DUTY OF CARE

**Existing Category:**

* Causing someone physical harm
* Causing physical harm to property
* Negligent Misrepresentation
* Misfeasance in public office
* Relational economic loss
* Failure to act
* Duty to warn
* Product liability
* Municipality owes duty to prospective purchasers of real estate to inspect housing development
* Government owes duty to maintain roads
* Police owes duty to shooting victim
* Doctor to unborn fetus

**Existing Category** **TEST**

***Reasonable Foreseeabillity must be established: (Hill)***

1. **Would it be 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?, and;**

1. **Would it be 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?**

**Novel Cases TEST:** ***(Cooper)***

1. **1st Stage: Is there a sufficiently close relationship between the parties? (Burden on plaintiff)**
   1. **REASONABLE FORESEEABILITY:**

* Basic Foreseeability analysis:

1. Would it be reasonable to say that a party in the position of the D **should have been aware of the risk of harm** generated through its activities, AND:
2. Would it be 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?
   1. **PROXIMITY**  *- Policy with the relationship itself*

* Is it fair and just, given the relationship, to impose liability on the D in relation to the P

*🡪PRIMA FACIE DOC @ this stage*

1. **2nd Stage: Are there any considerations which ought to negate or limit: (burden on defendant)**

* **Scope of duty, class of persons to whom it is owed, or the damages that may arise**
  1. **RESIDUAL POLICY**
* *Impact on the legal system*

1. Law already provides remedy
2. Indeterminate liability (unsure whom duty owed to, how much money owed, how long duty lasts)
3. Other reasons of broad policy (catch all)

* *Society in general*

**POSITIVE DUTIES/FAILURE TO ACT**

1. **Relationships of Economic Benefit**

* Special relationship: invitor/invitee
  + BAR PATRON: Must have additional knowledge to have duty (Jordan House)
    - Simply serving past intoxication not enough to form DOC to third parties injured as result of drunk bar patron (Stewart)
  + DANGEROUS SPORTS: Host has DOC to all participants to not let them participate is visually incapacitated (Crocker)
  + SOCIAL HOST: No liability (not easy to monitor guests, no regulatory regime, no contract) (Childs)

1. **Relationships of control and supervision**

* Teacher/pupil
* Employer/employee
* Carrier/passenger
* Prisons/inmates
* Landlords/tenants
* Hospitals/patients
* Doctor/patient
* Parent/child

1. **Creation of Dangerous Situations**

* CONTRIBUTE TO HAZARD: you owe a duty (not mere spectacle of hazard) (Oke v Weide)

1. **Reliance Relationships & Undertakings**

* Begin to take care of sick/injured person – must not omit to do what a reasonable person would (Zelenko)
* Begin to undertake safety measures – duty to maintain them (Nord-Deutsche)
* Begin to rescue someone, induce 2nd rescuer to party to partake, you owe DOC to 2nd rescuer (Horsley)

1. **Emergency Aid**

* No liability for emergence aid unless **GROSS NEGLIGENCE** (Good Samaritan Act)

DUTY TO WARN

**Nature of duty: (Lambert)**

* 1. Describe specific dangers arising from ordinary use of product (Danger ^ = Specific/clarity of warn^)
  2. Greater the danger, more detailed/forceful warnings must be (Lambert)
  3. New discoveries = duty for new warnings
  4. Higher standard for medical products ingested, consumed, or otherwise placed in body

**Application to Manufacturers:**

* Risks they know of, or ought to know of
* Can extend to speculative knowledge about danger

**Can be discharged through LEARNED INTERMEDIARY (Hollis)**

**Manufacturer must put the LI in the same state of knowledge they are n vis-à-vis material dangers/risks**

1. Product is technical in nature (used in situations of supervision)
2. OR: consumer not reasonably expected to receive warning directly from manufacturer

**Cannot use LI as a shield**

* LI does not break the chain of causation (assume the LI would have passed on info) (Hollis)

PUBLIC AUTHORITY LIABILITY

**When can government be held liable? (Just v BC)**

1. Making policy 🡪 NO
   * Discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations
2. Operationalizing policy 🡪 YES
   * Breach of statutory provision does NOT create a civil action, only evidence of negligence (Wht Pool)
   * Evidence of compliance with a statute does NOT preclude liability (Ryan v Victoria)
   * Bad faith/irrational policy 🡪 can be challenged (Imperial Tobacco)

**Misrepresentation:**

* Public statements about government duties + reliance on statements by P is NOT ENOUGH (Imperial)
* Government must have knowledge their statements were misrepresentations (Taylor)

**Not an established category? 🡪Go to COOPER ANALYSIS**: + incorporate

BUT: if a statute TELLS you there is a duty, then = DOC ✔

1st Branch:

1. Reasonable foreseeability
2. Proximity – LEGISLATIVE REGIMES creating DOC? (Fullowka)
3. Is the group to which the legislature regime is directed reasonably contained and defined?
4. What is the nature of the actual interactions between the regulator and the class of parties that might actually be injured?
5. Do the statutory duties actually relate to the class of parties who might be injured?

2nd Branch

1. Residual policy

* Indeterminate liability (Imperial)

MISFEASANCE IN PUBLIC OFFICE

**Public officer must have: (Odhavji)**

1. Engaged in deliberate & unlawful conduct in his or her capacity as a public officer

* UNLAWFUL: Bad faith/dishonesty
* Includes when public officer EXCEEDS mandate

1. Known his/her conduct was unlawful and was likely to harm the plaintiff

PEL: NEGLIGENT MISREPRESENTATION (Queen v Cognos)

**1st stage: establishing a prima facie duty of care**

1. There must be a duty of care based on a ‘**special relationship**’ between the representor and the representee

***Reasonable reliance*** (Hercules) **2-part test**

* 1. The person making the statement should have **foreseen the representee would rely on the advice**, **and**
  2. **The reliance by the representee in the circumstances was reasonable**

1. The representor must have **acted negligently** in making said misrepresentation
2. The representation in question must be **untrue, inaccurate, or misleading**
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

**2nd stage: General policy considerations** (Hercules)

* Indeterminate liability?

PEL: INDEPENDENT LIABILITY OF STATUTORY PUBLIC AUTHORITIES hkjhdkhaskdjh

PEL: NEGLIGENT PERFORMANCE OF A SERVICE BDC v. Hofstrand Farms (no DOC courier company to customer)

**1st stage: establishing a prima facie duty of care**

1. There must be a duty of care based on a ‘**sufficiently close relationship**’ between the representor and the representee
2. The representor must have **acted negligently** in performing the service
3. The representation in question must be **untrue, inaccurate, or misleading**
4. The representee must have **relied**, in a reasonable manner, on said the performance of the service; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted

**2nd stage: General policy considerations** (Hercules)

* Indeterminate liability?

PEL: NEGLIGENT SUPPLY OF SHODDY GOODS OR STRUCTURES( Winnipeg Condo)

A building contractor, architect or engineer has a duty of care in negligence to subsequent purchasers who may

suffer financial loss as a result of repairing a latent defect that would if manifest give rise to a “**real and substantial danger**” to the inhabitants.

PEL: RELATIONAL ECONOMIC LOSS (Bow Valley) 🡪 Policy, go to big CAN

Courts are prepared to recognize relational economic loss in the following situations (not totally closed though)

1. Cases where the claimant has a possessory or proprietary interest in the damaged property
2. General average cases, and
3. Cases where the relationship between the claimant and property owner constitutes a joint venture

DOC-PURE MENTAL SUFFERING (Devji)

1. There must be a recognizable psychiatric injury
2. The plaintiff must have been him/herself endangered or have witnessed a traumatic accident with his/her own senses (or been there at the immediate aftermath) [though this seems to be loosening up as time goes by]
3. The relationship to an injured party should be very close

CHARTER – SOURCE OF TORTS (Ward)

1. **Establish a *Charter* right has been breached**
2. **Show why damages are a just and appropriate remedy**
3. **Examine whether the state can show damages are not functionally appropriate or are unjust** 
   * Other alternatives, double compensation, chill government activity (but also promote good..)
4. **Quantify damages**

STANDARD OF CARE: IS THERE A BREACH?

If there is a material risk, a reasonable person would avoid this activity (Vaughn v Menlove)

**Material Risk – CONSIDER:**

1. The basic **likelihood** of something happening (Bolton)
2. The **severity** of the outcome (Paris)
3. Also consider if the act for a **social utility** 🡪 more lenient (Priestman, Watt)

**SOC: ROLE OF CUSTOM**

**Local** (Waldrick)

* If you are bringing up idea of custom to demonstrate you were in compliance with the SOC (+ burden of showing custom is in effect)
* Helpful, not determinative, cant be unreasonable

**Industrial/Professional** (Warren)

* Very strong evidence
* Court can override only in very from cases
  + Must offend logic or common sense, or flow from a gross error in weight

**SOC: PHYSICALLY DISABLED**

Disabled person can **DEFEND** against a negligence suit (Carroll)

* Modified objective for disability – what would the reasonable blind person have done?

Disabled person can **SUE** someone for negligence (Haley)

* Possibility of disabled people in vicinity? 🡪 Increased standard of care
  + Busy city area ✔🡪 RD (Ryall)

**SOC: STATUTORY REQUIREMENTS**

**Consider the purpose of statute before considering the statute as evidence of compliance/breach.** (Gorris)

1. **Accident must be of type statute was meant to prevent**: interpret broadly (Paulsen v CPR)
2. **Claimant must be someone whom the statute was designed to protect**
3. **Conduct in violation of the enactment must cause the injury**
   * Breach of statute is only EVIDENCE of negligence (Wheat Pool)
   * Compliance with statute is only EVIDENCE of reasonable conduct (Ryan v Victoria)

**SOC: THE YOUNG** (Heisler v. Moke)

* *No adjustment for elders*
* *No adjustment for children engaging in adult activities* (Ryan v Hickson)

1. **Is this child capable if being found**
2. **negligent?**

* Look to the particular child (subjective test) and determine if capabale of VOLITION
  + AGE: 1 or 2 year old? No; 3-5…not sure; 6-7…likely, but not necessarily
* Does this child have the abilities required to know what duties are expected of him/her?
  + If so, does the child know how to discharge these duties?
* Does it make sense to hold this child responsible for his/her acts?

1. **If yes to first question, was the child negligent? If so, to what degree?**

* When deciding what standard to apply the courts ask:
* **What would a child of like age, experience, and intelligence be expected to do in the circumstances** *[McEllistrum] 🡪* Construct hypothetical RP unique to each case, built on model of the child in situation

**SOC: MENTAL DISABILITIES** (Fiala) **D suffers from sudden unconsciousness - No volition** (no liability) (Slattery)

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 contol over his actions at the time the relevant conduct fell below the objective standard of care

***NOTE: Person on edge of loosing control?***

* So long as s/he struggles to retain some degree of control, may continue to be liable for his/her acts
* Better for that person to release control, damn what may happen, for then s/he releases him/herself from liability!

**SOC: PROFESSIONALS**

**it is expected of a professional man to show a fair, reasonable and competent degree of skill** *Challand v. Bell*

***NEGLIGENT OPERATIONS/PROCEDURES*** *(Wilson v. Swanson)*

1. Surgeon undertakes that he possesses the skill, knowledge and judgement **of the average of the special group or class** of technicians, and will faithfully exercise them
2. To determine: Look to **opinion of the group or class**: If a substantial opinion confirms, there is no breach

* **Errors in judgment** – but not actionable expected by any competent member of this group or class.
* All that is asked for, then, is this: an **honest and intelligent exercise of judgment**
* Do **SOME** experts agree with the course of action?Medical Profession – Gets MORE deference (Ter Neursen)

***DUTY TO DISCLOSE MATERIAL RISKS*** (Reibl v Hughes)

1. **Medical practitioners must:**

* Provide **sufficient disclosure of material risks** (*severity and possibility)* such that **a reasonable person, in the plaintiff’s position**, is capable of **rationally assessing the pros and cons** of undergoing the operation
* **‘unusual or special risks’**, which, though uncommon, should still be disclosed, *if the consequences are serious*

1. ***If Doctor did not provide full disclosure of material risk:***

**Would the plaintiff have changed their mind if they had known the full material risks?**

* MODIFIED OBJECTIVE: - put a reasonable person in the space of the patient, and they know the patients concerns

***LAWYERS*** *(Brenner v. Gregory)*

Must act in accordance with the general and approved practice followed by solicitors,

* **UNLESS:** Such practice is inconsistent with prudent precautions against a known risk

CAUSATION

Burden on plaintiff, but can draw inference: Must be roust, pragmatic, and practical common-sense (Snell)

* Scientific evidence not required

**“But for” test** (Kaufmann)

* Defendant does not need to be the sole cause of the injury, just a necessary cause (not sufficient cause) (Athey)

**Joint Tortfeasers (Cook v Lewis)**

1. Agent acting on principal’s behalf
2. Employee acting on employer’s behalf, **OR**
3. 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

**Material Contribution Test (Resurfice)**

1. Must be impossible to use “but for test” – breaks down

* Impossible to know who did the act (Cook v Lewis),
* Causal chains – impossible to determine actions (Walker Estate)
* Pointing fingers (Clements)

1. Impossibility beyond control of plaintiff
2. Clear defendant breached a duty of car to the plaintiff
3. Breach exposed the plaintiff to unreasonable risk of injury
4. Plaintiff suffered from that from of injury

REMOTENESS

**Defendant is liable for reasonably foreseeable “real risks”** (Wagon Mound 2)

* Can only escape liability if the damage differs IN KIND from what was foreseeable (not severity) (Hughes)
  + Severity is the **THIN SKULL RULE** and is not overruled (Smith v Leech Brain)
* Recovery is not conditional on foreseeability of precise details/sequence of events (Lauritzen)
* Distinction between illness caused from rat bits & rat urine (Tremain)
* You imagine the plaintiff having “reasonable fortitude” (Mustapha)🡪BUT YOU KNOW P’s mental state? DIF
  + Mustapha was NOT a person of reasonable fortitude, could not foresee mental suffering

**NOVUS ACTUS INTERVENUS**

**For intervening act to break chain, it must have been unforeseen**

**BASIC TEST: WAS THE INTERVENING EVENT REASONABLY FORESEEABLE?**

***YES 🡪 THEN ORIGINAL TORTFEASOR LIABLE FOR THEIR DAMAGE TOO!!***

***NO 🡪 THEN NOT LIABLE FOR ADDITIONAL HARM***

An **intervening unforeseeable event** that occurs after the defendant’s negligent act and operates to **precipitate or worsen the plaintiff’s loss**. The defendant is **not liable for the loss precipitated or aggravated by such an event.**

1. **Plaintiff acts negligently on their own** (McKew v Holland) 🡪 warned by doctor to be careful
2. **Intervening medical error**  (Mercer v Gray) 🡪 must be so negligent it would be actionable on its own

* *Negligent defendant has onus to show intervening medical care was negligent* (Papp v Leclerc)
* RELAXED STANDARD: original wrongdoer liable for all reasonably foreseeable injuries subsequently caused by another (Price)

1. **Intervening wrongful or illegal actions**

* But: if defendant could see the wrongful/illegal actions happening, still partially liable (Harris)
* Does not apply when the illegal/wrongful action was what the plaintiff should have been guarding against, but failed to do so because of their original negligence (Hewson)
  + Defendants should have foreseen this happen (again, turns on reasonable foreseeability)

1. **Second negligent act**

* **Is the intervening negligent act reasonable foreseeable?**
* Hysterical conduct not reasonably foreseeable (fire, shouting, causes stampede) (Bradford)

1. **Suicides**

* Suicide CAUSED from original negligent act (or result of insanity from original neg) 🡪 LIABLE
* Suicide deliberate, independent act 🡪 NOT LIABLE

1. **Intermediate Inspections** 🡪 APPORTION LIABILITY BTWN MANUFACTURER/INSPECTOR (Clare Bros)

* Negligent inspection? But product is also negligently manufactured = 2 neg parties, 1 injury

DEFENCES:

1. **Contributory Negligence (APPORTION LIABILITY)**
   * **Plaintff contributes to accident**
   * Butterfield – D leaves poll across driveway, but P rides violently and crashes
   * Scurfield – heli company neg by taking him there, but scurfield failed to adhere to rules
   * No more application of last clear chance doctrine (Negligence Act, s.8)
   * **Plaintiff exposes themselves to risk**
   * Crossing street at night in dark clothes, stands in intersection, malfunctioning lights (Rautins)
   * **Plaintiff fails to take reasonable precautions to minimize injuries**

**Seat-belt defence** (Yuan)

**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

**Child not wearing seatbelt?** –obligation on driver, + if parent present liability is split (Galaske)

1. **Voluntary Assumption of Risk (Full defence)**

* Difference between knowing risks + accepting risks 🡪 YOU MUST ACCEPT RISKS (ex: waiver)
* Consenting to injury is not enough(Hambley v Shepley)
  + Getting in car w/drunk driver when you have no other way home is NOT accepting risks
* Works in sporting context

1. **Illegality (Full defence)**
   * Plaintiff acting unlawfully – can be denied recovery (Hall v Hebert)
   * Plaintiff’s actions violated legal or moral rules, and plaintiff should not be able to “profit” from this
   * **DEFENCE NOT AVAILABLE**: if plaintiff’s illegal actions are irrelevant to the specific claim

*DEFAMATION*

*Libel (written – also broadcast s. 2 Libel & Slander Act)*

1. **Were defamatory,**

* **Does statement lower the plaintiff in minds of right-thinking people in society?** (Sim v Stretch)
  + Right-thinking = orindary member or society (Bou Malhab)
  + Sadness/humiliation not enough (Bou Malhab)
* Multiple interpretations? 🡪 Examine circumstances (do not automatically go to defamatory int.)
* Can be through INNUENDO:
  + **Legal/true** 🡪 Reader knows extraneous facts that make a normal statement defamatory
    - Even if publisher DOES NOT know extraneous facts 🡪 still liable (Cassidy v Daily Mirror)
  + **False/Popular** 🡪 Literally not defamatory, but you can INFER defamation w/o other info
    - Ordinary person is aware of the context (Rapp v McClelland)

1. **Made reference to the plaintiff, and**

**🡪 Doesn’t matter if defendant did not try to identify the plaintiff (**Booth v. BCTV)

1. **Is the statement CAPABLE of referring to the plaintiff *(question of law)***
2. **Would a reasonable person, who knows the plaintiff, knows it refers to the plaintiff? *(…of fact)***

**Defamation of a group? CONSIDER: (**Bou Malhab)

* Size of the group, how organized/homogenous, whether defam targeted members, whether the defam leads other people to try and identify members, whether statements plausible/convincing
  + EX: beer sodden hacks 🡪 referred to Old Bailey Journalists, easily identifiable (Knupffer)

1. **Were published or disseminated**

**Did D intend for anyone but the plaintiff should hear his defamatory utterances?** (McNichol)

* ***Intention is OBJETIVE 🡪 Was it the natural and probably consequences of the D’s actions that a 3rd party heard the defamation?***
  + Would the D have reasonably anticipated a 3rd party hearing the defamation?

**Republication/redissemination 🡪 COUNTS**

* Except for hyperlinks(Crookes v Newton)
* DEFENCE of innocent dissemination (Printing Companies) (Menear)
  1. **Innocent of any knowledge** of the libel contained in the work disseminated by him
  2. **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

***Additional element, if defamation is SLANDER (verbal, no record)***

**(d) Damages/pecuniary loss (+ causal connection between words said + damage occurring) 🡪 Except in the following situations (no damage needs to be shown)**

* 1. Accusation of a crime (unless made to police)
  2. Accusation of contagious disease
  3. Negative remarks about fitness in relation to work, profession, trade or business
  4. Accusation of adultery

*DEFENCES*

**Justification**

**D must show TRUTH of the words, as REASONABLY UNDERSTOOD in light of circumstances** (Bank of BC)

* The truth demonstrated must be RELEVANT to the defamation – cannot be a disconnect (Williams)
* Not sufficient defendant BELIEVED the statements were true (Hulton)

**Absolute Privilege**

1. **Statements made by executive officers “high officials” relating to state affairs** (incl. agents – Dowson)
2. **Statements made during parliamentary proceedings**
3. **Statements made in course of judicial/quasi-judicial proceedings**

* TEST: determining legal rights + affecting status of parties before it (Hung v Gardiner)

**Qualified Privilege:**

* **REQ. Reciprocal interest in receiving communication** (Pleau v Simpson-Sears)
* Defeated if P can demonstrate ***malice:***
* Any spite, ill will, indirect motive, ulterior purpose 🡪 conflicting w/original duty to convey info, dishonesty (Hill v Church)
* Speaking w/knowing or reckless indifference to the truth (Smith v Cross)
  + Jumping to irrational conclusions is NOT reckless disregard
  + D believing truth of statement does not give defence of truth, but PROHIBITS finding malice

1. **In protection of ones own interests**

* Store – protecting own interests by displaying names of cheque-bouncers (yes, recip int- cashier) (Pleau)
* Privilege has a limit (EX: lawyer holding press conference to read out claim – NO! (Hill v Church)

1. **Common or Shared Interest**
2. **Reciprocal interest** (C(LG) v C(VM))
3. **The communication must be “properly communicated” - MANNER (Ex: not newspaper)** (Bereman)
4. **The language used must be “warranted by the occasion that called forth the publication” – WORDS**
5. **Moral or Legal Duty to Protect the Interests of Another** *Watt v. Longdon*
6. Writer is acting on any duty, legal or moral, towards the person to whom he writes, ***or***
7. Where he has, by his situation, to protect the interests of another, and writes under such circumstances

* EX: Realtor protecting interests of other realtor (but no protection, malice found) (Fast v Cowling)

1. **Public Interest**

* Public must have an interest about something in the story itself (Jones v Bennett)
  + EX: Published in newpapers OK 🡪 because ELECTORAL district had interest (Parlett v. Robinson)

**Responsible Communication on a Matter of Public Interest** (Grant v Torstar)

1. **Publication must be a matter of public interest** (not synonymous with what INTERESTS the public)
2. **Publication was responsible; must show diligence in trying to verify allegation**

* Degree of diligence must be proportionate to the seriousness of effects of the defamation
* Higher public importance 🡪 heightened interest in defence working
* More urgency to disseminate 🡪 lower due dillgence required
* Reliability of sources 🡪 impacts degree of diligence required
* Must seek position of plaintiff and accurately report this position
* Must be matter of “reportage” 🡪 reporting something was said, not saying it…

**Fair Comment** (Cherneskey)

1. **Statements must be on a matter of public interest**

* Generally and broadly – not as strict as under qualified privilege

1. **Must be based on fact**
2. **Must be recognizably comments (not statements of fact)**
3. **Comments must be fair**

* Could any person express that opinion based on the facts? (WIC Radio Ltd. v. Simpson)

STRICT LIABILITY (Rylands v. Fletcher*)*

**a) The defendant made a non-natural use of his land; (OBJECTIVE)**

* Legislation/statutes – can help indicate whether something is ordinary (guidance)
* CONSIDER: Time/place, whether government permitted it
* NON-ORDINARY *Tock v. St. John’s Metro Area BD citing Rickards v. Lothian*
  + It must be some special use bringing with it increased danger to others, and *must not merely be the ordinary use of the land* or such a use as is proper for the general benefit of the community.
* EX: pipes thru neighborhood & other city planning = ORDINARY
* It may be that something found naturally on the property cannot attract liability under *Rylands v. Fletcher*. It is not, however, the law that anything that is not found naturally on the property can be subject to strict liability under *Rylands v. Fletcher* if it escapes and causes damage (Smith v Inco)
* But – ordinary use can shift over time in responsible to changing social conditions

**b) The defendant brought onto his land something which was likely to do mischief if it escaped;**

**c) The substance in question escaped; and**

* BC – momentary escape VS. Ontario – escape over time *Smith v. Inco, 2011*

**d) Damage was caused to the plaintiff's property (or person) as a result of the escape**

RYLANS v FLETCHER DEFENCES:

1. Consent
2. Actions of the plaintiff
3. Act of God
4. Deliberate act of 3rd party
5. Statutory authority

* Only when when clear activity authorized will lead to damage complained of

VICARIOUS LIABILITY

**1. Relationship of tortious actor to the (possible) vicariously liable party**

**Is the relationship between TF and 3rd party sufficiently close, it would be just and fair to impose vicarious liability?**

***SUFFICIENTLY CLOSE? - CONSIDER:***

1. **WHAT DEGREE OF CONTROL DID THE 3rd PARTY HAVE OVER THE TF?** (Sagaz)
   * **Level of control the employer has over the worker’s activities**
   * **Central question:** whether the person who has been engaged to perform the services is performing them as a person **in business on his own account**.
   * **If the 3rd party exercised control over the tortfeasor, then it is just and fair for compensation to come from the 3rd party**
2. **“… other factors to consider 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”

EXAM: Argue they have sufficiently close relationship, then alternate argument it is a non-delegable duty

***Relationship not sufficiently close?***

**IS IT A NON-DELEGABLE DUTY? (Lewis)**

1. APPLICABLE STATUES
   * + Whether or not there will be liability for the negligence of the acts of the independent contractor will **depend to a large extent upon the statutory provisions** involved
     + **Statues can set out the nature and the extent of the duty owed by the defendant to the plaintiff**
2. POLICY REASONS
   * + **Even if govt/3rd party divests themselves of responsibility through statutory provision**, court may still find them responsible if they create:

a risky project which confers safety obligations on them

**Nature of the act(s) committed by the tortious actor (in relationship to the relationship)**

1. **Is there precedent** which unambiguously determine on which side of the line between vicarious liability and no liability the case falls”?
2. **IF NO PRECEDENT:**

***Is there a significant connection*** between ***creation or enhancement of risk and the wrong that occurs***?

***CONSIDER:*** (BAZLEY)

1. **opportunity** the enterprise offered employee to abuse his/her power
2. the extent to which the wrongful act **furthered employer’s ends**
3. extent to which wrongful act related to **friction, confrontation, or intimacy** inherent in employer’s enterprise
4. extent of **power conferred** on employee in relation to victim, and
5. **vulnerability** of potential victims to wrongful exercise of employee’s power