Torts – Fall 2018 – Professor Neyers

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## Torts

* All Torts are relational wrongs.
* Burden of proof in torts: beyond a reasonable doubt.

## History

* Established out of the writ system in England in which there were categories of wrongs and cases would fall into:
  + Writ of trespass: includes direct & immediate interferences with the party bringing suit (didn’t have to prove loss
    - Actionable per se: had to prove violation of right, but did not have to prove damage
    - Breach of duty is an infringement of a right
  + Writ of trespass on the case: party bringing suit had to prove damage due to indirect, faulty action of the defendant
    - Actionable on proof of damage (but what damage is required to make it actionable?)
* All modern torts have evolved from either one of the two writs (writs were abolished in 1870).

## Nuisance

* Protects interference with the use and enjoyment of land
* The rights and duties that govern the relation between neighbours – rights to your land from indirect interferences
* Not every nuisance is actionable: must prove unreasonableness and damage

## The Grounds of Liability

## Appleby v Erie Tobacco Co (1910) – Test/remedy for Nuisance

**Facts**: P complains of odor emanating from D’s production of tobacco. D was doing their best to prevent the nuisance. Many witnesses found the smell nauseating.

**Issues:** 1: Is the odor a nuisance? 2. What is the remedy?

1. **TEST: does the odor materially interfere with the use and enjoyment of your land, based on a reasonable person (use community standard to determine)?**
2. Remedy - usually an injunction, but D can pay damages if they can show that the nuisance can be estimated in $

**Held:** the odor is a nuisance, you cannot estimate an odor in $, but suspend injunction for 6 months so D can try to contain smell

**BLL:**

1. **Test for Nuisance: does it substantially or materially interfere with the use and enjoyment of your land,**

**and render the land less fit for the ordinary purposes of life?**

1. **To meet this test, Local Standard must be applied**
2. **Local Standard is not a trump card (a new noise from a new inconvenience can give rise to action)**
3. **Reasonableness of the defendant is not a defense**
4. **Nuisance need not cause medical illness to be actionable**
5. **Nuisance need not be caused by the unreasonable actions of D**
6. **Damages in lieu of injunction can be appropriate where nuisance can be estimated in $**

**Notes:**

* though factory may have served public good, upholding someone’s property rights is more important
* Parliament is the forum for arguing the public good. If factory is in public good, Parliament can pass statute to overrule court’s decision
* in such cases, the law tends not to matter, rather it matters which neighbor has more money and if the other neighbor will sell his land
* courts are concerned with allowing each neighbor to maintain SOME use of their land
* Remedy – default remedy is an injunction – equitable remedy – to do or refrain from doing something – the judge has discretion – in this case, they stayed the injunction for six months – damages not a fair trade off to be subjected to bad smells forever – they could have also asked for damages for the past or for the six months that the injunction was stayed if the lawyer had of asked – a judges default position is to give an injunction – traditional judges did not want to be seen as licensing wrongs.
* Damages are for future interferences that may take place from this wrong – so injunctions stop a wrong from happening again, so you don’t get damages for that as well.
* You can get damages for past wrongs, and then and/or damages/injunction for the future
* Most plaintiffs seek injunctions for the future
* You’re not protected from every use and interference of your property – they have to be substantial
* *Property Rights*:
  + 1. Right to **Use of the thing**
  + 2. Right to **Fruits of the thing** - if something comes from your land, you own it
  + 3. Right to **Abuse of the thing** - you can destroy, sell, or alienate your things
* Should the plaintiff have recovered – something making your home less valuable is not an infringement on your rights – your right to property does not include that your property has a particular value – this does not violate your rights – in order to be sued for something it has to be both tortious and hurtful
* Why does this court favour the use of the plaintiff over the use of the defendant? Two ways to think about it:
* Nothing the plaintiff is doing is actually a nuisance to the defendant – they are just insisting on their rights
* Property includes the entitlement to use and enjoy; but you cannot infringe on someone else’s entitlement to use and enjoy their property
* The legal system comes up with a way for everyone to use and enjoy their property; provided you don’t substantially infringe upon someone else’s rights to use and enjoy their property
* According to the rules, in relation to the tort, would one be a reasonable trade -off for the other? The courts will use equitable remedies when damages are not enough.

## Rogers v Elliott – Reasonable person standard

**Facts:** P recovering from sunstroke, ringing of church bell by D causes him to have convulsions**.** P asked D to stop, D refused.

**Arguments**: The bell interfered with Ps use and enjoyment of their property. D is doing this with malice. Connection between morality and the law

**Judge**: There is no necessary connection between morality and the law (but in his personal opinion – there is no morality in ringing the bell). Would the bell substantially interfere with an ordinary person use of land?

**Issues: 1.** Is ringing a church bell a nuisance?Must be decided based on REASONABLE PERSON standard

**Held:** P is not a reasonable person since he has a peculiar condition and the bells would not be a nuisance to a reasonable person

**BLL:**

1. **one person’s view of your use of land cannot by itself stop you from using your land that way**
2. **reasonable person standard - cannot base judgment on one person’s peculiar circumstances**
3. **malice of D does not matter, since he had a good reason to ring the bells (religion)**

**Notes**: Judge criticizes the church based on religion

Community standard – if you took the defendant out of the picture, what would the community be like? But in some modern cases, some judges have lost confidence in this. Zoning – it doesn’t matter what the locality is actually zoned for, it is what you do on the ground that matters.

Seizures are not the nuisance – the nuisance is that one cannot use their property in an enjoyable manner without getting a seizure

You cannot sue someone multiple times for the same set of facts – Res judicata – things are decided once between the parties.

Do not confuse what you have to prove with how you are going to prove it.

Malice – the next two cases point out the difference in malice

## The Mayor of Bradford v Pickles (1895) (decided by the House of Lords) – Motive/intent is irrelevant

**Facts:** D had percolating water on his land which collected in a spring on P’s land.D dug a well and sucked out water, to try to force P to buy his land**.** P claimed this was out of malice

**Issues:** Does malicious intent matter?

**Held:** D had a right to the water on his property, malicious intent does not matter

**BLL: There is no doctrine of Abuse of Rights in common law - you CAN use your rights to abuse someone else**

**Notes:** Bad motive does not make legal action illegal, good motive does not make illegal action legal (motive has no bearing in private law)

Emanations: something is coming into your magic carrot (eg. Odor from tobacco factory)

Preventions: something is being stopped from entering your magic carrot. Must have a right to the thing or there is no nuisance. Rights include: riparian rights, lateral support, access

## Hollywood Silver Fox Farm Ltd v. Emmett – consideration of motive/intent

**Facts:** Foxes ate their young because neighbour was firing guns in the air (which he did deliberately, yet on his own land)**.** P sued for injunction.

**Issues: I**s malice relevant? Is P’s use of land too sensitive?

**Held:** D cannot rely on special sensitivity to cause a nuisance. Bradford v. Pickles has no bearing on a case such as this

**BLL: If defendant actions are malicious, the defendant will not be allowed to use the defense of over sensitivity**

**To Distinguish from B v. P:**

* B v. P is about something NOT leaving the property, while here is about emanating noise
* “he who owns the land owns everything below and everything above”—magic carrot
* Doesn’t have a right to water that it is not yet on his property
* Here, Silver Fox owns both the land and the foxes, D makes nuisance sound interrupting with fox use
* Can’t use your rights to affect someone else rights (fox)
* Key distinction between interfering with someone and with someone’s rights (B.P no right to water)
* You can’t act for primary purpose to piss off, however in B v. P he is doing it to sell back

**Notes:** In B v. P, Pickles is withholding water for a **legitimate purpose**, not just to cause nuisance (not abuse of rights)**.** In Silver Fox, D is just trying to annoy neighbour (true abusive rights case)**. Nuisance is about unreasonable interference, not unreasonable action**

* Thus, both B v. P and Silver Fox Farms were correctly decided because:
  + B v. P - something not leaving the property (rights v. no rights)
  + Silver Fox - something leaving the property (noise from gun fire)
  + Can’t infringe on something don’t have a right too

## Fountainblue Hotel v. Forty-Five Twenty-Five Inc. – First, must have a right

**- BLOCKING AIR/SUN; MUST HAVE RIGHT TO EVERYTHING IN CASE BEFORE IT IS NECESSARY TO DETEREMINE WHETHER THE INTERFERENCE IS MATERIAL AND OR REASONABLE**

**Facts:** Fontainebleau was stopped by trial judge from building extension that would block fresh air and sun from getting to the pool area of 4525.Trial judge applied maxim: *sic utere tuo ut alienum non laedas* (use your property so as not to injure another’s property RIGHTS) **–** gave aninterim injunction – applies for the proceedings of the court

**Issues:** Did 4525 have right to land?Did 4525 have right to sun and fresh air?

**Held:** Trial judge misunderstood the latin; **there must be property rights in order for the rights to be infringed.**  4525 did have right to property, but had NO right to sun and fresh air (because sun/air were blocked before reaching their property—hence they have no rights to sun/air).Can injure stuff that is there but can’t injure their RIGHTS (same as Bradford v. Pickles basic property rights)

**BLL:**

**1) to succeed in nuisance claim, must FIRST show you had a right to the thing being interfered with, AND THEN, must show that the interference is materially interfering with your use and enjoyment**

**Notes: Fontainebleau wasn’t acting predominantly with the purpose of injuring 4525 with no benefit for himself—he was doing it for a legitimate reason (it would make his competition less of a threat and would make him more money)—so the malice principle doesn’t apply. There is a universal rule that there is no legal right to the free flow of light and air from adjoining land. You cannot acquire the right to sunlight.**

**Notes:**

* Meaning of injury? – suffered a loss, or entitlement
* Per curium – all judges have given this judgement

**In English law** – the Doctrine of Ancient Lights – you can acquire the right to sunlight in ancient English law. – through long use you can acquire a right to light (has to come through an orifice – through an opening/channel/window). You cannot acquire light through original acquisition or just transfer in Florida.

**Canadian law** – not possible since March 5, 1880 – no longer possible to acquire a right to light through prescription – any right to light created prior to 1880 still exists (Osgoode Hall in Toronto) has rights to light because they were there prior to 1880 – changes with jurisdictions. We cannot say something different in the tort of nuisance regarding sunlight because that would change the law of property. We cannot give the plaintiff untouchable rights that the plaintiff cannot have.

Maybe they could make a claim about malice BUT as long as there is a reason for the construction of the building, they cannot use malicious intent as a principle.

What about the Florida economy? The Florida planning and building codes set out what is best for the area – ie. Bylaws for building height, placement, etc. If you have a dispute with the policy of southern Florida, go talk to your municipal representatives.

Main principles

1. **Rights – something that the legal system recognized as an entitlement**
   1. Rights to property
      1. What does one acquire when one acquires real property? What is the content of the real property? Ad coelum principle (magic carrot) – the owner of the surface of the land is also entitled to exclude others from everything above him or her, and everything below. What you can reasonably use (planes can fly over, you can’t get to the core of the earth).
      2. Rights arising ex jure naturae (naturally from owning the soil):
         1. Riparian rights – if your property touches a defined stream/channel, then you have a right that the water come to you in its natural state in flow, quantity and quality (it is a nuisance of an upstream owner to block a stream and take all the water – **Chasemore v Richards 1859**)
         2. Right to lateral support – my neighbor cannot dig a big hole in their land, that my property can fall into. You have a right to the support of the existing land that was there before (**Dalton v Angus 1881**). However this right does not apply to the buildings on your property and their weight, only you property.
         3. Common law right of access – you have the right to step on/off of your property any place that it touches a public road – this is regulated based on road ways/types (highways).
      3. Incorporeal Hereditaments – Not physical attachments – once these things have been created, they attached forever to your property. Consent of the party who is going to be burdened is required. Deemed consent is allowed – if you allow someone to take fish from your land for 20-30 years, they must have a right to do it. You usually have to pay for one of these rights.
         1. Easement – right to cross over someone else’s land
         2. Profit (a prendre) – a right to take from someone else’s property (turf, wood, turkey, fish, etc.) – presumed consent if someone has been taking things for so long and no one has done anything to stop them.
2. **Substantial interference**
   1. To claim a nuisance, you must prove that one of these things are being interfered with in a substantial way.
      1. Appleby - a smell is coming in to their real property (magic carrot), so their right of the ad coelum principle is interfered with
      2. Rogers - a sound was coming onto their property, but it was not a substantial interference.
      3. Bradford – substantial interference but this case is what is not coming into his property which is not a nuisance as you don’t have a property right to what is not yet on your property – does not apply to Riparian rights because the water that was percolating through the ground, it was not a defined stream/channel – no property right that was interfered with as you cannot own water that is percolating.
      4. Fountainbleu - does not meet any ad coelum or incorporeal hereditament interferences

## Bryant v. Lefever (1879) – Bernoulli’s principle, chimney: NO RIGHT TO AIRFLOW SO irrelevant whether or not defendant interefered (2 STEP PROCESS)

**Facts**: D builds addition to his house which blocks flow of air over P’s chimney – P’s house was there first. Bernouli’s Principle: flow of air creates pressure difference which draws smoke out. Smoke backs up into P’s house (Same as hotel sunlight case)—so P unable to light a fire to stay warm.

**Issues**: Did P have right to the airflow?

**Held**: P is the one lighting the fires, so it is his fault, and he couldn’t possibly have a right to the airflow (not in his magic carrot yet)

**BLL: No natural easement to a flow of air – no right to wind flow coming over your property (unless the wind was flowing through a defined channel of some kind)**

You must have a right to all things involved in the nuisance to be successful. Who’s there first isn’t important! Sic utere – the plaintiff would be violating this right because he would have to take his chimney down

Aldreds Case (1619) – one cannot complain about a loss of a view – doesn’t interfere with any rights

## Prah v. Maretti (1982) Wisc. SC - SOLAR POWERED HOUSE, CONTRAST TO PREVIOUS CASES – Balancing Interests (Harms vs utility)

**Facts**: P’s house ran on solar power, D built extension of his house which prevented sunlight from reaching P’s house

**Issues**: Does P have right to sunlight is it a nuisance?

**Held**: Yes, in some cases sunlight is a right; law of older times is outdated for 3 reasons (1880s):

1. in older times, sun was only aesthetic; due to artificial lighting it wasn’t necessary

2. development of land was important; now, we encourage ppl to make their own power

3. property rights were most important

Now, we regulate land. Development is not as important; sun is used for energy. Thus, he decides based on who’s claim is more helpful to society. Harm to plaintiff as opposed to utility to the defendant – balance harm and utility – sunlight is more important than building a tall building – utilitarianism – judges don’t often use this principle

**Problems:**

* Judge says that sunlight is more important than property rights
* Judge doesn’t cite sources, because previous cases contradict this ruling
* Creates incoherence in the law: property law says there is no easement for light, while nuisance would

now say there is

* Doctrine of Ancient lights – rights to light pre-existed before we had the technology to create artificial

light

* Government gave the defendants the go ahead to build their structure based on zoning, etc.

Brings up issues what is tort law doing?

• 1. It is protecting our previous existing rights

• 2. Second view is that tort law doesn’t protect rights it creates right

• You have a good exam theory if:

• 1. Fits cases

• 2. Justifies the cases

• 3. Coherent one should be contradictory parts to theory

• 4. Take most simple theory

## \*CANADIAN FALLACY\* Critelli v. Lincoln Trusts and Savings Co. (1978) Ont. HC;

SNOW PILES UP ON ROOF, REASONABLE FORESEEABILITY OF HARM VS. REASONABLE FORESEEABILITY OF INFRINGING SOMEONE’S RIGHTS --- Outcome questionable/wrong

1. Rights – no rights to air flow
2. Substantial interference of rights – shouldn’t actually get to this step

**Facts:** Increased height of building causes snow to pile up on neighbors building causing damage

**Issues:** Does this constitute a nuisance?

**Held:** Yes, Lincoln should reasonably have foreseen that the extension would have that effect

**Notes:** This is creating a right because he didn’t ask where snow is coming from or if have right to airflow

- Canadian view is that if person reasonably should have known, they must come up with a good reason not to pay

- But, a decision like this doesn’t fit any of these cases

- Bradford v. Pickles was not just foreseeable, it was intentional

- Fontainebleau was also intentional

- Lefever - contradicts because everyone knows air draws smoke out

- SO, why does the SCC latch onto this test if it is wrong? (note: just because something is new doesn’t mean it is better)

- It seems as though this case means that torts create rights... but we know that it only protects existing rights

- Thus, it seems that the judge in this case mixed bits of nuisance and negligence in making his decision, which created the awkward outcome

- Fault + loss = recovery ----> not the correct approach!

- Judges have a different two step test – combination of substantial and unreasonable (reasonable foreseeability, violation of law) NOT about rights and interference, but more about substantial interference and reasonableness.

Alternative view of the tort of nuisance – two steps:

1. Substantial interference
2. Unreasonable interference – can it be reasonably foreseen? Whether the harms outweigh the utility? Malice involved? Violation of the law? Can it explain the law?

## Orpen v Robarts

- P has a house, D builds a building

- Building is supposed to be set back 15 feet from the property line; but D builds in right on the property line

- P wants to sell house, and value is lost because of how close the house was built to the property line

- suspicion of bribes within the town council

- sues in nuisance

Two steps:

1. Substantial – yes – lost value on house – house feels claustrophobic
2. Unreasonable – illegal – violation of bylaws – it should have been foreseen that this would be an issue

Therefore liability under the tort of nuisance – SCC says NO liability

Other two step process:

1. Rights infringed? What right was infringed on P? The bylaw was infringed but that is not against P. She has to prove that the bylaw has been interpreted to create a negative easement in favour of D.
2. Substantial interference

**Modern view of the tort of nuisance cannot explain any SCC cases currently so the old view of 1. Rights, 2. Substantial interference is best.**

## Hunter v Canary Wharf – must have property/land rights

Facts: 2 plaintiffs - Town of London decides to diversity downtown – they build office towers in Canary Wharf – building these towers creates a lot of dust. One P is the son of someone living nearby – too much dust on car – has to be cleaned regularly. One P is the mother and she cannot watch TV anymore because of the office towers (they block the TV signal)

* Car P - Test 1 – is it substantial or unreasonable? No and no.
* TV P - Test 1 – is it substantial or unreasonable? Yes and yes. – but House of Lords says no.
* Test 2 – No and no – no property rights as they a license to stay in their apartment – rental – therefore cannot claim nuisance (have to have a right of property) – there is no tort of nuisance to personal property so his car doesn’t count
* Test 2 – prevention claims aren’t usually actionable – if you claim only that someone put up a building and that interferes with your use and enjoyment, you won’t be able to claim nuisance – you don’t have a right to watch TV, you don’t have an easement for TV satellite signals – there is no defined channel of the easement
* Contracts ONLY bind the two people involved in the contract, not any outside parties
* All torts cases have to be thought of in terms of bilateral – is there a right that binds the person that I am trying to sue and does something bind them from doing so? The rights have to bind both parties.

## Nor Video case – example of Critelli Test (modern view)

* **Facts:** D is ON Hydro – builds high voltage transmission lines – create electromagnetic waves/radiation. P has property nearby – the radiation stops him from getting satellite TV
* **Issue:** Is this a nuisance?
* **Ratio: Modern test**

1. Substantial interference – yes – tv is important

2. Unreasonable interference – yes – there is reasonable foreseeability here

* Key difference – Canary Wharf is a prevention, Nor Video is an emanation
* **Notes:** rightly decided but for the wrong reasons – emanation of waves entered the property so the magic carrot was interfered with.

## New Zealand v Greenwood (CA) – Having a building can cause a nuisance

* **Facts:** P has house with windows/views. D builds large building with reflective glass – sunlight is directed right into P’s windows – very bright
* **Issue:** Is this a nuisance?
* D’s argument - Public benefit, lack of malice/intent, right to use/build on property, no rights for/against light (no liability)
* P’s argument – most cases are prevention of light cases – this is a gathering of light case – too much light is emanating into P’s home – this is a substantial interference for P
* Held: Yes there was a nuisance – injunction ordered (D had to spray anti-glare on building) Although merely having a building isn’t typically a nuisance, it can create a nuisance. Light can be an emanation.

## Hay v Cohoes – Balancing of Rights

* **Facts:** D caused damage to P while excavating a canal by blasting dynamite. How to draw a balance between P and D – is a use really special and is an interference really profound? Building Erie canal – blasting through limestone – one person’s porch was blown off – substantial interference in light of community benefit of the canal
* **Issue:** Is there a nuisance?
* **Held:** Yes, there is a nuisance – better that one person surrenders a particular use of their land rather than another is deprived of beneficial use of his land fully. Conflicting rights – P has a right to undisturbed possession of property and D has a right to dig the canal.

## Shuttleworth v Vancouver General Hospital – Future Injunction (Quia Timet)

* **Facts**: A new hospital for infectious disease was built next to P’s home. P claimed nuisance for 3 different – quia timet injunction – don’t let them do it – pre-emptory injunction – a higher standard of proof – moral certainty (strong possibility) for hearing children crying, see sick people daily would cause them to become depressed, fear of contracting infectious disease (prove that fear is founded in actual fact – if you actually had a danger of being infected, that would be a nuisance), decrease in house value (not enough that the value of your property decreases, it must decrease for something material)
* **Issues:** were the reasons P claimed for nuisance founded?
* **Held**: No evidence to support these claims, case dismissed

## Laws v Florinplace Ltd – Reasonable use can create nuisance

* **Facts:** 10 P brought a motion for interim (filed for immediate injunction – must have a good claim) injunction against owners of a hardcore pornography shop that recently opened in their neighbourhood
* **Issues**: 2 claims: Nature of business is apparent to residents and offends their sensibilities (affronts); Business would attract undesirable clients that might accost local girls.
* **Held:** the injunction was granted; each claim presented a serious issue for the neighbourhood; passed the reasonableness test.
* **Problems:**
  1. Sensibilities are subjective, and they may vary over time. How you feel about something isn’t actionable as a legal rule.
  2. Has nothing to do with nuisance – local girls are not likely to have property right - May be in relation to public nuisance (instead of private nuisance)

Nuisance of affront – occasionally brought out to decide a case – it is an exception to the rule

Sometimes its not that a good view is taken away, but a view is so terrible that no one should have to look at it every day.

## Legal Process and Public Policy

## Bamford v Turnley – Reasonable Person Standard

* **Facts**: D has a large brick-making factory creating a lot of smoke which comes onto P’s land.
* **Issues**: at first glance, seems like a nuisance, but D states that he has a defense: done for public benefit – public policy
* **Court:** there is no such thing as public or society; just individual people.
* **Reasoning:** Public benefit cannot outweigh private harm (cost) without appropriate compensation. Ordinary acts done conveniently are not actionable in nuisance.
* If the defendant’s actions are done maliciously, this would be an actionable nuisance to the plaintiff (interferes with enjoyment).
  + Exception – ordinary acts conveniently done are not actionable in nuisance (eg. Mowing lawn at reasonable hour).
  + In this case, the defendant was not using his land in an ordinary way. Therefore his actions are actionable in nuisance.
* Public Benefit
  + A thing is only for public benefit when it processes good to all individuals in the public on a balance of loss and gains.
  + When something is for the public benefit, then you have to pay those people that you are going to inconvenience
  + It would be unjust to permit power of inflicting loss/damage to people without compensation.

Example of public benefit - pretend you own everything. You want to build a railway and you own both the railway and the forest that must be burned down. If forest was worth $4 million and railway only worth $500K, would you burn down forest? No. Therefore, paying people for the inconvenience must be worth it to you in order for it to be in public interest

**-judge states that there is one argument which is a defense to a prima facie nuisance 🡪 “ordinary acts conveniently done”**

**-if you are doing something with your land and everyone eventually will need to do on their land and you are doing it conveniently – reciprocity – no liability – necessary acts conveniently done**

**- not everyone is going to make bricks on their property and have smoke blow onto neighboring property, therefore cannot rely on this defense**

**BLL:**

**- public benefit is not, by itself, a defense against nuisance**

**- it is a defense if you are committing necessary acts that are conveniently done**

Miller v. Jackson (1977) CA - CRICKET FIELD, DENNING, REASONABLE INTERFERENCE, DEFENSES TO INJUNCTION

**Facts:** Miller’s purchase newly developed house on edge of cricket pitch which had been around for 70 years**.** Complaint that too many 6’s coming into the yard causing damage**.** Trial judge granted injunction based on nuisance test (reasonable use and enjoyment of land)

**Decision:** Majority said it’s a nuisance; majority said injunction is good; different majority for different issues of this case (because its so complicated); \*Denning is not the majority on nuisance\* Lane and Cumming-Bruce are majority on nuisance, but Denning and Cumming-Bruce are majority on injunction.

* **For Denning** it is about the reasonable group (cricketers) v. unreasonable neighbor, so she loses (utilitarian view)
* **For Lane**, proper nuisance test is about unreasonable (substantial) interference with land (of other person), not whether your land is being used reasonably; it doesn’t matter who is there first - there is a nuisance here
* **For Cumming-Bruce LJ,** “public interest” may be used as defense to an injunction for a nuisance

**BLL: being there first may be used as a defense to an injunction for a nuisance (because it is a discretionary remedy, and this can guide court’s discretion)—or at least can factor in to courts discretion in determining if they will give an injunction**

The judges got it wrong here:

* What right does the tort of nuisance protect? Individuals right to the use and enjoyment of land.
* What about trespass? The players came to get their cricket balls off of their land. This changes your idea of the issue.
* A nuisance did occur – using older test – what right is being interfered with? Is the interference substantial?
* Appropriate remedy here was damages in lieu of an injunction

Kennaway v. Thompson (1980) Eng CA - LOUD BOAT RACES; Partial injunctions can be used to restore an activity to an acceptable level; an amplification of a pre-existing activity can constitute a nuisance.

**Facts:** P built cottage on land near lake where loud boat races took place, though she didn’t think it would interfere with her land at the time she built it**.** D argued that they were using the lake reasonably. P argued that it was reasonably interfering with use of her land

**Held**: Partial injunction: you can use the lake as long as it doesn’t reasonably interfere with other’s use of their land. Judge issued specific rules about what they can do, when, etc.-i.e. only 3 races per week instead of 10

**BLL: An amplification of an activity can constitute a nuisance, even if the activity was pre-existing (i.e. if boat races get louder). There is possibility of partial injunctions to reduce activity to an acceptable level**

Sturges v. Bridgman (1879) CA - DOCTOR/CONFECTIONARY SHOP, EASEMENTS; A use which was unknown and physically unstoppable cannot found an easement by prescription.

**Facts:** P (physician) had land for long time and never complained about noise from D (confectionary shop). Recently P built additional consultation room which now shares a wall with confectionary shop, and now claims a noise nuisance. Confectionary shop was there long before the consultation room (he had been doing this for a long time) -I’ve gained a prescriptive easement to do this – a right in law.

**Issues:**

1. Is there an easement by acquiescence (is there a right to make noise on the other person’s property? (since P didn’t complain for 20 years, does silence mean acceptance?). In this case, the easement that the defendant claims is to make noise that travels onto the other person’s property

2. Should there be an injunction, because confectionary shop was there first?

**Held:**

1. There is NO easement, because P could not have known about the noise until he built the addition (it was not open and notorious); to make claim by acquiescence of the owner, you must put up with something and choose not to stop it; since P didn’t previously know about noise, he didn’t put up with it in the past.

*Nec vi* – without force

*Nec clem* – without secrecy

*Nec precario* – without permission – cannot say that the owner acquiesced when you were doing it in secret

**BLL: A use which was unknown and physically unstoppable cannot found an easement by prescription**

1. In determining an injunction, must take into account what the area is used for

**BLL: No answer to a nuisance to say that plaintiff brought it on himself by building too close; being there first is not a defence**

Notes:

* Society is in constant change, so if you don’t want to be charged with nuisance, you should buy buffer zone so that you do not bother neighbors. Is being there first ever relevant? It is relevant in light of the community standard, but not on a person to person basis. It is not fair being there first to make it totally controlling as that would be unfair to the other property owners around them – they would be getting someone else’s property rights.
* 2 Schools of Thought on Community Standard (to determine if something is unreasonable)
  + 1. Given what is around you, what should people reasonably expect to put up with (Sturges v. Bridgman)
  + 2. Whichever use is better will win (Denning, Miller v. Jackson)

## Re Ellenborough Park

* Easements by prescription (through long use)
  1. Must be a dominant and servient tenement – must be a piece of land which is subject to the easement (servient), and there must be a piece of land which the easement (dominant) attaches – easements attach to land so it must attach to land.
  2. Accommodate the dominant tenement – it has to be something that would make piece of land better for the owner – a land owner would want this for their land
  3. Dominant and servient tenements must be owned by different people
  4. The right you are claiming must be possible to be a subject to a grant of property – cannot create new types of easements - Limitations on Easements
     + - 1. Can be a right to do something or a right not to have something done
         2. CANNOT be a right to have something done (e.g. A retaining wall on the sea was built and maintained for about 40 years, other people had homes beyond the sea wall – the sea wall owner let it fall into disrepair and the sea took out the houses – there is no easement here)
         3. Copeland – a grant of an easement – cannot arise to the level of the ownership of the land – A pub, and cars would park around the pub (on neighbours land, etc.), and someone else bought the neighbours land and asked them to not park there anymore – not an easement as this would be inconsistent with the level of ownership of the land as this would dictate unlimited use of that land.

## Copeland v Greenhalf (Eng CA)

Cars parked over whole property. An easement must be limited and cannot rise to the level of ownership of the land.

## Coventry & Lawrence

* 1. Courts may take into account the Δ’s activities when determining the community standard;
* 2. Coming to the nuisance is not a defence where π uses the property for essentially the same purpose as predecessors;
* 3. It is possible to have an easement to emit sounds;
* 4. Planning permission is irrelevant to liability in nuisance but potentially relevant to choice of remedy.
* 5. The *Shelfer* criteria should not be treated as if they were a checklist and judges should take into account the public benefit.

## Tock v St John’s Metropolitan Area Board (1989) – Defense: Statutory Authority

**Facts:** P’s basement flooded after heavy backup of storm drainage system run by D (municipality). D claims the system was authorized by statute**.** P sues for damages, not injunction.

**Issues:**

1. Test of nuisance: whether the use of St. John’s land is reasonably interfering with Tock’s land (she said yes) – unreasonable/substantial interference

2. Though prima facie there is a nuisance, St. John’s claims defence of *statutory authority*

* 3 cases for defense of *statutory authority* depending on if statute gives the municipality a duty:
  + 1. Statue has a duty + nuisance is inevitable (Defendant must build sewer on these specific streets)
  + 2. Authority + specifics + nuisance is inevitable (defendant may create the sewer, but if done, must be done on these specific streets)
  + 3. May build system + may do it in any way (no defense of statutory authority)
* **Held:** This case is in the 3rd category, so no defense of statutory authority.
* Note: Burden of proof is on the party advancing the defense.
* **BLL: nuisance is traditional test (unreasonable and material interference with someone’s use and enjoyment of their property)**
* **Defense of statutory authority is available where it is implicitly or explicitly authorized by the statute**
* **Nuisance is implicitly authorized by the statute where it is the inevitable result of what the statute ordered or authorized (ie. a, b, above)**

**Dicey’s Rule of Law**: Government does not have special privileges (unless they pass legislation granting them special privileges.

## Ryan v Victoria – Test for defence of statutory authority

* *SCC – which case to use? Agreed with Sopinka – Statutory authority defense will work if:*
  + *Authorized by statute*
  + *Defendant proves that the nuisance is an inevitable result of exercising that authority*
* Sopinka: Defense of Statutory Authority: 1) Statute gave authority, 2) whatever happened was inevitable (which is difficult for the defendant to prove and typically results in them losing their case)

## Susan Hayes Inc v Vancouver – example of Sopinka statutory authority test.

**Facts:** Winter Olympics in Vancouver – new subway line may be built – two ways of building it – tunnelling under OR cut and cover – tunnelling would leave the street untouched but cut and cover would cause business owners a nuisance.

**Issue:** Is there a nuisance? Is there a defence of statutory authority?

**Test:**

Step 1: Was it authorized by statute? Yes

Step two – Is the damage inevitable? Yes – because there is only one practical method of doing this – tunnelling is too dangerous, too costly, and it wouldn’t be finished in time. So, cut and cover would be the only practical method of doing this.

## Antrim Truck Centre Ltd. v Ontario (Transportation)

**Facts:** π owned/operated truck stop. Δ changed highway; motorists could only get to π stop by circuitous route, effectively putting them out of business. π received compensation for damages for construction not under authority of statute. *CA* set aside the award (Board didn’t consider character of neighbourhood, sensitivity of complainant, and utility of ‘essential public service.’ **Issues:** What are the elements of private nuisance/ Did the *CA* err in holding for the Δ? How is reasonableness assessed? **Holding:** Substantial + Unreasonable. Judgment in favour of the π. **Ratio:** Claimant (private citizen) should not have to bear more than their fair share in relation to public utility. **Reasoning**(1) Substantial (ie. non-trivial interference)?  
(2) Reasonable interference with π? To determine, must balance (balance doesn’t have to be even)…

* Harm more important
  + Character of the neighbourhood
  + Gravity of the harm (frequency and duration)
  + Sensitivity of the π (*Rodgers*)
* Utility
  + Malicious intent
  + Negligence (is there something a reasonable person could have done to avoid the interference?)

Ask: is it reasonable to give compensation? If burden (harm) is disproportionate, it is reasonable to give compensation)  
*Note*: This is a claim in injurious affection (injury to property and would have had a claim in nuisance if there was no statutory authority). Reasonableness does not add anything; the question is always whether or not the interference was substantial.  
Although case doesn’t abide by *Shuttlesworth*, it was rightly decided.  
*Note:* This case should have been a public nuisance case, but π didn’t want this case to be public nuisance for fear of lower claim. Δ didn’t public nuisance because can’t raise reasonableness as a defence.

* *SCC – is this a private nuisance?* 
  + Progression from 1960s – substantial interference, 1970s – unreasonable interference, 1980s – defendant has to be reasonable
  + SCC’s decision is based on substantial and unreasonable interference
  + They define substantial as non-trivial, and added unreasonable (balancing the harm caused with the benefit/utility gained)
  + Harm – severity, gravity, how often it happens, how long it goes on for (frequency and duration), a sensitivity, character of the neighbourhood (locale),
  + Utility – intent (malice), public benefit, negligence of the defendant
  + Is it unreasonable to award compensation?
* Public benefit is not a large part of nuisance – it is a very small weight in determining unreasonableness

Traditional Rights based test

* Is a right being violated?
* Is the interference substantial?

This is a case of public nuisance – rightly decided but for the wrong reasons.

## Smith v Inco – Damage Test

**Facts:** D operated nickel refinery for 66 years. P argued that nickel in soil caused property values to not increase as much as they should have without the nickel deposits.

**Issues:** Did the trial judge err in holding that the discharge of nickel constituted an actionable nuisance?

**Holding:** Appeal allowed, judgement for the defendant.

**Ratio:** Property damage branch of nuisance requires the damage to be actual, ascertainable and material.

**Reasoning:** Tort of nuisance – half about the use and enjoyment, half about the damage to property – what does it mean for property to be damaged?

What is damage?

* Material – substantial (more than trivial) – has to cause a negative change – it isn’t enough for a change just to be a change, it has to be a negative change. Not something that could leave to damage in the future, it has to be present now. Need actual proof that it is dangerous.
* Actual -
* Ascertainable – nickel – you cannot see with the naked eye – you don’t necessarily have to see it with the naked eye, but it has to be testable.
* In order to be actionable, a nuisance must be tortious and hurtful. Two types of private nuisance:
  + Amenity – interference with use/enjoyment
  + Property damage – property damage in a substantial way
    - Did you suffer damage (both negligence and nuisance)?
    - Did you have substantial damage? Was the damage unreasaonble?
    - Damage cannot be just your property value going down – there has to be a negative physical change in your property. Property value change is evidence of a negative physical change, but it is not determinative.

## TTC v Swansea (Village) (SCC)

Private right of access is the right to step on and off of your property onto the highway at any point along its entire frontage.

## Remedies

## Shelfer v. City of London Electrical Lighting Co. (1895) CA - DAMAGES IN PLACE OF INJUNCTION (SHELFER RULE);

If plaintiff indifferent and injunction would be oppressive, court may force plaintiff to accept damages

* Injunction is normal remedy for a nuisance unless you meet the following four exceptional rules in which case damages may be awarded.
* Shelfer rule: Where plaintiff would be indifferent to getting damages and giving an injunction would be oppressive to the defendant, the court will force the plaintiff to accept damages:
  1. small injury
  2. injury can be estimated in $
  3. can be adequately compensated in $
  4. it would be oppressive to D to grant injunction (BUT, defendant can’t make it oppressive on himself ie. build the buildings quickly to make it appear oppressive if we were to be given an injunction)

Other notes about the Shelfer Rule:

* Context specific
* Courts are generally very strict about these
* Public utility is irrelevant
* If the defendant is a jerk (rude) – this will not be considered under the Shelfer rule.
* Note: Shelfer Rule is about **future damages** or **injunction**. Does not say what you are entitled to in the past. Therefore, it is possible to get both an injunction + damages
* Shelfer factors are not a checklist – if one is missing, it is OK to continue – the fact that one factor cannot be made out is not fatal to the defendant
* In addition to the Shelfer rule, the judge should also take into account the public benefit of the activity to be enjoyed (not determinative).
* Planning permission might be appropriate to examine under the Shelfer criteria – where the public has had a reasonable ability to be consulted about the activity

Outside of Shelfer Rule

1. Where there is continuing threat of physical damage, injunction is mandatory (ie. Miller v. Jackson)—hence, must be a small injury or threat of injury for damages to be an option as a remedy
2. Strong continuing odors (Appleby); hard to determine how much damages should be

## Canada Paper Company v. Brown (1922) SCC - UPHOLDING THE SHELFER RULE

**Facts**: Plaintiff built a cottage/retreat property near paper mill - paper mill is creating smell and pollution – starting using sulphates

**Arguments:**

D – globalization (need to stay competitive), if they go out of business, a lot of people would lose their jobs

**Issues:**

Canada Paper Company argued that the mill was important to the town (provided jobs), and that their communal interests trumped Brown’s private rights

**Held**: Judge said, this is not the forum for public policy (that is the legislature’s job) - court is there to do justice and uphold rights—all that’s relevant is that property rights are being infringed – better to shut down a factory so one person can enjoy their property. The only way to uphold these rights is to issue injunction.

**Notes:**

Common law (in rem) and equity (in personom) courts – Lord Cairns Act

1. Small injuries

2. Estimated in money

3. Money was an adequate compensation

4. Oppressive (to defendant) to grant injunction

5. Unexpressed criteria – public policy/benefit – this does not exist in the traditional common law view.

Insisting on an injunction – would be using your rights to violate someone else’s rights (legal entitlements to punish someone else)

## Black v. Canadian Copper (1917) ON HC - CONTRAST TO CPC v. BROWN; Contrary to Shelfer Rule

**Facts**: P suing D for injunction based on smoke from smelting of nickel—smoke is ruining plaintiffs carrots (old exam 8 yrs ago related to destruction of carrots)

**Held:** Judge said nickel was too important to the world to shut down the mine, which would collapse the town. it is better to keep nickel production open even if it ruins a few farms – where would you sell all your produce if there were no workers in the nickel mine? P abandons injunction and requests damages - damages awarded

Judge uses the unexpressed 5th criteria of the Shelfer rule – public policy/benefit

## KVP Co. Ltd. v. McKie (1949) SCC - RIVER POLLUTION, STATUTORY AUTHORITY can’t be RETROACTIVE LEGISLATION

**Facts**: Paper/pulp mill is polluting river, causing odor and pollution nuisance to neighbors

**Held:** Judge issues an injunction, saying only legislation can take away private right to enjoy their land. As a result, government issued Lakes and Rivers Improvement Act (which allows judges to refuse to grant injunction when importance of mill is greater than private injury).

SCC dismisses appeal because legislation cannot be retroactive – public benefit is not part of the Shelfer test.

**BLL: Lakes and Rivers Improvement Act - says that courts CAN weigh private rights against public good (it pays to have powerful friends). Gives the courts the power to refuse the injunction against a mill owner if the public benefit outweighs the private harm**

- Legislature can ALWAYS do what it wants as long as it is not a Charter infringement or Division of Powers infringement – can only disturb a judgement of the court if it is wrongly decided at the time – but the Act says that it is different at the time – based on the division of powers, the federal government wins here.

- Ontario government then made the KVP Act – legislature issues KVP Act (which dissolves injunction [retroactive]—this act only applies to KVP—KVP had solid gov’t connections, and people are from here-on limited to damages) – legislature can do what it wants to get what it wants to move forward.

## Stephens v. Village of Richmond Hill (1955) ON HC - SEWAGE BACKUP, STATUTORY AUTHORITY, RETROACTIVE LEGISLATION so doesn’t have to have injunction – Lord Cairns + KVP

**Facts:** Sewage from city system backs up on P’s property, asks for damage and injunction. Judge says she is entitled to BOTH.

**Issues:** Were the plaintiffs rights substantially interfered with?

**Defenses:**

1. statutory authority – no defence

2. public good of having a sewage system (even though it ruins her land) – public policy does not matter

**Held:**

1. Plant NOT built with statutory authority - statute only conveys “may”—its permissive, so no defence. Also, it was not inevitable that her land be ruined

2. It isn’t the court’s function to serve public good in general - that is up to the legislature (in private law, right is more important than the public good).

- COA: no proof of past damages, but injunction stands

- thus, legislature passes Public Health Amendment Act, retroactively giving plant statutory authority – judges don’t support utilitarianism through their judgements, the legislature must do this for you.

## Lord Cairns’ Act

* Gives court ability (if they cannot give injunction for some reason) to substitute damages in lieu of injunction
* Very rarely used in Commonwealth, only when the injunction is impossible for some reason

## Boomer v. Atlantic Cement Co. (1970) NYCA - OVERTURNED SHELFER RULE IN NY

**Facts**: Cement plant causes smoke, vibrations (how opposite)

**Held:** NYCA reverses Shelfer rule, since factory already spent $45,000,000 on the plant (the injury clearly wasn’t small, couldn’t accurately estimate damage, etc—violated Shelfer rule

* since the court already knew what the legislature would do, they did it for them
* no injunction, but have to pay past and future damages (opposite of Shelfer rule in New York)
* can’t penalize one company for an issue that has yet to be able to be solved by the entire industry
* we can’t regulate air pollution, lots of money, and we shouldn’t penalize one company for this structural issue...so only damages
* court basically created an easement on the P`s land to allow cement to be poured and smoke to emanate from land - but if courts cannot regulate rights, because it is too hard...who is supposed to do it?
* The US doesn’t follow the Shelfer rule – they use utilitarianism

**Substitutive damages** – doesn’t vary because it protects the right to your property, and the right to property is identical. Example – the market value of the violation of the rights (renting a horse, a house, etc.)

**Consequential damages** – have to prove them – will differ based on each person. Mitigation – if you had to leave your house as part of the nuisance, the consequential damages would be renting a new home/apartment.

## Spur Industries v Del E Webb Development Co (1972) Ariz SC

**Facts: C**ontroversial case, only case of its kind in the U.S. (this is significant b/c in the US, they “hunt in packs of 2s”)**.** Cattle feed lot exists for long time in middle of nowhere, development grows up beside it.Del E. Webb built developments around the lot, sues for nuisance from smell, flies, etc., and wants injunction.

* Note that the homebuyers are not involved in this claim at all – but they own the houses now.
* D - not only for themselves, but for the people who bought the homes in the sun and have to smell the odor

**Held:**

* 1. court says it IS a nuisance
* 2. should be an injunction (typical remedy)
* 3. Webb has to compensate Spur for their moving costs (even though Webb got an injunction)
  + Spur couldn’t have foreseen that area around would be developed
  + Webb COULD see that the lot was already there
  + Court says that Webb is NOT the victim, the people that live there are victims, thus Webb should not get off free
* **BLL: this will probably never be followed in Canada (and was never followed in U.S>)**
  + **compensated injunction is limited to a case where developer has with foreseeability brought into a previous agricultural area, a population which makes necessary the granting of an injunction**

**Notes:** Court says that Spur is committing tort of nuisance against 3rd parties, but Webb is committing tort of negligence against Spur (odd, because usually it is not a tort to use your land even if it makes your neighbors land less valuable)—this reasoning is inconsistent with previous cases we’ve studied ie *Bradford v Pickles*

* Common law rule - only YOU can enforce your rights, even if by someone else doing so benefits them
* Here, court is more concerned with parties that are not before the court (3rd party property purchasers), this is very *uncommon*
* Another problem: they looked to what result they wants, and reasoned back from the result (this can skew the view of rights)

*Second case brought against Webb*—action brought by homeowners against Webb

* Majority said developer (Webb) should be held liable
* Holohan **dissenting**:
  + Webb was not violating anyone’s rights, Spur was affecting ppl’s rights, he would therefore have decided both cases differently
  + also says that the fact that the 3rd parties may have contractual actions against Spur doesn’t have anything to do with Webb v. Spur
  + didn’t consider the rights of the parties, and the privity of the contracts between the 3rd parties and Webb

- **Holohan is the only one making sense, saying that the rights involved did NOT add up to the decision of the majority (fault + loss does NOT necessarily = liability)—says negligence claims (from old ladies against developer) are completely separate from those of Webb and Spur**

* this is the ONLY case with compensated injunction - has NEVER been followed in Canada - when you reason backwards you often get bad results
* **“hard cases make bad law”- because judges stretch too far, and then when trying to apply it to normal cases it**

**makes no sense**

## 340909 Ont Ltd v Huron Steel Products (Windsor) (Ont HC)

Machine causes noise and vibrations. Factors to consider when determining unreasonableness = severity, community standard, utility, sensitivity.

## Lemon v Webb (HoL) – Abatement

L’s trees encroach over to the neighbor’s property. W tells his servants to take off the limbs along the property line. L sued W, but W was not liable because he was merely abating a nuisance. However, W must give the branches back. Not a very neighbourly action – most people would take to their neighbour first.

**Abatement** – court will allow to stop a nuisance without going to court – self help remedy – modern view is don’t encourage this at all.

Three things taken into account:

* + - 1. How serious the nuisance is
      2. Necessity to you intervening before a court action
      3. Could you abate the nuisance without breaching the peace, trespassing or causing damage?

## Rylands Rules – Strict Liability

Liable if:

1 – Defendant must make non-natural use of land/property (HL decisions)

2 – Defendant brought on to their land something that was likely to do mischief if it escaped (Ex Chamber)

3 – Must have escaped the defendant’s land

4 – The escaped caused damage to the plaintiff

Theories:

1 – Negligence – pre-cursor to the tort of negligence – there is a fault somewhere (AUS)

2 – Nuisance – has something to do with the tort of nuisance – some sort of relationship here (UK)

3 – Strict liability – for abnormally dangerous activities (ultra-hazardous) (USA)

## Rylands v Fletcher

**Facts**: Fletcher suing to recover damages for injury to his mines caused by water flowing from reservoir on Rylands property. Ryland hired competent engineers to construct reservoir, but did not know there was a mine under his property. Ryland wasn’t negligent, but the engineers didn’t take reasonable care to reinforce the reservoir; shaft gave way and flooded Fletchers mines.

**Issues:** Is Δ responsible for damage? **Holding:** in favour of the π  **Ratio:** **Rylands Rule –** if a person brings or accumulates anything on his land that, should it escape, may cause damage to his neighbour, he does so at his peril. **Reasoning**Δ had a duty to keep the water in.

Note: If a person continues or adopts (makes use of) a nuisance, then you will be liable, but if it was already on the land and you didn’t know, you won’t be liable for it.

## Powell v Fall – Affirms Rylands

**Facts**: Spark escaped from defendant’s train engine and landed on plaintiff’s rick of hay causing damage.

Issues: Is the defendant liable for damage?

**Holding:** in favour of the plaintiff

**Ratio:** If a person uses a dangerous machine, he should pay for the damage.

**Reasoning:**

Rylands Rules apply

If a person uses a dangerous machine, he should pay for the damage.

If the reward gained for the use of the thing will not cover the damage, it is mischievous to the public and out to be suppressed; the loss should not be born by the community or the injured individual.

## RICKARDS v. LOTHIAN [1913] – Alters Rylands Rule + Defences to Strict Liability

**Facts:** P suing D landlord for water damage after someone maliciously plugged the sink and let the tap run in the bathroom above P business. Bathroom was available to all tenants and employees in the building. No evidence of negligence. **Issues:** Does Rylands apply? **Holding:** Judgment for the D - no liability **Ratio:** (1) Non-natural has a narrow meaning: must be non-ordinary and must have an element of danger – must not be the ordinary use of land  
(2) Defences to strict liability:

* 1. Act of God
* 2. Malicious acts of strangers (to rule out family, friends, people that you have invited onto your property – you are responsible for these people)
* 3. Statutory authority – if escape was inevitable
* 4. Consent – if you consent to the presence/accumulation of the thing – that is a defence if it escapes
* 5. Common benefit – plaintiff and defendant shared a building – flooded the basement – put up eavestroughs, water was collected on the defendants side of the building in a cistern, rats chewed through the pipes and it leaked onto the defendants building – cannot sue because the cistern was for a common benefit
* 6. Default of the plaintiff
  + 1. Voluntary and unreasonably encounters a known danger, no liability.
  + 2. Wilful blindness or reckless in relation to it.
  + 3. Land is extra sensitive.   
    *Note: statutory authority, consent, and common benefit are also defences to Rylands***Reasoning:** D cannot be said to have caused/allowed the water to escape; third party caused the damage  
    The provision of a proper supply of water to the building is not unreasonable, it is in the interests of the community. It would be unreasonable to regard those who install a water supply as doing so at their own peril.

## Losee v Buchanan: Denies Rylands

**Facts:** D manufacturer had steam boiler that exploded and catapulted onto P land.

**Issues:** Is D liable for damages?

**Holding:** In favour of D. No proof of negligence.

**Ratio:** Negligence must be shown. Infringing an individual’s right is allowed if it promotes the general welfare.

**Reasoning:** Society must have manufacturers; if operations are not a nuisance and reasonable care is taken, manufacturer is not responsible for accidental or unavoidable damage caused to neighbouring property.

P is compensated by sharing in the general welfare and the right to place the same things on his land.

A note on liability for Animals

* *Liability for animals is really just negligence in disguise… - fault based*
* Owners are responsible for any damage which their well-known disposition leads them to commit (no actual negligence needs to be proven, must only prove the animal was unrestrained).
* Domestic animals: Owner not responsible for injuries they are not accustomed to **unless** the owner had knowledge of the animal’s tendency (eg. owners are only liable for animals that stray if their nature is to stray)
* Should not bring wild animals into civilization.
* Animals and water should not be compared for liability.

## Restatement (Second of Torts) US

519. General principle

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm

(2) this strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous

520. Abnormally Dangerous Activity

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) Existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) Likelihood that the harm that results from it will be great;

(c) Inability to eliminate the risk by the exercise of reasonable care;

(d) Extent to which the activity is not a matter of common usage;

(e) Inappropriateness of the activity to the place where it is carried on;

(f) Extent to which its value to the community is outweighed by its dangerous attributes [balance the value/utility vs harm/danger]

Arguments about why we should have this strict liability rule:

1. Posner J: Indiana Harbour Belt Railroad v American Cyanamid Company

Purpose of tort law is to try to deter certain activities that we do not want. We usually do this by finding people negligent. There is a problem with certain kinds of activities that you cannot be found negligent. Therefore, we need a rule for activities when you cannot be found negligent BUT you still want to deter the activity. That is why we need strict liability for ultra-hazardous activity [ie. Ballooning in New York].

2. Fairness and Utility in Tort Theory: Fletcher

In both Rylands v Fletcher and Vincent v Lake Erie, the defendant increased the level of harm to the plaintiff greater than the other way around. Strict liability allows this unequal risk to be balanced. You cannot apply strict liability in reciprocal risk cases. Negligently and intentionally caused harm is not a reciprocal risk.

## READ (appellant - A) v. J LYONS AND CO LTD. (respondent - R) [1947] – No SL for Ultra-Hazardous

**Facts:** R agent of Ministry of Supply, conducted business of filling shell cases with explosives. A was employed to inspect the shells, was required to be present in the shop. While performing her duty, explosion injured A. No negligence was proved against R (evidence of all munitions experts was that they did everything they reasonably could to make it as safe as possible) **Issues:** Is R liable? **Holding:**  R is not liable. **Ratio:** For ultra-hazardous things, persons must take care, but there is no liability apart from negligence. **Reasoning***Based on Rylands… protects rights to land – not rights to body*  
(1) Escape from land of which the defendant has occupation/control of? 🡪 No  
(2) Non-natural use of land? (*action failed on first ground)*  
In the case of dangerous things, persons must take care, but there is no liability for ultra-hazardous things apart from negligence. Cutting back strict liability and changing to fault. Ultra dangerous cases should be part of the law of negligence. The more dangerous the act, the more care must be taken. Under tort of nuisance – you cannot sue for personal injuries.

## *SMITH v. INCO [2011] –* Application of Rylands Rules: Refined What Non-Natural Use Is

**Facts:** Δ operated nickel refiner for 66 years. π argued that nickel in soil caused property values to not increase as much as they should without the nickel deposits.  **Issues:** Did the trial judge err in holding that the discharge of nickel constituted an actionable nuisance? **Holding:** Appeal allowed. Judgment for the Δ (under nuisance) **Ratio:** There is no liability for ultra-hazardous activities under Ontario Law. **Reasoning:** The mistakes that the trial judge made are: Even if there was liability, there is no evidence that nickel is ultra-hazardous. It is ordinary to refine nickel in an industrial neighbourhood and it is not especially dangerous to refine nickel therefore it is not non-natural. It was also intentional but under *Rylands v Fletcher* it must be unintentional. There has to be interference or destruction of property, the property must not just be lower in value.Applying the *Rylands Rules* there would be no liability*…*  
(1) Trial Judge confused non-natural with non-ordinary:  
(2) Even if there was liability, no evidence nickel is ultra-hazardous in the quantity that escaped  
(3) *Rylands Rule* can apply to many little escapes

* Δ intentionally spewed out nickel, this was not an accident (it wasn’t an escape)
* *Rylands* doesn’t apply to intentional release

(4) No damage to property resulted – causing someone economic loss doesn’t count as damage. Damage requires the interference or destruction of property (ie. property must have been made worse). Damage to property has to be reasonably foreseeable – HL said so (Cambridge Waterworks case) *Note:* In *Rylands*, it is clear that the escape doesn’t have to be reasonably foreseeable, but may have to prove the damage was reasonably foreseeable.

Escape can be a one off or repeated incident but NOT intentional.

Gersten (Ont HC)

Garbage dump seepage causes explosion. Courts should examine the time, place and manner of the activity.

*CAMBRIDGE WATER v. EASTERN COUNTRIES LEATHER PLC. [1994]* – Rylands: Damage must be R Foreseeable  
Use SMITH v. INCO (Ontario) 🡪 this is a UK case

**Facts:** Δ leather manufacturer used chemical solvent in its process. Over the years, chemical spilled onto concrete floor, seeped into the earth and was conveyed by percolating water to a borehole used by π to extract drinking water. This was not reasonably foreseeable. **Issues:** Is Δ liable under *Rylands Rule*? **Holding:** In favour of the Δ. No liability.  **Ratio:** For *Rylands v. Fletcher* to apply, the damage must be reasonably foreseeable [for strict liability].  
**Reasoning**The pollution of a well 1.3 miles away is not reasonably foreseeable.  
Flaw in reasoning: judge relied on case about public nuisance, therefore, unclear whether there is a requirement of reasonable foreseeability for private nuisance. You don’t have to reasonably foresee the escape; you just have to reasonably foresee the type of damage if there was an escape.

AUTHORITY CITED DOES NOT SUPPORT THIS PROPOSITION - Not every tort has the requirement of proving that damages are reasonably foreseeable – Rylands is an extension to the tort of private nuisance, so it should have the rule of reasonably foreseeable IF the tort of nuisance has this; does it? According to Lord Goth, it does (Wagon Mound #2 case – which is not a claim in private nuisance, it is a claim in public nuisance and personal injury).

*INDIANA HARBOUR BELT RAILROAD v. AMERICAN CYANAMID COMPANY [1990]* – SL Deters Accidents  
Negligence deters people from doing certain activities, but difficult to find people negligent for doing certain activities. Therefore, SL deters accidents (encourages care or the minimization of consequences by shifting where the activity occurs)

## *TRANSCO v. STOCKPORT METROPOLITAN [2004]* – Rylands Rule: Non-Ordinary Use

UK Case 🡪 Don’t rely on unless you need to for some reason **Facts:** Leak in D pipe that supplied water to a housing development percolated into an embankment and caused it to collapse, requiring the π to pay to ensure the gas main wouldn’t crack. No negligence on the part of the defendant. **Holding:** P case dismissed. **Ratio:** Claim must be non-ordinary, and have an exceptional degree of danger. **Reasoning**Did not consider whether the use was for common benefit.  
Piping of water supply was normal and routine and did not have an exceptional degree of danger. The pipe arranged a supply of water, it did not accumulate the water. *Rylands* is only engaged when use is extraordinary and unusual. Rule of Rylands & Fletcher was too entrenched in the common law to remove. However, read down rule more:

* Subspecies of the tort of nuisance – must be an escape, can never sue for personal injuries
* Non-natural use to non-ordinary use – must prove that the use was extra-ordinary (combination of dangerousness and ordinariness – danger level should be very high)
* Community benefit? No utilitarian calculations should be made.

## Burnie Port Authority v General Jones Pty Ltd., 1994 Australia

**Reasons:** Looking at Rylands v Fletcher itself it was pretty good. All the additions to it have made it not useful. Since you can say that manufacturing explosives is natural something has gone wrong. Negligence can solve all problems under Rylands v Fletcher. If something is very dangerous it needs extra care, this just creates a higher standard of liability.   
**Held:** Rylands v Fletcher was abolished in Australia

## Tock v St. John’s Metropolitan Area Board, 1989 SCC

**Facts**: The appellant suffered extensive damage when their basement flooded due to a backup of the respondent’s storm sewage system. The appellant alleges a nuisance. The respondent claims they were authorized by statute.

**Issues**: Was there liability?

**Ratio**: There can be no liability under *Rylands v Fletcher* under the facts of the case because it was for the general benefit of the public to have sewers.  
**Reasons**: Legislation was permissive. It authorized a sewage system. It did not specify how or where it was to be done. Therefore, the defendant was obliged to construct and operate the sewage system in strict conformity with private rights.

**Held**: There was a nuisance even though there was a one-off escape. Damages granted.

## Public Nuisance

* Prove the public nuisance, then prove special damage (NOT damages)
* A public nuisance is:
  + Step 1:
  + A. An unwarranted act (R v Betts) OR
  + B. Omission to discharge a legal duty
  + Step 2:
  + A. Endangered the life, safety, health, property, ~~morals~~, or comfort of the public (the number of people here DOES matter), OR
  + B. Obstructs someone in the exercise of their common or public rights – 3 public rights - pass/repass on the highways, pass/repass on navigable bodies of water at their natural depth, right to fish in public waters. Your public rights are subject to everyone else’s public rights (rights to pass/re-pass).
  + Right to pass/re-pass – the duration of blocking/obstructing a road would come into play.
  + The number of people here doesn’t matter.

In Canadian law, there are 4 things that can be done:

* 1. Indictment – endangers life or causes physical injury – beyond a reasonable doubt
  2. Attorney General can sue civilly – get an injunction in support of criminal law – balance of probabilities
  3. Relator action – when the AG lends their name
  4. Tort claim – must prove special damage:
     + 1. Direct
       2. Substantial
       3. Particular

3 factual aspects of how one can commit the tort:

1. Multiple private nuisances
2. Danger on highway
3. Obstruction of public rights

## Attorney General v Orange

**Facts:** sought an interim injunction from holding an outdoor concert

**Issue:** Is there a public nuisance?

**Argument:** D – this is a private nuisance not a public nuisance – Proper plaintiff should be landowners not the AG. So how does a private wrong turn into a public wrong? AG v PYA Quarries – something becomes a public nuisance when the neighbourhood is affected. What is enough people? Usually 12 or more?!

**Trial J** – yes there is a public nuisance because the neighbourhood is affected here – the public must have some aspect of numbers.

Public rights do not supersede private rights – if there is a public nuisance that affects a lot of people, people can still assert their private rights.

## R v Rimmington

**Facts:** Perverted guy lives in the village, and calls many women in the village with a rude monologue.

**Issue:** Is there anything more that you need to show that the public has been interfered with than a number of people?

Sued in public nuisance – HoL – took the morals out of public nuisance (not democratic/constitutional). Public has to be more than a number of people (because of retroactive principle) – has to have some sort of simultaneousness or temporal-ness. The group has to suffer together for it to be a public nuisance (contemporaneity).  
Everyone commits a public nuisance who does an unwarranted act or fails to discharge a legal duty, and thereby a) endangers the lives, safety, health, property or comfort of the public, or b) obstructs the exercise or enjoyment of public rights. Public nuisance requires a common injury.

## R v Betts

Building bridge over river – pilons put in river to help – larger boats can no longer navigate the water – a private prosecution is brought against the municipality – crime of public nuisance in creating the bridge that stopped boats from passing through this body of water. Municipality had statutory authority to build the bridge – so it is not a public nuisance – this is not an unwarranted act as it had statutory authority. Statutory authority is built into the unwarranted act.

## Morton v Wheeler (1954) It is a public nuisance to create a danger on or near the public highway. Personal injuries count as special damage.

Liability on store owner for injury/death of person that fell onto 2-foot-high spikes that he had placed around this window sill to prevent people from sitting there.

Public nuisance – created a danger on/near a highway – burden of proof is first on the plaintiff to argue that there is a danger on/near the highway. Then it switches to the defendant, to prove why they had created that danger.

The only question is: are the spikes actually dangerous? Denning – says they are not dangerous.

Highways – anything that is dedicated to the public to pass/repass on – back road, side walk, pathway, 400 series hwy, etc. What about special damage? Personal injury = special damage.

## Hickey v Electric Production Company of Canada (Nfld SC) – Obstruction of Public Rights

Waste discharge killed all the fish in a bay. Everyone has a public right to fish in public waters and navigable rivers. Particular means that the injury must be different in kind, not simply different in degree. Direct means that the injury must have been caused directly, as opposed to indirectly – trespass/case distinction.

Phosphorus plant – leaked chemicals into a bay, killed all the fish. Sued in public nuisance – given that a public nuisance exists – there is no statutory authority that allows dumping of chemicals in the water - public fishing is a right. Special damages? Must be direct, substantial and particular.

* Direct – definition? – you/your stuff that is interfered with. If the pollution affected the boats, netting or made the fisherman sick, that would be direct damage. But the pollution killed the fish, which is indirect.
* Particular – definition? Damage different in kind than anybody else in the public – more than one fisherman complaining, so no one has a difference in kind.
  + Loss they are claiming? Economic loss – pure economic loss is bad.
  + Whose rights are these? Her majesty’s – the AG doesn’t want to get involved.

**BLL – 1. Public right to fish in public waters. 2. Special damage is direct, substantial and particular. 3. Damage that is different in kind not just a difference in extent.**

Ontario Law - Directness – someone throws a log over the road, the horse trips on the log – case application (not trespass)

Ricket (HL - 1867) – building a railway, plaintiff owned pub – railway cut off the end of the pub’s road for 18 months while the construction was on-going. Statutory authority to build railway? Injurious affection – owner could not sue because direct is: Losses that flow from a violation of your rights as opposed to someone else’s rights – it was not his right to pass/repass on the highway that was interfered with, it was the public’s rights to pass/repass on the highway, so they could sue.

**BLL: Losses that flow from a violation of your rights as opposed to someone else’s rights**

## Special Damages – Different Views – Conventional (factual) & Binding (legal)

**Direct**

* **Binding – Ricket, McArthur –** Losses that flow from a violation of your rights as opposed to someone else’s rights.
* **Conventional –** distinction between trespass (direct) & case (indirect) – similar to trespass – has to be immediately affected.
* **Example –** log across public road, horse tripped on log, person was thrown from horse and were injured. This is sufficiently direct.

**Substantial**

* **Binding –** Whalen – substantial is the same as with traditional private nuisance
* **Conventional -** $$

**Particular**

* **Binding –** Rainy River
* **Conventional –** difference in kind (Hickey, Stein)

## Sutherland (BCCA):

Something can be both a public and a private nuisance – not mutually exclusive.

## Re Corby (Eng CA): Personal injuries count as special damage.

**Facts**: Cleaning up a brownfield site, dirt particles (with heavy chemicals) in the air – people breathed the particles in and P is born with severe birth defects.   
**Issues**: Is there a public nuisance? Should people be able to claim personal injury under special damage?  
**Held**: Personal injury is still recoverable under the tort of public nuisance.  
**Reasoning**: Public nuisance – about protecting people. If people suffer, they should be able to sue

## Stein v Gonzales (BCSC): Particular damage requires a difference in kind.

**Facts**: P are business owners, wanted to stop D from using property around their area for prostitution. AG didn’t want to get involved.   
Private nuisance or public nuisance? Are their private rights being interfered with? No – no interference with use and enjoyment of property, no emanations, no interference with access.  
**Issues:** Is there public nuisance?  
**Held:** Public nuisance? 1 – Unwarranted act – yes. 2. Public rights – judge says yes. Is there special damage? There has to be a difference in kind (particular), direct and substantial ($$) – no difference in kind (particular).   
**Notes:** In order to get an injunction as a private individual for public nuisance, you have to prove special damage.

## Rainy River (Ont CA): Direct means that π’s rights have been interfered with. Particular means difference in extent rather than kind.

**Facts**: P has a business that uses a boat to go up and down the river delivering packages. Construction of a dam lowered a river’s water level. The public right to pass and repass on public highways includes navigable waterways.   
**Issues**: Is there a public nuisance?  
**Held:** Yes – you can sue as long as your damages are greater in extent than the rest of the public.  
**Notes:** An unwarranted act – no statutory authority by the government here. Public rights – yes violated right to pass/repass on a public waterway. Special damage? Yes – his right to pass/repass on the river is being impacted. Different in kind – yes because he uses the river for his business while others used it for recreation.

## Tate & Lyle Food v GLC (HL) - Recovery of pure economic loss allowed in public nuisance. Particular means that the π suffered actual pecuniary loss.

**Facts**: Factory upstream (riparian owner), ferry terminal was built upstream which slowed down the flow of the water and the particulate in the stream was deposited right in front of the plaintiff’s property. The river was used for shipping the factory’s sugar. P dredged out the stream, so the ships could still reach his factory.   
**Issues:** 3 theories of liability:  
1. Private nuisance – Riparian rights (right to flow and quality of the water) – they say these things were not impacted. Right to access – can still step on/off of the property. No private rights have been interfered with. \*because no private rights were interfered with, you cannot sue in negligence.  
2. D has committed the tort of negligence – no based on 1.  
3. Public nuisance – Unwarranted act – yes (no statutory authority). Public right or issue – interference with the public right of navigation because the water has been made less deep.   
Statutory authority – damage has to be inevitable – there were other ways to build the ferry terminal, so no statutory authority as the damage was not inevitable.   
Special damage? Conventional view – no. Binding view – yes.   
**Held:** Public nuisance - As a general rule any individual that suffers actual pecuniary loss in consequence of a public nuisance can sue.  
**Notes:** Policy view of public nuisance – AG should only take on public nuisance cases because – 1. Sovereignty (crown looks after own rights), 2. triviality (cannot be small, ineffectual), 3. multiplicity (don’t want 1 person sued a bunch of times by multiple people).

## Wagon Mound #2

D was filling ship with oil, oil lit on fire and burned down significant parts of Sydney Harbour. Sued in negligence and public nuisance. In a situation with a concurrent claim in negligence the remoteness of damage issue will always be part of public nuisance (doesn’t say anything about private nuisance, so Rylands v Fletcher doesn’t apply).

## Cadeby v Denaby (Eng CA):

Floating barge anchored permanently out in a harbour. A public nuisance claim must be based on one’s own rights, not on others’.

## Whaley (Ont CA) Substantial = non-trivial.

**Facts:** Veranda extending 1 inch onto a sidewalk - Addition is interfering with their right to pass/repass on the sidewalk.  
**Issues:** Is there a public nuisance?  
**Held:** No – damage is not substantial – it does not substantially interfere with your right to pass/repass on the sidewalk.

## Upper Ottawa (SCC) Public right of navigation does not include right to flow of river.

**Facts:** Log drivers on river – to public road where they are taken out of the river. D buys land on the river and wants to build manufacturing plant – so he takes water from river and runs it through his plant for energy. Causes river to come to a stop (issues with the flow). Creates a logjam, and boats have to be hired to pull boats down the river. P sues D for interfering with river flow.  
**Issues:** Valid claim in public nuisance?  
**Held:** No claim in public nuisance.  
**Notes:** Unwarranted act – yes. What rights are affected? Speed of the river – does it fall under riparian rights or right to pass/repass. This is part of the riparian rights (private right), and the logging company is not a property owner, so they cannot sue for the loss of flow.

## St Pierre (SCC)

**Facts:** New highway built by rural home. P sued for public nuisance.  
Issues: Is this public nuisance?  
**Held:** No public nuisance.  
**Notes**: Private nuisance claim – no – no interference with use and enjoyment. Diminution of property value isn’t relevant unless there is a rights violation.  
Public nuisance – Unwarranted act? Yes. Right to pass/repass – no – they added a new road, no other road was dead-ended or changed.

## Definitions/Notes

* **Reasonable use of land** - The courts are not concerned with whether the defendants use of their land is reasonable – does it impact their neighbours use and enjoyment of their land?
* **Injunctions** - If you don’t follow an injunction, you can be held in contempt of court – you can be fined first, and then also sent to prison if you continue to not follow the injunction. An injunction is discretionary – based on the judge’s discretion and a list of factors to determine when to apply
* **Damages** - A payment of damages is not discretionary – if you do not pay damages to a private entity/person, your wages may be garnished, or your personal belongings auctioned off until payment is met. You cannot be sent to prison for not paying damages; you can negotiate a payment schedule for damages with plaintiff if needed.
* Tort of nuisance protects – two halves – amenity and damages – damages to real property (real estate) – use and enjoyment of your land
  + Amenity nuisance – when is interference actionable under the law – where it is substantial – is a wrongful interference

**Easement** - An easement is a right that someone has to do something on someone else’s property—it’s a property right; you don’t actually own the land; you own the right to do something on their land. i.e. beach access—other people have an easement to get to the beach by walking over your land. You can get easement through a transfer from someone else; or could be implied by law i.e. if u sell landlocked property, the law gives u an easement (otherwise you’d be stuck on the property forever); can also give someone an easement if you allow someone to use your property for a prescribed period of time (generally 20 yrs—assume that FOR EXAM) = easement by prescription/easement by acquiescence—acquiescence = acceptance without protest

How to calculate damages for property - How much the capital value of your property has been decreased because of the nuisance – e.g. Stevens – how much is your property worth with your riparian rights? Then, how much is that property worth now that you have made the river an open conduit for sewage?

* Distinction between two types of damages (judges have been doing this for centuries without telling us they have been doing this)
  + Substitutive – measured objectively – not subject to principles of limitation, such as mitigation and remoteness
  + Consequential – measured subjectively – how did they affect you? Subject to doctrines of mitigation and remoteness – subject to proof – you have an obligation to take reasonable steps to minimize your damages (doctrine of mitigation). Harms that you have suffered must be reasonably foreseeable (doctrine of remoteness).
  + Stevens case – the tort of nuisance is consequential – cannot prove that you have suffered losses in the past.
  + Conventry v Lawrence – can get substitutive damages for the past
  + Hunter v Canary Warf – ask what would be the monthly leasing value without a nuisance, then, how much would someone rent that property with sewage floating in the river? Subtract one from the other, multiply that by the number of months you were subjected to that nuisance to find the damages.
  + Make the distinction between substitutive and consequential damages
  + Damage requirement – unreasonable interference in use and enjoyment NOT losses.
  + Ashby v White – false imprisonment during election – they aren’t owed anything because their political party still won. Had an entitlement to vote, that right was violated, so they received damages.
  + Tort of nuisance claims
    - Consequential damages for the past, plus injunction for the future
    - If no injunction granted, claim substitutive damages for the future
* ***res judicata****:* things previously decided - if you have an issue, you have to raise all the points at the same time, can’t keep going back again and again (one kick at the can)