**Duty of Care**

**Is there an established category such that a proximity analysis is not necessary?**

* Public Authority Liability **Kamloops SCC**
* Product Liability, Physical Harm **Donoghue UK**
* Negligent Misrepresentation **Queen v Cognos SCC**
* Dangerous (Defective) Structures **Winnepeg Condo SCC**
* Relational Economic Loss **Bow Valley Husky SCC**
* Negligent Performance of a Service **BDC v Hofstrand SCC**
* Duty to Warn (Product Liability) **Hollis SCC**
* Misfeasance of Public Office **Roncarelli SCC**
* Negligent Medical Care/Duty to Warn (Medical Advice) **Reibl SCC**
* Commercial Host Liability **Jordan House SCC**
* Duty to Warn (Created Dangerous Situation) **Oke SCC**
* Psychological Harm **Devji BCCA, Cooper SCC**
* Negligent Investigation **Hill SCC**

**Look for any indication that the situation is distinct from an established category**

* Social host liability is distinct from commercial host liability **Childs SCC**
* Can be novel sub-categories of existing categories requiring analysis **Imperial Tobacco SCC**

**How to apply specific established categories**

* **Public Authority Liability** – recognized first in Canada for negligent housing inspection **Kamloops SCC**
* First determine if statute exists that creates or displaces a civil action (public law duty)
* Can take action against the public servant and their overseeing authority(ies) through vicarious liability
* If no statute, do a proper proximity analysis to determine if a private law duty exists
* There is no civil action for breach of statute, though it may be evidence of negligence **Sask Wheat Pool SCC**
* Three primary questions to ask in first stage of proximity analysis **Fullowka SCC**
  1. Is the group to which the legislative regime is directed reasonably contained and defined?
     + No: All persons who may invest in mortgage securities **Cooper SCC**
     + Yes: Workers in the mine **Fullowka SCC**
     + Yes: People receiving TMJ implant, not all parties affected by regulator **Taylor ONCA**
  2. What is the nature of the actual interactions between the regulator and class of potential P’s?
     + No interaction **Cooper SCC**
     + Direct daily contact in the mine **Fullowka SCC**
     + ­Distinct from and more direct than interactions with the part of the public affected by the regulator’s work **Taylor ONCA**
  3. Do the statutory duties actually relate to the class of potential P’s?
     + No they are aimed at regulating mortgage brokers and don’t contemplate investors **Cooper SCC**
     + Yes they are directly aimed at protecting mine workers **Fullowka SCC**
* Policy-Operational distinction, can’t sue for policy decision, can sue for negligent operation of policy **Just SCC**
  + Discussion of this occurs in the ‘residual policy considerations’ analysis
  + Governments must have the ability to make decisions based on social/economic/political factors **Imperial Tobacco SCC**
  + Exceptions when policies are irrational or created in bad faith **Roncarelli SCC**
  + Statutes may displace the ability to sue for negligent operations
* Would imposing a private law duty bolster the public law duties? **Hill SCC, Taylor ONCA**
* Would imposing a private law duty conflict with public law duties? **Cooper SCC, Siverston BCSC**
* Misfeasance of public office has two requirements **Odhavji SCC**
  1. Public officer engaged in deliberate and unlawful conduct in his capacity as a public officer
  2. Public officer subjectively knew the conduct was unlawful AND likely to harm the P
* Was there a Charter breach? **Ward SCC**
  + 24(1) allows for remedies for Charter breaches based on a 4 step process
    1. Establish a Charter breach
    2. Show why damages are appropriate (Compensation, Vindication, Deterrence)
    3. Are their State arguments why damages are inappropriate (Alternative remedies, chilling effect)
    4. Quantify damages – seriousness of breach is the principal consideration
       - Compensation – damages increase with increased injury
       - Vindication/Deterrence – damages increase with more egregious behaviour
* **Negligent Misrepresentation** has 5 requirements outlined in **Queen v Cognos SCC**
  1. There must be a duty of care based on a ‘special relationship’ between the representor and representee made out in accordance with **Cooper Hercules SCC**
     + It must be reasonable to say the representor should have foreseen that the representee would rely on the statement (**Cooper** 1st stage)
     + The reliance by the representee should be reasonable in the circumstances (5 indicia)
       - The representor had a direct/indirect financial interest in the transaction for which the representation was made
       - The representor was a professional with special skills, knowledge or judgment
       - The statement was provided in the course of the representor’s business
       - The information or advice was given deliberately, and not on a social occasion
       - The information or advice was given as a result of a specific inquiry or request
     + Most policy considerations surround indeterminate liability (**Cooper** 2nd stage)
       - NM should only be permissible when information used for the purpose it was put together by the party for which it was intended
       - Representor should only be liable to parties they know to be the intended recipients
  2. The representation must be untrue, inaccurate, or misleading
  3. The representor must have acted negligently in making this representation
  4. The representee must have relied, in a reasonable manner, on this representation
  5. The reliance must have been detrimental to the representee resulting in damages
* Representor can be found liable to a 3rd party for damage that their statement caused analogous to NM and doesn’t require a full **Cooper** analysis **Hasket ON CA**
* **Defective (Dangerous) Structures –** pure economic loss **Winnipeg Condo Corp. SCC**
  1. **Cooper** 1st stage finds buildings are reasonably permanent structures with reasonably foreseeable harm to subsequent purchasers. Construction must be ‘dangerous’ not merely ‘shoddy’
  2. Policy considerations say warranties should not shield contractors from subsequent purchasers with no contract. Modern products are too complex to hold consumers to caveat emptor. Indeterminate liability is limited by:
     + **Parties:** duty is limited to subsequent purchasers and inhabitants of the building
     + **Money:** duty is limited to the reasonable cost of repairing dangerous defects
     + **Time:** duty is limited to the useful life of the building
* **Relational Economic Loss –** arises when the D breaches a duty to a 3rd party causing damage to the P who is very connected to the 3rd party **Bow Valley Husky SCC**
  + First look to see if the contract between the original parties limits or contradicts any action in tort
  + **CNR** resulted in a 3-3-1 split on the proper approach, which McLachlin clears up here
  + There is a general exclusionary rule holding no REL duty with no contract with 3 exceptions (La Forest)
    1. The 3rd party has a possessory or proprietary interest in the object of the damage (lease, part-owner)
    2. General averaging cases from Maritime Law (ignore)
    3. The parties have an actual joint venture
  + If the REL doesn’t fall into one of these, apply **Kamloops/Cooper** to see if there is something ‘akin to a joint venture’ (McLachlin’s “compromise”)
* **Negligent Performance of a Service –** 3rd party suffers damage from D negligently performing a service for a P. 3rd party has no contract with the D **BDC v Hofstrand SCC**
  + 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 (lawyer drafting a will)
* **Duty to Warn (Product Liability)** – manufacturers of potentially dangerous or risky products have a duty to warn consumers of the hazards **Hollis SCC**
  + Companies must provide clear communication regarding any specific dangers arising from ordinary use of their product
  + The greater the danger, the more detailed and forceful the warning must be
  + The duty persists over time – new discoveries require new warnings
  + Medical products to be consumed, ingested, or otherwise placed in the body are of significant risk and a very high standard applies
  + The underlying duty is to the P, though the duty may be discharged to a learned intermediary in some circumstances
    - The product is technical in nature, so naturally used in supervised situations
    - The consumer would not be reasonably expected to receive warning directly from the manufacturer
      * E.g. no labels on breast implants, manufacturer not present at surgery
    - Proper deployment would put the learned intermediary in the same position of knowledge as the manufacturer regarding danger/risks

**\*Must do Step 1 – reasonable foreseeability test even with established category\***

**If no established category, proceed to a proximity analysis** **Cooper SCC**

1. Foreseeability/Proximity: Is there sufficient relationship of proximity between the parties that a reasonable person could foresee that their lack of care could cause damage to the other?
   1. Is it reasonably foreseeable that the actions of a reasonable person in the D’s position could cause injury to someone like the P?
      * Not reasonably foreseeable for negligent motorcyclist to anticipate nervous shock of accident witness **Hay UK**
   2. Proximity: is it fair and just given the relationship between the parties to impose liability on the D for the P? This includes policy considerations based on the closeness of the relationship.
      * There may be positive policy reasons to impose a duty **Hill SCC**
      * Police Chief owed duty to victim of police shooting due to close causal link, but his supervisory Police Board did not **Odhavji SCC**
      * Policy dictated unreasonable to impose liability on pregnant mothers for unborn children **Dobson SCC**
2. Are there residual policy considerations that should reduce or negate the prima facie duty or the liability established?

* Indeterminate liability, 2nd guessing quasi-judicial decisions, floodgates to litigation, conflict with other duties, alternative remedies available **Cooper SCC**

**Is there a claim that there should be a positive duty to act?**

* No duty to come to the aid of another in peril when the P is not at fault in any way **Horsley OCA/SCC**
* There are situations when positive duties have been imposed

1. Relationships of Economic Benefit
   * Commercial host duty with over service + knowledge of danger **Jordan House SCC**
2. Relationships of Control and Supervision
   * Court may find duty when autonomy of P is controlled or restricted by D
   * Examples: teacher/student, doctor/patient, carrier/passenger, landlord/tenant
3. Creation of Dangerous Situations
   * Non-negligently created a dangerous situation requiring action **Oke SCC**
4. Reliance Relationships and Undertakings
   * If a task is undertaken, must not omit to do what an ordinary man would do **Zelenko NY**
   * Crown servants failing to maintain range lights breach of duty to ship pilots **Nord-Deutsche SCC**
   * Rescuer does not owe duty to rescuee unless negligently made situation worse **Horsley OCA**
5. Statutory Duties
   * Rendering emergency medical services at the immediate scene of an accident does not leave D liable unless they were grossly negligent, were employed for that purpose, or did so with a view to a gain **Good Samaritan Act RSBC**

**Standard of Care (already established – what is it?)**

**What is the required standard of care?**

* Focus is on the conduct not the mental state of the D, and measured on an objective standard
* The appropriate standard is a question of law, if the standard has been breached is a question of fact
* A person should take into account the possibility of damage if the risk is such that a reasonable person would regard that risk as material – consider 2 factors **Bolton UK**
  1. How remote is the chance a person might be injured?
  2. How serious are the consequences if someone was injured?
     + One-eyed worker owed greater duty than normal because of seriousness loss **Paris UK**
* Conforming to statutory requirements is evidence of meeting standard of care, but not determinative **Ryan SCC**
* Social utility/acting for the greater good may be considered when assessing standard of care **Priestman SCC**
* Police authorized to use as much for as reasonably necessary in execution of their duty **Criminal Code 25(1)**
  1. This protects from trespass, but does NOT protect from negligence
  2. BC protects police from negligence except when guilty of dishonesty, gross negligence, malicious/wilful misconduct, libel/slander **Police Act RSBC**
     + Does not absolve authorizing municipalities, regional districts or ministers of vicarious liability

**What is the reasonable person?**

* The standard of care is based on the conduct of a man of ordinary prudence (objective) **Vaughan UK**
* A higher standard of care may be owed by a D to a physically disabled person **Carrol and Carrol ONCA**
* A physical disability does not require a P to take greater care than an ordinary person **Haley UK**

**Are there any customary practices being followed by the D?**

* Established customary practice is evidence, but not determinative of a standard of care **Waldrick SCC**
  + Onus is on the party claiming custom to prove it is in effect
* Courts will usually only override professional/industry standards if they offend rationality **Warren ABCA**

**Are there any statutes governing the conduct of the D?**

* Breach of statute is only evidence of negligence, not determinative **Sask Wheat Pool SCC**
* Compliance with statute is not determinative of lack of negligence **Ryan SCC**
* If the damage is not of a nature contemplated by the statute, breach of that statute does not constitute evidence of negligence **Gorris UK**

**Exceptions to the objective reasonable person standard**

* There is a 2 part test for determining potential liability of a child (7 is typically the youngest) **Heisler SCC**
  1. Can this specific child be subject to liability based on age, intelligence, experience, knowledge (subj.)?
  2. If yes, to what degree can a child like this be held responsible (modified-objective)?
* Children engaging in ‘adult activities’ are held to the reasonable person standard **Ryan v Hickson**
* A D suddenly afflicted with a mental illness can be relieved of liability if they can show: **Fiala ABCA**
  + As a result of their illness, they did not have the capacity to understand the duty of care owed, OR
  + As a result of their illness, they were not able to discharge the duty of care because they had no meaningful control of their actions

**What is the standard of care for professionals?**

* A doctor is required to use an ‘honest and intelligent exercise of judgment’ **Challand ABSC**
  + The law would only require that some comparable experts would agree with the judgment call
* There is a duty on doctors to disclose all material risks of a procedure to their patient **Reibl SCC**
  + Material risks are any that pose a threat to life/health/comfort weighed both on possibility and severity
  + Unusual risks with very serious consequences must be disclosed no matter how remote the possibility
* A lawyer will be liable in damages only if his error or ignorance was such that an ordinarily competent solicitor would not have made it or shown it **Brenner ONHC**
  + Fails standard if a practice is inconsistent with prudent precautions against a known risk

**Causation**

**A few comments about proof of negligence**

* When only circumstantial evidence, first ask is it even reasonably possible to infer negligence? **Fontaine SCC**
* If yes, and negligence is inferred, prima facie case made out – D can rebut with equally plausible counter story
* In absence of evidence allowing distinction between multiple negligent parties, they are equally liable **Leaman**
* If evidence of negligence of one or more parties, but no distinction between them and no prima facie case made out against either, the P has not proven their case and neither liable **Wotta**
* Onus can be shifted by statute, for instance driver must disprove negligence against passenger/pedestrian claims according to the **Highway Traffic Act RSO**

**Did the negligent actions of the D cause the injury to the P?**

* Default test in Canada is would the injury have occurred ‘**but for**’ the actions of the D? **Kaufmann SCC**
* The D need not be the sole (sufficient) cause, only a necessary cause (but for) **Athey SCC**
* With multiple negligent parties, damages are awarded based on degree of fault but parties are held jointly and severally liable **Negligence Act 4(1,2) RSBC**
* The ‘but for’ test is appropriate MOST of the time, but there are exceptions:
* **Materially Increased Risk**: use this when D breaches duty of care and increases risk of injury, though ‘but for’ test fails due to factual uncertainty **Snell SCC**
  + The SCC has rejected the onus shifting approach from **McGhee UK** as it can be impossible for a D to prove they did not cause injury after MIR shown
  + Endorses “robust and pragmatic” and “practical common sense” approach
  + Scientific proof is not required to prove on a BOP, common sense inferences are sufficient
  + Judges can give weight one party’s ability to adduce evidence, and the other’s to contradict it
  + Onus never shifts from P to D, but once an inference is drawn, its up to the D to rebut it
* **Material Contribution to Risk:** use this test when there are multiple independent sufficient causes **Clements SCC**
  + Typically multiple tortfeasors, all of whom breached their duty of care to the P
  + One or more has in fact caused the injury to the P
  + The P would not have been injured but for their negligence globally
  + Through no fault of the P, and because each D can point the finger at the other, it is impossible to prove on a BOP who was responsible
  + Causation may be imputed
  + VERY rare, and has never been applied in Canada to this point
* **Joint Tortfeasors:** use this when it cannot be distinguished between innocent and injuring party **Cook SCC**
  + This occurs when there are 2 (or more) parties who acted negligently
  + It is known one of them caused the P’s injuries, but cannot be determined which
  + The burden of proof shifts to the D’s to prove they were innocent (or the other liable), and failing this, they will be held jointly liable
* When it is unclear what course of action a person would have taken ‘but for’ the negligence of another, we may create a hypothetical and use the modified objective test **Reibl SCC**

**Remoteness**

**Has it been established that the D was negligent, but the P was harmed in a disproportionately large way?**

* **WM1 UK** finds liability for the ‘probable consequences’ of an act
* **WM2 UK** expands the test to damages for the ‘reasonably foreseeable’ risks/types of harm
* Canada has adopted the **WM2** approach and cuts off liability where the results are no longer reasonably foreseeable **Mustapha SCC**

**Was the resulting injury different in kind than what was foreseeable?**

* A D is not liable for injuries that were of a different type/kind than what was foreseeable **Hughes v Lord Advocate UK**
  + Describe the kind of injuries as generally as possible when advocating for the P
* Recovery doesn’t have to be conditional on a particular harm or precise sequence of events **Lauritzen AB SC**
  + Damages awarded for frostbite/amputation resulting from grabbing wheel and crashing car
* The thin skull rule applies to extent of injury only after it is established that the type of injury was not too remote **Mustapha SCC**
  + Remoteness analysis will focus on a P of reasonable fortitude, unless it is shown that the D had prior awareness of the P’s condition
  + Remoteness looks for foreseeable kinds of injuries, not foreseeable extent of injury **Leech Brain UK**
  + The egg shell personality, like the thin skull rule, is also still applicable **Marconato BC SC**
  + The crumbling skull principle only requires compensation in a thin skull situation sufficient to bring the P back to their original condition, not to remove the pre-existing condition

**Unclear Situation: Pure Mental Suffering as a result of a traumatic event with negligence involved**

* There is no SCC case in Canada on this, and damages were rejected here for remoteness, but an outline is given for when it may apply **Devji BC CA**
  + There must be a resulting recognized psychiatric injury
  + P must have been endangered themselves or witnessed a traumatic accident or its immediate aftermath with their own senses
  + The relationship to a party injured in the accident should be very close

**Was there an intervening act?**

* *Novus Actus Interveniens*: A legal argument triggered when another party (including the P) performs an act said to break the chain of causation, and be a fresh, independent cause of damage **Bradford SCC**
  + If there is an NAI, the D’s liability is cut off as of this point
  + If there is no NAI, go back to the reasonable foreseeability remoteness test
* A second accident resulting from a first accident caused by the D’s negligence passes the ‘but for’ test and these types of injuries should be reasonably foreseeable by the D **Wieland UK**
* If the P was reckless/negligent themselves when the second accident occurred, the D might not be found liable **McKew UK**
  + It is less likely that a D should foresee a negligent P (further down the material risk spectrum)
  + A negligent P may be considered an NAI
* Following **WM2**, a D is liable for all reasonably foreseeable injury subsequently caused by a doctor as long as a reasonable person in the position of the D could have foreseen the subsequent conduct was possible or had a real/substantial risk **Price ON CA**
  + Negligent treatment is usually reasonably foreseeable conduct, though some courts have held that gross negligence is not
  + D could try to pursue the negligent doctor in an action afterwards to recover
* Following **WM2**, a D is liable for any damages resulting from intervening illegal or wrongful acts so long as it was reasonably foreseeable **Harris v TTC SCC**
* Negligent inspection will not relieve the original manufacturer, though the inspector may be held liable in addition to the manufacturer with damages apportioned according to the **Negligence Act Clare Bros ON HC**

**Defences**

**Are there any defences that can be invoked to reduce or nullify damages? (Onus of proof on the D)**

**Contributory Negligence - Was the P responsible in part for their own injury? Assumption P has duty to themselves**

1. Did the P contribute in some way to the accident that caused their injury?
2. Did the P expose himself to extra risk of getting in an accident? (eg. Enter street with dark clothes at night)
3. Did the P fail to take reasonable precautions to reduce injury should an accident occur? (seat belt)

* When 2 or more parties contribute to an injury, it is the role of the Court to determine the degree to which each is at fault and apportion liability on that basis **Negligence Act RSBC**
  + Multiple tortfeasors are held jointly and severally liable, and only one action need to be initiated with multiple D’s
  + The ‘last clear chance’ doctrine has been abolished by the Act **Scurfield BC CA**

**Seatbelt Defence - Did the P fail to wear a seatbelt in an automobile accident? Galaske SCC**

* There is always a duty on drivers and passengers to wear a seatbelt
* Obligation on the driver to ensure passengers under 16 wearing seatbelt
  + If their parent is present, they share liability with the driver
  + Driver is in control of a licensed activity and thus assumes responsibility

**Voluntary Assumption of Risk (*volenti*) – Did the P accept the risk of injury? Hampley ON CA**

* A complete defence, but has a VERY high standard and will rarely be met
* Requires the P have both knowledge of the risks, and be accepting of those risks
* Evidence must show not only that P consented to the risk, but also consented to the possibility that the D would not take reasonable care in producing that risk
* Usually P will just be found contributorily negligent rather than subject to a complete defence

**Illegality (*ex turpi causa*) – Did the P’s injury arise in the course of their own illegal conduct? Hall SCC**

* A P is not entitled to ‘profit’ when their own actions violated legal (or moral?) rules
* A court should not be put in the position of declaring an act to be illegal, but also capable of being rectified
* Only available when there are concerns for the integrity of the legal system
* Defence is available when:
  + To allow the P’s tort claim would allow them to profit from their wrong, AND
  + Profit defined as “a direct pecuniary award for an act of wrongdoing”
* Defence is explicitly barred from claims for compensation for anything other than wrongdoing
* *Ex turpi* prevents an incarcerated criminal from recovering for lost wages for time spent in prison even when the criminal life was demonstrated to result from a tortious act **Zastowny SCC**
  + Exception if it can be shown that it was a wrongful conviction
* Like *volenti*, usually will be dealt with under contributory negligence rather than subject to a complete defence

**Defamation**

Defamation is a form of strict liability, and lack of intent is not a defence **Hulton & Co UK**

1. **Defamatory Statement(s) Made**
   * Classic-Modern test: “Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?” **Sim v Stretch UK**
   * Law leans towards a defamatory interpretation if multiple reasonable interpretations possible, though it is a finding of fact for the jury and based on context and circumstances **Rapp SCC**
   * Defamatory communications do not have to be in words **Vander Zalm SCC**
   * Innuendo can be defamatory **Rupic ON SC**
     + True innuendo: when those receiving the statement are aware of extraneous circumstances which would give the publication defamatory meaning
     + False innuendo: when an ordinary person would be able to infer defamatory meaning beyond the literal meaning of the words, absent any extraneous circumstances
2. **Referring to the Plaintiff**
   * Would a reasonable person (who knows the P) understand that the statement was referring to the P? **Booth BC CA**
   * Corporations are capable of having reputations that may be defamed
   * It is possible that defamation could be found in statements about a group **Bou Malhab SCC \*Civil**
     + For this class action to succeed on behalf of a group, they must be able to show an ordinary person would believe the defamatory statement damaged the reputation of all individual members of the group
     + Court will examine: group size, homogeneity, how it’s organized, plausibility of comments being accepted, if defamatory material targeted individual members or would cause people to attempt to determine the identity of individuals
3. **That is published or disseminated** 
   * The D must have intentionally made the statement available to a 3rd party other than the P in a form that is comprehensible, and it must be received and understood by that 3rd party
     + Accidental communication is not sufficient to establish publication
   * A person is assumed to intend the natural and probable consequences of their actions **McNichol SCC**
     + The wrongful or illegal act of another which allows them to receive the communication is generally not considered a natural and probable consequence
   * Defamatory words in a broadcast are deemed to be published **Libel and Slander Act RSBC**
   * It is not republication if an extra step must be taken to access the information (eg. Hyperlink or footnote) **Crookes SCC**
   * Not good law but courts may be willing to consider defence of innocent dissemination **Menear ON CA**
     + The dissemination must have occurred during the ordinary course of business
     + The D was innocent of any knowledge of libel in the work
     + Nothing in the circumstances ought to have led him to think there may have been libel
     + When the work was disseminated, it was not by the D’s negligence that he did not know of libel

**Defences to Defamation**

1. **Justification (Truth)** – full defence, honest belief/good faith intention not sufficient
   * Lack of truth is presumed once defamation elements made out, D may prove truth as a full defence
   * Literal truth of statements may not be sufficient if they were made in such a manner that creates the impression they were false **Bank of BC BC CA**
     1. The focus is on the “sting” or meaning the audience would have reasonably taken away
2. **Absolute Privilege** – full defence, unaffected by malice, 3 categories
   1. Statements made by executive officers (‘high officials’) relating to matters of the State
   2. Statements made during Parliamentary proceedings
   3. Statements made in the course of judicial or quasi-judicial proceedings

* Defamatory statement by RCMP Chief Superintendent to Assistant Deputy AG in the course of his duty covered by absolute privilege (1st category) **Dowson FCA**
* The test for quasi-judicial proceedings is “whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which courts act” (3rd category) **Hung BC CA**
  + Do they determine legal rights? Do they affect the status of parties before them?

1. **Qualified Privilege** – defeated by malice or exceeding the scope of privilege
   * There must be reciprocal interests: on the publisher to publish and receiver to receive **Toogood UK**
   * Statements may not exceed the scope for which the privilege was granted **Church of Scientology SCC**
     1. Reckless making of statements w/o checking for truth not malicious but may exceed privilege
   * Three types of malice
     1. Personal spite or ill-will
     2. Indirect motive or ulterior purpose (e.g. financial gain)
     3. Knowing falsity or reckless disregard for truth
        + The recklessness must be indifference to the truth **Smith v Cross BC CA**
        + Honest belief in truth, carelessness or irrational conclusions are not sufficient
   1. **Protection of One’s Own Interests**
      * Company may be protected by QP when making defamatory statements about officer quitting and reciprocal interest of employees to hear it as their interest tied to employer **Dalrymple SCC**
      * Must ensure that only those with legitimate interests receive statement **Pleau ON CA**
   2. **Common or Shared Interests**
      * Communications made on a matter in which there is a common interest for both the person making and receiving it is privileged **C(LG) v C(VM) BCSC**
        + Must be properly communicated
        + Language used must be warranted by the occasion that called for the publication
        + Ulterior purpose is not sufficient for malice unless it is the dominant purpose
   3. **Moral or Legal Duty to Protect the Interests of Another**
      * When a writer acts on any duty, legal or moral, towards the person to whom he writes to protect their interests, that communication is privileged **Watt UK**
        + a moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle
      * Defeated if one is acting morally wrong or vindictively **Fast BC SC**
   4. **Public Interest**
      * Group of recipients must have an interest; can’t be made “to the world” **Boland SCC**
      * Statements can be made to very large groups (e.g. “the electorate”) so long as you can find an identifiable interest for the whole group **Parlett BC CA**
        + Important to keep this defence narrow so the media isn’t given free reign to say anything anytime; chilling effect on those running for office
2. **Responsible Communication on a Matter of Public Interest**
   * McLachlin recognized a need to reverse chilling effect defamation laws were having on media reporting and QP was not offering sufficient protection **Torstar SCC**
     1. Only for “reporting,” other matters such as opinion pieces dealt with under fair comment
   1. The communication must be on a matter of public interest (determined by the judge)
   2. D must show the publication was responsible and he took diligence in trying to verify the truth of statements having regard to the circumstances.
      * Look to D’s intended meaning if multiple possible interpretations
   * Factors to consider in assessing responsibility
     + Degree of diligence should increase in proportion to seriousness of potential effects
     + The more “public importance” increases, the lower the standard for responsibility
     + As urgency of information increases, need to verify information decreases
     + The degree of reliability of a source affects the degree of diligence required (eg. Need to find a corroborating source)
     + The reporter should diligently seek the position of the plaintiff and accurately report this
     + Degree to which the “sting” was necessary as part of the communication
     + Statements should be matters of “reportage” not simply repeating defamatory material
3. **Fair Comment**
   * Binnie modifies original formulation from **Cherneskey** and adopts Dickson’s language in the dissent as the modern test as it better conforms to 2(b) values **WIC Radio SCC**
     1. Statements must be made on a matter of public interest
        + Defined much more broadly than in QP, more similar to Responsible Communication
     2. They must be based on fact
     3. They must be recognizable as comments (not statements of fact)
        + Based on how a reasonable person would interpret it
     4. The comments must be fair
        + Dickson’s test is must be objectively capable of honest belief by any person
        + Defeated by malice

* **Strategic Lawsuit Against Public Participation (SLAPP suit) Taseko Mines BCSC**
  + Frivolous lawsuits by large corporations against poor individuals/organizations to use financial deterrence of their public demonstration against them
  + An accusation of a SLAPP suit can be subject to further defamation suits (subject to available defences)
  + Articles against Taseko not found defamatory as it would not lower reputation of the mine
    - A reasonable person would expect one submitting a mine proposal to be subject to vigorous public debate

**Strict Liability**

**Elements**

* A man will be liable if he brings onto his land and collects anything for a non-natural use that is likely to do mischief if it escapes, must keep it as his peril. If it does escape, he is prima facie responsible for all damage which is the natural consequence **Rylands UK**
* The elements in contemporary Canadian law were outlined in **John Campbell Law Corp. BC SC**
  1. The D made a non natural use of his land
  2. The D brought something onto his land that was likely to do mischief if it escaped
  3. The substance in question escaped
  4. Damage was caused to the P’s property or person as a result of the escape
* The definition of a non-natural use was outlined in **Tock SCC**
  + The touchstone for application of the rule in **Rylands** is to be damage occurring from a use inappropriate to the place where it is maintained (“pig in the parlour”)
  + Must not be merely ordinary use of the land
  + Must not be for such a use as is proper for the general benefit of the community
  + What constitutes a natural use may evolve over time in response to changing social conditions
  + Rejects notion of increased danger or extra-hazardous activities (better for legislation)
* Some additional commentary and clarifications made in **Inco ON CA**
  + Also rejects expanding the scope of **Rylands** to include extra-hazardous material and says this is better left for legislation such as the **Environmental Protection Act**
  + A substance (e.g. nickel) doesn’t have to be naturally found on the property to have a natural use
  + Liability for damage not confined to a single escape, may be many escapes over time
  + Zoning/Planning legislation and regulations governing activities are relevant considerations
    - Inco in heavily industrialized area, didn’t create risks beyond those incidental to any industry
  + Clarifies the meaning of “for the general benefit of the community”
    - Refers to entities, usually governmental, acting under statutory authority and engaged in activities that benefit the community or at least a significant segment of the community at large

**Defences**

1. **Consent –** Onus on D to prove P consented to the activity on D’s land that led to escape
   * Implied consent can be found when P benefits from activity and does not object to it **Rickards UK**
2. **Action of the P** – akin to contributory negligence when some fault is attributable to P’s acts **Cowles ON SC**
   * Can have difficulty reconciling with **Negligence Act** as strict liability does not require fault of D
3. **Act of God** – restricted to extraordinary acts of nature which are not reasonably foreseeable at the time
4. **Deliberate Act of 3rd Party** – D must show a 3rd party did a deliberate act that caused the escape **Rickards UK**
   * The 3rd party does not need to have intended the escape, only the act
   * It must have been unforeseeable that this would occur
5. **Statutory Authority –** when a provision explicitly authorizes the activity in question
   * The authorized activity must have necessarily led to the damage complained of
   * There cannot be a safer alternative, even if the current method is cheapest **Ryan v Victoria SCC**

**Fires and Animals**

* Escape of fire can generally be treated under **Rylands** if the use of the land was non-natural
  + The only two defences to escape of fire are Act of God/Stranger
  + Onus on P to show escape was not an Act of God/Stranger **Fire Prevention (Metropolis) Act UK 1774**
* *Ferae naturae* are animals deemed dangerous as a group and are treated under strict liability **Cowles ON SC**
  + Escape not necessary, though some decisions have required escape from control
* *Mensuetae naturae* are individual animals deemed to be dangerous and fall under a ‘scienter’ action
  + If an individual animal is known to be dangerous, and injures the plaintiff, strict liability is imposed
  + Onus on the P to show evidence the animal was known to be dangerous regardless of whether or not it had previously harmed someone

**Vicarious Liability (Strict)**

* The Crown may be held liable for torts committed by any of its agents **Proceedings Against the Crown Act RSO**
* Always look for statutory provisions establishing or removing vicarious liability first
* Keep in mind there may be multiple routes to go after Crown/3rd party (negligence or VL)
* When assessing if vicarious liability should be imposed consider policy goals of:
  1. Fair and effective compensation
     + Individual D’s will often not have sufficient money to pay judgments
  2. Deterrence of future harm
     + Gives employees heightened interest in educating employees and having good policy
* Two Stage Analysis (stop once you find a basis for liability)
  1. What is the **nature of the relationship** of the actor to the (possibly) vicariously liable party? **Sagaz SCC**

1. Is the relationship sufficiently close that it is fair to impose liability (employer-employee is the clearest example of sufficiently close)
   * + Early tests focused on control over the tortious actor, or if they were in business for themselves
     + Other considerations now include:
       - Whether the worker provides their own equipment
       - Whether the worker hires their own helpers
       - The degree of financial risk taken by the worker
       - The degree of responsibility for investment and management held by the worker
       - The worker’s opportunity for profit in the performance of their tasks
2. If not determinative based on this, consider how the policy goals would factor in
   1. What is the **nature of the acts** committed in context of the relationship? **Bazley SCC**
      * Issue is to distinguish between an unauthorized ‘mode’ of performing an authorized act (attracts liability) and an entirely independent act (does not attract liability)
      1. Are there precedents which unambiguously determine on which side of the line between vicarious liability and no liability this case falls?
         * Common feature of precedents is liability is imposed when the act falls within the ambit of risk the employer’s enterprise created or exacerbated
         * Don’t need identical facts, just generally relevant cases and decide on which side of the line it falls (e.g. many sex assault cases) **Oblates SCC**
3. If no precedents, consider if liability should be imposed in light of broader policy objectives?
   * + - Fundamental Question: is there a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom?
       - List of non-exhaustive subsidiary factors to consider:
         * Opportunity the enterprise offered employee to abuse his power
         * The extent to which the wrongful act furthered the employer’s ends
         * Extent to which the wrongful act related to friction, confrontation, or intimacy inherent in employer’s enterprise
         * Extent of power conferred on employee in relation to victim
         * Vulnerability of potential victims to wrongful exercise of employee’s power
       - VL for B&G Club not found in abuse case when nature of actor’s job was not supposed to entail intimate relationships with children **Jacobi SCC** (distinguished from **Bazley**)

**Non Delegable Duties –** Even with some relationships deemed not sufficiently close (don’t exercise control), a D may not absolve themselves of liability simply by delegating away some duties (must still pass 2nd stage of VL analysis) **Lewis SCC**

* Dependent on the nature and extent of duty owed, and on the surrounding statutory provisions
* Now closed or heavily restricted to very express language in the statute creating a duty **KLB SCC**

No issue surrounding imposing VL on multiple parties, and can be done in a chain **Plint SCC**

Unions do not have sufficient control over union workers to impose VL (union executives may be different) **Fullowka SCC**