



TORT LAW

Review Slides

ASSISTANT PROFESSOR SAMUEL BESWICK



**PETER A. ALLARD
SCHOOL OF LAW**
THE UNIVERSITY OF BRITISH COLUMBIA

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SUBSTANTIVE TOPICS



1. Duty of care [§ 13.4]:

- a. Analogous recognised duty of care?
- b. Prima facie novel duty of care?
 - i. Damage to Π a reasonably foreseeable consequence of Δ's conduct?
 - ii. Relationship of close/direct proximity between Π and Δ?
expectations, representations, reliance, property interests, statutory scheme ...
- c. Residual policy considerations?

2. Breach of duty of care (falling below standard of reasonableness) [§ 14]:

- *probability of harm • severity/gravity of risk • burden of precautionary measures • social value of activity • custom, industry practice • statutory & regulatory background*

3. Damage [§ 15]

4. Causation in fact [§ 16]

5. Remoteness in law [§ 17]

6. Defences [§ 18]

7. Remedies [§ 9, § 20]



Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19, ¶33:

- “A defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff’.
- There is no right to be free from the *prospect* of damage;
- There is only a right not to *suffer* damage that results from exposure to unreasonable risk.
- Negligence “in the air”—the mere creation of risk—is not wrongful conduct.”

Easy categories of damage:

Personal injury
Property damage/loss

Difficult categories of damage:

Mental suffering / nervous shock
Reputational harm
Pure economic loss
Anticipated future harm



Joint and several liability — where multiple Δs cause Π damage:

- Each Δ is liable to Π for the full extent of damage suffered: **Negligence Act, s.4(2)(a)**.
 - (Rather than each Δ being liable only for that Δ's own proportionate contribution.)
- As between Δs, liability is apportioned based on their relative fault: **Negligence Act, s.4(2)(b)**.

Contributory negligence — where Π contributed to own damage alongside Δ:

- Δ's liability is reduced by the proportion of Π's own fault: **Negligence Act, s.1(1)**.
- **Test:** "(1) Did Π fail to take reasonable care in its own interests? (2) If so, was that failure causally connected to the loss Π sustained?"

— *Wormald v. Chiarot*, 2016 BCCA 415, [14]-[15]



- **Nominal damages:** token damages to vindicate a violation of a right.
- **Pecuniary/special compensatory damages:** compensation for quantifiable monetary loss.
- **Nonpecuniary/general compensatory damages:** compensation that can't be exactly quantified.
 - capped by 1978 SCC trilogy of damages cases.
- **Aggravated damages:** compensation for additional (emotional) harm suffered.
- **Punitive/exemplary damages:** damages to punish the defendant's behaviour.
- **Restitutionary damages:** giving back a benefit obtained through tortious conduct.
- **Disgorgement damages:** giving up a benefit obtained through tortious conduct.
- **Interlocutory and interim injunctions:** temporary court orders [not] to do something.
- **Permanent/perpetual injunctions:** final court order [not] to do something.



Class discussion:

1. Who processes claims?

2. What's the lawyer's role?

3. What do victims (not) get?

4. How long to get money?

5. What's the victim's role?

6. Does fault matter?

7. How to appeal decisions?

8. What's the legal theory?



“Professor Blom is the master of many subjects As an academic, and as a judge, I have acquired a deep appreciation for the insights he brings to bear upon legal development in our field. At the risk of crude generalization, I have in my own mind tended to lump torts scholars, including me, into three general categories: the theorists, the applied theorists and the positivists. Each type of torts scholar is essential to our enterprise. **Theorists** generate insights. **Applied theorists** show how those insights can illuminate solutions to problems that lawyers and judges face. And the **positivists** [doctrinalists’] account of the law as it is pronounced by the courts allows both theorists and applied theorists to assess whether they are right or wrong (or, as the theorists might see it, whether the courts are right or wrong).

I have come to regard Professor Blom as bestriding the second and third categories, representing the best in each of those scholarly approaches.”

Hon. Justice Russell Brown, *Foreword: The Canadian Law of Obligations* (2018) 84 SCLR (2d) ix.

TORT THEORIES: § 10



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Instrumentalist:	Constructivist:	Critical:
Compensation: Tort law aims to compensate victims of torts.	Corrective justice: Tort law embodies defendants' duties to repair/correct injustices inflicted on plaintiffs.	Critical legal studies: Tort law is totally manipulable and serves the interests of the privileged classes.
Deterrence: Tort law aims to deter tortious actions.	Rights vindication: Tort law is about the infringement of rights, not the infliction of loss.	Feminist legal theory: Tort law perpetuates gender oppression.
Retribution: Tort law aims to punish tortfeasors.	Civil recourse: Tort law empowers plaintiffs to hold defendants to account in the courts.	Critical race theory: Tort law perpetuates oppression of minorities.
Reflexive: Tort law is judge-made law with no underlying grand theory.		

TYPES OF LEGAL ANALYSIS



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1. Doctrinal analysis
2. Policy analysis
3. Comparative analysis
4. Historical analysis
5. Economic (welfare) analysis
6. Empirical analysis
7. Critical (race, gender, poverty) analysis
8. Philosophical (right, justice) analysis



Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 *JOURNAL OF LEGAL EDUCATION* 65 (2013);
Christopher McCrudden, *Legal Research and the Social Sciences*, 122 *LAW QUARTERLY REVIEW* 632 (2006).



PREPARING FOR EXAMS

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PREPARING FOR EXAMS



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- CAN the syllabus. See [2021 CanLIIDocs 1859](#), p ii.
- Practice, practice, practice! See <https://blogs.ubc.ca/beswick/torts-quizzes/>.
- Study and practice with friends: attempt problems individually; **discuss answers together**.

- Read the exam cover page 24 hours before the exam.
- Keep perspective: it'll be okay!

- Follow the Prime Directive: what your professor says goes.
- Read instructions carefully before beginning.
- Pinball method of issue-spotting problem questions: hit the bumpers = points.
- Apply law, not emotions. (Beware the trap of sympathising with one party.)
- It is good to distinguish doctrine. It is not good to discuss irrelevant doctrine.

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Problem answer structure:

Issue 1
- R, A, C
Issue 2
- R, A, C
Issue 3
- R, A, C
...

Essay answer structure:

Introduction
Point 1
Point 2
Point 3
Conclusion

Guided answer exercises & exam question answer rubrics:

<https://blogs.ubc.ca/beswick/torts-quizzes/>

PROBLEM QUESTION ANSWER STRATEGIES



- Breathe.
- Do a plan:
 - Issue-spotting: what are the major and minor issues?
 - Issue-sorting: what order/structure to address them in? How much time on each?
- For each issue: follow the IRAC structure.
- Use headings (for each issue) and signifiers/markers where useful.
- Abbreviate case names (and underline/italicise if possible).
- No need to repeat the details of rules if they come up more than once.
- Very brief quotes are fine (no more than a sentence), but do not quote at length.
- Don't copy/paste from your notes.
- Do use symbols to signal when content jumps around the page.
- Remember to answer the question asked!

PROBLEM QUESTION ANSWER STRUCTURE



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- Spotting and sorting relevant issues.
 - And side-lining irrelevant issues: don't throw in the kitchen sink.
- Applying relevant rules/law to the facts in a considered and balanced way.
 - Reasoning with respect to relevant facts.
 - Citing, and applying or distinguishing, relevant authorities. Binding or dicta?
 - Considering arguments on both sides.
 - Allocating time/detail according to importance/complexity of issues.
- Reaching conclusions that are supported by analysis.
- Clarity (structure, comprehensiveness, and persuasiveness) of answer.

Exam question answer rubric: <https://blogs.ubc.ca/beswick/torts-quizzes/>

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ESSAY QUESTION ANSWER STRUCTURE



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Tips on **introducing** your thesis:

- Restate the question in your own words, clarifying any confusing legal terms/jargon, so as to demonstrate you understand the question.
- Briefly identify the different possible positions on this issue and key commentators/judges who align with each position.
- State your thesis and a three-pronged argument you will make in support of your position; present the strongest arguments, rather than trying to cover every possible point.

Tips on **arguing each prong** of your thesis:

- State your point of argument; what kind of analysis does it engage?
- Use authorities from the coursebook or class to reinforce your argument; use specific cases and examples to illustrate.
- Identify and respond to the weaknesses/criticisms of your argument; why are they ultimately not convincing?

Tips on **concluding** your essay:

- Briefly conclude, drawing together your argument.
- Show you have answered the question persuasively.



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