DUTY OF CARE

- "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question

Intro to DOC pre-write:

The duty of care is the first step of the negligence analysis and was introduced in Donoghue v Stevenson. This step in the analysis serves as a gatekeeper to negligence claims in determining who can make a claim against who but also ensures that harms are not left uncompensated (Donoghue). The duty of care analysis does not rest on moral obligations but rather legal duties (Donoghue). The court must ask if the [defendant] is under a legal obligation to exercise care with regard to [Plaintiff's] interests.

In Canada, the Anns- Cooper (Cooper v Hobart) test is the current standard for determining whether a duty of care exists. Before the application of the test, the court in Cooper states that it must be contemplated whether there is already an established duty which the case falls under. If this so, the court can skip the Anns-Cooper test and proceed to the analysis of the standard of care. If this is not so, the court must go through the test to determine whether a duty exists. This principle builds off Donoghue, where the court stated that the categories of duties are not closed, and duty needs to be analysed case by case.

[**Start by analogizing or distinguishing with an established DOC**, make your best argument (see list). →Looks to Childs (under positive duty section) for an example of how the courts does this: 3 differences they make between social and commercial host]

While I would argue that this case can be analogized to the duty established in _____, in the alternative it can be established as its own duty under the Anns-Cooper test.

The first step in the Anns Cooper test has two parts: foreseeability and proximity (Cooper), and the burden of proof is placed on the plaintiff (Childs). The first part, foreseeability, has been described as the "moral glue of tort law" (Rankin) as it serves to create boundaries on liability. It is an assessment that is measured on an objective standard, situated in the time and place of the act (Rankin). The test for foreseeability poses a relatively low burden of proof (Rankin).

The foreseeability analysis can be split up into two: the foreseeability of the plaintiff and the foreseeability of the harm.

The foreseeability of the plaintiff is determined by asking whether it was reasonably foreseeable that the particular plaintiff at hand could suffer the harm caused. [Palsgraf, or Jane Doe] In Rankin the court states that the plaintiff must "offer facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged". In this case, I would argue that foreseeability of the plaintiff is made out because **[_____].**

The foreseeability of the harm suffered must also be established. Was it foreseeable that **[harm suffered]** would be a consequence of **[defendant's actions/inaction]**?

Questions to ask/things to remember/mention:

- "Was the sequence of events so fortuitous as to be beyond the range of the foreseeable results which a reasonable man would anticipate as a probable consequence"? (Moule v NB Electric)

- Foreseeability attaches to the *harm,* not to actions events beforehand (Rankin)

- It's about what was foreseeable at the time prior to event, NOT hindsight (Rankin)

- Possible doesn't mean foreseeable (Rankin)

Once foreseeability is established, the analysis moves on to proximity, which is the meat of the duty of care analysis. Many principles of proximity are based on Donoghue, which poses the question "who is my neighbour". In other words the courts must determine If the relationship between the plaintiff and defendant is one which calls for a duty of care. According to Donoghue, this include "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question". Closeness and directness are the guiding principles of proximity. **[apply this to the facts: should p have been in d's contemplation?]** Cooper (/Hill) provides us with several factors to determine proximity which apply to this case. **[can you apply expectations, representations, reliance, type of interests at stake?]**

(analogize with proximity found in other cases where DOC was established)

Questions to ask/ Factors to mention:

- Is there a contract or a statute? (Cooper) → If so, this is evidence that a proximate relationship was considered

- Closeness and directness refer not to physical proximity but the effect of the defendant's actions on the plaintiffs (Hill).

- On relationship factor: P & D do not need to have personal relationship, but this is a factor to consider (Hill)

- The higher the level of control in the relationship, the higher the proximity (Hill)

Do facts give rise to a <u>positive duty to act</u>?

Certain scenarios where there is a positive duty to act require a special degree of proximity. Positive duties arise when the defendant has a material implication in the creation or control of a risk to which others (the plaintiff) have been invited (Childs). Childs: ""the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved". We need something more! Childs v Desormeaux lays out three different scenarios proximity is sufficient to give rise to a positive duty to act**.** These situations are not strict legal categories but simply factors which can lead to the conclusion that sufficient proximity exists to give rise to a prima facie positive duty to act

(1) where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls→D's causal relationship to risk (See **Crocker v Sundance** in duties)

(2) paternalistic relationships of supervision and control, such as those of parent-child or teacher-student → rests on vulnerability of P & formal position of power of D, right of control carries corresponding duty.

(3) defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large→ public role or benefit from services provided come with a duty.

Saying there is a positive duty: One of the categories is _____. I would argue that this case falls into that category and therefore a positive duty arises**. [explain why it falls under this category].**

OR

Saying there is not a positive duty:

The plaintiff might argue that the defendant has a positive duty under **[name a category it could fit into]**. I would argue **[explain why it doesn't fit].** Childs states that the court is reluctant to impose positive obligations and wants to safeguard autonomy. Competent people have the right to engage in risky behaviour and third party **(this part might only apply to PD #1)**. This case does not fit the category closely enough to establish a positive duty.

Childs v Desormeaux
Distinguishes between commercial hosts and social hosts: (1) It is easier for commercial hosts to monitor consumption, and it is more expected→ it is inherently part of commercial transaction. (2) Sale and consumption of alcohol is regulated by legislature → carefully regulated industry shows expectations. (3) Contractual nature of relationship between patron and server at bar is very distinct from range of social relationships between host and guests at a party→ because commercial hosts profit from overconsumption, there is more incentive to make sure they are responsible. A social host who continues to serve to clearly inebriated guests knowing they will be driving home, could be considered to be creating or enhancing risk and a DOC could be found in that scenario.

Kennedy v Coe
Kennedy and Coe had never met before being assigned as ski buddies. They never spoke, only gestured to each other (so they did not discuss mutual expectations of relationship) Pairs were instructed to ski together through forest and keep an eye on each other. Were not instructed to do the same before skiing down from top of log cut; Coe skied down alone. Within a few minutes of reaching lunch spot, Coe notified guide that Kennedy was missing, and they began a search for him. Kennedy (wife) argues that you can analogize with other "volunteer" cases. It was a high-risk sport, that Kennedy wanted to participate in, and the buddy system was flexibly applied depending on the terrain, the conditions and the instructions of the guides

Coe did not create the risk and court found he was not responsible to control it.

Guides were responsible!

"Agreeing to participate as a ski buddy for the purpose of mitigating risks does not mean that the participant is able to control those risks"

You can also consider policy reasons at this stage of the analysis in regard to the relationship of the P & D **[is there policy to consider regarding this type of relationship?]**

Kennedy v Coe: "On the one hand, establishing a duty of care as between ski buddies may result in skiers performing that role with greater diligence, thus enhancing safety, as suggested by the plaintiff. On the other hand, establishing such a duty of care may discourage skiers from agreeing to be ski buddies at all, thus diminishing safety, as suggested by the defendant."

PRIMA FACIE DUTY ESTABLISHED?

If foreseeability and proximity are established, as I argue they are [or despite my argument that they are not], there is a prima facie duty of care established. The second part of the Anns-Cooper test gives the defendant the opportunity to raise residual policy concerns to negate the duty despite the finding of a prima facie duty of care**.** These policy concerns are not concerned with relationship between the parties but rather the effect of the potential duty on other legal obligations, the legal system and society in general (Cooper) **[give policy considerations to negate duty OR explain what policy the D could come up with and say why they are false].**

Considerations:

- Floodgates? Will this cause too much litigation, overwhelm the courts→ Buckmaster dissent in Donoghue was concerned about this. (Cooper)
- Would establishing this duty negatively impact legal obligations, our legal system and/or society at large? (Cooper)
- Does the law already provide a remedy? (Cooper)
- Would recognition of a duty here create a spectre of unlimited liability? (Cooper)
- Chilling effect? (Hill)
- Other broad policy impacts? (Cooper)
- Conflict/ potential conflict does not negate a DOC unless it is between the novel duty proposed and an overarching public duty (Hill)
- You need evidence, it can't just be speculation (Hill).

LIST OF DUTIES

1. **Boat captain** owes a duty to take reasonable care to rescue a passenger who falls overboard (Horsley)

2. **Operator of a dangerous inner-tube sliding competition** owes a duty to exclude people who cannot safely participate (also see intoxication DOC's)

Crocker v Sundance
There was a tubing competition at a ski resort (two people sliding down a mogulled portion of a steep hill in oversized inner tubes. There was video playing of last year's race where people were being thrown from tubes, but Crocker and friend didn't watch much of it. Signed waiver, but Crocker did not read it or appreciate its nature. Day of race, Crocker and friend drank their own alcohol plus alcohol from bar of resort (served while wearing their race bibs). Crocker sustained small injury during first run. Drank two large swallows of brandy and two more drinks for bar between 1rst and 2nd heat. Owner asked at this point if he was in proper condition to compete again and did not dissuade him when Crocker said yes. Fell down at beginning of second heat, needed to be provided new tube. Was visibly drunk and manager said he should probably not continue in competition. Crocker insisted and manager took no more steps.

3. **Intoxication (broad duty)**:
    - Commercial host who serves alcohol to prevent harm to third party highway users (Stewart v Pettie in Childs).
    - In some cases, alcohol provider doesn't have to have actual knowledge of patron's intoxication (Picka v Porter & Schmidt v Sharpe)
    - Once staff realise patron is intoxicated and intends to drive, they have a legal duty to take all reasonable steps to stop him (call the police if you can't) (Hague v Billings)
    - Duty to control extends past conduct of driving (Donaldson v John Doe→ organizers of Oktoberfest event owed duty to those who could be injured by intoxicated attendees).
    - Serving patrons past the point of intoxication does not, in itself, pose a foreseeable risk. There needs to be additional risk (Stewart v Pettie→intoxicated patron was with 3 sober adults, so wasn't foreseeable he would drive).

4. **Police** (1) to suspect (see Hill) *also a tort of negligent investigation. (2) Police are statutorily obligated to prevent crime and protect others(Jane Doe) (3) under common law they have a duty to protect life and property(Jane Doe) AND, in some circumstances, they have a (4) duty to warn (see Jane Doe)

Hill v Hamilton (duty to suspect)
Hill was suspected of a string of robberies thought to be all committed by the same person. Increasing exculpatory evidence surfaced, and suggested a different suspect (police dropped 2/10 charges) He was found guilty at trial but appealed and was acquitted; spent a total of 20 months in prison. Because he was singled out as a suspect, Hill had a close and direct relationship with police. What interests were engaged? → Hill's freedom, reputation, dignity etc.

Jane Doe v Metropolitan Toronto Commissioners of Police
Rapist was attacking single white women living alone in second and third floor apartments w/ balconies in Church/Wellesley area. If Jane Doe had been warned (because she fit all the criteria), she could have taken precautionary measure and avoided the harm she suffered. Warning did not have to be public (which could have interfered w/ investigation), could have been targeted.

5. **Manufacturer** to consumer

   When manufacturer intends product to reach consumer in same form as it left them, with no possibility of intermediate examinations and with knowledge that absence of reasonable care could result in injury→ this leads to a duty of care (Donoghue).

6. **Manufacturer** DOC to warn → usually only used in medical setting.

Hollis v Dow Corning
Dow manufactures breast implants with no warning of post-surgery rupture. P's implants ruptured post-surgery. Manufacturers have a general duty to warn consumers of the dangers inherent in the use of their products which they know or ought to know (Lambert). This duty is continuing→ it applies to dangers discovered after the sale and delivery of the products (it was found that Dow should have known of the risk at the time of Ms. Hollis' surgery) The standard is especially high for medical products. Learned Intermediary Rule: Essentially the DOC gets discharged from manufacturer to doctor. If a doctor (LI) fails to relay warning provided by manufacturer to patient, manufacturer is not liable.

- When new risk develops, manufacturer must warn users ASAP, and manufacturer doesn't need actual knowledge, just 'ought to have known' (so objective standard) (Cominco v Westinghouse)

- Courts consider warning but also marketing, advertising etc which might undermine an adequate warning (Buchan v Ortho Pharmaceutical)

7. **Doctor→ exception: they have general + positive duties**

Positive duty to disclose risk of treatment (specific) and all available treatment (Reibel v Hughes) + Learned intermediary duty (Hollis).

Haughian v Payne
Doctor found liable for failing to warn of risk of paralysis (1 in 500) from surgery and for failing to disclose all available options of treatment (did not disclose option of not getting surgery). Doctors need to provide sufficient information for patients to make informed decisions. Cites positive duty to disclose risk and all available treatment from Reibel v Hughes

- When resident or intern is involved in procedure is there DOC to disclose? Courts have gone both ways.

- Health professionals must answer patients' questions fully (Sinclaire v Boulton)

- Risks must be explained in language that patient can understand→ substance of risk is more important than medical terminology (Martin v Findlay).

  For example, when patient has limited understanding of English (Malinowski v Schneider)

8. **Lawyer to client**

Ungaro v Demarco
Public interest does not require court to give lawyers immunity from action for negligence bya former client. In order to sue lawyer for negligence, the error must be more than an error in judgment, it has to be egregious. Reasonable care, skill and knowledge is expected (meeting deadlines, advancing client's interest, respecting client/attorney privilege).

- Recommending settlement is only negligent if egregious error is made (Karpenko v Paroian…)

- Folland v Reardon (ONCA) rejects egregious error standard for reasonableness standard: argues we should be able to fault lawyers for bad judgment (This hasn't really caught on, Demarco is usually followed, but address both!).

9. **Motorists** to other highway users (Rankin).

10. **Prison official** to care/provide secure environment ( )
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MAYBE DUTY

1. **Power companies** might owe DOC to people in neighbourhood (Moule no, Amos yes)

Moule v NB Electric Power Comm.
Boys climb one tree and walk across platform to another tree. Branches had been trimmed to a certain height. Boy climbed to unusual height and happened to step on rotten branch.

Amos v NB Electric Power Comm.
Distinguished from Moule: Power lines were concealed, and tree was not sufficiently trimmed.

NO DUTY

1. **Registrar of mortgage brokers** owes no DOC to investors (Cooper)

2. **Commercial garage** does not owe DOC to those who suffer subsequent harm arising from theft (Rankin)

3. **Private host** who serves alcohol owes no duty to highway users (Childs)

4. **Between "Ski buddies"** (very fact specific, could be different in another scenario→ look at Kennedy v Coe in positive duties.

STANDARD OF CARE

If the duty of care has been established, the next step in the negligence analysis is determining the standard of care (a matter of law), and whether it has been breached (a matter of fact). [remember that trial judge's findings of fact can only be overturned if there was a palpable and overriding error]. The standard of care is determined by posing the question of what care the reasonable person would have taken in the circumstances. The concept of the reasonable person, or the reasonable man, comes from Arland v Taylor and is described as "a man of normal intelligence who makes prudence a guide to his conduct." To determine the standard of care in this case we must ask if the reasonable man would have **[insert facts & circumstance]**

[go through facts while considering following factors→ also consider here is there is a special SOC?]:

- Free from both over-apprehension and from overconfidence (Arland).
- Does not require the highest degree of care, reasonable person is not superhuman (Arland).
- "reasonable depends on the circumstance→ how foreseeable/serious if the harm? (Ryan v Victoria).
- Look to external indicators: customs, statutory/regulatory standards, industry practice (Ryan).
- Looks at 4 factors (not determinative, just tools):
  (1) Probability plus severity of the harm (Bolton v Stone)→ standard should be based on likelihood of damage to others, not foreseeability alone. Risk might be foreseeable but so highly improbable, that reasonable person would not have tried to avoid it. BUT risk should not be disregarded unless it is extremely small.
  In Bolton: golf ball had only been hit that far 6 times in 30 years.
  In Paris v Stepney Borough Council: Man with one eye was at higher risk of a severe injury (blindness)→ take your person as your find them.

  (2) Cost of risk avoidance → If you can avoid a risk with minimal expense, you do it (Vaughn v Halifax-Dartmouth Bridge). If the harm is very severe (life & death), it can be greater than large financial harm (Law Estate v Simice aka CT scan)

  (3) Social Utility [of the defendant's conduct] (Watt v Hertfordshire County Council, firefighter)→ Balance the risk against the ends to be achieved. Social utility needs to be high; emergency situation, life or death.

SPECIAL STANDARDS OF CARE

Certain classes of plaintiffs are expected to follow a standard of care that differs from the regular standard of the 'reasonable person'.

<u>SOC expected of mentally ill</u> (Fiola v Cechmanek)

- Tort law is about compensation, but fault is still an essential element: if someone has no control over their actions and we hold them liable this is equivalent to strict liability which is not the goal of tort.

- Can be analogized to cases of sudden physical incapability.

- Defendant must show (1) they had no capacity to understand/ appreciate DOC owed at relevant time OR (2) they were unable to discharge DOC & had no meaningful control over their actions at the relevant time.

Facts of this case: Manic episode, McDonald got into car and strangled woman who pressed gas peddle and hit someone's car. He was not on medication because he was not aware of his mental illness at the time (his actions/manic episode) were unforeseen.

SOC expected of children (Joyal v Barsby)

- Modified standard of care : what would you expect from a child of like age, experience, and intelligence? (McEllistrum in Joyal)

- Possible for children to be held negligent/contributorily negligent→ In Joyal case, child had been thoroughly trained by parents about dangers of the road, crossed without looking when there as traffic.

- Perilli v Marlow (kid on bike and jogger)

- Breach of statute isn't necessarily breach of SOC
- Momentary lapse in judgment can be expected from children.
- D's actions here were not perfect, but they were reasonable→ looked back and gave room to pass, looked back again before moving back to original position; gradually, no sudden movements.
- Case emphasized different SOC for children than for adults→ we have different expectations
- "a child is to be measure on the standard of another child of similar age, intelligence and experience: McEllistrum. A momentary lapse in awareness may be expected from children; such a lapse does not result in a finding of legal responsibility

SOC expected of professionals (White v Turner)

- Bad result is not enough, it must have been brought about by negligent conduct.
- It is about compliance with norms of profession: what would reasonable plastic surgeon (or other professional) consider satisfactory?
- Ter Neuzen: Physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances.

- White case (post-operative complications in breast reduction surgery): Doctor was negligent because (1) operation was done too quickly (2) there was no proper check to see if enough tissue had been removed before suturing. **lots of evidence given by other plastic surgeons.

Notes:

- Part of doctor's SOC is knowing their limits and when to refer a patient to a specialist (Layden v Cope)
- SOC expected of GP in small town v big city is not significantly different (Layden v Cope)
- Codes of ethical conduct can help identify a professionals SOC but violation of a provision doesn't automatically mean a breach has occurred (Perez v Galambos)

Custom (Ter Neuzen v Korn): This isn't just for professionals!

- Conduct of doctors must be judged in light of knowledge that ought to have been reasonable at the time in question.
- Professionals are assumed to have adopted standards that are not negligent.
- Courts should not involve themselves in scientific disputes or treatments of preference.
- Established standard can be found negligent but only if it is "fraught with obvious risks" (an exception that is not easily applied: needs to be more than difficult/uncertain question of medicine or highly technical/scientific matter.

- Custom will set SOC, but only to a certain extent
- If there are alternative already being employed, this is part of standard.

Specifically define the breach of the standard of care: this is important in order to succeed on causation (Rankin; Kauffman v TTC).

CAUSATION

Following the finding of a breach of the standard of care, the plaintiff must also establish causation. The plaintiff must show on a balance of probabilities that, as a matter of fact (Clements), the breach was a cause of their loss. The test for causation is referred to as the "but for" test and asks: but for the breach, would the plaintiff have suffered the loss? (Clements v Clements) This means that [defendants] negligence must be necessary for [plaintiffs' loss] [Rephrase question with facts of case]

The 'but for' test has to make a causal connection with evidence, but it only requires a pragmatic, functional, common sense approach. You do not need scientific precision (Snell, Ediger). Law doesn't require certainty but only proof on a balance of probabilities (Snell)→ this is to compensate harm when it is impossible to prove positively.

Should we consider the **crumbling skull rule**? Does the P have a pre-existing condition? If so, this is inherent in their 'original position'. Was the loss caused by D or would it have happened anyways? (Athey).

Should we consider the **thin skull rule**? Does the P have a latent or fixed condition that made the harm more severe→ you take your victim as your find them (Athey). Does not mean D did not cause the harm, even if they just triggered.

Are there **multiple causes**? If they are divisible and caused separate losses→ you can just bring multiple actions (Solomon). You do not have to be the only cause to be held liable. As long as D is part of cause, they can be held liable for all losses even if their act alone was not enough to create loss. Even if cause played a minor role, you can still be held fully liable (Athey).

Ediger and Clements tells us to apply the 'but for' test unless you absolutely cannot.

(1) Evidence is not sufficient to show causation → **inference**

*You need to strike a <u>balance</u> between enduring D is only held liable for injuries where there is a substantial connection between their act and loss VS preventing D from benefitting from the uncertainty created by their own negligence (St Germain).

* Remember, if you cannot establish causation on the evidence you do not *have to* draw an inference (factual analysis) (St Germain).

- While you still need to evidence connecting breach to loss, the trier of fact weighs the evidence, and can draw inferences against the defendant if they do not introduce sufficient evidence to the contrary (Snell, Athey)→ St-Germain says this is an appropriate application of 'but for' test.

- In determining whether the defendant has introduced sufficient evidence to the contrary, the trier of fact should take into account the relative position of each party to adduce evidence (Snell).

- An action where the negligence of a doctor undermines the ability of the P to prove causation does not automatically trigger the availability of an inference→ you need to look at all the evidence (St-Germain)

(2) 2+ Negligent defendants, impossible to know who caused loss→ **Material contribution**

- This is a policy driven rule and is only justified when absolutely required by fairness and principles of tort law (Clements)
- Usually you would just establish 'but for' for the multiple tortfeasors.
- Only use material contribution if 'but for' is impossible (impossible does not mean that it cant be shown with scientific evidence) : this usually happens when multiple tort feasors point the finger at

one another. You can show they were both negligent, but not which one caused the loss in fact (Clements).

- Example Cook v Lewis: shooters hunting, shoot someone, impossible to know whose bullet hit them (this case applied a reverse burden onus on the Ds to show there was no causation)

Causation Established	Causation not established
Ediger v Johnston: Breach was failing to anticipate and have emergency staff prepped to start C-section. Standard was not to have someone standing by, but to be responsive to risk and take reasonable precautions so that Cassidy could be delivered without injury.	Kauffman v TTC: The breach was that the handrail was not adequately tested. Plaintiffs did not reach for handrail when falling, so this cannot be the cause of their injury. No link between breach and harm.
Athey v Leonati: It was a combination of the pre-existing back injuries and the car accident that caused the injury→ enough to establish causation.	Barnett v Chelsea & Kensington Hospital: Even though turning patients away from hospital was a breach, they would not have received antidote at hospital in time before dying anyways. Regardless of being turned away, factual inquiry shows they still would have died.
Snell v Farrell: Dr Farrell performed cataract operation on Snell, there was a little bleeding, he waited 30 min and continued operation. Following surgery Snell had blook in her that cleared 9 months later. She had an optic nerve atrophy that caused blindness which could have occurred naturally or from continuing of operation. Causation was not applied rigidly, positive medical opinion wasn't necessary, common sense was enough to show 'but for'.	Richard v CNR: Drove his boat off ferry when someone yelled "we're here". Court found that cause was not that rope across the end of the ferry was untied before docking, but just his rash act of backing off the boat, contrary to warning signs and crew trying to stop him.
	Benhaim v St Germain: Cancer diagnosis is delayed by negligence of Dr Benahaim In evaluating all the evidence, an inference could not be made. **Expert opinions** were based on incomplete information, and involved speculation and estimation.

REMOTENESS

Once causation is established on a balance of probabilities, the defendant has a chance to argue that the connection between the breach and the loss is too remote and there should not be any liability imposed (Solomon). It is a rule concerned with injustice and morality that seeks to achieve a balance between compensating loss but also relieving the defendant of an unreasonable burden (Wagon Mound 1). Donaghue not only emphasized compensation, but the necessity of fault and blameworthiness on the part of the defendant. The stage of remoteness serves this and the concerns raised by Tomlin's dissent in Donoghue. It is a similar analysis to causation, but a legal one rather than a factual one and it allows the courts to control the scope of liability.

The current test for remoteness, established in Wagon Mound no.1, is reasonable foreseeability. It is not necessary to foresee with exact precision the harm that will occur, only the type of harm that could occur. The defendant can still be held liable even if they do not foresee the extent of the damage (Hughes v Lord Advocate). Assiniboine South School v Greater Winnipeg broadens this and says that ambit of foreseeability is broad and you only need a general sense of possible harm. It does not matter that other causes out the defendant's control also ended up contributing.

Foreseeability is not about whether something is possible→ if it happened it was possible. But was it probable (Mustapha)?

Wagon Mound 2 tells us that you need to weigh the risk and the difficulty of eliminating it. Just because risk is very small, does not mean it is not reasonably foreseeable (we cannot read Bolton like this). The reasonable person standard remains: would risk occur to reasonable person in D's position? The standard of reasonable foreseeability is "real risk" aka is harm a possible consequence? Real risk is one that would occur to a reasonable person in the position of the D and not be brushed aside as far fetched (Mustapha).

The standard objective: a person of ordinary fortitude (Mustapha). Plaintiff must show that a person or ordinary fortitude might react in the same way→ how does this interplay with thin skull rule? **exception is if D knew about frailties of P: this makes it more likely they had foreseeability.

Thin skull rule and crumbling rule apply at this stage too if they are relevant. **Thin skull** victim is more vulnerable to harm but could have avoided any injury by leading careful life. **Crumbling skull** is doomed to damage. Legal question is whether D should be held responsible for speeding up the onset of an injury that would have occurred anyways. In this situation, damages are only available to the extent that the D worsened the P's condition (Solomon).

Thin skull rule and remoteness: The amount of damage suffered by harm depends on the victim (for example if pre-existing condition caused them to suffer more harm) (Smith v Leech Brain & Co.). As long as the breach was a cause, predisposition doesn't negate liability (Marconato v Franklin).

Intervening act? Test is "scope of risk" aka was loss (or the intervening act) within the scope of risk created by original tortfeasor (Bradford). A person doing a negligent act an be held liable for future damages that arise in part from another negligent actor when subsequent damage was foreseeable (Price v Milawski); meaning future negligence is not always an intervening act.

Remoteness Established
<u>Mustapha v Culligan Canada</u> Mustapha sees dead fly in water supplied by Culligan and becomes obsessed with event, develops major depressive disorder, phobia of water, and severe anxiety. Would have been unfair to D to assign liability in this case.

Wagon Mound 1:
Oil spilled by Wagon Mound, carried by wind and tide to respondent's wharf.

R employees were using welding equipment and molten metal fell and ignited rag floating on debris.

Burning debris ignited oil and wharf and equipment were damaged in ensuing fire.

Remoteness not established

Wagon Mound 2:

Events were found to be very rare but known to be possible.

Hughes v Lord Advocate:

Accident was cause by a known source of danger (lamp) but it wasn't caused in a way that could be not be foreseen.

This doesn't mean accident was not of foreseeable type.

There were several dangerous possibilities of leaving lamp unsupervised and explosion was one of them.

Assiniboine South School v Greater Winnipeg Gas:

Son looses control of auto toboggan and vehicle hits gas pipe servicing school, which is fractured.

Gas escapes and enters boiler room, reaches an explosive mixture and is ignited by pilot light causing explosion and fire.

Chinsang v Bridson:

P suffered minor brain injury in car accident which led to lasting depression and psychosis.

D claimed remoteness and that P's issues stem from schizophrenia, unrelated to accident.

This was rejected: evidence showed that it was rare but there was still a "real risk" for the ordinary person to suffer the same results.

Intervening Acts

Bradford v Kanellos:

Restaurant was negligent for undue quantity of grease accumulated in their grill which caused a fire.

When fire happened, the extinguisher made a noise, and customer then claimed it was a gas leak and created a panic.

People are running out and P was pushed her seat and sustained injuries.

Cause of her injury was hysteria, not fire: her injuries were not in the scope of risk created by undue grease.

Price v Milawski:

1rst doctor is negligent and says P's ankle is not broken.

2nd doctor does not order new x-rays and also says ankle is not broken.

P sustains permanent disability from delayed diagnosis.

2nd doctor was not an intervening act: once negligent error got into hospital system, Dr Murray should have foreseen that other doctors would rely on this when treating patient.

PUBLIC AUTHORITIES

Government authorities are subject to same law of DOC as individuals. Exemption from duty could arise from statutory exemption. You can only sue public authorities for operation (executing decision) and not policy (making decision) (Just v BC). This avoid crippling the government of their ability to govern, but also to make sure government is held accountable as part of their purpose is to protect the public (Just). (You can still challenge a policy decision on the basis that it was not made in the bona fide exercise of discretion)

R v Imperial Tobacco broadens the scope of operations by constraining

What are likely **operations**:

- something specific, execution,
- nBudgetary constraints related to operational choices such as staffing are operations

What is likely **policy**:

- Course or principle of action based on a balancing of economic, social, and political considerations. t (Imperial Tobacco)
- high level decision (though can be made at lower level if shown it was reasonable in circumstance)
- Economic factors deciding between two reasonable options is policy
- Considerations for manner and quality by which government executes its function — budgetary constraints, availability of qualified personnel and equipment (Just).
- Statutes, regulations, discretionary functions
- Requires the balance of policy consideration (Imperial Tobacco)

** Not all discretionary decisions are policy decisions (Imperial).

Standard of care required of government might be different than the SOC required of individual (gov must demonstrate that system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available …) (Just).

*****The line is not clear cut (Just v BC)

Just v BC
Boulder comes loose from wooded slopes above highway and hits P's car. P says BC was negligent in failure to maintain highway properly. Frequency, and manner of inspections were found to be operations→ back to trial.

Imperial Tobacco
Was the government decision to encourage consumers to choose light/low tar cigarettes policy? Yes→ Adopted at the highest level in Canadian government and involved social and economic considerations.

VICARIOUS LIABILITY

Vicarious liability is a policy tool. It serves to make sure plaintiffs will actually be compensated by those who have the resources to do so and to create normative change. (Which D can pay out + which defendant can institute change?)

First ask if there is a statute that prescribes liability (ex Highway Traffic Act).

Next, there are two categories that can trigger vicarious liability:

(1) Agent-Principle

Principle authorizes agent to act on their behalf (ex: company empowers a person to enter contracts for its benefits).

➔ TG Bright & Co: principle is liable to third parties for negligence of agent in the course of his (agent's) employment although the principle did not authorize, justify, participate, or know of such conduct, even if he forbade them. Principle is not responsible for negligence of agent in any matters beyond the scope of the agency, unless he has expressly authorised them to done or has subsequently adopted them for his benefit (Percy v Glasgow Corp).

(2) Master-Servant (Bazley v Curry)

This captures the employer/employee relationship.

Test for whether employer can be found vicariously liable: (1) Did the employer authorize the conduct? OR (2) Were the unauthorized acts so connected to authorized acts that we can deem them to be authorized.

If you are using second branch of test, there are two steps: Are there precedents which unambiguously determine the answer (need similar facts)? If not, then you determine based on broader policy considerations.

Policy= compensation and deterrence

- Openly confront the question of whether liability should lie against the employer
- Generally, if the connection between the creation or enhancement of a risk and the wrong that accrues therefrom is significant, vicarious liability is appropriate (even if wrong is unrelated to employer's desires).
- Once engaged in business, an employer pays the generally foreseeable costs of that business.
- How do we determine the connection?

➔ Opportunity that the enterprise afforded the employee to abuse his or her power
➔ Extent to which the wrongful act may have furthered the employer's aims
➔ Extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise
➔ Extent of power conferred on the employee in relation to the victim
➔ Vulnerability of potential victims to wrongful exercise of the employee's power

*Punitive damages cannot be awarded for vicarious liability.

DEFENCES

Contributory Negligence

A partial defence that claims P contributed to the harm.

Can take different forms: carelessly entering into a dangerous situation, carelessly contributing to an accident, carelessly contributing to resulting harm etc.

Test: Did plaintiff act as an ordinarily prudent person might reasonably have acted in the circumstance? (Walls v Mussens NBCA) (1) did P do something/fail to do something (2) Did this conduct lead to/exacerbate the harm (Gagnon v Beaulieu). Test is a modified objective standard based on circumstances.

➔ Agony of the moment rule tells us that the analysis is contextualised if there the stress of an emergency (Walls v Mussens NBCA: P arrive on site to fire at his service station and threw snow on fire like those present were doing, instead of going to get fire extinguisher which would have limited the damage).

But this is still based on reasonable person: no personal equation (for ex: if P thought not wearing a seatbelt is more safe, this doesn't matter because it is unreasonable and they ought to have known that wearing a seatbelt would reduce possibility of injury) (Gagnon v Beaulieu).

Contributory negligence will not limit recovery unless it is a proximate cause of loss(within scope of risk of P's conduct) (Cameron v Mortimer).

Failure to wear a seat belt provided is considered negligent and if wearing seatbelt would have prevented or reduced injury to any extent→ contributory negligence (seatbelt cases usually apportion contributory negligence at 25%) (Gagnon v Beaulieu).

Apportionment of loss

Very statute driven. Usually you want to look at the facts and if there is no answer, apportionment is 50/50 (Solomon).

Mortimer v Cameron
M & C were engaging in horseplay during party after a few beers. They fell through a wall that was not properly constructed and suffered injury. Apportionment was given at 40% to the city and 60% to building company who owned house→ building company Stingray had an ongoing duty to inspect the premises and they failed this statutory duty for several years. *A person/company who builds a building bears liability for it as long as it stands.

Voluntary assumption of risk (Dube v Labar)

This is a complete defence and very rarely applied (Solomon).

Test: Did the Plaintiff bargain away their right to sue, knowing of the virtually certain risk of harm?

- May be express acceptance or implication by conduct.
- Understanding between both parties that P is taking physical and legal risk.

*Inapplicable in the majority of drunk driver/willing passenger cases because the defence requires awareness of the circumstances and consequences.

*Was not found in Crocker, because he was drunk when he competed, and he did not read/understand release form (release provision was not drawn to his attention).

Ex turpi causa (Hall v Hebert)

A complete defence which is very narrowly interpreted, when the Plaintiff was engaging in criminal activity at the time of the loss.

Usually applied when Plaintiff seeks to profit illegally from conduct or where compensation would amount to an evasion of a criminal sanction.

Only invoked when it is necessary to maintain the internal consistency of the law.

Not part of DOC analysis, but strictly a defence: tort unlike equity does not require plaintiff to come with clean hands or to have a certain moral character.

Inevitable accident (Rintoul v X-ray and Radium Industries: driver's brakes stopped working, and they rear end someone [defence failed, no evidence]**)**

Test:

(1) Something happened over which D had no control.
(2) The effect could not have been avoided by the greatest care and skill.

Defendant needs to show evidence that the accident could not have been prevented by reasonable care on their part.

Checklist:

(0) Is someone suing a public authority→this change analysis
1. Why do we need a duty of care?
2. Does this fit under established duty?
3. Foreseeability
4. Proximity (is there a positive duty to act?) + Policy→ prima facie
5. Residual policy

6. Arland: reasonable man
7. 4 tools to determine
8. Is the D a child, mentally ill person or professional? → special standards
9. Consider custom
10. Establish specific SOC and breach

11. But for test
12. Is thin/crumbling skull rule relevant to analysis?
13. Are there multiple causes to the loss?
14. Is causation established, do we need to make an inference or is it simply not there?
15. Is there any case for material contribution?

16. Was loss reasonably foreseeable?
17. Look at probability, was there a real risk?
18. Objective standard
19. Do thin/crumbling skull rules apply to analysis?
20. Was there an intervening act?

21. Could there be vicarious liability?

22. Defences

23. Remedy