[DUTY OF CARE 12](#_Toc289697539)

[1. Is there a sufficient relationship of general proximity or neighbourhood between the 12](#_Toc289697540)

[plaintiff and defendant? 12](#_Toc289697541)

[2. Are there any policy reasons why that prima facie duty of care ought to be negated or limited in scope? 13](#_Toc289697542)

[Winfield (Torts Theorist) says Negligence arises from… 15](#_Toc289697543)

[KEY ELEMENTS IN NEGLIGENCE… 15](#_Toc289697544)

[*Res ipsa loquitur* = the thing speaks for itself 15](#_Toc289697545)

[SIX PART TEST FOR NEGLIGENCE: 16](#_Toc289697546)

[**Donoghue v Stephenson** [1932] UKHL 100 16](#_Toc289697547)

[**Anns v. Merton** [1977] 2 All E.R. 492 (H.L.) 17](#_Toc289697548)

[**Palsgraf v. The Long Island Railroad Company** (1928) 248 N.Y. 339 17](#_Toc289697549)

[**In Roe v Minister of Health** [1954] 2 All ER 131 (CA), - CONSIDERATIONS OF REASONABLE MAN 18](#_Toc289697550)

[**Caparo v. Dickman** [1990] 2 A.C. 605 (H.L.) U.K. TEST – MODIFIES/”OVERTURNS?” ANNS from a presumption in FAVOR of finding of duty of care into a presumption AGAINST finding a duty of care. 18](#_Toc289697551)

[**Kamloops (City) v. Nielsen**, [1984] 2 S.C.R. 2 {confirms ANNS test in Canada} 19](#_Toc289697552)

[**Cooper v. Hobart**  [2001] 3 S.C.R. 537, 2001 SCC 79 {MORE RESTRICTIVE THAN ANNS… when a claim is NOVEL it requires the three step analysis} ADDING PROXIMITY IN STEP ONE OF THE DUTY OF CARE – ALSO MEANS THAT… Burden to argue hat there SHOULD be a duty of care on PLAINTIFF 20](#_Toc289697553)

[Two (Three) part test: 20](#_Toc289697554)

[**APPLICATION OF THE DUTY OF CARE TEST** 21](#_Toc289697555)

[**Foreseeable Risk of Injury** 21](#_Toc289697556)

[**Moule v. NB Electric Co.** (1960 SCC) 21](#_Toc289697557)

[**Amos v. NB Electric Co.** (1976 SCC) 21](#_Toc289697558)

[**Haley v London Electricity Board** [1964] 3 All ER 185 (U.K. Case) 21](#_Toc289697559)

[**Dunsmore v. Deshields** (1978) (Sask. Q.B.) – Hardex Lenses 21](#_Toc289697560)

[SHOULD WE LIMIT THE DUTY OF CARE FOR POLICY REASONS? 22](#_Toc289697561)

[**Nova Mink v. Trans-Canada Airlines** [1951] 22](#_Toc289697562)

[EXAM POLICY QUESTION: “Does the fact that the plaintiff has suffered an injury mean that the injury was foreseeable?” (no!? – see above) 23](#_Toc289697563)

[SPECIAL DUTIES OF CARE: AFFIRMATIVE ACTION 23](#_Toc289697564)

[The distinction between misfeasance (positive acts) and nonfeasance (failure to act) 23](#_Toc289697565)

[The duty to rescue at common law 24](#_Toc289697566)

[**Osterlind v. Hill** (1928) – drunken Canoe – no duty to rescue 24](#_Toc289697567)

[Exceptions to the “no duty to rescue” rule 24](#_Toc289697568)

[**Matthews v. Maclaren; Horsley v. Maclaren** (1972) 24](#_Toc289697569)

[DUTIES *OWED* TO *RESCUERS* 25](#_Toc289697570)

[THE RESPONSIBILITY OF PROFESSIONALS 25](#_Toc289697571)

[**Smith v Rae** [1919] - Defendant (doctor) for breach of duty while Plaintiff giving birth (confinement) - **nonfeasance** and **does not amount to negligence** 25](#_Toc289697572)

[RESPONSIBILITY FOR THE INTOXICATED 26](#_Toc289697573)

[**Jordon House Ltd. v. Menow** (1973) - Commercial host - duty to reasonably ensure patrons make it home safely 26](#_Toc289697574)

[**Crocker v. Sundance Northwest Resorts Ltd.** (1988) 26](#_Toc289697575)

[**Childs v. Desormeaux** (2006) - social host does not owe a duty of care to a person injured by a guest who has consumed alcohol 27](#_Toc289697576)

[**Jane Doe v. Metro Toronto Police** (1998) 27](#_Toc289697577)

[THE DUTIES OWED TO UNBORN CHILDREN 28](#_Toc289697578)

[PRE-CONCEPTION WRONGS 28](#_Toc289697579)

[**Paxton v. Ramji**, 2008 ONCA 697 (CanLII), - women do not owe a duty to their future children 28](#_Toc289697580)

[WRONGFUL BIRTH AND WRONGFUL LIFE 28](#_Toc289697581)

[WRONGFUL PREGNANCY 29](#_Toc289697582)

[**Joshi v. Woole**y (1995) – tubal ligation – becomes pregnant – Dr negligent for failing to advise risks 29](#_Toc289697583)

[**Suite v. Cook**, [1991] R.J.Q. 514, 15 C.C.L.T. (2d) 15 (S.C.) aff'd [1995] R.J.Q. 2765 (C.A.) 29](#_Toc289697584)

[AN UNHEALTHY BABY IS BORN – WHAT ARE THE DAMAGES HERE? 30](#_Toc289697585)

[**Krangle (Guardian ad litem of) v. Brisco**, 2002 SCC 9, [2002] 1 S.C.R. 205 – Down’s syndrome – failed to advise – Dr. liable 30](#_Toc289697586)

[PRE-NATAL INJURIES 30](#_Toc289697587)

[**Bourhill v Young** [1943] AC 92 – no special duty to pregnant women 30](#_Toc289697588)

[THE “BORN ALIVE” RULE… 30](#_Toc289697589)

[**Duval v. Seguin**, 1972 – pregnant women ARE foreseeable 30](#_Toc289697590)

[**Dobson (Litigation Guardian of) v. Dobson**, [1999] 2 S.C.R. 753 – mother not liable for lifestyle choices 31](#_Toc289697591)

[Background 31](#_Toc289697592)

[Decision 31](#_Toc289697593)

[**A HEALTH PROFESSIONAL’S DUTY TO INFORM** 31](#_Toc289697594)

[**Haughian v. Paine** (1987) – doctors have a general duty to inform risks 31](#_Toc289697595)

[**A MANUFACTURER’S DUTY TO WARN** 32](#_Toc289697596)

[**Hollis v. Dow Corning Corp** (1995) 32](#_Toc289697597)

[**DeMarco v. Ungaro** (1979) – lawyer negligent in civil case (not immune) 32](#_Toc289697598)

[**Alcock v Chief Constable of South Yorkshire Police** [1992] 1 AC 310 – police negligently liability for nervous shock 32](#_Toc289697599)

[**Mustapha v. Culligan of Canada Ltd**  - Fly in bottled water (**psychiatric injury**) – a person of “**ordinary fortitude**” test comes **before** the **thin skull rule** for psychiatric injury. 33](#_Toc289697600)

[NEGLIGENT MISREPRESENTATION 34](#_Toc289697601)

[The traditional approach 34](#_Toc289697602)

[**Ultramares Corporation v. Touche,** 174 N.E. 441 (**1932**) - the law should not admit "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." (floodgates) (negligent misrepresentation) 34](#_Toc289697603)

[**Policy issues**: 34](#_Toc289697604)

[**Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465 – liability for pure economic loss where there is an “assumption of responsibility.” 35](#_Toc289697605)

[The relationship between **Hedley Byrne & Co. Ltd.** and **Donoghue** 36](#_Toc289697606)

[**FULL TEST (LIABILITY IN NEGLIGENT MISSTATMENT)** 36](#_Toc289697607)

[1. Duty of Care based upon a “special relationship”. 36](#_Toc289697608)

[a. Possession of a special skill. 36](#_Toc289697609)

[b. Reliance on the exercise of that skill. 36](#_Toc289697610)

[c. Knowledge and awareness of the possible reliance. 36](#_Toc289697611)

[(“REID test”) 36](#_Toc289697612)

[2. The representation must untrue, inaccurate or misleading. 36](#_Toc289697613)

[3. The person making the representation must have acted negligently in making the representation. 36](#_Toc289697614)

[4. The representation must have actually been relied upon. (but must be “reasonable” reliance) 36](#_Toc289697615)

[5. There must be damage. 36](#_Toc289697616)

[**Murphy v Brentwood District Council** [1991] 1 AC 398 – “the infliction of physical damage is recoverable, pure economic loss is not – in the UK” (Overturns Anns in the U.K.) 36](#_Toc289697617)

[**Judgment** 36](#_Toc289697618)

[THE CANADIAN POSITION 37](#_Toc289697619)

[**Hercules Management Ltd. v. Ernst & Young** (1997) {SPECIAL CONSIDERATION FOR COMPANY AUDITORS} 37](#_Toc289697620)

[CONCURRENT LIABILITY 37](#_Toc289697621)

[**BG Checo International Ltd. v. BC Hydro & Power Co. (**1993) - there is a prima facie presumption that a claimant CAN sue concurrently in TORT and CONTRACT. 37](#_Toc289697622)

[**MISREPRESENTATION DURING THE COURSE OF CONTRACTUAL NEGOTIATIONS** 38](#_Toc289697625)

[**Queen v. Cognos Inc.** (1993) – less than full disclosure in employment negotiations = negligent misstatement/misrepresentation 38](#_Toc289697626)

[MORE ON PURE ECONOMIC LOSS 39](#_Toc289697627)

[Five categories of pure economic loss (Feldthusen - academic). 39](#_Toc289697628)

[**1.** **Negligent misrepresentation** 40](#_Toc289697629)

[o **This is what we have been discussing above.** 40](#_Toc289697630)

[**2.** **Independent liability of statutory public authorities** 40](#_Toc289697631)

[o **Public entities owe a higher duty of care** 40](#_Toc289697632)

[**3.** **Negligent performance of a service** 40](#_Toc289697633)

[**4.** **Negligent supply of shoddy goods or structures** 40](#_Toc289697634)

[**5.** **Relational economic loss** 40](#_Toc289697635)

[o **This gets around Privity and other issues. A 🡪 B 🡪 C (claim between A and C)** 40](#_Toc289697636)

[**Martel Building Ltd. v. Canada,** 2000 SCC 60, [2000] 2 S.C.R. 860 40](#_Toc289697637)

[\*\*\* THIS IS A POSSIBLE EXAM POLICY QUESTION \*\*\* 40](#_Toc289697638)

[Policy of Why Torts/Courts Should Stay Out of Pre-Contractual Negotiations… 40](#_Toc289697639)

[NEGLIGENT PERFORMANCE OF A SERVICE 41](#_Toc289697640)

[**B.D.C. Ltd. v. Hofstrand Farms Ltd.** (1986) [1986] 1 S.C.R. 228 – Courier Company Fails to Deliver Envelope (Land Registry) 41](#_Toc289697641)

[**James v. British Columbia** (2005) – tree farm – Crown negligently omits to include a provision which would protect the workers – Crown is liable. 42](#_Toc289697642)

[THE ROLE OF PRIVITY (SHODDY GOODS & SERVICES – WITH ECONOMIC LOSS) 42](#_Toc289697643)

[**Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.** (1995) – building constructors are reasonably responsible to future owners – regardless of privity. 43](#_Toc289697644)

[RELATIONAL ECONOMIC LOSS 43](#_Toc289697645)

[**Canadian National Railway. v. Norsk Pacific Ltd** (1992) [SCC] “The Jervis Crown” 43](#_Toc289697646)

[**Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997) 44**](#_Toc289697647)

[STANDARD OF CARE 45](#_Toc289697648)

[**Vaughan v. Menlove** (1837, UK) 45](#_Toc289697649)

[**Blyth v Birmingham Waterworks Company** (1856) 11 Ex Ch 781 – Standard of Care – Reasonable Man test. 45](#_Toc289697650)

[**Arland v Taylor** [1955] 3 D.L.R. 358 (Ont. C.A.) – confirms Blythe – definition of the Reasonable Man 46](#_Toc289697651)

[**THE REASONABLE MAN**… 46](#_Toc289697652)

[Not extraordinary or unusual 46](#_Toc289697653)

[Not superhuman 46](#_Toc289697654)

[Not required to display the highest skill of anyone 46](#_Toc289697655)

[Not a genius who can perform uncommon feats 46](#_Toc289697656)

[Not possessed of unusual powers of foresight 46](#_Toc289697657)

[Is of normal intelligence 46](#_Toc289697658)

[Makes prudence a guide to his conduct 46](#_Toc289697659)

[When determining whether the defendant has acted reasonably and met the required standard of care, and reasonableness the courts often look at three main factors: 46](#_Toc289697660)

[**The probability and severity of the harm**; 46](#_Toc289697661)

[**The cost of risk avoidance**; and 46](#_Toc289697662)

[**The social utility or value of the conduct** 46](#_Toc289697663)

[**Bolton v. Stone** [1951] A.C. 850 (H.L.) - A defendant is not negligent if the damage to the plaintiff was not a reasonably foreseeable consequence of his conduct. 46](#_Toc289697664)

[**Paris v. Stepney Borough Council** [1951] A.C. 367 (H.L.) – Give the one-eyed man safety goggles, for Christ sake!! 47](#_Toc289697665)

[**Watt v. Hertfordshire County Council** [1954] 1 WLR 835 – Firemen and their employers can take more risks. (Social Utility Argument) 47](#_Toc289697666)

[**Vaughn v. Halifax-Dartmouth Bridge Comm**. [1961] – Cost of Risk Avoidance – Bridge Painting 47](#_Toc289697667)

[STANDARD OF CARE EXPECTED OF CHILDREN 48](#_Toc289697668)

[**McEllistrum v. Etches** [1956] S.C.R. 787 - Children over the tender age are liable for negligence but only weighed against the reasonable child. 48](#_Toc289697669)

[**Joyal v. Barsby** [1965] – 6yr old runs onto busy road – hit by truck – kid held to be contributorily negligent since trained in highway safety. 48](#_Toc289697670)

[**Heisler v. Moke** [1971] - year old boy had already injured his leg in a previous accident then was driving a tractor and aggravated the injured leg – found to be contributorily negl’t. 49](#_Toc289697671)

[**Tillander v Gosselin** - 3-year old tyrant grabbed a baby from her carriage and dragged her 100 feet 49](#_Toc289697672)

[**CHILDREN PARTICIPATING IN “ADULT ACTIVITIES” held to reasonable standard of care** 50](#_Toc289697674)

[**Dellwo v. Pearson** (1961) Unfair to permit minor in operation of motor vehicle to be held to lower standard 50](#_Toc289697675)

[**Ryan v. Hicksen**(1974) (snowmobile) 50](#_Toc289697676)

[**MclErlean v. Sarel** (trial bikes) 50](#_Toc289697677)

[**Thomas v. Hamilton (City) Board of Education** (1994) – parents will be held liable if the injury is a result of their failure to control or monitor the child’s conduct. 50](#_Toc289697678)

[**LaPlante (Guardian ad litem of) v LaPlante** -father held liable for letting 16 yr old son who just got his licence drive in icy conditions with traffic at highway speed 50](#_Toc289697679)

[STANDARD OF CARE EXPECTED OF THE DISABLED 51](#_Toc289697680)

[**Carroll and Carroll v. Chicken Palace Ltd.** [1955] - physically disabled are required to meet only the standard of care of a reasonable person with the same disability 51](#_Toc289697681)

[**Fiala v. Cechmanek** (2001) - guy jumps into sunroof; didn‟t know he was mental – absolved of liability 51](#_Toc289697682)

[STANDARD OF CARE EXPECTED OF PROFESSIONALS 51](#_Toc289697683)

[**White v. Turner** (1981)(Ont. C.A.) – breast reduction surgery botched – surgeon was rushed and careless. - professional should be judged by the standard of care of his profession 51](#_Toc289697684)

[**Layden v Cope** (1984) – man diagnosed with Gout… kept getting worse… wasn’t Gout – Country Dr. held liable for negligence for not refereeing to specialist. 52](#_Toc289697685)

[**Ter Neuzen v. Korn [**1995] - specialists must be assessed in light of the conduct of other ordinary specialists 52](#_Toc289697686)

[**Brenner v Gregory** - lawyers will be held to the standard of a reasonably competent and diligent lawyer 52](#_Toc289697687)

[CAUSATION 53](#_Toc289697688)

[**THE BUT-FOR TEST** 53](#_Toc289697689)

[**Kauffman v. Toronto Transit Commission** [1960] Passenger injured on escalator- metal-clad hand rail instead of rubber type (coefficient of friction) – no causation link/too remote 53](#_Toc289697690)

[**Barnett v. Chelsea & Kensington Hospital** [1969] – **arsenic poisoning – patient sent home –** even if the deceased had been examined and admitted for treatment, there was little or no chance that the only effective antidote would have been administered to him in time. 53](#_Toc289697691)

[**PROBLEMS WITH THE BUT-FOR APPROACH** 54](#_Toc289697694)

[**EVIDENTIAL INSUFFICIENCY (THE “EVIDENTIAL GAP”)** 54](#_Toc289697695)

[**Walker Estate v. York Finch General Hospital** [2001] 1 S.C.R. 647 - How do we know what the HIV infected person would have actually done (Donate blood or not) if he had all the information on the pamphlets?] – Material Contribution - not necessary for the defendant’s actions to be the SOLE cause of the damages 54](#_Toc289697696)

[[**MATERIAL CONTRIBUTION?**] 54](#_Toc289697697)

[**MULTIPLE INSUFFICIENT CAUSES (NO SINGLE FACTOR IS THE “BUT-FOR”)** 55](#_Toc289697698)

[**Athey v. Leonati** [1996] - a tortfeasor cannot avoid liability for injuries or losses on the grounds that one of the contributing causes (even if a major contribution) emanated from the Plaintiff. (Weak back, 2 car accidents, then herniated disk when returning to exercise.) 55](#_Toc289697699)

[**MULTIPLE SUFFICIENT CAUSES** (multiple causes which each could have done it – each separately fully liable). 55](#_Toc289697700)

[**Lambton v. Mellish** [1894 ] - 2 refreshment vendors with organs producing noise, nearby homeowner alleges nuicance- noise made by each organ alone is a nuicance, so hold each liable separately 55](#_Toc289697701)

[Materially increased risk - Coal Dust, Asbestos, Cigarettes, Botched surgeries 55](#_Toc289697702)

[**Snell v. Farrell** [1990] 2 S.C.R. 311 - Cataract Operation – bleeding – continued operation – blood in eye – 6 months optic nerve atrophied – total loss of vision – may have occurred anyway. - Causation can be inferred from the facts "in the absence of evidence to the contrary adduced by the defendant." 56](#_Toc289697703)

[Loss of chance - This area of claim has been shut down in Canada. 56](#_Toc289697704)

[Alternatives to the but-for approach – POSSIBLE EXAM POLICY QUESTION!!! 56](#_Toc289697705)

[CORRECTIVE JUSTICE – returning aggrieved parties to their original state 57](#_Toc289697706)

[DISTRIBUTIVE JUSTICE – poor guy hits Bill Gates’ car (Damages should be relative to what the people can afford.) 57](#_Toc289697707)

[RETRIBUTIVE JUSTICE (Kant) – wrong behaviour deserves to be punished – no matter what. 57](#_Toc289697708)

[CONSEQUENTIALISM (DETERRENCE) – Speeding tickets and heavy jail sentences deter crime. 57](#_Toc289697709)

[RESTORATIVE JUSTICE – very closely linked to Corrective Justice 57](#_Toc289697710)

[REMOTENESS 58](#_Toc289697711)

[**THE DISTINCTION BETWEEN FORESEEABILITY (NEIGHBOURS) AND REMOTENESS (PROBABLE OUTCOMES)**. 58](#_Toc289697712)

[**The decision in Re Polemis & Furniss, Withy & Co. Ltd** - Dropped a plank into the hull of a ship… caused a spark… spark ignited benzene in ship hold… ship exploded = Strict Liability – NO LONGER APPLIES – NOT THE LAW ANYMORE. 58](#_Toc289697713)

[**The Wagon Mound (No. 1)** and the foreseeability test - Furnace oil on water… welding on dock… ignites, fire on pier. Ultimately decided that it was not foreseeable. 58](#_Toc289697714)

[**The Wagon Mound (No. 2)** and the foreseeability test - Furnace oil on water… welding on dock… ignites, fire on pier – OTHER SHIPS BURN (NUISANCE). Ultimately decided that, although the risk of fire was low, it was still possible and thus it was foreseeable. 58](#_Toc289697715)

[**THE CHANGING LANDSCAPE OF REMOTENESS** 59](#_Toc289697716)

[**Hughes v. Lord Advocate** [1963] A.C. 837 (H.L.) – child picks up then drops a paraffin lamp – it explodes down an unmanned manhole – injuries result. 59](#_Toc289697717)

[**SEQUENCING OF EVENTS** 59](#_Toc289697718)

[**Assiniboine South School Div No. 3 v. Greater Winnipeg Gas Co.** (1971) – each individual link in the chain of events was foreseeable (sequencing) 59](#_Toc289697719)

[**Smith v. Leech Brain & Co.** [1962] - a tortfeasor is liable for negligent damage, even when the claimant had a predisposition that made that damage more severe than it otherwise would have been (thin skull rule). 59](#_Toc289697720)

[**Marconato v. Franklin** [1974] 6 W.W.R. 676 (B.C.S.C.) - minor physical injuries in a car accident caused by **Δ**’s negligence. Afterwards she developed pain and stiffness with no physical explanation, and underwent a “major personality change” - tortfeaser must take his victim as he finds him. 60](#_Toc289697721)

[REMOTENESS OF DAMAGE: INTERVENING CAUSES 60](#_Toc289697722)

[**Bradford v. Kanellos** (1973) - the last wrongdoer doctrine. (restaurant fire, hissing of extinguisher, patron yells “gas leak” – then full panic) 61](#_Toc289697723)

[**NATURALLY OCCURRING INTERVENING ACTS (ACTS OF GOD)** 61](#_Toc289697724)

[Negligent intervening acts 62](#_Toc289697725)

[Intentional intervening acts 62](#_Toc289697726)

[**EXCEPTIONS TO THE CURRENT POSITION** 62](#_Toc289697727)

[**INTERVENING ACTS OF MEDICAL MALPRACTICE**  62](#_Toc289697728)

[**Price v. Milawski** [1977] 82 D.L.R. (3d) 130 (Ont. C.A.) – one doctor negl. relying on other doctor negl. – both doctors liable. 62](#_Toc289697729)

[LIABILITY FOR THE DELIBERATE INTERVENING ACTS – 62](#_Toc289697730)

[**Hewson v. Red Deer** (1976) 63 D.L.R. (3d) 168 (Alta. T.D.) – Tractor left with keys in it – the act of the third party was not an intervening cause because it was foreseeable. 62](#_Toc289697731)

[**Lamb v. London Borough of Camden** [1981] QB 625 - water main maintained by the Council broke, the claimant moved out and squatters moved in, causing further damage to the house - secondary damage caused by the squatters was too remote 63](#_Toc289697732)

[DEFENCES IN NEGLIGENCE 63](#_Toc289697733)

[Start with: (\*\*\* IMPORTANT FOR EXAM \*\*\* ) 63](#_Toc289697734)

[o No duty of care 63](#_Toc289697735)

[o Duty was met 63](#_Toc289697736)

[o No causation 63](#_Toc289697737)

[o Too Remote 63](#_Toc289697738)

[Then and only then go to defences (which frequently are difficult to maintain in court.) 63](#_Toc289697739)

[o Contributory negligence 63](#_Toc289697740)

[o Voluntary Assumption 63](#_Toc289697741)

[o Illegality 63](#_Toc289697742)

[o Inevitable Accident 63](#_Toc289697743)

[Burden of proof is on the DEFENDANT and CAN argue multiple defences 63](#_Toc289697744)

[CONTRIBUTORY NEGLIGENCE 64](#_Toc289697745)

[**Walls v. Mussens Ltd.** (1969), 11 D.L.R. (3d) 245 (N.B.C.A.) - Truck/Gasoline fire in Garage – Owner used snow instead of fire extinguishers – owner NOT contributory negligent – “in the agony of the moment.” 64](#_Toc289697746)

[**Gagnon v. Beauliey** (1977), W.W.R. 702 (B.C.S.C.) - Did not wear a seatbelt – person did not believe that seatbelts were useful – Court said it didn’t matter = contributorily negligent 64](#_Toc289697747)

[**Rintoul v. X-Ray and Radium Indust. Ltd**. [1956] S.C.R. 674 - Collision with stationary car—Sudden failure of brakes—Defence of INEVITABLE ACCIDENT not valid – duty to inspect brakes still exists 64](#_Toc289697748)

[**The Negligence Act 1996** 65](#_Toc289697749)

[VOLUNTARY ASSUMPTION OF RISK (VOLENTI) 65](#_Toc289697750)

[**Mortimer v. Cameron** (1994), 17 O.R. (3d) 1 (C.A.) horseplay on stairs fell and crashed through an improperly constructed wall – NOT FORSEEABLE to horseplayers that building failed. 65](#_Toc289697751)

[The distinction between express and implied consent 66](#_Toc289697752)

[In order to apply the defense, Defendant MUST establish the following… 66](#_Toc289697753)

[**Dube v. Labar** (1986), 27 D.L.R. (4th) 653 (S.C.C.) - Defence of Volenti (in general) NOT applicable to the majority of drunk driver willing passenger cases – almost impossible to assume these precise risks. 66](#_Toc289697754)

[ILLEGALITY – COMPLETE DEFENSE 66](#_Toc289697755)

[**Hall v. Hebert** (1993), 101 D.L.R. (4th) 129 (S.C.C.) – establishes two requirements for Illegality Defense 66](#_Toc289697756)

[**MacDonald v. Woodward** [1974], 43 D.L.R. (3d) 182 (Ont. Co. Ct.) - P need only show that that accident occurred on highway, and that injury was the result of collision (not result of drivers conduct)- burden then shifts to D to show that neg’ce was NOT a factor. 67](#_Toc289697757)

[**Cook v. Lewis** [1952], 1 D.L.R. 1 (S.C.C.) - Negligence—Hunting accident—Jury's finding that plaintiff shot by one of two defendants but unable to say by which one—Whether finding of absence of negligence was perverse—Onus 67](#_Toc289697758)

[**Fontaine v. British Columbia (Official Administrator)** [1997] 156 D.L.R. (4th) 577 (S.C.C.) -‑ Negligence ‑‑ Res ipsa loquitur ‑‑ Circumstantial evidence ‑‑ Precise time, date and place of motor vehicle accident unknown ‑‑ Severe weather and bad road conditions at presumed time of accident ‑‑ Whether or not res ipsa loquitur applicable, and if so, effect of applying it 67](#_Toc289697759)

[LIABILITY OF PUBLIC AUTHORITIES 68](#_Toc289697760)

[**Wellbridge Hldg. Ltd. v. Winnipeg** (1970) - Municipalities are not liable for enacting, repealing, etc muncipal by-laws. 68](#_Toc289697761)

[Judicial Immunity and the Provincial Court Act 69](#_Toc289697762)

[Liability of Public Authorities 69](#_Toc289697763)

[**Just v. British Columbia** (1989) [1989] 2 S.C.R. 1228 – boulder falls on car– this was an operational instead of policy decision – therefore gov’t was negligent and liability exists. 69](#_Toc289697764)

[**Brown v. British Columbia** (1994) 1 S.C.R. 420 – summer vs. winter operational schedule = POLICY decision = NO liability. 70](#_Toc289697765)

[MISFEASANCE IN A PUBLIC OFFICE 71](#_Toc289697766)

[**Odhavji Estate v. Woodhouse**, 2003 SCC 69, [2003] 3 S.C.R. 263 – Police owed plaintiffs duty to take reasonable care to ensure that police officers cooperated with investigation. 71](#_Toc289697767)

[\*\*\*Review debates about Cooper versus Anns\*\*\* for EXAM 71](#_Toc289697768)

[**Cooper v. Hobart** [2001] 3 S.C.R. 537 (More restrictive than Anns?) (good reasons not to?) 71](#_Toc289697769)

[STATUTORY TORTS 72](#_Toc289697770)

[**Inferring a Cause of Action (Consider *Horsley*)** 72](#_Toc289697771)

[**R. in Right of Can. v. Sask. Wheat Pool** (1983) - courts should only use breaches of a statute as evidence towards an established tort. 73](#_Toc289697772)

[THE *CHARTER* AND TORTS LIABILITY 73](#_Toc289697773)

[\*\*\*EXAM NOTE – IS THERE A PREEXISTING DUTY OF CARE BEFORE ANNS TEST!!!!!??? IF YES THEN THERE *IS* DUTY OF CARE \*\*\* 74](#_Toc289697774)

[**Galaske v. O'Donnell,** [1994] 1 S.C.R. 670 - Negligence ‑‑ Motor vehicles ‑‑ Seat belts ‑‑ Duty of care ‑‑ Eight‑year‑old child injured in motor vehicle accident ‑‑ Child not wearing seat belt at time of accident ‑‑ Whether general duty of care owed by driver of vehicle to passengers includes duty to take reasonable steps to ensure that passenger under 16 years of age wears seat belt ‑‑ If so, whether duty negated by presence of parent of child. 74](#_Toc289697775)

[OCCUPIERS’ LIABILITY 74](#_Toc289697776)

[The Common Law Approach 74](#_Toc289697777)

[Relationship to Negligence 75](#_Toc289697778)

[Types of Visitors and the Standard of Care 75](#_Toc289697779)

[The Statutory Approach 75](#_Toc289697780)

[**Occupiers Liability Act** 76](#_Toc289697781)

[**[RSBC 1996] CHAPTER 337** 76](#_Toc289697782)

[COMMON LAW CASES 79](#_Toc289697783)

[**Palmer v. St. John** (1969), 3 D.L.R. (3d) 649 (N.B.C.A) - Plaintiff injured tobogganing on a hill in the City – but run by an independent Association – therefore City was NOT Occupier. 79](#_Toc289697784)

[**Finigan v. Calgary** (1967), 65 D.L.R. (2d) 626 (Alta C.A) - Plaintiff stumbled on tree stump going into TeePee at park – paid for admission – could be either an Invitee or Contractual – in either case the City owed duty of care – did not meet the standard – IS liable. 79](#_Toc289697785)

[**McErlean v. Sarel** (1987), 42 D.L.R. (4th) 577 (Ont C.A) - gravel pit – cyclists crash into each other – not an unusual danger – City not liable 79](#_Toc289697786)

[NUISANCE 81](#_Toc289697787)

[Designed to protect enjoyment of land, **near-strict liability** 81](#_Toc289697788)

[Different from negligence in that it looks at effects being unreasonable, not actions; **different from trespass as it’s indirect** 81](#_Toc289697789)

[Test for private nuisance (PLAINTIFF AND DEFENDANT MUST BOTH POSSESS LAND): 81](#_Toc289697790)

[ 1) Is there unreasonable interference with the plaintiff’s land? (two branches) 81](#_Toc289697791)

[o **2) Defences** 82](#_Toc289697792)

[o **3) Remedies** 82](#_Toc289697793)

[ Public nuisance 83](#_Toc289697794)

[o Public nuisance is nuisance that “**materially affects the reasonable comforts and conveniences of life of a class of [persons**]” (if sufficient number of people decided on case by case basis); can be interference with rights of way, public lands, bodies of water, etc. 83](#_Toc289697795)

[o Can be proven through multiple private nuisance claims 83](#_Toc289697796)

[o Can make private damages claim for public nuisance, but damage suffered must be distinct and of different kind from the damage suffered by the public at large 83](#_Toc289697797)

[o Generally taken care of under Criminal Code (s. 180 Common Nuisance) 83](#_Toc289697798)

[STRICT LIABILITY 83](#_Toc289697799)

[ ***Rylands v. Fletcher***rule leads to strict liability claim (no fault needed) 83](#_Toc289697800)

[ To show you need to prove 83](#_Toc289697801)

[o Non-natural use of land (**Gertsen v. Municipality of Metropolitan Toronto**) 83](#_Toc289697802)

[o Thing likely to cause mischief 84](#_Toc289697803)

[o Escape 84](#_Toc289697804)

[o Damage 84](#_Toc289697805)

[ Defences that are available: 84](#_Toc289697806)

[o **Consent** 84](#_Toc289697807)

[o **Mutual Benefit** 84](#_Toc289697808)

[o **Default of the Plaintiff** 84](#_Toc289697809)

[o **Act of God/Stranger** 84](#_Toc289697810)

[VICARIOUS LIABILITY 84](#_Toc289697811)

[ About relationship between tortfeasor and other entity (usually employer or principal), making entity liable strictly on demonstration of sufficient relationship 84](#_Toc289697812)

[ Usually employer/employee 84](#_Toc289697813)

[ Liability DOES NOT HOLD if the person is an independent contractor 84](#_Toc289697814)

[o **Step 1: Test for employment (671122 Ontario Ltd. v. Sagaz Ind.):** 84](#_Toc289697815)

[o **Step 2: Must be acting in the course of their employment** 85](#_Toc289697816)

# DUTY OF CARE

(a *threshold* question which won’t determine liability

**A DUTY OF CARE IS NOT OWED TO THE WORLD**)

Answering the duty question involves a two-stage inquiry (***Anns, Kamloops****)*

## 1. Is there a sufficient relationship of general proximity or neighbourhood between the

## plaintiff and defendant?

Does the plaintiff belong to a *class of persons* so closely and directly affected by the act of the defendant that the defendant “ought reasonably have them in contemplation? (***Donoghue v. Stevenson****)*

Think in terms of **categories of persons** and **relationships:**

* Does the pairing match an established pairing from cases we’ve read (i.e. consumer-manufacturer, parent-child)?

**Pre-Established Relationships:**

|  |  |
| --- | --- |
| Contractual offeror-offeree | *Dunsmore v. Deshield* – Hardex lenses |
| **Business-customer** | ***Crocker v. Sundance*** – drunk patron hurt in tubing competition  ***Arnold v. Teno*** *–* child hit by car when leaving ice cream truck |
| **Invitor-invitee** | ***Arnold v. Teno*** - child hit by car when leaving ice cream truck  ***Just v. B.C.*** – giant boulder falls on car driving on highway |
| **Manufacturer-consumer** | ***Donoghue v. Stevenson*** – snail in ginger beer  *Dunsmore v. Deshield* – Hardex lenses |
| **Retailer-consumer** | ***Donoghue v. Stevenson*** – snail in ginger beer  ***Arnold v. Teno*** - child hit by car when leaving ice cream truck  *Dunsmore v. Deshield* – Hardex lenses |
| **Doctor-patient** | *Dunsmore v. Deshield* – Hardex lenses  *Ter Neuzen v. Korn* – plaintiff gets HIV from AI procedure |
| **Driver-pedestrian** | ***Arnold v. Teno*** *–* child hit by car when leaving ice cream truck |
| **Government actor-citizen** | ***Just v. B.C*.** – giant boulder falls on car driving on highway  ***Jane Doe v. Toronto*** – balcony rapist (small identifiable group)  ***Hill v. Chief Constable of West Yorkshire***– Yorkshire Ripper; contra *Jane D*  ***Brown v. B.C****. -* failure to salt/sand road b/c still on summer road maintenance schedule led to serious accident |
| **Parent- child** | ***Arnold v. Teno*** *–* child hit by car when leaving ice cream truck |
| **Supervision & Control-TP** | ***Jane Doe v. Toronto*** – balcony rapist  ***Home Office v. Dorset Yacht*** – borstal boys wreck havoc on ship |
| **Police-General Public** | ***Jane Doe v. Toronto*** – balcony rapist |
| **Police-identifiable group** | ***Jane Doe v. Toronto*** – balcony rapist |
| **Commercial host-patron** | ***Jordan House*** *–* drunk man leaves bar & is hit by car  ***Crocker v. Sundance*** – drunk patron hurt in tubing competition |
| **Lawyer-client** | ***Brennen*** – Lawyer fails to investigate building encroaching on next lot |
| **Competition host-participant** | ***Crocker v. Sundance*** – drunk patron hurt in tubing competition |
| **Taxi driver-patron** | ***Ware’s Taxi*** – child falls out door of taxi; no safety latch |
| **Social Host | *Childs v. Desormeaux*** | |
| **Duties NOT established: Ex. Social host-TP users of the road, Pregnant woman-fetus** | |

* Can you analogize to an established pairing?
* Can you analogize or extend to an already existing category of relationship (i.e. invitor-invitee, relationships of supervision and control)?

If you’re considering a defendant for damages caused by a **third party**, can you show that the defendant was in a position of **supervision and control** (*Dorsey Yacht*) **or** that the plaintiff belonged to a specially identifiable plaintiff class (*Jane Doe*)?

If general proximity is established, there is a prima facie duty of care!

## 2. Are there any policy reasons why that prima facie duty of care ought to be negated or limited in scope?

Think about:

1. Identity of defendant (government actor who should free from oversight?)
2. Nature of the damages (Pure economic loss? Emotional harm? loss of profits ex. bridge was damaged, you did not own it but you lose $$ because of it)
3. Nature of relationship between defendant and plaintiff
4. Administrative factors (i.e. floodgates)
5. Constitutional considerations (i.e. ***Dobson***)

s.2 – freedom of conscience, religion, thought belief, opinion, expression, association

s.7 – right to life, liberty & security of person

s.15 – right to equality before and under the law (equal benefit & protection)

1. Others, since categories are not exhaustive
2. Economic argument: party is in a better position to bear the loss due to insurance
3. Deterrence of activity
4. Nature of the defendant’s act (is it an omission?)

If the alleged negligence involves an **OMISSION, rather than an act**, there will be **NO DUTY** (***Horsley v. McLaren****)* unless a **special relationship** can be established. (**Note:** first ensure that you are dealing with an omission and not a larger pattern of action.)

The presence of one or more of the following factors helps indicate a **special relationship, creating an EXCEPTION to the rule of no liability for OMISSIONS.**

|  |  |
| --- | --- |
| Defendant participated in the creation of the risk | ***Oke v. Weide***– knocked road sign over; man impaled  ***Crocker v. Sundance*** – held dangerous tubing competition |
| Gratuitous undertaking inducing reliance | ***Zelenko v. Gimble Brothers*** – put ill lady in infirmary & left her to die  ***Just v. B.C****.* – statutorily undertook to ensure safety of roads; failed  ***Oke v. Weide***– knocked road sign over; omitted to clean up part of debris or to call it in |
| Failure to perform a contractual promise | ***Dunsmore v. Deshield*** – breached K to provide Hardex lenses  ***Jordan House Ltd. v. Menlow and* *Honsberger*** – breached K to see to the safety of patrons, ensure they left bar safely, & didn’t get too intoxicated |
| Relationship of supervision and control | ***Arnold v. Teno*** – mother-child; ice cream truck operator-children  ***Home Office v. Dorset Yacht*** – HO omitted to supervise borstal boys  ***Jane Doe*** – omitted to control balcony rapist; P raped  ***Crocker v. Sundance*** – held competition; omitted to supervise and control drunkard. |
| Affirmative duty imposed by statute | ***Just v. BC*** – duty to see to maintenance of roads under *Highways Act*  ***Jane Doe*** – duty to protect general public from harm under *Police Act*  ***Jordan House* –** commercial host duty to ensure safety of patrons |
| Defendant’s status as a public authority with affirmative duties to individuals | ***Jane Doe v. Toronto*** – police duty to the general public & to individuals from specific groups known to be vulnerable  ***Just v. B.C.***– duty to ensure safety of highways for highway users |
| A relationship of economic benefit to the defendant | ***Crocker v. Sundance*** – P paid to participate & also to stay at resort  ***Jordan House*** – Paying patron of bar  ***Dunsmore v. Deshield*** – P paid for glasses  ***Donoghue v. Stevenson*** – P bought ginger beer  ***Arnold v. Teno*** – ice cream co. making money off children |
| Actual knowledge of vulnerability or danger | ***Crocker v. Sundance*** – resort knew competition was dangerous and drunk participant had fallen before & is likely to get hurt  ***Jane Doe v. Toronto*** – police were aware P was in specific target group of potential victims  ***Jordan House*** – bar owners knew that P was very likely to get drunk & therefore likely to be injured. |

\* If the defendant is a **GOVERNMENT ACTOR OR PUBLIC AUTHORITY**, then once general proximity is established, the case will follow the ***Just v. BC* framework:**

1. **Statutory immunity?** If *not*, move on to step two.
2. **Common law immunity?** Should common law extend immunity to the decision at issue? (**Note:** be factually specific about what decision you are focusing on.) Common law inquiry:

a) **Level of authority** of the decision maker

b) **Nature of the decision:** (i) **policy (NO LIABILITY)** (linked to financial, economic, social, or political factors; *or* (ii) **operational (LIABILITY POSSIBLE)** (administrative direction, expert or professional opinion, technical standards/general standards of reasonableness)

\* If you conclude that decision was **operational**, duty is established and you must go on to breach of duty inquiry, etc.

\*\* If you conclude the decision was based on **policy,** the inquiry will normally end. **BUT** you must still ask whether the policy decision was made in the **bona fide exercise of discretion** (if it is made in bad faith or if it is ‘so irrational as to constitute an improper exercise of government discretion). If not (i.e. decision was based on prejudice (***Roncarelli***) or amounted to discrimination (i.e. ***Jane Doe***)), then the negligence inquiry continues. If policy decision was bona fide, then the prima facie duty is negated by policy considerations.

**Is the plaintiff criticizing the entire system or this particular instance?**

There are no easy answers with the Just test but it is still the test you use. Draw from the Just test and make an argument with it, build an argument on the decision maker, and the way it was made.

# Winfield (Torts Theorist) says Negligence arises from…

1. **Nuisance.**
2. **Liability based on control of dangerous things**.

(rule in ***Rylands v Fletcher*** - Blackburn J (delivering the judgement of the court): "the person who for his own purpose brings on his lands […] anything likely to do mischief if it escapes, must keep it at his peril and is prima facie answerable for all the damage which is the natural consequence of its escape.")

1. **Duties voluntarily assumed**.
2. **Duties cast upon bailees and other persons pursuing a common calling**.

# KEY ELEMENTS IN NEGLIGENCE…

1. **Negligent Act**
2. **Causation**
3. **Damage**

## *Res ipsa loquitur* = the thing speaks for itself

Arises upon proof that the instrumentality or condition causing the injury was in the defendant's exclusive control and that the accident was one that ordinarily does not occur in the absence of [negligence](http://legal-dictionary.thefreedictionary.com/Negligence).

# SIX PART TEST FOR NEGLIGENCE:

1. **The Duty of Care – did the defendant owe a duty of care to the plaintiff?**
2. **The Standard of Care and Breach – what was the standard of care owed – did the conduct fall short of that?**
3. **Causation – was the breach the cause?**
4. **Remoteness of Damage – was the loss reasonably foreseeable?**
5. **Actual Loss – loss in question recognised by the courts?**
6. **Defences – is there a defence available? (contributory negligence; voluntary assumption of risk;**

### *Donoghue v Stephenson* [1932] UKHL 100

**Facts:**

* ginger beer case – plaintiff drank the ginger beer and found a snail at the bottom and suffered from shock and severe gastro-enteritis
* Minchella her friend bought her the drink from the café – but the defendant is the manufacturer who bottled and labelled the drinks

**Issue:**

* does the manufacturer owe a duty of care to the end user that the drink is free of any defects that may cause health issues?

**Decision:**

* defendant DOES owe a duty of care

**Reasons:**

Neighbour Negligence Test – (**Lord Aitkin**) “Take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation.”

DISSENT: **Lord Buckmaster** “how can trade be conducted with such a broad approach?”

(**floodgates**)

**Lord Tomlin** “Versailles train crash 1842 – every party injured would be permitted to sue the axle manufacturer.” (**remoteness**)

**The neighbour test was refined in Anns v. Merton**

**The two part test is known as the Anns test**

**1 – proximity and forseeability**

**2 – considerations which ought to negative or limit the scope of the duty, and the class of persons to whom it is owed or the damages to which a breach of it may give rise.**

### *Anns v. Merton* [1977] 2 All E.R. 492 (H.L.)

plaintiffs claimed that the damage was a consequence of the block having been built on inadequate foundations required under bylaws. The plaintiffs claimed against the council for approving the foundations and/or in failing to inspect the foundations.

The Court found in favour of the tenants.

The '**Anns Test'** established here by **Lord Wilberforce** is a two stage test.

1. **It requires first a *‘sufficient relationship of proximity based upon foreseeability’*;**
2. **and secondly considerations of reasons why there should *not* be a duty of care**.

### *Palsgraf v. The Long Island Railroad Company (1928)* 248 N.Y. 339

RULE: Defendant cannot be held liable for an injury that could not be reasonably foreseen.

(Rail workers help man onto train, drops package, fireworks in package explode, scale at other end of platform falls over and injures Mrs. Palsgraf.)

**DISSENT**: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice**, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics**." **Andrews J.**

**CAUSATION VS. REMOTENESS**

In formal terms we need to distinguish between causation and remoteness. We should always remember, however, what **Lord Denning** has told us on several occasions, for example in ***Lamb v Camden LBC*** [1981] 2 All ER 408, that **these two concepts cannot be separated in practical terms**.

### In *Roe v Minister of Health* [1954] 2 All ER 131 (CA), - CONSIDERATIONS OF REASONABLE MAN

**FACTS**:

It was common practice to store such anaesthetic in glass ampoules immersed in a [phenol](http://en.wikipedia.org/wiki/Phenol) solution to reduce the risk of infection. Unknown to the staff, the glass had a number of micro-cracks which were invisible to the eye but which allowed the phenol to penetrate. When used, the phenol-contaminated anaesthetic caused permanent [paraplegia](http://en.wikipedia.org/wiki/Paraplegia).

**JUDGEMENT:**

As the law then stood, to find [negligence](http://en.wikipedia.org/wiki/Negligence) proved, there must be a [duty of care](http://en.wikipedia.org/wiki/Duty_of_care_in_English_law), the defendant must have [breached that duty](http://en.wikipedia.org/wiki/Breach_of_duty_in_English_law), and that breach must have [caused](http://en.wikipedia.org/wiki/Causation_%28law%29) the loss or damage sustained by the plaintiff. The [standard of care](http://en.wikipedia.org/wiki/Standard_of_care) required of defendants was judged by applying an objective test, considering what a ["reasonable man"](http://en.wikipedia.org/wiki/Reasonable_person) would or would not have done in the same situation.

[Denning LJ.](http://en.wikipedia.org/wiki/Tom_Denning,_Baron_Denning) said, “**We must not look at the 1947 incident with 1954 spectacles**.” It was held that the **micro-cracks were not foreseeable given the prevailing scientific knowledge of the time**. Thus, since no reasonable anaesthetist would have stored the anaesthetic differently, it was inappropriate to hold the hospital management liable for failing to take precautions. That the profession had changed its practice in the light of experience proved that the profession was responsible in its self-regulation. In 1954, anaesthetists coloured the phenol with a [dye](http://en.wikipedia.org/wiki/Dye). If a vial became contaminated, the dye showed inside the vial. These vials were then discarded. But, given **that the hospital was applying the best practice of the time, there was no negligence.**

Duty, causation and remoteness, run continually into one another . . . they are simply three different ways of looking at one and the same problem.

Starting with the proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the…

[**only**] **one question: Is the consequence fairly to be regarded as within the risk created by the negligence?** If so the negligent person is liable for it: but otherwise not.

### *Caparo v. Dickman* [1990] 2 A.C. 605 (H.L.) U.K. TEST – MODIFIES/”OVERTURNS?” ANNS from a presumption in FAVOR of finding of duty of care into a presumption AGAINST finding a duty of care.

The House of Lords established a "**three-fold test**" (a series of three factors):

**DUTY EXISTS ONLY WHERE…**

1. **Harm must be a "reasonably foreseeable" result of the defendant's conduct;**
2. **A relationship of "proximity" between the defendant and the claimant;**
3. **Imposition of a duty of care must be "fair, just and reasonable" to impose liability.**

The decision arose **in the context of a negligent preparation of accounts for a company**. Previous cases on negligent misstatements had fallen under the principle of [*Hedley Byrne v Heller*](http://en.wikipedia.org/wiki/Hedley_Byrne_v_Heller).[[1]](http://en.wikipedia.org/wiki/Caparo_Industries_plc_v_Dickman#cite_note-0) This stated that when a person makes a statement, he voluntary assumes responsibility to the person he makes it to (or those who were in his contemplation). If the statement was made negligently, then he will be liable for any loss which results. The question in *Caparo* was the scope of the assumption of responsibility, and what the limits of liability ought to be.

**FACTS:**

A company called [Fidelity plc](http://en.wikipedia.org/wiki/Fidelity_Investments) – issued a profit warning – position was bad – Caparo begun buying up shares – the annual accounts were done by accountant Dickman – once it had control, Caparo found that Fidelity's accounts were in an even worse – sued Dickman for negligence to recover its losses.

(Difference in value between the company as it had and what it would have had if the accounts had been accurate.)

**HOLDING:**

House of Lords unanimously held there was no duty of care.

**REASON:**

**The statutory requirement** for an audit **was the making of a report** to enable **shareholders to exercise their rights in general meeting**. It **did not extend to** the provision of information to **assist shareholders** in the making of decisions **as to future investment** in the company.

* In **Canada**, *Caparo* was followed by [*Hercules Management Ltd*](http://en.wikipedia.org/w/index.php?title=Hercules_Management_Ltd&action=edit&redlink=1) (1997) 146 DLR 4th 577; also the case of [*Cooper v Hobart*](http://en.wikipedia.org/wiki/Cooper_v._Hobart) is sometimes acknowledged to be the Canadian equivalent of *Caparo*.

### *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 {confirms ANNS test in Canada}

The **discretion** granted to the city **to inspect** was a **policy decision**. A plaintiff cannot sue government for a policy decision; however, **once the city elected to inspect**, **the enforcement of that inspection was** an **operational decision** which could give rise to a duty of care.

The court concluded that **the city breached its duty of care by negligently enforcing inspection**.

The court held **that the commencement of a limitation period was delayed until the material facts on which a claim is based have been discovered** or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. This principle is later refined by the SCC in ***Central Trust Company v. Rafuse***.

Finally, the court held that the plaintiffs could recover its loss despite its categorization as “pure economic loss”. The SCC **adopted** the “[**Anns Test**](http://en.wikipedia.org/wiki/Anns_test)” (from ***Anns v. Merton London Borough Council***), which allows a claim in tort for economic loss when:

a. **there is a sufficiently close relationship between the parties so that in the reasonable contemplation of the defendant, carelessness on its part could cause damages to the plaintiff; and**

b. **there are no considerations that should serve to limit or negative the scope of the duty, the class of persons to which it is owed, or the damages to which a breach of the duty would give rise.**

### *Cooper v. Hobart* [2001] 3 S.C.R. 537, 2001 SCC 79 {MORE RESTRICTIVE THAN ANNS… when a claim is *NOVEL* it requires the three step analysis} *ADDING PROXIMITY IN STEP ONE OF THE DUTY OF CARE – ALSO MEANS THAT…* Burden to argue hat there *SHOULD* be a duty of care on *PLAINTIFF*

**Registrar of Mortgage Brokers** had become aware of Eron on August of 1996 and **did not suspend his licence** until October of 1997.

The Registrar was found **NOT** to have **a duty of care** **to the investors** on grounds that there was no sufficient **proximity**.

### Two (Three) part test:

(i) **Was Harm Reasonably Foreseeable** **AND**

(ii) **Is there a Sufficient Degree of Proximity between Plaintiff and Defendant**?

Consider: ***Moule v NB Elec Power Comm***. (1960) (kid electrocuted - wires running through trees - pwer co had attempted to clear most surrounding wires, - P climbed to an unusual height, stepped on a rotten branch which broke, causing him to fall, touch wires and was electrocuted held: the company did have a duty of care towards P, but ***sequence of events was such that Ps injury was not reasonably foreseeable*** (a) Foreseeable Risk of Injury? (b) Probability of Injury (Goes to Standard?) (c) Plaintiff Losses Too Remote?

(iii**) Is the Situation One in Which a New Duty of Care Should Be Recognised?**

Consider: (a) Does Law Already Provide a Remedy (b) Problem of Unlimited Liability/Indeterminancy? (c) Broad Policy Reasons to Deny Duty?

## 

## Application of the Duty of Care Test

### Foreseeable Risk of Injury

### *Moule v. NB Electric Co.* (1960 SCC)

* Kid climbs tree where there is a hydro line.
* Court finds that while it is reasonably foreseeable that at child would be likely to climb a tree, but since this child used a ladder, and climbed to an unusual height, this particular circumstance was not foreseeable, and the electric company did take reasonable precautions. **Dismissed**.

### *Amos v. NB Electric Co.* (1976 SCC)

* Hydro wires and children in trees again.
* This time, the court finds that it could have been reasonably foreseeable, distinguished from ***Moule***on the facts.
* Differing facts included the type of tree, the lax tree trimming practices, this case involved only one tree whereas ***Moule*** case the kid had to swing into the tree from another.
* Reasonable foreseeability is always arguable either way.

### *Haley v London Electricity Board* [1964] 3 All ER 185 (U.K. Case)

- blind man trips on workman’s obstacle

held: reasonably foreseeable that blind person would be on sidewalk, therefore duty of care towards that class owed, city negligent in breach

### *Dunsmore v. Deshields* (1978) (Sask. Q.B.) – Hardex Lenses

**Facts:**

* Plaintiff ordered a type of lens called Hardex – a specially treated lens meant to withstand more than ordinary lenses.
* The glasses were supplied by Hardex (Manufacturer) to Imperial Optical (optometrist - Deshield) to the Defendant (Dunsmore)
* During a touch football game the plaintiff collided with another player and the glasses broke and injured his right eye – the glasses were not Hardex
* plaintiff is suing both defendants – action against Deshield is breach of contract or negligence and the action against Imperial is negligence

**Issue:**

* Was there a duty and a subsequent breach of that duty by the defendants?

**Decision:**

* Judgement for the plaintiff –– joint and several liability

**Reasons:**

* the impact was not hard enough for Hardex to break and so defendants are liable as if they did what they were supposed to the defendant would not have been injured

# SHOULD WE LIMIT THE DUTY OF CARE FOR POLICY REASONS?

1. Does the law already provide a remedy? (Insurance!?, Statutory Provision!?)
2. If we allow this duty of care – will there be a floodgate of cases – (unlimited class of plaintiffs)
3. Broad reasons of policy? (Hospitals/Medical, Police – will it make them too conservative – consider police who arrested the right guy and then let him go and then he killed two more people, Etc.)

***Nova Mink v. Trans-Canada Airlines***[1951]

A low-flying airplane so scared the animals in a commercial mink farm that they ate their young, causing the owner considerable harm. The **airline was held to owe no duty of care to the mink farm** and, therefore, was not required to pay damages.

This decision is consistent with the view that tort actions are to be allowed only when they can deter harmful behaviour. (**And it is strongly inconsistent with the view that the function of tort law is to compensate "deserving" plaintiffs**.)

**The fact that there is a “deserving plaintiff” does not equal negligence = it is more about foreseeability.**

To have ruled in favour of Nova Mink would have established a precedent to the effect that injurers owe a duty even when they cannot foresee the consequences of their actions. Yet when those consequences could not (reasonably) have been foreseen no precautions against such consequences could have been taken. Therefore, any court action in such a situation could have produced no change in the behaviour of the parties. It could only have resulted in a transfer of income from the defendant to the plaintiff, at a great cost (in terms of judicial expenses) to society.

­­­­­­­­­­­­­­

# EXAM POLICY QUESTION: “Does the fact that the plaintiff has suffered an injury mean that the injury was foreseeable?” (no!? – see above)

# Special Duties of Care: Affirmative Action

### The distinction between misfeasance (positive acts) and nonfeasance (failure to act)

* Positive acts and failures to act
  + Generally speaking, failure to act cannot be a cause for a duty of care... except where there are contractual or other obligations (i.e. parent/child, doctor/patient, and contracts)
  + This comes for a general policy whereby society believes that the law should interfere minimally with people’s lives - related to a capitalism approach to society.
  + The “**but for” test** – how does that work in nonfeasance... the answer is that it doesn’t really – and so this is another reason why this doesn’t work.
  + Requiring people to act in a certain way limits other options. “Do this” as opposed to “Do whatever you want... except this.”
  + Perhaps the correct place for this kind of **“moral” duty to act should come from criminal law** (which tends to be more about morality) than torts (which is more about compensation).
  + JOSEPH RAZ – “obligation to obey” – why do people stop at red lights in the middle of the night when there is truly nobody around – no danger of causing injury & no danger of getting caught.
  + Driving a car and run down a pedestrian – don’t hit your breaks (misfeasance!?) VERSUS Somebody is drowning and you don’t throw them a life ring (nonfeasance!?).
  + In the case of the car and pedestrian – there is already a pre-existing relationship... they are both road users.
  + In the case of the drowning man – there is/was no pre-existing relationship between the parties. (!?)
  + What about other positive duties to act... intervening with a murder... being a witness to a murder... (???)

**The normative position and the role of well-being**

* + The role of community... where there is a tight community, it seems to become less necessary to “impose” legal obligations.

# The duty to rescue at common law

### *Osterlind v. Hill* (1928) – drunken Canoe – no duty to rescue

D found not negligent in renting a canoe to P who was visibly intoxicated, nor was he negligent in failing to respond to Ps calls for help when that canoe tipped (canoes inherently tippy by nature)

## Exceptions to the “no duty to rescue” rule

1. **Voluntary assumption of responsibility**
2. **Statutory Duty (e.g. maritime law)**

### *Matthews v. Maclaren; Horsley v. Maclaren* (1972)

Horsely v MacLaren “The Ogopogo”-  D invited (no K’l rel’n) people onto his boat, one fell overboard. In attempting to rescue the D did not follow the correct procedure, he backed up instead of circling around and coming head on towards the body, another guest then dove in to save the victim, and died instantaneously of shock. - was there a legal duty to rescue?

1. **Even in the absence of a statutory duty… liability and duty of care begins to exist ONCE rescue has begun**. (Voluntary). …if you start something you must finish it
2. **Drunkenness of passengers is irrelevant**.
3. **Burden is on plaintiff to show that defendant’s negligence is cause**.

[In this case, there was also statutory obligation because there is a statutory obligation of ship/boat commanders to rescue those who they find in peril.]

Captain did owe duty to rescue, but no negligence here, b/c death was instantaneous not result of improperly executed rescue.

## DUTIES *OWED* TO *RESCUERS*

One of the questions for the court was whether MacLaren owed a duty of care to Horsey as a rescuer – i.e. was he responsible for Horsey’s death because he created a situation which encouraged Horsey to risk his own life to save Matthews?

According to **Justice Ritchie**, the key question is not whether MacLaren caused Matthews to fall overboard, but rather **whether his negligent attempt at rescuing him created a new and distinct danger that induced Horsey to act as he did**.

“Any duty owing to Horsey must stem from the fact that a new situation of peril was created by MacLaren’s negligence which induced Horsey to act as he did.”

**Ritchie, J. did not find that this duty existed in the present situation.**

# The responsibility of professionals

* Generally speaking – there is no obligation of professionals (doctors, paramedics, police, etc.) to act.

***Smith v Rae*** [1919] - Defendant (doctor) for breach of duty while Plaintiff giving birth (confinement) - **nonfeasance** and **does not amount to negligence**

**FACTS**.: Plaintiff filed action in negligence against Defendant (doctor) for breach of duty while Plaintiff giving birth (confinement).

Contract was made between Plaintiff’s husband and Defendant for Defendant to attend to Plaintiff while in confinement.

Defendant did not attend to Plaintiff and child died during delivery.

**ISSUES**:

* + Was ∆ under a duty to attend to ∏ during her confinement?
  + By not attending to her, was ∆ negligently liable for the death of the baby during delivery?

**RULE**: **An action in tort for negligence must be based in malfeasance, not nonfeasance**. **Nonfeasance can be actionable only in contract**.

**ANALYSIS**:

Middleton JA.:

K was between husband and doctor. Since ∏ was not privy to K, she must sue in tort. ∆ not attending to ∏ is **nonfeasance** and **does not amount to negligence**.

**CONCLUSION**:

For ∆. ∆ did not breach any duty to ∏ and was not negligent.

# Responsibility for the intoxicated

***Jordon House Ltd. v. Menow*** (1973) - Commercial host - duty to reasonably ensure patrons make it home safely

Commercial host liability where the Court held that a **bar owner has a duty to reasonably ensure their intoxicated patrons are able to make it home safely**.

Menow was ejected from the hotel bar and started to make his way home down a highway but was hit by a car.

The court held that the hotel violated a common law duty of care to protect patrons from "danger of personal injury, foreseeable as a result of the eviction". **The duty**, the trial judge found, **could have easily been discharged by calling the police or arrange for a safe way home**.

***Crocker v. Sundance Northwest Resorts Ltd.*** (1988)

Ski resort, held a competition - teams sliding down a mogulled portion of a steep hill in oversized inner tubes.

**Appellant** entered the competition, **signed** the entry and **waiver** form **without reading** - suffered a neck injury - rendered a quadriplegic.

**Appellant** was visibly **drunk**. The owner of Sundance did nothing to dissuade him from continuing on.

 Appellant successfully sued respondent in tort but was found to be contributorily negligent. He was awarded 75 per cent of his damages.

**Injury** was **clearly foreseeable** and ski resorts failure to take reasonable steps to prevent man from competing.

**Appellant** **DID NOT**, either by word or conduct, **voluntarily assume** the legal risk involved in competing. The ***VOLENTI*** defence, therefore, was inapplicable.

**Appellant's** mind was **clouded by alcohol** at the time.

**Contractual waiver** had **NOT** been **drawn to appellant's attention** and had **not been read** by him.

***Childs v. Desormeaux*** (2006) - social host does not owe a duty of care to a person injured by a guest who has consumed alcohol

The Court held that a **SOCIAL HOST DOES NOT OWE A DUTY OF CARE** to a person injured by a guest who has consumed alcohol.

1. Commerical hosts have greater ability to monitor.
2. Social Hosts not regulated.
3. Social Hosts do not profit.

A **duty of care did NOT exist** between the **social hosts** (Courrier and Zimmerman) and **the third-party users of the road** (Childs) injured by Desormeaux. **PROXIMITY** between the plaintiffs and defendants was **NOT SUFFICIENT** to ground a duty of care.

### *Jane Doe v. Metro Toronto Police* (1998)

Jane Doe raped at knife-point by a stranger who broke into her apartment, from her balcony. In the seven months prior to the attack, four other women in her neighbourhood had reported to the police that they had been raped by a stranger in similar circumstances. The **police did not warn the women at risk.**

The Judge held that the **police owed a duty of care to the women in Jane Doe's neighbourhood** and that they "utterly" failed in their duty to protect these women. She concluded that the police investigation of the so-called "balcony rapist" was "irresponsible and grossly negligent.”

**ALWAYS REMEMBER:**

1. **GOVERNMENT only** liable for **Operational NOT Policy** decisions**. (This was an operational decision)**
2. **Very specific plaintiff group with very specific risk – keeping limits tight**

# The duties owed to unborn children

## Pre-conception wrongs

Is there a **duty of care to pre-conception? NO**

(Defendant harms – original harm – Plaintiff, Infant has not been ***conceived*** yet, but when Infant is conceived and born later there is harm resulting from original harm.)

### [*Paxton* v. *Ramji*](http://www.canlii.org/en/on/onca/doc/2008/2008onca697/2008onca697.html), 2008 ONCA 697 (CanLII), - women do not owe a duty to their future children

The Ontario Court of Appeal held that **physicians never owe such a duty to the future children** of their female patients. **INSUFFICIENT PROXIMITY**

The physician would often have to choose between the interests of the mother and those of her unborn child, and this could result in physicians putting future children’s needs before those of their patients.

Moreover, the court stated that in law, **women do not owe a duty to their future children**. {**WOMAN AND FETUS ARE ONE ENTITY – AN ENTITY CANNOT SUE ITSELF**.} (***Winnipeg Child and Family Services v. G. (D.F.)*** [1997] 3 S.C.R. 925)

For example, a woman may abuse substances while seven months pregnant. If her child is born with birth defects as result, the child cannot sue the mother.

## Wrongful birth and wrongful life

**Physician** fails to perform a test or **fails to inform** a woman of **possible birth defects**.

The courts have said that “**yes – there is a duty of care**” – has to do with **general fiduciary duty** of care **between doctor and patient** – duty to inform patients of **all** medical risks.

## Wrongful pregnancy

Physician **fails** to properly perform an **abortion or sterilization procedure** and a child is conceived – is there a duty of care?

In principle, yes there can be a duty of care… presumably due to medical negligence… but there are policy considerations…

1. A healthy baby is born – is there “damage”? Perhaps.

### *Joshi v. Wooley (1995) –* tubal ligation – becomes pregnant – Dr negligent for failing to advise risks

The plaintiff, a 45 year old married mother of three, underwent **tubal ligation**.  Some five years later she **became pregnant**, eventually giving birth to a child who suffered from some disabilities.

In this case, Boyle J. found that the **defendant was negligent in failing to advise** the plaintiff of the **risks of failure** and in the management of the pregnancy.  He went on to find that the first of these failures resulted in the pregnancy and the second caused physical harm to the mother.  Critically, there was no finding that the defendant's negligence caused the child's disabilities.

**Damages were awarded in this case both for non-pecuniary damages** **and** damages for **past and future income loss**, as well as for past and **future cost of raising the child**.

General damages were assessed at $30,000 for the pre-natal period including the birth, and $37,500 for the post-natal period (related to childbirth).

***Suite v. Cook***, [1991] R.J.Q. 514, 15 C.C.L.T. (2d) 15 (S.C.) aff'd [1995] R.J.Q. 2765 (C.A.)

The **Quebec Superior Court** found that parents of a child born following an unwanted pregnancy were entitled to **damages including the cost of raising the child**.  The court went on to reject the submission that the non-pecuniary benefits associated with raising the child should be offset.

The **Court of Appeal**, in affirming the judgment, **rejected** the latter reasoning finding that the emotional benefits and burdens of raising a child should be assessed and offset.

## An unhealthy baby is born – what are the damages here?

### *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 – Down’s syndrome – failed to advise – Dr. liable

**Doctor** responsible **failed to advise** the patient of her increased risk of having a **Down’s Syndrome** child. The child was born with Down’s Syndrome.

Parents were **entitled to damages for non-pecuniary loss** for the pain and suffering associated with giving birth to, and raising, a disabled child.

The contentious issue was whether the parents were entitled to damages for the cost of caring for the child **beyond the age of majority**? The Supreme Court held that **they were not**.

## Pre-natal injuries

### *Bourhill v Young* [1943] AC 92 – no special duty to pregnant women

A **pregnant woman** suffered **psychiatric harm** after **witnessing** the scene of a **motorcycle accident**, she was deemed **not to be a foreseeable victim**, having not been in immediate danger of physical harm.

**BUT…**

## The “born alive” rule…

### *Duval v. Seguin*, 1972 – pregnant women ARE foreseeable

* + Fetuses are reasonably foreseeable entities that can suffer injury as a result of acts of negligence
  + BUT…not actionable until fetus is born alive
* The fetus becomes a juridical person once born alive – no legal status before birth

### *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 – mother not liable for lifestyle choices

## Background

The case involved one Cynthia Dobson, who in 1993 was driving and got into a [car accident](http://en.wikipedia.org/wiki/Car_accident) in bad weather. Her foetus was supposedly damaged in the accident, and was delivered by [Caesarean section](http://en.wikipedia.org/wiki/Caesarean_section) on the day of the crash, before the expected due date. The child had [cerebral palsy](http://en.wikipedia.org/wiki/Cerebral_palsy). On behalf of the child, his grandfather brought a tort claim against the mother for negligence in driving.

## Decision

The majority of the Court found that tort claims **cannot** be brought against women for [negligence](http://en.wikipedia.org/wiki/Negligence) toward the [foetus](http://en.wikipedia.org/wiki/Fetus) during pregnancy.

* **No Duty Of Care owed by mother to unborn fetus**

## A health professional’s duty to inform

### *Haughian v. Paine* (1987) – doctors have a general duty to inform risks

Healthy 55-year-old father of ten children was diagnosed as having a herniated disk. Following surgery, he experienced widespread paralysis, lost mobility, became depressed, withdrew from his family, and attempted suicide.

His wife, acting as guardian, brought a negligence action on the grounds that the treating neurosurgeon, by not telling the patient about riskless alternatives to the surgery, had failed to obtain his informed consent.

After losing at the trial court level, the plaintiffs appealed to the Saskatchewan Court of Appeal. In ruling in the appellant's favor, the ***Court of Appeal*** **held that, in addition to disclosing the material risks of the surgery, a surgeon must also, where circumstances require, explain to the patient the consequences of leaving the ailment untreated, as well as alternative means of treatment and their risks.**

* + **Doctor must inform on risks/benefits of alternative treatments and inaction**
  + **Patient must show that a reasonable person would have refused treatment**

## A manufacturer’s duty to warn

### *Hollis v. Dow Corning Corp* (1995)

The duty of a manufacturer of a **silicon breast implant** to disclose the risks of using the product.  The Supreme Court held that the **manufacturer's duty was an ongoing one**.  It was required that patients be warned not only at the time the device was sold and delivered but **also of those dangers that became apparent subsequently**.

There was reference to the close parallel between the doctrine of informed consent and the manufacturers duty to warn.

* + “**Learned intermediary” rule** – the intermediary (doctor) must be **brought up to the level of knowledge of the manufacturer.**

### *DeMarco v. Ungaro* (1979) – lawyer negligent in civil case (not immune)

An “**attorney must exercise reasonable care, skill and knowledge in the conduct of litigation… and must be properly diligent in the prosecution of the case**.”

### *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 – police negligently liability for [nervous shock](http://en.wikipedia.org/wiki/Nervous_shock)

Massive crush during the [FA Cup](http://en.wikipedia.org/wiki/FA_Cup) Semi Final at [Hillsborough Stadium](http://en.wikipedia.org/wiki/Hillsborough_Stadium) in [Sheffield](http://en.wikipedia.org/wiki/Sheffield). The accident was caused by the **police negligently allowing too many supporters to crowd in one part of the stadium**.

**Many saw their friends and relatives die** in the crush and suffered psychiatric harm or [nervous shock](http://en.wikipedia.org/wiki/Nervous_shock) after the incident.

**Conditions** for a [**duty of care**](http://en.wikipedia.org/wiki/Duty_of_care) to be found in such cases.

* The claimant who is a "secondary victim" **must perceive a "shocking event" with his own unaided senses**, as an eye-witness to the event, or hearing the event in person, or viewing its "immediate aftermath". This requires **close physical proximity** to the event, and would usually **exclude** events **witnessed by television or informed of by a third party**.
* The **shock must be a "sudden"** and not a "gradual" assault on the claimant's nervous system.
* The **claimant** must show a "**sufficiently proximate" relationship** to that person, usually described as a "close tie of love and affection". Such ties are [presumed](http://en.wikipedia.org/wiki/Rebuttable_presumption) to exist only between parents and children, as well as spouses and fiancés. In other relations, including [siblings](http://en.wikipedia.org/wiki/Siblings), ties of love and affection must be proved.
* It must be **reasonably foreseeable** that a **person of "normal fortitude"** in the claimant’s position **would suffer psychiatric damage**. The closer the tie between the claimant and the victim, the more likely it is that he would succeed in this element. **However**, **once** it is **shown that some psychiatric damage was foreseeable**, it **does not matter that the claimant was particularly susceptible to psychiatric illness** - the defendant must "take his victim as he finds him" and pay for all the consequences of nervous shock

**Mustapha v. Culligan of Canada Ltd**  - Fly in bottled water (**psychiatric injury**) – a person of “**ordinary fortitude**” test comes **before** the **thin skull rule** for psychiatric injury.

The Court has ruled that an **objective, rather than a subjective, standard of vulnerability** is to be applied when determining **whether the risk of injury was reasonably foreseeable** to the party whose negligence caused the plaintiff harm.

While replacing an empty bottle with a full one, Mr. Mustapha observed a dead fly and part of another fly and became progressively obsessed and was diagnosed as a major depressive disorder with associated phobia and anxiety.

The Court found that **three of four** of the **elements** needed to prove recoverable negligence had been **established**.

1. the existence of a **duty of care** owed;
2. a **breach** of that duty; and
3. injury or **damages suffered** by the plaintiff.
4. **Not** **satisfied that "causation"** of the injuries by Culligan's breach had been established in the legal sense. That enquiry turns on an analysis of **whether an injury was reasonably foreseeable** to a party in the position of the defendant.

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 the purpose of **damages.**

# Negligent Misrepresentation

## The traditional approach

* Indeterminate liability
* Indeterminate class of plaintiffs

***Ultramares Corporation v. Touche,*** 174 N.E. 441 (**1932**) - the law should not admit "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." (floodgates) (negligent misrepresentation)

Some **accountants (**[**Touche**](http://en.wikipedia.org/wiki/Deloitte_Touche_Tohmatsu)**) knew that the accounts** when certified **would be used to raise money** and for that purpose supplied 32 certified and serially numbered copies: p. 442. On the faith of one of those copies, given to it on its demand, the plaintiff lent the company money. The **audit was** found to be **negligent**.

Cardozo, C.J., held that the **claim in** [**negligence**](http://en.wikipedia.org/wiki/Negligence) **failed** on the ground that the auditors owed the plaintiff no duty of care, there being **no sufficiently proximate relationship**.

He said "**no liability in an indeterminate amount for an indeterminate time to an indeterminate class**."

### *Policy issues:*

1. ***Pure economic loss – difficult to determine where does the causation train end?***
2. ***Tort law should not interfere with a free market ecomony.***

### *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 – liability for pure economic loss where there is an “*assumption of responsibility*.”

***Prior to this decision****, the notion that a party may owe another a* [***duty of care***](http://en.wikipedia.org/wiki/Duty_of_care_in_English_law) *for* ***statements made in reliance had been rejected****, with the only remedy for such losses being in* [*contract law*](http://en.wikipedia.org/wiki/English_contract_law)*.*

The [**House of Lords**](http://en.wikipedia.org/wiki/House_of_Lords) **overruled this previous position**, in **recognising liability for** [**pure economic loss**](http://en.wikipedia.org/wiki/Pure_economic_loss) not arising from a contractual relationship, introducing the idea **of "assumption of responsibility"**.

**Facts**

Hedley Byrne were a firm of advertising agents. A customer, Easipower Ltd, put in a large order. **Hedley Byrne wanted to check** their financial position, and **credit-worthiness**, and subsequently **asked their bank**, who replied in a letter that was headed,

"**without responsibility on the part of this bank**"

It said that Easipower was,

"**considered good for its ordinary business engagements**".

Judgment

The **relationship between the parties was "sufficiently proximate"** as **to create a** [**duty of care**](http://en.wikipedia.org/wiki/Duty_of_care_in_English_law).

**Reasonable for them to have known that the information** **would likely have been relied upon** for entering into a contract of some sort.

This would give rise, the court said, to a "**special relationship**", in which the defendant would have to take sufficient care in giving advice to avoid negligence liability.

**However**, on the facts**, the** [**disclaimer**](http://en.wikipedia.org/wiki/Disclaimer) **was found to be sufficient** enough to discharge any duty created by Heller's actions. There were no orders for damages. Lord Morris of Borth-Y-Gest,[[3]](http://en.wikipedia.org/wiki/Hedley_Byrne_%26_Co_Ltd_v_Heller_%26_Partners_Ltd#cite_note-2)

* The decision of Lord Reid

LORD REID: “My Lords, I consider that it follows and that it should now be regarded as settled that if someone **possessed of a special skill** undertakes, quite irrespective of contract, to apply that skill for the assistance of another **person who relies upon such skill**, a **duty of care will arise**. The fact **that the service is to be given** by means of or **by the instrumentality of words** can make **no difference**. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice **to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise**.”

1. Special skill exists.
2. Plaintiff relies on the expertise skill.
3. There is awareness that the plaintiff would likely rely on the advice.

If these **three** factors are present, then the court is ***entitled*** to conclude that there was a special relationship between the plaintiff and the defendant, which ***could*** then give rise to a duty of care.

The relationship between ***Hedley Byrne & Co. Ltd.***and ***Donoghue***

In Donoghue, the plaintiff didn’t have the opportunity to check the bottle before she drank from it. In this case, the plaintiff had lots of opportunity to check the information first. **ALSO** – there is a significant difference between **WORDS** and **DEEDS**

## FULL TEST (LIABILITY IN NEGLIGENT MISSTATMENT)

1. Duty of Care based upon a “special relationship”.
   1. Possession of a special skill.
   2. Reliance on the exercise of that skill.
   3. Knowledge and awareness of the possible reliance.

(“REID test”)

1. The representation must untrue, inaccurate or misleading.
2. The person making the representation must have acted negligently in making the representation.
3. The representation must have actually been relied upon. (but must be “reasonable” reliance)
4. There must be damage.

### *Murphy v Brentwood District Council* [1991] 1 AC 398 – “the infliction of physical damage is recoverable, pure economic loss is not – in the UK” (Overturns Anns in the U.K.)

The defendant Local Authority failed to inspect the foundations of a building adequately, with the result that building became dangerously unstable. The claimant, being unable to raise any money for repairs had to **sell the house at a considerable loss**, which he **sought to recover** from the L.A. **This action failed** as the loss was identified as a Pure Economic loss.

**Judgment**

The House of Lords **overruled "Anns" and held that the council was not liable for pure economic loss** in the absence of physical damage.

# The Canadian position

### *Hercules Management Ltd. v. Ernst & Young* (1997) {SPECIAL CONSIDERATION FOR COMPANY AUDITORS}

Auditors prepare financials according to statutory requirements. Shareholders relied on financials (it is argued that this was reasonably foreseeable) Money was lost.

LeForest rejects claim that Auditors don’t know who would have read the financials… (indeterminate liability)…

**This loss was foreseeable** in that the defendant auditors could easily have anticipated that someone (including existing shareholders) might rely on their client’s audited financial statements in making an investment in the client and could be harmed if the statements were wrong. **However on a policy basis there is no duty of care to the potential investors.**

The auditors **should only be liable to someone who used the advice for the specific purpose** or transaction for which the advice was given. In the case of an audit opinion, **that purpose is to assist shareholders in overseeing the management and affairs of the company, not to assist in making personal investment decisions**. Therefore, the auditors were not liable to the plaintiff shareholders for their individual investment losses in this case. Auditors can be liable to their clients’ shareholders if the shareholders as a group suffer a loss because inaccurate financial statements prevented them from holding management of the company to account for some problem.

## Concurrent liability

### *BG Checo International Ltd. v. BC Hydro & Power Co.* (1993) - there is a *prima facie* presumption that a claimant CAN sue concurrently in [TORT](http://en.wikipedia.org/wiki/Tort) and [CONTRACT.](http://en.wikipedia.org/wiki/Contract)

The Court held that there is a *prima facie* presumption that a claimant is **able to sue concurrently in** [**tort**](http://en.wikipedia.org/wiki/Tort) **and** [**contract**](http://en.wikipedia.org/wiki/Contract) where sufficient grounds exist. Still, liability in tort will still be **subject to exemptions or conditions set out in a contract**.

## Background

British Columbia Hydro and Power Authority called for [tenders](http://en.wikipedia.org/wiki/Call_for_bids) to erect power lines. BG Checo International Ltd. was interested in making a tender and so did a survey of the land by helicopter. On viewing the area they noted that the area was in the process of being clear-cut. BG Checo issued a tender and won. The tender was incorporated into the contract and included terms stating that BG Checo would have no part in clearing a [right-of-way](http://en.wikipedia.org/wiki/Easement) to the land. Once the agreement was made no further clearing was done which resulted significant difficulties for BG Checo.

BG Checo sued in tort of [negligent misrepresentation](http://en.wikipedia.org/wiki/Negligent_misrepresentation) and in the alternative [breach of contract](http://en.wikipedia.org/wiki/Breach_of_contract). The key issue is the case was whether the terms of the contract precluded BG Checo from suing in tort.

## Ruling of the Court

La Forest and McLachlin wrote for the majority. Citing [*Central Trust Co. v. Rafuse*](http://en.wikipedia.org/wiki/Central_Trust_Co._v._Rafuse) (1986), the Court stated that "where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort."

The Court considered three situations where a party can sue in tort and contract.

1. "where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty." Though the right to sue in tort still exists, it is generally not practical.
2. "where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances." This does not necessarily extinguish the right to sue in tort unless it is explicit in the contract.
3. "where the duty in contract and the common law duty in tort are co-extensive." In such cases, "**the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period."**

The Court found that the current situation fell into the third category and so BG Checo was able to sue in both tort and contract.

## Misrepresentation during the course of contractual negotiations

### *Queen v. Cognos Inc*. (1993) – less than full disclosure in employment negotiations = negligent misstatement/misrepresentation

Employment…

The **position** would be **for two years** with enhancements and maintenance thereafter.  At no point was the appellant made aware of the fact that **there was no guaranteed funding for the project** or was subject to budgetary approval.  He quit his current job and **took the position** – shortly thereafter the **project was cancelled**.

1. Duty of Care based upon a “special relationship”. {**YES**}
   1. Possession of a special skill.
   2. Reliance on the exercise of that skill.
   3. Knowledge and awareness of the possible reliance.

(“REID test”)

1. The representation must untrue, inaccurate or misleading. {**YES**}
2. The person making the representation must have acted negligently in making the representation. {**YES**}
3. The representation must have actually been relied upon. (but must be “reasonable” reliance) {**YES**}
4. There must be damage. {**YES**}

The negligent misrepresentations took place BEFORE the actual employment Contract existed… the fact that a Contract exists later… and that the issue could have been remedied by the plaintiff in the Contract… is NOT a defence for the Defendant.

# More On Pure Economic Loss

## Five categories of pure economic loss (Feldthusen - academic).

Each of these categories is distinct from one another – and although this list is not closed it would be extremely difficult to propose a new distinct area of tortious loss before the courts.

1. **Negligent misrepresentation** 
   * **This is what we have been discussing above.**
2. **Independent liability of statutory public authorities**
   * **Public entities owe a higher duty of care**
3. **Negligent performance of a service**
4. **Negligent supply of shoddy goods or structures**
5. **Relational economic loss**
   * **This gets around Privity and other issues. A 🡪 B 🡪 C (claim between A and C)**

### *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860

The federal government was leasing to Martel a building and the lease was up for renewal. As per the bid invitation's stated requirements, the government did a "total cost evaluation" of all the bids which involved adding various costs that the government would incur if it accepted a bid. The government added $1 million for "fit up costs" and $60,000 for a "card access system" to Martel's bid, **effectively turning Martel's original lowest bid into the second lowest.** When the government then awarded to another bidder (Standard Life), Martel sued, seeking its lost profit from the five-year lease.

The gist of Martel's allegations fell into three categories:

* unfairness in negotiations before the Invitation was issued;
* unfairness in how the Invitation to Tender was written; and
* unfairness in how the evaluation was handled.

There **is a duty of care** – there **is sufficient proximity and foreseeability**. However, there is a **policy reason not to allow a claim** (***Anns*** Test).

## 

## \*\*\* THIS IS A POSSIBLE EXAM POLICY QUESTION \*\*\*

## Policy of Why Torts/Courts Should Stay Out of Pre-Contractual Negotiations…

1. One always wins and one always loses in a negotiation – it is a zero sum game – the courts have no business getting into this. No real economic loss to society, just transfer of wealth between parties – hence no justification for the court getting involved.
2. Observe that unregulated pre-negotiation could be good for “hard bargaining”… “survival of the fittest.”
3. Tort law should not be used as an insurance policy for bad/unsuccessful negotiations.
4. Courts would have to examine every single aspect of pre-contractual negotiation.
5. The courts would become inundated with cases and claims (floodgates).
6. If the purpose of Torts is to be***corrective*** justice… what is being corrected here? If we are supposed to be putting parties “back to the condition” they were in in the first place, where is the party being restored to? And if there is a loss – haven’t the aggrieved party entered into the negotiations freely.

(Counter arguments: no economist would agree with this!? – there needs to be some rules around negotiating – fairness issues.)

# Negligent Performance of a Service

### *B.D.C. Ltd. v. Hofstrand Farms Ltd.* (1986) [1986] 1 S.C.R. 228 – Courier Company Fails to Deliver Envelope (Land Registry)

A courier company delivered an **envelope** from a government office **in Victoria to** the Land Registry Office in **Prince George**. Unknown the envelope contained a Crown grant. **Time was of vital concern** - failure to register the grant within the time stipulated entitled the purchaser to treat the contract as at an end. **Registration was late because of the courier's** **failure to deliver the envelope on time**. The third party refused to complete the transaction.

**Courier had no knowledge** of the existence of the respondent and could not reasonably have known of the existence of a class of persons whose interests depended upon timely transmission of the envelope.

There was **no assumption of risk** in reliance on the appellant's undertaking to deliver the documents.

The requirements of **proximity** were **not met** on the facts of this appeal. As respondent did not come within a limited class in the reasonable contemplation of a person in the position of the appellant, it was unnecessary to consider whether any circumstance existed to negate or limit the scope of the duty, the class of persons to whom it was owed, or the damages seen in law to flow from a breach of the duty.

The **same conclusion** can be reached on the basis that the **damages here were too remote** and consequently not recoverable. If the parties had been in a relationship of contractual privity the losses complained of would not have been foreseeable.

### *James v. British Columbia* (2005) – tree farm – Crown negligently omits to include a provision which would protect the workers – Crown is liable.

The Crown had intended to include a clause in a tree farming licence that would have prevented the licensee from closing its mill without the approval of the Crown. The clause was for the benefit of the Union Workers. The clause was negligently omitted. The licensee closed the mill and the workers lost their jobs.

**DECISION**

The Crown had **voluntarily assumed responsibility** to include the clause and then failed to discharge its responsibility. The class action was certified.

# The role of privity (Shoddy Goods & Services – with Economic Loss)

### *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1995) – building constructors are reasonably responsible to future owners – regardless of privity.

**An** **engineer or construction company involved in erecting a building may be reasonably responsible to tenants inhabiting the building many years in the future**.

|  |  |
| --- | --- |
| **“** | The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards. In the light of the fact that the home was constructed as speculative, the home builder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship. |

**It is reasonably foreseeable** to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, **subsequent purchasers of the building may suffer personal injury or damage** to other property when those defects manifest themselves.

There are **no policy considerations** which are sufficiently compelling to negate the duty.  There is **no risk of liability to an indeterminate class** because the potential class of claimants is limited to the very persons for whom the building is constructed:  the inhabitants of the building.  There is **no risk of liability in an indeterminate amount** because the amount of liability will always be limited by the reasonable cost of repairing the dangerous defect in the building and restoring that building to a non-dangerous state.  There is **little risk of liability for an indeterminate time** **because** the contractor will **only be liable** for the cost of repair of dangerous defects during the **useful life of the building**.

## Relational Economic Loss

A 🡪 B 🡪 C

(does/can C sue A for a loss A caused to B which resulted in harm to C)

Generally speaking – at common law there would not be an ability to sue – because of issues of indeterminacy, privity, etc.

This changes here…

### *Canadian National Railway. v. Norsk Pacific Ltd* (1992) [SCC] “The Jervis Crown”

**Court**: Argued that adoption of the ***Anns*** / ***Kamloops*** two stage approach provided a brake on the problem of indeterminacy, and would prevent the floodgates from being opened in cases of pure economic loss.

**However:** Strong dissent by La Forest. Argued that recovery for relational economic loss should be denied except in very limited cases as previously recognised at common law, namely: joint ventures, general average contributions, and possessory interests.

Note that this dissent is important because it becomes the basis of the majority decision in ***Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997)** five years later.

### *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997)

**Court**: **Relational economic loss is recoverable only in special circumstances**, as reflected in the recognition of number of key categories:

1. **Cases where the claimant has a possessory or proprietary interest in damaged property;**
2. **General average cases (averaging out loses involved – very specific to throwing goods in water); and**
3. **Cases where the relationship between the claimant and the property owners is a joint venture**

Court also stated that although the categories are not closed, an incremental approach must be adopted. Basic approach is to use the ***Anns*** test, but second (policy) stage should be very restrictive and stick to the pre-established categories

# Standard of Care

### *Vaughan v. Menlove* (1837, UK)

**Facts**:

* The defendant piled a haystack at the edge of his property, near the plaintiff’s property. Although he was warned several times that the haystack would catch fire, he did nothing. The haystack did catch fire, destroying the neighbour’s (plaintiff’s) cottages.

**Issues**:

* Is the appropriate standard in negligence:
  + whether the defendant “proceeded with such reasonable caution as a prudent man would have exercised under such circumstances,” or
  + whether the defendant acted “bona fide to the best of his judgement”

**Decisions/Reasons:**

* the correct standard is the reasonable person standard. This standard creates equality among defendants, compensates plaintiffs equally, and is most clear and objective.
* The other standard would create liability for negligence that would be as ‘variable as the length of the foot of each individual.’

**Ratio**:

* Standard is to caution such as a man of ordinary prudence would observe.

### *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 – *Standard of Care* – *Reasonable Man* test.

The defendant had installed a **fireplug** into the hydrant near Mr Blyth's house. That **winter**, during a **severe frost**, the **plug failed** causing a **flood and damage** to Mr Blyth's house. Blyth sued the Waterworks for negligence.

In establishing the basis of the case, [Baron Alderson](http://en.wikipedia.org/wiki/Edward_Hall_Alderson), made what has become a famous definition of negligence:

|  |  |  |
| --- | --- | --- |
| **“** | Negligence is the omission to do something which **a reasonable man**, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. | **”** |

The court found that the severe frost could not have been in the contemplation of the Water Works. They could only have been negligent if they had failed to do what a [reasonable person](http://en.wikipedia.org/wiki/Reasonable_person) would do in the circumstances. Birmingham had not seen such cold in such a long time, and it would be unreasonable for the Water Works to anticipate such a rare occurrence.

### *Arland v Taylor* [1955] 3 D.L.R. 358 (Ont. C.A.) – confirms *Blythe – definition of the Reasonable Man*

### The Reasonable Man…

### Not extraordinary or unusual

### Not superhuman

### Not required to display the highest skill of anyone

### Not a genius who can perform uncommon feats

### Not possessed of unusual powers of foresight

### Is of normal intelligence

### Makes prudence a guide to his conduct

### When determining whether the defendant has acted reasonably and met the required standard of care, and reasonableness the courts often look at three main factors:

### The probability and severity of the harm;

### The cost of risk avoidance; and

### The social utility or value of the conduct

**REMEMBER *Roe v. Minister of Health***

### *Bolton v. Stone* [1951] A.C. 850 (H.L.) - A defendant is not negligent if the damage to the plaintiff was not a [reasonably foreseeable](http://en.wikipedia.org/w/index.php?title=Reasonably_foreseeable&action=edit&redlink=1) consequence of his conduct.

**RULE: A defendant is not negligent if the damage to the plaintiff was not a** [**reasonably foreseeable**](http://en.wikipedia.org/w/index.php?title=Reasonably_foreseeable&action=edit&redlink=1) **consequence of his conduct.**

The plaintiff was hit by a cricket ball which had been hit out of the ground; the defendants were members of the club committee.

**Few important points to take away from this case:**

1. Court acknowledged that life is necessarily about judging risks. **Lord Reid** observed that “[**i]n the crowded conditions of modern life, even the most careful person cannot avoid creating some risks and accepting others**.”
2. The court also noted that **if the risk of associated with an activity is high and unavoidable, this may be a reason to prohibit the activity altogether**. According to **Lord Reid**: “If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.”

### *Paris v. Stepney Borough Council* [1951] A.C. 367 (H.L.) – Give the one-eyed man safety goggles, for Christ sake!!

The plaintiff Paris was employed by the then [Stepney Borough Council](http://en.wikipedia.org/wiki/Metropolitan_Borough_of_Stepney) as a general garage-hand. He had **sight in only one eye**, and his **employer was aware** of this. The council **only issued eye protection goggles to its employees who were welders or tool-grinders**. In the course of his usual work, Paris **received an injury to his sighted eye**. He sued the council for the [tort](http://en.wikipedia.org/wiki/Tort) of [negligence](http://en.wikipedia.org/wiki/Negligence). On appeal it was decided that Stepney Borough Council was aware of his special circumstances and failed in their [duty of care](http://en.wikipedia.org/wiki/Duty_of_care) to give him protective goggles.

Where there is a reasonable probability of harm and the injury resulting is **severe**, then there is **unreasonable risk**.

### *Watt v. Hertfordshire County Council* [1954] 1 WLR 835 – Firemen and their employers can take more risks. (Social Utility Argument)

The claimant fireman sued his employers in [Negligence](http://www.lawiki.org/lawwiki/Negligence) when he was injured by a heavy jack that had not been properly secured on his vehicle whilst attending an emergency call. His case failed.

When determining the standard of care to be applied, the court should consider the **cost of risk reduction** and **the social value of the conduct in question**.

Court held that it was **permissible for the defendant to run a high risk because the social utility of the conduct (fighting fires in this case) far outweighed the costs of the defendant’s conduct.**

**Denning, L.J.:** “It was well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition ought to be added this: you must balance the risk against the end to be achieved.”

### *Vaughn v. Halifax-Dartmouth Bridge Comm.* [1961] – Cost of Risk Avoidance – Bridge Painting

* Facts: Bridge painted, **damaged cars parked nearby from flying paint**
* **Duty was to take all reasonable measures** to prevent result or minimize damage of falling paint
* **Easily feasible to prevent damage** (ie warning signs)
* Could have avoided this risk, particularly in gravity of harm and probability (could have taken preventative measures at a relatively low cost)
* Conclusion: **Liable because did not take necessary precautions (could have taken preventative measures at a relatively low cost**

# Standard of care expected of children

**Rule #1**: [**Children**](http://www.duhaime.org/LegalDictionary/C/Child.aspx) **can sue if they are the victim of a** [**tort**](http://www.duhaime.org/LegalDictionary/T/Tort.aspx), the only distinction being that they generally need a litigation guardian or, as they are called in some jurisdictions, a litigation friend.

**Rule #2**: **Children of a very young age, say about 5 to 7 or below**, are, to quote from **Canadian Tort Law, 8th Edition**: "**totally immune from tort liability**", HOWEVER, “"**There is no fixed age below which a finding of** [**negligence**](http://www.duhaime.org/LegalDictionary/N/Negligence.aspx) **cannot be made....**"

### *McEllistrum v. Etches* [1956] S.C.R. 787 - Children over the tender age are liable for negligence but only weighed against the reasonable child.

Rule #3: **Children over the tender age**, be that 5 or 7, **are liable for negligence** **but only weighed against** a child's version of the adult's test of the [reasonable man](http://www.duhaime.org/LegalDictionary/R/ReasonableMan.aspx), **the reasonable child.**

The **Court refused to accept** that the age of six (6) was the **absolute immunity** threshold but preferred to leave the issue to the court to **determine on a case-by-case basis**. It is **only where a child's age would make a finding of negligence "absurd", that there would be immunity** from tort liability.

"... it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience."

### *Joyal v. Barsby* [1965] – 6yr old runs onto busy road – hit by truck – kid held to be contributorily negligent since trained in highway safety.

- 6 year old runs onto busy road and is struck by semi- issue at appeal was child contributorily neg’t in stepping onto busy highway?

- child 40% c.neg’t : trained in highway safety and had she looked wouldn’t have stepped onto road

### *Heisler v. Moke* [1971] - year old boy had already injured his leg in a previous accident then was driving a tractor and aggravated the injured leg – found to be contributorily negl’t.

Facts

* 9 year old boy had already injured his leg in a previous accident
* he then was driving a tractor and aggravated the injured leg

Issue

* What standard should children be held to?

Ratio

* child is negligent, engaged in adult activity
* Children are not held to the reasonable person standard
* 2 questions

1. Whether the child, having regard to his age, his intelligence, his experience, his general knowledge and his alertness, is capable of being found negligent in the circumstances under investigation (consider the particular child, it is subjective).

2. Was the child negligent at all. If so, to what degree? (Now that we know who you are, based on a comparison to the reasonable like child, is there negligence? More Objective.

### Tillander v Gosselin - 3-year old tyrant grabbed a baby from her carriage and dragged her 100 feet

3-year old tyrant grabbed a baby from her carriage and dragged her 100 feet. No one saw what else he did but when the adults found the baby, it had a fractured skull.

The 3-year old was sued and Justice Grant rejected the claim:

"In this action, the defendant's tender age at the time of the alleged assault satisfies me that he **cannot be cloaked with the mental ability of the ordinary** [**reasonable man**](http://www.duhaime.org/LegalDictionary/R/ReasonableMan.aspx) **and hence** [**negligence**](http://www.duhaime.org/LegalDictionary/N/Negligence.aspx) **cannot be imputed to him.** That same condition satisfies me that he cannot be said to have acted deliberately and with intention when the injuries were inflicted upon the infant plaintiff.

## Exception to the Exception…

## Children Participating in “Adult activities” held to Reasonable Standard of Care

### *Dellwo v. Pearson* (1961) Unfair to permit minor in operation of motor vehicle to be held to lower standard

**–** Unfair to permit minor in operation of motor vehicle to be held to lower standard than expected of all others… one cannot know who the operator of the vehicle/plane/etc. is.

### *Ryan v. Hicksen(1974)* (snowmobile)

### *MclErlean v. Sarel* (trial bikes)

### *Thomas v. Hamilton (City) Board of Education* (1994) – parents will be held liable if the injury is a result of their failure to control or monitor the child’s conduct.

16 year-old high school student player suffered a neck injury while playing football, resulting in quadriplegia.

The student’s parents argued their son should not have been allowed to play because

of his fatigue and poor physical condition. They also argued the teacher should have

known their son had a long, slender neck, making him vulnerable to injury.

The **Court dismissed the action against the teacher and school board**.

The court held that football is inherently dangerous, and that the student and his **mother had consented** to the **normal risks of the game**. The **student’s mother had signed a consent form indicating she knew of, and consented to, these risks**.

***LaPlante (Guardian ad litem of) v LaPlante*** -father held liable for letting 16 yr old son who just got his licence drive in icy conditions with traffic at highway speed

# Standard of care expected of the disabled

### *Carroll and Carroll v. Chicken Palace Ltd.* [1955] - physically disabled are required to meet only the standard of care of a reasonable person with the same disability

The **physically disabled are required to meet only the standard of care of a reasonable person with the same disability**.

**However**: According to the court in ***Carroll***, a person with a physical disability also has to recognize limitations and not take unreasonable risks.

### *Fiala v. Cechmanek* (2001) - guy jumps into sunroof; didn‟t know he was mental – absolved of liability

**Defendant is suddenly and without warning struck with a mental illness**, they will be **absolved of liability** if they can show, on the balance of probabilities:

1. As a result of the mental illness, the defendant had **no capacity** to understand or appreciate the duty of care owed at the relevant time

**OR**

1. As a result of mental illness, the defendant was unable to discharge their duty of care as they had **no meaningful control over their actions** at the time the relevant conduct fell below the objective standard of care.

# Standard of care expected of professionals

### *White v. Turner* (1981)(Ont. C.A.) – breast reduction surgery botched – surgeon was rushed and careless. - professional should be judged by the standard of care of his profession

**RULE**: a **professional should be judged by the standard of care of his profession.**

***Layden v Cope*** (1984) – man diagnosed with Gout… kept getting worse… wasn’t Gout – Country Dr. held liable for negligence for not refereeing to specialist.

**RULE**: general practitioner are excepted to exercise the standard of care of a reasonable, competent general practitioner. this **includes knowing their limits and when to refer patients to a specialist**

### *Ter Neuzen v. Korn* [1995] - specialists must be assessed in light of the conduct of other ordinary specialists

Standard expected of a doctor is that of a prudent and diligent doctor in the same circumstances. As a result, **specialists** **must be assessed** **in light of the conduct of other ordinary specialists**

***Brenner v Gregory*** - lawyers will be held to the standard of a reasonably competent and diligent lawyer

# Causation

**(1)** The distinction between cause-in-fact and cause-in-law

* Factual causation – actually, factually caused the event
* Legal causation - also known as the doctrine of [proximate cause](http://en.wikipedia.org/wiki/Proximate_cause). Deals with Remoteness. The most important doctrine is that of *novus actus interveniens*, which means a ‘new intervening act’ which may ‘cut the chain of causation’.

**Determining legal causation in negligence**

## The but-for test

***Kauffman v. Toronto Transit Commission***[1960] Passenger injured on escalator- metal-clad hand rail instead of rubber type (coefficient of friction) – no causation link/too remote

Plaintiff was going up an escalator of the defendant, was preceded by a man and two youths ahead of the man. The two youths started pushing each other and fell on the man. All three fell on the plaintiff who was knocked down and carried up the escalator.

**The fact that the hand rail used was round, corrugated and metal-clad**, while the type in use in escalators in some other cities was oval in shape and made of black rubber, **did not contribute to the accident**

***Barnett v. Chelsea & Kensington Hospital*** [1969] – **arsenic poisoning – patient sent home –** even if the deceased had been examined and admitted for treatment, there was little or no chance that the only effective antidote would have been administered to him in time.

## Facts

Three men attended at the [emergency department](http://en.wikipedia.org/wiki/Emergency_department) but the casualty officer, Dr Banerjee, who was himself unwell, did not see them, advising that they should go home and call their own doctors. One of the men died some hours later. The post mortem showed [arsenic poisoning](http://en.wikipedia.org/wiki/Arsenic_poisoning) which was a rare cause of death.

**Judgment**

It was held, that on the but-for test, **even if the deceased had been examined and admitted for treatment, there was little or no chance that the only effective antidote would have been administered to him in time.** Although the hospital had been negligent in failing to examine the men, there was no proof that the deceased's death was caused by that negligence.

## Problems with the but-for approach

## Evidential insufficiency (the “evidential gap”)

### *Walker Estate v. York Finch General Hospital* [2001] 1 S.C.R. 647 - How do we know what the HIV infected person would have actually done (Donate blood or not) if he had all the information on the pamphlets?] – Material Contribution - not necessary for the defendant’s actions to be the SOLE cause of the damages

[How do we know what the HIV infected person would have actually done (Donate blood or not) if he had all the information on the pamphlets?]

### [MATERIAL CONTRIBUTION?]

**Facts**: Three Ps were infected with HIV from transfusions of Red Cross blood. **Donor was given the warning used in 1983 with no specific reference to HIV risk factors/symptoms.** In 1984 the warning was changed to include mention of the risk of male-male sex with multiple partners. Donor testified that he thought it was safe to give blood as he had stopped having sexual relations with men two years before. Also **claimed that had he been given the 1984 warning, he would have talked to the nurse about being gay (and then possibly not given blood).** Red Cross sued for negligent screening.

**Held**: **Judgement for P upheld** (trial found for P, then reversed on appeal). Although the but-for test remains the general test for causation, it is unworkable in some situations. Test for causation in negligent donor screenings is whether **D’s (Blood Bank) negligence** **materially contributed to the harm**. **“Material” here meant outside “de minimis” range.**

**Now**: The approach adopted in ***Walker*** is usually referred to as the **material contribution test.** According to this approach, it is **not necessary for the defendant’s actions to be the sole cause of the damages** suffered by the plaintiff. Instead, a material contribution is established if their actions caused or contributed to the damages.

## Multiple insufficient causes (no single factor is the “but-for”)

### *Athey v. Leonati* [1996] - *a tortfeasor cannot avoid liability for injuries or losses on the grounds that one of the contributing causes (even if a major contribution) emanated from the Plaintiff. (*Weak back, 2 car accidents, then herniated disk when returning to exercise.)

1. To succeed in an action for negligence, the Plaintiff generally must prove **causation on the balance of probabilities.**
2. Causation typically is established **on the basis of the "but for" test**. If "but for" the Defendant's negligence, the Plaintiff would not have suffered the loss in question, a sufficient causal connection exists.
3. The Plaintiff **need not prove** that such carelessness was the **sole causal factor**. It is **sufficient to establish** that the Defendant's conduct "**materially contributed**" (beyond the de minimis range) to the creation of the injury.
4. **Causation** essentially is a matter of common sense; it **need not be proved to a scientific standard** and in some circumstances may be inferred on the basis of relatively little evidence.

While the accidents only contributed 25% to the disc herniation and 75% was attributed to the Plaintiff's latent weakness in his back, Major J. had no difficulty in finding that the accidents materially contributed to the disc herniation and awarded the Plaintiff 100% of his damages.

The issue of causation and compensation can be sorted out in most cases by returning to the basics of causation as restated in *Athey v. Leonati. The ratio of that judgment is limited in scope to cases of multiple causations, where* ***a tortfeasor cannot avoid liability for injuries or losses on the grounds that one of the contributing causes (even if a major contribution) emanated from the Plaintiff.***However, it can also be said from the dicta in this decision that these principles can be extended to resolve other more complicated cases of causation.

## Multiple sufficient causes (multiple causes which each could have done it – each separately fully liable).

### *Lambton v. Mellish* [1894 ] - 2 refreshment vendors with organs producing noise, nearby homeowner alleges nuicance- noise made by each organ alone is a nuicance, so hold each liable separately

### Materially increased risk - Coal Dust, Asbestos, Cigarettes, Botched surgeries

### *Snell v. Farrell* [1990] 2 S.C.R. 311 - Cataract Operation – bleeding – continued operation – blood in eye – 6 months optic nerve atrophied – total loss of vision – may have occurred anyway. - [Causation](http://www.duhaime.org/LegalDictionary/C/Causation.aspx) can be inferred from the facts "in the absence of evidence to the contrary adduced by the defendant."

Court found that:

(1) scientific evidence is not required and that

(2) that [causation](http://www.duhaime.org/LegalDictionary/C/Causation.aspx) can be inferred from the facts "in the absence of evidence to the contrary adduced by the defendant."

**Key quote:** “The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced.”

Loss of chance - This area of claim has been shut down in Canada.

Loss of a chance of recovery (or even a miracle) – e.g. 25% chance of recovery but only if diagnosed… 40% chance of diagnosis… etc.

# Alternatives to the but-for approach – POSSIBLE EXAM POLICY QUESTION!!!

1. The problem of too many causes
2. Sufficiency versus necessity: The NESS test (necessary set of sufficient conditions)

[H. L. A. Hart](http://en.wikipedia.org/wiki/H._L._A._Hart) and [Tony Honoré](http://en.wikipedia.org/wiki/Tony_Honor%C3%A9), and later [Richard Wright](http://en.wikipedia.org/w/index.php?title=Richard_W._Wright_%28Professor,_Chicago-Kent_College_of_Law%29&action=edit&redlink=1), have said that something is a cause if it is a ‘necessary element of a set of conditions jointly sufficient for the result’. This is known as the [NESS test](http://en.wikipedia.org/w/index.php?title=NESS_test&action=edit&redlink=1). In the case of the two hunters, the set of conditions required to bring about the result of the victim's injury would include a gunshot to the eye, the victim being in the right place at the right time, gravity, etc. In such a set, either of the hunters' shots would be a member, and hence a cause. This arguably gives us a more theoretically satisfying reason to conclude that something was a cause of something else than by appealing to notions of intuition or common sense.

Hart and Honore, in their famous work *Causation in the Law*, also tackle the problem of 'too many causes'. For them, there are degrees of causal contribution. A member of the NESS set is a "causally relevant condition". This is elevated into a "cause" where it is a deliberate human intervention, or an abnormal act in the context. So, returning to our [hunter](http://en.wikipedia.org/wiki/Hunting) example, hunter A's grandmother's birth is a causally relevant condition, but not a "cause". On the other hand, hunter A's gunshot, being a deliberate human intervention in the ordinary state of affairs, is elevated to the status of "cause". An intermediate position can be occupied by those who "occasion" harm, such as accomplices. Imagine an accomplice to a murder who drives the principal to the scene of the crime. Clearly the principal's act in committing the murder is a "cause" (on the but for or NESS test). So is the accomplice's act in driving the principal to the scene of the crime. However the causal contribution is not of the same level (and, incidentally, this provides some basis for treating principals and accomplices differently under criminal law). Leon Green and Jane Stapleton are two scholars who take the opposite view. They consider that once something is a "but for" (Green) or NESS (Stapleton) condition, that ends the factual inquiry altogether, and anything further is a question of policy. Jade.

**REVIEW…**

# Corrective Justice – returning aggrieved parties to their original state

# Distributive Justice – poor guy hits Bill Gates’ car (Damages should be relative to what the people can afford.)

# Retributive Justice (Kant) – wrong behaviour deserves to be punished – no matter what.

# Consequentialism (Deterrence) – Speeding tickets and heavy jail sentences deter crime.

# Restorative Justice – very closely linked to Corrective Justice

# Remoteness

**Breach of duty and causation are not enough to establish liability**. Plaintiff must also be able to establish that the damage complained of was not too remote, and that there were not intervening events or acts that should prevent the defendant from being found liable.

Best way to understand the idea of remoteness is to see it as **means by which the courts seek to limit the implications of a finding of factual causation**, usually for reasons of policy and general fairness.

In this sense, the role of remoteness is ensure that liability is kept within **fair and reasonable boundaries**, even when it is the case that the negligence of the defendant was the but-for cause of the plaintiff’s loss.

## The distinction between foreseeability (neighbours) and remoteness (probable outcomes).

### The decision in *Re Polemis & Furniss, Withy & Co. Ltd -* Dropped a plank into the hull of a ship… caused a spark… spark ignited benzene in ship hold… ship exploded = Strict Liability – NO LONGER APPLIES – NOT THE LAW ANYMORE.

***BECAUSE…***

### *The Wagon Mound (No. 1)* and the foreseeability test - Furnace oil on water… welding on dock… ignites, fire on pier. Ultimately decided that it was not foreseeable.

### *The Wagon Mound (No. 2)* and the foreseeability test - Furnace oil on water… welding on dock… ignites, fire on pier – OTHER SHIPS BURN (NUISANCE). Ultimately decided that, although the risk of fire was low, it was still possible and thus it was foreseeable.

????

**Note:** The courts have taken an increasingly flexible approach to the question of foreseeability and remoteness, with the result that it has arguably become easier and easier for plaintiffs to establish that the damage suffered was not too remote.

## The changing landscape of remoteness

### *Hughes v. Lord Advocate* [1963] A.C. 837 (H.L.) – child picks up then drops a paraffin lamp – it explodes down an unmanned manhole – injuries result.

The defender should **not escape liability because the *WAY* in which the danger have actually aroused** is **not identical** to what has is **foreseeable and protected against.**

**Lord Morris**: “My Lords, in my view there was a duty owed by the defenders to safeguard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injuries, and the defenders are not absolved from the liability because they didn’t envisage “the precise concatenation of circumstances which lead up to the accident.”

## Sequencing of events

### *Assiniboine South School Div No. 3 v. Greater Winnipeg Gas Co*. (1971) – each individual link in the chain of events was foreseeable (sequencing)

* Start snowmobile – might run into school (foreseeable)
* School might have exterior gas pipes (foreseeable)
* Gas pipes might burst in collision (foreseeable)
* Leaking gas might ignite (foreseeable)
* School could ignite from burning gas (foreseeable)

### *Smith v. Leech Brain & Co.* [1962] - a [tortfeasor](http://en.wiktionary.org/wiki/tortfeasor) is liable for negligent damage, even when the claimant had a predisposition that made that damage more severe than it otherwise would have been (thin skull rule).

An object spattered out from a smelting pot and struck the defendent on the lower lip, resulting in a burn. Unfortunately for the claimant, this burn was the "promoting agent" of a [cancer](http://en.wikipedia.org/wiki/Cancer) from which the claimant died three years later.

The employer's negligence in respect to the burn was not disputed, the important legal issue, however, was that the claimant had a predisposition to the cancer in his skin tissue.

[Lord Parker](http://en.wikipedia.org/wiki/Hubert_Parker,_Baron_Parker_of_Waddington) stated:

|  |  |  |
| --- | --- | --- |
| **“** | If a man is negligently run over... it is no answer to the sufferer’s claim for damages that he would have suffered less injury... if he had not had an unusually thin skull or an unusually weak heart. | **”** |

The [ratio decidendi](http://en.wikipedia.org/wiki/Ratio_decidendi) is that **a** [**tortfeasor**](http://en.wiktionary.org/wiki/tortfeasor) **is liable for negligent damage, even when the claimant had a predisposition that made that damage more severe than it otherwise would have been.**

### *Marconato v. Franklin* [1974] 6 W.W.R. 676 (B.C.S.C.) - minor physical injuries in a car accident caused by Δ’s negligence. Afterwards she developed pain and stiffness with no physical explanation, and underwent a “major personality change” - tortfeaser must take his victim as he finds him.

f.: Π suffered minor physical injuries in a car accident caused by Δ’s negligence. Afterwards she developed pain and stiffness with no physical explanation, and underwent a “major personality change” (depressed, hostile, anxious), due to pre-existing personality traits, as a result of the minor physical injuries.

i.: Should the Δ be held liable for the “major personality change” that occurred after she sustained minor physical injuries due to the Δ’s negligence, even though the change was accorded to her particular pre-existing personality traits?

r.: **The tortfeaser must take his victim as he finds him; he is liable for any further consequences that arise (regardless of the foreseeability) by reason of the victim’s “peculiar susceptibilities and vulnerabilities”, from the reasonably foresseable injury he negligently caused.**

a.: Aikins J.:

Π was predisposed by her personality to suffer the unusual consequences that she did suffer as a result of the modest physical injury caused by the Δ’s negligence. The **Δ must pay damages for all the consequences of her negligence.**

# Remoteness of Damage: Intervening Causes

Recap – the distinction between factual (“but for”) and legal (“remoteness”) causation.

* 1. Both are legal fictions in many ways.

The traditional approach to the problem of intervening acts in negligence.

### *Bradford v. Kanellos (*1973*)* - the last wrongdoer doctrine. (restaurant fire, hissing of *extinguisher*, patron yells “gas leak” – then full panic)

1. A grease fire is started in a Restaurant (negligent act)
2. Restaurant on fire
3. Automatic fire extinguisher goes off (makes hissing noise)
4. **A restaurant patron yells that there is gas leak (negligent act)**
5. Panic ensues and another patron is injured in the stampede.

**Item (d) becomes the intervening act.**

* *Novus actus interveniens* and the last wrongdoer doctrine.
  + Last person to act is most capable of preventing the resulting harm
  + It is the easiest solution to potentially complicated chains of causation

“**The actions of the third person were hysterical and idiotic and were beyond the contemplation of a reasonable person.**” (***Martland J.*** for the majority.)

“**Can’t panic and hysteria be foreseeable in certain circumstances!?**” (***Spence J.*** for the minority.)

*{This may be closer to the current attitudes of the courts! (at least in terms of finding “joint” liability)}*

* Limitations of the doctrine
  + It’s not particularly fair or equitable. Especially if one considers that a potentially liable party becomes absolved of responsibility if there happens to be (perhaps just by good/bad “luck”) a further negligent act by another.
  + It is not the purpose of courts to choose the “simplest” solution to a problem.
  + There is an increasing understanding of “remoteness” – both in terms of judges and juries.

## Naturally occurring intervening acts (Acts of God)

* Provided that they were **not “too unusual” they should not interrupt a chain of liability**. Imagine a place where there are **“regular” earthquakes – negligent construction** where there is then a collapse from an earthquake **could not be excused**. There is a reasonable expectation/foreseeability of earthquakes. Or having **left a window open** – then there is a rain storm that results in water damage. **Storms are reasonably foreseeable**.

### Negligent intervening acts

* + A injures B. B goes to the hospital and Doctor C makes the injury worse. In such a case medical negligence is not only foreseeable, but there are policy considerations as well. It is much less likely that Doctor C would be considered to be an intervening act.

### Intentional intervening acts

* + **Subsequent malfeasance always breaks the chain of causation**.

## Exceptions to the current position

## Intervening acts of medical malpractice - the decision in *Price v. Milawski* (1977)

### *Price v. Milawski* [1977] 82 D.L.R. (3d) 130 (Ont. C.A.) – one doctor negl. relying on other doctor negl. – both doctors liable.

P broke his ankle , but **emerg. physician** **ordered foot Xrays not ankle** so extent of injury wasn’t uncovered - orthopaedic **surgeon (2nd doctor) then put ankle in a cast w/o ordering further Xrays** that worsened damage - by time fracture was uncovered **permanent damage** was done.

held- orthopaedic surgeon (2nd doctor) not found to be a novus actus interviniens both **doctors held joint and severally liable.**

**Rule: it is reasonably forseeable that that a neg’t diagnosis by a first doctor will be relied upon by subsequent treating doctors.**

## Liability for the deliberate intervening acts –

### *Hewson v. Red Deer* (1976) 63 D.L.R. (3d) 168 (Alta. T.D.) – Tractor left with keys in it – the act of the third party was not an intervening cause because it was foreseeable.

**Facts**: Defendant negligently left a tractor unattended – third party then drove the tractor and caused damage.

**Held**: **The act of the third party was not an intervening cause because it was foreseeable** that someone might be tempted to drive it

**Key point:** This case is support for the argument that the general rule of foreseeability still applies in such cases, and that the act of the third party still needs to be foreseeable

### *Lamb v. London Borough of Camden* [1981] QB 625 - water main maintained by the Council broke, the claimant moved out and squatters moved in, causing further damage to the house - secondary damage caused by the squatters was too remote

A **water main** maintained by the Council **broke**, which **caused extensive damage** to the claimant's house. Because of the damage, the claimant moved out and **squatters moved in, causing further damage** to the house.

The court held that **the secondary damage caused by the squatters was too remote**. The council was liable for the damage caused by the broken water main, but the land owner is responsible for keeping trespassers at bay. [Lord Denning](http://en.wikipedia.org/wiki/Tom_Denning,_Baron_Denning) said at p636 that remoteness of damages is just a question of policy with the element of foreseeability being determined by what is perceived to be instinctively just. This means that the reasonable foreseeability test is not always appropriate for cases where the [acts of the claimant](http://en.wikipedia.org/wiki/Acts_of_the_claimant) may demonstrate some fault.

# Defences in Negligence

### Start with: (\*\*\* IMPORTANT FOR EXAM \*\*\* )

### No duty of care

### Duty was met

### No causation

### Too Remote

### Then and only then go to defences (which frequently are difficult to maintain in court.)

### Contributory negligence

### Voluntary Assumption

### Illegality

### Inevitable Accident

### Burden of proof is on the DEFENDANT and CAN argue multiple defences

# Contributory negligence

**The traditional common law approach** – contributory negligence = complete defence, since no apportionment of damages. (NOT TRUE ANYMORE)

**The current definition**

* + **Plaintiff didn’t take care**
  + **Lack of care contributed to damage/harm**

*A plaintiff will be contributory negligence if it can be shown that their careless conduct contributed to the harm suffered as a result of the defendant’s negligence.*

### *Walls v. Mussens Ltd.* (1969), 11 D.L.R. (3d) 245 (N.B.C.A.) - Truck/Gasoline fire in Garage – Owner used snow instead of fire extinguishers – owner NOT contributory negligent – “in the agony of the moment.”

Truck/Gasoline fire in Garage – Owner **used SNOW** **instead of fire extinguishers** – owner **NOT** **contributorily** **negligent** – “in the agony of the moment”.

### *Gagnon v. Beauliey* (1977), W.W.R. 702 (B.C.S.C.) - Did not wear a seatbelt – person did not believe that seatbelts were useful – Court said it didn’t matter = contributorily negligent

Did not wear a seatbelt – person did not believe that seatbelts were useful – Court said it didn’t matter = **contributorily negligent**.

### *Rintoul v. X-Ray and Radium Indust. Ltd.* [1956] S.C.R. 674 - Collision with stationary car—Sudden failure of brakes—Defence of INEVITABLE ACCIDENT not valid – duty to *inspect* brakes still exists

O. stopped at an intersection for a traffic-light. His service brakes worked properly. At about 150 feet away from the appellant’s car, O. applied his service brakes and found that they did not work. When his car was 50 to 75 feet from that of the appellant, he applied his hand brakes. This reduced his speed from 12 m.p.h. to 6 m.p.h. but did not stop his car which struck the rear of the appellant’s car.

The respondents **failed to prove** two matters essential to the establishment of the defence of inevitable accident: (1) **that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part** and (2) that, assuming that such failure occurred without negligence on their part, O. could not, by the exercise of reasonable care, have avoided the collision which he claimed was the effect of such failure.

On the first matter- **the sudden failure could have been prevented by reasonable care on their part and particularly by adequate inspection** and **made no attempt to show that the defect could not reasonably have been discovered.**

As to the second matter, they have failed to show that O. could not have avoided the accident by the exercise of reasonable care. If the hand brakes had been in the state of efficiency prescribed by the regulations, O. could have stopped his car before the collision occurred. At the least, **the unexplained failure to comply with the regulations was evidence of a breach of the common law duty to take reasonable care to have the car fit for the road**.

### *The Negligence Act 1996*

* + **Apportionment on the basis of fault**
  + **Damages can be offset if both parties are at fault**
  + **Legal costs also apportioned on the basis of fault**

## VOLUNTARY ASSUMPTION OF RISK (VOLENTI)

**COMPLETE DEFENSE** (therefore Courts are hesitant to allow this because there can be **no** apportionment.)

### *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.) horseplay on stairs fell and crashed through an improperly constructed wall – NOT FORSEEABLE to horseplayers that building failed.

2 guys engaged in horseplay on stairs fell and crashed through an improperly constructed wall-  one is injured to point of paralysation – (CONTRIBUTORY NEGLIGENT TOWARDS ONE ANOTHER) –

HOWEVER **Neither guy found neg’t b/c accident was beyond scope of risk created by horseplay** – they **could not have contemplated that the wall would “pop out”** – therefore liabilty apportioned btwn the **City (80%) and Building Owners (20%) for failing to properly inspect the wall** and make sure it was up to building code.

## The distinction between express and implied consent

* + Expressly **contracting out of liability** – then becomes **governed by contract law**.
  + **Implied consent** – where it seems obvious **by conduct**

## In order to apply the defense, Defendant MUST establish the following…

* + **Plaintiff Knew and understood the PRECISE particulars of the risk**
  + **Plaintiff Voluntarily assumed that risk**

### *Dube v. Labar* (1986), 27 D.L.R. (4th) 653 (S.C.C.) - Defence of Volenti (in general) NOT applicable to the majority of drunk driver willing passenger cases – almost impossible to assume these precise risks.

**Defence of Volenti (in general) NOT applicable to the majority of drunk driver willing passenger cases**, b/c the defence requires an awareness of circumstances and consequences of action that are rarely present on the facts of such cases at the relevant time.

[drunk buddy lets other drive]

## Illegality – COMPLETE DEFENSE

***Ex Turpi Causa Non Oritur Actio* – “from a dishonorable cause an action does not arise"**

### *Hall v. Hebert* (1993), 101 D.L.R. (4th) 129 (S.C.C.) – establishes two requirements for Illegality Defense

Plaintiff and defendant (both equally drunk) get in and drive a muscle car, and have an accident. P claims D should not have let him drive; D claims P acted illegally and cannot sue.

**Court** Majority held that **ex turpi can be a defence to negligence, but only available where**:

1. **The PLAINTIFF stands to profit from his criminal behaviour; or**
2. **Compensation would amount to an avoidance of criminal sanction**

Note that Cory J. argued that the question of illegality should be dealt with at the **duty stage**. The majority of the court rejected this on the grounds that by keeping ex turpi as a defence, it was maintaining a desirable degree of flexibility in the application of the principle.

### *MacDonald v. Woodward* [1974], 43 D.L.R. (3d) 182 (Ont. Co. Ct.) - P need only show that that accident occurred on highway, and that injury was the result of collision (not result of drivers conduct)- burden then shifts to D to show that neg’ce was NOT a factor.

Man boosting another’s car is run over by the one he is helping - P need only show that that accident occurred on highway, and that injury was the result of collision (not result of drivers conduct)- burden then shifts to D to show that neg’ce was not a factor.

### *Cook v. Lewis* [1952], 1 D.L.R. 1 (S.C.C.) - Negligence—Hunting accident—Jury's finding that plaintiff shot by one of two defendants but unable to say by which one—Whether finding of absence of negligence was perverse—Onus

The respondent while hunting was shot in the face by bird-shot. Three hunters admitted discharging their guns in the vicinity practically at the same time but not at the same bird. The jury found that the respondent had been shot by one of these two hunters but were unable to say by which one.

*Per* Rand J.: **the onus would be shifted to the wrong-doer to exculpate himself**.

*Per* Estey, Cartwright and Fauteux JJ.: The proper verdict would have been reached had the jury been instructed that once the plaintiff had proven that he was shot by one of the defendants the onus was then on such **defendant to establish absence of both intention and negligence**; and **that if the jury found themselves unable to decide** which of the two shot the plaintiff, because in. their opinion both shot negligently in his direction, **both defendants should be found liable.**

### *Fontaine v. British Columbia (Official Administrator)* [1997] 156 D.L.R. (4th) 577 (S.C.C.) -*‑ Negligence ‑‑ Res ipsa loquitur ‑‑ Circumstantial evidence ‑‑ Precise time, date and place of motor vehicle accident unknown ‑‑ Severe weather and bad road conditions at presumed time of accident ‑‑ Whether or not res ipsa loquitur applicable, and if so, effect of applying it*

Husband who was found dead several weeks after his expected return from a hunting trip.  His body and that of his hunting companion (which was still buckled in the driver’s seat) were in the companion’s badly damaged truck which had been washed along a flood swollen creek flowing alongside a mountain highway.  No one saw the accident and no one knew precisely when it occurred.

Since various attempts to **apply *res ipsa loquitur* have been more confusing than helpful, the law is better served if the maxim is treated as EXPIRED and no longer a separate component in negligence actions**.   Its use had been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident.  If such a case is established, the plaintiff will succeed unless the defendant presents evidence negating that of the plaintiff.

The circumstantial evidence here did not discharge the plaintiff’s onus.  Many of the circumstances of the accident, including the date, time and precise location, were not known.  **There were minimal, if any, evidentiary foundations from which any inference of negligence could be drawn.**

# Liability of Public Authorities

1. The Distinction between Legislative, Judicial, and Administrative Functions

Regulatory Bodies, Police, Municipal Gov’ts, Tribunals, etc. (Any type of body with delegated gov’t power).

The name is not important – the type of power they are excising is more important.

### *Wellbridge Hldg. Ltd. v. Winnipeg* (1970) - Municipalities are not liable for enacting, repealing, etc muncipal by-laws.

The plaintiff leased certain lands in the City of Winnipeg with the intention of constructing thereon a multi-storey apartment building. It allegedly relied on the validity of an amending zoning by-law which, in litigation terminating in this Court, was declared to be invalid. The building permit was thereupon revoked. Save for some subsequent protective construction, all work on the apartment project was then stopped.

There was nothing false or misleading or careless in the representations made to the plaintiff and it could not be accepted that those representa­tions involved an assumption of responsibility to the plaintiff for the procedural regularity of the rezoning proceedings.

**GOV’T BODIES CAN ONLY BE HELD LIABLE IN TORT WHERE THEY ARE EXERCISING ADMINISTRATIVE/OPERATIONAL POWERS/DECISIONS.**

**(Not Legislative or Judicial (Policy))**

**Why NOT Policy? – ultimately somebody will always be negatively affected by policy; unpopular or “bad” policy can be remedied at the ballot box; parliamentary privilege; judicial/courts should not stand over the shoulder of government (separation of power); second guessing legislation would be very inefficient; judiciary branch is about applying the rules, not making them;**

# Judicial Immunity and the Provincial Court Act

**Statutory immunity for both Judicial and Legislative members.**

BC Provincial Court Act – Section 27 (3)

#### Immunity protection

**27.3**  (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a tribunal, a member of a tribunal or a person acting on behalf of or under the direction of a tribunal, because of ***anything*** done or omitted

(a) in the performance or intended performance of any duty in relation to an inquiry, or

(b) in the exercise or intended exercise of any power in relation to an inquiry.

(2) Subsection (1) does not apply to a person referred to in that subsection in relation to ***anything*** done or omitted by that person in bad faith.

The argument against this immunity would be to allege that the individual is acting ultra vires.

Meaning that the person is acting outside of their authority. e.g. – off-duty police officers; or judges who might make a comment which is “outside” the authority of the court. (even if while physically in the court.)

Judges cannot be compelled to give evidence about how a decision was made or what discussions were had. (neither can juries – at least in Canada)

## Liability of Public Authorities

### *Just v. British Columbia* (1989) [1989] 2 S.C.R. 1228 – boulder falls on car– this was an operational instead of policy decision – therefore gov’t was negligent and liability exists.

Heavy snow fall forced appellant and his daughter to stop in a line of traffic.  A boulder came crashing down upon appellant's car, killing appellant's daughter and causing him very serious injuries.  Appellant contended that respondent negligently failed to properly maintain the highway.

The Department of Highways had set up a system for inspection and remedial work upon rock slopes.  Numerous informal inspections were carried out by highway personnel as they drove along the road.

*Per* Dickson C.J. and Wilson, La Forest, L'Heureux‑Dubé, Gonthier and Cory JJ.:  **The province owes a duty of care, which ordinarily extends to their reasonable maintenance, to those using its highways.  The Department of Highways could readily foresee the risk that harm might befall users of a highway if it were not reasonably maintained.** That maintenance could be found to extend to the prevention of injury from falling rock.

**{ANNS TEST – proximity (yes), policy reasons against (no)}**

**{have to consider what budgetary and resources are available when considering when/if there is a duty of care – can be viewed as part 2 of the Anns test.}**

**{the higher up the decision is made, the more likely it is to be a POLICY decision}**

*Per* Sopinka J. (dissenting):  Respondent had the power to carry out the inspections but was under no duty to do so.  Conduct within the limits of this discretion gives rise to no duty of care; conduct outside of these limits may attract a private law duty of care.

### *Brown v. British Columbia* (1994) 1 S.C.R. 420 – summer vs. winter operational schedule = POLICY decision = NO liability.

**The appellant** left Gold River to drive to Campbell River shortly after 8:30 a.m. on a Friday in November 1985 and, about 30 minutes later, **skidded on an icy patch of highway and went over the embarkment.** Three other accidents had occurred on the same stretch of highway that morning.  Because of the icy highway conditions, an RCMP officer had called his detachment at 7:25 a.m. requesting a sand truck, but it was not until 8:30 a.m., after a third call, that he was informed that the Highways Department had been contacted through the control tower and that a sanding truck should be on its way.  The department offices in Gold River and Campbell River were still **on the summer schedule at the time of the accident.**

*Held*:  The appeal should be dismissed.

*Per* Gonthier, Cory, Iacobucci and Major JJ.:  The province owes a duty of care to those using its highways.  That duty of care ordinarily extends to reasonable maintenance and would include the duty to take reasonable steps to prevent injury to users of the roads by icy conditions.  The imposition of this duty of care is not excluded by statute.  There is no exemption from tort liability in the *Highway Act*, and the *Occupiers Liability Act*, in particular s. 8, was not passed to exempt the Highways Department from liability for its negligent acts. Nor is the Department immune, under s. 3(2)(f) of the *Crown Proceeding Act*, from liability for negligently failing to maintain its highways.  The Department, however, is exempt from the imposition of the duty of care with respect to highway maintenance **because its decision to maintain a summer schedule, with all that it entailed in terms of reduced service, was one of policy.  That decision involved classic policy considerations of economic, financial resources, personnel and significant negotiations with government unions.  It was truly a governmental decision.**

# Misfeasance in a Public Office

Two types of misfeasance:

1. **Conduct specifically intended to injure a person or class of persons**
2. **Conduct where the officer knows their action is outside of the power granted by the public office and that it is likely to injure the plaintiff**

The question of proof:

* + 1. **Public officer must have engaged in deliberate unlawful behaviour**
    2. **Public office must have been aware that it was unlawful and that damage was likely.**

### *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 – Police owed plaintiffs duty to take reasonable care to ensure that police officers cooperated with investigation.

Negligence — Duty of care — Victim killed by police — Police officers involved in shooting not complying with statutory duty to cooperate with SIU investigation — Plaintiffs bringing actions in negligence against chief of police, police services board and province — Whether they owed plaintiffs duty to take reasonable care to ensure that police officers cooperated with investigation.

*Held*:  The appeal should be allowed in part and the cross-appeal dismissed. The actions in misfeasance in a public office against the police officers and the Chief and **the action in negligence against the Chief should be allowed to proceed.**  The actions in negligence against the Board and the Province should be struck from the statement of claim.

## \*\*\*Review debates about Cooper versus Anns\*\*\* for EXAM

### *Cooper v. Hobart* [2001] 3 S.C.R. 537 (More restrictive than Anns?) (good reasons not to?)

In October 1997, the Registrar of Mortgage Brokers, a statutory regulator, suspended a registered mortgage broker’s licence and issued a freeze order in respect of its assets because funds provided by  investors were allegedly used by the broker for unauthorized purposes.  The appellant, one of over 3,000 investors who advanced money to the broker, brought an action against the Registrar alleging that he breached the duty of care that he owed to the appellant and other investors.

*Held*:  **The appeal should be dismissed.  The Registrar did not owe a duty of care to investors.**

In assessing whether a duty of care should be imposed, the approach set out in *Anns* is still appropriate in the Canadian context.  Different types of policy considerations are involved at each stage of *Anns*.  At the first stage, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care.  The proximity analysis focuses on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy.  The starting point for the proximity analysis is to determine whether there are analogous categories of cases in which proximity has previously been identified.  If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances.  In order to recognize a new duty of care, mere foreseeability is not enough.  The plaintiff must show proximity -- that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances.

(i) Was Harm Reasonably Foreseeable **AND**

(ii) Is there a Sufficient Degree of Proximity between Plaintiff and Defendant?

# Statutory Torts

1. The Relationship between Statutes and Tort

* Two ways in which statutory provisions can affect tort liability

1. By creating an independent cause of action

Statute: It is illegal to drive a snowmobile in Stanley Park.

**The court may decided that because the action is prohibited then this statute creates a duty of care.**

1. By creating, changing or limiting the operation of a common law duty or tort

**Limiting damages.**

## Inferring a Cause of Action (Consider *Horsley*)

### *R. in Right of Can. v. Sask. Wheat Pool* (1983) - courts should only use breaches of a statute as evidence towards an established tort.

**CANADIAN APPROACH (SASK WHEAT POOL)**

Statutory Provision Common Law Duty of Care Common Law Cause of Action

(Negligence Step)

UK APPROACH

Statutory Provision Common Law Cause of Action

The **Court rejected the tort of breach of statutory duty**. The courts should only use breaches of a statute as evidence towards an established tort and should not be trying to determine whether the legislature intended to allow a private right of action.

The [Saskatchewan Wheat Pool](http://en.wikipedia.org/wiki/Saskatchewan_Wheat_Pool) **delivered a shipment of infested wheat** from one of its terminal elevators to the [Canadian Wheat Board](http://en.wikipedia.org/wiki/Canadian_Wheat_Board), which violated section 86(c) of the *Canada Grain Act*. The Board sought to recover damages for the statutory violation.

**Issue** before the Supreme Court was

**Whether the breach of the Act gave the Board a private right of action?**

**Decision**

Justice Dickson, for a unanimous Court, dismissed the appeal of the Board and held that there was **no private right of action**. Dickson examined the tort of breach of statutory duty in both England and the United States. He concluded that damages for breach of statutory duty should be subsumed by the law of [negligence](http://en.wikipedia.org/wiki/Negligence). He further rejected any novel right of action for damages for breach of statute and instead stated that the breach can be used as evidence of negligence and as evidence of a [standard of care](http://en.wikipedia.org/wiki/Standard_of_care).

# The *Charter* and Torts Liability

* Two ways in which the Charter may affect torts liability:

1. An individual whose Charter rights have been violated may have an express statutory cause of action under Section 24(1)
2. The Charter may alter existing common law causes of action and defences

## \*\*\*EXAM NOTE – IS THERE A PREEXISTING DUTY OF CARE BEFORE ANNS TEST!!!!!??? IF YES THEN THERE *IS* DUTY OF CARE \*\*\*

### *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 - *Negligence ‑‑ Motor vehicles ‑‑ Seat belts ‑‑ Duty of care ‑‑ Eight‑year‑old child injured in motor vehicle accident ‑‑ Child not wearing seat belt at time of accident ‑‑ Whether general duty of care owed by driver of vehicle to passengers includes duty to take reasonable steps to ensure that passenger under 16 years of age wears seat belt ‑‑ If so, whether duty negated by presence of parent of child.*

**A driver of a motor vehicle owes a duty of care to his passengers to take reasonable steps to prevent foreseeable injuries, and that duty of care extends to ensuring that passengers under 16 years of age wear their seat belts.**

Children under 16 require guidance and direction from parents and older persons, which must extend to ensuring that they wear their seat belts.  **Two or more people may bear that responsibility, but one of those responsible must always be the driver of the car**.  **A driver taking children as passengers must accept some responsibility for the safety of those children.**  The driving of a motor vehicle is a licensed activity that is subject to a number of conditions, and obligations and responsibilities flow from the right to drive.  Quite apart from any statutory provisions, the general public knowledge of the vital importance of seat belts as a safety factor requires a driver to ensure that young people make use of them.  While the requirement in the British Columbia *Motor Vehicle Act* that drivers ensure that passengers under age 16 wear their seat belts is subsumed in the general law of negligence, it can be taken as a public indication that the failure of a driver to ensure that children in the vehicle are wearing seat belts constitutes unreasonable conduct.  It may also be taken as indicating that such a **failure on the part of the driver demonstrates conduct which falls below the standard required by the community and is thus negligent.**

# Occupiers’ Liability

## The Common Law Approach

* Definition of Occupiers’ Liability
  + The care that is owed by those persons who control land (occupiers) to visitors who enter onto that land.
  + **ELEMENTS**
    1. **Premises**? (**SATISFY THIS FIRST IN THE FACT PATTERN/EXAM**)
    2. **Occupier** ? (**SATISFY THIS FIRST IN THE FACT PATTERN/EXAM**)
    3. **Visitor**?
    4. **Harm**?

## Relationship to Negligence

* + **Predates** ***Donoghue and Stevenson*** (therefore ***not* the same rules**/application of duty of care, foreseeability, as negligence)

## Types of Visitors and the Standard of Care

* 1. **Licensees** – **Implied Or Express Permission To Land** (DUTY to prevent harm from HIDDEN HAZARDS, of which the occupier had ACTUAL KNOWLEDGE.)
  2. **Invitees** - **Implied Or Express Permission To Land With *Economic Interest.*** (DUTY to prevent harm from UNUSUAL HAZARDS, of which the occupier had ACTUAL or OUGHT to have KNOWLEDGE.)
  3. **Contractual Entrants**  - **Access by Contract (sporting events, etc.)** (Governed according to terms of CONTRACT – but includes an implied warranty that premisis are “reasonably safe.”)
  4. **Trespassers**  - **Anybody who accesses land without permission.** (Can’t intentionally or recklessly injure a trespasser if known that a trespasser is or is likely to be on the property.) (Remoteness applies here.)
* The Position of Trespassers
  + **Child trespassers become licensees** – children act in predictable ways – it is likely that they will be “tempted.” Open mine shafts, closed fun parks, etc.
  + **Different types of Tresspassers** [***Veinot v. Kerr Addision Mines (1975) S.C.C.***]
    1. A person who knows or ought to know about a trespasser – owes a duty of *common humanity* to prevent injury from dangers of which he is aware. (no duty to inspect property; dependant on degree of danger on the land, the age of the trespasser, the reason for trespassing {e.g. children going on land to get their ball back vs. somebody with criminal intent}, the knowledge and resources of the occupier {consider, for example the “size” of the property}, the cost of remedying hazards.

## The Statutory Approach

* The Occupiers’ Liability Act 1996

1. Section One – Definitions
2. Section Three – The Standard of Care
3. Section Four – Restricting and Modifying the Duty
4. Section Five – Independent Contractors
5. Section Six – Liability of Landlords

* Criticisms of the Statutory Approach

**Occupiers Liability Act**

**[RSBC 1996] CHAPTER 337**

**Definitions**

**1**  In this Act:

**"occupier"** means a person who

(a) is in physical possession of premises, or

(b) has responsibility for, and control {***not necessarily physical possession***} over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

{***imagine a scenario where there are multiple occupiers – perhaps somebody is in control of the garden; another in control of the building – where does the “steps leading up to the house” fall?****}*

**"premises"** includes

(a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),

(b) ships and vessels,

(c) trailers and portable structures designed or used for a residence, business or shelter, and

(d) railway locomotives, railway cars, vehicles and aircraft while not in operation;

**"tenancy"** includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" must be construed accordingly.

**Application of Act**

**2**  Subject to section 3 (4), and sections 4 and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which the occupier is responsible by law.

**Occupiers' duty of care {*most relevant section!?*}**

**3**  (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

{***Replaces common law with a general standard of reasonable care – covers off people who accompany the visitor – missing in common law. Also, adds a visitors’ property. Also simplifies. Also brings it much closer to general negligence. Increases duty owed to trespassers & licensees, reduces that to contractual entrants. Applied broadly.***

***Courts Look to:***

1. ***foreseeability of damage;***
2. ***degree of risk of injury;***
3. ***gravity of the threatened injury;***
4. ***kind of premises;***
5. ***burden of preventative measures {cost, etc.};***
6. ***the practice of other occupiers of the same kind;***
7. ***purpose of visit***}

(2) The duty of care referred to in subsection (1) applies in relation to the

(a) condition of the premises,

(b) activities on the premises, or

(c) conduct of third parties on the premises.

(3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to

(a) create a danger with intent to do harm to the person or damage to the person's property, or

(b) act with reckless disregard to the safety of the person or the integrity of the person's property.

(3.1) **A person who is trespassing on premises while committing, or with the intention of committing, a criminal act is deemed to have willingly assumed all risks and the occupier of those premises is subject only to the duty of care set out in subsection** (3).

(3.2) A person who enters any of the categories of premises described in subsection (3.3) is deemed to have willingly assumed all risks and the occupier of those premises is subject only to the duty of care set out in subsection (3) if

(a) the person who enters is trespassing, or

(b) the entry is for the purpose of a recreational activity and

(i)  the occupier receives no payment or other consideration for the entry or activity of the person, other than a payment or other consideration from a government or government agency or a non-profit recreational club or association, and

(ii)  the occupier is not providing the person with living accommodation on those premises.

(3.3) The categories of premises referred to in subsection (3.2) are as follows:

(a) premises that the occupier uses primarily for agricultural purposes;

(b) rural premises that are

(i)  used for forestry or range purposes,

(ii)  vacant or undeveloped premises,

(iii)  forested or wilderness premises, or

(iv)  private roads reasonably marked as private roads;

(c) recreational trails reasonably marked as recreational trails;

(d) utility rights of way and corridors excluding structures located on them.

{***this basically excludes people with criminal intent and/or people on rural & agricultural lands – therefore reverts to common law principals of duty of care.***}

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on the person because of an enactment or rule of law imposing special standards of care on particular classes of person.

**Contracting out**

**4**  (1) Subject to subsections (2), (3) and (4), if an occupier is permitted by law to extend, restrict, modify or exclude the occupier's duty of care to any person by express agreement, or by express stipulation or notice, the occupier must take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person.

(2) An occupier must not restrict, modify or exclude the occupier's duty of care under subsection (1) with respect to a person who is

(a) not privy to the express agreement, or

(b) empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) If an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care of the occupier to those persons must, despite anything to the contrary in that contract, not be restricted, modified or excluded by it.

(4) This section applies to all express contracts.

**Independent contractors**

**5**  (1) Despite section 3 (1), if damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) must not be construed as restricting or excluding the liability, imposed by any other Act, of an occupier for the negligence of the occupier's independent contractor.

(3) If there is damage under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

**{*Occupiers are not liable for independent contractors liability/action*}**

## COMMON LAW CASES

### *Palmer v. St. John* (1969), 3 D.L.R. (3d) 649 (N.B.C.A) - Plaintiff injured tobogganing on a hill in the City – but run by an independent Association – therefore City was NOT Occupier.

Plaintiff injured tobogganing on a hill in the City.

While the **City DID make annual grants** to the park Association **and from time to time the Association used City work crews**, the **City was not the owner** of the Park at the time of the plaintiffs accident and **did not operate the slide or regulate its use**. The **City was NOT an Occupier** of the sliding hill.

**COMMON LAW**

### *Finigan v. Calgary* (1967), 65 D.L.R. (2d) 626 (Alta C.A) - Plaintiff stumbled on tree stump going into TeePee at park – paid for admission – could be either an Invitee or Contractual – in either case the City owed duty of care – did not meet the standard – IS liable.

### *McErlean v. Sarel* (1987), 42 D.L.R. (4th) 577 (Ont C.A) - gravel pit – cyclists crash into each other – not an unusual danger – City not liable

The Facts

McErlean, age 14, was riding a trail bike in an abandoned gravel pit owned by the City of Brampton. The gravel pit was a place that was popular among local trail bike riders. As McErlean raced down a smooth gravel road, he and another boy, Sarel, collided at a sharp, blind curve in the road. McErlean had been riding at speeds from 55 to 80 kilometres an hour. Sarel had difficulty controlling his bike and was driving on the wrong side of the road. McErlean suffered brain damage that left him paralyzed and unable to speak.

McErlean sued Sarel for negligence, and the City of Brampton for negligence as owners of the property.

Questions on Consider

1. What standard of care applied to the boys while riding their trail bikes?
2. Was McErlean negligent in racing his trail bike on the road at the gravel pit? Was Sarel negligent?
3. **Was the City of Brampton, the owner of the land, responsible because it allowed an unusual danger (the gravel road with the curve in it) to exist?**

The Judge’s Decision

The **trial judge** found Sarel negligent and held that the City of Brampton was also responsible. The **City had allowed an unusual danger**, the blind curve, to harm McErlean. McErlean was also responsible too; his fault was set at 10%, Sarel’s at 15% and the City’s at 75%.

The City of Brampton appealed. On the appeal the City argued that the blind curve was not an unusual danger.

The **Court of Appeal** **found that the City was not liable**. It held that the **road was not an usual danger for its users**. The boys were not young enough to make it an unusual danger for them. Also, the boys had been engaged in an adult activity, so their conduct would be measured against adult standards.

The Court of Appeal found the boys were each 50% at fault.

* ***Nuisance***

Designed to protect enjoyment of land, **near-strict liability**

Different from negligence in that it looks at effects being unreasonable, not actions; **different from trespass as it’s indirect**

* Test for private nuisance (PLAINTIFF AND DEFENDANT MUST BOTH POSSESS LAND):
  + 1) Is there unreasonable interference with the plaintiff’s land? (two branches)
    - * **Actual damage**
        + Almost always deemed to be unreasonable
        + Need not be continuous, but must be “beyond tolerance”, so not trivial (***Tock v. St. John*** *– block of drain plus heavy rainfall = flood)*
        + Cannot be due to particular sensitivities of plaintiff’s land (***Robinson*** *– heat from downstairs 80 degrees – caused damage to `special` paper upstairs – 80 degrees not unusual heat – no claim*)

If there is malice in the action, as in the reason the plaintiff did what they did was to damage the land knowing of the sensitivity, might still be liable (***Hollywood Silver Fox v. Emmett*** *– shotgun blasts disturb foxes breeding – done on purpose and with malice*)

* + - * **Unreasonable interference with enjoyment**
        + About what ordinary Canadians would find tolerable
        + Look at 8 factors from ***Huron Steel***

**The character of the neighbourhood**

That the plaintiff “moved to the nuisance” is no defence

A fresh noise, no matter the character, can be a nuisance

Threshold is lower in a rural setting, as if you live in an urban environment, you have to put up with more as people are there

**The intensity of the interference**

**The duration of the interference**

Frequency as well

**The time of day and the day of the week**

**Zoning designations**

Usually Canadian courts ignore zoning requirements; so complying with zoning is NOT a defence to nuisance

Not the issue, it’s about the reasonable enjoyment of land

**The utility of the defendant’s conduct**

Just because beneficial, not a defence – but sometimes it is (Ambulance Sirens, etc.)

But can be taken into account in determining what level of tolerance is needed

**The nature of the defendant’s conduct**

Less likely to find in favour of defendant if they’ve acted maliciously, carelessly, etc.

**The sensitivity of the plaintiff**

Damage can’t be the result of the abnormally sensitive nature of plaintiff’s land

Allergies and light sleeping are considered abnormal

* + - **2) Defences**
      * **Statutory Immunity**
        + Where a statute gives immunity to nuisance claim stemming from action; total defense, so very limited scope
        + Only applies where no discretion is given by statute as to how to comply with it (***Tock***), and must be impossible to comply and avoid nuisance (***Ryan***)
      * **Consent** 
        + Where a person consents to the activity the defense holds, but very unusual (***Kacsmarik v. Demenlenaere***)
        + If a person tolerates for a long time, it is UNCLEAR whether that form implicit consent
      * **Prescription**
        + Where a person has tolerated an activity for a long time without any complaint, they are barred from action on it

Like estoppel or laches

* + - * **Contributory Negligence**
        + Incredibly rare; courts are very reluctant to demand plaintiff’s alter their use to accommodate
    - **3) Remedies**
      * **Injunction**
        + Most common remedy in nuisance

Lots of rules around them due to Equity

* + - * + Prohibitory Injunction

Stop activity completely

* + - * + Mandatory Injunction

Modifying the activity to make it permissible (number of people, volume, time, whatever)

* + - * + Interloctory/Interim injunction

Injunction given before deciding the case

Is a hearing into prima facie case of nuisance

* + - * + Can be issued in combination with damages (**Mendez v. Palazzi)**
      * **Damages**
        + Can be awarded with injunction (***Mendez v. Palazzi***)
        + Usually for past damages, but can be awarded for future damages (rarer, as gives license for continued nuisance)
      * **Abatement**
        + Self help remedy, allows for trespass onto land in order to stop the nuisance (usually for trivial nuisances)
        + If you must enter the defendant’s land, you must GIVE NOTICE, and that notice MUST BE REASONABLE in the circumstances

If total emergency (fire), and no time, that’s ok

* + - * + Cannot cause unreasonable damage to their land
  + Public nuisance
    - Public nuisance is nuisance that “**materially affects the reasonable comforts and conveniences of life of a class of [persons**]” (if sufficient number of people decided on case by case basis); can be interference with rights of way, public lands, bodies of water, etc.
    - Can be proven through multiple private nuisance claims
      * (***AG Ontario v. Orange Productions***)
    - Can make private damages claim for public nuisance, but damage suffered must be distinct and of different kind from the damage suffered by the public at large
      * GREATER DEGREE OF SAME DAMAGE IS INSUFFICIENT
      * ***Hickey v. Electricity Reduction***
    - Generally taken care of under Criminal Code (s. 180 Common Nuisance)
* ***Strict Liability***
  + ***Rylands v. Fletcher***rule leads to strict liability claim (no fault needed)
  + To show you need to prove
    - Non-natural use of land (***Gertsen v. Municipality of Metropolitan Toronto****)*
      * Considered any extraordinary use, not of benefit to public, dangerous, etc.
        + Some activities are so dangerous, the court will just accept that they are non-natural

Explosives, nuclear materials, biological agents

Storage of water in bulk is there, but it’s odd

* + - * Courts assess dangerousness on a range of factors
        + Degree of danger; utitlity and normality of land use; circumstances
        + Some argue when you say it’s dangerous, it’s now about fault, even though it’s strict liability
        + Sliding scale of dangerousness works like a fault requirement
      * Must take into account changing societal standards and all the circumstances
      * ***Gertsen v. Municipality of Metropolitan Toronto***
    - Thing likely to cause mischief
      * Basically taken care of in non-natural use (dangers things, etc.)
    - Escape
      * Must be escape off of the defendant’s land onto the plaintiff’s, can’t just be escape from defendant’s control on their land
        + ***Read v. J. Lyons & Co.***
    - Damage
      * Some kind of foreseeability is needed (***Cambridge Water***)
  + Defences that are available:
    - **Consent**
      * Rare: must show plaintiff consented to use/dangers
    - **Mutual Benefit**
      * Must show that the plaintiff’s have been benefitting from the non-natural use of the land
        + Sewers are good example
    - **Default of the Plaintiff**
      * Where the escape/damage is in part the plaintiff’s fault, complete defence
    - **Act of God/Stranger**
      * What led to escape was entirely unforeseeable and outside of the control the defendant won’t be liable
        + Either act of someone else, or ridiculous act of God
* ***Vicarious Liability***
  + About relationship between tortfeasor and other entity (usually employer or principal), making entity liable strictly on demonstration of sufficient relationship
  + Usually employer/employee
  + Liability DOES NOT HOLD if the person is an independent contractor
    - **Step 1: Test for employment (*671122 Ontario Ltd. v. Sagaz Ind.*):**
      * Is the person going into the endeavour as a business for himself?
        + If yes, they are an independent contractor
        + *Factors to consider*

Level of control of ‘employer’

Does the worker use his own equipment?

Hire his own helpers?

Degree of financial risk taken by the worker

Degree of management/responsibility for investment by worker

Worker’s opportunity for PROFIT in the performance of his task

* + - * Used to be test of control, but that is no longer feasible
    - **Step 2: Must be acting in the course of their employment**
      * Only vicariously liable where there is some connection between the act and the employment, it was done within the scope of employment
      * Requirement has been interpreted broadly
        + Even if wrongful and unauthorized (or forbidden) may not limit liability
        + Expressly prohibiting something doesn’t stop liability
        + These only work where the prohibition forbids ANY work of a particular type, rather than forbidding a way of doing a type of work or manner of doing that work (*CPR v. Lockhart*)
        + If it’s a wrongful manner of doing what they’re supposed to be doing, will be liable

*T.G. Bright & Co. v. Kerr*

* + - * For intentional torts, there can be strict liability, and scope of employment was extended through test in *Bazley v. Curry*:
        + If the employer’s enterprise placed the employee in a position that increases the risk of the act, they can be vicariously liable

When deciding, look at the following factors

a) opportunity afforded employee to abuse power

b) extent wrongful act may have furthered employer’s aims

c) extent to which wrongful act was related to friction, confrontation, or intimacy inherent in employer’s enterprise

d) extent of power conferred on employee compared to victim

e) vulnerability of victim

* + - * + If sufficient connection, vicariously liable