TORT LAW

CAN

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NEGLIGENCE

Limitation Period

- **Most 2 years**: General limitation period.
- **Exceptions have no limit**: Misconduct of a sexual nature where claimant was a minor at time of misconduct; sexual assault; assault or battery where claimant was a minor or in an intimate relationship with, financially, emotionally, physically or otherwise dependent on the tortfeasor or person who contributed or consented or acquiesced in the assault or battery.

Duty of Care

Novel Cases

Novel cases require a three-step analysis [***Cooper*** ★]:

- **1: Foreseeability**. Was there foreseeability of damage to P, or someone in that class?
  - **See also**: Subheading on reasonable foreseeability.

- **2: Proximity**. Think of closeness, directness of the relationship, and *fairness* for this relationship to be captured.
  - **Consider**: Physical closeness, social closeness, circumstantial closeness, casual closeness, closeness through representation, assumption of responsibility, reliance, reasonable expectations [McLachlin OG in ***CNR*** ÷★].
  - **Personal relationship**: Existence 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 [***Hill*** ★].
  - **Limited class**: there should be a limited class of possibly effected parties that the D could have had in mind while acting. An undertaking or assumption of responsibility should be sufficient to establish this (ie. lawyer drafting a will) [***BDC*** ★].

- **3: Residual policy concerns**. What impact would this duty of care have on other legal obligations, the legal system, and society? Can focus on positive or negative concerns.
  - **D carries burden** of proving that there are compelling and real potential negative policy concerns not merely speculative.
  - **Consider**: Flood gates, indeterminate liability.
  - **Must not be speculative**.

Reasonable Foreseeability

- **Neighbour Principle:** "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour … persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which hare called in question" [***Donoghue*** ⟲✪].

- **Limits duty of care**: D only owes a duty to P if it was in the reasonable contemplation of D that someone like P might be injured as a result of their actions/omissions [***Amos*** ★].
- **Needed for established/analogous categories**: To establish a duty of care, even for an established category, there must be reasonable foreseeability [***Childs*** ★; ***Haskett*** ⇧].

- **Two requisite questions**:
  - **1. Risk of harm**: Is it reasonable for someone in D's position to be aware of the risk of harm generated from their activities?
  - **2. Foreseeable P**: Would it be reasonable for D to need to be aware that P, or someone like P, may be injured by the risk they created?
    - **Necessary condition for recovery**: If harm suffered by P not reasonably foreseeable, injuries not compensable [***Palsgraf v Long Island Railway*** ⇪].
    - **Third-Order Relationships**: Harm suffered by P as a result of D's breach of duty to a third individual is not actionable (ie, woman sees crash, gets nervous shock and miscarries, cannot sue [***Hay v Young*** ⇪]).

Established and Analogous Categories

- **Established Categories Create Prima Facie Duty**: Does this fall within any recognized category where a duty of care was previously recognized, or is it closely analogous to a recognized category? In that case there is a prima facie duty of care [***Cooper*** ★; ***Childs*** ✯].
  - **You must still consider reasonable foreseeability** [***Haskett*** ⇪].

Physical Harm

- **Product Liability**: Manufacturer owes duty to ultimate consumer to take reasonable care to prevent defects that may cause damage to person or property [***Donoghue*** ↻✪].

Psychological Harm

- **Proximity requirements for recoverability** outlined in ***Devji*** ✯:
  - **1. Foreseeable**: The shock must have been foreseeable [***supra***].
  - **2. Recognized psychiatric injury** beyond emotional upset [***supra***].
  - **3. Serious and prolonged** psychiatric injury [***Mustpaha*** ✯].
  - **4. P was there or in immediate aftermath** of the traumatic event, witnessed it with their own senses [***Devji*** ✯].
  - **5. Close relationship** — mere bystanders unlikely to recover [***supra***].

- **Nervous Shock** is an established category [***Cooper*** ★ ☌ ***Alock v Chief Constable of the South Yorkshire Police*** HL 1991 ⇪].

- **Reasonable fortitude**: Not compensable unless person of reasonable fortitude would have also suffered it [***Mustapha*** ✯].
  - If **D knew P was fragile, may work**: If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant [***Mustapha*** ✯].
  - **Same psychological harm from physical injury** is compensable, as it is an extension of the original foreseeable harm [***Mustapha*** ✯].

Economic Harm

Government Liability

- **NB: The pre-existing duty of care category must account for the kinds of relationships at issue.**

- **Proximity/Duty of Care — Irwin Law** [with clips from ***Cooper*** ✯].
  - **1. Legislation**: Does the legislation have a duty of care in its framework?

- **1.1. Statutory exemption?** Is there an explicit statutory exemption from liability? [***Just*** ★].
- **1.2. Statutory language**: Does it impose a duty of care or obligation? [***Just*** ★].
  - **Statutes conferring power they must exercise (shall)**, damage for the action of authorities in this case will not work unless done so negligently [***Just*** ★; ***Anns*** ꩜ ***Kamloops*** ✪].
  - **Statutes conferring power leaving discretion (may)**. If the authority exercises its power but does so negligently, having made the policy decision, there is a duty at the *operational level* to use due care [***Just*** ★; ***Anns*** ꩜ ***Kamloops*** ✪].
- **2. Private duty?** If there is a duty supported by the legislation, is it a private duty sufficient to found a negligence action, or is it a duty to the public at large?
  - **No economic recovery without** a private law duty [***Kamloops*** ✪].
  - **Not only statute**: Can also arise from relationship between parties created by the statutory framework that results in individual, finite, and specific interaction between gov and claimant, such that gov is acting more like a private party [***Imperial Tobacco*** ★]
  - **Fullowka Test** [***Fullowka*** ★].
    - **2.1. Reasonably defined group**: Is the group to which the legislative regime is directed reasonably contained and defined (ie. not merely an amorphous public)?
      - **Yes**: Particularized suspect in investigation [***Hill*** ★].
      - **Yes**: People working in mines [***Fullowka*** ★] which was smaller and better defined than;
      - **No**: The public at large for a mortgage broker [***Cooper*** ★].
    - **2.2 Nature of interaction**: What is the nature of the actual interactions between the regulator and class of potential P's?
      - **Yes**: Direct interaction of suspect with police [***Hill*** ★].
      - **Yes**: Inspectors at a mine daily [***Fullowka*** ★].
      - **No**: Regulator of mortgage brokers never met investors [***Cooper*** ★].
    - **2.3 Statutory duties relate**: Do the statutory duties actually relate to the class of parties who might be injured?
      - **Yes**: Duties were related to the miners [***Fullowka*** ★].
      - **No**: Trying to regulate mortgage brokers (not clients) [***Cooper*** ★].
      - **No**: "Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out" [***Alberta*** ○].
- **3. Private duty inconsistent?** Unlikely to be recognized if it is inconsistent with other duties, either public or private, falling on the defendant.
  - **Ie** mortgage broker situation in [***Cooper*** ★].
- **4. Remedies available?** Consideration must be given to any remedies — administrative, quasi-criminal, or civil provided for in the legislation.
- **5. Close and direct?** What is the closeness and directness of the relationship between the government and the claimant specifically?
  - [This is really step 2.1]
- **6. Prima facie established — residual factors (is this policy?)** It is at this stage of the analysis that the policy/operational dichotomy continues to play a role.
  - **6.1 Is it pure policy?** If it is policy than gov is immune [***Just*** ★].
    - **Policy is Immune — Policy/Operational Distinction**: Not liable for 'core' matters of policy, but can be held negligent for implementation of it. Characterization rests at nature of decision, not how high up the chain the actor was. **Budgets** are a clue to policy. [***Just*** ★].

    - **Core policy**: "discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations" [***Imperial Tobacco*** ★].
    - **Exception — irrational policy**: If policy is "... irrational [or] taken in bad faith," it can be challenged [***Imperial Tobacco*** ★].
  - **Operational**: If act is implementing the policy, can be liable [***Just*** ★].

- **Established Duties:**
  - **General:** Reasonable and balanced against quality and quantity of risk, budget limits, personnel and equipment available, and nature and quality of risk involved [***Just*** ★].
  - **Real estate inspections** of development by a municipality are an established category [***Cooper*** ★ ꩜ ***Kamloops*** ✪].
  - **Road maintenance** by a gov authority is an established category, gov has a duty to reasonably maintain the highway [***Cooper*** ★ ꩜ ***Just*** ★].
  - **Police duty to suspect**: The police owe a duty to take reasonable care towards a "particularized" suspect who is the subject of their investigation. They have a duty to investigate in accordance with the law, must have reasonable and probable grounds if investigating officer [***Hill*** ★].
    - **Standard**: The standard of care is that of the conduct of a reasonable police officer at the time of the investigation, somewhat flexible [***Hill*** ★].
  - **Police duty to family of victim**: Duty to the family of the deceased victim of a police shooting in respect of an investigation of the incident [***Odhavji*** ☆].
  - **Mine inspectors**: Duty on mine inspectors to exercise care for the safety of miners [***Fullowka*** ★].

Negligent Misrepresentation

- **General test** outlined in ***Cognos*** ★:
  - **1. Duty of care/special relationship** between the representor and representee [***Cognos*** ★]
    - **1.1 Reasonable foreseeability**: D ought to have foreseen that P would rely on the representation [***Hercules*** ★].
    - **1.2 Reliance was reasonable** in this particular circumstance [***Hercules*** ★].
      - **Need one of the following**:
        - D had **direct or indirect financial interest** in the transaction in respect of which the representation was made;
        - **D was a professional** or someone who possessed special skill, judgment or knowledge;
        - The information was provided in the **course of the D's business**;
        - **The information was given deliberately**, and not on a social occasion
        - The information was given **in response to a specific enquiry or request**
  - **2. Misrepresentation**: an untrue, inaccurate, or misleading misrepresentation [***Cognos*** ★]
  - **3. Negligence** [***Cognos*** ★]
  - **3. Reasonable reliance** [***Cognos*** ★]
  - **5. Detrimental reliance** in the sense that harm was suffered [***Cognos*** ★]

- **Limitation of Liability test** outlined in ***Hercules*** ★:
  - **1. Knowledge of identity**: Did the defendant know the identity of either the plaintiff or the class of plaintiffs who would rely on the statement?
  - **2. Knowledge of transaction**: Did the losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made?

- **Established SoC**: Duty to exercise such reasonable care as circumstances require to ensure representations are accurate and not misleading [***Cognos*** ★].
  - **Subjective belief irrelevant**: This is an objective test, claiming you believed the representation is true is not enough [***Cognos*** ★].
  - **Future-oriented statements**: If material to present circumstances they are actionable.
  - **Implied statements**: Actionable [***Cognos*** ★].
  - **Employer situations**: An employer has also been required to provide highly relevant information to a prospective applicant about the nature and existence of the employment opportunity [***Cognos*** ★].
  - **Statutes**: Suggestive but not determinative of the standard of care owed to subjects falling under the statute. A breach of statute is merely evidence of failure, but not determinative [***Hercules*** ★].

Negligent Performance of a Service

- **Proximity analysis** [***BDC*** ★]:
  - **1. Limited class**: Is the class of possibly affected parties limited (so that the defendant-appellant could have had them in mind when acting)?
  - **2. Reliance or undertaking**: Is there one where they'd have knowledge of a potential harm? Eg, drafting a will?

Defective and Dangerous Structures

- **Dangerous defects only**: Nondangerous defects like poor quality or shoddy construction do not fall under this duty, must be a product quality defect that create a real and substantial danger to the occupants of the building [***WPG Condo*** ★].

- **Limits of liability** [***WPG Condo*** ★]:
  - **Inhabitants/purchasers only**: Class of plaintiffs is restricted to the future occupants of the building.
  - Cost of repairs only.
  - Useful lifetime: Duration of potential liability is restricted to the useful life of the building

- **K exemptions ineffective**: Duty of care is owed independently of any contractual provisions or exemptions in the contract of sale between the defendant and the first owner [***WPG Condo*** ★].

- **Policy reasons for this duty**: The encouragement of preventive measures to avoid future damage to persons or to property, the deterrence of poor construction, the avail-ability of affordable third-party liability insurance for builders, and the purchaser's difficulties in detecting latent defects, negotiating contractual protection from the vendor, and securing first-party insurance [***WPG Condo*** ★].

- **Standard of Care**: Produce safe structures [***WPG Condo*** ★].

Relational Economic Loss

D negligently causes harm to a 3rd party, which causes pure economic loss to P.

- **Exclusionary rule**: All K-relational relational economic loss claims except those that fall into a few exceptional categories where there are identifiable policy factors that strongly support recovery are barred [✐ LaForest J in ***CNR*** ÷★].
  - **Exceptions** [***Bow Valley*** ⇧].

  - **1. Possessory or proprietary interest**: Where the claimant has a possessory or proprietary interest in the damaged property
  - **2. General average contribution cases**
  - **3. Joint venture**: Where the relationship between the claimant and the property owner constitutes a joint venture.
    - **Limited, not a general category of duty of care**: Applies only where property integral to the joint venture is damaged and a party to the joint venture who has no proprietary interest in the damaged property has suffered economic losses [***Design Services*** ✯].
    - ***✗*** **Subcontractor/owner** in the tendering process: Does *not* count as a joint venture. There is *no duty of care*. Commercial actors that can foresee and protect themselves form economic loss through K mechanisms should not be able to rely on negligence [***Design Services*** ✯].

- **Very Close Relationship**: There must be a much closer relationship of proximity between the parties than that rising from foreseeability alone — consider physical, circumstantial, casual, and responsibility closeness to find a duty of care, then consider policy to bar [*McLachlin OG* in ***CNR*** ÷★].

Affirmative Action

Relationships of Economic Benefit

- **Positive duty to act has three common features** [***Childs*** ✯].
  - **1. D materially implicated in creation of risk** or control of risk to which others invited
  - **2. Concern for autonomy** of persons affected by positive action proposed
  - **3. Reasonable reliance** (expectation from public that they will take precaution to reduce risk)

- **Invitor-Invitee + Knowledge**: If there is an invitor-invitee relationship, where D has significant knowledge of the risk they are creating there may be an obligation to act to prevent dangers of intoxication [***Jordan House*** ★].

- **Control/Economic Benefit + Danger They Create**: If there is an element of control or economic benefit inuring to the person as a result of the relation, coupled with knowing the person is in a dangerous state, this may create an obligation to act to prevent dangers of intoxication [***Crocker*** ✯].

- **Commercial host + knowledge of drunk customer**: A commercial host can have knowledge of one drinking to excess so has a positive duty to take reasonable steps to control the conduct of customer or protect innocent persons in some way [***Stewart*** ✯].

- **Established situations**: Carriers, innkeepers, warehousemen and public utilities, occupiers liability [***Crocker*** ✯].

- **Social hosts** do not have a similar duty to third parties as commercial hosts do — monitoring alcohol is harder, there's no regulatory regime, and no selling/perverse incentive [***Childs*** ✯].

Relationships of Control or Supervision

- **Those who enter these relationships generally do so willingly**, knowing the situation may require them to positively act to assist others. Generally, the autonomy of the party that might require assistance is restricted or controlled by the one who might fall under a legal obligation.

- **Young passenger, seat-belts**: Driver is in a position of control and has duty to ensure young passenger under 16 wears seat belt, even if parent in car [***Galaske*** ★].

Creation of Dangerous Situations

- **If you create a situation of danger**, even if you do it non-negligently, you are obliged to act to mitigate danger [***Oke v Weide*** – driver knocked over a post non-negligently has duty to fix it ⇪].

Reliance and Undertakings

- **Duty to follow through**: Once one has adopted an undertaking such as to maintain a stretch of road, even if they were not K obligated to do that specific thing, once adopted, must complete as not doing so creates danger [***Mainroad*** ✯].

Duty to Warn

- Duty to warn is a recognized category [***Cooper*** ✯ ∽ ***Rivtow*** ⇪].

- **Manufacturer's duty** as consumers rely on manufactures to produce products, and there is an imbalance of knowledge, and that imbalance must be resolved for the consumer to make informed decisions [***Hollis*** ✯].
  - **Nature of duty is to provide clear communication**, describing any specific dangers arising from the ordinary use of the product [***supra***].
    - **Not just danger**: Applies to things they 'ought to know' ie flammability [***Lambert*** ⇪].
    - **Greater danger** leads to more detailed and forceful the warnings required [***Hollis*** ✯].
    - **Duty persists** over time, new discoveries compel new warnings [***supra***].
    - **Medical products need more stringent warning** if they are to be ingested or otherwise put into the body [***supra***].
      - **Informing learned intermediary** is sufficient to dispose of this duty [***supra***].
  - **CAUSATION is subjective**, as manufactures are likely to overemphasize value and underemphasize risk. Holding the manufacturer to a strict standard of warning consumers of dangerous side effects to these products is therefore desirable [***supra***].

- **Doctor's duty**: Doctors have a duty to warn patients about material risks [***Reibl*** ⇪].
  - **Material risks**: Significant risks that pose a real threat to the patient's life, health or comfort [***supra***].
    - **Consider**: severity and likelihood of harm [***supra***].
- **Unusual or special risks**: Must also disclose uncommon but serious risks [***supra***].
- **Doctors must consider the impact of failure to warn** of particular risks in relation to the particular patient they have before them. "What the doctor knows or should know that the patient deems relevant to a decision whether to undergo prescribed treatment goes equally to his duty of disclosure as do the material risks recognized as a matter of required medical knowledge." [***supra***].
- **CAUSATION**: To see if doctor actually caused harm, take a modified objective test. What would the reasonable patient in their circumstances have done if faced with the same situation? Consider any particular concerns of the patient and special considerations affecting them. Think of their reasonable beliefs, fears, and expectations. Consider the questions they asked the doctor [***Arndt*** ⇪].

Issues of Proof and Evidence

- ***Evidence* of multiple negligent parties**: If there is evidence that Ds were negligent however cannot prove *which* precisely, then it falls to Ds to absolve themselves, else each is jointly liable [***Cook v Lewis*** ⇪; evidence req from ***Valleyview*** ⚡⇪].

- ✗ **Res ipsa loquitur**: Inference that D caused negligence, requires following steps [***Valleyview*** ⚡⇪]:
  - **NO LONGER APPLIES** [***Fontaine*** ★].
  - **1. Control**: The thing that caused damage was under sole management and control of D or of some one for whom he is responsible or whom he has the right to control.
  - **2. Normally needs negligence**: Occurrence is such that it would not have happened without negligence.
  - **3. Absence of direct evidence**: There must be no evidence as to why or how the occurrence took place.

- **Circumstantial evidence**: Res ipsa loquitur does not apply. The trier of fact must weigh the circumstantial evidence with any direct evidence and determine if P has established a prima facie case of negligence. Once this is done, then D must present counter-evidence. [***Fontaine*** ★].

- **One or the other, or *both***: Where evidence supports the idea that both parties were negligent, can determine that both *were* negligent [***Cicuto*** ★].
- **One or the other but *not* both**: Where there is no evidence to support the notion that one or the other was negligent. The court cannot find one party negligent [***Wotta*** ★].

Expert Evidence, Medical Cases

- **Firm expert opinion not needed**: It is not necessary to secure a firm expert opinion in favour of the plaintiff's assertion of cause. Medical experts tend to speak in terms of scientific certainty rather than the lower standard of the balance of probabilities favoured by tort law [***Snell*** ★].

Statutes, Breach or Compliance of

- **Not determinative**. Breaching a statute may be evidence of breaching a standard of care or it may not be [***SK Wheat Pool*** ⇪; ***Ryan v Victoria*** ⇪].

Standard of Care

Reasonable Person

- **Prevent Material Risk**: The reasonable person takes greater care where there is a strong likelihood of damage and takes lesser care when the chance of damage is minimal [***Bolton*** ⟲★]. This test is purely objective.
  - **Take into account**: Likelihood of a known or foreseeable harm; gravity of the harm; burden or cost which would be incurred to prevent the injury [***Bolton*** ⟲★].

Adjustments

- **Children**: Standard of care is a two-part test [***Heilsler*** ★]:

- **1. Is *this* child capable of being negligent in the circumstances**? Take into account age, intelligence, experience, general knowledge, alertness. Subjective test.
- **2. Did the child exercise the care expected** of a child of like age, intelligence, and experience? Objective test in light of reasonable child of this age and experience.
- **NB**: Adult activities like driving — children will be held to standard of reasonable person [*citation needed*].

- **Mentally disabled**. D must show one of these on balance of probabilities [***Fiala*** ★].
  - 1. As a result of his mental illness, the **D could not understand or appreciate the duty of care owed** at the relevant time.
  - 2. As a result of mental illness, the **D was unable to discharge duty of care as he had no meaningful control over his actions** at the time of the breach of his duty.

- **Doctors, general**. Physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances [***Ter Neuzen*** ★].
  - **Customary or standard procedure**: Adhering to standard medical practice is usually sufficient to avoid liability. Courts will only challenge standard practice if it is readily apparent to a layperson that it failed to incorporate obvious precautions [***Ter Neuzen*** ★].
  - **Simple or obviously deficient procedures**: If there are no highly technical matters, the procedures may be inspected and expert evidence rejected [***Walker*** ★].
  - **Rare circumstances**: If doctor complying with standard practice, will not be liable for rare or undiscovered circumstances [***Ter Neuzen*** ★].
  - **Doctor's duty**: Doctors have a duty to warn patients about material risks, test is **modified objective standard, not reasonable person** [***Reibl*** ⇪].
    - **Material risks**: Significant risks that pose a real threat to the patient's life, health or comfort [***supra***].
      - **Consider**: severity and likelihood of harm [***supra***].
  - **Unusual or special risks**: Must also disclose uncommon but serious risks [***supra***].
  - **Doctors must consider the impact of failure to warn** of particular risks in relation to the particular patient they have before them. "What the doctor knows or should know that the patient deems relevant to a decision whether to undergo prescribed treatment goes equally to his duty of disclosure as do the material risks recognized as a matter of required medical knowledge." [***supra***].

- **Police Standard**: The standard of care is that of the conduct of a reasonable police officer at the time of the investigation [***Hill*** ★].

Causation

But-For Test (Default)

- **Default**: This is the default test. **Onus on P** [***Snell*** ★; ***Resurfice*** ✪].

- **But for the negligence of D**, on a balance of probabilities, the injury would not have occurred. [***Snell*** ★].
  - **Necessary, not sufficient cause** [***Snell*** ★].

- **Flexible, common sense approach**: Causation rules must not be applied in a strict or rigid manner, there should be a flexible, pragmatic, and common-sense approach [***Snell*** ★].

- **Inference**: Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss [***Snell*** ★].
  - **Where facts lie particularly within the knowledge of the defendant**, little affirmative evidence of cause-in-fact is required of the plaintiff and, in the absence of evidence to the contrary, it is fair to make an inference of cause-in-fact. It is not appropriate, however, to reverse the burden of proof [***Snell*** ★].
  - **D may argue not necessary**: Where 'but for' causation established by inference only, it is open to the D to call evidence that negligence was not a necessary cause of the injury [***Clements*** ★].

- **Multiple independent sufficient causes**: But for test inadequate in situations where multiple independent sufficient causes may bring about a single harm. Where this is the case, apply the materially increased contribution test so long as the contribution was more than de minimis [***Walker*** ✪].

Material Contribution to Risk

- **Material increase in risk**: Did D's actions materially contribute to the risk of harm to the P?

- **Only available if two conditions are met** [***Resurfice*** ✪].
  - **1. Impossible to prove causation with but for**: It must be impossible, because of factors beyond the plaintiff's control (such as the limits of scientific knowledge [NB: Not required due to ***Clements*** ★) for the plaintiff to prove that the defendant's negligence caused the plaintiff's loss on the but for test [***Resurfice*** ✪].
    - **1.2 But for multiple tortfeasors**: Plaintiff must establish that his harm would not have occurred but for the negligence of two or more tortfeasors, each of whom is in fact possibly responsible for the loss, thereby creating a risk of the harm [***Clements*** ★].
    - **2.2 Unable to prove cause, multiple independent sufficient**: Plaintiff through no fault of his own is unable to prove that either one or the other is the but for cause of the harm because each can point to the other as the possible cause, thereby creating the impossibility of proving causation on the balance of probabilities against either one [***Clements*** ★].
  - **2. Harm within scope of risk D created by their breach**: The harm suffered by the plaintiff must be of a kind that was within the scope of the risk generated by the defendant's negligent conduct [***Resurfice*** ✪].
  - ***Examples***: Where it is impossible to say which of two simultaneous negligent acts caused the harm. Where it is impossible to prove what a particular person in a causal chain would have done had the defendant not been negligent [***Resurfice*** ✪].

Asbestos, Fairchild

Fairchild ⟲★

In this case it was held that two or more defendants, each of whom negligently exposed the plaintiff to asbestos, were jointly and severally liable for the mesothelioma suffered by the plaintiff since each had materially increased the risk of contracting the disease.

So long as the defendant's contribution to the risk was more than minimal, responsibility was warranted, albeit that there were competing wrongful or innocent causes. In Clements, the Supreme Court recognized that these latter two decisions, in particular, went beyond the current Canadian position.

C was employed at different times and for different periods by both A and B; A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma; Both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that C inhaled excessive quantities of asbestos dust; C is found to be suffering from a mesothelioma; Any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted; and C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A and B taken together, *C is entitled to recover damages against both A and B*.

- There are policy considerations on both sides:
  - It is unjust to hold an employer liable for damage that he did not cause.
  - It is unjust to deny the P a remedy for grievous harm when his employers owed them a duty to protect them against that harm, the harm can only have been caused by the breach of that duty, and science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm.
- *The injustice to the employee is greater than the injustice to the employer*.

Remoteness

Reasonable Foreseeability

- **Type of harm** must be reasonably foreseeable to create liability [***Wagon Mound #1, 2*** ⇪].
  - **Not extent of damage or the precise way** in which the harm happens [***Hughes v Lord Advocate*** ⇪].
  - **Exact nature needn't be anticipated**, only damage of the same kind needs to be reasonably foreseen [***Assiniboine*** ★].

Intervening Acts

- **Novus Actus Interveniens**: An act which causes or contributes to P's injury after the D's breach.
  - **Can result in 100% liability on the intervening actor**.

- **Segment the causal acts**: Can bridge substantial gulf between the negligent act and the ultimate damage by dividing the causal sequence into a number of steps, each of which is a readily foreseeable consequence of the preceding step. A narrative from step to foreseeable step allows the gulf to be spanned in a persuasive way with apparent fidelity to the foreseeability principle [***Assiniboine*** ★].

- **Intervening medical care**: A person acting in negligence may be held liable for future damages arising in part from subsequent acts of negligence and in part from his own negligence, where each subsequent negligent act/omission and consequent damage was reasonably foreseeable as a possible result of his own negligence. [***Price*** ★].

- **Intervening acts, generally**: Consider the following factors [***Bradford*** ★]:
  - **1. Is it 'fairly to be regarded as within the risk created** by D's negligence?' [***supra***]
  - **2. Could a reasonable person in the position of D reasonably anticipate** the interventions claimed to be the new cause of the damages? [***supra***]

- **NB**: Intervening act does not break the chain of causation *just because* it's negligent, however D is only liable for injuries that emanate from their negligent act [***Dudek*** ⇧].

Learned Intermediary

- **Can discharge duty to warn where appropriate**: If there is a legitimate obstacle between manufacturer and end-user communicating, in cases where the product is highly technical and intended to be used only under supervision of experts, or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product (ie prescriptions), then manufacturer may inform the learned intermediary [***Hollis*** ★].
  - **Passing-on of info presumed**: It is presumed that if the manufacturer gives the learned intermediary all of the necessary information, to put them in the same position as the manufacturer, that the intermediary will pass the information on [***supra***].

Fortitude, Psychological Harms

- **Reasonable fortitude, psychological harms**: Some harms cannot be foreseen, we assume a person of reasonable fortitude (NB: This does not undermine thin skill rule) [***Mustapha*** ★].
  - **Same psychological harm from physical injury** is compensable, as it is an extension of the original foreseeable harm [***Mustapha*** ★].
  - **Eggshell personality**: Similar to thin skull rule, but for psychological harms. If the psychological harm is not too remote or damage of a similar kind was caused, then the injury will be sufficiently proximate [***Gray*** ⇧].

- **Thin Skull Rule**: Makes the tortfeasor liable for the P's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take the victim as he finds him, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person [***Athey*** ⇧].

- **Crumbling Skull Rule**: If the pre-existing condition has produced some debilitating effects prior to the accident or is, independently of the accident, likely to cause some disability in the future, the defendant is not liable for the full extent of the damage. The defendant is liable only for what she has caused and damages are calculated to compensate the plaintiff to the extent that the defendant has worsened the plaintiff's underlying condition.
  - **Only when there is "measurable risk"** that pre-existing condition would have detrimentally affected plaintiff in future, regardless of defendant's negligence, should the test be applied to adjust damages [***Zacharias*** ★].

Defences

- **Compliance with statute**: Compliance with a statute may be evidence of reasonable care, but is not sufficient to demonstrate lack of negligence. The more specific a statute is in terms of conduct required/the less discretion it permits, the more likely it is that the courts will find compliance to be sufficient [***Ryan v Victoria*** ⇧].

- ✗ **Last clear chance**, that a plaintiff's claim is barred if he could have avoided an accident with the exercise of reasonable care, is barred by s8 of the *Negligence Act* [***Skinner*** ★].

Contributory Negligence

- **Incomplete defence**: Does not absolve of all liability [***Crocker*** ★].

- **Reduces damages** awarded [***Galaske*** ★].

Apportionment Under the Negligence Act

Apportionment of liability for damages
1.1 If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault . . .
1.3 Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed . . .

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

Questions of fact
6. In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact . . .
Further application

8.This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so. (Last clear chance is barred)

Examples

- **No seat belt, accident, parent in car**: If young P gets injured in accident because they did not wear seatbelt, driver will not be fully responsible of parent in car [***Galaske*** ★].

Voluntary Assumption of Risk

- **Complete defence**: Absolves D of all liability [***Crocker*** ✯].

- **Requires evidence that P is waiving right to reasonable care**: they must be consenting to *a lack of reasonable care that would produce the injury — not just to a risk of injury generally*. Sports contexts successfully employ this defence. [***Hampley*** ⇪; ***Chamberlin*** ✯].
  - **Physical and legal risk**: P must have assumed *both* the physical risk (risk of the actual injury) and the legal risk (risk that the damage will have no recourse in law) [***Chamberlin*** ✯; [***Crocker*** ✯].
  - **Clear and express proof** that D was *voluntarily* and *knowingly* assuming the legal risk is required (though this may be an implied agreement) [***Chamberlin*** ✯].

Illegality

- **Applies only if** l**egal system's integrity at risk**: The defence can operate only when the integrity of the legal system is threatened by allowing the claim. This can happen in two scenarios [***Hall*** ✯]:
  - **Direct profit from illegal conduct**: A plaintiff is not permitted to use a tort action to make a direct profit from illegal conduct [***supra***].
  - **Circumventing, subverting, or negating a criminal penalty**: A tort action may not be used to circumvent, subvert, or negate a criminal penalty [***supra***].

- **Cannot stem from illegal activity***: P may recover from injuries so long as it does not stem from the illegal act itself — consider if it is a situation where P is being rewarded for their illegal behaviour or merely being compensated for someone else's negligent acts [***Hall*** ★].

- **Consider instead**: Contributory negligence.

STRICT LIABILITY

Creates liability for harm caused by something brought onto land for a non-natural use and it escapes. Does not require proof that the D acted with intent or negligence: liability imposed upon proof of elements.

Non-Natural Use of Land

- **Rule in *Rylands***: To establish liability under the rule in *Rylands*, the plaintiff must show a non-natural use of land, an escape of something likely to do mischief from the land (brought on for a non-natural use), and damage [***Rylands*** ⏲✪].

  - **Kind of harm must have been suffered**: P must have suffered the kind of harm they allege [***Inco*** ★].

  - **Foreseeable harm**: The harm must have been foreseeable — claims for historic pollution are difficult [***Inco*** ★].

  - **Non-natural use** can evolve over time (eg sewers are now a natural use), also general benefit or utility of the defendant's land use is relevant (eg sewers) [***Tock*** ★].
    - **Must be very non-natural**: Must be a special, extraordinary, or unusual use of the land nor with incidental benefit to the community, eg creates risk beyond operation of a refinery in an industrialized area [***Inco*** ★].

  - **Single instance enough**: There is no need for continual interference with the property. An isolated incident causing physical damage may be sufficient [***Tock*** ★].
    - **Must be unintended escape**: applies only to the unintended escape of emissions such as those caused by a mishap or misadventure in the course of the defendant's operation — rule in Rylands does not apply to intended escapes or inevitable ones [***Inco*** ★].

Animals

- **Animal as group**: *Ferae naturae* — animals deemed dangerous as a group. Strict liability applies.
- **Meaning of "escape" in this context**: The animal is out of the control of the owner, not, for example, out of the bounds of a park [***Cowles*** ★].

- **Individual animal**: *Mensuetae naturae* — individual animals deemed to be dangerous
  - **Scienter action**: If this individual animal is known to be dangerous and injures the plaintiff, then strict liability imposed.
  - **Onus on P**: P must show that there was evidence that the animal had a propensity to harm humans.

Defences to Non-Natural Use of Land

Consent

- **Explicit Consent**

- **Implicit consent**
  - **Evidence of benefit**: It can be found when it seems the plaintiff benefits from the presence of the mischievous thing that subsequently escaped (and no evidence plaintiff complained before escape).
    - **Example**: ***Rickards v Lothian*** ⇧. D wins, because P implicitly consented to the presence of the building's water-system because he benefited from it and he did not object to its presence.

- **Onus on D** to show P consented to the activity on defendant's land that led to escaped-mischievous substance harming plaintiff's interests.

Actions of the Plaintiff ('Default')

Used in ***Cowels*** ★.

- **Akin to contributory negligence**.
- **P did something that contributed** to the harm in a causal sense. Doesn't need to be negligence (but often is)
- **Not a complete defence**; just apportioning damages through liability.

Act of God

- **Restricted to exceptional circumstances**: Generally restricted to extraordinary acts of nature which are not reasonably foreseeable (at the time) [mentioned in ***Rylands*** ⟲✪].
- Idea of strict liability is to make people think carefully about preventing something from escaping — if they couldn't've foreseen (and thus prevented) the escape, liability serves no purpose.

Deliberate Act of Third Party

- **Must be deliberate**: Requires the defendant show the third party acted deliberately to do that thing that caused the escape or harm [***Rickards v Lothian*** ⇧].
  - **Example**: ***Rickards v Lothian*** ⇧: A third party had deliberately plugged the wash-basin on the upper floor, causing the water to escape and flood the lower floors.

Statutory or Otherwise Legitimate Authority

- **1. Applies to act in question**: The statutory provision explicitly authorized the particular activity in question [***Ryan v Victoria*** ⇧].
- **2. Escape inevitable consequence**: The escape was an inevitable and necessary consequence of doing the thing that they were authorized to be by statute. [***Ryan*** ⇧; ***Tock*** ★]
  - **No other way**: D must show that there was no other way to do the thing the statute authorized.
- **Eg *Ryan*** ⇧: D argues that guy getting his wheel caught in track was the inevitable consequence of doing what they are allowed to do under the statute. In this case, there was another option: To use a wider flange way. But it was cheaper not to, so they didn't.

VICARIOUS LIABILITY

Employment

Cases With Precedent

- **Authorized Acts, Salmond Test**: Employers are vicariously liable for acts of employees which are authorized by their employers.

- **Unauthorized acts**: *An employer is strictly liable for the torts of her employees committed within the course of their employment*. The vicarious liability of an employer has been justified on **two broad policy grounds**: the provision of a ***just and practical remedy*** and the ***deterrence of future harm*** [***Bazley*** ★].

  - **Precedent**: If there is unambiguous precedent in the situation, it must be applied [***Bazley*** ★]. The precedent needn't 'land on all fours', and mainly serves as a guide [***Oblates*** ☆].
    - **Employee acting in furtherance of employer's aims** (agency/authority)? [***London Drugs*** ⇧; ***Bazley*** ★]
    - **Creation of a situation of friction** ('creation of risk'), ie bartender assaults drunk patron [***Bazley*** ★]..
    - **Employee theft or fraud** (ie bank employee steals clients money) [***Bazley*** ★].

Indy Contractors, Sufficiently Close Relationships

- **Indy contractors**: The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account [or on account of his employer]. The level of control is the determining factor. This will be determined based on the facts and circumstances of each case with a close examination of the total relationship [***Sagaz*** ★].
  - **Factors to consider** include [***Sagaz*** ★]:
    - Whether the worker provides his or her own equipment
    - Whether the worker hires his or her own helpers
    - Degree of financial risk taken by the worker
    - Degree of responsibility for investment and management held by the worker
    - Worker's opportunity for profit in the performance of his or her tasks

Cases Without Precedent

- **No precedent**: Consider policy supporting vicarious liability, is this a just and practical remedy, will it deter future harm? [***Bazley*** ★].

  - **Placed in position that enhanced risk**: The employer is liable where the employee is placed in a position that creates or enhances the risk of the wrongful act [***Bazley*** ★].
    - **Power given increased material risk**: It is not sufficient that the employer provided the opportunity for the wrongdoing. The employer's enterprise and the power given to the employee must have materially increased the risk of the wrongdoing [***Bazley*** ★].
    - **Sufficiently close connection**: The enterprise and power given must provide a sufficiently close connection between the employment and the wrongful act to justify the employer's responsibility [***Bazley*** ★].

- **Connection between risk created and nature of tort**: There must be a sufficiently strong connection between the kind of risk created and the nature of assault to warrant vicarious liability [***Jacobi*** ⇪].

- **Consider** [***Bazley*** ★]:
  - Opportunity afforded the employee to abuse his power.
  - The extent to which the wrongful act may have furthered the employer's aims.
  - The extent to which the act was related to friction, confrontation, or intimacy inherent in the employer's enterprise.
  - The extent of the power conferred on the employee in relation to the victim.
  - The vulnerability of potential victims to the wrongful exercise of the employee's power.

Unions, Multiple Employers, Foster Parents

- **Unions**: Unions do not have sufficient control over members to impose vicarious liability.
  - Unions don't choose or control who members are. Although relationship between union and members is contractual, relationship also determined by statutory regime and labour law. Members of union have unqualified right to speak out against agenda of bargaining agent.

- **Multiple employers**: An employee may have more than one employer. If both the general employer and the temporary employer have some degree of control over the temporary employee it will no longer be necessary to make a choice between them [***Blackwater*** ★].

- **Foster parents** are *not* employees of the government [***KLB*** ★].

Non-Delegable Duties

- **Definition**: This is a duty not only to take care, but ensure that care is taken [***KLB*** ★], it means that the gov must make sure that an indy contractor also takes care [***Lewis*** ★].

- **Legislation may impose**: Legislative provisions may impose an obligation on a province to carry out a duty, and these will likely be non delegable [***Lewis*** ★].
- **Alternative approach**: The existence of a non-delegable duty depended on the nature of the relationship between the parties, the nature and extent of the duty, and the propriety of holding the defendant liable for the wrongful conduct of the independent contractor [McLachlin G in ***Lewis*** ★].

DEFAMATION

- **Purpose** is to protect reputation and dignity [***Bou Malhab*** ★], countervailing interests are freedom of expression [***Grant*** ★].
- **P may be person or corporation**.
- **Burden is on D** — the law presumes the defamatory statement is false, and P must prove that they are true [confirmed in ***Bank of BC*** ★].
  - **Good motive is not a defence**.
- **Strict liability offence**, unless a defence is used that incorporates malice.

Libel and Slander

- **Libel**: Defamation in a physical form (typically written).
  - **No proof of damage is required**, as it is more permanent than slander (permanence is the dividing line) and it's more deliberate than slander.
  - **Includes radio broadcasts**, as these words are originally spoken. Statute also defines broadcasts as being 'published' and being, therefore, slander [s2 ***Libel and Slander Act*** ♕].

- **Slander**: Verbal defamation, leaving no record.
  - **Proof of damage is required in most cases**, eg loss of business caused by statement publication.
    - **Exceptions, where no proof is needed**: An accusation of a crime (unless accusation made to the police); an accusation of having a contagious ('loathsome') disease; negative remarks concerning one's fitness in relation to work, profession, trade, or business; an accusation of adultery ('unchastity of a woman').

Elements of Defamation

- **What is the sting** of the statement? Sometimes the arrangement of statements is more important than what was actually said or the literal truth [***Bank of BC*** ★]

- **1. Defamatory Statement**
  - **Defined**: Words that bring the individual named into hatred, contempt or ridicule [***Murphy*** ⇪], would the public think less of P [***WIC Radio*** ★]?
    - **Consider** [***WIC Radio*** ★]:
      - Is this a statement of opinion or fact?
      - How much is publicly known about P?
      - What is the nature of the audience?
      - What is the context of the statement?

  - **Objective test**: "Injury exists where an ordinary person believes that the remarks made, when viewed as a whole, brought discredit on the reputation" of the victim [***Bou Malhab*** ★].
    - **Ordinary person**: Someone who is reasonably thoughtful and informed, not overly fragile or sensitive, which has some common sense, who does not 'jump to conclusions' as to the meaning of something, but takes a balanced approach — this is a guide, not a stringent test [***Bou Malhab*** ★].

  - **Innuendo** — defamatory nature can be shown through literal sense of statement or through innuendo [***Rupic v TorStar*** ⇪].
    - **Legal/true innuendo**: Those receiving the statements know of extraneous circumstances that would give the publication a defamatory meaning. Audience would know these circumstances.
    - **Popular/false innuendo**: if an ordinary individual receiving the statements would be able to infer something defamatory beyond the plain and literal meaning.

- **2. About P**
  - **Question of law**: can the statement be regarded as capable of referring to the plaintiff? [***Knuffer v London Express*** ↻⇪]

- **Question of fact**: Does the statement in fact (in the minds of reasonable people, who know the plaintiff) refer to the plaintiff? [***Knuffer v London Express*** ⟲⇧]
  - **Not aim, but landing**: "The question is not so much who was aimed at as who was hit." [***Corrigan v Bobbs-Merrill*** Co ⟲⇧]

- **Defamation of group**: A group may be defamed if there is direct and personal (though not individually unique) 'personal injury', the statement must be such that it allows individuals to be picked out and defamed [***Bou Malhab*** ★]
  - **Consider** [***Bou Malhab*** ★]:
    - P's relationship to the group
    - **Size of the group**
    - How **organized** and homogenous it is
    - If the group is visible in the community or historically disadvantaged
    - Whether the defamatory material **targeted members of the group** or was more general
    - Whether the defamatory material might **lead people to try to identify particular individuals** within the group (or, conversely, not to care much about this)
    - Whether the defamatory statements are **plausible and/or convincing**
    - Seriousness or extravagance of the allegations

- **3. Statement Was Published/Disseminated**
  - **Publication means** D, by an act (can be anything, even expressive dance), communication to a third party who received it [***Crookes*** ★ citing ***McNichol*** ⇧].
  - **Includes radio broadcasts**, as these words are originally spoken. Statute also defines broadcasts as being 'published' and being, therefore, slander [s2 ***Libel and Slander Act*** ♕].

  - **Republication**
    - **Hyperlinks and footnotes**: A hyperlink by itself is content-neutral. Referencing on its own does not involve exerting control over the content. Communicating something is very different from merely communicating that something exists or where it exists, especially when the linked content can change at any time without notice [***Crookes*** ★].
      - **Hyperlinks can be defamation** where a defendant uses a reference in a manner that in itself conveys defamatory meaning about the plaintiff [***Crookes*** ★].

  - **Innocent dissemination rule**: Those who play a secondary role in the distribution system, ie news agents, booksellers, and libraries, may escape liability by showing [restated in ***Crookes*** ★, where extending this to hyperlinks is suggested by Deschamps J]:
    - **1. No actual knowledge**: They must have no actual knowledge of the alleged libel.
    - **2. No notice of libel**: They are aware of no circumstances to put them on notice to suspect a libel.
    - **3. No negligence**: They committed no negligence in failing to find out about the libel.

Defences

Justification or Truth

- **Statements presumed false, D may prove that they are true, this represents a justification**.
  - **Belief insufficient**. "A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably

believing it to be true, but that in fact the statement was false. Under these circumstances he has no defence..." [***Hulton v Jones*** ⟲⇪].
- **Literal truth insufficient if misleading** [***Bank of BC*** ★].

Absolute Privilege, Parliamentary Privilege

- **Malice plays no role**, is irrelevant in absolute privilege.

- **Negates action**: If covered by any of the absolute or Parliamentary privilege scenarios, there can be no action in defamation [***Hung*** ★].

- **High Officials**: Statements made by high officials referring to affairs of the state.

- **Parliamentary Privilege**: Statements made in the House, the Senate or otherwise during Routine Proceedings or Parliamentary Proceedings of any kind.

- **Judicial and Quasi-Judicial Proceedings**: "An absolute privilege also attaches to all proceedings of, and to all evidence given before, any tribunal which by law, though not expressly a Court, exercises judicial functions — that is to say has power to determine the legal rights and to effect (sic) the status of the parties who appear before it." [***Hung*** ★; citing ***O'Connor v Waldron*** ⟲⇪, citing a text].
  - **Even if does not go to proceedings**: Privilege applies even if the body does not go to proceedings [***Hung*** ★].

Qualified Privilege

Test

- **1. Reciprocal duty must exist**, ie duty on the publisher to convey the material and an interest or duty on the person receiving it to receive it.
  - **Also**: The communication must be 'properly communicated,' and the language used must be 'warranted by the occasion that called forth the publication.'
  - **Duty to convey is an objective test**. A belief that you have the duty is not enough.

- **2. No malice** [***Botiuk*** ⇪].
  - **Definition**: "Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard." [***Botiuk*** ⇪].
    - **Not only ill will**: "not necessarily personal spite or ill-will; it may consist of some indirect motive not connected with the privilege" [***Sun Life Assurance*** ★]

  - **Onus on P to establish malice** [***Sun Life Assurance*** ★].
    - **Need only a 'scintilla'** of evidence [***Sun Life Assurance*** ★].
    - **Malice is dominant motive?** To destroy the privilege the desire to injure must be the dominant motive for the defamatory publication, knowledge that it will have that effect is not enough [***C(LG) v C(VM)*** ⇪].

  - **Categories of malice** [***Hill*** ⇪]
    - **1. Spite** or will will.
    - **2. The primary purpose of the statements is ulterior to the duty** that creates the privilege.

  - **3. Defendant spoke dishonestly** or with reckless disregard for the truth.
    - **Honest belief**: Does not apply if speaker honestly believed the statements were true, must have been indifferent to the truth [***Smith*** ⇪].

- **3. Statements cannot exceed the occasion of privilege** [***Botiuk*** ⇪].
  - **Reasonably appropriate?** Consider "if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated." [***Botiuk*** ⇪].
  - **Exceed purpose?** Consider if the communication exceed the purpose of the privilege. Were they being 'highhanded and careless'? [***Hill*** ⇪].

Situations That May Attract Qualified Privilege

- **Protection of one's own interests**: "Statements which are fairly made by a person in the conduct of his own affairs in matters where his own interest is concerned are prima facie privileged." This includes economic and personal interests, and employer's interests [***Sun Life Assurance*** ★].

- **Common or shared interest**: A communication is protected by qual'd privilege if it is made in furtherance of a common or mutual interest shared by the 'publisher' and recipient of the communication [***C(LG) v C(VM)*** ⇪].
  - **Examples**: Therapists, mothers [***supra***].

- **Moral or legal duty to protect another's interest**: "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*** ↻⇪].
  - **Moral/social duty**: "a duty recognized by English people of ordinary intelligence and moral principle" [***Watt v Longsdon*** ↻⇪]

- **Public interest** "seldom assists media organizations" [McLachlin OG in ***Grant*** ★].
  - ***Globe and Mail v Boland*** ⇪: privilege should be used very sparingly. Category cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, "to the world."
  - ***Parlett v Robinson*** ⇪ **narrows Boland rule**: can publish to the public generally if it has a bona fide interest in the matter communicated. In this case, "the group that had a bona fide interest in the matter was the electorate in Canada. Hence the privilege was not lost."

Responsible Communication on a Matter of Public Interest

Elements outlined in ***Grant*** ★. Note that this applies only to reporting, not to op-eds [*citation needed*]

- **Public interest**, not what interests the public. Must be legitimate. Intentionally vague.
- **Responsible publication**. Journalist was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.
  - **Consider**:
    - **Seriousness/diligence balance**: Diligence should increase the more serious the potential effects on the defamed individual are.
    - **Public importance**: The more public import there is the more warranted jury may be in finding the communication was responsible.

- **Urgency**: As urgency of the information increases, need to verify decreases (this is not an excuse for irresponsible reporting, however).
- **Reliability of source**: The degree to which a source is reliable or not affects the degree of diligence required, ie, finding an additional source.
- **P's position sought**: Reporter should diligently seek P's position and accurately report it.
- **Necessary to report**: Degree to which the defamatory material was necessary as part of the information provided in the public interest.
- **Matters of reportage**: Statements made should be matters of reportage, ie, the matter of public interest is the fact something was said, so the press is simply reporting on the fact and not just repeating the defamatory material.

Fair Comment

With modifications, the adoption of Dickson J's dissent, in ***WIC Radio*** ★.

- **Malice**: The defence may be defeated by malice [***Cherneskey*** ✪].
- **Not available for publisher** (as they don't honestly believe it) but for commenter [***Cherneskey*** ✪].

- **Public interest**: Comment must be on a matter of public interest [defined more broadly than in qualified privilege] [***Cherneskey*** ✪].
- **Fact**: Comment must be based on fact [***Cherneskey*** ✪].
- **Recognizable as comment**: The statement must not be confusable with facts [***Cherneskey*** ✪].
- **Comment is fair**. This simply means that the party making it has an honest belief in the comment. This includes the following **objective** test [***WIC Radio*** ★]:
  - The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts [***supra***, adopting from AUSHC].
    - An opinion that could honestly have been expressed on the proved facts by a person "prejudiced . . . exaggerated or obstinate [in] his views" [***supra***].

Consent

- One can consent to defamation.

CASES BY SUBJECT

TABLE OF CASES

NEGLIGENCE

Alberta v Elder Advocates of Alberta Society

○ SCC 2011

🐦 AB seniors; long term care; duty of care; not actually in stat scheme.

Facts

Long-term care facilities were funded in part by provincial funds and in part by charge levied on residents. In principle, government was responsible for costs of residents' medical care, but residents could be asked to contribute to costs of their housing and meals through payment of accommodation charges. Alleged that government artificially elevated required resident contributions to subsidize medical expenses that were properly responsibility of government.

Issues

Was there a duty of care owed by AB?

Reasons

Legislative scheme did not impose duty of care on province. Legislative scheme did not impose duty on Crown to act in relation to class members with respect to accommodation charges. Plaintiffs failed to point to any duty to audit, supervise, monitor or administer funds related to accommodation charges in provisions.

Precedents

"Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out"

Amos v NB Electric Power Commission

★ SCC 1977

🐦 Tree near wires; children play in area; RF; duty imposed if D creates foreseeable risk to P; RF goes to sort of harm ensued & class of person.

Facts

D had allowed a poplar treat to grow up through electricity lines so that they were obscured from sight. Children known to play in the area. P was 9, climbed tree, severely injured when trunk or branch hit wires.

Issues

Did D owe a duty of care to P; was the risk reasonably foreseeable?

Reasons

A reasonable person would have foreseen the risk and trimmed the tree.

Precedents

Duty is imposed only if the defendant's conduct created a foreseeable risk of injury to the plaintiff. Reasonable foreseeability goes to both the sort of harm that ensured and the sort of person who was injured

Anns v Merton London Borough Council

UK 1978

🐦 Council didn't inspect homes; creates 2 stage duty of care analysis; 1 proximity/reasonable foreseeability creates prima facie; 2 limits.

Facts

D (local council) approved building plans for a subdivision, buildings not structurally sound, D failed to inspect.

Issues

Does D owe a duty of care to the occupiers of the homes in the affected subdivision?

Reasons

First determine if there is sufficient proximity between the parties such that carelessness on D's part may cause damage to another. If so, there is a prima facie duty of care.

If yes, second, consider if there are any reasons which should limit the scope of this duty or the class of person to whom the damage is owed.

Precedents

Two-stage test to find duty of care:
1: Is there sufficient proximity such that it would be reasonably foreseeable that carelessness on D's part may be likely to cause damage to P? If yes, a prima facie duty of care is established.

2: Are there any policy considerations which ought to negate or limit the:
A: Scope of the duty.
B: Class of person to whom it is owed.
C: The damages to which a breech may give rise?

BDC v Hofstrand Farms

★ SCC 1986
Courier service; did not deliver in time; negligent performance of service; proximity analysis.

Facts

Documents need to be submitted to LTO by a certain deadline in prince George; party involved gives envelope to courier company BDC; they don't get the opportunity on time; and as a result a third party loses money on business dealing. Want to sue courier company.

Issues

What is proximity for negligent performance of a service?

Reasons

Proximity: Not sufficiently close and direct to establish prima facie DoC. Not a limited class of possibly effected parties because D's didn't have knowledge of parties or importance of documents.

Precedents

To find sufficient Cooper proximity, there should be a limited class of possibly effected parties that the D could have had in mind while acting. An undertaking or assumption of responsibility should be sufficient to establish this (ie. lawyer drafting a will).

Bolton v Stone

↻★ UK 1951
Cricket; ball hit P; small risk; not reasonable to take account of it.

Facts

P was struck by a cricket ball while she was standing in the street outside her house. The ball was hit out of D nearby cricket ground in the course of a match. In the past thirty years, approximately six balls had been hit onto that street. P argued that, once a

single ball had been hit there, it was foreseeable that it might happen again and that someone might be injured. It was, therefore, negligent to continue to play cricket on that ground.

Issues

Is it enough to make an action negligent to say that its performance may possibly cause injury or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence?

Reasons

To demand that the conduct of citizens be entirely free of all foreseeable risk would be not only excessively burdensome but, in the light of human nature, impractical. The Court drew a distinction between foreseeable risks that are substantial and material and foreseeable risks that are highly unlikely or mere possibilities. Reasonable people avoid creating material and substantial risks of foreseeable harm. They cleanse their conduct of unreasonable risks, not every foreseeable risk. While the case was close to the borderline, it was not, in the opinion of the Court, negligent to expose the plaintiff to such a small risk of being hit. This is not an easy line to draw at the margins and much will depend on the other factors influencing the application of the standard of care.

The severity of the threatened harm was also a factor in favour of the defendant in Bolton. A cricket ball does not present a risk of serious injury or death. A laceration or a bruise is the most that one might anticipate. If the ground had been used as a training facility for track-and-field athletes and it was a discus or javelin that was occasionally thrown into the street, the decision would probably have gone against the defendant.

The Court appears to have decided the case on the assumption that the only way to remove the risk of personal injury to those outside the cricket ground was to stop playing cricket at that location. This significant economic and social cost probably supported the Court's decision in favour of the defendant. The decision might have been different if, for example, the plaintiff was able to establish that a minor realignment of the cricket pitch or a small increase in the height of the boundary fence would have prevented balls from being hit out of the ground.

Precedents

The reasonable person takes greater care where there is a strong likelihood of damage and takes lesser care when the chance of damage is minimal.

Bradford v Kanellos

★ SCC 1974, p404

Restaurant; grease fire; third party had inordinate response; not liable for "hysterical and idiotic" acts of third-parties as not foreseeable.

Facts

The plaintiff was a customer at the defendant's restaurant. An employee of the defendant negligently caused a minor grease fire on the cooking grill, which triggered the automatic fire extinguisher. The hissing sound of the extinguisher caused an unidentified person to shout that gas was escaping and that an explosion might occur. The customers panicked and in the rush to get out of the restaurant, the plaintiff was knocked down and injured.

Issues

Should remoteness analysis take into account the negligent conduct of a second actor in determining liability of initial wrongdoer?

Reasons

The intervening act was unforeseeable and the defendant was not liable to the plaintiff. The actions of the third person were hysterical and idiotic and were beyond the contemplation of a reasonable person.

Minority thought that the act was to be expected.

Precedents

The central role of reasonable foreseeability in deciding if an intervening act curtails the defendant's responsibility was confirmed.

Canadian National Railway v Norsk Pacific Steamship

SCC 1992

Boat hits bridge; pure economic loss; Kamloops adopted; prima facie when in addition to negligence/foreseeable loss sufficient proximity.

Facts

D's steamboat hits P's bridge, repair took time and money including opportunity cost for rerouting trains. P sues for their economic loss.

Issues

Does D owe P a duty of care, and can P recover for pure economic loss?

Reasons

McLachlin OG

Pure economic loss is prima facie recoverable where in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. This avoid unlimited liability. Proximity can be established in a number of ways. Look to the relationship between the parties, physical propinquity, assumed or imposed obligations and close casual connection.

Adopting the *Kamloops* approach allows the CL to incrementally determine whether economic loss can be recovered in new categories as Cs rule on them. To date established categories are: Negligent misstatements where there is an undertaking and correlative reliance (*Hedley, Byrne*); where there is a duty to warn (*Rivtow*); and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land (*Kamloops*), begin with them and work outwards, but the categories are not closed. Proximity is established here as the relationship was akin to a 'joint venture'.

If established, then consider why the recovery should be confined. Is there a reason to limit economic loss to cases where P has sustained physical damage, injury, or relied on negligent misrepresentation? Will this open the floodgates? Look at workability for the courts and economic theory (i.e. was inevitable due to the inherent nature of the activity, should be faultless and costs spread).

D brings 3 policy arguments, K allocation of risk, insurance, and loss spreading. K allocation of risk will not suffice. It assumes that people can assign liability to the least cost risk avoider, it assumes that parties have equal bargaining power, and undermines the law's desire to curb negligent behaviour. Such an argument will not be recognized for pure economic loss.

Loss spreading (who is better positioned to handle loss of money) also fails, as does insurance agreement (P should have insured bridge better).

Precedents

Outlines test for pure economic loss.

Chamberlin v Canadian Physiotherapy Association

★ BCSC 2015, p404

Physio course; P injured; signed waiver; voluntary assumption of risk; not clear enough waiver here.

Facts

Plaintiff was registered physiotherapist. Plaintiff claimed she was injured when she participated in continuing education course organized and administered by defendant Canadian Physiotherapy Association ("CPA"). Plaintiff signed waiver that defendants claimed released them from any responsibility for any injuries or losses attributable to plaintiff's participation in course.

Issues

Was there a voluntary assumption of risk?

Reasons

Waiver in issue was ambiguous. When read in its entirety, waiver was not sufficiently clear or specific to encompass negligence. Negligence did not necessarily fall within reasonable contemplation of risks posed by techniques and procedures of continuing education course in physiotherapy. Reasonable participant in course would not have understood or expected that he or she was agreeing to such onerous legal risks, especially given general language of waiver and its lack of specificity with respect to negligence. Defendants failed to establish that waiver provided valid and complete defence to action. Defendants had not met burden of proving that plaintiff voluntarily and knowingly assumed risks posed by her participating in course such that doctrine of volenti non fit injuria barred her from pursuing action for damages.

Precedents

Acceptance requires that "the plaintiff consented not merely to the risk of injury, but to the lack of reasonable care which may produce that risk."

Childs v Desormeaux

★ SCC 2006

Social host; party; drunk driving; no positive duty for social hosts.

Facts

At the conclusion of the party D decided to drive himself home and en route caused a motor vehicle accident which resulted in catastrophic injuries to P. P brought action against, inter alia, the hosts.

Issues

Do social hosts have a positive duty?

Reasons

The duty owed by commercial hosts to third parties where they are injured by patrons who have been drinking does not apply to private hosts as the duty is different. Monitoring by commercial hosts is easier to accomplish as it is expected by both patrons and members of the community.

Precedents

Social hosts of a private BYOB party do NOT owe a duty of care to members of the public injured as a consequence of an intoxicated guest's operation of a motor vehicle on leaving the party.

Cicuto v Gardiner

★ BCSC 2007

- Collision; person driving in middle of road; one or the other or both; both can be found negligent.

Facts

Collision occurred as P driver was completing final right-hand turn on curved road D was driving on smooth packed "wear strips" in middle of road, was well into P's lane and was oblivious to danger of oncoming traffic. P braked when he saw D's vehicle approaching on his side of road, but since he was travelling too fast for slippery road conditions, his vehicle moved to his left into lane for oncoming traffic. D's car hit left side of plaintiff's ATV.

Issues

Who's liable — one, or the other, or both?

Reasons

Parties found equally at fault and P entitled to recover 50 per cent of proven damages. Liability was apportioned equally as it was not possible to establish different degrees of fault. In present case, negligence of both parties combined to cause accident.

Precedents

When evidence supports the notion that one or the other or both were negligent both can be found negligent.

Clements v Clements

★ SCC 2012

- Single vehicle accident; clarifies material risk test.

Facts

The case dealt with a single-vehicle motorcycle accident that seriously injured the pillion passenger. The potential causes of the accident included not only the defendant's negligence in overloading the motorcycle and driving at an excessive speed, but also the innocent factor of a puncture leading to a rapid deflation of the rear tire.

Issues

In cases with fault, but no direct causal link, should 'material contribution' or 'but for' test apply?

Reasons

The Court held that in such circumstances the but for test was applicable. The Court, nevertheless, took the opportunity to recognize and define with greater precision a material contribution to the risk test. It is applicable only in very rare circumstances. Two conditions must be met. First, the plaintiff must establish that his harm would not have occurred but for the negligence of two or more tortfeasors, each of whom is in fact possibly responsible for the loss, thereby creating a risk of the harm. Second, the plaintiff through no fault of his own is unable to prove that either one or the other is the but for cause of the harm because each can point to the other as the possible cause, thereby creating the impossibility of proving causation on the balance of probabilities against either one. The Clements doctrine would apply, for example, where two defendants independently and negligently light fires, each of which was sufficient to spread onto the plaintiff's land, and ignite the plaintiff's barn. The plaintiff is unable to satisfy the but for test because each tortfeasor can point to the other as a possible cause of the harm, thereby defeating the power of the plaintiff to prove that it was one or the other. The Clements doctrine is, therefore, of no assistance to plaintiffs in single tortfeasor cases or in medical malpractice cases such as Snell or toxic tort cases such as McGhee where there are negligent acts combined with either innocent acts or extraneous innocent factors that may have caused the loss. In those cases, the but for test must be satisfied.

Precedents

The material contribution to risk approach is applied only when there are multiple tortfeasors, all are negligent, one or more has caused the injury, and one can point the finger at the other. Multiple independent sufficient causes.

Cooper v Hobart (1)

★ SCC 2001

COOPER ANALYSIS; Mortgage broker pinches money; duty of care between investors and registrar; creates duty of care analysis; no proximity in this case.

Facts

Registered mortgage broker arranged for investors to pool funds to make loans, then used the funds for unauthorized purposes. Registrar investigated and suspended license, and broker went out of business, with money outstanding to investors.

P sues registrar saying they owed duty of care to them and investors, liable in negligence for failure to oversee broker's conduct. TJ concludes registrar would have reasonably contemplated their carelessness would cause damage to P, and that there was prima facie duty of care. Registrar appeals, and registrar wins at CA, P appeals.

Issues

Was there a duty of care between the registrar and P?

Reasons

The first branch of the applicable test required an answer to the question of whether the circumstances of the case disclosed reasonable and foreseeable harm, and proximity sufficient to establish a prima facie duty of care. The case did not fall within and was not analogous to a category of cases in which a duty of care had previously been recognized. Nor was this a situation in which a new duty of care should be recognized. In this case, the factors giving rise to proximity, if they existed, had to arise from the statute under which the registrar was appointed. The Mortgage Brokers Act does not impose a duty of care on the registrar to investors with mortgage brokers regulated by the Act. The registrar's duty is rather to the public as a whole. The statute cannot be construed to impose a duty of care on the registrar specific to investments with mortgage brokers.

Precedents

Cooper Analysis for novel duties of care created.

Cooper v Hobart (2)

★ SCC 2001

PUBLIC AUTHORITY; Mortgage broker; government regulator of; government liability.

Facts

Cooper dealt with the alleged failure of the governmental regulator of mortgage brokers (the registrar) to exercise his powers and take timely action to prevent a delinquent broker from causing additional financial losses to a large number of investors.

Issues

What public authority liability is there here?

Reasons

Most of the government liability cases will be resolved not on the policy operational dichotomy but on the question of proximity.

Careful consideration must, therefore, be given first to whether a duty of care is found in the framework and language of the legislation. Second, if a duty is supported by the

legislation, it must be determined whether that duty is a private duty of care sufficient to found a negligence action or whether it is a duty owed only to the public at large. Third, a private duty of care is unlikely to be recognized if it is inconsistent with other duties, either public or private, falling on the defendant. Fourth, consideration must be given to any remedies — administrative, quasi-criminal, or civil provided for in the legislation. Finally, consideration must be given to the closeness and directness of the relationship between the government and the claimant.

Once a prima facie duty of care is established, residual policy factors must be addressed. It is at this stage of the analysis that the policy/operational dichotomy continues to play a role. It has, however, been downgraded from a position of analytic centrality. Nonetheless, a prima facie duty of care may be negated if a policy decision is at issue.

In Cooper the Court found no support in the legislation for a private duty of care on the registrar. At most he owed a general duty to the public at large. A private duty of care to investors might conflict with duties to the public, and there was insufficient closeness between the registrar and investors. Moreover, any prima facie duty of care would be negated by residual policy factors including the policy and quasi-judicial functions of the registrar, the severe indeterminacy issues, and the undesirability of taxpayers being guarantors of private investment losses.

Precedents

Addresses public authority liability for the first time.

Crocker v Sundance Northwest Resorts

✯ SCC 1988

Ski resort; tube race; P drunk, D offered liquor; D knew; D liable; duty of affirmative action; voluntary assumption of risk.

Facts

D owned a ski resort, organized contest involving racing down slopes with inner tubes. P was visibly intoxicated, participated, rendered quadriplegic when he fell off tube.

Issues

Was there a duty of affirmative action? If so, is it absolved by voluntary assumption of risk?

Reasons

Re: Duty of Affirmative Action

There is a duty to take reasonable steps to prevent P from participating in the contest even though D had supplied only a small amount of the liquor consumed by P. The authority and the control that D had over the race, the inherent danger in the contest, D's knowledge of P's incapacity, and D's commercial and promotional interest in the contest, and the heightened danger of racing when drunk were factors.

This created a relationship specifically special to generate a duty of affirmative action.

Re: Voluntary Assumption of Risk

This argument is unsuccessful. The signed waiver will not be enforced because P did not read it and did not understand that it was anything more than an entry form to the race.

Precedents

Re: Duty of Affirmative Action

If there is some element of control or some economic benefit inuring to the person as a result of the relation, this may create a duty of affirmative action when coupled with the individual supplying, for example, alcohol and being aware of drunk state.

D intentionally invites third party to an inherent or obvious risk that they have created or to which they have contributed.

Design Services v Canada

✭ SCC 2008

🐦 Bids and tenders; breach of K rules by owner; caused economic loss to 3P sub-Kers; SCC refuses to expand joint-venture; limits of economic loss and joint venture.

Facts

The main contractor/tenderer lost a tendering competition because of a contractual breach of the tendering rules by the owner. This, in turn, caused economic losses to the team of non-privity potential sub-contractors.

Issues

Is there a duty of care between owners and subcontractors where owner allegedly breaches tendering obligations to general contractor?

Reasons

The Supreme Court showed no enthusiasm for broadening the joint-venture exception. It noted that a joint venture is not a general category of duty of care. It applies only where property integral to the joint venture is damaged and a party to the joint venture who has no proprietary interest in the damaged property has suffered economic losses. It could not be relied on in Design Services which dealt with a design-build construction tendering process.

The Court held that the sub-contractors could not rely on the joint venture exception to sue the owner in negligence since their loss did not arise from property damage.

Precedents

Outlines limits to pure economic loss.

Devji v Burnaby

✭ BCCA 1999

🐦 Negligent cleanup of body; family suffered anguish; test for pure psychological injury.

Facts

Family claim mental suffering after negligent cleanup of body of young woman in car accident.

Issues

Is this psychological injury actionable?

Reasons

In the present case, the plaintiffs were aware prior to their arrival at the hospital that YD was dead. Viewing the dead body of a close relative after a fatal accident may well give rise to the reasonable foreseeability of psychological damage akin to nervous shock, but in the present case the circumstances of the plaintiffs' injuries were not reasonably foreseeable to the defendant. The plaintiffs had adequate opportunity to prepare themselves for the terrible reality in the present case, and this case can be distinguished from, for instance, the case of a parent or sibling rushing to hospital only to have their family member die in their presence. The plaintiffs' suffering is not to be minimized, but the defendant could not have reasonably foreseen the specific harm pleaded, and no damages lie.

Precedents

Test for pure psychological injury.

Donoghue v Stevenson

UK 1932

P finds snail in drink, sues manufacturer; C articulates concepts of proximity and foreseeability; product liability w/o K.

Facts

P was drinking ginger beer, bottle opaque, discovered dead snail inside, P subsequently felt sick. D was manufacturer.

Issues

Does a duty of care exist between P and D although no K?

Reasons

Love thy neighbour — You must take reasonable care to avoid acts or omissions which you can *reasonably foresee* would be likely to injure your neighbour. One's neighbour are those who are so *closely and directly* affected by one's acts that one ought reasonably to have them in mind as being affected by one's acts or omissions.

Essentially, there must be a close and direct relationship — proximity, and; a contemplation — foreseeability, of damage to P.

Precedents

A consumer can sue in negligence without K, product liability category of duty established. Must take reasonable care to avoid acts or omissions which one can reasonably foresee will injure a person of proximity.

Fairchild v Glenhaven Funeral Services

UK 2002

UK asbestos cases.

Facts

In this case it was held that two or more defendants, each of whom negligently exposed the plaintiff to asbestos, were jointly and severally liable for the mesothelioma suffered by the plaintiff since each had materially increased the risk of contracting the disease.

Issues

What is the test for causation in cases like asbestos?

Reasons

Fairchild was followed by Barker. In that case the plaintiff was exposed to asbestos when he was an employee of an insolvent company, an employee of the defendant, and self-employed. The House of Lords imposed liability on the single defendant on a material increase in the risk theory.

The issue was considered again by the United Kingdom Supreme Court in conjoined decisions in Sienkiewicz and Willmore. In those cases the plaintiffs were exposed to asbestos by tortfeasors and to asbestos in the general atmosphere (an innocent factor), each of which may have caused the plaintiffs' mesothelioma. In each case the defendant was held liable.

Precedents

So long as the defendant's contribution to the risk was more than minimal, responsibility was warranted, albeit that there were competing wrongful or innocent

causes. In Clements, the Supreme Court recognized that these latter two decisions, in particular, went beyond the current Canadian position.

Fiala v MacDonald

✶ ABCA 2001

🐦 Manic episode; violent attack; test for duty of care for mentally disabled persons.

Facts

The defendant, who was suffering from a severe manic episode, violently attacked the driver of a car stopped at an intersection.

Issues

What is the standard of care for mentally disabled people?

Reasons

The Court characterized tort law as a system of corrective justice that should not be distorted by a robust pursuit of compensatory goals. The defendant was robbed of his capacity to understand or appreciate his duty of care by the sudden onset of a serious mental illness and he could not be found liable in negligence.

Precedents

Test for duty of care for mentally disabled persons.

Fontaine v BC (Official Admin)

✶ SCC 1988

🐦 Truck left highway; no direct evidence; re-ipsa loqueter; no longer applies.

Facts

A truck left the highway in severe weather conditions and crashed into a swollen stream. Both the driver and his passenger were killed. The family of the deceased passenger sued the driver. There was no direct evidence as to how the accident occurred.

Issues

Does Rea-Ipsa Loqueter apply?

Reasons

Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone. On the facts, it was held that there was insufficient circumstantial evidence to create an inference of negligence against the driver of the vehicle.

Precedents

Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone. Res ipsa loquitur, the act speaks for itself isn't applicable. Instead, can rely on circumstantial evidence to infer negligence.

Fullowka v Pinkerton's of Canada

✶ SCC 2010

🐦 Miner's strike; explosion; statutory duty of care; public authority liability.

Facts

The defendant Pinkerton's had been retained by a mine owner to maintain security and to protect replacement workers during a bitter, and at times violent, strike of its miners. A rogue striker trespassed into the mine and planted a bomb which exploded, killing nine replacement miners.

Issues

What was the government's duty of care?

Reasons

The province was under a statutory responsibility for the safety of the mines and its inspectors had, in the course of daily inspections of the mine, developed a close, direct, and personal relationship with this defined group of persons. The Court, however, concluded that both the private firm and the province had met the applicable standard of care as they were relying in good faith on legal advice received by officials about scope of their statutory powers, and the claims failed on that basis.

Mine inspectors had statutory duty to inspect mine and order cessation of work if they considered it unsafe. In exercising statutory power, inspectors had been physically present in mine on many occasions, identified specific and serious risks to identified group of workers and knew that steps being taken by management and security firm to maintain safe working conditions were wholly ineffectual.

Precedents

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

Galaske v O'Donnell

★ SCC 1994

Defences; contributory negligence; duty re seat belts and young passengers.

Facts

D, driver of truck, accompanied by adult passenger and their 6 year old son (P). D took no steps to make sure that P was using seat belt. In subsequent collision, not caused by D's negligence, P suffered injuries which would've been less severe had they been wearing belt.

Issues

Was there a positive duty to act?

Reasons

D owed a duty of care to P; duty of driver to ensure young passengers (under 16) are wearing seat-belts, even if parents are in car.

Precedents

D owed a duty of care to P; duty of driver to ensure young passengers (under 16) are wearing seat-belts, even if parents are in car.

Contributory negligence reduces damage awards.

Goodwin v Mainroad North Island Contracting

★ BCCA 2007

D was not responsible for specific highway but responded to RCMP request; didn't follow through; injury; duty to follow through with undertaking.

Facts

D highway K-er was informed by RCMP that there was black ice on a section of road. D undertook to send out a crew to deal with it but failed to do so. P injured when a truck in which she was a passenger slid on the black ice and left the road. D's K obligation to maintain certain highways did not extend to the road in question.

Issues

Did D have a positive duty to act based on their undertaking?

Reasons

D's K obligation did not extend to the road in question however it voluntarily assumed responsibility to abate the danger and owed a duty of care to P as a member of the driving public. Public is placed in worse position as RCMP will not contact anyone else because they believe Mainroad will address the problem.

Precedents

Once you have taken an undertaking you have a duty to follow through appropriately.

Hall v Hebert

✶ SCC 1993

Illegal acts; doctrine of illegality; limits scope significantly.

Facts

In that case, the litigants, two young men, spent the evening drinking to excess and driving around in the defendant's car. When the car stalled, the plaintiff passenger asked if he could drive. The defendant agreed, and in the course of roll-starting the powerful manual-shift car, the plaintiff lost control of it and was injured.

Issues

The primary issue was the applicability of the defence of illegality since the plaintiff's conduct in driving while intoxicated was both negligent and illegal.

Reasons

The Court interpreted the defence of illegality in a very restrictive manner. It held that the defence can operate only when the integrity of the legal system is threatened by allowing the claim. This normally arises in only two narrow situations. A plaintiff is not permitted to use a tort action to make a direct profit from illegal conduct, and a tort action may not be used to circumvent, subvert, or negate a criminal penalty.

In Hall the Court held that the defence was inapplicable to the case under appeal. An award of damages to the plaintiff for injuries caused by the defendant's negligence did not amount to profiting from an illegal activity. Its purpose was to compensate the plaintiff for his loss and there was no suggestion that any criminal penalty was being avoided. The plaintiff was, however, found to be 50 percent contributorily negligent.

Precedents

The Supreme Court restricted the scope and application of the illegality defence in. The decision, for all practical purposes, makes the defence of illegality inapplicable to negligence actions.

Heilsler v Moke

✶ ONHCJ 1972

Negligence of children; put pressure on injured leg when told not to.

Facts

Child puts pressure on injured leg when told not to, and not found contributorily negligent.

Issues

What is the standard of care for children?

Reasons

The test to be applied when determining whether an adult was negligent is purely objective. In the case of children, however, there are two separate questions to be determined. The first one is whether the child, having regard to his age, his intelligence, his experience, his general knowledge and his alertness is capable of being found

negligent at law in the circumstances under investigation. The particular child is to be considered. The test in order to determine this preliminary question is therefore a very subjective one. All of the qualities and defects of the particular child and all of the opportunities or lack of them which he might have had to become aware of any particular peril or duty of care must be considered. The second question, to be determined by the jury, is whether the child exercised the care to be expected from a child of like age, intelligence and experience.

IN THIS CASE, (1) P bright, alert, was 9 at time of incident; and thus capable of being held negligent; however, (2) perfectly reasonable for a child to make the mistake that they did.

Precedents

Two-step negligence of children analysis.

Hercules Management v Ernst & Young

✶ SCC 1997

Negligent misrepresentations to shareholders; limitation of liability for such; breaches of statute suggestive of breach of standard of care but not determinative.

Facts

P's shareholders of corporation who lose money. D's auditors of corporation who were negligent in preparing auditor report. Corporation goes into receivership. P's sue for damages on the basis of having relied on auditor report in their investment decisions. P's allege that if auditor reports weren't negligent, they would have supervised management differently, and the difference in management would have averted losses of shareholders.

Issues

What is the test for proximity in NM cases? Do auditors of a company owe a duty of care to company's shareholders?

Reasons

The Court de-emphasized the language of special relationship and the importance of an assumption of responsibility and stressed the importance of the concept of foreseeable and reasonable reliance by the plaintiff. The Court also noted that the negligent misrepresentation cases should not be isolated from the general law of negligence. As far as possible, the Anns test, as it was then constituted, should be used to determine if a duty of care is owed by the defendant to the plaintiff.

In this case, purpose of representations in reports is to allow shareholders, as a class, to assess management performance, *not* to assist individual shareholders in making personal investment decisions. Shareholders have 2 capacities: individual holders of equity and group capacity required to act in interest of corporation. The group capacity is owed a DoC, because aim of audit not to protect individual shareholders but to safeguard interest of corporation.

Precedents

Limits liability for negligent misrepresentation.

Hill v Hamilton-Wentworth Regional Police Services Board

✶ SCC 2007

Duty of care; police officers; standard of care for police officers; sufficient proximity; presence of contact.

Facts

The plaintiff was arrested, prosecuted, convicted, and imprisoned for twenty months for a crime he had not committed. He sued the investigating police officers alleging various acts of negligence that had led to his wrongful arrest.

Issues

What is the duty of care for public authorities in this situation?

Reasons

The Court recognized that the police owe a duty of care to a "particularized" suspect who is the subject of their investigation. The prima facie duty of care was not negated on the grounds that a duty of care would have a chilling effect on the work of the police or that it would be inconsistent with their quasi-judicial and discretionary decision making.

The standard of care is that of the conduct of a reasonable police officer at the time of the investigation. The conduct of the police officers in Hill, in the Court's view, may not have reflected current policing standards but they did meet the standard of care applicable in 1995 when the investigation took place.

If the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established.

Precedents

In determining whether relationship sufficiently proximate for prima facie DoC- the existence or absence of personal contact is significant.

Hollis v Dow Corning

★ SCC 1995

Brest implant; had defects; duty to warn; manufacturers' duty; learned intermediary.

Facts

The plaintiff sued the defendant manufacturer in respect of a silicone breast implant that had ruptured and caused her damage. The crux of her case in the Supreme Court was that the manufacturer had failed to inform her or her physician of a small but known risk that the implant could rupture from normal, everyday activity.

Issues

Does the manufacturer have a Duty to Warn? Was it discharged by informing an intermediary: ie the doctor?

Reasons

The Court recognized the obstacles to direct communication between the manufacturer and the patient and the primary reliance of the patient on her physician and held that it was sufficient for the manufacturer to provide the requisite information to a learned intermediary (normally the attending physician) who is then in a position to pass it on to the patient. The Court stated that disclosure could be made to a learned intermediary where a product is highly technical in nature and is intended to be used only under the supervision of experts (for example, breast implants, artificial joints, and pacemakers) or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product (for example, prescription drugs). In the circumstances of the Hollis case, the manufacturer had not informed the learned intermediary of a material risk of rupture. The physician was not, therefore, in a position to tell the patient and the defendant was liable.

If the plaintiff would have agreed to proceed with the implant surgery with knowledge of the risk of rupture, the defendant's fault was not a cause-in-fact of the plaintiff's loss. The contentious issue was the choice between the modified objective test, which would ask what a reasonable person in the plaintiff's position would have done if she had known of the risks, and a subjective test which would ask what the individual plaintiff would have done. A majority of the Court chose a subjective test and concluded that the plaintiff would not have had the implant surgery if she had been given appropriate warnings.

It was not necessary to delve into such a hypothetical question and the defendant manufacturer could not exonerate itself on the ground that the physician might have been delinquent in his duty of disclosure.

Precedents

A product manufacturer has an ongoing duty to warn of inherent dangers for ordinary use of its products, proportional to the risk of harm. Duty to warn can be presumably discharged through a learned intermediary: technical nature, naturally used in supervision, customer not reasonably able to be directly warned.

Jordan House v Menow

★ SCC 1974

Failure to act; drunk patron; knew a lot about him; served him despite knowing he was drunk, got injured; sometimes duty to act.

Facts

P hit by a car when walking home, drunk, in the dark on a rural highway.

Issues

Was there a duty to act, a duty of care?

Reasons

The pub created a risky environment that caused the harm. Failure to act regarding a risk you created is different from failure to act in other cases. This was an invitor-invitee relationship — these were not strangers to one another — the hotel was aware of D's condition, and should have known letting D leave on foot would have crated a risk. All of this together created a duty.

A great deal turns on the knowledge of the operator of the patron and their condition where the issue is liability for injuries suffered by them. They knew his propensity to drink and even instructed employees not to serve him unless he was accompanied by someone, and they served him in breach of this as well as a stat obligation, and that they knew he was intoxicated.

Precedents

An invitor-invitee relationship coupled with significant knowledge of risk creates an obligation. D offering services to general public that include attendant responsibilities to act with special care to minimize risk to the users of those services.

Defendants offer services to the general public that include attendant responsibilities to act with special care to minimize risk to the users of those services.

Just v British Columbia

★ SCC 1989

Provincial inspection system; unstable rocks; policy/operational distinction.

Facts

D province's system of inspection for the discovery and removal of unstable rocks above highways failed to detect a boulder that broke loose and crashed onto P's automobile, injuring him and killing his daughter.

Issues

Is the government decision justiciable?

Reasons

Policy decisions normally involve the broad allocation of funding at a high level of government. The system of inspection that the province had implemented was open to judicial scrutiny as an operational matter. He noted, however, that [t]he manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment. His judgment appeared to show a clear preference for a much wider judicial scrutiny of governmental action and a desire to rely on the flexibility of the standard of care to avoid placing an undue burden on government.

Here, the government failed to abide by set standards of road safety, and was found liable.

Precedents

Proximity for public authority liability.

Kamloops v Nielsen

SCC 1984

House foundation problems; public auth liability, test for; adopts Anns; statutes and policies creating duties discussed.

Facts

House had insufficient foundations, found upon city inspection. Stop work orders issued but not enforced. House sold to D, who discovered deficiencies and sued P for negligent performance of inspection. Original owner assumed liability (75%) as well as P (25%).

Issues

Is there a duty of care owed by the city to D? A public authority liability issue and a pure economic loss issue.

Reasons

Re Pure Economic Loss

The plaintiff's loss, although purely economic, was recoverable because it resulted from the city's breach of a private law duty under a bylaw, to prevent construction of houses on defective foundations, and the loss was of the type the statute intended to guard against.

Re Public Authority Liability

L in *Anns* characterized stats as having two general forms:
(1) those giving power to interfere with rights, where action for damages caused by the exercise of these powers will not succeed unless the authority has done its exercises negligently, and;
(2) those giving power but leaving great discretion. There is a duty at the operational level to use due care.

Liability was imposed on grounds that the matter was largely operational. Policy decisions are not entirely immune from judicial scrutiny. (1) There may be liability for the total failure of the gov body to consider whether or not the stat power should be exercised. The holder of the stat power must seriously address that question. (2) There may be liability for a bad-faith exercise of discretion. This may arise where a decision is made for an improper reason or the decision is one that no reasonable person would have made. However beyond these instances, policy is not justiciable.

Precedents

First case where a public entity successfully sued in Canada.

In order to decide whether or not a private law duty of care exists, two questions must be asked:
1: Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person?

2: Are there any considerations which ought to negative or limit
A: The scope of the duty, and
B: The class of persons to whom it is owed, or
C: The damages to which a breach of it may give rise?

Answering 1 in the affirmative lies with P. Once C agrees that there's a duty of care, then a prima-facie duty of care is established, but then C considers reasons not to realize that duty of care.

Mustapha v Culligan of Canada

★ SCC 2008

Fly in water; didn't drink; psychological harm; assume person of reasonable fortitude; too remote.

Facts

The plaintiff suffered nervous shock when he discovered a dead fly in a bottle of water supplied by the defendant even though he discovered the fly before he or other members of his family consumed any of the water.

Issues

Are P's damages too remote to impose liability?

Reasons

The Supreme Court concluded that it could not be foreseen that such harm would be suffered by "a person of ordinary fortitude."

[14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see White v. Chief Constable of South Yorkshire Police, [1998] 3 W.L.R. 1509 (H.L.); Devji v. Burnaby (District) (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599 (CanLII); Vanek. As stated in White, at p. 1512: "The

law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

[15] As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in Vanek, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in Tame v. New South Wales (2002), 211 C.L.R. 317, [2002] HCA 35, per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

[16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in White, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

[17] I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha's particular sensibilities.

[18] It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan's negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do. The only evidence was about his own reactions, which were described by the medical experts as "highly unusual" and "very individual" (C.A. judgment, at para. 52). There is no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle; indeed the expert witnesses were not asked this question. Instead of asking whether it was foreseeable that the defendant's conduct would have injured a person of ordinary fortitude, the trial judge applied a subjective standard, taking into account Mr. Mustapha's "previous history" and "particular circumstances" (para. 227), including a number of "cultural factors" such as his unusual concern over cleanliness, and the health and well-being of his family. This was an error. Mr. Mustapha having failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury, it follows that his claim must fail.

Precedents

Establishes the standard of 'reasonable fortitude' and remoteness.

Product liability: A manufacturer owes a duty of care to consumers of their good.

Neilsen v Kamloops

✪ SCC 1984

🐦 Kamloops; insufficient foundation; public authority liability.

Facts

House had insufficient foundations, found upon city inspection. Stop work orders issued but not enforced. House sold to D, who discovered deficiencies and sued P for negligent performance of inspection. Original owner assumed liability (75%) as well as P (25%).

Issues

What is policy, and reviewable by C?

Reasons

It also commented on the issue of policy decisions and held that policy decisions are not entirely immune from judicial scrutiny. First, there may be liability for the total failure of the governmental body to consider whether or not the statutory power should be exercised. The holder of the statutory power must seriously address that question. Second, there may be liability for a bad-faith exercise of discretion. This may arise where a decision is made for an improper reason or the decision is one that no reasonable person would have made. Beyond these two instances, however, a policy decision is not justiciable in negligence law.

At each end of the spectrum of governmental functions, the policy/operational dichotomy presents few difficulties. If, for example, the pith and substance of the plaintiff's case is that she has suffered injuries because the government has failed to provide sufficient funds to upgrade a rural highway or because government has failed to fund expensive diagnostic equipment owing to a need to cut back healthcare expenditure, she is likely to be unsuccessful. If, on the other hand, the claim centres on injuries caused by the incompetent operation of road construction equipment or by the failure to correctly interpret medical testing at a hospital, it may well succeed. There can be little doubt, however, that at the margins, the line between policy and the operational matters is elusive.

Precedents

Policy/Operational distinction.

Odhavji Estate v Woodhouse

☆ SCC 2003

🐦 P fatally shot; duty of care re police chiefs; duty of care discussed.

Facts

P fatally shot by officers after running from vehicle after bank robbery. P (estate) sues police chief, Police Services Board, and ON.

Issues

Was there a duty of care?

Reasons

Supporting the causal link between the police chief and P is the relatively direct causal link between the misconduct and the harm. A second factor is that it may be reasonably expected that a police chief be mindful of police misconduct, and this expectation is consistent with the statutory obligations.

Precedents

Follows precedent.

Price v Milawski

✯ ONCA 1977

🐦 Negligent doctor; wrong x-ray; second doctor relied on first; intervening negligence; in med situations both can be liable.

Facts

Plaintiff suffering fracture of ankle. Doctor mistakenly ordering X-ray of foot. Plaintiff treated for sprained ankle or strained ligament for 5 months before fracture diagnosed. Permanent disability resulting. Negligence of first doctor for ordering wrong X-ray. Negligence of second doctor, a specialist, for relying on first X-ray report and failing to order new X-ray when plaintiff seen 2 months later.

Issues

Should subsequent doctors who rely on the negligence of an earlier doctor be liable? What is the extent of liability of the 1st doctor?

Reasons

First doctor's negligence compounded, but not halted, by second doctor's negligence. Damage to plaintiff reasonably foreseeable. Both the 1st and 2nd Doctor were negligent.

Precedents

A person acting in negligence may be held liable for future damages arising in part from subsequent acts of negligence and in part from his own negligence, where each subsequent negligent act/omission and consequent damage was reasonably foreseeable as a possible result of his own negligence.

Queen v Cognos

✯ SCC 1993

🐦 Negligent misrepresentation; establishes test; establishes the duty of care; standard of care.

Facts

An employer’s misrepresentation about the nature and existence of an employment opportunity for which the plaintiff successfully applied.

Issues

What is the test for negligent misrepresentation?

Reasons

As a general rule, a disclaimer of responsibility for the accuracy or reliability of the representation will prevent the establishment of a duty of care. It is normally not foreseeable that a person will rely on information for which the defendant has disclaimed responsibility and any reliance on it is likely to be regarded as unreasonable. However there is no judicial enthusiasm for disclaimers and it can be expected that courts will construe them severely against the defendant.

Tort liability may not, however, subvert or contradict the terms of the contract, and if an exemption clause negates tort liability for a negligent misrepresentation, the contractual provision governs.

The employer suggested that the only obligation was one of common honesty. The employee argued that the employer was under an obligation to make complete disclosure of all relevant information. The Supreme Court rejected both arguments, affirming the traditional standard of care of a reasonable person. The defendant must “exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading.”

Precedents

Reliance upon facts may be more foreseeable and reasonable than reliance on more subjective and speculative statements, but there is no hard and fast rule about it.

Courts have had no hesitation in imposing liability for implied misrepresentations. An employer has also been required to provide highly relevant information to a prospective applicant about the nature and existence of the employment opportunity.

R v Imperial Tobacco Canada

★ SCC 2011

Negligent misrep; tobacco; government situation; pre-existing duty must account for relationship at bar.

Facts

The government of Canada was alleged to have made negligent misrepresentations to a group of tobacco companies about the safety of low tar cigarettes, thereby encouraging those companies to develop and market such cigarettes.

Issues

What is the test for negligent misrepresentation in this case?

Reasons

In this case the Court found that there was a proximate relationship between the Government of Canada and some tobacco companies arising from Canada's regulatory power over the industry, its commercial interaction with the companies, and the specific advice it gave them relating to the development, manufacture, and marketing of low tar cigarettes. Chief Justice McLachlin, after noting that a duty of care might arise expressly or by implication from the statutory scheme, stated that "proximity might arise from a series of interactions between government and the claimant [and] the government [may have] through its conduct entered into a special relationship to establish the necessary proximity for a duty of care." She also recognized that the duty of care analysis will often involve consideration of both the controlling statute and the relationship between the parties.

SCC says just because Canada acting as a regulator and its non-commercial, doesn't mean there couldn't be reasonable reliance and therefore sufficient proximity to establish a prima facie duty of care.

Conflicting policy considerations override any DoC. Information health Canada conveyed was a policy decision based on social/economic/political factors.

Precedents

The pre-existing duty of care category must account for the kinds of relationships at issue.

Resurfice v Hanke

✪ SCC 2007

Zamboni design; explosion; but-for is primary causation test; two criteria to go to material contribution test.

Facts

P claims negligent design of a Zamboni which resulted in water being fed into gas tank instead of water tank; vaporized gas ignited by over head heater; explosion ensues that badly burns operator

Issues

What is the proper test for causation?

Reasons

In 2007, a full bench of the Supreme Court sought to clarify the nature and applicability of the material contribution test. It confirmed that the "basic" and "primary" test of causation is the but for test. The material contribution test was applicable only in exceptional circumstances where two preconditions are met. First, it must be impossible, because of factors beyond the plaintiff's control (such as the limits of scientific knowledge) for the plaintiff to prove that the defendant's negligence caused the plaintiff's loss on the but for test. Second, the harm suffered by the plaintiff must be of a kind that was within the scope of the risk generated by the defendant's negligent conduct. In such circumstances liability might be imposed because to deny it would offend basic notions of fairness and justice. The Court gave two examples where the material contribution test applied. The first was where it is impossible to say which of two simultaneous negligent acts caused the harm. The second was where it is impossible to prove what a particular person in a causal chain would have done had the defendant not been negligent.

Precedents

The material contribution to risk approach is applied only when factors outside of the plaintiff's control make it impossible for him to prove causation. Plaintiff caught in the sphere of risk created by the defendant.

School Division of Assiniboine South, #3 v Hoffer

✶ SCC 1971

Snow mobile leads to explosion; Reasonable foreseeability; defines and adopts from wagon mound; bridging the gulf with multiple steps.

Facts

The defendants' failure to start a snowmobile with reasonable care resulted in fire damage to the plaintiff's school. The risk inherent in the starting procedure was that the snowmobile might take off without its rider to the peril of persons and property in the vicinity.

Issues

What is the test for reasonable foreseeability?

Reasons

The chain of events that led to the fire was broken down into a series of foreseeable occurrences. They included the foreseeability of impact with a building, foreseeability of gas-riser pipes on buildings in that area of Winnipeg, foreseeability of impact with a gas-riser pipe, foreseeability of the escape of gas from the impact with a pipe, and foreseeability that gas might find its way into the school where it might be ignited by a foreseeable pilot flame in the boiler room. Foreseeability was thereby established and liability was imposed.

Precedents

A common technique to bridge a substantial gulf between the negligent act and the ultimate damage is to divide the causal sequence into a number of discrete steps, each of which is a readily foreseeable consequence of the preceding step. A narrative from step to foreseeable step allows the gulf to be spanned in a persuasive way with apparent fidelity to the foreseeability principle.

Skinner v Fu

✶ BCCA 2010

Stopped on highway; dark, no hazard lights; collision; last clear chance barred; apportionment of liability.

Facts

Plaintiff's vehicle rear-ended defendants' vehicle. Defendants' vehicle was stopped in roadway without hazards or signal when it was rear-ended.

Issues

Can the 'last clear chance' doctrine be used to sever a party from liability where multiple parties are negligent?

Reasons

Defendant's act of remaining stationary on well-travelled highway, where speed limit was 90 kilometres per hour, without activating either brake lights or emergency flashers, created unreasonable risk of harm.

The proper approach to cases where both P and D are negligent is to apportion liability according to s. 8, where negligence of both is determined on a but-for test. (which eschews last clear chance). New trial ordered to find facts necessary for apportionment.

Precedents

Last clear chance barred.

Snell v Farrell

★ SCC 1990

Surgery; outlines but for test definitively; asserts it is default test.

Facts

The defendant surgeon continued cataract surgery on the plaintiff in spite of the fact that an anaesthetizing injection had caused some bleeding behind her eye. The prudent course of action was to discontinue the surgery. Some months later it was discovered that the plaintiff had lost her sight in that eye. At the trial, the medical experts were unable to give a firm opinion that the nerve damage was caused by a continuation of the surgery. It may have resulted from natural causes, including the plaintiff's high blood pressure or her diabetes. The plaintiff argued that the defendant's negligent act had certainly increased the risk of damage to the optic nerve and the loss of sight was within the scope of that risk.

Issues

What is the test for causation?

Reasons

In a unanimous decision, the Court reasserted the conventional but for test and the traditional burden of proof. The Court, however, emphasized that causation rules must not be applied in a strict or rigid manner. It called for a flexible, pragmatic, and common-sense approach. It also noted that, where facts lie particularly within the knowledge of the defendant, little affirmative evidence of cause-in-fact is required of the plaintiff and, in the absence of evidence to the contrary, it is fair to make an inference of cause-in-fact. It is not appropriate, however, to reverse the burden of proof. The ultimate burden remains on the plaintiff. The Court also addressed the issue of expert evidence in medical malpractice cases. It is not necessary to secure a firm expert opinion in favour of the plaintiff's assertion of cause. Medical experts tend to speak in terms of scientific certainty rather than the lower standard of the balance of probabilities favoured by tort law. In the Court's view, the plaintiff had presented sufficient evidence to permit an inference of causation to be drawn.

Precedents

Snell provided some needed stability to the law by establishing the primacy of the but for test and providing guidance as to how it should be applied.

Stewart v Pettie

★ SCC 1995

Drinking to excess then driving; commercial host; owe duty to third parties to take reasonable steps.

Facts

P attending dinner theatre with driver and two others. Driver became intoxicated but did not exhibit overt signs. P and one other completely sober when leaving with driver. Driver skidded on icy road rendering P quadriplegic.

Issues

Was there a positive duty to act?

Reasons

If you owe an obligation to those who leave the bar who you've served as they may get injured after, it seems logical to extend this duty to people who may be hurt by that person's activities.

Precedents

C recognizes a duty to third parties in respect of the conduct of a person who had drunk to excess on D's premises. The duty arises from the relationship of commercial host and customer and the foreseeability of harm to innocent third persons such as users of the highway. The duty is to take reasonable steps to control the conduct of the intoxicated customer or, in some other way, to protect innocent persons.

Ter Neuzen v Korn

★ SCC 1995

Doctor; procedure; HIV; standard of care for doctors; following standard practices; risky standard practices.

Facts

The plaintiff patient participated in an artificial insemination program run by the defendant physician. As a result of a procedure performed before 1985, the plaintiff was infected with HIV.

Issues

Whether doctor should have thought about HIV problem so that he was aware of risk of this infection?

Reasons

The Supreme Court held that "where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent."

Conversely, where a standard practice is fraught with obvious risks that any layperson could understand, a finding of negligence may be made.

Dr. performed according to standard practice, and standard practice concerning HIV was technical enough that the jury could not find it negligent except with the aid of expert evidence.

Precedents

Adhering to standard medical practice is usually sufficient to avoid liability. Courts will only challenge standard practice if it is readily apparent to a layperson that it failed to incorporate obvious precautions.

Walker Esate v York Finch General Hospital

✪ SCC 2001

🐦 HIB from blood transfusion; multiple negligent parties; deficiencies in but for test; expert evidence re medical.

Facts

Walker contracted HIB from blood transfusion supplied by Red Cross. In early 80s, becoming clear that HIV is an issue. Alleges Red cross negligent in process that it used to screen blood donors. Donor screening consisted of questionnaire that required donors to 'be in good health', but made no reference to AIDS, its symptoms, or high-risk groups, thus didn't meet SoC. Despite this, they had a pamphlet out prior to time of donation that requested high-risk groups refrain from donating blood (but not part of screening procedure). Donor would have donated anyway on basis that he was no longer an active member of the high risk group; and is thus negligent.

Issues

What is the appropriate test for causation?

Reasons

Expert evidence approving of the Red Cross's screening procedures to prevent blood donations from groups at high risk of carrying HIV was rejected. A judicial evaluation of the procedures was appropriate because no assessment of complex, scientific, or highly technical matters was involved. The primary question was how a layperson would respond to the donor-screening questions.

Even if Red cross had met the SoC in their donor-screening procedure, infected donor would likely still give blood and wouldn't have been caught and P still harmed. Conversely, if Roberts was not negligent and answered questionnaire properly, blood would still have gotten through because of red cross's negligence and P still harmed.

Precedents

But for test inadequate in situations where multiple independent sufficient causes may bring about a single harm. Where this is the case, apply the materially increased contribution test so long as the contribution was more than de minimis.

Winnipeg Condo v Bird Construction

✶ SCC 1995

🐦 Leaky condos; dangerous construction; duty of care re dangerous structures; limits of; policy reasons.

Facts

The case involved an apartment block built by the defendant contractor that had been sold by the first owner to the plaintiff. Ten years after construction there was concern about the state of stone cladding on the exterior of the building and some modest remedial steps were undertaken. These remedial steps proved insufficient and some years later a large slab of cladding fell from the ninth storey. The entire cladding was replaced at a cost of $1.5 million. The plaintiff tried to recover this cost from the defendant. The defendant argued that it owed no duty of care to the plaintiff.

Issues

Do Contractors owe a duty of care to subsequent purchasers?

Reasons

The Court held that the builder did owe a duty of care to the plaintiff. It drew a distinction between product quality defects that create a real and substantial danger to the occupants of the building and nondangerous defects such as poor quality or shoddy construction. The Court held that the defendant owed a duty of care in respect of dangerous defects.

"[W]here a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a nondangerous state are recoverable in tort by the occupants."

This duty of care is owed independently of any contractual provisions or exemptions in the contract of sale between the defendant and the first owner.

The Court applied the Anns test in establishing the duty of care. The foreseeability of damage to future occupants of the building created sufficient proximity to create a prima facie duty of care. The Court found no compelling policy reasons to negate the duty. Indeterminacy concerns were not severe. The class of plaintiffs was restricted to the future occupants of the building. The amount of money payable by the defendant was restricted to the cost of repairs. The duration of potential liability was restricted to the useful life of the building. This may be a considerable period of time, but it will be increasingly difficult to assign the need for repair to the builder's negligence rather than normal wear and tear. There were, moreover, several policy factors that strongly supported the imposition of a duty of care, including the encouragement of preventive measures to avoid future damage to persons or to property, the deterrence of poor construction, the avail-ability of affordable third-party liability insurance for builders, and the purchaser's difficulties in detecting latent defects, negotiating contractual protection from the vendor, and securing first-party insurance.

Precedents

Creates duty of care for dangerous or defective condos.

Wotta v Haliburton Oil Well Cementing

★ SCC 1955

Collision at curve, one or the other but not both.

Facts

Collision at curve

Issues

What is the correct portioning of liability?

Reasons

No finding of negligence on part of either driver -- Action and counter-claim dismissed.

Precedents

If only one cause possible, liability is apportioned.

Where there is no evidence to support the notion that one or the other was negligent. The court cannot find one party negligent.

Zacharias v Leys

★ BCAA 2005, p404

Knee injury; crumbling skull; reduces amount of liability.

Facts

Plaintiff sustained knee injury when her car was struck by defendants' truck and hit her leg. Plaintiff testified that after accident, her knee became so painful that she was unable to continue working or engage in recreational activities. Plaintiff, who had history of knee problems and orthopaedic surgery, brought action for damages in negligence against defendants. Defendants appealed damages award on basis that trial judge failed to consider whether plaintiff was "crumbling skull" plaintiff.

Issues

What role does P's 'crumbling skull' play in damage assessment?

Reasons

TJ erred in not examining whether P would require surgery regardless of accident, despite evidence that surgery necessary in any event. Should have attached probability to that risk to adjust damages to reflect pre-accident risk of harm. Because the risk was unclear, a 25% reduction in damages applies.

Precedents

Crumbling skull rule should be applied to adjust damages only when there is "measurable risk" that pre-existing condition would have detrimentally affected plaintiff in future, regardless of defendant's negligence.

STRICT LIABILITY

Cowles v Balac

ONSCJ 2006, p404

Tiger attacks people in a wildlife park.

Facts

The automatic window of the plaintiff's car was inadvertently lowered allowing a Bengal tiger to enter the vehicle and attack the occupants.

Precedents

The trial judge held that although the tiger was controlled within the boundaries of the park and the occupants of the vehicle were intended to be caged within their vehicle the tiger was, for the purposes of the scienter tort, out of control and liability was imposed for the serious injuries suffered.

Rylands v Fletcher

UK 1868, p404

Water reservoir fell and flooded coal mine; strict liability; non natural uses of land; establishes Rylands rule.

Facts

The case dealt with an earthen water reservoir that failed and flooded the plaintiff's coal mine. The reservoir had been built by contractors on land occupied by the defendant. The contractors were negligent. They built the reservoir over disused mine shafts that led to the plaintiff's mining operation. The contractors, however, were not sued and, because they were not employees of the defendant, he was not vicariously liable for their negligence.3 The plaintiff's claim, therefore, depended on the recognition of a strict liability for the escape of water.

Issues

What is the rule for strict liability re non-natural uses of land?

Reasons

In the course of his judgment, Lord Cairns introduced the concept of a non-natural use of land. He emphasized that no liability could be imposed for the natural run-off of water from higher land to the lower land. In Rylands, however, the defendant had collected water artificially and a strict liability was appropriate for this non-natural use of land. This concept of non-natural use has played a central role in the evolution of the tort.

Precedents

To establish liability under the rule in Rylands, the plaintiff must show a non-natural use of land, an escape of something likely to do mischief from the land (brought on for a non-natural use), and damage.

Smith v Inco

✭ ONCA 2011, p404

Nickel refinery; greatly confines rule in Rylands.

Facts

The defendant operated a nickel refinery in Port Colburne from 1918 to 1984. A class action was brought by the owners of residential property in respect of nickel deposits emitted by the refinery and found in the soil of their properties. The evidence did not establish that the deposits caused a risk to health. The claim narrowed to one for the failure of residential property values to increase at the same rate as in other similar nearby cities because of the public knowledge of the deposits. The claim was based, in part, on the rule in Rylands v. Fletcher.

Issues

Does the rule in Rylands apply?

Reasons

The Ontario Court of Appeal reversed the trial judge, holding that the refinery was not an ultra-hazardous activity and was not, therefore, a non-natural use. The court also identified further stumbling blocks to the action. It held, first, that even if the defendant's land use was ultra-hazardous, it would not be a non-natural use because it was neither a special, extraordinary, or unusual use of the land nor without incidental benefit to the community. The operation of a refinery in an industrialized area of the city was in the court's opinion a usual and ordinary operation that did not generate risks any greater than many other industries. The court also identified further stumbling blocks to the action. Second, the rule in Rylands v. Fletcher applies only to the unintended escape of emissions such as those caused by a mishap or misadventure in the course of the defendant's operation. The emissions at issue were an intended and inevitable consequence of the activity. Third, it was of the opinion that there were compelling reasons to hold that liability is restricted to foreseeable harm. This would, in itself, foreclose many claims for historic pollution. Fourth, it was not convinced that the plaintiffs suffered the kind of harm they alleged. Finally, the court was of the view that any extension of strict liability should be made by the legislature, not by the courts.

The Court of Appeal emphasized the need for a very dangerous and extraordinary use of land and restricted liability to accidental escapes and foreseeable harm.

Precedents

Restricts rule in *Rylands*.

Tock v St John's

✭ SCC 1989, p404

Clarifications on non-natural use of land; single-instance enough for interference

Facts

Sewer floods an area.

Issues

What is a non-natural use of land?

Reasons

The Supreme Court imposed liability in private nuisance when a blockage of the defendant's sewer drains and a heavy rainfall combined to flood the basement of the plaintiff's house.

It is well accepted that the general benefit or utility of the defendant's land use is relevant in deciding if the land use is non-natural. The Supreme Court has, for example, been unwilling to regard a municipal sewer system as a non-natural use of land.

There is no need for continual interference with the property. An isolated incident causing physical damage may be sufficient.

Precedents

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VICARIOUS LIABILITY

671122 ON v Sagaz Industries Canada

✶ SCC 2011, p404

Canadian Tire; bribery; indy contractors; sufficient control test; look to whole relationship.

Facts

R Ontario manufactured car seat covers. R supplied goods to a major retail chain for many years until it was advised that it was being replaced by A Sagaz. When R learned that its termination was result of a 'kickback' scheme involving an employee of the retail chain, it brought action against A, their marketing consultant, and the principles of the two companies, alleging civil conspiracy. Action was allowed against marketing consultant company and its principal, but was dismissed against A and its principal. CA determined A vicariously liable to R as the employer of the marketing consultant company.

Issues

Is the marketing company an employee of Sagaz, such that they can be held vicariously liable for their actions?

Reasons

"The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account [or on account of his employer]. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, 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."

Justice Major also cautioned that the relative weight given to these and other relevant factors would depend upon the facts and circumstances of each case.

Precedents

The court concluded that there there was no one conclusive test to see if an independent contractor is under the 'control' of an employer. The Court called for a close examination of the total relationship and an approach which synthesized many of the factors found in the various nominate tests.

Bazley v Curry

✶ SCC 1999, p404

Facility for emotionally troubled children; sexual assault; vicarious liability.

Facts

The employer ran two residential facilities for emotionally troubled children between the ages of six and twelve. The role of the employees was to act as substitute parents to the children. They were responsible for the physical and emotional well-being of the children and they were involved in such intimate activities as bathing the children and putting them to bed. One of the employees committed a series of sexual assaults against the plaintiff in the residence.

Issues

Can the employer be held vicariously responsible?

Reasons

In Curry the test was clearly satisfied. The employer authorized the employee to undertake a parental, intimate, and nurturing role that materially increased the risk of abuse. The employer was vicariously liable for the sexual assaults that took place.

Precedents

An employer is strictly liable for the torts of her employees committed within the course of their employment. The vicarious liability of an employer has been justified on two broad policy grounds: the provision of a just and practical remedy and the deterrence of future harm.

A court must first determine if the situation is controlled by unambiguous precedent, in which case it must be applied. In the absence of such authority, the decision turns on policy considerations supporting vicarious liability generally, namely, the provision of a just and practical remedy and the deterrence of future harm. As a general rule, these policy factors support the principle that the employer is liable where the employee is placed in a position that creates or enhances the risk of the wrongful act. It is not sufficient that the employer provided the opportunity for the wrongdoing. The employer's enterprise and the power given to the employee must have materially increased the risk of the wrongdoing. This provides a sufficiently close connection between the employment and the wrongful act to justify the employer's responsibility. The relevant factors to be taken into account in applying this test include the opportunity afforded the employee to abuse his power, the extent to which the wrongful act may have furthered the employer's aims, the extent to which the act was related to friction, confrontation, or intimacy inherent in the employer's enterprise, the extent of the power conferred on the employee in relation to the victim, and the vulnerability of potential victims to the wrongful exercise of the employee's power.

CLARIFICATION FROM JACOBI V GRIFFITHS

It emphasized the importance of a strong connection between the enterprise risk and the sexual assaults. The nature of the employment must have significantly increased the risk of sexual assaults. In its view, the employer provided access to the plaintiffs and the opportunity to commit the sexual assaults but there was not a sufficiently strong connection between the kind of risk created and the nature of assault to warrant vicarious liability. The role of the program director was to establish a rapport with the children, to be their friend, and to provide adult mentoring. It was not to develop a parental, intimate, or nurturing relationship similar to that in Curry.

Blackwater v Plint

✯ SCC 2005, p404

Residential schools; tortfeasor with multiple employers; both employers can be held liable.

Facts

Aboriginal children sent to residential schools operated by government and church pursuant to Indian Act. Former students bring actions for various wrongs; all but those of sexual nature statute-barred. Held Dormitory supervisor D liable to six P's for sexual assault. TJ held Crown liable for assaults on basis of non-delegable statutory duty, found church jointly and vicariously liable. CA applied doctrine of charitable immunity to exempt church from liability, placing all on crown on basis of vicarious liability. Crown appeals on issues of charitable immunity, breach of non-delegable duty, and apportionment of fault.

Issues

Can the Crown and the church be held vicariously liable?

Reasons

Both the federal government and a church were found to be the joint employers of an employee who abused a student in a residential school run by them.

Precedents

The Supreme Court has, however, recently recognized that an employee may have more than one employer. If both the general employer and the temporary employer have some degree of control over the temporary employee it will no longer be necessary to make a choice between them. The borrowed servant issue will be restricted to the less likely scenario of one or the other having full control over the employee at the time of her wrongful act.

EB v Order of the Oblates of Mary Immaculate in the Province of BC

☆ SCC 2005, p404

Abuse at hands of repair man; vicarious liability; no imposed.

Facts

P suffered abuse at hands of repairmen. Sexual abuse not subject to statute of limitations. School put in place by the church in concert with the government.

Issues

Can the employer be held vicariously liable?

Reasons

Despite sexual assault precedent, situation doesn't connect to intimacy, friction, and confrontation in the same way in other VL cases. Thus, VL doesn't obtain on sheer precedent alone.

Precedents

Pay more attention to First step precedent analysis in Bazley. Is it fair and does it promote deterrence to hold the risk creator liable? Precedent acts as a guide, not binding, for finding a sufficiently close relationship.

KLB v BC

★ SCC 2003, p404

Foster care abuse; vicarious liability of the province; not vicariously liable.

Facts

P foster care children suffered physical/sexual/emotional abuse in 2 foster homes. Brought action against crown for, inter alia, VL for intentional torts and negligence of foster parents.

Issues

Is there a sufficient connection between the tortious actor and enterprise-creator/ controller to impose VL?

Reasons

A majority of the Supreme Court concluded that foster parents are not employees of the provincial government. A majority of the Court noted that foster parents enjoy a considerable degree of independence and discretion in meeting the goals of foster care and concluded that the government did not exercise sufficient control over the daily activities of the foster parents for them to be regarded as employees. They were acting on their own account not on account of the government.

The Supreme Court recognized the direct liability of government for a negligent failure to assess potential foster parents and to monitor carefully the home environment when a placement was made.

The Court recognized that the Superintendent of Child Welfare was in a fiduciary relationship with children who were removed from their parents and placed in a foster home where they were abused. It was argued that this was a breach of the Superintendent's fiduciary duty to the children because the placement was not, in retrospect, in the best interests of the children. The Court noted that the liability of a fiduciary is not strict and, furthermore, that in this context the application of a "best interests of the child" test was unworkable. The Court declared that the essence of fiduciary wrongdoing is a breach of trust and there must be some evidence of disloyalty or the promotion of one's interests at the expense of those of the beneficiary in order to establish liability. Since there was no evidence that the Superintendent had harmed the children by any act of disloyalty or conduct which favoured governmental interests over those of the children there was no breach of fiduciary obligation.

Foster families serve a public goal that is discharged in a highly independent manner, free from close government control.
Sagaz applied (1) Own 'equipment'- care in homes; (2) don't necessarily 'hire' helpers, but are responsible for determining who interacts with children and when; (3) control over organization and management of household (4) Gov doesn't interfere except to ensure regular meeting with social workers.

Policy considerations- Given independence of foster parents, government liability is unlikely to result in heightened deterrence- social workers can't be omnipresent. Can't regulate on day-to-day basis. Furthermore, might deter governments from placing children in foster homes in favour of less efficacious institutional settings. Slippery slope to VL for foster parent negligent driving.

Arbour dissent: Need to adapt Sagaz to non-commercial situations-

Control in Sagaz should mean acting on one's own account in non-commercial- level of control gov has capacity and right to exercise over foster parents most important indicator of this (not about actual control exercised everyday).
Province completely in control, they created the statutory regime, minister has discretion.
Consider perspective of victims: did they think Foster parents were doing things on their own, or really were agents of the province?
Look to communities reasonable perception of the situation.

Precedents

The approach outlined in Sagaz has not been restricted to commercial entities.

VL proper where 'liability is both fair and useful'. Fairness and Usefulness informed by policy goals

Link to economic considerations- Seems just that the entity that engages in the enterprise (and in many cases profits from it) should internalize the full cost of the operation, including potential torts

Lewis (Guardian ad litem of) v BC

✶ SCC 1997, p404

Independent contractor to remove rocks; poor job; province's non-delegable duty.

Facts

The defendant province hired an independent contractor to remove protruding rocks from a cliff-face above a highway. The work was carried out negligently by the contractor, and a rock that ought to have been removed fell onto the highway, killing a motorist. The province argued that since the work was delegated to an independent contractor it was not liable.

Issues

Can the province be held liable for the negligence of the contractor?

Reasons

The province was under a non-delegable duty of care and was liable because care had not been taken.

Justice Cory focused on the legislative provisions imposing various obligations on the defendant and concluded that the legislation indicated that the duty to carry out maintenance on the highway was non-delegable. He found additional support for this conclusion in a number of policy factors, including the vulnerability of the driving public arising from the fact that it is in no position to know if the work of a contractor has been done satisfactorily, the reasonable expectation of the public that the province is ultimately responsible for highway safety, and the practical difficulties in determining which contractor was responsible for the work in question.

Justice McLachlin (as she then was) wrote a concurring opinion in which she began to explore the idea that the disparate categories of non-delegable duties are instances of some broader principle. She observed that the existence of a non-delegable duty depended on the nature of the relationship between the parties, the nature and extent of the duty, and the propriety of holding the defendant liable for the wrongful conduct of the independent contractor. This appeared to herald a more principled approach to the categories of non-delegable duty around such concepts as the degree of risk in the work to be performed by the contractor or the employer's assumption of responsibility for the conduct of the contractor. A rationalization of non-delegable duties around some general principle might, moreover, lead to a more robust role for the concept.

Precedents

The leading case on non-delegable duties.

DEFAMATION

Bank of BC v CBC

✶ BCCA 1995

🐦 CBC defames bank; Charter values in CL; showing defamation.

Facts

The plaintiff bank sued the defendant television reporter and the defendant broadcasting company which employed her after a televised broadcast concerning the plaintiff's financial condition appeared as part of a news program. The claim was for damages for libel, injurious falsehood, negligence and wrongful interference.

Issues

Was there defamation? If so, does CBC have a defence?

Reasons

The burden of proof should not shift as major changes to the CL here should require intervention from the legislature. Yeah sure, the Charter is an expression of the law by all of the legislature but, yeah, let's just ignore it and not make sense.

Precedents

Showing truth of misconstrued statements may not be sufficient.

Bou Malhab v Diffusion Métromedia CMR

✶ SCC 2011

🐦 QC radio host was racist; defamation against a group; analysis for defamation against a group; statements about the plaintiff.

Facts

A radio host made on-air remarks about the taxi industry in Montréal, stating that the drivers were incompetent people who spoke "nigger" and did not take care of their cars. A taxi driver instituted a class action before the Superior Court, seeking damages for injury to reputation.

Issues

Can there be defamation against a group?

Reasons

An action in defamation can succeed only if personal injury has actually been sustained by the plaintiff or plaintiffs. This requirement also applies where the defamatory comments are made about a group. However, a group without juridical personality does not have the necessary capacity to be a party to an action. Also, a person does not, simply as a member of a group, have a sufficient interest to bring an action in damages. An interest will not be sufficient unless it is direct and personal.

The judge must take into consideration certain factors to determine whether personal injury has been sustained, including the size of the group, the nature of the group, the plaintiff's relationship with the group, the real target of the defamation, the seriousness or extravagance of the allegations as well as the plausibility of the comments and the tendency to be accepted. Here, the relevant group was of considerable size and it was well known that the group was heterogeneous.

Precedents

Test for defamation of a group.

Cherneskey v Armadale Publishing

✪ SCC 1979

🐦 Outlines test for fair comment; subjective component is later modified.

Facts

Law students objected to comments P made at a city council meeting, wrote a letter that the SK Star-Pheonex ran in which they allegedly defamed P, saying he had racist attitudes. Letter writers no longer in province. Newspaper owners (being sued) stated the paper did not honestly believe the comments in the letter.

Issues

What is the test for fair comment?

Precedents

The Supreme Court adopted the subjective test requiring the defendant to prove that he truly believed what he was saying.

This test was later criticized on a number of grounds.
First, it is the more restrictive of the two tests and does not give sufficient weight to freedom of expression.

Second, it does not harmonize well with the fact that the defence of fair comment may be defeated by proof that the defendant acted with malice. A true belief in the comment leaves little room for a finding of malice.

Third, it creates problems for secondary publishers such as media outlets and websites that provide a public forum for the comments of others. Newspaper proprietors, for example, may not agree with the views expressed in some letters to the editor or in op-ed pieces, but it would be a disservice to the community to suppress them.

Fourth, there are circumstances in which, for valid reasons, persons express opinions in which they have no belief. A debater may assert an opinion which he does not believe and a talk-show host may play the devil's advocate expressing a view contrary to his own in order to stir up controversy and to prompt a robust response from his listeners.

Crookes v Newton

✶ SCC 2011

🐦 Hyperlinks; are they republication; lol no of course not.

Facts

The plaintiffs brought various actions for defamation against a third party, alleging that they had been defamed in a series of articles published on the Internet which they characterized as a smear campaign. The article did not include any defamatory words, but contained hyperlinks to the allegedly defamatory articles to which he referred.

Issues

Are hyperlinks defamation?

Reasons

Majority (Abella J)
"Retweets are not endorsements" – Justice Abella

Precedents

relates to the use of hyperlinks contained in one communication to a site which contains defamatory material

Justice Abella, speaking for a majority of the Court, adopted a bright line rule that a hyperlink is not in itself a publication of the linked defamatory material. Publication occurs only when the defendant presents the content of the hyperlink in a way that actually repeats the defamatory words, not when the hyperlink merely refers to the existence and/or the location of material. In her view any other approach would unduly restrict the flow of information and freedom of expression on the Internet.

Grant v TorStar

✶ SCC 2009

Newspaper writes defamatory story; SCC creates defence of responsible communication on a matter of public interest.

Facts

Grant dealt with a story in the Toronto Star which reported on the plaintiff's plans to extend his private three-hole golf course on his lakefront estate to nine holes. The local residents objected to these plans on environmental grounds. The story also reported the suspicions of some of the residents that the plaintiff was improperly exercising political influence behind the scenes to secure governmental approval for this venture.

Issues

Is there a defence for newspapers?

Reasons

It was prompted in large part by the recognition of the difficult burden carried by news media publishers who, despite care in establishing the veracity of their reporting on a matter of public interest, nevertheless include a defamatory statement of fact. Under the law before Grant, such statements had to be justified unless some privilege was established. Consequently, a publisher needed not only to have confidence in the truth of the story but also to have confidence in his ability to prove its truth. This generated a degree of caution on the part of the media. That caution could be exploited by the powerful, the wealthy, and the privileged who would seek to suppress any anticipated uncomplimentary coverage by threatening court action. Important matters of public interest might, therefore, go unreported because of the "libel chill" cast by conventional principles. Grant provided an opportunity for the Supreme Court to recalibrate the tort of defamation to provide additional protection for freedom of speech and to further protect robust discussion on matters of public interest without unduly sacrificing the interest in reputation.

Precedents

The law of defamation has traditionally favoured the protection of reputation over free-speech interests and, to a significant degree, modern Canadian defamation law continues to reflect this bias. Recently, however, the Supreme Court has begun a gradual recalibration of defamation law in favour of free speech. It has been influenced by reform in other common law jurisdictions and by the failure of traditional doctrine to reflect sufficiently the constitutional recognition of freedom of expression and freedom of the press in the Charter.

The defence of responsible communication on a matter of public interest was established.

There are two essential elements to the defence. First, the statement must be on a matter of public interest. Public interest is defined in this context, as it is in the fair comment defence, as meaning legitimate public interest. Second, the defendant must have acted responsibly in making the communication. On this point, the Court offered a list of factors similar to those offered by the House of Lords to examine the conduct of the defendant. They are designed to test the degree of diligence and responsibility exercised in the investigation, writing, and fact-checking of the story. Consideration must be given to the seriousness of the allegation and the degree of harm that may be caused by it, the degree of public importance of the matter, the urgency of publication, the status and reliability of the defendant's sources, whether the plaintiff's side of the story was sought and accurately reported, whether the inclusion of the defamatory statement was justifiable, and any other relevant considerations.

Hung v Gardiner

✶ BCCA 2003

🐦 Litigator; complaint; pre-proceedings report; sues for defamation; absolute privilege extends to this body; extends even if proceedings do not ensue.

Facts

Litigator and accountant in front of Law Society review board. Plaintiff was subject of complaint to Institute of Chartered Accountants. Institute sent Law Society of British Columbia and Certified General Accountants Association edited copy of investigation report prepared in connection with professional conduct enquiry. Plaintiff brought action against institute and individuals for damages for defamation.

Issues

Was the society a quasi-judicial body?

Reasons

Held that actions of defendants, in sending edited report to both professional governing bodies, were necessary first steps in quasi-judicial proceedings and were sufficiently proximate to potential disciplinary proceedings to be protected by absolute privilege. Institute and individuals were immune from action by plaintiff in respect of report.

Precedents

An absolute privilege also attaches to all proceedings of, and to all evidence given before, any tribunal which by law, though not expressly a Court, exercises judicial functions — that is to say has power to determine the legal rights and to effect (sic) the status of the parties who appear before it.

Sun Life Assurance v Dalrymple

✶ SCC 1965

🐦 Discusses malice in qualified privilege defences.

Facts

Respondent brought an action for slander against his former employer and three of its employees. Defendants moved to dismiss the action on the ground that the alleged slanders were uttered on an occasion of privilege and that there was no evidence of express malice.

Issues

Was there malice?

Reasons

There was both extrinsic and intrinsic evidence of express malice sufficient for the jury to have found for plaintiff. "Malice" . . . does not necessarily mean personal spite or ill-will; it may consist of some indirect motive not connected with the privilege.

Precedents

Defines malice. P has burden of showing malice.

WIC Radio v Simpson

✶ SCC 2008

Anti-gay activist; defamatory statements made; definition of defamation, guidance on determining if statement is defamatory.

Facts

The plaintiff, Simpson, was a well known activist who strenuously opposed the introduction of materials dealing with homosexuality into the public schools' curriculum. In the course of a radio broadcast the defendant talk-show host expressed the defamatory opinion that the plaintiff condoned violence against homosexuals. At trial, however, he testified that he had no honest belief in that view. He could not, therefore, satisfy a subjective test of fairness.

Issues

What is defamation?

Reasons

It was, however, in the Court's view, an opinion that could honestly have been expressed on the proven facts by a person with prejudiced, exaggerated, or obstinate views. The Court reversed Chernesky, adopted the objective test, and held that the defence was established. The Court was influenced by some of the weaknesses of the subjective test alluded to above and a desire to promote the Charter value of freedom of speech. The concept of fairness does, therefore, provide a great deal of latitude for vigorous and harsh criticism on public issues even where the criticism may have serious economic and professional consequences for its target. Finally, the defence of fair comment is lost if the plaintiff proves malice on the part of the defendant. Malice includes spite, ill-will, and ulterior motive. The adoption of the objective test of fairness reinvigorates malice as a discrete element of the defence. The honesty of the defendant's beliefs is now a factor in determining malice.

Precedents

Defines defamation, gives guidance on determining if a statement is defamatory.