Tort Law Prof Arbel / Russo Winter 2017

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# Negligence Analysis: Overview

# The rule that you must love your neighbour, becomes a rule in law that you must not harm your neighbour. The lawyer asks, who is my neighbour? Who do I owe a duty of care to?

# …. Anyone who is near enough to be affected by my actions or inactions.

# 5 Elements of Negligence – P Must Prove All Dunsmore v Deshield

**Duty of Care** – **the existence, nature and scope of the legal relationship between the P and D D v S**

* Gatekeeping function - must only recognize a duty of care where it should be recognized.
* Legal obligation to take reasonable care to not harm another person
* **Anns-Cooper Test** – two cases that form the test
  + Who is your neighbour?
  + Is duty already recognized?
  + Step one – 1) reasonable foreseeability 2) proximity
  + Step two – 1) policy

**Standard of care (and breach) – how the D should have acted, breach if acted without that requisite degree of care**

* What is standard? (Reasonableness)
* Proof of breach
* Negligence – narrow meaning – acted without sufficient care
* Negligence – broad meaning – cause of action as a whole – only “negligent” if also show causation

**Causation** **FACT**

* “But for” test – but for breach, loss would not have occurred
* Exceptions

**Remoteness** **LAW**

* Foreseeability
  + Foreseeable consequences – what a reasonable person would foresee as consequence of the conduct or aftermath of conduct Mustapha
* Proximity
* Policy

**Actual loss / Damages**

* Proof of actual loss
* If there’s no loss, there’s no negligence

# Defences – D must prove

* Contributory negligence
* Illegality
* Voluntary assumption of risk
* Inevitable Accident
* Few other defences available

# Duty of Care

* D must be under a legal obligation to exercise care with respect to P’s interests 🡪 fact based, varies by case
* Defendant must prove the duty of care exists 🡪 if no duty, there is no claim

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| Donoghue v Stevenson \* establishes general test for duty of care |
| **Facts**: Woman drinks ginger beer with snail, gets sick, goes into shock. Manufacturer successfully sued by consumer for the first time. Previously only seller able to sue manufacturer as had to have a direct contractual relationship.  **Neighbour principle: One owes a duty to another to take reasonable care to avoid acts or omissions which you can reasonably foresee might harm anyone who ought to come into your sphere of contemplation as being closely or directly affected by your action or omission.**  \* NOTE – Not upheld until the 1960s when Anns combined DvS with Hedley Bryne v Heller & Parnerts (duty of care could be imposed for negligent advice) and Home Office v Dorest Yacht (authorities coud be liable in negligence b/c of statutory functions and operations) –establishing a test for a duty of care. |

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| Dunsmore v Deshield \* Elements of negligence \* Example of negligence |
| **Facts**:  P was playing touch football + thought he was wearing extra resilient glasses. Another player broke the glasses + caused P damages  **Duty of care** → both producer + distributor should consider P their neighbour  **Standard of care** → both owed P the proper glasses + distributor should have double-check product because both aware that not all glasses in the shipment isn’t extra resilient. Didn’t check 🡪 breached duty  **Causation** → based on “but for” test, the glasses wouldn’t have shattered if P was given the proper glasses  **Remoteness** → reasonably foreseeable that people who buy extra resilient glasses because they will use them in ways that will require the extra resilience + that broken glasses will injure the eyes  **Damages** → P’s damaged eye |

Anns Test

* **Anns case**: municipality sued by tenants of building that didn’t comply with building regulations. P claimed municipality did not adequately inspect the building, ended in loss to P’s
* **Duty of care can extend to claims that loss is purely monetary**

1. **P proves proximity and foreseeability** - Is there a sufficient relationship of **proximity** or neighborhood between the alleged wrongdoer and the person who suffered damages such that in the reasonable contemplation of the relationship, carelessness may be likely to cause damage (**foreseeability**) (DvS test)🡪 **if so, *prima facie* duty of care is established**
2. **If yes, P proves no policy limitations to applying a duty of care** – there must not be any policy reasons why duty of care should not be applied in the case 🡪 if so, no further claim action (slippery slope concern… wants to prevent landslide of cases)

**ANNS/KAMLOOPS TEST: Changes burden of Policy stage to D instead of P**

1. **Is there an existing category of duty of care?** 🡪 CITE THE CASE – make a list - Duty can arise from an established category (ie. Manufacturer/consumer, doctor patient, lawyer/client). *Prima facie duty of care* 🡪 establishes relationship and foreseeability of harm, no overriding policy considerations that would negate duty
2. **If not existing category of duty of care 🡪**
   1. **P proves** - Is there a sufficient relationship of **proximity** or neighborhood between the alleged wrongdoer and the person who suffered damages such that in the reasonable contemplation of the relationship, carelessness may be likely to cause damage (**foreseeability**)
   2. **D** **proves** **(makes the test more plaintiff-friendly)** - Only if #1 is YES 🡪 **Policy test** – are there any consideration that ought to negative or limit a) the scope of the duty of care or b) the class of persons to whom it is owed or c) the damages to which a breach of it may give rise?

ANNS/COOPER TEST: Anns test Modified by Cooper v Hobart 2001

**P proves duty of care existed (Neighbourhood test)**   
(in novel situations where there isn’t an existing recognized duty Childs)

1. **Reasonable foreseeability: Was the harm in question reasonably foreseeable?**

* Foreseeable risk of injury + foreseeable plaintiff
* **Whether it would be foreseeable to a person in the D’s position at the time of the alleged tort that carelessness on his part could create**

**a) Risk of injury/loss that resulted**

**b) To that particular plaintiff** Palsgraf

**Must be both -** Moule

* Foreseeability is FACT specific and based on each case’s circumstances Moule, Amos
* **If yes must also prove proximity, foreseeability not enough** Cooper

1. **Sufficient proximity: Was there sufficient relationship of proximity between parties to make it reasonably foreseeable that the party could be harmed?** **(Foreseeable plaintiff)**

* Proximity is found if we can reasonably foresee one parties act/omission harming another
* Type of relationship in which a duty of care arises, often through categories Hill v Hamilton
  1. Can be defined by factors such as expectations, representations, reliance and the property or other interests involved in the relationship between parties when establishing proximity
  2. **“Close and direct” relationship** (actions have a direct effect on the victim such that the wrongdoers ought to have the victim in mind) between P and D (wrongdoers and victim) Hill v Hamilton

**If yes to 1 AND 2 *prima facie* duty of care exists** Childs

**D proves countervailing policy considerations** (evidentiary burden of proof shifts to D per Childs):

1. **Policy Considerations: Are there broad external reasons that the duty of care should not be recognized?** 
   1. **Stage 1: Internal –**
      * Parties representations to each other
      * Reliance on those representations
      * Reasonable expectations about each others conduct (subj/obj analysis)
      * Is there any relevant statute to the facts?
   2. **Stage 2: External**
      * Would imposing a duty of care extend liability to an indeterminate class?
      * Costs outweigh benefits to society? Chilling effect/floodgates arguments
      * Goals of torts law – compensation, deterrence, punishment – how are these affected?

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| Cooper v Hobart \* Modified Anns Test, made policy factors more explicit |
| **Facts**: P invested money w/ mortgage company. Lost money as mortgage broker was violating rules and b/c of slow investigation lost more than he would have had reasonable care been taken. Registrar of Mortgage Brokers (D) suspended company’s license but P said should’ve acted more quickly. Did the D owe a duty of care to the D?  Two kinds of policy considerations: Stage 1 internal (would it be just and fair) State 2 external (does it open the floodgates too wide?)  **Decision**: **No duty of care owed to D**   * **Relationship between Registrar and investors not sufficiently proximate that it would be just and fair to impose a duty of care. (Registrar owes duty of care to public, not investors).** * Deals with Stage 2 in 51-55 in OBITER only b/c did not find duty of care so didn’t actually need to go into Stage 2 analysis.   **Principles**:   * Governments aren’t liable in tort law for making policy – just in executing * No PF duty of care – would’ve been found in statute – but would’ve been negated anyway * Only general duty of care to public |

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| Childs v Desmoreaux 2006 SCC \* social host vs commercial host duty of care |
| **Facts**: Man left house party drunk, drove, got into accident and killed/harmed many people.  **Issue**: Are social hosts responsible or liable in negligence for an invited guest’s actions and do they owe a duty of care to users of highways? NO  **Reasons**: No duty of care owed to a third party as there is no reasonable proximity or foreseeability between the social host and the injured party.  **Ratio**:   * **3 requirements 🡪 reasonable foreseeability AND sufficient proximity both required (separate elements), as well as absence of policy considerations** *Odhavji Estate v Woodhouse* * **Test not needed if existing duty of care established.** * **A positive duty of care may exist if foreseeability of harm is present and if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity.** * The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. * **While commercial hosts are licensed, gain economic benefit from sales, can monitor consumption of alcohol, and are required to monitor, social hosts not required to monitor consumption.** * Individual autonomy must be protected in law. |

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| Moule v NB Elec Power \* Foreseeability |
| **Facts**: Kid climbs tree near power wires, goes far beyond where other kids have gone, steps on rotten branch higher than power wires, falls on conductor box and is injured.  **Decision**: Injury not foreseeable 🡪 **sequence of events so fortuitous to be beyond the range of foreseeability**  **Ratio:**   * **Consequences must be within reasonable contemplation AND foreseeability of a reasonable man** * **P under a duty to take precautions only against any foreseeable consequence of danger with a reasonable probability of causing harm.** |

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| Amos v NB Elec Power \* Duty of care fact specific |
| **Facts**: Kid climbs fast-growing tree on residential property, but close to wire – not trimmed.  **Decision**: Risk was foreseeable – tree shouldn’t have been so near 🡪 General duty of care found  **Principle: FACT SPECIFIC for foreseeability** |

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| Palsgraf v Long Island Ry 1928 \* Foreseeable Plaintiff |
| **Facts**: Person trying to get on train, guard pushes him to get on. Bag falls on tracks, fireworks explode and scales fall 3- ft down track on P.  **Finding**: No reasonable foreseeability of fireworks or harm to P. No duty of care established.  **Ratio**:   * Foreseeable plaintiff: P must belong to class of persons foreseeably at risk * You can’t just pluck harm or foreseeability out of the air, there must be a reasonably foreseeable connection. * **If injury too bizarre or remote to be predicted cannot be actionable in negligence**   **Dissent**:   * The action of kicking the package was negligent in itself, regardless the consequences. * Except for that action she would not have been injured therefore the injury was proximate to the negligence. |

# Special Duties of Care

## Affirmative Action

**General rules:**

* In some situations Cdn law does recognize an affirmative duty of care – an **undertaking** that a person makes to another to complete a task (even gratuitously), and a **relationship** (dr/pt, jailor/prisoner, driver/passenger, parent/child, employer/employee)
* The law generally does NOT impose liability for failure to act (nonfeasance), only misfeasance Childs
* There is NO duty to prevent harm unless there is a special relationship between the parties Childs
* The law permits third parties witnessing risk to decide not to become rescuers or otherwise intervene Childs
* Defendant creates or contributes to the situation where it is foreseeable a person could be harmed

**Situations where a positive duty to act exists (so an omission does not immunize the D from a duty to act): Childs**

1. If the D creates a dangerous situation and invites others into it Horseley, Crocker v Sundance 🡪 must take a reasonable steps to reduce resulting risk or at least warn others of the risk (Oke v Weide Transport 🡪 had duty to notify authorities of dangerous pole that he had damaged, that later killed someone)
2. Paternalistic relationships of supervision and control (such as teacher/student) – vulnerability of Ps and formal position of power of D recognizes the autonomy of some persons may be permissibly violated
3. Statutory obligations – no tort of breach of statutory duty in Canada.
4. D exercises a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large Childs, Jordan House
5. Relationships of economic benefit – ie commercial hosts have duty to control intoxicated persons Jordan House
6. Reliance on remedies and undertakings – do you have a duty to complete the act that you started but did not complete. If partial performance has worsened P’s position, health or economic position, or if they lulled the P into false sense of secutiry – in those cases there may be an affirmative duty to perform a gratuitous promise (Horseley)

**Policy issue:** Imposing liability for people who fail to act (nonfeasance) could threaten the individual autonomy of the P which the law tries to uphold.

## Duty to Rescue

* No general duty to rescue a person in peril from their own action unrelated to the D, even where little risk or effort would be involved in assisting (Matthews, Osterlind).
* (In Osterlind v Hill the canoe rental guy would have had to assist if the renter was deemed incapacitated when he rented it, but wasn’t found to have a duty to rescue b/c the guy wasn’t THAT drunk….– terrible ruling! How immoral! Why doesn’t the rental shop have a duty to assist when a ship owner would in Matthews?!)
* “The law leaves the remedy to a person’s conscience” (Matthews/Horesely)
* However, once you intervene you are liable for your negligent actions as you voluntarily take on a rescue operation and the corresponding responsibility (Matthews/Horseley)

#### “The law permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy” Childs

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| Osterlind v Hill |
| **Facts**: D rents canoe to P, P flips its, clings to side for 30 mins yelling for help. D watches and does nothing.  Finding: **No duty of care not to rent canoe to drunk customer (still able to take measures to save own life), no duty to rescue – victim wasn’t completely helpless.** |

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| Matthews v Maclaren; Horsley v Maclaren |
| **Facts**: Guests on Maclaren’s boats. Captain had # of drinks. Matthews falls overboard by his own accident. M tries to save but makes wrong maneuvers. Matthews dies. H tries to jump in and save M but also dies.  **Principles**:   * **No general duty to rescue** * **Duty of care created for specific relationship of master of a pleasure boat and his invited guest – through contracts/statutes (Canada shipping act) - duty read in**   + To best of ability take care to rescue * **Once rescue is undertaken, rescuer has duty to act/complete the rescue**   + Voluntary assumption of duty and responsibility!   + QUESTION IS THIS NEGATED BY GOOD SAMARITAN ACT? NOTE 13 pg 352 * Standard – what would a reasonable boat operator do in the circumstances, given his skills and experience? * \* can analogize this duty of care * Duty of care was found to second rescuer (Horsley) for creating the risk * **No causation found (died likely due to extreme cold of heart attack) so not liable even though duty of care existed.**   **Exception to no general duty to rescue** – Criminal Code – must help officer makes arrest if asked, and drivers must stop if involved in accident (if person injured) |

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| Stevenson v Clearview Riverside Resort |
| **Facts**: Off-duty ambulance attendant, saw guest at party dive into pool, others rescued, wrong way – became quadriplegic.  **Principle**: no duty of care between off-duty ambulance attendant and guest at party  **Policy reason – no duty for off duty ppl – law protects personal autonomy, and slippery slope (dr., nurse, ambulance driver) – other pros bound by Code of conduct** |

## Duty to Control the Conduct of Others

* No general duty to control the conduct of another
* Growing number of special relationships where a duty will be imposed (ie. intoxicated people).

Liability for the Intoxicated

* Commercial hosts are under duty to prevent foreseeable risk of injury to other parties including 3rd parties by drunk patrons, but over-serving alone did not pose a foreseeable risk - it would require some additional factor. Stewart v Pettie (intoxicated person was accompanied by 3 sober people, so it wasn’t foreseeable that he would drive, so while they did have a duty of care, they had not breached the standard of care to him)
* Commercial hosts have a statutory duty to not serve alcohol to intoxicated patrons Jordan House
* Commercial hosts have a duty of care / duty to act to avoid risk for intoxicated patrons Jordan House
* Voluntary assumption of foreseeable risk not applicable (or is dubious) when patron is intoxicated Sundance
* Social host not found liable for intoxicated drivers action as they had not provided alcohol to him Baumeister v Drake
* Alcohol provider found liable even though they didn’t have actual knowledge of patrons intoxication Picka v Porter, Schmidt v Sharpe
* Commercial host owes duty to public to take all reasonable steps to stop intoxicated patron from driving and duty to call police if intoxicated patron cannot be prevented from driving Hague v Billings
* No duty of care found for hockey team that provided beer at tournament – model somewhere between social host and commercial establishment, but no duty of care found as D didn’t know or ought to know that driver was drunk Calliou Estate (Trustee of) v Calliou

**Social Host vs. Commercial Host** Childs v Desormeaux

* Commercial: Licensed, responsible and able to monitor alcohol consumption
* Heavily regulated through contract/statute
* Profit from sale of alcohol

\*less liability on social hosts - no duty of care

Factors to consider for liability:

* Knew guest was driving, did nothing to protect 3rd parties
* Social host serve guest directly?
* Did the host know how much they consumed?
* Know the guest was impaired when he left?

Jordan House 🡪 invitor/invitee relationship 🡪 aware of his propensity to drink and probable risk of injury if he was sent out of hotel 🡪 found to breached statutory provisions by serving a patron who was intoxicated, and they knew he was intoxicated 🡪 breached duty of care owed to Menow for ejecting drunk patron onto street where it was reasonably foreseeable that he would be hit by care while walking home on highway

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| Crocker v Sundance Northwest Resorts |
| **Facts**: Sundance put on a dangerous tube race to promote business. C got drunk and joined contest with friend, signed waiver, staff knew he was drunk but despite warnings after an injury on first run, participated in second run, injured and became a quadriplegic.  **Duty of care arose because there was a relationship of economic interest which creates a positive affirmative action duty.**  **Principles**:   * When a ski resort establishes a competition in a highly dangerous sport and runs the competition for profit, it owes a duty of care towards visibly intoxicated participants. * Dismisses voluntary assumption of risk – drunk, didn’t read waiver 🡪 resort staff should have ensured he knew the terms of the release provisions   **Policy considerations** – dangerous precedent to not find liability – don’t want organization to host events w/o a duty of care. However, there were many instances where Sundance staff could’ve intervened but didn’t. |

Duty to Control Other Situations

* Vicarious liability – liability for the tort of another party even though the party held responsible may not have done the negligent act
* Same relationships can occur in: employer/employee, occupiers/entrants, police/prisoners, coach/student.

**Parent and child** - Parental liability Act 2001 s 3 and 6 limited liability in property damage up to $10,000, School Act RSBC 1996

* + **Children cannot be supervised at all times** however parents/teachers/supervisors who are aware of a dangerous activity or permit it will have a rigorous standard of care. Ingram v Lowe, Coquitlam School District No 43 v D (TW)
  + **Ability to control action of another not sufficient to trigger vicarious liability** (ie. Parents not liable for actions of children unless poorly supervised or not fulfilling a duty of care owed to the victims of child’s misconduct). Parent/child defense of reasonable supervision. Parental Liability Act S 9
  + **Factors considered in reasonable supervision –** age of child, maturity, prior conduct of child, foreseeability of property loss, mental disorders / abilities of child, etc Parental Liability Act s 10

**Prison guards** must supervise prisoners to ensure that they do not hurt anyone or themselves. Williams v New Brunswick

* + Duties to take reasonable steps to: protect safety, provide necessaries of life, protect from self harm and harm from other prisoners, prison to take steps to not put prisoner in harm that is reasonably foreseeable.
  + Can be obligation to take reasonable steps to intervene and protect an at risk inmate.
  + Usually fail at the standard of care stage.

**Employer** may be held personally liable if fails to prevent abuse or harassment in the workplace Clark v Canada 🡪 RCMP officer harassed by colleagues and employer 🡪 is there an applicable statute to guide finding of liability / vicarious liability?

* + Crown Liability & Proceedings Act RSC 1985 c. C-50

**Coaches** may be sued on grounds including failure to control participants, failure to provide adequate warning, instruction, equipment Schulz v Leeside Dev Ltd, Myers v Peel

* + Duty of care can extend beyond teacher/child to include third parties including school districts

**Schools** may owe duty of care to protect a student from bullying at school but also in exceptional circumstances outside of school Bradford-Smart v West Sussex County Council 🡪 duty of care to protect student from bullying 🡪 have to establish cyber-bullying was linked to schools technology (ie school FB page), harder to establish duty of care of school when bullying happens away from school

* Municipality held liable for failing to provide enough lifeguards on class trip to pool – despite teachers not being exempt for watching children in pool Cliché c Baie-James

Duty to Prevent Crime and Protect others

* D has only indirect control or authority, ie. Probation or parole
* D has opportunity to prevent or reduce the likelihood of a crime or accident

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| Jane Doe v Metro Toronto Commissioners of Police |
| **Facts**: P attacked by serial rapist. Had raped 4 other women in her area in one year. Police had not warned public in area.  **Issue**: Was the police’s failure to warn negligent? YES  **Reasons**:   * Judge considered why police didn’t warn (fear women would become ‘hysterical’, attacks not violent as other serial rapists were, fear it would move rapist to another area). * Judge found women should have been warned of serial rapist in area so that women could take steps to protect themselves per statute Police Act s 57 duty to prevent “other crimes” – statutorily obliged to prevent crime, owe a duty to protect life and property. * There was negligence as there was reasonable foreseeability of harm, special relationship of proximity. Private law duty of care found. * Breach of duty of care as did not warn citizens of foreseeable harm * Awarded $220,000 in damages! |

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| Hill v Hamilton-Wentworth Regional Police 2007 SCC 41 \*\* Policy Stages 1B/2 Anns Cooper |
| **Facts**: Initially charged with 10 counts of robbery but then charges dropped as another suspect was identified. Charged and convicted of one count of robbery. Appealed and acquitted. In total he spent 20 months in jail. Brought civil action against police and Crown involved on negligence, malicious prosecution, breach of rights.  **Issue**:   * Can the police be held liable if investigation conduct is below acceptable standard and harm to a suspect results? If so, what standard should be used to assess conduct of the police? YES * More generally, are police immune to negligence law on the basis of policy grounds? NO – but they owe a duty of care to suspects and that their conduct during the course of an investigation should be reasonable (compared to other officer in similar circumstances).   **Trial**: Guilty of 1 count robbery  **CA**: Appeal, acquitted  **Claim for Negligent Investigation**  **Trial**: claim dismissed  CA: appeal allowed, found police didn’t breach standard of care  CA: appealed that they didn’t breach standard of care / cross-appeal by police that a duty of care to suspect even exists  **Ratio**:   * The law of negligence does not demand a perfect investigation – just that police conduct their investigations reasonably. * If not reasonable they may be accountable through negligence for harm caused. * **A police officer owes a duty of care to a suspect as there is sufficient proximity and there are no overriding policy concerns to negate a duty of care.**   **Reasons**:   * **Duty of care owed to suspects is established by P as reasonably foreseeable that negligent investigation could cause harm to a suspect and proximity proven through stage 1 analysis – reasonable proximity between police and suspect establishes prima facie duty of care.**    + **Personal and close relationship between the particular suspect and the police as they were investigating him closely.**   + Doesn’t have to be physical proximity but whether the actions of the alleged wrongdoer has a close effect on the P such that the wrongdoer should have had the victim in their mind. * **Recognizing a duty of care in negligence in investigating suspects would not change or raise the standard of care for arrest 🡪 still requires reasonable and probable grounds** * **Policy reasons examined at both 1B proximity stage and 2nd stage of Anns/Cooper test:**    + Suspect had a critical interest in the conduct of the investigation through his liberty and reputation   + No other remedy for the suspect if a duty of care was not found   + There’s a public interest in police avoiding wrongful convictions b/c they harm the reputation of the public justice system   + Duty of care is consistent with values and principle in the Charter of Rights * **Police’s primary duty to protect public from crime, is not inconsistent with the duty of care to a particular suspect (differs from Cooper where a registrar was not found to have a duty of care to banker but did have duty of care to public)** * **Rejects policy concerns re floodgates and chilling effect** (only a few suspects would be in the catgegory established and “does not open the door to indeterminate liability” 🡪 no policy reason negates the finding of a duty of care of investigation of suspect by police 🡪 no evidence to back those concerns, must be more than speculative. These policy concerns should be considered at the analysis of the standard of care |

## Duties to the Unborn Child

* Different types of losses: Mothers pain and suffering, parents in creased financial burdens and the child’s loss of potential earnings.
* **Does a party owe a duty of care to the fetus?** Before birth, legal entity of mother and child are one**.** Child only acquires legal entity upon birth (Winnipeg Child and Family Services)

**Policy reasons Precluding Duties to Unborn Child**:

* Fetus not recognized as independent entity
* Chilling effect on medical profession that they wouldn’t know who to advise and to what extent
* Dr. has some relationship w. fetus but not enough to find duty – can’t communicate in absence of mother
* Autonomy of woman (Johnson Controls)

4 categories surrounding injuries associated with birth

**Pre-conception wrongs**

* **Involve some negligence that arises prior to conception of child that causes some harm to future child or parents ability to conceive a healthy child**
* **No duty of care to a future child if harm took place pre-conception (Paxton)**
* D carelessly causes a parent to suffer an injury that detrimentally affects a subsequently conceived child (ie exposure to hazardous chemicals that cause injury to sperm or ova)
* **Complex problem of proving causation**
* **Public policy**: scope of Ds potential liability, P must mitigate potential harm by taking steps to reduce
* **UAW v Johnson Controls US 1991** – shielding itself from tort liability from potential negligence by reducing risk to childbearing women - company tried to get childbearing age women to prove sterility or lose jobs – found by court to discriminate against women, women can decide whether or not to expose to lead in battery factory. Balance of interests between protecting health of potential children and women’s autonomy rights.
  + **Scalia concurring decision** – questioned the freedom of a company to protect a fetus vs a mother
* **Paxton v Ramji** – woman took acne med before and during pregnancy. Partner had had a vasectomy. P stated D doctor should have prescribed extra birth control. Court – while harm to a future child was foreseeable, no proximity found due to policy concerns. **Dr had duty to patient, not to any potential future children.** Imposing a duty to future children would limit tx options for women and be inconsistent with women’s autonomy and privacy rights.

**Wrongful birth (brought by mother) and wrongful life (brought by child)**

* Physician carelessly fails to inform a woman that she has a high risk of having child with a disability, or negligently perform genetic screening tests. Therefore woman may continue a pregnancy that she otherwise would have terminated.
* Physician didn’t cause injury to child, but deprived mother of opportunity to make informed choice about abortion.
* **Mothers claim based on principle of duty to inform a patient of medical risks**.
* **Childs claim wrongful life** **is based on “but for” D’s carelessness, child would not have been born** and would not have been required to struggle through life disabled.
* **Wrongful life would be difficult to raise or succeed in Canada, unsettled, policy reasons.**
* **Arndt v Smith SCC** 🡪 Mother got chicken pox in pregnancy; gave birth to severely disabled child as a result. Court 🡪 Dismissed fathers claim for support, dropped child’s claim for wrongful life, woman’s action failed on causation – couldn’t prove a **reasonable woman in her position would have had an abortion** if informed of the very small risk of birth defects. **CA** 🡪 new trial **SCC**🡪 upheld trial judgment, claim dismissed
* **H(R) v Hunter**  parents of 2 disabled kids awarded $3M for costs to raise kids D doctors did not refer the mother for additional genetic counseling
* **Krnagle v Brisco** 🡪 child with Downs Syndrome. D physician didn’t offer testing in pregnancy. Parent were entitled to damages regarding the expenses associated with his care
* **Watters v White** 🡪 court dismissed a claim against a doctor for failing to inform relatives of an infant suffering neuro disease that they might also be carriers. P was second cousin, gave birth to a child who suffered from the disease 30 years later. Would have been a **breach of confidentiality** to inform other members of the family.
* **Watters v White** 🡪 court dismissed a claim against a doctor for failing to inform relatives of an infant suffering neuro disease that they might also
* **As ability to detect abnormalities in pregnancy, may see wrongful life cases increase in future.**

**Questions – Should expanded**

* **Should parents be able to make a claim if it’s a mild disability?**
* **What if it can be treated by medication?**
* **What if they can only tell if a child MIGHT in the future develop a condition?**

**Wrongful Pregnancy**

* Courts more reluctant to grant remedies in cases with healthy babies exception – cost of rearing child offset w emotional benefits of having a child (Suite v Cooke )– not strong authority
* Liability may be found w/ unhealthy/disabled child
* Physician performs abortion but pregnancy continues – negligence is needing repeated procedures, pain and suffering,
* Physician incorrectly performs sterilization procedure (BUT THEY ALL HAVE A RISK OF FAILURE)
* **If the woman does not terminate the wrongful pregnancy, the court may order**: **Cattanach v Melchior**

1. No damages where child is healthy
2. Damages confined to immediate damage to mother together with expenses and loss of earnings immediately consequential on the pregnancy and delivery but not for upkeep and care of a healthy child
3. Damages confined to the foregoing together with any additional costs of rearing child born with disability or to parents with disability \* traditionally chosen in Canada
4. Damages in full for costs of raising unplanned child to age when child is self-reliant, whether health, disabled, or impaired, but with a deduction from the amount for the joy and benefits received and potential economic support derived from the child
5. Full damages against tortfeasor for cost of raising child, subject to limitation of reasonable foreseeability and remoteness with no discount for joy benefits or support.

* **Suite v Cook** 🡪 Quebec CA found pecuniary damages for raising a healthy child were recoverable, but also that they had to be set off against the emotional benefits of a child
* **Kealey v Berezowski** 🡪 claims for child rearing should be universally denies as a matter of public policy, can only be recovered when P primary motivation for wanting to limit the size of the family was financial.

**Prenatal injuries**

* **Child cannot sue for damage in utero unless they are subsequently born with an injury caused by the physician’s negligence.**
* **Fetus is not recognized as a legal person with rights. However parents have right to sue for condition due to prenatal injury**
* **Dobson v Dobson** 🡪 27 wk pregnant woman caused car accident, damaged her unborn child. CS same day, severe and permanent disabilities. Sued mother for damages as a way to get insurance money
  + **SCC**🡪 **mother did not owe a duty of care to her son prior to birth for Stage 2 policy reason in Anns/Cooper test** 🡪 to impose duty of care of mom towards fetus would result in extensive and unacceptable intrusions on the bodily integrity, privacy and autonomy rights of women. **Would be difficult to determine tortious vs non-tortious behaviour in daily life of a pregnant woman. Too much external scrutiny on a womans every action. Would significantly undermine womens rights.**

**Wrongful birth/life**

* When parents took steps to prevent pregnancy or childbirth, but happens from DR’s negligence
* Court reluctant to recognize wrongful life (sanctity of life) (Jones)
* No duty to child to inform their mother of info that might lead to them not being born

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| Paxton v Ramji |
| **Facts**:   * Mother took prescription acne drug prior to pregnancy – led to disabilities. Husband had vasectomy. Dr negligent for not recommending BC pill?   **Ratio**:   * **No duty of care for doctors to future children due to lack of proximity (1B Cooper test)** * **Policy reasons (proximity):**   + **Conflict for DR – bound to both mother and unborn fetus**   + **Chilling effect on profession**   + **Autonomy/privacy of woman**   + **Introduces lack of clarity in law – doesn’t recognize fetus as person** * Women have rights to expose themselves to harmful risks – protect personal autonomy (UAW v Johnson Controls – US decision) |

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| Arndt v Smith |
| **Facts**:   * DR failed to advise woman or likelihood baby would be born with disabilities – had chicken pox during pg * Causation very difficult to prove – would’ve had the abortion is she knew the risks   **Other Principles**:   * **Statute of limitations** – 3 yrs to make claim from when aware * **Parents can recover costs of raising disabled children if proof that but for doctors negligent actions, mother would’ve aborted child (Hunter, Krangle)** * **Duty only owed to mother not children, for drs negligence in prescribing fertility drug leading to birth of disabled twins (Hergott)** |

## Psychiatric Harm

* For nervous shock – recognized psychiatric illness
* Must be proximate in time and space
* Shock must be caused by D

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| Historically only could recover is also had physical injury or impact prior, otherwise would be too broad (floodgates) | Victorian Railways v Coultas |
| “impact rule” lifted b/c her psychiatric harm was triggered by fear of personal injury. Replaced impact rule with new restriction: P must have suffered shock due to to fear of injury to themselves (not someone else) | Dulieu v White and Sons  🡪 woman scared by horse and buggy coming into her work |
| Court ruled liability was possible if fear was of harm to another person. Recovery limited to situations where shock occurred b/c of something the claimant saw or realized herself not from something she was told | Hambrook v Stokes Brothers  Woman suffered shock when runaway truck sped down hill towards her children 🡪 had psychiatric shock, gave birth to stillborn child and died a few months later |
| Court: reasonably foreseeable that this would cause her psychiatric shock. Reasonable foreseeability enough to impose duty of care. However limited for policy reasons to a) class of person whose claims are recognized (parent/child vs stangers), b) proximity of persons to the accident, and c) the means by which shock is caused. | McLoughlin v O’Brian  🡪 woman learned of husband and 1 child killed, 2 injured by D, went to hospital, was told details |
| Court uses McLoughlin v O’Brian test to determine whether there was a duty of care owed:   * **Class of persons** – relationships between persons, only close relationships should be compensated * **Proximity of P to accident** – must be proximate in time and space. Direct and immediate sight or hearing accident not required but needs to be reasonably foreseeable that injury by shock can be caused to a plaintiff * **Means by which shock is caused** – some version of sight or hearing or equivalent.   All claims dismissed. | Alcock v Chief Constble of South Yorkshire Police  🡪 90 fans crushed in stadium 🡪 150 P suffered psych injuries fearing for safety of loved ones in stadium. Some were in stands, others saw it on tv or heard on radio. |
| * For nervous shock, can be caused by the immediate aftermath of the accident. * Try to balance temporal, geographical, emotional proximity * Nature of the injury suffered – controlling mechanism – here viewing the body in the hospital wasn’t shocking enough   Principle: can’t recover for ordinary grief or sadness – need shock | Devji |
| **Requirements for IPH:**   * Foreseeable consequences – what a reasonable person would foresee as consequence of the conduct or aftermath of conduct * Reasonableness standard – person of ordinary fortitude * Proximity * Psych harm so serious it resulted in a defined and recognizable psych injury or illness * Life goes not - no recovery for transient or minor upsets | Mustapha v Culligan of Canada 🡪 fly in water bottle |

## Duty of Health Care Professional to Inform

* Cause of ailment
* Nature of proposed tx
* Material risks of tx
* Special or unusual risks (takes particular pt into account, medical hx, financial considerations)
* Alternative to tx and no tx
* Opportunity to ask questions and answer questions
* Duty to inform includes risks, benefits, alternatives to tx including no tx through informed consent
* If consent obtained fraudulently or no consent given 🡪 cause of action goes to **medical battery**
* **If negligent in obtaining consent goes to duty of care / negligence**
* **To prove a claim patient has to prove that “but for” advice (inadequate) they were given, they would not have proceeded with the treatment pg 439**
* Canadian Courts have broadened the duty to inform much since SCC

2005-2010

* 4,524 lawsuits filed against Canadian doctors
* 3,000 were dismissed or abandoned
* 521 went to trial
* 116 led to favourable judgment

Reibl v Hughes 1980 SCC \* provides rules for duty to inform

* Liability relies on whether dr breached a duty to disclose risks relating to proposed treatment
* Reibl clarified this duty, wasn’t clear prior
* DRs are bound by affirmative duties to disclose risk of any proposed treatment – specific duty w/ positive obligation.
* The breach of the duty to inform causes the pt to consent to a procedure that they otherwise would not have consented to had they known the full risks.
* **Must disclose all material risk of proposed tx 🡪 requires drawing out patients specific circumstances / history / personal factors / personal risks that might change their risks of the procedure**
  + Material risk includes % risk of all potential outcomes
* **Must give all information a reasonable person in Plaintiffs shoes would want**
* **Causation – SUBJECTIVE / OBJECTIVE test – Reasonable person in the patients position**

Haughian v Paine 🡪 disc surgery meant to relieve back pain, resulted in partial paralysis 🡪 Dr “had a practice not telling of risks < 1:100”

* **Expanded duty in Rebil in two key ways**
  + Failure to advise patients on not treating 🡪 didn’t discuss possibility of back probs improving on their own
  + Failure on duty to advise on alternate 🡪 didn’t discuss pain mgmt., physio, waiting and doing surgery in future instead of now
* Broadened duty – must also inform of risk of leaving ailment untreated, and alternative means of treatments and risks
* Must inform of all risks including those that are very low risk (pt was not aware of 1:500 risk of paralysis)
* **Modified objective test**
  + What might a reasonable person need/decide in the same situation
  + Seriousness of diagnosis
  + Success of treatment
  + Includes a subjective analysis of personals particular risks / state of mind / age, gender, health hx, personal beliefs and values
* Material risk – enough info for lay person to understand the gist (Paine)
  + Common sense approach
  + Can include low % risk of serious consequence (Reibl)

**Other principles (cite text as authority):**

* The scope of what constitutes material risk is expansive and broadened
* Disclosing some material risks, while not disclosing others, is insufficient
* If not immediate apparent or part of history, patient has responsibility to raise it with DR – may apportion liability
* DRs must explain the material risks of proposed treatment in language that patient can understand (Martin)

**Policy reasons:**

* Sanctity of life, and of the body
* Respect for autonomy of body, individual choice, ability to decide to rely on doctors judgment
* Must be clear communication of any desire to not be informed about all elements of the procedure

**Carlson v Steeves 2008 BCSC**

* duty to inform is separate from standard of care in diagnosis and tx
* right of consent of pt to decide what if anything should be done to their body
* standard for whether a risk is material which should be explained to the pt is an OBJ test whether the reasonable person would want to know of the risk
* scope of the risk must be decided in the circumstances of each case

**Tremblay v McLaughlin BCCA**

Defendant doctor argued that the risk of nerve injury was disclosed to the pt

* Trial and appeal found it was not disclosed properly.
* Didn’t explain the particular nerve or the type of injury that in the end occurred
* Nature of medical problem
* Magnitude of declining tx or consequences if the remote risk was to occur
* 3-5% of nerve injury resulting from tx
* Plaintiffs occupation deemed to be a material risk d/t the nerve injury making him not able to use it
* Consent form precludes action of non-disclosure. Consent form is only as good as the discussion that occurs from it.

**In what circumstances should a doctor be required to inform patients that a resident or intern is doing the procedure? (Not being assisted, but doing the procedure themselves)**

* Trial and appeal found it was not disclosed properly.
* Didn’t explain the particular nerve or the type of injury that in the end occurred

**Marcoux v Bouchard:**

* Surgery is a deeply personal relationship.
* Agreement for medical care must be made with specific person in mind.
* Pt may want to be treated by a particular surgeon.
* Pt is entitled to know who the main actors in the surgery will be.
* **Only need to inform who is principal in the surgery**.

**Must they inform if their success rate is less than desirable? NO**

* Inexperience or competence? No requirement to inform

**Must they inform if they are being sued for medical malpractice? NO**

**Must they inform if they are HIV+ or other health conditions? NO**

* Depends on risk of transmission to medical provider to patient
* No need to disclose
* When do nurses who are living with HIV have an obligation to disclose their status and to whom?
* In general, no duty to inform HIV+ but SOME regulatory bodies may require disclosure
* If accommodation is required, do not need to provide specific condition that they need accomm for

**Patients must have opportunity to ask questions**

* Questions must be answered fully even on minor procedures
* Must use basic language so pt can understand the substance of what is being explained
* May need translation or other way to ensure people understand risks of procedure and alternatives
* No set range of questions that must be answered

## Manufacturer’s and Supplier’s Duty to Warn

* Manufacturer has NO duty to warn if product is a) highly techincial b) only used in presence of experts or c) not realistic for manufacturer to warn patient
* Manufacturer of product has a duty of care to warn consumers of dangers inherent in its use (Lambert)
* Duty extends to info that manufacturer knows or ought to know (Lambert)
* Warning labels are not sufficient (McDonalds hot coffee case)
* Advertisement may not negate the risks warned about
* Manufacturer’s needs to advise of dangers at time of sale and subsequently – continuing duty for duration of life of product (Rivtow Marine)
* **Continuing duty** – not only what manufacturer KNEW but what they OUGHT to have known. If they learn new risk, must inform dr immediately Cominco
* **Supplier’s duty same as manufacturer** - but in some cases (super technical product) then supplier might not be held to as high a standard Allard
* Extended to installer for repairs (Bow Valley)
* Failure to warn of catastrophic results of misuse (Walford v Jacuzzi Canada – head first on slide – paraplegic )

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| Hollis v Dow Corning |
| **Facts**: P had implants in and ruptured, suffered extreme damages. Literature warned against extreme activities that cause risk. DR knew about some warnings of rupture during surgery, but not after.  **Principles**:   * **Manufacturer owes duty to P to disclose possible risks – can provide to doctor as learned intermediary** * **Duty will not be negated by determining that dr wouldn’t have informed patient of the risk** * Manufacturer discharged its duty to consumer when intermediary’s knowledge approximates that of manufacturer * **Refers to D v S – neighbour principle**   **Learned intermediary: Hollis v Down Corning 🡪 breast implants ruptured, pt suffered extreme damages**   * Manufacturer can discharge duty to warn to the expert who is handling the product to make the end user aware * Manufacturer warns learned intermediary 🡪 learned intermediary warns consumer/patient |

## Duties of Care Owed by a Barrister

* General duty of care owed by barrister not to act carelessly and cause harm to client
* No immunity in Cdn law for potential negligence actions against lawyers (Demarco)
* Policy reasons:
  + Standard of a reasonable barrister in conducting litigation
  + Job of a lawyer is to advise a client, so as long as behaving reasonably in a broad scope courts will not find lawyers negligent
  + It takes a LOT to truly be found negligent as a lawyer
* Difference between judgment calls and truly reckless behaviour/decisions (Demarco)
* Liable for failure to abide by rules/established mechanisms for civil cases (Demarco)
* **Egregious error standard rejected** – normal standard of reasonableness withheld (lots of pro’s need to make difficult calls) (Folland v Reardon)
* Separate body of law dealing Crown prosecutors (Miazga)
* No general duties to third parties except very special circumstances (if learns of info that someone is in danger, duty to report re child abuse etc)

# Standard of Care

* 1. **Question of Law – What was the standard of care? Reasonable person test**
* **General rule of standard of care: objective test: reasonable person of ordinary intelligence acting prudently taking reasonable steps to avoid putting others at risk** Arland
* **Reasonableness standard** – modified objective standard – the conduct that would be expected of an ordinary, reasonable and prudent person in the same circumstances Ryan v Victoria (adds subjective analysis)
  1. **Question of Fact – Was there a breach? Did D meet the standard of care?**
* **Criteria**: (Ryan v Victoria)
* **Risk – 1)** probability of harm**, 2)** severity of loss
* **Balanced against**
  + **Burden – 3)** cost of avoiding risk**, 4)** social utility of D’s conduct - Custom, industry practice, statutory or regulatory standards

What was the Standard of Care: Reasonable Person Test

**General rule of standard of care: objective test: reasonable person of ordinary intelligence acting prudently taking reasonable steps to avoid putting others at risk** Arland

* Law created “person”, assumes that the reasonable person acts prudently, avoids risks
* Normal intelligence, not super hero Arland
* Standard assessed at time alleged breach occurred Arland
* Definition of negligence – omission to do something that a reasonable man would do, or doing something which a prudent and reasonable man would not do Blyth
* Reasonable man would do, or doing something which a prudent and reasonable man would not Blyth

**Whether D breached standard of care:**

**1 – Probability of injury**

**2 – Potential severity of injury**

* **Probability and severity balanced against risk and social utility**
* Must be assessed as at the time of breach, not in hindsight Roe v Minister of Health
* P must prove there was a reasonably practicable precaution that D failed to take Vaughn and Law Estate
* Must take precautions against reasonably foreseeable harms - Simple precautions like installing handrails, in a milk tank or at a transfer station could be cheap and easy ways to reduce the risk of reasonably foreseeable injuries Lovely v Kamloops, Bingley v Morrison Fuels

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| Arland v Taylor \*\* Objective standard: Reasonable and prudent person |
| **Facts**: P injured in MVA. Jury held D had not breached standard of care. P appealed on error in jury charge.  **Ratio**:   * Judge erred by charging jury to “put themselves in the parties shoes” which is not the correct standard. You put the “reasonable person” objective test. * **Standard of care by which a jury is to judge the conduct of parties is that of a “reasonable and prudent man”** * **Reasonable man: not superhuman, not an extraordinary or unusual creature, not a genius, no unusual powers of foresight – he is a person of normal intelligence who makes prudence a guide to his conduct – he does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. Conduct is guided by consideration which ordinarily regulate the conduct of human affairs. His conduct is the standard “adopted in the community by persons of ordinary intelligence and prudence”.** * Create no reasonable risks – not no risk ever * The less skilled/educated person must reach for a higher standard much that of a reasonable person test * Some inherent risk in many activities – not a breach in every case there is a risk |

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| Bolton v Stone \*\* Foreseeability |
| **Facts**: P walking on road beside cricket field, hit by ball and injured. Very unlikely.  **Ratio**:   * **Whether risk of damage so small that reasonable man would take steps to prevent danger** * **Acknowledgement that inherent risks in every activity – here probability of injury so small that didn’t breach standard of care** * **If risk of injury high, then don’t do it** * Some inherent risk in many activities – not a breach in every case where there is a risk |

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| Paris v Stepney Bourogh Council \*\* Cost of Risk Avoidance |
| **Facts**: Man with one eye working and eye hurt in workplace. Should employer have made him wear goggles?   * **Prudent for employer to foresee greater risk of harm from one eye** * **Fact specific – different standard of care for one eye man** * **Note \* old case – today would be different – would be goggles for everyone and additional for one eyed man**   **Dissent**: Likelihood of accident and gravity of consequences – higher risk / higher precautions, lower risk / lower precautions. One eye irrelevant. If not negligent failing to provide goggles for two eyed men, then should nt be for one eyed men b/c risk of injury was so remote. |

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| Vaughn v Halifax-Dartmouth Bridge \*\* Precautions to avoid damage / injury |
| **Facts**: Painting bridge, flecks blew onto car lot, damaged cars. Question of cost associated w/ preventing paint from falling.   * Negligent b/c could’ve taken other, cheap precautions to avoid damage (warning signs, someone wiping away flecks) * **If costs low, you should do it** |

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| Law Estate v Simice \*\* Social Utility |
| **Facts**: P’s husband died from cerebral aneurism after DRs didn’t take CT scan and sent him home. He wouldn’t have died otherwise.  **Finding**: DRs negligent – severity of harm that occurs if patient undiagnosed is greater than financial harm for CT scan - high standard of care owed  **Principles**:   * **Assessment of standard of care is amalgamate of industry standard and individually based standard (individual doctor may be greater than medicaire system)** * **Reasonable doctor (industry standard) – assessed on facts** * **Hospitals should be held to higher standard of care**   **Social Utility** high – severity of risk is high so shouldn’t consider costs |

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| Watt v Hertfordshire County Council \*\* Social Utility |
| **Facts:** Fireman responded to call that required jack, only 1 truck equipped to transfer jack, but it was in use. P used other truck and injured driver of car behind them.   * *“One must balance the risk against the end to be achieved”* Lord Denning * They were going to an emergency, high social utility (need people to respond), no negligence found * Permissible for defendants to run high risk where there is high social utility   + Usually only considered for public officer or public authority D   **Social Utility** |

## Standard of Care Expected of People w/ Disabilities

* To meet test in Fiala disability must be so severe that they meet both parts of the test

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| Fiala v Cechmanek \* mental disability |
| **Facts**: D had no previous mental illness, but had sudden manic episode. Jumped in car and strangled driver, she hit gas and injured person in other car.  **Issue**: How do we interpret reasonableness standard when person doesn’t have capacity?  **Ratio**:   * **TEST Person who suffers mental problem will be absolved of liability if can show they were not capable of being at fault**    1. **As a result of mental illness, D has no capacity to understand or appreciate the duty of care that the law imposes on people**   2. **Or unable to discharge that duty of care as he had no meaningful control over actions**      + **\*\* both must be shown on BOP**      + **\*\* if no to both questions, no liability (says Russo however the case says EIT** * **Fault still essential element of tort law - not just about compensation**   + Otherwise strict liability (Parliament can intervene if they like)   + **A person with a mental disability should not be held liable if they are not at fault** * Risk of isolating disabled people if they are known to carry no liability for their actions * Practical considerations of how to determine mental capacity * Slight modification to objective standard – only in these circumstances |

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| Watt v Hertfordshire County Council |
| **Facts:** Fireman responded to call that required jack, only 1 truck equipped to transfer jack, but it was in use. P used other truck and injured driver of car behind them.   * *“One must balance the risk against the end to be achieved”* Lord Denning * They were going to an emergency, high social utility (need people to respond), no negligence found * Permissible for defendants to run high risk where there is high social utility   + Usually only considered for public officer or public authority D   **Social Utility** |

## Standard of Care Owed by Children

* **TEST: children should be held to modified standard of care McEllistrum**
  + **Objective - what a reasonable and ordinary child would do in that situation**
  + **Subjective - what is expected given age, intelligence and experience (past activities, consequences of their activities, instructions the child might have received)**
* Under age of 5 generally cant be held liable
* Otherwise no specific age of liability

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| Joyal v Barsby \* Child contributorily negligent |
| **Facts**: 6 yr old child follows brother across road, stops by truck honking. Then darts out and hits car. Trained in danger of traffic.   * Standard of 6 yr old of average intelligence and experience – found contributorily negligent * Facts are important – establish legal standard (and breach)   **Other Principles**: (text as authority)   * Age really important – capacity varies * If child involved in adult activity, normal standard of care applies * Parents held vicariously liable – hard threshold – “reasonable parent of ordinary prudence expected to do”   \*Note – courts are cautious about changing standard – idea of normative act, proscription of how we should act   * Also risk of stigmatization with elderly, mentally ill   **Dissent**: would have found child 40% liable |

## Standard of Care Expected of Professionals

* Codes of Conduct specific to each profession
* General standard/rules from negligence
* Specific duties in tort law (subject to own standard)
* Standard of care is reasonable person with same training, experience, knowledge

**Other principles: (text as authority)**

* Professions that are hierarchically arranged – standard of care varies (ex. Senior resident vs. intern)
* Violation of code not necessarily negligence – just a guide
* People in secondary fields not held to SOC of primary fields (ex. Herbal med)
* Need expert evidence for complex scientific or medical manners (ter Neuzen)
* Physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances (ter Neuzen and Layden v Cope 🡪 small town vs city doesn’t matter)
* Lawyer or other professional that breaks a code of ethical conduct is not automatically breaching the standard of care Perez v Glambox

Pg 589

* Medical profession is assumed to adopt standards and practices that are not harmful to patients
* **In medical malpractice, if dr follows established practice they wont be found negligent unless the practice itself is found to be negligent.** This would only happen when practice was found to be frought with obvious risk so that any one without clinical expertise would be able to find it negligent
* Common sense is NOT the standard for specialized medical care – need expert evidence in professional negligence claims

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| White v Turner 1981 \* Professional standard of care |
| **Facts**: P has breast reduction surgery. Plastic surgeon botches surgery – post-op complications. Patient won – did surgery too fast compared to standard time, and didn’t suture well.  **Ratio**:   * **Standard**: **what a reasonable professional in the facts (circumstances) would do** * **Mere error in judgment doesn’t always breach SOC – entitled to make mistake** * **Poor result does not mean here has been negligence** * Look to specific industry for standards – here plastic surgery – standard that of a reasonable plastic surgeon * Must prove that her treatment fell below the practices and customs expected of a reasonable plastic surgeon * **Conforming to accepted practice and custom is strong evidence of following standard of care.** * **If a custom itself is unreasonable, the practice or custom will not provide a defense.** |

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| Ter Neuzen v Korn |
| **Facts**: P contracted HIV after receiving Artificial insemination from DR. Risk of HIV at the time not widely known. D had adopted standard medical practices at the time but jury still found him liable. BCSC re-trial decision found in favour of Dr Korn as very little was known about HIV in the time.  **Ratio**:   * **Standard practice doesn’t necessarily govern standard of care – must adopt obvious and reasonable precautions apparent to ordinary person** * **Expert evidence needed to define the practice and custom – but trier of fact doesn’t have to accept it** * SOC – specialists must exercise degree of skill of average specialist in the field * **Conduct of physicians must be judged in light of knowledge they ought to have reasonably possessed at the time of negligence** * Courts cant decide what is the best path or plan of care– must consider universally accepted rules of medicine * “when frought with obvious risks” – pro’s have a duty to know that standard isn’t satisfactory |

Degrees of Negligence

**Generally common law recognizes the degree of a reasonable person (with some modified subjective standards for certain groups).**

**Restricted by statute**

* Gross negligence is a marked departure from the norm (McCulloch) – has acted recklessly with disregard for the consequence
* Somewhere between criminal negligence, and ordinary tort negligence.
* This standard also applies to Police conduct, and trustees to bankruptcy

**Statutes for Municipalities**

* Higher standard – gross negligence (avoid floodgates problem) – more than standard, less than crim
* Reasonable limits (Crinson v Toronto) - aka don’t have to shovel right after snowfall

**Good Samaritan legislation**

* Higher standard – protect people that intervene to help
* Good Samaritan Act
* No liability for emergency aid act or omission unless gross negligence

**Sudden Peril Doctrine**

* Careless conduct exempt from liability if reasonable in emergency setting “reasonable people make reasonable mistakes under pressure” Canadian Pacific Ltd

**Custom**

* How do we change a standard if we think it’s wrong?

# Causation

* Main test – but-for test – **but for the actions of the D, would the P have suffered the** **loss**
* If not sufficient, then use reverse-onus or material contribution
* Links Ds breach of the standard of care to Ps loss
* Very factually specific – just need some evidence that loss
* Causation doesn’t need scientific precision – ordinary common sense on BOP (Snell)
* Unlike intentional torts, Ds held liable only for foreseeable injuries
* DIVISIBLE LOSS – single cause - a loss that can be attributed to the conduct of a single tortfeasor
* INDIVISIBLE LOSS – multiple causes - a loss that is attributed to more than one tortfeasor

**But-for Test Clements (clearest rule)**

* **Causation is a factual inquiry** Clements / Ediger
* **Legal test: P must show on a BOP that “But For” D’s negligent act, which was a breach of the standard of care, the injury would not have occurred** Clements / Ediger
* Sometimes called “cause in fact” – Did the D’s negligence cause the Ps harm?
* Causal relationship of action and injury must be made out in evidence Kauffman
* Assessed using common sense principles Clements
* **But for the actions of the D, would the P have suffered the loss?** Clements
* **Need balance of probabilities (not scientific certainty**) **Snell LEADING CASE**
* *If the injury would have occurred regardless of the Ds negligent act, the act is not considered a cause*

What is and is not enough to satisfy the test?

* It is not enough:
  + that the defendant’s conduct “possibly” caused harm.
  + that the defendant’s conduct deprived the plaintiff of a chance to avoid injury. This is called “loss of chance” and the Supreme Court rejected it in the 1991 case *Laferiere v Lawson*, [1991] 1 S.C.R. 541 (see text at 66)
* It is enough:
  + that the defendant’s conduct “probably” caused the harm.
  + (where multiple forces contribute to an accident) if a person's [negligence](http://www.duhaime.org/LegalDictionary/N/Negligence.aspx) substantially contributed to an accident, it is also a cause of the accident.   
    [Note that this is possible a cause of an accident by acting along with others, or by failing to prevent it. It is distinct from the “material contribution to risk test” which we will discuss below]
* What about other causes of the harm?
  + If the defendant can prove the injury would have happened anyway, regardless of the defendant’s negligent act, then causation is disproved. An example would be alleged negligence in the slow manner of a rescue. Two passengers on a boat fall overboard and the owner of the boat has a duty to rescue them. But if the evidence suggested that the two people who fell in the water died instantly, of heart attacks, then even the quickest rescue would have achieved nothing – so, in this situation, no causation.

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| Kauffman v Toronto Transit \* Causal relation between breach and injury |
| **Facts**: Scuffle at top of escalator – domino effect. Person at bottom injured and suffered loss. Standard and breach – no testing of handrail design.  Did damage occur b/c of lack of appropriate handrail? NO Courts found insufficient causation.  **Fundamental principle: causal relation between breach and injury must be made out by evidence - But –for test** |

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| Barnett v Chelsea and Kensington Hospital (1968) |
| **Facts**: 3 men go to hospital after vomiting after drinking tea. Not assessed, sent home. Man dies of arsenic poisoning 5 hours later. REALLY BAD MEDICAL MGMT!!  Was dr’s negligence cause of man’s death? NO  Causation b/c antidote wasn’t available – would’ve died anyway. Expert evidence that there was no reasonable prospect of surviving.   * **Factual determination of whether D’s actions caused P’s loss** * **The burden of proof is on the plaintiff to prove that the negligent actions of the defendant caused the outcome, i.e. they must establish that if the negligent act did not occur, then the damage would not have happened** * **But-for test – common sense principles based on robust, pragmatic application of the facts (Clements)** |

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| Ediger v. Johnston, 2013 SCC 18, [2013] 2 S.C.R. 98 |
| **Facts:** Failed forceps delivery outside of OR. Breach of standard of care.  **Issue: Would injury have occurred but for Johnson’s actions? NO 🡪 finds causation**   * 1. Did the trial judge err by concluding that Dr. Johnston’s attempted forceps delivery caused the persistent bradycardia? NO   2. Did the trial judge err by concluding that Dr. Johnston’s failure to arrange for “immediately available” surgical back-up caused Cassidy’s injury? NO   3. Did the trial judge err by concluding that Dr. Johnston’s failure to advise Mrs. Ediger of the material risks of a mid-level forceps procedure caused Cassidy’s injury? * Correct causation test is but for * Inference of causation (From Snell) P has burden of proving on BOP, doesn’t need scientific certainty, does require expert evidence, |

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| Benhaim v. St-Germain, 2016 SCC 48 |
| **Facts:** Malpractice re: missed dx of lung cx in pt who then died. Was dr negligent if earlier diagnosis and treatment have saved his life?  **Trial**: No causation  **SCC**: Trial judgement of no causation restored  **Issue**: Is a trier of fact required to draw an adverse inference of causation against a D where the D’s alleged negligence undermines the Ps ability to prove causation? NO  **Principles**:  **Circumstances in which inference of causation may be drawn – from Snell**   * If no evidence to rebut an inference that the action caused the injury * Not essential to have a positive medical opinion to support a finding of causation * Application of common sense to draw an inference, not speculation * P assumes the burden of proving causation on a BOP quoting Ediger * Causation does not need to be proven with scientific or medical certainty, however courts should take a ‘robust and pragmatic’ approach to the facts, and may draw inferences of causation on the basis of common sense. quoting Snell and Clements * Can draw inference without “positive or scientific proof”, if the D does not prove evidence to the contrary * If the D does prove evidence to the contrary, trier of fact may take into account the relative ability of each party to produce evidence. Ediger   **Where there is causal uncertainty, and difficulty establishing facts in the absence of complete information, must balance two considerations:**   1. Ensuring Ds are held liable for injuries only were there is substantial connection between the injuries and their fault 2. And preventing Ds from benefitting from the uncertainty created by their own negligence. |

## Established Exceptions to But-for Test

**\* If underlying goals of tort law risk being frustrated (ie absence of remedy for P)**

1. **Multiple Negligent Defendants Rule**

**Cook v Lewis**: 2 men hunting, fire at same time, shoot other hunter. Unclear which one causally responsible

* Where can’t distinguish between multiple D’s – relax but-for test, replace with reverse onus (rare)
* Court applies to remedy unfairness of but-for test in some situations – to deny finding someone responsible violates principles of fairness – nobody would be held accountable
* **If both Ds have breached SOC, both would be found negligent *prima facie* if:**
  + **Two defendants (expanded in Clements to more than 2)**
  + **Harm definitely came from one of them**
  + **Impossible to prove which one caused harm**
* **Unless Defendant(s) could individually disprove causation on BOP – creates reverse onus**

1. **Learned Intermediary Rule**

**Hollis v Dow Corning** – breast implants case – couldn’t prove that Dr. would’ve informed her 🡪 Dow liable

* Manufacturers can’t use learned intermediary rule to shield from claims arising from own negligence - exempted from but-for test
* Would create anomalous situation where negligently injured P has no cause of action

1. **Informed Consent Rule**

**Hopp v Lepp and Reibl v Hughes**

* Healthcare professionals have a duty to put patients in position to make informed decisions about twhether to consent to proposed treatment.
* **Objective/subjective burden** – would a reasonable person in the Ps position have consented if he or she had been adequately informed?
* Subjective std of causation alone rejected by courts as would open floodgates to disgruntled patients
* **NOT GOOD LAW**: Purely subjective test: Did the P understand the warning that was given to them? (Arndt v Smith) Court decides if P would have had the treatment if adequately informed. Don’t want assessment to boil down to hindsight

## Emerging Exceptions to But-for Test

* Where facts complicated, and unable to conclusively point to evidence of causation – but-for test not sufficient (very rare – last resort)
* Ways for the courts to modify the but for test, come in and out of favour

1. **Materially Increased Risk of Injury Test Snell (CONFIRMED ATHEY),**

* **“But for” test must be applied in robust, pragmatic, common sense fashion Snell, Clements**
* **If the Ds negligence materially increases the risk of a particular kind of injury occurring and that very injury occurs, then the D will be deemed to be a cause 🡪 Burden of proof shifts to the D to disprove causation on BOP McGhee v National Coal Board (rely on Snell not McGhee)**
* Evidence connecting breach to injury may allow judge to infer that D’s negligence probably caused the loss Snell, Leonati
* D’s negligence doesn’t need to be sole cause of injury – if part of cause of injury, D may be found liable to P for whole of losses Leonati
* Patient unable to prove as he was anesthetized on the operating table so unable to assess harm occurring
* **Patient need only prove that D created a risk of harm and that the injury occurred within the area of risk. An inference of causation in this situation is warranted in that there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself** Snell
* **Policy driven rule** – applies to ensure underlying goals of tort law met Clements
  + Allows exceptions to but for test where unfair results
  + Compensation, deterrence, corrective justice

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| Snell v Farrell SCC \* Inferred causation |
| **Facts**: Doctor performed cataract surgery on P. Injected drug, saw a problem. Continued with surgery. Caused blindness. **Standard and breach found, but difficult to concretely find causation**.  Relied on McGhee, found a prima facie case of negligence in continuing operation after seeing problem. Burden shifted to D to disprove and was unable to so found liable.  **Rejects but for test - Says the but for should be flexibly applied to allow P to provide enough evidence to INFER causation, not have to prove it.**  **Defendant can put evidence to disprove / rebut the Ps evidence**   * If facts different, then can apply material contribution rule – contribute to the risk is equal to contributing to harm * Special situation – with malpractice, facts lie within knowledge of the D * **Causation can be found by inference- no evidence to the contrary** * Here it is basically the same as reverse onus (although courts say it isn’t) * Creates flexibility – courts have way to fill in the gap where fairness an issue   + Ex. When evidence of causation in D’s hands – medical malpractice |

1. **Material Contribution to Injury Test Clements (develops it from Snell to contribution to injury as opposed to risk)**

* First introduced in Athey v Leonati, evolved in Snell,
* But for test is standard causation for cases with multiple causes where but-for test is impossible to prove causation through no fault of the P Clements
* **Material contribution to injury test substitutes proof of material contribution to risk instead of the requirement of but for causation** Clements
  + **TEST: Clements**
  + **Multiple negligent defendants (had been limited to 2 in Cook v Lewis)**
  + **Each caused harm or contributed to harm**
  + **But for the defendants actions there would not have been harm**
* **Only applies where it is impossible to say that a particular Ds negligent act in fact caused the injury Clements**
* Imposes liability not because the act caused the injury, but contributed to the risk the injury would occur Clements
* Material contribution to injury is not a causation test – its is policy driven rule of law designed to permit Ps to recover in cases where they cant prove causation (MacDonald v Goertz quoted in Clements)

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| Walker Estate v York Finch General Hospital |
| **Facts**: HIV man donates blood. Red Cross had some knowledge of AIDS but didn’t warn P. Walker receives blood and dies from AIDS.   * **Material contribution** – D’s conduct was a sufficient (not necessary condition) * Material contributing factor – outside the de minimus range (obiter) * Notes some situations where but-for doesn’t apply, like when the D has no control over what P will do / multiple contributing causes * **\*Standard of breach should be assessed based on knowledge at time of breach** * **Hospital was seen as learned intermediary**   \*Note – normative proscriptions – what they should’ve done was same as American Red Cross. Blanket statement against gay men issued. Loss of faith in Red Cross, and they lost monopoly over blood bank. |

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| Clements v Clements 2012 |
| **Facts**: D driving motorcycle in wet weather with P (wife) on back. Motorbike overloaded by 100 lbs. Nail punctured tire. D sped to 120 in 100 zone passing car. Nail fell out, rear tire deflated, motorcycle crashed. P sued D for severe brain injury.  **Trial**: D’s negligence contributed to Ps injury but P could not satisfy but for test of causation due to limitations in crash reconstruction evidence. Applied material contribution test and held D liable.  **CA**: set aside and dismissed Ps action b/c failed to satisfy but for test and did not want to apply material contribution test  **SCC** material contribution test not suitable on the facts, returned for new trial    **Issue**: **Does the but-for test apply in this case, or can a material contribution to risk suffice? BUT FOR but also establishes the material contribution to risk test.**  **Ratio**:   * **Material contribution to risk is rarely used – only when a P cannot prove but for causation test** * **Must show causation impossible to prove**:   + How do you distinguish between where its truly impossible to prove causation, or where the P simply failed to prove on a BOP?   + Scientific causation not required Snell   + Applies in cases with multiple tortfeasors (ie Cook) only, and only when the but-for test fails |

Multiple Causes

* Are the injuries **divisible**? (Divided into distinct losses that are each attributable to a single tortfeasor?
* If divisible, can have separate cause of action against each tortfeasor and but-for test will apply Athey
* Distinguished from multiple tortfeasors with one harm
* **Joint tortfeasors can share liability when: Cook v Lewis  
  1) principal and agent  
  2) master and servant (employees committing tort in employment)  
  3) concerted actions or joint ventures (two or more individuals acting to bring about a comm illegal, dangerous end or one which negligence can be anticipated)**
* **IF Joint tortfeasors, only have to prove one of them was a negligent cause! Jointly and severably liable – BC Negligence Act** and **ATHEY**

Independent INSUFFICIENT Causes

* Several factors combine to cause the Ps loss
* No one factor is independently sufficient to cause the loss without the others
* Any defendant found to have negligently caused or contributed to injury will be fully liable for it (under causation) Athey v Leonati

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| Athey v Leonati SCC |
| **Facts**: P is car accident. Had pre-existing back problem. Exercising and pops his back – herniated disc. Is the negligent driver from car crash liable?  **TRIAL** YES but liability reduced to reflect the role played by his pre-existing condition.  **CA** Upheld  **SCC** NO liability not reduced – the disc herniation is **a single indivisible injury** and any D found to have negligently caused it or contributed to it will be fully liable. No evidence of crumbling skull or that herniation would have occurred without accident.  **Principle**   * But-for test – sufficient to establish liability * If facts more complicated – then maybe use material contribution * **Any defendant found to have negligently caused or contributed to injury will be fully liable for it (under causation)** * D not excused from liability b/c his actions aren’t sole basis for causation and there are other causal factors   **Pre-existing condition not relevant for causation (but maybe for damages**)  Thin-Skull and Crumbling Skull Rule   * Must take victim as you find them * Crumbling skull – recognizes that pre-existing condition was inherent in the Ps original position. * D’s do not need to put P in better condition that they found them, and need not compensate the P for pre-existing condition or damages that would have experienced anyways * **Only held liable for harm that actually caused (so to exacerbate pre-existing harm) – only pay for the INCREASED harm/injury** * **Fact that D contributes to harm is enough to find them liable** * D is liable for the additional damage but not pre-existing damage * This can come into play in assessment of damages – if it would’ve affected them in the future anyway |

# Remoteness

* **Even if D a) owed a duty of care and b) breached the standard of care in a way that caused P to suffer a loss, liability will be denied if the connection between the breach and the loss was too remote**
* **Close relationship between remoteness and causation.**
* **Causation – factual connection –** Did the D’s conduct cause the P’s loss?
* **Remoteness – legal connection -** Question of law for judge –connection between D’s breach and P’s loss
* **Policy mechanism –** balance D’s fault and damage resulting - considers fairness, justice and policy
* **To contain liability within fair and reasonable boundaries –** limits extent of D’s liability
* Not found with directness – use **reasonably foreseeable** standard
* **Is there an intervening act – enough to break the chain of causation?**
* **Foreseeability is much more narrow than duty of care – specific kind of conduct committed can kind specific kind of loss**

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| **Directness Test (no longer the law in Canada)**   * Established “directness” as test for remoteness. * In order to recover, a plaintiff had to show that the loss was a direct consequenceof the defendant’s negligent act. * If the P’s loss was a result of a logically connected sequence of events that flowed from the defendant’s negligent act (or omission), with no intervening causes, then the damages were not too remote. * Tends to favour Plaintiffs | ***Re Polemis & Furness Withy & Co .,*** [1921] 3 K.B. 560 (C.A.) 🡪 D was loading a wooden plank into a ship. Through D’s negligence, the plank fell. During its fall it struck other objects, causing a spark. The spark caused some gas to ignite. The resulting explosion destroyed the ship.  Despite the unforeseeability of such a bizarre chain of events, the defendant was liable |
| **The Reasonable Foreseeability Rule**   * **Debatable what must be foreseen and how certain the foresight must be** |  |
| * **Overturned directness test in Polemis** * **New test is foreseeability – was the P’s loss a foreseeable consequence of the D’s negligence** * Sometimes foreseeable harm can occur in indirect ways, failing the “directness” test * Test could be difficult to apply, due to difficulties in identifying the exact chain of events. A large part of the problem was that the test itself was never clearly defined. * **Rule: If it is reasonable foreseeable that damage is a probable consequence, then it is not too remote and compensable** * **Favours D’s** | Wagon Mound 1 *Overseas Tankship (U.K.) Ltd . v. Morts Dock and Engineering Co. Ltd* [1961] A.C. 388 (P.C.)  D’s let oil spil from ship into water, spread 600 ft to Ps wharf where employees were welding, metal from welding ignited oil, damaged wharf and 2 ships.  JCPC found not foreseeable, D’s not liable |
| **Modified Wagon Mound – focus on type of injury not cause**   * The *exact cause* of an injury need not be foreseeable—that is the exact sequence of events leading to it, as long as the **type (or kind) of injury** is foreseeable. * It also held, importantly, that the *extent* of the injury is not important either—as long as it is a foreseeable kind. | Hughes v Lord Advocate [1963] A.C. 837 (H.L.) 🡪 Municipal employees working under roadway, took a break, left hole open but covered and fenced and lamps around hole. Boys playing nearby, through an unlikely sequence of events, one of the paraffin lamps exploded, sending up a 30-foot-tall plume of flame. The explosion injured one of the boys: burning him and causing him to fall into the hole he had just climbed out of. The boy sued the municipality. |
| **Confirmed remoteness test of reasonable foreseeability from Wagon Mound 1 and Hughes**   * Interpreted Wagon Mound 2 🡪 confirmed that risk needs to be more than a mere possibility – likely closer to probability. Focus is on kind of harm vs specifc events leading to harm * Added that in cases of mental injury the test must be considered of a person of “ordinary fortitude” * **TEST: If it is foreseeable that a person with ordinary fortitude would suffer a psychiatric injury of some kind, then the D has to take the P that the D gets, and is liable for that injury** * **To be compensable, the injury must amount to a “recognizable psychiatric illness”.**   **ONLY APPLIES TO PSYCHIATRIC HARM In absence of physical damage – thin skull rule still applies other harms** | Mustapha v. Culligan of Canada Ltd. 2008 SCC 27 |
| **Modifies foreseeability needs to be possible**   * Damage/harm caused by negligence only needs to be possible, not probable * Changed the test from foreseeability as to a probability to foreseeability as to a possibility * P need only show that it was reasonably foreseeable that the injury could *possibly* result. * The harm must be a “real risk” that a person would not see as “far-fetched” - more than a mere possibility. | “Wagon Mound 2” Overseas Tankship (U.K.) Ltd . v. Miller Steamship Co. Pty. Ltd., The Wagon Mound (No. 2) , [1967] 1 A.C. 617 (P.C.)  The same fire basis of *The Wagon Mound 1* basis of a second action, this time by two boat owners whose boats were damaged in the fire. Court found loss by fire was NOT too remote – due to evidence from the engineers who were doing the welding, admitted that they foresaw some risk of furnace oil igniting |
| **Thin Skull Rule**   * IN order to establish liability must be proximate cause for initial injury. * The consequential injury (flows from initial injury)   + Needs to be proximate   + Does not need to be the same type of injury as the initial injury   + Type of consequential injury need not be foreseeable. | Smith v Leech Brain and Co 1962  D liable for burn to lip that caused cancer and death |
| * Not reasonably foreseeable that “moderate cervical strain with soft tissue damage would cause type of harm * BUT she was predisposed to greater consequences of moderate physical injury than average person | Marconato v Franklin 1974 BCSC 🡪 Car accident triggered major personality change. D found liable |
| **Crumbling Skull vs Thin skull**   * Thin skull – vulnerable but not doomed from outset, could avoid harm by being careful and avoiding injury * Crumbling skull – doomed to damage from outset * D only liable for extent of damage that worsened P’s condition | Athey v Leontai 1996 |

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| Mustapha v Culligan Water \*\* Test for Remoteness |
| **Facts:** Fly in water bottle, caused nervous shock 🡪 dismissed as person of ordinary fortitude would not have suffered the psychiatric harm the P suffered  **Rule:**   * Confirmed remoteness test of reasonable foreseeability from Wagon Mound 1 and Hughes * Interpreted Wagon Mound 2 🡪 confirmed that risk needs to be more than a mere possibility – likely closer to probability. Focus is on kind of harm vs specifc events leading to harm * Added that in cases of mental injury the test must be considered of a person of “ordinary fortitude” * **TEST: If it is foreseeable that a person with ordinary fortitude would suffer a psychiatric injury of some kind, then the D has to take the P that the D gets, and is liable for that injury** * **To be compensable, the injury must amount to a “recognizable psychiatric illness”.** * **ONLY APPLIES TO PSYCHIATRIC HARM In absence of physical damage – thin skull rule still applies other harms** |

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| Wagon Mound #1 & #2 |
| **Facts:** Ship in harbor leaking oil – floats to wharf where welding. Spark flies off, lands on rag, ignites oil. Damages P and wharf. Reject directness test (policy reasons) – extends liability too far.  **Rule:**   * **Wagon Mound 1 - D will only be liable for reasonably foreseeable consequences of its negligence**    + Rationale from Donoghue v Stevenson – “public sentiment of moral wrong-doing for which offender must pay”   + Concern with avoiding injustice * **Wagon Mound 2 (engineers admitted they foresaw an unlikely risk)**:   + Damage/harm caused by negligence only needs to be possible, not probable   \***Affirmed in Winnipeg Gas**   * Just need to reasonably foresee type of damage that occurs – not full extent and manner * Ambit of foreseeability broad |

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| Hughes v Lord Advocate 1963 \*\* KIND of injury matters, not cause |
| **Facts**: Post office people left paraffin lamp and open manhole. Boy breaks lamp, causes explosion, and injures himself. Is damage too remote?  **Principles:**   * **Exact cause of injury or exact sequence of events leading to injury does not have to be foreseeable as long as they TYPE of injury is foreseeable.** * Consistent with Wagon Mound #1 * Don’t need to foresee precise nature of accident, just that loss will occur – injuries that may result from accident of that nature (ex. Lamps give rise to fire, fire gives rise to burns) * **D can be held liable even when damage actually suffered greater than that which was foreseeable** |

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| Smith v Leech Brain & Co 1962 \*\* Special remoteness issues |
| **Facts:** Man suffered a burn to his lip at work. Because of earlier long-term exposure to tar vapours, he had become susceptible to getting cancer. The burn did cause cancer, and he died. The employer was found negligent in causing the burn.  **Held**: **Applying the thin skull rule, the court found the employer liable for the plaintiff’s death as well. The seriousness of the damage, getting cancer and dying, flowed from his weakened constitution and was not too remote for recovery.**  **Thin Skull Rule** –   * Take the victim as you find them, no matter their vulnerability. Athey v Leonati * IN order to establish liability must be proximate cause for initial injury. * The consequential injury (those that flow from initial injury)   + Needs to be proximate   + Does not need to be the same type of injury as the initial injury   + Type of consequential injury need not be foreseeable.   **Crumbling Skull Rule** – CONTRAST THIS |

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| Assiniboine South School Division v Greater Winnipeg Gas \* foresee any damage, general |
| **Facts**: Father gave boy power toboggan – outfitted for boy. Hit school, leaked gas, flame caused explosion. Duty and breach proven, causation. Too remote? Foreseeable that type of accident would occur.  **Principles**:   * **Reaffirms remoteness test – damage is of a kind that reasonable person should have foreseen** * **Only requires you to foresee damages in a general way**   + Not extent of damage, or manner of accident   + Broad ambit of damage * Law doesn’t exclude D from liability merely b/c there were other causes of loss   \*Note these cases combine to create broad, low-threshold, not difficult to meet standard for remoteness. |

## Intervening acts

* Situations in which a defendant is negligent and subsequently a second cause intervenes resulting in a different loss, or aggravating the loss that the defendant’s negligence causes.
* Used to be “the last wrongdoer” doctrine but now considers all causes’ contribution to harm
* Depends on moral blameworthiness
* **Test: Is it within the “scope of risk” set in motion by D (Bradford) sufficient enough that severs the chain of causation?**

**3 categories**:

1. Naturally occurring
2. Negligent intervening acts
3. Intentional intervening acts

**Intervening Act either:**

* Breaks the chain of causation between D’s original act and the harm caused, thus no liability to D for original act – however this is rare
* Chain of causation not broken, D responsible for the consequences of the intervening act as well as original act.

**Remoteness Tests:**

* D’s negligence caused some harm to the plaintiff, but other events affected the degree of loss or added additional injuries that bear some connection to the original loss.
* **Foreseeability Test**:
  + Still used in some cases, but moreso the within the scope of risk test
* **Within the Scope of Risk test**:
  + Broader than foreseeability
  + In order for original tortfeasor to be liable for subsequent damage, the harm must have been in the scope of risk caused by the first negligent act. Bradford
  + **The second cause and the resultant damage must be within the scope of the risk of the first negligent act before the defendant will be liable** Bradford
  + Both the second cause *and* injury must fall within the chain of causation from the first injury Bradford

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| Bradford v Kanellos \*\* intervening act broke chain of causation |
| **Facts**: Fire in restaurant and grill had a fire system that made a hissing noise, so people thought gas leak, panicked and ran. P sustained injuries in ensuing chaos.  Original act restaurant not cleaning grill causing fire  2nd act person calling out “Fire”.  D – restaurant owner  **Trial**: damages awarded to P. Although the yelling was idiotic, panic was foreseeable following the scream so the chain of causation not broken. (Used foreseeability test).  **CA**: No liability for restaurant owner.  **SCC**: **Test for determining whether D liable is whether the intervening act was within the risk created by the fire, then the chain of causation was not broken, so would be liable. If not within the risk created by the fire then would be too remote and D would not be liable. Held that the screaming customer would not have been within the scope of the risk so D not liable.**  **Dissent**: Used the foreseeability test, and would have found D liable if intervening act was foreseeable and part of the natural chain of events. So would have held D liable. |

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| Price v Milawski \*\* intervening medical error |
| **Facts**: P injured ankle in soccer game. Dr. xrayed foot instaed of ankle, said ankle not broken. Went to GP, then to ortho. Ortho asked for report but did not order new xrays. Dx with sprained ankle and applied cast. Eventually went to another ortho, new xrays revealed fracture. Suffered permanent disabilities due to delays in treatment.  **Trial**: Both ER Dr and 1st ortho found negligent and held equally liable  **CA**: Affirmed both D’s negligent  **Held**: Actions of both Dr’s were reasonably foreseeable, both found negligent.  **Principle**: **Person can be held liable for future damages arising in part from subsequent act of another, and part from own negligence (if both RF)**  **Foreseeability test:** Where the subsequent negligence and consequent damage were reasonably foreseeable as a possible result of the original negligence, then the first doctor would be liable for all damage including from the time of the second doctor’s intervention forward, and the 2nd doctor was liable from his intervention forward. |

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| Hewson v Red Deer |
| **Facts**: Employee of D left tractor w/ key in ignition and cabin unlocked. Later found that tractor had rolled into a house. Someone had put it in motion, then jumped out.  **Trial**: reasonably foreseeable that anyone could have been tempted to put unattended tractor in motion. Used reasonably foreseeability test. D liable – damage not remote  **CA**:   * D not liable. * Found that intervening act broke chain of causation – too remote * Anyone with a mind to do so could still put it in motion |

# Defences

* Negligence is hard to prove - minimal defences available.
* Burden of proof on D to prove defense.
* Now based on combo of statute and CL
* Principle: even if P was negligently injured by D, damages should be reduced or denied on the basis of a defense.
* Pertain to Ps own behaviour:
  + Contributory negligence
  + Voluntary assumption of risk
  + Participation in a criminal or immoral act
* Pertain to factual circumstances of D’s conduct and can be seen as special denial of negligence:
  + Inevitable accident

## Contributory Negligence

* Defence recognizes where P’s conduct caused or contributed to own loss, they are liable in part or full.
* Can be ACT or OMISSION
* **Elements**: P failed to take reasonable care which resulted in Ps loss by either:

1. Contributing to accident that caused loss
2. Exposing himself to risk of loss
3. Failing to take reasonable precautions that will reduce harm if accident was to occur (not wearing seatbelt)

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| **Modified objective standard:**  **Test: What an ordinary prudent man might reasonably have done under stress of emergency / in the circumstances** | Walls v Mussens 🡪 D drives timberjack into service station. Negligence of D, fire starts. D tries to throw snow. P knows where fire extinguishers are, but panics and forgets. Joins D to throw snow – causes damage.   * P NOT contributorily negligent - Court allows for “agony of the moment” – modified objective standard |
| Standard of care imposed is affected by age, disabilities, professional training, facts | Myers v Peel County Board of Eduation  Marshall (Litigation Guardian of) v Annapolis County District School Board 🡪 4 yo struck by school bus not contrib negligent d/t age incapacity |
| **Partial defence** – doesn’t let D off the hook   * Passenger who doesn’t believe in seatbelts is still negligent if they fail to wear it (have not taken reasonable precautions for his own safety) * D must prove P did not wear seatbelt AND that wearing it would have lessened or prevented injury * **P knew or ought to have known** that wearing seatbelt would reduce possibility of injury | Gagnon v Beaulieu 🡪 front seat passenger, no seatbelt  Not negligent if wearing seatbelt would not have made difference on the facts, negligent if it would have as failure (omission) contributed to the nature and extent of injuries. |
| **Factually specific** – varies case by case | Wells v Parsons |
| **Corrective justice** – courts more lenient when insurance company paying; tension of $$   * Court more likely to consider characteristics of P where corrective justice allows | Wells  Bow Valley |
| Previously all or nothing basis - CL rule now abolished due to manifest unfairness – doesn’t fit w/ goals of tort law (and encourages care + vigilance) | Bow Valley |
| **Apportionment of Loss** |  |
| * Up to judge to apportion contributory negligence based on assessment of fact (s.1) * Damages awarded=**proportion of liability** (s. 2) * If not possible, then divide equal liability (50/50) – default (s. 4) | Negligence Act (see full act in CAN) |
| * Mini negligence analysis, duty of care, standard/breach, foreseeability, proximity * **A plaintiff’s contributory negligence will not limit the recovery unless it is a proximate cause of injury** * “But for” D’s action, P wouldn’t have fallen. However, accident not reasonably foreseeable, not within “scope of risk” so not proximate, no liability | Mortimer 🡪 horseplay, one falls through poorly constructed wall on stairs, becomes quadriplegic  🡪 not contributorily negligent - building company and city inspectors liable |
| **Voluntary Assumption of Risk**   * When P consents to risk of harm that’s generated by D’s conduct and voluntarily assumes risk, P can’t sue D for damages from risk of harm. * Courts reluctant to apply this defense – inflexible and could lead to injustice * Complete defense, no recovery available | Crocker v Sundance – tubing so dangerous, defense rejected even though P signed waiver |
| **Violenti non fit injuria – to one who is willing no harm is done**  D must show:   * P voluntarily assumed risk - Express or implied agreement of P to accept risk without compensation * NOT If P knew or ought to have known of risk – but whether the circumstances were such that P assumed whole risk   **Courts only apply where parties plan to put themselves in harm’s way**   * Need to consent w/ full capacity for risk of physical and legal harm * Very difficult to show abandonment of right to sue | Dube v Labar 1986  P and D drinking together. Both drinking and driving. P couldn’t start car, so D takes over. P grabs wheel and they crash. |
| **Participation in Criminal or Immoral Act**   * *Ex turpi causa non oritur action* from dishonourable conduct no action will lie * Complete defense, no recovery available * Narrowly interpreted * Traditionally, the *ex turpi* defence applied when the parties had both been participating in a criminal or immoral activity (some later cases restricted the defence to criminal acts only), and as a direct result of those acts the plaintiff was injured. |  |
| * Applied rarely w/ great caution for personal injuries suffered while doing an illegal act * All but abolished by SCC in Hall * **P’s illegal or immoral conduct would only be relevant if the P was seeking compensation for actual physical losses or injuries. These claims are distinguished from claims in which the P was seeking to profit from his wrongdoing.** * Only applies where integrity of legal system is at threat * Only applies when:   + P is trying to profit from his illegal conduct   + P is trying to escape criminal sanction * 2 situations: * Where P tries to use tort action to directly profit from illegal conduct * or where P uses tort action to get out of criminal liability   \*Note- b/c of corrective justice principles – doesn’t factor into duty of care – only comes into analysis at very end (D v S – duty is owed toward everyone, not just those who act legally/morally) | Hall v Hebert  Parties both drunk. D stalled car on steep road. P allowed to drive. Flipped car and injured. Sued D for allowing him to drive drunk. Immoral act – drunk driving.  D argued ex turpi defense, P was driving drunk (illegal) at time of his injury. |
| * *Ex turpi* * Was able to link his sexual abuse to his drug addiction, to his drug dealing to feed his habit * The plaintiff sued the guard and the government, claiming that the sexual assault had, effectively, ruined his life, and had been a major cause of his subsequent troubles. * He won damages at trial for general and aggravated damages, future care costs, lost wages, and future income loss. * The Supreme Court of Canada had to consider whether the plaintiff was entitled to lost wages for time he spent in prison, during which he was not able to work. The Court declared that the defence of *ex turpi* could be applied to bar the plaintiff’s recovery for lost wages, since allowing the claim would “create that conflict between the criminal and civil law.” The plaintiff should not be allowed compensation for lost wages for time spent while incarcerated. He had to bear responsibility for the wages lost due to his criminal punishment—even if the incarceration had a causal link to the sexual assault that was the basis of the claim. | British Columbia v Zastowny, 2008 SCC 4  P was a drug dealer, lived off profits for long time, had been victim of sexual abuse for a long time. |
| **Inevitable Accident**   * Where P sues D, and D says that negligence wasn’t preventable * Complete defence – rarely applied * Negligence analysis already can take this into account   **Principles**:  To establish defence:   1. Problem couldn’t have been prevented by exercise of reasonable care 2. That D couldn’t have avoided accident caused by problem   Subsumed by negligence analysis | Rintou v X-ray and Radium Industry  Driving, brakes didn't work. Hit other car. |
| * May be found if P encourages careless behaviour (Allen) |  |
| * Not necessary that p’s neg as only cause but must be proximate or effective cause | Zsoldos |
| * Individual must take reasonable care of his own property | Heeney |

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| Gagnon v Beaulieu |
| **Facts**: Terrible car accident, P injured. She wasn’t wearing seatbelt – if she had, damages would’ve been decreased.  **Principle**:   * **P can contribute to loss through positive action or omission** * ALSO – example of tort law prescribing behaviour * D must prove that seatbelt not worn * Can analogize to other situations (ex. Helmets). * **5 -25% blame to P usually** * **Factually specific** (ex. Pregnant lady can’t wear seatbelt b/c it hurts) |

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| Mortimer v Cameron |
| **Facts**: friend drunks, playing around at party, fall down hallway stairs. Fall through poorly constructed wall, fall outside. 2nd fall causes P to become quadriplegic.  **Issue**: Can P be found contributorily negligent?   * **No – they should be able to rely on wall - Reasonably foreseeable that won’t crumble** * **Apportioned liability to city and company (not P)**   **Principles**:   * Mini negligence analysis – courts adopt reasonable foreseeability of loss * Building company – bears great burden, carries responsibility for life of building |
| Negligence Act RSBC [1996] c 33 |
| Apportionment of liability for damages **1**  (1) If by the 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 to which each person was at fault.  (2) Despite subsection (1), **if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be** **apportioned equally**.  (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed. Awarding of damages **2**  The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:  (a) the damage or loss, if any, sustained by each person must be ascertained and expressed in $;  (b) the degree to which each person was at fault must be **ascertained and expressed as a percentage of the total fault**;  (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;  (d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess. Apportionment of liability for costs **3**  (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the **same proportion as their respective liability** to make good the damage or loss.  (2) Section 2 applies to the awarding of costs under this section.  (3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly. Liability and right of contribution **4**  (1) If damage or loss has been caused by the **fault of 2 or more persons**, the court must determine the **degree to which each person was at fault.**  (2) Except as provided in section 5 if 2 or more persons are found at fault  (a) they are **jointly and severally liable to the person suffering the damage or loss**, and  (b) as between themselves, in the **absence of a contract** express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault. Negligence of spouse in cause of action that arose before April 17, 1985 [omitted] Questions of fact **6**  **In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.** Actions against personal representatives [omitted] Further application **8**  **This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.** |

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# Liability of Public Officials

* Tribunals
* Quasi-judicial agencies
* Regulatory agencies
* Municipal govts
* Crown Corporations (sometimes – if corp is agent of govt)

**Governmental Liability**

Federal: Crown Liability and Proceedings Act, R.S.C. 1985, c 50,

Provincial (B.C.): Crown Proceeding Act, RSBC 1996, c 89,

* Historically crown had immunity. In Canada, Crown immunity was finally ended primarily through the enactment of federal and provincial statutes that establish and circumscribe Crown liability in torts:
* The extent of governmental liability varies depending on the context and facts of any given situation but is always governed by the applicable statute.
* Notice of claim must be given within specific time limits

**Negligence and Crown liability relating to statutory powers**

* *Welbridge Holdings Ltd. v Greater Winnipeg*, - legislative functions of government do not give rise to a duty of care to private citizens (p 225, note 186).
* Judicial officials performing their functions, in the absence of fraud or bad faith, are not liable in Canada to negligence actions (ibid. note 188).
* These immunities are necessary to protect the integrity and functioning of both government and the judicial process.

**Govt performance of functions may owe a duty of care to a private citizen within the context of policies that involve many social and political considerations.**

* Primary method of dealing with the majority of government decisions that are viewed negatively is through **democratic elections, not litigation**.
* Government liability is maintained when it exercising its operational functions in bad-faith or for a complete failure to even consider exercising its statutory power.
* In general, however, policy decisions – even the worst ones – can’t be challenged in Canadian courts.

One of the key facts to retain post-*Cooper* with respect to governmental liability is that a duty of care still exists for governments in the various areas, including (p 231):

* Inspection of buildings and road maintenance;
* Police duty of care to criminal suspects and to families of deceased victims of police shootings in the context of an investigation;
* Duty to a plaintiff on the part of provincial officials to implement favourable judicial orders;
* Duty on mine inspectors to exercise care for miners’ safety

Apart from the expansion into these and other areas, governmental liability remains circumscribed. It’s unclear if and when there will be further significant expansions for governmental liability. Canadian courts seem unlikely to greatly expand governmental liability into areas that are more justly dealt with through policy adjustments. The emphasis in Canada may have shifted more towards governmental *accountability* through legislative oversight and, ultimately, the ballot-box.

***R. v Imperial Tobacco Canada Ltd***

**Facts:** Imperial Tobacco faced two lawsuits. One class action by cigarette smokers, for the damage to their health caused by low-tar cigarettes, which were in fact not safer than regular cigarettes. The other was a lawsuit by the B.C. government to recover the health care costs of caring for those with tobacco-related illnesses from smoking low-tar cigarettes. Imperial Tobacco was seeking to “third party” the federal government into those lawsuits, claiming that it was negligent for failing to warn consumers and industry that low-tar cigarettes were not in fact safer for smokers, and indeed for making statements suggesting that such cigarettes were safer. Canada applied to court to have the third-party motion struck out, saying it owed neither cigarette smokers nor the companies a duty of care.

**Two main bases for proximity between the government (including various governmental agencies) and a plaintiff.**

* One basis is for the duty of care to be found in legislation, whether explicitly or implicitly (at para 43). This notion should be familiar to you from *Cooper*, in which the legislative scheme was the main thing the Supreme Court of Canada looked at.
* The second, at para 45, is a series of specific interactions between the government and the claimant. [Here,] the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care.

**The Court notes that legislation is relevant to the second basis, since a conflict between a duty in tort and the state’s statutory duties might negate proximity**. It also notes that in some cases both bases, statute and relationship, may support a duty.

**Court held there was no proximity, despite some of the government’s health advisories**. Both bases of proximity were absent here: the relevant legislation contained only “very general duties to the public” (para 54), and there was “no direct relationship between Canada and consumers of light cigarettes” (para 49).

**The situation was different in relation to industry, however.** The legislative framework was also general, failing to satisfy that basis of proximity, but there were extensive “interactions between Canada and the tobacco companies … including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products”, and “a programme of cooperation with and support for tobacco” companies (para 53).

On that basis, the SCC found that Canada had a *prima facie* duty of care to the companies in relation to the lawsuit by BC Govt, but not in relation to the class action suit.

However, Canada convinced the Court that it should negate the duty based on policy considerations and governmental liability specifically relating to the government’s policy to encourage smokers to switch to low-tar cigarettes (p 194).

# Strict and Vicarious Liability

* Rare exception where proof of fault not required
* Law will impose liability given proof the D acted in a prohibited manner
* Don’t need intent, negligence, or even knowledge
* Applied in nuisance
* Core idea that underpins vicarious liability

Vicarious Liability

* Construction that allows courts to impose liability on ppl who bear greater responsibility for harm
* Applied on strict liability standard
* Not a separate tort
* Doesn’t absolve original D of liability – just provides alternative remedy
* Difference from personal liability – requires finding fault vs. vicarious liability – just have to prove relationship between person that is liable and person/entity that is vicariously liable.
* Example: employer acting negligently in hiring, employee commits tort

**Vicarious liability involves the liability of one party for the fault of another, due to the special relationship between them.**

* **Statutory Vicarious Liability** – Vicarious liability created by legislation
* **Principal-Agent Relationship** – where someone is authorized to act on someone else’s behalf
* **Master-Servant Relationship** – which is the area that has the most litigation and is now referred to as “employee-employer” relationship.

## STATUTORY VICARIOUS LIABILITY

## Motor Vehicle accidents

* Common law, had to be employer or agent.
* Changed through legislation, now statutory - provinces have leg on vicarious liability for MVAs
* In BC:
  + You can be held vicariously liable if you allow others to drive your vehicle s 86 of MVA
  + 86(1) people living together, in a relationship or as family OR had implied permission or express permission

**S. 86 of Motor Vehicle Act**

**Policy principles: social and economic policy objectives –** *Yeung v Au*. *Yeung* SCC

* **expand the availability of compensation to injured Ps beyond drivers who may be under-insured or judgment-proof.**
* **S. 86 is also meant to encourage employers and other owners to take care in entrusting their vehicles to others.**

***Motor Vehicle Act*, RSBC 1996, c 318, s 86**

#### Responsibility of owner or lessee in certain cases

**86**  (1) **In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who**

**(a) is living with, and as a member of the family of, the owner, or**

**(b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,**

**is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner**.

(1.3) The liability under subsection (1.2) of a lessor is subject to the applicable limit established under section 82.1 of the [Insurance (Vehicle) Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96231_01).

(2) Nothing in this section relieves a person deemed to be the agent or servant of the owner or lessee and to be driving or operating the motor vehicle in the course of his or her employment from the liability for such loss or damage.

**"owner"**

(a) includes a purchaser of a motor vehicle who is in possession of the motor vehicle under a contract of conditional sale by which title to the motor vehicle remains in the seller, or the seller's assignee, until the purchaser takes title on full compliance with the contract,

(b) if a purchaser of a motor vehicle is in possession of the motor vehicle, does not include the seller of that motor vehicle under a contract of conditional sale described in paragraph (a) or the assignee of that seller, and

(c) does not include a lessee of a motor vehicle who is in possession of the motor vehicle under an agreement in writing with the owner, whether or not the lessee may become its owner in compliance with the agreement.

## 2. Principle/Agent Relationship – Question of Fact

* **Party 1 - Principal**, authorizing the other party,
* **Party 2 – Agent**, acting on behalf of the principal
* Principal may become liable for an agent’s act even if the principal did not commit the act.

***Bright & Co v Kerr***

Majority held that there was no vicarious liability because there was no employment relationship and the negligent act was found to be outside the agent’s responsibilities.

**Test for vicarious liability in Principle/Agent:**

Whether an individual's work is a necessary and integral part of the business operation or merely accessory to it. Kerr

**Dissent in Kerr outlines considerations in generally assessing vicarious liability in a principal-agent relationship:**

1. Was the Agent’s act(s) committed within the scope of the agency? If not, did the Principal expressly authorize the act(s) or did the Principal subsequently adopt them for his/her own use or benefit?
2. Was the offense incidental to, or of same general nature as, responsibilities agent is authorized to perform?

**If the answer is yes to both those considerations, then it’s more likely vicarious liability can be applied.**

## 3. Master-Servant Relationship (Employer/Employee)

**Solomon Rule: Employers Held Vicariously Liable in 2 Situations Kerr**

1. **Employee acts authorized by the employer,**

* If not, then the employee has not acted in the scope of his employment and the employer will not be liable.
* If, however, the conduct was authorized, vicarious liability will be imposed even if the conduct was done in an unauthorized manner.

OR

1. **Employee’s tortious act fell “within the ambit of the risk” that the employer’s enterprise created or exacerbated**.

* Strong connection between what the employer was asking the employee to do and the wrongful act.
* For 2nd stage, 2 part inquiry:  
   1) Look at existing precedent (must be really similar on facts)   
   2) Look to policy – for application of strict liability

**Conditions**

1. **Must be an employer employee relationship**:
   1. Problems: independent contractor relationship – look at work contract, way work was being performed, degree of control that party who issued K has over K, how much control contractor has over their own work and how it is performed.
2. **Tort committed during scope of contract**:
   1. Were the work duties done in an authorized or unauthorized manner? (ie caring for kids)

***Bazley v Curry*** Employer was found vicariously liable for the sexual assaults, since it had significantly increased the risk of harm to the plaintiff by allowing the employee long periods of unsupervised time with his victims in intimate situations (e.g., bathing).

***Jacobi v Griffiths***. By contrast, no vicarious liability was imposed on the employer in *Jacobi*, as the employer's “enterprise” was fostering group recreational activities, mostly held in public, outdoor spaces. The employee had subverted those public activities to isolate victims from the group.

***Blackwater v Plint***, reflects the nature of the Indian Residential School system, where the federal government and churches operated the schools in question and employed staff (p 382, note 61).

* **Vicarious liability for church entities, who were held liable for sexual assault committed by employees of federal residential schools, was a critical factor in the Indian Residential School Settlement Agrmnt.**
* Some church entities were in danger of being bankrupted by ongoing litigation and the federal government felt increasing political pressure to proceed in settlement negotiations with plaintiffs.

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| Bazley v Curry |
| |  | | --- | | **Facts**: Curry had been abusing children in his care. Screening for hiring for Children’s Foundation. Missed that he was sexual predator. As soon as found out, fired him.  **BCSC**: Salmond test employers are liable for employee torts, foundation found vicariously liable  BCCA: was foundation vicariously liable for employees sexual assaults on employees? If so, should NGOs be exempt  2nd test of Salmond   * Curry’s arguments – assaults were a mode of doing unauthorized tasks * Courts dismissed appeal. Holding the employer vicariously liable may cause employer to take preventive steps. Vicarious liability t   SCC also examined in Blackwater, leaded towards policy considerations, imposing shared vicarious liability between fed govt and churches. Looks at Creation of Risk and Enhancement of Risk. Was there a strong connection between what the employer asked the employee to do, and the wrongful act. |   **Decision**: YES foundation was vicariously liable because they increased risk by allowing long periods of unsupervised time with children in intimate situations like bathing and dressing.  **Reasons**:   * **No actual fault, but foundation still liable – created high risk situation** * **Policy reasons – students should still be able to get compensation** * **Corrective justice – victims in vulnerable population** * Conduct is so extreme that doesn’t matter if they weren’t at vault – should be liable * Employer created risk by hiring people to work with children, leaving them alone * **Policy considerations**:   + Provide just and practical remedy   + Effective compensation – deeper pockets * **Approach to adopt:**  1. Courts should be open about what they are doing 2. Don’t require concrete proof – is wrongful act sufficiently connected to conduct authorized by employer 3. **5 factors**:    * + Did employer afford employee opportunity to abuse power      + Extent to which the wrongful act furthered employer’s aim?      + Extent to which wrongful act related to friction, confrontation, or intimacy inherent in enterprise (ie childcare workers)      + Extent of power imbalance between employee/victim      + Vulnerability of victim to wrongful exercise of employer’s powers   **Contrast to Jacoby and Griffiths:** no vicarious liability was found, employers enterprise was fostering group public activities – distinguished from Bazley where they were in private, isolated from the group |

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| TG Bright v Kerr \* Employer/Employee vicarious liability |
| **Facts**: Was D, a wine dealer, vicariously liable for negligence of its motorcycle deliveryman?  **Principle**:   * Employer/principle will be found vicariously liable for conduct that is conducted within the course of agency * Used a strict interpretation of employer/principal agent relationship * SCC hasn’t always followed, can distinguish facts * Case law tends to depend on the total relationship – dissent   **If yes to both of these, more likely to be found vicariously liable:**   1. **Was the agents’ act committed within the scope of the agency?**    * If not, did the principle expressly authorize the act or subsequently adopt it for their own use or benefit 2. **Was the offence incidental to or part of the same general acts the agent is authorized to perform**?   **Statute**   * Sometimes statutes will come in to ascribe vicarious liability * *Highway Traffic Act* – owner of vehicle will be responsible for person driving it |

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| Blackwater v Plint \* Applied Bazley/Curry |
| **Facts**: SCC in 2005 definitely recognized an employee may be employed by more than 1 entity.  **Issue:** Could the churches and govt be held vicariously liable together for a harm.  **Principle**:   * **Canada 75% liable** (provided most of funding, was overseeing power) and **church 25% liable** (ran schools on the ground – not a lot of money, trying to recognize the deeper pockets of Canada for victims?) * **Greater pressure from churches that it would bankrupt them**   KEY EXCERPTS:   * 1. **Vicarious Liability**   20 - **Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires**: ***Bazley v. Curry***, 1999 CanLII 692 (SCC), [1999] 2 S.C.R. 534. The fact that wrongful acts may occur is a cost of business.  **POLICY**: The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence.  **5 Factors:** When determining whether vicarious liability should be imposed, the court bases its decision on several factors, which include: (a) the opportunity afforded by the employer’s enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer’s interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.  21 - **The Church was Plint’s immediate employer.** Plint was in charge of the dormitory in which Mr. Barney slept and was answerable to the Church. The trial judge considered the legal test for vicarious liability and concluded that the Church was one of Plint’s employers. **It employed him in furtherance of its interest in providing residential education to Aboriginal children, and gave him the control and opportunity that made it possible for him to prey on vulnerable victims.** In these circumstances, the trial judge found the Church, together with Canada, to be vicariously liable for Plint’s sexual assault of the children. However, the Court of Appeal concluded that because of management arrangements between the Church and Canada, the Church could not be considered Plint’s employer for purposes of vicarious liability.    22 – 30 - **The trial judge made at least eight factual findings that support his conclusion that the Church was one of Plint’s employers in every sense of the word and should be vicariously liable for the assaults**.  32 **The Court of Appeal, rejected the Church’s vicarious liability based on Canada’s degree of control over AIRS, the Church’s specific mandate to promote Christian education, and the difficulty of holding two defendants — Canada and the Church — vicariously liable for the same wrong. I conclude that none of these considerations negate the imposition of vicarious liability on the Church.**  **CONCLUSION: Despite these assertions, the incontrovertible reality is that the Church played a significant role in the running of the school. It hired, fired and supervised the employees. It did so for the government of Canada, but also for its own end of promoting Christian education to Aboriginal children. The trial judge’s conclusion that the Church shared a degree of control of the situation that gave rise to the wrong is not negated by the argument that as a matter of law Canada retained residual control, nor by formalistic arguments that the Church was only the agent of Canada. Canada had an important role, to be sure, which the trial judge recognized in holding it vicariously liable for 75 percent of the loss. But that does not negate the Church’s role and the vicarious liability it created….The Church in fact ran the dormitory, as well as other parts of the school…joint vicarious liability is acceptable where there is a partnership.**  **If an employer with de facto control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence.**  I conclude that the Church should be found **jointly vicariously liable with Canada** for the assaults, contrary to the conclusions of Court of Appeal. The SCC found the church **not immune** to vicarious liability due to its charity status. |

Strict Liability

* Strict liability for escape of dangerous substances

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| Rylands v Fletcher |
| **Facts**: P operated a mine. D (neighbour) building a reservoir for mill. Water flows into P’s land, causes explosion and damage.  **Principle:**   * **Rylands v Fletcher Rule: to apply strict liability, need to show:**  1. **Non-natural use of land** 2. **Escape of something likely to cause mischief** 3. **Damage**   1) **Non-natural use of land**   * Need to show danger * No general benefit to community * Gertsen v Muni of Metro Toronto - look at facts, assess if dangerous/extraordinary, engage in 2 part analysis  1. Recognize that some things are inherently dangerous (use of explosives) 2. If danger less apparent, fact specific – look at degree of danger, type of use, utility of land   2) **Escape of something likely to cause mischief**   * Read v Lyons – escape from a place which the D has occupation or control over to a place which is outside his occupation or control * Doesn’t apply if damage occurred on your land – then it would be negligence – need for strict liability   3) **Show concrete damage**  **Defences**: consent (to mischief), common benefit, default of P, act of god/stranger, statutory authority  **Policy considerations**:   * How courts conceive of fault here – vs. compensation * Exceptions to established categories of tort law * Goals of corrective justice and if they are achieved. * Good microchasm example – does it stray from intentional torts or negligence? |

# Proof of Negligence

* **Legal burden** = burden to make case, prove claim
  + P bears legal burden of proof for elements of negligence
  + D bears legal burden for specific defences
* **Evidentiary burden** – which party bears burden of proving which portion of analysis
  + P must prove *prima facie* duty of care
  + D must show policy considerations against duty of care
* **May be minor situations where it switches (ie waiver forms)**

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| Wakelin v London & South Western Ry Co. |
| **Facts**: P’s husband hit on traintrack. Argued negligence. Not enough evidence.  **Principles**:   * P must prove – legal burden * D bears legal burden to make out defence * Must prove case by way of direct evidence, or maybe reasonable inference (in limited situations) * Evidentiary burden of proof might shift from party to party, but legal burden is the same * Civil standard of proof is balance of probabilities (RC v McDougal)   Language : “Plaintiff has discharged evidentiary burden, so duty of care can be found.” “Defendant has not discharged evidentiary burden of proving policy reasons that negate duty of care”    **No Evidence Motion -** Asserts that there is no evidence that P can make their claim  Difficult to prove – asks courts to declare that not enough   * Also happens where party doesn’t understand rules of evidence (self-represented) * If granted, everyone goes home. If denied, D has option of going on |

## Exception to Legal Burden of Proof

1) **Created by Statute** *Highway Traffic Act* – certain situations where enacted statutes to adjust the burden of proof

### MacDonald v Woodard

**Facts**: Gas station attendant hit by car driven by D.

* S. 133(1) of Highway Traffic Act – creates rebuttable presumption of negligence that the D carries throughout the proceedings until can show that wasn’t negligent
* D failed to give testimony or witnesses – failed to satisfy onus

2) **Multiple Negligent Defendants**

### Cook v Lewis

**Facts**: 2 D’s shoot P at same time, unclear who injured him. Both we careless.

**Principle**:

* If P can prove guilt on part of multiple D’s, but D’s action destroyed P’s ability to establish liability, presumption of liability forms
* Legal burden shifts to D
* Need proof they breached standard of care, and there is insufficient evidence to show cause
* So evidentiary burden just for causation

\*Note – doesn’t apply when D actively soils evidence

* If this happens, you can draw a rebuttable presumption that evidence would’ve harmed D

**3) Res Ipsa Loquitar** (the things speaks for itself)

* Where lack of direct evidence but abundance of circumstantial evidence – inference may be drawn
* No longer valid to use this doctrine

### Fontaine v BC (Official Administrator)

**Facts**: 2 men found in river bed in truck at bottom of embankment. Wife of one man argued her husband’s death was due to driver’s carelessness.

**Principles**:

* **The principle of *res ipsa loquitar* should no longer be applied**
* Circumstantial evidence is important, but it should be applied in the same way as other evidence – up to trier of fact

# Negligent Misrepresentation

Elements of Negligent Misrepresentation

Hedley Byrne

1. **Special relationship between representor and representee**
2. **Untrue, inaccurate, or misleading representation**
3. **Representor must have acted negligently in making said misrepresentation**
4. **Reasonable reliance on said misrepresentation**
5. **Reliance must have been detrimental to the representee in the sense that damages resulted.**

* Same underlying considerations – neighbour principle
* A duty of care can arise with respect to careless statements that cause pure economic loss (Hedley Byrne)

These negligent misrepresentation cases are *not* a special category of negligence—the ordinary test from Cooper v Hobart continues to apply in calculating the duty of care.

This ordinary test for establishing a duty of care from Cooper v Hobart involves asking the three following questions:

1A: Is the harm complained of a **reasonably foreseeable** consequence of the defendant’s act**?**

1B: Are the parties sufficiently **proximate** that a duty of care should be recognized?

2: Are there **policy considerations** that would negative the prima facie duty of care established in 1A & B?

The structure for the duty inquiry in cases of negligent misrepresentation follows the same structure. The first question (1A) remains largely untouched; but following *Hercules v Ernst & Young,* there are changes to the second (1B) and third (2) inquiries.

**The proximity inquiry (1B) has these added requirements:**

1. **The defendant ought reasonably to foresee that the plaintiff will rely on their representation; *and***
2. **Reliance by the plaintiff would, in the particular circumstances of the case, be reasonable**

**Reasonable reliance is generally indicated by:**

1. **The defendant having a financial interest in the representation;**
2. **The defendant was a professional or in possession of a special skill, judgment, or knowledge;**
3. **The misrepresentation was provided in the course of business;**
4. **The information was given deliberately, and not on a social occasion;**
5. **The information was given in response to a specific inquiry**

**The third inquiry (2) is heavily concerned with circumscribing liability. The ordinary policy considerations apply; but extra weight is to be given to indeterminacy, specifically in relation to:**

* + - * **Amount of liability (in cost);**
      * **Duration of liability (in time);**
      * **Class (in number of plaintiffs).**

**Policy concerns:**

* Indeterminate liability
* Chilling effect on certain professions
* Chilling effect on freedom of expression
* Reluctance to interfere with privity of contract

**Summary**

1. Negligent misrepresentation claims still rely on Cooper v Hobart to prove the existence of a duty of care
2. However, due to a variety of worries about scope and breadth of liability, proximity and policy considerations are more rigorous
3. The basis for these worries is up for legitimate and extensive debate

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| Queen v Cognos |
| **Facts:**  P took job offer based on representation that there would be project that required his skills. They misrepresented that they had funding – didn’t have approval yet. He moved himself and family to Ottawa, sold house. Then lost job. P sued for negligent misrepresentation.  **Trial**: Yes, there was a "special relationship" and there was negligent misrepresentation. **CA**: upheld trial decision.   * Misrepresented foundations of contractual relationship * Provision releasing liability didn’t matter- misrep occurred before contract * Incorporated 5 elements from Hedley-Byrne (see above elements) – relates back to neighbour principles   **Issue**(s):   * Did Cognos or its agent owe a duty of care to regarding the representations about the company and the specifics of the job being offered? * Whether Cognos breached the duty of care if it existed? * What is the effect of the fact that the appellant signed a contract even after the negligent misrepresentations? * Should the Hedley Byrne test apply to representations made by an employer to a prospective employee in the course of an interview? YES   **Ratio**:  The Hedley Byrne test for negligent misrepresentation applies to representations made by an employer to a prospective employee in the course of an interview.  **Analysis:**  MAJORITY 1: The tort here was independent of the K and the liability was not limited by an exclusion clause in the K  MAJORITY 2: Applied the Hedley Byrne test, 5 general requirements:   1. There must be a duty of care based on a “special relationship” between the representor and the representee. 2. The representation in question must be untrue, inaccurate, or misleading. 3. The representor must have acted negligently in making said misrepresentation. 4. The representee must have relied in a reasonable manner, on said negligent misrepresentation. 5. The reliance must have been detrimental to the representee in the sense that damages resulted. → 2, 4 and 5 were not met here.   DISTINGUISHABLE FROM BG CHECO: In BG Checo, there was a misrepresentation as a clause in the contract → Concurrency question: ⇒ In BG Checo, there was an impermissible concurrent liability in tort and contract (an exception to the general rule of concurrency) ⇒ In the case at bar: there is no concurrency → Plaintiff argument here is NOT: that Cognos negligently misrepresented the amount of time he would be working on the project or the conditions under which his employment could be terminated (i.e. that Cognos breached a common law duty of care by negligently misrepresenting his security of employment with Cognos) → Argument IS: Cognos negligently misrepresented the nature and existence of the employment opportunity being offered → Therefore: “it is the existence, or reality, of the job being interviewed for, not the extent of the appellant’s involvement therein, which is at the heart of this tort action.” In the agreement, there is no express provision dealing with the respondent’s obligations with respect to the nature and existence of the project.  FURTHER, IN THE CASE AT BAR → Cognos recognizes that it owed a duty of car to interviewees not to make negligent misreps → It was foreseeable that the appellant would rely on the information given during the interview in order to make career decision -- it was reasonable reliance → The Cognos interviewer didn’t make any caveats → The agreement signed 2 weeks later did not amount to a valid disclaimer  Holding:  Decision in favour of Appellant: The Respondent’s manager had acted carelessly in making statements during the Appellant’s job interview.  **Standard of Care:** "The applicable standard of care should be the one used in every negligence case, namely, the universally accepted, albeit hypothetical 'reasonable person'. The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading" |
| Hercules Management v Ernst & Young |
| **Facts**: Accountants prepared financial statements that were inaccurate. P suffered loss based on opportunity to earn more, and what they already had.   * Different requirement for existence of duty of care (special relationship) * Need to show: \* also known as proving “proximity” * \* has it been recognized before?   **COOPER TEST:** \***This is a modified Anns test – for negligent misrepresentation – significantly changed (HOW?)**  **Step 1 – Is there a prima facie duty of care?**   * 1A) Was the harm reasonably foreseeable? (for the D to foresee) (no change) * **1B) Was the relationship sufficiently proximate? (Was the relationship between P and D sufficient that the P was under an obligation to rely on D – so P must take care to ensure D’s reliance)**   + **i. the D ought reasonably to foresee that the P will rely on their representation; and**   + **ii. Reliance by the P would, in the particular circumstances of the case, be reasonable   Finding that reliance in question is reasonable in circumstances of the case (for P to rely)**   + **5 factors to show reasonable reliance**: (general indications - not exhaustive or a test)     - D had financial interest in the representation (direct/indirect)     - D was professional or had special skill / knowledge     - Representation (advice / info) at issue provided in course of business     - Representation given deliberately – not social occasion     - Information given in response to specific inquiry or request   **Step 2 – What are the policy considerations?**   * Even if 1 A&B generated a duty of care, is this negated by policy considerations? * Also – 2) policy consideration – are there policy considerations that would negative the prima facie duty of care established in 1A and B? (**Changed and narrowed)**:   + The ordinary policy considerations apply; but extra weight is to be given to indeterminacy, specifically in relation to:   + D had Knowledge of P   + Precise reliance (P used statement for precise purpose/transaction)     - Changes:     - Amount of liability (in cost)     - Duration of liability (in time)     - Class (in number of plaintiffs)   **Finding** – prima facie special relationship, but negated by policy – didn’t use for specific transaction.  **Other Principles**:   * Cnd courts reject notion that neg misrep different than negligence law – neighbour principle (Imperial Tobacco) * To find special relationship, first look for existing categories of special relationship (Imperial tobacco) * Reliance is a question of fact to P’s state of mind (Hub Excavating) * Material reliance = reasonable reliance (Colliers) * Damages - puts the P into position he would’ve been in had representation not been made (not if it’s true) (Rainbow Industrial) * Reliance doesn’t mean both D and P negligent always – damages not always apportioned (Grand Restaurants) |

Pure Economic Loss

* Concern to interfere with free market
* Freedom to contract at will

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| **Negligent act that causes pure financial/economic loss (not physical loss)** | Hedley Byrne created it |
| * Economic loss less compelling than physical or property interests * Negotiations – one party loses, one party gains * Inherent risk in economic activities – nature of business, already mechanisms * Worry about proliferation of lawsuits | Martel Building Ltd v Canada 2000 SCC  Federal govts tendering process  D leased building form P, renewal negotiations ended in P calling for tenders on competition, accepted another party and did not renew lease with P.  Breach duty of care to negotiate in a way that caused P pure economic loss. |
| **POLICY consideration:**  **Where there is a prima facie duty of care, courts consider policy, may limit types of damages**   * Cdn courts view negligent misrep with pure economic loss extremely cautiously. * Consider ethical, moral and legal issues. Risk of indeterminate liability. * Risk of overbroad category, flood of litigation * Purely economic losses would normally continue to fall into the ambit of contract law. * Canadian courts continue to view pure economic loss claims extremely warily. * Pure economic losses are one of those torts that can sometimes be difficult to ethically justifiy, and there also risk considerations. * There’s the risk of indeterminate liability, although as we’ve seen sometimes that risk is overhyped by inherently risk-adverse judiciaries. However there remains a concern that an overly broad recognition of liability for pure economic losses could result in a flood of litigation. * Finally there is a legal theory, that you see increasingly in the United States, relating to how free markets operate specifically, competition and capitalism in general. It’s been argued that the concept of a free market could well include the ability to inflict economic losses on market competitors. |  |
| **5 categories**   1. Misrepresentation 2. Liability of public authorities 3. Negligent performance of a service – ie property owner recently purchased, private inspection, didn’t find fault, suffers severe $ loss 🡪 remedy may come from contract 4. Negligence by shoddy goods or structures – ie cell phone supplier, sells new smart phone, reseller loses money due to faulty phones 5. Relational economic loss - | Solomon pg 505 |
| **Negligent Performance of a Service**   * Liability lies in tort for personal injury and property damage that P suffers as result of D’s supply of shoddy goods/structures * Causes party economic loss – apply Anns test * Courts reluctant to find liability – fails on proximity * No reliance on the implied representation * Notwithstanding staying passive and doing nothing, relying on the Ds implied * P can recover – Minister voluntarily assumed responsibility * Reliance not required by P * Factually specific | James v BC  P’s employer held tree farm license with clause saying had to keep mill open. Minister didn’t include protection to keep mill open in new license, so mill shut down. P suffered economic loss, sued Minister. |
| **Negligent Performance of a Service**   * No reasonable reliance * No foreseeability, no proximity (no knowledge, not privy to K) | BCD Ltd. V Hofstrand Farms  Courier to deliver to office in Vic, but late. Farm (3rd party) suffered b/c unable to register grant. |
| **Negligent Supply of Shoddy Goods or Structures**.  Building contractors, engineers, architects are under special duty of care, to current and subsequent occupier/owner of building, where their work creates **real and substantial danger** to inhabitants   * + Determinate for life of building   + Limited class (owners/occupiers) and amount (only damage occurs)   Situations where an exemption clause might not act to exclude a tort action?   * + Result of Dictates rather than Negotiations   + Negotiations on a very un-level playing field   + Parties intentions are unclear (whether the exemption clause is express or implied term of contract) | Winnipeg Condo Corp No 36 v Bird Construction co  D contracted to build condo building. Later P bought it and damage occurred, shown that caused by D’s defects in masonry work |

## Does the government have a duty of care?

Is it limited by statute?

## Concurrent Liability in Tort and Contract

**Principles**

* Contract and tort can exist concurrently, so long as contract doesn’t specifically negate common law duties of negligent misrep (BG Checo)
* Neg misrep is the one pure economic tort that arises most often in concurrent liability with contract
* Difference with neg misrepr – it can occur before the K is signed, occurs during negotiations, explanations, can occur after the K is signed
* Can occur at any time during or after the performance of the K
* K principles were very clear about fraudulent vs negligent misrep – wasn’t clear in tort,
* Notwithstanding exclusion clause there can be concurrent liability in tort and contract (BG Checo)
  + **Look at relationship between parties (foreseeability and proximity)**
  + **Review terms of K between D and other parties HINT ON EXAM!**
  + Any construction or architectural documents will have clauses limiting liability to a specific client
* Exemption clause – commonly seen, park at your own risk, signs serve to absolve liability
* Policy Reasons:
  + Want to eliminate differences – allow person who has suffered a wrong full access to all relevant legal remedies
  + In contract parties have ability to waive tort liability - protects autonomy and commercial flexibility
  + Iacobucci’s method of seeing context – too much uncertainty
* Specific provisions of an employment contract must speak to neg misrep – not to nature and existence of job itself (Cognos)

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| B.C. Checo International Ltd. v B.C. Hydro & Power Authority(1993), 99 D.L.R. (4th) 577 (SCC) |
| **Fact**  BG Checo successfully bid to erect transmission towers on BC Hydro's property. The contract said that BC Hydro would clear their land before the towers were erected, but they did not. As a result, BG Checo's work was more difficult and expensive. They sued in breach of contract and negligent misrepresentation. The lower courts allowed BG Checo to claim in both contract and tort, which BC Hydro appealed.  **Issue**  If there is a breach of contract, can you also sue in tort for the negligent misrepresentation that led to the breach? YES  **Decision**  Appeal dismissed.  **Reasons**   * P can sue in both causes of action * There are different remedies for both actions because the law should allow wronged plaintiffs to recover in any way possible. * In the contract action, the goal is to put the plaintiff in the position that they would have been in if the contract was performed. * **In the negligence action the damages could amount to any loss that reasonably stemmed from the negligence, as the goal is to put the plaintiff in the place they would have been in if the representation never happened.** * They state that a tort action is only disallowed if it is explicitly set out that this is the case in the contract. In this case, the contract did not limit the BC Hydro's duty. Therefore, they have the ability to sue in both, but this case needs to be sent back to trial to determine the damages in tort. * They also state that the damages for breach of contract are to put the party in the position it would have been in had the contract been completed.   **Ratio**   * A plaintiff is always allowed to sue in both tort and contract, if they both apply, so long as the relevant duty necessary for the tort action is not explicitly negated in the contract. * The goal of damages for breach of contract is to put the party in the position it would have been in had the contract been completed. |

# Police Accountability lecture

* Legal distinction between two police entities: Municipal police forces + RCMP (provincial)
* Complaint system and disciplinary review
* IIO Independent Investigations Office – independently investigates police and RCMP cases involving death. If charges recommended, sent to Crown Counsel. If no charges, or no death, reviewed by Complaints body in their depts. Result: discipline, public hearing, or “diddly squat”. 90% of cases end in nothing.

## PARENTAL LIABILITY ACT [SBC 2001] CHAPTER 45

#### Parent's liability

**3**  Subject to section 6 and Part 3, if a child intentionally takes, damages or destroys property of another person, a parent of the child is liable for the loss of or damage to the property experienced as a result by an owner and by a person legally entitled to possession of the property.

#### Joint and separate liability

**5**  If more than one parent of a child is liable in an action brought under this Act, the parents of the child are jointly and separately liable.

#### Maximum award

**6**  (1) Subject to subsection (2), if either an owner of property or a person legally entitled to possession of property suffers property loss, the owner, the person legally entitled to possession of the property or both may commence a civil action under this Act against a parent of a child who caused the property loss to recover damages, in an amount not exceeding $10 000, excluding interest and costs, in respect of the property loss.

(2) If one or more persons has suffered property loss as a result of the action of one or more children, the total amount of damages awarded against all the parents of all the children who caused the property loss must not exceed $10 000, irrespective of the number of parents of the children who are liable under this Act.

#### Parent's defence

**9**  A parent has a defence to an action under this Act if the parent satisfies the court that he or she

(a) was exercising reasonable supervision over the child at the time the child engaged in the activity that caused the property loss, and

(b) made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that caused the property loss.

#### Factors that court may consider

**10**  In determining under section 9 whether a parent exercised reasonable supervision over a child or made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that caused the property loss, the court may consider any of the following:

(a) the age and maturity of the child;

(b) the prior conduct of the child;

(c) the likelihood that the activity would result in property loss;

(d) psychological or medical disorders, psychological, physical or learning disabilities or emotional disturbances of the child;

(e) whether the likelihood of property loss arising from the child's conduct was reasonably foreseeable by the parent;

(f) whether the child was under the supervision of the parent when the child engaged in the activity that resulted in the property loss;

(g) if the child was not under the supervision of the parent when the child engaged in the activity that resulted in the property loss, whether the parent made reasonable arrangements for the supervision of the child;

(h) whether the parent has sought to improve his or her parenting skills by attending parenting courses or in any other manner;

(i) whether the parent has sought professional assistance for the child, designed to discourage activity of the kind that resulted in the property loss;

(j) psychological or medical disorders, psychological, physical or learning disabilities or emotional disturbances of the parent;

(k) any other matter that the court considers relevant to the determination.

#### Amount of damage award

**14**  In determining the amount of damages to be awarded under this Act, the court may consider any restitution made by, or compensation paid by, the child, a parent of the child or a person on behalf of the parent or the child.