**NEGLIGENCE CAN**

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**Negligence**

**Intro**

* Cause of action constituting breach of tort law concerned with liability for careless conduct
* Whether D’s conduct met the standard of care
* Whether D was subject to legal obligations/”duty” to exercise with respect to P’s interests
* “You must not injure your neighbour”- *Donoghue*

**Goals of Tort Law**

* Bring P back to position would have been had D’s act not occurred (Leonati*)*
* -1) Compensation
* -2) Deterrence
* -3) Corrective Justice

**Elements of Negligence (Solomon)**

**1) DUTY OF CARE (P)**

* Whether D was under legal obligation to exercise care on P’s interests
* Who is your neighbour?
* “Must Love thy neighbour” (*Donoghue v Stevenson*)
* Steps:
* -Existing Category? Yes-analogize
* No: *Anns/Cooper*
* -1) Foreseeability/Proximity (Yes-Prima Facie Duty of Care)
* -2) Policy to Negate Finding- REVERSE ONUS TO D (No- Duty of Care)

**2) BREACH OF STANDARD OF CARE (P)**

* A) Standard required of D: usually REASONABLE, can be particular based on facts (Question of Law)
* -How was D supposed to have acted?
* B) Apply Standard to D’s Conduct: determine if breached obligation by acting carelessly (Question of Fact)
* -Did D fall below how they should have acted?

**3) CAUSATION (P)**

* D’s careless conduct was a cause of P’s loss
* BUT FOR action of D, P would not have suffered loss
* Burden: Probability not certainty
* Link of breach to damage
* Multiple Negligent Defendants- REVERSE ONUS

**4) REMOTENESS (P)**

* Determine if relationship between breach and injury is too remote to warrant recovery
* Limited to foreseeable consequences of D’s negligent Act
* Not reasonably foreseeable: too remote
* Legal curbing of causation

**5) LOSS (P)**

* Not actionable per se
* P must have suffered injury and loss

**6) DEFENCES (D)**

* Damages for P may be reduced or eliminated based on P conduct
* D may raise defences:
* -1) Contributorily Negligent (Partial Defence)
* -2) Voluntary Assumption of Risk
* -3) Criminal Activity
* -4) Accident

**DUTY OF CARE**

**Intro**

* Legal responsibility/obligations

*Donoghue v Stevenson*

* **Facts**:
* -P found snail in ginger beer
* **Issue**:
* -Is the manufacturer under legal duty to purchaser to take reasonable care?
* **Ratio**:
* -P has to show injury by breach of duty owed to P in circumstance by D to take reasonable care to avoid such injury
* -“Love thy neighbour”
* -Neighbour:
* -1) Closely and directly affect by my acts that
* -2) I ought reasonably to have them in contemplation
* -Proximity: close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act
* -Common sense reasoning and reasonableness
* **Analysis**:
* -Manufacturer of products owes a duty to consumer to take reasonable care
* **Conclusion**:
* -Manufacturer liable
* **Dissent**:
* -Duty of care would lead unreasonably to too many people being involved
* -Too wide of net, too many duties of care

*Dunsmore v Deshield*

* **Facts**:
* -P injured by eyeglasses breaking in his eye
* -D sold wrong lenses that should have protected
* -P sued optometrist and manufacturer of lenses
* -D’s claimed P contributorily negligent in accident
* **Issue**:
* -Did the manufacturer or the optometrist owe a Duty of Care to P?
* **Ratio**:
* -Contributorily negligent: P in some way contributed to their loss
* -P only have to prove causation on Balance of Probabilities
* -Probably not certainty
* **Analysis**:
* -Not contributorily negligent, P was not assuming risk, was not a hazardous activity
* -1) Duty of Care (Glasswear to consumer, optom to consumer)
* -2) Standard of Care (Standard: Consumer to get eyeglass they ordered, required to check lenses. Breach: Did not check eye glasses)
* -3) Causation (But for negligent conduct, D would not have been injured)
* -4) Remoteness (Eye injury from glasses reasonably foreseeable)
* -Manufacturer negligent in failing to supply proper lenses
* -Optom negligent in failing to test lenses to see if proper
* -P showed proper lenses would not have broken
* -D’s failed in error to protect P
* **Conclusion**:
* -D’s liable

**Duty of Care Test**

*Anns/Kamloops Test* (As modified in *Cooper*)

* -A) PRE: Existing Category? (Direct or Analogy)
* **YES**:
* -Look to see if facts fit and apply that Duty of Care
* **NO**:
* 1) **Relationship**
* Sufficient relationship of proximity between wrongdoer and person suffered damage such that, in reasonable contemplation of D, carelessness on D’s part likely to cause damage to P?
* ->**A)** Reasonably Foreseeable
* -Low threshold
* -Standard of Reasonableness
* -Neighbour (*Donoghue*)
* -Foreseeability:
* -1)Harm has to be Reasonably Foreseeable
* -2)P has to be Reasonably Foreseeable
* -Not everything that could ever be possible has to be foreseen
* ->**B)** Proximity
* -Close and Direct Relationships (*Cooper*)
* -Expectations within Relationship (*Cooper*)
* -Reasonable contemplation (*Palsgraf*)
* -Statutory/Contractual Framework
* -People I ought reasonably have in my contemplation (*Donoghue*)
* Yes- Prima Facie Duty of Care
* 2) **Policy**
* Are there any considerations which ought to negate or reduce/limit prima facie Duty of Care?
* (*Mustapha*)
* -A) scope of duty of care
* -B) class of persons to whom it is owed
* -C) damages to which a breach may give rise to
* -Not just negative ones, but positive to reinforce finding duty
* No- Duty of Care established

Public Policy Considerations

* Chilling Effect: limiting/hindering something
* Strain on Public Purse
* Floodgate claims
* Indeterminacy
* Impact on community
* Impact on legal system
* Other existing legal remedy

*Mustapha v Culligan* (ONCA)

* Factors intended to control the spectre of indeterminate liability in tort:
* ->1) Close ties of love and affection must exist between P and victim (“relational proximity”)
* ->2) P must have been present at the accident or its immediate aftermath (“locational proximity”)
* ->3) Psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath, and not after hearing about it from someone else (“temporal proximity”)

*Cooper v Hobart*

* **Facts**:
* -P sued D for negligence in investing money
* **Issue**:
* -Did D owe P a Duty of Care?
* **Ratio**:
* -Foreseeability for a reasonable person not enough, must also be close and direct relationship
* -Second part of *Anns* test revolves around policy considerations
* -Must look if relationship is one in which there is pre-established duty of care
* -If not, must look at whether duty of care should be established in this relationship- Use *Anns* test
* **Analysis**:
* -Statute does not impose a duty of care on investors with brokers regulated by this act
* -Duty is to public, not investors (insufficient proximity)
* **Conclusion**:
* -No duty of care

**Foreseeability of Injury**

*Moule v Electric Power*

* A sequence of events which was so tortious as to be beyond the range of foreseeable results which a reasonable man would anticipate as a probable consequence of the presence of high tension wires
* Under a duty to take precautions but only against foreseeable consequences of the presence of that danger could be said to involve a reasonable probability of causing harm
* D should not be liable for negligence for not having foreseen possibility of occurrence of such an unlikely event

**Foreseeability of Plaintiff**

*Amos v Electric Power*

* Accident was one which could be foreseen and which was almost inevitable when given active boys and a poplar tree running up through and hiding high tension wires

*Palsgraf v Long Island*

* Nothing in the situation gave notice that falling package had potency or peril
* Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right
* In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury
* If the harm was not wilful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended
* **Dissent**:
* -Too narrow
* -Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt
* -Was a substantial factor in producing the result

*Nespolon v Alford*

* Dropping off drunk teenager not foreseeable that nervous shock would result from the driver who hit him

*Haley*

* **Facts:**
* -Blind guy injured by road gaps
* -City claims should not have to give extra duty to blind people
* **Ratio**:
* **-**Groups of people should be taken into account
* -Can’t carve out subsections of population that you don’t owe duty to
* -Reasonable contemplation must expand to include public at large including blind people

**Duty of Care: Psychiatric Harm**

*Mustapha v Culligan* (SCC)

* Damage will be seen as too remote if breach would not have resulted in the psychiatric harm of a reasonable person
* If D knew that P had particular vulnerability before breach then psychiatric harm is reasonably foreseeable

*Mustapha v Culligan* (ONCA)

* Factors intended to control the spectre of indeterminate liability in tort:
* ->1) Close ties of love and affection must exist between P and victim (“relational proximity”)
* ->2) P must have been present at the accident or its immediate aftermath (“locational proximity”)
* ->3) Psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath, and not after hearing about it from someone else (“temporal proximity”)
* P can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions:
* ->1) Psychiatric damage suffered was a foreseeable consequence of the negligent conduct
* ->2) Psychiatric damage was so serious that it resulted in a recognizable psychiatric illness

*Devji v District of Burnaby*

* -For psychological harm the plaintiff must have:
* ->1) P must have close ties of love and affection with the victim, some relationships assumed, others need evidence
* ->2) P must have been present at accident or its immediate aftermath
* ->3) Psychiatric injury must have been cause by direct perception of accident or its immediate aftermath
* -It is the proximity relationship of the claimant to the defendant’s conduct which provides the evidentiary base from which the court may conclude as a question of law, that a reasonable person should foresee that his conduct, in such circumstances, could create a risk of direct psychiatric injury and so give rise to a duty of care to avoid such a result
* -Must witness the shocking event or the immediate aftermath

**SPECIAL DUTIES OF CARE: Affirmative Action**

**Intro**

* Special duties and the policy considerations are considered on a category by category basis

**Special Relationships**

* Mental Institution and Committed
* Prisoners and Guards
* Employees and Employers
* Owner and Drunk People
* Parent and Child

**Affirmative Action**

* 1) Misfeasance: positive act
* 2) Nonfeasance: failure to act
* Courts usually only impose liability on misfeasance, but there are times where a person can be held liable for a failure to act
* Examples of Nonfeasance:
* -Special Relationship
* -Contractual Obligation
* -Statutory Obligation
* Must be some special justification for imposing an obligation of this character
* Compulsory altruism needs more justification than an obligation not to create dangers to others when acting for one’s own purpose

**Duty to Rescue**

* No duty to rescue, but may be read in in special circumstances

*Osterlind v Hill*

* **Facts**:
* -Man rented canoe to drunk guy knowing he was wasted
* -Man drowned and died while renter watched and did nothing
* **Issue**:
* -Did the renter have an obligation not to rent or to rescue him
* **Ratio**:
* **Analysis**:
* -D no legal duty in renting canoe
* -Victim was holding on for half an hour showing that he was not incapable
* **Conclusion**:
* -No legal duty

*Matthew v Maclaren*

* **Facts**:
* -D was a boat captain and a passenger fell overboard
* -D tried to turn boat around, did so improperly
* -Other man jumped in to save and died
* **Issue**:
* -Did D as captain owe a duty of care to the man who fell overboard and was D negligent in trying to rescue him?
* **Ratio**:
* -No General Duty, but can be found through:
* ->Statute
* ->Special Relationship
* -There is no general duty to come to the rescue of a person who finds himself in peril from a source completely unrelated to the defendant, even where little risk or effort would be involved in assisting
* -There is however strong support for a duty of affirmative care, including aid and rescue
* -Relation between master of boat and invited and to do best he could
* -What would reasonably boat operator do in circumstances
* -Common law must keep pace with the demands and expectations of a civilized community
* -D affirmatively undertakes the rescue operation, he is by law as assuming a duty to act and will be therefore liable for his negligence
* -Standard: what would the reasonable boat operator do in the circumstances, attributing to such person the reasonable skill and experience required of cabin master
* -Liability does not follow a finding of negligence, even where there exists a legally recognized duty, unless the defendant’s conduct is the effective cause of the loss
* **Analysis**:
* -*Canada Shipping Act* says that a captain has a duty (statute)
* -D’s adoption of wrong procedure in the circumstances was negligent, being a failure to exercise the reasonable care that the ordinary, prudent, reasonable operator would have shown in effecting a rescue (Breach of Standard)
* -D was not responsible for passenger falling overboard (Causation FAIL)
* **Conclusion**:
* -D’s negligence in operating boat was not cause of passenger who fell off, therefore no liability

*Good Samaritan Act*

* s.2(1)- Person who provides service is not liable for damages unless the damages were caused by the gross negligence of the person

*Kennedy v Coe*

* **Facts**:
* -Skiing accident
* -Buddies paired up, one died, wife of deceased brought action against ski buddy for negligence
* -Had never met each other before
* **Issue**:
* -Did C owe K a duty of care?
* **Ratio**:
* -Positive Duty to Act:
* ->Where D intentionally attract and invites third parties to an inherent and obvious risk that they create/controls
* ->Paternalistic relationships of supervision and control
* ->D exercises public function or engages in commercial enterprise including implied responsibilities to public at large
* -*Childs* Factors on Duty of Care in rescuing/saving:
* ->Risk: intentional invitation to risk (unless D has created or control)
* ->Autonomy: law will not stand in your way if you want to engage in risky behaviour (unless special relationship)
* ->Reasonable Reliance: Create risk in particular way, parties engaged in, (what P could rely on D)
* “the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved”
* “Something more is required”
* Positive duty to act in the face of an alleged failure to act (*Childs*):
* -(1) where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls
* -(2) in the context of paternalistic relationships of supervision and control
* -(3) where a defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large
* **Analysis**:
* -Not reasonably foreseeable that C’s negligence in reporting K’s absence would likely cause injury to K
* -Whether would cause damage to constitute duty of care and C’s negligence in reporting did not cause damage to K
* -Can only be implicated in the potential consequences resulting from the risk
* -A ski buddy who fails to notify of absence is not materially implicated in the control of risk itself
* -K did not rely on C to mitigate risk as C could control risks of K’s conduct
* -No mutual understanding of ski buddies roles
* **Conclusion**:
* -No duty of care owed, not negligent

**LIABILITY TO CONTROL CONDUCT OF OTHERS**

**Duty to Intoxicated Guests**

*Stevenson v Clearview Resorts*

* Off duty ambulance work does not help person drunk at party, gets spinal injury
* No common law duty to rescue

*Childs v Desormeaux*

* **Facts**:
* -Party, guest got drunk and into accident
* **Ratio**:
* -No to duty of social hosts to highway users
* -Social hosts have: 1) limited ability to control 2) don’t provide alcohol for profit 3) are not regulated
* Did social host directly serve the guest?
* Did social host know how much alcohol the guest had consumed?
* Did social host know that the guest was impaired when he left?
* Social versus Commercial Hosts
* 1) Duties on Social Hosts
* -Private Individual
* 2) Duties on Commercial Hosts
* -Commercial hosts have greater ability to monitor alcohol consumption
* -Commercial hosts are heavily regulated through contract and statute
* -Heavy regulation, ability to profit
* Nonfeasance: no liability will be imposed on social hosts for injuries cause by their intoxicated guests
* Differences between acts and omissions

*Stewart v Pettie*

* Commercial hosts who supply alcohol are under duty to prevent foreseeable risks of injury by intoxicated persons
* Merely providing alcohol is not enough to impose a duty of care and foreseeability of risk

*Crocker v Sundance*

* **Facts**:
* -C entered tubing competition drunk
* -Company knew they were drunk and still let them go
* -C got injured and sued for negligence
* **Issue**:
* -Does the ski resort owe a duty to stop drunken participants?
* **Ratio**:
* -One is under a duty not to place another person in a position where it is foreseeable that the person could suffer injury
* -No wrong is done to one who consents- complete defence if person voluntarily assumes risk
* -Ski resort establishes competition in highly dangerous sport and runs competition for profit owes duty to visible intoxicated patrons
* **Analysis**:
* -Sundance must accept responsibility as promoter of a dangerous sport for taking all reasonable steps to prevent a visibly incapacitated person from participating (duty of care)
* -Not acceptable for resort to open its dangerous competitions to persons who are visibly intoxicated (breach of standard of care)
* -Sundance caused the injury by allowing Crocker to participate (causation)
* -Participants mind was clouded by alcohol, didn’t have clear understanding of risks even with the waiver
* **Conclusion**:
* -Resort found contributory negligent

**Duty to Control Situations**

* Relationship to control is not sufficient to trigger doctrine of vicarious liability (Solomon)

**Duty of Care Owed to Rescuers**

*Horsley v Maclaren*

* **Facts**:
* -H jumped in to try and save friend
* -M used wrong method in trying to save passenger which H says prompted him to jump in
* **Issue**:
* -Does M owe a duty of care to H?
* **Ratio**:
* -If someone creates a situation of peril then they are liable for all rescuers who get involved as a result
* -Second rescuer is entitled to damages from person who created danger
* **Analysis**:
* -Evidence does not justify the finding that any fault of his induced Horsley to risk his life by diving as he did
* -McClaren was not reason Horsley jumped in (captain did not caused original man to fall off)
* **Conclusion**:
* -No duty of care
* **Dissent**:
* -As owner and operator on which he was carrying invited guests, he was under a legal duty to take reasonable care for their safety
* -His carelessness if effecting rescue prompted H to jump in

**Duties Owed to Unborn**

Pre-Conception Wrongs

* Only harms once child is born
* Before birth, mother and child are one (*Winnipeg Child Services v G*)

*Paxton v Ramji*

* Doctors do not owe a duty of care to a “future” child, one that has not yet been conceived
* Doctor’s sole duty is toward female patient and must consider only her best interests in providing medical advice
* Imposing duty of care toward a future child might cause doctors to limit treatment options proposed to women
* A doctor’s relationship with future children is necessarily indirect and it is female patient alone who has power to may decisions affect her or future children
* Additional duty to foetus would conflict for physician
* Physician cannot advise foetus, lack of clarity of what is best
* Physical autonomy of mother
* Chilling effect on profession with physicians not knowing who to advise and in what context

**Wrongful Birth and Wrongful Life**

* A physician may carelessly fail to inform a woman that she faces an unusually high risk of giving birth to a child with a disability, or may negligently perform tests that are designed to detect foetal abnormalities (*Arolnt v Smith*)
* Because of this negligence or failure to inform, the woman may continue a pregnancy that otherwise would have terminated
* A claim brought by a parent is said to be for “wrongful birth”
* A claim brought by a child is said to be for “wrongful life”
* Child’s claim, in contrast, is much more problematic
* But for the defendant’s carelessness, the child would have been born and therefore would not have been required to struggle through life with a disability
* Court stated that it was impossible to assess damages by comparing value of non-existence to value of existence in a disabled state
* Wrongful life: a baby is gift (*Jones v Rostvg*)

**Wrongful Pregnancy**

* Courts have chosen to award damages to parents who give birth to an unwanted child for the expenses associated with unwanted pregnancy and childbirth and mother may make claim for related pain and suffering
* If the child is disabled, parents may claim for extra costs associated with raising a disabled child
* If the parents give birth to a health child, they cannot claim damages for ordinary costs of raising that child to maturity
* Courts have adopted view that a healthy child is a blessing and its birth cannot be treated as a legal harm
* Exception: damages to healthy child (*Suite v Cooke*)

**Pre-Natal Injuries**

* Negligence for injuries sustained in utero
* A foetus is not recognized in Canadian law as a person and therefore has no standing to sue
* If the child is subsequently born with a disability then a claim in negligence may be possible

*Dobson v Dobson*

* Mother does not owe a duty of care to child prior to birth
* For policy reasons, imposing a duty of care would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women
* Everything the pregnant woman does or fails to do may have a potentially detrimental impact on her foetus
* Decision taken in course of daily life as a pregnant woman subject to the scrutiny of the courts
* Recognition of a duty of care owed by a pregnant woman to her foetus has a very real potential to intrude upon that woman’s fundamental rights
* Definition on an appropriate standard of care is fraught with insoluble problems due to difficulty of distinguishing tortious and non-tortious behaviour in daily life of an expectant woman
* Lifestyle choices such as alcoholism and drug addiction may be beyond control of pregnant woman and deterrent value of imposition of a duty of care may be non-existent
* Imposition of a duty of care upon a pregnant woman towards her foetus could increase to an unwarranted degree, level of external scrutiny focused upon her

**Health Professional’s Duty to Inform**

* Doctor may be held liable in negligence for breaching an affirmative duty to disclose the risks of the proposed treatment
* Special duty of care that arises independently of doctor’s general duty to exercise reasonable care in treating patients
* Doctors must disclose all material risks of proposed treatment (*Reibl v Hughes*)
* Material Risk: a low percentage of a serious consequence (*Reibl v Hughes)*
* -A relatively minor consequence of high probability may also constitute a material risk
* -Doctors have an obligation to disclose non-material risks that they know, or ought to know, would be a particular concern to the patient
* Doctors who do not meet these disclosure requirements will be held to have breached requisite standard of care
* Patients must also establish that this failure to inform was a cause of their loss
* Duty to provide patients with sufficient information to make an informed choice (*Haughian v Paine*)
* Patients must prove that, had they been adequately informed, they would not have proceeded with the treatment
* A special objective/subjective test of causation
* -P must prove that a reasonable person in their position would have refused procedure if properly informed
* Duty is no longer limited to warning patients of the risks of the specific procedure, rather doctor is require to provide patient with sufficient information to make an informed decision
* Definition of a material risk has been broadened to include very remote risks of death of serious injury
* Disclosing some material risk while not others is insufficient
* Must explain risk in a way that is comprehensible and understandable to patient

*Haughian v Paine*

* Informed consent: Explain to the patient the consequences of leaving ailment untreated and alternative means of treatment and their risks
* There was no adequate discussion of consequences of leaving ailment untreated or of undergoing conservative management and that consequences were, at worst, a continuation of pain and discomfort and possible need for surgery in future
* In absence of such information having been given to appellant, not position to give informed consent
* Failure of doctor to warn appellant of possibility of paralysis, a risk which materialized
* Disclosure made by respondent was not adequate to enable the appellant to give informed consent
* A failure to advise adequately of available options of no treatment or alternative management
* Judge considered failure to warn of risk of paralysis and failure to advise of alternatives to surgery

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

*Lambert v Lastoplex*

* Manufacturer of product has duty of care to warn consumers of dangers inherent in use of product
* Duty extends to things manufacturer knows and ought to have known

*Rivtow Marine v Washington Iron*

* Duty is a continuing one, requires manufacturers to warn at time of sale and also subsequent to that
* Continues for to exist for life of product

*Hollis v Dow*

* **Facts**:
* -Botched boob job
* **Issue**:
* -Was a manufacturer under a duty to let the doctor know of the risk of using the product when completing the surgery?
* **Ratio**:
* -A manufacturer of a product has a duty to warn consumers of dangers inherent in use of its product of which it has knowledge or ought to have knowledge (*Lambert v Lastoplex*)
* -Duty to warn is a continuing duty:
* ->1) Dangers known at the time of sale
* ->2) Dangers discovered after product has been sold and delivered
* -All warnings must be reasonably communicated and must clearly describe any specific dangers that arise from ordinary use of the product
* -Nature and scope of manufacturer’s duty to warn varies with level of danger entailed by the ordinary use of the product
* -Where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers
* -Warnings must be sufficiently detailed to give consumer full indication
* -Manufacturers of products that are ingested, consumed or otherwise placed in the body and thereby have a great capacity to cause injury to consumers
* ->High standard of care
* -Duty to warn is owed directly by manufacturer to the ultimate consumer
* -Rule is applicable either where a product is highly technical in nature and is intended to be used only under supervision of experts or where nature of product is such that the consumer will not realistically receive a direct warning from manufacturer before using the product
* -Manufacturer may satisfy duty to warn ultimate consumer by warning “learned intermediary”, merely an exception to general manufacturer’s duty to warn consumer
* -“Learned Intermediary”: person in between consumer and manufacturer who will administer their access to product
* -Duty of doctor to give best medical advice and service they can given the particular patient in a specific context
* **Analysis**:
* -Dow had duty to warn doctor as woman never came into direct interaction with the product itself
* -Dow had a duty to convey its findings concerning both the “unexplained” rupture phenomenon and possible harm caused by loose gel in body
* -Subjective test of whether or not Hollis would have not gotten surgery had she known would be satisfied
* -Likely that if doctor was warned as learned intermediary they would have told the patient
* **Conclusion**:
* -Manufacturer liable

**Duty of Care Owed by a Barrister**

* Lawyer owes an obligation to a client to act competently
* Public policy reasons negate holding immunity for barristers form negligence (*Demarco v Ungaro*)
* Bad ideas/litigation strategy/course of action is insufficient for negligent claim
* Negligence: failure to abide by specific rules/mechanisms allowing case to move forward

**NEGLIGENT MISREPESENTATION**

**Words not Actions**

* Duty of care that may arise with respect to written or oral communications
* -Words instead of Actions
* -Words are DIFFERENT
* “Words are more volatile than deeds” (*Hedley*)
* Ex: Inaccurate or incomplete advice/information provided by
* -Financial advisers
* -Business consultants
* -Lawyers
* -Stockbrokers
* -Bankers
* Possibility of harm resulting from statements often less obvious, people are less cautious with choice of words, particularly on social occasions

**Indeterminate Liability**

* Volatility of words led to judicial concern that NM can lead to indeterminate liability for time and class
* Balance b/w deserving people and limiting scope of liability

**Loss is Monetary**

* Pure Economic Loss: P suffers no physical injury but economic loss
* No substantial distinction drawn b/w negligent actions and negligent words

**Contracts and Free Will**

* Give deference to contract at will as private entities
* Don’t want to interfere with privity of contract and ability to conduct own affairs

**Careless Statements**

*Hedley Byrne*

* **Facts**:
* -P asked D to provide credit rating
* -D unaware of P identity and said credit rating was good
* -Company went into liquidation and P sued
* **Ratio**:
* -Careless statements resulting in pure economic loss can trigger liability\*\*\*
* -Circumstances of when remain uncertain
* -Careless statements may bring action in both torts and contract

*Hercules Managements v Ernst & Young*

* **Facts**:
* -Appellants were shareholders claimed that respondents had acted carelessly and that the appellants suffered economic loss as a result
* **Issue**:
* -Did respondents owe appellants a duty of care for their NM of the audit? Was there a duty of care/any policy reasons to negate it?
* **Ratio**:
* -*Anns* test should still apply to NM
* -Deciding whether or not a prima facie duty of care exists necessitates an investigation into whether D and P can be said to be in proximity or neighbourhood
* -Proximity: circumstances of relationship between P and D are of such a nature that D is under obligation to be mindful of P’s interests in conducting their affairs
* -Relationship in NM between P and D arises through reliance by P on D’s words
* ->Whether or not reasonable for listener to rely on speaker’s statement’s as accurate
* \*\*Is Relationship already recognized? Apply
* -1) Relationship of Reliance (Duty of Care-*Anns*):
* ->1) D ought reasonably to foresee that P will rely on D’s representation
* ->2) Reliance by P would in particular circumstances be reasonable
* -----Reasonable Reliance Factors:
* \*\*Do not need to use all 5 but Balance in your favour, say what’s important:
* ------>1) D had direct/indirect financial interest in transaction in respect of which representation was made
* ------>2) D was a professional or someone who possessed special skill, judgment or knowledge
* ------>3) Advice or information was provided in course of D’s business
* ------>4) Information or advice was given deliberately and not on a social occasion
* ------>5) Information or advice was given in response to a specific enquiry or request
* -P’s claim stems from detrimental reliance on D’s negligent statement and statement was reasonable (1st part of *Anns* test)
* -2) Policy Considerations
* (BURDEN switches to D- *Childs*)
* ->Preciseness:
* ->Relationship: is relationship precise enough
* ->Reliance: is reliance precise enough in this case from this statement
* ->Indeterminacy:
* ->Indeterminate liability for an indeterminate time to an indeterminate class
* ->Anyone ever gotten advice in any circumstance be liable?
* Other Policy (*Martel*)
* -Policy reasons that one commercial party should have to be mindful of another commercial party’s legitimate interests in negotiation:
* ->Indeterminate liability
* ->Commercial negotiation is to achieve most advantageous financial bargain
* ->Deter socially and economically useful conduct
* ->Defeat essence of negotiations by having disclose all motives and bottom line
* ->Could interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge risk of failed negotiations through pursuit of alternative strategies or opportunities
* ->Courts would become overtly regulatory, scrutinizing pre-contractual conduct
* ->Other contractual issues deal with this (undue influence, economic duress etc.)
* ->Needless litigation should be discouraged
* ->Deter professionals from being careless with their statements
* -When indeterminate liability can be shown not to be concern on the facts of a particular case, duty of care will be found
* **Analysis**:
* -Auditor’s liability: audit reports will be relied on by many different people for a wide variety of purposes will always be reasonably foreseeable and that anyone of these people could be said to be placing reliance on statements in conducting their affairs
* -Indeterminate liability would be imposed on auditors
* -Imposing widely drawn duties of care on auditors would probably generate substantial costs
* -Policy considerations negate finding a prima facie duty of care
* **Conclusion**:
* -No negligence for lack of duty of care

*Queen v Cognos*

* **Facts**:
* -Company advertised position to employee that had secured funding for relocation but had in not fact done so
* -Appellant sued for NM for economic loss for making move for job
* **Issue**:
* -Was company NM? Was a duty of care owed?
* **Ratio**:
* -5 requirements for NM:
* ->1) SPECIAL RELATIONSHIP: There must be a duty of care based on a “special relationship” b/w representor and representee (see: *HERCULES TEST)*- Modified *Anns* Test stemming from *Donoghue v Stevenson*
* -“Duty of Care”
* ->2) MISLEADING STATEMENT: Representation in question must be untrue, inaccurate or misleading
* -Misleading: can be about lack of diligence
* ->Look at statements and effect to determine if misleading
* ->Just conduct
* ->3) NEGLIGENCE: Representor must have acted negligently in making said misrepresentation
* -“Standard of Care”
* -a) What is the reasonable standard of D?
* -Person in circumstances making representations
* -b) Did D breach Standard?
* -Reasonable in making sure accurate/not misleading?
* ->4) RELIANCE: Representee must have relied in a reasonable manner on said NM
* -“Causation” and “Remoteness”
* -Causation: Reasonable to rely on statements as accurate?
* -Remoteness: Did P suffer from their reliance on D? Or suffer due to something else?
* -But For inducing actions of D, P would not have relied on words (*Leonati*)
* ->5) LOSS: Reliance must have been detrimental to representee (Damages)
* -Did untrue statement give rise to loss?
* ->6) DEFENCES: D may rise Defence afterwards
* -Voluntary Assumption of Risk?
* -Contributorily Negligent?
* -Look to outside Negligence law as relevant (distinguish is necessary)
* **Analysis**:
* -No concurrency between tort and contract
* -Employment agreement signed appellant did not contain express contractual obligation co-extensive with duty of care respondent alleged to have breached
* -Owed a duty of care to applicants and representations made to appellant about job opportunity
* -Foreseeable that appellant would be relying on information gave during interview and reasonable to rely on these statements
* -Foreseeable that damages would flow should representations be false and negligently made
* -Special relationship existed
* **Conclusion**:
* -Duty of care, acted carelessly in making statements

*R v Imperial Tobacco*

* 1) Does Relationship follow existing category?
* -YES-Analysis over
* -NO: *Cognos* test
* ->1) Special Relationship (*Hercules* factors)
* -If *Hercules* satisfied, return to last 4 *Cognos* steps

*BG Checo International v BC Hydro & Power Authority*

* **Facts**:
* -Contract for tenders, contract said would clear the area for work but caller did not clear
* -Hydro said stipulated in contract therefore no duty
* **Issue**:
* -Can Checo sue in both tort and contract?
* **Ratio**:
* -Existence of a contract b/w 2 parties does not preclude existence of common law duty of care
* -A contract b/w parties may preclude possibility of suing in tort for a given wrong where there is an express term in contract dealing with matter
* -Where a given wrong prima facie supports an action in contract and in tort, party may sue in either or both, except where contract indicates parties intended to limit or negative the right to sue in tort
* -P may sue either in contract or tort, subject to any limit parties themselves have placed on that right by their contract
* -When contracts and tort are applied to the same wrong:
* ->1) Contract stipulates a more stringent obligation than general law of tort would impose- higher contractual duty
* ->2) Contract stipulates a lower duty than that which would be presumed by law of tort in similar circumstances- usual liability imposed by law of tort is not binding
* -Duty imposed by tort can be nullified only be clear terms
* ->3) Duty in contract and common law duty are co-extensive- contract may expressly provide for a duty that is same as that imposed by common law or contractual duty is implied
* -Merely by stipulating a duty in contract, parties intended to negate all possibility of suing in tort
* -Whether parties will be held to have intended to oust tort remedies will depend on context:
* -> Whether contract is commercial/non-commercial
* -> Whether parties were of equal bargaining power
* -> Whether court is of view would lead to unjust result in court action
* **Analysis**:
* -Contract did not negate Hydro’s common law duty not to NM that it would have right of way cleared by others
* -Duty is not excluded by contract
* **Conclusion**:
* -Not precluded from suing in both

**RECOVERY FOR PURE ECONOMIC LOSS**

**Intro**

* Liability for pure economic loss raises issue of indeterminate liability
* Five Categories of Pure Economic Loss
* -1) NM
* -2) Independent liability of statutory public authorities
* -3) Negligent performance of a service
* -4) Negligent supply of shoddy goods or structures
* -5) Relational Economic Loss
* It is open for courts to recognize a duty of care in a new situation, outside of five categories

*Martel Building LTD v Canada*

* **Facts**:
* -D led P to believe that lease would be amenable to renewing lease on certain terms
* -P sued D for duty of care to negotiate to avoid causing P pure economic loss
* **Issue**:
* -Does negligence extend to damages for pure economic loss arising out of conduct of pre-contractual negotiations?
* **Ratio**:
* -Damages for economic loss absent physical or proprietary harm may be recovered
* -Economic interests are viewed as less compelling of protecting than bodily security or proprietary interests
* -Economic loss raises spectre of indeterminate liability
* -Economic losses often arise in commercial context where there are inherent business risk best guarded against by party on whom they fall through such means as insurance
* -Allowing recovery of economic loss through tort has been seen to encourage multiplicity of inappropriate lawsuits
* -May be foreseeable that carelessness on part of one negotiating party may cause an opposite party economic loss but this is implicit in negotiating environment
* -Policy reasons that one commercial party should have to be mindful of another commercial party’s legitimate interests in negotiation:
* ->Indeterminate liability
* ->Commercial negotiation is to achieve most advantageous financial bargain
* ->Deter socially and economically useful conduct
* ->Defeat essence of negotiations by having disclose all motives and bottom line
* ->Could interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge risk of failed negotiations through pursuit of alternative strategies or opportunities
* ->Courts would become overtly regulatory, scrutinizing pre-contractual conduct
* ->Other contractual issues deal with this (undue influence, economic duress etc.)
* ->Needless litigation should be discouraged
* **Analysis**:
* -Reasonably foreseeability and proximity established (pre-existing contractual arrangements, loss is foreseeable in negotiations)
* **Conclusion**:
* -Prima facie duty of care outweighed by policy considerations

*BDC v Hofstrand*

* **Facts**:
* -Appellant delivered envelope late
* -Third party refused to complete contract, respondent suffered economic loss and sued delivery people
* **Issue**:  
  -Did the delivery people reasonably contemplate that economic loss could be suffered as a result of the late delivery?
* **Ratio**:
* -Limited class must be broken off to reasonable people within contemplation not anyone who could be affected
* **Analysis**:
* -Respondent did not come within limited class in reasonable contemplation of a person in position of appellant
* -Wasn’t aware of relying on delivery for other things
* **Conclusion**:
* -No duty of care

*James v British Columbia*

* P launched class action against government, alleging negligence had caused him and others similarly situated to suffer loss of income
* Unnecessary for P to act at all on implied representation in order to attract loss they suffered
* Solicitor could reasonably foresee that if in performance of duty, failed to see that will was properly witness, neglect would cause very loss P had suffered without P doing anything
* Proof of reliance is essential to establish causation
* Absence of reliance was held not to preclude recovery because its place was taken by voluntary assumption of responsibility

*Hub Excavating v Orca*

* -Reliance is a question of fact
* -Don’t need to satisfy of 5 *Hercules* factors in showing reasonableness of reliance

*White v Colliers*

* -Case law often uses “material reliance” with “reasonable reliance”- same same

*Rainbow Industrial v CNR*

* -Damages for NM, damages aim to put person in position they would be been had the representation not been made, not about whether it was correct
* ->Not about whether of not funding had been there, damages to put person back in had the NM of having funding not been made (expenses of moving for job and the loss)

*Grand Restaurant v Toronto*

* -NM involves deliberate actions on behalf of parties, does not mean contributory negligent (split burden or screwing up) at all times
* -Just because NM requires for both parties to act in a particular way, damages will not always be apportioned

**Negligent Supply of Shoddy Goods Or Structures**

*Winnipeg Condo Corp v Bird Construction*

* **Facts**:
* -Architect said building was sound and investors invested but then it fell apart
* -Company sued for negligently ensuring building was okay
* **Issue**:
* -May a general contractor responsible for construction of a building be held tortuously liable for negligence to a subsequent purchaser of building, who is not in contractual privity with contractor for cost of repairing defects in building arising out of negligence?
* **Ratio**:
* -Where a contractor is negligent in planning or constructing a building and building is found to contain defects resulting from that negligence, which pose a real and substantial danger to occupants of building, reasonable cost or repairing defects and outing building back into regular state are recoverable by occupants
* -If constructor large and permanent structure which if negligently constructed causes damages to other person should be held liable
* -Liable to every inhabitant during useful life of building-no indeterminacy
* ->Determinate to specific people and lives for duration of building, people who live there and for damage caused
* -Important preventative function by encouraging socially responsible behaviour
* -Duty to construct a building to reasonable standards and without dangerous defects is independent of contractual stipulations- no risk of indeterminate liability (limited to only people in building during its useful life)
* -Caveat Emptor: Contractors and builders are in better position to ensure structural integrity than purchaser
* -Imposition of liability on builders provides important deterrent
* **Analysis**:
* -Reasonably foreseeable to contracts that if they design/construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest
* -Lack of privity does not make potential for injury any less foreseeable
* **Conclusion**:
* -No adequate policy considerations to negate contractor duty of care

**STANDARD OF CARE**

**Intro**

* Standard of Care: How D should have acted
* Reasonable person in the circumstances
* Objective Standard-can consider circumstances and factual scenario (not personal characteristics)

**2 STANDARD/BREACH Part Test**

* Once established D owed Duty of Care to P:
* -1) Formulate Standard of Care (Law)
* -2) Determine whether standard was breached (Fact)

**Standard: Reasonable and Prudent Man**

*Arland v Taylor*

* **Facts**:
* -P was injured in motor vehicle accident
* **Issue**:
* -What is the standard of care?
* **Ratio**:
* -Standard of Care: under the kind of circumstances by a “reasonable and prudent man”
* -Reasonably and prudent man: not an extraordinary or unusual creature, not superhuman, not required to display highest skill, not a genius
* -Person of normal intelligence who makes prudence a guide to his conduct
* -Conduct is standard adopted in the community by persons of ordinary intelligence and prudence
* -Improper for jury to judge conduct of a person in given circumstances by considering after events what he would or would not have done in circumstances
* Analysis:
* Conclusion:

**Standard Not Hindsight**

* Assessed at time of alleged breach rather hindsight
* How reasonable person in D’s circumstances would have acted at the relevant time (*Roe v Minister of Health*)
* We must not look at the 1947 accident with 1954 spectacles (*Desautels v Katimavik*)

**Factors Considered in Determining Breach of Standard of Care**

* Several factors in determining whether D breached Standard of Care
* Two most important factors:
* **-1)** Probability of Injury
* **-2)** Potential Severity of Injury
* Balanced against:
* **-3)** Private and Social Costs of Avoiding Risk
* **-4)** Social Utility of D’s conduct

**1)Probability and 2) Severity of Harm**

*Bolton v Stone*

* **Facts**:
* -P was hit by cricket ball flying from club
* **Issue**:
* -What is the nature and extent of duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway?
* **Ratio**:
* -Reasonable men do take into account degree of risk and do not act on bare possibility as they would if risk were more substantial
* -When risk is so small or so infrequent not required to take extreme precautions
* -Even most careful person cannot avoid creating some risks
* -Reasonable man must not create SUBSTANTIAL risk
* -Test: whether risk of damage to a person on road was so small that reasonable man, considering matter from POV of safety would have thought it right to refrain from taking steps to prevent danger
* ->Take into account remoteness and seriousness of consequences
* **Analysis**:
* -Readily foreseeable that accident would have happened
* -Chance of person ever being struck was very small
* -Because risk was so small, a reasonable man considering from POV of safety could disregard it
* **Conclusion**:
* -Standard of care not breached

*Paris v Stepney Borough Council*

* **Facts**:
* -One eye man blinded at work as employer did not provide goggles?
* **Issue**:
* -Was it Standard of Care of employer to provide safety equipment and was it breached?
* **Ratio**:
* -Duty of an employer towards his servant is to take reasonable care for servant’s safety in all circumstances
* **Analysis**:
* -The fact that employee had only one eye should have been considered
* -Ordinary prudent employer would have provided goggles
* **Conclusion**:
* -Standard of Care breached
* -One eye and likelihood of blindness increases severity in circumstances- risk of injury and extent of damage
* **Dissent**:
* -Should take precaution for everyone regardless of circumstances of severity of harm

**3)Cost of Risk Avoidance**

* Assessed with reference to Social Utility
* Higher social utility (saving lives) to take more care in risk avoidance

*Vaughn v Halifax-Dartmouth Bridge*

* **Facts**:
* -Paint from D’s bridge blew onto nearby cars
* -Owner of car sued in negligence
* **Issue**:
* -What is the Standard of Care? Was there a high cost of risk avoidance?
* **Ratio**:
* -Duty of D to take all reasonable measure to prevent paint
* -Cost considerations important
* **Analysis**:
* -Inevitable that paint should fall on cars and no amount of ordinary care would prevent wind carrying paint
* -Precautions that would have entailed little expense that could at prevented or minimized damage should have been adopted
* **Conclusion**:
* -D negligence

*Law Estate v Simice*

* **Facts**:
* -P sued D for not proper medical care and not giving CT scan
* -Doctor claimed CT too expensive to do all the time
* **Issue**:
* -What was Standard of Care and the Cost of Risk Avoidance?
* **Ratio**:
* -High severity of harm has high cost of risk avoidance in emergency work
* **Analysis**:
* -Severity of harm that may occur to patient to go undiagnosed greater than financial harm of running CT scan
* -Severity of harm extreme
* -Social utility of CT scan is saving lives, CT scan cost of risk avoidance is higher
* **Conclusion**:
* -D negligent, cost of saving life greater than financial harm

**4)Social Utility**

*Watt v Hertfordshire County Council*

* **Facts**:
* -Jack transported on fire truck fell off and injured someone
* **Issue**:
* -What was standard of care and was it breached? What about social utility?
* **Ratio**:
* -Higher the social utility, lower the cost of risk avoidance
* -Must balance risk against end achieved
* -Saving of life justifies taking considerable risk despite probability of harm
* **Analysis**:
* -Because it was saving lives in an emergency, more leniency in what the reasonable steps taken to avoid injury
* **Conclusion**:
* -Not negligent

**Special Standards of Care**

*Fiala v Cechmanek*

* **Facts**:
* -Man jumps on car during manic episode and injures people
* **Issue**:
* -What is the reasonable person standard for people suffering from mental illness?
* **Ratio**:
* -Person suffering from mental illness may not have to comply with reasonable person standard
* -Unfair to hold people liable for things they are incapable of avoiding
* -Strict liability should not be imposed to people with mental illnesses
* -Objective reasonable person should take into account age, physical and mental disability
* -If mentally ill individuals still have capacity to conform to objective standard they will not be relieved of liability
* -Have to be capable of appreciating duty of care
* -Act causing damage must been voluntary and D must have possessed capacity to commit tort
* ->Burden of showing absence relies on D
* -To be Relieved of Liability when D afflicted suddenly without warning with a mental illness must show either on Balance of Probabilities:
* ->1) D had not capacity to understand Duty of Care as a result of mental illness
* ->2) D unable to discharge Duty of Care as they had no control over actions at time of relevant conduct fell below objective standard of care as a result of mental illness
* **Analysis**:
* -Unable to appreciate
* **Conclusion**:
* -Not negligent
* **Theories**:
* -Compensatory nature of tort law: those suffering from mental illness should not be exempt
* -Fault element of tort law: should not hold people liable for things they are not at fault for
* ->Would be a strict liability fault
* -Concern of eroding reasonable person standard by allowing exceptions

**Standard of Care Expected of Children**

*Mckellestrom*

* Children should be held to a modified standard of care
* What should child know given their age, intelligence, experience

*Joyal v Barsby*

* **Facts**:
* -Kids ran into street causing accident
* **Issue**:
* -Whether infant was contributorily negligent
* **Ratio**:
* -Must look at whether infant exercised the care expected from a child of like age, intelligence and experience
* -Reasonable given the circumstances
* -Circumstances can help determine legal standard
* **Analysis**:
* -Child knew not to run out in the street, trained and had experience
* **Conclusion**:
* -Contributorily negligent
* **Dissent:**
* -Should have known better, reasonably equipped

**Standard of Care Expected of Professionals**

* Now developed modified standards of care to govern professionals, skilled trades and occupations
* Professionals have to comply with:
* -1) Codes of Conduct to each profession
* -2) Negligence Law
* -3) Additional Special Duties of profession (ex: duty to inform)

*White v Turner*

* **Facts**:
* -P went to get breast reduction from D
* -Sued D for negligence
* **Issue**:
* -What was standard of care for doctor and was he negligent?
* **Ratio**:
* -Mere error in judgment by a professional person is not by negligence
* ->Mistakes are allowed to be made
* -P must prove on Balance of Probabilities not only a bad result but that it was brought on by negligent conduct
* -Reasonable person in profession must see practice as less than satisfactory
* -If work complies with custom, even if result is less than satisfactory
* -Judged by standard by of profession
* **Analysis**:
* -Poor result was a result of doctor’s negligence, operation was done too quickly
* **Conclusion**:
* -Negligent

**Degrees of Negligence**

* 1)Gross Negligence
* -Something less blameworthy than criminal negligence but something worse than ordinary tort negligence
* -Marked departure from standards by which competent and responsible people govern themselves
* -*Municipal Act* and *Good Samaritan Act*
* Sudden Peril Doctrine: conduct that would normally be considered reckless is exempted from negligence if reasonably in scenario

**Custom Practice**

*Ter Neuzen v Korn*

* **Facts**:
* -P contracted HIV as a result of artificial insemination
* **Issue**:
* -Did standard practices fall short of standard of care?
* **Ratio**:
* -Standard of Care: Conduct of a prudent and diligent doctor in similar circumstances
* -A specialist who possesses a degree of skill and knowledge must exercise degree of skill of an average person in their field
* -Conduct must be judged in light of knowledge that ought to have been reasonably possessed at time of alleged act of negligence
* -When a Dr. acts in accordance with a recognized and respectable practice of the profession, they will not be found to be negligent
* -If practice is “fraught with obvious risks” such that anyone is capable of finding it negligent, without necessity of judging matters of clinical expertise
* -Matters falling within ordinary common sense can be judged
* -Where there are obvious existing alternatives which any reasonable person would utilize in order to avoid risk, one could conclude that the failure to adopt such measures in negligent notwithstanding that it is the prevailing practice among practitioners in that area
* -If beyond ordinary experience and understanding of judge, it will not be open to find a standard practice of a profession negligent
* -If standard fails to adopt obvious and reasonable precautions then it is no excuse for practitioner to claim that they were adhering to negligent common practice
* -Standard practice doesn’t necessarily govern standard of care
* ->Judge can overturn this
* **Analysis**:  
  -Not possible to find doctors would have known about HIV in 1985
* -D had complied with standard practice that was beyond understanding of lay person
* -Was not fraught with obvious risks
* **Conclusion**:
* -Not negligent

**Causation**

**Principles**

* P only has to prove D’s negligence was A cause
* Link Breach to Loss on BOP (*Clements*)
* Need not be scientific inquiry (51%) (*Clements*)
* Factual Inquiry requiring proof (*Clements*)
* Common Sense (*Snell*)
* May be inferred by little evidence (*Leonati*)

**But-For Test**

* General Test for Causation: But-For Test
* -“But for” D’s negligent act, injury would not have occurred (*Kaufman*)
* Would not have occurred but for D’s negligence (*Clements*)
* “Robust” and “pragmatic” approach (*Clements/Barnett v Chelsea)*

**Different Types of Loss**

* Divisible Loss: Loss attributable to single tortfeasor
* Indivisible Loss: Loss attributable to multiple tortfeasors

*Kaufman v TTC*

* **Facts:**
* -Commotion on escalator woman fell and injured
* -Claims handrail on escalator was faulty
* -No evidence to justify that type of hand rail was a contributing cause of P’s injury
* -But For standard
* **Ratio**:
* -Causal relationship make out by evidence

*Barnett v Chelsea & Kensington Hospital Management Committee*

* **Cause in Fact**: Factual Determination whether D’s breach actually caused P’s loss
* Common sense principles, robust, pragmatic application of facts
* Doctor dismissed someone who had been poisoned and later died
* Was Dr.’s negligence cause of man’s death?
* Nothing Dr. could have done
* P did not establish on Balance of Probabilities that D’s negligence cause death of deceased

**Goals of Tort Law**

* Bring P back to position would have been had D’s act not occurred (Leonati*)*
* -1) Compensation
* -2) Deterrence
* -3) Corrective Justice

**Exceptions To But-For Test**:

* Allows to find causation in absence of But For test
* Considerations guiding exceptions, no remedy for P otherwise
* -Underlying tort goal of compensation\*\*\*
* When underlying tort goals are at risk of being frustrated

**-1)** Multiple Negligence Defendants Rule

* If P could prove that TWO D’s were negligent, one had to have caused loss but impossible to prove which one, ONUS shifts to D
* Limited to TWO negligent D’s
* BURDEN SHIFTS to D

**-2)** Learned Intermediary Rule

* Manufacturers may discharge their duty to inform consumers by adequately disclosing information to learned intermediary (*Hollis*)
* Can discharge duty to someone else

**-3)** Informed Consent

* Objective/Subjective test for causation, framed in terms of whether a reasonable person in P’s position would have consented if they had been adequately informed (*Reibl v Hughes*)
* Did P subjectively understand/Would P objectively had not undergone/consented (*Arndt v Smith*)
* -Don’t want P’s claim to be based on hindsight and bitterness cases failing to adequately perform

**Modifications to But-For Test**

* But For still applies to Multiple D’s unless proven that it won’t work (*Clements*)
* If But For fails, go to Multiple D first then Material Contribution

**Multiple Negligence Ds**

*Cook v Lewis*

* **Facts**:
* -Two Ds hunting, one shot P
* -Fired simultaneously, couldn’t tell who did it but one of them did
* **Issue**:
* -How do you determine whom is to blame? Is either?
* **Ratio**:
* -Exception to But For test
* -When insufficient evidence, unable to point to single D as culprit, Reverse Onus may apply
* -Multiple negligent Ds all who have reached the standard but because of nature of conduct impossible to point a finger at one of them
* -Does not count when there is evidence but cannot tell who is more liable
* ->Only when NO evidence
* -Culpable actor in initial negligent act is to set in motion a dangerous force which embraces injured person within scope of probably mischief
* -Onus is shifted to wrongdoer to exculpate themselves
* -Person and other innocent party bear burden, onus attaches to culpability for negligent act
* **Analysis**:
* -Each hunter would know or expect by shooting by other and negligence act has culpability from participating
* -Multiple shooting and its consequences
* -No liability will attach to innocent act of shooting, but culpable actor must bear burden of exculpation
* **Conclusion**:

**Material Contribution**

* Absence of evidence/Impossibility to use But For allows P to recover (*Clements*)
* After *Cook v Lewis*- Multiple D
* Multiple tortious D who have been proven by evidence to breached standard of care and cause harm collectively but cannot pinpoint harm (*Hanke v Resurfice*)
* P are permitted to “jump” evidentiary gap because to deny liability would offend basic notions of fairness and justice (*Hanke v Resurfice Corp*)
* Imposing liability not because evidence establishes D’s act caused injury but because act CONTRIBUTED to risk that injury would occur (*Snell*)
* Underlying Goals:
* -Fairness
* -Deterrence
* Court cautions against using (*Hanke v Resurfice*)

*Clements*

* P may succeed by showing D conduct materially contributed to risk of P’s injury where:
* -1) P established loss would not have occurred “But For” negligence of 2 or more tortfeasors each possibly (Fact) responsible for loss
* -2) P, through no fault of own, unable to show any one of possible D’s in fact was necessary for “But For” for cause of injury because D can point to other one
* Material contribution only applies when But For fails
* Make sure underlying tort goals are met

*Walker Estate v York Finch General Hospital*

* **Facts**:
* -P’s contracted HIV from tainted blood products supplied by Red Cross
* -Did not use pamphlet about high risk groups or about feeling not healthy, warning against donation from homosexuals
* **Issue**:
* -Was Red Cross causally at fault?
* **Ratio**:
* -But-for test unworkable in situations where multiple independent causes
* -In cases of negligent donor screening, should not be whether screener was a necessary condition for P’s injuries using but-for, but whether conduct was a SUFFICIENT condition
* -Materially contributed: a contributing factor that falls outside the de minimis range
* ->When evidence not there to establish causation, not whether D actually caused but whether D materially contributed to cause
* -Go back to breach and what was known at time
* **Analysis**:
* -Listing signs and symptoms of AIDS would not have excluded donor as he had no symptoms of AIDS
* -Causation can be proved
* -Donor would not have donated had he seen the high risk categories of people
* -Requirement of pamphlet, a causal link is established
* **Conclusion**:
* -Red Cross Negligent

**Limiting Material Contribution**

* But-For test is the standard test
* Material contribution test can ONLY be applied if TWO requirements met:
* -1)P must establish impossible to prove causation using but-for for reasons beyond P’s control
* -2)P must establish that D breached Standard of Care and injuries fell within ambit of risk created by D’s breach

**Materially Increased Risk**

* Increased risk must make it more probable than not that D’s negligent act was cause of P’s loss
* If D’s negligence materially increases risk of a particular kind of injury occurring and threat very injury befalls P, then D will be a cause (*McGhee v National Coal Board*)
* Burden of proving causation should shift P to D who then must disprove causation on Balance of Probabilities (*McGhee v National Coal Board*)

*Snell v Farrell*

* **Facts**:
* -Eye surgery left P blind
* -P sued D for negligent operation
* **Issue**:
* -Whether P must prove causation on but-for standard or can use some other standard because of lack of scientific evidence
* **Ratio**:
* -Causation need not be proven by scientific precision
* -Answered by ordinary common sense
* -Legal burden remains with P, but in absence of evidence to contrary by D, inference of causation may be made although scientific proof has been given
* **Analysis**:
* -Dr. negligent in continuing operation and increased risk of P suffering injury
* **Conclusion**:
* -D negligent

**Proportionate Cause and Loss of Chance**

* P would recover based on a possibility that D was a cause

**Multiple Causes**

* Independent tortfeasor can only be held liable for injuries they cause or contribute to
* Joint tortfeasor held liable for torts committed by fellow tortfeasors even if they did not cause or contribute to P’s loss (*Cook v Lewis*)

**Independent Insufficient Causes**

*Athey v Leonati*

* **Facts**:
* -Began a new a workout plan
* -Suffered injury during workout as a result of car accident
* **Ratio**:
* -Not necessary for P to establish D was sole cause
* -As long as D was part of cause in injury, D is liable for all losses
* -No basis for reduction of liability because of existence of other preconditions
* -Take your victim as you find them
* -Fairness governs, even if solely responsible, even if contributed is possible so long as underlying goals met
* -Causation may be inferred based on little evidence

**Thin Skull and Crumbling Skull** (*Leonati*)

* -Thin Skull: Tortfeasor liable for P’s injuries even if injuries are unexpectedly severe owing to a pre-existing condition
* ->Still liable even though P’s losses were more dramatic than expected for average person
* -Crumbling Skull: Pre-existing condition was inherent in P’s original condition
* ->D need not put P in a position better than their original position
* ->Need for not compensate P for any debilitating effects of the pre-existing condition which P would not have experienced from negligence
* ->D liable for additional damage but not the pre-existing damage

*Nowland v Brunswick Construction*

* Negligence in constructing house
* While structural design particularly in lack of ventilation contributed to damage occasioned to building, poor workmanship of D and poor quality of materials also contributed
* D is concurrent wrongdoer and even though damage might not have occurred but for poor design does not excuse him from liability

**Independent Sufficient Causes**

* P’s indivisible loss results from two or more sufficient causes

*Lambton v Mellish*

* Noise was caused by two separate companies
* Both noises, taken separately amounted to nuisance
* Separately but equally liable

**Successive Causes of Parallel Injury**

* P suffers parallel or overlapping injuries in series of incidents
* Tortfeasors liability will be reduced to reflect P’s pre-existing injuries or disabilities

*Penner v Mitchell*

* **Facts**:
* -Woman suffered injury from D’s negligent but had heart condition where she would have had to take time of work anyways
* **Issue**:
* -Is D liable for entire work absence?
* **Ratio**:
* -Liable for everything should only be applied in culpable circumstances
* **Analysis**:
* -Giving her the extra money would result in victim being overcompensated
* **Conclusion**:
* -Not allowed damages for time off she would have taken anyway

**Devaluing P’s Loss**

*Dillon v Twin States Gas and Electric*

* Wires were not protected against contact
* P fell over bridge and grabbed wires to be saved and was electrocuted
* But for current wires P would have fallen and died/injured
* Evidence that he would have been injured form fall but for wire would be taken into account as though he had already had those injuries
* Only liable for the injury more from the fall in grabbing wires

**REMOTENESS**

**Intro**

* Liability will be denied if connection between breach and loss was too remote
* Rule of Fairness
* Question of Law
* Remoteness: Legal connection between defendant’s breach and P’s loss
* Cutting of logical inquiry based on Policy
* Sufficiently foreseeable then liability will be found

**Directness Test**

* Directness as a test for remoteness (*Polemis*)
* P’s loss would not be too remote to be recoverable if it was direct result of D’s carelessness
* Directness: close temporal and spatial connection b/w D’s breach and P’s loss
* -NO LONGER USED

**Foreseeability Test**

*Wagon Mound v Morts Dock*

* **Facts**:
* -Carelessly permitted oil to spill
* -Oil hit a spark and caused fire and damage
* **Issue**:
* -Was damage too remote? Liable for fire damage?
* **Ratio**:
* -Liability for consequences has been imposed that it was reasonably foreseeable or natural/necessary/probable
* -Ought to foresee with common conscience of mankind
* -Factor in determining liability is whether damage is such that reasonable man would have foreseen
* -If could see intervening events which left to its being done
* -If loss is foreseeable, making sure damage is not too remote
* -Concerned with justice and fairness (avoiding injustice)
* Analysis:
* Conclusion:

**Modifications to Foreseeability Test**

**1)**Kind of Injury

*Hughes v Lord Advocate*

* **Facts**:
* -Boy injured by exploring manhole lamp exploding and burning him
* **Issue**:
* -Is damage of burns too remote?
* **Ratio**:
* -D can be liable even if damage may be greater than foreseeable
* -Cannot be something that no one expected to happen
* -Don’t have to foresee precise nature of accident, just foresee that kind of harm/loss would occur
* **Analysis**:
* -Lamp known cause of fire
* -But caused in a way that was unforeseeable
* **Conclusion**:
* -Too remote

**2)**Thin Skulled Plaintiff Rule

*Smith v Leech Brain & Co*

* Tortfeasor takes victim as he finds them
* Burn caused in part by cancer, still liable for burn
* What amount of damage which he suffers as a result of that burn, depends on characteristics and constitution of the victim

*Marconato v Franklin*

* Accident triggered major personality change
* Particular susceptibility to suffer greater consequences
* Tortfeasor takes victim’s peculiar susceptibilities and vulnerabilities

**3)**Possibility of Injury

**Possible NOT Probable**

*Wagon Mound v Miller Steamship*

* Justifiable not to take steps to eliminate a real risk if it is small and circumstances are such that a reasonable man, careful of safety of his neighbour would think right to neglect
* Possibility of Damages: must be significant enough in a practical sense to require a reasonable man to guard against them
* He ought to have known that it is possible to ignite this kind of oil on water and that engineer ought to know this could happen
* D only liable for reasonably foreseeable consequences of negligence and damage that caused by negligence need only be Possible NOT Probable

*Assiniboine v Greater Winnipeg*

* **Facts**:
* -Dad altered toboggan for kid
* -Goes down hill he fucks up, it hits a gas valve, explodes, damages to school
* **Issue**:
* -Are the parents liable? Is the gas company liable?
* **Ratio**:
* -Recovery when event was not impossible even though it was very rare
* -What a reasonable person should have foreseen
* -Only requires foreseeing damage in a general way (not extent of damage or manner)
* -Test of Foreseeable: What is possible rather that what is probable
* -Law does not excuse D from liability because other causal factors helped caused harm
* **Analysis**:
* -Dad’s conduct was causally relevant factor- failure to exercise due care was cause of damage
* -Gas company negligent in constructing valve in place where could be damaged
* **Conclusion**:
* -Both liable

**INTERVENING CAUSES**

**Intro**

* Novus actus interveniens: a new intervening act
* -Used to be last wrongdoer was held solely responsible for wrongful act even if relatively minor

**Different Types of Intervening Acts**:

* -1) Intervening acts that were naturally occurring or non-culpable do not break chain of causation
* -2) Negligent intervening acts break chain of causation absolving original tortfeasor of liability
* -3) Deliberately wrongful or illegal acts, invariably broke chain of causation unless original tortfeasor had duty to prevent act
* Fairness and Corrective Justice

*Bradford v Kanellos*

* **Facts**:
* -Grease fire in restaurant
* -Sound of fire extinguisher caused hissing noise, someone thought it was leak and created panic
* -P injured in panic
* **Issue**:
* -Was consequence within risk created by negligence in creating grease fire?
* **Ratio**:
* -Not liable for intervening causes
* -Independent intervening act that severs from breach will be too remote if not reasonable breaking chain of legal causations such that D won’t be held liable for loss
* **Analysis**:
* -Proper procedure for putting out fire
* -System operating well
* -Not reasonable that panic would ensue from sound
* -Conduct of guy who freaked out and injury was not reasonably foreseeable part of loss
* **Conclusion**:
* -Not within risk of D negligence

*Price v Milawski*

* **Facts**:
* -Doctor did x-rays misdiagnosed P as not having injury
* -P went to new doctor who relied on previous x-rays saying everything was fine despite protests
* -P suffered permanent disabilities
* **Issue**:
* -Are both doctors liable in negligence?
* **Ratio**:
* -A negligent person may be held liable for future damages arising from subsequent negligence of another and in part from own negligence where damage were reasonably foreseeable as possible result of own negligence
* -Can be held liable for subsequent acts of others in foreseeable would be relied on
* **Analysis**:
* -Reasonably foreseeable by doctor that x-ray would be relied on by others
* -Reasonably foreseeable new doctor would not check even though that was negligent
* **Conclusion**:
* -Original doctor negligent

*Block v Martin*

* Injured in car accident
* Doctor says okay, slips and fall later
* Not an intervening act
* Was not an independent cause that factored in what happened to P
* Continued on in daily life and harm was exacerbated

*Hewson v Red Deer*

* **Facts**:
* -P claim damages against tractor owner
* -Tractor owner left keys in tractor
* -Stolen and crashed into P’s house
* **Issue**:
* -Is tractor owner liable for behaviour of other?
* **Ratio**:
* -Reasonable foreseeable acts that could have been prevented with elementary precautions will not be said to have novus actus interveneiens
* **Analysis**:
* -Reasonably foreseeable someone would drive tractor with keys in it
* -Easily could have prevented it by taking out keys
* **Conclusion**:
* -Liable

*Hussack v Chilliwack* (Hockey Case)

* Bug Bite scratch- original act caused bug bite
* Other cause “scratching” can make things way worse
* Can still be liable for outlandish causes if reasonably foreseeable and intervening acts would still occur (Was foreseeable that dad would act all crazy)
* 1 Million dollars damages

**DEFENCES**

**Contributorily Negligent**

* Dividing liability according to party’s relative degrees of fault
* Only for P’s negligence
* D not off hook, only partial defence
* Based on:
* -Statute (Negligence Act)
* -CL
* -Application of statute with common law overlay (statute tells judge what they can do)
* If insufficient evidence but P is also liable 50/50 default BC Negligent Act)
* Can be act or omissions
* P can either:
* -1) Cause Loss
* -2) Contribute Loss

**Contributorily Negligent-CONT’D-REDO!!!!**

* 1)Partial Defence
* -Doesn’t absolve D of liability
* -*Gagnon*
* 2)Modified Objective
* -*Walls* (Ordinary prudent man would have done in circumstances)
* -Not specific person but
* 3)Vary case by case
* -*Gagnon*-factual assessment in circumstances
* 4)Mini Negligence analysis
* -Can look at Negligence test steps- the core aspects of the analysis and decide accordingly
* -*Gagnon*
* -Look to NM if relevant
* -*Mortimor*
* 5)Corrective Justice
* -*Bow Valley Case*- Notes->Ideas of justice underpinning CN
* -*Walls*- no insurance, who can pay
* -Policy considerations
* -Can be used to support modified objective standard

*Bow Valley*

* Underlying considerations of tort law and how it affects contributory negligence
* Can’t accept traditional theory of all or nothing basis
* Avoid unfairness
* Assess fault in comparison with negligence of others
* Care and vigilance

Notes and Questions-697/698 REDO!!!!!

* Factual specificity
* NM deals with CN differently
* -Reasonable reliance in NM

*Walls v Mussens LTD*

* **Facts**:
* -Fire caused by D’s negligence
* -P knew of fire extinguishers to put out fire but instead used snow
* -D claimed P was contributorily negligent in not using fire extinguishers
* **Issue**:
* -Is P contributorily negligent?
* **Ratio**:
* -A person’s conduct in emergency cannot be judged in reasonable behaviour of hindsight and in a calmer time for alternatives
* -Agony of the moment: extreme/emergencies a person is given latitude
* -Modified Objective Standard: reasonable person in circumstances
* -Lenient on P when acting on their own without organization/company backing
* **Analysis**:
* -No portion of responsibility for starting fire can be given to P, solely D
* -P not liable simply for not thinking of fire extinguisher
* -P was doing what everyone else in emergency was doing
* -Cannot say prudent man would not have done that in emergency situation
* **Conclusion**:
* -Not contributorily negligent

*Gagnon v Beaulieu*

* **Facts**:
* -D hit P with a car
* -P was not wearing a seat belt
* **Issue**:
* -Is P contributorily negligent for injuries by not wearing a seat belt?
* **Ratio**:
* -Requires everyone to exercise all precautions as a man of ordinary prudence would observe
* -P can contribute to loss through positive action (doing something) or failing to do something (omission)
* -D has to prove:
* ->1) P did not take precautionary measures/seatbelt not worn/act not done
* ->2) Damage would have been prevented or lessened had it been done/not done
* -CN usually 5-25% liability
* -Context matters for CN and amount liability (ex: what if she was pregnant)
* **Analysis**:
* -P ought to have known that wearing seat belt would reduce possibility of injury
* **Conclusion**:
* -Contributorily negligent to injuries

*Mortimer v Cameron*

* **Facts**:
* -Two friends fighting, tumbled down side of wall
* -Crashed into wall that was not properly constructed and P was injured
* -City did not properly inspect
* **Issue**:
* -Was P contributorily negligent in fighting? How do you apportion liability?
* **Ratio**:
* -D’s negligence is actionably only to harm that is within scope of risk that makes offending conduct actionable
* -P contributorily negligence will not limit recovery unless it is a proximate cause of injury
* **Analysis**:
* -P’s negligence was not a reasonable or foreseeable likelihood of risk that would happen
* -Reasonable to believe that wall was sturdy and were entitled to rely on wall for reasonable protection
* -Risk of falling through went beyond reasonable contemplation
* -Not within risk of horseplay
* -Ongoing duty to properly inspect the wall and make sure it is safe
* -Inspectors and city negligent
* -Cannot rely on inspectors, should have made sure it was managed through ongoing duty
* **Conclusion**:
* -Company and city both liable

**Voluntary Assumption of Risk**

* FULL Defence
* When P consents to risk of harm generated by D’s conduct and voluntarily assumes that risk, P cannot sue for damages from that risk of harm
* D must show P assumed
* Courts Hesitant to use All or Nothing approach given the underlying goals or tort law and principles of fundamental justice to absolve D completely

*Dube v Labar*

* **Facts**:
* -P got into D’s car and they got into accident
* -D grabbed wheel while P distracted
* **Issue**:
* -Did P assume risk of getting into car? Is D absolved of liability?
* **Ratio**:
* -Burden on D or proving that P expressly or impliedly agree to exempt D of liability
* -Volenti non fit injuria will arise only when clear that P knowing risk of harm bargained away right to sue for injuries
* -Common sense: only rarely will P give away right
* -D must show for Voluntary Assumption:
* ->P accepted both physical and legal risk of injury
* -Physical Risk: Harm suffered
* -Legal Risk: Abandoning right to sue
* ->D must show P consented to both things
* -Parties sober and sound mind and have full capacity, planning to put themselves in harms way
* **Analysis**:
* -P knew of risks and gave up right when entered car
* **Conclusion**:
* -Appeal dismissed

*Sundance*

* Signing of waiver is not enough proof to discharge liability and consent was willing

**Participation in a Criminal or Immoral Act**

* Ex turpi causa non oritur action
* FULL defence/precludes recovery

*Hall v Herbert*

* **Facts**:
* -P injured and sued D for allowing them to drive drunk
* **Issue**:
* -Can illegal action of drunk driving absolve D of liability?
* **Ratio**:
* -Donoghue: does not say duty owed only to neighbours who are acting morally and legally
* ->Does not require clean hands
* ->Duty of care owed to all person who may reasonably be foreseen to be injured by negligent conduct
* -Usually arises when P tries to profit from illegal activity/circumvent criminal liability
* -Only applies when integrity of legal system is threatened
* -Negligence not about criminal, it’s corrective justice
* -Illegal conduct does not factor until defences, cannot play in other parts of analysis
* **Analysis**:
* -Duty owed to not let P drive drunk
* **Conclusion**:
* -Damages awarded

**Inevitable Accident**

* P suffers loss, sues D
* D says could not have prevented it, no way through conduct

*Rintoul v X-Ray and Radium Indust. LTD*

* **Facts**:
* -Breaks in D’s car did not work
* -Claimed out of his control
* **Issue**:
* -Can P claim inevitable accident?
* **Ratio**:
* -Inevitable accident: something happened over which P had no control and effect which could have not been avoided by greatest care and skill
* -Onus on P to show
* **Analysis**:
* -Brake failure could have been prevented by reasonable care of P in doing an inspection
* -No proof brakes were working right before and suddenly malfunctioned
* -P did not show accident was inevitable and that it happened even after P’s reasonable care
* **Conclusion**:
* -Defence denied

**PROOF OF NEGLIGENCE**

**Burden of Proof**

* Legal burden is proving issue on BOP
* P 2 Burdens:
* -1) Proving element of negligence case on BOP (legal burden)
* -2) Adducing evidence to establish a prima facie case (evidentiary burden)
* Have to bring evidence before court before each part of offence and for reasons that it happened
* Difference between legal and evidentiary burden
* -1) Legal Burden: to make a claim- P bears legal burden of proof to make the case (duty, standard, causation, remoteness and loss)
* ->D bears legal burden of defences
* ->P has adduce sufficient evidence that each phase can be met
* ->P must speak to any defences D has plead
* ->All assessed on BOP
* -2) Evidentiary Burden: which party bears what portion of proving in the analysis
* ->P bears evidentiary burden in majority of negligence analysis
* ->Switches sometimes to D (Multiple defendants and material contribution,)
* ->P must establish prima facie duty of care under *Anns* test, evidentiary moves to D to show policy considerations negate a finding of that duty

**BC Rule of Court**

* 2 cases where P opens and closes case
* -Witnesses, experts etc. and closes case
* D goes to judge before their case with application: rule 12(5)
* -1) D can bring no evidence motion
* -2) D can bring insufficient evidence motion
* D does this before even bringing forth their case
* Use sparingly
* -Corrective justice, everyone deserves their day of court and to make their case

No Evidence Motion

* No evidence that P can make out claim
* Very hard to prove
* Not asking to weigh evidence but asking to declare once see evidence and not weigh because there is none
* *Mohammed*
* -Fell asleep where fire took place, created lots of damage
* -P brings claim against D that caused fire from drinking, smoking and not putting out fire
* -D says that there is no evidence that he caused the fire (no cigarettes)
* Party making claim self-representation
* -Does not understand evidence and does not take rules from court
* Judge can grant it or deny it and give D option to go on

Insufficient Evidence Motion

* Not saying there is no evidence, D saying there is insufficient evidence
* Even harder (easier to say there is nothing when there is a clear lack)
* Declares it to be insufficient
* Rules of court require D to bring insufficient that you will not proceed with the case
* -If judge agrees, P’s case thrown out
* -If judge does not agree, D has no opportunity to make case and P automatically wins

*Wakelin v London South Wales*

* **Facts**:
* -D negligently drove a train and killed P’s husband
* **Issue**:
* -Is d liable?
* **Ratio**:
* -Whole burden of proof is not on P
* -P must prove not just D was negligent but also that negligence cause/materially contributed to injury
* **Analysis**:
* -No evidence brought illustrating material contribution to negligence
* -P has to prove husband’s death was caused by negligence on D to which injury complained of
* **Conclusion**:
* -Not negligent

**EXCEPTIONS TO BURDEN OF PROOF**

**Statutes and Shifting Burdens of Proof**

* Legislature can help out adjust Burden of Proof

*Macdonald v Woodard*

* **Facts**:
* -P was struck while standing in front of automobile of D
* **Issue**:
* -What does P have to prove in order to succeed in claim?
* **Ratio**:
* -Statutory (*Highway Traffic Act*): owner/driver is prima facie liable for damage caused by his motor vehicle until he satisfied Court on preponderant of evidence that he was not negligent
* ->Rebuttable presumption
* -P must show that damages were occasioned by presence of motor vehicle on highway
* -P must first prove effective cause of collision was conduct driver-need only show that collision not conduct of driver was cause of injury
* -D must then satisfy jury that accident was not caused by negligence
* ->Onus not discharged until D proves that his negligence did not cause injury
* ->Not necessary to find any specific act to attach liability
* **Analysis**:
* -P proved that damage was caused by D’s car
* **Conclusion**:
* -D liable

**Multiple Negligence Ds**

*Cook v Lewis*

* **Facts**:
* -Two Ds hunting, one shot P
* -Fired simultaneously, couldn’t tell who did it but one of them did
* **Issue**:
* -How do you determine whom is to blame? Is either?
* **Ratio**:
* -Exception to But For test
* -When insufficient evidence, unable to point to single D as culprit, reverse onus may apply
* -Multiple negligent Ds all who have reached the standard but because of nature of conduct impossible to point a finger at one of them
* -Does not count when there is evidence but cannot tell who is more liable
* ->Only when NO evidence
* -Culpable actor in initial negligent act is to set in motion a dangerous force which embraces injured person within scope of probably mischief
* -Onus is shifted to wrongdoer to exculpate themselves
* -Person and other innocent party bear burden, onus attaches to culpability for negligent act
* **Analysis**:
* -Each hunter would know or expect by shooting by other and negligence act has culpability from participating
* -Multiple shooting and its consequences
* -No liability will attach to innocent act of shooting, but culpable actor must bear burden of exculpation
* **Conclusion**:

**Notes and Questions**

* Does not apply when D actively spoils evidence
* Courts will make rebuttable presumption that whatever evidence was there would have harmed D

**Res Ipsa Loquitur**

* P must rely on circumstantial evidence to prove D was negligent
* Circumstantial Evidence: Evidence from which an inference may be drawn to reach a conclusion
* Res Ipsa Loquitur: “The Thing Speaks for Itself”
* -1) Occurrence must have been something that in ordinary course of events happens without carelessness
* -2) Instrumentality of harm must have been under sole management and control of D/someone for whom D was responsible
* -3) Must not have been any direct evidence as to how/why accident occurred

*Fontaine v British Columbia*

* **Facts**:
* -No direct evidence regarding events that resulted in deaths
* -P argued that evidence of occurrence was enough to attribute to D’s negligence
* **Issue**:
* -When does circumstantial evidence apply?
* **Ratio**:
* -Res ipsa loquitur very fact specific  
  -Invocation of res ipsa loquitur does not shift burden to D
* -Circumstantial evidence constitutes reasonable evidence of negligence
* -If equal infer negligence or no negligence from circumstantial evidence, P loses
* -If D produces reasonable explanation consistent with no negligence this will neutralize P’s case and it fails
* -Up to judge to determine when it applies
* -Once P has established on BOP prima facie case of negligence, D must present evidence negating P’s claim
* Analysis:
* Conclusion:

**Statute and Liability**

*BC Negligence Act*

Apportionment of liability for damages

* **1**  (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
* (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
* (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

**STRICT AND VICARIOUS LIABILITY**

**Strict Liability**

* Triggered by breach of obligation
* Court does not demand proof that breach was intentional, careless or unreasonable
* Sufficient that D acted in prohibited manner
* By choosing to engage in a dangerous activity, D assumes responsibility for almost all damage

**Vicarious Liability**

* Liability imposed on one person as a result of tortious conduct of another
* Usually in employment context
* If employee commits tort, employer may be held responsible for damage even though it did nothing wrong and did not breach any obligation

*Rylands v Fletcher*

* **Facts**:
* -Water from reservoir broke through hidden shaft and flooded P’s mine
* -D was using it in non-natural uses
* **Issue**:
* -Is D liable even though they took precaution?
* **Ratio**:
* -D if engages in non-natural use of land including use of water and if in doing so or in consequence of any imperfection, water escapes and affects P, then D was acting in their own peril
* -Must answer for all damage which is natural consequence of its escape
* -Strict liability rule need to prove:
* ->1) Non-natural use of land
* -Dangerous, extraordinary or of no general benefit to community (*Gretsen v Toronto*: some things are inherently dangerous ex:explosives, storage or water, biological agents->when less apparent, apply degree of danger/type of use/utility/normal use/specific circumstances of time and space)
* ->2) Escape of something likely to cause mischief
* -Escape: Escape from a place where D has occupation of or control of to a place that is outside where D has no occupation or control over (*Reed v Lyons*)
* ->Does apply if it occurred in your land
* -Mischief: no clear definition- harm
* ->3) Damage
* -Concrete damage
* -Won’t apply in situations of: Consent, Common Benefit, Preventing escape is role of P (“default”), Act of God/Stranger, Statutory authority
* -Policy: driving exceptions
* -Goals of Corrective Justice\*\*\*
* **Analysis**:
* Conclusion:

**Escape**

*Read v J Lyons*

* **Facts**:
* -D used explosives at work
* -Explosion occurred and injured P
* **Issue**:
* -Is P strictly liable for all consequences of explosion?
* **Ratio**:
* -“Escape” and “Non-natural use”
* -Escape: keeping a thing in at D’s peril and not preventing a thing which may inflict mischief from escaping from area with D controls
* **Analysis**:
* -Not about preventing an explosion from occurring from explosive device, but from outside the area
* -No escape of explosion
* -No rule which imposes on D carrying business of making explosive, though activity must be hazardous an explosive a dangerous thing, strict liability to those who are lawfully on premise
* **Conclusion**:
* -P’s claim fails

**Non-Natural Use**

*Gersten v Toronto*

* **Facts**:
* -Methane gas seeped from site, which caused P’s car to explode
* **Issue**:
* -D liable?
* **Ratio**:
* -Person who brings on land and collects and keeps anything that is likely to do mischief if it escapes must keep it in at his peril and if he does not do so, prima facie answerable for all damage which is natural consequence of its escape
* -When use of thing which law regards as potential source of mischief is an accepted incident of some ordinary purpose to which land is reasonably applied by occupier
* ->Prima facie rule of absolute responsibility for consequences of its escape must give way
* -Courts have looked not only to thing or activity in isolation, but also to place and manner which it is maintained and its relation to its surroundings
* ->Time, place, circumstance
* -No merit for claiming general benefit to community
* **Analysis**:
* -Area was not practical for storing gas
* -Benefits was for gas company
* -Non-natural use of land and therefore exception to strict liability fails
* **Conclusion**:
* -Liable

**Defences to *Rylands v Fletcher***

1)Consent

* D establishes P implicitly or explicitly consented to presence of danger is a complete defence

2)Common Benefit

* If source of danger is maintained for common benefit or both P and D, liability will not be imposed

3)Default of P

* A person who voluntarily and unreasonably encounters a known danger cannot recover
* P’s wanton, wilful, or reckless misconduct materially increased probability of injury

4)Act of God

* Act of God/force of nature that raise without human intervention
* Natural force must be so unexpected that it could have been reasonably foreseen and effects not prevented

5) Act of a Stranger

* Owner of a dangerous thing generally thing is strictly liable for foreseeable liable for foreseeable harm cause by third parties
* Liability will not be imposed if D proves that escape of dangerous thing was caused by stranger’s deliberate and unforeseeable act
* Onus on D to show escape could have not been prevented through reasonable care

6) Statutory Authority

* Liability may be denied if D acted pursuant to statutory authority

**Vicarious Liability**

* Original tortfeasoer not absolved of liability
* D may be held liable without acting intentionally
* 1) Statutory Vicarious Liability
* 2) Agency
* 3) Employment/Master-Servant
* Parents are not vicariously liable for children

**Statutory Vicarious Liability**

* Legislation, scope of vicarious liability is cast more widely

**Principal-Agent Relationship**

* Principal authorizes agent to act on its behalf

*Wright v Kerr*

* Facts drive case
* Statutes will come in to describe how applied
* Employer/principal found liable for conduct of agent if it is conducted in course of relationship

**Master-Servant Relationship**

* Alternative liability: vicarious liability does not relieve a tortfeasor of responsibility
* Right of Indemnification: If employer satisfies judgment under doctrine of vicarious liability, it generally has right to recover same amount from employee
* Third party protection: next point involves slight digression from tort law
* -Protection clause
* Vicarious and personal liability: narrowness of tort liability

*Bazley v Curry*

* **Facts**:
* -D had sexually assaulted children at work
* -Parents sued company and D
* **Issue**:
* -Can company be held liable for D’s actions?
* **Ratio**:
* Considerations of fairness and policy:
* -Where employee’s wrongdoing was a random act wholly unconnected to nature of enterprise and employee’s responsibilities, employer is not vicariously liable
* -Vicarious liability always concerned with policy
* -Social interest in furnishing innocent victim with recourse against financially responsible D
* -Employee’s acts are regarded in law as being authorized by employer and hence employer’s acts (direct liability theory)
* -Employer was employee’s superior in charge or command of employee (servant’s tort theory)
* -Vulnerability of victim
* Concerned: with just and practical remedy for harm and deterrence of future harm
* Vicarious liability is concerned with effective compensation and that victim can recover judgment
* -Should look to scope of employment and mode conduct
* -Whether wrongful act is sufficiently related to conduct authorized by employer to justify imposition of vicarious liability
* -Vicarious liability is generally appropriate where there is significant connection/w creation of enhancement of a risk
* -Require material increase in risk as a consequence of employer’s enterprise and duties entrusted to employee
* -Fairness and need for deterrence
* -Employee engages in unauthorized acts that are so connected to authorized acts that may be considered “modes of doing”
* -Can look to case law and pre-existing categories but must be VERY similar
* ->If no pre-existing look to policy
* **Analysis**:
* -Employer’s enterprise and empowerment materially increased risk of sexual assault (harm)
* **Conclusion**:
* -Foundation vicariously liable

Problem Question

* **Intro**:
* 1) What type of tort law is it about
* **Issue**:
* -List Relevant Types of Torts
* **Analysis**:
* -Use lists and apply law to facts
* -How do your facts differ/same as applicable law
* -Back up everything with authority
* -If something not important, dismiss in a sentence
* -Even if finding different, go through rest of steps
* ->IF I was wrong
* -Defences
* -Damages
* **Conclusion**:
* -State conclusion and how arrived at it (where did it hinge on)
* -Why does it matter (Policy)

Long Answer

* **Intro**:
* -What topic is about
* -State question in your opinion “yes/no”
* -Road map of where you will go
* **Body**:
* -Term 1 and 2 in each point
* -Recognize faults
* -Anticipate counterarguments and quash
* -Why does your position outweigh other side of argument?
* -Specific examples to back up
* -Recognize that specific examples are not always generalizable
* **Conclusion**:
* -Illustrate what you have proven
* -Why does this matter?/What does this mean?

Framework

* Stated purpose
* -Why there doing it (Law)
* -Underlying goals of tort law
* Legal finding
* -What they are doing (Law)
* Effect
* -Personal assessment (Opinion)
* Your view
* -Does it work? (Opinion)

Long Answer Topics

**1)Fault/Liability**

Negligence

* Contributory negligence
* -P can also be held negligent
* -No longer an “all or nothing” approach (*Bow Valley*)
* Remoteness
* -Only liable for a certain extent- mechanisms to curb indeterminacy
* CN
* -Hard threshold, don’t want people’s words always getting them in trouble
* Causation
* -Don’t have to foresee particular harm just that harm could occur
* -Possible not probable
* Multiple Negligent D
* -All at fault unless disprove
* Crumbling Skull
* -Only liable for what you caused, no more no less
* Professionals
* -Because of the seriousness of their work and skill they possess should be held to a higher standard (doctors, financial people-NM)
* Children/Incapacitated not held to same standard
* Learned Intermediary
* -Discharge duty
* Remoteness:
* -Just because other things help doesn’t get you off (Manitoba Sled)
* Defence:
* -Accident gets you off
* Intentional versus Negligence
* -Different levels of fault based on your conduct

Intentional Torts

* Liable for all consequences no matter (transferred/imputed intent)

Reverse Fault?

* Anns test-policy
* Multiple Negligent D
* Defences in Negligence
* Defences in Tort
* Shift in Intentional-show lack of intent

**2)Corrective Justice**

Negligence

* If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered
* ->This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm
* Annulling wrongful gains and correcting improper losses
* Vicarious Liability
* -Those who can should shoulder the loss
* Multiple Negligent D
* -They all breached therefore should help out
* -No remedy otherwise
* Irremediability of harm
* -Can you ever really “correct” a harm?
* ->Psychological damage in IINS
* ->Reputation in Defamation

-Intentional Tort

* Actionable per se (battery, assault, fi) therefore do not need harm
* Others: MP, IINS need them

A right is an inherently correlative concept whose existence immediately creates in others a duty not to wrongfully infringe it

**3)Fairness**

-Negligence

* Contributory negligence
* Can’t profit off of illegal gains
* Remoteness
* -Should only be able to be liable for what you actually caused
* Strict Liability
* -Can be held liable even without defence (Trespass)
* Duty of Care
* -Only owe duty to those within reasonable contemplation
* Multiple Negligent
* -Fair to P that they don’t have to bear onus when breach established (Cook v Lewis)
* Crumbling Skull
* -Only liable for what you caused, no more no less
* NM
* -Even though market is open place and pure economic loss hard to quantify, still want fairness and some redress as “words are more volatile than actions”
* Mother not Owing duty to Unborn
* -Don’t want to impose hardships in conducting of everyday life
* Standard of Care
* -Don’t except superhuman, just reasonableness
* -Childen/mentally ill different standard
* People have right not to be harmed and if they are, should be compensated for it
* Learned Intermediary
* -Discharge duty
* Defences
* -Allowed to rebut

-Intentional Tort

* Don’t want too high threshold-medical in emergency situations (Malette)

4)Normative Structure

* Consent in practices
* Reasonableness in Conduct