TORTS SUMMARY

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# Introduction

## History of Tort Law

**DO THIS EVENTUALLY LOL**

# Nuisance

**Nuisance**: Substantial and Material interference with the use and enjoyment of land in the possession of another

* Generally being used in a legal way, still causes interference

FINISH THIS UP LOL

## The Grounds of Liability

### Appleby v Erie Tobacco (1910) (Ontario High Court)

**Facts:** Tobacco factory near P’s house, odors emanated onto P’s land. Most people find the smell extremely sickening. Odors cannot be prevented, and D is trying their hardest to keep the smells small.

**Issues:** Does the smoke and smell constitute a nuisance?

* Test for Nuisance: Does the odor **substantially and materially** interfere with use and enjoyment of D’s land? (Use reasonable person standard as well as community standard)
	+ Doesn’t have to endanger life or cause physical detriment
	+ Community Standard – take it into account, but nuisance can not be thrown under the table because the community standard is higher/lower
* **NOTE** that even though D’s use of the land is reasonable, it still constitutes a nuisance
* Even though the factory may be in the public interest, upholding someone’s rights are more important

**Holding:** YES, this is a nuisance, interferes heavily with use and enjoyment – cannot estimate damages in $, but gives a stayed injunction of 6 months to give D a chance to fix smell

**Notes**

* The plaintiff would NOT have been able to recover if the smoke had simply lowered the value of his property
	+ You don’t have a right to the value of your property

### Rogers v Elliot (1888) (Massachusetts Supreme Judicial Court)

**Facts:** D ringing church bell often during the day, P has seizures due to sun stroke. P asked D to stop, D said no because calling people to mass was more important.

**Issue:** Does the ringing of the church bell constitute a nuisance?

* Based on the reasoning of the previous case, we would say yes
	+ However, this person is especially susceptible to this thing – he isn’t a regular person
* Standard for determining nuisance: would an ordinary/reasonable person be affected by this?
	+ This makes sense, otherwise the law would change every time there was a new neighbor
	+ Morality and law are not connected – even though we feel bad for the guy, he isn’t necessarily in the right

**Holding:** The ringing of the bell did NOT constitute a nuisance

**Notes**

* Judge believed that the convulsions were caused by the church bell, but ruled against him anyways because he is not a reasonable person
* It doesn’t matter how much he suffered, there was no violation of rights – imposing an injunction on D would be violating his freedom too much
* If P had an intent to harm D and D could prove it, then the case would be different

### Mayor of Bradford v Pickles (1895) (House of Lords)

**Facts:** Town has reservoir of water that P uses to supply community – D has a house on higher ground and stops water from flowing into the reservoir. P sues in nuisance, saying unreasonable and substantial interference with land, with malicious intent.

**Issue:** Does malicious intent matter? Do you have a right to water?

* Malice doesn’t matter if they are acting lawfully
	+ You have no claim in nuisance for things that you don’t have a right to
* Distinction between emanations and preventions
	+ **Emanations** – something is coming onto your land, getting into your magic carrot
	+ **Preventions** – stopping something from getting onto your land – have to prove that you have a right to the thing, and that you are being deprived of it
* Riparian rights: right to water from a river or stream in its ORIGINAL quantity and quality
	+ No right to percolating water, therefore P has no right to the water coming into the reservoir
* You can use your rights to abuse someone, as long as you are acting lawfully

**Holding:** D has a right to his own property; P has no right to the water flowing into the reservoir

### Hollywood Silver Fox Farm v Emmett (1936) (Kings Bench)

**Facts:** P breeds foxes, needs silence. D wants P to remove advertising sign as it interferes with his own business – P refuses, and D gets his son to shoot a gun and make noise to interfere with silver fox breeding.

**Issue:** Is malice relevant? Does the sensitivity of P’s farm matter?

* Because this is an issue of malice, the oversensitivity of P doesn’t matter
* Shooting the gun is an unreasonable interference, done on purpose
	+ You can’t use your rights to infringe on someone else’s rights
	+ No actual benefit of shooting the gun, only used to cause a nuisance to neighbors
* ***Bradford*** would have had a claim in malice if they had the right to the water, but they didn’t

**Holding:** D can’t rely on special sensitivity if P has rights and it is a deliberate nuisance

### Fontainebleau Hotel Corp v Forty-Five Twenty-Five (1959) (Florida District Court of Appeal)

**Facts:** D’s hotel interfering with sunlight on P’s land – light was required for business (beaches, etc.). Trial Judge ruled that it was a substantial interference.

**Issue:** Does P have a right to sunlight and fresh air?

* The trial judge misconstrued the Latin expression
	+ The expression says not to use your rights to injure the RIGHTS of others, not just don’t use it to injure others
* P has no legal right to unobstructed light and fresh air from the adjoining land
* Universal Rule: Where structure serves useful and beneficial purpose, it doesn’t give rise to cause of action, even though it causes injury to another by cutting off light and air
	+ Court ruled that the extension to the hotel serves a beneficial use
	+ Even though it may have been constructed in that location partially out of spite, since P has no right to sunlight, malice is irrelevant
* **Two Steps for a Tort:** To succeed in nuisance claim, you must FIRST show that you had a right to the thing being interfered with, THEN show that the interference is substantially and materially interfering with your use and enjoyment of land

**Holding:** Ruled in favor of D, injunction removed

**Notes:**

* Ad coelom – you own property down to the center of the earth, and up to the heavens
	+ Modern cases limit this to usable land above and below
* Right of lateral support – you have a right to the support of your neighbors land
	+ Only your LAND has this right, does not extend to buildings or structures on land
* Right of Access: Right to step on and off your property anywhere it touches a public road
	+ People can not leave things on your property
* Incorporeal Hereditaments
	+ Easement: A right to cross or use someone else’s land for a specified purpose
	+ Profits (a prendre) – Right to take something from someone’s land

### Bryant v Lefever (1879)

**Facts:** D builds a new house that is higher than before – now when P lights a fire the air channel is blocked, and the smoke stays in the house

**Issue:** Does P have a riparian right to air?

* Don’t have a right to free flow of air
	+ Additionally, P’s problem is self-induced – stop lighting fires if you get smoke in your house
	+ No riparian rights to air – only apply to water
* Doesn’t matter who was there first, only matters if rights are being infringed

**Holding:** Ruled in favor of D, no claim in nuisance

### Prah v Maretti (1982) (Wisconsin Superior Court) NOT BINDING IN ONTARIO

**Facts:** P owns solar powered house – D’s house prevents light from getting onto P’s property

**Issue:** Does P have a right to sunlight?

* P initially has no right to light
* Balance – P must be expected to endure some inconvenience, D must use his property in a way that causes no unreasonable harm to P
* New policy reasons for courts to provide rights to sunlight
	+ Sunlight now has an actual use (solar energy) instead of being just purely aesthetic
	+ We don’t have a rush to encourage people to build nowadays
	+ Before the rights of landowners to use land was heavily guarded. Now we don’t care as much as long as it is for the general public welfare
	+ Society has progressed, the law of torts should as well
* Note that this creates an incoherence in the law – property law says no right to light, now nuisance says there is
* You can argue that this case is wrongly decided – **NOT BINDING IN ONTARIO**

**Holding:** P does have right to sunlight due to new policy changes

### TH Critelli Ltd v Lincoln Trusts and Savings Co (1978) (Ontario High Court of Justice)

**Facts:** New height of D’s building caused snow to fall onto P’s building – P was there first

**Issue:** Does the snow falling onto P’s roof constitute a nuisance?

* Being there first can be a defence sometimes – if you come after and can reasonably foresee that there will be a nuisance, you will be responsible for damages if you don’t take steps to prevent it
* Does he have a right to the airflow that causes the snow to fall onto his roof?
	+ NO – Found in ***Bryant*** – judge doesn’t take this into account
* 2nd test for nuisance:
	+ Is it foreseeable?
	+ Is it important?
	+ This test isn’t correct – can’t explain ***Fontainebleau, Bryant, Bradford****, etc.*
	+ Not consistent – again, judge doesn’t take ***Bryant*** into account
* Neyers considers this a preventions case, but if you look at the snow it’s an emanations case
	+ This case isn’t even argued either way

**Holding:** Ruled in favor of P – this was a reasonably foreseeable nuisance

### Hunter v Canary Wharf (1997) (House of Lords)

**Facts:** D constructed building between TV transmitter and P’s home – interfered with TV reception. P2 also had a car which was accumulating dust from the construction. P2 does not hold property rights in the house.

**Issue:** Does P1 have a right to watch tv? Does P2 have a right to a clean car?

* Mere presence of building can’t give rise to a private nuisance
	+ Something needs to emanate from the land or be an offensive activity – in this case, there is neither of those
* P1 has no right to receive a tv reception – doesn’t infringe on any property rights
* P2 has no rights because its not his property – tort of nuisance is a tort against land – no rights to land, you can’t sue

**Holding:** Ruled in favor of D – P has no right to a tv signal or a clean vehicle

**Notes**

* This case is rightly decided but ***Critelli*** would say that this nuisance could have been reasonably foreseeable
* As in other cases, blocking something isn’t a nuisance, but emanating is

### Hay v Cohoes (1849) (New York)

**Facts:** D caused damage to P’s property by blasting dynamite while excavating a canal – big chunks of stone were landing on P’s land

**Issue:** Did D’s actions constitute a nuisance?

* Rules of nuisance are designed so everyone has use of their property
* Better that one party give up their use before destroying use of the other
* **If rights conflict, it is better than one man should surrender a particular use of his land than another should be deprived of the beneficial use of his property altogether**

**Holding:** Ruled in favor of P, this constituted a nuisance

### Shuttleworth v Vancouver General Hospital (1927) (British Columbia Supreme Court)

**Facts:** Hospital intents to open infection disease hospital across the street from P – Building is reinforced concrete structure and P can see into some hospital rooms – P wants a ***quia timet*** injunction (for things that haven’t happened yet)

**Issue:** Does the erection of the hospital constitute a nuisance?

* P’s arguments and the courts response
	+ Crying children – a bunch of children crying frequently will be noisy
		- Courts response: no proof that this will occur, and no guarantee that it will constitute a substantial interference
	+ Emotional Harm – P’s sympathy for human suffering will interfere with comfort
		- Courts response: emotional damage based on sentiment doesn’t count as damage – if anything you should be happy that they are getting help
	+ Risk of disease or infection
		- Courts response: No actual proof of possibility of infection
		- IF there was proof, there’s still no guarantee it would constitute a nuisance – the plaintiff should have gotten direct testimonies from multiple medical experts
	+ Loss of Property value
		- Courts Response: The fact that property value might go down isn’t a nuisance
		- You do not have a right to the value of your property

**Holding:** Ruled in favor of D, no injunction granted

### Laws v Florinplace Ltd (1981) (English High Court of Justice)

**Facts:** Residents want an injunction for porn store because they say it is a nuisance

**Issue:** Do little girls have property rights? If so, do they have a right to nuisance?

* Plaintiffs allege
	+ Nature of business offends them
	+ Business will attract unwanted clients
	+ Will accost local girls
* Nothing emanating from this shop – is difficult to reconcile with previous cases
	+ Shows the courts prudishness about sexual matters – mere presence = offence
	+ Neyers says that this is dumb and inconsistent with ***Shuttleworth*** – shouldn’t constitute a nuisance
	+ Other problem – people don’t have priority rights – the local girls don’t own the land
* Neyers contends that this is wrongly decided – stands for a principle that COULD exist, but doesn’t in this case

## Legal Process and Public Policy

### Holmes, “Privilege, Malice and Intent” (1894)

* Judges SHOULD be measuring gains on one side vs losses on the other side
* You have a right to interfere with other views, open competing shops, have freedom of information
	+ Economic postulate that free competition is worth more to society than it costs
	+ Free access to information is better than no information
* Judges don’t necessarily apply this theory on the cases up to this point

### Bamford v Turnley (1862) (Court of Exchequer)

**Facts:** D has brick making factory which creates a lot of smoke going onto P’s property

**Issue:** Is the smoke emanating from D’s property a nuisance?

* Judge admits that the smoke does seem like a nuisance, but there must be exceptions
	+ Acts necessary for the common and ordinary use and occupation of land may be done without subjecting those who do them to an action
	+ This principle does NOT apply to this case, as D isn’t using the land in a “common and ordinary” way
* Public benefit argument:
	+ Something is only in the public benefit when it is productive of good on the balance of loss and gains
	+ Whenever something is for the public benefit, the loss of people who lose will have to be compensated from the gains that are made
	+ If the profits are enough to compensate P, then D should compensate them
		- If the profits aren’t enough to compensate P’s losses, then D shouldn’t do it
	+ It would be unjust to permit power of inflicting loss and damage to individuals without compensation
* **Public benefit is not by itself a defense against nuisance. However, it is a defense if you are committing ordinary acts that are conveniently done**

**Holding:** Judgement in favor of P

**Notes**

* Economic efficiency models
	+ Kaldor-Hicks: if you can make enough gains to outweigh the losses, you don’t have to pay anyone – As long as it leads to more winners than losers, its efficient and you don’t have to compensate losers
	+ Pareto Efficient: If you can make one person better off and no one is made worse off, then it is for the public benefit – if someone is worse off, you should compensate them
		- Everyone has to be no worse off and at least one person has to be better off

### Miller v Jackson (1977) (English Court of Appeal)

**Facts:** Millers purchase a house on the edge of a cricket pitch which has been around for 70 years – P concerned about safety when cricket balls fly into their yard and break windows – Crickey club took preventative measures, promised to pay for damages, still some balls reached P’s land

**Issue:** Is having balls be hit into your backyard a nuisance?

* **Denning:**
	+ Cricket ground was there first so they have rights to continued land use – developers shouldn’t have been able to build homes so close to the field
	+ D did everything possible to see that no balls went into P’s land – D also offered to remedy all property damages, as well as install better windows
	+ Old law: every time a ball went over intentionally, it was a trespass. Every time a ball went over unintentionally, it was a nuisance
		- If P picked up balls for their own use, it was conversion
		- Would have a claim in nuisance once it was proved that it was interfering with use and enjoyment of land
		- No easement to hit cricket balls into someone else’s land
		- In 19th century, P would have one
	+ New law: Modern test for nuisance – was the defendant making a reasonable use of his property?
		- Using cricket ground as cricket ground – reasonable use of property, so it can’t be a nuisance
			* Building new houses doesn’t make it into a nuisance now when it wasn’t one before
		- Need to balance interests of neighbors
			* D’s use of land for 70 years > P’s right to sit in garden undisturbed
			* P should have foreseen this problem when moving in
		- Public interests v private interests
			* Public interest in having green space and watching cricket > private interest to sit in garden
		- Because the D’s are so nice, give them damages but no injunction
	+ **Problem:** Denning didn’t follow rules of substantial interference constituting nuisance – didn’t follow binding decisions without giving good reasons
* **Geoffrey Lane LJ:**
	+ Proper test for nuisance is unreasonable interference with P’s land – NOT whether your land use is reasonable
		- In this case, there is clear substantial and material interference
	+ Doesn’t matter who is there first
		- Says he is bound by ***Sturges*** – he doesn’t like the rule, but he is bound by precedent
	+ Remedy: postpone injunction for 12 months to allow D to find a new field – damages won’t suffice because they don’t give adequate compensation.
* **Cumming-Bruce:**
	+ Agrees with the test from Geoffrey Lane (there has been a substantial and material interference) – this becomes the RATIO of the case
	+ Still disagrees with injunction, says the interests of the public need to be considered
		- Says he is under duty to consider public interests – sometimes people have to put up with interferences in the interest of the public – P should leave garden during matches and accept the net that D says they will put up
	+ Awarded damages, no injunction

**Holding:** Ruled in favor of D – No injunction granted, but ordered to pay damages

### Kennaway v Thompson (1980) (English Court of Appeal)

**Facts:** P inherited land next to body of water where water skiing and boat races took place – Sued for injunction to stop noise during certain times

**Issue:** Did the noise constitute a nuisance?

* D argued similar to Denning in ***Miller*** – D was there first, public interest in having open access to water, body of water is being used in a reasonable way
* Court’s Reasoning:
	+ Not for the courts to decide what is in the public interest
	+ Disagree with what denning said – being there first doesn’t matter, reasonable use test is a bad test
		- Basically, they disagree with almost everything Denning said
		- They are not bound by Denning’s decision in ***Miller*** because Denning’s reasoning wasn’t the RATIO
	+ Issue a partial injunction so that the public can still use land – P cannot have no interference, but is entitled to not have a SUBSTANTIAL interference
* Shows that there is the possibility of a partial injunction
* Also shows that public interest doesn’t always prevail, even when granting injunctions

**Holding:** Ruled in favor of P, injunction granted

### Sturges v Bridgman (1879) (English Court of Appeal)

**Facts:** P next door to D who had a confectionary shop for over 20 years – P builds a consulting room for his patients along same wall, now the pounding from confectionary shop is disturbing patients

* D’s arguments
	+ Community standards – there are other confectionary shops around
	+ He was there first
	+ Acquired an easement to make noise
* Courts Response:
	+ Community standard isn’t a trump card – still has to be reasonable community standard
		- Community standard doesn’t control nuisance – while community standard can be relevant in determining nuisance, it has its limits
	+ Being there first isn’t a defense – just because you were there first, doesn’t give you an entitlement
		- P didn’t know about the noise until he built the addition
		- It would be unfair to take over someone’s property just because you are there first
		- The bakery can scale back the activity, move the activity, or buy P’s land
	+ You can’t get an easement if owner doesn’t have knowledge, if he wants to stop it, or if it’s just a temporary license
		- You can get an easement by prescription, but has to be “without force, without secrecy, and without permission”
		- P couldn’t have granted an easement by prescription since he didn’t know about the noise
* Neyers says this is a good decision – good case to follow

**Holding:** Judged in favor of P

### Re Ellenborough Park – Rules for Easement by Prescription

**Four Criteria in Making an Easement**

* Must be a dominant and servient tenement
* Must accommodate dominant tenement
* DT and ST must have different owners
	+ 20-year prescription period doesn’t start until it is no longer under your ownership
* The right asked for must be able to be granted
	+ Easement can be a right to do something, or a right to not have something done
	+ It CANNOT be a right to have something done for you
	+ Also, cannot be a right that affects the whole land – can’t negate the owners fee simple
* Coase – in a world with logical people, efficient solutions always win – the order of the court means nothing
* Epstein – harm is not reciprocal – taking someone to court isn’t harm

### Tock v St John’s Metropolitan Area Board (1989) (Supreme Court of Canada)

**Facts:** P suffered damage when basement flooded after heavy rain as the result of a blocked sewer – P says flooding is nuisance and sues for damages – D raises defense of statutory authority

**Issue:** Does statutory authority save the city from a nuisance claim?

* Unreasonable interference with use and enjoyment of property? YES
* Three cases for statutory authority defense (MAJORITY ARGUMENT)
	+ 1 – MUST: (explicit) duty + inevitability of damage - you MUST build a sewer system, and it MUST be there – this is a defence, since the city really has no power
	+ 2 – MAY, MUST: (implicit) may do something, but if you do it must be done in this way
		- You don’t have to build it, but if you do, you have to follow these rules
		- Also a valid defense
	+ 3 – MAY, MAY: may do it and do it at your own discretion – NO DEFENSE of statutory authority, since you had control over all circumstances – EVEN IF DAMAGE IS INEVITABLE
* This case falls into the 3rd category, so SA is no defense
* Laforest says that inevitability doctrine is silly, what’s reasonable or unreasonable is the important factor
	+ His test for nuisance – did it have an effect on your land, and is it reasonable to give you compensation?
		- If one person suffers a lot of damage, it’s reasonable to compensate them
		- If lots of people suffer minimal damages, no reason to compensate only one person
	+ In this case, just P with damage so he should get compensation
	+ Wants to spread damage across everyone benefitting from the system, not just the one person who suffered the damage (raise taxes to cover the judgement)
* Sopinka – agrees with Wilson’s test for nuisance:
	+ Disagrees with statutory authority test
	+ She says that defence has to prove has to prove that this was the only practically feasible way to carry out the work
	+ Doesn’t want to hear arguments about money

**Holding:** Judged in favor of P

### Ryan v Victoria (1999) (Supreme Court of Canada)

* “Statutory authority provides, at best, a narrow defence to nuisance”
	+ “in the absence of a new rule, it would be appropriate to apply the test as set out by Sopinka” – **SCC FOLLOWS TEST FROM SOPINKA**
* Sopinka: defendant must negate that there are alternative methods of carrying out the work. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance
	+ Just because one is more expensive doesn’t make it practically infeasible
	+ In this case, it was practically infeasible to pay for the alternative method – even Sopinka realized that sometimes when cost is practically infeasible, it can work

### Susan Heyes v Vancouver (2011) (British Columbia Court of Appeal)

**Facts:** Government of Vancouver promised to make subway to secure bid for Olympics – legislation said that they were allowed to make the subway however they liked. Susan Heyes lost lots of business because there was construction Infront of her shop and they were piling dirt up against store

**Issue:** Can the city use the defense of statutory authority?

* The city had two options
	+ Tunneling: less obstructive to the city, but was more expensive and more dangerous
	+ Cut and cover: More obstructive, but cheaper and safer
	+ The city chose cut and cover
* D said that the option to cut and cover was necessary – only feasible option
* BCAA used Sopinkas reasoning in ***Tock*** to say that the city proved that this was the only option
	+ Under Wilson’s reasoning, it would have been ruled in favor of P since technically there was an alternative

**Holding:** Judged in favor of D – trial decision overturned

### Antrim Truck Centre v Ontario (2013) (Supreme Court of Canada)

**Facts:** P owned truck stop – D reconfigured highways in the area and passed legislation to build a new highway – D essentially put P out of business cause now he was out of the way of the highway – P sued for reduction of property value and injurious affection

**Issue:** When are governments protected? What does reasonableness mean in relation to government activity?

* In order to make a claim under expropriations act, you have to prove
	+ SA authorizes nuisance
	+ It would be a nuisance/tort if it had been done without SA – have to prove it in this particular case
	+ Existence because of the thing not in use
* Previously, the Ontario municipal board gave P compensation, ONCA said D wins because replacing a dangerous highway with a safer one is an essential public service
* 2 aspects that you need for test of nuisance
	+ Substantial interference
	+ Unreasonable – balance harm vs utility
* We don’t look at D’s conduct, we look at the effects on P and whether this was reasonable
* How should reasonability be assessed if it is for public good?
* Balance of Harm (P) vs utility (D)
	+ Harm
		- Frequency and duration of the interference
		- Type of harm (gravity/severity)
		- Character of neighborhood
		- Sensitivity of P
	+ Utility
		- Malicious intent
		- Negligence/carelessness
			* If damage WAS NOT NECESSARY, then you are negligent – if you could have gotten the exact same result without causing a nuisance, then you can’t argue utility in relation to the outcome
		- Public utility
	+ This may be confusing, so here’s a real test – whether it’s reasonable to compensate
		- You should be compensated if you are bearing a disproportionate burden in the interest of the public good
* Purpose of the test is so that individuals don’t have to bear disproportionate share of the cost of procuring the public benefit
	+ Is it reasonable for P to bear interference without compensation?
	+ In this case, P shouldn’t be expected to endure permanent interference in order to serve greater public good
* But you don’t have value to your property?
	+ Its not just the value of his property that decreases, the public also doesn’t have proper access to his business that they used to – interferes with his right to access property
	+ He has a right to pass and repass a road as it was – this is infringed here
* This case was rightly decided but for the wrong reasons – this is a PUBLIC NUISANCE CASE

**Holding:** Judgement in favor of P

## Remedies

### Coventry v Lawrence (2014) (UK Supreme Court)

**Facts:** P own house near speedway – City approved use of speedway and expansion

**Issue:** Is coming to the nuisance a defence to the tort of nuisance? How does one figure out what the community standard is?

* Is coming to a nuisance a defence against nuisance?
	+ Old notion: if P bought property and then changed use of land, coming to a nuisance may be allowed – being there first could be a defence
		- In the present case there was no change, so this principle does not apply
	+ Not a binding case in Canada
* How to determine community standard?
	+ One should include D’s use into the community standard only so far as their use is not a nuisance
	+ Don’t take D’s actions into account, and then look at if D fits community standard
* It is possible to obtain a prescriptive easement to emit sounds
* Planning permission has no use as a defence in private law, only in public law – irrelevant to whether an activity constitutes a nuisance
* Where a claimant builds on or changes their use of land, it may well be wrong to hold that the D’s pre-existing activity gives rise to a nuisance as long as:
	+ Its only a nuisance to the senses
	+ Nobody complained about it before
	+ The claimant is using their land lawfully and in a reasonable way
	+ Their actual activities are done in a reasonable way
	+ Whatever they’re doing causes no greater nuisance today than it did when they started

**Holding:** Ruled in favor of D

### Shelfer v City of London Electrical Lighting (1985) (Court of Appeal England and Wales)

**SHELFER RULE:** Whether there should be damages or injunction for nuisance

* Default remedy for nuisance is injunction
* Can award damages instead of an injunction if ALL OF THE FOLLOWING ARE MET
	+ Small interference with rights
	+ Is capable of being estimated in money
	+ Can be adequately compensated by small money payment
	+ It would be oppressive to D to grant an injunction
	+ Possible 5th element – Concern for public benefit
* Might have cases where 4 circumstances are met but D’s conduct disqualifies him from asking for damages instead of an injunction – ex. Trying to avoid injunction by hurrying up his building
* Rules are context specific - $ payment may be small to a corporation, but large to an individual
* Some applications of this rule
* Example – 2 houses are built close together, part of the roof leaning over property line
	+ 2 choices
		- Tear the whole house down (injunction)
		- Order a small monetary payment (small interference with rights)
		- If you built house really fast so that you can try to use the fact that the house is already built as a defence, the courts will not like that and might order you to tear it down

### Canadian Paper Company v Brown (1922) (Supreme Court of Canada)

**Facts:** P owned land for a long time, then built cottage home – D had paper mill nearby which was the most important industry in the city. D was there before P, P knew this, but after P built cottage, D started emitting new fumes which made the house unlivable for P

**Issue:** Can D apply any defenses in this case?

* D argued that mill was important to the town and provided jobs for many people
	+ Court said that this defense doesn’t work because the property of the town could be enhanced by use of new and less toxic practices by factories
* SCC says that they are not legislators – they only care about rights, not effect on the public
	+ How are the courts supposed to know what is the public interest?
	+ There is no one representing the public in the court
* P has a right to their land – If D is interfering with those rights, then there is a problem
* What does it mean for something to be a public good?
	+ Denning – Paper should win, much more important for society
	+ Kaldor-Hicks – Weigh benefits and losses, whichever is more beneficial should win
	+ Pareto efficiency – should see if Mill can adequately compensate plaintiff. If they can, then they should and if they can’t then they should be shut down
	+ **Traditional legal view** – We don’t care about public good, only care about rights
* If the issue is of dire public importance, then the Paper Company should go to the legislators to get a bill passed – courts have no interest in preserving public good

**Holding:** Courts ruled in favor of P, public policy is a job for legislature

### Black v Canadian Copper Co (1917) (Ontario Supreme Court)

**Facts:** Smoke from smelting of nickel from D’s company ruins P’s carrots farms and gardens – P asks for injunction

**Issue:** Does D have a defence of public interest?

* Nickel was too important to the world to shut down the mine – no injunction, P’s case turns to damages
	+ It would be better to keep nickel production open even if a few farms are ruined
* You need to have people working to be able to buy veggies – if they aren’t working, then what’s the point of having your farm
	+ This consideration induced P to abandon injunction and look for damages instead
* This case did NOT follow the Shelfer rule
* This case was also ruled opposite of ***Brown***
	+ In ***Brown***, the judge found that P shouldn’t be deprived of rights, even if it meant shutting down an important mill
	+ ***Brown –*** Rights based decision
		- ***Black –*** balance of interests-based decision

**Holding:** Ruled in favor of P – damages awarded, no injunction

### Boomer v Atlantic Cement co (1970) (New York Court of Appeals)

**Facts:** D had cement plant – neighbors brought actions for injunction and damages due to smoke, dirt and vibrations

* Court ruled that the economic consequences of an injunction wouldn’t be balanced with the severity of the nuisance
	+ Even though there was a nuisance, P couldn’t get an injunction
	+ Court said that the plant was too valuable to the community
* Factory had already spend a lot of money on the plant – couldn’t accurately estimate damages
	+ Note that this is the opposite of the Shelfer rule – gave damages when it didn’t meet the criteria
* No point in temporarily stayed injunction, as there is no assurance that any technical improvements will be made in that time – unfair to cement company
	+ Can’t penalize one company that hasn’t been solved by the entire industry
* Court basically created an easement on P’s land to let D allow smoke to emanate
* Lord Cairns’ Act – **When an injunction would be unfeasible or impractical, court can award damages in lieu of inunction (US ONLY)**

**Holding:** P got damages for past and future, but no injunction

### KVP Co v McKie (1949) (Supreme Court of Canada)

**Facts:** P were landowners on river and use it for tourism and agriculture – D had paper/pulp mill that polluted the river, causing odor and pollution – water not the same quality as before

* At trial, it was ruled a nuisance – offensive smells interfere with use of land – awarded damages and injunction
	+ Subsequently, Ontario legislature amended lakes and rivers act so that injunction could be refused based on public benefit
* On further appeal, SCC found that amended statute didn’t affect current litigation since it wasn’t the law at the time of offense
	+ In response to this, legislature passes KVP Co Act to say no injunction against polluter
	+ In its place, P receives large damages
* This case shows two things – this is the proper way to do it, and that the legislators will fix things if it is truly for public benefit

**Holding:** Legislative Intervention

### Stephens v Village of Richmond Hill (1955) (Ontario Court of Appeal)

**Facts:** D owns sewage disposal plant by river – P owns land downstream and sues for damages and injunction

* Trial court gives injunction and damages
	+ There was no legislature decree, no statutory defense
	+ SHELFER RULE – Says nothing about past damages
		- Equitable damages – damages for the future in lieu of injunction
		- Trial judge granted damages because of past harm, and injunction for future
* ONCA Agrees but gives different reasons
	+ In order to claim past damages, you mush show proof of actual losses
	+ P had prima facie case in nuisance
	+ P’s proprietary rights are interfered with – Shelfer rule is not applicable here
	+ City had no statutory authority
* ON legislation passes an Act to retroactively grant SA – dissolves injunction but preserves damages

**Holding:** Legislative intervention

**Notes**

* To determine damages
	+ If property damage, figure out what property is worth with/without damage, then the difference is the damages to be awarded
	+ To assess past damages, figure out rental values at that time and then work from there
	+ Damages should never vary from person to person
	+ NOTE: property value diminishing is not a legal wrong
* Sometimes you don’t even have to prove loss
	+ How much would the property have rented for without the nuisance? How much would it rent for with the nuisance?
		- Damages are the difference x the duration of nuisance
* 2 types of damages in private law
	+ Substitutive damages – Past interferences that are meant to substitute for the right
		- Done objectively
		- Assessed at the time of the right being infringed
		- For reasonably foreseeable nuisances
	+ Consequential Damages – because rights were infringed, you suffered loss
		- Done subjectively
		- Assessed at date of judgement
		- Subject to remoteness/mitigation
	+ You are entitled to the greater of the two if you are getting damages for the same thing

### Spur Industries v Del E Webb Development Co (1972) (Arizona Supreme Court)

**Facts:** D (Spur) owned a cattle feed lot that existed for a long time in the middle of nowhere in agricultural district – P (Webb) purchased cheap land by feedlot and made a home development – as development grew, it came closer to feedlot until P encountered sales resistance because of flies and smell from D’s land

**Issues:** Is the farm liable for nuisance even though their actions are legal? If the nuisance is given an injunction, can P be forced to pay for the execution of the injunction?

* **Compensated Injunction is limited to a case where developer has with foreseeability brought into a previously agricultural area, a population which makes necessary the granting of an injunction** **(never followed in US and will probably never be followed in Canada)**
* Property and legitimate regard for the rights and interest of the public was deciding factor behind judgment
* It does not equitably or legally follow that P is free from any liability to the D
	+ P brought people to the nuisance – P should help with costs of moving or shutting down
* The courts reasoned that there should be an injunction properly
	+ There was a substantial nuisance, and Shelfer test didn’t apply here
	+ However, court says that D has to pay costs since this was **FORESEEABLE**
	+ Court says that P isn’t the victim, the homeowners are the victims, so P should have to pay as well
* Dissent: You can’t win the case based on someone else’s rights

**Holding:** Ruling for P, but P has to pay D’s moving costs

**Notes**

* Not great authority, but can be used if necessary – Neyers says developers shouldn’t have had to pay
* Webb has a right to develop its land, spur has no right to commit a nuisance
* What if the homeowners had sued instead of the developers?

### Lemon v Webb (1894) (House of Lords)

**Facts:** P planted trees on his property, which overhung onto D’s property when they grew – D cut off branches that were on his property

**Issue:** Did D’s actions constitute a nuisance?

* **Abatement:** Interruption or end of something
	+ **How serious is the interference, how long has it been going on for?**
	+ Necessity of acting without court approval
	+ Can the abatement be made without breaching the peace?
* In this case, the court ruled that D did not disturb the peace with his actions
* Important to note however that the cut off tree branches are still P’s property
	+ Right to the **use, fruits and abuse** of land/property

**Holding:** Ruled in favor of D

# Private Nuisance Analysis

Add some shit in here lol

# Strict Liability

## Rylands v Fletcher

### Rylands v Fletcher (1865) (House of Lords)

**Facts:** D wanted to build reservoir on his land – Hired a contractor, who were reputable company. Contractors were negligent, and made the reservoir without properly locking mineshafts – As a result, adjacent mine became flooded after the reservoir broke

**Issue:** Does P have a claim in nuisance?

* P couldn’t sue D in negligence because D did due diligence in selecting a contractor
* 4 things necessary for this rule to apply
	+ Non-natural use of land – not ordinary or social norm
	+ D brought something likely to do mischief if it escapes
	+ Something Escaped
	+ P suffered damages
* Trial Ruling – Not liable
	+ Judges say you can’t sue in trespass – trespass is intentional and direct
	+ Say you can’t sue in nuisance because it was an isolated incident, not an ongoing incident
	+ No issue in negligence, as mentioned earlier
	+ Since no nuisance, no trespass, no negligence, D is not liable
	+ Dissent: Claimant had a right to the use of his land
		- P knew the risk of consequences resulting from natural causes
		- Realizes it isn’t a trespass, but thinks it is a nuisance
		- Says that it doesn’t have to be a continuing state of affairs to be a nuisance
* Appeal Court – Liable
	+ One true law – “a person, who for his own purposes, brings on his land and collects and keeps anything likely to do mischief if it escapes, must keep it in at his peril. If he does not do so, he’s liable for all damage which is the natural consequence of his escape”
		- D can say that the escape was an act of god
	+ If a neighbor brings something onto his property that was not naturally there and could do damage if it escapes, then he should be responsible for those damages
	+ The same rule for wild animals, filth, and stenches so should apply to water too
	+ When it comes to property, you have no control over what D does with his property, so you have a strict liability standard
* House of Lords – Liable
	+ Agrees with appeal court, but says the answer is even more simple
	+ Draws distinction between natural and non-natural use
		- On facts of case, if rain got into P mine through natural use of land, then there would be no liability
		- Since D introduced a non-natural use, then he should be held liable
	+ “If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it escapes and causes damage, he is responsible regardless of how careful he may have been”
* To test if something is abnormally dangerous – S.520
	+ Is there a high degree of risk?
	+ Is the likelihood of damage/harm high?
	+ Is it difficult to eliminate this risk by taking ordinary care?
	+ Is this risk/activity one of common usage?
	+ Is it inappropriate or appropriate to a place in which it was carried out?
	+ Is it valuable to the community?

**Holding:** Ruling for P

**Notes**

* No one knows what was actually decided and what the answer is
* No one really knows what “non-natural” use of land entails
* Canadian view of what this case decided – it is an offshoot for the law of nuisance
	+ This is a nuisance case on the modern view

### Powell v Fall (1880)

**Facts:** Sparks coming off of D’s train caused P’s hay to catch on fire

* Sparks coming off of train was not preventable, however if a person uses a dangerous machine, he should pay for the damage which it causes
	+ There is liability because it is a dangerous machine – Strick Liability
* Liability for Animals – 2 types of animal
	+ Domesticated – mansuetae natura
		- No SL for escape unless animal is known to have vicious tendencies
		- Only liable if it escapes AND you can prove “scienter” (guilty knowledge)
		- If you know it has vicious tendencies and it escapes, you are liable
		- Done on an animal by animal basis
	+ Wild animals – ferae naturae
		- If you bring a wild animal into your home and it escapes, you are liable
		- Injury has to be done in the expected form – tiger biting = liability, licking = no liability

**Holding:** Ruled in favor of P

### Rickards v Lothian (1913) (English Court of Appeals)

**Facts:** D ran a business on 2nd floor of building – someone came in and intentionally turned on all sinks, flooded everything – P sued D for water damage

**Issue:** Can the D be held liable for the acts of someone else?

* P argued ***Rylands*** - water was a non-natural use of land – it was being piped in
	+ When the water escapes, it is mischievous and causes damages
* Court reasoning – non natural means not for the benefit of mankind – it is natural if it is expected in a civilized society
	+ In this case, water is definitely a common use of land in a civilized country
	+ Plumbing today is ordinary and not dangerous
	+ Therefore this was natural use of land, no liability
* There are defenses against the argument of P
	+ Act of god – sudden, unforeseen and unprecedented event – applies only to weather
		- Strict liability not absolute liability, so unforeseeable weather circumstances excuse the D of liability
	+ Acts of the Queen’s enemies
		- Enemies of the country, if there’s a war you aren’t at fault for damage from soldiers
	+ Malicious act of a 3rd party
		- This isn’t the fault of landlord if they weren’t negligent in letting them into the building
		- 3rd party has to be a stranger to you
* Other well-established defenses
	+ Consent – if the plaintiff implicitly consented to the danger
	+ Common Benefit – if the parties share a benefit, one can’t find the other liable
	+ Default of the plaintiff – P put themselves into a dangerous situation
		- Animal didn’t attack you, you attacked the animal
		- Reservoir broke and you decided to swim in it
		- If your property is especially sensitive
	+ Statutory authority
	+ Public Benefit Defense – this one is a little sketchy
		- In ***Tock*** SS ruled no Statutory authority – Laforest said it isn’t a Rylands case because sewer system is done for natural benefit to community

**Holding:** Ruled in favor of D

### Read v J Lyons (1947) (English Court of Appeal)

**Facts:** D work in factory where they fill shelves with explosives – P was employee who inspected shelves – explosion occurred killing someone and injuring others

**Issue:** Was the factory liable under ***Rylands***?

* P’s arguments
	+ Explosives were a non-natural use of land that escaped from the shelf
	+ This is a case of strict liability for ultra-dangerous materials
* Court’s reasoning
	+ In order to prove ***Rylands*** there needs to be an escape due to non-natural use
		- Here there was no escape – explosion happened on D’s property and stayed contained on D’s land
		- Also a natural use of land – this was during wartime, so explosive manufacturing was a reasonable and common use of land
	+ Law demands that the degree of care should be comparable to the risk created
		- Standard of care is objective in negligence – what would a reasonable person have thought?
	+ ***Rylands*** protects property rights, not personal rights

**Holding:** Ruled in favor of D, no liability

**Notes**

* Fletcher (“Fairness and Utility in Tort Theory”)
	+ Regime based on reciprocal and non-reciprocal risks
	+ When something is ordinary, we apply negligence standard cause we all do these things
	+ When there is non-reciprocal risk (we don’t all do it), then we apply strict liability
		- There is some merit to this argument, but courts haven’t really applied it
		- Just like its impossible to distinguish between hazardous and ultrahazardous, it’s impossible to distinguish between normal and abnormal risk
* Arthur Ripstein
	+ For things that seem to be beyond our control, if you use them, then you will be strictly liable
	+ There are certain things that are necessary to live but are still ultra-hazardous (eg. Gasoline)
	+ This may be the best theory in practice – not the law’s view, but shows what the law could do

### Smith v Inco (2011) (Ontario Court of Appeal)

**Facts:** P owned property near to D’s nickel refinery – Nickle particles were shot out and deposited on property of multiple P’s. D fixed it when the amount of nickel was over the legal limit. It wasn’t dangerous at all, but people believed it was, so property value was lowered

**Issue:** Does P have a claim under ***Rylands*** for the lost property value?

* In order to count as property damage, what’s deposited on your land has to do something negligent
	+ Nothing wrong with nickel – doesn’t smell, doesn’t hurt anything
	+ Not a substantial interference with property rights
* Depreciation of property value has already been established as not a concern
	+ If you could prove that nickel caused harm, then it would be property damage
* P’s arguments in terms of ***Rylands***
	+ Non natural use of land – nickel refinery is an unnatural use of land
	+ Dangerous/likely to do mischief – property values went down, this is mischief
	+ Has to escape – escaped from D’s land onto P’s
	+ Cause damage – caused an economic loss
* D’s defense
	+ Public benefit – they can’t be held liable since what they do is such a great benefit for the public
		- Court doesn’t buy this argument – only applies to governmental bodies, not individual entities
* Reasoning of ONCA
	+ ONCA says they aren’t comfortable abolishing Rylands
* **Non-Natural/Special use of property**
	+ In Ontario non-natural has a different definition than dictionary definition
	+ ONCA says trial judge read the definition literally, not by the definition of the law
		- The test is weather the use is **appropriate**, not non-natural
	+ Should look at
		- Where – where its being made
			* Can look at zoning regulations – this area was zoned for industrial use, so it makes it a much more reasonable use
		- When – duration, time of day
		- How – Manner of use
	+ Also have to balance ordinariness with dangerousness
		- In this case, it is not unordinary and not dangerous
* **Dangerousness/Likeliness to do mischief**
	+ Is nickel especially dangerous? No it isn’t
	+ Mischief is a much more abstract form of danger – either way, nickel doesn’t meet the requirements to be dangerous in this case
* **Escape**
	+ In this case, there was escape, as the nickel ended up on P’s property
	+ Obiter – we think escapes have to be accidental and not intentional
		- Since D was spewing out nickel on purpose, it wasn’t an escape
		- ***Rylands*** only applies to situations where it wasn’t meant to escape
		- Under this logic, there was no escape because it was on purpose
* **Cause Damage**
	+ There is no damage to property here. There was economic loss, but this doesn’t count as damage in Ontario
	+ There would have to be actual physical damage to the property for this to count
		- Type of damage that you suffer has to be reasonably foreseeable
			* Only have to foresee the TYPE OF DAMAGE – i.e.. Personal injury, property damage
			* Not part of the ratio of this case
* **BLL**
	+ Escape is not limited to a single isolated event
	+ Intentional, planned emission of something doesn’t meet escape requirements
	+ Non natural use is a balancing of dangerousness and unusualness

**Holding:** Judged in favor of D

### Cambridge Water v Eastern Counties Leather PLC (1994) (House of Lords)

**Facts:** D was a leather manufacturer that used chemical solvent in manufacturing process – small quantities spilled on the floor over the years and seeped into the earth – made its way into P’s well 1.5 miles away and contaminated the water

**Issue:** Is D liable under ***Rylands***?

* Rule of ***Rylands*** comes from nuisance
	+ This means that there should be foreseeability requirement to apply ***Rylands***
	+ In this case the leakage from 1.5 miles away was not foreseeable
* If negligence claim for personal injury can’t be claimed because the damage isn’t foreseeable, why would D be liable in this case when there is no foreseeability
* Neyers doesn’t like this case – private nuisance case used to justify public nuisance

**Holding:** Ruled in favor of D, no liability

### Burnie Port Authority v General Jones (1994) (High Court of Australia) – RETIRES RYLANDS

* Over time the principles from ***Rylands*** have become old and ridiculous
	+ Tort of negligence used to be difficult to make out, hence the need for rules like this
	+ Now it is easy to make out, we don’t need an old case to do it for us
* The rules of ***Rylands*** have been absorbed by negligence
* Court decided to retire ***Rylands***
	+ ***Rylands*** shrank considerably – used to be a robust rule but now it has shrunk beyond the point of use
	+ Space that used to be occupied by ***Rylands*** is now occupied by negligence

### Transco v Stockport Metropolitan Borough Council (2004) (House of Lords)

**Facts:** There was a leak in a high-pressure pipe owned by D, no negligence found – Water percolated into P’s area, and damaged gas systems

* Court wondered if they should follow ***Burnie*** and abolish ***Rylands***
	+ HL said they didn’t want to overrule ***Rylands***, it had been around too long
* In this case the water being pumped isn’t an unnatural use or a dangerous thing
* Under ***Rylands***, no liability found for D
* Neyers says that Australia had it right – should get rid of Rylands
	+ Every situation will be covered by tort or nuisance or tort of negligence
* FOR EXAM: Use ONCA test from Inco
	+ Answer in nuisance and tell him what the answer is under SL law of ***Rylands*** and answer in public nuisance