Basics of Intentional Torts

Definition

-Conduct must be voluntary and intentional
*Volition = exercise control over physical actions
*Intent = Desire to bring about results or consequences of the Act
-Imputed Intent- situations in which the defendant did not desire the consequences to occur, but they were certain or substantially certain to result from his or her act
-Transferred Intent- when a defendant intends to commit and intentional tort against one party, but unintentionally commits an intentional tort agains the plaintiff

Smith v Stone (1647)

Ratio
-Cannot be a trespass without intent (volition) (in this case, physical intent)

Gilbert v Stone (1648)

Ratio
-Duress as a motive does not alleviate liability for trespass, as Stone in this case physically trespassed (distinguished from Smith v Stone)

Cook v Lewis (1951)

Issue
-What should constitute an intentional tort? Who should bear the burden of proof?
Ratio
-Intentional Tort = Directness + Intent
-Once a direct action has been established by plaintiff (injured by direct force), defense must then prove that there was an absence of fault = intention and negligence (willfulness or intent)
*somewhat contradictory as they must disprove both intention and negligence (just ignore negligence)

Provocation

Definition

-Provocation is a motive and can mitigate damages primarily

Miska v Sivec (1959)

Issue
-Whether provocation must occur directly before the event for it to be a factor, or whether it can be a long-standing provocation
Ratio
-Test: Would a Reasonable Person, in light of the conduct of the plaintiff (at the time of or shortly before the assault), have lost his/her power of self-control?

Battery

Definition

-Battery = Intentional infliction upon the body of another of a harmful or offensive contact
*once proved, it is then open for the defence to say that there was consent or lack of intent

Bettel v Yim (1978)

Issue

Whether an intentional wrongdoer can be held liable for consequences which he did not intend?

Ratio

-Defendant should be held liable for the entirety of his actions stemming from the battery, as battery is an intentional harm and not making defendant responsible would not adequately protect the security of the person harmed

Non-Marine Underwriters, Lloyds of London v Scalera

*Once the plaintiff can prove that direct physical contact has been made with them, the onus is on the defendant to prove that it wasn't intentional, or that there was a consent involved
*plaintiff has no onus to prove non-consent

Accident v Mistake

Definition of Accident

-Accident- any situation by which the defendant unintentionally and without negligence injured the plaintiff, by definition cannot be held liable

Ranson v Kitner (1889)

(Wolf Hunters) Mistake is not a defense for a tortuous act if the act itself was intentional

Hodgkinson v Martin (1929)

Ratio

-Mistake can mitigate damages in intentional tort

Assault

Definition of Assault

Assault-intentional creation in the mind of another reasonable apprehension of imminent or immediate harmful or offensive contact

Mainland Sawmills Ltd v USW Local (2007)

-Defendants allege that it is not an assault because the plaintiffs could avoid the harm by not crossing the picket lines
*One cannot impose conditions on another when they do not have a legal right to do so
*Also, says that there is no tort of harassment recognized in BC (important for privacy)

Holmes v Whitaker
Issue
-Whether assault must constitute a direct physical element
Ratio
-Judge measured assault based on level of threat flowing through the plaintiffs actions/threats (pounding on door, trying to access plaintiff directly) as well as level of fear felt by plaintiff in apprehension of act
Not necessary to have a direct physical aspect, or even a direct physical threat

Police v Greaves
Issue
-Whether conditional nature of threat plays a role in assault?
Ratio
-Conditional nature of threat, in this case, was irrespective to the fact that there was a seemingly credible prospect of assault
Nature of threat (directness, credibility) is more important than conditionality

False Imprisonment

Definition
Encompasses most situations in which an individual's movement is intentionally restrained

Bird v Jones (1845)
Issue
Whether denial of access to desired route constitutes false imprisonment?
Ratio
-Could not succeed on false imprisonment because his right to motion was not completely impeded (to be imprisoned there must be no reasonable means of escape)

Campbell v SS Kresge Co (1976)
Issue
-Does false arrest necessitate physical barriers?
Ratio
-Judge finds that plaintiff was imprisoned from time confronted until time free to go
*defendant used force of position to compel the plaintiff to go where she didn't want to
Demonstrates that restriction does not have to be physical, but can be psychological as well

Wright v Wilson
-Means of escape was to trespass on someones property
*Found that this was a reasonable means of escape

Herd v Weardale Steel, Coal and Coke Co. Ltd
Issue
-Can you claim false imprisonment in situations where there is a contract/ willingness

Ratio
-Court finds its not false imprisonment because the worker voluntarily entered the mine, on the terms that he would be released at the end of his shift
-He tried to get out early but was denied, was not denied departure at his proper time
*therefore, not false arrest
If you insert yourself in a position consensually under certain terms, cannot claim false imprisonment if you violate these terms and are denied escape

Murray v Ministry of Defence
-The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage.
-You can hold someone to false imprisonment, even though the person being imprisoned was or is unconscious

Intentional Infliction of Mental Shock

Wilkinson v Downton
Issue
-Is there an action on intentional infliction of nervous shock?
Ratio
-For a long time in the common law, if the defendant injures the person physically, they also could find that the person suffered mental stress, could be an add on
-Suggests that the plaintiff willfuly committed an act calculated to cause physical harm to the plaintiff, which is malicious (intended to tell a lie), and caused harm
*imputes intent to cause physical harm on the person who utters such remarks
*would a reasonable person be certain or substantially certain that action of telling a lie would cause the results
-Court could have used transferred intent, and said that defendant intended to commit fraud (caused by lying) and then transferred intent to infliction of nervous shock
-Rules out defense of the unforeseability doctrine, as well as the defence of the harm not being directly related to the remark uttered
*on the latter point, says the case is differentiated from others
Intentional infliction of Nervous Shock- Malicious intent is imputed, cannot use defense of unforseeability/ doctrine or indirectness
Different from other intentional torts, as there is aspect of intent toward the harm involved, not just the action

Radovskis v Tomm (1957)
Issue
-Can the mother recover for nervous shock, if rape of her daughter caused weak nerves
Ratio
-Precedent suggests that if shock and illness occurred after the event in question it is assumed to be directly related
*however, it must be illness to recover damages, cannot simply be shock

*as there was no medical evidence offered, and the wife had weak nerves before the incident = no damages
-Mother's Action dismissed with costs
Shock isn't good enough to recover damages, must be illness*
*In this case, they move in a direction that the plaintiff needs to show some psychopathological harm to be able to claim damages for intentional infliction of nervous shock
-manifestation of the concern in the common law that overly sensitive people could claim ridiculous things*

Rahemtulla v Vanfed Credit Union
-*Rahemtulla* seems to be gaining favour (cases noted in note 3, page 95).
*new issue is the flagrant and outrageous aspect of the offence, court shifts some focus to the behaviour of the defendant (recklessness)
-Seems as though they are stretching Wilkinson a bit, introducing element of malicious behaviour that causes emotional distress
*do not have to be intending the consequences, but just need to be reckless (makes it easier to prove this type of action)
-this seems more like harassment, as it is not asking the plaintiff to show that there is intentional infliction of nervous shock (Samms v Eccles)

Saams v Eccles
-Test for intentional infliction of nervous shock: 1) where defendant intentionally engages in some conduct toward the plaintiff the purpose of inflicting emotional distress, or
2) Where any reasonable person would have known that such would result; and 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
This is the law of harassment in the US

Consent

Defence of Consent
-consent is not conceived of as an element of the action, but as a defence (defendant must raise, in an attempt to show consent)
*Has an effect on the burden of proof, defendant must prove on a balance of probabilities that there was consent
*The party allegedly giving consent must be capable of consenting
-Once that is established, the common law will not assess the reasonableness of consent given (any individual capable of giving consent can act foolishly or recklessly)
*We're all free to consent to stupid things
Two possible forms of consent: explicit and implicit
-Explicit consent: -verbally, written, physical consent
-Implicit consent: -no evidence of consent but circumstances

Many of the most difficult cases concern implicit or implied consent – what actions/ circumstances are sufficient to establish that the plaintiff implicitly consented to the specific acts of the defendant?

Consent through Fraud

1. Defendant must be aware of, or responsible for, the fraudulently induced belief
2. The fraud must relate to the nature and quality of the act (and not a 'collateral' matter)

-In relation to the second requirement, ask whether plaintiff knew the nature and quality of the act on the basis of which s/he is suing the other.

R v Williams

-Singing teacher convicted for rape for inducing a 16 yr old student to have intercourse under the pretence that it was a therapeutic procedure to improver her voice

-Court emphasize that the girl did not know that she was engaging in a sexual act

Papadimitropulos v R

-Accused was acquitted of rape for having sex with an illiterate woman after he had fraudulently convinced her that they had been married

-Woman was aware that she was participating in a sexual act and consented to it

-Fraud went to a collateral matter, and this did not vitiate her consent

Consent through Mistake

-Example: *Guimond v. Laberge* (1956)

*Woman goes in to get dentures, misunderstanding happened between doctor and patient

-Defendant asks whether the woman asked for all the teeth out, plaintiff says yes (thinking it was all the top teeth), took out all the teeth

-court finds that he did not properly word his question, and thus there was a mistaken belief surrounding the consent, doctor was liable

Wright v McLean

<u>Issue</u>

Whether there was consent in situation where boys engage in typical game?

<u>Ratio</u>

-All boys admit that the fighting was not carried on in malice or anger

*Defendant says that he wasn't even looking at what he was picking up, as he had to dodge incoming missiles

-Judge considered issue of consent

*suggests that in sport, where there is no malice, anger, or mutual ill will, the combatants consent to take the ordinary risks of the sport in which they are engaged

*Lack of fair play and good temper, will void consent in certain situations

-Action dismissed

Harm caused by consent is not a civil action

in sport, where there is no malice, anger, or mutual ill will, the combatants consent to take the ordinary risks of the sport in which they are engaged

Agar v Canning
Issue
-Whether participation in Hockey game constituted the consent described in *Wright*?
Ratio
-Judge suggests that injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even where is provocation and in the heat of the game, should not fall within the scope of the implied consent
*This act falls into that category
-Judge finds that the defendant is liable for the damages that arose out of the incident
*however, as a matter of provocation the damages are cut in 1/3rd
Shows that consent is limited to events that are seemingly outside of the implied consent
Also is an example of provocation

Marshall v Curry
Issue
-Whether the surgeon required consent to preform the additional surgery on the plaintiff (testicle)
Ratio
-Court says: 1) In the ordinary case where there is opportunity to obtain the consent of the patient it must be had
2)Consent can be express or implied; if operation is forbidden by patient consent is not to be implied
3)Consent may be implied from the conversation preceding an operation or from the antecedent circumstances
-Judge finds that in a situation in which there is an emergency that was un-anticipated and not easily foreseeable, the surgeon should not be liabile if he acts to preserve the health of the patient
No liability for surgeons acting in patients best interest, when the patient cannot be consulted

Malette v Schulman
Issue
-Did the defendant's lack of consent trump the gravity of her condition (JD blood issue)?
Ratio
-Judge finds that the right to one's body supersedes the doctor's ability to vitiate consent in emergency situations (she had expressed her will through a card, consent had already been rejected)
Doctrine of informed consent does not extend to informed refusal

C v Wren
Issue
-Whether the girl could validly consent to the abortion, even though she's only sixteen
Ratio

-Find that test for when a child may go against parents will relies on the age at which the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed
*In the case, judge finds no evidence to suggest that the child did not possess that here
-Dismisses appeal
Children can be held as consenting to medical procedures if they are at a sufficient intelligence to comprehend the risks/ramifications of medical procedures

Latter v Braddell
Issue
-Did the servant give consent?
Ratio
-Suggests that the case against the masters cannot be supported by law
-Supports this view by suggesting that there was no force or violence used against the plaintiff
*says that it was in the plaintiffs power to comply or not comply with her mistresses orders
*no evidence of violence or any force of violence
verdict: Court finds that as she did not refuse examination as she could have, therefore no charges laid!
*Principle of Duress is only applicable when the duress was applied through violence, threat of force or violence, or an illegal act done to threaten
-Duress can vitiate consent only when it meets this threshold
*Today, this would not fly as the common law has developed extensive set of rules around medical procedures

Norberg v Wynrib
Issue
-Is there a public policy concern surrounding consent in doctor patient relationships?
Ratio
-Doctor is charged with battery
-Trial judge rejected appellant's claim of sexual assault – she had *consented* to it:
*by voluntarily submitting to the doctor's advances, plaintiff gave her implied consent
-SCC majority -no evidence that the appellant's addiction interfered with her capacity to consent to the sexual activity or with her ability to reason."
-minority suggests that this approach is too limited
*The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will ... This presumption, however, is untenable in certain circumstances."
*Duress, undue influence, and unconscionability have arisen to protect the vulnerable in contracts
-Proposes to use this notion in the area of tort law - '**for consent to be genuine it must be voluntary**'
-Paralleling contract law, there will be two stages to proof of 'unconscionability':
1. "**Proof of inequality** between the parties, which ... will ordinarily occur within the context of a special 'power dependency' relationship."

2. "**Proof of exploitation"** (wherein community standards of conduct may come in to assist in determining whether such has occurred)
*when we have inequality and exploitation together there is an issue
-Was appellant truly in position to exercise freedom of choice?
*Not in this 'special relationship', where she was vulnerable to the doctor (proof of inequality)
Was there exploitation?
*Yes, for by community standards his acts were clearly not acceptable (The doctor should in the least have helped her to quit her addiction)

Privacy

-Is there a 'right' to privacy?
*There is no recognized tort of privacy in Canada
-*Lord v. McGregor* (2000)
*If it were accepted that there is a right to privacy, there is usually a powerful motion for courts to move to engrain this in the common law
*There are many statutory regimes that protect private information

Motherwell v Motherwell

Issue

-Whether there is a tort of invasion of privacy? Or whether there is a nuisance when someone continually harasses you via mail and telephone

Ratio

*Argued that the offence of invasion of privacy doesn't fall within intentional torts…common law cannot recognize invasion of privacy within an existing or new category of nuisance
-Judge finds that indeed the court does have the ability to create new categories of offences, however he lumps it in with nuisance
*Invasion of privacy is a new category of private nuisance
-nuisance offence = the undue interference of a neighbour with the comfortable enjoyment of his land
*However, the problem is with the word "neighbour" as the person is actually not the neighbour
-As the telephone is a very important part of modern life, and that in order to the system to keep functioning well, it is necessary to pick it up
*Therefore, it is a private nuisance, judge upholds damages and injunction placed by trial judge
*Holds that letters do not constitute a private nuisance as it is not a real interference with the reasonable use of the plaintiffs property
Common law approach is a tort of negligence that interferes with person's reasonable use and enjoyment of their property/way of life
In Motherwell the court creates new category of nuisance, when someone uses an electronic device

Hollinsworth v BCTV

Issue

-Is there a tort of invasion of privacy?Is it applicable toward BCTV for showing bald video?

Ratio
-Definition of privacy is not in *Privacy Act,* say that it is circumstantial
*Judge examines act finds that the defendant must have *Wilfully* invaded anthers right to privacy *without a claim of right*
*Wilful violations do not apply broadly, must be an attention to do an act which the person doing the act knew or should have known would violate the privacy of another person
*Without a claim of right involves an honest belief in a state if facts which, if existed, would be a legal justification or excuse
-In this case finds neither of these elements present, BCTV didn't know, and couldn't have known, that what they were doing was wrong
-BC Privacy Act defines the offence of breech of privacy
*c. 363, s 1 (1) (2)
BC Test for violation of of privacy involves a wilful invasion without a claim of right
There is no common law tort of privacy, but there is a legislative tort of privacy

Self-Defence

-Defence of Self-Defence:1) Accused must have honestly and reasonably believed that an assault was imminent
2)the amount of force that he or she used to avert the risk was reasonable in all of the circumstance
-Use of defence expires once the danger has passed
-Self-defence is a complete defence, as once you prove it the accused is absolved of liability

Wackett v Calder
Issue
-Did this constitute self-defence, in case of invitation to fight and trying to leave fight?
Ratio
-Appeal judge finds that the brothers were attacked which warranted the response from the defendants
*also finds that, while intoxicated, the plaintiff was not defenceless and was in a threatening state
-Defendant was liable to exchange blow for blow, and was not required the measure the nicety of the weight or power of his blows
-Judge finds that the defendant's blows were not over excessive, and that he was acting in self defence
Nice summation of concept of self-defence, lays out concept that one does not have to measure blows with nicety, and is entitled to respond with force to forceful attacks
This case is mostly just to show how self defence works

Gambrielle v Caparelli
Issue
Can one claim self-defence for protecting someone, especially if they are related?
Ratio

-In R v Duffy- judge states that there is a general liberty between people to prevent a felony
-In R v Fennell when the judge states that a parent has the right to use reasonable force when they believe their child is in imminent danger of injury
-Thus, there is justification to use force where a person holds an honest belief that the other person is in imminent danger of injury
*Finds that in this case the facts are sufficiently present to warrant the mothers intervention in the fight
-Next question is whether the force used was reasonable
*Judge finds that the woman would not have otherwise used force, tried to use words before resorting to violence, used relatively small amount of force in her attack
-Finds that this was a case of defence, and dismisses case
*Note that she may have had a *mistaken* belief – the question is whether the defendant had an *honest* and *reasonable* belief, and so mistakes can be overlooked in some circumstances
*its okay to have a mistaken belief, as long as it is an honest and reasonable belief

Authority Related Offences

Discipline

-Section 43 of the CCC:
*Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances
-Courts have accepted that this provision should be applied to both criminal and civil defences

R v Dupperon

Issue
-Is it a criminal offence to physically discipline your child?
Ratio
-At trial convicted of assault
-Section of the criminal code requires that the force is applied for correction, and that the force use is not excessive
*finds that the lashing was too heavy handed for the offence committed, and a boy that young.
-Finds that the appellant was deserving of the punishment of assault
*Note that the provision points to only one acceptable justification for discipline: it must be employed 'by way of correction'
-Should that be established, the question is (once again) about the reasonableness of the force applied
-Note that defence under s. 43 is distinct from broader common law and statutory powers enjoyed by educators to maintain order and discipline in a school setting (note 5, page 228)

Defence of Legal Authority

-Regards situations in which people believe they should escape liability because they had some kind of authority to be doing what they were doing

-For the most part, when civil liability comes up it is dealt with in conjunction with – and indeed employing – the provisions found in criminal law statutes
-Generally, for an individual to argue the defence of legal authority they must show:

1. That their act(s) were ***authorized*** by either statute or the common law, and;
2. That their authorized act(s) were ***privileged***

-For the most part, sections 494 and 495 of the CCC serve to **authorize** act(s) that lead to questions of liability (sections that describe conditions around arrests – reproduced on page 255)), and section 25 of the CCC serves to grant **privilege** to certain act(s) (justifying the act(s) authorized, so long as only so much force as was necessary for that purpose was employed and the actor(s) acted on reasonable grounds – reproduced on page 258)
*Police Officers, Peace officers preforming Act or Arrests
-Sometimes the criminal law approach is not the same as the civil law approach
-Consider *Nichols v. Wal-mart Canada Corp* (2003) 15 C.C.L.T. (3d) 150 (Ont S.C.J.), note 5, page 262
-Here the focus is on the matter of a private citizen's 'arrest'
*Ms. Nichols was shopping at Wal-Mart with her landlord and his 2 children
*On the way outside they were stopped by store security
*As they were held in the back waiting for the arrival of the police two cameras were found in the landlord's coat pockets (both stolen)
*The store officials believed Ms. Nichols may have stolen some mascara, but charges around that were later dropped
-She sued for false imprisonment as she is quite upset
**Madam Justice Pierce* noted the common law approach to the defence of legal authority, noting that *Williams v. Laing* (1923), 55 O.L.R. 26 held that:

-The law is quite clear that in order to succeed in establishing this defence the appellants must prove first that the crime they suspected had actually been committed, not necessarily by the person detained, but by someone, and that they had reasonable ground for suspecting the person detained.

Pierce J.* went on to note that *Cumming J.* had held that; There is another possible way for the defendant to succeed in justifying its actions at law. As evinced by the extracts of the authorities cited above, there is some discrepancy between the common law and the provisions of the Criminal Code regarding the scope of the private citizen arrest defence. A crime must actually have been committed in both situations. **The turning point is this: under the Criminal Code the crime must be committed by the plaintiff, while at common law it is sufficient if there were reasonable grounds to believe that the plaintiff was guilty of the crime so long as it is proven the crime was committed by someone.
-With this in hand *Madam Justice Pierce* went on to find that in the case before her the store officials did have reasonable grounds to belief that Ms. Nichols was guilty of the crime, and they had proof that a crime had been committed by someone (the landlord).
*Using the common law defence, then, they were absolved of civil liability in relation to the action for false imprisonment

Koechlin v Waugh and Hamilton

Issue

-Were the police acting in a way that was authorized and prescribed by the law?

Ratio

-Judge finds that the reasons given by the accused fell far short of being reasonable cause for arrest under s. 494/495

*therefore not acting within authorized function

-Further, the officers did not inform the plaintiff as to why he was being placed under arrest

-While police officers believed that they had a justified and honest belief for arresting the plaintiff, they did not inform him of the reason for their arrest, and thus cannot claim the defence of authority

General Negligence

-6 Elements of Negligent Action (burden of proof 1-5 on plaintiff, burden 6 on defence):

1.Existence of a duty

*there has to be the existence of a duty, or there is no grounds for action

-[Sub-question: standard of care]

*What should they have been doing? What was the standard of care?

2. A **breach of this duty**

*After establishment of what the standard of care was in the negligence action, plaintiff must convince court that the plaintiff breached the standard of care

3. The claimant must suffer some **damage**

*plaintiff must be injured. Economically, physically

4. Damage suffered by the claimant must be caused by the negligent conduct of the defendant.

-(**'cause-in-fact**')

*if plaintiff is just in picture acting negligently, but there actions don't cause damage, then there is no action in negligence

5. Conduct of the defendant must be the '**proximate cause**' of the loss [question of remoteness]

*comes up in very limited circumstances

*seems like defendant did something minor and trivial, but the way that the story goes, ends up leading to a huge injury

6. Should be **no prejudicial conduct** on the part of the plaintiff [contributory negligence, voluntary assumption of risk, etc.]

*these are the defences: contributory negligence is the major one

*-First, we note a question of interpretation connected to most provincial legislation governing apportionment

*liability is apportioned based on fault

-if its not possible to determine what party is more morally blameworthy the default position is 50/50

*this does not deal strictly with negligence, as the offending party may have intent, but the defending party is negligent, there may still be apportionment of fault

-Does one work through the full analysis whenever a question comes up about whether a duty of care exists, ***or*** only when a 'novel situation' arises?
-In *Childs v Desmoreaux* (2006) 1 S.C.R. 643 (see discussion at bottom of 311, top of 312) the SCC clarified matters (somewhat):
*where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established.

-don't have to go through a proximity argument if there are previous cases substantiating the recognition of a special relationship between two parties

Donoghue v Stevenson
Issue
-Is there a cause of action in this case?
Ratio
-Whether the manufacturer of a drink sold to a distributor, and ultimately a consumer, has a legal duty to the consumer to take reasonable care to ensure that the article is free from defect likely to cause injury to health
*in this case, it is important that the article in question could not be pre-inspected by the seller or consumer for defects because of the beverages dark colour
-In searching for a duty, judge uses neighbor principle laid out by *Heaven v Pender*
*says that there is a duty to take due care when one is sufficiently close, in person or property, to another, in person or property, that there acts or omissions could injure that person (even if there is no contract between them), proximate in such a way to ought to have contemplated them as being affected by their actions
*this applies also to products shipped or designed to be consumed in such a way that negligence on the part of the manufacturer could cause significant risks to the health or safety of a person

-must be the case that the product has not degraded naturally or by some outside force
Principle: Manufacturer who sells in such a form as to show that he intends the product to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care
Test for Negligence

Anns v Merton London Borough Council
*proposes an approach for analyzing existing categories of negligence and for recognizing new categories in novel situations
-Test:
*Two stages of analysis
1. Between the alleged wrongdoer and the person who has suffered damage, there should be a sufficient relationship of proximity or neighborhood such that, in the reasonable contemplation

of the former, carelessness on his part may be likely to cause damage to the latter (in which case a **prima facie duty of care arises**).

2. If (1) is answered affirmatively: "It is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

-*Anns* entrenched the notion that the neighbor principle should guide the law of negligence
*while *Anns* has largely been overruled elsewhere, it is still relied on in Canada
-Similar approach taken in *Kamloops (City) v Neilsen*
*however, in Canada the second test is up to the defendant to prove (i.e. why there should not be a duty of care)

Dunsmore v Deshield

Issue

-Is this negligence? Is there a defence of contributory negligence here, emerging from playing football with glasses on?

Ratio

1) Find that there was a breech of duty by the lens vendor
*Duty was to ensure that the plaintiff received Hardex lenses…protect the safety of the plaintiff
2)Focus on the testing site for the lenses, and that the vendor should have tested because there was minimal cost involved with this
3)There was damage to the plaintiff, through glass in the eyes
4) Often the problem that the plaintiff faces
*difficult to prove causation, was the impact on the plaintiff sufficient to break the Hardex lenses?
*law looks at whether or not there could have been damage, even in the case that there was no negligent conduct
5) Yes this was the direct cause
6) Did not find that there was contributory negligence
*Judge finds no contributory negligence as the game being played was non-contact football
-Finds that Deshield is negligent as he had a duty to test the lens to ensure that they were Hardex, and didn't
*Also finds, on a balance of probabilities, that Dunsmore has proven that had he been wearing Hardex lenses, the blow that he sustained wouldn't have caused his glasses to break
Good example of step by step analysis of a negligence case

Cooper v Hobart

Issues

-Whether the Registrar acted negligently in allowing Eron to continue to issue mortgages

Ratio

-Court suggests that this type of duty of care has not been traditionally recognized by the Canadian Courts
-Turns to the first test of *Anns* to ascertain whether they were discussing foreseeability, or proximity and foreseeability

-Suggests that in the first stage of the *Annes* test asks:
1) Was the harm that occurred the reasonably foreseeable consequence of the defendants acts?
*Was the risk of harm reasonably foreseeable?
*What is meant by proximity?
1 - Proximity is generally used to characterize the type of relationship in which a duty of care may rise- one in which an action by one can directly harm another
*factors that satisfy this element are diverse and depend on the circumstances of the case
2 -Sufficiently proximate relationships are identified through the use of categories
*categories are not closed and new categories of negligence may be introduced, but generally proximity is related to those categories already developed
*ex. actions cause foreseeable physical harm to person or property, nervous shock, negligent misstatement, duty to warn of risk of danger, relational economic loss
2)Are there reasons, not withstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?
-If the proximity and foreseabililty are established, this establishes a *prima facie* duty of care
-The second stage of the test then attempts to establish whether there are residue policy considerations outside the relationship of the parties that may negate the imposition of a duty of care
*government policy concerns, social concerns
**Clarifies *Anns/Kamloops* test: 1) Was the harm occurred: a) reasonably foreseeable b) proximate in a category that does not exist
2) Are there reasons, not withstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?
*not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest the duty of care should not be recognized?

Categories of negligence
-In the decades after ***Donoghue*** (as the principled approach was slowly accepted) negligence law gradually opened up to recognize:
1. Defendant's failure to act for the benefit of the plaintiff
2. Negligent statements
3. Public authority liability
4. Occupier's liability
5. Nervous shock, and
6. Pure economic loss
7. Supervising prisoners, or institutionalized mental health patients
8. Employers in relation to abuse/harassment in the workplace
9. Coaches in relation to participants, with different forms of duty (to warn of risks, for example)
10. Schools controlling various activities within (for example, bullying)

Duty of Care

Moule v NB Elec Power Comm

Issue

-Should the Power company be found liable for the boy's injuries? (for not clearing the branches)

Ratio

-Finds that the power line company imported the dangerous lines into an inhabited, woody area, and thus had a duty of care against any foreseeable consequence which could be said to involve a reasonable probability of causing harm

*likelihood that children climb trees is certainly foreseeable, ands thus requires power companies to place their wires so that young climbers will not come in contact with a live wire concealed in the branches of a tree

-However, in placing the wires high above the normal climbing range of a tree, and limbing adjacent trees, power company have taken adequate precautions against this risk

-Judge suggests that the power line company could not have reasonably foreseen that i)injuries would have occurred by not cutting branches higher up on the tree ii)boy would climb higher than usual and slip on a branch to cause his injuries

Only necessary for defendants to take precautions against reasonably foreseeable events, not extraordinary events, to avoid negligence

Amos v NB Elec Power Comm

Issue

-Is the power company liable for boy's injuries from climbing tree?

Ratio

-Judge suggests that this case was different from *Moule* in that the wire company had not made sufficient effort to protect climbing children by trimming off the top of the tree

*says that it was reasonably foreseeable that children climb trees, and that in this instance the tree climbing could result in injury

Distinguished from *Moule*, power companies have a duty to ensure that trees around power lines are trimmed to prevent injury to climbers

Palsgraf v Long Island Ry Co

Issue

-could the porter have reasonably foreseen that the porter pushing the person onto the train could have posed a reasonable risk to the people on the platform?

Ratio

-Suggests that negligence cannot exist without foreseeability

-Further, the court suggests that the plaintiff should be part of a class of persons to which the act could foreseeably do harm

*again, the plaintiff was far enough removed from the harm that she does not satisfy this criteria

**One only owes a duty of care to kinds of people who might be said to have been reasonably foreseeable as put in risk of harm by a party's possibly negligent dangerous activity **

Steward v Petty
-Court: serving past the point of intoxication did not in itself pose a foreseeable risk
*focus is on reasonable foreseeability of the server to know that plaintiff was going to be engaged in potential dangerous activity in this state
-Application: As the plaintiff was with 3 sober adults, it was not foreseeable that he would be the one driving, and thus, the defendant was not found liable

Jordan House v Menow
-Factors that influence finding of relationship:
- Invitor-invitee (Menow as patron)

-this is how the court finds a relationship, it is a commercial relationship between the two parties
- Hotel was aware of Menow's propensity to drink (and of his need to have someone responsible with him if he did)
- Hotel was aware of his intoxicated condition
- Hotel fed the intoxication
- Hotel did so in violation of liquor licence/legislation

*Court concludes: proper to find hotel under duty to act (a positive duty)

Crocker v Sundance Northwest Resorts Ltd.
Issue
-Whether the ski resort had a positive duty at law to take certain steps to prevent a visibly intoxicated person from competing in the resort's dangerous "tubing" competition?
Ratio
-Law distinguishes between negligent conduct (misfeasance) and failure to take positive steps to protect others from harm (nonfeasance)
-However, in *Jordan House* the court created a duty of care to invitor-invitee relationships (certain type of commercial relationship)
*this applies here, Sundance assumed liability by inviting patrons to participate in a dangerous competition, was in control of how the event functioned, and then providing the patron with alcohol, knowingly increasing the danger of the sport so that it was foreseeable that they might be injured
*further, they did not make a concerted effort to stop him from competing, knowing that he could be in danger of hurting himself (due to clear inebriation, and prior injury)
-Court then throws out voluntary assumption of risk defence
*the court finds that Voluntary assumption of risk requires that the plaintiff to voluntary assume both physical and legal risks
-court finds that the alcohol impaired Crocker's consent, and furthermore the waiver could not constitute legal consent as he did not read it (did not consent to legal risks
**Common law is recognizing that there is a duty to care for people in certain commercial circumstances
*must be some form of knowledge that a risk is developing

Childs v Desormeaux
-BYOB New Year's party
*Defendants knew that DD was a bad drunk, with DUI convictions
-SCC downplays knowledge element in two ways:
*First, focused on other aspects of the relationship (social host), and second, failed to see that even with the knowledge the defendants could be said to reasonably foresee the accident/injury
*Court distinguished this kind of scenario from commercial contexts on three levels:

- CH have greater ability to monitor patrons
- SH are not heavily regulated, and
- SH do not profit from their activity

Social host could not have been expected to know their guests condition/intentions intimately, so knowledge intent was not there

Duty to Prevent Crime

-Often difficult to find as police are held to owe a specific duty of care to the public, but not individuals specifically

Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police
Issue
-Did the police owe a duty to warn to rape bait?
Ratio
-Finds that warning could and should have been given to target women
*suggests that had evidence been given Ms Doe would have taken steps to protect herself
-Police have a common law and statutory duty to prevent crime and protect the lives of citizens in their jurisdiction
-*Anne's/Kamloops* test: 1)There was eminent foreseeability that rapist would strike again and cause harm to another victim
2)Police knew, or ought to have known, that she was part of a narrow group of potential victims to support the formation of a special private relationship. Also had identified her specifically as target
3)Extra policy: -While there may sometimes be a reason not to warn people (due to police operations) this is no excuse for a lack of duty to protect

Duties to Preform Gratuitous Undertakings

-Once an individual gratuitously undertakes to assist another, distinguish between:

1. situations in which plaintiff no worse off (from act of assistance), and;
2. situations in which defendant worsens condition (in carrying out the mere act of assistance)

*Note: 'no worse off' means that the plaintiff was not (as a result of the act of the defendant) put in a situation within which their prospects were diminished or impaired – for example, the defendant did not do something that prevented the plaintiff from availing him/herself of some other opportunity
*it is not the act of assistant that directly makes them worse off (Soulsby v Toronto)

Zelenko v Gimbel Bros. Inc
Facts
-Plaintiff falls ill in a store
*store officials take plaintiff into back room to attempt to treat medically
*however, plaintiff ends up sitting in room for 8 hours and does not receive care
Issue
-Can defendant have been said to owe plaintiff duty of care for attempting to remedy him and in the end worsening him, even though he was undertaking gratuitous act?
Ratio
-Court finds that once the defendant undertakes a task, he is obligated to complete the task
*in this case, there was negligence after undertaking the task which directly negatively effected the plaintiff (leaving him in back room)

Soulsby v Toronto
Issue
-Did a duty of care exist between the truck driver and the city as far as ensuring the gate was closed when a train was coming?
Ratio
-City was not required by law to operate the gate to ensure that gate opening and closing was done according to the exact train schedule
-Court finds that the mere undertaking of an additional duty is not actionable in negligence, there must be some direct act by the volunteer to injure the plaintiff, not just an injury at the plaintiff's own accord

Duties to the Unborn

Pre-Conception Wrongs

Definition
1)x does something negligently **to parent(s)** of unborn child
*typically it deals with health professionals
2)effects the unborn child
3)when born the child suffers from disabilities/harms
Example
-*Paxton v. Ramji*
-Mother's partner gets vasectomy, mother taking anti-acne medication which could harm theoretical fetus
*Mother get's pregnant, fetus comes out disabled
-Infant plaintiff argued that doctor should have prescribed extra birth control
-Court: Lack of proximity between doctor and 'future child'
*due to policy concerns, there should be only one primary obligation on a doctor in this situation, and that is to the mother; any conflicting duty would interfere with her autonomy and privacy; the mother is best placed to make decisions affecting her and future children
*trying to balance interests of mother, child, society

Wrongful Birth/Wrongful Life

Definition

-'Birth' claim is in relation to mother

-'Life' claim is in relation to the born-child

-Idea is that health professional has negligently failed to inform of risks of birth with disability/ defect, pregnancy leads to birth that otherwise would have been terminated

-What is the loss/injury complained of?

*In case of wrongful birth

- lost opportunity to make informed choice/decision
- this is a duty to warn problem

*In case of 'Wrongful Life'

- negligence requires proof that there is less value in the world after an act, where there would be more value in lieu of that act
    - thus, unborn child's argument is that there is less value in a world in which they are disabled, then if they were not born

Example

Arndt v. Smith

- No clear SCC decision based on this case, because the child's case was dropped

(b) *Bovingdon (litigation guardian of) v. Hergott*

-wrongful life, as the real harm here is that the mother might not have had the child had she been warned of the risks

*harm is measure against world in which the children don't exist

-Finds there should be only one duty on doctor in relation to the mother, to fully inform of material risks

-It would be inconsistent, they reason, to add second duty on the doctor (to the children) to have stopped the mother from taking the fertility medication (so that the children would not have then been born = wrongful life)

- Also, to consider such a second duty would be to interfere with the mother's autonomy in this situation

-Wrongful Life: Courts reluctant to find any form of 'damage' when healthy child born, when claim advanced by the child him/herself

Wrongful Pregnancy

-Parents take steps to avoid pregnancy, but due to negligence of health professionals, a child is conceived (but healthy)

-If terminated (for example, if sterilization procedure or abortion negligently performed, and woman deems it necessary to undergo second procedure), woman can recover for economic loss, pain and suffering, and emotional harm

-If not terminated courts struggle with determining what the 'loss' might be (since the comparison is between world without a child and world with a healthy child)

Canadian courts

- tend to hold that damages may be recovered, but confined to immediate damage to mother, loss of consortium for father, expenses and loss of earnings immediate to the

pregnancy, plus any additional costs if child born with disability, or to parents with disability

- General idea: healthy child is a positive outcome, raising of healthy child does not constitute legal harm

-*Kealey v. Berezowski* (1996) 136 D.L.R. (4th) 708 (Ont Gen Div), discussed on page 389, has been (somewhat) influential

- Lax J. characterized child-rearing costs as 'pure economic loss', such that they can only be recovered when primary motivation of parents in limiting family was *financial*
    - can you identify a harm to the family stemming from the unwanted birth? if yes than award can be given. In this case, judge says that there is severe economic harm when a family doesn't want a kid because of economic reasons

-Generally, Canadian law not settled in this area

-Wrongful Pregnancy: courts reluctant to allow parents to recover for full costs of raising child, when child is born healthy ('blessing', not loss)

Prenatal Injuries

-Common law recognizes that person may owe duty to avoid negligent actions before birth of a child that might result in loss upon birth

*Challenge lies with situation where the mother is the party that negligently causes injury to unborn child

-*Dobson (litigation guardian of) v. Dobson*

*This was worked out by Cory J. before the changes wrought by *Cooper v. Hobart,* but it is not too difficult to reconstruct how this would fit into the new framework

*Key to the outcome was a range of policy considerations taken into account by Cory J. Upon finding requisite foreseeability and proximity (it would be difficult to conceive of parties more intimately proximate), Cory considered a variety of other concerns that were sufficient to outweigh the prima facie duty established

*4 major policy considerations: 1) Autonomy of a mother's life 2)Difficult to define the standard of care owed by a mother to the foetus 3)Life style choices- sometimes people do not have control over certain habits (drugs/alcoholism) 4) It would subject mother to unacceptable scrutiny

-No obligation from the mother to the child

-Suggestion in the notes: this is a matter better dealt with by legislative bodies

-Prenatal Injuries: Courts create distinction that poses problems (third party versus mother). Is there really concern over ability to draw line between tortious and non-tortious conduct? Would it be impossible to calculate losses? Would claims generate unacceptable tension in family? Should the state intervene to protect the unborn foetus?What are some possible and reasonable legislative solutions?What might be best options and recommendations?

Psychiatric Harm

Mustapha v Culligan of Canada

Issue

-Whether a defendant may be liable for damages for psychiatric harm where the harm, by any objective measurement, consists of an exaggerated reaction by an obsessive person of particular sensibilities to what, in reality, is a relatively minor or trivial incident

Ratio

-Says the primary/secondary distinction should not be upheld in Canada

-Says that he fits into the 3 categories from *Alcock* as he a) Is concerned/ obsessed about the dead fly because of the possible impact the consumption of contaminated water had, or might have in the future, on his family

b) He was present at the event itself

c) Witnessed the fly in the bottle

[-*Alcock v. Chief Constable of South Yorkshire Police* (1991) 4 All E.R. 907 (HL)

- Illustrates the 3 factors being put to use (in a different way?)
- Psychiatric harm cases were claimed by a lot of different people who weren't directly proximate to the harm

*how how were the facts applied?

1) Focus is on relationships, was the person making the claim of a proximate familial relationship to the person potentially being injured

2) Focus that person is immediately proximate to the event, cannot be distance or time between the person and the event

3) Senses must not be in some way witnessing the thing

*could not say it was seen on tv in this case, as the tv station wasn't allowed to show it]

-Then ask, is the harmful act proportionate to the plaintiffs mental shock, and if it is inversely proportionate, is the plaintiff's lack of robustness the cause?

-As reasonable foreseeability requires a probability of the consequences occurring from the harm, to the degree that these consequences would be foreseeable, this case does not meet the threshold for reasonable foreseeability of nervous shock because the plaintiff was not mentally robust enough to respond in a way a reasonable person would respond to the event, and thus the harm was not probable to the extent that it was foreseeable

*Thing to take out of this is there is no settle approach in Canada to psychiatric harm, and that no claim will be settled unless it is very serious

Health Professionals Duty to Warn

Reibl v Hughes

-Doctors have a duty to warn patients about Material Risks

-What counts as a material risk depends for the most part on two vectors – seriousness of the possible harm that might ensue, and probability of harm that might ensue

-Additionally, doctors must consider the impact of failure to warn of particular risks in relation to the particular patient they have before them

-Court in ***Reibl*** did not think the common test for showing causation in these circumstances – asking of the subject whether he/she would have decided otherwise – is appropriate or workable

-***Reibl***: in relation to a health professional's duty to warn, a ***modified-objective*** test is appropriate

*what would a reasonable person, in the situation of the plaintiff, have done if properly informed?

-Which aspects of the plaintiff's personal circumstances should be attributed to the reasonable person?
*There is no doubt that objectively ascertainable circumstances, such as a plaintiff's age, income, marital status, and other factors, should be taken into consideration.
*"special considerations" affecting the particular patient should be considered, as should any "specific questions" asked of the physician by the patient

Haughian v Paine
Issue
-How broad is the duty to inform? What risks does it include?
Ratio
-Risk of paralysis was about 1/500
*doctor did not warn for anything less than 1/100
-Also find that the doctor did not inform the patient that other methods of more conservative treatment were available
-Court finds that: a) The doctor should have advised about alternative treatments, so that the patient was aware of the spectrum of options available to him
b)As non-surgical treatment was available, the doc should have warned about the minute risk of paralysis in comparison with the lack of risk of the other available treatments
-Court suggested that you can't isolate the different failures to warn, as they all work together to provide informed consent

Hollis v Dow Corning
Issue
-Did the BCCA find correctly that the manufacturer had breached its duty to adequately inform the surgeon of the risks of post-surgical rupture, and that this caused the injuries to patient?
Ratio
-Manufacturer duty to warn is a continuing duty, which means that dangers known at time of manufacturing, as well as dangers discovered along the way, must be reasonably communicated to consumers, and must describe specific dangers that arise from the ordinary use of the product
*this includes very specific situational risks, when the risk of injury or the severity of injury is high
-As medical stuff is very intimately connected with the body, manufacturers must be very specific in fulfilling their duty to warn
-Manufacturers may fulfill their duty to warn in circumstances where the product is highly technical in nature and is only to be used in supervision of experts, or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product, by informing a learned intermediary
*however, learned intermediary must have been warned to the extent that their knowledge approximates that of the manufacturer in order for this exception to work
-Court then turns to the issue of causation: 2 things: 1) Would the patient have consented to the operation if properly warned of the risk?

2) Would Dr have warned patient of the risk of rupture had manufacturer properly warned Dr about risk
1) Court finds that it is highly desirable from a policy perspective to hold manufacturer to strict standard of warning consumers, as manufacturers have incentives to overemphasize safety/value of product and downplay risks
2)Court says that the patient should not have to prove this, because this is a requirement to prove a hypothetical circumstance which might obscure the administration of justice where there has been personal injury
*plaintiff would be caught in middle, wouldn't be able to recover from the doctor for not disclosing information that he didn't have, wouldn't be able to recover from manufacturer for info they didn't disclose
*all they have to show is that they would not have the surgery if they were properly warned
**Note that duty applies to what manufacturers know, ought to know. Can include speculative knowledge (threshold for this is at issue)

Lem v Borotto Sports Ltd / Good-Wear Treaders v D & B Holdings Ltd
Lem v. Borotto Sports Ltd (1976) 69 D.L.R. (3d) 276 (Alta CA) (notes 12 and 16)

- Manufacturers and suppliers have a duty to warn about ordinary uses ***and*** about reasonably foreseeable uses (even if 'misuses')

Good-Wear Treaders v D. & B. Holdings Ltd (1979) 98 D.L.R. (3d) 59 (NSCA) (note 20)

- Supplier knew purchaser was going to ignore warnings about use of re-treaded tires for front of a heavy gravel truck
- One of the unsuitable tires blows out, truck crosses road, 3 members of family in car coming in other direction killed
- Supplier found to have obligation not to sell to purchaser that he knew would misuse the product, when that might create danger to others (duty was ultimately on the supplier, in relation to the third-parties injured).

Standard of Care

Arland v Taylor
-Charge to the jury should be what a reasonable man would do in the circumstances
*reasonable man has many definitions, but it is what an average, prudent person would have done given the circumstances in the case

Bolton v Stone
-Court says that it was readily foreseeable that a person walking on the path by the field could be injured by rogue ball, as they had been hit much further past the pitch then that before
*however, the chance of this happening was small (6 times in 30 years, and the road was large and did not offer a sure probability that if it was hit there it would strike someone
-Must only guard against material risk
*says calculation should take into account frequency of danger, how serious the injury is likely to be
*says calculation should not include difficulty of implementing remedial measures

Vaughan v Halifax-Dartmouth Bridge Comm

Issue

-Was the standard of care prohibitively expensive in this case?

Ratio

-Defendants argue that avoiding harm would have been prohibitively expensive because of the size of the bridge

-Judge finds that the expense argument does not really fly

United States v Carroll Towing Co

-Economically a person will take precautions to secure his barge when the expected cost of not securing his barge is greater than the cost of securing the barge

"If the probability be called P; the injury, L; and the burden, B; liability depends on whether B is less than L multiplied by P: i.e., whether B is less than PL."

*there are questions here surrounding the dollar value of lives, or the appropriateness of assigning a dollar value to risk

Paris v Stepney Borough Council

Issue

-Was the standard of care different between two types of workers simply because the potential injury to one type of worker was much more severe?

Ratio

Majority

-Says that a reasonably prudent employer would provide the one-eyed workman with goggles to protect his eye, that was in danger of being harmed

-Concedes that the risk of splinters hitting the employees eye was small, and that it would cause damage to two eyed employee as well

*however, says that the risk of the one-eyed man becoming blind through his work should have been enough to alert a prudent employer to provide goggles

*simple and inexpensive precaution

Dissent

-says that if A and B are engaged in exactly the same work, but the probability of risk to A is much greater that that to B, then the precaution taken against that injury to A should be greater

*However, says that the case comes down to whether it would be negligent also to not provide goggles to the one eyed man on the basis that the risk of injury was more severe

*rejects this, as he finds that the risk of eye injury to one-eyed and two-eyed employees was such that they should not have to wear goggles

Priestman v Colangelo and Smythson

-Court says where there is a social good, actions of the defendant can be considered more reasonable than they actually are

*Important factor was that the ***purpose*** of the defendant's acts was to apprehend a criminal, before his speeding car could get to a crowded intersection

Law Estate v Simice

Was the constraints on the allocation of limited and costly medical resources a defence for breeching the duty of care?

-Judge says that in a choice between physicians responsibility to his/her patient and responsibility to the medical system overall, the former must take precedence

-Severity of the harm that may occur to the patient who is permitted to go undiagnosed is far greater than the financial harm that will occur to the medicare system if one more CT scan procedure only shows the patient is not suffering from a serious medical condition

Watt v Hertfordshire County Council

Is the risk of jack falling off the truck so great as to displace trying to save the life?

-Denning suggests that in order to determine standard of care that has been breeched must consider: a) risk b)measures necessary to eliminate the risk c)balance risk against the end to be achieved

-However, says that commercial end is much different than the life saving

*in the commercial reality, then this claim would succeed

-However, as there is time press and a life on the line then the risk was not so great as to prohibit the attempt to save life

Shows that in some circumstances the economic calculation behind duty of care can be modified to take into account the purpose of the act

Fiala v Chechmanek

Can the guy with god complex be held to account for actions in negligence?

-There is debate whether mentally ill should be held to a lower standard then normal people as they do not meet reasonable person standard, or whether they should be held to the same standard to uphold the purpose of tort law and to eliminate the chance that people will use mental instability as a way out

*further they suggest that by holding them responsible, they would hold their caregivers accountable for their actions, which is important in de-institutionalized world

-There are difficulties with this though: 1) holding mentally ill to RP standard, even though they may not have done a "wrong" , turns tort law into a strict liability standard

2)courts can use expert testimony to verify those attempting to use mental health to escape liability wrongfully

3) the caregiver argument wrongfully assumes that caregivers understand their legal position in such a way that it influences their behaviour or caregiving

*overall judge determines that the concern of eroding the objective standard (by personalizing test to mental health) is overridden by concerns of justice, stereotypes, scientific evidence

-Test should be that the defendant must show either: 1) As a result of his or her mental illness the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time; or

2) As a result of mental illness, the defendant was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell the objective standard of care

** Could characterize this as tension between corrective justice and distributive justice **
Do we concern ourselves within law of torts with notion of 'wrong' and the need to meet a wrong with a 'correction', or do we concern ourselves with the notion of distributing goods amongst the members of society (shielding everyone from the devastating effects of a sudden (great) loss)?

Joyal v Barsby
Can a child be considered negligent for running into a car?
Majority
-Focuses its analysis on the situation, and concludes that given the busy traffic, and the horn by the large truck, the child's normal attention was thrown off
*given entirely to the truck, which caused her to forget about other cars
-Says normal child would have responded in the same way
Dissent
-Law establishes that it is a question of whether the infant exercised the care expected from a child of like age, intelligence, and experience
*dissent judge finds that as the girl had been educated in the ways of the road, had experience with traffic
** 2 stage test: 1) Is particular child capable of being found negligent (subjective analysis of the child asking if individual has abilities required to know duties expected of them and how to discharge these duties)
2) Was the child negligent in the situation
*difficult because asks court to look at a child of like age, intelligence, and experience**

Ryan v Hickson
When Children engage in adult activities they are held to a reasonable person standard
*in adult context it doesn't seem fair to change the opportunity for liability based on age because they might be in dangerous activity which could lead to tremendous damages

White v Turner
Does negligence apply differently to professionals in the capacity of their work?
-Court found that the execution of the surgery fell below professional standards
*operation was done quickly and doctor was not careful that enough tissue was removed
-Judge used evidence from other surgeons to judge standards of that doctor
*"… if [the defendant's] work complies with the custom of his confreres he will normally escape civil liability for his conduct, even where the result of the surgery is less than satisfactory"
*Note: a general practitioner is relieved of having to live up to standard of expert: Only ask of him/her that some experts would agree with his/her course of action

Ter Neuzen v Korn
How should courts approach the issue of negligence in the medical context?
-Doctor's conduct must be judged against that of an equal specialist in his field
*must also be judged in light of the time at which the evidence was given

-Court assumes that when a medical professional is acting within the confines of his profession, that he is not acting negligently but helpfully
*the court will question doctors when standard practice that is fraught with obvious risks, so that a normal and reasonable person can judge them, is negligent
*Shows that a doctors conduct will not only be measured against the conduct of other professionals in the field, but will be measured against the knowledge at the time of the procedure

Waldrick v Malcolm
What is impact on standard of care that there is a local custom not to salt/sand icy parking lots
-Argument for taking custom seriously: this injects a certain element of community standards, based on community expectations, into the law
-The court has the responsibility to evaluate customs, not to blindly accept them
*If … it is unreasonable to do absolutely nothing to one's driveway in the face of clearly treacherous conditions, it matters little that one's neighbours also act unreasonably" (852)

Negligent Misrepresentation

Queen v Cognos Inc.
-5 conditions of *Hedley Byrne* claims: 1) must be a duty of care based on a special relationship between the representer and the represented
2) representation in question must be untrue, inaccurate, or misleading
3) representer must have acted negligently in making said misrepresentation
4) represented 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
*4+ 5 put the causation requirement into force
*'reasonable reliance' (1st requirement)
-It must make sense to say that the person making the statement should have foreseen that the representee would rely on the advice, and
-it should make sense to say that the reliance by the representee in the circumstances was reasonable
-Concurrency - "The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way."

Hercules Managements Ltd. v Ernst & Young
Did the auditors owe the stockholders a duty of care?
-Negligent misrepresentation requires: a)defendant ought reasonably to foresee that the plaintiff will rely on his or her representation b)reliance by the plaintiff would be reasonable
*on the reliance point, court says that this is necessary because in some circumstances reliances on the defendant's words will not be reasonable
-5 points of reasonable reliance (not a strict test): 1) Defendant had a direct or indirect financial interest in the transactions in respect of which the representation was made

2) The defendant was professional or someone who possessed special skill, judgement, or knowledge
3) Advice or information was provided in the course of the defendant's business
4) Information or advice was given deliberately, and not on a social occasion
5) Information or advice was given in response to a specific enquiry or request
*in this case first 4 are clearly met, so court finds that there was a duty of care
-Then conduct a policy considerations test in the second branch: ex. did defendants know the identity of either the plaintiff or the class of plaintiffs who will rely on the statement, and that the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made
*in policy consideration statement, court is basically trying to limit indeterminate liability problem, as these negligent misstatement claims often engender considerations about indeterminate liability
*now that cooper has been passed. we recognize negligent misrepresentation as a category
-this means that the person can sue in the common law with the right facts
*so you just have to worry about policy concerns

Causation

General Stuff

-Causation generally has 2 elements: 1) But-for test for causation (with some exceptions)
2) can plaintiff prove on BOP that the defendant's breach of the standard of care was a cause of his or her loss
*called the cause-in-fact test
-When finding causation, often try to separate various actions that caused loss and test them separately (divisible loss)
*however, in some cases there are injuries which on the facts that can not be divided
-Plaintiff need not show that the defendant's action was the only cause of loss, or even the main cause of loss, just has to the prove defendants action was causation on BOP
-There have been attempted reformation of the but for test in 3 major ways: 1) Material contribution test *(Walker)* 2) Materially increased risk test (*Snell)* 3) proportionate cause and loss of chance test
1)-Application is limited, courts have held that it requires 2 aspects (*Hanke)*: A) Plaintiff must establish that it is impossible to prove causation using the but-for test and that this impossibility results from factors beyond the plaintiffs control
B) plaintiff must establish that the defendant breached the standard of care and that his or her injuries fell within the ambit of the risk created by the defendant's breach
*situations such as *Cook v Lewis,* and *Walker*
-No court has yet explained the test, nor has it explained why applying the but-for test is unfair when conditions are met
-Test is just generally pretty questionable as the court has not explained what it means, nor how its application in *Cook v Lewis* effects the multiple defendant's rule

2)- Used in situations where an action materially increases the probability of something happening- where the but-for test would not be able to ascertain that the action in question more likely than not caused someone's injury
*problem with test is that if there is a 49% chance that defendant's negligence was the cause, the plaintiff does not recover…51% change, then plaintiff recovers
-courts have suggested that recovery should be proportionate to causation…30% cause = 30% recovery
3) Another problem is when defendant's negligence leads to a loss of chance (for recovery etc.)
*courts have not upheld ability of plaintiffs to recovery proportionately for the % loss in chance in these situations

-When there are two or more causes, it gets complicated
*must be distinguished when 2 or more tortfeasors cause the same, indivisible harm
-2 categories of multiple causes: 1) Involving independent insufficient causes (but-for test works)
*several factors combine to cause the plaintiff's loss - each factor is individually necessary, however, no factor is individually sufficient to have caused the loss in the absence of the other factors (*Athey* and *Brunswick*)
2) Involving independent sufficient causes (but for test does not work) (*Lambton*)
-Must also distinguish independent tortfeasors from joint tortfeasors
*independent tortfeasors can only be held liable for the injuries he or she causes or contributes to bringing about
*joint tortfeasors are held liable for the torts committed by his/her fellow tortfeasors, even if he or she didn't cause or contribute to the plaintiff's loss
-3 situations: 1)Agent committing a for while acting on his principal's behalf
2) Employee committing a tort while acting on his or her employer's behalf
3) Two or more individuals agreeing to at in concert to bring about a common end which is illegal, inherently dangerous, or one in which negligence can be anticipated

Kauffman v Toronto Transit Commission
Does this meet the but for test on the subway owner?
-Total absence of evidence that the man or the scuffling teenagers fell because they were attempting to grasp the handrails
*nor was there any evidence that the plaintiff fell as a result of her inability to grab the handrail
defines the test for causation, alternative universe test

Richard v CNR
-Demonstrates the importance of framing a negligence issue in terms that allows courts to find that but for the defendants actions, the injury would not have occurred

Barnett v Chelsea & Kensington Hospital Management Committee
Whether the doctor's negligence was a cause of the man's death by arsenic poisoning
-Judge decides that even had the deceased been admitted, and treated, he would not have received the necessary drip to cure the arsenic poisoning in time to prevent death

-says that the plaintiff has failed to establish BOP that the defendant's negligence cause the death of the diseased

Walker Estate v York Finch General Hospital
Is the but for test for causation right for this situation? Material contribution test?
-But for test can be unworkable in certain situations, especially where there is multiple independent causes that may bring about a single harm
*this is so in the case of blood donations because it is almost impossible to prove what the donor would have done had he or she been properly screened - could leave legitimate plaintiffs uncompensated
-Says the proper test in this situation was whether the defendant's negligence materially contributed to the occurrence of the injury
-Material contribution test looks at causes outside de minimus range
*not clear what courts are suggesting here, but seems like they are saying that when a party contributes to harm in a material sense, they will be found to have caused the harm
-Take parties and ask question, did they do anything else by themselves that contributed to the test

Snell v Farrell
How does the Materially Increased Risk Approach work?
-Legal or ultimate burden remains with the plaintiff but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced
*if some evidence to the contrary has been adduced then, the plaintiffs case must be stronger, etc.
-In this case finds that defendant was negligent continuing the operation and that doing so greatly increased the risk of the injury the plaintiff befell
*found the TJ was in a position to find that the operation caused the injury because there was no-one who could attest to this but the doctor, and that once the operation was complete then he could not check for bleeding
*also no evidence to rebut this presumption
End result: legal burden rests on the plaintiff, but "… in absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced."

Hanke v Resurface Corp
What situations should the material contribution test be used in
-The basic test for determining causation remains the "but for" test. This applies to multi-cause injuries
-2 requirements for the material contribution test: 1) it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control;
2)plaintiff's injury must fall within the ambit of the risk created by the defendant's breach

-Example of but for test failure: Cook v Lewis where it is established that each of the defendants carelessly or negligently created an unreasonable risk of that the plaintiff in fact suffered
*another ex., where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission (breaking the chain of causation)

Cook v Lewis (Multiple Negligent Defendants)
Rand J
-Suggests that when there are multiple negligent defendants should shift the burden of proof to the defendants, that way they can't get out of it
*As a matter of legal history, subsequent courts took the rule in *Cook v Lewis* to be that when: (a) there are multiple negligent parties, (b) it is known that one of them indeed caused the plaintiff's injuries, and yet; (c) it is impossible for the plaintiff to demonstrate which one, then; (d) the burden of proof would shift to the defendants to try to disprove causation (and failing this, the plaintiff would find relief from both)

Athey v Leonati
Did the TJ correctly award partial damages based upon the material contribution test in the situation of assessing the plaintiffs back injury?
-In this case there is a single indivisible injury, so any defendant found to have negligently caused or contributed to the injury will be fully liable for it
-Crumbling skull rule = defendant need not put plaintiff in a better position than they were before, as they were injured originally
*defendant is liable for additional damage, but not pre-existing damage
-SCC says that this cannot operate like the multiple defendants rule because really it is a case of a thin skull, which means that once the plaintiff satisfies the but for test, they are liable for the full extent of the plaintiffs injuries

Nowlan v Brunswick Construction Lte
Was the contractor or the designer liable for the shitty house construction?
-Judge says that both the design as well as the construction caused the damage
*there would have been no rot if there was proper ventilation, however there would have been no dry rot if the roof had been impervious water
-Thus, judge says that the liability is a joint and several liability, either party contributing to the damage is liable for the whole damage to the person aggrieved
*thus the defendant was liable for the damages

Lambton v Mellish
Can defendants be held jointly liable for a cause that both contributed to, but neither caused separately the merry go round disturbance
-Judge says that the plaintiff is entitled to the injunction in each case
-However, says that even if it wasn't, and only their combined noise was a nuisance, that they would both be liable for the whole noise as far as it constitutes a nuisance

*as holding in the contrary would bar the defendant from recovery altogether

Clements v Clements
-Trial judge notes the 'impossibility' of showing, through scientific reconstruction of the accident, whether but-for the negligence of the defendant the plaintiff would not have been injured
*Doesn't use the but-for test and applies the material-contribution test
-McLachlin advises that the material contribution to ristk test will only be substituted for but for where it is impossible to say that a particular defendant's negligent act caused the injury
*imposes liability because the defendants act contributed to the risk that an injury would occur
-Test is imposed for fairness and policy reasons (to allow recovery where recovery should be had)
-Clarifies the impossible to prove requirement from *Hanke*
*basically says the problem with this formulation is "how do you know when something is impossible to prove? where is the line in factual, logical, scientific impossibility
-Requirements for impossibility: 1)Multiple tortfeasors 2)It is known that one or more in fact caused the injury (requiring that the plaintiff show, on a balance of probabilities, that the negligence of the actors was a necessary condition for her injury to have occurred) 3)Each individual tortfeasor enjoys the ability to escape a finding of causation by 'pointing the finger' at the other tortious actor(s) 4) It must be shown that each individual tortfeasor did in fact contribute to the risk of the injury that occurred
-In these circumstances, permitting the plaintiff to succeed on a material contribution to risk basis meets the underlying goals of the law of negligence.
*Compensation for injury is achieved. Fairness is satisfied; Deterrence is also furthered;
-Procedure: 1) Are there multiple injuries that are divisible?
*If yes, treat each as the source of a separate action
2) With one injury (or indivisible set of injuries), are there multiple injuring parties?
*If yes, consider if they might be seen as ***joint tortfeasors***
- Agent acting on principal's behalf , Employee acting on employer's behalf, or 2 or more individuals agreeing to act together to bring about act that is illegal, inherently dangerous, or one for which negligence can be anticipated

*if no then consider whether they are multiple individual sufficient causes (material contribution test)

Pure Economic Loss

General Stuff
-Injuries that result in pure economic loss raise risks of indeterminate liability, raises questions about whether such cases are good judicial uses of time,
-5 claims for pure economic loss: 1) negligent misrepresentation
2) independent liability of statutory public authorities
3) negligent performance of a service
4) negligent supply of shoddy goods or structures
5) relational economic loss

*these categories are not closed
-Relational economic loss - situations in which the defendant, as a result of negligently damaging property belonging to a third party, also causes a pure economic loss to the plaintiff with whom the third party had a relationship
*potential for indeterminate economic loss is particularly pronounced in these situations, courts have recognized need to strike balance between allowing victims to recover compensation for their losses, and protecting defendants from the prospect of crush in liability

Martel Building Ltd v Canada
1)Does a duty of care exist to the same group to not harm those who might foreseeably suffer damages from negotiations?
2) Does the tort of negligence extend to damages for pure economic loss arising out of the conduct of pre-contractual negotiations?
-Court says that the negligent conduct in this case does not fall within any of the 5 classifications
-Anne's Kamloops test: 1) Says that it is reasonably foreseeable in contract negotiations that one party stands to lose purely economically 2) Says that the two parties are impressively proximate when they have a pre-existing contract between them
*however, says that a contract negotiation is not sufficient for proximity, says that there must be a will to reach an agreement that must be shown by the parties
-In this case says that the first stage is met due to sufficient evidence
-Then say that in the second category, there are reasons to be mindful of another commercial party's legitimate interests in an arm's length negotiation
*negotiations limit the scope for indeterminate liability to the parties involved in the contract
*also says that the contract limits the extent to which damage may be recovered, as it can only be that amount that is the lost opportunity of contracting
-However, ultimately says there are good policy reasons not to extend tort of negligence to commercial negotiations:
1) Object of negotiation works against recovery - goal of negotiation is to achieve most advantageous bargain at the expense of the other party, this is zero sum game
2) Could deter socially and economically useful conduct
*by finding a tort, it would force disclosure of privately acquired information, dissipate competitive advantage
3) Interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities
4) Introduce to the courts a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct
*there are doctrines out there to protect parties, don't need to add more
point of Martel is to show that the categories are not closed, but that the courts will be hesitant to invade the business context (court has no place in negotiations of business savvy parties)

Winnipeg Condo Corp No. 36 v Bird Construction
-Says this case falls partially in the Negligent Supply of Shoddy Goods or Structures with the exception that the building was dangerous and not just shoddy

-Says there exists a standard of care
-Goes through a ***Kamloops***-type analysis
-Stage 1: sufficiently close relationship? Implications of fact buildings are (fairly) permanent structures – reasonable foreseeability of harm to subsequent purchasers if building is falling over
-Doesn't make any sense to limit liability, because you should be able to be preventively compensated, because if they wait until there is actual physical damage they will be able to claim for damages, and there may be losses to society
-Stage 2: Policy considerations - 1) Warranties respecting quality of construction are primarily contractual in nature and cannot be easily defined or limited in tort
*tort duty can arise in conjunction with a contract duty, as long as tort duty is independent of contractual duty
2) Recognition of a duty interferes with caveat emptor
*arises out of belief that the buyer of a building is in a better position than the seller or builder to inspect the building and bear risk for latent defects to the building
-not descriptive of the modern housing market, as contractors are the best people to be inspecting a building because of their knowledge

CNR v Norsk
-Example of claim for relational economic loss
-*McLachlin J* **-** Prefers a case-by-case approach
*Begin with the five categories, work outward from them (and note: categories are not closed)

- If sufficient proximity, prima facie duty of care established
- Then ask if other concerns ('policy' or practical considerations) are sufficient to lead court to negate or reduce duty

-Sees here something akin to a 'joint venture', sufficient to establish proximity, and to move us away from concerns over unlimited liability -joint venture creates necessary proximity
La Forest J.
-Begins with exclusionary rule (no duty exists in cases of relational economic loss)
-Then considers established exceptions: 1. Possessory or proprietary interest - if 3rd party has possessory or proprietary interest in the thing that is damaged (bridge) then they can recover
2. Joint venture -if party damaged is joined to the third party, then they can be compensated
-Would prefer not to use *Kamloops*-approach - claim: it lacks predictive power
-Pragmatic and economically rational reasons why exclusionary rule is preferable:1)Puts incentives on parties to act to minimize losses 2)Only one party has to purchase insurance 3)Will save judicial time and resources 4) Eliminate worry about impecunious defendants, who might be forced to pay both the primary party damaged and other 'relational' parties

Bow Valley Husky v Saint John Shipbuilding
McLachlin J. attempts to merge the two approaches from *CNR v. Norsk*
*2 stage process: 1) see if case fits into pre-established category (joint venture, claimant has possessory or proprietary interest in the property)
2) if not, then conduct Annes test to decide whether there is prima facie duty of care

*****The main concern (as usual) is with indeterminate liability (to an indeterminate class, for an indeterminate amount, for an indeterminate amount of time)
-McLachlin J. goes on, then, to consider arguments the Court itself is mindful of: 1)It might be in some circumstances that the liability the defendant owes the actual injured party is clearly not enough to promote the ends of deterrence – but here that is not the case, as BVHB suffered $5m in property loss
2) It might be in some circumstances, because of the nature of the transaction or an inequality in bargaining power, that the plaintiff was unable to effectively allocate risk through the contract (which is assumed to be possible in most contexts)
Side discussion: Joint Ventures: necessary features: A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking; A joint property interest in the subject matter of the venture; A right of mutual control or management of the enterprise; Expectation of profit, or the presence of 'adventure', as it is sometimes called; A right to participate in the profits
-Note: McLachlin J.'s finding of a joint venture in *CNR* only very loosely fits this concept and loosely fits within the list of necessary features - however she was only looking for something akin to a joint venture

Public Authority Liability

General Stuff

-*Welbridge Holding Ltd v. Winnipeg* - SCC held that generally public authorities cannot be held liable in tort for activities that fall under the umbrellas of legislative and judicial (or quasi-judicial) functions
-Exceptions? 1)Legislative - While activities of legislators protected by statute this immunity does not extend to actions of a legislator that are not directly or indirectly related to legislative activities - Only protected when your working in a legislative function
2) Judicial - While activities of judges (and other levels of adjudicators) are statutorily protected this legislation usually leaves judges open to tort action if it can be established that the judge/ adjudicator acted maliciously and without reasonable and probable grounds
-Lack of clarity around Attorney-Generals and Crown Attorneys and also how far along the spectrum of judicial officers the protection extends
-In context of exercise of ***duty***, public authority cannot be liable for doing what it is required to do, but if it acts carelessly in performing this duty (or fails to perform its duty) it may be found liable
-In the context of the exercise of a ***power***, courts are more concerned with the fact that they are being called upon to measure or evaluate how the public authority acted, as some of what the public body does in such a situation is quasi-legislative (in that it is fleshing out policy decisions, through the exercise of its discretion)

Just v BC

Was the decision of the rock work section as to the Quantity and Quality of Inspections a "policy" decision exempting the respondent from liability

-Generally, policy decisions cannot be challenged if they are made on discretionary lines within the governments power
*however, once policy decision has been made, the operation of this policy scheme may be reviewable by the courts given all the external factors that went into the policy scheme
-Procedure: 1) Reasonable forseeability/proximity
*at this stage the courts will take into consideration whether it was a policy decision or operational decision
2) Standard of care analysis - courts will consider whether operation meets the necessary standard of care owed to the individual in the situation
-In this case, public authority had settled on a plan which called upon it to inspect the rock face and make safety measures it deemed necessary
*these are operational decisions that are reviewable by the court
-Sopinka disagrees, says that this is really policy, not operation
*Road crew was given authority to make decisions about road safety, they were making policy
Dissent
-If statue creates no duty to inspect at all, but simply confers a person to do so, it follows logically that a decision to inspect and the extend and manner thereof are all discretionary powers of the authority
*says that in this case, the nature of inspection was in the hands of the inspection crew, as it was not statutorily guided
-Says that the law should be more interested, not in protecting the duty to inspect or not inspect, but protecting the duty to implement inspection procedures and delegate responsibility to the parties in the best place to adhere to that responsibility

Remoteness

Wagon Mound #1

Was spilling of oil too remote from the fire for the defendants to be considered liable
-Under the *Polemis* approach, there would have certainly been liability because the welder's spilling of the oil would have lead to the burning of the warf
-This case changes test, man will be considered to be responsible for the probable consequences of his act

Hughes v Lord Advocate

Were the child's burn injuries reasonably foreseeable? what is the exact test for this?
-Basically, the court finds that they are sympathetic about the boy
*so they have to find something in the test from Wagon Mound to allow the boy to recover
-The boy's injuries were mainly caused by burns, and these were foreseeable
*While it was not reasonably expected that the injuries would be this severe, this is not a defense:
-"He can only escape liability if the damage can be regarded as differing *in kind* from what was foreseeable."

-Story must be described in general fashion, would the kind of harm be reasonably foreseeable?
*flammable material, left negligently at this worksite, reasonably foreseeable that the negligence would lead to the injury
Question is not whether the fashion in which the explosion occurred was foreseeable, but whether the explosion itself was foreseeable

Tremain v Pike
-Guy is working on a farm, farmer is not doing a good job controlling rat population on farm
-Court says that rat bite would have been foreseeable but not rat urine
-*Lord Payne* finds a clear distinction between different *kinds* of rat illnesses, those caused by rat urine as opposed to those caused by rat bites and the like
Case shows us that the way that the harm is described by the courts is open ended and can be used to justify many types of harms

Smith v Leech Brain & Co
How does remoteness work in the context of a thin skulled plaintiff?
-Says that the foreseeability principle is not meant to conflict/ undermine the thin skull rule
-Question is not whether the defendants could reasonably have foreseen that a burn would cause cancer and Mr. Smith would die
*question is whether these defendants could reasonably foresee the type of injury which he suffered (the burn)
-Basically the court says that Wagon Mound didnt intend to overrule thin skull, because it was not concerned with the extent of the damages, but was concerned with the basic liability of the tortfeasor
Notion was that ***types* of damage were to be measured by how they might be reasonably foreseen**

Marconato v Franklin
Is the plaintiffs seeming overreaction to the car accident unforeseeable, or is this the thin skull principle?
-Judge says that it could not be foreseen that Marconato would have such a severe response to physical damage
-Defendant surely could see danger of physical injury
-Thus the argument the the damage is not reasonably foreseeable is not persuasive as it falls within the realm of the thin skull rule

The Wagon Mound #2
Was the trial judge wrong in holding that damage from fire was not reasonably foreseeable?
-Evidence in this case is substantially different then evidence in the first wagon mound case
-In #1, court says that the engineers could not be reasonably expected to know that the oil would set on fire in the water
*#2- find that the engineers would have regarded oil igniting on water as a possibility, but only in exceptional circumstances

-Question is whether the engineer would have foreseen that the oil could have poised a danger of igniting
-Says that the engineer must have known there was some risk, and even if this risk was remote, the engineer should have been vigilant enough to notice the leak and prevent the further leak as this was relatively easy to do (*Bolton v Stone)*
-What should be done about degrees of foreseeability?
-If it is clear that a reasonable man would have realized or foreseen and prevented the risk, then the defendant must be found liable

Assiniboine South School Division No 3 v Greater Winnipeg Gas Co
Was damage done by the snowmobile foreseeable?
-Says the thing that needs to be determined was whether it was enough that the snowmobile impacting something was reasonably foreseeable, or whether the explosion needed to be foreseeable
*say that Wagon Mound 2 altered test from was it probably going to occur, to what could possibly occur
-Says that it is enough if someone generally foresees the liability, extend of damage and matter of incidence must not be accurately foreseen
-Thus, in this case, the sled striking the gas pipe was reasonably foreseeable

Mustapha v Culligan of Canada Ltd (SCC)
Whether the defendant's breach caused the plaintiff's harm in fact and in law
-Court considers whether or not it is proper to hold the defendant liable for damages that probably weren't foreseeable because of the plaintiffs specific mental condition
*seeks to find balance between ordinary fortitude requirement and the thin skull rule
-Agrees that the test should be what is "real risk" from WM#2
-In ***duty of care*** analysis one can inquire into whether plaintiff was a person of reasonable fortitude (as this goes to whether the defendant should have had this sort of person in mind as the kind of person who might be injured if they act carelessly).
*The Court transfers this to analysis around issue of ***remoteness***.
-Says that in this case the harm was too remote because they should not owe a duty of care to someone who they could not reasonably foreseeably harm
-Says in this case Mr Mustapha failed to show that the damages that he incurred would have been those that a reasonable person of reasonable fortitude would have suffered in the same circumstance
This is meant to be a 'threshold test', and so does not operate in a way so as to interfere with the thin-skull (which deals with ***extent* of damage, once damage is found)**
*must get over threshold to be able to claim damages, and then once that is met defendant is liable for the extent of the damages
-Should the defendant ***know*** of the lack of reasonable fortitude of the plaintiff, that may change the calculation (as it may then be that the harm incurred was reasonably foreseeable)

Bradford v Kanellos

Should the original act of negligence in this case be found to cause the injury (flash fire), or was there an intervening act?

-For an act of another party (including the plaintiff) to intervene such as to trigger this sort of legal argument, it *must break the chain of causation*, being a '*fresh, independent cause of the damage'*

-Would a reasonable person in the position of original defendant ought to have been able to reasonably anticipate the intervention(s) claimed to be new cause(s) of damages incurred

-Court says that the system acted the way it should and put out the flash fire

*says that this is not negligence, but that it was the hysterical conduct of the customer that did the damage

-this customer was not within the ambit of negligence caused by the fire on the grill

Dissent

-Says that the person who caused the original negligence should have foreseen that other negligent causes would erupt from this and cause harm

-Says that they should have known that a greasy grill was apt to catch fire, which would cause gas release, which would cause panic that could cause damage

Price v Milawski

Was the original doctor negligent, or was second doctors negligence intervening act

-First doctor argued that it was not foreseeable to him that such dire consequences would result from his actions

-Court says that person doing a negligent act may be held liable for future damages arising in part from the subsequent negligent act of another, and in part from his own negligence, where such subsequent negligence and consequent damage were reasonably foreseeable as a possible result of his own negligence

-Says that it was reasonably foreseeable that the negligence of first doctor could cause damage for plaintiff once the information was entered into the hospital records

*further doctors who check information may be doing so negligently, however this does not displace the original negligence

-In this case second doctors negligence compounded initial negligence, did not stop initial negligence and displace it with some other form of negligence

*thus TJ was correct in finding that both the doctors were liable

*So long as a reasonable person in the position of the original defendant could be said to have reasonably anticipated that the subsequent conduct was *possible* (product of a real and substantial risk), s/he would be potentially liable for damages flowing from that conduct

-Note: This approach to intervening medical negligence protects the plaintiff, but also allows the original wrong-doer to pursue the negligent doctor afterwards

-Note: Some medical negligence cases explicitly hold that 'gross negligence' on the part of the subsequent medical professional is not foreseeable

Hewson v Red Deer

Is mysterious person an intervening act, or should the city be found liable for damages?

-Judge finds that given the close proximity of the rock pile to schools/ residences it was reasonably foreseeable that someone could climb in the cab and set the tractor in motion
*says that it would be very easy to prevent this, simply by taking the key out of the ignition
*Argument/rule considered by the court: that ***novus actus interveniens*** does not apply when the thing that happened was precisely what the defendant should have been guarding against (i.e., the defendant should have made it more difficult for someone to get into the machine and turn it on)

Wieland v Cyril Lord Carpets Ltd
Should bus driver be liable for the second accident that occurred while seeking medical treatment?
-2 basic questions: causation and remoteness
-Remoteness: See again reading of *Wagon Mound No. 1*, don't have to pay attention to the particular events, focus should be on whether original defendants negligence could cause particular type of harm
*is it reasonably foreseeable by the bus driver that the plaintiff, after being injured, would perhaps be put into danger by that harm
-if you get injured, you get medical attention, not uncommon that something else goes wrong in receiving this medical attention

Goldhawke v Harder
Whether the tortfeasor was liable for only the injuries suffered in the original accident, or whether he was also liable for the injuries suffered in the fall down the stairs at the nightclub
-Victim was injured in a motor vehicle accident and was restricted to using crutches for months.
*One night, after going to a nightclub with friends, he suffered further injuries when the heel on his shoe broke, causing him to fall down the stairs.
-Mr. Goldhawke was not acting unreasonably that night. Therefore the "chain of causation" had not been broken, and the tortfeasor was liable for the damages suffered in the motor vehicle accident including the damages suffered in the fall down the stairs.
*if the second accident is caused by unreasonable behaviour on the action of the plaintiff, then there will be no liability on behalf of the original tortfeasor
(but not others)?
*seems that there is being carved out an area of exception from the reasonable foreseeability rule
-maybe trying to mitigate the plaintiffs behaviour after an accident

Defences

General Stuff

Negligence Act (RSO)
-Says that court shall apportion liability between negligent parties
*says that in cases of groups the court may apportion liability jointly or severally depending upon their contributions to the negligent action
-if a court cannot determine degrees of fault, then each party will be found equally at fault
-court can add parties to a suit that may have contributed to the negligent action in question

-Three possible scenarios for contributory negligence: 1)Plaintiff contributes to accident that caused injuries 2)Plaintiff exposes him/herself to risk of being involved in an accident[example: *Rautins v. Starkey*, Ont. S.C.J. 2004 – plaintiff allegedly exposed herself unreasonably to risk of being involved in accident by going into and remaining in crosswalk in intersection with malfunctioning traffic lights, at dusk, with darker clothes on] 3)Plaintiff fails to take reasonable precautions to minimize injuries should an accident occur [note seatbelt defence]

Scurfield v Cariboo Helicopter Skiing
-Helicopter party was negligent in dropping him into unsafe country
-Helicopter company argued that he had the last clear chance to avoid negligence, but didn't and thus the Helicopter company is not negligent
-Judge notes that this doctrine has been abolished by statute
*further, the risk which Mr. Scurfield faced when he continued on in the face of obvious and avoidable peril must be regarded as one falling well within the scope of those avoidable hazards which are to be regarded as reasonable and acceptable in the present context. This is not a case of Mr. Scurfield having had a 'last clear chance' to avoid a peril created by the defendants. Insofar as the defendants had a duty to protect Mr. Scurfield from unreasonable risk of unavoidable avalanche, that risk was over once the hazard had become obvious and avoidable. On the findings of the trial judge I conclude that Mr. Scurfield's failure to concern himself with what he could see ahead was the sole act of negligence which constituted in law a proximate cause of his death.

Walls v Mussens
Was leaving the service station in the charge of a 17 year old kid contributory negligence?
-Ca says that no portion of the responsibility for starting the fire can be attributed to the plaintiff
*emergency was created solely by the negligence of Morrison
-Says that in the agony of the moment the plaintiff is allowed to not think completely rationally, exempting his behaviour from contributing to the negligence
*says that a prudent person in similar situation might do this, and thus there can be no finding of negligence for doing this

Gagnon v Beaulieu
Was plaintiff not wearing a seatbelt contributory negligence?
-Jurisprudence suggests that those who do not wear seat belts fail to take reasonable precautions for his own safety
*if it can be shown that injury would not have occurred, or would have been greatly lessened by wearing a seatbelt, then the defendant is contributorily negligent
-onus to show this is on the defendant
**Defendant would need to show both that (a) seat belt had not been worn by the plaintiff, and (b) that 'injuries would have been prevented or lessened if the seat belt had been worn' **

Galaske v O'Donnell

-Canadian courts have recognized duty on drivers and passengers to ensure their own safety by wearing seatbelts

*Note: case also interesting in that Court recognized that driver of a vehicle, whether or not s/he is parent of child in the vehicle, has obligation to ensure child has seat-belt on (even if parent of the child is also present in the vehicle)

Mortimer v Cameron

Did TJ err in holding that the plaintiffs injuries were not proximately caused by his own horseplay by the conduct of the defendant Cameron

-Neither Cameron nor Mortimer's contributory negligence entailed an unreasonable or unforeseeable likelihood of the risk or hazard that actually befell Mortimer

-reasonable for them to assume that the wall was properly constructed

-However CA questions finding mostly on the cit

*says that while it is true that the city had the duty to inspect buildings and ensure that they are constructed properly, primary duty was on the building company to properly maintain the stairway

-After city conducted initial inspection, had no reason to continue inspecting

*meanwhile, the building company had the duty to continually inspect, a duty which they continually breached

-Reapportions loss 60-40 for property management company and city

Dube v Labar

Can the voluntary assumption of risk defence be used in a situation where respondent agreed to drive drunk?

-Old doctrine would tend to equate the two, so that if the plaintiff knew what s/he was getting into (riskwise) it would be said that s/he must have accepted that risk to the point where the defendant is absolved of liability in relation to harms that emerge from that risk

-Jurisprudence suggests that for a negligent driver to be completely relieved from liability, plaintiff must have agreed expressly or implied that he was giving up his right of action in negligence

*must be very clear in situations of motor vehicle accidents

-Thus by implication it will be unavailable for the majority of drunk driving cases, as it requires awareness of the consequences of actions

Focuses on distinction between knowing of risks and accepting risks

Hall v Hebert

Can defendant raise participation in criminal or immoral act defence to negate the plaintiffs cause of action against him for flipping his car?

-Consideration of legality of the plaintiffs activity is to be an extrinsic inquiry only where there is serious concern about administration of justice

-Says that this consideration should be a defence, as putting it on the plaintiff might otherwise unreasonably prejudice his claim, which flies in the face of tort law

*says the defence should operate when the claimed compensate would amount to an evasion of a criminal sanction
-In this case there is not this aspect, says contributory negligence but cannot be wholly denied by reason of his disreputable or criminal conduct
-Really limit this doctrine, for the SCC explicitly focuses on this definition, and bars the use of this doctrine in those cases where "… compensation [is] for something other than wrongdoing, such as personal injury..."
-This means that the court is really not to worry too much about the wrongdoing, but instead apply normal negligence law analysis, and concern itself with whether the plaintiff suffered injury to be compensated for
-Outcome: As with voluntary assumption of risk, a plaintiff's illegal or antisocial behaviour is now likely to be treated as contributory negligence

Rintoul v X-Ray and Radium Indust. Ltd.
What is required for the defence of inevitable accident
-CA judge says that the respondents failed to prove two matters essential to the establishment of the defence of inevitable accident
1) that the alleged failure of the service breaks could not have been prevented by the exercise of reasonable care on their part
2) that, assuming the failure occurred without negligence, Ouelette could not, but the exercise of reasonable care, have avoided the collision which he claims was the effect of such failure
-Seems like they are applying, not the greatest care and skill, but reasonable care and skill is required
*in this case, the evidence is pretty scanty, and the court concludes that the breaks could have been better maintained

Proof of Negligence

General Stuff

-Beginning a tortious action the plaintiff bears 2 burdens: 1) Bears the obligation of ultimately proving the elements of the case on a balance of probabilities (legal burden)
2) bears the obligation of immediately adducing sufficient evidence to establish a prima facie case (evidentiary burden)
-After this, if the plaintiff establishes a prima facie case, then the defendant should adduce sufficient evidence to rebut the plaintiffs case
-Res Ipsa Loquitur- describes circumstances in which the occurrence of an accident provided circumstantial evidence that the plaintiffs injury was caused by the defendant's carelessness
*consists of following elements: 1) Occurrence must have been one that does not happen without carelessness in the regular course of events
*this is necessary to draw inference of carelessness against the defendant
2) instrumentality of harm must have been under the sole management and control of the defendant or someone for whom the defendant was responsible
*necessary to draw inference of carelessness against defendant as opposed to some other party
3) must not have been any direct evidence as to how or why the accident occurred

*otherwise issue should be resolved not on res ipsa loquitur, should be on principles of other area of negligence or tort law
No Longer part of the law - see Fontaine

Wakeling v London & South Western Ry. Co.
What is the plaintiff's burden of proof, who bears the burden of proof for contributory negligence where there is little to no evidence?
-House of Lords says that the plaintiff's case is established through proof that the death was caused by some negligent act or omission on behalf of the defendant
*says that she has not done this in this case, as she has not proved that it was the fault of the train for the death, and not the fault of the man
-Paintiff was to discharge the prima facie duty, then the defendants would have to show that there was contributory negligence

Macdonald v Woodard
Effect of a statutory shift of the BOP?
-Once plaintiff establishes that damages were caused by presence of motor vehicle, then rebuttable presumption of negligence arises in relation to the defendant
*Defendant has onus of proving, then, that s/he was not negligent
-Reverses burden of proof because it seems just and fair to make driver prove that they were not driving negligently
-Plaintiff must show that the collision was cause of damage, then it is up to the defendant to make a prima facie case that the damage occasioned was not a result of his negligence

Dahlberg v Naydiuk
How do we work out the irregularity created by the court's words in Cook v Lewis that defendant must disprove intention and fault (negligence)?
-Dahlberg sues under trespass (intentional tort), onus falls on the defendant, Mr. Naydiuk, to *disprove both negligence and intent* on his part
-Courts have kind of just read it out, has no more impact in Canada

Cook v Lewis (Multiple Negligent Defendants)
-Important thing coming out of this case is the need to compensate the plaintiff, placing burden on defendant is a good way to do this
-What kinds of situations would seem to be caught up in this exception to the general approach to the burden of proof?
*that there will probably be an innocent party charged
-unlikely that defendants will be able to prove it was not one or the other of them, which will lead to an innocent party bearing half of the liability

Leaman v Rea vs. Wotta v Haliburton Oil Well Cementing Co
-*Leaman v Rea* - two cars end up colliding on a "blind hill"
*both parties alleged that they were driving carefully, swerved to avoid

-no evidence to substantiate either party's story
-Find both of them liable and split the portion equally (while this may lead to an equal outcome, it has a bearing on insurance)
-Wotta v Haliburton Oil Well Cementing Co. (1955) S.C.R. 377
*two vehicles coming over a rise - experts seem to agree that one of them was driving properly, one of the people is telling the truth
-How is this distinguished from *Leaman*?
*no clear evidence that one or the other is telling the truth
-What rule applies in this sort of situation?
*not a good idea to apply the rule in Leamon, so lets both off, neither is liable

Fontaine v BC
What is role of res ipsa loquitur in Canadian context?
-"Whatever value *res ipsa loquitur* may have one provided is gone … It would appear that law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions." [first sentences of last 2 paragraphs on page 746]
*What, then, is a court supposed to do when faced with this sort of situation?
-Snell v Farrel general approach, factual inferences can be made upon circumstantial evidence that do not yield distinctive proof

Vicarious Liability

General Stuff

-Will most often arise in the master/servant context
-Situations involving independent contractors are different
*employers will not be held vicariously liable for torts committed by an independent contractor
-3 exceptions to this rule: 1) employer was negligent in hiring the contractor
2) employer was negligent in supervising the contractor
3)employer hired the independent contractor to do something unlawful
4) non-delegable duty - where someone cannot escape liability for doing something by contracting it out
*can delegate performance but not responsibility
*such situations are ultra-hazardous activities, duty to refrain from creating nuisance, duty to provide lateral support for adjacent land, the duty of a bailee for reward to safeguard goods in his or her possession
*arise in situations where the law has imposed a strict statutory duty to do a positive act
*nature and scope of duty to take care will depend on the statutory provision
-in some cases it can be discharge by hiring the proper contractor and to ensure that the work is done without negligence
*ultimately will depend on the relationships between the parties

Bazley v Curry
Test for Vicarious Liability?
-Employers are liable for employee actions when: 1) employee acts authorized by the employer

2) unauthorized acts so connected with authorized acts that they may be regarded as modes of doing an authorized act
*in this case we are concern with the second branch of the test
-It is difficult to distinguish when something is a mode of an authorized act, and when it is not
*you can do this is by examining the associated case law - only very close cases are useful
-3 main groups of cases: 1) cases based on the rationale of "furtherance of the employers aims
*this is the case of agency, employee said to have the authorization to do the unauthorized act, works well for negligence but not intentional torts
2) employer's creation of a situation of friction
*basically, this says that the employers enterprise incidentally created a situation of friction that gave rise to employees committing of a tortious act
3) dishonest employee cases
*employees stealing things from customers
-If this is not definitive, then the burden will be on the plaintiff to show a prima facie case that the employees act was done on the employers premises, during working hours, and that it bears a close connection with the work that the employee was authorized to do
*burden will then shift to the employer to who that there are policy reasons not to hold the employer responsible for the acts
-2 main policy considerations to be regarded when considering vicarious liability
1) promotion of a just and practical remedy for the harm
*people who employ others to go forth and conduct their profitable enterprise should be liable for any harms that come out of this enterprise
*further, vicarious liability improves the chances that the person will be effectively compensated for the harm inflicted upon them
2) deterrence of future harm
-Courts should consider: 1) Whether liability should lie against the employer rather than obscuring the decision beneath discussions of "scope of employment"
2) Whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability
*vicarious liability is generally appropriate where there is a significant connection between creation or enhancement of a risk and the wrong that accrues therefrom
-In determining the sufficiency of the connection between the employers creation or enhancement of the risk and the wrong complained , subsidiary factors may be considered such as; i) the opportunity that the enterprise afforded the employee to abuse his or her power ii) the extent to which the wrongful act may have furthered the employer's aims iii) the extent to which the wrongful act was related to fiction, confrontation or intimacy inherent in the employer's enterprise iv) the extent of power conferred on the employee in relation to the victim v) the vulnerability of potential victims to wrongful exercise of the employee's power
-Test for vicarious liability for an employees sexual abuse of a client should focus on whether the employers sexual abuse of a client should focus on whether the employers enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm

Jacobi v Griffiths
Binnie Majority
-Similar set up to *Bazley* but does not occur in the workplace
-'Boys and Girls Club' offered Griffiths only slight opportunity to abuse the slight powers he enjoyed as a result of his employment
*looks at #1 and #4 of the Bazley test to say that he had limited opportunity to abuse his power
-In that capacity he was encouraged to form friendships with the boys and girls. That was the most the Club could ask him to do. It had no power or authority over the children.
-Once the children were drawn into Griffiths home-based activities he increased the level of intimacy, but that this was unauthorized, and against the values of the club
Mclachlin Dissent
-As Program Director, Griffiths was encouraged to cultivate positions of trust and respect with his young charges.
*he was set up to create special conditions where abuse was possible
*the Club created and sustained the risk that materialized, thus compensation for the harm that followed may fairly be viewed as a cost of the Club's operation …
*rationales of risk distribution and deterrence support vicarious liability in these circumstances."
Case highlights the difficulty in drawing a line, as on the same set of facts they take it 2 different ways

671122 Ontario Ltd v Sagaz Industries Canada Inc.
Test for independent contractor vs employee?
-This type of consideration comes at the first stage of the analysis, was there a sufficiently close relationship between the parties to find one liable to another
-Says that there is no fundamental test to be applied to determine whether someone is an independent contractor or a employee
*must consider the totality of the relationship
*fundamental question is whether the person is performing the services as a person in business on his own account
-level of control the employer has, worker supply his own equipment?, whether worker hires own personal helpers?, degree of financial risk taken by worker, degree of responsibility for investment and management by worker

B(KL) v BC
-Matters that make imposition of vicarious liability difficult to predict are the questions of 'fairness' and 'usefulness'
-These, in turn, are said to be properly addressed by close consideration of the policy goals served by the imposition of liability
-Both justice and deterrence are said to be served when there is a close link between the enterprise created by the employer and the wrong committed by the tortious actor

*Note: tie to economic analysis seems just that the entity that engages in the enterprise (and in many cases profits from it) should internalize the full cost of the operation, including potential torts
-Reviews Bazley analysis says boils down to asking if employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks
-Adds a little bit to this basic analysis
*Examples of situations in which risk materially enhanced by enterprise in context of sexual abuse: - Time/space opportunities: Where employee permitted/required to be with children, Where also to be alone with them, Where also to supervise in intimate activities, Where activities occurred off-site, after hours (negates duty)
-Relationship opportunities: Where employee put in position of power over the child, Where employee put in position of respect/emulation/obedience
Basically court upholds *Sagaz* focus on the first aspect of the test, about the relationship between the parties

Blackwater v Plint
-**SCC** decides you can have two parties vicariously liable
*another interesting note is that the court applies the standard of negligence of the time the crime was committed
***Court** asks, then, about what would have been foreseeable and knowable, given the standards applicable at that time
-Says that non-delegable duties should only be found where there is explicit statutory language
-Christie seems most interested with the court's neglect to ind a fiduciary duty between the crown and the aboriginals to not erode their culture

B(E) v Order of the Oblates of Mary Immaculate BC
-Is it *fair* and does it *promote deterrence* to say the *Order of the Oblates* should compensate, as the risk generated by their enterprise materialized into harm committed by their employee?
*Do we see in *B.(E.)* clarification of *Bazley*, a shift back toward more protection of enterprise-creators, or just confusion?
-Precedent (the first stage of *Bazley*) - moces away from the precise requirement that there is factually very similar precedent - and look for similar case for guidance
*not a policy consideration
-Then after looking at case law for guidance, goes through 5 factors from Bazley

Lewis v BC
What should be the approach to non-delegable duties
-Court says that a non-delegable duty adds an obligation to ensure independent contractor takes reasonable care
*seems to differ from *Blackwater* in that they suggest that depends to a large extent on statutory wording, but is also based on the nature of the duty
-Key circumstances to look for in creating a non-delegable duty:

1)Is the activity entirely within the power delegating the duty? (government)
2)Is the public entirely vulnerable to the exercise of this bodies discretion?
3) What is at stake? Lives?
-Non-delegable duty only extends to tortious acts of the contracted party directly related to the contracted work
*have to look at the obligations between the third party and the tort feasor, and then the third party can only be liable for those acts within the scope of what has been contracted
-Vicarious liability, on the other hand, extends potentially to any act leading to injury to a possible plaintiff if the 'wrongful act' were found to be '*strongly connected*' to 'what the employer was asking the employee to do' (*Oblates*)
-Note of caution: in many of the vicarious liability cases we looked at post-2001 the ***SCC*** denied the application of the doctrine of non-delegable duty (door seemed to open in ***Lewis***, but then seemed to close shortly thereafter) ie Blackwater

Statutory Provisions

R v Sask. Wheat Pool

Does the wheat board have a right in civil action, or only in statutory action?
-Dickson says that he sees little reason to add a civil cause of liability if there is a statutorily implemented penalty
*doesn't further the discouraging aspect of tort law
*says that if tort liability is to be added, then it should only be to provide extra compensation to the victim
-Says that ultimately, if there is going to be penalty for statutory breach it should be done through negligence and not a separate tort
**If you have proof that there is statutory breach, this may be evidence of negligence
-The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct (1/3 down on 805)
*if statute indicates what reasonable standard of conduct should be, court may look at that to indicate standard of conduct
-At the end of the day, if someone hurts someone else through breaching a statute, then this may be negligence- and breach of statute and nature of statute will serve as informing negligence in such a suit

Galaske v O'Donnell (Statutory Duty)

Is the duty of care mitigated by the parent? how to treat the statute in this case?
-Finds that there is a duty of care on the occupant in a car to wear a seatbelt
*however, children require guidance from parents and society to do what is right
-Says that apart from the motor vehicle act, drivers must accept responsibility of taking all reasonable steps to ensure that passengers under 16 years of age are wearing their seat-belts
-Statute in this case says that drivers of cars with passengers between the age of 6 and 16 must ensure that they are wearing their seat belts
*uses Dickson's framework in Sask What pool to use this as standard of care, says that the statutory requirement to ensure youth wear seat belts is subsumed in the law of negligence

*statute reflects the community standard for road safety, and the influence put by society on road safety and the safety of children and thus is informative in the negligence calculation
-Note that question of standard of care then comes up, and serves to temper what might otherwise be a strict imposition on the driver
-Does the presence of the parent negate the duty?
*says that presence of parent mitigates duty on driver to ensure safety of passengers, but duty still exists regardless of parent's existence

-driver owes duty of care to passenger for many things, whether the parent is in the car or not (obey traffic signs, etc.)

*concludes that the lower courts erred in finding that the standard of care was erased when a parent was in the car

Ryan v Victoria (City)
Had the defendant met its standard of care because it complied with statutory provisions?
-Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive
*may provide evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness
-Court says you should look at the standards in question to see if they are reasonable/exclude a finding that the standards can be substituted for the reasonable person
*then base reasonable test on this analysis and the facts in question
-Where a statute is strict and authorizes only certain activities, this may serve as a reasonable standard of care, whereas if this statute is general and broad, it will probably not

Defamation

General Stuff

-Defamation attempts to balance competing values of reputation and freedom of expression - reflected in the fact that it is relatively easy to prove a prima facie case but there is many defences to this action
-In order to succeed in defamation, accused must prove the impugned statements: 1) were defamatory 2) made reference to the plaintiff 3) were published or disseminated
*1st requirement is relatively easy to prove
*2nd requirement - can make reference to the person explicitly or implicitly
*3rd requirement - will be fulfilled if the statement is communicated in any way to a third party who understands the statement

-every time the statement is repeated or restated, this is a new action of defamation

*original party will not be held liable for the repetition of their original statement unless: 1)gave express or implied permission for the remarks to be republished 2) he or she has given express or implied authority for the remarks to be republished 3) the republication is a natural and probable consequence of the original publication

-In modern context we can think about how much control does a chatroom or website have over the content that is posted on the website

*can you be held liable for things that are posted on your website so that you can find defamation

-generally the court says that once you discover this, then if you act you can probably avoid liability

-Defence of justification applies if the defendant can prove that the allegedly defamatory statements were true
*courts presume defamatory statements were false unless the defendant can prove otherwise
*complete defence
-Does not have to prove the entire truth of the statement, just must prove that the "sting" of the defamation was true
**Not sufficient* that the defendant show that s/he *believed* the statement(s) to be true

-Defence of Absolute Privilege
*provides complete immunity for statements falling within privilege
*3 categories: 1) statements made by officers relating to affairs of the state 2) statements made during parliamentary proceedings 3) statements made in the course of judicial or quasi-judicial proceedings
-Immunity is seen to be necessary to maintain the in dependence of those involved and promote honest and candid speech in the public interest

-Defence of Qualified Privilege- protects defamatory materials that are communicated on certain occasions
*applies even if the statements are untrue
*does not apply if the plaintiff can establish that the statements were made maliciously (which is not the case for absolute privilege)
-Generally applies when the speaker has an interest or duty to make the statement and the recipient has a reciprocal interest to receive the statement
*also applies to statements made in protection of one's own interests
-Roughly categorized as: 1) In protection of their own interests (person subjected to an attack on their character defends themselves) - will be protected unless they are excessive or irrelevant
2) defendant publishes the relevant statements in order to protect someone else's interests
*must show that they had a legal, social or moral duty (unclear) to communicate the information (ex character or credit references)
3) Communications made in the furtherance of a common interest may be protected as long as there is a reciprocity of interests
4) Will attach to statements that are made in the protection of the public interest
*covers political speech
*press are generally not covered because there is no duty for them to report matters of the public interest
5) Fair and accurate reporting
-applies to reports of proceedings that are open to the public
*available at common law as long as reporting is fair and accurate

-Defence of fair comment - provides a defence for those who comment daily on matters of public interest
*must show material was : a) a comment (opposed to an accusation or allegation b) which any person could honestly express c) based on facts that are true d) pertaining to a matter of public interest
*will fail if comments were made maliciously

-Defence of responsible communication on matters of public interest
*defence addressed a gap in defamation law that existed when a defendant published statements of fact on a matter of public interest that defamed the plaintiff
-justification would fail if the defendant couldnt prove statements were true
-fair comment would be unavailable because the statements were allegations of fact
-defence of qualified privilege would likely fail because there is no duty to publish information to the world

Sim v Stretch
Is this a defamatory statement, impliedly or explicitly?
-Judge says that the way the statement is worded cannot be taken by an ordinary person to be a stab at someone's credit
*rule is that there is no defamation
-Question then becomes whether the words in their ordinary significance are capable of being defamatory
-Says the statements were true, were quite innocent, and would not reasonably lower the viewing of the person in a reasonable persons eyes

Knupper v London Express Newspaper, Ltd.
Two stage test for whether statement refers to the plaintiff
1)Question of law: can the statement be regarded as *capable* of referring to the plaintiff?
-is it possible that the statement referred to the plaintiff?
2)Question of fact: does the statement *in fact* (in the minds of reasonable people, who know the plaintiff) refer to the plaintiff?

Booth v BCTV
-Adopts two-stage test fron Knupper
1) Capable of referring to the police officers
2) Were successful on behalf of the two people on the top of the unit, but not other 9 officers because they were not perceived to be in a decision making role
*Note the lack of focus on intent (or reasonable care) in defamation – it is no answer for the defendant to say s/he did not intend to identify the plaintiff (or that s/he took reasonable care to avoid identifying the plaintiff)

Williams v Reason
How must true statements relate to the defence of justification?
-Question is whether the evidence [of truth of x] is relevant to the words [contained in the defamatory statements], understood in any meaning which they are reasonably capable of bearing" [page 1016]
*Here, the 'sting' of the libel (the heart of the defamation contained in the statements) is that of 'shamateurism' and was originally tied to the charge he was going to make money off the writing of a book about his athletic career
-The evidence relates to the plaintiff's having received money for being tied to a particular shoe company
-The English CA finds the requisite degree of 'relevance' between the two for justification to operate as a defence

Bank of BC v CBC
-Shows that the rule in Williams v Reason is present in Canada

Dowson v the Queen
How far can you be down the rungs of government to still qualify for privilege?
-3 conditions for government official to receive privilege: 1) statement must have been made by one officer of the state to another 2) it must relate to state matters 3) it must be made by an officer of state in the course of his official duty
-Court basically says that you will be considered an officer of the state if you are high up or you are acting in a roll akin to agency for someone who is high up
*Note: malice said to play no role in this setting – it is said to be 'irrelevant' to the case of absolute privilege

Hung v Gardiner
What qualifies as a judicial or semi-judicial body to qualify for privilege
-Ultimate question is whether the body has or is exercising functions similar to a court
*doesn't have to be exercising them in the particular case
    -court says that to hold that it only applies in cases where there is the judicial function used would undermine the purpose of the immunity

Hill v Church of Scientology
To what extent does qualified privilege extend?
-Establishes that qualified privilege should extend to most facets of court procedure
*it is important that Scientology plans on actually launching the suit in this case, and is not simply filing motion as publicity
-Once it is established that it qualifies under privilege, can be rebutted through malice or exceeding this privilege
-Malice can be ill-will, or it can be any indirect motive or ulterior purpose
*also includes dishonesty or reckless disregard for the truth

-Exceeding privilege - anything not relevant and pertinent to the discharge of the duty or the exercise of the right

Wic Radio Ltd v Simpson

Should the defence of fair comment be available to pundits?

-5 requirements for fair comment: 1) must be on a matter of public interest 2) comment must be based on fact (expressed, or otherwise known to the listeners 3) comment must be recognizable as a comment (to a reasonable viewer/reader) 4) comment must satisfy objective test: could any man honestly express that opinion on the proved facts? 5) Even if comment satisfies the objective test the defence can be defeated if there was malice (plaintiff must show malice)

-A concern with the subjective-honest belief requirement is that if it were applied to disseminators of information (newspapers, for example), they would be restricted to providing comments with which they honestly agreed

*court says that the newspaper should be free to comment upon any article, and to publish a wide variety of viewpoints

-Thus, the honesty requirement is really in relation to the ties between the comment and the facts backing the comment

-could a reasonable person honestly hold that belief based on the facts?

-While generally the defendant must show facts underlying the comment(s) are true, this does not apply with imputations of 'corrupt or dishonourable motives' in statements made

*This is a historically-grounded exception that persists in the common law, originally based in an interest in making sure that individuals of good honour and integrity are not kept out of pursuing the public life (where they might be slandered along these lines)

Grant v Torstar Corp.

What is required for the responsible communication on matters of public interest defence?

-2 elements: 1) publication must be on a matter of public interest

-must consider the document as a whole, it is enough that some members of the community would have genuine interest in the subject

-not necessary to be on political or governmental matters, public must just have a genuine stake in knowing about the matter

2) Defendant must show that publication was responsible (in that he or she was diligent in trying to verify the allegations)

*calculation takes into account the seriousness of allegations, public importance of the matter, urgency of the matter, reliability on the source, whether the plaintiffs side of the story was sought and accurately reported, whether inclusion of the defamatory statement was justifiable, whether the defamatory statements public interest lay in the fact that it was made rather than its truth

-biggest factor might be whether the defendants perspective was sought, as this illustrates the fairness balance between the media and the individual (but will vary situationally like all other factors)

*factors playing into this are: 1) report attributes the statement to a person 2) report indicates that its truth has not been verified 3) report sets out both sides of the dispute fairly 4) report provides the context in which the statements were made

Jones v Brookes

Consent is a bar to a recovery for defamation under the general principle that the plaintiff's consent to the publication of the defamation confers an absolute immunity upon the defendant -However, a plaintiff who had authorized an agent to make an inquiry on his behalf is not to be charged with consent to a defamatory statement made in reply to the inquiry, unless he had reason to anticipate that the response might be a defamatory one…

*Macpherson J. also accepts that even when one instructs someone else to obtain statements from an individual the making of the statements to the hired-individuals constitutes publication