

Law 430  
Torts CAN  
Nelson Fall '17

# Torts CAN

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### WHAT IS A TORT?

- Wrong committed against someone else.
- It is a civil wrong
- But not every wrong amounts to a tort, only the ones the law recognizes.
- Determining which losses and injuries can be brought to the legal system for an attempt to redress it.
  - Negligence, battery, nuisance, defamation, trespassing.
  - Negligence is the focus of modern tort law systems.
- What has to be decided:
  - How do we decide who bears the costs?
  - What principles guide the decision?
  - What institutions should we create to realize these principles?
- Torts vs Criminal law
  - Civil vs criminal law
  - The outcomes can be different. Money in a criminal case goes to the state, money in a tort goes to the individual.
  - Tort is a wrong against an individual, criminal is a wrong against society.
  - The party prosecuting a crime is the state but in a tort the parties are private. The lawsuit is brought by the individual who suffered harm.
  - Different standards of proof: in criminal it is beyond a reasonable doubt; in Tort law, it is a balance of probabilities (roughly equated to 50% + 1, or more likely than not).
  - A tort and crime can come from the same incident. The tort claim comes from the desire for compensation.
  - They share a common heritage: historically they were not all that distinct, however, over time they have become more distinct.

### WHY DO WE HAVE TORTS?

- **1. Essentialist account:**
  - Tort law is about corrective justice.
  - The reason we have tort law is to ensure the wrongdoer must provide redress to the victim.
  - The mechanism tort law provides for that is compensation.
  - We should not be looking to tort law for other objectives.
  - 
  - Essentialist make the account that if we are focused on fixing the wrong, we shouldn't be worried about the impact that has on society as whole of that decision.
  - Damages being awarded, for an essentialist, is incidental. The consequences of liability (damages) are not purpose of tort law. Tort law is righting the wrong, the damages are how we do that, but they are not the purpose of tort law. They are a mechanism to achieve the purpose.
- **2. Instrumentalist view:**
  - Tort law has multiple goals. These are goal oriented theories.
  - Tort law protects a wide variation of interests (body, privacy, reputation).
  - It deals with different kinds of behavior. The conduct can be on a continuum: accidental harm, negligence and intentional harm.
- **2a) The most frequent aim tort law has to an instrumentalist is **compensation.****
  - Tort law is the tool to achieve this end, people who suffer losses get compensated for those losses.

- Compensation won't necessarily fix the problem caused by the tort but hopefully it will allow for the victim to adapt.
- Criticisms:
  - The person who was the victim has to bring the suit.
  - Bringing a suit is expensive. (inefficient)
  - The damages are arbitrary (compensation for a loss of limb).
  - The defendant may not have any money.
  - It takes a really long time. (inefficient)
  - You have to prove your claim by proving fault, which can be challenging. E.g. medical malpractice.
- **2b) Justice:**
  - One of the goals of tort law is to appease the victim.
  - Conforms to our notions of what is just and fair.
  - The victim can be vindicated by the process where the wrongdoer is shown to be wrong and the victim innocent.
  - In theory, there is no connection between punishment and compensatory damages.
  - Distributive justice - is the notion that we should distribute benefits and burdens among society in a fair way.
    - As things happen, the loss should be spread among at least the victim and wrongdoer, if not society as well.
    - In theory, you would want benefits and burdens shared equally among society.
    - In reality, if you injure a low-income earner you have to compensate them based on that wage, but if you injure a high-income earner you have to compensate much more. This is not really a sharing of benefits and burdens equally.
- **2c) Deterrence:**
  - Trying to prevent from acting in ways that cause harm to others.
  - Does tort law deter certain kinds of behaviour?
    - Specific deterrence - focuses on the individual tortfeasor, if they are found liable then in the future they will be deterred from doing similar actions.
    - General deterrence - the law having a deterrent effect on the rest of society. We see that the tortfeasor has been found liable and this will deter us from doing the things that the person was found liable for.
  - Characteristics of a law to be a deterrent:
    - They have to feel the punishment (money has to be great enough to prohibit behaviour.)
    - Punishment should be certain, swift, and proportionate.
    - You have to know what the consequences are and what you are doing is wrong. So, the law has to be clear.
- **2d) Educate:**
  - The law exists, in part, to teach us what is acceptable behavior.
  - Tort law teaches us and reminds us what is above the line and what is below the line.
  - Helps to think about it in very specific context. e.g. what can doctors do in a particular procedure.
- **2e) Ombudsman function**
  - Serve to put pressure on persons and institutions with power and in doing so operate like an ombudsman.
  - Ralph Klein and his health care cuts: People had health issues which they attributed to lack of service due to health care cuts (either delays or inability to serve people).
  - Claims were brought.
  - Government tried to have summary judgements for these claims, the court refused.
  - After that we don't know what happened to the claims but it shows that these laws could put pressure on political actors.
- **2f) Other functions**
  - Therapeutic or psychological process:
    - In the context of sexual assault. The criminal prosecution may not be successful, but a tort can be brought against the wrongdoer.

- It allows the victim to have some control and (due to the different burdens of proof) may have a greater chance of success.
- Law and Economics theory:
  - Tort law is designed to ensure accident cost are allocated optimally.
  - We want to incorporate the costs of potential accidents into the activity itself.
  - What are the actual costs and social costs of people engaging in these activities.

### **CRITICISMS OF TORT LAW**

- There are barriers to recovery (I.e. have to establish fault, defendant may not be able to satisfy the judgement).
  - You have to pay to file a claim, in QB you have to pay if the trial lasts longer than 5 days.
  - You have to pay \$50 to file a statement of defense.
- There are knowledge gaps between the plaintiff and the defendant. Often the defendant knows more than the plaintiff.
- Is tort law effective? How do we measure effectiveness effects the answer? Weinrib view of corrective justice vs compensation or deterrence.
- It is very slow. Is it worth the wait for the damages?
- Is this system fair? Because of the cost of litigating a claim, there is an incentive to get out of claims as quickly as possible. So for small claims you may want to settle for more just to avoid legal costs. Minor claims are therefore satisfied best, whereas more serious claims do not get as much of their damages in the end.
  - There is a theory the system causes plaintiffs to exaggerate their claims, so in the end they get more (or closer to what they are actually owed).
- Arbitrary - somewhat arbitrary about what you can and cannot file a claim for.

### **ALTERNATIVES TO TORTS LAW**

- Insurance – first party insurance rather than seeking to litigate.
- No fault systems
  - Tort law focuses on fault, the claimant has to establish fault.
  - If you don't have to prove fault, only that you were injured so then you can request compensation.
  - It's a collective scheme where lots of people pay into it.
  - Ex. Workers Compensation. If an employee is injured at work, then draw from WCB. The amounts you pay into it are defendant on the industry, your employer history.
  - The trade-off is that in exchange for your right to bring a lawsuit, they receive (in theory) an easier path to getting compensated. Is this actually the case? Is this a good trade-off?
  - WCB claims are not necessarily an easy path in reality.
  - Much like the Tort/common law system, the WCB system has some of the same issues.
  - Have to limit payouts, which tops out.
  - Some provinces have no fault, public insurance systems for motor vehicle accidents.
  - In SK, you have to participate to an extent in the no fault system, then there is an additional add-on fault system you can participate in but not many people participate.
  - Ontario is primarily no fault, but there are instances where if you meet the threshold you can bring a claim.

## **INTENTIONAL TORTS**

### **GENERAL**

- Early feature of the tort system was the writ
- Writ is a standardized pleading that you fill in and there were procedural formalities.
  - If you chose the wrong writ, you would have no ability to bring a claim. It was true no matter how bad the defendant acted. There were around 44 different writs.
  - If you didn't fit with an existing writ you could not bring a claim.

- Trespassing writs:
  - Originally did not require the defendant to be at fault. Did not require the plaintiff to have been injured either.
  - As long as you could show that the defendant acted in a certain way you could get a remedy.
  - Direct interference (trespass writ) vs indirect interference (action on the case writ)
    - The court tried to distinguish between direct and indirect interference as a way of determining what writ someone could bring.
    - In practice this can be hard to apply.
- If you could show direct interference you would not have to show fault. The defendant would however have to show lack of fault to escape liability.
- Regarding an action on the case, you would have to show fault, so the standard of proof is much higher for an indirect interference.
- In the 1870s the writ system was abolished in England, and shortly thereafter in all common law systems.
  - It still has an influence today, related to the procedural distinctions between trespass based torts and other intentional torts.
- E.g. D throws a firecracker, that is then thrown by Y, W, and R. Eventually it explodes on P's face. Can P sue D in trespass?
  - Nares J (for the majority): trespass would well lie in the present case. It is not necessary for trespass for the defendant to personally touch the plaintiff.
  - Blackstone (dissenting): trespass does not lie against the plaintiff. The injury is consequential and therefore it must be an action on the case.

## **MOTIVE, MISTAKE, VOLITION**

- **Motive**
  - The reason for engaging in a particular kind of conduct.
  - What were you hoping to accomplish?
  - Is the motive legally significant?
  - Motive and intent are not necessarily the same:
    - Friend moves your car to prank you
    - Friend moves car to prevent it getting towed
    - Someone steals it.
    - Intent is all the same, motive is different
  - In our analysis of intent, motive does not matter.
- **Mistake**
  - You take someone's bike thinking that it is your bike.
  - The intention is that you wanted to take that bike and ride it home. You made a mistake about the legal significance of what you are doing but you still intended to take that bike.
  - The legal significance of a mistake is not much because you still have the requisite intent. Therefore, mistake is not relevant to the concept of intent (same as motive).
- **Volition**
  - To act with volition the actor has to have control over what they are doing and understand what they are doing.
  - Are they acting voluntarily?
  - Does the actor have control over his physical actions?
  - Is the act directed by a conscious mind?
  - The bar is not very high. The court is looking for if you were conscious of your actions and able to control them.
    - Sleep walking, seizure, someone taking your arm and smacking someone with it are examples of when you are not.
    - There are not a lot of situations where people are said to be acting involuntarily.

- The difference between intention and volition is
  - You can act voluntarily but not intentionally.
  - You cannot act intentionally but not voluntarily.
- **Capacity**
  - The actor's ability to understand the act that they are engaging in.
  - You can act voluntarily but if you don't understand what you are doing, you do not have capacity.
  - If you do not have capacity, then you cannot be found to have acted in an intentional tort.
  - This relates to the mental ability to understand the act and consequences of that act.
  - In Canada there is no age of capacity.
  - It is not a high bar to get over, but the actor has to understand what they are doing and consequences of it.

## ASSAULT

- The tort is aimed at protecting the victims right to live in peace and without violence.
- **The definition of assault:**
  - The tort is committed when the defendant intentionally creates in the plaintiffs mind a reasonable apprehension of imminent offensive or harmful physical contact.
  - Intention – if the defendant desires the outcome or that the consequences were substantially certain to arise.
  - Apprehension – the victim has to perceive that the imminent offensive or harmful physical contact.
  - Reasonable qualification – the apprehension has to be something that a reasonable person would perceive.
- This is an **objective test** because of the reasonable apprehension, i.e. you do not have to consider the subjectivity of the victim because it is a reasonable person standard.
- **The elements of assault:**
  - The plaintiff must prove 1) a direct threat of harm;
  - 2) reasonable apprehension – do not have to establish that they are going to be injured but that they are going to be the recipient of harmful or offensive contact.
  - 3) The plaintiff does not have to show harm or damage only the reasonable apprehension.
  - 4) Fault (intent) is presumed – if the defendant desires the outcome or the consequences were substantially certain to have arisen, the defendant has intent.
    - Fault and intent are the same thing.
    - It is presumed because the plaintiff only has established a reasonable apprehension of imminent offensive or harmful physical contact.
      - The defendant has to then prove that there was no intent to escape liability.
- **The burden of proof in tort law is always the balance of probabilities.**
- E.g. if the defendant points a gun at the plaintiff – this is likely assault.
- If the gun is not loaded? – if the plaintiff believes it is, then there is still a reasonable apprehension, and the defendant would have to show there was no intent.
  - If the plaintiff knows it's not loaded, then it would be harder to establish a reasonable apprehension of harm.

### Stephens v Myers

(1830), 4 Carrington and Payne 349, 172 ER 735

#### Facts:

- A (P), was advancing in a threatening attitude with an intention to strike B (D).
- If A had not been stopped his blow would have reached B.
- It was an assault in point of law, though at the moment A was stopped he was not near enough for his blow to take effect.

- B was chairing a meeting, and there were 6-7 people between A and B. An engaged in angry discussion and a motion was made for A to be turned out, which was carried by the majority.
- A stated that he would rather pull the B out of his chair than leave the meeting and advanced towards B with his fist clenched.
- A was stopped by the Churchwarden at a point where no blow would have reached B but seemed to have the intention to strike him.

**Issue:**

- Was the defendant advancing at the time in a threatening attitude to strike the chairman so that his blow would almost immediately have reached the chairman if he had not been stopped?

**Analysis/Holding:**

- Judge to the jury: Even though the defendant was not near enough to have struck him at the time he was stopped:
  - If he was advancing with intent that amounts to an assault in law.
  - If he was advancing so that within a second or two he would have reached the plaintiff that is assault in law.
  - If he was not advancing to strike the plaintiff than the verdict must be for the defendant.
- In all cases there must be the means of carrying the threat into effect.
- Verdict for the Plaintiff. Damages awarded

**Tuberville v Savage**

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(1669), 1 Modern 3, 86 ER 684, Court of King's Bench

**Facts:**

- The plaintiff put his hand upon his sword and said if it were not assize-time I would not take such language from you.

**Issue:**

- Is this an assault?

**Analysis/Holding:**

- The Court agreed that it was not, for the declaration was that he would not assault him since the judges were in town.
- So there was **no imminent harm** since the judges were in town.
- The intention as well as the act makes an assault.
  - If someone strikes someone upon the hand, arm or breast in discourse, it **is no assault there being no intention** to assault.
  - If there is intention to assault, and someone strikes another and miss him, that is assault.
  - If he holds his hand up against another in a threatening manner and says nothing, that is assault.
- Judgment for the plaintiff.

**Herman v Graves**

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1998 ABQB 471

**Facts:**

- Plaintiff: Jesse Herman; Defendant: Jackson and co-defendant Graves
- A road rage incident, where Jackson drove Herman off the road.
- Herman passes Jackson and Graves, cuts them off and then slows down. Jackson starts tailgating Herman and both cars are driven off the road. Graves then commits battery.

**Issue:**

- Is Jackson liable for assault upon Jesse by virtue of her operation of Graves' truck and whether she is a joint tortfeasor in the assault and battery of Jesse?
- Did Jackson use Graves' truck as a weapon of assault?

### Analysis/Holding:

- The tort of assault is the intentional creation of the apprehension of imminent harmful or offensive contact.
- No physical contact is required, the legal wrong is the threat to the security of the person.
- Damages for assault is rare.
- Since no physical harm is required, damages are limited to psychological harm, or punitive damages.
- Court finds that Jackson used Graves' truck to commit an assault on Jesse and his brother.
  - She caused reasonable apprehension of harm by chasing and tailgating the car and driving the truck into the rear of the car, forcing it to veer of the road.
- Court also finds that Jackson was not a joint tortfeasor in the assault and battery of Jesse by Graves.
- While Jackson forced Jesse off the road with the truck and Graves is the only one to have exited the truck and attack Jesse, Jackson simply sat in the truck and did nothing.
- The judge rejects the idea that Jackson did not know of the assault until later
- While she is not a joint tortfeasor in the matter of battery, her conduct merits the award of punitive damages.

### BATTERY

- Protects against the right to be free from physical or harmful contacts.
- **The definition of battery:**
  - When the defendant intentionally causes harmful or offensive physical contact.
- Intention is defined similar to the assault context.
- Plaintiff doesn't have to establish actual harm. The contact could also be beneficial to a plaintiff but still considered a battery.
- The **elements of battery**, the plaintiff must prove:
  - **1) Direct physical contact.**
    - Did the defendant's action lead to contact with the plaintiff or did something else have to happen first?
    - The contact does not have to be person to person.
    - Not typically contentious.
  - **2) Has to be harmful or offensive.**
    - Physical contacts that are offensive: things we do not generally expect to happen in everyday life.
    - Therefore, the contact is outside of what is expected in everyday life, will depend on the circumstances and context.
  - **3) Fault (intent) is presumed**, and the defendant must prove there was no intent.
    - Intent – desires the outcome or the outcome was substantially certain to have arisen.
- The plaintiff does not have to be aware of the contact at the time it occurs.
- You can be the recipient of offensive physical contact even if you are not aware of it.
- Beneficial contact can still be battery:
  - You push someone out of the way of a car.
  - Medical treatment.
- Battery is just the direct of physical offensive/harmful contact, there is no question of consent in establishing battery.
  - Consent is a defence.
- In the context of a battery claim, the defendant's liability extends to all the consequences resulting from the battery.

### Allan v New Mount Sinai Hospital

(1980), 28 OR (2d) 356 (HC), rev'd on procedural grounds (1981)

#### Facts:

- P: Allan; D: New Mount Sinai Hospital in Toronto, Dr. Kurt Hellman.
- Allan was at the hospital to have surgery and Hellman was the anesthetist in the procedure.

- Allan mentioned to the resident she wanted to speak with the anesthesia before the operation. In the morning of the day of the operation, she tells Hellman to not try and find a vein on the left arm because of difficulty in past attempts.
- Hellman replies "we know what we are doing."
- During the procedure Hellman had to give additional sedative, however, the needle had slipped out and the solution leaked into the arm but not the vein.
- The day after the procedure, Hellman apologizes and says that they should have listened to her, according to Allan. Hellman doesn't remember what was said during the conversation.
- After surgery, Allan feels like her left arm is broken, over the next few months, due to complications, she developed pain and suffering and economic loss.
- Allan had a severe reaction, and Hellman had never seen it before.
- Expert witness: Hellman's technique was reasonable and customary. Every doctor has needles slip out of veins. Most doctors also prefer to work on the left arm for safety reasons.

**Issue:**

- Claim of negligence was brought against Hellman for not performing his duty in conformity with the standard of a reasonably competent anesthetist.
- There was also a battery issue, since any surgery is battery and the doctors typically have the defence of consent.

**Analysis/Holding:**

- On the negligence issue, perfection is not required, and the onus is on the plaintiff to show that he departed from the standard required of him.
  - There is no negligence since Hellman administered the anesthetic in a reasonably competent way.
- **On battery: The plaintiff has to show the elements of the tort, and then the doctor has the onus to establish that there was consent.**
- The plaintiff did not consent to the anesthetic being injected into her left arm as she has expressly stated otherwise.
  - It was not just warning, it was an express prohibition.
- The courts do not want to tell doctors had to do their jobs, but consent is not a formality, it is a right.
- Because the standard of proof is a balance of probabilities rather than reasonable doubt, the judge was relatively certain that Allan had not consent but that certainty may not have held up to the reasonable doubt standard.
- As a result, he was liable for consequences foreseeable and unforeseeable (which is typical).
  - Even though Allan had a severe reaction to the anesthetic and needle slipping was not his fault, he is still liable because of the battery committed.

**Non-Marine Underwrites, Lloyd's of London v Scalera**

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2004 SCC 24

**Facts:**

- D: Scalera, who had an insurance policy that pays on his behalf for his personal actions, but there is an exclusion for intentional or criminal acts.
- Scalera is accused of sexually assaulting a young woman. He is arguing that he did not intend it.

**Issue:**

- Whether the traditional battery onuses on the plaintiff and defendant should hold in this case, which deals with sexual battery?
  - Should the tort be fault-based, i.e. the plaintiff must prove fault?
  - The defendant intended to harm or they didn't take reasonable care and was negligent, or the tort is of strict liability and fault is presumed?

**Analysis/Holding:**

- McLachlin: Traditional battery:
  - "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault.'"
  - Consent, express or implied, is a defence to battery.

- Technically battery is not based on fault but the traditional approach will not impose liability without fault, because the violation of another person's right can be considered a form of fault.
- Not every physical act is battery. Contact plus is required. That's why the contact must be unlawful, harmful or offensive.
- It is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault.
- On sexual battery:
  - Some suggest the plaintiff should have to prove that she did not consent, since contact must be harmful or offensive to be battery.
  - **McLachlin rejects this. If battery is a violation of personal autonomy, then contact outside the category of contact that is accepted or expected in the course of regular life, is offensive.**
- The only times a plaintiff must prove more than direct contact is:
  - Implied consent in law: burden never shifts to the defendant to prove consent because consent is implied by law.
  - General exception: the plaintiff cannot merely prove contact if that contact falls within what is generally acceptable in ordinary life.
- **Sexual battery is no different than regular battery.**
  - Special rules for sexual battery could lead to victim blaming as they are singled out by special rules that don't apply to other plaintiffs.
  - It shifts the focus from the defendant's behaviour to the plaintiff's character. The plaintiff's conduct becomes the focus, and the defendant need not give their side of the story.
  - Otherwise it would be inconsistent with the criminal context.
  - **The defendant is the only person who knows whether they actually thought consent was present, and therefore, they are in the best position to prove that.**

#### Dissent:

- Iacobucci: Sexual battery is different from traditional battery.
- Not all touch is battery.
- In the context of sexual contact, the contact is harmful or offensive because it is non-consensual.
- If it is consensual, then it is not harmful or offensive.
- It is on the plaintiff to prove lack of consent because otherwise it is not harmful or offensive.
- But the majority disagrees:
  - Battery is aimed at protecting from harmful and offensive behaviour, so sexual contact, by the definition of offensive, is battery.
  - Sexual contact is similar to medical contact.
  - All sexual contact is offensive (by the definition of offensive), there is only no liability if there was consent. That is a defense to battery.

#### Notes:

- Sexual battery does not fall within one of the exceptions to the general rule:
  - Is sexual activity an activity where consent is implied? No.
  - Is it an activity that is generally acceptable in ordinary life? No.
  - It is not the casual, accidental or inevitable consequence of general human activity and interaction.
- It is a deliberate, targeted act.
- The plaintiff who alleges sexual battery makes her case by tendering evidence of force directly applied to her.
  - Force means (in terms of sexual battery) physical contact of a sexual nature.
  - It is neutral insofar as it does not necessarily connote a lack of consent.
  - If the force is not disputed, the defendant must prove that the plaintiff consented or that a reasonable person would have thought she consented.
- The court also discusses the concept of negligent battery:

- Careless as to the risk contact. You throw something off your balcony, not intending to hurt anyone but it does.
- So you would be acting without intent but still negligently.

## CONSENT AS A DEFENCE

- In general, defences are not mutually exclusive. You can draft defences in the alternative.
- Some defences are partial defences and only partly excuse liability.
- They are raised by and have to be proved by the defendant.
- **1. Consent is a complete defence.**
- **2. It can be implicit or explicit**, given verbally or in writing.
  - Written consent is evidence of consent but not proof.
  - It is the court's decision whether consent was given.
- **3. Consent extends to the normal risks inherent in the act.**
- Not everyone can give consent, if the plaintiff does not have the capacity to consent, then consent cannot be given.
- Factors that might vitiate consent:
- The plaintiff may be able to argue that there is something in the surrounding circumstances that makes the consent vitiated.
- The courts narrowly interpret these and are relatively specific.
- **Duress:** if the plaintiff was forced to give consent and it was not freely given, and there is no consent.
  - The courts don't take a broad view as the circumstances that lead to duress.
- **Fraud:** If the consent is obtained by fraud it is not legally valid. The fraud has to be engaged in by the defendant (i.e. they knowingly deceive the plaintiff)
  - The fraud has to directly relevant to the matter at hand and not related to a collateral matter.
  - Prior to the late 1990s, with an STI case at the SCC, STI status could not vitiate consent, however, after that case it can.
- **Mistake:** The defendant has to be responsible for the plaintiff's misunderstanding to vitiate consent.
- **Public Policy:** There may be policy reasons that would lead the court to ignore the legal definition of consent.
  - See Norberg and Wynrib

### Norberg v Wynrib

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[1992] 2 SCR 226

#### Facts:

- P: Norberg, a young woman who starts prescription painkillers for a dental issue and becomes addicted.
- D: Wynrib, a doctor.
- She went to Dr. Wynrib and got a prescription for her drug after alleging a hurt ankle. Eventually, Wynrib confronts her for an addiction, but also said "if you are good to me, I'll be good to you"
- This happened multiple times and Norberg refused and found her drugs elsewhere.
- She got desperate and returned to Wynrib and exchanged sexual favours for drugs. At one point she asked him for help and he did not advise treatment.

#### Issue:

- Can the defence of consent be raised against the intentional tort of battery in such circumstances?
  - At trial the judge rejected the claim of sexual assault, holding that she had consented.
  - On appeal, the judges accepted the trial finding.

#### Analysis/Holding:

- Consent must be genuine, it must **not be obtained by force or threat** of force or be given under the influence of drugs.
- Consent may also be vitiated (legally invalidated) by fraud or deceit as to the nature of the defendant's conduct.

- The SCC finds that consent should mean more:
  - Consent must be modified to appreciate the power relationship between the parties.
  - This is the public policy issue.
  - The reason is that consent had been presumed that the individual has the freedom to consent or not to, and this is untenable in certain circumstances.
  - They use contract law as an example where lack of free will comes into play. There are concepts like duress, undue influence, and unconscionability that protect vulnerable people who do not always have equality in bargaining power.
  - In these cases the person's act cannot be said to be voluntary.
- **For consent to be genuine, it must be voluntary.**
  - The factual context of each case will be used to determine whether there has been genuine consent.
- There are two steps that can be used as a framework for this evaluation:
  - **1) proof of inequality in the positions of the parties**
  - **2) proof of exploitation**
    - A consideration of the type of relationship at issue may provide strong indications of exploitation.
    - Community standards of conduct may also be useful.
- In this case, there was 1) an unequal distribution of power because she was an addict and he could give her drugs and suggested the arrangement.
  - The addiction itself is not determinative of inequality of power, just an indication.
- 2) The defendant did not use his expertise to address her addiction, instead he abused his power and exploited her weakness to pursue his own interest.
- This would also diverge from the community standards of acceptable behavior.
- **There was no consent.**

#### Notes:

- McLachlin also notes that the defendant is liable due to a breach of his fiduciary duty.
- On damages, battery is actionable without proof of damage and liability is not confined to foreseeable consequences
  - Aggravated damages may be awarded if the battery occurred in humiliating or undignified circumstances. They are designed to compensate.
  - These are not awarded in addition to general damages.
  - Punitive damages are awarded to punish the defendant or make an example of them as a deterrence.
  - \$20,000 was awarded in general damages.
  - \$10,000 was awarded in punitive damages.
- What is the risk of the unequal bargaining power argument to vitiate consent?
  - Are we saying that any addiction voids the legal impact of all the choices made by an addict in securing access to the drugs? You can't be legally responsible....
  - The fiduciary nature of the relationship may help to confine this concern.

<h3>CONSENT IN OTHER CONTEXTS</h3>
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- **Consent in sports**
  - Consent in playing sports extends to the usual risks (or typical risk) within that sport.
  - What can ordinarily happen within the rules.
- **Consent in the medical context**
  - Like in the context of ordinary consent, the consent has to be voluntary, by someone who has the capacity to give consent.
    - Capacity can be an issue with minors, or adults who are not capable of making decisions.
  - Consent has to refer to the treatment and the provider.
  - Has to be given in advance of the treatment.

- If they have the capacity to consent, then only their consent matters.
- It can be given expressly or implied. If the procedure is significant, you will likely be asked to give written consent.
  - It's safer for medical practitioners to seek explicit consent, it's not conclusive of consent but evidence of consent.
- The consent has to be informed of what they are consenting to.
- The issue of informed consent, is different than consent in general terms.
- **Adults lacking capacity**
  - If you are an adult (18 plus) then you have capacity unless there is some reason that the health care providers to think you do not have the capacity.
  - Personal directive that outlines the wishes or appoints an agent.
    - If they don't have capacity when they make the directive then it is not valid.
    - Don't need a lawyer to fill one out. More accessible but fewer safeguards.
  - Guardianship and Trustee Act (?) in Alberta
    - An adult may have a guardian appointed.
    - Appoints family members in a particular order for decision making.

## **Malette v Shulman**

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(1990), 67 DLR (4th) 321 (Ont CA)

### **Facts:**

- Malette, 57, was rushed to a hospital in 1979, unconscious, after having been in a car accident. Her husband had been killed and she suffered serious injuries.
- A card was discovered on Mrs. Malette, which said under no circumstances did she want a blood transfusion.
- Dr. Shulman was advised of the card. Malette was also seen by a surgeon who had similar conclusions to Shulman. Her condition deteriorated and continued to bleed.
- At this point the doctor determined a blood transfusion was required to preserve her life. He administered the transfusion and accepted full responsibility.
- The daughter later arrived and remained opposed to the blood transfusion. Dr. Shulman ignored her.
- Malette recovered and had no further transfusions.
- The Doctor says he was unsure of when she signed the card and whether she would have consented in that instance.
- The trial judge determined the card validly restricted her right and the doctor had no rational for ignoring the restriction.

### **Issue:**

- Whether a doctor is liable for battery for giving a blood transfusion to an unconscious patient in potentially life-threatening situation where the patient is carrying a card saying they reject blood transfusions.

### **Analysis/Holding:**

- Shulman was not found to be liable for negligence.
  - He acted promptly and professionally, and followed the standard of care.
  - The transfusion did not endanger her or cause her harm.
  - The treatment may have saved her life.
- Justice Cardozo: Every human being of adult years and sound mind has the right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.
- If there were no card, under the privilege given to doctors, Shulman would not be held liable.
- However, a doctor cannot disregard advanced instruction and they have to follow patient instructions.
- The decision to not accept transfusion were made in anticipation of emergency.
- As a case of first impression, the Court found the effect of the card was a refusal of transfusions even if the refusal involves a risk of death, then death is necessary to ensure her spiritual life.

- **The doctor committed battery because the card set forth unqualified instructions represents a patient's choice, and there is no evidence to the contrary.**

### Principles:

- **The doctrine of informed consent:**
  - No medical procedure may be undertaken without the patient's consent after the patient has received enough information to evaluate the risks and benefits.
  - This presupposes a patient's ability to make a decision based on their understanding of the medical facts.
  - A doctor who takes action without having given the patient the proper information and received their consent will have infringed on their rights.
  - They will be liable for battery regardless of the skill they performed the procedure with or the benefit received by the individual.
- Emergency situations are an exception to the general rule of prior consent.
  - If the patient is incapable of giving or withholding consent, doctors may proceed without it in the event of an immediate need to save the life or preserve the health of the person who is extremely ill or unconscious.
  - It is lawful either by implied consent to give emergency care or the doctor is privileged by reason of necessity in giving the aid and is not liable for doing so.
  - In either way the requirement of consent is set aside.

### Notes:

- The Court makes note of the reverse scenario where treatment is withheld and the patient dies. The relative then argue she would have consent in the face of death, then the doctor is found to be negligent.
  - This result cannot follow.
  - The doctor cannot be held to violate his legal duty when he follows the card and when he respects the patient's wishes.
  - The onus is on the patient. If they carry the card, they must accept the consequences. They cannot later turn around and say it did not reflect their true wishes.
  - The responsibility for those consequences is theirs not the doctors.
- Now there are advanced directives, personal directives and living wills which function similar to the card but are legal documents throughout Canada.
- That card would no longer be valid in Alberta because it is not a legal document.

## CONSENT: CHILDREN AND CAPACITY

- Who can consent to health care on behalf of a child?
  - Their parents, however, this is not absolute. It has to accord with the child's best interests.
  - If the health care team suggests treatment and the parents refuse, they go to the Child Welfare people.
  - The refusal of treatment usually has to be a high stakes situation.
  - An application is then made to the court for decision making power be giving to the director of child welfare.
- What factors need to be considered?
  - Age: lines are not drawn hard and fast on age in Alberta.
  - Maturity: Instead we do a case by case assessment of the maturity of the child.
  - The mature child doctrine was developed in England.
  - After 16 you can consent to your own health care decisions. If you are under 16 then there is the instance that occurred in AC v Manitoba.
- **Mature Minor Rule**
  - Applies when the child has capacity to make their decisions.
  - If the decision is low stakes, or the health care team is prepared to see within their best interest, then the minor makes the decision.

- In high stakes situations, the minor may not get the decision power if they are in need in protection as determined by the court. The court can override their decision.
- This is on a case by case basis. It avoids the need to draw specific lines.
- There is presumption above 16 that they are mature and have capacity, and below 16 they are not presumed mature, there has to be an assessment.
- How do we know a child is mature?
  - Expert evidence from psychiatrists, in Alberta we have capacity experts.
  - As an adult you have to have the right to personal autonomy, but children have not had the ability to grow and develop outside of their immediate parental or religious influences. The courts want to give children that chance.
  - It may depend on the treatment and the facts; blood transfusions work and are easy to do. Other treatments may not be as clear cut.

## AC v Manitoba

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2009 SCC 30

### Facts:

- A child under 16 in Manitoba, pursuant to the Child and Family Service Act, where the child or parents refuse essential medical treatment, the court may authorize treatment if it considers it to be in the best interest of the child.
- If the child is over 16, no medical treatment can be order without the child's consent, unless the court is satisfied that the child lacks the ability to understand the information or consequences of the treatment decision.
- AC, 14, is a Jehovah's Witness who had internal bleeding. Before going to the hospital she had a medical directive saying she did not want a blood transfusion.
- The doctor treating her asked she undergo a psych evaluation to determine if she was capable of understanding death.
- The report detailed that she understood the reasons for having a transfusion and the consequences of not having one. Her parents supported her decision.
- A few days later, she needed a transfusion. The Director of Child and Family Services, apprehended her as need of protection under the act.
  - A court order was requested authorizing medical personnel to administer a transfusion.
  - The judge granted the treatment order.
  - She was given blood and recovered.

### Issue:

- Are those provision of the Child and Family Service Act constitutional?
  - Under s 2(a), 7 and 15 of the Charter.
  - Freedom of conscience and religion
  - Right to life, liberty and security of person, and the right to not be deprived thereof.
  - Every individual is equal before the law, and has right to equal protection... without discrimination based on age.
- Following the treatment order, AC and her parents appealed the order.

### Analysis/Holding:

- Maturity is a necessarily imprecise standard, as we are dealing with the inherent imprecision of childhood.
- A thorough assessment of maturity is required, although difficult, to determine the child's best interests.
- The more mature the child is, the more important their wishes will become in what the decision should be. There is still residual authority in the court if the mature minor is making a decision the courts or health care team do not see it in their best interest.
- The courts inherent ability to protect the vulnerable.
- **If the young person's best interest is interpreted to sufficiently respect his or her maturity in a particular medical decision-making context, the constitutionality of the legislation is preserved.**

### Dissent (Binnie):

- Once you are a mature minor you are an adult for the purposes of making that decision. If you are going to designate a mature minor they should get to make their own health care decisions.
  - Binnie relied heavily on the trial judge's finding that she was in fact a mature minor.

- The trial judge said he is going to assume that she has capacity for the purpose of assessing the constitutionality of the mature minor legislation.
- Binnie then takes this as a finding, even though there was not much of a discussion as to whether she was a mature minor.

## INFORMED CONSENT

- What does the patient have to know about the treatment for consent to be valid?
  - What the procedure is.
  - Who is performing it.
  - If not valid, then the practitioner could be held liable for battery.
- What does the patient have to know about the treatment for the consent to be informed?
  - What the possible outcomes of the treatment.
  - What the possible outcomes of no treatment.
  - In the absence of informed consent (but still valid consent), there can be no battery but there can be negligence liability.
  - Have to disclose the risks.
- Exceptions to the requirement of consent.
- **1) Emergency**
  - The issue here is what is an emergency.
  - The treatment is needed on order to preserve life and health.
  - No realistic way to obtain consent.
  - Cannot withhold treatment until an emergency in order to get around consent.
  - There may be a situation where circumstances change and consent is unable to be given so the doctors may not need additional consent in those situations.
  - Malette, the doctor did not have consent and in an emergency, that does not change.
- **2) Statutory Requirements**
  - Mental Health Act
    - Criteria has to be met to be admitted to a mental health facility.
    - Likelihood to harm themselves or others if not admitted.
    - There are strict statutory requirements and there has to be more than one certificate.
  - Public Health Act
    - Preventing the transmission of readily communicable diseases.
    - There is a list of the diseases in the public health act.
    - Treatment of these can go ahead without the patient's consent.

## Reibl v Hughes

[1980] 2 SCR 880

### Facts:

- P: Reibl, appellant, 44, underwent surgery in March 1970.
- D: Hughes, Doctor, respondent.
- The surgery was for a blockage of the left carotid artery, which was restricting blood flow by 15%.
- The Doctor performed the surgery competently, during or after the surgery the patient suffered a stroke, which left him paralyzed and impotent.
- The plaintiff consent to the surgery.
- About 17 months away from being able to retire with a full pension. Now he cannot earn the full pension because he can no longer work.

### Issue:

- The plaintiff sued because his consent was not informed consent, and recovered on battery and negligence. At trial he was awarded \$225,000.
  - The defendant fell short on 2 accounts.
  - He did not sufficiently communicate the purpose of the operation.
  - He did not sufficiently communicate the gravity, nature, and extent of risks that result from the operation such as he could die or have a stroke.
- How specific must be the information in order for the patient to give informed consent between surgery and no surgery?

### Analysis/Holding:

- The surgeon must make disclosure to the patient of all material risks of the surgery.
  - He should answer any questions posed to him
  - **The nature of the operation, its gravity, risks, any unusual risks.**
  - If the consequences are serious enough then even a risk of mere possibility need be disclosed, such as paralysis or death.
- The risk of the surgery in this case was a stroke, paralysis and death. These were material risks.
  - There is also evidence that not removing the blockage presented a risk of a stroke and death.
- It was not urgent to have the surgery at that time. He could have waited till after he collected his pension.
- There was no liability for battery, since batter in surgical cases should be confined to instances where there was no consent at all or where treatment went beyond the consent given.
- On negligence, it arises as the breach of an anterior duty of care, not the test of validity of consent.
- The patient was told no more or understood no more that he would be better off to have the surgery than not.
  - This was not adequate nor sufficient.
- Mr. Reibl, a reasonable person would have wanted to know about the material, special or unusual risks, and had they know they would have made a different decision.
  - It was not urgent and the risk to his future finances make it clear he would have waited.

### Principles:

- How does a court determine informed consent?
  - **What would the reasonable person in the position of the patient want to know before agreeing to the treatment?**
  - Material, special, or unusual risks. Does not have to be an exhaustive list but what is typical outcome, or if the risk is particularly significant i.e. death, stroke, then the patient would want to know as well even if the probability it small.

## INVASION OF PRIVACY

- Privacy is the expectation that you have some control over the information about you that enters the public sphere.
- Prosser's 4 categories of privacy:
  - 1) intrusion upon the plaintiff's seclusion or into private affairs
  - 2) appropriation of the plaintiff's name or likeness
  - 3) publicity which places the plaintiff in a false light
  - 4) public disclosure of embarrassing facts about the plaintiff.
- Canadian law at this point does not have a clear approach or a coherent approach to the idea of privacy in all realms.
- Tort law and privacy
  - Statutes that protect privacy, including a tort of invasion of privacy.
  - These statutes are not complete and sometimes do not define privacy.
  - There are aspects of privacy that are related to and protect by other torts.
    - Trespass onto land.
    - Nuisance can protect the right to be left alone and use and enjoy your property. But you need a property right.

- Breach of confidence, seen in the business context, protects confidential business information.
  - Breach of copyright.
  - Defamation - is limited to things that are untrue. Truth is a defence.
- Interests that may have to be sacrificed in order to protect privacy:
    - Freedom of expression.
    - Freedom of the press.
    - Public or national safety/security.
    - There is balancing that is to be considered.

### **Roth v Roth (1991)**

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- A dispute between cottage neighbors. The plaintiffs complain the defendants are harassing them.
- The road owned by the defendants is used by the plaintiffs to get to their cottage. The plaintiffs will not pay to help maintain the road.
- The plaintiff's brought claims of nuisance among others, and argued their privacy is being invaded.
- The court agreed about the invasion of privacy argument. We have a claim that cries out for a remedy but no way to provide it.
- There is a claim for privacy but it will be done on a case by case basis.
  - The SCC has recognized a constitutional interest in privacy.
  - Not recognizing the right to the privacy limits the courts ability to develop the common law.

### **TW v Seo**

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#### **Facts:**

- Seo was an ultrasound tech working at the co-defendants Clinic.
- He videotaped the defendant in the change room
- During the ultra sound exam, he conducted in an unauthorized exam
- He engaged in unauthorized touching of the patient.
- The plaintiff discovered the video tape and there was struggle over the camera.
- The plaintiff suffered psychological damage.

#### **Issue:**

- The plaintiff had brought a claim for invasion of privacy related to the videotaping in the change room.

#### **Analysis/Holding:**

- The judge says that the common law tort of invasion of privacy in Canada does not extend to these facts.
- There are three areas where the right to privacy may exist.
  - 1) Related to the issue of nuisance and harassment. The issue related to the enjoyment of the plaintiff's property. The acts in the cited case (Roth v Roth) were repetitive.
  - 2) The present matter does not involve and infringement upon a constitutionally protected right such as the right against unreasonable search and seizure.
  - 3) Cases related to the appropriation of one's personality. The video image would have had to have been replayed and diminished the usefulness of the plaintiff's public image.
- The right to privacy is well entrenched in American Tort Law, however, in English and Canadian tort law courts have been reluctant to recognize a separate right to privacy.
- There was a successful battery claim (perhaps helped alleviate the concerns with not finding an invasion of privacy).

### **Jones v Tsige**

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## Facts:

- 2009: Jones finds Tsige has been looking at Jones' bank statements. They did not know each other but worked at the same bank branch.
- Tsige was in a common law relationship with Jones' former husband.
- As a bank employee, Tsige had access to Jones' records, however, this was contrary to bank policy. Tsige looked at Jones' bank records 174 times over 4 years.
- Jones did not distribute or publish the information.

## Issue:

- Does Ontario law recognize a right to bring a civil action for damages for the invasion of person privacy?

## Analysis/Holding:

- Aspects of privacy have long been protected through the causes of actions:
  - Breach of confidence, Defamation, Breach of copyright, Nuisance, Various property rights
  - In these causes, the individual's privacy interest is the fundamental value underlying these claims.
- The recognition of distinct right of action for breach of privacy remains uncertain.
- If Jones has a cause for action it falls into Prosser's 3<sup>rd</sup> category: intrusion upon seclusion.
- Does the Charter recognize rights to privacy?
  - There is s 8, unreasonable search and seizure.
- The Charter jurisprudence has recognized three distinct privacy rights.
  - 1) personal privacy - right to bodily integrity, not have our bodies touched or explored to disclose objects or matters we wish to conceal.
  - 2) territorial privacy - protects home and other spaces where individuals enjoy a reasonable expectation of privacy.
  - 3) informational privacy - at stake in this appeal. From the SCC in *R v Tessling*, the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.
- **The Charter does not apply to common law disputes between private individuals, the SCC has numerous occasions developed the common law in a manner consistent with Charter values.**
- **The judge finds it appropriate to confirm the existence of right to action for intrusion upon seclusion.**
  - This is an incremental step that is consistent with the court's ability to develop the common law consistent with the changing needs of society.
  - The case law, while not definitive, is supportive of this cause of action.
- Judgment for Tsige set aside, and judgment for Jones entered. Jones receives damages in \$10,000.

## Principles:

- The elements for the tort of invasion of privacy:
  - "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person."
  - Conduct must be intentional.
  - Invasion must be without law justification.
  - A reasonable person would regard the invasion as highly offensive and causing distress.
  - Proof of harm for economic damages is not required.
- Limitations
  - Claims arise only from deliberate and significant invasions of personal privacy.
  - If someone is sensitive or unusually concerned with their privacy will be excluded.
  - Invasions should be for matters such as financial, health records, sexual practices and orientation, employment, diary or private correspondence that viewed objectively on the reasonable person standard can be described as highly offensive.
- The claims may give rise to competing claims, mainly freedom of expression and freedom of the press.
  - No right is absolute and claims may have to be reconciled with competing claims.

## DOE 464533 v ND (2016)

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2016 ONSC 541

### Facts:

- Doe is suing her ex-boyfriend for the release of an intimate video to the internet and his circle of friends.
- They used to date and were since romantically involved. He kept asking for a video and she declined. Eventually, she relents after having been told he would not share them.
- She sends a video and the same day, he posts the video online.

### Issue:

- Was there a tort of invasion of privacy committed?

### Analysis/Holding:

- The Criminal Code in 2014 was amended to include "publication of an intimate image without consent." (s 161(1))
- Between the amendments to the Criminal Code and a law passed by Manitoba which created a tort, the ONSC concludes there are grounds for establishing a civil recourse for people who suffer harm arising from this misconduct.
- The Court in this instance reviews Jones v Tsige and Prosser's four categories of privacy.
- The Court says intrusion upon seclusion does not completely fit, instead public disclosure of embarrassing private facts about the plaintiff from Prosser's list is a better fit.
- **There is a new category of invasion of privacy in tort:**
  - Public disclosure of embarrassing private facts about plaintiff.
  - One who gives publicity to a matter concerning the private life of another is subject to liability to the other for the invasion of the other's privacy, if the matter publicized or the act of publication is:
    - (a) would be highly offensive to a reasonable person
    - (b) is not of legitimate concern to the public.
- The disclosure must be public and not private.
- The facts disclosed must be private not public.
- The matter would have to be offensive to a reasonable person.

### Notes:

- The defendant is also held liable for breach of confidence:
  - She sent the video based on his assurance it would be for him alone. His sharing of it was a breach of the terms.
  - Confidential info, communication that imports confidence, unauthorized use causing harm.
- And, Intentional infliction of mental distress:
  - Conduct is flagrant and outrageous
  - Conducted produced harm
  - Results in visible and provable injury.
  - These elements are all met.

## SUMMARY INVASION OF PRIVACY

- Current state of the law in Alberta:
  - These decisions are not binding in Alberta but they are likely to be highly useful and highly persuasive if dealing with a similar case in Alberta since these are novel claims everywhere.
  - Jones would have more weight being from the Court of Appeal.
- The courts are now becoming more and more willing to recognize privacy claims and expand torts in order to deal with these situations when they call for a remedy.

## STRICT LIABILITY

- If the defendant can be shown to have done the thing, then there is strict liability regardless of fault.
- Fault in tort law deals with intention or negligence (did not act with reasonable care).
- What grounds liability if fault is not required?
  - Causation.
  - Did the defendant cause this thing to happen?
- Torts that compensate an individual who was been wronged, this definition of liability makes sense.
- However, strict liability is defined in a narrow set of circumstances.
- Strict liability may not fit with an essentialist view of tort law (corrective justice).
- It might serve the purposes of general deterrence (setting certain standards) and compensation.
- Education aim
- There is a lot of overlap between negligence and strict liability. So this slightly limits the utility of strict liability.
- **This tort is typically use for special circumstances where there is no other tort that can be applied, and the courts feel that there should be some liability.**
  - It is an extra mechanism for the courts to use when the situation warrants it.

### Rylands v Fletcher

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(1865), 3 H & C 774 (Ex D), (1866), LR 1 Ex 265 (Ex Ch), (1868), LR 3 HL 330 (HL)

#### Facts:

- Fletcher brought action against Rylands for damages for injury to his mine cause by water flowing into them as a result of a reservoir built on the defendant's land.

#### Issue:

- What is the plaintiff's right when the defendant has cause harm unwillingly?

#### Analysis/Holding:

- The first court says that the plaintiff's rights have been infringed as the defendant had no right to pour water on to the defendant's works.
  - Does it make a difference if they did so unwittingly? No, the action is maintainable.
  - The plaintiff's case is you violated my rights, you have done what you had no right to do, and you have done damage.
  - As a rule, the knowledge or ignorance of the damage done is immaterial.
- Second court (Exchequer Chamber) upholds the ability of the plaintiff to recover.
  - There is no harm in building the reservoir but there is an issue of the substance escapes and causes harm.
  - Between a non-negligent defendant and an innocent plaintiff, it is fairer to put the liability on the defendant, because they were the one who did the action that eventually brought about the harm.
- **House of Lords:** The defendants were operating their reservoir at their own peril, and in the course of doing so an evil arose (the escape of water and passing of it to the close of the plaintiff), which injured the plaintiff. As result, **the consequence is that the defendants are liable.**
- If a person brings or accumulates on his land anything which if it should escape **may cause damage to his neighbour he does so at his own peril.** If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.
- They make a point of saying that it is non-natural use of the land.

#### Principles:

- The court decides the way to manage risk is to put liability on the person who engaged in somewhat dangerous activities where there is potential for harm to be caused.
- The elements of a claim:
  - **Non-natural use:**

- "It is not every use to which land is put that brings strict liability. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."
- The Court is concerned that the defendant introduces a situation where there is a risk but the defendant stands to benefit but public does not.
- **Escape:**
  - The harm causing substance had to escape from the defendant's land.
  - "escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control."

## DEFENCES TO STRICT LIABILITY

- Plaintiff proves the elements of the tort.
- The defendant does is the one who has to prove the defences. These defences are not 100% clear due to lack of case law.
- **1. Consent**
  - Does there have to be a true waiver in the plaintiff's mind?
  - Or is simply knowledge of the risk enough?
- **2. Act of God, act of the plaintiff, act of a third party.**
  - Natural phenomenon. Defendant has to show its extraordinary occurrence, unpredictable and unforeseeable.
  - Did the plaintiff do something to contribute to the loss that they suffered?
  - Third party did something that the defendant did not have control over.
- **3. Statutory Authority.**
  - Not a single defence but depends on what the statute says.
  - There may be statutory authority to do something that the defendant can rely on.
  - The defendant has to show that there were no other ways to comply with the statute that would minimize harm.

## VICARIOUS LIABILITY

- There has to be a relationship between the wrong-doer and the person being held liable.
- Typically, it is an employee/employer relationship.
- Vicarious liability does not substitute the defendant for the tortfeasor. They are both defendants and can both be sued.
- It is a form of strict liability based on a relationship.
  - 1. Have to establish whether the individual was an employee; and then
  - 2. If the tort was carried out in the course of employment.
- Why do we have vicarious liability?
  - Policy rationales:
    - Places the risk of loss of an activity on the person who stands to benefit from that activity.
    - Ensures that there might be someone from who the plaintiff can collect. The employee might not have the wealth to compensate the plaintiff. The employers can also get insurance whereas the employee may not be able to.
    - Efficiency: we achieve economic efficiency if we properly allocate the risk of loss associated with an activity. If a company is able to insure against the risk, then we encourage them to do so with this notion of vicarious liability.
    - Deterrence: If an employer is aware that they may face liability no matter how careful they are, then they will be extra careful and aim to minimize risks of actions that could lead to a tort.
- Who is an employee?
  - Control test (initial test): how much control does the employer have over the employee?
  - Over the years the courts have moved away from a strict application of this test.
  - Other factors: "there is no one conclusive test that can be universally applied"
  - Control is still a factor

- Degree of financial risk taken by the worker.
- The ability of the worker to make profit.
- Does the worker use their own equipment or hire their own helpers/assistants?
- Trying to decide whether they are in business on their own, or are they an employee?
- Physicians are not employed by hospitals, so hospitals cannot be held vicariously liable. Nurses and different therapists are employed by the hospital.
- **Liability has three elements:**
  - 1) the employee must have committed a tort.
  - 2) the person committing the tort must be an employee of the defendant.
    - The test is difficult to apply to skilled workers and professionals, such as physicians in hospitals.
    - There is no one conclusive test that can be universally applied.
  - 3) The tort must be committed in the course of employment.
    - There is no liability if the employee is on a frolic of his own.
    - If the employee deviates from the prescribed task in a way that can be construed as a detour.
    - Or was the act authorized by the employer?
- Vicarious liability for intentional wrongdoing.
  - Was the act/conduct authorized by the employer?
  - Typically, employers don't authorize intentional torts.
  - If not, **was the act/conduct sufficiently "closely connected: to authorized acts?"**

## **Bazley v Curry**

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[1999] 2 SCR 534

### **Facts:**

- The defendant operates child care facilities for troubled children between 6-12.
- The employees are charged to care for the mental, physical, and emotional well-being of a child. They supervise bed-time and bathing.
- Mr. Curry, the employee in question, was hired to work in Vancouver.
- He was a pedophile, and while the employer checked, they found no evidence of this.
- Mr. Curry eventually sexually abused a child, Patrick Bazley.
- Curry was convicted in 1992 of 19 counts of sexual abuse, two related to Bazley, and he since died.
- Bazley sued the Children's Foundation for the injury he suffered while in its care.
- The Foundation's position is that it had committed no fault in hiring or supervising Curry, so it was not legally responsible.

### **Issue:**

- Should an organization that employs the offender of the tort be held liable for the wrong?
- Such a liability is called vicarious liability.
- At trial they were found negligent and the CA dismissed the appeal.

### **Analysis/Holding:**

- Salmond Test: Employers are vicariously liable for:
  - 1) employee acts authorized by the employer
  - 2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.
- In this case the concern is number 2, which the SCC states should be approached using the **Strong Connection Test:**
  - **2a) are there precedents that unambiguously determine which side of the line between vicarious and no liability?**
  - **2b) If not, should vicarious liability be imposed in light of broader policy rationales behind strict liability.**

- Is there a connection or nexus between the employment enterprise and that wrong that justifies the imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence?
- The employer's enterprise created or materially enhance the risk of the tortious act is different than saying that a reasonable employer should have foreseen the harm in the traditional negligence sense.
- **The Foundation is vicariously liable for the actions of Curry.**
  - The opportunity for intimate private control and the parental-like relationship and the power required by the terms of employment created the special environment that nurtured and brought Curry's sexual abuse.
  - The employer's enterprise created and fostered the risk that led to the ultimate harm.

#### Notes:

- Should not for profit employers be exempt from liability?
  - Neither the courts below, nor the SCC accept this suggestion.
  - The same considerations of fairness and deterrence arise, whether the organization is NP or commercial.
  - To excuse them from liability would put the cost on the victim and not the organization.

### **STRONG CONNECTION TEST**

- **Start with:**
  - 1) are there precedents that unambiguously determine which side of the line between vicarious and no liability?
  - 2) **If not**, should vicarious liability be imposed in light of broader policy rationales behind strict liability.
- The SCC defines a set of **principles to guide (2), i.e. in the absence of precedent**, (will be context specific):
- **1.** Courts should openly confront the question of where liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of scope of employment and mode of conduct.
- **2.** The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify imposition of vicarious liability.
  - Liability is appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desire.
  - This will serve the considerations of adequate and just remedy, and deterrence of future harm.
- **3. In determining the sufficiency of the connection** between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered (**Bazley Factors**).
  - They may vary with the nature of the case, and may include but are not limited to:
    - **a.** the opportunity that the enterprise afforded the employee to abuse his or her power
    - **b.** the extent to which the wrongful act may have furthered the employer's aims (and hence to be more likely to have been committed by the employee)
    - **c.** The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise.
    - **d.** the extent of power conferred on the employee in relation to the victim.
    - **e.** the vulnerability of potential victims to wrongful exercise of the employee's power.
  - This are particularly relevant for intentional tort context, less so for negligence.
  - Remember they are only relevant for non-precedent cases.

### **GT v Griffiths**

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#### Facts:

- The tortfeasor was a program director employed by the Boys and Girls club.
- The job involved taking them on outings, and organizing programs for them.
- The program was after-school and was to foster good relationships with the children.

- Ultimately, Griffiths developed relationships with the kids, and invited kids to come to his house.
- Through meeting the kids through his job he would then invited them to non-club sanctioned things at this home.
- Plaintiff's sued for damages and included the Boys and Girls Club as defendants.

**Issue:**

- Should vicariously liability be imposed on the Boys and Girls club?

**Analysis/Holding:**

- The SCC said no, this decision was made at the same time of the Curry decision.
- The wrongdoing was not as closely connect to the employment as it was in Curry.
- The Court was split 4-3. This may cause issues for lawyers advising their clients given that this test was applied twice at the same time, and resulted in two different outcomes.
- This is a recreational based organization; not residential care like in Curry. **The employee had to go further than what the role demanded to foster these relationships.**

**John Doe v Bennett**

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2004 SCC 17

**Facts:**

- Catholic priest is accused of sexually assaulting boys in his parish for over two decades. The plaintiff's sued the Roman Catholic Church and the episcopal corporation.
- Trial judge found vicarious liability for the episcopal corporation of St Georges but not the church. Court of appeal reversed that ruling.

**Issue:**

- Is St. Georges liable and if so on what basis (directly or vicariously)?

**Analysis/Holding:**

- Vicarious liability Strong Connection Test:
- 1) court should determine whether there are precedents which unambiguously determine whether the case should attract vicarious liability.
- 2) Determine whether vicarious liability should be imposed in light of broader policy rationales behind strict liability.
- the relationship between the bishop and priest is akin to that of an employee - employer relationship.
- **Bazley factor discussion:** The Bishop provided Bennett the opportunity to abuse his power, as Bennett was allowed to organized activities for boys, and directed the altar boys.
  - Secondly, Bennett's acts were related to the psychological intimacy inherent in his role as a priest. It encourages submission and increase the opportunity to abuse.
  - Due to St Georges location, the church was the strongest source of authority in the community.
- **The test is satisfied and St Georges is held to be vicariously liable.**

**Notes:**

- St. Georges is also found directly liable as a failure to properly direct and discipline Bennett.

**EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia**

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2005 SCC 60

**Facts:**

- The plaintiff, EB, attended a residential school run by the defendant, Oblates. From 1957 to 1962 he suffered sexual abuse at the hands of an employee, Saxey, who worked in the bakery.
- The educational and social functions were under the direction of the Oblates. Saxey lured the plaintiff to his room with candy and then sexually assaulted him.

### **Analysis/Holding:**

- The connection has to be made between the tort and the risk created by the enterprise, as does the nature of that risk created by the enterprise.
- Saxey did not have the authority to insert himself into the intimate life of the students.
  - This was an important distinguishing factor.
- **Five Bazley factors:**
  - a) Saxey was provided the opportunity by the Oblates to come into contact with students, however, this is at the low end of significance. Not required or employed to come into contact with students.
  - b) the wrongful acts had nothing to do with furthering the enterprise's aims.
  - c) There was no degree of intimacy between Saxey and the students, as staff quarters were off limits, and he did not require regular un-supervised contact with students.
  - d) the Oblates did not confer any power onto Saxey in relation to EB. His status as an adult at the school is not enough. He was not encouraged to develop relationships with the students.
  - e) The students in residential schools are vulnerable and require protection, but that's the nature of the school rather than the vulnerability that came from the power conferred to Saxey.
- **The test for a strong connection** between what the employer was asking the employee to do and the wrongful act **was not established.**
- **Vicariously liability should not be imposed in this case.**

### **Dissent:**

- Abella goes through the factors and takes a different view.
  - She says here the link is strong.
  - He was permitted to form relationships.
  - Kids were taken from their home into a strange setting.
  - He lived in the middle of the children and knew of the lack of supervision.
  - Regarding factor (b), in terms of sexual assault, it will never be yes.
  - There was a power structure inherent in the organization operated did infer this kind of power and intimacy on Saxey.
  - The students were told they had to obey the staff and the context in which the students are at the school.
  - While the duties as described did not give him authority, the context of the situation told a different story. The staff would do jobs that needed doing regardless of their actual role.
  - Re vulnerability, Abella says that this is significant given that they were in residential schools.

### **STATUTES AND VICARIOUS LIABILITY**

- The School Act, s 16
  - If property of a school is damaged or destroyed by students, then the parents are liable for the damage.
  - Typically parents are not vicariously liable for the acts of their children.
  - But the legislation has said this is one case where this does not apply.
  - The goal of this is compensation.
- Traffic Safety Act
  - S 187, in action for the recovery of loss or damage for an accident on the highway, if you are a family member or living with the person who owns the vehicle, the owner/family member is vicariously liable. The goal is to give the victim access to insurance.
  - Sub-section 2 of the same section, extends this to anyone driving with the owner's consent, the owner is vicariously liable.

### **SUMMARY VICARIOUS LIABILITY**

- The law is as it was stated in Bazley:
  - There has to be a **strong enough connection**.
  - Policy considerations: compensation and deterrence.
  - **Bazley factors help to assess the strength of the connection.**
  - Usually there is two ways, however, to look at the facts in light of these factors.
  - May want to highlight uncertainty or flexibility in this test when applying it. Look at it from both sides.
  - **It only applies when there is intentional misconduct.**
  - Negligence and vicarious liability is different.

## DEFAMATION

- Based on the concept of strict liability.
- Seeks to protect the reputation of an individual against unjustified attacks.
- There is an inherent friction between defamation and freedom of expression, press. Balance must be try to be achieved.
- **Issues with defamation:**
  - Bringing defamation could be a trade-off, if you bring forward a claim you may be drawing attention to the statements made.
  - Defamation claims could also be used to chill expression simply through the threat of a claim (yelp reviews for instance).
- It is not so hard for the plaintiff to establish their claim, but the battles often come down to the defences available.
- In Alberta, the defamation act blends together liable and slander. So it does not matter which one it is, the claim will be for defamation.
  - Libel was action per se. didn't require damages.
  - Slander did require damages.
  - Now they are all lumped to
- **Elements the plaintiff must prove:**
  - Material is defamatory.
  - Material refers to the plaintiff.
  - Material was published.
- **What is defamatory?**
  - Words tending to lower the plaintiff in the estimation of right thinking members of society generally.
    - Sim v Stretch, [1936] 2 All ER 1237
  - A statement that has a tendency to injure the reputation of the person to whom it refers; lowers them in the estimation of right-thinking members of society generally and to cause them to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem.
  - The standard is of an ordinary, right-thinking member of society.
    - Abella JA in Colour Your World v CBC.
  - Defamatory statements are not limited to words, can also be an image, a drawing, a broadcast.
  - The context has to be considered, the tone, the body language or facial expressions.
- **What is publication?**
  - It only has to be shown that the statement was published to one other person.
  - It requires fault, it has to be intentional or careless.
  - Although defamation is strict liability, the publication aspect is not. The other two aspects are strict liability based (i.e. no fault)
  - The defendant may be able to show that they were not careless and intentional, and escape liability.
  - The SCC has said in Crookes v Newton, 2011 SCC 47, that hyperlinks to defamatory material are not publishing.

- In order for a group to be defamed the words have to be reasonably taken to defame each individual member of the group?
  - Also consider how big the group is, the extravagance of the statement, the context, any qualifications.
  - If the group is too big, no one member can bring a defamation suit because you have to show an individual plaintiff was referenced.

## Colour Your World v Canadian Broadcasting Corporation

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38 OR (3d) 97

### Facts:

- CBC showed a broadcast about mercury in paint. CYW was shown in the broadcast.
- While CYW admits that the health dangers discussed were true, their combination with visual images of the effects of mercury poisoning and industrial pollution, in CYW's view constituted defamation.
- CYW thought that the broadcast had the effect of making people think that the plaintiff sold products knowing that they would have cause poisoning with effects similar to those shown.

### Issue:

- The trial judge held that the broadcast was defamatory, not defensible as a fair comment, and motivated by express malice. CBC appealed.

### Analysis/Holding:

- A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers.
- The test is objective: judged by the standard of an ordinary, right thinking member of society.
- When examining an audio-visual broadcast, the dimensions of images, sound, sequence, and the actual words used.
- **The CA judge does not agree that the program was defamatory.**
  - A reasonable person watching the program would not form the impression that mercury in paint cause the same harm as that caused by the mercury effects shown in the program.
  - They would also not conclude that CYW knew of and was indifferent to this possibility.
- At no point in the broadcast is any serious health risk attributed to the level of mercury found in paint.
  - The trial judge narrowly focused on the segments showing the effects of mercury pollution in other cases.
  - **A reasonable viewer would have obviously been able to tell the difference between eating mercury tainted fish and being exposed to mercury paint vapors.**
  - The footage in question shows a completely different type of mercury pollution.

## DEFENCES TO DEFAMATION

- Once the plaintiff established the three criteria for defamation, the onus is on the defendant to establish a defence to escape liability.
- The plaintiff bears the burden of proof with respect to malice.
- **Justification**
  - Complete defence to a defamation claim
  - If the defendant unsuccessfully attempts to rely on this defence, damages may be increased.
  - The defendant has to prove the truth of the statements, that it is **substantially true, not every minute detail has to be true.**
  - Malice does not defeat this defence.
- **Absolute Privilege**
  - Also a complete defence.
  - Protect communications where societies interest is best served by having people speak freely.

- **Judicial proceedings, parliamentary proceedings, spousal communications, high executive officials of state (cabinet members).**
  - Quasi-judicial proceedings are covered as well (see Hay v Platinum)
  - A defence even if the statement is made with malice (spite or ill-will, or making the comments for an improper purpose).
  - In Alberta, this extends to a report of these proceedings.
- **Qualified Privilege**
    - Partial or conditional immunity.
    - Applies where the speaker making the statement has **an interest or a duty, legal, social, or moral to make it to the person to whom it is made.**
    - Limited to comments relation to the legitimate purpose of the occasion.
    - Four main contexts:
      - Protection of one's own interests.
        - Sort of like a self defence thing.
        - Limited to saying what needs to be said to protect from the attack.
    - Matter of common interest or mutual concern.
      - Communications between a landlord and tenant about a third party on the premise.
    - Moral or legal duty to protect another's interest.
      - Employment reference,
    - Public interest
    - Privilege is lost if abused or exceeded.
      - It has to be limited to the situation at hand (i.e. to see protection of interest).
      - If someone wants to join your organization and have concerns, you can let others know in the organization but cannot go so far as tell the public.
    - This defence does not apply to the media.
    - In Alberta, there is an absolute privilege for media comments on judicial proceeding.
- **Fair Comment**
    - Applies to comment and opinion
      - Must be:
        - An opinion (not a statement of fact)
        - Based on true facts
        - On a matter of public interest
        - Objectively fair (honest, even if harsh)
        - Not malicious (malice defeats the defence)
    - How does the reader take it? As fact or as a comment?
      - Levant was taken as a fact.
      - WIC radio it was taken as an opinion.
- **Responsible communication on matters of public interest**
    - Created by the SCC in 2009.
    - The aim was to provide a defence to the media that are commenting in a responsible way on matters of public interest.
    - The Court felt that the traditional approach did not respect freedom of expression or freedom of the press.
    - Defamation lawsuits should not be a way to shut people up.
    - There is a test for how this defence works:
      - a. Is the publication on a matter of public interest?
      - b. Was the publisher diligent in trying to verify the allegation, having regard to:
        - Seriousness
        - Importance
        - Urgency
        - Reliability of the source

- Both sides reported.
- Defamatory statement justifiable for inclusion
- Public interest in the fact that the statement was made rather than its truth
- Any other circumstances
- Defeated by malice by definition, since they have to be responsible and in the public interest.
- **Malice (defeats some defences)**
  - An indirect or improper motive not connected with the purpose for which the defence exists.
  - Spite or ill-will, also includes any indirect motive or ulterior purpose.
  - Can also be established by showing the defendant spoke dishonestly and knowing or recklessly disregarded the truth.
  - May be proved through intrinsic or extrinsic evidence.

## **Awan v Levant**

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2014 ONSC 6890

### **Facts:**

- The plaintiff, Awan, brought a libel action against Levant for publication of material on the defendant's blog.
- The plaintiff says the words on the blog about him are false and defamatory.
- Levant relied on a defence of fair comment, and to a part justification (truth) and qualified privilege.
- Awan is a lawyer, and was a student at the time of the blog post. Levant is an outspoken political commentator.
- MacLean's published an article about Muslims, which the plaintiff had issues with. Eventually the plaintiff and three other students, and MacLean's went to a Human Rights Tribunal.
- At the tribunal, the defendant published a series of articles about Awan titled "Awan the liar parts 1-7". Eventually part 8 was published, and the action was brought.

### **Issue:**

- Did the defendant defame the plaintiff?

### **Analysis/Holding:**

- Regarding the **3 elements of defamation**:
  - **1)** The defendant says his reputation makes the words he publishes not defamatory because he was known to stir controversy and make outlandish comments.
  - The defendant said that Awan was a liar, incompetent, and an anti-Semite. The judge considers that these words ordinarily carry defamatory meanings.
  - There is precedence against the character of the individual being a defence.
  - **2 & 3)** Were clearly met.
- The court finds that the first element is also met:
  - The defendant used terms like illiberal Islamic fascists and were meant to mean that the plaintiff had extreme, intolerant views.
- Levant tried to argue fair comment, but the judge did not find it applied:
  - In the judge's view they were statements of a fact rather than statements of an opinion.
  - If someone had of read them, they would read them as fact rather than an opinion.
  - No prefatory words such as "in my opinion"
- Also, the defendant acted with ill will towards the plaintiff and there was inaccurate reporting of the tribunal, so the act of **malice** was also established which **defeats fair comment**.

## **Hay v Platinum Equities Inc**

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2012 ABQB 204

### **Facts:**

- Hay, a CA, is the plaintiff and Platinum Equities, is the defendant.
- The plaintiff signed a RER (review engagement report) for the defendants who then submitted it to the bank in support of a financing application.
- The RER were determined to be forged and a report was submitted to the Institute of Chartered Accountants of Alberta.

**Issue:**

- Were the Hays defamed as a result of the submission of the RERs to the bank?
- Were the Hays defamed as a result of Chandran and Platinum's letter of October 24, 2005 to the ICAA?

**Analysis/Holding:**

- The false RERs implied that the plaintiffs had falsely or negligently prepared the RERs resulting in the implication that the plaintiffs were either dishonest or incompetent as chartered accountants.
- The plaintiffs allege that they were defamed as a result of the forged RERs having been submitted to the bank.
- There is not doubt on the evidence that the second and third elements of the tort of defamation have been proved.
- 1) Defamation - The judge is not persuaded that the words were defamatory.
  - The limited evidence before me does not satisfy me that these financial statements were fraudulent or not in accordance with GAAP. Therefore, I find that the RERs and the financial statements to which they refer are **not defamatory**.
- Regarding the letter, the plaintiffs allege that the letter to the ICCA was defamatory, by way of innuendo different from that in which it would be understood.
  - The letter, the plaintiffs claim, alleged that the RER was released from Hay's office and he signed a report knowing it to be false and misleading.
  - The trial judge **does not find these statements to be defamatory** because they do not have the tendency to lower Hay's reputation in the estimation of reasonable persons.
- **Absolute privilege applies to the letter** because the Regulated Accounting Profession Act provides a complaint inquiry process.
- **The defence of qualified privilege** also applies since there is communication that has been alleged to be defamatory was made where the person who makes the communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
  - There was a duty to bring this information to the ICAA and they had an interest to receive it in order to investigate.

**WIC Radio Ltd. v Simpson**

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2008 SCC 40

**Facts:**

- Simpson is a widely known social activist opposed to any positive portrayal of a gay lifestyle.
- Mair, is a radio DJ for WIC, who in his editorial, compared Simpson in her public persona to Hitler, the Ku Klux Klan and skinheads.
- Mair was a well-known and controversial commentator on public interest matters in BC.
- The subject matter was the debate over whether BC schools should introduce homosexual subjects.

**Issue:**

- Simpson brought an action of defamation against Mair.
- Did the defence of fair comment apply?

**Analysis/Holding:**

- The defence of fair comment helps to hold the balance in the law of defamation between the value of respect for individuals and the freedom of expression.
- It is common for common law to be informed and guided by Charter values.
- The Court distinguishes the comments made from the facts:

- The innuendo that Simpson is hostile towards gay people (fact) that she would condone violence (comment).
- The applicable defence is fair comment because he is not a reporter but a radio personality with opinions.
- Fair comment test (d): Could any person honestly express that opinion on the proved facts
  - Someone could have understood the expressed opinion to mean it.
- **Mair's editorial clearly defamed Simpson** as it would lower her in the opinion of right-thinking people.
- **Fair comment is established:** the comment engaged the public interest, they were based on fact that were substantially true, that she "would condone violence" by others, is an opinion that could honestly have been expressed on the proved facts by a person.
- There was **no malice** and the proof of malice is difficult.

### Principles:

- The SCC modified the "honest belief" element of the fair comment defence so that the test, as modified, consists of the following elements:
  - (a) the comment must be on a matter of public interest;
  - (b) the comment must be based on fact;
  - (c) the comment, though it can include inferences of fact, must be recognizable as comment;
  - (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?
    - Objective is that it is **not necessary for the defendant to subjectively hold the opinion** that forms the foundation of the defamation claim. As long as **someone could honestly express that opinion** on the basis of the proven facts, that will satisfy the court.
- This was originally given in a dissent that the Court is now adopting.
- Malice still defeats the defence.