

Causation:

As discussed before, the material contribution to risk approach may eliminate the proof of causation. McLachlin in the Clements case notes that “elimination of proof of causation [via material contribution of risk approach] is a ‘radical step that goes against the fundamental principle stated by Diplock, L.J. in *Browning v War Office*: a defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff’. For that reason, recourse to a material contribution to risk approach is necessarily rare, and justified only where it is required by fairness and conforms to the principles that ground recovery in tort”.

Basic Principles of Liability:

Imputed/Constructive Intent- intent can be ‘imposed’ if the consequences were certain or quite certain to result from an action (quite certain/certain defined by a reasonable person would think in the circumstances)

Transferred intent- may impose liability on D even from unintended consequences- (1) invoked if a tort results unintentionally against plaintiff from a tort the D had intended to commit against a different party

(2) also if a tort is committed against P unintentionally by D while the D had been intentionally trying to commit a different tort against the P → the ‘wrongful intent’ is transferred from the intentional tort to the unintentional tort

Intentional Torts vs Negligence:

→ Unlike negligence, which has incorporated liability insurance loss allocation policies in its development and application, intentional torts generally aren’t covered by liability insurance so they tend to operate differently than negligence and explicitly focus on corrective justice and apportioning fault between individuals.(Osbourne)

⇒ though theoretically this means intentional torts work better to deter and punish certain types of conduct, while encouraging others, this is limited by the fact that often defendants in intentional torts are often unable to fully compensate victims, forcing people to rely on insurance and government compensation funds- these sources of compensation tend to only compensate for certain types of losses, heavily shaping the variety and frequency of litigation for different intentional torts. (Osbourne)

→

Torts vs Criminal law

⇒ Tort law focuses on harm/damage to victim and their interest in receiving compensation, less about punishing defender.

⇒ Victim brings complaint, not government.

⇒ The civil burden of proof (BoP) in tort law is much lower than the criminal BARD standard

Torts vs contracts: Tort law looks backward to compensate the violation of rights, contracts looks forward

⇒ obligations in tort law are essentially imposed by society, whereas contract law you choose to take them

Instrumentalist view of Torts: Identifies aims of what tort law ought to achieve and distinguishes them

Compensation: primary aim is to ensure compensation and restore P to where they would have been if no tort
⇒ Contrast with criminal law where the focus is on the defendant’s moral fault and punishing them- not aiding the party who has suffered a violation of their right
→ Negligence requires risk and relation b/w D’s actions and harm to P/violation of P’s right
- negligence not a tort unless it results in wrong committed- the violation of a right (**Palsgraf**)
→ Prevents people from taking justice into their own hands
→ however only happens in certain circumstances, requires a significant investment of resources, and plaintiff must prove fault- and from a ‘tortfeasor’ who can pay compensation
→ Often fails to compensate people quickly or fairly- a small number of people receive damages- often excessive damages from insurance plans- most victims do not receive compensation and the costs of this insurance system are passed onto consumers.
→ Increasing ubiquity of liability insurance means that although Ps are more likely to receive compensation- it pay

not come out of the D's assets, lessening the ability of torts to deter and punish certain conduct
→ administrative costs are extremely high and can consume a large portion of the total sums paid out
→ Tort law goals of deterrence vs compensation are often incompatible
⇒ eg. holding D who has taken cost-justified precautions liable in negligence secures compensation for P but discourages efficient conduct

Problems with compensatory role in tort law- is it a good/sufficient 'vehicle' for compensating victims?

⇒ What **alternatives** to tort law are available?

→ No-fault insurance; though might lower incentives to drive carefully- system can be adjusted for this by having premiums

⇒ Transaction costs of litigating torts are significant

- Raises access-to-justice issues

⇒ Deterrence? Much of the conduct dealt with by tort law is basically spontaneous behaviour

→ Perhaps penalties need to be more severe and litigation more likely, could be achieved by lowering barriers to litigation- cheaper lawyers and allowance for 'no-fee' lawsuits

- Canada generally prefers less litigation- U.S. openness to litigation in multiple areas has chilling effect on certain behaviours (medical specialties), significantly increases medical costs through insurance

- If public authorities are more open to suits for negligence, may severely limit their ability to perform their statutory functions- police may not arrest

⇒ Feminist critique: dealing with harm- tort law tends to better deal with harm to property rather than other types such as psychological harm, harm to social relationships; This disparity also tends to be gendered

→ broader argument that tort law, and law in general, has historically been created and litigated by men, leading to pervasive inequities

⇒ Recognize assumptions about certain types of harms and reasons for compensation- why are some harms not addressed by law, should they be?

Deterrence: Torts aims to deter certain defendants as well as the general public

⇒ **Problems** with deterrence theory?

→ Problematic as much of tort liability is product of spontaneous, careless behaviour which is difficult to deter- particularly risk taking drivers

→ Impact on decision making in business through efficiency theories may be suspect- only effective if tort claims are actually pursued against defendants

→ Individuals have different perceptions of potential for litigation and finding liability- delay b/w act and finding lessens impact

- liability insurance also limits the deterrent capacity of torts

⇒ Tort law and **externalities Problem?**

Internalize costs by allocating costs of accidents to activities that produce them

→ Internalizing costs of accidents (think liability insurance for cars, rather than paid for through general society)

to activity that causes them helps lower accidents- if paid through general taxation more people would drive

→ tort law can lower spending on accidents by allocating costs to parties able to prevent them at lowest price

- Efficiency would require imposing liability on the party that can minimize accidents at the cheapest cost- car manufacturers or drivers? (in case of brake problems)

→ Can be problematic- if compensatory damages represent the cost of accidents (as law/econ approach to torts says), and someone prefers to commit tort rather than avoid harm, it's efficient- What about extremely rich people who don't care?

⇒ Tort liability critiqued for overdeterrence and discouraging preferable behaviour- see doctors who avoid certain fields due to malpractice claims, + excessive defensive medication (unnecessary tests, records) to protect from

liability

⇒ Promoting social good, deterring social 'evils'. closely related to punishment, though deterrence is forward looking

⇒ Tort law must define conduct meant to be deterred and then provide reasons to avoid it

⇒ thus torts is better than influencing premeditated behaviour than spontaneous careless conduct

⇒ tortfeasor may find it cheaper/worthwhile to simply pay liability costs than change their behaviour

⇒ **Types of deterrence:**

→ Specific- alter behaviour of specific D- signal societal disapproval and hope they change their conduct- may be less effective if the D is particularly wealthy

→ General- aims to alter behaviours of wider set of D- litigation signals

→ Market Deterrence- change behaviour's of good's producers

→ **Problems:** social inequality- less of a deterrent for wealthy, less useful for deterring non-intent. conduct, assumes people behave rationally; assumes people know the rules

Punishment: demonstrate societal disapproval of certain behaviour (eg. add punitive damages)- tho less effective if D has liability insurance it often won't apply to protect D's from liability for intentional conduct (Osbourne)

→ Underlying theory of torts is that it's about helping victim rather than punishing certain conduct

Economic theory: torts should aim to promote economic efficiency- reduce accidents/wasteful behaviour/etc

Appeasement and Vindication- condemn D's behaviour, vindicate plaintiff, sometimes more of an aim than money- thus awards of nominal damages as symbolic recognition

Education- tort law may serve to educate the general public about what sort of conduct society expects

Tort law Theory and Concepts of Justice

Distributive justice: aims to advance benefit/burden based on measures of a person's worthiness/merit and thus are often concerned with appropriateness of wealth/entitlement distribution

⇒ tort law does advance this at times- such as 'deep pocket rule' approach to allocating losses + liability based on market share

⇒ Using negligence rather than strict liability imposes costs on victims for unavoidable accidents, not on those who caused them

→ damages often reflect pre-existing wealth distribution

→ Some aspects of tort law are framed with distributive ends in mind

Corrective justice → use the **Coleman article**- first order duties- duties not to injure, and second order duties- repair those injuries if you do- tort law will aim to correct inequities between two parties resulting from a defendant's wrongful actions

→ in some way tort law reflects- and assumes- the presence of certain "ethical and moral principles" (Osbourne); meant to protect the rights/liberty of individuals (and sometimes groups)

⇒ aims to restore victim to position they were before harm/wrong/loss- return both parties to pre-incident positions

⇒ access to justice problems- relation between intent and justice

⇒ Does not care about the initial distribution as distributive justice does

⇒ Uses theory of correlating rights and duties between people, and Ps and Ds

What should torts do?

Retributive Justice- imposes liability on blameworthy parties to penalize/punish/nullify their moral fault

- problematic- many don't think society should support retribution; most negligence/tortious actions don't involve moral fault deserving retribution

Economic efficiency:

Intention:

- because of the focus in these torts on the fault of the D and his/her behaviour, intentional torts focus on their conduct and its effects
 - ⇒ generally for liability, the D must either intend these consequences or they are quite likely to be caused by the D's actions.
 - ⇒ though intent is normally considered as what the D subjectively wish to occur from their consequences, it also includes what is quite likely to occur from their conduct, even if they didn't subj. desire these consequences the law is willing to construe/imply intent into their actions- also in the case of transferred intent
 - wouldn't be appropriate to allow D to escape liability for dangerous, culpable conduct just because they didn't intend the specific results
 - however D must be able to appreciate the 'nature and quality' of their actions to be held liable

Priel: If we want to maintain the intentional torts we need to give them a role that cannot be captured in the ever-expanding law of negligence?

⇒ **Reasons for continuing to distinguish intentional torts and expanding field of negligence**

- Tort actions aren't just about compensation but reasserting, through the judicial system, an individual's rights
- Using negligence shifts focus from harm suffered by victims to someone else failing in their duties
 - Difference in symbolic effect between someone being labelled as having committed a wrong against someone, and someone having failed in a duty
 - Problems with 'labelling' argument- the end result may be the same- emphasizes the instrumentalist nature of tort law- all about restitution and compensating victims for harms suffered
- Should tort acknowledge the symbolic importance of labelling an offence in a certain way?
 - Being found liable for a sexual battery, or trespass to chattels, or battery, *is* different morally than being found liable for negligence

Epstein- element of intention makes deciding 'guilt' and who should pay intuitively and morally easier

→ the importance of this makes finding which harms are deliberate important

Strict liability, Negligence, Deliberate harms

Why have three theories?

Tort law generally asks for compensation for acts that criminal law demands punishment

→ Why is mens rea not the foundation then for the intent element of intentional torts?

→ Mens rea- you're only responsible for consequences you intended to cause

→ differing ideas of intent mean that in many cases an action for which you would not be found criminally responsible you might be liable under tort law

How can intention to harm can be made vital to law of torts that begins with concern for causation?

Feminist Perspectives → Focus on tort law areas concerning women- claims for wrongful conception/birth, liability for injuries in utero, litigation around certain reproductive drugs

→ Aim to correct inequities in basic foundations of tort law created and perpetuated over centuries by law for the most part made by and for men

-ignores particular concerns of women and contributed to inequalities

→ Analyses gendered nature of certain legal concepts and standards- the reasonable man, approaches to domestic abuse, focus on property torts,

How capable are people of appreciating the depth of harm associated with conduct they have not experienced?

- eg. Are male judges ill-placed/ill-equipped to develop the law of sexual harassment in torts

Duty of Care:

Functions-partly a matter of a policy decision about who bears consequences of risks in certain actions;

- Provides overall framework for the broad range of situations in which liability for careless conduct may arise
- Limits liability and sets the boundaries within which one person can be held liable to another
 - allows the court to control what losses will be covered under negligence,
- Allocates risks in society – who should bear the risk of activities? (*Nova Mink v Trans Canada Airlines* [])

→ *Heaven v Pender*: Was harmed person placed in position (physically or 'near') to suffer harm as result of

→ Main element of proximity is the closeness and directness b/w D's actions and P's harm

→ However 'suff. proximate' is also a matter of whether D reasonably foresaw P's loss

Earlier U.S. precedent: Generally assumed that *Donoghue v Stevenson* established negligence though some argue that an earlier U.S. case established the same and Aikin was drawing on it.

Buick v McPherson- defective wheel due to lack of inspection injures McPherson, Buick claims McPherson can't sue due to privity of K

Cardozo ignores privity, says that if a thing has an element of danger, and seller knows buyer will sell it to another who will use it in a potentially dangerous manner, seller should

Cooper v Hobart: Following from *Anns*, foreseeability and proximity divided into separate parts-

- Creating the explicit policy stage and emphasis on proximity may act as a check on what has been a consistent trend towards expanding liability (*Osbourne*)
- However the flexibility of N lends itself to expansion into areas that aren't currently actionable, whether due to technological and scientific inadequacies

Standard of care:

→ **Positive aspects of reasonable person?**

- less difficult to find proof of N- you need only look at a D's conduct rather than go through a subjective analysis of a D's state of mind and subjective beliefs or intent (as in criminal law)
 - simply means a faster test
- promotes a basic level of conduct that society expects of its citizens when conducting their activities (*Osbourne*) thus helps to create a certain degree of predictability and certainty- people know that if they conduct themselves within the standards they are less likely to be successfully sued-
 - advances the compensatory aim of tort law as it takes the D's perspective into less account and instead focuses on whether their conduct breached the community-prescribed SoC and harmed the P, who therefore merits compensation
 - highly flexible and accounts for the infinite variations across cases- and *can* adjust with societal norms.

→ **Negative aspects of reasonable man test?**

- ⇒ miss certain types of wrongs- sexual harassment assault
- ⇒ objectivity critique- the original "man on the Clapham omnibus" (*Hall v Brooklands*) concealed a number of rather serious matters embedded in the guise of reasonability-
 - who sets these standards- and what sort of losses are they most interested in?
 - some people may not meet the standard, hides values judgements behind the term reasonableness,
 - may hold the morally innocent liable,
 - may disregard whether , social utility of conduct
 - may hide value judgements about what is considered valuable
 - effects of hindsight bias- once a loss has been caused by Ds conduct- it lends itself to the belief that it was foreseeable and thus the D should have taken greater precautions to prevent it- harder for a D to establish post hoc that they took reasonable precautions to prevent a loss, given that it still occurred (*Osbourne*)

→ *Coleman*: successful tort suit in terms

→ Courts are willing to consider the utility of the D's conduct, the problems of emergency situations, customs and approved practises, and even post accident precautions

→ the application of the standard of care has seen significant amounts of variance- and towards a stricter SoC- particularly with respect to the many activities increasingly covered by liability insurance

→ Consider social hosts- sports activities- why don't we impose a strict SoC on them?

⇒ arguments about personal autonomy- state shouldn't interfere excessively when people choose to voluntarily undertake activities that bear certain risks

→ **Special standards of care**: notwithstanding tort theories of corrective justice and the role of compensation there is an aspect of fairness and pragmatism- first there may be a underlying sense of injustice in holding people to a standard that they cannot discharge due to no fault of their own, and second- apart from the compensatory aims of torts, holding them liable in negligence would not advance the purposes of deterrence, and while perhaps it might serve to signal that society is willing/able to punish certain conduct, there does seem to be a sense that such a society would be fundamentally unjust. (Osbourne)

- courts may be more willing to impose liability on those incapable of meeting the SoC, if the losses are covered by liability insurance- in effect distributing the loss across a wider section of society. (Osbourne)

- **tension between corrective justice and the interests of compensation**

⇒ **SoC of children**: Capacity- children are less capable of controlling their actions and foreseeing the consequences of their actions- rather their parents should not be held

- General principle that children shouldn't be held liable in negligence- children should be permitted to make mistake w/o being forced into the legal system

- When children doing a particularly adult activity (driving a car, hunting, snowmobiling) they're held to the same standard as adults- others assume they're being controlled by adults and act accordingly- they can't be expected to assume that children might be operating- b/c kids act unpredictably (Osbourne)

- Parents/guardians are generally not held vicariously liable for the actions of their children unless there was a clear duty to do so.

Causation → useful cases: Clements; Hanke; Cook v Lewis; Athey; Snell

Arguments against Hanke → useless? how difficult is it for the plaintiff to convince the courts that proving causation using the but-for test is not articulated in the Hanke decision. Furthermore, there is a lack of jurisprudence on the material contribution of risk approach to guide the (lower) courts use the Hanke test [Clements].

⇒ osbourne says that one possible use of MC test is to allow deserving plaintiffs recovery

Arguments for Hanke → the Hanke decision is consistent with the principles governing the defence of contributory negligence. After all, the Hanke decision shifts the focus of causation inquiry from injury to risk. Pursuant to the BC Negligence Act 1996, the apportionment of liability is based on the proportion of fault. The Hanke decision provides another means for the courts to assess the proportion of fault and therefore the quantum of damages.

→ **Hanke + corrective justice?**

→ **Hanke + compensation?**

- If you can prove P has suffered a loss and D breached the SoC, courts should be willing to be flexible when addressing causation and consider using MC if an otherwise deserving P would be denied recovery through but-for

→ **use cook v lewis to demonstrate this point.**

→ **Hanke + deterrence?**

- the but-for test may not be equipped to deter risky activities due to the lack of sufficient scientific evidence demonstrating a but-for causal relationship. Thus, people (who engage in risky activities and thus induce material risk of harm to others) may not be held liable and continue to engage in risky activities.

→ **Hanke + predictability**

- one benefit of having fairly clear tests for causation is that D's can know that if they conduct their activities in

certain ways (eg. discharge the reasonable standard of care), they won't face liability even if someone suffers a loss due to their conduct- when courts add a new test of causation (especially in such a vague test as the MC test) it leads to greater unpredictability and potentially greater liability- which isn't in itself a bad thing but we should be mindful of who is making these decisions, their interests and position in society, and whether it's appropriate for them to do so.

⇒ focusses on the D's role in causing the P's loss.

⇒ but-for test, problematic in certain situations and relies on a certain amount of speculation

⇒ needn't be the only cause, but a cause

⇒ **Problems with causation:**

→ Independent insufficient causes- if D's N partial cause of injury to P (needn't be sole cause) liable for injuries caused/contributed to by D's N (***Athey v Leonati***)

→ Multiple Sufficient causes- but-for test would remove liability from both defendant's-

→ turn to **material contribution/substantial connection**

- rather vague test- potentially this is part of its appeal- allows courts a certain amount of scope to discard or impose liability based on a particularly sympathetic/deserving plaintiff. (Osbourne) This is one way you might interpret Walker Estate

→ **Scientific problems/delayed reactions-** typical rules of causation are problematic involving cases when a D's N conduct leads to a materially increased risk of harm to the P- but it's not necessarily a decisive factor

- ***McGhee v National Coal Board***- flipped burden of proof onto D after certain point

- ***Snell v Farrell***- SC rejected flipping of onus- might hold Ds liable when they didn't cause/contribute to harm, excessive increase in liability for health related costs, however noted that the process of working out causation shouldn't be applied in an overly rigorous manner- proof of causation was not needed on a scientific level- only on a BoP to allow the court to infer causation b/w a D's conduct and a P's loss.

→ Causation should be flexible to changing societal attitudes (Osbourne) : Alternative Liability (*Cook v Lewis*), and joint tortfeasor's offer other options

What if injuries to P caused by 2+ causes? If injuries are divisible, P has separate CoA against person who caused them.

→ While factual causation is more a matter of logic connections, legal causation- that is remoteness in terms of foreseeability and intervening acts- involves a policy judgement about how far courts are willing to extend liability. Even given negligent conduct and a breach of the standard of care a court may decide that the results are too distant from the D's negligent conduct to attract liability.

⇒ Although the general trend over the past century has been expanding the boundaries of liability, remoteness and the duty of care stage act as a limit on this.

→ important to note that negligence, as a far more flexible area of law than intentional torts, by and large reflects societal attitudes about what sort of loss should be compensated, who should bear the risks of certain activities, and _____

Sexual Battery and the Role of Consent

Feldthusen: Civil Action for Sexual Battery

→ No distinct tort of sexual battery in Canada, consequently where offensive or harmful conduct is sexual in nature, it is dealt with according to the traditional rules of battery in torts

- Absence of consent is presumed. Defendant bears onus of proving consent, constructive or otherwise (Adjin-Tettey)

→ Sexual battery cases tend to fall into two types:

- Exploitation: abuse of power-imbalanced relationships
- Negligence: 3rd party breached duty to protect victim from sexual battery

→ Reasons for a sexual battery action:

- Sexual battery is not simply a species of traditional battery, but is qualitatively different from the latter with respect to who is targeted, decision to prosecute, credibility issues, and the effect on victims (Adjin-Tettey)
- Tend to be consistent w/ corrective justice system
- Part of the healing process: vindication, appeasement, retribution
- Accused is at the centre of the criminal justice system, whereas victim is central to civil suit
- Tort actions are important because criminal prosecution may not always be available, or may not adequately provide the kind of personal remedy desired by the victim (Adjin-Tettey)
- Civil system is premised on equality of plaintiff and defendant
 - Litigants must perceive that they have been fairly treated
 - P has high degree of control over case- they can participate, have a voice, or have control
 - Ties into the first principle of recovery: empowerment of the survivor
 - Tort suit can have specific and general therapeutic benefits Access to a tort remedy is important for victims of sexual wrongdoing and women's equality (Adjin-Tettey)
 - Recognition and restitution are imperative to rebuild victim's sense of order and justice
 - Affirmation of their status as humans- recognises and possibly tries to rectify harm
- BARD vs balance of probabilities
- **Problems?** Many actions go undefended- but those do not can be very unpleasant and may not seem fair
 - great expense of civil litigation with little prospect of recovery
- **Conclusions-** tort suits allow victim greater control and have their injuries addressed-
 - tort litigation may help bring attention to systemic child sexual battery
 - Criminal Justice system doesn't meet the therapeutic needs of victims

Adjin-Tettey: Constructive Consent in the Tort of Sexual Battery

→ Constructive consent is to be objectively determined based on whether complainant's conduct lent itself to a reasonable inference of consent to sexual contact

- "A reasonable person in the D's position should have believed the P consented to sexual contact in the particular circumstances" (objective determination)
 - Must be a reasonable belief that there is consent to sexual contact
 - Court will consider plaintiff's demeanor as well as surrounding circumstances at time of alleged assault

→ **Constructive consent actually makes it harder to receive a civil remedy**

- Raises threshold for liability in civil cases relative to criminal standard, which would be contrary to limitations on the use of implied consent in criminal law

→ Possibility of a successful defence of constructive consent, coupled w/ myths and stereotypes about women's sexual behaviour, could put a civil remedy beyond the reach of many victims

- Actually **undermines the autonomy and dignity of women** in context of sexual battery
- May **perpetuate socially constructed hierarchies**, particularly around already marginalized groups
 - allowing constructive consent **undermines the basic right of bodily autonomy**
- **Only voluntary and affirmative consent** should be accepted as a valid defence to claims of sexual

wrongdoing

- Focussing on the 'reasonable person' avoids insight into system nature of sexual abuse and gendered framework of incident- and its analysis
 - decontextualizes the incident from social forces that effect complainants response to advances
- Constructive consent is **assessed without reference to defendant's actual beliefs**, a defendant could be found not liable even if he knew plaintiff did not consent, if a reasonable person might have though his conduct not unreasonable in the circumstances
- Promotes blaming of victims for behaving in ways contrary to a reasonable standard- set by- expects them to resist more while ignoring wider societal dynamics
- Constructive consent **assumes some 'normal' or 'reasonable' reaction to unwanted sexual advances-** especially if **what is reasonable is produced from a male dominated perspective**
- - these also tend to reinforce/perpetuate inequalities of marginalized groups
- make marginalized groups more vulnerable to attacks on credibility by bringing up past records- particularly at risk are those who have been extensively monitored by the state
- introduces defence of honest mistake into tort of battery, against historical precedent of torts having no defence in a defendant's honest but mistaken belief in the propriety of an unlawful act
- standard of reasonable person is vague and varies depending on position in social order
- -still informed by white/middleclass/male/hetero standards and risks marginalizing those that fall outside this
- Categorizes women based on wealth, experience, race, reflecting variable valuation of female bodies
 - certain stereotypes create perceptions of certain (often marginalized groups) as 'unrapeable'
- Perhaps **don't eliminate constructive/IMPLIED consent** in every case, but **be aware of implications/contexts** in cases involving claimants and perpetrators from marginalized groups
- - exclude or limit constructive consent as a defence- both **emphasize 'rights-affirming purpose of battery'** and remain consistent with public policy
- Adjin-tetty **believes that its warranted owing to unique nature and effects of sexual wrongdoing compared with other 'violations of bodily autonomy'**
 - **-consent and credibility are main focus in sexual abuse cases- unlike other violations of bodily security/dignity**
 - -sensitivity and emotional strain of bringing a sexual battery case to court impose different costs on plaintiffs- requiring a separate regime to 'address these specific concerns'
 - also helps to **make stronger statement about societal beliefs on sexual attitudes** towards women
 - -Constructive consent defence "**subordinates a complainant's autonomy rights to the defendant's reasonable belief in consent**"

→ Historical context of tort liability

- Premised on theory of strict liability
- Defendant's fault is not traditionally a relevant consideration for determining liability
- Presumption of fault arises against D upon proof of interference w/ Ps bodily autonomy
 - Can only escape liability by disproving fault – that is, a lack of intent and negligence, or by establishing a valid defence

Decision in Scalera

→ P in a sexual battery case must prove that there has been physical contact of a sexual nature, but is not required to prove lack of consent

→ Confirms that absence of consent is presumed in sexual battery cases

→ Defendant's fault arises from the intentional violation of the plaintiff's bodily security, so defendant bears onus of proving consent

McLachlin J: wrong to recognize new tort of sexual battery requiring P to prove lack of consent

- **Purpose of battery is to protect personal autonomy rights**
- Wrong to expect person whose bodily integrity has been violated in such a fundamental way to then have to prove contact was non-consensual
- Decision considered a victory for feminists. McLachlin notes there is often a power imbalance.
 - Rejects formal equality of plaintiffs and defendants that underlies most civil litigation
 - Explicitly recognizes power imbalance present in sexual abuse as well as its often gendered nature, the inherent wrong to victims of sexual abuse, and more generally, persons who have suffered intentional invasions of their personal autonomy and dignity
- Court rejects subjective assessment of belief, and rejects idea that honest, mistaken (but unreasonable) belief could be defence

→ It can be argued that b/c Scalera did not go into great detail on the question of constructive consent, there are a number of problems with this approach:

- Unclear as to whether the defendant needs to adduce evidence about reasonable efforts to ascertain the claimant's consent
- Objective approach means that the plaintiff's perception of events is irrelevant provided the defendant can show that there is a reasonable basis for their belief in consent
- Victims may in effect find themselves being blamed for behaving in ways that induced the defendant into believing consent was present, or for failing to resist in circumstances where a reasonable person would have protested
- Constructive consent is premised on common sense ideas about "normal" or "reasonable" behaviour or responses to unwanted sexual advances

Problems with the subjective/objection approach

- What may seem to be taken as consent- may not actually be
 - Ex. P does not resist- taken as consent, whereas psychologists will say that this is likely a sign of past trauma
- Problem with rejecting the subjective approach- someone may actually genuinely believe what they thought, so you would find them liable even though they didn't believe that they were doing it without the P's consent
 - May find someone liable when they didn't think they did anything wrong- enormous social stigma attached to this
- Idea of constructive consent- can end up blaming victims for behaving in certain ways, not resisting enough etc.
 - Premised on common sense norms of "reasonable behaviour"
- The idea of a "reasonable person" in this case is more like a "reasonable man"- gendered

Advantages and Disadvantages of suing for sexual battery in tort

→ **Advantages:** There is the sense that in a criminal trial, the victim gets relegated. They have no control over the process.

- Some people claim criminal law “steals conflicts”. The victim doesn’t get to control the way the conflict is resolved, denying them the possibility of closure. The victim gets revictimized, this time by the legal system as they have to relive the process as a witness.
 - If court can be convinced that a reasonable person in that situation would have protested this critiques behaviour of the victim, which is problematic especially in the scientific study of sexual assault, most people shut down so you wouldn’t respond.
- In torts, victim gets more control and gets a “reclaiming of their rights”.
 - Plaintiff controls the case, choose what facts are brought before the courts, and what expert evidence is presented
 - Civil approach may have therapeutic benefits. Probably best captured by the idea that the defendant gets “their day in court”
- Importance of distinguishing a battery from unique harms of sexual battery- significance of labelling
- In criminal context non-consent is assumed- consent must be proven by defendant

Disadvantages

- Civil litigation can make things worse. Cost, delay, and stress may undermine the therapeutic benefit of civil litigation.
- If it is defended, there is high possibility of secondary victimization
- Civil litigation is expensive, and the plaintiff may not receive full, or even partial damages

Should there be a new tort of sexual battery:

→ Mirrors approach taken in the criminal law

→ Does not allow for defence of implied consent: Ewanchuk

- Severely limits the situations where an accused person can claim an honest but mistaken belief in consent to sexual contact
- Where complainant says it was non-consensual, court will accept unless they find complainant not to be credible
- Defendant must show they took reasonable steps to show there was consent: be clear about consent being given
- Rule: mistaken belief in consent can only operate to negate the mens rea required for sexual assault where the accused can show that they believed the complainant communicated consent to the sexual contact

Negligence VS Nuisance

Two main ways in which nuisance differs from negligence:

(1) In negligence, court will look to reasonableness of df’s conduct. In nuisance, the court instead looks to the reasonableness of the effects of df’s conduct.

· In negligence, the question is: Did the defendant behave unreasonably?

· In nuisance, the question is: Was the interference with pf’s enjoyment of land unreasonable?

(2) In negligence, proximity + limit of liability determined by general requirement of neighborhood (foreseeability). Nuisance: proximity + limit of liability determined by physical neighborhood → nuisance is similar to prior to Donoghue age. ~ Evidentiary problem

Nuisance vs. Negligence → should we get rid negligence?

· The preposition to use nuisance is to have an interest in property!! → exclude a whole class of plaintiff.

· Differences in remedies – injunction? [Miller v Jackson] Denning → “if the plaintiff seeks a remedy in damages for injury done to him to his property, he can lay his claim either in negligence or nuisance. But if he seeks an injunction to stop the playing of cricket altogether, I think he must make his claim in nuisance.