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# DUTY OF CARE

# Reasonable foreseeability

## Foreseeable risk of injury

### Moule v NB Electric Power Comm., *1960 SCC*

|  |  |
| --- | --- |
| **F** | Π/A: little boy, attached boards to tree making makeshift ladder + platform that crossed over to 2nd tree – climbs up tree, steps on rotten branch, gets electrocuted  Δ/R: power company |
| **I** | Was a child climbing high enough to reach the power lines a foreseeable risk that the power company had a duty to guard against? |
| **D** | No, appeal dismissed |
| **RA** | **Δ UNDER DUTY TO TAKE PRECAUTIONS BUT ONLY AGAINST ANY FORESEEABLE CONSEQUENCE OF THE PRESENCE OF DANGER THAT INVOLVES A REASONABLE PROBABILITY OF CAUSING HARM. A SEQUENCE OF EVENTS SO FORTUITOUS AS TO BE BEYOND THE RANGE OF FORESEEABLE RESULTS THAT A REASONABLE PERSON WOULD ANTICIPATE DOES NOT FALL WITHIN THIS DUTY.** |
| **RE** | * Kids climbing trees = probable; high voltage wires = risky ∴ co. should take such things into acc’t but that’s not the same as holding them responsible for every accidental contact w/ its wires by children who are daring and adventurous * R took adequate precautions by placing wires @ 33.5 ft + trimming branches to ensure wires were visible |

### Amos v NB Electric Power Comm., *1976 SCC*

|  |  |
| --- | --- |
| **F** | Similar to Moule but Π climbing tree that hid wires + wires were at lower height  No ladder; in residential area  Π climbed tree and got severe electric shock |
| **I** | Was the injury foreseeable ∴ imposing DOC on Δ? |
| **D** | Yes. |
| **RA** | **AN ACCIDENT WAS FORESEEABLE AND ALMOST INEVITABLE GIVEN ACTIVE BOYS, HIDDEN WIRES, AND THE FACT THAT THE TREE WAS RIGHT IN FRONT OF Π’S HOUSE.** |
| **RE** | Distinguished from Moule:   * Contact between tree and wires could’ve been avoided by better maintenance (practice was trimming trees every 4-7 yrs) vs. Moule had adequate maintenance * Growth of tree concealed wires * Boy climbing tree caused tree to bend and touch wires * No crossing over into second tree or putting up planks to enable climbing higher |
| **ETC** | Shows that this is a fact-specific question and the distinction between Amos and Moule is really about reasonableness: not just is it foreseeable but is it reasonably so |

## Foreseeable Plaintiff

### Palsgraf v Long Island Ry. Co., *1928* *NY CA*

|  |  |
| --- | --- |
| **F** | * Π/R: ticket purchaser; Woman standing on train platform // Δ/A: Railway co. * Π waiting on platform when train stopped + two men hopped on; they seemed unsteady so 2 of the train workers tried to assist one onto the train and accidentally knocked his parcel out of his hands * Parcel contained fireworks wrapped in newspaper; went off when they hit the ground * No way employees could’ve known what was in pkg * Force of blast knocked down some scales several ft away which fell + injured Π |
| **I** | Was the Π foreseeable? |
| **D** | Appeal allowed. |
| **RA** | **THERE IS A REASONABLE LIMIT ON THE EXTENSION OF DUTY IN NEGLIGENT ACTS – IF THE HARM IS NOT WILFUL THEN Π MUST PROVE THAT THE ACT HAD POSSIBILITIES OF DANGER SO APPARENT AS TO ENTITLE HIM TO BE PROTECTED AGAINST THE ACT.** |
| **RE** | * Even if employees knew contents of pkg, this outcome still not reasonably foreseeable * Diff between wrong and tort: “If no hazard were apparent to the eye of ordinary vigilance, an act innocent and harmless, at least outward seeming, with reference to her did not take itself to the quality of a tort b/c it happened to be a wrong.” |

### Nespolon v Alford, *1998 ONCA*

|  |  |
| --- | --- |
| **F** | Π suffered nervous shock after striking and killing drunk teen who’d fallen on highway; sued teen’s estate and 2 of teen’s acquaintances who had promised police to drive him back home  Teen asked to be dropped off at side of road + acquaintances complied  Π claimed it was foreseeable that if teen abandoned on side of highway, he would stumble onto road, posing risk to himself and others |
| **D** | Claim dismissed; unforeseeable that dropping teen off would eventually cause nervous shock to someone in Π’s position; acquaintances owed no DOC to Π. |

### Haley v London Electric Board, *1965 HL*

|  |  |
| --- | --- |
| **F** | Δ dug hole outside Π’s house and intended to refill by nightfall; constructed a 9” barrier around the hole  Blind Π tripped over barrier, fell in, rendered deaf – sued Δ in negligence  Δ denied DOC claiming it was only req’d to take precautions suitable for able-bodied people so barrier was adequate |
| **I** | DOC? |
| **D** | Reasonably foreseeable that a blind person might pass along a particular sidewalk. |
| **RE** | A low barrier in an unusual place is a hazard; a 2 ft fence, which wouldn’t have been difficult to provide, would be more than adequate  1/5 of people in London are blind – they’re foreseeable. |

# Proximity

### Childs v Desormeaux, 2006 SCC

|  |  |
| --- | --- |
| **F** | Δ/R at house party; hx of heavy drinking; drank 12 beers that evening  Hostess walked Δ out to car and asked if he was okay (no outward signs of intox)  Drove away w/ 2 passengers and collided head-on w/ another car – killed one passenger of other car and severely injuring Childs, a teenager  Δ pled guilty; Π/A now suing hosts of party saying they’re liable for her injuries |
| **I** | 1. Is the host at a party liable for the actions of an inebriated guest? 2. Do the hosts owe DOC to parties that might be injured by inebriated guest’s conduct? |
| **D** | Appeal dismissed. |
| **RA** | **A SOCIAL HOST OF A PARTY WHERE ALCOHOL IS SERVED IS NOT UNDER DOC TO MEMBERS OF THE PUBLIC WHO MAY BE INJURED BY A GUEST’S ACTIONS, UNLESS THE HOST’S CONDUCT IMPLICATED HIM OR HER IN THE CREATION/EXACERBATION OF THAT RISK.** |
| **RE** | Distinguishable from cases of commercial alcohol providers being held liable:   * Comm’l hosts have direct control over alcohol consumption of their patrons * V. strict leg’ve rules governing comm’l hosts – none exist for private parties * Contractual rel’nship between comm’l hosts + their patrons – fund’lly diff from range of rel’nships w/in private parties   **∴ novel case – goes through *Anns/Cooper* test**  **1(a) Foreseeability:** No; no outward signs of intox  **1(b) Proximity:** Nothing that links party hosts to 3rd-party users of highways // policy reasons for not holding owners of private property liable for subsequent actions of their visitors   * Plus, when the conduct alleged against the defendant is a failure to act, foreseeability alone cannot establish a duty of care. * Π argues that organizing party = creating risky situation and ∴ failure to act does not protect them from liability * would be true if it were the case but McLachlin finds that the hosts did not create a "risky situation" ∴ failure to act was merely nonfeasance. * positive duties of care exist in situations of paternalistic relationships, and when a defendant is exercising a public function that includes liability to the public at large – but neither of these apply to the case at bar * partygoers do not check their autonomy at the door of the party – they remain responsible for their own actions. * Unless partygoers are **reasonably relying on the hosts for their safety** (such as a party on a boat, etc.), partygoers are responsible for the outcomes of their own actions   → No need to go to second step of [*Anns*](http://casebrief.wikia.com/wiki/Anns_v_Merton_London_Borough_Council) test (public policy) |

# Residual Policy Considerations:

Cts leery of justifying what residual policy considerations might exist

Can either strengthen or weaken DOC:

|  |  |
| --- | --- |
| Considerations to negate DOC | Considerations to strengthen DOC |
| * Discouraging beneficial activities (good Samaritans, rescuers) * Creating unfair deterrent to a legit activity (carrying on a business, living ordinary life) | * Discouraging harmful activities (unethical or illegal behaviour * Creating a deterrent to immoral behaviour |

# SPECIAL DUTIES OF CARE – AFFIRMATIVE ACTION

**Misfeasance:** negligent conduct *vs* **Nonfeasance:** failure to take positive steps to prevent harm

* Reluctance to impose liability for nonfeasance b/c of value placed on personal autonomy
* “The law permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy” (Childs)
* more difficult to prove negligence by omission to act vs negligent positive acts
* Largely the same analysis as for misfeasance analysis except that the ct is less likely to find DOC in nonfeasance circs

**3 Established Positive Duty Cases:**

1. A duty to rescue (See Osterlind)

2. A duty to control the conduct of third parties; paternalistic rel’nship w/supervision and control (See Childs or Sundance)

3. Duty to fulfill gratuitous obligations

→ these don’t constitute an automatic duty. For example, not every duty to rescue case will have the rescuer owing a duty to rescue: this analysis still needs to happen w/in Anns/Cooper

* Based on detrimental reliance – where an individual has taken responsible for someone, inducing them to rely on this duty
* Consider: what is the **source of the duty**? **How far does the duty go/what is the limit on it?**
  + **There is no CL duty to assist**
  + ∴ the duties have to come from somewhere e.g. consent, control, inducement, contract

# Duty to Rescue

**General principle:** Based on the nature of the parties’ relationship, parties must take all reasonable steps to assist

* That is, a duty to act is not absolute; D required only to take reasonable care for another’s safety
* A duty to act will be assumed where a positive action begins; liability for negligent conduct will follow
* Based on an objective test of the reasonable person in the position of the D under the circumstances
* If you start to rescue, you may be liable for not rescuing competently but if you change your mind and don’t complete the rescue, won’t be held liable
* Negligence distinguishes between conduct that makes things worse and conduct that fails to make things better. If it only fails to make things better, the cause of the injury is the accident and not the failure of the D to rescue

|  |
| --- |
| Good Samaritan Act, S.O. 2001, ss. 2(1) and 2(2) |
| No liability for emergency aid, administered by either a civilian or a medical professional unless gross negligence |

|  |
| --- |
| Osterlind v Hill (Mass SC 1928) ***capsized canoer dies while Hill watches*** |
| * Amateur canoist who rented canoe from Hill * Canoe was fine; capsizes soon after rental begins * Hangs onto canoe screaming for help for 30 mins; Hill sitting on the shore, watching the spectacle and didn’t do anything * Is there a duty owed by Δ beyond the obvious DOC of the canoe being safe and serviceable? * Failure of Δ to respond to Π’s cries is immaterial; no legal right of Π was infringed |

Matthews v MacLaren 1969 ON HC (*two-men-die-after-falling-off-MacLaren’s-boat*)

|  |  |
| --- | --- |
| **D** | D’s negligence was not the cause of Matthew’s death and there can be no liability. |
| **RA** | **POSITIVE DUTY TO RESCUE EXISTS IN SPECIAL RELATIONSHIP WHERE THE D HAS UNDERTAKEN SOME RESPONSIBILITY FOR THE P’S SAFETY BUT ALL ELEMENTS OF NEGLIGENCE MUST STILL BE CONSIDERED – LACK OF CAUSATION WILL NEGATE A BREACH OF THE STANDARD OF CARE.** |
| **RE** | **Duty:**   * Matthews fell overboard due to his own misfortune or carelessness; not due to the negligence of the D * Negligence law holds no general duty to come to the rescue of a person who finds himself in peril from a source unrelated to the D * But, does a “special relationship” exist between carrier and passenger? Yes, ct extends the quasi-contractual duty to a master of a pleasure boat and invited guest should req’re a legal duty to aid and rescue * Also, leg’n in place to render assistance to any person found at sea and in danger of being lost (s. 526 of *Canada Shipping Act*)   + Boat owner/operator undertakes a responsibility by taking passengers out onto their boat   **Standard/Breach:**   * Expert evidence show M should have turned boat around; he was an incompetent operator and negligent in his operation of the boat → the standard rescue method which we can reasonably expect Δ to have learned was not used * Aggravated by the PO testimony that M’s ability to drive was impaired by alcohol   **Causation:**  However, based on the conditions present, not demonstrated on a BoP that M’s negligence was the cause of M/H’s deaths – per facts regarding COD, Horsley’s death (younger man) and that Matthews was entirely unresponsive, proper boat operation would not have resulted in survival |

|  |
| --- |
| Stevenson v Clearview Riverside Resort, 2000 |
| Claim dismissed against **off-duty ambulance attendant for failing to advise civilian rescuers** on the proper method of stabilizing the victim of a suspected spinal injury;  Δ observed the scene but didn’t tell the rescuers that Π should’ve been left in the water once it was clear he could breathe.  Ct concluded here was no special rel’nship between Δ and a party req’ing assistance b/c at the time she was simply a private party who had no duty to assist. For friends, ct applied ‘agony of the moment’ rule(?) – given their limited first aid training and urgent circs, it wasn’t negligent to drag Π from water to ensure he was breathing |

→ Cts have recognized that docs can’t abandon a patient ∴ cannot discontinue care w/o making adequate arrangements for patient’s ongoing medical treatment

***Lowns v Woods, (1996) NSW CA:***

Doc held to owe duty of care to leave office and render assistance to Π who was suffering epileptic seizure several hundred metres away.

***Criminal Code ss 129(b) and 252 [narrow provisions req’ing an individual to stop and render aid]***

s.129(b): individual, in absence of a reasonable excuse, must comply w/ an officer’s request for assistance in making an arrest or preserving the peace

s.252: except in unusual circs, driver who is involved in an accident req’d to stop and offer assistance if a person is injured (some prov’l highway traffic acts contain comparable provs)

# 2. Duty to Control the Conduct of Others

## a) Liability for the Intoxicated

*Crocker v Sundance Northwest Resorts Ltd 1988* SCC(*drunken tuber*)

|  |  |
| --- | --- |
| **HX** | SNR held 75% liable; C was contributorily negligent. |
| **F** | C and friend entered tubing competition, did not appreciate they were signing a waiver. On day of competition, got drunk again. After C won first race, C drank more. SNR owner asked C if he was in any condition to compete again. At top of hill for 2nd heat, SNR manager suggested that C should not race. C flipped off tube, was rendered a quadriplegic. |
| **I** | **Does a ski resort have a duty to prevent an intoxicated person from using its facilities?** |
| **L** | *Jordan House Ltd. v. Menow*: leading SCC authority on imposition of a duty to take positive action to protect another – Ct held that a licensed tavern owed DOC to intox patron and was liable when patron ejected and struck by car while stumbling home |
| **D** | Trial judgment restored + new trial ordered to assess damages |
| **RA** | **SNR MUST TAKE RESPONSIBILITY AS THE PROMOTER OF A DANGEROUS SPORT FOR TAKING ALL REASONABLE STEPS TO PREVENT A VISIBLY INCAPACITATED PERSON FROM PARTICIPATING** |
| **RE** | **Duty of care:**  Foreseeable: One is under a duty not to place another person in a position where it is foreseeable that they could suffer injury; Π’s inability to handle the situation in which he has been placed, either through youth, intox, or other incapacity, is an element in determining how foreseeable the injury is   * Clearly SNR knew that Π was intox (was asked twice if he was fit to contin); and also provided him liquor during the event; they were also in charge of the way the event was being run + the contest run for profit   Proximity:Nexus is close enough that SNR must take responsibility as the promoter of a dangerous sport for taking all reasonable steps to prevent a visibly incapacitated person from participating  **Standard of Care:**  Numerous ways, which wouldn’t have imposed a serious burden on SNR, with which to prevent Π from participating; SNR did none ∴ failed to meet standard  **Causation:**  Argument that Π’s drunkenness didn’t contribute to his injury (b/c tubing takes no skill) is dismissed (at odds w/ findings of fact at trial)  **Voluntary Assumption of Risk:**   * Only applies where Π has assumed both physical and legal risk involved in the activity * Π’s participation might be viewed as assumption of physical risks but dubious b/c he was intox @ time; definitely impossible to conclude he assumed legal risk * What about waiver? No, b/c he signed a combined entry and waiver form and no attempt was made to draw his att’n to the release provision ∴ SNR had no reasonable grounds for believing that the release expressed Π’s intention   → Π did not, by words or conduct, voluntarily assume legal risk involved ∴ volenti inapplicable |

#### Common law duty to control conduct of intoxicated persons broadened in a series of cases:

***Picka v Porter (1980) and Schmidt v Sharper (1983)*** alcohol provider liable w/o actual knowledge of patron’s intoxication

***Hague v Billings (1989):*** once staff realized Π was intox and intended to drive, they had a legal duty to take all reasonable steps to stop him + if they failed, they had legal duty to call cops. Π’s drinking buds also held liable b/c all three had agreed in advance to go drinking + driving

***Donaldson v John Doe (2009):*** Organizers of an Oktoberfest event owed DOC to persons who might be foreseeably injured by intoxicated attendees

***Stewart v Pettie (1995)***

Serving patrons past point of intox not itself a foreseeable risk factor; since Π was accompanied by 3 sober adults, it was not foreseeable that he would drive ∴ Δ did not breach standard of care even though they had served him 5-7 double hi-balls

***Baumeister v Drake (1986):*** applied liability principles from Jordan House to private social host; claim against Δ homeowners dismissed but only b/c they hadn’t supplied alcohol to the intox driver

### Childs v Desormeaux

(*party-guest-DUI-girl-paralyzed*)

|  |  |
| --- | --- |
| **RA** | **A SOCIAL HOST AT A PARTY WHERE ALCOHOL IS SERVED IS NOT UNDER A DUTY OF CARE TO MEMBERS AT THE PUBLIC WHO MAY BE INJURED BY A GUEST'S ACTIONS, UNLESS THE HOST’S CONDUCT IMPLICATES HIM OR HER IN THE CREATION OR EXACERBATION OF THE RISK.** |
| **RE** | Social host category is materially different from commercial hosts.  1) CH have direct control over alcohol consumption of patrons.  2) CH governed by strict legislative rules (no such laws exist for private parties).  3) Contractual relationship between CH and patrons - financial incentive to ply with liquor, but social host does not.  Established **duty of care of commercial hosts does NOT extend to social hosts**. As this is a novel case, it must go through two stage Anns test to determine if a duty is owed…  **Anns Test:**   1. Are the two parties proximate enough for a duty to be established? Must be foreseeable that D’s actions could cause harm to P   🡪 *Is the host at a party liable for the actions of an inebriated guest who left their party? Do the hosts owe a duty of care to parties that might be injured by the inebriated person’s conduct?*   |  |  | | --- | --- | | SITUATIONS WHERE A DUTY OF CARE EXISTS: | Considerations in imposing duty of care in nonfeasance: | | D attracts/invites P into risky situation  D has responsibility to supervise/control P  D has public responsibilities  Public authority  CH 🡪 public responsibility | D implicated in creating/controlling risk  Autonomy of individual [in favour of not imposing DoC]  Reasonable reliance |   **NONFEASANCE**: When the conduct alleged against D is a failure to act, then **foreseeability alone cannot establish a duty of care**.  P argued: by organizing the party, hosts created a risky situation [and so failure to act does not protect them from liability].  Court found hosts did not create a "risky situation" (therefore their failure to act was merely nonfeasance). She laid out considerations in imposing duty of care in nonfeasance (see second column above).  → McLachlin J. determined there was no foreseeability in this case (even though hosts knew Desormeaux was too drunk to drive, knowing was not enough to make them liable for consequences.) ∴ no DOC |

#### Continued authority of expansive cases is dubious in light of SCC decision in Childs

***Richardson v Sanyhie (2010):*** designated driver didn’t owe DOC to prevent passenger from becoming intox

***Hunt v Sutton Group (2001):*** Π became intox during xmas party hosted by employer; she attempted to drive herself home, then got drinks at a pub; Employer and pub found to be negligent; injury foreseeable and duty imposed to ensure that she didn’t become that drunk during their xmas party on their premises and also to take positive steps to see that she got home safely

***John v Flynn (2001)***

Flynn, alcoholic on return-to-work program, kept drinking. At the end of a shift, during which he had drank, drove home and caused a crash w/ Πs. Πs sued Flynn and Δ company in negligence. Knowledge of the drinking on its premises was not sufficient to establish DOC. Company didn’t know Flynn was intox that night, didn’t provide him with alcohol, and didn’t condone drunk driving, nor was this associated with the company in any way.

**NB:**

* Cts may be more likely to impose social host liability where hosts provide alcohol to or facilitate alcohol consumption by minors
* Members of hospitality industry and private social hosts have long been held liable under principles of occupiers’ liability for alcohol-related injuries that occur **on their property**
* Owner of a vehicle has CL duty not to permit an intox person to drive

## b) Duty to Perform Gratuitous Undertakings

If a person undertakes to perform a voluntary act, he is **liable if he performs it improperly** (*misfeasance*), but **not if he neglects to perform it** (*nonfeasance*). DOC analyses between misfeasance and nonfeasance are the same; but nonfeasance much less likely to attract a DOC

Situations where Δ:

Lulled Π into a false sense of security

Denied Π other opportunities for aid

Put Π in a more precarious physical position.

*Contrast the following three circumstances:*

|  |  |
| --- | --- |
| Phil owns a company that removes ice from sidewalks. P is contracted to remove ice from a sidewalk, but failed to do so. Sally slips and injures herself on the ice. | → Undertook to manage risk and didn’t  ∴ P is liable. |
| Vu sees a sidewalk is dangerously icy. He calls Phil, who agrees to come immediately. Vu agrees to prevent people from walking over the iced sidewalk, but fails to do so. Sue slips and injures herself. | → Also undertook to manage the risk. Doesn’t matter how reasonable it was.  ∴ Liability is Vu’s. |
| Cam is walking by, and sees a dangerously icy sidewalk. He shrugs his shoulders, and walks on another sidewalk | → Seems fine, you can be a dick. No positive duty b/c no undertaking |

### Horsley v McLaren SCC

(Negligent boat owner + failed rescue attempt; appeal to SCC)

|  |
| --- |
| **NO DUTY AT COMMON LAW TO RESCUE OR AID ANYONE IN DISTRESS. FURTHERMORE, "A PERSON WHO IMPERILS HIMSELF BY HIS CARELESSNESS MAY BE AS FULLY LIABLE TO A RESCUER AS A THIRD PERSON WOULD BE WHO IMPERILS ANOTHER."** |
| *Did McLaren’s negligence in attempting to rescue Matthews induce Horsley to risk his life*? |
| * Any duty to Horsley must stem from the fact that the new situation of peril was created by McLaren's negligence which induced Horsley to act * Maclaren failed to comply with established rescue procedure * However, Maclaren's actions were not faulty enough to induce Horsley to risk his life * Errors in rescue were errors in judgment and not negligence ∴ Appeal dismissed |

### Kenneth v Coe 2014 BCSC 120

|  |  |
| --- | --- |
| **P** | Π is estate of deceased |
| **F** | Ski buddies but Deceased and defendant were strangers who happened to be paired up during heli-skiing excursion with two guides and other skiers  Δ lost sight of dec’d; he was located quickly but he had been covered in snow long enough to die from lack of oxygen |
| **D** | Action dismissed |
| **RA** | **WHEN DEFENDANT AGREED TO BE DECEASED'S SKI BUDDY, HE DID NOT INVITE DECEASED TO RELY PRIMARILY ON HIM TO MITIGATE POTENTIAL RISK OF INJURY OR DEATH RESULTING FROM HAZARDS INHERENT IN BACK-COUNTRY SKIING. FURTHERMORE, EVEN IF HE DID OWE DOC TO DECEASED, HE WOULD’VE SATISFACTORILY DISCHARGED IT.** |
| **RE** | Foreseeability: Yes.  Proximity: No…ski buddies w/o anything ‘more’ not enough to impose +DOC  **Three factors in Childs (risk-control, reasonable preservation of autonomy, and reasonable reliance)**  Π argued:  (1) Δ specifically undertook responsibility; implicated in and exacerbated the risk of tree wells by inviting deceased to rely on him as a potential rescuer;  (2) recognizing a positive duty to act would not unjustifiably impinge on either party’s autonomy because they both voluntarily agreed to assume the responsibility of skiing as buddies; and  (3) Relied on Δ, based on the fact that he didn’t ski with anyone else  Further, when Δ realized he *does* say something so would’ve been found, in any case, to have discharged his duty satisfactorily. |

## 

## Other Duty to Control Situations

Situations where one person has the ability to control the actions of another

|  |  |
| --- | --- |
| **Prison supervisors** owe DOC to ensure prisoners don’t injure themselves, each other, or the public | * *Williams v New Brunswick* (NBCA)*:* prisoner set a fire killing 21 inmates * *Smith v BC (AG)* (BCCA)*:* one prisoner beaten by others in a drunk tank * *Home office v Dorset Yacht Co* (HL AC)*:* escaped prisoners damaged Π’s property |
| Those responsible for **supervising institutionalized mental health** patients (e.g. *Wellesley Hospital)* | |
| **Coaches:** failure to control participants, failure to provide adequate warnings, instruction and equipment | * *Bradford-Smart v West Sussex County Council,* UK CA: a school may owe DOC to protect a student from bullying not only on school property but in some circs, o/s school * *Cliché c Baie-James (Commission Scolaire)* Que. CA: municipality held liable for failing to provide enough lifeguards to supervise a class trip to a municipal pool for 36 kindergarteners; although teachers not exempt from duty to supervise, ct also took on a duty to ensure safety of premises by welcoming the kids and teachers into the facility |
| If **parents/teachers/other supervisors** are aware of a child’s hazardous activities or permit a child to have unsupervised access to snowmobiles, guns, etc. the ct will impose a rigorous standard of care | |
| **Employer** may be held personally or vicariously liable if it fails to prevent abuse or harassment in the workplace (e.g. *L.(J.) v Canada (AG)* BCSC) | |

# 3. The Duty to Prevent Crime and Protect Others: Duty to Warn and Protect

* Typically involves situations in which Δ has direct control over or supervision of another
* Issues can arise where Δ has only indirect control/authority (e.g. probation, parolees)
* Δ may also have the opportunity to prevent/reduce likelihood of a crime or accident

### Jane Doe v Metropolitan Toronto Police 1998 ON Gen Div

|  |  |
| --- | --- |
| **F** | P sued police after being attacked by a serial rapist – he had raped four other women on the 2nd and 3rd floor of apartment buildings in the vicinity by entering through the window.  Negligence claim based on failure to warn.  PO chose not to warn for fear of displacing rapist – leaving him free to re-offend elsewhere.  TJ believed real reason was to prevent hysteria and panic; PO believed rapes were “less violent” than those committed by previous serial rapist.  P would have taken steps to warn herself had she been warned. |
| **I** | Did MTP owe Π a Duty to warn? |
| **D** | Yes. |
| **RA** | **POLICE DEPARTMENTS OWE A DUTY OF CARE TO THE PUBLIC AT LARGE TO PROTECT. THIS PUBLIC DUTY CAN GIVE RISE TO A PRIVATE LAW DUTY TO ACT/WARN POTENTIAL VICTIMS OF A REASONABLY FORESEEABLE RISK OF CRIME OR HARM.** |
| **RE** | **DUTY:** Per *Police Act* the MTCP has a duty to prevent robberies and other crimes, including duty to warn potential victims of a foreseeable risk of harm.   |  | | --- | | **(Foreseeability Analysis)** “The plaintiff alleges that the defendants knew of the existence of a serial rapist. It was eminently foreseeable that he would strike again and cause harm to yet another victim. The allegations therefore support foreseeability of risk. | | **(Proximity analysis)** The plaintiff further alleges that by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow or distinct group of potential victims, sufficient to a special relationship of proximity.” The Court then applies the facts to justify their (positive) conclusion) This is an excellent way to separate and phrase your Cooper DOC analysis: it comes highly recommended by me. – MEYERS | | **(Residual Policy)** policy reasons exist for warning, not against it;  Legitimate reason may exist not to warn but only where risk of warning was greater than risk of not warning. Would not excuse a failure to protect – other means of notice were available. Potential victims effectively held out as bait | |

* Do you think that police should have a duty to warn potential victims? How wide do you think this duty should be?
* If, for example, the rapist in Jane Doe only preyed on white women who lived in the Toronto area generally, should the police nonetheless have a duty of care over any potential victims?

##### Other Cases:

***Allison v Rank City Wall Can. Ltd.,***Ont. HC: ct imposed affirmative duties on private citizens to prevent crime; landlords liable to tenants for injuries caused by attackers who gained access b/c of inadequate security

***Shultz v Miki, BCCA:*** Δ landlord absolved of liability for sexual assault committed by his cousin, whom the landlord had hired to perform carpentry in Π’s apt

***Mitchell v Glasgow City Council,***HL: Π attacked and killed by fellow resident of a public housing estate; had threatened Π on numerous occasions and Δ was taking steps to evict him. Δ and resident met and he was informed of his pending eviction. Afterwards, he violently attacked Π and Π’s estate claimed the local authority had a duty to warn Π. HL rejected this; no undertaking to protect Π + policy reasons to reject DOC (would reduce defensive practices by landlords)

***Okanagan Exteriors Inc. v. Perth Developments Inc. BCCA:*** Δ owned an abandoned construction site frequented by children and transients that was adjacent to Π’s greenhouse. Δ knew they occasionally set fired but did not take steps to control these actions. Π suffered property damage after a fire started there spread to greenhouse. Δ held to owe DOC

***Smith v Littlewoods Organisation Ltd., HL:*** derelict cinema set on fire by vandals and fire spread to neighbouring properties. No DOC b/c Δs had insuff knowledge of presence of trespassers

# Duty of Non-Negligent Investigation:

### Hill v Hamilton Wentworth Regional Police Services Board, 2007 SCC 41

|  |  |
| --- | --- |
| **F** | * Hill was investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit. * Police officers suspected that Hill had committed 10 robberies. evidence against Hill included a tip, a police officer's photo identification of Hill, eyewitness identifications, a potential sighting of Hill near the site of one of the robberies, and witness statements that the robber was aboriginal. * During their investigation, the police released Hill's photo to the media. They also asked witnesses to identify the robber from a photo lineup consisting of Hill, who is an aboriginal person, and 11 similar-looking Caucasian foils. * The police, however, also had information that two Hispanic men, one of whom looks like Hill, were the robbers. Two similar robberies occurred while Hill was in custody. * Hill was charged with 10 counts of robbery but 9 charges were withdrawn before trial. Hill was found guilty of robbery. He appealed and a new trial was ordered where he was acquitted and brought a civil action that included a claim in negligence against the police based on the conduct of their investigation. The trial judge dismissed the claim in negligence, but the Court of Appeal unanimously recognized the tort of negligent investigation, however a majority of the court held that the police were not negligent in their investigation. Hill appealed on the fact that the police were not found to be negligent, and the police cross-appealed on the finding of a tort of negligent investigation. |
| **I** | 1. Is there a duty of care owed by police officers to a specific accused who they are investigating? 2. Is there a tort of negligent investigation? 3. If so, are the police guilty of it? |
| **D** | 1. Yes. 2. Yes 3. No. |
| **RA** | **THERE IS A TORT OF NEGLIGENT INVESTIGATION IN CANADA.** |
| **RE** | **DUTY OF CARE**   1. Foreseeability? Obviously foreseeable that a clearly negligent police investigation of a suspect could cause harm to a suspect. 2. Proximity? There is sufficient proximity between a police officer and a particular suspect, as the relationship between the parties was personal, close and direct, thereby giving rise to a *prima facie* duty of care. 3. Policy? No broad policy reasons for declining to recognize a duty of care owed by the police to a suspect.    1. *Quasi-judicial role?* No. Fact-based investigative character of police distances it from such a role    2. *Discretion?* An appropriate standard of care allows suff room to exercise discretion w/o incurring liability    3. *Standard for arrest?* No evidence that this would have ‘chilling’ effect on policing    4. *Floodgates?* Particularized suspects represent a limited category of potential claimants, further limited by req’ment that Π est compensable injury caused by investigation    5. *Risk of unjust recovery in tort?* Present in any tort action – ever-present possibility of erroneous damages is safeguarded by req’ment that Π prove every element of their case   None of these provided a convincing REAL possibility of negative outcomes, they’re just hypothetical concerns.  **→ DOC est’d**  **STANDARD OF CARE**: Reasonable police officer in like circumstances  **BREACH**: There was a DOC owed to Π, to meet the standard of a reasonable person in similar circumstances. While the investigation was flawed, it did not breach this standard. |
| **DIS** | 1. Foreseeability? Yes. 2. Proximity? No… **Policy considerations**   it is *never* in the interest of the targeted suspect that the police investigate him or her. This suggests again that the interests of the public in having police officers investigate crime and the interests of suspects are inherently and diametrically opposed.   1. Residual Policy also militates against liability  * If holding POs civilly liable, prudent POs might decide that there is not enough evidence to begin investigations in order to avoid such liability * How then would we distinguish between a proper exercise of discretion based on a police officer's desire to fulfill his legal duty of care to the suspect and an improper one based on the selfish desire to avoid potential civil liability? * reasonable and probable grounds test is long-standing and ensures robust and efficient enforcement of the law and once this is met, it is left to others w/in the criminal justice system to delve into the case * Would be floodgates-opening b/c recognizes that harm could come to Πs who were targets of investigation but didn’t get convicted |

* Do you agree with this dissent?
* What policy implications do you see as relevant to finding, or not finding, a duty of care?

# SPECIAL DUTIES OF CARE: MISCELLANEOUS CATEGORIES

# Duties to the Unborn

* CL doesn’t ascribe status of person until child is born alive
* Dr. doesn’t owe *separate* DOC to fetus, as separate legal entity from Mother
* Actions are either commenced by the mother, or the child (through a litigation guardian)
* Each category asks thorny questions about life, death, parenthood, loss, and value
* Underpinned by various policy issues - what politics are revealed by the ct’s valuation of personal autonomy

## Preconception Wrongs:

* Δ carelessly causes a parent to suffer an injury that detrimentally affects a subsequently conceived child – e.g. negligently damaging a woman’s ova
* Causation is an issue
* Also raises policy issues re: scope of Δ’s potential liability
* Also debate around what steps a potential Δ can take o avoid harm to Π’s reproductive person w/o being discriminatory or invasive

### Paxton v Ramji (2008 ONCA)

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| --- |
| Infant Π suffered severe disabilities b/c mom took prescription acne drug prior to and during pregnancy. Effects known to mom’s doc but b/c dad had had a vasectomy, didn’t tell mom about risks. Although harm to future child was foreseeable, policy concerns militated against a finding of proximity. Doc’s sole duty was to mom and imposing DOC toward future child might cause docs to limit treatment options proposed to women. Inconsistent w/ women’s autonomy and privacy rights.  → What policy considerations were relevant? Unjustified conflict for Dr to hold separate DOC and inconsistent w/ autonomy of Mom too (crucial privacy concern): follows charter values |

### A (A minor) v A Health & Social Services Trust (2010)

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| --- |
| Parents + kids brought negligence claim against IVF service for negligently fertilizing ova w/ sperm of a diff race. Kids were upset from teasing resulting from skin being darker than their parents’. No DOC toward human cells prior to implantation. Moreover, being born of a particular race is not an actionable harm; it would be wrong to allow them to grow up believing that suffer from some damage for which they have had to be compensated financially. |

## Wrongful birth and wrongful life:

Physician may carelessly fail to inform a woman that she faces an unusually high risk of giving birth to a child w/ a disability or negligently perform tests designed to detect abnormalities and the woman may continue a pregnancy she otherwise would’ve terminated

→ Δ doc doesn’t positively cause an injury but has merely deprived child’s mom an opportunity to make an informed decision regarding abortion; can face claim by parent (for wrongful birth) or by child (wrongful life)

Wrongful life more problematic b/c it suggests that it would’ve been better if child hadn’t been born at all; cts have struggled w/ questions re: sanctity of life + quantification of damages

→ 2 common threads: wrongful birth is extraordinarily narrowly construed; and wrongful life does not appear to be actionable at CL in Canada // PERSONAL AUTONOMY was the touchstone for finding an absence of duty

### Arndt v Smith (1994 BCSC)

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| --- |
| *Π ave birth to severely disabled child after she contracted chicken pox during pregnancy. Rare consequence. Physician found negligent for failing to inform the mother of risks and offer option of abortion. No viable action could be brought for child’s claim of wrongful life. Father’s claim recover the costs of child was dismissed. Court accepted mother could claim for additional expenses of rearing a disabled child* 🡪 *her action* ***failed on issue of causation****. P could not prove that RP in her position would have abortion if informed of very small risk of birth defects.*) |

### H (R) v Hunter (1996 Ont Gen Div)

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| --- |
| Parents of 2 disabled children awarded ~3mil for add’l costs incurred in raising children; Δ docs held negligent in not referring mom to add’l genetic counselling |

### Krangle (Guardian ad litem of) v Brisco (1997 BCSC)

|  |
| --- |
| Child born w/ Down’s; Δ doc had carelessly failed to inform mom about amniocentesis test that would’ve detected it during pregnancy. Evidence indicated mom would’ve aborted had she known; ct found child didn’t have cause of action but parents entitled to damages regarding expenses assoc’d w/ his care |

### Jones (Guardian ad litem of) v Rostvig (1999 BCSC)

|  |
| --- |
| While a doc owes DOC to a child regarding pre-natal injuries that become manifest on birth, no DOC to provide mom w/ info that would lead to an abortion; ct struck down wrongful life claim |

### Watters v Whites (2012 QCCA)

|  |
| --- |
| Π was a second cousin to initial patient and gave birth to a child who suffered from the disease 30 years later. Π claimed doc should have told the relatives of initial patient. Ct disagreed. Doc acted reasonably in assuming that dad would inform other members of his family and it would’ve been a breach of patient confidentiality for doc to disclose the patient’s condition to a wider range of relatives |

### Bovingdon (Litigation Guardian of) v Hergott (2008 ONCA)

|  |
| --- |
| Δ doc prescribed fertility drug to Πs’ mom and failed to inform her that the drug would increase chance of multiple pregnancy; drug caused twin pregnancy, causing premature delivery, in turn causing disabilities. Πs’ parents successful in action for costs of raising disabled kids arguing that mom wouldn’t have taken fertility drug if properly informed. Ct rejected infant Πs’ claim suggesting it was comparable to claim for wrongful life. Would be inconsistent to impose a second DOC toward mom’s future children to prevent her from taking the drug that would lead to their conception; conflict of interests; violation of woman’s autonomy to make her own treatment choices |

## Wrongful Pregnancy

* Based on general principles of medical negligence
* Arises when parents have taken medical steps to prevent pregnancy or childbirth but due to negligence of med professional a pregnancy occurs or continues
* True area of contestation in this area is what is the loss? It’s a convoluted fiction but the area seems to be that
  + There is no duty of care owed to cases of a healthy child
  + But there is a duty owed in cases of a disabled child
* More complicated if a woman doesn’t terminate the pregnancy but instead gives birth; cts may decide any of the following (*Cattanach v Melchior* 2003 HCA):

1. No damages where child born healthy and w/o disability or impairment
2. Damages may be recovered but confined to immediate damage of the mom and loss of consortium for the father, together w/ any expenses or loss of earnings immediately consequential on the pregnancy and delivery but excluding the costs of upkeep until self-reliance of a healthy child
3. Damages may be recovered but confined to above together w/ any add’l costs of rearing child born w/ disability or born to a parent/parents w/ a disability
4. Damages recovered in full for reasonable costs of rearing an unplanned child to the age when that child might be expected to become economically self-reliant, whether the child is healthy, disabled, or impaired but w/ deduction from amt of such damages for the joy and benefits received and the potential economic support derived from the child
5. Full damages against tortfeasor for cost of rearing child may be allowed, subject to the ordinary limitations of reasonable foreseeability and remoteness w/ no discounts for joys, etc., leaving restrictions to such recovery open to whatever limitations as may be enacted by parliament

* **typically (iii) is chosen in CDN and Commonwealth cts** but more recently, cdn courts have been moving toward > recovery for costs of rearing an unplanned **healthy** child

### Suite v Cook (1995 QCCA)

Pecuniary damages for costs of raising healthy child recoverable but had to be offset against emotional benefits and burdens the child would bring to its parents

### Kealey v Berezowski (Ont Gen Div):

Rejected argument that healthy baby-rearing costs should be universally denied as a matter of public policy. Characterization of claims as a form of pure economic loss and conclusion that they could only be recovered where Π’s primary motivation for wanting to limit family size was financial

**→ CDN law remains unsettled…**

## Pre-natal injuries

Can a child sue in negligence for injuries sustained in utero?

* Unless the child is subsequently born w/ an injury, no cause of action arises
* Cts have recognized that a person may owe DOC to avoid careless actions before birth that may result in a loss upon birth (e.g. Duval v Seguin (1972 Ont HC)

### Dobson (Litigation Guardian of) v Dobson (1999 SCC):

|  |  |
| --- | --- |
| **F** | * Π child; Δ mom * baby born at 27 weeks. Child sued mom for negligently causing car accident. * Results in permanent & severe disability |
| **I** | Is liability possible from the mother to the child in utero? |
| **D** | No. A defendant mother cannot be seen to owe a duty of care to a child in utero? |
| **RA** | **MOTHERS DO NOT OWE A DUTY OF CARE TO CHILDREN THEY ARE CARRYING ∴ NOT LIABLE.** |
| **RE** | * Foreseeability: yes // Proximity: couldn’t be closer * **But:** Policy considerations negated finding a prima facie duty of care (intrusion into bodily integrity, privacy and autonomy in the rights of women) * held that a diff rule applies w/ respect to the child’s mother |
| **ETC** | Notable policy rationales for *not* imposing liability to the mother in Dobson:  1. Intrusion into Fundamental Sovereignty: Imposing liability in this way, finding a mother liable for damages to a foetus in utero, would cause unacceptable and extensive intrusions into the privacy, integrity and autonomy of a woman’s life  2.Judicial definition of appropriate standard of care is too difficult  3. Deterrent dimension would be non existent: (limited deterrent to establishing a duty of care in this case)  4.Practical problem of increasing scrutiny on women  5.Creating such a duty will cause irreparable damage to relationships |

### 

### Ontario *Family Law Act,* s. 66:

Provides that no person is disentitled from recovering damages simply b/c injuries were incurred before birth but it has been held that s.66 doesn’t override maternal immunity outlined in Dobson (Although a pregnant woman doesn’t owe DOC to her unborn child, a born alive child can sue other parties of injuries suffered in utero)

Remember, the overarching goals of the law of negligence are:

* Plaintiff compensation
* Defendant deterrence
* It is open to question, and many have, whether onerous lawyer fees negate the former; and insurers paying the entire damage awards negates the latter.
* In many, if not all cases, it is the insurer, not the plaintiff, that is carrying out the litigation
  + See Dobson v Dobson, where a child was suing his mother: the mother wanted to be found negligent, because it meant that the insurer would pay for the disabled child’s cost of living. If she was not found negligent, the mother would have to pay for these costs

# Psychiatric Harm

**Unsettled area of law & often little logic to final conclusions**

* CL has held long time skepticism of the reality or magnitude of psychological injury; difficult to quantify damages
* Each CL jurisdiction has developed their law in this area based on diff criteria and rationales
* No SCC ruling on this tort; *Mustapha* resolved on remoteness rather than DOC
* Nervous shock/psychological harm **does not include day-to-day emotional upsets.**
* Narrowly defined so that **recognized psychiatric illness required** for liability.

**Concerns:** easy to feign, damage to psyche less worthy of protection than damage to one’s body.

## Commonwealth developments

Began w/ idea that Π couldn’t recover unless psych harm precipitated by some physical impact

→ Developed out of ***Victorian Railways Commissioner* (1888) PC:** Π suffered severe shock when, b/c of Δ’s carelessness in raising a gate, she was nearly hit by a train. PC found that damages arising from mere sudden terror unaccompanied by any actual physical shock…cannot be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper.

Over time, artificiality of the ‘impact rule’ became unsustainable; modified extensively

***McLoughlin v O’Brian,* [1982] HL: (high water mark for recovery)** Π was told of a car accident involving her husband and 3 kids; suffered shock. HL imposed liability on the basis that her psychological shock was reasonably foreseeable.

**Some boundaries still drawn, based on three considerations:**

the class of persons whose claims should be recognised

the proximity of such persons to the accident

the means by which the shock is caused

### Alcock v Chief Constable of South Yorkshire Police (1991 HL)

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| --- | --- |
| **F** | *A stadium* *accident was caused by the police negligently allowing too many supporters to crowd in one part of the stadium. Many alleged to have seen their friends and relatives die in the crush (in person and on live TV, radio, and newspaper) and claimed to suffer psychiatric harm or*[*nervous shock*](http://en.wikipedia.org/wiki/Nervous_shock)*after the incident*. |
| **RA** | **A PERSON SUFFERING NERVOUS SHOCK MUST HAVE REASONABLE PROXIMITY TO THE EVENT THAT CAUSED THE SHOCK IN ORDER TO CLAIM FOR DAMAGES.** |
| **RE** | **Established since** *McLoughlin*:   1. A claim for damages of psych illness resulting from shock caused by negligence can be made w/o the necessity of the Π establishing that he was injured or was in fear of personal injury 2. A claim for damages for such illness can be made when the shock results:    1. From death or injury to Π’s spouse or child or the fear of such death or injury and    2. The shock has come about through the sight or hearing of the event, or its immediate aftermath   **Πs sought to extend the boundaries of the cause of action by:**   1. Removing any restrictions on the categories of persons who may sue 2. Extending the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on television of the incident which caused the shock; 3. Modifying the present requirement that the aftermath must be immediate   Limit claims w/ the following 3 considerations:   1. **Class of persons w/ a recognizable claim:**  * must show a sufficiently proximate relationship to that person * presumed to exist between children and parents, spouses, fiancées (rebuttable presumption that the love and affection normally associated w/ persons in those relationships is such that a Δ ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psych illness) * other relationships including siblings must prove ties of love and affection * decided on a case by case basis b/c much may depend on the nature of the negligent act/omission, on the gravity or apparent gravity of any actual or apprehended injury and on any expert evidence about the nature and explanation of the particular psychiatric injury which the Π has sustained  1. **Proximity of Π to the accident: Note that this is not Anns/Cooper proximity**  * Must be close in time and space * Direct and immediate sight or hearing of the accident isn’t req’d * Must perceive “shocking event” with his own unaided senses 🡪 eye witness, or hearing the event or viewing its immediate aftermath // DOC only owed to those who were directly present or present in the immediate aftermath to disaster * **separates plaintiffs into two types:**   **Primary plaintiffs:** those who were there at the time of, or in the aftermath of, the traumatic event  **Secondary plaintiffs:** those who weren't not there at the time of the event, but who observed it, or came later   1. **Means by which the shock is caused:**  * Would usually exclude witnessed on TV or informed of by a third party, but not totally ruled out as a possibility   **POLICY ARGUMENT:** Courts don’t recognize grief (mere loss of loved one is not something the law can compensate). Floodgates. |

## The Canadian Position

SCC decision in *Mustapha* provides guidance for cases involving manufacturers’ liability or so-called hypersensitive plaintiffs; but b/c it was decided on issue of remoteness, rather than framing it as a duty issue, it doesn’t solve much re: negligent infliction of nervous shock so earlier cases are still instructive

### Mustapha v Culligan of Canada (2006 ON CA)

|  |  |
| --- | --- |
| **F** | P suing for psychiatric injury after seeing dead flies in bottle of water supplied by D  P developed major depressive disorder with associated phobia and anxiety  Mustapha was the primary victim because he changed the water. |
| **I** | Was the injury too remote? |
| **D** | Failed on remoteness; the test is it reasonably foreseeable that a person of ordinary fortitude might be totally horrified? |
| **RA** | In a duty of care analysis concerning nervous shock, damage caused by a breach in the standard of care must be reasonably foreseeable → P must show that her or his mental injury would have occurred in a person of ordinary fortitude  If the defendant knew that the plaintiff had a particular vulnerability to psychiatric harm before the breach, then psychiatric harm is reasonably foreseeable  For psychological injury → ordinary fortitude = threshold → when assessing damages (use thin skull) |
| **RE** | * D owed duty of care as manufacturer of a consumable good * D breached standard * P suffered psychological injury * Rejection of primary vs secondary victim/bystander cases |
| **ETC** | * Mustapha is very closely confined: it does not apply far outside of these specific facts * The primary/secondary victim distinction from Alcock is not part of the Canadian law * Policy considerations are strong, if not inevitable factors militating against the creation of a duty of care * CDN law only calculates the class based upon people of ‘reasonable fortitude’—particular sensitivities of the plaintiff do not expand the class to which a duty of care is owed * **Psychiatric harm is not established class:** the Cooper duty of care analysis still needs to be analysed. The duty of care analysis is not much different for psychiatric harm. |

# A Health Professional’s Duty to Inform:

If a health professional does something **without consent** = **BATTERY**, unless it’s an emergency (***Marshall***)

If consented, but was misinformed about the nature of operation or procedure= **LACK OF INFORMED CONSENT** = **BATTERY**

But if Doctor did not inform of the risks = **NEGLIGENCE**

## Test for negligence

#### Reibl v Hughes

|  |  |
| --- | --- |
| **Negligence test:** | |
| **DUTY:** | Dr-Patient; prima facie, so not an issue |
| **BREACH:** | Dr has to provide ALL relevant information regarding risks of procedure, non-treatment, alternate treatment. What is relevant is based on circumstances, but statistical probability is not an excuse for non-disclosure if it is relevant to the patient (***Haughian v Paine***). |
| **CAUSATION:** (Modified Objective Test) | Have to show failure to inform caused harm. Would a RP in the position of the P elect to not have surgery?  Can’t use subjective test because the P will always testify that the failure to warn was the determining factor in their decision to take a harmful cause of action. |
| **→ duty to inform is independent of the standard DOC** | |

#### Haughian v Paine (1987 Sask CA) [content of duty to inform includes alternative treatments]

|  |  |
| --- | --- |
| **F** | *Patient had surgery that left him paralyzed. Second operation partially alleviated the paralysis. Plaintiff argued that defendant surgeon failed to get informed consent from patient (husband): to inform the patient that there were risk-less alternatives.* |
| **I** | ***What constitutes a failure to obtain informed consent?*** |
| **D** | → you must disclose all material risks of the treatment **and** any alternatives to the treatment suggested  Even though risk is low, statistics are only one factor of many that constitute risk. Court ruled that RP would not have chosen surgery. Appeal allowed, judgment for plaintiff. |
| **RA** | **THERE MUST BE ADEQUATE DISCUSSION OF THE CONSEQUENCES OF LEAVING AN AILMENT UNTREATED (AND ALTERNATIVES).**  **BECAUSE THE PLAINTIFF/APPELLANT WAS NOT INFORMED OF THE RISK, HE COULD NOT GIVE INFORMED CONSENT.** |
| **RE** | What’s a material risk? Anything that might be relevant to the patient making an informed decision about whether or not to choose a given treatment. Autonomy must be protected and the patient must be given be permitted to act autonomously. In order to be able to act in such a way, a doctor must impart knowledge. **This is a positive duty – and is separate and above the duty to not act negligently.** |

##### Notes on Material Risk:

* Scope of what constitutes material risk has been progressively broadened
* Disclosing some material risks while not disclosing others is insufficient - *Tremblay*
* Dr. does not have to inform patients that he/she will be assisted by some other medical professional but unclear whether a patient must be informed if an intern or resident rather than the specialist will be performing the procedure or a subst’l part thereof (*Bezusko v Waterfall* says not a material risk but *Currie v Blundell* says material risk)
* Unclear whether dr. must disclose a malpractice suit or investigation by governing professional body is a material risk (*Turner v Bederman*: no duty to disclose experience w/ procedure or pending lawsuits // **but** *Anderson v Queen Elizabeth II Health Sciences Centre:* Π wouldn’t have consented to medical procedure if he had known of risk of stroke + physician’s relative inexperience)
* If a patient has a particular concern, it is his/her responsibility to raise it with the doctor - *Videto v Kennedy*
* Health professional must answer a patient’s questions fully, even if they relate to minor aspects of the procedure - *Sinclaire v Bolton*
* The material risk must be understood by the patient – understanding the actual risks and information more important than using precise medical terminology – *Martin v Findlay*
* It is obligation of healthcare professional to ensure someone w/ limited understanding of English understands
* Red cross, etc owe DOC to eventual blood recipients – *Walker Estate*
* *Buchan v Ortho Pharmaceutical-* what constitutes a ‘material risk’ (and thus what risks the patient must be informed of) is much wider than that stated in Reibl v Hughes
* DeFerrari v Neville showed that a 1 in 800,000 risk of permanent numbness from dental anaesthetic is **not** a material risk

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

Manufacturers & Suppliers Owe a duty of care to those who are exposed to their products (Donohue\*\*\*; Lambert\*)

This duty, in very limited circumstances, can potentially be extinguished (where the goods passes through a ‘learned intermediary’ when the manufacturer/supplier fully informs this intermediary of the risks)

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

|  |  |
| --- | --- |
| **F** | *Plaintiff had breast implant surgery. Implants ruptured, and plaintiff needed corrective surgery to remove implants. Literature warned of rupturing during surgery, but not during normal use (post-surgery). Plaintiff sued surgeon and manufacturer (Dow Corning).* |
| **I** | ***If a manufacturer does not adequately warn users of its products of the risks, is it liable for injuries caused by the materialization of those risks?*** |
| **D** | Yes. |
| **RA** | **A MANUFACTURER IS HELD TO A HIGHER STANDARD OF CARE, AND CAN ONLY BE SAID TO HAVE DISCHARGED ITS DUTY TO THE CONSUMER IF IT INFORMS A "LEARNED INTERMEDIARY" WHO IN TURN INFORMS THE CONSUMER, AND THE KNOWLEDGE OF THE INTERMEDIARY APPROXIMATES THAT OF THE MANUFACTURER.** |
| **RE** | **1. DOC:**  There is a duty to warn: requirement to warn of dangers that could arise from the ordinary use of the product.  Manufacturers have more knowledge of defects and risks of using the product.  When there is a learned intermediary, duty of care to consumer *can* transfer from manufacturer to intermediary. But manufacturer still owes DOC to the intermediary.  **2. Standard and Breach:**  Dow’s warning to surgeon was inadequate. Dow had knowledge of risk of post-surgery rupture (Dow had received a number of unexplained rupture reports).  **3. Did breach cause injury:**  Would she have consented to operation if she knew risks?  Objective test? Subjective test?  **USED THE SUBJECTIVE TEST**: would she had undergone the surgery knowing the risk?  because not trying to protect doctor but a manufacturer who is trying to sell a product  *Policy reasons:* manufacturers have to be held to high standard due to imbalance of knowledge and b/c they would profit from under-emphasizing any risks. |

***Lambert v Lastoplex*** All warnings must be reasonably communicated and clearly describe any specific dangers that arise from ordinary use

***Rivtow Marine Ltd v Washington Iron Works*** shows that this is a continuing duty: if new risks become apparent after the product is provided to the intermediary, then the supplier/manufacturer needs to update the intermediary of this risk.

***Cominco Ltd. V Westinghouse Can. Ltd. (1981 BCSC):***

Manufacturer who hears of a new risk after its product is distributed has a duty to warn users ASAP. Π didn’t have to prove that manufacturer had actual knowledge, provided the manufacturer ought to have been aware of the new risk

## Suppliers, installers, and repairers:

* Suppliers duty to warn of risks largely same as that of manufacturer (i.e. risks of which they know or ought to know) – ***Allard v Manahan***
* Suppliers, however, cannot be expected to have same knowledge/expertise as manufacturers (i.e. not expected to keep up to date with the continuing literature and risks)
* Cts have also extended duty to warn to installers and repairers (***Bow Valley v Husky***)
* In determining adequacy of information to consumers, cts will examine the totality fot he manufacturer’s marketing and promotional activities, in add’n to the actual warnings provided. A manufacturer may ∴ be held liable, despite providing an adequate warning if it’s been obscured or undermined

# Duty of Care Owed by a Barrister:

CDN law does not distinguish between barristers and solicitors; DOC owed by both. However, DOC will be assessed narrowly – a simple bad judgment call will not be ‘negligent’ but concerted and persistent fund’l mistakes could possibly give rise to a duty (Folland)

### Demarco v Ungaro, 1979 Ont HC

|  |  |
| --- | --- |
| **I** | In Ont, is a lawyer immune from action at the suit of a client for negligence in the conduct of the client’s civil case in court? |
| **D** | No immunity exists for barrister’s conduct of a client’s case in civil litigation. |
| **RA** | A lawyer is not immune from action at the suit of a client for negligence in the conduct of the client’s civil case in court. |
| **RE** | Public interest militates against DOC (argument taken from UK cts): No. Depriving clients of recourse if cases are negligently dealt is not consistent w/ public interest  1. Duty owed to clients conflicts w/ duty owed to court: no, there’s no empirical evidence that counsel would be tempted to prolong trials by favouring the duty owed to their clients  2. Relitigating a matter: Although undesirable, it doesn’t justify recognizing immunity; better relitigation than clients being w/o recourse  3. No obligation to accept all clients: does not exist for civil litigation  4. Anomalous result b/c absolute privilege exists for things said by lawyers in ct: Does not follow from fact of privilege that barristers should be given immunity |

#### Notes:

Generally difficult for Π to est their lawyer has been negligent

***Karpenko v Paroian (1980 Ont. HC):*** Lawyer could only be found negligent for recommending a settlement of a civil claim prior to trial if he or she made some ‘egregious error’; in public interest to discourage litigation ∴ lawyers shouldn’t be inhibited from encouraging settlements

**Wechsel v Stutz, (1980 Ont Co Ct):** Method of cross-examination left to judgment of counsel; Π’s claim that lawyer’s x-ex had been negligent dismissed

***Folland v Reardon, (2005 Ont CA):*** Egregious error standard rejected; judgment calls aren’t any more difficult than other decisions made by professionals ∴ no reason to depart from standard of reasonableness.

Lawyers do not owe DOC to third parties, except in exceptional circs

***Mantella v Mantella (2006 Ont SCJ):*** Husband and wife signed separation agment but wife later challenged it. Husband brought claim against wife’s lawyer. Ct held no DOC owed by wife’s lawyer to husband; insufficient proximity between party to an agment and the other party’s lawyer. Policy consids would also have negative any prima facie DOC, esp given highly personalized context of family law litigation

# STANDARD OF CARE

# The Common Law Standard of Care: The Reasonable Person Test

## *Arland v Taylor* (1955 ON CA)

(car-accident-establishes-RP-test)

**THE STANDARD OF CARE USED TO JUDGE CONDUCT IS BASED ON WHAT THE CONDUCT OF REASONABLE PERSON WOULD BE.**

*Plaintiff injured in motor vehicle accident. The jury was asked (charged) to put themselves in the place of the driver in deciding whether standard of care was breached. At trial: Jury held that defendant did not breach standard of care. Plaintiff appealed, based on judge’s charge to the jury.* ***Can the judge charge the jury to use a subjective test? Is the standard of care by which a jury is to judge the conduct of parties in a case of the kind under consideration the care that would have been taken in the circumstances by a reasonable person?***

Emphasises that the reasonable person is one of: normal intelligence, foresight, and skill

### *Glasgow Corporation v Muir:*

**THE STANDARD OF CARE IS TO BE ASSESSED IN TERMS OF WHAT, “IN THE CIRCUMSTANCES OF THE PARTICULAR CASE, THE REASONABLE MAN WOULD HAVE HAD IN HIS CONTEMPLATION”**

The test is an impersonal one: the question is not whether the juror believes that they would have acted in a set way, but rather, what the reasonable person, in those circumstances, would have done.

### *Ryan v Victoria (City),* [1999] SCC:

“**Conduct is negligent if it creates an objectively unreasonable risk of harm.** To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including:

* the likelihood of a known or foreseeable harm
* the gravity of that harm
* and the burden or cost which would be incurred to prevent the injury.

→ In addition, one may look to **external indicators** of reasonable conduct, such as:

* custom
* industry practice
* an statutory or regulatory standards.
  + In general, the reasonable person complies with the law but a statutory or regulatory violation doesn’t automatically equate with negligence (*Holland v Saskatchewan,* 2008 SCC)

### Miller v Jackson:

balls were hit into the surrounding area several times a year: there, because of both the frequency and potential seriousness of the risk, failing to protect against the risk *was* considered to be a breach of the expected standard of care

# Factors Considered in Determining Breach of the Standard of Care

* Breaching the standard of care occurs when the defendant acts in a way that is less than that demanded of the standard of care
* For the purposes of this course, **breaching the standard of care is a binary conclusion**: it either is a breach, or it is not.
  + The degree of departure from SOC only relevant for **damages**

Three most important factors:

1. **Probability** of injury
2. Potential **severity** of injury
3. **Cost** of risk avoidance

→ must be balanced against the **private and social** costs of avoiding the risk and the social **utility** of Δ’s conduct

* Must be assessed at the time of the alleged breach rather than in hindsight – how a reasonable person would have acted at the relevant time (*Roe v Minister of Health,* [1954] CA: “We must not look at the 1947 accident with 1954 spectacles.”)
* If an awareness of a dangerous situation evolves over time, it can be difficult to identify when Δ’s failure to take precautions becomes a breach

## Probability and Severity of the Harm

### Bolton v Stone(1951 HL) (cricket-ball-hit-woman)

|  |  |
| --- | --- |
| **F** | *The plaintiff was hit by a cricket ball that had been hit out of the ground; the defendants were members of the club committee. The ball flew out of the ground, hitting the claimant, Miss Stone, who was standing outside her house in Cheetham Hill Road, approximately 100 yards (91 m) from the batsman.* |
| **RA** | **DEFENDANT IS NOT NEGLIGENT IF THE DAMAGE TO THE PLAINTIFF WAS NOT A REASONABLY FORESEEABLE CONSEQUENCE OF HIS CONDUCT.** |
| **RE** | Life requires judging risks. No one can avoid creating some risks and accepting others. If risk associated with activity is high/unavoidable, may be reason to prohibit it altogether. A small risk of small damage is not negligent (reasonable person in D’s position would be OK with not taking steps to prevent danger). Don’t look at cost of fence.  Court drew distinction between foreseeable risks that are substantive and material and foreseeable risks that are highly unlikely or mere possibilities. |

### Paris v Stepney Borough Council,[1951] AC (HL) [one eyed worker goes blind no goggles]

Duty of an employer towards servant to take reasonable care for the servant’s safety in all the circumstances of the case. The fact that the servant has only one eye is one of the circumstances which must be considered by the employer in determining what precautions if any shall be taken for the servant’s safety. Simple and inexpensive precaution to supply goggles.

**Dissent:** If the duty is owed to one individual worker, it should be owed to all. “Cannot reach the conclusion that a one-eyed man, but not a two-eyed man, has a remedy against the employer for so serious an injury. I think it must be both or neither.” → would’ve said no negligence.

**Two take-aways:**

1. The severity of the harm caused by one injury but directed toward different people will be dramatically different and require different standards of care
2. The (1) extent and (2) severity of the damage have to be weighed and assessed in the specific circumstances of the case

## Cost of Risk Avoidance

### Vaughn v Halifax-Dartmouth Bridge Comm(1961 NSSC) (painting-bridge)

|  |  |
| --- | --- |
| **F** | *Bridge operated and maintained by defendant was painted. Flecks of paint blew off by wind onto nearby cars. Owner of one of those cars sued in negligence. Defendant argued that it took all necessary measures to prevent or minimize injury to the plaintiff.* |
| **I** | ***What would a reasonable person have done to avoid the risk of paint falling onto cars?*** Bridge |
| **RA** | **IF COST OF PRECAUTION IS LOW, MORE LIKELY TO FIND NEGLIGENCE. A PERSON IS LIABLE IN NEGLIGENCE WHEN THEY DO NOT TAKE REASONABLE STEPS TO ADDRESS/AVOID THE RISKS OF THEIR ACTIONS** |
| **RE** | owners did nothing but there were additional steps at minimal cost that they could have done. P gave evidence of extra steps. |

### Law Estate v Simicie(1994 BCSC) (*doctors-didn’t-order-CT*)

|  |  |
| --- | --- |
| **F** | *Plaintiff sued defendant (doctors) in negligence: Claimed her husband died because of failure to provide timely, appropriate and skilful emergency care; Doctors had not taken a CT scan; Issue of the allocation of limited and costly medical resources.* |
| **I** | ***Does the physician’s responsibility to the patient outweigh his or her responsibility to the medical system overall?*** |
| **RA** | **A PHYSICIAN’S RESPONSIBILITY TO THE PATIENT OUTWEIGHS THEIR RESPONSIBILITY TO THE MEDICAL SYSTEM OVERALL (THE SEVERITY OF THE STANDARD OF HARM OUTWEIGHS THE COST)** |

**NOTES:**

#### Bateman v Doiron, (1991) NBQB:

Ct accepted that Moncton Hospital had to allow GPs to practice emergency room even though it resulted in there being physicians w/ limited skill and experience w/ emergency medicine. There is no community standard that the only staff of emergency dep’ts will be experts in management of critically ill patients ∴ no breach.

* As per *Vaughn* and *Law Estate*, Π must prove that there was a reasonably practicable precaution that Δ failed to take – in those cases, there were fairly obvious precautions available but there may be other situations where it’s more difficult
* E.g. *Neill v New South Wales Fresh Food:* Π had not adduced suff evidence of a practical solution ∴ no basis in evidence upon which jury could find that Δ had breached standard
* There are ample cases where cts explicitly weight the cost of precautions against likelihood and gravity of harm (*Bingley v Morrison Fuels* [combining reasonable foreseeability w/ enormous potential harm and trifling cost of permanently plugging fill pipe = breach of standard]*; Lovely v Kamloops (City)* [installation of guardrails or grab bars at transfer station would be an economic and simple measure relative to the capital and operating costs]
* *Watt*: Struck by jack haphazardly inserted into firetruck, fireman opens it and it strikes him. Denning finds that there is a duty but the fire dept didn’t breach the standard of care b/c the social utility of protecting citizens from fire is great. → i.e. you can get away with way more shit if you’re doing something that is socially useful

# Policy Dimensions:

* Much like when assessing duty of care, there is a catch-all policy dimension when assessing the standard of care
* This dimension looks the **specific and general effects of finding a particular standard of care**, and also what breaching that standard of care would involve
* This is, at least explicitly, relevant largely at the state of calculating breach

# SPECIALIZED STANDARDS OF CARE

* In particular cases of disability, there is no SOC ∴ no possibility of breach (Fiala)
* Children are held to the SOC of a reasonable child of that stage, with other caveats (Joyal)
* Professionals are held to a much higher standard than laymen (Walker; White)

# The Standard of Care Expected of Disabled Persons:

Must have **capacity to commit tort**

**Physically disabled** person is required to meet SOC of reasonable person with same disability (***Carroll v Carolla***).

**Mental disability:** if D is suddenly and without warning struck with mental illness, they are **absolved of liability if** they show on BOP:

1. Because of illness, D had no capacity to understand DOC owed at that time; OR
2. D was unable to discharge DOC as they had no meaningful control over their actions at the time the relevant conduct fell below the SOC (***Fiala v Cechmanek***).

## *Fiala v Cechmanek*(2001 Alta CA) Manic episode car crash

|  |  |
| --- | --- |
| **F** | *MacDonald, one of the defendants, was running, and had a manic episode (bipolar disorder). Jumped on roof of defendant’s (Cechmanek’s) car, broke through sunroof and started choking Cechmanek who inadvertently pressed on gas pedal, ran car into plaintiff. Plaintiff was injured.* |
| **I** | ***Did the defendant, who had a serious mental illness, breach the standard of care owed to the plaintiff?*** |
| **RA** | **A PERSON WITH A SERIOUS MENTAL ILLNESS IS NOT BEHOLDEN TO THE REASONABLE PERSON TEST. IF INCAPACITY TO UNDERSTAND DOC OR IF INABILITY TO CONTROL ACTIONS, SOC DOES NOT APPLY.** |
| **RE** | Argument that persons with mental illness may not have to comply with RP standard:   * Because it is unfair to hold people liable for accidents they are incapable of avoiding (creates a strict liability regime)   + **Does not apply to drug or alcohol users**, only for serious mental illness   → compensation is not the goal – this is an effect; the goal is to make sure that liability comes from some moral wrongdoing  Argument that persons should be held to same standard:  1. Persons who caused the accident should be liable → compensation is the overarching goal  2. Hard to determine extent of mental illness; ct would be inundated with people claiming mental illness erroneously  3. Holding them to same standard would encourage caregivers to take adequate precautions  4. Erosion of objective standard |

Onus is on Δ to show damage caused wasn’t voluntary and that they did not possess the capacity to commit the tort

**TEST** – Must **show one** of the following, on **BOP:**

1. Because of mental illness, Δ had **no capacity to understand** duty of care owed

2. Because of mental illness, Δ was unable to discharge duty of care, as they had **no meaningful control over their actions** at the time the relevant conduct fell below the objective standard of care

→ Preserves the idea that **defendant must act voluntarily and have capacity to be liable**.

# Standard of Care Expected of Children

* SOC adjusted to be appropriate to an individual child considering **age, intelligence and understanding** (still objective).
* BUT, if child is involved in adult-like activity (i.e. driving), held to a higher SOC (reasonable adult).
* No vicarious liability for parents, except if they “carelessly failed to monitor or control the child’s conduct.”

## Joyal v Barsby (1965 Man CA)

|  |  |
| --- | --- |
| **F** | *Large truck approached child with horns sounding. Child, 6 years old, moved towards truck without looking for traffic in other direction. After thinking the children had stopped, kept on driving. Child ran into defendant’s vehicle (that was following truck) and suffered grievous injuries* |
| **I** | ***Was the child contributorily negligent?*** |
| **D** | ***→* No,** children are not held liable if they are incapable of understanding/meeting SOC. |
| **RA** | **SOC FOR CHILDREN SET AT THE LEVEL OF A CHILD OF LIKE AGE/INTELLIGENCE/EXPERIENCE** |

# Standard of Care Expected of Professionals

SOC made appropriate to the particular profession. [“Mere errors” are not negligence]

* Relies on expert evidence to establish SOC (unlike e.g. driving cases, where judges are presumed to know what the SOC is).
* Surgery: SOC are unique to each individual specialty: **accepted practice of surgeons** (***White v Turner***)
* P must prove not only a bad result but also that it was caused by negligent conduct. Poor result does not necessarily mean there has been negligence.
* **Volunteers in health care** NOT held to professional SOC (expected to know limits and ask professional where necessary).
  + If they suggest they have professional skills, they will be held to that standard.

## *White v Turner*(1981 ON HC, affd 1982 ON CA)

|  |  |
| --- | --- |
| **F** | *Defendant (D) performed breast reduction surgery on the plaintiff (P). P suffered post-operation complications and breasts were scarred and misshapen. P sued D claiming negligence in performing the operation and in not adequately disclosing medical risk.* |
| **I** | ***Was the doctor negligent in performing the operation?*** |
| **D** | The SOC appropriate to that profession must be observed. Determining what this standard is often established only by expert evidence. |
| **RA** | **PROFESSIONALS HAVE A DUTY TO PERFORM ACCORDING TO THE SOC OF HIS PROFESSION** |
| **RE** | Mere error in judgment by a professional person is not negligence → Poor result does not necessarily mean there has been negligence. **P must prove not only a bad result but also that it was caused by negligent conduct.**  Reasonable person test:   * Did the surgeon perform operation in a substandard way? * Plastic surgery has its own standards unique to the specialty   D did not remove enough tissue, for two reasons:   1. Operation was done too quickly (should have taken min 3.5 hours, took only 1.5. Experts said too fast to take adequate care). 2. Suturing started before proper check was made of whether enough tissue removed. Standard practice is to make only a few sutures and then verify the bulk of the breasts; No evidence that defendant did the standard check (no notes, inconsistencies in written report). |

## 

## Degrees Of Negligence:

* CL generally recognizes only one standard of care in negligence: reasonable person
* Statutes sometimes restrict the scope of liability to injuries inflicted as a result of ‘gross negligence’ (difficult to define but usually determined by the **variance from the SOC**)
* Negligence < gross negligence < criminal negligence
* A ‘very marked departure’
* Generally confined to two types of statute:
  + Liability of a municipality for injuries caused by snow or ice on sidewalks
  + Liability of med professionals who provide medical assistance during emergencies
* Standard of care req’s Δ to act as the reasonable person would have in similar circumstances
* cts have recognized, w/in these circs, the ‘sudden peril’ doctrine: conduct that would normally be considered careless is exempted from liability if, in the context of an emergency, it was reasonable. **Reasonable people make reasonable mistakes under pressure.**

## Custom of Profession

* Custom is vital in determining what the reasonable person would have done in those circs
* Custom can be determined in many ways, but cts often rely on: expert evidence, guidelines, Ks, leg’n
* SOC expected is that of a prudent and diligent doctor in same circumstances.
* **Specialists** assessed in light of conduct of other ordinary specialists, who possess reasonable level of knowledge, competence and skill expected of professionals in Canada. **Must exercise degree of skill of an average specialist in his field.**

### Ter Neuzen v Korn(1995 SCC)

|  |  |
| --- | --- |
| **F** | *Ter Neuzen became infected by HIV as a result of her participation in Korn's artificial insemination program from 1981 to 1985. Not warned of risk of HIV infection. Prior to January 1985, there was no test available for detection of HIV in semen or blood in Canada, and medical literature did not mention AI as a mode of transmission of HIV before September 1985. Korn was not aware that HIV could be transmitted by AI until July 1985.* |
| **I** | ***Is living up to the customs of a profession enough to eliminate liability in negligence?*** |
| **RA** | **IN SCIENTIFIC CASES, LIVING UP TO THE CUSTOM IS SUFFICIENT TO ELIMINATE LIABILITY IN NEGLIGENCE. EXPERT ADVICE IS NEEDED TO EVALUATE THE "CUSTOM" STANDARD OF CARE IN SPECIALIZED CASES SUCH AS THOSE INVOLVING MEDICAL CARE.** |
| **RE** | **Expert evidence established that Korn's AI practice**, as well as recruitment and screening of donors was in **keeping with general practices in Canada at the time**. Used fresh semen (later found out that frozen would have been fine but no one knew that at the time of infection).  Screening process: didn’t screen adequately for sexually transmitted diseases in a generic sense. The evidence was that his screening was in keeping with what the average specialist did at the time. Korn was found negligent at trial, but this was overturned on appeal.  When dealing with a **regular DOC issue**, the judge/jury will intuit the SOC and **then applies it to the D and D’s action**/non-action.  When dealing with a **medical expert**, they need expert evidence as to what the competent professional would have done. The jury/judge needs to be **bound to that evidence**, unless the mistake is “obviously fraught with risk.” [sponge in the patient case: even though no one counted sponges at the end of the operation, the judge said that it needed to be done because it was a practice that was “fraught with risk”.] |

### Lapointe v Hopital le Gardeur:

Extracted in Ter Neuzen; provides perhaps the neatest statement of how custom determines SOC: *a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognised by medical science at the time,* ***even in the face of competing theories.***

Notes:

* GPs expected to exercise standard of care of a reasonable, competent GP, including knowing their limits and **when to refer patients to a specialist** (*Layden v Cope*: Gout diagnosed by 2 GPs but patient deteriorated; specialist immediately diagnosed other ailment but by that time leg had to be amputated)
* Individuals may be held to a professional standard if they implicitly or explicitly suggest that they have the skills and training of a pro
* if the person is practising in a 2e/related field, they won’t be held liable for not meeting standard of 1e field (e.g. *Shakoor v Situ*: Practitioner of traditional Chinese herbal medicine, didn’t hold himself out as an orthodox physician ∴ not held to meet standard of reg dr.)

### Walker Estate:

**Assessing and quantifying standard of care**:

* Blood donors gave blood between 1982-1985, infected 3 people (W, O, & M // Πs + Rs)
* Canadian Red Cross Society (Δ + A)
* CRCS owed DOC to ensure the safety of the blood and blood products it provided for therapeutic use

**SOC: What was reasonable of the CRCS to put in their pamphlet?** Professional standards of other voluntary blood banks (e.g. of US)

* ARC pamphlet (released March 1983) made reference to AIDS, high-risk groups, and signs of symptoms ***versus*** questionnaire released by CRCS in April 1983 did not make mention of AIDS – not until May 1984 that CRCS released a pamphlet referring to AIDS
  + CRCS had access to the same body of knowledge and data
  + In regular communication w/ other bodies ∴ reasonable to conclude that CRCS had same amt of knowledge possessed by US counterparts
* Symptom-specific questions deliberately designed and intended to eliminate donors at high risk for being infected w/ HIV (US approach) vs. CDN approach of ‘good health’ question
  + Illustrated by donor’s swollen lymph nodes which did not alarm the donor or make him think he was in ‘bad health’
  + did not turn on disagreement over a medical issue but rather the evaluation of whether the message conveyed by the pamphlet was sufficient to deter those at high risk of HIV from donating blood – this finding was not based on the application of any medical expertise)
  + ∴ good health question did not meet standard -- a donor cannot know if he or she is in good health unless told what would constitute bad health in the context of the *purpose* of the good health question
  + As early as April 1983, CRCS decided to implement a donor-screening pamphlet but not done for >1 year

**Breach:**

* CRCS failed in its duty to exercise the standard that other blood banks used to screen high risk donors under similar circumstances → appeals dismissed
* (CA applied learned intermediary rule; SCC did not but held nonetheless that W should be compensated)
* The standard of care was breached by CRCS’ failure to institute the pamphlet at all. Had the CRCS not been negligent, they would have had a pamphlet by 1983, using terms like the US 1983 pamphlet and would have made sure that donors read it.

# CAUSATION:

If there are **2+ distinct injuries**, each must be **separately analyzed** in terms of causation ∴ helpful to focus initially on each distinct loss or category of losses and determine if it attributable to 1 or to 2+ tortfeasors

IF SINGLE INJURY IS:

* **Divisible:** loss that is attributed to conduct of 1 person only, or in addition to a negligent Δ, there has been an absconding tortfeasor, a contributorily negligent Π, or an innocent, pre-existing, or naturally occurring contributory cause → SINGLE CAUSE
* **Indivisible:** attributed to the conduct of >1 → MULTIPLE CAUSE APPROACH (Π does not need to prove that Δ was the sole, immediate, direct, or even the most important cause of his/her loss – rather, must only prove that Δ’s negligence was **a** cause)

# The But-For Test

**If Π’s injury would not have occurred but for Δ’s negligent act, then Δ’s negligence is causally effective.**

## *Kauffman v Toronto Transit Commission,* (1959) ONCA

|  |  |
| --- | --- |
| **F** | *P stepped onto escalator in D’s subway station and was immediately knocked down by a man (who had been knocked down by two scuffling youths). Very severe injuries were sustained as a result of her fall and the continuing movement upward of the escalator.* |
| **I** | ***Did the type of handrail in use cause P’s accident?*** |
| **D** | No evidence that Π’s injuries would have been avoided if her hands had been grasping a rubber oval hand rail ∴ not a but-for cause. |
| **RA** | **IF P’S INJURY WOULD HAVE OCCURRED REGARDLESS OF D’S NEGLIGENT ACT, THEN THAT ACT WILL NOT GENERALLY BE HELD TO BE A CAUSE.** |

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

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| --- | --- |
| **F** | *Three men (Ps) went to D hospital complaining about vomiting for several hours after drinking tea and were told by the nurse (who was instructed by the medical casualty officer) to go home to bed and call their own doctors. One of the men died of arsenic poisoning 5 hours later.* |
| **I** | ***Was the doctor’s negligence a cause of the man’s death?*** |
| **RA** | **EVEN IF A SOC IS BREACHED, IT DOES NOT AUTOMATICALLY MEAN THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT.** |
| **RE** | P failed to establish, on the balance of probabilities, that Ds’ negligence caused the death of the deceased. It was a timing question; even if the doctor had not been negligent and had come to the hospital, the treatment would have come too late. |

### *Richard v C.N.R.,* (1970) PEISC: (car backed off a ferry)

Π asleep in his car aboard ferry. Awakened by someone shouting “we’re here,” thought it was an attendant so he backed his car off the ferry and ended up in the Gulf of St. Lawrence. Π sued alleging Δ had negligently untied rope across end of ferry before it had actually docked. Ct decided the only cause was the Π’s sudden act of backing off the boat, despite warning signs and the crew’s attempts to stop him.

# Multiple Causes:

Where 2+ causes led to Π’s injuries:

* If Π’s injuries are **divisible** he or she will have a **separate cause of action** against each tortfeasor and the **but-for** test will apply.
* If **single indivisible harm**, can be divided into 2 categories:
  + Independent **insufficient** causes → adequately addressed by **but-for test**
  + Independent **sufficient** causes → **but-for** test can produce **anomalous** results
* **Independent** tortfeasors vs. **joint** tortfeasors:
  + **Independent:** only liable for **injuries that person causes**
  + **Joint**: held liable for torts **committed by fellow joint tortfeasor(s)**, even if he or she did not cause or contribute to the Π’s loss

### *Cook v Lewis,* (1951) SCC:

**3 categories** of cases where individuals will be held to be **joint tortfeasors:**

* 1. **Principal and agent relationships** (agents committing a tort while acting on behalf of their principals)
  2. **Master and servant relationships** (employees committing a tort in the course of employment)
  3. **Concerted actions or joint ventures** (2+ individuals acting in concert to bring about a common end that is illegal, inherently dangerous, or one in which negligence can be anticipated)

→ issue of whether Δs are joint or independent tortfeasors should be considered prior to analyzing the other elements of the cause of action b/c if Δs are joint, Π need only prove that one was a negligent cause. [Asked Δ to disprove that the bullet was theirs.]

## Independent Insufficient Causes:

**Several factors (each being individually insufficient of causing the harm) combine to cause the victim harm**

## Athey v Leonati, [1996] SCC:

|  |  |
| --- | --- |
| **F** | Π/A: pre-existing back issues  Δ: negligently caused car crashes  Π ended up w/ herniated disc |
| **I** | Whether the Δs caused the Π’s injuries, despite the Π’s pre-existing condition |
| **D** | Yes. It is not necessary for Π to establish that Δ’s negligence was the sole cause, as long as they materially contributed, Δ is liable. |
| **RA** | **THERE IS NO BASIS FOR A REDUCTION OF LIABILITY BECAUSE OF THE EXISTENCE OF OTHER PRECONDITIONS: ΔS REMAIN LIABLE FOR ALL INJURIES CAUSED OR CONTRIBUTED TO BY THEIR NEGLIGENCE.** |
| **RE** | **Thin skull rule:** take your victim as you find them; liable even though losses may be more dramatic than they would have been for the ‘average’ victim   * However, there is no need to compensate plaintiffs for any debilitating effects of the pre-existing condition which the Π would have experienced anyway. Π must be returned to their ‘original position’, not req’d to go beyond that (**crumbling skull rule**) * If the injuries sustained in the MVAs caused or contributed to the disc herniation, then the Δs are fully liable for the damages flowing from the herniation. * **Π must prove causation by meeting the ‘but for’ or material contribution test**:   + If disc herniation would’ve occurred w/o the accident → no causation   + If accident *and* pre-existing condition necessary to cause herniation → causation b/c accidents still a *necessary* contributing cause   + If the accidents alone could have been sufficient, and the pre-existing condition could have been sufficient, then it is **unclear what was the cause-in-fact** of the herniation. TJ must then determine on BofP whether Δ’s negligence **materially contributed to the injury**   → Injury resulted from a combination of the accidents and the pre-existing problem. No finding of measurable risk that the herniated disc would have occurred without the accident ∴ **a necessary cause.** |

## Ediger v Johnston, 2013 SCC 18

|  |  |
| --- | --- |
| **F** | Doctor attempted mid-level forceps delivery of baby C — Baby’s umbilical cord became compressed causing bradycardia and brain injury — Doctor did not arrange for back-up Caesarean section delivery or advise mother of mid-level forceps delivery risks prior to attempting forceps delivery |
| **I** | Whether doctor’s attempted forceps delivery caused bradycardia.  Whether doctor’s failure to arrange for back-up Caesarean section delivery or to advise mother of mid-level forceps delivery risks prior to attempting forceps delivery caused baby’s injury  → did these breaches of the SOC cause Cassidy’s injury? |
| **D** | 1. Attempt of the forceps procedure more likely than not caused the bradycardia 2. The dr’s failure to have surgical back-up immediately available was a but-for cause of C’s injury by prolonging the bradycardia. 3. B/c this is decided on the failure of dr to arrange back-up, not necessary to consider the informed consent question but that further confirms that the duty required more than ensuring that anaesthetist was available. |
| **RA** | **THE FAILURE OF THE DOCTOR BREACHED THE STANDARD OF CARE IN ATTEMPTING A MID-LEVEL FORCEPS DELIVERY WITHOUT ENSURING A SURGICAL BACK-UP TEAM WAS AVAILABLE. THIS BREACH LED TO THE Π’S SUSTAINED BRADYCARDIA THAT CAUSED HER BRAIN INJURIES.** |
| **RE** | * Guidelines of CDN OBGYN Society require that surgical backup be immediately available to deliver by c-section upon failure w/ mid-level forceps attempt * Dr did not meet this; before he began procedure (i.e. when in a non-urgent scenario) Dr neglected to take steps to ensure that surgical team would be available * There were other possible causes of the bradycardia but the repositioning of the fetus’ head, allowing for a gap where the umbilical cord could then fall and be crushed by a contraction was **more likely than not**. **It’s reasonable to have reached this conclusion.** * The standard is not merely req’ing an on-hand anaesthesiologist (as Δ sustains) → this standard would be unresponsive to the risk in question and the potential harm arising from it |

# Tweaks and Exceptions to the But-For Test:

* But-for causation is **the almost inevitable test** for cause in fact in Canada
* **Material contribution to risk** is the **only rival** cause in fact test
* Cts looking for **A cause, not THE cause** [not looking for all of the global circumstances that were necessary]
  + Recall sufficient but independent causes or the flaming paper in the wastebasket is
  + More abstract, b/c the ct is really just picking which person is the one who should pay for the loss
* But-for is **an all or nothing test**: a 49% Probability gets 0% damages; a 51% causal probability gets 100% damages

**Proportionate Cause**

* No proportionate cause approach to injuries that occur prior to trial, but there is a different standard of proof for losses that may occur after trial:
* If Π can establish a substantial or reasonable possibility that Δ’s negligence will cause a future loss, Π can recover for a percentage of that loss
  + E.g. 40% chance that Δ’s negligence will cause Π to go blind and that if this occurs, the injury would result in $100,000 → pursuant to *Janiak v Ippolito,* [1985] SCC, Π would be awarded $40,000

**Loss of Chance: NOT IN CDN LAW**

## But-for Tweak #1: 2 defendants rule (Cook v Lewis) reversing onus of proving causation:

**FORCES 2 ΔS OF EQUAL CAUSAL PROBABILITY TO PROVE THAT THEY WEREN’T THAT THEY WEREN’T THE CAUSE OF THE Π’S INJURY**

When does it apply?

* There are **2** Δs → Note that this may come up on the exam about what policy reasons there are for denying this assessment to >2 Δs
* Both were negligent
* One had to have caused all of the Π’s loss
* It is impossible to isolate one Δ as **the** cause

**Citing the rule:** First applied in Cook; may or may not have been altered in Clements to remove the req’ment

## But-for Tweak #2: The objective/subjective test in informed consent cases ***Hopp v Lepp***/*Reibl v Hughes;* ***Arndt v Smith***:

Removes the need for Π to provide positive evidence that, if they were fully informed about a risk, they would have acted in a way to avoid that risk. This tweak allows for an application of a INSTEAD, can apply modified objective standard: **Whether RP in Π’s position would have consented if he/she had been adequately informed.**

**TRIGGER: Doctor knew and didn’t tell patient or doctor didn’t know and so couldn’t tell patient → if they had known, would the patient have done differently?**

**When does it apply?**

* A healthcare professional
* Failed to fully warn a Π
* And it needs to be shown that the failure to warn was a ‘cause’ of an injury that occurred
* There does **not** need to be a learned intermediary
* E.g. “but for the failure to warn, the injury would not have happened b/c the Π would not have undertaken the procedure”

**Citing:** Hopp v Lepp; Reibl v Hughes; then applied in Arndt v Smith;

But note, there is not always internal logic in the outcome: e.g. compare Arndt to Hollis

## But-for Tweak #3 Inference Causation

**TRIGGER:** There is a breach, there is a loss, when using causation where a Π puts forth **some** evidence of cause that the Δ cannot or does not provide rebutting evidence for, a judge is permitted to infer that the Π’s causal evidence is correct.

### Snell v Farrell (1990 SCC) (cataract-patient-goes-blind)

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| **F** | *D (Dr. Farrell) performed a cataract operation on P (Mrs. Snell). D noticed a slight discoloration after injecting a local anesthetic, waited 30 minutes, and proceeded with the operation. Following the surgery, there was blood in the eye (which eventually cleared but P was blind in one eye). The damage to the optic nerve could have occurred naturally or because of continuing the operation, and neither expert witness was willing to state with certainty the cause.* |
| **I** | ***Must Π always use but-for causation test?*** |
| **RA** | **ULTIMATE BURDEN OF PROOF RESTS WITH Π BUT IN THE ABSENCE OF EVIDENCE TO THE CONTRARY ADDUCED BY Δ, AN INFERENCE OF CAUSATION MAY BE DRAWN ALTHOUGH POSITIVE OR SCIENTIFIC PROOF OF CAUSATION HAS NOT BEEN ADDUCED.** |
| **RE** | * Damage to optic nerve could have been caused by continuing operation or could have been natural occurrence **but** expert testimony was that Dr was negligent for continuing with operation after noticing discolouration. * **Doesn’t need to be expert testimony.** * **Ultimate burden still lies with P**, but in case a like this P must show: [Doctor was negligent] + [here are the types of injury that could have resulted from that type of negligence] + [my injury is one of those things.] **Onus is satisfied by inference**. * **[**Π **has to prove that** Δ**’s negligence increased the risk to the extent that the negligence was more likely than not to have been a cause of the loss in issue]** * Draws a distinction between proving a fact scientifically and proving it legally. Didn’t need a 100% certain – rather needed only BoP (51%+) to establish fact. Appeal dismissed with costs. * Ct is bending causation where rigid application would produce injustice |

**Single Defendant Causing One Injury:**

When you **do not know what “in fact” caused the injury** 🡪 an inference may be drawn if no conclusive scientific proof exists. It must be able to say that the particular inference **is the most likely.** If D gives evidence to the contrary, inference can only be made if weight of combined evidence supports inference of causation (***Snell v Farrell***).

When you **know what brought the accident** (but don’t know what would have happened if the tort hadn’t been committed 🡪 Have to say that it is more than probable that the negligence would have caused the injury. It is still the “but for” test. Cts have stated that they will take a “robust”, “common-sense” approaches to causation, and that to “avoid injustice” courts must be flexible. **THIS IS THE RULE IN SNELL.**

## But-For Tweak #4: Learned Intermediary Rule **for causation** (Hollis) would the LI have passed on the information?

**TRIGGER:** LI didn’t know of a material risk, the ct assumes that info would have been passed on by doc.

* **Different rule than that applied in SOC (despite having the same name)**
* **Effectively does the following:** Where a manufacturer failed to provide adequate warning information to a learned intermediary, a ct is a permitted to assume that, if so warned, this learned intermediary would have passed this info onto the Π
* Manufacturers of products that are not directly available to the public, such as prescription drugs, may discharge their duty to inform consumers by adequately disclosing information to a learned intermediary.
* ***Hollis v Dow Corning Corp*** – Dow could not use the learned intermediary rule to shield itself from claims arising from its own negligence b/c it didn’t pass on enough info to make the doctor ‘learned’

## Material Contribution to Injury (never been the law in Canada):

### **McGhee v National Coal Board** (1972 HL) (coal-dust-on-skin)

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| --- | --- |
| **F** | *McGhee was employed to clean out brick kilns and developed dermatitis from the accumulation of coal dust on his skin. Because there were no shower facilities at his workplace, and he had to cycle home each day, increasing the risk he would contract dermatitis. He sued his employer for negligence for breaching its duty to provide proper washing facilities.* |
| **I** | ***Did the failure to provide the washing facilities had caused the rash.*** |
| **D** | **Risk of harm had been materially increased** by the prolonged exposure to the dust → The **material increase in risk was treated as equivalent to a material contribution to damage** |
| **RA** | **HL HELD THAT WHERE A BREACH OF DUTY HAS A MATERIAL EFFECT ON THE INJURY THEN THAT WILL BE A CAUSE.** |
| **RE** | The implication of the case was significant as it meant that a claimant need not demonstrate that the defendant's actions were the "but for" cause of the injury, but instead that the defendant's actions materially increased the risk of injury, and thus damage, to the claimant:  1) P has to prove D created risk of harm and injury occurred within area of that risk.  2) inference of causation warranted because **no practical difference between materially contributing to risk of harm and materially contributing to harm itself.** |

## Material Contribution to Risk Test (the law in Canada but has never been applied ∴ very rare)

NOTE THAT THIS WON’T COME UP ON THE FINAL – OTHER THAN WHAT IS THE TRIGGER OF WHEN THIS WOULD APPLY OR ON A POLICY LEVEL B/C YOU WON’T BE EXPECTED TO BE BREAKING NEW GROUND ON AN EXAM

The **MATERIAL CONTRIBUTION TO RISK TEST** is triggered when:

* 1. Multiple tortious Δs
  2. Π has globally met the but-for test of causation (i.e. shown DOC of each Δ and breach of SOC for each)
  3. But cannot meet the but-for test for each Δ individually (through no fault of her own) in order to isolate the fault to one of the defendant (∴ each defendant could state that the other defendant was the actual cause)

→ If all of these are met, then each Δ who contributed to the risk can be faulted

∴ the injury may or **may not have been caused by the contribution**. It’s about increasing the **CHANCE** of the injury rather than increasing the severity of the injury

## Clements v Clements (2012 SCC) (couple-riding-motorbike-traumatic-brain-injury)

|  |  |
| --- | --- |
| **F** | *A nail punctured the tire while Mr. Clements was driving 120-km/h in a 100-km/h zone. This caused Mrs. Clements to fall off while riding as passenger on the motorcycle. She sustained severe traumatic brain injury, and sued Mr. Clements, claiming that he was negligent in driving an overloaded bike too fast.* |
| **I** | ***Does the usual “but for” test for causation in a negligence action apply, or does a material contribution approach suffice?*** |
| **D** | Mr Clements won: matter should be returned to the trial judge to be dealt with on the basis of “but for” causation (shouldn’t have used material contribution to the risk test b/c it was a single Δ case). |
| **RA** | **SCC CLARIFIED THAT THE MATERIAL CONTRIBUTION TEST IS A VERY LIMITED AND RARE EXCEPTION TO THE GENERAL “BUT FOR” TEST.** |
| **RE** | * General rule is but-for causation test; TJ to take robust and pragmatic approach. **Scientific proof of causation is not required**. * **Exceptionally,** a P may succeed by showing that D’s conduct **materially contributed to the risk of P’s injury**, where:  1. P has established that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and 2. P, through no fault of her own, cannot isolate the fault to one defendant, with each defendant being able to state that the other defendant(s) could be the actual cause.  * “*Material contribution does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation.”*   + Pro-**compensation policy**   + **Corrective** justice – wrongdoer has disturbed the balance and the law must restore that equilibrium – “but for” is satisfied if look at the wrongdoers as a pool |
| **ETC** | Questions that *Clements* leaves open are:   * Whether, in the case of multiple Ds who are liable for each materially contributing to the risk that P would be injured as he/she was, the liability of each D is joint and several with the others, or several (proportional). *Barker* favoured the former view but the SCC did not indicate agreement with that proposition. * Whether, in a one-D scenario, material contribution to risk is unavailable. *Sienkiewicz* was not accepted by the SCC but not rejected outright either. |

ARE THESE TWEAKS BENEFICIAL OR DETRIMENTAL? --- POLICY QUESTION

# REMOTENESS OF DAMAGE

The narrowest point of the sieve of negligence – where someone might meet the but-for test on some kind of technicality but that we think it is unfair to hold that person responsible. To what extent can the D say that they aren’t liable because of the remoteness of the damage. Rule of “fairness”, policy considerations, LEGAL instead of factual link. Consider how remoteness separates kinds of harm from extent of harm.

* D is only liable for reasonably foreseeable consequences of his negligence (***Wagon Mound 1***). Have to decide whether the damage suffered is **different in kind** from the foreseeable kind.
* However, it is **NOT** necessary for the precise manner of the accident to be foreseeable. Instead foreseeability relates to the type/kind of the harm suffered by P (***Hughes***).
* Any foreseeable physical injury makes D liable for ALL physical injury, including psychiatric consequences that P suffers (***Marconto*** – change in personality).
* If there is no physical injury at all, psychiatric injury is considered too remote if it is such that a person of reasonable fortitude wouldn’t have suffered it (***Mustapha***, *flies-in-water-bottle*).
* D is liable for **all “possible consequences”** if a reasonable person would have taken it into account (***Wagon Mound 2***).
* This means a serious risk will not be too remote **even if there is statistically very small change** of happening.
* Remoteness usually only succeeds where damage linked to a factual thing which the tortfeasor has no awareness of (e.g. poisoning a well, which leads to a heart attack).

**Foreseeability of harm:** Progressively decline in each stage from the general to the particular

**Duty kind** - was ANY harm of any kind foreseeable? (*Donoghue*)

**Breach of the duty** - was it foreseeable that being negligent in this particular way would cause some kind of harm? (focus on the exact way that they were negligent)

**Remoteness** – was this type of damage foreseeable as an outcome of the kind of negligence charged?

# Directness Versus Foreseeability

1. The earlier statement of remoteness was the directness or proximate cause inquiry from Re Polemis\*\*, which stipulated that anything that was a ‘**direct result**’ of the defendant’s negligence was not too remote.
   1. This caused obvious difficulties: direct results include an incredibly wide ambit of outcomes.
   2. Unhelpfully, as a result of Re Polemis\*\*, some still refer to remoteness as a test of proximate cause

The Wagon Mound (No. 1)(1961 PC (NSW))

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| --- | --- |
| **F** | *Appellant Wagon Mound (WM) carelessly permitted oil to spill into Sydney Harbour while taking on fuel. Oil was carried by wind and tide under respondent Morts Dock and Engineering’s (MDE) wharf. MDE’s employees were using welding equipment. Burning debris ignited oil and set wharf ablaze; wharf and equipment were severely damaged* |
| **I** | ***Should a causation analysis adopt the test for directness or the test of reasonable foreseeability?*** |
| **D** | PC held that a party can **only be held liable for damage that was reasonably foreseeable**. [directness is no longer the test for remoteness] |
| **RA** | **IMPOSED A REMOTENESS RULE FOR CAUSATION IN DAMAGE. LIABILITY FOR DAMAGES IS BASED UPON THE REASONABLE FORESEEABILITY OF THE KIND OF INJURY.** |

# Modifications to The Foreseeability Test

## Limiting The Kind Of Injury

### Hughes v Lord Advocate (paraffin wax lamp explodes in manhole)(1963 HL)

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| --- | --- |
| **F** | *Workers removed a manhole to work under the road. They had marked it clearly as dangerous. Took a break from work. Π, a young boy, went into the manhole to explore; then lamp was knocked into the hole and caused explosion. Π fell back in & was badly burned* |
| **I** | ***Does the foreseeability of the actual event that caused the injury matter (i.e. the explosion), or just the foreseeability of the type injury (i.e. the burns)?*** |
| **RA** | **AS LONG AS THE GENERAL TYPE OF INJURY CAN BE FORESEEN, THERE WILL BE PROXIMATE CAUSE.** |
| **RE** | what is truly of importance is whether the lighting of a fire outside of the manhole was a reasonably foreseeable result of leaving the manhole unwatched, and they determine that it was as the lamps were left there. He focuses on the lamp, and states that the types of injuries that are reasonably foreseeable from lamps are burns, which is exactly what we have here. Therefore, the injury is not different in kind from what should have been expected. As long as you can foresee in a general way the type of injury that occurs then you have met foreseeability. |

Smith v Leech Brain & Co (1962 QBD)

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| **F** | *Smith's husband worked in a factory owned by Leech Brain galvanizing steel. He had previously worked in the gas industry, making him prone to cancer. One day at work he came out from behind his protective shield when working and was struck in the lip by molten metal. The burn was treated, but he eventually developed cancer and died three years later. The protection provided to employees during their work was very shoddy.* |
| **I** | Does it matter that the outcome of a physical injury is unforeseeable? |
| **D** | The test is *not* whether the injury would cause cancer, but rather whether the injury itself was foreseeable |
| **RA** | **IF THERE IS A FORESEEABLE RISK OF INJURY, YOU ARE LIABLE FOR THE WHOLE INJURY.** |
| **RE** | * the "thin skull" rule applies; this is a case of "taking your plaintiffs as they come" rather than insufficient proximity. * ∴ b/c the burn was a negligent action on the part of Leech Brain as they did not provide ample safety, and it at least partially led to the development of the cancer, the defendants are liable. * The ruling in Wagon Mound does not apply to cases where the outcome was unforeseeable to a particular plaintiff because of a condition that he or she had; rather it is used in situations when the foreseeable connection between the action and the outcome is unreasonable. * For actions in tort, you take a plaintiff as he or she comes - the fact that they have a condition that led to more damages than normal is not a factor in determining damages (the "thin skull" rule). |

### Marconato v Franklin (1974 BCSC)

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| --- | --- |
| **F** | *Plaintiff suffered relatively minor physical injuries in a car accident caused by defendant’s negligence. Following the accident, she developed psychiatric and physical problems. Psychiatric evidence indicated that she had paranoid tendencies before the accident; but that she had been a good homemaker. The accident triggered a major personality change.* |
| **I** | ***Is there a finding of causation when negligence results in an injury partly because of a pre-existing condition?*** |
| **D** | Thin skull rule applies. The specific consequences of the physical injury don’t need to be foreseeable. |
| **RA** | **A FINDING OF CAUSATION WILL FOLLOW WHEN NEGLIGENCE AGGRAVATES A PRE-EXISTING CONDITION, RESULTING IN AN INJURY.** |
| **RE** | * Injury arose because of pre-existing personality traits: the consequences could not be foreseen * Δ could foresee the probability of injury, and the wrongdoer takes the victim as he finds him, with all the victim’s peculiar susceptibilities and vulnerabilities * Π injuries were unusual, but arose involuntarily. * Π was predisposed by her personality to suffer the consequences which she did suffer as a result of the modest physical injury caused by the accident; and it was that predisposition which brought on the unusual consequences of the injury. * *If it was reasonably foreseeable that* Δ*’s carelessness would cause some injury* ***of a particular type,*** *then* Π *can recover in full even if, b/c of special vulnerability, he or she suffered to a greater extent than could have been reasonably foreseen* * However, note that before Πs can claim damages for thin skull personalities, there must be some form of physical injury first --- remember *Mustapha* |

## Thin skull vs. Crumbling skull in remoteness:

* CDN cts do not abide by this formal distinction // these issues tend to be dealt with in damages instead but not using skull nomenclature
* Although person w/ thin skull is unusually vulnerable to harm, they still might have been able to avoid injury. Legal question = whether Δ should be held responsible for carelessly cracking a skull that, while weak, might otherwise have survived?

**Vs.**

* Crumbling skull victim is doomed to damage.
* Legal question = whether Δ should be held responsible for hastening the onset of an injury that eventually would have occurred in any event → yes, but only to the extent that Δ worsened Π’s condition.
* Crumbling wallet rule? → no absolute rule that Π cannot recover full value of a loss that was exacerbated by its own impecuniosity

# The Possibility Of Injury

The Wagon Mound (No.2)

|  |  |
| --- | --- |
| **F** | Same incident as Wagon Mound 1, except these were the owners of a ship being repaired at the dock that was damage in fire. However, in findings of fact, they did find that it’s not *impossible* for oil to catch fire on water and Δs should’ve been aware of that. Also, the oil had to have been escaping for a long time, given the amount of oil. |
| **I** | should Δ be liable for damage to Π’s ship? |
| **RA** | **POSSIBILITY OF INJURY: IS THERE A REAL RISK THAT WOULD OCCUR TO RP?** |
| **RE** | BUT-FOR: already proven in No. 1  REMOTENESS:   * Reaches opposite conclusion * In this version, the Ps did not have to avoid the idea of foreseeability – in the first case they had to avoid it * Referred to ***Bolton*** (*cricket-accident*), which was a case on duty of care. Judge said risk of fire was not unheard of (was remote and small, but there’s no good reason not to avoid it because the risk of damage was known).   REASONS: 2 different types of risks at issue – too far-fetched vs real and substantial risk  ∴ must ask **is there a real risk that a loss would occur in the mind of a reasonable person in the position of the Δ?** |

### Assiniboine South School Divn. No 3 v Greater Winnipeg Gas Co [snowmobile idiots](1971 Man CA, affd 1973 SCC)

|  |  |
| --- | --- |
| **F** | *Hoffer’s snowmobile ran out of control, striking a gas-riser pipe installed by Greater Winnipeg Gas (GWG). A pipe fractured and gas leaked into the boiler room of the Assiniboine school. The gas in the school ignited, and an explosion and fire occurred caused damage to the school.* |
| **I** | ***Was the damage reasonably foreseeable and therefore recoverable?*** |
| **RA** | **THE TEST OF FORESEEABILITY OF DAMAGE IS A QUESTION OF WHAT IS POSSIBLE RATHER THAN WHAT IS PROBABLE***.* |
| **RE** | * Are Hoffers responsible for fire at school? Unusual that it hits a gas pipe, but def foreseeable that the vehicle would get away from son. * Is GWG responsible? Yes, getting hit by a toboggan or another vehicle might not be a great probability but must also consider that probable seriousness of injury would be v. great and also the cost and difficulty of precautions would be minimal. * Liability depends upon whether the damage is of such a kind as a reasonable man should have foreseen. Once that loss is foreseeable, you’re then liable for the entirety of the damages (*WM#1*); it’s not that the loss is probable but rather the loss only needs to be possible (*WM#2*) |

### Mustapha v Culligan(2008 SCC) (must be foreseeable that person of ordinary fortitude would suffer)

|  |  |
| --- | --- |
| **F** | *Water bottle had dead flies in it and Mustapha suffered a major depressive disorder as a result.* |
| **I** | Was it reasonably foreseeable that the psychiatric injury would result from the flies? |
| **D** | No, not for a person of ‘ordinary fortitude’ |
| **RA** | **P MUST SHOW THAT IT WAS FORESEEABLE THAT A PERSON OF ORDINARY FORTITUDE WOULD SUFFER SERIOUS INJURY. UNUSUAL OR EXTREME REACTIONS TO EVENTS CAUSED BY NEGLIGENCE ARE IMAGINABLE BUT NOT REASONABLY FORESEEABLE.** |
| **RE** | * Law of tort imposes obligation to compensate for any harm (including psychiatric) done on the basis of *reasonable* foresight, not as insurance * Law of negligence seeks to impose a result that is both fair to the P and D - draws the line at compensability of damage at reasonable foreseeability. * TJ erred in applying a subjective standard (considered P's previous history, particular circumstances, cultural factors). |

# Intervening Causes

* **Intervening act** = act that causes or contributes to P's loss after original D's breach has taken effect
* Not strictly speaking a remoteness issue, but there is a foreseeability component to it.
* When P's loss is caused by Ds breach and a subsequent intervening act
* *Ex: blocked sidewalk forces pedestrians to walk on road and one is struck by negligent driver*
* Both contractor and driver causally contributed to the situation that resulted in P's injuries - should the contractor be held liable for the injuries that were caused by the driver?
* Traditionally intervening cause was said to have severed the causal link between original breach and the intervening cause
  + Last wrongdoer was held responsible
* That doctrine replaced - intervening acts were then divided into three categories:

1. Intervening acts that were naturally occurring or non-culpable held not to break chain of causation
2. Negligent intervening acts were held to break chain of causation, absolving original tortfeasor of liability
3. Deliberately wrongful or illegal acts broke chain of causation unless original tortfeasor had a duty to prevent the act

## **General Principle:** "within the scope of the risk" test

Two approaches:

1. analyze the issue to see whether the **loss** caused by the intervening act was within the scope of the risk created by the original tortfeasor
2. **ASK:** was the intervening act **within the scope of the risk** created by the original tortfeasor?
3. **YES?** Original tortfeasor = liable
4. **NO?** Intervening cause

Two related issues:

**CAUSATION:** is it fair to say that D's negligence caused the other person to act?

**REMOTENESS:** was it reasonably foreseeable to D that negligence could lead to the ultimate injury suffered by P?

### Bradford v Kanellos (1973 SCC)

|  |  |
| --- | --- |
| **F** | *Appellants were customers in a restaurant where there was a grease fire. Fire was extinguished, but on hearing hissing noise from the suppression system, customer yelled that there was going to be an explosion and wife was knocked off her stool and injured.* |
| **I** | Remoteness: whether the response by the panicking patron was foreseeable  Is this within the risks set into motion by the Δ’s failure to keep the grill clean? |
| **D** | Martland J: **Majority of SCC finds that restaurant was not liable**—majority looks at whether the injury itself was foreseeable (and it was an unforeseeable reaction by a silly customer) |
| **RA** | **IF INTERVENING ACT IS BROADLY WITHIN SCOPE OF FORESEEABLE RISK CREATED BY D'S NEGLIGENCE, THEN HE WILL REMAIN LIABLE FOR RESULTANT DAMAGE. IF INTERVENING ACTS IS NOT FORESEEABLE, THEN D IS NOT LIABLE.** |
| **RE** | **Test**: the person guilty of the original negligence ought to reasonably have anticipated such intervening negligence and to have foreseen that if it occurred the result would be that his negligence would lead to loss or damage.  **Causation issue**: can you say that the D’s negligence caused the third parties act that caused the harm?  **Remoteness question**: was this a foreseeable type of harm? |

### Price v Milawski (1977 ON CA)

|  |  |
| --- | --- |
| **F** | *P broke his ankle playing soccer. Went to hospital and told the doctor that he heard his ankle crack and thought it was broken; Doctor did some X-rays although the foot, not the ankle. He told the P that there was no fracture and his ankle was sprained. P visited second dr. complaining about swollen ankle. did not order new tests, even though this could be easily done. Family doctor applied a cast for a strained ankle. Weeks later, tests from a specialist revealed that it was broken, and that the weeks delayed permanently injured the P. TJ found both Doctors liable for negligence; they appealed on negligence and damages****.*** |
| **I** | ***Can a person acting negligently be held liable for future damages arising, in part from subsequent acts of negligence, and in part from his own negligence?*** |
| **D** | Both doctors jointly and severally liable. |
| **RA** | **A PERSON WHO COMMITS A NEGLIGENT ACT MAY BE HELD LIABLE FOR FUTURE DAMAGES ARISING IN PART FROM THE SUBSEQUENT NEGLIGENCE AND CONSEQUENT DAMAGES WHICH WERE REASONABLY FORESEEABLE AS A POSSIBLE RESULT OF HIS OWN NEGLIGENCE.** |
| **RE** | * Argument by Dr. Murray: not foreseeable that such consequences would flow from his initial acts of negligence. * **No bright line**—evaluation of the extent to which your act of negligence made it possible for a subsequent person to do something and really caused them to do it * Courts reluctant to hold original defendant liable for negligence where intervening act is deliberate. |

### Hewson v Red Deer (1976 AB SC)

|  |  |
| --- | --- |
| **F** | *P owned a house near an urban construction site in Red Deer. Tractor used for pushing gravel was operated by an employee of the city. He left the key in the ignition, the door open. The Tractor ended up crashing up into the home after a mysterious individual let it loose. Crashes into Hewson home.* |
| **I** | Was the unknown mischief-maker an intervening cause or was it reasonably foreseeable that someone would try and meddle with it? |
| **D** | It was reasonably foreseeable and relatively easy to prevent. |
| **RA** | **CANNOT USE THIRD PARTY INTERVENTION (*NOVUS ACTUS INTERVENIENS*) AS A DEFENCE IF THE DEFENDANT FAILS TO GUARD AGAINST THE VERY THINGS THAT ARE LIKELY TO OCCUR.** |
| **RE** | * The defendant could have secured the tractor further; the tractor was parked in a location accessible to people living in the area (including a college campus) **∴**   → It was reasonably foreseeable that anyone of the people in the area might become aware that the tractor was being left at the stockpile unattended and might be tempted to put it in motion  → And thus *novus actus interveniens* is not applicable  **Supports the argument that the general rule of foreseeability still applies**.   * If the actions of the third party is foreseeable, even if it is intentional, D is still liable. * In a failing-to-prevent case, foreseeability of the third party's act decides the three elements of the breach, causation and remoteness of damage all at once. * Can be **liable for damage by third party** IF the third party's actions were something that you could foresee and that a RP would have attempted to prevent. |

# THE TORT LIABILITY OF PUBLIC AUTHORITIES

**Two schools of thought:**

1. Public officials should be subject to the same rules as private actors and that, by extension, the financial burden of misadventure should be borne by society as a whole, rather than by individual victims
2. B/c modern gov’t is so extensive, it will be exposed to a huge amt of liability ∴ there must be exceptions

# Liability for Judges:

* Leg’n typically provides for immunity of judges at all levels
  + Usually states that a judge can only be held liable in tort if Π can establish that he/she acted maliciously and w/o reasonable + probable grounds
  + *Provincial Court Act,* s. 71 and has also been affirmed in cases (e.g. *Foran v Tatangello)*
  + This has been extended to public authorities who perform quasi-judicial functions, but what constitutes a quasi-judicial function is still unclear (*Everett v Griffiths*)
* Criminal code permits a reviewing court, upon quashing a conviction, order, or other proceeding, to issue an order protecting the original judge from tort liability and can also issue a protection order for anyone acting in accordance w/ the order (e.g. PO who held someone in custody)

# Crown Immunity:

* *Nelles v Ont* (1989) SCC: held that Crown was protected by statute from civil claims based on how it discharged its judicial responsibilities but denied immunity to the AG and Crown attorneys personally
* Crown is not immune to liability in negligence; but statutes are complex and not clear
* Crown is subject to liability only to the extent that it voluntarily submits itself to judicial authority through legislation like the *Crown Liability and Proceedings Act*
* Not all public authorities are crown agents – only those over which the Crown exercises a significant degree of actual or potential control are characterized as such:
  + Includes exec gov’t of Canada and the provinces, their ministries, dep’ts, corporations and boards, as well as ‘servants or agents’ thereof
* More frequently sued for vicarious liability but can also be sued directly
* Municipalities are not considered to be part of the Crown, but are covered by other leg’ve prov’ns
* Limitation Periods

### *Black v Chretien,* (2001) Ont CA:

Black sued PM for negligence. Ct struck out the claim b/c Crown prerogative is subject to judicial review only if it affects the rights or legitimate expectations of an individual. Black had neither a right to nor a reasonable expectation of receiving a peerage. Dispute found to be purely political ∴ no basis for a claim in tort.

# Government Actors

### Just v British Columbia (1989 SCC)

*Father/Daughter going to Whistler on sea to sky highway. Rock slide – boulder crashes into car and kills daughter. It was alleged by father that the BC government was negligent in its administration of the highway, and that they failed to maintain the highway to a sufficient standard of safety; climatic conditions – freezing and thawing, wind, build up of snow and tree damage were considered all factors in the rock slide. It was contended that inadequate attention was given to these factors by the BC government and that a reasonable inspection could have saved the daughter’s life.*

**Is the implementation of the inspection a policy or operational decision?**

A decision not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. Once the policy decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the gov’t agency has met the requisite SOC.

DOC can be exempted for gov’t by:

* 1. Statute
  2. Classification as policy – this classification will be dependent on nature of decision not just by the seniority of actor

Manner and quality of inspection = SOC ∴ the manner in which inspections were to be carried out were manifestations of the *implementation* of policy decision to inspect ∴ *operational* in nature → go on to SOC

Sopinka dissent:

* The operation of the inspection program was a policy decision as well. The people charged by the government to inspect the rock ridge have limited resources to carry out the broader policy decisions.
* Thus in their operations they have to make bona fide decisions as to where they can focus their time and money. These decisions are within the government’s statutory discretion, and therefore not subject to action.
* **For an action to be possible**, it **must be shown that within the operational decisions of the government’s inspectors, they performed their duties carelessly**

**Notes:**

* Distinction between policy and operational functions is notoriously difficult to make
* Tort law often struggles when the Π’s injury takes the form of pure economic loss but in the context of claims against public authorities, SCC draws no distinction between cases involving physical damage and those involving pure economic loss ∴ once a ct recognizes a duty of care and formulates SOC, Δ liable for either type of loss
* The difference between the exercise of a discretionary power & the failure to exercise a discretionary power is stark (Kamloops v Neilson\*)
* If a discretionary power is not exercised, then the Crown will not be liable in negligence
* If a discretionary power is exercised, then the Crown will be liable if the manner in which is is exercised
* However, if a discretionary power is exercised in *bad faith,* then it *is* reviewable (Just\*\*\*)
* The Crown is not liable for policy decisions // The Crown is liable for operational procedures
* Two general observations are possible:
  + Generally, policy decisions are made by high ranking officials (Just\*\*\*)
  + Budgetary decisions are generally considered to be policy decisions (Just\*\*\*)

# The Effect of Cooper v Hobart

Effects on Negligence Analysis RE: Public Authorities in 4 ways:

1. Necessary to situate policy/operational distinction w/in the framework provided in Cooper [government immunity for policy functions falls w/in proximity stage]
2. Placed greater emphasis on the element of proximity than had previous decisions in Canada – similar considerations to those involved in the policy/operational analysis
3. Interaction of statutory duties and the common law DOC has become more complex [breach of statutory duty is not a nominate tort in Canada: Π cannot succeed unless there existed a common law duty of care. While statute may be relevant, it isn’t determinative // statutory framework has however become the primary consideration in negligence claims against public authorities; b/c many of the relevant statutory prov’ns are phrased broadly, w/ the general public interest in mind, the cts have had problems finding a private DOC in the statutory language]
4. Seems to reflect a more restrictive attitude toward public authority liability in Canada; Canadian cts now more reluctant to impose a DOC on public authorities

# Applying Public Authority Liability in DOC Analysis:

Is it an established or analogous class? If no:

* Cooper v Hobart\*\*\* tells us that we must consider two areas to determine if a novel duty should be created.
  + 1A: Reasonable Foreseeability. Which involves:
    - Asking if the kind of harm was reasonably foreseeable; and
    - Asking if the plaintiff was a reasonably foreseeable plaintiff
  + 1B: Proximity. Which involves:
    - Physical Proximity (Palsgraf\*\*\*)
    - Conceptual proximity (Donoghue\*\*\*)
      * Crown Δ and is the action a **policy** decision? If yes, then the parties are not sufficiently proximate → analysis over.
      * Crown Δ and the decision is an **operational** one: look to the statutory scheme. Does the scheme exclude liability? If yes, then the parties are not sufficiently proximate.
    - Specific policy questions esoteric to the relationship between the parties (Childs\*\*\*, Cooper\*\*\*)
  + 2: Residual policy questions

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**LEARNING OBJECTIVES:**

* Clarify the Policy vs Operational distinction through close reading of Imperial Tobacco
  + Distinction made that core policy decisions are those that weigh social, economic, political considerations – operational matters implement those
* Understand the difference between evidentiary burdens and legal burdens
  + Legal burden is who bears the onus of proving elements of claim on BOP (usually Π); evidentiary burden is a question of which party must introduce evidence of the fact
* Consider upon whom these burdens rest
* Analyse the exceptions to the general rule on the burden of proof
  + Statute, circumstantial evidence, multiple Δs
* Understand the (superceded) doctrine of Res Ipsa Loquitur
  + RIL used to be triggered by these three factors (which are still used when considering circumstantial evidence): wouldn’t have happened w/o negligence; under sole management and control of Δ; no evidence of how accident occurred.

# Policy vs. Operational Distinction

### *R v Imperial Tobacco Canada Ltd.,* 2011 SCC [core policy immunity // clarifies Cooper]:

|  |  |
| --- | --- |
| **F** | During litigation against IT for harms caused to smokers and costs of their health care on the BC gov’t, IT brought a claim against the Gov’t of Canada – alleged that Canada owed a DOC to consumers and to tobacco companies, and that Canada was liable for negligently misrepresenting the health attributes of light/mild cigarettes. IT claimed Canada was contributorily negligent to the health care costs by encouraging light/mild cigarettes as a viable alternative. |
| **I** | Whether Canada’s representations to consumers and tobacco industry was a policy or whether it was acting in an operational capacity? |
| **D** | Claim against Canada struck out; no PF case. |
| **RA** | Only true policy decisions should be protected, as opposed to operational decisions. Core policy gov’t decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith |
| **RE** | Cooper is becoming a three-part test:   1. **Reasonable foreseeability** (relative to the public) → Yes, gov’t of Canada is in a special relationship // (relative to the tobacco companies) → yes 2. **Proximity** (relative to the public)→ no relationship of proximity – no DOC arises to *individual* smokers // (relative to the tobacco companies) → yes, there was a relationship of reliance such that tobacco companies would rely on the gov’t’s claims and pursue marketing accordingly 3. **Residual policy** → PF DOC to tobacco companies is negated by the fact that the interactions between the gov’t and the companies are POLICY interactions.  * The reps made were part and parcel of the gov’t policy to encourage people who continued to smoke to switch to low-tar cigarettes * It was core policy – it was adopted at the highest level in gov’t and involved policy considerations   **Determining pure policy decisions – guidelines (no test):**   * Generally policy decisions are made by legislators or officers whose official responsibility req’s them to assess and balance public policy considerations * The decision is a considered decision that represents a policy in the sense of a general rule or approach, applied to a particular situation * Represents a course of action adopted or proposed by a gov’t * The weighting of social, economic, and political considerations to arrive at a course or principle of action is the proper role of gov’t not cts * Policy is not equal to discretion – where discretion is concerned w/ whether a particular actor had a choice to act in one way or the other, policy is a narrow set of discretionary decisions covering only those that are based on policy considerations * Actor involved can be relevant * Where it is ‘plain and obvious’ that an impugned decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort – if it isn’t plain and obvious, then it must go to trial |

# PROOF OF NEGLIGENCE

# Conceptually related but independent burdens

**Legal Burden of proof:** this details which party bears the onus of proving a fact // the ability to make your case

* Π must prove all element of a negligence action
* Δ has legal burden of proving any defence
* Balance of Probabilities

**Evidentiary Burden:** details which party must introduce evidence of a fact

* This rests on the plaintiff: the only time where this burden switches is during step 2 of the Anns/Cooper (residual policy concerns)
* Generally Π is given the much higher task of proving and providing evidence of their case
* Exceptions, albeit very limited ones, exist to potentially reverse this onerous task
* RIL is no longer a part of the Canadian jurisprudence

### *Wakelin v London & South Western Ry. Co.,* 1886 HL [husband hit by train – how to prove facts]

|  |  |
| --- | --- |
| **F** | Husband hit by train; walking alone, legally near tracks, no evidence of how he came to be hit by train but widow alleges negligence by train company. Π alleges that Δ *must* have been negligent. |
| **I** | Can circumstantial evidence be enough to prove negligence? |
| **RA** | **Π MUST ESTABLISH BY PROOF THAT DEATH WAS CAUSED BY NEGLIGENCE OF THE ΔS. IT THAT IS NOT PROVEN AND IF IN THE ABSENCE OF DIRECT PROOF THE CIRCUMSTANCES WHICH ARE ESTABLISHED ARE EQUALLY CONSISTENT WITH THE ALLEGATION OF Π AS WITH DENIAL OF Δ, Π HAS FAILED.** |
| **RE** | Π must establish either direct or indirect evidence that establishes a case for negligence  Nothing on the facts to reasonably suggest that there was negligence  ∴ can’t reverse the burden to make Δ disprove negligence b/c the initial onus to prove the elements of the claim was not discharged by Π |
| **ETC** | Thinking back to *Cook v Lewis*:   * Was this a question of factual cause; or an evidentiary question? * Is there a principled distinction between Wakelin\*\*\* and Cook\*\*\*? What is it?   + In Wakelin there was *no* proof of negligence or wrongdoing; in *Cook* you had 2 bozos who were clearly negligent so whether they were responsible or not is purely a matter of causal luck   + Furthermore, in *Cook*, it was the Δs’ acts of negligence that caused the precise causal link to be undiscoverable for Π   + Can describe the deprivation of Π in two ways: 1) the right not to be harmed by bozos in the forest and 2) the right to be able to prove your case     - Possible link back to essay topic type discussions about |

### *RC v McDougall,* 2008 SCC [Burden of proof is always BOP]

Ct must be mindful of inherent probabilities and improbabilities but that doesn’t change the fact of standard of proof. Rejected notion of intermediate standard between BOP and BRD for civil cases w/ particularly serious issues like sexual battery.

# Exceptions to General Principles Governing Burden of Proof:

## Statute:

E.g. *Highway Traffic Act*: recognizes the difficulty of Π knowing what exactly happened right before they got hit ∴ the statute reverses the **evidentiary burden** in this specific instance (*McDonald vs. Woodward*) and makes Δ disprove that they were negligent after Π has proven the simple fact of the Δ being the driver.

## Reverse Onus: Cook v Lewis [multiple negligent defendants]

If jury has found that one or both of Δs have been negligent, and that distinguishing between the consequences of the acts is not possible, then the onus on the guilty person arises. Δs then bear the burden of exculpation.

## Circumstantial Evidence (Modification, not exception):

* Circumstantial evidence allows an inference or a suggestion of a fact whereas direct evidence proves a fact
* A note on procedural options to consider in practice, where Π’s evidence is lacking

1. No evidence motions: no evidence available that Π can use to discharge their burden // very rare
2. Insufficient evidence motions: more likely
3. Summary judgments to dismiss: a paper judgment – no need to bring witnesses; can occur when factual records are clear and there is no question of fact that needs to be decided but rather a question of law; parties just bring affidavit evidence example:

### 

### *Mohamed v Banville,* 2009 OSCJ [smoker cleared of liability for house fire]

Π sued Δ alleging he had negligently caused a house fire; Δ was intox and was a smoker, and an insurance investigator said it was most likely caused by careless smoking. **BUT** no evidence that Δ was smoking in the house on the evening in question. “Just as there is no evidence that the fire started due to an electrical fault or arson, there is no evidence it was started by careless smoking, even if the fire originated in the area where Banville fell asleep.” Π’s claim failed.

## Res Ipsa Loquitor: “The thing speaks for itself” 🡪 infers negligence from the very nature of an accident or injury:

* + 1. in the absence of direct evidence on how any defendant behaved. Inference of negligence when
    2. the accident or event that caused the damage was something that in the ordinary human experienced does not happen without negligence
    3. the situation and circumstances from which the accident arose were under the **sole management and control** of the D.

→ Circumstantial evidence “speaks” to D’s negligence and a *prima facie* case was made out only if Δ’s negligence was indeterminate on the available evidence)

### *Fontaine v BC (Official Administrator),* 1997 SCC [hunting buddies found off road in a truck; RIL no longer appropriate]

|  |  |
| --- | --- |
| **F** | *Edwin Fontaine and Larry Loewen went missing over a weekend hunting trip – three months later their truck was discovered in a river bed at the bottom of an embankment. Loewen’s body was buckled in the driver’s seat, Fontaine’s in the passenger seat. No direct evidence of what had happened. Fontaine’s widow brought an action under the Family Compensation Act; sought to base her claim on the doctrine of res ipsa loquitur.* |
| **I** | When does RIL apply?  What effect does its application have? |
| **RA** | **CIRCUMSTANTIAL EVIDENCE IS TO BE WEIGHED ALONG WITH DIRECT EVIDENCE (IF ANY) TO DETERMINE WHETHER Π HAS ESTABLISHED ON BOP A PRIMA FACIE CASE OF NEGLIGENCE AGAINST THE Δ. ONCE THE Π HAS DONE SO, Δ MUST PRESENT EVIDENCE NEGATING THAT OF THE Π OR NECESSARILY THE Π WILL SUCCEED.** |
| **RE** | *When does it arise:*   * circumstances of the occurrence must permit an inference of negligence attributable to Δ; strength or weakness of that inference will depend on facts * b/c it’s highly fact-specific, impossible to determine in advance the types of situations where RIL will arise * Previous decisions may provide guidance but are not determinative   *Effects:*   * Π overcomes motion of non-suit b/c the circumstantial evidence has constituted reasonable evidence of negligence * Jury may but need not find negligence; if at the conclusion of the case, it would be equally reasonable to infer negligence or no negligence, Π will lose, b/c they have not proven it on BOP   This rule is superfluous…   * It shouldn’t be automatically applied to create liability * However, although it’s no longer a doctrine, per se, cts still use the **three conditions for RIL when determining the appropriate weight to give to circumstantial evidence** |

# SPECIAL DUTIES OF CARE: RECOVERY OF PURE ECONOMIC LOSS IN NEGLIGENCE

**5 Categories of claims:**

Note that these categories do not eliminate the need to do Anns/Cooper DOC; they merely **ADD** specific steps to the test

1. Negligent Misrepresentation
2. Independent Liability of Statutory Public Authorities
3. Negligent Performance of Service
4. Negligent Supply of Shoddy Goods or Structures
5. Relational Economic Loss

**\*\*\*if faced with a fact pattern on this, you should try and describe why it is similar to one of these categories. These are typologies, note if the case falls into one of these typologies as part of your DOC analysis. When you come to the policy heading, state: indeterminate liability, factors of indeterminate scope, class or time.**

**Policy considerations: factors x (ss1), y (ss2), z(ss3):**

**Ss1: indeterminate liability…etc.**

**Learning objectives:**

* Describe the five categories of pure economic loss.
* Analyse when a new class can be created.
* Consider the role of tort in the broader private law system.
* Understand (and critique) why courts so heavily restrict finding liability in cases of pure economic loss.

**What is pure economic loss?**

* Damage to a person or property is not economic loss. It is just loss.
* Damage that incurs only a pecuniary loss is pure economic loss
* The difference is normally readily ascertainable but you have to ensure that you look closely
  + Often there is some physical damage suffered by one party, but the Π suffered only economic loss (Bow Valley Husky)

**Where tort fits in the jigsaw of law:**

* The law of negligence does not cover the field. Πs can often seek the outcome they desire in other areas. For example:
  + Rather than making a negligent misrep claim, Π and Δ can be found to have an implied or oral K
  + In cases where constructive trust can be created, then potentially Π can obtain pecuniary benefit
  + Where the negligent actor is a gov’t decision maker, recourse to admin law can compel a reconsideration of the decision

→ where these things are not available, tort law can come in and play a role

# Negligent Misrepresentation

**Policy Considerations that Historically Discourage Negligent Misrep:**

* Indeterminate liability
* Chilling effect on certain professions
* Freedom of expression
* Words move in a way that actions cannot (i.e. can harm more widely and swiftly)
* Market interference

Before Hedley Byrne & Co v Heller (1963)\*\*, negligent misrepresentation was extremely heavily circumscribed. The factors listed above had led courts to minimize or exclude liability for all but the most negligent misrepresentations; and in all but a few professions.

Hedley Byrne says that negligent misrep can be just as damaging; even in the absence of a kual arrangement between the parties, there can be liability for negligent misrep causing purely economic loss.

Since Hedley Byrne\*\* (which is not the law of Canada today), negligent misrepresentation has ‘exploded’: both lowering thresholds, and radically widening the classes of persons to which it can apply

→In cases of negligent representation, the reasonable foreseeability component of the Ann’s test is replaced with “reasonable reliance.”

***DOC is the most important part of negligent misrep; it is the battleground, where most cases live or die…***

Hercules Management Ltd v Ernst & Young(1997 SCC)

|  |  |
| --- | --- |
| **F** | *H hired E to prepare financial statements; the statements were required by statute. H claimed that E was careless in preparing the statements and that, as a result, H suffered: → A. Economic loss as a result of relying on the statements in other investments → B. Economic loss based on their existing shareholdings* |
| **I** | ***Did Ernst & Young owe Hercules a duty of care? Is the duty of care test in cases of negligent representation and pure economic loss the same as in cases of negligence causing physical damage?*** |
| **D** | Duty of care owed, but was **negated for policy reasons.** |
| **RA** | A PF duty will arise on the part of a Δ in a negligent misrep action where it can be said that:   * + 1. Δ ought reasonably to have foreseen that the Π would rely on his rep and     2. that reliance by Π in the circs would be reasonable   Even though, in the context of auditors’ liability cases, such a duty will often be found to exist, the problem of indeterminate liability will frequently result in the duty being negated by policy considerations.  Where it can be shown that indeterminate liability is not a concern on the facts of a case, DOC will be found to exist. |
| **RE** | Anns/Cooper Test:  **I. Prima Facie Duty of Care?**   1. Δ ought reasonably to foresee that Π will rely on their representation (**foreseeability)** 2. Reliance by Π would in the circumstances be reasonable **(proximity)**  * Reliance on the statement of representation of another will not, in all circumstances, be reasonable * Five general indicia of reasonable reliance:   + Δ had a direct or indirect financial interest in the transaction in respect of which rep was made   + Δ was a professional or someone who possessed special skill, judgment, knowledge   + advice or info was provided in the course of Δ’s biz   + info or advice given deliberately, not on a social occasion   + info or advice given in response to a specific inquiry or request   If YES = prima facie Duty of Care.  **II. Policy Considerations to limit or negate DOC:**   * Fear of indeterminate liability (Auditor reports may be reasonably relied upon by many parties, not just the appellants) ∴ Inquire into:   + **Δ’s knowledge of the identity of Π (Or class of Πs)**   + **the use to which the statements at issue are put (precise reliance)** |

#### Notes:

* *Queen v Cognos*: DOC not confined to ‘professionals’; while a Δ being a professional adviser would provide evidence of a ‘special relationship’ it isn’t necessary
* *Hub Excavating v Orca Estates:* Where misrep was calculated or would naturally tend to induce the Π to act on it, reliance may be inferred
* Contributory negligence can be found in negligent misrep cases: “distinction between reasonable reliance as a necessary prerequisite to ground liability, to constitute the cause of action under *Hedley Byrne,* and reliance in the context of contributory negligence as simply a factor going to the extent of the damage suffered” (*Grand Restaurants of Canada Ltd v Toronto (City)*)
* *Premakumaran v Canada:* Π alleged gov’t had negligently misreped to potential immigrants the extent to which accountants could get work in Canada. Ct dismissed claim b/c no special relationship of proximity or reliance between the parties; info was ‘general material’
* *Baldwin v Daubney:* Πs wanted to supplement income but didn’t have $; went to financial advisors who referred them to a program which allowed them to borrow $ to use for investments. Investments drastically decreased in value and Πs sued both lenders and advisors. No special relationship between Πs and lenders and there had not been any advice provided by lenders themselves.

### *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 [does Canada owe DOC to public OR companies for misrep]

The role of legislation - two situations must be distinguished:

1. Alleged DOC is said to arise explicitly or by implication from the statutory scheme

* Difficult to infer that legislature intended to create private law tort duties to claimants, esp if a private law duty would conflict w/ public authority’s duty to the public ∴ compelling policy reason for refusing to find proximity

1. DOC alleged to arise from interactions between claimant and gov’t and is not negated by the statute

* Gov’t has, by its conduct, entered into a ‘special relationship’ where proximity is found
* But must not be in conflict w/ the state’s general public duty established by statute

\*\*could be possible that there is proximity based on interactions and gov’t’s statutory duties

**DOC to Consumers:**

* Statements between Canada and consumers limited to general statements that low-tar cigarettes are less hazardous; no specific interactions between Canada and class members ∴ finding of proximity in this relationship must arise from statute
* Statutes establish only general duties to the public, not private law duties to consumers
* The statutes do not foreclose the possibility of recognizing DOC to tobacco companies

**DOC to Tobacco Companies:**

* Alleged to have arisen from transactions between them whereby Canada went beyond its role as regulator of industry and entered into rel’nship of advising and assisting the companies I reducing harm to their consumers
* Officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to manufacturers including advice that strains designed and developed by officials of agriculture Canada would not increase health risks or otherwise be harmful to them
* Reasonable reliance? Canada’s regulatory powers over the manufacturers, coupled w/ its specific advice and comm’l involvement, could be seen as supporting a basis for reasonable reliance
* All that is req’d is that Canada could have foreseen that its negligent misreps would result in a harm of some sort to the companies – did not have to foresee the new structure around reimbursement of costs to prov’l health care
* Reasonable reliance means whether it was reasonable for the listener to rely on the speaker’s statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement

**HELD** → prospect of indeterminate liability is fatal to the tobacco companies’ claim of negligent misrep b/c Canada had no control over the number of people who smoked light cigarettes which is enhanced by the fact that the claim is for pure economic loss; DOC to companies would effectively amount to DOC to consumers b/c quantum of damages owed to the companies would depend on the number of smokers and number of cigarettes sold

### ***Queen v Cognos Inc.*** (1993 SCC)

**CONTRACTUAL PROVISIONS ABOUT TERMINATION HAVE NO BEARING ON THE PRE-CONTRACTUAL STATEMENTS ABOUT THE NATURE OF THE EMPLOYMENT OPPORTUNITY. CONTRACT TERMS DID NOT EXCLUDE OR LIMIT TORT LIABILITY.**

*Respondent Cognos advertised an accounting position. Appellant already had a good job, but applied and got an interview. Respondent said the job was associated with a big project, even though project had yet to secure funding. Appellant moved to Ottawa. 18 months later, the Respondent terminated the Appellant’s employment. Appellant sued for negligent misrepresentation.* ***Should the Hedley Byrne test apply to representations made by an employer to a prospective employee in the course of an interview?***

**Decision in favour of Appellant:** The Respondent’s manager had **acted carelessly in making statements** during the Appellant’s job interview.

RATIO 1: The tort here was independent of the contract and the liability was not limited by an exclusion clause in the contract

**The Hedley Byrne test for negligent misrepresentation applies to representations made by an employer to a prospective employee in the course of an interview.**

RATIO 2 (Iacobucci): Applied the Hedley Byrne test, which has 5 general requirements:

[which are the elements of the torts of negligence: duty 🡪 breach 🡪 causation 🡪 loss].

1. There must be a duty of care based on a “special relationship” between the representor and the representee.
2. The representation in question must be untrue, inaccurate, or misleading.
3. The representor must have acted negligently in making said misrepresentation.
4. The representee **must have relied in a reasonable manner**, on said negligent misrepresentation.
5. The reliance must have been financially detrimental to the representee in the sense that damages resulted.

Claimed that had the negligent misstatement not been made to me, I would have stayed where I was. Compensation is for loss of that good salary for that period of time.

**DISTINGUISHABLE FROM BG CHECO:**

In ***BG Checo***, there was a misrepresentation as a clause in the contract

Concurrency question:

⇒ In ***BG Checo***, there was an impermissible concurrent liability in tort and contract (an exception to the general rule of concurrency)

⇒ In the case at bar: there is no concurrency

→ Plaintiff argument here is NOT: that Cognos negligently misrepresented the amount of time he would be working on the project or the conditions under which his employment could be terminated (i.e. that Cognos breached a common law duty of care by negligently misrepresenting his security of employment with Cognos)

→ Argument IS: Cognos negligently misrepresented the nature and existence of the employment opportunity being offered (contractual provisions didn’t deal with that, so it’s not like an exclusion clause)

→ Therefore: “it is the existence, or reality, of the job being interviewed for, not the extent of the appellant’s involvement therein, which is at the heart of this tort action.” In the agreement, there is **no express provision** dealing with the respondent’s obligations with respect to the nature and existence of the project.

**FURTHER, IN THE CASE AT BAR**

→ Cognos recognizes that it owed a duty of car to interviewees not to make negligent misreps

→ It was foreseeable that the appellant would rely on the information given during the interview in order to make career decision -- it was reasonable reliance

→ The Cognos interviewer didn’t make any caveats

→ The agreement signed 2 weeks later did not amount to a valid disclaimer

|  |  |
| --- | --- |
| **Negligence** | **Negligent Misrepresentation**  **(from *Hedley\*\*\** and adopted in *Queen/Hercules\*\*\**)** |
| (1) Duty of Care | (1) Special Relationship |
| (2) Standard of Care & Breach | (2) Representation is untrue, inaccurate, or misleading (3) Made in a negligent manner (did the D act negligently in making the representation) |
| (3) Causation | (4) Reasonable Reliance  (5) Reliance Resulting in Loss also look to *Hub\** |
| (4) Remoteness | (5) Reliance Resulting in Loss |
| (5) Damages | Damages |
| Defences | Defences |

# How to analyse a negligent misrepresentation problem question in an exam: finding a prima facie duty

*Preliminary question*: Is the Duty of Care already recognized in previous cases? If it is novel then proceed with DoC analysis

1. Finding a special relationship: we need to find a special relationship to avoid indeterminate liability (*Hercules\*\*\**)

* Special relationship is vital for determining the reasonably foreseeable dimension of DoC.

Related to Step I in the Anns/Cooper Test: Proximity in the context of negligent misrepresentation can be determined by these indicia:

* The D ought to reasonably foresee that the P will rely on his or her representation; and
  + Reliance by the P would be reasonable (in the particular circumstances of the case)
* D had a direct or indirect financial interest in the transaction in respect of which the representation was made
* The D was a professional with special skills (possesses more knowledge than the average person)
* The advice or information was provided in the course of business
* The advice or information was given deliberately and not on a social occasion
* The advice or information was given in response to a specific query or request

**Related to Step II Residual Policy Considerations: (burden shifts to D)**

* Undertake the standard residual policy considerations, like you would for a typical negligence analysis. However, note that indeterminate liability in cases of negligent misrepresentation goes from an optionally relevant residual policy consideration to a necessary consideration (Hercules\*\*\*)

Unlike *Anns/Cooper*, *Hercules\*\*\** points to **two specific policy considerations** that inform indeterminate liability (these two factors serve to constrain liability):

1. **Knowledge:** 
   * Are the parties known to each other?
2. **Precise Reliance:**
   * Did the plaintiffs precisely rely on the representation and is that what led to the loss?
   * This is different from response to a specific inquiry; the reliance here is more related to policy.

SUMMARY

* Negligent misrepresentation is assessed with much more hesitance than negligence
* Equally, pure economic loss (much like pure psychiatric harm) is very carefully circumscribed by courts. The fears of proof and effects of decisions looms very large
* Negligent misrepresentation has very different results & implications to negligence
* As a result, negligent misrepresentation requires a stronger embodiment of policy considerations in its analysis (Hercules\*\*\*)
* Negligent misrepresentation is strongly influenced by the question of indeterminate liability (R v Imperial Tobacco\*\*\*)

# New Categories Of Pure Economic Loss

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

**IN THE CONTEXT OF ECONOMIC LOSS, A DUTY OF CARE DOES NOT EXTEND TO CONTRACTUAL NEGOTIATIONS.**

*P leased building to D. D led P to believe it would be amenable to renewing the lease on certain terms. When P extended the offer, D rejected and eventually did not renew its lease with P. P claims breach of duty to negotiate in such a way as to avoid causing the P pure economic loss.*

**Anns Test:**

**Stage One:** There is a prima facie duty of care (Foreseeability and Proximity)

**Stage Two (Policy):** Failed at second stage:Held against a duty of care to conduct negotiations with reasonable care so as not to injure the financial position of the opposite party. Various policy considerations against recognizing such a duty. (Parties who are in negotiations are looking after their own interests, not each others’, and a tort duty would be inconsistent with that basic standard).

**Other Possible Policy Considerations:** Economic interests are less compelling than bodily security, indeterminate liability, economic losses often arise in commercial context as inherent business risk.

**Hesitancy to acknowledge liability in some circs but not in others re: pure economic loss b/c of the impossibility of insuring against such risks (i.e. those that are potentially indeterminate)**

## Negligent Performance of A Service

* Negligent performance of a service is a rarely used area of pure economic case
* deals with economic loss suffered by a third party, generally under a contract of some kind that, through privity, does not apply to the plaintiff

**ANNS/COOPER TEST + EITHER DETRIMENTAL RELIANCE (Hofstrand) OR VOLUNTARY ASSUMPTION OF RESPONSIBILITY (James)**

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

**P MUST COME WITHIN A LIMITED CLASS IN THE REASONABLE CONTEMPLATION OF A PERSON IN THE POSITION OF THE APPELLANT (First stage of Anns test).**

*A courier company (BDC LTD) was contracted by the B.C. government (NOT Hofstrand, otherwise he could sue in contract) to deliver an envelope to the Registry Office in Prince George. The envelope had to be delivered on time otherwise the plaintiff (Hofstrand Farms) would lose the right to sale of land to a third party. The envelope was delivered too late and the plaintiff lost the right to sell the land to the third party and consequently sued the courier company for economic losses flowing from the failure to secure the sale as a result of the late delivery.****Was there a Duty of Care owed by the courier company to its customer(s)?*** No tort duty to be on time.

SCC held that BDC was not held liable for pure economic loss of the plaintiff - no duty of care because there is no proximity.

Court applied Cooper/Anns test but added to foreseeability.

**Foreseeability** of the Plaintiff? → No knowledge of the plaintiff or its interests

**Proximity?** → There is insufficient proximity according to Justice Estey.

**Reliance** → Hofstrand didn’t decide the courier, so there is no reliance on the courier. Not within reasonable contemplation

**Why?** → Too large of a class of plaintiffs thus creating the spectre of indeterminate liability.

### *James v British Columbia* (2005 BCCA)

**RELATIONSHIP OF PROXIMITY DOES NOT NECESSARILY REQUIRE RELIANCE OR ANY ACTION ON THE PART OF THE PLAINTIFF, VOLUNTARY ASSUMPTION OF RESPONSIBILITY OF D IS ENOUGH. CURRENTLY: APPLY COOPER. POLICY STAGE: RELIANCE OR ASSUMPTION? IF EITHER, SHOULD ALLOW RECOVERY.**

*The plaintiff’s employer held a logging license from BC, which contained a provision that prevented the employer from closing its sawmill without approval from the Minister of Forests. Upon renewal of the license, the Minister inadvertently omitted the protective clause. The logging company subsequently closes the sawmill. Plaintiff sued BC for negligent Performance of a Service (omitting the clause).* **Where is the Detrimental Reliance on behalf of the Plaintiff on the BC government that would establish a link for Pure Economic Loss?**

* There was no Reliance established but reliance was not necessary when **proximity is replaced by something else** (foreseeability on behalf of the service provider).
* Plaintiff was merely a passive beneficiary of the BC licensing.
* However, in negligent performance of service cases causing economic loss, as distinguished from negligent misrepresentation, the detrimental reliance necessary for establishing proximity may be replaced by something else such as **a unilateral voluntary assumption of responsibility** **(by the BC Government) for the benefit of the plaintiff**. Plaintiff successful. Awarded damages.
* *Note:* Opens liability up greatly to third parties where no contractual relationship initially existed

## Negligent Supply Of Shoddy Goods Or Structures

Historically, if P suffers pure economic losses as a result of the D’s carelessness but is unable to establish privity in contract, losses were generally not recoverable.

Winnipeg Condominium Corp No 36 v Bird Construction Co (1995 SCC) (*exterior-condo-walls-fell-off*)

**THE BUILDER OF A STRUCTURE, OR THE MAKER OF A CHATTEL, OWES A TORT DUTY OF CARE IN RESPECT OF PURE FINANCIAL LOSS SUFFERED BY A SUBSEQUENT OWNER OF THE PROPERTY AS A RESULT OF HAVING TO DEAL WITH AN UNKNOWN (WHEN THEY BOUGHT THE PROPERTY), DANGEROUS DEFECT.**

*P took ownership (a subsequent purchaser) of a condo that D built under contract with a 3rd party. Problems arose with the exterior walls and P had to repair it. P is suing in negligence.*

Where a contractor (or any other person) is **negligent in planning or constructing** a building, and where that **building is found to contain defects** resulting from that negligence which pose a real and substantial danger to occupants of the building, the reasonable **cost of repairing the defects** and **putting the building back into a non-dangerous state** are recoverable in tort by the occupants. The underlying rationale for this position is that a person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.

**Stage One: FORESEEABILITY AND PROXIMITY**

Foreseeability:

It is foreseeable that latent defects will cause personal injury or damage to other property when the defects manifest themselves

the lack of contractual privity does not change foreseeability.

**The reasonable likelihood of injury is sufficient to ground contractor’s duty in tort to subsequent purchasers of the building for the cost of repairing the defect if it is discovered prior to any actual injury and if it poses a real and subst’l danger to the inhabitants**

**Stage Two:** Are there residual policy considerations to negate/limit tort liability? No

Strong policy justification for imposing liability: serves important preventative function by encouraging socially responsible behaviour

It was only by chance that the cladding fell in the middle of the night and caused no harm

* No risk of indeterminate liability: potential class of Πs limited to the inhabitants of the building
* No risk of indeterminate amount: limited to reasonable amount to fix building defects.
* No risk of indeterminate time: limited to life of building. Eventually age will be blame and it will be more difficult to establish causation.
* Caveat emptor **does not** apply. Purchaser not in best position to bear risks of emergent defect.

How do you determine whether the case at hand falls under this category?

* No contractual relationship between Π and Δ
* **Real and substantial danger** required to avoid policy negating duty
* Deterrence

## Relational Economic Loss

Where D, as a result of negligently damaging property belonging to a third party, also causes a pure economic loss to P with whom the third party had a relationship. Category where there is **no Duty of Care** unless there are **circumstances that take it outside the rule of non-liability.**

Example: construction company cuts power line belonging to municipality. Construction company may be liable for losses sustained by municipality. Should the company also be liable to a factory that had to shut down because it didn’t have power?

**Indeterminate liability** means that courts have to balance between allowing victims to recover compensation for their losses and protecting D from crushing liability.

### ***Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*** (1997 SCC) (*offshore-drilling-fire*)

**INDETERMINATE LIABILITY IS SUFFICIENT REASON TO DENY DUTY OF CARE.**

*HOOL and BVI decided that they would form a separate company Bow Valley Husky Bermuda (BVHB) in order to go into the business of off-shore oil production. The new company became the owner of the off-shore drilling rig. BVHB entered into a construction contract with Saint John Ship Building (SJSB). BVHB wanted to use an anti-pipe freezing system manufactured by Raychem. This system, however, became flammable under certain conditions. Both SJSB and Raychem failed to warn the BVHB about this possibility. HOOL and BVI maintained a contract with BVHB for the hire of the rig and for day rates paid if the rig was out of service.* ***Can HOOL and BVI recover economic losses from SJSB or Raychem?***

McLachlin J: there is the problem of **indeterminate liability** that must be overcome and if not that is **sufficient reason to deny a duty of care under the circumstances.**

The plaintiffs tried to argue that there were factors that addressed the problem of indeterminacy in this case, but McLachlin was not prepared to accept any of them. There simply was no rationale basis to allow recovery to the plaintiffs and to deny it to others (e.g. other investors, employees and suppliers of the rig).

*A fire broke out because of the improper use of the pipe system and substantial damages occurred.*

**RELATIONAL ECONOMIC LOSS IS NOT RECOVERABLE DUE TO POLICY CONSIDERATIONS, SUBJECT TO CERTAIN EXCEPTIONS:**

1. Claimant has interest in damaged property (not really an exception because it is consequential to P’s property)
2. General average cases (maritime law where cargo owners all have to chip in when only a portion of the cargo is damaged – so each cargo owner is considered as having a reasonable claim against the wrongdoer who caused the damage).
3. Claimant and property owner in joint-venture (***Norsk Pacific***).
4. Other exceptions may be recognized using Anns Test (not closed categories but incremental approach required – **use Anns test but be restrictive in policy stage**).

**Policy reasons, besides indeterminacy, of why the courts are so cautious to allow recovery for relational pure economic loss claims:**

1. **Economic interests** have customarily been seen by the common law as **less worthy of protection** than either bodily security or property,
2. May be **more efficient to place the burden of economic loss on the victim**, who may be better placed to anticipate and insure its risks, and
3. Confining economic claims to contract **discourages a multiplicity of lawsuits**.

Other Policy considerations include:

1. Deterrence
2. Π has little ability to allocate the risk b/c of weakness in bargaining power

#### Norsk:

The key issue is proximity which would give rise to DOC

Principles underlying the cases:

* Indeterminacy is a real concern is assessed on the basis of the specific facts

# DEFENCES

* Part of tort law is about corrective justice; this goes a long way in explaining the apportionment of liability ∴ contrib neg is vital
* Also key for compensation – but it must be based on **fault**

# Contributory Negligence:

Can happen in a variety of ways:

* 1. Carelessly entering into a dangerous situation
  2. Contributing to the creation of an accident
  3. Contribution to the extent of harm

→ not a complete defence – just reduces damages accordingly.

OFTEN ARGUED BY DEFENDANTS

Contrib negligence can, in some cases, approach 100% but v. rare

## Walls v Mussens 1969 NBCA

**GAS FIRE/NO CONTRIB NEG. AGONY OF THE MOMENT ALLOWED FOR Π [QUESTION OF CONTRIBUTORY NEGLIGECNCE IS NOT CONSIDERED ON THE BASIS OF PERFECT, CAREFUL, PRUDENT JUDGMENT BUT RATHER REASONABLE BEHAVIOUR IN THE CONTEXT OF AN EMERGENCY SITUATION.]**

Important to note that the Π did not contribute to the actual start of the fire (i.e. the actual occurrence of the accident)

## Gagnon v Beaulieu 1977 BCSC

**IN DETERMINING RESPONSIBILITY, THE LAW ELIMINATES THE PERSONAL EQUATION. IT REQUIRES EVERYONE TO EXERCISE ALL PRECAUTIONS AS A MAN OF ORDINARY PRUDENCE WOULD OBSERVE**

Passenger of car not wearing seatbelt. Wouldn’t have sustained extent of injuries if wearing belt ∴ contrib neg. Didn't believe in seatbelts → irrelevant. He either knew or ought to have known that this was req’d in order to properly care for his own safety.

## Negligence Act:

Statute governs but CL gives subst’l discretion

Damages are apportioned in proportion to the degree of fault or negligence found against each of the parties. If impractical to determine w/ certainty, liability split 50/50.

→ question remains of whether this means proportion of contribution to the occurrence of the accident? The amount of harm? Blameworthiness?

## Mortimer v Cameron 1994 ONCA

**EVEN IF Π IS NEGLIGENT, DOESN'T NECESSARILY MEAN THEY ARE *CONTRIBUTORILY* NEGLIGENT. I.E. DOES NOT CLOSE OFF THE QUESTION OF WHETHER THEY ACTUALLY CONTRIBUTED TO THEIR INJURY. “a plaintiff’s contributory negligence will not limit his recovery unless it is a proximate cause of injury”**

Good natured horseplay, fell through a wall and Π ended up a quadriplegic. City negligently inspected the building in 1972; building owner failed to inspect property (continuously). Negligence apportioned between city and building owner 40/60, respectively. The injury “was not within the scope of the risk caused by their horseplay”, as the collapse of the wall was not within their reasonable contemplation

## RUN DOWN

Specifics of contributory negligence:

* The standard is a modified objective one: would an ordinary, prudent person have acted this way in the circumstances? (Walls v Mussen\*\*\*)
* In emergencies, the court looks to the ‘agony of the moment’: people do panic in emergencies, and should not be judged based on that notion (Walls v Mussen\*\*\*)
* The law requires everyone to exercise all precautions that a man of ordinary prudence would observe. (Gagnon v Beaulieu\*\*\*)

# Volenti

100% bar to recovery notwithstanding the fact that Δ negligently caused injury

Theoretically available but very rarely applied

Dube v Labar 1986 SCC

**VOLENTI IS ONLY AVAILABLE WHERE THE CIRCUMSTANCES ARE CLEAR THAT Π, KNOWING OF THE VIRTUALLY CERTAIN RISK OF HARM, BARGAINED AWAY HIS RIGHT TO SUE FOR ANY INJURIES RESULTING FROM Δ’S NEGLIGENCE.**

Δ Drunk driver and Π passenger. Driver turns around to talk to backseat passengers, starts to veer off road and pass grabs wheel but ends up crashing car thereby. Δ tried to argue volenti but didn’t work. Necessarily inapplicable in most drunk-driver/willing-passenger cases b/c it req’s an awareness of circs and consequences of action that won’t be present.

# Ex Turpi Causa

* There are some suggestions that illegality is not a bright line: namely, that in some cases, participating in a triflingly illegal matter may not attract this defence
* Also, note generally that it is likely that there needs to be some actual connection between the illegal act and the harm
* really, a policy reason that is codified into a defence.

## Hall v Herbert 1993 SCC

**PROPERLY APPLIES IN TORT WHERE IT WILL BE NECESSARY TO MAINTAIN INTERNAL CONSISTENCY OF THE LAW. MOST OFTEN WILL BE EITHER WHERE Π SEEKS TO PROFIT FROM ILLEGAL ACT OR WHERE CLAIMED COMPENSATION WOULD = EVADING CRIMINAL SANCTION.**

Very rare, complete defence, applies at the end of the analysis – as a proper defence rather than a negation of DOC.

# Inevitable Accident

## Rintoul v X-Ray and Radium Industry 1956 BCSC

**PERSON RELYING ON INEVITABLE ACCIDENT MUST SHOW THAT SOMETHING HAPPENED THAT (A) HE HAD NO CONTROL OVER AND (B) THAT THE EFFECT OF THE OCCURRENCE COULD NOT HAVE BEEN AVOIDED BY THE EXERCISE OF REASONABLE CARE.**

Person claimed that brakes working fine before and after accident but at the time of accident, they failed and the application of handbrake was not sufficient to stop accident. Ct held that Δ had not provided any evidence of the brake situation or for the idea that there was nothing he could’ve done to stop it.

# VICARIOUS LIABILITY

* a **vital part** of the law of negligence
* fairly common-sense tool, long used, to seek out the true source of liability.

→ If an employer told their employee to not bother maintaining equipment, it would be unjust for that employee to be the only one liable if the ill-maintained equipment injured someone. That someone could sue the (likely impecunious) employee: but through vicarious liability, will also be able to ‘get at’ the employer. Vicarious liability is, appropriately, closely confined.

# Statutory vicarious liability

* Statutory vicarious liability is simply vicarious liability that has been specifically created by statute.
* most common form is that of vicarious liability for motor users.
* Insurance for vehicles is tethered to *ownership* of the car: not the act of driving the car itself.
* If a car is driven by someone who is the not the owner, it is, at law, not really relevant: the owner of the car (more relevantly: their insurance) becomes vicariously liable for the actions of the driver.
* See, for example, the *Highway Traffic Act RSO 1990 c. H.8, s192 (Ontario)*

## Yeung v Au (2007) SCC

Π injured by car, driven by a young man. Car leased by his dad, and owned by Δ company. Both dad and company were vicariously liable

1. Principal-Agent Relationships

* principal is liable vicariously for the actions of their agents.
* Such a position is necessary in modern society: many contracts are entered into not by the parties, but by agents of the parties themselves. Insurance, for example, is sold by ‘independent’ agents of the principal (the insurance firm).
* Really, the difference between the principal—agent relationship and the master—servant relationship is not really a consequential one. The only substantive difference is **that agents need not be employees, but can instead be independent contractors**.
* What is vital, however, is that the conduct of the agent must be **“in the course of their employment”** (**TG Bright & Co v Kerr\*\*).**
* This is rooted in the view of **who benefits from the arrangement:** 
  + where the agent is acting for the benefit of their employer, then the employer rightly should be vicariously liable.
  + When the agent pursues only their own ends, however, then the employer obtains no benefit, and thus should not be found vicariously liable.

## TG Bright v Kerr

Δ wine-dealer *not* vicariously liable for acts of motorcycle deliveryman b/c company had no control over the precise manner of actions.

*Duff’s Dissent:*

Agent hired for and by the principal; the principal is in the best place to know what’s up ∴ should be held liable for agent’s negligence, omissions, etc. in the course of the agent’s employment.

# Master-Servant relationship

* This is the most common form of vicarious liability.
* Employers are often liable for the actions of their employees.
* The interpretation of what is, and is not, likely to attract vicarious liability is slightly different.

## Theoretical underpinnings of vicarious liability here:

* 1. **Alternative Liability**: Holds Π personally liable and their master vicariously liable ∴ not letting the employee ‘off the hook’ but rather providing alternative source of liability
  2. **Right of indemnification**: Generally an employer has the right to claim the amount of a judgement from the employee. The burden is always supposed to fall on the *actual* tortfesor. Typically, employers don’t exercise this right b/c
     1. Employment K may prevent it
     2. Counter-productive for damage to employee morale
     3. Useless b/c employee broke
  3. **Third Party Protection**: Employees generally enjoy the benefit of limitation/exclusion of liability clauses entered into by employers (i.e. w/o privity)
  4. **Personal and Vicarious Liability:** Employer can also be held personally liable for its own tort.

What is required is either

(1) that the employee acts were authorised by the employer; or

(2) that the act was unauthorised but so connected with authorised acts that they may be regarded as modes of doing an authorised act.

**(The Salmond Test, applied in Bazley v Curry\*\*).**

## Bazley v Curry 1999 SCC

|  |  |
| --- | --- |
| **F** | In Bazley\*\*, the defendant sexually assaulted a child in a residual care facility for emotionally troubled youths. |
| **I** | If the act was not an authorised one, and there are no pre-existing cases giving precedent, then how to determine whether the act was ‘in the scope of employment’? |
| **D** | The organization held vicariously liable. Because the defendant was highly powerful, and placed in close, powerful connection to the plaintiff, and strongly satisfied each of the 5 indicia, the employer was found vicariously liable. |
| **RA** | Broader Policy Objectives Must Be Consulted:  Really, the core test is the: **whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability** (*Bazley v Curry\*\*).* This is informed by the following 5 indicia:   1. Power afforded the employee to abuse their position; 2. Extend to which the wrongful act may have furthered the employer’s  aims; 3. Extent to which the wrongful act was related to the friction,  confrontation or intimacy inherent in the employer’s enterprise; 4. The extent of the power conferred in relation to the victim; 5. The vulnerability of potential victims to wrongful exercise of the  employee’s power.  Incidental connections do not suffice: and frank considerations of policy considerations should be very strongly encouraged. |
| **RE** | The previous cases do give some general information on what should be considered. Such cases are divided into three rough typologies:   1. cases where the D acted on **furtherance of the employer’s aims**   → who is reaping the benefit? if the act was thought to be in furtherance of the employer’s aims; then there will likely be vicarious liability.   1. cases based on the employer creating a source of friction:   → if the **employer directly or incidentally reaps the benefit** **from the creation of a source of friction or risk** which was acted upon by the defendant, then the employer will be vicariously liable   1. dishonest employee cases.   → neither (A), nor (B) will make the employer vicariously liable in cases of theft or fraud. This is a thinly disguised policy justification, really. At the core of this lies honesty and fairness: such thefts and frauds are breathtakingly common, and the parties affected by them are seldom disadvantaged themselves. |

*How to apply this in an exam*

Defences are applied after your complete analysis. Go through the full analysis, and the see if, at the end, defences apply. If the facts at hand very bluntly and obviously attract a complete defence (for example, the D was negligently injured while attempting to (illegally) murder someone), then do still apply your standard, complete analysis to the other elements, but just note early on that this defence is very likely to apply, and thus that you will provide a more clipped analysis to the earlier sections.

This is simple judicious time allocation: such an action is obviously not likely to succeed, so do your due diligence in the earlier elements, but do not waste undue time if it is blatant that the case at hand attracts a complete defence.

In applying vicarious liability, however, this analysis needs to come before your other analyses. In the Bazley v Curry\*\* example, you will need to apply the law to link the conduct of the Curry (the child abuser) to their employer. If this is successfully done, then you then just do the normal analysis for Curry (the D) in relation to Bazley (the P). Then, when it comes to who actually pays out the money, the employer steps into the shoes of the actual defendant, and pays the money. **Do not** replace the actions of the Curry with his employer in the fact pattern.