#### THE ELEMENTS OF NEGLIGENCE (SOLOMON)

1. **DUTY OF CARE (P)**
   1. Did the defendant have a legal obligation to exercise care with respect to the plaintiff’s interests in the type of case under consideration? What was the nature and scope of the obligation?
2. **BREACH OF THE STANDARD OF CARE (“NEGLIGENCE”) (P)**
   1. The standard of care is the level of care exercised by a reasonable person in all the circumstances. Professionals with special training and qualifications are expected to meet the standard of their professional colleagues.
   2. Did the defendant breach the relevant standard of care by acting carelessly (i.e., negligently)?
3. **CAUSATION (P)**
   1. Cause-in-fact: did the defendant’s breach of the standard of care cause the plaintiff’s loss?
4. **REMOTENESS OF DAMAGE (P)**
   1. Were the losses reasonably foreseeable consequences of the defendant’s wrongful conduct? The relationship between the breach and the injury may be too tenuous or too remote to warrant recovery.
5. **ACTUAL LOSS (P)**
   1. Negligence is not actionable per se. The plaintiff must establish that he suffered legally-recognized injuries and losses.
6. **DEFENCES (D)**
   1. Plaintiff’s conduct, e.g. contributory negligence, voluntary assumption of risk, or illegality.
   2. Other considerations, e.g. inevitable accident.
   3. General defences, e.g. lapse of a limitation period.

### FIRST ELEMENT: DUTY OF CARE

\*Defines the boundaries of negligence liability: concerned w/legal policy (Solomon). For summary, see p. 4.

### *(A) THE GENERAL DUTY OF CARE TEST*

**1) Donoghue v Stevenson, [1932] AC 562 (HL) (P’s friend bought dark, opaque bottle of ginger-beer. Gave it to P, who drank some b4 friend discovered decomposed snail in bottle. P sued manufacturer, alleging shock & gastroenteritis.)**

* **Specific duty of care: Manufacturer of a product has a legal duty to the consumer to take reasonable care that the product is free from defect likely to cause injury (especially where ultimate consumer cannot inspect contents before using/consuming). Here:** the relationship is proximate enough for DoC to arise.
  + **Rationale for imposing DoC:** A consumer should have recourse against a manufacturer that provides a flawed product. To deny such a legal remedy would be a social wrong.
* **General DoC Test (Lord Atkin’s “Neighbour Principle”)**: You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour, who is, in law, a person who is so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions which are called into question.
  + **DoC arises where there is a sufficient relationship of proximity.** Not confined to mere physical proximity. Extends to such 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.
* **Importance of this case:** Broadened the scope of negligence. No longer restricted to contractual or special relationships: M can be sued even w/o contractual relationship w/consumer --> More power to consumers!
* **Dissent:** There is NO special duty attaching to the manufacture of food found in statute and NO contract between consumer & manufacturer. **Slippery slope for the manufacturer to be responsible for ALL subsequent uses & consequences of its products (could be applied too broadly):** “If one step, why not fifty?” NOT practical for manufacturer to be responsible for the quality of *every* single item it produces.

### *(B) THE DEVELOPMENT OF THE MODERN LAW OF DUTY* (Expansion of DoC)

\*Negligence law extends, with few exceptions, to any act that causes physical injury. E.g., drivers owe DoC to other users of the road.

\*1960s – Courts began to use *Donoghue* to overturn traditional assumptions regarding DoC.

**1) Hedley Byrne & Co. v. Heller Partners Ltd. [1964]:** in certain situations, a DoC could be imposed for negligent advice.

**2) Home Office v. Dorset Yacht Co. [1970]:** public authorities could be held liable in negligence w/respect to their statutory functions & operations.

**3)** **Anns v Merton London Borough Council [1977] (HL):**

* **Test for recognizing new categories** **of negligence (2 stages)**: First, one has to ask whether, as between the alleged wrongdoer & the person who has suffered damage there is a **sufficient relationship of proximity or neighborhood** such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a ***prima facie* duty of care** arises. Secondly, it is necessary to consider whether there are any **policy** **considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise**.
* **Criticisms of the *Anns* test:** 
  + Leads to capricious results, providing unworkable tests of liability, unduly expanding scope of liability, & lacking foundation in any established principle: ***Murphy v Brentwood District Council* (1991)**
  + Concepts of proximity & fairness are not susceptible to any such precise definition as would be necessary to give them utility as practical tests.
  + Law should develop novel categories of negligence incrementally & by analogy w/established categories rather than by a massive extension of a *PF* DoC restrained only be indefinable considerations which ought to negative, or reduce or limit the scope of the duty….
* **Expansion of the DoC:**
  + Framework of test is plaintiff-friendly (low threshold: merely had to prove reasonable foreseeability of harm) & inherently expansive (judges often less-than-rigorous in their analyses under second branch).
  + Departure from traditional, category-by-category evolution of DoC in favour of more general test: downplayed historical distinctions btwn misfeasance & nonfeasance, deeds & words, physical injury & emotional harm, property damage & economic loss.

**3a) Kamloops (City) v. Nielsen (1984), 10 DLR (4th) 641 (SCC):** affirmed *Anns* test in Canadian context.

### *(C) THE ANNS-COOPER TEST*

**1) Cooper v Hobart** **[2001] 3 SCR 537:** **(P invested money w/mortgage company, which was governed by the *Mortgage Brokers Act*, RSBC 1996 c 313. The MBA allowed D to investigate complaints, freeze funds, & suspend licences of brokers found to be in breach of statutory obligations. D suspended the mortgage company’s licence. P sued D for negligence, claiming that if D had acted earlier, P would not have suffered the same amount of loss.)**

* **Clarification of *Anns/Kamloops* Test: Policy considerations incorporated into stage 1 (internal – between parties: reasonable foreseeability and proximity) and stage 2 (external – society at large)**
  + **First stage**: **reasonable foreseeability** + **proximity** (this is broadly about policy)
    - A) Was the harm that occurred the reasonably foreseeable consequence of the D’s act?
    - B) Are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?
    - **Clarification of stage 1**:

1) **Reasonable foreseeability of harm** must be supplemented by **proximity**.

* + - * **Proximity** refers to the type of relationship between the parties: there must be a “close and direct” relationship. ***Donoghue v Stevenson***
        + Look at expectations, representations, reliance, & property/other interests involved: How close is the relationship? Is it “just and fair” to impose a DoC on the D?

2) **Sufficiently proximate relationships** are identified by **categories** (provides certainty)

* **Consult the jurisprudence** to determine if a category ***already exists*** (e.g. defendant’s act may foreseeably cause physical harm to the plaintiff; negligent misstatement; duty to warn of the risk of danger; municipality’s duty to prospective real estate purchasers to inspect housing developments; government authorities have duty to perform road maintenance in a non-negligent manner)
* If no category exists, you might be able to introduce a **new category.**
  + **Second stage**: **residual policy considerations**. Are there residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care?
    - **Clarification**: This stage is not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society.
      * **Relevant questions:** Does the law already provide a remedy? Would recognizing a DoC create unlimited liability to an unlimited class? Distinction between gov’t policy and execution of policy should be made here (gov’t is not liable for policy decisions, only operational decisions; the courts cannot second-guess legislators on policy matters).
* **Application of the Test in this Case:** 
  + **Issue:** Does a person in charge of enforcing statutory obligations have a legal duty of care to those who suffer injury or loss due to breaches of the statutory obligations?
  + **Decision**: A gov’t actor who may **reasonably foresee** that particular individuals may suffer losses if he is careless in performing his duties under legislation **does not have a *prima facie* duty of care** to those individuals if the duty is **not** specified in the legislation (**insufficient proximity**).
* **FIRST STAGE**

1. Is this case analogous to previous cases where duty of care was recognized? No.
2. Is this a situation where a new duty of care should be recognized?
   1. **Foreseeability**: Plaintiffs may be able to show it was reasonably foreseeable that negligence in failing to suspend mortgage co. or issue warnings might result in financial loss to Ps.
   2. **Proximity**: This must arise from the statute under which Hobart was appointed. The statute is the only source of duties, private or public. The statute does not impose a DoC on Hobart (the Registrar) to investors with mortgage brokers regulated by the *Act*. Rather, the duty is to the public as a whole. Therefore, insufficient proximity. => NO *prima facie* DoC.

* **SECOND STAGE**: since there is NO *prima facie* DoC established, the 2nd stage is redundant. However, even if it had been established under the first stage, **it would have been negated for overriding policy reasons:**

1. Decision to suspend a broker involves both **policy** **decisions** and **quasi-judicial elements** (Registrar must act fairly or judicially in removing licence)**. DoC would undermine these obligations (imposed by legislature).**
2. **Distinction between government policy and execution of policy**: Government is not liable in negligence for policy decisions, only operational decisions.
3. Spectre of **indeterminate liability** to an indeterminate class (Registrar cannot control the number of investors or the amount of money invested in the mortgage brokerage system).
4. Imposing DoC would create insurance scheme for investors at **great cost to taxpaying public**, who did not agree to assume the risk of private loss to investors.

### *(D) DEVELOPMENTS SINCE COOPER V HOBART*

* Not clear whether *Cooper* approach was meant to be a general test of duty OR only applied in novel situations.
* Are recognized categories of proximate relationships exempt from stage 1 of the test but still subject to stage 2, or do they fall outside the scope of the new test altogether?
* *Cooper* did not state that D has burden of proof at stage 2.

**GENERAL GUIDE TO DETERMINING WHETHER A DUTY OF CARE EXISTS:**

1. Is the alleged DoC within an established category or analogous to an established category? If so, proximity is established & DoC exists. No need to proceed through *Anns-Cooper* test. (*Childs v Desormeaux; Mustapha v Culligan*)
2. If the case alleges a **novel duty of care**, apply the *Anns-Cooper* test. Was the harm **reasonably foreseeable**? The **PLAINTIFF** must prove it was **reasonably foreseeable** that a) some **harm** could result from D’s conduct and b) the particular class of **plaintiff** could be harmed.
3. If the harm was reasonably foreseeable, was there a **sufficient relationship of proximity** between the parties to make it just and fair to impose a duty of care on the D? Consider **policy considerations** arising from the **relationship between the parties (i.e., this *type* of P & D)**. Factors to consider (*Cooper*):
   1. Parties’ representations to each other, reliance on those representations, and reasonable expectations about conduct based on representations & reliance
   2. The types of interests involved (physical, economic, emotional)
   3. Any statutory or contractual framework
4. If there was foreseeable harm + sufficient relationship of proximity, P has proven the existence of a ***prima facie* DoC**. The **burden of proof** shifts to the **DEFENDANT** to raise any **residual policy considerations** that might **negative** or **limit** the **scope** of the DoC (*Childs v Desormeaux)*. Ds need some **evidence** to support claims, can’t be mere speculation (*Hill v Hamilton Wentworth).* As per *Hill*, Ps can also raise residual policy considerations that militate in favour of imposing a duty of care. **Residual policy considerations relate to the effect on the legal system or society more generally**. **FACTORS TO CONSIDER:** 
   1. Is there an alternative remedy available?
   2. Will a duty of care give rise to indeterminate liability?
   3. Does the case involve core governmental policy decisions that should be immune from negligence liability?
   4. Unspecified liability, negative effects on the legal system, economic factors, social factors

### 1(a): REASONABLE FORESEEABILITY

**TEST**: at the time of the alleged tort, was it reasonably foreseeable to a person in the defendant’s position that carelessness on his or her part could create: i) a risk of injury, ii) to the plaintiff.

#### (A) FORESEEABLE RISK OF INJURY

**1) Moule v N.B. Elec. Power Comm*.* (1960), 24 DLR (2d) 305 (SCC)**

* It is reasonably foreseeable that children will climb trees and a child may be injured by falling on a live wire. However, this was an **unlikely sequence of events**: boy climbed a tree (to unusual height, crossed on platform to another trimmed tree, stepped on a rotten branch, and fell on a live wire (about 3 feet from top of tree).
* When there is reasonable foreseeability of harm, precautions must be taken. In this case, the respondent took adequate precautions against the reasonably foreseeable danger (placed wires 33 ft 6 ins from ground), and could not have foreseen such an unlikely event, so it is not liable for negligence.
* **Ask**: was the sequence of events ‘beyond the range of foreseeable results which a reasonable man would anticipate as a probable consequence’?

**2) Amos v N.B. Elec Power Comm., (1976), 70 DLR (3d) 741 (SCC)**

* Boy climbed a poplar tree (fast growing), the tree swayed and came into contact with a live wire (>30 ft), and boy was severely electrocuted and burned.
* It was reasonably foreseeable that a child would climb the tree (directly in front of home); leafy branches **concealed** the live wires. The defendant **failed to trim** the poplar tree so it is liable for negligence.
* **Duty of care imposed on power companies** - those who erect electric lines carrying heavy charges to take precautions against injury
* What facts distinguish these cases? Fact-specific. **Moule**: unlikely sequence of events. **Amos**: concealed wires.

**\*Foreseeability of harm is relevant to three elements of negligence:**

1. **Duty**: if defendant’s conduct created a foreseeable risk of injury to the plaintiff 🡪 duty of care.
2. **Standard of care**: probability of injury 🡪 factor in determining: did the defendant breach the standard of care?
3. **Remoteness**: if plaintiff’s loss was not a foreseeable result of the defendant’s breach of the standard of care 🡪 plaintiff’s loss too remote.

#### (B) FORESEEABLE PLAINTIFF

**1) Palsgraf v. Long Island Ry. Co., 248 NY 339 (CA 1928)**

* **Facts**: guard shoved passenger to assist him in getting on a train. Package fell. Package contained fireworks and exploded. Shock waves caused overhead scales to fall on the plaintiff, who was some distance away.
* **Issue**: Is a person waiting at a railway station a reasonably foreseeable plaintiff?
  + She was not directly involved in the interaction between the passenger and the guard.
* **Decision**: not a reasonably foreseeable victim of the guard’s negligence.
  + A reasonably foreseeable plaintiff must be within the “zone of danger” and there must be a reasonable connection between the act and the harm. DoC is not owed to world as a whole.
  + The risk *reasonably to be perceived* defines the duty to be obeyed; risk imports relation; risk to another or others that is within a certain range of apprehension. Proof of negligence in the air will not do. There must be a reasonably foreseeable connection.
  + Entitlement to a duty of care depends on the relationship between two people; cannot be derived from a duty of care owed to another.
  + This is based on issues of **fairness**.
* **Dissent**: The appropriate question is ‘did the conduct of the guard **create a risk of harm** in the **general** sense?’ Not limited to a narrow zone of danger. By engaging in dangerous behavior (pushing someone onto the train), the guard should be liable for **any resulting harm.**

### SPECIAL DUTIES OF CARE ESTABLISHED:

#### (A) AFFIRMATIVE DUTIES OF CARE

A **positive duty** on a person to take some **action to prevent some harm** from befalling another party. Courts reluctance to impose b/c desire to preserve **personal autonomy**. In some situations, Canadian law does recognize a duty of care.

1. An undertaking that one person makes to another
2. **Special relationships**: jailor and prisoner, hospital and patient, driver and passenger, parent and child, employer and employee.

**1) Childs v Desormeaux, [2006] 1 SCR 643**

* D, who has drinking problem, attended a private party where alcohol was served. Drove while intoxicated (host did not know intoxicated). Head on collision. Severely injured a passenger (C) in another car. C sued hosts of party for injuries.
* **Clarification**: Childs was also suing the party hosts. Issue is whether a social host could be liable to a third party.
* **Decision**: A social host at a party where alcohol is served does not owe a duty of care to members of the public who may be injured by a guest’s actions (unless the host’s conduct implicates him/her in creation of risk). Partygoers are responsible for the outcomes of their own actions.
* **Summary of Law:**
  + *Donoghue v. Stevenson*, [1932] A.C. 562: “My legal duty, he said, extends to my ‘neighbour’. Legal neighbourhood is ‘restricted’ to ‘persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’.”
  + *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.): two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or “proximate” enough to give rise to a duty of care. The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, and recast as follows:
    - (1) Establishing a prima facie duty of care: is there “a sufficiently close relationship between the parties” or “proximity” to justify imposition of a duty and, if so,
    - (2) Negating the duty of care by broader policy considerations: are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?
  + *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79: The reference to **categories** simply captures the basic notion of **precedent**: where a case is like another case where a duty has been recognized, one may usually infer that **sufficient proximity** is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established.
* **Reasoning:**
  + This case is not analogous to a **commercial host** for **three reasons:**
    - 1) Commercial hosts have a greater ability to monitor/control alcohol consumption by patrons,
    - 2) commercial hosts who hold liquor licenses are heavily regulated while private social hosts are not, and
    - 3) social hosts do not profit from the sale of alcohol so they are not faced with the perverse incentive of over-serving an intoxicated patron; commercial hosts have contractual relationship w/patrons.
  + These facts do not fall within an established duty of care; it is a novel duty of care situation, so we must proceed through the **Anns-Cooper Test.**
    - **Anns-Cooper Test**: not reasonably foreseeable that D would cause harm to Childs because it was not apparent to social host that D was intoxicated. NOT enough to know D has a drinking problem.
  + Even if reasonable foreseeability is established, “foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant* has *directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure* *to act*, foreseeability alone may not establish a duty of care.” In this case, there is **no duty of care** because the action was **nonfeasance**, i.e. **failure to act to protect others** (contrast with **misfeasance**: positive act that endangers another). In such cases, liability is only imposed in certain situations (special relationship btwn parties), and social hosts do not fit into those situations:
    - “The **first** situation where courts have imposed a positive duty to act is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls.”
    - “The **second** situation where a positive duty of care has been held to exist concerns paternalistic relationships of supervision and control, such as those of parent-child or teacher-student.”
    - “The **third** situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.”

**2) R v Imperial Tobacco**

* **Cooper Test**: Proximity looks at relationship between plaintiff and defendant + policy considerations.

**Misfeasance** = doing something you should not have done.

**Nonfeasance** = doing nothing. As a general rule, the common law will not find someone liable for failing to act, unless the defendant has a positive duty to act. This exception arises in certain circumstances.

**Common thread**: the defendant has somehow contributed to the dangerous situations. One is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury. Element in determining foreseeability: P’s inability to handle situation in which she has been placed (e.g., through youth, intoxication, or other incapacity). **Crocker v Sundance Northwest Resorts Ltd.**

* **Five categories of relationships in which the courts have imposed a positive duty to act:**

**(1) Relationships of Economic Benefit:** one of the parties in the relationship benefits financially from the relationship. E.g. **Commercial hosts**, like bars and hotels, have a duty to control intoxicated patrons.

1. *Jordan House Ltd. v. Menow*
   1. The SCC ruled that Jordan House (a licensed tavern) owed Menow (its intoxicated patron) a duty of care to ensure he got home safely. “Given the relationship” between a commercial host and its patron…
   2. **Factors in establishing a duty of care:**
      1. Invitor-invitee relationship between Menow and the hotel.
      2. Knowledge: hotel was aware of Menow’s propensity to drink, and his recklessness when drunk.
      3. Policy of not serving Menow alcohol unless he is with a responsible adult; employees breached policy by serving Menow even though he was not with a responsible adult.
      4. Hotel breached statutory provisions against serving an intoxicated patron (*Ontario Liquor Licensing Act).*
      5. Hotel was aware that Menow was intoxicated.
      6. Hotel knew that Menow would be travelling alone, along the shoulder of a highway, after they ejected him.
   3. It was reasonably foreseeable that Menow could be injured if the hotel did not take preventive steps. The hotel could have taken preventive steps, such as calling a taxi or putting him in a room for the night.
   4. *Jordan House* is the leading case for the commercial host exception to the nonfeasance rule. What defines the **commercial aspect** of the relationship? Employee knowledge of drinks and intoxication + economic benefit (e.g. sales for profit)
2. Crocker v. Sundance Northwest Resorts (See below)
3. Stewart v. Pettie
   1. **Facts**: Car passenger injured when drunk driver lost control and drove off the road.
   2. **Analysis drew on Donoghue and Jordan House**: it is logical to move from finding that a duty of care is owed to a patron of the bar to finding that a duty of care is also owed to third parties who might reasonably come into contact with the intoxicated patron and who the intoxicated patron might pose some risk. However, serving past point of intoxication did not, in itself, pose foreseeable risk. There must be an additional risk factor.
   3. **Decision:** No breach of the standard of care – intoxicated patron w/3 sober adults; NOT foreseeable he would drive.

**(2) Relationships of Control or Supervision**: legal obligation to control the other party (e.g. parent and child; police, prison guards, hospitals, doctors, employers, teachers)

1. Parents are responsible for controlling their children: prevent them from harming themselves or harming others. However, parents are not vicariously liable for their children’s actions, except where vicarious liability is established by statute.
   1. e.g. *School Act* s. 10 covers damage to school property.
   2. e.g. *Parental Liability Act* ss. 3 and 6 imposes unlimited liability in cases of property damage up to $10,000.

**(3) Creators of Dangerous Situations**

* If a person creates a dangerous situation, he must take reasonable steps to reduce risk, or warn others of the risk created; this would be a failure to act.
* *Okie v. Weide Transport*
  + **Facts**: the defendant driver knocked down a stop sign on a gravel strip. He took steps to remove the sign, but could not remove the metal pole. Plaintiff tried to pass a car, drove over metal pole, speared himself, and died.
  + **Analysis**: Defendant had a duty to report to authorities, but the risk of harm was not reasonably foreseeable because the plaintiff drove off the road onto the gravel when he was speared.

**(4) Reliance on Relationships and Undertakings**

* If you promise to do something but don’t, and the other person relies on the promise to their detriment. Do you have a duty to complete an act you promised to perform? Generally no, but there are exceptions:
  + If **partial performance** places the plaintiff in a **worse condition** (e.g. poor health)
  + Lulled the plaintiff into a false sense of security, thinking performance would continue.
* *Smith v Rae* (pg. 382): doctor promised to attend the birth of the child, failed to attend, baby died. Gratuitous promise to mother. No liability for nonfeasance.

**(5) Statutory Obligations that Create a Positive Duty to Act**

* Failure to carry out public duty = breach of statute, but does this give rise to a private liability in tort? There is no general breach of statutory tort in Canada.

#### 1) THE DUTY TO RESCUE

**1) Matthews v MacLaren; Horsley v MacLaren (1969), 4 DLR (3d) 557 (Ont. HC) (“The Ogopogo”)**

* **Facts**: two men overboard, both died in water, one from shock and the other unknown. Operator tried to rescue.
* **Issue**: Does a boat operator, MacLaren, owe a legal duty to rescue his gratuitous passenger, Matthews?
  + **Question**: “Whether there existed a legal duty on the part of the defendant to come to the rescue of a passenger who fell overboard by reason of his own misfortune or carelessness, and without any negligence on the part of the defendant or any person for whom the defendant would be vicariously responsible.”
* **General common law position**: no affirmative duty to rescue.
  + “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”.
* **Law**: Yes, a boat operator owes a legal duty to rescue a gratuitous passenger.
  + **Duty to rescue:** “expanding the quasi-contractual duty of a carrier to his passenger in peril, it seems to me that the relation between the master of a pleasure boat and his invited guest should also require a legal duty to aid and rescue”.
  + **Assuming the duty**: Whether there is a duty or not, the moment you start acting you are subject to a duty that you cannot be negligent in fulfilling that duty.
* **If there is a legal duty to rescue, or a voluntary assumption of the duty, what is the appropriate standard?** 
  + **Standard of Care Test**: “what would the reasonable boat operator do in the circumstances, attributing to such person the reasonable skill and experience required of the master of a cabin cruiser who is responsible for the safety and rescue of his passengers?”
* **Decision**: the defendant owed a duty of care to the men overboard, and acted negligently in carrying out the rescue. By reversing his boat and adopting an unsafe rescue procedure, the defendant failed to exercise the reasonable care that the ordinary, prudent, reasonable operator would have shown.
  + However, the defendant’s negligence was not the cause of Matthew’s death, so there is no liability regarding Matthew’s death.
* Distinction between legal duty and moral duty.

**2) Stevenson v Clearview Riverside Resort*,* 2000 CarswellOnt 4888 (SCJ)**

* If off-duty, a special relationship may not exist that would be found if on-duty
  + Ambulance attendant found to be a private party when off-duty: no duty to assist in rescue
* “Agony of the moment” rule applied to friends who pulled P out of water. Not negligent to drag P from water to ensure he was breathing (even if damages spine) given limited first aid training & urgent circumstances.

#### 2) THE DUTY TO CONTROL THE CONDUCT OF OTHERS

### *2(A) LIABILITY FOR THE INTOXICATED*

**1) Crocker v Sundance Northwest Resorts Ltd. (1988), 51 DLR (4th) 321 (SCC)**

* **Facts**: visibly drunk man participated in tubing race. Signed waivers w/o understanding they were waivers. Drank heavily. Resort owner asked if ok to compete. Competed. Hit mogul --> quadriplegic.
* **Issue**: “whether the ski resort had a positive duty at law to take certain steps to prevent a visibly intoxicated person from competing in the resort’s dangerous ‘tubing’ competition.”
* **Duty of care**
  + **Common law in general**: negligent conduct (**misfeasance**) vs. failure to take positive steps to protect others from harm (**nonfeasance**). There is no affirmative duty to act, except for statutory or contractual obligations to intervene, and where there is a special relationship (e.g. parent and child). Trend: Courts increasing number and kind of special relationships to which a positive duty to act attaches.
  + **Jordan House Ltd. v Menow (1973), 38 DLR (3d) 105 (SCC):** licensed tavern owes an intoxicated patron a duty of care to take reasonable steps to ensure the patron arrives home safely: invitor-invitee.
    - “One is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury”
    - P’s inability to handle situation = element to determine how foreseeable injury is.
* **Decision**: Sundance, as the promotor of a dangerous sport, must take reasonable steps to prevent a visibly incapacitated person from participating. Sundance breached the **standard of care** by failing to take reasonable steps to prevent the intoxicated defendant from competing.
  + **Knowledge** of intoxication & increased risk of injury. Provided liquor.
  + Did not exclude intoxicated participant (asking “are you sure you can participate?” is insufficient)
* **Voluntary assumption of risk** removes defendant’s liability. Applies in situations where the plaintiff assumes the physical and legal risks involved in the activity. Does not apply in this case.

### *ELABORATIONS OF LIABILITY FOR THE INTOXICATED:* Broadened Scope of Alcohol Liability

**1) Picka v Porter; Schmidt v Sharpe:** Alcohol providers may be held liable even w/o actual knowledge of patron’s intoxication.

**2) Hague v Billings:** Once staff realized Billings was intoxicated & intended to drive, had legal duty to take all rsnble steps to stop him --> or call the police.

**3) Donaldson v John Doe**: Duty to control conduct of intoxicated patrons not limited to impaired driving context: DoC extended to persons who might foreseeably be injured by intoxicated attendees (intox. man throws glass in face).

* Imposing duty on commercial providers of alcohol **discourages them from over-serving patrons & provides incentives to protect others from risks that their intoxicated patrons might pose.** =Stage 2 *Anns/Cooper* test

***Limited Scope of Alcohol Liability***

**1) Stewart v Pettie:** Serving patrons past point of intoxication did not, in itself, pose a foreseeable risk. Additional risk factor required.

### *2(B) OTHER DUTY TO CONTROL SITUATIONS*

**EMPLOYER-EMPLOYEE**

**1) Clark v Canada (1994), 20 CCLT (2d) 241 (FC)**

* Female RCMP officer alleged sexual harassment. Crown was found vicariously liable.
* **Ratio**: an employer may be personally or vicariously liable if it fails to prevent abuse or harassment in the workplace.
* **See**: *Crown Liability and Proceedings Act*. **Note**: statutory interpretation is important!

**JAILOR-PRISONER**

**1) Smith v BC (AG) (1988), 30 BCLR (2d) 356 (CA):** a DoC is imposed on those supervising prisoners to ensure they do not injure themselves, each other, or members of the public.

* Prison has a DoC toward prisoners, including:
  + Safety of premises
  + Safety of inmates (protect prisoners from self-harm and harm from other inmates)
  + Provision of the necessities of life
  + Obligation to take reasonable steps to intervene and protect the at-risk inmate
  + Obligation to not act in a way that can reasonably cause harm to the prisoner (e.g. protective custody)
  + Statutory duty to ensure the premises is safe and avoid extreme practices.
* Prison’s DoC to prisoners arises in the case law and statute
* Prison’s DoC is a recognized category, so negligence claims typically fail at the standard of care and causation stages.

**COACHES, INSTRUCTORS, AND SUPERVISORS OWE A DUTY OF CARE TO STUDENTS**

* **Duty of care**: duty to control participants and duty to provide training and coaching, adequate warnings, instruction, and equipment. E.g., **Hussack v Chilliwack School District No. 33 (2009)**
* **Bradford-Smart v West Sussex County Council, [2002] 1 FCR 425:** school owes a duty of care to protect students from bullying on school property, and in exceptional circumstances outside school as well.
  + Bullying + internet is an expanding issue.
  + Problem with **remoteness**: school set up Facebook page vs. student acted independently

**PARENT-CHILD**

* What about parental liability for actions of child?
  + **Vicarious liability** = liability for the tort of another, even though the party that is being held responsible has not themselves done the negligent act.
  + Vicarious liability can also attach to employers-employees, teachers-students, and government-churches (for residential schools)
* Establishing parental liability for the actions of children
  + See: *Parental Liability Act*
    - Outlines parental liability and defences (ss. 3, 9, 10)
    - Section 10 outlines factors that affect “reasonable efforts” of parents to control children
* **Defence of reasonable supervision**
  + Parents in theory can be vicariously liable for the actions of their children, but liability to third parties can only arise in situations where children are not reasonably supervised by their parents.
  + **What is reasonable?** Reasonable supervision is not constant 24/7 supervision.
* Courts impose a more stringent **standard of care** when parents are **aware** of a danger that is available to the child (e.g. loaded gun, running car, unsupervised access to snowmobiles) **Solomon**
* Parental duty to control children, e.g. **LaPlante (Guardian ad litem of) v LaPlante (1992), 93 DLR (4th) 249 (BCSC)**: 16 year-old with physical and mental impairments was permitted to drive.

### *2(C) THE DUTY TO PREVENT CRIME AND PROTECT OTHERS*

**\*Situation**: one party has *indirect* control over another. Ex/prisoner out on probation/parole. **Lack of proximity** makes DoC more difficult to prove

**1) Jane Doe v. Metropolitan Police (1998), 160 DLR (4th) 697 (Ont. Gen. Div.)** (pre-Cooper)

* Plaintiff was attacked by a serial rapist in downtown Toronto. Police were aware that the rapist preyed on white, single women, with balconies. = Foreseeable risk of harm. The police, however, did not take any steps to warn any potential victims in the neighborhood.
* The court found a **duty of care**: investigating officers owe a duty to **warn** citizens of foreseeable harm (if NO sufficient policy basis for not doing so). Alternatively, a duty to adequately protect in absence of warning. There was a **special** **relationship of proximity** between the **police** and Jane Doe because she belonged to a **narrow and distinct category of potential victims**. However, the facts of this case were very specific.
* Trend toward increased civil liability of police officers. Statutorily obligated to prevent crime (Ontario *Police Act*) and owe CL duty to protect life and property.

**2) Hill v Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41**

* **Facts**: Plaintiff was Aboriginal. Suspect in 10 robberies; 9 charges were dropped and convicted of only 1 charge. Appealed but spent 20 months in jail. Plaintiff brought a claim against police for “negligent investigation”. Appeal Court recognized a duty of care of the police to plaintiff. However, police were not negligent because they did not breach the standard of care.
* **Issue**: does an investigating police officer owe a duty of care to a **suspect** in an investigation?
* **Decision**: **yes**, and there is a **tort of negligent investigation.**
* **Establishing the duty of care**
  + **1(a)** Reasonable Foreseeability (para 32)
    - Is it reasonably foreseeable that a negligent investigation could harm a suspect?
  + **1(b)** Proximity (paras 27, 33-45)
    - Is there sufficient proximity between a police officer and a suspect to establish a *prima facie* duty of care? The wrongdoer has it in reasonable contemplation that the plaintiff could be harmed.
    - There was a personal, close and direct relationship between the police and suspect. He was a “particularized suspect” that the police were investigating closely (para 33).
  + **Exploration of policy factors: 1(b)**
    - **Para 34:** the suspect had a critical interest in the conduct of the investigation (liberty and reputation)
    - **Para 35:** no other remedy if no duty of care was found
    - **Para 36:** there is a public interest in the police avoiding wrongful convictions (wrong + trust in justice system)
    - **Para 38:** duty of care is consistent with the values expressed in the Charter (emphasis on liberty & fair process)
* **Discussion of policy in relation to stage 1(b) of the Anns-Cooper test**
  + Police owe a duty of care to the public at large to not investigate negligently. Hill is a member of the public who happens to be a suspect. Therefore, he is already owed a duty of care as a member of the public. The police’s duty of care to protect the public is not incompatible with the police’s duty to the suspect. This **differs** from *Cooper* were the Registrar owed a duty of care to the public at large and not to individual investors.
* **Discussion of policy in relation to stage 2 of the Anns-Cooper test**
  + **Para 48**: policy concerns must be more than speculative: a “real potential for negative consequences must be apparent”. NB: Applies to both stages 1(b) and 2!
  + **Paras 50, 51, 55, 56, 64**: policy concerns should be taken into account in the standard of care, not duty of care. Liability is not automatically established by proving a **duty of care**; the plaintiff has additional hurdles (e.g. causation, standard of care, actual harm)
* **Test**: **Does the defendant owe the plaintiff a duty of care?**
  + Categories of relationships **already recognized** as having sufficient proximity to establish a duty of care: motorist to other users of the highway, the doctor to his patient, the solicitor to her client, etc.
  + If facts present a **novel category**…
    - (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care?
      * A) **Foreseeability**: whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.
      * B) **Proximity**: whether there is a “close and direct” relationship of proximity or neighborhood. Policy considerations focus on the relationship between the parties.
        + General policy factors include:

Expectations

Representations

Reliance

Property or other interests

* + - * + Specific policy factors relevant to this case include:

Reasonable expectations of a party being investigated by the police

Seriousness of the interests at stake for the suspect (freedom, reputation, conviction)

Legal duties owed by police to suspects under their governing statutes and the Charter

Importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person.

* + - * + There is a close and direct relationship between police and Hill because Hill was a “particularized suspect”
    - **(2)** If there is a prima facie duty of care, are there any residual policy considerations which ought to negate or limit that duty of care? **Residual policy considerations** are concerned with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.
      * Specific policy factors relevant to this case include:
        + Conflict of obligations: duty of care vs. “overarching public duty”. **A prima facieduty of care will only be negated when the conflict poses a *real potential for negative policy consequences*. Speculation is insufficient.**
        + Limiting professional discretion
        + Chilling effect on investigation of crime
        + Opening up a floodgate of litigation
* **Importance of this case:**
  + Discussion of policy factors for stage 1 and 2.
  + Tort of **negligent investigation.**
  + **Duty of care**: Investigating police officer owes a duty of care to the suspect because there is sufficient proximity between the police officer and suspect and there are no overriding policy considerations to negate the duty of care.
  + **Standard of care**: standard of care is “how a reasonable officer in like circumstances would have acted.”

### SPECIAL DUTIES OF CARE FOR 3 CATEGORIES OF CLAIMANTS

### *1) THE DUTY OF CARE OWED TO RESCUERS*

**1) Horsley v MacLaren (1972), 22 DLR (3d) 545 (SCC)**

* **Facts**: Horsley jumped overboard to save Matthews because MacLaren’s rescue attempt was ineffective.
* **Issue**: Does the defendant (MacLaren) owe a legal duty of care to the plaintiff (Horsley) who voluntarily tried to rescue someone else (Matthews), who was put in a dangerous situation as a result of the defendant’s negligence?
* **Ratio**:
  + **Duty to rescuers**: The general rule is that if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. However, this is subject to whether the person's actions are faulty enough to induce the other party to risk his life.
    - **Does not apply if rescuer is wantonly interfering**
* **In order to find liability**… Matthews fell in the water 🡪 dangerous situation was aggravated by MacLaren’s negligent rescue 🡪 induced Horsley to risk his life by jumping into the water?
  + If the defendant, by his own fault, creates a dangerous situation, and someone attempts to rescue the person in danger, the defendant owes a duty to the rescuer. The rescuer may act instinctively or out of courage, as long as it is not reckless. If the rescuer is killed or injured in the attempt, he can recover damages from the defendant.
* **Decision**: No liability.
  + Although MacLaren’s rescue procedure was negligent, it did not induce Horsley to jump.
* **Rare for courts to find rescuers contributorily negligent:** not held to same standard when facing emergency. ***Toy v Argenti* 1980 BCSC**
* **Rescuer doctrine not applicable if rescuer does not take reasonable care for own safety: *Meyer v Parker***
* **Defence of voluntary assumption of risk** is inapplicable where P consciously faces a **risk** in an **attempt to rescue** another who has been **imperilled** by **D’s negligence** (P donate kidney after surgeon negligently removed kidney, P claimed loss of kidney result of negligence, rsnbly foreseeable): ***Urbanski v Patel* (1978)**
* Rescuer may recover for injuries sustained in assisting **those who have negligently imperilled themselves** since claim **independent** from that of person being rescued: ***Bridge v Jo* (1998)**

#### 2) DUTIES OWED TO THE UNBORN

**Question**: Does a party owe a duty of care to a foetus?

**4 CATEGORIES:**

1. **Pre-conception wrongs** = the defendant carelessly causes a parent to suffer an injury that detrimentally affects a subsequently conceived child (Solomon pg. 399)
   1. Involve negligence prior to child being conceived resulting in injury to the child.
   2. Anything that affects a parents’ **ability to conceive** a healthy child.
      1. Exposure to environmental factor (e.g. exposure to toxic chemical that impacts ova or sperm)
      2. Defective product (e.g. drugs or medication)
      3. Negligent medical advice (e.g. prescribing medication for mother)
   3. Uncertainty
      1. Proving causation is difficult because there is often a delay in time (e.g. exposure to asbestos in workplace 🡪 birth defect)
      2. **Defence**: what are reasonable steps a defendant must take to avoid harm to the plaintiff’s reproductive system? See *Johnson Controls*…
   4. **UAW v Johnson Controls, 499 US 187(1991) (USSC)** 🡨persuasive in Canada
      1. **Johnson Controls** is a battery production company. Policy of excluding all fertile women from jobs with a risk of lead exposure out of fear of committing pre-conception harms. Policy also limited promotions of female workers to jobs with a risk of lead exposure**. Reason for policy:** shield the company from liability for negligence in pre-conception tort brought on behalf of children, after children were born with birth defects.
      2. **Decision**: The court struck down the policy as discriminatory. Female employees have the choice to expose themselves to risk. However, court left open door to similar policies.
      3. **Idea**: The court did not ascribe a duty of care to the unborn fetus. Rather, the court framed the issue as employee freedom. NEED TO BALANCE PROTECTING HEALTH OF POTENTIAL CHILDREN AGAINST AUTONOMY RIGHTS OF MOTHERS!
      4. **Context**: in 1991 the US Supreme Court was primarily liberal.
   5. **Paxton v Ramji (2008), 92 OR (3d) 401 (CA)**
      1. **Facts**: infant P suffered severe disabilities b/c mother took prescription acne drug prior to P’s conception and during pregnancy, effects on foetus known to doctor but partner had had a vasectomy and doctor didn’t expect her to become pregnant. Infant plaintiff argued the doctor was negligent in failing to recommend extra birth control.
      2. **Decision**: doctor did not owe the “future” child a duty of care. Harm to a future child is foreseeable, but **lack of proximity for policy reasons:** doctor’s sole duty of care is to the mother. Extending the duty of care to a future child would conflict with the potential duty of care owed to the mother and may limit treatment options, which is **inconsistent with women’s autonomy and privacy rights.**
2. **Wrongful birth and wrongful life** = doctor carelessly fails 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 fetal abnormalities. Because of negligence or failure to inform 🡪 woman continues pregnancy that she would have otherwise terminated. Wrong = depriving mother of opportunity to make an informed decision regarding abortion. (Solomon pg. 401)
   1. Claim brought by **parent** = *wrongful birth*
      1. E.g. doctor fails to inform woman about known risk factors in giving birth to a child with a particular disability.
      2. E.g. doctor is negligent in performing duties to examine and test a woman to reveal any abnormalities in the fetus.
   2. Negligence took away mother’s choice to make a decision about continuing or terminating the pregnancy.
   3. **Requirements of medical professionals:**
      1. Perform timely examination and correct medical procedure,
      2. Communicate information to patient, and
      3. Answer questions.
   4. **Damages**: parents may recover costs of raising disabled child rather than healthy child.
   5. Claim brought by **child** = *wrongful life*
      1. E.g. child would not have been born except for the defendant’s negligence & would not have been required to struggle through a life w/disability.
   6. Wrongful life is **more problematic** and **theoretical**. Canadian courts have denied claims based on wrongful life. This would require recognition that the child is better off dead, and courts have recognized an inherent value in life.
      1. When framing the question, or characterizing the claim, focus on the harm caused to the child, not the fact that the child was born.
   7. **Unsettled issues surrounding wrongful life highlighted in cases…**
   8. **Arndt v Smith, (1994), 93 BCLR (2d) 220 (SC) 🡨 upheld by SCC**
      1. Plaintiff sued physician for costs of rearing daughter who was congenitally injured by chicken pox acquired during pregnancy.
      2. **Defence**: no causation. A reasonable woman in Arndt’s position would not have terminated the pregnancy based on **small risk of birth defect**, so loss was **not *caused*** by negligence.
      3. **Decision**: Arndt would not, on a balance of probabilities, have aborted the child. Claim dismissed.
      4. Objective standard in assessing reasonableness, but consider the context of the facts of the case, including subjective state of mind.
   9. **H(R) v Hunter (1996), 32 CCLT (2d) 44 (Ont. Gen. Div.)**
      1. Doctors found negligent for not referring mother for genetic testing.
      2. Liable for $3,000,000 for additional costs of raising disabled children 🡨 this is an insanely huge damage award!
   10. **Krangle (Guardian ad litem of) v Briscoe (1997), 55 BCLR (3d) 23 (SC)**
       1. **Reframe case**: wrongful life 🡪 wrongful birth (parents sue): had the doctor advised the woman of an amniocentesis test that would have detected Down’s Syndrome, she would have had an abortion = causation.
   11. **Jones (Guardian ad litem of) v Rostvig(1999), 44 CCLT (3d) 313 (BCSC)**
       1. While a physician owes a duty of care to a **child** regarding pre-natal injuries that become manifest on birth, but not to provide mother w/info that would lead to abortion.
   12. **Watters v White, 2012 QCCA 257**
       1. Doctor has a duty to inform patients, within the confines of doctor-patient confidentiality. Doctor acted reasonably in assuming father would inform relatives of relevant risk factors. Doctor does not need to warn other relatives they might be carriers of disease.
   13. Improvements in medical technology 🡪 might lead to increase in wrongful life claims. **Questions**:
       1. Should parents be able to make a claim if the child suffers from a mild disability?
       2. What if the child suffers from a disability that can be treated through medication, but it is a hassle or expensive to administer?
       3. What if doctors can only say that a child *might* suffer from a disability? Probability though?
   14. **Bovingdon (Litigation Guardian of) v Hergott (2008), 88 OR (3d) 641 CA**
       1. **Facts**: doctor prescribed fertility drug 🡪 multiple pregnancies 🡪 premature birth of twins 🡪 disabilities due to premature birth.
       2. **Claim based on wrongful life**: if woman was informed of **risk of multiple pregnancies**, she would not have taken the fertility drug, and the children would not have been conceived. Wrongful life approach should not be used.
       3. **Ratios:**
          1. Duty of care is to the woman, not the future child. There is no duty of care to a future child.
          2. **Legal standard**: woman’s autonomy and ability to make an **informed** choice.
       4. **Decision**: Doctor breached duty of care to mother, child’s claim dismissed.
   15. No one can sue on behalf of a fetus that is not born alive; but parents can claim on their own behalf.
3. **Wrongful pregnancy** = parents take steps to prevent pregnancy or childbirth but, due to negligence of medical professional, pregnancy occurs or continues (Solomon pg. 404)
   1. E.g. negligence in performing **abortion** or **sterilization**. Damages based on performing **additional procedure**: economic loss, pain and suffering, and emotional harm.
   2. If woman does NOT terminate unwanted pregnancy: ***Cattanach v Melchior* (2003) (Australian)**.
      1. Canadian courts traditionally award damages for expenses associated with unwanted pregnancy and childbirth + related pain and suffering (mother) + if child is disabled, extra costs associated with raising a disabled child.
      2. If child is born healthy, parents cannot claim for ordinary costs of raising child.
   3. **Suite v Cooke (1993) QcCA**
      1. Pecuniary damages found for costs of raising a **healthy child** but set against emotional benefits brought to parents
   4. **Kealey v Berezowski (1996), 136 DLR (4th) 708 (Ont. Gen. Div.)**
      1. **Child-rearing costs** should not be universally rejected on the grounds of public policy. Rather, they should be characterized as claims for **pure economic loss** and only awarded where the plaintiff’s primary motivation for limiting family size was **financial**.
   5. **Unsettled** area of law, so resort to standard negligence law and public policy. ***Solomon***
      1. Public policy recognizes the inherent value of children in statutes.
4. **Pre-natal injuries** = no tort can be committed against a fetus because Canadian law does not recognize the fetus as a person with legal rights. **Trigger**: if a child is injured in utero, once the child is born with a disability, he can sue a third party for negligence. Award costs for *quality* of life, not fact of life. Loss to mother = loss to fetus.
   1. Duty of care on person to avoid careless actions before birth that may result in a loss upon birth: ***Duval v Seguin***
   2. **Question**: What if the mother was the negligent party?
   3. **Dobson (Litigation Guardian of) v Dobson (1999), 174 DLR (4th) 1 (SCC)**
      1. Child cannot sue its mother because mother does not owe unborn child a general duty of care.
      2. Although a *prima facie* duty of care was established under stage 1 of the Anns Test, it was negated by policy considerations under stage 2. Framed as privacy rights and individual autonomy.
         1. Would limit a pregnant mother’s right to control her own body (fundamental rights).
         2. Standard of care hard to define: what daily behaviour is tortious vs. non-tortious?
         3. Imposing a duty of care would increase judicial scrutiny of woman’s “lifestyle choices” (e.g. smoking, drinking, diet). Also so-called choices may be uncontrollable (addiction)
         4. Psychological harm to relationship between mother and child when child sues.
         5. Pressing societal issue: lack of financial support available for care of children w/special needs --> imposition of duty of care on woman merely exacerbates problem.

#### 3) PSYCHIATRIC HARM: NEGLIGENT INFLICTION OF PSYCHIATRIC HARM (NIPH)

* No relevant SCC decision, so examine lower court decisions.
* Commonwealth developments: reluctance to expand scope of **NIPH** (must be a “recognized psychiatric illness”). Why?
  + Difficult to prove and easy to feign psychiatric illness.
  + Assessment of damages difficult
  + Open the floodgates of liability: triggering mechanisms more far-ranging: see Alcock.
  + The reasonable person has the traditional British stiff upper lip (does not complain about emotional upset)

**1) McLoughlin v O’Brien, [1982] 2 AII ER 298(HL)**

* It was **reasonably foreseeable** that a mother would suffer psychiatric injury by a car accident that kills or injures her children and husband. Plaintiff did not have to be present at the scene of the accident.
* **Ratio**: (1) A claim for damages for psychiatric illness resulting from shock caused by negligence can be made w/o necessity of P being personally injured or in fear of injury; (2) a claim for damages can be made when shock results: (a) from death or injury to P’s spouse or child or fear of such death/injury & (b) shock has come about thru sight or hearing of event or its immediate aftermath.
* **Some boundaries on recovery had to be drawn – 3 considerations (see Alcock):**
  + Class of persons whose claims should be recognized,
  + Proximity of such persons to the accident, and
  + The means by which the shock is caused.

**2) Alcock v Chief Constable of South Yorkshire Police, [1991] 4 AII ER 907 (HL) UK TEST**

* **Facts**: Hillsborough soccer stadium stampede; 95 people died, over 400 injured; due to negligence of police; events additionally shown on TV.
* **Issue**: Did the police have a duty of care to the secondary victims who suffered nervous shock from viewing the consequences of police actions?
* **Ratio**: A person suffering nervous shock must have **reasonable proximity** to the event that caused the shock in order to claim for damages. Here, no proximity and/or no causation.
* **Law:** applies ratio of **McLoughlin v O’Brien** (see immediately above): Elements of NIPH
  + (1) A claim for damages for psychiatric illness resulting from shock caused by negligence can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury;
  + (2) a claim for damages for such illness can be made when the shock results:
    - (a) from death or injury to the plaintiff’s spouse or child or the fear of such death or injury, and
    - (b) the shock has come about through the sight or hearing of the event or its immediate aftermath.
* **Three limiting elements to a claim of NIPH (first stage of Anns-Cooper test):**
  + **(1) class of persons whose claims should be recognized**
    - The closer the tie in relationship and in care (e.g. immediate family members), the greater the reasonable foreseeability of psychiatric harm.
    - Extends to ordinary bystander of “normal fortitude”
    - Class of persons not limited to established relationships; must be determined on case by case basis (factors: nature of negligent act or omission, gravity of actual or apprehended harm, expert evidence about nature & explanation of particular psychiatric injury)
  + **(2) the proximity of such persons to the accident – in time and space**
    - Proximity must be close both in time and space: directly and immediately seeing or hearing the accident is not required.
    - Harm may be reasonably foreseeable in the **immediate** aftermath. However, identifying the body in a morgue 8 hours later is too divorced from the accident.
  + **(3) the means by which the shock has been caused**
    - Simultaneous television or radio broadcast in which there are no pictures of suffering by recognized individuals does not satisfy seeing or hearing the event or its immediate aftermath. TV station mediates what is broadcast (code of ethics). Therefore, shocks sustained through TV cannot found claim. However, in other circumstances, simultaneous television or radio broadcast may be sufficient (case-by-case basis): e.g., TV cameras filming children travelling in balloon that suddenly bursts into flames.

**3) Mustapha v Culligan of Canada Ltd. (2006), 84 OR (3d) 457 (CA) (ONCA)** 🡨 Also SCC decision in Mustapha, but it does not discuss duty of care (asserted straightforward ex/of established DoC of manufacturer to consumer)

* **Test for duty of care in cases of psychiatric harm**: whether it is reasonably foreseeable that a person of *normal fortitude or sensibility* is likely to suffer some type of psychiatric harm as a consequence of the defendant’s careless conduct.
  + Objective standard: “a reasonable mental state of the plaintiff” or “reasonable mental fortitude”
* **Psychiatric harm and reasonable foreseeability:**
  + The psychiatric harm that is reasonably foreseeable must be a natural and *probable* result of the defendant’s negligent act,not merely a *possible* result.
* **In this case**: Mustapha was an abnormal and hypersensitive plaintiff. The psychiatric harm he suffered after seeing a dead fly in a water bottle was certainly real but “objectively bizarre”. This psychiatric harm was not reasonably foreseeable.
* Court **rejects** distinction between **primary and secondary victim.**
* **What type of psychiatric harm is compensable?**
* Psychiatric harm was so serious it resulted in a “defined and recognized psychiatric illness or injury”
* Courts are traditionally reluctant to recognize emotional harm, e.g. British “stiff upper lip” mentality)
* Grief, sorrow and emotional distress (anger, disappointment, disgust) are not compensable. Must be a recognized psychiatric condition (e.g. depression, schizophrenia)

**\*CANADIAN POSITION:** Where there is a duty to avoid physical harm to person or property, that duty embraces the category of claims for nervous shock. ***Healey v Lakeridge Health Corporation* (2011) ONCA**

### SPECIAL DUTIES OF CARE FOR 3 CATEGORIES OF DEFENDANTS

#### 1) A HEALTH PROFESSIONAL’S DUTY TO INFORM

* **Duty of care**
  + Healthcare professionals owe a DoC to properly take care of a patient. This is a general DoC. Performing treatment carelessly = **malfeasance.**
  + Healthcare professionals also owe a duty to inform (aka duty to disclose) of risks of treatment. This is necessary so the patient can give **informed consent.**
* **If no consent** 🡪 **medical battery**
  + Doctor’s liability in cases of medical battery is limited to: 1) patient did not consent, 2) consent was exceeded, or 3) consent obtained fraudulently.
  + Once consent is obtained, doctor’s failure to inform may lead to liability in **negligence** (NOT battery).

**1) Reibl v Hughes, [1980] 2 SCR 880 NB: Subsequent cases have broadened duty to inform.**

* **Ratio:** Healthcare professional has an independent **duty to inform** patient of all **material risks** of proposed treatment.
* What would a reasonable patient in the plaintiff’s position want to know?
  + Doctors must disclose **all material risks** of the proposed treatment.
    - **Material risk** includes **low probability of serious consequence**: 4% chance of death or 10% chance of paralysis. **High probability of minor consequence** might also constitute a material risk.
  + **Context:** Doctors must also disclose **non-material risks** that they **know, or ought to know**, would be of **particular concern** to the patient.
    - Consider patient’s profession, expectation of future children, etc.
    - Doctor must make some effort to understand patient’s special considerations.
  + Alternatively, patient has the right to rely on doctor’s judgement and the right to not be informed. However, this must be **very clearly communicated.**
* **Breach of standard of care:** when doctors fail to meet the above disclosure requirements.
* **Establishing causation**: doctor’s failure to inform *caused* patient’s loss.
  + “But for” doctor’s negligent failure to inform, the patient would not have undergone the procedure.
  + **Special objective/subjective test for causation**: the plaintiff must prove that a reasonable person in the plaintiff’s position would have refused the procedure if properly informed.
    - **Objective** (e.g. seriousness of diagnosis and chances of success of treatment vs. risks)
    - **Subjective** (e.g. state of mind, age, sex, family circumstances, not irrational beliefs)
* **Checklist for duty to inform: Solomon**
  + Cause of the ailment to be treated; seriousness of diagnosis; chances of success vs. risk of treatment
  + Nature of the proposed treatment (however, the doctors doesn’t have to explain well-known risks, e.g. general anaesthetic or post-operative infection): material risks of treatment
  + Special or unusual risks (consider the characteristics of the particularized patient, including economic circumstances)
  + Alternative treatments: availability and effects of alternative treatments or no treatment
  + Opportunity for patient to ask questions; doctor must answer questions honestly & fully, even if they relate to minor matters [**Sinclaire v Boulton (1985)]** or if answers might be upsetting
  + Duty to ensure P *understands* risks & alternative remedies even if limited understanding of English language: ***Byciuk v Hollingsworth***

**2) Haughian v Paine (1987), 37 DLR (4th) 624 (Sask. CA) Expanding on *Reibl*: broadens “material risk”**

* **Facts**: P underwent disk surgery and became paralyzed. Claimed surgeon failed to obtain informed consent.
* **Principle:** surgeon’sduty to inform is no longer limited to warning a patient of the **risks of the specific procedure**; doctor must provide the patient with sufficient information to make an **informed decision:** must, where circumstances require, explain the **consequences of leaving the ailment untreated**, and **alternative means of treatment and their risks. Must know alternatives to make informed decision!**
  + **Def’n of “material risk” broadened to include remote risks of death or injury (1/500 chance paralysis)**
    - **Issue of materiality cannot be reduced to numbers (stats) for all cases.**
* **Holding:** Failure to advise of consequences of not undergoing surgery, failure to advise of alternatives to surgery (incl. no treatment & conservative management), and failure to warn of the risk of paralysis (even if small) meant the P was unable to give **informed consent.**
* **Distinguished from other cases**: presence of low-risk alternative treatment.

**3) Tremblay v. McLauchlan, 2001 BCCA 444**

* Risk of consequence (nerve injury) was a material risk that was not disclosed to P. Although the doctor explained some of the risks, he did not explain the type of injury that could result.
* **Ratio**: Disclosing some material risks, while not disclosing others, is insufficient.
* **What is a material risk?**
  + Considerations:
    - Nature of the risk
    - Magnitude of the problem
    - Circumstances of the patient
    - Potential consequences if risks materialized.
  + Nerve injury was a material risk because patient needed arm for work (economic considerations)
* Consent forms do not always protect the doctor!
  + Consent form does not preclude claim.
  + Consent form is only as good as degree of material disclosure.

**\*ADDITIONAL NOTES ON HEALTH PROFESSIONAL’S DUTY TO INFORM\***

**1) Consent should be to particular person performing surgery:** Failing to inform P that a resident, as opposed to fully qualified specialist, would be performing a cardiac catheterization is a material risk that had to be disclosed: **Currie v Blundell**

* **Bouchard**: surgery is a deeply personal relationship. Consent is based on knowing who will be performing the procedure. The patient is entitled to know who will be the **main actors** in performing the surgery; does not extend to secondary actors.
* **Exceptions**: emergency situations?

**2)** **No duty to disclose health professional’s experience w/procedure or pending lawsuits.** Balancing doctor’s right to privacy with patient’s right to know risks. **Turner v Bederman (1996)**

**3) Medical conditions – disclosing HIV or epilepsy?** Practitioners need not disclose conditions that do not affect capacity to provide proposed treatment. Balancing right to make informed consent & healthcare professional’s privacy rights and protection from unwarranted discrimination. **Halkyard v Mathew 1998 Alta QB**

**4) Duty – Need to Understand Substance of Risk:** healthcare professionals must explain the material risk of a proposed treatment in language that the patient can understand. Patient must understand substance of material risks (e.g. risk of death, speech impairment and paralysis stemming from removal of brain tumour) but surgeon does not have to use precise medical terminology (e.g. “stroke”). **Martin v Findlay (2008), 432 AR 165 (CA)**

#### 2) A MANUFACTURER’S AND SUPPLIER’S DUTY TO WARN

\* Duty to warn involves more than slapping on a warning sign (McDonalds hot coffee case). Tobacco cases: manufacturers normally liable.

**1) Hollis v Dow Corning Corp. (1995), 129 DLR (4th) 609 (SCC)**

* **Facts**: Hollis had breast implants. Hollis argues that Dow (manufacturer) is liable for failing to adequately warn the implanting surgeon, Dr. Birch, of the risk of post-surgical implant rupture inside Hollis’s body.
* **Issue**: is Dow liable to warn, given the presence of a learned intermediary, Dr. Birch?
* **General law re duty to warn consumers:**
  + **Important: A manufacturer of a product owes a** **duty to warn consumers** **of dangers inherent in the ordinary use of its product of which it knows or ought to know.**
  + **The duty to warn is a** **continuing duty**: manufacturers must warn of dangers known at the time of sale + warn of dangers discovered after the product has been sold and delivered. (In the medical context, manufacturers of potentially hazardous products have an obligation to keep doctors abreast of developments, even if they do not consider those developments to be conclusive.)
  + **All warnings must be reasonably communicated** and must clearly describe any **specific dangers** that arise form the ordinary use of the product.
  + **Nature and scope of duty to warn varies with level of danger of ordinary use of product:** The greater the danger, the more explicit the warning must be.
* **Higher standard of care for medical products:** 
  + Given the **intimate relationship between medical products and the consumer’s body**, and the attendant risk to the consumer, manufacturers of **medical products that are ingested, consumed, or otherwise placed in the body** (e.g. breast implants) are subject to a **higher standard of care (to warn)**.
* **Exception to manufacturer’s general duty to warn consumer:** **“the learned intermediary rule”**
  + In circumstances where the product is 1) highly technical, 2) intended to be used only under the supervision of experts, or 3) where the nature of the product is such that consumer will not realistically receive direct warning from manufacturer before using product (intermediate inspection of product anticipated or where the consumer is placing primary reliance on the judgement of a “learned intermediary” rather than the manufacturer), **a manufacturer may satisfy its duty to warn the ultimate consumer by warning the learned intermediary instead.**
  + A manufacturer has only discharged its duty to warn the consumer when the manufacturer fully informs the learned intermediary. The learned intermediary’s knowledge must approximate that of the manufacturer.
* **Legal Causation (P must prove):**
  + A reasonable person in the position of the P would have refused the breast implant surgery had she been properly informed of all material risks.
* **Policy considerations for holding manufacturer to strict standard of warning consumers:** Manufacturer would benefit (profit) from under-emphasizing the risks
* **Holding:** Dow knew or ought to have known of the risk of post-surgical implant rupture from everyday living experiences (50 reports of ruptures by 1983). Dow had a duty to convey its findings regarding post-surgical implant rupture and the harm caused by loose gel in the body to the medical community sooner than it did. Dow failed to discharge its duty to Hollis by failing to adequately warn Dr. Birch.

**2) Cominco Ltd. v Westinghouse Can. Ltd. (1981), 127 DLR (3d) 544 (BCSC):** a manufacturer who has actual knowledge of a new risk, or ought to have knowledge of a new risk, after the product is distributed, has a duty to warn users ASAP.

* What must a manufacturer *ought* to know? Courts will look at publications, conferences, etc.

**3) Allard v Manahan (1974), 46 DLR (3d) 614 (BCSC):** a supplier, similar to a manufacturer, owes a **duty to warn consumers of risks** inherent in the use of its product of which it **knows or ought to know**. However, suppliers are not expected to be up-to-date with the scientific or academic literature.

**4) Buchan v Ortho Pharmaceutical (Can.) Ltd. (1986), 35 CCLT 1 (Ont. CA):** Courts will examine **totality of manufacturer’s marketing & promotional activities** to determine if consumers **adequately informed**. May consider countervailing messages or advertising, marketing and promotional activities. May be held liable despite adequate warning if warning has been undermined or obscured.

#### 3) DUTY OF CARE OWED BY A BARRISTER

**1) Demarco v Ungaro (1979), 95 DLR (3d) 385 (Ont. HC)**

* **Holding**: In Ontario, barristers do *not* have immunity from negligence claims by clients for the conduct of civil cases in court. Owe duty of care not only to the court, but also to clients to represent in non-negligent manner.
* **Public policy reasons for barrister immunity:**
  + 1) Barrister’s duty to client would conflict with his duty to the court: e.g., counsel might prolong proceedings to prevent client from complaining
  + 2) Relitigating original issue in negligence action against client’s counsel
    - No evidence for either 1) or 2)
  + 3) Would undermine barrister’s obligation to accept any client, no matter how difficult
    - No such obligation exists in this case
  + 4) Barrister immunity consistent with absolute privilege enjoyed by all in court proceedings
    - But privilege not concerned w/special relationships among persons
* The appropriate standard is the “reasonable barrister” (no longer “egregious error” standard)
* BUT difficult to win a negligence action against a barrister because reasonableness includes a wide scope of action (could incl. mere error of judgment), lawyers use their professional judgement, and negligence might also implicate the judge.

**2) Egregious error standard:** court held that lawyer could only be found negligent for recommending settlement of a civil claim prior to trial if he/she made some “egregious error”. ***Karpenko v Paroian, Courey, Cohen, & Houston* (1980)**

**3) Egregious error standard rejected:** judgment calls made by lawyers no more difficult than those made by other professionals, no justification for departing from standard of reasonableness. ***Folland v Reardon* (2005)**

**4) Duties to third parties:** lawyers do not owe a duty of care to 3rd parties except in special circumstances (e.g., duty to report if someone is in danger, child sex abuse). Insufficient proximity between a party to an agreement (husband) and other party’s lawyer. Also: policy considerations would negative *prima facie* duty of care in highly personalized context of family law litigation. ***Mantella v Mantella***

### SECOND ELEMENT: STANDARD OF CARE

* How the D should have acted; breach if D acted without requisite degree of care.
* **Two questions:**

1. **What is the standard of care?** Question of law for judges (not juries) to determine
2. **Was the standard or care breached?** Question of fact for the trier of fact (either jury or judge)

* **Objective Test**: Reasonable person (in like circumstances) of ordinary intelligence, acting prudently, taking reasonable steps to avoid putting others at risk. ***Arland v Taylor***

#### STANDARD OF CARE TEST: REASONABLE PERSON

**1) Arland v Taylor, [1955] 3 DLR 358 (Ont. CA) (motor vehicle accident)**

* **Definition of the Standard of Care:** the care that would have been taken in the circumstances by “a reasonable and prudent man”.
* **Reasonable man:** “He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. **He is a person of normal intelligence who makes prudence a guide to his conduct.** He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice…”
* **Standard is NOT what jury would have done in like circumstances:** biased, hindsight, warped by extraneous considerations.
* **Factual standard changes** from time to time and from place to place (i.e. the relevant circumstances).

Problem with the reasonable standard test: punishes those who ordinarily fall below the standard due to lack of education, for example, and rewards those who ordinarily can act above the standard due to superior education, for example. However, experts are held to a higher standard in some circumstances.

**2) Ryan v Victoria (City),[1999] 1 SCR 201 (Objectively unreasonable risk of harm = breach of SoC)**

* **Conduct is negligent if it creates an** **objectively unreasonable risk of harm**. To avoid liability, a person must exercise the standard of care that would be expected of an **ordinary, reasonable and prudent person in the same circumstances**.
* **Reasonableness depends on facts of case**, including **(1) the** **likelihood of a known or foreseeable harm, (2) the gravity of that harm, and (3) the burden or cost which would be incurred to prevent the injury.** In addition, one may look to **external indicators of reasonable conduct**, such as custom, industry practice, and statutory or regulatory standards.
* **Objective reasonableness standard must be met:** Mere compliance with the statute (or custom) is not enough.

**2a) Holland v Saskatchewan, [2008] 2 SCR 551**: a statutory or regulatory violation does not automatically equate with negligence.

#### 4 Factors Considered in Determining Breach of the Standard of Care

**Probability & severity of risk:**

1. Probability of the injury occurring as a result of the defendant’s conduct
2. Potential severity or magnitude of the loss or harms threatened by the defendant’s activity

**Balanced against:**

1. Private and social costs of avoiding the risk
2. Social utility of the defendant’s conduct (courts do not want to create a disincentive against socially-beneficial behavior that has a slight risk associated with it)

**NB:** These factors are assessed *at the time of the alleged breach*, not in hindsight.

E.g. In **Roe v Minister of Health, [1954] 2 AII ER 131 (CA)**,the plaintiff suffered a surgical complication the risk of which was not known at the time of surgery but was known at the time of trial. **Denning**: **“We must not look at the 1947 accident with 1954 spectacles”.** Liability denied.

#### 1 & 2: Probability and Severity of the Harm

**1) Bolton v Stone, [1951] AC 850 (HL) (Passerby hit by cricket ball. Test for probability & severity of harm.)**

* **Test:** whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. Should not disregard any risk unless extremely small!
* **Consider**: **1) likelihood of damage (degree of risk), and 2) the seriousness of the potential consequences**. Standard of care requires more than mere foreseeability (i.e. possibility) of harm.
* Inappropriate to consider the difficulty of remedial measures.

**2) Paris v Stepney Borough Council, [1951] AC 367 (HL) (one-eyed worker injured on job, lost sight in only eye)**

* **Decision:** While there was an equal risk of injury, the *seriousness of the potential harm* (2) was greater (blindness) for particular employee. An ordinarily prudent employer would supply goggles to 1-eyed worker whose job posed a risk of injury to his one good eye.
* **Significance**: shows how the court must decide what steps an ordinarily prudent employer would take in particular circumstances to care for servant’s safety.

#### 3: Cost of Risk Avoidance

**1) Vaughn v Halifax-Dartmouth Bridge Comm. (1961), 29 DLR (2d) 523 (NSSC) (D’s bridge painted; paint flecks on cars)**

* **(While no ordinary amount of care could prevent flecks being carried by wind) Duty to take all reasonable measures (that are not cost prohibitive) to prevent or minimize damage from falling paint. Even if risk LOW.**
* E.g., the defendant could establish a policy of warning car owners in advance of painting operations, or post warning signs around the parking lot. Such precautions “would have entailed relatively little expense in view of the shortness of the painting season and would in all probability have prevented or at least minimized the plaintiff’s damage.”
* P must prove that D ***failed*** to take ***reasonably practicable precaution*** (reasonable steps to prevent damage)

**2) Law Estate v Simice (1994), 21 CCLT (2d) 228 (BCSC) (Patient not given CT scan. Died. Severity of harm vs. $$)**

* **Physician’s responsibility to his patient takes precedence** over his responsibility to medical system overall (i.e., budgetary restraints, limited & expensive medical resource). The **severity of harm** that may occur to patient who is permitted to go undiagnosed is far greater than financial harm that will occur to the Medicare system if one more CT scan only shows patient is not suffering from a serious medical condition.
* **Decision**: doctors *failed* to take a *reasonable practicable precaution* and were therefore negligent.

**3) Bateman v Doiron:** Court accepted that Moncton hospital had no choice but to grant privileges to non-specialized general practitioners in order to fully staff its emergency department. The **test of reality, or reasonably expected community standard**, may be invoked to **lower the standard of care** where necessary in **balancing risk of harm & cost.**

#### 4: Social Utility

**1) Watt v Hertfordshire County Council (1954)** **(Fire fighters respond to emergency in vehicle not usually prepared for carrying a jack; truck braked, jack injured P)**

* **In measuring duty of care, you must balance risk against the end to be achieved by defendant.** Beneficial activity may justify considerable risk! Generally reserved for public officers, those employed by public authority.
* **Social utility of Fire fighters**: risk involved in sending out lorry not so great as to prohibit attempt to save life.

### SPECIAL CASES IN STANDARD OF CARE: DISABLED, CHILDREN, PROFESSIONALS

**A) The standard of care expected of the DISABLED**

**1) Fiala v Cechmanek (2001), 201 DLR (4th) 680 (Alta CA) (3rd party (M): severe manic episode (w/o warning, not foreseeable). Caused Cech to hit P’s car. M later diagnosed w/bipolar. No ability to reason/recognize DoC.)**

* **Serious mental illness = narrow exception to objective reasonable person standard.**
* **Physically disabled defendants:** require an inquiry into the voluntariness of their actions, whether onset of incapacity to control actions could have been anticipated, & whether the damage could have been avoided.
* **Mentally disabled defendants (TEST):** In order for a **D** to be relieved of tort liability due to *sudden* and *unanticipated* affliction of mental illness, **D** must prove either of the following on a balance of probabilities:

1. **Duty of care**: as a result of mental illness, the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time, *or*
2. **Standard of care**: as a result of mental illness, the defendant was unable to discharge his duty of care because he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care.

* Arguments for holding the **mentally ill** to the **regular** objective standard:
  + 1) victim compensation is the primary goal of tort law (not assigning fault).
  + 2) lowering objective standard risks isolating the mentally ill: people would avoid them for fear of harm w/o compensation
  + 3) risk of feigning illness to avoid liability; fuzzy distinction between incapacitating mental illness and variations in temperament.
  + 4) encourages caregivers to take adequate precautions.
  + 5) erosion of the objective standard.
* Arguments for holding the **mentally ill** to a **lower** objective standard:
  + 1) tort law should focus on corrective justice, where fault is a key consideration.
  + 2) acknowledging the impact of mental illness legitimizes the disorder (treated same as physical).
  + 3) concerns re: erosion of objective standard have not prevented age or phys. disability considerations.
  + 4) more reasonable for caregivers to have their own liability.
  + 5) holding the mentally ill to the strict objective standard creates a no-fault regime (strict liability)
  + 6) Consistent with basic tenets of tort law: to find negligence, act causing damage must be voluntary + D must have capacity to commit tort. Does NOT erode obj. standard. Fault essential element of tort law.
* **Application**: MacDonald was afflicted with mental illness suddenly and without warning, which rendered him unable to appreciate the duty of care he owed to Cechmanek and Fiala. Furthermore, MacDonald was previously unaware of his mental illness and could not have taken any preventive measures. **No fault = no tort**.

**B) The standard of care expected of CHILDREN (modified objective test)**

\*Children of “tender years” (~< 5 years old) can’t be found liable in tort. Lack sufficient judgment to exercise rsnble care.

**1) Joyal v Barsby (1965), 55 DLR (2d) 38 (Man CA) (6 yr-old ran across highway. Struck by car. Adult driver=negligent)**

* **Modified objective standard of care test for children (CONTRIBUTORY NEGLIGENCE):** 
  + **McEllistrum v Etches, [1956] SCR 787 (SCC): when age does not make the idea of contributory negligence absurd, the standard of care expected of a given child is that of a reasonable child of similar age, intelligence, and experience (past experiences, punishment, specific instruction from parents, teachers).**
* **Decision**: an infant *can* be found contributorily negligent, but in this case, she is not.
  + **Dissent**: child should be found contributorily negligent. Looked at her conduct in isolation. She was repeatedly instructed that crossing the highway is dangerous and to always “stop, look, and listen” and failed to do so.
  + **Majority**: child acted as other children of similar age, intelligence, and experience would act. Lived by a highway, but rural environment made her le ss experienced with cars than a city-dweller. While her conduct was “heedless, careless, and negligent”, her actions were not unreasonable for a child.

**Note**: Lower standard of care does not apply to all children in all situations. For example, **a child who is involved in an adult activity (e.g. driving a car) must meet the standard of care of a reasonable adult.** ***Ryan v Hickson* (1974)**

**C. The standard of care expected of PROFESSIONALS**

**Professional standard of care**

* Standard of a reasonable person with the same training, skills, knowledge and expertise.
* Courts have developed modified SoC for not only professionals but also most skilled trades & occupations.
* Only applies to negligence in the professional’s specific profession.

**1) White v Turner (1982), 12 DLR (3d) 319 (Ont CA) (D negligently performed breast-reduction surgery, failed to remove sufficient tissue)**

* **Standard of care in plastic surgery (specialized medical field):** that of a reasonable plastic surgeon who adheres to the established practices or customs of plastic surgery.
  + In medical negligence cases, the standard of care is **established practice and custom** determined largely by **expert testimony**.
  + If work **complies** w/custom, normally no liability imposed (even where less-than-satisfactory results)
* **What constitutes negligence by a professional?**
  + **Mere error in judgement** is not by itself negligence.
  + **Mere fact of a poor result** does not automatically mean negligence.
  + **Plaintiff must prove**, on a **balance of probabilities,** that the defendant plastic surgeon performed the procedure in a **substandard manner** (i.e., a reasonable person of the same profession would consider less than satisfactory, based on accepted practices), **leading to poor results.**
* **Decision**: The defendant surgeon was negligent in performing the breast reduction surgery. He failed to remove enough tissue because: 1) he did the operation too quickly (completed in half the time of a standard procedure); and 2) he began suturing before doing the customary check to ensure enough tissue was removed.

**2) Ter Neuzen v Korn (1995), 127 DLR (4th) 577 (SCC):** physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. **Standard of care of a general practitioner**: reasonable and competent general practitioner. This includes knowing limits & when to refer patients to a specialist. SEE BELOW (CUSTOM) FOR SUMMARY.

**3) Layden v Cope 1984 Alta QB**: GP in small rural town is held to the same standard as GP in a city. Same principle applies to lawyers. Big-city professionals may be more specialized, but rural practitioners, if they practice in the same field, are held to the same standard. GP should have considered other diagnoses when P’s condition (cellulitis, initially diagnosed & treated as gout --> amputation) did not improve & referred P to specialist much sooner.

**4) Vancouver General Hospital v Fraser Estatem [1952] 2 SCR 36:** interns are held to a lower standard of care than a general practitioner because they are not qualified to practice on their own. **Standard of care of an intern** = reasonably competent intern in the circumstances.

**5) Dale v Munthali 1978 CA:** By contrast, residents are fully qualified doctors, but seek further training in a speciality. **Standard of care of a junior resident** = standard of care of a general practitioner. **Standard of care of a senior resident** = standard of care of a resident with comparable training (< fully qualified specialist).

**6) Solomon:** An individual may be held to the professional’s standard of care if he implicitly or explicitly holds himself out to have the skills, training, or qualifications of a professional (e.g. immigration consultant performing functions of immigration lawyer; merely offering particular service, e.g., marriage counselling).

**7) Shakoor v Situ, [2000] 4 AII ER 181 (QB):** A person practicing in a secondary or related field (e.g. practitioner of traditional Chinese medicine) will not be held to the standard of care expected in the primary field (e.g. Western medicine). Same principle applies to midwives.

**8a) Requirement for expert evidence in a claim of medical negligence:** to prove that the defendant breached the standard of care, the plaintiff must lead expert evidence of a physician practicing in the same field as the defendant. This is especially true if the medical treatment is technical or complex, and beyond ordinary experience and common sense. **Branco v Sunnybrook & Women’s College Health Sciences Centre 2003 Ont SCJ**; **Kurdina v Gratzer (2010); Rowlands v Wright (2009)**

**8b) Absence of expert evidence on SoC NOT necessarily fatal to claim.** Can be decided based on ordinary knowledge of jury or judge. **Goodwin (Litigation Guardian of) v. Olupona, 2013 ONCA.**

**9) Perez v Galambos 2009 SCC:** Proving violations of a code of conduct may be relevant to determining duties owed in a professional relationship, but it is not sufficient to prove breach of the standard of care.

#### Degrees of negligence

\*Statutes occasionally restrict scope of liability to injuries inflicted as result of **gross negligence.**

**1) McCulloch v Murray, [1942] SCR 141: gross negligence** = a *very marked departure* from the standards by which responsible and competent people govern themselves. Requires reckless conduct (e.g. doctor operates on a patient while drunk; cab driver driving on LSD)

**Gross negligence is typically confined to two types of statutes:**

1. **Liability of municipality** **for personal injuries** caused by **snow** or **ice** on the **sidewalk** (e.g. *Municipal Act*, 2001, SO 2001, c 25, s 44): *municipality ONLY liable for personal injury in cases of gross negligence.*
2. **Liability of medical professionals** who provide medical assistance during **emergencies** (e.g. *Good Samaritan Act,* 2001, SO 2001, c 2, s 2): a person (professional or not) who renders emergency medical assistance at the scene of an accident is exempt from liability, unless they are grossly negligent.

\*Gross negligence in statutes also applies to police conduct (e.g. *Police Act*, RSBC 1996, c 367, s 21) & to trustees in bankruptcy & receivers in several sections of the *Environmental Protection Act*, RSO 1990, c E 19.

**Sudden Peril Doctrine**

* **Standard of care** = If the circumstances are an **emergency situation**, “sudden peril” doctrine applies: conduct that is normally considered careless is **exempted from liability** if, in the **context of an emergency**, it is **reasonable**.
* **Canadian Pacific Ltd. v Gill (1973), 37 DLR (3d) 229 (SCC):** reasonable people make reasonable mistakes under pressure.

#### Custom

**1) Ter Neuzen v Korn (1995), 127 DLR (4th) 577 (SCC) (Dr. screened semen donor following standard medical practice. P still contracted HIV from artificial insemination. Risk of HIV not widely known in NA at time.)**

* **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 to General Rule:** if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact (falls below SoC), then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice (=fraught with obvious risks).
* **Standard of care**: the conduct of physicians must be judged in the light of the knowledge that ought to be reasonably known at the time of the alleged act of negligence.
* ***Prima facie* acknowledgment that standard medical practice is reasonable**: In a sense, it is *assumed* that the medical profession as a whole has adopted procedures that are in the best interests of patients and are not inherently negligent. It is generally accepted that when a doctor acts in accordance with these procedures, he will not be found negligent.

### THIRD ELEMENT: CAUSATION

**Two issues related to CAUSATION:**

1. **What test of causation is applicable in this situation?** 
   1. Generally, the **“but-for” test**, subject to modifications and exceptions.
2. **Cause-in-fact Test: Based on the facts, can the PLAINTIFF prove on the balance of probabilities that the defendant’s breach of the standard of care was a cause of his or her loss?**
   1. Plaintiff does **not** need to prove that the D’s breach was the **sole, immediate, direct, or even the most important cause** of his loss. Must simply prove that D’s conduct was *a* cause. **Solomon**
   2. **Balance of probabilities**: More than a mere possibility. Must be “likely” or “probably”.
   3. Conduct must be necessary, not sufficient element. **Athey v Leonati**
   4. **If D can prove P’s injury would have occurred regardless** = NO causation. **Barnett v Chelsea; Matthews v MacLaren:** deceased died instantly upon falling in water. Negligent rescue did not *cause* death. Harm would have happened regardless.

**\*First establish what is the actual breach and what is the actual loss (be precise). Then ask ‘but-for’ question.**

**What is the plaintiff’s injury? Solomon** If P has >2 injuries, each must be analyzed separately in terms of causation.

* **“Divisible loss”** = can be attributed to the conduct of a *single* tortfeasor; narrowly defined.
* **“Indivisible loss”** = is attributable to the conduct of *multiple* tortfeasors.
* **E.g.** A shoots plaintiff in the arm, B shoots plaintiff in the leg, and plaintiff dies of blood loss caused by both bullet wounds. Each bullet wound is a divisible loss and death is an indivisible loss.

**Substantial Contribution Link**

* The defendant’s conduct may have “substantially contributed” to the accident to satisfy causation.
* This applies when there is uncertainty due to intervening events or multiple causes.

#### THE BUT-FOR TEST

**1) Kauffman v Toronto Transit Commission (1959) (Application of But-For Test. Evidence of causation required.)**

* **Facts**: P fell down escalator when passengers ahead of her tumbled down like dominoes.
* **Decision**: transit authority is not negligent in design of handrails because there is NO evidence that, had there been a handrail, the passengers or the plaintiff would have successfully grasped the handrail and not fallen. In other words, the handrail was faulty **(breach of the standard of care)**, but she would have fallen anyways **(no causation). P must prove that but for D’s negligence, harm would not have occurred.**
* **Law**: **“It is a fundamental principle that the causal relation between the alleged negligence and the injury must be made out by the evidence and not left to the conjecture of the jury.”**

**2) Barnett v Chelsea & Kensington Hospital Management Committee [1969] (Application of But-For. NO causation.)**

* **Where the loss would have occurred regardless of D’s negligence, causation is NOT made out.**
* **Facts**: P went to hospital and was sent home without being seen by a doctor. Turned out to have arsenic poisoning. Died a few hours later.
* **Decision**: doctor breached the SoC by dismissing the deceased’s complaints w/o performing an examination. HOWEVER, not negligent because the deceased would have died anyways: given the timeline and expert evidence, there was “no reasonable prospect” that the antidote would have been given in time to prevent death. Therefore, the defendant’s breach of the standard of care did not *cause* the plaintiff’ death.

**3) Richard v CNR (1970), 15 DLR (3d) 732 (PEISC)** **(P asleep in ferry, x shouted We’re here, drove off ferry b4 it docked.)**

* **Sole, direct, proximate and effective cause** of the accident was the plaintiff’s rash act of backing off the boat, contrary to warning signs and the crew’s attempts to stop him. Removal of rope was not cause of the plaintiff’s loss.

**4) Ediger v Johnston, 2013 SCC 18 (D Obstetrician performed failed mid-level forceps procedure b4 C-section. No backup staff. P suffered brain damage during birth, leading to spastic quadriplegia & cerebral palsy.)**

* **ADVERSE INFERENCE OF CAUSATION: P has the burden of proving causation on the BOP. This does NOT require scientific or medical certainty. Trier of fact may draw an inference of C even w/o positive or scientific proof if D does not lead sufficient evidence to the contrary. If D does adduce evidence, then in weighing that evidence, trier of fact may consider relative ability of each party to produce evidence. *NB*: Reaffirms *Snell’s* principle that adverse inference of C may be drawn against D where D’s negligence undermines P’s ability to prove causation.**
* **Issue on Appeal**: “Did the trial judge err by concluding that Dr. Johnston’s failure to arrange for ‘immediately available’ surgical back-up caused Cassidy’s injury?”
* **Law**:
  + **Legal test for causation**: Causation is assessed using the “but for” test. The plaintiff must show on a balance of probabilities that, “but for” the defendant’s negligent act, the injury would not have occurred.
  + **Causation is a factual inquiry**. Accordingly, the trial judge’s causation finding is reviewed for *palpable and overriding error*.
* **Application**:
  + **Standard of care** = before beginning mid-level forceps procedure, doctor must take reasonable precautions that would have been *responsive to the risk* of bradycardia & the injury that results if bradycardia exists for >10 mins. Because it is undisputed that D failed to take these precautions, which would have resulted in a faster delivery and likely prevented injury from bradycardia, **trial judge’s finding of causation is sound.**
  + **Ediger would likely have rejected forceps method in favour of C-section if properly informed of risks.**

**[5) Benhaim v. St-Germain, 2016 SCC 48 \*NOTE: NOT ASSIGNED. Cites *Snell* & *Ediger.* Clarifies adverse inference of C.**

* **Facts**: Husband died of lung cancer. X-Ray taken three years prior showed shadow (tumour) on lung.
* **Issue**: Whether a trier of fact is required to draw an adverse inference of causation against a defendant **where the defendant’s alleged negligence undermines the plaintiff’s ability to prove causation.**
* **Decision**: Yes, the trier of fact *may* draw an adverse inference of causation. As a finding of fact, an adverse inference of causation must be a “palpable and overriding error” in order to be overturned on appeal.
* **Law**
  + **Burden of proof**: The plaintiff in medical malpractice cases — as in any other civil negligence case — assumes the burden of proving causation on a balance of the probabilities. ***Ediger; Snell***
  + **Degree of certainty**: Causation need not be proven with scientific or medical certainty. Courts may draw inferences of causation based on common sense (***Ediger; Snell***). The trier of fact may draw an inference of causation even without “positive or scientific proof” *if the defendant does not lead sufficient evidence to the contrary.*
  + **Statistical evidence is not determinative because such generalizations are not proof of what actually happened in a given circumstance.**
* **Summary of adverse inference of causation:**
  + If defendant doctor’s conduct undermines the plaintiff’s ability to prove causation, then
  + Plaintiff must adduce some or very minimal evidence, and
  + There is *prima facie* causation and burden shifts to the defendant to disprove causation.]

#### ESTABLISHED EXCEPTIONS TO THE ‘BUT-FOR’ TEST

\*Each exception addresses a specific perceived unfairness that would result from applying the but-for test.

\*Courts may relax the but-for test when…

1. Impossible for P to prove causation at BUT-FOR level, even by inference from circumstances (due to complicated facts, unwilling witnesses, etc.)
2. Unfair for the plaintiff to not get compensation and unfair for defendant to not pay compensation.
3. Multiple Negligent Defendants Rule
   1. ***Cook v Lewis*, [1951] SCR 830 (P shot in face by 2 hunters, both negligent, impossible for P to prove on BOP which hunter shot him. If BUT-FOR applied, both would be absolved of liability. UNFAIR?)**
      1. **Burden of proving causation** **shifts from P to the defendants** if the P can prove that:
         1. Both defendants were negligent,
         2. One had to have caused his loss, and
         3. It was impossible to prove which defendant caused his loss.
      2. **Burden of proof then shifts to defendants**: each defendant is liable for negligence unless he can disprove causation on the balance of probabilities (prove the other D is guilty).
      3. *[Rule traditionally applied to cases involving only* ***two*** *negligent defendants.]*
   2. ***Clements v Clements*, 2012 SCC 32**: multiple negligent defendants rule is **not limited** to cases involving **only two** negligent defendants. Could be more than 2.
4. The Learned Intermediary Rule
   1. ***Hollis v Dow Corning Corp.*, [1995] 4 SCR 634 (See Manufacturer’s Duty to warn for full summary)**
      1. It is **impossible** **for P to prove** that Dr. Birch would have informed her of the risk of non-traumatic rupture *had he been informed* by Dow (manufacturer). Therefore, Dow **cannot** rely on the **learned intermediary rule** to shield itself from claims arising from its own negligence.
      2. **Cases involving the learned intermediary are exempted from the but-for test. Manufacturer liable for injuries.**
5. Informed Consent
   1. ***Hopp v Lepp*, [1980] 2 SCR 192** and ***Reibl v Hughes*, [1980] 2 SCR 880**
      1. **Objective/subjective test of causation**: would a reasonable person *in the plaintiff’s position* have consented if he or she had been adequately informed?
         1. Majority of informed consent cases fail on this pro-defendant test of causation.
      2. **Health-care professionals have a duty to put patients in a position to make informed decisions about whether to consent to proposed treatment.**
   2. ***Arndt v Smith*, [1997] 2 SCR 539**
      1. **Upheld objective/subjective test because a purely subjective test (i.e., the standard test) would:** 1) require the court to hypothesize about how the patient would have reacted if properly informed, 2) result in the patient’s testimony being coloured by hindsight and bitterness, and 3) leave the causation issue to be determined solely on the patient’s testimony as to how he or she would have acted if properly informed.

#### 3 RECENT ATTEMPTS TO MODIFY THE BUT-FOR TEST

#### (A) MATERIALLY INCREASED RISK OF INJURY TEST

***\*Solomon:*** Scientific advances have made it possible to establish that events (e.g., exposures to substances) increase risk of injury or disability. Under the traditional but-for test, increased risk must be such as to make it more probable than not that D’s act was cause of P’s loss.

\*Established in ***Snell v Farrell****.* Clarified in ***Clements v Clements.***

**1) Snell v Farrell, [1990] 2 SCR 311 (pg. 604-607) (SCC analysis of inferring negligence/causation; adopted in Benhaim)**

* **Facts**: Dr. F performed cataract surgery on Snell. Bleeding occurred. The optic nerve was damaged, leading to blindness. Damage to the optic nerve could have occurred naturally or been the result of negligently continuing the operation. D argued that P failed to prove causation; plaintiff argued he was unable to prove causation because he was on the operating table and incapacitated at the time.
* **Two general principles in a civil case:**

1) Onus is on the party who asserts a proposition (usually P).

2) Where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

* **In medical malpractice cases, it is often difficult for the patient to prove causation, & Dr. is usually in a better position to know the cause of the injury.** 
  + **In these circumstances, very little affirmative evidence on part of the P will justify the drawing of an inference of causation in the absence of evidence to the contrary by the D.**
  + **Legal or ultimate burden remains with P, but in absence of evidence to the contrary adduced by D, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to contrary adduced by D, the trial judge may consider relative ability of each party to produce evidence.**
  + **The Court must take a “robust and pragmatic” approach to the facts in causation cases to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion (positive medical opinion supporting causation not essential).**
* **Other important points from case regarding causation:**
  + **Causation need not be determined by scientific precision. May rely on common sense.**
  + **There must be a substantial connection between the P’s injury and the D’s conduct.**
  + **Decision:** SCC found doctor negligent for continuing the operation, which increased risk of injury, and held that trial judge was correct in inferring causation & found doctor negligent since the doctor was in the best position to observe the bleeding and was able to interpret what he saw from a medical standpoint. By continuing the operation he made it impossible for anyone else to detect the bleeding which cause the injury. There was no evidence to rebut this inference.

**1a) Background for *Snell: McGhee v National Coal Board*, [1972] 3 AII ER 1008 (HL)**

* **Lord Reid**: if a defendant’s negligence materially increases the **risk** of a particular kind of injury occurring (even if unable to prove more likely than not to have been **cause**) and that very injury befalls the plaintiff, then the defendant will be deemed to be a cause.  *In contrast….*
* **Lord Wilberforce**: in such circumstances, the **burden of proving causation** should shift from the P to the D, who must then disprove causation on a BOP. 🡨 Most often applied in Canada.

#### (B) MATERIAL CONTRIBUTION TO INJURY TEST

\*Not clear how it differs from BUT-FOR test (don’t use this test); somewhat clarified in ***Clements v Clements***

***1) Athey v Leonati*, [1996] 3 SCR 458** – *introduced* material contribution to injury test.

***2) Walker Estate v York Finch General Hospital*, [2001] 1 SCR 647** – *applied* material contribution to injury test.

***3) Hanke v Resurfice Corp.*, [2007] 1 SCR 333**

* **But-for test** is the standard causation test for cases involving either a **single cause** or **multiple causes.**
* **Rationale for material contribution test:** unfair in context to deny P’s claim pursuant to the but-for test.
* **Material contribution test** only applies when two criteria are met:
* 1) The plaintiff must establish that it is impossible to prove causation based on the but-for test and that this impossibility results from factors beyond the plaintiff’s control (e.g. limits of scientific knowledge)
* 2) The plaintiff must establish that the defendant **breached the standard of care** and that his or her injuries fell within the **scope of the risk** created by the defendant’s breach.

#### (\*) MATERIAL CONTRIBUTION TO THE RISK OF INJURY TEST

\*Used where “But-For” and Multiple Negligent Defendants Rule BOTH fail. I.e., where caus. can’t be proven against any of the negl. defendants.

**1) Clements v Clements, 2012 SCC 32 \*\*\*(Summary of law of causation: But-For test remains standard test.)**

* **Material contribution to risk test** imposes liability, not because the defendant’s act caused the injury, but because the act contributed to the risk that injury would occur. Eliminates proof of factual causation; justified only where it is required by fairness & conforms to principles grounding recovery in tort. NEVER applied by SCC.
  + - **Should VERY rarely used to ensure fundamental principles of causation are not undermined.**
* **Summary**:
  1. As a general rule, P must show that, but for the negligent act of the D, she would not have suffered a loss. A trial judge must take a “**robust and pragmatic approach**” to determining if a P has established that D’s negligence caused her loss. **Scientific proof of causation is not required**; common sense inferences will suffice.
  2. **Exceptionally**, a plaintiff may satisfy causation by proving that the defendant’s conduct **materially contributed to the risk of injury** where **(a)** the plaintiff has established that her injury would not have occurred but for the negligence of two or more tortfeasors, each possibly in fact responsible for the loss, and **(b)** it is impossible for the plaintiff, through no fault of her own, to show that any one of the possible tortfeasors was the necessary or ‘but-for’ cause, because each can point his finger at the other, precluding a finding of causation on a balance of probabilities against anyone.
     1. **Meets underlying goals of negligence law:** 1) Compensation for injury is achieved. 2) Fairness is satisfied: P has suffered loss due to negligence. Fair to turn to tort for compensation. 3) Each D failed to act with care necessary to avoid *potentially* causing P’s loss. 4) Deterrence is furthered: potential tortfeasors know cannot avoid liability by pointing fingers. 5) Consistent w/corrective justice: deficit existing in relationship btwn P & Ds collectively if recovery denied is corrected.
  3. **[Usual case of multiple tortfeasors, P can prove injury caused by 1 D in particular (But-For test applied): Degrees of fault** are reflected in the calculation of **contributory negligence.]**

#### (C) PROPORTIONATE CAUSE AND LOSS OF CHANCE TEST

* **Proportionate cause**: e.g. 30% chance D’s negligence was a cause of loss occurring prior to trial = P recovers 30% damage awards. This approach has NOT been adopted in Canada.
* **Loss of chance**: if the plaintiff can prove, on a balance of probabilities, that there is a **substantial or reasonable possibility** that the defendant’s negligence will cause a **future loss**, the plaintiff can **recover** for a **percentage of that loss** (based on likelihood of occurrence & anticipated cost): ***Janiak v Ippolito,* [1985] 1 SCR 146.** 
  + E.g., 40% chance D’s negligence will cause P to go blind, which would result in $100,000 damages. P would be awarded $40,000 for this possibility.

#### MULTIPLE CAUSES

* A) Are the injuries **divisible** or **indivisible**?
  + **1) Divisible**: injuries can be divided into distinct losses that are attributable to the conduct of a single tortfeasor.
    - **Separate causes of action**: each defendant is only liable for the injury he causes.
    - Apply the **but-for test**, subject to relevant modification.
  + **2) Indivisible**: a) independent insufficient causes (**but-for** test still applies) vs. b) independent sufficient causes
* B) Is the tortfeasor acting **independently** or **jointly?** *Answer this b4 analysing other elements of cause of action!*
  + **Independent tortfeasor** = only liable for injuries that he causes.
  + 2+ defendants and contribution to harm was significant: all defendants are jointly and severally liable to the plaintiff for the whole harm (Athey para 34; BC Negligence Act s. 4(2))
  + **Joint tortfeasor** = liable for injuries caused by fellow joint tortfeasors (P only needs to prove 1 was negligent).

**Cook v Lewis, [1951] SCR 830**: **Categories of joint tortfeasors:**

* + - 1. Principal-agent relationship (agent commits tort)
      2. Master-servant relationship (employee commits tort)
      3. Concerted actions or joint ventures (2+ individuals acting in concert to bring about a common end that is illegal, dangerous, or one in which negligence can be anticipated)

#### (A) INDEPENDENT INSUFFICIENT CAUSES (INDIVISIBLE HARM)

\*Several factors, each necessary (loss could not have occurred w/o), combine to cause P’s loss. No factor individually sufficient.

**1) *Athey v Leonati*, [1996] 3 SCR 458 (P had pre-existing back condition -> car crashes negligently caused by Ds -> exercise program -> disk herniation=single indivisible injury)**

* **Causation**: defendant’s act does not have to be the *sole* cause of the injury, just necessary *part* of the cause (need not be sufficient). NO basis for reduction of liability b/c of existing preconditions. In this case, it was 25% = **material contribution** to injury (**beyond *de minimis* range**) = 100% liable for disk herniation.
* **Thin skull vs. crumbling skull doctrines**
  + **Thin skull rule** = tortfeasor is liable for the full extent of the plaintiff’s injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. Tortfeasor takes victims as he finds him.
  + **Crumbling skull rule** = recognition that pre-existing condition was inherent in plaintiff’s original position. The defendant must compensate the plaintiff to return him to his *original* position, not a *better* position. This means the defendant is liable for the *additional* damage, but not the debilitating effects of a pre-existing condition that the plaintiff would have suffered anyway.
    - Taken into account in reducing overall award of damages (if precondition would have detrimentally affected P in future regardless of D’s negligence)
    - E.g., if breach caused P’s skull to crumble 2 yrs earlier than expected, liability limited to that period.
* **Summary:**
  + If disk herniation would likely have occurred at the same time w/o accident 🡪 NO causation, because “but for the accident”, disk herniation would still have occurred.
  + If accident and pre-existing back condition were both *necessary* causes for disk herniation 🡪 YES causation because accident was a necessary contributing cause (even if minor role).
  + If accident and pre-existing back condition were both *sufficient* causes 🡪 UNCLEAR: judge must determine on a BOP whether D’s negligent act **materially contributed** to disk herniation.

#### Joint and several liabilities

* Each defendant is fully (**jointly & severally**) liable to the plaintiff. Each may pay a portion of the compensation based on degree of fault, or plaintiff can recover 100% from a single defendant (can’t recover >100%).
* E.g. defendant 1 = 20%, defendant 2 = 50%, defendant 3 = 30%
  + If defendants 1 and 2 skip town (disappear), plaintiff can claim 100% from defendant 3. D3 then has to claim 70% from defendants 1 and 2.

### FOURTH ELEMENT: REMOTENESS OF DAMAGE

**Remoteness vs. causation:**

* **Causation** = *factual* connection between D’s breach and P’s loss (aka “factual causation”)
* **Remoteness** = *legal* connection between D’s breach and P’s loss (aka “legal causation”) = for judge to decide
  + **Remoteness**: controls scope of liability for practical policy reasons; a rule of fairness; strikes balance btwn desirability of holding D responsible for loss he carelessly inflicted on P & desirability of relieving D of unreasonable burden.

#### TEST FOR REMOTENESS: Directness vs. Foreseeability

1. **THE DIRECTNESS TEST (OLD)**

**1) Re Polemis and Furness, Withy & Co.,[1921] 3 KB 560 [\*\*NO LONGER GOOD LAW IN CANADA]**

* **P’s loss would not be too remote to be recoverable if it was a direct result of D’s carelessness**. Must be a logically connected sequence of events with **no intervening causes.**
* **Directness** = close temporal and special connection between D’s breach and P’s loss.

1. **THE FORESEEABILITY TEST (CURRENT)**

**1) The Wagon Mound (No. 1); Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co., [1961] (D not liable)**

* **Test**: “whether the damage is of such a kind as the reasonable man should have foreseen”.
* **Overturns** **Re Polemis**: the proper limitation on remoteness is **reasonable foreseeability**, not directness; a person should be held responsible for the natural, necessary, or probable consequences of their actions *because* they ought to have **foreseen** them.
* **What must be foreseen and what degree of foreseeability is required?** 
  + 1) **Chain of events** from negligent act to harm must be foreseeable.
  + 2) **Kind of harm** must be foreseeable.
  + 3) **Probable consequences**: a man must be held responsible for the **probable** consequences of his act. If it is foreseeable that the consequences will ***likely*** result, then the consequences are not too remote.

**Foreseeability** arises regarding duty of care, standard of care, and remoteness, but in progressively **declining** degrees from the **general to the particular**… ***Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastien Pty. Ltd* (1983)**

* **Duty of care (proximity):** it is reasonably foreseeable that carelessness of *any kind* may result in damage of *some kind* to the plaintiff’s person or property.
* **Standard of care:** it is reasonably foreseeable that carelessness of *the kind charged against the defendant* may result in damage of *some kind* to the plaintiff’s person or property.
* **Remoteness**: *the kind* of damage suffered by the plaintiff was a foreseeable outcome of *the kind* of carelessness charged against the defendant.

#### MODIFICATIONS TO THE FORESEEABILITY TEST

1. **THE KIND OF INJURY**

**1) Hughes v Lord Advocate, [1963] AC 837 (HL) (D left paraffin lamp & open manhole unattended. Boy knocked lamp into manhole. Vapour escaped broken lamp. Caused explosion. Boy fell into manhole. Badly burned.)**

* **The** **exact sequence of events leading to the injury need not be foreseeable so long as the kind of injury is foreseeable.** Also, the **extent of injury need not be foreseeable** so long as the kind of injury is foreseeable.
* **Foreseeability**: The *cause* of the accident was a *known* source of danger, the paraffin lamp, but it behaved in an *unpredictable* way. However, this is NO defence. The explosion is immaterial in the chain of causation: “it was simply one way in which burning might be caused by the potentially dangerous paraffin lamp”.

1. **THE THIN-SKULL PLAINTIFF RULE**
2. Must a defendant compensate a victim who **suffers more** from the injury due to a **peculiar vulnerability**? **Yes.**
3. Must the consequential **injury** be foreseeable? **No.**

**1) Smith v Leech Brain & Co., [1962] 2 QB 405 (P had pre-malignant lip condition. P burned lip at work. Developed cancer & died. D employer liable in negligence.)**

* **Thin skull rule:** a tortfeasor takes his victims as he finds them. While the *type* of injury must be reasonably foreseeable (e.g., the burn), the *extent* of harm (e.g., developing cancer & dying), which depends on the victim’s characteristics & constitution, need not be.

**2) Marconato v Franklin, [1974] 6 WWR 676 (BCSC) (P was injured in minor car accident. Triggered a major personality change. Pre-existing paranoid tendencies.)**

* **Thin skull rule can apply to pre-existing personality traits** (as well as pre-existing physical traits).
  + 1) Plaintiff had a **peculiar vulnerability to suffer greater consequences** from a **moderate physical injury** than the average person.
  + 2) Physical injury was **reasonably foreseeable** to the defendant.
  + 3) Plaintiff’s predisposition brought about the **unusual and involuntary consequences** of the injury.
  + 4) Defendant is **fully liable** for **all** the consequences of the injury.

1. **THE POSSIBILITY OF INJURY**

**1) The Wagon Mound (No. 2), [1967] (Wagon Mound #1 fire formed basis of claim. Qualified by *Mustapha*)**

* **A person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real and substantial risk (i.e., a risk that a reasonable man, in the D’s position, would contemplate as not far-fetched)** and not a *mere possibility* (opposed to real possibility) which would never influence the mind of a reasonable person**. If eliminating risk is not difficult, disadvantageous, or expensive:** reasonable man would have no valid reason not to take steps to avoid risk (even if chance of loss occurring was very small).
* **Test of foreseeability** does not depend on chance on actual **risk of occurrence**; rather – whether harm was **reasonably foreseeable** (not merely foreseeable)

**2) Assiniboine South School Division, No. 3 v Greater Winnipeg Gas Co., (1971) (SCC) (Child drove automatic toboggan into a school, struck gas pipe (not protected), pilot light exploded. Qualified by *Mustapha.*)**

* **Liability** depends upon whether the **damage** is of such a ***kind*** as a reasonable man should have **foreseen**.
* **Test for foreseeability of damage** = what is *possible*,not what is *probable*. DON’T USE!
* **Extent of the damage** and its **manner of incidence** need not be foreseeable if **physical damage of the kind** which in fact ensues is **foreseeable**. Recovery may be had if **event** [e.g., furnace oil igniting on water] giving rise to damage is not “**impossible**.”
* **Decision**: the resulting **damage** was of the **kind** that any reasonable person might **foresee**.
* **Child**: Even though he was not the *sole* cause of damage, he was *a* cause, and is therefore liable.
* **Greater Winnipeg Gas Company**: The D must weigh the probability of injury resulting and the probable seriousness of the injury against the cost and difficulty of taking precautions. The duty to take protective measures increases in proportion to the risk. The Gas Company is liable for failing to exercise reasonable care.

**3) Mustapha v Culligan of Canada Ltd., [2008] 2 SCR 114 (P sues for NIPH caused by dead flies in H2O. D = not liable.)**

* The degree of probability required to establish reasonable foreseeability is a **“real risk” (Wagon Mound No. 2, not Assiniboine South School Division)**
  + **Real risk** = a risk that would occur to the mind of a reasonable man in the position of the defendant and which he would not brush aside as farfetched.
* **Reasonable foreseeability must be a real (i.e., strong) possibility (closer to probable)**
  + Follows **Hughes** and focuses on real risk of the *kind* of harm.
* **Remoteness also depends on whether P is considered objectively or subjectively:**
  + **Person of *ordinary fortitude* standard:** “the law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals”
    - Unusual or extreme reactions to events caused by negligence are imaginable but NOT reasonably foreseeable.
  + **Exception**: if the defendant had *actual knowledge* of the plaintiff’s particular sensibilities (< ordinary fortitude), then the plaintiff’s injury may have been reasonably foreseeable to the defendant.
* **Application of ordinary fortitude test:**
  + 1) **P must prove:** reasonably foreseeable that a person of ordinary fortitude would suffer mental injury.
  + 2) **Compensation**: D takes the P as he finds him for purposes of damages.
* **Decision**: not reasonably foreseeable that person of ordinary fortitude would suffer injury from seeing fly in h20.

#### REMOTENESS OF DAMAGE: INTERVENING CAUSES

\*Intervening act: causes P’s loss after original D’s breach has taken effect. ‘Within the Scope of the Risk’ Test applies! (Bradford v Kanellos).

***\*Novus actus interveniens -*** “new intervening act.” D will not be held liable where intervening act broke causal connection between D’s negligence & harm caused to P. \***Last wrongdoer doctrine** has been rejected.

**Three categories of intervening acts (\*\*since replaced by “within the scope of the risk” test): Solomon**

1. **Intervening acts that are naturally occurring or non-culpable**
   1. **Result**: generally do not break the chain of causation
   2. E.g. shoddy construction 🡪 storm 🡪 building collapses = liability
2. **Negligent intervening acts** 
   1. **Result**: generally break the chain of causation
   2. E.g. careless driver injures pedestrian 🡪 hospital administers wrong treatment 🡪 patient dies = no liability
3. **Deliberately wrongful or illegal acts**
   1. **Result**: break the chain of causation unless the original tortfeasor had a duty to prevent the act
   2. E.g. careless driver injures pedestrian 🡪 thief robs pedestrian while lying on the side of the road = no liability
   3. E.g. guard carelessly left car unlocked 🡪 thief steals contents = liability

**1) Bradford v Kanellos (1973), 40 DLR (3d) 578 (SCC) (Fire in restaurant. Fire suppressant made hissing sound. X thought gas escaping & screamed GAS! THERE’S GOING TO BE AN EXPLOSION. Stampede ensued. P injured.)**

* **Type of claim** = personal injury.
* **Issue**: Did the intervening act break the chain of causation?
  + **Negligent act** = restaurant’s failure to clean the greasy grill, causing the fire.
  + **Intervening act** = cry of “gas!” which provoked the stampede.
* **Within the scope of the Risk Test:** whether the *loss* caused by the intervening act was *within the scope of risk* created by the *original* tortfeasor or whether the *intervening act* itself was *within the scope of risk* created by the *original* tortfeasor. IF SO, chain of causation is NOT broken, so injury is NOT too remote.
  + **No**, the cry of “gas!” and the resulting stampede was **not** **within the scope of the risk** created by the **failure to clean the greasy grill.** The **fire suppressant** worked effectively, and the **subsequent intervening act**, which was the direct cause of the woman’s injuries, was **not reasonably foreseeable.**

**2) Price v Milawski (1977), 82 DLR (3d) 130 (Ont. CA) (P broke ankle playing soccer. Req. x-ray. Dr. #1 x-rayed foot, not ankle. Dr. #2 relied on faulty x-ray & did not perform another test. P suffered permanent disability & req. surgery.)**

* **Type of claim** = Personal injury.
* **Issue**: Did the intervening act break the chain of causation?
  + **Negligent act** = doctor #1 x-rayed wrong part of the body.
  + **Intervening act** = doctor #2 did not perform new x-ray and instead relied on initial bad x-ray.
* **Test**: when there are two negligent acts by two defendants in succession, the first negligent defendant may be liable for future damages arising from his own negligent act + subsequent negligent act, where the subsequent negligent act and consequent damage were reasonably foreseeable as a result of his own negligence.
* **Decision:** intervening act & ensuing damage were reasonably foreseeable b/c X-rays and other hospital records may be reasonably relied upon by future doctors in making diagnosis. Both drs. found jointly & severally liable.

**3a) Hewson v Red Deer (1976), 63 DLR (3d) 168 (Alta. TD) (3rd party reversed unattended bulldozer-keys left in ignition & cab unlocked-into a house) Note**: trial decision was reversed on appeal, so don’t cite trial decision!

* ***Novus actus interveniens* is unavailable when the D fails to guard against the very thing that is likely to occur.**
* **Issue**: Did the intervening act break the chain of causation?
  + **Negligent act** = left the truck unattended with keys in the ignition.
  + **Intervening act** = deliberate wrongful or illegal act
* **Trial judgement:** it was reasonably foreseeable that anyone in the vicinity could be tempted to put the unattended bulldozer in motion. Therefore, the intervening act was reasonably foreseeable. The operator failed to take basic precautions to guard against the thing that was likely to occur, and indeed did occur. *Novus actus interveniens* NOT applicable.

**3b) Hewson v Red Deer (1977), 146 DLR (3d) 32 (Alta. SCAD)** 🡨 **reversed** trial decision above!

* **Appeal judgement**: reversed trial decision because there was no evidence supporting the conclusion that the bulldozer being put in motion was reasonably foreseeable. No effective steps could be taken to prevent third parties from tampering w/the machine if they were of a mind to do so.
* *Deliberate* intervening act broke the chain of causation (*novus actus interveniens*). The D was not liable.

### DEFENCES IN NEGLIGENCE

\*(Tactical) burden of proof shifts to the DEFENDANT (BOP). Depends on the strength & nature of P’s case. Can rely on more than 1 defence.

\*Types of Defences (besides arguing P did not establish elements of negligence): 1) Contributory negligence; 2) Voluntary assumption of risk; 3) Illegality (*ex turpi causa*); & 4) Inevitable accident. \*Defences reduce or deny damages. Solomon

#### (1) CONTRIBUTORY NEGLIGENCE

\*On BOP, P failed to take rsnble care, & this lack of care contributed to P’s injury. **Effect:** reduction of damages. Most relied on defence.

\***Historically:** CN was a complete defence (all-or-nothing) that prejudiced the P. **Last clear chance** **rule** was introduced to help P (but still all-or-nothing). Abolished w/*Negligence Act.* **Legislation** now allows for the **apportionment of loss** according to **relative fault** of each party. **Solomon**

**\*CN typically capped at 25%.**

#### (A) CONDUCT CONSTITUTING CONTRIBUTORY NEGLIGENCE

\***3 Main Areas:** 1) P may carelessly enter into a dangerous situation (e.g., sober passenger negligently accepting ride from drunk driver who later crashes into a wall. 2) P carelessly contributes to the creation of the accident (e.g., passenger engaging driver in horseplay that results in accident). 3) P fails to take reasonable precautions that would minimize resulting harm (e.g., failing to wear seatbelt & suffering additional injuries). **Solomon**

**1) Walls v Mussens Ltd. (1969), 11 DLR (3d) 245 (NBCA) (D negligently caused fire at service station while operating propane gas torch. P assisted others in shovelling snow onto gasoline-fuelled fire & failed to use fire extinguisher. Snow may have aggravated fire.)**

* **The “Agony of the Moment” Rule:** may be invoked as answer to allegations of CN
  + When the P encounters a sudden emergency, NOT created by his own antecedent negligence, the degree of judgment & presence of mind expected is what would be **reasonable conduct in the emergency situation** (not what would have been reasonable in light of hind-knowledge & in calmer atmosphere), and he will not be found contributorily negligent for taking the wrong course of action.
  + **Test**: whether what P did was something an ordinarily prudent man might reasonably have done under the stress of the emergency (not whether P exercised careful & prudent judgment).
* **Decision**: P not contributorily negligent. No portion of responsibility for starting fire can be attributed to P. No antecedent negligence. Emergency created solely by D’s negligence. Agony of the Moment Rule applies.

**2) The standard of care in CN depends on the age, disabilities, and professional training of the plaintiff.**

**2a) *Myers v Peel County Board of Education*, [1981] 2 SCR 21:** A child is required to meet the standard of care of a reasonable child of like age, intelligence, and experience.

**2b) *Marshall (Litigation Guardian of) v Annapolis County District School Board,* 2009 NSSC 378, aff’d 2012 SCC 27:**

A four-year-old child cannot be found contributorily negligent.

**3) Contributory negligence turns on the specific facts of the case: Wells v Parsons (1970)**

**4) Gagnon v Beaulieu, [1977] 1 WWR 702 (BCSC) (D liable for car accident. P passenger failed to wear seatbelt b/c did not believe in their safety & efficacy. P sustained injuries consistent w/being thrown into dashboard/windshield.)**

* **Law re: Seatbelts and Contributory Negligence: (extends to failure to use other safety equipment)**
  + (a) If seatbelts are provided in a vehicle, failure to wear a seatbelt constitutes failure to take a step which a person knows or ought to know to be reasonably necessary to ensure his safety.
    - **Objective standard**: P’s personal beliefs about effectiveness of seatbelts are *irrelevant*.
  + (b) If the plaintiff is injured in a car accident, and the evidence shows that had the seatbelt been worn the injuries would have been prevented or less severe, then failure to wear a seatbelt constitutes negligence which has contributed to the nature and extent of the injuries.
  + (c) **Burden of proof:** the D must prove, on a BOP, that (1) the seat belt was not worn, and (2) the injuries would have been prevented or lessened had the seatbelt been worn.
    - **NB:** Courts should **not** find (2) merely as an inference to be drawn from (1).
    - **(2) Requires expert evidence**
* **CN More Generally:** A person who does not exercise all reasonable precautions as a person of ordinary prudence would observe, in accordance with prevailing safety standards, is contributorily negligent.
* **Decision**: P is contributorily negligent. By failing to wear seatbelt, P contributed to nature & extent of injuries. P had opportunity to consider safety benefits of wearing seatbelt & consciously chose not to (not emergency).

**\*NB:** Legislation now requires the use of seatbelts while riding in a motor vehicle. BC: s 220(4) of the *Motor Vehicle Act*. Section 220(6) also makes drivers responsible for having passengers btwn 6 & 16 wear seatbelts.

* *Motor Vehicle Act*, RSBC 1996, c 318, s 220(4): A person in a motor vehicle being driven or operated on a highway must, if the motor vehicle has properly attached to it a seat belt assembly for the seating position occupied by that person, wear the complete seat belt assembly in a properly adjusted and securely fastened manner.

#### (B) APPORTIONMENT OF LOSS

**1) Mortimer v Cameron (1994), 17 OR (3d) 1 (CA) (P & D engaged in friendly horseplay. Crashed through poorly constructed wall & fell 10 ft. to ground below. P severely injured: became quadriplegic. Trial judge apportioned liability between the City (80%) and Stingray, the landlord (20%)).**

* **Remoteness:** D’s negligence is actionable only with respect to the harm that is *within the scope of the risk* that makes the offending conduct actionable**. Contributory Negligence: Similarly, P’s CN will *not* limit his recovery *unless* it is a proximate cause of his injury.**
* **Decision**: Neither D’s negligence nor P’s CN entailed an unreasonable or foreseeable likelihood of the risk or hazard that actually occurred. Risk of crashing through a defectively constructed and unprotected wall was beyond the reasonable contemplation of the parties.
* **Apportionment of Liability: (Joint tortfeasors: one w/more proximate cause will have >liability)**
  + Stingray had a statutory DoC to ensure the safety of the premises: an “**ongoing duty**” to properly inspect the premises. It breached the SoC by (1) failing to conduct a reasonable inspection, and thus failing to detect the unsafe condition, and (2) failing to obtain the required permit, which resulted in the continuation of the hazardous condition. Though City was negligent, Stingray should bear significantly more responsibility.
  + This is a rare case where a CA reapportions liability to reflect degree of fault: City (40%); Stingray (60%).
  + **Apportionment of Loss:** A party who breaches an ongoing duty is more liable than a party breaching an intermittent or one-time duty. Where there are multiple liable parties, the party with **more proximate cause** will have a **larger apportionment of liability**.

**2) Negligence Act, RSBC 1996, c 333**

* Abolished *Last Clear Chance* doctrine in BC. CN=no longer a complete defence. *Negligence Act* sets out rules for apportioning loss. Loss is apportioned based on degree of fault (i.e., degree to which each party breached SoC), not causation: s 1(1). If not possible to establish different degrees of fault, liability is apportioned equally: s 1(2).

**Apportionment of liability for damages**

**1**  (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

**Awarding of damages**

**2**  The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

(a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;

(b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

(d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

**Apportionment of liability for costs**

**3**  (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

(2) Section 2 applies to the awarding of costs under this section.

(3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly.

**Liability and right of contribution**

**4**  (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

**Negligence of spouse in cause of action that arose before April 17, 1985**

**5**  (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable for the portion of loss or damage caused by the fault or negligence of that spouse.

(2) The portion of the loss or damage caused by the fault or negligence of the spouse referred to in subsection (1) must be determined although that spouse is not a party to the action.

(3) This section applies only if the cause of action arose before April 17, 1985.

**Questions of fact**

**6**  In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

**Actions against personal representatives**

**7**  (1) If a person dies who, because of this Act, would have been liable for damages or costs had the person continued to live, an action or third party proceedings that, because of this Act, could have been brought or maintained against the person who has died may be brought and maintained or, if pending, may be continued against the personal representative of the deceased person.

(2) The damages and costs recovered under subsection (1) are payable out of the estate of the deceased person in similar order of administration as the simple contract debts of the deceased person.

(3) If there is no personal representative of the deceased person appointed in British Columbia within 3 months after the person's death, the court, on the application of a party intending to bring or continue an action or third party proceedings under this section, and on the notice to other parties, either specially or generally by public advertisement, as the court may direct, may appoint a representative of the estate of the deceased person for all purposes of the intended or pending action or proceedings and to act as defendant in them.

(4) The action or proceedings brought or continued against the representative appointed under subsection (3) and all proceedings in them bind the estate of the deceased person in all respects as if a duly constituted personal representative of the deceased person were a party to the action.

(5) An action or third party proceeding must not be brought against a personal representative under subsection (1), or against a representative of the estate appointed under subsection (3), after the time otherwise limited for bringing the action.

**Further application**

**8**  This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

#### (2) VOLUNTARY ASSUMPTION OF RISK

\**Volenti non fit injuria*: “to one who is willing, no harm is done.” NOT possible to consent to serious harm. Narrow application w/very high bar. Tends to be limited to cases involving participation in sports (even then narrow). **Effect:** complete defence!

\*Consent relates to what is *reasonably expected* while engaging in an activity (e.g., if you play hockey, you expect to be checked, not sucker punched). Consent may be exceeded. *Volenti* does not apply if other party intends to harm.

**1) Dube v Labar (1986), 27 DLR (4th) 653 (SCC) (D crashed P’s car, both drunk, P injured. D raised *volenti non fit injuria*.)**

* **Defence of *volenti non fit injuria*:**
  + **Burden of proof** is on the **D** to prove that P consented, expressly or by necessary implication, to exempt D from liability for any damage suffered by P, occasioned by D’s negligence. P’s mere knowledge of the risk is insufficient, must have intentionally incurred the whole risk.
  + **Questions**: (1) Was P **aware** (virtually certain) of the **risk** of harm, **and** (2) did P genuinely **consent** to accept or assume the **whole risk without compensation** and to **absolve D** of his **duty of care**?
  + **Test**:
    - (1) P consented to ***physical* risk**: must clearly consent to clear physical risk of the activity.
    - (2) P consented to ***legal* risk** of the activity: must clearly give up right to sue D if any harm occurs.
  + **Narrow application:**
    - **Rarely** will a plaintiff **genuinely consent** to **accept the risk** of the defendant’s negligence.
    - Defence is **inapplicable** in the great **majority** of **drunken-driver-willing-passenger cases** because it requires an awareness of the circumstances and the consequences of action that are rarely present at the relevant time.
* **Decision**: Defence applies. The jury concluded that the P agreed to bear the legal risk when he entered the car as a passenger, knowing the driver was drunk, and while the appeal court would have reached a different conclusion, the decision was not unreasonable enough for the appeal court to overrule.

**2) Crocker v Sundance Northwest Resorts Ltd. (1988), 51 DLR (4th) 321 (SCC)** the defence of voluntary assumption of risk was rejected even though the tubing event was known to be dangerous and the plaintiff signed a waiver. Intoxication may inhibit P’s ability to assume legal risks involved in participating in an inherently dangerous activity.

#### (3) ILLEGALITY: (Plaintiff’s) PARTICIPATION IN A CRIMINAL OR ~~IMMORAL~~ ACT

\**Ex turpi causa non oritur action:* “From dishonourable conduct, no action will lie.” Narrow interpretation & rare application. Immoral has been eliminated. **Effect:** complete defence if cause of action arose from P’s transgression of the law! **Onus on the D: Hall v Hebert.**

**1) Hall v Hebert (1993), 101 DLR (4th) 129 (SCC) (P & D were drunk. D allowed P to drive his car. P attempted rolling start. Car flipped & injured P. P sued D for allowing him to drive drunk. D invokes the defence of *ex turpi causa.*)**

* **Doctrine should only be invoked if its use is necessary to maintain the internal consistency of the law** (e.g., between criminal & civil law)**. I.e., defence would only apply if P was trying to profit from his illegal conduct or escape from some criminal sanction (use compensation to pay fine).**
* **Issue**: Should *ex turpi causa* apply as a defence, or should it factor into the duty of care analysis (i.e. to negate a duty of care pursuant to 2nd branch of *Anns* test)?
* **Decision**: *ex turpi causa* is better viewed as a **defence** to a tort claim that is otherwise made out.
  + **Duty of care** is predicated on foreseeable consequences of harm and is **owed to all persons who may be reasonably injured by negligent conduct**, not just those with clean hands.
  + **Legality or morality of P’s conduct** are **extrinsic considerations** that are better dealt with as a **defence**.
* **3 reasons for viewing *ex turpi causa* as defence rather than considering illegal conduct in DoC analysis:** 
  + 1) **Burden of proof**: as a factor in DoC, P would have to disprove the existence & relevance of his illegal or immoral act. Precluding recovery on the basis of illegal or immoral conduct is an exceptional power so the onus should rest on the defendant.
  + 2) **Application to heads of damage** (e.g. damages for loss of future earnings = profit from illegal activity vs. compensation for personal injury): **DoC** is an all-or-nothing approach that cannot selectively apply to discrete heads of damage *(e.g. no duty of care = no damage award period)* whereas *ex turpi causa* as a **defence** can distinguish between heads of damage *(e.g. provides defence against claim for loss of future earnings [profit from illegality], but no defence against claim for compensation for personal injury).*
  + 3) **Procedural problems**: a P can sue in both contract and tort so it does not make sense to impose opposite onus. In **contract**, the **onus would be on the D** to **prove illegality/immorality** (normal), whereas in **tort** the **onus** would be **on P to disprove illegality/immorality** (weird).

**2) *British Columbia v Zastowny, 2008 SCC 4*** (Defence applies to bar recovery of P’s lost wages in prison = rebate of the natural consequences of the criminal penalty = would undermine integrity of judicial system.)

#### (4) INEVITABLE ACCIDENT

\*Concerned w/factual circumstances surrounding D’s conduct. Harm would have occurred regardless of D’s negligence = requires clear evidence. Not really a defence; more relevant to disproving causation.

**1) Rintoul v X-Ray and Radium Indust. Ltd., [1956] SCR 674 (Employee of respondent was driving car when service breaks suddenly failed. Applied hand-break but rear-ended appellant. Trial judge found no negligence: Collision was result of inevitable accident.)**

* **Defence of inevitable accident:** D must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill.
* **Decision**: Defence does not apply because the respondents didn’t prove that the sudden failure of services breaks could not have been prevented by reasonable care or that driver could not have avoided collision by exercising reasonable care even after such failure occurred.

#### TORT LIABILITY OF PUBLIC AUTHORITIES

\*Claims increasingly being brought against public officials. Public body more likely to be solvent & capable of satisfying any judgment issued against it --> Controversy over public funds going to judgments. Solomon

#### 1) SPECIAL RULES FOR PUBLIC AUTHORITIES

\***Public** **authorities**: gov’ts, elected officials, bodies to which day-to-day gov’t functions are delegated.

**\*Public authority functions:** enact rules or regulations (legislative function); judicial or quasi-judicial function (resolve disputes); administrative (establishment & application of policies that affect public). **Public authorities generally can’t be held liable in tort for action taken in performance of legislative, judicial or quasi-judicial functions: *Welbridge Hldg. Ltd. v Winnipeg* (1970). Tort liability tends to arise for administrative actions.**

##### (A) CROWN IMMUNITY

**1) Crown Liability and Proceedings Act, RSC 1985, c C-50, s 3(b)**

* (3) The Crown is liable for the damages for which, if it were a person, it would be liable
  + - (b) . . . in respect of
      * (i) a tort committed by a servant of the Crown, or
      * (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.”

**2) Crown Liability and Proceedings Act, RSBC 1985, c89**

* **2** Subject to this Act, (c) the government is subject to all the liabilities to which it would be liable if it were a person, and
* **3 (2)** Nothing in s 2 does any of the following:
  + (a) Authorizes proceedings against the government for anything done or omitted to be done by a person acting in good faith while discharging or purporting to discharge responsibilities
    - (i) Of a judicial nature vested in the person, or
    - (ii) That the person has in connection with the execution of judicial process
* **Crown agents (does not include all public authorities)** = ones over which the Crown exercises a significant degree of actual or potential control.
  + I**ncluded**: executive governments of Canada & provinces + their ministries, departments, corporations, boards, & “servants or agents” thereof.
  + E**xcluded**: Municipalities.
* The Crown may be sued (i) **directly**, or (ii) **vicariously** for the torts of its servants or agents.

#### (B) JUDICIAL IMMUNITY

* Legislation typically provides for immunity of judges at all levels (incl. masters, justices of peace, small claims court judges)
* **1) Provincial Court Act, RSBC 1996, c 379, s 42:** “Judges and justices have, for things done or not done by them in their official capacity, the same immunities from civil liability as judges of the Supreme Court have for the things done or not done by them in their capacity as judges of the Supreme Court.”
* **2) Morier v Rivard, [1985] 2 SCR 716:** statutory immunity extended to commissioners of a provincial commission of inquiry. Except where there is malicious prosecution.
* **3) Prefontaine v Gosman (2000) (QB):** Judges acting in their judicial capacity will not be held civilly liable for any actions done in such capacity, even if acting out of hatred, envy, or malice, if they believed they were acting in the course of their judicial duties.
* **4) Criminal Code, RSC 1985, c C-46, s 783:** a reviewing court, upon quashing a conviction/order/proceeding of provincial court judge or justice of the peace, may issue a “protection order” to protect the original judge from tort liability. May also issue a protection order for anyone acting in accordance with the order (e.g. peace officer who complied with warrant or held someone in custody).
* **5) Nelles v Ontario (1989), 60 DLR (4th) 609 (SCC):** when discharging its judicial responsibilities, the crown enjoys judicial immunity (statute protects against civil claims; prosecutorial immunity). However, the Attorney General and Crown Attorneys *do not* have immunity *personally*.
* **6) MacKeigan v Hickman (1989), 61 DLR (4th) 688 (SCC):** affirmed judicial immunity from being compelled to testify about decision-making process or composition of court in a particular case. Immunity is grounded in the constitutional theory of judicial independence from legislative control.
* **7) Everett v Griffiths, [1921] 1 AC 631 (HL):** Judicial immunity extended to public authorities who perform quasi-judicial functions, but unclear which specific boards, tribunals and officials will be granted immunity.

#### (C) LIMITATION PERIODS AND SPECIAL PROCEDURES

* **Limitations in bringing tort actions against a public authority: Solomon**
  + Limitations periods are shorter than normal
  + May be required to notify public authority prior to writ
  + Prohibition on jury trials in actions involving the crown
  + May be required to pay security for costs

#### 2) NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES

\*A public authority can be held directly liable for its own negligence. Proper approach depends on whether it was exercising (i) **a statutory duty**, or (ii) **a discretionary power.** Courts most likely to impose liability when PA breaches statutory duty **owed to an identifiable person** (not “the public” – less likely to disclose DoC for want of a sufficiently close and direct relationship to establish **proximity.**)

**\*(i) Statutory duty:** enabling legislation required PA to pursue particular course of action. Liability will NOT be imposed on PA for doing what it was required to do. Only imposed for performing duty carelessly or failing to perform duty at all.

**\*(ii) Discretionary power:** PA hadauthority but no obligation. See *Just v BC* & *R v Imperial Tobacco:* policy/operational distinction define ambit of Crown liability.

**1) Just v British Columbia (1989), 64 DLR (4th) 689 (SCC) (Distinguished between policy & operational matters)**

* **Facts**: Boulder fell on car. P claimed PA negligent for maintenance of highway. History of rock falls in area. Snow in trees created risk of rock falls. D had system of inspection & remedial work for rock slopes along highway.
* **Crown Immunity:** The Crown is not a person and must be free to govern & make true policy decisions w/o becoming subject to tort liability as a result of those decisions, but complete Crown immunity should not be restored by having every government decision designated as one of policy.
* **Duty of Care:**
* (1) As a general rule, **duty of care** applies to a **government agency** in the same way it applies to an **individual**: were the parties in **a relationship of sufficient proximity**?
* (2) A **gov’t agency** may be **exempt** from the imposition of a **DoC** for **lack of sufficient proximity** due to:
  + (i) Explicit statutory exemption
  + (ii) Nature of the decision = **pure policy, not operational** (characterization depends on nature of decision, NOT the actor, although typically made by high-level authority). As a general rule, decisions concerning **budgetary allotments for departments or gov’t agencies = pure policy.**
    - Policy decisions - open to challenge on basis that they are not *bona fide* exercises of discretion.
      * If *bona fide* --> inspections are an “unassailable” policy decision.
* **Standard of Care:**
  + Assessment of **operational** **aspects** of governmental activity (e.g. manner and quality of inspection system). Those matters that concern products of administrative decision, expert or professional opinion, technical standards or general standards of care are not considered to be part of policy decisions unless expressly stated. = **Operational**
  + Court may review inspection scheme to ensure it is reasonable & has been reasonably carried out, considering circumstances (ex/funding) to determine whether gov’t agency has met req. SoC.
  + What is the requisite standard of care to be apply to the **operation**?
    - Standard of care imposed on government may differ from standard of care imposed on individual. Gov’t agency should be entitled to demonstrate that balanced against the nature & quantity of risk involved, its inspection system was reasonable in light of all surrounding circumstances, including (i) budgetary restraints, and (ii) the availability of qualified personnel and equipment.
* **Application:**
  + **Duty of Care**: Was the public authority **exempt** from the **duty of care**? No.
    - The public authority had settled on a plan of inspection. The appellant challenges the manner and frequency of inspection. Therefore, the inspection issue is not a policy decision, but rather a manifestation of the policy decision which was operational in nature
  + **Standard of Care:** 
    - Inspection scheme is not pure policy. Rather, the inspection scheme is a manifestation of policy which is operational in nature and therefore subject to review by the courts.
* **Dissent**: The gov’t agency exercised statutory discretion in delegating the inspection program to the Rockwork Section. Policy to delegate cannot be challenged. In order for tort duty to arise, it must be shown that the Rockwork Section acted outside its delegated discretion to determine whether to inspect and the manner in which to inspect.

**2) Swainamer v Nova Scotia (Attorney General), [1994] 1 SCR 445:** distinction between policy and operational functions is difficult to make. **(P was injured when tree along highway fell on truck. SCC held provincial tree removal program was a matter of policy that was not reviewable by the courts.)**

**The following activities are operational** (Solomon, pg. 815)

1. Failure to erect higher meridian barriers on a highway in a timely manner: *Malat v Bjornson (No. 2)* (1978)
2. Municipality’s decision to issue building permit & failure to identify construction defects: *Mortimer v Cameron* (1994)
3. Crown’s failure to inspect and maintain a highway: *Lewis (Guardian ad litem of) v. British Columbia*, [1997]
4. Denial of crabbing licence on account of officer’s negligent measurement of plaintiff’s boat: *Keeping v Canada (Minister of Fisheries and Oceans)* (2003)
5. Failure to anticipate “freeze up” and salt a highway in a timely manner: *Benoit v Farrell Estate* (2004), 27 BCLR (4th) 226 (CA).
6. Decision to transfer a violent prisoner to a minimum-security facility: *Pete v Axworthy* (2005), 45 BCLR (4th) 311 (CA).

**The following activities are policy decisions** (Solomon pg. 815)

1. Maintenance of municipal manhole covers. *Wegren v Prince Albert (City)* (2004)
2. Adoption of a particular system for clearing snow and ice from municipal sidewalks: *Knodell v New West Minster (City)* (2005), 14 MPLR (4th) 258 (BCSC).
3. Municipality’s decision not to reduce the speed limit in a school area. *Potts v Heutink*, 2006
4. Refusal to enter into agreement w/parents to provide for the needs of a special needs child. *AL v Ontario (Minister of Community and Social Services)* (2006)
5. Decision not to inspect electrical connectors unless in receipt of complaints by customers. *Saskatoon (City) v Smith* (2008)

#### THE EFFECT OF COOPER V. HOBART

**Cooper v Hobart, [2001] 3 SCR 537:** the reformulated DoC affects negligence analysis re: public authorities in 4 ways:

1. Government immunity for policy functions falls under second stage of duty of care analysis: even if (a) harm was foreseeable and (b) parties are in a relationship of proximity, court may negative the duty of care if public authority was exercising a **policy function** rather than an operational function.
2. Greater emphasis on **proximity** (instead of policy/operational): plaintiff must have a sufficiently proximate relationship with PA.
3. Unfortunate conflation of **statutory duty of care** with **common law duty of care**, and **increased importance of statutory framework** in deciding whether a public authority owed a **duty of care.** 
   1. **Difficult** to find a *private* duty of care when **statute** is phrased broadly & concerned with the *public interest.*
   2. Conflation also **contradicts** *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205: breach of a statutory duty is not a nominate tort, plaintiff must show **common law duty of care.**
4. Reflects return to **restriction** on **public authority liability: more reluctant to impose liability**.

**2) R v Imperial Tobacco Canada Ltd., 2011 SCC 42 (Revisited policy/operational distinction in *Just v BC*)**

* **Test for determining “Core Policy Decision” (protected from tort liability) vs. Operational Decision:** decisions regarding a course or principle of action that are based on public policy considerations, such as economic, social, and political factors, provided they are neither irrational nor taken in bad faith.
  + **Approach emphasizes positive features of policy decisions (instead of ‘not-operational’)**
* **Motions to strike:**
  + If it is “plain and obvious” that impugned gov’t decision is policy decision 🡪 strike claim b/c no tort liability.
  + If it is not “plain and obvious” that impugned gov’t decision is a policy decision 🡪 matter must go to trial.
* **Summary**: Tobacco companies file 3rd-party claim against Gov’t for negligent misrepresentation b/c Health Canada made false representations that low-tar cigarettes are less harmful to health. *Anns-Cooper* Stage 1 analysis establishes a *prima facie* duty of care. Do policy considerations under the stage 2 negate duty of care? Are representations policy and therefore immune? YES – representations were part of gov’t policy to encourage people to switch to low-tar cigarettes, adopted at highest level of Canadian gov’t & involved social (health) & economic (cost of tobacco-related disease) considerations). => Core policy => Duty of care negated. 3rd party claim struck.

### VICARIOUS LIABILITY

\*Liability of one party for the negligent act of another. **Strict liability tort** b/c party can be held VL not b/c he committed wrongful act but b/c of his **special relationship w/tortfeasor.**

**\*3 Types of Vicarious Liability (VL):** NB: Parents are not VL for children’s torts. Parental responsibility legislation merely presumes, in some circumstances, that a parent negligently failed to control or supervise the child, & therefore is *personally* liable. Solomon.

**(1) Statutory vicarious liability:** created by legislation. See *Motor Vehicle Act.*

**(2) Principal-agent relationship:** agent is authorized to act on behalf of principal. See test: *TG* *Bright & Co v Kerr* dissent.

**(3) Master-servant relationship:** employer-employee relationship; area w/most litigation. See *Bazley v Curry* test*.*

#### (1) STATUTORY VICARIOUS LIABILITY

* **In Common Law: 3rd party drivers could only be liable if they were agents or employees of vehicle owner.**
* **The BC *Motor Vehicle Act* extends VL to family members and third parties who were granted permission to drive.**
* **Policy reasons for expanding vicarious liability to vehicle owners:**
  + Vehicles are frequently instruments of harm. Liability insurance is prevalent but is normally purchased in connection w/ownership rather than operation of a vehicle. Victims require access to owner’s insurance to be compensated. Encourage owners to take care in whom they entrust their vehicles.
* **Consent** may be express or implied. **No VL if car is STOLEN.**

**1) *Motor Vehicle Act,* RSBC 1996, c 318, s 86(1)-(3) –**

**Responsibility of owner/lessee in certain cases**

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

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

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

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

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

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

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

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

**(1.2)** In the case of a motor vehicle that is in the possession of its lessee, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who acquired possession of the motor vehicle with the consent, express or implied, of its lessor is deemed to be the agent or servant of, and employed as such by, that lessor and to be driving or operating the motor vehicle in the course of his or her employment with that lessor.

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

**(3) "lessee"** means a person who leases or rents a motor vehicle from a lessor for any period of time;

**"lessor"** means the following: **(a)** subject to paragraph (b), a person who, under an agreement in writing and in the ordinary course of the person's business, leases or rents a motor vehicle to another person for any period of time; **(b)** if the lessor referred to in paragraph (a) has assigned the agreement, the assignee;

**"owner"** **(a)** includes a purchaser of a motor vehicle who is in possession of the motor vehicle under a contract of conditional sale by which title to the motor vehicle remains in the seller, or the seller's assignee, until the purchaser takes title on full compliance with the contract, **(b)** if a purchaser of a motor vehicle is in possession of the motor vehicle, does not include the seller of that motor vehicle under a contract of conditional sale described in paragraph (a) or the assignee of that seller, and **(c)** does not include a lessee of a motor vehicle who is in possession of the motor vehicle under an agreement in writing with the owner, whether or not the lessee may become its owner in compliance with the agreement.

**Liability of partners**

87 Each member of a licensed partnership is liable to the penalties imposed against licensees for breach of this Act.

**Liability of licensees for offences of employees**

88 (1) The registered owner of a motor vehicle by means of or in respect of which motor vehicle an offence against this Act or the regulations with respect to the equipment or maintenance of the vehicle is committed by his or her employee, servant, agent or worker, or by any person entrusted by him or her with the possession of the motor vehicle, is deemed to be a party to the offence committed, and is personally liable to the penalties prescribed for the offence as a principal offender.

(2) Nothing in this section relieves the person who actually committed the offence from liability for it.

(3) On every prosecution of a registered owner of a motor vehicle for an offence against this Act or regulations that has been committed by means of or in respect of that motor vehicle, the burden of proving that the offence was not committed by the registered owner and that the person committing the offence was not the registered owner's employee, servant, agent or worker, or a person entrusted by the registered owner with the possession of the motor vehicle is on the defendant.

**2) Crown Liability**

* Crown is vicariously liable for the torts of its agents and servants: s 3(b)(i) of *Crown Liability and Proceedings Act*:

(3) The Crown is liable for the damages for which, if it were a person, it would be liable

* + - (b) in any other province [not Quebec], in respect of
      * (i) *a tort committed by a servant of the Crown*, or
      * (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.
* There is a high bar for making a Minister or Premier VL: *P (NI) v B(R)* (2000), 193 DLR (4th) 752 (BCSC).

#### (2) PRINCIPAL-AGENT RELATIONSHIP

\***Principle authorizes agent to act on its behalf. Principle may be held liable for agent’s torts. Note: agent can also be employee.** Doesn’t matter.

**1) TG Bright & Co v Kerr [1939] 1 DLR 193 (SCC) (TEST FOR PRINCIPAL-AGENT RELATIONSHIP LIABILITY: dissent)**

* **VL Test (if there is a principal-agent relationship):**
  + (1) Was the agent’s act or acts committed within the scope of the agency? If not, did the principal expressly authorize the act(s)? Or did the principal subsequently adopt the act for his own benefit?
  + (2) Was the wrongful act incidental to, or of the same general nature as, the responsibilities the agent is authorized to perform?
    - If **yes** to both questions, then vicarious liability can be applied.
* **Principal** is **liable** to 3rd-parties for the frauds, deceits, concealments, misrepresentations, torts, negligence, or omission of duty for their **agent** **in the course of their employment**, even though the **principal** does not authorize, or justify, or participate in, or even know of such misconduct, or even if they forbade the acts, or disapproved of them. **Principal** is NOT liable for its **agent’s** torts or negligence in any matters beyond the scope of the agency, UNLESS they have expressly authorized them to be done, OR they have subsequently adopted them for their own use and benefit.
* **Decision:** D, a wine dealer, was held not to be VL for negligence of its deliveryman. Although deliveryman was agent, he was not servant b/c D had no control over precise manner in which task was performed. Act outside agent’s responsibilities.

#### (3) MASTER-SERVANT RELATIONSHIP

\*Employer can be found strictly liable for employee’s actions b/c it is presumed to have control over employee. If conduct is unauthorized, then employee has not acted *in the scope of his employment*, and the employer will not be liable. If conduct was authorized, VL will be imposed even if done in an unauthorized manner: *Bazley v Curry.*

**1) Bazley v Curry (1999), 174 DLR (4th) 45 (SCC) (P was sexually assaulted as child in care facility. Facility undertook extensive background check of D before hiring. I: Can employer be VL for ee’s unauthorized, intentional wrongs?)**

* **Salmond Test for VL in Master-Servant Relationships: Employer is VL for:**
  + **(1) Employee acts authorized by employer**
    - Potential problems arise w/independent contractor situation. To determine ER/EE relationship:
      * (i) Work contract (Is payment $ per hour or $ per project?)
      * (ii) Manner of performing work (Who owns tools and equipment? Who pays CPP and EI?)
      * (iii) Degree of control that the party who issued the contract has over the contract (Who controls work hours?)
  + **OR (2) Unauthorized acts so connected w/authorized acts that they may be regarded as (improper) modesof doing an authorized act. NB**: This branch is relevant here.
    - (i) Court should determine whether there are precedents which unambiguously determine on which side of the line btwn VL and no liability the case falls.
    - (ii) Determine whether VL should be imposed in light of the broader policy rationales behind strict liability.
* Generally, if conduct itself is unauthorized, conduct is not *within the scope of employment*. If the conduct is authorized, VL may be imposed even if the conduct was done in an unauthorized manner.
* **Test for vicarious liability for an employee’s sexual abuse of a client** should focus on whether the employer’s enterprise and empowerment of the employee **materially increased the risk** of sexual assault (e.g., here: by giving employee time & opportunity to commit sexual assault; bathing/dressing children) and hence the harm.
* **Requirement is material increase in risk as consequence of enterprise,** mindful of **policy considerations** justifying imposition of VL:
  + **Fair and efficient compensation for wrong:** Employers are often in a position to reduce accidents & intentional wrongs by efficient organization & supervision.
  + **Deterrence:** Employer ought to pay for the generally foreseeable costs of business w/o becoming involuntary insurer.
* There must be a significant connection between **creation or enhancement of risk** and the **wrong that accrues therefrom**, even if unrelated to employer’s desires
  + Incidental connections to employment enterprise will not suffice e.g. time and place without more
* **In determining the sufficiency of the connection between the employer’s creation/enhancement of the risk and the wrong complained of (in the case of INTENTIONAL TORTS), consider:** 
  1. The opportunity that the enterprise afforded the employee to abuse his or her power
  2. The extent to which the wrongful act may have furthered the employers aims
  3. The extent to which the act was related to friction, confrontation or intimacy inherent in the employers enterprise
  4. The extent of power conferred on the employee in relation to the victim
  5. Vulnerability of potential victims

* **ADDITIONAL NOTES ON VICARIOUS LIABILITY**

**1) Personal vs. vicarious liability:** Personal liability requires proving fault; VL requires proving the relationship.

**2) Effect of VL: Alternative Liability:** VL does not relieve initial tortfeasor of responsibility. VL provides P w/alternative source of compensation (larger, wealthier target, e.g., employer, gov’t).

**3) Right of indemnification:** When a party is found vicariously liable, it can then legally claim from the servant/employee who committed the wrongful act. Most employers do not exercise this right b/c: 1) employment contract or collective agreement may prevent it; 2) enforcement of right counterproductive b/c it would damage employee morale, or useless if employee is impecunious.

**4) Remedies**: a Master who is vicariously liable may be liable for:

* + (i) **Compensatory damages** – yes Solomon
  + (ii) **Aggravated damages** – yes (*TWNA v Clarke* (2003), 235 DLR (4th) 13 (BCCA))
  + (iii) **Punitive damages** – yes, but the master must be guilty of “high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour” (*Blackwater v Plint*, [2005] 3 SCR 3)

#### POLICY QUESTIONS

#### A) TORT LIABILITY FOR RESIDENTIAL SCHOOLS

**1) Blackwater v Plint, 2005 SCC 58 (Plint, a dormitory supervisor at the Alberni Indian Residential School, was held liable for sexual assault of an Indian child. Canada & the Church were held jointly vicariously liable: Canada 75% liable and Church 25% liable. Canada & Church must pay general damages & aggravated damages. Plint must pay counselling fee and punitive damages.)**

* **BACKGROUND**
* Indian Residential School system (1940s-1960s). Purpose: (1) assimilate indigenous populations; (2) eradicate indigenous culture (cultural genocide); & (3) religious indoctrination
* Staffing & management of residential schools carried out by the Canadian government **in partnership with** the Church.
* Gov’t policies/practices provide context for assessing claims, but does not itself create legally actionable wrong.
* **LEGAL ISSUES**

1. **Negligence:** Are Canada & the Church negligent in hiring employees when they knew or ought to have known that the employees were pedophiles & failing to take reasonable steps to stop the abuse?
   1. Both Canada and the Church owed a **duty of care**; Canada not exempt on basis that its decisions arose from policy because the issue concerns how Canada ***implemented***its Indian Residential School policy.
   2. **Result**: No negligence because the harm (sexual abuse) was **not** reasonably foreseeable.
      1. No actual knowledge of abuse (children did not clearly report)
      2. No constructive knowledge of abuse (by the standards of the time, sexual abuse was “unspeakable acts” that were literally “not spoken of”)
2. **Vicarious Liability**
   1. “Vicarious liability may be imposed where there is a **significant connection** between the **conduct authorized by the employer or controlling agent** and the **wrong**.” **Bazley v Curry**
   2. **Rationale for holding employer or controlling agent vicariously liable:** 
      1. (i) Employer or operator created or enhanced the risk of the wrongful conduct.
      2. (ii) Potential for wrongful acts are a “cost of business”.
      3. (iii) **Policy goals**: compensation (providing an adequate remedy to victims harmed by employee) and deterrence (incentive for screening and supervision)
   3. **Factors to consider in imposing vicarious liability:**
      1. The opportunity afforded by the employer’s enterprise for the employee to abuse his power;
      2. The extent to which the wrongful act furthered the employer’s interests;
      3. The extent to which the employment situation created intimacy or other conditions conducive to the wrongful act;
      4. The extent of power conferred on the employee in relation to the victim
      5. The vulnerability of potential victims.
   4. **Joint vicarious liability:**
      1. **Joint vicarious liability is acceptable where there is a partnership:** Two employers can jointly employ a servant.
      2. Canada and the Church acted as **partners**, not independently, so they may be found jointly and severally liable for servant’s torts.
   5. **Result**: Canada and the Church are **vicariously liable** for the actions of Plint.
      1. The **Church** was Plint’s immediate employer and exerted **sufficient control** (e.g. employed Plint in the furtherance of its interest in providing residential school education to Aboriginal children; Church gave Plint the opportunity which enabled him to prey on children; Church involved in all aspects of operation and management of AIRS)
3. **The Doctrine of Charitable Immunity (Does it apply to *exempt* the Church from liability?)**
   1. **Doctrine**: “free-standing legal test that dictates that non-profits should be free from liability for wrongs committed by their employees, provided they are less at fault than a party better able to bear the loss.”
   2. The SCC **rejects** the doctrine of charitable immunity as a class-based exemption for non-profit organizations:
      1. Presence of government alone does not guarantee safety of children. Charitable immunity could provide no motivation for NPO to take precautions to screen employees & protect children from sexual abuse.
      2. Church worked with employees, not volunteers, and was best suited to supervise the employees.
      3. Incentive for organizations to claim non-profit status to take advantage of exemption.
      4. **Perverse legal principle**: suggests lesser responsibility should be converted to no responsibility.
   3. **Result**: No, doctrine of charitable immunity does not apply in this case to exempt the Church from liability.
4. **Non-delegable Statutory Authority** 
   1. **Issues**: (1) Does Canada have a *non-delegable statutory duty* to ensure the safety and welfare of Aboriginal students at school under the ss. 113 and 114 of the *Indian Act*, and (2) if so, was it breached? Answer this question using statutory interpretation.
   2. **Result**: No non-delegable statutory duty can be inferred from the statute.
      1. Use of the permissive term “may” rather than the imperative term “shall”
      2. The power of the government to enter into agreements with religious organizations for the care and education of Indian children suggests that the duty is eminently delegable and was contracted out of by the government.
5. **Fiduciary Duty**
   1. **Fiduciary Duty** = “a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient’s interest ahead of all other interests”: *K.L.B. v. British Columbia*, [2003]
   2. **Result**: No breach of *individual* fiduciary duty owed to individual claimants because Canada and the Church were not dishonest or disloyal. The issue of *collective* fiduciary duty owed to Aboriginal children cannot be resolved in this appeal.
6. **Damages: Apportionment**
   1. **Canada and the Church are jointly and severally liable:** Canada 75%, the Church 25%. Parties may recover full damages from either or both of them.
   2. **Issue**: Is the Church entitled to be completely or partially indemnified by Canada?
      1. **Conclusion**: No, Canada did not agree to indemnify the Church.
   3. **Issue**: Is it right to make Canada bear a larger portion of the loss? Or should liability be apportioned equally?
      1. *Negligence Act*, R.S.B.C. 1996, c. 333, s 1(2): “if . . . it is not possible to establish different degrees of **fault**, the liability must be apportioned equally”.
      2. (1) Does **vicarious liability** involve **fault**?
         1. “The most compelling view is that while vicarious liability is a no-fault offence in the sense that the employer need not have participated in or even have authorized the employee’s particular act of wrongdoing, in another sense it implies fault.”
      3. (2) Is **unequal apportionment of responsibility** appropriate in cases of vicarious liability?
         1. “Vicarious liability is imposed on someone who was in a position to have supervised and thus to have prevented the occurrence of the harm”. Therefore, the degree of fault may vary depending on the level of supervision: **parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact.**
      4. **Conclusion**: unequal apportionment of liability is appropriate (Canada was more senior and in a better position to supervise the situation and prevent the loss).
7. **Damages: The Effect of Prior Abuse**
   1. **A plaintiff is entitled to be compensated *only for the loss* *caused by the actionable wrong*.**
      1. The “essential purpose and most basic principle of tort law” = put the plaintiff in the position she would have been in had the tort not been committed: *Athey v. Leonati*
      2. Must untangle the **various sources of harm** to **isolate the loss caused by the actionable wrong**: (i) trauma suffered at home before attending AIRS, (ii) trauma for non-sexual abuse and deprivation at AIRS that was statute-barred, and (iii) trauma from sexual abuse at AIRS.
   2. **Causation vs. damage assessment:**
      1. (1) Causation applies the *but-for test*. (In a situation of multiple tortious and non-tortious causes of injury: if the defendant’s act is *a* cause of injury 🡪 defendant is fully liable for that injury.)
      2. (2) Damages assessment considers the plaintiff’s *original position*.
   3. **Balance**:
      1. (a) **Original position:** the defendant is not required to (i) put the plaintiff in a better position than his original position, or (ii) compensate the plaintiff for any damages he would have suffered anyway.
      2. (b) **Thin skull rule:** the defendant takes his victim as he finds him and is liable for all harm that flows from negligent act.
      3. (c) **Crumbling skull rule:** the defendant must compensate only for the harm he *actually* caused, and does not have to compensate for harm that would be caused anyway (e.g. other tortfeasors).
      4. The **damages** in question must relate to damages *caused* by sexual abuse, not to damages *caused* by the prior condition. However, it is necessary to consider the prior condition to determine the effect of sexual abuse (e.g. amplified effect).
      5. **Conclusion:** To the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be *taken into account* in assessing damages.
   4. **Issue**: Does the maxim ***ex turpi causa non oritur actio***(i.e. no one should profit from their own wrong) apply? No. Why?
      1. (1) *Not* awarding damages for loss caused by other factors does not “reduce” damages.
      2. (2) *ex turpi causa* cannot be used to evade limitation periods.
      3. (3) *ex turpi causa* should be applied cautiously and only where it is clearly mandated: *Hall v. Hebert*
8. **Damages: General and Aggravated Damages (Quantum)**
   1. **Result**:
      1. General damages = $125,000
      2. Aggravated damages = $20,000
   2. **Factors to consider:** 
      1. (i) nature and frequency of the assaults
      2. (ii) physiological and psychological effect on the victim.
9. **Damages: Punitive**
   1. **Result:**
      1. Punitive damages awarded against Plint = $40,000
      2. Punitive damages against Canada = $0
   2. **Criteria for award of punitive damages:\*\***
      1. **Punitive damages are awarded against a defendant only in *exceptional circumstances* for “high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour”:** *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.
      2. **In order to award punitive damages against an employer held vicariously liable, there must be reprehensible conduct *specifically referable to the employer*.**
10. **Loss of Future Opportunity (Employment)**
    * **Result**: award conventional amount of $20,000.

**2) The Truth and Reconciliation Commission of Canada: The Legacy of Residential Schools**

* **Issue:** Was the Independent Assessment Process (overseen by the courts), which imposed liability for wrongful acts (usually sexual and physical abuse) committed in residential schools, successful or not? Consider public policy.
* **Previous process** = **Alternate Dispute Resolution**
  + Government policy. No court oversight or recourse to the court.
  + **Vicarious liability** was divided between government and church (e.g. **Blackwater v Plint** was heard at this time). Payments were problematic for churches because damage awards were going to bankrupt them.
* **When the IAP was introduced, the federal government agreed to pay 100%**
  + **Participants in IAP gave up right to sue gov’t**
* **The Settlement Agreement included a Common Experience Payment (CEP) and Independent Assessment Process (IAP)**
  + **CEP** = payment to everyone who attended one of the residential schools listed in the Agreement
  + **IAP** = established to pay compensation to those who suffered sexual or serious physical assaults, such as severe beating, whipping, and second-degree burning, at the schools.
    - **Pro**: hearings held in private with cultural and health supports (easier on claimants than litigation). *Adjudicators are independent from Canada: more impartial??*
    - **Con**: claimants do not have the opportunity to confront their abusers
* **Problems with IAP:**
  + Compensation under IAP is scaled and is based on the **harm committed** *rather than* the **harm experienced**. Harm experienced from physical or sexual abuse may be **exacerbated by context** (e.g. heightened in IRS situation)
  + Canadian legal system considers **only some of the harms** suffered, generally harms suffered by **physical and sexual abuse**. (It does not consider loss of language, culture, family attachment, or violation of Treaty rights to education, or collective harms that residential schools caused to Aboriginal nations and communities.)
  + Many claims barred by **limitation periods**. Canadian government often relies on **statute of limitation defence.**
* **The Administrative Split (technical argument used to deny compensation to IRS survivors)**
  + The IAP is a tripartite agreement between claimants, the Canadian federal government, and the church. **The IRS had two components**: the residents and the school. In 1969, it was determined that the church was not involved in running the school component; only the federal government was involved in running the school component. Therefore, the IAP tripartite agreement does not apply to schools. This is a legal fiction but with very real results. Saves gov’t $$ & creates unequal restitution for survivors depending on date they filed claims (before/after 2010) & location on the school grounds where assaults occurred.
  + **Result**:
    - (i) **Abuse at residence** (dormitories) = compensable
    - (ii) **Abuse at school** = not compensable
  + **Effect of the administrative split on claimants:** resulted in some people not filing claims or not having their claims compensated.
* **Administrative split -** institution that existed before 1969 ceased to exist; church operated residences, while Canada took over operation of schools, thus making it not a residential school. However church still staffed schools and residences still existed. Post-split, abuse that happened in residences under IAP, but not in schools
* **Summary of who pays what:** ADR (each party held vicariously liable pays for their share) 🡪 IAP (church can still be held **vicariously liable** but government ***pays*** 100% to prevent churches from going bankrupt) 🡪 IAP “administrative split” (only abuse at residence is compensable)

**Indian Residential Schools (IRS)**

* IRS program started in 1879 and continued until 1960s (last IRS closed in 1996). RCMP took aboriginal children away from their families and placed them in IRS.
  + **Indian status** includes First Nations, Inuit and Metis.
  + RCMP rounded up people on reserves regardless of legal Indian status (indigenous in urban centres less likely to be apprehended or scooped)
  + It was **illegal to leave the Indian reserve** without the requisite pass.
* **Policy goals:**
  + “Take the Indian out of the child” (Duncan Scott)
  + Assimilation and religious indoctrination of aboriginal populations.
* **Long lasting effects of IRS**
  + Cultural genocide (e.g. extinction or near extinction of aboriginal languages)
  + Loss of aboriginal identity (e.g. name changes: indigenous names replaced with white Judaeo-Christian names)
  + Physical and sexual abuse
  + **Intergenerational effects**: severing family ties, loss of indigenous knowledge, alcoholism and resulting FASD
  + **Disparities between aboriginal and non-aboriginal populations** (child apprehension rates, incarceration rates, health indicators, income, employment, education levels)
* **Contrast IRS with day schools:**
  + Some are former IRS, some are new.
  + Government runs day schools and there is no Church involvement (government is 100% liable)
* **“60s scoop”**
  + Aboriginal children apprehended by child welfare authorities and placed in non-aboriginal homes.
  + Although the 60’s scoop proceeded the era of IRS, it perpetuated the policy of IRS, namely destroying aboriginal culture.
  + **Why?** Parents of aboriginal children were suffering from the effects of IRS and the government of Canada deemed them unable to care for children.
* *Indian Act* did not grant Indians legal status as “persons” until 1960, so until 1960 there was **no legal recourse** to challenge IRS.
  + Present day class action lawsuits regarding IRS and the 60s Scoop
  + **Causes of action:** 
    - (1) Loss of culture
    - (2) Intergenerational effects
  + Causes of action mean children of survivors become part of class action.
* Recognition of the impact of IRS in **R v Gladue**
  + **Judicial notice that aboriginal people are incarcerated disproportionately to non-aboriginal people.**
  + Enacted s. 718.2(e) of the *Criminal Code* as a remedial provision: the judiciary must make special efforts to
    - (i) find reasonable alternatives to imprisonment for Aboriginal offenders, and
    - (ii) take into account the background and systemic factors that bring Aboriginal people into contact with the justice system, including IRS.
  + **Gladue Report**
    - **Purpose**: Details background and contextual circumstances of aboriginal offenders. Intended to held judges in sentencing.
    - **Problem**: Gladue reports take time, expense and expertise to prepare.

**Truth and Reconciliation Commission**

* Report contained recommendations, including **94 calls to action** (e.g. museums & curricula – IRS in Can. history)**.**
* Problems with implementing recommendations:
  + It is a guiding policy document, not a binding legal document.
  + **Indian** includes First Nation, Inuit and Metis
    - It is easier to deal with Indian populations on reserves.
    - Less control over Indian populations who have lost “Indian status” (e.g. through marriage) or have left the reserve and now live in urban centres. E.g., in implementing aboriginal health programs, is the fed gov’t responsible under s. 91(24) or are the provinces responsible for the provision of healthcare?
* BC has incorporated an **IRS component into the public-school education curriculum**, but not legally required.
* Defines **cultural genocide** - destruction of structures/practices that allow a group to continue as a group e.g. legal, social, cultural, religious, racial --> Canada attempted this through **IRS policy.**
* **Reconciliation =** ongoing process of establishing and maintaining respectful relationships; components of this include reparations and revitalization of Indigenous law
* **IRS attacked autonomy and identity**; must return control to parents and Aboriginal agencies, and re-establish language and culture, improve health and education
* **Treaties** must be interpreted and enforced differently - so far ineffective
* Remedies require **law** (e.g. tort law, **Gladue** report in sentencing) and **policy** (recognizing long-lasting effects of IRS and closing gaps between aboriginal and non-aboriginals)

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