidence of consent, but do not constitute consent themselves. Must also include consideration of the mental capacity of the patient, the language of the form, the nature of explanations given to the patient. General words may only be effective in specific circumstances, for instance.

d. ALSO, *intent cards* - Physician who does not follow directions on intent card is liable for battery. Physician who follows the directions contained in a card cannot be found liable if the card no longer represents the true wishes of the plaintiff. Further, card can be set aside when physician has reasonable grounds to believe card to be invalid.

   i. ALSO, The right to consent, consent conditionally, or revoke consent is not mere formality. Relates to fundamental right of control over own body, integrity. {Malette}

e. BUT, *emergency* - exception to informed consent in emergency situations; where med. treatment necessary to save life or preserve health. {Malette}

   i. ALSO, There are three components required in considering whether treatment should be administered without consent in an emergency. {Malette}

      1. *Incapacity* - patient must be without capacity to make decision, with no one else able to legally act for patient available. {Malette}

      2. *Time* - time must be of the essence, in that it must reasonable appear that a delay would cause harm or death otherwise avoided {Malette}

      3. *Reasonable* - under same circumstances, a reasonable person would consent, probabilities are that subjective patient would also. {Malette}

   ii. ALSO, exception applies in circumstances involving unconscious or otherwise incapacitated patients in emergency situations; doctor may proceed without consent in such circumstances. This can come from two sources: {Malette}

      1. *Implied consent* - Doctor has implied consent to take such actions that will save life / preserve health. {Malette}

      2. *Privilege by necessity* - Considered more accurate, doctor privileged by necessity in giving aid, not liable. In emergency, doctor's desire to do good becomes more important than consent; a polarity change concerning the reasons underlying key rule. {Malette}

   iii. BUT, emergency doesn't override *advance declarations* by patient, whether oral or in writing, where there is no reason to doubt validity of statement. The right of an incapacitated patient to preserve physical integrity weighs against countervailing social/ state interests. {Malette}

7. *Policy*

a. *Privacy* - relates to how deep a doctor should probe in order to determine whether there are any advance declarations concerning treatment instructions. Should doctors be considered liable for failure to take sufficient steps to find an intent card or other instructions? There is a statutory tort concerning invasion of privacy (*Privacy Act*).

However, limited to "reasonable within the circumstances", therefore cannot necessarily solve problem.

b. *Informed refusal* - Shulman offers a symmetrical, elegant argument - that consent not sufficient to justify medical intervention, must be more: informed consent. On the other hand, refusal should also be informed; doctor should be allowed to reject refusal where it is not based on appreciation of risks.

c. Requirements

    i. *Not negligence* - The failure to provide information concerning risks of procedure is not battery, as consent was still secured. This would fall under negligence instead. For battery to apply, there has to be consent, the consent must have been either exceeded or the nature of the procedure must have been misrepresented.

        1. ALSO, If nature of operation is substantially that of which the Plf. was advised, (omitted information limited to risks), then consent given, no battery; ergo, *negligence* apt. {Reibl}

            a. ALSO, If surgery performed with no consent whatsoever, or in non-emergency, procedure performed beyond limits of consent, then *battery* appropriate. {Reibl}

Assault

1. *Definition* - direct and intentional act which causes a person to apprehend immediate harmful or offensive bodily contact (battery) is an assault. Can often hang together (eg. where there is a threat, immediately followed with violence - assault and battery) - but are independent actions, and will also be used apart. An unfinished, inchoate crime; apprehension.

2. *Source* - trespass

3. *Type* - intentional

4. *Interest* - protects interest of citizens to be free from the fear of harm or violence

5. *Actionability - Actionable per se.* As the interference itself is considered harmful, they do not require tangible proof of harm to the Plf. The wrongful act and the harm are identical, and the wrongful act requires redress without proof of harm.

6. *Onus* - Plf. must establish interference; once this has been accomplished, burden of proof is on the D. to show that the interference was not negligent, not intentional, or was consensual, etc.

7. *Requirements*

    a. *Threat* - does not require that harm be carried out, or proof of any damage. A mere threat is the activity which is comprehended by the tort of assault. Can consist solely of words (eg. telephoning a bomb threat).

    b. *Directness/immediacy* - threatened battery must be immediate - it must not be in future. Not assault to say that you would have attacked someone, were judges not in town. It is an assault to say that you will batter someone if they do not give you wallet - conditionality is fine, but temporal gap is not. Opportunity to do something to avoid threat.

    c. *Intentionality* - must meet one of the three definitions of intent in order to be actionable.

    d. *Reasonability* - must be reasonably apprehensible - that is, unreasonable threats do not count. Fear is not required, as assault tort protects brave and fearful alike. This is a flexible test; courts are savvy to potential for abuse.

    e. *Passivity* - does not require action or aggressing other than threat on part of the actor, so long as the threat meets the reasonable apprehension test.

    f. *Carry out* - does not require that actor be able to actually carry out threat. Threat to shoot w/ unloaded gun = assault, unless reas. pers. would've known that gun was unloaded.

    g. *Conditionality* - threats can be conditional and still actionable. If the condition to avoid battery is not fulfilled, and the battery itself would then fall within the directness requirement, then the activity amounts to battery.

False Imprisonment

1. *Definition* - involves the direct, intentional imprisonment of another person, falsely or wrongfully. Must be complete incapacitation. Does not require damage. Can be accomplished through physical or mental coercion.

2. *Source* - trespass

3. *Type* - intentional, but some decisions suggest can be carried out negligently (*Nolan)*. where the actions of one officer were in bad faith, and so intentional; however, supervising officer committed FI negligently by failing to take steps to avoid this imprisonment. {Nolan}

4. *Interest* - Protects individual liberty interest.

5. *Actionability - Actionable per se*. Interference itself is harmful, doesn't require tangible proof of harm to Plf. Wrongful act and harm are identical, act requires redress without proof of harm.

6. *Onus* - Depends. May be sufficient for imprisonment to be shown by Plf., and then onus on D. to prove that imprisonment was rightful - defence of *authorization.*

7. *Requirements*

    a. *Directness* - there must be a direct, causal link between the actions of the actor and the harm / interference / imprisonment of the victim.

    b. *Intentionality* - must meet one of the three definitions of intent.

    c. *Lawfulness* - detention and absence of lawful authority to justify this detainment. Where detainer is public authority, must have power to detain, exercised lawfully {Lumba}

    d. *Completeness* - must be a complete detention; one which can be easily circumvented (eg. obstruction in right of way) is not a false imprisonment.

    e. *Harm* - victim does not need to prove harm in order to claim damages.

    f. *Physicality* - can be physical or psychological - does not necessarily require physical restraint; police officer can detain through presence.

    g. *Consent* - If one goes freely and voluntarily into detention, there can be no false imprisonment. However, not the case where one is intimidated or coerced.

    h. *Awareness* - victim does not need to be aware of imprisonment; infants incapable of comprehension of imprisonment, for instance, still have remedy. {Lumba}

    i. *Burden* - onus falls to the actor in order to prove that imprisonment was justified through consent, legal authority, etc. Victim needs prove imprisonment itself.

Wilful Infliction of Mental Distress

1. *Definition* - If one causes mental suffering to someone else as result of a socially unacceptable action, one will be held liable. However, if one is merely negligent with regard to mental well being, or we would regard that person as having unreasonably thin skin - no liability.

2. *Source* - trespass.

3. *Type* - Intentional.

4. *Interest* - protect bodily and mental integrity, balanced against the autonomy of other actors; does not protect unreasonably thin skin.

5. *Actionability* - actionable given an insult / act designed to cause mental distress; damages relate to harms caused by that insult.

6. *Onus* - Plf. must show that insult designed to cause mental distress, and damage.

7. *Requirements*

    1. *Intentionality* - Wilfulness, malice, intentionality in tortious act. Further, conduct must go beyond the bounds of socially acceptable behaviour.

        1. ALSO, Conduct must exceed all bounds usually tolerated by decent society, and must be such that they are calculated to and in fact produce mental distress of a serious kind. {Nolan}

        2. BUT, *does not have to intend harm, only harmful act* - D. did not have motive or spite or malicious purpose, but nevertheless wilfully committed an act calculated to cause harm / infringe right to personal safety. {Downton}

    2. *Reasonableness* - test is to determine what the effect of the D.'s actions would have had on reasonable persons (objective) or given infirmities of human nature (subjective) {Downton}. Not every insult yields liability; must be extreme and outrageous conduct, intentional acts of a flagrant character so flagrant that they add weight to claim of mental distress. {Nolan}

8. *Policy*

    1. *Development* - there is no tort to deal with this by the 19th century; battery not sufficient, as there is no physical contact, assault not applicable, as such pranks don't necessarily involve apprehension of harm to one's own person. Slander only compensates for damage to one's reputation, and does not extend to medical consequences. New tort created to deal with mental turmoil caused, even without physical contact.

Negligence

1. *Definition* - tortfeasor commits negligent act, which causes reasonably foreseeable harm to another party.

2. *Source* - custom of the realm / common callings, but developed further following the inadequacy of contract law to recompense loss in increasingly complex, post-industrial society.

3. *Type* - well, negligence (obviously).

4. *Interests* - balances the interest to be protected from acts which could have reasonably foreseen to cause harm against the interests of one to not have to consider the whole world for every action. Therefore, relies on the orbit of danger, the vigilant eye.

    a. ALSO, effectively a negotiation; we wouldn't negotiate with everyone in world (to bring a coffee into the classroom), but rather only with those that coffee might potentially harm.

    b. ALSO, *Theoretical* - loss shifting system based on moral imperative that individuals should be liable for the damage they cause.

    c. ALSO, *Pragmatic* - loss distributing system that diffuses the losses caused by negligence to a broad segment of society.

5. *Actionability* - Negligence does not exist in abstract; must violate a right in order to constitute an actionable tort. Not actionable unless it leads to a harmful outcome. {Palsgraf}

    a. ALSO, One cannot sue via subrogation or vindictively to garner compensation from the invasion of *someone else's* interest; duty breached must be duty owed to Plf.

6. *Onus* - Plf. must prove duty owed, establish nature of this duty, show that it was not discharged, and finally, that this breach caused the damages claimed.

7. *Requirements*

    a. *Duty* - D. must owe Plf. a duty to take care not to diminish the Plf.'s well being. Must be an interest worthy of protection. Negligence is not actionable unless it involves the invasion of a legally protected interest: the violation of a right. {Palsgraf}

        i. ALSO, *modern test* - relies on *categorization* - duty of care can be found *prima facie* where relationship is existing category or closely analogous to existing category. If not, then this is a *novel* case, apply following test:

            1. Must be reasonably foreseeable;

2. Must be proximate relationship between parties - close, direct, sufficient to impose duty of care; if first two branches satisfied, *prima facie* duty of care established;

3. *Residual* policy factors dealing not with parties, but operation of legal system and greater society. {Cooper}

ii. ALSO, *limited w/in foreseeable scope* - Absent a hazard to the Plf. which would be discernible to a person of ordinary vigilance (reasonably foreseeable), act is innocent where Plf. is concerned. {Palsgraf}

iii. ALSO, The *duty to be obeyed is defined by the nature of the risk* reasonably to be perceived; risk to another, or others within scope of apprehension (think about the limitations of the risk of coffee in class). Termed "the vigilant eye" and the "orbit of danger" {Palsgraf}

iv. BUT, *limits type, not amount* - Allows limitation via type of activity, damage, exclusion of certain persons from liability. Consider, for instance, that judges not liable for damage that their incompetence causes to litigants.

b. *Breach* - D. must have failed to discharge that duty, failed to meet the standard of care required. {Palsgraf}

c. *Causation* - D.'s breach or failure must have caused the harm suffered by the Plf.

d. *Remoteness* - Breach cannot ground liability if determined to be too remote. Improbable consequences which are entirely removed in time and place from the actions of the D. are not likely to create liability. Where causation cannot be denied, D. may yet be sheltered as a result from responsibility.

i. BUT, If the possibility of an accident is reasonably foreseeable, it is not necessary that the defendant should have known particular shape which accident would take. {Palsgraf}

1. ALSO, Some acts are so imminently dangerous, such as firing a gun, that anyone who comes within reach of missile, regardless of how unexpected, falls under duty. {Palsgraf}

e. *Voluntary assumption of risk* - In certain circumstances, illegality or voluntary assumption of risk will be recognized as defences for negligence.

8. *Policy*

a. *Industrial revolution* - developed out of series of cases which gradually showed the need for liability to extend beyond those relationships governed by contract. The tort of negligence is a recent innovation of the courts, relating to the running down cases during industrial revolution; increased horses, carts, ships means more accidents. {Checo}

b. *Independent of contract* - negligence finds its roots in common calling / custom of the realm, where members of certain professions found to owe a duty relating to that profession. Predates assumpsit/contract; therefore, one is liable in negligence even if there is a contract, or in the absence of a contract. Regardless of whether a wrong is actionable in contract, this will have no effect on whether that same wrong is also actionable in tort; relates primacy of common callings {Checo}

c. Conceptualizations from Palsgraf

i. *Cardozo* - holds that Plf. can only succeed if D.'s conduct was wrongful in relation to her; that *the Plf. must have had a right that the D. not act*. Where a person has such a right, other people must attend to their interests (eg. act so as not to disturb right).

ii. *Andrews* - by exposing parties to unnecessary risk, D. is therefore a wrongdoer. The *only question to be considered is whether the D. should be held liable* for the effects of this conduct. There is a limit to remoteness, but this is expansive, difficult to reach. Dissent.

d. Development of the duty of care

i. Donoghue v. Stevenson (HL 1932) - *neighbour principle* - (*what*) holds that must take reasonable care to avoid acts or omissions which can be reasonably foreseen to cause harm to neighbour; (*who*) neighbour is one who is so directly and closely affected that they ought to be within contemplation. The directness and closeness came to be applied interchangeably with foreseeability by Canadian courts.

1. While the test has two aspects in form, it is truly only a single test; the idea of reasonable foreseeability governs both *who* and *what*. As *Palsgraf* differentiated tort law from crime, *Donoghue* differentiated tort law from contracts.

    a. The definition of *who* a neighbour is draws very much on the Cardozo decision concerning the *vigilant eye* guarding the *orbit of danger*.

    b. Relationship gives rise to both a duty and a right; the relationship in mind is one concerning close and proximal connection between parties.

2. Atkin provided a key limitation; not every manufacturer has a duty to the consumer, but rather only in circumstances where the Plf. has no reasonable opportunity to inspect goods. If the Plf. DOES have a reasonable opportunity, then the manufacturer is not liable (opaqueness of bottle!).

    a. Reflects the notion that the Plf. has to take sufficient care of their own wellbeing in order to not themselves be liable for the harm that they occur.

    b. In modern liability, this would relate to contributory negligence, lead to apportionment of liability based on extent of each party's contribution.

3. MacMillan eschews the neighbour principle in his dissent, holds that the standard of the reasonable person apply; also emphasizes categorization, ultimately becomes the dominant approach in Canada following Cooper.

    a. Categories of negligence are never closed, the law must match the changing circumstances of life.

    b. Emphasis is on profit; commercial relationship is one which gives rise to duty to take care.

ii. *Neilson v. Kamloops (City of)* (SCC 1984) - policy analysis - holds that there must be (1) sufficient relationship between parties culminating in reasonable contemplation, and (2) must consider whether there are any factors which ought to negative or reduce scope of damages. Applied by Canadian courts, *reasonable foreseeability creates presumptive prima facie duty of care*; D. left with sometimes onerous burden of satisfying second branch.

iii. *Cooper v. Hobart (SCC 2001*) - categorization - duty of care can be found prima facie where relationship is existing category or closely analogous to existing category. If not, then this is a novel case, apply following test: (1) must be reasonably foreseeable, (2) must be proximate relationship between parties - close, direct, sufficient to impose duty of care; if first two branches satisfied, prima facie duty of care established; (3) residual policy factors dealing not with parties, but operation of legal system and greater society.

Nuisance

1. *Definition* - Strict liability tort. Only damage must be proved. Requires unreasonable interference with neighbour's enjoyment of property - in this case, the unreasonable aspect relates to the behaviour of the Plf. (eg. would a reasonable person expect to live with / without this nuisance, have taken steps to avoid it?) as opposed to the D. However, once reasonability is satisfied and damage proven, the D. is necessarily liable to recompense the Plf.

2. *Source* - unknown

3. *Type* - strict liability

Coexistence interest

1. *Definition* - if one brings or encourages something unnatural and dangerous onto one's land, if one does something so dangerous so as to put others in risk of extreme danger - without intentionality or negligence, the D. has violated the *coexistence* interest, and therefore is liable. This is a strict liability tort.

2. Source - common law property interest in the industrialized era. *Rylands v. Fletcher.*

3. Type - strict liability

4. Interest - serves interest in not being exposed to dangerous items; promotes peaceful coexistence.

5. Actionability - action based on damage incurred.

INTENTIONAL TORT DEFENCES

1. Categorization

   a. *Justification* - intentionally carried out the act; had a right to do for what was done. Authorized activity, may even be the *right thing* for the person to do (eg. in the case of self defence). No apology, no contriteness, no wrongdoing involved. Justification defences cover self-defence, authorization, and consent. Aggressive, in that it denies any wrongdoing.

   b. *Excuse* - did not have a right to do the deed; but otherwise craving indulgence of the Court to excuse their actions. Excuse acceptable in this case because it meets certain standards. Excuse defences cover involuntariness, lack of intent & lack of negligence, infancy, and mental illness. Has to be an understandable claim, cannot merely say that the action was a mistake. Begs why the mistake was made. Cap in hand, admits wrongdoing.

2. Types of defence

   a. Ex turpi causa non oritur actio

      i. *Definition* - doctrine holds that one cannot bring an action founded in a dishonourable cause; not applicable to *Norberg*'s actions, however, as there is no causal link between immoral behaviour (eg. double doctoring) and the harm suffered; had she not double doctored, but instead persisted in sex relationship w/ D., harm arguably would have been worse. {Norberg}

         1. ALSO, In the context of her relationship with D., Plf. was not a sinner, but a sick person, therefore "clean hands" and *ex turpi* doctrine is inapplicable. {Norberg}

   b. Necessity

      i. *Definition* - had to commit act, because if had not acted as such, a disaster would have occurred. Situations where one has attacked someone in order to do something which is necessary in order to fulfill a duty. There are grounds in the margin of the criminal law which would make a homicide non-murderous; may also apply to torts. Primarily relevant to property. <u>Marginal</u>

   c. Valid social purpose

      i. *Definition* - questions the extent to which one can invade the autonomy and personal integrity of another in order to achieve a social purpose. However, when one looks at Scalera (eg. that one's freedom to act is subordinate to another's personal integrity), it becomes clear that this defence is very much marginal. Primarily relevant to property. <u>Marginal</u>

d. Involuntariness

i. *Definition* - based on the idea of control, whether one is in fact in control of the bodily movement which caused the harm to occur.

e. Lack of intent / lack of negligence (not at fault)

i. *Definition* - When making a claim about not being negligent, one is saying that one's behaviour in fact reflects acceptable societal behaviour standards.

f. Infancy

i. *Definition* - Cannot be held liable in circumstances in which tortfeasor is too young to have developed intentionality in action (see TO v JHO re: minimum age - under onus in Battery & Sexual battery)

1. BUT, *no age minimum for tortfeasor* - Criminal law has minimum age of 12 for culpability; no lower age limit in intentional torts; age relevant only in *conception of intentionality*. {JHO}

i. ALSO, even though child does not understand *severity of consequences* / level of harm, this does not undo liability of child in commission of battery tort. {JHO}

ii. ALSO, age of the actor can only be considered to be relevant in a determination as to *whether that actor possessed the capability* to form intent for the actions. Put another way, the actor must be able to understand the nature and quality of their actions in order to form intent, and thus be held liable. {JHO}

iii. ALSO, battery is *not a causally based tort*; it is sufficient to have battered someone for liability to be established, regardless of consequence. {JHO}

g. Mental illness

i. *Definition* - An excuse; person is so disconnected from reality that they are unable to understand / control their actions. Deficiency in mental understanding, ability to appreciate the world.

h. Authorization

i. *Definition* - eg. police action, citizen's arrest, etc. *CCC* grants authority to peace officers that has relevance to actions in torts. Also includes teachers, parents.

1. BUT, in other circumstances (eg. age of consent, age of liability) the *CCC seems to have limited weight*. In this case, it would seem to me that the utility of the *CCC* is

relevant, particularly in the case of peace officers, as they would not have acted in this capacity nor arguably even exposed to the situation were it not for the socially recognized offices and authorities which underly actions.

i. Causation

i. *Definition* - Neither common law trespass nor statute support the defence of *causation* in F.I. - actionable *per se.* D. holds that their wrongful adherence to illegal policy (rather than legal, published policy) did not *cause* the Plf. to be imprisoned, as still would have been imprisoned anyways. {Lumba}

1. BUT, causation defence is not sufficient to overcome liability for interference with personal autonomy; but can be factored into damages. following the trajectory of the lives of the Plf.'s had they not been wronged, their damages are strictly nominal; no harm has been incurred.{Lumba}

j. Self-defence

i. *Definition* - One is permitted to use reasonable force to defend oneself against assault (threat) or battery (harm). What is reasonable is decided in context of surrounding circumstances (severity of danger faced, for instance). Does not permit unnecessary, unreasonable, or punitive violence, but also does not require a careful calibration of force - one can be somewhat imprecise in response.

k. Defence of others

i. *Definition* - This is also extended to third parties defending one from such tortious actions. In the case of third parties, it is not necessary that the attacker actually commit harm; the third party defender is entitled to be mistaken, provided that this mistake is reasonable, as is the force used to avoid the attack.

1. ALSO, force *necessary, proportionate* v evil being prevented. Parties can use reasonable degree of force in protection of themselves or others against unlawful use of force. Reasonable standard, objective - where a person could reasonably believe that harm is to be visited on oneself or another party, then this constitutes a justification to use force in protection. {Babiuk}

a. ALSO, *belief is sufficient*; must have honest belief - can be mistaken, however, in order to justify the use of force in defence of others (*Gambriell*).

2. ALSO, not like vigilantism, as it must be proportional, necessary, and cannot be used punitively. {Babiuk}

3. ALSO, *no reason to confine defence* of others to family members, or restrict it to occasions outside of contact sports. {Babiuk}

a. *Family* - there is no such restricting principle, and further this is inconsistent with underlying principles of defence, eg. prevention of harm or interference. Whether one is related to party or not, harm to victim remains same. {Babiuk}

b. *Sports* - concerning contact sports, while these will involve a higher level of consent to battery, the line between consensual and non-consensual contact will be weighed on facts by the trial judge (eg. evil being defended from must occur within the nature of consent given relevant to nature of the sport - by playing rugby, one does not consent to have one's face stepped on). Further, while there is an authority figure present, this referee may not be able to manage protection of everyone engaged in activity. {Babiuk}

4. BUT, *greater caution is required* when defending others, owing that a third party cannot usually understand the extent of the threat as well as a first party. {Babiuk}

l. Consent

i. *Definition* - Occurs where individual agrees to interference with person, generally in order to achieve a personal or material gain (eg. fight a rival, play a sport). Can be implied or express, must be such that reasonable person would believe that consent was present, must be freely and voluntarily given, and, with exception to circumstances of public convenience (eg. airplane ride) can be revoked. Includes situations such as interpersonal violence (scrutinize the extent of consent to ensure not exceeded through use of weapon, etc.), contact sports (scrutinize whether violence occurred within or without the scope of the game).

1. ALSO, Consent to battery can't be given under (1) threat, (2) force, (3) influence of drugs, and (4) is negated by fraud concerning nature of D.'s conduct. {Norberg}

2. ALSO, Consent vitiated through (1) *feeling of constraint* if this interferes with (2) *freedom of person's will* - viz. effects *voluntariness*; doesn't need fraud/incapacity/coercion necessarily, if constraint affects the will. {Norberg}

a. BUT, This doctrine does not alleviate all responsibility of victim, but rather only protects from exploitation and vulnerability, not folly and carelessness. {Norberg}
b. BUT, Possible that lack of voluntariness caused by feeling of constraint (weakness) does not *vitiate* consent, but rather sets aside consent to satisfy public policy. {Norberg}

3. ALSO, Looks to contract concept of *unconscionability* in contracts to understand nature of voluntariness in tort; two part test for proof of *inequality negating consent*. Ergo, in spite of mutual consent, unconscionable agreements not recognized:

a. *Imbalance of power* - inherent in doctor-patient, parent-child, and other such relationships. {Norberg}

b. *Exploitation* - whether transaction is divergent from community standards of conduct. Involves instigation (in this case), manipulation of relationship to her detriment, to his gratification. {Norberg}

4. ALSO, *can be express or implied* - Failure to resist or protest is indication of consent where a reasonable person aware of consequences and capable of protest would voice objection. Implied consent is not the mere lack of refusal, but rather requires that there be informal, positive signs which indicate consent. Diminishes the role of the victim, however, as harm is considered "mitigated" by the mistake of the D. concerning whether the Plf. consented. {*Norberg*}

5. ALSO, *consent to sex* - Any sexual contact is battery unless D. can prove that it was freely and voluntarily consented to. For latter to be satisfied, required that the consent not be provided under coercion or threat, and further must not be in context of authority relationship where power imbalance affects ability of Plf. to consent (eg. doctor-patient, parent-child, etc).

   a. ALSO, *fraud concerning the nature and character* of bodily interference annuls the consent of the Plf., whereas fraud relating to collateral matters (eg. whether or not the D. is married, feels affection for Plf., etc.) do not affect the consent. May be separately actionable, but not under battery.

   b. ALSO, *fraud concerning any bodily risks* undertaken by the Plf. due to sexual contact with D. (eg. in presence of HIV or other STI) negates consent. This is similar to criminal law - concealment of serious risk of bodily injury is the underlying principle. May also be actionable in negligence - duty of care owed between sexual partners to avoid diseases.

      i. ALSO, represents departure from previous rule, which held that *concealment of disease does not vitiate consent,* as it does not deceive concerning nature of the act, but rather only concerning risks associated. This was based on floodgates argument, that if deceit used to vitiate consent, all manner of claims would be brought, including by paramours seduced by false promises of marriage, for instance. {Hegarty}

   c. ALSO, represents departure from previous rule, which held that *absent force, violence, illegal act done or threatened,* it follows that Plf. had ability to comply or not within her power, regardless of whether were aware of this. {Latter}

   d. ALSO, *children abused* by one parent can recover in battery from offending parent, and possibly also in *negligence from other parent* for failing to protect child from abuse. This is of critical importance, as insurance policies will cover

negligence but not intentional acts {*J(LA) v. J(H)*}

6. ALSO, *consent in sports* - Holds that all bodily contact in sport is a battery prima facie, and the onus is therefore on the defendant to establish that the plaintiff consented to battery; otherwise liable for harm. However, this requires both a breach of the rules of the sport, and the intention to injure, in order for consent to be exceeded.

7. BUT, *age minimum for consent* – age of consent in criminal cases can be applied in civil cases where appropriate; fourteen and under = no consent. The defence of consent is only available where the victim is capable of granting that consent. It would be inconsistent to hold that while someone would be incapable of consenting for criminal purposes, that the same act would be able to be consented to for civil purposes. As the age of consent in criminal is set in order to prevent children from experiencing exploitation, and this is a desirable goal in civil law as well, then the limit should apply. {JHO}

    a. ALSO, *where both actors under age of consent*, where there is a power imbalance (eg. between older and younger siblings) with a person under age of consent, defence of consent invalid. Therefore, even if the Plf. had been a "mature minor", the Court would not hear arguments concerning consent relating to the public policy requirements concerning the protection of children. We cannot allow possibility of inquiries concerning consent of children to sexual touching / other battery, due to the high likelihood of mistakes being made on aggregate level. {JHO}

NEGLIGENCE DEFENCES

1. Types of defence

a. Contributory negligence

i. Partial defence based on the Plf.'s contribution to the incurrence of damages; this creates a proportional decrease in quantum owed by D.

b. Voluntary assumption of risk

i. Complete defence; where the Plf. can be shown to have consented to the D's negligence and its consequences.

c. Illegality

i. Deny a claim, such as one for future illegal earnings, that would subvert the integrity of the legal system - complete defence (to extent of illegality, anyways).

d. Inevitable accident

i. Damage was not incurred through fault of the D., but rather through an accident which could not have been avoided. Complete defence.

e. Outside of scope of duty

i. Reasons for not applying the neighbour principle; the principle presumptively applies, except for in certain circumstances - inexhaustive.

1. Pure economic loss - it is foreseeable that in commercial competition that one will make a gain at someone else's loss. This competition is critical to capitalist society, and therefore must be immune from neighbour principle.

2. Distress - where the D. has failed to relieve someone in distress. Strangers cannot demand that you supply them with positive benefits, even where it is foreseeable that they will suffer harm if you do not.

3. Existing categories - cases long settled where no duty is recognized (eg. landlord-tenant). However, this undermines Reid's own argument against the government re: authority (eg. that it is the principle, and not the category which is of importance in consideration).

LIABILITY

1. General liability

a. Definition - governed in BC by s.4 of the the Negligence Act. In absence of contract, liable to contribute to and indemnify each other in proportion of fault - if the proportion cannot be determined, liability is apportioned equally. None of this applies where s.1 of the Negligence Act applies - if the Plf. contributed to the circumstances through own negligence. Therefore, in such cases, several liability applies, although this will still be determined through a joint action.

i. Several liability

1. Definition - Each party is liable only to the extent of its proportion of responsibility within the obligation. This will also apply in cases of contributory negligence, as this must necessarily take out the portion of the loss which is due to the Plf.'s own actions. Individuals involved independently, acting concurrently, brought about the consequence. They are not complicit in each others' actions (eg. car accident where one swerves to avoid a reckless driver and is struck by a speeder - each is responsible to an extent, acts were not complicit).

2. Requirements

1. *Contributing causes* - Sometimes the the acts of two independent tortfeasors described as contributing causes. A full account of how the consequence happened will refer to both. This is a full account of how the consequences happened.

2. *Settlements* - If settled against an independent tortfeasor, may still bring an action against other independent parties, although it is a complex business to determine the damages based on contribution. However, one can never be compensated for more than the injury is worth.

ii. Joint liability

1. Definition - In joint liability, each party is liable up to the full amount of the obligation. So, if the obligation is unfulfilled, the full amount may be collected from one of the other parties to the obligation. Plf. can choose who recompense will be taken from, and it is up to the wrongdoers to determine the extent to which wrongdoers must indemnify each other.

2. Requirements

a. Concert - Cause of action is same between one or more defendants - must have been acting in concert. {Cook}

b. *Specialized relationships* - occurs within the context of specialized relationships, such as that between an employer and employee {Cook}

c. *Fault* - can be no liability without fault - in pursuing lawful activity, engaging in activities within the scope of that activity, there is no reason that one should foresee that a tort will ensue {Cook}

d. *Contribution* - Where the plaintiff is held to be partially responsible for the harm suffered, each defendant is liable only in proportion to their level of fault - they are only severally liable for their portion of the harm - however, this is only the case in BC - in other provinces, s.4(2)(a) - joint and several liability may apply, less the extent of the victim's own contribution (eg. victim 20% liable, defendants each and both j&s liable for remaining 80%)

3. *Policy* - Relates to the idea that accessories are as liable as the principle wrongdoer. Historically, several liability would apply, requiring two separate actions - enormously expensive, so legislatures got involved - for instance, s.4 holds that Plf. can sue either or both in joint action - so therefore, nowadays, even non-complicit joint tortfeasors can each be held liable for 100% of the recompense - serves distributive function. Not trying to deter further actions, but rather trying to establish and elucidate the nature of complicity.

iii. Joint & Several liability

1. *Definition* - Each Liable jointly for the entire amount, and severally liable for the entire amount. Each wrongdoer is liable to the plaintiff for the entirety of the harm. Plaintiff can sue either, or both, and demand 100% of the compensation from either party - they are "joint and severally liable". The law does allow one defendant to bring an action against another for contribution, based on a determination of degree of fault. Effectively, it is up to the tortfeasors to squabble over who owes what. This happens after the victim of harm has received the compensation.

2. *Requirements*

a. *Settlements* - If the action is settled against one joint tortfeasor, then the action will not be able to proceed against the other (complicit enterprise).

b. *Contribution* - Where the plaintiff is held to be partially responsible for the harm suffered, each defendant is liable only in proportion to their level of fault - they are only severally liable for their portion of the harm - however, this is only the case in BC - in other provinces, s.4(2)(a) - joint and several liability may apply, less the extent of the victim's own contribution (eg. victim 20% liable, defendants each and both j&s liable for remaining 80%)

c. *Action for contribution* - refers to the action brought by one defendant against another to require that person to pay a part of the compensation. Effectively,

defendant brings action to force another defendant to contribute financially to the extent that they contributed to the harm.

3. Policy

a. Purpose - It is improper that an innocent plaintiff, faced with two wrongdoers, both of whom brought about the result, where one of these wrongdoers is unable to pay (no insurance, no assets), that the full extent of redress is owed nonetheless. We would rather guarantee the full extent of compensation to the plaintiff. This was brought about as a matter of policy via the legislature (although the plaintiff still has the option to seek only part of the damages from each tortfeasor). Unfairness concerning the distribution of wealth between tortfeasors is considered subordinate to unfairness of damage to plaintiff; therefore, more desirable to have the tortfeasors squabble after the fact.

b. Contributory negligence - The old rule at common law related to dirty fingers; if the plaintiff is in some way to blame, that plaintiff cannot bring an action to the courts. The plaintiff's negligence would end the case. However, the Last Clear Chance rule held that even if the plaintiff was negligent, where the defendant was the party which had the last clear chance to prevent the consequence from coming about, then the liability lies with the defendant, and an action can be brought. However, this rule was incredibly difficult to apply, in accordance with the fact that these events were rarely a simple sequence, but rather involve a confluence of simultaneous events. The Negligence Act expressly undermined the Last Clear Chance rule.

2. Corporate liability

a. Types

i. Personal / direct liability

1. *Definition* - occurs where corporation fails to select, train, or control its employees with due care. In direct liability, there is direct wrongdoing on the part of the D. which led to the harm suffered by the Plf. For instance, if an employer fails to check the criminal record of an employee who will interact with children, and harm occurs as a result, this is direct liability on the part of the employer.

ii. Vicarious liability

1. *Definition* - occurs where employees create liability through actions committed within the scope of employment. Plf. holds that they are a deserving victim because they have suffered wrongdoing. Further, the loss suffered should be transferred to the party on behalf of which the D. was acting. On the other hand, vicarious liability requires wrongdoing only on the employee or agent of the employer, and not the employer itself. Certainly, there are steps which could have been taken by

the employer which may have reduced or avoided the harm, but the failure or inadequacy of these steps do not add up to negligence or liability on the part of the employer.

a. ALSO, *strict liability* - Vicarious liability is holding one person responsible for misconduct of another due to nature of relationship. Different from joint tortfeasors in that wrongdoing need not be shown. {Sagaz}

b. ALSO, Vicarious liability requires *strong connection* between the task set for the employee (enterprise) and the wrongful act; increased risk as result. {Oblates}

c. Process involves answering two questions:

   i. Who is an employee? Organization test. (employee vs. independent contractor) {Sagaz}

   ii. For which tortious acts can an employer be held liable? Bazley test (did the employer enhance risk of intentional tort?) {Bazley}

2. Organization test (Sagaz)

a. Definition - determines whether actor is an employee of an organization, ergo capable of transferring liability to organization, or rather independent contractor, incapable of transferring liability. {Sagaz}

b. Test

   i. Determine whether the person engaged to perform services is performing them as a person in business *on own account*. {Sagaz}

   ii. If yes, then the contract is *for* services, if no, then the contract is *of* service. Former is an independent contractor, the latter is an employee. {Sagaz}

   iii. Consider - separate offices, commission rather than wages, provision of own equipment, ability to hire own staff, financial risk taking, responsibility for investment and management of time / resources. {Sagaz}

c. Policy

   i. *Control* - principle underlying the difference relates to the idea of *control* - vicarious liability is determined by the control in a relationship, and while a business is seen as having sufficient control over the actions of its employees to be liable for their actions, this does not follow for their contractors - contractors can be told what to do, but not how to do it. {Sagaz}

ii. *Liability* - We do not impose enterprise liability on entrepreneurs for other risks. For instance, producers of products are not held to strict liability standard for risks create, but rather to a negligence standard (eg. the neighbour principle / Kamloops test). Therefore, product liability requires proof of fault, but enterprise liability does not. Is this incoherent? Perhaps not - fault has already been proven in enterprise liability (eg. by the actual actor) - it is merely a question of "who else" is responsible for recompense.

iii. *Social consequences* - what does an entrepreneur do? Employers have great reason to outsource all of their work to independent contractors for reasons of avoiding liability. Consider outsourcing of prison staff to such agencies to avoid liability. Therefore, the government avoids its own concerns, and deliberately eschews control of areas. A fascinating consequence of this case, we have incentivized arm's length employment. This could have serious repercussions on service delivery. {Sagaz}

iv. *Undermined by movement* - concerning doctors with hospital privileges. It has been found in such cases that doctors acting within this capacity may stretch vicarious liability to the hospital. Certain duties are *non-delegable* - certain duties can only be satisfied through first-party action. One cannot delegate certain types of a responsibility, in other terms - there are circumstances where someone has undertaken to do something, particularly where this involves vulnerable people requiring a high level of care, and so the duty cannot be delegated to a third-party - one will be held liable for the torts (even of independent contracts) of third parties in such circumstances. This represents the answer of tort doctrine to the neo-liberalism set out in Sagaz. {Sagaz}

3. Bazley test (vicariousness)

a. *Definition* - five parts, is to be applied where the precedents are unable to resolve issue of vicarious liability unambiguously, or are insufficiently similar. Relate to whether employer enhanced risk of intentional tort - measures whether there is a *strong connection* between task of employee and tortious conduct.

b. *Test*

i. *Opportunity* - extent to which enterprise offered opportunity for employee to abuse power; if employment provides ample opportunity (eg. through lack of supervision), then this must be taken into account. Rigidly structured work environment mitigates vicarious liability. {Oblates}

ii. *Furtherance* - extent to which wrongdoing furthers the aims of the employer (which increases likelihood of tortious act by employee); for instance, AIM's bribery in Sagaz furthered the D.'s aims, aggravating, whereas it can be said

that in this case, abuse worked against aims, mitigating. {Oblates}

iii. *Role* - extent to which wrongdoing relates to nature of role with a view to intimacy, friction, or confrontation inherent in enterprise; this is an important factor - relates to the psychology of the environment in which the tort occurred. For instance, dehumanizing element inherent in residential school. {Oblates}

iv. *Power* - extent of power conferred on employee in relation to the victim; however, there is a determination required for perspective, requires a basis for comparison. In E.B. they compared the power of the handyman with the power of other people in contact with the children. {Oblates}

v. *Vulnerability* - extent to which potential victims will be vulnerable to wrongful exercise of power. This is a key issue, strongly weighted although not determinative. Increasing vulnerability is an aggravating factor, decreasing vulnerability is mitigating. {Oblates}

c. Must be applied in view of *policy considerations*. Enter into each stage of analysis.

i. *Remedy / Fairness* - just and practical, fair and efficient remedy for wrongs. In order to be just, cannot be coincidentally linked to tortious act, but must consist of a more meaningful connection, as set out in the *Bazley* test. {Oblates}

ii. *Deterrence* - vicarious liability must provide fair and efficient deterrent against future wrongdoing as well. This includes care by the court to ensure that over-deterrence does not preclude acts which are beneficial to society. {Oblates}

iii. *Narrow* - Precedents do not have to be *very* similar to resolve vicarious liability issues concerning sexual abuse. As Bazley was a pioneering case, it tempered itself with caution due to the broad domain of its scope. However, in sexual abuse cases, the need for "very similar" fact patterns is not necessarily required. {Oblates}

4. Types

a. Doctors with hospital privileges

i. *Liable* - While in *Yepremian v. Scarborough General Hospital* (1980), the D. was found not to be vicariously liable for the actions of a doctor with hospital privilege, it has since been established that hospitals have a *non-delegable* (eg. unable to be discharged but through first-party satisfaction) duty to ensure that care is taken. This duty applies not only to patients

under care of employees of hospital, but also to patients under care of independent contractors. As such, hospitals are vicariously liable for all of their agents, independent or otherwise, that take care of patients.

ii. *Policy* - supported by policy - public reliant on hospitals for medical care, and there is no possibility for the public to question competence of medical staff, whether they are employees of hospital or independent contractors. Further, patients have no conception of the nature of the relationship between those providing medical services and the hospital, nor is it their responsibility to determine this in view of obtaining medical services.

5. *Policy*

a. *Enterprise risk* - based on idea that by engaging in a commercial activity, an enterprise must assume some level of risk for the actions of its agents. However, there are two issues which this:

i. *Economy* - risk is means through which our economy advances! Certainly, ideal to minimize risk, but must ensure that it is not dampened completely!

ii. *Distributive* - compensation paid for those who had no liability - passed on to consumer. Ergo, misses the mark with a view to deterrence and fairness.

b. Historical theories

i. *Master's tort theory* - employer vicariously liable as acts of employee authorized by employer, and so legally, are the acts of the employer. {Sagaz}

ii. *Servant's tort theory* - employer vicariously liable because superiour to employee, thus in charge or in command of employee. {Sagaz}

c. *Modern theories*

i. *Fairness* - employer puts community at risk, and is the party which will *profit* by those risks. Further, the employer is best able to spread losses through insurance and higher prices, thus minimizing the dislocative effect of tort. Hazards of business should be borne by the business itself. {Sagaz}

ii. *Deterrence* - employers are best positioned to reduce actions and intentional wrong, vicarious liability is a means to make them do so; that they manage risk in order to minimize cost of harm which flow from their enterprise. Must be held to a high standard because the stakes are high. {Sagaz}

DAMAGES & COMPENSATION

1. Types of damages

a. Punitive damages

1. Definition - An additional sum beyond special (pretrial) and general compensatory (future losses), which punishes defendants where their actions have been vicious premeditated, high-handed, or disgraceful.

a. *Extreme* - punitive damages are only to be awarded in extreme circumstances; may not be appropriate where under age of criminal responsibility. Conduct so extreme that it cries out for punishment, punitive damages are appropriate. Mere reprehensibility is not sufficient, requires vindictive or malicious action beyond abhorrence / repugnance. Further, where a D. is under the age of criminal liability, it may not be appropriate to punish where the criminal law would not. {JHO}

b. Aggravated damages

c. Mental damage

i. Differentiates between tortious and non-tortious. This line, relating to psychiatric injury, is drawn on the basis of recognizable psychiatric illness (eg. PTSD) versus more transient and minor emotional distress. Widening the range beyond recognizable psychiatric illness would impose a severe burden on defendants, present difficulties with a view to proof and causation, and likely increase the number of fraudulent claims.

d. Pure economic loss

i. Pure economic loss has been approached with caution, due to the fact that liability for such claims may be greatly disproportionate to the degree of negligence demonstrated by the defendant's negligence.

2. Desirable defendants

a. Types

i. *Insured defendants* - those with liability insurance, permitting the cost of the action to be spread amongst all those who purchase the insurance.

ii. *Self-insured defendants* - large corporations or governments able to spread the cost of the action amongst those who purchase goods, or those who pay tax.

iii. *Defendants with means* - those defendants who have sufficient assets in order to cover the cost of the action out of pocket.

b. Policy

i. *Central tension* – relates to central tension in tort law, between the compensatory aspect of tort law - the emphasis on plaintiff's need for recompense - and the personal responsibility aspect - the emphasis on deterrence and the promotion of rightful conduct and accountability. For instance, in *Evaniuk,* the corporation was sued, rather than the bouncers who committed the tort - while the former was the better bet for compensatory damages, the latter would be ideal in holding the wrongdoers to account.

ii. *Sexual battery* - damages must reflect nature and impact of battery, and sexual battery is more damaging than non-sexual battery. Sexual battery, to greater degree than non-sexual battery, causes serious, lasting emotional and psychological injury. In accordance with this, sexual battery is aggravated compared to non-sexual battery, and this must be taken into account in order to calculate appropriate redress. {JHO}

3. Gender bias in damage assessment

a. *Experiential gap* - holds that male judges will be unable to empathize with female Plf., and therefore are unable to accurately measure damage in such circumstances.

b. Severity - damages measured mostly via severity of abuse, rather than damage to Plf., focus should be on latter in torts, due to compensatory rather than criminal aim.

c. Formal equality - women tend to earn less due to systemic issues, and further great portion of their labour (private sphere) is unrewarded and not included in damage calc.

d. Contingency - marriage contingency applied to women, assumes that single women may leave workforce in order to have family, therefore pecuniary damages must be lower.

e. Gender specific - some injury is gender specific. Sexual damage to women harms earning capacity.

FUNDAMENTAL PRINCIPLES

1. Purpose of tort law

a. To determine when a person who has caused a harm must pay compensation to the person who suffers it, and how much compensation is owed. Requires that the damage be caused by wrongful act - not an accident, error, or bad luck. Provides compensation for damage caused by conduct that is regarded as below societal standards, thus restoring the plaintiff to the position that they would have been in had the tort not been committed.

i. Moralist view

1. Torts are a system of corrective justice based on the ethical principle of personal responsibility for damage caused by wrongdoing. Tort law is designed primarily to rectify an imbalance between the litigants caused by the defendant's wrongdoing. Has value, therefore, in and of itself - does not need the justification of external, pragmatic functions in order to be valid or useful.

ii. Instrumentalist

1. Holds that there are a number of desirable functions of tort law; critical of the extent to which these functions are achieved, enabling discourse which allows for the modification of tort law to improve in these capacities, and suggesting other legal and non-legal vehicles for the distribution of compensation and other goals.

a. Psychological dimension - Torts allow for a non-violent and civilized means of channeling desire for vengeance and retribution against those who have wronged the victim.

b. Ombudsman - Relates to the idea that even the most powerful and wealthy organizations in our society, such as large corporations and governments, can be brought under punishment and made to pay compensation through torts.

iii. Deterrence

1. By imposing liability, tort law thus hopes to deter the specific individual from continuing wrongdoing. As with punishment, this is mitigated to some extent through the availability of liability insurance. On the other hand, general deterrence (eg. of those not party to the action) is also desirable - the possibility of tort action, inspired by an outcome, causes others in society to adopt safer practices. However, as much of tort liability arises out of spontaneous, unreflected behaviours, and few people understand or bother to access its outcomes, etc., both the specific and general deterrence functions of tort are weak.

iv. Corrective justice

1. The purpose of tort law is tort law. Torts can not be understood with a view of instrumentally achieving certain goals, but rather through the structure of the processes created within tort law. Tort disputes involve private individuals (plaintiff, defendant) where the D. is alleged to have interfered with the equilibrium, the status quo between Plf. and D., then the D. is charged with compensating the Plf. in such a way so as to restore the status quo. Determine whether there is a disruption, and correct it. The correction is not achieved through function (eg. no goal), but rather exists as an expression of justice as we understand it. Therefore, the person who committed the wrong is responsible for correcting it - this is the view taken by Bev.

2. There are circumstances in which we are dependent on other people; we rely on them to provide us with critical services (duty of care for children, provision of medical services, etc) - relations of dependence. When one person breaches this relationship such that there is a harm, they also must correct that harm through compensation. There are no further ends in corrective justice, no overarching goals which must be satisfied, only an expression of our societal notion of justice in order to redress wrongs.

2. Central tension in tort law

a. Occurs between the compensatory aspect of tort law - the emphasis on plaintiff's need for recompense - and the personal responsibility aspect - the emphasis on deterrence and the promotion of rightful conduct and accountability. For instance, in *Evaniuk,* the corporation was sued, rather than the bouncers who committed the tort - while the former was the better bet for compensatory damages, the latter would be ideal in holding the wrongdoers to account.

3. Types of justice applicable to tort law

a. *Retributive* - most similar to criminal law, seeks to exact vengeance on wrongdoers; compensation to D. not a meaningful factor.

b. *Distributive* - goods must be allocated with a view to serving justice; similar to a Posnerian view, can be seen in contract remedies aligned with principle of expectancy. Wrongdoing leads to redistribution of goods to reflect the nature of the world had wrongdoing not occurred.

c. *Corrective* - tort law. corrects injustice which has been wrought on Plf. by the D., generally by awarding damages.

4. Tort law and no-fault compensation

a. Overview

i. No-fault compensation is not slow, expensive, or unpredictable, unlike tort actions. This is the reason that governments have begun to institute a number of non-tort compensatory vehicles - bending to societal demand for such vehicles. This began with worker's compensation schemes, etc. Basically, these schemes allow for compensation even in those circumstances where the damage occurred due to accident (eg. there was neither negligence nor intention in the cause of the damage). This is an area where compensation is desirable, according to society, but where tort by definition is unable to account for damages.

b. Interaction between schemes

i. In some circumstances, the ability to seek compensation via tort is ceded through participation in the no-fault scheme (pure), where in other cases both can be pursued (add-on), or pursued only once a certain threshold of damages has been met (modified). Finally, some regions offer victims a choice (Saskatchewan) between which type of system they will pursue.

5. Development of the common law re: torts

a. Society of England in 1066AD is quite different than society today. The Normans entered a fractious preexisting world. A life of local communities each of which may have been conquered in the past and had the law of its conquerors imposed on it. The Normans were then tasked with organizing the disparate legal traditions found in England - but how?

b. Recognized that law should remain local in nature, the King will not enter into village life to impose rules unlike those which previously existed. Locality must be respected, the existing legal traditions, even where this means that there will be different rules in different parts of the kingdom. Intra-regional continuity more important that inter-regional coherence.

c. On the other hand, there must be a central bureaucracy in order to tie the nation together. One of the ways that this is made coherent is by instituting feudal property law. With the notion of property is the notion of sovereignty.

d. Tort law can be traced to the idea that while the King was to respect local customs, there is an obligation to provide the people with Royal Justice, the need for centralized justice. Deals with matters of serious import; wrongs of interest to the king.

e. Courts

i. *Court of Exchequer* - deals with finances and revenue.

ii. *Court of Common Pleas* - individuals dispute over property and inheritances. Land is the most important issue.

iii. *Court of King's Bench* - deals with matters of wrongdoing of interest to the King, with wrongs. There was no distinction between crime and private law during this period; individuals were allowed to bring actions concerning 'wrongs' to court (similar to the criminal law today) where people act with force of arms against the King's Peace (King's Peace necessary for King's Bench to take jurisdiction).

f. Actions in trespass

i. Related to force or social upheaval; making the claim that wrongdoing has been committed. The incentive to access neutral justice meant that there had to be barriers beyond simply mentioning the magic words ("against the King's peace") had to be instituted.

ii. Chancery Office was asked to provide a writ for those who sought the King's justice; document being sent to a person to summon them to court to explain behaviour (ie. why they acted against the King's peace). Trespass is the required writ required to access the courts.

g. Expanding jurisdiction

i. King's Justice so desirable, people began to engage in legal fiction to gain access to the court. Court wants to expand jurisdiction through this means. Law engages in untruths in order to solve a social problem.

1. For instance, one writ follows the following formula: Plf. bought a barrel of wine from an innkeeper, left it in the charge of the innkeeper's charge to arrange transport of barrel. Writ claims that innkeeper using force of arms against King's Peace, drew wine from barrel, replaced with saltwater.

2. Another example - blacksmith asked to shoe a horse, hammers the nail into the hoof, but accidentally lames the horse. Accused in writ of laming the horse through swords and blows and arrows against the King's Peace.

ii. *En son case* - On the case, or on the special case; making specific allegations in writ, specific to case, and this should be recognized as a form of trespass. As of 1373, court begins to recognize new writs through this concept. Not necessarily trespass against the King's Peace - the facts are of sufficient import to warrant the attention of the King's justice. Therefore, the magic words (*vit et armis*) are no longer required, thus rendering obsolete the requirement of legal fiction.

1. Different from writs of trespass - The essence of *vit et armis,* or trespass is direct force; allege *direct violence* before the court. Alternately, *nonviolent, indirect* wrongdoing will occasionally be acceptable for Royal Justice, *en son case*. The latter includes a breach of common custom concerning the treatment of dangerous items, such as animals (eg. if dogs attack sheep - wrongdoing is inability to contain dogs) or of fire, for instance. If one punches a horse, this is vit et armis; if one scares a

horse, causing it to run off of a cliff, this is en son case.

a. BUT, line blurred over time - The distinction between violent and nonviolent harms becomes blurred over time. For instance, someone brings a firework into the marketplace, sets it off causing a bystander to lose a hand. Is this trespass or case? It is hard to determine using law at the time, so development is made. The determination should not be made through the directness or indirectness of the injury, but through the intentionality of the conduct. Separate treatment is given to trespass because it is intentional. The farrier cases are cases of negligence, unintentional.

2. Two forms of en son case writs:

a. *Common custom* - treatment and care of dangerous items, such as animals or fire.

b. *Common callings* - Further, common callings come into play - doctors (apothecary) or blacksmiths (farriers) or innkeepers.

6. Unjust enrichment

a. Definition - There is an unknown area of law relating to restitution or unjust enrichment, where a person is unjustly enriched at the expense of someone else with no wrongdoing involved. The law will intervene where one person has benefited at one person's expense without breaking any laws.

i. For instance, neighbour contracts with a painting company, who accidentally arrive and paint your house. Do you owe the painter? Have you been enriched at their expense? In the situation of necessity, having damaged someone's property, have you done them wrong?

ii. For instance, tying a boat to someone else's dock during a storm in order to save valuable cargo, with the knowledge that this will damage the dock - do we owe compensation, in spite of the 'necessity' of this action?

7. Linguistic history of tort

a. From the French for "wrong." Wrong, in old English, means twisted or contorted. Wrongdoing has to do with the shape of things; misshapen, malformed. Originally an adjective, eventually came to describe unjust conduct as a noun (a wrong), and then a verb (to wrong). Also used as an adverb (wrongly). Dealing with words that have a broad application. Wrong was never seized upon by lawyers in a technical sense.

b. The Norman word of tort is adopted into the legal lexicon soon after the conquest. However, this had been proceeded in law by the word "trespass" - used in an indiscriminate manner to refer to a transgression, conduct which deviates from social norms.

8. Torts vs. contracts

a. There are different reasons taken into account in imposing damages in contract law; but, begs the question, what is the difference in breaking a promise (contract), or, alternately, acting in a manner outside of the realm of social conduct in a manner which causes harm (tort)? Very difficult to determine on a theoretical level.

9. Private vs. public wrongs

a. Legal wrongs

i. There is no hard and fast distinction between legal and non-legal wrongs. Can one sue for something which is not categorically a problem in the way that a lost leg is? For example, consider one who undergoes a sterilization procedure which fails, unbeknownst to patient, who then has a child - can this person sue the doctor who carried out the procedure?

1. Private - eg. Tort, breach of contract, breach of fiduciary duty, unjust enrichment (although this one isn't really a wrong, necessarily).

a. ALSO, brought by one individual against another. Dealing with process in which the government is providing the resources for private individuals, acting on their own behalf, without government permission, are able to bring a suit against other individuals. Pursuit of own interests. Once the plaintiff has brought suit, only the defendant has the ability to ask the court to strike down an action if one believes it is without merit. Individual cannot appeal to the government to ask them to intervene. The decision about whether the process will continue is in the hands of private individuals. Civil recourse between private disputes.

2. Public - eg. Criminal, regulatory, constitution / administrative.

a. ALSO, brought by the government against a private individual. In order to protect public interest and social order, government attempts to manage and administrate proceedings to control conduct relating to serious misconduct. Government can take over, intervene, or stop this type of activity (eg. through legislation). Victims of crime can refuse to testify if they no longer wish the prosecution to proceed, however this is not intervening, as the action can continue without their participation.

b. ALSO, constitutional violations could be considered tortious. Perhaps - can be considered "constitutional torts" - an example of public law torts! Violating rights, seeking remedy through court action, receiving compensation (or equity via injunction) as a result. Public law damages are quite different than tort damages, however.

b. Non-legal wrongs

i. any wrong which is considered outside of the realm of the legal system (eg. agreeing to meet a friend, and then failing to show up without notice).

10. Tort law vs. Criminal law

a. Overview - both processes seek to redress wrongs, deter wrongdoing in society, and effectively overcome imbalance between wrongdoer and victim. However, differ in three important ways.

b. Torts

i. Victim focused; the victim is considered, and in particular, the extent to which they have suffered damage as a result of criminal or non-criminal conduct.

ii. Prosecution brought by individual who suffered damage.

iii. Liability must be proved on balance of probabilities (51%)

c. Criminal process

i. Offender focused; the conduct of the offender is considered, and if found guilty, an appropriate sentence is rendered.

ii. Prosecution brought by the government.

iii. Guilt must be proved beyond a reasonable doubt - necessarily high relating to the fact that the sanctions are extremely severe.

11. Culpability vs. liability

a. Guilt in criminal law

i. Criminal law deals with guilt and punishment. Guilt is highly refined, a notion of responsibility. Once we have identified that someone is a criminal, we use the idea of guilt in a moral sense suggesting that the convicted has engaged in some sort of moral wrongdoing. Narrow idea concerning responsibility - we only step in and imprison people if they are subjectively accountable for the wrongdoing they have done. Judge can impose the demand that the guilty party attempt to make restitution to their victims. Attempts to be progressive in aims, as punishment / retributive justice does not recompense the party which has received harm.

b. Guilt in regulatory law

i. Notion of guilt is not a part of regulatory law - does not concern itself with moral blameworthiness. While one may be penalized for violating regulations (eg. health code in a food service business), this is a far cry from the sanctions that accompany criminal offences.

c. Guilt in administrative law

i. A harm or a wrong is not necessary on the part of the Plf. for the action to succeed, only that the government be shown to act outside of its obligations and limitations. Actions within this realm pertain to the idea of limiting the government to those limits enshrined in law, and to ensure that the government fulfills its responsibilities.

POLICY ISSUES IN SEXUAL BATTERY

1. Gendered phenomenon

a. Most victims are women, most abusers are men. Generally, involves power imbalance; women vulnerable due to lack of power in society (poverty, age, other factors), or women having been previously victimized become disempowered through fear or self-identification with victim roles. Relates to historic view of women as property, or as being for procreation or sexual gratification. Women disempowered through separation between public and private sphere; myths about nature of women embedded within legal system (particularly with a view to victim blaming).

2. Factors in increase in sexual battery civil suits

a. *Recognition* - pressure from survivors for recognition of suffering, call to account for perpetrators of abuse.

b. *Readiness* - presence of small group of female lawyers willing to take on such cases (significant risk, probably bet-the-farm litigation).

c. *Responsive* - Courts have proven themselves responsive to such claims, even though this is effectively uncharted territory.

3. Advantages of civil action in sexual battery cases

a. *Control* - Plf. has more control over process, as action is private, and does not involve the state except as a mediator in dispute. Plaintiff instead of mere witness.

b. *Cross-examination* - the nature of criminal cross examination involves secondary victimization, as focus on character of witness, not of accused. Not so in civil actions.

c. *Burden* - must prove on balance of probabilities rather than the more stringent beyond reasonable doubt standard.

d. *Message* - sends message to all women that power lost through victimization of sexual battery can be partially reclaimed by bringing action

e. *Deterrence* - may act as deterrent generally.

f. *Articulation* - provides fuller articulation of circumstances involved, in order to entrench abuse within its context. Allows catharsis, and more accurate understanding of damages.

g. *Damages* - focus on the needs of the claimant, rather than the interest of the state in sentencing. Can cover expenses, financial losses, non-pecuniary compensation, etc.

4. Disadvantages of civil action in sexual battery cases

a. Expense - can be very expensive to pursue civil action, dividing women between those who can and those who cannot afford action; latter is more "rape-able".

b. Judgment proof - many defendants will be judgment proof, lacking assets, insurance, or an interest in a distributive device (eg. a business). Thus, use vicarious liability where apt.

c. Prolong - suffering of victim due to long period of time needed to resolve matters, particularly with a view to appeals. Also, civil cross examination can also be brutal.

d. Undefended - many such cases go undefended (by judgment proof defendants) and therefore there is no therapeutic value or financial compensation.

e. Intersectionality - may ignore factors such as making heterosexuality "normative" in assessing lost opportunity for relationships, and also systemic (racial) discrimination.

5. Themes in sexual battery discredited in Norberg

a. *Seriousness* - Failure to recognize the seriousness of the harm associated with sexual violence. In the 19th century, sexual battery was treated as merely sex; the importance of the Plf.'s interest is not recognized as having the same level of importance as a doctor engaging in non-consensual treatment of a patient.

b. *Criminal focus* - Usually the criminal law that would *deal with sexual battery through prosecution, rather than the civil courts*. Access to the courts for victims of sexual battery was not encouraged. The state began to impose a notion of criminal responsibility that focused on the subjective state of mind of the accused, rather than the need of victims to be protected. Courts would accept "honest mistake" concerning the consent of the victim as a defence for the accused; ease with which one could escape a charge on doctrinal grounds obviously did little to deter such events. There has been an attempt to change the notion of what counts as a valid defence for sexual battery in the last 20-30 years - subjective state of mind is no longer a shield for sexual batterers.

c. *Evidentiary*

i. Adjudicative processes were often used in such a way so as to re-victimize those who had suffered sexual battery. Evidentiary rules allowed any aspect of sexual history to be examined in the court, for instance. This would lead to inferences being drawn concerning the credibility of the victim.

ii. Further, the Court also ran the risk of using the sexual history of a victim (stereotypes relating to chastity, for instance) in order to infer consent. Character assassination, leading to "rape shield" style rules of evidence in recent years. Not only are such rules now more likely to result in conviction, but also avoid re-victimizing.

d. *Prospective* - Equal concern is not yet being shown for all the parties. Therefore, the Court tells us in Norberg and in Scaleria that the process is not over, the problem is not yet solved. We need to understand whether the Court is making value choices, and whether these are rightful - truthful or ambivalent.

6. *Consent issues highlighted in Scalera and Norberg*

a. *Clarity* - There is a lack of clarity about what consent actually is in *Norberg* and *Scalera*. Consent can be implicit.

b. *Communication* - Talk about consent as communicating, essentially about communication. Therefore, we have to allow for the possibility of misunderstandings - what one person believes to have been communicated may not always be what another person intends to have communicated. Further, allows for the unwitting consent to an act; accidentally, mistakenly - might have led someone to believe something.

c. *Deficiency* - there is a differentiation between real consent and the appearance of consent. Apparent consent undermines the mere "communication". Consent gained by fraud, misrepresentation, coercion (or abuse of imbalance of power) may appear to be real consent, but in fact does not constitute actual consent.

d. *Open* - Whether or not the person is actually open to being touched. Not only whether the person has communicated, but whether this consent was given in circumstances in which one really is consenting to having force (sexual or otherwise) applied to their person. Genuine openness to consequence is the actual important issue underlying consent.

e. *Medicine* - the law places the onus on the doctor to ensure that the patient has given consent. The touching is wrong without such consent, regardless of whether the intrusion is beneficial to the patient.

f. *Casual* - In less formal settings, the same rule should apply, according to McLachlin. Iacobucci, on the other hand, argues that sexual touching is normal (like jostling) and therefore it should be up to the Plf. to show that this was harmful; ignores the medical cases in doing so (ostensibly because the medical relationship changes the dynamic).

g. *Definite conclusion* - if the D. is making the claim about the reasonable belief that consent was obtained, the onus should be on the D. to prove that this was indeed the case. Articulated differently, if the D. wants to show that the Plf. erred in communication, then the D. has to establish that this is the case. Scalera equates belief in consent (constructive consent) with consent, as if they are the same thing - however, they are different. We don't care about the Plf.'s communication skills, we care about the violation of the Plf.'s bodily integrity and personal autonomy.

h. *Nontrivial consequences* - Rather than engaging in sophistry, the Court could emphasize seriousness of the consequences of making a mistake. Even in informal settings, there are good reasons to make inquiries, to look beneath the surface. Since the stakes are so high,

the harm caused by mistakenly constructed consent so severe, then the onus must lie with the D., the person who is likely to make the serious mistake.

i. *Actual consent subordinate* - In most circumstances, actual consent won't be the primary issue; rather, it will be the D.'s beliefs rather than the Plf.'s openness to be touched. In most cases of concern re: sexual battery, involve the interpretation of reality between the parties, rather than what the Plf. believed. Therefore, this should be identified not as consent, but rather implied/constructed consent.

j. *Actual consent becomes irrelevant* - Ultimately, if the problems arise relate to belief in consent, does it matter whether "actual" consent is part of the definition or not? If we will always litigate based on whether consent can be constructed, regardless of whether consent actually existed, then actual consent itself (which is what the tort is designed to protect) becomes irrelevant.

CASES

- *Cook v. Lewis (SCC, 1951)*

    - Facts

        - Hunting trip with brother and friends, agree to divide bagged animals equally. Plf. accidentally shot, but could not determine whether the projectile which hit him and caused the loss of an eye originated from the gun of Akenhead or of Cook. Accordingly, sues both as joint tortfeasors, holding that their joint activity was sufficient to hold them as joint tortfeasors.

    - Rule

        - Appeal dismissed, find for D. as tort law requires that the D. be identified

    - Ratio

        - Determination of what constitutes a joint tortfeasor - cause of action is same (in concert) between one or more defendants.

            - Set out in *The Koursk* case - occurs in tort law where the cause of action against one or more defendants is the same. This occurs within the context of specialized relationships, such as that between an employer and employee (within scope of employment - this liability does not extend to actions taken by employee outside of employment), two person who agree to common action in which a tort is committed; tort must be committed by *principle* on *behalf of* or *in concert with* the other tortfeasors (*accessories*).

        - The D.'s are not considered to be joint tortfeasors, as they acted *legally*, and do not fit into special relationships otherwise required of joint tortfeasors

            - Precedent holds that when one of two individuals committed an act, and it is uncertain which of the two is culpable, neither of them can be found liable. D. holds that there are special circumstances which require that this rule be circumvented, because they are joint tortfeasors, each responsible for the acts of the other, based on the idea that they engaged in common action. However, the court did not agree, holding that this standard would require that in all common activity, that each member of the group would be liable for the actions of all other members - untenable and undesirable. There can be no liability without fault - in pursuing lawful activity, engaging in activities within the scope of that liable activity, there is no reason that one should foresee that a tort will ensue (although this is a *very* general principle). Consider that if you illegally street race with another person, who then pulls out a gun and

kills a bystander - the activity of street racing has little relation to the shooting, and this would therefore be outside of the scope.

- Policy

- Not trying to deter further actions, but rather trying to establish and elucidate the nature of complicity.

- 671122 Ontario Ltd. v. Sagaz Industries Canada, Inc. (SCC 1985)

- Facts

- Sagaz hires AIM, consulting company, to ensure that it receives contract from Canadian Tire. AIM secures contract by bribing Canadian Tire official. Competing company which lost contract sues for bribery scheme, and includes Sagaz due to vicarious liability, holding that evidence suggests that AIM was acting as an employee of Sagaz (for instance, by sending correspondence on Sagaz letterhead). Tort is unlawful interference with economic relations, makes tortfeasor liable to person affected by wrongdoing.

- Rule

- AIM found to be independent contractor, not employee, so vicarious liability does not follow.

- Ratio

- Vicarious liability is holding one person responsible for misconduct of another due to nature of relationship. Different from joint tortfeasors in that wrongdoing need not be shown.

- Most commonly, this relationship is defined as that between employer and employee. This is a strict liability principle because it requires no proof of personal wrongdoing on the part of the person subject to it. This does not include moral blameworthiness on the part of the vicariously liable party.

- There are two policy considerations which *historically* underly vicarious liability

- Master's tort theory - employer vicariously liable as acts of employee authorized by employer, and so legally, are the acts of the employer.

- Servant's tort theory - employer vicariously liable because superiour to employee, thus in charge or in command of employee.

- There are two modern policy considerations which underly vicarious liability, and these relate to the distinction drawn between direct and vicarious liability.

    - Fairness - the employer puts community at risk through *enterprise risk*, and is the party which will *profit* by those risks to the greatest extent. Further, the employer is best able, as a result, to spread losses through insurance and higher prices, thus minimizing the dislocative effect of tort. Hazards of business should be borne by the business itself.

    - Deterrence - holds that as employers are best positioned to reduce actions and intentional wrong, that vicarious liability is a means through which they do so; that they manage risk in order to minimize cost of harm which flow from their enterprise. Must be held to a high standard because the stakes are high.

- Vicarious liability requires *organization test* for whether a relationship falls within employer or contractor paradigm. These criteria are not exhaustive.

    - *Organization test* – Determine whether the person engaged to perform services is performing them as a person in business *on own account* - if yes, then the contract is *for* services, if no, then the contract is *of* service. The former is an independent contractor, the latter is an employee. The principle underlying the difference relates to the idea of *control* - vicarious liability is determined by the control in a relationship, and while a business is seen as having sufficient control over the actions of its employees to be liable for their actions, this does not follow for their contractors - contractors can be told what to do, but not how to do it. Separate offices, commission rather than wages, provision of own equipment, ability to hire own staff, financial risk taking, responsibility for investment and management of time / resources.

        - In Sagaz, AIM was found to be a contractor - while it maintained some actions consistent with an employee, the Court found that these were undertaken due to the fact that Canadian Tire did not like doing business with sales agents. Therefore, this evidence may not be consistent with the actual relationship between the parties. AIM had no ability to bind Sagaz, and while it had a directive to accomplish, it was free to accomplish this within its own means and discretion with a view to specific action. As a result, Sagaz has no vicarious liability.

- Policy

    - We do not impose enterprise liability on entrepreneurs for other risks. For instance, producers of products are not held to strict liability standard for risks create, but rather to a negligence standard (eg. the neighbour

principle / Kamloops test). Therefore, product liability requires proof of fault, but enterprise liability does not. Is this incoherent? Perhaps not - fault has already been proven in enterprise liability (eg. by the actual actor) - it is merely a question of "who else" is responsible for recompense.

- Because of the underlying discomfort of imposing liability on individuals strictly, we are going to make sure that we apply this exceptional rule in a very restrictively defined set of cases. We are going to be very careful about narrowing the ambit of the rule that we are creating because we recognize that there is an exceptional basis to it. If the subordinate in question is an independent contractor, and not an employee, the doctrine of vicarious liability will not apply.

- Court is making a similar decision to that in *Cook v. Lewis*, attempting to determine when other parties may be complicit in damage / injury rendered to another party. Is it just to hold an employer liable, where they have no control? One can only go after a third party if they are complicit in some way, and one clearly cannot be complicit with a party that one cannot control. When there is an element of control, we can connect the parties through that control, regardless of where fault actually lies. This is what the court actually does, in spite of what it claims to be doing.

- Social consequences of Sagaz - what does an entrepreneur do? Employers have great reason to outsource all of their work to independent contractors for reasons of avoiding liability. Consider outsourcing of prison staff to such agencies to avoid liability. Therefore, the government avoids its own concerns, and deliberately eschews control of areas. A fascinating consequence of this case, we have incentivized arm's length employment. This could have serious repercussions on service delivery.

- Consider, however, that this development may be to some degree undermined by the movement concerning doctors with hospital privileges. It has been found in such cases that doctors acting within this capacity may stretch vicarious liability to the hospital. Certain duties are *non-delegable* - certain duties can only be satisfied through first-party action. One cannot delegate certain types of a responsibility, in other terms - there are circumstances where someone has undertaken to do something, particularly where this involves vulnerable people requiring a high level of care, and so the duty cannot be delegated to a third-party - one will be held liable for the torts (even of independent contracts) of third parties in such circumstances. This represents the answer of tort doctrine to the neo-liberalism set out in Sagaz.

- *E.B. v. Order of the Oblates of Mary Immaculate (SCC 2005)*

    - Facts

        - Plf. repeatedly sexually abused by lay employee of D., hired as baker, odd job man, and operator. Plf. sues D. via vicarious liability, holding that they are responsible for the actions of this employee. Trial judge found vicarious liability as the operational characteristics created a risk of sexual abuse. Appeal court found that trial judge's decision did not pay sufficient attention to lack of connection between employee's role and wrongful act (employee's role does not involve any intimacy or power).

    - Rule

        - Vicarious liability cannot be found, appeal dismissed.

    - Ratio

        - Vicarious liability requires *strong connection* between the task set for the employee (enterprise) and the wrongful act; increased risk as result.

            - D. must have significantly increased risk of harm by putting employee in position and requiring completion of assigned tasks. This can be measured using the Bazley test.

                - This risk cannot be found in residential school - the enterprise only provided opportunity. If mere opportunity were sufficient, then employers would be responsible for all tortious acts of employees in all circumstances - an untenable position. Further, if it provided more than opportunity for sexual abuse to occur through enterprise, it would be *directly*, not vicariously liable.

        - *Bazley* test, five parts, is to be applied where the precedents are unable to resolve issue of vicarious liability unambiguously, or are insufficiently similar. Relate to whether employer enhanced risk of intentional tort - measures whether there is a *strong connection* between task of employee and tortious conduct. Must be applied in accordance with policy considerations (fairness, deterrence)

            - Opportunity - extent to which enterprise offered opportunity for employee to abuse power; if employment provides ample opportunity (eg. through lack of supervision), then this must be taken into account. Rigidly structured work environment mitigates vicarious liability.

                - Opportunity at low end of significance, particularly as the contact between employee and Plf. was limited, brief, and discouraged.

- Furtherance - extent to which wrongdoing furthers the aims of the employer (which increases likelihood of tortious act by employee); for instance, AIM's bribery in Sagaz furthered the D.'s aims, aggravating, whereas it can be said that in this case, abuse worked against aims, mitigating.

    - Aims of D. are not furthered in any way by the abhorrent acts of employee.

- Role - extent to which wrongdoing relates to nature of role with a view to intimacy, friction, or confrontation inherent in enterprise; this is an important factor - relates to the psychology of the environment in which the tort occurred. For instance, dehumanizing element inherent in residential school.

    - Intimacy did not extend to employee, and was not expected in roles assigned to employee by D.

- Power - extent of power conferred on employee in relation to the victim; however, there is a determination required for perspective, requires a basis for comparison. In E.B. they compared the power of the handyman with the power of other people in contact with the children.

    - No power assigned to employee over Plf. While adulthood confers some power in school setting, this cannot be the basis of liability - turns employer into *involuntary insurer*.

- Vulnerability - extent to which potential victims will be vulnerable to wrongful exercise of power. This is a key issue, strongly weighted although not determinative. Increasing vulnerability is an aggravating factor, decreasing vulnerability is mitigating.

    - The students at school are vulnerable, but not to the power given to employee by D. He exerted his own agency in taking advantage of student vulnerability, and this did not stem from the roles and powers given by D.

- There are two policy considerations which must be fulfilled in assessing vicarious liability, in accordance with the Bazley test.

    - Remedy / Fairness - just and practical, fair and efficient remedy for wrongs. In order to be just, cannot be coincidentally linked to tortious act, but must consist of a more meaningful connection, as set out in the *Bazley* test.

- Deterrence - vicarious liability must provide fair and efficient deterrent against future wrongdoing as well. This includes care by the court to ensure that over-deterrence does not preclude acts which are beneficial to society.

- Precedents do not have to be *very* similar to resolve vicarious liability issues concerning sexual abuse.

    - As Bazley was a pioneering case, it tempered itself with caution due to the broad domain of its scope. However, in sexual abuse cases, the need for "very similar" fact patterns is not necessarily required.

- Policy

    - Direct liability - This case leaves open the question that the school may be directly liable, in that it may not have taken sufficient care with a view to hiring practices, etc. that would make the school itself liable to the Plf. Vicarious liability has been ruled out, however.

    - Private law inappropriate - There are independent assessment processes (provincially) which relate to making claims for compensation for abuse suffered in a residential schools. One of the results of this case was a recognition of the magnitude of the problem, and realization that private law may not represent the ideal approach to recompense and provide redress.

    - Three problems

        - Binnie wants to identify that the trial judge in this case has done something wrong. In other words, if you look at the decision, wants to haul the trial judge over the coals, didn't make it clear enough the reasons for holding the Oblates responsible. There is not sufficient fact in this circumstances to prove the strong connection between the employer and the wrongdoing. The difficulty with this is that Binnie dismisses the action, rather than sending it back to trial for a fuller definition of the facts. Could be seen as punishing the Plf. for the inadequacies of the trial judge.

        - When you read Abella's dissent, there is a stronger notion of that the experience of living in a residential school is like. There is a need to fabricate a suitable resolution to the issues concerning residential schools.

            - Is this a matter meant to resolve all residential school issues? Or only the matter of E.B.?

        - Artificial to approach vicarious liability as a two-part test, as necessarily both precedent (eg. Bazley) and policy considerations (fairness, deterrence) will enter into each stage of analysis. There are two levels of

decision making, according to Binnie. Have to ask whether there is a precedent which decides this case - if not, only then do we consider the Bazley factors in order to inform our decision. Binnie accepts that there will never be two identical fact situations - nevertheless, the Bazley factors will be sufficient to resolve all ambiguities.

- - *Non-Marine Underwriters, Lloyd's of London v. Scalera (SCC 200)*

- Facts

  - *The Scalera* decision is not a tort case, but rather an insurance case. Focuses on the meaning of an insurance contract.

  - Victim of sexual assault sues BC bus drivers who committed it, one of whom is insured by the respondent in this case. The appellant, the bus driver, contends that the policy should cover negligence in this circumstance, in spite of the fact that the policy explicitly excludes liabilities incurred through intentional or criminal act. This action required the Court to address the question of whether the existing conception of battery in torts is sufficient, or whether it must be modified in order to shift the onus of proof onto the Plf. (as in other torts - negligence, for instance).

- Issue

  - Should the onus lie with the defendant to prove that they were not negligent, or that interference was consensual in battery actions (traditional approach)? Or rather, should the plaintiff have to prove that consent was absent (new approach being applied in other jurisdiction?)

- Rule

  - Traditional approach to tort of battery will remain in power, however the door is not closed to future reinterpretations, particularly with a view to the definition of what contact or interference will constitute battery (bar currently set at "non-trivial"). To do otherwise is to suborn victim's right to personal integrity under tortfeasor's right to act freely - counterintuitive.

- Principles

  - Traditional view of battery tort holds that the onus is on the defendant to raise an affirmative defence, prove that the trespass was utterly without his fault (eg. prove that the Plf. consented to the interference, for instance).

    - In order to prove that one is not liable, a battery D. must show that the act was both unintentional and without negligence. While consent, express or implied, is a defence to battery, this must be proved in a

compelling and convincing matter through evidence introduced by D., or otherwise the defence will not apply.

- There is a view that the tort of battery should be altered to reflect developments in the UK and elsewhere, shifting the burden of proof onto the Plf. However, this suborns the Plf.'s right to integrity to the D.'s freedom to act.

    - This view asserts that the Plf. has an unfair advantage in tort actions through the easement concerning the burden of proof. Hold that the Plf. must prove fault as part of case, by showing that the actions were intentional, that the D. was negligent, or that it is a strict liability tort which should apply (eg. damage occurring as a result of the response of rescuers to a negligent action). In the current case, this would be analogous with the opinion that the Plf., in order to be owed compensation, must prove that the D. either knew, or should reasonably have known that consent was absent concerning the interfering act.

- Development as suggested would support the D.'s freedom to act over and above the right to autonomy and integrity owed the Plf. Inconsistent with the closeness of connection between D.'s actions and results.

    - Fault is required in negligence and other torts due to the fact that the link between the activities of the D. and the damage or interference experienced by the Plf. may be remote (eg. leave a dog in a car on a hot day; the dog attempts to escape the car, in so doing shatters a window, a splinter of glass injuring a passerby). However, in battery, there is a direct link between the actions of the D. and the interference experienced by the Plf. Between the person who caused the injury and the person who received it, who should pay? Prima facie, once the Plf. has shown that personal autonomy has been violated, the D. should pay (unless there is a compelling defence available).

- It makes practical sense for the Court's to incentivize the production of all evidence by the D., and this end is accomplished through retaining the onus of proof for defence of battery with the D (GWB's "smoke out")

    - Effectively, this will help smoke out evidence which is required by the courts in order to achieve a complete understanding of the events which transpired. If the burden of proof concerning fault were to be shifted to the Plf., a considerable body of evidence which would be relevant to the Court's understanding may be omitted by the D., who would perhaps see this as prejudicial to defence (although, this view is basically saying that the D.'s should be incentivized for not withholding evidence from the Court - isn't their full cooperation required in any case?)

- There is a highly demoralizing cost where a victim of a direct attack is unable to garner recourse through the law; the *principle* principle.

    - There is further psychological impact of the law not supporting one who has been directly wronged w/ battery injury, particularly where this involves violence, or sexual violence.

- *Nolan v. Toronto (Metropolitan) Police Force* (ONCJ 1996)

    - Facts

        - Aboriginal Plf. asked to provide police with identification. Does so, police leave, run Plf.'s name through database, determine that there are warrants for person with same name, birthdate. Police arrest Plf. Plf. sues, holding that this detention was unlawful, as he was not the same person described in the warrant, and it was the responsibility of the police to ensure that they were rightful in detaining this person.

    - Issue

        - Is it unlawful detention where police officers detain the wrong person under a warrant, where they failed to take the required steps to determine whether or not they were detaining the right person?

    - Rule

        - Such detention is unlawful. Warrant gives leave to detain one person, the police detained another, with no legal excuse. Exacerbated by lack of due diligence by police in identifying detainee. Damages awarded.

    - Principles

        - While initial arrest was authorized, continued detention unjustified as examination of the warrant would show that wrong man detained.

            - Court found that the officers acted in bad faith, detained Nolan because he was aboriginal, and not because of the warrant. Officers chose to ignore those portions of the warrant which would imply that the detainee was not in fact the person described in the warrant. Jailer owes duty of care to prisoner in order to ensure that detention is not wrongful, but the requisite steps were not taken, and deliberately so.

        - Actions of one officer were intentional, ergo fitting false imprisonment tort; the other was *negligent*, and this found sufficient to constitute F.I.

- This figured in the award of punitive damages. Detention of individual traced not only to intentional, but also negligent wrongdoing.

- *Lumba v. Secretary of State for the Home Department* (UKSC 2011)

  - Facts

    - Two men detained under FNP (foreign national prisoners) pending deportation. Published policy holds that those detainees who had criminal records would be detained, but Secretary of State admits adherence to unpublished policy during this period, which advises the detention of all FNPs. Plf. argues that this detention wrongful, as in accordance with unlawful unpublished policy. D. argues that the Plf. would have been detained anyways, as have criminal records.

  - Issue

    - Is the *causation* test applicable to wrongful imprisonment torts? Is wrongful imprisonment tortious where there were alternate means to accomplish lawful imprisonment, but these were not exercised?

  - Rule

    - The men were wrongfully detained. *Causation* test cannot be used to support unlawful detention; however, it can be used in a determination of damages, and to this end holds that the men suffered little harm, and are only due nominal damages - in this case, one pound each.

  - Principles

    - Neither common law trespass nor statute support the defence of *causation* in F.I. - actionable *per se.*

      - D. holds that their wrongful adherence to illegal policy (rather than legal, published policy) did not *cause* the Plf. to be imprisoned, as still would have been imprisoned anyways. The reference to how a body could or would have acted if it had acted lawfully is not relevant in determining whether the Plf. has been wrongfully imprisoned. What is important and relevant, is rather a consideration of how the executive did act in fact. To do otherwise would be effectively rewriting history (eg. they acted unlawfully, but the outcome would have been the same if they acted lawfully so we should suppose that they did! - this is not rightful). Causation can only be used in determination of damages - if the detainee has suffered no loss, because outcome would have been the same if the D. acted lawfully, then this is considered with a view to redress, and not tort in general.

- Wrongful imprisonment does not require awareness of that detention or its wrongfulness, in accordance with supremacy of personal autonomy.

    - The law attaches supreme importance to the liberty of the individual, and if he suffers wrongful interference with that liberty it should remain actionable even without proof of special damage.

- Sets out basic elements required for wrongful imprisonment to have occurred.

    - There must be detention and the absence of lawful authority to justify this detainment. Where the detainer is a public authority, as in this case, must have the power to detain and this must be exercised lawfully

- The causation defence is not sufficient to overcome liability for interference with personal autonomy; but can be factored into damages.

    - Thus, following the trajectory of the lives of the Plf.'s had they not been wronged, their damages are strictly nominal; no harm has been incurred.

- *T.O. v. J.H.O.* (BCSC 2006)

    - Facts

        - TO sues brother under tort of battery for sexual contact which occurred when they were both under the age of consent. TO claims that much of the contact was coercive, although not all. The main consideration is whether the defendant, JHO, can be held liable for actions given his age during the period when the batteries were committed.

    - Issue

        - Is there a defence for sexual battery based on the age of the offender, where this could intersect with the ability to form intent?

    - Rule

        - D. is liable; intentionality established through strict principle, and even through lenient principle as had some understanding of degree and quality of acts. Further, Plf. cannot consent to conduct while under age of criminal consent.

    - Principles

        - Criminal law has minimum age of 12 for culpability; no lower age limit in intentional torts; age relevant only in conception of intentionality.

- The age of the actor can only be considered to be relevant in a determination as to whether that actor possessed the capability to form intent for the actions. Put another way, the actor must be able to understand the nature and quality of their actions in order to form intent, and thus be held liable.

- Galloway argues that this is in fact a problem of limited moral responsibility. It is not one's knowledge or appreciation of the world (may know exactly what is going on), but rather the ability of one to react quickly enough. Our expectations of the young are limited, and not just as it concerns their ability to form intentionality

- Even though child does not understand severity of consequences / level of harm, this does not undo liability of child in commission of battery tort.

    - Does not need to be cognizant of mental and physical consequences of actions. Regardless, in this case the D. had some awareness of nature of acts (eg. that they were sexual).

- Battery is not a causally based tort; it is sufficient to have battered someone for liability to be established, regardless of consequence

    - For instance, actor may or may not be old enough to understand consequences, but this doesn't matter - battery requires only interference with autonomy.

- There is a focus on sexual nature of activity in this case; however, may not be rightful; non-sexual battery is still a battery.

    - Exactly. While the Courts may be holding sexual batterers to a higher standard, this is a focus on the more severe nature of the activity and the more deleterious consequences as a result. Trespass, however, should not be taking these factors into consideration - it is sufficient that the person is interfered with, not necessary to go further concerning consequences.

- As we can say that D. knew activities were wrong. We can say that there is a developed conscience, should have guided D.'s activities.

- Contact or interference is prima facie offensive, unless it is proven to be consented.

    - That is to say, the onus of proof is on the defendant to show that the contact was genuinely consensual, otherwise, if the Plf. has proven that contact or interference occurred, this will be sufficient to hold the D. liable to the Plf. for damages.

- Liability in battery is established through harm or interference, and not through defendant culpability (read: intentionality).

    - This is a justification of the strict reading of intentionality under tort. That is to say that actions are intentional if borne of a conscious mind, acting under its own volition. It was only in later years that capacity to consider quality and nature of actions was taken into account; however, sexual battery implies that this is not rightful. To base the law on a principle of fault would be to subordinate the Plf.'s right to personal autonomy to the D.'s freedom to act.

- Traditional approach to liability does not impose liability without fault in any case.

    - While it has been argued that liability in battery is not borne out of fault, or the D.'s culpability, even were this not the case, it is irrelevant - battery; fault is found in the violation of another person's right.

- The age of consent in criminal cases can be applied in civil cases where appropriate; fourteen and under = no consent.

    - The defence of consent is only available where the victim is capable of granting that consent. It would be inconsistent to hold that while someone would be incapable of consenting for criminal purposes, that the same act would be able to be consented to for civil purposes. As the age of consent in criminal is set in order to prevent children from experiencing exploitation, and this is a desirable goal in civil law as well, then the limit should apply.

    - This age is a matter of public policy, designed to protect children from sexual exploitation.

- Where there is a power imbalance (eg. between older and younger siblings) with a person under age of consent, defence of consent invalid.

- There is a relation between public policy and private rights. Courts will not listen to arguments concerning consent due to policy concerns.

    - Therefore, even if the Plf. had been a "mature minor", the Court would not hear arguments concerning consent relating to the public policy requirements concerning the protection of children. We cannot allow possibility of inquiries concerning consent of children to sexual touching / other battery, due to the high likelihood of mistakes being made on aggregate level.

- There is a recognition of the particular vulnerability of children, but not of adults, regardless of evidence (vulner. of poor/women/racialized).

- Damages must reflect nature and impact of battery, and sexual battery is more damaging than non-sexual battery

    - Sexual battery, to greater degree than non-sexual battery, causes serious, lasting emotional and psychological injury. In accordance with this, sexual battery is aggravated compared to non-sexual battery, and this must be taken into account in order to calculate appropriate redress.

- Punitive damages are only to be awarded in extreme circumstances; may not be appropriate where under age of criminal responsibility.

    - In occasions where conduct so extreme that it cries out for punishment, punitive damages are appropriate. Mere reprehensibility is not sufficient, requires vindictive or malicious action beyond abhorrence / repugnance. Further, where a D. is under the age of criminal liability, it may not be appropriate to punish where the criminal law would not.

- *Babiuk v. Trann* (2005 SKCA)

    - Facts

        - Rugby match, Babiuk steps on player's face, referee does not notice, Trann interferes by punching Babiuk in the jaw. Only strikes once; sued by Babiuk for damages as a result of this battery.

    - Issue

        - Is there a defence available for battery in exerting force to protect another person from harm, or reasonable apprehension thereof?

    - Rule

        - Upholds TJ's decision, that defence of others allowable, in this case was reasonable and proportional, and therefore no damages owed.

    - Principles

        - Parties can use reasonable degree of force in protection of themselves or others against unlawful use of force. Force *necessary, proportionate* v evil being prevented.

            - Force is not reasonable where unnecessary, or disproportionate to the evil to be prevented. However, where a person could reasonably believe that harm is to be visited on oneself or another party, then this constitutes a

justification to use force in protection.

- Greater caution is required when defending others, owing that a third party cannot usually understand the extent of the threat as well as a first party.

    - Further, we want to ensure that the person entering the fray made sufficient inquiry to the extent of the threat before taking action.

- Belief is sufficient; must have honest belief - can be mistaken, however, in order to justify the use of force in defence of others (*Gambriell*).

- There is no reason to confine defence of others to family members, or restrict it to occasions outside of contact sports.

    - Family - there is no such restricting principle, and further this is inconsistent with underlying principles of defence, eg. prevention of harm or interference. Whether one is related to party or not, harm to victim remains the same.

    - Sports - concerning contact sports, while these will involve a higher level of consent to battery, the line between consensual and non-consensual contact will be weighed on facts by the trial judge (eg. evil being defended from must occur within the nature of consent given relevant to nature of the sport - by playing rugby, one does not consent to have one's face stepped on). Further, while there is an authority figure present, this referee may not be able to manage protection of everyone engaged in activity.

- The allowance of defence of others is not tantamount to allowing vigilantism, as it must be proportional, necessary, and cannot be used punitively.

    - This is due to the fact that the defence allowed restricts actions to proportionality and necessity in the face of potential harm; one cannot use force punitively in such a situation.

- Policy - Begs question, why doesn't tort law depend directly on the *CCC* (for instance, concerning defence of others)? They are designed to represent two different interests; a public interest (subordinate, but strict penalties and so broad defence) and a private interest (superiour, but minor penalties and so narrow defence).

- *Allan v. New Mount Sinai Hospital* (ONHCJ 1980)

- The right to consent, consent conditionally, or revoke consent is not mere formality. Relates to fundamental right of control over own body, integrity.

- *Malette v. Shulman* (ONCA 1990)

    - Facts

        - Woman injured severely in car crash, taken to hospital for treatment - unconscious. Nurse finds JW card in wallet, refusing blood transfusions. D., physician, determines that Plf. will die without such transfusions. Administers these personally, with knowledge that this contradicts the instructions on card.

    - Issue

        - Can an intent card constitute consent or refusal to treatment in an emergency situation in which the Plf. is unconscious?

    - Rule

        - Intent card constitutes consent/refusal, and binds doctor to follow treatment directives provided for therein.

    - Principles

        - Intent card sufficient to form consent or refusal, except for where there are reasonable grounds to doubt the validity of the card.

            - D. argues that card does not provide sufficient information to constitute consent. Holds that could not know whether or not card signed under duress, signed with full knowledge of risks involved with refusing blood transfusions, whether D. had changed mind previous to accident, or whether accident would itself have changed D.'s mind. Court disagrees. Card itself is valid, and can only be ignored where reasonably believed to be invalid.

        - Right to refuse treatment is component of the supremacy of patient's right over own body. This holds true even where perceived as foolish or harmful.

            - Certain aspects of life are more important than life itself; death before dishonour, death before loss of liberty, religious martyrdom. The right to refuse medical treatment is considered such.

        - Any intentional, nonconsensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable.

            - Person can waive this protection, and where this is the case, and such consent is proven by the D., then no action in battery is maintainable against the D. However, acknowledgement of the patient's decisive role in the medical treatment process. Every human being of adult years,

sound mind, has a right to determine what shall be done with his/her own body; otherwise liable.

- There is an exception to informed consent in emergency situations; where med. treatment necessary to save life or preserve health.
    - This exception applies in circumstances involving unconscious or otherwise incapacitated patients in emergency situations; doctor may proceed without consent in such circumstances. This can come from two sources:
        - *Implied consent* - Doctor has implied consent to take such actions that will save life / preserve health.
        - *Privilege by necessity* - Considered more accurate, doctor privileged by necessity in giving aid, not liable. In emergency, doctor's desire to do good becomes more important than consent; a polarity change concerning the reasons underlying *key rule*.
- There are three components required in considering whether treatment should be administered without consent in an emergency.
    - *Incapacity* - patient must be without capacity to make decision, with no one else able to legally act for patient available.
    - *Time* - time must be of the essence, in that it must reasonable appear that a delay would cause harm or death otherwise avoided
    - *Reasonable* - under same circumstances, a reasonable person would consent, probabilities are that subjective patient would also.
- Emergency doesn't override *advance declarations* by patient, whether oral or in writing, where there is no reason to doubt validity of statement. Exception.
    - In this case, there was a clear declaration available, with no reasonable grounds available for doubting the validity of this declaration. In such a circumstance, it is as if the patient told the doctor, prior to losing consciousness, that she does not consent to blood transfusions.
- The right of an incapacitated patient to preserve physical integrity weighs against countervailing social/state interests
    - The state has an interest in ensuring the health of its citizens (eg. prohibition of certain dangerous activities), and also in preserving the integrity of the medical profession. However, interest in the former limited to ensuring the health of society at large, and does not undermine

the right of each person to dispose of their bodies as they will. Interest in the latter cannot undermine the right of integrity either, as to do so would be to undermine the doctrine of informed consent, and vest decision making entirely in doctors.

- Policy

- Shulman offers a symmetrical, elegant argument - that consent not sufficient to justify medical intervention, must be more: informed consent. On the other hand, refusal should also be informed; doctor should be allowed to reject refusal where it is not based on appreciation of risks.

- Would not the entire problem be solved through a formalized system, if the only issue is the questionable nature of the intent cards (as with organ donation)?

- The issue here is that the best medical treatment is the normal medical treatment. Logging religious or other exceptions would serve to reduce overall quality of care; however, quality of care is subordinate to personal autonomy and integrity through the very nature of *IC*.
- So, assuming that every patient which comes before a doctor is accompanied immediately by full information concerning acceptable treatment. In that circumstance, it would be repugnant to the idea of personal autonomy for a doctor to contradict such information.

- When a doctor encounters a patient with a bracelet that says "allergic to antibiotics", the doctor does not question whether or not that bracelet was issued with informed consent of patient.

- Further, consider a circumstance in which a patient is allergic, has not yet received the bracelet, and so prudently laminates a card which states her allergy and puts it in her purse. Would a doctor be rightful in discarding such a card on the basis of informed consent? Nope.

- That being the case, the only approach through which information can be discarded is if there is reason to believe that it does not factually represent the wishes of the patient. Not the "informed consent" of the patient, mind you.

- *Reibl v. Hughes* (SCC 1980)

- Facts

- Plf. undergoes surgery, performed competently, suffers stroke as a result. Sues doctor, holding that while surgery was consensual, it was not compliant with informed consent doctrine as D. has not made Plf. aware of all risks accordant

with surgery.

- Issue

    - Where a doctor fails to fulfill the requirements of informed consent in performing procedure, is the appropriate action through battery or negligence?

- Rule

    - In such a circumstance, absent fraud or misrepresentation, the action would be in negligence and not battery; consent was gained.

- Principles

    - If nature of operation is substantially that of which the Plf. was advised, (omitted information limited to risks), then consent given, no battery; ergo, *negligence* apt.

        - While battery has advantages over negligence (no need to prove causation in battery), the latter is appropriate in circumstances described, as consent has indeed been obtained, and battery is by definition intentional, non-consensual tort.

    - If surgery performed with no consent whatsoever, or in non-emergency, procedure performed beyond limits of consent, then *battery* appropriate.

        - Lack of information concerning attendant risks is not sufficient to undermine consent that was given. Consent obtained must have been obtained through misrepresentation of the nature of the procedure itself.

- *Region 2 Hospital Corp v. Walker* (NBCA, 1994)

    - Facts

        - Fifteen year old boy, D., diagnosed with leukaemia. Treatment will require blood transfusion. Judge grants parental rights to Minister of Health, as D. refuses consent. D. had signed release forms concerning liability of Docs, consequences of decision, and refusal regardless of whether transfusion required to save D.'s life. Hospital make an application to declare D. a mature minor, and release hospital from liability in refusing blood transfusions.

    - Issue

        - Does the state have jurisdiction to interfere in the treatment of a mature minor, via *parens patriae?*

- Rule

    - *Parens patriae* jurisdiction does not apply to *mature minors*; the state has no right to interfere, any more than parent, in treatment of mature minor. Ergo, has ability to refuse blood transfusions.

- Principles

    - D. meets criteria set for mature minor classification, that two docs agree that treatment in best interest, able to understand consequences.

        - Further, after the D. reaches the age of sixteen, the agreement of the docs is no longer required. If the D. meets mature minor requirements, then able to determine own treatment regardless of whether doctors agree or disagree concerning interests of course of treatment, extent of understanding, etc.

    - Mature minors have the legal capacity to consent to own treatment, and in such circumstances, no parental consent is required.

    - *Parens patriae* jurisdiction does not apply to mature minors; the state has no right to interfere, any more than parent, in treatment of mature minor.

    - The right to informed consent subsumes the right to refuse consent; they are not separate rights, granted individually, but rather are the same.

        - While TJ holds that the legislature would have explicitly extended right of refusal were this intention, CA holds that part of consent holds that D. able to select between alternate treatments, etc.

- Policy

    - Ryan concurs, but differs in reasoning; holds that intent of legislation was never to allow youths to refuse treatment in life threatening situation; only informed consent. If child refuses consent in life threatening situation, the state is obligated to exercise *parens patriae*. The jurisdiction of the Courts is not deposed by his refusal, and can be reinstated in a life-threatening situation.

- *SJB (Lit. Guard. of) v. BC (Director of Child, Family, and Comm. Serv.)* (BCSC 2005)

    - Facts

        - Plf. under age of consent, JW, refuses blood transfusion in spite of cancer treatment which may require such in order to save her life. Docs determine after chemo that transfusion is necessary, cannot obtain consent from Plf. or parents.

Go to Court, TJ authorizes transfusion where necessary to preserve life.

- Issue
    - Which definition of minor is relevant - common law (mature minor), legislative (child/youth), and do either of these negate *parens patriae?*
- Rule
    - Appeal fails, TJ's authorization of transfusions is upheld.
- Principles
    - Legislative definition of child and youth is above the common law idea of mature minor. However, both are subordinate to *parens patriae.*
        - Plf. holds that meets criteria for mature minor at common law, and further that this rule is superiour to the Child Family and Community Service act definition of a child/youth; for the common law rule to be supplanted by the legislation, there would have to be express mention of this in the legislation. This mention is not present. However, not compelling to the courts; regardless of whether the Plf. is a *child/youth*, or a *mature minor*, neither status is sufficient to remove from the state its *parens patriae* powers.
    - Where legislation provides complete code for dealing with consent/refusal of treatment by minors, this legislation supersedes common law.

- *Latter v. Braddell* (UKCA 1881)
    - Housemaid, believed to be pregnant, forced to submit to medical exam by doctor in order to disconfirm or confirm. Ultimately terminated, and seeks action in assault.
    - Absent force, violence, illegal act done or threatened, it follows that Plf. had ability to comply or not within her power, regardless of whether she was aware of this.
    - In this case, through a mistaken belief about the law, Plf. was not aware that she had this ability. Court found that absent violence, this doesn't matter.
    - Policy - the Court in this case ascribes to the Plf. power which she simply does not have, and further, could not possibly wield in absence of knowledge that she has it.

- *Hegarty v. Shine* (UKCA 1878)

    - Plf. contracts sex disease from partner, D., who hid infection from her. Claims assault, as would not have consented to sexual activity had it not been for concealment.

    - Concealment of disease does not vitiate consent, as it does not deceive concerning nature of the act, but rather only concerning risks associated.

    - Floodgates argument, that if deceit used to vitiate consent, all manner of claims would be brought, including by paramours seduced by false promises of marriage, for instance.

    - Policy - in this case, uses adverse female stereotype and weak floodgates argument, as Court could very easily weed out vexatious suits by requiring presence of physical harm.

- *J (LA) v. J (H) and J (J)* (SCC)

    - Daughter, abused sexually by father, sues both mother and father, the mother being joint and severally liable in negligence for failing to protect daughter from father's abuse.

    - Policy - finding ignores critical facts, namely that she may not have had power to stop abuse, may have been victim of abuse herself. Ex post facto vesting of power in victim. Such liability should be reserved for cases of egregious maternal disinterest.

- *Norberg v. Wynrib* (SCC 1992)

    - Facts

        - Plf. addicted to painkillers, seeks treatment from D., who rather than attempting to treat addiction, instead uses Plf.'s illness to exploit her for sexual favours. Plf. brings action against D., who claims that did not batter, because Plf. consent to sex; further, Plf. was engaged in illegal activity, therefore barring equity claim.

    - Issue

        - Where a doctor exploits a patient for sexual favours, is it possible for the patient to consent? Should such consent be accepted? If not, is the correct action one in sexual battery or in breach of fiduciary responsibility?

    - Rule

        - Consideration of fiduciary relationship not necessary, where there is already an action available in battery. Introduces test based on unconscionability for determining whether there is an imbalance / exploitation relationship which would either vitiate consent or allow consent to be set aside for policy reasons. In either case, Plf.'s claim succeeds, awarded damages.

- Principles

    - There are four different approaches to sexual intrusion which are advanced in this case:

        - Battery - the tort of battery, updated to reflect a more modern understanding of consent, can be used to deal with this situation.

        - Fiduciary duty - McLachlin/Dube; cannot reduce this merely to the tort of battery

        - Negligence

        - Ex turpi causa

    - *Ex turpi causa non oritur actio* doctrine holds that one cannot bring an action founded in a dishonourable cause; not applicable to *Norberg*'s actions, however.

        - In this circumstance, there is no causal link between immoral behaviour (eg. double doctoring) and the harm suffered; had she not double doctored, but instead persisted in sex relationship w/ D., harm arguably would have been worse. Further, her participation in sex relationship was not voluntary, result of exploitation, and ergo not valid consideration.

    - Battery is the intentional infliction of force on another person, and consent - *express* or *implied* - is a defence to a battery.

        - Failure to resist or protest is indication of consent where a reasonable person aware of consequences and capable of protest would voice objection.

        - Implied consent is not the mere lack of refusal, but rather requires that there be informal, positive signs which indicate consent. Diminishes the role of the victim, however, as harm is considered "mitigated" by the mistake of the D. concerning whether the Plf. consented.

        - Consent to battery can't be given under (1) threat, (2) force, (3) influence of drugs, and (4) is negated by fraud concerning nature of D.'s conduct.

        - Consent also vitiated through (1) *feeling of constraint* if this interferes with (2) *freedom of person's will* - viz. effects *voluntariness*; doesn't need fraud/incapacity/coercion necessarily, if constraint affects the will.

    - Looks to contract concept of *unconscionability* in contracts to understand nature of voluntariness in tort; two part test for proof of *inequality negating consent*.

Ergo, in spite of mutual consent, unconscionable agreements is not recognized:

- (1) *Imbalance of power* - inherent in doctor-patient, parent-child, and other such relationships.

- (2) *Exploitation* - whether transaction is divergent from community standards of conduct. Involves instigation (in this case), manipulation of relationship to her detriment, to his gratification.

- Possible that lack of voluntariness caused by feeling of constraint (weakness) does not *vitiate* consent, but rather sets aside consent to satisfy public policy.

- This doctrine does not alleviate all responsibility of victim, but rather only protects from exploitation and vulnerability, not folly and carelessness.

- Dissent

  - Negligence, battery, etc. look on Plf. and D. as equal actors, and this not the case in doctor-patient relationship. Ergo, *fiduciary responsibility* correct approach.

    - Further, other relationships governed by self interest, whereas fiduciary relationship governed by trust, one must act in best interest of beneficiary

    - Doctor is more than a mere professional; architects can act in own interest on behalf of client, but doctor must always eschew own interests, can only ever act on the interest of patients.

  - In the context of her relationship with D., Plf. was not a sinner, but a sick person, therefore "clean hands" and *ex turpi* doctrine is inapplicable.

  - Power imbalance in doctor-patient relationships means that sexualization of that relationship is *always* a breach of trust; avoidance of breach always with doctor. Obligation of doctor is to heal; to use this to do otherwise is a breach.

  - There is an argument which concerns that society will treat all exploited/ vulnerable people as incapable of consent, attach this to consent to treatment, etc

  - Characterizing sexual battery in context of fiduciary responsibility does not open floodgates, as within principles already recognized - doctors already fiduciary.

  - Cannot fully compensate for the wrong by focusing merely on sexual battery, but rather must take into account breach of relationship, failure to treat.

- *Non-Marine Underwriters, Lloyd's of London v. Scalera (SCC 2000)*

    - Facts

        - *The Scalera* decision is not a tort case, but rather an insurance case. Focuses on the meaning of an insurance contract.

        - Victim of sexual assault sues BC bus drivers who committed it, one of whom is insured by the respondent in this case. The appellant, the bus driver, contends that the policy should cover negligence in this circumstance, in spite of the fact that the policy explicitly excludes liabilities incurred through intentional or criminal act. This action required the Court to address the question of whether the existing conception of battery in torts is sufficient, or whether it must be modified in order to shift the onus of proof onto the Plf. (as in other torts - negligence, for instance).

    - Issue

        - Should the onus lie with the defendant to prove that they were not negligent, or that interference was consensual in battery actions (traditional approach)? Or rather, should the plaintiff have to prove that consent was absent (new approach being applied in other jurisdiction?)

    - Rule

        - Traditional approach to tort of battery will remain in power, however the door is not closed to future reinterpretations, particularly with a view to the definition of what contact or interference will constitute battery (bar currently set at "non-trivial"). To do otherwise is to suborn victim's right to personal integrity under tortfeasor's right to act freely - counterintuitive.

    - Principles

        - Traditional view of battery tort holds that the onus is on the defendant to raise an affirmative defence, prove that the trespass was utterly without his fault (eg. prove that the Plf. consented to the interference, for instance).

            - In order to prove that one is not liable, a battery D. must show that the act was both unintentional and without negligence. While consent, express or implied, is a defence to battery, this must be proved in a compelling and convincing matter through evidence introduced by D., or otherwise the defence will not apply.

        - There is a view that the tort of battery should be altered to reflect developments in the UK and elsewhere, shifting the burden of proof onto the Plf. However,

this suborns the Plf.'s right to integrity to the D.'s freedom to act.

    - This view asserts that the Plf. has an unfair advantage in tort actions through the easement concerning the burden of proof. Hold that the Plf. must prove fault as part of case, by showing that the actions were intentional, that the D. was negligent, or that it is a strict liability tort which should apply (eg. damage occurring as a result of the response of rescuers to a negligent action). In the current case, this would be analogous with the opinion that the Plf., in order to be owed compensation, must prove that the D. either knew, or should reasonably have known that consent was absent concerning the interfering act.

- Development as suggested would support the D.'s freedom to act over and above the right to autonomy and integrity owed the Plf. Inconsistent with the closeness of connection between D.'s actions and results.

    - Fault is required in negligence and other torts due to the fact that the link between the activities of the D. and the damage or interference experienced by the Plf. may be remote (eg. leave a dog in a car on a hot day; the dog attempts to escape the car, in so doing shatters a window, a splinter of glass injuring a passerby). However, in battery, there is a direct link between the actions of the D. and the interference experienced by the Plf. Between the person who caused the injury and the person who received it, who should pay? Prima facie, once the Plf. has shown that personal autonomy has been violated, the D. should pay (unless there is a compelling defence available).

- It makes practical sense for the Court's to incentivize the production of all evidence by the D., and this end is accomplished through retaining the onus of proof for defence of battery with the D (GWB's "smoke out")

    - Effectively, this will help smoke out evidence which is required by the courts in order to achieve a complete understanding of the events which transpired. If the burden of proof concerning fault were to be shifted to the Plf., a considerable body of evidence which would be relevant to the Court's understanding may be omitted by the D., who would perhaps see this as prejudicial to defence (although, this view is basically saying that the D.'s should be incentivized for not withholding evidence from the Court - isn't their full cooperation required in any case?)

- There is a highly demoralizing cost where a victim of a direct attack is unable to garner recourse through the law; the *principle* principle.

    - There is further psychological impact of the law not supporting one who has been directly wronged w/ battery injury, particularly where this

involves violence, or sexual violence.

- There are two situations (*extraordinary category*) in which it would make sense to shift onus in battery to Plf.; sexual battery fits within neither, ergo onus on D.

    - *Implied consent* - where nature of activity such that consent is automatically implied (eg. touching someone to pass them a handout)

    - *Exception theory* - there is a category of activity in which falls within contact that is acceptable generally in ordinary life (jostled in a crowd)

- Sexual touching is by itself offensive, and cannot be considered an ordinary, casual conduct which is accepted in everyday life; thus, needs proof of consent.

    - Consent is unrelated to notion of harmfulness in battery. There are certain amount of normal, everyday physical touching; sex is a different animal.

- Floodgates argument is weak, as there are already ample means for the Courts to deal with vexatious litigation, and Plf.s won't bring suits so unlikely to succeed.

- Plf.s usually testify concerning lack of consent in any case, because generally this significantly strengthens their action; failure to do so gives D. an advantage.

- Criminal law requires that those seeking "mistaken belief" that consent was present must show that they took reasonable steps to ascertain consent.

    - Eg. if criminal law, requiring higher burden of proof in order to ensure that innocent never convicted, thus easier on D., requires this level of proof, then so must more restrictive tort law.

- Dissent

    - Iacobucci holds (in dissent) that unlike other batteries (punching, shooting, stabbing), sexual contact is *not* inherently offensive, and is usually or normally consensual. Therefore, substantively different from other categories, and proof of consent by Plf. is desirable. This relates to the fact that sexual contact is only harmful itself where it is non-consensual. Mistake re: consent in sexual touching, where mistake is reasonable, Iacobucci holds that *no harm has been done*.

- *Wilkinson v. Downton (QB 1897)*

    - Facts

        - D. tells P. that her husband has sustained grievous injury. Statement was false, although desired by the D. that the P. would think that they were true. The P.

suffers nervous shock as a result; vomiting, nervous breakdown, other symptoms.

- Issue

    - What constitutes wilful infliction - does the D. have to intend that the P. will be harmed, or is it sufficient that a reasonable person would believe that P. would have been harmed? Can the P. collect for these damages?

- Rule

    - D. does not have to intend damage, only must be within reasonable contemplation / foreseeability that harm would have been caused. Ergo, wilful refers to the action which caused the harm, and not the harm itself. Further, P. is entitled to collect for such damages. Awarded.

- Principles

    - D. did not have motive or spite or malicious purpose, but nevertheless wilfully committed an act calculated to cause harm / infringe right to personal safety.

    - D.'s actions were sudden, purported to be in earnest; only an exceptionally indifferent person would have been unaffected, ergo intent to harm is imputed.

    - Test is to determine what the effect of the D.'s actions would have had on reasonable persons (objective) or given infirmities of human nature (subjective)

- *Nolan v. Toronto (Metropolitan) Police Force* (ONSC 1996)

    - Not every insult yields liability; must be extreme and outrageous conduct, intentional acts of a flagrant character so flagrant that they add weight to claim of mental distress.

    - Conduct must exceed all bounds usually tolerated by decent society, and must be such that they are calculated to and in fact produce mental distress of a serious kind.

- *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (SCC 1993)

    - The tort of negligence is a recent innovation of the courts, relating to the running down cases during industrial revolution; increased horses, carts, ships means more accidents

    - However, negligence finds its roots in common calling / custom of the realm, where members of certain professions found to owe a duty relating to that profession.

    - Negligence, in view of custom of the realm, predates assumpsit/contract; therefore, one is liable in negligence even if there is a contract, or in the absence of a contract.

- Regardless of whether a wrong is actionable in contract, this will have no effect on whether that same wrong is also actionable in tort; relates primacy of common callings

- *Palsgraf v. The Long Island Railroad Company* (NYCA, 1928)

  - Facts

    - Plf. standing on railway platform. Man attempts to jump onto moving train. Pulled onto train by guards attending the train. In so doing, man's package falls onto the tracks. Package turns out to contain fireworks, which explode on impact. This causes a weigh scale to fall on the Plf.

  - Issue

    - As the tortious act (pulling man onto train, causing him to drop package) was a wrong to the man with the fireworks, and not to the Plf., and the consequences which affected Plf. could not have been foreseen, can the D. be held liable for the Plf.'s damages?

  - Rule

    - D. not liable; holds that negligence allows recovery only for breach of Plf.'s own rights, not someone else's rights. Further, duty owed only where the harm was within reasonable apprehension of the actor.

  - Principles (Cardozo / metaphorical)

    - Negligence is not actionable unless it involves the invasion of a legally protected interest: the violation of a right.

    - Absent a hazard to the Plf. which would be discernible to a person of ordinary vigilance (reasonably foreseeable), act is innocent where Plf. is concerned.

    - The fact that the conduct of D. towards the man may have been tortious to that man does not mean that the act takes on quality of tort with a view to Plf.

    - The duty to be obeyed is defined by the nature of the risk reasonably to be perceived; risk to another, or others within scope of apprehension.

      - Termed "the vigilant eye" and the "orbit of danger"

    - If the possibility of an accident is reasonably foreseeable, it is not necessary that the defendant should have known particular shape which accident would take.

- Some acts are so imminently dangerous, such as firing a gun, that anyone who comes within reach of missile, regardless of how unexpected, falls under duty.

- Negligence does not exist in abstract; must violate a right in order to constitute an actionable tort. Not actionable unless it leads to a harmful outcome.

    - Plf must be able to say that "I have a right that this person not have acted or neglected to act in this manner."

- One cannot sue via subrogation or vindictively to garner compensation from the invasion of *someone else's* interest; duty breached must be duty owed to Plf.

    - To do otherwise would be crime, not tort.

- The government has the responsibility to deal with crime, acting in the name of the community. Plf. has no ability to drop charges, neglect to prosecute. In tort, the action does lie with the Plf. As a result, we can compensate people to not bring an action, even prospectively.

    - Scope of this negotiation reveals Cardozo's orbit of danger; we wouldn't negotiate with everyone in world (to bring a coffee into the classroom), but rather only with those that coffee might potentially harm.

    - So, perhaps liability is the failure to negotiate ahead of time?

        - It's not whether or not I have a right to not be harmed; it's that I have a right to barter concerning the price of that harm ahead of time.

            - AND THIS MAKES PERFECT SENSE. Because the idea behind torts is to REDRESS HARM through compensation / redistribute liability, not to punish wrongdoers or protect you from harm.

    - If the rule were to be public a la crime, then there would be no ability to negotiate.

- Dissent (Andrews / pragmatist)

    - Actor is liable for consequences of any wrongdoing, regardless of whether actor could have reasonably apprehended that the person would be in danger radius

    - Negligence does not only govern the relationship between actors and those they might reasonably expect to injure; rather, between actors and those they *do* injure

- Everyone owes the world at large a duty of refraining from acts which might unreasonably threaten the safety of others, owes all harmed when breached.

- The limitation of the law relating to proximity is a matter of convenience, public policy, a rough sense of justice, practical politics, but not logic.

- Suggests that the true limit of proximate cause can be judged, by determining whether this was something without which the event could not occur.

- *Home Office v. Dorset Yacht Co. Ltd. (UKHL 1970)*

- From the 1960s onwards, we see a change in tack. There are general qualifications which should be placed on the Atkin neighbour formula.

- Do *Borstal* (youth prison) officers owe a duty to members of the public to prevent trainees from injuring them or their property?

- Government arguments

- There is no authority for such a duty. Tort law cannot operate when dealing with the government.

- However, Court finds that the question is not whether there is authority recognizing relationship, but rather whether the neighbourhood principle applies.

- In the alternative, policy requirements require immunity from such a duty. Similar to an s.1 demonstrably justified claim.

- Can't be held liable for wrongdoing of others except via vicarious liability (eg. employer->employee relationship). ITC, prisoners, not employees.

- Reasons for not applying the neighbour principle; the principle presumptively applies, except for in certain circumstances - inexhaustive.

- Pure economic loss - it is foreseeable that in commercial competition that one will make a gain at someone else's loss. This competition is critical to capitalist society, and therefore must be immune from neighbour principle.

- Distress - where the D. has failed to relieve someone in distress. Strangers cannot demand that you supply them with positive benefits, even where it is foreseeable that they will suffer harm if you do not.

- Existing categories - cases long settled where no duty is recognized (eg. landlord-tenant). However, this undermines Reid's own argument against

the government re: authority (eg. that it is the principle, and not the category which is of importance in consideration).