

TORT LAW
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Overview & Objectives	3
<i>Moralist/Essentialist View</i>	4
<i>Instrumentalist View</i>	5
Identifying Those Responsible for Harm	8
<i>Tortfeasors - Joint and Concurrent/Several</i>	8
<i>Cook v. Lewis</i>	8
<i>Joint & Several Liability</i>	9
<i>Vicarious Liability</i>	10
<i>671122 Ontario Ltd. v. Sagaz Industries Canada Inc.</i>	11
<i>Contributory Negligence</i>	12
Trespass to the Person	14
<i>Origins: Writ of Trespass</i>	14
<i>Overview of Requirements</i>	14
<i>Intentional Torts</i>	15
<i>Assault & Battery</i>	16
<i>Non-Marine Underwriters, Lloyd's of London v. Scalera</i>	17
<i>False Imprisonment</i>	18
<i>Nolan v. Toronto (Metropolitan) Police Force</i>	19
<i>Lumba v. Secretary of the State for the Home Department</i>	20
<i>Intentional Infliction of Nervous Shock (Mental Suffering/Distress)</i>	20

<i>Wilkinson v. Downton</i>	20
<i>Defenses to Trespass Action</i>	21
<i>Medical Treatment & Consent</i>	21
<i>Malette v. Shulman</i>	22
<i>Reibl v. Hughes</i>	23
<i>Region 2 Hospital Corp. v. Walker</i>	24
<i>S.J.B. (Litigation Guardian of) v. B.C.</i>	24
<i>Sexual Wrongdoing & Intrusion</i>	25
<i>Norberg v. Wynrib</i>	27
<i>Non-Marine Underwriters, Lloyd's of London v. Scalera</i>	29
<i>Unlawful Sterilization by State Officials</i>	30
<i>Muir v. Alberta</i>	30
<i>Vicarious Liability - Scope of Employment</i>	31
<i>E.B. V. Order of the Oblates of Mary Immaculate in the province of BC</i>	33

Overview & Objectives

What is tort law?

- tort - derived from the latin "crooked/twisted"; English/French - "wrong"
 - 10,000 year history of English common law of torts; landmark cases still cited
 - also "received" in United States, Australia, New Zealand (not Quebec)
 - Canada is unique... reflects origins as well as Canadian societal values/attitudes
- determines when the person who causes harm must pay compensation to the person who suffers it... depends upon:
 - nature of conduct of the defendant
 - nature of the harm/loss to the plaintiff
 - nature of the circumstances
- concerns private rights - individually contemptible wrongs
- plaintiff brings an action to recover compensation (damages)
- injuries may be to person, property, reputation, economic interests, etc.
- wrongs can be intentional or unintentional (as the result of behaving 'unreasonably')
- each incident can give rise to multiple torts and in different areas of law - i.e. tort, contract, equity
- number of discrete wrongs with definitions/requirements - i.e. battery
- doesn't usually depend upon a contractual relationship (will usually need to be brought under contract law)
- purpose/origins/future - lots of disagreement; series of flexible actions grounded in a variety of theories of liability/interests to be protected

What distinguishes torts from other forms of law?

TORT LAW	CRIMINAL LAW
focuses on the person who suffered harm	focuses on the offender
harm against the individual (private action)	harm against the state (state action)
lower burden of proof - BOP (can use criminal liability as evidence)	heavy burden of proof - BRD (can't use tort liability as evidence)
if you're at fault, you're at fault	gradations of fault
remedy = damages (compensation)	remedy = fines; imprisonment (punishment; rehabilitation; etc.)
arises from the common law (no relationship/agreement b/t parties) (broader social principles - i.e. 'neighbour principle')	arises from contractual agreement re: contract law (parties know each other)

Nature of Defendant's Conduct:

- draws a line between wrongful and innocent conduct (e.g. accident, error in judgement, bad luck)
- three concepts: intention; negligence; accident
 - intentional conduct - defendant desires the consequences
 - negligent conduct - defendant creates a reasonably foreseeable & substantial risk of the consequences
 - accidental conduct - defendant neither desires the consequences nor creates the risk of the consequences
 - "accident" - technical meaning = innocent, not wrongful
- generally proof of intentional or negligent conduct is an essential component of tort liability - "no liability without fault"
- "strict liability" - are a few torts that extend liability to accidental conduct; impose liability solely on causation of damage

Nature of Plaintiff's Loss:

- can't compensate for every loss caused by intentional/negligent conduct - draws a line between compensable & non-compensable damage
- *Hinz v. Berry* - death of a spouse and injury of seven children as a result of a car accident caused by a negligent driver; mother and one child witness the accident
 - financial claim re: breadwinning spouse and injuries - settled easily
 - other claims re: grief, anxiety, financial stress, nervous shock - contested by the defendant
 - allowed nervous shock (from witnessing the accident) b/c it led to a recognized psychiatric illness (depression)
 - line drawn between psychiatric illness and more minor (abstract?) emotional distress
 - "matter of judicial wisdom and social policy"
 - mental distress claims - difficulties re: proof and causation; fraudulent claims

Objectives of Tort Law:

- *be conversant... know how to apply and how you feel
- two contrasting views:
 - tort as an ethical system of promoting personal responsibility of wrongdoers for the harm they cause (correct individual injustices) - moralists
 - tort as a legal construct with various functions in the public interest; focus on evaluating the degree to which the objectives are met - instrumentalists

Moralist/Essentialist View

- Ernest Weinrib - main theorist
- system of corrective justice based on an ethical principle of personal responsibility for damage caused by wrongdoing
- rectifies imbalance caused by the wrongful conduct; restores relationship between the person who caused the harm and the person harmed through compensation - loss shifting

- complicated by the fact that some remedies are lost spreading - the cost of the harm is spread from the defendant to other parties (i.e. insurance companies, market prices, etc.
- reflection of intuitive ethical/moral principles; foundation of a stable, civilized, humane society - ingrained; taken for granted
- tort doesn't need to be justified... "feels rights"
- protects individual liberty by defining our rights against wrongful interference of others with our person, property, other interests
- courts shouldn't care about the impact of the case on broader society - no deterrence or punishment objectives - corrective justice is the aim; any other purposes are secondary

Instrumentalist View

- less idealistic - identifies multiple desired functions and evaluates them - little consensus or empirical evidence
- agree that how tort law fulfills the various goals changes
- also contemplates alternatives for attaining the identified goals more effectively/efficiently
- courts should pay attention to wider implications of decisions - should be concerned with socially desirable interests (as well as private interests)
- private party interests must be weighed against public policy interests which may be more important
- common objectives:
 - *compensation* - restore the plaintiff to the position they would have been in had the tort not occurred; tailored to the particular loss; seeks full indemnity
 - enhanced through liability insurance (almost all defendants) - therefore the loss is distributed through the community (goods & services, etc.)
 - loss shifting - shifting the cost of the loss from the plaintiff to the defendant (in accordance with the moralist view)
 - loss spreading - costs are distributed through insurance, the market, etc.
 - *punishment* - expresses society's disapproval of the wrongful conduct
 - award compensates and also acts as a sanction on the defendant (especially punitive damages)
 - this punitive power is somewhat diminished by liability insurance (which has limits)
 - liability insurance is generally for negligence, not intentional wrongdoing
 - *deterrence* - influences the conduct of citizens in order to secure a safer society; sets parameters of behaviour without the sanction of criminal law
 - *specific deterrence* - operates against the individual defendant; punitive
 - defendant is encouraged to change behaviour in the future
 - most effective when not insured, though claims can affect insurance (premiums, etc.)
 - defendant may be sensitive to publicized findings of liability - professionals, corporations
 - *general deterrence* - general threat of tort liability encourages safer behaviour/avoidance of harm to others (much debate)

- may work well in specific circumstances... health care providers, the uninsured (who understand tort law)
- generally our conduct reflects other factors other than tort law
- *market deterrence* - most applicable to select activities - manufacturing of goods, commercial supply of services
 - costs flowing from liability for substandard conduct get reflected in the price of goods/services thus encouraging defendants/consumers to respond in a way that reduces accidents
 - make a safer product; remain competitive
 - if all suppliers don't reduce their liability costs, consumers may spend their money elsewhere
 - result either way - cheaper, safer products
 - depends upon sophisticated consumers, efficient liability process, sufficient price differential
- *psychological dimensions* - provides a civilized, non-violent way to allow victims of wrongdoing to secure some appeasement, retribution, accountability for suffering
- *education* - general & specific
 - general... speaks to citizens of the importance of compliance with reasonable standards of conduct in the interest of safety to others
 - specific... may extend beyond litigants to affect the conduct of a particular group of people with an impact on the public's safety/well-being - i.e. physicians-informed consent; bar owners-intoxicated patrons; manufacturers of dangerous goods
- *Ombudsman Role* - challenges the wrongful/harmful behaviour of Canada's most powerful persons and institutions (Mr. Justice Linden)
 - responds to concerns re: the effectiveness of public law in holding the rich and powerful accountable
 - initiated by private individuals; adjudicated by judges "independent of political control"
 - examples of consumer actions (North America) - tobacco, asbestos, firearms, silica, lead paint, fast food, etc.
 - governments (ineffective response to SARS)
 - casinos (gambling addiction & financial hardship)
 - even if unsuccessful can still have significant political/social impact leading to safer products/practices (i.e. tobacco)

Personal Injury, Tort Law & Other Compensatory Vehicles:

- personal injury & fatality claims present significant challenges
- response in Canada - expand the concept of fault-based liability - we all have a duty of care to prevent foreseeable injuries to others
- process was encouraged by the prevalence of liability insurance
- but... a fault system can never provide universal coverage and compensation for all accident victims - designed for cases of wrongdoing
- in addition to limitations there are criticisms re: processes for personal injury claims - slow, expensive, unpredictable, etc.

- two resulting developments - alternative/supplementary compensation schemes for a broader range of accidents (by governments) & greater use of private sector first-party insurance
- *government initiatives*: first introduced in the early 20th century...
 - workers' compensation - workers gave up tort remedies in exchange for no-fault compensation
 - expansion of victims of car accidents receiving more compensation more efficiently (models vary by province)
 - criminal injury compensation schemes - no-fault - funded by tax revenues (all provinces)
 - others: EI, CPP, health insurance, etc. - not developed for victims but provide important financial support to victims
 - special arrangements: HIV/HepC in the blood supply; Walkerton's unsafe water supply; Residential Schools, etc.
 - tragic episodes damaging large numbers of innocent people
 - mass claimants - settlement is attractive
 - harm the consequence of government action/strong government involvement
 - strong public sympathy/support - political consensus to compensate without litigation
 - intruded into the traditional realm of tort, eroding significance (especially work place/automobile accidents)
- *private sector first-party insurance*: accelerating trend towards private protection
 - life insurance - most common; disability insurance - growing
- result is a mixed system of tort liability, no-fault schemes & first-party insurance
 - tort is dwarfed by the other two... continues to diminish

Identifying Those Responsible for Harm

Tortfeasors - Joint and Concurrent/Several

- joint: single tort, multiple people responsible acting in concert although only one person may have committed the tort; jointly liable
- arises from special relationships, common ventures, joint enterprises
- four categories:
 - one who instigates/encourages another to commit a tort and the person who commits the tort
 - employer-employee in respect of a tort committed by the employee within the scope of their employment
 - principle-agent in respect of torts committed by the agent within the actual/ apparent authority of the agent
 - fact-specific category re: instances of concerted action by two or more involving the commission of a tortious act
 - joint responsibility is guilt by participation (not guilt by association)
- concurrent/several: defendants who commit a series of discrete, independent torts, each of which is a cause-in-fact of the plaintiff's damage - *historically* separately liable (liability must be established against each)

Cook v. Lewis 1951, SCC

Facts:

- plaintiff is Lewis (reversed because it's an appeal - no longer done this way)
- two hunting parties are hunting for grouse and deer; opening day; lots of hunters out
- while advancing in a line with Wagstaff, Cook (defendant) and Akenhead [C-A-W formation] simultaneously shoot towards five grouse out in front of their accompanying dog which is "on point"
 - Cook shoots at the birds straight ahead; Akenhead shoots at the bird on the right; Wagstaff does not shoot
 - just previous to the shots being fired Fitzgerald - to the left of Cook - calls out a warning that Lewis (brother of John) is in a clump of trees in front of Cook and Akenhead
 - Cook claims he heard the call but not its content; he thought Fitzgerald was pointing at the dog; Akenhead claims he didn't hear the call at all
- immediately after the shots are fired they hear a scream from the trees; Lewis (plaintiff) appears; he received several shots in the face causing him to lose an eye
- John Lewis (where is he while this is happening?) claims Cook shot his brother...

Trail Judge - dismisses the action when the jury can not determine whether Cook or Akenhead shot the plaintiff; jury decides there is no negligence by either Cook or Akenhead...

Court of Appeal - Lewis argues that Cook and Akenhead are joint tortfeasors and that the judgement should be against both of them; argument is rejected (Sidney Smith J.A.) but he says it's unacceptable that the jury found that one of them shot him but couldn't decide which one and orders a new trial...

Questions: If we don't know who's shot injured Lewis, can either Cook or Akenhead be found liable? Are Cook and Akenhead liable for the acts of the other?

Answer: No (to be continued...)

Legal Principle:

- "...when it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted" (*Moxley v. The Canada Atlantic Railway Company* [1887])... unless there are certain circumstances (Cartwright)
 - respondent argues that Cook and Akenhead are tortfeasors as they are engaged in a joint enterprise (hunting together with an agreement to divide the bag evenly)
- "...unable to find any authority for the proposition that the mere fact that a party of persons are hunting together and have agreed to divide the bag renders each liable for the tortious acts of all the others" (Cartwright)
 - distinguishes *The Kursk* [1924] - question was not whether both Clan Chisholm and the Kursk were liable but whether their liability was joint or several
 - the relationship between Cook and Akenhead falls outside of the definition of tortfeasors (defined in the quote by Scrutton L.J. - p. 5)
 - Banks and Sargent, LL.JJ. concur on the same grounds - relationship between Cook and Akenhead doesn't meet the test for tortfeasors
 - hunting party is beyond the scope (floodgates - would make any member of a social/recreational party vicariously liable for the negligence of another party member)
 - relationship isn't characterized by a right or opportunity to control the other; no reason to anticipate negligence; no unlawful pursuit

Ratio: Members of a hunting party (who are "sharing the bag") do not meet the test of being joint tortfeasors and therefore if a plaintiff has been negligently injured by the actions of either one or another member of the party, but it can not be determined which, then neither can be found liable.

Joint & Several Liability

- the liability of each tortfeasor - whether joint or several - is now considered *joint and several* - allows plaintiff to bring an action against all parties at once and the court apportions liability & assigns a global damage awards
- *Negligence Act*, s. 4(2)(a) - two or more tortfeasors who are not joint tortfeasors may be found joint and severally liable; each defendant is liable for the full amount of damage and each is responsible for that amount
 - full satisfaction (payment) by one defendant discharges the liability of all other defendants to the plaintiff - no "double recovery"

- s. 4(2)(b) allows the defendant that paid the damages to then go after the other tortfeasors for their share of the damages (20 years)
- principle: it's more "fair" for a defendant to 'overpay' damages than for a plaintiff to not be fully compensated; spreads costs to increase ease of collection & likelihood of payment
- courts are directed to apportion responsibility for the loss according to degree of fault (up to 100% for the plaintiff)
 - 4(1) - empowers courts to determine the degree to which each person was at fault
 - 1(1) - damages are in proportion to the degree to which each person is at fault
 - 1(2) - if not possible to determine fault then the liability must be apportioned equally

Vicarious Liability

- describes the responsibility that one 'person' might have for the torts of another because of the relationship between them (not a discrete tort - could be for negligence or an intentional tort)
 - strict liability - doesn't require proof of personal wrongdoing only establishment of the requisite relationship between the defendant and the tortfeasor (i.e. employer-employee, principle-agent)
 - no fault on the part of the party found to be vicariously liable - relationship is sufficient
 - provides another party for the plaintiff to receive compensation from - more money/insurance than the tortfeasor; spread out the loss
 - goes against the basic premise of tort law re: being at fault for wrong-doing - creature of policy established by the courts (not legislated)
 - policy objectives: fair recovery & deterrence... see below
- employer-employee (master-servant) - strictly liable for torts committed *within the course of employment*
 - why? - provision of just/practical remedy & deterrence of future harm
 - employer creates an enterprise which creates the risk for the employee to do harm (just)
 - employer has deeper pockets & can more easily spread the loss (practical/fair recovery)
 - encourages employer (or other employers) to adopt accident prevention/risk management strategies (deterrent)
 - basic test:
 - does the requisite relationship exist? - see *Sagaz*
 - if so, was the employee acting within the scope of their employment? - see *Oblates*
- employer-independent contractor (no vicarious liability) - determined by the "control test" - employees are under direct control/supervision; contractors are controlled by the terms of their contract
 - difficult test under modern circumstances; enhanced by other tests - "entrepreneur test" (who has/controls the tools; profits), "organization test" (level of integration into the business), "enterprise test" (who controls the workers/who can control the system)

- no conclusive test; requires examination of total relationship (*Sagaz*, SCC) - broader "control test"
- remuneration is not an essential element - volunteers count
- in the case of an employee with more than one employer both can be found vicariously liable (or the primary employer)
- employers are not liable for *all* the torts of their employees - must be a connection between the wrongdoing and the employment relationship (re: "course of employment")
 - covers most torts broadly incidental or related to employment including wrongful/unauthorized way of conducting employment function
 - does not over conduct outside/unrelated to the course of employment
 - expressions dictating how work is to be done don't protect employers; expressions concerning what work is to be done will normally protect the employer
- hospitals - vicariously liable for their staff but not those with 'privileges' (i.e. surgeons) - this could change especially in cases where the patient doesn't have a choice of who will treat them
- parents - not vicariously liable under the common law; liability must be grounded in the negligence of the parent
 - *Parental Responsibility Act* (BC) - does make parents liable for the intentional property damage or loss caused by their child to a maximum of \$10,000
 - based on a presumption of fault unless they can satisfy the court they were exercising reasonable supervision (considering age/situation) or made reasonable efforts to prevent/discourage the harmful activity

**671122 Ontario Ltd. v. Sagaz Industries Canada Inc.
2001, SCC**

Facts:

- rival supplier (Sagaz) hires a consultant (AIM) to get Canadian Tire's business away from plaintiff; Sagaz pays a bribe (kick back scheme) to the head of Canadian Tire's automotive division
- original supplier (of synthetic car seat covers) - the respondent (plaintiff) - suffers substantial losses

Question: Is Sagaz the employer of the consultant (AIM) and therefore vicariously liable for his tortious conduct?

Decision: No - the consultant (AIM) does not meet the test of an employer-employee relationship

Legal Principle:

- apply the control test (classical, functional test) - looks at degree of control one party has over another; does the employer control the activities of the worker?
 - consultant was not an employee of the supplier but an independent contractor
 - AIM was a separate legal entity; Sagaz controlled what was done but AIM controlled how it was done - AIM was in business on it's own account

- does not meet the test of the relationship required for vicarious liability
- distinguishable from the employer-employee relationship (which has policy considerations that make vicarious liability appropriate so long as the tort occurred in the course of employment)
 - control test - if the employer doesn't control the activities of the worker then the policy justifications will not be satisfied
 - policy justifications - to provide a just and practical remedy; deterrence of future harm
 - contractor is in business for themselves (not the employer); employer does not have the same control over a contractor to reduce harm through effective organization/supervision
- control test is not the only relevant test to distinguish employees from contractors - there's no universal test (para. 47)
 - may also need to look to other case law/employment legislation
 - Integration of other more complex tests - entrepreneur test, organization/integration test, enterprise test...
 - who controls the tools/equipment?
 - who bears the financial risk?
 - what are the benefits... only wages?
 - does the contractor employ other workers?
 - etc...

Ratio: Sagaz is not the employer of AIM because AIM is a separate legal entity, not under the direct control of Sagaz, and in business for themselves; Sagaz is therefore not vicariously liable for the tortious conduct (bribery) of AIM.

- Sagaz - Canadian authority that a business isn't vicariously liable for the tortious conduct of an independent contractor
- a time may come where the distinction between employee and contractor is no longer tenable given modern work practices and the policy considerations of vicarious liability...

Contributory Negligence

- plaintiff bears some percentage of liability due to failure of a plaintiff to take reasonable care for their own safety which contributes to the accident or loss (i.e. failure to wear a seatbelt)
 - historically contributory negligence was a 'complete defense' - plaintiff was considered an "undeserving wrongdoer"; led to unjust results
 - 'last chance rule' - the party that had the last chance to avoid harm is liable - also led to unjust results and need for reform
 - now... courts must determine the *degree* to which plaintiff bears responsibility and *allocate* damages to all parties accordingly (basic principle)
 - apportionment process tends to be conventional, arbitrary, lenient - generally more indulgent towards plaintiffs (less likely to be able to recover loss?)
 - if the court can't determine fault it will be 50/50
 - provides the system with a flexible loss allocation mechanism and avoids the all or nothing approach of the common law

- in calculating apportionment court will take into account blameworthiness (including who bears the greater risk - i.e. driver of a car over cyclist)
- BC has different legislation than the rest of the country and requires a plaintiff that is contributory negligent to recover damages from severally liable defendants separately
 - defendants are not joint and severally liable in the case of contributory negligence [Negligence Act 4(2)(a)]
 - because "the person suffering the damage or loss" is interpreted have contributed to their loss/harm rather than being an 'innocent' plaintiff
 - deterrence - encourages people to take care of themselves
 - more equitable - treats all wrongdoers the same
 - policy argument against - penalizes the plaintiff twice - reduces their damages and makes it more difficult to recover from the other tortfeasors
- three ways for a plaintiff to be contributory negligent:
 - plaintiff's negligence was the cause of the accident
 - plaintiff's negligence was not the cause but they put themselves in a position where there was foreseeable harm from the defendant's negligence
 - plaintiff fails to take protective measures in the face of foreseeable danger
- determined by applying the "objective standard of the reasonable person"
 - considers the same factors as determining defendant's negligence
 - foreseeable harm
 - likelihood of damage
 - seriousness of threatened damage
 - cost of precautionary measures
 - exigencies of emergency situations
 - utility of the plaintiff's conduct

Trespass to the Person

Origins: Writ of Trespass

- King William created a writ system - goal was to consolidate his power by establishing a uniform law system throughout England (common law)
- writs were standardized pleadings issued on behalf of the King by his clerks
- needed a writ in order to commence an action in front of the King's Common Law courts; no writ - no action
- one of the first writs were the writs of trespass - what became known as the trespass torts
 - trespass torts covered the person, the land of the person, the possession of the person
 - plaintiff would have to prove that the interference was direct and with force (or arms) that, as a result, violated the King's Peace
 - actionable without damages - the tort in itself was the wrong - disrupted social tranquility
 - strict liability torts - the defendant would not have to be at fault
- another writ developed to catch the many wrongs that were excluded from the original trespass torts (due to rigidity of the system) - trespass on the case
 - grew into what we now know as negligence

Trespass	Trespass on the Case
forcible	not forcible
direct	indirect/consequential
actionable without damages	damages required (must show some sort of loss)
strict liability (didn't have to show fault)	conduct wrongful in some manner

Overview of Requirements

- directness requirement
 - directness test... would the result have occurred had it not been for the intervention of another independent agency? (Lewis Klar)
 - direct = D's action --> result for P = trespass
 - indirect = D's action --> creates risk/danger --> intervening act --> result for P = not trespass (negligence?)
- actionable without damages (stark contrast with negligence) - the act is damage enough
- may be committed intentionally or negligently
 - intention: intended result or substantially certain to result
 - negligent: unreasonably disregarding a foreseeable risk
- onus of proof - P must prove direct interfered by D

- then the onus shifts to the D (partial reverse onus) to prove the trespass was “utterly without fault) - i.e. that the interference (harm) was neither intentional nor negligent
- *Cook v. Lewis* - established the formulation of this three-stage test for trespass
 - 1950's - UK moved away from this; P must prove all three now
 - Canada kept partial reverse onus of proof - occasion to revisit decision in *Scalera*
 - three reasons for maintaining traditional approach (McLachlin):
 - partial reverse onus is justified because of the directness requirement
 - partial reverse onus helps smoke out evidence that may only be in the possession of the defendant
 - concerns about the effect of shifting the burden on to the plaintiff - high demoralization costs

Intentional Torts

- tort of negligence is distinct from torts dealing with intentional interference of the person, property (land & chattels), and economic interests; modern tort - invention of the 20th century
- intentional torts:
 - about more than simply culpability - significant differences in form, substance & policy
 - basic structure is centuries old (see above)
 - generally narrow is scope (vs. broad range of negligence) - defined fact patterns; categories of damage
 - defined by precise, narrow, rigid rules (vs. discretionary concepts like 'foreseeability' & 'reasonableness' in negligence)
 - courts have been slow to integrate intentional torts into a cohesive system of general principles
 - characterized by convention & conservatism (vs. dynamic ability of negligence to reflect public attitudes)
 - reluctance to recognize new areas of interest - e.g. privacy, equality, dignity, etc. - legislation has filled the void
 - not generally covered by liability insurance - more of a loss-shifting system
 - enhances punitive, deterrent, educational functions of tort - encourages greater personal accountability
 - but without insurance there is less chance of victims receiving adequate compensation
- conduct is intentional if it is the defendant desires the consequences (actual intent) or the consequences are substantially certain to occur as a result of the conduct (constructive or imputed intent)
 - transferred intent - defendant's intentional conduct towards one interferes with another (even if they didn't know the other existed) - transfer of intent from one to another - i.e. when A attempts to shoot B but misses and shoots C instead
 - intent can be transferred from one intentional tort (i.e. battery) to another (i.e. trespass to chattel) - i.e. when A attempt to shoot B bit misses and shoots C's car instead

- defendant may be incapacitated from forming intent by mental disability or infancy - defendant did not understand the nature and quality of their act
 - defendant still liable if they knew what they were doing but didn't know it was wrong
- protects from the direct interference of a discrete person interest:
 - bodily harm - *battery*
 - threats of violence - *assault*
 - liberty - *false imprisonment; malicious prosecution*
 - psychological security - *intentional infliction of nervous shock*
 - privacy - *invasion of privacy*

Assault & Battery

- assault: "a direct and intentional act that causes a person to apprehend immediate harmful or offensive bodily conduct" (Osbourne, p. 256-257)
 - reasonable apprehension of an immediate or imminent battery - i.e. pointing a gun at someone and threatening to shoot
 - no execution of threat = no battery (thus "assault and battery" = separate torts)
 - protects rights to feel secure, be free from intimidation/harassment/threat of imminent physical harm (psychological security)
 - may be intentional or negligent
 - apprehension of the battery must be reasonable under the circumstances - fear is not required
 - no need to prove physical damage - perceived threat is enough; though plaintiff needs to be aware of the threat (i.e. can't be sleeping, etc.)
 - threat must be immediate (not in the future)
 - conditional threat counts if it is intended to create an apprehension of immediate violence coupled with a condition the speaker has no right to impose
 - actions for assault are uncommon but an assault justifies the use of reasonable force in self-defense (must be proportional to be an appropriate defense)
 - societal interest in mitigating retaliation by providing other opportunity for compensation (origins in writ of trespass - King's peace; general social security)
 - damages are usually nominal; single assault actions are rare
- battery: "a direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person" (Osbourne, p. 253)
 - direct, offensive physical contact
 - protects the right to bodily integrity, personal security, dignity of the person
 - actionable without proof of damage; contact does not have to be harmful (only offensive to societal norms); contact may even be beneficial (i.e. medical intervention)
 - ranges from punching/stabbing/shooting to spitting/pushing
 - intimate/sexual contact requires justification - i.e. consent
 - borderline conduct - i.e. unsolicited hug - depends on the context - i.e. relationship, social conventions, etc.
 - plaintiff does not need to be aware of the interference at the time it takes place - i.e. unconscious, etc.
 - actual bodily contact *may* not be essential - can battery extend to "modern intrusions" - i.e. x-rays, etc?

- directness is an essential requirement for liability (origins in the "writ of trespass" - battery, assault, false imprisonment, trespass to land & trespass to chattels)
 - indirect interference (i.e. poisoning) isn't battery - caught under a "residual and innominate tort"
 - aims to reduce violence by providing recourse without retaliation
- burden of proof in respect to wrongfulness is on the defendant (vs. negligence)
 - D must establish that the loss was caused without intention or fault
 - can be intentional - physical contact is intended (subjective test) or substantially certain (objective test)
 - harm does not need to be intended
 - can be negligent - unreasonable disregard for the chance of physical contact
- liability not restricted to foreseeable consequences - moral culpability = extensive responsibility
- most frequent batteries are acts of criminal violence
 - lack of means of compensation has led to provincial criminal injuries compensation schemes
 - modest no-fault benefits; doesn't replace tort liability
 - resurgence of battery action re: sexual assault, spousal abuse, incest, child abuse (especially intra-family abuse and residential/custodial settings for children)
 - more about accountability than compensation
 - advantages & disadvantages of pursuing tort liability must be weighed
 - limitation periods may apply
 - SCC decision - "discoverability principle" re: sexual misconduct in special circumstances (i.e. incest)

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

Facts:

- Scalera - the appellant - (and four other BC Transit bus drivers) had a civil action brought against them by a plaintiff re: sexual assaults (1988-1992)
- Non-Marine Underwriters - the respondent - provided Scalera's homeowner's insurance - excludes damage caused by intentional or criminal acts
- insurer wants a declaration they will not be required to "defend" Scalera from the allegations of sexual battery
 - Does Non-Marine Underwriters need to defend Scalera or does the exemption clause apply?

Question: Should the court depart from the established rule that places the onus on the defendant for showing actual or constructive consent (or other lawful excuse) in a case of battery? Should the law be changed to remove the partial reverse onus of proof in the case of (sexual) battery?

Answer: no - a traditional rights-based approach to the law of (sexual) battery is justified

Legal Principle:

- critics suggest that torts must always be fault-based; plaintiff must prove fault: defendant intended to harm; defendant failed to take reasonable care or was negligent; tort is one of strict liability
 - sexual battery - plaintiff should be required to prove that the defendant either knew or ought to have known that she was not consenting (Iacobucci J.)
- McLachlin J. (majority) disagrees - law of battery is based on protecting individuals' right to personal autonomy
 - to base battery on a principle of fault would subordinate the plaintiff's right to protection of invasion of physical integrity to defendant's freedom to act
- liability in battery is based on a violation of the plaintiff's right - the violation can be considered a form of fault
- appropriate approach in Canadian context because:
 - trespass of person is confined to direct interferences - there is a direct connection between the defendant's action and the plaintiff's injury
 - once the plaintiff shows that there has been a violation of personal autonomy, prima facie the defendant should pay
 - traditional approach makes practical sense - the defendant knows how/why the direct interference occurred so it is sensible and just to give the defendant incentive to explain what happened
 - cases of direct interference tend to produce high "demoralization costs" - legal position to place the onus on the defendant to explain how their conduct was innocent is justified by:
 - close causal relationship between the defendant's conduct and the violation of the plaintiff's bodily integrity
 - identification of the loss with the plaintiff's personality and freedom
 - infliction of the loss in isolated circumstances (rather than systemic)
 - perception of the defendant's conduct as anti-social

Ratio: A traditional rights-based approach to the law of battery (where the onus is on the defendant to prove their innocence - i.e. consent) is justified because there is a direct connection between the defendant's action and the violation of the plaintiff's right to personal autonomy.

*Affirmation of *Cook v. Louise* - direct interference, committed intentionally or negligent, partial reverse onus on defendant

False Imprisonment

- confinement of a person - within physical or mental boundaries - set by defendant which amounts to imprisonment or detention without lawful authority ("false")
- generally brought against the state/public authorities - police; corrections (and security guards/employers)
- protects security of person, personal liberty & freedom of movement
- can be brought without damages
- can be intentional or negligent; most often intentional (rarely negligent)
- plaintiff needs to prove the confinement; defendant must prove lawful authority

- confinement must be total; there must be no reasonable way of getting out (*Bird v. Jones* - bridge case)
- plaintiff likely does not have to be aware of the confinement or falseness of it (no Canadian authority; UK only)

Nolan v. Toronto (Metropolitan) Police Force
1996, Ontario

Facts:

- plaintiff (status Indian) arrested and detained overnight by defendants (Bratt - investigating officer; Cartwright - officer in charge); age/date of birth match outstanding warrants (but not First Nations)
- plaintiff makes phone call from police station to Teaching Assistant; she overhears derogatory comments regarding the plaintiff

Issue: wrongful arrest; intentional infliction of mental distress (see below)

Decision: Cartwright failed to exercise statutory duty and was negligent in not respecting the endorsement of the warrant

- endorsement allowed for Cartwright to question the decision of Bratt; he did not do so
- initial arresting officers were acting within their authority; should have been released quickly upon realizing they had the wrong person

Legal Principle:

- given facts known by/ought to be known by the Officers the detention was not based on reasonable/probably grounds
 - warrant for "Joseph Nolan" was "endorsed" and for someone other than the plaintiff
 - original arresting officers were acting within their authority; but Nolan should have been released upon arriving at the police station
- failure to adequately investigate the warrants + overnight in prison = false imprisonment
 - court finds on balance of probabilities that the operative decision for detention was because plaintiff was Native
- court finds on balance of probabilities that the derogatory comments were made by Bratt
 - constructive intent to cause harm
 - relaxed standard re: "objective" evidence of harm (began to drink, missed classes, decline in school performance)
- jailor owes a duty of care to the prisoner
 - obligations of the Officer-in-Charge - *Criminal Code* s. 498-499

Damages: \$2,500 - wrongful detention; \$2,500 - wrongful infliction of mental distress; \$5,000 - punitive damages (against Bratt)

Lumba v. Secretary of the State for the Home Department **2011, UK**

Summary:

- plaintiffs were foreign national prisoners (FNP) detained pending deportation (Lumba - June 2006-present; Mighty - May 2006-July 2008)
- Secretary of State's published policies at the time favoured a presumption in favour of releasing FNP who were to be deported; discretion to detain available...
 - under the published policy both plaintiffs *could* have been detained pending deportation because of their criminal records (discretionary)
- April 2006 - Secretary of State discloses he had instead adopted an *unpublished* policy with a blanket presumption in favour of detention of FNP
- majority: their detention was unlawful because it wasn't a decision of lawful authority but rather of the unpublished/unlawful policy
 - differed on damages - no damages incurred (result was nominal damages of 1 pound) vs. unlawful use of government power (dissent)
- minority: conceded that they could have been lawfully detained under the current policy
- noteworthy: case indicates you can be falsely imprisoned within a prison (i.e. solitary confinement); do not need to be aware or show causation

Intentional Infliction of Nervous Shock (Mental Suffering/Distress)

- hybrid between trespass and trespass on the case; nominate tort
 - allows plaintiff to recover damages for intentional cause of mental distress
 - created by *Wilkinson v. Downton* (see below)
- intentional act (trespass)
- harm can be indirect (trespass on the case)
- damages required (trespass on the case)
- burden of proof is on the plaintiff (trespass on the case)
- historically courts were reluctant to recognize the tort - "floodgates"
 - false, trivial, numerous actions; unusually sensitive persons; problems in assessing damages
- control mechanisms - reasonableness; occurrence/nature of harm
 - must be socially unacceptable behaviour (freedom of speech)
 - plaintiff's reaction must be reasonable (unusually sensitive) - unless defendant knew/ought to know about the sensitivity

Wilkinson v. Downton **1897, UK**

Summary:

- prank - woman is told her husband was in an accident and seriously injured; suffers 'nervous shock' (mental and physical stress not related to previous ill-health or predisposition to nervous shock)

- doesn't fit into existing tort law; court essentially creates a new tort
 - not an assault - no apprehension of immediate bodily harm
 - not fraud - plaintiff didn't act upon the fraudulent information
 - sickness occurred upon hearing the words
- three elements:
 - an act or statement that is outrageous/extreme (see *Nolan* - beyond insults)
 - intended/calculated to produce harm
 - harm occurs (can be indirect)
 - must be objectively and substantially harmful (physical or psychological)

Defenses to Trespass Action

- *accident* - not reasonably foreseeable or preventable (will probably avoid liability)
- *mistake* - defendant intended results but was mistaken about fact - can be construed as intentional and therefore liable (i.e. operating on the wrong part of the body)
- *volition* - no voluntariness to interfere with plaintiff's rights
- *capacity* - ability to understand/appreciate the consequences of your actions (can be blurred with volition); defendant must have the capacity to form requisite intent
 - *infancy* - defendant doesn't have the capacity to form the requisite intent (infants, people with mental illness)
 - *T.O. v. J.H.O* - issues laid out in para. 19 (CP, p. 37)
 - no set age (unlike the Criminal Code, which is 12)
 - defendant understood the interference (nature/quality of the contact) even if he didn't understand/intend the harm - had the capacity to commit the tort
 - capacity to commit a tort can not be the same as capacity to consent
 - policy reasons for keeping the age of consent the same in civil law
 - result - plaintiff couldn't consent; defendant had capacity to commit the tort
 - damages - less likely for acts of children to result in punitive damages
- *self-defense & defense of others* - general rule is you can use reasonable force to repel a battery or assault (*Babiuk v. Trann* - CP, p. 43)
 - not available for unreasonable force or if the offender is retreating
 - don't need to contemplate exact proportionality - beyond a reasonable doubt - objective standard under the circumstances/contextual
 - generally the same rules apply for defending someone else; courts will be more cautious as there's more room for error when you're not being directly threatened
- *consent*...

Medical Treatment & Consent

Adults:

- we're entitled to make decisions about/control our bodies - give, refuse, revoke consent re: medical treatment regardless of the consequences
- can consent to torts that would otherwise be trespass
 - medical treatment/physician touches body = battery - unless there is consent
- given the importance of protecting personal autonomy we assume no consent - defendant must prove consent (partial reverse onus)

- courts consider "reality" of the context re: consent - e.g. mental capacity (minors; mental illness), language/explanations, circumstances, etc.

Malette v. Shulman

1990, Ont. C.A.

Summary & Notes:

- woman brought to the hospital unconscious (car accident); usual treatment (to save her life) would be a blood transfusion
- find an undated card re: patient being a JW & instructions to not administer blood/ blood products under any circumstances and that she understands the implications
- doctor gives transfusion anyway; administers it himself
- continues administration even after family arrives and confirms patient's wishes
- believes he doesn't know her actual wishes - she could have changed her mind if she knew she would die without the transfusion
- she's awarded \$20,000 & appeals; appeal is successful
- court confirms the principle of autonomy over one's own body
- consent must be informed (CP, p. 52); primary means of protecting a patient's right to control medical treatment
- patient needs to be provided enough information to evaluate risks/benefits; be told other available options
- doctrine presupposes patient has the capacity to make a decision re: treatment
- the right extends to refusing treatment - patient has the final say (i.e. *Nancy B* - injunction to stop using a respirator)
- health care provider has to immediately stop treatment when consent is revoked unless it would threaten life/cause serious harm
- people have to be able to make choices based on their own values no matter what others think
- exception: "emergency doctrine" - a true emergency (treatment is needed immediately) when the patient can't communicate their consent (no advance directive)
- card was there specifically to provide an advance directive in exactly this kind of situation - physician entitled to follow these instructions to override the emergency doctrine
- absent the card the doctor would have been fine - card changed everything - patient is entitled to override the emergency doctrine with an advanced directive
- onus is on the patient to communicate their desires; in the absence of other evidence the card is considered valid (even with no date, etc.)
- lots of cases recognize the right to refuse treatment - i.e. amputation of hand with express instructions not to (*Mulloy v. Hop Sang*, 1935; further examples - CP, p. 58)
- hospitals protect themselves through consent forms - evidence of consent but not conclusive
 - consent must be informed and freely made - considerations given to circumstances, language, explanations, etc.
 - during on-going treatment if further/new treatment is urgently necessary the provider won't be held liable for battery for providing the treatment without renewed consent - must be immediately necessary (emergency doctrine)

- what if you consent to the procedure without knowing all the risks?
 - the procedure is performed competently but risk materialized = tort in negligence but not battery...

Reibl v. Hughes

1980, SCC

Summary:

- patient underwent surgery he consented to; wasn't informed of all the risks (including potential stroke); surgery was performed competently but stroke materialized
- testifies he wouldn't have consented to the surgery; would have waited until his pension vested (surgery wasn't immediately needed)
- court finds the patient has to sue in negligence - he consented to the procedure therefore no battery (battery = no consent or action that clearly exceeded the consent)
- failure to disclose risks goes to negligence category of "standard of care" - does not affect quality of the consent; does not negate the consent; doesn't constitute an "unprivileged and unauthorized" invasion of one's body
 - material risks - if serious and even if rare - must be disclosed to patient
- negligence action is harder - puts the burden of proof on the plaintiff ("reasonable person" re: consent)
- requires a patient to prove they wouldn't have consented - very difficult; makes it very hard for patients

Health Care (Consent) and Care Facility (Admission) Act, ss. 4-6, 11-15:

- some provinces have codified the principles re: patient consent
- BC - consent must be informed, complete, voluntary
- statute lays out who can act as a substitute decision maker
- section 4 - consent principles (right to consent/refuse/revoke)
- section 5 - prohibits treatment without consent; exceptions for substitute decision maker in sections 11, 14, 15
- *Act* changed as of June 17, 2011 (see compare function in CanLII) - "substitute decision maker" changed to "personal guardian"
- section 12/13 - circumstances where treatment can be provided without consent from the adult or the substitute - i.e. triage, preliminary exam
- section 16 - lists (in order of priority) who can act as a substitute if there isn't someone designated
- BC legislation goes beyond common law (*Reibl v. Hughes*) - i.e. emergency procedures without consent

Minors:

- emergency - absent of expressed refusal from a parent/guardian - can provide necessary treatment
- no emergency - unless the child can consent - treatment without parental consent is a battery
- no set age of consent; common law recognizes "mature minor" - capacity to understand the nature & consequences of treatment; risks/benefits

- subjective test - varies from child to child; procedure to procedure
- principles codified in *Infant Act*, section 17(3)(a)
 - section (b) adds to the common law - provider agrees the treatment is in the patient's best interest
- interacts with common law, other legislation (i.e. child protection, *parens patriae*)
 - *Child, Family and Community Service Act*, s. 29 - doctors can apply for a hearing for necessary procedure with at least two medical opinions

Region 2 Hospital Corp. v. Walker
1994, NBCA

Summary:

- 15 year old boy with leukemia; request to deem him a mature minor not requiring parental consent
- two doctors believed him to be a mature minor; felt forced treatment would be detrimental
- want an order allowing the providers to not give transfusions if he refuses or to give them if he consents and his parents don't
- lower court - don't force transfusion; but Minister of Health received parental rights for two months; appealed - decision overturned
- court finds the trial court misapprehended two facts:
 - common law not recognizing mature minors
 - right of consent not extending to refusing treatment
- legislation requires two doctors to agree the patient is a mature minor and that the treatment is in their best interest – conditions have been met here
- court says there's no room for the court to act as a parent when the patient has been deemed a mature minor

S.J.B. (Litigation Guardian of) v. B.C.
2005, BCSC

Summary:

- 14 year old girl with cancer; doctors agree to treatment to try and avoid transfusions
- inform her family they will advise MCFD in the event a blood transfusion becomes absolutely necessary
- MCFD sought an order pursuant to child protection legislation; court grants the order to force treatment
- *Child, Family and Community Service Act*, s. 29(1) - overrides the common law rule re: mature minor
 - intent is to protect children who refuse medical treatment even if they're a mature minor (or whose parents refuse consent)
- difference from *Walker* is different legislation

Sexual Wrongdoing & Intrusion

- growing interest in using trespass torts for sexual battery, stalking, harassment - no specific torts (see below)
 - limitations to the *Charter* (only applies to state action) and human rights legislation (limited to particular kinds of relationships - i.e. employer-employee)
- traditional approach to trespass torts doesn't work well due to too much focus on injuries sustained in on-off situations

Stalking: knowingly/recklessly harassing in a manner that leads to fear for someone's safety

- Criminal Code s. 264(1) - "criminal harassment"
- no individual tort - may include several discrete torts
- constitutes a substantial & unreasonable invasion of privacy
 - common law tort of privacy
 - statutory schemes - privacy acts (i.e. Manitoba - *Pateman v. Ross*)

Harassment: no clear distinction from stalking except that the behaviour generally induces distress not fear

- annoying, vexatious, upsetting - not frightening
- i.e. sexual harassment, bullying, abusive/racist comments, hostilities between neighbours/employees, debt collection, etc.
- no individual tort - may fall under privacy, nuisance, nervous shock
 - often discrete acts accumulate to become harassment
- conduct may justify remedy when: it is outrageous and unacceptable by reasonable standards of civil discourse; targets the plaintiff; causes the plaintiff severe mental distress
- sexual harassment - sometimes falls under legislation (i.e. Human Rights Codes or employment - *Chapman v. 3M Canada*)
 - but has been identified as a tort - i.e. *Lajoie v. Kelly*

Sexual Relationships: no consent = battery

- consent must be free & voluntary; actual vs. constructive
- consent is invalid when there are threats/force or the exploitation of a power imbalance (i.e. *Norberg v. Wynrib*)
- may also be invalid due to fraud - specifically re: the nature/character of the interference
 - re: STI's - lack of understanding of the grave risks
 - *R. v. Cuerrier* - "concealment of a significant risk of serious bodily harm"
- alternately could fall under negligence for "negligent misrepresentation"
 - special relationship between sexual partners imposes a duty of affirmative action

Advantages/Disadvantages of Civil Action:

- litigation in cases of criminal violence is uncommon - except re: sexual assault; incest; spousal/child abuse

- offenders are often known; some offenders/employers can pay
- motivated by accountability; therapeutic benefits; etc.
- weighed against stress, emotional burden, expense, etc.
- Crown proceedings legislation presents a challenge to historical incidents of institutional abuse (i.e. Woodlands School) - only allowed after August 1974
- since 1980's - more recognition of systemic abuse; more survivors bringing claims; courts have become more responsive
 - historically courts have applied a de-contextualized analysis of consent
- advantages (over criminal law):
 - plaintiff has more control over the process
 - lower burden of proof - balance of probabilities (over RPG)
 - potential for compensation/financial redress for harm suffered
 - accountability to the victim (rather than the state)
 - educational/therapeutical functions
 - helps to clarify social standards re: dignity/individual rights
- disadvantages:
 - expensive, time-consuming, stressful/traumatic for plaintiff
 - defendant may be judgment proof - can't recover; insurance unlikely to pay (*Scalera*)
 - led to cases of vicarious liability for institutions for the wrongdoing of their employees
 - action may go undefended - defendant doesn't need to respond; denies therapeutic functions
 - difficulty in assessing remedies

Limitation Periods:

- usually set by statute - sets out a time limit for when a person can bring an action
- usually two years for tort or two years from age of majority
- *BC Limitation Act*, s. 3(2) - two years from when the right arose
- rationale: (LaForest in *K.(M.) v. H.(M.)*)
 - *certainty* - limitation acts are "statutes of repose"
 - there should be a time when a potential defendant should be secure they won't be held accountable for an 'ancient' act
 - *evidentiary* - plaintiff's should not be permitted to bring claims based on stale evidence
 - *diligence* - incentive for plaintiff's to bring suit in a timely manner
- discoverability rule (applies to all tort actions):
 - "a cause of action arises for the purpose of a limitation person when the material facts on which it is based have been discovered or ought to be discovered by the plaintiff by the exercise of reasonable diligence" (LeDain, J. In *Central Eastern Trust Co. V. Rafuse*) - codified in s. 6
- most provinces have legislation that accounts for this "discoverability principle" - dispenses with limitation periods for sexual misconduct until survivor can fully understand the wrongdoing & consequences
- ultimate limitation - cannot bring a claim if it's been 30 years since the event (s. 8(1)(c) - BC has one of the longest periods)

- there is no ultimate limitation for sexual assault in BC (s. 3(4)(1))
- **K.(M.) v. H.(M.) [or M.(K.) v. M.(H.)] - 1992, SCC:**
 - father sexually assaulted plaintiff from age 8-16; she sues at 28 for battery & breach of fiduciary duty (actions for intra-familial sexual abuse)
 - successful at jury trial but action dismissed - barred by Ontario *Limitation Act*
 - upheld on appeal; overturned by SCC (found for plaintiff on both claims) - applied the discoverability rule
 - in cases of incest the limitation doesn't begin until the plaintiff realizes the connection between the tortious act and the damages suffered
 - rule requires the plaintiff to have "substantial awareness of the harm and its likely cause before the limitations period begins to roll" (LaForest)
 - no public interest in shielding abusers while victims continue to suffer
 - relevant evidence will be stale even upon age or majority or within two years
 - re: diligence - in childhood sexual abuse cases damages are often latent until the victim is well into adulthood
 - there is a presumption that the link will become apparent only after psychotherapy (LaForest - majority view)
 - rebuttable - if the defendant can prove the plaintiff was aware earlier then the limitation period will begin earlier
 - dissent (McLachlin & Sopinka) concurred with judgment but disagreed re: the rebuttable presumption
 - many jurisdictions changed their limitation acts to encompass situations of childhood sexual abuse
 - some jurisdictions - including BC - amended their statutes so there is no limitation period for sexual abuse claims
 - limitation periods continue to apply in cases of physical abuse

**Norberg v. Wynrib
1992, SCC**

Summary:

- women addicted to pain killers; becomes a patient of Wynrib - gets him to prescribe her painkillers; doctor discovers her addiction & confronts her; tells her he will provide the drugs in return for sexual favours; initially refuses to comply; when she can't get the drugs elsewhere she returns to Wynrib & gives in; asks for help in overcoming addiction - he tells her to "just quit"/offers no other treatment/support; eventually enters rehab on her own
- she's charged with "double doctoring" (*Narcotics Control Act*) re: more than one prescription - dropped; plays an important role in the lower court
- brings action for: battery, negligence, breach of fiduciary duty, breach of duty
- lower court (Oppal): dismisses battery claim - consented; no force/threat; drug addiction didn't interfere with capacity to consent
 - dismisses negligence claim - can't prove necessary damages; defendant wasn't negligent in continuing to prescribe the drugs as their continued use didn't cause any "harm"

- holds in favour of breach for fiduciary duty but denies compensation due to her illegal/immoral conduct ("*ex turpi causa*") re: double doctoring
 - fiduciary duty is an equity claim - must come to court with "clean hands"
 - court won't grant compensation from harm that occurred during your own wrongdoing
 - BCCA - Locke J. Dissents on use of *ex turpi causa* - finds doctor negligent
- SCC - majority decides based on battery (recognizes power imbalance between doctors/patients)
- LEAF - intervenor re: lower courts application of an unduly broad definition of consent
 - did not address distinction between consent and coerced submission in the context of unequal power (para. 17)
 - approach inconsistent with legal principles of sex equality; result it to permit more powerful members of society to prey with impunity upon more vulnerable members; sends a message that if you have power you're permitted to use it (para. 18)
- majority (LaForest) - focused on issue of genuine consent
 - contractual analogy - no genuine consent when there in an unequal power relationship and the more powerful part exploits the relationship to the detriment of the other
 - re: the facts:
 - unequal power relationship
 - plaintiff particularly vulnerable
 - defendant had knowledge of plaintiff's medical problem; had skills to help but instead exploited for personal sexual interest (quote - para. 48)
 - awarded \$20,000 general damages; \$10,000 punitive damages
 - all judges award damages but spilt on reasoning
 - note: *ex turpi causa* should only be used in rare cases
- dissent as to quantum (Sopinka) - liability based on negligence & contract
 - consent therefore no battery
 - fiduciary duty only extends to confidentiality of patient's records
 - confined issued to whether defendant met obligation to provide reasonable careful treatment - on the facts defendant did not satisfy obligation to treat plaintiff's health problem
 - award - \$20,000 general damages
- dissent (McLachlin) - liability based on breach of fiduciary obligation - doctor/patient relationship inherently fiduciary in nature
 - important effect: situates the problem in the structure of the relationship (doctor-patient; parent-child; teacher-student) rather than in the personal relationship or characteristics of the parties
 - characteristics of fiduciary relationship (re: Wilson J. In *Frame v. Smith* - para. 69)
 - fiduciary has scope for the exercise of some discretion or power
 - fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests
 - beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power
 - re: the facts:

- met elements of a power relationship - ability of powerful party to act to the detriment of the other's interest; vulnerability of the latter
- doctor used power for his own personal satisfaction; did not serve the best interests of the patients as required (health/medical needs)
- plaintiff was not blameworthy - she was victimized
- award - \$20,000 for suffering & loss (para. 106); \$25,000 for sexual exploitation; \$25,000 in punitive damages

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

Summary:

- sometimes referred to as *Sansalone v. Wawanesa Insurance* (another defendant & insurer - same case)
 - issue: must an insurance company defend an insured person against allegations of battery in a sexual context (policy excludes conduct of an intentional or criminal nature)?
 - Scalera argued that the exclusion clause shouldn't apply to him and his insurance company should defend the sexual assault charges against him (clause at para. 59)
 - result: both majority/minority side with the insurer
 - split on who has the burden to prove consent falls to in a *sexual battery*
 - normally in a battery action there is a reverse onus on the defendant
- minority (Iacobucci with Major & Bastarache) - wanted to create a new tort for sexual battery that would require the plaintiff to prove 1) that the sexual conduct occurred); 2) that the contact was offensive/harmful = that there was no consent
 - generally the tort of battery only requires intentional physical contact (para. 98)
 - Scalera's argument - contact may have been intentional but the harm wasn't b/c he believed there was consent (para. 100)
 - traditional battery arose out of an *inherently* harmful act - this should be the standard and shouldn't include sexual battery - sexual contact isn't inherently harmful; only offensive without consent (para. 105)
 - should shift the onus of proof so the plaintiff needs to prove lack of consent in order to prove the contact is offensive (para. 107)
 - as opposed to being punched or shot where you don't have to prove the contact was offensive
 - defendant can have a defense of constructed defense (majority agrees) - reasonable person would have thought the person was consenting - this defense is not allowed in other intentional torts
- majority (McLachlin with L'Heureux-Dube, Gonthier & Binnie) - no reason to create a new tort or abandon the traditional approach for sexual battery; battery is already applicable to unwanted sexual contact
 - first part of judgment reviews traditional approach to partial reverse onus of proof
 - rights based approach supports this approach - protects personal autonomy and should be kept within the traditional battery (para. 22)

- sexual contact is different than being jostled on a bus - one can not presume consent (para. 18; 21)
 - shifts the focus from the defendant's conduct to the plaintiff's character; risks victim blaming
- would run counter to the direction of the legislature in the criminal law (which has shifted the focus away from the complainant)
- in the case of constructed consent the person has to have taken reasonable steps to ascertain consent; Iacobucci's approach would move away from this; making the plaintiff disprove constructed consent is unfair; the defendant has the relevant knowledge - relevant facts lie in the defendant's sphere of knowledge (para. 33)
 - practically speaking plaintiff's usually testify they did not give consent
- tort already focuses on the behaviour of the defendant and shouldn't be changed - no compelling reason to shift the burden in the case of sexual battery only
- result: no special tort for sexual battery; ordinary onus of proof partial reverse on the defendant) applies; focus stays on the defendant; defense of (constructive) consent is available to the defendant
 - plaintiff has to prove physical contact
 - can never have a negligent sexual battery (if so then the exclusion clause would apply)
 - this means insurance generally won't defend action for sexual battery as these types of exclusion clauses are common
 - the duty to defend is in relation to the nature of the action not whether one is found liable
 - nature of sexual battery claim is that it is always intentional
- re: constructed consent defense - reasonable person standard
 - problematic - premised on male dominated standard about 'normal' activities
 - presupposes a "reasonable" range of responses to sexual advances
 - ignores the plaintiff's perceptions of the events
 - particularly problematic for marginalized women
 - undermines the philosophy of control over one's body

Unlawful Sterilization by State Officials

***Muir v. Alberta* 1996, Alb. QB**

Summary:

- statutes authorized sterilization of people with mental disabilities believed to be hereditary; part of Eugenics movements (particularly strong in BC & AB)
 - legislation was more likely to apply to powerless, marginalized people while they were in state care
 - many were also used for drug experiments and research without their consent
- Muir brought forth battery and false imprisonment claims
 - placed in provincial training school for 'mental defectives' (from age 10-21)
- province conceded the battery claim - Eugenics Board "exceeded its legal authority" by sterilizing Muir - she didn't meet the "requirements"

- case does not address the legitimacy of the legislation itself - many people were deemed sterilized under lawful authority of the legislation
 - Eugenics Board could only authorize sterilization of those the institution was proposing to discharge; if no planned discharge, then no lawful authority to sterilize (CP, p. 137 - re: s. 6 of the sterilization act)
- court case was about damages (and false imprisonment claim)
- ruling: damages for both battery & false imprisonment claims (as well as for negligence & breach of fiduciary duty)
 - 'high-handedness' of conduct - ignored evidence of admittance that her issues were emotional; wasn't adequately tested before sterilization; court finds fault with discharge issue (she left on her own accord - against the wishes of the state)
 - province had breached their own legislation - admission and confinement were in violation of the statute
- award: \$750,000 for aggravated damages but no punitive damages
 - government accepted responsibility by conceding battery and didn't invoke the limitation period (she was out of time for bringing her action)
 - courts want to encourage governments to settle these types of claims
- Albert settled out-of-court with 246 other claimants who had been wrongfully sterilized (\$82m) and officially "expressed regret" for the sterilization policy
- there were also cases in BC, including ***D.E. v. BC - 2005, BCCA***:
 - lower court - institution of Essondale (now Riverview) did not exceed jurisdiction in ordering sterilizations; province invoked ultimate limitation period (s. 8(1)(c)) - denied action on limitation period
 - on appeal - held that 9 of the 18 claimants had been illegally sterilized - staff exceeded authority because legislation required a reasonable likelihood that the patients would be discharged in order to sterilize
 - majority found that sterilization fell within the meaning of sexual assault as per s. 3(4)(1) of the *Limitation Act* - therefore limitation period had not expired
 - province did not appeal - settled with the 9 plaintiffs (represented by the Public Trustee)
 - note: cannot sue the BC government for acts committed before 1974 when *Crown Proceeding Act* came into force (different federally and for different provinces)

Vicarious Liability - Scope of Employment

- employers not liable for all the torts of their employees - must be a connection between the wrongdoing the employment relationship = "course of employment"
- - if distinct or unrelated then no vicarious liability
- re: expressed prohibitions by the employer - draws a line between "how to do the work" (still related to the employee's function and therefore still caught by vicarious liability) and "what work is to be done"
 - *Canadian Pacific Railway Co. v. Lockhart* - prohibition against use of uninsured vehicles; carpenter uses person, uninsured vehicle to get between jobs; negligent driving; injures P. - employer found vicariously liable
- ***Bazley v. Curry (1999, SCC)***
 - majority (McLachlin - unanimous) establishes a two step approach:

- must follow "unambiguous precedent" (if available); or
- policy considerations - just and practical remedy; deterrence
- not sufficient for the employer to simply provide an opportunity - their enterprise and the power conferred on the employee must materially increase the risk of wrongdoing
- must be a sufficiently close connection between employment and the wrongful act
- factors considered:
 - opportunity afforded to abuse power
 - extent that the wrongful act may further the employer's aim
 - extent the act is related to friction, confrontation, intimacy inherent in the enterprise
 - extent of power conferred on the employee in relation to the victim
 - vulnerability of potential victims to the wrongful exercise of the employee's power
- **Jacobi v. Griffiths (1999, SCC)** - brings *Bazley* test into sharper focus
 - unable to agree on application of the test
 - majority (Binnie): distinguishes *Bazley* - no vicarious liability
 - emphasizes "strong connection" - role of the program director (Boys & Girls Club) was to establish rapport and friendship, not an intimate, nurturing relationship (like in *Bazley*)
 - policy considerations - liability would place undue burden on organizations where there is adult/child contact
 - dissent (McLachlin): role of the club was to provide care & protection; focused on the power and influence of the employee and his ability to form a trusting & intimate relationship with the victims (brother & sister)
 - employer sufficiently increased the risk of wrongdoing
- subsequent cases (including *Oblates* - see below) indicate that much depends on the nature and authority attendant on the employee's position and the degree that are enabled to use that authority to insinuate themselves into the intimate lives of the victim
- this approach (test) is appropriately applied in other types of wrongdoing - i.e. fraudulent acts/economic loss

Basic Test:

- step one: does the requisite relationship exist between the tortfeasor and the person found to be held to be vicariously liable?
 - are they employer-employee? - see *Sagaz*
- step two: if so, was the tort committed "in the course of employment"?
 - "Salmond Test"... "employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an unauthorized act"
 - problematic - sexual abuse is never "authorized"; hard to establish a connection to authorized acts
 - *Bazley v. Curry* - shift to an "enterprise risk test" - sufficient connection between the creation of the risk and the unauthorized act

- probably only applies in situations of sexual (maybe physical) abuse in institutional settings
- To operationalize the test -
 - look to precedents
 - policy considerations/fair compensation/recovery - just & practical remedy for the plaintiff; deterrence

E.B. V. Order of the Oblates of Mary Immaculate in the province of BC
2005, SCC

Facts/Issue:

- E.B. was a resident a Residential School for First Nations Children on Meares Island from 1957-62
- school was run by the Order of the Oblates of Mary Immaculate in the Province of British Columbia
- E.B. was sexually abused by a lay employee - Martin Saxey (First Nations; violent offender hired shortly after release from prison for manslaughter)
 - deceased; estate has no money to pay if found liable for damages
- trial judge had not yet ruled on whether Oblates was *directly* liable; focus of the appeal is on the basis of *vicarious* liability for the misconduct of their employee
 - application of *Bazley* test - strong connection between what the employer was asking the employee to do (risk created by the employer's enterprise) and the wrongful act; employer must have significantly increased the risk of harm by putting the employee in their position and requiring their task

Lower Courts/Result:

- trial judge found vicarious liability - "operational characteristics" of the school created a risk on sexual abuse; risk materialized in harm to E.B.
- overturned by the court of appeal - SCC agrees with BCCA that the trial judge put all the employee's on the same footing; Saxey's work did not involve any degree of intimacy; absence of requisite strong connection; mere opportunity not sufficient (references case law)
 - "operational characteristics" stressed by the trial judge argue for *direct* liability (not vicarious)
- result: appeal dismissed - "imposition of vicarious liability in this case does not conform with our jurisprudence" (para. 4)

Majority (Binnie):

- must pay attention to the wrongful employee's powers, duties & responsibilities
 - *Bazley* confirmed weakness of the *Salmond* test (*Canadian Pacific Railway Co. v. Lockhart*, 1942)
 - court must look to larger context of the employer's enterprise and the risk introduced by the enterprise
 - concern with providing a just and practical remedy - "just" requires more than a coincidental link to the activity of the employer and the duties of the employee

- mere opportunity not sufficient ("but-for") - must investigate the employee's specific duties/assigned tasks
- includes an examination of the job-created power and the nature of the duties of Saxey - including those discharged in the context of a residential school environment (don't need to be "parent-like") - to determine if the particular enterprise increased the risk of the employee's wrongdoing in relation to the claimant ("material increase in the risk" - para. 29)
 - summary of the *Bazley* test (para. 30)
- application to the evidence re: the job-related powers of Saxey
 - questions of degree are important in distinguishing the broad range of responsibilities of the employees at Christie (the school)
 - review of the case law pertaining to various roles-links to intimacy-findings of vicarious liability (para. 41-42)
 - Oblates delegated no significant power over the children to odd-job men, bakers, motorboat operators - Saxey's employment opportunities were mundane/remote from actually looking after the children
 - *Hammer* - janitor with no direct duties relating to children - no vicarious liability
 - *K.L.B.* - foster parents classified as independent contractors - no vicarious liability
 - review of additional case law (para. 44)
 - residential setting favours finding of vicarious liability but limited duties/role of Saxey mitigate against such a finding (para. 47)
 - how exact do the facts need to be when examining the precedent?
 - facts do not need to be very similar; *Bazley* provides sufficient guidance - provides five factors to consider re: the strength of the connection...
- stage one: application of *Bazley* test's five factors re: strong connection (para. 48)
- result - does not establish requisite strong connection between what the employer was asking the employee to do and the wrongful act
 - does not find statements made by the trial judge to be "findings of fact" (para. 51)
 - Oblates provided Saxey with the opportunity to come into contact with the children
 - low end of significance (precedent)
 - Saxey was not permitted or required to be with the children; boat trips were supervised; occasional contact in the bakery
 - wrongful acts had nothing to do with furthering the respondent's aims
 - conduct was abhorrent & in direct opposition to the Oblates' aims
 - degree of intimacy inherent in any residential school did not involve Saxey
 - duties required no significant contact with the students; his quarters were off limits to the students
 - Oblates didn't confer any power on Saxey in relation to E.B.
 - position did not involve regular or meaningful contact with the students
 - finding that Saxey's status as an "adult" was sufficient to attract vicarious liability crosses the line into making the employer an "involuntary insurer"
 - inevitable occasional contact with the children not sufficient; position did not put him in a position of power, trust, or intimacy; did not supervise any intimate activities

- it was the nature of the residential school and not the power conferred on Saxey that fed the vulnerability of the students
 - employer must increase risk of harm by putting the employer in their position and requiring performance of assigned tasks - not met in this case
- stage two: consideration of policy (effective compensation & deterrence)
 - part of a broad balancing of interests - must be "balanced with a measure of fairness to the employer and adherence to legal principle" (re: *Jacobi*, para. 54)
 - deterrence should be confined to situations where it is effective - danger of the general community being "over deterred" from socially useful activities (para. 55)
 - "good intentions of Oblates" (para. 56) - asshole...

Dissent (Abella):

- focussed on the "pertinent realities" of the context of a residential school - conducive to enhancing vulnerability of children (reports)
- *Bazley* test - focused on creation and enhancement of enterprise risk - "enterprise" and "operational characteristics" are the same thing (para. 74)
- application of the *Bazley* factors:
 - "opportunity that the enterprise afford the employee to abuse his or her power" - Saxey given high level of access to the children
 - junior & senior boys had access to grounds where he lived; swings outside his window; unrestricted access to where the children played - "lived among us"
 - school authorities permuted students to form casual relationships with lay staff including play & activities that included physical contact
 - children were not always carefully supervised; allowed to roam freely around the property with no childcare workers present
 - mere opportunity is insufficient but in this case the link is particularly strong
 - "extent to which the wrongful act... furthers the employer's aim" - has no bearing on the case - only remarkable when the intentional torts so further aims (re: *Jacobi*)
 - "extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise" - discipline at Christie was strict and harsh (physical & emotional violence, deprivation, belittling, intimidation); students were to repeatedly told to obey *all* staff members
 - unclear if lay staff had the same power to use corporal punishment but expert testimony claimed that in the setting the fear of adults was generalized to all that a child dealt with
 - "extent of power conferred on the employee" - breadth & amorphous nature of duties (and the ways they were allocated) gave Saxey both actual and perceived power over the students
 - Saxey's job duties were ambiguous/assigned verbally; employees were expected to help with all tasks including supervision of the children
 - baker position included direct supervision of children during chores; he was completely in charge with powers second only to the principle
 - E.B. never worked directly with Saxey in the bakery but he knew of Saxey's supervisory role and viewed him as a person of power & authority
 - evidence Saxey's role included supervising children on a daily basis and assigning chores to them

- "vulnerability of potential victims to wrongful exercise of the employee's power" - children were young, afraid, isolated, intimidated and conditioned to obey adults - especially school staff members
 - school separated children from their families for long periods of time
 - although E.B. had family living at Christie he was prevented from having a close relationship with them
 - isolation was aggravated by geography and compounded by the harsh/violent discipline routines & repeated orders to obey all staff members
- no basis for challenging the trial judge's findings of fact or conclusion of vicarious liability (even at a higher threshold)