**Overview of Analysis:**

**DUTY OF CARE -> STANDARD OF CARE -> BREACH -> CAUSATION -> REMOTENESS -> DAMAGES -> DEFENCES**

**goals of tort law: deterrence; compensation; punishment; appeasement & vindication; justice**

**DUTY OF CARE**
Historical source cases:
*Donaghue v Stevenson,* p294

* “**neighbor principle**”: Owe basic a duty of care for anyone who should come into your contemplation
* avoid doing things which you can **reasonably foresee** would injure your neighbour
* **foreseeability:**  being within reasonable contemplation
* **proximity:** closeness and directness
BUT at the remoteness stage of analysis, *Wagon Mound 1* moves proximity away from notion of directness

*Cooper v Hobart,* p303

* **foreseeability:**  was P reasonably foreseeable? Was loss reasonably foreseeable? Answered with common sense
* Closeness and directness → “proximate relationship between the parties”
* Also takes into account *broad* policy considerations → BUT only in terms of the relationship between the parties

**Is there a similar case which already recognizes a duty of care?**

Per Donaghue the categories aren’t closed.

Cases where **duty recognized:** duty to blind pedestrians in *Haley v London Electricity* (p325#7); duty to intoxicated by commercial hosts: *crocker v sundance* (p 342); this duty broadened somewhat, see p347#4; but also see #5 *Steward v Pettie*– serving past the point of intoxication not itself a foreseable risk, need additional risk factor; duty to intoxicated by employers: *Hunt v Sutton Group p 349#8;* social hosts more likely liable if serving minors: *p 350#10;* social & commerical liable for injuries on property: p350#10; duty of vehicle owner not to permit intoxicated to drive: p350#12. Police to identifiable potential victims: *Jane Doe v Metro Toronto Police;* Police to suspects: *Hill v Hamilton-Wentworth Regional Police* (nb. duty not breached here); private citizens to prevent crime: p362#12; Prison supervisors to ensure prisoners do not harm, eachother or public: p352#2; ditto mental health pros: p 52#3; employer to prevent harassment: p353#4; coaches, instructors, supervisors: p 353#5; higher standard when children allowed dangerous activities or unsupervised access to dangerous objects: p354#7; owner of abandoned property to control third parties: *okanagan exteriors v perth developments* p363#14. Doctors to patients to obtain informed consent: *haughian v paine* p421; doctor to mother for birth defects: *arndt v smith* p386#3; medical manufacturers to patients: *hollis v dow corning* p 426; *cominco v westinghouse* p434#8; including duty to warn of risks they ought to know about: p436#12; manufacturer might be held liable if warning obscured by promotion: p 436#15; barristers to clients: *demarco v ungaro* p 440, but difficult to establish breach: p 443#6, no duty of lawyers to third parties: p 444#8

**duty not recognized:** no duty to prevent nervous shock in a random motorist: *Nespolen v Alford* (p23#4) friends drop off drunk buddy who passes out on road, sued by motorist who hits buddy; no duty of social hosts to third parties: *Childs v Desormeaux*; no positive duty for ski buddies*: Kennedy v Coe*; no duty of doctor to future child: *paxton v ramji*; no duty of care toward human cells prior to implantation*: A (A Minor) v A Health & Social Services*; being born particular race not actionable harm; no duty of pregnant mother to unborn child (but a born alive child might sue third parties for *in utero* damages p395#7) - *Dobson v Dobson*; = **no general duty to rescue** where a person puts themselves in danger, unless there’s a special relationship:
*Mathews/Horsley v Maclaren* p332 (here special relationship created by statute; once you attempt rescue you have duty to do it competently); *Stevenson v Clearview­* – EMT watches buddy drown=no problem

If there’s an already recognized duty, can skip to STANDARD OF CARE analysis, otherwise, apply

**Anns-Cooper** test:

[ Test modified by 5 criteria for **Negligent Misrepresentation** from *Hedley Byrne* adopted by Canada in *Queen v Cognos:*

special relationship; representation untrue, inaccurate, or misleading; negligent misrepresentation; reasonable reliance; resulting loss.

Policy concerns for **Neg Misrep:** indeterminate liability; freedom of expression; chilling effect; potentially endless liability b/c of nature of words; markert concerns ]

**(1) Can a *prima facie* duty be found?**

1. **reasonable foreseeability**
	1. Burden on the P (as per *Childs)*
	2. both the plaintiff and the injury must be foreseeable
	3. assessed as a probability within a range of possible circumstances
	i.e. P must belong to a class of bros foreseeably at risk
	4. ex: in *moule v nb elec. Power comm.,* p14 the child plaintiff was foreseeable but the injury was not because he broke a branch fell onto the power line; but in *amos v nb elec. Power comm.,* p316 both child plaintfiff and injury of electrocution by climbing tree were foreseeable
	5. *palsgraf v long island railway company,* p320 the railway guard is not found to owe a duty to the plaintiff because he couldn’t know of a possible injury to a distant P (i.e. didn’t know package could explode)
2. **proximity**
	1. analgous cases insufficient to establish a duty of care might still be relevant here
	2. require closeness and directness *(donaghue v stevenson)*
	3. consider policy implications
	4. consider contractual relations, statutues
	5. is a positive duty to act? If so, consider the **“something more” criteria** from *Childs:* inviting risk; paternalism; public/commercial enterprise

Cases of psychological harm in *Mustapha v Culligan,* OntCA, p410:

* trial judge erred in neglecting the objective component of reasonable foreseeability
* **“person of normal fortitude and robustness” principle:** is the regular bro likely to suffer some time of psychiatric harm as a result of D’s negligent conduct?

*BDC v Hofstand Farms,* p487

* Third party (the P) suffers **pure economic loss** on the b/c of a late delivery of a package by a courier (the D) sent by someone else
* Fails on proximity b/c the P didn’t come within a limited class in the reasonable contemplation in the position of the D

*Winnipeg Condo Corp No 36 v Bird Construction,* p492

* a general contractor is found liable in negligence to a subsequent purchaser of the building, despite proximity concerns—must have “real and substantial danger”
* subsequent purchasers are reasonably foreseeable to the contractor as possibly suffering losses from negligent construction
* court considers policy, especially *caveat emptor* which might negate this duty of care, but doesn’t find them convincing
* This liability has been extended to architects and engineers in *Heinicke v Cooper* p 499#5
* **Shoddy products** must pose a “real and substantial” danger otherwise the suit will fail at the duty of care stage, *M Hasegawa v Pepsi* p499#6 the D didn’t sanitize bottle caps, product couldn’t be sold but no health risk to potential consumers.
* “real and substantial danger” not necc imminent danger - *Roy v Thiessen;* might apply to products which are only dangerous when relied upon like smoke detector, *Hughes v Sunbeam.* Court notes inconsistency in interpretting “real and substantial danger” in *Brett-Young Seeds v KBA Consultants,* all from p 499#8
* Claims about defective products are governed by legislation (p501#11

[ **Negligent Misrep** requires a “special relationship” of proximity, defined in *Hercules v Ernst & Young*: (a) the D ought reasonably to foresee that the P will rely on his or her representation, and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.
5 indicia for (b) above: i) financial interest; ii) professional/special skill; iii) advice in the course of business; iv) deliberately, not on social occasion; v) in responses to specific enquiry or request. Ex. of failure on this step is *Premakumaran v Canada* p 461#8, P said canada misrepped jobs for accountants to immigrants, court found no special relationship. ]

**(2) Are there residual policy considerations against a duty of care?**

Consider the implications for the legal system in recognizing these parties as neighbors- Is there an already existing remedy? Strain on public purse? Floodgates concerns. Relationship between parties already governed by contracts or statutes?

*Martel Building v Canada,* p478

* in case of **pure economic loss**, even though a *prima facie* duty of care can be made out in negotiations, policy considerations outweigh extending a duty of care in negotations.
* b/c it would “defeat the essence and hobble the marketplace
* it would use tort law as an “after the fact” insurance against exercising due diligence
* there’s other, more appropriate causes of action to ensure fair contracting.

*Bow Valley Husky v Saint John Shipbuilding,* p503

* Case of **relational economic loss** – where the D, by negligently damaging property of a third party causes pure economic loss to P, who had a relationship with the third party
* if a duty to warn is alleged, the D’s must ought reasonably foreseen that the P’s might suffer a loss as a result of the use of a product about which the warning should’ve been made
* However, there’s a problem of indeterminancy—of amount, of time, of class of plaintiffs
* Because there’s no principled reason to make it determinable—ie allow some Ps to recover and bar others—then there are policy reasons to negative the duty of care
* Court rejects “known plaintiff” test, test of actual users and test of reliance.

**STANDARD OF CARE**

**What would the reasonable person in the position of D have done?**

[ For **Negligent Misrep**: What a reasonable person would do in the circumstances to ensure that the statements are accurate and not misleading.

From *Queen v Cognos:* “The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person".  The standard of care required by a person making representations is an objective one.  It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading:” – NB this is not as fact specific as most negligence cases ]

By *BG Checo v BC Hydro,* p463

* general duties of common law still exist even when parties contract *unless* they specifically and clearly nullify them in the contract

by *Queen v Cognos*

* negligent misreppin can happen in pre-contractual relations
* P succeeds even though the contract allowed for him to be dismissed within a certain time frame—the contract seemed to limit liability, but the negligent misreppin is what induced him to contract

By *Arland v Taylor,*  p514

* it’s not appropriate for the jury person or judge to ask “what would I have done?” after the fact
* the reasonable person is “a person of normal intelligence who makes prudence guide his conduct” (p 515).
* Is presumed free from over-apprehension and over-confidence

By *Ryan v Victoria,*  p517#7

* the measure of reasonable depends on the facts of the case
* include likelihood of harm, gravity of harm, burden/cost of preventing the injury
* also include ext. indicators of resonable conduct: custom, industry practice, statutory or regulatory standards

by *Bolton v Stone,* p518 (cricket ball hits a passerby)

* Consider likelihood of harm rather than foreseeability alone
* Also consider severity of the consequences

By *Paris v Stepney Burough Council,* p520 (one eyed employee loses an eye while trying to knock out bolts)

* the D (employer) should take into account the special circumstances of the P (employee), because standard of care is a reasonable person in *all* the circumstances

by *Vaugh v Halifax-Dartmouth Bridge Comm.,* p525 (paint falling off bridge onto nearby cars)

* consider precautions which coud’ve been taken to prevent the damage
* P must show there was a reasonably practicable precaution the D failed to adopt
* cf *Neill v New South Wales Fresh Food* p 528#7, where P failed to adduce sufficient evidence of a practical solution

by *Law Estate v Simice,* p526 – failure of medical pros to order CT scan because of budgetary constraints

* costs of performing duty should be weighed against the severity of harm to the possible P

by *Bateman v Doiron,* p527 #3 – hospital let under-qualified doctors staff an ER

* if the D had no other choice but to act as they did, then standard may be adjusted

by *Bingley v Morrison Fuels* and *Lovely v Kamloops,* p528#8

* weigh the cost of precautions against the likelihood and gravity of the harm

**Special Cases** in standard of care:

Standard for **mentally ill** in *Fiala v Cechmanek,* p534:

* Two part test: defendant must be afflicted suddenly and without warning with the mental illness; must show that as a result of that illness was unable to discharge their duty of care or unable to appreciate/understand their duty of care = not liable.
* 2nd part of test also applies even if the person isn’t afflicted suddenly
* Court considers goals of tort law and prioritizes **fault** over **compensation**

Standard for **children** in *Joyal v Barsby,* p541

* Children should be held to a modified standard of care
* standard defined by children of a similar age, experience, intelligence, training/education, background
* if children involved in an adult activity (eg driving), they’ll be assessed by higher standard

Standard for **professionals** in *White v Turner,* p545

* pros have a duty to perform their duties according to the standards of their professions.
* mere poor result not sufficient
* mere error in judgement not sufficient
* unethical conduct not necessarily negligent conduct (also see p551#14)
* must show procedure followed was unacceptable by profession’s standards
* courts look to practices among other professions and factual departures
* expert evidence crucial

**medical pros** also see: standard for GP’s is a competent GP, *layden v cope* p 547#3 GP’s should know when to refer to specialist; standard for intern is a reasonably competent intern but residents are at least held to standard of GP’s, p548#4; representing yourself as a pro will hold you to a pro’s standard, p 48#6;

P is usually required to lead expert evidence of the standard, p551#13

**“Sudden Peril” Doctrine** – typically careless conduct might be exempt from liability in an emergency p553#3.

*Ter Neuzen v Korn,* p553 – can a fact finder question the standard practice?

* general rule – “where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, **it will not be open to find a standard medical practice negligent**”
* exception – “if the standard practice fails to adopt obvious and reasonable precautionswhich are readily apparent to the ordinary finder of fact”

**BREACH OF STANDARD**

In other words: Was there a negligent act? Did the D fail to uphold the standard of care?

[ Breaches in **Negligent Misrep:** requires that the statement is untrue and that the person acting negligently in making it, e.g. the red cross blood case - they didn’t know that they blood was infected but they should have. In cases where the person honestly believed the representation and had no way of knowing the truth, it’ll be hard to make out a breach. Failure to divulge information may be actionable just as providing misleading reps: *Deraps v Coia* p 460#6 and negligent silence is also found in *Queen v Cognos* ]

**CAUSATION**

Breach of standard means the D acted negligently, but to be liable for damages, that negligent act must’ve *caused* the P’s damages. Main test is “but for” the negligent act, the P wouldn’t’ve been injured. Only if “but for” can’t give us an answer to we look elsewhere to decide causation.

[ For **Negligent Misrep:** Must show that the P relied on the statements and had reason to do so. Ex where reliance not reasonable: *Conversions by Vantasy v GM Canada* p 450#8, because P knew about D’s business and 3 years passed since the statements. Reasonable reliance – question of fact; needn’t be the only thing that gives rise to the loss; plausible for inferences to be drawn where the misrepresentation would induce the plaintiff to act naturally to his/her detriment *(Hub Excavating* p 450#8*).* The reasonable reliance must actually result in a loss ]

*Clements v Clements*

* “but for” the negligent act, the injury wouldn’t have occurred
* burden on P to prove on balance of probabilities
* D’s negligence was necessary
* determined by facts
* applied with common sense, not scientific precision
* inference of causation can be rebutted by D with evidence that injury was inevitable
* several acts, each of which was necc. result in joint liability
* if several negligent acts, unknown which was factual cause, then “but for” test might be replaced with **material contribution** which allows plaintiffs to side step evidentiary gap, where they can’t prove causation
* nevertheless, even difficult cases might be resolved with “common sense” application of “but for” or reverse onus, w/out going to material contribution
* material contribution maybe appropriate when breach of duty of care is clear and it’s “impossible” for P to show causation with “but for”
* impossibility has typically meant multiple tortfeasors who can blame one another

*Ediger v Johnston*

* application of “but for” test in medical setting, defined as above
* three **possible causation issues**: (a) did the attempted foreceps delivery cause persistent bradycardia? (b) Did failure to arrange for immediately available surgical backup cause the persisten bradycardia? (c) Did failure to obtain informed consent cause the bradycardia?
* Court supports finding of causation for all three questions: (a) supported by well recognized risk and close proximity in time between the act and the injury; (b) because if dr had taken the precaution of immediate backup then the injury would be much less likely and (c) because of evidence that the mother would’ve opted not to have forceps delivery if informed

*Kauffman v TTC*, p562

* causation must be made out on the evidence at trial

*Barnett v Chelsea & Kensignton Hospital,* p563

* doctors negligent in dismissing a poisoned man, but no causation because he couldn’t have gotten the antidote anyways

*Richard v CNR,* p565

* asshat drives his car off the ferry, he’s the sole cause of his damages, despite allegations that the D was negligent in, *inter alia,* untying the rope at the end of the ferry, alleged saying “we’re here”

*Snell v Farrell,* p574

* inferences can be drawn in causation analysis
* other aspects of this ruling have been overridden in *Clements*

*Walker Estate v York Finch General Hospital,* p570

* red cross was found negligent in screening blood donors when compared to american red cross—it ought to have known that certain groups should be warned about donating
* but for the information on the pamphlet, the infected donor wouldn’t have given blood, and Walked wouldn’t have gotten HIV
* necessary need not be sufficient
* causation need not be proven with scientific accuracy

*Athey v Leonati,* p585

* guy has bad back which is injured in 2 accidents, he sues doc for advising him he can resume exercise
* D’s actions need not be sufficient; as long as D was a necc. part of the cause, D doesn’t need to be the sole cause of the injury
* This DOES apply “but for”
* **crumbling skull** – defendant is liable for additional damage but not pre-existing damage; D doesn’t need to compensate for pre-existing condition and effects P would’ve had anyways

Causation and **Informed Consent** p567:
*Hopp v Lepp* &  *Reibl v Hughes*

* “but for” test with modified objective/subjective test:
* would a reasonable person in the plaintiff’s position have consented if she was adequately informed?
* Modified obj/subj upheld in *Arndt v Smith* because it avoids hindsight and bitterness colouring the P’s testimony

Causation and **Learned Intermediary**
*Hollis v Dow Corning*

* if no direct link between manufacturer and consumer, the manufacturer can discharge their duty by conveying info to a learned intermediary
* “but for” the manufacturer neglecting to inform the learned intermediary who then neglected to inform consumer

Causation and **Multiple Defendants**

* the only real exception to “but for”
* can use **Material Contribution**
* or “but for” with reverse onus as in:

*Cook v Lewis,* p737

* can’t prove which D shot the P
* since both D’s were negligent, it’s up to them to prove they didn’t prove the P’s injuries

*James v BC,* p489

* P were employees who worked for a sawmill that was closed by an employer after a minister inadvertantly removed a protective clause
* Court finds that the P shouldn’t have to prove detrimental reliance—differ from negligent misrep
* Instead, a different kind of reliance from facts—they relied on the minister to exercise care to retain the protective clause unless he had a decision on policy grounds to remove it.

**REMOTENESS**

Liability can be denied if connection between breach and loss is found to remote, can be based on **foreseeability** or **intervening causes.**

**Foreseeability**

*Assiniboine South School Dv v Greater Winnipeg Gas,* p617

* Canadian authority for principles of remoteness by unforeseeability found below
* Test of foreseeability is what’s possible, not what’s probable
* Extent of damage need not be foreseeable if the damage is of a foreseable kind

*Wagon Mound 1,* p600

* moves analysis of remoteness away from directness found in Donaghue
* instead, remoteness as reasonable foreseeability
* justifies this move with notions of goals of tort law – liability is tied to moral belief, corrective justice, not just compensation

*Wagon Mound 2,* p614

* probability not necessary, possibility is sufficient
* but in *Mustapha,*  court moves away from possible/probable distinction as confusing

*Hughes v Lord Advocate,* p605

* In order for to excape liablity due to unforseeability, an accident (or injuries) must differ in kind from foreseeable ones
* In other words – not necc to see the specific manner in which the accident takes place
* Also, The defendant is liable even when the damage is greater than was was expected or foreseeable

*Mustapha,* SCC, p620

* as “is there a real risk that loss would occur in the mind of a reasonable person in the position of the defendant?”
* crumbling skull – only comes into play in assessing damages – not liable to bring them back to what they’re original position would’ve been

**Intervening Acts**

Test for *novus actus interveniens:* Is the intervening act within the risk set into motion by the defendant? If yes, defendant bears liability, if not, this is a new act and the defendant will be off the hook.

*Bradford v Kanello,s* p624

* court finds that the hysterical conduct of a customer was not iwithn the risk created by the D in allowing grease to accumulate on the grill (which caused fire which caused extinguisher system, which made a loud hissing sound, which made buddy freak out)
* Arbel thinks courts these days would be more in line with the dissent, which would’ve found liability

*Oke v Weide,* p627#2

* D knocked down a sign, negligent in reporting the accident, but not liable because of the deceased’s intervening act of passing illegally and its consequences couldn’t be foreseen. Dissent says an accident of some kind was foreseeable, majority finds no liability b/c intervening act

Courts subsequently adopt broad interpretation of foreseeability p627#3.

*Price v Milawski* p 628

* two doctors both failed to x ray foor properly, missing diagnosis of broken foot, causing injury
* if you act negligently but that negligence is compounded by the negligence of another, you’re both liable
* neither D is off the hook because of the negligence of the other

*Block v Martin* p 630#5

* D might be liable for further injuries P sustains while recovering
* D runs over P causing leg fracture; later P slips while fishing and completely fractures leg. Court holds second fracture was not a new intervening act, and original injury was a contributing cause of second injury, D is liable for entire loss.

*Hewson v Red Deer* p 631, but the important case is appeal p 633#2

* D left tractor unattended with keys in it, unknown party turns tractor on, puts it in gear, causes accident to P’s house
* Act of intruder was found to be an intervening act which broke the chain of causation by the court of appeal – “no effective steps could have been taken to prevent third parties from tampering with the machine if they were a mind to do so”
* Lesson – Remoteness is a question of law, causation is a question of fact.

**DAMAGES**

Types of Damages:

**General** (non-pecuniary) vs. **Specific** (pecuniary).
**Nominal**, **Compensatory**, **Aggravated** & **Punitive**

**Nominal damages** are meant to vindicate a P’s rights where no loss has occurred—so NOT AVAILABLE for negligence. The principle behind **compensatory damages** is to put the P in the position they’d have been in had the tort not occurred. Courts recognize 4 purposes for **punitive damages**: denunciation, deterrence, punishment, relieve a wrongdoer of wrongful profit. **Punitive damages** are available for negligence, but courts are reluctant to award them.

**Pecuniary loss** can include property loss, future loss, i.e. cost of future care, and loss of earning potential. **Non-pecuniary loss** might include loss of happiness, life enjoyment.

Loss of property is more likely to require a **duty to mitigate** by the P, compared to loss due to injury.

**Vicarious Liability -**  Generally only covers compensatory damages, not punitive relief, *Blackwater v Plint,* p939#10, Although a master might be held vicariously liable for aggravated damages, *TWNA v Clarke,* p939#10

**Crumbling Skull –** see *Athey v Leonati*

[ For **Negligent Misrep:** put theP in the position they would’ve have been in had the negligent misrepresentation not been made – NOT the position they would’ve been in had the negligent misrepresentation actually been true. ]

**DEFENCES**

Voluntary assumption of risk; *ex turpi causa;* inevitable accident = all complete defences

Contributory negligence = partial defence

**Contributory negligence** apportions the harm. Default by statute is 50/50 unless the judge can make out who’s responsible for how much. Can’t completely absolve liability. General situations of application: when the plaintiff’s negligence causes the accident; when the plaintiff carelessly contributes to the accident; when the plaintiff carelessly contributes to the harm. Judged on a modified objective standard: would an ordinary, prudent person act this way? Application of contributory negligence requires statutes.

*Walls v Mussens*, p695

* standard for assessing contributory negligence is modified objective standard
* there’s a difference between reasonable conduct and the conduct of a reasonable person in a certain situation
* in emergency situations we can apply **the “agony of the moment” doctrine**
* P not contributorily negligent in failing to use fire extinguisher; he did the best he could

*Lewis v Todd,* p697#3

* Police officer struck while on an accident scene, accused to contr. Negl.; is to be judges according to the standard of care expected of a police officer investigating an accident; not the standard of an ordinary pedestrian

*Myers v Peel County Board of Education, other cases,* p698#5

* standard in contr. Negl. Is affected by age, disabilities and professional training of the plaintiff

*Ducharme v Davies, other cases,* p698#6

* negligence of one party can be attributed by the conduct of another if there’s a special relationship between them, particularly in master/servant & car owner/driver; formerly in child/parent

*Grand Restaurants v Toronto,* p699 #8

* courts have allowed contr. Negl. To be raised in **negl. Misrep.** Although courts only allow it cautiously because negl. Misrep. already requires *reasonable* reliance

*Gagnon v Beaulieu,* p699

* seatbelt case, one of a collection which motivated seatbelt laws
* test for contributory negligence: the defendant has to prove that the plaintiff didn’t x, and the damage would’ve been prevented lessened had plaintiff x’d.

*Mortimer v Cameron,* p707

* P will only be found contributorily negligent if their actions are the proximate cause of the injury; i.e. the actions aren’t too remote
* D city said that P was contributorily negligent in horsing around when he tumbled through the wall; court says it fails by remoteness because it wasn’t reasonably foreseeable that the wall was so shitty

**Voluntary Assumption of Risk** Courts are reluctant to apply this defence because it’s a complete defence which means D is absolved notwithstanding causing P’s injury. Generally confined to participation in sports

*Dube v Labar* p 712

* The defendant must showed express or implied agreement between the parties, and the plaintiff has to except both the physical and legal risks.
* Acceptance physical risks might be easy to prove, but acceptance of the legal risks is much harder to prove.

***Ex Turpi Causa*** – participationi n illegal or immoral act. Difficult defence to prove, narrowly interpretted

*Hall v Herbert* p 717

* failed attempt at *ex turpi causa* where one asshole pushes a car with his drunk asshole friend at the wheel
* tort law applies to everyone, even if they’re drunk assholes—no “clean hands” doctrine
* *ex turpi causa* generally only applies if it’s needed to maintain internal consistency of the law.
* ex cases where *ex turpi causa* might apply: Puses the tort system to benefit/profit from torts; P uses torts to circumvent or negate criminal punishment

**Inevitable Accident** – boils down to misunderstanding of fault—if the accident would’ve happened regardless of the activities of the parties, liability won’t be imposed.

*Rintoul v X-Ray and Radium Indust. Ltd.* p 723

* buddy argues that brakes in van failed despite all reasonable precautions, hence accident was inevitable.
* Court finds failed to prove two essential elements: alleged brake failure couldn’t have been prevented; assuming brakes failed w/out negligence, the accident couldn’t have been avoided

**NONSUITS/EVIDENCE ISSUES**

*Wakelin v London & South Western Ry Co*  p 728

* issue is evidentiary burden on plaintiff
* according to Lord Halsbury, **P must adduce evidence making out a *prima facie* case** of a negligent act which caused the injury and evidence that the D wasn’t contributarily negligent
* according to Lord Watson, the P must simply adduce evidence of the P’s negligent act which caused injury, P doesn’t need to address contributory negligence, rather can be presumed not negligent
* P non-suited here for failing to make out a *prima facie* case

*Mohamed v Banville* p 732#7

* P alleged that D, who was drunk and a smoker, negligently caused a house fire. Claim failed for lack of proof of negligence

*RC v McDougall* p 732#8

* court can keep in mind inherent probabilities or inprobabilities and the seriousness of the allegations BUT **the standard of proof is always** on a **balance of probabilities**
* court here rejects an intermediate standard between balance of prob and beyond reasonable doubt for serious sexual assault alllegations

*Macdonald v Woodard* p732

* statutes might **change the evidentiary burden**
* by the Highway Traffic Act, there is a presumption of negligence for drivers who cause damage or injury
* so, reverse onus: the D must show that negligence hasn’t taken place in a traffic accident
* this is b/c it’s tough/impossible for the P to prove what the D was doing in a traffic accident

*Fontaine v BC*  p 744

* in some cases, the court can draw **inferences from circumstantial evidence**
* the decision must be *very* factually specific—inferences of negligence can only be drawn from the factual specifications of the case.
* “for *res ipsa loquitur* to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case.
* Here the P couldn’t prove the case because her husband died on a remote hunting trip with a buddy who was driving.

**Judicial/Crown immunity:** Judges at all levels are generally immune by statute (p 755#6) unless the P can show that they acted maliciously (p 756#7). When an appeal court quashing a conviction they can order that the original judge is immune from tort liability (p 756#8). The crown is immune from liability generally, but not individual AG and crown attorneys (p 756#9). Courts can’t be made to testify about decision making processes or court composition in a particular case (p 757#10). This immunity is extended to quasi judicial dudes (p 757#11).

*Just v BC* p 763

* rockslide on highway kills P’s daughter. Negligence in highway maintenance?
* **Policy decisions immune from** negligence, claims but operations decisions can. Problem of vagueness betwixt?
* Policy is immune so that the crown isn’t crippled in making policy decisions
* Crown can’t overstep discretion—can’t avoid liability by calling something policy which clearly isn’t

*Edward Snowshoe* case further illustrates difficulties in policy/operations

**Vicarious Liability**

Liability absent of fault, like in strict liability in *Ryland v Fletcher.*

Most vicarious liability cases regulated by statute, e.g. police dog bite cases; highway traffic act sets out how vicarious liability will be imposed: *Yeung v Au* p 927#3; son driving car leased by father, owned by D corp. Statute finds both father and corp. responsible vicariously. Such statutes deem people liable even if facts don’t support it. This is motivated by corrective justice. Gym Teacher & Devon exampe from class—Gym teacher is at fault, but the school is held liable to ensure that Devon gets compensated for his injuries.

Common law examples of **vicarious liability**: **principal/agent** situations & **master/servant** situations

*TG Bright & Co v Kerr,* p928

* when you have an individual who is acting as an **agent** on behalf of the **principal**, the the principal is vicariously liable
* once a principal authorizes an agent to act as agent, they are liable for the full scope of the agent’s actions done within the scope of his agency

**Master/Servant** – is broader than P/A, P/A requires proof the principal required the agent to act as agent. Most M/S situations are employer/employee. The employer will be liable for the employee if they authorized the emloyee’s act, or if the act is substantively similar to an authorized act.

*Bazley v Curry,* p931

* **Employer/Employee vicarious liability** in sexual assault against children case
* First branch of Salmond test – did the employer authorize the employee’s action? If yes, obviously liable, if no? maybe liable, if it’s deemed sufficiently similar to an authorized act. This case satisfies this second branch of the test
* Two fundamental concerns of **vicarious liability:** just and practical remedy for the harm; deterrance of future harm
* Relevant factors (intentional torts): the opportunity that the enterprise gave the employee to abuse power; extent to which the wrongful act may have furthered employer’s aims; extent to which wrongful act was related to inherend problems in employer’s enterprise; extent of power conferred to employee in relation to victim; vulnerability to victims to wrongful exercise of employee’s power