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# Negligence

## Introduction

* Can trace origins of modern law of negligence back to CL system of **writs** (written permission from Crown which set out a cause of action before the royal courts)
	+ Trespass *vi et armis*: cases of direct liability; analogous to modern intentional torts
	+ **Trespass on the case**: where interference was not direct or forceful; e.g. negligence, carelessness
		- P required to prove that loss suffered was direct result of D’s intentional or careless conduct
		- Defined a list of circumstances where P can recover damages from situations of carelessness
	+ Over time, Crown yielded power to issue and amend writs to Parliament; writs become rigid like statements of law and harmonized around a series of established principles that determined fault
		- And solidified around the idea that individuals owed each other duties of care
		- By end of 19th century: Actions on the case limited to scenarios were P was harmed by: a) the user of a public road; b) a doctor; c) keeper of an animal or another inherently dangerous object
		- Nearly all actions on the case required P to show that D had failed to meet the standard of care expected, and that the harm was a direct result of that failure

#### Donoghue v Stevenson, [1932] HL

|  |  |
| --- | --- |
| Facts | P and friend go to a café and friend orders a ginger beer in an opaque bottle. After drinking, they find the decayed body of a snail in the bottle. P later complained of stomach pains, later diagnosed with gastroenteritis and nervous shock. P sued D, the manufacturer. |
| Issue | Is there liability in negligence for injury caused by another in the absence of a contract? |
| Discussion and Analysis  | - D: Privity of contract issue; P’s got no standing, the contract of sales is between friend and café- Aitkin (advice of HL to Scotland): came up with the definition of **neighbour** (someone one can reasonably foresee to have an impact upon), doesn’t follow pre-established categories- Two Stage Test for Duty of Care:1) Is P someone D ought reasonably to have in their contemplation? (i.e reasonably foreseeable)2) Is P someone who would be closely and directly affected by the act? (i.e. proximity)- Needs a restriction 🡪 DIRECT and CLOSE (heart of proximity; not just physical notions, rather about foreseeability) |
| Ratio | Despite the lack of a pre-existing contractual relation between P and D, D still owed P a general duty of care and P is still entitled to recover. |
| Holding | No decision. |
| Misc. | - Buckmaster (Buttmeister) dissent: floodgates; where does the liability end?- Tomlin dissent: remoteness between the harm and the act – how to restrict number of claimants where there is a direct causative link between negligence and the given harm |

* *McPherson v Buick*: The manufacturer should have a duty of care for products that have a large impact on civilian safety, beyond whoever purchases it to include all who could be reasonably foreseen to also use it.
* Modern law of negligence emerged from these CL areas (Winfield): 1) Nuisance, 2) Liability based on control of dangerous things (*Rylands*), 3) Duties voluntarily assumed, 4) Duties cast upon persons pursuing common calling
* How to limit exposure to liability where harm results from carelessness: Base liability on the failure to meet a pre-existing duty or obligation, OR Base liability on some other limiting factor (e.g. interest in land)
* **Neighbours** can be defined as those with pre-existing duties/relationships or in physical proximity, but Aitkin advocates the general notion of neighbourhood as the “foreseeable claimant”
	+ Person so closely and directly affected by my act that I ought reasonably to have him in contemplation as being so affected when I am directing my mind to the acts or omissions called in question (*Donoghue*)
* **Negligence**: whole cause of action; vs **Carelessness**: conduct not meeting the standard of care
* Can see the elements as a funnel (never think about things in isolation); if expand duty then can limit in the other elements to maintain balance → Often done though the limiting of “loss”

**Elements of a negligence action**: (first five: Burden of Proof on P)

1.Duty of Care: Existence, nature, and scope of any legal obligation for D to exercise care with respect to P’s interests

* Q: Did D owe a duty of care to P? Who should bear the consequences of a particular risk of injury?

2. Standard of Care and Breach: D expected to meet standard of care that would be exercised by a reasonable person

* Q: If there was a duty, what was the standard of care D owed to P? Did the conduct fall short of that standard?

3. Causation: D’s careless conduct must be the cause of P’s loss

* Q: Was the loss suffered by P caused by D’s failure to meet the required standard of care?

4. Remoteness of Damage: P’s loss is limited to that which is a foreseeable consequence of D’s negligent act

* Q: Was the loss suffered sufficiently proximate? Was the loss reasonably foreseeable or too remote?

5. Actual Loss: legally-recognized injuries and losses, as well as their nature and extent

* Q: Was the loss in question recognized by the courts as recoverable?

6. Defences: BoP on D

* Q: Is there a defence available to D?

#### Dunsmore v Deshield (1977) SKQB

|  |  |
| --- | --- |
| Facts | D sold P glasses that P thought were Hardex. He wore them in a game; they broke and injured his eye. He sued D for breach of contract or negligence. He sued Imperial (manufacturer) for negligence. |
| Discussion and Analysis  | - Guilty: I for not inspecting lenses before shipping, D for not doing his duty of testing lenses- Contributory negligence defence failed since no bodily contact in this game except for odd injuries- To prove causation, P must prove that the impact he received, although sufficient to break a regular lens, would not, on BoP, be sufficient to break a Hardex lens |
| Ratio | Per the elements of a negligence action, both D’s are liable for general and special damages to P. |

# Duty of Care

## Function of the Duty of Care

* Two main functions of **Duty of Care**:
	+ Framework for liability: Sets out situations where it is possible to sue for careless conduct
	+ Limit on liability: Sets the boundary for holding one liable for consequences of one’s careless behavior
* Another view: Duty of care is the primary mechanism through which the law allocates and distributes risk to P/D
	+ *Nova Mink* [1951] (plane flies low over a mink farm, scared them, and made them eat their young): Court talks about risk allocation function, when court holds duty of care exists then court is stating a view of policy; you are doing something so risky that if goes badly you will bear the costs of it
* *Le Lievre*: One man may have a duty imposed on him toward another, even though there’s no K, if one man is “near” (sufficiently so, and not just in time or place) to another; the duty is to not do injury to him or his property (Aitkin draws from *Heaven*)

#### Anns v Merton London Borough Council [1978] HL

|  |  |
| --- | --- |
| Facts | Building plans approved. 8 years after apartment finished, cracks appear/problems with walls (apt starts to break down). P, who had leased the apt, sue people who approved construction (should have inspected better!) Specifically: foundation was not deep enough (as per law/code). |
| Issue | Does D owe P a duty of care? (Yes; ruling for P). |
| Ratio | Lord Wilberforce’s two-stage test (the ***Anns* Test**):1) Is there a sufficient relationship of proximity based on foreseeability (Collapses Aitkin’s two points of Reasonable Foreseeability and Proximity into one) (Interpersonal Justice; Rights of Individual)2) Principled reason why the court should NOT recognize a Duty of Care? (Community Welfare) |

* Concerns people had about the *Anns* test:
	+ Starts with assumption that the court should find a duty of care, and then only deny/restrict it when it can think of a good, principled reason to do so 🡪 Creates a presumption that favours recognition of new duties of care 🡪 Opening floodgates to a “whole raft of new categories of negligence”
		- In hindsight this didn’t happen, courts took the policy argument seriously
			* Also cultural reasons: not a whole set of plaintiff’s waiting to sue each other
	+ Collapsing both of Aitkin’s points into one (Stage 1) allows for an extremely broad scope of liability!
	+ Policy stage might get inconsistent results
* *Caparo* [1990]: Lord Bingham (HL) repudiates *Anns* test to un-collapse the two points:
	+ 1) P’s loss was a reasonably foreseeable consequence of D’s conduct
	+ 2) There was a sufficiently proximate relationship between the parties
	+ New limiting requirement: 3) It is “fair, just and reasonable” for the court to impose a duty of care in light of applicable policy consideration
		- Shift FROM presumption in favour of finding a duty (*Anns*) TO presumption against finding existence of a duty (i.e. *Caparo* is more restrictive, incremental)
* Canadian position: Easy for lower courts to understand *Anns*, so they stand by its test 🡪 *Kamloops* [1984]:
	+ 1) Is there a sufficiently close relationship between the parties so D should have reasonably foreseen his carelessness could lead to the harm caused to P?
	+ 2) Are there are considerations which ought to limit the scope of liability, the type of persons to whom it is owed, or the type of damages the breach may give rise to?
* ***Anns/Cooper* test** from *Cooper v Hobart* [2001], SCC that is more restrictive than *Anns/Kamloops*:
	+ First Branch: Is there a *prima facie* duty of care?
		- Is the alleged duty of care within, or analogous to, an established category?
			* If yes: won’t generally be necessary to proceed further (proximity and thus DoC exist)
		- If no, was the harm reasonably foreseeable? (objective standard)
			* + *Moule*: Was the sequence of events so fortuitous it was beyond the results which a reasonable man would anticipate as a probable consequence?
			* If no, it is possible to reject a duty of care.
		- If yes, was there a sufficient relationship of proximity between the parties to make it just and fair to impose a duty of care on D?
			* + Factors include: expectations, representations, reliance, type of interests involved, statutory/contractual framework
			* If yes, there is a *prima facie* duty of care.
	+ Second Branch: (*Childs*) Evidentiary burden then shifts to D to raise residual policy considerations that could negate or limit the duty of care.
		- Cooper stage 2 was just: Is this a situation where a new duty of care should be recognised? (Residual policy questions?)
		- Examples: voluntary assumption of responsibility, is there already a remedy, risk of creating unlimited liability, effects on legal system/obligations/society

## Application of the Duty of Care Test

* To prevent owing a duty of care to everybody (which is hard to enforce), it’s better to limit it for particular circumstances; e.g. in *Moule* and *Amos*, the duty of care is for children who are likely to play around trees
* *Haley v London Electricity*: Probability alone is not the determinant of whether something is foreseeable
* *-Nespolon* NCA: Unforeseeable that hitting drunk teen by highway 🡪 Driver’s nervous shock

#### Moule v NB Elec. Power Comm. (1960), SCC

|  |  |
| --- | --- |
| Facts | The maple tree had branches shorn on one side to avoid contact with live wires. P climbed makeshift ladder on a nearby spruce tree, then gained access to the maple. He stepped on a rotten branch, fell, made contact with live wires, and hurt himself. P/A; D/R. |
| Issue | Was D negligent in causing P’s injury? Was this a foreseeable injury? |
| Discussion and Analysis  | - Children are likely to climb trees, but not everyone would climb that highIssue of **foreseeability** relates to 3 elements of negligence:1) D’s conduct created foreseeable risk of injury to P 🡪 If yes 🡪 Imposes duty of care2) Probability of injury 🡪 If high 🡪 Determines that D breached the standard of care3) D’s breach of standard of care 🡪 If losses not foreseeable result 🡪 Remoteness of damage |
| Ratio | This sequence of events was fortuitous and thus beyond the range of foreseeable results which a reasonable man would anticipate as a probable consequence of the presence of high tension wires. |

#### Amos v NB Elec. Power Comm. (1976), SCC

|  |  |
| --- | --- |
| Facts | Same as *Moule*, except the poplar tree was easily climbable, the foliage was denser which obscured the wires, and the branch had bent under the child to touch the wire. P/A; D/R. |
| Issue | Was D negligent in causing P’s injury? |
| Discussion and Analysis  | - Existing policy to regularly lop off parts of the tree to keep it away from the live wires, so the fact that the foliage was obstructive means D wasn’t exercising its **due diligence** (unlike in *Moule*)- Greater focus on proximity than in *Moule* |
| Ratio | No long series of unlikely situations combining to cause accident; it’s foreseeable, almost inevitable. |

# Special Duties of Care: Affirmative Action

* Whether courts should impose duties of care where D’s **omission to act** has caused harm to P
	+ Should the law impose “duties of **affirmative action**”?
		- Only if the duty was established by statute (see below: Duty to Rescue), or where there has been some voluntary assumption of responsibility on D’s part
* **Misfeasance**: dangerous conduct
* **Nonfeasance**: omission to confer a benefit; CL doesn’t like to punish because:
	+ Personal autonomy issues (law shouldn’t be that intrusive)
	+ Minimal notion of state in law (capitalist notion of the law getting out of the way)
	+ Positive obligations more intrusive than negative obligations not to act
	+ If the law forces everyone to be a hero, then no choice for morality, just fulfilling tortious obligations
* Weinrib two situations; 1. Driver fails to apply brakes and hits a pedestrian = misfeasance; 2. Person sees someone drowning and fails to throw a rope to her = nonfeasance
	+ Claims there is no difference between misfeasance and nonfeasance
	+ Existence of a duty of care distinguishes the two (in the former: D is part of the harm; in the latter: D comes upon the harm as an external force); Can change liability/interpretation by stretching timeframe

#### Osterlind v Hill (1928) Mass. SC

|  |  |
| --- | --- |
| Facts | P was drunk and got into a canoe rented from D with someone. The canoe flipped, so P was hanging on for half an hour calling for help. D watched and didn’t help, so P drowned. |
| Issue | Was D liable for P’s death? |
| Discussion and Analysis  | - P was not in a helpless position, he’s a perfectly functional human who could have chosen whether or not he drowns (Intoxication is not a defence or justification) |
| Ratio | P’s choice to make bad decisions = No one else had a duty to rescue him. No general duty to rescue. |

## Duty to Rescue

* Generally: no liability for nonfeasance, no duty for a passerby to rescue someone in danger completely unrelated to himself, except if there is a special relationship between D and P
	+ **Special relationships**: professional, contractual, fiduciary, authority/supervisory
* Affirmative action recognized recently as concern increased for personal security in a more dangerous world
	+ People should have a growing range of duties to assist others in danger or in need of help
* In favour of a general duty to rescue:
	+ It reflects our common sense understanding of everyday morality
	+ It removes inconsistency in the law (why penalize people who have voluntarily assumed the duty, but not those who choose to do nothing?)
	+ Utilitarian argument (Bentham): If benefit from rescue > cost to rescuer, it should benefit whole society
* Where a duty of care is expected, Courts take a generous view of the standard of care expected (e.g. if a passerby has a duty to rescue a baby drowning in a shallow pool and does so but accidentally breaks its arm, Courts will be lenient about it since he had acted in good faith and had fulfilled his duty to save its life)

#### Matthews v MacLaren (1969) Ont. HC; Horsley v MacLaren (1972) SCC

|  |  |
| --- | --- |
| Facts | D owned a yacht, and invited the P’s M and H for a party. Everyone got drunk. M fell overboard. D tried to back up to him, instead of looping around. They tried to throw ropes down, but M was unconscious. H dove overboard to try to save M. H also died. |
| Issue | Was there a duty of care from D for H as a rescuer? |
| Discussion and Analysis  | - *Canadian Shipping Act*: Captains are under a duty to rescue people from his ship who are in danger (M) and to prevent others from getting into harm’s way (H)- D failed his duty since he was drunk; passengers’ drunkenness irrelevant to DoC- Inducement (by D’s negligent attempt at rescue) of H to do something risky to help M, but there is no evidence that H could have been saved if he had put on a life-jacket or used a lifeline- Burden is on P to show that D’s negligence was the effective cause of the harm |
| Ratio | Attempt to rescue = Imposing duty of care on rescuer (D), statute or no statute, due to voluntary assumption of responsibility. Duty of rescue can be imposed based on pre-existing obligation or a relationship created by the actions of one of the parties. |
| Misc. | - CA: One who voluntarily began a rescue attempt is under no duty to continue it unless he has worsened the victim’s original position. |

## Duty to Control the Conduct of Others

* It appears in cases where there’s a voluntary assumption of responsibility on D’s part

### Liability for the Intoxicated

* *Jordan House*: Is there a general duty of care for intoxicated people? No, unless there is statutory breach

#### Crocker v Sundance Northwest Resorts (1988) SCC

|  |  |
| --- | --- |
| Facts | P was drunk as he entered a tubing contest hosted by D. P was asked twice if he was fit to compete, but never really stopped. He broke his neck on the last run. |
| Ratio | By creating a dangerous situation and by assuming vendor-buyer responsibility over participants after serving them alcohol, a duty of care was imposed on D. |
| Holding | D was 75% negligent. P was 25% contributorily negligent. |

#### Childs v Desormeaux (2006) SCC

|  |  |
| --- | --- |
| Facts | D went to a party, drank a lot, and tried to drive home. He hit P’s car, severely handicapping her. |
| Ratio | Social hosts different from commercial hosts (which affects degree of proximity) because:1) Commercial hosts have a greater ability to monitor alcohol consumption2) Social hosts are not heavily regulated like commercial hosts3) Social hosts do not profit from the sale of alcohol |
| Holding | There was a prima facie duty of care (applying *Anns* test), but it was negated for policy reasons. |

### Duty to Prevent Crime and Protect Others

* Police do not have a general legal duty to prevent crime, but are under a duty to warn

#### Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police (1998), Ont. Gen. Div.

|  |  |
| --- | --- |
| Facts | P sued the police after being attacked by serial rapist. Primary claim was based on failure to warn. |
| Ratio | Tort applies to operational, not policy, decisions. There is a duty to warn in a situation of a real harm to a very specific plaintiff group. |

# Special Duties of Care: Miscellaneous

## Duty Owed to Rescuers

* Legal protection now for one who risks injury to himself in going to **rescue** another who had been foreseeably exposed to danger by the unreasonable conduct of a third person (*Horsley*), and for rescuer’s losses
	+ Persons in danger because of their own negligence owe a duty of care to their rescuers
* *-Videan*: Someone who died rescuing D was a foreseeable presence, and thus was owed a DoC.
* *-Meyer*: Rescuer doctrine fails if P left a place of safety and deliberately put himself at risk.
* *-Urbanski*: D’s negligence 🡪 Imperils one 🡪 P consciously risks to save = can’t apply voluntary assumption
* *-R v Browne*: Mere expression of words indicating a willingness to do an act cannot trigger a legal duty.

## Duties Owed to Unborn Children

* Multiple categories stemming from the fact that children up to the point of birth are not legal citizens

### Pre-Conception Wrongs

* Harm done to parents (e.g. exposure to toxins, radiation), who then conceive and transfer the harm to the child
* Physicians couldn’t owe duty of care to the future children of their female patients (they act in her best interest)

#### Paxton v Ramji (2008) ONCA

|  |  |
| --- | --- |
| Facts | P’s parents were expecting. Their Dr. D prescribed a teratogenic drug. It gave P birth defects. |
| Issue | Was the child a foreseeable plaintiff when D prescribed the drug? |
| Discussion and Analysis  | - Insufficient proximity between Dr. D and potential child, who’s not a separate legal entity til birth- Law recognizes a woman’s complete autonomy over her body (McLachlin in *Winnipeg Child and Family Services v G*); thus women never owe a duty to future kids (cannot curtail their free choices) |
| Ratio | Until birth, child and mother are one entity. No DoC to a child that has not yet been conceived. |

### Wrongful Birth

* Physician carelessly fails to inform woman that she faces an unusually high risk of giving birth to a child with disabilities, and deprived her of opportunity to make an informed decision regarding abortion
	+ Related to the duty of doctors to inform patients of risks
* If claim brought by the child, it’s called **wrongful life**

### Wrongful Pregnancy

* Consequence of carelessly performed procedures (e.g. failed vasectomy, sterilization, abortion)
* Generally regarded as not being a harm, since every child is a blessing
* Some parents would want to sue for damages covering the period from birth to age of majority
* *-Joshi v Wooley*: No longer contrary to public policy to award damages for the cost of caring for a healthy child

#### Krangle v Briscoe [2002]

|  |  |
| --- | --- |
| Ratio | Parents are entitled to damages for non-pecuniary loss for the pain and suffering associated with giving birth to, and raising, a disabled child. Can’t claim damages into adulthood. |

### Pre-Natal Injuries

* “**Born alive**” rule from *Montreal Tramways* [1933]: It’s permissible to pretend that the unborn child was already an independent legal person at the moment that the careless act was committed.
	+ Legal fiction due to hindsight
* *Bourhill v Young* [1943]: No special duty of care owed to pregnant women (since they’re not foreseeable P).
* Since *Duval v Seguin*, the law has recognized that pregnant women are foreseeable

## Psychiatric Harm

#### Alcock v Chief Constable of South Yorkshire Police [1991] HL

* Pre-*Alcock*, the plaintiffs couldn’t recover for relational harm since there was an indeterminacy issue

|  |  |
| --- | --- |
| Facts | Football stadium overfilled from police directing more people in. They tried to escape and got crushed. P’s (primary victims’ relatives) watched it on TV and were psychiatrically harmed. |
| Discussion and Analysis  | 3 control mechanisms to determine whether a secondary victim could recover:- Proximity: close tie of love and affection (e.g. parents/children, spouses)- Locational: secondary victim must view the event with his own senses- Temporal: soon after the accident/event |

#### Mustapha v Culligan [2008] SCC

* Goold prefers the Duty stage for *Mustapha*-like question, unless damage itself is too Remote

|  |  |
| --- | --- |
| Facts | P saw a dead fly in a bottle from D, developed nervous shock and a depressive disorder as a result. |
| Issue | Was it too remote to warrant recovery? Yes |
| Discussion and Analysis  | - ONCA (2006) found that P’s reaction was not typical for a reasonable person.- SCC: Trial judge ought not to have used a subjective standard, taking into account P’s previous history, cultural factors |
| Ratio | Standard for remoteness/ordinary threshold question: Whether it’s reasonable that a person of ordinary fortitude would suffer serious injury from D’s act. |

## Health Professionals’ Duty to Inform

* Docs have duty to inform patients of the material and non-material risks associated with a particular treatment
* Onus on P to show that a reasonable person would reject the offered treatment if aware of the risks

#### Haughian v Paine (1987) SKCA

|  |  |
| --- | --- |
| Facts | Dr. D did not obtain an informed consent from P for 2nd operation he underwent to partially alleviate paralysis, and had not informed P of the possibility of paralysis from 1st operation. P/A;D/R. |
| Ratio | Disclosure of D was inadequate to enable P to give informed consent. |
| Holding | Appeal allowed. |

## Manufacturer’s and Supplier’s Duty to Warn

* *-Cominco* BCCA: Manufacturer hearing of new risk after its product is distributed has a duty to warn users ASAP
* *-Good-Wear* NSCA: Supplier shouldn’t sell goods to someone it knows will misuse them and endanger others
* **Learned intermediary** rule: The intermediary must be brought up to the level of knowledge of the manufacturer

#### Hollis v Dow Corning Corp (1995) SCC

|  |  |
| --- | --- |
| Facts | P got breast implants made by D. One ruptured 17 months later. The literature had warned of risk of rupture during surgery, but not post-surgery from “ordinary, non-traumatic, human activities”. D/A. |
| Issue | Is D liable to P for failing to adequately warn the surgeon of the risk of post-surgical rupture? |
| Discussion and Analysis  | - Learned intermediary rule applies here: surgeon was not learned, and thus could not be held responsible for informing P of the risks, hence D still the one liable- According to policy, shifting risks to manufactures not consumer because m knows risks better |
| Ratio | A manufacturer should be liable for failing to give a warning it was under a duty to give, and shouldn’t escape it by showing that, even if the doctor had given the warning, he would not have passed it on to the patient. Nor should it put the onus on the patient to find out these risks. A warning must be clearly communicated as to risks related to normal use. |
| Holding | Appeal dismissed. |
| Misc. | Trial: Claim against surgeon dismissed; risk of injury not well known at the time; D still liableBCCA: D still liable, but because it had failed to warn of risks of post-surgery rupture even though there had been cases of rupture by 1983 |

## Duty of Care Owed by a Barrister

* No such thing in Canada as “barristers immunity” from liability (DoC just in special circumstances: *Mantella*)
	+ It’s reasonably foreseeable that careless litigation may expose a client to loss

#### DeMarco v Ungaro (1979) Ont. HC

|  |  |
| --- | --- |
| Issue | Is a lawyer immune from an ex-client’s action for negligence in conducting that client’s case in Court? |
| Discussion and Analysis  | - Denying clients recourse if cases were dealt with negligently isn’t consistent with public interest- Not the same thing as the absolute privilege that protects lawyers from accusations of slander |
| Ratio | Public interest does not require that our Courts recognize immunity of a lawyer from a former client’s action for negligence due to poor conduct. It should not be public policy to confer exclusively on lawyers in Court an immunity possessed by no other professionals. |

# Special Duties of Care: Negligent Misrepresentation

* Law expects business people to protect themselves from unanticipated losses (through K’s or insurance); thus Courts were generally reluctant to compensate P’s for losses from negligent misstatements; also because of:
	+ P is in best position to mitigate this, and not rely on a statement 100%
	+ **Indeterminacy** (A suffers loss, could lead to connected B’s loss also; where do we draw the line?)
	+ Should tort law interfere with the market and compensate for losses (a part of regular business life)?
* Policy concerns in *Hedley* relaxed these rules against recovery for **pure economic loss** (no injury, other damages)

5 Stage Test for Duty of Care in **Negative Misstatement**: (*Hedley* via *Hercules*)

1. There must be a duty of care based on a “**special relationship**” between parties: 3-stage **Reid Test**

 a. Possession of special skill by D

 b. Reasonable reliance by P on the exercise of that skill

 c. D was aware of the possibility of reliance

2. Representation must be untrue, inaccurate, or misleading (aka FALSE)

3. Representor (D) must have acted negligently in making the representation

4. Representee (P) must have relied on the representation

* *Indicia* (signs) to assess this reasonability of reliance (Feldthusen, quoted in *Hercules*)
	+ D had direct or indirect financial interest in transaction
	+ D was pro, or had special skill/knowledge
	+ Advice or info was provided in course of D’s business
	+ Info was given deliberately, not social occasion
	+ The info was given in response to specific inquiry

5. Reliance must have resulted in detriment/damages

#### Hedley Byrne v Heller (1963) HL

|  |  |
| --- | --- |
| Discussion and Analysis  | - Part 2 of *Anns* test applied: indeterminacy here- D: proximity, slippery slope argument (*Donoghue*); not sufficient proximity for liability because bank’s words were not given in secret, they could have checked over them or not relied on them |
| Ratio | Negligent misstatement authority. Courts still look to other facts when establishing a duty of care. |

#### Hercules v Ernst & Young (1997) SCC \*AUTHORITY\*

|  |  |
| --- | --- |
| Facts | Auditor D’s carelessly prepared financial statements for companies P’s were shareholders in. P‘s relied on these statements to make some personal financial decisions and lost money. P/A; D/R. |
| Issue | Did D’s owe a duty of care to shareholders of the companies for whom they prepared statements? |
| Discussion and Analysis  | - P: Foreseeable loss since D could easily have anticipated that someone might rely on their audited financial statements in making an investment and could be harmed if the statements were wrong- La Forest: 1) Still apply general rules of negligence, i.e. two-stage *Anns/Kamloops* test, instead of creating a new field of neg. misrep.; 2) Consider the *Hedley* rules in the second *Anns* stageStage 1:\*Main test based on “proximity” defined as: D ought reasonably to foresee that P will rely on his representation, and reliance by P would, in these particular circumstances, be reasonable\*Rejects *Anns* approach that D needs to have knowledge of particular P/class of P’s (too restrictive)\*Foreseeability of P and nature of the losses best dealt with as questions of policy; pf test should just be: Was it reasonably foreseeable that one would rely on the statements to one’s detriment?\*This case: D owed a prima facie duty of care to P, given the nature of relationship between themStage 2:\*Auditors don’t owe a duty to anyone who might be harmed by reliance on a negligent misstatement in the financial statements, only to those they actually know might rely on their advice (or people part of a specific class that the auditor/professional knows about, like shareholder P’s here)\*Policy question framed: balance “deterrence of negligent conduct” vs socially undesirable consequences of imposing indeterminate liability on D’s\*Indeterminacy concerns 🡪 Policy reasons 🡪 Deny/restrict the pf duty of care found in Stage 1 |
| Ratio | Auditor only liable to one using his advice for the specific purpose/transaction for which it was given. |
| Holding | D not liable to P for their individual investment losses. |

#### BG Checo International v BC Hydro and Power (1993) SCC

|  |  |
| --- | --- |
| Facts | Negligent misrepresentation in a contractual term. **Concurrent liability** question. |
| Issue | Did P have the right to sue in both tort and K? Did the K part cancel the ability to sue in tort? |
| Ratio | Parties should limit liabilities in their K’s if that is their intention. |
| Holding | K did not limit the duty of care owed by D to P, nor does it waive P‘s right to sue in tort (can do both). |

#### Queen v Cognos (1993), SCC

|  |  |
| --- | --- |
| Discussion and Analysis  | - Applied the *Hedley* doctrine and went through the 5 general requirements- Misstatement took place during contractual negotiations |
| Ratio | P can still seek tort damages caused by misrepresentation if it happened in a pre-contractual setting. |

# Special Duties of Care: Pure Economic Loss

* Flexible means of recovery for pure economic loss now, following taxonomy of Feldthusen:
	+ 1. Independent Liability of Statutory Public Authorities (see below)

## New Categories of Pure Economic Loss

* Courts can recognize new duties of care in new situations, still by using the *Anns/Kamloops* test per *Cooper*
* Justifications for why tort of negligence shouldn’t be extended into pre-contractual negotiations:
	+ 1. Negotiations will always have winner and loser (goal is to find most advantageous deal), so no real economic loss to society, just transfer of wealth between parties
	+ 2. Might discourage useful, efficient social/economic relations (e.g. “hard bargaining”)
	+ 3. Tort law should not be used as an insurance scheme for unsuccessful negotiations
	+ 4. It would result in courts examining every detail of pre-contractual negotiations, and there are already doctrines to deal with that (e.g. undue influence, economic distress)
	+ 5. It might encourage unnecessary litigation
		- Counter: let people sue to get their rightful remedy; Courts can shut cases down at the *pf* level

#### Martel Building v Canada (2000) SCC

|  |  |
| --- | --- |
| Facts | P leased a building to D. D led P to believe that D would be amenable to renewing on certain terms. After P formally gave offer on those terms, D rejected and issued a call for tenders. D received one from another party and didn’t renew the lease with P. |
| Issue | Can there be a duty of care in pre-contractual negotiations? |
| Ratio | Any *prima facie* duty is significantly outweighed by the deleterious effects that would be occasioned through expanding duty of care to include the conduct of negotiations. |

## 2. Negligent Performance of a Service

* Applicable principles closely mirror rules for liability for negligent misrepresentations; in many representation cases it’s the performance of the underlying service that is negligent, not the representation itself

#### BDC v Hofstrand Farms (1986) SCC

|  |  |
| --- | --- |
| Facts | D and a 3rd party had deal to buy land. They couldn’t respond and the deal isn’t binding until the Crown grant was received by D. D wasn’t allowed to order own courier; Crown hired P. P didn’t know the deadline, and delivered the envelope late. P/A; D/R. |
| Issue | Was there a duty of care owed by the courier company to D? |
| Discussion and Analysis  | - D: lack of knowledge doesn’t matter; courier company P had agreed to meet deadline without having to know the nature of the packages |
| Ratio | Applied *Anns* test, and it failed in the first part due to insufficient proximity (too broad of a category, which could lead to indeterminacy) and lack of knowledge (thus inability to determine the harm). |

#### James v BC (2005) BCCA

|  |  |
| --- | --- |
| Facts | P’s employer had a tree farm license. There was a provision clause to not close the employer’s sawmill. On the renewal, the clause wasn’t included. So the employer closed the mill. |
| Ratio | Apply *Cooper* test. At policy stage, no need to prove detrimental reliance (too onerous for P); just showing D voluntarily assumed responsibility will be enough. If either is present, allow for recovery. |

## 3. Negligent Supply of Shoddy Goods or Structures

* Product was constructed poorly or dangerously (Shoddy vs. dangerous – wording matters!)
	+ Dealt with as pure economic loss, instead of just negligence, because of pre-emptive nature
* Can be held liable in breach of contract only if privity is established

#### Winnipeg Condominium v Bird Construction (1995) SCC

|  |  |
| --- | --- |
| Facts | P hired D to build condos, without a K. D did, but a piece of the building fell off. P suffered a loss by replacing the entire exterior of the building, to prevent future significant harm to the property. P/A. |
| Issue | Can D be liable to P for cost of repairing defects in the building caused by negligent construction? |
| Discussion and Analysis  | - Incur loss pre-emptively (pure economic loss) vs. wait for building to collapse (suing in negligence)- For the normal life of the building (hard to determine), the builder is liable for ensuring its quality- No indeterminacy: potential class of P’s = owners and inhabitants; amount limited to that reasonable to fix dangerous defects; time limited to usefulness of the building- Caveat emptor (buyer beware) doesn’t apply, for the subsequent purchaser not in best position to bear the risks of an emergent defect |
| Ratio | No adequate policy considerations to negate a contractor’s duty to subsequent purchasers of a building to take reasonable care in building it and ensure that the building does not contain defects that pose foreseeable and substantial danger to the health and safety of occupants. |

## 4. Relational Economic Loss

* D negligently damages the property of a third party, which causes pure economic loss to P with whom the third party had a relationship; traditionally denied recovery
* *CNR v Norsk Pacific* (1992) SCC: Adoption of the *Anns/Kamloops* 2-stage approach braked indeterminacy problem, prevents floodgates from opening for cases of pure economic loss
	+ La Forest dissent: Limited cases (as previously recognized in CL) where one can recover for relational economic loss (from *Bow Valley*: joint ventures, general average contributions and averaging out losses, claimants’ possessory interests in damaged property)

#### Bow Valley Husky (Bermuda) v Saint John Shipbuilding (1997) SCC

|  |  |
| --- | --- |
| Facts | HOOL and BVI made arrangements to create an off-shore drilling rig constructed by D. HOOL and BVI incorporate an off-shore co joint venture, P. Before construction, ownership and the construction contract with D were transferred to P.  |
| Ratio | Incremental approach must be adopted for recovery in relational economic loss: start with *Anns*, but stage 2 should be restrictive and stick to the 3 pre-established categories. |
| Holding | Recoverability for third party. |

# Standard of Care

* **Standard of care** determines how D should have acted. What do I need to do? How should I act toward my neighbour? Vs. Duty of Care (Who should I be mindful of in my conduct?)
	+ Judge has to decide in law what the requisite standard of care is (according to reasonable person test), jury has to answer questions of fact (whereas in DoC, judge answers questions of law alone)
		- If in trial court without a jury, trial judge finds in P’s favour; appellant court would then determine if they found the right standard of care

## Reasonable Person Test

* CL standard of care test, gauged by the **reasonable person** in D’s position (*Blythe v Birmingham Waterworks*)
* Spectrum of objective (what would the reasonable person think) to subjective (what did D actually see/do) as more modifications are applied to determine the reasonable person. At what point do we stop in the spectrum?
	+ We need to take the objective approach for the sake of social protection and cost (**strict liability**)
		- Objections: Circumstances change how people behave and what is expected of them; It might not be fair to all social groups and distinctions, and is insensitive to their own differences and plights in attempting to meet the reasonable person standard of care
		- If one tries hard and fails (subjective attempts made), under objective standard he is still liable

#### Arland v Taylor [1955] ONCA \*AUTHORITY\*

|  |  |
| --- | --- |
| Facts | P was injured in a motor vehicle accident. P/A; D/R. |
| Issue | Did D breach the requisite standard of care? Yes he did. |
| Ratio | The standard of care expected is what a reasonable person would do in the same circumstances. |

## Factors Considered in Determining Breach of Standard of Care

* Subject to 3 qualifications to consider when assessing D’s conduct (factors determining limits of reasonableness)

### 1. Probability and Severity of the Harm

* ^ risk associated with activity (probability) = ^ SoC; ^ potential harm associated with the risk (severity) = ^ SoC
* *-Roe v Minister of Health* [1954] CA: At time of damage, if a risk is unknown it is not reasonably foreseeable.
* *-Miller v Jackson*: It’s sometimes not possible to entirely eliminate the possibility of damage, so damages ought to be awarded to P when property damage occurs, but no injunction to stop the game should ever be ordered.
* *-Bingley v Morrison Fuels*: If event that directly led to damage was reasonably foreseeable, P’s liable.

#### Bolton v Stone [1951] HL

|  |  |
| --- | --- |
| Facts | P was walking on a road beside a cricket ground. D hit a ball out of the ground and it injured her. D/A |
| Discussion and Analysis  | - P: After at least one ball has been hit out of the ground (6 in 30 years), there is a possibility of it happening again, and thus a duty from D to prevent it- D: Probability (quite low) vs Harm (relatively minor) 🡪 Shouldn’t have to guard against this risk- Life is necessarily about judging risks; if the risk associated with an activity is high and unavoidable, it would be reasonable to prohibit the activity altogether |
| Ratio | Not negligent if one took all precautions a reasonable person would take in the same circumstances to prevent damage likely to arise from one’s actions. Unreasonable to guard against far-fetched risks. |

#### Paris v Stepney Borough Council [1951] HL

|  |  |
| --- | --- |
| Facts | A one-eyed servant was injured on the job (went blind) while hammering bolts. P/A; D/R. |
| Issue | Is an ordinarily prudent employer liable for his servants’ safety in all circumstances? Yes he is. |
| Discussion and Analysis  | - No pre-existing duty to provide two-eyed workers with goggles- Foreseeable plaintiff; D knew that one of their employees had just one eye |
| Ratio | **Unreasonable risk** = Reasonable probability of harm + Severity of harm |
| Misc. | Dissent: Risk of eye injury to anyone was too remote that no employer can be found negligent in failing to take these precautions. Remedy cannot be found for one-eyed, but not two-eyed, man. |

### 2. Cost of Risk Avoidance

* Court should consider the cost of risk reduction
* *-Bateman v Doiron* (1991) NBCA: Hospital that can’t afford skilled, experienced emergency staff not negligent
* *Law Estate v Simice* (1994) BCSC: Constraints of insurance or cost should not work against a patient’s interest by inhibiting the doctor’s judgment of what should be done for him.

#### Vaughn v Halifax-Dartmouth Bridge Comm. (1961) NSSC \*AUTHORITY\*

|  |  |
| --- | --- |
| Facts | D operated and maintained a bridge that had been painted. Flecks of paint were blown onto nearby cars. P was an owner. |
| Issue | Did D take sufficient measures to prevent or minimize injury? No they did not. |
| Discussion and Analysis  | - Inevitable that paint would be carried by the wind onto nearby cars- D: High costs of doing any effective obstruction or warning |
| Ratio | If cost of precaution is low, Court is more likely to find negligence. |

### 3. Social Utility/Value of Conduct

* To assess to what extent you hold someone liable, you should look at the societal importance of their actions
* *-Priestman* SCC: *CC* allows officers w/ affirmative duty to use such force as necessary to apprehend suspects
* *-Burbank v Bolton* (2007) BCCA: An officer in pursuit of an unlawful driver is 15% responsible for a collision

#### Watt v Hertfordshire County Council [1954] UK

|  |  |
| --- | --- |
| Facts | Firefighter P responded to a call and moved a jack into the rear of his vehicle for transport. When driver braked suddenly, the jack dislodged and injured P. P/A; D/R. |
| Ratio | Denning: Balance the risk against the measures necessary to eliminate that risk. Permissible for D to run a high risk because the social utility (saving lives) >> costs of D’s conduct. |

# Special Standards of Care

* Three types of **special standard of care**

## 1. Standard of Care Expected of Children

* *Ryan v Hicksson* (1974): When children are involved in adult activities (e.g. driving, hunting, snowmobiling), they’re expected to meet the same standard as experienced adult drivers
* *Thomas v Hamilton Board of Education* BCCA: Parents and guardians held vicariously liable if the injury is a result of their failure to control or monitor the child’s conduct. Standard: reasonable parent of ordinary prudence
* Arguments against holding children liable at all:
	+ If childhood trial and error comes with liability, it’ll be less likely for a child to learn and develop
	+ Stigmatic effect of children making mistakes and being liable for them
	+ Parents/guardians bear the actual loss (but P doesn’t care, as long as someone pays)
* Arguments for a moderated standard of care for children:
	+ Eng. law: property owners responsible to children (e.g. abandoned fairgrounds, empty swimming pools)
	+ Children are less aware of their surroundings, consequences of their actions; different capacities of knowledge, less able to control impulses, less capable of foreseeing dangers/risks and of foresight/time

#### Heisler v Moke (1971) ON HC

|  |  |
| --- | --- |
| Discussion and Analysis  | - Distinguishing between children of tender age (i.e. very young) and older:\*Tender age: Child is not capable of appreciating the reasonable risk, cannot be liable in tort. No set age, ~ 5 (*Tillander*)\*Above tender age: Modified objective test. Did D exercise the care expected of a child of that age, intelligence, and experience? |
| Ratio | Whether a child can be held liable for negligence should depend on capacity rather than age. |

## 2. Standard of Care Expected of the Disabled

* Physical disability standard of care: what’s reasonable for a person with that disability (*Carroll v Chicken Palace*)
	+ Must recognize reasonable limitations and not take unreasonable risks
* Mental disability standard: At what point does a lower intelligence become akin to a mental disability, and how does that affect the expected standard of care?

#### Fiala v Cechmanek (2001) ABCA

|  |  |
| --- | --- |
| Facts | D suddenly and without warning struck with a mental illness. |
| Ratio | D absolved of liability if he can show, on BoP, either:1) As a result of the mental illness, D had **no capacity** to understand/appreciate the DoC owed then2) As a result of the mental illness, D was unable to discharge his DoC as he had **no meaningful control over his actions** at the time the relevant conduct fell below the objective SoC |

## 3. Standard of Care Expected of Professionals

* Layden v Cope (ABQB): GP’s are required to exercise the standard of care of a reasonable, competent GP, including knowing when a patient needs a specialist.

#### White v Turner (1982) ONCA

|  |  |
| --- | --- |
| Ratio | A professional should be judged by the standard of care of his profession. |

#### Ter Neuzen v Korn (1995) SCC

|  |  |
| --- | --- |
| Ratio | Standard of care expected of a doctor is that of a prudent and diligent doctor in the same circumstances. Specialists must be assessed in light of the conduct of other ordinary specialists. |

# Causation

* **Cause in fact/factual causation**: Did D’s negligent actions cause P’s injuries complained of? (But-For Causation)
* **Cause in law/legal causation**: Are there principled reasons to not hold D liable for the injuries? (Remoteness)
	+ Proximate cause; there might be good reasons to limit liability for fairness
* If many acts and factors cause an accident, the one that required voluntary human conduct is the one to sue
* **Divisible loss**: loss attributable to the conduct of a single tortfeasor; Requires “single cause” approach
	+ Traditionally also used where, in addition to a negligent D, there’s also either an absconding D, a contributorily negligent P, or an innocent/pre-existing/natural contributory cause
	+ Q: Can the injuries be divided into distinct losses that are each readily attributable to the conduct of a particular tortfeasor?
* **Indivisible loss**: loss attributable to conduct of > 1 tortfeasor; both D’s are liable for the entire loss (*Arneil*)
* **Informed Consent**:Objective/subjective test of causation: whether a reasonable person in P’s position would have consented if she had not been adequately informed
	+ Subjective, hard to enforce; disgruntled patients could claim in hindsight that they wouldn’t have done it

## But-For Test

* Standard test of factual causation: If P’s injury would not have occurred **but for** D’s negligent act, then that act is a cause of the injury. BoP on P to prove that D’s breach of SoC was a cause of P’s loss (**Cause-in-Fact Test**)
	+ CL loves the But-For Test because it doesn’t like change, it’s intuitively easy to understand (for juries)
	+ Requires you to inquire what would have happened had D not been negligent
* *-Richard v CNR* (1970): If the “sole, direct, proximate and effective cause” of an accident was P’s own rash action, then any negligence D may have been guilty of wouldn’t make D liable to P.

#### Kauffman v Toronto Transit (1959) SCC

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| --- | --- |
| Facts | P was on an escalator in D’s subway station. Ahead of her, two youths began scuffling, fell back against a man, who in turn lost his balance and fell upon P. As a result of her fall and the continuing movement upward, P suffered severe, permanent injuries. D/A. |
| Issue | Did D’s subway conditions contribute to the causation that led to P’s injury? |
| Discussion and Analysis  | - No proof that man and youths grasped/tried to grasp hand rail before or during the scuffle and fall- No evidence that P would not have fallen if her hands had been grasping the hand rail |
| Ratio | No evidence to justify that the type of hand rail used by D was a contributing cause of P’s accident. |
| Holding | Appeal allowed. |
| Misc. | Trial: D’s escalator used a radically different hand rail design that did not meet the proper tests by experts for hand rail safety (failed standard of care). |

#### Barnett v Chelsea & Kensington Hospital Management [1969] QB

|  |  |
| --- | --- |
| Facts | P and friends went to D’s hospital complaining about vomiting after drinking tea. The medical casualty officer sent them home to call their own doctors. One of them died from As poisoning 5 hrs later. Doctor’s dismissal without even seeing or examining him breached the standard of care. |
| Issue | Did D cause P’s friend’s death? |
| Discussion and Analysis  | - Likely due to enzyme disturbance, likely to cause death even if fluid loss was discovered and treated- Likely no chance to administer the antidote before the death |
| Ratio | Terrible things happen, but that doesn’t mean there’s always someone to hold liable. |
| Holding | P failed to establish, on BoP, that D’s negligence caused the death. |

## Exceptions to the But-For Test

* *Hanke*: Court should, despite all the exceptions and limitations found, start with the but-for test (\*EXAM TOO\*)
* **Material Contribution Test** (*Walker*), limited by *Hanke v Resurface Corp.*, has two requirements:
	+ 1. P must establish that it is impossible to prove causation using the but-for test (can’t run it) and that this impossibility results from factors beyond P’s control (e.g. current limits of scientific knowledge)
	+ 2. P must establish that D breached the standard of care and that his injuries fell within the ambit of the risk created by D’s breach
	+ MC established if P’s actions caused/contributed to damages (outside *de minimis*), not always sole cause
	+ Often unclear if it’s material contribution to P’s injury (i.e. but-for test, *Walker*), or material contribution to risk of injury (i.e. materially increased risk test); never clarified how it differs from But-For Test
* 4 types of **causal indeterminacy** problems, which muddy up the question of whether P caused D’s loss (and Court may adopt a different test of causation to get around limitations of but-for test):

### Evidentiary Insufficiency (“Evidential Gap”)

* Where it’s impossible to determine whether (on available evidence) P’s injury was actually the but-for consequence of D’s negligence as opposed to another non-tortious factor

#### Walker Estate v York Finch General Hospital [2001] SCC

|  |  |
| --- | --- |
| Facts | P received HIV-positive blood from Robert M. No blood screening to determine if it was infected, just pamphlets handed out to reduce the risk of infected donors. ARC 1983 one mentioned that one could be infected even if in otherwise good health; CRCS 1984 one expressly referred to gay men with multiple partners as being at risk. Robert kept donating blood over the years. P/A;D/R. |
| Discussion and Analysis  | - Robert: He would not have donated if he had seen the ARC pamphlet because he was also in good health; not the same if he’d only seen the CRCS one |
| Ratio | Proper test for causation in negligent donor screening cases: Whether D’s negligence **materially contributed** to P’s harm. Material = outside of *de minimis* range |
| Holding | Appeal allowed. (Goold doesn’t think this is a good case) |

### Multiple Insufficient Causes

* Where several factors combine to cause P’s loss, but no single factor is itself the but-for cause
* Each factor is individually necessary (without it, there would be no loss) but not individually sufficient to have caused the loss (in the absence of the other factors)
* -*Arneil*: Difficult to disentangle causal roles of 2+ negligent acts if they follow one another closely in time
* *-Alcoa*: Damages to be assessed at date of initial damage. D not liable for damages exacerbated by P’s limited financial resources, making him unusually vulnerable to financial harm (**“thin wallet” rule**)
* -*Smith v Leech Brain* [1962]: **Thin skull rule** (D takes his victim as he finds him; i.e. pre-malignant condition)
* -*Nowlan v Brunswick Const.* SCC: For concurrent wrongdoer, the fact that the damage might not have occurred but for the poor design of the building does not excuse D from the liability arising out of his poor workmanship.

#### Athey v Leonati [1996] SCC

|  |  |
| --- | --- |
| Facts | P had a pre-existing back condition (non-culpable factor) was injured by D’s negligent driving (culpable factor) car accident with D. On advice from his doctor, P resumes exercise and sustains a herniated disk. P/A; D/R. |
| Discussion and Analysis  | - If one of the acts contributing to P’s loss is tortious, it would be wrong to apportion liability for the portion that is non-tortious (i.e. so D materially contributed more than 25% to P’s injury)- D: “**Crumbling skull**” doctrine: thin skull but D doesn’t need to put P in a better position than original (hastening onset of an eventual injury) |
| Ratio | As long as D is part of the but-for cause of an injury, D is liable, even though his act alone was not enough to create the injury and he wasn’t responsible for the other causal factors. |
| Holding | Appeal allowed. P entitled to recover 100% of damages. |

### Multiple, Independent Sufficient Causes

* Where P’s loss arises from 2 independent acts, each of which was capable of causing the loss (Can: limited to 2)
	+ Example: 2 different bullets, each of which was fired negligently by 2 independent D’s, hit the P
	+ *Cook v Lewis* [1951]: If P could prove that both D’s were negligent and one HAD to have caused the loss (impossible to prove which one), then the burden of proving causation would shift to D
* *Cook v Lewis* 3 situations in which D’s will be held to be joint tortfeasors: An agent committing a tort while acting on his principal’s behalf; An employee committing a tort while acting on his employer’s behalf; 2+ individuals agree to bring to do something illegal, inherently dangerous, or can anticipate negligence
* Courts tend to apply here the **significant or substantial factor test** (see ratio):

#### Lambton v Mellish [1894] UK

|  |  |
| --- | --- |
| Facts | Both D’s (M and Cox) had organs playing at a fair attraction, from morning to night. P, living nearby, complained of nuisance and sought an injunction. |
| Ratio | If it can be concluded that the acts of one D would have led – by themselves – to the loss, then that D will be held liable. |
| Holding | P is granted an injunction against both D’s. They would split any damages equally. |

### Materially Increased Risk

* Where P suffers an injury (e.g. disease) that may have been caused by D’s negligent actions, but it’s extremely difficult to prove that the injury would not have resulted but for the actions of D
* Broader than the but-for test
* *McGhee v National Coal Board* [1972] HL: If D’s negligence **materially increases the risk** of a particular kind of injury occurring and that very injury befalls P, then D will be deemed to be a cause.
	+ Dissent by Wilberforce, adopted by Canada: In such an above situation, the burden of proving causation should shift from P to D, who must then disprove causation on the BoP
	+ Breach of duty which materially increased a risk of disease/harm should be treated as if it had materially contributed to the disease/harm

#### Snell v Farrell [1990] SCC

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| --- | --- |
| Facts | D operated on P’s cataract. D noticed a slight discolouration behind the eyeball. Since there were no further signs of bleeding, he continued with the operation. Following the surgery, there was blood in the eye; after 9 months, the optic nerve had atrophied, resulting in blindness. P/R; D/A. |
| Issue | Should the burden of proof for causation shift to D (to disprove a medical causal link)? If the burden remains on P, can causation be inferred without conclusive medical evidence? |
| Discussion and Analysis  | - Sopinka refused to shift burden of proof to D though his negligence = impossible to prove causation- Damage could have occurred naturally or due to continued operation (med evidence inconclusive) |
| Ratio | But-for test inappropriate in medical malpractice where scientifically impossible to prove causation and the medical knowledge rests with D. Although burden of proof is on P, **inference of causation** may be drawn in the absence of conclusive scientific proof. If D provides contrary evidence, the inference must be supported by weight of combined evidence. |
| Holding | Appeal dismissed, with costs. |

### Loss of Chance

* Proportionate cause and loss of chance: yet to be adopted by Canadian courts
	+ Example: There is only a 25% chance for P with disease X to survive if treated properly. If doctor D had treated negligently, P could sue for the loss of chance of finding out whether he could have survived from the disease. Might be impossible to show in BoP (51%+)
		- D could argue that he could never be the cause of P’s death, because of that unmet threshold.
	+ **Loss of chance**: Deprivation of the opportunity to find out whether P was in that 25%
* *Hotson (1987) HL*: 40% chance to save P’s leg from necrosis if he had received proper medical attention. P sued hospital D for depriving him of that chance to find out. Court: P’s leg was not hanging in the balance, it was either going to fail or not by the time he got to the hospital. D makes no difference, for the coin had already been flipped. P says that the coin was still in the air when he saw D, and thus D could have influenced how it fell.

## Issues in Assessing the Plaintiff’s Loss

* If a tortfeasor must pay damages to P over a long period of time and P dies during that time, D does not get to recoup the unspent funds for the remaining years, even if the funds are for care that is no longer required
* D’s liability is reduced to reflect P’s pre-existing injuries or disabilities, no matter how they were caused (naturally occurring, innocently caused, or due to another tort)
* A **supervening act** (an independent successive parallel injury prior to trial on the first injury of P) must occur within a limited timeframe (appeal period) in order to help extend the original tortfeasor’s liability.
* Successive parallel injuries are not limited to physical injuries (there’s also sexual and non-sexual abuse)

#### Penner v Mitchell (1978) ABCA

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| --- | --- |
| Facts | D caused an accident to P. P won in trial for damages covering 13 months’ loss of income, though she would have lost 3 of those months anyways due to a pre-existing heart condition. P/R; D/A. |
| Issue | Is the second event irrelevant in assessing damages against the first tortfeasor? Appeal allowed. |
| Ratio | Shouldn’t consider future culpable contingencies to assess damages like prospective loss of income. |

# Remoteness

* **Remoteness** is concerned with the legal connection between D’s breach of duty and P’s loss, seeking to limit the implications of a finding of factual causation for policy reasons
	+ Allows courts to exclude liability in situations where loss suffered is so different from that expected, or so disproportionate to magnitude of the fault, that it would be unfair to hold D responsible in law
* Distinguishing limitations based on concerns about scope of negligence from those based on concerns with the logical implications of strict adherence to factual causation
* *Re Polemis* [1921] UK: Test for remoteness = **directness**; P’s loss not too remote if it was a direct result of D’s carelessness, where **Direct** = close temporal and spatial connection between D’s breach and P’s loss
	+ As long as it’s direct, it doesn’t matter if the damage is disproportionate
	+ Directness test doesn’t associate fault and liability
	+ Courts careful to distinguish between foreseeability (relevant to breach and duty, wrongness; factual causation) and remoteness (relevant to extent of liability, practicality; legal causation)
* Weir: Helpful to think that the injury complained of = a normal consequence of the act complained of, and not so abnormal that no one would have thought it could have resulted (**requirement of normality**)
	+ Goold: Courts don’t use this language; they desire to ensure that a finding of causation is not so at odds with what we would ordinarily expect that it offends our everyday notions of fairness

#### Wagon Mound (No 1); Overseas Tankship v Morts [1961] PC

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| Facts | P’s chartered ship *Wagon Mound* carelessly permitted an oil spill in the harbour, and it was carried to D’s wharf. There, people were welding, and some molten metal fell on the oily water. It ignited, set fire to debris, and eventually set the entire wharf ablaze. P/A; D/R. |
| Discussion and Analysis  | - Tortious liability founded not on act, on its consequences: Wrong to hold D non-liable for indirect damage just because he can reasonable foresee the intervening events that led to the damage |
| Ratio | Better test than directness: reasonable **foreseeability** of outcome, which doesn’t place blame on D for all trivial foreseeable damage with unforeseeable, grave consequences just because it’s “direct.” |
| Holding | Appeal allowed. A fire was not foreseeable. |
| Misc. | *Wagon Mound (No 2)*: Ps owned two boats damaged in the harbour fire. D owned *WM* that leaked the oil. D/A. Despite the very exceptional circumstances that would have to be present for the injury to happen, a reasonable man would have realized or foreseen and prevented the risk. |

## Flexibility Modifications to the Foreseeability Test

### Shifting the Focus from Manner of Accident to Type of Harm

* Courts: Exact mechanics of an accident are not crucial, and not necessary for the precise manner of the accident to be foreseeable. Instead, foreseeability relates to the **type of harm** suffered by D

#### Hughes v Lord Advocate [1963] HL

* Criticisms of this type of harm approach:
	+ It undermines the foreseeability rule by expanding it too much; Counter: Practical effect = makes the requirement very easy to satisfy, no more onerous than the old directness rule
	+ No necessarily right or obvious answer to the question of what counts as the “same type of damage”
		- Inconsistency examples: frostbite damage = common cold; Weil’s disease (from rat urine contamination) different damage from rat bite or food poisoning (*Tremain*), dead pigs = sick pigs

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| Facts | D’s employees left a lamp by an open manhole unattended. A boy, P, knocked the lamp down, and it caused an explosion. P then fell in and got badly burned. |
| Discussion and Analysis  | - Test: 1. Duty owed by D; 2. But-for causation; 3. Foreseeability- Expands on Wagon Mound by saying it’s foreseeing the type of harm/injury, not the way in which the harm comes about, that matters |
| Ratio | D are not absolved because they didn’t envisage “the precise concatenation of circumstances” which led up to the accident. Only the type of harm needs to be reasonable foreseeable. |
| Holding | Damage was not too remote. D’s duty to safeguard P, even though the explosion wasn’t foreseeable. |

### Treating Accidents as Sequence of Discrete Events

* Divide a causal sequence and then asking whether each step was in and of itself foreseeable

#### Assiniboine v Greater Winnipeg Gas (1973) SCC

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| Facts | Hoffer let his son operate his snowmobile. It ran out of control and resulted in fire damage to P’s school and exploded. |
| Discussion and Analysis  | - The damage was of the type/kind which any reasonable person might foresee, once broken down into discrete parts (foreseeability of impact with building, of gas pipes in that part of city, of impact with a gas pipe 🡪 of escape of gas 🡪 of entering school and igniting boiler room |
| Ratio | D is liable to P on the ground that the installation of the gas service was negligently constructed in such a place and manner as to make likely the type of damage which ensued. |
| Holding | Harm foreseeable, so defendant H is liable. |

### Focusing on Fairness in Deciding Limits of Foreseeability

* Osbourne: Once P has established that a DoC exists and there has been breach, causation, and damage, Courts are now unwilling (for sake of fairness) to deny recovery on the grounds of remoteness; tend to favour P

## Intervening Causes

* **Intervening act**: Something that gets in between D’s careless act and P’s harm and contributes to the harm
	+ Traditionally, this relieves the original tortfeasor of liability because the causal link was severed (following but-for causation, only the last wrongdoer actually led to the harm)
	+ *Novus actus interveniens* (intervening act), no matter how minor, makes the **last wrongdoer** liable
* Criticism of last wrongdoer doctrine (besides that it assumes causation is always linear):
	+ Not entirely fair, if the initial tortfeasor had a larger contribution to the eventual harm
	+ **Moral luck** could save tortfeasors A (who could have done something morally repugnant) and B, just because C happened to come along; this would lose faith in Court’s ability to uphold justice
	+ Moral component of intentional torts (e.g. in malicious prosecution) is a recent addition to CL
* Last wrongdoer doctrine replaced, and intervening acts later divided into 3 categories based on their natural occurrence and moral blameworthiness:
	+ 1. Naturally occurring or non-culpable: do not break the chain of causation, if not too unusual
		- Example: If P failed to repair his roof in Vancouver, rain wouldn’t be an intervening act because it’s natural and fairly predictable.
	+ 2. Negligent intervening acts: break the chain of causation, thereby absolving original tortfeasor
		- Example: A careless driver would not be held liable if the P he injured died in hospital as a result of getting negligent treatment.
	+ 3. Deliberately wrongful or illegal acts: break the chain of causation unless original tortfeasor had a specific duty to prevent the act
		- Example: An armed guard who left his truck unlocked is liable if a thief stole money from it.
* Goold doesn’t care at what stage we address intervening causes, at causation or at damages stage
	+ Criticism: the interference of a grossly negligent or even intentional act shouldn’t absolve the moral blameworthiness of the original tortfeasor
* *-Papp v Leclerc* (1977) ONCA: Every tortfeasor causing injury to a person that requires medical help must assume the reasonably foreseeable and non-remote risks of complications, bona fide medical errors, or misadventure

#### Bradford v Kanellos (1973) SCC

* New test based on foreseeability: If the intervening act was broadly within the scope of the foreseeable risk created by D’s negligence, then he will remain liable for the resultant damage.

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| Facts | P’s had dinner in D’s restaurant. Grease on the grill caught fire; when a fire extinguisher was used, it made a hissing or popping noise. An unidentified patron yelled that gas was escaping and there was going to be an explosion, causing panic. Mrs. P was knocked over and sustained injury. P/A; D/R. |
| Issue | Was the intervening act within the scope of the risk created by D’s negligence? No, so D not liable. |
| Ratio | D will not be liable for his negligent act that does not include within the scope of its risk the intervening act or the consequence of P’s injury. |
| Misc. | CA: Unreasonable to hold the person guilty of the grill fire also guilty of the subsequent injuries to P.SCC dissent Spence: D did anticipate that negligence like leaving grills greasy would cause a fire and frequently warned the cooks of it, so the fire was reasonably foreseeable and part of the natural consequence of events leading invariably to P’s injury. |

#### Price v Milawski (1977) ONCA

* Despite *Bradford*, courts still quite conservative, classification-based in cases of med. negligence intervening acts

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| Facts | Dr. M x-rayed P’s foot post-injury, judged that ankle was only sprained when actually it was broken. P eventually went to Dr. C, who phoned Dr. M’s hospital, found the results negative, and didn’t order new x-rays. He diagnosed it as a strained ligament and applied a cast. Once cast was removed, P went to another orthopaedic surgeon who finally found the fracture. P suffered permanent damage. |
| Issue | Who, if any, is responsible for P’s permanent injury? Both negligent. |
| Discussion and Analysis  | - CA: Subsequent doctors might rely on the accuracy of first Dr. M’s info, and do so without checking, even if that is in itself a negligent act in these circumstances |
| Ratio | Original tortfeasor may be held liable for future damages arising in part from the subsequent negligent act of another, as long as such subsequent negligence and consequent damage were reasonably foreseeable as a possible result of his own negligence. |

#### Hewson v Red Deer (1976) Alta. TD

* Courts reluctant to hold original D liable (makes no sense) if 3rd party intervening act was intentional

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| Facts | D employee W parked a tractor on a hill blocks from P’s home. W took some safety precautions but didn’t remove the key when he left. 30 min later, unknown hooligan drove tractor into P’s house. |
| Ratio | Elementary precautions (e.g. removing key, engaging lever, locking cab door) not taken to prevent the accident. Third party not intervening cause since foreseeable that someone’s tempted to drive it. |
| Holding | P is entitled to damages against D.  |
| Misc. | CA: Reversed; no evidence to support conclusion that bulldozer being put in motion was reasonably foreseeable. No effective steps could be taken to stop a 3rd party intending to tamper with machine. |

# Defences in Negligence

* Damages may be reduced or denied on the basis of any of these defences, with burden of proof on D:

## 1. Contributory Negligence

### Development of the Defence

* Initially the CL “**last clean chance**/opportunity” rule: If D had the last clear chance to avoid the accident and negligently failed to take it, P can recover despite his contributory negligence; eventually abandoned
	+ Weakness: Perpetuates the all-or-nothing approach, i.e. if D hadn’t taken last chance, D bears entire loss
* Later, **apportionment of liability** according to the parties’ relative degrees of fault
* Not necessary for P’s negligence to be only cause, but it must have been a proximate or effective (-*Zsoldos*)

### Conduct Constituting Contributory Negligence

* If it can be shown that his conduct carelessly contributed to the harm suffered as a result of D’s negligence
* To establish the defence of **contributory negligence**, D must show:
	+ 1) That P did not take reasonable care of himself, AND
	+ 2) That the lack of care contributed to the injury
	+ After it’s been established, Court will apportion liability based on fault, according to *Negligence Act 1996*
		- S. 1: Where distribution of fault cannot be determined, liability is split equally
		- S. 2: Damages can be offset if both parties are at fault
		- S. 3: Liability for legal costs are apportioned according to the principles set out in S. 1
* P could: enter carelessly into a dangerous situation, carelessly contribute to the creation of an accident, or carelessly contribute to the resulting harm instead
* *-Rewcastle* ABCA: P died in car crash. Court found her not contributorily negligent for not wearing a seatbelt; her decision to ride w/o seatbelt (despite having access to alternatives like calling a cab) was reasonable
* *-Chamberland v Fleming* (1984) established a rough upper limit of 25% for contributory negligence if P’s negligence did not cause the incident but affected the extent of the loss
* -*Mortimer v Cameron* ONCA: Where wall at party unexpectedly fell, 60-40 liability building owners – city

#### Walls v Mussens (1969) NBCA

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| Facts | D’s employee caused a fire by negligently using a gas torch which leaked gasoline onto the floor, which was ignited by the gas torch. P’s employee had forgotten to use fire extinguishers, instead used snow to try to put the fire out. It didn’t work; most of P’s service station was destroyed. D/A. |
| Issue | Did P negligently contribute to P’s harm? |
| Ratio | “**Agony of the moment**” rule: doesn’t need to be gauged by what a reasonable person would do in a calmer atmosphere conducive to a nice evaluation of the alternatives. |
| Holding | No portion of responsibility for starting the fire can be attributed to P, just to employee’s negligence. |

#### Gagnon v Beaulieu [1977] BCSC

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| Facts | P was a passenger in D’s car when they got into an accident. P wasn’t wearing his seatbelt. |
| Issue | Did P contribute to causing his harm by neglecting to wear a seatbelt? |
| Discussion and Analysis  | - P’s beliefs about the efficacy and safety value of seatbelts was irrelevant- Court: P should have done what the ordinary person would have done. Idiot. |
| Ratio | Ordinary person knows that a seatbelt in this situation would reduce possibility of severe injury. |

## 2. Voluntary Assumption of Risk

* ***Volenti non fit injuria***: “To one whom is willing”, i.e. knows there is accompanying almost certain risk to the activity (e.g. concussion while playing a highly physical sport), “no harm is done”; he bargained away right to sue
	+ A complete defence if you can establish it… But extremely hard to establish (Courts prefer option #1)
* We can broadly divide situations in which the defence is likely to arise into 2 categories:
	+ 1) Where there has been **express agreement** – most common where P enters into K and expressly assumes the risk
	+ 2) Where there has been **implied agreement** – where there is no express consent
* Elements of the defence:
	+ D must prove that P knew of and understood the precise risk he was incurring; AND
	+ That P voluntarily assumed the risk

#### Dube v Labar (1986) SCC

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| Facts | P and D were coworkers on a construction site who decided to go on a bender, and picked up some hitchhikers while driving drunk. D was behind the wheel when they veered right, then P attempted to grab the wheel, then D tried to correct the course, which led to an accident. P/A; D/R. |
| Issue | Did P volunteer to assume the risks of riding in D’s car while D’s drunk? Yes he did. |
| Discussion and Analysis  | - 2 defences brought to the jury: *Volenti* and contributory negligence- P consented to bear the legal risk when he entered the car as a passenger, knowing D’s impairment |
| Ratio | To establish defence of *volenti*, D must prove that P consented to both the physical and legal risk. |

## 3. Participation in a Criminal or Immoral Act

* ***Ex turpi causa non oritur actio***: No cause of action is available in tort where P is participating in an illegal act
	+ A defence that precludes recovery altogether, so courts tend to interpret it very narrowly

#### Hall v Hebert (1993) SCC

* As a defence, it’s better at maintaining flexibility in application of the principle than if it was dealt at duty stage

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| Facts | P drove D while both were equally drunk and had an accident. P blamed D for his severe injuries, claimed D shouldn’t have let him drive. D claimed P acted illegally and couldn’t sue. |
| Issue | Could D raise the defence of *ex turpi* to negate P’s cause of action? Yes |
| Ratio | *Ex turpi* arises only when a given P genuinely seeks to profit from his illegal conduct, OR when compensation would amount to an avoidance of criminal sanction. |

## 4. Inevitable Accident

* If D can show that the accident was inevitable or out of his control, then D will not be held liable.
* Unlike the previous 3 defences, this one is concerned with factual circumstances surrounding D’s conduct (i.e. denial of negligence), not pertaining to P’s own behaviour
* *-Barron* (2003): More difficult to make out this defence based on factors “internal”, not “external”, to D.

#### Rintoul v X-Ray and Radium Indust. [1956] SCC

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| Facts | D was in his car approaching traffic when the brakes didn’t work anymore. D managed to slow the vehicle down somewhat, but he still rear-ended P. P/A; D/R. |
| Issue | Should P have a claim against D if the injury was caused by an inevitable accident that D tried to prevent? Yes. |
| Ratio | D needs to show that the alleged failure was inevitable, and that after such failure occurred the driver could not, by the exercise of reasonable care, have avoided the collision. |

# Tort Liability of Public Authorities

* **Public authorities**: govt depts, regulatory agencies, courts, elected officials, those exercising delegated auth.
* Test: 1. Is he a public authority? 2. If so, what sort of powers is he delegated to have?
	+ Nature of the function being performed: legislative (power to enact rules/regulations), judicial/quasi-judicial (power to resolve disputes), administrative (power to implement/administer policies)
	+ In many cases, a PA can exercise more than one type of power, and even simultaneously
	+ When considering whether PA is liable in tort, start looking at type of power exercised, not type of body
* PA’s only liable for Admin negligence (how they decide to discharge stat. oblig.), so PA aims to shift complaint to Leg or Jud categories to put it outside of Court’s jurisdiction (so it wouldn’t get past the Duty stage) (*Wellbridge*)
* Immunity to legislators extends to actions that are directly or indirectly related to legislative activities
* Municipality has margin of legitimate error, will not be liable for rational acts in good faith (*Enterprises Sibeca*)
	+ Not liable for losses from adopting/amending/repealing bylaw, even if it causes foreseeable econ. loss
* SCC: Jud. officers (judges, justices of peace) not liable for losses/damage flowing from exercise of jud. authority
	+ Affirmed by BC *Provincial Court Act*, s. 27.3 (immunity protection), s. 42 (immunities from civil liability)
	+ Judges not compelled to testify about their decision making process or composition of court in a case – from constitutional principle protecting them from scrutiny (unclear on quasi-judicials and mediators)
* *Crown Liability and Proceedings Act* allows Crown to be sued in tort
* Tort actions against public authorities have shorter than normal limitation periods and other limiting provisions
* Public authorities employ a great deal of people for whom they may be held vicariously liable
* A public official is often able to plead **defence of statutory authority**, which precludes recovery with respect to a loss that was inevitable result of D’s performance of a statutorily authorized act
* Four ways that *Cooper* has affected negligence analysis related to public authorities:
	+ 1. The policy/operational dichotomy falls in the second stage of the Cooper analysis: Even if harm was foreseeable and the parties were sufficiently proximate, a court could still decline to find a duty of care because the public authority was exercising its policy or planning (instead of operational) functions
	+ 2. More cases than before are now being decided based on the question of proximity
	+ 3. Conflates statutory and common law duties
	+ 4. Reflects a more restrictive attitude toward public authority liability in Canada

## Basic Rule for Liability of Public Authorities

* Two types of operations/administrative decisions:
	+ 1) Decisions that are made to fulfill a **statutory public duty**: PA not liable for damages resulting from proper exercise of a statutory duty requiring them to act a particular way
		- If exercised carelessly or failed to fulfil the duty, then yes liable
	+ 2) Decisions that are made under a statutory **discretionary power**
		- If policy decision 🡪 Courts will not review 🡪 No negligence actions for losses alleged to have resulted from the policy; PA’s defence
		- If operational decision 🡪 Courts may review it 🡪 Possible to claim in negligence for losses alleged to have resulted from it; P’s argument
	+ Example: Statutes require PA to clear roadways 6 hrs after snowfall, PA liable if he fails or does it negligently. But if no statute, or if the statute didn’t specify how well to clear road, PA cannot be sued
* *Brown v BC*: Corey clarified idea of “true policy decision”, noted that policy decisions are not necessarily made at highest level of govt, and court should look at nature of decision when determining if it was policy or operational
	+ Court: Instead of WHO makes decision, consider whether he/she must take into account social, political, economic, financial, personnel, union considerations (which all point to a policy decision)

#### Just v British Columbia (1989) SCC

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| Facts | P was driving with his daughter up to Whistler. A boulder came loose and fell on their car, killing the daughter. P contended that D had negligently failed to maintain the highway properly. P/A; D/R. |
| Discussion and Analysis  | - Corey J: narrow vision of “true policy decisions”; need to look at all circumstances to find appropriate SoC, need to consider budget restrictions, availability of qualified personnel/equipment |
| Ratio | Claim concerned manner in which inspections were done 🡪 = Attempts to implement policy decisions 🡪 Operational matter 🡪 Open to judicial scrutiny (more so than in the past). |
| Holding | P entitled to a finding of fact on these questions. New trial ordered. |
| Misc. | Trial: Applied Anns test, and decided the case would fail on the policy considerations |

## Misfeasance in a Public Office

* Two types of misfeasance (abuse of office, abuse of power) to sue in:
	+ 1. **Intentional misfeasance**: Conduct specifically intended to injure a person or class of persons
	+ 2. Misfeasance occurring outside of the proper intentional tort: PA acts with knowledge both that he has no power to do the act complained of and that it is likely to injure P; *ultra vires* action, basically
* In both cases have to prove: (1) Public officer engaged in deliberate and unlawful conduct in his capacity as a PO; (2) He must have been aware that his conduct was unlawful and likely to injure P
	+ For intentional misfeasance, proof of intention to harm can prove these two
	+ For Type 2, P will have to prove (1) and (2) independently
* -*Roncarelli v Duplessis*: Against rule of law for Premier to exercise his executive authority outside of good faith
* *-Odhavji Estate v Woodhouse* SCC sets out the modern Canadian position on misfeasance, further develops elements of that tort: Not obvious that action for misfeasance in public office against D and Chief must fail
	+ P had been shot and killed by police while running from his vehicle after a bank robbery. His estate alleged that officers D intentionally breached their statutory obligation to cooperate fully with Special Investigations Unit investigation. P must prove duty of care.

# Occupiers’ Liability

* Test for establishing a duty of care in **occupiers’ liability**: (in lieu of *Anns*, this developed in parallel to neg.)
	+ 1. What are the premises?
	+ 2. Who is the occupier?
		- If both of these are favourable, boom! You get the duty of care (makes negligence test easier)
	+ 3. Section 3 discussion on standard of care
* Simple breakdown of four types of **visitors** and the **occupiers**’ (persons who own and control the **premises**) respective standards of care:

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| --- | --- | --- |
| *Type of visitor* | *Description of visitor* | *Occupiers’ standard of care to the visitor* |
| Trespasser | No permission to be on property | No duty; can’t intentionally or recklessly injure him |
| Licensee | Permission, presence doesn’t benefit occupier (e.g. house guest) | Take reasonable care to protect him from unusual or hidden dangers that occupier knows of (low) |
| Invitee | Permission, econ. interest, presence benefits occupier (e.g. restaurant) | Take reasonable care to protect him from unusual dangers that occupier knows/ought to know (higher) |
| Contractual tenant | In K to use premises, not to receive services (e.g. hotel guest, concertgoer) | Take reasonable care to ensure that premises are fit for intended purpose, as safe as reasonable care makes it |

* Overtime, courts began to distinguish between different types of people (burglar and inquisitive child can both be trespassers); the less likely your land is to have trespassers (e.g. in the far north), lower the standard of care
	+ Child trespassers are treated as licensees on the basis of **fictionalized consent**
* Difficulties with this division:
	+ Difficult sometimes to determine a visitor’s status, plus it might not be static
	+ Proper description of a given danger can raise questions (e.g. would an icy sidewalk be an “unusual” danger in Canada?)
* In the case for licensees, there was a lower standard of care for an omission than for a negligent act
* Overtime, distinction between licensees and contractual entrants eroded at CL; an occupier must take reasonable care to protect a licensee from an unusual danger that he knows or ought to know of (*Bartlett*)
* -McErlean: Requisite quality of unusual dangers, which is occupier’s duty to know (or ought to) and prevent.

#### Veinot v Kerr-Addison Mines Ltd. (1975) SCC \*KEY\*

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| Facts | P and friends went snowmobiling on an evening along well-travelled snowmobile trails. P struck a rusty pipe stretched across the road at face-height and got badly injured. P/A; D/R. |
| Discussion and Analysis  | - Duty, though not onerous, is dependent on variety of factors within court’s discretion: (i) degree of danger on the land, (ii) trespassers’ age, (iii) why they were on the land, (iv) occupier’s knowledge and resources, (v) cost of preventative measures |
| Ratio | An occupier who knows of the presence of a trespasser (or that it’s likely) must act within “common humanity” to prevent injury resulting from dangers of which he is aware. No duty to inspect the property for danger. |

#### Palmer v St. John (1969) NBCA

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| Facts | P’s toboggan went over a hump at the bottom of a hill, injuring her. The hump had been created by a city work crew. P sued D and the Horticultural Association, which maintains the park. P/R; D/A. |
| Issue | Who is the occupier of the hill and who should be liable? D vicariously. |
| Ratio | Trial judge found both City and Association to be occupiers of the hill. With occupation goes control. |

## Occupiers’ Liability Act 1996

* Use it first if you see an Occupiers’ Liability question; go through CL negligence only if statute doesn’t answer it
* Under this Act, SoC applied broadly, and is relevant to: foreseeability of damage, degree of risk of injury, gravity of that injury, kind of premises, burden of preventative measures, practice of other occupiers, purpose of visit
* Reminder: Occupiers are also subject to other rules of law that impose a higher SoC
* Trespassers are also owed general DoC, except those with crim intent or trespassers on agricultural/rural ground (then, the duty owed is to avoid injuring them intentionally and not act with reckless disregard for their safety)
* S. 1: Defines scope of the Act and the boundary between occupiers’ liability and negligence
	+ Don’t have to be the (solo) owner or physical resident of a property to end up being the occupier
		- Responsibility for condition of premises, activities conducted on, persons allowed on
	+ Defines premises broadly; land, buildings, movable places not in operation (cars, ships, aircraft)
* S. 3 (most important): Replaces CL with a **general standard of reasonable care**
	+ S. 3(1): Occupier owes duty of reasonable care for visitor + accompanied property to be reasonably safe
	+ Increases level of care owed to trespassers and licensees, reduces level owed to contractual tenants
* S. 4: Allows occupiers to restrict, modify, or negate statutory DoC by express agreement or notice; limitations:
	+ 1) Needs reasonable notice of any alteration of the general standard, and only those privy to an express agreement are subject to the restricted standard
	+ 2) Stat. duty cannot be excluded or modified for those allowed to enter premises without occupiers’ consent
	+ 3) If occupier’s bound by terms of a K to allow entry to third parties, he owes them the usual SoC and aren’t subject to the exclusionary words in the K
* S. 5: Occupiers not liable for what’s done by independent contractors working on the premises, as long as it was reasonable to have hired an independent contractor to do the work and the occupier had taken reasonable care to supervise the contractor’s work
* S. 6: Treats landlord as an occupier (so long as landlord has a duty to maintain and repair the premises under the terms of the lease); P can only recover if he can show that the injury was a result of landlord’s failure to repair
* Remedies this old CL rule: A landlord couldn’t be liable for any harm caused to visitors of his tenants, because:
	+ No contractual liability – the visitors were not parties to the lease
	+ No occupiers’ liability – the landlord (an owner out of possession) was not the occupier (tenant is)
	+ No DoC owed in negligence because it was an area supposedly covered by occupiers’ liability

# Nuisance

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| --- | --- | --- |
|  | Law of nuisance | Negligence |
| Protects | Quality of possession, effects of D’s conduct | Possession, D’s conduct itself |
| What’s unreasonable? | D’s interference with P’s enjoyment of land | D’s behaviour |
| Proximity, limit of liability = | Need for **physical neighbourhood** | General req. of neighbourhood |

* **Public nuisance**: bothering public at large’s uses of public transportation, infrastructure, rights of way
* **Private nuisance**: substantial unreasonable interference with another’s use and enjoyment of their land, can be:
	+ 1. A causes physical damage to B’s land, no matter if it’s isolated or continual (*Tock*)
		- Courts see physical damage to property = unreasonable interference
	+ 2. A causes non-physical damage (e.g. noise, smells) that harms B’s ability to enjoy his land
		- Courts expect landholders to be fairly **tolerant** of occasional interferences with enjoyment of their land (esp. in urban environment) – ultimately depends on all circumstances of case at hand
* Elements of action for private nuisance causing physical damage:
	+ 1) Damage isn’t trivial; beyond the bounds of reasonable tolerance
	+ 2) Damage not a result of P’s land’s abnormal sensitivity to D’s land’s low-risk nuisance (*Robinson*)
		- Restricted if it’s shown D knew of P’s sensitivity and acted with malice/spite (*Hollywood Silver Fox Farms*) – can even be imposed in absence of malice (*MacGibbon* [1953], by BCCA)
* Factors to consider when determining reasonableness of interference with enjoyment of land (*340909 Ont Ltd*):
	+ Character of neighbourhood: generally interference in rural neighbourhoods = more significant
	+ Intensity of interference (*Appleby*): not transient bad smells; intensity intolerable to ordinary Canadian
	+ Duration of interference: > temporary; must be persistent and long-term
	+ Time of day and day of the week: e.g. residential areas, noises on Sunday morning not cool
	+ Zoning designations/restrictions: compliance with generally not a defence, but can be referred to when determining character of a neighbourhood and appropriate standard of tolerance
	+ Utility of D’s conduct: can’t be used as a trump card (e.g. my factory creates drugs that save lives, so my neighbours should put up with my emissions)
	+ Nature of D’s conduct: less likely to help an unreasonable D who’s motivated to annoy/discomfort P
	+ Sensitivity of P: standard = that of reasonable and ordinary resident of that geographical area
* **Intrusive interference**: something comes from D’s land, crosses into P’s land, causes damage/loss to enjoyment
* **Non-intrusive interference**: caused by the removal of something from P’s property by D
* Nuisance differs from trespass to land because:
	+ Issue of directness: trespass to land requires direct interference
	+ Issue of intention: trespass to land requires intent
	+ Nuisance requires proof of damage/harm, whereas trespass to land is actionable *per se*
* *-Doucette*: All natural uses of D’s land that did not pose a foreseeable risk cannot be nuisance
* *-Mann v. Saulnier*: not a trespass if injury was indirectly caused (no special damages proven = no nuisance)
* *-Martin v. Reynolds* (Ore.): trespass v nuisance depends on energy and force, not size of the invading object

## Defences to Private Nuisance

* 1) Statutory authority and immunity covers for conduct following statute that happens to be complained of
	+ Took: Revised so that it’s only a defence where statute gives no discretion to D as to the time, location, or performance of the statutory duty
		- Ryan v Victoria: In order for defence to apply, D must show it was practically impossible to avoid creating a nuisance
	+ Rule: Beyond showing reasonable care, have to also prove that nuisance was inevitable and unavoidable part of the activity
	+ **Statutory immunity**: where statute specifically abolishes liability in private nuisance for a certain activity
* 2) Consent: (hard to succeed) Successful if show that D consented to the conduct or actively encouraged it
* 3) **Prescription**: like Court recognizing and protecting an easement to carry out the activity
	+ Example: If A has operated his smelly BBQ every week for 20 years without complaints from B, then B complains in the 21st year. B had implicitly consented for the first 20 years
* 4) Contributory negligence: (very rare, P not usually able to move away or do anything about the nuisance)
	+ Courts very unwilling to require P to take steps to reduce the nuisance (e.g. keeping windows closed)
	+ No defence to claim that D came to the nuisance (*Sturges*)

## Remedies for Private Nuisance

* 1) **Injunction**: most common remedy, and considerations will take into account all circumstances
	+ A) Prohibitory: requires complete stop of activity (e.g. don’t ever make noise at all)
	+ B) Mandatory: requires adjusting activity to reduce/eliminate nuisance (e.g. don’t make noise at 7 am)
	+ C) Interlocutory/Interim: requires P to show the issues are serious and that they will suffer irreparable harm if not granted (e.g. if excessively damaging noise but case is delayed, can ask for this in meantime)
* 2) Damages: awarded after damage/nuisance done (maybe in combination with injunction), for any physical harm done, for both past and future losses
* 3) **Abatement**: self-help; must be reasonable, and can’t cause excessive damage to land
	+ Limitation: where abatement requires entry into D’s property (e.g. to put out a fire), P must give proper notice unless it’s an emergency (e.g. fire that threatens life or other’s property)

# Strict and Vicarious Liability

* Torts where liability can be imposed without the need for proof of fault
* Strict Liability for Escape of Dangerous Substances from *Rylands v Fletcher*

## Elements of Strict Liability

* 1) **Non-natural use of the land**: dangerous, extraordinary, and of no general benefit to community
	+ Q: Did this particular use of the land create an increased danger?
	+ Requirement no longer limited to just artificial/non-natural uses of land
	+ Some activities so inherently dangerous that it’s assumed land use was non-natural (e.g. storing water in bulk, manufacturing/using explosives, storing nuclear materials, storing/using bio agents)
	+ Where less obvious dangers, courts assess based on: land use’s degree of danger, utility/normality, time/space circumstances (starting to resemble negligence assessment of fault!)
* 2) Escape of something likely to cause **mischief**: mischief implied since already non-natural use that’s dangerous
	+ *Read v J. Lyons*: Strictly applies requirement of escape; if P was injured on D’s land, then must claim under *Rylands* rule
		- Interesting P argument: since liability caused by harm from ultra-hazardous activity, D should be liable even where loss is on the property
* 3) Damage: Q – Is there still some limit on liability once the previous two elements have been established?
	+ *Cambridge Water v Eastern Counties*: remoteness applies as a limit; court held that there’s no liability for the unforeseen consequences of a non-natural rule
* Key defences to an action under the *Rylands* rule:
	+ 1. Consent: No liability where P expressly or impliedly consented to D’s non-natural use of P’s land
		- Sufficient to show that P knew of land’s dangerous use and entered/remained in place of danger
	+ 2. Mutual Benefit: less likely to view activity benefiting D as a non-natural use (e.g. *Tock*: sewer system)
	+ 3. Default of P: where escape is in part the responsibility of P; defence is a complete bar to recovery
		- Most legislation that has modified rules of contributory neg don’t apply here
	+ 4. Act of Stranger/God: intervening events so unforeseeable that D couldn’t have guarded against them
		- Seems to contradict the idea that *Rylands* rule is of strict liability

#### Rylands v Fletcher [1868] HL

|  |  |
| --- | --- |
| Facts | P paid contractors to build a reservoir on his land. They discovered old coal shafts and passages under the land filled loosely with soil and debris, which joined up with D's adjoining mine. They left them. After being filled for the first time, P's reservoir burst and flooded D's mine, causing damage. D pumped the water out, his pump burst, and the mine again flooded. A mines inspector was brought in, and found the sunken coal shafts. D brought a claim against P. P/A; D/R. |
| Ratio | One who lawfully brings something onto his land, which though harmless while it remains there will naturally do mischief if it escapes the land, will be strictly liable for its escape. |

## Vicarious Liability

* Accounts for those certain situations in which the law of torts holds one person strictly liable for another’s acts
* Elements for vicarious liability (most commonly seen in employer-employee relationships):
* 1) Harm caused by an employee (under employer’s direct control and supervision), not an independent contractor: look for evidence that employer was empowered to tell employee how, when, where to do work
	+ Supplemented control test with others:
		- *Montreal*: enhanced control test by reference to **entrepreneur test**: adds new factors that can be taken into account like ownership of tools, chance of profit, risk of loss (all treated as evidence that the person is an independent contractor)
		- **Organization test**: focuses on how much employee has integrated into employer’s business org.
		- *671122 Ontario v Sagaz* considered relationship between these tests: questioned whether the person who has been engaged to perform the service is performing them as a person in business on his own account (Major J.)
		- Factors to help make this determination: (i) level of control employer has over activity, (ii) whether worker provides his own equipment, (iii) whether worker hires his own helpers, (iv) degree of financial risk assumed by the worker, (v) degree of responsibility for investment or management by the worker, (vi) worker’s opportunity for profit in performing the activity
* 2) Harm was caused by the employee in the course of his employment: shows connection to wrongdoing
	+ If carried out for purpose of the employment, wrongful or unauthorized conduct can still be held to be within the course of employment
	+ That conduct is expressly prohibited by employer doesn’t necessarily rule out liability
	+ **Express prohibitions** that forbid any work being done are effective, but prohibitions on the way in which work is done are not
		- *CPR v Lockhart*: Prohibiting employee from driving car as part of work = effective, prohibiting driving uninsured car = not effective (i.e. if he drives and causes harm, employer still liable)