**NEGLIGENCE**

**DUTY OF CARE**

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 (*Childs*).

**PRE-ESTABLISHED CATEGORIES**

The Court in *Cooper* identified proximity to exist in circumstances where the defendant’s act causes **physical harm** or **nervous shock** to the plaintiff or the plaintiff’s property.

**Duty to Inform** (*Reibl*)

* Special standard of care test.
* Special causation test.

**Negligent Treatment** (*Reibl*)

* Special standard of care test
* Special causation test.

**Duty to Warn (Product Liability)** (*Hollis*)

* Special standard of care test
* Special causation test
* Special remoteness test

**Duty of Care in Pure Mental Suffering**

There is no definitive Canadian case on this issue; however it is discussed in *Devji* and *White (*UK):

* There must be a recognizable psychiatric injury.
* The plaintiff must have been endangered or have witnessed a traumatic accident with their own senses (or been there at the immediate aftermath).
* The relationship to an injured party should be very close.

**POSITIVE OBLIGATIONS**

The court is generally unwilling to find a duty of care in situations which involve an obligation to positively act, however there are several exceptions.

There is a key underlying distinction:

* + 1. Situations in which the defendant comes upon a plaintiff “in peril from a source completely unrelated to the defendant” (*Horsley*).
		2. Situations in which the defendant is at least partly responsible for the situation of risk within which the plaintiff finds himself.

**Relationship of Economic Benefit**

The court will impose a positive obligation in situations of economic benefit where there is an inviter-invitee relationship as well as knowledge of the situation and its dangers (*Jordan House*).

* + *Jordan House: frequent and well-known patron of bar; had a tendency to drink to excess and act recklessly; was ejected from premises after drinking to excess; walked home at night in dark clothing; struck by a car*
	+ *Crocker: inebriated tubing race; competition run for profit*
	+ *Stewart: reiterated that simply serving past intoxication is not sufficient to create a legal obligation; the knowledge of the situation and its dangers must also be present*

Social hosts are distinguished from commercial hosts (*Childs*)*:*

* Monitoring alcohol consumption is both easier and expected for commercial hosts.
* There is regulatory regime imposed on commercial hosts:
	1. Shapes public expectations and attitudes around alcohol;
	2. Imposes special responsibilities; and
	3. Demonstrates expectations sellers, patrons and the public have about the commercial setting.
* A contractual relationship exists between the seller and purchaser - the seller is ‘perversely’ incentivized to over-serve.

**Relationship of Control and Supervision**

The court will impose a positive obligation in situations where there is a relationship of control and supervision between the two parties.

* Generally, the autonomy of the party that might require assistance is restricted or controlled by the one who might fall under a legal obligation.
* Examples: teacher/pupil; employer/employee; carrier/passenger; prisons/inmates; landlords/tenants; hospitals/patients.

**Creation of Dangerous Situations**

The court will impose a positive obligation on a party who has created a dangerous situation without failing to correct the situation, even if they were not negligent in created the situation (*Oke: defendant damaged signpost*).

**Reliance Relationships and Undertakings**

The court will impose a positive obligation in situations involving a relationship of reliance or undertaking.

* If a defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task (*Zelenko: undertook the task of rendering medical aid; the victim had no choice but to rely on it).*
	+ - *Nord-Deutsche: the Crown undertook to maintain range lights; one drifts; ships collide; court found that the ship pilots were entitled to rely on the lights.*
* A rescuer does not owe a duty to the rescuee unless he makes the situation of the rescuee worse *(Horsley: D undertook a rescue and failed, P had to jump in due to the failure*).

**LIABILITY OF PUBLIC AUTHORITIES**

Generally this concerns statutes that generate public and private duties and/or statutory power.

* If the statute specifies that a civil action is created, you look to the statute to see what the civil action would look like.
* If the statute specifies that civil actions are displaced or eliminated, the no civil action is possible.
* If the statute is silent on these matters, the issue is whether a common law duty arises between the regulator and the party harmed.

**Proximity**

The court in *Fullowka* set out three factors to determine whether there is sufficient proximity between the public authority and the injured party.

* 1. Is the group to which the legislative regime is directed reasonably contained and defined?
		+ - * *Cooper* and *Edwards* owed a duty in effect, to the public at large because it extended to all clients of lawyers or mortgage brokers.
				* *Fullowka*: it was confined to people working in mines.
	2. What is the nature of the actual interactions between the regulator and the class of parties that might be injured?

*Fullowka:* the inspectors were at the mine almost every day; and there were two official inspections.

* 1. Do the statutory duties actually relate to the class of parties who might be injured?

*Cooper* was trying to regulate mortgage brokers

*Edwards* was trying to regulate lawyers

*Fullowka*: the duties were related to the day to day actions of the miners.

The Court in *Taylor* was faced with a situation involving a three way relationship between a public regulator, a regulated party and an injured party, and set out two factors to assess whether there is sufficient proximity between the regulator and the injured party.

* + 1. Is the relationship between the regulator and the individual distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator’s work?
* See *Hill, Heaslip* and *Fullowka*
* *Taylor* claims this applies to her because of the representations made by the regulator and her reliance on those representations.
* This was the case in Im*perial Tobacco* where no liability was found, however:
* Health Canada became aware of its misrepresentations and failed to correct these misrepresentations in light of growing evidence (note: still not sufficient to form a duty here).
* Furthermore, this is analogous to the regulator’s failure in *Fullowka* “to act in the fact of the known and ongoing danger posed to a small and well-defined group of miners who worked in a specific mine which the regulator knew to be unsafe.”
	+ 1. Is the precise nature of the duty actually imposed by the legislative scheme consistent with a private law duty of care?
* See *Hill*
* Policy: you can’t create a private law duty of care that would conflict with the ability to carry out the public law duty.

**Residual Policy Considerations**

There is a policy-operational distinction: it is not the role of the courts to judge policy decisions but they can judge the operation decisions made under that policy (*Just*).

* Policy: governments should not be restricted in making decisions based upon social, political or economic factors (*Just*).
* The court has attempted to carve out “true” or “core” policy matters (*Imperial Tobacco*):
* Discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations.
* A course or principle of action adopted or proposed by a government, or a general rule or approach applied to a particular situation.
* Here, the Crown had weighed social and economic considerations and decided, in interests of safety, to promote the smoking of low-tar cigarettes. Therefore this was a policy decision and exempt from liability.
* This is sufficient to negate the prima facie duty of care.
* Some policy decisions can still be challengeable if they are shown to be irrational or taken in bad faith.

The discretionary approach (UK) is too broad: it would exempt too much government action from liability (*Imperial Tobacco*).

* For example: decisions made by a plow operator.

**PURE ECONOMIC LOSS**

The Court has recognized five distinct categories of pure economic loss.

**Negligent Misrepresentation**

The plaintiff must show five things (*Cognos: moved for a job that was not stable*):

1. There must be a duty of care based on a special relationship between the representor and the representee. The *Anns/Kamloops* approach is used in this determination (*Hercules*).
* First: establish a *prima facie* duty of care.
	+ The person making the statement should have foreseen that the representee would rely on the advice
	+ The reliance by the representee in the circumstances must be reasonable. There are five *indicia* that assist in this determination:
	+ Did the defendant have a direct or indirect financial interest in the transaction in respect of which the representation was made?
	+ Was the defendant a professional or someone who possessed special skill, judgment or knowledge?
	+ Was the advice or information provided in the course of the defendant’s business?
	+ Was the information or advice given deliberately, and not on a social occasion?
	+ Was the information or advice given in response to a specific enquiry or request?
	+ Second: are there any general policy considerations that ought to negate or limit this duty?
	+ A primary concern is indeterminate liability (time/money/class of individuals).
	+ *Hercules:* it should be limited to a known class who use the information for a known purpose (here the info was given to them as shareholders, but used as investors).
		1. The representation in question must have been untrue, inaccurate or misleading;
		2. The representor must have acted negligently in making said representation;
		3. The representee must have relied in a reasonable manner, on said negligent misrepresentation; and
		4. The reliance must have been detrimental to the representee in the sense that damages resulted.

**Negligent Performance of a Service**

This is similar to negligent misrepresentation except the service is provided by action rather than words/communication.

* + Common example: drafting a will.
	+ Since the notion of reasonable reliance does not make sense, the grounding of a sufficiently close relationship is more likely found in the undertaking (an assumption of responsibility).

*BDC: the defendant courier company was not held liable for failing to deliver a package on time.*

* + The Court focused on the *Anns/Kamloops* approach to establishing a sufficiently close relationship.
	+ Is a limited class of possibly-effected parties created (so that the defendant could have them in mind when acting)? No.
	+ Is there something like reliance or an undertaking? No

**Defective Dangerous Structures**

The Court in *Winnipeg Condo* applied the *Anns/Kamloops* approach to assess the duty of care:

* First: is there a sufficiently close relationship?
	+ Proximity: the buildings are permanent structures.
	+ Reasonable foreseeability: there is a key distinction between dangerous and merely shoddy (poorly built) construction.
* Second stage: policy considerations
	+ What about the existence of a contract?
	+ The tort arises independently from the contract: the duty deals with an obligation to produce safe (non-dangerous) structures; this is not usually covered in contractual documents.
	+ There is no logical reason for allowing the contractor to rely upon a contract to shield him or her from liability to subsequent purchasers.
* What about *caveat emptor?*
* Rests on an old assumption. Contractors and builders are in the best position to ensure the integrity of buildings and their freedom from defect.
* What about indeterminacy?
	+ Limited to subsequent purchasers and inhabitants of the building.
	+ Limited to the cost of repairs.
	+ Limited to the useful life of the building.

Policy: it isn’t sensible to allow recovery after an incident but not before; force the person who built it to fix it before something bad happens.

**Relational Economic Loss**

The Court in *Bow Valley Husky* set out the approach to deal with these situations: begin with the exclusionary rule, consider exceptions, and then use the *Anns/Kamloops* approach.

* Exclusionary rule: no duty exists in cases of relational economic loss.
	+ Policy reasons:
		- Puts incentives on parties to act to minimize losses
* Only one party has to purchase insurance
* Will save judicial time and resources
* Eliminate worry about impecunious defendants, who might be forced to pay both the primary party damaged and other ‘relational’ parties
* Rule is clean and definite (and exceptions allow for justice in other clear cases)
* Exceptions:
* Possessory or proprietary interest
* General averaging cases (don’t worry about this)
* Joint venture
* Take the *Anns/Kamloops* approach
	+ Begin with the five categories and work outward from them; the list of categories is not exhaustive.
	+ Proximity has no real meaning; it is an umbrella term where the court finds a sufficiently close relationship
	+ In *CHR s*he finds something ‘akin’ to a joint venture sufficient to establish proximity and move away from concerns over unlimited liability.

Williston on joint ventures: a joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common undertaking for joint profit by combining their respective resources, without however, forming a relationship in the legal sense or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control. They have some 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;
* Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.

**SITUATIONS WHERE NO DUTY EXISTS**

**Duty to an Unborn Child**

There is maternal immunity from suit by the infant after birth for pre-natal injuries.

* + To impose a duty of care on a pregnant woman toward her unborn fetus “…would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women” (*Dobson*).

There is no duty of care to a future child if the alleged negligence by a health care provider took place prior to conception.

* + *Liebeg: child born with cerebral palsy allegedly as a result of negligence of the hospital, physicians and nurses providing care.*

**Mental Disability**

A mentally disabled person is held to the same reasonable person standard as everyone else unless they can show (*Fiala v Cechmanek: D was bipolar, jumped on a car and caused an accident*).

1. As a result of his 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 below the objective standard of care

Policy considerations here:

* fault is generally an essential element of tort law
* liability can be imposed on caregivers (incentive to be more careful)
* need for science/experts
* slippery slope
* the main concern is compensation
* what about a person on the edge of losing control - they are better off to lose control to be released from liability?

**NEW CATEGORIES**

If the duty does not fall into one of the established categories, the creation of a new duty is based on the *Anns/Kamloops* approach:

**Sufficiently close relationship**

1. Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff? This part of the test is broken down into two questions (*Cooper*)
	* + 1. Reasonable foreseeability: ask whether a reasonable person, in the position of the dependent, would have foreseen that his activity might cause damage to the plaintiff.
* This is examined on the level of classes of persons/parties
* It can be broken down into two questions:
	1. Is it reasonable to say that a party in the position of the defendant should have been aware of the risk of harm generated through its activities?
* *Palsgraf*: *rushing for train, hit man holding fireworks, explosion, scale falls and injures P; “in every instance before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining.”*
	1. Is it reasonable to say that the defendant should have been aware that someone like the plaintiff might be injured as a result of the risk they created?
* *Hay*: *motorcycle crash; sees blood; stillborn; “…could not reasonably have foreseen the likelihood that anyone placed in her position could be affected in the manner in which she was.”*
1. Proximity: is it fair and just, given the relationship that exists between the parties, to impose liability on the defendant in relation to the plaintiff?
	* + - * “Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved.”
* Some things to consider: the relationship; propinquity; assumed or imposed obligations; existence of a close causal connection between the act and the harm suffered; potential conflict of interest.

Proximity analysis examples:

*Cooper*:

* Statute was the only source of duty. The duty imposed was to the public as a whole, not to investors with mortgage brokers, and a duty to investors would potentially conflict with the overarching duty.

*Hill:*

* Proximity: “…whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed…It may exist where there is no personal relationship between the alleged wrongdoer and the victim.”
	+ The presence or absence of a personal relationship is an important factor in the proximity analysis, but it may be necessary to consider other factors as well.
	+ Interests: personal representations and consequent reliance are absent; however the suspect has a critical personal interestin the conduct of the investigation (freedom and reputation). These high interests support a finding of proximate relationship giving rise to a duty of care.
	+ Existing remedies aren’t very useful, are incomplete, and don’t really fit the facts: torts of false arrest, false imprisonment, and malicious prosecution do not provide an adequate remedy for negligent acts. Government compensation schemes possess their own limits.

*Odhavji Estate: family of person killed by police, sued the chief, Board and province.*

* + Police Chief: sufficient proximity
		- There is a relatively direct causal link between the alleged misconduct and the complained of harm (the failure of the chief of police to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* leads directly to the police misconduct, which, in turn, leads directly to the complained of harm).
		- Members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct.
		- This expectation is consistent with the statutory obligations the *Police Services Act* imposes on the Chief (the Chief is under a freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Act* and the needs of the community).
	+ Police Board: not sufficient proximity
		- There is a lack of a close causal connection between the alleged misconduct and the complained of harm (The Board does not supervise members of the force, but, rather, supervises the Chief who, in turn, supervises members of the force. This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct).
		- There is no statutory obligation to ensure that members of the police force cooperate with the SIU. The Board is responsible for the provision of adequate and effective police services, but is not under an express obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*.

**Residual Policy Considerations**

Should reasonable foreseeability and proximity be established, a *prima facie* duty of care is said to arise. The test then shifts to ‘residual policy’ matters. The burden rests on the defendant to establish that such policy concerns should, in some fashion or other, reduce or negative the prima facie duty established.

1. If so, are there any considerations which ought to negative or limit
	1. The scope of the duty;
	2. The class of persons to whom it is owed; or
	3. The damages to which a breach of it may give rise?

“These are not concerned with the relationship between the other 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 should suggest the duty of care should not be recognized?” (*Cooper*)

* Concern with government policy makers.
* Concern with quasi-decision makers and their ability to render impartial decisions.
* Indeterminacy (money, time, parties).
* Existence of adequate alternative remedies.

Examples of residual policy analysis:

*Cooper:*

* A duty would undermine the registrar’s quasi-judicial elements, would interfere with government policy, would give rise to indeterminacy regarding money and parties involved, and would create a general insurance scheme for investors (risk to taxpayer).

**STANDARD OF CARE**

The defendant must show that the plaintiff breached the requisite standard of care by creating a material risk, taking into account the probability and seriousness of the consequences (*Bolton*). The standard is objective and is based on the conduct of a reasonable and prudent person (*Vaughn*; *Blyth*).

**Medical Practitioners**

*Challand v Bell: general practitioner; broken arm; gangrene; experts disagreed but some supported his actions:*

1. The surgeon undertakes that he possesses the skill, knowledge and judgement of the average.
2. In judging that average, regard must be had to special group to which he belongs. From a general practitioner at a rural point, a different standard is exacted than from a specialist at an urban point.
3. If the decision was the result of exercising that average standard, there is no liability for an error in judgement.

Policy: is not to punish errors in judgement which would be expected of any competent member of that group or class; there must be an honest and intelligent exercise of judgement.

**Medical Information**

*Reibl:*

* Medical practitioners must provide sufficient disclosure of material risks such that a reasonable person, in the plaintiff’s position, is capable of assessing the pros and cons of undergoing the operation.
* Material risks are significant risks that pose a real threat to the patient’s life, health, or comfort. The severity and possibility are to be weighed.

**Manufacturer**

There is a duty to provide clear communication, describing any specific dangers arising from ordinary use of product (*Hollis*).

* The greater the danger, the more detailed and forceful the warnings must be.
* The duty persists over time; new discoveries compel the company to issue new warnings.
* Generally, medical products to be ‘ingested, consumed or otherwise placed in the body’ are seen to be of significant risk, and so higher standard applies to them.

Policy:

* The reliance consumers justifiably place in manufacturers to produce safe products.
* Imbalance in knowledge between the consumer and the manufacturer.
* The need consumers have to be able to make informed decisions.

Possible problems:

* The duty is such that manufacturers are obliged to warn about material risks they know or ought to know of.
* The duty can extend to speculative knowledge of dangers. But how far does this reach?

**Statutes**

Breach of statute, where it has an effect on civil liability, should be considered in the context of the general law of negligence (*Canada v Saskatchewan Wheat Pool: D sold beetle-infested grain to P contrary to the Canada Grain Act*).

* If a statute explicitly creates a civil tort action, then the statute will rule the situation
* If there is no mention of creating a civil tort action, at most the statute can be taken to provide a standard that may be used as evidence, should it be breached, in a general action under negligence principles.

Limitations

* + When the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs they cannot maintain an action founded on the neglect (*Gorris v Scott: sheep penning on ship required to prevent disease, sheep not penned, sheep washed overboard in a storm*).

Conditions:

* The accident must be of the type the stature was meant to prevent, and the claimant must be someone whom the statute was designed to protect (*Kelly v Henry Muhs: firefighter falls down elevator shaft, no guard-rail or trapdoor, statute only protected employees*).
* Conduct in violation of the enactment must cause the injury (*Schofield v Town of Oakville*).

Compliance with a Statute:

* Mere compliance with a statute does not, in and of itself, preclude a finding of civil liability, but the statutory standard can be highly relevant to assessment of reasonable conduct in a particular case (*Ryan v Victoria: P’s motorcycle tire got caught in railway tracks, railway complied with all applicable statutes, regulations and administrative orders, but the statutes and regulations did not contemplate this situation*).

**Disabilities**

A plaintiff’s disability is relevant if it increases the risk (*Paris).*

On the side of being the defendant: it becomes a modified objective standard to allow a person’s physical characteristics to apply i.e. what would a reasonable blind person do (*Carroll and Carroll v Chicken Palace: blind woman falls down a flight of stairs at a restaurant*).

On the side of being the plaintiff: factor in circumstances when determining if the standard of care should take into account a disabled person i.e. it is more likely that there would be a person with a disability in a big city (*Haley v London Electricity: blind man falls into a hole indicated by a sign*).

A mentally disabled person is held to the same reasonable person standard as everyone else unless they can show (*Fiala v Cechmanek: D was bipolar, jumped on a car and caused an accident*).

1. As a result of his 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 below the objective standard of care

**Social Utility**

In circumstances of “Social Utility” the standard of care may be adjusted to allow for more risk, or to do “what is reasonably necessary in the circumstances and no more than is reasonably necessary” (*Priestman*).

* Look at the purpose of the acts, and whether the person is acting with authority.

**Custom**

Local customs are not necessarily decisive against a determination of negligence, and the party who relied on the custom bears the onus of proof that it is in effect (*Waldrick v Malcolm: no salt on icy parking area next D’s farmhouse*).

* + Customs may guide a person’s actions, but that person should still be conscious of their actions.
* Some customs may not be appropriate.
* Some customs may be unexpected or difficult to comprehend for visitors.

Consensus of the recognized experts, or a uniform practice of professionals, does not bind the Court, but it can be very strong evidence. The Court can override expert evidence and brand a universal practice as negligent only in a strong case; it must offend logic or common sense, or flow from a gross error in weight (*Warren v Camrose*).

* The Court gives deference to the custom: the profession knows more about the custom than the Courts, lots of thought may have been put into it.
* In some situations a bad custom may have been built up over time i.e. “cutting corners”.

**The Young**

The standard of care of young involves a two-step test (*Heisler v Moke: boy uses injured leg on clutch*).

* First: Look at the particular child and ask if he is capable of being found negligent (subjective).
	+ Did they have the capacity to know what duties are expected of him, and how to discharge these duties?
* Second: Ask whether the child was negligent, and if so, to what degree.
	+ Did the child exercise the care expected of a child of like age, intelligence and experience? (*McEllistrum v Etches*).

Exception: When children engage in adult activities, they are held to the objective reasonable person standard (Ryan v Hickson: youth using snowmobiles)

* Can’t know a child is operating adult equipment and protect against youthful imprudence
* The potential risks are such as to demand that the youth be held up to the same standard.

**Lawyers**

A lawyer “…will be liable if his error or ignorance was such that an ordinarily competent solicitor would not have made it or shown it.” Their obligation to exercise due care “…will have been discharged if he has acted in accordance with the general and approved practice followed by solicitors unless such practice is inconsistent with prudent precautions against a known risk…” *(Brenner v Gregory: solicitor facilitated the sale of land, searched title but did not perform a survey, survey was not standard practice)*.

**CAUSATION**

The plaintiff must show that the injury would not have occurred but for the negligence of the defendant (*Kaufmann: women falls on escalator; no railing*).

In making this determine, the court should take a “robust and pragmatic” approach and use “practical common sense” rather than requiring scientific proof (*Snell: surgery on eye goes wrong*).

* + The court can make inferences and give some evidence more weight; this helps to flush out more information from the defendant.

Policy:The House of Lords in *McGhee* ruled that if the plaintiff makes out that the defendant’s conduct materially increased the risk of injury, the onus of proof shifts to D to prove on a balance of probabilities that he did not cause the injury.

Canada did not adopt this test as seen in *Snell.*

* + The UK approach is very hard for the defendant
	+ The actual problem is that requiring proof along the lines of scientific evidence
	+ We should just get the right answer, we don’t need ‘scientific precision’

**Material Contribution**

The court should apply a “material contribution” test when two requirements are met (*Resurfice*):

* 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; and
	+ It is an impossibility to show any one party in fact caused the injury because each can point the finger at the other (*Clements: motorcycle; nail in tire*)*.*
	1. It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.
	+ In other words, the injury must fall within the ambit of risk created by the defendant’s breach.

**Medical Consent**

The court must “consider objectively how far the balance in the risks of surgery or no surgery is in favour of undergoing surgery” (*Reibl v Hughes: surgery, stroke, patient 1.5 years away from pension, lack of emergency*).

* “Modified-objective test”
* Incorporates special considerations affecting the particular patient.
* Avoids unreasonable subjective elements such as irrational or idiosyncratic fears.
* Subjective: leads to patient hindsight.
* Objective: too favourable to doctors, puts a premium on their assessment.
* No exception for beginners.

**Duty to Warn**

*Hollis:*

* + 1. Would she have consented to the operation if properly warned of the risk?
	+ This is a subjective test.
	+ Policy: this is a product liability case; a manufacturer acts in a more self-interested way that a doctor and there is a greater likelihood to underemphasize the risk of a product
		1. Even if the doctor has been adequately informed of the risk of the implant, would he have passed a warning on to the plaintiff?
	+ The court assumes the doctor would pass on the warning.
	+ Policy: avoid placing on obligation on P to show that the doctor would have passed on the information: could result in a ‘pointing fingers’ problem.

**REMOTENESS**

The defendant is liable for consequences that are reasonably foreseeable (*Wagon Mound No 1*)*.* The Court in *Mustapha* accepted the definition of reasonably foreseeable from *Wagon Mound No 2* to mean a “real risk”, in other words the risk need not be probable but is beyond *de minimus*.

**Injuries**

The damage must not be regarded as differing in kind from what was foreseeable (*Hughes: lamp knocked into manhole and broke resulting in a paraffin vapour mist which was ignited by the flame; boy badly burned*).

* + In other words, what must be foreseeable are the injuries, not the particular set of circumstances.

**The Thin Skull Rule**

A tortfeasor takes his victim as he finds him (*Leech Brain: molten metal burns lip; turns into cancer; he had a pre-existing condition*).

This includes ‘egg-shell personalities’ (*Marcanto: formerly happy individual undergoes personality changes as a result of minor injuries in a car crash*).

However, reasonable foreseeability requires a ‘real risk’ that a mental injury would have occurred in a person of ordinary fortitude (*Mustapha*).

* + This is a threshold test: if met, then the thin skull rule applies (with respect to the extent of the injury).
	+ Should the tortfeasor know of the lack of reasonable fortitude, this may change the calculation (*Mustapha*).

Crumbling-Skull Rule: The aim of compensation is to put the plaintiff back in position as if injury had not occurred; therefore the defendant is not called upon to remove the pre-existing condition. The original position must be put into the calculation of damages.

***NOVUS ACTUS INTERVENIENS* (A NEW INTERVENING ACT)**

A ‘new act’ which intervened at some point to initiate a new causal chain: past that point the defendant should not be seen as responsible (and so should not be liable).

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’.

Ask if a reasonable person in the position of original defendant ought to have been able to reasonably anticipate the interventions claimed to be new causes of damages incurred.

**Suicide**

If the suicide is the result of insanity brought about by the injury sustained, then the defendant will be held liable.

If the suicide is the result of a deliberate act it will be labelled a *novus actus interveniens* and the defendant will not be liable for that consequence of his negligence.

**Second Accident**

The question is still one of reasonable foreseeability. It is not necessary to show that each possible consequence was within the foreseeable extent or foreseeable scope of the original injury in the same way that the possibility of injury must be foreseen when determining whether or not the defendant’s conduct gives a claim in negligence (*Wieland: visiting doctor’s office and wearing neck brace due to original injury; falls down stairs*).

If the plaintiff was acting negligently, the second injury may not have been reasonably foreseeable (*McKew: weak leg; jumps down stairs*).

**Medical Error**

If medical treatment is so “negligent as to be actionable” it constitutes a *novus actus interveniens*, and the plaintiff would need to launch separate suit against the medical personnel (*Mercer*).

The onus rests on the initial defendant to prove the intervening medical treatment was negligent (*Papp*).

Another approach is to hold the original wrongdoer liable for all reasonably foreseeable injuries subsequently caused by another (there may be an exception in the case of gross negligence by a doctor) (*Price*).

* + Policy: this protects the plaintiff and allows the original wrongdoer to pursue the negligent doctor afterwards.

*Note: this cases are in Ontario*

**Wrongful or Illegal Acts**

The question is still one of reasonable foreseeability. The wrongfulness of the act only helps an argument against reasonable foreseeability (*Harris: boy sticks arm out bus window; driver was negligent in pulling away from a bus stop; still held liable*).

**Negligent Acts**

The question is still one of reasonable foreseeability. Was that consequence fairly to be regarded as within the risk created by the defendant’s negligence? (*Bradford*: *fire on grill; patron yells fire; stampede*).

* + Majority: the hysterical conduct of the patron was not reasonably foreseeable
	+ Minority: the second actor was acting in a very human and usual way, it was part of the natural consequences of events.

**Inspections**

Is it reasonably foreseeable that there would later be a negligent inspection? (*Ives: furnace has defect; inspectors missed it during three servicing appointments*).

**Learned Intermediary**

*Hollis:* In some exceptional circumstances the duty to warn may be discharged via a ‘learned intermediary’.

* If the product is technical in nature, therefore naturally used in situations of supervision
* If the consumer could not be reasonably expected to receive warning directly from the manufacturer.
* The manufacturer must put the learned intermediary in the same state of knowledge they are in vis-à-vis material dangers and risks.

**DEFENCES**

**Contributory Negligence**

Contributory negligence affects the assessment of damages according to the degree of fault.

There are three types of contributory negligence:

* 1. Plaintiff contributes to accident that caused injuries.
	2. Plaintiff exposes himself to risk of being involved in an accident.
	+ *Raurins: walked into crosswalk in intersection with malfunctioning traffic lights, at dusk, with dark clothes on*
	1. Plaintiff fails to take reasonable precautions to minimize injuries should an accident occur.
	+ This is a narrow category: it is a positive obligation
	+ ‘Seat-belt defence’

There is a duty on passengers and drivers to wear seat belts (*Yuan*).

* + Policy: failure to do so generally increases severity of injuries and rate of fatalities.
	+ The defendant needs to show:
		1. The seat belt had not been worn by the plaintiff
		2. Injuries would have been prevented or lessened if the seat belt had been worn.

This duty was confirmed by the SCC in *Galaske*.

* + They also noted that the driver of a vehicle has an obligation to ensure a child (under 16) has their seat belt on, even if they are not their parent and even if the actual parent is present in the vehicle.
	+ Policy: The driver is in control and in situation of a licensed activity.
	+ There may be shared liability with the actual parent.
	+ The *Motor Vehicle Act* plays a role here.

**Voluntary Assumption of Risk (“*volenti”*)**

This is a complete defence; but it is dealt with narrowly and rarely used.

The defence cannot succeed unless the evidence permits a genuine inference that the plaintiff consented not merely to the risk of the injury, but to the lack of reasonable care which may produce that risk (*Hambley*).

* + The court distinguished between knowing of risks and accepting risks.
	+ Policy: the police officer was discharging the duties of his office (analogy with employer-employee).

Based on the “willing passenger” cases, the law has developed in this area to require an express or implied agreement to waive one’s legal rights.

* + The kids just wanted to get home, didn’t consent to the lack of reasonable care on the part of a drunk driver.
	+ This is semi –contractual; like a waiver.

The defence can still succeed in sports.

* + Just being in the game is enough to indicate you assume the risk.
	+ As long as the action is within the ordinary aspects of the game.

**Doctrine of Illegality**

This defence is based on the ground that the plaintiff’s conducted violated legal or moral rules.

*Hall*: this doctrine is available only in clear cases where:

* + To allow the plaintiff’s tort claim would be to permit the plaintiff to profit from his or her wrong; and
	+ Where profit is carefully defined to refer to a direct pecuniary reward for an act of wrong-doing.
	+ Compensation for something other than wrong-doing, such as personal injury, would not amount to profit in this sense.

As with *volenti*, the doctrine is applied narrowly and the illegal behavior is now likely to be treated as contributory negligence.

Some examples where it will apply:

* + - Where there is no physical injury, just financial loss.
		- Where the plaintiff is physically injured and claims ‘lost income’ where the income is procured illegally.
		- Where the plaintiff is physically injured and claims for exemplary damages because the defendant acted egregiously.

*Zastowny: a young man in prison is sexually assaulted by a prison official; argues that a subsequent life of crime, and the years spent in prison, is partly a result of this tort; and during those years he lost potential income.*

* + - He cannot recover because the time spent in prison was a result of his illegal activities.
		- There is an element of autonomy in his choice to live a life of crime.

***Miscellaneous Policy***

Functions of the law of torts in Canadian jurisprudence:

* Compensation: ensured injured party is compensated
* Fairness: determining who should have to bear the cost
* Corrective Justice: if someone causes harm, they should be the one who has to pay
* Deterrence: promoting good behaviour and discouraging bad behaviour
* See also:
* Psychological (appeasement/revenge): sense of closure
* Psychological (therapeutic/restorative): feelings of justice
* As an ombudsman: instrument of social pressure on government and other institutions
* Empowerment: the ability to affect things around you

Historical debates/perceived tension in tort law:

* Deterrence vs. corrective justice
* Focus more on ‘loss spreading’ (compensation) vs. corrective justice

**DEFAMATION**

**ELEMENTS**

The plaintiff must show three things:

1. **Defamatory statements were made**

Would the words of the statement tend to lower the plaintiff in the estimation of right-thinking members of society generally? (*Sim v Stretch: telegram; monies owed to servant*)

Context is important.

Defamatory content can be shown through:

* + 1. The literal meaning of the statement (plain and ordinary sense).
			- * “The man is a thief.”
		2. Legal or true innuendo: if those receiving the statements know of extraneous circumstances that would give the publication a defamatory meaning.
			- * Extra information is required.
				* “The man entered the home.” (The home is a brothel).
		3. Popular or false innuendo**:** if an ordinary individual receiving the statements, absent extraneous circumstances, would be able to infer something defamatory.
			- * A meaning ‘below this surface’.
				* The plain and ordinary meaning would be said to include something beyond the literal sense.
				* “The man is a snake.”
1. **The statement made reference to the plaintiff**

There is a two-level analysis (*Knuffer v London Express Newspaper*):

* Question of law: can the statement be regarded as capable of referring to the plaintiff?
* Question of fact: does the statement in fact (in the minds of reasonable people, who know the plaintiff) refer to the plaintiff? (*Booth*)
* Look at the audience and replace them with reasonable people.
* “What a reasonable man would take from what was said” (*Booth v BCTV: television interview, comments directed at people ‘right on top’ of Narc Squad).*

Can a group be defamed?

* + - * + The plaintiff must show personal injury; and
				+ “A court would look into the size of the group, how organized and homogenous it is, whether the defamatory material targeted members of the group, whether the defamatory material might lead people to try to identify particular individuals within the group (or, conversely, not to care much about this), and whether the defamatory statements plausible and/or convincing?” (*Bou Malhab*)
1. **The statement was published or disseminated**

The defamatory statements must be communicated to a third party.

Did the defendant intend that anyone but the plaintiff should hear his defamatory utterances? (*McNichol v Grandy: the statements are overheard through a wall).*

* + - * + This is an objective test.
				+ “…a person must be taken to intend the natural and probable consequences of his act in the circumstances.”
			* The wrongful acts of another person would not be taken to be the natural and probable consequences of that person’s actions.

Any act which has the effect of transferring the defamatory information to a third person constitutes a publication. This captures republication.

* + Hyperlinks do not actually repeat the content of the material cited, and the reader has to do work to access that material, therefore their mere presence should not be taken as ‘publication’. They may attract liability if the manner in which they have been referred to conveys defamatory meaning; not because they have created a reference, but because understood in context, they have actually expressed something defamatory. (*Crookes v Newton: website on free speech; links to defamatory material).*

Innocent Dissemination: A party can escape liability if the individual can show that the work was disseminated in the ordinary course of business and:

1. That he was innocent of any knowledge of the libel contained in the work disseminated by him;
2. That there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel;
3. When the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel;

(*Vizetelly v Mudie’s Select Library: library circulating book containing defamatory material; Menear v Miguna extended this protection to publishers).*

**DEFENCES**

**Justification**

The law presumes the statement is false; the defendant has an opportunity to show, under a burden of proof, that the statement was true.

* The underlying policy here is freedom of expression.
* It is not sufficient that the defendant believe the statement to be true (*Hulton*).

The test is whether the evidence of truth is relevant to the words contained in the defamatory statements, understood in any meaning which they are reasonably capable of bearing. (*Williams v Reason: claim that plaintiff is not an amateur athlete, evidence of money from a shoe company*).

* It is an objective test: there should be a sufficient link between the evidence of truth and the statement made.

It may not be sufficient in some circumstances for defendant to show literal truth of statements if it is clear in these circumstances that the statements were made in a manner so as to create a different impression than their original meaning (*Bank of BC v CBC: broadcast twists government analyst’s statements to create a different impression than he intended).*

**Absolute Privilege**

Three categories:

1. Statements made by executive officers (‘high officials’) relating to affairs of the state.
* Individuals can be found to be akin to ‘agents’ of sufficiently high officials (*Dowson v The Queen: RCMP Chief Superintendent [Solicitor General] and Acting Assistant Deputy Attorney-General [Attorney-General]).*
1. Statements made during Parliamentary proceedings.
2. Statements made in the course of judicial or quasi-judicial proceedings.
* The test is “…whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which courts act.” (*O’Conner v Waldron*)
* Key attributes or functions of a court-like body include those of determining legal rights and affecting the status of parties appearing before it (*Hung v Gardiner: Law Society and CGA Association found to be quasi-judicial, empowered by statute, and having a duty, to investigate complaints and hold disciplinary proceedings).*
* Policy is to allow for truth-seeking and hear everything openly.

Malice does not play a role in absolute privilege.

**Qualified Privilege**

Qualified privilege requires a situation within which reciprocal interests exist: a duty on the publisher to convey the material, and an interest or duty on the person receiving the material to receive it.

* *Pleau v Simpson-Sears: protecting own interests by placing a notice of forged cheques on the register – but did the public need to see it?*

The existence of the duty to convey is tested objectively – it is not sufficient that this person believes they have a duty to convey.

Two things can defeat the presumption of privilege: malice, and if the communicator exceeds the purpose for which the privilege is creates.

* *Hill v Church of Scientology: by holding a press conference and reading out the statement of claim against the plaintiff, he exceeded the purpose in granting privilege in this sort of situation (‘highhanded and careless’).*

Malice is defined broadly, and the onus is on the plaintiff to prove:

* It may consist of some indirect motive not connected with the privilege (*Sun Life*); or
* The defendant did not honestly believe that what he said was true, or was reckless in the sense that he was indifferent to its truth or falsity (*Horrocks v Lowe)*.
* It is not sufficient to show that he jumped to conclusions which are irrational, reached without adequate enquiry or based on insufficient evidence, if he nevertheless does believe in the truth of the statement.
* This is subjective.
1. Protection of One’s Own Interests
* *Sun Life v Dalrymple: defendants (officers of the company) were found to be validly concerned with interests of the company (in costs of establishing offices, and the effects of resignations of the people they allegedly slandered).*
1. Common or Shared Interest

If the communication was made in pursuance of a duty or on a matter in which there was a common interest, on the party making and the party receiving it, the occasion is said to be privileged (*C (LG) v C(VM)*).

Conditions for successful application of this form of qualified privilege (*Bereman v Power Publishing: article in a union magazine accused plaintiff of having turned traitor*):

1. The communication must be “properly communicated”.
	* Should not be excessive or go beyond the reasonable requirements of the occasion (i.e. avoid too large an audience).
2. The language used must be “warranted by the occasion that called forth the publication.”
	* There is a limit on the language that can be used: are the terms such as the defendant might have honestly and bona fide employed in the circumstances?
3. Moral or Legal Duty to Protect the Interests of Another

Where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication (*Watt v Longsdon*).

To identify a moral duty: “A duty recognized by English people of ordinary intelligence and moral principle” (*Watt*).

*Fast v Cowling: the defence didn’t apply; the solicitor was not acting ‘unethical’; he was paid his full commission.*

1. Public Interest
* The court applies this test narrowly.
* There can be several countervailing considerations (*Globe and Mail v Boland*: *editorial suggests election candidate was creating issues in an election just to appeal to recent immigrants from Easter Europe.*
	+ Allowing such protection might have an unfortunate effect on those considering a public life.
	+ The plaintiff could only challenge the statement by showing malice, which is difficult to do.
	+ Another defence exists (fair comment).
* The public interest should be more ‘focused’, for example on the prison system rather than just some ‘bad person‘(*Parlett v Robinson: defendant MP mistakenly thought an employee of a penitentiary was violating rules around ‘custom work’ in the Correctional system; no malice because he asked for a public inquiry but his request failed; made public statements; Court finds the group had a bona fide interest in the matter).*

**Responsible Communication on a Matter of Public Interest**

The Court saw a need to create this defense in *Grant v Torstar:*

* + Qualified privilege rarely works for the press because the only defence is truth.
	+ This prevents the press from reporting on matters of public interest which are relevant and important to public debate.
	+ It is also detrimental to ‘truth-seeking’.
	+ Therefore there is an inadequate balance between freedom of expression and protecting reputation.

If there is more than one possible interpretation, the Court looks to the intended meaning of the defendant’s words.

There are two basic elements that are left for the judge to determine.

* 1. The publication must be on a matter of public interest.
		+ It is not “what interests the public” such as the private lives of well-known people.
		+ It is enough that some segment of the community has a genuine interest in receiving information on the subject.
	2. The defendant must show that publication was responsible, in that he or she was diligent in try to verify the allegations, having regard to all the relevant circumstances. There is a non-exhaustive list of considerations here:
* The degree of diligence should increase in proportion to the seriousness of the potential effects on person defamed.
* The more ‘public importance’ increases the more a jury may be warranted in finding communication was responsible
* As urgency of getting information to public increases the need to verify information decreases (but this requires caution – this will not simply provide an excuse for irresponsible reporting).
* The status and reliability of a source affects the requisite degree of diligence (in finding, for example, other sources).
* Whether the reporter diligently sought out the position of the plaintiff and accurately reported his side of the story.
* The degree to which the allegedly defamatory material was *necessary* (as part of the information provided in order to communicate matter of public interest) can determine whether including it was responsible.
* Statements made should be matters of ‘reportage’ (i.e., where the public interest is in the fact *something was said*, so the press are simply reporting on that fact (and not simply repeating the defamatory material)).

**Fair Comment**

This defence requires the statement to be:

* On a matter of public interest;
	+ Not just making a personal attack on an individual.
* Based on fact;
* Recognizably a comment (and not a statement of fact); and
	+ Not saying it is definitely true, just making a comment about it.
* Fair.
	+ Fair doesn’t mean ‘fair’ in the literal sense, but is closer in meaning to ‘honest’.
	+ The test up to and including *Chernesky* was whether the party making the comments honestly believed in the remarks made. Dickson dissented.
		- The newspaper did not honestly believe the student’s in that the alderman had a racist attitude.
	+ In *Simpson* the court adopted Dickson’s approach.
		- It better conforms to the requirements of free expression endorsed as a fundamental value of our society in s 2(b) of the *Charter.*
	+ It is an objective test: whether any person could honestly express the opinion on the facts established.
		- The radio host did not honestly believe she condoned violence against gay people; he was talking about what the possible consequences of her mode of thought could be.
		- Objectively, a person could express the opinion she was complaining of, based on the facts of her previous actions and comments.

**LIBEL AND SLANDER**

Libel:

* ‘Physical’ (typically non-verbal) means of communication.
* Leaves a record.
	+ Things communicated through a medium (i.e. television, internet) are libel because they leave a permanent record.
* General damages presumed.

Slander:

* ‘Non-physical’ (typically verbal) means of communication.
* Leaves no record.
	+ Includes body actions and gestures because they are ‘fleeting’.
* Special damages must be shown.
	+ Exceptions: accusation of a crime (other than to the police); accusation of having a contagious (‘loathsome’) disease; negative remarks concerning one’s fitness in relation to work, profession, trade or business; accusation of adultery.

The distinction comes from the permanence of the statement (‘perpetuates the scandal’), and the presumption that more deliberation (premeditation/malignity) went into it.

The BC *Libel and Slander Act*It ensures that broadcasts fall under libel.

**THE VALUES AT STAKE**

The central challenge is the balance of interest in protecting the reputation of individuals against societal interests in the protection of free expression. This balance will shift over time in relation to changing societal perspectives.

Reputation:

* “…to most people, their good reputation is to be cherished above all…[it is] related to the innate worthiness and dignity of the individual…False allegations can so very quickly and completely destroy a good reputation…[when] tarnished by libel [it] can seldom regain its former lustre.” (*Hill v Church of Scientology: lawyer makes public accusations against Crown lawyer which are subsequently not proven in Court*).
* “Reputation is a fundamental feature of personality that makes it possible for an individual to develop in society.” (*Bou Malhab v Diffusion Metromedia CMR: individual makes comments on the radio regarding cab drivers*)*.*
* “…publication of defamatory comments constitutes an invasion of the individual’s privacy and is an affront to that person’s dignity.” (*Bou Malhab*)*.*

Freedom of Expression:

* “…a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.” (*Hill*)
* “[Freedom of expression] is essential to the functioning of our democracy, to seeking out the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization.” (*Grant v Torstar: P is long-time friend of the premier; Toronto Star publishes piece alleging his golf course expansion plan will be approved because of his political ties).*
* “The constitutional status of freedom of expression…means that all Canadian laws [including defamation] must conform to it.” (*Grant)*
* “It allows individuals to become emancipated, creative and informed, it encourages the circulation of new ideas, it allows for criticism of government action and it favours the emergence of truth…[and it ensures] that social, economic and political decisions reflect the aspirations of the members of society.” (*Bou Malhab*).

Defamation does not protect such things as feelings, pride, or privacy.

**VICARIOUS LIABILITY**

There are two key policy goals underlying vicarious liability. Imposing liability in circumstance that wouldn’t further these underlying policy goals would be unfair.

* Fair and effective compensation
	+ A person should receive a just and practical remedy for harm suffered as a consequence of wrongs perpetuated by an employee.
	+ It is fair to hold the employer responsible for creating or enhancing the risk that led to the harm.
* Deterrence of future harm
	+ The employer has the ability to reduce accidents and intentional wrongs that result from a risk they have created.
	+ They can do this through their organizational practices and supervision.

There are two stages to the analysis:

1. **The relationship between the tortfeasor and the 3rd party**

Is the relationship sufficiently close for the imposition of vicarious liability to be appropriate?

In making this determination, the level of control the employer has over the worker’s activities will always be a factor (*Sagaz: consultant hired to secure business from a customer; held to be an independent contractor; a “person in business on his own account”*).

Other factors to consider may include:

* Whether the worker provides his or her own equipment;
* Whether the worker hires his or her own helpers;
* The degree of financial risk taken by the worker;
* The degree of responsibility for investment and management held by the worker; and
* The worker’s opportunity for profit in the performance of his or her tasks.

Even in cases where the relationship is deemed not sufficiently close for vicarious liability to flow, it is still possible the employer may be found liable under the doctrine of non-delegable duty, where some work or task initiated by a particular party may be such that that party cannot divest itself of liability simply by having another party actually do the work or fulfil the task.

Whether a non-delegable duty arises depends upon the nature and the extent of the duty owed by the defendant to the plaintiff (*Lewis: rock falls on vehicle; government hired independent contractor to do the highway maintenance work; “duty to ensure that the independent contractor also takes reasonable care”*).

There are two factors to consider when determining if a duty is non-delegable (*Lewis*):

* It will depend to a large extent upon the statutory provisions involved and the circumstances presented by each case.
* The words “may” but not “must” or “shall” could indicate an ability to divest obligations.
* The words “vested in the Ministry” could indicate further obligations.
	+ The court may also consider other policy reasons (*Blackwater – don’t use this step*).
		- “…including the reasonable expectation of the users of the highway” (*Lewis*).
1. **The nature of the act in relation to that relationship**

There is a two-stage approach to this part of the analysis (*Bazley: “Children’s Foundation”; non –profit; residential care facilities; acting* in loco parentis; *cared for children physically, mentally and emotionally; duties range from general supervision to intimate duties like bathing and tucking in; vicariously liable*).

* First, ask if there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls?
* If not, a court must determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.
	+ - * + These policy goals underlie the idea that “employers may justly be held liable where the act falls within the ambit of the risk that the employer’s enterprise creates or exacerbates.”

Therefore, if precedent is inconclusive:

* Determine whether there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom.
* In determining the sufficiency of the connection between the employer’s creation or enhancement of risk and the wrong complained of, the following subsidiary factors may be considered:
* The opportunity the enterprise offered the employee to abuse his/her power;
* The extent to which the wrongful act may have furthered the employer’s ends;
* The extent to which the wrongful act related to friction, confrontation, or intimacy inherent in the employer’s enterprise;
* The extent of power conferred on the employee in relation to the victim; and
* The vulnerability of potential victims to wrongful exercise of employee’s power

The Court applied the *Bazley* approach in *Jacobi* and did not impose vicarious liability:

* The ‘Boys and Girls Club’ offered the Program Director only a slight opportunity to abuse the powers he enjoyed as a result of his employment.
* While part of his job was to establish rapport with children, it was not envisaged by the Club that he would be intimate to the degree envisaged in *Bazley.*
* His job was to encourage children to participate in its activities and to supervise those activities, and in so doing to further the Club’s objectives “to promote behaviour guidance and to promote the health, social, educational, vocational and character development of boys and girls.”
* 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.
* It was not their parent.  Nor did it stand *in loco parentis*.  The boys and girls went home to their parents after every activity.
* Once the children were drawn into the Director’s home-based activities he increased the level of intimacy, but this was unauthorized and against the values of the club

McLachlin dissented and found there was vicarious liability:

* As Program Director, he was encouraged to cultivate positions of trust and respect with his young charges.
* “Almost all the relevant factors suggest that Griffiths’ torts were, in fact, linked to his employment…”
* The Club “…created and sustained the risk that materialized…”
* “Compensation for the harm that followed may fairly be viewed as a cost of the Club’s operation…”
* The rationales of risk distribution and deterrence support vicarious liability in these circumstances.”

*KLB* focused on the first stage of analysis:

* The court re-affirmed the central (though not sole) factor in determining whether the right sort of relationship exists between these parties – that of control***.*** In essence, they find foster families to be akin to ‘independent contractors’ (as in *Sagaz*).
	+ Provide their own homes; use their own equipment; responsible for determining who will interact with the children and when; control over organization and management of the household; government does not supervise or interfere except to ensure that the child and the foster parents meet regularly with their social workers.
* The Court also dismissed claims of non-delegable duty: statutory provisions in *Protection of Children Act* determine that province loses the liability after putting the children into a foster home.

Arbour J. dissented, using much the same language as McLachlin J. used in dissent in *Jacobi:*

* Government should be held accountable as substitute parents.
* In terms of the *Sagaz* analysis she thinks that ‘control’ is ‘the right to control’.
* “…the foster care arrangement reflects the highest possible degrees of power, trust and intimacy…”
* Unlike in *Jacobi,* children in foster care have “…nowhere to go to escape abuse in the short term…”
* “It is difficult to imagine a relationship requiring greater power or authority for its successful operation than the foster care relationship.”