

DUTY OF CARE?

1. Does it fit into one of the established categories of relationships that give rise to a duty of care?

If YES, then no further duty analysis is required (sufficient proximity)

Categories:

Drivers → other road users (*Stewart*)

Driver → born alive child IF D owed a duty to the mother, and child suffered damages caused by the D (*Duval v Seguin*)

Doctor → born alive child, must be conceived at the time, aka no wrongful life claims (*Winnipeg Family and Child Services*)

Commercial Hosts → guests and 3P's on road (*Stewart*) Note: distinction when host makes money from guest

Commercial Hosts → prevent injury to patron + and those the patron might injure (*Jordan House, Crocker*) Note: inviter/invitee relation

Manufacturer → customer to prevent defects (*Donoghue*)

Boat Captain → passengers who fall off (*Horsley*) Note: in invitee/inviter and controlling relation

Boat Captain → first rescuer if caused by captain's negligence causes the need to rescue (*Horsley*)

Police chief → family of deceased in negligent investigation (*Odhavji*)

Police → suspects they are investigating (*Hill*)

Security Firm → miners/workers (*Fallowka*)

Government → miners [for not closing mine earlier/ failing to implement safety procedures] (*Fallowka*)

Government → users of highway/ the public after decision is made to fix rock face (*Lewis*)

Governmental liability:

→ look to statute to find proximity at stage one

→ look for policy/operational decisions at stage two

2. If it doesn't fit into an established category, should a new duty be recognized?

Is it NONFEASANCE (Omission/failure to act for the benefit of others/protect)?

Note: The courts are reluctant to recognize a general duty of care where:

- the defendant doesn't create the danger (*Vanvalkenburg v Northern Navigation Co*),
- or there is no special relationship AKA more than uninterested strangers.

Three relationships that impose a duty to act (*Childs*):

- Creating the risk and then inviting people into it (ex. Tubing competition in *Crocker*, boat driving in *Horsley*)
- Controlling, paternalistic relationship, supervisory position (parent/child, teacher/student, NOT social host/guest in *Childs*)
- Public function/commercial enterprise that implies responsibility to the public at large (*Jordan House, Stewart*)

Catch all: if there is reliance on the defendant, this is what “unites examples in all three categories”

Or MISFEASANCE (action/ positive act that endangers others/property)?

- Misfeasance + foreseeable physical harm = duty of care is likely established (*Childs*)
- Others? Go to duty test

New Duty Test (*Cooper, Childs*)

STAGE ONE = Prima Facie duty of care?

(P bears burden of proof)

- a. Is there **proximity**? A sufficiently close relationship?
- b. are there **policy reasons**, notwithstanding the existing proximity, that the tort liability should not be recognized for this particular relationship?

STAGE TWO = reasons to reject duty of care?

(D bears burden of proof)

Are there **residual (broader) policy reasons**, notwithstanding the proximity, that the recognition of this duty should not be enforced. → concerned with the implications of recognizing this duty

- the effect it would have on other legal obligations, the legal system, and society more generally (*cooper*)
- ex. Floodgates, deference to government policy, autonomy of judicial bodies, burden on taxpayers

*** Read *R v Imperial Tobacco Canada Ltd.* for a recent run through of the test

STANDARD OF CARE

Did the defendant create an unreasonable risk? (burden on P)

➤ **First, separate out D's with special standards (relaxed)**

A. Children → subjective/objective standard (*Heisler*)

Exceptions: adult activities and driving, will be held to adult standard (*Pope* and *Nespolon*)

Test (*Heisler*)

1) whether this child (age, intelligence, experience, general knowledge and alertness) is capable of being found negligent at law

2) what would a reasonable child of that age and intelligence reasonably be expected to do and foresee under the circumstances?

B. Mentally Ill (*Fiala*)

D must show on a BoP, as a result of the illness:

1) no capacity to understand duty of care

2) no control over actions so could not discharge duty

- need to mitigate risk, ex take medication

C. Special Skills or Professional Behaviour Standard?

Ter Neuzen: Doctors must act as a reasonably prudent physician, on information ought to have been reasonably possessed at the time

Kern: a specialist must exercise the skill of an average specialist in the field

D. If Regular, then look to these FOUR factors:

1. Probability of harm (*Bolton*)

- the fact that the harm was foreseeable was not enough for the court to say it was an unreasonable risk. It may be enough to ground a duty, but not for the standard of care

2. Seriousness of the Injury (*Bolton*)

- Risk may be more unreasonable if the injury is serious

3. Cost of preventative/Remedial Measures

- Learned Hand Formula, *Rentway*
- Is the utility in having something outweighed by the potential risk of it that was foreseen by the manufacturer?

4. Purpose/Social Utility of the Activity (*Horsley*)

- emergency? More leniency
- Government: where society need something

➤ **Then address evidentiary Issues**

A. Customary Standards

Waldick: Are relevant to a reasonableness assessment, will be specific to each fact situation, requires evidence of reasonableness

- If the custom is unreasonable in itself the courts will not accept it
- Generalized negligence cannot be countenanced by "custom"

Rolls Royce: had medical evidence to support the custom

B. Statutory Standards

Sask Wheat Pool: If you breach a statute, it may breach the common law standard (can use to strengthen claim, but not determinative)

Gorris: For the statute to be relevant to the standard of care, the injury must be the one that the statute was aimed at preventing, and the P part of the class of persons the statute was aimed at protecting

Ryan: The common law standard of care and the statutory standards are concurrent, they must both be met in a standard of care analysis for Δ to be not negligent (check for detailed or general statute)

Particularized Standard of Care: DUTY TO WARN

Doctors

Two duties:

- 1) to treat/provide care non negligently
- 2) Before they treat, they have a duty to warn of the material, special, or unusual risks that attach to the procedures, without being asked (*Reibl*)
 - any risk of death, paralysis, or stroke is material
 - **Policy reasons** for imposing this duty: based on a participatory model of the practitioner/patient relationship. It is designed to promote effective communication

Videto: If the doctor doesn't know a normally non-material risk had special significance, they would not have to disclose it

Brito: Any unusual or improbable risk should be disclosed if its effects are serious

Van Mol: Alternative methods of a procedure need to be disclosed along with the risks

Manufacturers (Hollis)

- Have a continuing duty to warn customers of dangers inherent in the use of the product
- If there are significant dangers, more than a general warning will be required
- Learned Intermediary is an exception in SOME situations

Learned Intermediary Rule: applies where a the product is highly technical and to be used under supervision of experts, or where the nature of the product is such that the consumer will not receive direct warning from the manufacturer (it would not be realistic). Has to only pass info to intermediary in a clear and complete way to discharge the duty to the ultimate consumer

Policy: Manufacturers have an informational advantage, there is an intimate relationship between the patients and medical products, designed to protect from harms of a hidden nature. There is a relationship of reliance..

CAUSATION (Factual)

(1) “But For” Test → Would the damage have occurred “but for” the D’s negligence?

- Must be proved on a BoP, Note that the test is speculative... the court must decide what would have happened if the D had not been negligent

Four Steps

- 1) Identify the harm
- 2) Isolate the specific acts of negligence
- 3) adjust the facts so that D wouldn’t be negligent (can be multiple defendants)
- 4) Ask if the same harm would have occurred (looking for substantial contribution)
 - generally, if D was a “possible cause” of the harm, the P will be unsuccessful in court (*Horsley*)
 - established where the D’s negligence materially contributed to the occurrence of the injury (*Myers v Peel County*)
 - test does not require the P show that they D was the ONLY cause of injury, tortious acts will still be apportioned 100% liability (*Athey v. Leonati*)

Snell: The legal or ultimate burden remains with the P, but in the absence of evidence to the contrary (defendant cannot prove), an inference of causation may be draw although positive or scientific proof of causation has not been found.

(2) Material Contribution (of Risk) Test → has never been successful in court

- generally used where there are multiple defendants and it is clear that one of them did it, or one or more did it but impossible to prove who

Clements: material contribution is a substitute for the usual requirement of "but for" causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury.

Look for these features:

- multiple tortfeasors
- all have breached the standard of care (on a “but for” basis on a global level)
- They have all breached the standard of care (don’t worry about apportionment at this stage)
- that breach materially increased the risk of injury

Causation and Duty to Warn → would the person have consented to the procedure had they been properly informed of the risks?

Objective test (*Reibl*) : could causation ever be established if the surgeon has recommended surgery which is warranted by the patient’s condition?

Subjective test (*Hollis*): premium on hindsight, causation would be in the patient’s hands and would result in liability unless there was a finding that there was no breach of duty of disclosure

Temporal element: It is not upon the P’s to prove anything more than that he would not have consented to the operation at that particular time → no temporal limitation on damages to apply

REMOTENESS (legal causation)

- **The P's injury cannot be too remote from the D's conduct**
- **Defendant is only liable for the reasonably foreseeable (or naturally flowing) consequences of the act (*Wagon Mound*)**

Hughes: Only the type of harm must be foreseeable, not the specific harm that occurred (P friendly)

Assiniboine: Harm must be possibly foreseeable, not necessarily probably foreseeable

Thin Skull Rule:

Physical Injury: As long as some physical injury is foreseeable, the D will be liable for exacerbated injuries to the P caused by a pre-existing condition, take your victim as you find them (*Bishop*)

Pure Psychological Injury: must be a reasonable foreseeability of psychiatric injury in people of ordinary fortitude (unless the defendant knows about the condition) and then excess harm will be included in the damages

Crumbling Skull Rule: The Defendant doesn't have to put the P back in the position they would have been in if the P has a degenerative disorder. The D is only liable for the difference (*Athey*)

Intervening Acts: it will break the chain of causation.

Consider:

- Was the harm within the scope of risk created by the D's action and within the scope of the D's duty? (*Stansbie*)
- Was the intervening act reasonably foreseeable? (*Stansbie*)
- Should the person guilty of the original negligence have anticipated such subsequent intervening negligence and have foreseen that this would have led to damage from his original negligence? (*Bradford*)
- An act may contribute to the harm without breaking the chain of causation (*Hussack*)

Pure Psychological Harm: If psychological harm was not reasonably foreseeable in a reasonable person, then the P cannot recover for it (*Mustapha*)

- Psychological harm flowing from a physical injury is easier to collect damages for

Test for psychological harm as a witness:

1. relational proximity (family members, could be argued for close friends)
2. locational proximity (must be at the scene or be at the immediate aftermath of a shocking/startling event)
3. temporal proximity (flow directly from the event)

