1. INTRODUCTION TO THE LAW OF TORTS

**1.1 What are torts?**

* A breach of involuntarily assumed obligations that causes harm
  + obligations that the law and circumstance impose on you; implicit social agreements
  + private wrongdoings
    - i.e. negligence, nuisance, libel, battery, trespassing
  + remedied through monetary compensation for the harm done (damages)
* What are the standards that torts reflect?
  + duty or standard of care (negligence)
  + accepted social norms (re: behaviour)
  + “enterprise” liability – liable because you did it; no need for intent or reasonable care
* Torts can be very difficult to explain; often focus on the harm and not on behaviour (intent)
  + Very black and white sort of quality; quite often if you do it, you’re liable
  + Often no reference to intent or reasonable care
  + Not easy to find a unifying principle; the law of obligations itself includes contracts, restitution & tort
  + Tort is where the law puts responsibility on you to make good on some harm you’ve done; and it defines the wrong by reference to fault or risk
  + Limits continuously changing
    - For example, privacy. Relatively modern idea that did not exist until the 20th century. Several provinces have created statutes around the right to privacy in the past decade.
    - Tort law evolves/expands to reflect changing social norms and cultural values; typically through common/judge-made law but also through statute (i.e. FIPPA)
    - Seldom constrained; most often changed via statute. Only the SCC is able to ignore binding statute and declare a tort no longer socially relevant. However lower courts may use discretion based on the level of harm inflicted.
  + French civil code defines torts as any act that causes harm to another; putting you at fault

09/06/2012

**1.2 Differences Between Tort & Contract Law**

* Though they often align, torts are typically obligations that you made involuntarily – i.e. to respect your neighbours, don’t hit anyone, etc. Contracts are about obligations that you voluntarily entered into.
* Nonetheless, they are not mutually exclusive; you can be liable in both tort and contract for the same offence.
  + You cannot receive compensation twice over for one loss. However, there is no principled objection for making your claim in both tort and contract and receiving judgement in both.
  + If there is difference in remedy, you may be able to choose which one you want.
* The other difference between the two is in the remedy
  + Torts look backwards – they seek to put you in the same position prior to the damages being incurred
  + Contracts look forwards – they seek to put you in the same position you would have been if the obligation had been performed; if the contract had been carried out according to the understood terms
* Contractual liability does not require fault; in the sense of negligence or deliberate cause
  + i.e. if you promised/committed to doing something (obligation), you are required to fulfill that obligation regardless of circumstances
* Example #1:
  + K agrees to sell me *x* for my business at a price of $10. However, K did not deliver on *x*.
  + How do we determine the value of the lack of *x* in a contracts case?
    - **Loss of Profit** – May argue/prove that *x* would have allowed me to profit $2. Therefore, the value of the loss is $2.
    - **Consequential Damages** – damages/loss that I incurred as a result of not receiving x
    - The question is, what position would I be in had I been in had I received *x*?
* Example #2:
  + If you invest $10 in K’s business, you are promised you will earn $12.
  + I never see any profit from my $10.
  + If I sue you for fraud (as the defined cause of action), what would the remedy be?
    - Tort does not deal with promised gains; therefore it would only seek to put me in the position I was in before I handed over my $10. Would not receive the extra $2.
  + May be able to demonstrate evidence of lossed gains due to the loss of the $10. This can be difficult to prove though.
    - **Remoteness of Damage** – cannot recover everything you lost; can only recover for the damages the other party could reasonably foresee would occur.
  + What about legal fees?
    - Not considered damages; legal fees can be received by way of costs. Winner may be able to recover a portion of costs based on a scale/formula.

**1.3 History of Tort Law**

Writ of Trespass

* Included battery/assault (trespass to the person), trespass to land, trespass to chattel (personal property),
* Applied when you had interfered in someway with the person or their various forms of property
* Conduct could be wrongful even if it was unintentional; i.e. if you hurt someone then you are liable
* “ It is immaterial whether the injury be wilful or not”

Writ of Action/Trespass on the Case (Negligence)

* Wrongful conduct that caused harm
* Conduct could be wrongful even if it was unintentional (included negligence)

**1.4 Trespass & Case: A Brief Review of Case Law**

Scott v. Sheppard (1773) Eng CP

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| Facts | * D threw squib (firecracker) into crowd; thrown twice more by other individuals before hitting P in the face, exploding and injuring him * D: not trespass because he didn’t cause ‘immediate injury’; intermediate individuals liable |
| Issue | * Is the offence trespass or negligence (case)? |
| Analysis | * Trespass requires *vi et armis*; direct application of physical force   + Injuries that are mediate and consequential do not result in trespass; they are case   + Court found that force was applied to the final victim – but was it applied by the D?   + Was the injury the direct and immediate act/application of force of the D? Did the intermediary handlers commit the trespass? * Gould J “the terror impressed on Willis and Ryal excited self-defence and deprived them of the power of recollection”; initial application of force was still “in play” * Raises concerns that liability in trespass exists for actions after the initial application of force. The intermediary handlers would therefore shirk liability (re: football in a crowd). * Not a test of unlawfulness of the act (Blackstone J) |
| Ratio | * Trespass requires the direct and immediate application of force by the D. Intermediate actions may not negate liability of the original actor. |

Leame v. Bray (1803) Eng KB

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| Facts | * The D was driving his carriage at night on the wrong side of the road. He hit the P’s carriage and the P fractured his collarbone when jumping out to save his life * D argued that the injury happened from negligence; he did not wilfully injure the P |
| Issue | * Is intent or voluntariness required for actions in trespass? |
| Analysis | * Lord Ellenborough CJ “It is immaterial whether the injury be wilful or not” and it was “...an immediate injury from an immediate act of force by the D” |
| Ratio | * Direct application of force is required for trespass; the P is not required to apply the force intentionally or negligently upon the D. |

* Negligence/trespass case requires P has to prove the fault/wrongdoing; test of ‘reasonable care’ applies.

Williams v. Holland (1833) Eng CP

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| Facts | * P’s carriage was carrying his son/servant. D collided with P’s carriage. P sued in negligence (case) for damage to his carriage and medical fees/loss of service from his son. |
| Issue | * Are direct actions available in negligence? |
| Analysis | * If negligence was shown, direct contact is available in negligence actions * “P is at liberty to bring an action on the case, notwithstanding the act is immediate [direct], so long as it is not a wilful act” * Suggests that intentional or negligent actions are required for trespass * In contrast to Leame v. Bray, JJ require wilfulness for action in trespass. No wilfulness req’d in negligence. * Why negligence? The P is not the person injured but the employer/father; not a direct and immediate act * Negligence allows for both direct and indirect injuries |
| Ratio | * Intent to commit the act resulting in the tort is required for actions in trespass. |

Holmes v. Mather (1875 Eng Ex) – courts combined by this point

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| Facts | * D’s horses were scared by a neighbours dog; despite attempts to control, horses knocked down and injured the P; P sued in both trespass and negligence * D won on the grounds that no wrongful act occurred; whether intentional or negligent |
| Issue | * What is required for actions in trespass or negligence? |
| Analysis | * Trespass definition has not changed; there was no intent to commit the act   + Court would not hold D liable based on the fact of the collision alone   + In contrast to Leame v. Bray – required intentional act for trespass * Negligence requires that the P proved negligence by the D; Court found actions fulfilled ‘reasonable care’ standard |
| Ratio | * Laws regarding trespass and negligence are subject to changing interpretations over time |

09/18/2012

Burden of Proof

* In tort, the burden of P is on the P to prove elements of the tort on a BoP
  + If burden is on P and it is not proven on BoP; P suffers
* May see references to the ‘tactical burden’ – a reverse onus or evidentiary burden requiring the D to refute the P’s evidence or displace an inference/assumption by the ocourt

Cook v. Lewis (1952 SCC)

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| Facts | * Parties were hunting together; P was accidentally shot * P was unsure if he was shot by Cook or Akenhead |
| Issue | * Does the burden of proof always remain with the P in negligence cases? |
| Analysis | * Four questions were posed to the trial jury:   1. Was the P shot by either D [Cook or Akenhead]? YES   2. If so, by which one? NO ANSWER   3. Can you decide by which D the P was shot? NO   4. Were the D’s injuries caused by the negligence of either D? NO * Questions 3 & 4 would eliminate P’s case – re: P must prove harm AND negligent action * Two concerns arise from this case:   + If facts show that two people shot in the same direction and the P was hit by one of them, does the P lose out because we can’t figure out who it was?     - Required to prove on a BoP that it was one or the other   + Was the judge correct in posing Question 4 to the jury?     - The P appealed on this basis; argued this was perverse.     - The judge should not have allowed the jury to make contradictory findings. * Cartwright J argued that the burden of proof should be shifted to the D’s   + Unusual in the case of negligence; burden of proof rests with P   + Cartwright J argues that in the old forms of actions, this particular set of facts could have been pleaded as trespass. And, it was the rule in trespass, that the D must prove his actions were not intentional or negligent.   + Question 4 should have asked: “Did the D(s) prove that his actions were not negligent?”     - This reverses the onus of proof |
| Ratio | * In negligence cases, the burden of proof may be shifted to the D where it would cause undue duress on the part of the P. |

* Should there be a different kind of burden of proof for certain types of negligence? In this case both individuals could have been held jointly and severally liable; judge could have apportioned fault
* Why is this relevant?
  + Demonstrates that BoP rests with the P in trespass cases
  + Demonstrates that BoP rets with the P in negligence cases; but can be shifted to the D if it would cause undue duress to the P
  + However, the J is often able to make these assessments without consideration for the BoP; little practical relevance

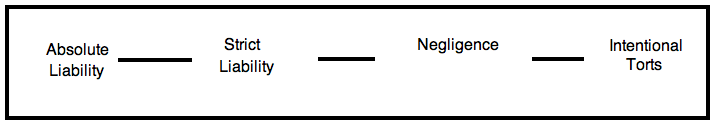
Summary: Elements Trespass vs. Case (Negligence)

Trespass – direct application of force by the P on the D

* P:
  + Actionable without harm; although only nominal damages available without harm
  + Action must be direct and immediate application of force
  + Must prove intent to commit act
* D:
  + Must prove the action was not intentional

Case (Negligence)

* P must prove:
  + Harm required for action
  + Harm occurred as a result of intentional or negligent action (fault)
* However, the onus of proof may be shifted to the D in some cases (see Cook v. Lewis)
* Typically applied to unintentional and indirect actions (direct actions were trespass)
  + However, deliberate and indirect harm would qualify as negligence as well



**1.5 The Bases for Imposing Liability in Tort**

(a) Absolute Liability

* P must prove loss only
* No defence in fault (intentional or negligent)

(b) Strict Liability

* P must prove loss only
* Few defences available; can still be liable without intention or negligence
  + Rylands v. Fletcher (1868)
    - D water reservoir broke and flooded P’s lands; held liable w/o intentional or negligent action
    - Only defence available to D was to prove the action was caused by a 3rd party or an ‘act of god’
* Historically present in the ‘law of animals’ – at fault for damage caused by your cattle
* Most common in the doctrine of **vicarious liability**
  + Can be liable for the actions of others; most often an employer being liable for their employee
  + The employer is automatically liable for a tort committed by their employee if the tort is proven to have occurred intentionally or negligently and “in the course of employment”
  + Has a significant impact on damages; employer has money (or insurance)
    - For civil servants, legislation shifts liability onto the government

(c) Negligence

* P must prove loss and that the D acted negligently
* That, their failure to take reasonable care caused foreseeable harm to another person

(d) Intentional Liability

* P must prove subjective intent on the part of the D
* Similar to strict liability – the P is required to prove only the damage that was caused and intent by the D However, the D is accorded a defence where they can refute the P’s evidence of intent and/or negligence
* N.B. The concept of fault varies from one cause of action to another

(e) No Liability

* Some harm simply not recognized under tort; even if done so intentionally or negligently

**1.6 Functions of Tort Law**

* Why does it exist and does it serve its purposes rationally? The law is not objective or value free; it is a social institution that serves social functions.

1. Compensation
   * Sense of reparation for loss
   * Way of loss shifting; aggrieved party receives compensation
   * However, tort is considered an extremely inefficient mechanism for providing compensation
2. Appeasement and Vindication
   * Satisfaction of having the wrong-doer held accountable; may provide only nominal damages
   * Relevant in cases where criminal proceedings were unsuccessful; lower standard of proof (BoP) means claimants may be more successful in civil court
     + i.e. OJ Simpson case
3. Punishment
   * Not a frequent consideration of use; more about compensation
   * Crosses the line into punishment when considering punitive damages
4. Deterrence (Market Deterrence)
   * Present when the action brought or remedy granted discourages the D (specific deterrence) and others (general deterrence) from repeating a wrong
   * Assumes people will behave better and restrain their actions because of potential civil suits/liability (tort); is as much cultural as it is legal
   * However, the availability of insurance may seriously hamper deterrence
   * Market Deterrence argues that tort is a system of loss allocation; an important goal of allocating the costs of accidents
5. Justice
   * Form of corrective justice; it accepts the existing distribution and is concerned with correcting improper deviations from that pattern; annulling “wrongful” gains and compensating “wrongful” losses
   * The tortfeasor has disturbed the balance
6. Ombudsperson\*
   * To resolve disputes; strongly related to appeasement and vindication
   * Legal resource that can hold people accountable; it ‘pries open’ the ‘closed doors of the wrongdoer’
     + Can force individuals or corporations to answer for their wrongdoings

2. REMEDIES IN INTENTIONAL TORTS

**2.1 Introduction**

* When P is successful, issue of appropriate remedy arises
* The nature of the available remedy will influence the Ps decision to bring action

**2.2 Judicial and Extrajudicial Remedies**

Two broad categories:

* Judicial
  + Damages (common law)
  + Injunction (equitable)
  + Declarations (equitable)
  + Orders of specific performance/restitution (equitable)
* Extrajudicial – ‘self-help’ remedies

Types of Injunctions

* Recall that an injunction is an equitable remedy; therefore its application is discretionary when damages can be found to be an adequate remedy

1. *Quia timet* injunction (in anticipation)
   * Order not to act; granted when D provides sufficient reasons to believe their rights will be infringed
2. Mandatory Injunction – positive action to correct a wrong (i.e. move a sign or take down a building)
3. Specific Restitution – grants the P what he/she was originally entitled to; rather than damages
   * More common in contracts

**2.3 Classification of Damages**

* Damages are typically classified according to the purpose for/function intended to serve (see 2.4-2.7)

1. Special – can be exactly quantified at the time of trial in dollars and cents
2. General – cannot be quantified at time of trial. Includes:
   1. Pecuniary
      * Any future material loss which will be calculated in dollars and cents – property, income loss, medical bills, repair costs
   2. Non-Pecuniary
      * Loss with no monetary equivalent; includes emotional, pain & suffering, loss of reputation, lost earnings, future care.
      * Inflation considered; BC has a legislated discount rate
      * Determined by evidence; what was their earning potential? Imperfect science
      * Typically includes aggravated and punitive damages

\*Important description in personal injury cases

* Relevant Judgement: SCC 1979
  + Passed a judgement that asserted that pecuniary damages should be maximized; they declared that the maximum amount of non-pecuniary damages was $100,000 (has since risen to $300,000)
  + What is the judge to tell the jury about this limit?
    - If the judge feels the jury is unlikely to exceed the limit; no requirement to inform
    - If the jury is likely to exceed the limit, the judge instructs them of the cap
    - Should make sure their informed without influencing their decision
* Dispensing of Damages: typically provided as a lump sum payment. However, the *Insurance Vehicle Act*, s.99 allows for structured settlements (payment over time).

**2.4 Nominal Damages**

* Awarded to acknowledge the violation of a legal right, even in the absence of actual harm
  + Typically a small sum of money; but small damages are not necessarily nominal
* Most commonly awarded for torts that are actionable without proof of loss (i.e. trespass)

**2.5 Compensatory Damages**

* Compensatory damages are provided to compensate for some loss; seek to put you in the position you would have been in had the tort not been committed
* Includes special, general and pecuniary/non-pecuniary losses (see 2.4)
* Often difficult to quantify in monetary terms
  + Pecuniary: How do you value heirlooms? For property that would have otherwise sat idle? (The Mediana*)*
  + Non-Pecuniary: Pain & suffering? Time?

The Mediana [1900] H.L.

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| Facts | * The Mediana ran into one of four lightships that the harbour authority maintained * The lightship was taken out of commission, took 74 days to fix it. The harbour authority had a reserve ship that they maintained at roughly £1000 per year. * The D argued they didn’t lose anything (beyond repair costs) – you had a spare |
| Issue | * Is the P eligible to receive damages? |
| Analysis | * Lord Halsbury insists that it is not nominal damages. Nominal damages exist where there has been no loss; nominal sum is awarded to recognize the infringement on the P’s rights. * The P submitted the cost of maintaining the reserve ship. The question is if the jury considers it a real loss – if they were able to maintain operations, is it a real loss? * The judge said they should get a real loss; not nominal.   + How do you value that loss? Parties had agreed– 74 days worth of the maintenance costs of the reserve ship. |
| Ratio | * Illustrates the challenges in assessing general damages – the P couldn’t appoint to a specific expenditure with relation to the replacement ship * Damages that are difficult to assess are not necessarily nominal; a real loss was found * Reference for the difference between nominal and compensatory damages; and the difficulty in assessing general damages. |

**2.6 Aggravated Damages**

* Form of compensatory damages designed to benefit the P
* Awarded to compensate for additional injuries to dignity and similar feelings arising from the D’s reprehensible conduct (particularly bad action)
* Based on the way that the D acted towards you – so humiliating or brutal that it added to your injury
  + Don’t have to prove how big the added injury was; simply provide evidence thereof
* Both aggravated and punitive are available (see below, both forms of compensatory damages)

**2.7 Punitive Damages**

* Punitive damages are exceptional; D has to have done something particular unsavoury
  + Provided as punishment or deterrence for a particularly bad action
  + Designed to benefit the public but awarded to the P; relatively uncommon in Canada
* Calculated based on purpose:
  + Punishment – quantified with reference to the D’s ‘moral blameworthiness’
  + Deterrent – quantified in terms of the financial disincentive required to discourage future actions
* Judge alone decides on availability of punitive damages, jury determines the amount
* No limit on punitive damages; excessive amounts often appealed though
* Can you get punitive without aggravated?
  + Example: D cut down trees to improve view & property value. P has small, but real loss. However, D improved property value by significantly more. P may receive deterrent punitive damages, but not aggravated because it didn’t add to the injury.

Punitive Damages: B(P) v B(W) (1992) Ont. Trial Court

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| Facts | * Father (D) was convicted of incest; additional charges related to rape were stayed * Daughter filed civil suit for assault and battery |
| Issue | * If the D has been criminally convicted, are punitive damages available? |
| Analysis | * Judge dealt with and awarded non-pecuniary general, aggravated and punitive damages separately * Judge awarded punitive damages on the basis of the rape (charges were stayed) * Editor summary indicates criminal conviction is not a bar; one factor to be considered by the courts |
| Ratio | * If the D has been criminally convicted, the civil court must take this factor into account. Although it is not an absolute bar to punitive damages, it is likely to have a substantial influence |

Punitive Damages: Whiten v Pilot Insurance [2002] SCC

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| Facts | * D company refused to pay the claim P’s made under their policy when their house was destroyed by fire * D alleged that the P’s intentionally burned down their own house despite expert evidence to the contrary, adjuster who recommended D pay and evidence of D pressuring his own experts |
| Issue | * When should punitive damage be awarded? |
| Analysis | * Do not award punitive damages unless it is demonstrably necessary to deter or denounce beyond what the compensatory award will already do. * If compensatory damages are large enough, may not see an additional award of damages. |
| Ratio | * Punitive damages will only be warranted in the case of very serious misconduct. There is no limit on punitive damages. |

3. INTENTIONAL INTERFERENCE WITH THE PERSON

**3.1 Introduction**

* Conventional view is that trespass is an intentional tort
* Requires only intent to commit the act; not intent to cause damage or harm

**3.2 Basic Principles of Liability**

(a) Volition: Smith v. Stone (1647) K.B.

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| Facts | * Smith brought action of trespass; Stone claims he was carried onto the land |
| Issue | * Whose trespass is it? |
| Analysis | * Court uses analogy of cattle – it would not be the cattle who trespassed on the land, but the person who drove them on |
| Ratio | * D must act voluntarily and exercise control over his or her physical actions to be held liable. |

(b) Intent: Used to refer to an actor’s desire to bring about the results or consequences of his or her act, rather than his or her desire to do the physical act itself

Gilbert v. Stone (1648) K.B.

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| Facts | * D trespassed on P’s land and took his gelding * D argued that 12 armed men forced him onto the land and to take the gelding |
| Issue | * Is duress a defense in trespass? |
| Analysis | * Judge sides with the P; the P would not be able to secure damages from those that threatened Stone |
| Ratio | * Intent is viewed narrowly; simply requires that you had control of your own muscles * Motive (including duress) is not relevant in trespass |

* Textbook indicates that while duress does not negate volition or intent, or serve as a defence, it would likely be a consideration for damages (p. 49, n. 2)
* Contemporarily, doing something in fear of your life can hardly be said to be of your own volition

**3.3 Relates Issues: Motive, Mistake and Accident**

(a) Motive

1. Duress – see Gilbert v Stone (1648) Eng KB
   * Ratio: Intent is viewed in a very limited sense. Duress is not a defense in intentional torts.
2. Provocation – Miska v Sivec (1959) Ont CA

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| Facts | * Miska and Sivec got in a car accident; Miska threatened Sivec with a knife and an iron bar. Sivec retreated to his house and shot Miska from his window. Evidence of bad blood between the parties. |
| Issue | * Does provocation mitigate liability? |
| Analysis | * D found liable at trial; appealed on grounds that TJ did not charge the jury on the effect of provocation in mitigation of damages   + - Court stresses immediacy of time for provocation – no sudden passion, lack of self control or even any annoyance on the D’s part     - The long-standing feud may assist in the argument for “understandable” provocation * *“There is no such evidence directly or by way of inference to be drawn from the D’s testimony…his conduct was careful and deliberate and belied the existence of any sudden and uncontrolled passion* |
| Ratio | * Provocation is not an exculpatory defence in trespass. However, if it was proven that the D acted instinctively and immediately to the provoking act, it may impact damages. * Affect on Damages: The BC *Negligence Act* allows provocation to be used to reduce both compensatory and punitive damages; (similar to apportionment in negligence). Other jurisdictions will reduce only punitive damages. |

Question: To what extent is the idea of provocation subjective?

* Considers a ‘reasonable person’ standard – but from the perspective of the provoker or the provoked?
* What about cross-cultural communication?
  + Victim cannot be at fault if they didn’t know that what they were doing was insulting
* Not likely to impact compensatory damages, but may impact punitive damages (state of mind of the wrongdoer)

(b) Mistake: If you think your actions are reasonable or legal, does that make any difference?

Hodgkinson v. Martin (1929) BCCA

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| Facts | * A business went bankrupt; Hodgkinson is the bailiff and had appeared to take over the property (repossess) on behalf of the bank * Martin is the deputy minister of industries and industrial commissioner – physically forced the P off the premises; thought he was protecting the interests of the Crown in the property |
| Issue | * Does mistake impact liability? Does mistake impact damages? |
| Analysis | * Not the slightest injury occurred to P’s person, clothing or reputation; only nominal damages available * Damages are a measure of blameworthiness |
| Ratio | * Mistake does not mitigate liability. However, it may have impacts on damages (i.e. only nominal where no real damage/loss is evident). |

Ranson v. Kitner (1889 III)

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| Facts | * Kitner mistakenly shot Ranson’s dog when hunting, thinking it was a wolf |
| Issue | * How does mistake impact damages? |
| Analysis | * Intention is verified simply by the application of force; not relevant why you applied the force or thought you had a right to do it (except for damages); you are still liable |
| Ratio | * P is entitled to compensatory damages (value of the dog) only; mistake impacts grounds for aggravated or punitive damages. |

(c) Motive

* Motive is irrelevant when determining liability; however it may mitigate damages
* If you commit a legal act/an act you have a right to do, a bad motive doesn’t make you liable
* Example: Bradford v. Pickles [1895] AC 587
  + Pickles interfered with the towns water supply (he is upstream of the town)
  + HL said Pickles wasn’t liable because common law gives him the right to extract water from his land; downstream users do not have a right to continued flow
  + His motive to annoy or bargain with the town is irrelevant; he had a right to do what he did.

(d) Accident

* Term is used to refer to any situation in which the D unintentionally and without negligence injured the P; D cannot be held liable
* Absence of intent that distinguishes accident from mistake

(e) The Liability of Children and Those with a Mental Illness

* Apply different rules for determination of volition and intent
  + Understanding the nature and quality of his/her actions
* Vicarious liability is not placed on parents through tort law
  + However it is in several education statutes

**Battery** – Bettel v. Yim (1978 Ont Co Ct)

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| Facts | * Bettel and friends causing trouble in store. Yim grabbed him by and tried to ‘shake a confession out of him’ before calling the police. In doing so, he hit his head against Bettel’s nose; it was bleeding * Bettel sought damages for assault, his father sought special damages |
| Issue | * Can an intentional wrongdoer be held liable for consequences which he did not intend? |
| Analysis | * That is, can he be held liable only for reasonably foreseeable consequences? * Defence was that Yim only meant to shake him, not him in the head * Yes – the test of foreseeability does not apply to intentional torts. * “If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference.” * Refers to Cook v. Lewis – once battery is proved, D must exculpate themselves by disproving intent and negligence   + Ds evidence proves intent; he intended to grab and shake the boy |
| Ratio | * If intentional interference with the person (intentional tort) occurs, only an absence of intention or negligence will serve as a defence. The D will be held liable for all consequences; foreseeable or not. * No foreseeability limit to the damages in tort |

(f) The Burden of Proof in Sexual Abuse Cases

* Generally accepted that D is required to prove the absence of intention and negligent behaviour
* Excerpt: Non-Marine Underwriters, Lloyd’s of London v. Scalera [2000] SCC
  + Burden of proof question was controversial
  + Majority held that battery (sexual abuse) was an intentional tort. The P must only demonstrate the intentional act. The burden is on the D to establish consent
  + Minority held that a contrary assumption about consent was appropriate for some forms of bodily contact. The burden should be on the P to establish that the contact was harmful or offensive; meaning the D had no reason to think she was not consenting.
* NOTE: In BC there is no limitation period for actions based on misconduct of a sexual nature that occurred while the P was a minor irrespective of the P’s age at the time: *Limitation Act* (supp.), s. 3(1)(i)-(j)

**3.5 Assault**

* Defined as the intentional creation in the mind of another of a reasonable apprehension of immediate physical contact
  + Words alone not sufficient; generally requires some overt act
* Courts are moving away from the need for an overt act
  + Requires that the D intended to or deliberately created an apprehension of harm
  + Must be reasonable apprehension on the part of the P (objective standard), even if the D didn’t mean it
* If assault is a prelude to battery then assault is likely to be discussed superficially at trial; may impact damages

Holcombe v. Whitaker (1975 Alabama)

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| Facts | * P filed for divorce; D offered repeated threats indicating “If you take me to court, I will kill you”. This included showing up at her apartment and attempting to beat down the door * Defence argued that it could not constitute an assault, because it was merely a conditional threat of violence and because no overt act was involved; threat was conditional and not immediate |
| Issue | * Do words standing alone with no immediate apprehension of harm constitute an assault? |
| Analysis | * In this case, the D’s action of showing up at the P’s residence and banging down her door would constitute an overt act and therefore it could be an assault. Allowed the action to go to trial. * Up to the jury to determine whether the D had the apparent ability to effectuate the threatened act |
| Ratio | * An overt action is required in addition to words to constitute assault |

Police v. Greaves (1964 NZLR)

|  |  |
| --- | --- |
| Facts | * Police showed up to a domestic violence call. Inebriated D indicated “Don’t you bloody move. You come a…step closer and you will get this straight through your…guts.” The constable continued and more threats were uttered * Convicted of assault at the trial court, quashed by the Supreme Court. Heard by Court of Appeal. |
| Issue | * Does a verbal threat constitute an assault? |
| Analysis | * Ruled that holding a gun or a knife – indicating the “present ability to affect his purpose” – would cause the P to be in sufficient fear of harm * “There was a threat of violence exhibiting an intention to assault and…a present ability to carry the threat into execution.” |
| Ratio | * Coupled with conditional threats, the D’s immediate ability to carry out the treat will constitute an assault. * Prosser: “It is the immediate physical threat which is important, rather than the manner in which it is conveyed.” |

**3.6 False Imprisonment**

* Situations in which an individual’s movement is intentionally restrained
  + Does not turn on force; only the effect of the Ds actions or words
  + Must be total confinement; even if only for a short period of time
* False imprisonment depends on:
  + Where there is in fact detention
  + Whether that detention was authorized by law or by the detainee’s consent

Bird v. Jones (1845 QB)

|  |  |
| --- | --- |
| Facts | * A public bridge was closed down by a private individual for spectators of a boat race. Bird climbed over the fence; D (a policeman) stops him and prevents him from going further down the road * D asserted that P was at liberty to go in any other direction and that no actual force or restraint was used * Bird sued Jones for false imprisonment |
| Issue | * Can a party be liable for false imprisonment if he only partially restricts the movement of another in such a way that a way out is available? |
| Analysis | * Majority argue this confounds partial obstruction & disturbance with total obstruction & detention   + False imprisonment is not a mere loss of power; “includes the notion of restraint within some limits defined by a will or power exterior to our own”   + A prison may have boundaries that are large or narrow, visible or tangible, moveable or fixed, but it must have some boundary.   + Obstruction of passage was not a sufficient deprivation of liberty to constitute imprisonment   + Opted for the narrower position; the dissenting judge’s theory would mean any kind of unlawful obstruction would be actionable in false imprisonment * Dissent argued that partial containment and preventing the P from where he is going is enough for an action in false imprisonment   + Company was unlawfully obstructing a public way for their own purpose * Pleadings were not concerned with the amount of inconvenience the P was (or would be) expected to endure in choosing alternate routes; could be another reason for narrowly defining the case |
| Ratio | * False imprisonment requires that the P establish the source of the confinement or boundaries – can be large or narrow visible or tangible, moveable or fixed. * Mere obstruction of passage is not sufficient; requires total restraint. |

Notes & Questions

* FI requires that an individual intentionally prevents someone from leaving a space – but does a window (or another unreasonable means) count as an ‘avenue of escape’?
* False imprisonment can be committed if you’re not presently aware that you’re imprisoned (p. 73).
  + Murray v. The United Kingdom: Army suspected the occupants of being IRA members. For a time they blocked all the exits from the house. Before the occupants were aware they’d been confined, the army retreats. Several tort actions occurred including false imprisonment; although only nominal damages.
* Mixed case law exists on whether people who are legally in prison can be falsely imprisoned when further detained (i.e. solitary confinement). Generally Canadian courts have allowed the action; English courts have not

(a) False Arrest

* One category of false imprisonment; requires restraint to be imposed by an assertion of legal authority
* Can be brought against peace officers and private citizens
  + Peace officers can arrest on reasonable and probable grounds
  + Citizens can only arrest on absolute grounds
    - Code s. 494 (1) “Anyone may arrest without warrant a person whom he finds committing an indictable offence”
    - If accused turns out to be innocent, then an action in false imprisonment is available (no defense of reasonable and probable grounds)
* Increasing number of false imprisonment and arrest cases since the advent of the *Charter*
* Like assault, it is based on the reasonable perception and apprehension of the P
  + Requires an objective evaluation of the intent of the wrongdoer; had to create a feeling of restraint

Campbell v SS Kresge Co (1976 NSSC)

|  |  |
| --- | --- |
| Facts | * Campbell waited to be attended to; left store after employees took too long * Third party informed D (off duty policemen hired as security guard) that they had seen Campbell take something from the store; coupled with the unattended cart, D was suspicious * D confronted Campbell outside store and suggested she come in to “avoid embarrassment” * Campbell complied but stopped in store to demand info and offered purse to be searched; D let her go |
| Issue | * Does voluntary compliance constitute false imprisonment? |
| Analysis | * Court reject defense of a lack of action; P was indeed detained   + She felt obligated to comply with the D’s request & consented out of fear of the consequences   + D indicated to “avoid embarrassment” * Court rejected defence of legal authority; did not have absolute proof to arrest   + A citizens arrest can only be made if the citizen (store) finds someone committing an offense   + The D did not see actually see the P, the 3rd party was no longer available and she was innocent * FA applied from the time the D approached Campbell outside until she was told she was free to go; it wasn’t very long but it was real * Damages assessed at $500 for personal inconvenience and upset; felt the matter was handled discreetly |
| Ratio | * False imprisonment can be analogous to psychological imprisonment – intangible boundaries. No physical force is required for an action in false imprisonment. |

(b) Consensual Restraint – Herd v Weardale Steel [1915] Eng HL

|  |  |
| --- | --- |
| Facts | * D would not let P use the cage, the only exit, from the mine until his scheduled time * The D justified their refusal based on breach of contract; P had refused to do work he’d agreed to do |
| Issue | * Is an action in false imprisonment available if the D consented? |
| Analysis | * *Volenti nonfit injuria* – to a willing person, injury is not done * “Only entitled to the use of facilities on the terms on which he has entered” * Although the motive for making the D wait was to punish the D for refusal to work, his agreed upon conditions of entry were to go back up at the end of his shift * Uses example of a train – can’t get on and demand to get let off at any point in time |
| Ratio | * Consent can override the tort of false imprisonment. The question of whether or not the P can withdraw consent depends on the facts.   + False imprisonment is likely not actionable when an individual is subject to the terms of the facility they willingly entered   + However, a different set of facts could have changed this case and the outcome   + Doing what you have a right to do with a bad motive doesn’t make it wrong |

**3.7 Malicious Prosecution**

* Essentially, the improper initiation of criminal proceedings
  + Can be through direct or indirect interferences
  + Derived from negligence; requires demonstration of damages
* Historically a private action among private individuals; currently an action against ‘vengeful’ witnesses and police/prosecutors
* Witness cannot be held liable for merely providing information to the police or testifying
  + Police officer was acting on good faith of the information they received
  + Witness must be driving force of the proceedings – by laying the charge or lying to/pressuring the police
  + Must have:
    - Falsely and maliciously given the police information that the accused committed a crime and offer to testify, making it clear that they want the accused prosecuted
    - The offered testimony must have been available only to the witness, such that the police cannot exercise independent judgement in the matter
* Action is limited almost exclusively to penal matters; however some civil actions available
* Four requirements to establish (Nelles v. Ontario [1989] SCC):
  1. The proceedings must have been initiated by the D;
  2. The proceedings must have terminated in favour of the P;
  3. The absence of reasonable and probable cause;
  4. Malice, or a primary purpose other than that of carrying the law into effect.

\*\*Must also established a loss or damage

Nelles v. Ontario [1989] SCC

|  |  |
| --- | --- |
| Facts | * P was charged with 1st degree murder * After a publicised preliminary hearing, no evidence emotion was successful * P sued police officers, Ontario AG and Crown for false imprisonment, malicious prosecution, negligence and violation of her Charter rights |
| Issue | * Does the Crown possess absolute immunity to actions in malicious prosecution? |
| Analysis | * Crown argued that they were acting on behalf of the legal system; judges are immune from civil action with respect to legal proceedings   + Should not be exposed to this type of lawsuit; would inhibit them from doing their duty * D required to refute evidence regarding the 3rd & 4th elements (police and/or AG)   + If proven, this almost always amounts to a breach of the D’s *Charter* rights   + 3: Judge described 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…would reasonably lead any ordinarily prudent and cautious man…to the conclusion that the person charged was probably guilty of the crime imputed” (Hicks v. Faulkner)   + 4: malice = improper purpose   Policy Considerations   * Shields the Crown from civil liability in cases of abuse * The existence of an absolute immunity strikes at the very principle of equality under the law; would be akin to granting a license to subvert individual rights * Argues immunity is not necessary to prevent a flood of litigation; already an onerous burden of proof; very difficult to prove malice on behalf of a public official * Criminal or professional disciplinary proceedings are not adequate to compensate the victim |
| Ratio | * The Crown does not have absolute immunity in malicious prosecution actions. However, the legal burden of proof is on the P to prove all 4 elements of the tort. The D must refute the 3rd and 4th elements. |

Notes and Questions

* In Kvello v. Miazga, the trial judge stated that you can infer malice from the total absence of reasonable cause
* SCC overturned; a lack of reasonable grounds (3) and malice (4) should not be conflated
  + Where the existence of reasonable & probable grounds is sufficient to prevent the charge of malicious prosecution. BUT, a lack of reasonable grounds does not create an assumption of malice.
  + Where the prosecutors subjective belief of guilt irrelevant; only applicable to civilians
* Mixed case law around actions for negligence when malicious prosecution is not available.
  + Can apply for negligence if physical harm; case by case for economic, reputational or emotional harm

(a) The Tort of Abuse of Process

* Available by statute in AL, BC, SK and ON
* Focuses on the misuse of civil proceedings for purposes other than the resolution of the claim; must prove:
  1. The D brought a civil action
  2. The D did so for some extrinsic purpose
  3. The D undertook, or threatened to undertake, some overt act, other than the litigation itself, in order to further the improper purpose;
  4. The P consequently suffered a loss
* Do not have to prove the how the proceedings ended or lack of reasonable and probable grounds
* Alleged frequently, but very seldom successful as it can be difficult to demonstrate “some overt act” and the improper purpose of the D

**3.8 Intentional Infliction of Nervous Shock**

* Not a medical term; it is a label that covers psychiatric injury
  + Recurring Question: Does it have to be an illness or a disturbance less than an illness?
  + The application of liability for a state of mind requires a high standard of proof
* We deal with the rare cases where the common law does to choose to respond
* N.B. This is different from cases where psychological harm is included in assessment of damages for some other tort – i.e. emotional harm from battery

Wilkinson v. Downton (1897 QBD)

|  |  |
| --- | --- |
| Facts | * Downton told Wilkinson that her husband was smashed up in an accident and she needed to fetch him * Resulted in a severe shock to Wilkinson’s nervous system and physical sickness; she also spent money to attempt to fetch him * P took action in deceit/fraud in which the costs of travel were immediately granted; deemed a “misrepresentation intended to be acted on to the damage of the P” |
| Issue | * Is a practical joke actionable as an intentional infliction of nervous shock? |
| Analysis | * A person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on (tort of deceit)   + Applied to action in deceit/fraud, however the P’s sickness was not an action she took as a result of the information she received * **Intent:** The D wilfully said something that would likely cause harm to the P   + Although no physical harm, the impact was obvious. Judge **imputed intention to D.** * **Reasonableness of Outcome:** Not too remote or unnatural a consequence; the effect was a reasonable outcome for a person of an ordinary state of health and mind   + Must be a natural, probable or necessary consequence of the D’s act   + In this case, the argument that the effects were unforeseeable is not an adequate defense * Nervous shock cannot have a merely mental origin; this involved a physical response in the P * No precedent existed for these cases; judgement of the P for £100 |
| Ratio | * Actions in nervous shock require the D to have intent to do or say something that is intrinsically shocking. The damage suffered by the P must have been reasonably foreseeable by the D and real (manifested in physical symptoms). * Treated as an intentional tort. |

Radovskis v. Tomm (1957 Man QB)

|  |  |
| --- | --- |
| Facts | * Young daughter was raped by father; mother claims damages for nervous shock |
| Issue | * Is there an action in nervous shock? |
| Analysis | * No evidence of visible and provable illness as a result of nervous shock   + Law is uncomfortable with unverifiable allegations of harm; mental illness or injury is an unclear test * Fear or acute grief is not sufficient; question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act   + Not a direct consequence; she was a bystander |
| Ratio | * Nervous shock claims require evidence of a visible and provable illness. They must be a natural or direct consequence of the wrongful act. |

Samms v. Eccles (1961 Utah)

*N.B. Case provided in contrast to commonwealth authorities*

|  |  |
| --- | --- |
| Facts | * Samms takes action for ‘severe emotional distress’ due to Eccles’ persistent indecent proposals * Eccles called her for months and visited her home; he exposed himself * She “regarded his proposals as insulting, indecent and obscene”; seeks damages for emotional distress |
| Issue | * Can the P take action in nervous shock? |
| Analysis | * Courts wary of granting damages due to the subjective/volatile nature of emotional distress; often require some other overt tort * “Where the act is wilful or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results.” * Where no physical injury, the D must have intentionally engaged in some conduct toward the P:  1. With the purpose of inflicting emotional distress or, 2. Where any reasonable person who have foreseen the consequences, and 3. His actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality |
| Ratio | * American nervous shock cases accept a broader range of harm; that is, harm without physical symptoms * Accepted where the D’s actions were committed with the purpose of inflicting distress, the outcomes were reasonably foreseeable, and where the D suffered only mental anguish as a result of objectionable or morally apprehensible conduct. |

Excerpt: Mustapha v. Culligan of Canada Ltd.

* SCC suggests it is possible to recognize psychological harm as compensable without physically manifestations

Excerpt: Wainwright v. Home Officer [2004}

* Woman and son were visiting another son in prison; mother and son were strip-searched. They sued for invasion of privacy and nervous shock based on Wilkinson
* However, unlike Wilkinson, the judge characterizes the precedent as a negligence case.
  + Court unwilling to impute intention to the D, the liability of the D would then extend beyond the demonstrated physical harm.
* Do not overrule Wilkinson, simply assert that negligence would be a sufficient cause of action

(a) The Broadening of Liability

* Canadian courts have been generously interpreting the facts to met the requirements by rephrasing the them in broader terms; by requiring mental illness be proven by expert testimony
* The US requires only emotional distress

(b) The Innominate Intentional Tort

* Some authors have viewed Wilkinson as creating an ‘innominate intentional tort’ for claims that do not fit into the traditional definitions of torts
* However, per Mustapha and Wainwright, it is likely that most cases are able to solved via a negligence claim.

10/9/2012

© Nervous Shock and Negligence

1. Negligence which causes harm (Mustapha)
   * Indirect harm would include negligent actions which could foreseeably lead to psychiatric injury; subject to “robust” person standard
2. Harm done to A where a lawsuit is brought by B
   * Negligence results in immediate shock to the primary victim; primary victim who has the injury but the secondary victim or bystander seeks claim in nervous shock
   * This is potentially recoverable in negligence – must be a foreseeable injury in addition to other requirements. See negligence.

**3.9 Privacy**

(a) Introduction

* Challenging as a legal concept; shortcomings in tort actions has resulted in several legislative schemes
  + Public law regulation of access to personal information in the *Freedom of Information and Privacy Act*
  + The statutory tort of violation of privacy is created by the British Columbia *Privacy Act* (supp)
    - Other provinces including SK, MB, NS and NL also have privacy statutes
* Statutory cause of action considered an addition to the common law
* Common law would provide redress only if you could fit your claim into one of the existing torts.
  + Exception: “Appropriation of personality”
    - Very limited; privacy tort only in that you should have control over your image/public persona
    - Example: unauthorized use of someone’s photographs
* This was the only movement in the common law until Jones v. Tsige

(b) A Common Law Tort Action for the Invasion of Privacy? Motherwell v. Motherwell (1976 ABSC)

|  |  |
| --- | --- |
| Facts | * Mentally unstable D was continually harassing and making false allegations against the Ds (her family) * Family members claimed in invasion of privacy and nuisance; won at trial and D appealed |
| Issue | * Can nuisance be used in lieu of a statutory civil claim of privacy? |
| Analysis | * Appellate court agreed that invasion of privacy was not an existing tort * However, precedent shows that the tort of nuisance can be expanded where warranted. They have a claim in private nuisance for the invasion of their privacy through the abuse of the telephone system. * N.B. Nuisance requires an interference with the enjoyment of land.   + However, nuisance protects landowners only. Trial judge erred in law by allowing the claim to be expanded to those in the family who were not landowners. |
| Ratio | * Where statutes have not created a civil claim in privacy, privacy claims may be actionable as a nuisance. However, this should only be available to landowners. |

(b) The Statutory Protection of Privacy

* Although not explicitly stated in the *Charter*, this interest is an integral part of many of the fundamental freedoms in s. 2 and the legal rights in ss. 7-15

Hollinsworth v. BCTV (1999 BCCA)

|  |  |
| --- | --- |
| Facts | * P had hair replacement surgery. He consented to have the procedure filmed for instructional purposes only. Film was provided to doctor and Look International Enterprises. * Seven year later, the cameraman (Mr. Cable, BCTV) is working on a similar story. He and a co-worker visit the doctor and LIE who speak openly and hand over the film. BCTV employee was assured there was no concern regarding confidentiality. * Once used on TV, Hollinsworth took action against the LIE employee (Mr. van Samang), LIE and BCTV and others for defamation, breach of contract and breach of the *Privacy Act*. * Hollinsworth was unsuccessful against BCTV, but received $15,000 in damages from Mr. van Samang and LIE. Hollinsworth appealed. |
| Issue | * Can a party be held liable for an action in privacy if they were unaware their actions were a breach of privacy? |
| Analysis | * BCTV could not be held liable in defamation because it did not make a false statement; no breach of confidence as they were not aware the videotape was confidential * *Privacy Act* states “It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another”   + Word “wilfully” requires that BCTV be aware they would be violating privacy; they weren’t   + Phrase “claim of right” can be defined as “…an honest belief in a state of facts which, if it existed, would be a legal justification or excuse…”   + BCTV had reason to believe their use of the videotape was justified, they had a claim of right |
| Ratio | * A statutory tort action in privacy requires that the D act (1) wilfully and (2) without a claim of right (honest belief). That is, they must be aware of the breach of privacy and without an honest belief that their actions were inappropriate. * P must establish the intent or knowledge of the D |

(c) Subsequent Common Law Developments

* Slow movement as courts recognize need for common law tort of invasion of privacy; difficult to balance right to privacy and freedom of expression
* Harassment often considered an ‘invasion of privacy’

Jones v. Tsige (2012 Ont CA)

|  |  |
| --- | --- |
| Facts | * In abuse of her access, Tsige accessed Jones banking records at BMO 174 times over four years   + The information was not published, distributed or recorded in anyway * Jones did not know Tsige; Tsige had entered a common law relationship with Jones’ ex-husband and wanted to confirm financial information * Ontario does not have a provincial Privacy Act |
| Issue | * Does Ontario common law recognize a right to bring a civil action for the invasion of personal privacy? |
| Analysis | Trial Judge   * No freestanding right to dignity or privacy in the *Charter* * Reviewed jurisprudence which suggests this tort may exist; but suggested it be handled by statute * TJ awarded $35K in costs; felt J had not taken reasonable settlement offers and had litigated aggressively   Appeal Judge   * Reviewed academic commentary; right to privacy is necessary in today’s fastpaced communication and social structures * **Prosser identified four different torts with common themes/names based on American jurisprudence:**   + 1. **Intrusion upon the P’s seclusion or solitude, or into his private affairs.**        - An expression provision of the BC Privacy Act s. 1     2. Public disclosure of embarrassing private facts about the P.        - May be recognized at common law (Re: Hollinsworth v. BCTV)        - See Breach of Confidence     3. Publicity which places the P in a false light in the public eye.        - Not likely to be recognized by Canadian courts; more likely to be an action in defamation     4. Appropriation, for the D’s advantage, of the P’s name or likeness. * As “appropriation of personality” common law tort and s. 3 of BC Privacy Act * **SCC has consistently interpreted s. 8 *Charter* regarding protection against unreasonable search and seizure, as protecting the underlying right to privacy**   + The federal legislation, PIPEDA, would hardly provide Jones an adequate remedy * This tort exists in several common law jurisdictions or is at least moving towards it   + Makes explicit what is already implicit * **Affirmed the existence of a right of action for intrusion upon seclusion (key features p. 28, para 71)**   + Intentional tort; no requirement for harm     1. The D’s conduct must be intentional or reckless     2. D must have invaded, w/out lawful justification, the P’s private affairs or concerns     3. A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.     - N.B. Awards must be a conventional amount as they do not require proof of harm; just intrusion itself     - N.B. Aggravated and punitive damages are available but should only be used in exceptional circumstances |
| Ratio | * A cause of action in intrusion upon seclusion (form of privacy) without proof of harm exists in Ontario with damages available up to $20,000. |

Excerpt: Watts & Kleamt (2007 BCSC) p. 31, para 84 (sup)

|  |  |
| --- | --- |
| Facts | * D was listening to phone conversations because she thought her neighbours were dealing drugs * D overheard call from P’s mother warning P that she’s about to be investigated for welfare fraud * D tells the ministry; mother loses her job * Mother sues the D for violation of privacy |
| Issue | * Do privacy claims exist if P cannot show ‘clean hands’? |
| Analysis | * Requires reconciliation b/w concerns for privacy and public policy (i.e. dishonest employees)   Judgement   * Can’t receive damages for financial loss of her job (i.e. lost wages) as she was justly fired * But nevertheless, her privacy was violated in a severe way * Awarded $30K for emotional distress and upset (due to job loss) |
| Ratio | * An action in privacy is available even if the outcome was due to the wrongful conduct of the P. However, damages may not be available for the outcome where the outcome was just. |

10/16/2012

(e) Breach of Confidence

* Equitable doctrine; when someone misuses information told to them in confidence
  + Subjective standard of embarrassment; relative to public interest in disclosure
* Used increasingly to protect sensitive business and personal info – trade secrets, customer lists, etc.
* Must establish:
  + The information was confidential in nature
  + It was disclosed in circumstances creating an obligation of confidentiality
  + Its unauthorized use was detrimental to the confider

4. INTENTIONAL INTERFERENCE WITH CHATTELS

**4.1 Development of the Actions**

1. Property:
   * Definition of Chattel: Movable and tangible forms of property; irrespective of size
   * Transferred through the intention of the transferor and transferee
2. Contract:
   * Used to transfer; determines time, validity and enforceability
3. Tort:
   * Concern with possession; easier to determine/evaluate than ownership

* All three torts protect the right of the immediate possessor against interference with that possession
  + Mistake or claim of right does not serve as a defence
* All three also require intent as a prerequisite to liability; where intent requires only the intent to commit the act
  + N.B. Where negligence is available if intent cannot be proved

**4.2 The Causes of Action**

(a) Trespass

* Act: The D’s intentional **physical interference with the chattel**
  + Developed in response to inadequacy of criminal theft
* Interference with the chattel required
* No requirement for exercise of dominion over the chattel
* D never required to be in possession; the affected goods can be in the claimant’s possession
* Damages are only available for actual demonstrable damages/losses

(b) Detinue

* *Sur bailment*
  + Act: **When the D will or cannot give back something that was lent to them by the P**
    - Bailor sues the bailee for return of the goods
  + No interference with the chattel required
  + Exercise of dominion over the chattel required
  + D/bailee does not have to be in possession of the chattel for action to be taken
    - B/c of the obligation to the bailor to return the chattel; unless lost through no fault of their own
  + Damages include:
    - Return of the chattel + damages from detention of chattel
    - Value of the chattel (at time of judgement) + damages from detention of chattel
    - Either or as elected by the D
* *Sur trover*
  + Act: **Finder, thief or purchaser interferes with right to immediate possessor’s rights and refuses to give up possession**
    - Used against a finder, thief of or purchaser who was unaware of the claimant’s rights
  + No interference with the chattel required
  + Exercise of dominion over the chattel required
  + D must still be in possession of the chattel
  + Damages include:
    - Return of the chattel + damages from detention of chattel
    - Value of the chattel (at time of judgement) + damages from detention of chattel
    - Either or as elected by the D

(c) Conversion (Trover)

* Act: **About “keeping the P out of possession by wrongfully appropriation the chattel for “one’s own use”**
  + Focused on whether the D, by some positive act, converted the goods thereby depriving the P of possession
* No interference with the chattel required
* D does not still have to be in possession of the chattel
* Requires proof of loss to be actionable
* Damages only include the value of the chattel (at the time of conversion) + consequential losses

Why Detinue over Conversion?

* Specific Recovery – detinue can be used for recovery of the chattel rather than damages
* Calculation of Damages – conversion uses value at time of act; detinue at time of trial

Clarification between Damages in Conversion & Detinue:

* Detinue = Value at Time of Judgement + Damages for Detention
  + Damages for Detention = loss of related to loss of use
  + Where an increase in value of the property is reflected in the increased value at the time of judgement
* Conversion = Value at Time of Conversion + Consequential Losses
  + Consequential Losses = losses related to the loss of use + the increased value of the property (post-conversion)
* However, a **“failure to mitigate”** may be used as a defense against the increased value of property if the D can prove that the P did not take reasonable steps to avoid the loss
  + For example, if they were waiting to get their shares back, may assert that the P should have replaced the share certificates to avoid the losses from increased value

Clarification between Trespass and Detinue/Conversion:

* Trespass occurs where there is direct interference with the chattel but no exercise of dominion over the chattel; no interference with the right to immediate possessor’s right to possession
* While trespass is generally occurs with detinue/conversion, the latter causes of action can occur without trespass
  + i.e. can exercise dominion over something without physical touching it

Summary of Interference with Chattels Causes of Action

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Trespass | Detinue sur bailment | Detinue sur trover | Conversion |
| Interference with the Chattel | ✔ | ✖ | ✖ | ✖ |
| Continued Possession by the D | ✖ | ✖  (unless no fault loss) | ✔ | ✖ |
| Exercise of Dominion over Chattel | ✖ | ✔ | ✔ | ✔ |
| Specific Restitution Available? | ✖ | ✔ | ✔ | ✖ |
| Value of Chattel Available? | ✖ | ✔  (at time of judgement) | ✔  (at time of judgement) | ✔  (at time of conversion) |
| Demonstrated Consequential Damages | ✔ | ✔ | ✔ | ✔ |

\*refusal to deliver is not necessarily conversion; must exercise dominion over chattel – i.e. warehouse who refuses to deliver chattel because you were not the one who stored it there; no intent to possess

NOTES

* Concern with possession can result in unusual case of Costello v. Chief Constable of Derbyshire [2001] Eng
  + Costello sold stolen cars; police lawfully seized car but were unable to determine true owner
  + Thief claimed in conversion; CA upheld as according to property law principles, the thief of the car had a better claim to possession than everyone except the true owner
* Chain of Possession
  + Good faith does you no good; trespass to property is strict liability
  + If wrongful possession exists in the preceding chain of possession, none of the subsequent possessors can receive good title; irrespective of whether or not they purchased in good faith
* However, if a contract exists to pass title, but the contract was voidable on the basis of fraud, can the fraudulent purchaser transfer good title?
  + That is, if I sell my car to someone and the cheque bounces, can they sell the car to a third party prior to my voiding the contract? Can the third person maintain title of my car? Yes, they purchased in good faith
  + Re: Lewis v. Avery; mini cooper
* *“nemo dat quad non habet”*
  + Cannot transfer title to something you don’t own

**4.3 Trespass to Chattels**

Foulds v. Willoughby (1841 Ex)

|  |  |
| --- | --- |
| Facts | * Claimant got on board ferry boat with two horses; P ‘behaved improperly’ * D put horses on shore in hopes of getting rid of P; D turned horses loose * Next day, horses were seen in the stables of the Ds brother-in-law * Claimant sent for them; brother wanted payment for their keep or they would be sold to cover costs * P brought action in conversion; meanwhile the horses were sold * Settled in favour of claimant; court of appeal considered the ground of misdirection |
| Issue | * Is mere asportation (putting the horses on shore) a case of conversion? |
| Analysis | * Conversion requires that the P was deprived of possession * D did not take possession of the horses himself or deprive the claimant of possession   + Did not exercise any right over them and did not destroy or consume them * However, he did physically interfere with the claimant’s chattels (trespass) * Overturned; new trial to be undertaken |
| Ratio | * Trespass is available if physical interference with the chattel is proved; it does not require an act which interferes with the P’s right to possession. However, damages in trespass can only be calculated based on demonstrated damages (actual loss). * Temporary interference with chattel may only be trespass; not detinue or conversion   + Conversion would have given him the value of the horses; forced sale |

**4.4 Conversion**

(a) General Principles: Mackenzie v. Scotia Lumber Co. (1913 NSSC)

|  |  |
| --- | --- |
| Facts | * Ps raft floated away; two of the Ds rafts floated away * D sent employees to retrieve his rafts, the employees brought back all three rafts * D used the P’s raft for a short period of time before realizing the mistake. He returned the raft to the P at that time. |
| Issue | * If the chattel was returned, is the P eligible to receive damages in conversion? |
| Analysis | * Conversion: the D used the chattel as if it were his own, even if it was a short period of time * D was held vicariously liable for his employees’ actions * However, the P is only entitled to receive nominal damages   + Can’t receive the chattel back and the full value of the chattel |
| Ratio | * Conversion is defined as using or taking over something as if it were your own (exercise of dominion over the property). However, if the chattel is returned, the P is entitled to nominal damages only. * A strict liability tort.   + Question remains if the claimant could refuse the goods and require a forced sale; the judge was not forced to answer this question because the P did take the it back   + However, may be seen as a **failure to mitigate** (see below) |

Notes:

1. English court has held that reading someone else’s documents (i.e. mail) was wrongful interference of goods.
2. Just as ownership may be acquired over previously un-owned property (i.e. *ferae naturae*), so too rights of ownership may be given up through abandonment.
   * However, it requires both proof of abandonment and intent to relinquish the goods
   * Must make reasonable efforts to allow the former tenant to retrieve their goods
3. Strict liability means there are few defenses for individuals who were unaware they were in unlawful possession of a chattel.
4. Interference alone may constitute conversion, however “the court must be satisfied either that the D absolutely denied the P’s rights or that the D asserted a right that was inconsistent with the P’s rights.”
5. May attempt to use *jus tertii* (right of a third party) as a defense against claimant/possessor with permission from absolute owner. Seldomly successful as court deals with only the property interest present in the court.

(b) Conversion of Cheques an Other Unusual Chattels: 373409 Alberta Ltd. (Receiver of) v. BMO (2002 SCC)

|  |  |
| --- | --- |
| Facts | * Lakusta director of 373409 and Legacy Holdings Ltd. He recv’d a cheque for the sale of an automobile payable to 373409. He altered the cheque by adding ‘/Legacy’ & deposited it in the Legacy bank account. * Receiver of 373409 is suing BMO for conversion for depositing the cheque into Legacy’s bank account. |
| Issue | * Is an action in conversion available against the dispossessor of a cheque? |
| Analysis | * An action in conversion may be brought by the rightful holder of a cheque against a wrongful dispossessor (bank); re: strict liability action   + References BOMA case whereby the bank was held liable for converting cheques receive from the companies accountant acting fraudulently   + Only the dealing itself must be intentional; not an awareness of the wrongdoing * Lending institution’s liability is predicated upon:   1. Finding that the payment upon the cheque was made to someone other than the rightful holder   2. AND that such payment was not authorized by the rightful holder * Therefore, if 373409 authorized the Bank to deposit the cheque into Legacy’s account, then it cannot be held liable in conversion   + Lakusta had provided BMO authorization to deposit the cheque (he endorsed cheque)   + Not necessary to show whether 373409 transferred title of the cheque to Legacy * As sole director & shareholder Lakusta’s actions within the scope of authority delegated to him |
| Ratio | * An action in conversion may be brought by the rightful holder of a cheque against a wrongful dispossessor. However, their liability may be mitigated if they were authorized by the rightful holder. * Authorization is case-specific and fact-specific. |

Notes:

* Conversion does not apply to land (including buildings)
* Conversion is only available for tangible property
  + Can be remedied through the creation of a document that records or evidences the intangible property
  + Such as cheque, insurance policies, share certificates and guarantees
* Excerpt: OBG Ltd. v. Allan
  + Brought action for conversion of contractual assets; tort should not be restricted to tangible goods
  + Dissenting Lord Nicholls “The existence of a document is essentially irrelevant. Intangible rights can be misappropriated even if they are not recorded in a document.”
* Some American courts have held that trespass applies to computers including the IP held there within

(c) Remedies for Conversion: Aitken v. Gardiner (1956 Ont HC)

|  |  |
| --- | --- |
| Facts | * D unknowingly purchased stolen share certificates; sold some before the action came to trial * J Spence ordered the remaining certificates returned; both conversion and detinue *sur trover* available * Share value had risen significantly |
| Issue | * Could the D be liable in detinue *sur trover*? |
| Analysis | * Re: conversion gives value at time of conversion while detinue *sur trover* gives value at time of trial   + However, the D no longer has possession of the chattel. Only conversion actionable. * Consequential losses allowed P to recover damages which he/she may have sustained that are “not too remote”; includes the increase in share value, because if they had been in the P’s possession, they may not have been sold. * J provides damages based on current value of shares, but *obiter* indicates that the proper date of valuation is the date of conversion |
| Ratio | * Damages for conversion should be calculated from the date of conversion. However, additional recovery may be available for consequential losses/damages.   + Conversion Damages = Value at Conversion + Consequential Losses   + Consequential Losses = losses related to the loss of use + the increased value of the property |

Notes:

* If a specific remedy is imposed and the chattel returned and the chattel has been improved/repaired while in the D’s possession, should the P be liable to the D for unjust enrichment?
  + Example, dispute between owner and trainer of “Airbud”. Owner sued for conversion. Opted not to allow for a specific remedy as the value of the dog had increased significantly during the trainer’s possession. Returning the dog would create a case for restitution. Also did not allow for consequential damages.
* Claim in conversion takes priority over other personal debts; relevant when the tortfeasor is insolvent

**4.6 Detinue**

General & Finance Facilities v Cooks Cars (1963 CA)

|  |  |
| --- | --- |
| Facts | * Claimants issued writ for “the return of a mobile crane index No. OMF 347 or its value and damages for detaining the same” * Cooks Cars received crane from salvage company and refuse to give it up to General Finance Facilities * Appealing that the damages were inaccurately assessed; should have independently assessed the value of the crane and consequential losses |
| Issue | Should the J have separately assessed the value of the crane and the consequential damages? |
| Analysis | * Since D is still in possession and refuses to return, both *detinue sur trover* and conversion available * Conversion described as forced sale; but only once payment for the chattel is received. The judgement itself “does not divest the P of his property in the chattel”. * Since detinue allows for specific restitution, J should have evaluated the value of the chattel and the damages for detention separately * So yes, he should have assessed separately. But why?   + Consequential losses (conversion)/damages for detention (detinue) are available in both causes of action; irrespective of the potential for an equitable remedy (return of the chattel) * Though both may provided damages, the amount of damages may differ |
| Ratio | * Damages in detinue are based upon the value of the chattel at the time of judgement because it is a continuing tort. Because of the potential for specific restitution, value of the chattel and the damages for detention must be assessed separately. |

Aitken v. Gardiner (1956) Ont HC

|  |  |
| --- | --- |
| Facts | * D stole share certificates from P and sold them * P asserts (1) D must have chattel in his/her possession and (2) that, if the D no longer has possession, he/she parted with it wrongfully * D submitted that the *detinue sur trover* is restricted to bailors |
| Issue | What constitutes *detinue*? |
| Analysis | * *Sur trover* covers ‘purely tortious wrongs’; including wrongful conversion and wrongful detainer * *Sur bailment* only covers agreement b/w amenable parties; available only if D had right to immediate possession and improperly departed with it * D had no right to possession; therefore only *detinue sur trover* should have been available |
| Ratio | If the D no longer has the goods in his/her possession, *detinue sur bailment* is available only if it can be shown to have wrongfully parted with the goods.  If the D never had a right to possession (bailee), then onlyconversion is available. |

**4.7 Recaption & Replevin**

* Recaption:
  + When a dispossessed owner simply takes back the goods; self-help remedy
  + Limited to results that can be achieved without the use of unreasonable force and breach of peace
* Replevin:
  + Section 57 of the *Law and Equity Act* (supp.) allows a court to make an interlocutory order for the surrender of specific property to a claimant who is suing for the recovery of the property. It overlaps almost totally with Supreme Court Civil Rules 10-1 (4) and (5) (supp.). Note also the interpleader procedure in rule 10-3, which applies if person is holding property that is subject to conflicting legal claims but the person him- or herself claims no beneficial interest in the property.

5. INTENTIONAL INTERFERENCE WITH REAL PROPERTY

**5.1 Trespass To Land**

* Defined as the direct and intentional physical intrusion onto the land in the possession of another; strict liability
* Possession not title based; would allow a squatter to take action for land he/she does not own

Entick v. Carrington (1765 CP)

|  |  |
| --- | --- |
| Facts | * D broke into the P’s house and stole papers; D claimed authority under a warrant from the Secretary of State; sued in trespass |
| Issue | * What defences are available in trespass? |
| Analysis | * The right to property is sacred in society; set aside only by positive law * Do not have to be aware of the Ps possession |
| Ratio | * Trespass to land is a strict liability tort set-aside only by positive law. Though damages may be nominal, it is actionable without proof of loss. |

Turner v. Thorne (1960 Ont HC)

|  |  |
| --- | --- |
| Facts | * Thorne owns delivery service; co-D Thorne is delivery driver * Thorne mistakenly identified delivery location; when no answer he placed packages in garage * Ps arrived late at night and did not see packages; he tripped over them, sustaining serious injuries * P takes action in trespass for damages related to injury |
| Issue | Does the strict liability of trespass extend to incidental damage resulting from trespass? |
| Analysis | * “A trespass…may be committed by the continued presence on the land of a structure, chattel or other thing which the actor has tortuously placed thereon, where or not the actor has the ability to remove it” * An innocent mistake does not relieve the trespasser of liability or for any of the results thereof |
| Ratio | * All harm caused by a trespass, including personal injury, can be subject to a damage award; remember per Bettel v Yim, that in intentional torts you are responsible for all harm; not necessary to be foreseeable * Example of a continuing tort – whereby damages are available for continuing damages * Mistake is not a defence for trespass and the results/consequences of a trespass. |

* However some cases do exist where the D was absolved of liability for the unforeseeable consequences of his trespass.
* Canadian courts have awarded punitive damages in trespass where the action was high-handed or arrogant

6. THE DEFENCE OF CONSENT

**6.1 Introduction to the Defences**

* Though many intentional torts are strict liability, some defences exist
* Defence of consent is a complete defence which requires the D to prove that they were reasonably under the apprehension that consent was given
  + Claimants can give up or waive right to action; i.e. if you sign a waiver, you agree to give up rights to sue
* But just how far does the consent go? Can be tricky to determine and/or assess
  + Viewed narrowly; can be found explicitly/implicitly through participation, demeanour or other behaviour
* Defences are not mutually exclusive; can use multiples where only one is required to absolve liability

**6.2 General Principles of Consent**

* Canadian courts treat consent as a defence that the D must plead and prove
* To prove consent, the D must prove that the P agreed to the act giving rise to the tort; the P is then viewed as consenting to the risks normally inherent in that act

(a) Implied Consent: Wright v. McLean (1956) BCSC

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| --- | --- |
| Facts | * Boys were throwing mud at each other; P drove by on his bike and stopped to join “want to fight?”; boys continued throwing mud at each other * P was hit in the head with something; undetermined if it was mud ball or rock |
| Issue | How narrowly is consent construed? |
| Analysis | * Harm suffered when consented to, within limits, not a cause of civil action * Court found the P voluntarily participated in the mud fight; no ill will on the part of the D’s and acts were within the ‘limits of the game’ |
| Ratio | * Consent to an activity is viewed as consent to the normal risks of the activity. |

Excerpt: Elliot and Elliot v. Amphitheatre Ltd. [1934] Man KB

* Do spectators implicitly consent to injuries incidental to attendance at sporting events?
* D was absolved of liability on the basis that the P was an amateur hockey player himself and was aware of the risks and protections commonly provided; subjective evaluation of consent

(b) Exceeding Consent: Agar v. Canning (1965) Man QB

|  |  |
| --- | --- |
| Facts | * Hockey game; D took possession of the puck; P attempted to hook him and in doing so, hit D in the back of the neck * D retaliated by hitting P with blade of stick between the nose and right eye |
| Issue | * Are torts within sports covered by implied consent? |
| Analysis | * No existing precedent * Those engaged in sport generally accept the risk of injury (Wright) and waive their rights to action; provides immunity to players engaged in sporting events * Some limit must be placed on a player’s immunity; fact specific making it difficult to ‘draw a line’ * Circumstances showing a definite resolve to cause serious injury should not fall within the scope of implied consent * Reduced damages by 1/3 on account of provocation; not argued by defence |
| Ratio | * Players engaged in sport accept the risks of the activity. However, some limit must be placed on the immunity of players on a case and fact specific basis. * i.e. a definite resolve to cause serious injury |

* Canadian courts have become less tolerant of hockey violence over time; some forms of conduct are “too dangerous for the players to consent to”
* R. v. Jobidon (1991)*:* SCC has held that in a consensual fight between adults, the combatants’ consent is vitiated if they “intentionally apply force causing serious hurt or non-trivial bodily harm to each other”
  + Court incorporated a common law concept in the statutory language of s. 265(1)(a) which specifies that assault is limited to situations in which force is applied to another without consent
* R. v. Paice [2005] SCC clarified that consent will only be negated if the accused both intends and causes serious bodily harm

(c) Competency to Consent

* Must be capable of appreciating the nature and consequences of the act to which it applies
  + No reasonableness judgement; law will uphold competent wise and unwise decisions
* May be invalidated on factors such as age, physical or mental illness, intoxication or other incapacitating factors
* Competency to consent can also be governed by statute – i.e. sexual assault (age of consent) and for consent to treatment, counselling and care

(d) Duress (Coercion): Latter v. Braddell (1880) CP

|  |  |
| --- | --- |
| Facts | * Housemaid is forced by her employers to undress and undergo a pregnancy examination against her will. She sues for battery. Defending doctor claims consent. |
| Issue | * Does duress negate consent? |
| Analysis | * “Consent to which the will was not a party”; consented due to force or fear of violence * Lopes J: Consent secured by force or threat of force (duress) is not valid * Lindley J: Argued that there is no distinction between consent and reluctant obedience; no evidence of coercion (threat or otherwise). No claim exists. |
| Ratio | * Lindley was upheld at the CA * At common law, duress requires the threat of physical violence. Psychological pressure is not sufficient. |

**6.3 Factors Vitiating Consent: Fraud, Mistake, Duress and Public Policy**

* Where consent procured by improper bases vitiates consent; it was not “real” because it was based on a misapprehension of the nature of the act OR that it should not be a defence for reasons of public policy

(a) Fraud (Deceit)

* Will not necessarily vitiate consent; generally only applies where:
  1. The D was aware of or responsible for the P misapprehension and acts in disregard of that fact
  2. Only applicable if it relates to the nature and quality of the act, as opposed to a “collateral matter”
* i.e. A man who lies about his marital status to a woman will not be liable in battery

(b) Mistake

* Applies where the D was responsible for creating the P’s misapprehension; but not fraudulently
* Again, mistaken belief must go to the nature of quality of the act

(c) Duress (Coercion)

* Consent obtained by threats; requires overt threats of physical force (Latter v. Braddell)

(e) Public Policy

* Courts have increasingly recognized public policy considerations in negating the defence of consent such as:
  + Consensual fights where serious physical harm was intended and cause
  + P was ‘no match’ for the D
  + Where individuals have abused their position of trust
  + Where the act was illegal or would cause bodily harm
* Addresses compulsion cases; impermissible means of obtaining consent or the goal of consent
* People are free to consent to many things, but there is a point to where people are consenting to things that are destructive
  + Re: assisted suicide or S&M…

Excerpt: Norberg v. Wynrib [1992] 2 SCR 226

* Doctor knew patient was addicted to painkillers; he agreed to write her prescriptions in return for sexual favours
* Patient eventually got off the painkillers and brought actions in battery, negligence and breach of fiduciary duty
  + Argued doctor had betrayed trust held by doctors
* SCC divided 3:1:2 regarding applicable cause of action
  + **Battery: She could not have provided meaningful consent based on the parties unequal bargaining power and the exploitive nature of their relationship**
* If consent is compromised or procured in a particularly ‘bad way’; it may be disregarded on the court
  + Done so as a matter of public policy; rather than duress

**6.4 Consent to Criminal or Immoral Acts**

* A person cannot recover in tort law for the consequences of his/her own illegal or immoral conduct
  + *ex turpi causa non oritur action* – "from a dishonorable cause an action does not arise"
  + SCC has clarified that it applies to prevent P’s from profiting from illegal or immoral behaviour; doctrine is likely to be applied where actual physical injury has occurred during the course of illegal conduct
* Has generated considerable controversy; has had a narrow application in Canada
  + SCC has stated it should be used to preserve the “integrity of the legal system”

**6.5 Consent to Treatment, Counselling and Care**

(a) General Principles of Consent

* Medical professionals must obtain consent from the patient before any physical examination, test, procedure, surgery or counselling
  + Based on a full and frank disclosure of the nature of the intervention or the research underlying it; generally expected to put the proposed treatment into the context of the risks and benefits of its alternatives, including foregoing treatment
* If competent, only the patient’s consent is required. Next-of-kin is only relevant where the patient is incapable of consenting; statutory limits remain on substitute consent.
* Consent must be given “voluntarily”; however the legal definition of volition is broad
* Patient’s can place constraints on their consent; their express prohibitions cannot be ignored or overridden
* However, this area of the common law has largely been taken over by statute:

*Health Care Consent to Treatment Act*, RSBC 1996, c 181

* Statute provides direction regarding who can give consent on another’s behalf; distinguishes between different types of medical care
* Medical professions wanted guidelines; high degree of liability
* s. 4 outlines rights for consent and refusal
* s. 16 set up a temporary substitute decision maker

*Infants Act*, RSBC 1996, c 223, Part II – Medical Treatment

* Infants are able to provide consent if the health care provider has explained the nature and consequences and the reasonably foreseeable benefits and risks of treatment to the infant and they are satisfied that the infant understands

(b) Exceptions to the General Principles of Consent

* Courts have relaxed the strict requirements of consent in three situations:

1. In an unforeseen medical emergency where it is impossible to obtain the patient’s consent; right to intervene without consent to preserve the patient’s health or life
2. Where general consent has been given to a course of counselling, treatment program or operation – implied consent applies to an subsequently procedures that are necessarily incidental to the agreed treatments
3. “therapeutic privilege to withhold information” when disclosure would undermine the patient’s morale; this has been subsequently narrowed or eliminated by the SCC

Marshall v. Curry [1933] NSSC

|  |  |
| --- | --- |
| Facts | * Patient agreed to surgery to have hernia removed * Upon beginning surgery, the surgeon (D) found that the testicle was grossly diseased with multiple abscesses; removal was required to cure the hernia and to ensure the health of the patient * P takes action in battery for damages of $10,000 * D asserts that implied consent was given with his desire to have the hernia cured |
| Issue | * Does implied consent apply to wholly unrelated operations? |
| Analysis | * 3 Legal Principles:   + Ordinarily, consent should be sought; consent does not apply to a different operation   + Consent may be express or implied   + Consent may be implied from the conversation preceding an operation * The patient does not make the surgeon his representative to give consent; P and D could not have foreseen the circumstances * However, it is the surgeon’s duty to act in order to the save the life or preserve the health of a patient * What is the risk of closing up and obtaining expressed consent? * Found that operation was necessary and unreasonable to postpone the removal to a later date |
| Ratio | * A doctor may act without consent (without refusal) to save the life or preserve the health of a patient. |

Malette v. Shulman (1987) Ont CA

|  |  |
| --- | --- |
| Facts | * P was injured in car accident; arrived in emergency ward * Card in P’s purse indicated she was a practicing JW; Dr. began blood transfusions to save her life * P’s daughter arrived hours later, confirmed her mothers religious beliefs and ordered the blood transfusions be stopped; D only stopped once P was stabilized * P sued in negligence and battery |
| Issue | * Does the doctrine of informed consent extend to informed refusal? |
| Analysis | * Doctor faced with decision, follow the card or administer the medically essential blood transfusion?   + Patient’s right over her own body versus society’s interest in preserving life * D asserted that he could not rely on validity of the card – no evidence that it represented the P’s current intent, the instruction applied to the present circumstances, or that P made the decision when she was fully informed of risks of refusal of treatment * Further, was unsure if the daughter was competent, devoid of self-interest, or the closest blood relative * Court found that obvious purpose of the card was to speak in circumstances where the card carrier cannot; daughter confirmed her mother’s religious intent (although not crucial finding of fact) * No rationally founded basis (evidence) for the doctor to ignore that restriction; Court accepted that his doubt was honest * Rejected his proposal that the doctrine of informed consent extended to informed refusal; doctor will not be held liable for the decisions of patients made on moral & religious grounds |
| Ratio | * The doctrine of informed consent does not extend to informed refusal. Therefore, a clear denial of consent is sufficient to constitute battery. |

(c) The Burden of Proof and Consent Forms

* Consent may be given orally or in writing, but consent forms are only written evidence, not conclusive proof.
* Patient must still understand the proposed procedure’s nature and risks; consent form may be vitiated if is too general, too technical or presented as a mere formality

(d) Competency to Consent (OMIT)

* A minor’s consent to medical procedures is regulated in BC by s. 17 of the *Infants Act* (see supp.). Consent to medical treatment generally, is codified in the *Health Care (Consent) and Care Facility (Admission) Act* (supp.). Sections 4-9 define the patient’s rights with respect to consent, what consent means, how it’s given, and when the patient is incapable of giving consent. Sections 10-11 deal with consent by a substitute decision maker (a defined term), guardian or representative. There are also temporary substitute decisions makers defined by s. 16, who must be sought out, if possible, to give consent to emergency or major or minor health care as defined in ss. 12, 14 and 15.
* The Marshall emergency situation is dealt with in s. 12, and the *Malette* situation in s. 12.1. Note particularly the exemption from liability in s. 33(1), for acts done in good faith and with reasonable care.
* In relation to the Malettesituation, note that s. 29 of the *Child, Family and Community Service Act* (supp.) allows a director appointed under that Act to apply to court for an order that will authorize health care for a child (defined in s. 1 of the Act as anyone under 19), in the face of the child’s or his or her parents’ refusal, if the care is necessary to save life or prevent permanent impairment of health.

7. DEFENCES RELATED TO THE PROTECTION OF PERSON AND PROPERTY

7.1 Self-defence

* Must establish on a BoP that:
  1. Was the threat enough to justify some physical response?
     + D must honestly and reasonably believed that an assault was imminent
  2. If so, was the response witthi the bounds of what was reasonable?
     + The amount of force that he or she used to avert the risk was reasonable in the circumstances (reasonable, not an exact counter from the weight of the P)
* Complete defence; will absolve D of liability

Wackett v Calder (1965) BCCA

|  |  |
| --- | --- |
| Facts | * P determined to lack credibility as a witness * D asserted that P invited him to engage in a fight; P continually attempted to strike the D; doing so at one point “in a rather futile way” * D punched the P twice until “he didn’t get up so fast” and went back into the bar; D’s cheekbone broken |
| Issue | * Were the D’s actions self-defence or an excessive force” |
| Analysis | Dissent (upholds liability of D)   * TJ found that D’s force was excessive under the circumstances; should have been evident that the P was intoxicated and incapable of effecting his intention (no real threat)   Majority (dismissed the action)   * P was not staggering but was belligerent and persistent * Was there a need to defend yourself? Was the force used reasonably necessary under the circumstances? * If you’re entitled to self-defence, the court will generally provide the individual under threat a broad set of actions to do so (not held down to a “measure of exactitude or nicety “the weight of his blows) |
| Ratio | * Self-defence is only available in light of the emergent situation, but does not allow the defence to continue in excess of the reasonable and necessary force. However, the Ds force is not required to be equivalent to the Ps. |

* D may not have to wait for the other party to strike the first blow to claim self-defence

7.2 Defence of Third Parties

Gambriell v Caparelli (1974) Ont Co Ct

|  |  |
| --- | --- |
| Facts | * Son of D was washing his car in the laneway; P backed into son of D’s car * Car owners got into a scuffle; P ended up on top of the D with his hands around the D’s neck (P asserts this didn’t happen) * Mother of D came outside and hit the P with a pitchfork 3x times on the shoulder and once on the head |
| Issue | * Did the D apply excessive force? |
| Analysis | * Court reviewed criminal cases to assert the following about self-defence:   + No special relationship required with the victim   + Right to defend oneself or others with reasonable force from imminent threat   + An honest and reasonable belief (though mistaken) would justify this force * Mother not held liable – reasonable response and amount of force. Dismissed without cost. * Takes the view that the P provoked the attacked; uses the concept of provocation to mitigate damages since physical harm did exist. |
| Ratio | * Viewed from the perspective of the D’s reasonable perception of threat or harm * Physical force can be used to defend a third party irrespective of your relationship with the party. However, the threshold of reasonable/excessive force still applies. |

* A person who makes a reasonable and *bona fide* mistake of fact in acting in self-defence can still rely on the defence (R v Reilly [1984] SCC)

7.4 Defence of real property

MacDonald v Hees (1974) NSSC

|  |  |
| --- | --- |
| Facts | * P takes action in assault for injury, loss and damage – D forcibly removed P from motel and caused physical injury (lacerations to the head) * D contends that he did not assault the P, alternatively that his force was justified in law and the application of force was in response to unlawful entry on his property |
| Issue | * What is required to utilize the defence of property? |
| Analysis | * Accepted that P mistakenly thought he was invited to enter; rejected D’s claim of self-defence * After requesting a trespasser to leave the premises and providing a reasonably opportunity to do so, “…it is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to control his movements or to eject him after entry”   + No request required if forcible entry; can apply force immediately   + However, cannot use excessive force. Can only amount to forcible removal. * Found no forcible entry and the D did not provide reasonably opportunity for the P to leave * Further, the force applied was excessive |
| Ratio | * To utilize the defence of property, the D must have requested the P leave the property and provided reasonably opportunity to do so. Then the D is free to use a reasonable degree of force to remove the P. * However, this request is not required for forcible intruders. |

* Enough of a possessory interest exists to defend your hotel room
* The courts have held that an occupier may be required to tolerate the presence o a trespasser if ejecting him/her would pose a foreseeable risk of physical injury
* Canadian courts, unlike American courts, will not permit an occupier to use force that is likely to cause death or serious bodily injury solely for the purpose of ejecting a trespasser.
  + Older cases suggest this is so; has changed since the 70’s

Bird v Holbrook (1828) CP

|  |  |
| --- | --- |
| Facts | * D owned tulip garden, set up spring gun and trip wires without notice * P attempted to help servant girl recover bird, he called several time for occupant with no response * Jumped into garden, gun went off, seriously injuring P * Does not specify the form (cause) of action |
| Issue | * What level of force is acceptable to protect your property? |
| Analysis | * “Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity”; premised decision on Christian beliefs * No man can do indirectly what he is forbidden to do directly; could not have shot the P himself and could not have detained him; example of excessive force * Court also finds that there was no notice; the D purposely set up the gun with the intent to injure (testified that notice would prevent him from catching the thief) |
| Ratio | * The level of force used to defend your property must be reasonable – spring guns are not included. |

* Rights to property are extensive, but not absolute

Excerpt: Tutinka v mainland Sand & Gravel (1993) BCCA

* Gravel yard; kids ran over hill with their bikes; found out it was no longer a hill
* Despite D’s effort to keep trespassers off the property, the D did not take steps to ensure the trespassers safety while on the property
* “Even trespasser’s have rights”

7.5 Defence and Recaption of Chattels

* Similar to defence of real property; can only defend property from someone immediately attempting to take possession or from someone who recently took possession (in ‘hot pursuit’)
  + Owner must first request his/her property back before using force
  + However, where the object was forcefully taken, the D can use force to retrieve it without asking first
* Cannot use defence after they’ve been dispossessed; must rely on the courts or on recaption
* Very limited common law privilege exists to trespass (without damage) on another’s land to recapture chattels

7.6 Public and Private Necessity

(a) Public Necessity

* Allows an individual to intentionally interfere with the property rights of another for the public interest – typically in case of threats or acts of nature
  + Must be reasonable; cannot cause more damage than necessary
* It is a complete defence – mitigating liability for any resulting damages

Surocco v Geary (1853) Cal SC

|  |  |
| --- | --- |
| Facts | * P house and property were blown up by the D during a fire for the apparent necessary purpose of saving the buildings adjacent; D was the Mayor of San Francisco |
| Issue | * Who determines public necessity? |
| Analysis | * D pleads a defence of necessity for the public purpose; preventing the spread of a fire * *Necessitas inducit privilegium quod jura private* – necessity provides a privilege for private rights * Onus of proof on the D to demonstrate necessity; facts of this case established the necessity of the actions take by the D to save the neighbourhood from fire (all wooden buildings) |
| Ratio | * The burden of proof lies with the D to demonstrate the defence of public necessity. |

NOTES

* Mistake of fact as to the apparently necessity will not negate the defence of public necessity
* Defence of public necessity applies to military operations in times of war; the application of the defence to law enforcement has not been addressed in Canadian courts
* If the D relies on the benefits receive by society, why is the state not required to compensate the injured party?
  + No right to compensation for public takings (re: Canada line businesses)
* Defence cannot apply to an individual who negligently caused or contributed to the emergent circumstances
* Statutes often grant public works broad powers to invade property

(b) Private Necessity

Vincent v Lake Erie TPT (1910) Minn SC

|  |  |
| --- | --- |
| Facts | * D lawfully docked at the P’s dock to discharge cargo * Large storm last throughout the night; could not get a tug boat to tow D boat from the dock * Kept the lines holding the ship to the dock in place to prevent the boat from drifting away; boat was hit with such force that $500 of damage to dock ensued |
| Issue | * Is private necessity a complete defence? |
| Analysis | Majority   * D acted with good judgement and prudent seamanship; conditions of the storm were such that their actions were required to preserve their property * However their actions preserved their own property at the expense of another; they are responsible to the extent of the injury inflicted (outcome was reasonably foreseeable)   Dissent   * Found that the D had exercised due care * D could not have anticipated the severity of the storm; legally in position at the dock, D should not be liable for damages resulting from the contractual relationship |
| Ratio | * The defence of private necessity is a complete defence. * However, though the court accepts the defence, individuals can still be held liable for the reasonably foreseeable damages. No corresponding Canadian case law. |

* Once the defence of private necessity is accepted, court must determine who should pay for actual losses

Excerpt: London Borough of Southwark v Williams [1971] All ER, CA (p. 239, 8)

* Held that homeless squatters could not invoke the defence of public necessity to privilege their entry into vacant houses owned by the Council.
* “Plea would excuse all sorts of wrongdoings” and “no one’s house would be safe”

7.7 Apportionment of Fault in Intentional Torts

* Legislation applies only where 2 or more parties have contributed to the same loss or injury – framed in terms of whether the loss or injury is “indivisible”
  + Joint torts – where 1 tort and multiple parties (D’s) cause 1 damages
  + Several concurrent torts – where 2 separate torts by separate parties cause 1 damage (indivisible harm)
* Common law holds all parties liable as joint tortfeasors
  + D’s were jointly and severally liable for all of the damages
  + P can collect full amount how they choose; limits the risk to the P so that they could collect against a D with money should the other D be broke
  + The common law did not establish a way to share the liability among the defendants
* *Negligence Act*, RSBC 1996, c 333 requires that courts apportion losses in negligence actions between the D’s according to their respective degrees of fault (s. 6) as determined by the Court (i.e. 65:35)
  + Provision maintains common law right of the P to collect the full value irrespective of fault (s.4)
  + But, the D’s can take action between themselves to recoup costs from the other D (i.e. only apportioned 30% but paid 100%; take action to recovery 70% from other D)

Contributory Negligence of the Plaintiff

* In common law, the P was prevent from collecting anything if they were at fault (either by provocation or through contributory negligence)
* *Negligence Act*, s. 1 apportions fault between the P and D, similar to apportionment b/w co-D’s
  + However, when s. 1 applies (P is partly to blame) then liability is not joint; only several
  + P can collect from D’s based on their apportionment only

Application to Intentional Torts

* The Act specifically applies to negligence cases – whereby the concept of fault is nearly universally relevant
* In intentional torts, the concept of fault must be applicable for apportionment to apply
  + Framed in terms of whether the loss or injury is “divisible”; applies only to indivisible losses
  + If strict liability, then concept of fault and apportionment is not relevant

Excerpt: Bains v Hofs (1992) BCCA

* Three young men set fire to Bains’ farm; considerable harm both physically and emotionally to the family
* Bains’ took action in trespass to land (intentional tort)
* The judge apportioned fault – ring leader (50%), enthusiastic follower (40%), reluctant follower (10%)

8. THE DEFENCE OF LEGAL AUTHORITY

8.1 Introduction

* Defence to intentional torts including false imprisonment\*, battery, trespass to chattels, conversion, trespass to land, etc.
* Early common law made few distinctions between the authority of the citizenry and various enforcement officials
* Statutory provisions greatly expanded the power of police to act without prior judicial approval; will focus on federal criminal law powers
* Must answer three questions:
  1. Was the 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 (or other) liability? (= **privileged**)
  3. Did D lose the protection that would otherwise extend to D’s actions by failing to do them in the correct manner? (= **other obligations**)
* Prior to 1980, Canadian courts broadly interpreted police powers and only reluctantly held police civilly liable
* Example: Construction of the Canada Line on Cambie St.
  + Business owners argued that that City and/or construction company liable for nuisance as the ‘cut and cover’ method decreased their sales and interfered with their right to enjoyment of their property
    - Court found that the City had a legal right to construct the Line
  + The business owners argued that they did not do it in the ‘correct manner’. Could have used the boring method using downtown and in other areas.
    - However, there was not requirement that the City choose the method least intrusive to the rights of others, as this was the most cost effective method.

8.3 Authority and Privilege to Arrest Without Warrant

(a) Introduction

* D must prove that the specific act that gave rise to the tort action was authorized by the common law or statute
* Require careful analysis of:
  + Status of person making the arrest
  + Whether the offence is about to be, is being or has been committed
  + The category of offence (indictable or summary)
  + Reasonable grounds v finds committing or had committed
  + N.B. Where reasonable grounds is the facts that would create in the mind of a reasonable person (objective) a strong and honest belief that the suspect had committed the offence in question

(b) A Peace Officer’s Power to Arrest Without a Warrant

* Need only reasonable ground to believe the P has committed or is about to commit an indictable offence
* SCC has interpreted “finds committing” within s. 495(1)(b) to include both actually finds committing and apparently finds committing; unrealistic for an officer to always know with certainty that an arrest is lawful
  + Cannot be based on what is afterwards determined
  + N.B. This does not apply to private citizens

(c) Privilege or Justification under the *Criminal Code*

* Remember that D utilizing this defence must prove both that their conduct was authorized and privileged
* Relevant Criminal Code provisions:
  + s. 494 – set out civil arrest requirements
  + s. 495 - set out arrest requirements (without warrant) for peace officers
* Criminal Code, RSC 1985, c C-46, s. 25
  + Allows anyone required or authorized by law to do anything in the administration or enforcement of the law if he acts on reasonable grounds and is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose. Cannot cause death or grievous bodily harm.
* Where “justified” means protected from both criminal and civil liability (per SCC)
* **SCC has held that privileges may be extended under this provision for a mistake of fact; will not be extended for a mistake of law**

(d) A Private Citizen’s Authority and Privilege to Arrest Without a Warrant

* Scope of a private citizen’s statutory authority to arrest will depend in part of whether the SCC broad interpretation of the term “finds committing” (above) is applicable to s. 494
  + Courts remain divided on this issue
* However, accepted that it is narrower than that of a PO; cannot arrest for past crimes
* Issue came to light when Chen, a grocer, subdued and arrested a career thief who returned to his store
  + J sympathized and interpreted his return to the store as a continuation of the ongoing theft; Crown did not appeal
* Recent federal bill addressed this issue to expand it to “within a reasonable period of time after” they find him or her committing a criminal offence on or in relation to their property

8.4 Rights and Obligations in the Arrest Process

(a) Reasons for the Arrest: Koechlin v Waugh and Hamilton (1957) ONCA

|  |  |
| --- | --- |
| Facts | * P & friend were walking home; PO stopped and asked for ID * PO asked P for ID. PO showed badge. P not satisfied and requested name and number. Name not provided, only number on badge. * Scuffle ensued. PO and other PO’s used force to arrest P. P not advised of reason for arrest until at station. * Parent of P arrived at station; not allowed to see P and not advised of reason for arrest * P takes action against PO for false imprisonment |
| Issue | * Do the PO’s have to advise an accused of the reason for arrest at the time of arrest? |
| Analysis | * Law may allow PO to require a person to account for his presence and ID himself   + No right to use force if P refused to comply   + No reasonable grounds for arrest * Refer to following propositions: * PO must inform the person arrested of the true ground for arrest (now in *Charter*) * If not so informed and nevertheless seized, the PO is liable for false imprisonment. * P only required to submit to restraint if he knows in substance, the reason for arrest * Unless the P produces the situation which makes it practically impossible to inform him |
| Obiter Dicta | * Judge critical of the P being held *incommunicado* * A person in custody should never be denied his right to communicate with his relatives at the earliest reasonable opportunity so that he may avail himself of their advice and assistance * Now a right within the *Charter* |
| Ratio | * PO must advise the accused of the reason for arrest at the time of seizure. Relates to part III of the defence of lawful authority. |

(b) The Use of Reasonable Force

* Accused must be given opportunity to submit peacefully before force is used
* Can only use as much force as is reasonably necessary to subdue the suspect; must believe that such force is necessary to protect him or herself or a third person from imminent or future death or grievous bodily harm
* Mistake of fact will not negate this defence

9. INTRODUCTION TO THE LAW OF NEGLIGENCE

9.1 The Historical Development of Negligence

* From trespass on the case – wrongful act by the D and harm to the P suffered indirectly
* Negligence is frequently litigated – unlike, intentional torts, the D’s act does not have to be directed at the P
* Over time, the judiciary began to recognize legal duties of care in the absence of contract or prior relationship
* Held that a P was entitled to relief only if the D was at fault; based on fault and duty of care

9.2 Defining Terms

* Negligence two meanings:
  + The cause of action that constitutes a branch of tort law concerned with liability for careless conduct
  + A particular element within the cause of action; whether the D’s conduct met the standard of care (better referred to as carelessness)
* Breadth and flexibility determined by judicial interpretation of the duty of care; most frequently litigated tort

9.3 The Elements of a Negligence Action

(a) Introduction

* Burden of proof lies primarily with the P

*(i) Duty of Care* (term of art)

* The duty owed by the D to the P; need to determine nature and scope
  + Did the D owe the P a duty of care? In respect to what kind(s) of harm?
  + **Question of law; determined by the judge**
* No integrated concept of duty until 1930s – just a collection of various specific instances of duty
  + Duty in tort coexisted with contract in *common callings*, but otherwise duty in contract was exclusive
  + Where common callings are responsibilities where one person is responsible for another’s physical safety (i.e. carriers or carriage drivers
* Excerpt: Winterbottom v Wright, (1842) Eng ER
  + Exclusive of contract law; if you owe a duty to A under contract, you did not owe a duty to anyone other than A.
  + D was a coach-maker (carriage). He negligently maintained the coach. Was under contract with the Post Office. A coachman was injured.
  + At that time, the court found that the duty owed by the coach-maker was owed only to the Post Office; no duty to the coachman.
  + Otherwise those injured/killed in the Versailles railway disaster (May 1842) could hold the maker of the axle that failed liable for all those people. The disaster occurred only months before Winterbottom.
  + Often concerned with ‘floodgates’ of litigation.
* Overruled by Donaghue v Stevenson – expanded the duty of care beyond contract law
  + Rejected the categories of duties and made “duty of care” a general concept
* However, this simple concept must be qualified in non-physical types of injury.
  + Psychiatric injury – not always reasonably foreseeable; requires a greater proximity between the P and D
  + Economic loss – business owners cannot be responsible to one another for lost business

*(ii) The Standard of Care and its Breach*

* Failure to observe *standard of care* (= *negligent* act or omission)
* Determined duty was owed, but what standard was required? Did the D breach it?
  + **Issue of mixed fact and law**
* Objective standard of reasonable person from the viewpoint of the D
  + Requires application of subjective elements of knowledge of the D (i.e. professionals)

*(iii) Causation*

* Was the conduct the cause of the P’s loss?
  + **Known as “cause-in-fact”; generally an issue of fact based on a legal standard**
* Would the loss/damage have occurred “but for” the actions by the D?

*(iv) Remoteness*

* In negligence (unlike intentional torts), liability is limited to those kinds of damage/losses that are reasonably foreseeable consequences of the D’s negligent act
* How close is the relationship b/w the breach and the injury?
* **Question of law; when is it no longer foreseeable?**

*(v) Actual Loss/Damage*

* Unlike intentional torts, negligence is not actionable without proof of loss or damage
* *Harm to which the duty extends*
* **Issue of fact**
* Type of loss recognized has been expanded with legislation

Available Negligence Defences

* P’s damages may be reduced based on their own conduct – contributory negligence, voluntary assumption of risk or illegality
  + *Volenti non fit injuria* = voluntary assumption of the legal risk – equivalent to consent in intentional torts
  + *Ex turpi causa* = tort claim barred by the fact it arose out of P’s own illegal conduct
  + NOTE: Inevitable accident is not a defence; it proves the D did not act intentionally or negligently
* Other defences do exist

Summary of Elements of Negligence

NOTE: Though it looks clear, these issues often overlap. Both duty and remoteness are foreseeability issues. Causation can also be a foreseeability issue as well. Re: Mustapha case – where the CA saw it as a duty issue and the SCC saw it as a remoteness issue but came to the same conclusion.

Exam: Need to think through all five issues despite the fact that judgements often run them together. Address all five issues in exam answers.

(b) Case Illustration: Dunsmore v Deshield (1977) SKQB

|  |  |
| --- | --- |
| Facts | * P’s glasses broke during touch football and injured his right eye; his eye glass lenses were supposed to be “Hardex” lenses that were more impact resistant * Takes action against optometrist (Deshield) and manufacturer (Imperial) * J satisfied on a BoP that the lenses were not Hardex |
| Issue | * Is there a duty of care on the seller and/or distributor of a product? |
| Analysis | Duty and Standard of Care   * Judge views case as concurrent torts – both had a duty that was breached; Deshield negligently sold the glasses and Imperial negligently supplied them * But who should be liable? Found that Imperial was in a better position to check them; Deshield did not have testing equipment * Why not an apportionment of liability? Finds the P’s jointly and severally liable, but finds Deshield indemnified from Imperial for all costs (based in contract)   Causation & Remoteness – application of the “but-for” test   * On a BoP, likely that the blow received by the P was less than the steel ball test used on Hardex lenses * Also, Hardex lenses supposedly break in a different manner from an ordinary lense   Damages: Contributory Negligence   * D’s plead contributory negligence – should not have been playing football with them * P not “the type of young man who might take unnecessary risks”; would not have worn glasses at football if the lenses were not Hardex |
| Ratio |  |

10. THE DUTY OF CARE

10.1 Introduction

(a) The Classical Approach

* Concept developed over time; from a narrower to more expansive view
  + Legal responsibility did not flow inexorably from moral responsibility
  + Strict adherence to precedent and absence of; required legislators to enact new duties of care
  + Drew a distinction between misfeasance (an act) and nonfeasance (an omission); more likely to impose liability for misfeasance
  + Required physical or tangible loss; less likely to accepted emotional harms or loss of commercial profits

(b) The General Duty of Care Test

M’Alister (Donoghue) v Stevenson [1932] HL (p. 294)

|  |  |
| --- | --- |
| Facts | * P’s friend purchased ginger beer; P drank until friend noticed decomposed snail in the bottom * P sued the manufacturer alleging shock and severe gastroenteritis * Retailer cannot be liable because the bottle is opaque; no opportunity to discover defect * Bottler argued that they were not liable   + D liable only to the retailers or distributors; not to the customers (re: Winterbottom) |
| Issue | * Does a manufacturer have a legal duty to the consumer (not purchaser) to take reasonable care to ensure that products are free from defect? |
| Analysis | Lord Atkin   * **Individuals must take reasonable care to avoid acts or omission which they could reasonably foresee would be likely to injure their neighbour(s) – where your neighbour is a person who is so closely and directly affected by the act that I should be able to reasonably foresee the impacts on them** * Based in concept of proximity; “so close that the duty arises” * Heaven v Pender (refers to dissenting judgement)   + Rules apply to goods supplied to be used immediately. Where it would be obviously to the manufacturer that the goods would be used immediately; prior to a reasonable opportunity to discover defects which might exist. And, where the good supplied is of such a nature that neglect of due care would probably cause danger to the person or property of the person. * Argues that morally, this duty must exist; otherwise the P would have no cause of action against anyone |
| Ratio | * Duty of care is a general concept owed by all individuals to anyone who may be reasonably foreseen to be impacted by their actions. Hinges on ideas of proximity and reasonable foreseeability. |

(c) The Development of the Modern Law of Duty

* Following Donoghue, courts began applied generally test of foreseeability against ones neighbour
* Courts held that special circumstances may raise special considerations that justify the formulation of restricted duty principles
* Particularly by Anns v Merton London Borough Council (1977) and Caparo Industries v Dickman [1990]
* Three part test:
  1. Was the P’s loss a reasonably foreseeable consequence of the D’s conduct?
  2. Was there a sufficiently proximate relationship between the parties?
  3. Is it “fair, just and reasonable” for the court to impose a duty of care in light the applicable policy considerations?
* Following Caparo, the English and Australian courts limited the more expansive *Anns* test

(d) *Anns* and the Supreme Court of Canada

* Canada more receptive to Ann judgement; notable for flexibility and expansiveness; plaintiff friendly
* Ask only two question:
  + [I]s there a sufficiently close relationship between the parties…so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to [the plaintiff]?
  + If so, are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?
* Requires only that the P prove reasonable foreseeability of harm; this establishes a prima facie duty of care
* Then burden falls on D to establish why a duty of care should be rejected or limited

Cooper v Hobart [2001] 3 SCR 537

|  |  |
| --- | --- |
| Facts | * Cooper (P) invested in Eron; Eron was govern by the provincial *Mortgage Brokers Act* * D was a Registrar of Mortgage Brokers; he investigated the D and suspended Eron’s license * P sued the D claiming that if he had acted more quickly in suspending Eron’s license, she would not have suffered the same magnitude of loss |
| Issue | * In the circumstance, does the D owe a duty of care to the P? |
| Analysis | * Re: Donoghue v Stevenson and “balance of interests” * Reformulated Anns test:   (1) Was the harm that occurred the reasonably foreseeable consequence of the defendant’s act?   * Consideration of foreseeability and proximity; where proximity is used to describe the “close and direct” relationship necessary to grounding a duty of care   (2) Are there reasons, notwithstanding the proximity between the parties established in the first part of the test, that tort liability should not be recognized here?   * Are there residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care? Consideration of the effect of creating a new category of duty of care on other legal obligations * Application: * Government actors are not liable for policy decisions; only for operational decisions * Registrar’s duty is only to the public as a whole; a duty to investors would conflict with other interests such as efficiency and public confidence in the system * Even if reasonably foreseeable, there was insufficient proximity b/w the D and the investors’ would be in conflict (Part 2) * Decision requires the Registrar to balance the public and private interest; this duty would shift the burden to the tax payers by effectively creating an insurance scheme for private investors |
| Ratio |  |

9. INTRODUCTION TO THE LAW OF NEGLIGENCE

9.1 The Historical Development of Negligence

* Stems from the write of trespass on the case, involving:
  + Wrongful act by the D
  + Causing harm to the P indirectly
* Governed by the concepts of **fault** and **duty of care**
  + “Must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”
* Term “Negligence”: Be careful not to confuse the cause of action with the breach of the standard of care
* In all negligence claims, the burden of proof lies primarily with the P on a BoP
* Illustration of the interrelationship among elements of negligence; often overlap with another (Dunsmore v Deshield)

9.3 The Elements of a Negligence Action

*(i) Duty of Care* (LAW)

* Did the D owe the P a duty of care? Need to determine nature and scope
* Originally existed only in specific categories – including contract law and common callings
  + Winterbottom v Wright (coachmen unable to sue coachmaker; contract was with post office)
  + Often concerned with ‘floodgates’ of litigation
* Overruled by Donaghue v Stevenson (see below)
  + Rejected the categories of duties and made “duty of care” a general concept
* However, this simple concept must be qualified in non-physical types of injury
  + More limited in the cases of pure psychiatric/mental or pure economic injury; increased proximity required

*(ii) The Standard of Care and its Breach* (MIXED FACT & LAW)

* Failure to observe *standard of care* (= *negligent* act or omission)
* Standard of reasonable person in D’s position
  + Objective test/standard from the viewpoint of the D – applies subjective elements of knowledge of the D

*(iii) Causation* (FACT; legal standard)

* “But For” – Compare the P’s actual position now to what the P’s position would have been if tort had not been committed

*(iv) Remoteness* (LAW)

* Liability is limited to those kinds of damage/losses that are reasonably foreseeable consequences of the D’s negligent act

*(v) Actual Loss/Damage* (FACT)

* Negligence is not actionable with proof of loss or damage
* Type of loss recognized has been expanded with legislation

Available Negligence Defences

* Damages may be reduced by the P’s conduct – contributory negligence, voluntary assumption of risk or illegality
  + *Volenti non fit injuria* = voluntary assumption of the legal risk – equivalent to consent in intentional torts
  + *Ex turpi causa* = tort claim barred by the fact it arose out of P’s own illegal conduct
  + [Inevitable accident, which book refers to at p. 288,is not really a defence, but a situation where D can’t prove D acted intentionally or negligently]
* Other defences do exist

(b) Case Illustration: Dunsmore v Deshield (1977) SKQB

|  |  |
| --- | --- |
| Facts | * P’s glasses broke during touch football and injured his right eye; his eye glass lenses were supposed to be “Hardex” lenses that were more impact resistant * Takes action against optometrist (Deshield) and manufacturer (Imperial) * J satisfied on a BoP that the lenses were not Hardex |
| Issue | * Is there a duty of care on the seller and/or distributor of a product? |
| Analysis | Duty and Standard of Care   * Judge views case as several concurrent torts – both had a duty that was breached; Imperial negligently sold the glasses and Deshield negligently supplied them * But who should be liable? Found that Imperial was in a better position to check them; Deshield did not have testing equipment * Finds the P’s jointly and severally liable, but finds Deshield indemnified from Imperial for all costs (based in K law)   Causation & Remoteness – application of the “but-for test”   * On a BoP, likely that the blow received by the P was < the steel ball test used on Hardex lenses * Also, Hardex lenses supposedly break in a different manner from an ordinary lense; reducing the likelihood of the damage suffered by the P   Damages: Contributory Negligence   * D’s plead contributory negligence – should not have been playing football with them * P not “the type of young man who might take unnecessary risks”; would not have worn glasses at football if the lenses were not Hardex |
| Ratio | * General illustration of the interrelationship among elements of negligence cases; often overlap and run into one another |

10. THE DUTY OF CARE

10.1 Introduction

(b) The General Duty of Care Test: M’Allister (Donoghue) v Stevenson [1932] HL (see above)

|  |  |
| --- | --- |
| Facts | * P’s friend purchased ginger beer; P drank until friend noticed decomposed snail in the bottom * P sued the manufacturer alleging shock and severe gastroenteritis * Retailer cannot be liable because the bottle is opaque; no opportunity to discover defect * Manufacturer argued that they were not liable   + D liable only to the retailers or distributors; not to the customers (re: Winterbottom) |
| Issue | * Does a manufacturer have a legal duty to the consumer (not purchaser) to take reasonable care to ensure that products are free from defect? |
| Analysis | Lord Atkin (majority)   * Accepted that an injury was demonstrated; concern only with the question of duty of the manufacturer * Can find little authority within English common law and Scots civil law * Asserts that there must be a general concept giving rise to the liabilities arising from duty of care * **Individuals must take reasonable care to avoid acts or omission which they could reasonably foresee would be likely to injure their neighbour(s) – where your neighbour is a person who is so closely and directly affected by the act that a person should be able to reasonably foresee the impacts on them** * Hypothesize that individuals engage in a thought process: who should I have in contemplation? * Based in concept of proximity; not just physical but relationship to P; “so close that the duty arises” * Heaven v Pender (refers to dissenting judgement)   + Rules apply to goods supplied to be used immediately. Where obvious to the manufacturer that the goods would be used immediately; prior to a reasonable opportunity to discover defects which might exist. And, where the good supplied is of such a nature that neglect of due care would probably cause danger to the person or property of the person.   + No opportunity for intermediate examination; however this rule is not exhaustive – how likely is it that someone would look at the bottle? * Argues that morally, this duty must exist; otherwise the P would have no cause of action against anyone   Lord Buckmaster (dissenting)   * All rights in K must be excluded from consideration of this principle * Argues that “it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works” |
| Ratio | * Duty of care is a general concept owed by all individuals to anyone who may reasonably be foreseen to be impacted by their actions. Hinged on ideas of proximity and reasonable foreseeability. |

(c) The Development of the Modern Law of Duty

* Following Donoghue, courts began applying a more general test of duty of care
  + Eliminated the defined categories of duty of care and established more general principle of duty of care; based in the idea of proximity which arise from the foreseeability of harm
    - If it foreseeable that a physical impact will exist, proximity is obvious. However, proximity is based in relationships. A user of your product that is far away, is still expected to exist.
  + However, proximity is more or less synonymous with foreseeability
* Courts have held that some circumstances may raise special considerations that justify restricted duty principles
  + Where there victim suffers emotional or economic injury without physical injury – problem is that it is almost always foreseeable that someone will suffer economic harm from your actions.
* Adjust principle to ask: **Is it reasonably foreseeable that a reasonably robust person would be injured?**

(d) *Anns* and the Supreme Court of Canada

* How do we determine if special considerations would justify restricted duty principles?
  + Arises only where an existing duty of care category has not been established – such as non-physical harm and new types of claims relating to government
* Anns asks two questions:
  1. Is there a sufficiently close relationship between the parties…so that, in the reasonable contemplation of the D, carelessness on its part might cause damage to the P?
     + Requires only that the P prove reasonable foreseeability of harm; this establishes a prima facie duty of care
  2. If so, are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?
     + Then burden falls on D to establish why a duty of care should be rejected or limited

Special Case: Government Liability

* Do you hold governments to same level of liability as the private citizen?
* Governments unlike private individuals; they are elected to address societal issues and make decisions. Generally the law has been unwilling to second-guess government choices.
* Courts distinguish between government:
  + Policy Choices – unwilling to review; available only in constitutional challenges or administrative law
  + Operational Decision – willing to review
    - Recent phenomenon; once you expand the law of negligence into financial loss, you can always tie some financial loss to government actions or decisions
* Meaning that a duty of care owed by government officials must be established – Cooper v Hobart

Cooper v Hobart (2001) SCC

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| --- | --- |
| Facts | * Class action suit by P’s who invested in Eron; Eron was governed by the provincial *Mortgage Brokers Act* * D was a Registrar of Mortgage Brokers (BC government); he investigated and suspended Eron’s license * P sued the D claiming that if he had acted more quickly in suspending Eron’s license, they would not have suffered the same magnitude of loss * D can argue either that no one in the class action has a claim; or that it is not suitable for a class action proceeding b/c each claimant has separate issues * D argued that no one in the class action has a claim – a duty of care does not apply |
| Issue | * In the circumstance, does the D owe a duty of care to the P? |
| Analysis | * Affirmed Donoghue v Stevenson * Replaced categories of duty with broad negligence principle; new duties can be developed * Reformulated Anns test:   (1) Is there a *prima facie* duty of care? Was the harm that occurred the reasonably foreseeable consequence of the D’s act?   * Consideration of foreseeability and proximity; where proximity is used to describe the “close and direct” type of relationship between the P and D necessary to ground a duty of care * *Makes the proximity issue policy sensitive; court concerned that it should not be too easy to establish a prima facie duty of care and wants to avoid interfering with the policy decisions of public officials*   (2) Are there residual policy concerns/reasons, notwithstanding the proximity between the parties established in the first part of the test, that tort liability should not be recognized here?   * Are there residual policy considerations outside the relationship of the parties that may negate or limit the imposition of a duty of care? Must consider the effect of recognizing a duty of care on other legal obligations * Application: * 1: Even if reasonably foreseeable, there was insufficient proximity b/w the D and the investors’ * The statute governs the Registrar’s duties; duty is only to the public as a whole; a duty to investors would conflict with other interests such as efficiency and public confidence in the system * 2: Even if it passed part 1, would have failed at part 2 * Decision requires the Registrar to balance the public and private interest; this duty would shift the burden to the tax payers by effectively creating an insurance scheme for private investors |
| Ratio | * Reformulate the *Anns* test to consider policy issues within proximity – prevents *prima facie* duties of care being too easily established. * Unlikely that a public body will be held to owe a duty of care to particular interest groups; this would be at odds with their statutory duty to the public at large. This negates proximity. * Likely to only apply where the public official deals with interests of specific individuals/groups * Further, that public officials performing a public duty must do so in the public interest; not just in the interests of the private individuals affected by their decisions. |

Q: Which policy issues are considered in the first and second stages?

* Not a logical set up, may be difficult to determine at what stages policy issues should be considered
* First stage analysis should consider the issues around creating a duty of care in this type of relationship; strongly related to proximity b/w the two parties
  + What were the expectations of the parties, the ability to foresee the harm, etc.
* Second stage analysis considers indeterminate liability; policy problems not tied to the nature of the relationship and the impacts on the legal system of creating a *prima facie* duty of care

Q: What is proximity?

* Not the dictionary definition of proximity
* It refers to the policy concerns that may arise in the context of the nature of the relationship between the parties – see Childs v Dorsemeaux where the policy concerns around the differences between the commercial host and the social host negated the proximity issue

**10.2 Application of the duty of care test**

* Was it reasonably foreseeable to a person in the D’s position that carelessness on his or her part could create (i) a risk of injury (ii) to the P?

Foreseeability: Duty, Breach & Remoteness

* Duty: Does engaging in this activity create a foreseeable risk of any harm?
* Breach: Would the reasonable person have realized engaging in this particular act/omission would create a foreseeable risk of any harm?
* Remoteness: Would a reasonable person have foreseen that this particular act/omission would create a foreseeable risk of this kind of harm?
  + Seldom triggered; avoids cases of very strange or unexpected consequences
  + Remoteness considers only the type of harm; the degree of harm is irrelevant per the thin skull principle

Moule v New Brunswick Electric Power Comm. (1960) SCC (standard of care)

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| Facts | * Ladder up spruce tree; platform across to maple tree which is approx. 3 ft from the wires * NBEPC had trimmed maple branches to a height of 13 ft * Child climbed up spruce, across platform and ended up stepping on the wires and was electrocuted * TJ held NBEPC liable for the accident and its consequences; probable that tree would allure small boys and that a child might slip or fall in his climb |
| Issue | * Does NBEPC owe a duty of care to children? * Did NBEPC **breach the standard of care**? Was this particular harm reasonably foreseeable? Should they have done more to prevent this accident? |
| Analysis | * SCC held that the fact that the child crossed from another tree at an unusual height and that he put his weight on a rotten branch made this unforeseeable * Proximity of the wooded area to occupied houses and the likelihood that children would play there created a *prima facie* duty to take precautions but only against any foreseeable consequences of the presence of that danger * Does not mean they’re responsible for every accident; took all reasonable precautions by trimming to 13ft |
| Ratio | * Not all types of harm are reasonably foreseeable |

Amos v New Brunswick Electric Power Comm. (1976) SCC (standard of care)

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| Facts | * Wires ran through poplar tree; in July the tree was in full leaf and screened the series of wires * Boys competed to climb the highest and the fastest * When youngest boy was in tree, the poplar swayed, came into contact with a high voltage cable and the boy was electrocuted; neighbour had to cut down tree to get boy down (at his on risk) |
| Issue | * Does NBEPC owe a duty of care to children? YES * Did NBEPC **breach the standard of care**? Did they do enough to minimize the risk to those which they owed a duty of care? |
| Analysis | * NBEPC should have foreseen that the tree would be alluring and taken steps to trim the tree back and/or insulate the power lines; the danger was reasonable foreseeable * SCC distinguishes from Moule since the wires went through the branches, the children climbed up the tree directly in contact with the branches and the tree branches had not been trimmed |
| Ratio | * The duty of care and the standard of care owed are case and fact specific. The allegedly negligent party is required only to take all reasonable precautions – where reasonableness will be assessed based on potential harm and the foreseeability of the type of harm in question. |

Palsgraf v Long Island Ry. Co. (1928) NY

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| Facts | * A passenger was running to catch a train; he scrambled on board * Guard who helped him was unaware the passengers parcel contained fireworks * P was standing at other end of the platform and was injured from the force of the explosion |
| Issue | * Did the P owe the D a duty of care? |
| Analysis | Majority (Cordoza)   * No duty owed because the P’s injuries were not reasonably foreseeable; * Acknowledges that there was a duty of care towards the passenger not to hurt him or his parcel * BUT there is no duty of care to the P because she was out of the range of foreseeable harm; guards were unaware of the contents of the package * Negligence is a wrong in relation to the P (foreseeability and proximity); you could be negligent against person A but not person B due to the issue of foreseeability * Duty is in respect of every victim; breach is in respect of the victim in question   Dissent (Andrews)   * Duty was to the world including others at the station * Railway breached standard of care by negligently helping the passenger aboard when already in motion * He feels it an issue of proximate cause; was the negligence the cause of the injury to her (causation) |
| Ratio | * Illustrates that the duty concept is P-specific; there can be a duty of care to one potential victim but no duty to another, because that other is not foreseeably at risk. * Unlike the dissenting judgment, the duty and standard of care should be considered before causation. |

11. SPECIAL DUTIES OF CARE: AFFIRMATIVE ACTION

**11.1 Introduction to Special Duties of Care & Affirmative Action**

* Court has only recently created an affirmative DOC in certain cases – a duty to act
  + Based on detrimental reliance – where an individual has taken responsibility for someone, inducing them to rely on this duty
* Consider: **What is the source of the duty? How far does the duty go/what is the limit on it?**

**11.3 Duty to Rescue**

* Common law did not recognize a duty to rescue; a duty to assist another individual when they are in a “perilous” situation
  + Too difficult to define when someone is required to come to someone else’s assistance
* General Principle: Based on the nature of the parties’ relationship, parties must take all reasonable steps to assist
  + That is, a duty to act is not absolute; D required only to take reasonable care for another’s safety
* A duty to act will be assumed where a positive action begins; liability for negligent conduct will follow
  + Based on an objective test of the reasonable person in the position of the D under the circumstances
  + Not a duty to rescue; only a duty to act
* Negligence distinguishes between conduct that makes things worse and conduct that fails to make things better. If it only fails to make things better, the cause of the injury is the accident and not the failure of the D to rescue.

Osterlind v Hill (1928) Mass SC

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| Facts | * Hill rented a “frail and dangerous” canoe to Osterlind and his friend when they were intoxicated and “manifestly unfit to go upon the lake in the canoe” * Canoe tipped, Osterlind called for help for approx. ½ hr; eventually drowned * Osterlind’s estate taking action against Hill (1) for renting them the canoe and (2) failing to rescue them |
| Issue | * Is there a duty to rescue? |
| Analysis | * Unlike case cited, the intestate was not in a helpless condition at the time he rented the canoe; he was capable of exercising care since he hung to the side of the canoe for approx. ½ hr   + Have not alleged an incapacity “bad enough”; must be extremely drunk for this to apply   + Find no duty to refrain from renting a canoe to an intoxicated person * No right to be rescued; no parallel duty/obligation on Hill to respond to the intestate’s outcries   + No evidence to show that the canoe was “frail and dangerous” * Case decided on the pleadings; no reference to the evidence (as written in the allegations) |
| Ratio | * Confirms CL presumption; no positive duty to come to the aid of a person (or a person’s property that is in danger) * Case draws a hard line with respect to the duty to act; raises moral issues regarding the connectedness of the predicament and the person |

* In contemporary law, could we find a duty of care? Could argue there was a special relationship between the two; as the seller and renter of the canoe (Per Mathews v McLaren)

Mathews v McLaren (1969) Ont CA (see Horsley v McLaren)

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| Facts | * M/H were guest on M’s 30 ft boat; Mathews went overboard but was unresponsive in the water * Several rescue attempts – reversed the boat, threw life ring, could not hook with pike pole * Horsley jumped into save; could not be resuscitated. Mathew’s body was not recovered. * Water was only 39°F (-17°C); COD was cardiac failure from shock on immersion or prolonged immersion |
| Issue | * Is there a duty on a boat owner to save his passengers? |
| Analysis | **Duty**   * Mathews fell overboard due to his own misfortune or carelessness; not due to the negligence of the D * Negligence law holds no general duty to come to the rescue of a person who finds himself in peril from a source unrelated to the D * But, does a “special relationship” exist between carrier and passenger? Yes, per legislative intent found in the *Canada Shipping Act* and a civilized community; duty to assist where it possible to do so without putting the crew or the passengers in danger   + Relevant that *Act* was amended due to similar case; where ship did not go back for overboard crew member   + Boat owner/operator undertakes a responsibility by taking passengers out onto their boat   **Standard/Breach**   * Expert evidence show M should have turned boat around; he was an incompetent operator and negligent in his operation of the boat * Aggravated by the PO testimony that M’s ability to drive was impaired by alcohol   **Causation**   * However, based on the conditions present, not demonstrated on a BoP that M’s negligence was the cause of M/H’s deaths – per facts regarding COD, Horsley’s death (younger man) and that Mathews was entirely unresponsive, proper boat operation would not have resulted in survival |
| Ratio | * A duty to rescue exists in special relationships where the D has in effect undertaken some responsibility for the Ps safety – including between boat operator/owner and passengers * However, all elements of negligence must still be considered; a lack of causation will negate a breach of the standard of care * \*Case made possible by the *Family Compensation Act*; allows the spouse/parent/dependent of the deceased to make a tort claim against the wrongdoer on the deceased’s behalf |

**11.4 Duty to Control the Conduct of Others**

* Raises issue of how far a duty to intervene extends – is there a duty to physically intervene?
* Keep in mind that if a duty to act is found, it is not absolute; Ds are required only to take reasonable care for another’s safety
  + For example, where a bar owner took reasonable steps to dissuade someone from driving while intoxicated; they took all reasonable steps and therefore were not held liable

Crocker v Sundance Northwest Resorts (1988) SCC

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| Facts | * C and friend drunkenly entered tubing competition; did not appreciate that they were signing a waiver * On day of competition, got drunk again. After C won 1st race, C drank more. SNR owner asked C if he was any condition to compete again. At top of hill for 2nd heat, SNR manager suggested that C should not race. * C flipped off tube, was rendered a quadriplegic. SNR held 75% liable; C was contributorily negligent. |
| Issue | * Does a ski resort have a duty to prevent an intoxicated person from using its facilities? * Is the resort liable for failing to prevent C from participating in the race? Similar to Osterlind |
| Analysis | **Duty of Care**   * Did the relationship b/w Crocker and SNR give rise to a special case of duty? Drew from Jordan House, duty as organizers of a competition to its participants not to put them in a dangerous position * Find SNR accepts responsibility as the promoter of dangerous sport and as a seller of alcohol to take all reasonable steps to prevent a visibly incapacitated person from participating * Duty to intervene exists – SNR is not liable simply for holding the tubing race; liable for letting C participate while being aware that he is intoxicated   **Breach/Standard**   * SNR made only mild attempts to dissuade C; could have disqualified him or refused to get him another tube (when he drunkenly dropped his down the hill)   Defence: Voluntary Assumption of Risk via K   * Finding of fact that C did not appreciate the physical and legal risk involved in the activity at the time he signed the waiver or when engaging in the tubing competition * NOTE: This may have been construed differently if SNR had given C a copy of |
| Ratio | * A duty to rescue exists in special relationships where the D has in effect undertaken some responsibility for the Ps safety – this duty extends to the duty to take reasonable steps to prevent the P from risking his/her safety * A duty to intervene exists where the D creates or contributes to the dangerous situation faced by the P (tubing race and alcohol). |

Excerpt: Childs v Dorsemeaux (2006) SCC (see p. 348)

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| Facts | * D left a house party drunk; hit another car head on, killing one passenger and paralyzing the P from the waist down * D was found criminally responsible; Childs takes action against hosts of party for negligence * D had known alcohol problem and had consumed 12 beers; host walked D to his car; showed no signs of intoxication; finding of fact that that the host never knew that D was too drunk to drive |
| Issue | * Do social hosts owe a duty to control the conduct of their guests? |
| Analysis | Contrast with Commercial Host Duty to Control Conduct of Others   * Hosts have a duty to patrons and to the public at large at risk of harm from the drunken patron * Duty to take reasonable steps to ensure their patrons do not drive a vehicle while under the influence * Reasonable only – Note 5 provides example of an intoxicated person who was with several sober people; the bar was not held liable because the sober friends let the intoxicated person drive while they were passengers in the car   How is a social host different from a commercial host?   * Commercial hosts have direct control over the alcohol consumption of their patrons * There are strict legislative rules governing commercial hosts, while no such laws exist for private parties * Contractual relationship between commercial hosts and their patrons – this is fundamentally different from the range of relationships that characterize private parties   **Duty** – does a social host owe a duty to potential victims of their patrons’ inebriated actions?   * Applied the *Anns* test as explained in Cooper  1. Is there a *prima facie* duty of care on the social host?    * Is there a foreseeable risk of harm to the victim? Not foreseeable in this case; the host was not aware their guest was too drunk to drive    * Proximity? Nature of relationship b/w social host-guests and commercial hosts-patrons differs substantially    * The autonomy of the guest is also considered to be relevant to negating the duty    * Finds their failure to act was merely nonfeasance; host did not create a “risky situation” 2. Not addressed |
| Ratio | * Social hosts, unlike commercial hosts, do not owe a duty of care to the public at large for the injuries caused by a drunken guest. * However, SCC leaves open the possibility that a social host who was well aware of the intoxication of their guest may be held liable. * No duty for social hosts to exercise control over their guests |

Jane Doe v Metropolitan Toronto Commissioners of Police (1998) Ont SC

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| Facts | * P sued police after being attacked by serial rapist; he had raped four other women on the 2nd and 3rd floor of apartment buildings in the vicinity by entering through the window * Negligence claim based in failure to warn |
| Issue | * Do police officers/departments owe a duty of care to the public? |
| Analysis | **Duty**   * MTCP claimed they chose not to warn for fear of displacing rapist; leaving him free to re-offend elsewhere * Not accepted by TJ: believes real reason was to prevent hysteric and panic in the area   + That the PO’s believed rapes were less “violent” than those committed by a previous serial rapist * Accepts P’s evidence that if she had been aware of the serial rapist in her area, she would have taken steps to protect herself and would not have been attacked * Per *Police Act* the MTCP has a duty to prevent robberies and other crimes; including a duty to warn potential victims of a foreseeable risk of harm * Find police failed to protect women in the area by not warning them   **Foreseeability**   * Risk was foreseeable; knew of the serial rapist in the area, and it was likely that he would strike again * Proximity – PO knew the distinct group of potential victims; based on neighbourhood, 2nd and 3rd floor apartments w/ balconies, and white, single females   **Standard/Breach**   * Legitimate reasons may exist not to warn; but only where the risk of warning was greater than the risk of not warning * However this would not excuse a failure to protect; other means of notice were available – not warning on the basis that women would panic is not sufficient |
| Ratio | * Police departments owe a duty of care to the public at large to protect * This public duty can give rise to a private law duty to act/warn potential victims of a reasonably foreseeable risk of crime or harm (case is unusual in that it was a specific and narrow group of citizens who were at serious risk of criminal harm) |

**11.5 The Duty to Perform Gratuitous Undertakings**

* Per Thorne, The common law did not require an individual to honour a gratuitous promise
* However, once the D begins to perform a gratuitous undertaking, he or she may be held liable in negligence for positively injuring the P (worsening the P’s original position)
* Such as where the D:
  1. Lulled the P into a false sense of security
  2. Denied the P other opportunities for aid
  3. Put the P in a more precarious physical position
* Thorne rule remedied by:
  + Classifying the D’s conduct as misfeasance (rather than nonfeasance)
  + Using K law (creating obligations)
  + Imposing liability for pure economic losses

Smith v Rae (1919) ONCA

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| Facts | * Mr. & Mrs. Smith arranged with Dr. Rae to deliver their child due mid-November * Labour began December 2, Dr. Rae not available, baby died during delivery |
| Issue | * Is there a duty in tort to perform an obligation? |
| Analysis | * Wife cannot sue in K (K was with husband); her claim must be made in tort * Duty: No action available for nonfeasance; Dr owed no duty to fulfill a gratuitous promise to act (attend the delivery) * Standard: Dr. not negligent in failing to attend given his other responsibilities and the info he’d received |
| Ratio | * There is no tortious duty to act (to fulfill gratuitous undertakings) * Breach of K with the husband * If the doctor had begun treating the patient and then stopped; owe a duty not to make things worse |

Q: Why was the special relationship owed by the doctor to Mrs. Smith as the patient not considered?

* If the doctor had been held to have owed a duty, he could have ben liable in negligence for not performing his obligations to treat Mrs. Smith as the patient.
* However, common law has held that you owe a duty only to not worsen the patient’s position (by misfeasance). There is no tortious obligation to act.
* Court took the view that the doctor did breach his contractual obligations, but this was with the husband. Was not a tortious duty to act.

Zelenko v Gimbel Bros Inc (1936) US SC

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| Facts | * Deceased P died in D’s store * D attempted to assist by placing P in infirmary w/ out medical care; should have called ambulance or left the P alone |
| Issue | * Did the D have a duty to assist? |
| Analysis | * Nonfeasance – therefore the D was under no duty to assist the P * Duty is not as a “common carrier of passengers” (or a special duty recognized); however the D assumed his duty by “meddling in matters with which legalistically it had no concern” * Once you begin a course of action, must follow through; can be held negligent where no duty existed * Do not owe a duty to save, but a duty not to make things worse; this would be a case of positive misfeasance |
| Ratio | * Once a gratuitous undertaking has begun, the D owes a duty not to make the situation worse for the P. They are not required to “solve” the situation or rescue them. * Becomes an issue of misfeasance rather than nonfeasance. * i.e. the D would not have been held liable if he had left the P on the floor |

Soulsby v Toronto (1907) ON

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| Facts | * City put a gatekeeper at the train tracks during busy seasons when many people are in the park; kept gates closed when trains were approaching * P found the gates open but no gatekeeper; assumed he was safe to cross; was hit and seriously injured * P argued that even if the City was under no duty to establish the gate and employ a watchman, once they undertook this duty he was entitled rely upon it |
| Issue | * Did the City have a duty to monitor the tracks with a gatekeeper? |
| Analysis | * No duty was imposed by statute * Similar to Skelton v London – individual found gates unfastened and proceeded without further inquiry; hit by train and injured. In this case the P knew of the ordinary dangers of railway crossing and that the road led across it; P was required to employ caution on his own * Reasonable Reliance   + A duty of care may exist where the City continuously and consistently operated the gate throughout the year. If the watchmen was missing, then it would actually be a case of misfeasance.   + However, not enough action by the City to justify reliance; operated the gate on a seasonal basis. This was nonfeasance – a failure to do anything. * Partially the fault of the victim; should have taken due care. |
| Ratio | * If a person undertakes to perform a voluntary act, he is liable if he performs it improperly (misfeasance), but not if he neglects to perform it (nonfeasance) * N.B. Court seems open to the idea that a duty of care may exist where the voluntary act was continuous and consistent (enough that others would rely on it) * Courts are unwilling to create a duty where no obligation existed. |

12. SPECIAL DUTIES OF CARE: MISCELLANEOUS CATEGORIES

**12.1 Introduction**

* Special duties of care developed from frameworks involving aspects of foreseeability, proximity and policy; but their principles are more finely-tuned and directed

**12.2 The Duty of Care Owed to Rescuers**

* If you create a situation where some is compelled or drawn to rescue, do you owe a duty of care to the person who intervenes?
  + Yes, however the actions of the D must have “created a new situation of peril” that induced the P to act.
* This duty to rescuers may exist (1) where a person puts themselves in danger – owing a duty of care to their passengers – and (2) where a rescuer (under a special duty to act or not) begins their act and does so negligently or carelessly.
* Meaning that if another boat had attempted to rescue Mathews and did so negligently, and their negligent rescue induced Horsley’s rescue attempt, they could be held liable.
* These issues will likely be subject to issues of causation

Horsley v McLaren (1972) SCC

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| Facts | * M/H were guest on M’s 30 ft boat; Mathews went overboard but was unresponsive in the water * Several rescue attempts – reversed the boat, threw life ring, could not hook with pike pole * Horsley jumped into save; could not be resuscitated. Mathew’s body was not recovered. * Water was only 39°F (-17°C); COD was cardiac failure from shock on immersion or prolonged immersion * The trial judge established that a duty of care was owed to Mathews (see previous brief) |
| Issue | * Did McLaren owe H a special duty of care based in the relationship b/w carrier and passenger? * **Did McLaren’s negligent attempts to save Matthews’ prompt Horsley to rescue?** * Was Horsley’s conduct contributorily negligent? |
| Analysis | Duty of Care   * Accepts that a duty rested upon McLaren as host, owner and operator of the boat to all passengers & other rescuers * However this duty exists at common law; not from the *Canada Shipping Act*   Breach   * Any duty owing to H must stem from the fact that a new situation of peril was created by M’s negligence which induced Horsley to act as he did – did McLaren’s actions alter or prolong the situation enough that H was prompted to enter the water? Court found that they did not.   Causation   * Accepted that M failed to comply with the appropriate “man overboard” procedure; does not accept evidence regarding M’s potential intoxication * But were satisfied that life jacket and pike pole were thrown and that Mathews was unresponsive * Do not find evidence that justifies H choosing to risk his life by diving in the frigid water * N.B. Laskin dissented; argued that the clumsy rescue was enough to induce H to act |
| Ratio | * A duty of care to other potential rescuers exists where an individual owes a duty of care to the victim (i.e. a special relationship) |

**12.3 Duties Owed to the Unborn**

* Negligence that preceded the child’s birth
  + Can you owe a duty of care to a “person” who does not yet exist?
  + The common law does not ascribe “person” status until a child is born alive
* One the child is born, the parent, child or both are able to claim rights based upon acts that occurred prior to the child’s death – question is, against whom?
* Losses can include pain and suffering, increased financial burdens and the child’s loss of potential earnings

1. Pre-Natal Injuries

* A child born alive after some pre-natal injury (often an accident suffered by the mother) can sue other parties in negligence; treated simply as personal injury to the child
* However, this does not allow the child to sue the mother (Dobson v Dobson; SCC applied *Anns* test; overturned on account of policy concerns)
* Policy Concerns:
* A duty of care owed by a pregnant woman to her foetus has the potential to intrude upon a women’s fundamental rights and autonomy; would impact her entire life
* Difficult for the judiciary to determine what constitutes tortious and non-tortious behaviour
* Some lifestyles choices such as alcoholism and drug addiction are beyond the control of the pregnant woman
* Could increased the level of external scrutiny focused upon these women
* Could have devastating affects on the mother and child’s relationship – but would a child typically sue its mother unless the real purpose was to secure access to her insurer?

1. Pre-Conception Wrongs

* Occurs when the D carelessly causes a parent to suffer an injury that detrimentally affects their reproductive system
* i.e. exposure to chemicals
* Often occurs in the case of drug companies which do not warn women that taking this drug may cause issues prior to pregnancy; courts have generally not found a duty of care
* Uncommon action unless the foreseeability is sufficient and there are no public policy reasons for negating the duty

1. Wrongful Birth & Wrongful Life

* Occurs when a medical professional carelessly fails to inform a women that she faces an unusually high risk of giving birth to a disabled child or when they negligently perform tests that are designed to detect foetal abnormalities
* Wrongful birth occurs when a claim is brought by the mother; on the principle that she would have terminated the pregnancy
  + Damages are only available if the child is born disabled; healthy children should be considered a “blessing”
  + Will give costs attributable to the child being disabled
* Wrongful life occurs when a claim is brought by the child; on the principle that they would not have been born and would not have been forced to struggle through life with a disability
* Not resolved in Canada
* Aus HC held that it is impossible to compare a disabled life to a non-existent one; public policy favoured equal treatment those with disabilities, that their lives would be devalued by a decision that disabled life is worse than no life at all, and that these complex decisions should not be decided by the courts
* Excerpt: Arndt v Smith (1997) SCC
* Facts: Pregnant woman contracted chicken pox. Doctor failed to inform patient of the risks and offer her the option of an abortion. Child was born severely disabled.
  + Child’s claim for wrongful life was dismissed based on policy reasons
* Mother claimed that she suffered undue hardship by having a disabled child; if she had been properly advised she would have terminated pregnancy.
* TJ believed that the evidence did not demonstrate that the mother would have terminated the pregnancy. Dismissed the claim. Overturned by the BCCA.
* At the SCC, the claimed failed based on causation. In applying a reasonable person standard, concluded that she would not have terminated the pregnancy.
  + However the reasonable person standard is based on a person “with all of the P’s subtleties” meaning that they accounted for her beliefs

1. Wrongful Pregnancy

* Form of medical negligence that arises when parents have taken steps to prevent pregnancy; such as a botched abortion or sterilization procedure
* Straight forward when the pregnancy is terminated; more complex if carried to term
  + Could construe parents decision not to terminate after negligence as breaking causal chain or contributory negligence; not yet done in Canadian courts
* In Canada compensation is available only for the (1) costs of delivery and (2) related pain and suffering.
  + A healthy, unplanned child should not be a legal harm and will provide some benefits
  + Additional costs are available only for a disabled child

**12.4 Psychiatric Harm**

* Given the variability of human nature, it is always foreseeable that psychiatric harm is possible
* Courts were loathe to impose liability for psychiatric harm; evidence is far less conclusive than x-rays or photos
* Tort requires two things:
  1. Something more than typical emotional response – usually includes “recognized psychiatric illness”
  2. Shock – a response that come from the scene of the accident or the immediate aftermath
* **Duty of Care in Bystander Cases**: Courts have narrowed the scope of the duty of care to avoid “floodgates of litigation” by anyone who had a severe emotional reaction to an accident.
  + Narrows the field of people to whom duty would be owed; limits the thin skull principle
* A duty of care was only likely to be found where (Alcock):
  1. the bystander had **an emotional stake** in the accident
     + Usually because of close relation to the primary victim
     + Rebuttable presumption of parent, child, and spouse. However other individual who can show a close and intimate relationship comparable to that of immediate family may be considered.
  2. the bystander was close in **time and space** to the accident (including the immediate aftermath)
     + Where P’s who identified victims hours later were too far removed in time
  3. the bystander **actually saw or heard** the shock causing accident or aftermath
     + Where the means by which they saw must have been reasonably foreseeable (i.e. cable networks should not have aired)
* SCC characterized Mustapha as a case of a duty owed by a manufacturer-consumers; determined based on remoteness

Alcock v Chief Constable of south Yorkshire Policy (1991) HL Eng

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| Facts | * Action brought by 16 Ps on behalf of 150 people; suffered nervous shock after fearing for the safety and loved ones who were in a soccer stadium which was dangerously overcrowded due to police carelessness; fights broke out and many were trampled to death * The Ps watched from the stands, on TV or the radio |
| Issue | * Do the police owe a duty of care to the family of those injured or those fearful for their loved ones? |
| Analysis | * Police accepted that they owed a duty of care to the fans at the stadium; including those injured and not. But maintain that they were not in any breach of any duty of care owed to the D’s. * Established in the law that:   + A claim for damages is available if the P establishes that he was injured or was in fear of personal injury   + A claim can be made when the shock result from death or injury to the P’s family or the fear of death or injury   + The shock has come about through the sight or hearing of the events * Case seeks to extend the boundaries of the cause of action for psychiatric injury * Reasonable foreseeability must be limited by proximity; should restrict the duty of care to one’s “neighbour”   Establishes three required elements:   * **The class of person whose claims should be recognized** * Rebuttable presumption of parent, child, and spouse. However other individual who can show a close and intimate relationship comparable to that of immediate family may be considered. * **The proximity of such person to the accident – in time and space** * Must be close in time and space; through sight or hearing of the event and its “immediate” aftermath * Ps who identified victims hours later were too far removed in time * **The means by which the shocked has been caused** * Means were television and radio of the event; the police expected that the television authorities would not show pictures of suffering by recognisable individuals; evidence shows that no such pictures were shown * Could not equate with the “sight or hearing of the immediate aftermath” |
| Ratio | * Cite for the three elements which limit liability in bystander cases. |

Excerpt: Devji v Burnaby (1999) BCCA

* Parents not able to recover for the psychiatric consequences from their daughter dying in a car accident
* “The nature of the experience by which an injury is alleged to have been suffered is one of the “controlling mechanisms” that serve to limit the reach of liability for nervous shock in this province. It seems to me that the principle shock suffered by the Ps was in learning of Yasmin’s death; after that, grief, sorrow and regret would follow immediately, and would continue for an unlimited period. The experience of viewing the body, however, cannot be equated to the shock and horror that would be experienced, for example, at the scene of an accident witnessed by the Ps because the features of surprise, shock, horror and even fear are absent in a hospital setting”

Mustapha v Culligan of Canada (2006) Ont CA

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| Facts | * M found dead fly in Culligan water bottle; expert testimony confirmed that he suffered severe nervous shock and had suffered financially as a result * TJ awarded damages; but conceded that M’s reaction was “objectively bizarre” |
| Issue | * Is reasonable foreseeability evaluated on an objective or subjective standard? |
| Analysis | * M argued that he was the “primary victim”; lower threshold of reasonable foreseeability was required * The Court rejects the primary & secondary victim distinction articulated in Page v Smith (Eng); all claimants must demonstrate reasonable foreseeability as a fundamental element of tort law * Arbitrary distinction that camouflages the policy considerations (outlined in the *Anns* test) * Q: Is it reasonable foreseeable that a person of normal fortitude or sensibility is likely to suffer some type of psychiatric harm as a consequence of the D’s careless conduct? * Should not confuse with thin skull rule; the thin skull rule applies only once liability (duty and breach) has been established * Affirm the three elements outlined in Alcock (see above) * **Remoteness**: TJ erred in failing to account for the objective components of the test   + All of the medical evidence characterized M’s reaction as unique and strange (questioning reasonable foreseeability)   + Culligan was not made aware of, or ought to have known, of M’s particular sensibilities (proximity) |
| Ratio | * Affirms the three elements outlined in Alcock regarding the duty of care in psychiatric harm cases * The primary & secondary victim distinction does not apply in Canada; all claimants must demonstrate reasonable foreseeability of harm |

**12.5 A Health Professional’s Duty to Inform**

* Battery vs. Negligence
  + Battery (intentional tort) occurs where a patient did not consent, the consent was exceeded or the consent was obtained fraudulently
  + Negligence occurs where the consent was obtained but the health professional did not fully disclose all relevant information to the patient
* Must satisfy all of the elements of negligence
  + **Duty:** Clear that an affirmative/positive duty on doctors and health professionals exists to disclose all information required to make an informed decision
    - Includes all material risks of the proposed treatment and non-material risks that they know or ought to know would be of particular concern to the patient
    - “Therapeutic privilege” has been strictly limited by the courts
  + **Breach of the Standard of Care:**
    - Did they disclose all material risks? Comes back to the question of, what is a material risk?
  + **Causation:**
    - Patients must prove that the failure to inform was the cause of their loss – that if they had been adequately informed of the risks they would not have undergone the procedure
    - Courts have applied a special objective/subjective test of causation which requires both that a reasonable patient in the position of the P and the actual P would not have undergone the procedure if fully informed
      * Limits the action significantly; concern about exposing doctors to unreasonable litigation
  + **Remedy:** If they hadn’t had the surgery/procedure, what position would the P have been in? What difference did it make to the patients ultimate outcome?
* N.B. These are not cases where the operation was negligently performed – in those cases, the negligent actions of the doctor during the procedure caused the harm or loss to the patient.

Excerpt: Reibl v Hughes (1980) SCC

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| Facts | * R underwent surgery to remove a blockage in his artery; the surgery was performed competently but during or immediately after the surgery R suffered from a massive stroke leaving him partially paralyzed * R needed only 1.6 years at his job to get access to pension and extended disability |
| Issue | * When is an action in battery available? * Do small chances of death or paralysis always constitute material risk? |
| Analysis | * Action in battery is only available if the patient did not consent to the procedure – meaning the misinformation must be related to nature of the procedure. * Breach: R did not receive adequate information regarding the risks of the procedure – where very small risks of death and paralysis should be discussed no matter how smaller. * Causation: Found that a reasonable person in R’s situation would have delayed the surgery. This test is objective and information from the medical community is not conclusive. |
| Ratio | * Action in battery is only available if the patient did not consent to the procedure – meaning the misinformation must be related to nature of the procedure. |

Haughian v Paine (1987) SKCA

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| Facts | * Patient underwent disc surgery that left him paralyzed; subsequent surgeries only partially alleviated |
| Issue | * If doctors must disclose all material risks, what makes a risk material? |
| Analysis | Standard of Care   * Patient not told that condition might improve through conservative mgmt. without surgery (alternatives) * Also not told of the risk of paralysis – though risk was statistically low at 1/500, the statistics are not the only relevant factor to determining materiality * “One cannot make an informed decision to undertake a risk without knowing the alternatives to undergoing risk”   Causation   * Because of the potential that conservative management (alternative treatment) may have alleviated the patient’s symptoms, court accepted that a reasonable person would not have undergone the surgery if fully informed. |
| Ratio | * Expands duty to disclose to include the consequences of leaving the ailment untreated and alternative means of treatment and their risks * Statistical risk is not the only relevant factor in determining risk – the more serious the risk, the less likely it must be to be material; i.e. a very, very small risk of death is still material |

**12.6 A Manufacturer’s and Supplier’s Duty to Warn**

* A manufacturer of a product has a positive duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge
* Different from negligent manufacturing of the product
* A **continuing duty** –dangers discovered after the product has been sold and delivered must be communicated
* All warnings must be reasonably communicated and must clearly describe any specific dangers that arise from the ordinary use of the product
* Nature and scope of the duty to warn varies with the level of danger
* Generally the duty to warn is owed directly by the manufacturer to the consumer
* However, in certain situations a “learned intermediary” and not the manufacturer will be required to disclose any dangers or risks of the product
* In these cases the manufacturers duty is discharged if the intermediary’s knowledge approximates that of the manufacturer
* Subjective test applies to causation per Buchan

Hollis v Dow Corning Corp (1995) SCC

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| Facts | * P had breast implants, one ruptured after only 17 months during normal activity * The literature accompanying the product warned of the risk of rupture during surgery, but not of any risks of post-surgical rupturing “from ordinary, non-traumatic, human activities” * P sued Dow; arguing that it had failed to warn of the risks even though it had received reports of 50+ ruptures by the time she had her surgery (this is a small percentage of implants) * Dow argued (1) it fulfilled its duty and (2) that even if it did breach its duty to warn the P, that she still would have had the surgery or (3) that the doctor would not have warned her anyways |
| Issue | * What duty is there on manufacturers to warn consumers about the dangers of their products? * What causation test applies? |
| Analysis | Duty to Warn/Standard of Care   * Duty to warn and standard of care expected of manufacturer’s of medical products is necessarily high; these products are often ingested, consumed or otherwise placed in the body with great risks * No warnings of the possibility of rupture arising from normal squeezing or non-traumatic, everyday activity were given to the patient or the doctor * As learned intermediary, notice to the doctor would have discharged Dow’s duty * Evidence showed that Dow was aware of the risk and did not communicate it until 2 years after receiving rupture reports; as duty to warn is a continuing one and the onus/standard of care is high for medical manufacturers, Dow found to have breached the standard of care   Causation – Would she have had the surgery if she was aware of the risks?   * Highly desirable from a policy perspective to hold the manufacturer to a strict standard of warning consumers of dangerous side-effects of their products * Subjective test should be applied (irrelevant that a doctor was also sued; the objective test applicable to health professionals should not apply) * Particularly since manufacturers have an incentive to “sell the product” rather than inform * However this distinction may not be terrible convincing – seeing as how a doctor working a semi-private clinic may have the same incentives * P was clear at trial that she would not have had the surgery   Causation – Would the doctor have warned her if he was aware?   * Argument is irrelevant; would allow manufacturers to escape liability by establishing that theoretically, if the doctor had been warned, he would not have told the patient * Cannot be shielded by a theoretical and speculative breach of duty by the doctor * Would leave the patient without any recourse |
| Ratio | * The standard of care owed by manufacturers of inherently dangerous and medical products is necessarily high – this duty continues after the purchase of the product. * A subjective test of causation applies to manufacturers – not the modified objective test applicable to health professionals. If notified, would the P have purchased/used the product? |

13. SPECIAL DUTIES OF CARE: NEGLIGENT MISREPRESENTATION

**13.1 Introduction**

* Duty of care that arises with respect to written or oral communications (statements) that were made carelessly
  + Unlike the tort of deceit/fraud, which requires that the D had knowledge, or was reckless as to the falsity of their statement (Derry v Peek)
  + Broader range of “statements” than misrepresentation in K
* Misrepresentations can include:
  + General advice, opinions and statements about the future
  + Does not require that the statement was factually untrue; only that it was made carelessly
  + Does not require a contractual relationship – concept of the “neighbour” governs in tort
  + However, requires that someone reasonably relied on that information
    - Dependent on the context/circumstances in which the advice of given
    - i.e. professional setting or cocktail party chit chat?
  + Available both between contractual parties (easy to find a duty of care) and against 3rd parties
    - Where the “special relationship” is more difficult to establish; the third parties interest may be zero (i.e. where Ernst & Young had no interest in the K’s entered into by Hercules Mgmt)
    - Raises issues among vicarious liability and employees
      * Some courts have held employees personally liable in addition to the company; no satisfactory line of cases on that point
* Statements are inherently different from actions:
  + Statements often made less cautiously than actions
  + Statements have a greater durability and portability (particularly in the advent of the internet)
* Two types of injuries:
  + “physical injury” – where the P or the P’s property is damaged or destroyed
    - The courts have treated these harms similarly to negligent actions
  + “pure economic loss” – where the P suffers economic loss with no physical injury

Duty of Care

* To address concerns about the “floodgates of litigation” due to the broader nature of the tort than in K, courts have attempted to limit the tort through a **narrowed duty of care**
  + Where contractual terms can further limit tort liability
* Canadian courts (before Hercules) required a “special relationship” between the P and the D
  + Form of proximity
  + Easy to delineate when the parties are entering into a contractual relationship
  + Becomes a much “fuzzier” distinction where no contractual relationship exists
* Pre Hedley Byrnes, courts also restricted recovery for pure economic loss
* Since Hedley Byrnes, courts have struggled to articulate a principled justification for liability and to delineate a satisfactory set of rules
* Consider the *Anns* test throughout the cases

Hedley Byrnes v Heller (1964) Eng HL

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| Facts | * HB was an advertising agency that extended large amount of credit for advertising to Easipower (EP) * HB’s bank requested information regarding EP’s creditworthiness from EP’s bank (H); the information turned out to be wrong but H has stipulated that the report was give “without responsibility” * EP ends up defaulting on the credit extended by HB * HB takes action against H for negligent misrepresentation |
| Issue | * Can a P take action in negligent misrepresentation for pure economic loss? |
| Analysis | * Prior to this case, carelessly misleading someone was not a civil wrong * Case held that the law will impose a duty of care when someone seeks information from an advisor who has special skills, is trusted to exercise due care and where the advisor knew or ought to have known that reliance was being placed on his skill and judgement * Implicitly we assume individuals give you “careful” information * However, in this case the disclaimer (exclusive clause) barred the claim |
| Ratio | * A negligent misrepresentation, may give rise to an action for damages for pure economic loss even if there was no contractual relationship between the parties * HL unanimously declared that a tort of negligent misrepresentation existed |

**13.2 Negligent Misrepresentation Causing Pure Economic Loss**

Hercules Managements Ltd v Ernst & Young (1997) SCC

* Rejects the “special relationship” approach outlined in Hedley Byrne
* When addressing all new duties of care, the court should undertake an *Anns* style test:
  + (a) a *prima facie* duty of care, which depends on foreseeable reliance that is reasonable reliance;
  + (b) the absence of factors militating against a duty of care, notably indeterminate liability

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| Facts | * HML was and investor in two companies that E&Y had prepared audited financial statements for * HML argued that E&Y had been careless in preparing the statements and that they suffered economic loss as a result of their reliance by (1) investing further and (2) based on their existing shareholdings * N.B. No contractual relationship b/w the parties |
| Issue | * Does a duty of care exist here? Apply the *Anns* test |
| Analysis | **1. Is a *prima facie* duty of care owed?**   * “Proximity” is intended to connote that the relationship b/w the P and D is such that the D is under an obligation to be mindful of the P’s legitimate interests in conducting his or her affairs * Unlike negligent actions, this requires that (a) the D ought reasonably to foresee that the P will rely on his representation and (b) that the reliance by the P, in the particular circumstances, was reasonable.   **2. Do policy considerations negate or limit this duty?**   * Concern that D’s will be exposed to “liability in an indeterminate amount of an indeterminate time to an indeterminate class” * Particularly relevant for modern accountants – financial statements of corporations affect the economic interests of the general public, share holders and potential shareholders * Benefits of tort liability as an incentive to produce accurate audit reports is outweighed by the socially undesirable consequences to which the imposition of indeterminate liability might lead   + Increased insurance costs   + Increased litigation   + Decreased profitability and increased costs to clients * Generally the concerns over indeterminate liability will negate a *prima facie* duty of care unlessindeterminate liability can be shown not to be a concern on the facts of a particular case * This requires the following two questions to be answered in the affirmative:  1. Did the D have knowledge of the identity of the P (or of the class of P’s)? 2. Did the P use the statements in question for the specific purpose or transaction for which they were prepared or made?  * Five general *indicia* of reasonable reliance include: * The D had a direct or indirect financial interest in the transaction in respect of which the representation was made * The D was a professional or someone who possessed special skill, judgement or knowledge * The advice or information was provided in the course of the D’s business * The information or advice was given deliberately, and not on a social occasion * The information or advice was given in response to a specific enquiry or request   **Application**   * *Prima facie*, court found that the D was aware that shareholders would rely on the report and that the P’s reliance was reasonable * However, the purpose of the report was “the standard statutory one” to permit shareholders to exercise their role *as a class* of overseeing the *corporations*’ affairs at their AGM; E&Y was unaware of the specific reasons for which HML (or others) would use the statements |
| Ratio | Defines *Anns* Test for Negligent Misrepresentation  1. Is a *prima facie* duty of care owed?   * Where proximity requires that (a) the D ought reasonably to foresee that the P will rely on his representation and (b) that the reliance by the P, in the particular circumstances, was reasonable.   2. Do policy considerations negate or limit this duty?   * Concerns over indeterminate liability will negate a *prima facie* duty of care unlessindeterminate liability can be shown not to be a concern on the facts of a particular case * This requires the following two questions to be answered in the affirmative:  1. Did the D have knowledge of the identity of the P (or of the class of P’s)? 2. Did the P use the statements in question for the specific purpose or transaction for which they were prepared or made?   N.B. This maintains the distinction b/w the claims by the company and claims by its shareholders |

Notes on the *Anns* Test

* The Anns test as formulated in Cooper v Hobart and Hercules Management has not been well-followed by lower courts when attempting to find a new category of a duty of here
  + Applying Anns to every case/fact pattern in negligence misrepresentation is inconsistent with the purpose of the Anns test as a method for defining new duties of care in particular categories.
* However, both approaches result in the same outcome – who the representation was made to, what was their relationships, did they reasonably rely on it, and are there legitimates policy concerns?
  + Hercules does not change results; SCC feels the analysis needs to be homogenized with other duty of care contexts
* When policy issues arise in the analysis is often irrelevant. The test is about balancing a myriad of issues to determine if a duty of care is appropriate in the circumstances and the relationship between the parties.
* **NOTE: Cite both Cooper and Hercules Management when finding a new duty of care**

**13.3 Negligent Misrepresentation and Contract**

* What if the statement arises in a contractual context?
  + Traditionally tort law had no role to play; was about accidents and physical injury
  + Exception: “common-callings”
* **Can the D incur liability in both K and tort on the basis of essentially the same event?**
  + Yes, but cannot double recover (Central Trust v Rafuse (1986) SCC)
  + Question is of practical significance as additional advantages may be offered in tort law
* Q: Should negligence (tort) principles be allowed to operate with respect to the period of negotiation that precedes the formation of a K (pre-ACC)?

BG Checo International v BC Hydro & Power Authority (1993) SCC

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| Facts | * BC called for tenders to erect transmission towers & lines * Tender documents (K) indicated that clearing of the right of way would be done by others and formed no part of the work to be performed by the successful tender * N.B. Seems to be a promise, not a statement? * No clearing was ever done and this caused Checo difficulties in completing the work * Shown at trial that Hydro was aware the contractor did not clear the right of way properly * Checo sued BC for negligent misrepresentation, breach of K & fraud * TJ held in favour on the basis of fraud – if the tort had not been committed, Checo would not have bid * But fraud overturned by BCCA b/c no dishonest intent * Overturned TJ finding on the basis that the facts did not support it * Found that Checo would still have bid, but at a higher cost to accommodate the work * At SCC, Hydro argued that Checo must be confined to their K remedy |
| Issue | * Can a P in a contractual relationship with the D, sue the D in tort if the duty relied upon by the P in tort is also made a contractual duty by an **express term of the K**? |
| Analysis | * Courts have moved towards concurrency in tort and K; reducing the significant of the two different forms of action and allowing access to all relevant legal remedies * Parties may sue in K or tort – except where the K indicates that the parties intended to limit or negative the right to sue in tort; tort duty is diminished only to the extent that the private ordering of the K contradicts the tort duty * Should not assume that parties intended to exclude tort liability * Express terms of the K did not negate BC’s common law duty not to negligently misrepresent that it would have the right of way cleared by others * In this case, the tort remedy would have provided a large quantum of damages – the cost of clearing plus profit margin; in K only the cost of clearing   Why not Iacobucci’s suggestion in dissent?   * Express and implied terms are of equal weight in the law * Any assessment of equality of bargaining power and “justness” of the K would be far too uncertain   Application – Agree with BCCA’s finding that Checo would still have bid |
| Dissent | * The existence of a K does not preclude the existence of a common law duty of care * Per Le Dain, any duty arising in tort will be concurrent with duties arising under the K, **unless the duty which the P seeks to rely on in tort is also a duty defined by an express term of the K** * Assumes that the parties intended for the law of K to apply |
| Ratio | * Parties may sue in either or both K and tort; although they can only recover once * Except where the K indicates that the parties intended to limit or negative the right to sue in tort |

Queen v Cognos Inc (1993) SCC

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| Facts | * Cognos hired Queen for an accounting position; he moved his family to Ottawa for the job * During the interview, the manager (Johnston) made representations regarding the nature of the employment opportunity – stating that the position was associated with a major project that was to be developed over a two year period and that prospects for employment post-completion were good * Did not reveal that funding for the project had not yet been secured * 18 months later Queen’s employment was terminated; brought action in negligent misrepresentation |
| Issue | * What is needed to establish a duty of care for negligent misrepresentation? * What elements are required to prove negligent misrepresentation? |
| Analysis | Duty of Care   * Applies a loose version of the *Anns* test * Clear that Cognos ought to have foreseen that Queen and other candidates would rely on representations made during the interview. It is reasonable to expect this. * Clear that proximity is met b/w an employer and prospective employee – “special relationship” * Would be unreasonable not to impose such a duty   What is required for a negligent misrepresentation case?   1. There must be a duty of care based on a “special relationship” b/w the representor and the representee 2. The representation in question must be untrue, inaccurate or misleading 3. The representor must have acted negligently in making said misrepresentation 4. The representee must have relied in a reasonable manner, on said negligent misrepresentation 5. The reliance must have been detrimental to the representee in the sense that damages resulted   Application   * Issues 2,4 and 5 not contested * 1: Cognos contest that the duty to Queen was negated by a disclaimer in the employment K and that the misrepresentations were not made in a negligent manner * To distinguish from Checo, Iacobucci asserts that here the tort action was not co-extensive with a duty imposed on the D by an express term of the K; no concurrency b/w K and tort   Remedy   * Put him the position he would have been in – ended up getting a large chunk of his salary as he would likely have been employed throughout this time if he had stayed in Calgary and the costs and hardship of moving him and his family |
| Ratio | What is required for a negligent misrepresentation case?   1. There must be a duty of care based on a “special relationship” b/w the representor and the representee 2. The representation in question must be untrue, inaccurate or misleading 3. The representor must have acted negligently in making said misrepresentation 4. The representee must have relied in a reasonable manner, on said negligent misrepresentation 5. The reliance must have been detrimental to the representee in the sense that damages resulted |

Why not claim in K?

* Would have to sue for wrongful dismissal; employer was able to let him go with one months notice
  + Presumably the employer complied with the terms of the actual employment K
* Tort route offered him a broader claim and remedy

**Aside:** Hercules *Anns* Test or the Cognos Components?

* Though Hercules is the more recent SCC precedent, lower courts have a tendency to follow the checklist or components outlined in the older Cognos case
* Notice that the issues are all the same; likely to end up in the same position
* Concept of “special relationship” includes the policy factors present in the *Anns* test
* On an exam, mention both cases but be sure to deal with all the factors and/or circumstances

**Aside:** Remedies in Checo and Cognos

* In *Checo* the finding was that the D would have entered into the contract but increased the price to pay for the extra work plus a profit margin. Damages were the amount the bid price would have increased.
* In *Cognos* the finding was that Π would not have taken the Ottawa job at all but would have stayed in Calgary. Damages were the amount more Queen would have earned and saved in moving costs.

14. SPECIAL DUTIES OF CARE: RECOVERY OF PURE ECONOMIC LOSS IN NEGLIGENCE

**14.1 Introduction**

* Pure economic loss presents considerable difficulties in tort
  + Raises risk of indeterminate liability
  + Economic loss is generally considered less important than personal injury/property damage
  + Overriding contractual allocations of risk and privity of K
* Five categories of pure economic loss claims:
  1. **Negligent misrepresentation** (Chapter 13; succeeds a lot)
  2. **Independent liability of statutory public authorities** (succeed a little bit)
  3. **Negligent performance of a service** (seldom succeed)
  4. **Negligent supply of shoddy goods or structures** (succeed a bit more than a little bit)
  5. **Relational economic loss** (seldom succeed)
* Open for the courts to recognize a duty of care in the new type of situations using the *Anns* test or “special relationships”

**14.2 New Categories of Pure Economic Loss**

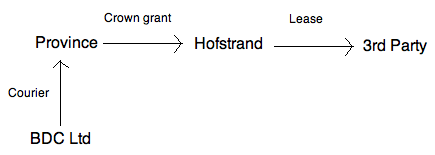
Martel Building Ltd v Canada (2000) SCC

\*Again overlap between contractual relationships and tortious liability

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| Facts | * Martel had leased space/building to Canada; when renewal time came, Canada lead Martel to believe that it wanted to renew on certain terms * When Martel formally extended the offer, Canada rejected and issued a call for tenders; ultimately choosing a different property/landlord * Martel sued argued that Canada had breached a duty of care to negotiate in such a way as to avoid cause them pure economic loss (negligence in negotiation) * The incompetence of federal employees lead to their loss – by repeatedly delaying matters, breaking appointments, ignoring requests, etc. * Could not sue in K – at the end of the lease the tenant owed no rights/obligations to the landlord |
| Issue | * Is there a duty of care owed in pre-contractual negotiations? Does this extend to purely economic loss? |
| Analysis | * CL traditionally did not allow recovery of economic loss where the P suffered no physical harm or property damage * Has been allowed in very limited circumstances for the following reasons:   + Economic interests are viewed as less important than bodily security or proprietary interests   + An unbridled recognition of economic loss raises the spectre of indeterminate liability   + Economic losses often arise in a commercial context where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance   + Allowing the recovery of economic loss would lead to “floodgates of litigation” * However, additional duties of care can be found through the *Anns* test   1. Was there a sufficiently close relationship b/w Martel and Canada?   * + The prospect of causing deprivation by economic loss is implicit and foreseeable in the negotiating environment; there is a *prima facie* duty of care   + Where both the pre-existing lease arrangement and the communication b/w the parties are indicators of proximity Blom argues no proximity, no duty on government to negotiate at all)   2. Are there any policy considerations that service to negate or limit the duty of care?   * Overcome hurdles of indeterminate liability – inherent nature of negotiations create definable limits   + Damages would be limited to the loss of opportunity to concluding a 10 year lease   + Potential claims limited to those persons that Canada directly negotiated with * However, policy concerns preclude extending the tort of negligence into commercial negotiations: * The very object of negotiation works against recovery; implicit that negotiations will transfer wealth between parties * Could deter socially and economically useful/efficient conduct   + In commercial negotiations an advantageous bargaining position is derived from the industrious generation of information not possessed by the opposite party   + Creating a duty of care would fore the disclosure of privately acquired info and the dissipation of any competitive advantage derived from it * Would make tort law an “after the fact insurance” against failures to act with due diligence or hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities * Martel was aware they weren’t negotiating fairly; should have looked elsewhere * Would encourage a multiplicity of law suits |
| Ratio | * No duty of care is owed by parties negotiating to enter into a K; would deter socially & economically efficient conduct and would make tort law an “after the fact insurance” against failures by contractual parties to act with due diligence. |

Excerpt: Design Services v Canada (2008) SCC

* Feds launched tendering process; Olympic launched bid with Design Services as sub-contractors
* When Feds did not comply with tendering process, Design Services was not able to sue for breach of K.
* Court unwilling to find duty of care owed to sub-contractors by a tendering party; issues of indeterminate liability

**14.3 Negligent Performance of a Service**

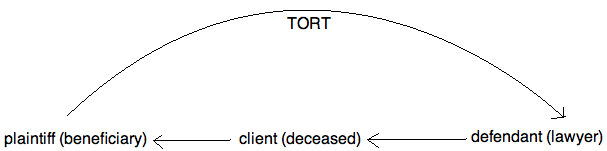
* No authoritative SCC cases at present
* However it has generally followed the same test as negligent misrepresentation
  + Could argue that there is only a fine line between services and representations

BDC Ltd v Hofstrand Farms (1986) SCC

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| Facts | * BDC contracted with Province to courier an envelope to the LTO in Prince George; unaware of the Crown grant included, the intended recipient or the need for timely delivery * Hofstrand was relying on Crown grant to be registered by December 31 in order to lease the land to a 3rd party; the envelope was delivered late and Hofstrand was forced to accept a less profitable lease * Hofstrand sued for negligent performance of a service * Could not sue the LTO as they had not guaranteed the arrival of the envelope * Attempted to get the benefit of the K between the Province and BDC; **would circumvent privity of K** |
| Issue | * Does a contractual party owe a duty of care to a 3rd party? In this case, are the parties of a sufficiently close proximity? |
| Analysis | * Pure economic loss cases always involve the possibility of liability “in an indeterminate amount for an indeterminate time to an indeterminate class” * Involves a balancing of the demands of society for protection for the carelessness of others vs. concerns around widespread liability * Fails the first stage of the *Anns* test; **no proximity**   + BDC had no knowledge of the recipient b/c Crown does not disclose the nature of the documents   + Would stretch the concept of proximity too far to conclude that BDC owed a duty of care to anyone who might be affected by a failure by the Province to register a Crown grant within the calendar year; would be far to broad to constitute a “limited class” * “…it would be going very far to say that the D owes a duty to every ultimate consumer…” * Further the situation of risk was created by Hofstrand by creating terms of the K with the 3rd party which relied on the Crown grant |
| Ratio | * The concept of proximity in new categories of duty of care should not stretch so far as to circumvent the doctrine of privity of K. |

James v BC (2005) BCCA

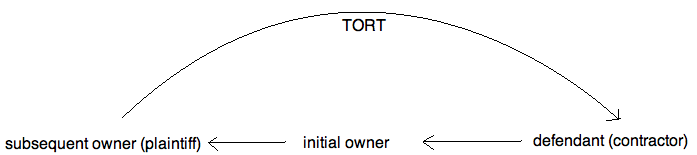
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| Facts | * Lumber mill had provincial license to harvest timber. When it was time to renew, the Minister inadvertently omitted a protective clause which prohibited closure of the mill * Subsequently the employer closed the mill * Ps were employees of the mill; a class action against the government occurred |
| Issue | * Can proximity exist between a minister and individual employees (as 3rd parties)? |
| Analysis | * TJ attempted to consolidate case with misrepresentation; but the Minister never made any representations to the employees * However, the TJ determines that the claim should not be struck out at this stage; judge establishes only that a duty of care may exist and that the matter can go to trial * Reasonable that the Minister could foresee that the employees would rely on the permit for employment |
| Ratio | * Per Cooper v Hobart, there is only proximity between the individual and the government if the government is concerned about the individual’s interest, and not the public as a whole. |



**Aside:** Solicitor’s Liability to 3rd Parties

* Cases where negligent legal work caused pure economic loss to 3rd parties (i.e. the beneficiary who stands to lose the inheritance)
  + No pre-existing right to inherit. They have no contractual right against the testator; the testator has the power to change their will at any time. The financial interest is considerably less compelling.
* Per Wittingham (1978) BCSC, a solicitor may be held liable to an intended beneficiary who is deprived of a bequest because of the lawyer’s negligence

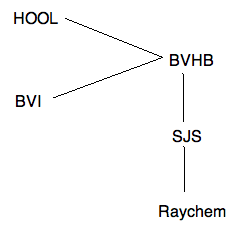
**14.4 Negligent Supply of Shoddy Goods or Structures**

* Contractors and builders are held liable for personal injury and property damage; more difficult where the P suffers pure economic loss only and is unable to establish privity of K
* **How is this different from relational economic loss?**
  + In these cases, the P is the victim or owner of the property who suffers the expense.
  + In relational economic loss, someone other than the owner who suffers the financial loss.

Winnipeg Condo Corp v Bird Construction Co (1995) SCC

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| Facts | * Bird Construction built an apartment building (via K with initial owner) * Years later, building was converted to condos and Winnipeg Condo Corp (WCC) became the owner * In ’82, WCC hired original architect and structural engineers to inspect the building; concluded structurally sound * In ’89, a section of the exterior cladding feel from the 9th storey of the building; WCC had the building repaired immediately and took action against the architect and builder (Bird Cons) |
| Issue | * Can a contractor be held tortuously liable for negligence to a subsequent purchaser of the building for the cost of repairing defects in the building arising out of negligent construction? * This duty of care would circumvent is privity of K |
| Analysis | * Clearly economic loss; WCC claims only for the costs of repairing the allegedly defective masonry * Distinction should be drawn **between merely shoddy goods or structures and “dangerous” defects** in buildings with the capacity to cause serious damage to other persons and property in the community * Defined as a “real and substantial danger”   1. Sufficiently close proximity?   * Reasonable foreseeable to contractors that subsequent purchaser(s) of the building may suffer personal injury, damage or economic loss when defects manifest themselves * If contractors have been held liable for personal or property damage, should also be held liable for economic loss or repair costs of dangerous defects * Doing so serves a preventative function against careless construction   2. Considerations which should negate the duty?   * Indeterminate Liability   + Claimants: Potential class of claimants is limited to the inhabitants of the building; the fact that these will change over time does not render the class indeterminate   + Amount: Amount will be limited by the reasonable cost of repairing the dangerous defect and restoring the building to a safe state   + Time: Practically the period of liability will not last the full useful life of the building   + Burden of proof falls on the P to demonstrate the serious risk to safety, the causal link b/w the contractors work and the risk, and that repairs are required to alleviate the risk * Warranties are Contractual in Nature * Duty in tort can arise concurrently with K; find that the tort duty to construct the building according to reasonable safety standards arises independently of the contractual duty * Tort deals with dangerous construction; K deals with defects * *Caveat emptor* as applied by the MBCA   + Arose from a time of *laissez-faire* attitudes; divorced from present realities   + Contractors and builders are in the best position to ensure the reasonable structural integrity of buildings and identify defects   + Right to recover does not hinge on whether or not the building was inspected (although the D might be able to argue contributory negligence) |
| Ratio | * The builder of a structure or the maker of a chattel can be held liable in tort for pure economic loss suffered by subsequent purchasers/occupants as a result of a dangerous defect; irrespective of the *caveat emptor* principle in K. |

NOTES:

* The definition of “dangerous” has been stretched since this case; does not have to be an imminent danger
* Logically the case should extend to sub-contractors and other products – where it is reasonably foreseeable that their negligent work or actions will cause loss to a subsequent owner
* Does not require the risk manifests itself – able to recover reasonable repair costs where a dangerous risk is present
* Can an exclusion or limitation clause b/w the initial owner and the builder be invoked to protect against the subsequent purchaser?
  + Subsequent purchaser likely to argue that they were not party to the K
  + This argument was made in Donaghue v Stevenson – how can a contractual party protect themselves? Tort overrides the allocation of risk and freedom of K.

**14.5 Relational Economic Loss**

Bow Valley Husky (Bermuda) v Saint John Shipbuilding (1998) SCC

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| Facts | * Husky Oil (HOOL) and Bow Valley (BVI) made arrangements with SJS to build an off-shore drilling rig * They incorporated BVHB as an offshore company to construct and own the rig; enter into the K with SJS * BVHB told SJS to use Thermaclad; the product cause a fire and the rig had to be towed to port for repairs * BVHB, HOOL and BVI sued SJS and the maker of Thermaclad (Raychem) for negligence * Meaning HOOL and BVI are attempting to recover for economic loss as a result of damage to the property of a third party (BVHB); form of relational economic loss * N.B. Where the claims by BVHB are dealt with in K and a tort duty to warn * TJ found: * SJS had breached a tort law duty to warn about the flammability of Thermaclad * Raychem had also breached a tort law duty to warn * BVHB was contributorily negligent at 60% * Maritime law applied, meaning contributory negligence constituted a complete defence for SJS |
| Issue | * Can HOOL and BVI sue for relational economic loss? |
| Analysis | * Relational economic loss in Canada is exceptional, but does exist   + Recoverable only in special circumstances where the appropriate conditions are met   + These circumstances can be defined by reference to categories; but the categories are not closed * These categories have defined to date as  1. Cases where the claimant has a possessory or proprietary interest in the damaged property 2. General average cases 3. Cases where relationship between the claimant and property owner constitutes a joint venture  * This case does not fall into the above; must apply the *Anns* test to assess a new category * 1. TJ and CA held that the SJS owed a *prima facie* duty of care to BVI and HOOL – reasonably foreseeable that they would be affected by a failure to BVHB of the flammability * 2. However, this is negated by problems of indeterminate liability * Could owe a duty to a host of other person who would foreseeable lose money if the rig was shut down; could result in a ripple effect of litigation * Arbitrary distinctions without legal justification (such as limiting liability to those persons the D knew the *identity* of) cannot be used to limit * Also, the P had the opportunity to allocate the risk of the loss under K; tort should not be used as a form of insurance for your own fault |
| Ratio | * Relational economic loss in Canada is exceptional, but defined exceptions exist   + Only where the usual policy reasons against recovery do not exist * P must appropriately allocate risk (as a purpose of K) * Difficult to define a limited class of potential claimants; number of individuals with a financial interest in the function of the property is likely indeterminate   + These circumstances can be defined by reference to categories; but the categories are not closed  1. Cases where the claimant has a possessory or proprietary interest in the damaged property [Not really an exception – the loss suffered is consequential damage suffered by the claimants property (not pure economic loss)] 2. General average cases [A maritime law concept in which cargo owners all have to chip in when only a portion of the cargo is damaged, so each cargo owner is considered as having a recoverable claim against the wrongdoer that caused the damage] 3. Cases where relationship between the claimant and property owner constitutes a joint venture [Exception outlined in CNR v Norsk Pacific (1992) SCC. Granted CNR claim for pure economic loss suffered due to loss of use of a railway bridge it had contracted to use. The D’s barge had crashed into the bridge and put it out of commission. Though CNR did not own the bridge, the SCC held that CNR had a joint venture with Public Works Canada, the owner of the structure.  * Likely to negated by problems of indeterminate liability |

15. THE STANDARD OF CARE

**15.1 Introduction**

* **Duty of Care** is the an inquiry into the existence, nature and scope of the legal relationship
* Once duty is established, it becomes necessary to determine the **standard** **of care** and determine whether it was breached. Should be resolved before factual causation.
* Used the term “carelessness” to describe the breach of the standard of care; use negligence to describe the cause of action
* Concept is “open-ended’ and does not lend itself well to systematic formulae

**15.2 The Common Law Standard of Care: The Reasonable Person Test**

Arland v Taylor (1955) Ont CA

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| Facts | * P injured in car accident. TJ charged the jury on SOC by instructing them to put themselves in the place of the driver * D appealed on account of jury charge |
| Issue | * How is the reasonable person assessed? |
| Analysis | * Should assess standard of care by considering “the care that would have been taken in the circumstances by a ‘reasonable and prudent man’” * Test eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question * Does not require the highest degree of care of which mankind is capable; only what a reasonably prudent man would have done in the same circumstances * TJ’s (and juries) should not interpose himself; his point of view may be warped by extraneous or subjective considerations. Cannot charge jury to put themselves in the place of the D. |
| Ratio | * Assessing the standard of care is an objective test against the reasonable person – what care would have been taken under the circumstances by a reasonable and prudent man? * TJ’s and juries should not put themselves in the place of the D when making this assessment; the reasonable person is not an “actual person” |

**15.3 Factors Considered in Determining Breach of the Standard**

* In determining the applicable standard of care, judges/juries must consider (Bolton v Stone):
  1. The probability of Injury
  2. The potential severity of injury
  + N.B. Foreseeability of injury is used to establish the duty of care; should not consider the cost of remedial measures
* All factors and considerations must be assessed from the **time of the alleged breach**; information about risk or remedial measures that comes to light after the incident is not relevant

Bolton v Stone (1951) HL

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| Facts | * P was walking on road adjacent a cricket match; she was struck and injured by a ball |
| Issue | * What is the standard of care expected by a person who carries out operations on his property which may cause damage to people on the adjoining road/sidewalk? |
| Analysis | * Duty of Care: Readily foreseeable that an accident such as this one might happen * Standard of Care: * Question of fact * The probability of injury was small; a ball had only been hit out of the park 6 times in 30 years * Should also consider the seriousness of the consequences (potential severity of injury) * Should not create a risk that is substantial |
| Ratio | * Probability and severity of injury are relevant considerations in assessing the standard of care. * The cost of preventative steps was not relevant in this case; but is considered in others * Meaning it may not be negligent to take small risks with small damage |

Vaughn v Halifax-Dartmouth Bridge Commn. (1961) NSSC

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| Facts | * City painted the bride; flecks of paint were blow by the wind onto nearby cars * Car owner sued in negligence; D argued that any effective remedial measures were both impractical and cost prohibitive |
| Issue | * What cost must the D endure to avoid or mitigate the risk to meet the standard of care? |
| Analysis | * Court concluded that it was inevitable that paint would be blown onto cars in the parking lot in question * However, the time period of painting was short, no policy was established to warn car owners in the lot, and no signs were posted. * Notice to car owners would have been cheap and prevented/minimized damage to the P and other car owners. |
| Ratio | * The court may consider the costs of measures necessary to eliminate the risk * Case suggests that elaborate and expensive precautions may not be required; only those reasonable |

Law Estate v Simice (1994) BCSC

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| Facts | * Estate of deceased sued doctors in negligence; claiming the P died b/c of failure to provide timely, appropriate and skilful emergency care (primarily a diagnostic CT scan) * Case addressed the issue of allocation of limited and costly medical resources |
| Issue | * How much cost must be endured? Whose interests should prevail? |
| Analysis | * TJ accepted that CT scans are costly and budgetary restraints are placed on doctors * However in this case the constraints worked against the patient’s interest by inhibiting the doctors in their judgement of what should be done for him. Doctors held negligence. |
| Ratio | * If the severity of the harm that may occur to the patient if inadequately diagnosed is greater than the financial harm to the medical system (tax payers), the patient must take precedence |

Watt v Hertfordshire County Council (1954) CA

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| Facts | * Firefighters needed special jack; the truck equipped for carrying it was unavailable. The jack was loaded in another vehicle. The jack dislodged and injured the P when the driver suddenly braked. * P sued for failing to load or secure the jack, transporting it on the wrong vehicle and improperly loading the jack |
| Issue | * What interests must be measured when assessing the duty of care? |
| Analysis | * Courts must balance the risk against the measures necessary to eliminate the risk * Must ALSO balance the risk against the end to be achieved * Where saving people justifies taking considerable risk (i.e. emergency vehicles running red lights) |
| Ratio | * Courts must balance the risks of the act against the measures necessary to eliminate the risk and the **end to be achieved** by taking the risk. * Where the end to be achieved may be of greater importance than the risk of the act (i.e. saving lives through firefighting). May need to consider the other duties and skills held by the D (i.e. where first responders owe a duty to individuals in trouble). |

Excerpt: Priestman v Colangelo (1959) SCC (p. 530)

* The officer attempted to shoot out the thief’s tires; the bullet ricocheted and struck the thief in the head; the car went out of control, and struck and killed two pedestrians
* The families of the deceased sued the police in negligence
* At what cost do police officers carry out their public duty?
  + SCC held that the police were not liable; was justified under *Criminal Code*, s. 25(4) to use as much force as necessary to prevent the thief’s escape
  + Key Finding: Risk of letting the thief continue into a busy intersection was greater than the risk of trying to stop him

**15.4 An Economic Analysis of the Standard of Care**

* Tort law seldom lends itself to economic calculations; more common in commercial settings (i.e. Ford Pinto case)
* Other cases have generally included more subjective concerns
  + The formula does not accurately reflect what is at stake; tort law possesses a moral component

United States v Carroll Towing (1947) NY Court of Appeal

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| Facts | * Bargee left the barge unattended; barge broke loose from its moorings and did damage to other barges |
| Issue | * Can economics assist in determining the appropriate standard of care? |
| Analysis | * No general rule existed to determine the appropriate standard of care (created below) * In this case, the bargee was unattended for 21 hours and it was reasonable that the work being done around the barge might cause her to become dislodged and do damage; the gravity of the result (damage by a barge) is large irrespective of the probability of breaking away * Held that a bargee or other attendee should be aboard during the working hours of daylight |
| Ratio | * Determining the standard of care is a function of three variables where B must be less than P × L: * The probability that she [the barge] will break away (P) * The gravity of the result injury, if she does (L) * The burden of adequate precautions (B) * Where a standard of care has been breached if the cost of avoidance is less than the risks involved; you are negligent for causing “economic waste” |

**15.5 Special Standards of Care**

* What standard of care is required if it would be unfair to hold the D to the reasonable person standard?
* Where the individual does not possess the capacity to meet the requisite standard of care.

Fiala v Cechmanek [& MacDonald] (1991) ABCA

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| Facts | * MacDonald had a severe manic episode; he jumped on the D’s car, broke through the sunroof and choked her. The D hit the gas pedal and drove into the intersection hitting the P’s car. It took two PO’s to restrain MacDonald. |
| Issue | * What is the standard of care expected of the mentally disabled? |
| Analysis | * TJ held that MacDonald has no control over his actions, was incapable of appreciating the nature or quality of his actions and could not have foreseen the danger (he was undiagnosed bipolar). * The premise of tort law is **fault**; not only to compensate the victim * Objective reasonable person standard has been relaxed in cases of children and the physically disabled; distinguishing the mentally disabled only perpetuates negative stereotypes of mental illness * To be liable in tort law, the D must have acted voluntarily and must have the capacity to be liable; again, fault is an essential element of tort law |
| Ratio | * The objective reasonable standard is relaxed where the D has a “serious mental illness” * To be relieved of tort liability when a D is afflicted suddenly and without warning of mental illness, D must show on a BoP that as a result of his or her mental illness:   (1) The D had no capacity to understand or appreciate the duty of care owed at the relevant time; or  (2) The D was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care |

* This case was unlike *Wenden* were the D was aware of his mental illness and was found to be negligent for driving a car under the circumstances; did not fulfill “sudden and without warning” requirement.
* Typically requires medical experts to provide proof of mental illness; the mental illness exception has generally been interpreted fairly narrowly

Joyal v Barsby (1965) MBCA

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| Facts | * 6 yr old stepped out on the road and collided with car; she was aware of the dangers of the road * D (driver) was found negligent; attempted to argue contributory negligence by the infant |
| Issue | * What is the standard of care expected of children? |
| Analysis | * Dissent found that she was heedless, careless and negligent despite her training and traffic experience * Majority held that she was preoccupied with the fog-horn of the semi-trailer which had honked at her, and darted back out when it passed without thought to traffic coming from the other direction. Found that an ordinary child of her age, intelligence and experience would have responded in the same way. |
| Ratio | * Infants in negligence actions are evaluated against reasonable children of their **age, intelligence and experience**; standard of care is modified for children who are incapable * In this case, it was a question of her intelligence with respect to road safety (where the dissent found that she had been adequately informed of the dangers of the road) |

**Aside:** Parent’s Liability (p. 544)

* Re: Parent’s cannot be held vicariously liable for their children in committing a tort
* However, it is possible to hold parents liable if they carelessly failed to monitor or control their child’s conduct
  + i.e. where the parents in Joyal may have been held contributorily negligent by not supervising the children or not adequately advising them of the dangers of the road

White v Turner (1981) Ont HC (affirmed 1981 Ont CA)

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| Facts | * P sued the D for negligent performing a bread reduction operation; she suffered several post-op complications and her breast were scarred and poorly shaped |
| Issue | * What is the standard of care expected of professionals? |
| Analysis | * 2 plastic surgeons were brought in as expert witnesses to determine the standard practices within the industry * Found that Turner did not remove sufficient tissue because:  1. The operation was done too quickly (average time is 2-4 hours and he did it in 1 hr 35 min) 2. The suturing was started before a proper check was completed (would have alerted him to the fact that approx. 300 g still required removal)  * These actions were below the SOC within his profession; case infers negligence based on surrounding facts |
| Ratio | * P’s must demonstrate that the D (a professional) that a bad result/injury/harm occurred and that it was brought about by negligent conduct on a BoP * The standard of care is that of the reasonable professional in the circumstances (i.e. a reasonable plastic surgeon); based on the skill, education and knowledge of the reasonable professional * This professional standard of care also applies to most skilled trades and occupations |

**15.6 Degrees of Negligence**

* Statutes may restrict the scope of liability to injuries inflicted as a result of “gross negligence” – defined as:
  + Acts which are less blameworthy than criminal negligence but worse than ordinary tort negligence
  + “a very marked department from the standards by which responsible and competent people…habitually govern themselves”
* Common in statues which concern:
  + the liability of municipalities with respect to snow and ice removal
  + the liability of medical professionals who provide medical assistance during emergencies
  + the liability of police officers in general

**15.7 Custom**

Ter Neuzen v Korn (1995) SCC

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| Facts | * P contracted HIV during artificial insemination in 1985; the D doctor was responsible for screening donors * Risks were not widely known at the time and evidence showed that the doctor had adopted and complied with standard medical practices available at the time * Jury found him liable despite all evidence to the contrary; appealed to CA and SCC |
| Issue | * Did the doctor’s actions fall short of the standard of care based on standard practices? |
| Analysis | Duty of Care   * Physicians owe a duty to conduct their practice in accordance with the conduct of a prudence and diligent doctor in the same circumstances * Based on the conduct of ordinary specialists who possess a reasonable level of knowledge, competence and skill   Standard of Care   * Judges and juries must assess the standard of care based on the standard practice in the medical professions – where the profession is assumed to have adopted procedures which are in the best interests of patients and which are not inherently negligent * However, there are situations where standard practice is “fraught with obvious risks” where the judge/jury may be capable of finding the standard practice is itself negligent without requiring diagnostic or clinical expertise * These cases are rare and uncommon; common example is where surgical practice did not count the number of sponges before and after a surgical procedure; sponges were left in patient * TJ can withhold from the jury any issue on which the TJ holds there is no evidence fit for the jury to consider; whether there is any evidence on an issue is a question of law, rather than fact * Law: Question of whether the finder of fact can find a standard practice negligent is a question of law, determined by the TJ irrespective of the mode of trial * Fact: Open to the jury to determine the standard practice based on the expert evidence * Fact: Did the D conform with the standard practice? Where failure to accept the evidence of the standard of practice may result in an unreasonable verdict (as in this case). |
| Ratio | * Generally, where a medical procedure involves complex or technical understanding beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent. * It is only open to the finder of fact to determine a standard practice is negligent if the practice is “fraught with obvious risks”; something even lay people can appreciate * The standard of care must be assessed based on the level or availability of knowledge at the time of the tortious act; not the knowledge at the time of trial. |

**Q:** What about the standard of care for lawyers?

* Specializations in law are not regulated the same way as they are in the cases of doctors, engineers, etc.
* For that reason, a single standard of care is applicable to lawyers; which likely “floats around” on a practical level based on the area of law, length of time in the legal profession, seniority of the lawyer, etc.

**Summary**

* **Determining risk** (Bolton):
  + Probability of injury
  + Severity of injury
* **Considerations against the risk of the act:**
  + Measures necessary to eliminate the risk (Vaughn v Halifax)
  + End to be achieved by taking the risk (Watt v Hertfordshire)
  + Other obligations or duties in play that are often owed by the D (Watt v Hertfordshire)
  + Skills held by the D; factor in the education and training of the D (White v Turner)

16. CAUSATION

**16.1 Introduction**

* Concept links the D’s breach of the SOC to the P’s loss based on factual causation (whereas remoteness is legal causation)
* P need only prove on a BoP that the D’s act was a cause of their injury. Does not have the sole, immediate, direct or most important cause.
  + Keeping in mind that the D is only held liable fore foreseeable injuries/damages
* Involves two sub issues:
  1. What test of causation governs the situation?
     + Would the P have been injured or damaged “**but-for**” the actions of the D?
       - Requires that the breach of the standard of care was the necessary cause of the P’s injury/loss
     + Where the post-tort position of the P must be compared to the non-tort position the P would have been in had the breach of the standard of care not been committed (Kauffman v TTC)
     + Per Brown v BC (1994) SCC, P sued the government for not having a proper communication system to get sanding tracks out to the roads. The evidence showed that a good communication system would not have allowed the trucks to get there before the P went off the road.
  2. Can the P prove on a BoP that the D’s breach of the standard of care was a cause of his or her loss?
     + Typically the “cause-in-fact test”

**16.2 The “But-For” Test**

* Would the P’s injury have occurred “but for” the D’s negligent act?

Kaufman v TTC (1959) ONCA (affirmed by the SCC 1960)

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| Facts | * Youths in front of P get into scuffle on escalator; they fell onto a 3rd party; the 3rd party fell onto the P * P suffered severe and permanent injuries * P sued the TCC in negligence alleging that the faulty handrail caused he accident |
| Issue | * Was there a negligent action by the TTC? Was it a cause of the P’s injuries? |
| Analysis | * TJ held that the TTC had installed an escalator with a “radical departure in hand-rail design” * However, in the absence of evidence showing that the youths and the 3rd party were grasping the hand rail and further that there was no evidence stating that the P would not have suffered injuries if she’d been grasping the handrail, the ruling was overturned |
| Ratio | * Applying the “but for” test must consider the position the P would have been in had the breach in the standard of care not been committed. |

Barnett v Chelsea & Kensington Hospital Mgmt Committee (1969 QBD)

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| Facts | * Deceased came to hospital vomiting; doc instructed nurse to send home w/out seeing patient; she died 5 hours later * Court accepted the doctors actions as breaching the standard of care |
| Issue | * Was the doctors breach of the standard of care a COD? |
| Analysis | * Evidence showed that the deceased was not likely to have been admitted and treated for hours; chances of survival after that time were not good * Further evidence submitted that treatment required specific drug; not likely that the need would have been detected and the drug administered immediately |
| Holding | * The doctor’s negligent conduct was not a “but for” cause of the P’s death |
| Ratio | * Applying the “but for” test must consider the position the P would have been in had the breach in the standard of care not been committed. * A breach of the standard of care is not enough to prove a negligence action. |

**16.3 Established exceptions to the but-for test**

* Exceptions address a specified unfairness that would result from applying the but-for test

(a) The Multiple Negligent Ds Rule

* Re: Cook v Lewis
  + The P could not prove on a BoP of that either hunter was a necessary cause of his injuries
  + If the “but-for” test had been applied, both negligent hunters would be absolved in liability and the P provided no cause of action.
* Ratio: Where two negligent Ds are involved, then the P need only prove loss or injury. The burden of proof of causation then shifts to the D.
  + In Canada, this rule appears to limited to cases involving 2 negligent D’s (not > 2)

(b) The Learned Intermediary Rule

* Where manufacturers can shift liability to an intermediary where their knowledge approximates that of the manufacturer (i.e. a doctor or other professional)
* Acts as an exception to the “but for” rule. Recall in Hollis v Dow Corning Corp that Dow was not able to argue causation, as this would have result in a situation where the P would not be able to recovery against Dow on the basis of causation and against the doctor because he was not informed.

(c) Informed Consent

* Where there is a duty for healthcare professionals to adequately inform decisions prior to their consent to proposed treatment, the court will use an **objective/subject test of causation** – framed in terms of whether a reasonable person would have consented if he/she had been adequately informed (Haughian v Paine)
* Disgruntled patients too likely to provide self-serving evidence in a subjective test

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

(a) ~~Material Contribution Test~~

* Snell confirms the “but-for” test, while allowing for flexibility in the evidence that’s needed to satisfy the test; allows for an inference with respect to causation
* Clement*s* is the SCC’s most recent decision on when causation can be established on other than a “but-for” basis

(b) Materially Increased Risk

* When a P develops a disease or disability, the “but-for” test would require the P to establish that the increased risk made it more probable than not that the D’s negligent act was a cause of their loss
  + i.e. was asbestos the cause of cancer?
* Per Snell, the SCC established the following:
  1. If a D’s negligence materially increases the risk of a particular kind of injury occurring and that very injury befalls the P, then the D will be deemed the cause
  2. The ultimate legal burden of proof remains with the P to prove causation on a BoP. However, an inference regarding causation is permissible when the D does not present evidence to the contrary, notwithstanding that causation was not proved by positive evidence.
  3. This principle should be limited to cases in which policy warrants the exception – this is common in class action law suits

Snell v Farrell (1990 SCC)

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| Facts | * D performed cataract operation; noticed bleeding, waited and continued with the procedure * P developed blindness in that eye. TJ held the doctor liable; CA overturned. |
| Issue | * Should a P in a malpractice suit be subject to “but for” causation? * Or should the law find liability based on some less onerous standard? |
| Argument | * D provided expert evidence demonstrating that the P may have bleed and developed blindness irrespective of his actions; questioning the causal relationship |
| Analysis | * The burden of proof is determined by the substantive law “upon broad reasons of experience and fairness”   + The onus is on the party who asserts a proposition (the P);   + That where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it * Accepts that proof of causation often difficult for P’s in medical malpractice suits * Modified McGhee   + Affirmed that burden of proof rests with the P; any shift would compensate P’s where a substantial connection b/w the injury and the D’s act is absent   + Should promote “a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion” * Therefore an inference regarding causation is permissible, in the absence of evidence to the contrary adduced by the D, notwithstanding the causation was not proved by positive evidence * Causation need not be proven with scientific precision – requires only a BoP * Difficult since medical experts required 100% certainty |
| Holding | * Evidence existed that a reasonable surgeon in the position of the D would not have continued with the operation (breach of the standard of care). * Judge or jury can infer that the careless conduct caused the loss of blood to her eye * Meaning the court accepts that it is possible that the damage was caused by an unrelated change in her body, but it is more likely that it was the operation. Lowers the causation threshold on account of policy concerns. |
| Ratio | * The ultimate legal burden of proof remains with the P to prove causation on a BoP. However, an inference regarding causation is permissible when the D does not present evidence to the contrary, notwithstanding that causation was not proved by positive evidence. |

NOTES:

* Alternatively, should employers be strictly liable for negligently exposing workers to the risk of a serious industrial disease? Re: Fairchild case regarding jointly & severally liable employers for mesothelioma
* Sindell (California) – P developed cancer related to DES, a drug her mother took while pregnant. The manufacturers were held liable in proportion to their market share at the time the P’s mother took the drug.
* Would these issues be better addressed by statute? Re: *Tobacco Damages and Health Care Costs Recovery Act*

(c) Proportionate Cause and Loss of Chance

* “But for” test tends to be all or nothing – tortious act must be a necessary cause to recover
* Would the proportionate approach in Sindell be better? Would allowing the P to recover based on the possibility that the D was a cause be better?
* Canadian courts apply this standard for post-trial losses (i.e. loss of income) but have rejected this approach for the injury itself

Resurfice Inc v Hanke (2007 SCC)

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| Facts | * P put water hose in gasoline tank; vapourized gasoline was released and ignited; P suffered burn injuries * P sued Resurfice (D), the manufacturer and distributor, alleging design defects |
| Issue | * Was the harm to the P reasonably foreseeable? * Which test – the but for or the material contribution test – should be applied to determine causation? |
| Analysis | **Foreseeability**   * TJ did not accept P’s evidence regarding design errors or testimony by other workers who had made similar mistakes; by his own admission, the P knew how to operate the machine * The CA held that policy matters such as the seriousness of the injuries and the financial position of the parties should have been considered; SCC overturns this assertion * No error of law existed in the determination of foreseeability   **Causation**   * Per Snell, the onus is on the P to established causation * P admitted that he knew which tank was which and that the City had changed the caps to more similarly designed caps; and the TJ disposed of the alleged design errors * CA overturned on grounds that the material contribution test should have been applied * Comparative blameworthiness is a necessary component – the D is not absolved of liability just because the P was contributorily negligent; however the TJ noted that the accident had “nothing to do with the design or manufacture of the machine” * Principles of Causation Test(s) * The basic test is the “but-for” test; it is applicable to multi-cause injuries * **Material contribution test should only be applied if:** * It is impossible for the P to prove the D’s negligence using the but-for test (Cook v Lewis) * The P’s injury must fall within the ambit of the risk created by the D’s breach * Found that this situation did not apply; CA erred in this matter |
| Ratio | * + The basic test is the “but-for” test; it is applicable to multi-cause injuries   + **Material contribution test should only be applied if:** * It is nearly impossible for the P to prove the D’s negligence using the but-for test * The P’s injury must fall within the ambit of the risk created by the D’s breach |

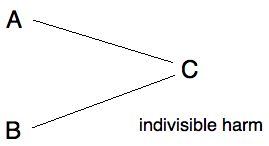
Excerpt: Walker v York Finch Hospital (2001) SCC

N.B. Contrast with the standard “but for” test in Hollis and reluctance by the court to consider the theoretical actions of a third party

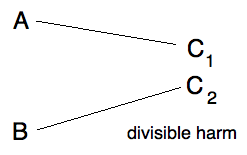
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| Facts | * Walker contracted HIV from tainted blood from Canadian Red Cross Society (CRCS) * Blood was donated in 1983 when little known about HIV; donor screening process implemented through handout of information pamphlets * Claim dismissed at trial on causation; evidence showed that even once pamphlets were improved in 1984 the donor continued to donate until 1987 * Overturned by the CA on the basis of Hollis (learned intermediary rule) |
| Issue | * Can the actions of a third party break the chain of causation where they are not a learned intermediary? |
| Analysis | * Standard of Care: Failure to warn or failure to warn donors against donating blood * Causation: Would the HIV+ donor have donated blood if the CRCS had better warned of potential risk factors?   + Similar to the situation in Hollis – link in the causal chain is what a third person would have done.   + Cannot presume that the donor would have been deterred by improved warnings (like in Hollis). Would also be too difficult for the patient to prove on a “but for” causation test. * Court instead applied the “material contribution” test of causation * Walker should succeed as long as she can show that the lack of adequate screening “materially contributed to the risk” that the donor would have given blood |
| Ratio | * Unlike Hollis, where the court was willing to presume that a doctor would have fulfilled his tortious and statutory duty to inform his patients. In other cases, the court may be unwilling to make presumptions about a general member of the public owing no direct duty to the P. In this case, they modified the causation test to accommodate for the uncertainty of a 3rd party’s actions. |

Clements v Clements (2012 SCC)

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| Facts | * Husband (driver) and wife on motor bike; bike was 100 lbs overloaded and had nail in rear tire * Sped up to 120 km/h to pass; tire blew, lost control, wife thrown off and suffered brain injury * Negligence in driving not disputed; question of causation * Due to impossibility of ‘but-for’ standard of proof; TJ applied “material contribution” test * CA held that ‘but-for’ standard had not be met and overturned judgement |
| Argument | * To be successful on “but for” causation, the P must have shown that had the cargo been reduced and the D drove slower, then the accident would not have happened on a BoP * D adduced expert evidence which indicated that the punctured tire was the culpable cause, not the overloaded bike and increased speed; this questioned “but for” causation |
| Issue | * Does a material contribution approach suffice in a negligence action? |
| Analysis | * D’s negligence must be proven on BoP to have been necessary to bring about the injury; it is a question of factual causation though scientific certainty is not required * Affirm ability to infer causation (Snell) * A “material contribution” test allows P to recover where multiple actors caused the injury * An exceptional substitute and policy driven rule * Per comments in Resurfice, a material contribution test may be applied:  1. Where it is nearly impossible for the P to prove but-for causation  * Where there are multiple D’s and it is impossible to prove “but for” causation against any of the D’s (Cook v Lewis) * The but-for test still applies in cases with multiple agents – their liability will be apportioned by contributory negligence legislation.  1. Where it is clear that D breached the standard of care in a way that exposed the P to an unreasonable risk of injury 2. With the intent to further the goals of negligence law – compensation, fairness and deterrence  * However, this test has yet to be applied by the SCC. Resolved prior cases on a “robust and common sense application of the but-for test”. |
| Holding | * Court held that “but for” causation should have been applied by the TJ; they returned the matter to trial |
| Ratio | * The “material contribution” test exists in Canadian law but is an exceptional method of limited application – where multiple tortfeasors make it nearly impossible to show that anyone was the “but for” cause of the injury or loss. * A robust and pragmatic approach should be applied to the but-for test of causation – allowing for an inference of causation per Snell |



**16.5 Multiple Causes**

* Two types of losses:
  + **Divisible** – where each injury is attributed to the conduct of a single tortfeasor
  + **Indivisible** – where the injury is attributed to more than one tortfeasor
    - Including another tortfeasor, a contributorily negligent P, and an innocent, pre-existing or naturally occurring contributory cause
* Answer three questions:
  + Are the P’s injuries/losses divisible?
  + Are the D’s independent insufficient causes or independent sufficient causes?
  + Are the D’s joint tortfeasors?
    - If the D’s are joint tortfeasors, they need only prove that one of the D’s was a but-for cause
* Once the D has been found to be a cause of the P’s loss, the D will be held liable for the entire loss even if there were other causal factors.

(a) Independent Insufficient Causes

* Where no factor is individually sufficient to have caused the loss, in the absence of the other factor
* Meaning no factor meets the “but for” test of causation

Athey v Leonati (1996) SCC

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| Facts | * P injured in two car accidents; exercised on doctors advice; he sustained a herniated disk while stretching * TJ accepted that the car accident was a necessary cause (satisfied the “but-for” test) of the injury. BUT he held that the pre-existing conditions were large contributing causes to the injury, and reduced damages accordingly. * **The SCC rejects this**. You cannot apportion liability for non-culpable factors. |
| Issue | * Were the car accidents a necessary cause of the herniated disc or were they only a contributing cause? * Would the pre-existing damage/injury have caused the disc to herniate on its own? |
| Analysis | * No need to be the sole cause; need only be the “but-for” or necessary cause of the injury * Only one injury was in question – any party found to have negligently caused the injury will be fully liable for the P’s losses * There is no basis for a reduction of liability b/c of the existence of other non-culpable factors * Based on the “thin skull rule” – you take your victims as you find them. Makes the tortfeasor liable for the P’s injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. * However, the court affirms the “crumbling skull” rule – which means that a P need not compensate for the debilitating effects of the pre-existing condition that would have materialized irrespective of the careless act/omission (Penner v Mitchell) * Consistent with the idea that losses are meant only to put the P back into the position he would have been in had the careless act/omission not occurred * Future losses can be calculated in damages according to degrees of probability |
| Holding | * The car accident made the difference – it triggered the herniated disc – despite the previous injuries * The pre-existing condition would not alone have caused the herniation but for the D’s actions, it simply made the resulting damages worse – this is an application of the "thin skull" rule |
| Ratio | * The negligent act need not be the sole or majority cause of the injury – need only be a necessary cause. * When pre-existing conditions would not have caused the injury but for the D's actions, then it is the "thin skull" rule that applies and the D will be totally liable for the P's losses. |

(b) Independent Sufficient Causes

* Where each tort is capable of causing the injury or loss on its own; these are rare cases
* Courts have applied a significant or substantial factor test of causation

**16.6 Issues in Assessing the P’s Loss**

(a) Successive Causes of Parallel Injury

* The P’s subsequent fate has no impact on the original tortfeasors liability – i.e. if damages included costs of living for 20 years and the P dies 3 years later, the D cannot recoup costs
* **Liability vs. Quantum of Damages**
  + A tortfeasors damages will be reduced only to reflect the P’s pre-existing injuries or disabilities; their liability (for the whole of the injury or loss caused) remains the same
* Uncertainty exists where the P suffers an independent successive parallel injury prior to trial (a supervening injury)

Penner v Mitchel (1978 ABCA)

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| Facts | * TJ awarded the P damages including loss of income for 13 months * The D appeals on the grounds that the P would not have been able to work for three of those months due to a heart condition that occurred before trial and was unrelated to the accident |
| Issue | * In the case of successive causes of parallel injury, can the tortfeasor rely on a subsequent cause (culpable or non-culpable) to reduce the damages owed? |
| Analysis | * The D relied on Baker – a case where the P was injured by the D but later the P was shot and required amputation. Court ruled that the original tortfeasors liable would only be reduced if the successive culpable injury reduced the P’s disability. * Dickson stated that damages should consider “contingencies” which might affect future earnings such as unemployment, illness, accidents and business depression” where accidents would include any non-culpable circumstances * Court held that the only contingencies that should be included are those that are non-culpable * Including culpable injuries could under compensate the P while not accounting for non-culpable injuries could overcompensate the P |
| Holding | * TJ erred in awarding damages for the 3 month period the P would have been disabled irrespective of the tortious act |
| Ratio | * An assessment of damages must consider contingencies which arise from non-culpable circumstances and reduce the damages awarded accordingly. Per Baker, a culpable circumstance cannot reduce the original tortfeasors liability. * Non-culpable circumstances include those that are naturally occurring, innocently caused or the result of a preceding tort. |

17. REMOTENESS

**17.1 Introduction**

* Form of legal causation; court can limit liability where the connection b/w the breach and the loss is too “remote”
  + Courts must balance b/w the desirability of holding the D responsible for a loss that he/she carelessly inflicted and the desirability of relieving the D of an unreasonable burden
* Closely related to causation
  + Causation is the factual connection b/w the D’s breach and the P’s loss – did the tort result in the loss?
  + Remoteness is the legal connection b/w the D’s breach and the P’s loss – where causation has been established, but the damage was too remote such that it would be unfair to hold the D liable
* Rarely raised argument; applies where the type of harm that actually materializes is too different from the type of harm that you could reasonably foresee
  + Extremely difficult to draw this line – where is the type of harm unforeseeable?
  + What is ‘type” of damage/injury/loss?
  + Is there a difference between foreseeable and reasonable foreseeability?

**17.2 Directness vs. Foreseeability**

(a) Directness

* The “directness test” states that the P’s loss will not be too remote if it was a direct resultof the D’s careless
* Where directness is defined in terms of a close temporal and spatial connection b/w the D’s breach and the P’s loss; rejected in Wagon Mound No. 1

The Wagon Mound No. 1 (1961) Eng PC

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| Facts | * The D’s spilled oil into the harbour; the oil travelled under the P’s wharf. An employee accidentally lit the oil while using welding equipment, the wharf and its equipment was severely damaged in the ensuing fire |
| Issue | * Can a D be held liable for damage or injury that was unforeseeable if it was “direct”? |
| Analysis | * Not consonant with current ideas of justice or morality to hold an individual responsible no matter how unforeseeable the consequences – evidence was adduced that it was unforeseeable (at that time) that oil was capable of burning when spread on water * Rejects the concept of the reasonable person; would result in issues with respect to causation * Foreseeability is what makes you negligent and one test should be applied; and applying directness would allow a D to escape liability for indirect damage however foreseeable the consequences |
| Holding | * The damage from the fire as a result of the spill was not foreseeable * The damage from the oil itself was foreseeable |
| Ratio | * Directness should not be applied as a test of remoteness; overturn *Re Polemis* * Foreseeability turns on the concept that damage from drifting oil itself is different than the damage from the oil catching fire * About separating damage into different types; only liable for the type of damage you could reasonably foresee |

**17.3 Modification to the Foreseeability Test**

(a) The Kind/Type of Injury

* If the type of injury is foreseeable, then even if the way in which it was caused was unforeseeable, remoteness will be satisfied (Hughes v Lord Advocate)
* Hinges on how you define categories of “type of injury”. The precise mechanism by which the damage is caused is not important as long as factual causation is established. The point is whether you can see generically if that damage can occur

Hughes v Lord Advocate (1963) HL

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| Facts | * Manhole left uncovered with a paraffin lamp nearby * 8 yr old boy knocked the lamp into the manhole; the lamp caused an explosion and the boy was burned |
| Issue | * Was this type of injury foreseeable? |
| Argument | * D argued that the type of injury was unforeseeable – bad burns |
| Analysis | * Duty: Owed by the workmen * Breach: Workmen breached the standard of care by leaving out the lamp and not closing the manhole * Causation: If they had fulfilled this duty, no injury would have befallen the boy * Remoteness: Though the injuries suffered by the boy, though different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature * The burns could have occurred in some other way – i.e. directly from the paraffin wax |
| Ratio | * If the type of injury is foreseeable, then even if the way in which it was caused was unforeseeable, remoteness will be satisfied. * Where the type of injury was burns; and the burns could have been cased in some other way |

* Excerpt: Doughy v Turner (1964) Eng QB Held that the injury was a “chemical reaction” rather than a “burn”

(b) The Thin-Skulled P Rule

* If it is reasonably foreseeable that the type of damage could arise, the fact that the degree of damage was not foreseeable is irrelevant
* Remoteness hinges on the concept of “type of damage” – where categories of type of damage will greatly affect how this factor operates

Smith v Leech Brain & Co (1962) QBD

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| Facts | * P worked as galvanizer; piece of molten metal flew up and burned his lower lip; burn was treated * Later he was diagnosed w/ cancer; P died three years later * Court held that causation had been proved; but that the burn promoted the cancer in tissues which already had a pre-malignant condition as a result of exposure to tar for 10 years prior |
| Issue | * Was the injury foreseeable? |
| Analysis | * Tortfeasor takes his victim as he finds him * Only a question of whether the D could reasonably foresee the type of injury which he suffered – the burn * Court treats the cancer as a part of the burn; don’t treat it as a different type of damage * The characteristics of the victim (a pre-disposition to cancer) relates only to the amount of damages |
| Ratio | * It is the type of injury, not the type or degree of damage that must be reasonably foreseeable. |

Marconato v Franklin (1974) BCSC

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| --- | --- |
| Facts | * P suffered minor physical injuries in a car accident caused by the D’s negligence (causation satisfied) * Accident triggered a major personality change – making her depressed, hostile and anxious |
| Issue | * Is this type of injury (psychiatric) foreseeable? |
| Analysis | * Re: Smith v Leech Brain – tortfeasor takes his victim as he finds him * Question is whether the D could reasonably foresee the type of injury suffered by the P * Citing precedent whereby the D had negligent caused an accident and was held liable for aggravating a latent condition (schizophrenia), the D was held fully liable |
| Ratio | * Physical injury which induces or worsens a psychiatric condition is reasonably foreseeable * Court is unwilling to draw a line between the physical and the mental consequences * This case differs from Mustapha in that the physical injury induced psychiatric harm; Mustapha applied the reasonably robust person standard because it was pure psychiatric harm |

(c) The Possibility of Injury

* Serious harm will not be too remote even if there is only a statistically very small probability of its happening—all the more so if it was easy for Δ to avoid creating the risk (Assiniboine School v GWG)

The Wagon Mound No. 2 (1967) PC NSW

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| Facts | * The D’s spilled oil into the harbour; the oil travelled under the WM No. 1 P’s wharf. An employee accidentally lit the oil while using welding equipment, the wharf was severely damaged in the ensuing fire * This P owned two boats in the harbour that were also severely damaged in the fire |
| Issue | * Was the damage reasonably foreseeable? |
| Analysis | * Unlike Wagon Mound No. 1, the findings of fact were:  1. The officers of the WM “would regard furnace oil as very difficult to ignite on water” (not impossible) 2. Their experience would probably have “that this had very rarely happened” (not never) 3. That they would have regarded it as a “possibility”, but one which could become an actuality only in very exceptional circumstances  * Essentially, the TJ determined that it was reasonably foreseeable that there was a very small chance that the oil would catch fire and cause damage * Per Bolton v Stone, the probability of harm is relevant to determine if the D breached the standard of care * Question is whether the chief engineer of the ship possessed the knowledge and experience to know that there was a real risk of the oil on the water catching fire in some way and that if it did, serious damage to other property was not only foreseeable but very likely * Findings of fact established that the ought to have known that it is possible to ignore this kind of oil on water and that it had in fact happened before |
| Ratio | * Reasonable foreseeability requires a “real risk” or one which would occur to the mind of reasonable man in the position of the D…and which he would not be brushed aside as far-fetched * Meaning if a reasonable responsible person would ignore the risk, then the D will not be held liable * Suggests that the D will be held liable where tiny risk could result in serious damage * Addresses the elasticity of the concept of reasonable foreseeability – seems to suggest that recovery is available where the damage is improbable, but known to be possible |

Assiniboine South School Div v Greater Winnipeg Gas (1971) MBCA (affd SCC)

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| Facts | * Father & son (Hoffer) driving snowmobiles; son lost control and struck a gas-riser pipe servicing a school * Gas escaped, entered the boiler room of the school and was ignited by the pilot light; explosion and fire occurred totalling damages of approx. $50K * All three were held liable at trial; appealed on basis of remoteness |
| Issue | * Was the damage/loss caused too remote for recovery? Was it reasonably foreseeable? |
| Analysis | * Depends upon whether the damage was of such a kind as a reasonable man should have foreseen * Where liability is not avoided because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against * Standard of Care: * Father was negligent in adapting the sled for the son; son was negligent in not using the kickstand * Despite the low probability of injury, the extreme severity of injury and the low cost measures required to mitigate the risk established that GWG breached the standard of care; where the duty to take protective measures increases in direct proportion to the risk * Causation: * Explosion would not have occurred “but for” the Hoffer’s culpable conduct * Explosion would not have occurred “but for” the location of the gas pipe * Remoteness: * Based on Wagon Mound No. 2, the recovery for improbable types of damage is available if the resulting injury was sufficiently severe that a reasonable person would have taken action * The damage was the of the *type* or *kind* which any reasonable person might foresee |
| Ratio | * “It is enough to fix liability if one could foresee in a general way the sort of thing that happened” * Case applies the logic of Wagon Mound No. 2 |

\*\*Do not apply the “step by step” process to remoteness – should go from the damage to the result

\*\*Example of several and concurrent tortfeasors; held jointly and severally liable for indivisible harm

Mustapha v Culligan of Canada (2008) SCC

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| Facts | * P suffered from a major depressive disorder with associated phobia and anxiety as a result of seeing the dead flies in a bottle of water supplied by Culligan |
| Issue | * Was the injury reasonably foreseeable? |
| Analysis | Causation: TJ held that the D’s breach of its duty of care caused the injury; court not asked to address  Remoteness:   * Asks whether “the harm is too unrelated to the wrongful conduct to hold the D fairly liable” * Any harm which has actually occurred was clearly possible; instead requires a “real risk” or one which would occur to the mind of reasonable man in the position of the D…and which he would not brush aside as far-fetched * Similar to the duty of care analysis, based on whether it was reasonably foreseeable that a person of reasonable fortitude (objective test) would have suffered the type of injury at issue * Prevents unusual or extreme reactions to events caused by negligence which are imaginable, but not reasonably foreseeable, for recovering; based on principles of fairness to the P and the D * P must establish that it was reasonably foreseeable that a mental injury would occur in a person of ordinary fortitude; after this is established, the thin skill principle will apply for the assessment of damages |
| Holding | * P adduced no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle; not reasonably foreseeable |
| Ratio | * In the case of pure psychiatric harm, remoteness requires an objective test * The P must establish that it was reasonably foreseeable that psychiatric harm would occur in a person of reasonable or ordinary fortitude * Different from Marconato where the psychiatric harm was induced by physical harm |

**17.4 Intervening Injuries**

* Cases where the P’s loss was caused by the D’s breach and a subsequent act; one that causes or contributes to the P’s loss after the original D’s breach has taken effect
  + The damage is done by a 3rd person, but the action is brought against the D arguing that it is their negligent act or omission that caused the action or omission by the 3rd party
* *novus actus interveniens* – “a new intervening act” which holds the last wrongdoer fully liable
* Doctrine has been converted into three categories:
  + Intervening acts that were naturally occurring or non culpable which do not break the chain of causation
  + Negligent intervening acts generally break the chain of causation
  + Deliberately wrongful or illegal acts break the chain of causation unless the original tortfeasor had a specific duty to prevent the act
* Two related issues:
  + Causation – is it fair to say that the D’s negligence caused the other person to act
    - Law has trouble determining whether one actor acts in response to what another actor did
  + Remoteness – was it reasonably foreseeable that the negligence could lead to the final injury suffered
* The “within the scope of the risk” test
  1. Whether the loss caused by the intervening act was within the scope of the risk created by the original tortfeasor
  2. Or whether the intervening act itself was within the scope of the risk created by the original tortfeasor

Bradford v Kanellos (1973) SCC

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| Facts | * D owned restaurant; fire broke out on cooking grill; fire extinguisher was successfully used which made hissing noise; a patron shouted “Gas!” and chaos insured * P’s were injured in the havoc (pushed off a chair) and sued for negligence |
| Issue | * Was the P’s injury reasonable foreseeable? |
| Analysis | Majority (Causation – did the D’s negligence cause the 3rd parties act that caused the harm?)   * Negligent act was in allowing too much grease to build up on the grill; but the standard of care had be discharged by having the extinguisher present and successfully used * Not reasonably foreseeable that a patron would injured as other patrons fled the restaurant   Dissent (Remoteness – was this a foreseeable type of harm?)   * Takes a step-by-step approach to remoteness – foreseeable that grease would necessitate the use of the extinguisher, that the noise of the extinguisher would cause the hysteria and that the hysteria would result in an injury. Argues that it is “human nature” for the other patrons to have reacted that way. |
| Holding | * Dismiss the appeal |
| Ratio | * When there are measures in place to eliminate potential injuries from negligent acts, and they work properly in eliminating the risk when such an act occurs then improbable outcomes resulting from the correct employment of the measure cannot be attributed to the original negligent act. * Dissent suggests that a significant or substantial intervening act is required to break the chain of legal causation (remoteness) |

Price v Milawski (1977) Ont CA

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| Facts | * P injured his ankle; 1st doctor x-rayed the foot (not the ankle) but told P his ankle was sprained * 2nd doctor did not order new x-rays; put on a cast; problems continued after cast was removed * 3rd doctor took new x-rays and discovered fracture; due to delay, P suffered permanent disabilities * At trial, the 1st and 2nd doctors were held joint and severally liable (50:50); the 1st doctor appealed on the basis that the 2nd doctor was an intervening cause |
| Issue | * Can a D found negligent be found liable for damages worsened by a subsequent act of negligence? |
| Analysis | * Per *Mercer v Gray*, if a P receives improper medical treatment for an injury caused by the D, the D is held liable for all damages * It was foreseeable that subsequent doctors would rely on the x-rays he took, even if doing so might constitute negligence * The negligent of the 2nd doctor only compounded the effects of the earlier negligence – a reasonably foreseeable type of injury that was worsened in degree |
| Ratio | * A person acting negligently may be held liable for future damages arising in part from subsequent acts of negligence and in part from his own negligence, where each subsequent negligence and consequent damage was reasonably foreseeable as a possible result of his own negligence. |

Hewson v Red Deer (1976) ABCA

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| Facts | * Employee went on break; left tractor on top of large mound of gravel 2.5 blocks from the P’s house * Employee lowered the blade, adjusted the throttle to low gear, turned off the ignition; but did not remove the key or close and lock the cab * Employee came back 30 minutes later and tractor was gone. Found crashed into the P’s house. * City argued that if negligent, the damage was to remote and that *novus actus interveniens* should apply |
| Issue | * Was the damage too remote? |
| Analysis | * Court accepted that the tractor was set in motion by an unknown person who raised the blade, turned it on and put the engine into high gear * But, the employee was negligent in not removing the ignition key, engaging the safety lever and locking the cab door * The gravel mound and tractor were accessible to many people within the neighbourhood, reasonably foreseeable that any one of such persons might be tempted to put it in motion |
| Holding | * City held liable; the tractor being set in motion was within the scope of the risk created by leaving the tractor unlocked with the keys in it |
| Ratio | * Cannot argue for 3rd party intervention if the intervening act itself was within the scope of the risk created by the original tortfeasor |
| Appeal | * CA reversed this decision; held that the act of the 3rd party was criminal and unforeseeable * No evidence to support that the bulldozer being put in motion was reasonably foreseeable. It was midnight in a remote location on top of a pile of gravel. |

* Since this case, it has been held that leaving a car unlocked with the keys in it leaves open the possibility that your car may be stolen. P’s have been held liable for the acts of thieves committed while in their car.
* Can still use this case as precedent on an exam; demonstrates the fact dependency of intervening injures/can refer to the case as a factual analogy (even though the BCCA overturned it).

**Aside:** Suicide after Physical Injuries (see note 9, p. 631)

* P committed suicide because of physical injuries that had made him depressed. Court found that the disfigurement lead to the suicide. Characterized it as a thin skull case.

Excerpt: Skinner v Fu (2010) BCCA

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| Facts | * Driver #1 is driving on a rural road, hits a coyote. Stops the car in the middle of the single lane road.Driver #2 runs into the parked car.Both drivers sue one another in negligence. |
| Issue | * Which driver is the “but for” cause of the accident? |
| Analysis | * TJ concluded that Driver #1 was not the proximate cause of the crash when Driver #2 hit him; Driver #2 was held fully liable for all injury and losses * CA overturned; TJ had revived the long discredited doctrine of “last clear chance” which held that the liable party was the one who had the last chance to avoid the accident. The most recent negligent act. The doctrine avoided issues of contributory negligence. * However, the *Negligence Act* allows for apportionment of fault and eliminates the need for the application of the doctrine. * TJ should have held that both drivers caused the accident (the negligence of each was a cause in the “but-for” sense) and fault should **have been apportioned between the two, so each had a claim against the other for part of his loss** * Can hold both parties in each lawsuit to be contributorily negligent. If each were held 50% responsible for the other parties damages, then the only difference in cost would be the difference in damage amounts (i.e. for whomever had the more expensive vehicle). |
| Ratio | * The implementation of the *Negligence Act* allows for apportionment of liability and for courts to hold D’s joint and severally liable * There is no need for the use of the “last clear chance” doctrine |

18. ASSESSMENT OF DAMAGES

* *Insurance (Vehicle) Act*, s. 99 allows a court to make a “structured judgment”; avoids the “once and for all” assessment issue
* Lawyers’ ability to charge contingent fees, by way of a percentage of the damages the client is awarded, is regulated by ss. 66-68 of the *Legal Profession Act*
* Two BC statutes deal with claims by the estate of a deceased person
  + *Estate Administration Act*, s. 59(1)-(5) for claims against the estate of a deceased wrongdoer
  + *Negligence Act*, s. 7 for claims by the dependents of a person who died as a result of a tort (*Family Compensation Act*)

19. DEFENCES IN NEGLIGENCE

**19.1 Introduction**

* Burden of proof is on the D to prove on a BoP; or to simply prevent the P from proving on a BoP
* D may be able to plead and prove more than one

**19.2 Contributory Negligence (OMIT)**

* *Negligence Act*, ss. 1-2 outlines the rule for joint and several liability
* *Negligence Act*, s. 4 outlines liability where the P is held contributorily negligent; the tortfeasors are then held jointly (but not severally) liable

**19.3 Voluntary Assumption of Risk (OMIT)**

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

**19.4 Participation in a Criminal or Immoral Act**

* *Ex turpi causa non oritur action*; applies similarly in negligence
* Absolves the D of liability altogether; no damages for the P

Hall v Hebert (1993) SCC

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| Facts | * P and D were driving home from a party; the D stalled his car. The D agreed to let the P drive. The P lost control and flipped the car. The P was severely injured; sued D for allowing him to drive while intoxicated. * The D raised *ex turpi causa* (P should be prevented from the action on account of his criminal drunk driving) at trial; appealed to the SCC on these grounds |
| Issue | * Does the defence of *ex turpi causa* exist in Canada? How does it operate? |
| Analysis | * Unlike Australia and the UK, hold that the defence should operate in Canadian law as a defence whereby the burden of proof is on the D * Duty is an all or nothing; can’t be applied selectively * *Ex turpi causa* is raised by the D; burden should be on the D to prove * The defence makes it clear that the duty of care has been breached, but that responsibility for the wrong is suspended only because concern for the integrity of the legal system trumps the concerns of tort * Exceptional power; operates in derogation of the general principles of tort applicable to all society * Care for your neighbours does not require that your neighbours have acted morally and legally * Defence applies to tort only where it is necessary to invoke the doctrine in order to maintain the internal consistency of the law * Such as where the P seeks to recover profit from his criminal activity; cannot allow someone to recover from illegal conduct |
| Holding | * Concerns not relevant here; the P can be held contributorily negligent, but the fault still rests with the D |
| Ratio | * *Ex turpi causa* is an exceptional defence in Canada whereby the burden of proof is on the D * Generally illegal/immoral activity is not relevant in barring tort liability; the defense applies only where it is necessary in order to maintain the internal consistency of the law * Such as when the P attempts to recover from or mitigate the downside of illegal activity |

Excerpt: BC v Zastowny (2008) SCC

* Similar logic applied where P successfully sued for sexual abuse; court refused to grant income lost for time the P spent in jail
  + Court accepted causal relationship between abuse and the life of crime, but refused to let the P recover for rightful convictions
  + Tort law cannot “undo” criminal convictions
  + “An award of damages for wages lost while incarcerated would constitute a rebate of the natural consequence of the penalty provided by the criminal law”

20. PROOF OF NEGLIGENCE

**20.1 The Burden of Proof in a Negligence Action**

* *Apology Act* applies to any form of liability, not just negligence, but its biggest impact is in relation to the latter

**20.2 Exception to the General Principles Governing the Burden of Proof**

* Technically a reverse onus does not apply in tort; however we do “tinker with” the obligation of the proof
* Consequence of Cook v Lewis is that a D can only avoid joint & several liability if they can prove that they were not the “but for” cause of the injury
  + Even though the victim cannot prove if it was A or B who shot him

Cook v Lewis (1952) SCC

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| --- | --- |
| Facts | * Lewis shot by two hunters; jury unable to determine which one caused the damage * CA sent the matter back to trial; Cook appealed |
| Issue | * Should the burden of proof remain with the P to prove causation where multiple tortfeasors may have caused the P’s loss? |
| Analysis | * To allow both parties to escape liability would be unfair; both were negligent in shooting and the P would be in an unfair position if he had to prove which one caused the injury or further, was denied recovery altogether. In these cases, the burden of proof shifts to the Ds to prove which one did it. * Rand holds that if neither D can adduce proof of which one did it, they should be held equally liable. * At fault for: (1) endangering the victim and (2) confusing the consequences so as to prevent the D from proving causation (‘proof destroying’) |
| Ratio | * When it has been proven that one of two parties caused harm to the P, but it cannot be proven which party actually did it, then both D’s are held jointly and severally liable for the resulting damage. |

**20.3 *Res ipsa loquitur***

* Maxim deals with circumstantial evidence; evidence from which an inference may be drawn to reach a conclusion
  + “the thing speaks for itself”
* Common where the occurrence of an accident provided circumstantial evidence that the P’s injury was caused by the D’s negligence
* Often criticized for effectively shifting the burden of proof to the D

Fontaine v BC (Official Administrator) (197) SCC

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| Facts | * Fontaine and Lewis went hunting; found 3 months later at the bottom of a river in the truck * Wife of Fontaine brought action against Lewis in negligence on the basis of *res ipsa loquitur* * No direct evidence was available; D adduced evidence which showed that the area had been subject to torrential rain the weekend they were presumed to have died * TJ found that the P had not shown that the accident would not have occurred w/out negligence by Lewis |
| Issue | * When does *res ipsa loquitur* apply in Canada? |
| Analysis | * The Latin phrase is not a doctrine unto itself. Circumstantial evidence is simply a form of evidence and the threshold (BoP) and burden of proof (on the P) remain the same. * Circumstantial evidence provides a permissible fact inference; it is up to the jury to assess the inference as a matter of fact. * however the strength or weakness of that inference will depend on the factual circumstances of each case |
| Holding | * Uphold the TJ decision for the D; the D adduced evidence which provided alternative explanations * TJ found that the accident may have occurred w/out negligence (removing Lewis as a “but for” COD) |
| Ratio | * *Res ipsa loquitur* is not a “doctrine”. It does not shift the threshold (BoP) or burden of proof (on the P) * Fancy phrase for circumstantial evidence of negligence; whereby you can’t directly prove that the D was careless, but the circumstantial evidence may suggest that they were. * Still requires the finder of fact to assess all of the evidence on a BoP |

21. TORT LIABILITY OF PUBLIC AUTHORITIES

**21.1 Introduction**

* Gov’t intervention is significant; affects the decisions and operations of a typical citizen’s day-to-day life
* Public body is relatively more likely to be solvent and capable of satisfying judgements issued against it; but public authority liability affects us all since the money must come from public resources
* Two school of thought:
  + Public officials should be subject to the same rules as private actors and that the financial burden should be borne by society as a whole rather than by the individual victims
  + Modern government is exposed to potential liability and insist upon special exemptions
* Duty in Public Authority
  + Approached typically using the Anns/Kamloops test
  + Re: Cooper v Hobart
    - No proximity found; because the regulator is responsible for regulating a whole industry and operating in the public interest; not compatible with a duty to individual investors

Excerpt: Nielsen v Kamloops (1984) SCC

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| Facts | * P’s purchase house in Kamloops; foundations were inadequate and couple suffered large costs * Sued the City of Kamloops for negligently failing to enforce the building by-law; evidence demonstrate that the building inspector had found that the foundations were not deep enough, but the builder was not prevented from building the home |
| Analysis & Ratio | * First case in the which the SCC applied the Anns test to determine whether a public authority could be liable in negligence for pure economic loss; find a duty of care * City is dealing with a specific house; narrows the potential P’s and the potential for indeterminate loss |

N.B. Winnipeg Condo Corp had not yet been decided; P decided to sue the City to avoid concerns about privity of K

**21.2 Special Rules for Public Authorities (OMIT)**

* Legislature reversed Kamloops through the *Local Government Act*, ss. 285-286 and the *Vancouver Charter*, ss. 294(1)-(2); prevent individuals from suing the municipality for negligent failing to enforce a by-law
  + N.B. Not the same as performing the operation negligent (such as inspecting negligently)

**21.3 The Negligence Liability of Public Authorities**

* Two situations:
  + Where government is held vicariously liable for the great number of people they employ (vicarious liability)
    - Should an employer be held liable for intentional torts? For torts committed while not working?
  + Where the government is held directly liable for its own negligence
* Two sub situations:
  + Statutory Duty – liability may be imposed if the public authority performed its task carelessly or if it failed to perform its duty at all; requires a specific duty, unlikely to be applied to broad duties
  + Discretionary Power – more complex issues; depends if it is a **policy or operational matter**
* Cannot hold public authorities liable for misjudgement or discretion; not liable for “policy decisions”
  + Not the role of the courts to interfere with the governments discretionary mandate
* However, the courts decision as to whether something is policy or operational can be very difficult to determine

Leading Case on Policy vs. Operation: Just v BC (1989) SCC

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| --- | --- |
| Facts | * P was going to Whistler with his daughter; stuck on Highway 99 due to heavy snow fall * Boulder worked loose from the slopes; crashed on P’s car killing his daughter and seriously injuring him * P sued the Dept of Highways for negligently inspecting and maintaining the highway |
| Issue | * What is a policy decision and what is an operational matter? * Was the decision a policy matter or an operational matter? |
| Arguments | * Court accepts duty (first step of Anns test); foreseeable risk of physical harm to highway users existed * Crown argues that even if a foreseeable risk of physical harm exists, it is an issue of pure policy; that the gov’t made policy decisions regarding the allocation of resources to and the system of inspection required * P argues this is an operational decision; shortcoming was a result of the design of the inspection system |
| Analysis | * Crown is not a person; must be free to govern and make truly policy decisions without being subject to tort liability as a result of those decisions * “Protecting the government from liability that would seriously handicap efficient government operations” * Should not restore Crown immunity; results in a struggle between “policy” and “operation” * Overturn previous case which held that a municipality could not be held negligent because it chose one operational policy rather than another * Court holds that a policy decision may be open to litigation if the P can prove the government, in reaching a policy decision, did not act in a reasonable manner which constitutes a *bona fide* exercise of discretion * Policy decisions may include the allocation of resources (re: lighthouse vs airport facilities) * Gov’t must be able to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in the light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard of care * Exemption where (1) there is an explicit statutory exemption and (2) where the it is a pure policy decision * However, the characterization of a decision as operational or policy is not only predicated on the identity of the actors (re: lower or upper management); based on the nature of the decision |
| Dissent | * Absent evidence that a policy was adopted for some ulterior motive and not as a *bona fide* exercise of discretion, it is not open to a litigant to attack it * “Public authorities have to strike a balance between the claims of efficiency and thrift and whether they get the right balance can only be decided through the ballot box and not in the courts” * A decision to inspect – including the time manner and techniques of inspection – are all within the discretionary power * Policy is the decision to inspect; but once that decision is made, you have to do so competently * Where a statute creates no duty but creates a power, it follows logically that a decision to engage is a discretionary power of the authority |
| Holding | * Characterized as an operational decision; new trial ordered * The SCC regarded only the decision 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 |
| Ratio | * Governments will be exempt from liability where (1) there is an explicit statutory exemption and (2) where the it is a pure policy decision * However, Court holds that a policy decision may be open to litigation if the P can prove the government, in reaching a policy decision, did not act in a reasonable manner which constitutes a *bona fide* exercise of discretion (manifestly unreasonable?) * Where the determination of “policy or operational” is based on the nature of the decision made * The government must be able to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in the light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it met the standard of care * Case narrows the concept of policy decisions (such as high level budgetary inspection) and suggests that most decisions will be characterized as operational decisions |

**21.4 Misfeasance in a Public Office**

* Known as abuse of office or abuse of power
* Intentional tort involving malicious or abusive conduct by a public office that was directly aimed at a particular individual
* Accepted in Canada through Roncarelli v Duplessis

Odhavji Estate v Woodhouse (2003) SCC

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| Facts | * Odhavji was fatally shot while leaving the scene of a robbery * Police officers are under statutory obligation to cooperate with the Special Investigations Unit (SIU); the police chief is required to ensure that members of the force carry out their duties and comply with SIU * P alleged that the officers intentionally breached their statutory obligations by not complying with the SIU and that the chief knew or ought to have known that injury (mental distress) would result from an inadequate investigation * Case is based on pleadings alone; D makes motion to strike out the pleadings |
| Issue | * Did the facts, if proven, amount to misfeasance in a public office? |
| Analysis | * Originally required an abuse of power actually possessed * Now a broad range of misconduct can found an action for misfeasance in a public office – “Any act or omission done or made by a public official in the purported performance of the functions of the office can found and action for misfeasance in a public office” * Two forms:  1. Conduct that is specifically intended to injure a person or class of person; not limited to cases where the public official is acting outside of their powers  * Requires subjective intent; may include subjective recklessness or wilfully blind * Includes a public officer who fails to act when under a legal obligation to act  1. A public officer who acts with knowledge both that he has no power to do the act complained of and that the act is likely to injure the P  * Requires subjective intent; may include subjective recklessness or wilfully blind * III Elements of the Tort   + Deliberate and unlawful conduct in his/her capacity as a public official   + Must have been aware both this his or her conduct was unlawful (inconsistent with the obligations of the office) and that it was likely to harm the P * Does not include: * A pubic officer who cannot adequately discharge his/her duties because of budgetary constraints * A public officer whose decision not comply with statutory obligations is done so in name of his/her constitutional rights (i.e. right against self-incrimination) |
| Holding | * Deliberate decision not to cooperate is inconsistent with statutory obligations (Type #2) * Strike out that the Chief “knew or ought to have known”; its an intentional tort that requires subjective awareness that harm to the P is a likely consequence of the alleged misconduct * P’s allowed to take their case to trial (at trial was held that proximity did not exist) |
| Ratio | Misfeasance in public office requires either:   * Conduct that is specifically intended to injure a person or class of person * Requires subjective intent; potentially recklessness or wilfully blind to * Deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injury the P |

**21.5 Other Torts (OMIT)**

22. STATUTORY PROVISIONS AND TORT LIABILITY (OMIT)

Relationships Between Statutes & Negligence

* Of what relevance is it that the D’s tortious conduct is in breach of a statute? Can you be liable for the mere breach of statute? Does liability exist without fault?

R v Saskatchewan Wheat Pool (1983) SCC

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| Facts | * Sask Wheat Pool (terminal operator) delivered infested wheat to CWB in violation of the *Canada Grain Act* * CWB took action; made no claim in negligence but sought damages based on the Pool’s breach of the *Act*; loss was purely economic * Sask Wheat Pool argued that they weren’t negligent; the infestation was not visually detectable |
| Issue | * Where A has breached a statutory duty causing injury to B, does B have a civil cause of action against A? * If so, is this an independent cause of action or part of negligence? |
| Analysis | * Case law is conflicting; some agreement that the breach of a statutory provision which causes damage to an individual should be relevant to the recovery of damages * Reject the English position that recognizes a separate tort of statutory breach; creates absolute liability that requires only a breach of statute and damages caused by the breach * Also reject the American position which has assimilated civil responsibility for statutory breach into the genera law of negligence; have held that the unexcused violation of the statute is negligence “per se”; also causes issues of absolute liability * Cannot uphold policy which would hold a D liable for breaching a statutory duty unwittingly and obliged to pay even though not at fault * Court holds that the statutory breach may be considered as evidence of negligence; but does not constitute sufficient evidence of negligence on its own |
| Holding | * Sask Wheat Pool held not liable; they had not breached the standard of care as the infestation was not detectable by visual inspection and the test results took some time to come in |
| Ratio | * Civil consequences of breach of statute should be subsumed in the law of negligence; unless the legislation provides for a statutory tort * Proof of statutory breach, causative of damages, may be evidence of negligence. It is not sufficient evidence to demonstrate a breach of the standard of care (unless the statute creates an actionable tort) * The statutory formulation of the duty may afford a specific and useful standard of reasonable conduct |

Excerpt: Ryan v City of Victoria (1999) SCC (p. 811)

* Cycling down Front St in Victoria; used to have railway tracks on the street; his wheel feel into the flange beside the railway track; under the Railway Act, this flange had to be a specific width
* Sued in negligence and public nuisance
* Being outside the rules doesn’t mean you are negligent, but being inside the rules doesn’t mean you aren’t negligent

23. OCCUPIERS LIABILITY (OMIT)

* *Occupiers Liability Act* established that property owners (or those who control access to property) owe a duty of reasonable care to those who come onto the property (i.e. occupiers)
* Now absorbed into the general rules of negligence

24. NUISANCE

* Tort is actionable for the interference with the use and enjoyment of public space (public nuisance) your own property (private nusance)
  + Includes one time and continuing interferences
  + Does not have to be intentional or negligent, just unreasonable in light of the circumstances
  + A specific and powerful legal instrument for dealing with conflicts between land use
* Based on property ownership and fairly strict liability; few defences available
* Rylands v Fletcher
  + Creates a limited tort that establishes liability without fault; no “unreasonableness” criterion
  + Addresses issues of “things” escaping from your property that do damage to property or people outside; restrictions exist on the kinds of things that trigger the tort
    - Essentially damage based
* *Farm Practices Protection (Right to Farm) Act*
  + Bars nuisance claims against farmers who are properly farming; prevents issues of nuisance claims brought by newcomers as urban areas expand and the countryside becomes gentrified

27. DEFAMATION

**27.1 Introduction**

* Defamation is unique in protecting one’s reputation from unjustified attacks; often irremediable harm
  + Balance between the interests of the victim in maintaining their reputation and freedom of expression
  + Per Hill v Church of Scientology, law of defamation must develop in light of Charter values
    - Charter is not applicable; as the Charter is applicable only to government action and the judiciary is not included in “government”
* Damages award compensation, vindicate the P’s reputation and deter future defamatory publications
  + Essentially strict liability; defenses are limited
* Distinction between libel (published) and slander (verbal) has been removed
  + Libel: Was enough to prove that people will think less of you
  + Slander: Must show that actual harm was caused unless it fits into one of several categories; theory being that oral defamation is less harmful because it is transitory and limited in scope
    - Imputations of the commission of a crime, a loathsome disease, a lack of chastity (women only), and unfitness to practice one' s trade or profession
* Has been legislated in several jurisdictions, but common law principles remain dominant
  + *Libel and Slander Act*, RSBC 1996, c 263
  + Commonly have a right to a jury; tort hinges on what the members of the community would think
* Tort has been significantly impacted by the Internet and issues of jurisdiction
  + What is an email? How does the Internet impact the transitory and limited nature of slander? Is it defamatory to provide a link to defamatory websites?

**27.2 Elements of a Defamation Action**

* Requires that the P prove on a BoP that the impugned statement(s):
  1. Were defamatory
  2. Made reference to the P
  3. Were published or disseminated
* Where the impugned statement can include words, images or suggestions

i) Defamatory Nature

* Requires that the statements read in the plain and ordinary sense are defamatory
  + Would that statement lower the P in the estimation of right-thinking members of society? (Sim v Stretch)
    - Based on real people in the community; not simply the “reasonable person”
  + Whether the words are capable of having a defamatory meaning is a question of law; is there an interpretation which would lead actual members of the society to think less of the P?
  + Whether the words do have a defamatory meaning is a question of fact (for the jury)
* The P may be able to overcome this hurdle through:
  + Legal or True Innuendo: Where extraneous facts or circumstance known to those receiving the publication give it a defamatory meaning
  + False or Popular Innuendo: Where the ordinary or reasonable person would infer a defamatory meaning; how the words would perceived by real people in the community
* Q: Can you specify a group of members in the community?
  + If there is a more than minimal group of people who would regard you as having broken the rules of the faith or association to which you belong, then it is defamatory
  + Reflected in damages; if only a small group of people’s opinions were swayed, damages are less
* Q: Is the action and/or damages affected by the public personality?
  + In Canada, the same rules apply to all individuals. Damages will be a reflection of their public persona and the harm actually suffered.
  + In the US, public figures have to expect public comment. Raises the threshold. Actionable only if there is actual malice (New York Times v Sullivan 1964 US SC).
    - Argument was at the forefront of the defense in Hill v Scientology; the SCC rejected this American approach
    - The need for public discourse does not justify disseminating falsehoods even about public figures; the reputation of the public figure is still worthy of protection

Sim v Stretch (1936) Eng HL

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| Facts | * Housemaid worked for D, then P, then D * D sent telegram to P indicating “Edith has resumed her service with us today. Pleas send her possession and the money you borrowed, also her wages…” * P sued in defamation; TJ found for the P * Telegraph would have been transcribed by the human hand; P argued that it made the reader infer that they were in financial difficulty or borrowing from their housemaid |
| Issue | * Can false or popular innuendo be used to put forward an unlikely interpretation? |
| Analysis | * “Words used at in their ordinary meaning incapable of being understood by the reasonable person as conveying an imputation upon the P’s financial credit” * The mere fact of borrowing from a domestic servant bears not the slightest tinge of “meanness” * Defamation requires that the words tend to lower the P in the estimation of right-thinking members of society generally * Difference between imputing what is merely a breach of conventional etiquette and what is illegal, mischievous or sinful; other facts necessary to make the statement defamatory would not be known to the telegraph operator |
| Ratio | * Defamation requires that the words tend to lower the P in the estimation of right-thinking members of society generally |

ii) Made reference to the P

* Simple where the statement refers to the P by name; can also be satisfied in the absence of express reference
* Whether or not the statement is capable of referring to the P is a question of law
* Whether or not the statement would lead reasonable people, who know the P, to the conclusion that it does refer to the P (Knupfer v London Express)
* More commonly deals with defamation of the individual; not of the group (see below)

Knuppfer v London Express Newspaper Ltd (1944) Eng HL

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| --- | --- |
| Facts | * D published an article which indicated that the Young Russia group was pro-Hitler and was going to select a “puppet fuehrer” to head up a fascist Russian state * P was the leader of the British branch of the group but not named in the article; at trial the P lead four witnesses who testified that they thought of him when they read the article |
| Issue | * Can a statement be defamatory if it refers to a group to which the P is a member or leader? |
| Analysis | * Words make allegations of a defamatory character about a body of persons who belong to a society whose members are in thousands and found in many countries * Question of Law – Can the article (statement) having regard to its language, be regarded as capable of referring to the P? NO * The witnesses took more out of the statement than was capable * Question of Fact – Does the article (statement), in fact, lead reasonable people, who know the P, to the conclusion that it does refer to him? |
| Ratio | * Law takes a restrictive line on group defamation; more difficult to prove where the size of the group makes it difficult to refer to a specific individual |

**Aside:** Group Defamation

* Law takes a restrictive line on group defamation; more difficult to prove where the size of the group makes it difficult to refer to a specific individual (Knupfer v London Express)
* **General Rule:** The individual members of a large group cannot succeed in an action for defamation unless there is something in the statement that identifies a particular member
* However, a group of correctional officers (200) successfully brought a class action suit for defamation against an editorial writer. The writer did not specify which officers to whom he was referring. The TJ held that anyone knowing the officers would be likely to think less of them.

Applicable Legislation

* *Civil Rights Protection Act* – creates a tort of promoting hatred or contempt of a person or group, or the superiority or inferiority of a person or group, on the basis of colour, race, religion, ethnic origin or place of origin
* *Libel and Slander Act* – in relation to innocent dissemination

iii) Publication

* Satisfied as long as the statement is communicated in any way to a 3rd party who understands the statement
* Every repetition of the statement is a new publication that is independently actionable
  + Thus repeating the statement is actionable even if the 3rd party believed the statement to be true, attributed it to the original party or did not adopt it
* **Repetition Rule:**
  + May also be liable for repeating it, printing it or allowing it to be posted on premises under their control
  + Original tortfeasor not liable for repetitions unless:
    - He gave express or implied authority for the remarks to be republished
    - He made the remarks to someone had a moral, legal or social duty to republish those remarks
    - The republication is a natural and probable consequence of the original publication
  + Exception: Reportage (Grant v Torstar)

**27.3 Defences**

* Raised and proved by the D on a BoP; most litigation spent on defences
  + After the P has proven the elements of the tort BoP, the information is presumed to be false and said/published with malice (Hill v Scientology)
  + Can alternatively negate one of the elements proven by the P
* Options:
  + Justification: The statement is true
  + Types of Circumstances:
    - Privilege
    - Qualified privilege
    - Fair comment
    - Responsible communication on matters in which the statements were published
  + Consent

a. Justification

* Complete defence; the common law refuses to restrict free speech to the point that the truth is actionable
  + Even where the statement is made maliciously
* Must show that “the whole of the defamatory matter is substantially true”
* The defence is risky – its considered a republication of the statement and if unsuccessful, will make the D liable for a separate instance of defamation

Williams v Reason (1983) CA

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| Facts | * D was a sports corresponded; P an amateur rugby player * D wrote 2 article accusing the P of “shamateurism” (i.e. playing amateur rugby while accepting money from outside sources) on the basis that the receive money for writing a book about his rugby career * P won at trial; D sought to introduce evidence of P taking “boot money” |
| Issue | * What evidence is relevant to justification? |
| Analysis | * The scope of the defence of justification is dependent upon the way in which the judge rules they are capable of meaning and the way in which the jury determines them to mean * The D is entitled to bring evidence which is relevant to justify the words in any meaning which they are capable of bearing * Held that a jury may view the acceptance of boot money as undermining the P’s claim to amateur status and support the D’s claims of “shamateurism”; if the D could prove that the P was a “shamateur” then it means that “the whole of the defamatory matter is substantially true” |
| Ratio | * Must determine the sting of the statement before determining what evidence is relevant to its justification (proof of truth) * Justification is available to you to support any reasonable interpretation of the defamatory comment; don’t have justify every possible defamatory meaning |

b. Absolute Privilege

* Applies to untrue and/or malicious statements

1. Anything said in a legislature is absolute privilege – MP’s or MLA’s can say anything they want within the House of Commons or within the course of Parliamentary debate
2. Anything said or published in court proceedings (applies to litigation only)
   * Also applies to quasi-judicial proceedings such as disciplinary hearings, tribunals, etc.
   * Includes the judge, witnesses, parties, counsel and documents prepared for litigation

* **Q:** How do we reconcile with the rule that an unsuccessful defence of justification is considered a republication?
  + Absolute privilege applies to any new statements made in court
  + If A called B a liar, and A repeatedly called B a liar and a thief in court, then the statement about B being a thief is under absolute privilege. A calling B a liar increases the damages for the original libellous statement.

c. Qualified Privilege

* Applies to untrue statements but does not apply if the P can establish malice on the part of the D
* Applies in situations where the speaker has an interest or duty (legal, social or moral) to make the statement and the recipient has a reciprocal interest to receive the statement
  + Does not include gossip; the duty to communicate must be legal, social or moral
  + Very difficult to apply to public statements; difficult to establish a duty to speak to the public and no personal interest in doing so
  + More commonly applies to personal or individual statements
* Examples:
  + Letter of reference
  + Confidential communications
* Applies is four discrete situations:
  + Statements made in protection of the D’s own interests
    - Such as responding to attack on his character; unless excessive or irrelevant to the original attack
  + In order to protect the interest of another person
  + Communications made in furtherance of a common interest; where there is a reciprocity of interest
  + Statements made in the protection of the public interests
    - Where there is no common law duty for the media to report matters of public interest; however media can rely on the “responsible communication on matters of public interest”
    - Includes “fair and accurate reporting” on proceedings open to the public, such as judicial or legislative proceedings, public meetings and public documents
* *Libel and Slander Act*, s. 3
  + Prevents use of this defence where the newspaper, periodical, broadcaster, etc. refuses to publish the “other side” of the story

Hill v Church of Scientology (1995) SCC

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| Facts | * Hill is a Crown prosecutor; was involved in a criminal investigation against Scientology * Lawyer for CoS stood on steps of Osgoode Hall/Ont CA and read notice of motion for contempt of court; including the accusations against the P and the desired sanction of fine or imprisonment * Called him an “enemy”; argued that he had violated sealed documents * Hill was exonerated; brought action for defamation * Scientology relied on defence of qualified privilege; on the basis that the press conference was intended to inform the pubic about a planned court proceeding |
| Issue | * What is qualified privilege and when does it apply? |
| Analysis | * Legal effect of the defence of qualified privilege is to rebut the inference that the statement was spoken with malice * Documents related to judicial proceedings * Public has a right to be informed about all aspects of proceedings * Common law immunity has not extended to proceedings which had not yet been filed with the court or referred to in open courts * Public scrutiny of our courts by the press is fundamentally important in a democratic society * s. 2(b) may provide the means to gain access to court documents; therefore the concept of qualified privilege should be modified * Privilege is not absolute; is limited in the following ways: * If the statement was said with actual or express malice – “any indirect motive or ulterior purpose” that conflicts with the sense of duty or the mutual interest which the occasion created * The information communicated must have be reasonably appropriate in the context of the circumstances in which it was given |
| Application | * At common law the defence should not apply; but the court was not willing to draw a distinction between what has been and what was about to be filed * The privilege was exceeded both by communicating the information in a way that went far beyond the reporting function and through malice (should have waited until the investigation was complete before attacking Hill’s professional integrity) |
| Dissent | * Qualified privilege should not extend to judicial proceedings before they are heard in open court; not afforded the protection of qualified privilege until that time |
| Ratio | * Qualified privilege applies only to judicial proceedings which have commenced and are a part of the public record; however this technicality may no be sufficient to bar the defence * The defence does not apply where: * The D made the statements with malicious intent (“go beyond the occasion”) * The statements were not reasonably appropriate in the context of the circumstances in which it was given |

d. Fair Comment

* Defence available to those who comment fairly on matters of public interest; based on concept of entitlement and freedom of expression
  + Applies to untruthful statements but not to malicious statements
* Requires that the material in question was
  1. A comment, as opposed to an accusation or allegation of fact
  2. Which any person could honestly express – could any man honestly express that opinion on the proved facts?
  3. Based on the facts that are true; don’t have to recite the facts on which the comment is based; can be facts that would be known to the listener of the comment(s)
     + Must be able to recognize that the statement made was comment
  4. Pertaining to a matter of public interest; matter of legitimate public discourse or discussion

WIC Radio Ltd v Simpson (2008) SCC

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| Facts | * Mair was radio talk show host; known as a controversial commenter on public interest matters * Simpson was a leading public figure in the debate over the introduction of materials dealing with homosexuality into public schools; leader of those opposed to any positive portrayal of a gay lifestyle * Mair made comments based on Simpson’s meeting with parents; made analogy between Simpson and American governors regarding the integration of schools in the US |
| Issue | * What elements are required to prove the defence of fair comment? |
| Analysis | * Case balances the individuals right to protection of their reputation from unjustified harm and the freedom of expression and debate * Evolution of the common law is to be informed and guided by Charter values; do not want to “chill” debate on matters of legitimate public interests; would raise issues of inappropriate and self censorship * Is it defamatory? * Simpson pleaded *innuendo* – that his statements could be construed as meaning that she was so “hostile toward gay people to the point that she *would* condone violence toward gay people” * Test for Fair Comment – onus is on the D  1. Fact or Comment: Statements were comment, not an imputation of fact – “what is comment and what is fact must be determined from the perspective of a ‘reasonable viewer or reader’” 2. Based on True Facts: Comment must be based on a sufficient substratum of facts; facts must be sufficiently stated or otherwise known to the listeners such that they can made up their own minds on the merits of the statements; Simpson based his comment on her meeting with parents and position in the debate (facts that were publicly known) 3. Matter of Public Interest: Clearly a matter of public interest – “whoever seeks notoriety, or invite public attention, is said to challenge public criticism and she cannot resort to the law courts, if that criticism be less favourable than she anticipated”  * Honest Belief Requirement – Objective Belief * No evidence that Simpson “honestly believed” that Mair would engage in violence * Overturned Cherneskey; test is whether anyone could honestly have expressed the defamatory comment on the proven facts * Where fair/honest refers to limit to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts * Found that Simpson’s use of violent images could support an honest belief on the part of at least some of Mair’s listeners that she “would condone violence toward gay people” * Proof of the elements of fair comment does not preclude the P from demonstrating subjective malice as the dominant motive of the particular comment |
| Ratio | * Fair comment requires a more objective standard; could any man, no matter how opinionated or prejudiced, honestly express that opinion on the proved facts? * Does not require that the person making the statement honestly hold this belief, but that someone could make the comment based on the facts present * Results in a relatively low standard |

**Aside:** Proving Malice

* Requires that you have some other aim than expressing your views
* Challenging to prove malicious intent with respect to fair comment; would require the intent to do something other than comment
* Less challenging to prove in the case of qualified privilege where you must only “go beyond the occasion” of informing the public and serving some duty

e. Responsible Communication on Matters of Public Interest (Grant v Torstar)

* Two elements:
  1. The matter must be one of public interest (question of mixed fact and law)
  2. The D must show that he acted responsibly, in that he/she showed diligence in attempting to verify the allegedly defamatory comments, having regard to the totality of the circumstances (question of fact)
* Must consider the publication as a whole and not the statements made in isolation
* In considering the second part of the defence, the court should consider the following:
  + The seriousness of the allegation
  + The public importance of the matter
  + The urgency of the matter
  + The status and reliability of the source
  + Whether the P’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 (“reportage”)
    - Addresses freedom to report on public statements made by someone else; applies only to quotes or statements made by someone else (what was said)
    - Exception to the **repetition rule** if:
      1. the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability;
      2. the report indicates, expressly or implicitly, that its truth has not been verified;
      3. the report sets out both sides of the dispute fairly; and
      4. the report provides the context in which the statements were made
* As with all of the other defenses, this defense can be defeated by the proof of malice on the part of the D; onus in on the P to prove

Grant v Torstar Corp (2009) SCC

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| Facts | * Grant was proposing to build a golf course on land he owned * Torstar published an article quoting several comments which were critical of Grant; indicating that he was using his political influence to establish the golf course. Torstar contacted Grant for comment, but Grant refused. When the articled was published, Grant sued in defamation. |
| Issue | * Are any other defences available to media outlets in defamation claims? |
| Analysis | * On the basis of Charter values, a balance ought to be struck * Moved towards the UK courts; established a defence distinct from qualified privilege and fair comment known as “responsible journalism” * SCC recognized defense of “responsible communication on matters of public interest”. Two elements: * The matter must be one of public interest (question of law) * The D must show that he acted responsibly, in that he/she showed diligence in attempting to verify the allegedly defamatory comments, having regard to the totality of the circumstances (question of fact) * Must consider the publication as a whole and not the statements made in isolation * In considering the second part of the defence, the court should consider the following: * The seriousness of the allegation * The public importance of the matter * The urgency of the matter * The status and reliability of the source * Whether the P’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 (“reportage”) * Freedom to report on public statements made by someone else * Exception to the **repetition rule** if: * (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; * (2) the report indicates, expressly or implicitly, that its truth has not been verified; * (3) the report sets out both sides of the dispute fairly; and * (4) the report provides the context in which the statements were made * Did the D make what effort they could to contact and verify with the subject of the story? Onus is on the P to answer questions or respond should they be contacted |
| Holding | * The paper had made an attempt to secure comment and verify the allegations * Why not fair comment? The comments published were statements of fact; rather than comments * Sent the case back to trial for additional findings of fact |
| Ratio | * Court recognized a defence of responsible communication on matters of public interest; it requires that: * The matter must be one of public interest (question of law) * The D must show that he acted responsibly, in that he showed diligence in attempting to verify the allegedly defamatory comments, having regard to the totality of the circumstances (question of fact) * The court must consider the publication as a whole and not the statement in isolation * The court must consider all of the circumstances to determine if the D acted responsibly |

**27.4 Remedies**

(a) Injunction

* Commonly requested pre-trial to avoid re-publications; infrequently granted
* Requires that:
  + The statements are clearly defamatory
  + Either the D does not plead justification or it is impossible for the defence of justification to succeed
  + If the continued publication could be adequately compensated by damages at trial
* However, because each new publication is a new instance of defamation, may be wise for a D to refrain from republishing allegedly defamatory statements (**Repetition Rule**)

(b) Damages

* High level of deference should be shown to juries in awarding damages in defamation cases; they are drawn from and speak for their community and are uniquely qualified in this regard
  + Appellate courts should only be reviewed if the amount “shocks the court’s conscience and sense of justice”
* No cap applies to non-pecuniary (general) damages in defamation claims because:
  + Non-pecuniary is the only opportunity for recovery
  + Presumption of malice
  + No issues of insurance
  + Could serve as a “licence to defame”
* Aggravated and punitive damages are both available on the basis of the malicious, oppressive and high handed conduct of the D. However aggravated damages are meant to compensate the P while punitive damages are meant to punish the D and deter the conduct.

Hill v Church of Scientology (1995) SCC

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| Facts | * $300K general; $500K aggravated; $800K punitive |
| Issue | * What level of damages are appropriate? |
| Analysis | * Juries assess damages; they are drawn from and speak for their community and are uniquely qualified to assess the damages * Appellate courts are not entitled to substitute their own judgement merely because they would have arrived at a different figure; requires that the amount “shocks the court’s conscience and sense of justice” * Why? * B/c the unfortunate impression left by a libel may last a lifetime * A lawyers reputation is of paramount importance; our whole system of administration of justice depends upon counsel’s reputation for integrity * Jury should be free to make an assessment which will provide the P with a sum of money that clearly demonstrates to the community the vindication of the P’s reputation * No cap should be applied * In negligence, the cap applies only to non-pecuniary damages. However pecuniary damages are unlimited. However in defamation, non-pecuniary damages are the only opportunity to recover; there are no physical damages. * Presumption of malice; onus is on the D to prove truth or some other defence * No issues of insurance; was perceived at the time that there was an insurance being brought on by huge damage awards. Defamation damages are typically quite modest. * Could serve as a “licence to defame” * Joint and several liability applies to general damages; but not to aggravated or punitive   Assessment of Damages   * In libel/slander/defamation, “the assessment of damages does not depend on any legal rule” * Aggravated damages apply where the D’s conduct has been particularly high handed or oppressive, thereby increasing the P’s humiliation and anxiety arising from the libellous statement; represent the expression of natural indignation of right thinking people arising from the malicious conduct of the D * Punitive damages apply where the D’s misconduct is so malicious, oppressive and high handed that it offends the court’s sense of decency; their aim is not to compensate the P but rather to punish the D * W/ out them it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims * Triggered by the same outrageous conduct; but aggravated is compensatory while punitive is to punish and deter the D and others |
| Application | * Motive and conduct of the D is relevant in assessing damages * Held a very public conference associated with the administration of justice in the province * Continued to publish throughout the course of trial and after the decision by the jury; P had to get an injunction; D did not express regrets until 5 days into proceedings at the CA |
| Ratio | * No cap applies to non-pecuniary (general) damages in defamation claims because: * Non-pecuniary is the only opportunity for recovery * Presumption of malice * No issues of insurance * Could serve as a “licence to defame” * Aggravated and punitive damages are both available on the basis of the malicious, oppressive and high handed conduct of the D. However aggravated damages are meant to compensate the P while punitive damages are meant to punish the D and deter the conduct. |

*Libel and Slander Act*, s. 6

* Allows for newspapers, periodicals and broadcasters can plead a prompt apology in mitigation of damages
  + Means the P can recover only actual damages
* At common law, apologies treated as admissions of fault. The *Apology Act* prevents this presumption of fault. Do not forfeit insurance coverage.