Duty of Care

**A Question of Law – “Who is my Neighbour?”**

Lord Wilberforce - “Is there a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter = Prima facie. Are there policy reasons to negate it?”

**Functions**

* Establish liability: Overall framework for range of situations where liability could arise
* Limit Liability
* Allocates risk in society

## Anns/Cooper Test

#  \*Existing Category

# Reasonably Foreseeable

# Proximity

# If met then a *prima facie* duty of care found

# Policy

### \*Existing Category

Is the alleged duty of care within an established category or analogous to it?

* If so proximity is established and overriding policy considerations will rarely arise. (***Cooper***)

### Reasonably Foreseeable

*Was the harm that occurred a reasonable foreseeable consequence of the defendants act?*

* Accessed on an objective standard of reasonableness. not concerned with blame
* Generally a low threshold to overcome
* Question of who is your neighbor is relevant
* Was the particular coincidence of events foreseeable

### Moule v NB Power (1960) – A SEQUENCE OF EVENTS SO FORTUITOUS AS TO BE BEYOND THE RANGE OF THE FORESEEABLE RESULTS THAT A REASONABLE PERSON WOULD ANTICIPATE AS A PROBABLE CONSEQUENCE.

* Kid climbing tree had to do a series of technical maneuvers to put himself in harm’s way.
* Duty of care is an allocation of risk
* Coincidence of events very unlikely means less foreseeable.

### Amos v NB Power (1976) – FORESEEABLE RISK OF INJURY DUE TO INACTION

* Unlike in Moule the electrical company didn’t do enough to prevent the electric shock.
* The poplar was not trimmed like the spruce and the wire went right through it.
* It’s reasonably foreseeable that a kid would climb a tree (Moule).

**“Foreseeable Plaintiff”**

### Palsgraf v Long Island (1928) – NO HAZARD WAS APPARENT TO THE EYE OF ORDINARY VIGILANCE.

* The guards could not have reasonably foreseen that the box was fireworks, it would be lead to an explosion that would harm bystander.

### Nespolon v Alford (1998) – UNFORESEEABLE THAT DROPPING OFF A DRUNK TEEN WOULD EVENTUALLY CAUSE NERVOUS SHOCK TO SOMEONE IN PLAINTIFFS POSITION

### Haley v London Electricity (1964) – PROBABILITY ALONE IS NOT DETERMINANT OF FORESEEABILITY.

* It doesn’t matter if plaintiff was unusually vulnerable to harm.
* It is not surprising that a blind person would walk on the pavement alone. Blind people must live somewhere

### Proximity

*Is there close or direct relationship of proximity or “neighbourhood?”*

* Even if the harm was foreseeable, was there a sufficient relationship of proximity between the parties to make it just and fair to impose a duty of care on the defendant?
* Characterizes the type of relationship in which a duty of care may arise (***Cooper***)
* Court will consider policy considerations arising from the relationship between the parties
* **Factors to consider are**: expectations, representations and reliance – the types of interests involved (physical, economic, emotional) and any statutory or contractual framework.
* **“Close and Direct”** relationship, within the range of people you’d think of as foreseeable, not so causally removed that you can’t foresee them.
* The “close and direct” relationship, that grounds a Duty of Care in Donoghue and Stevenson (***Cooper***)
* **Relation and Temporal aspects**
* Deals with the “**Foreseeable Plaintiff”** the harm and the person must be in reasonable contemplation **(*Alford, Palsgraf, Childs, Haley)***

# Policy

Evidentiary burden shifts to defendant to raise residual policy considerations that would negate the duty of care established. (***Childs***)

* Pertain to the decision’s effects on other legal obligations, the legal system or society more general **(*Cooper*)**
* Already a remedy
* Indeterminate liability
* Chilling effect
* Involve government policies that should be immune from such liability (*Cooper*) tax-payers footing the bill for investors
* Policy concerns must not be of trivial nature. Must be convincing” or “compelling” matters.

Affirmative Action

* Hesitation to impose liability on nonfeasance
* Offends against personal autonomy/individualism
* Positive obligations require “something more”
* Nonfeasance interferes with capitalist notions of choice and minimal interference with individual choice.
* positive obligations are necessarily more intrusive than negative obligations
* Misfeasance = worsening P’s position; nonfeasance = failing to improve.

**Special Relationships = positive obligations**

Parent/Child or people who assume caretaking of children.

Employer/Employee – safe work environment, no abuse, duty to public if leaving a work party.

Prisoners/staff – don’t harm yourself or others Masters/invited guest, Occupier/non trespassers.

Circumstances with implied contractual agreement

## Duty to Rescue

## Osterlind v Hill (1928) – no cl duty to rescue

* Smoked a dart while boat renter drowned

### Matthews v Maclaren (1969) – duty to rescue may be implied from statute. Voluntary assumption of liability

**Duty to rescue a passenger who fell overboard by reason of his own misfortune or carelessness?**

* Special Relationship between pleasure boat operator and invited guests duty of care may be implied through *Canada Shipping Act.*

**If a person attempts a rescue he has entered voluntarily into a relation of responsibility and therefore assumes the duty.**

* He will be liable for failure to use reasonable care in conducting rescue until peril is over.
* Standard of care = what would the ordinary prudent boat operator do in the circumstances?
* Burden is on plaintiff to prove that the defendant’s negligence was the effective cause of the death or harm. In this case it was not

### Stevenson v Clearview (2000) – no duty on off-duty ambulance. Policy: onerous, would avoid career Do not have a duty same as other individuals.

**Arguments in Favour:**

* Reflects common sense understanding of morality. Uncomfortable with legal responsibility?
* Utilitarian argument (Bentham) – benefit outweighs cost = net gain for society

**Exceptions**

Duty Established by statute & once commenced

**Encouraging rescue –** Provide statutory protection from liability. Pass Good Samaritan acts.

**Holding rescuers liable is rare** – lower standard of care in sudden emergencies (**Sayers**)

**Voluntary Assumption of Risk** does not preclude rescuers from compensation when harmed **(Patel)**

## Duty to Rescuers

### Horsley v Maclaren (1971) – If a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger.

* Any duty to Horsley must stem from the fact that the new situation of peril was created by Maclaren's negligence which induced Horsley to act
* Special relationship between boat captains and gratuitous guest recognized This comes from implied contract

## Liability for the Intoxicated

***Crocker v Sundance (1988) – When a ski resort establishes a competition for profit, it owes a duty of care towards visibly intoxicated participants.***

* Don’t want companies to put on dangerous events for profit, without a duty of care.
* Foreseeability – resort knew he was dangerously drunk
* Proximity – Commercial host, contractual, for profit

### Childs v Desormeaux (2006) – Social hosts do not owe a duty of care to public users of highways.

* No positive duty for social hosts to stop guest from getting in car drunk and leaving house
* Unlike commercial hosts, social hosts:
1. Are not regulated
2. Can’t control consumption
3. Don’t make profits (contractual)

**Factors that Support a Positive Obligation**

1. **Risk Control** – was the defendant materially implicated in the creation or control of the risks to which others have been invited (serving an intoxicated person alcohol requires something more, like knowing he’ll be driving home)
2. **Reasonable Preservation of Autonomy** – may be satisfied where defendant has special relationship with plaintiff or a reasonable role in the management of risk. Without this you are entitled to respect the personal autonomy of the other (party goers and heli-skiers don’t check their autonomy at the door)
3. **Reasonable Reliance** – was it reasonable for the plaintiff to rely on defendant to mitigate all risks. Did they rely on this? (kids/parents rely on teachers)

### Stewart v Pettie (1995) - Commercial host that supply alcohol have duty to prevent harm by guests

* Something more, knowledge they’ll drive

Duties to Unborn

## Preconception Wrongs

When the defendant carelessly causes a parent to suffer and injury that detrimentally affects a subsequently conceived child.

### Winnipeg Child and Family Services v G [1997] – woman has compete autonomy, foetus and mother are one legal entity. No duty for the unborn

### Paxton v Ramji (2008) – Policy that Doctor’s sole duty is to the mother

* Woman was prescribed acne medication that cause birth defects. Dr. believed that husband was sterile.

**Policy why Mother comes first** – may limit treatment options for women, limit autonomy of mother.

**No duty of care between doctors and future children (no proximity, create a conflict)**

**Women do not owe a duty to their future children**

## Wrongful Birth/Life

When a doctor carelessly fails to inform a women that she has an unusually high risk of giving birth to a child with disabilities. Doctor doesn’t cause the injury to the child. Merely deprives the mother an opportunity to make an informed decision on abortion. (**Connected with duty to inform**)

### Jones v Rostvig (1999) – No such thing as a wrongful life. Not held liable to kid for not convincing mom to abort you.

### Ardnt v Smith (1994) - Mother may claim for extra cost of rearing a child. But Causation near impossible to prove.

* Dr. was negligent for not telling mother of minor risk of birth defect and option to abort. But difficult to prove a reasonable women in her position would abort over minor risk.

## Wrongful Pregnancy

When parents take medical steps to prevent pregnancy and due to negligence in the medical profession a pregnancy occurs or continues.

### Suite v Cooke (1993) – generally if you give birth to a healthy child (it’s a blessing) and no damages. however in this case the Quebec court gave damages for the cost of raising a healthy child

## Pre-Natal Harm

When a child sues for injuries sustained in the womb. Child must be born with a disability.

### Dobson v Dobson (1990) – Mother does not owe a duty of care to foetus. Based on policy grounds.

* Result in intrusion in bodily integrity, privacy and autonomy rights of women.
* Anything and everything she does may affect foetus.

**Cory J’s reasons why no duty between mom/foe**

1. Intrude on women’s fundamental rights. Her autonomy would be traded for foetus.
2. Standard of care is impossible to determine. Don’t know what’s good/bad in a pregnancy.
3. Lifestyle choices like alcoholism and drug abuse may be beyond control of mother. Creating a duty of care would not **deter** this type of behaviour anyways.
4. Duty of care would result in level of external scrutiny focused on mom to increase.

Duty to Inform

## Health Professional’s Duty to Warn

### Reibl v Hughes (1980) – Doctors are bound by an affirmative duty to disclose the risk of proposed treatments.

* Once a patient consents to the general nature of the treatment the Dr. won’t be charged with battery but he may be found negligent for breaching his affirmative duty to disclose risk.
* Subjective/Objective standard – a reasonable person in Plaintiffs position

### Haughian v Paine (1987) – duty to inform of “material” risks a) high risk/low harm or low risk/high harm b) to particular p c) p must show that reasonable person would have refused

* Must provide enough information to provide informed consent. Including risk of not doing procedure and alternatives
* 1/500 chance of paralysis was enough.

**Cite the text book for these**

* The scope of what constitutes a material risk is broad
* Disclosing some but not all MR is not enough
* If patient has a particular concern (special risks) it is up to the patient to ask
* More important for patient to understand the substance of risks than precise medical terms.

## Manufacturer’s Duty to Warn

### Lambert v Lastoplex (1971) – manufacturers have a duty to warn consumers of dangers of product if it has knowledge or ought to have knowledge of it.

### Rivtov v Washington (1973) – Duty to warn is a continuing duty. all warnings must be reasonably communicated. dangers that arise from ordinary use of product.

### Hollis v Dow Corning Corp (1995) – Manufacturer has duty to inform the “Learned intermediary” which controls access and has a duty to inform potential customers. Disclose all possible risks. The higher the potential risk the greater the duty to inform.

* Need enough Info to make informed decision.
* Need to ask would a reasonable person in plaintiffs position would refuse the implant if they were properly informed. (Sub/Ob test)
* Med product greater risk = greater duty

Pure Economic Loss

## Negligent Supply of Service

Use Anns then ask is there detrimental reliance or voluntary assumption of responsibility, if yes = duty

### BDC v Hofstrand Farms (1986) – Uses the Anns/Cooper test had detrimental reliance

* No proximity, courier couldn’t have foreseen it was delivering time sensitive info that would cause harm if late.

### James v British Columbia (2005) – IF NO DETRIMENTAL RELIANCE, VOLUNTARY ASSUMPTION OF RESPONSIBILITY ON THE PART OF THE DEFENDANT IS SUFFICIENT

## Negligent Supply of Shoddy Goods

### ***Winnipeg Condo v Bird Const. (1995)*** – A building contractor, architect or engineer has a duty of care in negligence to subsequent purchasers who may suffer financial loss as a result of repairing a latent defect that would if manifest give rise to a “real and substantial danger” to the inhabitants.

* **a)** class restricted to inhabitants **b)** amount limited to reasonable fix **c)** time limited to life of building (not indeterminate)

## Negligent Misrepresentation

In an area of its own. Different type of action different type of harms (mostly economic loss)

### Hedley Byrne v Heller (1963) – First case to recognize negligent misrepresentation. The power of words.

### Rainbow v CNR – Damages aimed to put the plaintiff in position he would have been in had there not been a MR not if representation was correct

### Hub v Orca (2009) – Enough for P to prove MR was at least one reason that induced him to act.

### White v Colliers (2009) – MR was not “material” to how plaintiff acted

**Pure economic losses should be limited (*Martel)*:**

1. Economic interests are less compelling of protection than bodily or proprietary interests
2. Unbridled recognition would raise spectre of indeterminate liability
3. Economic losses often arise in a commercial context: inherent part of business risk, better guarded by allocation on risk
4. Allowing such cases would seem to encourage inappropriate lawsuits

# PRE-CONTRACT NEGOTIATIONS

Rare to find liability here.

### Martel Buildings v Canada (2000) – Why MR does not apply to pre-K negotiations

1. Negotiations create winners and losers transfer of wealth is good for society.
2. Creation of a duty could deter socially and economically useful conduct. Hard Bargaining.
3. Imposing a duty would make tort law an after-the-fact insurance against failure to act with due diligence and to hedge risk of failed negotiations
4. Extending a duty to negotiations would impose significant regulatory function upon the court, unnecessarily when law of contract already provide
5. Needless litigation should be discouraged, many negotiations fail may end up in court

# DURING CONTRACT FORMATION

### Queen v Cognos (1993) – Made hedley Byrne into Canadian Law.

* Signed K, Moved family expecting a Job.
* MR went to the very fundamental basis of K
	+ It was foundational in inducing acceptance.

# AFTER CONTRACT IS FORMED

### BG CHECO v BC Hydro (1993) – The existence of K does not preclude existence of duty of care

* So long as Duty and K do not conflict (one negate the other) you can sue concurrently

## Finding Negligent Misrepresentation

*Queen v Cognos Test*

\*Pre-existing special relationship

1. **Special Relationship** (*Modified by Hurcules*)
	1. **Reasonable Foreseeable Reliance** – The defendant ought reasonably to foresee that the plaintiff will rely on their representation.
	2. **Reliance must be Reasonable** - Reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.
		1. Defendant had financial interest in the transaction
		2. Defendant was a professional or had special skill, knowledge, judgment.
		3. Advice was given in course of defendant’s business.
		4. Information was given deliberately, not during a social occasion
		5. Information was given in response to specific enquiry or request.
	3. **Policy** (deals with indeterminate liability)
		1. That the defendant know the identity of the plaintiff or class of plaintiffs who will rely on the statement
		2. Reliance losses claimed by plaintiff stem from the particular transaction in which the statement was made.
2. **Representation was Untrue or Misleading**
3. **Must have acted negligently in making it –** Defendant must be truthful and honest and must take care that it’s truthful.
4. **Reasonable Reliance –** Plaintiff must have relied in a reasonable manner on MR(Goes towards causation and remoteness)
5. **Reliance must be Detrimental –** Causes damages.

Standard of Care

 **“How should I act towards my neighbour?**

**What’s the Standard? = Question of Law**

**Has it been Breached? = Question of Fact**

* Can only appeal a fact if there was a “palpable and overriding error”
* Conduct of a reasonable person in the circumstances – look at factual scenarios not personal perspective

### Arland v taylor (1953) – Reasonable person test

* **“What a reasonably prudent man would have done in the circumstances.”**
* He is a mythical creature in law. He is not extraordinary or unusual, he is not superhuman.
* His conduct is the standard “adopted in a community by persons of ordinary intelligence and prudence.”

### Roe v Minister (1954) – These various considerations associated with risk avoidance and Social Utility of defendants actions. must be made at time of relevant breach

***Factors to Consider in Determining Standard***

1. **Probability of Injury and Severity of Harm**

Greater the risk/potential harm – greater the standard of care required.

### Bolton v Stone (1951) – Probability of Injury not foreseeable. Every activity has risk, not all are breach

* When a risk is sufficiently small, a reasonable man can disregard it.
* Must be extremely small risk to disregard.

### Paris v Stepney Borough (1951) – Severity of possible harm (complete blindness) should be factored in

* A reasonably prudent employer would supply goggles to a one eyed man. Low cost fix.
1. **Cost of Risk Avoidance**

What would it cost to do everything to prevent such harm? Is it reasonable to do all them?

Vaughn v Halifax Bridge (1961) - ***A person is liable in negligence when they do not take reasonable steps to address/avoid the risks of their actions.***

* What would it cost to stop the flecks of paint from falling on cars below? Could have done more, put up posters, moved cars.

### Law Estate v Simice (1994) – Cost of confirming that a patient doesn’t have a life threatening condition is less than burden on tax payer.

* What a reasonable doctor should know is based on an industry standard.
* Duty to patient greater than to taxpayer
1. **Social Utility of Defendants Actions**

If the ends they are trying to achieve are socially valuable then we may accept higher risk.

### Watt v Hertfordshire County (1954) – social utility outweighed costs

* Saving lives (fire fighter) has a high social value therefore justifiable to run higher risks.

## Special Standards of Care

1. **People with Disabilities**

### Fiala v Cechmanek (2001) – sudden mental illness will be absolved from liability if: 1) no capacity to understand duty of care or 2) no meaningful control over actions to discharge duty based on BOP

* People with mental disabilities should not be measured against the reasonably prudent man.
* Negligence law is **concerned with fault** for falling below requisite standard of care
* This is evident in lack of strict liability torts
* Other roles of tort can be solved by other programs, education, insurance (537)
1. **Children**

### Joyal v Barsby (1965) – Girl running into traffic

* **Modified Cbjective Standard:** care to be expected of child of like age, intelligence and experience (about capacity not culpability).
1. **Professionals**

Should be judged by the standard of their profession.

### White v Turner (1981) – Doctor did not follow the standard of his breast reduction profession.

* Plaintiff must prove that not only was there a bad result (harm), there was a negligent act. Mere error of judgment not enough
* Courts bring in professional codes of conduct, fellow professionals to compare.
* In this case he failed to meet the standard of care by being too quick and not checking twice.

### VGH v Fraser Estate – Intern doctors have lower standard. “reasonable competent intern in the circumstances”

## Degrees of Negligence

**Blameworthiness:**

Tort Negligence 🡪 **Gross Neg**.🡪 Criminal Neg.

“A very marked departure from the standards by which responsible and competent people habitually govern themselves.” (McCulloch)

**Sometimes written into statutes.**

**Municipalities –** “gross negligence” standard written in to protect them so they can function.

* Have duty to clean ice off sidewalk.

**Good Samaritans –** Encourage emergency intervention by reducing the threat of liability for those who intervene.

**Sudden Peril Doctrine –** What normally would be careless may be exempted from liability if in circumstance of emergency (**CP v Gill)**

## Custom

**Standard of Care v Standard Prof. Practice**

### Ter Neuzen v Korn (1995) – Artificial insemination with HIV. DR. Followed standard practice but jury found this to below standard of care.

* If the standard practice is complex, scientific or highly technical, Court must accept it as SofC
* Where it is common sense they can raise it.

Causation

**But For…. Is a Factual Inquiry**

**Based on Common sense and pragmatism.**

1. **What test should be used?** Usually but-for-test but some exceptions and modifications. (“facts drive the analysis”)
2. **Can the Plaintiff prove on a balance of probabilities that Defendant’s breach of the standard of care was the cause of the loss (cause in fact)**
* Important to state with precision the alleged breach of the standard of care and the specific injuries at issue.
* “Common sense principles based on robust application of the facts”

## Standard But-For-Test

### Kauffman v Toronto transit (1959) – But for test

* No evidence that different handrail would have stopped harm or if people would even grab it.

### Barnett v Chelsea & Kensington Hospital (1969) – no causation

* Had the doctor admitted patient as he should have. He still would have died of poisoning.

**Apply the but-for-test, if it doesn’t work ask yourself if the underlying goals of Tort have been met, if not, look into exceptions.**

## Established Exceptions

Limited exceptions that apply to a very narrow category of cases. They address unfairness that may arise from strictly applying the but-for-test. Must serve the underlying goals of compensation, corrective justice, deterrence.

1. **Multiple Negligent Defendants Rule**

When you cannot with any certainty figure out which defendant may have caused the harm.

### Cook v Lewis (1951) – Causation is Presumed and Defendants must prove on balance of probabilities their Breach of the Standard did not cause the harm

* Two hunters both careless use of firearm
1. **Learned Intermediary Rule**

Manufacturer of products that are not directly available to the public must inform the “learned intermediary” of any potential risks related to the product. If they inform LI they discharge Duty

### Hollis v Dow Corning (1995) – Cannot use the existence of a learned intermediary to absolve your causation.

* Plaintiff will usually have a difficult time proving that the LI would forward the info if it had it.
1. **Informed Consent**

### Hopp v Lepp and Reibl (1980) – Causation is measured with special subjective/objective test. Would a reasonable person in the plaintiffs position consent?

## Modifications to the But-For-Test

Where you don’t have enough evidence to apply the but-for test. May leap evidentiary gap.

1. **Material Contribution**

The SCC has yet to apply this test. Don’t touch it

* Applied when there are multiple defendants and its impossible for the Plaintiff to prove which one’s breach caused the harm
* (drag race example)(Clements)
* **See Hand out if you must.**
1. **Materially Increased Risk**

Where it is not possible to conclude the proper causation on but for… would be multiple factors

### Snell v Farrell (1990) – A plaintiff need not prove with scientific certainty that the breach caused the harm.

* Eye surgery may have caused the blindness or the eye could have been on its way out.
* After plaintiff shows increased risk from common sense perspective, low standard. Burden then shifts to defendant to show that that conclusion is unreasonable.

## Multiple Causes

When the plaintiff’s injuries are brought on by two or more causes.

1. **Independent Insufficient Causes**

Neither cause on its own sufficiently caused harm

If your found liable for one 🡪 liable for both.

### Athey v Leonati (1996) – Not necessary to establish that the defendants negligence was the sole cause of the injury. as long as it’s part of injury = 100%

* The pre-existing condition would not have caused the herniation but for the respondents' actions, it simply made the resulting “damages” worse – this is an application of the "thin skull" rule.
* The defendant will be totally liable for the plaintiff's losses.

**Crumbling Skull v Thin Skull**

1. **Independent Sufficient Causes**

Suppose two companies both release enough toxic chemicals into a river to kill downstream cattle. The But-For-Test would absolve them both. The plaintiff would have suffered either way. This is against the underlying goals of tort.

Remoteness

**Question of Law (Cause in Law)**

**Was the harm “reasonably foreseeable?”**

* Based on Fairness and Policy
* Policy mechanism in which courts ask “is this enough?” Controls the scope of liability.
* Role is to contain liability in fair and legal boundaries
* Concerned with the **legal** connection between the breach and the loss

## Measured by Foreseeability

### Wagon Mound No1 (1961) – Liability for damages is based upon the reasonable foreseeability of the outcome.

* Reasonable foreseeability adds to **Fairness and Justice. (**Should be some blameworthiness)
* The defendants could not reasonably foresee that oil in the water would light on fire.
* Dono and Steve basis is Reasonable Foreseeability

### Wagon Mound No 2 – Only liable for reasonably foreseeable consequences of your negligence

* Enough that damage is possible, does not have to be probable. This is a super low threshold.
* If the risk, no matter how small can be mitigated at low cost, a reasonable man would

### Hughes v Lord Advocate (1963) – As long as the general type of injury can be foreseen, there will be proximate cause***. (Lamp causes explosion that burns kid) Reasonable that an unattended lamp would burn someone***.

* Don’t have to foresee the preciseness of the injury, just foresee that one can occur.
* Defendant can be liable for damages greater then were reasonably foreseeable.

### School v Winnipeg Gas (1971) – Do not have to foresee the precise nature of the damage. Re-affirms the remoteness test

* It was reasonably foreseeable that runaway snowmobile would cause damage. RF that it could hit pipe
* Just because there is an intervening act (gas entering building and igniting) does not absolve you of liability.
* Ambit of Foreseeability is broad.

## Thin Skull Rule

### Smith v Leech Brain (1962) – Take your victim as found

The thin skull and crumbling skull mainly become relevant at damages.

**Thin Skull** – Not doomed from the outset. Short of the injury inflicted they may have lived a normal life with no issues regarding vulnerability. Owe more damages because you are responsible to bring them back to the original place.

**Crumbling Skull –** Doomed from the outset. Owe damages for hastening their demise. Damages only owed for the difference in time you hastened.

## Intervening Causes

An act that causes, or contributes, to the Plaintiff’s injuries after Defendant’s original breach**.**

* **Was it “Within the Scope of Risk” set in motion by original defendant?**

###  Bradford v Kanellos (1973) – Independent intervening act (Build-up of grease causes Trampling?)

* Was it reasonable to foresee that letting grease build up would cause trampling?
* It was unreasonable for patrons to react as they did = Independent intervening act. (loss to remote)

### Price v Milawski (1977) – Responsible for others negligence if it stems from your own

* 1st doctor took x-ray that missed proper spot, said not broken. 2nd doctor looked at the same x-ray and said your fine. By the time 3rd Dr. saw it, it was too fucked. (Both Dr.’s liable)
* “A person acting in negligence may be held liable for future damages arising in part from subsequent acts of negligence and in part from his own negligence, where each subsequent negligence and consequent damage was reasonably foreseeable as a possible result of his own negligence.”

### Hewson v Red Deer (1976) – It is not possible to reasonable foresee people doing illegal things.

* Left his keys in the tractor while he got some smokes. Thief made off with it and drove it into house.
* He did enough. Could not have done more to prevent theft. The thief will get it if he wants it
* Intervening act broke the chain.

Defences

Burden of proof is on the Defendant

## Contributory Negligence

***BC Negligence Act –*** Up to the judge to apportion contributory negligence. If he can’t decide 50/50 is the default.

* Liability is measured by “comparative” blameworthiness.

**When to apply this:**

1. Applied when someone causes loss ***(Mortimer)*** or when someone contributes to the loss.

(Either through act or omission)

1. Partial defence (don’t get fully absolved of liability) ***(Gagnon)***
2. Measured on the modified objective standard. “What would ordinary prudent person in the circumstances done + consideration of plaintiff’s circumstances, profession, age skill. ***(Walls)***
3. Varies Case by Case ***(Gagnon)***
4. “Mini Negligence” analysis ***(Gagnon, Mortimer)***
5. Recognizes where plaintiff contributed to their own injury – Should be liable (blameworthy) Based on corrective justice ***(Bow Valley, Walls)***
6. Often this defence has been accused of being arbitrary.

**Examples:**

* Sober P negligently enters car with drunk driver
* May carelessly contribute to an accident (fucking around in the car)
* Carelessly contributing to increase in injuries (not wearing a seat belt)

### Bow Valley Husky (1997) – Completely got rid of CL approach to this defence where if plaintiff was even the slightest bit contributory he was not able to claim damages

* CL approach was unfair and let the defendant get away even if his conduct was egregious.
* This does not further the tort goals of encouraging care and vigilance

### Grand Restaurants – Rarely is this applied to Negligent Misrep. Cause it requires Plaintiffs reliance to be reasonable

### Gagnon v Beaulieu (1977) – Can contribute through positive or negative actions. Plaintiff was not wearing a seatbelt

* Requirement to wear a seat belt was not yet law. Torts normatively steered it into law.
* Defendant had to prove 1) that the seat belt wasn’t worn 2) that injuries would have been mitigated had it been.

### Mortimer v Cameron (1997) – Not reasonably foreseeable that wall would fall down.

* A defendant’s negligence is only actionable with respect to harm that is within the scope of the risk that makes the offending conduct actionable. Similarly, a plaintiff’s contributory negligence will not limit recovery unless it is a proximate cause of his injury (and if the loss was within the ambit of risk created by his negligence).
* Owner of builder more liable because they had an “ongoing duty” to make sure premises was safe.

### Walls v Mussens (1969) – Agony of the moment rule

* “What would an ordinary prudent man might reasonably done under the stress of the emergency” (Modified Objective)(Logging truck)

## Voluntary Consent to Risk

Applied way less often. – The more they move towards corrective justice the less they apply this.

* A complete defense – bad for corrective justice because let off the hook for wrongs.

### Dube v Labar (1986) – Rules for Consent (consented to getting in a car with a drunk)

* Defendant must show express or implied consent that plaintiff was willing to accept physical risk of injury and legal risk of injury. (waives right to sue)
* Must plan to put one’s self in harm’s way and be of full capacity while agreeing to it.
* Very rare that fact will support this

### Sundance Resort – merely signing a waiver is not enough to consent.

## Participating Criminal or Immoral Act

**Based on “*ex turpi causa*” – can’t profit from your illegal acts**

### Hall v Hebert (1993) – “Hey bud you shouldn’t have let me go out for a drunken rip, eh?”

* Defense is applied rarely
* Only applies where integrity of legal system is at risk
	+ Where P tries to profit off illegal activity
	+ Where P turns to tort to get out of criminal responsibility.
* Proximity exists, he is your neighbour but struck down on policy grounds.

## Inevitable Accident Defence

Rare – It’s mostly dealt with already under causation.

### Rintoul v X-Ray (1956) – Breaks worked fine then shit the bed crashed at intersection, did everything he could… didn’t provide enough evidence breaks randomly shit

* **Defendant must establish the damage was:**
* 1) caused by event in which the defendant had no control (inevitable)
* 2) that by exercising reasonable care the it could not be avoided (unavoidable)

Proof and Burden

## Proof of Negligence

**Facts drive the law – Bringing evidence is very difficult.**

* ***Legal Burden***

Plaintiff’s burden to prove the entire case on the balance of probabilities. Must show existence of duty, breach, causation, non-remoteness, non-defences.

* Defendant then gets chance to adduce sufficient evidence to rebut your arguments and reiterate defences.
* Plaintiff gets to rebut
* If Plaintiff discharged the legal burden Plaintiff wins the case.
* **Evidentiary Burden**

Plaintiff’s burden to prove evidence that supports case. Defendant only has evidentiary burden to bring evidence to negate the duty of care on policy grounds.

* May be done through direct evidence (testimony from witnesses, if true prove a fact without any inference) Bart saw Homer eat the pie.
* Indirect, circumstantial, inferred. Bart saw Homer go into kitchen and make eating sounds. The pie was gone.

**Plaintiff discharges evidentiary burden every time they prove one of the elements.**

## Non Suit / Mistrial

If the Judge does not believe that the plaintiff discharged the evidentiary burden. May shut er’ down before the defendant even says a word.

* Defendant must apply for this after Plaintiff brings case
* Case would be dismissed for no evidence or insufficient evidence
* Used rarely, everyone deserves their day in court.
* **No Evidence**

If defendant raises this motion (very rare) must be zero evidence. Happened in the accusations of drunken sleep smoker case and happens when self-represented plaintiffs does not understand the rules of evidence and neglects courts guidance.

1. Judge may dismiss case
2. Judge doesn’t defence still gets to argue.
* **Insufficient Evidence**

If defendant raises this he is ballsy as fuck.

1. Judge agrees and dismisses case
2. Judges disagrees and does not let defence state its piece. Case decided just on plaintiffs submissions.

## Exceptions to Burden Rules

1. Sometimes statutes shift the burden of proof

***Highway Traffic Act –*** *creates a rebuttable presumption that motor vehicle operator was negligent.*

* Recognizes that sometimes it would be difficult for plaintiffs to hold burden, may not know what the fuck happened
1. Multiple Negligent Defendants

***Cook v Lewis –*** *Presumes negligence,**reverses burden of proof*

***Watta v Haliburtan –*** *can be used when neither Plaintiff nor Defendant knew who was negligent* (head on collision)

1. Defendants Purposely Destroyed Evidence

***St. Louis v R –*** *If defendant purposely destroyed evidence it is presumed that evidence was unfavourable.*

## Res Ipsa Loquitur (thing speaks for itself)

Can infer negligence on circumstantial evidence alone.

### Fontaine v BC (1997) – Found husband dead in hunting buddy’s truck in a swollen river.

* Tried to infer that there must have been negligence based on this circumstantial evidence
* Without really proving fault defendant would be presumed negligent and would have to rebut it. This is shitty law.
* Plaintiff must use circumstantial along with direct to prove the case

Liability

## Vicarious Liability

**Core idea of fault not necessary here.**

* Occurs in master/slave relationships
* Employers should be responsible for what their workers do. **Practical reason:** they have more money
* **Corrective Justice –** Plaintiff should be compensated, sometimes the only way to get what’s fair is aim for deep pockets (**Kerr)**
* **Deterrence at issue -** Some conduct is so extreme (teacher toucher) we don’t care that you did all you could do. (**Kerr**)

**Salmond Test (Kerr)**

1. Employees acts authorized by employer
2. Unauthorized acts so connected with authorized act that they may be regarded as modes of doing act (albeit improper)

**If it is unclear:**

1. Look for existing precedents. Must be “really” similar on facts
2. If there’s no precedent look to policy

**Real Question is:**

Is the connection between the employer’s creation or enhancement of the risk and wrong complained of sufficient?

Do not need much proof to find someone vicarious

**Factors to consider:**

1. Did the enterprise afford the employee the opportunity to abuse his power?
2. Did the wrongful act in any way forward the employers aim?
3. Did the enterprise confer more power on the employee over the victim
4. What are potential victim’s vulnerabilities to this wrongful exercise of power?

(**Kerr**) – Employer only liable where the harm is done while in course of work. Must do it at work, course of agency or employment.

**Car Insurance–** Often statutes state that owner of car is liable regardless of operator. This is a way to get at the cars insurance. Person with name on insurance is vicariously liable.

## Strict Liability

### Rowlins v Fletcher – Test for strict liability (mine Shaft)

1. Non-natural use of land
* Something that is dangerous extraordinary or generally of no use to society

### Gerstsen – Methane gas from dump filled garage

* Something’s are inherently dangerous (storing bulk water, explosives, nuclear explosives)
1. Escape of something likely to cause mischief

### Reed v Lions – Must leave your land

1. Harm done
* Must be concrete damage

**Defences**

Consent, common benefit, preventing escape was job of plaintiff, act of god/stranger.

**Problems with the test.**

* Generally tort is based on negligent and intentional fault. Does not even involve foreseeability of risk