INTRODUCTION TO TORT LAW

What is a tort?

A civil wrong causing harm to another person other than a breach of contract

What is tort law?

Fault-based system Shifts losses from the victim to the tortfeasor

Essentialist Account

- a.k.a corrective justice
- · Tort law is an end in itself
- Weinrib's view of tort law

private

- parties are plaintiff and defendant
- · against an individual or group of individuals

Criminal Law

public

Tort law

- parties are state and accused
- against society as a whole

Compensation

Justice

Education

Deterrence

Ombudsman

purpose Other (Law & economics,

psychological

benefits)

Tort law

versus criminal law Tort Law versus contract law

- obligation arises from general principles
- no need for an agreement between plaintiff and defendant

Contract law

obligation arises from a contract

Why do we have tort law? -

Instrumental Accounts

- Tort law is a tool used to meet certain
- No agreement on what those objectives or aims are

- objectives or aims

Criticisms of Tort Law

Come from instrumentalist accounts and mostly directed at compensation as objective of tort law

- Inefficient
- Slow
- Unfair
- Arbitrary

Alternatives to Tort

Law

- Insurance system
- No-fault system
- Partial no-fault system

Arguments Against Compensation as an Objective

- Only a small number of victims in limited circumstances get compensation
- Plaintiffs have to invest money to initiate a claim
- Plaintiffs have to prove fault
- If a defendant has no assets, plaintiff might not recover damages
- Inefficient

Two Types:

- 1. General influences other people
- 2. Specific deter's defendant

Effective Deterence

Must:

- 1. Clearly define undesirable conduct
- 2. Provide sufficient inducement to avoid the undesirable conduct

Insurance System

- provides compensation to victims that do not require tort law claims
- more efficient and straightforward way of getting compensation
- · e.g. liability insurance, first-party insurance, life insurance

No-Fault System

- plaintiffs are compensated simply because they are injured and not because someone was at fault
- plaintiffs give up their right to sue the individual who injured them
- · e.g. Worker's Compensation

Partial No-Fault System

- extinguishes the right to sue to an
- e.g. Threshold No-Fault Scheme (below the threshold is covered by the no-fault scheme but tort claims can be made for more serious injuries); Blended System (some benefits are provided for no fault, others are only available through tort claims)

Tort Law vs. Alternatives

<u>Alternatives</u>

 more efficient and less costly but less individualized and less value

Tort Claims

 costly and slow but potential to recover more

INTENTIONAL TORTS

Writs

History

- · focused on peace and security
- used a writ system
- torts were more concerned with disruptive conduct and social order that could be interfered with in the absence of harm, damage or loss

What is a writ?

- standardized pleading
- · a fill in the blank document used to initiate a claim
- claims that could not be fit within an existing writ had no cause of action
- writs no longer used

Direct vs. Indirect Interference

Direct: no other act has to combine with the defendant's act to produce the outcome

Indirect: occurs when a defendant's act creates a situation of danger but another act is required in combination with that act to cause the injury

Trespass-based

- developed to provide remedy for victims of direct and forcible interference
- originally did not require fault or damage
- now requires fault but when other elements are met, fault is presumed

Action on the Case

- became available for indirect injuries for which justice required a remedy
- fault-based system of torts evolved from this

Influence of the Writ System Directness and presumption of fault in trespass-based torts

Requirements:

- damage or harm
- fault on the part of the defendant

Three **Types** of Conduct

in Tort

Law

Accidental Conduct

the outcome was not foreseeable and not preventable by a reasonable person

Negligent Conduct

foreseeable and preventable conduct by a reasonable person

Intentional Conduct

desired outcome or substantially certain that the outcome would occur

Battery

intentional application of harmful or offensive physical contact

Elements of a Battery

- direct physical contact
- harmful or offensive: cont outside of what is generally acceptable in everyday life
- fault is presumed

Notes:

harm or damages not required

Scelara v Lloys of London

offensive in sexual battery is

consented to is not offensive

argument because it would

require the plaintiff to prove

defendant argued that

the absence of consent

sexual contact that is

the Court rejected this

what makes contact

plaintiff does not need to be aware of conduct

contact does not have to be hostile (could be helpful)

Allan v New Mount Sinai Hospital

- the defendant injected the plaintiff on her left arm with anaesthesia after the plaintiff told him not to
 - defendant liable in battery for all the consequences flowing from his action (foreseeable or not)

Bettel v Yim

- the defendant shook the plaintiff and accidentally struck his nose
- liable in battery because intent to commit battery transfers from one to another

Definitions

Motive & Mistake: not legally significant in intentional torts

Volition: act directed by a conscious mind and necessary to intention; no volution no liability Capacity: actor must understand (1) that the act has consequences and (2) what those consequences are

Assault

the intentional creation in the mind of another of a reasonable apprehension of imminent harmful or offensive physical contact

Elements of an Assault

- · direct threat of harm
- a reasonable apprehension of imminent harmful or offensive physical contact
- fault is presumed (trespass-based tort)

Note: harm or damages not required

Bruce v Dyer

- road rage
- plaintiff stopped defendant from entering lane and got out of the car shaking his fist
- fight broke out and defendant broke the plaintiff's jaw
- plaintiff's conduct was an assault

Tuberville v Savage

- plaintiff held handle of his sword and said "if it wasn't assize-time I would not take such language from you"
- not an assault because it lacked imminence (plaintiff specifically said I won't assault you because it's assize-time)

Stephens v Myers

- defendant approached plaintiff w/ clenched fist and intention to strike
- stopped before he could reach the plaintiff
- still an assault

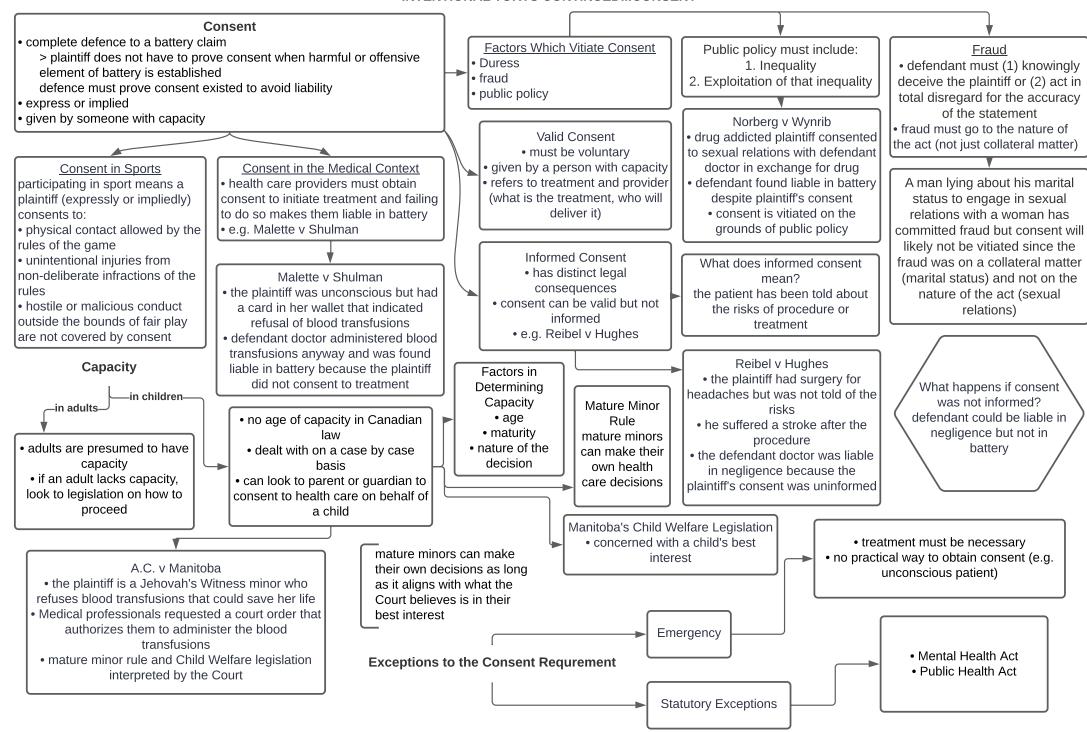
Herman v Graves

- third party drove defendant's truck aggressively and chased and tailgated the plaintiff's car
- this was an assault

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the absence of consent

INTENTIONAL TORTS CONTINUED...CONSENT



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INTENTIONAL TORTS CONTINUED...PRIVACY

no specific tort for invasion of privacy but aspects of privacy are protected by other torts

Statutes that protect aspects of privacy in Alberta

Freedom of information and protection of privacy act

Personal information protection act

Health information actPersonal information protection in electronic documents act (federal statute)

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

Elements of Intrusion Upon Seclusion

- intentional (or reckless)
- invaded the plaintiff's private affairs without lawful justification
- a reasonable person would have regarded the invasion highly offensive

Elements of Unauthorized Public Disclosure of Embarrassing Facts

- public disclosure of facts
- facts are private in nature
- facts are highly offensive to a reasonable person
- facts not a legitimate concern of the public

Cases Involving Invasion of Privacy Roth v Roth TW v Seo plaintiff and defendant were • the defendant was an ultrasound neighbours and had a fight technician and recorded the plaintiff • defendant harassed the plaintiff in a changing room • the Court took steps to recognize defendant liable in battery but not the tort of invasion of privacy for invasion of privacy Doe 464533 v ND • the plaintiff sent an intimate video to the defendant Jones v Tsige • the defendant posted the video • defendant looked at the plaintiff's online bank records multiple times • the Court recognized a tort for • the Court recognized a tort claim invasion of privacy for intrusion upon seclusion

 no longer as relevant in Alberta because privacy for intimate images is now protected by statute

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STRICT LIABILITY

What is it? • defendant can be liable even **Elements of Strict Liability Defences to Strict Liability** though he/she was not at fault • non-natural use consent requires causation · likely to do mischief if it escapes · act of God, the plaintiff or a third • available in Canada but rare escape party • significant overlap with negligence damage to plaintiff's property statutory authority · has some use in settlement negotiations **VICARIOUS LIABILITY** Rylands v Fletcher What is it? · based on relationship between the • case where strict liability arises · a form of strict liability that holds a vicarious defendant and the tortfeasor defendant liable for the wrongdoing of · defendant built a reservoir over a · most commonly arises from an coal mine that caused water to fill in someone else even though they are employment relationship the plaintiff's mine not at fault · plaintiff can recover Requirements of Vicarious Liability Policy Rationales • tort committed by an employee • benefit/risk Who is an employee? • employment relationship deep pockets · who controls the activities? · tort committed in the course of employment efficiency whose equipment? deterrence · Who hires assistants? Was the act committed in the course of · Who will bear the financial risks? employment? Who will profit from the enterprise/activity? uncertain Yes _No Vicarious Nο Was the act authorized by the employer? Vicarious liability will vicarious No liability will follow liability Ν'n vicarious follow Yés Vicarious liability liability will Could the act be viewed as an improper follow mode of an authorized act? Is there a strong uncertain Is there precedent? connection between the uncertain employee's torts Should vicarious liability be imposed based and the on the broader policy rationales? Vicarious employer? liability will follow **Cases Involving Vicarious Liability** -**Strong Connection Test** Opportunity that enterprise Bazley v Curry afforded GT v Griffiths · the defendant sexually Extent to which wrongful act • the defendant sexually assaulted children assaulted the plaintiff awhile while employed at a non-profit club furthered employer's aims employed at a non-profit Extent to which wrongful act was · he took them to his home non-profit held vicariously non-profit club was not vicariously liable related to friction, confrontation, liable or intimacy inherent in employer's enterprise Extent of power conferred on E.B. v Order of the Oblates of Mary John Doe v Bennett employee Immaculate in the Province of British defendant priest sexually Vulnerability of potential victims Columbia assaulted the plaintiff for many • the defendant was employed at a residential years school where he was an odd job person • the Episcopal Corporation that Statutory Vicarious Liability · he sexually assaulted children employed the defendant was held • Education Act makes parents liable for • employers were not found liable because vicariously liable students who destroy school board there was not enough of a strong connection property • Traffic Safety Act makes drivers

insurance purposes compensation and deterrence

Policy Considerations Underlying Vicarious Liability:

employees of the owner of the vehicle for

DEFAMATION

Elements of a Defamation Claim

- material is defamatory
- material refers to the plaintiff
 - · material was published

Material is Defamatory

- one that injures the plaintiff's reputation in the eyes of right-thinking members of society
- spoken or written words, drawings, photos, tweets, etc.

Defences to Defamation

includes innuendo

Material Refers to the Plaintiff

- plaintiff does not have to be named
- · description or context could refer to the plaintiff
- would a reasonable person who knows the plaintiff conclude that the statements were about the plaintiff?

Material was Published

- must be published to at least one person in addition to the plaintiff
- accidental publication is not actionable
 - hyperlinks are not considered publication

It is not difficult to establish defamation the real battle is with the defences

Based on strict liability (if statements are defamatory, defendant's intent is irrelevant)

Not based on strict liability (publication must be intentional or careless)

Justification/Truth complete defence to defamation claim statements must be substantially true entails aggravated damages if unsuccessful

Absolute Privilege

- protects communications in situations where society's interests are best served by allowing people to speak freely
 - Events Protected by Absolute Privilege
 - Judicial proceedings and quasi-judicial proceedings
 - Parliamentary proceedings
 - · High executive officials of state
 - Spousal communications

Qualified Privilege

- defeated by malice
- limited to comments relating to the legitimate purpose of the occasion

applies to:

- protection of one's own interests
- · matter of common interest or mutual concern
- moral or legal duty to protect another's interest
 - public interest

Fair Comment applies to comment and opinion but must be:

- an opinion
- · based on true facts
- on a matter of public interest
 - · objectively fair
 - not malicious

Malice: motivated by spite, ill-will, hatred or other improper purpose

Responsible Communication on Matters of Public Interest • new defence

- recognized in Grant v Torstar because of difficulty in proving the truth sometimes
 - defeated by malice

Test for Responsible Communication on Matters of Public Interest

- Is the publication on a matter of public interest?
- Was the publisher diligent in trying to verify the allegation, having regard to:
 - The seriousness of the allegation
 - The public importance of the matter
 - The urgency of the matter
 - The status and reliability of the source
 - Whether the plaintiff's side of the story was sought and accurately reported
- Whether the inclusion of the defamatory statement was justifiable
- Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage") and
 - Any other relevant circumstances

WIC Radio Ltd v Simpson

- the defendant was a known social activist against gay people and the plaintiff made comments that put her on par with Hitler, KKK and the like
 - statements were found defamatory but the plaintiff was not liable because of the defence of fair comment
- the Court held that fair comment applies even if the plaintiff does not subjectively hold the view as long as it could objectively be held by a reasonable person

Colour Your World v CBC

- plaintiff is a company that sells paint who sued the defendant for publishing a documentary on mercury in paint
- the documentary was not defamatory because a reasonable person would not interpret it in that way

Grant v Torstar

- the defendant published a story that had critical comments about the plaintiff using political influence to develop a golf course
 - created a new defence to defamation

Awan v Levant

- the defendant published defamatory material about the plaintiff on his blog
- defences to defamation were defeated by malice

Hav v Platinum Equities Inc the defendant obtained RER's from a third party and the RER's were allegedly made by the plaintiff but was found to be fraudulent

- the plaintiff sued for defamation against the defendant for the fraudulent RERs and for the report they made to the ICAA
- fraudulent RERs and report were not found defamatry

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