

**Occupational  
Health & Safety Law  
OHS 208  
2017**

**Unit 2 -- *Historical Aspects and  
Common Law of OHS***

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It was the inability of the common law to compensate injured workers and their families which led to the imposition of state-run, no-fault insurance systems in many jurisdictions at the beginning of the 20th century.

While few workers are allowed to sue (workers' compensation legislation prohibits such lawsuits), we see that the common law lives on in such rare cases. Indeed, the common law of OHS has lived on in the U.K., where workers' compensation reform left the option open for workers to sue.

Many of the defences an employer could deploy against a worker in the 19th century have disappeared or have been modified.

# Other Types of Lawsuits

- Can a worker or the employer sue the manufacturer of defective materials or goods?
- Can the worker or the employer sue the government Inspector?
- Can the OHS professional be sued by the employer for giving poor advice?

# Worker Sues Employer

In the 19th century, when a worker was injured on the job, he or she could sue the employer for damages. This would be characterized as a common law action. The cause of action would usually be in tort – the tort of negligence. The worker, as plaintiff, would allege that the employer, as defendant, had failed to take reasonable care. The worker would have to specify what that carelessness was.

The purpose of the lawsuit would be to obtain damages; to compensate the worker for his or her loss.

# Family Sues Employer

It was also possible for the worker's spouse or dependants to sue the employer in a similar fashion if the worker was killed or injured.

# Employer's Defences

## 1. "Volenti Non Fit Injuria"

This is also called the "assumption of risk rule". If a worker knows of the hazards of the job and continues working with those hazards, it was said that the worker had assumed the risks of the job.

# Employer's Defences

## 2. Doctrine of Common Employment

This is also known as the "***fellow servant rule***". Many accidents involve the errors or omissions of fellow workers. The doctrine of common employment held that the employer was off the hook if it could be shown that the accident was caused by a worker other than the one injured.

# Employer's Defences

## 3. Contributory Negligence

Under this rule, if the injured worker was at all at fault for the accident the employer was absolved of any responsibility. Like the doctrine of common employment it was an all or nothing rule. Even if the worker was only 10% at fault, the worker would fail 100%.

# Employer's Defences

## 4. Violation of Employer's Rules

The employer may have established rules for safe conduct. If it could be shown that the worker violated such rules and so caused the accident, then the employer could rightfully argue that the worker had been the author of his or her own misfortune.

# Employer's Defences

## 5. Violation of Statutory Law

In the second half of the 19th century there were “factory laws” which contained safety rules, such as turning off the machinery before cleaning it. The employer could argue that the worker was injured as a result of his or her unlawful conduct because the worker failed to comply with a statutory rule.

# Employer's Defences

## 6. Low Standard of Care

We will see that part of a due diligence defence is to show that the defendant was taking reasonable care because the defendant was following established practice in the industry, trade or occupation. So, the courts would look to what other companies in the same industry were doing when trying to decide whether an employer had taken reasonable care. Often industry standards were very low in the 19th century.

# Other Hurdles Faced By the Injured Worker

Other than specific legal defences, injured workers and their families had some practical problems when attempting to sue employers for damages in the 19th century.

# 1. The Burden of Proof on the Worker

The general rule in procedural law is that the claimant or plaintiff has to make his or her case first.

The burden of proving carelessness lay on the shoulders of the worker or the surviving family.

## **2. No Protection Against Dismissal**

It was easier to fire a worker in the 19th century. A worker would have to weigh carefully the choices -- sue and be fired, or hope that the employer would give you a job sweeping the factory after you could no longer do your old job

### **3. Fellow Workers Refuse to Testify**

It follows that it was also easy to fire a co-worker who helped the plaintiff by testifying in court about the employer's carelessness.

## 4. High Cost of Litigation

In most Canadian jurisdictions the accepted practise is to "pay as you play". So, an injured worker in the 19th century would have to have money up front to pay for the lawsuit as it proceeded. Legal aid did not exist. Few workers could afford to sue.

## **5. Delay in Receiving Money even if Successful**

A lawsuit can take many years before it gets in front of the courts or is settled out of court. What worker would have the resources to fund a lawsuit and support a family while unemployed for several years?

# Old Cases

- Worker Sues Employer

# ***Priestley v. Fowler***

(1834) 3M + W1; E.R. 1030

- Butcher's assistant
- Thrown from carriage
- Broke thigh
- Sued employer, the butcher
- Cause of action in negligence

# *Priestley v. Fowler*

“It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.”

# *Priestley v. Fowler*

“But, in truth, the mere relationship of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself.”

# *Priestley v. Fowler*

“He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of the judgment, information, and belief.”

# *Priestley v. Fowler*

“The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself...”

# ***Priestley v. Fowler***

“In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master...”

# ***Hamilton v. Groesbeck et al.***

**(1890) 19 O.R. 76 (Q.B. Div.)**

“The plaintiff, a lad of seventeen, was employed by the defendants to work at an equalizing machine in their saw mill. This machine consisted of a circular saw, nineteen inches in diameter, run by the motive power of the saw mill....”

# ***Hamilton v. Groesbeck et al.***

(1890) 19 O.R. 76 (Q.B. Div.)

“This machine was used for the purpose of sawing staves to a prescribed length, which work the plaintiff was engaged to perform; and as the staves were sawed by the machine he threw them in a pile behind him to the east of the saw.”

# ***Hamilton v. Groesbeck et al.***

(1890) 19 O.R. 76 (Q.B. Div.)

1. Was the machine in question defective in not having a guard? A. Yes.
2. If so, would the injury have been caused if there had been a guard?  
A. No.
3. Was the plaintiff negligent? A. No.

# ***Hamilton v. Groesbeck et al.***

**(1890) 19 O.R. 76 (Q.B. Div.)**

**Armour, C.J.**

J = Judge (Justice)

JJ = Judges (Justices)

CJ = Chief Judge (Justice)

# ***Hamilton v. Groesbeck et al.***

(1890) 19 O.R. 76 (Q.B. Div.)

## *Ontario Factories Act:*

“That Act provides by section 15, that in every factory (which includes a saw mill), "all belting, shafting, gearing, fly wheels, drums, and other moving parts of the machinery...shall be, as far as practicable, securely guarded.”

# ***Hamilton v. Groesbeck et al.***

(1890) 19 O.R. 76 (Q.B. Div.)

- “...the words "other moving parts of the machinery" are referable only to parts of the machinery used for a like purpose as the belting, shafting, gearing, fly wheels, and drums.”
- “Upon this construction, therefore, of this provision, there was no statutory duty imposed upon the defendants to guard the saw.”

# ***Hamilton v. Groesbeck et al.***

(1890) 19 O.R. 76 (Q.B. Div.)

“It would be very wide construction to put upon this provision, and one not warranted by the terms of it, to hold that the want of a guard to the saw was a defect in the condition of the saw, when such guard was no part of the saw, nor of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the purpose of which it was used.”

# *DeLeavey v. Brinkman*

New Brunswick Queen's Bench, Trial Division,  
(1986) 68 N.B.R. (2d) 195.

Plaintiff employee was injured while attempting to manually move a potato loader contrary to the specific instructions of the defendant farmer. The plaintiff alleged that the farmer had been negligent by failing to keep adequate equipment in safe and proper condition, and relied upon the *Occupational Health and Safety Act* in his pleadings.

# *DeLeavey v. Brinkman*

New Brunswick Queen's Bench, Trial Division,  
(1986) 68 N.B.R. (2d) 195.

- **Held:** Plaintiff's action was dismissed. The farmer had warned against manually moving this particular equipment, and when the plaintiff chose to act contrary to these instructions he assumed the risk of injury. Although the arm of the potato loader had been altered by the farmer into a fixed position, the equipment was still adequate and the employee was solely responsible for his injuries.

# *R. v. John Albert Marshall*

Federal Court of Appeal, February 26, 1985

This was an appeal from a decision of the Federal Court, Trial Division wherein judgment was given in favour of the plaintiff Marshall against the Crown for the sum of \$7,934. The plaintiff, an inmate of a correctional institution, was injured by a chain saw while cutting timber; he had no previous experience.

# *R. v. John Albert Marshall*

Federal Court of Appeal, February 26, 1985

- **Held:** Appeal allowed. The Federal Court of Appeal held that two errors were made by the trial judge. First, the trial judge misconceived the Crown's duty by imposing a higher duty than that required by law; the duty is actually to take reasonable care.

# ***R. v. John Albert Marshall***

Federal Court of Appeal, February 26, 1985

**Secondly, he failed to consider the issue of contributory negligence. In substituting its own decision, the Court stated that the Crown's servants did not fully discharge their duty to take reasonable care for the plaintiff's safety because the plaintiff had no experience in timber cutting, received no formal instruction therein, and was not warned of the specific danger which ultimately injured him.**

# *R. v. John Albert Marshall*

Federal Court of Appeal, February 26, 1985

The plaintiff was guilty of contributory negligence as it was imprudent of him to become involved in the process since he had no experience and knew chain saws to be potentially dangerous. In balancing both parties' negligence, fault was apportioned equally and judgment was ordered for the plaintiff for the sum of \$3,967.

# Employers' Common Law Duties

- Lawsuits by workers against employers were not eliminated in England by the advent of workers' compensation legislation at the dawn of the 20<sup>th</sup> century.
- The broad duty is to take *reasonable care* to ensure a safe workplace. This general duty can be broken down into more narrow duties.

# Employers' Common Law Duties

1. Duty to Ensure Safe Premises
2. Duty to Provide Safe Tools and Equipment
3. Duty to Hire Competent Staff
4. Duty to Ensure Safe System of Work

# WSIA

## Amending the Common Law

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

113.(1) This Part applies with respect to industries that are not included in Schedule 1 or Schedule 2 and with respect to workers employed in those industries.

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

#### *Employer's liability*

114.(1) A worker may bring an action for damages against his or her employer for an injury that occurs in any of the following circumstances:

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

1. The worker is injured by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business.

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

2. The worker is injured by reason of the employer's negligence.
  
3. The worker is injured by reason of the negligence of a person in the employer's service who is acting within the scope of his or her employment.

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

#### *Voluntary assumption of risk*

116.(1) An injured worker shall not be considered to have voluntarily incurred the risk of injury in his or her employment solely on the grounds that, before he or she was injured, he or she knew about the defect or negligence that caused the injury.

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

#### *Certain common law rules abrogated*

116(2) An injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers.

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

#### *Contributory negligence*

116(3) In an action for damages for an injury that occurs when a worker is in the service of an employer, contributory negligence by the worker is not a bar to recovery,

(a) by the injured worker; or

(b) if the worker dies as a result of the injury, by a person entitled to damages under Part V of the *Family Law Act*.

# *Workplace Safety and Insurance Act*

## Part X

### Uninsured Employment

116(4) The worker's contributory negligence, if any, shall be taken into account in assessing the damages in such an action.

# Origins of Workers' Compensation Legislation

# State Regulation of Workers' Compensation

1883-84

Germany, under Bismarck, establishes the first workers' compensation statute.

# State Regulation of Workers' Compensation

1886

Legislation titled *Ontario Workmen's Compensation Act* passed, but this was not a true no-fault insurance scheme. Rather, the Act tended to limit the legal remedies of injured workers.

# State Regulation of Workers' Compensation

1897 Britain passes workers' compensation legislation. It has the following elements:

1. automatic compensation
2. an arbitration procedure
3. scales of compensation
4. allowed a worker to go to the courts as a final recourse

# State Regulation of Workers' Compensation

1907

Britain. The 1897 Act was broadened so as to increase employers' liability. It was this Act which was copied by a number of American jurisdictions.

# State Regulation of Workers' Compensation

1907

## The Pittsburgh Study.

In this study it was shown that there were 526 workers killed in one county (Allegheny County) of one U.S. state. In over 50% of the deaths there was no compensation for the surviving dependents.

# State Regulation of Workers' Compensation

1908 U.S. legislation passed. It was for federal government employees only.

1911-15 About 30 U.S. states passed compensation laws.

# **State Regulation of Workers' Compensation**

**1920** All but 8 U.S. states had compensation statutes by this time. There were still many problems:

- 1. not all workers were covered**
- 2. not all occupations were covered**
- 3. accidents were covered but usually not disease**

# Meredith Royal Commission

## 1910 - 1913

In 1910, the Premier of Ontario, Whitney, appointed Justice William Meredith to head a Royal Commission to study workers' compensation schemes and to make recommendations for an Ontario scheme.

# Meredith Royal Commission

## 1910 - 1913

Meredith studied worker's compensation laws in England, Germany, and the U.S.. He was apparently much influenced by the State of Washington's *Compensation Act*.

# Meredith Royal Commission

## 1910 - 1913

Meredith's recommendations were followed by the Ontario government and the Ontario *Workmen's Compensation Act* was passed in 1914, coming into effect January 1, 1915. This Act of 1915 is the same Act, with amendments, as the current Act in Ontario, the *Workplace Safety and Insurance Act*.

# Meredith Royal Commission

## 1910 - 1913

Meredith's "historic tradeoff". Workers gave up the right to sue their employers, but gained guaranteed protection against income loss due to industrial accidents and disease. Employers' marginal gain was some measure of predictability in the payment of costs.

# Meredith Royal Commission

## 1910 - 1913

The Ontario Act of 1914 was used as a model by other Canadian jurisdictions, which enacted compensation legislation in the following years:

Nova Scotia	1915
BC	1916
Alberta	1918
New Brunswick	1918

# **Meredith's Principles**

- 1. Public, Compulsory System**
- 2. No-Fault Compensation**
- 3. Primarily a "Collective Liability System"**
- 4. Compensation for the Duration of Injury**
- 5. Control by an Independent Board**
- 6. Compensation Tied to Earning Power**
- 7. Divert Some Money to Prevention**

# No-Fault Compensation

Private lawsuits are based on the fault principle. The defendant loses if the defendant was at fault, usually by being negligent. In a lawsuit, compensation is based on the finding of fault. If it is not your fault, you should not have to pay. Note that "fault" and "causation" are two different ideas.

# "Collective Liability System"

Except for a few large, public sector employers, the system was to be one of "collective liability". Money does not go from the employer to the injured worker directly. Instead, the money goes to the accident fund of the WCB (now the WSIB in Ontario). An injured worker applies to the Board and is paid out of the Board-administered accident fund.

# Control by an Independent Board

The workers' compensation system in Ontario is set up so as to prevent workers or employers from taking disputes to the courts. The WCB was to develop expertise in the area of workers' compensation and be able to apply consistent policies and principles over all cases. The worry was that a judge would only hear compensation cases on rare occasions and would not have the expertise to do a good job.

# Compensation Tied to Earning Power

The amount of money paid to an injured worker was in proportion to the amount the worker was earning. A highly paid worker would receive more money from workers' compensation than a worker who earned less, even though both workers might have exactly the same injury.

# **Divert Some Money to Prevention**

Some money was (and still is) taken out of the fund to go to employers' safety associations to help educate employers and their workers so that accidents could be prevented.

# Product Liability

# Product Liability

Suppose that a worker is using a machine, a tool or a material which is defective, and so causes an accident in which the worker is injured. The thing might have been poorly designed, poorly manufactured, badly packaged, inappropriately labelled, or had misleading instructions to go with it.

# Product Liability

The employer might be able to sue the manufacturer or supplier in the law of contract. The supply of a defective item might amount to a breach of contract. But the worker cannot sue on the contract because the worker is not a party to the contract -- there is no "privity of contract".

# Product Liability

Up until about 60 years ago, the worker would not have been able to sue in tort -- for negligence -- because there was said to be no duty of care on the part of the manufacturer towards the ultimate consumer of the manufacturer's product.

# Product Liability

People outside the contract of sale can now sue the manufacturer for harm caused by the manufacturer's product

WSIB is “subrogated” to the worker’s lawsuit in some cases.

# Other Lawsuits

# Can the Inspector or Officer be Sued?

A section of the OHS Act prohibits lawsuits against the Inspector if the Inspector was acting in good faith (*bona fides*). This means that an Inspector is immune from lawsuits over his or her negligence, but not wilful harm. It is clearly "bad faith" (*mala fides*) if the Inspector made a decision that was not for the purposes of the OHS Act, but was for the Inspector's own self-interest.

# Suing the Crown

Historically, no one could sue the Crown, or an agent of the Crown. This was changed by legislation. One can only sue for *operational* decisions.

One can sue the Crown as the employer of the Inspector (vicarious liability), even where you can't sue the Inspector.

# Can the OHS Professional be Sued?

Possible, but not likely.

Can't sue for harm that is compensated under the WSIB, but accidents can cause uninsured losses that could be the subject of a lawsuit.

More likely where the OHS professional is a consultant.

# Early OHS Statutes

# Some Early Statutes

*Act for the Better Regulation of Chimney Sweeps  
and Their Apprentices – 1788*

Earliest OHS Act, UK.

Sir Percival Pott, founder of "occupational  
oncology"

# Some Early Statutes

*An Act to require the Owners of Thrashing and  
other Machines to Guard against Accidents*  
S.O. 1874, c.12.

# Some Early Statutes

## Thrashing Machine Act

4. All fines imposed and collected under this Act shall be paid, one half to the complainant or prosecutor, and the other half to the treasurer of the school section in which the offence was committed, for the use of the public school in such section;

# Some Early Statutes

*The Workmen's Compensation for Injuries Act*  
*[An Act to secure Compensation to Workmen in*  
*certain cases], S.O. 1886*

**Not a real compensation regime... doesn't  
come until 1915 in Ontario.**

# Some Early Statutes

“...the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.”

# Some Early Statutes

*The Ontario Factories Act*

*[An Act for the Protection of Persons employed  
in Factories], S.O. 1881, c.39.*

**Forerunner of modern OHSA.**

# *The Ontario Factories Act*

13. The Inspector may, for the purposes of the two next preceding sections, take with him into any factory a physician, health officer, or other officer of the local sanitary authority.

# *The Ontario Factories Act*

“...shall, upon conviction thereof, incur and be liable to imprisonment within the common gaol of the county within which the offence was committed, for a period of not more than twelve months, or to a fine of not more than five hundred dollars...”

# Some Early Statutes

## *Railway Accidents Act*

*[An Act to make provision for the safety of  
Railway Employees and the Public] S.O.  
1881, c.22*

# **Environmental Lawsuits**

# **Environmental Causes of Action**

Many health and safety professionals are responsible for the environmental management system of their organization. Environmental law is now a subtopic in the BCRSP professional examination.

# Environmental Causes of Action

The simple scenario here is that a facility has had an accident and there has been a sudden release of a hazardous (or very annoying) material (or energy form) and this release has harmed the neighbours in some way. As a variation of this scenario, we also have a situation where the release of material or energy is on a slow, chronic basis, which has harmed or annoyed the neighbours.

# Environmental Causes of Action

The neighbours, whether they be residential, commercial, or other, may have the ability to sue the organization responsible for the release. They have to fit their lawsuit into a recognized “*cause of action*”. More than one cause of action can be applicable to any given situation.

# Strict Liability

*(The Rule in Rylands and Fletcher)*

The Defendants, Rylands and Horrocks, dammed up water in reservoir in order to operate a mill on land owned by X. The water entered into abandoned coal mine shafts under the reservoir and then "escaped" into Fletcher's active mine tunnels under the land next door (also owned by X). Fletcher was harmed by the flooding of his mine.

# Strict Liability

*(The Rule in Rylands and Fletcher)*

"If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

# Strict Liability

*(The Rule in Rylands and Fletcher)*

We call the Rule "strict liability" because it doesn't matter how careful the person storing or holding the dangerous thing is -- ie, it does not matter that he is not negligent.

# Types of Escaping Dangers

- Water
- Sewage
- Fire other than from fireplaces
- Electricity
- Gas or Propane used in amounts beyond ordinary household needs
- Flammable/Explosive material
- Toxic substances
- Vibration from a pile driver
- Dangerous animals

# Defences to Strict Liability

1. Consent of the Plaintiff
2. Default of the Plaintiff
3. Act of God
4. Deliberate Acts of Third Persons
5. Legislative Authority

# Product Liability

"Product liability" is not a "cause of action". It is an area of law. There are two causes of actions that are important in product liability law:

1. Contract law
2. Negligence in tort law

# Product Liability

## Contract

Caveat emptor is no more:

1. Implied warranty of "reasonable fitness for the purpose".
2. Implied warranty of "merchantable quality".

# Product Liability

## Negligence

It was the famous British case of Donoghue v. Stevenson in 1932 which set the stage for modern products liability law in Canada.

# Donoghue v. Stevenson

Someone bought a bottle of ginger beer for a friend, who drank the contents of the bottle, discovered the remains of a decomposed snail in it, and suffered damages as a result. The friend sued the manufacturer, even though there was no contract of sale between her and the manufacturer.

# Donoghue v. Stevenson

"A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care..."

# Some Products...

- cherries jubilee
- pet turtle
- hair dye
- underwear
- water heater

# Trespass

Every invasion of property, be it ever so minute, is a trespass. No damage need be done by the trespass. No knowledge or intention is necessary.

# Trespass

If a person dumps material on another's property, but the owner of the property never uses the land, there is still a trespass, but there would not be a private nuisance because there is no interference with enjoyment of property.

# Nuisance

Nuisance describes a type of harm that is suffered rather than a kind of conduct that is forbidden. That harm is "interference with enjoyment of property".

# Nuisance

- Noise
- Vibration
- Noxious odours
- Air pollution
- Water pollution
- Dangerous structures

# Three Types of Nuisance Actions

- Private Nuisance
- Public Nuisance
- Criminal Nuisance

# Criminal Nuisance

- 180. (1) Every one who commits a common nuisance and thereby*
- (a) endangers the lives, safety or health of the public, or*
  - (b) causes physical injury to any person,*
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*

# Public Nuisance

A public nuisance must materially affect the reasonable comfort and convenience of life of a class of Her Majesty's subjects. It is not necessary to show that every member of the public has been affected, as long as a substantial number is. A public nuisance must relate to an interest common to all.

# Private Nuisance

Private nuisance is an unreasonable interference with the use and enjoyment of property

# Elements of Private Nuisance

1. The harm is normally caused indirectly, in contrast to trespass, which arises from direct, physical invasion.
2. Actual damage must be shown, unlike trespass.
3. Responsibility for private nuisance is not restricted to occupiers of adjoining lands.

# Elements of Private Nuisance

4. What is "unreasonable interference"?      The  
court balances:

*gravity of  
the harm*

vs.

*utility of  
the defendants*

# Elements of Private Nuisance

5. Damages for injury to health may be recovered in an action for nuisance if there is also interference with the use and enjoyment of land.
6. Nuisance is a "continuing wrong".
7. The Court will consider the character of the locale when deciding if there is unreasonable interference.

# Elements of Private Nuisance

8. In Canada, it is not a defence that the nuisance was there before the plaintiff arrived on his land.
9. A Plaintiff with an "abnormal sensitivity" to something may not succeed in nuisance.
10. It is not necessary to show that the conduct of the Defendant was negligent or intentional

# Defences to Private Nuisance

1. Defence of Legislative Authority
2. Prescription
3. Acquiescence
4. Act of a Third Party

# Remedies for Private Nuisance

## 1. Injunction

Prohibitory injunction: "don't do X".

Mandatory injunction: "do X".

## 2. Damages

# Negligence

Negligence is conduct falling below the standard established for the protection of others against unreasonable risk of harm.

Negligence law is the "largest" area of tort law because it is the most "generic" form of civil wrong-doing.

# Elements of Negligence

1. The claimant must suffer some damage.
2. The damage suffered must be caused by the negligent conduct of the Defendant.
3. The Defendant's conduct must be negligent, that is, in breach of the standard of care set by law.
4. There must be a duty recognized by the law to avoid this damage.

# Elements of Negligence

5. The conduct of the Defendant must be a proximate cause of the loss or, stated another way, the damage should not be too remote a result of the Defendant's conduct.
6. The conduct of the Plaintiff should not be such as to bar his recovery, that is, he must not be guilty of contributory negligence and he must not voluntarily assume the risk.

# The Standard of Care in Negligence

1. The standard of care in negligence law is an objective one, not a subjective one.
2. Conduct is negligent if it creates an unreasonable risk of harm.

# The Standard of Care in Negligence

**3. Whether activity is unreasonable depends in part on the balance between the hazard created and the social value of the activity:**

## **Hazard**

a. probability

b. severity

## **Social Value**

a. purpose of activity

b. cost to the actor of eliminating the hazard

# The Standard of Care in Negligence

4. What would the "reasonable person" have done in the circumstances? This is called the "Reasonable Person Test".