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INTRODUCTION

WHAT IS A TORT?: An unlawful interference with a person’s rights (personal/bodily integrity, property, reputation)

BALANCE OF PROBABILITIES: Unlike “beyond reasonable doubt” in criminal law, tort law relies on a balance of probabilities to determine the outcome of cases.

NUISANCE

Two kinds of nuisance in tort law: Public and Private.

Private nuisance protects the holder of interest in land from interference with the use and enjoyment of that interest. Public nuisance is an unlawful act which endangers the lives, safety, health, property or comfort of the public, or an obstruction of the public in the exercise or enjoyment of any right that is common to the public.

Three other torts designed to protect an interest in land: Trespass, The Rule in Rylands v Fletcher, and Negligence.

GROUND FOR LIABILITY

Appleby v Erie Tobacco Co
(1910), 22 OLR 533 (Div Ct)

RATIO: A nuisance has to materially interfere with the landowner or occupier’s ordinary comfort (Materiality). We must balance this standard against any allowances for the type of nature of the neighbourhood (Local Standard). However, local standard is not a trump card. New interferences can still cause a nuisance (Qualification of Local Standard)

FACTS: The nuisance complained of is the odour arising from the manufacture of tobacco on the defendants’ premises. These odours cannot be prevented if the manufacture is to go on, and, upon the evidence, the defendants appear to be doing their best to prevent injury to their neighbours.

ISSUE: Does the smell qualify as a nuisance?

RESULT: The defendant's property does constitute a nuisance. An injunction is issued restraining the defendants from operating their manufacturing.

REASONS: There is a local standard applicable in each particular district.
The odours do cause material discomfort and annoyance and render the plaintiff’s premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood.

“a small money payment” and the inconvenience and annoyance can not be adequately “estimated in money.” so the injunction is to follow.

Rogers v Elliott
146 Mass 349, 15 NE 768 (SJC 1888)

RATIO: Must determine the effect of interference upon people generally, and not upon those who are peculiarly susceptible to it or those who by long experience have learned to endure it without inconvenience. The threshold of materiality is to be determined by reference to the ordinary person. (Ordinary Average Person Rule)

FACTS: The defendant, who was in charge of a church in a small town, regularly had the church bell rung several times a day. The plaintiff was recovering from sunstroke and suffered convulsions that his doctor attributed to the noise from the bell. The defendant refused the plaintiff’s request not to ring the bells, and the plaintiff sued for the damage that the noise was causing him.

ISSUE: Whether or not that the use of the bell was lawful, that is, was the ringing of the bell a nuisance?

RESULT: We think [the Plaintiff] could not put himself in a place of exposure to noise and demand as of legal right that the bell should not be used.

REASONS: Must determine the effect of noise upon people generally, and not upon those who are peculiarly susceptible to it or those who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

If one’s right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises.

The Mayor, etc of Bradford v Pickles
[1895] AC 587 (HL)

RATIO: Intention, even if malicious is irrelevant. For actionable nuisance, the only relevant question is whether the plaintiff’s use and enjoyment of land has interfered with by the defendant.

FACTS: D owned land containing underground streams which fed P's waterworks. D began to sink shafts for the alleged purpose of draining certain beds on stone the effects of which were to seriously affect water supplies to P's operations. P
alleged that D was not acting in good faith but to compel them to purchase his land.

ISSUE: Can a use of property which would be legal if due to a proper motive become illegal because it is prompted by a motive which is malicious?

RESULT: Appeal denied.

REASONS: The court held that as long as Pickles had a right to take action on his property, there is no way that can be converted to an illegal action, no matter what his motives (i.e. MALICE IS NOT MATERIAL). There was no reason why he should not demand that the city pay for his interest in the water beneath his land.

### Hollywood Silver FoxFarm ltd v Emmett

[1936] 2 KB 408 (CA)

FACTS: P owned a fox breeding ground. D was in dispute with P, and made his son discharge guns to interfere with the breeding of the foxes. P sought injunction to restrain D's acts.

ISSUE: Does a landowner have an absolute right to create noise on his property?

RESULT: Injunction was granted as against D.

REASONS: Court held that in an action for nuisance by noise, the motive of the noisemaker must be considered in determining whether he was using his property in a legitimate and reasonable manner (THIS IS THE WRONG REASONING – The holding may have been influenced by moral inquiry instead of legal inquiry...this case cannot be used to counter Bradford v Pickles).

No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public.

Compare with Bradford v Pickles. Mr. Pickles could act with malice because Bradford had no rights to the flow of water; Mr. Emmett could not because HSF’s rights were at stake to use and enjoy his property.

### Fontainebleau Hotel Corp v Forty-Five Twenty-Five, Inc

114 So 2d 357 (Fla Dist CA 1959)

RATIO: Only injuries to a right are compensable under tort law (Misfeasance). The tort of nuisance cannot create a right where property law says there is none. Nuisance claims are based on material interference with use and enjoyment of land, but such use and enjoyment must pertain to a RIGHT.

FACTS: Fontainebleau constructing a fourteen-story addition that the shadow of the addition will extend over the Eden Roc. Respondent (Plaintiff in lower court) argues irreparable injury and malice and ill will for not building on other side of building. Lower court is-
sued a temporary injunction restraining the defendants from continuing with the construc-
tion of the addition.

ISSUE: Does a landowner have a legal right to the free flow of light and air across the adjoining
land of his neighbour? If there is no right, does this constitute nuisance? Is there ill will
and malice?

RESULT: The plaintiff has not established a cause of action against the defendants and the order
granting a temporary injunction should be and it is hereby reversed with directions to
dismiss the complaint.

REASONS: Even at common law, the landowner had no legal right to unobstructed light and air
from the adjoining land. Only injuries to a right are compensable under tort law. Had
the lawyers argued about enjoyment of land rather than rights in sunlight and air, the
decision may have been different.

It is universally held that where a structure serves a useful and beneficial purpose, it
does not give rise to a cause of action, either for damages or for an injunction even
though it causes injury to another by cutting off the light and air and interfering with
the view that would otherwise be available over adjoining land in its natural state,
regardless of the fact that the structure may have been erected partly for spite.

**Bryant v Lefever**
4 CPD 172 (1879)

RATIO: Nuisance is not actionable if the alleged interference only disrupts a benefit the
plaintiff enjoys but does not have a right to (Nonfeasance). For example, air and sun-
light are matters of “delight” and the law does not give an action for things of de-
light.

FACTS: P and D lived beside each other. D rebuilt house with a wall beside P’s chimney higher
than it was originally, and topped with timber. The effect was that P's chimney started
to smoke because of the erection of the wall. Jury granted damages. D appealed.

ISSUE: To what extent does the maxim *sic utere tuo ut alienum non laedas* apply? That is, in
which ways can you use your property that do not injure other people's property?

RESULT: Appeal was allowed. Damages reversed.

DECISION: There is a nuisance present, but it is P’s own fault. P should either cease to light his fire,
or modify his chimney to prevent the smoking. The appellant's do not infringe on the
maxim as they are only interfering with the air, and not the respondent’s property.

This case affirms the decision of *Fontainebleau*, in that interfering with the air in a
neighbour’s property through a reasonable use of one's own property does not con-
stitute a nuisance. That is, the plaintiff has no right to use the defendant’s land for a
flow of air.
Prah v Maretti
321 2d 182 (Wisc SC 1982)

RATIO: Occasionally courts will stray from doctrine for public policy/social good grounds.

FACTS: P and D are neighbours and P uses solar panels to heat his home. D proposed to build a residence on property that was up to regulations, but will block sunlight from reaching P’s solar panels.

ISSUE: Does a person still have no right to air and sunlight if they are using them for more than aesthetic purposes (i.e. energy generation)?

RESULT: Appeal allowed, injunction granted.

REASONS: The court found that there was nuisance, notwithstanding the universal principle held in Fountainebleau. The court holds that the principles on which Fountainebleau was decided were:

(1) The right to use property as long as they do not harm;
(2) Sunlight was valuable only for aesthetic purposes; and
(3) Society has a significant interest in not restricting land development.

The court states that these principles no longer apply as times have changed and the issues have developed away from these principles. Specifically, sunlight is not merely being used for aesthetic purposes, but as a power source, which is in the interest of society. The court has taken into account social policy. Different mode of reasoning. MISFEASANCE versus NONFEASANCE is not that relevant to the judge of this case.

If you are looking for a source of law that reflects prevailing public policy or social norms, would it not make sense to look to the bylaws? If the municipal council, in its elected wisdom, has refrained from legislating a right to sunlight, why should the court do so for the sake of resolving one dispute?

TH Critelli v Lincoln Trusts and Savings Co (1978)
86 DLR (3d) 724 (Ont HC)

RATIO: A court may depart from doctrine for reasons that cannot be consistently applied in other cases (Eg. Who was there first?).

FACTS: By increasing the height of its building, D created a lee that caused more snow to accumulate on the roof of P’s adjacent building, imposing a cost on P to reinforce his roof. P brought an action for damages in the amount of the reinforcement.

ISSUE: What level of foresight is required by an individual in constructing something which may be a potential nuisance?

DECISION: Finding for P, damages of $14,433 and costs awarded.
REASONS: The court states that there is “a good deal of advantage in being there first.” P built his building reasonably and had no reason to assume that he would need to reinforce his roof. D knew before construction that their action would cause damage to their neighbour’s property so it was incumbent on them to mitigate such potential damage. Again, there is no consideration of misfeasance and nonfeasance. Further, there is no consideration about the rights to flow of air, which would normally be nonfeasance.

Hunter v Canary Wharf Ltd
[1997] 2 All ER 426 (HL)

RATIO: For an action in private nuisance to lie in interference, something must emanate from the defendant’s property.

FACTS: D erected a tall tower between television transmitter and P’s home which interfered with television reception. P brought an action for nuisance.

ISSUE: Does blocking a television signal constitute a nuisance in law?

RESULT: Action dismissed. No nuisance.

REASONS: The court held that for an action in private nuisance to lie in interference, something must emanate from the defendant’s property.

Occasionally, actions on the defendant’s land themselves are so offensive that they constitute a nuisance, however this is not the case here, and those cases must be rare.

Shuttleworth v Vancouver General Hospital
[1927] 2 DLR 573 (BCSC)

RATIO: Diminution of property value is a ground for being rejected by the courts. Further, unsubstantiated fear or emotional disturbances without any actual injury are grounds for being rejected. Generally, sights do not rise to the level of interference and result in nuisance. Liability based on offensive sights is rare, but possible (See Laws v Florinplace below).

FACTS: Isolation Hospital built. Plaintiff can see into the hospital. Plaintiff alleges the Isolation Hospital to be a nuisance and asks for an injunction or in the alternative, damages. Action is brought so as to protect the plaintiff from damage which he has reason to fear will be the result of the operation of the Isolation Hospital (quia timet – an immediate injunction before facts are found. Plaintiff must should a strong probability of injury. High standard).

ISSUE: Is the Isolation Hospital a nuisance?

RESULT: The application was dismissed. The Isolation Hospital was not a nuisance.

REASONS: There must be a strong probability, almost amounting to moral certainty, that if the Hospital be established, it will be an actionable nuisance.
Plaintiff argues crying children will be a nuisance. Judge says that there is no proof that there will be violent crying.

Plaintiff argues that inmates of his house will have sympathy constantly aroused from seeing patients at hospital to such a degree so as to seriously interfere with their comfort and enjoyment of life. The law is clear that sentiment will not give a plaintiff a cause of action. Generally, sights do not rise to the level of interference and result in nuisance. Only in rare circumstances will sights result in nuisance (see Laws).

Plaintiff argues potential infection. But the cases cited show plaintiff must go further and prove not only widespread belief but that such belief must be well founded in fact. He has failed to adduce such proof.

Finally, plaintiff argues depreciation. However, the mere fact of depreciation cannot found an action. The mere fact you are deprived of a benefit does not mean you can recover for its loss.

Laws v Florinplace Ltd
[1981] 1 All ER 659 (ChD)

RATIO: Liability based on offensive sights is rare, but possible.

FACTS: D operated a hardcore pornography shop. Nearby residents brought a motion seeking an injunction to stop operations as they claimed the business was a nuisance in that it interfered with their enjoyment of their property.

ISSUE: Can the nature of a business constitute a nuisance in law?

RESULT: Injunction granted.

REASONS: There can be a nuisance if the use of a property is an affront to the reasonable susceptibilities of ordinary people. No matter how discreetly a business is carried on, its nature must be apparent for customers to locate and use it. On the issue that the neighbourhood girls will be susceptible, the judge says that even if 80% of the patrons are normal people, 20% will still be deviant...HE IS MAKING STUFF UP...This judge hates pornography.

Compare to Hunter v Canary, this is the rare case where the actions of the defendant themselves are a nuisance. Sights can sometimes, but rarely, constitute a nuisance.
When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. Free competition is worth more to society than it costs. The benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate.

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics.


**Bamford v Turnley**
(1862), 122 ER 27 (Exch)

**RATIO:** THE DEFENCE OF NECESSARY ACTS are those acts necessary for the common and ordinary use and occupation of land (Ex. Burning weeds, emptying cess-pools, making noises during repairs).

**FACTS:** D burnt bricks in a kiln which sent noxious fumes to the surrounding country which made P ill. P sued to prevent the nuisance. At trial it was held that the brick smoke was reasonable because D had only been using the kiln in order to build a home.

**ISSUE:** If an act is determined to be a reasonable use of one’s property, but it causes a nuisance to neighbours, where does the balance lay – with the individual or the public?

**RESULT:** Appeal allowed. The court reversed the lower court’s ruling, stating that a Defendant’s use of land, even if private and for beneficial use, is not justification for the infringement on his neighbor’s rights.

**REASONS:** DEFENCE OF NECESSARY ACTS AND DEFENCE OF PUBLIC BENEFIT (Defences arise after the Plaintiff prove a prima facie case. The onus shifts to the defence to defend their interference). The court held that even if an action is being performed for the public benefit it may still constitute a nuisance. The public gain and the loss of the individual must be balanced. Even if actions are for the public good they cannot go on causing harm to individuals without compensating them. If the defendant is not able to compensate the plaintiff through the profit that they make undergoing the activity, then it must not be in the public interest that the activity goes on. That is, something is only a public benefit where the loss to individuals who lose can be compensated out of the gains of those who gain (Patreo Optimality).

**Miller v Jackson**
[1977] 3 All ER 338 (CA)
FACTS: P bought a house in a housing estate that bordered an established cricket field. Cricket balls began to go over the protective barrier into the housing estate, particularly when a six was hit. In response to complaints, D built a chain link fence which helped, but it did not prevent some balls from going over. D offered to pay for damages for any injuries that may occur, replace windows etc.. P refused all offers and insisted on suing for nuisance and negligence.

ISSUE: Is playing cricket a nuisance? Is it relevant that the houses were there recently and the field was there for 70 years? Is this an unreasonable use of land? Is an injunction necessary?

DECISION: Appeal allowed, injunction overturned; only damages ($400) ordered.

REASONS (Denning, J.): Denning finds that this is not a nuisance, and states that the Millers should have understood this would happen before they purchased the house. He finds that this is not a case of nuisance or negligence and thus dismisses the desired injunction. He holds that the public interest here overrides the interests of the respondents. He says that if the houses had been there first, this would have been a nuisance, however it was not a nuisance before the houses were there and their construction does not all of a sudden make this a nuisance.

DENNING, J. IS WRONG. He invents stuff to try and justify keeping the status quo.

REASONS (Lane, J.): This is a case of nuisance, and the fact that the respondents "moved into" the nuisance is irrelevant. In Sturges v Bridgman a defendant cannot claim that "I was here first" as a defence. Lane, J states that an injunction should follow and that the public interest does not outweigh the threat of harm to the Millers. He also considers the threat of personal harm.

REASONS (Cumming-Bruce, J.): Finds that although there is nuisance and negligence here on the part of the cricket club, he does not grant an injunction based on the principles of equity. He states that the public interest is relevant here, and must be balanced against the interests of the Millers. The risk of damage does not fortify the case for an injunction.

Kennaway v Thompson [1980] 3 All ER 329 (CA)

RATIO: Public interest does not necessarily prevail over private interest (opposite of Miller v Jackson).

FACTS: P built house on land near lake where there was water skiing, etc. She knew of activities but did not think they would disturb her. Activities increased and she brought an injunction. Lower court found there was a nuisance but did not grant injunction, only damages. P appealed.

ISSUE: Does P have an action for an injunction in nuisance?
DECISION: Appeal allowed, injunction granted, detailing when and how often activities could take place.

REASONS: Once P had proved that the club caused a nuisance that interfered in a substantial and intolerable way with the enjoyment of her house, she was entitled to an injunction, but that injunction would only protect her from excessive noise and not prevent the club from organizing events about which a reasonable person could complain.

In short, the court disagreed with Denning, J’s view in Miller v Jackson and refused to allow public interest to prevail over P’s private interest.

Tock v St John’s Metropolitan Area Board
[1989] 2 SCR 1181

RATIO: THE DEFENCE OF STATUTORY AUTHORITY and THE INEVITABILITY DOCTRINE – if there is no discretion given by the statute, and if it is inevitable that a nuisance will occur, then it will be a good defence. This is judicial deference in that legislatures are supreme.

FACTS: The municipality (D) operated and maintained a sewer. P tries to sue the board in negligence because his property is damaged by flooding caused by heavy rain and sewer prevents proper drainage. Legislation allowed for sewer to be constructed, but did not specify how or where it was to be done. D had obliged to do so but in a way that was a nuisance to P.

ISSUE: Is it reasonable to deny compensation because of damage suffered at the hands of a body exercising statutory authority?

DECISION: P is entitled to recover damages resulting from nuisance.

REASONS: The SCC defines actionable nuisance as only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes.

A law only intervenes to shield persons from interferences to enjoyment of property that are unreasonable in light of circumstances.

Linden, J considers the DEFENCE OF STATUTORY AUTHORITY, but argues this doesn’t meet the defence because although the construction of the sewage system was authorized, the ensuing damage was not necessarily inevitable - the respondent was given discretion and could have carried out its duty without creating a nuisance (e.g. could have chosen different location). The inevitability doctrine – if there is no discretion given by the statute, if it is inevitable that a nuisance will occur, then it will be a good defence. This is judicial deference in that legislatures are supreme.

La Forest, J rejects the inevitability doctrine. Legislatures never create statutes with such specificity so as to maintain the defence of statutory authority, so the defendant will always fail. But, it is inevitable that members of the public will have to suffer, and
we must trust the legislature’s discretion and economic efficiency. You have to do a reasonableness analysis. Must balance public good versus individual nuisance.

Reasonableness is now considered an additional ground for liability in nuisance cases (among materiality and misfeasance). Whether in the circumstances in the case it is reasonable to compensate the Plaintiff.

**Antrim Truck Centre Ltd v Ontario (Transportation)**
2013 SCC 13, [2013] 1 SCR 594

**RATIO:**
**INJURIOUS AFFECTION,** only actionable under the Expropriations Act when the defendant’s activities interfere with the claimant’s occupation or enjoyment of land. Claimant must show (1) Damage resulted from action taken under statutory authority; (2) Action would give rise to liability but for that statutory authority; and (3) Damage resulted from construction and not use. Balancing in reasonableness analysis is between gravity of harm to plaintiff; and utility of defendant’s conduct.

Utility of conduct does not mean nature of conduct. Purpose instead of *how the purpose is carried out.* Utility of conduct analysis is relevant in all claims against public authorities.

Gravity of harm and public utility are not equally weighted considerations. Simple balancing always favours public utility. If balancing yields conclusion that harm, reasonably viewed does not outweigh claimant’s fair share of costs for providing public benefit, then there will be no liability.

**FACTS:**
In 2004, the province, D, undertook construction of a new highway which rerouted traffic from a highway that P operated a truck stop on (for safety purposes). P claimed that the rerouting interfered with the use and enjoyment of their property.

**ISSUE:**
Does the rerouting of a highway constitute a nuisance in law, and if so, what does the plaintiff have in damages?

**DECISION:**
Appeal allowed with original damages reinstated.

**REASONS:**
This is a case of injurious affection. This occurs when the defendant’s activities interference with the claimant’s occupation or enjoyment of land.

To be able to recover under act, must meet 3 requirements:
(1) Damages must result from action taken under statutory authority,
(2) Action would give rise to liability but for the statutory authority, and
(3) Damage must result from construction and not the use of the works.

The important question is: is it unreasonable to expect the claimant to bear the interference without compensation in cases where the interference is by a public body for the greater good? That is, should public benefit trump private rights?
How is this case consistent with the majority in *Tock* when it seems to be applying the minority reasoning (reasonableness)? In *Antrim*, like *Tock*, the statute left the defendant with some discretion. If there was no discretion, then statutory authority defence would apply.

The Board properly understood that the purpose of the statutory compensation scheme for injurious affection was to ensure that individuals do not have to bear a disproportionate burden of damage flowing from interference with the use and enjoyment of land caused by the construction of a public work. It was reasonable for the Board to conclude that in all of the circumstances, the appellant should not be expected to endure permanent interference with the use of its land that caused a significant diminution of its market value in order to serve the greater public good.

In these cases, must balance the utility of the defendant which focuses on the purpose of the conduct, not the nature of the conduct. However, the gravity of harm and public utility are not equally weighted considerations because simple balancing will always favour public utility. The focus on the balancing is on whether it is reasonable for the individual to bear, disproportionately the cost of providing a public benefit.

**REMEDIES**

*Shelfer v City of London Electrical Lighting Co*

[1895] 1 Ch 287 (CA)

**RATIO:** Working rule for remedies is that (*Shelfer Rule*):

1. If the injury to the plaintiff’s legal right is small,
2. And is one which is capable of being estimated in money,
3. And is one which can be adequately compensated by a money payment,
4. And the case is one in which it would be oppressive to the defendant to grant an injunction.

Then damages in substitution of an injunction (the usual remedy) may be given.

Additional considerations are: If the defendants attempt to avoid induction or acts with reckless disregard, the court may lean towards injunction; Outcome is very case specific.

General rule is that where the plaintiff’s interest are indifferent to the type of remedy and the injunction will have a disproportionate impact on the defendant, damages can be issued.

*Canada Paper Co v Brown*

(1922), 63 SCR 243

**RATIO:** Not the court’s business to ensure social justice, but a job for the legislature. The court must keep in view the essential merits of the remedy as a means of protecting the rights of property and preventing them from being infringed upon by assertions of what will be better for the community.
FACTS: Brown owns a house that is close to a paper mill which was in operation before the house was purchased. After a time, the paper mill began using sulfates in their processes, which emitted fumes so noxious that they rendered Brown's house uninhabitable at times. Brown brought an action for an injunction which was successful, and Canada Paper appealed.

ISSUE: Is an injunction reasonable when it shuts down the primary industry in a small town?

DECISION: Appeal denied. Injunction upheld.

REASONS: The “public benefit” argument has led to a mass of irrelevant evidence being adduced. Not the court’s business to ensure social justice, but a job for the legislature. The court must keep in view the essential merits of the remedy as a means of protecting the rights of property and preventing them from being infringed upon by assertions of what will be better for the community.

Black v Canadian Copper Co
(1917), OWN 243 (HC)

RATIO: In cases where an injunction is unreasonable, damages should be awarded very liberally.

FACTS: P was a farmer and vapours from smelter-stacks of D caused damage to P’s farms.

ISSUE: Is an injunction always a reasonable remedy in an offensive nuisance?

DECISION: Damages awarded, injunction not granted.

RESULTS: Judge takes a decidedly different approach than Canada Paper Co v Brown. Farmers have no right to claim that an injunction should be brought to shut down the plant where the whole town depends on it. However, there is clearly a nuisance, so the judge assessed the damages without any information as to calculation, but rather on what is “fairest and best.”

How can we reconcile Brown and Black? In Black (1917) copper was desperately needed in British Empire for bullets, so there is a historical context. In Brown (1922) the war was over and there was a resistance to assault on property rights.

Nevertheless, the Brown case is more consistent.

Spur Industries v Del E Webb Development Co
494 P2d 700 (Ariz SC 1972)

FACTS: P was a city planner and was planning to start up a new city; D is the owner of feedlot in an agriculture area; the feed lot produced very repugnant odours. P bought land around the feed lot to develop. The land was cheap because the feedlot was close by. P intended to sell off the lots but because of the smell from the feedlot, he had problems selling them. P brings a claim of nuisance and wants a Prohibitory Injunction.
Where the operation of a business is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area developing right by it, will the developer of the new residential area be required to pay the owner of the business that now has to close or shut down?

Injunction granted as against Spur Industries. But damages awarded to Spur Industries as per indemnification of Developments actions. Only case of Compensated Injunction.

This case is inconsistent with everything learned so far. Where a pre-occurring action by a Defendant was not a nuisance and a Plaintiff has created the circumstances that this action becomes a nuisance, an injunction can be ordered to cease the action but the Plaintiff is responsible for paying the damages caused against the Defendant for the action being ceased (if any).

In the proper circumstances, an owner of a lawful business that is enjoined from operating because his business is found to be a nuisance can seek indemnification from the individual successful in claiming the nuisance.

Problem with this case is that it is a failure to confer a benefit. The only effect on D is that he is losing sales which is not usually enough to bring a nuisance suit. It should be the owners of the houses that bring the action (see the next case).

Spur Feeding Co v Superior Court of Maricopa County
505 P2d 1377 (Ariz SC 1973)

As above, except in this case it is the 400 homeowners who are the plaintiff’s.

Should Webb (from the first case) be required to indemnify Spur as to any damages the court might find the plaintiffs are entitled to receive? Should the Third Party Claim as against Webb stand notwithstanding a potential res judicata?

Defendant Spur is entitled to have litigated the conduct of Webb as to each of the plaintiffs and to have the question of indemnity litigated as to each of them.

Not only are the parties different, but the facts of the case are different than those of the prior case.

There is no reason to bring Webb into this matter. Inviting though the argument of Spur may be, it overlooks the fact that Spur was a wrong-doer as to Webb as well as the new buyers. Webb has a right to develop its land; spur has no right to commit a nuisance. Today the Court apparently holds that Webb must indemnify the wrongdoer for any damages caused to property owners by the operation of the nuisance.
LAW AND ECONOMICS

A Gentle Introduction

Economics is essentially the science of rational choice. Note that this definition is not restricted to market transactions. Trying to understand human affairs at large, and that includes law. Scarcity and unbounded community desires are included in here. In a scarce world, decisions have to be made, and that is where the law comes in.

Richard Posner suggested that the rules that evolved through the common law evolved that way because of economic efficiency. This approach attempts to discern and underlying common law rule. Not everyone buys into this theory. By contrast, the normative aspects of law and Economics explains why the law should be changed.

CONSEQUENTIALISM: Looking at law in an economic mode, you are concerned about consequences. Human welfare is an example. But there is a bit that is controversy about this. Fairness or justice have no independent value except that they produce a greater human welfare. If you tell lawyers that justice and fairness is only a means to an end, you can see how this would be controversial. An example in tort law is developing the law so as to maximize accident reduction.

SELF INTEREST: For the sake of simplicity, economists mode behaviour after their own self interest. But as you incorporate more elements, the models become more complex. Economists think of people’s interest subjectively, they takes people’s preferences as they find them.

RATIONALITY: In relation to your objectives, you act in the most objective way possible. However, not everyone acts rationally. There are all kinds of ways in which we fail to achieve our objectives in a efficient manner. However, a population as a whole may exhibit this rationality.

BEHAVIOURAL LAW & ECONOMICS: Relaxes some rationality assumptions. Takes into account some deviation of rationality.

THE LAW OF DEMAND: The idea that the higher the cost of something, the less people will demand of it, the less they will want that thing. If your raise the price of coffee, some people might bring their own coffee. What does this have to do with the law? Rational actors will react to a higher cost of something by doing less of it. An example in tort law is Punitive Damages. These are damages that are awarded on top of compensatory damages which is supposed to be equivalent to whatever the plaintiff suffered. Punitive damages are essentially a windfall. A lot of people do not like them because they overcompensate. Why have Punitive damages? They are designed in such a way to punish. There is an argument that if you just give compensatory damages, you do not maximize deterrence.

This type of reasoning can also be applied to criminal law. The rational criminal weighs the costs of the crime versus the benefit of the crime. If you increase the punishment, that should reduce crime based on the rational criminal. Or, you could invest more resources in enforcement and increase the probability of being caught.

OPPORTUNITY COSTS: Measure the costs of something against the next best alternative. Consider the example choice of going to law school. What is the “cost” of going to law school? Lost wages is the biggest loss. Other costs are tuition and strain.
THE LEARNED HAND FORMULA: \( B < P \times L \). Where \( B \) is the burden of precaution, \( P \) is the probability of loss, and \( L \) is the size of the loss. The point is you should take precautions only if it is less than the loss multiplied by the probability of that loss occurring.

EFFICIENT TRANSACTIONS: What is something that virtually every voluntary transaction between rational and informed parties has in common? Each person values what they are getting more than what they are giving up. Transactions that meet this criteria leaves each party better off. In the realm of consumer contracts, may not always be the case where the consumer is informed or rational. Consider an online contract where you have to click “I agree.”

Consider the idea of social welfare versus individual welfare. Consider a gas station opening up right to another gas station. This may be better for social welfare than the welfare of the original gas station. Transaction costs are the costs incurred to bring about a deal. Includes negotiation, time spent, hiring a lawyer. But if the costs of the transaction are greater than the difference, than the transaction will not take place. Consider also administrative costs. Think about law school admissions where there is a ranking of people by LSAT and GPA, or it could be based on holistics. The holistics may be better, but the administrative costs will tend to be higher. The last consideration is information costs. Rational parties often have to use resources to make their decisions. Consider purchasing a car and the time it may take to find out how safe this car is.

COASE THEORM: It is not about one party harming another, it is about two parties that can not both be there and perform their actions. Which use is more valuable? Each of the two uses prevents the other use from happening. When you take this mode of analysis, you look to which use is more valuable. When you do not have transactions costs, the more valuable use will prevail. When there is zero transaction costs, there is no issue with entitlement. Whoever values it more will get it.

CORRECTIVE JUSTICE: Idea that some harm is done to the Plaintiff, and the court is to apply a remedy to make up for the harm that was done. The point of private law is to enforce the rights of the defendant, uphold those rights and effect justice. This is against the idea of Law and Economics.

INTENTIONAL TORTS AND INFORMED CONSENT

BATTERY: A physical contact to which a person has not consented. (Could even include kissing, but only in the context of unwanted). The modern tort of battery often deals with sexual misconduct. One of the few torts that is actionable without proof of damage. However, damages can still be awarded. Note that actual bodily contact is not necessary for battery, but the interference with the Plaintiff must be direct (Consider spitting on someone).

Grey areas are resolved by looking at relationship between persons, surrounding circumstances, social convention. There is also a shared burden of proof. The plaintiff must prove that direct and physical offensive or unwarranted interference occurred, and the defendant must prove that the conduct was not intentional or that some defence applies.
ASSAULT: The threat of an immediate battery. Direct and intentional act that cause a person to apprehend immediate physical or offensive bodily harm (Ex. Pointing a gun or waving a knife). Is an independent cause of action.

CONSENT: Consent is a complete defence to battery (fights, contact sports). It can be expressed or implied by conduct. It is not good consent, however, if it is vitiated by duress (force or threat of force), alcohol, or drugs. In Norberg, consent by duress is extended to include relative weakness and exploration of power dependency.

Consent is not to be confused with Volenti non fit injuria. This is the consent to be exposed to risk of harm. Consent to battery is consent to actual harm, not to the risk of harm.

Absent consent, all medical treatment is battery. A competent patient can reasonably or unreasonably refuse treatment. Or, a patient may give conditional consent, and revoke any consent at any time. The treatment may in fact save your life, but it is still battery if you do not consent to it. It is not a defence that the care was provided in good faith or with reasonable skill.

INFORMED CONSENT: Prior to obtaining consent, physician must ensure that patient understands: (1) The basic nature of the treatment, (2) the risk of proceedings/proceeding with the treatment or benefit, and (3) all that a reasonable patient in similar circumstances would want to too know.

The failure to adequately inform prior to obtaining consent gives rise a distinct cause of action. Even if consent is obtained, failure to inform patient to standard required by law is a tort. This goes to negligence.

Allan v Mount Sinai Hospital
ONSC, 1980

RATIO: Absent consent, every medical procedure would result in battery. It is a physician’s duty to prove that consent was given either written or oral. An implied consent will suffice. Even if no injury results, damages would still need to be paid (actionable per se).

FACTS: P underwent procedure at D’s hospital. P did not give permission to use a needle in the left arm because she has an unusual reaction in that arm. D said that I know what I am doing and used the left arm anyways. A reaction occurred and P sued for intentional battery.

ISSUE: Did battery occur?

DECISION: Battery occurred. Ordered special damages in full, and $4000 for general damages (pain and suffering, future loss). (Note that this case was overturned on a technicality in that p did not plead battery and the judge adjudicated it without proper litigation)
REASONS: An expert witness testified that D’s method was usual and customary. That is, there was no negligence. Absent consent, every medical procedure would result in battery. This rule is an important aspect of the right to self-determination and individual right to have control over one’s own body.

It is the physicians duty to prove that consent was given (shared burden of proof). It is clear in this case that P did not consent of placing needle in left arm.

Further, the fact that the reaction was a very rare occurrence is immaterial. If battery if found, the defendant is liable for all consequences. Even if nothing had gone wrong, then D would have to still pay damages (Actionable *per se*).

Malette v Shulman (1990), 67 DLR (4th) 321 (Ont CA)

RATIO: Honest and justifiable belief that operation is medically necessary is no defence to battery. The fact that the patient’s refusal was not “informed” or is “unreasonable” is immaterial. Failure to obtain consent is not to be confused with failure to provide and obtain informed consent.

FACTS: M is a Jehovah’s Witness who was in a car accident. S was the doctor attending her. S was made aware of a card on M’s person stating that she would refuse blood transfusions for religious reasons. S ignored this directive, and gave her blood. After recovery, M sued S for battery.

ISSUE: Whether a doctor is liable for administering blood transfusions to an unconscious patient in a potentially life-threatening situation when the patient is carrying a card stating that she rejects blood transfusions under any circumstances.

DECISION: In favour of plaintiff M; patient did not consent to transfusion.

REASONS: A doctor who performs a medical procedure without having first furnished the patient with the information needed to obtain an informed consent will have infringed the patient’s right to control the course of her medical care, and will be liable in battery even though the procedure was performed with a high degree of skill and actually benefitted the patient. The doctrine of informed consent does not extend to informed refusal: “The right to refuse treatment is an inherent component of the supremacy of the patient’s right over his own body. That right to refuse treatment is not premised on an understanding of the risks of refusal.” INFORMED REFUSAL IS STILL BATTERY.

The emergency situation is an exception to the general rule requiring a patient’s prior consent. This requirement can be waived in cases of emergency under specific circumstances: 1) the patient must be unconscious or unable to make a decision 2) time must be of the essence 3) under the circumstances, a reasonable person would consent, and the doctor must reasonably believe that the patient would consent. However, as in the case at bar, a doctor is not free to disregard a patient’s advance instructions any more than he would be free to disregard instructions given at the time of the emergency.
FAILURE TO OBTAIN CONSENT IS NOT TO BE CONFUSED WITH FAILURE TO PROVIDE AND OBTAIN INFORMED CONSENT.

Recognition of the right to reject medical treatment cannot, in my opinion, be said to depreciate the interest of the state in life or in the sanctity of life. Individual free choice and self-determination are themselves fundamental constituents of life.

[T]he card on its face set forth unqualified instructions applicable to the circumstances presented by this emergency. In the absence of any evidence to the contrary, those instructions should be taken as validly representing the patient’s wish not to be transfused.

The doctor cannot be held to have violated either his legal duty or professional responsibility towards the patient or the patient’s dependants when he honours the Jehovah’s Witness card and respects the patient’s right to control her own body in accordance with the dictates of her conscience. The onus is clearly on the patient.

Reibl v Hughes
[1980] 2 SCR 880, 114 DLR (3d) 1

RATIO: Prior to obtaining consent, a physician must ensure that a patient understands (1) the basic nature of the treatment; (2) the risk of proceeding/not proceeding with treatment/benefits; (3) all that a reasonable patient in similar circumstances would want to know. Battery is failure to obtain consent, and negligence is failure to adequately inform.

The test is whether a reasonable person in the appellant’s shoes would have elected to have the surgery or not when the proper information was known (an objective test). In the case at bar, this reasonable person must also be put in R’s particular situation (modified objective standard).

FACTS: R underwent surgery for the removal of an occlusion in the left internal carotid artery. H, the surgeon, performed the surgery properly, however either during or immediately after the surgery R had a massive stroke that left him paralyzed on the right side of his body and impotent. Prior to the surgery the respondent did not inform the appellant specifically about the risk of stroke. The appellant consented to the surgery. He only had 1.6 years left at his job before he was eligible for his pension and extended disability benefits. R was successful at trial and recovered $225,000; however a new trial was awarded upon appeal (old thinking about the professional defining the scope of the risks, not the patient).

ISSUE: How specific must the information about the risks of a medical procedure be to enable a person to make an informed choice between surgery or no surgery?

DECISION: Appeal allowed. Trial judgment restored.

REASONS: Laskin, writing for a unanimous court, agrees with the trial judge that H did not properly inform R of the risks involved. He holds that you must inform a patient about all potential material risks, and specifically if there is any chance of death or paralysis it should be discussed even if the chances are very small. In the case at bar
the chances of having a stroke were about 1 in 10. The doctor told the appellant that he would be better off having the surgery (it was not an emergency), but this is the extent of the information provided. R believed that the surgery would correct his headaches and allow him to work better, but the doctor did not guarantee this.

Even with this finding, however, Laskin states that the doctor is not liable for battery. Actions for battery in respect to surgery or other medical procedures should be limited to circumstances where consent has not been given for the particular procedure (or was vitiated). This was a breach of the duty of care; there is no invalidity to the consent given. Failure to disclose risks goes to negligence.

Laskin holds that the Ontario Court of Appeal gave too much deference to doctors. Although medical information is necessary and very helpful in determining if sufficient information was given, it is not determinative. Medical information does not determine whether there has been a breach the duty of care. The court finds that a reasonable person would have delayed the surgery if they had known all of the information. Causation is satisfied as with the proper information the plaintiff would not have had the surgery or the resulting stroke.

Norberg v Wynrib
[1992] 2 SCR 226, 92 DLR (4th) 449

RATIO: Consent is not voluntary if obtained by force or threat of force, under the influence of drugs/alcohol, fraud, misrepresentation. The exploitation of “power dependency” or a relatively weaker plaintiff is also involuntary consent. Consent is vitiated when there is (a) power inequality between parties, and (b) defendant exploits that inequality.

FACTS: N had severe pains in her jaw. To remedy this problem, took painkillers. After the source of her pain, an abscessed tooth, was found and treated, her addiction to painkillers remained. She found a doctor who would prescribe painkillers. After this doctor retired, she sought out another who would provide the drug. Starting in 1982, she began seeing Dr. W, an elderly physician, and he began giving N painkillers under the pretext of an ankle injury. In exchange, Dr. W demanded sexual favours. She eventually brought an action against him for battery/assault, negligence and breach of fiduciary duty.

AT TRIAL: No sexual assault because of consent. Breached duty and standard, but no physical damage so not negligence. Breach of fiduciary duty, but defence of ex turpi causa (plaintiff will be unable to pursue legal remedy if it arises in connection with his/her own illegal act.) was available to the defendant

AT APPEAL: Upheld trial judge that appellant gave consent. Upheld no breach of fiduciary duty (because no breach of confidential information)

ISSUE: Can a person consent to battery?

REASONS
It must be noted that in the law of contracts proof of an unconscionable transaction involves a two-step process: (1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain. Similarly, a two-step process is involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which, as already noted, will ordinarily occur within the context of a special “power dependency” relationship. The second step, I suggest, is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of exploitation.

The defence of consent cannot succeed in the circumstances of this case. The appellant had a medical problem—an addiction to Fiorinal. Dr. Wynrib had knowledge of the problem. As a doctor, he had knowledge of the proper medical treatment, and knew she was motivated by her craving for drugs. Instead of fulfilling his professional responsibility to treat the appellant, he used his power and expertise to his own advantage and to her detriment. In my opinion, the unequal power between the parties and the exploitative nature of the relationship removed the possibility of the appellant’s providing meaningful consent to the sexual contact.

REASONS

(Dissent): While it is clear that the sexual contact was contrary to the appellant’s wishes, in my view it cannot be said that it was without her consent. I therefore do not find any basis on which to set aside the conclusion of the courts below on the issue of consent. That is, power imbalance plus exploitation of that imbalance means NO meaningful consent.

REASONS

(Concurring): Characterized duty differently. The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician’s failure to fulfil his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence. In common with all members of society, the doctor owes the patient a duty not to touch him or her without his or her consent; if the doctor breaches this duty, he or she will have committed the tort of battery. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. All the authorities agree that the relationship of physician to patient also falls into that special category of relationships which the law calls fiduciary.

CONSEQUENTIALISM AND CAPACITY

Consent to medical treatment is only valid if given by capable individual. “Capable” means ability to appreciate and understand: (1) nature of proposed medical treatment, (2) the potential risks and benefits, and (3) the consequences of giving or not giving consent.

Generally, there is no set against for medical decision-making. Age is irrelevant to whether someone can give consent or not. Adults are presumed capable of consenting. However, subject to limits set by provincial statutes, capable minors can make their own medical decisions.

H(B) v Alberta (Director of Child Welfare)
2002, ABQB
In Alberta, a capable child can make her own medical decisions if they are not a child needing protective services. If the child is in need of protection or intervention, a court may make the decision. A capable child’s opinion may be taken into consideration in “intervention decisions”, but may not be followed.

Appellant is a 16 year old Jehovah’s Witness with leukemia. It was established in evidence that be best and only treatment is chemotherapy with blood transfusions. The appellant refused to consent to the treatment. According to Malette, there should be no issue with respect to rejecting the treatment, but this case involved a minor. An action was brought by the Director of Child Welfare to get a treatment order.

To what extent can a minor give or refuse consent?

The court has the authority to decide on behalf of the Child when they are not capable.

Which law governs, the “mature minor” rule from common law, or the Child Welfare Act? The mature minor rule states that a minor with sufficient intelligence and understanding to appreciate the nature and consequences of proposed treatment can consent to that treatment. This concept is enshrined in some provincial statutes (uses the word “person” rather than “adult” in regards to consenting to treatments).

The court accepted that the child was a mature minor. However, the Child Welfare Act adopts a different legal standard for assessing role of minors in medical decision-making. The statute says that if a minor is “a child in need of intervention” (i.e. in need of protective services) and “the guardian is unable or unwilling to obtain essential medical services for the child,” then the decision must be made by the court or some other statutorily appointed SDM, “in the best interest of the child.”

In making the decision, the court shall consider a number of factors including the child’s opinion, if the child is capable of forming one. However, this is not determinative.

In this case, while the child is a mature minor, the statute is a higher authority and overrides this concept. The court decides that it is in the best interest of the Child to receive the treatment, even after having regard to the appellant’s rule.

It was also argued that the CWA provisions violated the Charter. The court said no.

PROVOCATION AND SELF – DEFENCE

A person is entitled to use reasonable force to remove someone from battery or assault. Reasonable force is determined on a case by case basis and relies on a number of factors including, the nature of the attack, the size and strength of the individual, the opportunities to use non violent defence, degree of force, whether weapon was involved.

Wackett v Calder
BC CA 1965
RATIO: Self-defence is a complete defence. Provocation is a likely partial defence. May result in reduction of damages. “Reasonable force” standard is fact-dependant.

FACTS: P, while intoxicated and belligerent, insulted his brother and dared him to a fight. D accepted dare and cold-cocked P who then suffers a broken wrist and cheekbone. P sues D. Trial judge ruled that D ought to have walked away from the “alcohol induced bravado.” Even if self-defence, D used excessive force. However, damages were reduced due to the provocation.

DECISION: Court of Appeal reversed the decision because P was capable of harming D notwithstanding intoxication and that D used reasonable force to repel this attack.

REASONS: Self defence is a full or complete defence. Provocation is likely a partial defence (if there is opportunity to walk away or self defence cannot be proved). A successful provocation defence may result in reduced damages.

DEFENCE OF THIRD PERSON

Gambriell v Caparelli
ON County Court, 1974

RATIO: Defence of a third person is not restricted to cases where third person is a family member, and is a full defence.

FACTS: D’s son and P got into fight. D thought son was being chocked so hit P over head.

DECISION: D was defending a third person, and force used was reasonable.

DEFENCE OF PROPERTY

In certain situations, a possessor of land may use reasonable physical force to protect land from trespass. But you cannot shoot first and ask questions later. If the trespass is “peaceful,” first request that the trespasser leave. If not peaceful, no need to make preliminary request – force may be used immediately.

DISCIPLINE TO CHILDREN

The Tort law mirrors the Criminal Code defence. That is, parents and teachers can use reasonable force for the purpose of correction. The SCC put limitations on defence and the force must specifically be for “educative or corrective purposes.” Also must relate to “restraining or expressing disapproval of the actual behavior of a child capable of benefiting from the correction.”

Note that Binnie J’s dissent said that you cannot deny to children something that would be criminal if done to adults (though ultimately saved by s 1 for parents).
**TRESPASS TO LAND**

Direct, intentional and physical interference with a person’s right to possession in land. Do not have to be the owner of the land to bring an action, just a legal right to be there (like a renter). Actionable without proof of damage.

**Turner v Thorne**  
ONSC 1959

**RATIO:**  
Three ways to commit trespass to land. (1) Entering land possessed by plaintiff without permission. (2) Placing an object on land in Plaintiff’s possession (new cause of action arises each day until the object is removed. This is a continuing trespass) (3) Plaintiff (occupier) revokes defendant visitor’s permissions/license to be on property.

**FACTS:**  
Package delivery guy inadvertently left 14 cartons of material on plaintiff’s property. The plaintiff came back at night and tripped over packages. He sued for trespass to land ad negligence.

**DECISION:**  
Trespass action succeeded because defendant entered the land and intentionally placed the items on plaintiffs land without permission. Intent to injure was not required.

**DEFENCES TO TRESPASS**

**Consent, Necessity** (in situations of danger or emergency to prevent Harm to responses or others). Will the defence apply to a hiker who trespasses on another person’s property while seeking shelter from a severe storm? It will depend on the severity of the storm, and if there are alternative means of seeking other shelter. Is it comfort or is it life? Generally, in borderline cases, the courts looks at immi- nence of danger, advantage to be gained, and availability of other options.

There is also a defence of **LEGAL AUTHORIZATION**. This is when a statute or other legal authority governs the ability to trespass. This includes executing warrants and reading utility meters.

**INTENTIONAL INTERFERENCE WITH CHATTELS**

**TRESPASS TO CHATTEL:**  
A chattel is an item or property or real estate. Intentional damage to a chattel in the plaintiff's possession or physical control.

**DETINUE:**  
A person who has a right to possession of a chattel requests it, and the defendant refuses to grant possession. Note that detinue is the only tort that holds out a clear prospect of recovering a chattel. If the chattel still exists in its original form, it is possible to recover through a writ of replevin.

**CONVERSION:**  
The defendant takes the plaintiffs chattel in defiance of the plaintiffs ownership or possessory rights. Involves an act and intent inconsistent with the plaintiffs right of possession or ownership.
**ACTION ON THE CASE:** This is a rare course of action that usually involves negligence. An action by an owner of a chattel who does not have possession or a right of immediate possession of that chattel goes against a defendant who has frustrated possession of the chattel by damaging it. The plaintiff asserts a reversionary interest by suing in damages. An example is where the plaintiff has an unexpired fixed term bailment, where a bail mentioned is a transfer of physical possession of property by one person to another for safekeeping.

It is not trespass or conversion because the plaintiff Baylor does not have physical control of the chattel. Not detinue because the chattel has been damaged.

To recover on an action on the case, the plaintiff must prove existence of legal right to control the chattel in question.

**Pierson v Post**  
SC NY 1805

**FACTS:** The plaintiff, Post, was a fox hunter chasing a fox through the forest. The defendant, Pierson, happened on the Fox and killed it and took it away. Post brought an action on the case. He claimed his necessary legal right of ownership interest came from pursuit in the course of hunting. The trial court agreed, the court of appeal disagreed and said it would cause a lot of litigation and quarrels about who is pursuing what.

**Penfolds Wines Prop. Ltd. v Elliott**  
HCA 1964

**FACTS:** P is a winemaker and sold wine to its customers in bottles that remained Penfield property. The bottles were marked that "this bottle always remains property of Penfold." The bottles were to be returned. D was aware of the policy but filled the empty bottles with other wines, and D did not buy the bottles directly (his customers would bring them, and he would fill them). P claimed that D by action of filling bottles with wine assumed dominion over the bottles amounting to conversion. Or, the purpose was inconsistent with P's rights.

**ISSUE:** Do the facts disclose a specific tort of intentional interference with chattel.

**DECISION:** Knows of no common law tort with relation to chattels.

**REASONS:** It was not trespass to chattel as the bottles were not in P's control. It is not conversion, because no act or intent inconsistent with P's right. Not action on the case because no damage. Not detinue because no demand for return of the bottles.

**STRICT LIABILITY**
Strict liability is liability without a finding of fault. No intentional act or negligence or recklessness. Liability is imposed on a "responsible" defendant. Cases of this type are very fact dependant. Without intention or negligence, courts do not like to apply it when it does exist.

Some critics argue that strict liability is an anomaly as it does not fit nicely in tort law theory. Plaintiff is required to prove that harm or loss occurred and that the defendant caused the harm (or is responsible for it).

**SCIENTER ACTION:** Strict liability is imposed for damage caused by animals that the owner knows to be dangerous.

**CATTLE TRESPASS:** Owner of cable is strictly liable for damage caused by the escape of cattle onto land possessed by the plaintiff.

**Rylands v Fletcher**
(1865), 3 H & C 774 (Ex D), (1866), LR 1 Ex 265 (Ex Ch), (1868), LR 3 HL 330 (HL)

**RATIO:** The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape (there need not be intentional or negligent act). There is a "non-natural use" requirement as well.

**FACTS:** Both R and F were neighbours. R owned a mill for whose energy requirement he constructed a water reservoir on his land. He gave this work to independent contractors. Due to the negligence of the contractors, the shafts that led the way to F’s mine were broken which led to water into the mine causing heavy loss to him. F sued R notwithstanding he was not liable for the contractor’s negligence since they were not employees.

**ISSUE:** Was the use of Defendant’s land unreasonable and thus was he to be held liable for damages incurred by Plaintiff?

**REASONS**
(Trial): The tort of trespass was inapplicable, as the flooding was deemed not to be "direct and immediate"; the tort of nuisance was rejected as this was a one-off event. This was appealed.

**REASONS**
(Appeal): What is the obligation which the law casts on the person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? The person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape.

There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stenches, or any other thing
which will, if it escape, naturally do damage to prevent their escaping and injuring his neighbour.

There are some defences to the rule. The defendant can excuse himself by showing that the escape was owing to the plaintiff’s default; or perhaps that the escape was the consequence of visitors major, or the Act of God.

Note that the House of Lords, in the final appeal, add the "non-natural use" requirement. Hence there is no strict liability for natural occurrences (natural runoff of water from high or low ground). In *Rylands*, the water was collected artificially.

**Rickards v Lothian**

[1913] AC 263 (PC)

**RATIO:** Non-natural use redefined so that the use is special, posing an “increased danger” and is of no general benefit to the community. If land is used in an ordinary and proper manner, there is no strict liability.

**FACTS:** The plaintiff sued the defendant landlord for water damage suffered when someone maliciously plugged the basin and let the tap run in the lavatory above the plaintiff’s business. The lavatory was available for tenants and employees in the building.

**ISSUE:** Is there Rylands v Fletcher liability?

**DECISIONS:** There is no liability.

**REASONS:** Their Lordships are of opinion that all that is there laid down as to a case where the escape is due to “vis major or the King’s enemies” applies equally to a case where it is due to the malicious act of a third person, if indeed that case is not actually included in the above phrase. A defendant cannot in their Lordships’ opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.

But there is another ground upon which their Lordships are of opinion that the present case does not come within the principle laid down in Fletcher v. Rylands. It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

It would be unreasonable for the law to regard those who install or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence.

**Read v J Lyons & Co, Ltd**

[1947] AC 156 (HL)

**RATIO:** The Doctrine of Strict Liability can ONLY apply if there is an ESCAPE of a hazardous thing that causes damage on another’s property.
FACTS: An explosion occurred in a munitions factory and injured an inspector who was present during the explosion and sued the company arguing that liability should be based on the principle of strict liability. The argument was based on the principle that if a person engages in ultra-hazardous activities then he/she should be responsible for any injury that occurs regardless of where or how it happens. No evidence that the company was negligent.

ISSUE: Does the doctrine of strict liability apply in this case?

REASONS: “Escape,” for the purpose of applying the proposition in Rylands v. Fletcher means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control. Blackburn J several times refers to the defendant’s duty as being the duty of “keeping a thing in” at the defendant’s peril and by “keeping in” he means, not preventing an explosive substance from exploding, but preventing a thing which may inflict mischief from escaping from the area which the defendant occupies or controls.

Also not a non-natural use to build and operate a munitions factory in an otherwise industrial community.

It would be impracticable to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter.

NOTE: A defendant can excuse himself by showing that the escape was owing to the plaintiff’s default; or perhaps that the escape was the consequence of an act of God.

VICARIOUS LIABILITY

It differs from the rule in Rylands, because the defendant has a connection with the person who committed the tort. That is, you have someone bearing the cross for another person’s tort.

An employer is vicariously liable for the torts of his/her employee, committed in the course of that employee’s employment.

No amount of reasonable care on employers part will serve as a defence. Just the fact that it happened and you are an employer is enough. Lack of proper training is basis for direct, not vicarious liability.

Note that vicarious liability applies to torts committed by employees, not independent contractors. How then do we distinguish between employees and independent contractors?

In Jones v Hart, there is an example of the common law doctrine of respondeat superior meaning “let the superior answer.” The liability has three elements:

1. The employee must have committed a tort,

2. The person committing the tort must be an employee of the defendant. Independent contractors are solely and directly responsible for their own torts. This test of employment
has been found to be difficult to apply to skilled workers and professionals, such as physicians working for hospitals, where the employer coordinates the work, but cannot plausibly be said to direct the manner in which it is executed. Accordingly, courts have more recently moved to the “organization” test, which asks in effect whether the supposed employee is a cog in the defendant’s organizational machinery.

THE CONTROL TEST (“Yewens v Noakes”): Did the employer tell the tortfeasor what to do and how to do it? This test has been modified and refined to account for contemporary employment arrangements.


*Stevenson, Jordan, and Harrison v Macdonald and Evans*: Lord Denning says an employee is employed as part of the business (Organization Test), and his work is done as an integral part of the business (Integration Test), whereas the work of an independent contractor “although done for the business, is not integrated into it but is only accessory to it.”

*Stevens v Brodribb Sawmilling Co*: neither the employer’s authority to control the employee nor the employee’s role in the employer’s organization are independent or decisive tests, but are rather factors that along with others (for example, the mode of remuneration, the provision and maintenance of equipment, the provision for holidays, the deduction of income tax, the right to dismiss, and the putative employee’s power to delegate) go to the characterization of the relationship as a whole.

671122 Ontario Ltd v Sagaz Industries Canada Inc: [T]here is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. … [W]hat must always occur is a search for the total relationship of the parties. … The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks.

(3) The tort must be committed in the course of employment. The employer is not liable if the tort was committed while the employee, in the famous words of Parke B in *Joel v Morrison* (1834), ER 1338 (Ex), was “on a frolic of his own.” However, the employer is liable if the deviation from the prescribed task can be construed merely as a detour. Moreover, the employer may be held liable even if the accident arose out of prohibited conduct.

In *Morris v CW Martin & Sons Ltd*, a woman drops off a fur coat for cleaning. An employee steals the fur coat while off on delivery, and the question is whether the employer should be vicariously liable.

In *BC Ferry Corp*, a security guard was hired by the defendant to guard plaintiff’s premises intentionally burned down premises. The party with control over the hiring and supervision of employees
should bear the legal responsibility for the tortious acts of those employees whether negligent or deliberate.

A person who delegates a *non-delegable duty* to an independent contractor is *directly liable* (not through vicarious liability) for any torts committed by the independent contractor. Similarly, a person who is negligent in selecting, instructing, or supervising an independent contractor is *directly liable* for the independent contractor's tort.

**Canadian Pacific Railway v Lockhart**
[1942] AC 591 (PC)

**FACTS:** The employee was a carpenter who, contrary to a written policy brought to the attention of employees, used his own uninsured car to travel from one of his employer's properties to another and negligently injured the plaintiff in the course of the trip.

**ISSUE:** Is the employee liable notwithstanding the fact that an accident arose out of prohibited conduct?

**DECISION:** A master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may rightly be regarded as modes—although improper modes—of doing them.

**REASONS:** If the prohibition had absolutely forbidden the servant to drive his motor-car in course of his employment, it might well have been maintained that he was employed to do carpentry work and not to drive a motor-car, and that, therefore, the driving of a motor-car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor-car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which or by means of which the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties.

**London Drugs Ltd v Kuehne & Nagle International Ltd:**
(1) The vicarious liability regime allows the plaintiff to obtain compensation from someone who is financially capable of satisfying a judgment.
(2) A person, typically a corporation, who employs others to advance its own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise.
(3) The regime promotes a wide distribution of tort losses since the employer is a most suitable channel for passing them on through liability insurance and higher prices.
(4) Vicarious liability is also a coherent doctrine from the perspective of deterrence.

**Lister v Romford Ice and Cold Storage**
[1957] AC 555 (HL)
RATIO: An employer who has been found to be vicariously liable can seek indemnity against the employee tortfeasor. The right of indemnity applies regardless of the existence of insurance coverage.

ISSUE: Is an employer who is liable under respondeat superior able to recover from the employee who commits the tort?

DECISION: An employer who is liable under the doctrine of respondeat superior has a right to indemnity from the employee.

REASONS (Majority): The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master. To preclude indemnity would promote an “irresponsibility” among employees.

REASONS (Dissent): If an accident takes place through negligence, the person injured can sue either employer or employed or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has bought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer’s name and the former, instead of getting the benefit of the insurance which his employer was to provide, is, in the end, the one who foots the bill.

QUESTION: Is the employee liable for damages beyond what employer has undertaken to cover/beyond insured amount? See London Drugs v Kuehne.


RATIO: An employee will be protected from a contractual provision between the employer and the plaintiff that limits liability. It does not matter that the employees were not parties to the contract.

FACTS: The employees of a warehousing operation were being sued by the owners of a stored transformer for negligently damaging the transformer when lifting it. The contract between the plaintiff and the employer limited the warehouse’s liability to $40.
ISSUE: Whether the plaintiff could recover full damages from the negligent employees on the ground that they were not parties to the contract.

DECISION: The employees were protected by the contractual provision limiting liability if (as was the case here) the clause was expressly or implicitly for the benefit of the employees and the employees were performing the very services provided for in the contract. The liability of the employees was therefore limited to $40.

REASONS (Majority): The employer will almost always be insured against the risk of being held liable to third parties by reason of his vicarious liability: the cost of such liability is thus internalized to the profitable activity that gives rise to it. There is no requirement for double insurance, covering both the employee and his employer against the same risk. Shifting the loss to the employee, either by permitting a customer to act against the employee or by permitting the employer to claim an indemnity against the employee, upsets the policy foundation of vicarious liability.

As for deterrence, imposing tort liability on the employee in these circumstances cannot be justified by the need to deter careless behaviour. An employee subjects himself to discipline or dismissal by a refusal to perform work as instructed by the employer.

The critical policy concern that would be raised by the elimination of the employee’s liability in this case is related to compensation. Obviously, removing a potential defendant from the equation will reduce to some degree the plaintiff’s chances of being compensated for its loss. In this regard, it should first be noted that in the vast majority of cases, eliminating the possibility of shifting the loss to the employee will have no impact on the plaintiff’s compensation. The plaintiff will naturally prefer to sue the employer whenever possible. Nonetheless, for one reason or another, the employer may not be available as a source of compensation.

In my view, where the plaintiff has suffered injury to his property pursuant to contractual relations with the company, he can be considered to have chosen to deal with a company.

REASONS (Dissent): No liability for loss at all – elimination of employee loss-bearing more consistent with vicarious liability doctrine. Does not have to jeopardize the doctrine of privity of contract (only parties to a contract can bring an action for breach).

**Bazley v Curry**

[1999] 2 SCR 534

FACTS: P was sexually assaulted as a young child in a youth care facility. The non-profit facility operator had carried out a background check of the perpetrator Curry prior to hiring him. On discovering Curry’s criminal conduct, the facility fired him. He later died, and now P wants damages from the youth care facility, alleging they are vicariously liable for the conduct of the employees.
ISSUE: May employers be held vicariously liable for their employees’ sexual assaults on clients or persons within their care? If so, should non-profit employers be exempted from liability?

DECISION: The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition Curry’s sexual abuse. The employer’s enterprise created and fostered the risk that led to the ultimate harm. The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished.

REASONS: The Salmond test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. Concerned here with the second branch of the test. The Foundation says that its employee’s sexual assaults of Bazley were not “modes” of doing an authorized act. Bazley, on the other hand, submits that the assaults were a mode of performing authorized tasks, and that courts have often found employers vicariously liable for intentional wrongs of employees comparable to sexual assault.

ENTERPRISE RISK: Did the employer’s enterprise introduce, aggravate or materially increase the risk of what happened (THE STRONG CONNECTION TEST).

First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

PREVIOUS CASES:
From previous cases, the overall theme is the idea that where the employee’s conduct is closely tied to a risk that the employer’s enterprise has placed in the community, the employer be held vicariously liable for the employee’s wrong.

Relevant cases can be grouped into three categories:
1. “Furtherance of employer’s aims” cases;
   This rationale works well enough for torts of negligent accident. It does not suffice for intentional torts, however. It is difficult to maintain the fiction that an employee who commits an assault or theft was authorized to do so, even “ostensibly.”

2. “Employer’s creation of friction” cases;
   The employer’s aims or enterprise incidentally create a situation of friction that may give rise to employees committing tortious acts, an employee’s intentional misconduct can be viewed as falling within the scope of the employment and the employer is vicariously liable for ensuing harm. Relevant to accident-like intentional torts; occurs in circumstances where such incidents can be expected to
arise because of the nature of the business (e.g. bartender assaults obnoxious customer).

3. “Dishonest employee” cases.
   Determined by fairness and policy, where the employee’s wrongdoing was a random act wholly unconnected to the nature of the employer’s enterprise, the employer is not vicariously liable – however, in less clear instances, the employer may be held liable

One common feature: in each case it can be said that the employer’s enterprise had created the risk that produced the tortious act.

**POLICY CONSIDERATIONS:**

**DOES IT MAKE SENSE TO APPLY POLICY CONSIDERATIONS?** McLachlan, J. says that there are some areas of law where social considerations are changing, and policy should be the basis for reforming doctrine. The problem is when policy determines every case, it makes the law unstable. Two fundamental concerns underlie the imposition of vicarious liability: (1) provision of a just and practical remedy for the harm; and (2) deterrence of future harm.

“a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise.” The first is the goal of effective compensation. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer’s reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.

Fixing the employer with responsibility for the employee’s wrongful act, even where the employer is not negligent, may have a deterrent effect. Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.

Where precedent is inconclusive, courts should be guided by principles (including but not limited to):

1. To openly confront the question of vicarious liability and not obscure it.
2. Vicarious liability is generally appropriate where there is significant connection between the creation of the risk and the wrong.
3. **Consideration of subsidiary factors to gauge the sufficiency of the connection between employer’s creation of risk and the wrong.** Factors may include: (a) Opportunity afforded by the enterprise to the employee to abuse power (b) Extent to which wrongful act furthered employer’s aim (c) Extent to which wrongful act was related to an employer friction (d) Power relationship between employee and victim (e) Vulnerability of potential victims to wrongful exercise of power.
In cases of sexual assault, incidental considerations of time and place are unlikely to be relevant (e.g. that the assault occurred on the employer’s premises is not determinative). However, it is obvious that the risk of an employee sexually abusing a child may be materially enhanced by giving the employee an opportunity to commit the abuse. If an employee is permitted or required to be with children for brief periods of time, there may be a small risk of such harm—perhaps not much greater than if the employee were a stranger. If an employee is permitted or required to be alone with a child for extended periods of time, the opportunity for abuse may be greater.

**Jacobi v Griffiths**  
[1999] 2 SCR 570

**FACTS:** Boys and girls club employee, Griffith’s entertained the Jacobi brother and sister after hours and outside the club. Their relationship grew more intimate until eventually sexual abuse occurred. Jacobi’s sued the club under vicarious liability (didn’t sue the individual because he has no money). **THE BIG DIFFERENCES FROM BAZLEY IS THAT THE KIDS DID NOT LIVE IN THE PLACE OF ABUSE.**

**ISSUE:** Is the club to be held responsible for Griffiths actions provided they happened after hours and outside the club?

**DECISION:** Not vicariously liable.

**REASONS** (Majority): The key to this case, in my view, is that the Club’s “enterprise” was to offer group recreational activities for children to be enjoyed in the presence of volunteers and other members. The opportunity that the Club afforded Griffiths to abuse whatever power he may have had was slight. The sexual abuse only became possible when Griffiths managed to subvert the public nature of the activities. The success of his agenda of personal gratification, which ultimately progressed to sex acts, depended on his success in isolating the victims from the group.

There was no enterprise risk. The emphasis was on developing horizontal relationship among members (kids making friends their own age), not vertical relationships with employees (not trying to create parental figures).

Further, the majority stated that a “reasonably cautious” parent would have questioned invitation to defendant’s home. **This is putting the blame on the parent, and is somewhat unnecessary.**

Another argument was that the Plaintiffs were free to leave anytime – the club did not confer any meaningful power over them. **This does not make any sense. It puts the blame on the kids.**

In this case, policy considerations have to be balanced with a measure of fairness to the employer. It is not explained how to do this.
(Dissent): To treat the torts simply as discrete incidents that occurred at Griffiths’ house ignores the careful plan of entrapment that Griffiths laid. It was his fostering of trust at the Club, flowing from the requirement of his employment that he forge bonds of intimacy and respect, that enabled him to commit his despicable acts. However, if we accept this, there is not point to the Enterprise Risk. Almost all the relevant factors suggest that Griffiths’s torts were, in fact, linked to his employment. The Club introduced Griffiths to the community’s children and clothed him with special responsibilities and powers over those children who were most vulnerable. It created and sustained the risk that materialized.

NOTE: In Lister v Henley Hall from the UK, the House of Lords had an opportunity whether or not to consider Bazely. They did not, and stressed that it would have been better to flesh out the enterprise risk.

DEFAMATION

Defamation is any communication that reduces the esteem or respect to which the plaintiff is held by others in the community.

Proof of defamation requires an objective test. Did the statement lower the esteem or respect for the plaintiff in the minds of “right-thinking members of society?” Proof of ACTUAL loss of esteem is NOT required. It is up to the court to infer that the statement would or would not lower the esteem or respect for the plaintiff.

This is a STRICT LIABILITY tort. It does not matter that the defendant did not intend to defame plaintiff. Or that reasonable care was taken to ascertain the truth of the statement.

Written defamation is libel. Spoken defamation is slander. Libel is generally viewed as more serious as there is a permanence, and there is a greater likelihood that it was premeditated. At common law, Libel is actionable per se, but slander requires pecuniary loss (special damages). However, this distinction is eliminated by the Defamation Act.

A statement must reasonably be understood as referring to the plaintiff. Must identify plaintiff in some way by name, description or context. Further, the plaintiff must demonstrate that the defamatory statement was published to a third party, or that a third party heard or read it.

The Plaintiff must prove:
(1) That the impugned communication is defamatory (ie. Lowers the plaintiff’s reputation in the eyes of reasonable members of society).
(2) That the communication in fact referred to the plaintiff.
(3) That the communication was published to at least one person.

The onus then shifts on the defendant to establish a defence.

Awan v. Levant
2014 ONSC 6890

FACTS: Libel action where L published an article on MacLean’s website with central theme that Muslims were to be feared by virtue of their numbers and the rate they were multiply-
ing in Western societies. There was first a meeting where no legal action was brought up and where the Editor did not agree with the characterisation. The meeting was a significant failure of communication. Neither side effectively communicated what they had planned to propose. Plaintiff prepared a complaint to the Ontario Human Rights Commission. The Ontario Human Rights Commission decided against proceeding with the students’ complaint, concluding that it did not have jurisdiction. The British Columbia complaints therefore moved forward to a hearing. Mr. Porter’s cross-examination marks the beginning of the series of blogs complained of in this action. All but one of the posts complained of in this action were posted starting at that point of the cross-examination and following, with headlines as follows: “Khurrum Awan is a serial liar,” “Awan the liar, part 2,” etc. The complaints were dismissed. A libel notice was then served on the defendant, who posted it on his blog with a further article.

DECISION: I find that the defendant’s dominant motive in these blog posts was ill-will, and that his repeated failure to take even basic steps to check his facts showed a reckless disregard for the truth.

REASONS: The plaintiff in an action for defamation is required to prove three things to obtain judgment and an award of damages:

(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person;

(2) that the words in fact referred to the plaintiff; and,

(3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

In this case, there is no dispute about the second or third requirements.

The statements are judged by the standard of an ordinary right-thinking member of society. Hence, the test is an objective one. In this case, the impugned words include numerous meanings that would, in the ordinary course, be readily regarded as defamatory. I do not rule out the possibility that some speech may be so widely known to be false or unbelievable that its otherwise defamatory meaning is lost. However, that is not the case before me.

When the above three requirements are met, falsity and damage are presumed. The onus shifts to the defendant to establish a defence in order to escape liability The fair comment defence has a number of requirements that must be met by the defendant, set out by the Supreme Court of Canada in WIC Radio, at para. 1, as follows:

(1) the comment must be on a matter of public interest;

(2) the comment must be based on fact;

(3) the comment, though it can include inferences of fact, must be recognizable as comment; and,
the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?

The defence of fair comment is defeated by malice – that is, an indirect or improper motive not connected with the purpose for which the defence exists. Proof of honest belief within the context of the fair comment defence does not negate the possibility of a finding of malice. That defence can still be defeated by proof that malice was the dominant motive of the particular comment.

A fair and accurate report of judicial or quasi-judicial proceedings is protected by the defence of qualified privilege, subject only to malice. The report must give a complete and fair summary of the judicial proceedings. It must capture the substance of the proceeding measured by the natural and probable effect on the ordinary and average reader and viewer. It must not carry a greater sting in terms of its libelous impact than what occurred in court. The question is “whether the report substantially alters the impression which its recipient would have gained had he or she been present during the proceedings.”

I conclude that the reasonable reader of this blog post would regard the use of the words “liar” and “lie” as statements of fact. Quite simply, they are stated as fact. They are stated as fact in a purported report of an ongoing hearing. Those words are not recognizable as comment in the blog post, readily distinguishable from facts, as would be required to assert that they are comment. It is also relevant that the word “liar” appears in the headline. Some people may read the headline only, which contains no supporting facts.

I would also conclude that the defence of fair comment fails because the defendant has failed to prove the requisite foundational facts. Either way, the defendant must prove not only that the plaintiff had previously made an incorrect statement but also that he did so deliberately.

There is, however, ample evidence before me demonstrating express malice on the part of the defendant. That malice arises not from his campaign against human rights commissions but from his strongly held animus toward Dr. Elmasry.

The factors to consider in determining the quantum of damages for defamation include the following: the plaintiff’s position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances. In the Internet context, these factors must be examined in the light of the ubiquity, universality and utility of that medium.

Aggravated damages may be awarded in circumstances where the defendant’s conduct has been particularly high-handed or oppressive, increasing the plaintiff’s humiliation and anxiety arising from the libel. Like general or special damages, these damages are compensatory in nature. Having found that the defendant was motivated by malice, I further find that it increased the injury to the plaintiff.
Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency.

Hill v. Church of Scientology of Toronto
[1995] 2 SCR 1130, 1995 CanLII 59 (SCC)

FACTS: Notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of $300,000 and Scientology alone was found liable for aggravated damages of $500,000 and punitive damages of $800,000. Their appeal from this judgment was dismissed by a unanimous Court of Appeal.

ISSUE: The major issues raised in this appeal are whether the common law of defamation is consistent with the Canadian Charter of Rights and Freedoms and whether the jury's award of damages can stand.

DECISION: Appeal dismissed.

REASONS: The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. Reputation is an integral and fundamentally important aspect of every individual; it exists for everyone quite apart from employment. The appellants impugned the character, competence and integrity of the respondent himself, and not that of the government.

The common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it. The common law strikes an appropriate balance between the twin values of reputation and freedom of expression. The protection of reputation is of vital importance, and consideration must be given to the particular significance reputation has for a lawyer. Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights.

The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. The traditional common law rule with respect to reports on documents relating to judicial proceedings is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged.
When properly instructed, jurors are uniquely qualified to assess the damages suffered by the plaintiff. An appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.

Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The factors that a jury may properly take into account in assessing aggravated damages include whether there was a withdrawal of the libellous statement made by the defendant and an apology tendered, whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant.

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. They should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

DEFENCES

Justification, Absolute Privilege, Qualified privilege, Fair comment, Consent, Apology and Retraction.

Note that it is not a defence to use the defendant’s reputation as a controversial person, or any known characteristics.

JUSTIFICATION: Is a complete defence. It is not defamatory if it is substantially true.

CONSENT: Is a complete defence. Unusual defence that usually arises where plaintiff seeks to refute rumours or allegations. A broadcast of a refutation is not actionable.

APOLOGY: Partial defence. Operates to mitigate damages (s.15 of the Defamation Act).

ABSOLUTE PRIVILEGE:

Defence based on overriding public interest in promoting full and frank communication without threat of lawsuit. Focus is not on who the speaker is, but on the occasion where imputed communication is made. The question to ask is whether it is an occasion where it is necessary in the public interest to speak candidly and without inhibition. Defence provides immunity even in cases of maliciousness. Legislative proceedings, and judicial or quasi-judicial proceedings, including complaints by which such proceedings are initiated.

Does the defence extend to media reports of proceedings protected by absolute privilege? This is covered in Section 10 of the Defamation Act. Only extends to fair and accurate reports in newspapers and broadcasts. The publication should not made maliciously. BRING DEFAMATION ACT TO EXAM.

Note that the section will not apply if the defendant fails on request by the plaintiff to publish a reasonable letter or statement of explanation or contradiction.
Hay v Platinum Equites Inc.
2012 ABQB 204

RATIO: Absolute privilege applies to complaints and other “initial or incidental steps” in a quasi-judicial proceeding. Other recognized occasions/communications include solicitor/client communications, communications between cabinet ministers and high-level civil servants, and communications between spouses. Absolute privilege protects witnesses doing their public duty from civil action for example. The purpose is not to protect malice but to guard persons acting honestly in the discharge of a public function.

FACTS: This was an action for defamation and appropriation of personality arising out of the preparation, delivery and use of review engagement reports (RERs) purportedly prepared and signed by the plaintiff chartered accountant for the defendant corporation who in turn submitted the RERs to a bank in support of its application for financing. Thereafter, the RERs were determined to be forged (by Humeniuk, employee of the defendant corporation), the application to the bank was withdrawn, and the situation reported to the Institute of Chartered Accountants of Alberta, independently, by both the plaintiffs and the defendant corporation. The defendant corporation counterclaimed against the plaintiffs as well as Humeniuk and Glover, seeking damages based on loss of reputation, defamation and injurious falsehood all based on an alleged conspiracy by the defendants by counterclaim.

ISSUE: Were the Hays defamed as a result of the preparation and submission to the bank of the forged RERs under the Hays name and signature?

DECISION: Not defamatory.

REASONS: Note that the ICAA, under which complaint was made, allows for complaints inquiry process which is a quasi-judicial proceeding.

I am not persuaded on the evidence that the words are defamatory. No expert evidence was lead to show that the financial statements attached to the RERs were not in accordance with GAAP. Or that the RERs and financial statements themselves were fraudulent.

The plaintiffs claim that the statements in the letter that “the alleged false Review Engagement Report was released from Hay’s office” and the implication that Hay had signed or allowed himself to be associated with a “letter, report, statement, representation or financial statement which [Hay] knows or should have known, is false and misleading”... are defamatory of the plaintiffs.

I do not find the letter to be defamatory. One has to look to all of the circumstances surrounding its preparation and sending. At the time it was sent, the plaintiffs had already commenced this action claiming, inter alia, that Platinum had forged the RERs and defamed them. Platinum had not prepared the RERs. They had received them on the plaintiffs’ letterhead and apparent signature. They had been advised by the bank that the RERs were apparently fraudulent. This was a serious matter. It clearly called for an
investigation. In all of these circumstances, while it may be said that the words com-
plained of refer to the plaintiffs and that they were published to a third person, the
ICAA, they are not defamatory because, in my opinion, they do not have a tendency to
lower Hay’s reputation in the estimation of reasonable persons in the community.

Even if I am wrong in this conclusion and the letter was defamatory, I find that the letter
is protected by the doctrine of privilege. **I am satisfied that the letter to the ICAA was a complaint to a professional disciplinary body and was an initial or incidental step in a quasi-judicial proceeding. As such, it is protected by absolute privilege.**

**QUALIFIED PRIVILEGE:**
Provides complete immunity except for cases of malice. Courts look for compelling public policy reason to permit honest but defamatory statements. This applies to situations where the maker of the statement has “an interest or duty to make it;” and the recipient has “a corresponding interest or duty to receive it.” Examples include reference letters, communications from parent to adult child about conduct of intended spouse. It DOES NOT apply to media or press communications. They have the right to publish, but the public should be protected for defamation.

**Globe and Mail Ltd. v. Boland**

**RATIO:** The defence of qualified privilege, based on the plea that the newspaper had a duty to inform the public and the public had an interest in receiving information relevant to the question of the candidate’s fitness for office, is not open to a newspaper which has published defamatory statements about the candidate. This would be contrary to public welfare in instances where malice is not proven.

**FACTS:** The plaintiff, a candidate in a federal election, sued the defendant newspaper for libel in connection with an editorial published by the defendant. The defence of qualified privilege was pleaded. The trial judge dismissed the action on the ground that the publication was made on an occasion of qualified privilege and there was no evidence of malice. The Court of Appeal ordered a new trial on the ground that there was evidence of malice to go to the jury, but did not affirm or reject the view of the trial judge on the question of qualified privilege. The defendant appealed to this Court.

**DECISION:** The appeal should be dismissed.

**REASONS:** Where a defence of qualified privilege is set up, it is for the defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege, unless such facts are admitted before or at the trial of the action. Whether the facts and circumstances proved or admitted are or are not such as to render the occasion privileged is a question of law for the judge to decide.

To hold that during a federal election campaign in Canada any defamatory statement published in the press relating to a candidate’s fitness for office is to be taken as published on an occasion of qualified privilege would be, in my opinion, not only contrary to the great weight of authority in England and in this country but harmful to that “common convenience and welfare of society” which Baron Parke described as the underlying principle on which the rules as to qualified privilege are founded. It would mean that every man who offers himself as a candidate must be prepared to risk the
loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice.

Banks v. the Globe and Mail Ltd. et al.

FACTS: The plaintiff, brought an action for libel in connection with an editorial published in a newspaper. It was alleged that the defendants falsely and maliciously published the editorial and that the same was defamatory of the plaintiff. The defences pleaded were, *inter alia*, a plea of qualified privilege and a plea of the defence of fair comment. At trial, on a motion for dismissal of the action, it was ruled that the editorial was published on an occasion of qualified privilege but that there was *evidence of malice to go to the jury*. The jury in answer to questions put by the trial judge negatived express malice but found that the comment was unfair. The action was dismissed and this decision was affirmed by the Court of Appeal; the latter granted leave to appeal to this Court.

ISSUE: The appeal should be allowed.

DECISION: The proposition of law that given proof of the existence of a subject-matter of wide public interest throughout Canada, without proof of any other special circumstances, any newspaper in Canada (and *semble* therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege was untenable.

REASONS: The defence of fair comment must also be distinguished from that of qualified privilege. In the defence of fair comment the right exercised by the defendant is shared by every member of the public. Who is entitled to comment? The answer to that is ‘everyone’. A newspaper reporter or a newspaper editor has exactly the same rights, neither more nor less, than every other citizen. In that of qualified privilege the right is not shared by every member of the public, but is limited to an individual who stands in such relation to the circumstances that he is entitled to say or write what would be libellous or slanderous on the part of anyone else. For instance, if a master is asked as to the character of a servant, and he says that the servant is a thief, he has a privilege which no one else would have. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a matter of public interest whether it be the conduct of a public man or a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged.

On the assumption that the allegations of facts and circumstances on which the plea of qualified privilege was founded were proved, they were not such as to render the occasion privileged. The *right* which the publisher of a newspaper has, in common with all Her Majesty’s subjects, to report truthfully and comment fairly upon matters of public interest was not to be confused with a *duty* of the sort which gives rise to an occasion of privilege.
FAIR COMMENT:
The defendant must establish that:
1. The defamatory statement is based on fact
2. Though based on fact, the statement is recognizable as a comment or opinion by the ordinary reader or listener
3. The comment is on a matter of public interest
4. The comment is an honest expression of the maker’s opinion. They way to determine if it is honest is by an objective test. It does not matter that the defendant subjectively believes comment is honest. This test is whether anyone, however opinionated, could honestly express the defamatory comment, on the proven facts.

The media can rely on this defence.

The Honest Belief requirement is an objective test. It does not matter that the defendant subjectively believes a comment is honestly held. The test is whether ANYONE, however opinionated or prejudiced, could honestly express the defamatory comment, on the proven facts. The defence fails if the plaintiff proves that the defendant was motivated by express malice in making the statement.

Vader Zalm v Times Publishers
BCCA 1980

FACTS: P was the 28th premier of BC. Held several cabinet portfolios including Minister of Human Resources. D published political cartoon depicting P picking wings off flies. Was to depict attitude and views regarding welfare recipients. P claimed cartoon defamed him and D pleaded fair comment. Trial judge awarded damages of $3500 found no basis in fact.

ISSUE: Does the defence of fair comment apply in this case?

DECISION: Defence of fair comment applies. Not looking to see if the defamatory cartoon is reasonable, just must look at facts.

REASONS: 1./2. The defamatory statement is based on fact and is recognizable as comment. The plaintiff’s statements were “sufficiently” publicized as to enable ordinary reader to recognize cartoon as a commentary on the statements.

3. The comment or opinion is on a matter of public interest. Matter was concerned with plaintiff’s role in a public capacity.

4. The comment is an honest expression of the real view of the person making the comment.

WIC Radio v Simpson
SCC 2008

FACTS: Appellant is a controversial talk show host that was in a spat with the defendant who does not like homosexuality. Radio compared her to Hitler. Respondent brought a def-
amation lawsuit and Radio pleaded fair comment. Trial judge accepted defence, but CA revered on grounds that there was no evidentiary foundation, no factual basis.

ISSUE: We’re the defamatory comments based on fact? Does the appellant need to testify that he had an honest belief in the innuendo or associated imputation?

REASONS
(Majority): The general facts of the dispute between the parties was well-known to the listening audience. The facts need not relate specifically or reasonably to the alleged imputation. It is enough if it provides a basis for the defamatory statement.

The appellant did not have to testify about honest belief as the test is whether anyone could honestly express the defamatory statement on proven facts.

MIDTERM EXAM INFORMATION

3 Sections with 7 Questions

1st Section is short answer requiring only one or two sentences. There is a true and false question. Only answer true or false. (5 marks: 5 questions 1 mark each) (10 minutes)

2nd Section is a short fact patter where you are to predict the outcome with reasons. “This is how the action will turn out, and this is why.” (15 marks) (50 minutes) (Intentional Tort / Nuisance)

3rd Section is a long fact pattern. You are asked to provide a legal opinion about issues, remedies, and defences. (20 marks) (1 hour) (Intentional Tort / Defamation)

Do not state the facts of cases studied in class. Unless you are applying a legal principle and you think the facts of the legal case can be distinguished. It is enough to put the case of support in brackets.

Do not reason from facts of cases (“This looks like what happened in …”) Just simply state the law. Even though facts may be similar, only interested in legal principles and doctrine.

Organized answer. Have 30 minutes. Concise is always better but do not sacrifice meaning for brevity. Only answer the questions asked.

Avoid “what if’s” Do not make assumptions or invent facts. If you feel you need more facts, simply make a request for those facts. “I think I need to know more information about this, because…”

No point form answers, full complete sentences.

For every question you have been assigned a role. It may be a judge, a lawyer, a law student. Keep that role in mind. Assume the client knows no law, so explain very carefully what you are trying to say. Have to be less technical and explain things in a way the client would understand. If you are advising a lawyer, you can be a bit more technical. “Nuisance is a serious interference with land” as opposed to “Nuisance is a material interference with land.” If you are writing to a client, may not need to mention cases, though there is nothing wrong with it, just won’t get more marks. If you are writing to lawyer who may need to reference the case, then you can cite the case.
NEGLIGENCE GENERALLY

Negligence is the failure to take proper care in doing something. Reckless actions sometimes fall under negligence, but mostly deals with matters where the defendant failed to take proper care.

Intention on the other hand is an act or instance of determining mentally upon some action or result.

Negligence is the most prevalent cause of action in the law of torts. It has been expanded in recent decades as a result of flexible judicial interpretation / application of core elements. Courts in Canada have been active in expanding the law of negligence. This may have created some uncertainty.

3 main elements that you have to prove: (1) The defendant has committed a negligent act, (2) that the negligent act created an injury, and (3) that the plaintiff suffered from an injury. In this way, injury must be shown as opposed to battery where actual injury is not needed.

The Negligent Act is determined by identifying the appropriate standard of care to which D should have adhered. Would a reasonable person have acted more carefully? Then, that standard of care is applied to the facts of the case to see if D adhered to it.

If the defendant is indeed negligent, the next thing to ask is whether that negligent conduct actually caused the injury (Causation). Or is there some other cause or way to explain the injury?

Note that the existence of these three elements does not automatically translate to liability. Sometimes the courts have developed control devices to keep negligence liability within appropriate boundaries. The two main control devices are (1) Duty of Care, and (2) Remoteness of Damage.

For DUTY OF CARE, unless D owes a duty to take reasonable care of P’s interests, harm to P cannot result in liability to D. Hence, we can exclude certain persons from the scope of the defendant’s responsibilities.

For REMOTENESS, this is similar to duty, but it excludes liability for certain losses. On the basis that they were utterly improbable consequences of D’s negligent act of responsibility. The question is where does the blame start, and where does the blame end in terms of causation? Where should the line be drawn?

There are still defences that can be applied if negligence is proven. These include contributory negligence, voluntary assumption of risk, and illegality.

In Contributory Negligence, it is a partial defence that claims that the plaintiff was partly negligent. In Voluntary Assumption of Risk, this is a complete defence and there will be no negligence on the
part of D. In **Illegality**, this occurs where P was engaged in illegal conduct when the negligent act occurred. It operated as a full defence, but the scope is severely restricted.

**SUMMARY**
1. Does the defendant owe the Plaintiff a duty of care?
2. Did the defendant’s conduct fall below the standard of care?
3. Is there a causal link?
4. Did the D’s conduct result in actual injury or damage to the P? (Usually a right in property or bodily integrity, but sometimes purely economic).
5. Was the damage reasonably foreseeable (Remoteness)?
6. Are there any defences that may shield the defendant?

**FIRST ELEMENT: PROVING THAT THE DEFENDANT’S CONDUCT WAS NEGLIGENT**

Generally, the standard of care is an objective test, not a subjective test.

**Vaughan v Menlove**

[1837] CP

**RATIO:** The standard for negligence is an objective one. One has behaved negligently if he has acted in a way contrary to how a reasonably prudent person would have acted under similar circumstances.

**FACTS:** D built a haystack with chimney to prevent risk of fire. When warned of possibility of fire, he said “he would chance it.” Haystack caught fire, and destroyed P’s property? Trial court found D liable on the basis of failing to meet standard of ordinary prudence. On appeal, D argued that his conduct should not be measured by that standard because he is not that intelligent and should instead be whether he acted Bona fide within his intelligence.

**ISSUE:** What standard shall be used?

**RESULT:** Appeal allowed.

**REASONS:** Tindal, writing for a unanimous court, states that to allow the judgment of each individual to be based upon their own personal level of intelligence would be subjective and too variable. The court "ought to adhere to a rule that requires in all cases a regard to caution such as a man of ordinary prudence would observe".

**Buckley v Smith Transport Limited**

ONCJ 1946
RATIO: If a Defendant is incapable by way of insanity, a court may be sympathetic to that but lower IQ will not discharge obligation.

FACTS: A truck driven by an employee of Smith Transport came into an intersection and crashed into a streetcar operated by T.T.C. The driver had syphilis of the brain and was not in control of his actions at the time of the accident. The trial judge found for the plaintiffs which Smith Transport appealed.

ISSUE: Can an allowance be made?

RESULT: No negligence.

REASONS: Employee had insane delusion. He was incapable of discharging objective standard of care.

QUESTION: Is the defendant free from liability when his insane delusion does not affect his ability to appreciate risk? Why should an insane delusion count, but not severely less intelligence? Doesn’t a person with less intelligence have less ability to regard risk? The law assumes D is capable of exercising reasonable care. An insane person is not capable, but a dull person is.

Roberts v Ramsbottom
QB 1980

RATIO: In order to escape from liability in negligence on the basis of not having control of your actions, you must prove a total loss of control (such as unconsciousness).

FACTS: Ramsbottom drove into Roberts as she was emerging from her car, injuring her, her daughter, and wrecking her car. Shortly before he had rear-ended a van and knocked a boy off his bicycle. He had had a minor stroke that caused him to lose control of his actions, which was responsible for these actions. He had no reason to expect that he had had a stroke as he had never had any previous symptoms and did not realize at the time that he was unfit to drive. Ramsbottom is claiming that he was acting reasonably and not responsible for his actions as a reasonable person would not expect to be impaired in this way.

ISSUE: Was the defendant acting reasonably, or would a reasonable person have realized what was happening and not driven?

RESULT: Judgment for the plaintiff. A reasonable person would have stopped after the first accident. Despite impaired awareness, D had some sense of what he was doing.

REASONS: Neill says that Ramsbottom would escape liability if his actions were deemed to be completely beyond his control, but if he had some control, then he is held liable even if he was objectively below the required standard to drive. He finds that the man did not have a total loss of consciousness, and thus he is liable in negligence. The judge finds Ramsbottom liable for his driving in the accident at hand and further states that he
would also be liable on the grounds that he should have realized his unfitness to drive after the previous accidents.

BUT, IS CONSCIOUSNESS A GOOD STANDARD? IS THIS CASE CONSISTENT WITH BUCKLEY? In Buckley, there was not a total loss of consciousness. It makes more sense to say that if the defendant has a diminished capacity to control the situation then he is not liable. Buckley is the better decision.

**Mansfield v Weeabix**

CA 1998

**RATIO:** This case overrules Roberts. Standard is that of a reasonably competent driver **unaware** that he is suffering from condition that impairs driving. Diminished physical capacity may result in a lowering of the standard of care in circumstances where the loss of capacity resulted from a condition that the defendant is not aware of, even if the defendant retains some control.

**FACTS:** D’s employee had a condition that caused brain to malfunction when blood sugar was low. He caused a series of accidents by driving while hypoglycemic. He knew he had this condition, but did not know he was having a fit at the time of the accidents.

**ISSUE:** Was the defendant liable for the accidents caused by hypoglycemia?

**DECISION:** No liability. The unconsciousness standard as set out in Roberts is wrong.

**REASONS:** Do you need total loss of consciousness (as per Roberts), or is diminished loss of capacity all that is necessary? If the defendant is able to show a diminished loss of capacity, that should be the standard. Mansfield is the better standard than Roberts even though the standard was perhaps not applied properly in this case, since the defendant was aware of his condition. Anyone who knows they have a condition that may affect their driving should take steps to make sure it does not effect their driving.

**McHale v Watson**

HCA 1966

**FACTS:** Watson, age 12, after a game of “tag” threw sharpened piece of welding rod at a post. It bounced off the post and hit McHale, a few years younger, in the eye. Susan was rendered permanently blind. The trial judge ruled no liability even though standard of care doctrine does not allow for the “idiosyncrasies of the particular person.” But childhood is not an idiosyncrasy.

**ISSUE:** To what standard do we hold minors? Did the trial judge error in applying a different standard? Or, if the standard is lowered, was the defendant liable on the lower standard?

**DECISION:** For defendant, but for widely divergent reasons.

**REASONS**
(Majority): Semi-subjective duty of care. You can put minors at a different standard. Childhood is not an idiosyncrasy. Three levels of standards are applicable to children: (1) **Babies** are manifestly incapable of perceiving risk, and incapable of negligence (2) **Young Adults**, who have not yet obtained majority age are nonetheless capable as adults of foreseeing risk or probable consequences of action and we hold them to the usual standard of care of the reasonable person, (3) **In-between group including children**, capacities to appreciate risk will vary with age, intelligence and experience and will be held to the standard of a child it the same age, intelligence and experience, this is a semi-subjective standard that accounts for intelligence and experience.

(Concurring): No subjectivity. We can simply deviate from the adult standard to account for childhood. Age can be relied on as a limitation to capacity that is not personal, but a general characteristic of stage of development. So, not idiosyncratic but in fact an appeal to the standard of ordinances for a 12-year old. **This is the best reasoning, instead of grouping into categories.** In this case, a normal boy would have thrown the spike (!?) The rule is great, the application is wrong.

(Dissent): No deviation. Reasonable person applies, and not room for variations. This is probably wrong. Not fair to judge children on same level of adults. He also says that even on a lowered standard, D is still liable. It was not reasonable for a boy to throw the rod.

**R v Hill**
SCC 1986

“THE LAW DOES NOT ATTRIBUTE TO INDIVIDUALS IN THE DEVELOPMENTAL STAGE OF YOUTH THE SAME DEGREE OF RESPONSIBILITY....ATTRIBUTE TO FULLY ADULT ACTORS.”
On the road to objectivity, standard should be adjusted incrementally in accordance with age. But note *McEllistrum v Etches* (SCC 1956) where semi-subjective view was applied.

What if a minor is engaged in an activity we associate with adults? As per *McErlean v Sarel*, two teenagers were involved in trail bike accident: “**When a child engages in...an adult activity, he or she will not be accorded special treatment.**” Operating a motor vehicle is different from playing ball. Machines are capable of high rates of speed regardless of operator and inherently dangerous in wrong hands. Where the activity is insured, the minor is protected from ruinous liability. But should the law hold the person who granted the minor access responsible instead?

In summary, in a situation involving children, age, intelligence and experience should all be considered.

**Fleming, Law of Torts**

“Reasonable person” standard eroded over time by policy considerations and adoption of semi-subjective standards. The objective standard is necessary for general welfare of society (compensation of injured plaintiffs), but often changed when it does not meet or hinders this objective. Cases sometimes make adjustments to reasonable person standard based on specific factors.

Such adjustments include:
Knowledge/Experience. No allowances for substandard knowledge/experience, but the converse is not true. If a person has a higher level of experiences, she may be judged according to that experience. For example, a physician is held to the standard of the average and reasonably skilled practitioner of the class to which she belongs or holds herself out to belong. However, for beginners (perhaps interns), there is no lowered standard of care: held to standard of reasonably skilled and proficient persons in that calling. Where a task demands expert skill, especially if public safety is implicated, a layperson undertaking the task will be judged by the standard of the expert.

Physical and intellectual impairments. Physically disabled persons are often judged by standard of reasonably prudent person with the same disability. No allowances for intellectual or emotional characteristics.

Lunacy. Depends on whether D can or cannot appreciate risk and the need to take care. The weight of authority suggests no allowances in any circumstances. Though this is not necessarily true due to the case of Buckley.

WHAT DOES IT MEAN TO BE A REASONABLE PERSON?

It is argued that a reasonable person can be determined by the “Learned Hand Formula.” Only to be applied when there is no clear rule of law.

United States v Carroll Towing
2d Circ, 1947

FACTS: Barge broke away from its moorings while unattended and collided with another ship.

ISSUE: Was leaving a barge unattended in a busy harbor negligent?

REASONS: The reasonable person is reflected in the following test:
- \( B < P \times L \) = Reasonable to take care.
- \( B > P \times L \) = Not reasonable to take care.

- B = burden or cost of precautions (dollar amount).
- P = probability of accident occurring (percentage).
- L = loss or cost of loss (dollar amount).

That is, it is reasonable to take precautions where the cost of avoidance is less than the cost of loss discounted by the statistical probability of accident occurring.

Note that the learned hand formula is difficult to apply in practice.

McCarty v Pheasant Run
7th Circ, 1987

The burden (B) is fairly easy to quantify, but exceedingly difficult to quantify, in monetary terms, loss (L) and its likelihood (P).
Also, if the cost of precautions are very high, then it is not negligent to inflict harm of the plaintiff?!
This sacrifices the plaintiff’s wellbeing for the social or economic good.

Lesley Bender argues that economic analysis turns people into abstractions. Rather, the primary assumption we should make is that no one should be hurt. The burden can never be high enough to absolve D of taking precautions. The reasonable person test should be one of conscious care and concern of a reasonable neighbor under the circumstances. Posner responds to this by saying most neighbors really could not care less about each other.

**Bolton v Stone**
HL, 1951

**FACTS:** P was hit and seriously injured by a cricket ball. The probability of injury extremely low, but not inconceivable. Ball bit clear out of grounds only 6 times in 30 years. Landed in lane that was back entrance into row of houses.

**ISSUE:** D’s actions are to be assessed on the reasonable person standard. But what does it mean to act reasonably in the context of this case?

**DECISION:** Defendant was not liable.

**REASONS:** We must draw a distinction between unforeseeable risk and foreseeable real risk. **Unforeseeable risk** arises from events so **bizarre and freakish** no one could reasonably foresee that outcome. To impose a foreseeable risk on another can be a breach of the standard of care. But, once an unforeseeable risk occurs once, it is no foreseeable, right? The court says we can refine to account for degree of foreseeable risk: Foreseeable but small or infinitesimal risk versus foreseeable and substantial risk.

The law does not seek to protect people from all risks. We live in a crowded society, and even the most careful person creates risk. Defendants are only required to refrain from creating foreseeable substantial risk. D must also consider seriousness of the consequences.

The court says not to regard the burden. You should not think about how much it will cost you to solve the problem.

**Wagon Mound No 2**
PC 1967

**RATIO:** A reasonable person would not disregard a foreseeable but infinitesimal risk if that risk could have been avoided without difficulty, disadvantage or expense.

**FACTS:** A tanker, the Wagon Mound, was docked to take on oil. Due to a bad fitting, oil was discharged into the harbor by the defendant covering part of the harbor. The dock owner was welding at the time. Piece of molten metal fell on the water igniting the oil and burning docks and boats. The ship-owners sued the welder. Trial judge said there was a foreseeable but infinitesimal risk, hence no liability.
ISSUE: Can you be held liable for an infinitesimal risk with regard to burden?


REASONS: In Bolton the risk was so small that a reasonable person would be justified in disregarding it. It was reasonable to ignore the risk in Bolton because of the considerable expense in eliminating it. This is opposite of Bolton where it was said that the burden was not important. This case reintroduces the burden element. In this case, there are no avoidance costs – all it would have taken was to tighten the fitting. Therefore a reasonable person would not create the risk.

Latimer v AEC
Hl. 1953

RATIO: If risk is foreseeable and substantial, cost of precaution is irrelevant. But relevant consideration if risk is foreseeable but small.

FACTS: Exceptional rainfall floods factory floor. Plaintiff slips and falls and sues.

DECISION: Not liable. The cost of avoidance would have been to shut down the plant. The reasonable person would not have bared that burden.

SUMMARY (FOR SITUATIONS WITHOUT PRECEDENT)

If risk is unforeseeable, no liability.
If risk is foreseeable, ask if it is small or substantial (determined by the facts).
   If the risk is small, you consider the seriousness of the consequences and the cost of precautions. If the costs are low, the Defendant may be liable.
   If the risk is substantial, you only consider the seriousness of the consequences and do not consider the cost of precautions.

THE ROLE OF STATUTES

Consider the hypothetical: Your client was struck by a truck. Truck hard cargo limit. Truck was carrying weight over that limit. It was the extra weight that caused the accident. Is the defendant liable merely on the basis of the breach of the statute? This issue is important because tort law developed exclusive of state regulation of hazards, which came later. Why should a statute impose liability then in a case dealing with negligence? That is, the breach of statutory rule matters to regulator, but should it matter to the relations between plaintiff and defendant?

Three possible approaches:
1. Breach of statutory duty is determinative of liability notwithstanding the separation of tort law and statutory authority. The breach of a statute is the breach of the standard of care or that the statutory rule is the standard of care. The breach of the statute is itself a tort and is a strict liability tort.
2. Breach of statutory rule is totally irrelevant. Such cases deal with the interaction between two private parties, the plaintiff and the defendant but not the government. In determining the standard of care, obligations owed by the defendant to the state do not matter.

3. Somewhere in between. Statute can be considered, but not determinative.

**Saskatchewan Wheat Pool v The Queen**

**SCC 1983**

**RATIO:** Evidence of a breach of statutory requirements is a relevant consideration in assessing whether the defendant breached the standard of care. But a breach of statute does not, in itself, constitute a tort OR a basis for a standalone civil action.

**FACTS:** The defendant/appellant stored and transported the Canadian Wheat Board’s grain. D loaded a quantity of grain onto a ship. It was later discovered that grain was infested. As a result, P was required to divert ship and fumigate and then reload again. It cost nearly 100,000 which it sought to recover. Note that the plaintiff did not allege negligence. The alleged breach was of a section of Canada Grain Act that prohibited delivery of infested grain.

**DECISION:** The mere fact of a statutory breach does not give rise to a civil cause of action unless the statute says it is a tort. Instead, the fact of a statutory breach should be considered within the context of a claim for negligence. That is, the violation of a statute should be evidence of negligence, and not determinative.

**REASONS:** Justice Dickson said that there was no general principle on this issue. From England, the “painful emergence” of a “new nominate tort of statutory breach.” This involves a search for non-existent Parliamentary intent to create a civil cause of action. Only create civil penalties.

In the US, some confusion in the cases, but dominant position is that violation of statute is per se negligence.

None of this applies to industrial statutes which historically involve absolute liability. Canadian law rejects the idea of a civil action for breach of statutory duty. No tort of statutory breach in Canada. To hold otherwise is judicial legislation of creating a tort where there was no intention of one being created.

Other considerations are whether D operated the terminal to accepted trade standards, made regular checks for infested grain and tested samples and carried out visual inspections.

**QUESTION:** When the statutory breach was not negligent but intentional and that causes harm to the Plaintiff? Can we then treat the breach of statute as determinative in finding liability? If the breach was intentional, then P will not sue in negligence but in intentional tort and will be likely to succeed, so the rule does not extend to intentional torts and is limited to negligence. But cases exist where courts have treated a breach as forming the basis of a private right of action.
Whistler Cable v IPEC Canada

FACTS: P operated a cable TV system and D operated an unlicensed cable system thus cutting into P’s business. This is not a tort (is it tortious to compete with another company?), but P sued anyway. The Broadcasting Act made it an offence to broadcast without a licence.

DECISION: D is held to be liable?!

REASONS: Sask Wheat Pool confined to negligence law claims, but does not eliminate “tort of breach of statute”? WAS THIS WRONGLY DECIDED? Yes, this court expressly overrules the SCC decision.

YO v Bellville (City) Chief of Police
1991 ONGD

FACTS: Police breached provision of Young Offenders Act by revealing P’s criminal record to potential employer. Penalty for breach was criminal prosecution. P sued the police for negligence.

REASONS: At trial, judge said no tort of statutory duty and case should be determined on negligence principles. But, “all defendants had a duty to the plaintiff to use reasonable care to keep youth record confidential.” D’s were negligent and breached that duty.

BUT, WHAT TORT WAS COMMITTED? Tort of giving out information? Should not have been a tort, but a breach of statutory duty for which penalties apply. Also appears that the trial judge treated the breach as determinative.

But note that if a statute expressly provides that person harmed by breach has action for damages caused by the breach. In this way, a statute can create a tort.

THE ROLE OF CUSTOM

Custom: “The way of doing things in a particular and traditional way.”

The question is whether it matters that a defendant’s degree of care conformed to the custom of an industry? And if yes, then how so? In determining whether there has been a breach of the standard of care is it relevant to know how similarly situated persons conducted themselves?

Trimarco v Klein
NYCA 1982

RATIO: When certain dangers have been removed by a customary way of doing things, this may be considered in determining whether a defendant has met or has not met the standard of care, but the evidence of custom is never determinative.
FACTS: P was injured when glass enclosure door of a bathtub shattered. Practice of using shatterproof glass common since the early 1950s. P also cited statute that made it a crime not to use shatterproof glass prior to 1973, but door was installed prior to 1973 so the criminal sanction did not apply. However, the statutory provisions reflect the custom.

ISSUE: Should evidence of custom influence the standard of care?

DECISION: Yes, it is influential, but it is not determinative.

REASONS: When certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that D has fallen below the required standard. Conversely, proof of an accepted practice and conformity by D may establish due care.

Custom shows collective judgment of many people on the issue. It is better than having a judge make it up. The community generally thinks that acting reasonably (assuming they are acting reasonably) entails the customary practice.

Shows that precautions that the court is imposing on the defendant are feasible. Everyone else is doing it, so why aren’t you?

QUESTION: Must the custom be universal? No. It is enough that it is fairly well defined and in the same calling or business. Further, it must be the fact that D either knows about the custom or is negligently ignorant about it. If the two experts of some practice disagree with a custom, then the custom may still be applied. The only way you can rely on the respectable minority rule is where there is no custom.

QUESTION: Is the evidence of custom conclusive? No. The finder of fact must still be satisfied that the custom itself is reasonable. Just because everyone is doing does not mean it is reasonable. Focus is not just on what everyone else is doing, but also on what is reasonable.

TJ Hooper

RATIO: Custom is often helpful in the standard of care analysis by only if the custom itself is reasonable.

FACTS: P’s barges towed by D’s tugs were caught in a storm and sank. The tugs were alleged not to be seaworthy because they did not carry radio receiving sets. There was no general custom of using radio sets, but it was clear from evidence that they could be obtained at little expense, and were fairly reliable with maintenance and offered great protection. D tried to say that radio sets were not customary in the industry. That is, custom should be used as a SHEILD in this case.

DECISION: Justice Learned Hand held for the plaintiff and said that the custom is unreasonable. The barges are unmaneuverable ships and using the sets should be required.

Malcolm v Waldick
1991 2 SCR 456
FACTS: W slipped on ice on D's driveway and fractures skull. D neither salted nor sanded the driveway. D claimed that the local practice was not to do this in their rural community (lol?). Trial and CA ruled that the failure to salt driveway was negligent regardless of a local custom.

DECISION: The SCC dismissed D's appeal in which he claimed local custom was not taken into account. But the D's were mistaken: local custom was taken into account, but it is not determinative. Just because it was not applied does not mean it was not considered.

REASONS: D's did not offer sufficient proof of this so-called local custom. Relied on testimony of only one defendant. But even if the local custom did exist, the custom itself was negligent. “No amount of general community compliance will render negligent conduct reasonable.”

QUESTION: Say that there is evidence of a practice adopted by most or all astronauts, which exposes others to risk. How do you decide if the custom is unreasonable? Where do you draw your decision on reasonableness from a very niche field?

RATIO: The rule of law says that we respect customs that involves complex or highly technical matters except where the custom is fraught with risk is so obvious that it can be appreciated and understood by any reasonable person.

FACTS: D physician failed to warn plaintiff of the dangers of contracting HIV from artificial insemination procedure. At time of infection, virtually no knowledge among specialist of danger of HIV transmission. Only one letter in a journal that was no heavily circulated that warned of the risk. There was no practice of screening donors or warning of risk. Physician, in not warning, actually complied with standard medical practice. However, the physician even went beyond what his colleagues would do, since he actually screened his donors (but one slipped through). CA found physician not liable.

DECISION: The SCC upheld CA decision of not being liable.

REASONS: Only two ways jury could have found D to be negligent: (1) the jury could find that D violated the custom (evidence of custom in this case was unambiguous and D’s actions complied with that custom) or (2) the jury could find that he custom itself was negligent (this was impossible to determine since this case involves a highly complex area of practice and study and it was not up to the trier of fact to find such custom negligent).

There is only one exception. If a custom or standard of practice is fraught with obvious risks, then a court may find a defendant to be liable. That is, the standard practice must fail to take precautions that are readily apparent to anyone with the experience or knowledge base of the trier of fact.

THE PROOF OF NEGLIGENCE
The plaintiff in a torts case must prove their case on a balance of probabilities. The evidence can be direct or circumstantial.

The doctrine of Res Ipsa Loquitur is a mechanism for dealing with circumstantial evidence. Traditionally, RIL considered to be sufficient evidence where the things that caused the damage was under the defendant’s control, the event would not have occurred without negligence, and there is no evidence as to why or how the event took place.

This doctrine morphed into an interpretation that burden of proof shifted to defendant to disprove negligence.

**Bryne v Boadle**  
Exch 1863

**FACTS:** Barrel of flour rolled out of defendant’s shop. It struck and seriously injured the plaintiff.

**DECISION:** Barrels of flour do not just get up and walk out of buildings. What happened could only resulted from negligence. Accident reveals evidence that defendant can either rebut or be found negligent.

**QUESTION:** What kind of evidence can defendant use to rebut RIL?

**Fontaine v. British Columbia**  
SCC 1998

**FACTS:** Appellant’s husband was travelling in car driven by hunting companion. Car veered off the road in very poor weather. Both were killed but no one saw the accident or knew when it occurred. Evidence of driver’s negligence: car was moving with sufficient force to plough through small trees. But also circumstance evidence of other non-negligent causes.

**ISSUE:** Do the alternative explanations negate res ipsa loquitur?

**DECISION:** Res Ipsa Loquiturno no longer applies. It is technical and unhelpful. New test for circumstantial evidence. The trier of fact must weigh circumstantial evidence against any existing direct evidence to determine whether plaintiff has established on a balance of probabilities if there is a prima facie case of negligence. If the plaintiff successfully establishes a prima facie case, it falls to the defendant to present evidence to negate the plaintiff’s evidence, or the plaintiff will succeed on the prima facie case.

**STANDARD OF CARE IN MEDICAL NEGLIGENCE CASES**

Every medical practitioner must bring to his tasks a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal prudent practitioner of the same experience and standing,
and if hold himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified.

**General Principles:**
Typically addressed by looking at conformity of defendant’s conduct with accepted or approved standard practice.

Consistent with *ter neuzen*, courts will not overrule approved practice unless “clearly unnecessary or unduly hazardous.”

**Sylvestor v Crits**

**FACTS:** 5 year old plaintiff injured during medical operation when anaesthetic exploded. Anaesthetist *created* a highly explosive mixture of oxygen and ether. Also placed ether can on operating table close to the plaintiff’s head. Hence two grounds of negligence. Explosion caused by static electricity.

**ISSUE:** Was there negligence?

**REASONS:** Court found that there was a “minimum of evidence” of approved standard practice. However, obvious to a non-technical person that turning off oxygen tank would have prevented accident. Does not matter if you are a doctor or not. It did not require a technician’s understanding to see that a dangerous volume of the gaseous mixture had built up in the immediate area in which the flash of flame appeared.

**Approved Standard Practice**

Typically determined through expert testimony or by reviewing professional standards of practice. Often taken as conclusive evidence of the standard of care, unless “fraught with obvious risks.” Courts show deference as they lack technical expertise to determine what is appropriate.

**Error of Judgment**

Medical professionals should not be held liable for mere errors of judgment that are distinguishable from professional fault. The question is how do you determine if it is an error of judgment or a professional fault? The first thing that distinguishes fault and error is **reasonableness**. For example, say you go and see a doctor and complained about a swelling around thyroid. Doctor gave some antibiotics but did a biopsy which is inconclusive. Consistently goes back and is diagnosed as the same thing by different doctors. Finally find out it is stage 4 cancer on the fifth visit. From the first time walked in, cancer was an option. Question is if the misdiagnosis was reasonable? It was reasonable that he made a diagnosis and sent away for a biopsy. But what about the second and third doctors? They probably acted unreasonably.

The question to ask is: **could a reasonably competent and similarly skilled professional have made the same error?** An error in judgment is an error made in the context of the exercise of reasonable
A doctor will not be found liable if the diagnosis and treatment to a patient correspond to those recognized by medical science at the time, even in the face of competing theories.

A typical example of an error of judgment is a misdiagnosis that is consistent with approved standard practice. However, doctor is negligent if she fails to reconsider diagnosis.

Wilson v Swanson
SCC 1956

FACTS: Defendant, a highly skilled surgeon, found a growth during surgery. Test said probably malignant. Defendant made judgment call to remove organs that would have been untouched in initial surgery. As a result of not waiting for confirmatory test, turns out growth was benign and the patient sued.

ISSUE: Did physician breach standard of care, or was this an error of judgment?

DECISION: An error in judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge. The honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation.

REASONS: He obtained the opinion of a pathologist of recognized competence. He then made an admittedly difficult decision. In making that decision, I am satisfied he exercised his best judgment in what he considered to be the best interest of his patient.

Lapointe v Hopital le Gardeur

FACTS: 5 year old cut her elbow resulting in severed artery and severe blood loss. Attended by emergency physician who realized he could not fix artery, so made judgment call to send her to an expert. Did not perform blood transfusion, but communicated gravity of case to pediatrics expert including possibility of shock. Patient suffered cardio-respiratory arrest due to oxygen loss and was left with irreversible brain damage.

ISSUE: Was there an error of judgment or a breach of standard of care? In circumstances where it is taking a long time to get fluids, should you do a blood transfusion prior to transfer?

DECISION: SCC held that the doctor made an error of judgment and the doctor exercised proper judgment in ordering transfer. Decision to transfer without giving her a transfusion was reasonable.

REASONS: The court is not saying that there were no other options, they just decided that the decision made was reasonable.

Summary

A medical professional is held to a standard of care expected of a prudent, diligent and reasonably skilled practitioner of the same standing and experience.
A medical professional who acted in conformity with approved standard practice is not negligent, unless the standard practice is fraught with obvious risks.

Medical professionals are not legally responsible for errors of judgment that are distinguishable from professional fault.

**NEGLIGENCE: DUTY OF CARE**

Unless a defendant owes a duty to take reasonable care for the plaintiff’s interests, the mere fact of harm to the plaintiff cannot result in liability to the defendant. The idea behind this is that recovery is confined to a certain type of person. Largely speaking, this is a question of law. The judge determines if the duty exists. It is a value judgment based upon various factors. That is, who is exposed to the risk? What is the risk?

**Winterbottom v Wright**  
Exch, 1842

**FACTS:** D is a coach manufacturer. Enters into contract with postmaster to maintain coaches in good working order. Postmaster contracts with third party, Atkinson to deliver coach. Atkinson contracts with plaintiff to drive coach to its destination. En route, coach broke due to latent (hidden) defects. P was seriously injured and sued D. At this time, there was no law of negligence, only law of contract. If using doctrine of contracts, only person P can sue is Atkinson who had nothing to do with the coach.

**ISSUE:** Did D owe the plaintiff a duty of care?

**DECISION:** No duty of care owed. Hard cases make bad law.

**REASONS:** No precedent for this type of case. There was no privity of contract between P and D. Court said that granting the plaintiff relief would open the floodgates to anyone injured by the upsetting of a coach by suing the manufacturer. *Damnum absque injuria* means loss without a violation of legal rights.

**NOTE:** Since the advent of insurance, the courts should not be concerned about any impeding of industrial development through the “opening of the floodgates” as was the concern in *Winterbottom*.

**Donoghue v Stevenson**  
HL, 1932

**FACTS:** P and friend goes out to drink. Friend buys a drink and gives it to P. Bottle was opaque. There was a snail in the bottle. P claims that she suffered physical and mental injury from drink from the snail bottle.
ISSUE: Did the defendant manufacture owe the plaintiff a duty of care?

DECISION: The House of Lords said yes.

REASONS (Dissent): Winterbottom is the law/ Absent a contractual relationship between P and D, there is no duty. There are two exceptions: (1) Inherently dangerous articles like firearms, or (2) articles that are dangerous by reason of hidden defects known by the manufacturer. If you would allow a general principle of negligence, this would “open the floodgates.” That is, D would eventually owe duty to all persons who consume the product regardless of contractual privity.

REASONS (Majority): Duty of care has been determined based on precedent or established classifications (Contract, Bailment, Transfer of custody of chattels). This approach results in denial of claims. The approach is inconsistent with common law methods of adjudication. Precedent does not always work and sometimes you have to create something new. Rather than relating the specific facts of a case to established categories, we should relate them to a general principle.

This general principle is the “Neighbour Principle.” The rule that you love your neighbour, becomes in law, you must not injure your neighbour. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

In this case, D intended the product to reach the consumer in the form it left the factory. There was no real possibility of inspection by the seller. There may be no contractual relationship, but a direct relationship exists. D intended the product to be consumed. D could have foreseen that negligence on his part will cause injury to P’s legally protected interests (right to bodily integrity and right to property).

Winterbottom was distinguished because no duty was alleged other than that arising out of contract. Hence does not apply or govern. Hence, Atkin, J. read down Winterbottom.

REASONS (Concurring): Claim in tort is not precluded by the absence of contractual privity. Winterbottom does not apply since P in Winterbottom sought to impose contractual duty.

SUMMARY: There must be a close and direct relationship. This is the proximity principle. The second idea is that there must be a contemplation or foreseeability. Note that Atkin, J. also stressed that D owes P a duty to take reasonable care to avoid acts that will result in an injury to the plaintiff’s life and property. That is, injury to plaintiff’s legal right. There must be misfeasance, not nonfeasance.

QUESTION: Which of proximity or foreseeability triggers the duty of care inquiry? Can we ignore one or find that a duty exists simply on one element? There are three interpretations: (1) Classical/current English approach that you need both proximity and foreseeability, (2) the New Zeland (former Canadian) position, called the Anns Test, that foreseeability alone is sufficient (simply ask if the risk of harm is reasonably foreseeable. If yes, then
ask if there are policy reasons to limit the scope of the duty, the class of persons to whom it is owed, or quantum of damages.), and (3) Foreseeability and proximity minus policy limitations as set out in Cooper v Hobart.

SUMMARY: **Foreseeability:** Is it reasonably foreseeable that my mistake would cause harm to another or other (essentially anyone; broad)?

**Proximity:** Narrows the foreseeability principle. Who are the persons / should have in my contemplation as likely to be affected by my mistakes

**Policy.**

EXAMPLE: Defendant’s deceased husband mounted a sniper attack from roof of house and hurt people driving by before taking his own life. Plaintiff’s sued the homeowner and wife. The wife knew that husband was a human time bomb that was going to go off at any point due to aggressive behaviour and mental problems and shooting animals nearby. Plaintiff’s argued that wife let deceased husband access to instruments to cause harm.

The mistake being alleged here is failure to warn neighbours and failure to take steps to control husband. Assume that there is a negligent act, there is no injuries to a legal right. There was no legal right to take care of the husband or protect him from himself. Hence Plaintiffs have no legal claim. Also probably not foreseeable that a person like this would have evolved to shooting drivers by sniper. It’s not just a possibility, there must be foreseeability.

EXAMPLE: Plaintiff who was stabbed 4 times while in public laundromat. On three earlier occasions, women had been stabbed at same time and same type of locations. The laundromat was under surveillance. Police failed to capture the accused but next day watched surveillance and identified his as a probable suspect but did not do anything. Suspect stabbed the Plaintiff and Plaintiff sues the police for breach of duty of care.

Police were not liable. Court found no special relationship between police and assailant, because mere speculation was not enough to create it. Proximity is therefore not present. The police were not certain about the assailant, and to owe a duty, they would had to have known for sure. Perhaps not the best decision, since there was strong suspicion that this suspect was indeed the assailant.

EXAMPLE: Plaintiff’s 16yo son was a passenger driven by friend. Car developed engine trouble and friend pulled over on highway. Auto club promised assistance but never located the stalled car. An hour later, a drunk driver struck the son, and the mother sued the Auto club for not providing assistance.

Was it reasonably foreseeable that showing up late would cause harm to the son and was the son someone that should have been contemplated as likely to be affected by the mistake? Court ruled that it was reasonably foreseeable and they were proximate. They expected the emergency assistance to arrive and therefore did nothing else. By not arriving on time, it kept then in that zone which caused them harm.
MISFEASANCE VS NONFEASANCE

Once you prove injury, you must also prove that this injury was to a legal right.

Deyong v Shenburn
1946 CA

FACTS: P, actor, had his clothes stolen from dressing room during rehearsal. Argued producer owed him duty of care to safeguard property. Because it was foreseeable that producer’s negligence would lead to theft of clothes.

ISSUE: Was there an injury or interference with a legal right?

DECISION: No. No legal right against the world to have clothes looked after. There may be harm to a protected interest (clothing), but no legal right entitling P to claim protection of that interest from D. There would have to be some legal right, perhaps by contract.

NOTE: Modern employment statutes may impose an obligation of safekeeping.

Palsgraf v Long Island RR Co
NYCA 1928

RATIO: Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.

FACTS: Package dropped by a passenger when D’s employee pushed him onto train. The package contained fireworks, which detonated. The shock from the explosion knocked over scales at other end of platform; one fell and injured P.

ISSUE: Did the defendant owe her a duty of care?

REASONS (Majority): There was no duty of care. “The conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away.” No such thing as a legal right to prevent fireworks from exploding and scales falling. But consider that you always have the expectation that you are safe and secure. Apparently persons are not protected from all kinds of harm, and the Plaintiff must show is a wrong to herself. There was no duty of care because she was not within the ambit of risk created by D’s employee, but this is not compelling. This is a proximity question, not a misfeasance question.

REASONS (Dissent): More compelling. Negligence is an act or omission which unreasonably affects the right of others, including those not within the ambit of the risk. Since employee’s act is a negligent breach of duty owed to holder of package. He is liable for outcome where there is injury to someone else. To confine breach to the person owed the duty is too narrow. But the argument breaks down when Andrews suggest that proximity does not matter: “Not only is he wronged to whom harm might reasonably be expected to result, but he
also who is in fact injured, even if he be outside what would generally be though the danger zone.” This is a rejection of proximity. But he did say that a broader scope of liability should have limits. His limitations are factual causation and proximate cause (remoteness). He also considered policy reasons.

**Evolution of Duty of Care Analysis Since Donaghue v Stevenson**

**Home Office v Dorset Yacht Co (1970)**

**RATIO:** Focus is on whether there are reasons to exclude the duty of care (policy)

**FACTS:** Several “borstal” boys escaped while guards were sleeping. They then damaged a Yacht.

**ISSUE:** Were the guards liable for tortious acts of competent adults?

**REASONS:** Majority applied Donaghue to reach conclusion that D owed owners of yacht a duty of care. Outcome/damage is foreseeable and no public policy reasons to deny liability. Was a note that Donaghue is not statute, and so it need not necessarily apply if there is a reasons to exclude it.

**Anns v Merton Borough Council (1978)**

**RATIO:** Focus is on whether there are policy reasons that negative or limit a prima facie (foreseeable) duty of care. Canadian courts followed this precedent for some time.

**FACTS:** Ps were tenants in a bloc of flats which developed structural defects. Because foundations were too shallow. D responsible for inspecting the blocks.

**ISSUE:** Did D owe Ps a duty of care?

**DECISION:** Yes, the council owed Ps a duty of care.

**REASONS:** Two part test: (1) Is there a prima facie duty of care (foreseeability), and (2) are there any conditions which “ought to negative…reduce or limit” (policy).

**Caparo Industries v Dickman (1990)**

**RATIO:** A return to the test of Home Office. 3-part test: foreseeability, proximity, and whether it is fair, just and reasonable to impose a duty of care.

**Cooper v Hobbart**

**FACTS:** Registrar suspended a registered mortgage broker’s licence. They froze the assets cause broker allegedly used investor’s funds for unauthorized purposes. Named P was one of over 3k investors who lost a lot of money because of this. Sued D claiming they breached standard of care correlative to a duty of care owed to investors. Ps alleged
that D became aware of brokers offences but did nothing. Should have acted earlier to suspend license and to notify investors that broker was under investigation. Ps allied to have action certified as class action. Had to show that action discloses a cause of action. One component is to show that there was a duty of care owed by D to the investors. Trial judge said pleadings disclosed a cause of action, but CA reversed.

ISSUE: Did D owe P a duty of care as an investor to protect him from economic loss?

DECISION: No duty of care. The duty was unrecognized and this is not a proper case to recognize a new duty. Attempted to clarify the distinctive policy considerations which impact each stage of the Anns analysis.

REASONS: To begin the test, there are two stage of the Anns test: (1) Prima facie duty of care. (2) Are there policy reasons why this duty should be limited.

STAGE 1: Two questions arise: (1) Foreseeability, was the harm foreseeable: “Was the harm that occurred the reasonably foreseeable consequences of the defendant’s act.” If no, the analysis ends and there did no duty of care, but if yes, we proceed with the analysis. (2) Proximity analysis, focused on the factors that arise from the relationship between plaintiff and defendant, but also includes the broad application of policy considerations. Hence policy is internal to proximity analysis. Analysis is two pronged: (i) Ask if there are analogous categories of cases where proximity has previously identified. If there is an analogous category, then a prima facie case is established and go on to stage 2. If you cannot find an analogous category, then (ii) assess the factors that allow us to evaluate the closeness of the relationship between P and D. And to determined whether it is just and fair to impose a duty of care on D having regard to that relationship. There is no single unifying characteristic, it is diverse and fact-specific We look at expectations, representations, reliance, property, and other interest involved. (When dealing with a public authority, then proximity must be grounded in statute.) The point of this analysis is to establish new categories, since new categories of negligence may be introduced. I no new category is found, the inquiry ends, but if a new category is found, a prima facie case is established and we proceed to stage 2 of Anns Test.

STAGE 2: External Policy Inquiry. Are there policy reasons to limit the duty of care? Is not concerned with proximity, but rather concerned with effect of recognizing duty on other legal obligations, legal system and/or society more generally.

SUMMARY: STAGE 1:
1. Foreseeability analysis. No, stop. Yes, go to 2.
2. Proximity analysis. Are there analogous categories? Yes, go to stage 2. No, go to Prong 2. Is there a new category? No, then stop. Yes, got to stage 2.

STAGE 2:
External policy analysis.

PROBLEMS WITH COOPER V HOBART:

1. Scope of “internal policy.” There was insufficient proximity between Registrar and investors: “Such a duty...would come at the expense of other important interest of efficiency, and public
confidence in the system as a whole.” This sounds a lot like stage 2 (residual or external policy) analysis. Concerned with the effect of recognizing duty on other legal obligations, the legal system, and society more generally.

2. Confusing on issue of policy. Better to say balancing of rights of individuals against the need to co-exist with others instead of a very broad analysis. Do policy considerations really add anything at this stage?

3. Analogous categories? How analogous do the categories have to be?

4. It is rare to find express statement of proximity is a statute. The questions is whether the statute, which is designed to protect public, can be read as creating a right in the plaintiff as an individual.

James v British Columbia 2005 BCCA 136

FACTS: Sawmill permanently shut because Minister and staff inadvertently removed from tree farm license clause that would have prevented mill closure. Plaintiff claimed an analogous category: pure economic loss. Two sub-categories: (1) the independent liability of statutory public authorities, and (2) negligent performance of a service. The trial judge said that the first analogous category was inapplicable. The duty imposed by statute is to public as a whole, not to workers in forestry industry.

NOTE: For negligent performance of a service, there is a privity between a service provider and a client by contract, but there is a 3rd party beneficiary who suffers from economic loss due to not performing the contract properly. Example: I enter into a contract with a solicitor to draft my will in which I make a gift to my daughter. The will is negligently prepared and daughter fails to inherit and her loss is purely economic. In this case, the service provider is the Minister who proves tree farm licenses to a licensee. The 3rd party beneficiaries are the workers.

DECISION: Trial judge says that duty is established. Cause of action disclosed and class action is certified. The BCCA said that category A was analogous and the trial judge was wrong. On category B, the analogy also works, like the trial judge found.

NOTE: If Minister had discretion to withdraw the clause at any time, how could plaintiff have reasonably relied on it? Note that defendants win in the vast majority of cases where courts are called upon to recognize a new duty of care.

Childs v Desormeaux

FACTS: Courrier and Zimmerman hosts a BYOB party. Guests bring alcohol. Desormeaux drives away, causes an accident and injures P. Only alcohol served by hosts was “three-quarters of a bottle of champagne in small glasses.” But, hosts knew he was a heavy drinker and had 12 beers and they knew he was intoxicated, but not how drunk.
ISSUE: Does a social host owe a duty of care to a person injured by a guest who has consumed alcohol at his/her party?

DECISION: No duty owed.

REASONS: Is there an analogous category? Canadian law does not provide a clear answer on whether duty is owed by social hosts. However, there is a duty recognized for commercial alcohol providers. But there were three main differences in the proximity relationship: (1) Commercial hosts are better able to monitor consumption (payment must be ensured, and regulators require training in monitoring) (2) Sale and consumption of alcohol strictly regulated, and (3) Duty is necessary to suppress “perverse” incentive that CAPs have to encourage over-consumption for profit. Overall, not analogous.

Should we create a new duty? NO! Surprisingly, the SCC held that the injury to Ms. Childs was not reasonably foreseeable on the facts. The trial judge did not find that hosts knew of or ought to have known F was too drunk to drive. But was this not actually foreseeable? Apparently, the history of alcohol consumption and impaired driving does not make impaired driving and consequent risks to motorist foreseeable! The only thing that supports this is that D did not display signs of intoxication when escorted to vehicle.

The SCC also said that there was no proximity and there was nonfeasance not misfeasance. The wrong alleged is a failure to act or nonfeasance in circumstances where there was no positive duty to act.

DUTY OF CARE: SPECIAL ISSUES

Rescue Doctrine

Consider these facts, person A rents a boat to B. Owing to A’s negligence in maintaining the boat, it starts to leak. B is in danger and C responds to ‘s call for help. Unfortunately, C dies in trying to help. C’s family wants to sue A. Do persons owe a duty of care to a third person involved in a rescue?

In pre-20th century, there was little sympathy for rescuers as they were authors of their own misfortune. The incident necessitating rescue was novus actus interveniens, or a “new intervening act.” The chain of causation is broken.

Haynes v Harwood
CA 1935

RATIO: If the injury to the rescuer is foreseeable, then D owes a duty of care to the rescuer.

FACTS: D negligently left horses untied on busy street. Horses were aggravated by young boys who threw rocks at horses who scampered off, and endangered the lives of several pedestrians. A police office attempted to rescue pedestrians by stopping horses. The rescue was successful, but policeman was injured in the process and he sued D.
ISSUE: Did the defendant owe a duty of care to the rescuer policeman?

DECISION: D was liable. The rescuer policeman can recover.

REASONS: There was no *novus actus*, because startling of horses by children on a busy street is foreseeable (!?) It is the very thing to be expected, so the intervention by boys did not break chain of causation, it instead completed it.

Also, there was no *volenti*. The act is not based on consent because of there being moral compensation to act, and there were time constraints (heat of the moment).

Since *Haynes*, rescuer actions almost invariably succeed. Consider *Corothers v Slobodian*, where a rescuer left the site of a MVA caused by D’s negligence. He ran down the highway to seek assistance and was hit by oncoming vehicle but successfully recovered.

In *Urbanski v Patel*, D negligently removed one kidney from P’s daughter. P then donated his kidney to his daughter. Sued D for loss of his kidney. D held liable on basis that P was a rescuer.

It is important that the duty to rescuer is independent of duty to person in danger? Rescuer’s ability to recover is not affected by defences that D may have against person in danger. The only limit to rescuer’s ability to recover is that the intervention must not be so foolhardy as to be unforeseeable.

However, is a person who injures herself liable to a rescuer?

**Duty to the Unborn**

Consider the case where a MVA caused by someone’s negligence. A pregnant woman is involved in the MVA. The foetus is injured. The question is whether the foetus can recover for the negligently-caused injury.

The Born Alive rule: Once a child is “born alive,” he or she may sue and recover for prenatal injuries. Injuries that occur in utero are therefore legally significant. Legal personhood under the Common Law begins at birth – no rights or duties until birth.

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

FACTS: D was 27 weeks pregnant when vehicle she was driving collided with another. Resulted in prenatal injuries to her foetus and to his premature birth by C-section later that day. Prenatal injuries caused permanent and physical impairment to infant P. Child, through his father sued the mother for damages alleging that collusion was caused by her negligent driving.

ISSUE: What role, if any, should the availability of insurance play in the duty inquiry? Are there floodgates and slippery slope concerns?

DECISION: The born alive rule should not apply when the defendant is the plaintiff’s mother.
REASONS: Motions judge found that the born alive rule applies even where the defendant is the plaintiff’s mother. The Court of Appeal agreed. Any concern that the born alive rule interferes with the mother’s autonomy during pregnancy is misplaced. This is because we can distinguish between a woman’s lifestyle choices (which should not be a basis for liability in tort) and aspects of life where general duties are owed to others, such as driving.

The SCC disagreed in two majority judgments. As per Cory, J. decision was largely based on traditional duty analysis. As per McLachlin, decision looks to Charter values to shape the direction of tort law.

As per Cory, J. Judicial recognition of duty of care must pass the standard two-step test. In this case, the foreseeability and proximity aspects are met, but there were policy considerations negating that duty of care. Public policy concerns are of a nature and magnitude as to absolutely negate judicial imposition of a duty of care. Such a duty would have profound effect on every pregnant woman and society in general.

There were four specific concerns: (1) Privacy/autonomy in that negation of duty is justified in light of biological reality that only women can become pregnant. Unique burden should make courts reluctant to impose additional burden. (2) Uniqueness of relationship between pregnant woman and foetus. It would be wrong to impose a duty on a woman with something that is so intimately connected to that woman for life. (3) Standard of care problem in that if there were to be a rule, it would be based on a reasonable pregnant woman standard which raises the spectre of tort liability for lifestyle choices which further undermines privacy and autonomy interest of women. (4) Lifestyle choices and the floodgates problem.

These kinds of policy matters are best left to the legislature. Real problem is inadequate financial resources allocated to care for children with disabilities.

As per McLachlin, the same result is met, but through a different reasoning. They say that whether a mother should be liable to her foetus is a question which CANNOT BE LEFT TO formal duty of care analysis. We must instead shape this tort law by the Charter. Applying the common law liability for negligence is an unacceptable trespass on the liberty and equality of women. On liberty, women have a right to control their bodies, and on equality, the duty is impossible to impose on everyone, just women. Therefore, no liability.

In the Maternal Tort Liability Act, SA 2005, there is a limited exception to Dobson immunity. A mother may be liable to her child for injuries suffered on or after birth that were caused by mother’s use or operation of an automobile during pregnancy if at the time of use or operation the mother was insured. Liability is limited to amount of insurance money payable under the insurance contract that the child can recover as a creditor under the Insurance Act.

It seems like this is a strict liability offence because the Mother can be liable even if she is not negligent.
REMOTENESS

The Duty of Care Inquiry asks whether the defendant is obligated to take reasonable care not to injure the plaintiff. The Remoteness inquiry asks that if a duty of care is owed, and that duty of care was breached, was the resulting injury a natural or sufficiently direct consequence of the negligent act? You focus specifically on the injury and do not focus on the plaintiff at all. Is the specific type of injury or result suffered by the plaintiff foreseeable? In duty it is the foreseeability of harm no the foreseeability of the actual harm. In remoteness it is the foreseeability of specific harm.

There are all sorts of tests to resolve the remoteness problem. Decisions have been based on a blend of common sense, pragmatism, and judicial policy regarding fairness.

To satisfy remoteness, must the plaintiff show that the type of damage suffered was foreseeable, or is it enough to show that some kind of injury was foreseeable in that D should be liable for any injury that results?

Re Polemis
ECA 1921

FACTS: D chartered a ship from P for use in transporting petrol. Due to rough storm some petrol leaked and filled ship hold with petrol vapour. Stevedores employed by D dropped a plank into the hold. This caused a spark, which caused a fire, which destroyed the ship. It was admitted that the stevedores acted negligently but D contended that the damage to the ship was too remote, that is, this type of damage was not foreseeable.

ISSUE: Was the injury too remote?

DECISION: Foreseeability of actual extent of the damage suffered by P is not required. Rather, just foreseeability of some damage.

REASONS: This is no longer good law. The Court said that as long as some kind of injury was foreseeable result of the negligent act, D is liable for any kind of injury results. The fact that the damage caused is different than expected is immaterial.

If a reasonable person can foresee that an act would cause damage, and the damage caused is directly traceable to the negligent act, it does not matter that it is not the exact kind of damage expected.

Wagon Mounds No. 1
PC 1961

FACTS: P are carrying on welding operation. D leaks oil due to shipowner’s negligence. Through discussions, everyone agrees oil cannot be lit on fire on water surface. So P keeps on welding. Some molten metal, wood and cotton cause a fire which destroys dock and several ships. P and D agree that this damage was NOT foreseeable, but P
claims that there was other foreseeable damage, such as congealment of spilled oil on slipways.

ISSUE: Was this type of damage remote and what is the proper test for remoteness? Do we ask whether the fouling and congealment was directly traceable to the oil leakage, or a reasonably foreseeable consequence of the oil leakage?

DECISION: Foreseeability is the test for remoteness. Re Polemis is overruled.

REASONS: The essential factor in determining liability is whether the damage is of such as the reasonable man should have foreseen. Damage suffered by the plaintiff must be of a kind that is reasonably foreseeable. Under Re Polemis, negligent actor is held liable for all consequences however unforeseeable as long as direct negligent act. This is a palpable injustice.

Mustapha v Culligan
SCC 2008

FACTS: P saw a dead fly in an unopened bottle of water supplied by Culligan. Neither he nor his family members consumed the water. Although all members of his family had consumed D’s water for past 15 years. P became obsessed with what he had seen and with potential implication of past consumption for his family’s health. He was diagnosed with major depressive disorder with associated phobia and anxiety. At trial, judge held that the reaction was objectively bizarre. But it was clearly foreseeable that supply of water with dead flies would cause P to suffer some degree of nervous shock.

ISSUE: Whether a defendant may be liable for damages for psychiatric harm where the harm by any objective measurement consists of an exaggerated reaction by an obsessive person of particular sensibilities to a relatively minor or trivial incident.

DECISION: No. No person of ordinary fortitude would have foreseeably suffered this kind of injury from seeing flies in an unopened bottle of water.

QUESTION: What if P had a predisposition in the form of OCD prior to the incident. Consider a situation where your negligence results in a weight that won’t hurt a fly being dropped on me. It turns out I am an acute hemophiliac and suffered massive and severe internal injuries. This would still be too remote if we follow Mustapha.

Smith v Leech, Brian and Co
QB 1962

RATIO: If the threshold injury is foreseeable, injuries that flow from it are irrelevant BUT ONLY as it applies to thin skull plaintiff. (If you do not have a predisposition you cannot recover on subsequent injuries).

FACTS: Workers at D’s plant must dip stuff into a molten metal bath from behind a small corrugated shield. D’s employee is splashed on the lip resulting in a bad burn. The burn becomes malignant and he dies of cancer some years later. It turns out he was suffering
from pre-malignant changes prior to the incident due to the nature of his job and the burn was a promoting agent.

ISSUE: Was the injury too remote? Should it matter that the plaintiff is particularly prone to this type of injury?

DECISION: Wagon Mounds #1 does not apply to this type of fact pattern. It does not apply to predispositions. WM#1 does not address thin skull cases.

REASONS: Thin Skull Rule: A tortfeasor must take his victim as she finds her/him. What matters is whether the threshold injury was foreseeable. Beyond then, the court will not excuse the defendant for any other subsequent injuries due to predispositions. What is the amount of damages which he suffers as a result of that burn, depends on the characteristics and constitution of the victim

Is the thin skull rule too harsh on defendants? The ultimate consequence suffered by Smith is disproportionate to threshold injury. Note that there was a reduction of damages in Smith because the deceased might have developed cancer without the burn. Consider whether the thin skull rule should apply to cases where a plaintiff with depression prior to negligent act commits suicide because unable to accept the threshold injury caused by negligent act.

Cotic v Gray
ONCA, 1981

FACTS: P, a man with history of mental problems, committed suicide after surviving car crash. His mental condition deteriorated after crash because of guilt feelings over death of negligent driver and of his son.

ISSUE: Can P’s estate recover from the estate of the negligent driver based on suicide from predisposition to mental illness?

DECISION: Thin-skill rule applies and P can recover.

REASONS: Suicide is a result of predisposition to depression and flows from threshold injury.

SUMMARY:

As a general rule, a victim who suffers aggravated damages because of a physical or mental pre-condition will always recover, and his extended injuries will never be too remote, because the possibility of a predisposition to injury is foreseeable as a class of harm...the extent of injury need not be foreseen, only the type of injury.
MECHANICS OF THE ACCIDENT

How the accident happened can be relevant to remoteness analysis. If injury suffered is foreseeable, does it matter that the manner in which it occurred is unforeseeable?

All cases, for the purpose of remoteness, fall within 3 categories:
1. Typical, ordinary case (Mr. Builder drops brick on Mr. Pedestrian, causing head injury). This is obviously foreseeable.
3. Everything in between – not ordinary or freakish. Result of remoteness analysis depends on description/characterization of facts. A more general description of the facts is likely to yield conclusion that incident was foreseeable.

Two Lessons:
1. Advocacy skills as much as knowledge of doctrine will help win cases.
2. The role of a good judge is to settle on a reasonable description of facts.

Hughes v Lord Advocate
1963, HL

RATIO: So long as the actual injury is foreseeable, it does not matter that the mechanics by which it occurred was unforeseeable. It is sufficient to focus on the foreseeability of the source of harm suffered or type of harm suffered. If it is foreseeable, no need to examine the actual mechanics of the accident or precise course of events that led to accident.

FACTS: Postal employees are working on cables located underground. They open a manhole and are working below. Hole is covered by a trap tent surrounded with red paraffin warning lamps. Employees take a tea break and leave the hold unattended. Two kids prepare to descend into manhole, taking lamps with them. One lamp knocked or dropped into a manhole, causing a violent explosion due to paraffin escaping, vaporized, and detonated by naked light of lamp. Plaintiff/appellant falls into manhole and suffers serious burns.

ISSUE: Do the mechanics of how the injury was caused matter in a remoteness analysis?

DECISION: Defendant is liable.

REASONS: The explosion/mechanics of accident not foreseeable – experts agreed. Not clear if injuries were directly caused by explosion or by fire in manhole. But injuries were caused mainly by burns, which were foreseeable. Because it is foreseeable that if boys entered a dark tent, they would take a lamp with them. And if the lamp fell and broke, boys would be burned and burns may be serious.

Accident was caused by a known [foreseeable] source of danger, but caused in a way which could not have been foreseen [mechanics of the accident].

Cf Daughty v Turner Manufacturing
1964, CA
FACTS: Asbestos cover falls into molten metal cauldron. No one knew immersion of cover posed danger, so not one stepped away. Only foreseeable risk was splashing, which did not occur. Cover disintegrated upon immersion, causing explosion (not a foreseeable risk). Explosion ejected liquid from cauldron and injured P. P argued even though risk of explosion was unforeseeable, he should recover because actual injury sustained was of the same kind of injury that would be sustained from splashing.

ISSUE: If burning is foreseeable from splash caused by lid slipping or being knocked over, then actual mechanics by which injury occurred (explosion) should not bar recovery.

DECISION: No. (Note that his is a lower court, English decision). This decision is somewhat disconnected to Hughes.

REASONS:

SUMMARY

Characterization of facts and damage in relation to risk is extremely important in remoteness analysis. Cases show that in remoteness analysis, reasonable people can disagree. In an exam, argument and clarity or reasoning is important. Analysis and conclusion should be well supported.

Jolley v Sutton London Borough Council
2000, HL

FACTS: Dilapidated boat abandoned. Council aware of boat but plans to remove it not implemented. P and friends start to repair boat. Use a car jack to prop up the boat. Boat fell off prop and crushed P who sustained serious spinal injuries, rendered paraplegic. QB ruled for the plaintiff. Clear that a boat would attract children. It posed two risks. Young children might fall through, or old children might prop it up. Court of Appeal reversed saying that it was reasonable that children might play on the boat and get injured, but not reasonable that people would prop it up.

DECISION: The trial judge’s characterisation was better, but does not say why.

Novus Actus Intervenus

What if following D’s negligent act, but before P suffers actual damage, something or someone triggers or worsens the P’s damage?

A new act which intervenes between defendant’s negligence and plaintiff’s injury is called a novus actus intervenes. If such act can be proved on a balance of probabilities, this is a complete defence.

The test is reasonable foreseeability. If intervening act is within the scope of foreseeable risk created by original defendant’s negligence, that defendant is still liable. The more culpable the intervening act is, the more likely it is to be deemed unforeseeable.
Brandford v Kanellos
SCC 1973

FACTS: Gas grill in D’s restaurant caught fire. Extinguishers activated, producing a hissing sound. A patron heard the hissing and yelled “Gas, there is going to be an explosion!” Panic ensues. P is pushed or fell from her seat and was injured. D argued that there may have been negligence with respect to cleanliness of grill. But actions of hysterical third party were novus actus. Trial court held for P, saying third party’s actions were foreseeable. It was a natural consequence of an emergency. The Appeal Court reversed holding that the third party’s actions were novus actus.

ISSUE: Was there a novus actus intervenes?

DECISION: Injuries were not caused by D’s negligence act, but by hysterical patron.

REASONS: Not reasonably foreseeable, especially since hysterics resulted from proper functioning of fire equipment, not the fire.

Laskin, J dissented saying it was reasonably foreseeable that a stampede could happen if visible gas grill caught fire and extinguisher went into operation. Even if patron acted negligently, injury to P still foreseeable. Reaction to hissing sound and gas grill on fire was natural consequence of original negligent act.

CAUSATION

Factual causation deals with the simple question of what, in fact, occurred. Pure factual inquiry into whether D’s act caused P’s injury. Requires that we simply link a defendant’s conduct with the plaintiff’s injury. Ask the question: did the defendant’s conduct cause the plaintiff’s injury?

Except…it is not that simple. Courts have struggled with what legal test to use in determining cause in fact. Further, evidence is often unclear on what happened.

The “But For” Test

“But for” the defendant’s negligence, would the plaintiff have suffered the injury?

EXAXMPE: D fails to stop at a red light at an intersection. P is crossing intersection. D’s vehicle hits P and P suffers back injury. But for D’s negligence in failing to stop at a red light, would P have suffered the back injury? Most likely not, so D’s negligence caused P’s back injury.

The problem arises when the but for test leads to an injustice. These situations have forced the courts to invent other tests for causation where necessary. There are two main situations where this problem arises: (1) Pre-emptive causation, and (2) Duplicative causation.

Pre-emptive causation
There is no case law on this issue.

EXAMPLE: P is just about to drink a cup of tea that X laced with poison. D fires gun negligently and kills P. But for D’s negligence, would have P have died? Yes. P would have died anyway through the fault of X. D merely pre-empted death by poison.

**Duplicative causation**

EXAMPLE: D and X each independently start fires. P’s house is destroyed by fire. Not clear from evidence which fire triggered destruction of P’s house. Each fire, on its own, is sufficient to destroy P’s house. The “but for” test would result in liability for D or X.

**Barnett v Chelsea & Kensington Hospital Mgmt Comm**
QB 1968

FACTS: P’s spouse and two co-workers drank some tea. Became sick and went to hospital. Nurse informed doctor on call that patients were vomiting. Doctor tells them to go home and does not treat them. P’s spouse died.

DECISION: But for D’s negligence, P’s spouse would have still died, so no liability.

REASONS: D owed a duty of care and breached the standard of care. But did D’s negligence cause the plaintiff’s spouse’s death? Evidences showed even if P’s spouse was admitted and treated properly, he would have died anyway because it was not possible to take antidote in time.

Doctor’s failure to admit/treat would have been cause in fact if and only if P’s spouse would not have died without the failure.

**Lambton v Mellish**
Ch D, 1894

FACTS: Nuisance case, but reasoning relevant. Two companies catering to visitors in common area by providing games, rides, organ music, etc. This generated a lot of noise, which was found to be maddening and a nuisance. D argued that noise can only be factual cause of nuisance if and only if the nuisance would not have occurred but for their activities.

DECISION: If there are two or more tortfeasors, each aware of what the other is doing and each contributing to the damage, each is liable in full.

**Corey v Havener**
Mascc SC, 1902

FACTS: P was riding horse-drawn carriage. Two D’s came up from behind on two loud smoky motor tricycles which backfired as they passed him. P was injured as a result of the horse being startled. Jury found both defendants contributed to P’s injury.
Court treated the two tortfeasors as one. Where each defendant contributed to the plaintiff’s injury. Each being liable in full to plaintiff. This was notwithstanding the “but for” test. Like Lambton, two or more tortfeasors who jointly or concurrently cause of contribute to the plaintiff’s injury are each fully liable for damages.

**Wright, Causation in Tort Law**

Replace the “but for” test with Necessary Element of a Sufficient Set Test. A particular condition is the cause of a consequence if and only if it is a necessary element of a set of actual conditions that are sufficient to lead to that consequence.

**EXAMPLE:** 5 units of pollution necessary and sufficient to cause damage. Each of seven defendants release one unit of pollution. Under the but for test, each can say accident would have occurred without her contribution. Under NESS, each D’s unit was necessary for the sufficiency of a set of actual conditions that included four other units. The sufficiency of the pollution set is not affected by the existence of two more duplicative units. Therefore, they all cause damage.

**Natural Cause + Tortious Cause**

What if one of the causes is a natural cause? Suppose that A negligently pollutes a river. River is also polluted by non-negligent circumstances such as a natural disaster. Is A liable? A would argue that pollution would have occurred without her negligence.

**Kingston v Chicago & NW Rwy**
Wis SC, 1927

**FACTS:** P’s property was damaged by two sources of fire: one from D’s locomotive, and the other from an unknown origin.

**REASONS:** If in situations of duplicative causation, and one of the causes is a natural cause, then there is no causation and the tortfeasor will not be liable. But, the defendant must demonstrate that the other cause was a natural cause. If the other cause is of unknown origin, the doctrine does not apply.

**SUMMARY:** Where the defendant’s negligence cause or materially and concurrently contributed to the plaintiff’s injury, defendant is full liable except where the defendant can demonstrate that the other contributing and concurrent cause was a natural cause.

**Sequential Causation**

Suppose that two unrelated sequential events caused damage to P. Which defendant is liable? This is known as an **Independent Intervening Cause**.

**Sunrise Co v The Lake Winnipeg**
SCC 1991
FACTS: P’s boat was grounded two consecutive times in unrelated accidents. First grounding resulted from D’s negligence. After this accident, on way to anchorage area, boat was grounded again, either through owner’s negligence or force of nature, it was not clear. Each incident alone would have necessitated detention in dry dock for repairs. Repairs for both incidents in dry dock was completed in 27 days. Repairs for first incident alone would have taken 27 days, repairs for second incident alone would have taken 14 days.

ISSUE: Who is responsible for the loss of earning resulting from the detention for 27 days?

REASONS (Majority): When you have two unrelated incidents which are sequential and which cause property damage and the first incident was sufficient to cause all of the loss, the nature of the second incident or cause (tortious or non-tortious) is irrelevant. In such situations, the party who caused the first accident bears full responsibility for the loss. Regardless of whether or not the second accident was caused by the owner, a third party, or no one.

REASONS (Dissent): The purpose of damages is to restore P to position he would have been in but for D’s tortious conduct. Where a second intervening incident necessitates repairs at the same time as repairs resulting from first incident. A court can conclude that because the second incident would have put the ship out of commission anyway. The person who caused the first incident is not responsible for the entire loss. Events which subsequently and independently diminish the loss caused by the first tortfeasor must be reflected in damages award. We have to recognize the causal contribution of the second intervening cause.

Two approaches: (1) Full diminishment where second incident is a non-tortious cause. Discount completely the loss occasioned by non-tortious cause. D is responsible for only the difference. In present case, P would recover for 13 days (27 days less 14 days) (2) Pro Rata Apportionment. Two causes of the detention and loss of earning. D is solely responsible for 13 days of grounding, D and subsequent cause are responsible for the remaining 14 days. Divide equally to 7 days, so that D is responsible for 20 days total.

Baker v Willoughby
HL, 1970

FACTS: P sustained injury to leg and ankle due to D’s negligence. Sued for loss of income. Before trial, P shot in attempted robbery and sustained injury to already injured leg. Leg had to be amputated. D argued that he was not liable for lost income after date of robbery.

DECISION: D’s negligence and robbery were concurrent causes of the loss of income flowing from independent intervening event. D is responsible for the value of the losses after the date of robbery caused by him. The negligence was still a factor at the time of amputation.

Cf Jobling v Associated Diary
HL 1982
FACTS: P suffered back injury due to D’s negligence. Could only engage in light work. Before trial, suffers from a spinal disease unrelated to initial accident, which resulted in a total incapacity to work. No signs or symptoms of disease at time of accident.

ISSUE: Is D responsible for lost earning for partial incapacity for rest of P’s working life OR only up until the time that disease resulted in total incapacity?

DECISION: If independent intervening event is non-tortious, D remains liable. However, D’s liability for damages should be reduced to account for loss of income flowing from non-tortious independent intervening event.

REASONS: The aim of tort law is to return P to their original position. P would have suffered disease anyway. By making D pay for ongoing losses less losses linked to non-tortious intervening cause, P is returned to original position. Making D responsible fully for ongoing losses without reduction will make P’s position better than original position.

If the intervening event is tortious, as in Baker, D is also liable for ongoing losses less contribution of second tortfeasor. D cannot say second tortfeasor is solely responsible for loss flowing from independent intervening event. Both tortfeasors are jointly liable for total loss after or flowing from independent intervening event. If D alone is sued by P, he is responsible for portion of total loss after or flowing from independent event. That portion cannot be reduced or eliminated by the fact that a second tort occurred.

Athey v Leonati
SCC 1996

FACTS: P suffered back injuries in two successive Motor Vehicle Accidents. Soon after he experienced disc herniation during a mild stretching exercise. Herniation caused by combination of injuries from two MVAs and pre-existing condition. The trial judge said that the herniation was caused by 25% from MVAs and 75% from the pre-existing condition instead of applying the but-for rule. Note that the thin skull rule is a remoteness rule and not a rule of causation. In remoteness doctrine, we disregard pre-existing conditions in determining whether the P’s injury is too remote. That is, the fact that P has a pre-existing condition that exacerbated or triggered injury and which may not be foreseeable is irrelevant in determining whether that injury is remote or not.

ISSUE: Here, we are asking whether the pre-existing condition, as a factual matter, actually caused the injury. And if it did, should the courts apportion some of the losses to the pre-existing condition? Or conversely, should damages for the tortious cause (MVAs) be reduced to account for causality linked to pre-existing condition?

DECISION: No. We will not apportion losses between tortious and non-tortious contributing causes. If D’s negligence is cause of injury, presence of non-tortious contributing causes will not reduce D’s liability. Because this will result in P not receiving full compensation.

The “Crumbling Skull” rule does not apply because trial court did not find that there was a measurable risk that injury would have occurred without MVAs.
REASONS: This case should be distinguished from other situations where apportionment is possible:

(1) Multiple tortious causes: Each D is liable in full and can seek contribution and indemnity from one another,

(2) Divisible injuries: separate and distinct injuries not true apportionment – each D liable on but for rule,

(3) Independent Intervening Events: non-tortious even if sequential to or occurs after tortious event. Failing to apportion or account for IIEs in reducing D’s damages will make P’s position better than original one (Baker, Jobling) Disc herniation in present case is not independent intervening event. It is the product of tortious and non-tortious events. The pre-existing condition is not a sequential or IIE either,

(4) “Crumbling Skull” Rule applies where a “pre-existing condition is inherent in the plaintiff’s original position.” That is, P’s original position includes the pre-existing condition which would have detrimentally affected P anyway. Any compensation that does not discount the future measurable risk and effects of the pre-existing condition will put P in a position better than original position. Therefore, D’s liability ought to be reduced to account for the measurable risk of the pre-existing condition. That is, the pre-existing condition is part of the plaintiff’s original position and a factual cause. And therefore, while D is responsible for injuries, his liability should be reduced to account for the other factual cause so as not to make P better off than original position.

SUMMARY

Where the defendant’s negligence caused or materially contributed to the plaintiff’s injury, defendant is fully liable.

Defendant cannot escape liability by pointing to another contributory or intervening cause (tortious or non-tortious), unless it is a natural cause.

However, damages owed by D can be reduced where: The injury to P would have resulted from a pre-existing condition which existed before the defendant’s negligence (crumbling skull rule). A non-tortious independent intervening event occurs after the defendant’s negligence which affects or worsens P’s original position.

In an exam scenario, apply both the but-for rule and this case. On the plaintiff’s side, argue the but-for rule and argue that Athey was wrongly decided.

FACTUAL UNCERTAINTY

What happens in cases where the courts are unable to make a finding of fact about what actually caused the accident. Not a question of which cause to blame, but who or what in fact caused the accident. Evidence is inconclusive.
Cook v Lewis
SCC 1951

FACTS: Cook and Akenhead were hunting in a hunter-infested area. They shot at what they thought was a grouse. Turns out it was the Plaintiff. Seriously injured and lost eye. Jury was unable to return a verdict because impossible to tell which D hit the plaintiff.

ISSUE: Both defendants are liable but slightly different reasons.

REASONS: But-for test not applicable. Should the court impose liability on both, one or none of them?

Cartwright for the majority, says that if all A can prove is that he was injured by either B or C, but is unable to establish who among B or C caused the injury, then the action, absent special circumstances must fail. The special circumstances include a “joint enterprise” (not accepted in this case because merely sharing the spoils of a hunt does not make a person liable for the fault of another), Ds are liable because they are in a better position to tender evidence as to who really is the guilty party. If they cannot or will not exculpate themselves because each was blameworthy, they will both be held liable. This way, P is not left without a remedy.

Rand says that D breached the standard of care in shooting negligently. In doing so, they wrongly and foreseeable interfered with the plaintiff’s ability to prove cause-in-fact and obtain a remedy.

Locke said P could not prove who shot him, and end of story.

Snell
SCC 1990

FACTS: P was undergoing cataract surgery. Developed retrobulbar bleeding. Surgeon noticed outward signs of bleeding but continued with the operation. Nine months later, when blood in vitreous chamber cleared, surgeon was able to see that optic nerve had atrophied. Resulted in loss of sight. Experts testified at trial that when such bleeding occurs, operation should be stopped. But that there are many causes for the atrophied condition, including P’s comorbidities. High blood pressure and diabetes are potential non-negligent causes. None of the experts could say what caused the atrophy. Trial judge said that the burden of disproof shifts to D.

ISSUE: What is the correct standard of proof of causation where we have factual uncertainty between a negligent and non-negligent cause?

DECISION: The traditional test of causation (but-for) although based upon common sense inferences from the evidence.
REASONS: Justice Sopinka says that the rule of evidence is that onus is on the party who asserts a proposition to prove it. However, where the subject matter lies particularly within the knowledge of one party, that party may be required to prove it. However, those circumstances don’t exist in factual uncertainty cases – no reverse onus of proof.

Causation does not require scientific certainty, just a common sense approach. P’s evidence may be limited, but if it is consistent and not contradictory with our intuitions, then there is a prima facie inference of causation. D will need to present evidence to rebut the inference of causation. Failure to do so will result in having the adverse inferences drawn against him.

Resurface Corp v Hanke
SCC, 2007

FACTS: P is an arena operator employed by City of Edmonton. He was injured when water hose was placed into gasoline tank rather than adjacent water tank of Zamboni. Mixture of water and gasoline led to release of vapourized gasoline into the air in the area. Gas ignited by overhead heater, causing explosion and fire, severely burning P in the process. WCB paid out no-fault benefits, but WCB commenced an action alleging that D should not have put water tank next to gas tank. Trial judge ruled that the cause was P’s dreadful mistake of operating machine after having observed hose in gas tank.

ISSUE:

DECISION: SCC confirmed that the design effects did not confuse P and so did not cause his injuries.

REASONS: Basic test if the but for test, even for multi-cause injuries. This has never been displaced and remains the fundamental test.

In special circumstances, a material contribution test is to be used instead: Where it is impossible for the plaintiff to prove causation using the but for test; and the D breached duty of care owed to P, thereby exposing P to unreasonable risk of injury, and P suffered from that injury. THIS IS ABSOLUTELY WRONG, AND WAS LATER CLARIFIED IN CLEMENTS V CLEMENTS. So while in Snell, the court opted for the inference of causation, McLachlin brought in material contribution as a way to estimate causation.

Clements v Clements
SCC 2012

FACTS: Ms. C was riding pillion on a motorcycle driven by hubby Mr. C. Motorcycle 100 pounds overloaded, nail punctured rear tire and Mr. C lost control. Crashed and Ms. C was thrown off. Trial judge invoked material contribution test as stated by McLachlin in Resurface. It was impossible for P to prove causation on but for test, and D materially contributed to plaintiff’s injury.

ISSUE: Did Mr. C’s negligence caused Ms. C’s injury, or was it the tire puncture and deflation (Factual uncertainty)?
DECISION:

REASONS: Basic rule is the but for test – scientific proof or precision not required. As an exception, P may succeed by showing D’s conduct materially contributed to risk of P’s injury. But there is need to flesh out the “impossibility” criterion for the latter rule.

Material contribution rule applies where: P has established that her injury would not have occurred but for the negligence of two or more tortfeasors, Each possibly in fact responsible for the injury, and P is unable to show, through no fault of hers, that any of them is the “but for” cause.

CAUSATION ON AN EXAM

Begin with or use the “but-for” test. Unless case involves joint tortfeasors or multiple causes contributing to P’s harm.

If joint multiple tortfeasors, use material contribution test. Each is liable in full.

If one cause is negligent and the other is a natural cause, no causation.

If first cause is negligent and responsible for full loss, second subsequent cause (whether tortious or not) is irrelevant. First D is fully liable, and there is no apportionment.

If first cause remains concurrent cause together with a second tortious intervening cause, first D remains liable for losses linked to her negligence. If first cause is negligence and second intervening cause is innocent, latter can be taken into account in damages against first D.

If one cause is negligent and the other is non-tortious, negligent is fully liable. No apportionment.

If there is factual uncertainty, and one of the possible causes is negligent, draw an inference that the alleged negligence caused the actual harm by taking a robust and pragmatic view of the facts.

DAMAGES: PECUNIARY LOSS

Loss of chance is not recoverable in Canada.

Negligence requires proof of actual damage, unlike some torts, which are actionable without proof of damage.

Arises mainly in personal injury cases. Liability will be admitted in vast majority of cases – only question is what is claim worth? Point of tort law is to compensate plaintiff and restore him to pre-accident position. Law allows for punitive and aggravated damages.

Aggravated damages are compensatory. Punitive or exemplary damages are awarded where D’s conduct is so outrageous, vicious, malicious or despicable.
How do courts determine the amount?

**Damages for wrongful death**

Spouse or children of decease victim sue for support. No common law cause of action. Provinces have adopted fatal accident legislation. Confers on surviving spouse and children and in some cases parents, the right to sue for losses arising from wrongful death of relative.

**Damages to property**

Chattels: If altered or no longer available, measure of damages is the value. But is the value taken at the date of judgment or the depreciated value?

If cost of repair is less than diminution, courts will often award cost of repair. May award cost of repair in some cases where higher than diminution. Subject to mitigation principles.

**Mitigation**

P must take all reasonable steps to mitigate her loss. P can recover for costs incurred in taking such reasonable steps. P CANNOT recover for losses successfully mitigated. D has option of proving P failed to act reasonably to mitigate loss. Failure to mitigate may result in reduction of damages.

*Janiak v Ipolitio*
SCC 1985

**FACTS:** P suffered serious back injury due to D’s negligence. P was informed that if he had corrective surgery, there was a 70% chance of full recovery. He would return to work thereby mitigating future income loss. But 10% of poor result including 1% chance of quadriplegia, and 0.1% of death. P refused to take surgery.

**ISSUE:** Was there a mitigation issue?

**DECISION:** Refusal amounted to a failure to reasonably mitigate. Damages were reduced.

**REASONS:** Balance of risk versus consequences of reusing surgery meant P should have had surgery. Absent psychological condition which precludes rational decision-making: fear of surgery does not justify unreasonable failure to have an operation.

**Personal Injury**

*Andrews v Grand & Toy Alberta Ltd*
SCC 1978

**FACTS:** 21 yo man suffered “catastrophic injuries” which rendered him quadriplegic as a result of motor accident. Lost bowel, bladder, and sexual functions. Had to be repositioned in bed every two hours. Liability was not an issue. P was contributorily negligent,
damages apportioned at trial (75% to D, 25% to P). Court of Appeal reduced $1 mil award at trial to $500K.

ISSUE: 75% and 25% of what? How should damage awards be calculated? Prior to this case, courts had a tendency to make global awards without explaining what the money is for. No consistent breakdown. Possibility of overcompensation or undercompensation.

DECISION:

REASONS: It is important to note that plaintiff is not a vegetable or a piece of cordwood. Must keep an eye on current state and balance state prior to accident. He remains a human of above average intelligence, who wants to live as other human beings do, so he wants home care instead of institutional living. Divide damages into heads of damage.

1) SPECIAL DAMAGES: Compensate P for damages that can be specified, i.e. calculable because they were actually incurred prior to trial. Includes pre-trial losses such as past income loss, past care costs, and other out of pocket expenses. Generally not controversial because they have already been incurred. No need to speculate – P proves by providing receipts.

2) GENERAL DAMAGES: Compensation for future losses and other damages that cannot be precisely quantified at the time of trial. This will include past pain and suffering. Some quantification or value is ascribed to them for purposes of providing P with a damage award.

General damages can be of two kinds: PECUNIARY DAMAGES (losses calculable in monetary terms such as future losses by lost earning capacity, though not precise). And NON-PECUNIARY DAMAGES (losses that cannot be quantified: Pain and Suffering, Permanent Disability/Disfigurement/Loss of Expectation of Life).

PECUNIARY DAMAGES encompasses various costs associated with treatment or case that are yet to be incurred.

FUTURE CARE COSTS
Nursing, personal attendant services, user fees, home or automobile modification, drugs, transportation to treatment, prosthetics, etc. Anything arising from treating the injury or associated with an ongoing disability. Example: $4135 a month for home care, only alternative is institutional care assessed at $1000 a month. SCC awarded the home care because P should be put to pre-accident condition, like living at his home, and it was therapeutically the best option for P. Cost mostly taken care of by liability insurance anyways.

METHODOLOGY: First step, set amount, next step, account for variety of factors that impact on ultimate amount to be awarded. For example, life expectancy, 50 years life expectancy minus 5 years for quadriplegics. Now, you do contingencies of life, like future events that may increase of decrease costs of future care. Might include periods of hospitalization which is cheaper than home care. Might benefit from social services, which saves costs, but might have to pay for special equipment, which will increase costs. In this case, trial judge discounted by 20% for contingencies. CA discounted fur-
ther, because not going to live as long, but SCC said duration of life already accounted for under life expectancy. Capitalization or discount rate is next where you account for inflation. It is intended to last for 45 years, so what rate of return should be assumed? Take present rate of return on long-term investments, and subtract the inflation rate. In this case, around 7%. You then gross up for tax on the interest earned on the lump sum. Account for the impact of taxation on the income generated from lump sum awards for cost of future care. Typically increases award by 30-40%.

LOSS OF EARNING CAPACITY: We gaze deeply into crystal ball. What kind of career would he have had? Not the same as past income loss. Lost capacity is a capital asset. Court adopted valuation based on current line of work. No consideration of possibility of educational advancement. Mostly about what you are doing now.

METHODOLOGY: Estimate P’s future earning, then deduct from it the amount that the P is still capable of earning (zero if not capable of earning anymore). This is the gross income, and then determine how long would P have earned the income before retiring. The working life expectancy. Then applies contingencies to that amount. Suppose income level is set at $1200, for a time of 30 years. Now deduct contingencies like unemployment, illness, accidents, and business depression.

NON-PECUNIARY DAMAGES. Not easy to determine the appropriate amount. There is no market value for non-pecuniary loss, but the court can ascribe anyways. In Andrews, justice Dickson was concerned with wildly extravagant awards in the US, and today, his observation has shaped the way non-pecuniary damages are provided in Canada. But are they really that extravagant? Oddball jury awards are infrequent and often reduced on appeal.

In Liebeck v McDonald’s Restaurants (1994) 79 year old woman ordered a cup of coffee from drive-thru of local McDonald’s, spills coffee, gets scalded and sues. Jury awarded her $160,000, but $2.7 million in punitive damages. So perhaps Justice Dickson’s concern is unjustified if it is punitive damages that are justified (including skin grafting and extensive treatment after suffering 3rd degree burns). There was also evidence that the temperature being served was much hotter than it should have been. Further, the quality control manager of McDonalds testified that he warned the company that the coffee was too hot, and that there had been a significant number of complaints.

Justice Dickson’s response to cases like these was to put a CAP on non-pecuniary awards. No matter how egregious the situation, the award cannot be limitless. He said that no award of non-pecuniary damages can be more than $100,000.

Lindal v Lindal
SCC 1981

DECISION: The CAP should be adjusted for inflation. So by January 2016, the amount would be $361,254.

In Lee v Dawson, (2006 leave to appeal refused), the BCCA hinted that CAP was a bad idea. Indicated that it might limit the CAP to catastrophic injuries in the future.
In Alberta, non-pecuniary damages have been limited by statute in certain circumstances. In the *Minor Injury Regulation*, minor injuries are capped at $4000, adjusted for inflation.

The constitutionality of minor injury cap was challenged in *Morrow v Zhang* (ABQB, 2008). P, diagnosed with grade 2 whiplash following MVA, would have received non-pecs in excess of cap. Trial judge ruled that “minor injuries” distinction was based on a personal characteristic. Amounted to discrimination on grounds of physical disability in violation of section 15 of the *Charter*. ABCA reversed. Nothing wrong with the CAP.

**COLLATERAL BENEFITS**

What happens where accident victims receive benefits from third party sources like EI, WCB, and private disability insurers. That is, benefits that are “collateral” to the damage award. Should courts deduct the amount of the benefit received from the damage award?

Scenario A says that X paid into a disability insurance plan that reimburses 80% of regular income in the event of injury that prevents her from working. If injured by Y and unable to work, should a court deduct that amount from income loss?

Scenario B asks if X’’s plan was paid entirely by the employer?

If X is allowed to recover as if no collateral benefits existed, then we have a problem of DOUBLE RECOVERY. If collateral benefit is deducted and D pays only NET LOSS, then D has the windfall benefit of X’s foresight or employer’s generosity. Or, allow X full recovery, but require her to pay back collateral benefit to insurer. All three approaches have been used by courts.

As a general rule, P is entitled to full compensation, but no more. No double recovery. No windfall. However, private insurance is an exception. If P paid out of pocket for the collateral benefit, then value of benefit should not be deducted. P is entitled to full recovery of damages from D plus full value of collateral benefits funded out of pocket.

*Patych v Bloomer*

SCC 1990

**FACTS:** Police officer injured in MVA due to D’s negligence. Continued to receive full salary while off work for several months pursuant to terms of collective agreement. Also, did not lose any accumulated “sick credits.”

**ISSUE:** Should employment benefits be taken into account in assessing damages for loss of earning?

**DECISION:** Deduct employment benefits to avoid double recovery.

**REASONS:** Measure of damages should be “actual loss.” Private insurance exception does not apply absent evidence that employee contributed to the fund from which benefits were paid.
Cunningham v Wheeler
SCC 1994

FACTS: P received disability benefits from employer under terms of collective agreement. **There was no deduction from his pay for the disability benefits.** Trial judge accepted evidence that collateral benefits was an important aspect of collective agreement negotiations. If benefits increased, hourly wage would go down, and vice versa.

DECISION: No deduction as benefits fall within private insurance exception.

REASONS: Some type of consideration was given up by employee in return for the collateral benefit. **THIS WILL BE ON THE TEST.** Look for consideration.

The bargaining trade-offs between wages and benefits constituted such consideration.

Other kinds of consideration include direct contribution by employee, P gives up some money in return for benefit, or benefit is part of employee’s work package/wages – employee worked for it.

Trial courts often decline to deduct if there is the slightest evidence of some consideration or contribution from employee.

**LUMP SUM OR PERIODIC PAYMENTS?**

Should damage awards be paid by D as a lump sum or periodically, as it is incurred?

At common law, damage awards must be single lump sum. Advantages of periodic payments: adjustable to contingencies; removes guesswork; avoids overcompensation. Disadvantages: administrative costs; lack of finality/certainty.

The SCC has rejected periodic payments and ruled in favour of lump sums. This is a matter for the legislature, not the courts. In ON, MB, and BC, they have enacted legislation providing for periodic payment alternative.

**YOUNG PLAINTIFFS**

*Andrews* formula particularly difficult to apply to young plaintiffs. Especially as it relates to lost earning capacity. Young plaintiffs typically don’t show aptitudes that allow us to assess that head of damage.

Arnold v Teno
SCC 1978

FACTS: P was 4 year old rendered quadriplegic when struck by D’s car on way to purchase ice cream. Trial judge relied on education level and vocational circumstances of parents/older siblings. P’s mother was a teacher; court awarded $10,000 per year. The ONCA agreed.
DECISION: SCC said NO! It is compelling, but we are not going to apply this formula.

REASONS: We can not assume that she will follow her mother’s lead, or that she will be a washout or public charge. They reduced the award to halfway between trial award and poverty line = $7500. Plus 20% deduction for contingencies of life.

DEFENCES

What actions of the plaintiff might disqualify or limit her recovery?

**Contributory Negligence:** Plaintiff’s failure to take reasonable care for her own safety, which contributes to the accident or her loss/damage. This is a partial defence and D remains liable though it absolves D of liability to the extent of P’s contribution.

In Alberta, there is the Contributory Negligence Act which has somewhat replaced the common law with respect to contributory negligence. s. 1 says that where by the fault or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault. If it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

**Voluntary Assumption of Risk:** Plaintiff is taken to have consent to the risk of harm generated by defendant’s negligence. This is a full defence. An example might be getting a ride from an obviously drunk driver.

**Illegality:** Out of a base cause, no action can arise. The plaintiff engaged in illegal conduct in the course of suffering damage should not be permitted to recover. An example might be breaking into someone’s house then falling down a flight of stairs in a state of disrepair. This is a complete defence.

CONTRIBUTORY NEGLIGENCE

**Butterfield v Forrester**
KB 1809

FACTS: D obstructed highway with a pole while making repairs to his home. P left the public house at dusk on his horse which he was riding violently and struck the obstruction, was thrown from his horse, and was seriously injured. Witness said he would have seen obstruction if riding slower. Trial judge instructed jury that if P could have avoided the obstruction by taking reasonable care, they should find for D.

ISSUE: Was the instruction correct?

DECISION: Yes. P was riding too fast and he would not have been hurt if he employed ordinary care. P should not be able to take advantage of another’s fault if he fails to use ordinary care.

NOTE: In this case, contributory negligence was used as a complete defence, though this is no longer the case in Canada. Liability is apportioned.
**Davis v Mann**
Exch 1842

**RATIO:**
To be contributory negligent, P’s negligence must be causative to the injury.

**FACTS:**
D was driving at a smartish pace negligently ran over and killed P’s donkey. Argued that P was also negligent for tying the donkey facing highway with forefeet “fettered.”

**DECISION:**
Court held not contributory negligence because D could have avoided injuring the donkey if he had exercised proper care. Although the ass may have been wrongfully there, still the defendant was bound to take actions to prevent mischief. The Donkey did not cause the injury – D’s negligent driving did.

**Last Clear Chance Rule:** Trial judges or juries will be asked to consider if the Plaintiff could have avoided the injury. In Alberta, statute says that it is no defence to say that the negligence is inevitable. The rule now is that you have to prove negligence against the Plaintiff and show that that negligence caused or contributed the injury. No defence to say that the negligence was unavoidable.

**Froome v Butcher**
ECA, 1975

**RATIO:**
Contributory negligence is negligent conduct by plaintiff which contributes not merely to the accident, but to the damage.

**FACTS:**
P was driving at speed limit, but not wearing seatbelt. Head on collision with D who was passing illegally. P suffered injuries to his ribs, and a broken finger. Finger injury could not have been prevented by wearing seatbelt. P testified he did not wear seatbelt because he thought he was better served by being thrown from car.

**ISSUE:**
Should damages be reduced for failing to wear a seatbelt?

**DECISION:**
Yes, damages should be reduced.

**REASONS:**
Question is not what caused the accident, but what caused the damage. Both the accident and failure to wear seatbelt caused the damage.

Plaintiff said it is not a criminal offence to fail to wear a seatbelt, but the Court said so what? No criminal liability does not amount to immunity to civil liability.

If I honestly believe it is safer to not wear a seatbelt, why should the law interfere? Standard of care is not subjective, but objective.

If failure to wear a seat belt made no difference, no contribution, no reduction of damages. If failure made all the difference, then 25% reduction, if failure made considerable difference, 15% reduction.
**VOLUNTARY ASSUMPTION OF RISK**

Arises where P is taken to have consented to risk of harm generated by D’s negligence. Used to be a very broad defence. Now more restrictive and difficult to establish. SCC: D must prove an agreement, whether express or by implication whereby P has consented to accept both the physical and legal risk of the injury from D’s negligence.

**Dube v Labaar**
SCC, 1986

**FACTS:** P and D were on all day binge drinking. Driving back from Whitehorse, they stop to pick up hitchhikers. The car stalls, P was driving with D as passenger, but after a brief exchange P and D switch places. Car flips and P is injured. D argued volenti, among other things.

**ISSUE:** Did the defendant consent to the physical risk? What is the scope of the volenti defence?

**DECISION:** SCC upheld the jury verdict, but restricted the scope of the volenti defence.

**REASONS:** D must show that P, knowing of the virtual/certain risk of harm (knowledge of physical risk) bargained away her legal right to sue for injuries incurred as a result of D’s negligence (knowledge of legal risk).

Acceptance of risk may be expressed or implied from the conduct of the parties. But required understanding on part of both parties that D assumed no responsibility for P and P agreed to this.

Volenti likely inapplicable in vast majority of drunken driver / willing passenger cases, because unlikely for willingness to waive right to sue. The passenger might be aware the driver is drunk, and aware of physical risk, but to say that they waived legal risk will be hard to establish. HOWEVER, contributory negligence is still an option.

**Crocker v Sundance Northwest Resorts Ltd**
SCC 1988

**FACTS:** Grossly intoxicated P participated in inner tube race down a mogul rain on a ski hill and was seriously injured. He ignored advice from D to withdraw from race. D argued volenti.

**ISSUE:** No volenti, but 25% contributory negligence.

**DECISION:** Given P’s level of intoxication, he could not have appreciated and accepted physical or legal risk of injury.

**Waivers and Volenti**
Frequently used in commercial, sporting, and recreational events. Validity usually determined by applying the law of contract. Not enforceable unless reasonable notice was given to P of its terms.

The issue is irrespective of a waiver’s significance in contract law, does it lend support to a volenti defence? In the previous case, SCC refused to enforce the waiver because P did not read it and thought it was just part of form to enter race.

However, in Dyck v Manitoba Snowmobiling Association Inc, P, a snowmobiler, crashed his machine at a race sponsored by D. Signed waiver gave rise to a volenti defence.

How do we reconcile both cases? P in Dyck had read waiver and had better understanding of terms? For a waiver to apply, there must be reasonable notice and clear understanding and acceptance of its terms.

Labelling

Is the warning on a product label sufficient to allow a manufacturer to say that user voluntarily accepted the physical and legal risks of product?

In Lambert v Lastoplex, manufacturers have a duty to warn consumers of dangers inherent in use of their products. Applicable standard of care is to take reasonable steps to provide warnings that allow product to be used safely. Nature and extent of warning required depends mainly upon nature and degree of danger posed by product.

Lambert v Lastoplex

FACTS: P was an engineer who was using a special fast-drying lacquer to seal the floors of the basement. Furnace in next room had a pilot light which when exposed to the lacquer caused a fire. P tried to exit, but explosion caused burns and property damage. Lacquer came with warning label that substance should be kept away from open flames and high heat. But a competing product had much more specific warning like risk of explosion and fire from pilot lights and light switches.

DECISION: For P, full recovery.

REASONS: Judgment principally focused on duty to warn. Duty requires explicit disclosure from manufacturer. Because of failure to warn, D cannot argue volenti. That is, D had to prove that P appreciated the legal and physical risk of leaving pilot light on, and willingly took that risk.

Without proper warning, knowledge of that risk cannot be established. No proper warning or failure to warn. No volenti. Not contributory negligent either, even though P had some special knowledge, at least in general terms, of inherent danger.

Illegality
Plaintiff engaged in illegal conduct in the course of suffering damage should not be permitted to re-
cover. Illegality is a complete defence. However, like volteni, the SCC has restricted this defence con-
siderably.

Hall v Herbert
SCC 1993

FACTS: P and D young gentlemen, spent the evening drinking too much, including in a field, into early hours of the morning. Drive down road so bumpy, keys fell out of ignition. D turned car around and suggested that they do a rolling start. P asked if he could drive, D says sure. P gives too much gas sustains significant injuries and sues D alleging vari-
ous acts of negligence. D argues *ex turpi*.

ISSUE: Does *ex turpi* apply?

DECISION: Severe restriction of illegality doctrine.

REASONS (Cory): “The doctrine of *ex turpi causa* should be eliminated from application to tort cases.” In-
stead, focuses on second arm of *Anns* test – question best dealt with as part of public policy inquiry. Public policy does not bar the plaintiff’s recovery. Permitting his reco-
very would not shock the conscience of right-thinking members of society fully apprised of facts.

Illegality should be just another factor examined under the second branch of *Anns*. One is to ask as a matter of public policy, should the illegality of the P’s conduct disentitled him or her from recovery? In the case at bar, no.

REASONS (McLachlin): Basis of illegality rule is to prevent a person from profiting from his/her wrong. If this is basis of rule, then it should have little impact on tort law because tort law is compens-
satory.

Exceptions are where there is a claim for damages for lost earning based on illegal pro-
fession or activity, and bar to recovery where a claim for exemplary damages might otherwise be granted – no windfall damages.

No role for *ex turpi* beyond these exceptions. Better explanation is that doctrine would apply where allowing recovery would introduce inconsistency in tort law. This is why tort law allows a defence of illegality – to protect the legal system from incoherence.

For example, P caught committing burglary due to negligence of fellow criminal cannot successfully recover cost of imposed fine. Because this allows criminal P to off-load punishment that society has deemed he should receive.

McLachlin disagrees about the public policy inquiry for three reasons: (1) Duty is about relationship between P and D, and is predicated on foreseeability, not morality of P’s conduct. Illegality is best viewed as a defence rather than a matter of duty of care. (2)
Dealing with illegality at duty stage creates new problems. If illegality goes to duty, then P will have to disprove the illegality. (3) Under contract, D has to prove illegality. Would be ironic to impose burden on D for a breach of contract part of a case.

NOTE: So ex turpi does not generally apply to tort law, save where P is seeking to profit from illegal activity.

When you have a case where a Plaintiff is involved in illegal conduct and suffers harm from Defenant’s negligence, then Plaintiff can recover so long as they are purely compensatory, but will not recover damages that will create incoherencies in the law and from benefiting from the illegal act.

This would be hard to apply in the case of perhaps a burglar hurting themselves on stairs in state of disrepair. Would instead have to turn to Cory’s decision and do a public policy analysis on the duty of care.

If Defendant, start with duty care as in Cory, but then argue in alternative about splitting up damages. If Plaintiff, go in opposite direction.

OCCUPIER’S LIABILITY

What responsibilities do occupiers of land have to people who come onto their land to prevent them from being injured. Note that an occupier does not to be an owner of land, only have to control the land, could be a tenant.

Note that occupier’s liability was developed as a discrete area of tort law prior to when general tort of negligence was recognized, so it was grandfathered. Plaintiffs invariable bring claims in both areas.

Under Common Law, four standards of care. It matters whether the visitor is a trespasser, licensee, invitee, or contractual entrant.

TRESPASSER: Originally no duty owed to make premises safe. But the occupier cannot intentionally or recklessly injuring trespasser. However, in 1970s, HL introduced a duty of humanity standard to be applied on a case-by-case basis.

LICENSEE: A visitor who has express or implied permission to be on land. Express: Social guest. Implied: Mail person. The occupier has a duty to prevent injury to licensee from hidden dangers that the occupier has actual knowledge of.

INVITEE: Someone with permission and in whose visit the occupier has an economic interest. Ex: Store customer. Occupier’s duty has duty to take reasonable care to prevent injuries caused by foreseeable / unusual dangers.

CONTRACTUAL ENTRANT: Person who enters land under the terms of a contractual agreement. Ex. Ticket holder to Oiler’s game. Absent terms to contrary, occupier has duty to make premises as safe as can be made with reasonable skill and care.
OCCUPIER’S LIABILITY ACT

An OCCUPIER is a person who is in physical possession of premises, or one who has responsibility for, or control over condition of premises, activities conducted on the premises and persons allowed to enter.

A VISITOR is an entrant as of right – person permitted by law to enter without occupier’s permission. Could be a contractual entrant or any other lawful entrant.

Section 5 says that an occupier owes visitors a common duty of care to take reasonable care to see that the visitor will be reasonably safe in using the premises. The practical effect is to impose common law duty of negligence on occupiers, provided the visitor is using the premises. The other effect is increasing CL duty owed to licensees and decreasing duty owed to contractual entrants.

NO duty of care owed to ordinary trespasser, unless injury or death to trespasser results from occupier’s intentional or reckless conduct.

For CHILD TRESPASSERS, if the occupier knows that the child trespasser is on the premises and that the condition or activities of premises pose a danger of death or serious bodily harm to the child, then the occupier owes duty to take reasonable steps to see that the child will be reasonably safe from danger. Factors to consider include age of child, child’s ability to appreciate the danger, burden of removing the danger, etc.

Cullen v Rice
ABCA 1981

FACTS: P is a 16 yo high school student went to restaurant. Rule in restaurant is that teenagers must leave promptly after meal. No hanging around. P was aware of the rule but refused to leave. Employee pushes P to get him to leave into glass door and cut P.

ISSUE: What duty was owed to P under the Occupiers’ Liability Act? Depends on if her is a visitor, regular trespasser or child trespasser.

DECISION: Not a child trespasser. Hence regular trespasser but P’s injury not the result of wilful or reckless conduct by D. Wilfulness of pushing directed at eviction, not injury.

Section 7 is the Volenti clause which says a general duty owed by occupier does not apply to risks willingly accepted by visitor.

Section 9 is the Warning clause. A warning without more, does not absolve occupier of duty to visitor, unless enough to enable visitor to be reasonable safe.

Roasting v Blood Band
ABQB 1999

FACTS: P ventured into a construction site. Bleachers off limits. P was warned not to go there. Ignored warning, went to bleachers, fell off, injured.
ISSUE: Did the occupier satisfy statutory duty under s 5 of the Act. Since the premises presented reasonably foreseeable risk to persons exercising ordinary care and diligence, did the occupier take reasonable steps to ensure that users of the premises were reasonably safe?

DECISION: The warning was sufficient. Reasonable steps need not be a physical barrier.

Section 8 is the Variation of Duty of Care. Liability to visitor may be extended, restricted, modified or excluded by express agreement or notice. Only if reasonable steps are taken to bring the extension…to the visitor’s attention.

GOVERNMENT LIABILITY

Proceedings against the Crown Act allows for legal proceedings to be started against the Crown (Provincially and Federally). Crown can be sued for torts committed by its officers, agents, breach of duties owed to servants and agents as their employer, breach of duties linked to ownership or possessory interest in property, and for actions taken under statute, regulation or bylaw.

MISFEASANCE IN A PUBLIC OFFICE

New and emerging tort. Deals with claims of intentional misconduct by Crown through its agent. Three requirements: (1) Actor must be a public official, (2) Activity in issue must relate to an exercise of a statutory authority or power, (3) wrongdoing must be intentional (knowingly acts beyond his power or jurisdiction, or acts within power but for improper purpose such as to injure the plaintiff).

Odhavji Estate v Woodhouse
SCC 2003

FACTS: Police officers failed to cooperate with investigation into a fatal shooting involving the officers. ONCA drew a distinction between failing to perform a statutory duty and improper exercise or abuse of power.

ISSUE: Is there a distinction?

DECISION: No.

Roncarelli v Duplessi

First National Properties Ltd v Highlands
2001

FACTS: Developer sued Mayor for frustrating efforts to develop land. Mayor wanted land preserved as park. Developer’s planning application delayed and denied. Trial judge found against Mayor for abuse of public office.
DECISION: BCCA reversed on grounds that major acted intra vires and his advocacy for land preservation was well-known. Did not act with malice or motive to gain private advantage.

POLICY/OPERATIONAL DISTINCTION

POLICY DECISIONS: Questions about whether and how to implement a government program. No liability

OPERATIONAL DECISIONS: Questions around actual operation/delivery of the program once it is implemented. Liability.

Kamloops v Nielson
1984

FACTS: Municipality failed to enforce bylaw and prevent completion of a house with defective foundations. Subject to stop-work orders, but building completed. Owner was city alderman and builder’s father moved in. He sold house, who then discovered defects and sued city.

DECISION: Majority of SCC imposed liability on Kamloops on the grounds that the matter was largely OPERATIONAL.

REASONS: Municipalities have a statutory authority to enact bylaws to regulate construction of buildings and inspection to ensure enforcement. Enacting bylaws and setting up inspection system are policy matters, but manner in which it is operated is OPERATIONAL matter.

However, government authority may still be liable for failing to consider whether or not statutory power should be exercised. City might be liable for absence of a bylaw and inspection system. Further, a decision maker in making a policy decision must act in good faith.

NOTE: This may be a difficult precedent to apply.

Just v BC
SCC 1989

FACTS: Winter day on Highway. Traffic at standstill, large boulder comes loose from steep wooded slopes above and crashes into P’s car, killing P’s daughter and injuring P. System set up by Dept. for inspection. Rock work engineer carried out visual inspection for risk of rock instability. Trial judge found that system of visual inspection was policy matter. CA affirmed, which was appealed.

ISSUE: Is the decision to adopt a visual inspection system a policy decision?

DECISION: Allegations of negligence fell within the operation aspects of government activity. Policy is limited to THRESHOLD DECISIONS. That is, the intial decision about whether
something will or will not be done. Involves budgetary allocations or other political matters. Beyond this, everything is operational.

**CF Brown v British Columbia**

**SCC 1994**

**FACTS:** P was driving. 30 mins out, skids off icy patch. Suffers injuries. Three other accidents occurred on same stretch of highway that morning. There was a program for snow and ice maintenance but was operating on a summer maintenance schedule at time of accident.

**ISSUE:** Was the department’s decision to maintain summer schedule a POLICY or OPERATIONAL one?

**DECISION:** POLICY!?

**REASONS:** Decision to maintain a summer schedule, with all that it entailed in terms of reduced service, was one of policy. Involved classic policy considerations of financial resources, personnel and significant negotiations with government union.

**Swinamer v AG NS**

**SCC 1994**

**FACTS:** P was injured when tree along highway, which had Dutch Elm disease fell. Province initiated a preliminary program of identifying and flagging trees with aim of deciding on a policy once scope was established. Accident occurred during pre-policy period.

**ISSUE:** Was the decision to conduct survey a policy decision?

**DECISION:** As per Cory, decision to determine the scope of the problem before making a policy decision was in and of itself policy. As per McLachlin, no private law duty on a public authority until it makes policy decision.

**REASONS:**

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Don’t Calculate Damages
Only address relevant issues.
#1 Medical Negligence Problem
#2 Occupiers Liability, and address statutory claims, so no common law.
#3 Duty of Care problem – New of Novel duty of care.

**FACTS:** Soccer game at Hillsborough stadium in Sheffield. High steel fencing placed between spectators and pitch due to hooliganism concerns. Fans arrive early and there was a buildup concentrated outside turnstiles at one end of the stadium. To ease bottleneck,
opened an outer exit. Then thousands of people flooded the stadium. Lead to death of 95 persons. All this unfolded on live TV. As per broadcast guidelines, scenes showing suffering or dying of recognizable individuals were not depicted – no close ups. 16 plaintiffs brought claim for nervous shock caused by seeing disaster. Police admitted liability to those killed, but argued no duty of care was owed to nervous shock claimant.

One plaintiff was at stadium and watch tragedy unfold. Knew brothers were in holding area where crush occurred. Later informed by telephone that brothers were dead. Other claimants were watching on TV. TJ found 10 plaintiffs could recover. CA held none could recover.

**ISSUES:** Are the plaintiffs sufficiently close to the victim? There must be proximity to the victims. Does viewing a simultaneous broadcast of the incident qualify as witnessing by sight or hearing? Is shock caused by viewing a broadcast enough? Does it matter that plaintiff did not witness immediate aftermath?

**DECISION:** Appeal dismissed. None can recover.

**REASONS:** Claims under this category have very specific features – absence of those features disqualifies the claim.

As with every negligence claim, the risk of psychiatric illness resulting from shocking event must be reasonably foreseeable.

To limit volume of potential claims from shocking events, only “proximate” plaintiffs can recover.

That is, plaintiffs that are “proximate” to primary victim and to the accident or its immediate aftermath.

1. The shocking event must result in recognized psychiatric harm. Mere grief is not enough.
2. Only psychiatric harm induced by shock can be the basis for recovery. Psychiatric harm caused from caring for disabled relative over long period of time will not be enough.
3. Shock and resulting psychiatric illness must arise from seeing or hearing the shocking event (or perhaps the consequences). Not enough to merely e informed of, or to read or hear about it.
4. Shock must be sudden appreciation by sight or sound of horrifying event, which violently agitates the mind.

For foreseeability analysis. It is reasonable foreseeable that the psychiatric injury suffered by the plaintiffs would affect the persons.

Real issue is proximity analysis. Only proximate plaintiffs can recover as a control mechanism. Three elements of the proximity analysis: (1) Is the plaintiff within a class of persons whose claims should be recognized? (Relational proximity), (2) Is the shock suffered by the plaintiff close both in time and space to the accident or its immediate af-
termath? (Locational/temporal proximity), (3) Did the plaintiff actually see or hear the shocking accident or its immediate aftermath?

Note that the plaintiffs were not primary victims. They were not directly affected by the incident resulting from defendant’s negligence. They are secondary victims, that is, affected by virtue of a relationship with a primary victim. This distinction is taken into account in proximity analysis.

Is P’s relationship to the primary victim sufficiently close such that it is reasonably foreseeable that P would suffer nervous shock if primary victim is injured? Plaintiff must show he is sufficiently close to primary victim. This is a rebuttable presumption (Defence can claim you do not like your brother). Hence, all people watching on TV are not close enough.

For locational/temporal proximity, the shock must occur close in time and space to the accident or its immediate aftermath. Shock from subsequent identification qualifies, but not too long after.

Lastly, the event must have visual or aural proximity. Could be in person or through simultaneous broadcast. If TV, suffering of primary victim must be portrayed (generalized portrayals will not do).

In this case, no relational proximity since not established at trial that there was close relationship. No locational/temporal proximity since did not find out fate of relatives much later. No Visual or aural proximity.

In *Rhodes v CNR*, P’s son was killed in train crash in Alberta. CNR admitted negligence. P hears of death from 3rd party days later in Vancouver and did not see body. Court held that there was no locational/temporal/visual/aural proximity. But what if P saw newspaper photos?

*Vanek v Great Atl & Pac Co (1990)*, 11 year old consumes contaminated juice at school but is fine. Parents develop stress related complications. Court holds no claim.

In *Mustapha v Culligan*, post-Cooper, recall the plaintiff’s injury was too remote to warrant recovery. Difference in this case is that plaintiff is primary victim. Does P have to prove specific injury or simply personal injury of whatever kind? As per *Page v Smith*, some injury is sufficient.