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## Joint Tortfeasors

- Definition: When two or more people act together to commit a tort they can all be found liable regardless of who actually committed the tort.
- *Cook v. Lewis* factors to consider:
  - Agree upon a common course of action, which leads to the tort
  - Control over the other's behaviours
  - Encouragement
  - Possible anticipation of the other's negligence
  - Employer / employee type relationship
- *Fish & Fish* Requirements: a common design (which can be implied) and actions that furthered the common design.
  - Common design can be a tacit agreement
  - Things that do not imply a common design: Facilitation such as selling someone something, a close relationship such as shareholders, looking on with approval
  - Joint tortfeasor does not need to be present if they played a significant role

## Vicarious Liability

- Seen in employer / employee relationships – though it is not automatic
  - This is a form of liability without fault – Strict liability
- Policy reasons:
  - Employer can control employees to minimize risk
  - Employer receives profits and should therefore also bare responsibility for the wrongs of people who are a part of the business
  - Employer is in a better position to provide compensation
  - Deterrent: encourages employers to properly train employees and to minimize potential risks
- Does the necessary relationship actually exist?
  - Vicarious liability exists for employees, but not for independent contractors
  - *Sagaz* factors to determine if someone is an employee – Is the person in business for their own account?
    - Control – historically this was the only factor
    - Ownership of the tools
    - Chance of profit
    - Risk of loss
    - Hiring of helpers
  - *Yepremian v. Scarborough General Hospital*: doctors who have privileges only are not employees of the hospital
- What sort of conduct gives rise to vicarious liability?
  - Outdated *Salmod* Test: Is the act authorized by the employer or if it is unauthorized is it so connected to authorized acts that there is no clear distinction.
  - *Bazley* strong connection test applied in *Oblates* was developed for sexual assault but applies to all situations:
    - Employment provided the opportunity for abuse of power
    - The extent to which the act furthers the employers aims
    - How the act relates to conflict or intimacy of the relationships encouraged by employment
    - Power given to the employee over the victim
    - Vulnerability of the potential victims

## Legislation

- *BC Parental Responsibility Act*: parents are liable for damage or loss caused by their children up to \$10 000.
  - This is based on a presumption of parental fault not on vicarious liability and lays out potential defenses
  - At common law parents are not vicariously liable for the torts of their children
- *Negligence Act*:
  - Joint and several liability (s4): when there are multiple people at fault and the court divides damages the tortfeasors are required to indemnify each other.
  - There is not joint and severable liability when the plaintiff is contributorily negligent
  - See s1 and s2 for apportionment and awarding damages (CB 42)

## Negligence Generally

- An action in negligence requires: a duty of care, breach of the standard of care, plaintiff sustained damages, damage was caused by the breach (*Mustapha*)
- Four elements of negligence from Ted:
  - Duty of Care – gatekeeper function
  - Breach of standard of care
  - Causation
  - Remoteness – public policy limits to negligence damages
- Negligence is a cause of action unrelated to the state of mind of the defendant
  - Someone is found negligent if their conduct falls below a the standard based on a reasonable person test
- There is balancing of competing interests:
  - Desire to protect legitimate activities even if they create risks
  - Personal autonomy
  - Not allow people to expose others to unreasonable risks

## Duty of Care

### Development of the duty of care

- *Palsgraf* shows the decision to use duty of care to limit actions in the development of negligence.
  - Duty of care: negligent actors are only responsible for injuries, which could be foreseen by an eye of normal vigilance.
  - Seemed to be based off of physical proximity.
  - The dissent took a very different approach: limitations to liability in negligence should not be at the start of the analysis when an innocent party has been injured in what should be a safe environment, but rather at the step of remoteness based on proximity in time and place.
- *Donoghue v. Stevenson* expanded duty of care in negligence law by establishing the neighbourhood principle.
  - Everyone has a duty to avoid acts, which can harm people who can reasonably foreseen to be affected by their acts.
  - Results in a class of class of people who one has a duty to.
  - Focuses on proximity and foreseeability, which are both required.
    - Proximity is closeness in time, space or relationship.
    - Foreseeability is predictability of consequences
  - Up until this point there were only very specialize categories of duties with no general concept

- In *Dorset Yacht* it is established that the government should not have a prima facie exemption from negligence liability
  - Reconfirms *Donoghue v. Stevenson* and that the neighbourhood principle should be applied unless there is a valid justification to the contrary.
  - Youth corrections officers owe a duty to the public to prevent their charges from causing damages.

### Established Duties and the *Anns* Test

- In the case of a previously established duty in the case law this analysis is not done (*Childs*). Duties already established are:
  - Manufacturer to eventual consumer (*Donoghue v. Stevenson*)
  - Corrections office to members of the public (*Dorset Yacht*)
  - Boat captains have a positive duty to rescue anyone who goes overboard (*MacLaren*)
  - A rescuer has a duty to not act so negligently as to induce others to act (*MacLaren*)
  - A commercial host to keep intoxicated patrons from being exposed to harm (*Jordan House*)
  - A commercial host has a duty to third parties on highways for injury caused by intoxicated patrons (*Stewart v. Pettie*)
  - Medical staff have a duty to the foetus/child during labour and delivery (*Liebig*)
  - During an abortion a doctor has a duty to the mother to perform it non-negligently and to the foetus not to harm it if the duty to the mother is failed (*Cherry*)
  - Security firms have a duty to that which they are hired to protect (*Fullowka*)
  - Police have a duty to suspects to investigate competently (*Hill*)
  - The government has a duty to properly implement road maintenance policies (*Just / Lewis*)
  - The Mine Safety Division has a duty to protect miners from dangerous situations including criminal action (*Fullowka*)
  - Cricket club has a duty to surrounding landowners to not expose them to harm from flying balls (*Bolton v. Stone*).
  - Golfers to others who use the course (*Pope*)
  - Occupiers to people on their property (*Waldick v. Malcom* and the *Occupiers Liability Act*)
  - Swimming pool owners to swimming pool users (*Warren v. Camrose*)
  - Hunters have a duty of care to other people in the woods (*Cook v. Lewis*)
  - Railway companies have a duty of care to road users (*Ryan v. Victoria*)
- *Cooper v. Hobart* lays out how to apply the *Anns* Test to determine if there is a new duty of care.
  - Step 1: Was the harm a reasonably foreseeable consequence? And notwithstanding the proximity established in the first question, are there policy factors relating to this relationship why a duty should not be established. Is it fair and just?
    - This first branch must be supplemented with proximity. Proximate relationships are established through the use of categories.
    - Also considerations of **reliance, expectation and representation** for proximity.
  - Step 2: Are there residual policy considerations outside of the relationship between the parties?
  - Here this is applied to whether the Registrar of Mortgage brokers owed a duty to investors to investigate and warn them of the conduct of a licensed investment company.
    - This is not a previously recognized or analogous duty.
    - Fails step one on proximity – no direct communication. Legislation gives duty to public not to individuals.
    - Would have also failed step 2 as it is against public policy to impose negligence duties on a board with a quasi-judicial function.
- *Childs* establishes who has the burden of proof at each stage of the *Anns* Test:
  - Step 1: the plaintiff has burden to establish prima facie duty

- Step 2: defendant has burden of showing any residual policy factors against the duty.
- Only the foreseeability analysis is required for new: physical harm, duty to warn

### Applications of the *Anns* Test

- Traditional the common law has been hesitant to acknowledge duties for nonfeasance, which is a failure to act to protect others or their property
  - Misfeasance, acts, which cause harm, is what is traditionally covered.
- A very clear relationship is therefore required for there to be a duty to act.
- *Childs* lays out how to apply the *Anns* test to establish nonfeasance duties
  - A positive duty requires more than foreseeability. There must be a clear link between person required to act and person harmed.
- Categories of nonfeasance duties (*Childs*):
  - The defendant intentionally attracts third parties to an obvious risk which he/she has control over
  - Paternalistic relationships
  - Defendants who exercise a public function or engage in a commercial enterprise. This can involve a duty to the general public
- Policy and nonfeasance duties:
  - Personal autonomy vs. reasonable reliance.

### Rescue

- *Horsley v. MacLaren* establishes a nonfeasance duty of a rescuer.
  - Established a duty of the boat owner operator to attempt rescue of anyone who goes overboard. Also established a duty of the first rescuer to the second to not require the second attempt due to negligence.
  - Previously in Canada ship owners only had a duty to attempt a rescue if they caused the person to go overboard.
  - Here Matthews goes overboard, the ship owner MacLaren tries and fails to rescue, then Horsley tries to rescue. Matthews and Horsley both die.
  - MacLaren is found to be not liable to Matthews family because Matthews was died to quickly for even the best rescue attempt to have saved him (this is causation).
  - MacLaren is found to be not liable to Horsley's estate. His rescue attempt of Matthews was not perfect, but cannot be said to have induced Horsley to act.
    - The dissent would have found liability here, as it is reasonably foreseeable that someone else will attempt to rescue if first attempt fails.
- The *Good Samaritan Act* section 1 states that a person who renders assistance in an emergency is not liable unless there is gross negligence.
  - Section 2 states that section 1 does not apply to people who are employed to give aid or those who do so with the intent to gain.

### Alcohol

- Commercial host duty to intoxicated patrons to avoid endangering them or exposing them to harm is established in *Jordan House*
  - Finds that the hotel bar was in a special position with regards to the plaintiff
    - He was invited
    - Owner was aware of intoxication and continued to serve him
    - When he is kicked out the owner knows he will walk home down the highway
  - The breach of the duty was not in serving him alcohol but in allowing him to walk home down the highway (during which he was struck by a car).
- *Jordan House* is applied in *Crocker v. Sundance* to a ski resort that allows an intoxicated patron to partake in a for-profit tubing competition.

- By setting up an inherently dangerous competition Sundance had a duty not to place customers in a position where they can foreseeably injure themselves. This involves taking reasonable steps to prevent a visibly intoxicated person from participating.
- *Steward v. Pettie* establishes a duty of care on commercial hosts to third parties, here highway users.
  - This is done as an extension of *Jordan House*
  - However, no liability was found here but the duty was established.
- *Childs v. Desormeaux* establishes that social hosts do not have a duty of care to guests or third parties but leaves open the door for a duty to exist in special circumstances where there is creation or enhancement of a risk.
  - Factors: a social host does not benefit from overconsumption, does not provide or control liquor, no reliance on social host by those attending, house parties are not inherently dangerous activities, host did not encourage the driver to drink or to drive

## Doctors

- *Paxton v. Ramji* establishes that a doctor does not have a duty of care to the not-yet-conceived children of his/her patients by applying the *Anns* Test
  - Step 1: it is reasonably foreseeable that prescribing a teratogenic drug, like Accutane, to a female patient could harm future children. However the prima facie duty is not established due to lack of proximity.
    - There is a disconnect between a doctor and the not-yet-conceived children of his/her patients.
    - Lack of control by doctor over whether a woman becomes pregnant.
    - Also the problem of a chilling effect of a conflicting duty to woman and her future children
  - Step 2: would have also failed here due to concerns over the autonomy of women.
    - A doctor is expected to act on behalf of the mother unless he/she is expressly told not to.
  - There is no duty to the child and it was found that the doctor properly advised the mother of the risks of Accutane.
- In *Liebig v. Guelph General Hospital* the court clarifies that (and potentially narrows) *Paxton* only applied to not-yet-conceived children, and does not affect the rule that a born alive child may sue for injuries sustained in utero assessed that the date of birth.
  - This case involves a pre established duty of health care professionals to a foetus/child during labour and delivery
  - This does not result in a foetus receiving legal personhood (*Winnipeg Child and Family Services*)
  - There is still maternal immunity from suit by the infant for in utero injury (*Dobson*). However in Alberta there is a *Maternal Tort Liability Act* but this is only for car accidents and aimed at getting insurance money for foetal injuries of born alive child.
- *Cherry v. Borsman* establishes that a doctor has a duty of care to both the mother and foetus during an abortion. (Here the mother is suing.)
  - Duty to the mother is to perform the procedure non-negligently
  - Duty to the foetus is to not injure it if the duty to the mother fails
  - There is not a conflicting duty because the foetus never attains personhood if the abortion is successful
- All of these cases bring up the public policy issue of the lack of resources for children born with serious disabilities.
  - This would likely be better addressed through public policy than tort law technicalities.
  - How one ended up disabled affects funds available which lacks an inherent fairness.

## Security Firms

- *Fullowka v. Pinkerton's* establishes a positive duty on security firms to that which they are hired to protect.
  - *Anns* Step 1 foreseeability: the security company had received bomb threats resulting in them having actually foreseen the risk of explosion.
    - Very fact specific
  - *Anns* Step 1 proximity: Based on nonfeasance proximity factors from *Childs* – defendant creation of the risk, individual autonomy, plaintiff reasonably relied on the defendant to minimize a risk. Proximity is found based on reliance; the workers were assured that the security company would keep them safe.
  - Case fails as the court establishes the standard was met. Security firms are not expected to guarantee safety, only to take reasonable care.
  - Comes down to if the duty is fair and just, which is based on *Cooper v. Hobart* even though the analysis is done based on *Childs*.

## Police

- Negligence liability of police relates to that of government, however courts are more willing to find police liability, as there is more direct proximity and greater potential for abuse due to police authority.
- *Hill v. Hamilton* established that police have a duty to suspects during an investigation
  - This was a new duty, which is established here. It was found to not be analogous to previously established police duties to victims or potential victims.
  - *Anns* test foreseeability: it is clear that if the police negligently investigate that someone could go to jail
  - *Anns* test proximity: focuses on property or other interests consideration from *Cooper*
    - Critical personal interest in not being in jail. Also a public interest against wrongful convictions.
    - The micro policy here is not an issue as the class of suspects here is one, which is a small group
  - Police had tons of residual policy arguments which the court rejects:
    - Concerns about liability for every wrongful conviction – there is still a standard of care
    - Argument that police are quasi-judicial – nope they gather evidence, discretion does not equal judicial
    - Chilling effect – its not at all chilling for the police to have to act reasonably
    - Indeterminate liability – suspects are actually a very small class of people

## Government

- At common law no one can sue the government without their permission.
- It is statutes, which allow the crown to be sued in tort.
  - As a result of this you need to see whom the legislation covers and if it has special notice requirements or limitation periods.
- Cannot sue the government for policy, only operational decisions.
- *Just v. British Columbia* discusses the difference between policy and operational decisions, in a situation where a rock fall on the see-to-sky highway severely injures a man and kills his daughter.
  - Policy decisions made most often by high-ranking members of government, and budgetary decisions are as a rule policy.
  - However, once a decision to act has been made by the government, the court may look at the manner in which it is carried out.
  - Here there is found to be a duty between the BC Highways Department and this family to implement the program of rock maintenance in a non-negligent way. When sent back to trail the government is found liable for one million dollars.

- *Lewis v. British Columbia* states that the use of a contractor by the government for an operational decision does not exempt them from liability.
  - Negligent contractor = negligent government.
- *Imperial Tobacco* establishes that an advertising campaign of the government aimed to improve the health of Canadians is a policy decision.
  - The goal of the campaign was to encourage Canadians to stop smoking or switch to mild cigarettes which were thought to be better but aren't.
  - Issue of indeterminate liability: if the tobacco companies can sue Canada for this then so can every Canadian who smokes.
    - However smoking is a choice, which is not controlled by the government and not one they can be expected to bare responsibility for.
- *Fallowka v. Pinkerton's* also involved a lawsuit against the NWT Mine Safety Division and set out how to approach proximity for the government
  - The families of dead miners are suing the regulatory body for failing to close the mine and protect the workers from a criminal act.
  - Proximity: compare *Hill* where it was found to *Cooper* where it was not
    - Is there a direct relationship?
    - Is duty to the public rather than to an individual?
  - Found proximity here based on: miner are a clearly defined group, there had been personal dealing between miners and inspectors, inspectors had control over mine and miners.
  - Also notes that discretion does not indicate policy, here inspectors have discretion but are operational actors.
  - Even though a duty is found here the standard was met.

## Standard of Care

- There is only negligence if the defendant exposes the plaintiff to an unreasonable risk of harm and damage actually occurs.
- This is judged on the standard of how a reasonable person would act.
- When assessing the standard of care required there are four factors to consider:
  - Probability of harm (*Bolton*)
  - Seriousness of harm (*Paris*)
  - Cost of Remedial measures (*Rentway*)
  - Utility of the defendants conduct (Rescue situations like *Horsley* tend to lower standard)
- In *Bolton v. Stone* the risk of a cricket ball hitting someone on the neighbouring residential road was found to be too small as only six balls had ended up there in the previous thirty years.
  - The risk was clearly foreseeable but so small that a defendant should not have to take extra precautions.
- In *Paris v. Stepney Borough Council* it was stated that the defendant's knowledge of the plaintiff's disability is important when it affects the gravity of the harm the plaintiff is exposed to.
  - There is a different standard of care for the mechanic who only has one eye than the mechanic who has two eyes
- The importance of the cost of remedial measures was first contemplated by Judge Learned Hand, who established a formula. If the probability of harm multiplied by the cost of the harm is less than the cost of remedial measures then the defendant should not be expected to implement them.
  - While this formula can be very useful in some scenarios, the courts do not want large corporations using a calculator to decide if the cost remedial measures outweighs human life.
- Cost of remedial measures is considered in *Rentway Canada*, where it is found that the dangers of having both headlights on trucks on the same circuit far outweighs the cost of designing a new system.



- Considers how expensive the trucks are and that the cost of fixing the headlight circuits would not approach this.
  - Case failed on causation but the defect was found.
- The reasonable person test developed from the reasonable / prudent man test articulated in *Vaughan v. Menlove*. A reasonable person similarly situated.
  - Having been warned that his haystacks are a fire risk the defendant stated “he would chance it,” which is found to be unreasonable.
  - A trial the judge had used a subjective test, which is rejected in favour of an objective standard.

## Children

- Children are held to a mixed objective – subjective standard for negligence (*Heisler v. Moke*).
  - Must first determine if the child is capable of being found negligent at law. Uses age seven as the critical age where children begin to assume responsibility for their actions.
  - The standard of a child of similar age, intelligence, and experience.
- An exception to this is that children are held to the adult objective standard when engaging in adult activities, such as driving a vehicle, or golfing (*Pope v. RGC*).
  - However, it is the specific activity which gave rise to the alleged negligence, which must be examined not the over all circumstances (*Nespolon*). Here it was the decision to drop off a drunk acquaintance, not the context of driving which was considered.

## Mental Illness

- In order to be relieved of tort liability when a defendant is suffering from a mental illness without warning, the defendant must show (*Fiala*):
  - The defendant had no capacity to understand or appreciate the duty of care
  - OR, the defendant was unable to discharge the duty of care because he/she had no meaningful control over their actions
- This is based on maintaining the integrity of a fault based tort system. To hold a defendant liable who lacked any volition would be to impose strict liability.
- However, people with disabilities are expected to modify their conduct to minimize the risk to others.
  - Not an issue in *Fiala*, as it was his first manic episode.

## Customary Practices

- The onus is on a defendant to establish that there was a customary practice and its reasonableness (*Warren v. Camrose*)
- Courts are generally deferential to customary practices, but the reasonableness of a practice is still assessed
  - A practice of not sanding or salting icy sidewalks was found to be completely unreasonable (*Waldick v. Malcome*). Note there was also little evidence the practice existed.
- A uniform practice can provide strong evidence for the standard of care, especially when the rationale for that decision is shown (*Camrose*).
  - Professionally customs are also more persuasive than local ones.
- Departure from a professional practice does not automatically breach the standard of care
  - In *Brown v. Rolls-Royce* failure to provide barrier cream, as was the customary practice, based on medical advice as found to be acceptable (case really failed on causation though).
  - In *Kern v. Forest* a chiropractor failing to take additional precautions found in guidelines was not negligence, as it was found that an ordinary careful and competent chiropractor would not need to take those additional steps.
- Professionals are held to a higher standard than the reasonable person.
  - A specialist, someone who holds them selves out as having special skill or knowledge, must exercise the degree and skill of the average specialist in that field (*ter Neuzen v. Korn*).

- “average” is modified in *Kern v. Forest* to mean “ordinary, careful and competent”
- It is also important not to use hindsight in assessing the reasonableness of a professional decision or standard (*ter Neuzen v. Korn*).

## Statutory Standards

- *Saskatchewan Wheat Pool* clarifies that the breach of a statute does not give rise to a civil action in the absence of negligence
  - This would impose strict liability in the absence of explicit statutory intention to do so.
  - Canada adopts the approach that the breach of a statute is only evidence of breach of a standard of care.
- *Gorris v. Scott* states that statutory standards are only relevant to negligence when the damage caused was that which as contemplated by the statute.
  - A violation in storing sheep on a ship contrary to the *Contagious Diseases (Animal) Act* was not relevant to the loss of the sheep by them being washed overboard.
- *Ryan v. Victoria* states that compliance with statutory standards is not an automatic defense to negligence.
  - Statutory standards play a similar role to custom in assessing the standard of care.
  - The standard of care is: a prudent person who is aware of all the circumstances including laws and regulations.
  - When assessing the use of statutory standards one must consider:
    - Relevance to the circumstances of the case
    - Discretion under the regulations – suggests compliance may not be enough
    - Applications of the common law standard of care – if defendant is aware they have created a risk compliance is unlikely to save them.

## Causation

- There must be both factual (“but for”) and legal causation (relates to remoteness) for tort liability to occur.
- The plaintiff is required to prove causation on a balance of probabilities.
- But for causation requires that a plaintiff proves that but for the defendant's negligent act the harm would not have occurred (*Horsley*).
- A plaintiff is not required to prove the defendant was the sole cause of injury (*Athey*).
  - Damages are not reduced due to preconditions or non-tortious causes.
  - Causation must be beyond the de minimis but here the defendant was found to be 25% responsible, which clearly is.
- As seen in *Snell v. Farrell*, causation can be especially difficult for plaintiff's in medical settings.
  - Here the plaintiff became blind following surgeon negligence in continuing surgery after noticing bleeding. The surgeon is liable here.
  - The court confirms that the burden of proof does not shift to the defendant in complex cases.
  - The plaintiff must only show some evidence of causation, which allows the court to draw an inference unless rebutted by the defendant when he/she has special knowledge about the facts.
  - Causation has always been based on common sense not on scientific proof.
- *Cook v. Lewis* shows the inadequacy of the “but for” test where there are multiple independent negligent actors but only one caused the harm to the plaintiff.
  - The plaintiff was only shot by one of two negligent shooters but is unable to prove which one did it.
  - Here the judge switches the burden of proof to the defendant.
  - This eventually develops into the material contribution test although the court will not confirm that is what was done in this case.

- In *Clements v. Clements* the court establishes the test for material contribution to risk although it does not apply in this case
  - Multiple independent tortfeasers are required
  - The plaintiff must prove that harm would not have occurred “but for” the negligence of this group of independent tortfeasers.
  - The plaintiff is unable to prove which tortfeaser was responsible through no fault of their own.
  - This prevents negligent defendants from avoiding liability by pointing the finger at each other.
  - Consistent with the asbestos cases from the UK.

## Remoteness

- Remoteness is a question of law not of fact.
- Defendants are not held liable for every consequence of a breach of a duty of care.
  - A degree of proximity is required between the negligent act and the damages
- *Polemis* is no longer good law, but shows the old approach to remoteness in tort law.
  - Used a directness test where the defendant was liable for all damage resulting as a direct consequence of a negligent act.
  - Facts here were during the unloading of a ship the defendants negligently drop a plank into the hull. The plank hits something causing a spark and the ship burns down. The defendants were liable
- *Cameron v. Hamilton’s* overrules *Polemis* in Scotland stating that a defendant is only liable for the natural and probable consequences of their negligence.
  - Water damage resulting from a cow climbing stairs, falling through the floor then turning on taps in a dairy is not foreseeable, and thus the defendant should not be liable for it.
- In *Wagon Mound No. 1* the JCPC overrules *Polemis*, and is the case adopted into Canadian law
  - A defendant is only liable for reasonably foreseeable consequences of negligent action.
  - Facts: Furnace oil spill into the harbor. Molten metal from welding falls onto a piece of cotton debris, which allows the furnace oil to ignite. Damage to the wharf and ships. The metal alone would not have caused the oil to ignite. No liability.
- *Hughes v. Lord Advocate* clarifies what qualifies as foreseeability from *Wagon Mound No. 1*
  - Liability only requires foreseeability of the type of injury not of the nature and the manner of the accident.
  - Liability can only be escaped if the damage can be seen as of an entirely different kind than that which was foreseen.
  - Here it was clear that unattended paraffin lamps and manhole could cause burns. It does not matter that the burns were from an explosion rather than from the oil spilling.
- In *Assiniboine School Division v. Hoffer* the court looks at foreseeability at each step of the chain of events rather than globally resulting in liability for what seems to be a very bizarre event.
  - There was clear negligence in a fourteen year-old boy starting a snowmobile in such a way, which allowed it to escape in the middle of town.
  - However, liability is found for it hitting a building resulting in a negligently placed gas riser breaking and the gas floating up to the furnace room causing an explosion.
- The courts are now more open in the use of policy in determining remoteness
  - Personal injury vs. property loss
  - Industrial undertaking vs. individual as defendant
  - Will the decision actually have a deterrent effect?

## Thin Skull Rule

- Regardless of preexisting conditions a tortfeaser must compensate the victim for the full extent of the damage caused by their negligence.

- The thin skull rule counters remoteness in personal injury torts.
- The policy behind the thin skull rule:
  - Promotes the goal of compensation
  - Works as a deterrence – be more careful in case you get an extra vulnerable victim
  - Does not offend corrective justice
  - It would be very hard for the courts to determine what damage would have occurred without the preexisting condition.
  - The crumbling skull rule exists to lessen the burden on defendants
- *Bishop v. Arts & Letters Club* shows an application of the thin skull rule where the damage suffered by the plaintiff was far worse due to haemophilia. The defendant was liable for the full damages.
- The crumbling skull rule recognizes that the goal of tort law is to restore the plaintiff to their original condition which must take into account a preexisting condition (*Athey*)
  - The defendant does not need to compensate the plaintiff for debilitating effects of the preexisting condition, which would have occurred anyway.

### Novus Actus Interveniens

- The actions of a third party may break the chain of causation if the act does not fit within the risk set in motion by the defendant (*Bradford*).
- *Stansbie v. Troman* states that a third parties actions are not an intervening act, if they are exactly what the defendant was supposed to guard against.
  - Contractor leaves the house unlocked and a thief comes in.
- In *Bradford* the reaction of a patron to the fire extinguishing system in a restaurant causing panic was found to not be foreseeable.
  - The fire did not cause the panic, which lead to injury. The properly functioning state of the art fire extinguisher made a sound, which caused panic.
  - Defendants are not liable for the reactions of idiots.
  - There is a dissent stating that once there is a fire it is not unforeseeable that someone could be scared or could panic.
- An act by a third party is not an intervening act if the defendant knew it was likely to occur (*Smith v. Inglis*).
  - A refrigerator has a defective capillary tube, which causes injury because the ground prong was cut off the plug.
  - The cutting of the ground prong was not an intervening act, as the distributor knew that everyone in Nova Scotia did this.
- A warning is not sufficient to relieve a seller of liability if they know that the product will be used negligently in spite of it (*Good-Wear Traders*).
  - The defendant seller knew that the tires it sold would be put on a truck, which was too heavy for them. The tires fail while on a gravel truck and three people are killed.
  - The only way for the seller to meet the duty to highway users was to refuse to sell those tires.

### Defenses

- Voluntary Assumption of Risk
  - Attempted in *Crocker v. Sundance*
  - Viewed as too harsh as it is a complete defense.
  - Now mostly dealt with through contributory negligence
  - Might apply in sports
- Illegality
  - No compensation for people injured during illegal activity.
  - Public policy decision

- Narrowed in *Norberg*
- Contributory Negligence
  - Only a partial defense, which is favoured by the courts
  - BC *Negligence Act* sections 1 and 2

## Duty to Warn – Failure to provide information

### Manufacturers – *Hollis v. Dow*

- Manufacturers have a duty to warn about any dangers related to their products due to the relationship of reliance and knowledge imbalance between manufacturers and consumers.
  - The duty to warn serves to correct the knowledge imbalance
  - Must be clear, complete and current
- Significant dangers cannot be covered with only a general warning (pilot light and flammable sealant).
  - The more dangerous something is the more specific the warnings must be
- The duty is also continuing and reasonable efforts must be made if a hazard is discovered after.
- An exception to warning the consumer directly is through a learned intermediary:
  - Only works in cases where the packaging and product don't go directly to the consumer.
  - Requires a gatekeeper.
  - Duty can be discharged then by warning the intermediary.
- Causation question: even if the consumer knew, would they still have used the product?
  - Do not have to prove that the learned intermediary would tell the patient in cases where the intermediary was not warned.

### Doctors

- *Reibl v. Hughes* establishes that insufficient consent to medical procedures is negligence not battery
- A plaintiff must prove (*Reibl v. Hughes*):
  - The physician did not adequately warn about the inherent risks
  - AND, a reasonable person in the plaintiff's situation, who had sufficient information would not have consented
- Note: even though the causation can be difficult to prove the courts will go out of their way to find a material risk even if the case fails.
- If a risk is a mere possibility but has enormous consequences it is a material risk requiring disclosure
  - 10% risk of stroke or paralysis found to be material risk (*Reibl v. Huges*).
  - 3 % chance of a usually large scar is not a material risk (*Videto*). Note this case could have been different if it had gone through on bowl perforation, which is what caused the scar.
  - 1-3 % chance of cord prolapsed in childbirth of second twin with 5-10 % chance of poor outcome was found to be a material risk (*Brito*).
- The risk must also be communicated in such as way for the patient to understand it (*Martin*).
  - The doctor's warning of bleeding for brain surgery was not sufficient communication of the risk of stroke. (overturned on appeal)
- There is also a duty to provide information about alternate treatment, including treatment, which is only available by another doctor at another hospital (*Van Mol*).
- Causation in medical consent cases is an objective subject standard set out in *Reibl v. Hughes*
  - Reasonable persona similarly situated with the same knowledge
  - Must be proved on the balance of probabilities
  - This is very fact oriented and greatly depends on what information was given to the doctor and the significance the plaintiff stressed.
- Causation is only examined for that particular surgery. That the plaintiff would have waited and received treatment several moths later does not negate causation (*Martin*).

- Key facts here were: elective surgery to remove benign tumour causing headaches, importance of dancing in his daughters wedding, desire to travel and be able to qualify for travel medical insurance.

## Liability for Pure Economic Loss

- Traditionally there was not tort liability for pure economic loss. It was left to contracts.
- There are also serious concerns about indeterminate liability and pure economic loss and economic damages can balloon in a way personal injury damages cannot.
- There are five categories of pure economic loss in torts, which are seen as exceptions to the rule:
  - Independent liability of statutory public authorities
  - Negligent misrepresentation
  - Negligent performance of services
  - Negligent supply of shoddy goods or structures
  - Relational economic loss

## Negligent Misrepresentation

- The tort of negligent misrepresentation is established in *Hedley Byrne*
  - Requires more than just foreseeability
  - It must be reasonable for the plaintiff to rely on the statements made and reasonable for the defendant to know that the plaintiff would rely upon them.
  - Factors here: the plaintiff requested the information knowing that the defendant was an expert, a business and not a social setting.
  - Case ultimately fails due to a limitation of liability clause but the court states that it would have succeeded but for that clause.
  - Big concern with indeterminate liability. The bank has no control over the statement once they send it off. Gives rise to the double reasonableness requirement for proximity.
- The test for negligent misrepresentation is articulated by the Supreme Court of Canada in *Hercules* using the *Anns* test
  - A prima facie duty of care arises when: the defendant ought to have reasonably foreseen that the plaintiff would rely on his statements AND the reliance by the plaintiff is reasonable
  - However, it will be negated if indeterminate liability can be shown to exist on the facts of the case.
  - Here an audit statement was relied upon by shareholders to make investments, which is not the purpose the report was made for.
    - Policy factors against audit companies being responsible for all use of their reports: expensive insurance, reports wouldn't be timely, they are used by business people who should be expected to accept risk in investment decisions and responsible for their own due diligence.