Tort Law

Professor Nelson

18/19

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# Introduction of Torts

* Private law context dealing with wrongs committed by someone to someone
* Tort law mainly a question of deciding who bears the costs
	+ “misfortune happens and when it does victims incur costs

## Essentialist Approach

* System of corrective justice and that’s it
	+ Just explains the relationship between the duty of care and the cost of harm to others
* Elements of the consequences of the system are not the point

## Instrumentalist Approaches

* All ascribe an aim/objective to tort law
	+ Compensation
	+ Justice
		- Appease victim, retribution, mechanism of punishment
		- Redistribute the loss
	+ Deterrence
		- Specific/general
	+ Education
		- Professional negligence (ex. defensive medicine)
	+ Ombudsman function
		- Put pressure on person’s in power
		- Ex. Class action suit against govt and Ralph Klein for reducing health care funds
	+ Economic
		- Allocating accident losses = enables society to have the optimal number of accidents
	+ Psychological (Therapeutic Jurisprudence)
		- Need of legal vindication
* Criticisms
	+ (Mainly to aim of compensation)
	+ Ineffective
	+ Slow
	+ Unfair
	+ Arbitrary

## Alternatives to Tort Law

* Insurance
* No fault system
	+ Ex. Car insurance in some provinces, workers compensation
	+ Trade off that pure no fault your right to sue is extinguished
		- There are hybrid systems

# Intentional Torts (Trespass and Intentional Interference with Person)

### History

* Historical focus of peace and security
	+ Central feature = writ system
* Trespass writs – direct and forcible interference
	+ Originally no fault and you did not have to prove harm
* Writ for action on the case
* Courts tried to articulate the distinctions between these writs
	+ Direct interference (trespass)
	+ Indirect interference (action on the case)
	+ This became unclear as well (firecracker example)
* 1870s writ system was abolished
	+ Has continuing influence in development of tort law
		- Particularly in intentional torts and trespass

### Accidental, Negligent and Intentional Conduct

* Intentional
	+ Did the actor desire the consequences?
	+ Were the consequences substantially certain to arise?
* Imputed intent
	+ Even if they didn’t desire the consequences but they were substantially certain they would arise
* Transferred intent
	+ Ex of hitting someone you didn’t mean to hit
	+ Also if you intended for one tort and also thereby intend a consequential intentional tort
		- Assault and battery
* Negligent
	+ Outcome could have been foreseen and possibly prevented by the reasonable person (objective)
* Accident
	+ Consequences not foreseeable or preventable

### Volition and Capacity

* Motive and mistake do not matter when establishing requisite intent/fault

Volition

* Does actor have control over physical actions?
* Is the act directed by the conscious mind?

Capacity

* Can the actor understand the act?
* Can the actor understand the consequences and what the consequences are?

## Assault

Defn: Intentional creation of a reasonable apprehension of imminent physical contact on the part of the plaintiff

**Assault** – Protects one’s right to be free of the threat of imminent physical harm. Assault is a trespass-based tort and is the threat of imminent battery.

* + The defendant’s conduct must have caused a *reasonable* apprehension of imminent harm—reasonable person would have apprehended imminent battery
	+ D does not need to have the present ability to cause the harm threatened.
	+ The P need not be fearful so long as harm was apprehended.

Elements of assault:

1. Direct threat of harm (imminent physical contact)
2. Reasonable apprehension of imminent battery
3. No harm/damage required
4. Intent (fault) is presumed (D has to disprove intent)

### Stephen v Myers

Ratio: If there is intentional creation of a reasonable apprehension of imminent harm in the plaintiffs mind

Facts: D in parish meeting was being told he should maybe be turned out. D claimed he would rather pull the chairman (P) out of the chair than be turned out of the room and immediately advanced with his fist clenched toward P. He was stopped when at the time he was not near enough to actually strike – witnesses however claim that it seemed he was advancing with an intention to strike.

Result: Held for plaintiff

Reason: If he was advancing with the intent to strike this is assault in law

Issue: Whether or not the D advanced with the intention of actually striking P

Notes: Argument for D; no assault because there was no power in the defendant to execute his threat – he had not the means of executing his intention at the time when he was stopped

### Tuberville v Savage

Ratio: If there is intentional creation of a reasonable apprehension of imminent harm in the plaintiffs mind

Facts: P put his hand on his sword and said “If it were not assize-time (the judges in town), I would not take such language from you”

Result: Ruled for plaintiff

Reason: The intention as well as the act makes and assault.

Issue: Is this statement an assault?

Notes: What if it was “if I weren’t in such a good mood?”/“If you take one more step, I’ll…” – conditional threats can still amount to an assault

### Herman v Graves

Ratio: Irresponsible and dangerous behaviour on the road can cause reasonable apprehension of immediate harm or offensive contact.

Facts: Jackson chased and tailgated the and driving into the rear of Volkswagen causing it to veer off the road. Graves got out of truck to beat up Jesse.

Result: Jacksons actions amount to assault however not tortfeasor with respect to battery but conduct merits an award of punitive damages.

Reason: Jackson caused reasonable apprehension of harm and her operation of the truck was dangerous and wrong headed.

Issue: #1 Whether Jackson used Graves truck not as a vehicle but as a weapon of assault. #2 was the plaintiffs action assault for Graves to plead self defense like in Bruce v Dyers

Notes: Jackson never charged with any criminal offence – should be no reduction in damages because she was never charged or convicted.

### Bruce v Dyer

* Highway passing spat. P pulls car over shaking fist and blocking the D’s car. A fistfight ensues and the D breaks the P jaw.
* The shaking of the fist and car blocking of the P was an assault. The D was entitled to defend himself and was not liable for breaking the jaw.
* The D reasonably apprehended violent physical contact

## Battery

Defn: intentional application of harmful/offensive physical contact to another person

Elements: direct physical contact & harmful/offensive

* **Direct**; would the result have occurred without the intervention of another independent agency?
* **Harmful**; straightforward BUT does not have to be proven for claim
* Offensive; there is some implied consent with everyday contact but contact has to be outside of this realm of general, every day contact
* Intentional; desired the consequences/substantially certain the consequences would arise
	+ Volition and capacity

### Allan v New Mount Sinai Hospital

Ratio: Doc responsible for battery as Mrs. A did not consent to administration of anaesthetic (surgical operation) in her left arm.

Facts: Dr. Kurt Hellman, was the anaesthetist responsible for the administration of the anaesthetic to Mrs. Allan during the operation. Mrs. A asked doc not to touch her left arm to which he responded “we know what we are doing” and she then says she saw him put the needle in the left arm before she fell asleep. She awoke and her left arm was in pain and there were complications that happened and developed – doc apologized saying they should have listened and would do best to correct. Doc does not deny what she says he said but does not recall. Prior to any conversation doc had intended to use SP in the left arm of the patient and claims nothing in the conversation indicated he should change his original plan. No problem finding vein in the ante cubital fossa. Needle slipped out – doc says not unusual. Normally when injecting SP into tissue patient will have sore arm for couple of days – not so for Mrs. A.

Result: Held for plaintiff for total of $10,148 plus costs

Reason: Judge finds that she did not consent to the anaesthetic in the left arm – expressly instructed doc otherwise. It was an error for doc to assume she was merely warning him rather an express prohibition. Apology indicates he should have listened to her and lends support to the view that she had told him not to use the left arm. Consent not formality – an important individual right to have control over ones body even where medical treatment is involved.

Issue: Battery is the intentional application of offensive or harmful physical contact to a person – any surgery is battery unless the patient consents. Did Mrs. A consent to surgical operation of anaesthetic administration in left arm?

Notes: Because doc is responsible for battery, **he is liable for all of the consequences flowing there from (foreseeable or not). Special damages and general damages**.

### Non-Marine Underwriters, Lloyds of London v Scalera

Ratio: Insurance company does not have duty to defend Scalera.

Facts: Scalera has been sued for sexual battery. Insurance company does not have duty to defend Scalera. “Not insured for claims arising from: bodily injury or property damage caused by any intentional or criminal act or failure to act by any person insured by this document.”

Result: Dismiss appeal with costs – should not change onus Mclachlin says

Reason: Mclachlin; for traditional batteries – consent is conceived of as an affirmative defence that must be raised by the D and this has shown to be maintained in sexual battery. Traditional rule that in action for trespass P succeeds if she can prove direct interference with person – the burden is then on the D to allege and prove defence, consent being one such. Has been argued for otherwise because torts is fault based. No – law of battery is based on protecting individual’s right to personal autonomy. Shifting onus is to subordinate to P’s right to protection from invasions of her physical integrity to the defendants freedom to act. Not persuaded that P in sexual batter must prove contact was non-consensual in order to prove that it was harmful/offensive.

“The question then becomes whether sexual battery falls into the extraordinary category of cases where proving contact will not suffice to establish the plaintiff’s case. Is sexual activity the sort of activity where consent is implied? Clearly it is not.”

Also presents dilemma of either changing the law for other types of battery or introducing an inconsistency in the law of battery.

Issue: Does the insurer have a duty to defend Scalera?

Onus on the defendant to prove consent – or plaintiff as Iacobucci suggests.

“To prove a claim for sexual batter, the plaintiff will have to establish that the defendant intentionally inflicted a harmful or offensive touching on her. In the context of sexual battery, harmful or offensive battery is because a lack of consent.”

Why?

Sexual battery is different from traditional batteries. In the context of sexual contact, the contact is harmful or offensive because its non-consensual. \*\***THIS MEANS** that the plaintiff has to prove lack of consent and the D appreciated the lack of consent. **WRONG**.

Notes:

## Defense of Consent

### General Principles

* D has the burden of proving the defence of consent
* Consent can be implicit or explicit
	+ Explicit (written/statement etc) is still just evidence of consent – not proof
* Scope of consent\*
* Threshold; can anyone give consent?
	+ Main concern is usually capacity

### Factors Vitiating Consent

Even where consent was given, that consent can be invalid (vitiated)

What Factors Vitiate Consent?

* Duress
	+ Usually by threat of force
* Fraud
	+ Intentional
	+ And in direct relation to the action (not a collateral issue)
	+ Courts construe this narrowly
	+ HIV example in class
* Mistake
	+ By the P and D has to be responsible for the mistaken understanding
* Public policy
	+ Norberg v Wynrib
		- Criteria
			* There is marked inequality
			* AND exploitation of the inequality

#### Norberg v Wynrib

Ratio: In a relationship of unequal power, the defence of consent may not be available if acquired by a person using their position of authority.

Facts: Norberg became addicted to a drug, Fiorinal, and struggled to find a source. She eventually asked Dr. Wynrib, who implied that he would give her prescriptions in exchange for sexual favours. Norberg rejected the offer at first, then eventually gave in to Wynrib’s request. Then, of her own accord, she sought treatment and managed to get off the drugs. Now she is suing for battery — claimed that her consent should be vitiated because she wasn’t truly free to consent; she needed to consent to uphold her addiction. The lower courts ruled for the defendant because Norberg was consenting to the sexual activity

Result: Held for P – D liable for battery as consent was vitiated for various reasons. Awards $20,000 general damages + $10,000 punitive damages

Reason: The lower courts had too limited an approach to consent. Norberg’s position caused her to feel constraint which interfered with her free will. The doctrines of duress, undue influence, and unconscionability in contract law should also apply here. \*\*There should be a two factor test:

Proof of inequality of the two parties

Proof of exploitation

Norberg was forced into an unconscionable “transaction” with Wynrib as a result of the inequality of bargaining power (**inequality**). While Norberg’s drug addiction may not have made her unable to consent by way of intoxication, it did diminish her ability to make a real choice (**exploitation**).

Issue: Can someone consent to sexual battery with someone in a position of power?

Notes: Sopinka dissent; The case is more appropriately resolved on the basis of Wynrib’s duty to treat his patient. The sexual acts were only causally connected to the failure to treat and must form part of the damages. Would award $20,000 general damages, no punitive damages because of the nature of the offence.

 Mclachlin dissent; The principles of fiduciary relationships and their breach are most applicable here. These are fundamentally distinct from those of contract and tort. Contract and tort assume independent and equal actors. Fiduciary relationships assume a power imbalance. Contract and tort do not recognize consensual sexual relations as an offence. La Forest and Sopinka are bending these rules to make it work.

re Sopinka: what if there is a patient whose medical needs are met but who is also sexually exploited? Instead the focus should be on the fiduciary breach.

Wynrib was in a position of trust and he exploited that trust by:

Prolonging her addiction

Sexually violating her

Would award $20,000 for prolonging addiction + $25,000 for sexual exploitation + $25,000 punitive damages

### Sports Context

* Contact is outside the general norm of conduct
* Considerations
	+ What did the P consent to when they play a sport?
	+ Express/implied?
* General Criteria
	+ Consent to the inherent risk of the sport incl risk from ordinary rule infarctions is presumed
	+ Outside the boundaries of fair play you consent is not presumed

### Medical Context

General Principles

* Voluntary
* Given by person with capacity
* Refers to treatment and provider
* Informed

Capacity

* Not an adult OR an adult lacking capacity
* The law presumes an adult is capable of consenting
	+ If they lack capacity
		- CL does not give another the capability to consent for an adult only statute/leg can
* Children
	+ Not presumed
	+ Parents/guardian can consent on their behalf
	+ What factors need to be considered?
		- Age
		- Maturity
		- Decision in Q
	+ If the parents are not making decisions in the best interest of they child they are no longer entitled to that decision
		- Court can order treatment or give powers to child welfare services
	+ Maturity
		- As the maturity gives greater ability to make more complex decisions they may be considered capable of consenting
	+ **Mature Minor Rule**
		- Tension btw
			* Low profile decisions easier to say they are mature enough
			* Life threatening situations we are much more uncomfortable to grant capacity

#### Malette v Shulman

Ratio:

Facts: Malette was brought into the ER after a car crash. She was identified as a Jehovah’s Witness by a card in her wallet which expressed her wishes to not be given blood transfusions. The doctor in charge, Shulman, was aware of the card but transfused her anyways in order to save her life. Malette sued for battery. While not found guilty of negligence, he was found liable at trial for battery

Result: Appeal dismissed – held still liable for battery

Reason: All medical intervention without consent is considered a battery. The exception is in emergencies where doctors may perform life saving procedures without consent. The law assumes that a reasonable person would want emergency aid. If Malette had not had the Jehovah’s Witness card, Shulman would not be liable. However, this was not the case. The state’s interest in preserving life or health must give way to the patient’s stronger interest in directing the course of her own life. The card has the effect of validly restricting the treatment — therefore the transfusion was a battery.

Issue:

Notes:

#### AC v Manitoba

Ratio: Each best interests analysis must be done on an individual case-by-case basis including the nature of the treatment decision and the severity of its consequences

Facts: A.C. was 14 years and 10 months old when she was admitted to the hospital when she suffered an episode of lower GI bleeding as a result of Crohn’s disease. A.C. is a Jehovah’s Witness who believes that her religion requires that she abstain from receiving blood. A.C. had completed an “advance medical directive” with written instructions that she not receive blood transfusions under any circumstances. Psychiatrists indicated (on request of assessment by doc) The patient understands the reason why a transfusion may be recommended, and the consequences of refusing to have a transfusion. She was apprehended by director of Child and Family Services under Child and Family Services Act when she refused transfusion as she experience more internal bleeding. A court order was requested under ss. 25(8) and 25(9) of that Act, authorizing qualified medical personnel to administer blood transfusions to A.C. as deemed necessary by the attending physician. In Manitoba, under *Child and Family Services Act*, when a child is apprehended and under 16 and parents refuse essential medical treatment, court may authorize treatment that is considers would be “in best interests” of the child.

Result: Appeal dismissed

Reason: The statute struck a constitutional balance between an individual’s right to autonomous decision-making in connection with his/her body and the law’s attempt to protect vulnerable children from harm. Making a child under 16 incapable of having a say in their treatment would be arbitrary and would violate security of person (s 7), but because they were given an opportunity to prove their maturity, the statute is saved from arbitrariness and violating the *Charter*. By permitting adolescents under 16 to prove sufficient maturity, their ability to make treatment decisions was ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age could be said to be engaged. Therefore, there was therefore no violation of s. 15. Finally, since the provisions allowed the person to lead evidence of sufficient maturity, the impugned provisions did not violate a child's religious convictions under s. 2(a) of the Charter.

Issue:

Notes: Binnie dissent; Once someone is a mature minor, they should be considered an adult. Mature minors should be given deference — their consent should dictate their treatment, not simply give them a chance to convince a judge. Problem — the trial judge said, for the sake of argument, that AC was a mature minor. Binnie took this as a finding and ran with it.

Consent and Informed Consent

* What do you know about treatment for consent to be valid?
	+ What and who
* What do you know about treatment for consent to be informed?
	+ What and who
	+ Risks/potentials etc

#### Reibl v Hughes

Ratio: Doctors must inform their patients of all material, special, or unusual risks before the patient can give informed consent - i.e., what’s typical or what could go seriously wrong (even though there is a low risk).

Facts: Reibl was experiencing headaches. He underwent surgery which caused him to suffer a stroke. This made him unable to work and thus unable to work until his pension was up. He argued that his consent was not “informed consent” because he was not made aware of the significant risks associated with the surgery or the nature of the procedure. Reibl sues the surgeon, Hughes, for battery. The trial judge found the defendant liable for battery.

Result: Appeal allowed – restore the judgement at trial and appellant is entitled to costs throughout.

Reason: **Battery**; The findings do not justify the imposition of liability for battery. Lack of proper information from doctor to patient *can* vitiate consent/ Patient must be informed of all potentially material risks; especially risk of death of paralysis. Failure to advise the plaintiff of relevant risks can amount to negligence. Battery = consent with misrepresentation or fraud. **Negligence = failure to disclose material risks. This was a breach of the duty of care, but the consent given was valid.**

**Court of appeal decision**; Too much consideration given to doctor’s opinions (too subjective). Goal: to determine whether a reasonable person in the appellant’s position would have chosen to undergo the surgery given the risks. The surgery wasn’t necessary at the time — Reibl could have waited. A reasonable person probably would have delayed the surgery had they known all the information

Issue: Was Reibl given sufficient information to give an informed consent? How specific must the information to a patient be to enable him to make an informed choice?

 The test to determine whether enough information has been given:

* + Objectively ask whether a reasonable person would have undergone the surgery or not if they had all the information
	+ Is this different than their answer with whatever information they *were* provided?

Notes:

### Exceptions to the Consent Requirement

* Emergency
	+ What counts as an emergency?
		- Treatment is needed in order to preserve life/health
		- No practical way to obtain consent
	+ Can the doctor wait until a stable situation becomes critical/urgent and then call it an emergency?
		- No – think Malette
		- The consent has already been withheld
* Statutory exceptions
	+ Mental Health Act
	+ Public Health Act
		- Has to be listed in the regulation

## Invasion of Privacy

### Prosser’s Four Torts

1. Intrusion upon P’s seclusion or into private affairs
2. Appropriation of P’s name or likeness
3. Publicity which places the P in false light
4. Public disclosure of embarrassing facts about P

How Does Tort Law Protect Privacy?

* Statutory protection
* Aspects of privacy are related to other torts
	+ Trespass
	+ Nuisance
	+ Defamation
	+ Breach of confidence
* Specific protection of some aspect(s) of privacy using tort (common) law

What interests might be sacrificed in order to protect privacy?

* Freedom of the press
* Freedom of expression

### Roth v Roth

* Dispute between cottage neighbours
* Plaintiffs are complaining that the defendants are harassing them
* There is a road between the two properties which the plaintiffs refused to help pay to upkeep
* The defendants, in their frustration, stole property, would put locks on the gate, etc.
* The plaintiffs brought a lot of claims including one about the invasion of privacy
* Courts recognized this wrong, but realized that none of the other claims would cover it
	+ The SCC has acknowledged a privacy interest, so the court draws on this
	+ We shouldn’t limit privacy interests to those with an interest in land (which is necessary for the other torts)

### T.W. v Seo

Ratio: Because there is no case law the actions do not give rise to cause of action based on the common law tort of invasion of privacy.

Facts: Seo was an ultrasound tech who has admitted to videotaping the P in the change room and engaging in unauthorized examinations and touching of the plaintiff. After the video camera was discovered at the end of the examination a struggle ensued where Seo tried to get the camera. The plaintiff extremely psychological damage.

Result: In favour of P on battery claim but not invasion of privacy

Reason: In jurisp *Roth* there were elements of enjoyment of property and repetition in this case, where there is no interest in land in this case nor is there the element of repetition. Second, the matter does not involve an infringement on a constitutionally protected right, such as in *Hunter.* Also an absence of prov privacy leg in ON making other jurisp based on leg provisions inapplicable. Finally, does not fall within the “appropriation of one’s personality” because the image on the video camera would have had to have been redisplayed and must have diminished the usefulness of the plaintiff’s public image (*Saccone*).

Issue: Does the common law support the right to privacy in this circumstance?

Notes:

### Jones v Tsige

Ratio: A new tort is created with respect to the right of privacy: the invasion of privacy – **intrusion upon seclusion** (only protects a specific kind of privacy interest; only binding in Ontario).

**Elements Required:**

1. The defendant’s conduct must be intentional (and reckless)
2. They must have invaded, without lawful justification, the plaintiff’s private affairs or concerns
3. A reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish

Financial loss is not an element that you have to prove – generally speaking court will assign damages in a modest conventional sum.

Facts: Jones discovered that Tsige, as an employee of the bank had full access to her banking information and, against bank policy, looked into Jones’ banking records at least 174 times over a period of 4 years. Tsige explained that she was involved in a financial dispute with the appellant’s former husband and accessed the accounts to confirm whether he was paying child support. Jones does not accept this because she says it is inconsistent with the timing and frequency.

Result: Appeal allowed with 10,000 in damages

Reason: Common law so far does not recognize the coa of invasion of privacy but that it should but has been shown as an important value to the common law. If Jones does have a right of action it falls under Prosser’s first category of intrusion upon seclusion – as court recognizes Prosser’s insight that the general right to privacy embraces four distinct torts. Jurisprudence has recognized individual privacy interests (breach of confidence, defamation) as a fundamental value but have yet to recognize a distinct action for breach of privacy. They have also refused to rule it out, though. The *Charter* recognizes privacy as a fundamental value worthy of being protected (s. 8). Common law develops in line with *Charter* principles. Ergo, the *Charter* supports a civil action for intrusion of privacy. There is much legislation which supports personal privacy. Though no legislation provides a precise definition of what constitutes invasion. American and other commonwealth jurisprudence recognizes Prosser’s four categories. Technological evolution makes it necessary for the common law to evolve and adapt to the problems caused by its aggregation of information.

Issue: Did the motion judge err in holding that ON does not recognize a cause of action for invasion of privacy?

Notes: Privacy interests protected by the *Charter* include:

1) Personal privacy — the right not to have our bodies touched or explored to disclose concealed objects

2) Territorial privacy — protects the home and other species where individuals enjoy a reasonable expectation of privacy

3) Informational privacy — privacy regarding our personal information\*\*

### Doe 464533 v ND

Ratio: Tortious invasion of privacy (public disclosure of private matters) now extends to sharing of intimate media without permission; it requires:

1. Giving publicity to the private matter of the subject
2. The act must be highly offensive to a RP
3. The act is not of legitimate concern to the public

Facts: The plaintiff and defendant were dating, broke up, but continued to see each other romantically. The defendant pressured the plaintiff into sending an intimate video to him. He published it onto a pornography website without her knowledge or consent and showed it to his friends. The video was taken down, but the plaintiff suffered severe psychological harm. This is very possibly the first civil case on this matter.

Result: Held in favour of the plaintiff – damages awarded $100 000, mainly in response to aggravated punitive damages

Reason: There are both established and developing legal grounds that support the proposition that the courts can and should prove civil resource for individuals who suffer harm arising from this misconduct and should intervention to prevent its repetition. The plaintiff’s decision to send the video was based on the relationship and D’s assurance that he alone would view it – him publishing it was a clear breach of the terms as communicated.

 Elements of a **breach of confidence** leading to a cause of action:

1. That the information must have the necessary quality of confidence about it
2. That the information must have been imparted in circumstances importing an obligation of confidence
3. That there must be unauthorized use of that information to the detriment of the party communicating it

Video meets a) and b) because the circumstances that led to the creation of the video clearly demonstrate that it was communicated to the D on the express basis that he would treat it as confidential. The third element is ordinarily considered in commercial contexts – but no rational basis to distinguish btw economic harm and psych, emo and physical harm (as experienced by P). Therefore, conclude the plaintiff has made out a cause of action for a breach of confidence.

Intentional inflection of **mental distress**

1. Conduct that is flagrant and outrageous
2. Calculated to produce harm
3. Resulting in a visible and provable injury

Follows that the P has made out a claim for intentional inflection of mental distress

**Invasion of Privacy**

* + Cites *Jones* recognition of the existence of the tort of invasion of privacy in the context of intrusion upon seclusion
	+ The misconduct had all the required elements of tortious invasion of privacy (intrusion upon seclusion) used in *Jones v Tsige*
	+ But wouldn’t provide a meaningful remedy and therefore a new privacy related tort should be created

“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other’s privacy, if the matter publicized (or the act of the publication)”

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.”

Issue: Alleged breach of confidence, intentional inflection of mental distress and invasion of privacy

Notes: This case wasn’t defended so the judgement has been set aside for “second chance”.

 After this case, this type of behaviour has become a criminal offence.

## Strict Liability

Can a defendant be held liable in the absence of fault?

 What does fault mean in tort law? Intention or negligence

 What grounds liability without fault? Causation

 Does strict liability fit with the idea of tort law more generally?

 Compensation, yes. Others.. maybe not

### Rylands v Fletcher

Ratio: Elements

Non natural use

Likely to do mischief if it escapes

Escape

 Damage to P’s property

Facts: Fletcher brought action to recover damages for injury to his mines caused by water flowing into them from a reservoir built on D’s land.

Result: Held for P

Reason: First Ruling

 P has right to be free from ‘foreign water’. The D’s had no right to pour or send water onto P’s works. It makes no difference in the law that the D’s did so unwittingly – the action is still maintainable because P’s right was infringed. As a rule the knowledge or ignorance of the damage done is immaterial. The burden of proof of this proposition is not on the P.

Dissent: There must be negligence in the party ding the damage to render him legally responsible, and if there be no negligence the party sustaining the damage must bear it. To hold the D liable without negligence would be to constitute him an insurer, which in my opinion, would be contrary to legal analogy and principle.

Exchequer Chamber (Blackburn)

The P (although no blame on him) must bear the loss unless he can establish that it was the consequence of some default for which the defendants are responsible. The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that there is fault on P. There is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the D’s should choose to apply their land.

HoL (Carin)

If a person brings, or accumulates, on his land anything which, if it should escape and cause damage, he does so at his peril.

Issue: What is the obligation which the law casts on the person who lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land?

Notes: Blackburn’s sentiments were approved by the HoL but difficulty arises out of Clarins added principle: the natural and non natural user of land – and holding that the latter case only was the liability absolute. This shift has the advantage of flexibility and enables the court by determining what is or is not a natural user of the land to give effect to its own view of social and economic needs. Its disadvantage is that it has produced a bewildering series of decisions on the meaning of non-natural use.

 **Losee v Buchanan** – courts refusal to follow Rylands

* + The general rules that I may have the exclusive and undisturbed use and possession of my real estate, and so that I must use my real estate so as to not injure my neighbour, are much modified by the exigencies of the social state
	+ I should hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me

Non natural use (*Rickards v Lothian*): unusual, with high risk of dangers to others and only to the benefit of the user

Escape (*Read v Lyons*): escape from place of D’s control/occupation to a place which is outside of that – has been criticized as non sensical

#### Defences:

* Act of God
* Consent
* Act of P
* Act of 3rd party
* Statutory authority

## Vicarious Liability at Common Law

Policy Rationales

* Benefit/risk – risk of loss on party that stands to benefit from the risk you’re putting out there
* “Deep pockets”
* Efficiency – who has chance to profit/who has is likely to have protection against this loss?
* Deterrence – who is best placed to avoid this risk

### Common Law Doctrine of ‘Respondeat Superior’

* “Let the superior answer”
* The employer is liable for torts committed by their employee in the course of employment
* Liability has 3 elements
	+ Employee must have committed a tort
	+ **Person committing the tort must be an employee of the defendant**
		- Traditionally defn in terms of control: the servant was “subject to the control of the master as to the manner in which he shall do his work”
			* Difficult to apply
		- Modern organization test: whether the supposed employee is a cog in the defendant’s organizational machinery
	+ **The tort must be committed in the course of employment**
		- Was the employee carrying out an authorized act? Could be also an unauthorized mode of the authorized act?
		- Unauthorized?
			* Was it done to further the aim of the employer?
			* Strong connection test?

### Strong Connection Test

Was the unauthorized conduct sufficiently “closely connected” to the authorized act? \*\*only in cases of intentional wrongdoing that is unauthorized by the employer\*\*

In determining the sufficiency of the connection btw the employer’s creation or enhancement of the risk of the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include but are not limited to, the following:

* The opportunity that the enterprise afforded the employee to abuse their power
* The extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee)
* The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise
* The extent of power conferred on the employee in relation to the victim
* The vulnerability of potential victims to wrongful exercise of the employee’s power

### Bazley v Curry

Ratio: The opportunity for intimate private control and the parental relationship and power req by the terms of employment created the special environment that nurtured and brought to fruition Curry’s sexual abuse. The employer’s enterprise created and fostered the risk that led to the ultimate harm.

Facts: Children’s Foundation NPO operated two residential care facilities for the treatment of emotionally troubled children. The Foundation authorized its employees to act as parent figures to the children – charged them to care for the children physically, mentally and emotionally. Curry sexually abused children. Bazley sued the Foundation for compensation for the injury he suffered while in its care. Foundation took position that it had committed no fault in hiring or supervising Curry, it was not legally responsible.

Result: Held that the Foundation is vicariously liable for the sexual misconduct of Curry

Reason: **1.** Posit the employers are vicariously liable for

* + Employee acts authorized by the employer
	+ **Unauthorized acts so connected with authorized acts that they may be regarded as modes of doing an authorized act**

First step; precedence

1. Cases based on the rationale of “furtherance of the employer’s aims”
	1. Said to have ‘ostensible’ or ‘implied’ authority to do unauthorized act – does not suffice for intentional torts
2. Cases based on the employer’s creation of a situation of friction
	1. Idea that if the employer’s aims or enterprise incidentally create a situation of friction that may give rise to employees committing tortious acts, an employee’s intentional misconduct can be viewed as falling within the scope of the employment and the employer is vicariously liable
3. The dishonest employee cases

Progression from accidents, accident like torts to torts that bear no relationship to either agency-like conduct or accident

Common feature – in each case it can be said that **the employer’s enterprise had created the risk that produced the tortious act**. **Where the employee’s conduct is closely tied to a risk that the employer’s enterprise has placed in the community, the employer may justly be held vicariously liable for the employee’s wrong.**

Second step; whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability

Compromise between two policies; the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant and a concern not to impose undue burdens on business enterprises

Two fundamental concerns

1. Provision of a just and practical remedy for the harm
	1. Fleming; “a person who employs others to advance his own economic interest should be in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise.”
		1. Idea that the person who introduces a risk incurs a duty to those who may be injured
2. Deterrence of future harm

Holding the employer liable may encourage the employer to take such steps that reduce the risk of future harm

 Third step; precedent + policy = principle

Whether there is a connection btw the employment enterprise and the wrong that justifies imposition of vicarious liability on the employer for the wrong.

Any employment can be seen to provide “general cause” of an employer’s tort – therefore mere opportunity to commit a tort (but for) does not suffice.

It is obvious that the risk of an employee sexually abusing a child may be materially enhanced by giving the employee an opportunity to commit the abuse – which is obviously great in this situation (alone with child for extended periods and expected to supervise the child in intimate activities.

The risk of harm may also be enhanced by the nature of the relationship the employment establishes btw the employee and the child – **puts employee in position of intimacy and power over the child enhance the risk** of the employee feeling that they are able to take advantage.

The test for vicarious liability on employee’s sexual abuse of a client should **focus on whether the employer’s enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm** – must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of VL.

**2. Exemption for NPO**; from Blazey’s perspective the institution (however meritorious) put him in the intimate care of Curry and enhanced the risk of his being abused – it is fair the institution bear legal responsibility and may also deter other incidents of sexual abuse by motivating charitable organizations entrusted with the care of children to take precautions. **The suggestion that the victim must remain remediless for the greater good is crass and unsubstantiated utilitarianism – it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it.** Whether this applied to NP was not clear before this case.

Issue: Whether the appellant was nonetheless vicariously liable for its employee’s conduct

 Sub-issues:

1. May employers be held vicariously liable for their employees’ sexual assaults on clients or persons within their care?
2. If so, should non-profit employers be exempted from liability?

Strong Connection Test

Is the relationship btw the tortfeasor and vicarious defendant sufficiently close?

Is the wrongful act sufficiently closely connected to the conduct authorized by the employer?

Notes: McLachlin’s Principles – whether an employer is vicariously liable for an employee’s unauthorized, intentional wrong in cases where precedent is inconclusive

1. Openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of “scope of employment” and “mode of conduct”
2. The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the general employer to justify the imposition of vicarious liability. VL is generally appropriate where there is significant connection btw the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires.
3. In determining the sufficiency of the connection btw the employer’s creation or enhancement of the risk of the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include but are not limited to, the following:
	1. The opportunity that the enterprise afforded the employee to abuse their power
	2. The extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee)
	3. The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise
	4. The extent of power conferred on the employee in relation to the victim
	5. The vulnerability of potential victims to wrongful exercise of the employee’s power

### Jacobi v Griffiths

* Binnie
	+ D was non-profit club, objective: to provide behaviour guidance and to promote the health, social, educational, vocational, and character development of boys and girls
		- Important to interpret the NPO cannot internalize the costs in a way that profit enterprises can
	+ Griffiths (program director) was to organize recreational activities and the occasional outing, develop a rapport with clubs members
	+ Griffiths cultivated individual relationship with B&S P’s by drawing children to his home and eventually abused them sexually
	+ Court saw that the opportunity that the Club afforded Griffith’s was to abuse whatever power he may have had was slight – the sexual abuse only became possible when Griffith’s managed to subvert the public nature of the activities
		- Distinguish from Bazley from the intimate relationship created by the enterprise
	+ Its not enough that the enterprise creates the risk – there has to be a strong connection of the conduct and the role given by the employer
	+ ***Blazey* ­– it is not enough to postulate a series of steps each of which might not have happened “but for” the previous steps**
* McLachlin dissent
	+ Ultimate focus must be on the connection btw the employment and the tort and whether the former materially and significantly enhanced the risk of the latter
		- Dissipated by two considerations
			* Spatial and temporal factors – such as when and where the torts occurred must be considered with all the other relevant factors
				+ They are not per se determinative
				+ **Sufficient connection involves much more than when and where the wrongful act occurred**
			* Treat torts simply as discrete incidents that occurred at Griffith’s house ignores the careful plan of entrapment that Griffiths laid
	+ Almost all relevant factors suggest that Griffith’s torts were linked to his employment
		- Employment did materialize the risk
			* Without the opportunity with the objective to create relationship with children he would not have been able to subvert that public nature

**If there is no precedent, should vicarious liability be imposed based on the broader policy rationales behind strict liability?**

### John Doe v Bennet

Ratio: Roman Catholic Episcopal Corporations can be held direct and vicariously liable for wrongs committed by their priests if the enterprise is connected enough with the tort (per *Bazley*)

Facts: Bennett was a priest at the St George’s Diocese who sexually assaulted young boys for over 20 years. The boys, now adults, sued for the wrongs done to them. They are also suing St George’s Episcopal Corporation, the bishop and archbishop of St George’s. Bishops’ admitted negligence because the corporation’s activities and powers are confined to property and do not extend to the direction and discipline of its priests. Trial judge said they were liable. Appeals court said they were not because of what the SCC had said in *Jacobi* about non-profit status affecting vicarious liability.

Result: St. Georges Episcopal is liable

Reason: SCC clarifies that in *Jacobi* they only meant that courts had to be cautious when dealing with vicarious liability and non profits. The purpose of an ecclesiastical corporation is to serve as a point of legal interface between the church and the community. The legislation which created the corporation makes clear that its powers are not confined to property – it can sue and be sued with respect to all matters. The bishops were in charge of directing the priests and the actions of the bishops are those of the corporation. Applying the tests from *Bazley* and *Jacobi*, the enterprise (church) substantially enhanced the risk which led to the wrongs suffered by the plaintiffs.

**The bishop provided Bennett with the opportunity to abuse his power. Bennett’s wrongful acts were strongly related to the psychological intimacy inherent in his role as a priest. The bishop conferred an enormous degree of power on Bennett relative to his victims (power imbalance). In the small community the people perceived him as “god”** and he was really seen as the only figure of authority because this small community was so isolated.

Issue: Is St George's liable for Bennett’s actions while he was working in that church? To what extent?

Are the corporation sole’s activities and liability confined to matters pertaining to property?

Notes: Court declined to comment on if the Roman Catholic Church could also be held vicariously liable.

In *KLB*, it was determined that the relationship between foster parents and the government was not sufficiently close to ground imposition of vicarious liability because of the highly independent nature of foster parents from the government.

### E.B. v Order of the Oblates of Mary Immaculate in the Province of British Columbia

Ratio: The notion of fairness to the non-profit organization remains compatible with vicarious liability provided that a strong connection is established between the job-conferred authority and the tort

Facts: Saxey was a lay staff in a residential school (Oblates). Though his designated job was baker and motorboat operator, he partook in many other roles. During this time, he lured the plaintiff to his living quarters and sexually assaulted him multiple times. EB seeks damages from the Oblates by means of vicarious liability.

Result: No – VL should not be imposed

Reason: Invoking the *Bazley* test:

1. Saxey was not permitted or required to be with children at all — he was acting outside of his role when he got to know the children
	1. An opportunity was presented but it was a small one
2. The wrongful acts had nothing to do with furthering the respondent’s aims
3. Saxey’s duties did not require any significant contact with the students — further, his quarters were off limits to students
4. The respondent did not confer any power on Saxey in relation to the plaintiff
	1. To find that his status as “adult” conferred sufficient power to warrant vicarious liability would make the employer an “involuntary insurer”
5. **We cannot say that the employer increased the risk of harm by putting Saxey in his position and requiring him to do his job**

Issue: Did Saxey’s employment at the Obates substantially increase the risk of the tort according to the *Bazley* test?

Notes: Abella dissent; Abella J found a different outcome of the *Bazley* test:

1. Saxey was given living quarters in the middle of the school, was permitted to form relationships with vulnerable children, and was certainly aware of the lax supervision at the school
	1. i.e., there was significant opportunity for the misconduct
2. Sexual molestation is never the aim of any enterprise
3. Children were disciplined by threat of violence and were taught to obey all adults, including Saxey
4. (and 5) Saxey’s job duties were not clearly delineated and all staff were implicitly expected to help with all tasks — consequently, Saxey was given both actual and perceived power over students
	1. His job description might not have conferred power on him, but the way the school operated did

### Civil Liability for Sexual Assault in Aboriginal Residential Schools, Bruce Feldthusen

* The process for deciding these cases, especially *EB*, you can see the test
* Think about the aims they’re concerned about and press the court and ask really if they are achieving this goal
* The courts could easily have followed *Bazley* and imposed VL had they wanted
* Fair Q: why is the court taking such a narrow view?
	+ Why does the *EB* case turn on the status of the employment
* You could argue that these cases are not consistently decided

### Statutory Vicarious Liability

School Act s16(1) Liability for damage to property by a student

* Student and students parent are jointly and severally liable to the board in respect to the act of the student
* Not applicable to an “Independent student” – 18 or older, 16 or older and living independently or who is party to an agreement
* Parents generally are not VL but here it is imposed through statute

Traffic Safety Act s(1)

* If you are living with your parents and borrow their car and cause damage – you are deemed to be an agent or employer
* Makes it possible for the injured person to have access to the owners insurance funds

Traffic Safety Act s(2)

* The person who owns the car has consented to let you drive it, the owners insurance will be engaged by the fact that they are in essence VL for the damage that you have caused

## Defamation

Elements of Defamation

* + 1. That the words complained of are **defamatory**
		2. That the words complained of **refer to the plaintiff**
		3. That the words complained of were **published** to a third person

\*plaintiff’s case is not very onerous to meet

1. A defamatory statement is one which has:

“...A tendency to injure the reputation of the person to whom it refers, which lowers him in the estimation of the right thinking members of society, and in particular which causes him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem.” Abella J *Colour Your World*

The real test is: **Would the words tend to lower the plaintiff in the estimation of right thinking members of society generally**?

1. Reference to Plaintiff – Does the plaintiff have to be named?
	* Were the defamatory comments “published concerning the plaintiff”?
	* Would a reasonable person conclude that the statements were said about the plaintiff?

Can a group be defamed?

* + Cannot just escape liability by making comments to the group
	+ Can the words be reasonably taken to refer to and defame each individual member of the group?
	+ Context driven
		- How big is the group?
		- How extravagant is the statement?
		- Etc
1. Publication

Defamatory statements have to be published to have a course of action…

* + One person other than the plaintiff = published
	+ One aspect of plaintiff’s claim that is not based on strict liability
		- Accidental publication won’t lead to liability
		- Has to be **intentional or negligent** (fault element)
	+ Hyperlinks?
		- Court has said no (*Crookes v Newton*)
		- Link doesn’t stay under your control therefore you are not liable

### Definition of Defamation

#### Colour Your World Corporation v CBC

Ratio:

Facts: Colour sued CBC for defamation – alleging that their combination with certain visual images produced a defamatory broadcast. In particular, the combination would have the effect of having a viewer falsely understand that the plaintiff sold products knowing that they would cause mercury poisoning similar to that suffered at Minimata Bay and Grassy Narrows and by the young boy. Trial judge held that it was defamatory – not defensible as fair comment and was motivated by malice.

Result: Appeal allowed = set aside the trial judgment, and dismiss the action, with costs here and at trial.

Reason: Whether a statement is defamatory is judged by the standard of reasonable or ordinary member of the public. A degree of common sense should be attributed to viewers. Considering what was actually shown and said during the segments, its difficult to see how these two scenes transformed the program’s admonitory thesis about a possible unknown and untested health risk into a defamatory one that tied P to the knowing promotion of a potentially lethal mercury danger.

Issue: Is the segment defamatory? Would this lower the general public’s estimation of Colour Your World?

Notes:

#### Hay v Platinum Equities Inc

Ratio:

Facts: Platinum wanted to buy a property and needed fast financing, so they asked RBC, who then requested RERs (review engagement reports). To get the RERs quickly, Platinum went through a third party accountant who returned Platinum their necessary RERs, apparently done by Hays. RBC then contacted Platinum and Hays letting them know that the RERs were fraudulent. Hay called the ICAA to report the issue and proceeded to sue Platinum for defamation. After being served, Platinum also contacted the ICAA to report the issue. Hays was found to not have had anything to do with the RERs. Platinum then countersued Hays alleging that they had conspired to injure Platinum.

Result: Not defamation

Reason: 1)

The plaintiff claims that they were defamed **by innuendo** when fraudulent RERs were submitted to the bank, thus implicating the plaintiffs for falsely or negligently preparing the RERs. This claim may meet the second and third elements of defamation, but fails the first (defamatory words). This is because there is no expert evidence which shows that the financial statements were not in accordance with GAAP standards or that the statements themselves were fraudulent. Therefore the submission of the RERs to the bank was not itself defamatory.

2)

The letter is not defamatory because:

The plaintiff had already reported the issue to the ICAA,

This was a serious matter which Platinum was justified in investigating

And the words themselves do not lower the reputation of the plaintiff in the eyes of reasonable persons

The letter is protected by absolute privilege because:

Despite never explicitly stating “absolute privilege” as a defense, it is implied in their factum

The letter was a complaint to a professional disciplinary body and was an initial or incidental step in quasi-judicial proceedings (caselaw supports this as a ground for absolute privilege)

The letter is protected by qualified privilege because:

The serious allegation of fraudulent RERs made for a duty to bring the matter to the attention of the ICAA

Issue: Were the Hays defamed as a result of the submission of the RERs to the bank?

 Were the Hays defamed as a result of Chandran and Platinum’s letter?

Notes:

#### Awan v Levant

Ratio: Plainly defamatory statements were not neutralized because of a “known characteristic of the speaker”

Facts: Action challenges nine publications by the defendant on his blog. These blog posts generally relate to the events leading up to and including a hearing of the British Columbia Human Rights Tribunal in 2008. The plaintiff claims that the words complained of in the nine blog posts are false and defamatory of him. Although other defences were also pleaded, the defendant relied mainly on the defence of fair comment, and to a limited degree the defences of justification (i.e., truth) and qualified privilege. The defendant also takes the position that due to his reputation as an outspoken provocateur and troublemaker, none of what he said would be understood as defamatory in any event.

Awan, a law student at the time, alleged a book excerpt published in a magazine was Islamophobic. Awan testified to this affect at a British Columbia Human Rights Tribunal in June 2008. Levant is a conservative blogger on hate speech in Canada who wrote about Awan’s testimony on his blog. Levant targeted Awan because of Awan’s connection to the Canadian Islamic Congress’ President, against whom Levant felt ill-will. In nine different blog posts, Awan claimed that Levant’s statements were defamatory and false. Levant published these blog posts between 2008 and 2010, and the posts have remained on Levant’s blog ever since, with some later alterations by Levant. Titles for Levant’s relevant blog posts included “Khurrum Awan is a serial liar” and “Awan the liar, part 2.” Though Awan had considered a defamation suit in 2008, he waited until 2009 after Levant posted “Awan the liar, part 8,” which was a lengthy blog post that included hyperlinks to some of Levant’s earlier post about Awan.

Result: Held with costs for P – D take down defamatory words from blog. If D wishes to only remove part of the posts – D and P shall try to agree on what should be moved. If not D must submit proposed approach.

Reason: **Levant’s blog posts all contained language which was considered defamatory and would lower Awan’s reputation in the eyes of “ordinary right-thinking members of society.”** The blog posts also had a number of factual inaccuracies. Awan defended himself arguing that his special reputation would stop his readers from taking what he said at face value (*WIC Radio* defense). The Court decided to use the ordinary meaning of words, not taking into account the defendant’s special characteristics. Though the Court acknowledged similarities between this case and *WIC Radio,* it agreed with the majority in that case that **plainly defamatory statements were not neutralized because of a “known characteristic of the speaker.”**

Levant relied on the defenses of justification, fair comment, and qualified privilege. The latter two could be defeated by malice, for which a plaintiff has the burden. Some posts were protected by fair comment. Extrinsic evidence showed that Levant had malice towards Dr Elmsary, which he redirected at Awan. Intrinsic evidence in some of the blog posts also demonstrated malice, which was further indicated by the numerous errors and Levant’s decision to do minimal or no fact-checking.

Issue: Does being a “shock jock” show that the general public would not take his words seriously?
Notes:

### Defences

1. Justification/truth
	* Complete defence
	* Burden on D
	* If D unsuccessfully attempt to rely on this defence – damages may be increased
		+ Arguably you should be protected by absolute privilege in this light
	* Not subjective – based on evidence if it is actually true
2. Absolute privilege
	* Attached to a number of specific occasions (limited to these so its not abused)
		+ Judicial proceedings
			- As long as the commentary is relevant to the proceedings
			- Other court like proceedings will have same privilege (ex. WCB hearings, Hay and complaint to chartered accountants)
			- Journalist/reporter reporting what happened is covered
		+ Parliament proceedings
		+ High exec officials of state (cabinet members)
		+ Spousal communications
	* Complete defence
	* Protects communications in situations where society’s interests are best served by allowing people to speak freely
		+ Notion that it is better for everyone in these contexts if people are permitted to speak freely and this is true even if the commentary might cause harm
			- Law deciding the balance in this case
3. Qualified privilege
	* Partial or conditional immunity
	* Applies where the speaker making the statement “has interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom is so made has a corresponding duty to receive it.”
	* Limited to comments relating to the legit purpose of the occasion
	* Four main contexts
		+ Protection of one’s own interests
			- Limited to comments only that are necessary
		+ Matter of common interest or mutual concern
			- Ex. Land lord and tenant about third party, religious organization, professional associations, union etc.
		+ Moral or legal duty to protect another’s interest
			- Ex. Asked as an employer to be a reference, parent informing child about a safety concern
		+ Public interest
			- Ex. Communicating with wider public in good faith about a public concern
	* Privilege is lost if abused or exceeded (ex. malice)
4. **Fair comment**
	* Applies to comment and opinion
	* Must be:
		+ An opinion (not a statement of fact)
		+ Based on true facts
		+ On a matter of public interest
		+ Objectively fair (honest, even if harsh)
		+ Not malicious (malice defeats the defence)
		+ How does the reader take it? As fact or as a comment?
	* Levant was taken as a fact
	* WIC radio it was taken as an opinion
5. **Responsible publication on matters of public interest**
	* New complete defence since 2009
	* Why did the court decide to recognize this defence?
		+ Give more freedom to journalists and media – remove the concern about the chill on free speech, and using law of defamation to stifle commentary
		+ Grounded in principle
			- Existing law does not go far enough to protect freedom of expression
				* A right which is protected by the Charter should not have a chilling effect on this in favour of protection of reputation
		+ Grounded in jurisprudence
			- Other jurisdictions have similar defences
	* **TEST**: (*Grant v Torstar*)
		+ (A) Is the publication on a matter of public interest?
		+ (B) Was the publisher diligent in trying to verify the allegation having regard to:
			- The seriousness of the allegation
			- The public importance of the matter
			- The urgency of the matter
			- The status and reliability of the source
			- Whether the plaintiff’s side of the story was sought and accurately reported
			- Whether the inclusion of the defamatory statement was justifiable
			- Whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth
			- Any other relevant circumstances

Malice to Defeat a Defence

* Comments made out of spite or ill will
* Or where commentary is made because of an indirect motive or improper purpose
* Can also be established by showing the defendant spoke dishonestly and knowing or recklessly disregarded the truth.
* May be proved through intrinsic or extrinsic evidence.

Defamation Act

#### WIC Radio Ltd v Simpson

Ratio:

Facts: S was a widely known social activist opposed to any positive portrayal of gay lifestyle. M and S took opposing sides in the debate about purpose of introducing homosexuality into schools. In editorial, M compared S in her public persona to Hitler, KKK and skinheads and the acts of others after (the effect of their words). S brought defamation action against M and WIC. M testified no imputations of condoning violence but only to convey that S was intolerant bigot. Trial judge dismissed claim for defence of fair comment applied for complete defence. Court of Appeal reversed.

Result: Yes - appeal allowed

Reason: Law of fair comment must be developed in a manner consistent with freedom of expression but also dignity and reputation. Public controversy can be a rough trade, and the law needs to accommodate its requirements. Appropriate to modify the “honest belief” element of the fair comment so that the test consists of:

1. The comment must be on a matter of public interest
	1. Education on homosexuality engages public interest
2. The comment must be based on fact
	1. Facts well known to listening audience
3. The comment, though it can included inferences of fact, must be recognizable as comment
	1. The sting of libel was a comment and it would have been understood as such by M’s listeners
4. **The comment must satisfy objective test**: **could any person honestly express that opinion on the proved facts?** (Represents balance between free expression and appropriate protection of reputation)
	1. Sufficient nexus between S’s public declarations and the defamatory imputation to meet this element

The D must prove the four elements of the defence before the onus switches back to the plaintiff to establish malice.

Issue: Does the defence of fair comment protect D?

Notes: **Lebel** concurring; triers of fact should be mindful of ensuring that the P’s reputation is actually threatened before turning to available defences. Test = whether public would think less of the plaintiff as a result of the comment. In this case this was comment not fact and would be treated necessarily different than statement of fact. There was no realistic threat to reputation and were not prima facie defamatory.

 **The fair defence should not include an element of honest belief**; no longer offers any value in balancing. Eliminating the element would formally recognize that it is no longer justifiable.

 **Rosthein** concurring; Statements were defamatory and defence applies but should **not include honest belief**.

#### Grant v Torstar

Issues:

1. Should the common law provide a **defence based on responsible communication in the public interest**?

The current law with respect to statements that are reliable and important to public debate does not give adequate weight to the con’al value of free expression. Strict liability is not a justifiable protection of reputation. The law of defamation currently accords no protection for statements on matters of public interest if they cannot be proven true – but such communications advance both free expression, democratic discourse and truth finding – and require some protection in the law of defamation. The balance tips in favour of broadening the defences available to those who communicate facts it is in the public’s interest to know.

1. If so, what are the **elements** of the new defence?
	1. The publication is on a matter of public interest and
	2. The publisher was diligent in trying to verify the allegation, having regard to
		1. The seriousness of the allegation
		2. The public importance of the matter
		3. The urgency of the matter
		4. The status and reliability of the source
		5. Whether the plaintiff’s side of the story was sought and accurately reported
		6. Whether the inclusion of the defamatory statement was justifiable
		7. Whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth
		8. Any other relevant circumstances
2. If so, what procedures should apply? In particular, what are the respective roles of the judge and jury?
	1. The defence of responsible communication does not require preliminary rulings from the jury on primary meaning, since it does not depend on the supposition of a single meaning. The jury should be instructed to assess the responsibility of the communication in light of the range of meanings the words are reasonably capable of bearing, including evidence as to the defendant’s intended meaning.

# Intro to Negligence

Questions to Consider:

What leads to the courts recognizing a claim that would not normally be recognized?

Why did negligence law come to have such a wide ambit?

## The Negligence Claim

### Components of Negligence Action

**Duty of Care**

A duty of care is owed to persons who fall within the ambit of foreseeable risk created by the D’s actions.

A duty of care is a question of law – the trial judge’s decision therefore can be overturned by an appellate court.

* Donoghue v Stevenson
	+ Case where HoL recognized a wider duty of care so as to not limit the types of claims that could be brought through negligence
	+ “You must not injure your neighbour” – question of when duty of care is owed
		- Lawyer’s Q “who is my neighbour” receives a restricted reply
		- You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbor
			* Who is my neighbour? “persons who are so closely and directly affected by my act that I ought reasonable to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”
				+ Better question is; who is not my neighbour

**Standard of Care**

(Did the D meet the duty of care that they owed?)

1. What would a reasonable person have done in the circumstances? (objective inquiry)
	1. How ought the D to have acted?
	2. Question of LAW
		1. Can be overturned by a court of appeal
2. Was the defendant negligent?
	1. Did they meet the standard of care?
	2. Question of FACT
		1. Can only be overturned if the conclusion is so perverse

**Causation**

*“But for the D’s conduct, would the P have suffered this loss”* (TEST)

Did the defendants negligent actions cause the loss suffered by the plaintiff’s?

**Remoteness**

Sometimes a part of the causation inquiry – as proximate causation

Defendant is only liable for losses that are a foreseeable result of his or her conduct.

For which of P’s injuries should be the D held liable? Which of the injuries are sufficiently proximate?

**Damage (Actual Loss)**

Negligence law does require harm for a successful claim. A D will not be liable if the P cannot prove that they has suffered a legally recognized typed of loss.

**Defences**

D to rely on either to completely evade liability or reduce damages.

To what extent do we rely on the P’s conduct when assessing D’s liability?

 Contributory negligence; voluntary assumption of the risk; illegality (partial)

 Limitation periods (how quickly the P brought the claim)

# Duty of care

**A duty of care is owed to those individuals who are within the ambit of foreseeable risk that surrounds the defendant’s conduct.**

Is there any legal reason the D should care how or if their behaviour effects the P?

* Any negligence claim will start with whether the D owes the P a duty of care..
	+ Foreseeable victim?
	+ Status of the wrongdoer? Ex. government authority
	+ Type of injury? Is it solely financial, what is the class of people that the duty may be owed to?
* Duty of care is a QUESTION OF LAW 🡪 it can be overturned in appeal
	+ Standard of review = correctness
* This is how the courts try to reign in the expansion of negligence law
	+ By limiting the contexts in which duty of care will be found
	+ Thereby reigning in the expansion of negligence law
	+ Closely related to the idea of remoteness
		- Not a threshold question but does ask “to what extent are we going to hold the D accountable?”
		- Both ways to limit negligence
* **The Neighbour Principle:** We owe a DoC to anyone who is a foreseeable victim of our negligent conduct. The concept is not limited to the parties to a contract (*Donoghue*)
* “Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air will not do” (*Palsgraf*)
* Security companies owe a duty of care to those they supposed to protect (*Fullowka*)
* Treatment centres taking care of a child do *not* owe a DoC to the child’s family (*Syl Apps*)

**FIRST QUESTION: Is there an already established duty?**

**If, NO 🡪 Anns/Cooper test**

**First Stage: (Plaintiff burden of proof)**

1. **Was the harm a reasonably foreseeable consequence of defendant's actions?**
	* Establishing this on its own is not sufficient to satisfy this first stage
2. **Are there policy reasons why tort liability should not be recognized between these parties?** Is there sufficient proximity between the parties? (Proximity analysis, plaintiff’s burden)
	1. Factors to consider
		1. Expectations of the parties
		2. Representations made by the D
		3. Reliance by P
		4. Property or other interests
	2. Categories in which proximity has already been recognized:
		1. Foreseeability of physical harm to plaintiff or plaintiff’s property
		2. Negligent misstatement
		3. Duty to warn of risk of danger
		4. Municipality owes duty to inspect houses w/o negligence
		5. Relational economic loss (in certain situations)
		6. Gov’t authorities who undertake a policy of road maintenance must execute the policy without negligence
	3. These categories are not closed – but the P will have to establish proximity 🡪 analogy to recognized situations or policy pushing to recognize proximity in this case

**Second Stage: (Defendant burden of proof)**

* + **Are there any residual policy concerns?** Not related to the relationship of the parties, but larger questions of how recognizing the duty would impact the legal system and society in general — policy concerns that are external to the parties themselves.
		- i.e. what will it do to legal system, economic efficiency, etc.
		- If a duty exists what would be the effect on…
			* Other legal obligations
			* The legal system
			* Society more generally?

What is the court trying to balance?

* The continued expansion of negligence law into areas that it has not already be established

Why not use the duty at large approach?

* Indeterminate liability

### General Principles

#### Winterbottom v Wright

* Postal worker was thrown from his mail carriage and became injured
* There was carelessness by the organization which maintained the carriage
* But the contract for maintenance was between the organization and the plaintiff’s employer (no privity of contract)
* Therefore, there was no contract between the plaintiff and defendant and the plaintiff could not recover
	+ There could be no duty of care owed by the maintenance company because of privity of K
	+ Privity was a barrier to duty of care
* **At this point a DoC could only be recognized if there was a K or a special type of relationship**
	+ But industrial revolution = more industrial injuries
	+ Also increase in the advent of insurance
	+ Gradual erosion of privity of K limit on DoC
	+ Which leads to Donohue v Stevenson

#### DONOHUE V STEVENSON

Ratio: “The neighbour principle” We owe a DoC to anyone who is a foreseeable victim of our negligent conduct. The concept is not limited to the parties to a contract anymore as in Winterbottom.

Facts: Woman found remains of a snail in her ginger beer float, tries to sue the manufacturer

Result: Overruled Winterbottom and developed the neighbour principle

Reason: There is no recourse for a victim in cases such as this. She cannot sue the sue the bar because they didn’t do anything wrong. Under the law at the time she had no cause of action against the manufacturer because there was no privity of contract. But the manufacturer (and others) must know that their products will eventually be used by an end consumer. Therefore, there should be a duty of care imposed on manufacturers.

Issue: Whether the manufacturer owed a duty of care to the victim

Notes: Dissenting judges feared the broadening of DoC — where will we draw the line? This case marks the first time the court opened the door a bit more widely for DoC. At the same time this decision was made, industrialization was occurring and the world was becoming closer knit.

#### Anns v Merton Borough Council (high watermark)

* Whether or not the council owed a duty of care in the context of its failure to inspect homes as they were being built
* You do not have to show the court precedent, all you have to do is establish the existence of a two-stage test
	+ This test was extremely wide open compared to any duty of care definition
	+ Overtime, HOL retracted from this openness to restrict it
	+ **Canadian courts have adopted and held to this test – continued reiteration of this test for DoC in Canada**
1. Is there a sufficient relationship of proximity neighbourhood such that, in the reasonable contemplation of the D, carelessness on his part may be likely to cause damage to the P?
2. If yes, are there any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach may give rise?

#### Cooper v Hobart, 2001 SCC

Ratio:

Facts: A mortgage broker caused investors to lose money, he was eventually deregistered. Investor sues the registrar of mortgage brokers for not acting sooner than they did — trying to recover damages for losses.

Result: No duty of care

Reason: Different policy considerations are relevant at each stage of the Anns test.

**1st** **Stage: (Plaintiff burden of proof)**

* (1) Does an analogous duty already exist? No
* (2) **Was the harm a reasonably foreseeable consequence of defendant's actions?**
	+ 1. Establishing this on its own is not sufficient to satisfy this first stage
		2. Yes – it’s clear that if the registrar is acting negligently, harm to people investing their money is reasonably foreseeable
* (3) **Are there policy reasons why tort liability should not be recognized between these parties?** Is there sufficient proximity between the parties? (Proximity analysis, plaintiff’s burden)
	+ 1. Categories in which proximity has already been recognized:
			1. Foreseeability of physical harm to plaintiff or plaintiff’s property
			2. Negligent misstatement
			3. Duty to warn of risk of danger
			4. Municipality owes duty to inspect houses w/o negligence
			5. Relational economic loss (in certain situations)
			6. Gov’t authorities who undertake a policy of road maintenance must execute the policy without negligence
		2. These categories are not closed – but the P will have to establish proximity 🡪 analogy to recognized situations or policy pushing to recognize proximity in this case
* Does not pass 1st stage therefore the court is not prepared to recognize a duty of care
	+ 1. There were no existing or analogous cases.
		2. Even if the loss was foreseeable, there was no proximity between the registrar and the plaintiffs.
			1. The registrar does not exist to look after the interests of the individual investors; instead it looks after the public in general
		3. **The registrar is a statutory creation and therefore, there must be a DoC explicitly created in the statute explicitly**
			1. P 168 – the regulatory scheme provides a general framework to ensure an efficient operation of the mortgage market in general

**2nd** **Stage: (Defendant burden of proof)**

* **Are there any residual policy concerns?** Not related to the relationship of the parties, but larger questions of how recognizing the duty would impact the legal system and society in general — policy concerns that are external to the parties themselves.
	+ 1. i.e. what will it do to legal system, economic efficiency, etc.
* Would not have passed the second stage either.
	+ 1. The registrar is acting in a quasi-judicial manner when it determines whether to revoke a license — must be fair to the broker.
		2. They owe a duty to the public at large, not to individual investors.

Issue: Whether the registrar owed a duty of care to its brokers’ investors

Notes: The court is now considering different policy considerations at both stages of the analysis.

#### Fullowka v Pinkerton

Ratio: This is how the test from *Cooper* is applied. There is a duty of care between security firms and the people that they are expected to protect.

Facts: Miners were striking and one of the miners snuck by the security, entered the mine, and set off an explosion killing replacement mine workers and strike breakers. A miner brought a negligence claim against the security firm (Pinkerton’s) and the government for not effectively keeping the mine safe. The original security firm quit because of how much violence there was during this strike. As the violence began to subside, Pinkerton’s lightened the security. Plaintiff won at trial but was overturned on appeal.

Result: There ***is*** a duty of care for both entities but it was not breached

Reason: **1st Stage**

* + Was the harm foreseeable?
		- Yes, Pinkerton’s could have foreseen harm since there had been previous explosions
	+ Was there sufficient proximity? RE **Pinkerton**
		- Plaintiff expected that Pinkerton’s would provide security and keep the mine safe and act reasonably in the execution of that obligation — they were there to manage risk and protect the workers
		- This was represented by Pinkerton’s and the plaintiff reasonably believed it to be true
		- Plaintiff relied on their presence to ensure safety
			* Court of Appeal: Repeated incidents of violence demonstrate that Pinkerton’s was not actually able to fully secure the mine then why did the P’s rely on it?
				+ SCC says this does not matter – the miners still relied on this security and expected this
		- BUT Pinkerton’s did not have to *guarantee* safety, simply to meet the standard of care
	+ **Government** definitely could have foreseen the violence, but were they close enough in proximity?
		- Start with the statute (because the government body is a creature of statute)
		- Yes, proximity exists because the group seeking protection were just the replacement miners, a much smaller group than the investors in *Cooper*
		- Government inspectors were frequently at the mine site, got regular briefs, and had personal and direct dealings with the replacement miners
		- Statutory duties were related to the conduct of the miners themselves — many of the government representatives personally knew the miners
		- The fact that you’re a statutory regulator does not remove you from sufficient proximity of the plaintiffs
		- Conclusion: Pinkerton’s and the government had a statutory duty to inspect the mine and stop work if it was found to be unsafe — AKA they had a DoC towards the replacement workers

**2nd Stage**

* + Are there any policy considerations against recognizing a duty of care?
		- No, court dismisses all of them.
		- Court of appeal held that tort liability is personal and fault based – we have to be careful and cautious imposing liability
			* That is a misunderstanding of what the P’s are asking for
			* The claim is that those entities failed to act reasonably to provide safety and ensure shutting down a mine that couldn’t be operated safely
		- Ability of the D to control the actions of the person who set the explosion, ability to intervene etc.
		- **No concern of indeterminate liability since it was a small group of miners** that needed protection; pretty straightforward
			* Also talking about physical injury to this small group of people
				+ This is self-limiting due to the nature of the injury

Issue: Whether Pinkerton’s and the government owed a duty of care to the workers and whether they breached that duty

Notes:

#### Syl Apps Secure Treatment Centre v BD

Ratio: Treatment centres taking care of a child owe no duty of care to the child’s family.

Facts: RD, a 14 year old girl, was apprehended by Child Welfare authorities after she had written a story in school which suggested that her parents had sexually abused her. After police investigation, no criminal charges were laid, however, she was determined to be in need of protection by the state. She was put in foster care, attempted suicide several times, and as a result was transferred to several psychiatric facilities and made a permanent ward of the state. She was at a treatment centre where B was her social worker, who treated her as if her parents had physically and sexually abused her. Her parents, grandmother and siblings filed a statement of claim seeking $40 million in damages which revolved around their assertion that RD being treated as an abuse victim was negligent conduct, and that it was further negligence not to return her to the family, thereby depriving the family of a relationship with her. The parent’s argument was that child welfare authorities had treated the case as though there was sexual abuse, which was not true, and therefore they had irreparably damaged their relationship with the child. Motion was filed to have statement of claim struck down on the grounds that there was no reasonable cause of action, court of appeal overturned.

Result: No duty of care

Reason: Would need to pass 3 steps in recognizing duty of care—needs to pass *Anns/Cooper* test for reasonable foreseeability, proximity, as well as no policy reasons for not acknowledging a duty of care for the treatment centre and the social worker towards the family.

* + There is reasonable foreseeability of harm towards family, as if those parties fail to discharge their duty adequately there may be harm to the family
	+ There is also a concern of whether there is proximity; **court held that the statutory scheme in the Child and Family Services Act outlines the primary concerns of the entities involved (child is paramount)**
		- The risk of conflicting duties is too high; statute says that the primary concern is the child, therefore t**he court refused to find proximity**
		- Overall duty of care for social worker and treatment centre should be towards the child
		- \*Social workers could not do their job properly if they have to worry about being sued by the family
		- Clear intention by the legislature that the focus should be on child, and that if social workers do their job properly then they should not be subject to litigation
		- The statute itself shields from liability provided they act in good faith
			* Signal from legislature a limited scope of liability
	+ Don’t really need to answer whether there are residual policy considerations as they already found in the first stage of analysis no duty of care, however, even if that wasn’t the case then we would have said no at residual policy stage
	+ Residual policies: the possibility of having dual litigation present (child protection hearing + private law) would result in unnecessary public expense and inhibit social workers from acting in the best interests of the child for fear of subsequent litigation, which are not in the interest of the legal system or of the public

Issue: Does a treatment centre and its employee into whose care a child has been placed, owe a (novel) legal duty of care to the family of a child they have been ordered to protect?

Notes:

#### Rankin v JJ

Ratio:

Facts: J and C (minors) both drank and smoked weed at C’s mothers house and left to steal from unlocked cars. Boys began walking around R’s lot for unlocked car. C stole car with keys still in it and told J to get in. Car crashed, J suffered catastrophic brain injury. J (by litigation guardian) sued R, C and C’s mother. At trial it was held R owed a duty of care to J and the jury found that all parties had been negligent. ONCA upheld trial decision.

Result: Appeal should be allowed and claim against R dismissed – no duty of care

Reason: J did not provide sufficient evidence to support the establishment of a DOC owed by R. There is no clear guidance in Canadian case law on whether a business owes a duty of care to someone who is injured following the theft of a vehicle from its premises. Therefore, an Anns/Cooper analysis will be conducted in this case. To establish a duty of care, there must be a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. Once foreseeability and proximity are made out, a prima facie duty of care is established.

**The proper question to be asked is whether the type of harm suffered — personal injury — was reasonably foreseeable to someone in the position of R when considering the security of the vehicles stored at the garage.**

* + To find a duty of care, there must be some circumstance or evidence to suggest that a person in the position of R ought to have reasonably foreseen the risk of injury
	+ Courts below relied on risk of theft by minors who would be inexperienced or reckless
		- This assumption should not be automatic
		- Risk is assumed of theft – but court does not want to go further than this
		- Here there was insufficient evidence to suggest that minors would be there/involved in joyriding or theft
	+ There was also nothing to connect the risk of theft to the risk of someone being physically injured
	+ The burden of establishing a prima facie duty of care owed by R has not been met

The notion that illegal or immoral conduct by a plaintiff precludes the existence of a duty of care has consistently been rejected by the Court… While illegality can operate as a defence to a tort action in limited circumstances when it is necessary to preserve the integrity of the legal system, this concern does not arise in the circumstances of this case.

Issue: Whether R owed J a duty of care

Notes: Brown and Gascon dissent; The relationship between R and J falls within a category of relationships in which a duty of care has been previously found to exist. This case does not require the Court to undertake a full analysis to establish a novel duty of care. t involves the application of a category of relationships that has long been recognized as imposing a duty of care — namely, where the defendant’s act foreseeably causes physical harm to the plaintiff. Physical injury to J was a reasonably foreseeable consequence of R’s negligence.

#### Palsgraf v Long Island Railroad (US – lego video lol)

Ratio: Without the conception that one’s actions could cause harm excludes the possibility of liability. If not foreseeable, you don’t owe a duty of care.

Facts: Defendant was a railway guard who helped push a passenger onto a train — in doing so he made the passenger drop his fireworks. The fireworks went off and the explosion caused a scale to fall over onto the plaintiff who was far from the defendant.

Result: No, there was no duty of care owed to the plaintiff

Reason: If the defendant was at all negligent, it was to the man he pushed onto the train, not the plaintiff. Held that the plaintiff was outside of the range of foreseeable danger. “Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air will not do”.

Issue: Whether the railway employee owed a duty of care to the plaintiff

Notes: Dissent; Argued that a general duty is owed to the world at large in the vicinity of your wrongful conduct. Everyone owes duty of care to the world at large, if our actions cause harm to other people then we need to be responsible for those actions—would favour compensating the plaintiff, disregards fault-based rationale for tort law.

## Duty to Rescue

**At common law, the presumption is that you have no duty to rescue…** for the most part the literature says we should not change this (liberal underpinnings of the legal system)

* Common law has never recognized this and imposing this duty would require a radical change
* Impose a moral duty
* Other scholars argue that a duty to rescue is not aimed at the negative structure of tort law (not the positive structure have having to help people)
* Most civil law jurisdictions do have duties to assist even if they are conditioned

### Horsely v MacLaren

Ratio: There is no such thing as a duty to rescue, however in particular cases where there is a pre-established relationship, the court may find a duty of care to help another. Owner/operator of a boat has a duty to do his best to rescue a guest who has fallen overboard.

Facts: While on MacLaren’s boat, Matthews fell into the water. MacLaren tries to reverse the boat to go back. Horsely jumped in to save him after failed attempts to give him life jackets, and Jones jump in – but both Matthews and Horsely died. Families of Matthews and Horsely are suing MacLaren for his negligent rescue. Matthews cause was unsuccessful at trial – due to the lack of causation because there was no COD determined like with Horsely even though its likely they died of the same thing. Horsely’s estate argues that MacLaren’s negligent rescue caused Horsely to jump in.

Result: No, there was no duty to rescue

Reason: Nothing that MacLaren did or failed to do caused the deaths. Though there is no generalized duty to rescue, MacLaren did owe a reasonable duty of care to look out for guests which he invited on to his boat. **MacLaren is not just a bystander - he was implicated in the creation of the risk by inviting people onto his boat (risky situation) which creates some obligations**. If MacLaren was to be found responsible for Horsley’s death, then MacLaren’s negligence must have created some new danger to Matthews, which caused Horsley to act as he did. This was not the case. While MacLaren may not have acted in the best way possible, he did not breach the standard of care owed to his passengers. He felt that reversing the boat was the better move, rather than turning it around and coming bow on to the body. Ritchie J accepts this as a “heat of the moment” sort of argument — may not have been ideal but was not negligent.

Issue: Whether a legal duty exists to rescue a passenger who fell overboard by reason of his own carelessness

Notes: Laskin’s dissent; Disagrees, feels that this was negligent. Says that MacLaren should have turned boat around and attempted bow on rescue, not doing so directly led to Horsley feeling compelled to jump in the water to attempt a rescue which led to his death. SCC found that the defendant must take reasonable care in respect of his passengers. With respect to Matthews, no causation was established (he jumped, sank and died of his own mistake). Plaintiff would have to establish that the defendant's negligence in trying to rescue Matthews is what caused plaintiff to jump out of the boat. Defendant did not do anything that caused plaintiff to jump in the water. Defendant did not create the perilous situation. Therefore, there is no liability

### Jordan House v Menow

* Well-known patron of bar became intoxicated. Bar agent asked him to leave. They knew that for him to get home he would have to walk along a busy highway. He got a ride part of the way but was later struck by a car and killed.
* SCC found a commercial host duty of care. Had to take care not to serve to the point of intoxication. If they did, they then assumed the duty to prevent him from injuring himself or others.
* Many factors in the case: (1) He was well known to tavern and couldn’t “handle” his liquor (2) They served him to the point of intoxication (3) The tavern stood to gain financially from relationship (4) Location on busy highway (5) Liquor statute prohibits over-service.
* This seems to create an exception to the rule that there is no duty to rescue.

### Stewart v Pettie

Ratio: Alcohol-serving establishments have a duty of care to their intoxicated patrons and third parties who may be injured by their intoxicated patrons. Serving people past the point of intoxication does not in and of itself pose a foreseeable risk, there must be an additional risk factor.

Facts: Party of four was drinking in a hotel bar. Driver had been drinking all night but did not appear drunk. The waitress who had been serving them knew he had been drinking. He drives and the plaintiff is injured in a resulting accident — she sues him and the hotel. Argues that the hotel owes a duty of care to ensure that drunk patrons do not drive. There were other sober members of the party that could have driven. Defendant knew driver was drunk but could have thought that someone else was going to drive.

Result: Yes, there is a duty of care but it was not breached by the establishment
Reason: SCC applied *Jordan House* and *Anns* test:

(1) There was a duty of care based on *Jordan House.* It is reasonably foreseeable that if an intoxicated customer drives away after drinking at the establishment they might injure themselves or a 3rd party.

(2) But, the DoC was not breached. There were sober persons in the party that could have driven and were aware of the driver’s status. It would not have been reasonably foreseeable to the waitress that the drunk would have ended up driving. She would’ve concluded that one of the sober people would have driven.

Proximity analysis was not as robust prior to *Cooper*, which is when this case occurred.

Issue: Whether hotels (commercial hosts) owe a duty of care to ensure that drunk patrons do not drive (duty would extend to the driver *and* third parties)

Notes: After this case was decided, there were a lot of cases of people trying to extend this duty of care to fit their own circumstances.

### Childs v Desormeaux

Ratio: Social host is not liable for actions of their inebriated guests, unless they knew of and/or assisted in those actions

Facts: Desormeaux was drinking at a NYE BYOB party (12 beers in 2.5 hours). He had a history of drinking and driving and did not have insurance (hosts of the party did). He goes to drive home and the host asks if he was okay — he said he was, then drove off. While driving he collides with oncoming traffic and a passenger is severely injured — she sues the hosts of the party.

Result: No, there is no duty of care here

Reason: Is this a novel claim? Yes — significantly different from commercial hosts (hotel).

* + Differences between commercial and social hosts:
		- Commercial hosts can monitor consumption, social hosts cannot
		- Commercial consumption of alcohol is regulated by statute, private-affairs are not — as a result, the two types of hosts operate differently
		- There is a contractual relationship between commercial hosts and their patrons, not between social hosts and their guests
		- Commercial hosts also have an incentive not only to serve drinks, but to over serve, as overconsumption is more profitable than responsible consumption — creates a greater duty to monitor consumption in the interest of the general public
	+ Was the harm reasonably foreseeable? (*Cooper*)
		- No — injury could not have been foreseen since Desormeaux did not appear drunk when he left the party. Hosts could not have known.
		- It was not enough that he had a history of DUIs
		- “Was it foreseeable when he left, even though he did not appear to be impaired, that he would harm someone while driving?”
	+ Was there sufficient proximity? No — none of the following elements were present.
		- **It is possible to find proximity in the case of nonfeasance – but this requires very thorough analysis/consideration**
		- Factors common to other NON-feasance situations
			* Risk creation/enhancement
				+ Where the defendant has been reasonably involved in the creation of a risk then the defendant has incurred some responsibility
				+ If the host has an active interest in getting the guest drunk, or alternatively if the host is not intoxicated and sees a clearly drunk guest leave, planning to drive, then the host might be found liable
			* Autonomy
				+ If there is a requirement that the defendant does something, how much does that interfere with the plaintiff’s autonomy?
				+ This is often found in relationships with a control/supervision element (e.g., teacher and their student)
				+ A person who accepts an invitation to “attend a private party does not park his autonomy at the door”
			* Reasonable reliance — was there reliance placed on the defendant by the plaintiff?
				+ If you as a plaintiff have come to rely on the defendant for safety, then the court will be more prepared to impose a duty of care
				+ Likewise, in a control/supervision relationship, it is assumed that the student (for example) was relying on their teacher
	+ **More is required to establish a danger or risk that requires a positive action**

Issue: Whether the hosts owe a duty of care to parties that might be injured by their inebriated guests

Notes: Depending on the date that a case was decided, the judges may or may not refer to *Cooper* (may only refer to the *Anns* test). These cases aren’t so much exceptions to the rule (that there’s no duty to rescue) but different factual patterns that lead to different results.

### Liability to Rescuer

If the D put’s people/person in danger, do they owe a DOC to the rescuer? The courts are inclined to find this, they are not too fussed with the fact that the rescuers action involves choice.

Cardozo J *Wagner v International Ry Co*

“Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their efforts within the range of natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is also a wrong to his rescuer… **the risk of rescue, if only it be not wanton**, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had…”

*Moddegonge v Huron County*

“It was delicately argued that the efforts of Geraldine Moddejonge constituted a rash and futile gesture; that reasonableness did not attach to her response. Upon this, the rescue of Sandra Thompson is sufficient answer. One must not approach the problem with the wisdom that comes after the event. Justice is not to be measured in such scales. To Geraldine M duty did not give her a choice. She accepted it. She discharged it. More need not be said. The law will give her actions a sanctuary.”

## Duty to the unborn

Pregnant woman is injured… later child is born with injuries

* Well established that a third party that injures the pregnant woman can be liable to the child if its born with injuries
* The law has never recognized the fetus as a separate legal entity
* Courts apply legal fiction indicating that the rights/cause of actions crystallize upon the birth of the child

*Dobson v Dobson*

* Pregnant woman was in accident – her fault
* Her child was born and had injuries that were thought to be attributable to the car accident
* Question: can a pregnant woman and later mother be liable to her child for her actions while she was pregnant
* Before *Cooper v Hobart*
* Assumed that there was a separate legal entity
	+ Turned on policy argument for autonomy of the pregnant woman
		- Basically everything a pregnant woman does can affect the fetus
* The common law is not the right place to do this – if Parliament wants to
	+ AB is the only province with legislation
	+ Maternal Tort Liability Act
		- Creates the possibility of liability in only motor vehicle accidents, where the woman is insured

## Public Officials

* In general terms the executive branch of the government (Crown liability)
* Statutory intervention into traditional common law approach that the Crown can do no wrong
	+ Creates a cause of action
	+ This is in every jurisdiction in Canada
* Can include direct liability, vicarious liability, occupier’s liability etc.
* There can be special limitation periods and immunities
	+ *Municipal Government Act* and clearing roadways/sidewalks special circumstances and limitation period

Why distinguish between public authorities and private persons for the purposes of tort liability?

* Statutory powers vs. statutory duties
	+ If there are duties from a statute by legislative mandate, it is less contentious
		- If they are carrying out duties, then its less likely to be found negligent
	+ If they are given power/discretion… the courts are reluctant within – to substitute public discretion with courts discretion
* What concerns arise in contemplating whether public authorities can be liable in negligence?
	+ Flood gates?
	+ Taking away money to go towards litigation rather than public benefit
* Are these concerns present in all tort claims against public authorities?

*Anns*

* Economic loss case and a failure to take up a statutory power to inspect
* Authority to inspect the buildings while they were under construction but didn’t
* Can this municipal authority owe a duty of care?
	+ HOL held that yes they owe a DOC and could be liable to damages
	+ This has since been stepped away from
* England later essentially overturned this possibility for liability in economic loss cases
	+ Only property damage or personal injury

Policy vs. Operations

* The only duty that policy decisions create is to act in good faith
* Operational decisions, however, may result in an actionable DoC
* Policy decision indicators include: (*Just v BC*)
	+ Are they decisions made on the basis of social, political, economic factors?
	+ High level of decision making
	+ Resource allocation decisions
* Test to determine DoC in government cases:
	+ Is there **proximity** between the plaintiff and the allegedly responsible public official?
	+ Is there **reasonable foreseeability** between the decision and the injury?
	+ Is it a “core policy” decision or an operational decision?
* “Core policy” decisions are decisions as to a course or principle of action, such as economic social and political factors, provided they are neither irrational nor taken in bad faith
	+ “Core policy” decisions are immune from liability unless they are made in bad faith

### Just v BC

Ratio: Only duty in policy decisions are to act in good faith, operational issues can arise in a duty of care. When determining if it’s a policy decision or an operational decision, factors in favour of it being a policy decision are whether it involved social, political, and economic factors, has a high level of decision making, and includes resource allocation decisions.

Facts: Plaintiff and daughter were driving to Whistler, had to stop on the highway to wait as they were caught in a blizzard. While they were stopped, the car was crushed by a boulder on a mountain highway. The daughter was killed, father was seriously injured. They sued the government saying they did not take proper care in their inspection of the rock slopes. At trial, and the CA held that the government inspection system was a policy decision. The government could decide to inspect and how to inspect.

Result:

Reason: **Cory J SCC**:

SCC reversed the lower court. The manner and frequency of inspection were operational decisions. Only the decision to inspect at all was a policy decision. Only duty in policy decisions are to act in good faith. Operational issues however can arise in a duty of care. When determining if it is a policy decision: involves social, political, and economic factors, has a high level of decision making, and includes resource allocation decisions. This seems to really broaden the scope of government liability. The plaintiff got a new trial and was awarded damages.

**McLachlin J** was the trial judge in this case, relied on *Barrett v North Vancouver*, in which a plaintiff was riding his bicycle and hit a pothole, which caused him to fall and hurt himself. Sued city for negligence in not having filled the pothole; City was found not negligent as it was found that how often potholes should be filled was a policy decision, and therefore they only needed to act in good faith.Felt that it was a policy decision amounting to the allocation of scarce resources in Just, and therefore just need to act in good faith.

Issue: Is it a policy or operational decision?

Notes: Sopinka dissent; policy vs. operational distinction not the best touch stone

### Brown v BC

* Plaintiff skidded on an icy road on Vancouver Island and was injured.
	+ Other accident also occurred there.
	+ The RCMP called to get some maintenance (a sand truck) on the highway but nothing was done for a while as the department responsible was on its “summer schedule”.
* Plaintiff sued: (1) Did not respond to the icy conditions in a timely manner (2) Had the highway been properly maintained it would not have gotten icy.
* Plaintiff appeals to SCC
* Province was not responsible. The decision to have a “summer schedule” is a policy decision as it involves factors like budget constraints, personnel negotiation with gov’t unions, and political and economic factors etc.
* Since there was no bad faith the policy is not reviewable by the Court.
* The Court states that *Just* was not meant to broaden the scope of government liability as it has been interpreted.
* Was *Just* more about compensating the victim than anything else?

### Swinamer v NS

* Tree fell on truck on a provincial highway. The tree was on private property but had a fungal infection.
* The department of transport had started a program to inspect and remove potentially dangerous trees. There was no general policy in place, but the dept had started a survey, by a technician with some experience in forestry and a gov’t bureaucrat with little experience in forestry. 200 dead trees were marked for removal but not the one in question.
	+ There was no policy in place that had received the funding to actually remove them, asked for funding and received a short-term funding as a pilot project to remove the trees they marked
* At trial: The department was found liable
	+ The department was negligent in the way it conducted the survey, should have had experts doing the survey, and people who were properly trained in forestry
	+ It failed to ensure proper training or take steps to remove the trees
* The CA overturned this decision
* The SCC agreed with the CA 🡪 Plaintiff loses
	+ Policy decision that could not give rise to liability
	+ “Classic” policy decision = setting of priorities to allocate resources and funds
* There is a duty to maintain the highway in general.
* BUT, the marking of trees was a preliminary step in the policy making process & therefore a policy decision – it involves choices about resource allocation and was not made in an irrational matter or in bad faith and therefore cannot be reviewed in negligence.
* This case is similar to *Brown*, but there is still no good way to decide on the policy/operation question.
* The government can shield itself from liability by statute:
	+ *Municipal Government Act* – “A municipality that has the discretion to do something, it is not liable for deciding not to do that thing in good faith or for not doing it”

### Post Cooper Jurisprudence

* Where does the policy vs. operations question come into the picture of proximity and residual policy considerations?
* Since *Cooper*, P’s have a very hard time holding public authorities liable
* Most of the time the P’s case will fail at the proximity stage (looking to statute)
	+ If you’re looking to a statute to find a DOC owed to private individuals – you are not likely to find this
		- Statute usually looks to add discretion or for public benefit
* According to *Cooper*, policy vs operations question is not dead
	+ It comes in in the second part of the test
	+ Ultimately unlikely that the courts will even get to that second part
	+ Deciding it’s a policy/no liability its usually an alternative to denying P’s case in proximity stage

#### R v Imperial Tobacco Canada

Ratio: Refinement of the policy/operational test. Go through Proximity, foreseeability, then determine if it is “core policy” decision or operational.

Facts: Health Canada had said that low-tar tobacco was better for you than regular tobacco. Two lawsuits, one from consumers who had thought that low-tar tobacco was better and subsequently got cancer. Other one was from the tobacco companies themselves against Health Canada saying they owed a duty of care to give them proper research. Court was trying to make a decision as to whether it was plain and obvious that the claim would not proceed. In doing this, they take the position that all the claims of the plaintiff are true, and then decide whether there is a claim at this point. We are just focusing on two specific arms of this claim; whether Health Canada owed a duty of care to consumers, who actually smoked low-tar cigarettes and then got sick. The tobacco companies are also suing Health Canada for promoting low-tar cigarettes as a healthier option and getting the tobacco companies to also promote the low-tar cigarettes as a healthy option.

Result:

Reason: The first question of whether there is a duty of care between Health Canada and the plaintiffs who were smoking low-tar cigarettes. Relevant statutes established only general duty to the public, and no private law obligation to the plaintiffs. Ultimately conclude that based on what the ONCA said that they cannot see how the ministers public law duty’s can be transformed into a private law obligation to individual groups of people. Basically no proximity between individuals and the government, therefore no DoC. With respect to the tobacco companies, the tobacco companies argued that Health Canada had made a negligent misrepresentation to the tobacco companies that they could market low-tar cigarettes as a healthier option. This is already an established situation where a Duty of Care is owed. Going through analysis, **SCC found foreseeability**, as it is foreseeable that if Health Canada promotes low-tar cigarettes wrongly, then the tobacco companies could get hurt. **Also proximity**, as regulator worked closely with tobacco companies in making this decision. However, there is immunity for policy decisions, McLachlin J finds that basically deciding whether a decision is a policy or operational decision is impossible at this time. Therefore policy/operational split isn’t a very good test. Need to define policy decisions more carefully, policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations like economic, social and political factors. Not all discretionary decisions are policy decisions; but all policy decisions are discretionary. “Core policy” gov’t decisions are decisions as to a course or principle of action, such as economic social and political factors, provided they are neither irrational nor taken in bad faith. “Core policy” decisions are immune from liability unless they are made in bad faith. Decision to say low-tar cigarettes are healthier was a core policy decision, focused on harm reduction strategies.

Issue: What about the second stage of the Cooper test? Did the Court apply the policy/operational test? Do we need that test? How should govt liability be handled?

Notes:

# Standard of Care

## The Reasonable Person

***Arland v Taylor*** – Who is the reasonable person?

“…a mythical creature of law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time… not a genius… not required to display… nor is he possessed of unusual powers of foresight.”

#### Vaughan v Menlove

Ratio: Rule for standard of care should be reasonable person, so as to not make it subjective for different people.

Facts: Defendant had a haystack which was near the boundary of his premises. Hay was in such a state that defendant was for 5 weeks warned of the probability that a fire might break out. His stock was insured, and he said he would risk it. He made a chimney in the rick, and then it caught fire, and burned down defendant’s barn and stables, as well as plaintiff’s cottages. Patteson J told the jury that the question was “whether the fire had been occasioned by gross negligence on the part of the defendant, adding that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances”. Jury found for the plaintiff, but new trial was ordered as jury should not have been ordered to determine whether defendant was guilty of gross negligence with reference to the standard of an ordinary person, but whether he had acted bona fide to his best judgement, as he should not be responsible for the misfortune of not possessing the highest order of intelligence.

Result:

Reason: Making the rule in reference to defendant’s best own judgement would leave so vague of a line as to not have a rule at all, so instead should use the rule of the care taken by a prudent man, as that has always been the rule applied. Therefore in determining what the rule is for finding negligence, the rule should be that which requires in all cases a regard to caution such as a man of ordinary prudence would observe. **If not for the measuring stick of the “reasonable person”, the standard of care would be “co-extensive with the judgement of each individual, which would be as variable as the length of the foot of each individual”**. Neighbor lets haystack get out of control despite warnings. It starts on fire and destroys some of the Pl. buildings. Court considers what standard to apply to Def’s conduct. Decides that a subjective standard would be meaningless and opt for “what the man of ordinary prudence would do”. The subjective characteristics of the Def are not taken into account.

Issue:

Notes: **RP creates some degree of certainty – tort is fault based and has a focus on compensation; there has to be a balance between those two aims and this is how the courts have best decided to approach that problem**

#### Holmes: The Common Law

* Looking to try to find a general principle of civil liability. The reasoning behind torts is that the law seeks to rectify behaviour that is outside of some general view of conduct which one may fairly expect and demand from every other, whether that other has agreed to it or not
* Start with idea that man is answerable for all the consequences of his acts “He acts at his peril always”
* Two theories of common law liability
	+ First is that of **Austin**—**essentially the theory of a criminalist**
		- Law is sanction or detriment threatened and imposed by sovereign for disobedience to the sovereign’s commands
		- Liability under this system is a penalty for disobedience
	+ **Second theory is the idea that a man acts at his peril, therefore is liable for any damage that he might cause from his voluntary actions, regardless of whether they were intended or due to negligence of the actor**
		- Makes sense in the abstract—if plaintiff has done nothing, and defendant chooses to act, between the two the party whose voluntary action caused the damage should suffer, rather than the one who did nothing
		- Principle requires us to charge a man with trespass when his act causes force to be brought on another through a comparatively short train of intervening causes, in spite of him having used all possible care, it requires same liability, however numerous and unexpected the events between the act and result
* Basically saying that if a voluntary action is done by one party, and causes a battery to another, then that party who did the action is liable for that battery
* General principle is that loss from an accident must lie where it falls, and this is not affected by the fact that human being is the instrument of the misfortune
* To a person, anything is an accident which he could not fairly have been expected to contemplate as possible, and therefore avoid
* Therefore, everyone is expected to take reasonable care as an ordinary person would, as we can’t be having a subjective rule which is different for every person
* However there are exceptions to this—people who have distinct defects of such a nature that recognizing certain precautions would be impossible, i.e. Blind man can’t be expected to see
* However overall standards of law are external standards, and therefore equally applicable to everyone

#### Fleming: The Reasonable Man

* Reasonable man is supposed to be an objective theory, however there is some subjectivity in that it is applied to determine what a reasonable man would do in similar circumstances to the ones encountered by the accused
* An individual with less knowledge or experience than the “reasonable man” cannot use that as an excuse, (except in the case of children) however an individual with more knowledge would be held to the higher standard that that knowledge allows—i.e. a doctor would be held to a higher standard in a medical context than would a layman
* Physicians are held to conduct of the average practitioner of the class to which he belongs
* Beginners will be held to the same level of conduct as everyone else
* The need to employ a professional is obvious in some cases, but law still allows for doing some work around the house etc by the layman, but even a task such as felling a tree may require an expert
* Children are only expected to conform to a standard appropriate for children of similar age and experience
* Some similar discrimination in cases of infirmed or aged- primarily in the lack of mobility in being able to get out of the way in contributory negligence claims—as drivers they must conform to the same standard
* Lunacy is controversial—some courts have absolved liability for those so insane that they don’t understand the duty of care that they owed, on the basis that negligence presupposes an ability for rational choice.
* Majority view is that it is unfairly prejudicial to accident victims if any allowance is made for defendants mental abnormality

## Reasonable Care

Factors Relevant

* Likelihood or probability of harm
	+ The more likely, the more carefully the RP will approach the conduct
* Gravity/seriousness of harm
	+ Same rationale as above
* Practicality or cost of taking precautions
* Social utility of the risk-causing activity
* Agony of an emergency
	+ Court is reluctant
	+ Does not apply if their actions brought about the emergency, and they cannot have anticipated the emergency

#### Learned Hand Formula

If B < P x L 🡪 then it is negligent not to undertake B

 B = burden of adequate precautions

 P = probability of injury

 L = gravity of injury

Economic analysis approach to determining of whether conduct is reasonable. Is it worth it to take the risk of precaution?

There is an acknowledgement that these values are difficult to quantify. You cannot reduce every outcome of human activity to a cost that we can calculate.

#### Posner: The Learned Hand Formula for Determining Liability

Based on Judge Learned Hand’s ruling in *United States v Carroll Towing Co*

* Question was whether it was negligent for Conner’s Company, the owner of the barge, to leave it unattended for several hours in a busy harbour. While unattended the Barge broke away and collided with another ship.
* The judge determined that liability depends upon whether B is less than L multiplied by P, with B being burden of adequate precautions, L being gravity of resulting injury, and P being the probability that she will break away. So where B < PL, there is negligence
* The Hand formula is simply the application to accidents of the cost-benefit analysis, and Negligence is failing to avoid an accident where the benefits of the avoidance exceed the cost.
* Posner says that Hand is essentially codifying something that judges had already been doing for some time. In determining whether one’s conduct is that of a reasonable man, you need to determine what the variables are surrounding the circumstances, with 3 in particular being important; the magnitude of loss if accident occurs, the probability of an accident occurring, and the burden of precautions it would take to avoid it.
* If the burden, or cost of prevention is less than the discounted accident cost, i.e. the probability of the accident occurring multiplied by the cost of the accident, then the reasonable man would be assumed to purchase the cost of prevention, in order to prevent the larger discounted cost of the accident. If on the other hand the cost of prevention is higher than the discounted accident cost, then the reasonable man would not be expected to purchase the cost of prevention, but rather would pay for the accident cost (in the form of tort judgements) if and when it occurred.
* Overall the Hand formula is a greater analytical tool rather than operationally significant, as ordinarily the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant.

Bender in **“A Lawyer’s Primer on Feminist Theory and Tort”**, says that by converting the standard of care to cost-benefit analysis, we are subverting the standard of care into a floor of unprofitability or inefficiency, where people are disassociated from their suffering, and are dehumanized. The result has little to do with care or even with caution, if caution is understood as concern for safety.

A better way of looking at the standard of care would be to say that if we do not act responsibly with care and concern for others, then we will be deemed negligent.

* Posner’s reply is that Bender’s idea would replace the reasonable man with the caring neighbor. But this would have significant implications as it would change negligent liability to strict liability.
* Her point seems to be that potential injurers should be mildly altruistic towards their victims, but this is not human nature. And human nature will not be altered by holding injurers liable for failing to take care that a caring neighbor would have taken.
* Therefore, the only effect of Bender’s proposal would be to shift negligence liability in the direction of strict liability, which will end up being economically unsound and the extra costs would be passed on to the consumer.

#### Bolton & Others v. Stone

* Someone standing outside a cricket yard is hit with a ball and injured and sues
* Trial judge throughout the case, appeal court overturned and found that **there was a foreseeable risk of the ball being hit into the road**, and the D didn’t take any action to reduce or minimize that risk.
* HoL – would the reasonable person take the risk that the ball could leave the yard and hit someone?
* The Court looks to how rarely the ball goes over the fence—ball only went out of the park 6 times in the past 30 years, and no one had been hurt in 90year history of playing cricket there; **the probability of injury was very** **low**.
* The costs of the alternative (you can’t play at all) has a high social cost
* **Cricketers** **are not negligent b/c risk is very small; if it had been higher it would be unreasonable to play there**.

#### Priestman v. Colangelo & Smythson

* Police in a chase with a stolen car. They shoot at the tires, but the car goes over a bump and they shoot driver. He loses control of the car and it hits 2 pedestrians and kills them. Family of the dead pedestrians sues for negligence.
* SCC (3-2) finds the police action not unreasonable, as the social value of capturing criminals is substantial. Police can take reasonable risks for this purpose. It was reasonable under s. 25 of the CC.
* Dissent: given the circumstances it was not reasonable to shoot, s 25 does not apply where there is concern that innocent bystanders—Officer should consider the gravity of offence of which the suspect is guilty, and how dangerous the suspect is to the public at large. Officer should not have fired and therefore was negligent
	+ The dissent is probably more valid today, nowadays the police actually have a policy not to give chase in high speed chases, never mind attempting to shoot out the tires.
* This is an application of Judge Learned Hand’s formula—how likely is someone to get hurt, what is the potential loss (in this case death of two pedestrians), and what is the prevention cost (allowing the suspect to get away)
* NELSON: outcome depends on how the broadly or narrowly you define the question

## Standard of Care for Children

Does the common law make allowances for youth? It depends…

#### Court Analysis for Children

1. Is this child (having regard to age, intelligence and experience) capable of being negligent?
2. Would a reasonable child of like age, intelligence and experience have acted in this way?

Exceptions:

* **Adult activities doctrine**: if the child is engaged in an adult activity - then we do not worry about the child standard of care because these activities require the normal SoC

Factors:

* **Foresight of Harm**: could the child have foreseen the events happening as they transpired, based on their age, experience and knowledge.
* **Prudence**: Majority attribute the lack of prudence, like the lack of foresight as attributable to his childhood. This is interesting as it suggests that attentiveness to others should be allowed to be relaxed for children, without really justifying why. The lack of foresight is attributable to the lack of experience, and knowledge, which creates a lack of foresight, which makes sense, however they don’t really explain this allowing for a lack of attentiveness to others (prudence) other than to say that it is a result of boyish impulse which should be considered normal.

#### McHale v Watson

Ratio: A child will be held to the same standard of care as a reasonable person of his or her own age

Facts: Plaintiff suffered serious injury to her right eye while playing tag with two other girls of her own age, and Watson, a boy aged 12 years old, a few years older than the others. Watson threw a small piece of welding rod that had been sharpened by him and it hit McHale in the eye, causing her to lose sight in that eye. McHale said he had aimed it at her, however Trial judge found that this was not the case, and that he had meant to stick it in a post, but that it had glanced off and hit her in the eye. Trial judge observed that while the reasonable man is objective, and not subjective, however it is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what accordingly the party sought to be made liable ought to have foreseen. In taking this into account, the Trial judge did not feel that he should ignore the fact that the defendant was a child, and childhood is not an idiosyncrasy of an individual, therefore he found Watson not negligent. Appeal was argued on 2 main grounds, first that trial judge was in error in holding that Watson’s age should be taken into account when determining liability, and second that the trial judge should have found negligence for either the standard of the reasonable man or the standard of the 12 year old boy.

Result: D was not found negligent

Reason: McTiernan (majority)

* + Disagree with both grounds
	+ American authorities show 3 different types of minors
		- (1) young children who cannot be held responsible for their decisions,
		- (2) older children who are mature enough that they should be held to the same standard as adults, and
		- (3) **children somewhere in between these two extremes, who require a standard of care reasonable for their age, intelligence and experience**
	+ Would say that Watson falls in the third category, and therefore it will be a subjective opinion of the standard of care he owes.
	+ In this case, McTiernan finds that like many other boys his age, he wouldn’t be able to foresee the possibility of the dart glancing off the wood and causing harm to McHale, and therefore the finding of no negligence is correct
	+ The overall case seems to come down to whether it was right to take into account Watsons age, which in this case, there seems to be no grounds for not taking his age into account

Issue:

Notes: Kitto concurring

* + A defendant does not escape liability by proving that he is abnormal in some respect which reduces his capacity for foresight or prudence
	+ However obviously being 12 years old is not abnormal, it is completely normal, and therefore we must determine what the objective standard would be for foresight required of a 12 year old boys
	+ Trial judge didn’t err in his finding of law, and must take his finding of fact as correct as well, which Kitto believes is correct anyways
	+ Appeal should be dismissed

Menzies dissent

* + Fundamental principle of law of negligence is that standard of care fixed by the law is to be an objective standard
	+ Menzies is asking whether it would be reasonably foreseeable that throwing a sharp metal object at head level in the direction of someone else would result in harm. A reasonable 12 year old would be found negligent for this action.
		- Can’t change this just because we don’t like the results.
		- The way the majority frames the facts (very specifically) was necessary for their conclusion
	+ Law of negligence is principally concerned with correcting the injustice for the person who suffered harm, and there doesn’t need to be a connection between legal liability to make compensation and moral culpability
	+ Would allow appeal and award damages
* From McHale, we get a good analysis of how far the law should go in recognizing the capacity of the defendant in determining liability in negligence
	+ What about the other end of the age spectrum?
		- Does not really take this into account?
		- Why? Even if you are of an advanced age, you have a wealth of life experiences and should at least appreciate risks
* Court didn’t ask if throwing a piece of metal when people are around, was a good idea, but rather whether throwing the metal dart at a post, and then the dart glancing off because of the hardwood, and then hitting someone in the eye was negligent.
* Obviously adding in more detail in the latter question leads the answer to be no negligence, whereas the previous question would be better for the plaintiff.
* The Court considers a number of factors, including:
	+ 1) Foresight of Harm: The majority made it clear that Watson could not have foreseen the events happening as they transpired, due to his age and lack of experience and knowledge. However this argument heavily relies on their characterization of the facts, as Menzies dissent shows.
	+ 2) Prudence: Majority attribute the lack of prudence, like the lack of foresight as attributable to his childhood. This is interesting as it suggests that attentiveness to others should be allowed to be relaxed for children, without really justifying why. The lack of foresight is attributable to the lack of experience, and knowledge, which creates a lack of foresight, which makes sense, however they don’t really explain this allowing for a lack of attentiveness to others (prudence) other than to say that it is a result of boyish impulse which should be considered normal.
* Wilson J found in *R v Hill*, that “the incorporation of an individual’s age into the objective “ordinary person” standard is an attempt to reflect the extent of the legal rights and responsibilities of children in the legal system. The reduction in standard against which young accused persons are measured merely reflects the fact that the law does not attribute to individuals in the developmental stages of their youth the same degree of responsibility as is attributed to fully adult actors” p 66
* In *McErlean v* *Sarel* (1987), 61 OR 386, court found that where a child engages in an adult activity, he or she will not be afforded special treatment, and will be held to the same standard of care as an adult engaged in that activity

## Standard of Care for Persons with Disabilities

**General rule**: standard of care do not take personal characteristics into account…

 Should allowances be made or persons with disabilities?

 What if the court is putting compensation first?

 To what extent are disabilities taken into account?

 Limitation does not = negligence, but may expect individual to take precautions in light of the limitation

**Exceptions**: the common law is willing to recognize that individuals with disability may not be capable to act in the same way

* However, RP will appreciate what the limitations are that they face and anticipate risks and work around them

**What is the choice the courts are facing in dealing with mental illness or disability and the SoC?** Mention this balance on the exam.

1. What function or aspect of tort law is prioritized by an approach that ignores mental illness or disability? Compensation, proof, encourage prudence of supervisors, facilitate integration
2. What aspect of tort law is emphasized by an approach that considers, the D’s mental illness or disability in the SoC analysis? Fault based system of tort law! If you are incapable of meeting the SoC you cannot label them as having fault. It is discriminatory to not take mental disability into account.

#### Fiala v. MacDonald (Cechmanek) – TEST FOR MENTAL ILLNESS

Ratio:

Facts: The defendant suffered a manic attack while jogging and jumped on a car and tried to get through the sunroof.

The driver of the car panicked and went through an intersection hitting another car.

Result: Both the defendant and the driver were held not liable

Reason: The driver was not liable due to “the agony of the moment”. The defendant because his manic episode was so severe that his actions could not be described a voluntary. The case law and academic literature reveals that there has been judicial recognition in Canada of the need to relieve the mentally ill of tort liability in certain circumstances. While the compensation of victims is still a worthy goal, that should not compromise the basic tenets of tort law. To find negligence, the act causing damage must have been voluntary and the defendant must have possessed the capacity to commit the tort.

The burden of showing the absence of either falls on the defendant. If the defendant understood the duty of care he owed and was able to discharge that duty, his actions would be voluntary and the requisite capacity would exist.

**In order to be relieved of tort liability when a defendant is afflicted suddenly and without warning with a mental illness, the defendant must show on a balance of probabilities**:

(1) that they had no capacity to appreciate the duty owed because of their mental illness **OR**

(2) because of the illness, the defendant had no control over his actions at the time the relevant conduct fell below the standard of care.

This test preserves the notion that the defendant must have acted voluntarily and must have the capacity to be liable.

MacDonald was afflicted suddenly, and without prior warning, with a condition that left him with no meaningful control of his behaviour and an inability to appreciate the duty of care he owed to Cechmanek and others, including the Fialas. His mental illness was manifestly incapacitating.

Issue: Whether the defendant’s manic episode should relieve him of liability?

Notes:

#### Buckley and T.C.C. v. Smith Transport Ltd

* The defendant drove his truck through an intersection and collided with a streetcar. He was operating under a delusion that his car was being controlled remotely.
* The Court held him so ill that he could not understand the SoC expected of him.
* If it could be said that he did understand, the particular delusion prevented him from discharging it. Therefore, no liability.

#### Blackburn v. B.C.

* Police officer on his way to an emergency. He struck the Pl who had failed to notice the Cop partly b/c of Pl. hearing impairment.
* The Court found the Cop negligent for speeding through the light, but found the Pl. contributorily negligent.
* Courts will sometimes relax the SoC for disabled people. However, a person so disabled has to take their disability into account when engaging in certain activities.
* Pl. in this case was required to be attentive b/c of her hearing impairment, but ought not to have the radio turned up so loud (but she’s deaf).

#### Wenden v Trikha

* Def suffered from a mental illness causing him to believe that comet was coming to take his soul and that his car was a time machine. While delusional he sped through a red light (thinking he could outrun the comet) hitting the Pl.
* The Def negligent for going through the light and not taking preventative steps. He failed to take his mental illness into account and take precautions to prevent his actions from causing harm
* The Court held that he would be exonerated if he could show the danger was unforeseeable and that he was too insane at the time of the accident to be held negligent.
* ROBERTSON: Likely his failure to take precautions that led to being held negligent.

## Standard of Care for Professionals

General rule: negligence claims will always start with the reasonable person

Exception: The common law will modify the SoC 🡪 How does a person with the same skills/training/expertise have acted in like circumstances?

* Professionals like doctors are not *necessarily* liable for errors of judgement
	+ If a reasonable person of the same training could make the same error then they can be absolved from liability
	+ Professional expertise is not a guarantor of perfection
* The common law makes no excuses for “beginners” – expected to know when you need ‘help’
* If they had additional training/specialization this will raise the standard of care
* Court has to be very careful to assess the SoC at the time that the alleged tort took place (“hindsight is 20/20”)

### Millette (Estate of) v Zung

Ratio: Doctors owe standard of care of a reasonable average doctor in their specialized field. To prove negligence, plaintiff needs to show evidence that the doctor violated this standard of care

Facts: P sued Dr. Zung for negligence for failing to diagnose the bleeding aneurysm which caused Millette’s death. Mr. Millette attended Dr. Zung on October 5th, 1998 complaining of severe headaches with a stiff neck. Dr. Zung conducted a detailed examination and took a thorough history from Mr. Millette and found that he had high blood pressure and prescribed medication to bring his blood pressure down. Also ordered a CT scan for Mr. Millette noting that he had new onset headaches and a family history of aneurysm. Told him to attend an emergency room if the headaches suddenly increased. Dr. Zung then faxed a requisition for a CT scan to PLC on Oct. 7th, 1998. Mr. Millette was found unresponsive on Oct 13 by his daughter and taken to the emergency room where he was found pulseless. P’s claim is that Dr. Zung should have ordered CT scan on an Emergent basis rather than an urgent basis. One set of experts claimed that based on the level of pain that Mr. Millette was facing, was that the path Dr. Zung took was entirely reasonable, and that even if Dr. Zung had ordered an emergency scan, it was unlikely that the scan would have shown the bleed. The other set of experts argued that from Family history and symptoms, Dr. Zung should have ordered an emergency scan.

Result:

Reason: To succeed in medical negligence claim, need to show 4 elements

1. Doctor owed patient a duty of care
2. Doctor breached the applicable standard of care established by law
3. Plaintiff suffered injury or loss
4. Doctor’s conduct was the actual and legal cause of Plaintiff’s injury or loss

It is clear that both Dr. Zung and Dr. Swanson owed a duty of care to Mr. Millette. **Doctor must have skill, knowledge and judgement of the average reasonable doctor, and must be judged against other doctors in the same class as him or her**. If a doctor follows the commonly accepted standard of practice, or there is no evidence to the contrary, there will be no negligence unless the practice itself is found to be negligent. In this case the duty to diagnose, required doctor to take a full history, heed patients complaints during treatment, and take reasonable care to detect signs and symptoms and formulate a diagnosis using good judgement. A doctor is not liable in failing to reach a proper diagnosis or administering improper treatment where it is a mere error in judgement. **Based on witnesses, not satisfied that Dr. Zung failed to meet the requisite standard of care required, as the diagnosis was reasonable from what the first set of expert testimony says**. Judge felt that the second set of experts were really just looking at the two specific facts rather than the whole picture. What was extremely telling was that the patient’s brother in law, Dr. LeBlanc, who had known Mr. Millette for far longer, and had recommended that he go see Dr. Zung, and was with him the day before he died, did not recognize the possibility of an aneurysm either. No evidence to support finding of negligence on the part of Dr. Swanson for not processing the CT scan faster

Issue:

Notes:

### Reibl v Hughes

Ratio: Expert evidence is not alone in determining the SoC of disclosure of risks to patients.

Facts: Reibl was experiencing headaches. He underwent surgery which caused him to suffer a stroke. This made him unable to work and thus unable to work until his pension was up. He argued that his consent was not “informed consent” because he was not made aware of the significant risks associated with the surgery or the nature of the procedure. Reibl sues the surgeon, Hughes, for battery. The trial judge found the defendant liable for battery.

Result: Appeal allowed – restore the judgement at trial and appellant is entitled to costs throughout.

Reason: **Negligence = failure to disclose material risks. This was a breach of the duty of care, but the consent given was valid.** To allow expert evidence to determine what risks are material to disclose hands the issue of disclosure over to the medical profession. Therefore, expert evidence cannot be the only determination of SoC for disclosure.

The test to determine whether enough information has been given:

* + Objectively ask whether a reasonable person would have undergone the surgery or not if they had all the information
	+ Is this different than their answer with whatever information they *were* provided?

Too much consideration given to doctor’s opinions (too subjective). Goal: to determine whether a reasonable person in the appellant’s position would have chosen to undergo the surgery given the risks. The surgery wasn’t necessary at the time — Reibl could have waited. A reasonable person probably would have delayed the surgery had they known all the information.

Issue: Was Reibl given sufficient information to give an informed consent? How specific must the information to a patient be to enable him to make an informed choice?

Notes:

## Custom or Generally Approved Practice

1. Is there a custom?
2. If there is, how widely is it followed? How long has it been in place?
3. How persuasive is the evidence of custom?
* The more highly technical the case is, the more persuasive that the custom satisfies the SoC is
* However, no matter how many people engage in the same practice, if the practice itself is negligent, the court will have the same answer as your parents would

### Waldick v Malcolm

Ratio: Here, the practice of not sanding or salting driveway shouldn’t gain acceptance of the court. Even if it was custom- the practice is negligent and wouldn’t gain acceptance by the court.

 No amount of custom renders negligent behaviour reasonable.

Facts: Waldick slipped and fell in the parking area of Malcolm’s rented farm property. The laneway became very icy after an ice storm and below freezing temperatures.

Result:

Reason: **Local custom can inform the court’s interpretation of statutes. Court needs evidence of the custom. (here there was no solid evidence that not sanding/salting was the custom/ norm)**. Even if custom was established – it does not mean that the D acted reasonably. *Occupiers Liability Act* requires that occupiers take positive action to make the premises reasonably safe. Custom was properly considered by the lower courts even though it wasn’t decisive. There was no evidence presented that it was custom for laneways to go unsanded or unsalted. The testimony of Malcolm alone was insufficient.

Issue: Were the occupiers of the property negligent in failing to sand or salt the icy laneway?
Notes:

### Neuzen v Korn

Ratio: Doctors have to conduct their practices in accordance with the conduct of a prudent and diligent doctor in like circumstances. Must be judged in light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of negligence. With regard to medical procedures if the problems are too technical, can’t say that a standard medical practice is negligent, **however if a standard practice is “fraught with obvious risk” that it is negligent to any reasonable person then it is not an excuse to say they were conforming to a negligent common practice**.

Facts: The P contracted HIV as a result of artificial insemination in 1985. The D Dr. acted in accordance with the usual medical practice of the time when HIV was not widely known. The donor had not been screened. Only one doctor recognized the possibility of spreading HIV through artificial insemination, and his paper was not widely read by obstetricians. No test for HIV in semen at the time. In September 1985, an article in a British magazine found 4 women had contracted HIV from AI, and when the respondent hear this he discontinued his AI program, and recommended that his donors and the appellant be tested.

Result:

Reason: It is well settled that Dr’s have to conduct their practices in accordance with the conduct of a prudent and diligent Dr in like circumstances. Conduct of physicians must be judged in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of negligence. Therefore Dr. needed to be judged as a reasonable practitioner in 1985, not as a reasonable practitioner today. With regard to medical procedures, if the problems are too technical, can’t say a standard medical practice is negligent. If a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse to say they were conforming to a negligent common practice. This case was too technical for jury to be left as finders of whether the medical practice was negligent. The Dr was relieved of liability b/c he had observed the generally accepted practices of that time.

Issue: Is the court bound by the general practice? Or is there any room for the court to decide what is reasonable in the circumstances? The SCC says the decision belongs to the trier of fact with some pretty significant caveats…

Notes:

## Statutory Standards

* Regulatory statutes will sometimes set standards of conduct
	+ Will there be civil liability in negligence when sometimes violates a statutory standard of care?
		- Parliament has not really given the answer, so the courts have had to do something
	+ How do the courts approach this problem?
		- Two questions:
			* 1) is there civil liability for breach of the regulatory statute is silent on the matter?
			* 2) how do we treat the standard in the statute compared to the standards in negligence law?
* Saskatchewan Wheat Pool Case – it is an offence to deliver infested grain under the Canada Grain Act
	+ SWP has delivered infested grain to the Canada Wheat Board (CWB)
	+ Costed at CWB $100,000 for having to fumigate the infested wheat and seeks damages
	+ CWB sues SWP: 1) SWP broke a law under *Canada Grain Act*
	+ Competing views:
		- English position on breach of statute – there is a tort called breach of statute which is available in certain circumstances.
			* This position was argued by the Crown (CWB). SCC rejected this approach. The statute doesn’t say anything about civil liability – if we interpret the statute as also creating civil liability, the court would be imputing an intent to the legislature that they did not have that the statute would give rise to civil liability.
			* This leads to uncertainty and lack of clarity in the law!
			* Many scholars also disagree with the English position because it is indefensible. Many times, the breach of statute tort is used selectively.
		- American position – majority view in US is that breach of statute should be subsumed into negligence law – most American states even say breaching a statutory duty is negligence per se. In other words, the statutory standard IS the common law standard of care.
			* SCC rejected this view on the basis that we would be imposing strict liability. Doesn’t give fair consideration to our fault-based system.
		- American position – minority view – when dealing with negligence claim, breach of duty will be subsumed into negligence law – statutory standard will be EVIDENCE to help the court determine what the standard of care is.
	+ Questions:
		- Is there a tort of “breach of statutory duty” in Canada? No. There is only a possibility of negligence claim where there is a common law standard
		- In Canada, statutory standard is EVIDENCE about what the SOC should be
		- Can a judge conclude that a defendant has been negligent solely on the basis that he/she breached a statutory duty? No. this would be the
		- What does the judge have to conclude? Whether the person has acted reasonably. Statute standard will be considered alongside other factors for the court to determine what should be the appropriate standard of care
			* If the plaintiff is within the group or class of people that Parliament is trying to protect in the statute, then the court will weigh the statutory standard more heavily.
				+ Ex. Highway Traffic Act – driver collides with another car and was speeding and drinking. The driver breached statutory offences. This would be evidence to the court about how a reasonable person would have behaved in the circumstances.
			* The more closely related the plaintiff’s injury and defendant’s conduct is related to the statute, the more heavily the statute is weighted.
	+ McGee & Shell Case
		- M bought land from S to set up his dental practice. Soil sample had detectable smell of gas before the sale of land happened. Further investigation showed the land was contaminated. M insisted that S was liable for failing to ensure the site was not contaminated and had to pay to rectify the problem. M decided that 18 ft of land must be excavated land. M used a statute (gasoline handling act) that says it is a breach if statute if you don’t ensure land is not contaminated.
		- M tried to use that GHA as a statutory standard for negligence
		- Court said rejected this argument
			* The statutory standard is NOT realistic from the reasonable standpoint
			* A reasonable person would be guided by what is needed for safe work – the statutory standard doesn’t take into account the practicality and cost.
			* The statute can help us determine the standard of care, but this statute is too onerous (too perfect of a standard) on the defendant.
	+ Ryan v Victoria outlines the rule
		- **Para 28** – “Conduct is negligent if it creates an objectively unreasonable risk of harm.  To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances.  The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury.  In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.”
		- **Para 29** – “Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive.  ***The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness***...  Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent.  This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.”
* Some statutes refer to idea of “gross negligence”
	+ Ex. only successful as plaintiff if you fall on the sidewalk b/c of bad snow removal by the City if the City acted with *gross negligence*. The Court has interpreted gross negligence as “***marked departure*** from the standard of care”
		- **Problem: what does that even mean? No clear meaning of “gross negligence”**
			* What Parliament is trying to tell the Court is that the defendant should not be held liable unless they acted really far from reasonableness.
	+ Ex. legislation says if you are a doctor or other healthcare profession, you are at a scene of an emergency, you voluntarily provide medical help, and you are not in a facility that has the resources required – will NOT be held liable for injury or death unless there was gross negligence
		- This same protection is given to those who are not professionally trained medical professionals.
		- Purpose? Encourages regular non-trained people and medical professionals to help at the scene of an accident without fear of liability for causing further injury
	+ **Idea behind “gross negligence” is to encourage certain types of behavior or protect individuals from liability**

**SOCRATIC QUESTIONS**

Question: According to the Learned Hand formula, reasonable people

Correct: Take precautions which cost the same as or less than the product of the likelihood and gravity of injury

Question: A reasonable person exercises more care as... (select all answers that apply)

Correct: the likelihood of injury increases; the seriousness (gravity) of injury increases

Question: It is reasonable to engage in extremely risky conduct when ... (select all answers that apply)

Correct: There is no other way to carry out a socially important task; The 'costs' of injury resulting from the conduct are less than the costs of taking appropriate precautions

Question: How does the court approach the issue of the standard of care when dealing with a child?

Note: case-by-case that considers activity, age of child, and context

Question: When dealing with a defendant who has a physical disability, the courts typically

Answer: modify the 'reasonable person' standard to that of the reasonable person with the same type of disability

Question: What does the evidence have to show in order for the defendant to meet the standard of care by following custom or standard practice?

Answer: That there is a custom or standard practice

Question: How persuasive is evidence of custom or standard practice? Select all answers that apply

Answer: It is evidence of the standard of care expected of the defendant; The persuasiveness of the evidence depends on the degree of expertise required in order to determine the appropriate standard of care

Question: What role does a statutory standard play in the decision about whether the defendant acted negligently?
Answer: The statutory standard is useful evidence that may assist in the determination of the standard of care

Two schools of thought: statutory breach is a separate tort (UK) or statutory breach goes to negligence (US).

* + UK: Every statute creates a duty and someone who breaches gives rise to common law duty.
		- SCC rejects; if parliament wanted to create a duty, why didn’t they explicitly say so?
	+ US: Breach of statutory duty is evidence of negligence.
	+ Where statute is silent about creation of a litigable civil duty in addition to a penal consequence, courts should ***not*** interpret the statute as creating a private law remedy.

Statute may provide a useful guideline to determine whether there was a breach of a standard of care. However, breach is not conclusive, need to consider other evidence.

### R v Saskatchewan Wheat Pool

Ratio: There is no tort of “breach of statutory duty” in Canada, if the statute is silent on civil liability then there will only be a tort if there is a duty of care in that area already. If there is a duty of care, then the court can look to the statute as evidence of what would be considered reasonable practice. If the defendant breaches the statute, that is not conclusive for the purpose of determining whether the defendant is liable, but may be used as evidence that they breached an existing common law duty of care.

Facts: Saskatchewan sent beetle infested grain to Canadian Wheat Board. Statute says it is an offense under the statute to send infested Grain. This is discovered after the grain is loaded onto a ship, Canadian Wheat board has to incur costs to fumigate the grain and kill the infestation. Canadian Wheat Board is claiming that SWP breached duty of care, trying to regain costs to redirect the shipment and fumigate the ship. Have to argue that the offense of delivering infested grain should also give rise to tort and failing to live up to statute is also negligence. Here in Canada the plaintiff doesn’t have a civil cause of action because the statute didn’t expressly provide for a private law remedy.

Result:

Reason: English position is that there is a tort of “breach of statute”, statutory obligation therefore gives rise to a common law duty. This is problematic because it is imputing an intention to the legislature which was clearly absent, as if they intended to create civil liability they could have done so by including it in the law. Majority American position is that it is negligent to breach a statutory duty, as people who are reasonable don’t break the law. This is problematic in that you can find tort liability without fault, in other words this can create strict liability, or absolute liability, which the court doesn’t like, as our tort system is supposed to be a fault based system of liability. Court ultimately accepts the best way to deal with statutory negligence is minority American position, which establishes that there is no tort of breach of statute, but the statute itself may set out a reasonable conduct or a duty of care. Breach of a statute may provide evidence of a tort.

Issue: Whether a civil cause of action can be brought for breach of statutory duty

Notes: SWP delivered infested grain the CWP. CWP claims a breach of statutory duty and wants to recover costs. SCC rejects the idea that the statute implies an action in tort. The legislature must explicitly create torts. The statute here does not create a tort of sending infested grain. Breach or compliance with statutory standards of conduct merely provides evidence in a negligence action. It is not “proof” that the Def. was or was not negligent.

*Ryan v Victoria* at paras 28-29

* We have defendants arguing that they *did* comply with the statutory standards and therefore cannot be found negligent
* External standards (like statutes) can help inform the standard of care, but none are alone sufficient to determine what the standard is
* Mere non-compliance with a statutory standard is not sufficient to make a finding of negligence — by the same token, mere compliance is not necessarily indicative of innocence
* Ratio: there’s more to the standard of care than *just* complying with statutory regulations, but they can help inform the standard of care

### Degrees of Negligence

#### Municipal Government Act

* In cases of a plaintiff suing the city, a municipal gov’t can only be found negligent if they are found to be grossly negligent
* This is to prevent the city from getting sued too often for people slipping on icy sidewalks, etc. (s 531)
* This means there must be a marked departure from the behavior expected of a reasonable person

#### Emergency Medical Aid Act

* Doctors, nurses, or civilians who help out in an emergency situation in a non-hospital context will only be found liable for negligence if they are found to be grossly negligent
* This is to encourage people to help in emergency situations, and not be afraid of helping because they’re afraid of being sued
* Issue can be that gross negligence can be a subjective finding of the judge, as determining what a “marked departure” is from the behavior expected of a reasonable person is based on the subjective judgement of the judge.

# Proof of negligence

Primary Burden of Proof – Pl. must establish that their version of events is what took place.

Secondary Burden of Proof (Evidentiary Burden) – This can shift back and forth between the Pl and Def. Example: The Pl. brings lots of evidence to make out their claim. The burden then shifts to the Def to neutralize this evidence. If the Pl. has not given enough evidence the Def. can move for a “non-suit”.

Standard of Proof in Negligence is **Balance of Probabilities**—needs to be more probable than not, 50% + 1

Burden of proof is discharged through bringing evidence, if they don’t bring evidence they cannot discharge the burden of proof. A contributing factor to being able to discharge their burden of proof is through inferences.

Inference vs. Presumption – A **presumption** is a legal rule: “If the following is proven then this other thing exists”. It operates in the absence of other evidence and can be rebuttable or irrebuttable. An **inference** means: “If the following is proven then it *may be reasonable* to say the following thing exists”.

It is mostly always the case that the Plaintiff has the burden of proof, unless the onus of proof is shifted either through statute or through common law. I.e. Traffic Safety Act shifts burden of proof to the defendant (motorist) if there is an accident involving a pedestrian, they do this because the pedestrian can’t really give evidence as to what the driver was doing that lead to them hitting the pedestrian.

What if the plaintiff has no direct evidence as to how or why the incident occurred?

### Inferring Negligence (*Res Ipsa Loquitur*)

*“Res Ipsa Loquitor” –* The thing speaks for itself.

* Applied where the Pl was trying to prove negligence via circumstantial evidence. It was possible for the Pl to succeed.
* The doctrine had specific requirements:
1. The Defendant was in control of the situation or thing
2. The accident had to be of a kind that would not normally happen without negligence
3. The cause of the accident must not be known (no direct evidence)
* How is the trier of fact to deal with circumstantial evidence?

**Problem:** Lots of confusion among Courts about when to apply it and how.

* The process of using it: Plaintiff invokes *res ipsa*. The defendant would have to assert an explanation that was at least as plausible and showed no negligence. Some evidence must support this assertion – cannot just be pulled out of thin air.
	+ The explanation, with the strength of the evidence required depending on the strength of the inference by the Judge. The Plaintiff could use the doctrine to get past the point where the defendant could move for a non-suit.
* But the courts had issues with procedurals issues
* Various theories about its application (lots of confusion):
1. Creates a **presumption** that the defendant is negligent which they then have to rebut, OR,
2. It calls upon the defendant to introduce evidence from which innocence could be inferred, with the amount of evidence predicated on the strength of the original inference by the judge (**no actual shift** in the BOP), OR,
3. It permits, but does not require, the trier of fact to infer negligence. Even if there was an inference the defendant need not introduce evidence to rebut. Felt that it created a situation where the **Court was entitled but not required to draw an inference**.
* In *Fontaine* the SCC treats the doctrine as expired

### AB Traffic Safety Act (an exception to the rule)

* If a person sustains damage or loss on a highway by reason of a motor vehicle, the onus of proof is on the defendant to prove that their negligence/misconduct was not the cause of the plaintiff’s loss.
	+ Plaintiff proves damage/loss then the defendant must exculpate himself
* This does not apply to passengers in cars or accidents between cars.
* Therefore, this provision is solely for collisions between motorists and pedestrians

### Wakeland

* A body is found near train tracks
* It is clear that there was contact between a train and the body
* The widow sued the train company
* The only evidence was the location of the body and the fact that there was a collision
	+ There is not evidence of negligence on the part of the train company though
* The scales are balanced – D should not call anymore evidence

### Fontaine v ICBC [*Res Ipsa*]

Ratio: *Res Ipsa* isn’t a useful doctrine anymore, plaintiff still has the burden of proof, but it is possible for the trier of fact to be persuaded of negligence based on circumstantial evidence. Overall trier of fact simply weighs all evidence, including direct and indirect circumstantial evidence, to determine if there was negligence.

Whether this is different or not from when Judges applied *Res Ipsa* is an open question…

Facts: Plaintiff is the wife of a passenger in a car accident. The accident occurred on a hunting trip. Several weeks later the car was discovered and the bodies were found. Evidence showed that the vehicle had fallen off the road and into a river where it had been swept downstream. Significant rain and extreme winds when the men were suspected to have driven off the road. Plaintiff sues driver’s estate for negligence. The weather was very bad the week of the trip. There was no evidence as to when exactly or how the accident occurred.

 The trial judge said that there was not enough here even if *res ipsa* was used.

Result:

Reason: Major J

**When does *res ipsa loquitur* apply?**

* + For res ipsa loquitar to arise, circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the facts
		- Court cites the requirements of the doctrine (in CAN above).
		- It is necessarily fact driven. There must be a situation where negligence could be inferred in favour of the plaintiff. In this case, just b/c a car leaves the road that does not mean there was negligence.
	+ What does it mean when res ipsa applies?
		- The plaintiff still has the burden of proof. It is possible for the trier of fact to be persuaded of negligence on circumstantial evidence.
		- The inference that can be drawn will vary in strength. The stronger the inference the more evidence is required of the defendant to neutralize it (there must be a factual basis).
		- Major J **feels the doctrine should be ignored and the trier of fact should simply weigh the circumstantial evidence along with the direct evidence and then decide if the plaintiff has enough to sustain their action**.
			* The only thing that came out of this doctrine was confusion and uncertainty
		- In *Fontaine*, the **circumstantial evidence was *not* enough to discharge the burden of proof given the other operating circumstances** (the weather).
			* Trial judge found the onus was not discharged by the plaintiff
			* The only potential evidence is that the vehicle left the roadway
			* Evidentiary foundations are too fragile to suggest the D’s negligence

NELSON: Approach to circumstantial evidence basically the same as under res ipsa, the court still has to weigh the evidence. (You can’t plead “res ipsa” anymore.)

Issue:

Notes: Academic response… “*Res Ipsa* is Dead, Long Live *Res Ipsa*” the task involved remains much the same even though its not named by this doctrine anymore.

### Baker v Market Harborough Industrial Cooperative Society Ltd

Ratio: Because there was negligence, and they couldn’t tell who was negligent, and there was no evidence as to who was negligent, then they must both be equally negligent

Facts: Husband of the first and second plaintiffs were killed when the vehicles they were driving collided head on in the centre of a straight road at night. Each plaintiff brought an action in negligence against the company-owner of the vehicle driven by the other. Evidence from the circumstances and causes of the accident was meager. Lower court determined that from facts available, in the absence of other evidence allowing the court to draw a distinction between the two drivers that they had each committed the same negligent acts; failing to keep a proper lookout, failing to drive their vehicles on the right side of the road, hugging the centre of the road, and failing to give way to each other.

Result: Each found equally to blame, and each plaintiff recovered 50% of damages

Reason: (Lord Denning) If there was a passenger in one of the cars, he could have brought an action against both drivers, as proof of a collision is sufficient to assign liability to either one or both of the drivers. In absence of evidence that proves otherwise, both are assigned an equal share of the liability. It can’t be proven that one is more at fault than the other. Same principle applies in respect to the drivers; in the absence of any evidence against either of them, they are both found equally to blame.

Issue:

Notes: Another way to deal with circumstantial evidence (not *res ipsa*)

# Causation

“Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury of the victim in order to justify compensation of the latter out of the pocket of the former.” (*Snell v Farrell*)

* Link or relationship between what the D did and the P’s harm – if there is no lnk then there is no justification for compensation

TEST: **BUT FOR** the defendant’s negligence, would this harm have materialized?

* This is ALWAYS the starting point!!!!
* Causation does not demand that the D’s actions were the sole cause – only has to be *a necessary* cause…
* Counter factual scenario – what if the D had not been negligent…
* Apply this test in a flexible and practical manner
* Small amounts of evidence can lead to an inference of causation
* In situations where the defendant best knows what happened, the plaintiff can lead the judge to a finding of causation with little evidence. The defendant may then rebut.
* If, however…
	+ It would be impossible to show liability due to factors outside of the plaintiff’s control,
	+ Impossible = multiple tortfeasors, all of whom acted negligently
	+ The defendant owed and breached their duty of care to the plaintiff, and that breach caused the risk of injury and that injury occurs…
	+ Then the court may use the material contribution test.
* Principles
	+ It must then be established that the defendant’s negligence is what caused the plaintiff loss
	+ Causation need not be proved with scientific precision, but enough to justify compensation flowing from the defendant to the plaintiff
	+ Needs to be 50% + 1, rather than with 100%
	+ Problem: As cases become factually complex the but-for test breaks down and can lead to unjust results.

The Material Contribution Test

* This test allows for defendants to be liable so long as their conduct created some risk that an injury would occur and that injury does occur
	+ Liable if they contributed in a material way to the occurrence of the loss
* Used in situations where there are multiple tortfeasors and it is impossible to know who is to blame for the plaintiff’s loss.
* First adopted into Canadian law in *McGhee*, later rejected in *Snell v Farrell* (it’d be too easy to succeed with false claims), and finally refined in *Athey*, *Resurfice Corp*, and *Clements* (only available in the case of a single, indivisible injury and multiple tortfeasors where all defendants contributed).
* Without the material contribution test, situations with multiple tortfeasors can lead to a circular blame game
	+ The material contribution test therefore achieves corrective justice, compensation, fairness, and deterrence

## General Principles

#### Horsley et al v MacLaren et al., 1972 SCC

* 1st person overboard. The water was cold, it seemed that as soon as he hit the water he had a heart attack.
* The Court decided at trial that causation was not made out because he died when he hit the water, therefore the alleged negligence of the rescue was not the cause of death.

#### Kauffman v TCC, 1960 SCC

* Woman on escalator. Youths at top “rough-housing”. They fall and cause everyone on escalator to fall.
* Plaintiff sues TCC for having insufficient handrail and no attendant present.
* Court: Causation is not made out. No evidence that a better handrail or attendant would have prevented injury. No one tried to grab a handrail.

#### McGhee v National Coal Board (Material Contribution Test)

[Watering down causation]

* Ratio: as long as defendant’s conduct created a risk that injury would occur, and then the injury did occur, this was enough to establish an inference of causation
	+ First articulation of the “Material Contribution Test”
* Plaintiff was an employee of the defendant, he developed dermatitis.
* Plaintiff's job caused lots of coal dust and it got on his skin. Defendant failed to provide adequate washing facilities.
* Court found a duty owing and that the standard was breached but causation was a problem in that he could have developed dermatitis but for the presence of washing facilities.
* Science could only show that lack of facilities contributed to the risk of dermatitis in a material way.
* Riding bike home covered in Coal dust made more likely that he would develop dermatitis but could have developed it regardless. The Court accepted that this was good enough.

#### Snell v Farrell, 1990 SCC (rejects *McGghee* 🡪 “but for” flexibility)

Ratio: Causation is a practical question of fact, which can be best answered by common sense. Court can infer causation based on limited evidence of the plaintiff, which may then be rebutted or not by the defendant. Rejects *McGhee* as it allows the possibility of false claims, as all you would need to show as a plaintiff is that the defendant’s conduct was negligent, and they suffered a loss which may be caused by some other factor, which then the defendant has to disprove.

Facts: Plaintiff was 70 years old and was legally blind in right eye due to cataracts. Doctor was an ophthalmologist who did surgery to remove cataracts. Plaintiff had eye surgery, eye started to bleed, doctor continued the procedure though he maybe should have stopped. Blood occluded the eye and didn’t clear for 9 months, which stopped doctors from being able to tell what was happening behind her eye. Plaintiff later lost sight in that eye from a stroke, **which may have been either caused by natural causes (high blood pressure and diabetes) or by continuing the surgery**. Negligence claim comes from the doctor continuing surgery after the bleed. At trial and CA, the doctor was found liable with *McGhee* principle; contributed to risk 🡪 causation established.

Result:

Reason: Sopinka J

* + “**Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury of the victim to justify compensation of the latter out of the pocket of the former**”
	+ Issue of law is whether the plaintiff in a malpractice suit must prove causation in accordance with traditional principles or whether recent developments in Law justify a finding of liability on the basis of a less onerous standard, which will determine whether appellant is liable for damages to plaintiff’s eye
	+ Trial judge relied on *McGhee* approach to material contribution test, which causes burden of proof to be shifted to defendant in certain situations, in that defendant was prima facie considered to have caused the plaintiff’s injuries and defendant has not discharged his onus to disprove this
	+ *\*\*McGhee* test is that defendant created a risk of injury, and injury occurred within the ambit of that risk. Therefore, there is an inference of liability, which the defendant needs to then disprove. Allows inferring liability without being able to show “but for” test
	+ SCC doesn’t like this test because it allows the plaintiff to hold a defendant liable when he may not be
	+ Sopinka J doesn’t believe that this shifting of the onus is necessary to prevent defendants who have substantial connections to injuries from escaping liability, and believes causation is sufficient to this task
	+ Traditional application of causation by the courts was too rigid, which caused the dissatisfaction with the approach
		- Causation need not be determined by scientific precision, but is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory
	+ **Where the knowledge of the facts lies solely within the defendant, a small amount of affirmative evidence will allow the trier of fact to make an inference that the D’s negligence caused the injury therefore the P can satisfy causation on the basis of the BUT FOR test**
		- Legal or ultimate burden remains with plaintiff, but in absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been proven — can infer causation based on evidence
		- Basically, very little evidence on the part of the plaintiff is required in order to establish an inference of causation, which may then be rebutted by further evidence from the Plaintiff
	+ The trial judge found that the plaintiff had prima facie proved that the defendant’s actions caused the plaintiff’s injury, which is the same as inferring causation
	+ Therefore, appeal should be dismissed with costs
	+ **SCC rejects *McGee*** – It is **unfair because it shifts the onus to the defendant and *presumes* the doctor was liable when they may not be**. The Court allows a flexible approach:
		- The “ordinary rules of causation” apply. Only the defendant knows what happened, so the plaintiff can establish causation by merely providing some affirming evidence of causation.
		- The Court will infer causation unless the defendant can rebut it. Without a flexible approach the plaintiff might never succeed in such a case because they don’t really know what happened.

Issue:

Notes: \*\* This case allows the court to draw inferences!! Avoids cases where the P would never be successful due to a lack of knowledge of the facts (relevant in many medical situations).

#### Athey v Leonati, 1996 SCC

Ratio: In this case because there was a single, indivisible injury and multiple tortfeasors, and they were both contributing factors, the defendants are jointly and severally liable to the plaintiff for the entire injury. D’s action does not have to be a sufficient cause.

Facts: Plaintiff had pre-existing back problems and was in 2 unrelated car accidents. Some months after 2nd accident he suffered disc herniation during a mild stretching exercise which was approved by his doctor. Herniation was caused by a combination of injuries sustained in the two motor vehicle accidents and a pre-existing disposition. P sued both drivers in his accidents. At trial – Judge awarded 25% damages because his injury was 75% due to pre-existing problems.

 \*\***This is not how causation works – it is not to be apportioned… if it was a cause at all then causation is met and the D is liable (this was held by the SCC)**

Result:

Reason: Major J

* + Causation is established where the plaintiff proves on the balance of probabilities that the defendant caused or contributed to the injury, usually using “but for” test, but where that is unworkable courts have recognized establishing causation where the defendant’s actions have “materially contributed” or are necessary to the occurrence of the injury
	+ As long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury
	+ In cases where there is an independent intervening event which was unrelated to the tort, and affected the plaintiff’s “original position” and therefore changed the actual net loss the plaintiff suffered, this may be taken into account by a reduction in damages payable
	+ Plaintiff not obligated to show that defendant’s negligence was the only cause to recover full damages. It need only be a cause beyond *de minimus*
	+ “**Thin skull rule**” — tortfeasor is still liable for plaintiff’s injuries even if the injuries are unexpectantly severe due to a pre-existing condition—not plaintiff’s problem that they have a “thin skull”
	+ “**Crumbling skull rule**” — Tortfeasor need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyways—in this case no measurable risk of disk herniation occurring without the accident, therefore no need to reduce the award based on crumbling skull rule
	+ **Loss of chance doctrine** — Plaintiff may be compensated where their only loss is the loss of a chance at a favourable opportunity or of a chance of avoiding a detrimental event, finding of trial judge was that there wasn’t a loss of a chance of avoiding injury, but rather an injury as a result of the accident
	+ The trial judge’s finding of the injuries contributing to a 25% contribution to the subsequent disk herniation is a finding of material contribution and therefore sufficient to render the defendant fully liable for the damages resulting from the disc herniation
	+ This is a straightforward application of the “thin-skull rule” the pre-existing disposition may have aggravated the injuries, but the defendant must take the plaintiff as he finds him
	+ The Court refers to the “thin-skull” rule. If you have a collision with a person who has a pre-existing condition that results in worse than normal injuries, that’s too bad – both parties are jointly and severally liable for the damage.
	+ The Court is concerned that Non-Tortious/Tortious injury should not be apportioned out.

Obiter:

* + If one of the accidents caused injury to the arm and the other to the leg, then each defendant would be liable for only the injuries cause.
	+ “Crumbling Skull” rule – was the defendant's strongest argument.
		- “You only have to restore the plaintiff to their original position” if they could have proven that the disc would have herniated in six months anyway then the defendant would be liable only for that six-month difference

Issue: What if an injury has more than one cause? What is the difference between a necessary and sufficient cause?

Notes:

#### Resurfice Corp v Hanke, 2007 SCC

Ratio: But-for test is starting point. However, in a situation where Iit is impossible to prove plaintiff’s liability based on the “but for” standard, that impossibility was based on factors outside of plaintiff’s control, the defendant breached the duty of care owed to the plaintiff, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff then suffered that form of injury, then the court may use the material contribution test.

Note: this sounds like *McGhee* test.

* + There was no reason for the Court to define when the material contribution test should be used, but they did and after that everyone argued for this test.
	+ What does it mean for it to be impossible to know?

Facts: Hanke was an operator of a Zamboni and was badly burned when the Zamboni exploded, because he filled the gasoline tank of the Zamboni with hot water which caused the gasoline to evaporate and ignite. He sued the manufacturer and distributor for damages, maintaining that the water tank was too close to the gasoline tank, which can cause an operator to easily confuse the two. Trial judge threw out the case, but Court of Appeal set aside the judgement, holding that the trial judge had erred in both his foreseeability and causation analysis.

Result:

Reason: McLachlin CJ:

* Trial judge found that it was not reasonably foreseeable that an operator of a Zamboni would mistake the gas and water tanks, and place a water hose in the gas tank which would lead to an explosion
* Hanke admitted he knew the difference between the two tanks and was not confused between them
* CA found that trial judge had erred in discounting expert testimony as evidence, as well as the evidence of two other workers who had made similar mistakes in the past. However, Trial judge is not obliged to accept all evidence, just needs to ensure that there is evidence to support findings of fact he or she makes
* Additionally, CA criticized trial judge failing to take into account the seriousness of the injuries to the plaintiff, as well as the financial positions of the parties, however these are not relevant to reasonable foreseeability on the part of the defendant
* Therefore, no error of law or palpable and overriding error of fact or mixed fact and law has been established by the CA
* CA suggested that Trial judge erred in not doing a comparative blameworthiness analysis for causation, however the trial judge clearly found that Mr. Hanke’s carelessness was responsible for his injuries, and that the alleged design defects were not responsible, and therefore there was no need to engage in contributory negligence analysis
* CA also held that Trial judge incorrectly just applied a “but for” test, rather than a material contribution test, which should be used when there is more than one potential cause of an injury
* This would do away with “but for” test completely, as there are always more than one possible cause of injury
* Basic test for determining causation remains the “but for” test, which applies to multi cause injuries; plaintiff bears the burden of showing that “but for” the defendant’s negligent act or omission, the injury would not have occurred. After this, contributory negligence can be applied
* In certain exceptions the law has recognized material contributions test being appropriate for replacing “but for" test—has two requirements
* First, must be impossible for plaintiff to prove that defendant’s negligence cause the plaintiff’s injury using the but for test, and impossibility must be due to factors outside of plaintiff’s control, i.e. current limits on scientific knowledge
* Second, must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury
* One situation requiring exception would be where it is impossible which of two tortious sources caused the injury, i.e. two shots carelessly fired at victim, but don’t know which injured him
* Alternatively, where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the “but for” chain of causation
* In this case, CA erred in failing to recognize that basic test of causation remains the “but for” test

Issue:

Notes:

#### Clements v Clements, 2012 SCC

Ratio: Material contributions test is only to be used in situations with multiple tortfeasors who all acted negligently and all of whom exposed the plaintiff to an unreasonable risk of injury.

Facts: Husband was driving an overloaded motorcycle (100 lbs too much weight on the motorcycle), with his wife on the back. They were driving at an excessive speed, hit a nail, when he went to pass another motorist, the nail came loose and the tire deflated rapidly, caused the motorcycle to swerve. Husband then made decision to bring the bike down, and he was unsuccessful in doing so under control, and therefore they both flew off and the accident happened. Wife sued husband for negligence. TJ says this fails the BUT FOR test but finds causation with the material contribution test.

Result:

Reason: SCC

* Wife has to show there is a causal connection between either the speed or the weight which caused the bike to crash
* Expert testified that it was the nail which caused the motorcycle to begin wobbling and swerving, and there was no way the expert could determine at what speed or weight the bike could have been brought down safely, therefore trial judge could not establish “but for” the speed and overweight, that the crash would have happened
* Plaintiff tried to get trial judge to apply the material contribution test, which he does.
	+ - Trial judge looks at this as a problem with the science of motorcycle dynamics, so he can’t prove but for the defendant’s actions, that this would have happened, but will use material contribution test instead, and therefore find defendant liable
* CA and SCC disagreed with Trial judge, applying material contribution test here is a mistake, as result here should have been that the case should have been dismissed for lack of causation
* That said, there are *exceptional circumstances* where a plaintiff can succeed in showing causation despite the “but for” test not being met, which is not establishing causation in fact
	+ - Whereas the but-for test is a **factual finding**
* **The material contribution test is available to the plaintiff when it is impossible for the plaintiff to show via the “but for” test that defendant’s negligence caused the injury**
	+ - \*\*Impossible means when there are multiple defendants, all of whom acted negligently, and all of whom through their negligence exposed the plaintiff to an unreasonable risk of injury
			* Multiple tortfeasors
			* All of whom acted negligently
			* And all of whom exposed P to an unreasonable risk of injury
		- Why is the material contribution test available in such circumstances?
			* It is (mostly) consistent with corrective justice
			* Compensation, fairness, deterrence…
* The fact that each defendant can blame the other(s) makes it impossible to establish causation, the material contribution test is available in these circumstances as it is consistent with corrective justice, and compensation, fairness and deterrence (circular causation problem).

What did the trial judge do wrong in Clements? (check this this is wrong)

* + Evidence was not sufficient to suggest that the accident would not happen without the actions of the D 🡪 therefore not satisfying the but for test
	+ Court said that this was an improper use of the material contribution test

Issue:

Notes: Without the material contribution test, situations with multiple tortfeasors can lead to a circular blame game (e.g., two separate parties negligently start a fire which burns down your house — using the but-for test will result in each plaintiff saying that the other would’ve caused it therefore their individual actions fail the but-for test). The material contribution test therefore achieves corrective justice, compensation, fairness, and deterrence.

#### Ediger v Johnson, 2013 SCC

Ratio: Trial judge is still free to find inference of causation-based *Snell v Farrel* – TJ is not barred by expert evidence of other causes but can take it all into account.

Facts: Medical malpractice case, doctor attempted mid-level forceps delivery of baby, baby’s umbilical cord became compressed causing bradycardia and brain injury, Doctor did not arrange for back-up c-section or advise mother of risks prior to attempting delivery. Mother sued doctor for negligence. TJ found in favour of the plaintiff on the issue of causation.

Result:

Reason: Rothstein & Moldaver JJ 🡪 Application of *Snell v Farrel*, Trial judge drew inference that causation was present. Court of appeal should not interfere with trial judge’s finding of fact, and trial judge was free to make this inference – this rejected the D’s argument that the TJ was not free to make this inference because of their expert evidence creating other possible causes. Trial judge found that doctor breached standard of care by not having c section available.

Issue: What caused the bradycardia? There were other possible reasons why the compression of the umbilical cord happened.

Notes:

## Factual Uncertainty

#### Snell v Farrel

* Impossible to pin down precisely the loss of the plaintiff’s eye sight
	+ There are a few possible explanations
* Flexibility of causation test – does not have to have the same certainty as a scientist
	+ Inference can be drawn even in the presence of little affirmative evidence
	+ This is one way to solve the factual uncertainty problem

#### Cook v Lewis (1951) SCC

Ratio: If the negligent conduct of multiple plaintiffs caused injury to the plaintiff, and the plaintiff can show that the negligence of one or the other or both caused harm, they both should be held equally liable, and the onus shifts to the defendant’s in order to prove they were not the cause.

Facts: The plaintiff and defendant were hunting grouse in separate parties. The plaintiff was injured when 2 people in the other party fired their guns in his direction. It could not be established which defendant had actually shot him.

Result:

Reason: Court did not find that the defendants were “joint-tortfeasors”. It could not be proven that they were acting in common design. The common design would have to itself be unlawful or give rise to a reasonable possibility that an unlawful act would be committed. The plaintiff could not prove, but for either one of the tortfeasors negligence, that he would have been shot. Where the plaintiff can prove he was injured due to the negligence of either of the two defendant but cannot prove which one actually caused him the injury, then both should be held liable. Both were negligent and brought about a situation that injured the plaintiff. The onus shifts to the defendant to exculpate them.

Rand J: Where the conduct of two parties, both negligent, destroys the innocent plaintiff's ability to prove causation, the onus is justifiably reversed to the wrongdoers.

Issue:

Notes:

#### Fairchild v Glenhaven Funeral Service, (2002) UK HL

Ratio:

Facts: Had a number of plaintiffs who were negligently exposed to asbestos in a number of different employer’s workplaces. Each of the 3 plaintiffs came to court after developing lung cancer from the exposure. However, you can develop mesothelioma from inhaling 1 particle of asbestos, from decades ago. Therefore, it is impossible to pinpoint which inhalation actually caused the cancer. Can’t pinpoint which employer actually caused the cancer. Plaintiffs could not prove which place of employment was “the cause” of the inhaled asbestos dust. The 3 claimants had worked for different employers (disease can take years to develop).

At trial, after duty and breach had been made out, the Court said because they could not establish where they were exposed, and which employer is responsible, two of the plaintiffs cannot succeed. The 3rd claimant had proved that each employer had “contributed to the risk”.

On appeal, the Court dismissed all three claims for want of causation, rationale was that since mesothelioma can be caused by inhalation of 1 particle of asbestos, the plaintiffs could not prove causation—obviously not a just result.

Result: Reversed the courts below

Reason: In circumstances like this, the test has to be modified because this cannot be the outcome… Modified the causation test on the “but-for” standard. The but for test can’t work in this situation due to the circular blame problem. Plaintiffs need only prove “material contribution to the risk” to recover. Question is who should go home with lighter pockets—which is a policy question, and therefore will be prepared to consider an alternative.

Issue:

Notes: This is the situation which was described in *Clements*, multiple tortfeasors, all of whom exposed plaintiff to harm, and therefore all will be held liable — if they can each show that they weren’t the cause, then they could escape liability, however that is clearly not the case here.

Criticism – Perhaps the “all or nothing” approach to causation is the problem, not the “but- for” test.

#### Sindell v Abbott Laboratories (1980) California SC

Ratio: Court created market share liability – each manufacturer who produced the drug in identical formula could be liable to the plaintiff relative to its portion of the market at the time. Also said that if a company could show that it was not the one who produced the drug (ex. there was a company that started manufacturing the drug after the P’s birth date), you could escape liability.

Facts: Plaintiff sued the drug maker who made DES to which her mother used to prevent miscarriage. It led the plaintiff to develop cancer some years later. It could not be established which company among many was responsible, as there were many different companies which were producing and manufacturing DES and given the time period between when DES was manufactured and when the cancer actually took place. Therefore, couldn’t tell which company was actually the cause, as plaintiff couldn’t remember who produced the specific DES which led to the cancer.

Result:

Reason: Court held that if the plaintiff could show that the defendant companies had produced a substantial amount of the drug (i.e. market share) they could be held liable proportionately.

Example: if the plaintiff sued 10 companies and they represented 85% of the market then they would be responsible for 85% of her damages in proportion to their respective shares.

* + Problem: the plaintiff's mother actually bought DES from that 15% that wasn’t sued.
	+ Another problem is that the plaintiff will not get 100% of damages, unless they have 100% of the market in the lawsuit

Court basically found a way to work around “but for” requirement, as they realized that plaintiff would not be able to show causation and found a way through market share liability to compensate the plaintiff.

Issue:

Notes: This has not been adopted yet!! But it is another option.

#### Hypothetical Examples

1. C is swimming in a city swimming pool. She suffers a cramp and starts to drown. The lifeguard employed was not at his station. C is eventually rescued by has suffered brain damage and will need constant care. It is possible that, if the lifeguard had been where he was supposed to be, she would have been rescued in time to prevent the brain damage.
	* Yes, DOC he is a lifeguard
	* SOC?
		+ He was not at his station… but was he negligent??
			- Maybe he was saving someone else – then he is not liable
		+ Lets assume he was on his phone playing a game = breach of SOC
	* Causation?
		+ Possible is not the same as overcoming a balance of probabilities (50+1)
			- Plaintiff has to establish that is more likely than not that if he had been at his station that she would have avoided the brain damage – would this have happened anyway?
			- Plaintiff has to establish that causal relationship
2. A steps into the road immediately in front of the car: D is exceeding the speed limit and talking on her mobile phone. A is struck and injured. Is D liable for the injuries?
	* AB – the onus is on the driver to prove that they were not the cause…. (but let’s just analyze this through the common law)
	* Very likely negligent…
	* Causation?
		+ Would this injury have happened even if D was driving not negligently?

# Remoteness

* AKA “cause in law” or “proximate cause”
* Really asking the question – how far will the D’s liability extend?
	+ Should the D be responsible for all of the consequences of their negligence?
		- Why or why not?
* What are the courts trying to balance?
	+ Accountability for the D
	+ Concern about saddling the D with an unreasonable burden
* TEST?
	+ Directness test
		- The original test the courts used
		- Any consequences that could be traced directly to the D’s conduct, the D would be liable for
		- *Re Polemis*
			* People unloading cargo dropped plank which ignited an entire ship
			* Court said they can all be traced back so = liable
		- Advantage: the answer to the remoteness question is simple (clarity and predictability)
		- Disadvantage: often the case that you can trace a lot of consequences back to the D’s negligence
			* May not be happy with how far this goes
	+ **Foreseeability** **test**
		- Limits the D’s responsibility to foreseeable consequences
* This is now issue #3 where foreseeability is a question of law
	+ DOC
	+ SOC
	+ Now remoteness…

### Justice Brown’s Guest Lecture

* Remoteness limits liability 🡪 presupposes you owed a duty (foreseeably cause harm) but then asks **even if what I was doing could foreseeably injure this person and a proximate relationship, is what happened foreseeable? Is the specificity of how it happened foreseeable?**
* Realistically decided with a blend of common sense, what is pragmatic and judicial policy about what is fair
* Distinction between duty and remoteness is key
	+ *Libendt* at para 78 – foreseeability within the duty analysis is concerned with foreseeable with type of injury, whereas remoteness asks was this particular injury or how it happened was foreseeable
* Requirement for remoteness recognizes just because a type of injury might be the natural and direct consequence of negligence does not necessitate liability
* NEW RULE when remoteness was established 🡪 The damage suffered by the plaintiff must not be too remote (*Wagon Mound*)
* Smith v Leech Brain and Co – burn to malignant, fatal cancer
	+ Court decides that he was predisposed to cancer that the burn triggered
	+ Thin skull rule 🡪 tortfeasor must take their victim as they find them
	+ Remoteness here was about the extent of the injury!
* In a person of normal fortitude, and you can foresee any damage 🡪 then the thin skull rule is in play
	+ Thin skull rule and foreseeability can co-exist
		- 1. Initial threshold step: PL wouldn’t have to show that anyone would have same degree of injury, but that a person of ordinary fortitude would foreseeably suffer in these circumstances
		- 2. Then thin skull rule can apply
		- Issue comes down to: **whether TYPE of injury was foreseeable, then thin skull rule allows them to recover full extent even if that full extent was not reasonably foreseeable.**
	+ **Smith v Leech Brain & Co:** thin skull rule does not preclude a finding that the cause was too remote. If the type of initial injury was foreseeable, then the resultant harm must be bundled into the analysis – however, the amount to which the negligence caused that injury will be dealt with in damages (here, a burn caused a cancer, but the cancer wouldn’t have developed had the plaintiff not worked in a gas works plant before)

## General principles

### Wagon Mound No 1, (1961) JCPC – overturned *Polemis* test

Ratio: People should only be responsible for foreseeable consequences of their negligence – rejected the directness test

Facts: Furnace oil in the water, which was leaked by the plaintiffs. A welder ignites it and it causes extensive damage. It was a finding of fact that it was not foreseeable that the oil could burn on the water.

Result:

Reason: JCPC (Australian litigants)

* + JCPC adopts the test of foreseeability.
	+ There was foreseeable harm, but not foreseeable that fire would cause destruction of entire wharf area. If they used directness test, would have been responsible for the entire damage caused
	+ The fire was a direct result but it doesn’t make sense to hold defendant responsible for something a reasonable person could not have foreseen.
	+ ***Polemis* is no longer good law.**
		- JCPC says that it is unfair to hold people liable for grave and unforeseeable consequences of trivial acts of negligence.
	+ The Court wants to equate blameworthiness with the extent of consequences and uses foreseeability as the tool—people should only be responsible for consequences which they can reasonably foresee

Issue:

Notes: **NELSON** – Foreseeability is not obvious either. It is evaluated in hindsight and depends on how narrowly or broadly you look at the situation.

Example:

(1) Plaintiff suffers injury chasing car thief. Is the thief liable?

(2) Plaintiff steps on hydro wire and dies chasing car thief, is this then too remote?

In this case the Court took the broad approach and found the thief liable.

### Hughes v Lord Advocate (1963) Scotland

Ratio: Foreseeing the **type of injury** is all that is necessary, the manner in which the injury occurs is not.

Facts: Post Office opened a manhole and left lamps around it and went for tea. Some kids came along entered the manhole, when they were leaving they knocked a parafin lamp into the hole which exploded and a child fell back in, and suffered severe burns.

Result: Court held the injuries were foreseeable, in that the children might get burned by a lamp they left on

Reason: If you leave that unattended – it is foreseeable that children could come and be injured by way of a burn.

That the children might be burned was foreseeable even if the exact manner in which it occurred was not. Foreseeing the manner in which the injury occurs is not necessary because the type of injury was. Need to determine what must be foreseeable in order for the plaintiff to be able to recover--

* + The manner in which the injury occurred? This was not foreseeable in this case
	+ The extent of the injury? This was also not foreseeable
	+ The type of the injury? This was foreseeable

Neither the manner nor the extent of the injury needs to be foreseeable, only the type of injury. It was foreseeable that a child might get burned if you leave a burning lamp unattended next to an “allurant” (the manhole).

Issue: What exactly has to be foreseeable for the P to recover?

Notes: Nelson – There is really no difference between this case and *Polemis*. When foreseeability is framed this widely it is equivalent to directness.

### Smith v Leech Brain & Co(1962) UK QB – still a leading case

Ratio:

Facts: Smith worked at a factory where they had to dip objects into molten metal. Didn’t have a proper protection to protect them from getting burned—just had a metal shield which they couldn’t look through which they would hide behind, but then in order to see they would need to look out from behind it. Plaintiff looked out from behind a metal shield to see what was going on. Man hit by piece of molten metal in the lip, he was predisposed to cancer because of his previous time in the gas industry. Plaintiff brought an action after husband developed cancer and died, defendant argued remoteness.

Result: Causation between the metal and the cancer was made out.

Reason: Court decided the burn was reasonably foreseeable therefore; the defendant is still responsible for his cancer and death. Thin Skull Rule applied, as need to take the victim as you find them, burn was foreseeable, and there was direct causation between metal burn and cancer. Arguable that the type of injury is not foreseeable here, as it is foreseeable that he would get burned, but not that he would develop cancer. We would seem to be back in the territory of the directness test, rather than a foreseeability test.

Is the “thin skull rule” compatible with a test of foreseeability? According to the court, it is. From a policy standpoint, foreseeability means that you can foresee harm to the plaintiff, when that harm manifests it may be related to the constitution of the plaintiff. Implies that *Wagon Mound No. 1* does not adequately address the compensation and deterrence aims of tort law.

Issue:

Notes: The thin skull rule is somewhat inconsistent with the reasonable foreseeability test. Applying the foreseeability test this broadly seems to be similar to the directness test, but the Court likely sticks with foreseeability to prevent the floodgates that may open if directness becomes the new rule.

### Mustapha v Culligan of Canada, SCC

Ratio: Thin skull rule is qualified, to satisfy the reasonable foreseeability test, plaintiffs need to show that this would harm a person of ordinary fortitude. No difference between mental and physical injuries.

Facts: Plaintiff was replacing a water bottle in his water cooler. As he was putting the water bottle in, he saw multiple dead flies in the new water bottle. He then becomes sick to his stomach and develops psychiatric condition from thinking about all the flies he could have not seen and drank. He couldn’t get the fly in the bottle out of his mind, hasn’t been able to sleep more than 4 hours a night, and gone into depression, hasn’t been able to drink water since. Also hasn’t been able to continue working. Suing for damages, Trial Judge awards damages for negligence, Court of Appeal overturns, and SCC confirms for different reasons.

Result: Too remote, plaintiff unable to recover.

Reason: McLachlin

* + Duty of care made out, as clearly Mr. Mustapha was owed a duty of care by Culligan of Canada
	+ Also clear that Culligan breached their standard of care
	+ Always the case that in negligence claims that plaintiff had to suffer a loss.
		- Court talks about damages here being psychiatric or psychological damages.
		- McLachlin says that difference between psychiatric and psychological damages and physical damages is artificial.
		- This is because courts have long struggled with difference between physical damages and psychiatric damages — courts can become a bit suspicious because the court can’t see psychiatric damages
	+ Seems to say that those days of court being suspicious of psychiatric damages are over
	+ Not going to define what it means to have a compensable injury—but has to be serious and prolonged
	+ Didn’t have difficulty establishing that he had a psychiatric injury
	+ Court doesn’t have difficulty establishing causation; *but for Culligan’s negligence, Mr. Mustapha wouldn’t have suffered injury*
	+ Trying to determine if injury itself it too far removed from defendants negligence for the court to compensate plaintiff
	+ How far does foreseeability go from *Wagon Mound No. 1*?
		- Not enough to say harm was possible, that is too low of a standard, as if it happened it was possible.
		- It has to be something that would be considered a reasonable risk, wouldn’t need to be far-fetched or flighty
	+ In this case, should we consider plaintiff **subjectively or objectively**?
		- Start with an objective threshold
		- Whether or not this type of harm was foreseeable in a person of ordinary fortitude…
		- From *Smith*, should take victim subjectively—thin skull rule, take your victim as you find them 🡪 how are these two thoughts reconciled?
	+ McLachlin finds that the law expects reasonable robustness and fortitude from everyone, and therefore should consider plaintiff objectively
	+ This reaction was very peculiar to him; if Mr. Mustapha could show that a person of reasonable fortitude would also suffer some psychiatric harm, however here we can’t compensate him, in that the reaction was very peculiar to himself
		- Nelson: does this fit together with the previous lack of distinction between psychiatric and physical harm? Nelson thinks no
	+ Qualifies the thin skull rule to mean that plaintiff must show that a reasonable person would suffer the same type of harm; and after that the degree of harm is compensable
		- However, if the defendant knows that a person is unusually susceptible to harm, then they may be held liable

Issue: Whether the damage was too remote and whether there were actually damages

Notes: When determining if the question is a duty of care in comparison to a remoteness question: Duty of Care looks at the relationship between the plaintiff and defendant, whereas remoteness looks at what happened and whether it was foreseeable.

Despite what the Court says about no distinction between mental and physical injuries, their qualification to the thin skull rule essentially makes this distinction anyways.

Example. D negligently drives into a fire hydrant. The result is a heavy flow of water which forces open a basement window of the P’s building. The basement is flooded in several feet of water. P sues for the damage done to the supplies stored in the basement. Liability? Or too remote?

 Representing the D 🡪 you want to make the question as detailed and specific as possible.

Example. D negligently causes a house fire while using a blowtorch to burn he pain off the eaves off his home. Fire fighter responding to the call suffers burns while putting out the fire, despite wearing protective clothing. Liability? Or too remote?

Example. D takes P’s car without permission. P gives chase in a second vehicle. As a result of his negligent driving, D knocks down a hydro pole and ends up stopping in a field. P catches up, runs into the field and steps on a downed, live hydro wire. P winds up with severe burns and has to have his leg amputated. Liability? Or too remote?

 CA said NOT too remote.

What kind of inquiry is the court engaging when deciding whether a particular injury is too remote to be recoverable?

What are some of the factors that influence judicial decision -making in this context?

* Seriousness of the injury
* Burden of D if liable
* Relationship of P and D
* Type of injury
* Degree of negligence
* Others?

## Intervening Forces

*Novus* *actus* 🡪 Is D’s liability affected when someone else’s act “intervenes” between the D’s negligent conduct and the P’s injury? Does the intervening act sever the chain of causation?

* The plaintiff is injured by the defendant's negligence, then the plaintiff or a third party does something to make the injuries worse.
	+ Does the intervening act sever the chain of causation making the further injury too remote to hold the defendant liable?
* Where there is a *novus actus interveniens* in between the negligence caused by the defendant and the plaintiff’s injury, there won’t be liability for injury caused by the *novus actus* by the defendant.
	+ Court has to decide what impact the intervening act had on the outcome
* If there is a *novus actus interveniens*, by a conscious act of the plaintiff, the defendant cannot be held liable for the consequences of that act.

Suicide as an Intervening Force

* If the injuries caused by the defendant were such that they led to mental disturbance which led to suicide, then the defendant is liable (not a *novus actus*).
* If the injuries caused by the defendant were not such that they led to a mental disturbance but a deliberate act of a disturbed individual then it is a *novus actus* and the defendant is not liable (suicide not as a result of the injury = no liability)

Intervening Medical Error

* Old law – if a P is injured by D’s negligence and the P seek medical attention (reasonably) and if the attention they get from the medical providers makes it worse, as long as they have not acted negligently, it is ALL the D’s liability
	+ Nelson: cannot wrap head around that it is foreseeable it might not get worse but not foreseeable that docs will act negligently
* Doctor causes, by treatment, a worsening of the plaintiff's condition
* Where the medical error is not negligence, the defendant is still liable for all injuries
* If the medical error is negligent, the defendant is not responsible for the extra injuries
* The law in Canada has changed to make defendants liable for all damage and then it would be up to the defendant to try and recover from the doctor by bringing him into the action as a third party and trying to prove his negligence.

### Bradford v Kanellos (1974) SCC

Ratio: Where there is a novus actus intervening in between the negligence caused by the defendant and the plaintiff’s injury, in this case the panicked patron who yelled gas it’s going to explode, there won’t be liability for injury caused by the novus actus by the defendant. Court has to decide what impact the intervening act had on the outcome.

Facts: There was a fire in a restaurant. An employee activated the fire extinguisher, expelled carbon dioxide on the fire, and put it out immediately. The fire made a hissing sound when it was put out, a patron shouted that gas was escaping and there was going to be an explosion. Patrons in the dining room panicked and rushed out, and the plaintiff was injured in the resulting stampede to the exit. At trial the plaintiff won, trial judge held that the restaurant should have cleaned the grill which led to the fire. This was reversed by the C.A., who held that the respondent could not have reasonably foreseen the events which led to the plaintiff’s injury. This was upheld in the SCC.

Result: Majority held that the patron broke the chain of causation and therefore the restaurant was not liable

Reason: Martland:

* + Agreed with CA, as negligence caused by flash fire was mitigated by the fire extinguishment system, which was one of the best fire prevention systems according to the Chief of the Kingston fire department
	+ Restaurant could not have anticipated that patrons would hear sound, and become panicked and run out of the restaurant
		- This intervening act was an unforeseeable reaction
	+ The SCC agreed that the hysterical conduct of the patrons was not within the risk created by the negligence in allowing grease to accumulate on the grill. The patrons were a novus actus.

Issue: Whether the defendant restaurant was responsible for the plaintiff’s injury or whether the patron who caused the stampede broke the chain of causation?

Notes: Spence J (Dissent):

* + Argued that the result was “utterly foreseeable” in that the patrons acted in a “human and natural way” in a panicked situation, and their actions were part of the natural consequence of events leading inevitably to the plaintiff’s injury
	+ Doesn’t think that patron’s acts were negligent in calling out fire, and even if they were, would still hold the plaintiff had a cause of action against the respondent

Nelson: Doesn’t think the majority is right, as if intervener had seen the fire instead in the kitchen, and yelled fire, it probably wouldn’t be considered a novus actus, and defendant would have been held liable, and the distinction between hearing the sound vs seeing a fire is kind of ridiculous.

### Wright Estate v Davidson (1992) BCCA

Ratio: If there is a *novus actus interveniens*, by a conscious act of the plaintiff, the defendant cannot be held liable for the consequences of that act:

1) If the injuries caused by the defendant were such that they led to mental disturbance leading to suicide then the defendant is liable (not a *novus actus*).

2) If the injuries caused by the defendant were not such that they led to a mental disturbance but a deliberate act of a disturbed individual then it is a *novus actus* and the defendant is not liable.

There are problems with this distinction what is a “deliberate act”? Is the insane plaintiff's suicide really foreseeable? Based on Courts are reluctant to be compensating the dependants of suicide “victims”.

Essentially, if the P is not suffering by a mental illness from the accident it is a conscious and independent act and therefore cannot be an intervening act.

Facts: Bradley Davidson was in a car accident with Rita Wright, Ms. Wright was injured. No pronounced head injury, slight laceration to her head, didn’t lose consciousness. Ms. Wright suffered whiplash, neurologist held that anxiety and depression she felt were symptoms of the accident, became more and more depressed, and attempted suicide. Plaintiff subsequently committed suicide. Trial judge ruled that the subsequent suicide death of Rita Wright was a reasonably foreseeable result of the motor vehicle accident. Defendant appealed, said that suicide death of plaintiff was a *novus actus interveniens* which broke the chain of causation between the alleged negligence of the of the motor vehicle accident and the damages flowing from the death of the deceased, he appealed for CA to dismiss past loss of income up to the date of the death of the deceased.

Result:

Reason: From the evidence, this wasn’t a thin skull case, as there were no pre-existing psychiatric difficulties or depression. Trial judge erred in his decision to apply *Hayes*, as there was no evidence of a disabling mental illness which would lead to the conclusion that Ms. Wright’s suicide was not of her own volition (“of a sane individual”). If there was a mentally disabling condition which caused her suicide to not be of her own volition would mean that it wouldn’t be *novus actus interveniens.* Therefore, her suicide must be taken as a *novus actus interveniens* and cannot be said that her death was a reasonably foreseeable consequence of the wrongdoing. Her death cannot be reasonably considered to be a consequence of the defendant’s actions. Therefore, allowed the opinion and dismissed all damages except for the loss of wages.

Issue:

Notes: Nelson: this is an example of court’s discomfort with the notion that a P’s decision to kill themselves dependently means that D should not be held liable 🡪 stems from old religious roots that suicide is wrong. Courts are starting to understand this differently though – starting to recognize that the sanctity of life does not ALWAYS have to outweigh harms and injury.

### Costello v Blakeson (1993) B.C. S.C.

Ratio: Defendant can be held partially responsible for suicide attempt if the plaintiff had pre-existing mental health condition which was exacerbated by the accident, and if the defendant had known about, would have made the suicide attempt reasonably foreseeable.

Facts**:** Actions for damages for injuries which the plaintiff sustained as the result of a motor vehicle accident. Plaintiff had her car hit by the defendant’s car, suffered a head wound and mild concussion, later was diagnosed with PTSD. Plaintiff then tried to kill herself by throwing herself from a 2nd story window, she survived but had to have serious surgery, and is now hobbled with a cane, and suffers from depression as a result of both accidents—a young child she was emotionally attached to died that day, probably jumped as a result of that. Plaintiff had suffered serious physical and emotional trauma prior to accident, home life led her to find a foster home at age 14, at age 17 got in an accident where she broke her neck, at age 24 she was admitted to a hospital suffering from an overdose of prescribed drugs and valium. Also was a diagnosed alcoholic, suffered a head injury when she was struck by another car, and has suffered from intermittent seizures since. Subject to a severed assault in 1985 when she was hit over the head with a blunt object, and had several teeth broken. Also had attempted suicide in 1988, 3 months prior to getting in the accident. Additionally, she suffered from a degenerative condition that affected her joints as a result of seizures from the first accident. Liability for accident was admitted, primary issue were whether the injuries suffered by the plaintiff as the result of a subsequent suicide attempt by the plaintiff were causally linked to the accident and reasonably foreseeable as likely to result from it.

Result: Have to take victim how she is, from thin skull rule

Reason: Evidence that accident was a contributing factor to the suicide attempt. Reasonable foreseeability should be applied based on what the defendant reasonably ought to have foreseen had he known of that condition, plaintiff had already attempted suicide 3 months before, likely she would try again once her pain was exacerbated by the accident. Therefore, Defendant is 25% liable for Pl suicide attempt.

Issue:

Notes:

## The Instinctive approach

### Palsgraf v Long Island Railroad, supra

* Attendant “helps” person on train their fireworks fall/explode, scale falls on plaintiff
* Cardozo CJ:
	+ Characterized this as a question of duty and said no DoC here (see above for DoC discussion).
* Andrews J (dissent):
	+ The Dissent said the act was negligent in respect of the public at large and the claim should be allowed to continue—found that everyone owed a duty to the world—if you are negligent, you owe a duty to anyone who is injured as a result of your negligence—concept of owing a “duty at large”—duty of care to the world
	+ Determining who is liable is based on concept of remoteness, says it’s a basis of common sense
	+ Damages can only be recovered if the injury is caused by the negligence, but if it is, then it doesn’t matter how unusual, unexpected, or unforeseeable, only need to be connected so one is considered to be the proximate cause of the other
	+ Looks at the situation instinctively and with common sense and says there is “no reasonable place to draw the line”.
	+ Is there a natural and sequential sequence of events which occurred, and was the defendant’s negligence a direct cause, without too many intervening factors, a question of fair judgement and practical rule

### Lamb v Camden London Borough Council (1981) UK CA

* Facts:
	+ Lamb lent his house to a lease
	+ While he was away, local council repaired a water main, which broke and washed away foundation of her property
* Had to vacate the property while it was getting fixed
* While they were away, squatters moved in and caused further damage
* Denning LJ:
* Found it was too remote, not part of local councils responsibility to compensate victim for the harm caused by squatters
* Used Lord Reid test in finding this
* Oliver LJ:
* Found the same as Denning LJ, foundation for this decision is that reasonable man wouldn’t have found that breaking a water main would wash away foundation and cause squatters to take up residence and further ruin the property
* In doing so, he essentially applied his own “instinctive feelings” in determining this was too remote

# Defences to Negligence

When we analyze defences to a negligence claim, we are shifting our attention from D’s conduct to P’s conduct 🡪 has the P done something that might limit (or preclude) their recovery?

## Contributory Negligence

*Originally at common law, it was a complete defence*

*NOW a Partial Defense*

#### What does the D have to establish?

* That the P was negligent
	+ Duty of care is established
	+ It is a standard of care analysis – did the P act reasonably?
* That the P’s negligence contributed to their injuries
* Then the court has to assess how much to take away from the damages due to their contribution

#### Butterfield v Forrester (1809) UK KB – harsh old rule

* The defendant, in making repairs to his home, left a pole on the road.
* The plaintiff came along riding his horse at a high rate of speed in the dark and was thrown from his horse.
* The plaintiff was not using ordinary care at the time, so his claim fails.
* The Court is saying that had the plaintiff been more careful, the accident would not have occurred.
* There was no apportionment, and this resulted in the plaintiff being completely barred from recovery. This rule is kind of harsh
	+ If there was any negligence that contributed there was no compensation, period.

**Last Clear Chance Rule:** The harshness of the old rule prompted the development of the “last clear chance rule”

* Whoever has the last clear chance to avoid the accident is the one who is liable. Even if the Plaintiff was contributorily negligent, if the Defendant had the last clear chance, the Plaintiff could recover.
* Still an all or nothing rule but it gives the plaintiff an opportunity to recover despite their negligence
* Courts used this rule to just do whatever they wanted — no rhyme or reason for how this rule was applied
	+ **No longer applies** (see *Contributory Negligence Act*)
		- Apportionment legislation has been established in every jurisdiction in Canada
	+ The *Contributory Negligence Act* abolishes the “last clear chance rule.”
		- This Act applies regardless of who had the last opportunity to avoid the accident
	+ The *Tortfeasors Act* establishes how to apportion liability when there are multiple negligent tortfeasors

Example. Jumping on the soccer goal and hanging from it, was not anchored properly. D argues contributory negligence.

* Is this reasonable for the soccer player to do?
	+ If we can’t conclude that the soccer player was unreasonable then we do not even have to ask if its contributory
	+ Standard of care analysis
		- Custom
			* In soccer, goalposts are supposed to be anchored
			* Soccer players do this all the time
				+ He’s played for X years, how many times has he seen any example where the post has not been anchored

Example. Child plaintiff swimming beyond ropes when he was told not to,

* Was the P negligent?
	+ How is it different when analyzing a child plaintiff’s negligent?
		- How do we assess the SOC of a child?
			* Have to ask if this child is CAPABLE of being negligent… (capacity)
				+ Test: can he appreciate the nature of the consequences of the behaviour he was engaging in?
	+ Is this how a reasonable of like age, intelligence and experience acted the same?
* Did his negligence contribute to the loss suffered?

**Medical Malpractice Context**

* Elective tummy tuck – doc says no smoking but does not properly inform what the risk was – but he argued contributory negligence
	+ TJ rejected CN
	+ COA overturned
		- She ignored that instruction despite repetition and clarity
		- Negligent and contributed to her injuries
		- But cannot determine an apportionment (comparative blameworthiness)
			* 50/50
* Contributory negligence in the medical malpractice context has become more acceptable because of the change of focus in the perspective of informed consent
	+ Mutual decision
	+ Threshold of contributing to their injuries – cannot just be negligent

### Comparative Blameworthiness

* Who was more blameworthy?
* **In comparing relative blameworthiness, factors include** (*Heller v Martins*)
	+ The nature of the duty owed by the defendant
	+ The number of acts of fault/negligence
	+ Timing and various acts of fault
		- Who was first at fault?
	+ Nature of the conduct
	+ To what extent did the conduct breach statutory requirements?
* *Contributory Negligence Act*
	+ S(1): when by fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, **it is not possible to establish different degrees of fault, the liability shall be apportioned equally**.
* Most of the time in seatbelt cases – there will be some degree of apportionment
	+ However, this is NOT necessarily always true (*Rewcastle*)
	+ Always a question of context

#### Heller v Martins (2002) ABCA – apportioning fault (comparative blameworthiness)

Ratio: The proper approach for apportionment of loss is comparative blameworthiness. To what extent did each party’s negligence contribute to the loss?

Facts: The defendant ran a stop sign and collided with Heller’s milk truck. Heller was injured, and not wearing a seat belt (the truck did not have one). In the context of motor vehicle accidents, the jurisprudence shows that if the plaintiff is not wearing a seatbelt, the court will attribute some of loss to the plaintiff. The defendant claimed contributory negligence and said he should not have to pay. The trial judge found Heller contributorily negligence, and apportioned damages to the Plaintiff of being 25% liable.

Result: Comparative blameworthiness. In this case, the plaintiff was found to be 25% liable

Reason: CA found the proper approach is comparative blameworthiness (at least for seat-belts), from the legislation as legislation says we are looking at relative degree of fault and apportion damages on that basis. Rejects causation, as it incorporates part of the Last Clear Chance doctrine—as by determining causation it can boil down to who has the last opportunity to avoid harm. Causation approach also fails to address the primary reason for tort law, which is to put the victim in the position they would have been in had the negligence not occurred. A causation approach would bring back the “last clear chance rule”. This was not the drafter’s intention under the *Contributory Negligence Act*. And would ignore the blameworthiness of the defendant in running the stop sign. Also, it would not be in keeping with the compensation and deterrence goals of tort law.

Issue: How should contributory negligence be approached, by causation or comparative blameworthiness?

Notes:

#### Rewcastle Estate v Siebens (2001) ABQB

* 16 year old girl gets a ride from the Defendant. There are not enough seatbelts in the back for her, but she comes anyway.
* The car rolls and she is killed. The estate sues the Defendant driver for negligence.
* The Defendant argues she was contributorily negligent for getting in the car when there weren’t enough seatbelts.
* Court held her *not* contributorily negligent as she had no other option to get home and therefore her choice was reasonable.

#### Dumais v Hamilton (1988) ABCA

Ratio:

Facts: The Plaintiff had a tummy-tuck (elective procedure) and was informed that she could “lose skin” in the surgical area. The doctor told her not to smoke before or after the surgery. The Plaintiff smoked anyway. The doctor told her to quit and she did until she was discharged, but then started up again. A few weeks later she was admitted with a necrotic tissue problem and lost “a lot of skin” (was significantly disfigured). Brought a claim for lack of informed consent — in an elective medical procedure, it is a more exacting standard for disclosure.

Result:

Reason: The trial judge held she was not negligent. He was persuaded by the fact the doctor did not tell her why she should not smoke. On appeal they found it was clear that the smoking had played a role in her injury. The held that the trial judge had erred. The issue was whether she had taken reasonable care of herself. The fact the doctor told her not to smoke suggested she hadn’t. They could not determine the impact the smoking had had on her injuries, so they held the parties 50% liable, respectively.

NOTE: b/c this was elective surgery there is a higher level of disclosure required.

Issue:

Notes:

#### McCabe v Westlock Roman Catholic Separate School District

* Student injured in gym class trying to do a new, difficult gymnastics move.
* The teacher argues that he should not be held liable for all her injuries, the student must bear some responsibility.
* The student was found contributorily negligent because she did a move she had not done before or learned how to do safely.
	+ It was foreseeable to her that she might get hurt.
* The fact that the instructor was negligent too does not eliminate the student's responsibility.
* Student found 25% liable

## Voluntary Assumption of Risk (Volenti)

*Complete Defence*

What is the defendant arguing in relying on this defence? The P willingly accepted the risk involved.

Why is this defence less attractive to the courts than contributory negligence? Courts would rather a partial defence succeed and apportion some fault to a negligent defendant.

* The plaintiff must have agreed to accept *both the legal and physical risk* of injury:
	+ It can be express in the form of an agreement (decided by contract law)
	+ It can be express or implied from the circumstances
* Court will look at situation as a whole and decide whether the plaintiff either expressly or impliedly gave up their right to an action of negligence.
* *Volenti* will only arise where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant’s part
	+ This is a very rare occurrence.
* Where clear, express agreements through waivers will give up rights to a negligence action

#### Dubé v Labar, 1986 SCC

Ratio: *Volenti* only applies where plaintiff expressly or impliedly gives up right to action of negligence towards defendant. Court will look at situation as a whole and decide whether the plaintiff either expressly or impliedly gave up their right to an action of negligence. The **Plaintiff must have agreed to accept** ***both the legal and physical risk*** of injury (accepts the risk of injury and foregoes the right to sue) – this has to be based on FACTS (this narrows the defence).

Facts: Appellant and respondent were partying in a town close to the construction camp where they lived, and the morning of the accident they started drinking again. They decided to retrieve the respondent’s car, which they had left over night, and then proceeded to the nearby town to get the appellants glasses and pick up two girls they had met the night before. Continued drinking when they reached the town, then drove off with the girls at their request to Whitehorse. Respondent was a passenger at the time and was drinking in the front seat. Respondent then got into driver’s seat, told the appellant that he was ok to drive, went to speak to a hitchhiker they had picked up, swerved off the road injuring the appellant. Respondent blew a 0.25 in BAC administered by police. Only 2 defences put to the jury, contributory negligence, and *volenti non fit injuria*.

Result: *Volenti* is available to the defendant driver

Reason: However, from *Seymour*, for a negligent party to be completely relieved from liability, the plaintiff must have agreed expressly or by implication to exempt the defendant from liability for damages suffered by the plaintiff and occasioned by the negligence of the defendant during the carrying out of the latter’s undertaking. In other words, there must have been express or implied bargain where the plaintiff gave up his right of an action for negligence. Therefore, *volenti* will only arise where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant’s part. Pretty rare that this ever happens, therefore it is rare the defence will work. Defence of *volenti* doesn’t apply where a plaintiff takes a chance, but there is nothing in his conduct to show a waiver of a right of action communicated to the defendant. Would need to be an express or implied bargain where the plaintiff gives up his right of action for negligence.

Issue: Whether the defence of *volenti* being inapplicable to negligence on the highways

Notes:

#### Loychuk v Cougar Mountain Adventures, 2012 BCCA

Ratio: Where clear, express agreements through waivers will give up rights to a negligence action

Facts: Case involving zip-lining, waiver signed released risk of negligence on the operators, freely accept and fully assume all risks of injury, was a pretty clear waiver. Operators were negligent, someone was sent down while someone was still on the line, and one of the people were injured when they collided. Operators were clearly negligent however, issue was whether waiver was valid.

Result:

Reason: One of participants who was injured was a 26 year old who had recently graduated from law school. She didn’t think that they were waiving all rights, as from her contracts class she felt that some waivers were not valid. However, BCCA held that it did apply since the waiver was very clear.

Issue:

Notes:

## Illegality (EX turpi)

*Complete Defence*

* *Ex turpi causa non oritur action*
* Can be raised by the defendant or could be raised by the courts in its own motion
* The Court can ban recovery where the plaintiff has acted illegally or immorally but only in certain circumstances:
	+ Where allowing the plaintiff to prosper from their illegal activity would imperil the integrity of the process.
	+ Or alternatively would permit to an evasion or rebate of a penalty prescribed by criminal law.
* Compensation for personal injuries does not seek damages as profit for illegal or immoral acts (*Hall v Hebert*)
* A plaintiff will not be able to recover if their loss was a result of their own criminal activity, regardless if there was an underlying reason why they committed the crime which was the fault of someone else (*Zastowny*)

#### Hall v Hebert, 1993 SCC

Ratio: Can use defence of *ex turpi*, where allowing the plaintiff to prosper from their illegal activity would imperil the integrity of the process, or alternatively would permit to an evasion or rebate of a penalty prescribed by criminal law. Compensation for personal injuries does not seek damages as profit for illegal or immoral acts, and therefore doesn’t fall in this category.

Facts: Plaintiff and Defendant had been drinking. Their car stalled going up a very steep road. The Plaintiff asked if he could drive and was behind the wheel when they attempted a rolling start. While attempting a rolling start, the plaintiff lost control of the car, and the car went off the road and tipped over. Plaintiff and respondent walked to a nearby house of an acquaintance, who described them both as drunk when they arrived. It was later discovered that the plaintiff had suffered head injuries. Plaintiff alleges negligence on the part of the defendant for letting him drive after he had been drinking. Defendant raised defence of *ex turpi causa non oritur actio*, alleging that both parties were engaged in a criminal enterprise and as a result he could not be held liable. At trial the judge apportioned liability, did not find that getting in a car with a drunk driver constituted common enterprise. The CA overturned saying that the plaintiff could not recover because of his illegal conduct. CA also found that respondent didn’t owe a duty of care to the appellant.

Reason: Cory J

* + Court has procedure for determining if duty of care applies, and the doctrine of *ex turpi causa* should be eliminated from tort cases, as it would be better to consider the issue as a question to be resolved on consideration of public policy
	+ On this basis, there is no reason to prevent the appellant from recovering compensation, as it would not shock or offend the conscience of reasonable right-thinking members of the community fully apprised of the facts

McLachlin J

* The Court can ban recovery where the plaintiff has acted illegally or immorally but only in certain circumstances:
	+ - Where allowing the plaintiff to prosper from their illegal activity would imperil the integrity of the process
		- Or alternatively would permit to an evasion or rebate of a penalty prescribed by criminal law
* Compensation for personal injuries does not seek damages as profit for illegal or immoral acts, therefore no problem with tort law being used to get compensation for personal injury
* Can use the term of *ex turpi causa non oritur actio*, so long as conditions governing its use are clear

Issue:

Notes:I

#### British Columbia v Zastowny

Ratio: A plaintiff won’t be able to recover if their loss was a result of their own criminal activity, regardless if there was an underlying reason why they committed the crime which was the fault of someone else.

Facts: Man was incarcerated, suffered a sexual assault from a prison guard. Later got out of jail, became addicted to heroin, and was subsequently imprisoned again for 15 years. Later he learned of an investigation into the conduct of the prison guard. Came forward, and prison guard was indicted, and then he opened a civil suit looking for damages saying his criminal conduct which resulted in his imprisonment was a direct result of the sexual assault by the prison guard. Was awarded damages at trial for future and past wage loss, overturned at CA, then upheld at SCC.

Rea son: Case went to SCC to determine whether he could recover for past wage loss or future wage loss, as past wage loss was a result of his criminality. His diminished prospects of earning income in the future was also the result of his criminal behaviour. “The Law will not give with one hand what it takes away with the other”. Only way court could award these types of damages were if the plaintiff had been wrongfully convicted.

Issue:

Notes:

## Limitation Periods

* These are rules about how long a plaintiff is allowed to wait to bring their claim after their cause of action arose
	+ If it is outside the limitation period, the Defendant can defeat the claim
* Rationale:
	+ Evidentiary problems (witnesses etc.)
		- Who does it disadvantage if the evidence is old? The plaintiff
	+ The claim will not be allowed to hang over the defendant’s head forever
	+ To ensure that modern standards of conduct are not applied to long-ago situations
* Cause of action arises when the P suffers injury
	+ Time periods used to be construed narrowly
	+ Problem; was not always obvious that the P has a claim to begin with
* Discoverability: runs from when the cause of action (material facts) was discovered or ought to have been discovered by the exercise of reasonable diligence
	+ This rule can be trumped by statute (e.g., *Medical Act* – 2 years from when the services rendered ended)
* Missing a limitation period as a lawyer is negligent

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### Alberta Limitations Act

* Section 3(1)(a)/(b)
	+ Incorporates discoverability; seek remedial order within 2 years of discovery or 10 years after the claim arose
	+ “Whichever period expires first, the D, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim”
		- This means that AB has an ULTIMATE 10 year limitation period
* Section 3(3) For the purpose of subsections 1(b) and 1.1(b) – ultimate 10 year limitation period
	+ If there are a series of breaches of duty, the 10 year timeframe begins after the last of the breaches have occurred
	+ A claim based on a breach of duty arises when the conduct/act/omission occurs
* 2017 Amendment
	+ 3.1(1) No limitation period in respect of a claim
		- That relates to a sexual assault or battery
		- Misconduct of a sexual nature
			* The person in the claim was intimate with the D
			* Minor
			* The person with the claim was a dependent (financially, emotionally, physically or otherwise)
			* The person with the claim was a person under disability
		- Assault or battery
			* Minor
			* Intimate relationship
			* Person with disability
	+ These are both retrospective and prospective
* Status of the plaintiff
	+ S. 5 — Persons under a **disability** as defined by *Adult Guardianship Act* or has a certificate of incapacity under the *Public Trustee Act* or an adult who is unable to make reasonable judgements in respect of matters relating to a claim
		- Limitation period begins to run when they are no longer “disabled”
		- Burden is on the P to prove that the operation of the limitation periods provided by the Act
	+ S. 5.1(1) — Limitation period is suspended during time the plaintiff is a **minor**
		- But a defendant can make time run against a minor by delivering notice to parent, guardian or public trustee
		- They then have to go to Court to re-suspend the Limitation Period. Ultimate limitation period for something that happened to a minor would be when they turn 28

# Damages

## General Principles

* Nominal Damages – Something is actionable without proof of damage.
	+ E.g., Trespass claims.
	+ The Court is recognizing the legal wrong, but there are no damages to compensate. Unusual to sue for this because of litigation expenses.
* Compensatory Damages – Seek to compensate plaintiff’s losses (personal injury or property). The most common.
	+ Aim is to do the best you can to restore the plaintiff to their original condition.
* Aggravated / Exemplary Damages – (Rare) Awarded to reflect plaintiff’s loss as a result of defendant’s conduct.
	+ Example: Plaintiff humiliation by Defendant conduct.
* Punitive Damages – (Rare) Not compensatory. Meant to punish the defendant for their “outrageous” behaviour. Amounts to a fine payable to the plaintiff.
* Special Damages – Capable of precise quantification at the time of trial. They compensate for things already occurred.
	+ Examples: out-of-pocket expenses, lost income from missed work, travel.
	+ They have to be specifically outlined in the claim.
* General Damages – For things that have not yet happened but will require compensation for the future. This claim is generally more vague, not proven or capable of “precise quantification”, do not have an easily determined dollar figure.
* Pecuniary Damages – Monetary Damages.
	+ Examples: lost earnings/capacity, future personal care, repair costs, disability equipment.
* Non-Pecuniary Damages – Non-monetary.
	+ Examples: Humiliation, loss of enjoyment of life, loss of life expectancy, pain and suffering.
	+ Non-Pecuniary damages should partially compensate the plaintiff for their loss (since fully compensating the plaintiff isn’t really possible)
* Principle of Mitigation – Plaintiff has to act reasonably in an attempt to mitigate their losses
	+ P has an obligation to act reasonably to mitigate their loss
		- P has to act reasonably to minimize their losses
		- P can recover if they have to spend money to mitigate
		- If the P can avoid the loss, then they cannot recover that loss
	+ D has burden to prove a failure if they want to rely on a failure of mitigation
	+ If by attempting to mitigate losses with reasonable steps the plaintiff makes their injuries worse, those too will be compensable
* Assessment of Damages
	+ Try to fully compensate for pecuniary losses
	+ Modest reflection of compensation for non-pecuniary losses
* The plaintiff has to prove that they have suffered a loss in order to get damages. They also have to prove the quantum.
* At common law, damages are awarded as lump sums in a once and for all manner.
	+ This makes assessment difficult as inflation, interest rates and the Plaintiff future needs all have to be estimated.
* Heads of Damage – are specified in decisions (as opposed to a global sum) so that it is more transparent on appeals.

### Andrews v Grand & Toy, 1978 SCC

Ratio: The case led to development of a framework for assessing damages, so it wasn’t just assessed on a global sum basis, but rather broken down and itemized.

Break down into two headings, pecuniary and non-pecuniary:

* + Pecuniary costs include future care costs, loss of future earning capacity, loss of housekeeping capacity.
	+ Non-pecuniary losses include pain and suffering, collateral benefits.

Facts: Plaintiff was 21 years old, injured by Defendant driving a vehicle owned by Grand and Toy while on motorcycle. Plaintiff became a quadriplegic but was 25% contributorily negligent. At trial he was awarded $1M, this was reduced to $0.5M on appeal, CA found Andrews should mitigate by going into a group home, however Andrews argued that he should be able to live independently in his own home (with the assistance of care allowing him to live there). Plaintiff appeals to SCC. Liability was not an issue, as trial judge found fault was entirely that of the respondent, while the CA found Appellant 25% contributorily negligent.

Result:

Reason: Plaintiff argued he wanted to live at home. Experts testified this would be best for him. The Defendant argued this would be excessively expensive and the C.A agreed, saying Andrews had a duty to mitigate the damages. Dickson J restored the trial award troubled by the C.A. simply substituting one figure for the other. SCC said the $1M was reasonable; the focus should be the Plaintiff’s needs not sympathy for the Plaintiff or fears of expense for the Defendant. **Both lower courts agreed that a home setting would be best for him**. SCC said that the focus should not be if its “too much money” the focus should be on the injured victim. Inability to pay is an enforcement problem not a quantity assessment problem,

**Dickson J held that the plaintiff had a duty to be reasonable in their expenses, however this did not extend to forcing him to live in an institution rather than at home if he wished and it was best for him to live at home—tort law is to put the victim back into the position he would have been had the accident not happened, as much as it can**. Social argument that allowing large damages will drive up premiums doesn’t work, as it would be “monstrous to keep down premiums by depressing damages below their proper level” pg 655. Also need to take into account loss of capacity for earning, based on the capacity for earning that the victim had prior to the accident.

Issue:  What was Plaintiff able to claim for his future care costs? Duty to mitigate does not mean he has to accept less than what he deserves by way of compensation… that is not what mitigation means.

Notes:

## Compensatory Damages

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### Pecuniary Loss

Future Care Losses

* The goal of future care award is to provide for the future caring needs of the plaintiff
	+ Should be exhausted at which the point (if there is) where the plaintiff no longer needs it
* Determine the basic sum. How much per month?
	+ Personal attendants, disability modifications etc.
* Determine length of time care will be required.
* Assess contingencies. What additional injuries can be expected? Will they improve?
* Capitalization rate – amount by which the reward is discounted to the extent that the interest/inflation will accrue on the amount
	+ If interest/inflation will be 5%, 5% of the total amount is taken off
* Gross-up for taxes – the income from awards is taxable, although the award itself is not
	+ i.e., if you invest the money from the award, the income that it generates will be taxed, therefore gross up for these taxes
	+ This is done because this money has purchasing power (whereas loss of earning capacity does not)

Loss of Future Earning Capacity

* Determine the earnings the plaintiff would have made, less the amount he can still earn.
* Determine the length of expected working life
	+ i.e., time to when he could have earned full pension
	+ If plaintiff will live less years than they would have due to accident, can include lost years as part of income calculation
* Assess contingencies. Unemployment, promotion etc.
	+ Courts often assume this balances out, usually subtracts rather than adds.
* Account for the capitalization rate
* Tax consequences are ignored (don’t gross up)

What if the Plaintiff is Not Earning?

* A law student is injured. Courts try to incorporate subjective plans of the plaintiff.
* Children: Criticized area because it perpetuates inequality. No good way of assessing school age children. Courts look to status of family and their expectations (if the parents are saving for post secondary education). Courts respond that it is not the defendant's job to rectify inequalities.
* Women: Same concern about inequality.
	+ *McCabe v Catholic Separate School*
		- The trial judge was concerned that the assessment not reflect historical inequalities. The CA responded that it was not the Defendants job to rectify this; the individual must be assessed. The trial judge ignored the evidence that she wanted 4 children.
	+ *Walker v Richie* (2003) Ont.
		- Court used “entire population” statistics.
* Note: With Children, even harder to determine this. Could take into account what parent’s do, whether they attended post-secondary, kid’s grades (depending how old he is), etc.
	+ This approach has been criticized for perpetuating inequality.
* Women also raise the same issue since they make less than men. Is it the place of the courts to fix this?
	+ The CA in *McCabe* responded that it was not the defendants job to rectify the wage gap; the individual must be assessed

#### MacCabe v Westlock Roman Catholic Separate School District No 110, 2001 ABCA

Ratio: Need to take individual case and try to do your best to gaze into a crystal ball and determine the future.

Facts: MacCabe was a 16 year old girl, rendered quadriplegic in her gym class, found her gym teacher breached duty of care he owed to MacCabe, and was sole case of damages, with vicarious liability being found against the school board. MacCabe tried a complex gymnastics move (270 degree turn combined with a back flip) into a crash mat, fell on her neck, and suffered paralysis. Trial judge allowed MacCabe to use male actuarial table in determining future earnings, as to use the female actuarial table she felt would perpetuate inequities in the labour market.

Result: Trial judge erred in not finding MacCabe contributorily negligent, evidence showed that MacCabe was aware of the risks involved in trying the complex move, therefore should be found to be 25% contributorily negligent

Reason: Also appealed whether the trial judge was correct in using male earning tables rather than female earning tables in determining future earnings. Was appealed that they should not, as she is a female, however trial judge thought this was reflective of gender pay gaps, and therefore should use male tables to avoid this gender discrimination. However, also in evidence was the fact that MacCabe wanted to have 4 children, and ideally would stay at home with them if able.

Job of Tort law is to put people in same position they would have been prior to the accident, and therefore should use female earning tables in recognition of realities of contingencies of MacCabe wanting children. Should depend on individual case, whether they should use female earning table or male earning table, and evidence put before the court, however data does not perpetuate stereotypes.

Issue:

Notes:

### Non-Pecuniary Loss

* In *Andrews v Grand Toy*, the Court uses a functional approach. The ***aim is to provide reasonable solace*** for misfortune; to make life more endurable, cannot fully compensate plaintiff for their loss.
	+ Not pretending there is an actual monetary amount that could compensate this
* *Andrews* sets a cap on these damages (with inflation it is around $365,000).
	+ Intangible losses — loss of years of their life, loss of quality of life, etc.
* The cap is set because non-pecuniary damages are total guesses — even more than other damages
	+ The non-pecuniary damage cap (full amount) is saved for permanent, severe disabilities
	+ i.e., Those with temporary disabilities will not be able to recover the full amount

### Collateral Benefits

* Collateral Benefits = received from a third party as a result of the accident to offset P’s losses in some way
	+ E.g., government disability, charity, family, first party insurance, etc.
	+ Remember the courts concern to not overcompensate the P – not to give P a windfall for suffering this injury from the D

Three Approaches

* **Accumulation Approach:** Plaintiff recovers full damages from defendant and keeps all other payments too.
	+ The plaintiff is overcompensated, but often the collateral benefits are things the plaintiff contributed to/paid premiums for.
* **Deduction Approach:** Value of collateral benefit is deducted. The defendant is then liable for only the “net loss” of the plaintiff
* **Subrogation Approach:** Plaintiff receives one payment. The defendant reimburses the collateral source (i.e., plaintiff gets paid by 3rd party, but 3rd party can then seek to recover those damages from the defendant). The fund receives a kind of windfall.

Common Law

* Common law presumption is to always deduct collateral benefits… with some exceptions
	+ Principle against double
* Exceptions
	+ Gifts
	+ Private Insurance Exception: if the plaintiff has paid or given something up for the collateral benefit (e.g., insurance scheme), then they are allowed to accumulate both the collateral benefit and damages
* This is the dominant approach in Canadian courts (subject to the *Insurance Act*)

*Insurance Act*

* In the context of auto-insurance claims (motor vehicle accidents), payments made to the plaintiff in relation to the accident must be deducted from the overall award, even if they had paid premiums for the benefits.

*Cunningham v. Wheeler* (1994) SCC – Plaintiff received disability while off work. Benefits were received as per a collective agreement. Since it was “bargained for” the Court did not deduct them.

“Minor Injuries”

* Puts a low cap on non-pecuniary losses for minor injuries
* “Minor injury”, in respect of an accident, means a sprain, a strain, or a WAD (whiplash associated disorder) injury caused by that accident that does not result in a serious impairment
	+ WAD with objective, demonstrable, definable and clinically relevant neurological signs is NOT a minor injury
	+ Fracture or injury of spine is not a minor injury
* The total amount recoverable as damages for *non-pecuniary loss* for all minor injuries sustained by a claimant as a result of an accident is $4000

## Punitive Damages

* Punitive damages are only awarded in exceptional circumstances, where the defendant’s behaviour has departed markedly from standard of ordinary decent person.
* The objective is punishment and the award needs to be rationally related to objectives of award (punishment, deterrence, and denunciation)

#### Whiten v Pilot Insurance (2002) SCC

Ratio: Only award punitive damages in exceptional circumstances, in circumstances where defendant’s behaviour has departed markedly from standard of ordinary decent person.

Objective is punishment, and award needs to be rationally related to objectives of award which are punishment, deterrence, and denunciation.

Also need to look at proportionality in award, which includes Blameworthiness, harm was directed to Plaintiff, need for deterrence, the advantage gained by the defendant, and other civil and criminal sanctions.

Facts: Plaintiff’s house burned down. They fled the home. All contents destroyed, her husband got frostbite. Plaintiff started insurance claim. The Defendant denied the claim for 2 years. Several investigations indicated it was accidental. Defendant was aware that Plaintiff was in dire financial straits and used this as leverage to get them to accept less in a settlement. Trial jury awarded $1M and client-solicitor costs. CA reduced amount to $100,000.

Result: In circumstances where the defendant's behaviour has departed markedly from the ordinary decent person.

Reason: Binnie J:

The objective is punishment. This straddles the civil and criminal realm. Punitive damages are the exception rather than the rule. When the defendant acts in a way which offends the decency of the court. The Plaintiff is acting as enforcer of the public interest and punitive damages recognize the social value of this litigation.

*How much to award?*

* + Should be awarded rarely as it is the criminal law that is more appropriate for this generally.
	+ Award needs to be rationally related to Objectives which are: punishment, deterrence and denunciation
	+ Award the lowest damages that are consistent with achieving these objectives.
	+ Appeal courts can reduce if the amount is not “rational and measured”.
	+ In this case the trial judge went out of his way to mention that the award is reasonable. The SCC restores this trial award. The Court looks at proportionality. Namely:
		- Blameworthiness
		- Degree of vulnerability of the plaintiff
		- Harm/potential harm to plaintiff
		- Need for deterrence
		- The advantage gained by the Defendant
		- The total amount (taking into consideration other penalties awarded against the defendant)
			* The advantage wrongfully gained by the defendant from their misconduct
		- Other civil & criminal sanctions.

Issue: When do we award punitive damages?

Notes:

## Survival of Actions and Wrongful Death

At common law, the plaintiff's death terminated any existing or contemplated tort action…

### Survival of Actions

*Survival of Actions Act*

* S. 2 – Allows the **estate** to bring/maintain a claim or be a defendant
	+ S. 2(3) – And the estate can be sued!
* S. 4 – mechanism by which an estate can be a legal entity that can have a claim or have claims made against it
* S. 5 – Only actual financial losses by the deceased or estate are compensable.
	+ e.g., medical expenses, funeral costs, etc.
	+ Excludes non-pecuniary damages
* **Not** Compensable under this Act:
	+ Punitive / exemplary damages, future earnings, ability to earn, chance of future earnings. (There is no loss to the deceased’s estate… he’s dead).

###

### Fatal Accidents Legislation

*Fatal Accidents Act*

* Allows family members to bring a claim
	+ Can only bring a claim if the deceased would have had one; again, subject to defenses
* Both pecuniary and non-pecuniary losses are compensable *in Alberta*
* Pecuniary:
	+ Pre-trial pecuniary losses (did not die promptly)
		- e.g., expenses incurred for the care of the deceased between injury and death
		- Travel and accommodation incurred in visiting
	+ Loss of future support
	+ Lost value of domestic work
	+ Loss of future wealth
* Non-pecuniary:
	+ Bereavement. The statute sets the specific amounts.
		- $82,000 for the spouse or adult interdependent partner
		- $82,000 to the parent or parents to be divided equally
		- $49,000 to each child of the deceased person
			* Includes adult children
	+ Restricted to the son, daughter, mother, father, or spouse
	+ This is on top of other damages
* Without this statute there would be no action available

# Government Liability and Harms to Indigenous Persons

#### Background

* Residential schools were in place from the time of Confederation until the mid-1990s
* By the end of the residential school era, there were 139 residential schools and residences
* Federal government estimates that at least 150,000 students from FN, Inuit and Metis communities went through the system to some extent
* Residential schools were operated by various religious denominations, usually in partnership with the federal government
* Practice of Indigenous and Aboriginal cultures and languages was not permitted
* The underlying premise of the residential school system was the need to assimilate Indigenous persons into European culture and Christian religion, as these were presumed to be superior to Indigenous cultures and practices
* In the mid-1990s, survivors began to demand that the perpetrators of abuse in residential schools be charged and prosecuted for their crimes
* Several former students also commenced lawsuits against the federal government and the churches, seeking compensation for the harms they suffered in the residential schools and in other contexts involving government care (day schools, foster care)

### KLB v British Columbia, 2003 SCC 51

Ratio:

Facts: Appellants suffered abused in two successive foster homes – second home also included sexual abuse. TJ found that the government had failed to exercise reasonable care in arranging suitable placements and in monitoring/supervising these placements and that the children had suffered lasting damage as a result of their stays in two homes. TJ rejected defence that the actions were barred by the BC *Limitations Act*.

 TJ’s findings: Government is…

(1) **directly liable** to all four children for its negligence in the placement and the supervision of the children and for breach of its fiduciary duty to the children; and

(2) **vicariously liable** for the torts committed by the foster parents.

Court of appeal overturned that the govt had breached its fiduciary duty but upheld that the government was vicariously liable and in breach of a non-delegable duty of care in the placement and supervision of the children.

Result: Appeal dismissed – all claims were statute barred

Reason: *Breach of Duty*

The *Protection of Children Act* offers no basis for imposing on the Superintendent of Child Welfare a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents.  Nor did the government breach its fiduciary duty to the appellants. Parents do not have to be perfect in looking out for the best interest of their children… but the fiduciary duty is focused on potential for breach of trust or disloyalty.

There is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty. **The Court of Appeal’s conclusion that the appellants’ claims were statute-barred should be upheld.**

*Direct Liability*

Social workers prioritized keeping the siblings together. In the first home, there was some information with concerns that the social worker had overlooked. There were repeated warnings that the home was unsuitable. In the second (Alberta) home, information was more limited but a concern that they may have drugged a child in their care. Once they were placed, the social workers did not monitor properly.

The government was found to be directly liable for the lack of reasonable care. SOC with children – did the person who had control of the children act as a careful parent would?

*Vicarious Liability*

 In determining whether the tortfeasor was acting “on his own account” or acting on behalf of the employer, the level of control the employer has over the worker’s activities will always be a factor. Other relevant factors include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers and whether the worker has managerial responsibilities.  These factors suggest that the government is not vicariously liable for wrongs committed by foster parents against the children entrusted to them.

 Foster families serve public goal to give children the experience of a family, but they **discharge this public goal in a highly independent manner, free from close government control.** Connection between the parents and the government was not sufficient enough.

Issue:

Notes: Arbour dissent; The appellants have also made out the elements of a successful claim of vicarious liability against the government for the abuse inflicted by their foster parents

* + The relevant factors, properly weighed, indicate that foster parents do in fact act on behalf of the government when they care for foster children.  The government has sufficient power of control over the foster parents’ activities to justify finding vicarious liability
	+ Majority analysis is much like a business analysis which is not relevant in this kind of fact situation
	+ While foster parents **do control the organization and management of their household to the extent permitted by government standards, the government does indeed supervise via the social workers, and may interfere to a significant degree, precisely to ensure that the child’s needs are being met**
	+ The wrongful act at issue here was sufficiently connected to the tortfeasor’s assigned tasks for vicarious liability to be imposed
		- Clear that the foster care arrangement reflects the highest possible degrees of power, trust, and intimacy. The relationship does more than merely provide an opportunity for child abuse; it materially increases the risk that foster parents will abuse.
	+ The policy goals that justify vicarious liability, namely just compensation and deterrence of future harm, are served by finding vicarious liability in the present circumstances
		- As vicarious liability is a form of tort liability, the claim is statute-barred, for the reasons set out by the majority.  As a result, it is unnecessary to decide issues related to damages

### Elizabeth Adjin-Tetty – Righting Past Wrongs through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses

* Many claims by Aboriginal victims of abuse while in government care stem from alleged abuses that occurred many years ago
	+ To what extent do courts consider the broader issues of colonization and racism that have informed the relationship between Aboriginal people and the settler society
* Most of these abuses have happened in residential schools
	+ Also in out-of-home care facilities such as foster care or day-schools
* By 2005, an estimated 18,000 lawsuits had been filed
* A number of class actions were also filed, and in 2004, the ONCA certified one class action involving 1400 plaintiffs
* In 2005, the federal government **agreed to negotiate** with the aim of settling the increasing number of class action claims
* *Agreement in Principle* **(AIP)** towards a Fair and Lasting Solution of the Legacy of Indian Residential Schools
	+ Provide a more encompassing and improved non-judicial process for all former IRS students.
* May 2006, the Federal Government approved the ***Indian Residential Schools Settlement Agreement***and launched an Advance Payment program for the immediate compensation of eligible recipients over **65** years old
	+ **Includes**:
		- Common experience payment
			* Former students to receive $10,000 for the first year they attended residential school; plus $3,000 for each additional full/partial year of attendance
		- Independent assessment process (IAP)
			* To adjudicate and compensate the claims of those students who were physical or sexually abused at the schools
		- Support for the Aboriginal Health Foundation
		- Support for the residential school commemoration
		- The establishment of a TRC of Canada
	+ Does not eliminate the possibility of some victims choosing to pursue abuse claims through the tort system. Some victims of IRS-related abuses will choose to litigate before a final agreement is reached
	+ Others may opt out of the *Agreement* after it comes into force or may miss the Common Experience Payment (CEP) and/or Improved Appeal Process (LAP) deadlines
	+ Agreement only covers IRS related claims
		- Does not include:
			* Abuse in other settings (foster/day school)
			* Residential schools other than IRS (Mennonite residential schools)
* The ADR processes rely on legal analyses and tests adopted in court decisions to determine appropriate rules and ranges of compensation to be followed by independent adjudicators
	+ Useful to have a litigation process that is attentive to the context in which the claims emerged, including the complexities of having to untangle the effects of other tortious and non- tortious factors that have impacted claimant’s lives
* A de-contextualized approach often results in injustice and a sense of disappointment for claimants

**Challenges with Litigation Process (in class)**

* Causation
	+ Things like mental health
		- P’s burden to prove that
* Damages
	+ Would their earning potential have been better?
* Limitations defence
	+ If there were any that were statute barred – they were likely physical and sexual nature
		- So only the physical claims were statute barred
		- But you could affect the causation and damages by saying the statute barred abuse is a mitigating factor to them proving
			* Court was sort of sympathetic to this
	+ Having these defences be aggressively raised in these claims is essentially revictimizing the P
* The system itself is adversarial for claims of this nature
	+ Maybe it is ill suited??

**Challenges with IAP (in class)**

* Adequacy of compensation?
	+ As close to a no-fault system as you can get
		- Compensate more people, but necessarily means a limitation of damages
	+ Might mean you are inclined NOT to opt in and take chances in court
		- Which is also an unattractive option
* Confidentiality of the process
	+ Safer place for some people if they know that it is not open to the public
	+ But for many, public acknowledgment and recognition is important – which this takes away
* Lack of choice about how to proceed
	+ Sometimes an adjudicator to say that the IAP process is not the right place for your claim, but that decision is not appealable
	+ Further if you proceed in court the no fault IAP process is not open to you anymore

**Context: Accounting for the Socio-Economic Marginalization of Aboriginal Peoples and Communities in Contemporary Canadian Society**

* *Indian Act* = residential schools
	+ Principal objective of residential schools was to assimilate by re-socializing children with a resulting breakdown of family structures and communities
	+ Described as an engine of the colonial system and a major force in the marginalization of Aboriginal people
* IRS survivors returned to their families and communities having suffered a loss of identity and culture and the devastating effects of abuse
	+ Led in some cases to lasting emotional difficulties that affected future relationships with partners and children and caused family difficulties and breakdowns
	+ The disproportionate number of Aboriginal children in the child welfare and criminal justice systems is partly attributable to the legacies of colonization including forced attendance at IRS
* Economic impacts on Aboriginal communities are significant: high unemployment, reliance on social assistance and a cycle of poverty
* Aboriginal people have been negatively affected by social differentiation orchestrated by the settler society," and by the resulting "politics of difference that disproportionately affects them
* “In light of the complex historical factors and processes that have contributed to this situation and its inter- and multi-generational effects on many Aboriginal people and communities, substantive equality demands sensitivity in responding to claims of abuse in government care. This calls for contextualised analyses and application of tort law principles relevant to these claims in ways that recognize these connections, their causes, and their effects on claimants' lives and harms resulting from abuse.”

**The IRS Settlement Agreement**

* Recognizes the negative experiences of every child who attended an *IRS* or suffered an IRS-related abuse, and the legacy of the *IRS* experience for Aboriginal peoples and communities. To show the government's desire to heal and repair the damaged relationship between Aboriginal and non-Aboriginal Canadians
* The *Agreement* proposes a Common Experience Payment (CEP) to be made to eligible former students who do not opt out of the *Agreement* ($10,000 for the first year of attendance at an *IRS* and $3,000 for every subsequent year in attendance at an *IRS)*
* Compensable abuses include physical and sexual abuses and conduct causing serious psychological consequences perpetrated by adult employees and other adults authorized to be on school premises
	+ Extends to abuses committed by such persons on and off school premises and committed both when school was in and out of session
	+ Also covers abuses committed by students, provided the claimant can establish actual or constructive knowledge on the part of school officials, that the type of abuse in issue was occurring at the institution and they took no reasonable steps to prevent it
	+ Reverse onus is adopted for claims of serious sexual exploitation perpetrated by students
		- Claims will be validated where defendants cannot prove on a balance of probabilities that reasonable supervision was in place at the time
* Potential unfairness
	+ Eligible recipients who have already obtained judgment for their *IRS* claims are entitled to receive the CEP in addition to damages obtained for actionable torts
	+ Such claimants may also be entitled to seek compensation under the AP for other claims dismissed in litigation, for example statute-barred physical abuses, if they are validated
	+ Claimants who have retained counsel, other than those in the National Consortium or the Merchant Law Group, and who wish to obtain compensation under the *Settlement Agreement* will have to pay for their own legal fees and disbursement in relation to work done before the signing of the *AIP*

**Importance of Therapeutic Approach to Claims of Aboriginal Victims of Historical Abuses**

* The essence of therapeutic jurisprudence is to challenge the legal system or law so as to go beyond the rhetoric of rights to ascertain the actual effect of laws and legal institutions on the lives of those affected. Emphasis is on the healing effects of law or beneficial outcomes of one's engagement with the legal process
* The importance of financial compensation for claimants is evidenced by the fact that they often sue not just the perpetrator but also third parties who would often be in a position to satisfy damages awards
	+ Underscores importance of fair compensation for survivors
* Expressions of outrage and disappointment for the awards to six former students of the Alberni Indian Residential School, which ranged from $12,000 to $190,000, emphasize the importance of fair and adequate compensation in the therapeutic process
	+ The awards were perceived to reflect the devaluation both of victims' lives and losses as well as the effects of abuse on their families and communities. The awards constitute re-victimization of Aboriginal people
* Financial compensation may be essential in plaintiffs' healing or in their coming to terms with the effects of abuse.
* Principles that severely limit recovery of this aspect of plaintiffs' claims are likely to discourage suit and thereby impede access to justice
	+ Aboriginal plaintiffs are often awarded lower compensation for impaired working capacity, among other things, because their material prospects are often thought not to be promising even if they had not been injured
	+ Survivors, who choose to litigate, face further obstacles generally and more so for Aboriginal claimants
* Aboriginal people have paid a heavy price for these policies and practices; they were denied their basic human dignity and equal worth and were often placed in harm's way, which incidentally produced these claims
	+ Many of the claims for compensation arise from the Government's actions of removing children from their families at a very young age, and of placing them in strange environments where their culture, language, religion and way of life were all denigrated and prohibited
* Therapeutic jurisprudence has been found appropriate in relation to victims who suffer long-term psychological consequences from abuse, such as sexual abuse victim
	+ Real need to ensure that victims' long-term needs are satisfied through the adjudication process
	+ The same is true for Aboriginal victims of institutional/historical abuse as well as abuses while in government care generally
* Ultimately, the viability of the tort system as an avenue for redress depends on the ability of victims to feel that justice has been served in their case and that fair financial compensation has been recovered. It takes courage to initiate a lawsuit and to relive painful experiences and dark periods in one's life

**Giving Claimants Choice: Importance of Preserving the Torts Avenue for Victims**

* The threshold for eligibility for compensation tends to be lower compared with civil suits, thereby improving the chances of many survivors to obtain compensation.
* Civil actions provide a forum for public accountability for plaintiffs' victimization and for identifying those responsible for the horrific experiences of abuse

**Limiting the Scope of Inquiry**

* Separating sexual and non-sexual abuses
	+ Plaintiffs often allege physical, sexual and emotional abuses while in the care of the defendants
		- Many of these claims are being pursued long after the alleged abuses occurred.
		- Notwithstanding liberal interpretations of limitations provisions, claims governed **by** limitation periods are sometimes subject to ultimate limitation periods beyond which victims lose their right of action
		- Allegations of sexual misconduct are not subject to limitation periods"5 or have more generous limitation provisions in many jurisdictions.
	+ Separating sexual and non-sexual abuses that occurred contemporaneously as well as harm from those experiences, and prior and/or subsequent victimization is both complex and artificial
		- Attempts to separate what for all practical purposes was an integrated coercive experience of abuse and indivisible injury arising from the combined effects of sexual and non-sexual abuse
		- Victims perceive sexual and nonsexual abuses in the same setting as integrated, whether or not they were perpetrated by different defendants and at different times
* Decontextualized construction of claimant’s original position
	+ To the extent that tortious conduct impacts plaintiffs' holdings by impairing their ability to meaningfully engage in productive work or lead full lives, financial compensation is morally justified as necessary to restore plaintiffs to their *status quo ante*
	+ A plaintiff's entitlement is determined not by the rules of liability, or causation in particular, but by principles relating to the assessment of damages
	+ *Restitutio in integrum* mandates that a plaintiff is to be restored, in monetary terms, to their original position, that is, the same position they would have occupied but for the injury.
* Contingency Deductions
	+ Assessment of damages must reflect the chances of risks inherent in the plaintiff's so-called original position materializing regardless of the actionable wrong
		- Damages may be reduced to reflect that contingency
	+ Existence of necessary preconditions inherent in the plaintiff's original position does not justify reduction in damages absent evidence of a realistic chance that the plaintiff might suffer the same or similar injury at some point even without the defendant's tort
	+ It is not uncommon for courts to discount damages for Aboriginal claimants on the basis of the crumbling skull principle
		- The rationale is that, given their often difficult family circumstances before and/or after the abuse in issue, their original position was already compromised regardless of the defendant's wrongdoing
* Determining quantum of damages
	+ Practice is premised on an assumption that plaintiffs' earning potential will be fully restored when treatment is complete
		- It assumes full recovery with no recognition of some impairment, even if partial, at least before and during treatment
	+ Some courts seem to be more willing to acknowledge the impact of psychological effects of abuse on pre-trial loss of income and past and future non-pecuniary effects but not in relation to future earning capacity
	+ There is often a real and substantial chance that certain employment opportunities will be closed to childhood abuse victims who suffer psychological harm
		- This has a corresponding detrimental effect on their earning capacity over the course of their working lives
	+ Emphasis on the nature, frequency, duration and circumstances surrounding sexual abuse in assessing appropriate compensation in particular cases as opposed to the effects of abuse on survivors also contributes to lower damages for Aboriginal claimants

**The Limitations Defence**

* This is a technical defence and does not nullify defendant's culpability or plaintiffs' injuries
	+ The limitations defence should not affect defendant's liability once the actionable wrongs are determined to have significantly contributed to plaintiffs' overall condition
* The case for not apportioning damages between causes of injury is even stronger where the same defendant would have been responsible for the allegedly statute-barred aspects of the claim
* The Supreme Court of Canada cautioned against permitting damages in respect of statute-barred allegations of wrongdoing to avoid frustrating legislative intent and imposing liability without proof
* For the most part, non-sexual abuses are not disputed but they are excluded on technical grounds. The limitation defence encourages plaintiffs to diligently prosecute claims, protects "potential defendants against stale claims" while giving closure to legal issues
* The rationales underlying limitation periods may be justifiable in 'typical' claims involving definable incidents such as motor vehicle accidents

# Economic Loss

* Pure economic losses are financial losses that are not connected to personal injury or property damage.
* There are exceptions (below)
* Categories of recoverable economic loss 🡪 Economic loss due to…
	+ Negligent misstatements
	+ Negligent performance of services
	+ Defective products or structures
	+ Relational economic loss
	+ Liability of public authorities
* This list is not frozen, but these are the kinds that have been recognized and compensated by the courts

**Why do we approach recovery of economic loss differently than we do personal injury or property damage?**

* Personal injury is more confined in its rippled effect
	+ Potential for indeterminacy
* We can encourage people to take care of their financial losses in different ways other than negligence law
	+ Ex. First party insurance
* General approach is one of concern and reluctance

**What is the most significant concern, from a policy standpoint, in permitting recovery for pure economic losses?** INDETERMINANCY.

* Courts are traditionally reluctant to allow the plaintiff to recover for pure economic losses because of indeterminacy
	+ Indeterminate number of claimants 🡪 Who may raise a claim?
	+ Indeterminate amount of time surrounding the claim 🡪 How long do the effects of the claim persist for?
	+ Indeterminate extent (damages) of the defendant liability

## Negligent Misstatements

* The most significant exception
* A representation made by someone in a negligent manner that causes loss to the plaintiff because of the plaintiff’s reliance on that statement
* Negligent statements are usually advice given in a semi-professional atmosphere which was wrong (i.e. from a financial advisor, accountant, etc.)

### Required Elements for Negligent Misrepresentation (*Cognos*; *Livent*)

1. A **duty of care** must exist based on a special relationship.
	* According to *Livent…*

**1A)** First, we determine proximity by asking if the defendant undertook to do something that invited reliance by the plaintiff (thus establishing a close and direct relationship)

**1B)** Second, we determine foreseeability of loss using what the defendant undertook to do and whether they can reasonably foresee plaintiff’s reliance (e.g., undertaking to provide a statutory audit makes it reasonably foreseeable that the plaintiff will rely on that audit)

**2)** Look to other policy considerations (indeterminacy is paramount)

***\*****Livent* provides a change in how we undertake the DOC analysis (proximity first – this prevents indeterminacy by limiting the reasonable foreseeability test).

1. Statement made or advice must be untrue, inaccurate or misleading
2. Person making the representation must have been negligent (**breaching standard of care**)
	* Did the defendant act reasonably in making the statement?
		+ What would the reasonable person would have said in this case?
3. Plaintiff must have reasonably relied on it (equivalent to **causation**)
	* Was it reasonable?
		+ Status or skill of advisor
		+ Status or skill of advisee
		+ Nature of the occasion
		+ Nature of the advice (fact or opinion?)
		+ Was the advice specifically requested?
		+ Not fatal to a claim that the advice be specifically requested, but it is a stronger claim if the advice is an answer to a question posed by the plaintiff
		+ Indicia used in *Hercules Management*:
			- Where the defendant had a direct/indirect financial interest in the transaction
			- Defendant was a professional possessed of special skill (it can also be reasonable to rely on others)
			- Advice provided in the course of the defendant’s business
			- The more speculative the information the less reasonable it is to rely on it
			- Information or advice is given deliberately, not on a special occasion
			- Information or advice is given in response to a specific request
		+ U of Ottawa Bruce Feldhusen’s indicia
			- D has a direct/indirect financial interest in the transaction
			- D is a professional/possessed special skill or knowledge
			- Advice or information is provided in the course of D’s business
			- Information or advice given deliberately, and not on a social occasion
			- Information or advice is given in response to a specific request
4. Resulted in a financial loss to the plaintiff (**harm** resulted)

Other:

* It is possible that a plaintiff in these claims can be contributorily negligent if the extent of the plaintiff’s reliance was unreasonable
* It is also possible for the plaintiff to sue in both contract and tort
	+ The two have different standards and therefore will result in differing levels of success – always sue in both

#### Development Through Caselaw

* *Headley Byrne* establishes that a DoC can be imposed on someone who gives negligent advice (opened the door)
	+ Prior to this case economic loss was only open to those with K’al rights
* *Queen v Cognos* establishes the elements of a negligent statement claim for pure economic loss
* *Hercules Management v Ernst & Young* establishes how the test from *Cognos* works with the *Anns* test and outlines policy concerns of indeterminacy
* *Deloitte & Touche v Livent* sets out the unique order for the DoC analysis (proximity analysis first, then reasonable foreseeability)

### Headley Byrne v Heller, 1963 HL

Ratio: In some cases, a DoC can be imposed on someone who gives negligent advice.

 First time the courts recognize negligent misstatement outside of a K’al or fiduciary relationship.

Facts: Plaintiff wanted to extend credit to a customer. The Plaintiff asked its bank to ask the customers bank about its credit rating. The bank responded positively about the customer’s credit but explicitly denied liability for the information. The customer was not actually in good financial shape and the Plaintiff lost money. There was no contract with the Defendant’s bank (it was gratuitous). Plaintiff sues Defendant’s bank: Lost money b/c of the negligent misstatement and it was relied on.

Reason: House of Lords

* + In the absence of a contract, can this type of loss be recognized?
	+ Yes, in some cases a DoC can be imposed on someone who gives negligent advice.
	+ Court was concerned about the distinction between words and actions. Actions are confined in time and space, words are not. As soon as words have left the person’s mouth, they no longer have control over them
	+ The D should reasonably foresee that the P could reasonably rely on their misstatement
		- In this case, the P would rely on the statements and reasonably rely on it
		- There was no liability in this case because they clearly denied any responsibility if they were wrong
			* The fact that they relied on the statement was the P’s own responsibility
			* The letter absolved the bank of responsibility

Issue:

Notes:

### Queen v Cognos (1993) SCC

Ratio: Elements required for Plaintiff to recover purely financial loss includes a DoC based on special relationship, statement made must be untrue, inaccurate or misleading, person making the statement must have been negligent, plaintiff must have reasonably relied upon it, and must have resulted in a financial loss to the plaintiff.

Factors which have a bearing on whether reliance is foreseeable and reasonable: (1) Status or skill of advisor, (2) status or skill of advisee, (3) nature of the occasion, (4) nature of the advice, and (5) was the advice specifically requested.

Facts: The Plaintiff, on the basis of a representation made during a job interview moved his family to Ottawa. He was told it would be at least a 2-year contract. He was not told that the funding for the project was not approved. The company scaled back the project and laid him off 18 months later. Plaintiff claimed he relied on the statements of manager made during the interview that it was a stable job.

Result:

Reason: Analysis (Iacobucci J):

* + SCC allowed the plaintiff to recover. The elements required:
		- DoC based on a special relationship
		- Statement made must be untrue, inaccurate or misleading
		- Person making statement must have been negligent
		- Plaintiff must have reasonably relied on it.
		- Resulted in a financial loss to the plaintiff
	+ Trial judge found (2), (4) & (5) as facts—manager negligent misrepresented nature of employment opportunities, and the plaintiff relied on those misrepresentations
	+ But was (1) and (3) satisfied? The Defendant argued that there was a special relationship but there were disclaimers in the employment contract and that the managers statements were not negligent.
	+ Factors which have a bearing on whether reliance is foreseeable and reasonable: (1) Status or skill of advisor, (2) status or skill of advisee, (3) nature of the occasion, (4) nature of the advice, and (5) was the advice specifically requested—in the case of a job interview, obviously it is foreseeable and reasonable that the person who you are interviewing for the job would reasonably rely on their representations.
	+ SCC says: It was foreseeable and reasonable that the Pl would rely on the representation made in a job interview.
		- The disclaimer does not have any effect because they do not cover statements made in the interview- reliance on comments was from interview, disclaimer was in contract signed weeks later
		- The test for DoC is still based on foreseeability and proximity, and also where reasonable reliance is possible.

Issue:

Notes:

### Hercules Management v Ernst & Young (1997) SCC

Ratio:

Facts: Investor relied on the financial statements produced by the defendant. The reports were produced to comply with statutory requirements, but the plaintiff used them to make investment decisions. They were prepared negligently and the plaintiff sued for their losses stemming from the decisions that were based on the reports.

Result
Reason: SCC reinterprets *Cognos* 🡪 There just need to be a duty based on the *Anns* test: (This case was pre-*Cooper*)

* + Stage 1: Proximity
		- Should have the Defendant ought to have reasonably foreseen that the Plaintiff would rely on the statements?
		- Was the plaintiff's reliance on the statements reasonable?
		- NELSON: this is really no different than the “special relationship” based DoC in *Cognos*.
	+ Stage 2: Policy Concerns
		- La Forest J is most concerned about **indeterminate liability** arising from recognizing this DoC. It would almost always be reasonable and foreseeable that someone would rely on these reports. They are circulated widely for many reasons.
		- If a *prima facie* duty arose then the liability would be indeterminate.
	+ SCC declines to recognize a duty here. But there are exceptions a DoC could arise where:
		- When an auditor/defendant knows the class of plaintiff that will be potentially relying on the information.
		- The defendant relies on the negligent misstatement for the very purpose for which it was made (here it was made, not to help out the plaintiff’s decision but just to meet the requirements of a statute).

Issue:

Notes:

### Deloitte & Touche v Livent Inc, 2017 SCC

Ratio: **For negligent misrepresentation and negligent performance of a service, consider proximity first, *then* foreseeability**, then look to other policy reasons. This should avoid the indeterminacy concern from Hercules. If the proximity analysis is done properly than indeterminacy should be avoided at that stage.

Facts: Livent produced and staged performances in theatres that it owned in Canada and the U.S., with its shares listed on Canadian and U.S. stock exchanges. To enhance Livent’s success, its directors manipulated the company’s financial records. Deloitte was Livent’s auditor. Deloitte never uncovered the fraud. In August 1997, however, Deloitte identified irregularities in the reporting of profit from an asset sale. Deloitte did not resign. Instead, for the purpose of helping Livent to solicit investment, Deloitte helped prepare, and approved, a press release issued in September 1997, which misrepresented the basis for the reporting of the profit. In October 1997, Deloitte provided a **comfort letter** for a public offering. It also prepared Livent’s 1997 **audit**, which it finalized in **April 1998.** New equity investors later discovered the fraud. A subsequent investigation and re‑audit resulted in restated financial reports. Livent filed for insolvency protection in November 1998. It sold its assets and went into receivership in 1999. Livent sued Deloitte later in tort and contract. If Deloitte did something or could have done something that could have alerted people to the fraudulent behaviour of the two directors, maybe there would have been less losses.

Result: Deloitte was liable, but only for the 1997 audit

Reason: First opportunity to address auditor negligence in light of *Cooper*. **For negligent misrepresentation and negligent performance of a service**…

* + **Consider proximity first, *then* foreseeability**
	+ Then look to other policy reasons

While *Hercules* stands for the general proposition that an auditor may owe its client a duty of care in relation to a particular undertaking, it is the *Anns/Cooper* framework that identifies a principled basis for imposing liability.

In **Stage 1**, foreseeability alone is not enough to establish a *prima facie* duty of care - it is also necessary to establish proximity; therefore, in the *prima facie* duty of care analysis:

* + Proximity entails asking whether the parties are in such a “close and direct” relationship that it would be “just and fair having regard to that relationship to impose a duty of care in law”
	+ Reasonable foreseeability entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant’s negligence

In **Stage 2**, where a *prima facie* duty of care is recognized on the basis of proximity and reasonable foreseeability, the question then becomes whether there are "residual policy considerations" outside the relationship of the parties that may negate the imposition of a duty of care

* + In that regard, indeterminate liability is liability of a specific character, not of a specific amount, and it is only a residual policy consideration

  *Application*

* + Two representations were made:
		- 1) the press release and comfort letter released by Deloitte
			* Purpose was to comfort customers that it was a good investment
		- 2) the statutory audit
	+ The question is whether there is a duty of care regarding each of these
		- Trial judge found liability in relation to both
	+ SCC did not find any DoC regarding the press release and comfort letter
	+ However, these *was* a DoC regarding the statutory audit
	+ Both gave rise to proximate relationships, but the press release/comfort letter was not reasonably foreseeable whereas the statutory audit was
	+ Reliance must now be established (equivalent to causation)
		- The trial judge did not actually make a finding of reliance, nor did Livent make the argument that they relied on it
		- Brown J and Gascon J skip over this
		- McLachlin, in dissent, brings up that there is no evidence that the shareholders actually relied on the audit

Issue: Whether Deloitte owed a DoC to shareholders?

Notes: McLachlin dissent; Agrees with the test outlined for the DoC 🡪 However, says there is no liability here because there is no factual basis for a conclusion about reliance (plaintiff’s burden of causation has not been met)

NELSON’s problem with this case 🡪 **Causation**: trial judge did not make a finding of actual reliance. Minority judgement notes that there was no evidence of reliance by Livent. Livent didn’t produce evidence about reliance.

Livent argues that they would have done x,y,z with a proper picture. This was in statement of claim but was not a finding in fact by the trial judge. Trial Judge simply summed up the statement of claim.

**The test NOW**…

* Proximity (in this context) is based on:
	+ **The defendant’s undertaking**
		- * Defendant undertakes to provide representation or services in circumstances that invite plaintiff's reliance
	+ The plaintiff’s reliance
		- Plaintiff is entitled to rely on the defendant’s undertaking
* Foreseeability
	+ Will be limited by what the defendant undertook to do (and by what the plaintiff relied on the defendant to do)
* Residual policy considerations
	+ Indeterminacy is the most significant of these
	+ Does the law already provide a remedy?
	+ Does recognition of a duty lead to indeterminate liability?
	+ Are there other reasons of broad policy that suggest we should not recognize a duty?
		- Will this interfere with other legal obligations?
		- Will this create some mischief for society?
	+ **If we do the first part of the test properly, we should USUALLY not need to deny DOC based on residual policy concerns if the proximity analysis is done properly**

#### Haskett v Equifax (2003) ONCA

Ratio:

Facts: Plaintiff sued Equifax. Defendant is trying to strike out the claim. Court looks to see if the claim is “plain and obvious” i.e. can a neg. claim be brought? is there a duty of care? Pl went into bankruptcy and was discharged in 1996 and has since met all financial obligations. He applied for credit and was denied on the basis of bankruptcy stuff in his credit file (this is not allowed after discharge). He is trying to sue for negligence. The trial court was concerned about indeterminacy of liability and rejected the plaintiff’s claim. Plaintiff appeals.

Result: The CA applied the *Ann’s* test and decided the claim could go ahead despite the fact that defendant reports to the Bank not to the plaintiff. There was no reliance by the plaintiff but the Court recognizes this as an “analogous” category and that the representor has assumed the responsibility for the accuracy of the information. CA does not agree that there is indeterminate liability as the plaintiff's class is restricted to the persons that Equifax makes reports about.

Reason: Concurrent Liability in Contract and Tort

* + This is in issue when a claim is available in contract and tort EXCEPT where the contract indicates that the parties intended to negate or limit liability in tort.
	+ *Headley Byrne* was unsuccessful in tort because the contract excluded tort liability.
	+ Where the contract contains more stringent or equivalent obligations than required in tort, the plaintiff can choose to sue in either.
	+ Where the tort duty is more restrictive, the plaintiff will likely proceed in contract.

Issue:

Notes:

#### BG Checo v BC Hydro (1993) SCC

Ratio:

Facts: Plaintiff tendered a bid to BC hydro to do some transmission lines. They entered into tender contract. The document indicated that the right of way would be cleared by another party. The 3rd party did not do a proper job and so the Pl did it at extra cost (if they knew they would have had to do it they would have not bid as low for the job). Pl sued inter alia for negligent misrep.

Result: Where a wrong can give rise to both contract and tort claim, the plaintiff can choose either except where the contract does not allow it.

Reason: There are 3 classes of cases where concurrent liability is an issue:

* + Contract includes more stringent obligations than what tort law would include.
		- Pl would want to sue in Contract because they would be able to recover more damages under the higher standard, but they are not precluded from suing in tort.
	+ Contract sets out a lower duty of care than in tort (i.e. and exclusion of liability clause).
	+ Duties in contract and tort are co-extensive. Pl can choose the most advantageous one. (Tort may be better for damages as the Pl can recover what they lost b/c of the misrep (i.e. would they have entered the contract at all?) as opposed to contract where the damages are assessed on the basis of expectation. If the representation had been true what would have been the position of the Pl.

Issue:  Can these pre-contractual misreps that formed part of the contract result in liability? Can the terms of the contract exclude the defendant from liability (exclusion clause)?

Notes: Dissent; Thinks that where the contract expressly mentions the duty assume that the terms of the contract would apply. Here, the right of way was mentioned in the contract and therefore a breach of this term should proceed in contract, not tort.

# Psychiatric Harm

* There did not use to be recovery for mental suffering or nervous shock for a couple reasons:
	+ **Too many potential claims**
	+ Too hard to tell if the claim is real
	+ Too hard to assess damages
	+ The psyche is less worthy of protection than the body
		- The common law has become more distanced from this
* Courts eventually moved towards allowing some claims for psychiatric harm:
	+ Recovery is not possible for minor emotional upsets (anger, frustration, disgust) or for sorrow or grief
		- These are not compensable by law
	+ How do we distinguish between claims that will lead to recovery and those that will not?
* What are judges worried about in this area of negligence law?
	+ What does this prompt them to do in assessing claims for assessing claims for psychiatric harm?

Evolution of the limiting factors

* + - Physical injury, or at least physical impact to P
		- P had a “reasonable fear” of impact/injury
		- P had a reasonable fear of imminent personal injury to self or one’s children… and shock was caused by the P seeing “or realizing” something with their own unaided senses
* ***McLoughlin*** (HL) 🡪 Courts response to limit indeterminate liability includes using a test of reasonable foreseeability (like in the case of physical injuries)
	+ Limit the test by imposing some boundaries around which claims can succeed
		- Who is making the claim?
		- How close is the claimant to the accident?
		- How did the psychiatric injury occur?
	+ Problems?
		- Where is the duty of care? (Briggs)
			* You are driving so you have a duty of care to those on the road but why the mother not on the road?
		- **There is no principled distinction that you can point to for these limiting factors**
			* This is completely arbitrary
* The Canadian approach to psychiatric harm is to use the usual negligence analysis.
	+ ***Saadati v Moorhead*** 🡪 Harm does not have to be a recognized psychiatric illness
* ***Mustapha* 🡪** the plaintiff must show that a person of ordinary fortitude would also have suffered the harm
	+ In cases where the defendant knows that the plaintiff was of less than normal fortitude, then plaintiff’s injury may have been reasonably foreseeable to the defendant even where it would not have caused a person of ordinary fortitude to suffer an injury
* **In British caselaw,** three elements serve to limit the application of the reasonable foreseeability test in psychiatric harm cases: (*Alcock*)
	+ (1) the class of persons whose claim should be recognized — expanded this by determining that any given relationship, where the defendant should have reasonably foreseen the shock-induced psychiatric illness, should be recognized, on a case by case basis
	+ (2) the proximity of such persons to the accident in time and space, needs to be either present at accident or in immediate aftermath
	+ (3) the means by which the shock had been caused, cannot be television broadcasts
	+ This approach prevents too much indeterminacy.
* *Page v Smith* (HL) introduced primary and secondary victims
	+ Primary Victim = plaintiff was at risk, doesn’t need to show that psychiatric harm was foreseeable
	+ Secondary Victim = plaintiff was not involved in the accident itself, must show that psychiatric harm was foreseeable
	+ But the court is beginning to figure out this is not necessarily a workable solution (rejected by CA in *Mustapha*, not commented on by SCC)

English vs Canadian Approach

* The English approach (*Alcock*) wants to weed out as many claims as possible using an analysis specific to psychiatric harm
* The Canadian approach (*Saadati*) also wants to weed out claims, but operates on the assumption that the normal negligence analysis is sufficient

### English Law

#### McLoughlin v O’Brian (1982) HL (high water mark for psychiatric harm)

Ratio: **TEST** 🡪 Courts response to limit indeterminate liability includes using a test of reasonable foreseeability + some kind of proximity (like in the case of physical injuries).

Facts: Plaintiff attended to the aftermath of an accident in which one of her children was killed, and her husband and two other children were seriously injured. Claim for psychiatric injury was not based on physical impact, fear for her own safety or fear for the safety of her children. Nor did she witness the accident.

Result: Holds that recovery should be available to the mother.

Reason: It was reasonably foreseeable that a mother who attended to the aftermath of this kind of accident and saw her injured family “with her own eyes” could suffer psychiatric injury.

Reasonably foreseeable, and proximate in that there was proximity between mother and her family (proximity in relationship), as well as mother and attending the immediate aftermath of the accident (proximity in time), and physical proximity in that she saw what happened with her own eyes.

Issue:

Notes: NELSON 🡪 Using a test of reasonable foreseeability plus other factors in order to limit indeterminate liability – without other factors, anyone coming across a scene could claim psychiatric harm, or alternatively mother hearing of loss over a telephone could cause loss. With this rationale, it would be hard to reconcile a mother who hears not at the scene of the aftermath would not have legally recognizable psychiatric injury.

#### Alcock v Chief Constable of the South Yorkshire Police (1991) HL

Ratio: Three elements serve to limit the application of the reasonable foreseeability test in psychiatric harm cases;

* + (1) the class of persons whose claim should be recognized—expanded this by determining that any given relationship, where the defendant should have reasonably foreseen the shock-induced psychiatric illness, should be recognized, on a case by case basis
	+ (2) the proximity of such persons to the accident in time and space, needs to be either present at accident or in immediate aftermath
	+ (3) the means by which the shock had been caused, cannot be television broadcasts

Facts: Football match, police which were responsible for crowd control allowed an excessively large number of intending spectators to enter the grounds. Crammed into pens and in resulting “crush” 95 people were killed and over 400 physically injured. Scenes from the ground were broadcast live on television from time to time during course of disaster and recordings were broadcast later. Chief constable of South Yorkshire had admitted liability in negligence in respect of deaths and physical injuries. 16 separate actions were brought against him by persons who weren’t present in the area, but where connected in various ways to the persons who were in the area, who in most cases were killed, or injured, or in one case was uninjured. Most of the plaintiffs did not know until sometime later that their family member was involved in the incident. Plaintiffs claim damages for nervous shock resulting in psychiatric illness which they allege was caused by experiences inflicted on them by disaster.

Result: No, they cannot.

Reason: Lord Ackner

Plaintiffs seeking to extend boundaries of cause of action from *McLoughlin* by

* + (1) removing any restrictions on the categories of persons who may sue,
	+ (2) extending the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on television of the incident which caused the shock, and
	+ (3) modifying the present requirement that the aftermath must be “immediate”

Generally accepted that nervous shock is a type of claim in a category of it’s own, and from the jurisprudence a number of observations can be made:

* + Must be induced by shock: even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if it was not induced by shock
	+ It has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable, even where nervous shock and subsequent psychiatric illness caused by it could both have been reasonably foreseen
	+ Physical injury must also accompany reasonably foreseeable mental suffering in order for there to be a claim in damages
	+ There is no authority establishing that there is liability on the part of injured person, his or her estate, for mere psychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable
	+ Shock, in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind

Three elements serving to limit application of the reasonable foreseeability test:

* + The Class of Persons Whose Claim Should be Recognized:
		- Whether the degree of love and affection of any given relationship, is such that the defendant, in light of other elements, should reasonably have foreseen the shock-induced psychiatric illness, has to be decided on a case-by-case basis
	+ The Proximity of Such Persons to the Accident – in time and space:
		- Proximity must be close in both time and space, don’t need to be present at the accident, but may be liability in the immediate aftermath of the accident as well
		- Soonest anyone was identified by a loved one was 8 hours after accident, which was not sufficient proximity in time and space to the accident
	+ The Means by which the Shock has been caused:
		- Ethics prevents television authorities from televising event to show pictures of suffering by recognizable individuals, and had they done so would have been a novus actus, breaking causation
		- Therefore, television broadcasts cannot be equated with sight or hearing of the event or its immediate aftermath, and shocks sustained by reason of broadcasts cannot found a claim

Therefore, claims must fail…

Issue: Whether the plaintiffs can recover

Notes: Brian Harrison 🡪 how could he have proven that he and his brothers shared “particular close ties of love and affection”?

* + What about the evidence that he has taken this case all the way to the HL??
	+ NELSON 🡪 The initial skepticism is part of the problem here

What does this approach prevent? Opening the floodgates through indeterminacy… What problems might it cause? It’s not really based on any clear principles.

* + NELSON 🡪 is it a better way to go might just be to rule out recovery for psychiatric damages?? Would be based on clear principle of psychiatric harm being too indeterminate to compensate for…

\*\*Is tort law the right way to handle these type of claims??

#### White v Chief Constable of South Yorkshire Police, (1998) HL

Ratio:

Facts: Same facts as before, but plaintiffs were police officers that were first responders on the scene responding to this crisis. House of Lords also denied their claim.

Result:

Reason: Control mechanisms have been criticized as drawing lines which the layman cannot understand

* + Mother finding son’s twisted body in the mortuary might wonder why she can’t recover because her son’s blood was too dry
	+ Jane Stapleton, academic who doesn’t think these cases should be allowed at all

“It seems to be the search for principle was called off, no one can contend existing law is formed on principle”. Basically, found it unjust to open up to the police when they didn’t allow the families to recover, needs to be some lines to prevent indeterminacy.

Issue:

Notes:

#### Page v Smith, (1995) HL

Ratio:

Facts: Involved a motor vehicle accident, was foreseeable that plaintiff would suffer physical injuries, didn’t end up suffering physical injuries but instead suffered psychiatric harm.

Result:

Reason: Tried to distinguish between primary and secondary victims; primary victims just have to show foreseeability of some type of harm, not the exact harm that took place, whereas secondary victims would need to show foreseeability of the exact harm that took place.

Primary = plaintiff was at risk, doesn’t need to show that psychiatric harm was foreseeable.

Secondary = plaintiff was not involved in the accident itself, must show that psychiatric harm was foreseeable.

Issue:

Notes: They are beginning to figure out that this is not necessarily a workable solution

### Canadian Law

#### Mustapha v Culligan of Canada, 2008 SCC

Ratio:

Facts: Plaintiff was replacing a waterbottle in his water cooler. As he was putting the water bottle in, he saw multiple dead flies in the new water bottle. He then becomes sick to his stomach and develops psychiatric condition from thinking about all the flies he could have not seen and drank. He couldn’t get the fly in the bottle out of his mind, hasn’t been able to sleep more than 4 hours a night, and gone into depression, hasn’t been able to drink water since. Also hasn’t been able to continue working.

ONCA rejected the “primary victim” and “secondary victim” approach from House of Lords, SCC did not comment on this.

Result:

Reason: McLachlin

* + Also a question of whether there was actually damages here. Always the case that in negligence claims that plaintiff had to suffer a loss.
	+ Finding of the trial judge that Mr. Mustapha suffered major depressive disorder with associated phobia and anxiety, which is debilitating and has had a significant impact on his life and therefore he has established he sustained damages
	+ Court doesn’t have difficulty establishing causation; but for Culligan’s negligence, Mr. Mustapha wouldn’t have suffered injury
	+ Requirement that a mental injury would occur in a person of ordinary fortitude is inherent in the notion of foreseeability
	+ However, McLachlin finds that the law expects reasonable robustness and fortitude from everyone, and therefore should consider plaintiff objectively
	+ After it is determined foreseeability of mental injury for a person of ordinary fortitude, then the defendant must take the plaintiff as he finds him for purpose of damages
	+ This is a threshold test for establishing compensability of damages at law
	+ In cases where the defendant knows that the plaintiff was of less than normal fortitude, then plaintiffs injury may have been reasonably foreseeable to the defendant even where it would not have caused a person of ordinary fortitude to suffer an injury

Issue:

Notes: Scope of the duty of care relating to psychiatric harm may shift, and Courts are always looking for some way to limit general negligence principles as they apply to psychiatric principles. The specific formulation of restrictions often seem arbitrary.

Needs to be close ties of relationship, some real evidence of psychiatric harm, presence at scene of accident or “immediate aftermath”, and potentially primary/secondary victim distinction.

#### Saadati v Moorhead, 2017 SCC

Ratio: The Canadian approach to psychiatric harm is to use the usual negligence analysis. Harm does not have to be a recognized psychiatric illness.

Facts: Plaintiff was involved in a number of vehicle accidents; this claim was about the second one. The plaintiff put forward some evidence about psychiatric harm. The MVA didn’t actually cause any recognized mental or physical harm. His family and friends testified that his personality had changed entirely… Went from being optimistic and outgoing to the opposite.

 TJ did not find the expert evidence of no clear diagnosis persuasive but was convinced by the testimony of his friends and family – and therefore compensated on that basis.

Result: **No, there is no need for an actual diagnosis**. The Court is more concerned with the symptoms.

Reason: All that the diagnoses in the DSM are a moving target — it’s what the psychiatric community is currently agreeing about.

* What the trier of fact should be focusing on are the effects on the plaintiff
* A court adjudicating a claim of mental injury should not be concerned with diagnosis, but rather symptoms and their effects.
* There is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme; rather, the court’s inquiry should be directed to the level of harm that the claimant’s particular symptoms represent, not whether a label could be attached to them.
* While expert evidence can assist in determining whether or not a mental injury has been shown, such evidence is not necessary, and a court can find mental injury based on other evidence, including the testimony of family and friends.
* It remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry.

**PARA 21** "It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more is founded not on legal principle, but on policy — more particularly, on a collection of concerns regarding claims for mental injury founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is “subjective” or otherwise easily feigned or exaggerated; and that the law should not provide compensation for “trivial matters” but should foster the growth of “tough hides not easily pierced by emotional responses”. The stigma faced by people with mental illness, including that caused by mental injury, is notorious, often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them.”

* In Canada, we use the regular negligence analysis that we use
* The plaintiff has to establish the elements of a negligence claim (DoC, SoC breach, breach caused injuries, and that there is an actual injury or loss)
	+ Injury does not have to be recognized by medical profession
	+ Would a person of ordinary fortitude have also suffered the harm?

Issue: Whether the plaintiff must be suffering from a recognizable psychiatric illness?

Notes: The English approach (*Alcock*) wants to weed out as many claims as possible using an analysis specific to psychiatric harm. The Canadian approach (*Saadati*) also wants to weed out claims but operates on the assumption that the normal negligence analysis is sufficient.

 How does this change the law?

* + Does not say anything about the ordinary fortitude test – this would be at the remoteness stage

# Occupiers Liability – NOT on the exam

#### Cullen v Rice (1981) ABCA

Ratio:

Facts: 16-year old in café. Him or his friends had previously bought something, but had finished, and knew unwritten rule of café was that once you were done eating, you left. He was asked to leave a bunch of times by the defendant, Rice, who was an employee of the Café. Rice escorted him out by pushing him, a glass door was broken and Plaintiff was injured. Plaintiff sued on occupier’s liability. Trial found negligence and apportioned the liability at 50% each.

Result:

Reason: CA held there was no negligence. They looked at Alberta OL Act and held that the boy was a trespasser and the duty owed was not to willfully/recklessly injure. No breach of duty. Found from authorities, duty of occupiers is to refrain from intentionally injuring him, or not do a willful act in disregard of humanity towards him.

Suggests a “child” for the purposes of the act would be a young child, not a 16 year old high school student. Therefore claim cannot be successful; no DoC owed to trespasser on occupier’s premises.

Issue:

Notes:

#### Waldick v Malcolm (1991) SCC

* Defendant rented farmhouse and did not take any steps to deal with the ice on their walk, the plaintiff slipped and fractured his skull.
* *Volenti* requires more than knowledge of the risk, there must be an acceptance of it as well.
* Defendant liable because they took no steps to make it safer.

#### Roasting v Blood Band (1999) ABCA

* Although OLA clarifies the law it is often difficult to apply the sections.
* Plaintiff, an inmate, was working on a crew at rodeo hosted by defendant. Plaintiff fell from the bleachers and was injured. They were under construction and there was no railing and he was told to stay off.
* Issue: Is there an OL duty? What is the effect of warnings? S. 9 – a warning without more is not necessarily sufficient. Must look at the situation globally. Was there contributory negligence?

## Common Law

* Liability for personal injury suffered by persons on property “belonging to” the occupier.
* Common law factors to determine liability are confusing, and based on a variety of factors:
	+ Status of the plaintiff on the property
	+ Who the occupier is
	+ Whether the plaintiff was injured because of the condition of the premises or activity taken place on the premises.
* Occupier = a person who has immediate supervision and control of the premises and the power to admit and exclude others.
	+ Does not have to be the owner. There can be more than one occupier.
* Categories of Entrants to Land:
	+ Trespassers
	+ Licensees
	+ Invitees
	+ Contractual Entrants

### Trespassers

* Trespassers: On property without the permission of the occupier.
* Originally, at common law, there was only a duty on occupiers to not willfully injure them or act with reckless disregard of their presence.
* This has been tempered somewhat by the duty of “common humanity” owed by an occupier.
* Certain factors affect how trespassers (a wide net) are handled:
	+ How serious is the injury?
	+ How likely was the injury to occur?
	+ Character of the intrusion (wandering child, inadvertent adult, burglar/someone there with malicious intent)?
	+ Nature of the place where the trespass occurs, condition of the premises (whether area is secure, etc.)
	+ However there is no duty on the occupier to inspect their land for safety to trespassers.
	+ Knowledge of the occupier about the likelihood of trespasser being present (if the defendant knew that children frequently trespass, then the obligation is higher, courts have held that barriers around dangers are necessary)
	+ Cost to the occupier of guarding against the danger
	+ Did the occupier create the danger himself (e.g., set traps)

### Licensees

* Someone on your property with permission. Normally a social relationship.
* Common law approach is to protect them from hidden dangers that the occupier has actual knowledge of, this has been diluted to take reasonable care to protect the licensee from unusual dangers the occupier knows, or ought to know of (there is no positive duty to inspect).
* Warnings have to be timely and visible. If warned, the duty may be discharged OR the plaintiff may be held contributorily negligent.
* Usually a warning is enough to discharge.

###

### Invitees

* Someone on your property with permission. Normally a more commercial relationship (e.g., shoppers in a store)
* Common law imposes a duty to be aware of unusual dangers
* Because of relationship of mutual benefit, the common law duty is higher.
	+ There is a positive duty to inspect for danger.
* Adequate warnings will often be enough to discharge the duty

###

### Contractual Entrants

* Someone who has bargained/contracted for entry — paid for the right to be on premises (patron of a movie theatre, guest in a hotel, hockey attendee).
* At common law, the occupier owes the highest duty.
* If the contract is silent, then the common law implies a DoC for the occupier to take reasonable care and skill that premises are fit for the intended purpose.

## Statutory Reform

* Some provinces do not have an Act, New Brunswick has abolished occupier’s liability; just treats as part of negligence law.
* Alberta does have a statute: the *Alberta Occupier’s Liability Act.*

###

### *Alberta Occupier’s Liability Act*

* Occupier is defined similarly to the common law
* It is possible to bring a claim under both this act and common law negligence
* There are only two classes of entrants: trespassers and visitors

Visitors:

* Visitor: A person who is lawfully on the premises, or person who was originally lawfully on the premises but then unlawfully and who is taking reasonable steps to leave.
* DoC: The occupier owes everyone in this category the same duty:
	+ They must ensure that the premises are in reasonably safe condition.
	+ This includes not only the condition of the premises but also activities and conduct of 3rd parties on the premises.
	+ Note: duty of occupier can be modified by express agreement or notice, but only if brought to the attention of occupier by reasonable steps
* Occupier is not responsible for the activities of certain independent contractors.
* A warning on its own is not enough to discharge occupier of liability unless the circumstances show that a warning is enough to enable the visitor to be reasonably safe
* Defenses:
	+ S. 7: Risks that are willingly accepted by the visitor – *Volenti* (Voluntary assumption of risk). Would need to show that they *accepted* physical and legal risks just as in common law negligence context. Mere knowledge of the risk is not enough.
	+ S. 15: Contributory negligence act applies if plaintiff suffers damage and is partly at fault, and also partly at fault of occupier. Plaintiff can have damages limited by contributory negligence where they are partly at fault for damages

Trespassers:

* Trespassers: s. 12 — occupier does not owe a duty to trespassers, but by s. 12(2) they are liable if they injure or kill them by willful or reckless conduct.
* Child Trespassers: s. 13 — When occupier knows or has reason to know that children trespass, or that there is a condition/activity that poses a threat of death or serious bodily harm to children, then the occupier has a DoC to that child to take reasonable steps to ensure that the premises are safe.
	+ DoC similar to that owed to visitors
	+ Factors to consider: Age of the child, ability of child to appreciate danger, the burden on occupier of eliminating danger or protecting the child from danger as compared to the risk of the danger to the child
	+ “Child” is not defined in the act. *Cullen v Rice* – a 16 year old is not a child.
* Warnings, without more, shall not be treated as resolving an occupier of liability unless in all circumstances, the warning is all that is necessary to keep the visitor safe