LAW 140: Torts

## 12.6 A manufacturer’s and supplier’s duty to warn

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| Hollis v Dow Corning Corp (1995)(SCC) |
| Facts – Hollis underwent breast implant surgery in 1983. The implants (which were manufactured by Dow Corning) ruptured. Dow Corning had not warned of the risk of rupture from ordinary, non-traumatic, human activities. By the time the implant was bought by the surgeon, Dow had had 50-60 reports of implants rupturing without any apparent explanation.  Plaintiff – Hollis  Defendant – Dow Corning Corp  Who won? Hollis  Issue – Is Dow Corning liable?  Holding – Dow Corning is liable.  Ratio –**The standard of care applicable to a manufacturer’s duty to warn of risks of using the product:**   * A manufacturer has a duty to warn consumers of dangers inherent in the use of its product or which it has knowledge or ought to have knowledge. The duty to warn is a **continuing duty**; duty to warn of dangers discovered after the product has been sold and delivered. * There must be a good reason not to warn (like that everyone would know) for manufacturers to not be liable.   **The “learned intermediary” situation where the duty is to warn a professional rather than the ultimate user: In exceptional circumstances, a manufacturer may satisfy its informational duty to the consumer by providing a warning to a “learned intermediary”.**   * The learned intermediary rule applies whenever the consumer is not involved in the decision to use the product and will get advice from an intermediary.   **The causation issue related to what the patient herself would have done (subjective, not “modified objective” as with doctors)**   * A subjective test is applicable to products liability cases (as opposed to the modified objective test adopted for doctor cases) because manufacturers are conflicted because they want to sell the product.   **The causation issue related to what a third party (the surgeon) would have done, had the manufacturer provided adequate warnings of risk**   * The patient benefits from a conclusive presumption the doctor would have done his duty and passed on the information.   Reasoning –  **Standard of care** – Dow did not discharge its duty to Hollis by properly warning her doctor concerning the risk of post-surgical implant rupture (even under ordinary circumstances).  **Causation** – Hollis would not have consented to the operation if properly warned of the risk (she satisfied the subjective test by testifying). Hollis does not have to establish that her doctor would have informed her if he had known.  Note – The last causation issue contrasted with the handling of a similar issue in *Walker v York-Finch Gen Hospital*, where the question what a third party (the blood donor) would have done, had the Red Cross used proper screening advice, was not presumed in favour of the plaintiff but the plaintiff was said to be able to satisfy the onus of proof, on what the donor would have done, on a “material contribution” standard rather than a but-for standard. (That is, the blood service is liable if the evidence shows that, by not using adequate screening methods, it at least increased the risk that the donor would not be warned off donating blood). |

### *Class Proceedings Act* (BC), s 4

* Allows 2 or more claims to be adjudicated in a singular procedure
* The essential requirements for having a claim certified as a class action:

1. Must be a cause of action
2. Must be an identifiable class
3. **Must be common issues** (i.e. legal issues common to the potential claims of all members of the class)
4. **A class proceeding must be a preferable means of dealing with those common issues, compared with individual actions**

* Big advantage of class proceeding from the plaintiffs’ point of view is that it enables a group of claimants to pool resources for their collective benefit in terms of the litigation
* The advantage to the defendants is that it’s a means of getting a legal decision or settlement that is binding on all potential claimants, except those who (as they are permitted to do) opt out of the class proceeding
* In BC, non-residents of the province can be included as a plaintiff subclass, but they must opt in. Ontario and other jurisdictions put them into the class unless they opt out.

### Lawyers’ liability

* Lawyers are subject to a duty of professional competence like other professionals; they can be sued in contract or in tort; and a successful claim must show what the plaintiff’s position would have been if the lawyer had not been negligent.
  + In litigation cases, this can mean the plaintiff must persuade the court of what would have happened in a court proceeding if the lawyer had not been negligent, which can be tricky.
  + If P would have had X% of getting $Y (had his/her lawyer not been negligent), P will be awarded X% of $Y
* Suing a criminal defence lawyer for negligence is considered against public policy if it is a collateral attack on a conviction duly arrived at. The accused should appeal the conviction, not sue the lawyer for letting him/her be convicted (which would, in effect, require a retrial of the criminal proceedings to determine what would have happened if the lawyer hadn’t been negligent).

# 13. Special duties of care: negligent misrepresentation

## 13.2 Negligent misrepresentation causing pure economic loss

* Negligent misrepresentation is a tort that got started in the early 1960s with the *Hedley Byrne* case
  + Before then, a misrepresentation could give rise for damages only if it was fraudulent, which requires that the D either knew what was said was false, or was reckless as to whether it might be false (*Derry v Peek*). Contract law would give relief for a non-fraudulent (“innocent”) misrepresentation only by rescinding the contract, which could be done only if the parties could be restored more or less fully to the *status quo ante*.
* *Hedley Byrne* affirmed that **a person giving information or advice could be under a duty of care in respect of a purely financial risk loss that the recipient of the information or advice incurred by relying on what the D said.** The line between careless but casual misinformation, and careless, serious misinformation is very difficult to define precisely; that’s what *Hercules* is about.

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| Hercules Managements Ltd v Ernst & Young (1997)(SCC) |
| Facts – Accountants prepared audited financial statements for companies NGA and NGH. Shareholders of NGA and NGH claimed the accountants acted carelessly in preparing statements, and as a result they suffered economic losses as a result of relying on the statements in deciding to make additional investments and suffered economic losses based on their existing shareholdings.  Who won? Accountants  Issue – Do the accountants owe the shareholders a duty of care?  Holding – Even though the accountants owed the shareholders a *prima facie* duty of care with respect to the investments and the losses incurred through the devaluation of their existing shares, the duties are negated by policy considerations.  Ratio – Canadian law should analyze the circumstances when a duty of care will exist, not in terms of a “special relationship” between P and D, but in terms of   1. A *prima facie* duty of care, which depends on foreseeable reliance that is reasonable reliance, and; 2. The absence of factors militating against a duty of care, notably indeterminate liability.  * The fundamental policy consideration in negligent misrepresentation actions centres around the possibility that D might be exposed to liability in an indeterminate amount for an indeterminate time to an indeterminate class. **Where indeterminate liability can be shown not to be a concern on the facts of a particular case, a duty of care will be found to exist.**   Test – Proximity can be seen to inhere between a D-representor and P-representee when two criteria relating to reliance may be said to exist on the facts:   1. **Foreseeability of reliance:** D ought reasonably to foresee that P will rely on his or her representation, and; 2. **Reasonableness of reliance:** Reliance by P would, in the particular circumstances of the case, be reasonable.   Reasoning – **A *prima facie* duty of care was owed to the shareholders** because the possibility that the shareholders would rely on the audited financial statements and that they may suffer harm if reports were negligently prepared must have been reasonably foreseeable to the accountants and reliance would be reasonable.  **The duty ought to be negated** because the shareholders did not use the audit reports for the specific purpose for which they were prepared, and if accountants owed shareholders a duty in this case, they would be exposed to the possibility of **indeterminate liability (they would owe a duty of care to any known class of potential plaintiffs regardless of the purpose to which they put the auditors’ reports).**  Note – Post-*Cooper*, it would maybe be more logical to move this kind of consideration to the stage 1 “proximity” analysis because it deals with aspects of the relationship between P and D that relate to the appropriateness of imposing a duty of care on P. Whether you talk about “special relationship” (ignoring *Hercules*), or talk about it as a stage 2 policy consideration or talk about it as a stage 1 proximity consideration, makes no difference to the result. You’re looking at the same mix of factors with the same objective, to try to ensure that people are not exposed to risks of liability that they cannot effectively gauge or manage. |

## 13.3 Negligent misrepresentation and contract

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| BG Checo International Ltd v BC Hydro & Power Authority |
| Facts – Hydro called for tenders for a contract to erect transmission towers and string transmission lines. Checo inspected the area before submitting a tender, noting evidence of ongoing clearing activity. Hydro accepted Checo’s tender and entered into a written contract that stated that the clearing of the right-of-way formed no part of the work to be performed by Checo. No further clearing took place, causing Checo difficulties. Checo sued Hydro for negligent misrepresentation and breach of contract. Had the negligent misstatement not been made, Checo would have entered into the contract but increased the price to pay for the extra work plus a profit margin.  Who won? Checo  Issue – Can a P who is in a contractual relationship with D sue D in tort if the duty relied on by P in tort is also made a contractual duty by an express term of the contract?  Holding – Checo was entitled to claim against Hydro in tort.  Ratio – Contract and tort duties can simultaneously exist with respect to the same act or omission. If the contract amplifies or cuts down the tort duty or the liability for breach of it, you have to apply the contract. If the contract and tort duties can co-exist, you go with either, whichever suits the plaintiff.  Reasoning – **The principle of primacy of private ordering** – the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort.  The contract (more or less) replicated the tort duty (promising P wouldn’t have to clear the right of way versus negligently leading P to assume it wouldn’t have to do that). |

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| Queen v Cognos Inc (1993)(SCC) |
| Facts – Queen applied for a position at Cognos Inc. and was told during the interview that the position was associated with a major project and that prospects for employment after the project were very positive. The manager of the company did not tell Queen that the funding for the project had not yet been secured. Queen accepted the offer and moved his family, but shortly after moving the company reduced the scope of the project and Queen was terminated 18 months later. Queen sued the company for negligent misrepresentations. Queen’s employment contract had a termination clause in it.  Who won? Queen  Issue – Did the contractual provisions about termination exclude or limit the tort duty?  Holding – The contractual provisions about termination did not exclude or limit the tort duty.  Reasoning – A special relationship existed between the manager and Queen and it was foreseeable and reasonable that Queen would rely on the representations. Cognos and the manager were under a duty of care during the pre-employment interview to exercise reasonable care and diligence in making representations. It is not unreasonable to impose such a duty.  Note – Negligent misstatement raises a causation issue because recovery depends on what P would have done had the negligent misstatement not been made. In this case the finding was that Queen would not have taken the Ottawa job at all but would have stayed in Calgary. The damages compensate P based on these findings (the amount more Queen would have earned and saved in moving costs). |

# 14. Special duties of care: recovery of pure economic loss in negligence

## 14.1 Introduction

* Liability for pure economic loss – economic loss that does not flow from personal injury or property damage – presents considerable difficulties
  + It raises the risk of **indeterminate liability**
  + It extends legal protection to interests that most people would agree are less important than interests protected by liability for personal injury and property damage
* Categories of duty of care relating to pure economic loss

1. **Negligent misrepresentation**
2. **Independent liability of statutory public authorities** (*Cooper v Hobart*)
3. **Negligent performance of a service**

* Example – beneficiary suing the negligent lawyer for not adequately performing the obligation of having a valid will made

1. **Negligent supply of shoddy goods or structures** (*Winnipeg Condominium*)
2. **Relational economic loss** – you’re property isn’t damaged, but somebody else’s is damaged and it costs you money because you use that property in some way

## 14.2 New categories of pure economic loss

* The categories of recoverable pure economic loss, like the categories of negligence generally, are not closed. It is open for the courts to recognize a duty of care in a new type of situation, outside the five categories mentioned above. In doing so, they will use the *Anns/Kamloops* test, as interpreted in *Cooper v Hobart*.

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| Martel Building Ltd v Canada (2000)(SCC) |
| Facts – Martel leased a building to Canada, and Canada led Martel to believe that it would be amenable to renewing the lease on certain terms during negotiations for a renewal. Martel formally extended an offer on those terms, and Canada rejected the proposal and issued a call for tenders (eventually accepting one). Martel sued Canada for breaching a duty of care to negotiate in such a way as to avoid causing Martel pure economic loss (by repeatedly delaying matters, breaking appointments, ignoring requests, and failing to put Martel into contract with appropriate personnel.)  Who won? Canada  Issue – Is there a duty of care on parties during negotiations, during the preparation of calls for tender, and during the evaluation of bids submitted in response to such calls?  Holding – Any *prima facie* duty is significantly outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations.  Ratio – No duty of care arises in conducting contract renewal negotiations because of policy considerations.  Reasoning – **Parties who are in negotiation are looking after their own interests, not each other’s, and a tort duty would be inconsistent with that basic stance.**  *Anns/Kamloops* test:   1. Proximity    * Canada’s pre-existing contractual arrangement with Martel and communications are indicators of proximity. 2. Policy considerations    * The object of negotiations works against recovery – “a zero-sum game involving a transference rather than loss of wealth” (society is not worse off)    * Could deter socially and economically useful conduct    * To impose a duty could interject tort law as after-the-fact insurance    * To extend the tort into conduct of commercial negotiations would introduce the courts to a significant regulatory function    * Needless litigation should be discouraged   Note – The *Design Services* case similarly held that the subcontractors could not make up in tort what they failed to gain in contract because they were not parties to the “contract A” in which Public Works had promised Olympic to conduct the bidding process in a particular way. The attempt to get the court to approve an “other category” of duty of care failed because the tort duty towards the subcontractors would have been inconsistent with the contractual arrangements under which the contractual duty was assumed only to the actual bidder, not to those with whom the bidder had arrangements to give work if the bidder won the project.  In *Young v Bella* the attempt to approve an “other category” of duty of care succeeded because the student was in an obviously proximate relationship to the university and her professors (who accused her of child abuse). |

## 14.3 Negligent performance of a service

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| BDC Ltd v Hofstrand Farms Ltd (1986)(SCC) |
| Facts – BDC Ltd (a courier company) contracted with the Province of BC to deliver an envelope that, unknown to BDC, contained a Crown grant in favour of Hofstrand Farms. BDC delivered the envelope later, and as a result Hofstrand suffered economic loss when a third party was not bound by a contract for the sale of land.  Who won? BDC Ltd  Issue – Can a person who is dealing (usually contractually) with A, and undertakes to perform a service for A, owe a duty to B if that service is not done carefully?  Holding – BDC was under no duty of care to deliver a package carefully vis-à-vis the person whose financial interest were riding on the timely delivery.  Reasoning – The requirements of proximity (stage 1 of the *Anns* test) are not met because Hofstrand did not come within a limited class in the reasonable contemplation of a person in the position of BDC.  Note – Hofstrand had not signed the slip (which would have had limitations), and the Court was bothered that Hostrand could be better off than the actual client. |

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| James v British Columbia (2005)(BCCA) |
| Facts – James’ employer held a tree farm license from BC that prevented their sawmill from being closed without approval from the Minister. The Minister inadvertently omitted the clause upon renewal, and the employer closed the mill, causing James to suffer a loss of employment income. James sued the government in negligence. The government brought an application to strike out the claim.  Who won? James  Issue – Is BC liable in negligence.  Holding – The claim does not deserve to be struck out.  Ratio – **The absence of reliance does not preclude recovery because its place is taken by the voluntary assumption of responsibility by D.**  Not all pure economic loss duties of care turn on reliance. That is true only of the duties where the causal link involved the P doing something different from what he/she otherwise would have done (like negligent misstatement).  Reasoning – The facts demonstrate a different form of reliance (employees can be said to have relied upon the Minister to exercise reasonable care to retain the clause unless and until he reached a decision on policy grounds to remove it).  This case goes very far in finding a (potential, depending on the eventual facts proved) relationship of proximity between the Minister and the individual employees. |

## 14.4 Negligent supply of shoddy goods or structures

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| Winnipeg Condominium Corp No 36 v Bird Construction Co (1995)(SCC) |
| Facts – A land developer contracted with Bird Construction to construct a building later sold to Winnipeg Condominium. Years later, a section of the exterior cladding fell from the building, and further inspections revealed structural defects in the masonry work. Winnipeg Condominium brought an action in negligence.  Who won? Winnipeg Condominium Corp No 36  Issue – Can a general contractor responsible for the construction of a building be held liable in tort for negligence to a subsequent purchaser, who is not in contractual privity with the contractor?  Holding – Those responsible for the construction of the apartment building were under a duty of care to eventual owners of the building to ensure that the owners would not have to spend money on fixing construction defects.  Ratio – Where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which post a **real and substantial danger** to the occupants, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants.   * Applies only to **latent** defects (if they were patent, they would have been taken into account in fixing the purchase price) * “Dangerous” – any defect that, if left unremedied, threatens the eventual structural failure of the building or some other physical harm (such as the leakage of pollution)   Reasoning – The negligently supplied structure in this case was dangerous.  Was there a sufficiently close relationship between the parties?   * Yes – It is reasonably foreseeable to contractors that, if they design or construct a building negligently, subsequent purchasers may suffer personal injury or damage.   Are there any considerations that act to negate (a) the scope of duty and (b) the class of persons to whom it is owed or (c) the damages?   * No – There is no serious risk of indeterminate liability (the class of claimants is limited, the amount of liability is limited, and the burden of proof will always fall on P to demonstrate that there is a serious risk to safety), and the assumption that the purchaser is better placed than the seller to inspect the building and bear the risk is not responsive to the realities of the modern housing market (no amount of inspection would reveal this defect).   Note – This principle logically applies to dangerously defective chattels that have to be fixed/replaced and cause economic loss. |

## 14.5 Relational economic loss

* *Cattle v Stockton Waterworks* (187) and *CNR v Norsk Pacific SS Co* (1992)
  + In both cases, the problem was that those whose business depended on the property in question (the tunnel contractor in *Cattle* and the railway in *Norsk*) had financial losses that, if recoverable, would set a precedent that would apply very broadly.
  + *Cattle*
    - **Facts** – A farmer paid Cattle to make a tunnel. Stockton Waterworks had a pipe that ran through the embankment, and the pipe broke. As a result, Cattle had to pay a lot more to make the tunnel because he had to wait for the pipe to be fixed. Cattle tried to sue Stockton Waterworks on the basis that they negligently allowed the pipe to become weak, which caused him a loss.
    - **Holding** – Stockton Waterworks cannot be held liable because that would open the floodgates.
  + *Norsk*
    - **Facts** – CNR entered into a contract for the use of a bridge owned by the government. Norsk carelessly damaged that bridge and as a result CNR sustained considerable economic losses due to the disruption of its services.
    - **Holding** – A *prima facie* duty arose under the first stage of the *Anns/Kamloops* test, largely because, given the close contractual relationship between CNR and the government, those parties essentially were in a “joint venture” with respect to the bridge. Consequently, a sufficient degree of proximity existed between CNR and Norsk.
    - **Note** – This reasoning probably doesn’t apply to anything except the CNR Bridge in New Westminster.

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| Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd (1997)(SCC) |
| Facts – Husky Oil Operations Ltd (HOOL) and Bow Valley Industries Ltd (BVI) arranged to have an oil-drilling rig constructed by Saint John Shipbuilding Limited (SJSL). HOOL and BVI incorporated an offshore company, Bow Valley Husky (Bermuda) Ltd (BVHB). Ownership of the rig and construction contract with SJSL was transferred to BVHB. HOOL and BVI would continue to pay “day rates” to BVHB even if the rig was out of service. A heat trace system was required, and BVHB directed SJSL to use a system manufactured by Raychem. A fire broke out as the result of the flammability of the Thermaclad wrap. Neither Raychem nor SJSL warned any of the plaintiffs that Thermaclad wrap was flammable. HOOL and BVI sought to recover economic losses that they suffered during the repair period, including the day rates that they were contractually required to pay to BVHB.  Plaintiffs –Husky Oil Operations Ltd and Bow Valley Industries Ltd (BVI)  Defendants – Saint John Shipbuilding Ltd and Raychem  Who won? Saint John Shipbuilding Ltd and Raychem  Issue – Can HOOL and BVI recover economic loss from SJSL and Raychem?  Holding – HOOL and BVI fail in their actions in negligence.  Ratio – (1) Relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed.  Categories of recovery of relational economic loss defined to date:   1. Cases where the claimant has a possessory or proprietary interest in the damaged property    * Consequential economic loss as a result of property damage 2. General average cases    * Example – cargo owners for share in gains and losses 3. Cases where the relationship between the claimant and property owner constitutes a joint venture    * *CNR v Norsk Pacific SS Co*   Because these categories involve almost nothing, **it’s up to individuals to consider if their financial interests may be affected if somebody else’s property was damaged, and either insure against that eventuality or put something in their contracts that gives them protection. Only the property owner can shift the loss to the wrongdoer.**  Reasoning – The case at bar does not fall into any of the above three categories. Is the situation one where the right to recover contractual relational economic loss should nevertheless be recognized?  *Anns/Kamloops* test:   1. Is a *prima facie* duty of care owed?    * Yes – BVI and HOOL’s economic interests could foreseeably have been affected by a failure to warn BVHB of the danger of fire resulting from the use of products supplied by the defendants. 2. Is that duty negated or limited by policy considerations?    * Yes – The most serious problem is the problem of **indeterminate liability**. If the defendants owed a duty to warn to the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig were shut down as a result of being damaged (other investors, for example).   Note – The *D’Amato* case applies the same exclusionary rule to a claim by someone (e.g. an employer) who has a financial stake in somebody’s personal health; that they’ve suffered financial loss because that other person’s been injured due to D’s negligent. |

# 15. The standard of care

* Once it is established that D owed a duty of care to P, it then becomes necessary to formulate the standard of care and to determine whether that standard was breached. Broadly stated, **the standard of care determines how D should have acted. A breach occurs if he/she acted without that requisite degree of care.**
* The duty of care is a legal issue that is resolved by the judge. In contract, the issues of standard of care and breach raise questions of both law and fact.
  + It is for the judge to formulate the standard of care and determine the factors that need to be considered.
  + It is for the jury (or judge, if there is no jury) to apply those factors to the case and to determine whether D met the standard.

## 15.2 The common law standard of care: the reasonable person test

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| Arland v Taylor (1955)(ONCA) |
| Facts – P was injured in a motor vehicle accident.  Procedural history – At trial, the jury held that D had not breached the requisite standard of care. P appealed, objecting to the trial judge’s charge to the jury.  Issue – How should juries be charged on the standard of care?  Holding – The trial judge misdirected the jury, but there was no substantial wrong caused by the misdirection.  Ratio – It is improper for a juryman to judge the conduct of a person in given circumstances by considering, after the event, what he would or would not have done in the circumstances.  Reasoning – The standard of the reasonable person is not the standard of an actual person, if for no other reason than that the mythical reasonable person is infallibly reasonable, whereas no actual person is. Also, if the person applying the standard asks what they themselves would have done, hindsight may get the better of them and they may pitch the standard of care too high. |

## 15.3 Factors considered in determining breach of the standard of care

* The two most important factors to consider in determining whether D breached the standard of care are:

1. The probability of injury
2. The potential severity of injury

* Those considerations are balanced against the private and social costs that would have been associated with avoiding the risk and the social utility of D’s conduct
* These various considerations must be assessed at the time of alleged breach, rather than in hindsight

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| Bolton v Stone (1951)(HL) |
| Facts – P was walking on a road adjacent to a cricket ground when she was struck and injured by a ball that had been hit out of the ground.  Who won? Defendant (the cricket club)  Issue – What is the nature and extent of the duty of a person who promotes on his land operations that may cause damage to persons on an adjoining highway?  Holding – The cricket club did not breach the standard of care.  Ratio – Applying the standard of care involves weighing not only the probability of an accident but also the severity of the accident, so that it is not negligent to take small risks of small damage. What a man must not do is to create a risk that is substantial.  Reasoning – It was readily foreseeable that an accident such as befell P might possibly occur during one of D’s cricket matches, but the chance of a person ever being struck even in a long period of years was very small.  Note – The cost of taking preventive steps was said not to be relevant, but that’s because cricket didn’t have to be played at all in that location, so substantial risks to the public couldn’t be justified even if it would be expensive to mitigate them. |

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| Vaughn v Halifax-Dartmouth Bridge Commn (1961)(NSSC) |
| Facts – A bridge operated and maintained by a bridge owner was painted. Flecks of paint were blown by the wind onto nearby cars, and the owner of one car sued in negligence. The bridge owner argued that it had taken all necessary and proper measures to prevent or minimize injury to P, so that it was not careless.  Who won? Plaintiff (the car owner)  Issue – Was D negligent?  Holding – D was negligent for failing to take fairly simple steps to avoid the (relatively minor) damage from paint splatters to the cars below, but probably wouldn’t have been required to take very elaborate or expensive precautions.  Ratio – The duty of a D is to take all reasonable measures to minimize damages.  Reasoning – D could have taken effective steps because the season of painting did not exceed a month, we are only concerned with precautions in respect of one parking lot relatively close the bridge, and no policy was established of warning car owners or the dockyard authorities, though D well knew of the danger to them. |

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| Law Estate v Simice (1994)(BCSC) |
| Facts – P sued D doctors in negligence, claiming her husband died because of their failure to provide timely, appropriate and skillful emergency care (including not initially taking a CT scan). D worried about the cost to the taxpayer of doing the medical test.  Who won? Plaintiff (Law Estate)  Issue – How should limited and costly medical resources be allocated?  Holding – The patient’s health was a higher priority and so D was negligent in failing to order the expensive test.  Ratio – If it comes to a choice between a physician’s responsibility to his/her individual patient and his/her responsibility to the medicare system overall, the former must take precedence in a case such as this.  The standard is what the reasonable profession would have done, and it’s possible that, in some circumstances, the expensive use of scarce resources could legitimately factor into that professional’s decision whether a risk (of not doing the test, for instance) was significant enough to make use of the resources appropriate.  Reasoning – The severity of the harm that may occur to the patient who is permitted to go undiagnosed is far greater than the financial harm that will occur to the medicare system if one more CT scan procedure only shows the patient is not suffering from a serious medical condition. |

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| Watt v Hertfordshire County Council (1954)(CA) |
| Facts – Watt, a firefighter, was seriously injured by a special jack (used very infrequently) which was loaded into a vehicle unfit for carrying it. He sued his employers in negligence, claiming that they failed to load or secure the jack, loaded it in a way they knew or ought to know it would have dislodged and caused injuries, permitted and/or caused him to ride on the back, did not provide clips or straps to secure the jack, and failed to provide adequate supervision of loading the jack.  Who won? Hertfordshire County Council  Issue – Did the firefighter’s employer breach the standard of care?  Holding – The risk involved in sending out the lorry was not so great as to prohibit the attempt to save life.  Ratio – In measuring due care you must balance the risk against the measures necessary to eliminate the risk, and **you must balance the risk against the end to be achieved.** The saving of life or limb justifies taking considerable risk.  Reasoning – The standard of care, in effect, is lowered to take account of the purpose of the activity.  Note – Taking a risk with a bystander’s safety is obviously a different matter, but here, too, the duty of the person to act is relevant in deciding whether they should not have run the risk (*Priestman*). |

## 15.4 An economic analysis of the standard of care

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| United States v Carroll Towing Co (1947)(2d Cir) |
| Facts – A bargee left his fleet of ships for 21 hours, and it broke away during the full tide of war activity when barges were being constantly “drilled” in and out.  Who won? United States  Holding – It was a fair requirement that the Connors Company should have a bargee aboard (unless he had some excuse), during the working hours of daylight.  Ratio – From an economic point of view, the cost of reducing a risk is a key question because, if it is less than the estimated future damage from the risk if no measure is taken (the product of P and L, in Hand’s formula), D’s act or omission results a net “social cost” – a loss to somebody else that is not counterbalanced by a saving to D.  **Liability depends on whether B (the burden of adequate precautions) is less than L (the gravity of the resulting injury, if X happens) multiplied by P (the probability that X will happen): i.e., whether B is less than PL.**  Note – This sort of calculation is most viable when you’re just dealing with property or money; as soon as people’s lives or happiness are part of the equation, the moral and social foundations of negligence become more important. Another example is intentional torts where the wrongdoer makes a profit, e.g. by chainsawing the neighbour’s trees to raise the value of D’s own property by improving the view. |

## 15.5 Special standards of care

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| Fiala v Cechmanek (2001)(Alta CA) |
| Facts – MacDonald experienced a severe unexpected manic episode and jumped on Cechmanek’s car, broke through the sunroof, and began choking her. She involuntarily hit the gas pedal and accelerated into the intersection, striking the Fialas car, injuring the Fialas. MacDonald continued to threaten and yell obscenities and sexually explicit statements. An action against him was brought in negligence.  Who won? MacDonald  Issue – Was MacDonald negligent?  Holding – MacDonald satisfied the onus of showing that both of the tests to relieve him of tort liability were met.  Ratio – In order to be relived of tort liability when D is afflicted suddenly and without warning with a mental illness, D must show either of the following on a balance of probabilities:   1. As a result of his/her mental illness, D had **no capacity to understand or appreciate the duty of care owed** at the relevant time, or 2. As a result of mental illness, D was **unable to discharge his duty of care as he had no meaningful control over his actions** at the time the relevant conduct fell below the objective standard of care.   Reasoning – Negligence law is concerned with fault associated with falling below the requisite standard of care in the circumstances. Holding someone liable for his/her actions without attributing fault would create a strict liability regime.  Note – The policy arguments, as between the compensation principle and the fault principle, work against each other in this case. |

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| Joyal v Barsby (1965)(Man CA) |
| Facts – The six-year-old P (who had been instructed in the dangers of crossing the highway) ran out onto a busy highway after a truck driver sounded a foghorn. She was with her two younger brothers (one of which had already ran across). The D motorist saw the children but concluded they realized traffic was on the highway, and would stay where they were. He did not see the boy who ran across. He decreased his speed, but P started to run across the highway and collided with the rear door of the vehicle, sustaining severe injuries.  Who won? Infant plaintiff  Issue – Can a six-year-old infant be guilty of contributory negligence?  Holding – The infant plaintiff was not negligent.  Ratio – A child of six years is capable of being guilty of contributory negligence.  In cases involving the alleged negligence of young children, the standard of care is not reduced to zero (as with adults who are incapable of understanding or acting in accordance with the standard of care), but adjusted to a standard appropriate to the individual child, given his/her age, intelligence and understanding (and background in terms of where they’ve lived and so on).  Reasoning – The ordinary child of P’s age, intelligence and experience would have responded to the situation in the same way. |

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| White v Turner (1981)(Ont HC) affd (1982)(Ont CA) |
| Facts – D plastic surgeon performed a breast reduction operation on P. P suffered post-operative complications and sued D, claiming that he was negligent in performing the operation and not properly disclosing the risks of surgery.  Who won? Plaintiff (White)  Issue – Was D negligent?  Holding – The poor result obtained in the mammoplasty performed on P was the result of D’s negligent execution of the surgery.  Ratio – Professionals’ standard of care is higher than that of the reasonable, but unskilled, person; the standard of care appropriate to that profession must be observed.  Reasoning – The reason for the bad result here was that insufficient tissue was removed by D, for two reasons (both of which were negligence):   1. The operation was done too quickly. 2. The suturing was started before a proper check was made of whether enough tissue had been removed.   Note – This case presents an example of the use of **circumstantial evidence** – the court had to reconstruct what happened from what they knew and what was in evidence because there was no direct evidence of what the doctor did. |

## 15.6 Degrees of negligence

* The common law generally recognizes one standard of care in negligence – that of a reasonable person
* However, statutes occasionally restrict the scope of liability to injuries inflicted as a result of “gross negligence”
  + Gross negligence requires something less blameworthy than criminal negligence but something worse than ordinary tort negligence (“a very marked departure from the standards by which responsible and competent people habitually govern themselves”)
* The idea of gross negligence tends to be confined to two types of statutes:

1. Concerns the liability of a municipality for injuries caused by snow or ice on sidewalks

* *Example – Municipal Act*

1. Concerns the liability of medical professionals who provide medical assistance during emergencies

* *Example – Good Samaritan Act*
  + Section 1 – A person who renders emergency medical services or aid… at the immediate scence of an accident or emergency… is not liable for damages for injury, to or death of that person caused by the person’s act or omission in rendering the medical services or aid unless that person is **grossly negligent**.
  + Section 2 – Section 1 does not apply if the person rendering the medical services or aid (a) is employed expressly for that purpose, or (b) does so with a view to gain.

## 15.7 Custom

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| Ter Neuzen v Korn (1995)(SCC) |
| Facts – P contracted HIV in 1985 as a result of artificial insemination. The risk of infection was not widely known in North America when the procedure was performed, and the doctor responsible for screening semen donors had adopted standard medical practices.  Who won? Defendant  Issue – Is D liable?  Holding – A properly instructed jury could not find D liable for respect to his screening of potential donors for HIV specifically.  Ratio – What the professionals’ standard of care is, can often be established only by expert evidence; if the professional standard is proved, a judge or jury can’t say it was inadequate unless the issue is something even lay people can appreciate.   * **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 the general rule** – if a standard medical practice fails to adopt obvious and reasonable precautions that are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he/she was merely conforming to such a negligent common practice.   The (now) $300,000 “cap” on non-pecuniary damages applies to cases of medical malpractice as it does to other forms of personal injury.  Reasoning – At the time of treatment, D had complied with a standard practice that was beyond the understanding of a lay person and was not so obviously fraught with danger that it could be declared careless in itself. |

# 16. Causation

* Question in causation: **What is the loss that the tort caused P to suffer?**
  + Compare P’s current (post-tort) position with her/his hypothetical position if the tort had not been committed (the no-tort position)
* Two problems:

1. Difficulties of **fact**

* The exact connection of one event to another may not be known

1. Difficulties of **making educated guesses about what might have happened if the tort hadn’t been committed, or will happen in future**

* Typically problems of estimating what P would have done, how much P would have earned, etc.
* The factual causation issues usually revolve around **alternative causes** or **cumulative cases**.
  + **Alternative causation issue** – if you take the tort away, not sure if it would have made any difference
    - In the one-D scenario, the alternative causation issue is deciding whether P’s injury was caused by D’s tort, or by some other cause altogether
    - In the multiple-tortfeasor scenario problems of alternative tortfeasors are rare (*Cook v Lewis* being a notable exception)
    - *Snell v Farrell*
  + **Cumulative causation issue** – extracting the tort from the other factors that led to the injury and deciding whether the tort was necessary to the occurrence of the injury, i.e. whether the injury would have occurred, but for the tort
    - Multiple-tortfeasor scenario
    - Example – *Hansen v Sulyma*
      * The tort of negligence was committed by three Ds: the bar that served the patron too much, the bar patron who got into his car after having drunk too much, and the P’s own driver who had failed to put on the warning lights when he ran out of gas and parked his car, with P in the passenger’s seat, by the side of the road. There was **indivisible injury** to P that was caused by three separate torts, each of which met the but-for test.
    - *Kauffman* and *Barnett*

## 16.2 The but-for test

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| Kauffman v Toronto Transit Commn (1959)(Ont CA) affd (1960)(SCC) |
| Facts – P stepped onto an escalator in D’s subway station and was immediately knocked down by a man (who was knocked down by two scuffling youths). Very severe injuries were sustained as the result of her fall and the continuing movement upwards of the escalator.  Who won? Defendant (Toronto Transit Commn)  Issue – Did the type of handrail in use cause P’s accident?  Holding – The evidence did not support but-for causation.  Ratio – If P’s injury would have occurred regardless of D’s negligent act, then that act will generally not be held to be a cause.  Reasoning – There is no evidence that the type of handrail in use was a contributing cause of P’s accident. |

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| Barnett v Chelsea & Kensington Hospital Mgmt Committee (1969)(QBD) |
| Facts – Three men (Ps) went to D hospital complaining about vomiting for several hours after drinking tea and were told by the nurse (who was instructed by the medical casualty officer) to go home to bed and call their own doctors. One of the men died of arsenic poisoning 5 hours later.  Who won? Defendant (Kensington Hospital Mgmt. Committee)  Issue – Was the doctor’s negligence a cause of the man’s death?  Holding – P failed to establish, on the balance of probabilities, that Ds’ negligence caused the death of the deceased.  Reasoning – It was a timing question; even if the doctor had not been negligent and had come to the hospital, the treatment would have come too late. |

## 16.3 Established exceptions to the but-for test

* Numerous efforts have made over the years to rework the but-for test of causation with varying degrees of success. The most widely accepted modifications involve limited exceptions that apply to relatively narrow categories of cases.
* Three established exceptions to the but-for test:

1. **The multiple negligent defendants rule**

* If P can prove that two Ds were negligent, and one had to have caused his loss, and it is impossible to prove which one, then the burden of proving causation will shift to Ds. Each D will be held liable for negligently causing the loss unless he can disprove causation on the balance of probabilities.
* *Cook v Lewis*

1. **The learned intermediary rule**

* Manufacturers of products that are not directly available to the public, such as prescription drugs, may discharge their duty to inform consumers by adequately disclosing information to a learned intermediary.
* *Hollis v Dow Corning Corp* – Dow could not use the learned intermediary rule to shield itself from claims arising from its own negligence.

1. **The objective/subjective test in informed consent cases**

* *Hopp v Lepp*/*Reibl v Hughes –* Healthcare professionals have a duty to put patients in a position to make informed decisions about whether to consent to proposed treatment. The court adopted a special objective/subjective test of causation, framed in terms of **whether a reasonable person in P’s position would have consented if he/she had been adequately informed.**

## 16.4 Recent attempts to modify the but-for test

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| Snell v Farrell (1960)(SCC) |
| Facts – D (Dr. Farrell) performed a cataract operation on P (Mrs. Snell). D noticed a slight discoloration after injecting a local anesthetic, waited 30 minutes, and proceeded with the operation. Following the surgery, there was blood in the eye (which eventually cleared but P was blind in one eye). The damage to the optic nerve could have occurred naturally or because of continuing the operation, and neither expert witness was willing to state with certainty the cause.  Who won? Plaintiff (Snell)  Issue – Must a P in a malpractice suit prove causation?  Holding – P met the onus of proof on the factual issue because the finder of fact can infer from the fact that the injury happened after the operation, and was consistent with having been caused by the doctor’s negligently carrying on with the operation, that the injury happened because of what the doctor did.  Ratio – In many malpractice cases, the facts lie particularly within the knowledge of D. In these circumstances, very little affirmative evidence on the part of P will justify the **drawing of an inference of causation in the absence of evidence to the contrary**. The legal or ultimate burden remains with P, but in the 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.   * In these cases, you can take what you know and infer the factual link (applying a sort of *post hoc ergo propter hoc* logic) – compare one factual explanation with other factual explanations, and say what is the most likely explanation (50% + 1 probability)   Reasoning – D was negligent in continuing the operation and he greatly increased the risk to P. The continuation of the operation was more likely to have been the cause of injury than natural causes. Other, unrelated causes could have been the explanation for P’s injury, but those explanations were less probable than that the tort was the cause. |

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| Clements v Clements (2012)(SCC) |
| Facts – Mrs. Clements fell off while riding on the passenger seat of Mr. Clements’ motorcycle after a nail punctured the tire while Mr. Clements was driving 120-km/h in a 100-km/h zone. She sustained severe traumatic brain injury, and sued Mr. Clements, claiming that he was negligent in driving an overloaded bike too fast.  Who won? Mr. Clements  Issue – Does the usual “but for” test for causation in a negligence action apply, or does a material contribution approach suffice?  Holding – The matter should be returned to the trial judge to be dealt with on the basis of “but for” causation)  Ratio – The material contribution test –material contribution to the *risk* – is only available in cases of multiple tortfeasors where each tortfeasor was shown to have been at fault but P could not prove that the injury resulted from the negligence of D1 rather than D2, D3, etc.   * As a general rule, P cannot succeed unless she shows as a matter of fact that she would not have suffered the loss “but for” the negligent act or acts of D. A trial judge is to take a robust and pragmatic approach to determining if P has established that D’s negligence caused her less. Scientific proof of causation is not required. * Exceptionally, a P may succeed by showing that D’s conduct materially contributed to the risk of P’s injury, where:  1. P has established that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and 2. P, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or “but for” cause of her injury, because each can point to one another as the possible “but for” cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.   Reasoning – The trial judge erred in insisting on scientific reconstruction evidence as a necessary condition of finding “but for” causation and applying a material contribution to risk test (this is a simple single-D case).  Note – Questions that *Clements* leaves open are:   1. Whether, in the case of multiple Ds who are liable for each materially contributing to the risk that P would be injured as he/she was, the liability of each D is joint and several with the others, or several (proportional). *Barker* favoured the former view but the SCC did not indicate agreement with that proposition. 2. Whether, in a one-D scenario, material contribution to risk is unavailable. *Sienkiewicz* was not accepted by the SCC but not rejected outright either. |

* *McGhee v National Coal Board*
  + D employed P to clean out brick kilns. In breach of the requisite standard of care, D failed to provide shower facilities at the work site, and P was required to cycle home while still filthy. P developed dermatitis and sued D. D’s failure to provide showers materially increased the risk of P developing this condition. However, the experts were unable to say that the absence of showers was more likely than not to have been a cause of P’s dermatitis.
  + The HL found for P, holding that if D’s negligence materially increases the risk of a particular kind of injury occurring and that very injury befalls P, then D will be deemed to be a cause.
* *Fairchild*, *Barker* and *Sienkiewicz* 
  + UK cases that held employers liable for exposing P employee to asbestos, even though P could not prove that it was employer A’s asbestos, rather than employer B’s or C’s, that was the cause.
  + The HL recognized this was making people liable simply for materially increasing the risk of injury, even though they may well not be the one that caused the injury. *Barker* said that since this was the basis, D should not be liable for 100% of P’s loss but only for a proportional share, but that was reversed by statute.
  + *Sienkiewicz*
    - Disease case in which the tortious cause (D’s negligence) and the non-tortious causes (exposure to the same agent, but from “innocent” sources) were of exactly the same nature.

### Corrective justice

* The idea that justice demands restoration of a “deficit” in P’s position, caused by D’s wrongful conduct
* The SCC introduced the concept of corrective justice into a tort judgment for the first time in *Clements*
* Helpful in explaining why it is was appropriate to hold multiple Ds liable on the basis of materially contributing to a risk of injury; the deficit was seen as their collective responsibility, in a sense
  + Court seems to assume that joint and several liability is demanded
* Example – *Abbott v Sindell Laboratories*
  + Drug companies held severally liable for damages to a large number of Ps, based on the share of the market they had in comparison with the other drug companies. All had been negligent in some way.

## 16.5 Multiple causes

* The issue of causation becomes more complex when P’s injuries are brought about by two or more causes
  + It must first be determined if the injuries are **divisible** (can the injuries be divided into distinct losses that are each readily attributable to the conduct of a particular tortfeasor?)
    - If P’s injuries are divisible, he/she will have a separate cause of action against each tortfeasor
  + This situation must be distinguished from one in which two or more torfeasors cause a **single indivisible harm**
    - Two categories of these multiple cause causes:

1. Those involving independent insufficient causes
   * + - But-for test adequately addresses the causation issues
2. Those involving independent sufficient causes
   * + - But-for test produces anomalous results when applied

* Important to distinguish situations in which the Ds are independent tortfeasors from those in which they are joint tortfeasors
  + **Independent tortfeasor** – can only be held liable for the injuries he/she causes or contributes to bringing about
  + **Joint tortfeasor** – held liable for the torts committed by his/her fellow tortfeasors, even if he/she did not cause or contribute to P’s loss
    - Three situations in which Ds will be held to be joint tortfeasors:
      * An agent committing a tort while acting on his/her principal’s behalf
      * An employee committing a tort while acting on his/her employer’s behalf
      * Two or more individuals agreeing to act in concert to bring about a common end which is illegal, inherently dangerous, or one in which negligence can be anticipated
  + If Ds are joint tortfeasors, P need only prove that one of them was a negligent cause

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| Athey v Leonati (1996)(SCC) |
| Facts – P had a pre-existing back condition. He suffered neck and back injuries in a traffic-crash D negligently caused. P later sustained a herniated disc while doing an exercise program on his doctor’s advice. The trial judge accepted that the crash causally contributed to the hernia, but reduced P’s damages by 75% to reflect the greater causal role played by his pre-existing condition.  Who won? Plaintiff (Athey)  Issue – Should the liability be apportioned?  Holding – P is entitled to recover 100% of his damages.  Ratio – It is not necessary for P to establish that D’s negligence was the *sole cause* of the injury. As long as D is *part of* the cause of an injury, D is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: Ds remain liable for all injuries caused or contributed to by their negligence.  **“Thin skull” rule** – makes the tortfeasor liable for P’s injuries even if the injuries are unexpectedly severe owing to a pre-existing condition  **“Crumbling skull” rule** – D is liable for the injuries caused, even if they are extreme, but need not compensate P for any debilitating effects of the pre-existing condition which P would have experienced anyway  **Situations in which we do, and don’t apportion between causes:**   * If two concurrent tortfeasors cause divisible harm🡪 don’t apportion   + The damage is assessed separately for each tort * Where the second tort would have caused the same damage the first tort did 🡪 don’t deduct from D1’s liability; just hold D2 liable for the extent to which he/she added to the injury that D1 already caused (*Baker*) * If D1 and D2 cause indivisible harm (one injury caused by the cumulative effect of both torts) 🡪 hold them jointly and severally liable for the whole damage as far as P is concerned, but (under the *Negligence Act*) apportion liability for the purpose of contribution and indemnity between D1 and D2   + If P is contributorily negligent we hold D2 and D2 severally liable because of that oddity in the drafting of s 1 of the Act * We also do something that looks like apportionment when we calculate damages based on evidence that there’s a significant chance that part of the injury would have happened anyway (crumbling skull). If the evidence in this case had been that there was a 30% change that P’s back would have given out in a year or two anyway, P would only have received 70% of the damages for the injury. * We also work with probabilities when we base damages on contingencies (a percentage chance that something would have come along to **diminish** P’s position anyway), or on loss of a chance (a percentage chance that something would have happened to **improve** P’s position).   + The loss of a chance logic could be used, in theory, to calculate P’s loss if a doctor’s negligence has caused P to lose a chance of a better outcome, but the SCC in *Laferriere* and the HL in *Gregg* have not gone that route. They’ve said a P has to prove the lost good outcome would probably have happened, but for the tort – i.e. this hypothetical past event is treated as if it were provable on the same balance-of-probabilities basis as an actual past event.   **Distinction about how we prove facts (on a balance of probabilities, but once proved the facts are taken as certain) and how we “prove” future events or hypothetical past events**   * Making estimates of different sorts, and sometimes it’s appropriate to use probabilities to do that (especially with future events). Generally the probabilistic approach is not used with hypothetical past events.   + For example, what P would have done if the doctor had advised of the risk, whether P would have entered into the K if the negligent misstatement had not been made, etc. – those are typically treated as yes-or-no issues to be decided on a balance of probabilities as if they were “straight” facts. We don’t attempt to say that there is a 75% chance P’s decision would have been different, etc., because no evidence would enable you to make that kind of probabilistic assessment.     - We don’t analyze it in terms of the chance that P’s decision would have been different, we just ask whether P has proved the decision would have been different.       * *Kripps* – P can prove this by showing the misstatement was **material** to P’s decision – a kind of material contribution approach because making P prove it “but-for” is impractical.   Reasoning – P’s disc would not have herniated, but for the accidents (caused by Ds’ negligence) having weakened his already weak back.   1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven. 2. If it was necessary to have *both* the accidents *and* the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, D would be fully liable because the accidents were still a *necessary* contributing cause. 3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether D’s negligence materially contributed to the injury.   The findings of the trial judge indicate that **it was necessary to have *both* the pre-existing condition *and* the injuries from the accidents to cause the disc herniation in this case.** Although the accidents played a lesser role than the pre-existing problems, the accidents were nevertheless a necessary ingredient in bringing about the herniation (this contribution is assessed at 25%). This falls outside the *de minimis* range and is therefore a material contribution, sufficient to render D fully liable for the damages flowing from the disc herniation.  Note – This was a case of cumulative causation with a tortious cause and other, non-tortious causes. |

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| Nowlan v Brunswick Construction Ltee (1972)(NBCA) affd (1975)(SCC) |
| Facts – D contractor was negligent in constructing P’s house, which suffered extensive rot due to leaks in the structure. D argued that no damage would have occurred, but for the architect’s poor design which had not provided for proper ventilation.  Who won? Plaintiff (Nowlan)  Holding – Each tortfeasor/contract-breaker is jointly and severally liable for the loss.  Ratio – When there are concurrent torts, breaches of contract, or a breach of contract and a concurrent tort both contributing to the same damage, whether or not the damage would have occurred in the absence of either cause, the liability is a joint and several liability and either party causing or contributing to the damage is liable for the whole damage to P.  Reasoning – D is a concurrent wrongdoer and the fact that the damage might not have occurred but for the poor design of the building does not excuse him from the liability arising out of his poor workmanship and inadequate material supplied by him. Each tort (or breach of contract) met the “but for” test. |

## 16.6 Issues in assessing the plaintiff’s loss

1. Once the appeal period ends, P’s subsequent fate has no impact on the original tortfeasor’s liability.
2. A tortfeasor’s liability will be reduced to reflect P’s pre-existing injuries or disabilities, whether they were naturally occurring, innocently caused, or the result of a preceding tort.
3. There is more uncertainty regarding the extent of an original tortfeasor’s liability when P suffers an independent successive parallel injury prior to trial on the first inquiry (often referred to as a **supervening injury**).

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| Penner v Mitchell (1978)(Alta CA) |
| Facts – The trial judge awarded RESP special damages for loss of income for a period of 13 months following the date of the accident that gave rise to RESP’s cause of action. During that 13-month period RESP would have been unable to work for a period of three months, even if the accident had not occurred, as he suffered from a heart condition that was unrelated to the accident.  Who won? Appellant  Issue – Should the rule applied in the *Baker* case, which resulted in treating injury arising from the second event as irrelevant in assessing damages against the first tortfeasor, be applied when the second event, the heart problem, arose in non-culpable circumstances?  Holding – The trial judge erred in awarding RESP damages for the three-month period she was disabled.  Ratio – **The contingencies taken into account in assessing prospective loss of income should only include those that occur in non-culpable circumstances, that is, in circumstances that do not give rise to a cause of action.** The rule applied in *Baker* (original tortfeasors can only take into account a successive culpable parallel injury if it reduced P’s disability or shortened the period of time that he/she would suffer it) should be applied only to those contingencies that arise from culpable circumstances.   * *Example – If tortfeasor A breaks P’s left leg, and tortfeasor B breaks P’s right leg, but would have broken both legs, only hold tortfeasor B liable for the right leg, and A for the left leg.*   Reasoning – Future contingencies arising in culpable circumstances should not be taken into account in assessing damages such as prospective loss of income because if that were done, P would receive less than full compensation from the two wrongdoers. There would be a deduction from the first loss because of the contingency that the second culpable event might occur and there would be a deduction from the second claim as the first culpable incident had occurred.  On the other hand not taking into account future contingencies arising in non-culpable circumstances would result in an injured person being overcompensated. |

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| Dillon v Twin State Gas & Electric Co (1932)(NH) |
| Facts – D maintained wires to carry electric current over a public bridge. The decedant and other boys had been accustomed to play on the bridge in the daytime, when no current passed through the wires except by chance. The decedant, while sitting on a girder where the wires from the post to the lamp were in front of him or at his side, leaned over, lost his balance, and took hold of one of the wires to save himself from falling. The wires happened to be charged with a high voltage current at the time and he was electrocuted.  Holding – A simultaneous, non-tortious cause could have caused the injury even if the tort hadn’t happened; it depends on the evidence whether this was so.  Ratio – P’s probable future but-for the tort bears on liability as well as damages.  Reasoning – Whether the shock from the current threw him back on the girder or whether he would have recovered his balance, with or without the aid of the wire he took hold of, if it had not been charged, are issues of fact, as to which the evidence may lead to different conclusions. |

# 17. Remoteness

* Even if D breached the standard of care in a way that caused P to suffer a loss, liability will be denied if the connection between the breach and the loss was too “remote”
* There is a close relationship between the issues of remoteness and causation
  + Causation is concerned with the *factual* connection between D’s breach and P’s loss
  + Remoteness is concerned with the *legal* connection between D’s breach and P’s loss
* **Remoteness hardly ever comes up. It’s only an issue if (a) the D can reasonably foresee that P will suffer some kind of injury (because otherwise there’s no duty), but (b) D suffers a type of injury different from what was foreseeable.** 
  + The latter requires the court to accept that the injury suffered differs in kind from the foreseeable type, and that it actually not be reasonably foreseeable – which, given the flexibility of the test in *Wagon Mound (No 2)*, means it has to be practically unimaginable.

## 17.2 Directness versus foreseeability

* *Re Polemis and Furness, Withy & Co*
  + **Directness test for remoteness** – P’s loss will not be too remote to be recoverable if it was a direct result of D’s careless
    - Directness is defined in terms of a **close temporal and spatial connection between D’s breach and P’s loss**

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| The Wagon Mound (No 1)(1961)(PC (NSW)) |
| Facts – The appellants, charterers of the Wagon Mound, carelessly permitted oil to spill into Sydney Harbour, which continued to escape for over a day and was carried by the wind and tide under RESP’s wharf. RESP’s employees were using welding equipment and some molten metal ignited a rag that was floating on some debris. The burning debris ignited the floating oil and the wharf and some equipment were severely damaged in the fire.  Who won? Appellants  Ratio – The directness test of *Re Polemis* should no longer be regarded as good law. **The essential factor in determining liability is whether the type of damage is of such a kind as the reasonable man should have foreseen.**  Test – “Reasonably foreseeable” test  Decide whether the unforeseeable damage P suffered is different in kind from the foreseeable kind.   * There is not a logical classification of “types” of damages; it relates both to the nature of the injury and to the process by which it is brought about.   Reasoning – The liability for negligence is based upon a general public sentiment of moral wrongdoing for which the offender must pay. It is a departure from this principle if liability is made to depend solely on the damage being the “direct” or “natural” consequence of the precedent act. |

## 17.3 Modifications to the foreseeability test

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| Hughes v Lord Advocate (1963)(HL) |
| Facts – D’s employees left a paraffin lamp and open manhole unattended. An 8-year-old boy knocked the lamp into the manhole and the vaporized paraffin that escaped caused an explosion. The boy fell into the manhole and was badly burned.  Who won? Plaintiff (Hughes)  Issue – What is it that has to be foreseeable (burning by explosion or some kind of burning)?  Holding – The damage was not too remote.  Reasoning – The relevant type of injury is “injury from burning”, making the precise means by which the burning came about irrelevant in terms of remoteness. |

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| Smith v Leech Brain & Co (1962)(QBD) |
| Facts – P’s husband was employed by Ds. He was operating an overhead crane when a piece of molten metal or flux struck and burned his lower lip. Later, the spot where he had been burned began to ulcerate and get larger. He was diagnosed with cancer, and although treatment destroyed the primary growth, the cancer spread and he died of cancer.  Who won? Plaintiff (Smith)  Issue – Was the damage too remote?  Holding – The damages that P claims are damages for which Ds are liable.  Ratio – Different forms of personal injury are not treated as different types of damage for remoteness purposes; any foreseeable physical injury makes D liable for all the **physical** consequences that P suffers.  Reasoning – Ds could reasonably foresee the burn. |

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| Marconato v Franklin (1974)(BCSC) |
| Facts – P suffered relatively minor physical injuries in a car accident caused by D’s negligence. Following the accident, she developed symptoms of pain and stiffness for which there was no physical explanation. She became depressed, hostile and anxious. The accident triggered a major personality change.  Who won? Plaintiff (Marconato)  Issue – Are P’s damages too remote?  Holding – D must pay damages for all the consequences of her negligence.  Ratio – Any foreseeable physical injury makes D liable for all the **psychiatric** consequences that P suffers.  Reasoning – The consequences for P arose because of her pre-existing personality traits and could no more be foreseen than it could be foreseen by a tortfeasor that his victim was thin-skulled and that a minor blow to the head would cause a very serious injury. It is implicit, however, in the principle that a wrongdoer takes his victim as he finds him that he takes his victim with all the victim’s peculiar susceptibilities and vulnerabilities. |

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| The Wagon Mound (No 2) (1967)(PC (NSW)) |
| Facts – This case arose from the same incident as the *Wagon Mound (No 1)*. The Ps in this action, however, were the owners of two boats that were damaged in the harbor fire. The vital parts of the findings of fact are (1) that the officers of the Wagon Mound would regard furnace oil as very difficult to ignite on water – not that they would regard this as impossible, (2) that their experience would probably have been that this had very rarely happened – not that they would never have heard of a case where it had happened, and (3) that they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances – not, as in *Wagon Mound (No 1)*, that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on water.  Who won? Plaintiffs  Issue – Do these differences between the findings in the two cases lead to different results in law?  Holding – It was foreseeable enough that spilling oil into the harbor would cause this damage.  Ratio – “Reasonably foreseeable” does not mean “probable to happen”; even a slight possibility of harm may be recoverable if the reasonable person would have taken it into account. This means that serious harm will not be too remote even if there is only a statistically very small probability of its happening—all the more so if it was easy for D to avoid creating the risk.  Reasoning – There was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but also it involved considerable loss financially. |

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| Assiniboine South School Divn No 3 v Greater Winnipeg Gas Co (1971)(Man CA) affd (1973)(SCC) |
| Facts – An auto toboggan owed by Hoffer and operated by his son ran out of control, over a snow bank and across a parking lot, and struck a gas-rise pipe servicing a school. The pipe was fractured, with the result that gas under high-pressure escaped and rose and entered the boiler room of the school through a duct. In the boiler room the gas reached an explosive mixture and was ignited. An explosion and fire occurred, causing damages of $50,739.90 to the school.  Who won? Assiniboine South School Divn No 3  Issue – Was the damage reasonably foreseeable and therefore recoverable?  Holding – The damage was reasonably foreseeable and the Hoffers (joint tortfeasors) and the Greater Winnipeg Gas Co are liable to P.  Ratio – It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its matter of incidence need not be foreseeable if physical damage of the kind that in fact ensues is foreseeable.  Reasoning – The damage was of the type or kind that any reasonable person might foresee. Gas-riser pipes on the outside of buildings are common. Damage to such a pipe is not of a kind that no one could anticipate. When one permits a power toboggan to run at large, one must not define narrowly the outer limits of reasonable prevision.  The installation of the gas service was negligently constructed in the sense that it was constructed in such place and manner as to make likely the type of damage which ensued. |

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| Mustapha v Culligan of Canada Ltd (2008)(SCC) |
| Facts – P sues for psychiatric injury sustained as a result of seeing the dead flies in a bottle of water supplied by D.  Who won? Defendant (Culligan of Canada Ltd)  Issue – Did D’s breach of its duty of care cause P’s damages in law or was it too remote to warrant recovery?  Holding – D’s breach of its duty of care was too remote to warrant recovery.  Ratio – Psychiatric injury is considered too remote if it is such that the person of reasonable fortitude wouldn’t have suffered it. The thin-skull rule doesn’t apply, but a reasonably robust skull rule applies – to psychiatric injury only (**unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable**).   * Once P establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, D must take P as it finds him for purposes of damages. * If D knew that P was of less than ordinary fortitude, P’s injury may have been reasonably foreseeable to D.   Reasoning – Mustapha failed to show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. |

## 17.4 Intervening causes

* Cases in which P’s loss was caused by D’s breach and a subsequent intervening act
  + Intervening act – one that causes or contributes to P’s loss after the original D’s breach has taken effect
* Intervening cause cases involve two related issues:
  + Causation (is it fair to say that D’s negligence caused the other person to act)
  + Remoteness (was it reasonably foreseeable to D that the negligence could lead to the ultimate injury suffered by P)

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| Bradford v Kanellos (1973)(SCC) |
| Facts – The appellants (husband and wife) were seated at a restaurant counter when a flash fire occurred and a fire extinguisher was activated that made a hissing/popping sound. A patron in the restaurant shouted that gas was escaping and caused a panic in the restaurant. The wife was injured as people ran.  Who won? Respondent  Issue – Was the hysterical conduct fairly to be regarded as within the risk created by the RESP’s negligence in permitting an undue quantity of grease to accumulate on the grill?  Holding – The hysterical conduct was not fairly to be regarded as within the risk created by the RESP’s negligence.  Reasoning – The grease fire did not cause the person to yell “gas” because this was a totally irresponsible act and so, by the same token, unforeseeable.  Note – The dissent thought that it was an instinctive response to the hissing sound from the extinguisher and so was caused by the grease fire, and foreseeably so. |

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| Price v Milawski (1977)(ONCA) |
| Facts – P injured his right ankle and went to the hospital. Dr. Murray (D) sent P for x-rays but instructed the technicians to x-ray his foot, not his ankle. After examining the x-rays, Dr. Murray informed P that there was no fracture and his ankle was sprained. P was eventually referred to Dr. Carbin, a surgeon. Dr. Carbin discovered that P’s x-ray results were negative, and did not order new x-rays (despite P’s complaints). P eventually went to another surgeon and discovered the fracture, but P suffered permanent disabilities as a result of delays.  Who won? Plaintiff  Issue – Is Dr. Murray liable for Dr. Carbin’s intervening act?  Holding – Dr. Murray caused Dr. Carbins’ negligence in the but-for sense and so is liable, jointly and severally with Dr. Carbin, for the (indivisible) injury that resulted from the combination of Dr. Murray and Dr. Carbin’s treatment.  Ratio – A person doing a negligent act may, in circumstances lending themselves to that conclusion, be held liable for future damages arising in part from the subsequent negligent act of another, and in part from his own negligence, where such subsequent negligence and consequent damage were reasonably foreseeable as a possible result of his own negligence.  Reasoning – It was reasonably foreseeable by Dr. Murray that once the information generated by his negligent error got into the hospital records, other doctors subsequently treating P might well rely on the accuracy of that information. |

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| Hewson v Red Deer (1976)(Alta SC) |
| Facts – P sustained damages when a tractor crashed into P’s house. Weisenburger, an employee of the City operating the tractor, left the tractor and did not remove the key or close and lock the cab. On his return, the tractor was gone. He found the tractor crashed into the Hewson residence. Footprints consistent with a person having jumped out of the cab of the tractor were found.  Who won? Plaintiff (Hewson)  Issue – Was the illegal act of the unknown third party foreseeable?  Holding – It was reasonably foreseeable that anyone might become aware that the tractor was being left at the stockpile unattended and might be tempted to put it in motion.  Reasoning – The tractor could be set in motion by any person and this might have been prevented by taking precautions.  Note – The CA thought there was no evidence before the judge from which to infer that the third party’s prank was foreseeable; hence it was a *novus actus interveniens*. |

# 19. Defences in negligence

* Even if P proves that he/she was negligently injured by D, damages may be reduced or denied on the basis of a defence
* Defences that pertain to P’s own behavior
  + **Contributory negligence**
    - *Negligence Act*
  + **Voluntary assumption of risk**
    - *Lehnert v Stein* – voluntary assumption of risk does not apply except in very narrow circumstances (only when P has accepted the **legal risk** (by signing a waiver, for example); merely running a physical risk is not the voluntary assumption of legal rights)
  + **Participation in a criminal or immoral act**
* Fourth defence
  + **Inevitable accident** – concerned with the factual circumstances surrounding D’s conduct and can be seen as a special denial of negligence
* For each defence, the burden of proof is on D
* D may be able to plead or prove more than one defence

## 19.2 Contributory negligence

* *Negligence Act*, ss 1-2
  + Deals with liability where the victim was also at fault
* *Negligence Act*, s 4
  + Deals with contribution among tortfeasors who are jointly and severally liable to the victim

## 19.3 Voluntary assumption of risk

* A contractual exclusion of liability, subject to all the rules about notice to the customer or client, and the *contra proferentum* rule of strict consideration, is now virtually the only situation in which *volenti non fit injuria* is applied
* Contractual limitations on a lawyer’s liability to a client for negligence or other breach of duty are void in BC
  + Section 65(3) of the *Legal Profession Act*

## 19.4 Participation in a criminal or immoral act

* The *ex turpi* defence does not merely lead to reduction in damages: it precludes recovery altogether. As a result, it has been narrowly interpreted.

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| Hall v Hebert (1993)(SCC) |
| Facts – P and D got drunk at a party. While driving home, D stalled his car on a steep, unlit gravel road that sharply dropped away on one side. D agreed to allow P to drive, P lost control and flipped the vehicle down the embankment. P was severely injured and sued D for allowing him to drive.  Who won? Plaintiff  Issue – Could D raise the *ex turpi* defence to negate P’s cause of action?  Holding – The plaintiff need not be denied recovery since the grounds (where P genuinely seeks to profit from his/her illegal conduct, or whether the claimed compensation would amount to an evasion of a criminal sanction) are not relevant to his claim.  Ratio – The *ex turpi* defence is a true defence, not a factor in settling the duty of care. Basically **it only cuts in if (1) P is seeking to recover the gains of illegal activity (e.g. income that would have been earned from crime), or (2) lessen the punishment for that activity.**   * The new test eliminates the uncertainties surrounding the old test, even if sometimes it seems counterintuitive to treat somebody’s involvement in illegal activity as (at most) contributory fault rather than a disentitlement to sue. * Merely compensating somebody for personal injury (arising from the course of committing some illegal act) is never going to be blocked by the *ex turpi* defence (unless possibly if P is claiming for lost earnings as a criminal).   Reasoning – The *ex turpi* defence should not be replaced with a judicial discretion to negate, or to refuse to consider, the duty of care. The important but limited power to prevent tort recovery on the ground of P’s illegal or immoral conduct is better viewed as a defence.  Practical reasons:   1. The onus of establishing the exceptional circumstances that preclude recovery on the basis of P’s immoral or illegal conduct should rest with D. 2. If the *ex turpi* causa priniciple operates as a defence it is possible to distinguish between claims to profit from an illegal act and other claims, whereas if it operates as a factor negating a duty of care, it is not possible to treat an action in the selective manner justice requires. 3. Procedural problems would be raised if P sued in tort and contract.   Note – *Folland v Reardon* allowed a P, whose criminal conviction was set aside, to sue his lawyer for letting him get convicted in the first place. Normally **suing the defence lawyer is barred by public policy because it amounts to a collateral attack on the validity of the conviction**. |

# 20. Proof of negligence

## 20.1 The burden of proof in a negligence action

*Apology Act*

* **“apology”** means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, **whether or not the words or actions admit or imply an admission of fault** in connection with the matter to which the words or actions relate
* **Section 2**

1. An apology made by or on behalf of a person in connection with any matter (a) does not constitute an express of implied admission of fault… (b) does not constitute an acknowledgement of liability… (c) does not void, impair or otherwise affect any insurance coverage… (d) must not be taken into account in any determination of fault or liability in connection with that matter.
2. …. Evidence of an apology… is not admissible in any court…

## 20.2 Exceptions to the general principles governing the burden of proof

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| Cook v Lewis (1952)(SCC) |
| Facts – P was hit in the face by bird-shot when Ds fired simultaneously at different birds which had flown in P’s direction.  Who won? Plaintiff (Lewis)  Holding – The finding of the jury exculpating both Ds from negligence was perverse and it is unnecessary to examine the facts on which that conclusion is based.  Ratio – The burden of proof is on P to prove each element of the tort of negligence. However, where two Ds are simultaneously negligent but only one of them could have caused the injury, the onus is put on Ds to prove it was not their shot that hit P.  Reasoning – When we consider the relative position of the parties and the results that would flow if P was required to pin the injury on one of the Ds only, a requirement that the burden of proof on that subject be shifted to Ds becomes manifest. They are both wrongdoers – both negligent toward P. They brought about a situation where the negligence of one of them injured P, hence, it should rest with them each to absolve himself if he can. The injured party has been placed by Ds in the unfair position of pointing to which D caused the harm. If one can escape the other may also and P is remediless. Ordinarily Ds are in a far better position to offer evidence to determine which one caused the injury.  Note – *Clements* reinterpreted this case as one in which a material contribution to risk was sufficient to establish causation. |

## 20.3 *Res ipsa loquitur*

* The maxim *res ipsa loquitur* describes the circumstances in which the occurrence of an accident provided circumstantial evidence that P’s injury was caused by D’s carelessness
* The maxim consists of the following elements:

1. The occurrence must have been one that does not, in the ordinary course of events, happen without carelessness
2. The instrumentality of harm must have been under the sole management and control of D or someone for whom D was responsible
3. There must not have been any direct evidence as to how or why the accident occurred

* There were three views on *res ipsa loquitur*’s effect

1. Successful invocation of the maxim **reversed the legal burden of proof such that D was required to prove on a balance of probabilities that his/her carelessness did not cause P’s injury**
2. Successful invocation of the maxim requires D to **adduce some evidence that was sufficient to raise an inference of proper care that was at least as strong as the inference of negligence that had been raised by P**
3. Successful invocation of the maxim merely **provided a basis upon which *some* inference of negligence *might* be drawn**

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| Fontaine v British Columbia (Official Administrator) (1997)(SCC) |
| Facts – Fontaine and Loewen went missing and months later their truck was discovered in a river bed at the bottom of a steep embankment. Loewen’s body was behind the steering wheel and Fontaine’s body was in the passenger seat. There was no direct evidence regarding the events that resulted in their deaths. Fontaine’s widow brought an action under the *Family Compensation Act* with respect to her husband’s death. She argued that the mere occurrence of the accident sufficiently established that her husband’s death was attributable to Loewen’s carelessness.  Who won? British Columbia (Official Administrator)  Issues – What is *res ipsa loquitur*? When does it arise? What effect does its application have?  Holding – The circumstantial evidence in this case does not discharge P’s onus.  Ratio – The “doctrine” of *res ipsa loquitur* is put to an end on the basis that it added nothing; the problem it dealt with was simply finding negligence by inference from circumstantial evidence. The circumstances may be some evidence of negligence but not compelling, or it may be very compelling.  Circumstantial evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether P has established on a balance of probabilities a *prima facie* case of negligence against D. Once P has done so, D must present evidence negating that of P or necessarily P will succeed.  Reasoning – If an inference of negligence must be drawn in these circumstances, it would be modest. The trial judge found that the defence had succeeded in producing alternative explanations of how the accident may have occurred with negligence on Loewen’s part. |

# 21. The tort liability of public authorities

## 21.2 Special rules for public authorities

* Municipalities get the benefit of special limitation periods under ss 285-286 of the *Local Government Act* and s 294(1)-(2) of the *Vancouver Charter*.

## 21.3 The negligence liability of public authorities

* To determine whether a public authority can be held directly liable for its own negligence, it is important to first determine whether the public authority was exercising a ***statutory power*** or a ***discretionary power***
  + If the enabling legislation required the public authority to pursue a particular course of action, the authority was exercising a **statutory duty**
    - A public authority cannot be held liable for simply doing what it was required to do
    - Liability may be imposed if the public authority performed its task *carelessly*, or if it *failed* to perform its duty at all
  + If the public authority had discretion, it was exercising a **power**
    - The court must be concerned about substituting its choice for that of the legislature. The law therefore has developed a distinction between policy matters and operational matters.

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| Just v British Columbia (1989)(SCC) |
| Facts – The appellant was seriously injured and his daughter killed when a boulder worked loose from the slopes above Highway 99 and came crashing down upon the appellant’s car. The appellant brought this action against the respondent contending that it had negligently failed to maintain the highway properly.  Who won? Appellant (Just)  Issue – Were the decisions the Ministry made about how much to inspect rock faces policy or operational decisions?  Holding – The appellant was entitled to a finding of fact on the issues bearing on the standard of care and a new trial should be directed to accomplish this.  Ratio – The traditional tort duty of care will apply to a government agency in the same way that it will apply to an individual.   1. In determining whether a duty of care exists **the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty.**  * In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations that arise from its pure policy decisions.   + In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also be properly made by persons of a lower level of authority. The characterization of such a decision rests on the **nature of the decision** and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. A policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion.  1. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.  * The manner and quality of an inspection system is clearly part of the operational aspect of a government activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.   Reasoning –   1. **Foreseeability/proximity issue**  * The ministry, as operator and maintainer of the highway, had a duty of care towards highway users to take reasonable care for their physical safety.  1. **Whether the decisions the Ministry made about how much to inspect rock faces were policy or operational decisions (second stage *Anns* consideration)**  * Only the decision whether to inspect at all was a policy decision; once that was taken, there was a duty of care to adopt a reasonable system of inspection. * The decisions of the government agency in this case could not be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the court to determine whether the RESP had been negligent or had satisfied the appropriate standard of care.   Note – This case drew the line pretty high up the decision ladder; other cases, like *Swinamer*, have regarded decisions about how often and how rigorously to inspect as policy rather than operation. Essentially, the idea is that the scale and overall design of a system is policy whereas its execution is operational, but obviously there’s no bright line between the two. |

* On the policy/operational distinction, a case on point is *Kamloops v Nielsen*. There the activity (deciding whether to enforce building bylaws) was discretionary in nature, but the city was held negligent in failing to exercise its discretion at all. The BC legislature responded by giving municipalities immunity for failing to enforce building bylaws (*Local Government Act*, s 289). The *Vancouver Charter*, s 294(8), goes further and absolves the city of any duty of care. Detected building defects can also be noted in the land title registry under s 57 of the *Community Charter*, which makes it applicable to regional districts as well as municipalities.

## 21.4 Misfeasance in a public office

* This is an intentional tort, and historically involved malicious conduct by a public officer that was directly aimed at a particular individual. However, the misfeasance tort has now expanded to include conduct that is less obviously malicious or abusive.

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| Odhavji Estate v Woodhouse (2003)(SCC) |
| Facts – Odhavji was fatally shot by officers of the Metropolitan Toronto Police Service. An assistant to Chief of Police Boothby notified the Special Investigations Unit of the Ministry of the Solicitor General (SIU) of the incident. The SIU is an agency statutorily mandated to conduct independent investigations of police conduct in cases of death or serious injury caused by the police. The SIU requested that the D officers remain segregated, that they make themselves available for same-day interviews, and that they provide their shift notes, on-duty clothing, and blood samples. Under the *Police Services Act*, a chief of police is required to ensure that members of the force carry on their duties in accordance with the provisions of the Act. The estate of Odhavji and members of his family (Ps) allege that Ds intentionally breached their statutory obligation to cooperate fully with the SIU investigation.  Who won? Plaintiffs (Odhavji Estate)  Issue – Should Ps’ cause of action be struck out?  Holding – If the facts are taken as pleaded, it is not plain and obvious that the actions for misfeasance in a public office against Ds must fail. Ps should not be deprived of the opportunity to prove each of the constituent elements of the tort.  Ratio – The tort of misfeasance in a public office can arise in one of two ways:   * **Category A** – The public official deliberately abused an authority he/she possessed by using it deliberately to injure P   + The fact that the public officer has acted for the express purpose of harming P is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his/her powers for an improper purpose, such as deliberately harming a member of the public * **Category B** – The public official knowingly acted without authority and was aware that P could probably be injured as a result   + P must prove the two ingredients of the tort independently of one another   Reasoning – The pleadings in this case can support the second type of claim against the police officers and the police chief, so far as they alleged deliberate acts to frustrate the special investigation, and referred to actual knowledge by Ds that those acts would probably injure the family.  Note – Malfeasance in public office requires special damage, at least in the sense of actual harm (like the emotional harm in this case). |

# 22. Statutory provisions and tort liability

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| R v Saskatchewan Wheat Pool (1983)(SCC) |
| Facts – The Saskatchewan Wheat Pool delivered infested wheat to the Canadian Wheat Board in violation of s 86(c) of the *Canada Grain Act*. The statute made no reference to the issue of civil liability for breach of its provisions. The Board made no claim in common law negligence, but rather sought damages based solely on the Pool’s breach.  Who won? Saskatchewan Wheat Pool  Issue – Where A has breached a statutory duty causing injury to B, does B have a civil cause of action against A? If so, is A’s liability absolute, or is A free from liability to perform the duty is through no fault of his?  Holding – The action must fail as negligence is neither pleaded nor proven.  Ratio – The nominate tort of statutory breach should not be recognized in Canada.  If D broke a statutory obligation, it can be evidence of negligence but has no other civil liability consequence (unless the statute says it does).  Reasoning – The legislature has imposed a penalty on a strictly admonitory basis and there seem little justification to add civil liability when such liability would tend to produce liability without fault.  Notes – In the UK there is a great deal of law on the liability of employers for breaches of industrial safety legislation. There is no equivalent in Canada because workplace accidents are taken out of the torts system by the *Workers Compensation Act* or its equivalent in other provinces; the abolition of civil liability is in s 10(1).  *Ryan v Victoria* involved the converse issue, whether *compliance* with a regulatory statute immunized the railway from liability for having too big a gap next to its rails, which was a hazard for cyclists like Ryan. The answer was that the legislature had not intended the regulation to take liability away. |

# 23. Occupiers’ Liability

#### Occupiers Liability Act

* Section 3: **Occupiers’ duty of care**

1. An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person’s property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
2. The duty of care referred to in subsection (1) applies in relation to the
   1. Condition of the premises,
   2. Activities on the premises, or
   3. Conduct of third parties on the premises
3. Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
   1. Create danger with intent to do harm to the person or damage to the person’s property, or
   2. Act with reckless disregard to the safety of the person or the integrity of the person’s property

* The minimal duty towards somebody who willingly assumes the risk by which they’re injured (subs. (3)) is also applied to entrants who come onto the premises to commit a criminal act (subs. (3.1), or trespassers or recreational entrants on certain classes of farmland or rural land (subs. (3.3.)). The only duty, as subs. (3) defines it, is not to create a danger with intent to harm, and not recklessly to disregard the safety of the person or the property.

# 24. Nuisance

* Liability for the tort of nuisance depends on proof of **unreasonableness**
* The court must weight P’s interest in being free from interference against D’s interest in carrying on the impugned activity, as well as society’s interest in allowing some types of activities. Relief is available only if, having regard to all of the circumstances, the interference was unreasonable.
  + The issue pertains primarily to the ***effect*** that D’s conduct has on P’s enjoyment of the land
  + The concept of reasonableness necessarily imports a judicial discretion

## 24.2 Private nuisance

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| 430909 Ontario Ltd v Huron Steel Products (Windsor) Ltd (1990)(Ont HC) |
| Facts – D’s stamping plant had been in operation since 1947. In 1977, P bought a nearby apartment building. In 1979, D purchased a press. P complained of noise and vibrations. Although a second press was installed in 1983, efforts were made to reduce noise and vibrations. P brought action for nuisance claiming loss of rental income and value of the building.  Who won? Plaintiff  Issue – Does P have a cause of action in nuisance?  Holding – D’s plant operations have caused and continue to cause an unreasonable interference with P’s use and enjoyment of its property.  Ratio – Private nuisance can be defined as **an unreasonable interference with the use and enjoyment of land.** The court goes through a balancing process to determine whether a nuisance exists or not: Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place.  Test – Is D using his property reasonably, having regard to the fact that he has a neighbor?  **“Unreasonable” is when the interference in question would not be tolerated by the ordinary occupier. What constitutes “unreasonable” interference is determined by considering a number of factors:**   1. The severity of the interference, having regard to its nature and duration and effect;    1. Nature of the interference  * Must be considered from P’s point of view   1. Duration   2. Effect * P must show that the alleged nuisance has caused it damage  1. The character of the locale  * The standard of comfort to be expected varies from area to area, depending on the character of the locale in question * **It is not a defence to a nuisance action that P moved to the nuisance**   + **The addition of a fresh noise may give rise to nuisance no matter what the character of the locale**   + See note (*Coventry v Lawrence*)  1. The utility of D’s conduct  * The importance of D’s enterprise and its value to the community is a factor, but tends to go towards the leniency of the remedy, rather than liability itself * Question of **whether D took all reasonable precautions** is relevant to whether the interference was unreasonable as well  1. The sensitivity of the use interfered with   Reasoning –   1. The severity of the interference    1. Nature of the interference – #1 press is the source of the problem; the press sound would be more noticeable at night; air conditioners would negate much of the sound    2. Duration – Although the problem was not continuous, it was fairly regular; the press often operated during nights and weekends; the situation has continued for 10 years    3. Effect – One tenant moved out and others complained; the building lost revenue because of the high vacancy rate; there had been a loss in the value of the building of about $71,000 (D expert witness did not agree) 2. The character of the locale – The character of the locale is one of “mixed use” (apartment buildings, houses, school, church, commercial establishments, factors) 3. The utility of D’s conduct – The plant is important to the community (it employs 200 people); improvements could be made to the building envelope that would ameliorate the situation 4. The sensitivity of the use interfered with – P’s use of its property is not an unusually sensitive one   Note – On the “coming to the nuisance” point, *Coventry v Lawrence* held that D could refer to its own (noisy) activity as part of the character of the neighborhood, but only to the extent that the activity was not a nuisance. It also held that if P acquires the “dominant” property (the property to which the right to complain of nuisance attaches), P is in no better position than the previous owner(s) of that property in terms of whether D’s activity amounts to a nuisance. But if P changes the use of that property, by making it more sensitive to D’s activity, P can’t use that to support a nuisance claim if what D was doing was not a nuisance given the former use of the property.  ***Farm Practices Protection (Right to Farm) Act* (s 2(1))** – If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business, (a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation  *Nor-Video* and *Hunter v Canary Wharf* – Found that interference with TV reception did injure the use or enjoyment of P’s property (and *Hunter* confirmed that it is only somebody with a proprietary or possessory interest in the property who has a claim in private nuisance). *Hunter* nevertheless dismissed the claim because the interference was simply building a structure, **which by itself is incapable of being a nuisance because the law doesn’t protect you from having your view, light, etc., blocked by a building.**  **Nuisance does have to be tied to something done or not done by D as owner of the property; it’s not a strict liability tort for whatever comes off your property.** |

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| Tock v St John’s Metropolitan Area Board (1989)(SCC) |
| Facts – A large amount of water entered the Tocks’ basement during a day of exceptionally heavy rainfall. They notified the Board, who determined the sewer was blocked, but did not remove the blockage until early morning. By this time, substantial damage had been caused.  Who won? Tocks  Issue – Is the Board liable in nuisance.  Holding – The Board is liable in nuisance.  Ratio – If D relies on a statute authorizing the activity, the question whether P can sue is not just resolved on the basis of policy, nor is it important whether the statute is permissive or mandatory in its drafting. **If the statute gives D authority to do the work, the question is whether it is practically impossible to do the work without causing the nuisance.**  Reasoning – The CA exonerated the Board from liability in nuisance on the basis that there was an absence of negligence. The heavier onus that must be discharged was not met in this case.  Note – In *Susan Heyes Inc v South Coast BC Transportation Authority*, the effect of “cut and cover” Canada line construction on the South Cambie merchant was held (1) to be a nuisance, but (2) not actionable as having been done by statutory authority, since the alternative, which (might have) avoided a nuisance, was seriously impractical in terms of expense and timing. |

## 24.3 Public nuisance

* A public nuisance may take one of two forms:
  + ***Common interests***: A public nuisance may arise if D’s conduct unreasonably interferes with rights, resources, or interests that are common to the entire community.
  + ***Private interests combined***: A public nuisance may arise if D’s conduct unreasonably interferes, on a large scale, with the use and enjoyment of *private* property.
    - In this situation, two options exist. Each affected homeowner may sue individually in *private* nuisance and seek *private* remedies or the interests of the affected homeowners may be joined together in an action for *public* nuisance that seeks *public* remedies.
      * A public claim generally becomes available as membership in the class approaches ten.

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| Hickey v Electric Reduction Co (1970)(Nfld SC) |
| Facts – Ds destroyed the fish life of the adjacent waters to their phosphorus plant by the discharge of poisonous waste. Ps, all other fisherman in the area, suffered in their livelihood. The pollution created a nuisance against the public.  Who won? Defendant (Electric Reduction Co)  Issue – How do the courts determine which Ps will be permitted to maintain private actions for public nuisance?  Holding – The facts only support the view that there has been pollution that amounts to a public nuisance—a private action by Ps is not sustainable.  Ratio – Any person who suffers peculiar damage has a right of action, but where the damage is common to all persons of the same class, then a personal right of action is not maintainable.  Where a nuisance or injury is common to the whole public the remedy is by indictment but no private right of action exists unless there is a special or particular injury to P.  Reasoning – The right that Ps enjoy is a right in common with all Her Majesty’s subjects, an interference with which is the whole test of a public nuisance; a right which can only be vindicated by an action by the AG, either with or without a relator.   * If the nuisance took the form of obstructing the right of Ps as adjacent landowners, of access from their land to the public navigable waters, the injury would be peculiar to themselves, and would therefore be an interference with a right peculiar to themselves and distinct from their right as one of the public to fish in the public waters. |

# 25. Strict and vicarious liability

* Strict liability
  + Strict liability is triggered simply by the breach of an obligation. The court does not demand proof that the breach was intentional, careless, or unreasonable. It is sufficient that D acted in a prohibited manner.
* Vicarious liability
  + The concept of vicarious liability allows liability to be imposed on one person as a result of the tortious conduct of another.

## 25.2 Strict liability for escape of dangerous substances: *Rylands v Fletcher*

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| Rylands v Fletcher (1868)(HL) |
| Facts – Ds built a reservoir on their property to provide a supply of water to their mill. Ds did not realize that their reservoir was constructed over an abandoned mineshaft that was connected to P’s property. Water from the reservoir broke through the hidden shaft and flooded P’s adjoining mine.  Who won? Plaintiff  Issue – Is D liable?  Holding – D is liable even though it was not negligence.  Ratio – The person who, for his own purposes, **brings on his land** and collects and keeps there anything **likely to do mischief**, if it escapes must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape.   * This strict liability tort resembles nuisance, because it concerns something “mischievous” that emanates from D’s property, but does not involve a finding of fault in the sense of unreasonable interference. **Liability is automatic.** * The strict liability principle is pretty significantly qualified by fault-related exceptions, including the one for “natural” uses of land, and the one for acts of God and intentional acts of third parties. Later cases developed those substantially.   + Note – *Rickard v Lothian* applied both the act of third party exception and the natural use exception to the “escape” of water from a building’s bathroom; it was a third party that plugged the sink, and building plumbing was a natural user.   Reasoning – But for D’s act no mischief could have accrued. |

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| Read v J Lyons & Co (1947)(HL) |
| Facts –RESPs carried on in the factory the business of filling shell cases with high explosives. Appellant was an employee of the Ministry, and her work required her to be present in the shell filling shop. An explosion occurred while she was lawfully in the shop in discharge of her duty, killing a man and injuring appellant and others. No negligence was proven.  Who won? Respondents (J Lyons & Co)  Issue – Are RESPs liable to appellant in damages?  Holding – RESPs are not liable.  Ratio – *Rylands v Fletcher* has nothing to do with personal injuries.   * This case shut the door on expanding *Rylands* into a general tort of ultra-hazardous activities, and did its best to confine *Rylands* to a narrow range of cases by suggesting that personal injuries weren’t covered by the principles, and that munitions factories in wartime were a natural use of land.   Test –Strict liability is conditioned by two elements (*Rylands v Fletcher*)   1. **Escape** from the land of something likely to do mischief if it escapes – means escape from a place which D has occupation of, or control over to a place which is outside his occupation or control 2. **Non-natural** use of the land   Reasoning –   1. Escape is not present at all.    * You have to be injured off the premises from which the thing comes 2. It is not a non-natural use of land to build a factory on it and conduct there the manufacture of explosives.    * Natural means good/useful to society |

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| Gertsen v Metropolitan Toronto (Municipality) (1973)(Ont HC) |
| Facts – Toronto and York agreed that Toronto would dump putrescible organic waste into a landfill site in York. Methane gas seeped from the site, some of which accumulated in P’s garage and exploded when he started his car. P sued both municipalities in nuisance, negligence, and strict liability.  Who won? Gertsen  Issue – Are the municipalities liable?  Holding – This was non-natural user of the land, and the municipalities are held strictly liable, as well as in nuisance and negligence.  Ratio – The rule from *Rylands v Fletcher* makes liability absolute. However, there are sometimes other considerations brought to bear which, if applicable, somewhat restrict the rule.   * The burden of proving that the use of the land was non-natural rests on P. * When the use of the element or thing which the law regards as the potential source of mischief is an accepted incident of some ordinary purpose to which land is reasonably applied by the occupier, the *prima facie* rule of absolute responsibility for the consequences of its escape must give way.   + Time, place and circumstance, not excluding purpose, are most material   + The distinction between natural and non-natural user is relative and capable of adjustment     - Yet, there is no merit in suggestions to exempt all activities redounding to the “general benefit of the community”   Reasoning – The primary purpose for filling the ravine in this manner was a selfish and self-serving opportunity for Metro. This, having regard to its location together with the known temporary and permanent problems caused by such a garbage-fill project, cannot be said to be supported by the “overriding public welfare” theory.  Notes – This case takes a better view of natural use (than *Read v Lyons*), focusing on the fact that **it was a use that was out of keeping with the rest of the neighborhood.**  The English cases reduced *Rylands* to a special case of nuisance, but *Transco* did treat “non-natural” rationally by saying it meant any risk that you wouldn’t expect people to insure against (or self-insure). The Australian High court regarded *Rylands* as obsolete because its field was now completely covered by nuisance and negligence. |

## 25.5 Vicarious liability

* *Motor Vehicle Act*, s 86 – Motor vehicle owners are vicariously liable for accidents caused by the negligence of family members who drive the car, and non-family who drive the care with consent
* *Parental Responsibility Act*, s 3 – Parents are not vicariously liable for the torts of their young children, except for limited (up to $10,000) liability for intentional property damage by a child under 18
* Legislation absolves many public sector employees of personal liability for negligence in the good faith performance of their duties, while preserving the vicarious liability of the public body that employs them. See *Local Government Act*, s 287 (municipal police officer); *Police Act*, s 21 (police officers).

### (c) Master-servant relationship

* Vicarious liability most often arises in a master-servant relationship
* Aspects of vicarious liability:
  + **Alternative liability:** Vicarious liability does not relieve a tortfeasor of responsibility – a court may hold the employer *vicariously* liable and the employee *personally liable*
  + **Right of indemnification:** If the employer satisfied judgment under the doctrine of vicarious liability, it generally has the right to recover the same amount from the employee (typically employers do not exercise that right)
  + **Third party protection:** If P’s conduct with D included an exclusion clause, the protection of that clause may extend to D’s employees as well
  + **Vicarious and personal liability:** An employer may be held *personally* liable for its own tort
    - *Example* – the employer might have acted negligently in hiring a person who was ill-suited to working

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| Bazley v Curry (1999)(SCC) |
| Facts – P was sexually assaulted as a child in a residential care facility for emotionally troubled youths. The Children’s Foundation had undertaken a background check of Curry, the perpetrator, prior to hiring him. As soon as Curry’s criminal conduct was discovered, the facility fired him.  Who won? Plaintiff (Bazley)  Issue – Was the tort sufficiently related to the employment such that the employer should be held liable?  Holding – The Foundation is vicariously liable.  Ratio – The problem of unauthorized acts by employees is to be addressed by a policy-grounded test of the “significant connection” between the employer’s enterprise and the risk by which P was harmed. If the employer’s introduction of the enterprise into the community materially enhanced the risk of the tort being committed, it pointed towards vicarious liability (to be decided on the factors listed).  The 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 the sexual assault and hence the harm.  Test – “Salmond” test: Employers are vicariously liable for   1. Employee acts authorized by the employer; or 2. Unauthorized acts so connected with authorized acts that they may be regarded as modes of doing an authorized act  * This branch may be approached in two steps:   1. Determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls   2. If prior cases do not clearly suggest a solution, determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability **(see below)**   Test – Whether an employer is vicariously liable for an employee’s unauthorized, intentional wrong in cases where precedent is inconclusive:   * Courts should be guided by the following principles:  1. Openly confront the question of whether liability should lie against the employer 2. Fundamental question – **Is the wrongful act sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability?**    * Vicarious liability is generally appropriate where there is a **significant connection** between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires. Where this is so, vicarious liability will serve the policy considerations of provision of adequate and just remedy and deterrence.    * Incidental connections to the employment enterprise (time and place) will not suffice 3. Subsidiary factors may be considered:    * The opportunity that the enterprise afforded the employee to abuse his/her power    * The extent to which the wrongful act may have furthered the employer’s aims    * The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise    * The extent of power conferred on the employee in relation to the victim    * The vulnerability of potential victims to wrongful exercise of the employee’s power   Reasoning – The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition Curry’s sexual abuse.  Note – The enterprise liability theory that underlies *Rylands* is reflected in the vicarious liability issue. |

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| 671122 Ontario Ltd v Sagaz Industries Canada Inc (2001)(SCC) |
| Facts – P manufactured car seat covers. Sales to Canadian Tire accounted for more than half of P’s annual business. D also manufactured car seat covers, and hired AIM (marketing company) to obtain Canadian Tire’s business. AIM achieved this by bribing the head of Canadian Tire’s automotive division. P was devastated by the loss of business, and sued several parties for inducing breach of contract, including D.  Who won? Defendant  Issue – Was D vicariously liable for the torts committed by AIM?  Holding – D was not vicariously liable for the torts committed by AIM; AIM was an independent contractor, rather than an employee.  Ratio – The relationship of an employer and independent contractor typically does not give rise to a claim for vicarious liability.  Test – Is a worker an employee or an independent contractor?  **Central question – Whether the person who has been engaged to perform the services is performing them as a person in business or on his own account**   * In making this determination, the **level of control** the employer has over the worker’s activities will always be a factor. Other factors to consider include:   + Whether the worker provides his/her own equipment   + Whether the worker hires his/her own helpers   + Degree of financial risk taken by the worker   + Degree of responsibility for investment and management held by the work   + Worker’s opportunity for profit in the performance of his/her tasks   Reasoning – AIM was “in business on its own account” (AIM had separate offices; paid all of its own costs; was free to take on other business; decided when, where and how to perform the job and was otherwise generally in control of the project, and; was in a position to either suffer a loss or earn a profit) |

### (e) Non-delegable duties

* **A party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability simply by delegating the work to an independent contractor. Rather a D subject to such a duty will always remain personally liable for the acts or omissions of the contractor to whom it assigned the work.**
* The “non-delegable duty” technique is an alternative means of making an “employer” liable for things done by an independent contractor
* The *Lewis* case turned on the statutory role of the Highways Ministry in relation to users of the roads; the Ministry could not delegate away its own responsibility for negligent road maintenance. That technique was held not to work in *B(KL)* because the statutory framework was different; foster parents were not subject to the Ministry’s control in the way that the highway-maintaining firms were.

# 27. Defamation

* The tort of defamation recognizes the competing values of reputation and freedom of expression. This is reflected in the fact that, while it is relatively easy for P to prove a *prima facie* case of defamation, there are also numerous defences available.
* The common law historically distinguished between **slander** (spoken defamation) and **libel** (written defamation, films, pictures, or other concrete forms of expression; broadcast words are deemed to be libel by s 2 of the *Libel and Slander Act*).
  + Because slander is transitory, it was considered to be less damaging than libel and was actionable only in certain situations or on proof of special damages.
  + The types of slander that were historically actionable *per se* were **imputations of the commission of a crime**, a loathsome disease, a lack of chastity (women only), and **unfitness to practice one’s trade or profession**.
  + Damage is presumed in cases of libel.

## 27.2 Elements of a defamation action

* In order to succeed in a defamation action, P must prove on the balance of probabilities that the impugned statements (i) were defamatory, (ii) made reference to P, and (iii) were published or disseminated.

1. **Defamatory material** – P may allege that the statements were defamatory in the plain and ordinary sense, or that there are facts or circumstances extraneous to the publication that are known to those receiving the publication and would give the publication a defamatory meaning (“legal innuendo”), or that an ordinary person would infer something defamatory from apparently innocent remarks (“false innuendo”)
2. **Reference to P** – P in a defamation action has the burden of showing, on a balance of probabilities, that the defamatory statement made reference to P
3. **Publication** – This element of the tort will be satisfied as long as the statement is communicated, in any way, to a third party who understands the statement
   * Every repetition of a defamatory statement is considered a new publication that is independently actionable. Someone who repeats a statement that originated with someone else may be held liable in defamation even if he/she believed the statement to be true, specifically named the source of the statement, or did not adopt the defamatory remark.

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| Sim v Stretch (1936)(HL) |
| Facts – A housemaid worked for D and then for P. She later returned to her employment with D, who sent a telegram to P, asking for P to send the housemaid’s possessions, the money borrowed, and her wages to D’s home. The reference to the money borrowed was to 14s. that the housemaid had paid to pay part of the books while D was away. P brought an action in defamation, claiming that by the publication of the words of the telegram to the officials of the post office, D meant and was understood to mean that P was in pecuniary difficulties, and a person to whom no one ought to give any credit.  Who won? Defendant (Stretch)  Issue – Are the words capable of a defamatory meaning?  Holding – The words are not capable of a defamatory meaning.  Ratio – There is a distinction between imputing what is merely a breach of conventional etiquette, and what is illegal, mischievous, or sinful.  Test – Whether words are defamatory or not  Would the words tend to lower P in the estimation of right-thinking members of society generally?   * The judge must decide whether the words are capable of defamatory meaning (question of law) * If they are capable, then the jury is to decide whether they are in fact defamatory   Reasoning – No right-thinking person would lower his/her opinion of P just because there was reference in the telegram to P’s having borrowed money from the housemaid.  Note – Section 13 of the *Libel and Slander Act* obviates an old requirement that the pleadings had to show how the words were used in the defamatory sense; now all P has to do is plead that they were used in such a sense. Supreme Court Civil Rule 3-7 (21)(a) requires particulars if P alleges the words were used in a derogatory sense other than their ordinary meaning. |

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| Knupfer v London Express Newspaper Ltd (1944)(HL) |
| Facts – Ds published an article about a group known as “Young Russia”, claiming that the group was pro-Hitler and that one of them would be selected as a “puppet fuehrer” to head up a fascist Russian state. P was the leader of the British branch of the group, but was not named in the article. P called four witnesses who indicated that their mind went to P when they read the article.  Who won? Defendant (London Express Newspaper Ltd)  Issue – Were the words published “of the plaintiff”?  Holding – The article cannot be regarded as capable of referring to P.  Ratio – The individual members of a large group cannot succeed in an action for defamation unless there is something in the statement that identifies a particular member.  The question of reference to P, like defamatory nature, involves a question of law for the judge (are the words capable of referring to P) and a question of fact for the jury (do the words, as the people who heard or saw them – or a significant portion of those people – would interpret them, refer to P).  Reasoning – There is no specific mention of P; the words make allegations of a defamatory character about a body of persons who belong to a society whose members are to be found in many countries.  Note – The *Civil Rights Protection Act* creates a tort of promoting hatred or contempt of a person or group, or the superiority or inferiority of a person or group, on the basis of colour, race, religion, ethnic origin or place of origin.  In relation to innocent dissemination, see the exemption for public or educational libraries in s 6.2 of the *Libel and Slander Act*. |

## 27.3 Defences

### (a) Justification

* Once P has proven that the statements made by D were defamatory, the court will presume that those statements were false. Thus, it falls to D to prove that the statements, though defamatory, were true.
* Justification is a complete defence to defamation
* A D pleading justification must show that **the whole of the defamatory matter is substantially true**
  + D need not prove the literal truth nor the truth of every single fact in the allegation
  + D needs to prove the truth of the statements that comprise the “sting” of the defamation

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| Williams v Reason (1983)(CA) |
| Facts – D wrote two articles accusing P (an amateur rugby player) of “shamateurism” (playing amateur rugby while accepting money from outside sources). The articles specifically referred to money P had received for writing a book about his rugby career. P was successful at trial, but D requested a new trial and sought to introduce evidence that P had received money from Adidas.  Who won? Defendant  Issue – Should evidence that P had received money from Adidas be relevant to D’s plea of justification?  Holding – Evidence that P had earlier lost his amateur status by being paid like a professional such remuneration as boot money is admissible to justify the allegation of shamteurism.  Ratio – A defamatory statement that is general in character may be justified by proving the truth of specific instances that support the general imputation.  The defence of justification is made out if D can prove (in the eyes of the jury) the truth of what was said. **You have to interpret the defamatory sense of the words in order to decide what facts would “justify” those words.**   * D does not have to prove the truth of all possible defamatory interpretations of a single statement, just the truth of any reasonable defamatory interpretation of the statement (the “shamateur” interpretation of the story).   Reasoning – The sting of the libel here is ‘shamateurism’, the charge that P was a professional while claiming to be an amateur. The evidence which alleges that he regularly took boot money, if accepted, would prove that P had no amateur status to infringe or loose at the time he wrote the book because he had already lost it by taking boot money and a jury might have been influenced into finding that P had infringed the regulations by writing a book for money. |

### (b) Absolute privilege

* Absolute privilege provides complete immunity in tort for statements falling within the privilege.
* There are three categories of communication attracting absolute privilege:
  + Statements by executive officers relating to affairs of the state
  + Statements made during Parliamentary proceedings
  + Statements made in the course of judicial or quasi-judicial proceedings
* Absolute privilege for members of Parliament and the BC Legislature is dealt with in s 1(1) of the *Legislative Assembly Privilege Act*. Absolute privilege also attaches to certain fair and accurate reports of judicial proceedings by virtue of s 3 of the *Libel and Slander Act*.
* **The privilege applies even if the statements were made maliciously and without justification.**

### (c) Qualified privilege

* **Qualified privilege requires a duty or interest on the part of D to make a statement and a duty or interest on the part of the recipients of the statement to receive the information in question.** The core idea is that where D has a legitimate reason for discussing P with a particular audience, D should not be liable even if the statement turns out to be untrue. The statements to which qualified privilege attaches are usually private or confidential in nature, because usually D has no duty to speak publicly about P, and no personal interest to defend in doing so. But sometimes D does have such a duty or interest, like someone who fairly makes public statements reporting on judicial proceedings (*Hill*).
* **It does not apply if P can establish that the statements were made maliciously.**
* **Types of occasions attracting qualified privilege:**
  + Statements made by D in protection of his/her own interests
  + Situations where D publishes the relevant statements in order to protect the interests of another person
  + Communications made in the furtherance of a common interest (as long as there is a reciprocity of interests)
  + Statements that are made in the protection of the public interest (some political speech, as well as communications among public officials over matters of public interest, health or safety)
  + “Fair and accurate reporting” (applies to reports of proceedings that are open to the public, such as judicial proceedings, legislative proceedings, public meetings and public documents)
* *Libel and Slander Act*, s 4 (1) – Statutory qualified privilege for certain fair and accurate reports of a public meeting
  + (3) – The privilege is lost if the publisher of the fair and accurate report refuses to publish a reasonable letter or statement by way of contradiction or explanation of what’s in the report

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| Hill v Church of Scientology (1995)(SCC) |
| Facts – The Church of Scientology (D1) initiated contempt of court proceedings against Hill (P; a Crown prosecutor), alleging that he had misled a judge and opened sealed documents pertaining to D. Ds organized a press conference in which Manning (D2) represented the Church and read out the notice of motion, including accusations against P (that P had participated in a criminal act). Hill was exonerated at the contempt proceedings and then brought a defamation claim against Ds. Ds argued that their statements were covered by qualified privilege (that it constituted a report on court proceedings).  Who won? Hill  Issue – Were the statements covered by qualified privilege?  Holding – The privilege was exceeded both by communicating the information in a way that went far beyond the reporting function, and (at least in the Church’s case, if not its lawyer’s) by malice (the desire to achieve an end extraneous to the purpose for which the privilege exists).  Ratio – The defence of qualified privilege rebuts the inference, which normally arises from the publication of defamatory words, that they were spoken with malice.   * The privilege can be defeated if the dominant motive for publishing the statement is actual or express malice.   + Malice may be established by showing that D spoke dishonestly, or in knowing or reckless disregard for the truth. * The information communicated must be **reasonably appropriate in the context of the circumstances existing on the occasion** when that information was given.   Reasoning – Manning’s conduct far exceeded the legitimate purposes of the occasion; as an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made; Manning’s conduct was high-handed and careless.  Note – There exists statutory qualified privilege for certain fair and accurate reports of a public meeting, in s 4 of the *Libel and Slander Act*. The privilege is lost if the publisher of the fair and accurate report refuses to publish a reasonable letter or statement by way of contradiction or explanation of what’s in the report (subs. 3). |

### (d) Fair comment

* Fair comment allows “false” commentary to be sheltered, on the basis that debate on matters of public interest is a good thing and shouldn’t be discouraged by fear of libel suits. It only protects what the hearers or readers would perceive as the writer’s opinion as distinct from assertions of actual fact. The actual facts on which the opinion is based have to be stated or known to the audience.
* Fair comment does not involve duty or interest, but involves speaking on matters of public interest.
* Supreme Court Civil Rule 3-7 (21)(b) – if D alleges that, insofar as the words complained of consist of statements of fact, they are true in substance and in fact, and that in so far as they consist of expression of opinion, they are fair comment on a matter of public interest, D must give particulars stating which of the words complained of D alleges are statements of fact and of the facts and matters relied on in support of the allegation that the words are true.

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| WIC Radio Ltd v Simpson (2008)(SCC) |
| Facts – Simpson (a social activist) alleges that Mair (a commentator) made defamatory comments during his editorial broadcast. In his broadcast, Mair imputed that Simpson “would condone violence toward gay people”.  Who won? WIC Radio  Issue – Should the defence of fair comment be allowed?  Holding – The defence should be allowed.  Ratio – The elements of the “fair comment” defence (the onus is on D to satisfy the judge that the requirements of the defence are met (including the objective capable-of-being-honestly-held test)):   1. **The comment must be made on a matter of public interest** (legitimate matters of public discussion) 2. **The comment must be based on fact**  * The facts must be sufficiently stated or otherwise be known to the listeners – if the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available  1. **The comment, though it can include inferences of fact, must be recognizable as comment**  * Words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used.  1. **The comment must satisfy the following objective test: Could any man honestly express that opinion on the proved facts?**  * The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts. * An effective way to establish that somebody could “honestly express that opinion on the proved facts” is to call the defamer to establish that he/she did indeed express an honest belief.  1. **Even though the comment satisfied the objective test D can be defeated if P proves that D was actuated by express malice** (onus is on P)**.**  * Proof of honest belief does not negate the possibility of a finding of malice.   Reasoning –   1. The public debate about the inclusion in schools of educational material on homosexuality clearly engages public interest. 2. The general facts were well known to Mair’s audience, and were referred to in part in the editorial; the facts were true. 3. Mair’s imputation was a comment not an imputation of fact. 4. The defamatory imputation that Simpson “would condone violence” by others is an opinion that could honestly have been expressed on the proved facts. 5. Mair’s fair comment defence was not vitiated by malice. |

### (c) Responsible communication on matters of public interest

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| Grant v Torstar Corp (2009)(SCC) |
| Facts – Grant sued the Toronto Star in defamation for an article published concerning a private golf course development on Grant’s estate. The story aired the views of local residents who were critical of the development’s environmental impact and suspicious that Grant was exercising political influence to secure government approval. The reporter attempted to verify the allegations, including asking Grant for comment, which Grant chose not to provide.  Who won? Torstar Corp  Issue – Should the common law be modified to recognize a defence of responsible communication on matters of public interest?  Holding – A defence of responsible communication should be recognized, and a new trial should be ordered.  Ratio – Like qualified privilege (but unlike fair comment) the defence of responsible communication is a defence even if D states false facts. D has the onus of showing both that the subject matter was of public interest, and that the communication was responsible. Malice is not a separate “defence to the defence” because, if the communication is responsible, it by definition excludes malice.  Test – The defence of responsible communication  Two essential elements: public interest and responsibility   1. The publication must be on a matter of **public interest**  * The subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.  1. D must show that the publication was **responsible**, that he/she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances  * Factors (non-exhaustive but illustrative guides):   + **The seriousness of the allegation** – publications of the kinds of allegations traditionally considered the most serious (corruption or other criminality on the part of a public official) demand more thorough efforts at verification (so too will those which impinge substantially on P’s reasonable expectation of privacy)   + **The public importance of the matter**   + **The urgency of the matter** – if a reasonable delay could have assisted D in finding out the truth without compromising the story’s timeliness, this factor will weigh in P’s favour   + **The status and reliability of the source** – it may be responsible to rely on confidential sources, depending on the circumstances   + **Whether P’s side of the story was sought and accurately reported**   + **Whether inclusion of the defamatory statement was justifiable** – for the jury to determine whether inclusion of a defamatory statement was necessary to communicating on a matter of public interest   + **Whether the defamatory statement’s public interest lay in the fact that is was made rather than its truth (“reportage”)** – if a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue provided (1) the report attributed the statement to a person, preferably identified, (2) the report indicates that its truth has not been verified (expressly or implicitly), (3) the reports set out both sides of the dispute, and (4) the report provides the context in which the statements were made   Reasoning – Both for the “public interest” aspect, and for the “responsible” aspect, an important element is the dual rationale of promoting public governance and the free exchange of ideas, which (along with self-fulfillment) underlie free expression. |

## 27.4 Remedies

* *Libel and Slander Act*, s 6 – Newspapers, periodicals and broadcasters can plead a prompt apology in mitigation of damages
* *Libel and Slander Act*, s 7 – P can recover only actual damages if D shows (*inter alia*) the article was published or the broadcast was made in good faith and an apology was promptly published
* *Libel and Slander Act*, s 10 – Provides all Ds with the right to adduce, mitigation of damages, evidence that they made or offered to make a written apology to P

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| Hill v Church of Scientology (1995)(SCC) |
| Facts – The jury awarded $300,000 in general damages against Manning and the Church jointly, and $500,000 in aggravated damages and $800,000 in punitive damages against the Church alone.  Who won? Hill  Issue – Were the damages awarded by the jury justified?  Holding – There were grounds for each component of the jury’s award.  Ratio – An appellate court can substitute its own judgment as to the proper award for that of the jury when the verdict is so exorbitant or so grossly out of proportion to the libel as to **shock the court’s conscience** and sense of justice.  **General damages –** presumed from the very publication of the false statement and awarded at large   * The jury as representative of the community in which the defamed person lives should be free to make an assessment of damages that will provide P with a sum of money that clearly demonstrates to the community the vindication of P’s reputation. * **There should not be a cap placed on damages for defamation.** * All persons involved in the commission of a joint tort are joint and severally liable for the damages caused by that tort.   **Aggravated damages** – may be awarded in circumstances where Ds’ conduct has been particularly high-handed or oppressive, thereby increasing P’s humiliation and anxiety arising from the libelous statement   * They are compensatory in nature. * If awarded, there must be a finding that D was motivated by **actual malice**, which increased the injury to P, either by spreading further afield the damage to the reputation of P, or by increasing the mental distress and humiliation of P. * Factors that a jury may properly take into account in assessing aggravated damages:   + Was there a withdrawal of the libelous statement made by Ds and an apology tendered?   + Whether there was a repetition of the libel, conduct that was calculated to deter P from proceeding with the libel action, a prolonged and hostile cross-examination of P or a plea of justification that D knew was bound to fail   + Was the conduct of D at the time of the publication clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to P?   **Punitive damages** – may be awarded in situations where D’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency   * Their aim is to punish D * Should only be awarded where the combined award of general and aggravated damages would be insufficient to punish and deter * Punitive damages are not at large – courts have a much greater scope and discretion on appeal (the appellate review should be based upon the court’s estimation as to whether the punitive damages serve a **rational purpose**).   Reasoning – The award of $300,00 by way of general damages was justified in this case; every aspect of this case demonstrates the very real and persistent malice of the Church – the award of aggravated damages was justified; the award of punitive damages served a rational purpose in the case, and there was such insidious, pernicious and persistent malice that the award cannot be said to be excessive. |