

## Elements of Negligence Action

### 1. Duty of Care Owed by DF (pg 6)

- As a question of law, is the DF under any legal obligation to exercise care for the PL's interests?
- Owed to the people who fall within in the ambit of risk produced by the DF's actions
  - Drivers = other people on road. Doctor = patients
- If no duty of care owed, there can't be liability. Period.
- Not often contentious, but if it is, it's fought hard by DF
- Question of Law: Is DF under a legal obligation to take care of PL's interests?

### 2. Standard of Care and It's Breach (pg 2)

- Standard of care is objective. Using **reasonable person test**. Judge determines what reasonable behavior is.
- What is the SOC? Did DF fall below it?

SoC asks how **the reasonably prudent person would act in this situation (question of law- objective assessment)**.

**How ought the DF to have acted?** One way of getting at the answer to this question is to consider the following factors:

**FACTORS** - related to foresight of the harm

#### 1. Likelihood or Probability of Harm

- The more likely the potential harm, the more court will expect from the reasonable person

#### 2. How grave/serious would the harm be if it arose

- The higher the gravity of potential harm, the higher the court's expectation that the reasonable person will adjust their activity (the care will be proportional to that gravity)
- The higher gravity, the higher the care

#### 3. Practicality or cost/burden of taking adequate precautions or of foregoing activity in question?

- Balanced against likelihood and gravity of harm
- The lower likelihood and seriousness, the less likely someone should undertake a high cost to prevent a less likely and less serious harm

#### 4. Social Utility of the risk-causing activity factored in too. What is the social cost of not having the activity? Is the activity being carried out to save someone's life?

#### 5. Law and Economics Standpoint: Learned Hand Formula

**THEN** ask Has the DF met those standards for SoC or fell below? Were they negligent? (Fact question)

- Has DF acted as a reasonable person would've or not
- IF standard is not met, then duty is breached

### 3. Causation

- Factual Cause
- Did the DF's negligence or conduct cause the PL's loss?
  - **BUT FOR TEST:** But for the DF's negligence, would the PL have been injured or suffered the loss?
- One of the toughest areas to prove causation is in the medical context
- If DF owed duty and fell below standard, and whatever their behavior was not causally linked then PL will not be successful. If DF can show that injury would have happened anyways, then can get out of liability.

### 4. Remoteness of Damage (Proximate cause)

- DF is only liable for losses that are a foreseeable result of his or her conduct
- **Question:** For which of PL's injuries should the DF be held liable? Which of the injuries are sufficiently proximate?
  - This area can be very unpredictable
  - Typically that type of injury (general class) has to be foreseeable
  - Did DF's actions expose the PL to this particular injury? This extent of injury?

### 5. Actual Loss (Damage)

- Actual loss
- There must be damage or actual loss suffered by the PL. PL must establish this loss.
- DF will not be liable if PL cannot prove that he suffered legally recognized type of loss
- Imperfect relationship: Money does not fix injury, but operating on full-restitution, putting P back in position they would have been had they not been injured

### 6. Defenses

- Defendant can still raise defenses
- Should the PL's conduct be taken into consideration?

#### **Contributory negligence**

- Did the plaintiff fail to take proper care?
- Partial defense

#### **Voluntary assumption of the risk**

- Did the plaintiff agree to assume the risks?
- Complete defense

#### Illegality

- The court's process doesn't exist to help out people who engaged in conduct that would bring the court's reputation into disrepute if damages are awarded
- If the PL did something criminal, the court won't compensate them for a loss in that conduct

#### Limitation periods

- Did the plaintiff file their claim in time?
- Statute varies limitation periods

## Topic 3+4: Standard of Care

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

- Who is the Reasonable Person?
  - A person of normal intelligence whose conduct is the standard by which the Courts measure the conduct of all other persons.
  - In court situation argument for the "judge" as the reasonable person..
    - Forces judge to think outside their own perspective
    - Bolsters impartiality in the justice system
- Purpose of Reasonable Person?
  - Need for objective measuring test, for certainty
- Tension btw recognition of differences of background/objective benchmark: if we don't have benchmark, it is too easy for people to excuse themselves and avoid compensating victim
- Has an emergency materialized?
  - Has the D's fault led to this emergency?
  - An emergency could not have been anticipated

### Reasonable Care

#### Learned Hand Formula

- If  $B < PL$ , there is liability
- Where B = burden of taking reasonable care
- P = probability of injury
- L = severity of injury
  - This isn't a formula so much as an expression of what a judge considers
- According to the Learned Hand formula, reasonable people take precautions within the cost the same as or less than the product of likelihood of injury and gravity of injury
- A reasonable person exercises more care as, the likelihood of injury increases and the seriousness (gravity) of injury increases
- It is reasonable to engage in extremely risky conduct when... there is no other way to carry out a socially important risk and the "costs" of injury resulting from the conduct are less than the costs of taking appropriate precautions

#### Vaughan v Menlove:

- This case rejects the argument that a DF's particular sensibilities or weaknesses should be taken into account in evaluating negligence claims. Rather, one must look only to whether one has acted as would a reasonably prudent person under similar circumstances.

#### Bolton v Stone:

- Where the risk is extremely unlikely, there is no duty to take care to prevent that risk (**Burden of adequate precautions**)

#### Paris v Stepney Borough Council:

- Depending on degree of injury, SoC may shift
- The more serious the possible damage, the greater the precautions that should be taken.
- Employee blind in one eye. Works in garage and is struck in good eye by loose piece of metal, making him entirely blind. Probability of such event was small, but consequences were very grave. And his employers, knowing of his disability, should have taken extra care to provide goggles.

#### Watt v Hertfordshire:

- Emergency of situation (and conduct to save a life) justified and outweighed the risk taken

#### **Priestman v Colangelo:**

- Police activity will sometimes put others at risk, but as long as the police acted reasonably in carrying out their actions and obligations, they will not be liable if that risk materializes
- If person acts reasonably under statutory power and required performance of duty, there can be no rise to action

#### **Standard of Care for Children**

Tender years 0-7: kids can only be negligent in extraordinary circumstances

- No vicarious liability for parents. Unless there was lack of supervision, then maybe

#### **Common Law Standard:**

When considering whether a child is negligent: (*McHale v Watson*)

1. **Subjective Test:** Consider the age, intelligence, experience, general knowledge and alertness; is the child capable of being found negligent? If NO → no capacity, we stop here. IF YES:
2. **Objective Test:** How would a reasonable child of that particular age have acted in those circumstances?

#### **McHale v Watson:**

- Children are held to a modified standard – the reasonable child of their age and experience

#### **EXCEPTION:**

- **Adult Activities Doctrine** → We presume children are able to meet the ordinary standard of care for adults if they are engaged in adult activities
  - Why? Underlying reason is the public policy risk of the activity which may put others at risk
  - Criticism: Child is often PL so will be reimbursed less often. Also what even if an adult activity? Driving okay. But what else? Where do we draw the line?

#### **Phrasing of Question:**

- The more broadly framing the question, what answer are you more likely to come to?
  - Broad: Can someone foresee a 12 year old throwing a sharp piece of metal around people and that it would hit someone? Yes.
  - Specific: Would a 12 year old throwing metal at a post and have it bounce off and hit PL in the eye? Not foreseeable.
- PL wants court to lean into broad question. Easy path from A to B (dissent- negligence)
- DF wants specific b/c it adds complicating factors, makes it harder to get from A to B.

#### **SoC for the Elderly**

- Q: Does the SOC change for elderly people?
  - No; elderly adults are expected to have experience and have formed reasonable judgment
- Children lack experience of wisdom and judgment for the consequence so of their reactions

#### **Standard of Care for Disabled**

To what extent are disabilities taken into account?

- If they are aware of the limitation, must act in such a way as to accommodate that impairment (*Blackburn*)
- If they are not aware of the limitation, they are place are regular “reasonable standard” and therefore, could not have foreseen incident (*Fiala*)

#### **Summary of Disability and SOC**

- **Physical**
  - Held to the standard of a reasonable person WITH THE SAME LIMITATION (reasonable deaf person)
  - It is not negligent to not have the ability, but it IS negligent to not take the limitation into account.
- **Mental**
  - If it was foreseeable (has happened before) → DF expected to have taken steps to prevent it ex: medication, or not working around people
  - If not foreseeable (first time), DF must prove on BOP
    - As a result of mental illness they had no capacity to appreciate the duty owed OR
    - B/c of the illness the DF had no control over his actions at the time his relevant conduct fell below the SoC
- What function or aspect of tort law is prioritized by an approach that ignores mental illness or disability?

### Compensation.

- What aspect of tort law is emphasized by an approach that considers the DF's mental illness or disability in the standard of care analysis? **Fault.**
- Why we should/shouldn't consider mental illness?
  - Someone could fake a disability.
    - Courts readily accepting of physical ability because it's readily visible and not something likely to be faked
    - Whereas mental disability is opaque, we may not be able to see it. We don't have a good empirical way of observing that ourselves.
  - Impact on caregivers if they know the person they're caring for will be responsible
  - Reasonable person will become irrelevant, won't have objective standard anymore.

### Steps to Establish Relief of Liability:

"In order to be relieved of tort liability when a DF is afflicted suddenly and without warning with a mental illness, the DF must show the following on a balance of probabilities

1. Sudden and without warning affliction, AND
2. As a result of his or her mental illness, the DF had no capacity to understand or appreciate the duty of care owed at the relevant time, **OR** As a result of mental illness, the DF was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care"

If illness happens quickly and without warning and DF has no ability to control actions, not liable.

- CASE IN AB: Mental illness CAN be taken into account in SoC. But if it is something that can be foreseen then DF must take steps to make sure illness doesn't pose risks to people.

### *Fiala v MacDonald:*

- Mentally ill people are to be held to a different standard if the "episode" was not reasonably foreseeable – adequate precautions otherwise

### *Blackburn v British Columbia:*

- Court said she was expected to take account of hearing impairment when driving, she's expected to compensate in other ways to make up for the hearing impairment such as visual clue of green light but car next to her stopped.

### Standard of Care for Professionals

- Reasonable and prudent professional
- **SoC of professionals: the reasonable and prudent doctor, the reasonable lawyer.**
- The modified standard of care must be in the context of their work as a professional
- Following industry practice not negligent, unless practice itself found negligent
- Standard based on the time of the incident – standards/equipment can change very quickly
- Expert evidence critical. First qualify the expert so judge believe their advice is good.
- **Doctors:**
  - In general the standard of reasonableness has to do with being a medical professional, acting in a medical context. We now know that we are at least outside of the general reasonable person context
  - **Error in judgment/mistake** is not negligent; to be negligent you have to fall below the standard of care. Error itself has to be departure of acceptable practice
  - **Beginner status** not an excuse. If they're new, expected to consult with senior practitioner to make sure. Beginner status does not excuse them.
  - **Competing schools of thought?** Important to show what vast majority of doctors would have done in situation. Can have more than one approach and all be reasonable (DF cannot be held liable for following one and not another but must have followed one)
  - **Time frame?** By time negligence claim is before the courts time has elapsed and practices have changed. Will this change the assessment of SoC? No. Must follow standard at time of incident.
  - **If a generalist engages in a specialist activity he will be held to the standard of the specialist.**
    - SoC is assessed based on what a similar (specialty) reasonable DR would've done.
  - Informed Consent
    - Q to ask is: What would the reasonable person in the patient's position want to know before making a decision? (*Reibl v Hughes* is also relevant here)
- **Lawyers:**
  - Must establish lawyer-client relationship for DoC to exist
  - Missing the Limitations Period would be falling below SoC. Otherwise, hard to say he didn't meet SoC.
  - Also see: Negligent Statements/Misrepresentation under "Pure Economic Losses"
  - Judges don't need expert evidence cause you know... they were all lawyers at one point LOL

### **Milette Estate v Zung:**

- Modified SoC for professionals: reasonable practitioner of similar experience

Plaintiff has onus of proving, on balance of probabilities, all four of the following elements

- 1) The doctor owed the plaintiff a duty of care
  - a. Yes- doctor/patient relationship
- 2) The doctor breached the applicable standard of care established by law
  - a. Based on “reasonable doctor’s skill, knowledge and judgment”
  - b. A doctor is not liable in failing to reach proper diagnosis or for administering proper treatment, where it is a mere error in judgment
  - c. In Case, doctor followed proper processing for CT requisition form
- 3) The P suffered injury or loss; and
- 4) The doctor’s conduct was the actual and legal cause of the P’s injury or loss
  - a. Whether the new onset of headaches were result of bleeding from undiagnosed aneurysm which led to his death?
    - i. Expert evidence: mixed reports. Overall: the type of reported headaches has not usually indicated aneurysm

### **Standard of Care for Custom**

If everyone is partaking in that practice, then is it reasonable?

#### **TEST: What does the DF have to prove in order to rely on custom?**

1. Is there a custom?
  - a. Existence of custom is not determinative of whether SoC is met or not, merely evidentiary (custom itself can be unreasonable). Must be persuasive
  - b. “Just cause everyone else is doing it doesn’t mean it’s a good idea”
2. How persuasive is evidence of the custom?
  - a. How many follow it (prevalence)? How long has it been in place (pervasive)?
    - i. Suggests reasonableness
    - ii. Suggests economic reality \*are the safety precautions customary or excessive?
  - b. How technical is the custom? (More tech = more persuasive) Or can it be over turned with common sense?
3. Does adherence to custom settle the issue? (Or is adherence unlawful?)
  - a. If the practice itself is negligent, it does not matter how many people are practicing that custom, the court will not uphold it
  - b. First assessment whether it’s reasonable
    - i. Can’t settle issue of whether DF is negligent or not until known as reasonable
  - c. What if it is reasonable?
    - i. Doesn’t settle issue. It is a piece of evidence court will consider but not end all, be all.

#### **Custom in a Professional Practice:**

- Custom in Practice is almost always determinative of the SoC with professional context negligence
  - EXCEPTION: a practice that is fraught w/obvious common sense risks
    - Ex: not counting how many cloths you put in and out of a person before and after surgery
  - Also, what is relevant is the generally accepted practice at the time of the alleged negligence, as new practices might’ve appeared by the time of trial

### **Waldick v Malcolm:**

PL falls on icy DF’s drive way. DF argues that nobody in their community puts ice on their driveway (custom) and PL would have been used to that reality. Court: Not enough evidence to establish existence of custom and the custom was unsafe/unreasonable/unlawful/negligent – court does not uphold custom over law

### **Ter Neuzen v Korn:**

Custom or general practice is almost always going to be determinative when you are dealing with professional negligence context. Except where the practice itself is fraught with obvious risks (Echoed by *Milette*)

- **A doctor will not found not liable if he acted as a reasonable doctor would. He met the standard of care required by his profession**

### **Statutory Standards**

What is the effect (in the context of a negligence action) of a breach of a statutory standard?

- The statute might explicitly create or preclude civil liability
  - Statute can also specify that only “gross” (unclear concept) negligence will allow a PL to sue in negligence (Ex: *Municipal Act*, *Emergency Medical Aid Act*)
- If statute is silent on civil liability, then:
  - **Statute might provide a useful standard of conduct, and breach of that statutory standard MIGHT give evidence of negligence (*SK Wheat Pool v Can Wheat Board*).**
    - Breach or compliance with statutory standards of conduct merely provides evidence in a negligence action. It is not “proof” that the DF was or was not negligent.

### *R v Saskatchewan Wheat Pool:*

Breach of a statutory standard can be evidence of negligence, up to court to weigh duty created by statute in relevance to context within the claim. + Determine how persuasive this evidence is to find if the plaintiff has breached the statutory duty of care.

## Degrees of Negligence

- Liability will only be found in certain circumstances where the defendant has acted with gross negligence
- Courts look for marked departure from standard of care. How far below the standard of care did the DF fall?
- Effect of gross negligence: P must work harder to show there was a breach, a “gross” breach
- Rational for requiring “Gross negligence”: to protect activities of high social utility
- Gross negligence is exceptional and can only be applied through statute

### *Municipal Government Act*, s 531(1)

- A municipality is only liable for an injury to a person or damage to property caused by snow, ice or slush on roads or sidewalks in the municipality if the municipality is grossly negligent.
- Protect city against lawsuits where it is not realistically possible to clean all roads/sidewalks perfectly.

### *Emergency Medical Aid Act*

- Protection from action
- **Purpose:** Encourage people to help each other out in cases of emergency by taking away liability if you try to help and things go poorly
  - **2** If, in respect of a person who is ill, injured or unconscious as the result of an accident or other emergency,
    - (a) a physician, registered health discipline member, or registered nurse voluntarily and without expectation of compensation or reward renders emergency medical services or first aid assistance and the services or assistance are not rendered at a hospital or other place having adequate medical facilities and equipment, or
    - (b) a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency, the physician, registered health discipline member, registered nurse or other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his or her part in rendering the medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence on his or her part.
- Don't want people who could provide help to be too nervous of being charged for helping

## Topic 5: Duty of Care

### STAGE 1

1. Does an analogous duty already exist? If YES, don't do Anns test. If NO, Anns test.
2. **FORESEEABILITY:** Was the harm a reasonably foreseeable consequence of DF acts?
  - Foreseeability at this stage is “**foreseeability of the plaintiff as a victim**” as opposed to *foreseeability of the injury itself which is dealt with in remoteness*
3. **PROXIMITY**
  - Analysis whether sufficient proximity between parties (were the two parties closely enough related that it would be appropriate to engage duty of care – does there exist a relationship such that there is a proximate connection)?
  - How to determine PROXIMITY:
    - Courts look at following factors
      - Expectations of parties
      - Representations by parties

- Reliance by the Plaintiffs
- Were there property or other interests involved?
- Personal relationship – a factor not necessary though
- Does relationship constitute a novel duty category or does it fall under into a recognized category (where proximate-duty relationship exist)?
  - Personal injury/property damage?
  - Negligent misrepresentation,
  - Duty to warn of the risk of danger
  - Gov't authorities

Even if we haven't already recognized duty of care in question, we might've recognized something close: proximate-duty relationship cases in which duty of care exists can have indicators that can tell us whether we can find a sufficient proximity:
- Are there any **Policy Reasons** relating to the nature of the relationships that would block a duty of care?
  - Questions of policy as they relate to the internal relationship of the parties (different from residual policy considerations) → difference not clear (Klar)

## STAGE 2

### Residual policy considerations (DF has to raise them)

- Are there any residual policy considerations that scope of duty of care should be limited?
- External to the parties (is there something more global/social importance than might lead us to wish to decline to recognize duty of care?) Outside the relationship of PL and DF.
  - Questions of how recognizing the duty would effect the legal system/obligations, social and economic consequences, society in general
- Concerns about **indeterminacy**: worry about liability becoming too broad, having no limits (indeterminate)
- Negligent misstatement

Duty and remoteness are two issues often discussed together

- Remoteness: Limiting device courts use to rein in potential liability a DF might face. Refers to whether particular kind of loss was foreseeable.
- Duty: Whether PL was a foreseeable victim

Examples:

- **Donoghue v Stevenson**: Neighbor principle. Person should take reasonable care to avoid acts or omissions that she/he can reasonably foresee as likely to cause injury to neighbor
- **Pinkerton**: NWT gov't and security company owed DoC to mine workers – because of the relationship and the size of the group
- **Palsgraf** – **No DOC owed to the plaintiff because she was too far away from situation to be a reasonably foreseeable victim → there must be foreseeability for there to be a duty**
- **Sylapse** – Social worker and treatment center did not owe DoC to family of the child they're protecting? (no proximity and **public policy reasons** not to recognize duty) [girl wrote story indicating abuse]
- Biggest difference between Cooper and Anns is at the proximity stage. Foreseeability is given much more weight than it used to be

## Duty to Rescue

### General Principle: No duty to rescue in common law

- UNLESS some other factor implicates you in the situation in a way differently than just running into that situation
- Misfeasance → wrongful infliction of harm
- Nonfeasance → failure to prevent harm
- Justifications for common law to refrain from requiring one helping someone
  - Courts drawing distinction btw misfeasance and non-feasance
  - Requiring "duty to assist" would effectively change many aspects of common law
  - Liberal Philosophy upholds punishing wrongful interference with others – does not require punishing those who fail to help others
  - Formalist (essentialist/Weinrib) – Structure of private law is inherently negative, prohibiting people from doing something rather than compelling to do something. Law isn't supposed to command us to take action to look after rights of others

- Winerib: The law consists of rules that tell one how not to interfere in business or the rights of others. To impose an affirmative duty to require interfering goes against blanket position of common law

### **Horsely v McLaren:**

**There can be a duty to rescue in a situation where the defendant created a relationship which created an obligation on the DF's part**

- You can look at it as an exception to duty of rescue or as something different which gave rise to a duty of care

### **Zelenko:**

- A duty to rescue, although not imposed at first, if undertaken by someone, establishes a DOC. If then abandoned, it can amount to a breach of duty

### **Emergency Medical Aid Act RSA 2000**

- One giving first aid is not liable for injuries
- Legislative attempt to make it more likely to encourage people to come to the rescue of somebody
- Applies to both health care providers and lay people that attempt to provide medical help in an emergency
- No liability unless you're grossly negligent

### **Duty of Care for Commercial Hosts**

- Commercial host DOC to prevent intoxicated patron from injuring himself or others

### **Stewart v Petite:**

- Alcohol-serving establishments have a duty of care to their intoxicated patrons and third parties who may be injured by their intoxicated patrons.
- A duty CAN be owed by commercial vendors to their patrons for the foreseeable risks associated with their intoxication. Particularly, the vendor should monitor consumption at sale. However, as Stewart was accompanied by 2 sober individuals, who could have driven, the theatre could not reasonably foresee such a scenario

### **Social Host Liability**

### **Childs v Desorneaux:**

- Being a host of a party at your home where there is drinking is NOT enough to impose a duty of care

### **Duty to Warn/Creation of Danger**

- A failure to act (nonfeasance) to prevent future harm is not negligent if the type of harm that occurred was not foreseeable (*Oke v Weide*)

### **Liability to the "Rescuer"**

If you as a rescuer, if you behave in such a way as to recklessly endanger your own safety, that won't be a way to fault the initial defendant

- Court trying to say don't be foolish, don't put yourself at risk when you're in over your head. But short of something glaring, we won't say it was wanton.

### **MacLaren:**

- The general rule is that if a DF creates a situation of peril as a result of his negligence, he must answer for it to any person who attempts to rescue the person who is in danger
- It is reasonably foreseeable that someone will try to help
  - However, this is subject to whether it was the DF's negligence that induced the other party to risk his life
  - In *MaLaren*, the boat driver was not negligent in the first guy falling in the water and neither was he negligent in the rescue operation → hence, no DOC owed to the rescuer

### **Moddejonge v Huron County:**

- Group of junior high students taken to go swimming in a lake. Couple of the kids got into some trouble in the water and then an older child tried to get in and help. Older child ended up drowning. They should be compensated. She managed to rescue one of the students.
- If you want to help, they will give you lots of scope. Common law is not prepared to say you have to help. Court will recognize it is a normal reaction for people to have and unless you really acted foolishly, they will require the original DF to compensate you if you suffered losses as a result.

### **Urbanski v Patel:**

- P was father of woman who had surgery. Daughter only has one kidney, Doctor thought it was a cyst and removed it. Father donates kidney to daughter. Claim against doctor as rescuer.
- This is a situation of rescue. Doctor is liable for Father's downtime/pain etc.

### **Rescue** must be reasonable

- Rescue was reasonable → rescuers could recover (*Moddejonge v Huron County*)
- If you as a rescuer, if you behave in such a way as to recklessly endanger your own safety, that won't be a way to fault the initial defendant

### **Urgency**

- No liability to the rescuer if there is no urgency/need to rescue (*Shilling v Balckburn*)
- However, in *Bridge v Joe*, court ruled that urgency was not necessary
  - Distinguished *Shilling* where PL was too distant and unconnected from the accident, PL didn't know for sure there was an accident

**Emergency Medical Aid Act:** If you get hurt when you're trying to help someone and the reason you're helping is due to another party's negligence. That party could be liable to you. This act encourages people to help (lay people, or health care people off duty). There will only be liability if the person providing aid is grossly negligent. In order to be liable they don't only have to be below standard of care but significantly below.

## **Duty to Supervise Others**

### **Parents**

- Presumption is always that parents are not liable for negligence of their children by virtue of status as parents (neither vicarious liability)
- There is a parental duty to supervise and control conduct and activities of children
  - Whether a parent's conduct is negligent is assessed in view of accepted standard of parents in community (*Taylor v King*)

### **Teacher-Student**

- Duty of Care exists, SOC depends on age and activity

## **Duty to the Unborn**

- Fetus is considered to be part of the body of the mother, not its own person
- Duty doesn't crystalize until the child is born
- Fetus doesn't have legal standing as it's not a legal entity so we use "legal fiction" to recognize the claim of the not yet born individual (like we do in estates with the deceased)
- Child in utero is a reasonably foreseeable victim and should be considered in scope of duty of care.
- Lawsuit cannot happen until child is born
- Manifestly unjust and unreasonable to fail to see that if a pregnant woman is injured, then her fetus can be injured

### **Duval v Seguin (not in book)**

- Pregnant woman injured in car accident by DF driver negligence. As a result of accident, child is born with disabilities. Child after birth brought a claim against DF seeking a claim

### **Dobson v Dobson:**

- Pregnant women do not owe a duty of care to the fetus in their womb (policy reasons in Anns Test)
- Would violate women's right under the Charter (liberty and equality)
- Slippery slope → woman becomes responsible for everything to happen to fetus. No way to draw a line around what would affect and wouldn't affect a fetus. Isn't always obvious what is okay/beneficial/harmful, it's a moving target.
  - What if a pregnant woman isn't eating healthily? But what if she's not eating right because she's in poverty and eating less so there's enough food for her born child. People make decisions based on their circumstances.

### **Paxton v Ramji:**

- The physician does NOT owe a duty of care to an unborn or not yet conceived child at the time of the physician's negligence
- This is controversial, but it basically boils down to the fact that a doctor cannot act in the fetus' best interests while also acting in the patient's best interests. Again, this analysis may be incorrect, but it's the law

### **Liebig v Guelph General Hospital:**

- There **IS** a Duty of Care to unborn in the context of labor and delivery
- An infant, once born alive, may sue for damages for negligence during labour and delivery

### **Other DOC situations**

- **Wrongful Birth**
  - Claim by parents that physician's negligence led to birth of a child with a disability (didn't tell them about a test that would have shown the disability and had they known they would have terminated pregnancy)
  - Fairly accepted by courts
- **Wrongful Life**
  - Brought by the child when child born w/disability and suffering (causing child to suffer) or illness against the doctor (Dr. was negligent in failing to offer parents some sort of pre-natal testing that would have indicated problems and having known the issues, the mother would have terminated the pregnancy)
  - Child argues, but for negligence, he/she wouldn't have been born, hence would've been better off "I would have been better off not being born"
  - Canada does NOT recognize this claim because existence is more preferable to non-existence, and it's impossible to assess damages
- **Wrongful Pregnancy**
  - Dr. negligent in giving advice about contraceptive or in performing a vasectomy or sterilization → healthy but unwanted kid (denied in AB)
  - Courts don't like these claims – brought by parents

### **Maternal Tort Liability Act**

A mother may be liable to her child for injuries suffered by her child on or after birth that were caused by the mother's use or operation of an automobile during her pregnancy if, at the time of that use or operation, the mother was insured under a contract of automobile insurance evidenced by a motor vehicle liability policy.

- S 4 – caused by mother's use or operation of an automobile if at the time of use the mother was covered by automobile insurance
- Only province to pass legislation. Suggests this is not very common concern.
- Woman driving on farmland and gets into accident. Her unborn child suffers injuries. Tort claim was initiated even though *Dobson* was decided. Family sought special remedy. Special legislation passed just to address this incident. Legislature also took the step to make legislation to address this issue. Child's actual name is addressed in the act. Intended to apply retrospectively so an insurance claim could be made in respect to that accident.
- What does this legislation accomplish?
  - Goal is to accomplish limited exception to immunity mother has at common law for injuries to her child
  - Motor vehicle accident context
  - Allows a child born with injured caused by mother's negligence while driving and while she was insured driving then an insurance claim can be made on that basis
- Is this solution preferable to imposing a duty through the common law? Why or why not?
  - Can work to create a solution.

### **Public Officials**

**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

- Can be sued but lots of special rules (special notice periods, limitation periods, context for immunity)
- Why distinguish between public authorities and private persons for purposes of tort liability?
  - Concern about floodgates. Concern about opening the door too widely for negligence claims. Worried about overly burdensome liability. What a public authority does can affect more people than a private person.

### **Statutory Duty vs Statutory Powers**

- Statutory Duty: Government is not liable for doing what the statute requires. However, if they do it negligently or don't do it, they can be liable
- Statutory Power: Gives the government discretion in their behavior. Example: Highways dept. "may" conduct inspections.

### **Policy/Operations Dichotomy**

**Policy** → when gov't authorities are making policy they shouldn't be liable unless they do that in bad faith

- What is a Policy decision? One that includes:
  - Social, political, economic factors
  - High level of decision-making
  - Resource allocation decisions (budgetary considerations)

**Operations** → (executing the policy decisions they made) → then a duty of care can be imposed by the common law

#### **Just v British Columbia:**

- Duty owed by government if it's an operational decision, not policy

#### **Brown v British Columbia:**

- Generally duty to maintain road but this specifically is whether what schedule we have is a "classic policy decision" because it involves consideration of finances, personnel, social, political, and economic factors

#### **TEST ISSUE:**

Duty of Care: when dealing with government liability, have to consider Anns / Cooper test – policy issues; primary issue is policy / operational dichotomy; NO duty of care is owed re: policy decisions, unless made in bad faith; operational decisions can be reviewed in negligence.

#### **TEST: How to determine if something is operational or policy?**

- Policy:
  - Social, political, economic factors
  - High-level decision making (how low do we go?)
  - Resource allocation decisions
    - McLachlin, in dissent, viewed the inspection schedule as policy
- Operational:
  - The manner, frequency, and methods
  - The product of administrative direction, expert or professional opinion, technical standards, or general standards of care
  - Manifestations of the implementation of a policy decision to inspect

**Statute can address civil liability specifically, but it can be silent on civil liability.**

**If statute is silent on civil liability, Statutory Standard can be indicative of whether a duty of care is owed AND/OR of the standard of care.**

- In Canada there is **no tort of breach of statutory duty** (*SK Wheat Pool*). Therefore Courts have to look outside of the statute. If courts continue to look at statute to find a duty of care, an argument to raise is that they shouldn't be looking there.

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".

- Legislative response that exempts or shield authority from liability

## **Topic 6: Proof of Negligence**

### **The Burden of Proof in Negligence**

**PL has burden of proof on Balance of Probabilities**

- "More likely than not" or 50% + 1

**Burden can be shifted to the DF (through statute or common law)**

How does PL perform the burden?

- **Evidence** that supports the argument they're making.
  - Might not always have evidence for everything however, there are other ways such as inferences and presumptions
- **Inferences**
  - Logical conclusion the court can reach from other information in front of them from which it logically follows that something else must also be in place

- Useful when No Direct Evidence, DF was in control of situation, injury wouldn't normally happen without negligence
- "Res Ipsa Loquitur" – The thing speaks for itself
  - Major J: The doctrine is no longer law 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
- **Presumptions**
  - A legal consequence that flows from proof of a particular fact or set of circumstances
  - Can be rebuttable or irrefutable. If it's irrefutable then that's the end of it, the DF is stuck with that consequence. If it's rebuttable then the DF can point the judge to the facts that lead away from the consequence
  - Can be presumption of death. If someone is missing for more than 7 years, then that person is presumed dead

Issue of negligence brings up certain questions

1. Sufficiency of evidence to bring a finding of fact
2. Weight of evidence in establishing the facts
3. Existence of a duty
4. General standard of conduct
5. Particular standard of conduct

#### **Baker v Market Harborough:**

- Where the evidence suggests that both drivers were at fault, the court will apportion liability equally between them

#### **Inferring Negligence/Res Ipsa Loquitur**

How does trier of fact deal with circumstantial evidence?

- Res ipsa loquitur ("the thing speaks for itself")
- Creates a presumption of negligence or constitutes prima facie evidence of negligence
- If the PL is injured and doesn't have direct evidence but can put circumstantial evidence, the PL can discharge their burden by showing Latin maxim to apply
- Unless D can give you explanation of how event happened, and its consistent with his negligence, then ask court to draw inference to apply the doctrine and agree that "thing speaks for itself". Now – onus on D, to explain how this happened without his negligence.
- Factors to Use the Latin Maxim:
  - DF had control of the situation
  - Accident has to be type that typically doesn't happen without negligence
  - Cause of accident itself, reason why it happened, isn't known
- Once PL satisfies the court that Latin should apply, the court can infer negligence and then it would fall to DF to dispel that inference
- Doctrine available in limited circumstances. People disputed what its effect was in a procedural way.
  - It creates a presumption of negligence and now DF has to show they weren't negligent on a BOP
  - Other courts said didn't reverse proof but DF must show proof of same strength for court to have support in favor of DF as of strength for PL
  - Entitles trier of fact to be able to draw inference but doesn't require them to draw inference

#### **Byrne v Boadle:**

**Ratio:** Res Ipsa Loquitur – the injury is evidence of the negligence

- Barrel rolled out of an attic and struck a passerby injuring his shoulder
- Couldn't prove negligence directly, but on a balance of probabilities there was responsibility for negligence
- Res Ipsa Loquitur

#### **Fontaine v British Columbia (Official Administrator of):**

- Res ipsa loquitur is no longer good law – circumstantial evidence will be treated as supporting a reasonable inference if it convinces the trier of fact on a balance of probabilities.
- Now we let the trier of fact determine what importance or relevance the circumstantial evidence has. They just weigh direct and circumstantial evidence. Whether that is different than what happened when they used the Latin maxim is arguable. We don't label it with the maxim anymore but it's basically similar.

#### **Shifting the Onus of Proof**

- A legal rule says finding of a fact can lead to the existence of a presumed fact

- Presumption can sometimes be rebutted (if it can be rebuttable by law) → as long as the other party presents evidence to the contrary it can be rebuttable
  - Ex. Statute: *Traffic Safety Act* (TSA)
    - S 185: If DF breached the TSA, onus is on the DF to prove that the breach of TSA didn't cause injury to the PL
    - S 186: When a driver hits a pedestrian, then onus of proof lies with the driver (even if the motor vehicle operation did NOT contravene the TSA). Pedestrian may have a concussion and not remember what happened, no idea what was happening in car.
  - Ex: Common Law: What if the PL has no direct evidence as to how or why the incident occurred?
    - **Presumption of negligence when injury of passenger on public transport (*Nice v Doe*)**

## Topic 7: Causation

- An expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury of the victim in order to justify compensation of the latter out of the pocket of the former (*Snell v Farrell*)
  - Element that P has to prove: a connection btw D's negligence and the injury
  - Causation = purely factual inquiry
- Whether the D's conduct caused P's loss?
- The Standard Test: "But for" Test
- Exceptional: Material Contribution test

### BUT FOR TEST

- **Cause in Fact:** But for DF's negligent conduct, would the PL's loss have occurred?
  - Not enough to show that the DF's negligence was a POSSIBLE cause. Has to be a legitimate cause (not just that the actions COULD HAVE caused the loss, but that they DID CAUSE the loss)
  - Could be more than one cause though
  - Necessary cause vs sufficient cause
  - DF's conduct doesn't have to be entire reason of outcome, but must be necessary to outcome
  - If the damage would have happened anyways, D is not guilty
  - Ex. *Matthews v Maclaren*: D was relieved of liability w/ respect to a passenger who died as a result of falling into cold water from D's boat, since it could not be established that D's negligent rescue attempt was a factual cause of the death
    - He may have died of shock
    - If it could have been shown that a reasonably conducted rescue probably would have saved the deceased = causal connection

### Robust and pragmatic approach to the "BUT FOR" test

- Flexible causation test where **causation does not have to be determined by scientific precision**
  - Burden of proof remains with the plaintiff, but in some circumstances **an inference of causation may be drawn from the evidence without positive scientific proof** (scientific proof requires 95%+ certainty, but courts only need BOP)
- Relevant in cases of factual uncertainty
  - **Where the PL can prove he was injured due to the negligence of either of the two DFs but cannot prove which one actually caused him the injury, then both should be held liable (*Cook v Lewis*)**

### *Snell v Farrell*:

- P has to prove that D created a risk that the injury would occur and the injury did occur = justifies an inference that D's conduct caused P's loss.

### Material Contribution Test

- ONLY USED WHEN MORE THAN 1 TORTFEASORS WHO WERE NEGLIGENT AND THEREFORE BUT FOR TEST CAN'T BE APPLIED

### Material Contribution Test (legal test, not factual one):

- Courts recognize that causation is established where D's negligence materially contributed to the occurrence of the injury (*Major J in Athey*)
- SCC doesn't want lower courts to use this test often, but only in exceptional circumstances:
  - Available when impossible for PL to show injury based on "but for test" (D's could point blame at each other)
  - "But for test" impossible to use when
    - 1) There are 2 or more tortfeasors and can't be determined which caused damage

- 2) All of whom act negligently
- 3) And all of whom exposed the PL to an unreasonable risk of injury
  - Material contribution test can be involved if two requirements met: (In exceptional circumstances)
- 1. Must be impossible for P to prove that D's negligence caused the P's injury using But for Test (due to factors outside of P's control)
- 2. Clear that D breached a duty of care owed to P, exposing P to unreasonable risk and P must have suffered from injury.
  - Example situation (2 shots fired at P from 2 culpable Ds, impossible to say which shot injured him)
  - If these two conditions are met "liability may be imposed, bc it would offend basic notions of fairness and justice to deny liability by applying the "but for" approach

#### **Athey v Leonati:**

- Take the victim as you find them (thin skull rule applies). If you are a necessary cause, you are liable. You don't have to be a sufficient cause. Necessary is enough. DF is liable for injury even if there were pre-existing contributing causes.
- General Principles in tort to issues of causation
  - 1. But For Test, on BoP, is general test for causation
  - 2. But For test does not require that D's negligence be the only condition necessary to cause the P's injury →
    - Ds whose acts were necessary parts of causal consequence, subject to remoteness, will be fully liable for injuries
    - Where other causes were non-tortious = D's will bear the entire burden
    - Where other causes were tortious = apportionment btw ds
    - Where other cause was D's fault = contributory negligence
  - 3. D's only liable for injuries that were caused by their negligent acts (look to proximity + remoteness)
  - 4. Thin Skull Rule: D is liable for full extent of P's injuries, even if they are more serious due to pre-existing susceptibility or vulnerability of P. (Question of legal cause, not factual cause)
  - 5. Crumbling skull scenario: D is liable only for injuries and losses that p suffered as a result of D's negligence. If P would have suffered same consequences anyways, due to degenerative process that might have caused them, = taken into consideration

#### **Resurface Corp v Hanke:**

Material contribution only used where it's impossible to prove causation for factors beyond PL's control

- But For test is the standard test, **material contribution test is only to be used in exceptional cases where it's impossible to prove causation due to factors beyond P's control and there was a breach of duty and standard of care**
- That absent special circumstances, the plaintiff must establish on the balance of probabilities that the injury would not have occurred but for the negligence of the defendant

#### **Clements v Clements:**

- Looked at when material contribution test is valid – not valid here because there was only one tortfeasor, not multiple
- But for test used in most situations

#### **Ediger v Johnston:**

- Use the "BUT FOR" test
- Faced with conflicting evidence of causation, TJ must weigh evidence to determine if balance of probabilities met.
- Scientific certainty not required. TJ has right to draw inference. Even if there are other possible reasons, TJ still open to draw inference. TJ not required to give all expert evidence the same weight.

#### **Fullowka v Pinkerton's of Canada:**

- CA found that TJ made 2 errors in his analysis of causation: he applied wrong legal test for causation and wrongly considered the conduct of the co-defendants collectively rather than individually
- The but for standard should have been, but was not applied by TJ
- Neither Pinkerton nor the gov breach its duty of care towards the murdered workers

### **Factual Uncertainty**

- Its unclear what exactly led to the particular outcome
- Expert evidence: their standard of proof is higher, Judges make decision based on lower standard of certainty

#### **Snell v Farrell (258)**

- Few possible reasons that could have happened to result in outcome

- We knew physician was negligent for carrying on with procedure
- Uncertain because could have been other factors
- Allows inference of cause to be drawn even where there is no scientific evidence or other probative evidence of a probable connection btw negligence and injury, → is in effect to accept the principle of McGhee

#### **Cook v Lewis:**

Snell Case: A plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where

- a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and
- b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

Due to the situation that each defendant can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused the plaintiff's injury.

- Both parties must be held liable as they were both negligent in firing shots (alternative liability → where at least one DF caused the harm)
- Rand: Burden must shift to DFs to prove who did it. If neither had proof then they are both equally liable, however onus is on each DF to show the other one did it. This is fairer because the DFs have a better idea of what happened than the PL.

#### **McGhee v National Coal Board:**

- D's negligence caused the P's injury by materially increasing the risk that the injury would occur
- Facts: P employed at D's brick works and contracted dermatitis.
  - Argued that failure to provide washing facilities was negligent, unable to show on BoP this was necessary factor in Dermatitis, could have happened anyways since he worked all day covered in dust
  - Evidence that lack of washing facilities materially increased the risk of the P contracting dermatitis

#### **Fairchild v Glenhaven Funeral Services:**

- Material contribution test when liability is evident, but uncertain
- When all DF's can point at each other to blame (and it has to be one or more of them), the onus then shifts to them to prove who is at fault, else they all are
- Employers negligently exposed employees to asbestos, and now they have cancer caused by asbestos.
- Employers owed a duty of care to employees not to expose them to asbestos dust at work = breached duty
- Exposure occurred only at work, and mesothelioma could not have been caused as a result of non-work exposure
- CA: They can't be successful because they can't establish causation, bc did not know which employer asbestos came from
- House of Lords: In situations like this, we can apply the material contribution standard and make all the employers responsible. It should not be the P's problem to bare the entire loss bc each D can point fingers at the other
- Courts flexing rules = difficult to draw clear boundaries when it is okay to make changes, must be precise

#### **Sindell v Abbott Labs:**

- Class Action claim brought by women who had mothers who ingested drug called DES while pregnant. Advertised as being able to prevent miscarriage.
- Caused serious cancer in reproductive organs of daughters who were exposed to the drug, when they were adults.
- Unable to know which manufacturer of DES their mom purchased from
- Market share liability when impossible to prove x manufacturer was the one who caused the injury, but they were a part of it
- A P injured by a drug of unknown source can recover against known manufacturers of the drug under the market share theory
- P must bring before the court Ds representing a "substantial share" of the market. A D is dismissed from the case if it can prove that it did not produce the drug taken by the P. Each of the remaining Ds is severally liable for only that portion of the P's damages that corresponds to the percentage of its share of the market.
- When a particular class of defendants can be identified as being responsible for an injury, but the specific party that caused the injury cannot be determined, then all of the defendants must share liability for the damages proportionally to the probability that they caused the injury.

### **Topic 8: Remoteness**

- Duty owed, duty breached (standard of care not met), causation was present and now we're asking whether the DF should be responsible for the entire picture of the loss suffered by the P? Where do we draw the line?
- Trying to balance accountability and an unreasonable burden

- Used to limit D liability where D act is far removed from P injury
- Remoteness only an issue after Doc, SoC, causation and legally recognized loss have been made out

### Test for Remoteness:

- **FORESEEABILITY:** was the INJURY foreseeable?
  - Depends on how question is framed:
    - Narrow – was it foreseeable that that specific injury in that specific circumstance would occur?
    - Broad – was it foreseeable that that an injury would occur?
  - **Foreseeing the manner and full extent in which the injury occurs is not necessary b/c the type of injury was foreseeable (*Hughes v Lord Advocate*)**
  - **Doesn't matter if you couldn't foresee extent of injury as long as it's foreseeable that some type of injury of this type would result (*Smith v Leech Brain*)**
  - Reasonable foreseeability (*Wagon Mound*)– has to be foreseeable that an injury of a certain type would occur
    - Has to be more than possible (every injury that's ever happened is thus possible)
    - Has to be a real risk that wouldn't be brushed aside as trivial o
  - Subjective/objective nature of inquiry
- **DIRECTNESS**
  - Decision in *Re Polemis* = directness test → bad law = defendant was responsible for all consequences of his act, whether foreseeable or not
- **REMOTENESS**

### *Overseas Tankship Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No. 1):*

- Recognized foreseeability in test of remoteness not directness

### Thin Skull Rule and Foreseeability (in Remoteness):

- Thin skull rule and foreseeability can co-exist. Even if injuries to PL are more severe than was reasonably foreseeable, the D is still liable
- 1. Initial threshold step: PL wouldn't have to show that anyone would have same degree of injury, but that a person of ordinary fortitude would foreseeably suffer in these circumstances
- 2. Then thin skull rule can apply
  - Issue comes down to: **whether TYPE of injury was foreseeable, then thin skull rule allows them to recover full extent even if that full extent was not reasonably foreseeable.**
- ***Smith v Leech Brain & Co*:** Remoteness doesn't negate thin skull rule; if the type of injury was foreseeable, then recovery, even if there was a pre-existing condition which made it worse, is not precluded
  - Thin skull rule does not preclude a finding that the cause was too remote. If the type of initial injury was foreseeable, then the resultant harm must be bundled into the analysis – however, the amount to which the negligence caused that injury will be dealt with in damages (here, a burn caused a cancer, but the cancer wouldn't have developed had the plaintiff not worked in a gas works plant before)

### Crumbling-Skull Rule

- Recognizes the pre-existing condition of the PL. A DF is liable for the injuries caused even if they are extreme, but need not compensate the PL for the debilitating effects of pre-existing conditions that the PL would have suffered from anyway. HOWEVER – accelerating a condition that the PL would have suffered from anyway is actionable.

### *Hughes v Lord Advocate*:

As long as the general type of injury can be foreseen [a burn, in this case] there will be proximate cause (Is this kind of injury reasonable foreseeable?)

- Doesn't have to be manner or extent

### *Mustapha v Culligan of Canada*:

- Reasonable foreseeability test for mental distress: (1) probable, (2) objective, → damage too remote if breach would not have resulted in psychiatric harm of reasonable person

## Intervening Forces

*Novus Actus Interveniens*: Whether or not, when a third party acts to exacerbate or increase the degree of injury, whether the D will be responsible for full extent or third party action breaks chain of action?

Is DF's liability affected when some else's act intervenes between the defendant's negligent conduct and the PL's injury?

Does the intervening act sever the chain of causation?

### **Bradford v Kanellos:**

Do intervening events sever the causal chain? – THEY CAN

- Injuries resulted from hysterical conduct of a customer which occurred when the safety appliance properly fulfilled its function. Was it fairly to be regarded as within the risk created by the restaurant operator's negligence in permitting grease to build up? → on balance of probabilities, unlikely
- **If there is an intervening act that separates the act of negligence from the injury, there is more remoteness. Depending on the degree, it may sink a claim**

**What are some factors that influence judicial decision making in remoteness?**

- Seriousness of injury
- Burden on defendant if liable
- Relationship of plaintiff and defendant
- Type / severity of injury
- Degree of negligence

**Canada's Position:** If PL reasonably seeks medical help for injury caused by DF. And if the medical care makes it worse then DF is liable for a mistake of medical team if it wasn't negligent. If the care of medical team was negligent then it would stop chain of DF's liability. He is reasonable for everything up until negligent care. Theory is that medical team may make mistakes, but if it rises to negligence then it's less foreseeable and shouldn't be DF's responsibility.

**Dr. causes by treatment a worsening of the Plaintiff condition**

- If treatment an error DF liable for all damage and then it would be up to the DF to try and recover from the Dr. by bringing him into the action as a 3rd party and trying to prove his negligence.

**Suicide**

- (1) If the injuries caused by the DF were such that they led to mental disturbance leading to suicide then the DF is liable (Not a Novus Actus).
- (2) If the injuries caused by the DF 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 DF is not liable.

### **Wright Estate v Davidson:**

- Suicide found to be intervening cause – questionable law
- If Injuries caused by the D led to mental disturbance leading to suicide → D liable
- If injuries caused by D did not lead to mental disturbance but a deliberate act of disturbed individual then it is a *novus actus* and D is not liable

### **Costello v Blakeson:**

- Suicide not found to be intervening cause, because court applies thin skull rule
- Court applies thin skull rule, this does not have to be reasonably foreseeable, must take victim as you find them
- Damages: Crumbling skull – D is liable only for the acceleration of the suicide attempt - given P's history it is likely that another suicide attempt would follow at some point. D sped this up.
- Note: Weird court thoughts: Giving money to survivors of suicide seems to condone suicide.

## **Policy and the "Instinctive Approach"**

- Imposing liability taking into consideration the circumstances of the D/P, the seriousness of the injury
- Should we have critical concerns to the approach to negligence law in general? What can we do about it?

### **Palgraf v Long Island Railroad:**

- Andrews J: When facts are bizarre/freakish
- TEST allows for judge to choose any outcome. They don't seem to have enough concrete substance to dictate a particular approach.

### **Lamb v London Borough of Camdem:**

- Reasonable foreseeability of damages is not enough in itself to justify awarding damages; courts must consider the public policy implications, or discover a more stringent standard to ensure that damage awards are logical.
- Judge applies instinctive feelings to issue of remoteness

## Topic 9: Defenses

When we analyze defenses to a negligence claim, we are shifting our attention from Defendant's conduct to Plaintiff's conduct

- Has the PL done something that might limit (or preclude) his/her recovery?

### Contributory Negligence

- Used to be full defence, now it's a question of apportionment (aka partial defence)
- Last clear chance rule: If the PL was the person with the last clear chance to avoid injuries = lose, if DF was last, then DF would lose. Whoever had the last clear chance to avoid the injury would be responsible. Allowed PL to collect even if they were negligent if the DF had the last chance to avoid injury
- Apportionment legislation applies to a situation of multiple tortfeasors (separate legislation in Alberta = *Tort Feasors Act*)
  - Legislation directs court to assess how responsible each party is.
  - NOTE: when dealing with multiple DF's on an exam, do not say other defendant's were contributory negligent! They are just negligent.

Does it make sense to have a defence of contributory negligence?

- Yes, b/c encourages PLs to take some responsibility for their own safety & would be unfair to DF to be responsible for the entire loss when PL contributed
- No, punishes injured PL & is an inefficient way to allocate accident losses

If the court decides that PL was contributorily negligent, it must apportion damages between the plaintiff and defendant, per the *Contributory Negligence Act*. Apportionment is based on **comparative blameworthiness** rather than causation (based on *Heller v Martens*), and the court considers factors such as the following (which are outlined in *Heller v Martens*): the nature of the duty owed; the number of acts of fault or negligence; the timing of the acts of fault (the idea being that the party who first commits a negligent act will usually be more at fault); the character of the conduct in question (inadvertent vs deliberate breaches); and the extent to which the conduct breaches statutory requirements.

### Test → What Must DF Establish:

- PL was negligent (has a duty to look out for their own safety)
- That negligence contributed to injury suffered to him

### Analysis

- **Stage 1: Was PL negligent?**
  - Standard of Care question (duty of care already established because we all have a duty to look out for ourselves)
- **Stage 2: Whether PL's negligence contributed to the injury?**

### Apportioning liability:

- **Relative Comparative Blameworthiness** approach. How to determine it:
  - How many acts of negligence were involved on each person?
  - What was the timing? First person usually bears more fault
  - What conduct was involved? To what extent does it breach statutory requirement? → Statutory requirements not determinative but instructive
  - What is to be considered?
    - Nature of duty owed by defendant?
    - Number of acts of fault/negligence
    - Timing of various acts of fault
    - Nature of the conduct
    - Extent to which statutory requirements are breached
  - There is no cap on PL contributory negligence
  - What happens is court can NOT figure out based on the facts how to allocate blameworthiness?
    - They have to allocate 50/50% liability (**Contributory Negligence Act**)
- **Causation Approach**

### Contributory Negligence Act RSA 2000

- Last clear chance rule abolished
- Liability for damages is in proportion to which you're responsible for. If the court cannot decide on apportionment of liability they are equally liable (50%-50%)

- Questions of fact: amount of damage or loss, the fault (if any), the degree of fault
- If someone not named in the claim is found to be wholly or partially at fault, they can be added to the claim

### Seatbelts

- Generally, you will be contributorily negligent for not wearing seatbelt
- Usually 5-25% to a PL who wasn't wearing a seat belt depending on the facts
- Exception:
  - Not enough seatbelts for teenagers in the vehicle, car rolled over. DF argued she was contributorily negligent for not wearing seatbelt. Court held that in this context it was not negligent because it was late, had no other option to get home. Not conclusive that you are negligent if you don't wear a seatbelt.

### Medical Malpractice starts to see contributory negligence for patients

- Person should've listened to doctor's advice (ex: shouldn't smoke after medical procedure)
- Cases of pregnant women failing to follow up on doctor's visits

### Voluntary Assumption of Risk (Volenti non fit injuria)

- Complete defence
- Voluntary Assumption of Risk = **Assumption of the PHYSICAL risk + LEGAL Risk** (both need to be present)
  - Legal = right to sue
  - Difficult to prove waving of legal risk
- Tension: court wants to compensate P, but where VAR is clear courts want to give effect to parties' intentions.
- **Agreements**
  - DF must prove PL agreed to exempt DF from liability.
  - To be effective: must clearly describe the risk involved; can be written or oral, express or implied
    - Note: a written agreement is evidence, not prima facie proof
    - When can implied be used? Sports
- **DF argues that the PL had knowledge of the risk of injury or the willingness to take the risk are not enough, express or implied agreement to waive a claim for the injury is needed**
- "Willing Passenger" cases (initially found to be implied agreement → no longer good law)
  - In the past, this was seen as an assumption of risk if you knew the driver consumed alcohol and voluntarily got in the car. Today → not enough to just get into the car to show voluntary risk, courts would apply contributory negligence.
- Waivers of Liability
  - Must be made aware of waiver, drawn to your attention, and you understand what you are signing.
- Why is this less attractive than contributory negligence?
  - It's a full defence so rules out any recovery. No apportionment. PL gets nothing. Even though there is a negligent DF.

### Illegality

- *Ex turpi causes non oritur action* = from turpitude no cause of action can arise
- Courts not prepared to enforce tort duty that arises from illegal action → ensures judicial process is not undermined
- Complete defence
- Can be raised by courts own motion, even if DF does not bring it up
- Examples:
  - *BC v Zastowny*
    - Was a criminal, in prison, he got abused in prison and when he came out he committed crimes because of abuse, and got send back to jail again → causation established. So then he claimed for lost wages for being in jail → court said no way! Principles of criminal law are punishment, retribution, we don't want to clash principles of criminal and civil law
    - One cannot be compensated for a lawfully given prison sentence because it would create conflict within the branches of the law and negate the punishment given by the criminal courts.
  - Can't inherit if you murder your parents

**Hall v Hebert** [Defence of illegality applies only to purely profit driven criminal activities]

**Facts:** 2 young men drink and drive. Both tried to jump the car, when they lost the keys. Non-owner tried, but lost control and car flipped. Friend discovered he had a head injury as a result, sues car owner.

**Issue:** Do they get compensation?

**Decision:** SCC on appeal ends defense of illegality for personal injuries, now applies only to purely profit driven activities (drug dealer)

**Reason:**

- No question that PL is profiting. Money aimed at way of compensating.
- When would this be applicable:
  - Someone is trying to avoid criminal penalty by getting money from courts in negligence claim. I.e. Cannot sue fellow bank robber.
- PL should not be denied damages for his injuries, will be punished separately for illegally driving drunk

**Ratio:** PL gets compensation for personal injury because it is separate from illegality of driving. The fact that he was doing something illegal before, does not bar him from getting compensation.

## Limitation Periods

- Limitations Act is a defence, on onus of DF to raise it
- If you fail to bring the claim within the time allowed, it is time barred and defeated
  - Reasons:
    - Evidentiary problem
    - Business should be able to carry on affairs and no longer threat exists
    - Must look at issue in terms of law at the time of act → threat of bringing bad law into present times

### Why do we have limitation periods?

- **Quality of evidence that can be brought**
  - Evidentiary rush. The evidence won't be as high quality if you wait 20-30 years. Witnesses memories will be affected. Witnesses dying or moving. Documents no longer being kept or available.
- **Length of Time**
  - DF should not have threat of litigation hanging over their head indefinitely
- **Efficiency**
  - DF's being able to make business decision without future claims.
- Harder as time goes by for the court to apply standards that were in place at the relevant time the incident happened as opposed to more modern standards

### Where do we find limitation periods?

- Generally in the *Limitations Act* (first place you want to look) but not always there
- Some statutes have specific limitation periods specific to certain kind of conduct or DF
  - *Municipal Gov't Act* usually have much shorter limitation periods for things like slipping on a sidewalk

### Start Dates:

- Contracts: The date the contract was entered into is the starting date
- Negligence: Date on which cause of action arose (vague, gives flexibility). Limitation period starts to run on the day the claim arose. What does that mean?
  - Date of car accident or some other time frame that is vaguely imbedded
  - In negligence law there is no claim until there's an injury
- Discoverability: Limitation period starts to run when PL became aware or ought to have become aware of fact that they suffered injury/had a claim
  - I.e. Car injury, or poor building takes a couple years, or lawyer drafting will negligently wont become apparent until testators death. Engineering work on a structure in 2010. Doesn't become apparent that something is wrong until 2015.
  - Appreciate risk of evidentiary problems, or creating longstanding threat of liability BUT adopts approach that aids lesser of two evils
- Example: *Manitoba Medical Act*
  - Medical Malpractice liability of physicians: Action must be commenced within two years from the date when those professional services terminated.
  - 2 years from the date of the last service for the issue

Note: Sometimes courts can use discoverability, sometimes statute does not permit it as above

\*\*In a case with a clear limitations issue, you'd file for summary judgment. If it's less clear, court may require additional process. If it's clear that it has passed you won't even make it to trial

### \*\*Sexual Assault: Getting Rid of Limited Period

- Even if there's no statute what would limit people? Witnesses moving away/losing track of them, DNA evidence

degrading, other evidence degrading, DF may not be able to satisfy judgment (lack of money, or insurance) so even if PL wins they may not be able to get the pay out

### Alberta Limitations Act

- **2 years from day in which PL discovered/ought to have discovered the loss (General Limitation Period)**
- **10 years ultimate limitations period even if you couldn't have been aware of the loss within those 10 years (Ultimate Limitation Period)**
  - S3(1)(b): 10 year period starts when the claim arises. If there's a series of breaches then it's when the last one occurred. If one, then when conduct occurs. Could happen before discoverability.
- When does the limitation period start to run (in the case of the usual 2 year period)?
  - When the PL either discovers or should have discovered that he/she was injured by the PL and could have a claim
- When does the limitation period start to run in the 10 year ultimate limitation period?
  - When breach of duty occurred
- Car crash May 1 2015. PL badly injured. When does limitation start running? Right when it happens.
- What if you have immediate injury and one that shows up later?
  - Arguably knew of claim day off. You just have to file within two years. It won't be heard immediately. Can include further damages later on.

**Section 3 (1)(a)** → If a claimant does not seek a remedial order within **2 years** after the date on which the claimant first knew, or in the circumstances ought to have known, i) that the injury had occurred ii) that the injury was attributable to conduct of the DF and iii) that the injury, assuming liability on the part of the DF, warrants bringing a proceeding.

**Section 3 (1)(b)** → or **10 years** after the claim arose (10 year maximum!)

- Concern over having a 10-year limitation period for adults, then justifying inconsistency of time given to minor.
  - Minor's ability to pursue claim against parents vs. lack of evidence
  - **Policy rationale for having ultimate 10 years limitation**

### Exceptions:

#### Disabled persons

- Someone who is a dependent adult or adult w/ a court decision that they don't have capacity or unable to make reasonable judgments in regards to a claim
- Limitations period does NOT run while the person is under that disability
- S 5 suspended for people with disabilities

**Section 5(1)** → The operation of the limitation periods is suspended during any period of time when claimant is under disability. **(2)** Claimant has burden of proving that the operation of the limitation periods was suspended under this section

- For people who suffer from permanent mental disorder, limitation act is "suspended" for their entire life.

#### Minors

- S 5(1): Limitations period is suspended until minor reaches age of majority (doesn't run)
  - Someone abused by parents as a child. Doesn't discover till they're 20. Once you reach age of majority limitation runs. So runs at 18 (Child has till they turn 28).
  - But also gives ways for DF to start clock early. Such as giving notice and judicial involvement exc. Point is DF can take action to get the time to run
- 10 years ultimate limitation doesn't apply to the minors

**Section 5.1(2)** → Operation of limitation periods is suspending during period when claimant is a minor

- Minor needs "guardian" to litigate with. Litigation may be against parents. = conflict.

## Topic 10: Damages

Assessment of damages happens at the end of a case

- PL has obligation to prove they have suffered a loss in order to get damages. They must also prove quantum. Loss and quantum must be proven on a BOP.
- Damages are awarded as **lump sum**. Difficult assessments of inflation, interest rates, and PL's future needs all have to be estimated. Guess work on behalf of court – we can't go back and re-assess after damages are given. If there has been a mistake, there is NO going back.

**Principle of Mitigation** – PLs have obligation to take reasonable steps to attempt to minimize their losses. If by attempting to mitigate losses with reasonable steps the PL make their injuries worse those too will be compensable. If they successfully mitigate then these avoided losses are not recoverable to the PL.

- PL cannot simply let losses accrue if there's reasonable steps they could have taken to help
- If PL has to incur an expense in order to minimize their losses, court will recognize that and award that amount back to PL
- If PL manages to avoid some amount of loss then they can't claim for the amount they avoided
- Ex: PL had injury to his back. Was informed if he had surgery he would have a 70-75% of being better and going back to work. 10% chance it wouldn't work. 1% of being bad and paralyzed. And 0.1% of dying. PL refused the surgery and DF said it was a failure to mitigate. Court agreed.

**“Set-off” Parallel Expenditures**

- The DF is entitled to set-off parallel expenditures. Example: If PL is claiming the full cost of nursing care the DF can attempt to prove that this should not include expenses they would have incurred anyway had they not suffered the loss
- DF has to show expenditures are parallel
- Ex. If PL is claiming full cost of residential care in a nursing home and that care includes food expenses. Then DF may want to set off the cost for food needs. The DF who wants to set off expenses has to show that there are parallel expenses and how to quantify.

**Heads of Damages**

<b>Nominal</b>	<ul style="list-style-type: none"> <li>• Function is to vindicate a claim</li> <li>• There is a legitimate claim, DF acted in a way that caused harm but court doesn't think you need compensatory damages because harm was minimal. Court awards a small amount to recognize harm done.</li> <li>• Actionable without proof of damage. Ex: Trespass claims. Court is recognizing the legal wrong, but there are no damages to compensate (Unusual to sue for this bc of litigation expenses)</li> </ul>
<b>Compensatory</b>	<ul style="list-style-type: none"> <li>• Function is to compensate PL's loss (personal injury or property)</li> <li>• Aim is to do the best you can to restore PL to original condition</li> <li>• Return the PL to the position they would have been in had the wrong not been done, compensate for the loss suffered</li> </ul>
<b>Aggravated/ Exemplary</b>	<ul style="list-style-type: none"> <li>• Rare. Awarded to reflect PL loss as result of DF conduct.</li> <li>• Example: humiliation by DF conduct</li> </ul>
<b>Punitive</b>	<ul style="list-style-type: none"> <li>• Rare: Not compensatory. Meant to punish the DF for their “outrageous” behavior. Amounts to a fine payable to PL</li> </ul>
<b>Special</b>	<ul style="list-style-type: none"> <li>• Capable of precise quantification at time of trial. Compensate for things already occurred</li> <li>• Compensate the claimant for the quantifiable monetary losses suffered by the PL.</li> <li>• Ex. Out of pocket expenses, missed work, travel, extra costs, repair or replacement of damaged property, lost earnings (must be specifically outlined in the claim)</li> </ul>
<b>General</b>	<ul style="list-style-type: none"> <li>• Compensate the claimant for the non-monetary aspects of the specific harm suffered. This is usually termed 'pain, suffering and loss of amenity'. Examples of this include physical or emotional pain and suffering, loss of enjoyment of life</li> <li>• When dealing with general damages, we take non-pecuniary damages as one separate thing, and pecuniary damages are dealt with separately</li> </ul>
<b>Pecuniary</b>	<ul style="list-style-type: none"> <li>• Fully compensate PL, put in position they would have been before</li> <li>• Can be used similarly to Special Damages</li> <li>• Monetary losses: Capable of being quantified with a fair degree of accuracy (loss of income etc)</li> <li>• Example: Lost earnings/capacity, future personal care, repair costs, disability equipment</li> </ul>
<b>Non-Pecuniary</b>	<ul style="list-style-type: none"> <li>• Non-Monetary (can be used similarly to general damages)</li> <li>• Not fully compensate, but moderately compensate</li> <li>• Not readily quantified or asses; happen in the future, no exact dollar amount</li> <li>• Examples Humiliation, loss of enjoyment of life, loss of life expectancy, pain &amp; suffering</li> </ul>

**Compensatory Damages for Personal Injury**

*Andrews v Grand & Toy Alberta*

**Facts:** PL injured by DF while on motorcycle. PL became quad, but was 25% contributorily negligent. At trial he was awarded 1 million, this was reduced to 0.5 million on appeal. PL appeals to SCC.

**Issue:** What was PL able to claim for future case costs?

PL argued that he wanted to live at home and experts testified this would be best. DF argued this was excessively expensive and CA agreed.

- SCC restored the trial award. SCC said the 1 million was reasonable; the focus should be on the needs of PL, not sympathy for PL or fears of expense for DF.

**\*Remember: Pecuniary Damages:** Monetary Damages that can be reasonably quantified.

- Examples: lost money, lost earnings/capacity, future care costs, medical bills, repair costs, disability equipment.

**Pecuniary Loss: Future Care**

- Attempt is to fully compensate PL by giving them the amount they need
- **Future care cost award** – calculated in such way that ideally it should be 0 by the time the P dies
- We do not look to mitigation where to do so would lead to a substantial reduction of quality of life – within reason
- Mitigation does not mean the PL needs to accept the cheapest option for care
  - What a PL chooses to do with the money he is awarded is of no concern to the courts – he'd have the option to spend it as he saw fit had he not been injured
  - **Full compensation is the paramount concern of the courts in severe personal injury cases**

**Issue:** PL wants to live at home. SCC agrees that consideration of “extra” expense of living at home to the DF should not be the focus, should be needs of PL.

**To Assess 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.
  - a. Can be +/- . What additional injuries can be expected? Will they improve? PL can live longer/shorter than expected. PL may recover
4. Capitalization rate
5. Gross-up for taxes. The income on awards is taxable although the award itself is not.

Difference btw future case costs award = diminishing fund, that will be at point when P dies.

Loss of Earning Capacity = Courts attempt to reflect that loss with damages award

**Pecuniary Loss: Loss of Earning Capacity**

Capital asset, loss of ability to earn income → damages award aimed at compensating that loss

**How to Assess:**

1. Determine the earnings that 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. Grossing Up/Capitalization Rate: take into account what person will earn on investment, account for inflation
5. Tax Consequences are ignored.

Additional Things To Consider	
<b>Guessing Future Income</b>	<ul style="list-style-type: none"> <li>• How long would they have been able to work until retiring with full pension? (Dependent on age, occupation exc)</li> <li>• If working life expectancy is lower because of injury, that's factored in</li> <li>• Take what he earned before and subtract what they can earn now and that's the amount lost</li> <li>• Look at net income not gross income since it has already covered prior needs</li> <li>• Must show how much PL was earning pre-accident, how much they would have been able to make through working life, how long they'd be able to work, how likely is it that they will have uninterrupted work life</li> </ul>
<b>Contingencies</b>	<ul style="list-style-type: none"> <li>• <b>Positive</b> <ul style="list-style-type: none"> <li>○ What if person would've been a rockstar at their job and earned more than expected?</li> <li>○ What if salaries increase in a way not predictable at this time?</li> </ul> </li> <li>• <b>Negative</b> <ul style="list-style-type: none"> <li>○ What if person gets laid off, potential periods of unemployment, what is their job because extinct due to technology, forced early retirement, would they have developed some disability anyways</li> </ul> </li> <li>• If PL was employed in workforce and had significant role in the home (cleaning, cooking, exc)</li> </ul>

	they can be compensated for that loss
<b>Grossing Up</b>	Taxation → any money invested will earn income and then tax will have to be paid on that income so they try to neutralize that tax. Return and inflation. <ul style="list-style-type: none"> <li>Loss of earning capacity is not “grossed up” for taxes because idea behind it is that you’re not asking for damages to make up for earning but a capital asset for your capacity</li> </ul>
<b>Gender Wage Gap</b>	Court will apply the female numbers/expectations even if they are different <ul style="list-style-type: none"> <li>In <i>McCabe</i> CA overturned trial’s decision not to impose difference</li> </ul>

**Issue: What if PL is child who hasn’t worked yet? How do you determine their prospects?**

- Look at family (if parents have university degrees), what parents do for work, expectations of parents, average intelligence of the child → horrible things to do in a damage assessment
- If it’s an adolescent and they have expressed a preference for a particular career, it may affect things. But if it’s a 5 year old who wants to be a doctor today and a cop tomorrow then no effect. But like a 16 year old wanting to be a nurse may.
- Drawback: Can be bad in situations like me. Parents both blue collar, no post secondary yet you’re in law school. If I were the kid as a PL, I’d get screwed over in damages

**Non-Pecuniary Loss**

- Non-monetary, difficult to quantify
  - Examples: Humiliation, embarrassment, disfigurement, loss of enjoyment of life, loss of life expectancy, pain & suffering.
- Andrews* held use of Functional Approach: Aim is to provide reasonable solace for misfortune, to make life more endurable (*Andrews* sets cap on those damages)
- Place upper limit on non-pecuniary losses (“capped” it) because cap was needed to be implemented as costs were constantly rising
  - Can ask for money for a financial planner
- Andrews*: \$100,000; in 2017 its \$360,000 (max is reserved for most serious injuries)
  - People can only claim up to that max cap. People whose life is turned upside down forever that have suffered substantial pain and suffering with a decreased life expectancy and someone who cannot enjoy life to the same extent as they did before are the ones who get more money
- Another method sometimes used, if PL and DF agree, you can have some of your sum done as a structured settlement. Fairly safe investment.

**\*\*Depression:** Could be pecuniary or non-pecuniary. PL can establish the costs (doctor’s visits, medications, exc) and how much it will cost to mitigate. And could show their ability to enjoy life has been diminished (non-pecuniary)

**Assessing Non-Pecuniary Damages:**

- Courts look at how serious injuries are, how they affect PL’s ability to enjoy life in the future, what’s the need in the situation for \$ award that PL can enjoy some of the life.
- Court isn’t supposed to take into account the ability of the DF to pay. But what happens when they can’t pay? Various ways to enforce. Say some comes from insurance but rest is due from DF. And you’ve attempted enforcement and garnishing wages exc then PL doesn’t get the money. You can’t get blood from a stone. There may come a point where there is no money to be had.

**Collateral Benefits**

- Received by PL from a 3<sup>rd</sup> party as a result of the accident to offset PL’s losses in some way
- Government disability, charity, family, 1<sup>st</sup> party insurance, employee benefits – how do we treat these?
- What are the advantages to keeping them?
  - Simple
  - Makes full compensation more likely
  - Ensures the DF is held fully responsible
  - To not do so would seem to penalize the person who is prudent
- Disadvantages?
  - Don’t want to overcompensate

**Nelson: Only have to worry about this in context of auto insurance claims**

**3 Approaches**

<b>Accumulation Approach</b>	PL recovers full damages from DF and keeps all other payments too. The PL is overcompensated, but often the collateral benefits are things the PL contributed to/paid premium for
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	<ul style="list-style-type: none"> <li>• Pro: (1) Less complex. (2) If people paid into a life insurance policy, why not allow them to benefit from it. Not fair to let the DF benefit from the PL's risk adversity. If our concern is compensation, then this is better because at least we know we're not undercompensating</li> <li>• Con: Worry that PL is recovering twice for the same loss</li> </ul>
<b>Deduction Approach</b>	<p>Value of collateral benefit is deducted. The DF is then liable for only the "net loss" of the PL</p> <ul style="list-style-type: none"> <li>• Pro: Point isn't to punish DF, we're trying to compensate PL. So if the PL has what they need then maybe we shouldn't be that worried.</li> <li>• Con: (1) Letting the DF off the hook to an extent because they happened to be the lucky person who injured someone that had taken care of the possibilities of life's risks. (2) Where there has been a trade off, like PL has paid insurance thus taking a hit to their income, then the court may make the exception to allow PL to keep benefits. But if it's gratuitous, PL hasn't provided consideration then they haven't suffered a loss. If they took a month off work but employer kept paying them, they haven't lost anything so why should we make DF pay.</li> </ul>
<b>Subrogation Approach</b>	<p>PL receives one payment. The DF reimburses the collateral source. The fund receives a kind of windfall PL gets the benefits but that party who paid them (ex: the insurer) is paid back (right of subrogation)</p> <ul style="list-style-type: none"> <li>• When an insurance company reimburses PL pursuant to contract of insurance, the insurer is entitled to a subrogated claim. The Insurer can piggyback on PL's claim and they can also get paid back by DF too</li> <li>• Has no effect on DF. Insurer is paid back from total sum of damages awarded to PL.</li> </ul>

Key: Want to avoid the PL from collecting twice for the same loss – avoid Double Recovery

- Case where police officer has been paid full wages after he couldn't work, and is then claiming damages for lost wages. The court said DF would pay lost wage minus the amount that the police officer had been paid since the injury.
- Should disability benefits be treated as collateral damages? Or should the PL give it up? In this case, the Courts agreed that the employee gave consideration of a right for the disability benefits.
  - If PL has given up something in exchange for these benefits, the Court may allow PL to keep these benefits even though they are already compensated by DF?

**Insurance Act:** In motor vehicle accident there is an answer to what we do with collateral benefits. Collateral benefits to be deducted from damages. Deduct taxes, premiums, and contributions paid by PL.

- Decreases insurance premiums
- PL's aren't double dipping – getting compensation from both insurers
- Who benefits from this? Insurance companies. This means they will pay less in insurance proceeds.
- At common law, general approach, if you pay for the benefit you get to keep it.

### **“Minor Injures”**

**Insurance Act, RSA 2000** – reform

- Section 3 → We deduct collateral benefits in the case of automobile insurance.
- Section 4 → a) Subsection 3 includes medical, dental, disability, rehab b) medical care, accident and sickness benefits etc.
- In a case where an insurance company has paid benefits, they will not have the right to have a subrogated claim. Why? Because the court takes into account the amount the insurance paid and minuses it from the damages that DF owes, so effectively, the PL losses twice if insurance is then paid out for the amount they put into PL. This is a Statutory modification of the common law.
- Only in automobile insurance claims
- **We now deduct collateral benefits in automobile insurance claims**
  - Where insurance company has paid some benefits, takes away insurers right to make a subrogate claim.

### **Minor Injury Regulation AR 2004**

1(h) “minor injury”, in respect of an accident, means

“Sprain, strain, Wiplash Associated Disorder”

- Wiplash Associated Disorder is NOT minor when there is demonstrable clinically relevant neurological signs, a fracture to or a dislocation of the spine
- Note: Attempts to prevent P's exaggerating small injuries

Section 6 → the total amount recoverable for non-pecuniary loss for minor injuries is maximum \$4000.00. (Pain & suffering damages, loss of enjoyment of life)

- All non-pecuniary minor injuries capped at \$4000

- Note: Insurance companies would have to increase premiums to account for exurbanite non-pecuniary losses, if we had no cap on these.

Minor injuries (sprain, strain, WAD injury) tend to be overcompensated whereas large injuries tend to be undercompensated. Numbers are reviewed each year.

Since imposition of minor injuries cap. Insurance companies like it because it's administratively easier and it's easier to determine how much one gets. If you ask PLs and personal injury lawyers, it's not a good thing because insurance companies start from idea that if you haven't been hospitalized or have an obvious injury that they start with saying you have a minor injury and you have to argue that it's more serious. If there's disagreement between the parties, they can go to dispute resolution method and go to certified assessor.

- Benefits general people because less money paid out for these kinds of damages because our premiums should be lowered

Is it fair to cap non-pecuniary losses in the context of auto insurance, or as we do at common law?

- Common Law:
  - Cap on non-pecuniary losses generally is a common law decision by the supreme court, is that overstepping their boundary? Achieves social benefit.
  - In *Andrews*, The Cap is applied to the degree of injury, the courts said this is at the extreme end. There will be cases along the entire spectrum that will be taken into account.
- Statute:
  - In Minor injuries, legislature stepped in, because they were worried that most of the minor claims would be settled on what they could potentially get at trial. The quantum were often 3-4x the amount they should be. (ie. Sprain would be 12k)
    - This has impacted the amount that settling gets to now.
    - Has influenced people to not go to trial if they have suffered minor injuries and minor financial loss.
  - Detrimental to admin justice by taking up court rooms
  - Prevents people from exaggerating injuries

### Survival of Actions and Dependent's Claims for Wrongful Death or Injury

- Common Law: Death of PL terminated the action. Deceased's estate could not commence litigation and could not continue litigation that was started prior to death.
- This has been amended by statute, and now the estate and family can sue for wrongful death.
- Note: These claims are **derivative: The estate only has a claim if the PL would have had a claim.** Furthermore, any applicable defenses are still applicable here.

### Survival of Actions Act

Responsibilities of deceased's estate. Allows Estate to Bring a Claim or to maintain a claim that was commenced

- Varies province to province
- Allows estate to bring a claim or maintain a claim on behalf of a PL (deceased)
- Allows claim brought against individual to be maintained against estate (if deceased is DF). Claim doesn't vanish.
- Allows for the maintenance of the claim against a tortfeasor's estate if they also die.

**Section 5** → Damages that can be claimed are only those that result in actual financial losses by the deceased or the deceased's estate that you can recover (NO Non-Pecuniary Damages)

- **Not Compensable:** Punitive/exemplary damages, cannot earn loss of future earnings (recently removed through statutory reform), future earnings, ability to earn, chance of future earnings
- What if against the estate? Estate is DF. Can exemplary or punitive be awarded? Doesn't say. General sense is no. Purpose of punitive damages is to punish but how do you punish someone who's dead?
- Note: Not always the case that pecuniary damages are ruled out. Depends on the jurisdiction.

### Fatal Accidents Act [Allows family members to bring a claim]

- Allows claims by family members ("dependents") of deceased to make claims on their behalf
  - Would also allow "loss of future earning capacity" that PL had
- Can only bring a claim if the deceased would have had one; again, standard defenses apply

**Section 3** → Spouse, Parent (step parents and grandparents included), Adult Partner, Child (including step children) & Sibling

- Can only bring a claim if the deceased would have had one ie. Derivative defenses
- Both pecuniary and non-pecuniary losses are compensable.
  - Pre-trial pecuniary losses (if they did not die promptly)
  - Loss of future support (future earning capacity, loss of financial support)
  - Lost value of domestic work that deceased would have undertaken
  - Loss of future wealth

**Section 8** → Allows certain dependents automatic, no need to prove actual dependency if you are listed as a family member, amounts listed according to family member category.

- Ie. If member who died was bread-winner = this is large claim.
- Primary Focus: Loss of future financial support (support you would have received if they had not died)
  - If you're university student – depending on parental support
  - Does have to be proven
- Loss of future wealth
- Loss of value of domestic work
  - Homemaker of a family killed – domestic work has to be replaced by purchasing services from someone else
- Pre-trial pecuniary losses (did not die promptly)
- Pecuniary losses incurred for caring for deceased (if time elapses between injury and death), travel expenses between injury and death to visit the deceased, funeral expenses, grief counselling
- Non-pecuniary: Bereavement. The statute sets the amounts. Spouse = \$X.
  - No need to prove amounts, just relationship.
  - Not all jurisdictions have this
  - \$82k to spouse/partner and parents (if both alive then to be divided equally), \$49k per child
  - Spouse doesn't get bereavement damages if they were living separate and apart at time of accident

Amount of money awarded in the case of a deceased PL – usually way less than in the case of a surviving PL, unless significant loss of future wealth or loss of future earnings capacity.

## Punitive Damages

(Rare). Not compensatory. Meant to punish the DF for their “outrageous” behavior. It amounts to a fine payable to the PL. In excess, they're given in order to reflect court's view of DF's conduct. They signaled court's distaste for how DF has acted. Purpose is punishment, deterrence, and denunciation.

- Not meant to compensate PL. They want to send message to DF about unacceptable nature of their conduct.
- Outside category of compensatory damages
- We don't have to measure how much PL needs, but how much we need to send a message to DF about the unacceptable nature of the conduct – objective is to punish the DF
- Punitive vs aggravated damages
  - Aggravated also not aimed at compensating PL → DF's behavior was aimed at humiliating PL

### When/How are punitive damages awarded?

- Where DF's behavior has departed markedly from the ordinary decent person.
- Objectives are: punishment, deterrence, and denunciation
- This overlaps the civil and criminal realm
  - Means it's OK if we overcompensate the PL, objective is sending message to DF from POV of punishment
  - Context we're operating in is almost criminal conduct
- Award the lowest damages that are consistent with achieving these objectives.
  - Appeal courts can reduce if the amount is not “rational and measured”

### Factors taken into account:

Proportionality between conduct and award:

1. Proportionality to the DF's conduct/blameworthiness
  2. Proportionality with degree of vulnerability of the PL to the DF's conducts
  3. Was proportionality to the harm that was directed specifically at the PL?
  4. Is it proportionate to the need for deterrence?
  5. Is it still proportionate after you take into account all other penalties that have been or likely that will be imposed (civil, criminal, industry fines – factored in, but not deducted)
- Is amount proportionate to the advantage that the DF has wrongfully gained?

## Topic 11: Economic Losses

### Negligent Misrepresentation: Required Elements

- A duty of care must exist (*Queen v Cognos*)
  - The duty is based on a 'special relationship' meaning that the reliance on the representation was *foreseeable* and *reasonable* in the circumstances
- The statement or advice was untrue, inaccurate, or misleading
- Representor acted negligently
- Representee reasonably relied on the representation (Goes to our Causation analysis)
- Reliance resulted in financial detriment

### Liability for Negligent Statements

#### Required Elements (*Hadley*):

- A duty of care must exist (*Queen v Cognos*)
  - The duty is based on a 'special relationship' meaning that the reliance on the representation was *foreseeable* and *reasonable* in the circumstances
- The statement or advice was untrue, inaccurate, or misleading
- Representor acted negligently
- Representee reasonably relied on the representation (Goes to our Causation analysis)
- Reliance resulted in financial detriment

#### Whether PL's reliance on the advice was reasonable?

1. What was the status or skill of the advisor? (ie professional, special skills etc)
  - If Yes = reliance more reasonable
2. What was the status or skill of the advisee?
3. What was the occasion where the advice was given? Was the advice provided in the course of the D business? Or at a BBQ? Information or advice was given deliberately, and not in a social occasion?
4. What was the nature of the advice? The more speculative information the less reasonable it is to rely on it. Was it fact or opinion? What information was conveyed?
5. Was the info/advice in response to a specific question?
6. Where the D had a direct/indirect financial interest in the transaction?
  - If yes → more likely the court will find it reasonable

#### Steps to take:

1. Is there a duty of care?
  - a. Duty based on the existence of a special relationship (reliance was foreseeable and reasonable)
  - b. Factors that determine if reliance is foreseeable:
    - i. Status/skill of advisor
    - ii. Status/skill of advisee
    - iii. Nature of occasion
    - iv. Nature of the advice
    - v. Was the advice specifically requested
  - c. When is reliance reasonable?
    - i. DF has direct/indirect interest in the transaction
    - ii. DF is a professional or has special skill or knowledge
    - iii. Advice given in course of business
    - iv. Is it given deliberately and not on a social occasion
    - v. It is given in response to specific request
2. Standard of Care:
  - a. Was the statement or advice inaccurate or misleading?
  - b. Did the DF Act negligently in making the statement?
3. Causation:
  - a. Did the PL reasonably rely on the statement?
4. PL must show an actual loss:
  - a. Did the reliance result in financial detriment? If not, no claim

#### Issue: Can a PL be contributory negligent in the negligent misrepresentation context?

- It is possible: The extent of the PL reliance can be unreasonable. This will go to reducing the damages payable to

them, not to negating the prima facie duty owed by the DF

### Negligent Performance of Services

In this type of situation Courts want to know if the PL could have protected themselves against losses through contract (insurance) (*White v Jones*)

- If yes → then no liability

*White v Jones*: Survivors of a deceased who are left out of a will by the solicitor's negligence can sue

*BDC Ltd v Hofstrand Farms Ltd*: Could have protected interests in contract. DoC too remote. No proximity.

### Negligent Supply of Products and Services

When there is no contract with the DF

*Winnipeg Condo v Bird Construction*: A building contractor, architect or engineer has a duty of care in negligence to subsequent purchasers who may suffer financial loss as a result of repairing a latent defect that would if manifest give rise to a "real and substantial danger" to the inhabitants

- HOWEVER, La Forest says primary focus is on potential for "danger". How a situation without danger would be decided is still uncertain.

### Relational Economic Loss

REL: Losses suffered by one person as a result of a physical loss to another person with whom they had a contractual relationship

- Most contentious area of economic loss b/c it is potentially most indeterminate.
  - In example below: A could be a large party
- Example:
  - Regular: A has a contract with B to use B's property. C negligently damages B's property. Now A can't use it. B loses the use of the property and therefore suffers financial loss. Can B sue C for the damage C caused? YES
  - REL: Because of the relationship btw A and B, A also suffers financial losses. Can A sue C for the damage that C caused?
- In **CNR** Recovery in relational economic loss must be limited but should not be impossible. Look for some connection (proximity) between the PL and DF such that it is appropriate that the DF compensate the PL
  - If we think it's fair to allow recovery, then we might
- **Bow Valley Husky (clarified CNR)**
  - Relational Economic Losses: General exclusionary rule with limited exceptions and the possibility of further categories being recognized.
  - **Cases in which Relational Economic Loss will apply**
    - (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.
  - How are new categories recognized?
    - PL must successfully argue new category based on Public Policy, Unequal Bargaining Power, Deterrence, Proximity will also look at Public Policy

### Cases Outside of the Categories

*Design Services v R*: If the party has other methods to allocate risk, a new category will not be created. PL capable of foreseeing risk and mitigating through contract. Sophisticated commercial parties will be expected to act as such

## Topic 12: Psychiatric Harm

**\*\*This is an area of law that is unsettled**

The courts have generally tended to handle the issue of psychiatric harm as one of duty of care, although it could also be viewed as a remoteness issue. In *Mustapha*, the SCC took the view that the issue was one of remoteness and focused on the question of whether the person of ordinary fortitude could suffer psychiatric harm as a result of the defendant's negligent conduct. This may have been because of the specific facts in issue in that case, and the concern about treating physical vs psychiatric harm differently (clearly, physical harm was foreseeable in *Mustapha*). I would say that you want to use the facts of the problem you are dealing with as your guide. There may be one approach that is more relevant on the facts, or it might be appropriate to comment on aspects of both.

### Test Articulated in *Mustapha*:

As in any negligence (standard → reasonably foreseeable) claim, to get recovery for psychiatric harm you must prove:

- That there was a duty owed,
- A breach of the standard of care,
- Resulting damage,
- Causation, and
- Sufficient proximity
- Remoteness
  - If the breach would result in psychiatric harm to a reasonable person
  - If yes → thin skull rule applies
  - As long as SOME harm was foreseeable to someone ordinary, then the fact that the harm is worse due to this victim is just too bad for the DF
  - Test: Reasonable foreseeability

Requirements:

- A remoteness inquiry:
  - Is the harm too unrelated to the wrongful conduct to hold the defendant fairly liable?
- Ordinary fortitude
  - The injury must be one that would occur in a person of ordinary fortitude (reasonable person)
    - This is inherent in the notion of foreseeability
- The harm must be reasonably foreseeable

### Test Articulated in *Alcock*:

Going to have to be some other bits and pieces

- Argument of closeness of relationship (parental/spouse)
- Physical proximity to incident (presence at accident or immediate aftermath), and
- How harm itself came to exist

## Topic 13: Occupier's Liability

### Common Law

**Who is the occupier?** Home owner or someone in control of the premises in question (landowner).

- Has immediate supervisory control and has ability to admit or deny someone to the premises
- Doesn't have to be owner, can be tenant in possession. As long as they have the right to let people in and exclude others.
- Can have more than one occupier

#### Trespasser:

On land or property without permission of the occupier. This is a broad group not looking to motive.

- Ex. Robber, pedestrian, curious children

#### Duty:

##### Original:

- Do not harm them on purpose, + must not act with reckless disregard to the trespasser's presence

##### New:

- **Duty of Common Humanity:** Depends on a variety of factors...
  - Occupier's knowledge or knowledge should have had of trespasser's being present (if site is commonly a place for trespassing that will be considered, or if there is an attractive like a pool, more likely to impose duty)

	<ul style="list-style-type: none"> <li>○ How serious and likely injury was</li> <li>○ Nature of the place where the trespass occurred (security)</li> <li>○ Character of the intrusion (intentional or just wandering onto)</li> <li>○ Cost to the occupier of taking measures to reduce the likelihood of injury</li> <li>• Allowed courts to make judgment calls between undeserving trespassers and those deserving of compensation</li> <li>• Important thing is that occupier is not under obligation to inspect premises to make sure it's safe for trespassers.</li> <li>• If they know that trespassers are present on a regular basis or this group does trespass often then they have a duty of common humanity to them.</li> <li>• Child trespasser, duty may be a bit more onerous. You may have to put in place a physical obstruction so it makes it difficult for them to make it onto the property.</li> </ul>
<b>Licensee:</b>	<p>Social Guest → invited or have permission to be on premises</p> <p><b>Duty:</b> Originally:</p> <ul style="list-style-type: none"> <li>• Owed duty to prevent damage from hidden damages that the occupier had actual knowledge of</li> </ul> <p>New:</p> <ul style="list-style-type: none"> <li>• Occupier must take reasonable care to protect licensee from <u>unusual danger</u></li> <li>• Occupier is aware or should be aware of the danger → duty <ul style="list-style-type: none"> <li>○ Note: no obligation on occupier to routinely inspect for dangers, then occupier would owe a duty to take reasonable care</li> </ul> </li> <li>• Duty can be discharged with occupier warning the licensee of the danger or unusual circumstance (orally or with a sign)</li> </ul>
<b>Invitee:</b>	<p>Patron of a commercial establishment, mutually beneficial financial transaction</p> <p><b>Duty:</b></p> <ul style="list-style-type: none"> <li>• <b>Duty of Reasonable Care</b> to make sure premises are safe and prevent damage from an usual danger that occupier is aware of or should be aware of based on routine inspection of property.</li> <li>• Warning will be sufficient to discharge duty provided it was given in timely manner, so it gives the person time to be aware of the danger before it presents itself</li> <li>• Diff between licensee vs invitee: inspecting land for unknown danger and becoming aware as luck would have it</li> </ul>
<b>Contractual Entrant:</b>	<p>Paid for right to enter premises (theatre-goer, hotel guest)</p> <p><b>Duty:</b></p> <ul style="list-style-type: none"> <li>• Higher duty. In absence of contractual terms to contrary the contract between contractual entrant and occupier implied the premises were as safe as reasonable care could make them. A duty of reasonable care.</li> <li>• <b>Duty to Take Reasonable Care</b> to make sure premises are safe</li> </ul>

## Statutory Reform

### Alberta Occupier's Liability Act

#### Who's Who

##### Occupier:

- **Section 1(C)** → Person who **owns** the premises/has **physical possession** of premises OR a person who has **responsibility for**, control over, condition of premises, activities conducted on those premises and the persons allowed to enter those premises

#### Two Classes of Injured Person: Trespasser OR Visitor

##### Visitors:

- **Section 1(e)** → An entrant as of right, lawfully present on premises by virtue of an express or implied term of a contract, any other person there lawfully, a person whose presence on premises becomes unlawful after their entry on those premises and who is taking reasonable steps to leave the premises
- **Section 5** → Duty of care to every visitor to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there
  - Bit vague. Duty to take reasonable care to make sure individual is reasonably safe using premises

- **Section 6** → Duty of care applies in relation to a) the condition of the premises, b) the activities and c) the conduct of third parties on the premises
  - Not responsible for independent contractor if reasonable steps taken in choosing that contractor
- **Section 8** → Liability of an occupier in respect to a visitor may be extended, restricted, modified, or excluded by express agreement or express notice but no restriction, modification, or exclusion of that liability is effective unless reasonable steps were taken to bring it to the attention of the visitor

#### Trespasser

- **Section 12(1)** → Occupier does not owe a duty of care to a trespasser
- **Section 12(2)** → An occupier is liable to a trespasser for damages or death that results from occupier's willful or reckless conduct
  - Not much. You can't hurt them on purpose but short of that there is no exacting obligation

#### Child Trespasser

- **Section 13(1)** → When an occupier knows or has reason to know that a child trespasser is on the premises, and the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child, the occupier owes a duty to that child to take such care as in all circumstances of the case is reasonable to see that the child will be reasonably safe from that danger
- **Section 13(2)** → In determining whether duty has been discharged, consideration shall be given to: the age of the child, the ability of the child to appreciate the danger, and the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child
  - "Child" not defined in the Act.

#### Defenses

##### Contributory Negligence

- **Section 15** → When the occupier does not discharge the common duty of care, and the visitor suffers damage partly as a result of the fault of the occupier and partly as a result of the visitor's own fault, the contributory negligence act applies
  - Clear sign that there are dangers on the property but they charge ahead anyways, you may be able to find them contributory negligent
- **Section 7** → Voluntary Assumption of Risk (Volenti). An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor
  - Just because it is common practice to not shovel snow, is not an excuse that visitor should assume that risk
  - What will occupier have to show for this to be applicable? That they accepted physical and legal risks

#### Warnings

- **Section 9** → A warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to the occupier's visitor unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe.
  - Must go to the activity. You have to do something in addition to simply having a warning or have to show that just having a sign is enough to enable a visitor to be reasonably safe.

#### Liability of Independent Contractor

- **Section 11** → Occupier not liable when damage is due to negligence of an independent contractor

### Topic 14: Vicarious Liability

Policy reasons: Compensation and deterrence

#### Common Law

##### Common Law TEST:

##### Step 1: Who is an employee? Is this an employment relationship?

- If not, no vicarious liability

##### Control Test:

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:**
    - Do they have their own equipment?
    - Does the employer pay the tax on the employee's wages? I.e. is he contracted or paid hourly?
    - Does the employer hire their own people?
    - Who owns the business?

- If found to be EMPLOYER, they should bear financial liability for activities they did not engage in with regards to the above employee.

### Step 2: Is employee acting in the “Course of Employment”?

The employer can be VL for:

1. Act was authorized by the employer (unlikely to authorize intentional torts)
  - Unauthorized act → was this act outside the scope of employment?
2. An “unauthorized mode” of carrying out an “authorized act”

If not, was the act/conduct sufficiently “closely connected” to the employment?

- Can be said employers introduced the risk and thereby should be liable for it

**Strong Connection Test:** strong connection between what employee did and what they were authorized to do.

Are there precedent which unambiguously determine whether the case should attract .... No

If no precedent, should vicarious liability be imposed based on the broader policy rationales behind strict liability?

- Is the relationship btw the tortfeasor and the person against whom liability is sought sufficiently close?
- Is the wrongful act sufficiently connected to the conduct authorized by the Employer?
  1. What sort of opportunity did the employer give the employee to abuse their power?
  2. To what extent did wrongful act further employer’s aims (and hence be more likely to have been committed by the employee)?
  3. Was the wrongful act related to friction, confrontation, or intimacy inherent in 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

**Issue:** What if the employer is a non-profit organization?

**Answer:** Take non-profit nature into account but organization is not exempt because it is non-profit.

- Compensate the victim: Although employer does not benefit from D’s actions, it is better for employer to carry the loss, than the innocent victim
- Deterrence: If non-profits are aware they may be liable for an intentional tort through VL, hopefully they will be more careful
  - Policy objectives outweigh fact that insurance policies might increase.

**Issue:** Can an employer avoid vicarious liability somehow?

**Answer:** No, not really. Not direct.

- It’s a strict liability. Employer doesn’t have to have done anything that could be considered negligent or careless in any way. Chance of having an employee do this will be lowered if they have clear workplace policy in place and proper supervision. Less likely that employees will act in a way that goes against that. Employer can be vicariously liable regardless of how careful they’ve been

## Statutory Vicarious Liability

### Traffic Safety Act

(1) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

- (a) was driving the motor vehicle, and
- (b) was living with and as a member of the family of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

- (c) to be the agent or employee of the owner of the motor vehicle,
- (d) to be employed as the agent or employee of the owner of the motor vehicle, and
- (e) to be driving the motor vehicle in the course of that person’s employment.

**S 187 (1) → Imposes VL on the** owner of a vehicle even if they were not the ones driving it. Liable if someone living with you as a member of your family drives the vehicle

- VL for persons that have their permission express or implied
- With no consent clause
- Would count children who take their parents car without consent

(2) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

- (a) was driving the motor vehicle, and

(b) was in possession of the motor vehicle with the **consent**, expressed or implied, of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

(c) to be the agent or employee of the owner of the motor vehicle,

(d) to be employed as the agent or employee of the owner of the motor vehicle, and

(e) to be driving the motor vehicle in the course of that person's employment.

**S 187 (2)** → If you give consent for someone to use your vehicle, than that individual who is driving with your consent is driving with your insurance policy

- Limits the extent of liability to 1 mill\$

### School Act

Liability for damage to property by student

16(1) If property of a board is destroyed, damaged, lost or converted by the intentional or negligent act

(a) of one student, the student and the student's parent are jointly and severally liable to the board in respect of the act of the student, or

(b) of 2 or more students acting together, the students and their parents are jointly and severally liable to the board in respect of the act of the students.

(2) Subsection (1) does not apply to the parent of an independent student.

- **S 16** – if property of school board is destroyed, the student and their parents are jointly and severally liable. This does not apply if the student is independent (+18, or 16 and living independently)
  - Normally parent would not be liable