Contributory Negligence

* You bear some responsibility to your harm, which will affect how much you’ll be compensated

Neighbour Principle

* You have a duty to be careful to your neighbour
* Often used as a way of maintaining or assisting people who have been injured in a way that public healthcare can’t cover and will take a lot of money to sustain them over the years. Mental trauma and embarrassment can lead to damages as well. Lost income for life.

Key ideas and purposes of tort

* Key purpose of tort law is to compensate. Pro-defendant, generally want people to be as likely to be compensated as possible without being totally biased.
* Master/Servant category (employer/employee) captured by vicarious liability.
* Often can be additional plaintiffs. Judge can apportion responsibility.
* Plaintiff’s lawyer names as many parties as possible, and they’ll fall off bit by bit.
* Call for action begins at the point that the injury manifests itself, it’s your personal realization of the harm that is the moment. Complications when not clear when injuries manifested, courts try to be generous.
* Typically, if you win, you get the legal costs. Damages = money. Money is all you can get in tort, sometimes a judge can request an apology or public statement.
* If victim is a child, damages go to legal guardian. Parents’ lost wages are compensated and court projects loss of future income for the child. Look at income tables across the country to do this, then look at the characteristics of the family to project.
* Damages are awarded as a lump sum.
* Key consideration: is this something state would be interested in? Things police are involved in would call under criminal code. Otherwise, private dispute.
* More likely to pay damages if you have money or good insurance.
* Whoever you sue must disclose everything, including insurance policies

Intervening Acts

* Multiple causes and subsequent injuries. Where the act of a third party exacerbates the injury caused by the original defendant.
* An intervening act, so long as within the scope of risk and foreseeable outcome of the original harm, original defendant remains responsible for some portion of that liability. If it’s not foreseeable, then not liable

Liability

* Parties are severally or jointly liable. Plaintiffs will always get 100% of the amount, but it’s up to the parties to fight amongst themselves to determine how its apportioned
* If plaintiff dies, the estate can continue the claim. However, dead people are worth less than living people, as they’re no longer experiencing pain and suffering. Estate can however bring separate claim of pain and suffering for people who died, but judges are loathe to award this.
* Creditors can still make claim on the damages that are given to the estate if the plaintiff owed money. They can’t sue, as they’re too distant and not a person that was directly harmed, can only make a claim.
* You owe a duty only to people when you could reasonably foresee the harm. This is why creditor’s can’t sue (too distant to foresee).

What a tort is

* A legally recognized wrong, enforceable in court, a legal entity
* New torts emerge. There are torts that exist in textbooks as a point of discussion but are not yet recognized by the court. These are actions people have brought forward trying to make it a tort, but judges decided against.
* To be a tort, must be confirmed as such and legally recognized, they emerge by common law.
* Fit case as closely as possible to previous case that judge ruled favourably in.
* “civil wrong”: private individuals or corporations suing each other about their own personal rights (property rights, their body, personal dignity/freedom)
* Argued on balance of probability, 50%+1
* Almost never heard by juries
* State can be involved in civil law as a litigant. Private citizen can sue the state. Private litigation without a societal concern.
* Not about retribution, even large punitive awards are more about deterrence. Purpose is compensation. Tort law looks backwards to compensate a harm and bring the plaintiff forward to where he’d’ve been were it not for the harm.
* Created by common law, developed on case law and precedent, judge made law.
* Intentional torts: require intention and some cognitive process on part of the defendant that is clearly at fault.
* Negligence: don’t need to show that the defendant intended to harm the plaintiff but that their behaviour was so reckless that it was foreseeable that it might harm the plaintiff
* Torts of absolute liability: defendant is liable simply because they are engaged in the behaviour, no defences available. No right of reply. None of these in Canada
* Strict liability: same as above, but there are defences available, usually act of God.
* Torts of Negligence: there is no intention here, defendant didn’t intend to harm the plaintiff or their property, but their behaviour was careless or reckless. You don’t intend to harm, but you do, and plaintiff needs to show that they were owed a duty of standard care and you failed to meet it.
* Tort of intent: there is intention on part of the defendant and it was their subject of intention to interfere with the plaintiff and/or his property

**Class 4 – Remedies and types of Damages**

Intentional tort process

* Alleged tort occurs, action happens that gives rise to dispute.
* Onus of proof is on plaintiff, who has to show that defendant acted voluntarily.
* Plaintiff must then show that defendant acted intentionally
* Then have to establish actual elements of the tort, the factual proof of the alleged tort.
* Defendant then gets to respond and raise any defences in his favour
* Then court determines remedy, what plaintiff will receive in an effort to return the plaintiff to the position he or she was in prior to the injury occuring

Types of Remedies

* Extra-judicial remedies: uncommon, typically linked to a specific tort, only arise in specific situations, primarily designed to force an individual defendant to act in one way or another. Primarily linked to nuisance and trespass.
* Declarations (statements by court to settle a dispute, declare something to be the case), usually accompanied by other remedies.
* Specific restitution: something other than damages to restore plaintiff to prior position
* Injunction: statement by the court that directs a defendant to act or cease to act in a particular way. Restrain a defendant from engaging in a behaviour they are currently engaging in or compel them to do something. Injunctions are only if damages are insufficient or unsuitable.
* Damages give plaintiff specific sum of money stated by the judge and can come in many different forms.

Types of damages

* Pecuniary (special) and non-pecuniary. Pecuniary damages are those that can be easily calculated in dollars and cents, like medical expenses. They must be strictly proven, can’t approximate, need hard evidence. Easy to quantify and only difficult when have to project into the future or when there’s a loss but it’s not easy to quantify.
* If you have a physical disability, court will let you retain your previous lifestyle, if it’s a mental disability, court will generally just go for a standard lifestyle, not as concerned about trying to give you back your previous high standard.
* Non-pecuniary: things that cannot be quantified (pain and suffering) but courts are forced to anyway. Court will use a hypothetical reasonable person and how said person could be expected tor eact to loss. However, if you in particular have a pre-existing condition that worsens the lost, the “thin-skull” plaintiff, that condition will factor in and be put on defendant’s shoulders.

Categories of damages (each of which can include pecuniary and non-pecuniary elements)

* Nominal damages: rarely awarded, only a token amount. Designed to respond to a violation of a kind of legal right but that is not actually causing any significant harm. Almost exclusive to trespass cases with goal to protect right of exclusive possession. No compensable loss, but a tort has been committed.
* Compensatory: meant to cover actual loss, pecuniary or non-pecuniary. Object is to, as far as possible, through monetary award, place the plaintiff in the position he was in prior to the tort.
* Punitive damages: go on top of compensatory. Objective is to punish, deter, and denunciate. Awarded in situations where defendant has behaved outrageously in a kind of public sense, engaged in behaviour that is beyond the pale and you want to send a public message using the defendant as your example of what not to do. Available in all tort actions in Canada. Rare, court uses them in situation where seek to deter or denunciate serious misconduct and want to send a message, usually for intentional tort, element of bad behaviour. If there has already been criminal punishment, it doesn’t preclude punitive damages, but court will consider it. Requires something outrageous, unusual, and unacceptable. Can be criminal conduct.
* Aggravated damages: personal to the plaintiff, designed to respond to the humiliation the plaintiff has experienced, not a public message like punitive. Compensate for harm to the plaintiff with regard to a loss of dignity. Defendant had to act outrageously, looking for same behaviour from defendant as punitive, but now this extra element of humiliation of the plaintiff, which can be tied to non-pecuniary pain and suffering. Usually determined by what the plaintiff subjectively feels. Doesn’t matter if defendant has malicious intent in this regard, so long as there’s an intention to harm the plaintiff. Thin-skull rule doesn’t apply here though. Thin-skull must be medically quantifiable, not just being a sensitive person. Use reasonable person test.
* Disgorgement damages: awarded in situations where someone has profited primarily from the uses of someone else’s property. They are stripped of that financial benefit and it is paid back to the plaintiff. Compensation is equivalent to the financial benefit that the defendant gained. It’s rare, but easy to quantify. It is only pecuniary. It’s not disgorgement unless it’s money that the plaintiff is losing or that the plaintiff could’ve made. Has to be a not just at plaintiff’s expense, but a loss of what the plaintiff was capable of gaining.

How are damages determined?

* Goal of punitive damages is to create the outcome you want (deterrence, denunciation
* No rules, no ratios, no cap
* Only rule is that punitive damages rarely exceed compensatory.

**Class 5 – Volition and types of Intention**

Volition

* Every tort, defendant must act voluntarily, exercises control over his physical actions, acts are directed by the defendant’s conscious mind.
* Comes up rarely, often in situations where defendant is mentally ill (not driven by conscious mind) or drivers who are rendered unconscious. Also an issue with very young children. Defendants who are sleep-walking, are overtaken by sudden illness and rendered unconscious, defendant who suffers from mental illnesses that affect conscious mind on a fairly extreme level, and very young children. Alcohol and drugs are not an excuse.
* Defendant’s mind must have prompted the action for it to be voluntary. Defendant’s motive is irrelevant. Motive is irrelevant in intentional torts outside of damages.

Smith v. Stone

* Guy is carried onto land by a third party, then is sued for trespass. Defendant disputed volition, saying someone brought him on by force. Court rules that the people who carried him on were trespassing, but not him. Not voluntary, as he was brought onto land by force.
* If he was chased onto the land, there would’ve been volition as his conscious mind is aware of trespassing. Malice doesn’t matter. Trespass is “per say,” don’t have to prove harm.

Intention

* Rarely arises as usually defendant’s intention is clear
* Defendant’s desire to bring about the results or consequences of his or her act. It’s not to commit the act itself, but the consequences of the act.
* Needs to be a relationship between defendant’s intent and recipient of their harm

Types of Intention

* Direct intention: requires direct relationship between plaintiff and defendant. Most common. Requires plaintiff to intend consequences of his or her act, need to determine what the specific consequences the defendant desired were and then make the link. Doesn’t need to be malice, just intent for consequences to occur.
* Once you’ve established direct intent, defendant is responsible for all the consequences that flow from that intent. You hit someone with intention of hitting their face and they end up falling over and cracking head – as long as initial act’s consequences were intended, defendant is responsible for all the consequences that flowed from that initial intended consequence. No time limit, but should flow reasonably promptly.
* Imputed intent: intent is imputed where there is no direct desire to bring about the consequences of the act, but the unintended consequences were certain or substantially certain to result from the act. If you throw a bomb at a person, it’s pretty certain the person sitting next to them will be hurt too.
* Transferred intent: situation where a defendant intends to commit a tort on one plaintiff but unintentionally commits it on another. Swing a punch to hit person A, who ducks, and you hit person B. Committed tort on person B, your intention to hit A is transferred to B. Transferred intent only applies to people.
* Other option is where a defendant intends to commit one intentional tort on a person but ends up committing another. You intend to commit assault, accidentally make contact, which means intent is transferred to a different tort (now intended to commit battery).
* Start with direct intent, if it’s iffy, move on to imputed and transferred, making a case that tries to prove both.
* Provocation, coercion and duress don’t negate intention, but reduce damages. Self-Defence can knock out the tort altogether.

**Class 6 – Duress, Provocation, Accident, Mistake**

Duress

* A defendant who acts under duress nonetheless intends to do the act and exercises control over his actions, so it does not negate intention nor serve as a defence.
* Reduces damages, still liable, but not a bad defendant so damages are mitigated
* Court’s goal is to compensate a plaintiff who has been wronged. Looks to who can deal with that first. If duress is a defence, the plaintiff has nowhere to turn.
* Gilbert v. Stone: defendant was threatened to go on land ans teal horse, but plaintiff can’t sue the threateners for trespass, as they weren’t the ones who trespassed. Underlying concern is that the plaintiff has somewhere to turn for compensation.

Provocation

* In tort, provocation is not a defence and doesn’t negate intention, just has impact on damages
* Provocation requires defendant’s conduct to cause plaintiff, as a reasonable person, to lose self-control.
* Provoking act needs to occur shortly or even immediately before the alleged tort.
* Miska v. Sivec: defendant’s actions are too careful and well thought out, too much time. Temporal element is activated in cases where provocation is rejected, needs to happen immediately. Physical contact is important, if not extreme physical contact, as far as the provoking act is concerned.
* The provocation must generally be directed at the person who responds.
* You cannot rely on the provoking act of someone else as an excuse for engaging in a tortuous act against a third party. Can’t attack someone because someone else provoked.
* Hard for mere words to constitute provocation. It can be if the words are an assault, a reasonable expectation of physical contact, or concrete threat.

Mistake

* Defendant does intend the consequences of a mistake, but makes an error regarding the legal or factual significance of them.
* A mistake does not change that a tort has been committed, so not a defence and doesn’t negate intention. Only mitigates damages. However, only mistake of fact mitigates damages, not mistakes of law.
* Mistake of law: defendant does not understand the law, is not aware of the law, or things they have legal right to do something when they don’t. Hodgkinson v. Martin: enters private property thinking they have legal right to do so. Not aware of boundary or think they have consent. A lack of awareness of the law is never a legal defence, nor does it mitigate damages
* Mistake of fact: Ranson v. Kitner: shoots neighbor’s dog because he thought it was a wolf

Accident

* Can’t result in liability, as it means defendant did not act intentionally. Accident is the absence of intention, like if defendant fells a tree intending it to fall on his land but, miscalculates, and it falls on neighbour’s land. Does not count as trespass because the consequences of the act were not intended. He knew it the tree would fall, but didn’t intend it to fall on neighbour’s land
* That said, trespass does include property thrown into or onto another.

**Class 7 – Tort of Battery, Bettel v. Yim, Scalera**

Battery

* “the intentional infliction upon the body of another a harmful or offensive contact.” Distinct from assault in that assault does not involve physical contact.
* No element of foreseeability
* Bettel v. Yim: you are liable for all the consequences that flow from intended action as well as all subsequent consequences that flow from that intended action, regardless of whether those consequences were intended or not or foreseeable.
* 3 key elements of battery: “intentional,” “harmful or offensive contact, “another person.”
* Actionable per say: don’t need to actually show harm (cuts and bruises). All that needs to be made out in battery is contact.
* Key of battery is intention: whether or not you intended to touch, not whether you intended the consequences that flow from that touch, just intention to touch. Actual damage is only relevant to calculation of damages. First step in intention is “was their intention to make physical contact,” which can be direct, imputed, or transferred.
* Contact itself, in that it is unwanted, is “harmful or offensive.” Presumption that all unwanted bodily contact without consent is harmful/offensive. Can be battered even if unaware of the battery. Fact that it’s non-consensual makes it harmful/offensive
* If I propel something towards plaintiff and it hits him, this is considered battery.

Implied Consent, Implicit Consent to Battery

* Areas the court has carved out where there is an assumption where, say if you get on a bus, you are consenting to being battered within reason. This is implied consent and are societal necessities cases, where it’s implicit in your activity that you’re consenting to everyday batteries. To establish a tort, would need to show something more, that goes beyond necessity of moving through the bus
* Implicit consent: tapping people on shoulder to get their attention, moving through a crowd, exceptions are carved out so you can go about daily activities, challenge being to determine when someone has crossed the line.

“With another person”

* Common law has restricted battery to where the thing battered is a person, but has defined “person” broadly. Not necessary for plaintiff’s body to actually be to touched to be battered. You can come into contact with their clothing, something they’re carrying, or something they’re riding. Battery can also be propelling something that hits the plaintiffs, like spitting. Extends beyond a person’s body to a sort of safe area around them that the law protects

Common defence for battery

* Most common defence is consent. Burden of proof shifts to defendant after battery is established and now the defendant tries to prove that plaintiff provided consent. If this is shown, defendant isn’t liable.

Bettel v. Yim

* Clear case of battery, focused primarily on question of intention and question of whether an intentional wrongdoer should be responsible for consequences that flow from that original intention. Defendant intended to shake him and ended up headbutting him.
* There was direct intent, he intended to shake the plaintiff. There was harmful/offensive contact when he grabbed the plaintiff. Court said defendants are liable for the consequences that flow from offensive contact and liable for any subsequent injuries from the shaking.
* After this case, definition of battery is extended: “Battery is the intentional infliction of harmful or offensive contact with another person...including all consequences that flow from that contact including those that were unintended.

Burden of proof in battery cases

* Plaintiffs have responsibility for establishing the elements of the tort (intention, contact to person). Plaintiff speaks first, establishes his case.
* The burden then shifts to the defendant who must establish any defences, most commonly consent. Generally, it is not the responsibility of the plaintiff to establish the absence of consent, it is the defendant’s responsibility to establish consent.
* Courts historically carved out two areas where the plaintiff bore responsibility for showing he did not consent. This is in the context of sports, that if you participate in contact sport you are consenting to all batteries, and so plaintiff must show he did not. Also, cases of sexual battery, where there’s an assumption that the plaintiff consented and plaintiff must show he did not.

Non-Marine Underwriters v. Scalera

* Underwriters are insurance company arguing the case, not the individual. He worked for a bus company, which was insured, and so it’s the bus insurers v. Scalera. Series of sexual batteries for several years on 14 year olds. Buses would pull into area known for child prostitution, picking her up, and sexually assaulting her over several years. Defendant said if plaintiff ever disclosed what happened or said it wasn’t consensual, he would harm her. Said these were normal acts of love and issue was whether plaintiff consented.
* Responsibility of plaintiff to show absence of consent. Clear the batteries had occurred and plaintiff’s argued that placing responsibility on plaintiff for showing absence of consent was wrong. Majority of SCC affirmed this, shift in law, sexual battery was now on same level as all other batteries in that it’s up to the defendant to show that plaintiff consented. SCC decided time for change, shouldn’t be a difference between sexual battery and other battery, victims of sexual battery are no different from physical battery victims. The minority said sexual battery, like sports battery, were “unusual activity” and intimacy makes it different.
* Age is only relevant to the extent that a child cannot cognitively understand the concept or situation or decision. In Scalera, no showing that she didn’t understand what she was doing. It’s about whether you can understand the activity, not its emotional consequences or societal implications.
* You can withdraw consent during the act, it would be up to defendant to show that there was no withdrawal. Defendant establishes consent, then plaintiff shows withdrawal, back and forth
* Sexual battery rules came from a time where there were doubts about women’s honesty regarding sex and a time where they and children were property of men. Scalera is SCC saying endpoint to our understanding of women’s honesty and men’s entitlement to their bodies.
* Scalera did away with all differentiation. Sports were within implied consent already, as defendant has to show if it fell within the rules and that the plaintiff consented to things that happen within the game. If it’s within the game, you consented, implied consent. Plaintiff would have to prove that it far exceeded what you’d expect from the game.

**Class 8 – Tort of Assault**

Assault

* “the intentional creation in the mind of another of a reasonable apprehension of immediate physical contact.”
* Absence of contact, as upon contact, it becomes battery. Could argue that every battery is preceded by an assault where plaintiff knows it’s coming.
* Reasonable apprehension is required, unlike batter. Sense of an impending battery in the mind of a plaintiff is required. Physical contact here need not be bodily contact. It’s just the apprehension of contact.
* Minute it becomes a battery, assault is gone and you just focus on your battery. Battery can be committed without assault (hitting someone from behind) and assault without battery (swinging at someone and missing)
* Fear is not an element of assault. You must be conscious of it, not just scared. Moment of apprehension is when assault occurs.
* Intention in assault: did the defendant intend to create a reasonable apprehension of physical contact in the mind of the plaintiff? Don’t need to show whether or not the defendant intended to follow through it. For instance, threatening plaintiff with empty gun is an assault. Intention is just to crate in plaintiff’s mind that something is about to happen.

Reasonable Apprehension of Physical Contact

* Focus is on plaintiff and about whether the plaintiff had apprehension of something impending.
* Two part test. Subjective component: did plaintiff apprehend incoming contact?
* Objective component: once we know that the plaintiff apprehended, we then have to decide if it was reasonable for the plaintiff to do so by asking what the reasonable person, in plaintiff’s position, would likely have apprehended. Was the plaintiff’s response outlandish in situation?
* Whether defendant has intention or ability to make that contact is irrelevant.
* If plaintiff is unaware of the danger, he can’t be assaulted. (pointing gun at sleeping person)
* Fear is not a requirement. You must simply apprehend immediate physical contact. Liability of the defendant should not turn on who they assault, whether they assault a courageous or timid person should affect the outcome for the defendant. It’s whether the defendant created a reasonable apprehension of contact, not fear.

Immediacy

* Remains unclear. In old days, assaulter needed to be physically proximate to you; any barrier or temporal issue, even physical distance, and courts not willing to accept it as assault.
* Any future threat of harm was not assault, because it’s presumed to pose no immediate threat of physical contact.
* This is complicated by, say, a threat over the phone about contact in 5 minutes, the time it takes to get from the phone to you. Courts dealing with technology, this may be assault. What if threat is made from phonebox outside your house or cell phone call from your building, or form plaintiff’s car saying he’s coming? Muddy, but now doesn’t have to be immediately, can be very soon after.
* Immediacy is also altered where there’s a history of violence. Plaintiff’s sense of something happening soon is influenced by it happening many times before. Plaintiff knows it’s coming because it’s happened so many other times, even if not immediate. It’s not technically immediate, but person is still living under apprehension of physical contact.

Holcombe v. Whitaker (words alone as assault? Conditional Threats)

* Words alone are not sufficient unless accompanied by actions, as they were here.
* Husband said “if you’ll take me to court I’ll kill you” and at one point, it was followed by action of pounding on door and trying to break in.
* Plaintiff lived in fear, never left apartment alone, nailed windows shut, and had friends stay over. Clearly apprehended physical contact, at any moment, from her spouse.
* Court says words alone rarely constitute an assault because a belief that words alone do not meet the immediacy requirement of immediate physical contact.
* When words are accompanied by physical acts, they can be raised together to meet the immediacy requirement and establish an assault. Here, his verbal threat is combined with the banging on the door to establish an assault.
* Can’t be assaulted if I don’t do something physically. Saying “i’m going to kill you” is not assault unless I start coming towards you or leaning over you.
* Defendant argues it’s not assault because the threat is conditional, that if she simply did what he asked, immediate physical risk is averted, and it’s up to the plaintiff.
* Court says defendant is not free to compel plaintiff to buy her freedom by complying with a condition that there’s no legal right to impose. Plaintiff can’t be expected to do something that is her legal right to avoid physical contact.
* Threats by their very nature are conditional: “your money or your life,” it’s not a real choice and court won’t let defendants hide behind conditional threats to avoid legal liability.

**Class 11 – False Imprisonment**

Tort of False Imprisonment

* “anyone who intentionally confines another within fixed boundaries, even momentarily, is liable for the tort of false imprisonment.”
* Right to move freely and in the direction that you want to move in, protects bodily integrity
* Evolved from traditional confinement situations to include modern concepts like situations of arrest, security guards who detain, individuals and shopowners who confine and wait for police
* Physical restraint is permissible if you have lawful justification. Police have defence of legal authority, entitled to hold someone. False imprisonment responds to situations where you have no lawful justification.
* Restraint is typically physical but can also be psychological, a sense within the plaintiff that they must submit to the restraint or they will suffer some harm.
* Basic standard is that there are no means of escape; complete confinement.

Intention

* The intention to confine.
* Confining within “Fixed boundaries,” not necessarily talking about physical boundaries. You can be confined for five minutes or just ten seconds.
* Intention rarely comes up and it’s usually direct intent, though imputed or transferred are possible (like transferred if imprison someone thinking it’s someone else, or imputed if it’s substantially certain that doing what you’re doing will confine someone)

Categories of false imprisonment

* Physical confinement = someone is locked in a room
* By way of explicit threat of force: falls in with psychological force. No physical touch, but threatening to do something if they do leave the space
* Implicit or explicit threat of legal authority in the absence of legal authority
* Psychological Force

Confinement

* Must be complete, total confinement. Blocking someone’s path, if there’s an alternate route available (however inconvenient) is not confinement. If there’s an alternative, you’re not being confined.
* Physical confinement is self-explanatory, locked in a room.
* Threat of force, plaintiff isn’t necessarily confined by walls or physical boundaries. It’s the plaintiff’s perception that he/she cannot leave because typically of a threat of violence. Plaintiff is imprisoned because the consequence of escaping are too high. A direct threat (Try to escape and I’ll kill you). No physical contact, no fixed boundaries in the sense of a physical space as boundaries can be fixed by psychological force. Plaintiff may submit to defendant’s restraint to avoid public embarrassment. If as a result of defendant’s conduct, plaintiff, as a reasonable person, feels he cannot escape.
* If there is a means of escape that is reasonable, the plaintiff is not falsely imprisoned. Escapes that result in minor trespasses are also said to be reasonable escapes. Reasonableness is an objective test, but takes into account physicality of the plaintiff. If there’s an easily accessible window, not false imprisonment. Having to jump out of speeding car is.
* Reasonable escape generally doesn’t occur in psychological cases, unless psych threat is not reasonable. Psych and physical can overlap: there are walls, but there’s a window, but you’ve also been threatened.
* Can be for negative as well as positive conduct (failing to release a prisoner on release date)
* You may be falsely imprisoned while asleep or unconscious. Tort is to protect your bodily integrity and freedom regardless of whether or not you’re aware of it.

Legal Authority

* The second a police officer goes off-duty, he loses his legal authority. you are also falsely imprisoning a shop-lifter if you catch him in the act and hold him until police arrive.

Defences

* You can consent to being imprisoned.
* Legal authority: defendant has statutory authority to imprison you (police officer)

Bird v. Jones

* Private company hires police to prevent people from continuing along a public highway, where works are going on. Plaintiff is stopped by the police and told he can’t continue along the highway and that he’ll either have to go back, or go around on substantial detour.
* False imprisonment cannot exist without total confinement, complete restraint, and defined boundaries. Not necessary that the plaintiff be physicall restrained, but there’s no psychological restraint here either, just verbally saying you can’t go further. Cannot be said to be imprisoned here because there is an alternative, even if can’t go way they want. Court says he also has option of just staying where he is. Can remain where he is or go a different way.
* May amount to imprisonment if he’s forced to go in a particular direction. Simply blocking a person’s way is insufficient if another route is available to them.
* If you’re being sent in a particular direction, your choice is gone. However, if your options are marching in that direction or standing there, there’s still a choice.

Campbell v. S.S. Kresge Co

* Psychological restraint. Plaintiff leaves store after failing to get service. Another customer approaches security guard and says she thinks plaintiff shoplifted. Guard follows plaintiff, shows his badge, and tells plaintiff he thinks she has something that isn’t hers and asks her to come back with him to the store to “avoid an embarrassing situation.” Before going to his office, she challenges him, lets him search her, and leaves. Only lasts a couple of minutes.
* First time judge says physical restraint is not a necessary component of the tort.
* No threat of force here, only threat of an embarrassing situation. Threat doesn’t involve physical harm. Court says this is new category of “psychological force” and it’s a case where we could understand a reasonable person to submit to the defendant in order to avoid a scene, embarrassing situation, or something that will damage them psychologically. Here, Campbell submits to avoid public humiliation.
* He also showed his police badge, making it clear that he has legal authority to arrest her on the spot, though he doesn’t.
* As long as it is reasonable that the plaintiff felt compelled to go with the defendant, it amounts to an imprisonment. Two part test: plaintiff must have felt some psychological force and it needs to have been reasonable in an objective sense.
* Defence relies on legal justification as defence, saying a police officer can arrest without a warrant a person who has committed indictable offence on reasonable or probably probable grounds. Already problematic, as all he has for grounds are a random person saying they have a suspicion. Court rejects defence, saying he’s not acting as a peace officer as he wasn’t on duty as a cop and was doing his second job as a security guard, who don’t have this authority. Security guards can’t do anything but look scary and deter by mere presence, and phone cops
* Defences for security guard: get consent of the plaintiff or Citizen’s Arrest (permits any person who finds another person commiting an indictable offence or has reasonable grounds to believe they have committed an indictable offence can arrest that person without a warrant)

Herd v. Weardale Steel, Coal, and Coke (consensual restraint)

* You may agree to things by a contract that involve you being imprisoned and it just turns on whether the imprisonment is outside what you agreed to.
* Plaintiff worked at a mine and decides the conditions are dangerous and demands to be hauled back up in the cage. Defendant, employer, refuses, saying he has 20 min left on his shift and therefore, he has to stay down there.
* Defendant argued plaintiff signed contract that he would do the work and not come to surface until end of shift, which is when he was ultimately brought up.
* Court determines relationship between contract and false imprisonment. Plaintiff accepted conditions and then upon changing his mind, argued false imprisonment. Court says no false imprisonment if you are holding a plaintiff to the conditions of a contract he signed.
* As long as you understand the terms, no duress or coercion, you cannot expect to be released from that contract whenever you choose.
* Example: get on express bus then demand bus stop and let you out at a place not one of its designated stops. The bus driver is not falsely imprisoning you if he refuses.

**Class 12 – Nervous Shock (Wilkinson, Radovskis, Rahemtulla, Tran, Samms)**

Tort of Intentional Infliction of Nervous Shock

* “Anyone who intentionally causes another person severe mental suffering”
* Plaintiff has clearly suffered some kind of harm but the torts of assault and battery aren’t sufficient to give compensation. Fails to meet immediacy requirement of assault.
* Three elements: intention, conduct needs to be “outrageous” (not just a minor thing that makes you feel upset, has to have level of outrage, serious things being done, completely subjective), designed to inflict emotional distress or that a reasonable person would have known would cause emotional distress (imputed intent), and third element is that the conduct causes a visible and provable illness. Last element increasingly relaxed.

Intention

* Determined from what the defendant intended to do, focused on defendant’s intent. Need not have intended to cause nervous shock itself or have a goal to cause a visible and provable mental illness. Sufficient if defendant acted in reckless disregard of that possibility.
* Reckless disregard is determined by what a reasonable person would think.
* Defendant need only have intended the conduct, not the consequence of emotional harm. Defendant may not have particular insight into what causes emotional distress, as long as there’s a particular disregard to the possibility.
* No definitive statement about whether transferred intent is available.

Physical requirement

* Fear is that nervous shock can be faked, so courts tend to require some physical manifestation of your psychological harm be shown. Trending away from strict analysis to relaxing the physical requirement. Traditional test is still that the psychological harm must manifest itself physically.
* Not actionable without proof of harm, need to prove illness and show evidence of it and the plaintiff has onus for doing so, leading to a lot of medical evidence.

Wilkinson v. Downton

* Defendant tells plaintiff as practical joke that husband got smashed up in an accident. News has violent effect on nerves, producing vomiting and other more serious, permanent consequences
* Wife said mental anguish she suffered was enough for a tort action, arguing that she suffered mentally and mental suffering manifested itself in physical symptoms (vomiting) and court held that this tort exists and there was a cause of action where the defendant doesn’t act wilfully to cause physical harm on the plaintiff but that harm is in fact caused. The act was wilfully done. Wilkinson makes it clear we’re talking about outrageous conduct that does actual harm.
* Case turns on whether defendant engaged in conduct intentionally. Court relies on imputed intent. Says while defendant didn’t directly intend to cause the harm that ensued, he acted in a way that was certain or substantially certain to cause such harm. The fact that more harm ensued than was anticipated is irrelevant (Bettel/Yim).
* Still, case focuses only on the physical ailments. No suggestion of compensation for the mental anguish, only the physical symptoms of it. A lot of concern that people could fake it otherwise.

Radovskis v. Tomm

* Child is raped by the defendant and father makes tort claims on behalf of child for assault and battery but also the mother of the child seeks damages for nervous shock, arguing that upon finding out the info, she suffered psychological harm. No medical evidence of harm.
* Court says that only if the plaintiff’s emotional response manifests itself in some physical manifestation is there a case. Need proof of physical illness, usually medical proof. Uses academic Pollock: the injury compensated in these torts is not the nervous shock itself, but the physical, visible, provable illness that comes as a result.

Rahemtulla

* Weakens the provable illness requirement from Radovskis. Here plaintiff is woman incorrectly accused of theft in her workplace and fired. She goes through long investigation while she’s still working, very public. She goes about proving symptoms of depression.
* Court holds that the plaintiff does need to provide evidence of visible and provable illness, but need not be provided by medical experts. As long as you can provide medical reports from family doctor, don’t need to have an expert appearing in your case. Medical records enough.
* First case that explicitly includes imputed intent into the intention test. First one to include “reckless disregard” as part of our general question of intention. Defendant need not have intended to cause nervous shock, only have acted in reckless disregard for that possibility

Heighington v. Ontario

* Ontario High Court further expands the test: plaintiff can prove EITHER physical harm or serious psychological illness to recover. Don’t need physical manifestation; evidence of psychological harm or disorders is sufficient
* Court separates out things that won’t fall under this psychological illness category, listing them as “stress, strain, upset, or anxiety.” Needs to be above and beyond that, not mere stress.

Tran v. Financial Debt Recovery

* Plaintiff receives constant phone calls at his workplace that include physical threats and lies designed to get him to pay student loans. He’s undergoing dispute over certain portion of it, so get these calls. Debt Recovery gives impression that calls are made by the provincial govn’t. Impact his job performance, he’s scared to answer the phone, interrupts his work.
* Court states that nervous shock can be made by a plaintiff for emotional harm that falls short of a psychiatric illness or condition. Tran says he suffers from depression, severely anxious in workplace, and feels humiliated in front of co-workers, worries about keeping his job, concentration and memory problems. Whole range of serious problems but none labelled as a recognized psychiatric condition. Doesn’t seek medical assistance, going for alternative responses.
* Court accepts this evidence as to the genuine nature of his emotional distress; not necessary to show an actual psychiatric condition that can be labelled by the psychiatric profession and you don’t need any physical manifestation.

Samms v. Eccles

* American case, no precedential value.
* Defendant constantly solicits plaintiff for sex with endless phone calls, exposing himself, etc. She fears for her safety.
* Court says that it is not a tort to invite someone to participate in sex. A single claim is unlikely to be a tort action. If the circumstances are aggravated or prolonged over time or the person is married (1961) or if the person is vulnerable for some reason, may be circumstances that single invitation can cause nervous shock.
* Samms develops a test for situations in which nervous shock can be successful in the absence of bodily impact or physical injury. Test: defendant engages in some conduct towards the plaintiff with purpose of causing emotional distress or where any reasonable person would expect emotional distress to occur and these actions are outrageous or intolerable in that they offend against the generally accepted standards of decency and morality

**Class 14 – Trespass (Entick, Turner, Harrison)**

Tort of trespass

* “the direct and intentional physical intrusion onto the land in the possession of another.”
* Can be physical body or something propelled onto the property. To complain of trespass, plaintiff need not be in ownership of the land, just in possession of it.
* Actionable per say, don’t need to prove damages.

Entick v. Carrington

* Owning property is the purpose for which we are on this Earth. Don’t need to show damage, though damage may be nothing.
* Invasion ever so minute, little toe trespassing, is still a trespass
* Defences: given a right of entry, the typical defence is consent, that you’ve consented to the person entering your land.

Direct

* Only direct intrusions are actionable not indirect. Someone who blows leaves onto your property intentionally, that’s direct. If the wind blows a snowdrift from my property to yours, that’s indirect and not actionable. Anything that moves from one property to another without the direct action of the defendant is not trespass.
* There is direct action if you have knowledge that it’s going to head into one direction or is highly likely to impact on a neighbour
* “land” includes not just the surface area but also the things upon it: houses, structures, trees, anything affixed to that real property is capable of sustaining a trespass action.

Intent

* Defendant’s subjective intent is irrelevant. As long as the defendant intended to do the conduct complained of, there is a trespass. Even if there is a situation of duress, but you make conscious decision to engage in the conduct, it’s still a trespass.

Sustaining a Trespass

* Plaintiff needs to be in possession of the land. Person with legal title to land is generally presumed to have exclusive possession and therefore the right to maintain an action of trespass
* Absence of legal title need not to be fatal to an action of trespass if you have possession, which is what gives entitlement to action of trespass. Even without legal title, possession allows you to initiate proceedings. Can lead to multiple actions: someone with a better title than you can come into the case and say you’re trespassing while you’re suing someone else for trespass
* Any form of possession so long as clear, exclusive, exercised with intention to possess is sufficient. Sustainable against all save those who can show better right to possession in themselves. For instance, original squatter would have rights of action against other subsequent squatters. Only person who can preclude action is someone with a better title, probably the person with legal title for that land. The only person who can challenge the plaintiff is the person with the better title.
* Not a defence for the defendant, trespasser, to say that plaintiff can’t sustain action because someone has a better title. Only person who can make that argument is the person who HAS the better title.

Turner v. Thorne

* Guy drives up and drops boxes off in the wrong house; owner trips over them and injures himself and brings action of trespass.
* Driver entered property himself, and that’s a trespass. He’s then deposited these boxes on someone’s land; leaving something on someone else’s land without right to do so is trespass.
* Absolutely innocent defendant, just an error, but still trespassing.
* Court says the continued presence of the boxes is a constant trespass, every day the some comes out, the boxes are trespassing, it’s a continuous action: “doctrine of continuing trespass.” This increases damages the longer that they’re trespassing, particularly if they increase the burden of the plaintiff.
* Duty on plaintiff’s part to mitigate damages. If someone offers to remove them, that’s the date at which trespass ends.
* Where the complaint is for trespass to land, the trespasser is laible to all consequences that flow from the original trespass, whether intended or unintended. For instance, plaintiff here intended to bring boxes onto property, but not to the physical injury they’d cause.

Harrison v. Carswell

* Public/private distinction in property. Many pieces of property we go onto are a mix of public and private. This case is a mall, mall owner and individual tenants who run their businesses in there surrounded by public spaces (walkways, parking areas)
* Plaintiff is mall owner and defendant is group of union picketers who were picketing in the public areas: parking lots, walkways, that people needed to go through in order to enter. Mall owner asked them to leave, used Manitoba Petty Trespass Act: where you’ve been requested not to enter a particular area and you do so, then the owner of that land, who happens to be person in possession as well, can sustain an action
* Defendant argues they’re picketing areas of public movement, parking lots and walkways are not private property, right of public access to these places. Also, right of person to picket peacefully in support of lawful strike is of greater social significance the proprietary rights of an owner of a shopping mall. Latter argument won’t get far: Entick v. Carrington: purpose of life is owning property. Also not justiciable; social issue is legislature’s job.
* Court refuses to say walkways or parking lots are public. Legislation says owner is in his right to exclude people from their property, if he says you can’t enter, obey or be liable for trespass. Court says only thing important is that these walkways and lots do in fact have an owner and are not Crown land like the sidewalks; private property with a clear owner.
* Dissent argues the need for a distinction between the kind of private property that one might think of when one thinks of a private dwelling and a mall, where the public engage frequently and where there are public areas for mall users and non-mall users, those areas being much closer in use and character to public walkways and sidewalks than to private property. Says owner does not have significant enough possession of walkways and parking lots and this isn’t situation legislation was directed towards.
* Dissent says social value argument is justiciable. Mall owners may carve out areas not currently covered by human rights legislation and use this type of action to exclude them. In weighting right to strike and law of trespass, need to look at nature of strike itself. Providing it’s legal, not infringing on other mall use (not harassing), provided it fits in right to strike, they conclude it’s not an infringement on private property owners.

**Class 15 – Consent, Inability to Consent, Direct Consent, Implied Consent (Sports), Exceeding Consent**

Consent

* Onus is on the defendant to give evidence of some form of behaviour from the plaintiff showing consent. Either agreed verbally or by way of some gesture or physical action, or if in cases like sports, by actively participating in the activity itself. Test is objective, whether the info provided by the defendant can be reasonably understood to constitute consent. Balance of probabilities
* Plaintiff must have consented to the actual act or activity that the defendant is accused of engaging in. Need to link the consent with the defendant’s tortious action. Agree verbally, in writing, by gesture or just by turning up and participating in the activity.
* Gesture may be indeterminate or nature of the participation may be challenged. Plaintiff may have started participating in the activity, which then changed in nature and question becomes whether agreed to participate in this new form. By going to nightclub, you agree to be jostled, but not to be groped. Determine what you are consenting to by entering into a situation and ensure the activity remains in that domain.

Inability to Consent

* Situations where plaintiff can’t consent.
* Minors can’t consent to certain sexual activity, particularly where regulated by statute (age of consent). Minors may also be unable to consent to medical treatment or may be unable to refuse it.
* Minor mature test: where they can understand the decision being made, they can consent
* Person who cannot appreciate the nature or consequences of an act cannot consent. Mental illness can prevent you from understanding, but only if the nature of the illness prevents understanding of the act in question or understanding what one is participating in.
* Extreme intoxication: not fully cognisant of what’s going on, cannot consent
* You also need to be conscious, need to be aware of what’s going on.
* There are situations where consent is given freely but is vitiated or exceeded by other situations: fraud, public policy, etc.
* You do not need to struggle or verbally resist in order for it to be a situation that plaintiff didn’t consent to. Plaintiffs fearful of safety may not always respond in the same way as a reasonable man. In a situation where you are fearful of your safety, you may not physically struggle. Defendant may argue that a failure to struggle shows consent, but that’s not a good enough argument and is not understood as evidence of willingness to participate. Lack of physical struggle is generally not interpreted as consent.

Implied consent

* Situations where the focus is entirely on gestures of some kind. Direct is verbal or written agreement, while gesture may have some verbal interactions, but implied consent applies in situations where the plaintiff doesn’t explicitly issue a statement of consent. Two common scenarios: bar fights and sports

Wright v. MacLean (implied consent in sport)

* Group of kids have made up own game, aren’t playing anything recognizable. MacLean is riding bike by an excavation while kids in there are throwing clumps of mud at each other, this is considered a sport. Defendant gets hit, not clear if intentional. He stops, walks over to group, says “wanna fight” and other boys keep throwing mudballs and defendant joins them, no sense of antagonism. Unfortunately, he picks up a mudball that has a rock in it, hits kid and causes brain injury. No sense of malice, defendant didn’t know there was a rock
* Defendant sued due to financial loss associated with the parents. Question is whether there is consent in this case and therefore defendant’s actions are vitiated.
* Complete unstructured game without clear rules, unlike most sports which thus have penalties within realm of reasonableness. This is a made-up sport and court has to decide what the rules were and whether they were consented to
* Court says you consent to the rough and tumble of the sport, but only while play is fair and according to the rules and the blows are given in sport and not maliciously.
* You’re only consenting to what might be contained in the rules and what you might expect as giving rise to penalties. The blows are given in sport and not maliciously. If an activity is participated in with malice, that’s likely proof that it’s outside the rules. Expectation of rough and tumble and aggression in sport, but once you move into malice, indication that you have left realm to which the plaintiff is likely to have consented, outside of rules and reasonable penalties
* Court says this wasn’t malicious, no evidence it was deliberate that he intended to exceed rules of the game. He continued to play in a way that was fair and it was by error. Plaintiff consented to mudball fight and defendant’s actions did not exceed that consent, consent of what one might have anticipated.

Implied Consent in Sports

* If an act in a sport is a reasonable penalty, it isn’t totrious unless the defendant intended to commit it and it wasn’t accidental. If standard penalty is commited with malice and intention, it’s tortious
* Spectators – the person thta is putting on the sport has reasonable obligation to protect spectators. That level will vary depending on the particular scenario. People who are running the sport presumably don’t want spectators to get hit, must take reasonable steps to protect spectators, but you as spectator also consent to certain expected or anticipated risks
* Elliot and Elliot: member of public who attends game does understand the inherent risk of doing so, there is an expectation that you are reasonable person knowledgeable of the inherent risks of every sport you may intend. But you can also anticipate that the provider of the arena or the sport will also exercise reasonable caution in providing barriers
* Warnings never prevent suing in negligence; you can’t preclude negligence.

Exceeding consent

* Consent is given and then the activity continues beyond what you have agreed to; consent is vitiated.

Agar v. Canning

* Amateur hockey; Canning hooks Agar, against the rules, Canning responds by smashing his stick down on top of Agar’s head, blatantly against the rules.
* Merely suffering an injury in course of a high impact sport is not an indication that there’s a tort as you take risks associated in participating. It’s not your typical realm of behaviour: there’s aggression and hitting is part of the game. But court must impose limit on players’ immunity
* “Injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of implied consent.” Focus is on the injury, which must be serious. Reference to malice.

**Class 16 – Vitiating Consent (Exceeding Consent, Mistake, Fraud, Duress)**

Fraud vitiating consent (two requirements

1. It must be shown that the defendant was awre of, or responsible for, the plaintiff’s misapprehension
2. The fraud will only negate consent if it relates to the nature and quality of the act as opposed to a collateral matter.

Implied consent

* Exists when a party is said to consent to risks inherent in an activity: participating in a sport, you know what the inherent risks are of that category.
* Consent can be exceeded when play exceeds what can be reasonably expected in that sport or other activity, activity so far outside the rules or what one might expect of penalties.
* If you’ve agreed to a fistfight and someone uses a weapon, it’s not part of the agreement and clearly exceeds what other party consented to. Use of excessive force, beyond what the plaintiff could have consented to or did consent to.
* There are certain activites that a person simply cannot consent to, too violate, vitiated.

R v. Jobidon and Paice

* Both parties agree to fight, this results in Jobidon’s death and Paice’s serious injury. Rule made is that consensual combatants can participate in a fistfight without being criminally charged (or without giving rise to a tort). Consent is vitiated only where the accused intentionally uses force causing serious or non-trivial bodily harm.
* In Jobidon, accused hit victim while he was unconscious, and he died. This was exceeding consent for minority, majority said it was vitiated.
* Court slightly modified this test, saying consent is only vitiated if the accused both intends and causes serious bodily harm. The “non-trivial” part of Jobidon was arguably removed in Paice. Test is now just “serious bodily harm.”

Abott v. Jarochi

* Teens agree that they will, after school, have a fight to resolve their dispute. Defendant wears steel-toed boots and kicks the plaintiff when he’s already on the ground. Results in serious injury and court holds that consent was exceeded, minority position of Jobidon, that defendant intended to cause serious injury when he kicked the downed plaintiff.
* Not very clear which test, exceed or vitiate, that you are applying, but you’re always looking for intention and it need be simply to make contact. Also need to show that the activity causes serious bodily harm.

Fraud: Factor Vitiating Consent (proven by plaintiff)

* Defendant was aware of or responsible for the plaintiff’s misapprehension
* Negates consent only if it relates to the nature and quality of the act, as opposed to a collateral matter. This is what the case turns on: what the courts consider a collateral matter.

Williams

* a choirmaster convicted of rape for inducing a 16 yr old to have sex with him under pretext that it would improve her singing voice. Evidence brought in case is that the girl involved was not yet aware of the facts of life, no understanding of sexual contact. Court held that there was fraud sufficient to vitiate consent. First factor met: choirmaster blatantly lied about activity to trick her into it. Second factor: she did not even know she was engaging in a sexual act.

Papadimitropoulos

* rape situation, the victim is illiterate and she was fraudulently convinced by defendant that they were married. She was aware that she was participating in a sexual act, but thought it was within the confines of a marriage.
* Court holds that this is a collateral matter only. Collateral matter is whether or not they were married; she understood the nature and quality of the act, she understood they were having sex, only thought that it was in the context of a marriage. Hence, consent is not vitiated.
* As long as you understand the activity you are participating in, then the fact that the fraud might go to other aspects of that activity the court deems to be collateral.

Cuerrier

* Usually consequences are treated as collateral.
* Here, HIV positive defendant has frequent, unprotected sex with two women. CC rejects treating harmful consequences (contracting HIV) as a collateral matter. SCC focused on extreme danger of HIV. Defendant is charged with aggravated assault for having sex on numerous occasions while aware of having HIV. First plaintiff actually asked if he was positive, and he lied, while never responding to the second plaintiff.
* Defendant said parties consented to unprotected sex, but plaintiffs argued their consent was vitiated by fraud due to failure to disclose on part of defendant.
* Court held that there can be fraud here. Changes harmful consequences aspect of the test; being unaware of harmful consequences may now give rise to fraud vitiating consent. Crown must prove accused was dishonest, which could include lying or non-disclosure. Crown must prove the dishonesty resulted in a deprivation, which could be actual harm or exposing the person to a significant risk of bodily harm. Dishonesty induced the complainants to consent to the dangerous activity when they otherwise wouldn’t have done so (they asked if he had HIV).
* There is no tort decision in this context yet, so not sure how it will go.

Mistake

* Plaintiff’s consent induced by a mistaken belief on his or her part.
* Only vitiates consent if the defendant was responsible for the plaintiff’s misapprehension. Similar test to fraud. Mistake only vitiates consent when it is created by the defendant. Very little difference from fraud.

Duress

* Situations of force or threat of force. Absent force, there is no duress.

Lattle and Braddle decision

* Plaintiff is a servant of the defendant. Plaintiff accused of being pregnant by the defendant. Plaintiff denies, defendant brings a doctor and orders her to stay in her room and speak to no one. Doctor asks her to undress, has to ask repeatedly and at every stage of undressing, she says she doesn’t want to and cries, doctor says she doesn’t have a choice. Doctor determines that she wasn’t pregnant.
* Plaintiff argued that her consent is vitiated by duress. It’s a battery, doctor touches her, in action against doctor. Also action against the Braddles.
* Majority judgment: there must be force or threat of force for there to be duress and here there was evidence of neither. Plaintiff had it entirely in her power to comply or not to comply with her mistress’ orders, no evidence of anything improper or illegal threatened if she did not comply. No threat of force or violence. Plaintiff reluctant, but ultimately consented without any threat of force or violence. It was entirely in her power to cease to participate.
* Dissent argues that plaintiff did most she could possibly do without using physical force herself.

**Class 17 – Norberg test for vitiating consent**

Norberg

* New context in which consent would be fitiating, filling gap of Graddle, that absent force or threat of force, consent isn’t vitiated by duress.
* Minority position here says that in the context of a relationship like this one, there’s a servere power imbalance that makes saying no or fighting back very challenging. Threat of force is too high a standard.
* Derives from contract principles of unconscionability and undue influence.
* Fiduciary duties are example of power imbalance relationship – pre-established relationships that give rise to a duty of care, heightened care relationships like parents/children, obligation of the more powerful party to take particular care of the other.
* Both parties knew what was going on: drugs for sex.
* Public policy grounds for decision: breach of fiduciary duty. Age differential of the doc and pat.
* Two steps of test in Norberg. Step 1: proof of inequality of the parties, usually in the context of a special “power dependency” relationship. A power imbalance and a dependency on part of the more vulnerable party.
* Step 2: proof of an improvident bargain/proof of exploitation, which is evaluated according to community standards.
* Tort law is based on individual autonomy and free will, but a position of relative weakness can in some circumstances interfere with the freedom of a person’s will.
* Can’t just show inequality. Can have outrageously unequal relationship but if the stronger party doesn’t exploit the weaker, no issue of consent.
* Shouldn’t bar a tort claim for unrelated criminal activity, otherwise you could just target people engaged in illegal activity, creates a vulnerable class of people. Hall v. Herbert, criminals can be compensated for actual personal injuries, but not lost (illegal) income.
* Addicts can consent, it’s the exploitation of them based on their addiction that is of concern.

**Class 18 – Ex Terpi Defence, Consent to Medical Treatment, Competency to Consent to Medical Treatment (Jehova’s Witness, Mentally Ill, Children), Substitute Consent**

Hall v. Herbert (ex terpi defence)

* plaintiff sues defendant because defendant allows him to drive car while drunk despite knowing he was drunk. Plaintiff was driving while intoxicated, illegal activity, , defendant says he’s not responsible because plaintiff not an innocent party, engaged in illegal activity.
* Court says ex terpi rule is changing, applies in very narrow circumstances. Judge argues that integrity of legal system requires that all people come to the court able to seek compensation, damages for injuries sustained, and that we don’t create a category of people who are available to defendants to be harmed tortiously
* Judge tries to differentiate between basic personal injury compensation – for physical injury and pain and suffering – but precludes any kind of financial profit that might arise from a tort award.
* Punitive damages are typically out and you cannot succeed in lost income if you’re incarcerated, fact you’re in jail means you can’t work can’t sue for that period of lost income (profiting from the tort)
* you can’t argue that you would have made a profit through your illegal activity that defendant should compensate you for. Any profit from illegal activity and any damages that exceed cost of physical injury and any lost wages are excluded from any case where ex terpi is argued.
* So you still argue it as a defendant to reduce damages award that plaintiff gets, but plaintiff still gets compensated for any harm they sustained. It’s also just about “illegal,” the “immoral” portion is done away with

Consent to medical treatment and/or counselling

* Medical professionals must get consent of their patients before engaging in any kind of examination, treatment, etc. Usually achieved through a signed intake form. But those forms only give consent to everyday batteries in going to see the doctor. Anything that is slightly different, more particular technically require additional consent.
* Consent you provide must relate to the specific procedure that the doctor is undertaking. Those intake forms are very vague; if you are undergoing a specific procedure, additional consent is needed, usually verbally. Needs to be given voluntarily. Consent has to be based on full and frank disclosure of the intervention, the treatment, and its risks, including the risks of NOT undergoing the treatment. Needs to be a real choice; need to know the risks of having the treatment, and the risks of not having the treatment.
* All of these things said, there is a strong case for implied consent where a plaintiff makes an appointment and turns up for that appointment.
* Exceptions: an unforeseen medical emergency where it’s impossible for doctor to obtain consent, they can intervene without that consent.
* Where a general consent has been provided, the kind you sign to when first go to doctor’s office, it’s implied that you have consented to subsequent sessions. Don’t need to re-sign the form each appointment. It’s implied that it’s just a continuation of initial treatment, but you consent ends if you say you want to stop this particular treatment.

Marshall v. Curry

* Doctor is performing a hernia operation, discovers in course of surgery that patient’s left testicle is severely disease and can cause death if not removed. Discover a serious ailment in course of initial surgery. Doctor goes ahead and removes it, no consent to that removal.
* Court holds that in this case that there was something that posed significant health risk to plaintiff that was discovered in course of surgery; couldn’t have been anticipated before the surgery. Doctor was precluded from initially gaining consent to what he eventually did. Doctors say it would’ve been unreasonable to postpone given severity of infection. Even waiting for patient to regain consciousness and recover to ask consent could cause severe harm.
* Court – no way of getting consent prior to the surgery and this constituted an emergency.

Mallet v. Schulmann

* a doctor who acts without obtaining plaintiff’s consent in giving a blood transfusion. However, it’s in the face of a clear statement on a card carried by the plaintiff and was seen by the doctor, that she was a Jehovah’s Wtiness and contrary to her faith to get transfusion.
* Doctor sees card, ignores, and gives transfusion. Daughter then shows up and says card was an accurate representation of her mother’s current views, but doctor gives her further transfusion.
* Doctor clearly going against obvious statements by plaintiff and daughter, doctor’s doubts about whether the card accurately reflected current wishes may have been honest, but not valid given the info he had when daughter showed up.
* Doctor argues life is sacred, his job to save lives. Court rules that while this is true, law recognizes certain aspects of life as potentially being more important than life itself; this includes religious convictions. Where they outweigh desire to live, doctors need to respect
* If you have info that the plaintiff would not have consented, use can’t use the defence of emergency to override clear info to the contrary.
* Infants born into Jehovah’s Witness families who need transfusions are exception, they fall under child protection legislation and can be deemed children at risk.

Competency to consent to medical treatment, focusing on children and the mentally ill

* In order for consent to be valid the person giving it has to be legally competent
* The test for competency: common law test, focuses on ability of the plaintiff to understand the nature of the proposed treatment and its risk, NOT on their ability to make a prudent decision. We all have the freedom to make misguided, dumb decisions about medical treatment or decisions based on religious convictions that the majority of society wouldn’t agree with, but must understand the treatment, the risks associated with it, and risks of not getting it.
* tends to focus on adults who suffer from mental illness or intellectual disability, need to understand the relevant info given about the treatment and the consequences of their decision

Starsky

* Plaintiff suffers from bi-polar disorder. This plaintiff is brilliant, published extensively in math. Even though no qualifications, is regarded as many academics as a peer. However, erratic behaviour, threatened to kill people, committed number of violent crimes.
* He refuses to take meds because he believes it will interfere with his research abilities. At time of trial, he is detained in govn’t facility or making death threats. If you are in this circumstance where you are already in state care, there is actually a board that first your case, the Consent and Capacity Board, all they do is determine if someone is able to give consent or capacity to engage in a particular activity. Ends up in SCC.
* SCC makes findings that plaintiff in this case has full knowledge of his health condition and can explain it in great detail and that he is refusing treatment in a very conscious way, he is aware of the risks of not taking medication, but he feels strongly that it limits his creative and intellectual lifeCourt concludes that he is fully competent to refuse medical treatment. He understands the medication, his condition, and the impact of not taking the medication, however the court doesn’t release him from the facility. He’s clearly dangerous when not taking meds

Children

* there is no recognized age at which minors can magically consent or refuse medical treatment. There are provincial statutes regarding certain things, like limits for donating blood, sperm, or eggs. But in general, the courts rely on the competency or capacity of the minor to understand the nature of the proposed treatment and its risks, and if they do, parental consent is neither needed nor valid.

Gillick Competency Test

* if a child has sufficient intelligence to understand the procedure and its associated risks and the risks of not undergoing, the court will recognize the child’s consent or refusal.

C and Renn

* Applies Gillick test. 16 year old girl wishes to have abortion, received approval of statutory committee that governs medical decision making with regard to minors and the deadline to have the procedure is looming. The parents argue that the daughter couldn’t have given the informed consent, doesn’t have capacity to do so. They argue that being informed means knowing more than simply the details of the procedure and its risks. Means of also being informed of the ethics of abortion and the ethics of parental authority, obligation of children to their parents.
* Court rejects this, says these two issues do not relate to informed consent. Court holds that dispute between parents and child in this case is not a medical one, no lack of clarity about the medical procedure and what it involves.
* Court goes on to create a general rule. It says that over the age of 16, the court and the parent must exercise restraint and give the minor significant authority, says vast majority of 16 year olds know what their doing and have capacity to understand risks of a procedure. For those individuals, minors, under 16, there is a general parental right to determine medical treatment but that it terminates at the point that the individual child has sufficient understanding and intelligence to enable him or her to make a fully informed decision.

Substitute consent

* where we’ve determined that the patient/plaintiff cannot consent either because extreme intellectual disability, mental illness, or young age. Substitute consent can be obtained from patient’s next of kin.

Mrs. E v. Eve

* states three elements needed for substitute to be upheld: patient must be incompetent, the next of kin must act in good faith, finally the procedure must be in the patient’s best interest.
* the interests of the patient’s parents, the institution in which they’re being held, and any others cannot be considered in defining the patient’s best interest.
* It’s a fiction to think best interest of patient is not influenced by interests of the caregivers. In Eve, it was a non-therapeutic sterilization of a mentally incompetent adult. The court holds that non-therapeutic sterilizations can never be in the patient’s best interest.

**Class 19 – Self Defence**

To invoke self-defence, the defendant must establish on the balance of probabilities that:  
1. He honestly and reasonably believed that an assault was imminent  
2. The force used to avert the risk was reasonable in all circumstances. Only do what is proportional to defendant yourself, only what is sufficient to offset the risk.

Self Defence:

* Common law understanding: always excused from intentional tort if you’re threatened with harm by another. It’s a complete defence. Defendant must argue on balance of probabilities.
* Force used to defend yourself must be reasonable (two factors)
* Necessity requirement: Defensive force is generally not reasonable if it is greater than necessary for the purpose of preventing the attack
* Proportionality requirement: Defensive force is generally not reasonable if it is disproportionate to the threat being counteracted
* Reasonably necessary: was the use of force necessary to prevent the attack? Could the defendant have just walked away or called for help. If you could do these things and avert attack, necessity requirement is not met.
* Reasonably proportionate: was the force applied disproportionate to the threat? An intoxicated plaintiff who is barely able to stand takes a swing and defendant and defendant beats the shit out of him – a push would have sufficed.
* Exception to tests of necessity and proportion: “heat of the moment” argument. This is where you have to make a split second decision to defend yourself; you may not respond in the same way you would in a calm situation. Courts do not expect people to “measure with legal nicety the weight of their blows,” need not be exactly proportionate, courts give leeway for self-defence, as you’re acting in self-preservation, not reasonableness.

Wackett v. Calder

* Plaintiff is drunk, battering defendant and brother all night at bar looking for fight. Attempts to hit them several types, lurches at them, pounds on their chests, but so intoxicated that he causes no harm and difficult for him to harm anyone. On one occasion, he strikes defendant sufficiently to knock him over, defendant leaves, plaintiff then goes after him. The plaintiff is still wanting to fight by the end, but the defendant has hit him several times. Can defendant rely on self-defence?
* Court of Appeal: reasonableness and proportionality is a case by case analysis, no blanket rules. Court relies on common sense argument. While plaintiff was intoxicated, he wasn’t physically incapacitated, he was still capable of hitting doing serious physical injury. The first aspect, that battery was imminent, was clear. Plaintiff did pose a threat, had already battered the defendant, so defendant’s response was reasonable, proportionate.
* Defendant made several attempts to walk away from plaintiff. But plaintiff keeps following them and drawing them back out. So reasonably necessary. Defendant made several attempts to avoid the conflict, and unable to.
* This case isn’t representative, it’s case by case. Have to ask these two questions and make a reasonable argument. Consider options available to defendant, consider amount of force used to repel the plaintiff, and decide whether test of necessary and proportionate and whether there was imminent threat is met. Absolutely must have had to use force to avoid the harm. If there are other options available to you, must do those first.

Defence of third parties

* Law allows you to defend yourself, also allows a third party to step in and protect a victim. This is an intervener rescuing a potential victim from violence. Test is that you can intervene to rescue another as long as you have a reasonable and honest belief that an assault is imminent on that party and you are justified in using force as long as the necessity and proportionality tests are met.

Gambrio/Cabernelli

* 21 yr old man and older neighbour are involved in an altercation over minor car accident. Defendant is the mother of the kid, who hears the scuffle and finds neighbour with both of his hands around her son’s neck. She thinks he’s being choked (reasonable and honest belief, hands are around his throat), mother is 57 yrs old and has limited English, she yells at the man several times to stop, and when he doesn’t, she runs into backyard and grabs the first tool that’s available, and hits the man on the shoulder first three times with the handle, and when he still doesn’t cease, she hits him on the head. When plaintiff sees blood flowing from his head, he releases defendant’s son.
* Necessity: court goes through the facts of what she did and whether she made other attempts to avoid using physical force before doing so. She did, she said “stop” several times. When she gets no response to that, she gets a weapon. First she uses the weapon in a way less likely to harm, hitting him on the shoulder. Then when he still doesn’t stop, she hits on the head, and even then, only stops because he sees blood, not because of her use of force.
* Could she have gone for help though? Court decides that no. There was a clear risk of imminent harm, the battery was underway already when she came across it, would’ve been too late had she went to get help. Also, her limited English would mean she’d struggle to get the help she needed.
* Was force proportionate (not excessive)? She tried something verbally, then tried to use weapon on the shoulder, and only when wouldn’t stop, did she use most force available to her.
* Court uses Cachay v. Nemeth as example of disproportionate force. Plaintiff is at a party, tries to kiss defendant’s wife, the defendant is trained in karate, and strikes plaintiff, fracturing his jaw and knocking out two teeth.

Disciplining

* Defence of discipline, only through s.43 of the Code: every school-teacher, parent, or person standing in the place of a parent is justified in using force by way of correction of your kids or pupils if the force does not exceed what is reasonable under the circumstances.
* s.43 challenged by Charter, brought forward by Canadian Foundation of Children, Youth, and the Law. Argued s.43 was unconstitutional.
* Case turns on “by way of correction” and what this means, to use force solely for this purpose and not haphazardly, as well as what’s reasonable on the circumstances.
* Court notes that there’s nothing wrong with s.43, that allowing the use of force, the defence of discipline, is supported by mainstream Canadian society but, “this kind of force must be limited to minor corrective force of a transitory or trifling nature.”
* You can’t use weapons (belts, sticks, etc) and it must be for the purpose of correction, not an ongoing use of force that’s unrelated to the indiscretion of the child.

Six limitations of s. 43   
1. Force can only be used for a corrective purpose that is designed to restrain or control a child or express a symbolic disapproval. Can only hit kids in response to misbehaviour, not whenever you want. Can’t hit them out of anger or simply to punish them Must connect behaviour with your use of force.

1. Child must be capable of understanding why the force is being used and be capable of benefiting from it. The defence does not apply to force applied under the age of two or a child who, because of disability, is incapable of learning from it.
2. The defence does not apply to force that harms or could reasonably be expected to harm a child. It also doesn’t apply where children are hit with objects or where force is used against the child’s head.
3. It does not apply to any use of force that is cruel or degrading. Not going to mock the child or getting child to take all of his/her clothes off to get spanked.
4. Force cannot be used against teenagers.
5. While teachers may use reasonable force to remove a child from a classroom or secure compliance with instructions, they cannot use force merely as corporal punishment.

Defence of Real Property (attaches solely to law of trespass)

* It is permissible to defend one’s property, both personal and real, with reasonable force.
* Owner must request the trespasser leave before using force. A sign is sufficient. Only after that request has been made can you use any kind of force.
* Exception: if someone enters your property using force, you need not ask them politely to leave. It is permissible to return the trespasser’s force with force of your own. Force can be force towards you, but also force towards your property (breaking a door down)
* The force must be reasonable. Invokes same necessity/proportionality analysis. Absent physical force directed at you that would create self-defence, your goal is to get them to leave the property. It’s reasonable force to remove them from your property.
* Canadian courts have clearly stated that if you are the occupier of a property, you cannot use force that is likely to cause death in order to remove them from your property. This separate from scenario from if they’re affecting your personal safety, they’re just trespassing.

Mcdonald v. Heast.

* plaintiff wanted to introduce defendant to someone, so goes to room of defendant in the hotel, knocks on the door, room has light on, hears someone calling from adjoining room and it’s dark, thinks it’s invitation to come in, tries to come in, and is physically thrown out. Defendant had been in bed. Never requested the plaintiff to leave. Plaintiff suffers serious bodily harm as result of being thrown out and sues. Defendant says he was a trespasser and he used force to defend his property. Possession is sufficient, need not be owner.
* Court starting point: lawful for an occupier of land to use a reasonable degree of force to remove a trespasser. Force used has to be for purpose of removing the trespasser. Defendant is clearly the occupier, however first problem is that the trespasser can’t be forcibly ejected without first getting a verbal request to leave and a reasonable opportunity to do so.
* Court says only exception is where trespasser has used force to enter. Any force that is used must be sufficient only to remove the trespasser from the property and must not exceed that.
* In this instance, partially because of factual circumstances, accept defendant hears call from other room and thinks it’s invitation, it’s reasonable. This shows that it was not entry by force
* The actual force used was also excessive, not necessary to throw him out in order to remove him.

**Class 20**

Nuisance

* designed to protect an occupier’s use and enjoyment of their land.
* Unlikes trespass, nuisance is not actionable persay, must show some form of damage. That damage may be something physical and obvious like cracked foundation or noise that impacts enjoyment of your land.
* nuisance is the balancing between your perfectly legal activity and someone else’s use of their land, it’s competing interests that are both perfectly legal and becomes a question of reasonableness. If the interference is deemed unreasonable by the court, then nuisance
* Focus on unreasonable test is whether the effects of the defendant’s actions are unreasonable, not whether the actions themselves are unreasonable. Focus is on the effects of the defendant’s use.
* Discretionary tort on part of judge, determined on case by case basis..
* Entitled to use their land and exploit their land for profit but must measure up those competing interests in a way that doesn’t unduly burden the defendant while allowing the plaintiff to still enjoy their land.
* Nuisance comes in three forms: the physical damage to plaintiff’s property, impairment of the plaintiff’s enjoyment of the land absent physical damage (noise pollution, air pollution that doesn’t cause physical damage), and non-intrusive harm (hardest to prove, like a methadone lab is established in neighbourhood, no physical harm, it’s harm that is speculative).
* An action can be brought by an occupier, means can be brought by tenants as well as the landlord. Both must show harm to themselves, however.
* Within one household, only one person in the household can bring an action
* Public nuisance focuses on protecting a harm to society, a wider harm than what we’re talking about in private nuisance which is a specific injury and specific plaintiff.

Huron Steel

* establishes 4-part analysis for evaluating concept of unreasonableness.
* Apartment building opposite a steel stamping plant. Defendant purchases new piece of equipment; extremely loud.
* Plaintiff is the apartment owner. He says his lost rental income because of a high vacancy rate and the value of the building itself have decreased because of the noise.
* Reasonableness: on view of effect of defendant’s conduct on plaintiff’s use of his land.
* Both parties are entitled to use their land as they see fit but must remember that they are using it in the vicinity of neighbours. As soon as their use begins to interfere with their neighbour’s use to the point of unreasonableness, the defendant is liable for nuisance

Huron Steel Four Part Analysis for Reasonableness

1. The severity of the interference having regard to its nature, duration and effect.
2. Character of the locale/location, whether you’re in the middle of residential neighbourhood, industrial, mixed neighbourhood, or gentrified neighbourhood.
3. The utility of the defendant’s conduct. Social utility and value of defendant’s activity
4. Sensitivity of the use interfered with. Whether the plaintiff’s use of his or her land is unusually sensitive for the neighbourhoodand therefore unreasonable on part of plaintiff to expect perfect silence.

Huron – application of the 4-part test

* Analysis of severity is entirely on the plaintiff’s point of view. Here, this is the tenants suffering day to day noise, but ultimately effects the landlord as the tenant’s displeasure impacts value of the building. Three experts brought in to satisfy first point. Noise level is high.
* Plaintiff must still show that some damage has been caused. Competing evidence about financial loss. At least one of the experts says this occupancy rate of this building is no different, while another says lost revnue. Judge is willing to accept that there’s some loss, determine at damages stage what exactly that loss will be.
* Character of the locale. Law makes it clear that this determines the standard of comfort that may be reasonably expected by the occupier of the land. Mixed neighbourhood: some expectation of living in apartment building without severe intrusion and they conclude that in this case there is intrusion and it causes harm. No sensitivity issue here.

Moving to a nuisance (Huron)

* Court states that it is not a defence to a nuisance action to say that the plaintiff moved to the nuisance. You’re still entitled to use your land/apartment in a way that it’s not going to be unreasonably interfered with. What you would you reasonably expect from moving near a steel plant.
* You can be paid off, live with unreasonable interference for compensation.
* A fresh noise can also give rise to a nuisance, regardless of the character of the location. If you are already an occupier and a fresh noise starts.

Huron cont’d

* Utility: Huron argues they’re a valuable business and employ 200 people in the neighbourhood. Court notes that while this is a factor, one of the four, it tends to go to leniency with regards to damages as opposed to liability. It In some cases it CAN sever liability where there’s particularly high social utility
* You can’t argue that because it’s expensive to change your business up you can’t be liable to have to.

Hollywood Silver Fox Farmv. Emmett

* plaintiff is breeder of silver foxes, puts sign up that advertises his business, this sign annoys defendant. Plaintiff refuses to remove sign, defendant threatens to fire gun during breeding season near the pens to disrupt the mating/breeding and does so.
* Court holds that the intent of the person making noise does matter. If a nuisance is deliberately designed to annoy or vex the plaintiff, it’s not a legitimate use of your own property, that alone establishes an instance of private nuisance.
* Sensitive use of land: court determines that this is semi-rural area and while this may not be a common use, there’s no reason why a fox breeding business is inappropriate for this property.

Toch

* Very heavy rainfall, plaintiff’s basement is flooded, they notify defendant, they couldn’t pump out water themselves. Upon inspection, there’s a blocked sewer, it’s cleared and immediately plaintiff’s basement drains.
* Statutory authority are immunized only where the legislation explicitly prevents actions being taken, or where damages are an inevitable part of the action the statutory authority is mandated to take. They/defendant is obliged to act reasonably; construct a sewer system that works and conforms to existing private rights. Court finds they failed to do so.
* Flooding is not an inevitable consequence of building a sewer system. It is possible constructing one that does not flood.
* Sopinka argues that to avoid liability the defendant must show that there are no alternative methods to carrying out the work than the one that was taken. Once you establish that, you look at the method that you did take, show the defence that it was practically impossible to avoid the nuisance (the inevitability argument). Cost is irrelevant.

Dennis v. Defence.

* Defence of public interest
* Plaintiff is in rural area next to military base, they are undertaking new training for harrier jets and the noise is described is bad. Damage: it effected value of plaintiff’s property.
* Military has a history of cooperating with people who live alongside their bases In this instance, they say this is our one opportunity to train pilots and there is no alternative.
* This was a cause where they had defence of public interest, the public had an interest in “defending the realm,” protect in times of war, learn state of the art equipment.
* Judge holds that while there is a public interest, it’s not a conclusive one and rather than say that the defendant is completely liable, we will provide an award of damages until this program is over.

**Class 21**

Public nuisance (three forms)

* designed to protect society’s use and enjoyment of land.
* Common interests: where the defendant’s conduct unreasonably interferes with rights, resources, or interests that are common to the entire community (eg public roads), some kind of public land, Crown land, public usage land. Arguing that the entire community has experienced loss, generally argued by the attorney general.
* Private interests combined with common interest: if the defendant’s conduct unreasonably interferes, on a large scale, with the use and enjoyment of private property. In such a case, each individual homeowner can bring a case in private nuisance or all homeowners could band together to bring an action in public nuisance. Requires the establishment of a class. Courts will say fairly frequently that they feel most comfortable when the group approaches ten.
* Private action for public nuisance: PERHAPS available, where the harm is to a common space but a private individual sues in his/her name for a special injury, above and beyond the injury experienced by other members of the public. Hicky case. No private interest here, but says something heightens your need. Normally AG brings the action.

AG v. Orange Productions

* Defendant has run a series of concerts in public parks that have got a bad reputation.
* Court states that any nuisance that materially affects the reasonable use and comfort of the life of a class of her majesty’s subjects is a public nuisance. It’s an interference with her majesty’s subjects use and enjoyment of public spaces.
* Whether a group is a class or not is case-by-case. Not necessary to prove that every member of the class has been injuriously affected. Sufficient to show that a representative cross-section.
* General rule for a public nuisance: “a nuisance is a public nuisance if it is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his/her own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.”
* If you can show a sufficiently large collection of private nuisances exists, you can warrant an action of public nuisance.
* Given past behaviour and potential to occur again, to prevent harm to those who live in the neighbourhood, an injunction is ordered. Evidentiary burden met

Hickey case

* Public pollutant in bay destroys fish population. Plaintiffs are fishermen in area and suffer clear economic loss. Court notes that they weren’t the only ones to suffer this nuisance; everyone who lived around bay suffered the same nuisance.
* The defendant wants to construct the nuisance as one committed against the public, but plaintiffs want to say they suffered over and above what public suffered. Plaintiff must show loss direct and substantial over and above the injury inflicted on the public in general.
* Rule: “any person who suffers particular (public nuisance) damage has a right of action, but where the damage is common to all persons of the same class, then a personal right of action is not maintainable.” Hickey argues that he has a separate private action because his harm was exceeded.
* Not sufficient for plaintiff to show that he or she suffered the same harm to a higher degree. Rather, for a plaintiff to succeed in a private action for public nuisance, they need to show that they suffered a different KIND of harm.
* Court’s argument is that anyone could fish in the bay so everyone has had their fishing enjoyment affected, this is just a matter of degree.
* Subsequent decisions have changed this distinction between kind and degree. Instead, the court has adopted this phrase of “special damage beyond that experienced by the general public.” Following Hickey, showing that you suffer the harm to a different degree is sufficient to bring private action. Remedies: three available: injunction, damages, or abatement

Remedies: discretionary, weighing up competing interests, choose the remedy that’s least intrusive on the defendant’s enjoyment of his property. Limited only to the extent that it resolves the conflict.

Types of Injunctions

* Prohibitory Injunctions: compels the defendant to refrain from a certain act
* Mandatory Injunctions: compels the defendant to perform a certain act, can’t be forced to do something that costs money
* Interlocutory: a temporary restraint on the defendant until the plaintiff can establish the case for a permanent injunction. Basically temporary restraint while the plaintiff, or until the pl, goes to court and gets a judgment. If plaintiff’s claim then fails, they will pay damages.
* Quia timet: an injunction designed to prevent anticipated harm (no harm has occurred yet)

Mendez

* Two requirements to get an injunction: 1. There must be damage. 2: it must be substantial
* Requirements for a Quia timet injunction: 1. there must, if no actual damage is proved, be proof of IMMINENT danger. 2. There must also be proof that the apprehended damage will, if it comes, be very substantial.

Miller (Cricket case)

* Public benefit draws a large number of people and is a community focal point, and when you weigh that up against the private interests of the plaintiff, burden too high on the community to just shut the grounds down. The public interest is greater. So damages are sufficient.
* a balancing act and you are allowed to discuss things like general public good and weigh it up against private interests. However, where minimal injunctive relief can be offered, courts will favour that over damages.
* Discretionary what one judge sees as public good and social value to particular pursuits.

Spurr Industries (US Case)

* In Canada, defendant’s cannot argue that plaintiffs came to the nuisance and should put up with what exists there. Canada says that if plaintiff comes to the nuisance, they should put up with what’s reasonable
* US here takes position that when a plaintiff comes to an area that is primarily agricultural, they must put up with any agricultural type nuisances. Coming to the nuisance is presented as a bar.
* Court focuses on a balancing between the public interests and the defendant’s interests.