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**Basis for Imposing Liability**

Four Categories of Tort Law: Absolute Liability, Strict Liability, Negligence, Intentional Torts

* Absolute Liability does not exist in Torts any more
* Under strict liability an obligation was breached but not intentionally or carelessly
  + Defendant enjoys some defences
  + Confined to discrete circumstances
* Negligence is a failure to take reasonable care to prevent foreseeable harm to a person
  + Some situations burden of proof may be placed on defendant
* Intentional torts- if intention is proved, the defendant must disprove intent and negligence

**Damages**

1. **Pecuniary (monetary)** 
   * **Special damages** are those which can be exactly quantified at time of trial
2. **Non-pecuniary (non-monetary)  -$300,000 CAP**
   * **General damages** are those which are incapable of such quantification at time of trial
   * Monetary evaluation of non-penuniary losses is more a philosophical and policy exercise: not logical but awarded must be fair and reasonable
3. **Nominal Damages**
   * Small sum to redress a violation of a legal right that the law deems worthy of protection even without harm
   * Nominal damages speak to the purpose of the damages (The *Mediana* 1900- the ship hit a light ship that was replaced with a spare, orig. ship owner paid for repair, P sought extra damages, was awarded nom. damages)

1. **Compensatory Damages**
   1. "So far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained" – **provocation** **can reduce** compensatory damages

That sum of money which will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation” (Livingstone)

1. **Aggravated Damages**

* When D’s conduct is so outrageous that the harm done is worse than it otherwise would have been=compensate injury to dignity
* Especially situations where there is a gross breach of trust or authority (BP v BW)

1. **Punitive Damages**
2. To provide punishment and deterrence, but should be awarded only if it is demonstrably necessary to deter or denounce beyond compensatory damages (*B.(P). v B.(W)*1992*.*- sexual assault young daughter. $50k pun. Awarded + 175 k other)
3. Should not punish civilly if already punished by criminal court

Other Considerations:

**Volition**- A person cannot be held liable for an intentional tort that they didn’t do voluntarily (*Smith v Stone* 1647). In *Smith* the defendant Stone claims he was carried onto the land. Stone won, must be a voluntary action.

**Intent**- An actor’s desire to bring about the results or consequences of his or her act, rather than desire to do the physical act itself

**TO BE LIABLE CONDUCT MUST BE VOLUNTARY AND INTENTIONAL**

* 1. **Imputed Intent**- the defendant did not desire the consequences to occur, but they were certain or substantially certain to result from the act. i.e. planting a bomb for safekeeping in a public place
  2. **Transferred intent**- a defendant intends to an intentional tort against one party, but unintentionally commits an intentional tort against the plaintiff

**Motive-** generally not an element of the cause of action, can be used in assessing damages

**Duress-** Duress is not a defense for trespass (*Gilbert v. Stone* 1648)- Stone pleads that he had to trespass when people were chasing him, was ruled against.

**Provocation-** The conduct of the plaintiff to be capable of provocation must make the defendant to lose his power or self-control and have occurred at the time of or shortly after the assault (*Miska v Sivec* 1959)- crazy two guys shooting from house. No provocation.

**Mistake-** defendants intend the consequences of their acts, but those consequences have different factual or legal significance. Not recognized *per se* as a defence to intentional tort liability, but used in assessing damages (*Hodgkinson v Martin*, *Ranson v Kitner*- Accidentally shot dog thinking it was a wolf, still found liable)

**Accident-** accident means without voluntariness or intent injured the plaintiff, thus cannot be liable

**BATTERY**

* **Actionable *per se* (no need to prove damages)**
  + **P must only prove that D directly interfered with his person, D must prove conduct was neither negligent or intentional**
* D doesn’t have to be aware of contact
* If physical contact was intended, then magnitude of consequence is irrelevant
* D must have intended to make harmful or offensive contact with *person*. D should often know that intent is harmful or offensive. Contact may be with something P is carrying or wearing and by something D is carrying or thrown.
* D is liable for unintended consequences (“thin-skulled” plaintiff”) unless totally unforeseeable.
* Surgery or blood transfusion are battery if performed without consent
* In sport, violence far outside the rules of the sport can be seen as battery
* There is no limitation period for actions based on misconduct of a sexual nature

**Defences**: Consent, self defense, defense of 3rd party, defense of property, necessity, and legal authority

*Bettel v. Yim* (1978) - An individual is liable for all harm that arises from initial conduct, even when consequences exceeded expectations. D (Yim) shook P with unintended consequence of injuring nose. Initial act of shaking constituted battery.

**ASSAULT**

Intentional creation in the mind of another of a reasonable apprehension of immediate physical contact *(actionable per se)*

* D must have intended to create that apprehension or at least do an act that in reasonable people would create that apprehension
* Requires P to have an apprehension of immediate physical contact and that apprehension must be reasonable in those circumstances
* Conditional threats can be assaults (Police v Greaves)
* Both threatening words, and actions that make them plausible are necessary for assault (HolCombe)

**Subjective/ Objective Apprehension Test:** Did P in fact apprehend the immediacy of the physical contact, and was that apprehension reasonable?

**Defenses:** Consent, self-defense, defense of 3rd party, defense of property, necessity, and legal authority

*Holcombe v Whitaker* 1975 – D twice threatened to kill P if sued by P, had no right to impose such a condition. Plaintiff was rightfully terrified in her mind. Although threat was not immediate, it was carried out with actions of harm, and the result of the threat was potentially immediate.

*Police v Greaves* 1964- D threatened to stab police if they’d stepped closer to the house. Threat was immediate and conditional. Police had a right to be there.

**FALSE IMPRISONMENT**

Definition: Situations in which an individual's movement is intentionally (totally) restrained against their will *(actionable per se)*

* Was there intent to confine? Was there in fact a detention? Was that detention authorized by law?
* Can be physical or psychological (D must have intended to give the impression that P was not free to go)
* May be imposed by physical means, an implicit or explicit threat of force, or an implicit or explicit assertion of legal authority (Campbell)
* There is no false imprisonment for partial obstructions or disturbances (there needs to be a total restraint of movement) (Bird v Jones)
  + If there is a reasonable route of escape, there is no false imprisonment
* False imprisonment can occur without P being aware of the imprisonment

False Arrest (One category of False Imprisonment): False imprisonment imposed by an assertion of legal authority

* False arrest actions can be brought against peace officers and private citizens who implicitly or explicitly assert legal authority in detaining others.

Defence: Legal authority, Consent (Herd v Weardale), Having witnessed the offence being committed

Damages: Punitive damages increasingly being awarded

*Bird v Jones* 1845- P was trying to pass through public highway when D stopped him. P could have left in another direction, so no imprisonment. False imprisonment requires total confinement.

*Campbell v S.S. Kresge Co.* 1976- Police officer working as security guard was tipped of P shoplifting. Took her inside and found she had nothing. She was given the impression that she was not free to leave, and there was intention of D to confine her. P suffered panic and trauma as a result.

*Herd v Weardale Steel, Coal and Coke Co. Ltd.* 1915- Coal miner stuck in mine refused dangerous work and had to wait 20 minutes before elevator could take him up. He had agreed to work in mine implicitly, and so could be held without any reason.

**MALICIOUS PROSECUTION**

**Act without reasonable grounds and with malice in prosecution against an individual (Not actionable *Per Se*)**

* **Malice requires proof that the prosecutor was trying to harm in some way or some reason outside of justice**
* **Heavy burden on plaintiff: must establish malice, no reasonable grounds, and that they suffered loss/harm**

**Four Necessary Elements** (*Nelles v Ontario* 1989- P charged with murder of 4 babies in hospital, cause not proved, P sued D w/M.P.)

1) The proceedings must have been initiated by the defendants (Not liable for merely providing info to the police/testifying in court)

2) The proceedings must have terminated in favour of the plaintiff

3) The absence of reasonable and probable cause

* Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction , founded on reasonable grounds, of the existence of a state of circumstances , which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed (Different test for Public v. Private Prosecutor See Mizaga)

Public prosecutor: Whether there were reasonable grounds to initiate and continue prosecution

Private prosecutor: standard is whether they reasonable believed the accused is guilty.

4) Malice or a primary purpose other than that of carrying the law into effect

* + The equivalent of "improper purpose”.

**ABUSE OF PROCESS**

Definition: Focuses on the misuse of civil proceedings for collateral or illicit purpose other than the resolution of the claim *(not actionable per se)*

Four elements:

1. The defendant brought on a civil action
2. The defendant did so for some extrinsic purpose
3. The defendant undertook, threatened to undertake, some overt act, other than the litigation itself, to further the improper purpose
4. The plaintiff consequently suffered a loss

**INTENTIONAL INFLICTION OF NERVOUS SHOCK**

Intent to cause psychiatric harm (=illness) or to do something that is virtually certain to cause such harm (imputed intent) (*not actionable per se*)

Required Elements:

1. Intentional and “outrageous” conduct (actual or imputed intent)
2. Designed to inflict emotional distress or that a reasonable person would have known would cause emotional distress;
   1. D need not intend nervous shock. Sufficient that D acted in reckless disregard for this possibility, or was foreseeable that profound distress would ensue.
   2. More harm was done than was anticipated is irrelevant (Wilkinson)
3. That causes a visible and provable illness—there must be some physical or psychological manifestation of injury (Radovskis), HOWEVER if there is no physical harm, intent must be shown

\*Canadian courts have expanded the definition to “visible and provable” illness (some indication that something less than illness may be accepted-Mustapha)

* Absence of expert medical evidence is not fatal to the claim (Rahemtulla v. Vanfed Credit Union)
* P may be entitled to recover for emotional harm falling short of a psychiatric condition (Tran v. Financial Debt Recovery)

*Wilkinson v Downton*- 1897- D told P that husband was injured and P became physically ill. Found to be malicious, even without intent or motive to be malicious.

*Radovskis v Tomm*-1957- 5 yr old child was raped by D, mum claimed medical expenses, lost wages, and mother’s nervous shock. Was found that there were no measurable damages (i.e. physical illness) and dismissed.

*Samms v Eccles*-1961- D kept calling and making indecent proposals (sexual requests). Court deemed that there was intention in the action that a reasonable person could foresee as harmful. D was held liable.

**PRIVACY**

The public law regulation of access to personal information is contained in the *Freedom of Information and Privacy Act* and under the statute of the *Privacy Act*.

Privacy Act s.1: It is a tort actionable without proof of damage when a person willfully and without claim of right violates the privacy of another

* “willfully” applies narrowly to the intention where the person knew or should have known the act would violate the privacy of another (*Hollinsworth*)
* “Without right of claim” means an honest belief in a state of facts which, if existed would be legal justification for an excuse. (*Hollinsworth*)

Privacy continues next page

Common Law:

*Jones v Tsige* (2012): Tsige looking at Jones’ banking action. Four privacy torts set out:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs
2. Public disclosure of embarrassing private facts about the plaintiff
3. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness

All three should be intentional or reckless, without lawful justification, and highly offensive causing distress, humiliation, or enguish in the eyes of a reasonable person

*Motherwell v Motherwell* (1976): Mentally unstable D harasses P and her family by phone and mail. New tort for invasion of privacy and nuisance by telephone.

*Hollinsworth* v *BCTV* (1999): P, Hollinsworth, signed release for Dr to film for educational purposes only. Dr. gave it to BCTV. BCTV not held liable because they had no duty to check that they were allowed to use it and Dr. said that Hollinsworth had consented.

**Defenses:** No reasonable expectation of privacy, right of claim, legal justification

**Damages:** Sharpe suggests that the cap should be around $20,000, and damages are for the BREACH, not necessarily the effects of the breach of privacy

**BREACH OF CONFIDENCE**

Definition: Tort action used to protect the privacy of both sensitive business and personal information.

To recover for breach of confidence, the plaintiff has to establish:

* 1. The information was confidential nature
  2. It was disclosed in circumstances creating an obligation of confidentiality
  3. Its unauthorized use was detrimental to the confider

**INTENTIONAL INTERFERENCE WITH CHATTELS**

Chattel torts were intended to give claims to people who are may not be owners, but rightfully have possession of property. In other words, they cover someone’s *interest* in the property.

**TRESPASS TO CHATTELS**

Trespass to chattels is where the defendant directly and intentionally applies force to the chattel in the *possession* (not necessarily ownership) of the chattel. Only intent required is the intent to do the act.

* Any direct interference with chattel is actionable (damage usually occurs in practice, but not req.)
* Defendant must try and prove absence of intent
* Knowledge that there was interference is not required. Mistake is no defence.
* Remedy is an award of damages (reduction of market value, or the cost of repairs if less)
* If trespass results in total destruction or disappearance of the chattel it is **conversion**

*Fouldes v Willoughby* (1841)- P boarded his two horse on a ferry, paid fee. D moved horses off ferry with thought that P would follow. P stayed on Ferry, sued for conversion to horses. Case dismissed since P sued for conversion and hotel had no intent to make horses their own or assume rights over them. May have been trespass.

**CONVERSION**

**Intent** to keep chattel permanently i.e. exercise dominion that denies right to immediate possession.

* Chattel may or may not still be in possession
* Doesn’t matter if chattel is ‘taken’ in good faith
* **Orders for the return of chattel are not made in a conversion action**
  + **D is treated as if he had bought the chattel and can keep it**
* Mistake is no defence to conversion
  + **Therefore, an innocent buyer and an innocent seller can both be liable for conversion**
* Plaintiff must attempt to mitigate the loss by replacing chattel as soon as is practical
* If the goods are returned after being mistakenly taken it will result in nominal damages (*Mackenzie*)

Damages: Damages are assessed at time of conversion, or when the plaintiff became aware of the conversion+ consequential damages (or increase in value after conversion) (*Aitken v Gardiner*).

*Mackenzie v Scotia Lumber Co* (1913)- P’s raft went adrift. Plaintiff’s loss was nominal because they gave the property back intact. Shows that consequential gain (i.e. recovering the chattel) will reduce damages

*Aitken v Gardener* (1956)- Purchased shares without knowing they were stolen from P. Sold some at a low price, were ordered to return what was left. Additional damages in lost profits awarded because P didn’t have opportunity to sell shares at higher current price.

*373409 Alberta Ltd. (Receiver of) v Bank of Montreal* (2002)-conversion of cheques. Cheque must be from authorized owner otherwise it must be endorsed.

**Defences:** Consent to give away possession, failure of P to mitigate loss. Contributory negligence is no defence or reduction of damages since it is a strict liability tort.

**DETINUE**

Intent of refusal to return chattel to which plaintiff has the right to immediate possession. (Actionable *Per Se*)

**Detinue Sur Bailment:** The defendant acquires the chattel through lending and is wrongfully withholding it

* A Bailee who is unable to return the chattel because he or she negligently (or intentionally) lost the chattel is liable because they are estopped against the Bailor from raising a defence to detinue that they no longer have the chattel. May also be liable under **conversion** if it was intentional.

**Detinue Sur Trover:** The defendant has wrongful possession of goods

* Only works if defendant actually has the property
* Strict Action (as well as trespass and conversion), defendant possibly made to pay full MKP
* Chain of possession has to be established in an unbroken chain
* Used instead of **conversion** when specific item needs to be returned (i.e. unique item)

For both:

* Plaintiff must first ask for item back
* Main remedies are an order from the court (requiring return) or an award in damages for its value
  + **There is no right to the chattel**, the court must make an order
* The action will fail if the defendant returns the chattel before judgement is given

Remedies:

1. Value of the chattel at time of **trial** (plus damages for detention)
2. Return of the chattel (plus damages for detention)
3. No return, just value at the time of the trial

**Defences**: Good faith (i.e. not returning in good faith that item doesn’t belong to P)

*Gen. & Finance Facilities Ltd. v Cooks Cars (Romford) Ltd* (1963) – P sued D for the return of their mobile crane and an alternate claim for damages in conversion. It was found that P could elect which cause of action to pursue, if D is still in possession of the chattel, depending on if he wants the chattel returned or its value in damages.

**TRESPASS TO LAND**

Direct and intentional physical intent to wrongfully enter land that is in possession by another. Also includes trespass to anything else on that land. (Actonable *Per Se)*

* Only intention necessary is the intention to do the act (D does not have to be aware)
* Can also be propelling an object (inc. person) onto land
* Includes failing to leave after permission to enter has been terminated
* Wrongfully failing to remove an object off P’s property
* Once established that D is a trespasser, he is liable for ALL consequences of the trespass

Defences: Accident (no intent), Legal Authority (Duress and Mistake are NOT defences)

*Turner v Thorne* (1960)- Co- D’s were the owner and driver for a delivery service. They left packages in unlocked garage of P. P tripped over packages, sued for trespass and won. Continued presence was a trespass for which mistake was no defence.

*Entick v Carrington* (1765)- D broke into P’s house, claimed to have warrant. Up to D to prove. Didn’t. Lost.

**DEFENCES**

**CONSENT**

* By participating in an activity where there is no malice, ill will, or negligence, a person accepts consent to consequences
* **D has the burden to plead and prove consent by P**
* Can either be **explicitly** through words or writing, or **implicitly** through participation or behaviour
* **Failure to resist or protest is an indication of consent** “if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection”
* **Unreasonable or foreseeable consequences may vitiate consent**
* **Person consenting must be competent to consent**
  + May be due to age, illness (physical or mental) intoxication etc.

*Wright v Mclean* (1956) BCSC- mud fight, P agrees to play and is injured. D did not mean to harm, was not particularly negligent, and was playing within the rules

*Agar v Canning* (1965 Man QB)- Good ol’ hockey Game, D checked P, P hooked D with stick, D smashed P’s eye causing blindness. Consent is no defense here because actions exceeded rules and normal play of the game.

**Factors Vitiating Consent**

**Fraud-** In order to vitiate consent P must establish:

1. D was aware of, or responsible for, plaintiff’s misapprehension
2. Fraud must relate to the nature and quality of the act, not collateral matter (do it because of some other situation)

* P must not understand nature of fraud, if they do understand, they have tort in deceit (relying on false repr.+ suff.)

**Mistake-** only vitiate consent if plaintiff’s mistaken belief if defendant was responsible for belief

* Obvious, but D’s mistaken belief that P consented is no defense (there was no consent)

**Duress-** Duress requires physical or life threat, otherwise reluctant consent is still consent.

*Latter v Braddel* (1880 CP)- supposedly pregnant maid was subject to examination by D, doctor. Doctor used verbal coercion but not physical force, was not held to cause duress.

**Public Policy**- if consent is procured in a particularly bad way, we may disregard it on policy grounds

* Usually involves 1) proof of inequality between parties
* Proof of exploitation (measured by “community standards”

**Competency-** person consenting must have been legally competent to consent

**Consent to Criminal or Immoral Acts** *Hegarty v Shine* (1978)

* One cannot recover in tort law for the consequences of their own illegal or immoral conduct
* Purpose is to protect integrity of legal system (stops someone gaining on an illegal act)
  + Wouldn’t apply to someone seeking compensation for physical injuries

**Consent to Treatment, Counselling, and Care**- s.17 of *Infants Act*, codified in *Health Care (Consent) and Care Facilities (Admission) Act*

To be valid, consent must:

1. Have been given voluntarily
2. Relate to specific procedure or treatment that is undertaken
3. Be based on a full and frank disclosure of the nature of the intervention and its risks

* If person is incompetent to consent then it passes to next of kin, must be in good faith and in patient’s best interest

*Marshall v Curry* (NSSC) 1933- Where general consent has been provided, the patient will be treated as having implicitly consented to any subsequent sessions, tests etc. that are incidental to agreed treatment

**DEFENCES TO PROTECTION OF PERSON AND PROPERTY**

**SELF DEFENCE**

**Complete defence- once proved all liability is absolved**

* Burden of proof falls on the party invoking the defence
* Requires:
  + - * 1. He or she honestly and reasonably believed that an assault was imminent
        2. The amount of force that he/she used to avert the risk was reasonable in all circumstances
* Must have been **proportional** to threat
* Can be just enough to stop threat *Wackett v Calder*

*Wackett v Calder* – Pub fight, Wackett wanted to wack D, D was just doing enough to try and stop him, P got hit, fell down, got back up and kept coming. Finally D hit him so that he fell down and broke his cheek

* Can’t always require a carefully calibrated response, enough self-defence to end situation is just

**DEFENCE OF THIRD PARTIES**

Defence of third parties is a valid defence under similar principles to self-defence but allows for a third party to protect someone in the cause of action.

* **Only needs to be an apparent threat**
* **Reasonable force must still be used**

*Gambriell v Caparelli* (1974) – Italian fight on car. D and P were in a fight where D was being held and ‘choked’ on the car by P. D’s mom came in with a pitchfork and stopped P. Court ruled that reasonable force was used and D won the case.

**DEFENCE OF REAL PROPERTY**

Occurs when someone is wrongfully on another’s land i.e. trespass.

* If person gained entry to land **lawfully**, then must be asked to leave (and given reasonable opportunity to leave) before force can be used
* If person gained entry to land wrongly but **peacefully**, the same procedure
* If person gained entry to land wrongly and **forcefully**, then reasonable amount of force in return

**Note:** One cannot eject a person from land and place the trespasser in a situation with a foreseeable risk of injury

*Macdonald v Hees* (1947) P knew that D would be at the hotel and went to introduce Boyd. Door was unlocked (still found forced entry) and P entered. D pushed him out so that he was injured. Force used was excessive, and ruling went in favor of P.

*Bird v Holbrook* (1828): D set spring gun in garden without any warning signs as he intended to catch trespasser. P entered to retrieve property that had fallen in D’s yard. Was shot with spring gun and injured. Use of force was excessive, and one cannot harm another without being asked to leave first. No man can do indirectly what he is forbidden to do directly.

**RECAPTION OF CHATTELS**

* Can recapture chattel on someone else’s land without force or breach of peace
  + Force may be used if chattel was taken on land unlawfully
* If chattel is taken innocently, request **must** be made first

**PUBLIC AND PRIVATE NECESSITY**

**Public (Complete Defense)**

* Allows an individual to intentionally interfere with the property rights of another in order to save lives or to protect the public interest from external threats of nature.
* **Don’t do any more damage than strictly necessary**
* **Must be imminent peril**

*Surocco v Geary* (1853)- D destroyed P’s house, with good faith and apparent necessity to prevent the spread of a fire through the community

**Private** (not complete defense)

* Must also be imminent
* Any damage done to private property due to necessity must be compensated

*Vincent v Lake Erie Tpt. Co.* – P moored ship to dock and took positive action that may damage the dock (used different ropes), dock was damaged, P ordered to pay damages.

**APPORTIONMENT OF FAULT IN INTENTIONAL TORTS**

Governed by *Negligence Act*

* Judge decides degree of fault
  + s.1 “liability is in proportion to the degree to which each person was at fault”
  + Question of fact
* If multiple defendants, no fault from P, then fault is apportioned among defendants to relevant degree
  + Joint liability, P can go after any D for 100 percent of fault
* If multiple defendants, P has fault, the Ds faults are no longer joint, but several
  + P can only go after each D for their respective fault

**Apportionment of liability for damages**

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

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

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

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

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

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

**DEFENCES OF LEGAL AUTHORITY**

**AUTHORITY AND PRIVELEGE TO ARREST WITHOUT A WARRANT**

* + - * 1. Was D acting pursuant to a legal right or duty? = authorization
        2. If so, does the authorizing legislation expressly or by implication exempt D from tort? =privileged
        3. Did D lose the protection that would otherwise extend to plaintiff’s actions by failing to do them in the correct manner?

*Susan Heyes Inc. v South Coast BC Transportation Authority* (2011) BCCA- Lady complained that the Canada Line was causing a nuisance. Sued BC Trans. D was acting in legal right, and had authorization to do so.

**Without a Warrant:**

**CC**

**s.494** “anyone”- cannot arrest for past crimes, must be within reasonable time period

**s.495** “peace officer”

* **Indictable (incl. hybrid) offence** when “found committing”, by **anyone** s. 495(1)(b)
  + Or **by peace officer** who on reasonable grounds believes **has committed or is about to** s.495(1)(a)
* **Summary conviction** offences can only be by **peace officer** who “finds committing” s.495(1)(b)
* **Reasonable Grounds** means “Individual must subjectively believe that the person committed the offence and that belief must be objectively reasonable”.
* **Justifying Provision in s.25 CC** (Courts generally say that s.25 is independent and can protect you even you acted without legal authority as long as you acted on reasonable grounds)
* **Peace Officers:** Police Officers, Sheriffs, Mayors, Commercial Pilots, Fishery Officers, and others

**In Relation to Property:**

s.494(2) The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and

*Koechlin v Waugh and Hamilton* (1957) Ont Ca*-* Hoodlums stopped by police and refused to give ID.

Judge found that police did not have authority under s.494 to *forcefully* ask for ID given the reasons for suspicion (clothing)

* You are not required in law to submit to restraint of freedom unless you know the reason of restraint
* Plaintiff should have been entitled to communication at first reasonable time

Use of reasonable force under legal authority:

* If a suspect resists, reasonable force may be used
* As a general rule suspects must be given the chance to submit peacefully
* Mistake of fact as to the innocence of a suspect does not make individual liable for using force
* s.25 states applicability of force
* Police officers are allowed to use force likely to cause death if they cannot be stopped in a less violent manner or have reasonable grounds to believe they are stopping themselves or a third party from dying

# 

# NEGLIGENCE

# GENERAL PRINCIPLES

* **Negligence decided by accessing duty**

The Elements of a Negligence Action:

* 1. **Duty of Care** (question of **law)**
     + Was the defendant under any legal obligation to exercise care?
  2. **Failure to observe standard of care** (= negligent act or omission) (**mixed law and fact)** 
     + The defendant is expected to meet the standard of care that would be exercised by **a reasonable person** in all the circumstances of a case
     + Except some professionals such as doctors who have special training and are required to meet standards of their colleagues
  3. **Causation (mixed law and fact)**
     + Must be a loss caused to the plaintiff (area also known as cause-in-fact)
     + Compare P’s position to now, what would have been if tort had not been committed

* 1. **Remoteness of Damages- i.e. damage not of a kind that’s too remote from D’s wrong** (**q of law)**
     + Court must determine whether the relationship in the breach and the injury is too tenuous to warrant recovery
     + In intentional torts defendants are normally liable for all consequences
     + In negligence, liability is generally limited to those losses that were foreseeable consequences of the defendant's negligent act

* 1. **Actual Damage- harm to which the duty extends** (question of **fact)** 
     + Plaintiff must establish that he or she suffered legally-recognized injuries and losses, as well as their nature and extent

* 1. **Defences**
     + Inevitable accident (not really defence, just can’t prove negligence)
     + Lapse of limitation period
     + Contributory negligence (s.1 of negligent act)
     + Volenti nom fit injuria = voluntary assumption of the legal risk- i.e. consent to trespass
     + Ex turpi cause = tort claim barred by the fact tit arose out of plaintiff's own illegal conduct

**Law and Fact in Negligence**

1. Duty- question of law
2. Failure to observe standard of care (i.e. negligent act of omission on the facts)- question of **mixed** fact and law, decided by jury on judge's instructions as to what the standard is
3. Causation- question of mixed fact and law (+ different legal tests may apply by which the facts must be assessed)
4. Remoteness- question of law
5. Damage- question of fact

## **Burden of Proof**

* Burden is on plaintiff to prove each element of the tort of negligence
  + Where two Ds are concurrently negligent (*Cook v Lewis*), the onus is on them to disprove

DUTY OF CARE(Question of Law)

Steps to establishing duty of care (Anns/Cooper Test):

Note: Case of Cooper v Hobart restricted traditional Anns test by putting policy considerations with proximity, making it less likely that a public body will be held to have a duty of care to an industry-wide function

1. Is the alleged duty of care within/analogous an established category?
   1. Yes, then duty of care exists based on law. Unlikely new policy considerations apply.
2. Was there a reasonably foreseeable risk of harm? (to a specific P or class of people)
3. Was there sufficient proximity between the parties?
   1. Policies mentioned here are policies between parties
4. Is it “fair, just, and reasonable” for the court to impose a duty of care in light of applicable policy considerations?
   1. Policies mentioned here are public duty policies

Donoghue v Stevenson- Famous snail case- established duty of care towards consumers

* Woman claimed to have found a snail in her ginger beer, bottle was opaque, claimed stomach issues
* Court ruled in favour of Donoghue

Dunsmore v Deshield- Hardex lenses- P bought lenses expecting them not to break. Hardex was found to have a duty of care to P and was negligent in making sure that its lenses met Hardex standard. Ruling in favour of P.

Cooper v Hobart­- Eron investors- P, along with 6000 invested money with Eron- P sued claiming that D had a duty to suspend license earlier so no money was lost. Court found **insufficient proximity because of public interest grounds** (can’t protect nature of investments, or shut down companies as soon as they have trouble)

## Reasonable Foreseeability

Moule v NB Electric Power Comm.– Kids climbing tree #1- Judge found D to have duty of care but ruled in favour of D because they had taken **reasonable precautions**, and the accident was therefore not foreseeable (kid had an accident causing situation)

Amos v NB Electric Power Comm*.* – Kids climbing tree next to highway- Here D was found negligent because harm was reasonably foreseeable and D did not take any precautions to avoid it.

## Foreseeable Plaintiff

Duty concept is plaintiff specific

Palsgraf v Long Island Ry. Co– train station case – no duty of care found between station guard and person waiting for train. Person waiting was injured due to package that passenger dropped while boarding, was pushed on by guard. Guard did not have duty of care because such an injury was not foreseeable.

# 

# DUTY TO RESCUE

Courts generally hold people liable due to misfeasance, but not nonfeasance (unless there is a special relationship). *Good Samaritan Act* dictates some relationships. *Estate Administration Act* allows estate to make claims in place of dead people (only insofar as the damages to the deceased). *Family Compensation Act* allows the same but with damages to other family members included.

Rescuer only liable if D:

1) Make things worse for P

2) Directly created situation of peril

3) Initiated rescue attempt and was negligent

4) Had a special relationship with P (shipmaster, lifeguard, doctor etc.)

Osterlind v Hill – canoe drowning case- P rented out a canoe, was in fine condition to do so. Flipped canoe and was stuck under it. D could hear yelling, did nothing. P drowned. Ruling in favour of D because he had no affirmative duty to rescue P.

### Matthews v Maclaren; Horsley v Maclaren

* There is no general duty to come to the rescue of a person who finds himself in peril from a source completely unrelated to a the defendant
  + Unless the defendant takes it upon himself as in this situation
* Court found that there was a duty imposed on Maclaren to perform a rescue
  + The rescue was conducted improperly, and Maclaren is therefore liable
* HOWEVER the negligence of rescue was not the cause of the death, the fall overboard and cold water was
* Therefore, court rules there was no **direct** liability

# DUTY TO CONTROL CONDUCT OF OTHERS

**Liability for the intoxicated** (Crocker v. Sundance Northwest Resorts LTD*.)*

Drunk Tubing – D found liable

* Crocker became paraplegic from tubing incident while drunk
* Held that Sundance **was in close enough proximity** to Crocker to have a duty
* Held that Sundance **failed to meet standard of care**
* Held that **there was causation**
* Held that the waiver did not show intent
  + Did not voluntarily waive his rights

**Other Duty to Control Situations**

* Commercial host liable. Private not liable for guests since hard to monitor (Childs v Desormeaux)
* Parents are not liable for their children's acts
  + Only liable if they had a separate duty to the plaintiff

**Duty to Prevent Crime and Protect Others**

### Jane Doe v. Metropolitan Toronto

Rape in apartments

* Public policy case
* Court found that police had a duty to warn women
* The harm was foreseeable and a proximity existed
* Police have a duty to warn citizens of foreseeable harm
* Private law duty of care established
* Jane Doe awarded 222,000

# DUTY TO PERFORM GRATUITOUS UNDERTAKINGS

* Law does not generally require an individual to honour a gratuitous promise, as it would be a nonfeasance
  + Unless defendant places plaintiff in worse situation
* Promissory estoppel may enforce a nonfeasance

Smith v Rae 1919­- failure to act not a tort, may be a breach in contract

Baby delivery mishap

* Entered a contract with doctor, doctor didn't show up
* Court deemed only thing doctor did wrong was not do something he said he was going to do
* Court rules that was fine

Zilenko v Gimbel Bros Inc. *(1936)-* starting to act and then doing so negligently

* Plaintiff's intestate fallen ill on boat and held by defendant
* Defendant originally had no duty, but then imposed one on himself
* Intestate could not get care because he was being held
* Court rule in favour of plaintiff

Soulsby v Toronto *(1907)*

Gate keeper of railway crossing

* Judge found that there was no duty to keep gates closed
* City had not grown to rely upon gatekeeper operating crossing
* Therefore Toronto was not liable

# DUTY OWED TO RESCUERS

Horsley v Maclaren- Man overboard case

* Court ruled that Maclaren was not liable for death of Horsley since his rescue efforts did not prompt Horsley to jump in, **create new situation of danger**
* McLaren should only be liable if his actions increased the danger to Matthews
* **Threefold test to find duty of care to rescuers:**
  1. **Original breach of duty** (in this case found McLaren was not responsible)
  2. **Whether the breach prompted the rescuer**
  3. **Whether defendant's conduct made him guilty of contributory negligence**
* Generally, if you leave a place of safety to perform a rescue, you cannot recover for injuries occurred during rescue

# DUTIES TO THE UNBORN

* Common law does not ascribe the status of "person" until a child is born alive
* Defendant (other than pregnant mother) may be liable for harm done to baby while still inside
* Claim of wrongful birth/life arise when defendant fails to inform mother of condition of birth and possibility of abortion
* A mother does not have a duty of care to her foetus
* If A child is born without disabilities then no damages awarded

# PSYCHIATRIC HARM

Damages need to be proven

Secondary victim Case (Alcock)- stampeding soccer crowd people trampled:

Three conditions:

1. Bystander had an emotional stake in what happened
2. Bystander was close in time and space
   * Everyone failed the three tests in proximity
   1. Relationship to effected (could only be spouses, children)
   2. Proximity to accident (must have been there)
   3. Means by which shock was caused (with own eyes or on tv)
3. Bystander actually saw or heard the shock-causing incident or aftermath

Primary Victim Case: Mustapha v Culligan of Canada Ltd*.* – fly in water bottle

* Question over the extent of duty of care to an obsessed or crazed person (objective v. subjective)
* Established no need to differentiate between primary and secondary victims
* It's a threshold test of breach of duty
  + Is this type of damage too remote?
  + Was there a duty of care for *psychiatric harm*? No. There may have been a duty of care for physical harm. threshold of foreseeability was not met- **person of reasonable fortitude would not suffer**.

# HEALTH PROF. DUTY TO INFORM

* Doctors must disclose all "material risks"
* Material risk includes a low percentage of a serious consequence
  + Also depends on context ie profession
* Would the reasonable person continue after knowing the risks? (based on modified objective test)

### Haughian v Paine

* Doctors must explain consequences of leaving ailment untreated, alternative means of treatment and their risks
* The risk of paralysis was small, but in light of no-risk alternative, recovery becomes "material"
* Court ruled in favor of plaintiff (patient)

# MANUFACTURER AND SUPPLIER DUTY TO WARN

Hollis v Dow Corning Corp *(1995)*- Breast implant case- P sued because implants burst

* General Rule: The Duty to Warn is owed directly by the manufacturer to the ultimate consumer to provide clear, complete, and current information concerning the dangers inherent in the ordinary use of their product.
* Exception: Informational duty to consumer may be satisfied in exceptional circumstances by providing warning to a “learned intermediary”

Causation: SUBJECTIVE TEST: WOULD SHE HAVE UNDERGONE THE SURGERY KNOWING THE RISK? **Subjective** test, because not trying to protect doctor but a manufacturer who is trying to sell a product.

# CLASS ACTIONS

* + Section 4 of the *Class Proceedings Act* (BC)
  + Must be common issues to all members of the class
  + Must be an identifiable class
  + Most class proceedings don’t go through a judgement, settle
  + Defendant pays x dollars into a fund, lawyers get percentage of fund
  + All members of the class are bound by that claim and cannot sue individually
  + Class proceeding must be a preferable means of dealing with those common issues, compared with individual actions
  + Advantage to plaintiff – enables a group of claimants to pool resources for their collective benefit in terms of the litigation
  + Advantage to defendant- It’s a means of getting a legal decision or settlement that is binding on all potential claimants, except those who opt out (if they are permitted to do so)
    - In BC, non-residents of the province can be included as a plaintiff if they opt-in

## Lawyers’ Liability

* + Lawyers are subject to a duty of professional competence like other professionals
    - Can be sued in contract or in tort
    - Successful claim must show what the plaintiff’s position would have been if the lawyer had not been negligent
  + Suing a criminal defence lawyer for negligence is considered against public policy if it is a collateral attack on a conviction duly arrived at
    - Should appeal the conviction, not sue the lawyer

# RECOVERY OF PURE ECONOMIC LOSS IN NEGLIGENCE

* + There is generally no duty to cost someone money
  + There are five established categories of pure economic loss:

1. Negligent misrepresentation
2. Independent liability based on statute
3. Negligent performance of services
4. Negligent supply of shoddy goods or structures
5. Relational economic loss
   * This list is not exhaustive, new ones can be added with Anns/Kanloops

Martel Building– Attempted to introduce a duty of care in conducting contract renewal negotiations. Question over whether negotiations were conducted in a manner that would allow for recovery of economic loss. Court ruled no, failed on policy considerations. Would deter socially and economically useful conduct. If the government had not entered negotiations no *prima facie* duty would have existed (not liable for not negotiating).

## 

## Negligent Misrepresentation Causing Pure Economic Loss

* + **Do *Anns* test for each case**

1. Must be a duty of care established and policy considered (*Anns/Cooper* test)
   1. Considers indeterminate liability
2. Must be untrue, inaccurate, or misleading (Fraud needs intent, negligence doesn’t)
3. D must have acted negligently in making statement (ought to have known)
4. Reliance on the statement must have been detrimental

Test:

1. The defendant ought reasonably to foresee that the plaintiff will rely on the statement
2. Reliance by the plaintiff would be reasonable
   * + **Do not have to prove that you would have acted differently, just that statement was material to the decision**
     + **P must attempt to mitigate damages**
   * Started with *Hedley Byrne*, used to be based on “special relationship” between parties
   * Before then, a misrepresentation could give rise for damages only if it was fraudulent
     + Fraud = knowing statement is false, or was reckless as to whether it might be false
   * Contract law would give relief for a non-fraudulent (innocent) misrepresentation only by rescinding the contract
     + Could be done only if the parties can be restored more or less fully to original position
   * *Hedley Byrne* affirmed that a person giving information or advice could be under a duty of care in respect of purely financial risk loss by relying on the defendant said
   * **Line between careless but casual misinformation, and careless serious misinformation is difficult to define (***Hercules,* next page)

Hercules – Hercules hired Ernst and Young to prepare financial statements, relied on statements and lost money on other investments. Ruled that no duty of care existed due to policy concerns (indeterminate liability).

NOTE: Blom thinks that whether looking at “special relationship” pre-Cooper, or as stage 1 or 2 of the Anns test (proximity or policy) it doesn’t really matter, all factors are still there.

## Negligent Misrepresentation and Contract

* + Tort of negligent misstatement was said to have been committed on (more or less) the same basis as the breach of contract, very frequently arises because D has made a disadvantageous contract
    - Both turned on an express contractual provision
  + **Tort:** Provision operated as a pre-contractual, negligent misstatement
  + **Contract:** Breached the provision
  + **Issue of principle:** Can both be claimed? Yes, assuming contract did not state otherwise (*Rafuse*)

Damages:

* + If contract amplifies or cuts down the tort duty or the liability for breach of it, contract is applied
    - Shows parties agreed to change the duty
  + If they co-exist, the whichever suits the plaintiff (seldom the case)

BG Checo *­*– BC Hydro held bidding war for work, Checo won. Had to do a lot of clearing work which was promised by hydro in contract would be done by someone else. Incurred great expenses. No doubt as to breach of contract. SCC finds no fraud since no one was being dishonest, but was negligent in that they should have known. Contract damages were expense of clearing, tort damages were all expenses from entering contract. SCC claims that Checo would have still entered contract, just with higher bid.

*Queen v Cognos*- Interviwer made representations about employment (6 year project). Funding wasn’t approved and employment terminated after employee moved his family. Couldn’t sue in contract because it was only 1 month, in tort it was decided that claims were made negligently.

## Negligent Performance of a Service

BDC– BDC delivered Hofstrand’s documents late, and Hofstrand suffered loss as a result (didn’t close the deal). Courier was not aware of any financial interest. Ruled that there was no proximity (*Anns* test stage 1).

James- P’s employer held a tree farm licence from BC which contained a provision that would have prevented the employer’s sawmill from being closed. On renewal of the license the protective clause was inadvertently omitted and farm closed, causing loss of income. Found that proximity existed and allowed recovery.

Rarely used except where lawyers are negligently drafted a will

**Recovery = *Anns* test + reliance OR assumption of responsibility**

## Negligent Supply of Shoddy Goods, Chattels, or Structures

* + Applies only to **hidden** (latent) defects
    - If they were apparent (patent), or known, then the purchase price would be less
  + Applies only to **dangerous** defects (no one needs to be hurt)
    - Since the tort is only geared to physical safety
    - Generously interpreted – any defect that, if left unremedied, threatens the eventual structural failure of the building or some other physical harm (i.e. leakage of pollution)

Winnipeg Condominium Corp– Those responsible for the construction of the apartment building were under a duty of care to eventual owners of the building to ensure that the owners would not have to spend money on fixing construction needs. Not indeterminable since amount of repairs as damages is specific.

## Relational Economic Loss

* + D, as a result of negligently damaging property belonging to a third party, also causes pure economic loss to the plaintiff with whom the third party had a relationship
    - As opposed to consequential loss of property by owner
  + **Not recoverable**, **except for circumstances due to policy considerations** 
    - **Requires strict application of *Anns* test**
  + If your financial interests may be affected by somebody else’s person or property being damaged, you bear the risk – it’s up to you to manage that risk
  + Example: Construction Company carelessly cuts electric wires, obviously liable to the municipality, but is it liable to a factory requiring the power?
  + NOTE: an employer cannot sue for loss of productivity from its injured employee

CNR v Norsk– Barge crashed into railway bridge so that it couldn’t swing. CNR claimed losses even though it did not own the bridge. Held that since **CNR was in joint venture with Federal Government** to maintain bridge, there was proximity and no policy indeterminacy since so specific (joint venture).

Bow Valley Husky– Goes further than *CNR*, states that **D’s ability to arrange its financial affairs so as to deal with the risk to the third party’s property,** AND **the problem of defining a limited class of potential plaintiffs with interest in the functioning of the property** (indeterminate). Negligence caused fire on an oil rig.

# THE STANDARD OF CARE

* + Described as “carelessness” towards the overall act of negligence
  + **D must act according to Standard of Care expected of a Reasonable Person (*Arland*)**
    - **Based on reasonable person, not the standard of actual person**
    - Not superhuman
  + **Factors determining SOC:**

1. **Probability and severity of the harm (*Bolton*)**
   * + - **TEST: Was the risk of damage so small that a reasonable person in D’s position would have thought it ok to not take steps to prevent damage**
       - Not expected to guard against “Fantastic and far fetched risks”
2. **Cost of taking steps to avoid the risk (*Vaughn*)**
   * + - Balance of cost to avoid risk with estimated future damage
         * Easy with monetary, difficult with lives and happiness
       - Where wrongdoer makes a profit from actions, punitive damages compensate
3. **Social utility or value of the conduct (*Watt*)**
   1. **Why the risk was taken (i.e. rescue lowers SOC)**

Bolton– Cricket ground case. Plaintiff struck by ball. Judge rules no duty of care or breach of standard of care. Too remote an incident. Cost of building a fence is pointless because they can just play elsewhere.

Vaughn- Bridge painters let specs of paint fall onto cars below. Court ruled minimal costs could have prevented the problem. Reasonable painters would have undertaken such costs.

Simice- Defendant doctor didn’t get a CT scan because of limited resources. Court held that life was a higher priority and the defendant was negligent. Standard was what a reasonable professional would have done, and there may be circumstances (where life is not at stake) where this is possible.

Watt- Firefighter had to use a special jack, which required a special truck that wasn’t there. Had to use different truck, was injured by jack. Sued employer for setting him up in the truck. Again, court found life was at stake so risk was worthwhile.

## Special Standards of Care

Disabilities

* + Defendant could not be held liable in negligence if the defendant has an illness or disability which renders them unable to understand the duty to take care OR was incapable of acting on that understanding (*Fiala*)
  + Standard of care is relaxed
  + D proves on BoP

Fiala*,* man goes crazy while running, has bipolar disorder

NOTE: Tort is a fault based system; someone must be at fault to claim injury. In *Fiala* there is no claim since there is no fault. Arguments can be made that all personal injuries should be taken out of the tort system and covered with universal insurance.

Children

* + Held to modified SOC, not reduced to zero as it is with disabled
  + Adjusted to standard appropriate to the individual child given age, intelligence, understanding, and personal background

Joyal– Six year-old ran across the road at the last minute. Court said that it was understandable for her to do what she did. Parents are not vicariously liable for the torts of their children.

Professionals

* + SOC higher than that of the reasonable, but unskilled, person
  + The SOC appropriate to that profession must be observed (*White*)
  + Usually established only by expert evidence
  + If the professional standard is proved, a judge or jury can’t say it was inadequate unless the issue is something even lay people can appreciate (*Ter Neuzen*)

*White*- Breast implants went wrong, P sues doctor in negligence. Experts come in and say that the operation was negligent. He went too fast.

*Ter Neuzen*- plaintiff was inseminated with semen that contained HIV. Court ruled that it was standard of care given the time period. Jury of the current time was not in a position to comment.

## Degrees of Negligence

* + Recklessness < Negligence < Gross Negligence
  + Gross negligence tends to only apply in two types of statutes: municipalities for injury and professionals acting in an emergency (*Good Samaritan Act*)
    - Snow and ice clearing requires gross negligence

# CAUSATION

* + Causation is generally established through the but-for test
    - Compare the actual scenario with a hypothetical non-tort scenario
      * Cause in-fact test- **Can P prove on BoP that the defendant’s standard of care was the cause of the loss?**
    - “Common sense” instead of “scientific” proof of causation
    - **Three established exceptions to test:**
      * Multiple negligent defendants (i.e. *Cook v Lewis*)
      * Learned intermediary (*Hollis*)
      * Informed consent (modified objective)
  + One D: was the injury caused by D’s tort or by some other cause?
    - **Alternative causation** – was there an outside, unrelated, factor the cause (*Snell*)
    - **Cumulative causation**- extracting tort from other possible causes which led to injury, and deciding whether the injury would have happened but-for that cause (was it necessary to the injury)
    - When you don’t know what “in fact” caused the injury- look at evidence to infer tort was most probably cause (*Snell*)

Continued

Factors in Assessing Damages

* + **Thin skull principle**: if there are other insufficient (non-tortious) causes D will bear entire burden
  + **Crumbling skull principle**: D does not need to put P in a position *better* than the one before (if he was already suffering, i.e. herniated disk)
    - Uses a sort of apportionment of fault between defendant and plaintiff
  + **Damage based on contingencies** – a percentage chance that something would have come along to diminish P’s position
  + **Loss of chance** – a percentage chance that something would have come along to improve P’s position
    - Have to prove would have happened but-for tort on BoP
    - **Don’t use when induced by a negligent misstatement, or P’s lack of being informed of risk**
      * Just look at whether the decision would have been different
      * Was the information/statement a “material contribution” *Kripps*, since using but-for test is impractical for these situations
  + **Note: Cannot reclaim damages if they are paid out for 20 years, and person dies in 3**

## Multiple Tortfeasors

* + **Separate Ds, one injury to P** (**caused by either but NOT both**)
    - Alternative tortfeasors (*Cook v Lewis*)
    - But-for test inapplicable (pointing fingers)
    - Jointly and severally liable (better than having no-one liable), can be apportioned (s.4 *NA*)
    - Both D’s liable
    - Material contribution test used
      * Is material contribution to the risk
      * Can be used when two criteria are met: (*Clements*)
        + P has established that overall, her injury would not have happened but-for the negligence of the other parties
        + P, through no fault of her own, is unable to show which party caused injury
  + **Separate Ds, one indivisible injury to P** (**caused by both**)
    - Concurrent tortfeasors (*Nowlan*)
    - But-for test applies to each D (Would P’s loss occur “but-for” THAT D) (*Hansen*)
    - Jointly and severally liable, entitled to contribution and indemnity as against each other pursuant to s.4 of *NA*
      * Unless P is contributorily negligent, in which case they are severally liable for loss proportionate to their fault
  + **Separate Ds (or only 1 D), injury to P overlaps another cause (cumulative)**
    - D1 is liable for whole damage done by himself, D2 liable for additional damage
    - Can be one D with non-tortious causes elsewhere (*Athey*)
  + **Separate Ds (separate torts), multiple divisible injuries to P** 
    - Each D is liable for the injury that they themselves caused
    - D1 is liable for entire damages that D1 caused, D2 for his tort caused
  + **Joint Ds (acting together commit one tort), one injury to P** 
    - But-for test applies to the one body of Ds
    - Liability is joint and several and the court can apportion fault
    - If P gets judgement against one of several joint Ds, P is precluded from starting an action against any other D in the tort, since it is a single cause of action

Cases next page

Kauffman- P fell on subway escalator, but-for test not satisfied. Court ruled that there was no causation, actions or omissions of people around her broke any causal relationship. Finder of fact did not find evidence to support it.

Barnett- P had stomach problems, went to hospital but was told to go home, died. But-for test not satisfied. Court ruled that even if the hospital/doctor had acted on the stomach problem, it would have been too late, died anyway.

Snell- Damaged nerve behind the eye resulting in P’s blindness. Was able to prove on BoP that the doctor caused the blindness, despite natural causes being a possibility. D did not meet onus of disproving it. Inference adduced.

Clements- Biking accident in Kananaskis. No question over negligence but whether or not there were alternative causes. Leaves open question of whether multiple defendants are joint or several (proportionate). Also whether one D can use material contribution test.

Athey- D caused accident which caused P a herniated disk. P had a weak back. Passed but-for test but liability was apportioned due to crumbling skull rule.

Nolan- Ds architect and contractor had been concurrently negligent. Both passed but-for test, so they are jointly and severally liable.

Penner- P awarded damages for 13 months pay, but independent heart problem kept her out of work for three months. D claimed three months’ pay damages back, and won. This was before the final trial. Events after trial are irrelevant.

Dillon- Boy fell off bridge onto electric current wire, gets electrocuted. Court decides that he would have died anyway and does not award damages. Depends on evidence. Can be difficult task of reconstruction.

# REMOTENESS

* + Rule of fairness
  + Whereas causation is concerned with the factual connection between D’s breach and P’s loss,
  + Remoteness is concerned with a legal connection between the breach and loss
  + **TEST: Reasonably foreseeable (***Wagon Mound***)** 
    - **Is the damage different in kind from the foreseeable kind**
  + Not necessary for the precise manner of the accident to be foreseeable, only the type of harm
  + **D is liable for all “possible consequences” if a reasonable person would take it into account**
    - A serious risk will not be too remote even if only small chance statistically (*WM2*)
      * Especially if it was easy to control the risk

Type of injury

* + Any foreseeable physical injury makes D liable for all the physical injury (*Smith*) and psychiatric (*Marconato*) that P suffers
  + If non-physical injury then it is person of reasonable fortitude test (*Mustapha*)

Wagon Mound 1- The Wagon Mound ship carelessly permitted oil to spill into the harbour, eventually causing a wharf to light on fire due to welders in the water. Judge rules that the damage was too remote.

Hughes- D’s employees left lamp and open manhole unattended. Boy kicked lamp, fell into the hole, and suffered burns. Court rules it does not matter that the manner was unforeseeable (explosion), but the kind (burning), and therefore the manner does not matter in remoteness. It was foreseeable and the boy can recover damages.

Smith- P died as a result of being splashed by molten metal. Had pre-existing malignant condition. Court ruled that D was liable since D is responsible for all physical injury (thin skull rule).

Marconato- P was injured in a car crash, and suffered psychological damage. D was liable for damage.

Wagon Mound 2- Found D liable for spilling oil. It was easy to prevent and damages to the boats were foreseeable. Was easy to prevent the risk. Differs from WM1 in that the welders shouldn’t have welded knowing that there was oil in the water.

Assiniboine- Boy riding motorized toboggan negligently crashed into duct outside of school, school burned down. Boy and gas company held liable. Boy for driving negligently (crashing was foreseeable), gas company for negligent building of pipes (would have cost them little when risk was so big).

Mustapha- Man finds fly in Culligan bottle, freaks out. Court ruled that damage is different from foreseeable type. Since non-physical thin skull rule does not apply (we are all a little cray). Person of reasonable fortitude test is applied.

# INTERVENING CAUSES

* + D1 does something negligently, creating opportunity for D2 to cause injury to P, it is possible that D2’s act is an intervening cause (*novus actus interveniens*), and D1 is not liable
  + An intervening cause is an exceptional circumstance unrelated from the first one
  + Test:
    - **Is the intervening act within the scope of the foreseeable risk created by D1’s negligence**
      * **Causation - Did D1 cause D2 to act?**
      * **Remoteness- Was it reasonable foreseeable to D1 that the negligence could lead to the ultimate injury?**

Bradford- Grease fire in restaurant kitchen caused popping noise which alarmed customer. Majority claimed that the yell was irresponsible and unforeseeable, D therefore not liable. Yell was intervening cause. Dissent thought yell was foreseeable.

Price- P suffered broken ankle during soccer game. D1 only x-rayed foot claimed it was a sprain. P went to D2, who did not demand x-ray since D1 found no problems in his x-ray. Third doctor did proper x-rays found problem. D1 and D2 were jointly and severally liable for the indivisible injury caused by their negligence.

Hewson- City worker operating tractor left it alone. There was evidence that someone set the tractor in motion, caused it to crash into a house. Held by the CA that the act was not reasonably foreseeable, and that the precautions of putting the vehicle in neutral and bucket down were sufficient to absolve liability.

# DEFENCES IN NEGLIGENCE

## Contributory Negligence

* + - More apportioning blame than full defence

## Voluntary Assumption of Risk (Volenti non-fit injuria)

* + - P must have explicitly waived their rights (*Sundance*)

## Participation in a Criminal or Immoral Act (Ex Turpi causa non oritur actio) (*Hall*)

* + - P will be unable to recover legal remedies if it arises in connection with his own illegal act
    - Cannot make profit of an illegal activity
    - Cannot lessen the penalty of an illegal activity
  + NOTE: Res ipsa loquitur- the thing speaks for itself
    - Was put to an end in *Fontaine* since it added nothing
    - Some evidence is not enough to be compelling, if it is very compelling then it is almost obvious
    - Became circumstantial evidence

# MISFEASANCE IN PUBLIC OFFICE

* + Intentional tort- sometimes called abuse of power
  + Judicial review does not ask whether the decision was right, asks whether properly made
  + Cannot say the government was negligent, as there is no such thing as a reasonable government
    - It is very difficult to sue the government in negligence
  + **Two Categories:**

1. By using the power deliberately to injure P
2. The officer knowingly acted outside of their power and P was injured as a result
   * + - For both, D must have been aware that the conduct was likely to harm AND
       - Must have been in capacity as public officer
       - Must cause a special harm (*Watkins*, *Karagozlu*)

Odhavji- P (estate) was fatally shot by officers while running from his vehicle. Question over the following protocol of the police officers and whether it was followed. Whatever the police did, they were not doing it to injure P outside of their authority. Court allows appeal and P to prove each element of the tort (high hurdles).

## Negligence Liability of Public Authorities

* + Policy vs. Operational decisions (second-stage in *Anns* consideration)
  + SCC regarded whether to inspect at all as a policy decision; once that was taken there was a duty of care to adopt a reasonable system of inspection
  + A duty of care should apply to public authority unless there is a valid basis for its exclusion
    - Sanding and maintaining from falling trees is excluded (policy budget reasons)
  + No bright line between the two

*Just*- P was driving on the highway and had to stop due to weather. Boulder from the cliff came down and killed P’s daughter, injured him. Unlike *Barrett* (bike pothole case), here there was no reasonable inspection. Authority found liable. This is the furthest the court has ever gone for inspection cases.

# STATUTORY PROVISIONS AND TORT LIABILITY

* + If plaintiff breaks a statutory obligation, it can be evidence of negligence but has no other civil liability consequences, UNLESS stated by the statute (*Sask Wheat Pool*)
  + If statute does not intend to take liability away, then D is liable even if following statute (*Ryan*)
  + Basically, the statute’s intent has to be explicit
  + UK- there is tort of statutory breach
    - Remains unsatisfactory
    - Breach must be shown
    - Question over what situation would allow the cause of action, and intent to create civil remedies
  + US – has been subsumed into law of negligence
  + CAN- oscillates between the two

*Sask. Wheat Pool* – The wheat pool delivered infested wheat to the Canadian Wheat Board in violation of s.86 of *Canada Grain Act*. Court rules that there is no liability since the *Act* did not state a civil liability.

## Occupiers Liability Act

* + **Occupier**: A person with either 1)Physical possession of the premises; or 2) Responsibility for – and control over – the condition of the premises, the activities conducted on the premises, and the persons allowed on the premises
  + **Premises**: Defined broadly – not only land/buildings, also vehicles, ships, not operating
  + **General duty of care:** Not to create a danger with intent to harm, and not recklessly to disregard the safety of the person or the property. They must be reasonably safe.
    - Applies to a) condition of the premises b) activities on the premises c) conduct of third parties on the premises
    - Minimal duty is applied to people who willingly assumes a risk and is injured, commit criminal acts, or trespassers or recreational users on certain classes of farmland or rural land

# NUISCANCE

* + **Test:** Is the effect of act reasonable interference with the other person’s property
    - **Unreasonable –** not tolerated by the ordinary occupier
    - Determined by:
      * The severity of the interference, having regard to nature, duration, effect
      * Character of the locale
      * The utility of the defendant’s conduct
      * The sensitivity of the use interfered with
  + Who can sue?
    - Person who owns the property or has proprietary interest
    - Not people who are living there and have no legal interest in property
  + Cannot move and claim nuisance, or change sensitivity of property and then claim
  + If permitted by statute (but not explicit), question becomes policy (costs) (*Susan Heyes Inc*.)
    - Question is whether it is practically impossible to do the work without causing nuisance
  + Can be what someone fails to do
  + Maliciousness plays a part (*Hollywood Silver Fox*)
  + **Private nuisance-** interference with one person’s property
  + **Public nuisance**

1. Common interests: interference with rights of a community (block highway, pollute)
2. Private interests combined: over ten parties, large scale operation (fumes)

Huron- D had a stamping plant. Bought a new press. It was loud, intermittent, building had suffered loss in rent, neighbourhood was not sensitive. Court gives damages and injunction was ordered.

Tock- Heavy rainfall clogs pipe, causes P damage. Sopinka’s view prevailed. Used question for statutes (above), found that it would have been possible to complete without nuisance. Also stated that it is a strain for private rights to be sacrificed for a common good.

# STRICT LIABILITY, ESCAPE OF DANGEROUS SUBSTANCES

* + Resembles nuisance, but does not involve finding of fault of unreasonable interference
  + Does not create general tort for “ultra-risky behaviour”
  + **Liability is automatic, does not need to be intentional**
  + **Test:** Non-natural use of land, that if escapes, will cause mischief
  + Restrictions:
    - Natural uses of land
    - Acts of God
    - Consent
    - Common benefit
    - Default of the Plaintiff (voluntarily and unreasonably encounters a known danger)
    - Intentional acts of third parties
    - Statutory restrictions
      * If it is permissive, then possibly liable
      * If it makes action mandatory, not liability

Rylands- Defendant built reservoir for watering purposes. Said to have introduced an evil to the land. There was an old mine underneath and water flooded into it causing damage to neighbouring property. Held liable.

Read- P working in shell factory is injured by exploding shell. Not liable since it was deemed natural used of land (wartime) and was personal injury.

Gertsen- Methane gas from dump site escaped into P’s garage, car exploded when he started it. Found that the use was non-natural and there was escape, therefore held liable.

# VICARIOUS LIABILITY

* + May arise under three headings:
    - Statutory vicarious liability
    - Agency
    - Employment or master-servant relationship
  + **Liability will not extend to independent contractors (no control over them)** (*Sagaz*)
  + **Non-delegable duties –** duty which is still under employer even if contracted out (i.e. safety)
    - Makes employer liable if duty is non-delegable
  + Parents are not vicariously liable for children’s torts, except intentional property damage up to 10,000 dollars
  + Tortfeasor has two options: claim vicariously through employer or direct at employee
  + Motor vehicle owners are vicariously liable for accidents caused by the negligence of family members who drive the car, and non-family members who drive the car with consent
  + **Test:** Did the introduction of the employer’s enterprise into the community materially enhance the risk of the tort being committed?
    - Consider policy, and if the act is “sufficiently related”
  + Factors for determining whether sufficiently related:
    - The opportunity that the enterprise afforded the employee to abuse his or her power
    - The extent to which the wrongful act may have furthered the employer’s aims
    - The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise
    - The extent of power conferred on the employee in relation to the victim
    - The vulnerability of potential victims to wrongful exercise of the employee’s power

Bazley- P sexually assaulted as a young child in residential care facility. Background check on perpetrator was performed. As soon as Children’s foundation found out, they fired him. Court found employer liable due to the opportunity of intimate enclosure developed and fostered the risk.

Sagaz- P manufactured synthetic sheep skin car covers. D hired AIM, who bribed Canadian Tire into accepting their product. AIM was deemed not to be an employee, was operating on their own accord and D **did not have control of them**. D was not held liable.

# DEFAMATION

* + **P must prove on BoP that the impugned statements:**
    1. Were defamatory (question of law)
       - Would a right-thinking person lower their opinion of P (real person, not perfect)
    2. Made reference to the plaintiff
       - Are they capable of referring to the plaintiff
    3. Were published or disseminated
  + There is a presumption that material is false
    - Defendant must prove something is true
  + Innuendo can count as defamation (married man posing with girl)
  + Must be communicated to someone other than P
  + Every repetition is enforceable against the repeater
    - Except where defamation is attributed, states level of truth, sets out both sides fairly, AND provides context in which statements were made (reportage rule)
  + Has to be balanced with freedom of expression

## Defences to Defamation

### Justification

* + Can D prove (in the eyes of the jury) the truth of what was said
  + Look at defamatory sense of the words
  + D does not have to prove the truth of all possible defamatory interpretations of a single statement, just the truth of any reasonable defamatory interpretation of the statement

### Qualified Privilege

* + Can D show that a duty or interest is required of him or her and a duty or interest on the part of the recipients of the statement to receive the information in question
  + Possible even if facts are false
  + Where D has a legitimate reason for discussing P with a particular audience, should not be liable
  + Usually private in nature, since usually no public duty
    - Except fair public statements reporting on judicial hearings (*Hill*)
      * *Hill*, D still found liable since malice and context

### Fair Comment

* + Must be something perceived as writer’s opinion and distinct from assertions of actual fact
  + Must be public interest
  + Facts must be stated or known as true, and honest (not reasonable) person could follow “false” comment from facts (capable-of-being-honestly-held test)
  + Onus on D to prove
  + Can also be defeated by malice (Onus on P)

### Responsible Communication

* + Possible with false facts
  + D must show was a statement of public interest
  + Must have been reasonable
    - How serious was the allegation?
    - Public importance?
    - How urgent was it needed to be released?
    - Status and reliability of the source
    - Whether the plaintiff’s side of the story was sought and accurately reported
    - Whether inclusion of the defamatory statement was justifiable
    - Whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth

NOTE: No cap on general damages in defamation. Up to jury to decide damages.

* + Aggravated damages (above general damages) are awarded for high-handed or oppressive conduct, and with malice
  + Punitive damages are so offensive, oppressive, and high handed that it offends the court’s sense of decency
  + A prompt apology can mitigate damages.

*Slim*- A housemaid worked for D, then P, then back to D. D made statement requesting return of money, then sent another note clarifying. Ruled that especially with second note, right-minded person would not think it was defamatory in nature.

Knupper- P was member of Young Russia movement. D published article defaming the leader of the movement. Court ruled that article was not capable of referring to P, dismissed claim.

Ralston- “Sick son of a bitch” ruled defamatory, not given its plain meaning but its tone.

Williams- Amateur rugby player accused of “shamateurism”. Author brought forward new evidence which justified his opinion and the claim was dismissed.

Hill- D made public statement in theatrical fashion on steps of Osgoode Hall. The actions were above and beyond what should be allowed. Punitive damages were awarded and claim of defamation succeeded.