Tort Law – Prof Arbel 2013

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# Definition

*Area of law concerned with private wrongs other than those of contract law*

# Comparison of Criminal, Tort and Contract Law

|  |  |  |
| --- | --- | --- |
| Criminal Law | Tort Law | Contract Law |
| Crime | Wrongful Act | Circumstances |
| Public | private | Between parties |
| Crown | Plaintiff v Defendant |  |
| Punishment | compensation |  |
| Guilt | liability |  |
| Beyond a reasonable doubt | Balance of probabilities |  |
|  |  |  |
|  |  |  |

# Objectives of Torts

* Compensation
* Appeasement/vindication
* Punishment
* Deterrence
  + Specific deterrence
  + General deterrence
  + Market deterrence
  + Justice

# Principles of Liability

Absolute Liability

* Proscribed behaviour causes loss
* No negligent/intent needed

Strict Liability

* Similar to absolute
* Defendant can raise defences

Negligence

* Failure to take reasonable care to prevent foreseeable harm to other person

No Liability

* Some harms not recognized by torts

Intentional Torts

Volition

* Volition will be present if defendant exercised control over his/her physical actions

Intent

* Desire to bring about consequence of action, rather than desire to do the physical act
* Also unintended consequences:

Imputed intent

* Doctrine to impose liability for unintended consequences certain/substantially certain to result from intentional act (should’ve known)

Transferred intent

* Doctrine to impose liability where defendant intends to commit tort against one person but unintentionally commits tort against other party (oops, wrong person)
* Motive not element of tort (Gilbert v Stone)
  + May mitiage damages
  + Duress not a defence
  + Provocation can be partial defence (Miska v Sisvec)
  + Not held liable for accident
  + Need capacity to prove intent
  + Mistake not relevant for intent (Hodgkindon v Martin)

**Key Point:** Motive is not usually an element of a tort action. As a result, while the plaintiff will almost always have to prove intent on the part of the defendant, they don’t have to prove motive.

# Battery

*Battery is the intentional infliction upon the body of another of a harmful or offensive contact*

**Actionable per se – not proof of harm for cause of action**

* **Very much concerned with protecting dignity of person**
* **Threat to person’s autonomy**
* **Trespass on the person**

## **Elements of Battery**

1. Directness (poison is indirect)
2. Interference – physical contact
3. Harmful/Offensive

* Harm needs consequence
* Or dignity offended
* Not harm required - Ex. Spitting (Alcorn v Mitchell)
* Cutting hair (Forde v Skinner) – bodily contact not required
* Don’t need to be aware of harm (kissing sleeping girl)

1. Intent – desire to do actions that trigger consequences

Plaintiff must prove first 3 elements

Defendant must disprove intent

## Bettel v Yim

Facts: D shakes kid in store and hits his head, breaking nose

Issue: liable for unintended consequence?

Ratio: If physical contract was intended, the fact that its magnitude exceeded all reasonable or intended expectation should make no difference

Other Legal Principles:

* Foreseeability shouldn’t be imported into intentional torts (only negligence)
* Definition of battery
* Distinction between assault and battery blurred

Motive does not matter (Malette v Shulman – Jehovah’s witness case)

# Assault

Definition – intentional creation in the mind of another of a reasonable apprehension of immediate physical contact

Actionable per se – no proof of harm for cause of action

## Elements of Assault

* 1. Directness
  2. Reasonable apprehension – criteria
     + Causation – *but for* the action of the defendant would the plaintiff apprehended the harm
     + Realistic for harm to have happened – may follow (subjective)
  3. Immediate Harm – happen in realistic and immediate way
  4. Intent – similar to battery – intent to bring about the threat
     1. Transferred intent – in bar, “dave I’m going to kill you”

Plaintiff must prove first 3 elements

Defendant must disprove intent

## Police v Greaves

Facts: police threatened by man in door with knife, said don’t move

Need immediate harm

# False Imprisonment

Definition: Offers a remedy for the intentional and total confinement of another person

## Elements of False Imprisonment

* 1. Directness
  2. Intent
  3. Total restraint (Bird v. Jones)
* Must be complete
* Can be anywhere
* Don’t need force
* Not unlawful or malicious (motive doesn’t matter)

Plaintiff must prove all 3 elements

Legal Authority may be a defence – defendant must prove

Defence: Consent (Herd v Weardale Steel) – (like getting on train)

## Bird v Jones

Facts: P trying to pass trhough highway, obsttucted

Ratio: NOT FI b/c only partial obstruction – must have total restraint

Other legal principles:

* For FI there must be a boundary, but it doesn’t need to be physical (can be constrained by will or power)
* Can be “for however short a time”

## Campbell v SS Kresge

Facts: P shopping in K-mart, stopped in parking lot by security officer who makes her return to store – felt she had no choice, didn’t want to cause embarrassment

Principles:

* Threat of authority is enough
* Short period of time, doesn’t matter – still FI

## Frey v Fedoruk

Peeping tom case

* “Action of false imprisonment is the mere imprisonment”
* onus lies on the defendant of proving a justification

Other notes:

* Individual may be liable in FI for ordering another person to do so – “Stop that man, he’s a thief” (Reid v Webster)
* Intersection between Charter and tort law
* If not conscious of confinement, may still have claim (ex. Children, alziemer’s patients

# False Imprisonment in Prisons (solitary confinement)

## R. v. Hill (BCAC)

* **Facts -**  Placed in SC after riot b/c he was an important person
* Tort of FI could apply
* Is there enough legal authority?
* Warden had the authority to put him in segregation
* Terms of review not done properly

## Saint-Jacques v. Canada (TB case)

* Refuse to take medical test, put in SC
* Did they have legal authority? Couldn’t conclusively show
* Said decision made by warden – arbitrary

## Brandon v. Canada

* First part of confinement was justified – the extended part was FI
* (can be split as to when FI begins/ends)

# Malicious Prosecution

To protect from indirect interference that result from improper initiation of criminal proceedings against an individual.

**Not actionable per se** – need proof of harm

Purpose: not bring administration of justice into disrepute

## Elements of Malicious Prosecution (Nelles)

* 1. Defendant initiates
  2. Terminates in favour of plaintiff
  3. No reasonable and probably cause
  4. Malice on part of D
  5. Damage to P (not actionable per se)

## Nelles v Ontario

Facts: P falsely charged with killing babies in hospital

**Reasonable and probable cause**

* Objective component – reasonable person wouldn’t think guilty
* Subjective component – defendant didn’t actually believe plaintiff guilty
* High threshold – don’t want to have chilling effect

## Miazga v Kvello Estate

Facts: Thought that the kids were lying re sexual abuse, still proceeded to pursue parents’ case

* Loosened requirements of subjective belief
* Professional opinion of merits of case – (not prosecutors’ personal belief)
* Gives additional level of protection to public prosecutors

# Sexual Battery

No independent tort of sexual battery

## Norberg v Wynrib

Facts: trade of drugs for sex (doctor)

Majority found action in tort of battery

Elements – Intent – direct interference – intent to engage in sexual contact

Consent – defendant must prove

* Involves direct engagement with plaintiff
* Must be genuine, voluntary
  + P must be in position to make free choice
* Contradicted by presence of exploitation
* NOTE - \*\*\* Compliance is not consent

Ratio: where there is an imbalance of power it may mitigate the ability of consent to be used as a defence

# Non-Marine Underwriters v Scalera

Ratio: defendant must prove consent in sexual battery (like other torts)

**Specific to sexual battery**:

* In sexual assault – plaintiff should just have to show that it happened
* Too much burden on plaintiff- risk victim-blaming
* Dangerous precedent to reference the plaintiff’s character (how they dress)
* Public policy reasons
* Hard for victims to bring action forward
* Makes it harder for defendant

**Constructed consent**

* Some situations, there is not enough info for explicit consent
* Courts will sometimes jump in an construct intent – objective standard (standard of reasonableness)
* *Subjective belief of defendant doesn’t matter*
* Assume no consent unless it’s given
* Does evidence support finding of consent
* Sexual activity requires repeated consent

# Intentional Affliction of Nervous Shock

## Elements of IANS

* 1. Outrageous conduct
  2. Intent to Cause (shock)
  3. Shock

(text in Samms v Eccles)

## Wilkinson v Downton

Facts: practical joke that husband was dead – severe consequences from shock – side effects on her health

Outrageous

* No clear authority
* Based on facts, relationship, pre-existing conditions

Intent to cause

* Intent may be imputed (Purdy – punched husband, so wife suffered shock)
* Intent may be imputed when damage long-term (Tran v Financial Debt Recovery)

What is shock?

*Radovskis v Tomm* – no evidence of physical manifestation of nervous shock (although facts extreme)

* Must be visible and provable illness - measure
* Standards relaxed somewhat since then
* CND courts trying to take balanced approach

*Rahemtulla v Vanfed Credit Union* –no medical evidence for shock

* broadening of liability
* Need physical manifestation, not necessarily medical evidence (*Tran)*
* Depends on relationship between parties
* More recognition of shock, how we understand it
* Whether the plaintiff has previous history – mental imbalance, bad nerves

# Privacy

## Motherwell v Motherwell

Facts: continual harassment by telephone

* Courts don’t recognize tort of privacy
* Special part of nuisance

Ontario: more likely to apply tort of privacy

BC – Privacy Act

* Statutory creation of tort
* Carves out what tort is – damages, exceptions
* Limits interpretation of court
* Limitation periods
* Carves out defence of lawful authority, consent

## Bracken v Van Police Board

Facts: P filed complaint, then moved. D used BC Ministry of HR to find address – sent her letter concluding investigation

Issue: Is this an invasion of privacy tort?

No malice – no invasion of privacy (no bad faith)

* Careless, but not malicious

## Jones v Tsige

Facts: D looked at P’s personal banking info due to dispute with her boyfriend (P’s ex husband)

Issue: Does Ontario Law recognize right to bring civil action for damages for invasion of PP?

Elements of tort:

* Intentionally intrudes
* Upon seclusion of another in private affairs
* Liable if invasion highly offensive to a reasonable person
* Actionable per se – no proof of harm

## Advantages of Independent Common Law Tort of Invasion of Privacy

* More compensation – damages
* More control of when/how to initiate proceedings
* Can adapt to technology
* Clarity, symbolic idea of what is right/wrong
* Charter doesn’t apply to private parties (civil better)
  + Sec. 8 narrow, applies to crim law
* Common law more flexible

BC Statute – malice matters

Sec. 1(1) It is tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.

Hollinsworth v BCTV – no action for privacy because no malice.

* Must advance under statute
* Must fit within parameters of statute
* May be more restrictive
* Harder to advance

# Discrimination

## Bhadauria v Seneca College

Facts: P applied for job, more than qualified, never got interview

Court of Appeal tries to create an independent tort of discrimination

SCC – decides statutory scheme is comprehensive – no tort

Now protected by Charter – explicit recognition that no piece of legislation can be discriminatory

* Also quasi-constitutional statutes (Human Rights Code)
* Better, more comprehensive remedies
* May be able to stop discriminatory behaviour better
* More accessible, less expensive

## Andrews v Law Society of BC

Facts: not called to the bar with no Cnd Citizenship – said discriminatory

* Under Charter – Sec. 15 – Protection for Equality

SCC –

* Equality in Canada is substantive, not formative (not just form)
* Preventing discrimination is about substantive equality
  + Recognizes history, systemic barriers
  + Affirmative action programs

Better than in torts

# Stalking and Harassment

Stalking – measure of fear

Harassment – annoyance, frustration, humiliation

## Fowler

* No independent tort of harassment
* Establishes elements of hypothetical tort

# Intentional Interference with Land

Definition – direct and intentional physical intrusion onto land in the possession of another

**Actionable per se** – no proof of harm (Carrington)

Purpose of tort: protection of fact of possession of property (Carrington)

## Elements of Tort of IIWL

1. Direct
2. Physical intrusion (to property in possession of other)
3. Intent

\*P must prove first two, D must prove no intent (text)

# Negligence

## 6 Elements of Negligence

Demonstrated in Dunsmore

* Duty of Care
* Standard of care (and breach)
* Causation
* Remoteness
* Actual loss
* Defences

\* P must prove first 5 elements, D proves defences

# Duty of Care

The D must be under a legal obligation to exercise care with respect to P’s interests.

### Donoghue v Stevenson

Facts: Woman drinks ginger beer with snail, gets sick , goes into shock.

Neighbour principle: neighbour is someone who ought to come into your sphere of contemplation

* someone who is **closely and directly** affected
* You must take reasonable steps to avoid acts or omissions which you can **reasonably foresee** would be likely to injure your neighbour

Other principle: notion of common sense and reasonableness

* Must be sufficiently proximate

\* NOTE – clear statement in Hollis that D v S is at the heart of tort law in Canada

### Dunsmore v Deshield

Facts: P was playing touch football + thought he was wearing extra resilient glasses. Another broke the glasses + caused P damages

Ratio: Elements of negligence

Analysis: 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 the product because both are aware that sometimes mistakes are made + not all glasses in the shipment isn’t extra resilient

Parties didn’t do this, thus, they breached their care

Causation → based on “but for” test, the glasses wouldn’t have shattered if P was given the proper glasses

Remoteness of damages → 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/Kamloops Test, Modified by Cooper v Hobart

\* Is there an existing category of duty of care? (Cooper)

1. Was the harm in question reasonably foreseeable, and is there sufficient degree of proximity between P and D to find a *prima facie* duty of care?

-temporal and special proximity

* Must be close and direct (cooper)
  + Type of interest – economic/physical/emotional
  + Expectations/representation/reliance between parties
  + Statutory/contractual framework
* NOTE – talk about policy here too (cooper)

-neighbour principle

-foreseeable risk of injury + foreseeable plaintiff

1. Are there broad residual policy reasons that the duty of care should not be recognized? (separate from relationship)
   * + existence of other legal remedies – does the law already provide?
     + Does it extend liability to an indeterminate class?
     + Costs outweigh benefits to society?
     + Chilling effect/floodgates arguments
     + Goals of torts law – compensation, deterrence

\*burden of proof – first stage on P to show prima facie duty of care, then D must prove any policy considerations (Childs)

### Cooper v Hobart

Facts: P invested money w/ mortgage company. Registrar of Mortgage Brokers (D) suspended company’s licence but P said should’ve acted more quickly. Did the D owe a duty of care to the D?

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

## Foreseeable Risk of Injury

### Moule v NB Elec Power

Facts: Kid climbs tree (complex), spruce tree rotten.

Issue: is injury reasonably foreseeable?

No – not foreseeable because of complex way he climbed and fell

* Consequences of event must be within reasonable contemplation

### Amos v NB Elec Power

Facts: Kid climbs tree, but close to wire – not trimmed.

Risk was foreseeable – tree shouldn’t have been so near

Principle: FACT SPECIFIC for foreseeability

* General duty of care found

## Foreseeable Plaintiff

* P must belong to class of Plaintiffs foreseeably at risk

### Palsgraf v Long Island Ry

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 to foresee fireworks. No duty of care.

* P must be within contemplation of risk (not just harm)
* If injury too bizarre or remote be predicted

### Nespolon v Alford

Facts: Sober friends commit to taking home drunk teen safely. Drop him off at house they thought was his – he stumbles onto highway, driver (P) hits him.

No duty of care – not reasonable that nervous shock would result from dropping on drunk teen - too implausible.

* When the facts are extreme, there’s needs to be something extra to afford plausibility

### Haley v London Electricity Board

Facts: D build trench outside, barrier with ditch and sign saying beware. P blind, walking with cane – doesn’t find barrier, falls and injures himself.

Finding: Duty of care found – company took measures to warn public, but not enough for blind person.

Principle: can’t carve out subsections of population that don’t owe a duty of care to – blind ppl are common

* To members of population at large
* Liability can be extended despite fact D has taken precautions for ordinary member

# Special Duties of Care

## Affirmative Action

Imposing liability for people who fail to act (nonfeasance)

General rule : DO NOT impose liability for failure to act

Exceptions: duty to rescue, and duty to control conduct of others

## Duty to Rescue

### Osterlind v Hill

Facts: D rents canoe to P, P flips its, clings to side. D watches and does nothing.

Finding: no duty of care not to rent canoe (still able to take measures to save own life), **no duty to rescue** – wasn’t completely helpless.

### Matthews v Maclaren; Horsley v Maclaren

Facts: ppl on Maclaren’s boats. Captain had # of drinks. Matthews falls overboard by his own accident. M tries to save but makes wrong maneuvers. Dies. H tries to jump in and save 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
* 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 to second rescuer for creating the risk ( Horsley)
* no causation found

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)

### 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

**Liability for the Intoxicated**

Social Host vs. Commercial Host (Childs v Desormeaux)

* Greater ability 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?
* Commercial host owes duty to public to stop intoxicated patrons from driving and duty to call police if intoxicated patron cannot be prevented from driving (Hague v Billings)

### Stewart v Pettie

Facts: got drunk at theatre. Accompanied by 3 sober adults, still drove home.

Principle: Commercial hosts that supply alcohol are under duty to prevent foreseeable risk of injury by drunk ppl.

* Over-serving doesn’t in itself pose foreseeable risk – need additional risk factor

### Crocker v Sundance Northwest Resorts

Facts: S put on a tube race. C got drunk and despite warnings after an injury on first run, participated and became a quadriplegic.

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.
* Dismiss voluntary assumption of risk – drunk, didn’t read waiver

Policy considerations – dangerous precedent to not find liability – don’t want organization to host events w/o a duty of cared. There were many instances they could’ve intervened but didn’t

## Duty to Save

Voluntary assumption of duty

### Kennedy v Coe

Facts: P & D expert skiing, heli-skiing. Informal agreement to buddy system. After forested area, P fell into rut and died. D didn’t see, skied to bottom then alerted others.

Yes, foreseeable – that would fall into tree hole (not necessarily die though)

Duty of care not proximate – buddy requirements loose. Look at 3 factors (Childs)

* Material creation of risk – control of risks
* autonomy concerns - must be respected
* reasonable reliance – ex. Invites someone into dangerous situation

Principles:

* where allegation is that D failed to act (omission), something more is required (Kennedy, Childs and Cooper) - foreseeability isn’t enough
* occurs b/c duty to take positive action in face of risk of danger not freestanding “mere fact that person faces danger or has become a danger to others doesn’t itself impose any kind of duty of those in position to become involved” (Childs)
* importance of victim having chosen to participate in risk activity (Kennedy) – compared to alcohol cases, which are to 3rd party

## Duties to the Unborn Child

* 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:

* 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)

Preconception Wrongs

### 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?

No duty of care for Drs to future children. 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

Other principle:

* women have rights to expose themselves to harmful risks – protect personal autonomy (UAW v Johnson Controls – US decision)

Wrongful birth/life

* when parents took steps to prevent pregnancy or childbirth, but happens from DR’s negligence

Life: 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

Birth: recognized in limited situations – based on duty to inform of risks (Arndt)

### Arndt v Smith

Facts: DR failed to advise woman or likelihood baby would be born with disabilities – had chicken pox during pregnancy

* 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)

Wrongful Pregnancy

* courts more reluctant to grant remedies in cases with healthy babies
* liability may be found w/ unhealthy/disabled child
* exception – cost of rearing child offset w emotional benefits of having a child (Suite v Cooke )– not strong authority

Pre-natal injuries

* mother doesn’t owe a duty of care to child prior to birth (Dobson)
* Policy considerations: (Dobson)
  + Autonomy rights of mother
  + Punishing lifestyles – not a deterrent
  + Doesn't reach goals of compensation and deterrence
  + Also retracts from society’s needs to provide financial support do special needs kids
  + Too much intervention into lives’ of parents
* Child can sue other parties for injuries caused in utero (Oliver)
* No duty to fetuses, child must be born alive (Davey)

## Duty of Health Care Professional to Inform

* DRs are bound by affirmative duties to disclose risk of any proposed treatment – specific duty w/ positive obligation (Reibl v Hughes)
* DRs need to provide individuals w/ sufficient info to make informed choice (Haughian v Paine) – broad duty – risk of leaving ailment untreated, and alternative means of treatments and risks
* 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

## Psychiatric Harm

* For nervous shock – manifested in physical, psychiatric, psychological disorder

### Devji

Principles:

* 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

### Mustapha v Culligan of Canada

Facts: fly in water bottle.

Reasonableness standard – person of ordinary fortitude

* Life goes not - no recovery for transient or minor upsets

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

* 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)
* Manufacturer’s needs to advise of dangers at time of sale and subsequently – continuing duty for duration of life of product (Rivtow Marine)
* Manufacturer hears of new risk, must inform dr immediately (Cominco)
* Supplier’s duty same as manufacturer (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 )

### 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

## Duties of Care Owed by a Barrister

* General duty of care owed by barrister not to act carelessly and cause harm to client
* 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 duties to third parties

# Negligent Misrepresentation

Elements of NMR:

1. Special relationship
2. Untrue representation
3. Negligent act
4. Reasonable reliance
5. Reliance detrimental

* Same underlying considerations – neighbour principle
* Fact that service in question is given by means of actions or words makes no difference for negligence analysis (Hedley Byrne)
* Policy concerns:
  + Indeterminate liability
  + Chilling effect on certain professions
  + Chilling effect on freedom of expression
  + Reluctance to interfere with privity of contract

Pure Economic Loss – Concerns:

* Concern to interfere with free market
* Freedom to contract at will
* Economic loss less compelling than physical (Martel)
* Inherent risk in economic activities – nature of business, already mechanisms (Martel)
* Worry about proliferation of lawsuits (Martel)

### 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.

* 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

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?

* 1) Reasonably foreseeable reliance (for the D to foresee)
* 2) Finding that reliance in question is reasonable in circumstances of the case (for P to rely)
  + 5 factors to show reliance reasonable: (not exhaustive or a test)
    - D had Financial interest in transaction (direct/indirect)
    - D was professional or had special skill/knowledge
    - Advice/info at issue provided in course of business
    - Representation given deliberately – not social occasion
    - Information given in response to specific inquiry or request
* Also – policy consideration:
  + D had Knowledge of P
  + Precise reliance (P used statement for precise purpose/transaction)

Finding – prima facie special relationship, but negated by policy – didn’t use for specific transaction.

\*This is a modified Anns test – for negligent misrep

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)

## 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)
  + 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)
* No liability imposed during negotiations – nature of negotiations (Martel)
  + Policy reasons:
    - Tort isn’t insurance scheme
    - Law already provides remedy
    - Not role of judiciary to intervene
    - Indeterminacy
    - Limits goals of negotiations

Spectrum:

* BG Chico – after contract took place
  + Look at terms of contract
* Queen v Cognos – during contractual negotiations
  + If MR goes to very existence of contract
* Martel – pre negotiations
  + Liability rare

## Pure Economic Loss

\*Note – Iacobucci’s policy reasons why courts reluctant to recognize liability here (see above) – In Martel

**Negligent Performance of a Service**

* Causes party economic loss – apply Anns test
* Courts reluctant to find liability – fails on proximity

### BDC v Hofstrand Farms

Facts: Courier to deliver to office in Vic, but late. Farm (3rd party) suffered b/c unable to register grant.

* No foreseeability, no proximity (no knowledge, not privy to K)

### James v BC

Facts: P’s employer held tree farm license with clause saying had to keep open mill. Minister didn’t include protection in new license, so mill shut down. P suffered economic loss, sued Minister.

* P can recover – Minister voluntarily assumed responsibility
* Reliance not required by P
* Factually specific

**Negligent Supply of Shoddy Goods or Structures**

* Liability lies in tort for personal injury and property damage that P suffers as result of D’s supply of shoddy goods/structures

### Winnipeg Condo v Bird Construction

Facts: D contracted to build condo building. Later P bought it and damage occurred, shown that caused by D’s defects in masonry work.

* 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)

# Standard of Care

* Question of fact and law
* Reasonableness standard – modified objective standard – circumstances
* Criteria: (text)
  + Probability of injury
  + Severity of harm
  + Risk avoidance
  + Social utility
* Probability and severity balanced against risk and social utility

Standard of Care : Reasonable Person Test

* standard of reasonableness is care taken in the circumstances by reasonable and prudent man (Arland v Taylor)
* normal intelligence, not super hero (Arland)
* standard assessed at time alleged breach occurred (Arland)
* definition of negligence – prudent v non prudent, reasonableness (Blyth)

**Probability of Injury/Severity of Harm**

### Bolton v Stone

Facts: P walking on road beside cricket field, hit by ball and injured. Very unlikely.

* 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 there is a risk

### Paris v Stepney Bourogh Council

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
* Note \* old case – today would be different – would be goggles for everyone and additional for one eyed man

**Cost of Risk Avoidance**

### Vaughn v Halifax-Dartmouth Bridge

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

### Law Estate v Simice

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 is high – severity of risk is high so shouldn’t consider costs

**Social Utility**

### 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.

* Emergency situation – high social utility (need ppl to respond)
* Permissible for defendants to run high risk where there is high social utility
  + Usually only considered for public officer or public authority D

## Standard of Care for People w/ Disabilities

### Fiala v Cechmanek

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?

* Person who suffers mental problem will be absolved of liability if can show:
  + No capacity to understand duty of care
  + Or unable to discharge that duty (BOP) – no control over actions
* Fault still essential element of tort law - not just about compensation
  + Otherwise strict liability (Parliament can intervene if they like)
* Practical considerations of how to determine mental capacity
* Slight modification to objective standard – only in these circumstances

## Standard of Care Owed by Children

* Principle: children should be held to modified standard of care – what is expected given age, intelligence and experience (McEllistrum)

### Joyal v Barsby

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

## Standard of Care that’s Expected of Professionals

1. Codes of Conduct specific to each profession
2. General standard/rules from negligence
3. Specific duties in tort law (subject to own standard)

### White v Turner

Facts: P has breast reduction surgery. Plastic surgeon botches surgery – post-op complications.

* Standard: what a reasonable professional in the facts (circumstances) would do
* Error in judgment doesn’t always breach SOC – entitled to make mistake
* Look to specific industry for standards – here plastic surgery

Other principles: (text as authority)

* Professions that are hierarchically arranged – standard of care varies (ex. Senior surgeon vs. intern
* Violation of code not necessarily negligence – just a guide
* People in secondary fields hont held to SOC of primary fields (ex. Herbal med)
* Judge/jury not to rely on common sense regarding complex scientific or medical manners (Ter Neuzen)

Degrees of Negligence

Restricted by statute

* Gross negligence is 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 ppl that intervene to help

**Sudden Peril Doctrine**

* Careless conduct exempt from liability if reasonable in emergency setting

## Custom

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

### Ter Neuzen v Korn

Facts: P contracted HIV after receiving AI from DR. Risk not widely known. D had adopted standard medical practices.

* 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
* Standard practice doesn’t necessarily govern standard of care – must adopt obvious and reasonable precautions apparent to ordinary person
* Duty to conduct as reasonable and prudent Dr. in circumstances
* “when frought with obvious risks” – pro’s have a duty to know that standard isn’t satisfactory

Note – consider standard proscribed by Walker (see below)

# 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
* Very factually specific – just need some evidence that loss
* Unlike intentional torts, Ds held liable only for foreseeable injuries that caused

**But-for Test**

* Question of fact – if need more facts, then say that
* Assess using common sense principles
* But for the actions of the D, would the P have suffered the loss?
* Need balance of probabilities (not scientific certainty) (Snell)

**Principles from Handout**

* Causation is factual inquiry – P must establish that D’s breach of SOC caused injury/loss (Clements)
* Test is but for test (Kauffman)
* “But for” test must be applied in robust, pragmatic, common sense fashion (Clements)
* causation doesn’t need scientific precision – ordinary common sense (Snell)
* rare cases, causation may be inferred on little evidence (Leonati)
* 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)

### Kauffman v Toronto Transit

Facts: Scuffle at top of escalator – domino effect. Person at bottom injured and suffered loss. Standard and breach – no testing of handrail design. Would damage had occurred is there was? Courts found insufficient causation.

* Fundamental principle that causal relation between breach and injury must be made out by evidence - But –for test

### Barnett v Chelsea and Kensington Hospital

Facts: Husband dies of arsenic poisoning – not admitted to hospital. No causation b/c antidote wasn’t available – would’ve died anyway.

* Factual determination of whether D’s actions caused P’s loss
* But-for test – common sense principles based on robust, pragmatic application of the facts (clements)

## Established Exceptions to But-for Test

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

**Multiple Negligent Defendants**

* Where can’t distinguish between multiple D’s – relax but-for test, replace with reverse onus (rare)

### Cook v Lewis

Facts: 2 men hunting, fire at same time, shoot other hunter. Unclear which one causally responsible.

* Both found to have breached SOC
* Courts reverse onus – D must disprove causation on BOP
* Find both responsible – to deny violates principles of fairness

**Learned Intermediary**

* Manufacturers can’t use learned intermediary rule to shield from claims arising from own negligence - exempted from but-for test (Hollis v Dow Corning – breast implants case – couldn’t prove that Dr. would’ve informed her)
* Would create anomalous situation where negligently injured P has no cause of action

**Informed Consent**

* With medical professionals, shift to objective/subjective burden – did the P understand the warning that was given to them? (Arndt v Smith)
  + would they 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)
* only justified where required by fairness and where its application conforms to principles that ground recovery in tort (Clements) – compensation, fairness, and deterrence
  + but-for test impossible – results from factors beyond P’s control
* May involve multiple independent causes bring single harm
* Material contribution standard – (Clements)
* Policy driven rule – applies to ensure underlying goals of tort law met
  + Where unfair results
  + Compensation, deterrence, corrective justice

### Walker Estate v York Finch General Hospital

Facts: HIV man donates blood. Red Cross had some knowledge of AIDS but didn’t warn P. She 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.

### Snell v Farrell

Facts: Doctor performed cataract surgery on P. Injected drug, saw a problem. Continued with surgery. Cause blindness. Standard and breach found, but difficult to concretely find causation.

* If facts different, then can apply material contribution
* 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

### Athey v Leonati

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?

* But-for test – sufficient to establish liability
* If facts more complicated – then maybe use material contribution

Principle:

* 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
* Only held liable for harm that actually caused (so to exacerbate pre-existing harm)
* Fact that D contributes to harm is enough to find them liable
* This can come into play in assessment of damages – if it would’ve affected them in the future anyway
* D is liable for the additional damage but not pre-existing damage (Leonati)

\* Note, thin skull is concrete, present conditions (ex. Half blind)

Crumbling skull – unfolding, evolving conditions (ex. Going blind)

# Remoteness

* Question of law – legal connection between D’s breach and P’s loss
* Policy mechanism – deals with fairness, justice and policy
* To contain liability within fair and reasonable boundaries
* 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

### Wagon Mound #1

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:

* 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
* Additional principle from **Wagon Mound #2**:
  + 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

### Hughes v Lord Advocate

Facts: Post office ppl left paraffin lamp and open manhole. Boy breaks lamp, causes explosion, injures himself. Is damage too remote?

Principles:

* 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

### Assiniboine South School Division v Greater Winnipeg Gas

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

* Replaces last wrongdoer doctrine
* Act that cause to P’s loss after breach has occurred which can exacerbate loss
* 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?

### Bradford v Kanellos

Facts: Grease fire in restaurant. Ps eating there. Automatic fire extinguisher – takes care of fire. Emits CO2 – hissing sounds. Someone yells “gas leak” and causes panic. P suffers injury.

Is there legal causation for loss?

* Found that hysterical conduct of patron was intervening act – this wasn’t within the scope of risk
* Dissent – said was within scope - can use b/c now if this case came before courts, would be decided differently

### Price v Milawski

Facts: P hurt ankle, goes to e-room. Dr. orders X-ray of foot not ankle – negligent. Finds not broken. Tells him to go home. Later goes to other Dr., who relies on previous X-ray. Month later finds out broken, more damage caused.

* Actions of both Dr’s were reasonably foreseeable.
* 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)

### Block v Martin

Facts: P suffers leg fracture from negligence of driver. 6 mos later, slips and falls, fractures leg. Was there intervening act?

* No independent cause – continued daily life, initial loss exacerbated
* Similar to Leonati

### 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. Person had moved it then jumped out.

* Found that intervening act broke chain of causation – too remote
* Anyone with a mind to do so could still put it in motion

\*Note – here we have Trial decision and Court of Appeal – can use this as an authority to say that sometime the same set of facts will lead to different outcomes

### Hussack v Chilliwack School District

Facts: Gym teacher, field hockey.

* Confirms principle of standard of foreseeability for intervening act (father’s craziness within the scope)
* Proscriptive behaviour
* Vicarious liability

# Defences

* Negligence is hard to prove - minimal defences available
* Now based on combo of statute and CL

## Contributory Negligence

* Defence recognizes where P caused or contributed to own loss, they should be held accountable
* Can be positive or omission
* Partial defence – doesn’t let D off the hook (Gagnon)
* Assessed by modified objective standard – what would ordinary, prudent person have reasonably done in the circumstances? (Walls)
* Varies by reference to duties of care, age, profession, facts
* Sometimes seen as arbitrary
* Factually specific – varies case by case (Gagnon)
* Goals of corrective justice – money comes into play - this creates a tension
* 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)
  + Bringing in neighbour principle -assess fault in comparison to neg of others
* Concerned w/ corrective justice (Walls, Bow Valley)
* Mini negligence analysis – basic principles (Mortimer)
* 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)

\* Note – for neg misrep, courts look at whether P’s reliance was reasonable (Grand Restaurants)

### Negligence Act

* Up to judge to apportion contributory negligence based on assessment of fact (s.1)
* Damages awarded w/ proportion of liability (s. 2)
* If not possible, then divide equal liability (50/50) – default (s. 4)

### Walls v Mussens

Facts: 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. Is D contributorily negligent?

* Court allows for “agony of the moment” – modified objective standard
* Test was whether ordinary prudent man might reasonably have done under stress of emergency
* Corrective justice – courts more lenient when insurance company paying
* Court more likely to consider characteristics of P where corrective justice allows

### 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
* also factually specific (ex. Pregnant lady can’t wear seatbelt b/c it hurts)

### 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

## 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.
* Complete defence
* Less likely now – b/c of corrective justice – inflexibility
* Need a moment court can point to of sober, sound resolution to accept both types of harm – very difficult to show abandonment of right to sue (Dube)

### Dube v Labar

Facts: P and D drinking together. Both drinking and driving. P couldn’t start car, so D takes over. P grabs wheel and they crash.

Was P negligent b/c assumed risk?

Rule: D must show:

* Express or implied agreement btw parties
* That P consented to accept physical risk of injury + legal risk of injury (actual harm + abandoning right to sue) – difficult to prove

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

**Other Principles:**

* Crocker v Sundance Northwest – defence rejected – mere signing a waiver not enough to show that parties willingly consented to both physical/legal risk
* May be found if P encourages careless behaviour (Allen)

## Participation in Criminal or Immoral Act

* Complete defence

### Hall v Hebert

Facts: 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.

Principle:

* Applied rarely w/ great caution
* Test: only applies where integrity of legal system is at threat
* 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)

## 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

### Rintou v X-ray and Radium Industry

Facts: Driving, brakes didn't work. Hit other car.

Principles:

* need 2 things 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

# 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)

### 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

### Mohamed v Banville

Facts: D accused of smoking in house and causing house fire. But not evidence that he was smoking that night.

* Judge ruled that no evidence fire started by careless smoking, even if fire originated in area where Banville fell asleep.
* Failed for lack of proof of negligence

**Insufficient Evidence Motion**

* D alleges that insufficient – even harder to prove (something there, but not enough)
* Declaration that case will not proceed no matter what – so P presumptively wins if it fails
* Policy reasons – further goals of justice, don’t waste courts’ resources, expensive for both parties – also disincentive – to prevent D bringing as strategic tool

## 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

# 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

**Master-Servant Relationship**

* Salmond Rule: employers vicariously liable in 2 situations:

1. Employee acts authorized by the employer, or
2. Unauthorized acts so connected w/ authorized acts that they are seen as “modes of doing” the authorized act

* Fact specific – facts drive the case
* 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
* Courts do combo of both – situations where employer was asking employee to further their aims
* Situations where employer creates the risk that produced tortious act

### Bazley v Curry

Facts: Screening for hiring for Children’s Foundation. Missed that he was sexual predator. As soon as found out, fired him.

* 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
     + wrongful act further employer’s aim?
     + Wrongful act related to friction, confrontation, or intimacy inherent in enterprise
     + Extent of power relationship btw employee/victim
     + Vulnerability of victim to wrongful exercise of employer’s powers

**Principle/Agent Relationship**

* Not much different than master/servant

### TG Bright v Kerr

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

**Statute**

* Sometimes statutes will come in to ascribe vicarious liability
* *Highway Traffic Act* – owner of vehicle will be responsible for person driving it

## Strict Liability

* Strict liability for escape of dangerous substances

### 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?