

NEGLIGENCE- idea that fault can be attached to actions even if there is no intent to harm; encourages behavior consistent with societal values, deters negligent conduct.

*Main policy concern: courts do not want to create indeterminate liability for an indeterminate amount of people

Elements (to be proven by P on BoP)

- **Duty of care** (Anns Test)
 - Is there already an established or analogous duty of care?
 - 1) Was it reasonably foreseeable that D's carelessness would cause harm to P? (consider P as a broad category of people)
 - 2) Is the relationship between P and D sufficiently close and direct? (Proximity analysis includes smaller policy arguments)
- if 1+2 are established = prima facie duty of care. D has burden for 3:
 - 3) Are there any broader policy reasons that would negate the duty of care?
- **Standard of care**
 - Reasonable person standard in all the circumstances, was breached by D (consider specific circumstances)
- **Causation**
 - D's carelessness caused the harm to P
- **Remoteness of Damages**
 - D will only be held liable for foreseeable injuries (diff from intentional torts)

Duty of Care:

Donoghue v M'Alister: (decomposing snail in ginger beer) Manufacturer owes a duty of care to the ultimate consumer; idea that people must take reasonable care to avoid acts or omissions which could be reasonably foreseen to injure another person.

Dunsmore v Deshield: (mislabeled Hardex glasses broke during touch football) Optometrist and manufacturer both had a duty to test the lenses and breached the standard of care; Hardex likely would not have broken with same impact, ordinary lenses caused the injury = negligence.

Cooper: (investors in risky company, gov't agency shut company down) Reasonably foreseeable that agency's carelessness would harm investors; however, lack of proximity, no duty identified in statute. Policy reasons to negate: agency has duty to public as a whole, quasi-judicial function, taxpayers should not be liable for paying back investors.

Hill v Hamilton-Wentworth Police: (tunnel vision investigation) Police owe a duty of care to their suspect, but there is a flexible std of care = reasonable officer at that time, has ongoing duty. Std of care is met in this case, judgment call to pursue new evidence or not.

Special Duties of Care:

- No general duty to act, people are not liable for failing to act
- However- duty can arise if there is a special relationship btwn P and D

Osterlind v Hill: (canoe rental, intoxicated renter fell out of boat and drowned) No duty to rescue, no negligence; person was able to call for help, was not in immediate danger.

Matthews v Maclaren: (boat guest fell overboard, captain attempted rescue but was unsuccessful) Special relationship btwn captain and guest = duty to act, captain's actions were not reasonable = negligent; however, cannot establish causation- victim likely died from cardiac arrest/shock due to the cold water.

- Person who voluntarily attempts a rescue can be held liable if they do not act reasonably (Good Samaritan Act protects rescuers from liability unless they are grossly negligent)

Crocker v Sundance Resorts: (intoxicated participant in tubing competition became quadriplegic) Resort is responsible for the injury- set up an inherently dangerous competition for promotional purposes, did not take all

reasonable steps to prevent a visibly intoxicated person from participating. Duty to act, failure to act, and causation are established; contributory negligence for P getting drunk and having some knowledge of the danger involved.

Childs v Desormeaux: (someone paralyzed by drunk driver leaving a house party) Social hosts of parties do not owe a duty of care to a person injured by an intoxicated guest. Reasonable foreseeability is satisfied, but proximity is not. Policy = concern about indeterminate liability for an indeterminate number of people, autonomy of guests must be protected.

Duty of care exists in a commercial setting:

- Commercial host is able to/required to monitor alcohol consumption
- Sale and consumption is strictly regulated; bar has liquor licensing rules, employees receive special training, etc.
- Contractual relationship btwn bartender and patron = incentive to serve drinks and make a profit

Proximity analysis- types of relationships which are special enough to impose a duty to act:

- **1) intentional invitation of 3rd parties to a risky situation** (i.e. **Crocker**)
- **2) paternalistic relationship btwn D and P** (i.e. parent-child, teacher-student)
- **3) D exercises a public function, is a commercial host**

Principles that apply to these relationships:

- **Creation or control of risk-** D might be liable if conduct implicates them in creating or exacerbating the risk (i.e. serving alcohol, aware that person will be driving home)
- **Expectations/Reasonable reliance-** it is reasonable to expect a commercial host to prevent a drunk person from driving, not reasonable to expect a social host to monitor guests on behalf of the public

Standard of Care:

Arland v Taylor: (P injured in car accident, jury told to assess std of care based on their own perceptions) Clear duty of care btwn drivers; std of care = reasonably prudent but not perfect driver in all the circumstances, reasonable person = average person/ordinary intelligence.

Bolton v Stone: (P walking next to cricket ground, was struck and hit by ball) Must consider degree of risk/probability of risk; very remote possibility of damage in this case. Stadium had taken reasonable steps to prevent damage, met the std of care.

Matharu v Nam: (golf shot rebounded off trees and hit P in eye, D did not yell fore) Shot was reasonable, no duty to call "fore"; no breach in D's std of care. Golf course planted tree barrier, took reasonable steps to mitigate risks; no breach in std of care.

- Occupier's Liability Act- imposes a statutory duty of care on the golf course, but negates duty for risks that are willingly assumed by patrons
- Court says there is still a duty to mitigate unusual risks, clause cannot exempt the golf course from liability completely

Causation:

- **Factual causation** = part of a sequence of events necessary to cause result
 - But-for test: **But for D's negligent act, would P's injury have occurred?**
 - Negligent act only needs to be a cause, does not need to be the sole or most important cause
- **Legal causation** (remoteness) = narrows test; some factual causes too remote to attach liability

Kauffman v Toronto Transit: (P fell on escalator, handrail design was negligent) No causation; no evidence that anyone was grasping for the handrail, no evidence that a different handrail would have prevented the injury.

Barnett v Chelsea & Kensington Hospital: (doctor sent patient home, he died from arsenic poisoning) Std of care was breached, but no causation; man would have died in hospital anyway.

Walker Estate v York Finch Hospital: (HIV from tainted blood, claim that Red Cross was negligent in screening donors) Donor pamphlet breached std of care, causation is established since Red Cross “materially contributed” to P’s injury. High-risk donor was enough of a contributor to satisfy causation, likely would not have donated if pamphlet was more detailed.

Material contribution test (modification for factual causation): **Did D’s negligence materially contribute to the risk of P’s injury (beyond de minimis)?**

- Limited to cases where there are multiple tortfeasors/it is impossible to prove but-for
- Must show causative relationship between the group’s conduct as a whole and the injury that resulted (but-for the actions of the group, injury would not have occurred)

Clements v Clements: (man speeding on overloaded motorcycle with punctured tire in wet weather, crashed and injured wife) D’s negligence contributed to accident; however, material contribution test not appropriate here. Only 1 D, retrial required with application of but-for test.

- Note that scientific proof is not required for factual causation, judge is permitted to make common sense inferences

Negligent Misrep:

- Deals with statements made rather than conduct (similar to defamation)

Elements:

- 1) Statement was negligent
- 2) P relied on statement (causative relationship)
- 3) P suffered some loss

Duty of care test (modified from Anns test) = **reasonable reliance**

- D ought reasonably to have foreseen that P would rely on their representation
- Reliance by P was reasonable in the circumstances

Policy concerns: Charter value of freedom of expression, do not want too many limits on speech; potential for indeterminate liability and losses, speech travelling quickly over long distances.

Hercules Management v Ernst & Young: (audited financial statements were prepared negligently by accountants, relied upon by shareholders/investors) Reasonable reliance test is met, but there is potential for indeterminate liability. Duty of care must be limited.

- 1) must establish reasonable reliance = prima facie duty of care
- 2) in the context of this type of neg misrep, is there a policy problem where the scope of liability would be too large?
- 3) If there are policy issues, then 2 additional requirements must be met:
 - a) D knew the identity of the person or classes of persons who would be relying on their advice
 - b) Reliance losses stemmed from the particular transaction in which the statement was made

In **Hercules-** D was aware that class of shareholders would rely on info; however, purpose of statement was not to promote reliance, specific transaction criteria is not met.

*purpose of audit reports: to allow shareholders, as a group, to oversee the corporations’ affairs

*duty of care is negated by policy: possible imposition of indeterminate liability on auditors outweighs the deterrence of negligent conduct.

5 general indicia of reasonable reliance:

- D had financial interest in transaction
- D was a professional with special skill, judgment, knowledge
- Advice was provided in course of D’s business
- Info was given deliberately, not on a social occasion
- Info was given in response to specific inquiry or request

Tort Liability of Public Authorities:

- Crown Proceedings Act- gov't can be sued
- Problem with gov't lawsuits- money spent satisfying judgments is drawn away from other uses (health care, education) or generated through higher taxes
- There is some immunity:
 - **Cannot sue government in its adjudicative role**
 - **Cannot sue government for purely political decisions** (unless these decisions are not bona fide- i.e. too vague, broad or arbitrary)
- Note that gov't can create legislation- to broaden or narrow its liability. Some legislation explicitly creates a gov't duty of care (i.e. Child Protection Act- **KLB v BC**).

Bradley v Fisher: (P was lawyer, acted in contempt; D was judge, suspended P from practicing in crim court and Supreme Court) D has judicial immunity, cannot be held liable.

Just v BC: (boulder fell on car driving up to Whistler) Can sue the government for operational but not political decisions; broad-based legislation creating general program for safety = operational. Retrial to determine whether the inspection program was reasonable, considering availability of funds.

- Political decisions = higher level budget allocation, diverting money from lighthouse services into air traffic control
- Operational decisions = general safety and inspection programs

KLB v BC: (abuse in foster home) Gov't was negligent- had statutory duty to act in child's interest, breached std of a reasonable parent, caused the abuse. Gov't not vicariously liable- foster homes are autonomous, private, independent.

Vicarious Liability: holding someone responsible for D's conduct

1) relationship btwn tortfeasor and person being sued- must be sufficiently close

- employee-type relationship = sufficiently close
- independent contractor relationship = not sufficiently close
 - relevant factors: own equipment, own helpers, managerial responsibilities ?

2) tort must be sufficiently connected to the tortfeasor's assigned tasks

- basically engaged in job activities = within assigned tasks

*vicarious liability is a common law concept, has same limitation period as tort committed (i.e. sexual battery = no limitation period)

*negligence limitation period is set by the gov't = 2 years for sexual battery

BC v Imperial Tobacco: (gov't claim against tobacco co for existing and reasonably expected health care costs) Act created rules for this lawsuit, favoring the gov't. Judicial independence/rule of law were not violated. Result is policy-driven, in the public interest; Act is valid and tobacco co is liable.

- Reverse burden of proof: presumption that the suppression of information led to more smoking which led to more disease; onus on tobacco co to rebut the presumption
- Class action: based on broad sociological and statistical evidence, no particular claim needs to be proven

R v Imperial Tobacco: (feds brought in as a 3rd party D, claim of negligent misrep) Marketing of light cigarettes, addressing health concerns = policy decision; gov't cannot be held liable. Even if it was operational- lawsuit too broad, potential for indeterminate liability

- No duty of care btwn gov't and individual plaintiffs, potential for duty btwn gov't and tobacco co
- Duty of care is subject to:
 - Potential for indeterminate liability, policy factors
- Core policy decision involves social, economic and political considerations
 - Exceptions = irrationality, bad faith

Abuse of Public Office

Roncarelli v Duplessis: (revocation of liquor license based on religious discrimination) “Discretion” is not unfettered, does not include revocation for a sinister or irrational purpose. D acted outside jurisdiction and scope of discretion; implied criteria for any use of authority to be in good faith.

Odhavji Estate v Woodhouse: (police officers shot someone, did not comply with investigation) Defines tort quite broadly, potential for elements to be met here, retrial required.

- Tort arises in 1 of 2 ways:
 - A) conduct specifically intended to injure a person or class of persons
 - B) public officer who acts with knowledge that their action was unlawful and likely to injure P
- 2 elements:
 - 1) deliberate and unlawful conduct in job capacity
 - 2) aware that conduct was unlawful and likely to harm P

Product Liability

Can arise in a number of ways:

- 1) Giving a product an unnecessarily dangerous design
- 2) Negligence in the manufacturing process
- 3) Failure to warn about a dangerous condition

Hollis v Dow Corning Corp: (breast implant rupture) Manufacturer liable for failing to warn of risks of post-surgery rupture; did not discharge duty by properly warning the doctor.

Causation questions:

- 1) would she have consented to the surgery if she had the information (**subj test**)? No
- 2) would the doctor have given the information to her? Not relevant- since doctor did not have the information in the first place

Duty to warn:

Manufacturer has a general duty to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge

- Continuing duty- must warn of dangers discovered after the product has been sold
- Warning must be sufficiently detailed to give consumer a full indication of the specific dangers arising from use
- For medical products, std of care to ensure warning is necessarily high

Learned Intermediary rule: manufacturer may satisfy its duty to warn the consumer by warning the learned intermediary of the risks; consumer is placing primary reliance on the intermediary to give them that information

Reid v Ford Motor Co: (faulty module in car causing stalls) Possible negligence of Ford, did they know or ought to know that the module would overheat? Case proceeds as a class action.

Class Proceedings Act:

- A) pleadings must disclose a cause of action
- B) there is an identifiable class of 2 or more persons
- C) claims of the class members raise common issues
- D) class proceeding would be preferable for the fair and efficient resolution of issues
- E) representative P- must be typical, must not raise any individual issues that conflict with the common issues of the class

Defences to Negligence

Contributory Negligence- allows for the apportionment of liability according to parties' relative degrees of fault, prevents all-or-nothing defences

Walls v Mussens Ltd: (mechanic negligently started fire in P's service station, P arrived and joined others throwing snow on it) P's reaction was merely to do what the others were doing, something that an ordinarily prudent man might reasonably do in the stress of emergency. Failure to use fire extinguisher- not contributory negligence.

- Agony of the moment rule
- Where P is confronted by something caused solely by D, court gives broader scope to what is reasonable in the circumstances

Gagnon v Beaulieu: (P injured in car accident, not wearing seatbelt) **General duty to protect yourself from dangerous situations**- was breached; failure to wear a seatbelt = contributory negligence. Onus on D to prove that seatbelt was not worn and injuries would have been prevented or lessened if it had been worn (causation piece).

Mortimer v Cameron: (boys roughhousing in stairway, 1 fell through wall and became paralyzed) Both boys were negligent; however, **negligence is only actionable with respect to harm within the scope of risk of the offending conduct**. Accident that occurred was beyond reasonable contemplation. Building manager/city = 60/40 apportionment (ongoing duty vs. one-time duty?)

Cempel v Harrison Hot Springs: (girl climbed over fence, fell into source pool) Resort/girl = 60/40 apportionment. P breached duty to protect self from danger, falling into hot water was within scope of risk. Resort breached duty under Occupiers Liability Act- no warning signs, flimsy fence, unusual danger. Resort bears more responsibility b/c it has more resources, ongoing duty to property and customers, was better able to foresee the risk.

- Degree of fault more important than degree of causation; court rejects distinction between active and passive participant

Voluntary Assumption of Risk- complete defence (all-or-nothing), confined to very narrow circumstances (i.e. sports participation?)

- Burden on D to prove that P (expressly or by necessary implication) agreed to exempt D from liability for any damage suffered

Dube v Labar: (P/D drinking and driving) Volenti is available to a D driver, but will only apply in rare circumstances. Appeal court shows deference to jury finding of volenti in this case.

Inevitable Accident- D did not breach std of care on BoP, no one is at fault

Rintoul v X-ray and Radium Indust Ltd: (brakes allegedly stopped working, D crashed into P's car) Assumption that there was negligence, onus on D to prove that failure of brakes could not have been prevented and collision could not have been avoided by reasonable care. Not enough evidence to displace assumption, inevitable accident defence does not apply.

Damages

Nominal = vindicating P's rights where he has suffered no injuries (not available in negligence cases)

Compensatory = putting P in position he would have been in if the tort was not committed

- **Pecuniary damages** = compensation for tangible injuries
 - future care, lost earning capacity
- **Non-pecuniary damages** = intangible- pain and suffering
- **Aggravated damages** = intangible- humiliation and distress as a result of D's actions (rarely appropriate in negligence cases)

Punitive = 4 purposes: punishment, deterrence, denunciation, relieving wrongdoer of profits made from the wrong (rarely appropriate in negligence cases)

Principles:

- Damage must be established by P on BoP
- General duty of P to mitigate
- Lump sum payments are efficient but hard to estimate (ongoing assessment would be more accurate, but stressful and expensive)

Andrews v Grand & Toy Alberta: (quadriplegic in car accident, damages award reduced on appeal) Reduction of award must be justified by an error of law or a clearly unreasonable estimate, was not appropriate in this case.

- Future care- takes into account life expectancy (post-accident), contingencies of life, cost of special equipment. Home care not unreasonable.
- Lost earning capacity- takes into account level of earnings, length of working life (pre-accident), contingencies, deduction for basic necessities of life.
- Non-pecuniary losses- additional money to make life endurable = **\$100,000 cap** for personal injury claims (~\$300,000 in today's dollars)

Hill v Church of Scientology: No cap on damages for defamation, general damages award is mostly non-pecuniary. Aggravated and punitive damages awarded against Church- for malicious intent, misconduct subsequent to trial.

Remoteness of Damages

- No liability if connection between breach and loss is too remote
- Controls scope of liability for practical policy reasons
- Reasonable foreseeability test

Wagon Mound (No.1) v Morts Dock: (oil spill, dock fire) Fire was outside the scope of reasonable foreseeability, D can only be held responsible for probable results of his actions.

Hughes v Lord Advocate: (lamp down manhole explosion) Type of injury (burn) was foreseeable. Manner in which the injury occurred does not need to be probable, as long as the injury itself was probable.

Smith v Leech Brain & Co: (burn on lip became cancer) Thin-skull rule applies, tortfeasor must take his victim as he finds him. If burn was foreseeable and caused the cancer, D is liable.

Maronato v Franklin: (minor car accident, major personality change) Thin-skull rule applies. Physical injury was foreseeable, D is liable for all consequences.

Wagon Mound (No. 2) v Miller Steamship Co: Threshold of reasonable foreseeability- shifts from probable to possible, more P-friendly. Fire was a foreseeable real risk, although remote; D is liable.

Assiniboine South School Division v Greater Winnipeg Gas Co: (auto-toboggan struck gas pipe, explosion at school) Extent of damage and its incidence need not be foreseeable as long as general damage was foreseeable.

Mustapha v Culligan of Canada Ltd: (flies in water bottle) General test for remoteness = was the risk probable (real risk that D would not brush aside as farfetched)? For purely psychological damage = **was it reasonably foreseeable that a person of ordinary fortitude (without particular vulnerabilities) would have serious psychological injury?**

- Thin-skull rule is very limited for purely psychological damage
- Probable test- for all injuries, more D-friendly