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LAW 108C | private law: torts

final outline | 2012-2013

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## RESPONSES TO HARM

### DEFINITIONS

- ❖ Conduct (includes acts and omissions) that interferes with **legally protected interests** of others without lawful justification.
- ❖ Gives rise to **personal actions** in which plaintiff (P) seeks a **remedy** for unlawful interference with their legally protected interests
- ❖ **Proof of harm not always required** - though generally require fault (intentional or negligent)
  - *Torts actionable per se*: Some torts are actionable without proof of damage.
    - e.g. trespassory torts – battery, assault, false imprisonment, trespass to land, trespass to chattels, and defamation.
  - *Torts actionable only upon proof of actual damage*: resulting from defendant's conduct (may not be wrongful but requires due care).
    - e.g. negligence actions and intentional infliction of mental distress.
- ❖ **3 types of relief from tort action:**
  - declaration of tort action – determination of boundaries
  - monetary compensation – damages
  - injunction – prohibition of conduct that interferes with interest of P or compelling D to remedial action

### TWO BASES OF TORT LIABILITY

- ❖ **Fault**: central to modern tort law in Canada; evidence of wrongdoing condition for liability
- ❖ **Strict**: rare; liability imposed w/o fault unless valid defence; applied to activities that are inherently dangerous (nuisance, defamation, vicarious liability)

### TORT LAW AS SOCIAL CONSTRUCT

- ❖ Only certain undesirable conduct falls within the ambit of tort law
  - Tort law remedies are limited to the protection of certain interests – those that have been recognized as deserving of protection
- ❖ **Factors that influence scope of tort law:**
  - Proximity
  - Common law precedent
  - Implications of recognizing (or not) certain conduct as a tort
  - Societal interests/norms
  - Alternatives available

### THEORETICAL BASES FOR TORT LIABILITY

- ❖ **Essentialist/Moralist**
  - Corrective justice
  - Focus on immediate litigant
  - Purpose = to restore equilibrium between parties caused by D's wrongdoing
  - Tort an end to itself; compensation incidental

- **Critique:**
  - Doesn't recognize socio-economic sources integral to success, presumes between parties, ignores social context/background of parties
- ❖ **Instrumentalist/Functional**
  - Distributive justice
  - System of loss distribution
  - Goals = compensation, education, deterrence, loss spreading, psychic benefits
  - Provides compensation to victims at D's expense
  - **Critique:**
    - No compensation if D has no \$, burden on victim, tortfeasor often no on paying (insurance, vicarious liability), deterrence overstated

## DETERMINING LIABILITY

- **Joint Tortfeasors (*Cook v. Lewis* ruled no, but ratio = *When there are two parties, and it is proven that one of them caused harm in their actions but it cannot be proven which party actually did it, then both of them are liable for the resulting damages.*)**
  1. Encouragement or instigating?
  2. Principle/agent relationship?
  3. Employee/Employer relationship?
  4. Residual fact-specific category - Guilt by Participation? (catch all)
    - (Last para. of *Cook v Lewis* – anticipation of other's action?, control over other's action?, assistance or encouragement of other's action? right to interfere with other's action?)
- **Independent Tortfeasors** (aka. several, concurrent)
  - Operate independently - but consequences of their separate acts harm plaintiff
- **Vicarious Liability** (type of strict liability)
  - *\*See hospitals and parents for special 'exceptions'*
    - 1) **Sagaz Test** – Employee/employer (requisite) relationship? Independent Contractor?
      - i. Level of control over worker's activities
      - ii. Worker hires own helpers?
      - iii. Worker provides own equipment?
      - iv. Worker's degree of financial risk?
      - v. Worker's degree of self-investment, management?
      - vi. Worker's opportunity for profit?
      - vii. Other: own insurance, multiple bosses, benefits, etc.
    - 2) **Salmond Test**
      - To determine vicarious liability:
        - Requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing.
      - **Test:**
        1. Is it authorised by the employer? (if yes, employer is VL)

2. Are unauthorised acts so connected with authorised acts that they may be regarded modes, although improper modes, of doing an authorised act.
    - Is the court controlled by unambiguous precedent? If yes, apply it, otherwise...
    - Policy Reasons
      - Just and practical remedy, and deterrent of future crime
    - E.g. Bouncer *roughly* throws a girl out of a bar. Authorised to remove from bar, but not in that manner.
  - If employee was off on his own, vicarious liability could not be attached to the employer.
- 3) **Second Part of Salmond Test > Bazley Factors** (non-exhaustive list) used to determine policy reasons– **even if** first two are not there, can still prove liability with Bazley Factors. (enterprise risk test)
1. **Are there any cases that provide precedents?**
  2. **If not, should VL be imposed having regard to bigger policy goals of CL? (Deterrence, Compensation – fair recover)**
    - i. Opportunity for employee to abuse power
    - ii. Extent that wrongful act furthers employer’s aim (limited)
    - iii. How much confrontation & intimacy inherent in enterprise
    - iv. Extent of employee’s power
    - v. Vulnerability of the victim
- According to Kodar – start with Salmond test, and the Bazley Factors test is an articulation of how to operationalize the second branch of the Salmond test.
  - *Residential schools application*: 1) Precedent? 2) If no, must balance rules.
  - Test should focus on operational characteristics of activity, not just specific tasks of the employee (dissent – *Oblates*)
  - **Joint and Several Liability**
    - Two or more parties commit tortious acts to P
    - Can go after each one separately for 100% of damages
    - Each is liable for whole thing independently (unless *Contributory Negligence – BC Negligence Act s. 4(2)*)
  - **Contributory Negligence**
    - “Reasonably prudent person” test
      - 1) Accident
      - 2) P puts his or her self in foreseeable harm
      - 3) P fails to take protective measures
  - Reduces P’s claimable damages, apportionment (*BC Negligence Act s. 1(1)*)
  - **Note on Parental Liability**
    - Parents not vicariously liable for children’s wrongdoing
    - There is some Parental Liability Legislation (BC, MB, ON)
    - Parents are not liable, but there is legislative override up to \$10,000 when child commits intentional wrong; under Parental Responsibility Act, parents are assumed liable unless they can show that they were exercising reasonable responsibility and did what they could to prevent harm.

## TORTS IN SMITH V. INCO

- ❖ Inco operated nickel refinery in Port Colborne until 1985
- ❖ Nearby property owners have high levels of nickel in their soil, incorrectly reported in 2000 as being a threat to human health
- ❖ Property owners claim that their properties have lost value as a result
- ❖ Class action of property owners sues Inco in Ontario under four torts:
  - *Private Nuisance*
  - ***Rylands v. Fletcher***
  - Trespass
  - Public Nuisance
- ❖ Ontario Superior Court finds Inco liable for \$36 million in damages under private nuisance and ***Rylands v. Fletcher*** (no finding of trespass or public nuisance)
  - Inco appeals to the Ontario Court of Appeal
  - Court of Appeal allows the appeal, finds no private nuisance or *Rylands v Fletcher* claim is made out
- ❖ **What is the difference between nuisance and negligence? (Fault vs. effect)**
- ❖ Negligence: have to prove fault and that the defendant was behaving in an unreasonable manner.
- ❖ Nuisance: just have to show that the defendant created something that interfered with reasonable use and enjoyment. Don't have to prove fault, just that they did it.

## PRIVATE NUISANCE IN OSBORNE

- ❖ Did the defendant "unreasonably interfere with the plaintiff's use, enjoyment, and comfort of land"?
- ❖ **Categories of Nuisances:**
  - *Physical damage to land*
    - Must not be trivial
    - Plaintiff's damage must not be a result of unusual use (e.g. keeping a supply of very delicate paper)
      - Unless defendant knew about it in advance
    - If first two conditions are met, strict liability
  - *Interference with comfort and enjoyment of land*
    - Property owners are expected to put up with some amount of interference, defendant's interference must be unreasonable to be actionable
    - Court tries to balance rights of various property users
    - Court looks at several factors, not definitive/exhaustive:
      - Character of the neighbourhood
      - Intensity of the interference
      - Duration of the interference
      - Time of day and day of the week
      - Zoning designation
      - Utility of the defendant's conduct
      - Nature of the defendant's conduct
      - The sensitivity of the plaintiff
  - *Non-intrusive nuisances*



- Non-intrusive nuisances don't cause smells, sounds, or objects to go onto the plaintiff's property
- Usually the Court does not allow claims for non-intrusive nuisance
  - E.g. blocking someone's sunlight or view
- Exceptions are often made when defendant's conduct is malicious, negligent, or illegal
- ❖ **Who can be sued in private nuisance?**
  - *Always: the creator of the nuisance*
    - Usually this is the landowner
    - Sometimes this is someone who commits the tort on another person's land or on public property
  - *Sometimes: the landowner who did not create the nuisance*
    - If they were negligent in preventing it
- ❖ **Who can sue in private nuisance?**
  - *Must have a proprietary interest in the land*
    - This is a tort to land, not to the person
    - Can be owner, tenant, or occasionally a permanent occupant
- ❖ **What are the defences to private nuisance?**
  - *Statutory authority*
    - Limited protection, just because it's legal doesn't make it okay
  - *Statutory immunity*
    - Government passes statute to protect a particular activity
  - *Consent*
  - *Prescription*
    - Defendant has carried on this activity continuously for 20 or more years, and plaintiff knew about it for that long
  - *Contributory Negligence*
- ❖ **What are the remedies the Court can order?**
  - *Injunction* – stopping from doing
  - *Damages* - compensation
  - *Abatement* – reduction or diminution

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#### PRIVATE NUISANCE IN *SMITH V. INCO*

- ❖ Trial judge finds that the nickel particles in the soil were physical damage
  - Finds that it was more than trivial because it affected property values
- ❖ Court of Appeal
  - Rejects the trial judge's finding that a change in the chemical composition of the soil constitutes physical damage (para 55)
  - Physical damage would have been found if the nickel particles had posed a risk to human health, which they did not (para 67)

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#### THE RULE IN *RYLANDS V. FLETCHER* IN *OSBORNE*

- ❖ Defendant is strictly liable for damages if, during a non-natural use of their land, something escapes from their property that is likely to do mischief
- ❖ Note on non-natural use of land

- In modern times, is taken to mean use that is dangerous, extraordinary, special, and of no general benefit to the community
- ❖ **Elements of the Rule:**
  - Non natural use of the land (*Osborne 344*)
    - Two types: things that are dangerous *all the time* (water in bulk, storage natural gas), things that are dangerous *only in the circumstances* (degree of danger of land use, time and place)
  - Escape of something likely to cause mischief (*Osborne 347*)
    - Needs to escape from the defendant's premises. The dangerousness of it must escape (mischief is basically covered by the non-natural use).
  - Damage was caused to the plaintiff's property as result of the escape (*Osborne 348*)
    - Proof of harm to the plaintiff
    - Remoteness rule though: *reasonable foreseeability* of the harm (like neg)
- ❖ Defences:
  - ❖ Consent – if both knew, remained in place of danger
  - ❖ Mutual benefit
  - ❖ Default of plaintiff
  - ❖ Act of a stranger and act of God
  - ❖ Statutory authority
    - Like in private nuisance, Court has narrowed this defence

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#### THE RULE IN *RYLANDS V. FLETCHER* IN *SMITH V. INCO*

- ❖ Court notes that the on-going use of this rule as separate from private nuisance and negligence is a subject of controversy
- ❖ Trial judge finds that Inco's use of their land as a nickel refinery was a special use that brought extra dangers
  - Further stated that the nickel particles constituted an escape
- ❖ Court of Appeal does not accept that Inco's refinery was non-natural use
- ❖ Court of Appeal also dislikes the imposition of strict liability for ultra-hazardous activities, wants this to be in Parliament's bailiwick

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#### TRESPASS IN OSBORNE

- ❖ **Trespass: Direct, intentional or negligent, physical interference with land**
- ❖ **Actionable without proof of damage**
- ❖ **Trespass to land is committed in three ways:**
  - ❖ It is trespass to enter a plaintiff's land without permission
  - ❖ It is trespass to place objects on the plaintiff's property
  - ❖ It is trespass if the plaintiff revokes the defendant's permission to be on the property, and the defendant does not leave within a reasonable amount of time
- ❖ **The tort protects three interests:**
  - ❖ Possessor's ability to freely use their land
  - ❖ Possessor's ability to recover damages to their land
  - ❖ Possessor's privacy
- ❖ **Defences to trespass:** Consent, necessity, legal authorisation, (mistake is not a defence).

- ❖ **Remedies:** Damages, injunctions, allowed to use reasonable force to eject trespassers who have been asked to leave.

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#### TRESPASS IN *SMITH V INCO* (SUPERIOR COURT)

- ❖ Good description of trespass (para 37) from *Grace v. Fort Erie (Town)*
- ❖ “Any direct and physical intrusion onto land that is in possession of the plaintiff; The defendant’s act need not be intentional, but it must be voluntary; Trespass is actionable without proof of damage; and while some form of entry onto, or contact with, the plaintiff’s land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto, the plaintiff’s land.”
- ❖ Trial judge finds that Inco’s intrusion onto the land was indirect, and thus not trespass
- ❖ Difference between spraying nickel onto someone’s property and operating a refinery that emits nickel smoke

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#### PUBLIC NUISANCE IN OSBORNE

- ❖ Typically an action brought by the AG, unless citizen is granted special standing
- ❖ Only certain circumstances in which they can be granted status.
- ❖ Not properly a tort subject, is *criminal* in nature
- ❖ Tort action can be brought if there are special damages to a particular individual
- ❖ Section 180(2) of the Criminal Code of Canada defines public nuisance:
- ❖ Everyone commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby:
  - Endangers the lives, safety, health, property or comfort of the public, or
  - Obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.
- ❖ Suggestion in Osborne that private nuisances become a public nuisance when they affect a class of persons or a neighbourhood
- ❖ Seems to directly conflict with *Smith v. Inco*
- ❖ Remedies: Damages or injunction.
- ❖ Osborne also includes a note on *Smith v. Inco*, but only has the information from the Superior Court judgment, so assumes claim for private nuisance and *Rylands v. Fletcher* were successful

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#### PUBLIC NUISANCE IN *SMITH V. INCO* (SUPERIOR COURT)

- ❖ “A public nuisance refers to a criminal or quasi-criminal offence which involves actual or potential interference with public rights, not private rights. Public nuisance involves interference with public health, public morals or public comfort, or the use of a public place.” (para 70)
- ❖ Trial judge finds that the plaintiff’s claim is about a bundle of individual property rights, not about public property, public morals, or public comfort, and therefore is not a public nuisance

## FALSE IMPRISONMENT

- ❖ **Right Protected:** Individual Liberty (*Osborne*)
- ❖ **Actionable:** Without proof of damage (*Osborne*)
  - Nominal awards may be given when actual damages cannot be established (*Lumba v. The Secretary of State*)
- ❖ **Required Elements:**
  - Must be a detention AND
  - Detention must be false (unlawful) (*Osborne*)
- ❖ **False Imprisonment can be Either Intentional or Negligent.**
  - There are no reported cases of negligent false imprisonment (Kodar, Nov 22, 2012)
  - Example: A manager might lock someone who lawfully entered a bank vault in the vault when they closed it without checking. (Example given by Kodar, Nov 22, 2012)
- ❖ **Form of Imprisonment:**
  - Physical
    - Detention must be complete (*Bird v. Jones*)
      - as long as there is an available and safe way to escape it is not a complete detention (*Osborne*)
  - Physiological
    - Threat of physical harm or show of authority (*Osborne*)
- ❖ **The Test is Mostly Subjective:**
  - That a reasonable person in that person's circumstances would do/ think (Kodar, Nov 22 2012)
- ❖ **Reverse Onus:**
  - The defendant must prove that any detention was not 'false,' that it was done for a lawful purpose. They may also prove that the action were neither intentional nor were they negligent. (*Osborne*)
- ❖ **Police and Identity:**
  - It is not false imprisonment if police have reasonable grounds to believe that you are the correct person when you are arrested. However, they must check your ID and take reasonable steps to confirm your identity. (Paraphrased from Kodar, Nov 22, 2012)
- ❖ **Notes on Lawful Authority:**
  - There is no Canadian Authority as to whether a person must be aware of his imprisonment and there for it is likely that a remedy would be available to infants and adults who are unaware of their detention because of limited mantel capacity. (*Osborne*)
  - **Three factors in determining lawfulness of a detention allowed by administrative directive:** "First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations." (*Lumba v. Secretary of State*)

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LUMBA V. SECRETARY OF THE STATE FOR THE HOME DEPT.

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❖ **Summary:**

- Plaintiffs were foreign national prisoners (FNP) detained pending deportation (Lumba -June 2006-present; Mighty - May 2006-July 2008)
- Secretary of State's published policies at the time favoured a presumption in favour of releasing FNP who were to be deported; discretion to detain available...
- Under the published policy both plaintiffs could have been detained pending deportation because of their criminal records (discretionary)
- April 2006 - Secretary of State discloses he had instead adopted an unpublished policy with a blanket presumption in favour of detention of FNP

❖ **Majority:**

- Their detainment was unlawful because it wasn't a decision of lawful authority but rather of the unpublished/unlawful policy
- Differed on damages - no damages incurred (result was nominal damages of £1) vs. unlawful use of government power (dissent)

❖ **Minority:**

- Conceded that they could have been lawfully detained under the current policy

## ASSAULT, BATTERY AND NEGLIGENCE

*Assault and battery are from the family of writs called trespass. The other torts from this family are trespass to land and taking of goods. Battery is also covered under medical consent and fiduciary duty.*

- ❖ Assault and battery are trespass torts protecting physical security and integrity.
- ❖ Elements: (*Kodar class notes*)
  - **Direct**
  - Actionable without damages
  - “Intentional” or negligent
  - Onus of proof:
    - Plaintiff must prove defendant directly interfered with plaintiff
    - Once they have proved this, the court assumes defendant liable
    - Then defendant must raise a defence (necessity maybe) or they can show they didn’t intentionally interfere **and** didn’t negligently interfere

### ASSAULT

(*Kodar class notes, Osborne pp. 256-9*)

- ❖ Reasonable apprehension of immediate or imminent battery (offensive *direct* physical contact)
- ❖ Legal wrong = disturbing sense of security
- ❖ Defendant must have, or appear to have, ability to follow through with threat
- ❖ Plaintiff must be aware of threat.
  - Fear is not necessary, nor any physical damage (**Osborne pp. 257**)
  - Threat of future violence doesn’t count (**Osborne pp. 257**)
  - Rare to see assault action on its own

### BATTERY

(*Kodar class notes, Osborne pp. 253-6*)

- ❖ *Direct*, offensive physical contact
- ❖ Legal wrong = violating bodily security
- ❖ Contact does not have to be person-to-person, e.g. shooting, throwing, knocking object out of hand (“interference”)
- ❖ Must be non-trivial, things in everyday life – (**Scalera**)
- ❖ “Offensive” contact does **not** have to be harmful
- ❖ Plaintiff does **not** have to be aware of battery

### DIRECTNESS

- ❖ “**But for**” test. Ask yourself “would the result have occurred *but for* the intervention of another person? Defendant’s action = result – an injury is directly produced by the defendant’s conduct if it flows naturally from it, without the necessity of intervention by an independent actor
- ❖ Directness requirement consistent with idea that trespass torts protect security of the person and inviolateness of the body – rights-based tort. That is why there is liability without damages.

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## ONUS OF PROOF FOR TRESPASS

Outlined in *Cook v. Lewis* – adopted 1951

- ❖ **Trespass**
  - Plaintiff must prove *interference*
  - Defendant must have legally-recognised defence, or that acted without intention *and* without negligence (partial reverse onus)
- ❖ **Negligence**
  - Plaintiff must prove *all* elements

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## NON-MARINE UNDERWRITERS, LLOYD'S OF LONDON V. SCALERA

- ❖ **Significance:**
  - Onus of proof remains on the defendant for trespass torts
- ❖ **Facts:**
  - Plaintiff in another case is suing five defendants for sexual battery; one is Scalera, who has home insurance policy – not insured for claims of bodily injury caused by intentional act
- ❖ **Issue:**
  - Should traditional onus change for sexual batteries?
- ❖ **Held:**
  - No. Should remain the same for ALL trespass torts (i.e., burden of proof should remain on the defendant). McLachlin has 3 reasons:
    - Affirms *directness* requirement: in trespass actions resulting in injury, there is a direct flow from defendant's actions to plaintiff's injury that doesn't necessarily exist in negligent acts (para 11)
    - Practical: Since injuries direct, *defendant may have evidence that is unavailable to plaintiff* that will be uncovered in the case (para 12)
    - Effect of shifting onus – Plaintiff would have to prove interference **and** that plaintiff didn't consent – "*high demoralization costs*" (para 14 quoting Sullivan)
  - These three factors support making the defendant explain his behaviour. Tort of battery's goal is to guard "personal autonomy," not fault. Compensation stems from its violation. (para 15)
  - Because of partial onus, more plaintiffs will sue – because you can choose trespass or negligence in cases of direct interference, and trespass is easier for the plaintiff to prove.
  - Another advantage of trespass: if defendant is liable, defendant is liable for **all** the damages resulting from action. In negligence, court could say damages too remote.

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## NEGLIGENT TRESPASS

- ❖ In Canada you can sue for negligent trespass.
  - Negligent battery will generally involve disregarding a risk (this often comes up in shooting or sporting accidents, *Osborne pp. 254*).
  - Negligent assault might be, e.g., if defendant rushed into what defendant thinks is an empty room with a gun.

- ❖ You don't need damages or onus of proof, but you must show necessary components of negligence action (*CPI pp. 65*):
  - *Assumed preliminary component of all negligence actions: Plaintiff has suffered damages*
  - 1. Duty of care.
  - 2. Breach of the standard of care required by duty.
  - 3. Breach of duty cause the harm plaintiff suffered.
  - 4. Harm can't be too remote from the breach of duty.
  - *Sometimes law may consider defences of illegality/voluntarily assumption of risk.*
- ❖ Canadian position towards torts of trespass [Kodar class notes]
  - Maintains direct/indirect distinction.
  - Intent is not intent to harm, it's just to commit the interference.
  - Trespass can be negligent or intentional.
  - Defendant must prove absence of intent and negligence .
  - So can try to say it was necessary or that there was consent.
- ❖ **Negligent battery**, throw a bowling ball down the street and it hurts someone.



F.A. TRINDADE, “INTENTIONAL TORTS: SOME THOUGHTS ON ASSAULT AND BATTERY”

- ❖ Assault and battery, and imprisonment constitute trespass; not commonly used torts – why?
  - Wrongs are also crimes and tried as such
  - Confusion about essentials of assault and battery
- ❖ Sometimes the tort of trespass is the only possible action
- ❖ Criminal injury compensation schemes don’t always measure up.

Battery	Assault
<i>Direct <b>act</b> by defendant – contact with body of plaintiff without plaintiff’s consent</i>	<i>Direct <b>threat</b> by defendant that makes plaintiff apprehensive of contact by defendant or person/thing in defendant’s control</i>
<p><b>Direct Act</b></p> <ul style="list-style-type: none"> <li>• Essential element</li> <li>• Can be one event that causes the contact, or a series of events, eg, you strike a horse that the plaintiff is sitting on, horse kicks plaintiff off, may have committed battery</li> <li>• Directness requirement sometimes removes need for doctrine of transferred intent</li> </ul>	<p><b>The Meaning of Direct Threats</b></p> <ul style="list-style-type: none"> <li>• Act or words and act that leads to reasonable apprehension of contact</li> <li>• Words alone that lead to reasonable apprehension of contact</li> <li>• It can’t be a threat of <i>indirect</i> bodily contact</li> <li>• Threatening to shoot burglar is not assault, but probably “lawful threats of force”</li> </ul>
<p><b>Intentional Act</b></p> <ul style="list-style-type: none"> <li>• Must first be a voluntary act (sleepwalker steps on your face-not voluntary)</li> <li>• If contact is certain to occur even though person who initiates it isn’t directing it at anyone, the defendant can still have intentionally done it, legally speaking</li> <li>• Reckless acts being treated as intentional acts – best in cases of transferred intent (eg, you hit an innocent bystander in the course of a fight and injure them sufficiently)</li> </ul>	
<p><b>Contact with the Body of the Plaintiff</b></p> <ul style="list-style-type: none"> <li>• This can be “hand to hand” or something less direct, such as a forcible x-ray or grabbing something out of someone’s hands</li> <li>• Reasonably necessary contact will not constitute battery, eg: holding someone back who is about to go back inside a burning house</li> </ul>	<p><b>Reasonable Apprehension</b></p> <ul style="list-style-type: none"> <li>• Fear is not necessary (this would hinge too much on the type of person the plaintiff is)</li> <li>• Reasonable: “If it is quite clear that the person making the threat has the present actual ability to carry out that threat then the apprehension is reasonable” -&gt; many cases</li> </ul>
<p><b>Knowledge of the Contact:</b></p> <ul style="list-style-type: none"> <li>• <i>Not necessary</i>, though it is usually the case</li> <li>• Sometimes plaintiff won’t know (eg: wrong surgery performed on you when under anaesthetic); sometimes defendant won’t know (eg: defendant throws TV from rooftop and hits plaintiff below on street)</li> </ul>	<p><b>Knowledge of the Threat</b></p> <ul style="list-style-type: none"> <li>• Unlike battery, <i>plaintiff needs to have knowledge of the threat.</i></li> </ul>
<p><b>Consent</b></p> <ul style="list-style-type: none"> <li>• Arguments both ways for who (plaintiff or defendant) needs to prove or disprove consent.</li> </ul>	

## INTENTIONAL INFLICTION OF MENTAL SUFFERING

- ❖ *A hybrid tort that allows a plaintiff to recover damages in situations where a tort-feasor has intentionally caused mental distress.*
- ❖ “Case” – early form of writ that was called “trespass on the case”.
  - This early form of action was what grew into negligence.
  - Developed in response to the rigidity of the trespass system.
  - Before **Wilkinson**, someone could frighten another person and cause mental harm without incurring liability, *as long as* they didn’t first cause apprehension of imminent harm.
- ❖ **Three elements to the tort:**
  - *Needs to be an act or statement.*
    - Outrageous or extreme, bullying, harassment, etc.
  - *Has to be intended or calculated to produce harm.*
    - Therefore infringe on person’s right to safety.
    - Court can construct intent - *constructive intent*.
    - Do so by using the reasonable person:
      - If they behave in such a fashion, a reasonable person would have been harmed.
  - *Needs to be harm.*
    - Has to be substantial.
    - Until recently, courts seem to require expert evidence, or some sort of diagnosis.
      - i.e. – something that had a name.
- ❖ **Court combines elements of trespass and case.**
  - Trespass tort elements that are evident.
  - From negligence:
    - Proof of harm.
    - Plaintiff has to prove everything.
    - Causation can be indirect.
  - Before this tort, and subsequently, courts were quite reluctant to recognise tort related to emotional distress. Worried about floodgate opening.
    - **Concerns:**
    - False, trivial and numerous actions.
    - Unusually sensitive persons.
    - Conduct that would be socially acceptable, generally speaking, that causes harm to people with particular sensitivities would be generally actionable.
- ❖ **Control mechanisms**, control recovery, ensure it’s not open to every claim involving statements.
  - *Reasonableness*
    - Determined on an objective standard.
    - Unusually sensitive persons won’t have a claim, if their reaction is unreasonable by this standard.
      - *Unless* the defendant knew about their sensitivity. (same as thin skull argument)
  - *Proof of Harm Requirement*
    - More recently courts have been relaxing the requirement that there be corroborating evidence for the plaintiff’s claims.
    - More willing to accept plaintiff’s evidence of the claims without extra evidence – when the conduct is sufficiently outrageous.
- ❖ **Elements of an infliction of mental suffering:**
  1. An act or statement.
  2. Intended/calculated to produce harm.
  3. Actual harm.
- ❖ **Three ways to recover psychiatric harm.**
  1. D acts negligently and P suffers physical harm and psychological harm.
  2. D acts negligently and P suffers only psychological harm.
  3. D causes physical injury to someone related to A.

## WILKINSON V. DOWNTON

- ❖ **Summary:**
  - Plaintiff suffers severe mental distress because of a prank the defendant had committed against her.
- ❖ **Facts:**
  - Wilkinson, husband of plaintiff, went to a race-meeting.
  - Same day the defendant came to the plaintiff's house and represented to her that her husband had both legs broken.
  - Plaintiff became seriously ill from a shock to her nervous system.
    - Also incurred a small expense in that she sent persons on the train to Leytonstone to see her husband.
- ❖ **Arguments:**
  - There was no apprehension of an imminent battery, therefore no avenue at that time for plaintiff to go after defendant.
  - This was a case of intentional conduct causing harm that was not assault.
    - As there was no current tort, defendant thought case should just be thrown out.
  - Plaintiff thought they could extend it to a case on fraud.
    - When damages are paid, they're dependent on the plaintiff acting upon the fraudulent information.
    - Plaintiff's damages are not based upon acting upon the fraudulent information.
    - Injury occurred when the statements themselves were made her ill.
- ❖ **Court Ruling:**
  - Another ground for recovery is proposed:
    - Defendant wilfully did an act to cause harm to the plaintiff, and has caused harm.
    - Court says that proposition, without more, is a good cause of action (*creates new tort*).
  - Element of intention is made out in case, because defendant wanted some sort of shocking result.
- ❖ Awarded compensation for both the railway expense and for the injury from the shock.
- ❖ Injury compensation was paid because *reasonable person would suffer grave effects* from hearing the news.

## NEGLIGENCE AND PSYCHIATRIC INJURY

- ❖ In *Wilkinson* the Court held that the defendant was liable for causing harm to the plaintiff by means of an act that was plainly calculated to bring about such harm.
- ❖ Liability was recognised even though it was not a physical harm – psychiatric or mental in nature.
- ❖ Later cases have distinguished between psychological harm or illness and mere emotional distress.
- ❖ Individuals who have suffered psychiatric harm have tried to bring an action in negligence with mixed results.
- ❖ **Must show that:**
  - Suffered harm
  - That the defendant owed to the plaintiff a duty to take a measure of care to prevent such harm from occurring
  - That the defendant failed to take the required care
  - That the harm suffered by the plaintiff can be causally traced to the defendant's failure.
  - That the linkage between the failure and the harm is not too remote
- ❖ **Examples:**
  - *Hussack* - Exposed to unjustifiable risk of physical harm and harm has occurred *along with consequential psychiatric harm*, courts have no hesitation in holding the defendant liable.

- **Mustapha** – Exposed to unjustifiable risk of physical harm but the plaintiff *only suffered psychiatric harm*, liability is only found if a person of ordinary fortitude would have suffered harm.
- **Devji v. Burnaby (District)** - If a defendant has negligently caused physical harm to one person, he or she may also be held liable for psychiatric illness suffered by individuals who are closely connected to the victim and who witnessed the events or their immediate aftermath but only if a person of ordinary fortitude would.

## CONSENT TO MEDICAL PROCEDURES

### MALETTE V. SHULMAN

- ❖ Plaintiff brought to hospital unconscious with severe injuries after car accident;
- ❖ Necessary medical intervention is blood transfusion
  - Prior to this being done, nurse searching plaintiff's purpose found a card indicating that the plaintiff does not want blood transfusions for religious reasons;
- ❖ Defendant doctor ignores and performs blood transfusions anyway, even after plaintiff's daughters arrive and confirm patient's refusal to blood transfusions;
- ❖ Doctor argues that plaintiff is not conscious to hear the actual benefits/risks of blood transfusions first hand -> this is something that relying off the card alone would neglect to consider
- ❖ Plaintiff recovers: sues doctor for **battery**; court finds in favour of plaintiff, awards damages

### MULLOY V. HOP SANG

- ❖ Plaintiff asked defendant surgeon *not* to amputate his hand while under anaesthesia
- ❖ Surgeon had no chance to examine hand until patient was under anaesthesia
- ❖ Upon examination while patient was under anaesthetic, surgeon discovered risk of blood poisoning and deemed it necessary to amputate hand
- ❖ Plaintiff patient sued defendant doctor when he had found out what happened
- ❖ **Held:** Judgment awarded for plaintiff and damages charged against defendant

### EXPLANATION

- ❖ Ruling upholds most important precept as being **the autonomy of each person regarding their own body**:
  - "The doctrine of informed consent has developed in the law as the primary means of protecting a patient's right to control his or her medical treatment. **Under the doctrine, no medical procedure may be undertaken without the patient's consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options.**" (*Malette v. Shulman*, 1990 OCA, at para 69);
- ❖ In this case, evidence of the card in the patient's bag is sufficient evidence to suggest she had not given consent (and in fact, refused) the application of blood products.
  - "The doctrine presupposes the patient's capacity to make a subjective treatment decision based on her understanding of the necessary medical facts provided by the doctor and on her assessment of her own personal circumstances." (*Malette v. Shulman*, 1990 OCA, at para 70)
- ❖ Presupposition applied to the clear directive stated on the card that was found in patient's bag prior to being given the transfusion
  - "For this freedom to be meaningful, people must have the right to make choices that accord with their own values, regardless of how unwise or foolish those choices may appear to others...." (*Malette v. Shulman*, 1990 OCA, at para 70)

- ❖ Right to autonomy over body trumps the apparent absurdity present in refusing a medical treatment that may result in patient's death.
- ❖ **Rule:**
  - **No consent, or a refusal of procedure, combined with performance of that procedure = claim for battery.**
- ❖ **Exception:**
  - Exception to this rule is the **emergency doctrine**: if medical intervention is
- ❖ *urgently necessary* and the plaintiff is
- ❖ *unconscious/unable to give consent* and
- ❖ *there are no advanced directives*, the doctor will be shielded from liability based upon their actions (*Kodar*, Nov. 8)
- ❖ Doctors use consent forms in order to shield themselves from liability regarding treatment options; *consent forms must be clear, specific and the patient signing it must be clear-minded and able to give informed consent.* (*Kodar*, Nov. 8)
- ❖ Some provinces, like BC, have moved to codify their medical consent laws.
  - Including requirements like being informed and who can be informed, (substitute) decision maker; see the ***Health Care (Consent) and Care Facility (Admission) Act***.

#### WHEN YOU CAN SUE:

- ❖ If you have consented to the treatment but haven't been informed of all the risks and one of the risks materialises (even if the procedure/treatment is done perfectly), you can bring a *negligence* action (not battery).
- ❖ If patient gives consent but is not told of all risks and one of those risks materialises, must bring an action in negligence; to allow a battery claim in cases like these is incompatible with the elements of battery
  - "... where the allegation is that attendant risks which should have been disclosed were not communicated to the patient and yet the surgery or other medical treatment carried out was that to which the plaintiff consented ..., *I do not understand how it can be said that the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity.* (**Reibl v. Hughes** SCC 1980, CB at 58)

#### DOCTRINE OF INFORMED CONSENT TO MEDICAL CARE

- ❖ Old authoritarian model: physician dictates, newer model: participatory (lots of info for patient!)
- ❖ **Duty of Care**
  - Doc has to answer questions and give info about how bad the illness is, pros and cons of proposed treatment as well as alternative treatments, what'll happen if you do nothing, anything that goes wrong during treatment, and treatment results
- ❖ **Standard of Care**
  - **Reibl v. Hughes** adopted "full disclosure" standard – this doesn't mean exhaustive list
  - Doc has to make sure the patient understands (offering explanatory materials is prob not enough)
  - Have to tell patients about alternatives

- Doc may have “therapeutic privilege” – avoiding bad psych consequences by glazing over some things – courts generally don’t want to favour this privilege bc it takes away from patient “self determination”
- Doc doesn’t have to give advice, just info (modern model – patient decides)
- Duty to inform goes for semi-medical types as well (e.g., chiropractors) and a bit to nurses
- Sometimes docs will need to warn about inadequate health care resources or detail one’s own medical record, successes, failures, etc.
- ❖ **Causation** (Would the patient have chosen the procedure if the doc had properly informed them?)
  - Subjective test: what would this patient have done?
  - Objective test: what would a reasonable person have done?
  - Reibl v. Hughes uses “modified objective test” (reasonable person in plaintiff’s particular circumstances)
  - Problems with this test as well: How do you properly take into account this patient’s circumstances?

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FOR MEDICAL NEGLIGENCE, PATIENT MUST PROVE:

- ❖ Medical practitioner did not sufficiently inform of the material risks inherent in the medical procedure AND
- ❖ One of these risks materialised (even if the procedure/treatment was performed perfectly) AND
- ❖ That a reasonable person in the plaintiff’s particular circumstances would not have consented if they had been properly informed of the risks (often difficult to prove)

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REIBL V. HUGHES

- ❖ **Significance:** Failure to disclose risks goes to negligence, not battery. Modified objective test for causation. Case determines heavy onus of proof for patients in such cases.
- ❖ **Facts:** Plaintiff had elective surgery to reduce risk of future stroke. Plaintiff had massive stroke during surgery – permanent and serious disability. Plaintiff not told by dft of risk from surgery. Plaintiff either wouldn’t have consented in the first place, or wouldn’t have consented at that time; Plaintiff wanted entitlement to full pension, so he would have waited to have procedure until after his pension “bested” had he been informed of risk. Failure to disclose risks goes to doctor’s standard of care.
- ❖ **Issue:** How specific must be the information about the risks of a medical procedure to enable a person to make an informed choice between surgery and no surgery?
- ❖ **Held:** Full disclosure required. Surgeon liable in negligence for not getting proper informed consent.
- ❖ **Reasoning:**
  - Battery should only be assigned where: a) no consent whatsoever or b) treatment beyond that covered by consent [barring emergency situations] (CPI 78-9)
  - “unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than to battery” (79)
  - Consent is not vitiated by incomplete disclosure of risks
- ❖ **Outcome:** Plaintiff must prove [Kodar class notes Nov. 13]:

- Doctor or other practitioner gave insufficient information of substantial risks inherent in procedure.
- ❖ AND
- Must apply the modified objective test and prove that the answer would be “no”.

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### SEXUAL BATTERY

- ❖ There is no limitation period. If there’s a power dependency relationship (fiduciary relationship), there is a reverse onus. – *Norberg v. Wynrib* (McLachlin in dissent).
- ❖ **Consent and Sexual Assault**
  - Charter has limitations; Growing interest in using trespass torts to address historical disadvantages
  - Offensive sexual conduct can cover range of things: isolated incident, series of incidents, etc., can be accompanied by other abuses (emotional, cultural)
  - Generally abuses indicative of systemic problem against vulnerable people
  - Often involved breach of trust, involving professionals or family members
  - Sexual abuse in any context constitutes the elements of tort of battery
  - Limitation period: time after which you’re no longer allowed to bring a tort action (BC generally 2 yrs)

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### CIVIL ACTIONS TO REDRESS SEXUAL WRONGDOING – *KODAR NOV. 13*

- ❖ **Advantages for Plaintiff**
  - Greater involvement in process
  - Less demanding burden of proof
  - Possible therapeutic effect (think back to instrumentalist view of tort law)
  - Access to compensation for harm suffered
- ❖ **Disadvantages for Plaintiff**
  - Cost
  - Adversarial process
  - Possible counter-therapeutic effects
  - Compensation may be illusory unless other parties can be brought in (Vicarious Liability?)

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### FIDUCIARY RELATIONSHIP

- ❖ Someone puts trust in another; the one owing the fiduciary duty that arises is expected to act in interests of beneficiary without self-interest
- ❖ This can be contractual relationship, setting up a duty of care; when this is the case, suing for breach of fiduciary duty is preferred course of action – why?
  - Strict obligations for fiduciary’s behaviour
  - If defendant is deemed fiduciary, there may be longer limitation period
  - Might get more in remedies for breach of fiduciary duty (equity) than for breach of contract or for tort (*Norberg*)



## NORBERG V. WYNRIB

- ❖ **Significance:** Landmark case in law's recognition of power and abuse, in professional context and particularly in doctor/patient relationships. Minority judgment has had a lasting effect on jurisprudence that followed – evolution of sexual wrongdoing tort actions.
- ❖ **Facts:** Plaintiff prescription drug addict who sought out doctor to get drugs. Doctor provided in exchange for sex. Did not help treat her addiction. Actions for battery, negligence, breach of fiduciary duty and contract.
  - Trial: she consented; dismissed negligence because no damages; fiduciary duty breached but no damages because *ex turpi causa*.
  - Appeal: upheld decision; not a breach of fiduciary duty - "participants in a joint criminal activity do not owe a duty to each other"
- ❖ **Issue:** "The central issue is whether the defence of consent can be raised against the intentional tort of battery in such circumstances" (para 1); Battery – sexual assault
- ❖ **Held:** Reversed in split decision – doctor liable, but for 3 different reasons (2 discussed in class):
- ❖ **Reasoning:**
  - *La Forest (majority):*
  - Battery. Develops 2-part test for genuine consent based on K law's idea of unconscionable transactions (para 40):
  - Special power/dependency relationship (Plaintiff: young woman, limited education, addiction limits capacity to make a real choice; Dft: doctor, professional, inherently powerful position)
  - Proof of exploitation - Doc used knowledge about her addiction and drug to exploit plaintiff for own purposes – test – is sexual relationship one that is sufficiently divergent from community standards of conduct? (community would not consider sex-for-drugs relationship initiated by a doctor acceptable)
  - No genuine consent because:
    - unequal power relationship, exploitative: removed possibility of providing meaningful consent
  - Π particularly vulnerable – addiction affected her ability to choose
  - Δ powerful position – inequality arose from Π's addiction to painkillers
  - Δ had knowledge of Π's medical problem (and skills to help) but instead acted to satisfy his personal sexual interest – person with this addiction cannot withdraw without professional assistance (exploitation)
  - No *ex turpi causa* – no connection between double doctoring and harm suffered
  - ANY sexual activity between doctor and patient is exploitative
  - \$20,000 damages; \$10,000 punitive damages
  - **Sopinka** also judged and found in favour of plaintiff, but took issue with majority's use of K law; focused on failure of doc to treat plaintiff properly
  - *McLachlin (minority):*
- ❖ Liability based on breach of *fiduciary duty* [civil claim independent of tort and K] – doctor/patient inherently fiduciary
- ❖ Fiduciary relationships: where one party exercises power over another and pledges to act in latter's best interests. 3 characteristics (Frame v. Smith quoted at para 69):
- ❖ fiduciary has scope for the exercise of power
- ❖ fiduciary can unilaterally exercise that power to affect beneficiary's interests
- ❖ beneficiary is particularly vulnerable to/at mercy of fiduciary holding power

- ❖ adopts broader notion of fiduciary duty – says it is best way to address harm of Π (tort and K ill-fitting moulds to fit facts into); only ground for action
- ❖ says that Π consented BUT irrelevant: focus on fiduciary's conduct, not beneficiary's
- ❖ Fid duty analysis puts problems in structure of relationship rather than in the relationship btwn particular parties – Δ owed Π all duties associated with fid relationship, including:
- ❖ Para 70 ... “the duties of “loyalty, good faith and avoidance of a conflict of duty and self-interest” (quoting Wilson J. in Frame v. Smith)
- ❖ Damages \$20,000 for prolonged addiction; \$25,000 for sex. exp. and \$25,000 punitive --> Damages in equity, bc K and tort damages don't include “wrongful sexual exploitation”

## NEGLIGENCE

- ❖ Tort of **negligence** is composed of a number of elements, most of which must be proved by the plaintiff.
  - **Three core elements:**
    - *Negligent Act*
    - *Causation*
    - *Damage*
  - **Two control boundaries have been developed to keep negligence liability within appropriate boundaries.**
    - *Duty of Care*
    - *Remoteness of Damage*
- ❖ **Once the plaintiff has established the elements of negligence, the defendant has four defences:**
  - *Contributory Negligence* by the plaintiff
    - A partial defence leading to a proportionate reduction in the quantum of damages.
  - *Voluntary Assumption of Risk*
    - Complete defence that arises where the plaintiff consents to the defendant's negligence and its consequences.
  - *Illegality*
    - Seeks to deny a claim that would subvert the integrity of the legal system.
  - *Inevitable Accident*
    - Complete defence that says, in spite of evidence to the contrary, the loss was not caused by defendant's negligence - but was, instead, an inevitable accident.
- ❖ **Policy Framework**
  - *Underlying theory:* "Loss-shifting system based upon the moral imperative that wrongdoers should be individually liable for the damage they cause".
  - *Reality:* "Negligence/insurance system that spreads or distributes losses caused by negligent conduct to a broad segment of the community".
  - *Inherent Tension* between "loss-shifting rules and loss-spreading realities"
    - Competing perceptions of the purpose of negligence law.
- ❖ **Once liability is established, damages are assessed.**
  - Damages are tailored to the plaintiff's individual losses, paid as a lump sum.
  - Assessment of pecuniary and non-pecuniary losses arising from personal injuries is difficult.
- ❖ **To Bring an Action of Negligence:**
  - **Duty of Care:**
    - Defendant must owe a duty of care to plaintiff.
    - Duty of care must be sufficient to merit the protection.
    - Courts decide where duty of care exists (policy decision).
  - **Breach of a Standard of Care:**
    - Defendant must have breached the duty by not adhering to the proper standard of care.
  - **Causation:**
    - The breach must be the cause of the injury.
  - **Remoteness**
    - The injury cannot be too remote.

## DUTY OF CARE

### ❖ Development of the Duty of Care

- ***Mitchell v. Allestry*** – First example of a modern “duty of care”.
- ***Palsgraf v. The Long Island Railroad Co.*** – Remoteness, harm must be foreseeable to establish negligence.
- ***Donoghue v. Stevenson*** – Neighbour Principle, you must take reasonable care to avoid acts which you can reasonably foresee would be likely to injure your neighbour. (See case brief).
- ***Home Office v. Dorset Yacht Ltd.*** – Opening of government liability in negligence.
  - Adopts Neighbour Principle as general principle of law.
- ***Anns*** – Prima Facie Duty Test, follows formal establishment of neighbour principle as basic legal principle in ***Home Office v. Dorset Yacht Ltd.***
  - Is there a sufficient relationship between the parties that the harm was reasonably foreseeable to the defendant?
  - Are there any considerations that ought to negate or limit the scope of the duty?
- ***Kamloops v. Nielson*** – Anns test adopted into Canadian law.
- ***Cooper v. Hobart*** – Leading case established the duty test in Canada.
  - *Example: Odhavji Estate v. Woodhouse*
    - O fatally shot by police; police didn’t comply with subsequent investigation regulations; O’s estate claimed lack of thorough investigation into shooting caused mental distress.
    - Foreseeable – reasonably foreseeable that negligent investigation would harm.
    - Proximity – close causal connection between misconduct and harm.

## ESTABLISHING A DUTY OF CARE

### ❖ (1) Determine whether the case falls into an existing duty of care, or is analogous to an existing duty of care.

- *Recognised Duties/Examples*
  - Manufacturers owe duty not to allow their products to become harmful through use, if there is no opportunity for inspection before use (***Donoghue v. Stevenson***)
  - Manufacturers’ duty to warn of inherent dangers in products, including medical products (***Hollis v. Dow Corning***)
  - Physicians have duty to disclose material risk of procedure, its gravity, and any special or unusual risks (***Reibl v. Hughes***)
  - Duty owed to relational claimants that the defendant could have foreseen might suffer psychiatric harm as result of defendant’s actions (***Hambrook***)
  - Police chief owes duty to those harmed by police misconduct to ensure inquiry is conducted properly (***Odhavji***)
  - Resort putting on dangerous competition owes duty to participants not to allow them to compete drunk (***Crocker v. Sundance Northwest Resorts***)
  - A bar owes a duty of protective care to those it allows to become intoxicated (***Jordan House Ltd. v. Menow***)
  - Duty also owed to those who could be injured by those a bar allows to become intoxicated (***Stewart v. Pettie***)
  - Boat operator/owner owes duty to those they take out not to allow them to come to harm (***Horsely (next friend of) v. MacLaren***)

- A first rescuer owes a duty of care to a second rescuer who joins after the first's unsuccessful attempts (*Horsely (next friend of) v. MacLaren*)
- Doctor owes duty to take caution when operating on patient (*Snell v. Farrell*)
- Road users owe duty to harm each other (*Athey v. Leonati*)
- Duty of care not to start a snowmobile in a way that can cause it to go flying off endangering buildings, duty of care not to put gas mains in a place where a snowmobile could fly into. (*Assiniboine School District*)
- Duty not to leave a house unlocked and unattended if you're given a key to lock up (*Stansbie v. Troman*)
- Vendors owe a duty to those who may be injured by misuse of their products not to knowingly sell to those who will misuse them (*Good-Wear Treaders Ltd. v. D & B Holdings Ltd et al*)
- ❖ **(2) If not, begin duty analysis – determine whether it is misfeasance or nonfeasance.**
  - Misfeasance – to take inappropriate action or give intentionally incorrect advice.
    - Proximity and foreseeability are assumed, move to policy concerns.
  - Nonfeasance – to ignore and take no indicated action.
    - Begin duty analysis with the:
- ❖ **Anns/Cooper Test – (*Cooper v. Hobart*)**
  - **Step 1**
  - A) *Reasonably Foreseeable*:
    - In cases of misfeasance where plaintiff was injured, reasonable foreseeability is generally enough to establish prima facie duty of care.
    - In cases of nonfeasance, court will look more closely to proximity.
  - B) *Proximity*:
    - Is there a sufficiently proximate relationship where the defendant is obliged to be mindful of the plaintiff's interests when acting?
    - Proximity determined by expectation, representation, reliance, property interests involved, etc.
    - Preliminary look at policy concerns: are there reasons, notwithstanding proximity, that tort liability should not be recognised here?
      - Policy concerns: fairness, deterrence, restitution.
  - **Step 2**
  - Are there residual policy reasons for not imposing a duty?
    - Does the law already offer a remedy?
    - Does it create a risk of unlimited liability to an unlimited class (indeterminate liability)?
    - Governmental policy concerns.
  - Can only move to second step if the first is successful, and in rare cases where entirely new duty of care is being considered.

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**PALSGRAF V. THE LONG ISLAND RAILWAY CO.**

- ❖ Fireworks package dropped at the train station, woman harmed by falling scales.
- ❖ Remoteness – must be foreseeable harm to establish negligence
- ❖ Guard was not liable because he behaved appropriately toward the situation as he understood it
  - Didn't know the package contained fireworks.
  - No sufficient duty of care link between plaintiff and defendant.

## DONOGHUE V. STEVENSON

- ❖ Woman drank part of a ginger beer from an opaque bottle, realised there was a snail in it, became ill, no claim for breach of contract because she had not purchased it.
- ❖ Issue was whether the manufacturer was liable for the illnesses caused by the faulty product.
  - A manufacturer of products, which are sold in a form that is intended to reach the ultimate consumer in the form in which they left the manufacturer, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products would result in an injury to the consumer's life or property, owes a duty of care to the consumer to take reasonable care.
- ❖ Lord Atkin: "Take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".
- ❖ Neighbours: "Persons who are so *closely* and *directly* affected by my act that I ought reasonably to have them in *contemplation* as being so affected when I am directing my mind to the acts or omissions which are called into question".
- ❖ Neighbour Principle: You must take reasonable care to avoid acts, which you can reasonably foresee would be likely to injure your neighbour.
  - Break from doctrine of privity of contract.

## HOME OFFICE V. DORSET YACHT LTD.

- ❖ Men in juvenile detention escape and yachts are damaged, yacht owners sue government.
- ❖ Guards were in breach of instructions, went to sleep, and left inmates to own devices.
  - Knew, or ought to have known, they could escape and cause damage to property.
- ❖ Opening of government liability in negligence (government had remained exempt from negligence post-Donoghue for policy reasons).
- ❖ Adopts the *Neighbour Principle* for general principle of law. (*Donoghue v. Stevenson*)
- ❖ Neighbour Principle should apply unless there is a specific reason it does not work.

## COOPER V. HOBART

- ❖ Issue is whether the defendant Registrar of Mortgage Brokers in BC was under a *duty of care* to investors who had suffered financial losses caused by the wrongdoing of a mortgage broker.
- ❖ If the defendant had acted more expeditiously, their losses would have been avoided or lessened (according to the plaintiffs).
- ❖ Court articulated a three-stage test for the "novel" case:
  - Foreseeability of damage to the plaintiff remains an essential element but not sufficient in itself to establish a *prima facie* duty of care.
  - There must be a proximate relationship between the parties.
    - Focuses on both the closeness and the directness of the relationship between the parties and on broad policy factors to determine whether it is fair and just to impose a duty of care.
    - *Prima facie* duty of care only established when both of above have been established.
  - Third stage involves a consideration of *residual* policy factors. Not concerned with the impact of the proposed duty of care on other legal obligations, the legal system, and on society generally.

## ODHAVJI ESTATE V. WOODHOUSE

❖ **Facts:**

- Odhavji fatally shot by police, investigation into incident was insufficient.
- Family brings and action for psychiatric harm caused by lack of investigation.

❖ **Held:**

- Liable in negligence.

❖ **Reasoning:**

- While not immediately clear failing to oversee the investigation would create harm, it was reasonably foreseeable.
- Direct causal link between alleged misconduct and alleged harm suggests proximity.
- Reasonable for public to expect police chief to be mindful of injuries that could arise from misconduct – which was the harm alleged.
- This expectation is consistent with statutory obligations for chief to prevent harm arising from misconduct.
- Vitiating policy reasons?
  - Imposing duty does not compromise the effectiveness of the unit (government policy).
  - Existing complaint process is not an alternative. They want compensation, not disciplinary action for officers.
- **Decision comes down to authority and vulnerability, people that are immediately vulnerable and susceptible to a process over which they have no control**

## DUTY &amp; NONFEASANCE

❖ **Nonfeasance is a failure to act upon a duty of affirmative action.**

- ❖ Where a person has done nothing to put himself in a relationship with another party, mere accidental propinquity does not require him to go to that person's assistance (*Dorset Yachts*).
- ❖ Where the alleged negligence is nonfeasance, then the question is whether there is a relationship.
- ❖ **If direct physical harm is reasonably foreseeable and you created the risk, proximity is generally established and you move directly to policy part of the test.** Would then move to duty.
- ❖ **Normally, negligence law says you mustn't expose others to risk, *not that you must help them.***
  - However, a duty of affirmative action can arise if plaintiff/defendant in a special relationship.
  - **Recognised special relationships:**
    - Contractual and quasi-contractual, fiduciary relationships, parent-child, professional relationships like doctor-patient, relationships of authority, control and supervision such as teacher and student, or custodial prisoner relationship of occupier and visitor, emergency personnel and citizens in danger
  - **Factors examined to find new relationships:**
    - Voluntary assumption of responsibility,
    - Control and supervision of defendant over plaintiff,
    - Commercial benefit of defendant from plaintiff,
    - Close familial or personal bonds,
    - Any reasonable or reliance by plaintiff on defendant,
    - Special expertise the defendant may have in rescuing (circumstances),
    - Effect of imposing the burden on the defendant,

- Direct or indirect contribution by defendant to plaintiff's peril,
- Statutory obligations, or
- Comparison of the costs of affirmative action on defendant to benefit to plaintiff.
- **The court will consider if there are enough of these factors to distinguish the defendant from other members of the public in relation to the plaintiff.**
- **There are two further situations likely to generate duties of affirmative action:**
  - **If a defendant is under no initial duty to rescue but who, nevertheless, voluntarily embarks on a course of conduct designed to assist a person in danger.**
    - Note that *BC Good Samaritan Act* limits liability.
  - **Where the defendant, without fault, has created a dangerous situation.**
    - Not unreasonable to expect the creator of the peril to take reasonable steps to abate/warn/alert proper authorities of it.
    - Example: motorist, without negligence, hits/kills a moose on highway. If body is blocking the highway steps must be take to protect other drivers. *Fajardo v. Horianopoulos*.

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### CROCKER V. SUNDANCE NORTHWEST RESORTS

❖ **Facts:**

- Ski resort held a tubing competition (inner tubing down a steep mogul led hill)
- Crocker drank plenty of his own alcohol, then bought drinks from resort restaurants while wearing a bib that stated he was part of the competition – was sold more drinks before the second heat and was visibly drunk.
- Owner of Sundance asked Crocker if he was in any condition to compete and manager suggested it would not be a good idea to compete, but Crocker insisted - Crocker was even supplied with an extra tube when he dropped his before the start of the second heat.
- Crocker hit a mogul, was thrown from the tube and struck his neck – he became a quadriplegic; he sued Sundance.
- Another competitor had been hospitalised for neck injuries earlier that day.

❖ **Issue:** Is Sundance liable for the injuries of a drunken participant they did not prevent from competing? **Held: Yes.**

❖ **Reasoning:**

- You are responsible for misfeasance if you are in a relationship where the other party is not a stranger.
- Factors Wilson highlights:
  - Sundance contributed to his drunken state
  - The competition had an economic motivation
  - They were in charge of how the race would be conducted
  - That they advised him to stop shows they realised the danger
- **Steps reasonable organization would have taken to prevent Crocker from competing:**
  - Disqualify him when seen to be drunk
  - Prevent him from competing altogether
  - Could have not supplied Crocker with a fresh tube when he dropped one before the second heat
  - Could have made clear the risk of serious injury when competing while drunk
- **Sundance did none of these, failed to meet standard of care**



- The fact that Crocker was irresponsible and intoxicated during the competition gives rise to Sundance's legal obligation to take reasonable steps to prevent Crocker from competing
- ❖ **Rule:**
  - In cases where the link between the plaintiff and defendant is sufficiently strong, the defendant has a duty not to put the plaintiff in a position where it is reasonably foreseeable that he could suffer harm. The foreseeability of harm is higher if the person is inebriated.

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JORDAN HOUSE LTD. V. MENOW

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- ❖ **Facts:**
  - Plaintiff was frequent patron of the defendant's beverage room
  - Plaintiff knew his propensity to drink
  - Plaintiff was ejected when visibly intoxicated, though def knew he would have to wander onto busy street
  - Plaintiff struck by car and suing
- ❖ **Held:** Yes, liability due to relationship.
- ❖ **Reasoning:**
  - Factors establishing such a relationship.
  - Invitor/ invitee – bringing someone onto property for commercial reasons.
  - Long lasting relationship that has perhaps given rise to dependence.
  - There is a statute involved – in Jordan house, statute saying not to over serve.

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STEWART V. PETTIE

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- ❖ **Facts:**
  - Two couples out at dinner theatre for office Christmas Party
  - Defendant drinks heavily but was not showing signs of intoxication, and plaintiff got in car
- ❖ **Issue:**
  - Is hotel liable to the plaintiff for injuries caused by actions of a person they sold alcohol to?
- ❖ **Held:** Not Liable, met duty of care.
  - If duty owed to patrons than a duty is owed to those they could foreseeably come in contact with.
    - Including passengers and other road users
  - Liability cannot come from over serving as that is not inherently dangerous to road users
  - Duty to prevent danger caused by drunk driving met by seeing defendant leave accompanied with sober people.
- ❖ **Ratio:**
  - Alcohol-serving establishments have a duty of care to their intoxicated patrons and third parties who may be injured by their intoxicated patrons.
  - Serving people past the point of intoxication does not in and of itself pose a foreseeable risk, there must be an additional factor.
- ❖ **Notes:**
  - **Deals with the *Standard of Care*.**
  - Didn't do anything wrong, just failed to stop them from driving.

## CHILDS V. DESORMEAUX

- ❖ **Facts:**
  - Defendant attends private party where the host did not provide alcohol.
  - Defendant leaves a party drunk, gets in accident and severs someone's spine.
- ❖ **Issue:**
  - Is the social host liable for the injuries to the plaintiff? **Held: No.**
- ❖ **Reasoning:**
  - Generally, social hosts do not owe a duty of care to a guest that has consumed alcohol.
  - Does not fit into the commercial host category as.
    - Social host have less ability to monitor consumption.
    - Actions are not heavily regulated.
    - No profit motivation or contractual relationship.
  - **Does relationship present a situation wherein these results would be reasonably foreseeable? *Cooper* put this first, *Childs* seems to be moving it to the second step.**
  - Not proximate enough for *Anns/Cooper* test.
    - Not foreseeable the guest would drink and drive, even though he had in the past.
    - No one reasonably relied on the host to monitor alcohol consumption.
  - Generally the common law doesn't push duties onto people unless:
    - A party is invited to an inherent or obvious risk that the invitor controls.
    - Or there exists a paternalistic relationship of supervision and control.
    - Or where defendants exercise a public function or engage in commercial enterprise that includes implied responsibility to the public at large.
  - **Galloway suggests this is moving reasonable foreseeability to after proximity?**
- ❖ **Ratio:**
  - A social host at a party where alcohol is served is not under a duty of care to members at the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk.

## THE GOOD SAMARITAN & PRIVATE LAW

- ❖ Where a person has put another wrongfully in peril, he owes a duty to those who attempt to rescue the victim, unless the rescuer acts in a fool hardy way.
  - A has negligently placed B or herself (A) in a position of danger and C, the plaintiff, is injured or killed in the course of a rescue attempt.
  - Legal arguments against are that the rescuer was unforeseeable, that they had wilfully done it (against chain of causation), or that the rescuer had consented to the injury.
- ❖ Modern view in *Videan v. British Transport Commission* (approved by the SCC)
  - ...If a person by his fault, creates a situation or peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages *from the one whose fault has been the cause of it.*
- ❖ *Jordan House Ltd. v. Menow* case from the SCC was an important case in expanding this notion of positive duty: tavern owed duty of care to its intoxicated patron.
- ❖ *Corothers v. Slobodian* rescuer who left the site of an automobile accident when trying to help got hit by a car, and had a good case against the defendant, cause of accident.

- ❖ **Urbanski v. Patel** sued because the doctor removed the only kidney of the plaintiff's daughter, unsuccessful transplant.
- ❖ **Horsley v. McLaren** defendant was the owner-operator of a pleasure craft. Passenger fell overboard, unsuccessful attempt by the defendant to rescue Matthews, another passenger, Horsley, dived to the rescue. Both passengers died.
  - First rescuer sued by the family of the second rescuer.
  - Argued that the defendant had prolonged or exacerbated the danger to Matthews, thereby inducing Horsley to attempt a rescue.
  - Court was of the view that liability could be imposed only if the first rescue was conducted negligently.
- ❖ **Futility of the rescue is not a defence.**
  - It is the reasonable perception of the rescuer that is important, not the certainty of hindsight that the imperilled person was beyond help.
- ❖ **Contributory negligence is difficult to establish:**
  - Rescue usually involves instinctive and spontaneous action where risk to one's own safety is unavoidable.
- ❖ Even if you didn't owe a duty to someone who is being rescued, if you created the situation of peril, you owe a duty to the rescuer. **Osborne**

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#### HORSLEY (NEXT FRIEND OF) V. MACLAREN

- ❖ **Facts:**
  - Guy falls off a boat, and another guy jumps in to save him.
  - The rescuer drowns.
  - While rescue was underway the boat operator did not perform the recommended rescue manoeuvre of going bow-on to the man who fell overboard.
- ❖ **Issue:**
  - Does the first rescuer, owe a duty of care to a second rescuer if a negligent attempt at rescues causes the second rescuer to act and thereby suffer harm.
- ❖ **Held:**
  - Yes a first rescuer owes a duty of care to a second rescuer.
  - **However**, on the facts the first rescuer's conduct was not found negligent.
- ❖ **Ratio:**
  1. Assuming the duty, whether there is a duty or not, the moment you start acting you are subject to a duty that you cannot be negligent in fulfilling.
  2. Negligence has to cause the injury to the plaintiff.
  3. Duty to rescuers: The general rule is that if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger.
    - However, this is subject to whether the person's actions are faulty enough to induce the other party to risk his life.

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#### GOOD SAMARITAN ACT, RSBC 1996, C 172

- ❖ **No liability for emergency aid unless gross negligence**
  - 1 A person who renders emergency medical services or aid to an ill, injured or unconscious person, at the immediate scene of an accident or emergency that has caused the illness, injury or unconsciousness, is not liable for damages for injury to or death of that person

caused by the person's act or omission in rendering the medical services or aid unless that person is grossly negligent.

❖ **Exceptions**

- 2 Section 1 does not apply if the person rendering the medical services or aid
  - is employed expressly for that purpose, or
  - does so with a view to gain.

❖ **Health Care (Consent) and Care Facility (Admission) Act**

- 3 The *Health Care (Consent) and Care Facility (Admission) Act* does not affect anything in this Act.

## STANDARD OF CARE

### THE REASONABLY CAREFUL PERSON

- ❖ Primary element of negligence liability is the negligent act.
  - Failure to take care for the safety of the plaintiff.
- ❖ In order to measure the appropriate level of care, you must have some standard against which to measure the conduct of the defendant.
- ❖ The common law uses the **standard of the reasonably careful person**: - *Vaughan v. Menlove*
  - That of the reasonably careful person in the circumstances of the defendant.
  - Objective standard that focuses on the defendant's conduct and its sufficiency with reference to that of a reasonable person.
  - Not a standard of perfection, takes into account the practical realities of what ordinary people do and what judges believe they ought to do.

### FORESEEABLE RISK:

- ❖ Central element on applying the standard of reasonable care.
- ❖ May not sufficient to support a finding of negligence because other factors must be considered, but is an *essential* element.
- ❖ **Examples:**
  - *Gloster v. Toronto Electric Light Co.* – 8-year-old boy was injured because he touched a live wire that was easily reachable from where he was standing. An obvious danger to a reasonable person.
  - *Amos v. New Brunswick* – Defendant allowed a polar tree to grow through electricity lines, obscuring them from sight. Plaintiff climbed the tree and was shocked when the tree swayed. Clearly foreseeable risk, reasonable person would have trimmed the tree.
  - *Shilson v. Northern Ontario Light & Power Co.* – 12-year-old boy was electrocuted as he walked across a narrow rope stretching 300 ft. across a 20 ft. deep ravine. Touched a live wire 4 ft. above the rope at the middle. Many warning signs. No liability imposed.
  - *Moule v. New Brunswick Electric Power Commission* – 10-year-old plaintiff had climbed a tree and touched defendant's power lines. Defendant had trimmed branches on side of power line, and it wasn't possible to climb the tree from the ground. Plaintiff had to make a makeshift ladder to get up, then a wooden platform. Then fell off a rotten branch before hitting wires. No liability imposed.

## THE LIKELIHOOD OF DAMAGE

- ❖ The reasonable person takes greater care when there is a strong likelihood of damage and vice versa.
- ❖ ***Bolton v. Stone*** – the leading case on the matter. The plaintiff was hit by a cricket ball. In 30 years, only 6 balls had been hit onto the property. Just because it's happened once, doesn't mean it's foreseeable that it will continue to happen. To demand that the conduct of citizens be entirely free of all foreseeable risk would be not only excessively burdensome, but also impractical. While close to the line, not negligent to expose plaintiff to such a small risk of being harmed.

## THE SERIOUSNESS OF THE THREATENED HARM

- ❖ Reasonable person also regulates conduct with reference to the severity of the threatened harm.
- ❖ ***Paris v. Stepney Borough Council***
  - The leading case. Plaintiff was removing bolts from a car with a steel hammer. Plaintiff had already lost sight to one eye, but was not given eye protection for the foreseeable risk of steel splinters flying off of the bolts. Argued that the risk was low, and the same risk to all, *but* there was a greater risk of injury to him. Reasonable employer would have taken greater care for an employee who already lacked sight in one eye.

## THE COST OF PREVENTATIVE MEASURES

- ❖ Consideration of the magnitude of the risk (likelihood of the damage multiplied by the seriousness of the threatened harm) must be balanced by a consideration of the cost of the measures needed to reduce or neutralise the risk.
  - Doesn't make sense to demand hugely expensive measures to remove minimal risk.
  - Where reasonable, affordable, and practical safety measures are available to combat foreseeable risks, they must normally be taken.
- ❖ **Learned Hand Formula:**
  - ***United States v. Carroll Towing*** – court used an economic efficiency model to explain the concept of unreasonable risk in algebraic terms.
  - States that a risk should be considered unreasonable if the seriousness of the risk multiplied by the likelihood of injury is greater than the cost of avoiding the risk from materialising.
  - Large barge unattended in a busy harbour broke away. The owner's duty to provide against resulting injuries is a function of three variables:
    - P - Probability it will break away,
    - L - Gravity of the resulting injury, and
    - B - Burden of adequate precautions.
  - Resulting formula, precautions must be taken if B is less than P x L.
- ❖ ***Ware's Taxi Ltd. v. Gilliam***
  - The taxi company transported young children to and from school in a four-door car. Plaintiff was playing with the lock on the back door, driver admonished her, told her to move away from the door, and checked to see if it was locked. Despite this, door opened and plaintiff fell out. Childproof locks were available for \$10/lock. Other companies positioned older children in the back seat to guard, or used two-door vehicles. Majority found defendant negligent.

- ❖ ***Latimer v. A.E.C. Ltd.***
  - Factory was flooded by a sudden storm. Water mixed with oil and left the floor very slippery. Extensive clean up was done, but factory would have had to be closed to make completely safe. Defendant didn't do so, the plaintiff slipped and injured ankle. Court found no negligence. Small risk to employees didn't justify expense of closing the factory, even temporarily.
- ❖ ***Rentway Canada Ltd. v. Laidlaw Transport Ltd.***
  - Attempts to establish fault following major truck accident that caused property damage. Defendant manufactured the trucks the plaintiff was using. Found for the plaintiff, because large trucks often lose their treads (well known phenomenon, so argued this was known to the plaintiff). They did know, but the accident was caused by the fact that the tread separation took out both headlights – a design fault. Risk is low, but consequences are very high if it materialises with a low cost of prevention. **The cost of avoiding risk will be taken into consideration, and weighed against the probability of harm and severity of injury.**

#### UTILITY OF THE DEFENDANT'S CONDUCT

- ❖ This factor is only *directly* relevant to a few cases.
  - Usually involve governmental services where the inevitable price of direct and necessary benefits to the public is an increased risk of injury to innocent persons.
    - E.g. plaintiff bystanders who are injured as a result of high-speed police chases. Police officers are allowed to expose public to greater degree of risk, but they do not have *carte blanche*. Standard of conduct remains one of reasonable care in light of the circumstances.
    - Must consider: danger created, nature and purpose of the defendant's conduct, urgency of the situation, any alternative means of achieving the laudable purpose, the surrounding circumstances of time and place.
  - Essentially comes down to whether or not the risk was reasonable or unreasonable in light of the service being provided with regard to personal, commercial, or public utility.
- ❖ ***Hammond v. Wabana***
  - Introduced a degree of subjectivity into the standard of care of volunteer firefighters. Court was sensitive to the fact that volunteer fire department may be burdened by a lack of training resources and experience in delivering services.
  - Considered the difficulty of their task, utility of their conduct, and the interest of the community in supporting and maintaining a volunteer firefighting service. *Bona fide* decisions or actions cannot be questioned unless they worsen the situation or amount to a substantial departure from basic principles of firefighting.

#### ...IN EMERGENCY SITUATIONS

- ❖ Sometimes defendant must act in an emergency that is not of his or her making.
  - Emergencies tend to breed excitement, confusion, and anxiety which may rob the defendant of usual power to exercise prudent judgment and due care.
  - Looking back, defendant may have made a poor choice, perform badly, or worsen the situation.
- ❖ Courts will be sympathetic and give some leniency when defendants have done their best in the "agony of the moment". More so when the defendant is acting as a "rescuer".

❖ **Horsley v. McLaren**

- SCC considered the actions of the owner of a pleasure boat when a passenger fell overboard and died in the water. Defendant attempted a rescue by backing the boat towards the passenger (experts said this was a bad idea). Court held that he made a mistake but had acted in good faith and did his best.
  - Laskin would have found liability, said it was a case of not putting into action standard procedures that are required in an emergency that the defendant knew of and had practised.

## UNREASONABLENESS &amp; FAULT

❖ **Vaughan v. Menlove**

- Defendant built a haystack near the boundary of his land, which bordered the plaintiff's land. Haystack had been built with a precautionary "chimney" to prevent the hay from spontaneously igniting, but did so anyway.
- Defendant's disregard for safety created a fire hazard. Fire that broke out caused plaintiff significant damage.
- Defendant was found negligent, as they failed to show the reasonable caution as a prudent man would have exercised under such circumstances.
- Court rejected the appeal that made standard whether the defendant acted honestly and to the best of his own judgment – thus affirming the objective basis or reasonability test.

## CHILDREN

- ❖ Children don't have the same knowledge, experience, or wisdom as adults to foresee danger and act accordingly. Mental capacity and the ability to perceive risk develop gradually at a child's own pace.
- ❖ Canadian courts have adopted a mixed objective/subjective test of liability.
- ❖ If an older child is partaking in an activity normally carried on by adults it is more likely that the adult standard of care will be applied.
  - Reasoning for this is that if adults see children partaking in children's activity, they can account for the inherent immaturity more easily.
- ❖ Harder to collect funds from a child, unless the child has coverage under parents. May also keep the judgment alive by re-registration until the child becomes a wage earner or acquires assets.
  - Parents are not vicariously liable for the torts of their children, however, they are under a personal duty to take reasonable care to supervise and control their minor children and may be liable for losses caused by a failure to discharge that liability.
- ❖ **Three steps to consider:**
  - Is the child capable of being negligent?
    - Is it absurd to apply responsibility?
    - E.g. Kid behind the wheel of a car, releases brake and runs over someone. Yes, adult activity, but incapable of actually doing that.
  - Age?
    - Must consider age, intelligence, and experience.
  - Adult activity? Then standard of a reasonable person.
    - Right back to **Vaughan v. Menlove** then.
    - Baseball – kid's. Golf – adult's.

- ❖ **McEllistrum v. Etches**
  - SCC held that the standard of care applicable to a child was that of a child of similar age, intelligence, and experience as the defendant. The latter two elements are subjective, and the court must also consider the circumstances.
- ❖ **Joyal v. Barsby**
  - Court applied the test to determine if a 6-year-old was guilty of contributory negligence. Girl was seriously injured when she failed to observe the defendant's oncoming vehicle when crossing a busy rural highway.
  - **Court did not find her guilty**, said she was not of above-average intelligence, was not a city child who would have had more knowledge, and was distracted by a loud fog horn that had blasted a moment earlier.
- ❖ **Heisler et al. v. Moke et al.**
  - Standard of care, this test or *Pope*. **Two stage test to determine the standard of care for children.** Objective, is a young child capable of being able to foresee a risk and make a decision based on that? Or are knowledgeable that they are creating a risk? If yes, then should this particular child of this age, experience, etc., have been able to foresee this risk? (subjective)
    - **Facts:** Plaintiff was 9 years old and had injured his leg, warned not to jump on it because there was concern that he may re-injure it. Stepped on a clutch pedal of a tractor and injured his leg. No negligence attributed to plaintiff, had been told not to jump, but in this case he was pressing his leg down onto the clutch while holding the steering wheel to brace himself. Court concluded that the child could not have been expected to realise the dangers given age and experience.
- ❖ **Pope v. RGC Management Inc.**
  - 12-year-old golfing, intelligent and well spoken as a 12-year-old, not quite the same as if it was a motor-powered machine. Children will be held to an adult standard of care when they are engaging in "purely adult activities".
  - **Must compensate for the fact that plaintiff cannot take reasonable precautionary measures if they do not know the action is being taken by a child.**
    - **Facts:** Plaintiff suffered extensive injuries to face when struck by golf ball hit by child who had been assigned to her golf group. In taking part in adult activity should be required to live up to the standard of the reasonable person. Woman was not in child's line of sight when lining up shot, and woman had not remained vigilant nor taken precaution to stay behind line of play.
- ❖ **Nespolon v. Alford et al.**
  - Young people driving each other between parties, leave a 14-year-old on the side of the street who crawls across the street to meet the underage driver.
  - Child gets run over by an oncoming truck, driver sues the kids after he gets PTSD. Can't treat this as an adult activity, the negligent act was not the driving, it was leaving the child on the other side of the road.
  - Nonetheless, **court looked at what a reasonable 16-year-old would have done** which was to not leave the child on the side of the road.



## MENTAL ILLNESS

- ❖ **Considerations of fairness and justice suggest that mentally incapacitated defendants should be free of liability. Doesn't seem right to punish those who are incapable of acting with reasonable care.**
  - Not really fair to those who have suffered loss, though.
  - Canadian law has traditionally resolved this conflict in favour of the mentally impaired defendants.
- ❖ **Mental illness brings two issues:**
  - May render their actions involuntary.
  - May prevent a volitional defendant from complying with the normative standard of care.
- ❖ ***Stokes v. Carlson***
  - Defendant was asleep in the back seat of a car driven by the plaintiff. While asleep, defendant pushed the driver's seat forward causing the plaintiff to lose control of the car. **Not liable because action lacked volition.**
- ❖ ***Slattery v. Haley***
  - Defendant driver of a car was suddenly taken ill and lost consciousness. Car left the road and killed a person on the sidewalk. **Held not responsible for the death due to lack of volition.**
- ❖ ***Buckley v. Smith Transport Ltd.***
  - Employee of defendant crashed his truck into a tram and injured the plaintiff. Established that the employee suffered from advanced syphilis of the brain, and had been operating under the delusion that his truck was remotely controlled by an electrical beam and thought he couldn't stop it. **Court held that because he could not understand the duty of care, nor discharge it, he could not be found negligent.**
    - Some shift away from this, due to third-party liability insurance of motor-vehicle owners and operators, and before the compensation of accident victims was regarded as the primary focus of tort law.
- ❖ ***Fiala v. Cechmanek***
  - Defendant suffered from a severe manic episode, violently attacked the driver of a car stopped at an intersection. During the attack, the driver unintentionally hit the gas pedal, which caused the car to accelerate into the intersection where it hit the plaintiff's vehicle. **Defendant couldn't understand or appreciate his duty of care due to onset of sudden serious mental illness.**
    - *Court characterised tort law as a system of corrective justice that should not be distorted by a robust pursuit of compensatory goals.*

## CUSTOM & PROFESSIONAL STANDARDS

- ❖ **Standard of care is also influenced by proof that the defendant's behaviour was consistent with the established practices and customs of other citizens carrying out similar activities and tasks.**
  - A defendant who is a member of a business, trade, or profession will try to seek to avoid a finding of negligence on the ground that he had acted in accordance with a well-established custom or practice of the group to which he belongs.
  - Reasoning for this is that it establishes a concrete, defined course of conduct that reflects the accumulated wisdom of those involved in the activity.

- ❖ **Current approach is to view proof of compliance with approved practice as providing some evidence of due care.**
  - Depends on the longevity of the practice, its universality, and the status and reputation of the profession or occupation and its members. As well as the degree of technical difficulty of the task at issue, and any evidence of additional precautions that may have been available.
- ❖ ***Waldick v. Malcolm***
  - Waldick was seriously injured when he fell on the icy parking area of defendant's farmhouse (private property). Obvious that it was icy. Defendants stated that there was a local custom not to sand/salt icy parking areas. Question is whether the defendants meet statutory duty of care imposed by occupiers liability act to persons coming onto their premises. Court ruled they did not, held defendants liable. **Customary practices do not oust duty of care owed by statute. Conduct that is not reasonable will not meet the standard requirement.**
- ❖ ***Brown v. Rolls Royce***
  - Plaintiff was employed by the defendants, and his hands were constantly in contact with the oil due to nature of employment. He contracted dermatitis as a result of the contact and brought an action for damages for negligence in failing to supply him with barrier cream as protection (since it was commonly supplied by other employers in the industry).
  - Found defendant not negligent as they provided evidence that cream may not have prevented dermatitis anyway. **If defendant departs from customary practice, it raises a prima facie case against them and negligence may be inferred.**
  - **Defendants hold a burden of giving evidence that they were not negligent** (i.e. medical evidence, etc.). **Note that customary practice must also be reasonable.**
- ❖ ***Warren v. Camrose (City)***
  - Plaintiff suffered injuries when he dove into the municipality's swimming pool into shallow water. Consensus of experts in a field on reasonable conduct is not binding but can be highly persuasive to courts. Customary standards/industry policy can indicate that a defendant was acting reasonably and under normal circumstances.
  - **Found it was reasonable for the defendant to rely on the customary procedures of the industry, an expert's opinion is valid unless it offends logic or common sense, or flows from a gross error in weight.**
- ❖ ***Ter Neuzen v. Korn***
  - Plaintiff patient participated in an artificial insemination program run by the defendant physician. Plaintiff was infected with HIV. Expert evidence showed that the defendant had complied with approved medical practice in screening donors at the time of the procedure.
  - SCC said that "where a procedure involves difficult or uncertain questions of medical treatment or complex, **scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent.**"
    - Conversely, if a standard practice is fraught with obvious risks that any layperson could understand, a finding of negligence could be made.
- ❖ ***Anderson v. Chasney***
  - Child suffocated from a tonsillectomy. A sponge inadvertently left in his throat. Court held that it was appropriate to find that the failure to perform a sponge count and have tapes on the sponges was negligent even though the approved practice at the time was not to do so.
- ❖ ***Girard v. General Hospital of Port Arthur***
  - Adds to *Ter Neuzen*, shows the difficulty in application. During a neurological examination of the plaintiff, the defendant physician performed a gait assessment. Plaintiff who had been

- experiencing dizziness and a loss of balance for some weeks fell before the defendant could catch her.
- Defendant argued the test was conducted with the standard of care. **Court found defendant negligent because there was an obvious risk, apparent to the ordinary person.** Should have had a nurse or something assist.
  - Overturned by higher court, because actions were consistent with customs, and there was no reason to suspect the plaintiff might fall. It was not open to the court to reject the professional opinion even if presence of nurse may have helped.

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## STATUTORY STANDARDS

### ❖ 5 Part Test:

- **Defendant's conduct violates the statute.**
- Defendant's breach causes plaintiff's loss.
- Object of statute standard is related to the harm caused. (*Gorris*)
- **Plaintiff is the party the statute is meant to protect.**
- Statute is usually strict liability, harm is irrelevant.

### ❖ *Canada v. Saskatchewan Wheat Pool*

- SK Wheat Pool breached statute by shipping beetle-infested grain, although they could not have known about the infestation. Canada Grain Commission approved the shipment had to pay associated costs and are now suing Wheat Pool.
  - **Issue: Does a breach of statutory duty give a cause of action?**
  - No, court will not recognise a tort of statutory breach, as doing so would create liability in situations without real moral fault. Breach of Statute can still play into considerations of negligence (may be instructive in determining standard of care), but not negligent in this case.

### ❖ *Gorris v. Scott*

- Plaintiff's sheep were washed overboard because the sheep were overcrowded, which was against a statute.
- **Issue: Because the statute was violated, can the plaintiff sue for the loss of sheep?**
- No, a statute that sets out a duty on a defendant *can only be relied on if the harm the plaintiff suffered was the sort that the statute is designed to protect from.* Here, the overcrowding statute was about disease, not sheep being washed.

### ❖ *Ryan v. Victoria (City)*

- Plaintiff was injured when thrown from motorcycle attempting to cross train tracks that run along a downtown street.
- **Issue: Can plaintiff sue for negligence where a defendant has complied with statutory orders?**
- Yes, defendant owes duty of care to road users who could foreseeably be injured by their railway tracks. **Just because they complied with statute does not mean they have met the standard of care.**
- *Mere compliance with a statute is more likely to discharge a duty when the regulation is specific, the fact situation before the court can be regarded as an ordinary case, and there is less discretion granted in performance – because discretion requires care.*
- Here, they were allowed discretion in where to put the crossing, the situation was an unusual case – tracks running down middle of street rather than perpendicular.

## CAUSATION

- ❖ To succeed, a plaintiff must establish that the defendant's wrongful conduct caused the harm complained of.
- ❖ This is almost always done using the But For Test.

## THE "BUT FOR" TEST

- ❖ After *Clements*, this is the standard test. (Could maybe argue *Athey* still applies).
  - *Clements* changes Material Contribution to just Material Contribution to Risk (has to be a harm).
- ❖ Problems with the But For:
  - Not good for determining causation in nonfeasance cases.
  - Never produces *false positives*, but often produces *false negatives*.
  - Other actions that would have brought about the same result.
    - Car comes along, knocks over lamp, next car could have hit the lamp if it had still been there.
  - Two independent events produce the same result (*Cook v. Lewis*)
- ❖ If you don't think the But For test should not apply, explain why it doesn't work or why it shouldn't be used in this situation. Maybe try to use *Athey*.
- ❖ **Material Contribution Test:** Requires the plaintiff to show that the defendant's conduct materially contributed to the plaintiff's risk of injury. (*Clements*)
- ❖ **If the defendant is part of the cause of injury, he's liable even if the act alone is insufficient to create the injury.** Can use any time when But For Test isn't applicable.
- ❖ Take current situation, compare it to what would have happened if the defendant hadn't have been acting that way.
- ❖ E.g.
  - Big structure, 15 people standing around it and all push on it. One person walks away, probably still going to go over, so it doesn't work.
  - Material contribution test, still would have worked.

## ATHEY V. LEONATI

- ❖ Plaintiff suffered back injuries in two successive car accidents.
- ❖ Then experienced a disc herniation during a mild stretching exercise.
- ❖ **Issue:** Should loss be apportioned between the tortious and non-tortious causes when both were necessary to cause the injury?
- ❖ Yes. **Causation test is not to be applied rigidly**, and need not be determined scientifically.
- ❖ It's a practical question of fact best answered by ordinary common sense.
- ❖ Plaintiff need not establish that defendant's negligence was the sole cause of the injury.
- ❖ **As long as the defendant is part of the cause, the defendant is liable.**

## SNELL V. FARREL

- ❖ 70-year-old respondent, consulted with appellant about her vision.
- ❖ During surgery a small risk of bleeding causing blindness arose, which suggested stopping, but the surgeon felt he could continue if he took additional steps.

- ❖ Subsequently the respondent lost her eyesight, could have been caused by other conditions she had.
- ❖ **If it is not clear that the defendant's action necessarily caused the injury, can they still be found liable?**
  - **Yes, two broad principles of onus:**
    - Onus on party assuring the proposition.
    - Where the subject matter of an allegation lies particularly within the knowledge of one party, that party may be required to prove it.
  - **Proof of medical causation is often difficult for plaintiff, and doctor is in better position to know the cause of the injury.**
  - As long as plaintiff forward likelihood defendant's treatment caused the harm, it is up to the defendant to disprove as they have the expert knowledge.
  - Medical expert testimony is not always helpful as experts treat causation as requiring 100% certainty, rather than "more likely than not".
- ❖ **Expands the But For Test, must be applied in robust common sense fashion.**
  - **Enables you to use the test more widely, don't need to prove *for sure*, you can infer based on the circumstances. Reasonable person would see that bleeding wasn't going to be caused by anything other than the surgery.**

## THE ADEQUACY OF THE “BUT FOR” TEST

### COOK V. LEWIS

- ❖ Two men hunting, both shooting, impossible to tell which one was the negligent shooter.
- ❖ **Issue:** When there are two parties, and it is proven that one of their actions caused harm, but it cannot be proven which one it was, who, if anyone, is liable?
- ❖ **Held:** No, if you can't tell who did the wrong, but they are jointly liable in denying him his rights to recover due to their making it impossible, then you can base claim in that wrong.
- ❖ **When there are two parties, and it is proven that one of them caused harm in their actions but it cannot be proven which party actually did it, then both of them are liable for the resulting damages.**
- ❖ **Material contribution test only to be applied when there are negligent acts by a number of plaintiffs, and one of their actions was a clear But For cause.**
  - Point is to prevent wrongdoers from escaping liability by fingering each other.

### CLEMENTS V. CLEMENTS

- ❖ Husband and wife are riding on an overloaded motorbike.
- ❖ Unbeknownst to them there is a nail puncturing the rear tire.
- ❖ Husband drives too quickly, accelerates to pass a car, nail comes out and tire deflates, loses control, crashes, and wife is thrown off the bike.
- ❖ Wife suffers severe brain injury as a result, claiming injury was as a result of his negligence in operating the bike.
- ❖ **Issue:** Clear that husband was acting negligently, but did his actions cause the injury? (Nail in tire was also necessary).
- ❖ **The test for showing causation is the “but for” test: the plaintiff must show on a balance of probabilities (i.e. more likely than not) that “but for” the negligence, the injury would not have occurred. In other words, it must be shown that the negligence was “necessary to bring about the injury”.**
- ❖ **Held:** No, accident would have happened even without the negligent act. **Need to prove causation. Must show on a balance of probabilities that the injury would not have happened were it not for the negligence.**

### RESURFICE CORP. V. HANKE

- ❖ Hanke was the operator of a Zamboni. Overfilled the gas tank, releasing vapourised gas, which was ignited by an overhead heater.
- ❖ The ensuing explosion and fire caused Hanke to be badly burned.
- ❖ Hanke sued the Zamboni maker for negligence (design defect), arguing that the gas and water tanks were similar in appearance and close together on the machine, making it easy to confuse the two.
- ❖ **Did the manufacturer materially contribute to Hanke's injuries? Appropriate to apply the material contribution test?**
- ❖ **Ratio:** The But For test is the standard test for causation, Material Contribution Test is only used in exceptional cases.
- ❖ Material Contribution test doesn't apply in these circumstances, only in the narrow one.

- ❖ Henke was not confused by the two tanks (own admission), seriousness of Henke's injury and the relative financial positions of the parties were not matters relevant to foreseeability.
- ❖ Causation found to be Henke's own carelessness as responsible for his injuries, not design defects.

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#### LAWSON V. LAFERRIÈRE

- ❖ Doctor forgets to tell patient she has cancer.
- ❖ Had she taken the treatment she probably would have died anyway.
- ❖ **Can the doctor be found liable for loss of a chance of survival?**
- ❖ No liability found, talking about losses *actually* suffered.
- ❖ The fact a defendant increased the risk, or took away a chance of survival is not enough.
- ❖ **Courts don't recognise loss of chance.**

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#### B.M. V. BRITISH COLUMBIA (ATTORNEY GENERAL)

- ❖ Woman reports abusive husband to police who fail to investigate.
- ❖ She is then killed seven weeks later.
- ❖ **Can the police be found liable for failing to investigate the complaint?**
- ❖ No, material contribution test not applicable.
- ❖ Harm was caused by RK's violent actions.
- ❖ The constable's conduct alone was incapable of causing the harm.
- ❖ They have not established which positive acts the constable didn't do could have prevented the harm.
- ❖ Chance he may have been deported not enough.

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#### DIVISIBLE & INDIVISIBLE HARM

- ❖ **Indivisible harms** – it's as though they're the same injury.
  - E.g. Injury to sprained and then broken ankle.
- ❖ **Divisible harms** – separate injuries.
  - E.g. Injury to an arm and then a foot.

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#### BRADLEY V. GROVES

- ❖ Bradley is injured in two separate car accidents.
- ❖ Following the first accident Bradley had pain, commenced action against the driver.
- ❖ At the time of the second accident, is 80% recovered from the first.
- ❖ At time of the trial, Bradley is back to 65%.
- ❖ **Is the initial causer of the injury responsible for the extra damage caused by the aggravation of the injury?**
- ❖ **Yes.** But just in BC. Indivisible injuries create joint and several liability for tortfeasors.
- ❖ **The aggravation is treated as the same injury**, and the initial tortfeasor was the cause so the plaintiff can sue for the whole amount.
- ❖ **Main principle is that the plaintiff is fully compensated.**
- ❖ Defendant can go after the second driver through the apportionment part of *Negligence Act*.

## E.D.G. V. HAMMER

- ❖ Janitor who sexually assaulted plaintiff would be liable for all the damage caused by sexual assaults by individuals subsequently.
- ❖ Under the **BC Negligence Act**, “if the damage or loss has been caused by the fault of two or more persons, then they are jointly and severally liable to the person suffering the damage or loss”.
- ❖ That law was taken to apply to Hammer.

## REMOTENESS

- ❖ **Interpretation of Reasonable Foreseeability**
- ❖ It is not necessary that the specific mechanics of how the injury occurred be foreseeable (*Hughes v. Lord Advocate*)
- ❖ **Likelihood:**
  - Initially needed only to be foreseeable as possible, not “probable” (*Wagon Mound No. 2*)
  - Now SCC uses the language of “real risk,” (*Mustapha*) – not clear if this will mean difference in practice
  - **Test: Whether harm is a real risk, one which would occur to the mind of a reasonable man in the position of the defendant, which he would not brush aside as farfetched.**
- ❖ Linkages – courts have broken down complicated circumstances into a series of foreseeable occurrences to show that damage was foreseeable, (*Assiniboine*) – even if the exact combination of factors seems unlikely
- ❖ **Courts interpretation of foreseeability can be elastic:**
  - Once the other elements are proven, courts generally need a good reason not to find liability
- ❖ **5 arguments defendants put forward:**
  1. There was a bizarre chain of events occurred between the breach of duty and result
  2. Breach of duty occurred against a strange context, which great increased the consequences
  3. Thin skull rule is an exception (this isn’t how lists work Galloway)
  4. There was a an intervention by a third party that breaks the chain of causation
  5. The consequences arising from a no bizarre event was not to be expected

## CAMERON V. HAMILTON AUCTION MARTS LTD.

- ❖ Cow gets loose, goes up a guy’s house, causes the floor to collapse, floods out a dairy.
- ❖ **Is Hamilton liable for all of the damage the cow caused?**
- ❖ **No**, the specific chain of events was so unforeseeable that there cannot be liability.
- ❖ The type of damage though, was not unforeseeable though, the court recognised that if the cow had gone in through a ground floor entrance and wrecked a place there *would* be liability).

## WAGON MOUND NO. 1

- ❖ Oil spills out into the harbour, however the defendants don’t think it’s a fire hazard.
- ❖ Also got opinion of the manager of an oil company saying it wouldn’t ignite.
- ❖ In fact, it did catch on fire when sparks fell onto a cloth in the water.
- ❖ **Are they liable for the fire damage?**
- ❖ **No.** Defendant had a reasonable belief that the oil could not catch fire while spread on the water – they could not have been expected to know.



- ❖ **Consequence must be foreseeable in advance by a reasonable person.**
- ❖ **Liability depends on whether the damage is of such a kind, as a reasonable person should have foreseen.**
- ❖ **Important to note that defendants did not know, and could not reasonably have been expected to know, that furnace oil was capable of being set afire when spread on water**

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#### HUGHES V. LORD ADVOCATE

- ❖ Two boys find an oil lamp in an unattended construction area.
- ❖ Boy is burned in an unexpected way – lamp exploded due to falling in hole.
- ❖ Burns were quite severe.
- ❖ **Is the defendant post office liable for the injury even though it came about in an unexpected way, which magnified the expected consequences?**
- ❖ **Yes**, defendants not absolved because the precise details of the accident aren't foreseeable.
- ❖ **It's enough that the type of injury was reasonably foreseeable – which it was.**

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#### ASSINIBOINE SCHOOL DISTRICT NO. 3 V. HOFFER & GREATER WINNIPEG GAS

- ❖ Boy starts snowmobile in an improper way; it gets out of control and crashes into a pipe.
- ❖ Pipe vents gas into a school, which explodes when it connects with pilot light.
- ❖ **Was the damage foreseeable?**
- ❖ **Yes**, foreseeable that the boy would forget to put stand down when starting, thus causing the snowmobile to take off without a rider.
- ❖ Buildings like this have gas riser pipes and when toboggans run amok there is a chance they will hit these.
- ❖ Duty of care not to start a snowmobile in a way that can cause it to go flying off endangering buildings, duty of care not to put gas mains in a place where a snowmobile could fly into
- ❖ **When a person is doing a dangerous activity there is no need to construe foreseeability narrowly.**
- ❖ **Ratio: Test of foreseeability of damage is a question of what is possible rather than what is probable.**

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#### THE THIN SKULL RULE

- ❖ As long as some injury to the plaintiff was foreseeable, the defendant is liable for all the consequences of the injury arising from the plaintiff's unique physical or psychological make-up regardless of foreseeability (*Osborne*).
- ❖ Rule is consistent with the desire to protect plaintiffs from interference and to fully compensate.
- ❖ **Crumbling Skull Rule:**
  - Rule for assessing damages, if the plaintiff has a pre-existing condition you don't have to put them into a place as though they don't have the condition (*Athey*).
- ❖ If it's purely psychological, there has to be an ordinary fortitude for the harm (*Mustapha*).
  - If you have physical harm first, much easier to accept psychological harm. If no physical harm, then you must prove ordinary fortitude.

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BISHOP V. ARTS & LETTERS CLUB OF TORONTO

- ❖ Frail old man expects door to club to be difficult to open.
- ❖ Puts his weight into it and goes flying down the stairs; badly injured.
- ❖ Man is haemophiliac, so his recover will be long and painful.
- ❖ **Is the defendant liable for the extra damage caused by his being a haemophiliac?**
- ❖ **Yes, you must take your plaintiff as you find him.**

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ATHEY V. LEONATI

- ❖ **Crumbling skull means you don't have to put them in a better position than they otherwise would have been.**
- ❖ On the facts, however, there is no evidence that the herniated disc would have happened anyway, even if there was a susceptibility.
- ❖ *See above for full brief.*

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NOVUS ACTUS INTERVENIENS

- ❖ **Where there's an intervening act that breaks the causal chain, there is no liability, except when that second act is within the ambit of risk.**

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STANSBIE V. TROMAN

- ❖ Decorator leaves house unattended and unlocked; while he's gone a burglar breaks in and burgles.
- ❖ **Is the defendant liable for the damage caused by the third party burglar?**
- ❖ **Yes**, decorator was given a key to lock up because of risk of theft.
- ❖ **Because the harm brought by the third party was one that the defendant was supposed to guard against, found liable.**

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BRADFORD V. KANELLOS

- ❖ Restaurant grill catches fire due to grease build up, use of fire extinguisher creates hiss, a patron yells gas, there is a stampede that injures the plaintiff.
- ❖ **Is the restaurant liable for the damages to the plaintiff, even though *but for* the idiot yelling there would have been no injury.**
- ❖ **No**, the idiot yelling was **not within the realm of foreseeability** of grease build up.
- ❖ **Also note:** They had taken all appropriate precautions for a fire – this was act of an idiot third party; what else were they to do?

## MANUFACTURERS, DISTRIBUTORS, CONTRACTORS & REMOTENESS

### SMITH V. INGLIS

- ❖ Plaintiff electrocuted by refrigerator assembled by the defendant.
- ❖ The injury only occurred because the fridge had been assembled with a defect and because the third party deliveryman had cut off the ground on the plug.
- ❖ **Is the defendant liable even though injury required a third party's action?**
- ❖ **Yes**, the manufacturer's defect was not readily apparent to the consumer's inspection.
- ❖ **It was reasonably foreseeable to the manufacturer that the prong would be removed, thereby exposing the plaintiff to the risk of their negligence.**
- ❖ If the intervening act is the foreseeable negligence of someone else than that doesn't break the chain of causation – it's not too remote.

### GOOD-WEAR TREADERS V. D&B HOLDINGS LTD.

- ❖ Loaded up truck with an inappropriate tire in the front, tire fails; truck falls; kills family.
- ❖ The appellant supplied the tire for use on truck knowing it would be used inappropriately, although they warned not to.
- ❖ **Did the supplier, in supplying the tire contribute to the injury?**
- ❖ **Yes**, if you know a person is going to use something you're selling in an unsafe way that could injure others to whom you owe a duty of care, you cannot escape from liability to others by providing a warning to the purchaser, though you will escape from liability to the purchaser.
- ❖ The truck company's actions do not become an intervening cause, because the accident stemmed from supplying the tire for an improper purpose.
- ❖ However, case does not say that there is an obligation to find out the use, just that if you know.

## DEFENCES TO NEGLIGENCE ACTIONS

- ❖ **Contributory Negligence**
  - A partial defence leading to a proportionate reduction in the apportionment of damages.
- ❖ **Voluntary Assumption of Risk**
  - Complete defence that arises where the plaintiff consents to the defendant's negligence and its consequences (*Crocker v. Sundance*)
  - Must agree both to the risk of the injury, and waive the right to seek compensation from defendant.
  - Risk must be obvious to the plaintiff and necessary part of the activity in question.
  - Plaintiff must be fully informed.
- ❖ **Illegality**
  - As a matter of public policy, this defence seeks to deny a claim that would subvert the integrity of the legal system.
  - Defence is greatly restricted in torts, and basically inaccessible for personal injury.
    - Only applicable to prevent a person from profiting from an illegal conduct, or where a person seeks damages to evade a criminal penalty (*Hall v. Herbert*).
- ❖ **Inevitable Accident** (not covered this year)

- Complete defence that says, in spite of evidence to the contrary, the loss was not caused *Contributory Negligence* by the plaintiff.

## LIABILITY FOR FAILURE TO PROVIDE INFORMATION

### DUTY TO WARN

- ❖ **Particular relationships give rise to obligation to look after interests of another person (*Childs*).**
  - **Manufacturer:** duty to warn a consumer about a product's use.
  - **Doctor:** duty to inform patients of materials risks inherent in a procedure and alternative available measures.
- ❖ **Four elements of a duty: (*Osborne*) (maybe *Lambert*?)**
  - Placed on market for use by general public,
  - Dangerous when used for intended purpose,
  - The manufacturers know or ought to know of the inherent dangers,
  - Public doesn't have the same knowledge of the danger.
    - Not needed when obvious: guns, etc.
- ❖ **Learned Intermediary:**
  - Duty is dispensed to learned intermediary when product is highly technical and used under expert supervision, or nature of product is such that the consumer doesn't realistically receive a warning from the manufacturer before use.

### MANUFACTURERS

- ❖ Manufacturers owe duty to consumers for dangers inherent in the use of the product of which they have, or ought to have, knowledge.
- ❖ **Duty arises where: (*Lambert v Lastoplex Chemicals Co* and *Hollis*)**
  - Product placed on the market for use by general public
  - Product is dangerous when used for its intended purpose (**ordinary use**)
  - The manufacturer knows or ought to know of the danger
  - The public does not have the same awareness of the danger as the manufacturer
- ❖ Duty doesn't terminate on sale of product but is continuing, requiring manufacturer to warn of risks discovered after product on the market.

### STANDARD OF CARE

- ❖ To take **reasonable steps** to provide warnings that permit the product to be used safely
- ❖ Court considers many factors to determine what is reasonable, including:
  - Nature and degree of the danger
  - Size, distinctiveness, intensity, clarity, and extent of the written warning
  - Practice of the manufacturers of similar products (ie professional standard)
- ❖ Knowledge that a particular product is going to be used by a purchaser in an improper and dangerous way may oblige a retailer to refuse to sell it to that person (*Good-Wear Treaders v D&B Holdings Ltd*)
- ❖ Where products supplied for specialized purpose, warning requirements are less stringent (ie professional, commercial, industrial purposes)

- ❖ Causation important: Plaintiff has onus to establish that they would've read/complied w/warning had it been given
- ❖ **Policy:** Related to the neighbour principle
  - Manufacturers place products into the flow of commerce, creating relationship of reliance with consumers. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product. (*Hollis*, following *Donoghue v. Stevenson*)

#### LEARNED INTERMEDIARY RULE

- ❖ **Duty is dispensed to learned intermediary when product is highly technical and used under expert supervision, or nature of product is such that the consumer doesn't realistically receive a warning from the manufacturer before use.**
- ❖ Dangers inherent in the ordinary use of medical products require a **heavy obligation** to be placed on manufacturers.
  - However, manufacturers don't always have access to communicated information directly to patients regarding medical products.
  - Manufacturer can fulfil duty by providing requisite information to a **learned intermediary** who is then in a position to pass information to a patient (*Hollis v. Dow Corning Corp.*)
    - When intermediary has the same information a patient would need to know, standard has been met.
- ❖ **Where the rule applies: (*Hollis*)**
  - A product is highly technical in nature and intended to be used only under supervision of experts (i.e. breast implants/pacemakers)
  - Where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product (prescription drugs).
- ❖ **Where the rule does not apply:**
  - Products that inherently allow manufacturer to communicate with the consumer are not subject to the rule (i.e. over-the-counter medicines and prescription medications).
- ❖ **Would a learned intermediary pass on information about risks inherent in medical product if provided for by defendant?**
  - SCC held that defendant manufacturer couldn't exonerate itself on ground that physician may have been delinquent in his duty of disclosure (*Hollis*)
  - **Policy:** Allowing manufacturer to absolve themselves of responsibility on hypothetical that the doctor would not have performed their duty could leave no party responsible where patient was not informed as doctor would not have had information either.
    - A manufacturer has the convenience and indulgence of giving info to learned intermediary rather than consumer and thus it is justifiable for the manufacturer to accept the risk that the learned intermediary will fail their obligation.
    - Deterrence and loss distribution are factors considered by court.

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**HOLLIS V. DOW CORNING**

- ❖ Dow made breast implant that was implanted in Hollis. Ruptured after 17 months.
- ❖ Hollis is suing stating the implants were negligently manufactured and they failed to give the doctor the proper information, and he therefore could not give her enough information to make informed consent.
- ❖ La Forest J, says **manufacturers generally owe a duty of care to the eventual users of their products. In the medical realm there is an even higher threshold for the duty because of the serious consequences that can result from a breach.**
- ❖ **All warnings must clearly describe any specific dangers that could result.**
- ❖ **If a patient does not know all of the information about a medical product/prescription that they use they cannot truly be said to give informed consent.** This is true of the doctor-patient relationship as well as the patient-manufacturer relationship.
- ❖ **Ratios:**
  - Particularly strict duty of care to the eventual consumers because of the serious side effects that can result from a breach of this duty, however, they can discharge this duty to the consumer if they properly inform a "learned intermediary" (the doctor) to give them the same level of knowledge of the manufacturer in order to assist the consumer.
  - When establishing causation in cases involving a failure to disclose medical risks, you must use a modified objective test and ask if a reasonable person in the patient's shoes, with all of the proper information, would have decided to have the surgery. If they would have decided against surgery, then causation is established.
  - In learned intermediary cases patient does not need to prove that the intermediary would have relayed the risks on to the patient if the manufacturer had properly informed them.

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**MEDICAL PROFESSIONALS**

- ❖ Due to dangers associated with being ingested or placed in body medical products require *prima facie* need for more clarity/completeness than non-medical (**Hollis**).
- ❖ "Physicians have a duty, without being questioned, to disclose to a patient the **material risks** of a proposed procedure, its **gravity**, and any **special or unusual risks**, including risks with a low probability of occurrence, attendant upon the performance of the procedure" (**Hollis**, following **Reibl**)
  - Courts suggest that even though a risk is not material in the sense that it is not particularly dangerous, the uniqueness of it might give doctor responsibility – *danger and oddness* (**Reibl**)
- ❖ Serious risk (i.e. paralysis or death) must be treated as material no matter how low the probability is (**Vidito**).
- ❖ Patient should be given explanation as to gravity of the operation and its nature (**Vidito**).
- ❖ Dangers inherent in operation (i.e. risk of anesthetic or infection) don't have to be disclosed subject to the above (don't have to explain ordinary risks that an ordinary patient would be aware of) (**Vidito**).
- ❖ Scope of disclosure duty and if it has been breached will be determined on each case – no precedential value (**Vidito**).

- ❖ Alternative options, even those that cannot be performed by the patient's own physician, must be communicated (*Brito* and *Van Mol v. Ashmore*).
- **Policy:** emphasizes choice/autonomy.

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#### DOCTRINE OF INFORMED CONSENT

- ❖ Patient's consent will only protect surgeon against liability if patient has been sufficiently informed so that patient could make the choice whether or not to submit to the surgery (*Vidito*).
- ❖ **Policy:** personal autonomy
  - "Right of a patient to decide what, if anything, should be done with his body" (*Hopp v. Lepp*).

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#### STANDARD OF CARE

- ❖ **Full disclosure** standard (*Reibl*) – all **material risks** must be disclosed such that a reasonable person in the circumstances of the patient would attach some significance in determining the course of their healthcare
- ❖ Adherence to professional standards does **not** meet duty -- those are just a factor to be considered (*Ter Neuzen – negligence for medical malpractice different*) (*Vidito v Kennedy*).

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#### SPECIFIC CIRCUMSTANCES

- ❖ **Knowledge** - court looks at what doctor knows/should know and patient deems relevant – doctor must answer questions due to imbalance inherent in relationship
  - Includes responsibility of disclosing alternative procedures/treatments (*Van Mol*).
  - However, if patient does not express special reasons for wanting surgery outside of what the doctor ought to know, a doctor will not be liable (*Vidito*).
- ❖ An **emotional patient** or the patient's **specific sensitivities** might warrant the surgeon being general rather than specific about details.
- ❖ Trier of fact determines what is a material risk and whether there is a breach of duty.

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#### REIBL V. HUGHES

- ❖ Plaintiff underwent serious surgery. Operation was competently performed by the defendant.
- ❖ During or immediately following the surgery the plaintiff suffered a massive stroke, which left him paralysed on the right side of his body and also impotent.
- ❖ Plaintiff had formally consented to the operation. Alleges that this was not an "informed consent" he sued for damages and recovered on this ground in both battery and negligence.
- ❖ Plaintiff was 1.5 years away from earning a lifetime retirement pensions.
  - Claims that if he had been properly informed of the magnitude of the risk of the surgery he would have foregone it, at least until his pension had vested.
  - Would have opted for a shorter normal life than a longer one as a cripple because of surgery.
- ❖ Duty of the surgeon to make disclosure to the patient of all material risks attending the surgery.
- ❖ If he had been properly informed of the magnitude of the risk involved in the surgery he would have elected to forego it.
- ❖ Defendant knew plaintiff was under the impression surgery would help with headaches, didn't inform him it wouldn't.
- ❖ **Considerations:**

- No emergency making surgery imperative.
- No noticeable neurological benefit.
- Risk of a stroke (with no surgery) was off in the future, four to five years (defendant said so).
- Plaintiff also had issues with English language, need to be very clear in explanations.

## NATURE OF REQUIRED WARNING

### THERAPEUTIC VERSUS NON-THERAPEUTIC

- ❖ “Where the surgery is elective, the doctor has a duty to be especially careful to disclose completely all material risks and special risks as well as the consequences for the patient should these risks materialize. Where the therapy is elective there is normally no urgency.”  
-*Hankins v. Papillon*
- ❖ In *White v. Turner*, plaintiff underwent breast reduction surgery. Principal purpose was cosmetic, with some therapeutic benefits. Not satisfied with surgery, more scarring than expected. Underwent more surgery to fix, still not perfect. Sued, claiming that doctor did not inform her of the risk of scarring and of the possibility the procedure may not be perfect.
  - Judge found doctor disclosed major risks, but failed to disclose the possible ones.
  - Emphasized the need for absolute disclosure in cases of cosmetic interventions, even if the risks are considered minimal.
  - “Frequency of the risk becomes much less material when the operation is unnecessary for his medical welfare”

### VIDETO V. KENNEDY

- ❖ How much does surgeon know about real concerns? Scars were prime concern to plaintiff here.
- ❖ **Facts:** Women goes to get sterilization. Doesn't want family to know she's been sterilised (she is from Catholic family).
  - Surgeon explains procedure, but doesn't raise issue of the scar (nor does patient raise this).
  - Things go wrong, leading to a substantial unsightly scar + further operation.
- ❖ **Decision:** No compensation – scar not material risk
- ❖ **Reasons:**
  1. A material risk and whether there has been a breach of duty of disclosure is not solely determined by professional standards.
  2. Duty of disclosure takes into account *what the surgeon knows (subjective) or ought to know (objective)* that the patient deems relevant their decision on whether to consent to the operation.
    - a. This includes answering specific questions about operation, and giving patient reasonable answers.
    - b. Other relevant information to Dr. may be obtained by medical history, and patient's family.
    - c. If patient expresses concerns – Dr. must meet these in a reasonable way
  3. A risk, which is a mere possibility, does not normally need to be disclosed. Material risks must be disclosed - if it's occurrence may result in serious consequences, such as paralysis or death then it is considered a material risk
  4. Subject to the above requirements, dangers inherent in any operation do NOT have to be disclosed. [e.g. anaesthetics, risks of infection, scar]



5. Emotional condition of a patient may justify a surgeon's decision to withhold or generalize information as to which he would otherwise be required to be more specific
6. Scope of duty of disclosure and its breach is to be determined in a case-by-case basis.

### BRITO V. WOOLLEY

- ❖ **Facts:** Birth of twins - 2nd twin has brain damage from umbilical cord depleting oxygen, from vaginal birth. Says if she knew risks of vaginal birth, she would have opted for C-section.
- ❖ Plaintiff loses, fails on causation.
- ❖ **Analysis:**
  - Standard of Care to be applied.
    - Professional standard of doctors disregarded.
    - Once duty arose, that standard of care was breached if the Drs didn't disclose of risk.
  - Causation: Use a modified objective test - "what would a reasonable person do in the particular circumstances that the plaintiff was in?"
    - A modified objective test: what would a reasonable person do in the particular circumstances that the plaintiff was in?
      - Examples of factors to take into account are profession, personality etc.

### VAN MOL V. ASHMORE

- ❖ **Duty:** Did doctor effectively inform the patient of real alternatives to a medical procedure [and risks of those alternatives] to a medical procedure?
  - "One cannot make informed decisions to undertake a risk without knowing the alternatives to undergoing a risk".
- ❖ **Must show that lack of information ran to the informed nature of the consent.**
  - **Causation:** If a patient suffers harm after operation and it can be shown that "a reasonable person would have opted for an alternative procedure had they have known about it" [ie. industry standards, risks of the other surgeries etc], dr. will be liable.

### FAILURE TO WARN & CAUSATION

- ❖ But For Test, plaintiff has to establish that he would have read and adhered to the warnings if they written.
  - Only case we have on this is *Hollis* and they use the subjective test, very different from other cases (medical), even the defence in *Hollis*. Likely want to go to objective/subjective.
- ❖ If court finds that plaintiff would have agreed to proceed with a medical procedure with knowledge of the risks inherent in the surgery (even where doctor breached duty to warn), the defendant will not be found to have caused the plaintiff's loss (*Hollis*).
- ❖ **Two tests:**
  - **Products Liability** (Manufacturer-consumer relationship) – *Hollis* says to use the *Buchan* subjective test.
  - **Medical Procedures** (Doctor-patient relationship) – *Reibl* modified objective test.
- ❖ Reasons for different tests: *Hollis* cites *Buchan*, "Manufacturers, unlike doctors, are not called upon to tailor their warnings to the needs and abilities of the individual patient; and, unlike doctors, they are not required to make the type of judgment call that becomes subject to scrutiny in informed consent actions."

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**SUBJECTIVE TEST**

- ❖ Asks what the patient would have done if the appropriate information had been provided
- ❖ Concern that every plaintiff, with the benefit of hindsight, will always claim that she would not have used the product if she had been properly warned **is ameliorated** by the ability of the trier of fact to weigh the evidence at trial with the benefit of cross-examination (**Hollis**).
- ❖ Evidence to consider: testimony/ cross-examination/expert evidence – (i.e. category of “pre-sold” plaintiffs, those who would appear not to be deterred by warnings) – mentioned in **Hollis**.
- ❖ Does NOT require the plaintiff to show doctor would have passed on info if he had been told (**Hollis**).
- ❖ Policy: Subjective test is appropriate because drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know (**Hollis**).
  - Facilitates meaningful consumer choice and promotes marketplace honesty by encouraging full disclosure
- ❖ **Critique:** LaForest, J – in *dissent* in **Hollis**: subjective test places too much evidence on opinion of the plaintiff in hindsight which may be honest but not accurate as it is self-serving.

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**MODIFIED OBJECTIVE TEST**

- ❖ Asks whether the average prudent person in the plaintiff’s position, informed of all material risks, would have foregone a treatment (**Reibl**).
- ❖ A wide range of personal factors may be included to modify the reasonable person test: including age, income, marital status, personal beliefs/fears, and special considerations including those the patient relayed to doctor (**Arndt v. Smith**).
  - Only eliminates consideration of a patient’s idiosyncratic, unreasonable, and irrational beliefs and subjective fears that are unrelated to the material risks.
- ❖ **Economic considerations are valid.**
  - In **Reibl**, the plaintiff would have likely foregone treatment cause he was near pension (not emergency surgery)
  - I.e. A reasonable person was determined to likely forego surgery in such a circumstance.
- ❖ No “temporal” limitation on damages (**Martin**).
- ❖ In **Brito**, court applied Modified Objective test to determine whether mother would’ve chosen a caesarean section during complications in surgery. Since expert evidence (doctors) all agreed vaginal delivery would’ve been the best course of action, despite the unfortunate event that nonetheless occurred, the court determined a reasonable person would not have opted for the caesarean, even though the doctor had the duty to let her know of alternative options.
  - Court considers factors such as the woman’s personal history and the trust she had in the doctor.
- ❖ **Policy:** The objective standard is preferable, since the subjective standard has a gross defect: it depends on the plaintiff’s testimony as to his state of mind, thereby exposing the physician to the patient’s hindsight and bitterness. (**Reibl**).

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REIBL V. HUGHES

- ❖ Although elective surgery was indicated for his condition, there was no immediate emergency for the surgery.
- ❖ **Found that reasonable person would have declined surgery at this point.**
  - **No immediate requirement for the surgery, and a grave risk of stroke or worse during or as a result of the operation, no immediate risk of stroke in the future.**
  - **Also under mistaken assumption that surgery would help with continuing headaches, defendant also should have disclosed truth here.**

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MARTIN V. CAPITAL HEALTH

- ❖ What happens if you didn't get consent but person would have had operation anyways?
- ❖ Modern case: every litigating lawyer defending, would have a nightmare with this case
- ❖ **Facts:**
  - Plaintiff has benign tumour – goes to interview surgeon – makes detailed notes, talks over with fam. Informs D that he wants to dance with his daughter at her wedding. Tumour doesn't need to be removed immediately. Surgeon fully informed about plaintiff's life and ambitions.
  - Doctor says only risk is to lose hearing on one side, however suffers stroke. Now he is a cripple in wheelchair, lost sense of speech, life is ruined. Q of whether Pl, if fully informed of nature of the risk would have gone through with operation at that time
- ❖ **Reasons:**
  - Doctor did not use clear language and words that conveyed to the patient the clear nature of the risks, and failed to use layman's terms to make it clear to the layman what risk they are facing.
  - Must inform patient of all risks to get "informed consent"
  - To determine causation in medical malpractice case need not be determined with scientific precision
  - **Proper test for doctors failing to warn of risks is modified objective "but for" test**
    - "But for the failure of the defendant, would a reasonably person in the plaintiffs position have consented" to the operation at the particular time.
      - Must use reasonable person in plaintiff's circumstances.
    - Need not say never would have consented to operation ever
    - Evidence: Pl. communicates active lifestyle and concerns for his ability to partake in those activities because of operation, elective surgery.

## LIABILITY FOR PSYCHIATRIC HARM (NERVOUS SHOCK)

### HISTORICAL DEVELOPMENT OF THE LAW

- ❖ Courts do not hesitate to provide damages for psychiatric harm resulting from a physical injury. (*Page v. Smith*). However, difficulties arise where the harm is not consequent on the physical injury. In such circumstances:
  - Current state of law limits recovery to the most serious kinds of psychiatric damage in narrow circumstances
  - Rationale for concerns: avoid floodgates, recognition would expand pool of potential plaintiffs significantly
  - Also, psychiatric claims can be more easily fabricated
- ❖ Two main areas of concern:
  - Circumstances in which a person can be found to have a duty in relation to the mental wellbeing of another person.
  - Whether a person who has exposed the plaintiff to an unreasonable risk of physical injury is liable when the plaintiff suffers only psychiatric harm
- ❖ No liability for any psychiatric injury unless it satisfies the legal concept of Nervous Shock

### NERVOUS SHOCK

- ❖ Severe emotional trauma manifesting in a physical disorder or recognizable psychiatric illness (i.e. depression or PTSD) – definition from *Osborne*.
  - Severe emotional distress caused to surviving passengers of an accident or family members of a deceased do **not** meet this standard
- ❖ **Proof of harm:**
  - Emotional distress which is “Serious and prolonged and rise[s] above ... ordinary annoyances, anxieties and fears” (*Mustapha v. Culligan*).
- ❖ **Standard owed: *Mustapha*** – (a case of mental injury without physical injury)
  - Person of ordinary fortitude standard (to find remoteness)
  - Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damage (i.e. the **eggshell rule** kicks in)
  - If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff’s injury may have been reasonably foreseeable to the defendant
- ❖ In *Hussack*, the court found that the somatoform disorder developed by the plaintiff met the remoteness standard as it followed from his physical injury which itself was reasonably foreseeable.

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**PROXIMITY**

- ❖ Courts consider factors such as *relational*, *temporal* and *locational* proximity (for each case).
  - Courts declared that a duty of care was owed to those *relational* claimants that the defendant could reasonably have foreseen might suffer nervous shock as a result of defendant's actions
    - Not limited to family relationships, closeness and love and affection are necessary
  - No recovery for *distant* shock where plaintiff is informed of a tragic event rather than experiencing it with plaintiff's own unaided senses. (i.e. in **Beecham**, the plaintiff's inability to accept and adjust to his wife's disability arising from car accident was not found to directly result from the accident)
    - Court influenced by factors such as the intensity of the event
    - Foreseeability increases in relationship in proportion to the horror of the occasion
  - Plaintiffs grief and shock of a death of a loved one rather than at the accident itself does not meet *temporal* / *locational* proximity requirement (**Rhodes**) (the mother was in a separate province and heard of the accident over the radio)
  - Significant area of litigation – **miscarriages**.
    - **Policy concern** re: mothers – should reward selflessness
    - Mother who suffers miscarriage -- **Dulieu**: As someone who could easily have been physically harmed by a breach of duty – she was in the ambit of foreseeability and she suffered. (Carriage driven thru window of restaurant – met proximity)
    - **Hambrook** – similar to **Dulieu**, just with a child that got hit by truck, mother awarded for suffering psychological harm due to proximity

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**LEADING CASES**


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**MUSTAPHA V. CULLIGAN OF CANADA LTD.**

- ❖ **Facts:** Person saw dead flies in bottled water supplied by defendant. Claiming for damages for developing a major depressive disorder - phobia/anxiety
  - **Reasoning:** Court looks at duty of care (yes) – then skips to remoteness
    - Remoteness? Anxiety not a foreseeable consequence of defendant's negligence.
    - Too unusual/extreme
    - [note: McLachlin seems to reject "possible" for the term "probable" in remoteness]

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**HUSSACK V. CHILLIWACK SCHOOL DISTRICT NO. 33**

- ❖ Student was injured by a field hockey stick in a PE class. Had not attended classes for the first couple of weeks of the field hockey unit, and had a history of chronic absenteeism.
- ❖ Got hit in the face with a stick during the game, ended up with somatoform disorder.
- ❖ Although Mr. Hussack refused any psychological treatment for his son's disorder, and coached him to remember symptoms, the court found that but for the field hockey injury, his disorder would not have occurred.
- ❖ The court found that the somatoform disorder developed by the plaintiff met the remoteness standard as it followed from his physical injury which itself was reasonably foreseeable.
- ❖ Court found that lack of instruction led to the injury, which in turn led to the disorder.
- ❖ Despite the pervasive feeling that he was being coddled by his father and made little attempt to recover from his own injury, court still focused on the proximate cause of the situation.

## LIABILITY FOR PURE ECONOMIC LOSS

### RECOGNISED CATEGORIES

- ❖ Circumstances where a defendant's actions have not caused harm to property or physical injury but rather negatively impacted the plaintiff's economic interests
- ❖ There are five recognized categories: (*Winnipeg Condominium Corporation No. 36 v. Bird Construction*).
  - The Independent Liability of Statutory Public Authorities;
  - Negligent Misrepresentation;
  - Negligent Performance of a Service;
  - Negligent Supply of Shoddy Goods or Structures;
  - Relational Economic Loss.
- ❖ "Pure" used intentionally to exclude those situations where the economic loss is consequential upon damage to the person or property (*Osborne*).
  - Can have another relationship outside of K-relationship that can have a bearing on economic loss. K not good enough to deal with all the situations that arise.
- ❖ Policy concerns: fear of flood of litigation coming from the vast diversity in interrelating economic relationships
  - Wealth independent of property is a luxury that few enjoy and is also suggestive of corporate and commercial interests disassociated from the ordinary person
  - Conventionally thought of as the subject matter of contract law, don't want to subvert traditional boundaries established in K law
  - High cost of liability insurance = reluctance to shift losses from those who suffer to those who cause
  - Free market economy allows a party to intentionally inflict economic loss on rivals and competitors, so focus should be on intentional, not negligent conduct

### NEGLIGENT MISREPRESENTATION

- ❖ In general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement (*Hedley Byrne & Co Ltd. v. Heller & Partners Ltd*).
  - (Defendant bank negligently provided a positive credit report to the plaintiff in respect of the plaintiff's customers, which the plaintiff relied on and took on liability as a result).
- ❖ A duty of care may arise in providing "information, opinion or advice" (*Hedley Byrne*).
  - Duty of care can't be defined solely by foreseeability of economic loss as foreseeability couldn't keep liability for economic loss caused by words within reasonable and appropriate boundaries.
  - Not reasonable to expect care to be taken unless the nature of the occasion or the words of the inquirer signal the importance of the information and the likelihood of reliance on it by the plaintiff.
- ❖ *Special Relationship* Concept from *Hedley Byrne* (diminished in importance since *Hercules*).
  - Used on a case-by-case basis to identify the occasions on which a duty of care may arise.
  - Factors to support a relationship:
    - Defendant's voluntary assumption of responsibility for the accuracy of their words.
    - Plaintiff's foreseeable and reasonable reliance on the information.
  - Specific factors found in *Hedley Byrne* to support such a relationship:
    - Plaintiff's request for the credit report.

- Expertise of the bank in such matters and seriousness of occasion when report given
- The reasonable and foreseeable reliance of the plaintiff.
- Factor for the opposite conclusion: credit report came with a disclaimer and as such the defendant owed no duty of care to the plaintiff.

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## DUTY OF CARE

- ❖ **Hercules** : applies a modified version of the *Anns/Kamloops* test.
- ❖ **Two part test: (proximity and policy)**
  - Is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person?
  - If so, are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach may give rise?
- ❖ The first part involves discerning whether, in a given situation, a duty of care would be imposed by law;
- ❖ The second demands an investigation into whether the legal duty, if found, ought to be negated or ousted by policy considerations
- ❖ **Hercules** Case was about a firm of chartered accountants who prepared the annual audited financial statements for corporations in which the plaintiff's were shareholders and investors.

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## FORESEEABLE RELIANCE

- ❖ **Hercules** says the concern is about **reasonable reliance**
- ❖ The plaintiff must establish that the representor "ought reasonably to have foreseen that the plaintiff would rely on his representation and that reliance by the plaintiff, in the circumstances, would be reasonable" **Hercules**
- ❖ No precise criteria, but rather numerous **factors to consider** (similar to *special relationship* concept)
  - The expertise and knowledge of the representor: duty most commonly arises where defendant has special skill/knowledge or access (key is the imbalance of info between defendant and plaintiff)
    - Duty also placed on those who rep selves as having greater expertise than they have
  - Seriousness of occasion: not reasonable to rely on info given in a casual/social/informal setting
  - An initial request for information: indicates to defendant that the inquirer has a real interest in receiving the info and they are likely to rely on it.
    - Exception: info volunteered by media, governments or on Internet may not be R.F. unless tailored to the special circumstances of individual persons or special class of persons
  - Pecuniary interest – any direct or indirect financial benefit received or anticipated by the representor increases the cachet of the info and encourages reliance on it.
  - The nature of the statement – reliance on fact more foreseeable than subjective and speculative statements but it's not determinative
  - Disclaimers – as general rule, disclaimer will prevent the establishment of a duty of care

- Exceptions: where insufficient notice of disclaimer is given Courts will likely construe disclaimers against the defendant when info isn't available from any other source and difficult to impair

### POLICY CONCERNS: THE ISSUE OF INDETERMINACY

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- ❖ A *prima facie* duty may be negated where problem of indeterminacy arises
  - In **Hercules**, court found that there were an indeterminate amount of people who could reasonably be foreseen to rely on financial statements
    - This would cause the losses generated to be extravagant and disproportionate to the fault of the defendant.
    - Eventual causes would be detrimental to the public due to increased expenses and decrease in the availability of those service
- ❖ **Haskett**: Indeterminacy is not an issue where the group may potentially be very large, but:
  - The group is wholly within the knowledge and control of the party
  - The timing of potential harm (and therefore liability) is limited.
- ❖ A court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments – (at trial, evidence affecting policy concerns can be heard, can't assess prior) (**Haskett**).

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### HEDLEY BYRNE V. HELLER & PARTNERS

- ❖ Hedley (a firm) wanted to know if it would be advisable to extend credit to a customer, Easipower. Hedley asked Heller whether it would be advisable.
- ❖ Heller advised Hedley that it was appropriate to extend credit to Easipower.
- ❖ Hedley extended credit and Easipower went out of business.
- ❖ Hedley sued Hedler.
- ❖ **Did Heller owe Hedley a duty of care? Does the duty of care apply to statements that cause pure economic loss?**
- ❖ **Yes, a duty of care can arise with respect to careless statements that cause pure economic loss.**
- ❖ **Hedley Byrne test has 5 general requirements:** (affirmed in *Queen v. Cognos*).
  - Must be a duty of care based on a "special relationship" between the representor and the representee.
  - Representation in question must be untrue, inaccurate, or misleading.
  - Representor must have acted negligently in making said misrepresentation.
  - Representee must have relied in a reasonable manner, on said negligent misrepresentation.
  - Reliance must have been detrimental to the representee in the sense that damages resulted.

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### HASKETT V. EQUIFAX CANADA:

- ❖ Also case of negligent provision of service: analogous category via **Winnipeg**.
  - Facts: the defendant credit-reporting agency negligently and illegally provided inaccurate information about the plaintiff's credit worthiness; the credit grantors relied on it; plaintiff suffered economic loss. Can the defendant be held liable for the economic loss of the plaintiff?



- Held: Yes, liability is imposed.
- ❖ **Third-party:** A representor can owe a duty to a claimant who has not actually relied on a misrepresentation but has suffered detrimental consequences from a third party's reliance on that statement.
  - Proximate relationship exists when economic interests are at stake.
  - Presumption that it is reasonably foreseeable someone will rely on the info that you give in economic situations (presumed reliance).
  - Proximity is used to characterize "the type of relationship in which a duty of care may arise", and "sufficiently proximate relationships are identified through the use of categories".

#### HERCULES MANAGEMENT V. ERNST & YOUNG

- ❖ The plaintiffs were shareholders in a corporation who allege that they made investments and lost money based on negligently prepared financial audit reports.
- ❖ **Do the accountants who prepared the audit reports owe a duty of care to the plaintiffs?**
- ❖ **Held no.** While the Anns test still properly governs incidences of negligent misrepresentation, one has to remember the caveats of reasonability.
- ❖ It must have been reasonable to foresee the plaintiff's reliance on the products, and part of what forms the "reasoners make decisions on how to steer the company as a **group** of shareholders, not to aid them to make individual investment decisions. Thus, no duty of care owed.
- ❖ **Incidents of negligent misrepresentation may still be subject to a duty of care as per the Anns test, but only in certain circumstances.**
- ❖ **Note:** There is also discussion in this case of coping with the nature of the loss as purely economic. The court finds no hurdle there.

#### NEGLIGENT MISREPRESENTATION & NEGLIGENT PROVISION OF A SERVICE

##### WILHELM V. HICKSON

- ❖ Intended beneficiary doesn't get his stuff because the lawyer screwed up
- ❖ **Can the intended beneficiary of a will who didn't benefit because the solicitor screwed up sue the solicitor for being negligent?**
- ❖ Difficult to apply *Hedley Byrne* principle to the relationship of lawyer and disappointed beneficiary.
  - Work is done for testator, and the beneficiary has not relied on the lawyer – generally no privity.
  - No duty of care can be owed by lawyer to disappointed beneficiary in tort, aside from if there is an assumption of responsibility under the principle in *Hedley Byrne*.
  - No claim in tort for pure economic loss found – though in Canada *Rivtow Marine Ltd v Washington Iron Works* would say otherwise.
  - 3rdly, it would allow for liability to indeterminate classes of people who had been affected
  - Finally, illogical to impose duty on lawyer to disappointed beneficiary when the testator had no duty to the beneficiary
- ❖ Policy arguments to remedy the above difficulties:
  - If the beneficiary cannot recover, the lawyer is free of liability for professional negligence, and the beneficiary has no remedy for a loss caused by negligence
  - Also there are lots of precedents to support the proposition that lawyer should be held liable

- Goff in **White v. Jones**: important to recognize right of people to leave their property to whom they please and there is a need to rectify mistakes which frustrate that right
- And that there is no injustice in making lawyer pay for negligence
- The public relies on lawyers to prepare effective wills. To deny an effective remedy amounts to refusal to acknowledge a lawyer's professional role in the community

### NEGLIGENT SUPPLY OF SHODDY/DANGEROUS PRODUCTS

- ❖ Where manufacturer negligently produces a dangerous product, the consumer may discover the defect before the danger is realised. The consumer may incur significant economic loss in his or her attempt to render the product safe. Should the manufacturer be held liable for those losses?
- ❖ **Winnipeg Condos** leaves open important issues.
  - Emphasised that it just deals with housing
  - Is the *real and substantial danger* test workable?
  - Does not answer the question of whether the ruling applies when the product is shoddy but not dangerous

### WINNIPEG CONDOMINIUM CORPORATION NO. 36 V. BIRD CONSTRUCTION CO.

- ❖ The owner of a condo building (not developer, 2ndary owner) became concerned about the masonry work. Turned out that it was defective, had to replace, brought action in negligence against Bird who did the original work.
- ❖ **Can a general contractor be held liable to a subsequent owner of a building despite the lack of contractual privity?**
- ❖ **Held yes.** In large part, this finding is based on policy considerations.
  - There is a large interest in ensuring that contractors do their work up to a standard that protects subsequent occupiers.
  - Uses the **Anns** test.
  - Though some may seek refuge in the notion of *caveat emptor*, the rationale from the rule (that the consumer is best placed to detect the risks or defects) clearly does not hold when speaking of a building whose deficiencies are not even always detected by experts, let alone the purchasers.
- ❖ **There are no policy considerations that would exclude a contractor from being held to owe a duty to take reasonable care to ensure that a building does not contain defects that pose "foreseeable and substantial danger" to the healthy and safety of occupants.**
- ❖ **Policy:**
  - If they can be liable for causing damage, they should also be liable in tort if the danger is discovered and owner wishes to mitigate the danger by fixing defect and putting building back into a non-dangerous state (**Rivtow Marine Ltd v. Washington Iron Works**)
  - In both cases the duty in tort serves to protect the bodily integrity and property interest of the inhabitants of the building
  - Interest in not providing a bar to recovery, as that would mean builders don't have incentive to not build shitty apartments
    - Case is distinguishable from cases of merely shoddy goods
      - This is about danger to people, those cases are about fitness for purpose
  - No policy considerations which are sufficiently compelling to negate the duty
    - No risk of liability to an indeterminate class because the potential class of claimants is limited to persons for whom the building ins constructed

- No risk of liability in indeterminate amount because liability is limited to reasonable cost of repair
- Little risk of liability for indeterminate time because liability only lasts for the life of the building – moreover, as time passes it will be increasingly difficult to attribute damage to negligence rather than just deterioration
- Finally given that the subsequent purchaser is not best placed to bear the risk of the emergence of latent defects, the doctrine of *caveat emptor* should not serve to negate a contractor's duty – the subsequent purchaser is not better placed than builder or seller to inspect, as latent defects only manifest over time.

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HASEGAWA V. PEPSICO, INC.

- ❖ Plaintiff wanted to recover damages in negligence for pure economic loss resulting from its purchase of defective bottled water.
  - **No recover allowed because there is no duty of care for the provision of a defective but non-dangerous product.**
- ❖ Defect must pose a “real and substantial danger” to consumers.
- ❖ Claim fails because plaintiff fails to show that the water is dangerous to human health.
  - **Liability only imposed here for economic loss where the product is dangerous.**
- ❖ Some uncertainty about whether Canadian courts will extend recovery to cover non-dangerous defects. Expressly left wide open in *Winnipeg Condominium*.