Duty of Care

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

**Neighbour principle**: One owes a duty to another to take reasonable care to avoid acts or omissions which you can reasonably foresee might harm anyone who ought to come into your sphere of contemplation as being closely or directly affected by your action or omission. Donoghue v Stevenson

**Functions**

* Establish liability: Framework for situations where liability could arise
* Limit Liability to parties not neighbours to the plaintiff
* Allocates risk in society: actions = harm/benefit, policy analysis needed

## Anns/Cooper Test

### Existing Recognized Category Where Duty of Care is Owed

* If alleged duty of care within an established category, duty of care established.
* Policy considerations will rarely arise in established categories. Cooper
  + **Drivers and road users**: Commercial hosts Crocker, Jordan House
  + **Social host / guest** Childs
  + **Manufacturer / Consumer:** product liability to prevent defects DvS, Dow Corning, Mustapha SCC
  + **Employer / Employee** Blackwater
  + **Lawyer / Client**: general discussion with client Hercules
  + **Doctor / Patient** Norberg v Wynrib
  + **Police / Suspect** Hill

### New Category of Duty of Care – establish duty based on:

# Reasonably Foreseeable

# Proximity

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

# Policy Considerations 1-Internal 2-External

# Reasonably Foreseeable

**Was the harm in question a reasonably foreseeable consequence of the defendants act?**

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

**Case notes:**

* Moule Sequence of events so fortuitous to be beyond the range of foreseeability of a reasonable man. Coincidence of events very unlikely = not foreseeable.
* Amos Reasonably foreseeable a child would climb tree, company didn’t do enough to prevent the tree going to power line
* Palsgraf If injury too bizarre to be predicted, cant be actionable in negligence

# Proximity - Foreseeable Plaintiff

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

* Even if the harm was foreseeable, was there a sufficient relationship of proximity between the parties to make it just and fair to impose a duty of care on the defendant? Hill
* Characterizes the type of relationship in which a duty of care may arise Cooper
* **“Close and Direct”** relationship between P wrongdoer and D victim
  + Within the range of people you’d think of as foreseeable, not so causally removed that you can’t foresee them. Cooper
  + D ought to have victim in mind as actions directly affect them Hill

**Case notes:**

* Palsgraf No proximity or foreseeability of harm to P. Guards could not have reasonably foreseen that the box was fireworks, it would be lead to an explosion that would harm bystander

# Policy Considerations

**Evidentiary burden shifts to defendant to raise residual policy considerations that would negate the duty of care from being recognized**. Childs

* Policy concerns must not be of trivial nature. Must be convincing” or “compelling” matters.
* **Internal Factors to consider**: parties representations, reliance on reprs, expectations about each others conduct, types of interests involved (physical, economic, emotional), and any statutory or contractual framework Cooper, Hill
* **External Factors to consider**: Decision’s effects on other legal obligations, the legal system or society more general Cooper, Chilling effect, balance of cost/benefit to society in recognizing liability / duty, floodgates arguments.

## Special Duties of Care: Affirmative Action

* Positive obligations create liability for actions (misfeasance – worsening P’s situation), but not failure to act (nonfeasance – failing to improve situation) Childs
* Statutory obligations – no tort of breach of statutory duty in Canada.
* **Policy issue:** Imposing liability for people who fail to act (nonfeasance) could threaten the individual autonomy of the P which the law tries to uphold

**Special Relationships = positive obligations – implied contractual agreement**

**Parent/Child – supervision / care / guidance**

* + Parental Liability Act s 3 and 6 limited liability in property <$10K damage
  + Defense of reasonable supervision allowed s 9
  + Consider child’s age, maturity, previous conduct in supervision s 10
  + Children cannot be supervised at all times Ingram v Lower

**Employer/Employee – ensure safe work environment**

* + Prevent abuse or harassment in the workplace Clark v Canada 🡪 RCMP officer harassed by colleagues

**Prisoners/guard** – must supervise prisoners to ensure that they do not hurt anyone or themselves. Williams v New Brunswick

**Police / Suspect** - Police owe duty of care to suspect - sufficient proximity - no overriding policy concerns to negate a duty of care. Hill v Hamilton

**Schools/students -** may owe duty of care to protect a student from bullying at school but also in exceptional circumstances outside of school Bradford-Smart v West

# Factors that Support a Positive Obligation

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

**Case examples:**

* D creates a dangerous situation and invites others into it Horseley, Crocker v Sundance, Oke v Weide Transport 🡪 must take reasonable steps to reduce risk
* Paternalistic relationships of supervision and control (vulnerability of P, power of D)
* Comm enterprise that includes implied responsibilities to public Childs, Jordan Hse
* Relationships of economic benefit – comm hosts / drunk patrons Jordan House
* Reliance on remedies and undertakings – if they lulled the P into false sense of security –may be an affirmative duty to perform a gratuitous promise Horseley

# Duty to Rescue

* No general duty to rescue a person in peril from their own action unrelated to the D, even where little risk or effort would be involved in assisting Matthews/Horseley, Osterlind
* “The law leaves the remedy to a person’s conscience” (Matthews/Horesely)
* However, once you intervene you are liable for your negligent actions as you voluntarily take on a rescue operation and the corresponding responsibility Matthews/Horesely
* **Encourages rescuing others:** Statute can provide rescuers with partial immunity from civil proceedings Good Samaritan Act

**Case notes:**

* **No CL duty to rescue** Osterlind 🡪 canoe rental guy wasn’t found to have a duty to rescue b/c victim wasn’t completely helpless
* **No duty to rescue passenger who fell overboard by his own misfortune or carelessnes**s Matthews/Horesely 🡪 although special relationship may be implied between boat operator and invited guests
* **Duty to rescue may be implied by statute** Matthews/Horesely *Canada Shipping Act* duty read in to say must take care to rescue
* **If a person attempts a rescue voluntarily** 🡪 assumes the duty, will be liable for failure to use reasonable care until peril is over Matthews/Horesely
* **No duty on off duty-officer or paramedic to rescue** Stevenson  
  **Policy reason**: would be too onerous, people may avoid career. Personal autonomy protected when off work to decide to accept / refuse to take risk

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

# Duty to Rescuers

* If a person by his fault creates a situation of peril, he is liable to any person who attempts to rescue who is in danger. Horesely 🡪 New situation of peril was created by Maclaren's negligence which induced Horsley to act  
  **Standard of care = What would the ordinary prudent boat operator do?**

# Liability for the Intoxicated

**Voluntary assumption of risk**

* Not applicable when patron is intoxicated Sundance 🡪 When ski resort has competition for profit, owes a duty towards visibly intox folk
* **Policy reason**: Dangerous precedent if hosts not have to take responsibility, don’t want to allow hosts to avoid liability in favour of earning extra profits.

**Commercial hosts**

* Duty to prevent foreseeable risk of injury to other parties incl 3rd parties by drunk patrons Stewart v Pettie 🡪 over-serving alone did not pose foreseeable risk – needs more - would require knowledge he would drive
* **Duty to act to avoid risk for intoxicated patrons** Jordan House
* **Comm Host has statutory duty** to not serve intoxicated patrons Jordan Hs
* Alcohol provider found liable even though they didn’t have actual knowledge of patrons intoxication Picka v Porter, Schmidt v Sharpe
* **Duty to public** to take all reasonable steps to stop intoxicated patron from driving, duty to call police if can’t be stopped Hague v Billings

**Social host**

* Not liable for intoxicated drivers action as they had not provided alcohol Baumeister v Drake
* **Less liability for social hosts -** Do not owe a duty of care to public highway users Childs v Desmoureaux 🡪 unlike comm hosts, social hosts are not regulated, dont control consumption, don’t make profits. if reasonably foreseeable and proximity, social host could be liable
* **Factors to consider**: did they serve the alcohol, did they know how impaired he was? Childs 🡪 D hosted NYE party, served ETOH, one of guests was alcoholic, conviction hx, hosts didn’t stop him driving, crashed and injured 18yo. Trial: hosts had duty of care, but negated for policy reasons. CA/SCC no duty d/t proximity.

**Between social host and commercial** - No duty of care found for hockey team that provided beer at tournament Calliou Estate (Trustee of) v Calliou

# Duty to prevent crime

* D has indirect control or authority (police, probation officer)
* D has opportunity to prevent crime or accident

**Police / Public** – Duty to warn about dangerous offender Jane Doe v Toronto Police

# Duties of Care Owed by a Barrister

* **General**: Not to act carelessly and cause harm to client
* **Demarco** No immunity in Cdn law for potential negligence actions against lawyers, Difference between judgment calls and truly reckless behaviour/decisions, Liable for failure to abide by rules/established mechanisms for civil cases
* **Egregious error standard rejected** – normal standard of reasonableness withheld (lots of pro’s need to make difficult calls) Folland v Reardon
* Separate body of law dealing Crown prosecutors Miazga
* No general duties to third parties except very special circumstances (if learns of info that someone is in danger, duty to report re child abuse etc)

**Policy reasons:**

* Standard of a reasonable barrister in conducting litigation 🡪 high threshold
* Job of a lawyer is to advise a client, so as long as behaving reasonably in a broad scope courts will not find lawyers negligent

## Duties to Unborn

* Before birth, legal entity of mother and child are one. Child only acquires legal entity upon birth Winnipeg Child and Family Services

# Preconception Wrongs

**Defendant carelessly causes a parent to suffer an injury that detrimentally affects a subsequently conceived child.**

**Case notes:**

* **No duty if harm occurred pre-conception** (no proximity) Paxton 🡪 acne Rx caused birth defects. Dr thought husband was sterile
* **Doctors sole responsibility is to mother**
* **Women do not owe a duty to their future children** UAW v Johnson Controls US 1991 – Company tried to get childbearing age women to prove sterility or lose jobs – found by court to discriminate against women, women can decide whether or not to expose to lead in battery factory. Balance of interests between protecting health of potential children and women’s autonomy rights.

**Policy Reasons: scope of doctor liability would be far too broad to cover future children, P responsible to mitigate their own risks in life, mother comes first** – may limit treatment options for women, limit autonomy of mother, women do not owe a duty to their future children

# Wrongful Birth (mother) / Life (Child)

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

**Case notes:**

* **Arndt v Smith SCC** 🡪 Mother got chicken pox in pregnancy; gave birth to severely disabled child as a result. Court 🡪 **Woman’s action failed on causation – couldn’t prove a reasonable woman in her position would have had an abortion** if informed of the very small risk of birth defects.
* **H(R) v Hunter** 🡪 Parents of 2 disabled kids awarded $3M for costs to raise kids D doctors did not refer the mother for additional genetic counselling
* **Krnagle v Brisco** 🡪 Child with Downs Syndrome. D physician didn’t offer testing in pregnancy. Parent entitled to damages for expenses for his care
* **Watters v White** 🡪 court dismissed a claim against a doctor for failing to inform relatives of an infant suffering neuro disease that they might also be carriers. P was second cousin, gave birth to a child who suffered from the disease 30 years later. Would have been a **breach of confidentiality** to inform other members of the family.
* **Watters v White** 🡪 court dismissed a claim against a doctor for failing to inform relatives of an infant suffering neuro disease they might also have

**Policy Thoughts: should parents be able to claim for mild disability? If it can be treated by meds? What is child only MIGHT develop future condition?   
Currently very hard to prove causation, may increase with better genetic testing**

# Wrongful Pregnancy

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

* **Suite v Cook** 🡪 Quebec CA found damages for raising healthy child were recoverable, but had to be offset against emotional benefits of having child
* **Kealey v Berezowski** 🡪 claims for child rearing should be universally denied as a matter of **public policy**, can only be recovered when P primary motivation for wanting to limit the size of the family was financial

# Pre-Natal Harm

**Child sues for injuries sustained in womb. Child must be born with disability.**

* **Dobson v Dobson** 🡪 27 wk pg woman caused car accident, damaged her unborn child. CS same day, severe and permanent disabilities. Sued mother for damages as a way to get insurance money to help with financial burden.

**Policy reasons** 🡪 **SCC mother does not owe duty of care to fetus before birth**

1. Intrude on women’s fundamental rights 🡪 bodily integrity, privacy, autonomy
2. Standard of care is impossible to determine re: what’s good/bad in a pregnancy
3. Lifestyle choices like alcoholism and drug abuse may be beyond control of mother. Creating a duty of care would not **deter** this type of behaviour anyways.
4. Duty of care would result in increased external scrutiny focused on mom

## Health Professional’s Duty to Inform

**Doctor must inform: nature of proposed tx, material risks of tx, risks of no tx, alternatives to tx offered, special or unusual risks (patient specific), and provide opportunity for questions and answer. Reibl v Hughes**

* **If consent obtained fraudulently or no consent** 🡪 medical battery
* **If negligent in obtaining consent** 🡪 duty of care / SoC, negligence
* To prove a claim, P has to prove that “but for” advice (inadequate) they were given, they would not have proceeded with the treatment pg 439

**Reibl v Hughes (1980**) Dr did not tell 10% chance of death and 4% chance of paralysis on surgery

* Doctors are bound by affirmative duty to disclose the risk of proposed treatments (all material risk, personal to P’s circumstances)
* **Subj/Obj standard** – a reasonable person in Plaintiffs position

**Haughian v Paine (1987)** back disc surgery left paralysis – Judgement for P  
**Expanded Reibl**

* Added risks of not treating (back probs could have healed on their own)
* Added duty to inform of alternatives to surgery or proposed tx
* 1/500 chance of paralysis enough, reasonable person may not consent

**Cite the text book for these**

* The scope of what constitutes a material risk is broad
* Disclosing some but not all MR is not enough
* If patient has a particular concern (special risks) it is up to the patient to ask
* More important for P to understand substance of risks than medical terms.
* Patient responsible to raise personal risks with Dr – apportions risk/liability
* **Dr Must use language patient can understand (Martin)**
* **Do NOT need to advise if their success rate is low Marcoux**
* **Do NOT need to advise on malpractice suits Marcoux**
* **Do need to advise who is primary surgeon Marcoux**
* **Do NOT need to advise on Dr HIV status Marcoux**

## Manufacturer’s Duty to Warn

* **Manufacturer has NO duty to warn if product** is a) highly technical b) only used by experts or c) not realistic for manufacturer to warn patient
* **Manufacturer has a duty of care** to provide any info they know or ought to know, to warn consumers of dangers inherent in its use Lambert
* **Warning labels are not sufficient** (McDonalds hot coffee case)
* Advertisement may not negate the risks warned about
* **Manufacturer’s needs to advise of dangers at time of sale and subsequently** – continuing duty for duration of life of product (Rivtow Marine)
* **Continuing duty** – not only what manufacturer knew, but what they ought to have known. If they learn new risk, must inform immediately Rivtov
* **Supplier’s duty same as manufacturer** - but in some cases (super technical product) then supplier might not be held to as high standard Allard
* Extended to installer for repairs (Bow Valley)
* Failure to warn of catastrophic results of misuse (Walford v Jacuzzi Canada – head first on slide – paraplegic )

**Hollis v Dow Corning Corp (1995) –** ruptured br implant, severe damages

* Manufacturer has duty to inform the “Learned intermediary”, intermediary informs end users / customers.
* Disclose all possible risks. Higher potential risk = greater duty to inform.
* Need to ask would a reasonable person in plaintiffs position would refuse the implant if they were properly informed. (Sub/Ob test)
* Med product greater risk = greater duty

Standard of Care

## “How should I act towards my neighbour?

**1. What’s the Standard? = Question of Law –**

* **Reasonable person test -** Conduct of a reasonable person of ordinary intelligence in the circumstances – look at factual scenarios not personal perspective Arland
  + Reasonable person is a mythical person in law, not superhuman Arland
  + Conduct is the standard adopted in community of people of ordinary intelligence and prudence Arland
* **Reasonableness standard** – **Ryan** (adds subjective analysis)  
  **Modified objective standard** – the conduct that would be expected of an ordinary, reasonable and prudent person in the same circumstances

**2. Has Standard been Breached? = Question of Fact Ryan v Victoria**

1. **Probability/Foreseeability of harm**
2. **Severity of loss**

**Balanced against Burden**

1. **Cost of avoiding risk**
2. **Social utility of D’s conduct – custom, industry practice, regulatory standards**

## Factors to Consider in Determining Breach of Standard

# Probability of Injury and Severity of Harm

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

**Bolton v Stone (1951)** P walking on road near cricket ground, struck by ball and injured. Probability of Injury not foreseeable. Every activity has risk, not all are breach

* When a risk is sufficiently small, a reasonable man can disregard it.

**Paris v Stepney Borough (1951)** P injured by splinter off steel in eye, did employer take reasonable precautions? Could have given goggles, low cost to fix. Negligent

* Severity of possible harm (complete blindness) should be factored in
* A **reasonably prudent employer** would supply goggles to a one eyed man. Low cost fix.

**Lovely v Kamloops, Bingley v Morrison Fuels** Simple precautions like installing handrails, in a milk tank or at a transfer station could be cheap and easy ways to reduce the risk of reasonably foreseeable injuries

* Must take precautions against reasonably foreseeable harms

**Vaughn and Law Estate** P must prove there was a reasonably practicable precaution that D failed to take

# Cost of Risk Avoidance

**What would it cost to do everything to prevent such harm? Reasonable cost?**

**Vaughn v Halifax Bridge (1961)** Painting bridge, flecks damaged cars. Could have stopped flecks of paint from falling on cars below.

* A person is liable in negligence when they do not take reasonable steps to address/avoid the risks of their actions. Especially when cost minimal.

**Law Estate v Simice (1994)** Dr didn’t do CT, sent home, died of aneurysm

* Cost of confirming that a patient doesn’t have a life threatening condition is less than burden on tax payer.
* What a reasonable doctor should know is based on an industry standard.
* Hospitals should be held to higher standard of care

# Social Utility of Defendants Actions

**If ends they are trying to achieve are socially valuable, may accept higher risk**

**Watt v Hertfordshire County (1954)** Firetruck didn’t have jack on it.

* **Social utility outweighed costs** 🡪 “one must balance the risk against the end to be achieve” Lord Denning 🡪 going to emergency, high social utility
* **Permissible to run high risk where there is high social utility** 🡪 Saving lives (fire fighter) has a high social value therefore higher risks justifiable.

**Roe v Minister (1954)** – These various considerations associated with risk avoidance and Social Utility of defendantsactions must be made at time of relevant breach, not in hindsight

**Watt v Hertfordshire County (1954)** Firetruck didn’t have jack on it.

**Social utility outweighed costs** 🡪one must balance risk against end to be achieved

# Breach of Standard of Care

**Consider statutory compliance in assessment of reasonableness Ryan**

* Where statute authorizes certain activities and defines manner of performance and precautions to be taken, compliance constitutes reasonable care
* P injured when motorcycle wheel caught in “flangeway” part of railway track through city street. D stated complied with relevant statutory regs. D liable

## Special Standards of Care

# Standard of Care Expected of People with Disabilities

**Test - Sudden mental illness will be absolved from liability if**: **Fiala**

1) No capacity to understand duty of care or   
2) Unable to discharge duty of care due to no meaningful control over actions   
**BOTH must be shown on BOP**

Mentally disabled should not be held to “reasonably prudent man” standard

# Standard of Care Expected of Children

**Under 5 yrs generally can’t be held liable. Otherwise no specific age of liability**

**TEST**: **Children should be held to modified standard of care** **McEllistrum**

**Objective** - what a reasonable and ordinary child would do in that situation

**Subjective -** what is expected given age, intelligence and experience (past activities, consequences of activities, instructions child might have received)

**Joyal v Barsby (1965)** – Girl running into traffic, hits car, was trained in road safety

* **Modified Obj Standard:** That expected of child of similar age, intelligence and experience (about capacity not culpability). Found contrib. neglig.

# Standard of Care Expected of Professionals

**Professionals should be judged by the standard of their profession. Standard of care is reasonable person with same training, experience, knowledge. White**

* Need expert evidence for complex scientific or medical manners (terNeuzen)
* Physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances (ter Neuzen and Layden v Cope 🡪 small town vs city doesn’t matter)
* Lawyer or other professional that breaks a code of ethical conduct is not automatically breaching the standard of care Perez v Glambox
* Poor result doesn’t automatically mean negligence White

**White v Turner (1981)** – Doctor did not follow the standard of his breast reduction profession. Failed to meet SoC by being too quick and not checking twice.

* Plaintiff must prove that not only was there a bad result (harm), there was a negligent act. Mere error of judgment not enough
* Courts bring in prof codes of conduct, fellow professionals to compare.
* **Conforming to accepted practice and custom is strong evidence of following standard of care. However if a custom itself is unreasonable, the practice or custom will not provide a defense.**

**VGH v Fraser Estate** – Intern doctors have lower standard of a “reasonable competent intern in the circumstances”

# Custom

Standard of Care v Standard Prof. Practice

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

* If the standard practice is complex, scientific or highly technical, Court must accept it as SofC

## Degrees of Negligence

Generally common law recognizes the degree of a reasonable person (with some modified subjective standards for certain groups).

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

**Gross Negligence:** “A very marked departure from the standards by which responsible and competent people habitually govern themselves.” McCulloch

**Sometimes written into statutes.**

**Municipalities –** “gross negligence” standard written in to protect them so they can function. Have duty to clean ice off sidewalk Crinson v Toronto

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

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

Factual Causation

## But For Test Clements/Ediger

Did the D’s conduct cause the P’s loss? But for the actions of the D, would the P have suffered loss. Assessed using common sense principles BOP Clements

**What test should be used?**

1. **BUT FOR LEGAL TEST: P must show on a BOP that “But For” D’s negligent act, which was a breach of the standard of care, the injury would not have occurred / P would not have suffered the loss** Clements / Ediger
2. Usually but-for-test but some exceptions and modifications when P cannot prove in evidence, reverse-onus or material contribution tests can be used **Ediger / Leonati / Snell (courts can fill gap where fairness is issue)**

**Can the Plaintiff prove that Defendant’s breach of the standard of care was the cause, or probably the cause, or a substantial part of the cause, of the loss Clements**

* Important to state with precision the alleged breach of the standard of care and the specific injuries at issue.
* D’s negligence doesn’t have to be sole cause of injury **Leonati**
* Needs to be proven on balance of probabilities, not scientific certainty **Snell**
* **Thin skill and crumbling skull –** take victim as you find them. Pre-existing conditions may contribute to damage – contribution enough to be liable **Athey**

**Case notes:**

* **Kauffman v Toronto transit (1959)** – No evidence that different handrail would have stopped harm or if people would even grab it.
* **Barnett v Chelsea & Kensington Hospital (1969)** –Pt would have died of food poisoning EVEN IF the doctor admitted as he should have 🡪 doesn’t meet causation test, no negligence found.
* **Ediger v Johnston 🡪** failed forceps delivery. Causation as injury would not have occurred but for breach of standard of care.

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

Inference of Causation acceptable when: Benhaim v St-Germain 2016

* No evidence to rebut an inference that the action caused the injury
* Application of common sense to draw an inference, not speculation
* P assumes the burden of proving causation on a BOP quoting Ediger
* If the D does prove evidence to the contrary, trier of fact may take into account the relative ability of each party to produce evidence. Ediger

## Established Exceptions To But For Test - Causation

* Limited exceptions – apply to a very narrow category of cases.
* They address unfairness that may arise from strictly applying the but-for-test.
* Use when underlying goals of tort law are being frustrated (no remedy for P).

# Multiple Negligent Defendants Rule

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

**Cook v Lewis (1951)** – Two hunters both careless use of firearm, P shot, who did it?

**Causation is presumed – Reverse onus burden on the 2+ D’s.** Must prove on BOP their breach did not cause the harm. If both D’s have breached, both found negligent if: Harm definitely came from at least one, impossible to prove which one.

# Learned Intermediary Rule

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

**Hollis v Dow Corning (1995)** – Cannot use the existence of a learned intermediary to absolve your causation. Plaintiff will usually have a difficult time proving that the LI would forward the info if it had it. 🡪 Dow liable can’t shield from negligence thru LI

**Walker v York Finch General** – Man got AIDS from blood transfusion, hadn’t been warned. Hospital found to be learned intermediary.

# Informed Consent Rule

**Hopp v Lepp and Reibl** – Causation is measured with special subjective/ objective test. Would a reasonable person in the P’s position consent to proposed tx

## Modifications to the But-For-Test

Where you don’t have enough evidence to apply but-for test.

# Materially Contribution to Injury Test

**Test**: **Ds negligence materially increases the risk of a particular kind of injury occurring and that injury occurs, then D will be deemed to be a cause Snell**

* A plaintiff need not prove w/ scientific certainty that the breach caused harm.
* Burden of proof shifts to the D to disprove causation on BOP

**Test would apply if:**  **Hanke**

1. **P establishes it is impossible to prove causation based on but for test and that this impossibility results from factors beyond the Ps control; and,**
2. **P establishes that D breached standard of care and that breach caused risk that could cause Ps injuries**

* First introduced in Athey v Leonati, evolved in Snell.
* Where facts are complicated, and it is not possible to conclude the proper causation on but-for test
* “But for” test must be applied in robust, pragmatic, common sense fashion Snell, Clements
* Imposes liability not because the act caused the injury, but contributed to the risk the injury would occur Clements
* Evidence connecting breach to injury may allow judge to infer that D’s negligence probably caused the loss Snell, Athey
* D’s negligence doesn’t need to be sole cause of injury – if part of cause of injury, D may be found liable to P for whole of losses Athey

**Snell v Farrell (1990)** – Eye surgery lost vision. Standard / breach found, but difficult to find causation unless through inference – no evidence to the contrary proved by D.

* Eye surgery may have caused the blindness or eye could have been failing
* P shows increased risk from common sense perspective, low standard.

**Policy Reasons** – Material contribution to injury is not a causation test – its is policy driven rule of law designed to permit Ps to recover in cases where they cant prove causation (MacDonald v Goertz quoted in Clements)

* Rule applies to ensure underlying goals of tort law met Clements
* Allows exceptions to but for test where unfair results
* Compensation, deterrence, corrective justice

## Multiple Causes

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

# Independent Insufficient Causes – single indivisible injury

Neither cause on its own caused sufficient harm. Liable for one = liable for both

**Joint tortfeasors can share liability when: Cook v Lewis** two hunters

1. principal and agent
2. master and servant (employees committing tort in employment)
3. joint ventures (two or more individuals acting to bring about an end of which negligence can be anticipated)

**IF Joint tortfeasors, only have to prove one of them was a negligent cause! Jointly and severally liable – BC Negligence Act** and **ATHEY**

**Athey v Leonati (1996)** – Pre-existing back condition not relevant to causation!

Not necessary to establish that the defendants negligence was the sole cause of the injury. as long as it’s part of injury = 100% liable

* Car accident, herniated disc, had back injury before. Pre-existing condition wouldn’t have caused herniation but for D’s actions, simply made “damages” worse – this is an application of "**thin skull**" rule. D held 100% liable.

# Thin-Skull and Crumbling Skull Rule Athey

* **Thin Skull -** Must take victim as you find them. **Fact that D contributes to harm is enough to find them liable.** D is liable for the additional damage but not pre-existing damage
* **Crumbling skull** – recognizes that pre-existing condition was inherent in the Ps original position.
* D’s do not need to put P in better condition that they found them, and need not compensate the P for pre-existing condition or damages that would have experienced anyways

Remoteness – Legal Causation

**Question of Law (Cause in Law) Was the harm “reasonably foreseeable?”**

**Judge decides – Connection between the D’s breach and the P’s loss?**

* **Policy mechanism - Courts ask “is this enough?” Controls the scope of liability. Based** **on Fairness and Policy** - contain liability in fair and legal boundaries
* **Is there an intervening act – enough to break the chain of causation?**
* **Foreseeability is much more narrow than duty of care – specific kind of conduct committed can kind specific kind of loss**

## Measured by Foreseeability

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

* **New test - foreseeability – was the P’s loss a foreseeable consequence of the D’s negligence**
* **Rule: If it is reasonable foreseeable that damage is a probable consequence, then it is not too remote and compensable**

D’s let oil spill from ship into water, spread to P’s wharf, metal from welding ignited oil, damaged wharf & 2 ships. D’s not liable, couldnt reasonably foresee harm-too remote

**Wagon Mound No 2 – Only liable for reasonably foreseeable consequences of your negligence.** Two boat owners claiming tort negligence. Loss by fire not too remote, welders foresaw risk of oil igniting.

* Enough that damage is possible, doesn’t have to be probable. Low threshold
* If the risk can be mitigated at low cost, a reasonable man will

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

* Don’t have to foresee precise injury, just foresee that one can occur.
* D can be liable for damages greater than were reasonably foreseeable.

**Assiniboine School District v Winnipeg Gas Affirms remoteness test, extent of damage isn’t foreseeable, manner of accident is. Broad ambit of damage.**

* Father gave boy power toboggan. Hit school, leaked gas, flame caused explosion. Gas company liable for placement of pipe. Duty and breach proven, causation. Not too remote - Foreseeable that type of accident would occur.

**Mustapha v Culligan (2008) – Risk needs to be more than mere possibility, closer to probability. Focus on kind of harm vs specific events leading to harm.**

* Applies to psychiatric harm 🡪 fly in water bottle, caused nervous shock. Dismissed as person or ordinary fortitude wouldn’t have suffered psych harm
* Must equate to “recognizable psych illness”

**TEST: If it is foreseeable that a person with ordinary fortitude would suffer a psychiatric injury of some kind, then the D has to take the P that the D gets, and is liable for that injury**

## Thin Skull Rule

Thin skull and crumbling skull mainly become relevant at damages.

**Thin Skull** – Not doomed from the outset.

* In order to establish liability must be proximate cause for initial injury.
* The consequential injury (flows from initial injury)
  + Needs to be proximate
  + Does not need to be the same type of injury as the initial injury
  + Type of consequential injury need not be foreseeable.

**Smith v Leech Brain (1962) – Take your victim as found** D liable for burn to lip that caused cancer and death, employee prone to cancer b/c of exposure to tar vapours

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

## Intervening Causes

1) D is negligent 2) A second cause intervenes resulting in a different loss, or aggravating the loss that the D’s negligence causes.

**Test:** **Is it within the “scope of risk” set in motion by D sufficient enough that severs the chain of causation? Bradford**

**Does Intervening Act break the chain of causation between D’s original act and the harm caused**?

* **If yes**, no liability to D for original act – however this is rare
* **If no,** D respons for consequences of intervening act as well as original act.

**Within the Scope of Risk test**:

* Broader than foreseeability
* **The second cause and the resultant damage must be within the scope of the risk of the first negligent act before the defendant will be liable** Bradford
* Both the second cause *and* injury must fall within the chain of causation from the first injury Bradford

**Bradford v Kanellos (1973) – Independent intervening act broke chain of causation** Build-up of grease, fire in restaurant, patrons panic and trample P

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

### Price v Milawski (1977) – Responsible for others negligence if stems from yours

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

### Hewson v Red Deer (1976) – Not possible to foresee people doing illegal things

* Left his keys in the tractor while he got some smokes. Thief made off with it and drove it into house. D not liable. Intervening act broke chain, could not have stopped theft from happening.

Defences

* Burden of proof is on D to prove defences
* **Principle**: even if P was negligently injured by D, damages should be reduced or denied on the basis of a defense.
* **Pertain to Ps own behaviour**:
  + Contributory negligence
  + Voluntary assumption of risk
  + Participation in a criminal or immoral act
* **Pertain to factual circumstances of D’s conduct and can be seen as special denial of negligence**:
  + Inevitable accident

## Contributory Negligence – P’s own behaviour

**Elements**: **P failed to take reasonable care which resulted in Ps loss by either:**

1. Contributing to accident that caused loss
2. Exposing himself to risk of loss
3. Failing to take reasonable precautions that will reduce harm if accident was to occur (not wearing seatbelt)

* **Applied when someone causes lossor when someone contributes to the loss** (either through act or omission) Mortimer
* **Partial defence** (don’t get fully absolved of liability) Gagnon
* **Measured on the modified objective standard**. “What would ordinary prudent person in the circumstances done + consideration of plaintiff’s circumstances, profession, age skill. Walls
* **“Mini Negligence” analysis** Gagnon***,*** Mortimer
* **Recognizes where P contributed to their own injury**, **should be liable** (blameworthy) Based on corrective justice Bow Valley, Walls

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

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

### Gagnon v Beaulieu (1977) – Can contribute through positive or negative actions

* Plaintiff was not wearing a seatbelt. Requirement to wear a seat belt was not yet law. D had to prove 1) that the seat belt wasn’t worn 2) that injuries would have been mitigated had it been. Not contrib negligent

**Mortimer v Cameron (1997) – Not reasonably foreseeable that wall would fall down.** Horseplay in stairwell, fell through wall, injured. Owner of builder more liable because they had an “ongoing duty” to ensure premises safe. P not contrib negl.

* A defendant’s negligence is only actionable with respect to harm that is within the scope of the risk that makes the offending conduct actionable.
* P’s contributory negligence will not limit recovery unless it is a proximate cause of his injury and w/in ambit of risk

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

* Fire in gast station, throws snow even though fire extinguishers there. Not contrib negligent as emergency – uses mod obj standard
* **TEST**: What would an ordinary prudent man might reasonably done under the stress of the emergency” (Modified Objective)

# Apportionment of Loss

***BC Negligence Act –*** Up to the judge to apportion contributory negligence - 50/50 is the default. Liability is measured by “comparative” blameworthiness.

## Voluntary Consent to Risk - P’s own behaviour

* Applied way less often. As Courts move towards corrective justice, less applied.
* A complete defense – bad for corrective justice b/c let off hook for wrongs.

### Dube v Labar (1986) – Violenti non fit injuria – to one who is willing, no harm is done. Rules for Consent Consented to getting in car with a drunk

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

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

Tubing so dangerous, defense rejected even though P signed waiver

## Participating Criminal or Immoral Act - P’s own behaviour

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

### Hall v Hebert (1993) – Both drunk. Car stalled on steep road. P allowed D to drive. Flipped car and injured D. Sued D for allowing him to drive drunk. Defense not allowed. Defense is applied rarely

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

**British Columbia v Zastowny (2008)**

* Can P recover lost wages for time spent in prison?
* P was a drug dealer, lived off profits for long time.Had been sexually assulated by prison officer in prison. P should not be allowed compensation for time in prison, had to bear responsibility for his criminal punishment, even if it was linked to sexual assaults. However got damages.

## Inevitable Accident Defence

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

### Rintoul v X-Ray (1956) – Brakes not working, crashed at intersection, did everything he could… didn’t provide enough evidence breaks randomly shit

**Defendant must establish the damage was:**

1. Caused by event in which the defendant had no control (inevitable)
2. That by exercising reasonable care the it could not be avoided (unavoidable)

Proof and Burden

## Proof of Negligence

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

# Legal Burden

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

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

# Evidentiary Burden

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

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

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

Strict and Vicarious Liability

## Vicarious Liability

* **Statutory Vicarious Liability** – Vicarious liability created by legislation
* **Principal-Agent Relationship** – where one is authorized to act on other’s behalf  
  MVA s 86 vicarious liability if you let someone use your car and they cause injury
* **Master-Servant Relationship** – “employee-employer” relationship.   
  **Test:** Whether the employee’s tortious act fell “within the ambit of the risk” that the employer’s enterprise created or exacerbated

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

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

**Bazley v Curry** - Curry had been abusing children in his care. Screening for hiring for Children’s Foundation. Missed that he was sexual predator. As soon as found out, fired him. Foundation vicariously liable b/c they increased risk by leaving him unsupervised for long periods.

**Policy reasons**

* **Students should still be able to get compensation**
* **Corrective justice – victims in vulnerable population**
* Conduct so extreme, doesn’t matter if they weren’t at fault, should be liable
* **Provides a just and practical remedy**
* **Effective compensation** – deeper pockets

**Jacobi v Griffiths –** Employment for group activities in public outdoor spaces with children. Employee isolated kids from group. Employer not liable.

**Blackwater v Plint** Church held 25% responsible for harms caused in residential schools, 75% to Canada. Church had significant role in res schools – hired and fired employees, partly for the govt but partly to impose Christian education on Ab kids.

# Salmond Test (Kerr)

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

**If it is unclear:**

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

**Real Question is:** Sufficient connection between employer’s creation or enhancement of the risk and wrong complained of?

**Factors to consider: Bazley, Blackwater**

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

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

## Strict Liability

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

1. Non-natural use of land

* Something that is dangerous extraordinary or generally of no use to society

### Gerstsen – Methane gas from dump filled garage

* Something’s are inherently dangerous (storing bulk water, explosives, nuclear explosives)

1. Escape of something likely to cause mischief

### Reed v Lions – Must leave your land

1. Harm done - Must be concrete damage

**Defences**

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

**Problems with the test.**

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

## Govt Liability

* Tribunals, Quasi-judicial agencies, regulatory agencies, Municipal govts, Crown Corporations

**Welbridge Holdings Ltd. v Greater Winnipeg**

* Legislative functions of government do not give rise to a duty of care to private citizens – citizens deal with govt through voting not litigation
* Judicial officials performing their functions, in the absence of fraud or bad faith, are not liable in Canada to negligence actions
* These immunities are necessary to protect the integrity and functioning of both government and the judicial process.

**Anns was modified in Cooper to when Crown owes private citizen duty of care:**

* Within the context of policies that involve many social and political considerations.
* Govt liability is maintained when it exercising its operational functions in bad-faith or for a complete failure to even consider exercising its statutory power.

**Duty of care still exists for governments in the various areas, including (p 231)**

* inspection of buildings and road maintenance;
* duty of care on the part of police to criminal suspects and to families of deceased victims of police shootings in the context of an investigation;
* duty to a plaintiff on the part of provincial officials to implement favourable judicial orders;
* duty on mine inspectors to exercise care for miners’ safety

**Judicial immunity:**

* Judges at all levels are immune from tort liability, incl provincial commissioners Morrier v Reb..?
* Charter challenge of a judge who made a comment of a spectator who was wearing a hijab. Judge had immunity

**Nelles v Ontario - Limits to immunity of Crown prosecutors** **– public policy**

* Absolute immunity would drop public confidence in legal system
* Charter rights violations need protection by Courts
* Built in deterrent to flood of cases – burden of proof very high

Pure Economic Loss

## Negligent Supply of Service

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

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

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

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

## Negligent Supply of Shoddy Goods

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

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

Negligent Misrepresentation

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

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

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

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

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

# PRE-CONTRACT NEGOTIATIONS

Rare to find liability here.

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

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

# DURING CONTRACT FORMATION

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

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

# AFTER CONTRACT IS FORMED

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

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

## Finding Negligent Misrepresentation

### Queen v Cognos Test \*Pre-existing special relationship

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Duty of care Who is my Neighbour   * **Established duty of care** * **Novel Duty of Care 🡪 Anns/Cooper Test**   + Reasonable Foreseeability of type of harm   + Proximity   + Policy 1-Internal   + Policy 2-External   **Special duties of care / Affirmative Action Duties:**   * Duty to rescue * Liability for intoxicated * Duty to prevent crime * Duty owed by a barrister * Duty to unborn   + Preconception   + Wrongful birth / life   + Wrongful pregnancy   + Prenatal harm * Health professionals duty to inform * Manufacturers duty to warn | **Did \_\_\_\_\_ owe \_\_\_\_\_\_ a Duty of Care**  **Relevant Facts -**  **Cases**   * DvS – who is my neighbour * Cooper- Novel Duty of Care * Moule / Amos Foreseeability * Palsgraf – foreseeable P * Crocker – intoxicated comm * Jordan House – intoxicated * Hill – Policy stage 1/2 Cooper * Mustapha – psychiatric harm * Hollis – manufacturers duty   **Conclusion** – **Owed Duty of Care**  **YES / NO Likelihood** | Standard of Care  **Reasonableness** – **the conduct that would be expected of an ordinary, reasonable and prudent person in the same circumstances** **Ryan**  **1A What is standard in the circumstances**   * That of a reasonable person * Increased if **professional** * Decreased for **child/capacity**   **1B Was there a breach? YES / NO**   * Probability of injury * Severity of harm   **Balanced with…**   * Social utility of Ds actions * Cost of Risk Avoidance | | **What is the SoC \_\_\_\_\_ must follow**  **Relevant Facts** –  **Cases**:   * Bolton – Probability of Injury * Paris – Cost of risk avoidance * Ryan – Breach of SofC * White v Turner – Professional * Ter Neuzen v Korn – Prof evidence   **Conclusion– Based on main fact**  **There is / is not a breach of SofC**  **Strength of belief**  **Other facts that may change conclusion?** |
| Factual Causation  Did the D’s conduct cause the P’s loss? But for the actions of the D, would the P have suffered loss. Clements   * But For Test * Material contribution to injury (if insufficient evidence for but for)   **Other causation considerations**   * Multiple causes * Thin Skull * Crumbling skull   **INJURIES** - list each separately  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **Breach** Facts \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  **Loss** Facts \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | **BUT-FOR \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **Would the P suffered the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **Cases**:   * Kauffman – Breach = Cause of injury * Cook v Lewis- multiple defendants * Snell v Farrell – Inferred causation * Athey v Leonati – material contribution to injury test * Clements – But for vs material contribution   **CONCLUSION**  **Breach caused Loss**  **OR**  **Breach /= Loss** | Remoteness – Legal Causation  **Was the P’s loss a foreseeable consequence of the D’s negligence Wagon Mound 1**   * Reasonable foreseeability of injury / loss as risk of the D’s action Wagon Mound 1 * Thin Skull Athey * **Intervening Causes**   1) D is negligent  2) A second cause intervenes resulting in a different loss, or aggravating the loss that the D’s negligence causes.   * **Within the Scope of the Risk**? YES / NO * **Break the chain of causation**? YES / NO | **Did the loss occur as a foreseeable consequence of D’s breach of SofC?**  **Relevant Facts -**  **Cases**   * Wagon Mound 1 – foreseeability test * Wagon Mound 2 – possible not probable * Huges v Lord – KIND of injury * Smith v Leech – special remoteness issues * Assiniboine – Foresee any damage * Mustapha – harm more than mere possibilitity, focus on kind of harm * Bradford – scope of risk test * Price v Milawski   **Conclusion** –  **Remote Met / Too Remote** | |

Duty of care

* **Established duty of care**
* **Novel Duty of Care 🡪 Anns/Cooper Test**
  + Reasonable Foreseeability
  + Proximity
  + Policy 1-Internal
  + Policy 2-External

**Special duties of care / Affirmative Action Duties:**

* Duty to rescue
* Liability for intoxicated
* Duty to prevent crime
* Duty owed by a barrister
* Duty to unborn
  + Preconception
  + Wrongful birth / life
  + Wrongful pregnancy
  + Prenatal harm
* Health professionals duty to inform
* Manufacturers duty to warn

Standard of Care

* Probability of injury
* Severity of harm
* Social utility of Ds actions

**Special standards of care**

* Disabled people
* Children
* Professionals

Breach of standard of care

Factual Causation

* But For Test
* Material contribution to injury (if insufficient evidence for but for)

**Other causation considerations**

* Multiple causes
* Thin Skull
* Crumbling Skull

Remoteness

* Thin Skull
* Intervening Causes

Defences

* Contributory Negligence
* Test: What an ordinary prudent man would do in the circumstances

Walls v Mussens – Mod Obj standard – test for contrib negl

Gagnon v Bealieu – P ought to have known risk / possibility of injury

Mortimer v Cameron – Contr negl will not limit recovery unless proximate cause of injury

* Voluntary Assumption of Risk (not if intoxicated)
* Participating in Criminal or Illegal Act – Hall v Hebert, BC v Zastowny
* Inevitable Accident

Liability Types

* Strict liability
* Vicarious liability
* Statutory (motor vehicle)
* Principal / Agent
* Employer / Employee (Master / Servant)
* Govt Liability

Strength of Claim

* Likelihood of success \_\_\_\_\_\_\_\_%
* Claim is Strong? Claim is weak?
* Which other claim in question is better??