**Reference Guide to Issue Spotting**

Intentional Torts

1. Assault
2. Battery & Battery w/ sexual element
3. False Imprisonment
4. Malicious Prosecution
5. Intentional infliction of nervous shock
6. Trespass to land
7. Chattel Torts (Trespass, Conversion, Detinue)
8. Privacy *(Privacy Act*; COR s. 7-8)

Defenses

1. Involuntariness – Smith
2. Duress – Gilbert v Stone
3. Provocation – Miska v Sivec
4. Consent (implied/express)
* Factors vitiating consent (fraud, mistakes, duress, public policy)
1. Self-Defense
2. Defense of third parties
3. Defense of real property
4. Defense & reception of chattels – p. 235
5. Public & Private necessity – p. 236
6. Defense of legal authority -- 494-495 25CC; Canada Line Case

Other Torts

1. Defamation (libel/slander) – Sim *v Stretch*
2. Public & Private Nuisanc
3. Misfeasance in a public office – *Odhavji Estate*
4. Occupiers Liability
5. Strict Liability for escape of dangerous substances – *Rylands v Fletcher*

How To Answer

1. Who’s going to claim what against whom?
2. What tort(s) are the claims based on?
3. What interests does it protect?
4. Start w/ the first one
	1. Elements of the physical act?
	2. Mental fall requirement?
	3. What issue are raised by the facts?
		1. What arguments & counterarguments can be made?
	4. Is there a causation issue?
	5. Are there any defenses/limitation periods
5. Neutrally state likelihood of success & potential remedies (nominal/punitive/injunction etc.)

Negligence – (The role of foreseeability is set out on page 603)

1. Duty of care
2. Duties established by precedent

I. Duty to Rescue – *Horsley v Maclaren*

 Duty owed to rescuers – *Horsley v Maclaren*

II. Duty to control the conduct of others (Drunk fucks)

 Commercial Hosts – Crocker v Sundance

Social Hosts – *Child's v Desormeaux*

III. Police duty to warn – *Jane Doe v Metro Toronto*

IV. Duty to perform gratuitous undertakings

Generally no duty to act, but once you do it must be done with reasonable care

1. Duty not to injure – *Donoghue*
2. Novel duties – *Anns/Kamloops via Cooper*

I. Proximity (foreseeability) = Prima Facie duty of care

ii. Policy considerations so

1. Special Duties

I. Duties to the unborn (Pre-conceptual wrongs/wrongful birth-life/wrongful

 pregnancy/pre-natal injuries

II. Duty to avoid causing "psychiatric injury" (foreseeability is not enough, it must be foreseeable that a

 person of reasonable fortitude would've suffered injury – *Mustafa*

III. Health professional's duty to inform – *Reibl v Hughes*

 exceeding consent = battery failing to disclose risks = negligence

IV. Manufacturer's duty to inform – *Hollis v Dow*

Special Issues in whether there is a duty of care – See outline already created

1. Negligent Misrepresentation – *Hercules Management*
2. Pure Economic Loss
3. Negligent Performance of a Service
4. Negligent Supply of Shoddy Goods or Structures
5. Relational Economic Loss
6. Standard of Care + Breach
7. The reasonable person (subjective/objective) – *Arland v Taylor*
8. Factors in considering breach

I. Probability of injury + potential severity – *Bolton v Stone*

II. Social utility of the conduct – *Watt v Hertfordshire*

III. Cost of risk avoidance – *Vaughn v Halifax-Dartmouth Bridge*

1. Special standards of care (Disabled – *Fiala;* Children *– Joyal*; Professionals – *White v Turner*
2. Professional standards/customs ≠ Special standards of care – *Ter Nuezen*

Breach of professional standard merely = proof of negligence

1. Causation (*factual causation*)
2. "But-for" Test – General rule – *Kauffman*; *Barnett; Snell* 562-563

I. Direct/Physical connection between act & harm (may be made by inference – *Snell*)

II. Posed Hypothetical – what would've happened if plaintiff had not acted negligently

1. Material contribution – *Resurfice*

Only applies if the plaintiff can establish that it is impossible to prove causation using the but-for test and that the impossibility results from factors beyond the plaintiffs control (i.e. limits on scientific knowledge). Second, the plaintiff must establish that the defendant breached the standard of care and that his or her injuries fell within the ambit of risk created by the defendant's breach.

1. Multiple causes P. 583

I. Single harm by joint tortfeasors – all liable

II. Single (indivisible harm) by concurrent tortfeasors – jointly & severally liable

III. Divisible harm by concurrent tortfeasors – severally liable for harm each caused

1. Successive causes of parallel injuries
2. Devaluing the plaintiffs loss P. 595
3. Remoteness of Damages (*legal causation*) – "*It's not logic, it's practical politics*"
4. It's not about directness (*Re Polemis*), but rather foreseeability (*Wagon Mound #1*)

I. Wagon mound #2 broadened the test of foreseeability of damage from one based

 upon probability of damages to one based upon possibility of damages

What the hell does this mean? Why is it not taken into account at breach?

 (b) Modifications to the foreseeability test

I. The kind of injury vs. the specific injury – *Hughes v Lord Advocate*

Damages to remote if that *type* of harm was not reasonably foreseeable

II. This "thin-skull rule"

(c) Intervening Causes

1. Harm/Loss

(a) Loss of Chance (Contract Case beauty pageant – compensated according to probability)

1. Defenses In Negligence

(a) Contributory Negligence

(b) Participation in a criminal or immoral act (*ex turpi causa*)

1. The Burden of Proof in Negligence

(a) The apology act

(b) Exceptions

I. *Res ipsa loquitur – Fontaine* (says circumstantial evidence = proof of negligence.

 Burden doesn't shift to the D to prove absence of negligence if no direct evidence

II. Multiple negligent defendants – *Cook v Lewis*

1. Negligence liability of public authorities (figure out where this fits in)

*Just v British Columbia*

Remedies

1. Damages
2. Apportionment of fault (*Negligence Act*)
3. Injunction

Other issues

1. Limitation Periods – 3 (2) most subject to two years although some six years
* running of time is postponed so long as plaintiff didn't know identity of D or that there was a reasonable prospect of a successful claim

# Definitions

Nonfeasance – A failure to act in the existence of an obligation to act

Misfeasance – A wrongful positive act

# Difference Between Torts And Contract

1. The source of primary obligations (which tell people how they ought to act)
* Torts – imposed on the basis of circumstances
* Contract – arise from mutual agreement between parties
1. Privity
* Torts – Because obligations are imposed by law based on circumstances, obligations are often imposed on complete strangers
* Contracts – Because obligations are voluntarily created between parties, they cannot bind those external to the agreement
1. Aim of compensation
* Torts – Retroactive in nature, to restore the party to the position they would have been in had the wrong not been committed
* Contracts – Law of promises (inherently forward-looking). Compensation puts the party in the position they would have been in if the contract was performed

Note: On the surface, the distinction between tort and contract appears to be fairly obvious; the contract, the relationship between parties is defined by a prior agreement, whereas in torts there is no such formal relationship. However, this is complicated by the courts imposing implied contractual terms (contracts) and duties of care (negligence). And implied contractual term effectively imposes an obligation on individual to behave in a certain way in certain circumstances, which blurs the line between tort and contract

# Bases for imposing liability in Tort

1. Absolute Liability – A prohibited act + loss = liability; Defendant need not prove intention or negligence; No exculpatory defenses available
2. Strict Liability – A prohibited act + loss = liability, then burden shifts to the defendant to show the exercise of due diligence
* Rare in tort law; most commonly arises in cases of vicarious liability
1. Negligence – In contrast to strict liability, the plaintiff must show that the defendant failed to exercise reasonable care that resulted in loss
2. Intentional Torts – A prohibited act + fault + loss = liability
* In Canada, if the injury/loss was caused directly, the onus shifts to the defendant to disapprove intent and/or negligence
* If injury/loss was caused indirectly, the onus remains on the plaintiff to prove intent and/or negligence
1. No Liability – Some harm caused deliberatel, or negligently are not torts (i.e. competitive business practices – Allen v Flood [1898] HL)

# Functions of tort law

1. Compensation – providing reparations of harm through the compensation of loss
2. Appeasement & Vindication – some victims simply want the tortfeasor to be officially condemned if only to secure nominal damages(i.e. sexual abuse victims who can't secure criminal convictions)
3. Punishment – Punitive damages available to sanction high-handed, vicious or otherwise outrageous conduct
4. Deterrence – "specific", "general", and "market deterrence"
* "market deterrence" – the incorporation and allocation of costs associated with risk into her daily activities. For example, manufacturers increasing prices to cover their potential liability costs.
* According to economists, this allocation of accident costs through the market enables society to experience the "optimum" number of accidents
1. Social control – looking to control certain types of human behavior beyond deterrence
2. Justice
3. Retributive– Imposition of *penalties* to condemn moral fault
4. Corrective – Torts should be concerned with correcting improper deviations in the distribution of wealth in our society by looking at the individual situations of the parties to possibly write off "wrongful gains" and compensate for "wrongful losses"
5. Distributive –?????

# Damages

1. Special damages – quantifiable at the time of trial (i.e. have receipts)
2. General – Incapable of *explicit* quantification (i.e. even if have to determine lost wages bc requires computation)
3. Pecuniary (monetary)
4. Non-pecuniary (non-monetary) – so far as is practicable the award must be fair and reasonable yet simultaneously arbitrary
* **Irwin Toy Trilogy** – Set a $100,000 adjusted for inflation (now $300,000) in cases of personal injury
1. Nominal – Redress a violation of a legal right deemed worthy of protection, even in the absence of loss – The **Mediana [1900] HL**
2. Compensatory – the purpose "so far as is possible by means of a monetary award, [is] to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of" **Dodd properties Ltd v Canterbury city Council [1980] CA**
* Issue raised in **The Mediana [1900] HL** – suppose if someone takes a chair out of my room and keeps it for 12 months… Could the defendant reduced the damages by showing that I hardly use the chair or that there were plenty of others?
* **Inverugie investments v Hackett [1995] PC** – Defendant wrongfully occupied 30 of 164 units in a hotel for 20 years. Attempted to show that average occupancy was only 35 to 40% so the plaintiff actually lost nothing. The court held the quantification of damages was not concerned with the plaintiffs actual loss, nor the profit made by the defendant. A trespasser or someone who hires services whether or not they are actually used, must pay the going rate.
1. Aggravated – Distinct from punitive damages, aggravated damages are to compensate for additional injuries to dignity and similar feelings arising from reprehensible conduct
2. Punitive – Designed to punish and denounce reprehensible, high-handed and fraudulent conduct.
* Quantified with reference to the defendant's moral blameworthiness and the financial disincentive required to achieve deterrence
* In **Whitten v Pilot [2002] SCC** Binnie reviewed the principles of punitive damages (remember **Hill v Scientology**)
* A previous criminal sanction does not exclude an award of punitive damages, but as one factor to be considered
* More likely to be awarded for intentional torts, but they also be awarded in negligence & nuisance
* Only very serious misconduct warrants punishment, deterrence, denunciation & thus punitive damages
* They should be awarded with restraint of compensatory damages would suffice
* There is no fixed ratio between compensatory and punitive damages, nor should the latter be subject to acap
* Both compensatory & punitive damages may be awarded under 24 (1) for a violation of the charter right
* **B (P) V B (W) (1992)**

Facts: Of father sexually assaulted his daughter from the age of 5-18 and raped her when she was 20. He was sentenced to 5

 1/2 years in prison but two additional criminal charges were stayed. He didn't defend the action the only issue was damages

* + Non-pecuniary damages ($100,000) for the vicitimization/shame/harm to self-esteem and self-worth
	+ Aggravated damages ($75,000) for violation and loss of trust – essentially for the gross breach of trust
	+ Punitive damages ($50,000) for the undocumented assault for which he was not charged
	+ **Key points to take away from this case:**
		- That although questions of aggravation can be taken into account when determining the amount of non-pecuniary general damages, they can also be considered separately; and
		- In awarding punitive damages, the court must be careful not to create a situation of double jeopardy (must avoid punishing D for something they already received a criminal sanction for)

# Trespass vs. Action on the case

Why we need to know this stuff: Substantial block has its roots in procedure

"So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substandard law has at the first look

 of being gradually secreted in the interstices of procedure" – [Maine, *Early Law and Custom,* p. 389]

"the forms of action we have buried, but they still rule us from their graves" – F. W. Maitland

Intentional + Direct = Trespass (Scott v Shepherd)

Negligent + Direct = Trespass (Leame v Bray)

Negligent + Direct = Case (Williams v Holland)

Anything Indirect = Case

Absence of intention and/or negligence = Accident w/o liability (Holmes v Mather)

Scott v Shepherd [1558-1774]

Facts: Shepherd threw a squib into a crowded marketplace. In order to save himself and his goods Yates threw it near Ryal,

 who threw once again where it blew up in the plaintiffs face. The plaintiff brought an action in trespass

Issue: Was trespass the correct form of action given the indirect harm to the plaintiff

Held: The case lies in trespass. The intermediate acts of third parties will want purge the original tort in the defendant. He who

 does the first wrong is answerable for all the consequences (in the old days fault there was no requirement of fault)

* The majority characterized the whole fiscal course of the squib is continuous and direct save bc the intermediaries acted reflexively, not deliberately
* Blackstone (dissent): The distinction between trespass & case is direct/immediate injuries on the one hand and media/consequential on the other. Only the former is a trespass, and here, only the Shepherd's original act against the Yates was a trespass.

Leame v Bray (1803) KB – p. 12

Facts: The defendant negligently (due to darkness) drove his carriage on the wrong side of the road into the plaintiffs carriage.

 His horses panicked, so he jumped, and fractured his collarbone

Issue: Does an action lie in trespass for negligence

Held: Yes. Unintentional + Direct = Trespass

Williams v Holland (1833) CP – p. 13

Facts: The D carelessly, and skillfully and negligently drove his carriage and the P. An action was brought in case

Issue: Does an action lie in Case for negligence

Held: Yes. Unintentional + direct = Case

Cook v Lewis [1952] SCC

Facts: The P's were hunters who shot the P believing he was a deer on the first day of hunting season. At trial the action

 proceeded in Case based on negligence, with the onus on the D to prove fault. The jury found he failed to do so)

Held: The SCC said this should have proceeded in Trespass. The action was direct – follows Leame v Bray

 The jury should have been charged that the onus was on the D to show he was without false

Ratio: Where you have a choice to proceed in Trespass or Case, there is an advantage to proceed in Trespass because all you

 have to show was the action was direct, then the defendant must prove absence of fault

Note: Professor says this decision is a bit of an anomaly, but it has not come up in the last 60 years.

Holmes v Mather (1875) Ct Exch

Facts: The D's horses were startled by a barking dog. He attempted to guide them but led them straight into the P. The P sued

 in both negligence & trespass

Issue: Is the action maintainable

Held: No. There was no intention, nor was he negligent. He attempted to do what was best

Ratio: Court starting to move away from directness (as in Scott v Shepherd) towards false

# Intentional Torts

Volition (**Gilbert v Stone** 1648 – Man forced to steal horse bc feared for his life. Court said too bad, it's voluntary)

– synonymous with "voluntary". Did X exercise control over his or her physical actions?

– Duress does not negate volition or intent, nor serve as a defense. It is but one factor for the court to consider.

Intention

– That X desired to bring about the *consequences* of his action, rather than his/her desire to do the physical act itself

 – A physical act may bring about several consequences, only some of which may be intentional

Imputed Intent

* Where X did not intend the consequences but they were certain or substantially certain to result from his act

Transferred intent

 – Where X intends to commit a tort against one party, but unintentionally commits it on someone else

 – The defendants wrongful intent regarding the first tort is transferred to the second tort

Motive

 – The reason behind the intended act

 – Usually not a requirement except in exceptional circumstances (i.e. malicious prosecution)

Provocation

– (**Miska v Sivec [1959] Ont CA** – D claimed P cut them off and threatened him with knife, so he retreated to his host

 200 yards away and shot him from a window. Court said no, there was previous of bad blood prior to the night of

 the assault. That was the reason you shot him and it should not be considered in provocation.

 – Must (1) [objectively] cause the D to lose power of self-control (2) be sufficiently proximate to the events in question

 – In Canada can only be used to reduce or eliminate punitive & compensatory damages

Mistake

 – **Hodgkinson v Martin [1929] BC CA** – Ministry was owed money & repossessed the building. Trustee in bankruptcy

 came to claim it, but that D threw him out (without any more force than was necessary)

– Court said a sincere, yet mistaken belief in the legality of one's actions is not a full defense, yet it may be taken into

 account as a mitigation of liability (especially here where not the slightest injury has occurred) Nominal damages.

– **Ranson v Kitner** – D shot P’s dog, believing it to be a wolf. P liable for their mistake notwithstanding good faith

Accident

 – No liability for any action code and save taken without intent or negligence (except strict liability torts)

Capacity, Children, and Mental Illness

 – Courts generally apply different rules based on the mental disorder provisions in 16 (1) *Criminal Code*

 – Individual assessment of "appreciating the nature and quality" of his or her act

 – Parents, teachers, and others who supervise children are not vicariously liable for the child unless they were a party

 to the act or negligent in failing to supervise and observe a duty of care

**Battery**

Purpose: To protect against bodily harm and interference with one's dignity; thus, one may be awarded more for a public slap in the face than a

 severe punch by a friend)

Definition: "intentionally bringing about a harmful or offense of conduct with the person of another" – Fleming in Bettle v Yim

 – A direct, intentional, and physical interference with the person of another that is either harmful to their person or offensive to their

 dignity (judged by the standard of the reasonable person)

**Bettle v Yim (1978) Ont Co Ct – p. 58**

Facts: The P was being a hooligan, throwing firecrackers in the D’s store. The D grabbed him by the collar, shook him two or three times, and

 "accidentally" head butted him. He intended to grab him, but not to hurt him.

Issue: Should the defendant be liable for all consequences flowing from an intentional act, even if he didn't intend the consequences?

Held: Yes. If the defendant was guilty of deliberate, intentional, and unlawful violence or *threats of violence* and a more serious harm befalls the

 plaintiff then was intended he must bear the responsibility for the unintended result.

Ratio: "if physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference"

**Battery With a Sexual Element**

**Note:** Not an independent tort, the elements are the same as regular battery

**Problem**: Two year limitation period in ***Limitations Act***

* Can get **Postponement if**  (a) the plaintiff was aware of the assaults but did not recognize the physical or psychological problems associated with them or (b) the plaintiff had no recollection of the assaults, because of the trauma, until sometime after they occurred – **M (K) v M (H) 1992 SCC**

**Scalera**

**Facts:** The defendant was a bus driver being sued for sexual assault. He asked his insurance company to defend him. They said they don't cover for intentional acts. He said that because consent is implied it's not an intentional tort. The court said no, the fact that the onus is on the defendant to prove she consented does not mean it's an unintentional tort.

**Assault**

**The intentional act of creating a reasonable apprehension of harmful or offensive bodily contact in the mind of another**

* Damages for assault unaccompanied by battery are often very small.
* If assault is a prelude to battery, the assault may be ignored altogether
1. Words alone cannot amount to assault. But words may give meaning to an act, that when taken together amount to an assault – Holcombe
2. A threat, though conditional, amounts to an assault if the defendant has no legal basis to impose the condition which he does – Greaves
* a.k.a. – the fact that the plaintiff is provided an alternative course of action to avoid harm will not absolve the defendant if there is no legal basis to impose the condition which he does
1. A conditional threat will not amount to assault if it is clear that defendant has no present intention of carrying out the threat – Greaves
* In Greaves, the court distinguished the fax from Tubervelt where it was clear the defendant had no present intention of carrying out his threat

**Holcombe v Whitaker –p. 66**

P requested an annulment of the marriage. D said to P "if you take me to court, I will kill you" while repeatedly pounding on her door and trying to pry it open after she requested an annulment.

**Police v Greaves [1964] NZCA –p. 67**

Wife called police on her husband after she had been attacked. Husband pointed knife at the Constable and said "don't you bloody move… You come a step closer and you'll get this straight through your guts". The constables with true to obtain assistance

**False Imprisonment**

**The direct and intentional imprisonment of another**

1. "imprisonment is, as I apprehend, a **total restraint of liberty** of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him" – Patteson J in *Bird v Jones*
2. It is not necessary that a man's person detached – Bird
3. If there is reasonable means of escape, a restraint will not amount to FI – Bird
4. It is actionable without proof of damage
5. Psychological imprisonment through coercive authority may be enough – Campbell
6. A third party may be liable for FI if they cause another at their direction to detain somebody

**Defenses:**

1. Legal authority

2. Consent

**Bird v Jones (1845) QB –p. 70**

: The P was prevented from crossing a public highway by hired policeman supervising an event. He was at liberty to turn back and proceed in any other direction. No force or restraint on his person was used

**Campbell v Kresge (1976) NSSC – p. 74**

Facts: P went Christmas shopping a department store. A customer told security she saw the P shoplifting. Security approached P in parking lot,

 showed her his badge, and asked her to come inside to save embarrassment.

Held: She was imprisoned from the time she was confronted in the parking lot. She went for fear of the consequences if she refused. Evidence was

 that if she did refuse this procedure would have been to force her anyway and he would have followed through. He was using his position as

 an officer to take her in a direction which she did not wish to go.

**Herd v Weardale Steel [1915] HL – p, 77 – Consensual Restraint (Problem – what about people who enter a store where there is a sign that says they agree to have their bags searched?)**

Facts: The P was a miner who refused to perform some work. His supervisor refused to bring him up the shaft until his shift was over.

Held: HL said he was in a contractual agreement. He voluntarily went down and had no lawful right to come out till the end of his shift

**Malicious Prosecution**

**Concerned with indirect interferences resulting from the improper initiation of criminal proceedings. (Derived from trespass on the case)**

1. The proceedings must have been initiated by the defendant
2. The proceedings must have terminated in favor of the plaintiff
3. Absence reasonable and probable cause
* Defined as "an honest belief in the guilt of the accused based on reasonable grounds (Objective + Subjective Element)
* In Miazga, the court said this on objective/subjective test is only appropriate for prosecutions initiated by private parties. For Crown prosecutors to test should be based on an object is assessment of whether there were reasonable grounds
1. Malice, or an improper purpose (i.e. fraud or abuse of process)
* Malice must not be inferred from an honest but mistaken subjective belief in RPG bc of inexperience, incompetence or negligence Mizga
* Malice must not be inferred from absence of RPG – Miazga
* However, it may be inferred from absence of RPG with certain conduct – Proulx
1. The D must prove loss (it is not actionable per se)
2. Public prosecutors have no blanket immunity from civil action
* There is no evidence that leaving prosecutors civilly liable would feter prosecutorial discretion
* "flood-gate" argument that there would be a ton of frivolous claims is ridiculous. Ample mechanisms exist within the system to ensure such claims are not brought (i.e. must be in improper motive and not a mere mistake)

**Nelles v Ontario [99] SCC – P. 80**

The P was charged in the first green murder of four babies. After a lengthy and well publicized preliminary hearing all charges were dropped for lack of evidence. The defendant argued for a blanket immunity protecting the attorney general and his or her agents. Court said no

**Proulx v Québec (AG) [2001] SCC**

Majority inferred malice from the absence of reasonable and probable grounds, coupled with the prosecutors hiring of a former police officer being sued by the plaintiff for defamation

**Proceedings against the Crown Act, s. 5(6) – Crown immunity**

No action **lies** against the crown under this section in respect of anything done or omitted to be done by a personal discharging their responsibilities. It doesn't protect the personal liability of prosecutors though (although they will carry insurance)

**Intentional Infliction of Nervous Shock**

***Wilkinson v. Downton* [QB 1897]**

* **Facts**: Prankster tells wife her husband got into an accident and was severely injured. She suffers severe mental and physical injuries.
* **Issue**: Is the D liable for intentionally causing the P’s injury?
* **Decision**: Yes. The P’s reaction was normal under the circumstances. He wilfully (should say negligently) did an act calculated to cause physical harm to the P, violating her right to personal security (mental security). There was no reason for this.
* **Ratio**: Only need to prove that D had the intent. Intent is wilfully doing an act intended to cause physical harm. So as long as the person intended the conduct that caused the harm and a reasonable person would have foreseen the harm done then the D is imputed to have meant to cause the harm.
1. Wilkinson was framed as intentional infliction of nervous shock the should've been characterized as negligent infliction – Wainwright
2. The question is whether the injury was reasonably foreseeable, with the expectation that the victim would be a person of reasonable fortitude – Mustafa
3. The question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant – Wilkinson
4. It is no answer law to say that more harm was done than was anticipated
5. The courts require some type of recognizable psychiatric illness or physical harm (anguish, worry, emotional distress usually insufficient)
6. the illness, not the shock, furnishes the measurable damage – Radovskis

**Invasion of privacy**

In ***Motherwell***, the plaintiff asked the court to recognize the common-law tort for the invasion of privacy. The Defendant repeatedly harassed the plaintiffs over the telephone and was mentally unstable. Clement J concluded that the plaintiffs claim was better addressed by expanding the tort of private nuisance

In public law, the regulation of access to personal information is contained in the ***Freedom Of Information And Privacy Act***

**In BC, a statutory tort is created by the *Privacy Act*, but it only protect against violations that are (1) willful and (2) without color of right**

1 (1) it is a tort, actionable without proof of damages, for a person, willfully and without the claim of right, to violate the privacy of another

(2) the nature and degree of privacy to which a person is entitled in a situation… Is that which is reasonable in the circumstances, giving due regard

 to the lawful interests of others

(3) in determining whether the actor conduct of the person is a violation of another's privacy, regard must be given to the nature, incidents and

 occasion of the act or conduct and to any domestic or other relationship between the parties

(4)… privacy may be violated by use dropping or surveillance, whether or not accomplished by trespass

* in ***Hollinsworth***, the plaintiff failed because nobody at BCTV acted so as to willfully violate the plaintiffs right, and they had a color of right and that they honestly believed he'd consented to the use of the video
* In ***Silber v BCTV***, the issue was whether the plaintiff was entitled to a reasonable expectation of privacy in IKEA’s parking lot where a tussle occurred and was filmed. The court said no, although it’s private property it's typically accessible by the public. The film crew was guilty of trespass, because the manager asked them to leave, but not violation of privacy
* in ***Watts***, the plaintiff sued for violation of privacy due to the use dropping of her daughter's neighbor that cost her her job. The issue was whether the violation of privacy was somehow justified by the fact it uncovered the plaintiffs wrongdoing. The court thought not, upholding her claim. She was awarded damages for mental suffering, but not loss of job. It's debatable whether she should have even caught that because the invasion of privacy itself did not cause the harm, it was the loss of the job

**Trespass to land**

Direct, intentional (or negligent) physical interference with land in the possession of the plaintiff

* Indirect interferences are dealt with by nuisance (i.e. Smoke from a barbecue, noise from generator etc.)

Actionable *per se* without proof of damage (derived from action on the case)

* Trespassers are liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect and consequential – Turner
* every invasion of private property, be it ever so minute, is a trespass – ***Entick 1765***
* Three main objectives:
1. Protects possessor’s freedom of land use
2. Compensates for damages from intrusion
3. Deterrence of intrusion
4. Protects privacy interests
5. **Direct intrusion on to land** – must be direct result of D’s actions (oil spills, something washing up on land are dealt with by nuisance)
6. **Interference must be intentional or negligent** – only requires intention to intrude on or interfere with land, not intent to cause harm
7. **Interference must be physical** – unlikely to be satisfied by smog, chemical fumes, smoke, noise, odour (nuisance)

Can be committed in three main ways:

1. D enters land in possession of P without permission
2. D places objects on P’s property
3. Possessor of land revokes visitor’s permission/licence to be on property
4. **Issue of continuing trespass for statutes of limitations**
* The new cause of action accrues everyday – ***Williams v Mulgrave***
1. **Land must be in possession of P**
* The tort protects possessory rights, not just ownership rights (action available to lessors, live in nanny or hotel guest – licence only)
* Liable for damages both for trespass and for damage caused by trespass – includes indirect and consequential damages (***Turner)***
1. **Defenses**
* Mistake is no defense (***Turner***) – Where D delivered parcels to the wrong address, P tripped sustaining injuries
* consent
* justification (I was fleeing personal injury)
* recapture of chattels (you took my shit and I'm here to get it back)
* legal authority

**Chattel Torts: Trespass, Conversion, Detinue**

Trespass was designed for cases of wrongful taking, detinue for cases of wrongful detention, and Trover (conversion) for cases of wrongful disposal

With each tort (especially conversion), must assess whether P failed to mitigate their damages. If so, they may not be able to recover the full value.

* This is why the damages for conversion are assessed at the date of conversion – because P can replaced item for its current value)

**Trespass to Chattels**

Provides remedy for any direct and intentional interference with chattels in the possession of another

* Intention: just the same as trespass to land; don’t have to realize it is not your chattel (voluntary doing of act)
* Unlike trespass to land, trespass to chattels is not actionable *per se*. There must be damage or proof of loss
* Jut touching a chattel is not actionable
* "it is a proposition familiar to all lawyers, that a simple aspiration of the chattel, without any intention of making any further use of it, although it may be sufficient foundation for an action of trespass, is not sufficient to establish conversion" – ***Fouldes***

**Conversion**

The party taking the goods should *intend* some used to be made of them, either by himself or by those for whom he act, or that, owing to his act, the goods are destroyed or consumed to the prejudice of the lawful owner – ***Fouldes* (removed horses from ship)**

* As soon as you exercise dominion over property in a manner inconsistent with the possessory rights of the owner you are liable.

***McKenzie*** – whether one who takes the property of another, mistaking it for his own, a returning it to the owner immediately upon discovery of the mistake, can be held liable for conversion? Absolutely. It would be a mistake to give full damages but they should receive nominal damages.

* As soon as you exercise dominion over property in a manner inconsistent with the possessory rights of the owner you are liable.
* Servants of the defendant were tasked with fetching defendants rafts but got the plaintiffs instead

**Detinue**

Protects against the defendant wrongfully withholding a chattel to which the plaintiff has an immediate possessory right***– Cook Cars***

Detinue sur bailment – if you lend/rent something to someone who refuses to give it back

Detinue sur trover – used against a finder/theof/innocent purchaser who acquired possession w/o knowledge of the P's possessory right

Mental element – P need not prove that that D came into possession of chattel intentionally. P need only show that once D was asked to deliver it **up** they failed to do so. The mental element then is the intentional failure to deliver the chattel.

A claim in detinue is a continuing cause of action until the date of judgment.

* Remedies are assessed at the date of trial (in contrast conversion in which they are assessed at the date of conversion)
* Can get value of the chattel + non-pecuniary damages
* Can get the chattel back + non-pecuniary damages
* Can get the chattel back + damages for its detention

**Private Nuisance**

**Private nuisance** –Indirect and unreasonable interference with the use and enjoyment of one's land – *Huron Steel* – Where D co installedpess causing vibrations & noise to neighbors across the street

* **not actionable per se (P must prove damage)**
* The law of nuisance aims to strike a tolerable balance between conflicting claims of landowners, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other – *Huron Steel*

**Policy –** Private nuisance bears close relationship to trespass to land – both are concerned with protecting P's reasonable use & enjoyment of land.

* However, reasonableness is irrelevant to a trespass inquiry whereas it forms an integral part of private nuisance. Not every interference entitles one to a remedy in nuisance. Liability is dependent upon unreasonableness
* Also distinction between nuisance vs negligence.
* Negligence dependent upon the unreasonableness of D's *conduct*, whereas nuisance pertains primarily to the *effect* that the P's conduct has on D
* In negligence P must prove fault (negligence). In nuisance P need not prove negligence, just that the effect was unreasonable
1. 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… Determined by:
2. the severity of the interference having regard to its nature/duration/effect
3. the character of the locale (residential, industrial, mixed-use)
4. the social utility of D's conduct
5. the sensitivity of the use interfered with (tends to go to remedy rather than liability) – would many people have to be fired? Save
6. It is no defense to state that the plaintiff moved to the nuisance (that it was pre-existing)
* In Huron Steel, the defendant company purchased a 880 tons press 2yrs after P bought apartment across the street, and another one some years later it's
1. ***Motherwell*** – family members who have no property interest in the home were still entitled to succeed in nuisance (rejected in England- *Hunter v Canary Wharf*)

**Defenses**

1. **Statutory authority** – Provides a defense where the plaintiff was acting under statutory authority, and the authority conferred left no option but to create the nuisance (***Sopinka in Tock, affirmed in Ryan***)
* "The D must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance"
* However, in ***The Canada Line Case*** the BCCA held that a plaintiff cannot succeed merely by showing that there was an alternative method that could have been used when , as a practical matter, it was out of the question (in this case bc of $)

***Tock***, the escape of water from blocked sewage system into the P's basement constituted a non--natural user of the land (***Rylands v Fletcher***) constituting a serious interference with their right and enjoyment of the property. The defense of statutory authority failed because the language was permissive in authorizing a sewage system to be constructed and did not specify how or where it was to be done.

1. **Statutory immunity** – Where a statute specifically abolishes liability in private nuisance (Vancouver charter?)
2. **Prescription**– amounts to an easement (applies in some provinces) where conduct has occurred uninterrupted over significant period of time in which the plaintiff is known about it and failed to sue or take steps to prevent it

**Public Nuisance**

Arises in one of two ways:

1. interference of common interests (the rights, resources, or interests, and the entire community i.e. blocking the highway)
2. interfering with sufficient number of private interests (i.e. escape of noxious fumes to nearby houses)
* The issue, however, is that it's difficult to determine when the conduct has affected the sufficient number of private claimants to support a claim in public nuisance

It is now largely addressed by s. **180 (2) of the Criminal Code**

Everyone commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

(a) endangers the lives, safety, health, property or comfort of the public or

(b) obstructs the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada

Public nuisance is only actionable by the Attorney General, on behalf of the public, unless a plaintiff can show peculiar damage

**Rule – In *Hickey*, there was an escape of poisonous waste from the defendants plant killed the fish life in adjacent waters. The plaintiffs were "all other fishermen" that exploited this resource, but the pollution created a nuisance to all.**

* A private party may only secure damages for a public nuisance if the injury is "particular direct and substantial, over and above the injury inflicted upon the public in general"
* "the plaintiff has suffered differently from the rest of the public only in degree. That is not enough to entitle him to recover"
* "neither is it an injury peculiar to the plaintiffs themselves, but is suffered by them in common with everyone else's right to fish in these public waters is affected by the nuisance"
* almost all cases in which peculiar damage has been found are cases in which access to the plaintiffs on premises was actually blocked by the public nuisance – not the case in *Stein*

**Misfeasance in a Public Office**

***Roncarelli*** definitively establish the tour of misfeasance in public office

***Odhavji Estate* –** this tort requires knowledge of (or reckless as regards) the unlawfulness of the public's officials act or omission (meaning unlawfulness in relation to that official statutory authority or duty) and the fact that the plaintiff may well be injured by that act or omission

1. (acts) the individual acts with knowledge that he/he has no power to do the act complained of; or
2. (omissions) the individual fails to act when he/she knows that he/she has a legal obligation to do so; and
3. he/she knows that his/her conduct is likely to cause harm to the plaintiff

\*\*\*if the official didn't know but *ought to have known* that their conduct was likely to cause harm the action should be framed in negligence

* "the relevant act (or omission) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose"
* The tort is not directed at a public official who inadvertently or negligently fails to adequately discharge his/her obligations

Man fatally shot by Toronto police officers. His estate alleges the defendant officers and police chief failed to cooperate properly with the internal investigation. The action was not related to the alleged wrongful death, but rather to the officers' alleged failure to cooperate. The statement of claim was not struck out, but the allegation that the chief ought to have known of the likelihood of harm was struck out because it should've been framed in negligence

**Strict Liability For Escape of Dangerous Substances**

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 the defendant acted in a prohibited manner. The onus then shifts to the defendant to establish due diligence or a valid defense. **The policy justification** is always that by choosing to engage in a particularly dangerous activity, the defendant should assume responsibility for the damage that may occur

* what constitutes engaging in a "dangerous activity" is not always clear and the application of Ryland has been surprising. It has been applied to housing water, gas, electricity, sparks from the locomotive, strips of metal foil, and the car with a full gas tank in a garage

***Rylands v Fletcher***

**Facts:** The plaintiff built a reservoir on their property, not realizing it was constructed over an abandoned mine shaft connected to the plaintiffs

 property. Water broke through the vertical shafts and flooded the mine under the plaintiffs property, causing significant damage

**Rule:** "the rule of law is that 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 state. He can excuse himself by showing that the escape was owing to the plaintiff default, or, perhaps, that the escape was the consequence of vis major or the act of God

* **What constitutes nonnatural uses?**
* ***Gertsen*** – The issue is whether waste disposal was a natural use of the lands (methane gas escaped and blew up plaintiff's garage)
* All the circumstances of the time, place, and practice of mankind must be taken into consideration
* The distinction between natural & non-natural uses is both relative and capable of adjustment to changing patterns of social existence
* The burden is on the plaintiff to prove a non-natural use of the land.
* In this case, filling the routing with garbage was a selfish act to end up with a level area instead of an eyesore for gaining attractive facilities at no expense. It was a non-naturally use safe

So, the defendant be liable for the escape dangerous things on account of non-natural uses, but not if they can excuse themselves by showing an "act of God" or malicious activity 3rd-party. These exceptions excuse the defendant's conduct in situations where they are demonstrably blameless

**Defenses to Rylands**

1. Consent – certain P's implicitly consent to the presence of dangerous things (i.e. apartment owners consent to water pipes above head)
2. Common Benefit – if the source of danger is maintained for the common benefit of both the plaintiff and the defendant no liability
3. Default of Plaintiff – No recovery where P voluntarily/unreasonably encounters a known danger & where P's misconduct materially increased probability of injury.
4. Act of God – a force of nature arising without human intervention, but it must be so unexpected that it could not have been reasonably foreseen and thus prevented
5. Act of a Stranger – if escape was caused by a stranger's deliberate and unforeseeable act (who's a stranger, family?)
6. Statutory authority – see private nuisance (Tock; Canada Line Case)

**Occupiers Liability**

**Occupiers Liability Act**

**3(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 the premises, will

 be reasonably safe in using the premises.

**(2)** The duty applies in relation to the condition of the premises, activities on the premises, and conduct of third parties on the premises

**(3)** The duty doesn't apply to anyone who willingly assumes risks (unless the person safety is recklessly disregarded

**(3.1)** The duty doesn't apply to anyone trespassing for the purpose of committing a criminal act

**(3.2)** A person is deemed to have assumed all risks if they are trespassing or entering for recreational activity without payment on certain lands

**Defamation**

**Slander** – Spoken words

* Generally not actionable without proof of loss *except*
* imputation the commission of a crime, infection with a loathsome disease, lack of chastity (women only), and fitness to practice a trade/profession

**Libel** – Covers concrete forms of expression (i.e. written works, films, pictures)

* Actionable per se (lasting and enduring effect – "seeps into the unconscious and leaps out later find this")

**Two separate questions: – *Sim v Stretch***

1. Whether the words capable of being defamatory? (Question of Law) – judge
2. Whether they were defamatory in this instance? (Question of Fact) – jury

**How does the judge decide if he should put it to the jury? –** *Hill v Scientology*

1. **Defamatory**
* If made in reference to a group, not actionable by individual members because it didn't refer to them as individuals – *Knupfer*
	+ double check this with *Libel and Slander Act*
* Would the words tend to lower the P in the estimation of right-thinking people – *Sim*
	+ On their literal meaning
	+ Or by innuendo – *WIC Radio*
		- extrinsic facts can translate apparently innocent words into defamatory ones
* Intention not required (in effect strict liability). Once the P has proved D' statement defamatory, they are presumed to be false and burden of proof shifts to The to prove otherwise – *Hill*
* Courts will look at context of the words + mode of publication, focusing on the publication as a whole rather than isolated passages
1. **Made in reference to the P**
* If the statement doesn't refer to the P by name the court will ask whether – *Knupfer*
	+ the statement can be regarded as capable of referring to the P (QOL)
	+ the statement would lead a reasonable person who knows the P to conclude that it refers to P (QOF)
1. **Published or disseminated to a third-party**
* Every repetition is considered a new publication and independently actionable – *Lambert v Thompson*
	+ So any party playing a part in the communication, even if only repeating someone else's statement, may be liable
	+ But, person making original statement is only liable for repetitions if it can be shown that
		- * + He/she did express/implied authority for remarks to be republished
				+ the remarks were made to someone with a moral/legal/social obligation to republish them
				+ republication is a natural & probable consequence of the original publication
* No liability for news vendors, book distributors and retailers, libraries, video stores, and in some circumstances, printers, if no knowledge of defamatory content, no reason to be suspicious, and if they have taken reasonable and practical steps to vet the material – *Vizetelly v Mudie's*
* Actions on behalf of a deceased are not permitted

**Defenses (Burden on D and all operate as complete defenses)**

1. Justification (Trueness)
* Once P proves statements were defamatory, their presumed false. It's up to D to prove otherwise.
* Risky to plead because if it fails your guilty of republication – *Williams v Reason*
	+ - * + Here, D wanted to reduce fresh evidence that’d proof truth of what the article said (Shamatuerism). Court said okay, bring the evidence of "boot money" because it's relevant to the general imputation of the article, Shamatuerism.
1. Absolute Privilege
* MOP & BC legislature – Legislative Assembly Privilege Act s. 1(1)
* somebody else too
1. Qualified Privilege – ***Hill*** (1029)

Rule: protects defamatory materials communicated on certain occasions, even if untrue, but not if made maliciously or occ exceeded

"a privileged occasion… An occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made as a corresponding interest or duty to receive it. This reciprocity is essential" – Hill

* Hill recognized the qualified privilege attaches to the reporting of documents intended to be filed in legal proceedings
* However, the defendants had exceeded the occasion by saying far more than needed to to simply report their intention to file the documents – they made very public accusations about hills conduct when they knew the truth of those accusations was still under investigation
* "the fact that an occasion has privilege does not necessarily protect all that is said… Anything that is not relevant and pertinent to the discharge of the duty… Which creates the privilege will not be protected"
* ***Miscellaneous Employees Teamsters*** – Leader of union A fixed defamatory statements to his membership of leadership of the union B. Held privileged bc bona fide attempt to serve the interests of A's members
* ***Richardson v Vancouver*** – Police chief defames plaintiff's lawyer & complains about him to law society. Held privileged because it was a a public response to a public attack on the integrity of the force).

Statutory qualified privilege in s. 4 ***Libel & Slander Act***

* Protects fair and accurate reports of a public meeting (municipal Council, school board etc.)
1. Fair Comment – ***WIC Radio***

Rule: It provides a defense to those who comment fairly on matters of public interest if:

The material was (1) a comment, as opposed to an accusation or allegation of fact (2) that any person could honestly express (3) based on facts that are true (d) that pertain to matters of public interest

* The comment must explicitly/implicitly indicate the facts on which it is based
* The individual must not have an honest belief in the views expressed, the question is whether any person could express those views based on the underlying facts.
* Justification for this rule: "It is true that the common must have a basis in the facts, but a requirement that the comment be "supported by the facts", read strictly, might be thought to set the bar so high as to create the potential for judicial censorship of public opinion"
* This test "represents a balance between free expression on matters of public interest in the appropriate protection of reputation against damage that exceeds what is required to fill free expression requirements.
* A comment motivated by malice will all be privileged
1. Responsible Communication in the Public Interest – ***Grant v Torstor***

Facts:. Toronto Star published critical article of proposed private golf course development w/o verifying the allegations

Issue: Fair comment protects comments, not facts, and qualified privilege rarely applies to public discourse

Held: We will recognize a new tort of responsible communication in the public interest

(1) Public interest ≠ What the public is interested in

* "the matter must be shown to be one inviting public attention… Because it affects the welfare of citizens, or one to which considerable public notoriety or controversy is attached"

(2) Was the communication responsible?

* The seriousness of the allegation affects the degree of diligence required in pursuing verification
* The public importance of the matter – not all matters of public interest are of equal importance
* The urgency of the matter – does this story have to go today?
* The reliability of the source
* Whether the other side of the story was sought and accurately reported
* Whether the defamatory statement could have been excluded

**Damages – *Hill***

* An injunction will be granted if continued publication could be adequately compensated by damages at trial
* $300,000 general damages 🡪Morris Manning + Scientology (at large and in the sole province of the jury)
* $500,000 aggravated damages 🡪Scientology alone (compens nature; address high-handed/oppressive conduct; must be actual malice)
* $800,000 punitive damages 🡪Scientology alone (conduct that offends the court sense of decency; punishment + deterrence in nature)

Rule: "There cannot be joint and several responsibility for either aggravated or punitive damages" – they arise from individual conduct

Issue: Should a cap be imposed on damages for defamation? NO

* The nature of the injury in defamation vs personal injury cases are entirely different
* In personal injury cases, the vast majority of damages are special damages for quantifiable sums. Non-pecuniary damages are secondary
* In defamation, special damages for pecuniary loss are rare. The bulk of the claim and the sole basis for recovery for loss of reputation lies almost exclusively in the realm of general damages
* Moreover, personal injury cases are often dealt with by negligence (in which there's no intent to harm). In contrast, defamation is the intentional publication of an injurious false statement, which ought to attract greater moral culpability's

# Negligence

**Primary Issue**: Because a negligent act is not directed at individual persons, there are questions as to how wide the net should be cast with respect to what class of persons one might owe a duty of care for harm they unintentionally cause. A second, but related issue, is how wide the net should be cast with respect to the type of harm that one not be liable for

History

Prior to Donoghue, a lack of contractual privity made it extremely difficult for consumers to sue manufacturers in negligence, unless the articles dealt with were dangerous *per se* (Winterbottom) At the same time, claims could only be brought where there was a pre-existing recognition of a duty of care to be observed between the parties. Donoghue changed all of this so that a valid claim could be brought in negligence where the plaintiff and defendant were in a sufficiently proximate relationship insofar as the latter should have foreseen risk of physical harm to the plaintiff.

**Five Issues to Be Determined**

1. **Duty of Care**
	1. First look to see whether the relationship falls within the class of recognized duties

I. Duty not to injure– *Donoghue; Palsgraf*

* Palsgraf distinguished the concept of "duty" in tort from that in criminal law. The majority framed "duty" as a matter of relation whereas Cardozo, in dissent, thought foreseeability of harm to anybody was sufficient to frame an action. The

II. Duty to Rescue

* No general duty to rescue unless special relationship exists

*Osterlind* – Rented canoe to drunk guy (but he wasn't helpless). Canoe capsized. No duty to respond to calls for help

*Matthews v Maclaren –* Operator invited guests aboard. One fell overboard. Duty to rescue bc proximity. You can abandon a

 stranger but not someone for who safety you've assumed summer spots ability

 Duty owed to rescuers

*Horsley v Maclaren* – duty of care if you are responsible for creating a situation of peril & someone jumps in to help. In this

 case, Horsley jumped in bc Maclaren incapable of grabbing pole – not bc slow pace of rescue

III. Duty to control the conduct of others (Drunk fucks)

 – Commercial Hosts – *Crocker v Sundance*

* Drunk fucks compete in ski resorts tubing competition. Inviter-invitee relationship + reasonable means at their disposal to control his conduct (disqualification or don't provide a second tube) = duty of care.
* Defense of voluntary assumption of risk failed. Evidence indicated sober person could somewhat control tube

– Social Hosts – *Child's v Desormeaux*

* BYOB party guest got drunk drove home injure someone. SCC distinguished commercial vs social hosts finding insufficient proximity for duty of care
* Commercial = greater ability to monitor alcohol consumption; social hosts not heavily regulated via liquor licenses; social hosts don't profit from sale of alcohol

IV. Police duty to warn – *Jane Doe v Metro Toronto*

Victor attacked by Paul callow after police failure to warn

Duty of care existed because of their legal position as police + sufficiently defined set of potential victims

But a legitimate decision not to warn will not excuse a failure to protect

Odehavji – police oh duty of care to victims family to investigate competently

Hell v. Hamilton – police oh DOC to suspect who, if it investigated competently, would have been cleared rather than charge

V. Duty to perform gratuitous undertakings

– Generally no duty to act (*Smith; Soulsby*), but once you do it must be done with reasonable care (*Zelenko*)

– in *Zelenko*, the D took it upon himself to render medical aid but left the P in an infirmary alone for 6 hours

– if you generate expectations by always performing voluntary service, you may be negligent if you fail to format service

 without warning. This translates nonfeasance and a misfeasance. In *Tutinka*, the D occupier excavated sand flats were

 children were known to play after hours, creating a trap

VI. Duties to the unborn (Pre-conceptual wrongs/wrongful birth-life/wrongful pregnancy/pre-natal injuries

Pre-Conception wrong – Something happens to mother (i.e. takes bad prescription) that causes harm/disability to child

 subsequently conceived – Paxton v Ramji

* No duty of care to "future child", meaning child not yet conceived. Harm to a future child is foreseeable, policy concerns militate against finding of proximity (i.e.Doctor may neglect prescribe beneficial drugs to patients)

In Utero–Injuries – treated as normal negligence because if harm mother it's foreseeable you may hurt the baby – *Dobson*

* But child has no claim against mother – "For reasons of public policy, the court should not impose the duty of care upon a pregnant woman towards her fetus are subsequently born child. To do so would result in very extensive and unacceptable intrusion into the bodily integrity, privacy and autonomy rights of women"

Wrongful Pregnancy – Parents have taken steps to prevent pregnancy but it occurs anyway

* Child has no claim for existing, but parents can claim damages for loss associated with giving birth (pain and suffering + special damages), costs for raising a disabled child (*Arndt)*, but not costs for raising a healthy child

Wrongful Birth – Woman claims but for negligence of Doctor (after conception) she would have terminated

* The duty is primarily based on physicians duty to inform patient of medical risks
* The same principles apply as damages for wrongful pregnancy
* The primary issue, however, is causation. A mother's evidence that she would have terminated is not conclusive; the test is whether a reasonable woman in the mother's position would've done so – *Arndt*

VII. Duty to avoid causing "psychiatric injury" (possibly to secondary victims as well)

 – Foreseeability is not enough, it must be foreseeable that a person of reasonable fortitude would've suffered injury – *Mustafa*

– foreseeability doesn't require the probable damage, merely sufficiently possible that it's a risk P should take into account

– ordinary day-to-day emotional upsets not enough – more required in the form of recognized psychiatric illness

*Alcock* – 95 people killed 400 injured in soccer stadium accident's. Brother-in-law claim failed & so did brother – 406

* restricted duty owed to secondary victims to (A) people who are very closely tied to the victim (B) proximate space to the scene (TV or video may qualify) (C) proximate in time

VIII. Health professional's duty to inform – *Reibl v Hughes*

 – exceeding consent = battery failing to disclose risks = negligence

* standard of care = what would the individual patient reasonably want to know
* causation issue: what the patient would have done had the information being provided. This is resolved by applying, not a subjective test, but a "modified objective test" that looks at what a reasonable patient in the individual patient's position would've done at the information being provided
* *Haughian* Disc surgery = paralysis case– Doctor has a duty to advise of material risks + alternative procedures and to acquaint him or herself with the facts about the patient that are relevant to the patient's potential choices
* "Material Risks" = probability + severity

IX. Manufacturer's duty to inform – ***Hollis v Dow***

* In the case of medical products posing a risk, the standard of care (for manufacturers) is one of complete and current disclosure of any and all risks. The duty may be discharged by informing a "learned intermediary" rather than the patient. The court won't entertain whether, hypothetically, the learned intermediary would I pass on the information. The law assumes that they would have.
* Causation – It's not a modified objective test. The Q is simply what would the patient have decided W/proper disclosure
* Why? Because "in the case the manufacturer… There is a greater likelihood that the value of the product will be overemphasized and the risk under emphasized. It is, therefore, highly desirable from a policy perspective to hold the manufacturer to a strict standard of warning consumers of dangerous side effects of these products

X. Occupiers Liability – Occupiers Liability Act

* (see above, after strict liability for release of dangerous substances)

XI. Municipalities duty to properly inspect buildings & enforce bylaws – **Kamloops v Nielsen**

* Under DOC in respect of their inspection of buildings under construction, and enforcement of bylaws once defect found
* Kamloops was a case of negligent failure to enforce (M held liable but legislature responded w/ Local Government Act)
* Duty owed to any occupier of a building forced to spend money to remedy defects in construction

Local Government Act, s. 289 – absolves BC municipalities of negligent failure to enforce building bylaws

Vancouver Charter, s. 294(8) – goes further, absolves the city of any duty of care in inspecting buildings

Special Duties – See outline already created

1. Negligent Misrepresentation – *Hercules Management*
2. Pure Economic Loss
3. Negligent Performance of a Service
4. Negligent Supply of Shoddy Goods or Structures
5. Relational Economic Loss
	1. Novel Duties – If no duty established by precedent, **Anns/Kamloops** via **Cooper** v **Hobart** to see if novel duty should be recognized

I. Foreseeability of harm + proximity = Prima Facie duty of care

ii. Whether the prima Facie duty of care should be vitiated by policy considerations

 (i.e. indeterminate liability; governmental immunity for policy vs operational decisions)

* + 1. At first stage, foreseeability of harm + "proximity" = PF duty of care (Anns said just foreseeability, Cooper adds prox)
			1. Key Q is what is meant by proximity? – It's asking who should we have in mind when taking risky actions? The answer is "persons who are so closely and directly affected by my act that I ought to reasonably have them in mind when performing the act in question". It is not confined to mere physical proximity"**Donoghue**
			2. may involve looking to the parties expectations, representations, and reliance, if any – **Cooper v Hobart**
		2. Once a prima Facie duty is established, it remains to be considered whether tort liability should be negated, having regard to policy considerations external to the relationship between the parties
			1. Here, the policy considerations are concerned with the effect of recognizing a duty of care on other legal obligations, and legal system and society more generally
			2. Here, recall the government is not liable for policy decisions, only operational decisions (i.e. it may be liable for the manner in which it executes/carries out a given policy but not the policy itself – **Cooper v Hobart**

"To some extent, [the concern whether there is an application of policy considerations] is academic. Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which "stage" it occurs. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances".

* ***Just v BC***  is an example where (1) Prima Facie duty of care existed (2) but was negated by extraneous policy concerns
1. **Standard of Care + Breach (***Amos; Moule***)**
2. General rule: Must live up to the standard of the reasonable person (subjective/objective) – ***Arland v Taylor***

The reasonable person is not a projection of the finder of fact – Arland (where TJ gave erroneous jury instructions to the effect of "what would I have done; and what precautions would I have taken that he didn't")

* the reasonable and prudent man is a mythical creature. "He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest scale of which anyone is capable; he is not a genius who can perform on common feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence and makes prudence a guide to its conduct… His conduct is the standard adopted in the community by a person of ordinary intelligence and prudence" – Arland
1. Special standards of care (Disabled – ***Fiala****;* Children *–* ***Joyal***; Professionals – ***White v Turner***

Disabled – Bipolar guy loses it on a run. Reaches through sunroof, starts choking driver, driver accelerates hits plaintiff

* Court draws a distinction between those who could foresee manic episodes versus random occurrence
* holding the mentally ill to restrict objective standard would essentially create a no-fault regime

Children – six-year-old girl runs into approaching (negligent) car while crossing Highway.

* "It is a question for the jury in each case whether the infant exercise the care to be expected from a child of like age, intelligence and experience" – Here she was stunned by a horn = not negligent

Professionals – Botched breast surgery

* "The plaintiff must prove that the defendant performed the surgery in such a way that a reasonable plastic surgeon would consider to have been less satisfactory" – poor result ≠ negligence

(c) Professional Standards/Customs– ***Ter Nuezen***

If it is impossible for the finder of fact to form a lay opinion, they ought to defer to the professional standard

Nevertheless, the standard of the profession can be second-guessed if the nature of the issue is such that an ordinary person can properly pass judgment on whether the professional standard is sufficiently careful – great quote on 555

* Doctor responsible for screening sperm donors. P got HIV. Physician abided by standard medical practices. Jury found him liable nevertheless. Issue whether they were entitled to do so
1. Factors in considering breach

I. Probability of injury + potential severity – ***Bolton v Stone*** (at this stage foreseeability is not enough)

"In the crowded conditions of modern life even the most careful person cannot avoid treating some risks and accepting others. When a man must not do… Is create a risk which is substantial"

II. Social utility of the conduct – ***Watt v Hertfordshire***

Firefighters loaded Jack in back of truck because normal vehicle wasn't available. Truck breaked, Jack shifted injuring plaintiff. You must balance the risk involved against and to be achieved. Here, risk not so great to prohibit saving lives

III. Cost of risk avoidance – ***Vaughn v Halifax***

bridge paint gets on cars court says were only talking about one parking lot and one month work. UBC could've posted warning signs were employing someone to wipe the cars)

* .
1. **Causation (*factual causation*)**
2. "But-for" Test is the general rule: "What would've happened but for the defendant's negligence" – *Kauffman*; *Barnett; Snell* 562-563

***Kaufman*** – Transit authority not liable for P's fall on escalator bc no evidence that scuffling youths ahead of her were attempting to grasp the hand rail or that if it was of a certain type she wouldn't have fallen.

***Barnett*** – man died after arsenic poisoning & being told to go home by ER nurse. Court said negligence of hospital didn't cause P's death bc even if they had seen him proper treatment can be administered in time to prevent it

I. Factual causation – Direct/Physical connection between act & harm (may be made by inference – ***Snell***)

II. Posited Hypothetical – what would've happened if plaintiff had not acted negligently

* The question of what would've happened had the tort not being committed raises no difficulty where you assume life would've gone on as normal or where something final happens afterwards (i.e. plaintiff dies). The difficulty is when you can't assume or say for sure what the plaintiffs position would've been if the Torah hadn't been committed. For example, in respect of lost earnings can you conclusively say the plaintiff would've kept his job in a bad economy? Alternatively, what do we do with a plaintiff who was doomed anyway ("crumbling skull")

***McGee*** said that if it was impossible for a plaintiff to establish proof using the but for test than the onus should shift to the defendant to disprove causation. ***Snell*** said no, that's incorrect. If it's impossible because the facts lie particularly within the knowledge of the defendant (i.e. medical malpractice cases), very little affirmative evidence on the part of the plaintiff will justify drawing an inference of causation in the absence of evidence to the contrary.

1. Material contribution – ***Resurfice***

Only applies if the plaintiff can establish that it is impossible to prove causation using the but-for test and that the impossibility results from factors beyond the plaintiffs control (i.e. limits on scientific knowledge). Second, the plaintiff must establish that the defendant breached the standard of care and that his or her injuries fell within the ambit of risk created by the defendant's breach.

* ***Cook v Lewis*** is an example
* ***McGee*** is also an example – the defendants wrong can't be said for sure to of been one of the events that led to the injury, but added to the risk that the injury would occur. Here, the lack of showers added to the risk you get dermatitis and he did get it
* ***Athey*** – Pre-existing back condition suffers injuries in car accident. Appeared to apply material contribution because the tort formed part of the total complex of causes. Issue was whether damage should be apportioned between tortious and non-tortious causes. Court said that's possible, but not appropriate here (1) not indivisible harm (2) not lost of chance (3) not crumbling skull
1. Multiple causes P. 583

I. Single harm by joint tortfeasors – all liable

II. Single (indivisible harm) by concurrent tortfeasors – jointly & severally liable (**Nolan** – contractor + architect = shit house)

III. Divisible harm by concurrent tortfeasors – severally liable for harm each caused

1. Successive causes of parallel injuries

***Baker in Penner*** – Where each cause is culpable, and the 2nd one makes the plaintiff worse off, the 1st tortfeasor can't rely on the 2nd

 tortfeasors act or mitigate damages (i.e. left leg injured in motor vehicle accident + guy gets shot and amputated same leg = 1st

 guy doesn't get off on paying damages)

***Penner*** – however, the 1st tortfeasor is entitled to mitigation of damages where the 2nd injury occurs in non-culpable circumstances

 (i.e. Car accident + subsequent heart attack prevents P from working = 1st guy only pays damages and told the heart attack)

1. **Remoteness of Damages (*legal causation*) – "*It's not logic, it's practical politics*"**
2. It's not about directness (*Re Polemis*), but rather what you which suffered is of an unforeseeable different kind from the kind that was foreseeable (*Wagon Mound #1*)

 ***Wagon Mound #2*** *&* ***Assiniboine*** broadened the test of foreseeability of damage from one based on probability to possibility of damage

* ***Assiniboine*** – school sued gas company after Kidd struck riser skidoo. "It is enough to fix liability if one could for Siena general way the sort of thing that happened. The extent of the damage and its manner of incidents need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. I would hold that the damage was of the type or kind which any reasonable person might foresee.
* ***Wagon Mound #2*** – D spilled oil in Sydney Harbour. Carried by wind and tide underneath wharf that caught fire. 2 plaintiffs boats were damaged. Distinguished Wagon Mound #1 on the evidence. Here, the defendant stated furnace oil would be very difficult to ignite on water (not impossible) and that this would probably have rarely happened (not that it never had). There was a foreseeable possibility that the furnace oil would ignite and cause damage of the kind to the boat

 (b) Manifestations of the foreseeability test

* ***Hughes v Lord Advocate*** – The question is whether the nature of the injury is different in kind from that reasonably foreseeable, not the nature by which it occurs (Here, lantern fell into manhole & exploded causing burning = he got burned either way)
* Other cases (usually involving the thin skull rule) emphasize the mechanism by which the injury occurs instead of the Kind.
* ***Smith v Leech*** – Galvanizer sloshed by molten metal. Burn triggers cancer from pre-malignant condition. The question wasn't whether they could foresee a burn would cause cancer and he died. The question was whether the defendants could reasonably foresee the type of injury he suffered – a burn.

(c) Intervening Causes – rule set out on 629

* The key question to be asked is whether the subsequent act was "within the scope of the risk" created by the 1st tort

 (1) Was the initial tort a cause of the 2nd actor's actions; if so (2) were the secondary actions a foreseeable consequence

* ***Bradford*** – Negligent kitchen fire was a cause of other patron yelling "gas leak" but it was unforeseeable (no liability)
* ***Price*** – Soccer guy injures ankle. 1st Doctor negligently x-rays wrong foot. 2nd Doctor relies on clean x-ray of 1st Doctor and doesn't order new ones. 1st Doctor is liable
* ***Hewson*** – Joy riders taking of bulldozer unforeseeable after worker left keys. City (owner) not liable
1. **Harm/Loss**

(a) Loss of Chance (Contract Case beauty pageant – compensated according to probability)

1. **Defenses In Negligence**

(a) Contributory Negligence – No longer a complete defense. Would have apportionment of fault via *Negligence Act*

(b) Participation in a criminal or immoral act (*ex turpi causa*) – Used to be broad but it was narrowed in ***Hall v Hebert***. Now, it only

 prohibits allowing a guilty person to gain from their wrong or reduce their punishment

1. Volenti – Voluntary assumption of risk

 Mere fact that you risked your safety does not mean you have given up your legal rights should something bad happen

 (Crocker v Sundance)

1. **The Burden of Proof in Negligence**
2. The apology act
3. *Res ipsa loquitur –* ***Fontaine*** (says circumstantial evidence = proof of negligence)

 Burden doesn't shift to the D to prove absence of negligence if no direct evidence (similar to what *Snell* did with causation)

1. **Negligence liability of public authorities**

***Just v British Columbia***

**Dunsmore v Deshield** – P. 289 – Illustrates the five elements of a negligence action

**Donoghue v Stevenson – P. 294**

Facts: Donoghue's friend bought a bottle of ginger beer for her. It was opaque/couldn't see in it. It contained a snail. She got sick. She had no action in K bc she didn't buy the beer. Only action available was as against the manufacturer, if she could establish a duty of care

Issue: Did Stevenson have a duty of care to the ultimate consumers of its product

Held: Yes! Lord Atkin

* Starts with biblical command "love thy neighbor" & translates to "must not harm your neighbor". So who's the neighbor?
* Looks to the earlier Scottish cases *Heaven v Pender & Le Lievre v Gould* to observe the underlying principles of earlier decisions to come up with the notion of "proximity"
* He adopts the language of *Heaven v Pender* to the extent that it not be limited to mere physical proximity
* He agrees that in many cases it will be difficult to determine whether such a relationship exists, but not here.
* The manufacturer knew its product would only be opened and ingested by the ultimate consumer and that there was no reasonable opportunity for preliminary inspection

2 Ratios: – there is a duty owed when the manufacturer intended product to reach a consumer un-inspected, with knowledge that absence of care

 in preparation is likely to cause harm

 – There is a duty of care whenever a party can reasonably foresee that others will be closely or directly affected by their actions

**Palsgraf – P. 320 – American version of Donoghue v Stevenson**

Facts: Man late for train, jumps on, begins to fall, gets pushed from behind by train guard which causes [concealed] package of fireworks to fall,

 setting off chain reaction whereby scales fell on the woman.

Woman argues: Guard had a duty to treat the passenger and his package with care, he failed to do so. His actions directly caused harm so he

 should be liable

Majority: Cardozo says she mistakes the distinction between criminal and civil law. The only duty owed was to the passenger who the guard pushed

 and it was to treat his person and his package with care. There was no duty with respect to the plaintiff. He says you can't build up

 negligence to the plaintiff from a duty that was really owed to someone else

Dissent: Andrews says no no no. It is the act itself that is wrongful and once it is done, if harm so results, the doer is liable for the harm caused to

 anyone. In his own words "unreasonable risk being taken, its consequences are not confined to does who might probably be hurt"

**Note:** Both majority and dissent agreed that liability needs to be limited somehow. The former limits liability under the concept of "duty" and who

 it is owed to. The dissent says once a wrongful act is taken, liability is limited by a causal link that is reasonable and direct

**Hedley Byrne**

A bank give the wrong credit score to a client who secured a loan when the lender relied on the report. The court said so what if it didn't involve "physical" negligence and the only damage was "financial". It was perceivable that someone would rely on this advice and suffer **loss**

**Cooper v Hobart – P. 303**

Facts: Class-action by investors against gov’t for not exercising its statutory powers under the *Mortgage Brokers Act* quickly enough. Statute gave

 the govt power to investigate & suspend mortgage brokers licenses, by the time it did so it owed investors $180 million.

Issue: Was the government under a duty of care to the plaintiff investors

Held:

1) There is no pre-existing class of recognized duties such as this one

2) It is foreseeable that harm would befall investors, but there is insuff proximity btw the registrar and the investors to grant a PF duty of care

* Why? BC any duties, if they exist, must arise from the enabling statute of the Registrar; it's it's only source of power
* Under the statute, the registrar must balance a myriad of competing interests, including ensuring public access to capital while maintaining confidence in the system by determining who is "suitable" as a broker
* The registrar was under no specific duty to the investors. It had a much wider duty to the general public of which they were only a subset

 3) Although no need to proceed to the 2nd branch of Anns, even if a PF duty of care was found, sufficient policy considerations would justify

 overriding that duty

* Registrar exercises discretionary power in the best interests of public policy, deference should be afforded
* Registrar not simply carrying out government policy, but deciding as an agent of the executive what that policy should be
* If the plaintiff succeeded, the registrar would be subject to indeterminate liability. It's enabling statute imposes no limits on the number of investors and the amount of money in the mortgage brokering system

**Just v British Columbia – Liability of government authorities: "policy" vs. "operation"**

Facts: Case related to the duty question of Cooper vis-à-vis the government's failure to prevent rock slides on the Sea to sky highway

* Distinguished decisions of policy (not reviewable by the courts vis-à-vis the separation of powers) vs. Operational decisions (subject to review on grounds of negligence) – but if exemption by way of statutory immunity than no liability (*Government Liability Act 🡪Neilson*)
* Whether or not the government chooses to perform a particular act is a decision of policy. But once they undertake an act they must do so with reasonable care, and the courts are willing to supervise the latter
* "once a policy to inspect is established that it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion and to demonstrate that in all the circumstances, including budgetary constraints, it is appropriate for a court to make a finding on the issue"
* "what constitutes a policy decision may vary infinitely and may be made at different levels although usually a high-level"
* But at this stage of breach, "the standard of care imposed upon the crown may not be the same as that owed by an individual"
* The manner and quality of government inspections deserves leniency because of their vast responsibilities (i.e. hundreds of miles of sidewalk vs. right in front of one's house)

Held: Government liable. "Here, what was challenge was the manner in which the inspections were carried out, their frequency or infrequency,

 how they should have been inspected, and the manner in which scaling should have taken place… [These decisions] were not decisions that

 could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were

 operational in nature

**Sopinka (in dissent**) – "on this analysis it is difficult to determine what aspect of a policy decision would be immune from review (**affd *Swinnimer***)

**Moule v NB Electric – P. 314 – Damages not foreseeable**

Facts: The D company was responsible for electric wires near a tree. A young boy stepped on a rotten branch and fell onto the wires.

Issue #1: Was there a duty? Yes.

* given the geographic proximity of the wooded area to nearby houses and the reasonable foreseeability the children would play their, the defendant was under a duty to exercise reasonable care.

Issue #2: Was the injury too remote? Yes.

* Notwithstanding the duty on the defendant, the circumstances render the injury too remote to have been reasonably contemplated
* The presence of cleats on both trees, the platform between them, the unusual height to which the boy climbed, the unfortunate presence of a rotten branch above the wires (that he stepped on) discloses a sequence of events which was so fortuitous to be beyond the range of results which are reasonable man would anticipate…

**Amos v NB Electric – P. 316 (distinguished from Moule on the facts)**

Facts: In front of the uncle's house was a highway, on it wooden poles with wires. There also was a nearby poplar tree. 3 boys competed to see who could climate the fastest. It began to sway and a boy struck power lines that had been concealed by branches

Issue #1: Was very duty? Yes

* Such reconstituted in the Lieberman for young boys so it was reasonable to contemplate they would play their

Issue #2: Was the injury to remote? No

* It was or should have been foreseeable the young boys would play there, and it is well-known that a poplar is a fast-growing tree.
* Given the defendant's policy of trimming the branches only every 4-7yrs one could easily imagine the branches concealing wires and a young person getting hurt

Recovery of Pure Economic Loss In Negligence

**General rule**: It's not recoverable unless it fits into a defined set of categories (which are not closed). They are unified by the common theme of pure economic loss, but each category involves different policy considerations including:

1. The degree to which judicial interference with acceptable business practices should be permitted (i.e. fair competition); and
2. indeterminate liability
3. **Negligent misstatement/misrepresentation (possibility of concurrent liability in contract – *BG Checo*)**
* first recognized in ***Hedley******Byrne*** and was founded on a "special relationship"
* Client of ad company wanted ad space on credit. Ad company's bankers contacted clients bank for credit rating who said he was "good for the arrangement". He defaulted & ad company loss $.
* HL said but for disclaimer waiving liability ad company would have been able to recover
* Picked up by SCC in ***Hercules******Management*** but based on *Anns* test
* Shareholders of 2 CO's brought an action against the CO's auditors for negligently preparing financial statements which they alleged caused them economic loss via a) additional investments and b) depreciated existing shareholdings]
* SCC said yes, prima facie duty of care exists and yes, the D knew the potential class of claimants who may reasonably rely on the statements. However, DOC negated bc the statements were put to use for which they were not intended. They were for the shareholders as a class to oversee the running of the company at the AGM not for them to protect their personal investments. LIABILITY DENIED
* Contrast to ***Haig v Branford*** where CO went to auditors to prepare financial statements to attract new investors. DOC upheld. Auditors did not know exactly who would rely, but knew it would be a group of investors and knew exactly the nature of the reliance

1. A prima facie duty of care will exist if:

a) The D ought reasonably to have foreseen that the P would rely on his representation and

b) Reliance by the P, in the circumstances, is reasonable (having regard to 5 indicia of such)

1. The D had a direct/indirect financial interest in the transaction in respect of which the represent was made
2. D is a professional or someone who possesses special skill/judgment/knowledge
3. the representation was made in the course of the D's business
4. The representation was given deliberately (i.e. not on a social occasion)
5. The representation was given in response to a specific inquiry or request

 2. In considering whether the prima facie duty of care should be negated one must consider:

a) the fundamental policy considerations that a D might be exposed to "liability in an

 indeterminate amount for an indeterminate time to an indeterminate class (Cardozo CJ in

 *Ultramares*). – Deterrence of negligent statements outweighed by potential indeterminacy

3. However, "knowledge of the plaintiff (or an identical class of plaintiffs) on the part of the D and th use

 of the statements at issue for the precise purpose or transaction for which they were prepared"

 militates in favor of upholding the duty of care

1. **Independent liability of statutory public authorities (government wins most of the time)**
* ***Cooper v Hobart***, – the nature of the statutory mandate differs from case to case study each case must be treated new
* makes it difficult to get Prima Facie duty of care where the public body exercises a general regulatory function, as distinct from having a particular responsibility for the economic interests of a particular party (like building inspection)
1. **Negligent performance of a service**
* D performs services for 3rd party with whom the P has a relationship. P suffers pure EL via D's negligent performance of the services
* Where the service is not the giving of information or advice (negligent misrepresentation), there is usually no duty of care in respect of a financial loss to anyone except the client (because the company providing the services will rarely know of the existence of the plaintiff, and could rarely know the class of possible persons to whom the duty would be owed – as in BDC)
* ***BDC v. Hoftrand*** –

Facts:P needed land titles delivered by Dec 31st. Land titles office asks BDC (courier) if they can meet the

 deadline. They say yes but deliver late and P loses out on land deal. P sues BDC

Held: Per stage 1 of *Cooper*, there was insufficient proximity to establish a prima facie duty of care

* BDC had no knowledge of the existence of the P, nor could it have reasonably known the existence of the class of persons whose interests depended on timely transmission
* There was also no reliance by the P on the D's representation. The situation of risk was created by the terms of the P's contract with the 3rd party.
1. **Negligent supply of shoddy goods or structures**
* Defects cause physical accidents/injuries are covered under ***Donoghue***
* However, defects that cause a P pure economic loss to subsequent owners because they have to be repaired raises policy concerns
* As such, there is a recognized duty of care towards a future owner not to create *dangerous* (limits the scope of liability) defects in the goods or building – ***Winnipeg Condominiums***
* So far, no duty of care in respect of *merely substandard* work needing fixing (a matter best dealt with by K with the original owner)

**Rivtow Marine**

1. **Relational economic loss**
* Generally not recoverable **(*Cattle V. Stockton Waterworks*)** B/C of indeterminate liability (***Hickey***) except in narrow circumstances
* Contractor couldn't recover from Waterworks for negligence causing burst pipe that made job more expensive. Said you should have taken that into account in your bid goof!
* May be recoverable if it fits into the following categories (La Forest in ***Norsk*** affirmed in ***Bow******Valley****)*

a) If the claimant has a possessory or proprietary interest in the damaged property in

b) Where the relationship between the claimant and property owner constitutes a joint venture

c) General average cases (i.e. maritime law – if cargo lost at sea than others with cargo ship in *pro rata*

 to cover the losses)

* The categories are not closed (according to *Bow Valley* although the court found no new category in that case) – perform *Anns* test
1. **New Categories Of Pure Economic Loss**

***Martel Building LTD*** – The test is to do Cooper *v Hobart*

Concerns in recognizing new categories of pure economic loss

1. Economic interests are viewed as less compelling of protection than bodily security or proprietary interest
2. And unbridled recognition of economic loss raises the specter of indeterminate liability
3. Economic loss often arises in a commercial context, where there are inherent business risks best guarded against through means such as insurance

Ratio: One commercial party should not have to be mindful of another commercial parties interests in an arms-length negotiation

Facts: D led P to believe it would be amenable to me renewing P’s lease on certain terms. When P extended an offer on those terms, D

 declined and issued call for tenders – accepting another bid. P sued for breaching a duty of care to negotiate in such a way as to

 avoid causing pure economic loss

Issue: Should negligence extend to damages for pure economic loss arising from pre-contractual negotiations? No!

1. Was there "sufficient proximity" between the parties to establish a prima facie duty of care? Yes.
* The pre-existing contractual relationship between the parties is "an impressive indicator of proximity" but…
* The expression of interest does not automatically create proximity absent some evidence of genuine and mutual contracting intent
1. Are there any policy considerations that serves to negate or limit (a) the scope of the duty of care (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise? Yes.
* There are a number of ancillary policy considerations that necessitate precluding the extension of negligence and commercial negotiations:
* The primary goal of negotiation is to achieve the most advantageous bargain
* Absence of net harm on a social scale
* Extending the duty to pre-contractual negotiations could deter socially and economically useful conduct
* Imposing a duty in the circumstances could act as after-the-fact insurance against failures to act with diligence in hedging the risk of failed negotiations through alternative strategies
* Other forms of action already protect commercial parties (undue influence, economic dress, unconscionability)

***Design Services LTD***

Issue: Can subcontractors of a main contractor who submits a bid (Contract A) to a call for tenders sue for pure economic loss if the

 company calling for tenders violates Contract A?

Held: No. Policy considerations militate against a finding of proximity. (a) they could have protected themselves by forming a joint

 venture so that they would be privy to Contract A and (b) indeterminate liability arises – subcontractors have employees and

 suppliers and subcontractors of subcontractors etc. Where would we draw the line?

# Defenses

**Trespass to Land, Chattels, and the Person**: Involuntariness is a defense; Duress and Provocation or not (mitigate damages)

Involuntariness – ***Smith v Stone***

Rule: Involuntariness is a defense to trespass to land, trespass to chattel, or trespass to a person (battery)

Facts: Someone drove cattle on to P's land. Owner of the cattle not liable, must go after the person that did it

Mistake – ***Hodgkinson v Martin***

Rule: "A sincere, yet mistaken belief in the legality of one's actions is not a full defense, yet it may be taken into account as a mitigation of

 [damages]" *especially were not the slightest injury has occurred*

Facts: Ministry was owed money & repossessed the building. Trustee in bankruptcy came to claimant, but D threw him out w/o any more

 force than was necessary

* ***Ranson v Kittner*** – D shot P's dog, believing it was a wolf. P liable for mistake not withstanding good faith

Capacity – (Disabled – ***Fiala****;* Children *–* ***Joyal***)

Rule: Courts generally apply different rules based on the mental disorder provisions and 16 (1) of the Criminal Code

* Individual assessment of "appreciating the nature and quality" of his or her act

Duress – ***Gilbert v Stone***

Rule: Duress does not negate volition or intent, nor serve as a defense. It's but one consideration in assessing damages

Facts: Man forced to steal horse because he feared for his life. Court said too bad, it's voluntary.

* The question is whether X exercise control over his own actions. If so, intent is satisfied

Provocation *–* ***Miska v Sivec***

Rule: Must (1) [objectively] cause D to lose power of self-control and (2) be sufficiently proximate in space and time to the events in Q

* (NB the test was phrased subjectively in *Miska*, corrected later)

Use: Does not serve as a defense, merely a factor to consider in mitigation of damages

Facts: D claimed P cut him off and threatened him with a knife, so D retreated to home 200 yards away and shot’m from upstairs window

Consent (implied/express)

Issue: 2 overlapping issues: (1) Whether consent was real (express/implied) (2) whether it should nevertheless be disregarded because it

 was obtained under unjust circumstances

Rule: Courts generally treat it as a full defense that the defendant must plead and prove (except in sexual assault cases, where for

 policy reasons the onus may be on the plaintiff to prove an absence of consent) ***– Non-Marine Underwriters v Scalera***

Implied Consent – ***Wright v MacLean*** (Kids playing on construction site throwing "mud missiles")

* "the reasonable view is that the combatants consent to take the ordinary risks of the sport in which they engage… But only while the play is fair, and according to rules, and the blows are given in sport and not maliciously
* ***Agar v Williams*** had opposite result. Hockey player responded to blow w/ cross-check to the face. Implied-cons exceeded

Factors vitiating consent:

1. Fraud – Must relate to the nature and quality of the act and not a collateral matter (singing teacher said sex would improve voice)
2. Mistake – Only if the defendant was responsible for creating the plaintiff's misapprehension
3. Duress – ***Latter v Bradell*** – Patient (housemaid) examined by Doctor against her will not request of employers
* "[consent] obtained through a belief that she is bound to obey her master and mistress; or a consent obtained through a fear legal consequences to arise to herself, induced by her masters or mistresses words or conduct, is not sufficient. In neither case would consent be voluntarily given: *it would be consent in one sense, but consent to which the will was not a party*"
1. Public Policy – ***Lane v Holloway*** (elderly plaintiff no match for young defendant in fight) ***M(M) V K(K)*** – (exploiting position of trust)

Exceptions to general principles of consent – Consent to Medical Treatment/Counseling/Care

1. An unforeseen medical emergency
* ***Mallette v Schulman*** – Jehovah's Witness in car accident loses a lot of blood. Card in wallet says don't give blood in any circs
* Doctor says how do I know (1) that's her present intent (2) in applied to life-threatening injuries (3) that the plaintiff was fully informed when signing the card? Held: Court says her daughter was there and the message was clear, concise, and unqualified
1. Consent to a general procedure where one gives implicit consent to any necessarily incidental procedures
* ***Marshall v Curry*** – hernia surgery in which Doctor removed diseased testicle

Self-Defense – ***Wackett v Calder***

Rules: (1) D must prove he/sh honestly and reasonably believed that an assault was imminent and that (2) the amount of force used was

 reasonable in all circumstances (3) the right to invoke the defense evidence when the danger has passed (4) it's a complete defense

Facts: Drunk repeatedly tries to engage P and brother in a fight with futile blows. P dropped him once. D got up but was dropped again

* TJ rejected the defense. He could have walked away, and even if he was entitled to use force it was excessive
* BCCA "the appellant was entitled to reject force with force and not bound to take a passive defense". Also, "and attacked person defending himself when confronted with a provoking situation is not held down to measure with exactitude or nicety the weight or power of his blows"

Defense of 3rd Parties – ***Gambriell***

Rule: Were a person honestly and reasonably believes (even if mistaken) that another person is in imminent danger of injury, he is

 justified in using force, provided that such force is reasonable in the circumstances

Facts: Son washing vehicle. P back into him. Scuffle ensues. Mom witnesses son being choked & pitchforks P.

Defense of Real Property – ***MacDonald v Hees***

Rule: The mere presence of a stranger on one's property is not a threat per se. You have no right to use force to get them to leave unless

 a prior request is made. On the other hand, if the intruder uses force no prior request to leave is necessary, although the force used

 can be more than is necessary

Facts: Member of a political party forcibly ejected from motel room after knocking on door, but hearing "come in" from neighboring unit.

 Held: he did not forcibly enter, wasn't asked to leave, and the force was excessive (he split his head on the glass door)

* Deadly force is probably never justified if it's just property rights at stake
* ***Bird V Holbrook*** – you can't defend your property by setting traps

Defense of Recaption of Chattels

Rule: Same principles apply as defense of property. D must be in possession of the chattel, attempting to immediately regain possession, or in hot pursuit of the person who just took it. If the person innocently picks up D's chattel, D must issue a prior request for it back before using ports. However, if a person grabs the chattel out of D's hands he may use reasonable force without a prior request

* Once dispossessed, an individual cannot invoke the defense. They must resort to the courts

Public & Private Necessity

Rule: May not be liable in trespass for destroying property for a demonstrated public necessity (***Surroco***) or private necessity (***Vincent***).

 Subjective test (amazingly! "The conduct of the individual must be regulated by his own judgment as to the exigencies of the case""

* N.B. In private necessity, if you destroy the property of another to preserve your own, and your property is undamaged, the common law will require you to compensate the other property owner (which is fair enough) – like in *Vincent*
* N.B. in public necessity, it's easy to compensate the owner whose property was sacrificed for a public purpose under statute (expropriation act), but difficult under the common law because the judge would have to impose liability on the entire segment of the public that benefited who are (a) hard to define and (b) have done no wrong
* *Surroco* (blew up P's house to stop fire from spreading; *Vincent* (D mooreed ship to D's dock to prevent it being lost in storm)

Defense of Legal Authority (Immunity)

* ***ss. C5, 494-495 CC*** – These provisions are confusing because they are incompatible. S. 25 suggests that even if you arrest without authority (because you have no power to arrest on reasonable grounds or because the person you "find committing" wasn't really committing) you may be immune from liability as long as you act on reasonable grounds.
* ***Canada Line Case (Susan Heyes)*** – the city's liability was impliedly excluded by the statutory authority the defendants had to construct a line. It was crucial that, on the evidence, there was no practical alternative way to build the line that would've caused less harm
* ***Police Act, s. 21 (2)*** – Immunizes individual officers from liability (but preserves vicarious liability of the employer municipality/govt)