

LAW 430

TORTS

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INTRODUCTION

Tort

- Wrong committed against a particular person (as opposed to a criminal wrong against society).
- Tort and a crime can result from the same act.
- As opposed to contracts, torts can arise between parties with no agreement between them (you have no pre-existing contract with every other driver on the road). However, they are not mutually exclusive, a tort can arise from a breach of contract.

Theories of Tort

Essentialist (not the pervasive view) – Tort is about fixing the problems of specific parties, and should not be used as a method of social control. It is unconcerned with deterrence.

Instrumentalist – Concerned with the aims of tort law:

1) **Compensation** (primary)

Criticisms:

- Not efficient to deal with losses
- Only a minority are compensated
- “Victim” has to initiate and pay costs
- System is fault driven (no compensation focus)

2) **Justice** – is this the way to appease victims?

- The system is public, plaintiff can get vindication
- Punitive considerations not primary
- Distributive justice (is this fair, i.e.) injured exec.

3) **Deterrence** – (Specific and General)

Criticisms:

- Unintentional/negligent behaviour not really deterrable
- Lots of cases settled, no deterrence
- Compensation is monetary, poor people don't get sued as much
- Deterrence works best when they know what they might be liable for, the C.L. is always changing
- Compensation is excessive for deterrence

4) **Education** – reminds public what is acceptable.

5) **Ombudsman** – put economic and social pressure on those with power.

6) **Other** – psychological benefits to pl./victim

Alternatives to Tort Law

- **General Criticisms:**
 - The system is slow, medical costs are up-front

- Pl. has to prove fault, this can be difficult
- Inefficient, costly to administer
- Arbitrary as to who is compensated
- What happens if tortfeasor is poor?

- **Alternatives:**

- Broad social insurance schemes
- Workers compensation
- Other no-fault schemes
 - People that suffer losses should be compensated, not tied to fault

TRESPASS TO THE PERSON

1. Accidental, Negligent and Intentional Conduct

Intentional Torts:

- Liability only for intentional and voluntary conduct
- **Intent** = desirability to bring about consequences.
- **No need to show damage**
- **Must be a direct act**
- **Fault is presumed**

Differences between:

1. Accidental – unforeseeable, unpreventable consequences.
2. Negligent – careless, reasonable actor could have foreseen & prevented
3. Intentional
 - Degree of foreseeability
 - (1) a reasonable person could not have foreseen this event
 - (3) need not be hostile or otherwise blameworthy.

Garratt v. Dailey (1955) U.S.

- A child pulls a chair out from under someone causing injury.
- The Supreme Court held that a battery would be established if it was proven that, when the child moved the chair, he knew with substantial certainty that the pl. would try to sit down where the chair had been.
- Trial judge said that there was no intent to injure.
- The absence of intent to injure does not absolve him of liability; it is that he had intent to cause the contact that is relevant, or the intent to create the circumstances that will create the contact.
- **Imputed (constructive) intent** – Consequences substantially certain to result.

Restatement of Torts, Second (How intent is used in tort)

- All the consequences the actor desires to bring about are intended, also covers the consequences of acts which the actor knew were certain or substantially certain to result.

- As this probability falls from substantially certain it becomes **recklessness**, falling further still it becomes ordinary **negligence**.

Carnes v. Thompson (1932) U.S.

- Def. struck at former employee with pliers, instead hit employees wife. Wife sues
- Clear the Def. intended to commit a tort, but Court held it didn't matter who he actually hit (**transferred intent**)
- Also, if you intend to commit one tort but commit another instead, transferred intent applies.
- **Rationale:** Makes sense for the consequences to fall on the defendant in the circumstances.

Concepts related to Intent

Motive – Reason why the actor did what they did; why did they desire the consequences?

- I.e.- Practical joke moving car on Apr. 1st v. friend moves car so you don't get towed v. stealing a car

Mistake –

Basely v. Clarkson (1681) Common Pleas

- Def. cut neighbours hay “involuntarily and by mistake...intending only to mow the grass upon his own [land].
- Clarkson was mistaken as to his legal action, but he intended the consequences.
- Mistake does not mean you are not liable. **Why you act is not all that important.**

Volition and Capacity

Volition – a low standard. Was the action directed by a conscience mind?

- Must be conscience of act
- Must be able, in some way, to control the act
- Were you in control of your physiology at the time? Yes? Then voluntary.

Smith v. Stone (1647) U.K. K.B.

- Def. was carried upon the land of the pl. by the force and violence of others and not therefore voluntarily.
- Court: Not a voluntary act => no trespass.

Q. Can a voluntary act be unintentional?

A. Yes, you can direct your body without wanting the outcome or appreciating the consequences.

Q. Can an intentional act be involuntary?

A. No, intentional means “substantially certain of a consequence”, being “certain” implies that it is not involuntary.

Capacity – In order to have the capacity to commit a battery the actor must be capable of appreciating the nature and consequences of his act.

Tillander v. Gosselin (1967) Ont. C.A.

- Infant Def. removed a baby from its carriage and dragged her, fracturing her skull and causing brain damage.
- Not a battery b/c the 3 year-old did not have the mental capacity to form intent.
- The “tender years” presumption may make it legally impossible for a child of that age to ever be held to have formed the requisite intent.
- NOTE: this decision did not turn on lack of voluntariness, but on intent. The child’s actions were voluntary.

Battery

Protects the right to be free from harmful or offensive physical contact. The Pl. need not have suffered an injury.

Elements of Battery:

1. Harmful / offensive contact
2. Directness (is this necessary? What is the tort intending to protect? The Pl. rights.)
3. Intention (i.e. not accidental)

The Pl. must establish (1) and (2) and then their case is *prima facie* made out, this is straightforward to do.

Offensiveness: What kind of contact is offensive?

Cole v. Turner (1705) Nisi Prius

- Touchings that are done in anger as opposed to those without any violence or design of harm. Hostility of the “toucher” is characteristic.

Non-Marine Underwriters, Lloyd’s of London v. Scalera [2000] SCC

- Insurance policy does not cover intentional conduct.
- Iacobucci J. focuses on the consent aspect of sexual battery, saying that Pl. must establish that there was a lack of consent to the touching. This is incorrect. Contact can be beneficial and still be a battery. Consent is a separate issue from establishing whether there has been a battery.
- MacLaughlin J. says that contacts that are not generally acceptable in society might be a battery, like sexual contact. Consent is a separate issue.

The Pl. need not be aware of the contact for it to be a battery. The aim of the tort is to protect one’s bodily dignity and autonomy. Although it must be direct it need not be fist-to-fist.

Intention: The Def. has the onus to show no intent.

Is there such thing as negligent (reasonable foreseeability) battery in Canada? There is some thought that this is possible in Canada. The Def. must show that the consequences of his actions were not reasonably foreseeable. *Cook v. Lewis* says there is such a thing.

- Iacobucci J. thinks that negligent battery is when Def. is careless as to the risk of contact. This would be contact inflicted with fault, in a careless manner. Ex. Practice Tai-chi at a bus stop – careless as to risk of contact.

Should there be such a thing as negligent battery? Fault is generally not a huge component of the claim so it probably does not matter.

Bettel et al. v. Yim (1978) Ont.

- Pl. and friends threw lighted matches into Def. store. They ignited charcoal. Def. grabbed Pl. and shook him. Def.'s head came into contact with Pl. nose injuring it. Pl. sues for battery.
- Def. did not intend the injury; this does not matter. Even if he didn't intend the result, and was not "substantially certain" it would occur, is he still liable?
- Court says if you are in the process of battering someone you are liable for the consequences that ensue. The Court will not use the "reasonably foreseeable standard" (negligence). This is a very harsh, broad reading and may not survive a policy analysis.

Test of Directness: Would the result have occurred without the intervention of another independent agent?

Q. Is poison added to the drink of another a battery?

A. No, because the poisoning requires an act (drinking) on the part of the Pl. (although it could be argued that the Def. knew they were going to drink it.)

DEFENCES TO THE INTENTIONAL TORTS

Consent – If the Def. cannot prove he acted without fault then he can raise defences such as consent.

- Consent is a complete defence.
- It can be explicit (oral/writing) or implicit.
- Consent has to be full, free and informed
- Generally extends to all the inherent risks involved in the activity.
- The person needs the capacity to consent.

Factors that vitiate consent:

Duress – Consent obtained under force/treat of force. The consent is not free.

Fraud – In the tort context it is not enough to establish that there was a fraud, it must be the fault of the Def. and go to the "heart of the matter" and not just be of collateral importance.

Examples:

(1) Pl. is induced to marry when Def. was already married. This is collateral – construed very narrowly.

(2) Pl. misled about Def. STD status (lies or does not disclose) and argues that they would not have consented to sex had they known.

Bell-Ginsburg v. Ginsburg – Bisexual husband, Pl. claims she would not have consented to sex with him had she known. This was dismissed for no good cause of action. The “fraud” did not vitiate consent.

R. v. Cuerrier – In the criminal context failure to disclose the HIV status to the complainant resulted in her being put at significant risk. The Court determined that fraud did not need to go to the nature and quality of the act. The SCC no longer looks at STD’s as collateral to the act. The SCC test is now (1) proof on an objective standard that consent was obtained dishonestly (2) proof the accused conduct exposed the Pl. to serious risk of bodily harm. This broader standard is likely to be adopted in the tort context because the liberty of the Def. is at stake in the criminal trial and is not in the tort action.

Mistake – Consent given under a mistaken belief only vitiates consent if the Def. is the source of the mistake, and led the Pl. to the mistaken belief (different than fraud). American’s have a broader definition of mistake i.e. even if the Def. is not the source of the mistake.

Public Policy – Court looks at the situation. Nothing on the face of the consent invalidates it, but the Court does not allow the consent to stand for public policy reasons. Examples:

(1) *M(M) v. K(K)* (1989) B.C. C.A. – Pl. sues foster father for sexual battery. At trial the Def. defence of consent succeeded. On appeal it did not because the wrong doing of the Def. created the circumstances under which the Pl consented (i.e. criminal act, breach of trust).

(2) *Norberg v. Wynrib* [1992] SCC – Doctor, Def., supplies drugs to Pl. in exchange for sex. Pl. alleges battery among other things. At trial and at the Court of Appeal the action is dismissed because the Pl. consented. At SCC three judges held the Dr. liable for battery b/c of invalid consent. The test employed by the Court is that (1) there is a disparate power relationship AND (2) The Def. exploited the inequality.

Q. Is the consent of a drug addict then always invalid?

A. No, It was not the fact she was addicted, but the fact that it was her addiction that was exploited to get consent.

Consent in a Sports Context – How far does consent extend?

The physical contact in sports is not acceptable in everyday life, but the person involved in the sport is taken to have consented to the “regular” types of contacts that take place in the sport. This includes injuries sustained by those that break the rules (penalty worthy blows). What is not included is that which falls below the standard of fair play. The absence of malice seems to be the key. Example:

Agar v. Canning (1965) Man. Q.B. – Pl. was hit with Def. stick after he had “hooked” him. The Court “The conduct of the player in the heat of the game is instinctive and unpremeditated and should not be judged by the standards suited to polite social intercourse”. In this case the act went beyond the standard. “[T]he act...in retaliation for the blow he received, goes beyond the limit marking exemption from liability”.

Mutual fights – If you engage in a mutual fight you cannot claim for injuries that result unless the force used by the other person is excessive/unnecessary.

Consent in a Medical Context – Provider of care must obtain consent BEFORE the procedure or it will be a battery.

Consent *can* also be implied, but hard to prove (e.g. rolling up sleeve for a blood test). The Court will apply a “reasonable person” test to this.

Consent must be:

(1) Voluntary – The patient themselves must consent. This is broadly interpreted (e.g. treatment as a condition of parole, this is voluntary).

(2) Given by someone with capacity – Minors can give consent, the “mature minor” rule. Examples:

C. v. Wren (1987) Alta. C.A. – 16-year old can get an abortion without the parents consent.

Gillick v. West Norfolk (1985) H.L. – Minor can consent to treatment “as long as the child has sufficient understanding and intelligence to make up their own mind.

Re Superintendent of Families & Child Services and Dawson et al. (1983) B.C. – Severely handicapped 6 year old requires surgery. Parents refuse on compassionate grounds. Child services took the child under statutory authority b/c he was in need of protection. Court tends to always preserve life and does so in this case ordering the surgery. The rights of parents are not absolute.

(3) Directed towards a specific treatment/provider

If these elements, (1)- (3) are present then consent is valid, but not necessarily informed. If it is valid there is no action in battery, but in negligence (harder to succeed).

(4) Consent must be informed – lack of informed consent does not vitiate the validity of consent otherwise and there will be no cause for an action in battery. Consent, to be informed, should cover all aspects of the treatment (e.g. disclosures of information, material facts and risks). Example:

Reibl v. Hughes (1980) SCC

- Patient Pl. brought action of battery and negligence against Dr. Def. Pl. claimed that Dr. ought to have disclosed that there was a risk of stroke associated with the operation. He claimed had he known he would not have consented so that he would not be risking his full pension.
- Court held there was no liability for battery. In the absence of fraud or misrepresentation a failure to disclose all the risks will not vitiate consent, b/c the procedure was not an

unprivileged, unconsented invasion of the person. This is what battery is intended to protect. However, a claim in negligence does exist.

Gerula v. Flores (Not in Materials)

- Def. Dr. operates on wrong disc in Pl. back. Dr. Alters the medical records.
- Court held that both surgeries amounted to a battery. No consent for the 1st surgery on the wrong disc. No consent for 2nd operation (he did consent) because of the Dr.'s misrepresentation.

Exceptions to Consent Requirements

1. Statutory Exceptions – Patients consent is not required where there exists a statute that says they can proceed without consent.

- (1) Public Health Act, R.S.A. 2000 – authority to act to prevent spread of communicable disease.
- (2) Dependent Adults Act – with agreement of 2 doctors/dentists, AND where they do not have the capacity to consent, AND has not previously withheld consent can be examined/treated without having given their consent.

These exceptions are not absolute:

Starson v. Swayze (2003) SCC – Court upheld decision of board declaring mentally ill person capable of refusing treatment. Court identifies “individual autonomy” as generally prevailing over “effective medical treatment” in priority. Autonomy is s.t. the need for “societal protection” (e.g. incarceration of those held not criminally responsible by reason of mental disorder).

2. Emergency

Marshall v. Curry (1933) N.S.

- Hernia/testicle case. Was removing his ball outside of the consent?
- Court held it was not a battery. If it was not removed at the time of the hernia surgery it posed an immediate threat to the Pl. life.
- Crucial factors: The problem was totally unanticipated and dangerous and therefore an emergency.

Murray v. McMurchy (1949) B.C. S.C.

- Pl. patient has C-section, Dr. ties her tubes. She sued in battery claiming a lack of consent. She won.
- Crucial factors: Immediacy of danger low, it was a future threat. Merely convenient for the doctor to do it then rather than obtaining consent again (although he did save her the risks of future surgery). It was a permanent procedure.

Malette v. Schulman (1990) Ont.

- Pl. patient a JW. Carried card in wallet refusing blood transfusions. She was injured in a vehicle accident and required blood to save her life. Dr. administered on and was sued for battery after she recovered.
- Trial judge ordered in favour of Pl., Dr. appeals.
- Court held: There was a battery. The card should have been regarded as Pl. withholding consent. Had she arrived conscious and refused treatment it would be a battery.

Marshall and *Malette* are reconciled by the fact that *Malette* had expressed her refusal of consent. This overrides the emergency situation.

OTHER INTENTIONAL TORTS AND DEFENCES

Assault – Protects one’s right to be free of the threat of imminent physical harm.

- The defendant’s conduct must have caused a *reasonable* apprehension of imminent harm.
- Def. does not need to have the present ability to cause the harm threatened.
- The Pl. need not be fearful so long as harm was apprehended.

Elements of assault:

- (1) Direct threat of harm
- (2) No damage required
- (3) Intent is presumed (Def. has to disprove intent)

Stephens v. Myers (1830) Nisi Prius

- Not every threat amounts to an assault, But:
- The Def. in advancing toward the Pl. was liable for assault on the basis that he was advancing toward the Pl. with a threatening attitude, and if not stopped, would have been able to strike the Pl.

Tuberville v. Savage (1699) King’s Bench

- A conditional threat: “If it were not assize time, I would not take such language from you”. Is this an assault?
- No, it is not. There must be a reasonable expectation of an immediate battery on the part of the Pl.
- Words alone will not constitute an assault when they are phrased in such a way that negatives the Def. threat.

Bruce v Dyer [1970] Ont.

- Highway passing spat. Pl. pulls car over shaking fist and blocking the Def.’s car. A fistfight ensues and the Def. breaks the Pl. jaw.
- The shaking of the fist and car blocking of the Pl. was an assault. The Def. was entitled to defend himself and was not liable for breaking the jaw.
- The Def. reasonably apprehended violent physical contact

Assault Examples:

- | | | |
|-----|--|-------------|
| (1) | Def. points gun at Pl. | Assault. |
| (2) | Def. points unloaded gun | Assault. |
| (3) | Pl. knows the gun is unloaded | No Assault. |
| (4) | Def. phones Pl and says, "I'm going to shoot you"
No assault – the threat of harm is not immediate. | |
| (5) | Pl. answers door and Def. points gun at him. | Assault. |
- Q. Does a Battery claim also automatically result in an assault claim as well?
A. The ability to perceive the threat is key to assault. Ex. Throw a chair at the Pl. a claim for battery will lie, but because the Pl. did not have the opportunity to perceive the threat there is no assault.

Intentional Infliction of Emotional Distress

The tort of *Wilkinson v. Downton* (1897) U.K.

- The act, (telling her that husband was injured) was wilful and intended to produce harm, and did produce harm. The case is made out.

Elements of the tort:

- (1) **Act or statement** – The conduct must be outrageous/extreme. It is an open question if a true statement will result in liability, as there is a tension with "free-speech".
- (2) **Calculated to produce harm** – this distinguishes it from negligence. Liability is premised on intention; the full extent of the harm need not be foreseeable. What if the Pl. was particularly susceptible to emotional distress? It depends on the Def. knowledge of the Pl. susceptibility, this goes to intent.
- (3) **Harm** – The harm must be physical (visible and provable), suspicion by the Courts toward non-physical harm.

Frame v. Smith (1987) SCC

- No application where family animosity is involved, not in the best interests of children.

Clark v. Canada (1994) Fed Ct.

- Female RCMP sues for harassment.
- Even though it involved several wrongdoers and took place over a period of time the elements of the tort were made out.
- The conduct was extreme, calculated to produce harm and did result in illness.

False Imprisonment

Intentionally restraining someone within fixed boundaries w/o justification. It is the total restraint of progress; more than the loss of power to go where one pleases. Generally it is not false imprisonment to be locked in a room with an open window, for example.

Bird v Jones (1845) Q.B.

- Pl. tried to cross a public bridge, but a temporary viewing area barred his way so he jumped the fence and was detained by security, who told him he had to go another way.
- The Pl. refused to go the other way and was “detained” for 30 min.
- The Court held there was no false imprisonment b/c he was free to go another way (not confined within fixed boundaries).
- Merely preventing him from going where he wanted did not amount to false imprisonment.
- In Obiter, the Court said that physical violence was not necessary to be an imprisonment.

Imprisonment does not need to involve physical force. Example:

Chaytor v. London Ass’n of Fashion (1961) Nfld – Pl. were imprisoned in that they reasonably believed that they were required to remain (dept. store spying).

False imprisonment exists in the case where the Pl. reasonably believes that escape is futile, or where the circumstances give the Pl. no real choice.

Imprisonment must be total:

Q. What is a reasonable v. unreasonable means of escape?

A. Reasonable means will not require risk of injury, and the prisoner must know of the means of escape.

Q. What if by unreasonable means of escape the Pl. injures themselves, what is the liability of the prisoner?

A. Probably not liable for imprisonment, but for negligence.

Q. Does the imprisoned have to be aware of the imprisonment?

A. No, you can be imprisoned while unconscious or sleeping. It is a trespass action; no proof of damage is required.

Q. Can you agree to be imprisoned / Have a condition of imprisonment imposed?

A. Example: staying in a room to write an exam. You can agree to be imprisoned. It depends on the reasonableness of the condition and circumstance (express bus scenario)

Directness Requirement – the false imprisonment must occur as the direct result of the Def.’s conduct. What about where a person is arrested on false information supplied by a citizen and then imprisoned wrongly by the police? The action of the citizen did not result in the Pl. direct imprisonment. KLAR thinks this is bad.

Invasion of Privacy

What do we mean by privacy?

Per Prosser:

- Intrusion on persons solitude seclusion
- Publication of private information
- Appropriation of persons name/likeness for benefit
- Placing a person in a “false light”

In Canada there is no such tort as “invasion of privacy”. Privacy is protected piece-meal by:

- Nuisance
- Breach of confidence
- Trespass to land
- Breach of copyright
- Defamation
- Intentional infliction of emotional distress

It is unrealistic to expect total privacy. The law is concerned with unreasonable invasions of privacy. KLAR: Separate tort is maybe not necessary, but none of the above was originally intended to deal with privacy.

Roth v. Roth (1991) Ont. – (Cottage owners feud)

- Court recognizes possibility for tort of invasion privacy
- SCC recognizes right to privacy under the *Charter*
- Denying a remedy where a clear wrong has occurred unnecessarily restrains the growth of the C.L.
- Does not make sense that an interest in land is required to protect privacy.

Saconne v. Orr (1981) Ont. (Co. Ct.)

- Court upheld Pl. invasion of privacy action. The Def. had played an embarrassing tape recording, made without permission, of a phone conversation at a city council meeting.

Some provinces have Privacy Acts that create a tort of invasion of privacy.

INTENTIONAL TORTS: DEFENCES

Self Defence

A complete defence. An entitlement to use reasonable force to defend what they reasonably believe to be an imminent physical threat.

The defendant invoking the defence must prove:

- (1) There was no alternative to the use of force. If there was an alternative there is no defence.
- (2) The force applied must be reasonable/proportionate. This is determined on the specific facts of the case. If a reasonable amount of force is used but you cause more damage than intended, it is still covered under the defence.

- The defence is not a license for revenge or counter-attack. If you are no longer in danger you cannot claim self-defence for injuries you inflict.

- If there is a reasonable means of escape you are required to take it (unless it is your own home).
- You need not wait for the first blow, as long as you know a blow was coming.
- Distinct from defence of provocation (response to provocative Pl. behaviour) that is a partial defence that may merely reduce the damages you are liable for.

Defence of Third Parties

- People are entitled to defend others that are being attacked or threatened. This is more difficult to establish because courts are concerned that the protector is truly acting in defence of the person.
- If one defends a third party in the reasonable belief that that person is in need of help, one may be excused of liability even if it was action taken under a mistaken impression so long as the mistake is reasonable.

Defence of Property

- One is entitled to use reasonable force to defend one's property (wallet, purse). Reasonableness depends on the circumstances...generally less force is acceptable than in defence of life.
- You can remove trespassers from your home with reasonable force, but generally you have to ask them to leave first.

Necessity

A complete defence – The idea of necessity underlies other defences, but it is a (rarely used) defence unto itself.

When does it apply?

- (1) Imminent danger to life or property
- (2) Def. act (which sacrifices Pl. lesser interest) is reasonably necessary to avert the threatened harm.

Should it be a complete or partial defence?

What about where the Def.'s conduct was not entirely lawful and the Def was partially responsible?

Dwyer v. Staunton (1947) Alberta

- Public road impassable, Def. drives through Pl. private property and claims necessity as defence to trespass action.
- Def. was within legal rights to use the private route when the public road was impassable, so long as he did no unnecessary damage.

Four ways to use the defence of necessity:

- (1) Def. acts to protect his own interests. Example:

Vincent v. Lake Erie Transport. Co. (1910) Minn.

- Def. left ship moored to Pl. wharf. Pl. claims negligence. Def. defends with necessity as a windstorm was imminent and moving it was impossible.
- The infliction of the injury was beyond the control of the Def., and is a situation in which the Def prudently availed itself of the Pl. property to protect it's own more valuable property. The Pl. is entitled to compensation for some of the collateral damage done.
- Dissent: Dock owner assumes the risk of damage done by ships being moored during storm so long as the shipmaster used all reasonable care.

Southwark London Borough Council v. Williams (1971) England

- Homeless people entered homes owned by Pl. claiming defence of necessity.
- The Court held that as a matter of public policy, necessity is not valid in this case. If homelessness were a defence to trespass then no one's house would be safe.
- There was no imminent danger they were seeking to escape in the short term (might have been differently decided if they had been in danger of freezing and had stayed there one night).
- Denning J. - The aim of tort law is not the alleviation of homelessness, but the protection of public property rights.

- (2) Def. acts to protect the interests of Pl.
 - Preventing a fire from spreading
- (3) Def. acts to protect interests of a third-party.
 - Person drowning in a neighbours pool
- (4) Def. acts to protect the public interest.

Legal Authority

A complete defence – Def.'s actions are justified by the law. Most often this is by legislative authority that entitled the Def. to engage in conduct that would otherwise be regarded as tortious. Examples: *Mental Health Act* and *Criminal Code*.

Constitutional Issue: Tort law is a provincial matter. Can Fed's legislate immunity from tort?

Charter Issue: What is the effect of a *Charter* challenge to a statute relied on for defence?

This defence often arises in the context of assault/battery and false imprisonment. The Court will interpret and construe statute to determine if it does indeed give authority and relieve them of civil liability and whether there are any conditions in the statute (reasonability).

Criminal Code – provisions are commonly invoked. Ss. 25, 494-495 interpreted as relieving civil liability.

s. 495 – A peace officer may arrest without warrant a person who has, or whom he reasonably believes has committed an indictable offence or is about to commit an indictable offence.

s. 494 - Anyone may arrest without warrant a person whom he finds committing an indictable offence or who, on reasonable grounds, he believes has committed a criminal offence AND is escaping from and freshly pursued by police.

s. 25 – Everyone who is required or authorized by law to do anything in the admin. or enforcement of law as private person, peace officer, in aid of a peace officer, or by virtue of his office is, if he acts on reasonable grounds, justified in doing what he is authorized or required to do and in using as much force as is necessary,

- Store security is treated as private citizens under s. 494.
- Does s. 25 expand the power under s 494?
 - Majority of Courts have narrowed the scope of s. 494 in that you need proof of the indictable offence (on balance of probabilities), not just “reasonable and probable grounds” that is sufficient for police.

Introduction to Negligence

As opposed to trespass:

- Injury can be caused indirectly
- Have to prove actual damage
- Pl. has to establish the fault of the Def.
- Requires recognition of a “duty” relationship (initially greatly restricted)

The Components of a Negligence Action

- (1) **Duty of Care** – A DoC is owed to persons who fall within the ambit of foreseeable risk created by the defendant’s actions. This is the first thing that a Court will consider. If they find no duty, there is no claim.
- (2) **Standard of Care** –
 - i) What would a reasonable person have done in the circumstances (how ought the Def. to have acted)? This is the SoC.
 - ii) Was the Def negligent (fall below the standard)? This is a fact-based concern.
- (3) **Causation** – Did the Def’s negligence cause the Pl. loss? (“but for” test). If the Def. is not the cause then irrespective of (1) and (2) the Def. will not be held negligent.
- (4) **Remoteness** – Def. is only liable for losses that are a foreseeable result of his/her conduct. Which of the Pl. injuries should the Def. be held liable? Which are sufficiently proximate? This is a legal policy question – to what extent is the Def. responsible?
- (5) **Damage/Actual Loss** – A Def. will not be held liable if the Pl cannot prove that they have suffered a legally recognized type of loss. Generally, monetary damages are awarded that approximate the loss suffered.

- (6) **Defences** – Should the Pl. conduct be taken into account (contributory negligence, voluntary assumption of risk, illegality)? Limitation periods are also important.

The Standard of Care – Topic Outline #4

- How the reasonable person would behave. The difference between engaging in risky behaviour and being negligent is the SoC.
- It is a question of mixed law and fact (only perverse findings of fact can be overturned on appeal)

Who is the reasonable person? It is a benchmark of conduct; an objective test.

- Is there such a thing as a truly objective standard (or a subjective view of a particular judge?).
- Feminist critique of “reasonable man”, and counter critique (not everyone fits gender stereotype)
- Does this standard really result in more certainty? Maybe it will “even out” as bench diversifies.

Vaughn v. Menlove (1837) Common Pleas

- Neighbour lets haystack get out of control despite warnings. It starts on fire and destroys some of the Pl. buildings.
- Court considers what standard to apply to Def’s conduct. Decides that a subjective standard would be meaningless and opt for “what the man of ordinary prudence would do”.
- The subjective characteristics of the Def are not taken into account.

Impact of Emergency on Reasonable Action

- Courts do take into account “sudden emergency” and “agony of the moment” in granting flexibility to Def. in interpreting the SoC (i.e. a reasonable person in like circumstances)
- Choices made in emergency might not be the best but are excused in the circumstances
- Interpreted very narrowly:
 - ****Emergency cannot be b/c of Def. own conduct****
 - Emergency must not have been anticipated by the Def

Wong v. Gonzalez (2000) B.C. Prov. Ct.

- Def. at a red light, a bee came in the window and stung her. Def. rear-ended the Pl as a result.
- Def. argued she was not negligent b/c it was an emergency.
- Court rejects argument b/c there was time for her to prevent the bee-sting.

Elliot v. Hillbros Expressways (1998) Alta C.A.

- Def. driving a truck he overturns it “avoiding a deer” (too fast for conditions)
- Pl. had to swerve to avoid Def, lost control of car and were injured
- Other drivers had managed to avoid the Def
- Court says the Def created the emergency so he cannot claim against Pl.
- Pl. driving excused under emergency (no contributory negligence)
- Def. liable, he should have just slowed down

Factors Considered by Courts in Determining the SoC

- Likelihood/probability of risk occurring
- Gravity/seriousness of risk if it occurs
- How practicable is it to take precautions?
- What is the social utility of the Def conduct? (*Watt*)

It is considered negligent to take an unreasonable risk in harming someone. Where there are risk reducing measures that could be taken by the Def and they are “less costly” when balanced against the “harm” then it is negligent to not take those measures.

U.S. v. Carroll Towing (1947) U.S. C.A.

- Learned Hand formula:

P = Prob. of Injury; L = Gravity of the injury; B = cost of adequate precautions (private and social cost)

- $B < (P \times L)$
- If the cost of “avoidance” were less than the damage it would be negligent not to undertake to do B.
- Strengths – clearly articulates the relationship
- Negative – Not possible to quantify

Bolton & Others v. Stone (1951) H.L.

- Some broad standing outside a cricket yard is hit with a ball and injured and sues
- H.L. – would the reasonable person take the risk that the ball could leave the yard and hit someone?
- The Court looks to how rarely the ball goes over the fence; the probability of injury was very low.
- The costs of the alternative (you can’t play at all) has a high social cost
- Cricketers are not negligent b/c risk is very small; if it had been higher it would be unreasonable to play there.

Paris v. Stepney Borough Council (1951) H.L. rev’g U.K. C.A.

- Pl. has one eye and works at Def garage. The Pl gets a splinter in his eye and loses his remaining sight
- C.A. overturns the trial judge b/c the risk of an incident was not higher b/c the Pl. had one eye. If it is not negligent to not provide goggles to two-eyed employees, then it was not negligent to supply them to this Pl.
- H.L. overturns the C.A. b/c the gravity of potential harm was greater for the one-eyed man. A reasonable person would take into account the seriousness of the event should it occur.

Watt v. Hertfordshire County Council (1954) U.K. C.A.

- Def fire station only has one truck capable of transporting a heavy jack. It is out on an emergency call.
- Another emergency call comes in requiring transport of the jack. The Def officer in charge orders it loaded onto a lorry that is not capable of securing it properly. On the way to the call

the Pl. must stop short and the jack rolls forward and the jack injures him. He sues for damages claiming negligence (failing to use reasonable care in supplying safe appliances and working conditions)

- Denning J. refuses the Pl. action. He considered the emergency more important than the fireman's injury (P x L). HOWEVER: In a purely commercial context he would have found negligence. Is this a good rule????

Priestman v. Colangelo & Smythson (1959) SCC

- Police in a chase with a stolen car. They shoot at the tires, but the car goes over a bump and they shoot driver. He loses control of the car and it hits 2 pedestrians and kills them. Family of the dead pedestrians sues for negligence.
- SCC (3-2) finds the police action not unreasonable, as the social value of capturing criminals is substantial. Police can take reasonable risks for this purpose. It was reasonable under s. 25 of the CC.
- Dissent: given the circumstances it was not reasonable to shoot, s 25 does not apply where there is concern that innocent bystanders
- NELSON: outcome depends on how the broadly or narrowly you define the question

Law Estate v. Simice (1994) B.C. C.A.

- Pl. alleges that failure of Dr. to order a CT scan caused the death of husband. There was evidence that Dr.'s felt pressure to use costly equipment sparingly.
- The Dr. was found liable. It is unreasonable to not use the equipment if it is available. In balancing the needs of the patient with the health care finance the former must win.
- Court says health care workers cannot be held liable if the equipment does not exist.

The Standard of Care Expected of Children

- In assessing the negligence of children (not engaged in adult activity), a two-step subjective/objective test is used.
- If a child is engaged in an adult activity he will be held to the adult standard.
- There is a tender years presumption btw the ages of 0-7. Children of this age can only be held negligent in extraordinary circumstances. The standard in *Heisler* only comes into effect after this age. Children are also generally incapable of being contributorily negligent (so when they sue adults...)

Heisler v. Moke (1972) Ont. H.C.

- Facts unimportant
- When considering whether a child is negligent:
 - (1) Consider the age, intelligence, experience, general knowledge and alertness. Are they capable of being found negligent?
 - (2) If the answer to (1) is yes, then: must consider the objective test i.e. what could a reasonable child of that particular age reasonably be expected to do and foresee under those circumstances.

McErlean v. Sarel (1987) Ont. C.A.

- A collision occurred btw two trail bikes driven by teenagers (13 and 15). Both were held equally liable.

- Where a child engages in an “adult” activity, he will not be accorded special treatment (no imported subjected factors like immaturity). The child will be held to the standard of an adult in like circumstances.

Hypothetical Example – Scott is 8. He is riding his bike to school, racing cars down the street. He looks up in time to see his classmates Tonya and Patrick, but not in time to avoid colliding with them. T & P both suffer injuries.

- Apply 2 step test from *Heisler*

What if Scott was 5 instead of 8?

- This may change the analysis; b/c the tender-age doctrine arguably applies.

What if he had been driving a Vespa?

- This could be deemed to be an adult activity (need a license etc.). In that case he would be subjected to the adult standard. The SoC is related to the activity.
- Unfair to the public to allow kids doing adult activities to use the lower standard as people expect a certain level of experience/proficiency.
- The definition of adult activity is vague; a 12-yr old playing golf?

The Standard Expected of the Disabled

Physical Disability

Blackburn v. B.C. (2001) B.C. S.C.

- Police officer on his way to an emergency. He struck the Pl who had failed to notice the Cop partly b/c of Pl. hearing impairment.
- The Court found the Cop negligent for speeding through the light, but found the Pl. contributorily negligent.
- **Courts will sometimes relax the SoC for disabled people.** However, a person so disabled has to take their disability into account when engaging in certain activities.
- Pl. in this case was required to be attentive b/c of her hearing impairment, but ought not to have the radio turned up so loud (but she’s fucking deaf!).

Mental Disability

Wenden v. Trikha (1991) Alta Q.B.

- Def suffered from a mental illness causing him to believe that comet was coming to take his soul and that his car was a time machine. While delusional he sped through a red light (thinking he could outrun the comet) hitting the Pl.
- The Def negligent for going through the light and not taking preventative steps. He failed to take his mental illness into account and take precautions to prevent his actions from causing harm
- The Court held that he would be exonerated if he could show the danger was unforeseeable and that he was too insane at the time of the accident to be held negligent.
- ROBERTSON: Likely his failure to take precautions that led to being held negligent.

Fiala v. MacDonald (Cechmanek) (2001) Alta C.A. ** A LEADING CASE OF DISABILITY**

- The Def suffered a manic attack while jogging and jumped on a car and tried to get through the sunroof. The Driver of the car panicked and went through an intersection hitting another car.
- Both the Def. and the driver were held not liable. The driver due to “the agony of the moment”, and the Def. b/c his manic episode was so severe that his actions could not be described as voluntary.
- **Where there is no history of mental illness the Def must show on a balance of probabilities** (1) as a result of mental illness they had no capacity to appreciate the duty owed OR (2) b/c of the illness the Def had no control over his actions at the time the relevant conduct fell below the standard of care.
- **Courts are reluctant to allow intangible mental illness defences**
- This case applies *Buckley*
- *Wenden* is distinguished on the basis that there was no previous history of mental illness, so he was unable to take precautions.

Buckley and T.C.C. v. Smith Transport Ltd. (1946) Ont. C.A.

- The Def drove his truck through an intersection and collided with a streetcar. He was operating under a delusion that his car was being controlled remotely.
- The Court held him so ill that he could not understand the SoC expected of him.
- If it could be said that he did understand, the particular delusion prevented him from discharging it. Therefore, no liability.

Hypothetical Example

- (1) Donna, a waitress, left with a weak arm after an accident when she was 10 years old. Although it does not normally cause her problems, she spills a hot bowl of soup on Molly who suffers injuries as a result.
 - She is held to reasonable person standard. She was aware of the disability and should have taken it into account (*Blackburn*).
- (2) What if it was the first time it ever gave out?
 - it was unforeseeable and therefore she is not liable
- (3) What if Donna was afflicted with a paranoid delusion that Molly was trying to kidnap her, and she spilled the soup b/c she was holding it in front of her to defend herself?
 - *Fiala*: she must be aware that she owed a duty and be able to discharge it to be liable. Also, if she has no history of mental illness then it is unforeseeable that she would have a delusion that would cause harm to another.
 - Policy concerns: (i) although it is arbitrary to excuse the physically disabled over the mentally disabled, it is easier to pretend you are mentally ill.

Summary of Disability and SoC

Physical – Held to the standard of a reasonable person WITH THE SAME LIMITATION (the reasonable deaf person). It is not negligent to not have the ability, but it IS negligent to not take the limitation into account.

Mental – Will be exempt from the regular SoC, but it is narrowly defined; not negligent if inflicted suddenly such that they do not understand, and are unable to discharge the SoC.

The Standard of Care Expected of Professionals

- Professionals held to a higher standard than the “reasonable person”; the reasonable doctor, lawyer etc.
- The Courts distinguish btw errors of judgement and negligence. However, Dr’s have a duty to reconsider their diagnosis if patient is not responding as expected.
- If a Dr. is shown to have acted in accordance with an accepted, approved practice he will escape liability
- Dr’s have a duty to disclose info to a patient that a reasonable patient would want to know in order to make a decision about treatment. Patients should be informed about material risks and the Dr has a duty to ensure they understand them. All risks of elective surgeries must be disclosed.

DOCTORS:

Challand v. Bell (1959) Alta C.A.

- Pl broke arm and had it set by Dr. who concluded that the wound was not contaminated. Later swelling occurred the Dr checked it and decided it was not excessive. Later still the Dr sent the Pl. to a specialist who had to amputate.
- The Pl. alleged negligent treatment by the Dr.
- The Court held that the Def gave the same care a specialist would have given in the circumstances. He is not liable.
- Note: if a generalist engages in a specialist activity he will be held to the standard of the specialist.

ter Neuzen v. Korn (1995) SCC

- The Pl contracted HIV as a result of artificial insemination in 1985. The Def Dr. acted in accordance with the usual medical practice of the time when HIV was not widely known. The donor had not been screened.
- ****It is well settled that Dr’s have to conduct their practices in accordance with the conduct of a prudent and diligent Dr in like circumstances****
- The Dr was relieved of liability b/c he had observed the generally accepted practices of that time.

Generally Accepted Practices

- Following generally accepted practice properly is usually a defence to negligence
- Where a Dr. is faced with 2 competing schools of thought on a treatment, the Dr. is free to choose either based on his judgement.
- A Pl can try to show a practice is negligent but this is a heavy burden as in technical matters the Court will defer to the medical profession.
- A standard practice can be deemed negligent if a layperson can understand it and see that it is obviously negligent.

Reibl v. Hughes (1980) SCC

- The Pl. underwent serious surgery and had a stroke that left him paralyzed and impotent. The Dr. was held liable b/c he failed to disclose the attendant risks.
- The consent to surgery was held valid, but not informed (therefore no battery).
- Dr.'s have to tell patients about all material/special/unusual risks.
 - These are determined on the basis of frequency & severity AND,
 - What the reasonable person in the patient's position would want to know (modified/obj) is the test. A purely subjective test would lead to patients using bias hindsight.
 - If a patient asks specific questions the Dr. must answer; alternative treatments must be disclosed; this does not mean every possibility needs to be disclosed.
- **Causation** – if the Dr. had provided the info would have the Pl refused treatment? A reasonable patient generally follows Dr. advice. Therefore, the above test is hard to establish
- In this case the Pl. won b/c the reasonable patient would want to know about the 10% chance of stroke (the pension eligibility was also NB to the Court's decision)

Ardnt v. Smith (1997) SCC (Wrongful Birth)

- Pl. had baby with serious syndrome resulting from exposure to chicken pox during pregnancy
- Sued Dr. for costs of caring for disabled daughter. Claims Dr. deprived here of informed consent
- Dr. took steps to find out what risks were, but did not disclose small risk of serious disability.
- Court says causation not made out b/c she would have likely continued the pregnancy
- Court confirms the suj/obj test. Factors specific to Ardnt: (1) suspicion of traditional medicine (2) it was a planned pregnancy.

LAWYERS:

Brenner v. Gregory (1973) Ont. H.C.

- Pl. purchased land later learns that they encroach on municipal lands He was alerted to this possibility by the vendor.
- Sued lawyer for not conducting a survey of the land
- Lawyer's conduct did not fall below the standard expected of ordinary competent lawyer b/c a lawyer in same circumstances would not have required a survey.
- To make out negligence something more than an error of judgement is necessary.

Other Considerations:

- If you can prove, but for the lawyers negligence, your claim would have succeeded on a balance of probabilities you get 100% damages. If you cannot prove it would have succeeded you get 0%. NELSON: It would make more sense that if you could prove with 35% probability you would get 35% damages.
- 3rd parties injured by negligence of professionals can sue.
- Professionals can be concurrently liable in contract and tort (unless contract limits tort liability)

DEGREES of NEGLIGENCE:

- Statute can specify that only “gross” (unclear concept) negligence will allow a Pl. to sue in negligence
- *Municipal Act*: Require gross negligence with respect to icy sidewalks and must bring claim within 30 days.
- *Emergency Medical Aid Act*: When administering emergency aid in certain circumstances the actor will only be liable if they act grossly negligent. Meant to encourage people to help.

CUSTOM / GENERALLY APPROVED PRACTICE:

- Courts use this as a guide to determine the appropriate SoC.
- Evidence of custom is persuasive especially when in matters beyond the Court’s experience
- Existence of custom is not determinative of whether SoC is met or not, merely evidentiary.

Waldick v. Malcolm (1991) SCC

- Def. alleged “common practice” that nothing be done with icy sidewalks
- SCC said practice must be proved by evidence, not just by Def. claim or allegation
- Even if custom/practice is shown does not necessarily make it reasonable.
- See *ter Neuzen v. Korn*, supra.

STATUTORY STANDARDS:

- What is the effect in the negligence context of a breach of statutory standard of care?
- When a statute creates a duty it can preclude tort action b/c it is looked at as “taking care of the issue”
- Some statutes *explicitly* create or preclude civil liability for a breach of statute
- Where the statute is silent:
 - (1) Can someone sue based on breach of statute for their injury?
 - (2) When the statute sets out a standard of conduct what effect does this have on the SoC?

R. v. Saskatchewan Wheat Pool (1983) SCC

- SWP delivered infested grain the CWP. CWP claims a breach of statutory duty and wants to recover costs.
- SCC rejects the idea that the statute implies an action in tort. The legislature must explicitly create torts. The statute here does not create a tort of sending infested grain.
- Breach or compliance with statutory standards of conduct merely provides evidence in a negligence action. It is not “proof” that the Def. was or was not negligent.

The Duty of Care – Topic Outline #5

- Is the Def. under any legal obligation to exercise care for the benefit of the Pl.?
- A question of law. Courts of Appeal can review.
- Duty is a threshold claim; no duty = no claim.

- A duty is owed to those within the foreseeable risk of the conduct. The reach of negligence is limited by recognizing only certain DoC. Even if a Def has been negligent they may still be not liable b/c no DoC b/c they fall outside of the scope of foreseeable risk or b/c of policy concerns.
- Duty used to be limited to parties to contract. Courts slowly eroded this principle especially as industrialization occurred and the advent of liability insurance.

General Principles

Donoghue v. Stevenson (1932) H.L.

- “The neighbour principle” We owe a DoC to anyone who is a foreseeable victim of our negligent conduct. The concept is not limited to the parties to a contract.
- Dissenting judges feared the broadening of DoC.

Anns v. Merton London Borough Council (1978) H.L

- Sets the test for recognition of previously unrecognized DoC. The facts of a present action do not have to follow the facts in previous negligence cases.
- (1) Is there a relationship of sufficient proximity that would demand that the Def. reasonably contemplate the Pl? Is the Pl. part of a class within the ambit of foreseeable risk created by the Def?
- (2) Are there policy reasons that would indicate a DoC should not be imposed in this situation?
- This created a presumption of duty that the Def. has to rebut. An expansive concept.
- (The H.L. has since abandoned this test, and has been modified in *Cooper*)

London Drugs v. Kuehne & Nagel Int'l Ltd (1992) SCC

- SCC decision that applied *Anns* test
- Employees of moving company moving equipment belonging to L.D., they drop it cause \$33,000 damage. The contract btw Pl. and Def. limited liability to \$40. The Pl. sued the employees directly.
- SCC held that the employees were covered by the liability limit in the contract, but did owe a DoC.
- Dissent stated that no DoC care existed on policy grounds as the employees were acting within the scope of their employment duty.

Cooper v. Hobart (2001) SCC

- Investor sued statutory entity – the registrar of mortgage brokers. The investors were trying to recover losses incurred by rogue dealer. The dealer was eventually deregistered. Pl argues the registrar should have acted sooner.
- SCC had to decide whether the registrar owed a duty to investors. The Court modified the *Anns* test.
- **1st Stage:**
 - (1) Does an analogous duty already exist?
 - (2) ****Was the harm a reasonably foreseeable consequence of Def. acts?*****
 - (3) ****Are there policy reasons, as between the parties why tort liability should not be recognized**** (proximity analysis) Already recognized categories:
 - Foreseeability of physical harm to Pl.

- Negligent misstatement
- Duty to warn of risk of danger
- Municipality owes duty to inspect houses w/o negligence
- Relational economic loss (in certain situations)
- Gov't authorities who undertake a policy of road maintenance
- **2nd Stage:**
 - (1) ****Residual policy concerns not related to the relationship btw the parties but larger questions of how recognizing the duty would impact the legal system and society in general****
- In *Cooper*, there were no existing or analogous cases. SCC declines to recognize duty. Even if the loss was foreseeable, there was no proximity. The registrar is a statutory creation and therefore, there must be a DoC explicitly created in the statute explicitly. Does not pass 1st stage.
- Would have been overridden at 2nd stage anyway. Registrar is quasi-judicial, applies and party creates gov't *policy*. It has to use a fair approach in determining license revocation. They owe a duty to the public at large, not to indemnify individual investors at taxpayer's expense.
- This is a retreat from expansive *Anns* test, it thwarts finding presumptive DoC.

Edwards v. Law Society of Upper Canada (2001) SCC

- Lawyer involved in gold investment scheme. Investors were not his clients. Using trust account, he informed the Law Society he was doing this. Law Society investigated him. Appellants are investors who lost money on the basis that the L.S. owed them a duty to inform them when they knew the lawyer was using his account improperly.
- SCC used modified *Anns* test and found no DoC.
- 1st stage: No analogous cases where the duty was recognized.
- 1st stage: Should they find a duty? No, the L.S. task is to protect the public at large and s. 9 says they do not owe a duty when administering policies as long as they act in good faith. DoC not easily recognized for statutory entities that have statutory immunity. Fails 1st stage.
- 2nd stage: Would not pass. Again quasi-judicial function

Odhavji Estate v. Woodhouse (2003) SCC

- Estate of man shot by police brought an action against the Chief, individual officers, the province etc.
- Argued that Chief failed to ensure that the officers co-operated with the investigation. This caused mental distress to the Pl.
- SCC applies modified *Anns* test requiring that the **PI** establish:
 - (1) The harm complained of is a reasonably foreseeable result of the alleged breach.
 - (2) There is sufficient proximity btw the parties that it would not be “unfair or unjust” to impose a DoC.
 - (3) There are no policy reasons to deny or restrict the duty.
- How do you “establish” a question of law? This is a step away from the original *Anns* test.

Nova Mink Ltd. v. Trans-Canada Airlines (1951) N.S. C.A.

- Airplanes flying low over mink farm. The noise caused stress to the female mink and they ate their young. Owner of farm sued airline for negligence in flying low and causing the loss.
- Court held pilot had no DoC b/c he had no idea the farm was there or what would happen.
- The CL only creates a duty where there is a probability of risk of harm based on Def. actions. This is a policy decision really.

Smith Article – “The Mystery of Duty”

- Duty concept is ambiguous. It allows judges to state policy without really articulating it – it is hidden. In framing the policy decision in terms of duty it becomes a question of law for the judge to decide. It can be used in a number of ways:
 - (1) Extensions of the law of negligence – The Court wants to deny a SoC it will say there is no DoC. Example: Courts not willing to hold municipalities liable.
 - (2) Foreseeability of risk of harm – Nova Mink: would the reasonable person foresee a risk of harm?
 - (3) Talk about what standard of care ought to be taken in determining duty
 - (4) Remoteness and duty are often used interchangeably.

Foreseeability of the Plaintiff

Hay (or Bourhill) v. Young (1943) H.L.

- Pregnant woman alighting bus heard accident and saw blood on the roadway. Claimed to suffer nervous shock, back pain and she later gave birth stillborn.
- No duty owed by deceased cyclist (even if there was there is still a causation problem)
- The cyclist need not have been in contemplation of the effect on a woman in Pl. position.

Palsgraf v. Long Island Railroad (1928) N.Y. C.A.

- Def. railway guard pushed man onto train that was departing. His fireworks fell and ignited. The ensuing explosion knocked a scale onto the Pl who was some distance away.
- Court denied her recovery on the basis that she was beyond the range of foreseeable danger. If the guard was negligent it was only with respect to the man he knocked the package from.
- Dissent: Argued that a general duty is owed to the world at large in the vicinity of your wrongful conduct.

Duties Requiring Action

No Duty to Rescue at Common Law

- Common law historically discouraged imposing a duty to rescue. This differentiates malfeasance from nonfeasance (omission to act).
- Honore argues that morality should be separate from the law “whether my soul is saved is none if the state’s business”.
- *Horsley*: There is no general duty to come to the rescue of a person in peril from a source completely unrelated to the def. ****This is not an absolute rule****.

Duty to Rescue / Warn

Galaske v. O’Donnel (1994) SCC

- Truck in an accident. The Pl. is aged 8 and his father were passengers in the Def. vehicle.
- Pl. sued driver for negligence in not ensuring that he wearing his seatbelt.
- Def. argued that the father was responsible for the seatbelt. The SCC held that the Def. owed a duty of care as well. (They sued Def. b/c he was insured).

Horsley v. MacLaren (1969) SCC

- Boating on Lake Ontario. M fell in water. Def. backed up boat. Pl. jumps into to try to rescue M.
- Both M and Pl. die.
- SCC found that Def. must take reasonable care in respect of his passengers. With respect to M no causation was established (he jumped, sank and died).
- Pl. would have to establish that Def. negligence in trying to rescue M is what caused Pl. to jump out of the boat.
- Def. did not do anything that caused Pl. to jump in the water. Def. did not create the perilous situation. Therefore, there is no liability.

Commercial Host Liability – To what extent do commercial hosts owe a duty of care to customers?

Jordan House v. Menow (1973) SCC

- Well-known patron of bar became intoxicated. Bar agent asked him to leave. They knew that for him to get home he would have to walk along a busy highway. He got a ride part of the way but was later struck by a car and killed.
- SCC found a commercial host duty of care. Had to take care not to serve to the point of intoxication. If they did they assumed the duty to prevent him from injuring himself or others.
- Many factors in the case: (1) He was well known to tavern, and couldn't "handle" his liquor (2) They served him to the point of intoxication (3) The tavern stood to gain financially from relationship (4) Location on busy highway (5) Liquor statute prohibits over-service.
- This seems to create an exception to the CL rule that there is no duty to rescue.

Stewart v. Pettie (1995) SCC

- **what happens when a 3rd party is injured?*
- Party of 4 drinking at hotel. Driver of car served by same waitress all night. She knew he had drunk a lot, but he did not appear drunk.
- Driver's sister (Pl.) injured in accident. She sued the driver and the hotel. Argued the hotel owed a DoC to the Pl. to ensure drunk patrons do not end up driving.
- Other NB facts: There were other sober members of the party that could have drove. Pl. knew driver was drunk.
- SCC applied *Jordan House* and *Anns* test:
 - (1) There was a duty of care based on *Jordan House* It is reasonably foreseeable that if an intoxicated customer drives away after drinking at the establishment they might injure themselves or a 3rd party.
 - (2) But, the SoC was not breached. There were sober persons in the party that could have driven and were aware of the driver's status. It would not have been reasonably foreseeable to the waitress that the drunk would have ended up driving. She would've concluded that one of the sober people owed a DoC.

Neufeld v. Foster (1999) B.C. S.C.

- Commercial host found to have breached SoC.
- Pl. were last to leave bar. 2 of the 4 had BAC over 3x the legal limit. The bar employees called a cab and tried to get their keys, but did not stay to make sure that they took the cab. The Pl ended up driving.
- Court held they breached the SoC b/c they over-served the patrons significantly, it was not so overly busy that the employees could not have taken the further step to make sure they took the cab.

Dryden v. Campbell Estate (2001) Ont. Sup. Ct.

- Driver driving father's uninsured truck while drinking. Friend, P, gave driver more alcohol. They went to a club and were served. Subsequently had accident after running light and injured Pl. killed other driver.
- Club owed a general duty to a user of highways. P owed a duty to Pl. as it was reasonably foreseeable that giving driver booze could create a risk of harm to driver and others. Def. also owed a duty.

Hunt v. Sutton Group Incentive Realty (2002) Ont. C.A.

- Part-time employee drank at company premises. Went for more booze with colleagues to a pub. They later drove and she was injured severely.
- The employer was found 25% liable. They owed her a DoC as her employer.

John v. Flynn (2001) Ont. C.A.

- Def. a drunk driver and alcoholic drank surreptitiously at work. Supervisor did not notice. He injures Pl. after work. Employer was aware someone was drinking. Employee had previously agreed with employer to attend "AA" meetings. Employer did not monitor his rehabilitation.
- At trial jury found Def. 70% liable, and employer 30% liable. Employer had been negligent in supervising employee with problem. Employer appealed and succeeded.
- Employer had no duty that extended beyond the workplace. The Ct. did not want to impose liability for employers that provide programs for employees.

Social Host Liability

- The law is unsettled. What standard should the social host be held to? The commercial standard? When should liability be imposed?

Prevost (Committee of) v. Vetter (2002) B.C. C.A.

- Vetter's had teen-age kids who liked to party. They were aware that their house was a gathering place, but had a "rule" against under-age drinking.
- A friend of Vetter's got drunk on her own booze and drove 6 people home. Accident, and Pl injured. She sued the social host.
- Vetter's mother was awakened and knew that party was out of control, but now back under control. She took no steps to assess the situation. She owed a duty in allowing her house to be used in such a manner.
- The Def appealed and a new trial was ordered on the basis that the trial judge should not have addressed the issue of causation in the preliminary application. The trial judge assumed that had

she taken steps to assess the situation she could have prevented the drunk from driving. She had no opportunity to assess the situation.

Stevenson v. Clearview Resorts (2000) Ont. Sup. Ct

- Pl. sues hotel where party took place for his diving accident. The hotel sued the 3rd parties (the people that arranged the party at the resort).
- Court held that no DoC between the Pl. and the 3rd party as they were not aware of his drinking or impairment and it was not foreseeable that he would dive into the river.

Childs v. Desormeaux (2004) Ont. C.A.

- Pl. injured by drunk driver. He sued driver and the hosts of a New Year's Eve Party. It was a BYOB party and guests served themselves. Driver and hosts were old friends and host was aware of propensity of driver to drink and drive.
- At trial the court imposed liability on the hosts; they did not take steps to ensure the driver did not drive. Court did not pose a duty b/c of policy reasons: (1) hard to keep track of consumption (2) no special training.
- Appealed to C.A. They concluded there was no duty in this case. But did not foreclose the possibility that a different set of facts would not lead to a duty. They applied modified *Anns*:
 - (1) This would lead to the recognition of a new duty of care. This is not an extension of commercial host liability. There are statutory standards that govern how commercial hosts must behave.
 - (2) Based on 1st stage of *Anns*: Trial judge erroneously place weight on hosts knowledge of drivers propensity to drink and drive. The social hosts assumed no control over driver. There is no expectation on the part of the driver that the hosts would take care of him. It is not just and fair to impose a duty here b/c of hosts lack of knowledge and they had no obligation to monitor him. Fails 1st stage.
 - (3) 2nd Stage – In *obiter*, Must balance the importance of deterrence with the burden placed on social hosts (a chill on social gatherings). What would be the extent of the duty owed?

Creation of Danger

Oke v. Weide Transport (1963) Man. C.A.

- Def. driver knocked over a sign on a gravel median strip without negligence. He removed debris, but could not remove signpost. He did not notify anyone the sign was damaged.
- The Pl attempted to pass on gravel strip and was impaled by sign. At trial the Def was held liable on the grounds he had created the danger and had not notified anyone about it.
- C.A. allowed the appeal on the basis that the accident was not foreseeable. The fact that the act of passing on the gravel was illegal may have been determinative. Also, had the Def been negligent in hitting the sign he might have been liable.
- C.A. Dissent – the Def created the danger and attempted to rectify it but did not go far enough. The loss should lie with him and not the “innocent” driver.

Hollis v. Dow Corning (1995) SCC

- Pl., recipient of breast implants, not warned of post-op complications. Sued Dr. and Dow.
- Dr. was not told of the risks. The C.A found Dow liable for failure to warn physician.
- SCC decided that Dow should have warned the Dr., as learned intermediary. Because they failed to warn the Dr. they were liable to the Pl.

- Dow omitted to do something they ought to have done

Zelenko v. Gimbel Bros (1935) U.S. S.C.

- A girl took ill in the Def store. He put her in the back room to rest instead of summoning an ambulance. The girl died.
- The Court held that if he had done nothing he wouldn't have been liable. But b/c he undertook to administer treatment he was under a duty to ensure that she would get reasonable care.
- Meant to ensure that if you create a disincentive to other to help (b/c you are helping) then you will be liable. (today occupier's liability would make him liable even if he did nothing).

Mercer v. S.E. & C. Railway Co. (1922) U.K. K.B.

- Def. had a practice of keeping the path gate closed when the train goes by and the Pl. was aware of this practice. The Pl. was injured when he walked through the gate and was hit by the train.
- Court held that the Def. assumed a duty by gratuitously undertaking this duty of locking the gate.

Emergency Medical Aid Act R.S.A. 2000

- If you, a Dr. or other professional come to the aid of a victim you will not be held liable unless you are grossly negligent. This creates the incentive to help others (Good Samaritan legislation).

Duty to Supervise Others

Ryan v. Hickson (1974) Ont. H.C.

- No supervision of children operating snowmobiles. Kid got it for Xmas and took it for a spin with no instruction caused Pl injuries.
- Father's lack of supervision led them to be held liable.

Bain v. Calgary Board of Education (1994) Alta. Q.B.

- On a school trip a teacher allowed students to do activities other than what was scheduled. A student is injured. Does the teacher owe a DoC to act to prevent the students from injuring themselves?
- Yes, teacher owes duty based on teacher-student relationship. There is a control/supervision relationship here. NB factor: the length of relationship, student had an expectation that the teacher would supervise/instruct/train.

MacCabe v. Westlock Roman Catholic School Division (2001) Alta. C.A.

- Teacher-student relationship in phys ed. class. The student attempts gymnastic manoeuvre on apparatus and ends up quadriplegic. Phys. Ed. teacher gets sued.
- Ct. found a duty focussing on the relationship of control. A duty to ensure that they do not attempt things that they are not previously instructed in. The Phys. Ed. teacher is required to continually warn students about danger of attempting things.

Wenden v. Trikha (1991) Alta. C.A.

- Psych patient drove through red light b/c of compulsion etc. Did the treating Dr. and hospital owe a DoC to the Pl.?
- Court says in some circumstances they could. In this case they did not b/c they had discharged the duty by taking reasonable steps. Factors the Court will look to: (1) What is the risk knowing their illness? (2) How predictable is their behaviour? (3) Can we identify the class of persons at risk?

Crocker v. Sundance Northwest Resorts (1988) SCC

- Def. is a ski company that ran a downhill tube race over moguls. The Def. allowed the drunk Pl. to compete and he injured himself.
- The Def. owed a duty in these circumstances to take care to prevent such occurrences. NB factor: The Def was running the dangerous race for profit so it owes a duty to drunks.

Putting It All Together

- In general you do not owe a duty to take positive acts to effect a rescue or protect the interests of others. There are two “schools” to account for the preceding cases:
 - (1) KLAR – The cases are not exceptions to the general rule, but there are complicating facts that make these unlike true “Good Samaritan” cases. They fit into a number of general categories (below).
 - (2) These are “Good Samaritan” cases and represent ad hoc exceptions to the rules. They are foremost concerned with compensating the victim. **Where would the social host fit in these categories? This depends largely on the facts** This seems to point to an ad hoc approach.

KLAR’s Categories:

- (1) Economic Benefit to the Defendant:
 - Commercial host cases
 - *Crocker v. Sundance*
- (2) Relationships of Control/Supervision
 - *Ryan v. Hickson*
 - Teacher/Student Cases
 - Dr/Patient Cases
- (3) Creators of Dangerous Situations
 - *Oke v. Weide* Transport (Driver not liable, also not negligent, but dissent would have allowed liability)
- (4) Reliance Relationships
 - *Zelenko v. Gimbel Bros.*
 - *Mercer v. S.E. & C. Ry. Co.*
- (5) Statutory Duties

O’Rourke v. Schacht (1973) SCC

- The existence of a statutory duty can be used to convince Courts to create a common law duty.
- A sign warning drivers about an excavation in the road was missing. The Pl. was injured when he drove into it. The Police were aware the detour sign was missing but did nothing.
- Courts look to the statute, the Highway Traffic Act duty “to prevent injury or damage to persons or property“ and the Police Act. They find that in combination with the CL that there is a duty for the Police to take steps to rectify/warn the public (park a car in front of it).

Special Duties of Care

Duty to the Unborn

Duval v. Seguin (1972) Ont. C.A.

- Is the Pl. (foetus) a foreseeable victim of the Def. driving (at C.L. the foetus is not a person). The Foetus is born and has injury that is linked to the accident can they be compensated by a 3rd party?
- Court says yes. The Court pretends that child was alive when the accident happened. It is foreseeable that pregnant women are on the road.

Dobson (Litigation Guardian of) v. Dobson (1999) SCC

- Pregnant woman drove negligently. Her foetus was injured, delivered early by C-section with disabilities. The Child’s grandmother sues mother on behalf of child to access insurance.
- Does a pregnant woman owe a duty of care to her foetus? The majority of the SCC said no.
- Applied *Anns* test (Pre-*Cooper/Hobart*):
 - (1) Is there sufficient proximity and foreseeability of harm? Yes, there is a *prima facie* duty.
NELSON – The foetus is not a legal entity!
 - (2) The SCC rejects the duty on policy grounds:
 - The mother’s privacy and autonomy rights; every activity of the woman could then be considered a potential creator of liability. She cannot leave her uterus at home!
 - It would provide neither compensation nor deterrence, but only cause family strife.
- In the motor vehicle context there is no reason to not recognize the duty b/c there is insurance (therefore not a transfer from mother to child) and b/c the mother owes a duty to be careful anyway. In the U.K. there is statute that provides for a DoC in the motor vehicle context, but no general duty.

Other Related DoC Situations:

- “Wrongful Birth” – brought by parent against Dr. arguing that Dr’s negligence prevented them from making informed choice about whether to continue the pregnancy.
- “Wrongful life” – Same as above, but brought by child.
- “Wrongful Pregnancy” – Dr’s negligence resulted in an unplanned pregnancy.

These are difficult issue to resolve as they are resistant to standard negligence principles

Cherry v. Borsman (1992) B.C. C.A. (Wrongful birth; *possibly* wrongful life)

- Dr. didn't complete abortion properly and child was born with a disability. Child and mother were awarded damages.

Issue of Genetic Testing – If Dr. neglects to inform about availability of test or other test negligence is the Dr liable for:

- Wrongful Birth? Yes, the Courts recognize this claim.
- Wrongful Life? This met with much reluctance by the Courts. There are no judgements; a few American states have gone as far as preliminary hearings. Quantifying damages would entail the Court valuing the difference in dollar damages between a “normal” and a “handicapped” person.

Wrongful Pregnancy – There are a few cases. Had procedure to sterilize themselves. Dr's negligence in performing procedure led to pregnancy.

- Courts reluctant to award damages for cost of raising the child
- Courts also not interested in telling mothers to get abortions to “mitigate their damages” either.

Winnipeg Child & Family Services v. G. (D.F.) (1997) SCC

- Pregnant woman addicted to sniffing glue. Her other children were already wards of the state.
- Pl. wanted forcible treatment for addiction in detention. Man Q.B. agreed with Pl.
- The Def appealed and won (although stayed in treatment voluntarily)
- C.A. reversed the Q.B. decision. The SCC affirmed the C.A. saying that absent a mental health problem you cannot treat her forcibly and against her will. The foetus is not a legal entity and therefore there is no legal jurisdiction based in tort or inherent jurisdiction in the Court to protect those who cannot help themselves.

Duty to Rescuers

- When someone is negligent and thereby imperils someone else and a 3rd party comes to the rescue does the negligent person owe a duty to the rescuer?

Horsley et al. v. MacLaren et al. (1972) SCC

- 1st person fell overboard. 2nd person dives in to save the first. Both died. The 2nd person's estate sued Def. boat operator on the basis that he owed a DoC to rescue the 1st person.
- Court said there was no duty b/c the 1st person did not require rescue *b/c of the operator's negligence*.
- The rescue itself was reasonable. There would have had to be some negligence on the part of the operator to generate a duty owed by the operator to the rescuer.

Moddejonge v. Huron County (1972) Ont. H.C.

- Students swimming under supervision. They become imperilled. The Pl. rescues one, but drowns trying to save the other. The parents of the dead girls sue the board for negligence.

- Court recognizes that rescuers can recover if their rescue was reasonable. The Court gives a wide berth to what is reasonable.

Urbanski v. Patel (1978) Man. Q.B.

- Woman having tubes tied, Dr. discovers a “cyst”. It is actually her optic kidney. He removes it. She becomes very ill. Her father (as rescuer?) donates her his kidney, but it doesn’t work out.
- Patient and Father sue Dr. They claim as rescuer he was owed a duty of care by the Dr. (for “damage” of removing his kidney).
- The Court decides that it was foreseeable that family may be called upon to donate a kidney. The Dr. is liable to the father for removal of his kidney.

Bridge v. Jo (1998) B.C. S.C.

- An accident btw a car and truck. The truck driver was negligent. Someone inside a house saw the accident and ran back inside to call 911. She fell and broke her leg.
- She sued the truck driver claiming she was a rescuer who should be able to claim against him as he caused the accident in the first place.
- The Court agreed! (Jesus). It was reasonable for her to go call 911 when she was unsure of the injuries. She would not have done this but for the accident, for which the truck driver was negligent.

Causation – Topic Outline # 6

- Once a duty has been established, then we look to the standard of care (was the defendant negligent?). ****It must then be established that the Defendant’s negligence is what caused the Pl. loss****
- Causation need not be proved with scientific precision, but enough to justify compensation flowing from the Def to the Pl.
- The Pl. does not have to prove that Def was the sole cause.
- GENERAL RULE: The “but-for” test. This is a hypothetical inquiry (the Pl. has suffered a loss). As cases become factually complex the but-for test breaks down and can lead to unjust results.
- Example: Two people incensed by Ralph Klein’s ranting on the radio run red lights and simultaneously hit the Pl. “but-for” the actions of each Def individually, the Pl is still injured.
- In this scenario the Court would establish causation by calling each actor a ****substantial contribution**** to the Pl. loss.

Horsley et al. v. MacLaren et al. (1972) SCC

- 1st person overboard. The water was cold, it seemed that as soon as he hit the water he had a heart attack. The Court decided at trial that causation was not made out b/c he died when he hit the water. Therefore the alleged negligence of the rescue was not the cause of death.

Kauffman v. TCC (1960) SCC

- Woman on escalator. Youths at top “rough-housing”. They fall and cause everyone on escalator to fall. Pl. sues TCC for having insufficient handrail and no attendant present.

- Court: Causation is not made out. No evidence that a better handrail or attendant would have prevented injury. No one tried to grab a handrail.

Causation and Correlation

Multiple Causation – This can lead to “joint and several liability”. There is a single loss, but both Def. parties are responsible for the full loss. They have to set levels of responsibility between themselves or the Court will do it for them. The Pl. can collect from either party.

Material Contribution A.K.A. “Substantial Factor Test” This can be used as an alternative to the but-for test when it breaks down.

Single Cause – Can be difficult where there is one cause but b/c of the lack of scientific knowledge the but-for test cannot be made out. Sometimes Courts look to “*material contribution to the risk*” to avoid an injustice resulting from the but-for test.

McGee v. National Coal Board (1972) U.K. H.L. **watering down causation**.

- Pl. an employee of Def. developed dermatitis. Pl. job caused lots of coal dust and it got on his skin. Def. failed to provide adequate washing facilities.
- Court found a duty owing and that the standard was breached but causation was a problem in that he could have developed dermatitis but for the presence of washing facilities.
- Science could only show that lack of facilities contributed to the risk of dermatitis in a material way. The Court accepted that this was good enough!

Snell v. Farrell (1990) SCC **Considers McGee**

- Pl. had eye surgery, eye started to bleed. Dr. continued procedure later. Pl. later lost sight in that eye. The surgery may have contributed (also had high blood pressure diabetes).
- At trial and C.A Dr. found liable with *McGee* principle; contributed to risk=>causation established
- **SCC rejects McGee** – It is unfair b/c it shifts the onus to the Def and *presumes* the Dr. liable when he may not be. The Court allows a flexible approach:
 - The “ordinary rules of causation” apply. Only the Def knows what happened, so the Pl. can establish causation by merely providing some affirming evidence of causation. The Court will infer causation unless the Def. can rebut it. Without a flexible approach the Pl. might never succeed in such a case b/c they don’t really know what happened.

Fairchild v. Glenhaven Funeral Service (2002) U.K. H.L.

- Pl’s could not prove which place of employment was “the cause” of the inhaled asbestos dust.
- The 3 claimants had worked for different employers (disease can take years to develop)
- **At trial**, after duty and breach had been made out the Ct said b/c they could not est. where they were exposed, and which employer is responsible, two of the Pl. cannot succeed.
- The 3rd claimant had proved that each employer had “contributed to the risk”.
- **At C.A.**, The Court dismissed all three claims for want of causation.

- **The H.L.** modified the causation test on the “but-for” standard. The Pl need only prove “material contribution to the risk” to recover.
- **Criticism** – Perhaps the “all or nothing” approach to causation is the problem, not the “but-for” test.

Lawson v. LaFerriere (1991) SCC (Civil Law)

- Pl. had breast cancer. Dr. failed to inform her in 1971 and therefore deprived her of treatment to prolong life. (DoC and breach of SoC were made out).
- Dr. argues that even had she known about cancer there is no way to prove the result would be any different. Did Dr. cause the loss or would have outcome been the same?
- SCC rejected this “loss of chance” claim; causation does not work on this basis.

De la Giroday v. Brough (1997) B.C. C.A.

- Pl went to Dr., thought he had the flu. It turned out to be flesh-eating disease.
- Pl. claimed that Dr. was negligent for failing to recognize that he needed a specialist opinion. The Pl. lost part of his arm and is claiming “loss of chance” to receive treatment.
- C.A held that recovery on “loss of chance” would require SCC action to reverse *Lawson*, or legislative action for torts context. However, it could be applied in breach of contract. (Concurrent liability).

Multiple Causes

- Pl will have difficulty proving causation on the but-for standard, so Courts try to get around this in a number of ways.

Athey v. Leonati (1996) SCC

- Pl. in 2 unrelated car accidents. Some months after 2nd accident he suffered disc herniation.
- **At trial** – Judge awarded 25% damages b/c his injury was 75% due to pre-existing problems
- **At SCC** – Pl. not obligated to show that Def. negligence was the only cause to recover full damages. It need only be a cause beyond *de minimus*.
- The Court refers to the “thin-skull” rule. If you have a collision with a person who has a pre-existing condition that results in worse than normal injuries, that’s too bad – both parties are jointly and severally liable for the damage.
- The Court is concerned that Non-Tortious/Tortious injury should not be apportioned out.
- **OBITER:**
 - If one of the accidents caused injury to the arm and the other to the leg, then each def. would be liable for only the injuries cause.
 - “Crumbling Skull” rule – was the def. strongest argument. “You only have to restore the Pl. to the original position” **if they could have proven** that the disc would have **herniated** in six months anyway then the def. would be liable only for that six month difference.
- **Summary:** In this case b/c there was a single, indivisible injury and multiple tortfeasors, and they were both contributing factors, the Def’s are joint and severally liable to the Pl for the entire injury.

Hollis v. Dow Corning (1995) SCC

- Manufacturer did not warn Dr (learned intermediary) that implants might rupture.
- Dow argued that even if they had warned the Dr, he might not have warned the Pl. They are arguing that Pl. must prove that had they warned Dr, he would have warned her.
- **SCC held** this is not fair. The Pl. does not have to establish what the Dr. would have done. Requiring Pl. to establish this would preclude her from ever recovering.

Walker Estate v. York Finch General Hospital (2001) SCC (**this case is a mess!**)

- 3 Pl. contracted AIDS from tainted blood from Red Cross.
- Pl sued CRC arguing that had they used the proper screening mechanism that particular blood wouldn't have been available for transfusion and they would not have got the AIDS.
- **At trial:** held it was impossible to say whether the blood would not have been donated anyway, even if proper screening would have been in place.
- **C.A. held:** The Pl. had established causation according to *Hollis v. Dow Corning*.
- **SCC held:** Pl. properly recovered but should not have been on the basis of *Hollis*.
- Who would have been the learned intermediary here? The blood donor who had HIV? The SCC said that blood donor is not a learned intermediary b/c they are not required to warn the Pl.
- At trial the donor testified that had the screening been properly done he would have advised the nurse he was a homo with risk factors and would not have donated (so but for the poor screening the Pl. would not have been injured). **The SCC overturns this finding of fact** and concludes that this testimony would not have been necessary to find the Def. liable b/c they "materially contributed" to the Pl injury.
- **This case does not really say how the "material contribution" test can be used.**

B.M. v. British Columbia (Attorney General) (2004) B.C. C.A.

- Domestic violence situation. Complaints made to Police and husband had been charged, but the wife dropped the charges. The couple then lived apart.
- Seven weeks later man returns shoots and kills wife's friend, shoots daughter and wife. Kills himself.
- Pl. woman sues police on the basis that had they investigated Seven weeks prior it would have stopped the resulting deaths.
- **Trial:** The Pl had not established causation
- **C.A. held:** There was no causation. But in a dissent it was argued that the police had "materially contributed" on the basis of *Fairchilds*.
- **NELSON:** Fairchilds is distinguishable on the facts and won't be able to establish causation here. (Is this b/c of remoteness perhaps?)

Cook v. Lewis (1951) SCC

- The Pl. and Def. were hunting grouse in separate parties. The Pl. was injured when 2 people in the other party fired their guns in his direction. It could not be established which Def had actually shot him.

- Court did not find that the Def's were "joint-tortfeasors". It could not be proven that they were acting in common design. The common design would have of it itself to be unlawful or give rise to a reasonable possibility that an unlawful act would be committed.
- Where the Pl. can prove he was injured due to the negligence of either of the two Def. but cannot prove which one actually caused him the injury, then both should be held liable. Both were negligent and brought about a situation that injured the Pl. The onus shifts to the Def. to exculpate them.
- Per Rand J.: Where the conduct of two parties, both negligent, destroys the innocent Pl ability to prove causation, the onus is justifiably reversed to the wrongdoers.

Bigcharles v. Dawson Creek Health Care (2001) B.C. C.A. (considers Cook)

- Pl in a car accident and he suffers spinal cord injury. No X-ray was taken upon hospital admission even though one was ordered. The Pl. was not immobilized and was moved by the Def.
- Pl. alleged negligence of hospital caused his injury.
- Problem: there was no basis of comparison to what the extent of the injury was before the hospital intervened. The issue was then what did the hospitals negligence cause?
- Medical experts testified on both sides. They were all equally credible. Trial judge held that causation could not be made out on a balance of probabilities.
- **C.A.:** Pl. argued that Cook applied. The Def negligence made it difficult for the innocent Pl to est. causation, the onus should shift to the Def. to exculpate themselves.
- **Courts held that Cook does not apply but did not give reasons. It is unclear when the principle should be applied. But presumably in anomalous cases like this!**

Sindell v. Abbott Laboratories (1980) Calif. S.C.

- Pl. mother sued the drug DES to prevent miscarriage. It led her to develop cancer some years later. It could not be established which company among many was responsible.
- Court held that if Pl. could show that the Def companies had produced a substantial amount of the drug (i.e. market share) they could be held liable proportionately. Example: if the Pl sued 10 companies and they represented 85% of the market then they would be responsible for 85% of her damages in proportion to their respective shares.
- Problem: The Pl. mother actually bought DES from that 15% that wasn't sued.

Independently Sufficient Causal Factors

Successive and Causally Unrelated Injuries

Example: A injures B, but before trial "C" event happens to B.

"C" can be an independent tort, or a non-tortious event.

Baker v. Willoughby (1970) U.K. H.L.

****Deals with a second culpable incident****

- The Def injures the Pl's leg in a car accident. Later during a robbery the Pl is shot in the leg and has to have it amputated.

- **At Trial:** The Def argued that the damages assessed against him should factor in that the amputation was necessary b/c of the robbery, not the car accident. The shooting is not causally connected to Def actions.
- **H.L.:** Rejects this argument. If the later incident had reduced the disability from which the Pl suffers then the Def would be responsible for less damages. In this case the later injury is a concurrent cause of the Pl. disability. The damages cannot be diminished.
- The Court reasons this was b/c there is a possibility that the Pl could be under compensated.

Penner v. Mitchell (1978) Alta. C.A.

****Second incident is non-culpable****

- Pl. injured by Def and is unable to work for 13 mo. During this period the Pl. had a heart condition that would have precluded him from working for 3 mo. (with or without the Def act's). The trial judge awarded the entire 13 mo. loss of income damages.
- **At C.A.:** The Court held that the Pl is over compensated b/c he would have missed those 3mo. anyway. The Court considered *Baker* (which says not to reduce the damages), but distinguished on the basis that the heart condition is non-culpable. **C.A. says *Baker* should only apply to culpable.**

Jobling v. Assoc. Dairies (1981) U.K. H.L.

- The Pl injured his back in a fall at work. The Def is his employer. Three years later he develops a debilitating condition that is wholly unrelated to the previous injury and leaves him unable to work.
- **At Trial:** Awarded damages for 3.5 year period. After this point the Def is only liable for 50% of the lost income as a result of the accident. The Court said they were bound by *Baker* to ignore the second health condition.
- **At C.A.:** The Def argued he should not have to keep compensating the Pl. The Court agreed.
- **At H.L.:** When a Pl. injured by the Def tort is wholly incapacitated from earning income by a supervening illness then the law will no longer treat the tort as a continuing cause of any lost earning potential. ***Baker* does not apply when the 2nd accident is not a tort.**

HYPOTHETICAL

Pl is injured by the negligence of D1. As a result Pl earning capacity is reduced from \$100 to \$70.

Prior to trial, Pl. sustains further injury by negligence of D2. Earning capacity reduced to \$50.

What is the extent of the liability of D1 and D2?

Two Principles of Damage Assessment:

- (1) Court must take into account events occurring after the tort, but before the trial.
- (2) You take your victim as you find them

Principle 1: Suggests that D1 is liable for \$30 loss. D1 caused Pl. loss only up to the date of the 2nd accident. But b/c of D2 they would only have been able to earn \$50 not \$70. D1 argues that he is overcompensating Pl.

Principle 2: Suggests that D2 is only liable for \$20 loss b/c when he injured PI they had an earning capacity of \$70.

Problem: If you extinguish D1's liability the PI is under-compensated. The PI has suffered a \$50 loss b/c of the negligence of D1 and D2. If D2 pays \$20 and D1 is not required to pay then PI does not recover their \$50 loss.

Penner v. Mitchell states that the Court should be concerned about over/under compensation.

Baker v. Willoughby addresses this problem. It imposed ongoing liability on D1 in spite of the actions of D2. So, D1 pays \$30 and D2 pays \$20 and the PI is fully compensated.

Jobling v. Assoc. Dairy does not overrule *Baker* but it does say that that *Baker* does not apply when the 2nd incident is not a tort.

Example of a non-tort:

Suppose that D2 does not happen, but the PI develops an illness that extinguishes their earning capacity. Requiring D1 to keep paying past the point where the PI has no earning capacity is not fair.

Remoteness (Cause-in-Law) – Outline Topic #7

General Principles

- This is a legal question. It is used to limit the Def. liability where the Def act is far removed from the PI injury.
- Remoteness is only an issue after DoC, SoC, causation and legally recognized loss have been made out.
- Courts may use a test of reasonable foreseeability, or may use instinct to decide remoteness.
- While it is necessary to be able to foresee the type of injury, it is not necessary to foresee the chain of events leading up to the injury.
- Thin-Skull Rule – Even if injuries to PI are more severe than was reasonably foreseeable, the Def is still liable
- Crumbling-Skull Rule – Recognizes the pre-existing condition of the PI. A Def is liable for the injuries caused even if they are extreme, but need not compensate the PI for the debilitating effects of pre-existing conditions that the PI would have suffered from anyway. HOWEVER – accelerating a condition that the PI would have suffered from anyway is actionable.

Directness vs. Foreseeability

Re Polemis et al. (1921) U.K. K.B.

- Ship carrying benzene, a plank is dropped in the hold. It catches fire and the ship is destroyed. Did the Def liability extend to the destruction of the ship?
- Two tests considered by the Court:
 - (1) Directness – Def is responsible for all direct consequences.

(2) Foreseeability – Def is responsible only for what the Def could have foreseen and therefore, have taken precautions against. (Note: Court found that this incident was not foreseeable).

- Court adopts the directness test and said that foreseeability applies only to the SoC and whether the action was negligent.
- NELSON: What exactly constitutes “directness”?

Wagon Mound No. 1 (1961) J.C.P.C (Australian litigants)

- Furnace oil in the water. A welder ignites it and it causes extensive damage. It was a finding of fact that it was not foreseeable that the oil could burn on the water.
- JCPC adopts the test of foreseeability. The fire was a direct result but it doesn’t make sense to hold Def. responsible. *Polemis* is no longer good law. JCPC says that it is unfair to hold people liable for grave and unforeseeable consequences of trivial acts of negligence. The Court wants to equate blameworthiness with the extent of consequences and uses foreseeability as the tool.

NELSON – Foreseeability is not obvious either. It is evaluated in hindsight and depends on how narrowly or broadly you look at the situation.

Example: (1) Pl suffers injury chasing car thief. Is the thief liable?

(2) Pl steps on hydro wire and dies chasing car thief, is this then too remote?

- In this case the Court took the broad approach and found the thief liable.

What is meant by Foreseeability? (Extent of damage, Method of injury...)

Hughes v. Lord Advocate (1963) Scotland

- Post Office opened a manhole and left alighted lamps around it and went for tea. Some kids came along and knocked the lamp into the hole while exploring and it exploded and they fell in.
- Court held the injuries were foreseeable. That the children might be burned was foreseeable even if the exact manner in which it occurred was not.
- Foreseeing the manner in which the injury occurs is not necessary b/c the type of injury was.
- NELSON – There is really no difference between this case and *Polemis*. When foreseeability is framed this widely it is equivalent to directness.

Doughty v. Turner Manufacturing (1964) U.K. C.A.

- Cover of a molten heating bath slid in and exploded. A bystander was burned.
- Was the injury too remote or is it recoverable?
- Court said it was too remote. The limit to liability would be if the bystander was splashed and this would not have occurred by the lid sliding in. The chemical reaction was unforeseeable.
- **NELSON**- on the basis of *Hughes* (foreseeability of burns is all that is necessary) why is there no liability here? The court pre-empted the remoteness inquiry by finding there was no negligence.

Lauritzen v. Barstead (1965) Alta. S.C.

- Pl. had to go for help from stranded car in the cold after a drunken highway misadventure. He suffered frostbite.
- The Def, in grabbing the wheel of the moving car, was liable for the Pl injuries b/c dangerous circumstances were foreseeable as a result. The exact injuries need not be foreseeable (the frostbite and amputation).

The Thin-Skulled Plaintiff Rule

- Tortfeasor takes victims as he finds them. Does *Wagon Mound No 1* alter this? Maybe. They would only be responsible for the reasonably foreseeable ones, not for trivial negligent acts that result in vary bad consequences.

Smith v. Leech Brain & Co. (1962) U.K. Q.B. **Still a leading Case**

- Man hit by piece of molten metal in the lip. Pl. brought an action after husband developed cancer and died.
- Causation between the metal and the cancer was made out.
- Court decided the burn was reasonably foreseeable therefore; the Def is still responsible for his cancer and death.
- Implies that *Wagon Mound no 1* does not adequately address the compensation and deterrence aims of tort law.

Athey v. Leonati, supra.

- Def. claimed that he should not be liable for the pre-existing back problem based on the “crumbling-skull” rule that was inherent in the Pl. “original position”.
- Court rejects this argument b/c it was not certain the herniation would have occurred on its own. Therefore, the Def is responsible for the full extent of the injuries based on the thin-skull doctrine.

The Impecunious Plaintiff

- What about a Pl. that doesn't have the funds to rectify the situation caused by the Def and as a result things get worse as a result? Should a “thin-pocketbook” be recognized and make the Def liable?
- It seems the Pl can recover, so long as the losses are reasonably foreseeable. This is a relatively new development.

The Possibility of Injury

Wagon Mound No. 2 (1966) J.C.P.C (Australian litigants)

- Different Pl. from *W.M. No1*. Def when welding created a fire. It was recognized that ignition of the oil was a possibility, but would be exceedingly rare.
- **JCPC:** Even though rare the cost of avoidance was low. The reasonable person would have taken steps to avoid b/c the fire would have to have been regarded as a “possibility”; therefore it is not too remote.
- **The test can now be stated as “What is foreseeable as a possibility”. This test can get applied in a way that looks a lot like directness a la *Polemis* (since all “direct” consequences must be viewed a “possible”).** This is a lower threshold than the test of reasonable foreseeability.

Policy and the “Instinctive” Approach

- Remoteness is a policy issue. Considerations include the types of injury, the sorts of behaviours we want to encourage, damage to property vs. personal injury, commercial enterprises vs. private citizens, whether insurance \$ is available etc.
- Not an accepted practice in Canada

Palsgraf v. Long Island Railroad, supra.

- Attendant “helps” person on train their fireworks fall/explode, scale falls on Pl.
- Majority characterized this as a question of duty and said no DoC here.
- The Dissent said the act was negligent in respect of the public at large and the claim should be allowed to continue. Looks at the situation instinctively and with common sense and says there is “no reasonable place to draw the line”.

Linden, “Foreseeability in Negligence Law” (1973)

- Stable legal rules should be developed for the recurring type situations.
- In pretending there is an overarching principle that can be applied to all novel cases we are shielding judges from view of the real policy judgements they are making.
- “Foreseeability” can be cast as broadly or narrowly as the inquirer wishes.
- Decisions concerning policy are rightly (and realistically) included in determining the extent of liability.

NELSON – Basing decisions on intuition can be a problem b/c this is entirely subjective and reduces certainty in the judgements as they turn on the facts.

Meah v. McCremer No 1 and No 2 (1985, 1986) U.K. Q.B. (with the same Judge)

- **No 1:** Pl was injured in an accident as a result of the Def drunk driving. A few years later as part of the brain damage he incurred the Pl’s personality changed and he committed a series of sexual assaults, he had not previously been violent
- The Pl sued the Def. and was compensated for the fact that he was incarcerated for next 25 years.
- **No 2:** The women the Pl attacked sued him and were awarded damages. The Pl went back to court and sued the Def claiming that he was responsible for the judgement against him.
- The judge decided that these damages were too remote as he was seeking to recover losses incurred by others and is therefore too indefinite. (Also against public policy to indemnify criminals for their crimes).

Lamb v. Camden London Borough Council (1981) U.K. C.A.

- Judge applies his “instinctive feelings” to the issue of remoteness.

Intervening Forces

- The Pl is injured by the Def. negligence. Then the Pl. or a 3rd party does something to make the injuries worse. Does the intervening act sever the chain of causation making the further injury too remote to hold the Def liable?

Bradford v. Kanellos (1974) SCC

- Flash fire in a restaurant. An employee activated the fire extinguisher and it made a hissing sound. Patrons in the dining room panicked and the Pl. was injured in the resulting stampede to the exit.
- At trial the Pl won, but was reversed by the C.A. and upheld in the SCC.
- The SCC agreed that the hysterical conduct of the patrons was not within the risk created by the negligence in allowing grease to accumulate on the grill. The patrons were a novus actus.
- Dissent argued that the result was “utterly foreseeable” in that the patrons acted in a “human and natural way”.

Children

Harris v. TTC & Miller (1967) SCC

- Child passenger on bus had arm extended out window. It was crushed against a pole. There was a sign posted inside the bus addressing this issue, but the driver was aware it occurred anyway.
- SCC said this is not an issue of foreseeability b/c the driver was aware the children did this.
- Def had a duty to protect the Pl from his own acts and those of 3rd parties. Therefore they cannot be considered intervening acts relieving the Def. of liability.

Intervening Medical Error

- Dr. causes by treatment a worsening of the Pl condition (*Mercer v. Gray (1941) Ont C.A.*)
 - (1) Where the medical error is not negligence
 - The Def is still liable for all injuries
 - (2) If the medical error is negligent
 - The Def is not responsible for the extra injuries, Pl has to sue Dr
- This was the leading case for years; it forced Pl to conduct two actions. The law in Canada has changed along with the American example to make Def liable for all damage and then it would be up to the Def to try and recover from the Dr by bringing him into the action as a 3rd party and trying to prove his negligence.
- This approach is fairer.

Suicide

- Where the Pl is injured b/c of Def negligence and then kills himself b/c he can't deal with the injuries is it a *novus actus* or is the Def still liable?

Walker Estate v. Davidson (1992) B.C. C.A.

- (1) If the injuries caused by the Def were such that they led to mental disturbance leading to suicide then the Def is liable (Not a *novus actus*).
- (2) If the injuries caused by the Def were not such that they led to a mental disturbance but a deliberate act of a disturbed individual then it is a *novus actus* and the Def is not liable.

- There are problems with this distinction what is a “deliberate act”? Is the insane PI’s suicide really foreseeable? Based on (2) Courts are reluctant to be compensating the dependants of suicide “victims”.

Costello v. Blakeson (1993) B.C. S.C.

- Thin skull rule used to hold Def 25% liable for PI suicide attempt.

Second Accident

- PI injuries are made worse by a “second accident” (self-inflicted). How far does Def liability extend?

Weiland v. Cyril Lord Carpets (1969) U.K. Q.B.

- PI injured by Def negligence. PI had to wear a neck collar, fell down stair while using her bifocals.
- Def liable for second accident b/c the injury he inflicted to PI made her more susceptible to further injury.

McKew v. Holland (1969) U.K. H.L.

- PI injured leg as a result of Def negligence. The leg was weakend and the PI was aware of the propensity of it to collapse unexpectedly.
- PI fell down stairs but was acting unreasonably given his knowledge of his weak leg and broke his ankle.
- Court said the Def was not liable for the further injury b/c of his unreasonable action taken in trying break his fall (distinguished from *Weiland?*)

Intentional Wrongdoing

Stansbie v. Tronman (1948) U.K. C.A.

- A decorator hired by the PI left his house unlocked when he left. Thieves came and burgled it.
- Def. sued the PI for not paying him the PI house owner sued for the value of the stolen articles
- Court found in favour of homeowner. The decorator owed a duty to leave the premises in a relatively secure state. It was reasonably foreseeable that it could be burgled and that is the whole point of locking your house.

Spagnolo v. Margesson’s Sport’s Ltd (1983) C.A.

- Car left in parking lot with keys in it. It was stolen. Six days later the thief was in an accident with the PI. PI sued Def. parking lot operator.
- At trial: Judge held that given that kids often steal cars it is reasonably foreseeable that one would steal a car and drive negligently.
- At C.A.: Had the accident occurred in the course of stealing it then maybe liability would attach to the Def. Court said that six days later was too remote, and probably not much more likely to cause an accident than the average lawful driver.

Proof of Negligence – Topic Outline #8

Primary Burden of Proof – Pl. must establish that their version of events is what took place.

Secondary Burden of Proof (Evidentiary Burden) – This can shift back and forth between the Pl and Def. Example: The Pl. brings lots of evidence to make out their claim. The burden then shifts to the Def to neutralize this evidence. If the Pl. has not given enough evidence the Def. can move for a “non-suit”.

Inference vs. Presumption – A **presumption** is a legal rule: “If the following is proven then this other thing exists”. It operates in the absence of other evidence and can be rebuttable or irrebuttable. An **inference** means: “If the following is proven then it *may be reasonable* to say the following thing exists”.

Wakelin v. The London & S.W. Ry. Co. (1886) H.L.

- Railway admitted that a train hit the Def’s husband. As executrix she sued them saying that they must have been negligent. She was successful at trial.
- At the H.L. the def won. Just because something happened does not mean that the def were necessarily negligent. Nothing is known about the circumstances of the incident. The burden of proof is still on the Pl to establish negligence.

Traffic Safety Act (an exception to the rule)

- If a person sustains damage or loss on a highway by reason of a motor vehicle, the onus of proof is on the def. to prove that their negligence/misconduct was not the cause of the Pl loss. (Pl. proves damage/loss then the Def must exculpate himself)
- This does not apply to passengers in cars or accidents between cars.

Cook v. Lewis (1951) SCC

- Pl injured by a gunshot. It was not possible to tell which of the two def had actually shot him.
- The court held that where both def fired negligently in the direction of the Pl then they should both be held liable.

Inferring Negligence

“*Res Ipsa Loquitor*” – The thing speaks for itself.

- Applied where the Pl was trying to prove negligence via circumstantial evidence. It was possible for the Pl to succeed.
- The doctrine had specific requirements:
 - (1) The Def was in control of the situation or thing
 - (2) The accident had to be of a kind that would not normally happen without negligence
 - (3) The cause of the accident must not be known (no direct evidence)

Problem: Lots of confusion among Courts about when to apply it and how.

- The process of using it: Pl invokes *res ipsa*. The def would have to assert an explanation that was at least as plausible and showed no negligence. Some evidence must support

the explanation. The Pl could use the doctrine to get past the point where the def could move for a non-suit.

- Various theories about its application (lots of confusion):
 - (1) Creates a presumption that the def has to rebut, OR,
 - (2) It calls upon the def to introduce evidence from which innocence could be inferred, OR,
 - (3) It permits, but does not require, the trier of fact to infer negligence. Even if there was an inference the def need not introduce evidence to rebut.
- In *Fontaine* the SCC treats the doctrine as expired.

Fontaine v. Insurance Corp. of B.C. (1998) SCC

- Pl. is wife of a passenger in a car accident. The accident occurred on a hunting trip. Several weeks later the car was discovered and the bodies were found. Pl. sues driver's estate for negligence. The weather was very bad the week of the trip. There was no evidence as to when exactly or how the accident occurred.
- When does *res ipsa* apply?
 - Court cites the requirements of the doctrine (*supra*).
 - It is necessarily fact driven. There must be a situation where negligence could be inferred. In this case, just b/c a car leaves the road that does not mean there was negligence.
- What does it mean when *res ipsa* applies?
 - The Pl. still has the burden of proof. It is possible for the trier of fact to be persuaded of negligence on circumstantial evidence.
 - The inference that can be drawn will vary in strength. The stronger the inference the more evidence is required of the def to neutralize it (there must be a factual basis).
 - Major J. feels the doctrine should be ignored and the trier of fact should simply weigh the circumstantial evidence along with the direct evidence and then decide if the Pl has enough to sustain their action.
 - In *Fontaine* the circumstantial evidence was not enough to discharge the burden of proof given the other operating circumstances (the weather).
 - NELSON: Approach to circumstantial evidence basically the same as under *res ipsa*, the court still has to weigh the evidence. (You can't plead "*res ipsa*" anymore.)

Leaman v. Rea (1954) N.B. C.A.

- Two drivers travelling opposite direction collided on a road. They each claimed the other was driving "on their side of the road". Court determined they were both basically driving in the middle. Trial judge said he could not determine whose fault it was. He dismissed the claim and counter-claim.
- C.A. said that when in the circumstance where obviously there was fault on the part of both parties they should both be held equally at fault.

Wotta v. Haliburton Oil (1955) SCC

- Collision between the rears of two trucks on the highway. No evidence to assist in determining the relative positions of the trucks. The trial judge dismissed.

- This was upheld by the SCC. Expert evidence had ruled out that both parties were at fault. Since it could not be determined which party was negligent the claim was dismissed.
- This decision limits *Leaman v. Rea* to the situation where both parties were negligent but fault cannot be established.

Defences to a Negligence Action – Topic Outline #9

Contributory Negligence – This used to be a total defence to a negligence action. If the Def. could establish it the Pl could not succeed in their action.

Butterfield v. Forrester (1809) U.K. K.B.

- The Def, in making repairs to his home, left a pole on the road. The Pl. came along riding his horse at a high rate of speed in the dark and was thrown from his horse.
- The Pl was not using ordinary care at the time so his claim fails. The Court is saying that had the Pl been more careful the accident would not have occurred. This rule is kind of harsh.

This harshness prompted the development of the “**last clear chance rule**” – Whoever has the last clear chance to avoid the accident is the one who is liable. Even if the Pl. was contributorily negligent, if the Def had the last clear chance, the Pl could recover.

Davies v. Mann (1842) U.K.

- The Pl donkey was in the road (negligently). The Def ran it over and killed it with a horse-drawn wagon. The court ruled that the exercise of proper care on the part of the Def would have avoided the accident. The Def is completely liable.
- The Def had the last clear chance to avoid the donkey. Even though the Pl was also negligent he bears no liability.

This is still an “all or nothing” approach to liability. This was rectified by apportionment legislation:

Contributory Negligence Act, R.S.A 2000

- The “last clear chance rule” is abolished.
- The Court can apportion liability in proportion to the fault of the parties. If the Court cannot decide on apportionment they are to held equally liable.
- The *Tortfeasors Act* deals with situations dealing with multiple def.

Heller v. Martins (2002) Alta. C.A.

- The def. ran a stop sign and collided with Heller’s milk truck. Heller was not wearing a seat belt (the truck did not have one). The def claimed contributory negligence and said he should not have to pay. The trial judge found Pl 25% liable. The issue on appeal was how should cont. neg. be approached, by causation or comparative blameworthiness?
- C.A. found the proper approach is comparative blameworthiness (at least for seat-belts).

- A causation approach would bring back the “last clear chance rule”. This was not the drafter’s intention under the Cont. Neg. Act. And would ignore the blameworthiness of the Def in running the stop sign.
- Also, it would not be in keeping with the compensation and deterrence goals of tort law. In comparing relative blameworthiness factors include:
 - The nature of the duty owed by the Def
 - The # of acts of negligence of the person
 - Timing, who was first at fault?
 - Nature of the conduct
 - To what extent did the conduct breach statutory requirements?

Rewcastle Estate v. Sieben (2001) Alta. Q.B

- Girl gets a ride from the Def. There are not enough seatbelts in the back for her but she comes anyway. The car rolls and she is killed. The estate sues the Def driver for negligence. The Def argues she was contributorily negligent for getting in the car when there weren’t enough seatbelts.
- Court held her not cont. neg. as she had no other option to get home and therefore her choice was reasonable.

Pugsley v. Wong (2001) Alta. C.A.

- The Pl was injured by the Def. The Pl’s Dr. recommended that she needed to do exercises for her injuries to heal properly. She failed to follow this advice.
- The judge reduced her award of damages for her contribution to them. She appealed but the C.A. said she had a responsibility to mitigate her damages by taking reasonable steps.

McCabe v. Westlock Roman Catholic Separate School District, supra.

- Student injured in gym class. The teacher argues that he should not be held liable for all the injuries, the student must bear some responsibility.
- The student was found cont. neg. b/c she did a move she had not done before or learned how to do safely. It was foreseeable to her that she might get hurt. The fact the instructor was negligent too does not eliminate her responsibility.

Galaske v. O’donnel, supra.

- The child-seatbelt case. Issue: Was there contributory negligence for failure to wear the seat belt?
- SCC says that it seems like it will always be negligent to not wear a seatbelt (the statute is evidence of this). In general if the failure contributed to the injury then they will be found to be contributorily negligent.

Dumais v. Hamilton (1988) Alta. C.A.

- The Pl. had a tummy-tuck and was informed that she could “lose skin” in the surgical area. The Dr. told her not to smoke before or after the surgery. The Pl did smoke some anyway. The Dr. told her to quit and she did until she was discharged, but then started

up again. A few weeks later she was admitted with a necrotic tissue problem and lost “a lot of skin”.

- Issue: Did the Dr properly & sufficiently inform her of the risks of surgery? The Dr argued that the smoking contributed to her injury.
- The trial judge held she was not negligent. He was persuaded by the fact the Dr. did not tell her why she should not smoke.
- At C.A. they found it was clear that the smoking had played a role in her injury. The held that the trial judge had erred. The issue was whether she had taken reasonable care of herself. The fact the Dr told her not to smoke suggested she hadn't.
- They could not determine the impact the smoking had had on her injuries so they held the parties 50% liable, respectively.
- NOTE: b/c this was elective surgery there is a higher level of disclosure required.

Voluntary Assumption of the Risk (*Volenti Defence*) – This is a complete defence. The Pl. is unable to recover if the Def can establish that The Pl. consented to the **legal** and **physical** risk of injury presented by the conduct engaged in. Because this is a complete defence the courts are reluctant to use it when liability can be apportioned.

Hambley v. Shepley (1967) Ont. C.A.

- The policeman Pl. set up a roadblock to attempt to stop the Def. driver. The Def hit the police car blocking the intersection, injuring the cop.
- The Def argued that the cop voluntarily assumed the risk of being hit in the intersection
- The Court rejects this. The cop was in the course of his duty and he knows there is a risk but that does not mean that he accepts that the Def negligent conduct will be Ok.
- Simply knowing that it is dangerous does not mean that you accept the risk. The Def cannot succeed unless there is actual evidence that permits an inference that the Pl consented to a lack of reasonable care that might produce the risk.

Hagerman v. City of Niagra Falls (1980) Ont. S.C.

- Pl. is hit with a puck at a hockey game at the Def arena.
- The Court decides the issue in favour of the Def by characterizing it as a duty issue, and finds the Def owes the Pl no duty.
- **Criticism:** Linden says this is the wrong approach to take:
 - The Def has the onus of proving a defence. The Pl must establish that there is a duty. Therefore looking at *Volenti* from a procedural angle this removes the procedural advantage from the Pl., we don't want to do this.
 - The DoC issue is almost unworkable as it is. We don't want to make it more complicated.
 - *Volenti* is an issue of fact, duty is a legal issue. Allowing judges to decide this would allow more manipulation.

The Pl. must have agreed to accept the risk of injury:

- It can be express or implied from the circumstances
- If there is an express agreement then it is properly decided by contract law principles.

Nettleship v. Weston (1978) U.K.

- Lord Denning – Now that contributory negligence is no longer a complete defence, *volenti* will be severely restricted. **Nothing short of an express or implied agreement to waive liability as to the required standard of care will suffice.** Knowledge of, or willingness to take a risk is insufficient.

Illegality- is a complete defence. The Ct. can raise it by its own motion.***Hall v. Hebert (1993) SCC***

- Pl. and Def had been drinking. Their car stalled on the road. The Pl. was behind the wheel when they attempted a rolling start. The car went off the road and tipped over. Pl. was injured.
- At trial the judge apportioned liability. The C.A. overturned saying that the Pl. could not recover b/c of his illegal conduct.
- SCC set out how illegality should be applied. The Court can ban recovery where the Pl has acted illegally or immorally but only in certain circumstances:
 - Where allowing the Pl to prosper from their illegal activity would imperil the integrity of the process.
 - Compensation for personal injuries is not normally s.t. dismissal by illegality. Compensation does not amount to “profit”.

Limitation Periods – are rules about how long a Pl is allowed to wait to bring their claim after their cause of action arose. If it is outside the limitation period the Def can defeat the claim.

Rationale:

- Evidentiary problems (witnesses etc)
- The claim will not be allowed to hang over the def head forever.
- To ensure that modern standards of conduct are not applied to long-ago situations

Not all limitation periods are contained in the *Limitations Act*

- The period runs from the date the cause of action arose.
- **Discoverability:** Runs from when the cause of action (material facts) was discovered or ought to have been discovered by the exercise of reasonable diligence. This reduces the unfairness of adhering to a strict period *Kamloops v. Nielsen, Central Eastern Trust v. Rafuse*.
- This rule can be trumped by statute i.e.) medical malpractice acts 2 years from when the services rendered terminated.
- *Alberta Limitations Act:*
 - Incorporates discoverability; seek remedial order within 2 years of discovery or 10 years after the claim arose.
 - Exceptions:
 - (1) *M(K) v. M(H) (1992) SCC* – Sexual battery case. Pl. battered while a minor. The limitation period began to run when she reached 18. C.A. dismissed claim as statute barred. The SCC allowed Pl appeal. In a sexual assault in the parent-child context the limitation period does not begin until Pl realizes connection btw wrongdoing and its effects. This connection is presumed to arise when the Pl is undergoing therapy.

- (2) S. 5 - Persons under a disability as defined by *Dependent Adults Act*. Limitation period begins to run when they are no longer “disabled”.
- (3) S. 5(1) – Limitation period is suspended during time the PI is a minor. But, a Def can make time run against a minor by delivering notice to parent, guardian or public trustee. They then have to go to Ct to re-suspend the LP.

Assessment of Damages– Topic Outline #10

Types of Damages:

Nominal Damages – Something is actionable without proof of damage. Example: Trespass claims. The Court is recognizing the legal wrong, but there are no damages to compensate. Unusual to sue for this b/c of litigation expenses.

Compensory Damages – Seek to compensate PI losses (personal injury or property). The most common. Aim is to do the best you can to restore the PI to their original condition.

Aggravated / Exemplary Damages – (Rare). Awarded to reflect PI loss as a result of Def conduct. Example: PI. humiliation by Def conduct.

Punitive Damages – (Rare). Not compensory. Meant to punish the Def for their “outrageous” behaviour. It amounts to a fine payable to the PI.

Special Damages – Capable of precise quantification at the time of trial. They compensate for things already occurred. Example: out-of-pocket expenses, missed work, travel). They have to be specifically outlined in the claim.

General Damages – For things that have not yet happened but will require compensation for the future. This claim is generally more vague.

Pecuniary Damages – Monetary Damages. Examples: lost earnings/capacity, future personal care, repair costs, disability equipment.

Non-Pecuniary Damages – Non-monetary. Examples: Humiliation, loss of enjoyment of life, loss of life expectancy, pain & suffering.

General Principles

- The PI has to prove that they have suffered a loss in order to get damages. They also have to prove the *quantum*.
- Principle of Mitigation – PI has to act reasonably in an attempt to mitigate their losses. If by attempting to mitigate losses with reasonable steps the PI make their injuries worse those too will be compensable. If they successfully mitigate then these avoided losses are not recoverable to the PI.

- “Set-off” – The Def is entitled to set-off parallel expenditures. Example: If Pl is claiming the full cost of nursing care the Def can attempt to prove that this should not include expenses they would have incurred anyway (food, accommodation etc).
- At C.L. damages are awarded as lump-sums. Makes assessment difficult as inflation, interest rates and the Pl future needs all have to be estimated.
- Heads of Damage - are specified in decisions (as opposed to a global sum) so that it is more transparent on appeals.

Andrews v. Grand & Toy (1978) SCC

- Pl. injured by Def while on motorcycle. Pl. became a quad, but was 25% contributorily negligent. At trial he was awarded \$1M, this was reduced to \$0.5M on appeal. Pl. appeals to SCC.
- Issue: What was Pl able to claim for his future care costs?
- Pl argued he wanted to live at home. Experts testified this would be best for him. The Def argued this would be excessively expensive and the C.A agreed. The SCC restored the trial award troubled by the C.A. simply substituting one figure for the other. SCC said the \$1M was reasonable; the focus should be the Pl needs not sympathy for the Pl or fears of expense for the Def.
- In assessing Future Care Costs:
 - (1) Determine the basic sum. How much per month? Personal attendants, disability modifications etc.
 - (2) Determine length of time care will be required. Actuarial evidence.
 - (3) Assess contingencies. Can be +/- . What additional injuries can be expected? Will they improve?
 - (4) Capitalization rate
 - (5) Gross-up for taxes. The income on awards is taxable although the award itself is not.
- Loss of Earning Capacity:
 - (1) Determine the earnings the Pl would have made, less the amount he can still earn.
 - (2) Determine the length of expected working life. Calculate total and deduct “set-off” expenses.
 - (3) Assess contingencies. Unemployment, promotion etc. Courts often assume this balances out.
 - (4) Capitalization Rate
 - (5) Tax Consequences are ignored.
- What if the Pl is not earning?
 - A law student is injured. Courts try to incorporate subjective plans of the Pl.
 - **Children:** Criticized area b/c it perpetuates inequality. No good way of assessing school age children. Courts look to status of family and their expectations. Courts respond that it is not the Def job to rectify inequalities.
 - **Women:** Same concern about inequality.
 - *McCabe v. Catholic Separate School, supra.*

The trial judge concerned that the assessment not reflect historical inequalities. The CA responded that it was not the Def job to rectify this; the individual must be assessed. The trial judge ignored the evidence that she wanted 4 children.

- *Walker v. Richie* (2003) Ont.
Court used “entire population” statistics.

- Non-Pecuniary Damages

- How to value? In *Andrews* the Court uses a functional approach. The aim is to provide reasonable solace for misfortune; to make life more endurable. This case sets a cap on these damages.
- Should a mentally unaware PI receive non-pecuniary damages?

- Collateral Benefits – Received from a 3rd party as a result of the accident.

- Gov’t disability, Charity, family, 1st party insurance, employee benefits. How do we treat these?
- 3 Approaches:
 - (1) Accumulation Approach – Pl. recovers full damages from PI and keeps all other payments too. The Pl. is overcompensated, but often the collateral benefits are things the PI contributed to / paid premiums for.
 - (2) Deduction Approach – Value of collateral benefit is deducted. The Def is then liable for only the “net loss” of the Pl.
 - (3) Subrogation Approach - Pl receives one payment. The def reimburses the collateral source. The fund receives a kind of windfall.

- *Ratyck v. Bloomer* (1990) SCC – Police officer injured and unable to work but still received full wages. Court said the wages were gratuitously paid and therefore should be deducted. The Def was not responsible for lost wages.
- *Cunningham v. Wheeler* (1994) SCC – Pl received disability while off work. Benefits were received as per a collective agreement. Since it was “bargained for” the Court did not deduct them.

Fatal Accidents

- At C.L. the Pl death terminated any existing or contemplated tort action. The deceased’s estate could not maintain an action. This was changed by statute. It allows family members to sue for wrongful death and the deceased’s estate can also sue and be sued.
- In Alberta: *Survival of Actions Act* and *Fatal Accidents Act*. Claims are derivative; would the deceased been able to sue? A defendant can still raise any defences against the estate.
- *Survival of Actions Act* (varies from province to province)
 - S. 5 – Only actual financial losses by the deceased or estate are compensable.
 - Not Compensable: punitive / exemplary damages, future earnings, ability to earn, chance of future earnings. (There is no loss to the deceased’s estate...he’s dead).
- *Fatal Accidents Act*
 - Allows claims by family members (“dependants”).
 - S. 3 – spouse, parent, adult partner, child & sibling.
 - Can only bring a claim if the deceased would have had one; again, s.t. defences.
 - Both pecuniary and non-pecuniary losses are compensable.

- Pre-trial pecuniary losses (did not die promptly)
- Loss of future support
- Lost value of domestic work
- Loss of future wealth
- Non-pecuniary: Bereavement. The statute sets the amounts. Spouse = \$X.

Punitive Damages

Whitten v. Pilot Insurance (2002) SCC

- PI house burned down. The fled the home. All contents destroyed, got frostbite. PI started insurance claim. The Def denied the claim for 2 years. Several investigations indicated it was accidental. Def was aware that PI was in dire financial straits and used this as leverage to get them to accept less in a settlement. Trial jury awarded \$1M and client-solicitor costs.
- SCC:
 - When do we award punitive damages?
 - In circumstances where Def behaviour has departed markedly from the ordinary decent person.
 - The Objective is punishment. This straddles the civil and criminal realm.
 - The PI is acting as enforcer of the public interest and punitive damages recognise the social value of this litigation.
 - How to decide how much to award?
 - Should be awarded rarely as it is the criminal law that is more appropriate for this generally.
 - Objectives are: punishment, deterrence and denunciation
 - Award the lowest damages that are consistent with achieving these objectives.
 - Appeal courts can reduce if the amount is not “rational and measured”.
- In this case the trial judge went out of his way to mention that the award is reasonable. The SCC restores this trial award. The Ct looks at proportionality. Namely:
 - Blameworthiness
 - Harm was directed to PI.
 - Need for deterrence
 - The advantage gained by the Def.
 - Other civil & criminal sanctions.

TOPIC OUTLINE #11 – TORT LIABILITY OF PUBLIC AUTHORITIES

- Can an injured person bring a tort claim against a public body in negligence?
- At C.L. the Crown was immune from tort claims.
- This is changed by legislation: *Proceedings Against the Crown Act*. Allows actions against the executive branch as though it were an ordinary person. It can be sued directly or for the vicarious acts of its agents (you have to sue the individual (not the department)).

Tort Liability of Public Authorities

- Sometimes statutes that give power to public bodies address tort law responsibility, but more often the body is given discretion that they “may” do this or that.

- Statutory Duty: Government is not liable for doing what the statute requires. However, if they do it negligently it is possible to sue.
- Statutory Power: Gives the Government discretion in their behaviour. Example: Highways dept. “may” conduct inspections.
 - It is not the Courts job to decide policy, as they do not have access to all the relevant information. The Courts are cautious to not usurp government policy function.

Which decisions should be subject to liability, and which should not?

City of Kamloops v. Nielsen (1984) SCC

- Adopted the Policy-Operation dichotomy of *Anns*. Policy decisions are not reviewable in negligence (except where undertaken in bad faith), whereas, operational decisions can give rise to a DoC and are reviewable.
- In this case the city council ignored their responsibility totally and were therefore liable.

It is difficult to characterize decisions as either operational or policy at the margin. The Court will take account of factors such as:

- Social, political and economic factors
- The level at which the decision is made (higher level suggests policy)
- Resource allocation decisions.

Just v. British Columbia (1989) SCC

- Pl. and daughter’s car crushed by a boulder on a mountain highway. The daughter was killed. They sued the government saying they did not take proper care in their inspection of the rock slopes.
- At trial, and the CA held that the government inspection system was a policy decision. The government could decide to inspect and how to inspect.
- SCC reversed the lower court. The manner and frequency of inspection were operational decisions. Only the decision to inspect at all was a policy decision. This seems to really broaden the scope of government liability. The Pl got a new trial and was awarded damages.
 - Dissent: The policy/operational dichotomy is no good.

Brown v. British Columbia (more recent than Just) SCC

- Pl skidded on an icy road and was injured. Other accident also occurred there. The RCMP called to get some maintenance on the highway but nothing was done for a while as the department responsible was on its “summer schedule”.
- Pl. sued: (1) Did not respond to the icy conditions in a timely manner (2) Had the highway been properly maintained it would not have gotten icy.
- Pl appeals to SCC:
 - Province was not responsible. The decision to have a “summer schedule” is a policy decision as it involves factors like budget constraints, negotiation with unions etc.
 - Since there was no bad faith the policy is not reviewable by the Court.
 - The Court states that *Just* was not meant to broaden the scope of government liability as it has been interpreted.
 - Was *Just* more about compensating the victim than anything else?

Swimanager v. Nova Scotia (more recent than Just) SCC

- Tree fell on truck on a prov. highway. The tree was on private property but had a fungal infection.
- The dept. of transport had started a program to inspect and remove potentially dangerous trees. There was no general policy in place, but the dept had started a survey. 200 trees were marked for removal but not the one in question.
 - There was no policy in place that had received the funding to actually remove them.
- At trial: The dept was found liable. The dept was negligent in the way it conducted the survey. It failed to ensure proper training or take steps to remove the trees.
- The CA overturned this decision. The SCC agreed. The PI loses:
 - There is a duty to maintain the highway in general.
 - BUT, the marking of trees was a preliminary step & therefore a policy decision – it involves choices about resource allocation.
- This case is similar to *Brown*, but there is still no good way to decide on the policy/operation question.

The government can shield itself from liability by statute:

- *Municipal Government Act* – “A municipality that has the discretion to do something, it is not liable for deciding not to do that thing in good faith or for not doing it”.

Jane Doe v. Board of Police for Toronto (1998) Ont. Gen. Div.

- PI raped in her home. Commenced an action against the Police for damages.
- Claim: (1) Police were negligent in failing to warn the neighbourhood and knew the offender would continue to offend (2) In failing to warn her violated ss. 7 & 15 of the Charter.
- Trial Judge:
 - The police have a duty to protect life and property. Where they have specific information about a particular risk that targets an identifiable group, they owe a duty. The PI. was a member of this class and the Police owed a duty to warn her so that she could take appropriate measures to protect herself.
 - Was this a policy decision?
 - The Police argued it was as it involved resource allocation decisions (time, personnel)
 - The Court noted the difficulty in making this distinction but characterized it as operational; There is limited discretion involved in these decisions because of training of those in charge of the investigation

TOPIC OUTLINE 12 – ECONOMIC LOSSES

- **Pure economic losses** are a purely financial loss that is not connected to personal injury or property damage.
- Courts are traditionally reluctant to allow the PI to recover for pure economic losses b/c:
 - Indeterminacy
 - (1) Indeterminate number of clients. Who may raise a claim?

- (2) Indeterminate amount of time surrounding the claim
 - (3) Indeterminate extent (damages) of the def liability
 - Is this just shifting the losses from one party to another? Can contract or insurance not take care of this?
- Categories of recognized economic loss (exceptions that allow the PI to recover):
 - (1) Negligent statements
 - (2) Negligent performance of services
 - (3) Defective products/structure (i.e. that aren't dangerous but just not proper)
 - (4) Relational economic loss
 - (5) Liability of public authorities

Negligent Statements (the most significant exception)

- Prior to *Headley Byrne* this was not recognized unless there was a contract, fiduciary relationship or fraud.

Headley Byrne v. Heller (1963) H.L.

- PI wanted to extend credit to a customer. The PI asked its bank to ask the customer's bank about its credit rating. The bank responded positively about the customer's credit but denied liability for the information. The customer was not actually in good financial shape and the PI lost money. There was no contract with the Def bank (it was gratuitous). PI sues Def bank: Lost money b/c of the negligent misstatement and it was relied on.
- H.L.: in the absence of a contract can this type of loss be recognized?
 - Yes, in some cases a DoC can be imposed on someone who gives negligent advice.
 - In this case there was no liability b/c the letter absolved the bank of responsibility.

Queen v. Cognos (1993) SCC

- The PI, on the basis of a representation made during a job interview moved his family to Ottawa. He was told it would be at least a 2-year contract. He was not told that the funding for the project was not approved. The company scaled back the project and laid him off 18 mo later. PI claimed he relied on the statements of manager made during the interview that it was a stable job.
- SCC allowed the PI to recover. The elements required:
 - (1) DoC based on a special relationship
 - (2) Statement made must be untrue, inaccurate or misleading
 - (3) Person making statement must have been negligent
 - (4) PI must have reasonably relied on it.
 - (5) Resulted in a financial loss
- Trial judge found (2), (4) & (5).
- But was (1) and (3) satisfied? The Def argued that there was a special relationship but there were disclaimers in the employment contract and that the managers statements were not negligent.
- SCC says: It was foreseeable and reasonable that the PI would rely on the representation made in a job interview.
 - The disclaimer does not have any effect because they do not cover statements made in the interview.

- The test for DoC is still based on foreseeability and proximity, and also where **reasonable reliance** is possible.

Hercules Management v. Ernst & Young (1997) SCC

- Investor relied on the financial statements produced by the Def. The reports were produced to comply with statutory requirements, but the PI used them to make investment decisions. They were prepared negligently and the PI sued for their losses stemming from the decisions that were based on the reports.
- SCC reinterprets *Cognos*:
 - There just need to be a duty based on the *Anns*'s test:
 - Stage 1: Proximity
 - (1) Should have the Def ought to have reasonably foreseen that the PI would rely on the statements?
 - (2) Was the PI reliance on the statements reasonable?
NELSON: this is really no different than the “special relationship” based DoC in *Cognos*.
 - Stage 2: Policy Concerns
 - (1) LaForest is most concerned about indeterminate liability arising from recognizing this DoC. It would almost always be reasonable and foreseeable that someone would rely on these reports. They are circulated widely for many reasons. If a *prima facie* duty arose then the liability would be indeterminate.
- SCC declines to recognize a duty here. But there are exceptions a DoC could arise where:
 - (1) When an auditor/Def knows the class of PI that will be potentially relying on the information.
 - (2) The Def relies on the negligent misstatement for the very purpose for which it was made (here it was made, not to help out the PI's decision but just to meet the requirements of a statute).

When is reliance Reasonable?

- (1) Where the Def had a direct/indirect financial interest in the transaction.
- (2) Def was a professional possessed of special skill (it can also be reasonable to rely on others).
- (3) Was the advice provided in the course of the Def business? The more speculative the information the less reasonable it is to rely on it.
- (4) Information or advice was given deliberately, and not in a social occasion.
- (5) Was the info/advice in response to a specific question?

Can a PI be contributorily negligent in the negligent misrepresentation context?

- (i.e. – if you reasonably relied how can you be contributorily negligent?)
- It is possible: The extent of the PI reliance can be unreasonable. This will go to reducing the damages payable to them, not to negating the *prima facie* duty owed by the Def.

Haskett v. Equifax (2003) Ont. C.A.

- PI sued Equifax. Def is trying to strike out the claim. Ct looks to see if the claim is “plain and Obvious” i.e. can a neg. claim be brought? is there a duty of care?

- PI went into bankruptcy and was discharged in 1996 and has since met all financial obligations. He applied for credit and was denied on the basis of bankruptcy stuff in his credit file (this is not allowed after discharge). He is trying to sue for negligence.
- The trial court was concerned about indeterminacy of liability and rejected PI claim
- The C.A. applied the *Ann's* test and decided the claim could go ahead despite the fact that Def reports to the Bank not to the PI. There was no reliance by the PI. But the Court recognizes this as an “analogous” category and that the representor has assumed the responsibility for the accuracy of the information. C.A. does not agree that there is indeterminate liability as the PI class is restricted to the persons that Equifax makes reports about.

Concurrent Liability in Contract and Tort

- This is in issue when a claim is available in contract and tort EXCEPT where the contract indicates that the parties intended to negate or limit liability in tort.
- *Headley Byrne* was unsuccessful in tort b/c the contract excluded tort liability.
- Where the contract contains more stringent or equivalent obligations than required in tort, the PI can choose to sue in either. Where the tort duty is more restrictive the PI will likely proceed in contract.

BG Checo v. BC Hydro (1993) SCC

- PI tendered a bid to BC hydro to do some transmission lines. They entered into tender contract. The document indicated that the right of way would be cleared by another party. The 3rd party did not do a proper job and so the PI did it at extra cost (if they knew they would have had to do it they would have not bid as low for the job). PI sued inter alia for negligent misrep.
- Issue: Can these pre-contractual misreps that formed part of the contract result in liability? Can the terms of the contract exclude the Def liability (exclusion clause)?
- Where a wrong can give rise to both contract and tort claim the PI can choose either except where the contract does not allow it.
- There are 3 classes of cases where concurrent liability is an issue:
 - (1) Contract includes more stringent obligations than what tort law would include.
 - PI would want to sue in Contract because they would be able to recover more damages under the higher standard, but they are not precluded from suing in tort.
 - (2) Contract sets out a lower duty of care than in tort (i.e. and exclusion of liability clause).
 - (3) Duties in contract and tort are co-extensive. PI can choose the most advantageous one. (Tort may be better for damages as the PI can recover what they lost b/c of the misrep (i.e. would they have entered the contract at all?) as opposed to contract where the damages are assessed on the basis of expectation. If the representation had been true what would have been the position of the PI.
- **Dissent:** thinks that where the contract expressly mentions the duty assume that the terms of the contract would apply. Here, the right of way was mentioned in the contract and therefore a breach of this term should proceed in contract, not tort.

Edgeworth Construction v. N.D. Lea (1993) SCC

- Can the engineering firm rely on the exclusion of liability clause in the contract between the government and the contractor? No, the PI can sue them in tort. They should have protected themselves with insurance or put a disclaimer on their plans.

Negligent Performance of Services

BDC Ltd. v. Hofstrand Farms (1986) SCC

- BDC is a courier company. They entered into a contract with the government to deliver an envelope. BDC was not aware of the contents of the envelope – a Crown grant in favour of Hofstrand, which he had to register before a certain date or the purchaser (3rd party) could treat the contract of sale as at an end. BDC was late. Hofstrand loses \$77,000 and brought an action against BDC and the government.
- SCC says there is no DoC owed by BDC to Hofstrand (it is also too remote). There is a problem with indeterminate liability. There is no proximity between the courier and the PI. The courier had no idea what was in the envelope or the consequences of late delivery for the PI.
 - There is no principled way of limiting this liability if a duty were recognized.
 - Also, the PI did not rely on the courier, the government engaged them.
 - The PI should have been more careful about the clause in the purchase contract that makes time a factor.
- In this type of situation Courts want to know if the PI could have protected themselves against losses through contract (insurance). In the case about the beneficiary not recovering under a will b/c of lawyers negligence, he would be able to recover here (probably) b/c he could not protect himself from that loss.

Economic Loss caused by the negligent supply of products and structures

- Where there is no contract with the Def

Winnipeg Condominium v. Bird Construction (1995) SCC

- The original developer has a contract with the Def to construct the building. The PI then became the owners of the building, they have no contract with the Def.
- A huge chunk of stucco fell from the building. No one was injured. The PI had to repair b/c it was not safe. Each condo owner was responsible for a pro rata share of the cost.
- The PI sues the Def builder in tort for the cost of repair.
- The only question in SCC was whether the PI can bring the claim (not about def negligence).
- SCC: LaForest says that the PI can bring a claim. The rationale is that the situation, if created by the builder's negligence, is potentially dangerous. The degree of danger posed is the most important factor in these cases (for economic loss). The fact that there is no contract does not decide the issue. The buildings are inhabited and permanent. The people who own the building are foreseeable to the builders negligence. We want to encourage rectification of these situations before people get hurt.
- LaForest addresses some of the reasons a duty might not want to be recognized here:
 - (1) **Overlap between contract and tort duties:** Can't easily define warranties in tort law.
 - He argues that there does not have to be a contract to have the builder construct properly (true).
 - The class of persons that can sue is limited to owners.
 - The tort damages are limited to making the things safe, not improving its quality.
 - PI still have to establish their claims in negligence
 - There is no indeterminate time problem because as a building gets older it is harder to differentiate between negligence and wear and tear.
 - (2) **Caveat Emptor:** The buyer is in the best position to assess the building

- In this case the buyers had inspected the building and the problem was not discovered. They were told only minor repairs were necessary.
- **NELSON:** Why else might we not want to recognize this duty? If the duty is not recognized the parties will take care of it in the original contract. The contracts negotiated prior to this case allocated the risks. I.e.) the developer paid less for the building because builder does not have a duty.
 - Tort law is affecting the parties contracting. The need for certainty is important. LaForest relies on potential for “danger”. How a situation without danger would be decided is still uncertain.

Relational Economic Losses

- Losses suffered by one person as a result of a physical loss to another party with whom they had a contractual relationship.
- **This is the most contentious area of economic loss b/c it is potentially the most indeterminate.**
- **Until recently you could not recover for this. **This area is unsettled**.**

CNR v. Norsk Pacific Steamship (1992) SCC

- CNR has contract with government to use a bridge the gov’t owns, CNR owns the land at either end. The Def was pulling a barge in the fog and crashed into the bridge disrupting CNR’s use of it. There was no provision in the CNR-Government contract for disruption.
- CNR sues Norsk to recover their economic losses. The win at FCA and “win” at SCC. There is a split on the law (3-3) with a judge concurring in result.
- **“Majority”:**
 - Recovery in relational economic loss must be limited but should not be impossible. Look for some connection (proximity) between the Pl and Def such that it is appropriate that the Def compensate the Pl.
 - This is very vague and leads to uncertainty, it cannot be applied prospectively. There is no predictability in the law if this is the rule and risks cannot be allocated efficiently.
- **“Minority” (LaForest):**
 - Maintain the exclusionary rule that denies recovery for relational economic losses. But allow exceptions where good public policy reasons exist. There are 3 exceptions:
 - (1) Pl. has a possessory or proprietary interest in the damaged thing/property.
 - (2) “General average” cases
 - (3) Situations where the Pl and property owner are in a joint venture.
 - LaForest claims his rule is more predictable and certain, and will dictate who should have insurance.
 - Criticism of exclusionary rule: can seem to arbitrarily deny recovery to the Pl.

Bow Valley Husky (Bermuda) v. St. John Shipbuilding (1997) SCC

- Two Pl had contracted with a 3rd Pl regarding the use of an oilrig. The contract stipulated that even if the rig was out of service the 2 Pl still had to pay the day rates.
- Def failed to warn about the propensity of an electrical part to catch fire. It did and the oilrig was out of service for some time. The 2 Pl sued the Def for their losses.
- Court decides to sort out the confusion in *CNR*.

- Court wants to limit recover for relational economic loss, but make a rule that is predictable and fair.
- Court recognizes the categories LaForest suggested in *CNR*, and says that they are not closed. How are new categories recognized?
 - Parties must convincingly argue on PP grounds why recovery should be allowed, including:
 - Unequal bargaining power between the parties
 - Deterrent effect of limiting recovery to the “owner” of the property/thing is not sufficient to deter the Def.
 - The proximity analysis will look to PP. Is there sufficient proximity such that the Def should have reasonably foreseen that persons like the PI would suffer a loss. If yes, then there is a prima facie duty, but it can be negated with by policy concerns about indeterminacy.
 - I.e. why just let the two PI recover? Why not investors? There is no principled way to draw the line. In this case the two PI fail to recover.
- **Bottom line:** General exclusionary rule with limited exceptions and the possibility of further categories being recognized.

TOPIC OUTLINE #13 – OCCUPIER’S LIABILITY

The Common Law

- Liability for personal injury suffered by persons on property “belonging to” the occupier.
- C.L. factors to determine liability are confusing, and based on a variety of factors:
 - (1) Status of the PI on the property
 - (2) Who the occupier is
 - (3) Whether the PI was injured because of the condition of the premises or activity taken place on the premises.

Who is an Occupier?

- Does not have to be the owner of the property, can be a person who has immediate supervision and control of the premises & the power to admit and exclude others. There can be more than one occupier at a time.

Categories of Entrants to Land

- There are 4 categories of persons who can be injured on the property of another and make an occupier’s liability claim (from lowest to highest duty owed):
 - (1) Trespassers
 - (2) Invitees (person who enters land with permission but not for any commercial benefit)
 - (3) Licensees (lawful visitor from whose visit the occupier stands to derive an economic advantage)
 - (4) Contractual Entrants
- (1) **Trespassers:** On property without the permission of the occupier. Originally at C.L. there was only a duty on occupiers to not wilfully injure them or act with reckless disregard of their presence. This has been tempered somewhat by the duty of “common humanity”.

These factors allow the court to differentiate between child trespasser and burglar b/c the category of trespasser is very broad:

- a. How serious is the injury?
- b. How likely was the injury to occur?
- c. Character of the intrusion. (wandering child, inadvertent adult, burglar?)
- d. Nature of the place where the trespass occurs, condition of the premises – there is no duty on the occupier to inspect their land for safety to trespassers.
- e. Knowledge of the occupier about the likelihood of trespasser being present (if Def knew that children frequently trespass then the obligation is higher, courts have held that barriers around dangers are necessary).
- f. Cost to the occupier of guarding against the danger
- g. Did the occupier create the danger himself (i.e. set traps).

(2) Licensees:

- C.L. approach is to protect them from hidden dangers that occupier has actual knowledge of, this has been diluted to take reasonable care to protect the licensee from unusual dangers the occupier **knows, or ought to know of** (there is no positive duty to inspect).
- Warnings have to be timely and visible. If warned the duty may be discharge OR the PI may be held contributorily negligent. Usually a warning is enough to discharge.

(3) Invitees:

- Because of relationship of mutual benefit the C.L. duty is higher.
- There is a positive duty to inspect for danger.

(4) Contractual Entrants

- Someone who has bargained/contracted for entry. (Patron of hotel, hockey attendee).
- At C.L. the occupier owes the highest duty. If the contract is silent, then the C.L. implies DoC for occupier to take reasonable care & skill that premises are fit for the intended purpose.

Statutory Reform

- Some provinces do not have an Act. Alberta does; the Alberta Occupier's Liability Act.
- Under the Act there are two classes of persons: Trespassers and Visitors.
- **Visitor:** A person who is lawfully on the premises, or person who was originally lawfully on the premises but then unlawfully and who is taking reasonable steps to leave.
 - **DoC:** The occupier owes everyone in this category the same duty:
 - They must ensure that the premises are in reasonably safe condition.
 - This includes not only the condition of the premises but also activities and conduct of 3rd parties on the premises.
 - Occupier is not responsible for the activities of certain independent contractors.
 - **Defences:**
 - S. 15: Contributory negligence act applies if PI suffers damage and is partly at fault.
 - S. 7: Risks that are willingly accepted by the visitor – *Volenti*.

- **Trespassers:** s. 12 – occupier does not owe a duty to trespassers, but by s. 12(2) they are liable if they injure or kill them by wilful or reckless conduct.
- **Children:** s. 13 – When occupier knows or has reason to know that children trespass, or that there is a condition/activity that poses a threat of death or serious bodily harm to children then the occupier has to take reasonable steps to ensure that the premises are safe.
 - **“Child”** is not defined in the act. *Cullen v. Rice* – a 16 year old is not a child.

Waldick v. Malcolm (1991) SCC

- Def rented farmhouse and did not take any steps to deal with the ice on their walk, the PI slipped and fractured his skull.
- *Volenti* require more than knowledge of the risk, there must be an acceptance of it as well.
- Def liable b/c they took no steps to make it safer.

Cullen v. Rice (1981) Alta CA

- 16-year old in café. He was asked to leave a bunch of times. An employee escorted him out a glass door was broken and PI was injured. Trial apportioned the liability at 50% each and found negligence
- CA said there was no negligence. They looked at Ontario OL Act and held that the boy was a trespasser and the duty owed was not to wilfully/recklessly injure. No breach of duty
- Suggests a “child” for the purposes of the act would be a young child.

Roasting v. Blood Band (1999) Alta

- Although OLA clarifies the law it is often difficult to apply the sections.
- PI, an inmate, was working on a crew at rodeo hosted by Def. PI fell from the bleachers and was injured. They were under construction and there was no railing and he was told to stay off.
- Issue: Is there an OL duty? What is the effect of warnings? S. 9 – a warning without more is not necessarily sufficient. Must look at the situation globally. Was there contributory negligence?

Topic Outline #14 Vicarious Liability

- One of the most important applications of strict liability and is therefore a departure from the general rule that liability is based on the fault of the defendant.
- **Rationale:** The risk of the loss should be born by the party that created the risk of harm (because the potentially foreseeable harm is increased) and not the innocent party.
- Most often arises in the employer/ee context. Employer can be VL for the employee.
 - Employee is still potentially liable as well (joint and several liability).
- **Questions:**
 - (1) When does the employer/ee relationship exist?
 - (2) What are the policy objectives underlying the imposition of VL?
 - (3) What about intentional torts, how is that treated?
- **Policy Concerns:**
 - (1) The employer is profiting from the acts of the employee, so they should take on some risk of loss in carrying out that activity.
 - (2) They have the capacity to compensate
 - (3) VL acts as a deterrent to unsafe practices.
 - (4) It best achieves economic efficiency – employer can get insurance and recover losses through pricing.

Who is an employee?

671122 Ontario Ltd. v. SAGAZ Industries Canada (2001) SCC

- The Pl (respondent) lost substantial business when the Def's hired consultant paid to secure Canadian Tire's business and get them to switch automotive suppliers.
- Was the bride payer an independent contractor or an employee? Is the supplier VL for the contractor's acts?
- Whether the person is an employee:
 - (1) How much control does the employer have over the employee? Do they tell them what to do and **how** to do it?
 - (2) Is the person supplying the services in business on his own account? Factors:
 - a. Do they have their own equipment?

- b. Where do the risk of profit/loss lie?
- c. Does the employer pay the tax on the “employee’s” wages?
- d. Do they hire their own people?
- e. Who owns the business?
- SCC looks to the two principal policy considerations (1) Want to impose a just and practical remedy (2) Deterrence – Employers are in a better position to ensure that similar incidents do not happen in the future (training ect).
- They find that the briber was no an employee. The briber decided **how** to do things so he was an independent contractor.
- NELSON: this does not accord with (1) as the Def’s benefited from the bribe!

What does “in the course of employment” mean?

- This is a question of fact.
- It is more complicated than “was the act authorized but done in an unauthorized manner vs. unauthorized act”:

Bazley v. Curry (1999) SCC

- The Foundation hired Curry to work in its Vancouver group home. They did some evaluation of him before he was hired. He was a pedophile. He sexually assaulted several children. His employment duties required him to perform parent-like tasks. The PI sued the Foundation on the basis that they were vicariously liable for the intentional torts of the Def.

THE TEST:

- What can the employer be VL for? (Wouldn’t intentional torts be unauthorized acts taking it outside the scope of his employment?)
- SCC: The employer can be vicariously liable for:
 - (1) Acts the employer authorized.
 - (2) Unauthorized acts that are so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing authorized acts.
 - The SCC said that employer can be VL for intentional torts under (1) [but unlikely to authorize intentional torts] and (2).
- SCC says the Courts should make the policy considerations explicit. The two main policy concerns are:
 - (1) If VL is imposed will it provide an adequate and just remedy?
 - (2) Deterrence
- **Test:** Were the wrongful acts sufficiently related to the conduct that was authorized?
 - **Subsidiary factors:**
 - (1) What sort of opportunity did the employer give the employee to abuse their power?
 - (2) To what extent did the wrongful act further the employer’s aims?
 - (3) Was the wrongful act related to friction, confrontation or intimacy in the inherent in the employer’s enterprise?
 - (4) Extent of power conferred on the employee in relation to the victim.
 - (5) The vulnerability of the victim to the exercise of the employee’s power.

- SCC focuses on whether the employer's enterprise or power conferred on the employee materially increased the risk of sexual assault on the children. This is not a mechanical exercise.
 - **Compensation of the victim:** Here the employer is non-profit. The employer does not stand to benefit from the Def actions. The Court is careful to not allow an exemption for non-profits. SCC is trying to reach a fair result and here they decide that it is better that the employer carry loss rather than the innocent victim.
 - **Deterrence:** If non-profits are on notice that they may be liable for an intentional tort through VL then hopefully they will be more careful.
 - **Problem:** Will the service be provided at all now given potential for VL? Will insurance be prohibitive?

Jacobi v. Griffiths (1999) SCC (same day as *Bazley*!)

- Also a non-profit organization. A Club for boys and girls, but not in an institutional setting like in *Bazley*. Employee pled to 14 counts of sexual assault. He took the children to his home, this was not directly related to his job.
- SCC: Held the Club not VL. They apply the test from *Bazley* and this splits the court 4-3.
- The opportunity the Club gave the Def to abuse any power he had was held to be slight. He had to get the children isolated and away from the Club's programs to commit the wrongful acts.
- In order to impose liability there should be a **strong connection**. The Club's group activities did not really create the opportunity for abuse. In *Bazley* there was a much more intimate relationship.
- The minority would have held the Club liable b/c they placed him in a position of trust.

Foster Parent/Custodian cases and Government Liability

- SCC has resisted holding the Government VL.
- In the foster parent cases the gov't does not exercise any day-to-day control over the parent. The parent is completely responsible for the running of the household.
- In the custodian cases there was no "job created power" that the employee held over the victim, therefore a lack of a strong connection.
- **Feldthusen's Critique:** These cases say that there will not be liability unless the organization fails to do something or is negligent. The degree of extensive control the SCC seems to require in these cases to hold the government or organization liable comes at the cost of leaving the victims uncompensated. Maybe the solution is not through the courts.

Statutory Vicarious Liability

Traffic Safely Act

- S. 187 – Imposes VL on the owner of a vehicle even if they were not the ones driving it. VL for persons that have their permission express or implied.
- *Mahan v. Hindes* (2001) Alta – A leased vehicle. Ford Credit Canada was held VL for the driver, this gave the PI access to more cash.

School Act

- S. 16 – If property of a school board is fucked with by a student, the student(s) and their parent(s) are joint and severally liable. This does not apply if the student is independent (+18 yrs old or 16 and living independently).

- *Coquitlam School District v. Clement (1999) BC CA*
 - Four students stole a car and drove it to the school to get some privacy while they removed the tires. They set it on fire and the school burned to the tune of \$3M.
 - The parents tried to get out of VL by arguing the section should only apply to when a student is enrolled in a school board program.
 - The CA did not accept this. The section is clear and ultimately it would be the tax payer paying to fix if there was no VL.