1. Duty of Care **(WOEFULLY INCOMPLETE, WILL FIX LATER)**

a. *Definition* - duty of care can be found prima facie where relationship is existing category or closely analogous to existing category. If not, then this is a novel case, apply following test: (1) must be reasonably foreseeable, (2) must be proximate relationship between parties - close, direct, sufficient to impose duty of care; if first two branches satisfied, prima facie duty of care established; (3) residual policy factors dealing not with parties, but operation of legal system and greater society. {*Cooper*}

b. See below re: duty of care in psychiatric harm, economic loss, etc.

c. *Development*

i. *Neighbour principle* - (what) holds that must take reasonable care to avoid acts or omissions which can be reasonably foreseen to cause harm to neighbour; (who) neighbour is one who is so directly and closely affected that they ought to be within contemplation. The directness and closeness came to be applied interchangeably with foreseeability by Canadian courts. {*Donoghue*-Snail}

1. *Limitation of neighbourhood* - the definition of *who* a neighbour is draws very much on the Cardozo decision concerning the *vigilant eye* guarding the *orbit of danger*. Relationship gives rise to both a duty and a right; the relationship in mind is one concerning close and proximal connection between parties. {*Palsgraf*-Firework}

2. *Limitation of manufacturer liability* - not every manufacturer has a duty to the consumer, but rather only in circumstances where the Plf. has no reasonable opportunity to inspect goods. If the Plf. DOES have a reasonable opportunity, then the manufacturer is not liable (opaqueness of bottle!). Reflects the notion that the Plf. has to take sufficient care of their own well being in order to not themselves be liable for the harm that they occur. In modern liability, this would relate to contributory negligence, lead to apportionment of liability based on extent of each party's contribution. {*Donoghue*-Snail}

ii. *Reasonable person* - MacMillan eschews the neighbour principle in his dissent, holds that the standard of the reasonable person apply; also emphasizes categorization, ultimately becomes the dominant approach in Canada following Cooper. Categories of negligence are never closed, the law must match the changing circumstances of life. Emphasis is on profit; commercial relationship is one which gives rise to duty to take care. {*MacMillan*}

iii. *Policy analysis* - holds that there must be (1) sufficient relationship between parties culminating in reasonable contemplation, and (2) must consider whether there are any factors which ought to negative or reduce scope of damages. Applied by Canadian courts, *reasonable foreseeability creates presumptive prima facie duty of care*; D. left with sometimes onerous burden of satisfying second branch. Oddly, the two part test articulated in Anns was overturned by the HL in the UK, after the standard had already been applied in Canada. {*Kamloops*-House}

iv. *Categorization* - duty of care can be found prima facie where relationship is existing category or closely analogous to existing category. If not, then this is a novel case, apply following test: (1) must be reasonably foreseeable, (2) must be proximate relationship between parties - close, direct, sufficient to impose duty of care; if first two branches satisfied, prima facie duty of care established; (3) residual policy factors dealing not with parties, but operation of legal system and greater society. {*Cooper*}

2. Standard of Care

a. *Definition* - where a duty is owed, the standard of care constitutes the content of that duty, what actions must be done in order to discharge that duty.

i. General formulation

1. *Definition* - generally, the standard of care requires that an actor take the steps which a reasonable person would take in averting harm. precautions need not be taken against every peril foreseen by the overly cautious. Must foresee probability, not mere possibility for there to be a standard of care concerning a given risk. {*Bolton*-Cricket}

a. *Considerations* - (1) foreseeability of risk, (2) standard higher where risk more likely, lower where risk less likely, (3) seriousness of harm must be considered, (4) cost of preventive measures, (5) social desirability of D.'s conduct, (6) standard may be lower in emergency situations if acting in good faith.

b. *Balancing likelihood and seriousness* - the likelihood of the harm coming to fruition must be balanced against the seriousness of the harm if the risk in fact materializes. {*Paris*-Goggles}

c. *Social importance of the activity* - risk may be acceptable if activities are highly socially desirable, negative consequences would result from not engaging. The purpose to be served, if sufficiently important, justifies the assumption of the risk. Profit making is not the same as saving humans; must balance risk against the end. {*Watt*-Fireman}

d. *Emergency situations* - when acting in emergency not of own making, SOC is lower as reasonable person will be subject to anxiety, confusion, etc. {*Osborne*}

e. *Capacity to perform* - objectivity of the reasonable person test means that the actual actor it applies to may be incapable of meeting the standard. But, to do otherwise would mean each person has own standard, untenable. {*Vaughan*-Hayrick}

i. *Physical disability* - person with physical disability does not have to meet SOC which is incompatible with condition. There is an according obligation on the disabled to adjust conduct so as not to create avoidable risk by engaging in activities beyond conduct to perform safely. {*Osborne*}

ii. Standard of care for children

1. *Definition* - must consider age, intelligence, experience, knowledge, and alertness to determine whether child *capable* of being found negligent - subjective test; while age seven common, not absolute. If so, objective test follows. Consider conduct against SOC re: reasonable child of same age. {*Heisler*-Tractor}

a. *Children engaged in adult activities* - held to the same standard care as adults while engaged in that activity. community legitimately expects more of youth when engaged in such activities. {*Pope*-Golf}

i. *Classification of activity as adult is contested* - characterization of activity is critical to whether considered "adult" or not. {*Nespolon*-Drunk}

iii.Standard of care for the mentally ill

1. *Definition* - if as a result of mental illness, (1)D. had no capacity to understand or appreciate the duty of care owed at the relevant time, *or*, (2) as a result of mental illness, D. was unable to discharge duty of care as had no meaningful control over actions at the time the conduct fell below the SOC, *then* the D. is not liable for breach of duty. {*Fiala*-God}

iv.Risk utility

1. *Definition* - - standard of care in design-defect cases, regards economic efficiency: where seriousness multiplied by likelihood of risk is greater than the cost of safety measures, the risk is unreasonable. {*Rentway*-Circuit}

a. *Investigates decision process* - queries whether the manufacturer made quality, socially acceptable decisions and thereby developed a reasonably safe product. Also called *Learned Hand* formula. {*Rentway*-Circuit}

v. Customary practices

1. *Definition* - standards or industry practices may be used to determine the adequacy of a defendant's conduct. Conduct consistent with practice of persons similarly

situated will be indicative of due care on the part of the defendant. {*Warren*-Pool}

a. *Not binding, but indicative of standard of care* - consensus of experts on what is reasonable or safe / standard practices of an industry do not bind courts re: standard of care. Can be strong evidence or even substantive defence. {*Warren*-Pool}

b. *Onus on alleging party* - where alleged (in the negative to explain omission by the D., or in the positive to explain commission by the Plf.), onus is on the party alleging custom. Judicial notice should not be taken of custom. {*Warren*-Pool}

c. *Custom must not be negligent* - existence of custom is not decisive, as must be reasonable; negligent conduct cannot be countenanced, even when committed by a large group continually. No amount of community compliance renders an unreasonable act reasonable. {*Waldick*-Ice}

vi. Statutory standards

1. *Definition* – statutory standards may provide guidelines re: the standard of care. Breach of statutory duty may indicate, prima facie, that the SOC has been breached; so, action lies if stat. breached, and other elements of negligence met. {*SWP*-Beetle}

a. *Requirements for stat. breach to indicate SOC* – conduct of the D. must (1) violate the statute, the purpose of the statute must (2) protect persons like the plaintiff against (3) the type of loss they have suffered. {*Gorris*-Sheep}

b. *Applicability of statute to circumstances* - the statute in question must be *clearly applicable* to present circumstances to inform SOC. Further, if statute offers wide discretion, must ensure that this not used to create unreasonable risk. {*Ryan*-Flange}

vii. Professional standards

1. *Definition* - experts who profess certain skills and knowledge are held to a higher than normal SOC, that which is consistent with or exceeding the reasonably competent / average member of group. {*Gregory*-Lawyer}

a. *More than mere error of judgment or knowledge* - must be an error that would not have been made by ordinarily competent professional - unless this standard is inconsistent with *prudent precautions against a known risk*. {*Gregory*-Lawyer}

b. *Specialists held to higher standard* - competence must be assessed in the light of average specialists, those with reasonable knowledge, competence, skill in that

particular field. {*Neuzen*-HIV}

c. Professional practices negligent if *fraught with obvious risks* - however, only if they are not outside of expertise of common person, involve no difficult or uncertain questions of scientific / technical nature. Complex questions outside of common understanding are not within purview of courts. {*Neuzen*-HIV}

d. *Courts deferential to professionals* - will not usually tell experts that they are not behaving appropriately in their own fields, attempt to resolve divergent opinions within fields. Contrast with treatment of statutory discretion. {*Neuzen*-HIV}

3. Causation

a. Definition - Plf. in negligence must also prove that the D.'s conduct was causally relevant in producing the harm complained of. Generally done via the *but for* test. {*Athey*-Hernia} Reflects that compensation only required where there is a substantial connection between tortious conduct and the harm that occurred. {*Resurfice*-Zamboni}

i. Precision in causation – not to be determined through scientific precision; it is a practical question of fact which is best answered through common sense. {*Athey*-Hernia}

ii. Multiple causes - Plf. need not prove that the D.'s negligence was the sole cause of the injury; there will often be other background events, both tortious and innocent. If D. is *part* of the cause, then D. is liable to the extent of the contribution. {*Athey*-Hernia}

b. Tests for causation

i. But for test

1. Definition - if, but for the negligence of the D., the Plf. would not be injured, then causation is established *prima facie*. {*Athey*-Hernia} Applicable in all circumstances, except for where impossible due to circular / dependency causation. {*Clements*-Load}

ii. Material contribution test

1. Definition – but for test unworkable in some circumstances, and so causation can be established where the D.'s negligence *materially contributed* to the occurrence of the injury; to materially contribute, must exceed *de minimis*. Must create risk, and harm must occur within that area of risk. {*Snell*-Eye}

a. Applicability – doesn't apply where there is merely more than one cause of injury - every litigated claim involves multiple potential causes. Applies only where (1) it is impossible for Plf. to prove causation using *but for* due to factors outside of the Plf.'s control (eg. limits of scientific knowledge), *and*, (2) D. created risk of

injury negligently, Plf.'s injury occurred within scope of that risk. {*Resurfice*-Zamboni}

2. *Requirements* - only relevant in cases of *circular causation* (impossible to show which of two parties caused harm, because equally likely that it was each) or *dependency causation* (impossible to establish what party would have done if other party had not acted negligently). Otherwise, causation is *but for.* {*Clements*-Load}

3. *Inferential causation* - where D. is one of the possible causes of injury, and evidence is inconclusive that any of the causes is probable or necessary. Flexible approach, Plf. adduces evidence which leads to drawing of inference adverse to D; absent contrary evidence, inference of causation can be drawn even absent positive or scientific proof of causation. This is the robust and pragmatic approach. {*Snell*-Eye}

4. *Onus of proof* - generally on party asserting a proposition to prove it; however, where the subject matter of the allegation lies greatly within the knowledge of one party, that party *may* be required to prove it. {*Snell*-Eye} In mat. cont., duty remains with the Plf {*Essex*-O2} unless *Cook v. Lewis* situation arises: D.'s both negligently fire at the Plf., who is harmed; D.'s tortiously destroy the means of proof at the Plf.'s disposal. Injury not caused by neutral conduct. {*Cook*-Shot}

5. *Policy rationale* - reason for allowing the expansion of causation beyond the but for test is that legitimate plaintiffs could be left uncompensated. As this spectre has now become real, modification of causation test is justified. {*Walker*-Blood}

iii. Causation re: failure to warn

1. *Medical failure to warn* - unlike other domains, medical causation proved on an *objective* basis - subjective would expose doctor's to bitterness and hindsight, causation always be established. Objective test susceptible to overvaluing medical evidence, therefore must also account for subjective factors in modification: special considerations particular to the patient, such as anticipation of maturation of pension. Such considerations must also be deemed reasonable to be considered causative. *But for* test applies presumptively. {*Reibl*-Pension}

    a. *Full recovery* - once causation established in medical failure to warn, the Plf. is entitled to full recovery. Not incumbent that Plf. prove would never have surgery, nor is this a question of risk or chance. There is no temporal limitation on damages, or reduction of damages to the gap period (between the period between actual and hypothetical dates of procedure). {*Martin*-Dance}

    b. *Protects right to choose* - informed consent doctrine reflects importance of choice on the part of patients. Law protects right of patient to choose, and for that choice to be meaningfully informed. Law should not protect only those for whom decisions are made easily; those who require time and deliberation must also be protected. Must protect regardless of whether they would have opted for

surgery if fully warned. {*Chester*-Back}

c. *Loss of a chance* - where causation is murky, Plf. can contend that the doctor's negligence deprived the Plf. of the chance to achieve a favourable result. So, shifts focus from whether the doctor's neg. caused the harm which materialized to whether the doctor's neg. deprived Plf. of oppo. to pursue other avenues. Approach not recognized by SCC. {*Laferriere*-LOC}

2. *Products liability* - not the same as medical failure to warn. Doctor has close, intimate relationship, allowing for discussion of pros and cons, understanding adapted to patient's needs and capacity. Deserving of objective standard. Manufacturer is a distant commercial entity with massive knowledge advantage, may accentuate value, underemphasize risk, don't need to tailor warnings to specific patients, ergo subjective standard - the *Buchan* test. {*Hollis*-Implant}

a. *Full disclosure* - manufacturer can escape all liability through providing full disclosure through warnings, desirable that they be incentivized to do so. Ergo, not undue burden to place on manufacturers. {*Hollis*-Implant}

3. *Learned intermediaries* - where learned intermediary is used to discharge duty of care with a view to warnings, the party relying (manufacturer) cannot assail causation by holding that the intermediary may not have passed on the warning one made aware of it. Where an intermediary is not warned, then the manufacturer has failed to discharge its duty to warn the consumer. {*Hollis*-Implant}

iv. Causation re: industrial / mass torts

1. *Apportionment of liability* - concerns situations where there are multiple defendants whose negligence occurred at different times, and Plf. subsequently suffered injury within scope of risk created by the Ds. Apportionment of liability, severally, on the basis of proportion of risk attributable to each defendant would temper rough justice of material contribution. Wouldn't be far to have full liability on basis of material contribution with multiple sources, would amount to holding that *but for* causation satisfied when merely replaced with legal fiction. {*Barker*-Industry}

4. <u>Remoteness</u>

a. *Definition* - determination of what damages will be compensable, once duty, breach, and causation have been approved. Benchmark is *reasonable foreseeability* - defendants will be responsible for compensating for damages which were foreseeable and probable consequences of their negligent acts. {*Wagon*-Oil}

b. *Type of damage is the key to reasonable foreseeability* - if the damage is of the type which would be reasonably foreseen, then the precise concatenation of circumstances leading up to the accident are irrelevant, as is the severity of damages. {*Hughes*-Manhole}

c. *Linkage foreseeability* - can bridge gulf between act and damage by breaking causal sequence into discrete steps, each of which is a foreseeable consequence of the proceeding step. {*Osborne*}

d. *General foreseeability sufficient* - sufficient if one can foresee in a general way the sort of thing that happened. When one fires a rifle down the street, the limits of reasonable provision are broad, not narrow. {*Hoffer*-Pipe} May be merely *possibility*, not probability required. {*Wagon2*-Oil}

e. Thin skull rule – for purposes of calculating damages, D. must take the Plf. as found; that is, even if injury is unexpectedly severe due to underlying conditions, must still compensate for full extent of harm. {*Bishop*-Club}

f. Crumbling skull rule - recognizes that preexisting condition inherent in the Plf.'s original position. The D. does not need to put Plf. in a *better* position than the original. Effectively, need not compensate for debilitating effects of preexisting condition which would have occurred anyways. Liable for new damage, not preexisting damage. {*Athey*-Hernia}

5. Intervening factors

a. Definition - weighs whether subsequent events or acts of parties other than the D. have caused or exacerbated the Plf.'s damage, such that the D. is no longer liable for that damage in whole or in part. {*Astor*-Grill}

i. Intervening factor cannot be the very thing guarded against - D. increased the problematic risk, which matured into a certainty. Negligence was in failing to take care to guard against the very outcome which came about. {*Stansbie*-Lock}

ii. Requirements - Damage is recoverable if, despite intervening negligence, person guilty of negligence should have anticipated the subsequent intervening negligence, which, in occurrence, could lead to loss or damage. Cannot be normal incident of the risk created by the D. - part of the ordinary course of things. Interference can be normal or negligent, but never foreseeable nor ordinary. {*Astor*-Grill}

b. Manufacturer / vendor liability

i. Definition - where products have design defects, the modification of those products after the fact will only constitute an intervening cause where this modification is not foreseeable by the manufacturer, does not arise out of the ordinary course of things. {*Inglis*-Prong} The act of a party which increases the risk created by a negligent act does not block the causal flow of that act. {*GoodWear*-Pash}

1. Duty to warn - knowing that warnings will be ignored and thus rendered nugatory, a manufacturer cannot rely on those warnings to exculpate one from liability to third parties, but only to the parties to whom the warnings have been given. arely would a seller know that a prospective buyer firmly intended to use a normal, safe

product in an unsafe way, dangerous to persons other than the buyer, persons who cannot be warned or otherwise protected. {*GoodWear*-Pash}

c. Medical errors as intervening acts

i. Definition - where one causes injury through negligence, and the Plf.'s injuries are aggravated through subsequent medical treatment, may be treated as intervening act. Focused on *foreseeability of error.* where intervening medical error may be considered within the range of risk created by negligence, then it is not an intervening act. This applies regardless of whether it was negligent. {Katzman}

1. Historical position - focused on the *nature of error*, medical complications and genuine errors are to be considered reasonably foreseeable consequences; negligent treatment is an intervening act which alleviates the original D. of resultant harm. No longer applicable. {Mercer}

6. Defences

a. General - lack of judicial support for defences, particularly the absolute defences of voluntary assumption of risk and illegal conduct. They are harsh, and therefore interpreted strictly, applied hesitantly.

i. Contributory negligence

1. Definition - arises where the Plf. is partly responsible for their injuries; partial defence, results in apportionment of damages between the Plf. and D via *Negligence Act*. {*Norman*-Mortgage}

ii. Voluntary assumption of risk

1. Definition - occurs where one has consented to the risk of injury resulting from D.'s negligence; complete defence, absolves all liability. Plf. must have agreed to (1) *physical risk of injury*, danger of being injured in fact, (2) *legal risk of injury*, waiver of right to seek compensation from D. should injury result, and (3) risk must have been obvious, and a necessary part of activity in question. Agreement can be express or implied. {*Crocker*-Ski}

iii.Illegality

1. Definition - ex turpi causa, action does not arise from a base cause. Compensation to those involved in illegal or immoral conduct will not be ordered by the court. This defence has been greatly limited in torts, esp. personal injury - applicable (1) to prevent person from profiting from illegal conduct or (2) where person seeks damages to avoid criminal penalty. {*Hall*}

7. Psychiatric harm

a. *General* - no problem in cases where psychiatric harm and physical harm co-occur. However, there are cases where person owes duty re: physical harm, but causes only psychiatric harm, or cases where person owes duty re: psychiatric harm; these are more problematic. Medical opinion posits *no difference between physical and psychiatric harm*. {*Devji*-Body}

b. *Requirements* - generally, accords with the *Anns / Kamloops* test, psychiatric harm (1) must be reasonably foreseeable, (2) must occur within the context of a sufficiently close relationship so as to establish a duty of care, and (3) must not be negated by any policy requirements - where controls become relevant. Psychiatric diagnoses are more uncertain, ergo judges wary re: compensation. {*Devji*-Body}

   i. *Temporal proximity* - shock must occur at time of accident or in immediate aftermath. Aftermath of the accident can be extended to the hospital immediately after the casualty. {*Devji*-Body}

   ii. *Relational proximity* - victim of shock must have close relationship with victim of actual harm; presumed in certain cases (spouse, for instance), others must be established through evidence. {*Devji*-Body}

   iii. *Locational proximity* - must have perceived shock directly, must not have merely been told by third party that shock occurred, for instance. {*Devji*-Body}

   iv. *Must accord with usual fortitude* - common experience demonstrates that the usual fortitude of our citizens protects against psychiatric injury, and therefore makes such injury reasonably foreseeably. Eggshell rule only applicable to the quantum of damages, and cannot be used to found liability. Alarming, horrifying, shocking, or frightening; *more* than misfortune, annoyance, sorrow, or grief. {*Devji*-Body}

      1. *Objective, not subjective consideration* - previous history, particular circumstances (including concern over cleanliness), and cultural factors (particular concern re: health and well being of family) are not relevant to considerations re: person of ordinary fortitude in position of Plf. {*Devji*-Body}

      2. *Strangers owe no special duty to the frail* - such susceptibility to psychiatric injury that it is unreasonable to expect strangers to have in contemplation the possibility of extreme harm - strangers cannot be expected to take care re: such harm. Extreme reactions are imaginable, but not reasonably foreseeable. {*Mustapha*-Fly}

      3. *Knowledge of special sensibilitie*s - where a party is aware of the particular sensibilities, the consequences of acting in a way which will upset those sensibilities would be clear to a reasonable person, and therefore an extreme reaction could be reasonably foreseeable. {*Mustapha*-Fly}

4. *Ordinary fortitude for liability, thin skull for damages* - ordinary fortitude rule is not to be mistaken with the thin skull rule: ordinary fortitude determines whether there was a duty to take care, and the thin skull rule deals with the quantum of damages owed where liability is established. {*Mustapha*-Fly}

8. Pure Economic Loss

a. *Definition* - while economic losses are always compensable where these occur as a result of negligent physical damage, this is not always the case where the Plf.'s economic interests have been harmed absent physical damage. Many such cases would also be actionable in the context of contract law, if there is such an agreement b/w parties. {*Winnipeg*-Condo}

b. *Types* {*Winnipeg*-Condo}

i. *Negligent misrepresentation*

1. *Definition* - where a party is called upon to give some information or advice, does so negligently, and causes economic damage to a relying third party. {*Hedley*-Credit}

a. *Negligent words are different from negligent acts* - Can give opinion in social situation without taking same care that would be taken in business situation, no duty of care. However, cannot negligently provide poisonous wine in social situation and expect there not to be a duty of care. Further, negligently made article will only cause one accident; negligent words can be repeated, relied on by unlimited class without consent of maker, leading to indeterminate liability. {*Hedley*-Credit}

b. *Duty of care* - normal duty of care considerations apply in negligent misrepresentation case, no reason to create *pocket* of such cases although they involve economic loss, not physical damage. (1) sufficient proximity so as to imply reasonable contemplation re: damage, (2) policy considerations present which negative liability. {*Hercules*-Audit}

i. *Proximity* - generally, the relationship between D. and Plf. such that D. under obligation to be mindful of Plf. in affairs. In negligent misrepresentation specifically (1) D. could or ought to foresee reliance of Plf., (2) Plf.'s reliance was reasonable under the circumstances. {*Hercules*-Audit}

1. *Indicators of reasonable reliance* - neither exhaustive nor determinative, (1) D. had direct financial interest in transaction in respect of which representation was made, (2) D. professional or someone with special skill, (3) advice provided in the course of D.'s business, (4) not provided during social situation, provided deliberately, (5) provided in response to specific request. {*Hercules*-Audit}, (6) presence of disclaimer. {*Norman*-

Mortgage}

2. *Contributory negligence not inconsistent with reasonable reliance* - former involves foreseeability of harm to oneself, must consider the possibility of others being reckless in this consideration. If allegation of contributory negligence is based on contention that Plf. acted unreasonably in relying on statement, then claim will already have been defeated by the time contributory negligence is considered. {*Norman*-Mortgage}

3. *Reliance not always required* - where D. has assumed responsibility for the accuracy of the information because of the harm which could be caused to the consumer if the contents are inaccurate. {*Haskett*-Equifax}

ii. Policy considerations - limitations due to breadth of liability: (1) D. must know the identity of Plf. or class of Plf.'s that will rely on statements, (2) harm must stem from transaction respecting which statement was made. These are policy reasons for which liability is limited, and not truly means for establishing proximity; they ensure that liability is not indeterminate. {*Hercules*-Audit}

1. *Auditor's liability could be indeterminate* - financial reports relied on many people for many reasons. Prepared by skilled professionals, almost always reasonable to rely - could lead to indeterminate liability. Deterrence of negligent conduct on part of auditors important, outweighed by consequences. Better to circumscribe duty of care than to hope that this is solved by evidentiary issues via litigation. {*Hercules*-Audit}

2. *Indeterminacy is a critical policy determination* - temporal, class, and liability. Timing of harm and liability not indefinite, as credit reports are prepared for specific purposes and acted upon accordingly. Class not unlimited where within knowledge and control of D., even if large. Quantum of damages may be high, but limited by nature of transaction. {*Haskett*-Equifax}

3. *Negligent misrepresentation w/o reliance not defamation* - this does not encroach on defamation; the latter action recognizes qualified privilege, and therefore inadequate remedies in circumstances such as these. Further, at issue is not general reputation in community, but specific facts relevant to credit history. {*Haskett*-Equifax}

4. *Statute does not exhaust liability* - while there are statutory means for dealing with the problem, this does not bar cause of action in damages. Alternative means may not be as beneficial or effective (because they do

not provide for punitive damages, for instance). Effectiveness of statutory measures can be a matter at trial, however. {*Haskett*-Equifax}

ii. Negligent performance of a service

1. *Definition* - where defendant negligently failed to provide a service, or provided defective service which they had undertaken to supply. Important is the *assumption of responsibility* by the performing party. {*BDC*-Courier}

    a. *Duty of care* - found in *Hedley Byrne* re: negligent provision of service, recognized also in Haskett, via *assumption of responsibility.* If no such claim recognized, then only person with a claim has suffered no loss (testator), and only person who has suffered loss has no claim (beneficiary). But, lawyer who draws will knows of import re: economic dependence, so *responsibility assumed*. {*Wilhelm*-Will}

    b. *Service can be gratuitous or for consideration* - if service provider *undertakes* to perform service, then it can be relied upon, ergo can be actionable for economic loss by third party. Applies regardless of whether service performed but negligently, or not performed at all. {*Osborne*}

    c. See generally: Hedley Byrne, negligent misrepresentation.

iii.Negligent supply of shoddy goods or structures

1. *Definition* - where manufacturer produces *dangerous* product, consumer may discover defect before it materializes into harm, and therefore may incur significant economic losses in remedying defect. {*Winnipeg*-Condo}

    a. *Prima facie duty of care* - recoverability for economic loss must be approached with reference to unique policy issues prevalent in each category of economic loss; determines the proper ambit of tort law; defines the duty of care for this tort. {*Winnipeg*-Condo}

        i. *Rejects complex structure theory* - this holds that damage to one part of structure caused by a hidden defect in another part of structure can be considered actionable as property damage (no need for economic loss). But, circumstances envisioned relate to positive malfunction (eg. explosion of boiler), not merely failure of component in sustaining other parts (as in this case). {*Winnipeg*-Condo}

        ii. *Real and substantial danger* - where builder has constructed defective building which poses a *real and substantial* danger, reasonable costs of putting building into non-dangerous state are recoverable in tort by *occupants.* Construction of large, permanent structure, has capacity to cause serious damage to other persons and property, will be occupied by

succession of tenants. {*Winnipeg*-Condo}

iii. *Contract not required* - contractor's duty to take reasonable care does not relate to special interests in contract with original owner, for instance to use high-grade building materials or special ornamentation. Only issues relating to *real and substantial danger* are actionable in tort. Merely shoddy or substandard work is also not sufficient to breach duty of care. {*Winnipeg*-Condo}

iv. *Incentivize beneficial behaviour* - want to incentivize plaintiffs to take action before defect causes injury to persons or property. Otherwise, Plf.'s who neglect defects benefit at law from costly and tragic consequences - encourages reckless behaviour. {*Winnipeg*-Condo}

v. *Cannot discard homes* - analogy to defective articles (which are thrown away so as to not cause harm) must fail due to nature of homes in our society. Choice to discard a home is no choice at all; represents long term investment, and so few owners will choose to abandon rather than repair or sell. {*Winnipeg*-Condo}

b. *Policy concerns which could negate duty of care (but don't)*

i. *Contracts already account for risk allocation* - complex in case of building agreements due to numerous parties involved in various aspects of the construction. But, tort duty concurrent with contract duty. Duty to construct building safely always separate from contract, since tort duty is not subject to contractual standards; where building is permanent, subject to occupation, etc., then must be built safely regardless of contract. {*Winnipeg*-Condo}

ii. *Interference with caveat emptor doctrine* – negligent provision of shoddy structures duty interferes with doctrine of caveat emptor. Caveat emptor does not serve as a shield to tort liability; this doctrine is offset by the knowledge advantage of the building constructor concerning the structural integrity, presence of latent defects, etc.

c. *Liability indeterminate in class, time, and quantim* – liability in class is limited to occupants; liability in amount is limited to the reasonable amount needed to remedy the defect; while this could be disproportionate to the cost of remedying, this is allowable due to the fact that it counters a real and substantial danger. Time is limited to useful life of the building; shorter than that, in fact, since as time progresses, construction defects will gradually become indistinguishable from the decay caused by age. {*Winnipeg*-Condo}

iv. Relational economic loss

1. *Definition* - defendant negligently damages property owned by third party, and in so doing, may cause plaintiff who relies on third party to suffer economically. {*Norsk*-Bridge}

    a. *Requirements* - (1) relational economic loss only recoverable in special circumstances with apt conditions, (2) circumstances defined by reference to categories which make the law predictable, (3) these categories are not closed, can be expanded through *Anns/Kamloops* analysis. {*BowValley*-Rig} (4) property of third party must actually have been damaged (not *merely* contract breach or economic loss). {*Design*-Tender}

    b. *Categories identified to date* - (1) cases where the claimant has a possessory or proprietary interest in damaged property, (2) general average cases where cargo owners and ship owners share risk of sea dangers, (3) where relationship between claimant and owner of property is a joint venture, and (4) transferred loss cases. Where case does not meet categories, must see if new category to be created on defensible policy grounds. {*BowValley*-Rig}

        i. *These categories are not types of economic loss themselves* - rather, examples of where there may be sufficient proximity / relationship / foreseeability to award damages in circumstances of relational economic loss. {*Design*-Tender}

2. *General rule against recovery for policy-based reasons relaxed* - (1) where the deterrent effect of potential liability to property owner is low, or (2) despite risk of indeterminate liability, where claimant's opportunity to allocate risk by contract is slight because of type of transaction *or* inequality of bargaining power. {*BowValley*-Rig}

    a. DG suggests that this could instead be an area of law which concerns itself with honourable dealings between parties, rather than one which is governed by policy-centric considerations regarding the duty of care.

3. *Foreseeability governs duty of care in duty to warn / relational economic loss* - where failure to warn is alleged, the issue is not reliance, as there is nothing to rely upon, but whether the D. ought to have reasonably foreseen that the Plf. might suffer loss as a result of the use of the product about which the warning should have been made. This is the mechanism through which liability can extend beyond owners *prima facie*. {*BowValley*-Rig}

    a. *Duty of care negatived for policy: indeterminate liability* - D. owes duty to warn Plf., so difficult to see why similar duty would not also be owed to a host of other parties that would foreseeably lose money if the rig was shut down as a result of damage. This is the spectre of indeterminate liability; could not cut off at any logical point, no reason to weigh one relationship as better than another.

{*BowValley*-Rig}

b. McLachlin's previous position had been based on relationships / proximity - {*Norsk*-Bridge}

i. Essence of proximity - must be connection b/w D.'s negligence and Plf.'s loss to make it just for D. to indemnify Plf. Cannot identify single criterion to this end; must view circumstances in which it has been found to determine whether matter at hand sufficiently similar. Concerning proximity, court must review all factors connecting the negligent act with the loss; not only relationship between parties, but all forms of proximity, including physical, circumstantial, causal, or assumed indicators of closeness. {*Norsk*-Bridge}

ii. Policy rationale - while physical damage valued more greatly at tort law than economic loss, no reason why it shouldn't be recompensed in many circumstances; for instance, one who invests in a bridge in order to use it cannot be distinguished from someone who leases a bridge in order to use it; therefore, should not both have claims? {*Norsk*-Bridge}

v. Independent liability of statutory public authorities

1. Definition - deals with government's unique power to convey discretionary benefits such as the power to enforce bylaws, inspect homes and roadways, etc. {*Design*-Tender} Economic nature of losses is contingent issue, and so poses no difficulty once the duty questions concerning the public authority are resolved - difficulties relate to statutory duty, not to economic loss, in other words. {*Feldthusen*}

a. Further inquiry required beyond DOC - once duty is established, must (1) review legislation to determine whether there are statutory obligations concerning maintenance, or exemptions relating to liability concerning maintenance. Must also (2) determine whether the decision was an exercise of policy, rather than operation, and therefore exempt from liability. {*Just*-Boulder}

i. Categorization of conduct as criminal or labour related artificial - for instance, deliberately ignoring safety regulations can constitute a crime. Fighting / theft / explosive use are all criminal matters, but can result from labour relations. Therefore, no categorization scheme will necessary meet all circumstances. {*Pinkertons*-Bomb}

b. Policy rationale - government is in a different business than any other actor in the state, as definitionally it is seen as acting in society's bests interests, and not its own. Therefore, the unique nature of government in our society is what entitles it to special consideration in context of private law duties. {DG}

c. Requirements for recoverability - (1) private law duty - for action to lie, must be a private law duty established by statute, alongside public duty / obligation, (2)

must not involve a policy decision or *bona fide* discretion, (3) must be the type of loss which the statute intended to guard against. {*Kamloops*-House}

2. *More operational activity, increasing likelihood of DOC* - Many operational duties or powers have within them some element of discretion. Can be said that the more operational the power or duty is, the easier it is to superimpose a common law duty of care on it. {*Kamloops*-House}

    a. *Generally will be at the second stage of Anns test that government action will be controlled.* {*Just*-Boulder}

    b. *Three issues concerning proximity* - (1) smaller, more clearly defined group than those at issue in *Cooper / Edwards;* in these cases, extended to public at large via clients of all lawyers / mortgage brokers (and not miners working at a specific mine), (2) miners have more direct and personal contact with inspector than stat. authorities have clients of lawyers / mortgage brokers, (3) stat. duties related directly to conduct of miners, rather than to clients. {*Pinkertons*-Bomb}

    c. *Duties at both public and private law* - public law duty to prevent the continuation of the construction of substandard building once aware of it; private law duty arose when actual damage occurred. {*Kamloops*-House}

    d. *Conflict between DOC to victim and DOC to public* - conflict does not negate a duty of care per se, unless novel duty proposed conflicts with an overarching public duty in a manner which could potentially create negative policy consequences. Both suspects and public have interest in seeing investigations undertaken reasonably, not unreasonably. {*Hall*-Police}

3. *Differentiation between policy and operation* - authorities are not under a duty of care concerning to decisions which involve or are dictated by financial, economic, social, or political factors / constraints. However, actions or inactions which are the product of administrative direction, expert / professional opinion, technical or standards of reasonableness. {*Just*-Boulder}

    a. *Policy can arise at any level of authority* - not policy merely because made by high level v. lower level of government. It is the nature of the decision and not the identity of the actors which is key. {*Just*-Boulder}

    b. *Implementation is not exempt from liability* - once a policy is established, it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion and to demonstrate that in all the circumstances (eg. budgetary restraints) that it is apt for court to make a finding concerning this exercise of power. {*Just*-Boulder}

4. *SOC of government lower / different than for individuals* - the duty of care owed by governments where not exempted from liability by statute or by virtue of its action

being a policy decision is the same as that owed by one individual to another. However, the standard of care is lower; if govn't can demonstrate that operational decisions *reasonable in light of*: budgetary limits, personnel, equipment available, all other circ. then it has met standard of care. {*Just*-Boulder}

a. *Nonfeasance / misfeasance irrelevant present statutory duty* - where there is a statutory duty to carry out some task, then in failure to perform that duty, the nonfeasance / misfeasance dichotomy is not relevant. {*Kamloops*-House}

b. *Exercise of discretion must be bona fide* - open to authorities to exercise discretion at both policy and operational levels. However, this must be a bona fide exercise of discretion. Not open to a public authority to not consider available course of actions; inaction for no reason or for an improper reason is *not bona fide*. {*Kamloops*-House}

    i. *Discretion relevant to SOC, not DOC* - discretion is taken into account in formulating the SOC; irrelevant to the DOC. Cannot say that it is unbound by requirements of reasonableness; courts will not second guess use of reasonable discretion, but will hold parties liable for unreasonable exercise of discretion. {*Hall*-Police}

c. *Concurrency with contract* - primacy of private ordering is the right of individuals to allocate for risk in different manner than would normally be done via tort. Tort duties only diminished in light of primacy of private ordering. Ergo, Plf. may sue in either contract or in tort, subject to any limit the parties themselves have placed on rights in contract, concerning waivers of liability or risk allocation. {*Checo*-Hydro}

    i. *Three situations concerning concurrency* - (1) where contract stipulates more stringent obligation than tort, Plf. will sue in contract (most commercial transactions), (2) where contract stipulates lower duty than tort, Plf. will only sue in tort to avoid limitation periods / gain other procedural advantages, (3) where duties are coextensive, Plf. will sue concurrently, or in tort for procedural advantages. {*Checo*-Hydro}

d. *New categories* - governed by *Cooper* analysis: reasonable foreseeability / proximity in the first branch of the *Cooper* analysis - consider expectations, representations, reliance, and the property or other interests involved. Beyond consideration as to whether the damage was foreseeable, these help determine whether it is fair and just to impose a legal duty of care. Second, consider policy considerations which may negative duty of care. {*Design*-Tender}

e. *Safeguards for erroneous damages* - Plf. must prove every element of the offence, including that the damaging outcome would not have occurred *but for* the D.'s negligence. Further, acquittal at trial is not necessarily conclusive proof of evidence in an ensuing civil trial. Finally, litigants always have the right of appeal; safeguards in place to ensure that claims can be pursued and evaluated, therefore no reason to deny claimants their right to have claim heard. {*Hall*-Police}

9. Cases

- *Donoghue v. Stevenson (HL 1932)*

    - Negligence is based on the general public notion that offenders must pay for moral wrongdoing. However, this notion cannot be extended legally, for practical reasons, to give a right to every injured person to demand relief / compensation.

    - One must take reasonable care to avoid acts / omissions which will cause reasonably foreseeable injury to one's neighbour, where one's neighbour is a person who would be so closely connected to one's actions that the consequences to that neighbour should be reasonably contemplated when one's actions are brought to mind.

    - Proximity is not mere physical proximity, but rather describes relationships where the actions of one party create consequences to the other which are known or should have been known by the acting party.

- *Home Office v. Dorset Yacht Co Ltd. (HL 1970)*

    - The categories of negligence were virtually closed until Donoghue. Now, steady trend towards eschewing categories altogether, applying general principles (proximity) instead.

    - Neighbour principle applies presumptively, unless rebutted through justification for exclusion; in this way, recognized as common law principle, not treated as statute.

    - Example of exclusion from principle would be the fact that a person has no obligation to assist another person in distress absent a further relationship between them.

    - Government agents must not perform statutory duties in a careless manner, leading to damage to the public which would have been avoided if acting carefully.

    - Would be an irrational distinction to provide protection (liability to wardens) from the behaviour of prisoners only to other prisoners, and not to the public at large.

    - While it can be said that liability for government activity would lead to curtailed, risk averse actions by the government, equating to worse government. However, HL holds that this US precedent should not apply; UK bureaucrats are made of sterner stuff.

- *Anns v. Merton London Borough Council (UKCA 1978)*

    - Statutory duties give rise to liability; statutory powers may or may not, depending on the manner of their exercise (bona v. mala fide exercise, latter is actionable).

- However, this is insufficient to tell the whole story concerning liability of public officials; with statutory power/discretion comes a duty to exercise that discretion in good faith.

- Sets out two part test for negligence liability. This test was overturned in the UK, but adopted in Canada in *Kamloops (City) v. Neilsen* (SCC 1984):

    - *Proximity* - must be a sufficiently close relationship between the parties, which gives rise to reasonable contemplation on the part of the tortfeasor, involving foreseeability of harm. Satisfaction of this branch leads to a prima facie duty of care, based on the requirements of *justness* and *fairness*.

        - Look for established category or analogous category. If so, then precedent establishes proximity itself; and in such circumstances, it is highly unlikely that second branch (ancillary policy) will be applicable.

    - *Ancillary* - court must consider ancillary factors which negative or limit the scope of duty, the class of persons to which it is owed, or appropriate damages.

        - Policy considerations unrelated to the parties themselves (which are in any case resolved in the first branch of the test), but rather with the legal system and society at large. Unlikely to apply w/ established categories.

- *Cooper v. Hobart (SCC 2001)*

    - The Anns test did not depart from the principle in Donoghue, but rather simply made explicit the policy component of the test.

    - Proximity for the purposes of the Anns test relates to the type of relationships in which the courts will recognize a duty of care. This is generally recognized through the use of existing categories (but not exclusively, and new categories can be created).

    - The principle required for creating a new category of relationship involves identification of a close and direct relationship; the act complained of directly affects a person whom the person allegedly owing a duty would know would be directly affected by actions.

    - *Justness and fairness* – in creating a new relationship, must take into account i) the *expectations* of the parties, ii) the *representations* which have been made, ii) any *reliance* which has been induced, and iv) the *nature* of interest that is threatened. Further, harm must yet be reasonably foreseeable in any case.

    - Proximity and foreseeability are separate concepts; they are not totally independent. Where a person is the *creator* of a risk of foreseeable harm, that person is in a proximate relationship with the potential victim, an established category since *Palsgraf*.

- This is DG's own take. Think of a Venn diagram in which this category of action represents the overlap between proximity and reasonable foreseeability.

- McLachlin seems to believe that there are categories where they do not overlap (eg. reasonably foreseeable that not helping a drowning person will cause them harm; however, not being the author of the risk, no sufficiently proximal relationship to impel one to action via duty).

    - By merely failing to negate a preexisting foreseeable risk, one is not in a proximate relationship unless it is just and fair to recognize it.

    - Where the interest is not personal injury or physical harm, the fact that it is reasonably foreseeable will not determine whether the relationship is proximate (eg. we will not infer a proximate relationship for economic loss, but only physical harm).

    - There may be a duty to inform people that an established norm will not be followed (eg. if a train gate operator does not show up to work)

    - There may be a proximate relationship established if one begins to swim out to save a drowning person, and then having a change of heart and swimming back to shore; you have changed that person's life by taking public responsibility for them (own the foreseeable harm by voluntarily entering the proximate relationship).

    - Proximity has been recognized in the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This relates to the word "injury" in Atkin's decision in Donoghue; you are not "injuring" someone where you let something harmful happen to someone; McLachlin's view was anticipated by Atkin.

- The second branch of the Anns test is not concerned with policy considerations re: parties, but rather with the legal system and society. For instance, does the law already provide a remedy? Would recognizing liability open floodgates re: unlimited liability?

    - i) Would recognizing constrain government policy, interfere with judicial or quasi judicial decision making? ii) Constrain commerce and economic activity? iii) *Indeterminate liability?*

- Government actors are not liable for policy decisions, but rather only operational decisions, in recognition of parliamentary supremacy. It is not for the Courts to second guess the policy decisions of a democratically elected government; this is the task of the public. Only the manner in which policy is executed creates governmental liability.

- The second branch of the Anns test generally applies only where there is not an established category of duty under the first branch; where there is a category, Court is

satisfied that there are no overriding policy considerations which preclude duty of care.

- Second branch of Anns will rarely arise, and questions of liability will generally be answered under first branch, with reference to established principles.

- ITC, no duty of care; there is no reason of justice or fairness between the parties to make the registrar of mortgage brokers liable to potential investors. The harm caused may have been reasonably foreseeable; however, the relationship is not sufficiently proximate (not an established category, and type of harm is economic, not physical).

    - Further, McLachlin held that there were significant issues concerning the second branch of the test - holding the government liable for economic loss which occurs as a result of the actions of government agents.

– *Bolton v. Stone (HL 1951)*

- Facts

    - Members of cricket club, established for ninety years. Batsman hits ball out of bounds, something which had happened only six times previously, injures neighbour.

- Issue

    - Is an action negligent where it could *possibly* cause injury, or must it *probably* cause injury?

- Rule

    - The standard of care in negligence is the standard of an ordinary careful man. This person does not take precautions against every foreseeable risk.

- Principles

    - Porter

        - For liability to fall, requires not only that injury be foreseeable, but there must be sufficient probability that a reasonable person would anticipate it.

        - Would not exonerate the cricketers if they have considered the matter, decided that the risks were small, and therefore little needed to be done.

    - Normand

- Precautions do not need to be taken against every peril which can be foreseen by the overly cautious. Must foresee probability, not mere possibility for there to be a standard of care concerning a given risk.

- Oaksey

- The standard of care in negligence is the standard of an ordinary careful man. This person does not take precautions against every foreseeable risk.

- Reid

- In modern life, careful persons cannot avoid creating some risks. They must not create substantial risks, however.

- Would a reasonable person have taken steps to avert a given peril, given its degree of risk? If so, what steps would have been taken? This is the measure of the standard of care.

- The degree of difficulty of remedial measures is not important. If an activity cannot be engaged without substantial risk because remedial measures are impossible or infeasible, then that activity must not be engaged.

- *Paris v. Stepney Borough Council (HL 1951)*

- Facts

- Plf. worked as fitter, and had use of only one eye. While working, chip of metal damaged his other eye. D. did not provide goggles for Plf.

- Issue

- Given the seriousness of the harm to the Plf. in consideration of his existing infirmity, what was the standard of care owed by the D. in view of safety equipment?

- Rule

- Given seriousness and likelihood of injury, D. should have provided safety goggles, breached standard of care in failing to do so, ergo liable.

- Principles

- Two factors in considering a risk re: standard of care - seriousness of the injury risked, and the likelihood of the injury risked.

- While usual practice was not for employers to provide goggles, this does not apply considering the seriousness of the risk to a one-eyed Plf.

- *Rentway Canada Ltd. v. Laidlaw Transport (ONCA 1989)*

  - Facts

    - Collision between tractor trailers leading to two deaths. Traced to defect in manufacturing, where single circuit used for both headlights. Short circuit from high-speed blowout caused truck to lose both lights, thus leading to accident.

  - Issue

    - What is the standard of care owed by a tractor trailer manufacturer to highway users? Does this require that manufacturer use individual circuit for each headlight?

  - Rule

    - Design was defective, but this did not, on BOP, cause or contribute to the accident.

  - Principles

    - Risk utility analysis is used in defective design cases, involves assessment of the decisions made by manufacturers concerning the design of their products.

    - Question in risk utility is whether the manufacturer made quality, socially acceptable decisions and thereby developed a reasonably safe product.

    - Defectiveness of the product in question is determined relative to safer alternatives, the fact that risk could be diminished cheaply / easily is relevant.

- *Watt v. Hertfordshire* (UKCA 1954)

  - Facts

    - Heavy jack loaded onto truck by fireman attending to emergency. While driving, jack shifts and injures fireman.

  - Issue

    - What is the standard of care owed by the fire chief to the fireman? Would further precautions need to be taken in such an emergency situation?

- Rule

    - Consequences of not having firemen attend to emergency situations quickly outweigh the risks assumed as a result.

- Principles

    - Employers must take reasonable care to provide proper equipment, maintained in acceptable conditions so as not to subject employees to unnecessary risk.

    - Standard of care is what is reasonably demanded by the circumstances; for instance, while train accidents could be all but extinguished through limiting speeds to 5kmph, not reasonable to do so.

    - The purpose to be served, if sufficiently important, justifies the assumption of the risk. Profit making is not the same as saving humans; must balance risk against the end.

- *Warren v. Camrose* (ABCA, 1989)

    - Facts

        - Plf. suffered injuries when diving into municipal swimming pool.

    - Issue

        - D. negligent for failing to warn of danger of such a dive?

    - Rule

        - No. Not part of common practice to warn in such circumstances, expert evidence not unreasonable to omit warnings, therefore liability cannot fall on D.

    - Principles

        - Cannot advise of every risk, and rigid/blanket rules have negative or no results on activities. Experts disagree with stricter view.

        - Consensus of experts on what is reasonable or safe, standard practices of an industry does not bind the courts re: standard of care. Can in fact form a substantive defence.

        - Where plaintiff can show that other precautions were feasible, but these were not commonly used by profession / trade, then liability will only be found where the omission of such measures is very unreasonable.

- *Waldick v. Malcolm* (SCC 1991)

    - Facts

        - Plf. injured after fall in parking area of farmhouse; had not been sanded / salted; D. claims that few people did so, therefore not responsible to do so.

    - Issue

        - Was the D. obligated to sand/salt icy parking areas, or did the fact that this was not a custom adhered to in the region mean that D.'s relieved of SOC?

    - Rule

        - Custom not to salt unreasonable, negligent, therefore cannot be relied on to excuse the D. of liability.

    - Principle

        - Customary practices can provide a fairly precise standard of care to facilitate the court's task of deciding what is reasonable in the circumstances.

        - Where custom alleged (in the negative to explain omission by the D., or in the positive to explain commission by the Plf.), onus of proof is on the party claiming the custom is in effect. Judicial notice should not be taken of custom.

        - *Custom must not be negligent* - existence of custom is not decisive, as must be reasonable; negligent conduct cannot be countenanced, even when committed by a large group continually. No amount of community compliance renders an unreasonable act reasonable.

- *Brown v. Rolls Royce* (HL 1960)

    - Facts

        - Plf.'s hands constantly exposed to oil while working for D. Contracted dermatitis. Others in industry provided barrier cream. Disagreement in medicine re: efficacy of cream on dermatitis. D.'s medical officer advises against.

    - Issue

        - Does departure from custom constitute a breach of the standard of care where the custom may not be reasonable, and adherence may not have avoided harm?

    - Rule

- Plf. must prove on BOP that the custom existed; thereafter, must also show that custom was reasonable / departure unreasonable to ground claim in negligence.

- Principles

- Where Plf. bases claim on departure from custom, onus on Plf. to show that adherence to the custom was reasonable for SOC to have been breached.

- Where the D.'s do not adhere to a custom, there is a prima facie case for negligence. However, this must be proved by the Plf. No onus on D. to disprove.

- *Canada v. Saskatchewan Wheat Pool* (SCC 1983)

- Facts

- Plf. recover damages from D. for delivery of grain ingested with beetle larvae.

- Issue

- Do civil causes of action arise where a party has breached statutory duties?

- Rule

- Yes, but only within the law of negligence; breach of statutory duty is evidence of a breach of the standard of care, but not determinative.

- Principles

- General agreement that the breach of a statutory provision which causes damage should be compensable. Multiple approaches available; using statutory standard as evidence of SOC, or alternately, creation of nominate tort of stat. breach.

- Breach of statutory provision is evidence, prima facie, of a breach of a duty of care - accords with legislative intent, avoids application of criminal conduct to civil cases. Therefore, should be considered within law of negligence.

- Industrial legislation has special consideration, as such statutes recognize absolute liability, which should not be extended to other domains.

- Absolute liability does not accord with tort law; fault in tort law justifies taking money from guilty party, and recompensing harmed party. There is no fault in breach of statutory duty re: absolute liability.

- Legislature has already defined penalties for parties breaching statutory duties; to determine whether legislative intent implies more, must look to statute, see if

expression in law implies that this is desirable.

- *Gorris v. Scott* (UKEX 1874)

    - Facts

        - Sheep washed overboard on ship. Plf. sues, alleging that D. violated sanitary statute re: holding pens, and thereby caused loss of animals.

    - Issue

        - Can an action based on a statute passed for sanitary purposes succeed in compensating plaintiff for loss of sheep through washing overboard?

    - Rule

        - Action cannot be maintained; purpose of statute to prevent disease, not animals washing overboard.

    - Principles

        - Statutory breach only informs the standard of care where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to protect.

        - Statute enacted to prevent spread of disease among animals does not evidence standard of care for where animals washed overboard from ship.

- *Ryan v. Victoria* (SCC 1999)

    - Facts

        - Plf. injured when thrown from motorcycle; tire trapped in flangeway gap on streetcar tracks. D. denied liability, as flangeway gap authorized by statute.

    - Issue

        - If a statute imposes a discretionary range, can the government rely on compliance with that statute to show standard of care had been met?

    - Rule

        - Not in all circumstances; where there is discretion, this must be exercised in accordance with what a reasonable person would do, and further, statute must be *clearly applicable* to the circumstances at hand.

- Principles

    - Mere compliance with a statute does not preclude civil liability. Can be highly relevant, and can render reasonable acts which would otherwise be negligent. However, such standards do not ouster standard of reasonableness required.

    - Ordinary case, compliance with the statute satisfies the standard of care. Exceptional case, statutory standard deemed insufficient, D. must go further to discharge duty to the Plf.

    - Where a statute is general, permits discretion, or where unusual circumstances exist which are not within the scope of the statute, mere compliance with the statute does not exhaust the standard of care.

    - Where a party is specifically authorized to create a risk, compliance with that authority cannot be negligent. However, it can become negligent if in performance, the party creates an objectively unreasonable risk.

    - Where authorities are not directly applicable to the circumstances, and allow for significant discretion in the manner of performance, they do not exhaust the duty of care. Range of discretion might not be reasonable in all circumstances, and so there is a duty to exercise discretion reasonably.

    - Common law standard of care, reasonable person, applies presumptively to all circumstances. However, can be supplanted by statutory standard where this is *clearly applicable*; must not be special or exceptional in any sense.

- *Brenner et al. v. Gregory et al.* (ONSC, 1973)

    - Facts

        - Plf. purchased lots, engaged D. lawyer who was negligent concerning the transaction to the detriment of Plf.

    - Issue

        - What is the standard of care appropriate to a lawyer?

    - Rule

        - Average professional. Expert evidence indicated that D. acted as a prudent professional, therefore no negligence.

    - Principles

- Expert evidence indicates that a reasonably competent and diligent solicitor in that region, acting in that capacity, would not be expected to undertake certain steps during transaction, and therefore omission to do so is not negligence.

- Professional standards requires more than an error of judgment or knowledge; must be an error that would not have been made by ordinarily competent professional - unless this standard is inconsistent with prudent precautions against a known risk.

- *Folland v. Reardon* (ONCA 2005)

  - Lawyers held to the same standards as other professionals, that of reasonable actions within scope of member of group of average skill.

- *ter Neuzen v. Korn* (SCC 1995)

  - Facts

    - Doctor performs artificial insemination which led to patient contracting HIV. Doctor conformed with skill of reasonably competent doctor in procedure.

  - Issue

    - Notwithstanding that doctor performed procedure in conformity with skill of reasonably competent doctor, does an action lie in negligence?

  - Rule

    - No negligence, as practice not fraught with obvious risks; was common practice at the time, therefore, doctor discharged SOC

  - Principles

    - In case of specialists, such as gynaecologists, obstetricians, surgeons, doctor's competence must be assessed in the light of average specialists, those with reasonable knowledge, competence, skill in that particular field.

    - Courts must be wary of perfect knowledge afforded by hindsight, cannot hold doctors accountable for mistakes apparent only ex post facto.

      - Not reasonable to expect that a specialist in the doctor's field could have known of the risk, acted otherwise than what was done to avoid it.

    - Courts deferential to experts in professional standards; will not tell experts that they are not behaving appropriately in their own fields. Different treatment than

statutory standards, where party acting within discretion may yet not meet SOC.

- Courts will not settle scientific disputes or choose between divergent opinions; will only find fault where there is a violation of universally accepted rules of medicine; will not be involved with treatment preference.

- Medical practices may be condemned as negligent if *fraught with obvious risks*, if they are not outside of expertise of common person because they involve no difficult or uncertain questions of scientific / technical nature. However, complex questions outside of common understanding are not within purview of courts.

    - Negligently leaving sponges inside body of patient while performing surgery; does not require expertise to know that sponges should be counted.

- *Vaughan v. Menlove* (UKCP 1837)

    - Facts

        - D. built hayrick next to neighbour's cottages, which led to discussions re: fire. Built chimney through rick, and/but fire started, destroying Plf.'s cottages.

    - Issue

        - Is the D. required to meet the reasonable person SOC, or rather is it merely necessary that the D. act honestly, bona fide, and to best of own judgment?

    - Rule

        - Must meet reasonable care of prudent man.

    - Principles

        - Liability for negligence is not coextensive for the judgment of each individual, but rather, all people are held to the standard of caution exhibited by average person of reasonable prudence.

- *Heisler et al. v. Moke et al.* (ONSC 1971)

    - Facts

        - Not reviewed.

    - Issue

- Negligence on the part of an infant child causing an injury?

- Rule

- Could not have foreseen consequences.

- Principle

- *Capability of children to be found negligent* - must consider age, intelligence, experience, knowledge, and alertness to determine whether child *capable* of being found negligent. Subjective test; while age seven common, not absolute. If so, then consider conduct against SOC re: reasonable child of that age.

- *Pope v. RGC Management Inc.* (ABQB 2002)

- Facts
- Plf. struck in the face by golf ball hit by 12-year old assigned to golf with Plf. and her husband by course management.

- Issue

- What is the apt test concerning SOC to apply to a child engaged in an adult activity, such as golf?

- Rule

- D. not negligent on reasonable child standard *or* reasonable adult standard; however, court concluded that reasonable adult standard applicable in adult activities.

- Principles

- Where given the rights of adulthood, the responsibilities of maturity must follow those rights. Therefore, no privileges in adult activities, must exhibit standard of care expected of reasonable person. This is because community legitimately expects more of youth when engaged in such activities.

- *Nespolon v. Alford et al.* (ONCA 1998)

- Facts

- Underage child becomes drunk; D. (underage friends) drop him in front of house of acquaintance. Falls out of vehicle. D. return several times to check on child., final time to learn that he wandered into road, was struck by vehicle. Suit by person who struck and killed child.

- Issue
    - In caring for their drunk friend, where the D.'s involved in an adult activity, and therefore subject to an adult SOC? Did dropping off friend in front of acquaintance home discharge applicable SOC?
- Rule
    - Activity not adult, therefore juvenile SOC applies.
- Principles
    - Activity engaged by the D.'s characterized as dropping off a friend, not an adult activity, therefore not capable of drawing forth the adult SOC.
        - However, could also be characterized as "caring for intoxicated person", an inherently adult activity.
        - Judge also holds that, subjectively, D. had no experience with drinking, and therefore could not have known how to deal with their friend, or what the consequences of failing to do so properly would be.
- Dissent
    - While D. had no experience with drinking, the serious effect of what their friend had consumed was obvious. Understood obligation to take friend home, so this implies the gravity of consequences apprehended by the D.
    - Further, they returned to check on him multiple times, also indicating knowledge of circumstance. Generationally have extensive information concerning substance use.

- *Fiala v. Cechmanek* (ABCA 2001)
    - Facts
        - Man suffers severe manic episode; attacks stopped vehicle operated by D., which accelerates to escape and rear ends Plf., who sues for damages.
    - Issue
        - What is the standard of care owed by someone suffering from mental illness?
    - Rule

- Applies new test concerning SOC for those suffering from mental illness.

- Principle

    - Bipolar disorder impairs almost completely the ability to deal with issues of rightness or wrongness which intersect with emotionality; however, has almost no effect on ability to discern right from wrong where emotionality not involved.

    - Not accountable where unable to will oneself to act differently; where control is completely dependent on external factors (such as presence of emotionality), then one can be said to have no control. This vitiates liability. However, some argue that given compensatory nature of torts, no lower standard applicable.

    - Two views concerning the nature of liability of the mentally ill in negligence:

        - Persons suffering from mental illness not required to comply with reasonable person standard, as it is unfair to hold people liable for accidents which they cannot avoid. There is no mercy for the intellectually deficient, or those who have voluntarily clouded their minds through substance use.

        - Where two innocent persons involved in an accident, the party which caused the accident should be liable. Further, unlike youth or physical disability, mental illness susceptible to feigning illness. Some argue that this would encourage caregivers to to take precautions. Could also potentially erode reasonable person standard.

            - Weak; absent fault, there would be strict liability. Negligence law is about wrongdoing, not mere loss distribution. To sacrifice the former to serve the latter would compromise the legal process. Increased medical understanding has considerably reduced the risk of feigning; would have no effect on caregivers (have no incentive / disincentive); finally, considering children / physically disabled has not undermined reasonable person standard.

            - Cannot expect mentally disabled to cope with distribution of loss; dislocative theory would recommend that the mentally ill retain their own resources for use in their own care. Further, recognition of nuance in mental illness could benefit society by promoting understanding of the nature of this affliction.

    - *Old test* - if severe mental disorder has manifestly incapacitated defendant from complying with the reasonable person standard, the injury was produced by an unavoidable accident, then the defendant should be absolved from responsibility.

- Liability will attach only to those who fail to conform, but were capable of so conforming; combination of objective standard with individual capacity considerations. If strict liability to the mentally ill, the legislature must do this.

- *Modern test, from contributory negligence* - due to disability, D. could not appreciate consequences or risks, or could not comprehend circumstances in which action was undertaken, or lacked capacity to act differently; thus could not conform conduct to standard required. Onus on D. to prove this BOP.

- *Test applied by ABCA* - as a result of mental illness, D. had no capacity to understand or appreciate the duty of care owed at the relevant time, or, as a result of mental illness, D. was unable to discharge duty of care as had no meaningful control over actions at the time the conduct fell below the SOC.

- *Athey v. Leonati* (SCC 1996)

- Facts

- Plf. suffers back injuries in car accidents; thereafter, stretches back during exercise leading to disc herniation.

- Issue

- Can loss be apportioned between tortious and non-tortious causes?

- Rule

- Yes.

- Principles

- But for test unworkable in some circumstances, and so sometimes causation can be established where the D.'s negligence *materially contributed* to the occurrence of the injury; to materially contribute, must exceed *de minimis* (must not be insignificant, a la throwing a match into a raging bonfire).

- Causation is not to be determined through scientific precision; it is a practical question of fact which is best answered through common sense.

- Plf. need not prove that the D.'s negligence was the sole cause of the injury; there will often be other background events; consider that a fire ignited in a wastepaper basket caused by lighted match, presence of oxygen, failure of cleaner to empty basket, etc. If D. is *part* of the cause, then D. is liable.

- Thin skull rule makes tortfeasor liable for Plf.'s injuries even if they are unexpectedly severe owing to a preexisting condition.

- Crumbling skull rule - recognizes that preexisting condition inherent in the Plf.'s original position. The D. does not need to put Plf. in a *better* position than the original. Effectively, need not compensate for debilitating effects of preexisting condition which would have occurred anyways. Liable for new damage, not preexisting damage.

- *Snell v. Farrell* (SCC 1990)

  - Facts

    - Plf. undergoes ophthalmologic surgery, which is completed by surgeon in spite of discovery that surgery should be discontinued due to patient's condition. This may or may not have caused haemorrhage in optic nerve; could also have been caused by stroke. Experts unable to determine cause of condition with certainty.

  - Issue

    - What is the proper test for causation in this circumstance, where the but for test appears unworkable?

  - Rule

    - Material contribution test; leads to drawing of inference, absent evidence to the contrary, that the D.'s conduct materially contributed to the Plf.'s harm.

  - Principles

    - Concern that due to complexities of proving causation, probable victims of tort are deprived of relief, particularly where Plf. victim of combined conduct of multiple defendants but cannot prove causation BOP against any on *but for*.

    - Onus is on party asserting a proposition to prove it; however, where the subject matter of the allegation lies greatly within the knowledge of one party, that party *may* be required to prove it.

    - Reversal of the burden of proof is only justified in a *Cook v. Lewis* situation: D.'s both negligently fire at the Plf., who is struck and harmed; D.'s thereafter, through tortious conduct, destroy the means of proof at the Plf.'s disposal. Injury was not caused by neutral conduct. Not the same as present cases.

    - Causation should not be applied too rigidly, as flexibility by the courts will allow existing principles to deal with hard cases. This means that strict causation not

necessary, nor is shifting burden of proof.

- Flexible causation approach, plaintiff can adduce evidence which leads to drawing of inference which is adverse to the D; absent evidence to the contrary adduced by the D., inference of causation can be drawn even absent positive or scientific proof of causation. This is the robust and pragmatic approach.

- *McGhee v. National Coal Board* (HL 1973)

    - Facts

        - Plf. contracts dermatitis from abrasive dust; employer offered no washing facilities on site. Impossible to determine whether dermatitis was from *tortious* exposure (due to lack of shower) or non-tortious exposure, ergo, cannot prove causation.

    - Issue

        - As the Plf. cannot prove causation on a but for basis, does claim fail on causation?

    - Rule

        - Claim succeeds, due to inferential causation.

    - Principles

        - Court can draw legitimate inference of fact that the D.'s negligence had materially contributed to the Plf.'s injury.

        - Where there has been a breach of a duty of care creating a risk, and injury occurs within that area of risk, the loss should be born by the creator unless that person can prove that it had some other cause. Thus, inference of material contribution to *risk* of harm same as inference of material contribution to harm *itself*.

- *Wilshire v. Essex* (HL 1998)

    - Facts

        - Plf. sues health authority for negligent treatment; likely cause, but not definite, was too much oxygen, but not determinative.

    - Issue

        - Does the Plf.'s claim fail due to inability to prove causation via *but for* test?

- Rule

    - New trial, due to improper onus.

- Principles

    - Onus of proving causation lies with the plaintiff, not with the defendant. Only the legislature can change the law requiring proof of fault for liability in negligence.

    - The decision in McGhee was based on inferential reasoning concerning the material contribution of the D.'s negligent conduct to the Plf.'s harm. This is acceptable, according with a robust and pragmatic approach.

- *Cook v. Lewis* (SCC 1951)

    - Facts

        - Plf. negligently shot at simultaneously, negligently, by two D.s. Unclear which bullet struck and injured Plf.

    - Issue

        - As Plf. cannot prove BOP which D.s bullet caused his injury, does his action against each fail?

    - Rule

        - No, action succeeds; shifts burden to D.s due to their conduct, and as neither can disprove liability, both are liable.

    - Principles

        - D.s negligently created risk, and made it impossible to prove that the harm which resulted was a result of their contact; thereby has violated victim's bodily integrity and remedial right of establishing liability. As a result, onus shifts to D.'s to exculpate themselves from liability.

- *B.M. v. British Columbia Attorney General* (BCCA 2004)

    - Facts

        - RCMP fail to investigate complaint of domestic abuse; the subject of that complaint, RK, later kills Plf.'s friend, wounds daughter, kills self. Action is for mental injury caused by psychological shock. RK may have acted no differently even had the police responded appropriately, as did not know that RCMP were

not investigating. Plf. knew RCMP were not investigating, so security not compromised. Therefore, claim for causation must rely on idea that RCMP did not *lessen* risk of harm, thus materially contributing to the harm.

- Issue

    - Is there causation to be found between the RCMP's failure to investigate and the harm suffered by the Plf.?

- Rule

    - No causality can be found.

- Principles (Hall)

    - No interventions previously had been able to deter RK from continuing violence (even incarceration). Therefore, absent deportation or permanent incarceration, posted a continuing risk of harm to do persons with whom he had contact.

        - One would think that this is an argument which accords with Donald's position, eg. that the police should have intervened, because this is the means through which RK's harm could be averted.

- Principles (Smith)

    - Material contribution test not applicable here, as scientific proof of causality is not impossible. Causation is always a matter of inference, as it is never susceptible to direct proof. Therefore, lack of direct proof does not mean that there should be deference to the material contribution test.

    - Even applying robust factual inference, can it be said that the police's nonfeasance materially contributed to the harm beyond de minimis? No.

- Dissent (Donald)

    - Where direct proof of causation is impossible, considerations of fairness and justice may require relaxation of conventional requirements for causation.

    - Argument from policy, holds that the right to police protection so desirable that causal linkage must be sufficient to ground liability. For instance, victims of spousal abuse would not have enforceable claims, although significant harm.

    - Necessary to speculate about what might have happened; not reasonable to find on evidence that apt response by the D. would have been futile. Violent behaviour / risk of harm as a result was reasonably foreseeable; therefore. the

police had a duty to reduce in a material way the risk of future violence.

- *Inferential causation* - where breach has occurred, damage arisen within the area of risk which brought the duty into being, and breach increased materially risk of that type of damage, where impossible to establish that the D. *caused* the loss (or not), then permissible to infer.

- Between an innocent Plf. and a D. who committed a breach of duty and materially increased the risk of harm, where impossible to prove that the breach caused the harm, causation must be approached with common sense: D. liable.

- Above formulations deal with *increasing risk*, whereas in the present matter the D. merely failed to *reduce* the risk. Dealt with through *Swanson*: where multiple forces contribute to an accident, the test is modified; if a person's negligence substantially contributed, then it is also cause of the accident. Therefore possible to *cause* an accident by acting with others or in failing to prevent it.

- *Resurfice Corp v. Hanke* (SCC 2007)

  - Facts

    - Plf. mistakenly causes ice resurfacing machine to explode, sues manufacturer for negligence, alleging design defects.

  - Issue

    - What test is appropriate?

  - Rule

    - But for, save for very specific circumstances.

  - Principles

    - The material contribution test does not apply where there is merely more than one cause of injury, as this would do away with the but for test altogether, because every litigated claim involves multiple potential causes.

    - Basic test for determining causation remains the but for test. Reflects that compensation only required where there is a substantial connection between tortious conduct and the harm that occurred.

    - The but for test applies to injuries with multiple causes, where damages will be apportioned between D.s and causes in accordance with their liability.

- Material contribution applies where it is impossible for the Plf. to prove causation using the but for test due to factors outside of the Plf.'s control (eg. limits of scientific knowledge), *and*, D. created risk of injury negligently, Plf.'s injury occurred within scope of that risk.

- Two situations where material contribution applies, as examples. First, Cook. v. Lewis, impossible to say which of two tortious sources caused injury. Second, where it is impossible to prove what someone in the causal chain would have done had the D. not committed negligent act (eg. wouldn't know what HIV+ blood donor would have done if screened properly).

- *Walker Estate v. York Finch General Hospital* (SCC 2001)

  - Facts

    - Plf. contracted HIV from blood collected by D. Can't prove that had the collection staff met the standard of care, that the donor wouldn't still have donated blood.

  - Issue

    - Is there causation where cannot prove that, but for D.'s negligence, donor would not have donated?

  - Rule

    - In present matter, even but for application sufficient to ground causation. However, material contribution proper test in such circumstances.

  - Principles

    - Impossibility of knowing how donors would have acted means that the but for test could operate unfairly, leaving legitimate plaintiffs uncompensated. Therefore, in such cases the material contribution test must apply.

- *Clements v. Clements* (BCCA 2010) - on appeal to SCC.

  - Facts

    - Overloaded motorcycle, hits nail, later blows out tire while passing, was speeding, swerves uncontrollably, injures Plf. and husband (D., driver). Cannot say that *but for* the negligence of the driver in speeding/overloading that the crash still would have occurred; science unable to answer at what level of speed and what level of load the blowout would have been recoverable.

- Issue

    - What test of causation applies in this circumstance?

- Rule

    - But for; the material contribution test applies only in circular causation / dependency causation.

- Principles

    - Material contribution test does not provide a framework for finding factual causation, but rather substitutes legal causation; policy-driven rule of law, permitting jump of evidentiary gap where denial of liability would offend justice and fairness. Only applicable in exceptional circumstances.

    - Material contribution only relevant in cases of *circular causation* (impossible to show which of two parties caused harm, because equally likely that it was each) or *dependency causation* (impossible to establish what party would have done if other party had not acted negligently). Otherwise, causation is *but for*.

- *Reibl v. Hughes* (SCC 1980)

    - Facts

        - Surgeon does not warn of risk of stroke regarding procedure; stroke occurs. While reasonable person probably would have undergone surgery anyways, Plf.'s pension was about to mature, but now not eligible due to injury. Therefore, Plf. alleges that reasonable person, warned of all risks, would have delayed procedure.

    - Issue

        - While surgeon's lack of warning did not cause Plf. do undergo surgery which would have been unreasonable, is surgeon liable because lack of warning caused Plf. to undergo reasonable procedure at unreasonable time?

    - Rule

        - Reasonable person in the Plf.'s circumstances would have opted to have surgery at a later date if properly warned, ergo causation established.

    - Principles

        - Where negligence alleged in medical practice, causation is proved on an objective, not subjective basis. The latter would expose doctor's to bitterness and hindsight, causation would be established in 100% of litigated claims:

undesirable.

- Objective test susceptible to overvaluing medical evidence, therefore must also account for subjective factors in modification: special considerations particular to the patient, such as anticipation of maturation of pension. However, such considerations must also be deemed reasonable to be considered causative.

- *Brito v. Woolley* (BCCA 2003)

  - Facts

    - Infant suffers brain damage during birth, could have been avoided through caesarian section rather than vaginal delivery. Mother sues on basis that she was not warned of benefits of c-section, would have opted for it had she known.

  - Issue

    - Would a reasonable person in the circumstances of the mother have opted for a c-section had she been told of its benefits?

  - Rule
    - Plf. would not have opted for a c-section had she been properly informed (although the test is actually whether a *reasonable person* would have, but still)

  - Principles

    - Reasonable person in the circumstances of the D. would not have opted for a caesarian section instead of a vaginal delivery.

    - D. is a very loving and intelligent woman (odd descriptors, since the average / reasonable person isn't "very" anything, except for "very reasonable") - ergo, would have selected whatever delivery mode best for children; evidence would indicate that vaginal delivery was best at the time.

    - D. trusted her doctor, would have received same opinion had sought second opinions from experts, and professionals defer to other professionals (no they don't - this judge is insane).

- *Hollis v. Dow Corning Corp* (SCC 1995)

  - Facts

    - Plf. undergoes breast implantation surgery at suggestion of her doctor. Implants made by D., who was aware of a small risk of unexplained rupture. Did not warn Plf. or her doctor of this risk, which came to fruition.

- Issue

    - Would a reasonable person in Plf.'s situation still have undergone the surgery had she been warned of the risk of unexplained rupture?

- Rule

    - No; test modified by circumstance shows that surgery elective, occurred at the urging of her family doctor (not sought by Plf.), and risk of rupture incompatible with Plf.'s lifestyle (eg. cooking classes).

- Principles

    - Products liability cases are not the same as medical failure to warn cases. Doctor has close, intimate relationship, allowing for discussion of pros and cons, understanding adapted to patient's needs and capacity. Deserving of objective standard. Manufacturer is a distant commercial entity with massive knowledge advantage, may accentuate value, underemphasize risk, don't need to tailor warnings to specific patients, ergo subjective standard - the *Buchan* test.

    - Doctor discretion is always subject to scrutiny after the fact, while manufacturer is not; in fact, manufacturer can escape all liability through simple expedient of providing full disclosure through warnings, desirable that they be incentivized to do so. Not undue burden to place on manufacturers then.

    - When learned intermediary is used to discharge duty of care with a view to warnings, the party relying (manufacturer) cannot assail causation by holding that the intermediary may not have passed on the warning one made aware of it. Where an intermediary is not warned, then the manufacturer has failed to discharge its duty to warn the consumer.

- *Martin v. Capital Health Authority* (ABQB 2007)

    - Facts

        - Plf. has cyst. Removal not urgent, but suggested by doctor. Not fully warned of risk of stroke. Has removal, becomes crippled by stroke as a result. Will no longer be able to achieve ultimate dream of dancing at daughter's wedding.

    - Issue

        - Had Plf. been fully warned of risks, would still have undergone surgery after daughter's wedding? If so, are damages limited to the "missed wedding", or is the Plf. entitled to full damages?

    - Rule

- Reasonable person in Plf.'s situation would still have undergone surgery after wedding; however, once causation established, Plf. entitled to full recovery.

- Principle

- Doctor did not tailor discussion of certain material risks, in this case the risk of stroke, to the understanding of the D. Therefore, did not discharge requirements of informed consent.

- Once causation is established, the Plf. is entitled to full recovery. Not incumbent on Plf. to prove that he would never have surgery. Nor is this a question of risk or chance. There is no temporal limitation on damages, or reduction of damages to the gap period (between the period between actual and hypothetical dates of procedure).

- *Chester v. Afshar* (HL 2004)

- Facts

- Plf. gets back surgery from D., who failed to warn of risk of nerve damage. Harm occurs, Plf. sues; however, Plf. admits that she may still have undergone surgery if properly warned. Ergo, cannot be said that but for the lack of warning she would not have incurred the injury.

- Issue

- As Plf. admits that she may yet have had surgery even were she properly warned, is she still entitled to recover?

- Rule

- Policy grounds demand that causation be met in this circumstance.

- Principles

- Duty to warn and informed consent doctrines are reflections of the importance of choice on the part of patients. What the law protects is the right of the patient to choose, and for that choice to be meaningfully informed.

- Law should not protect only those for whom decisions are made easily; those who require time and deliberation must also be protected. In order to protect patients, have meaning law must protect the right of all patients to choose, and must protect regardless of whether they would have opted for surgery if fully warned. Therefore, on policy grounds causation is satisfied.

- *Fairchild v. Glenhaven Funeral Services Ltd.* (HL 2003)

    - Facts

        - Plf. contracted mesothelioma after being exposed tortiously to asbestos dust over course of employment with multiple employers.

    - Issue

        - Plf. cannot prove which employer's tortious exposure of asbestos to his person caused his mesothelioma; therefore, does claim fail on causation?

    - Rule

        - No; causation established because each D.'s breach of duty materially increased the risk of the Plf. contracting mesothelioma. Exceptional case, however.

- *Barker v. Corus UK Ltd.* (HL 2006)

    - Facts

        - Not provided.

    - Issue

        - What are the limits and extent of liability in the *Fairchild* exception?

    - Rule

        - Material contribution test applies, liability apportioned on proportion of contribution to risk by each source, severally. Leads to legislative solution with j&s liability.

    - Principles

        - Standard rule is that it is insufficient to show that the D.'s conduct increased the likelihood of damage being suffered and *may* have caused it; must be proved on BOP that the the damage was caused by the D., and would not otherwise have happened.

        - As in *McGhee*, where there are multiple possible sources, not all of those sources need to be tortious, nor do all of the sources have to be linked to the actions of a tortfeasor. Irrelevant whether other causes are tortious, non-tortious, caused by human agency or natural causes, or even by the claimant himself.

- Material contribution causation does not create inference that *but for* causation is satisfied; separate doctrine supporting policy principles. Therefore, liability and apportionment must follow in this vein. The basis of liability is wrongful creation of risk, therefore basis of damages is the same.

- This rule involves rough justice, as based on limited scientific knowledge. Therefore, in future, science may show that D.'s actions did not cause the harm, an unjust result then. Further, j&s liability rule requires that if you caused harm, there is no reason why liability should be reduced just because someone else also caused the same harm. This is problematic when D. only *may* have caused harm.

- United States applies apportionment of liability on the basis of market share in drug liability cases; several liability proportionate to this.

- Apportionment of damages, severally, on the basis of proportion of risk attributable to each defendant would temper rough justice, ensure that compensation is achieved, would also allow for contributory negligence to be considered, eg. where the Plf. did not take reasonable steps to avoid harm.

- *Sindell v. Abbott Laboratories* (US 1980)

  - Facts

    - Negligently manufactured drug causes birth defects, produced by 300 companies, didn't warn of risks, liable but impossible for Plf. to prove which manufacturer actually made the pills taken by that specific Plf.

  - Issue

    - Where the Plf. cannot prove which of multiple tortfeasors that created risk of harm, how can causation be proved or apportioned?

  - Rule

    - Once causation inference drawn through material contribution, liability is apportioned on the basis of market share; analogous to proportion of contribution to creation of risk seen in *Barker*.

  - Principles

    - Reasonable to measure the likelihood that any of the D.'s supplied the product which injured the Plf. by the percentage of their contribution to the production of all such drugs sold for that purpose. If the D. cannot prove that they did not supply the product, then they are liable for their market share.

- *Polemis* (KB 1921)
    - Facts
        - D. drops plank on ship, causes explosion.
    - Issue
        - One could foresee damage by dropping plank, but not explosion. Damages too remote?
    - Rule
        - If the D. is negligent, the D. is responsible for all consequences of negligence, whether reasonably foreseeable or not. This has been rejected in subsequent decisions in favour of a more nuanced position re: remoteness.
- *Wagon Mound No. 1* (JCPC 1961)
    - Facts
        - Plf. seeks damages relating to destruction of property by fire; D. spilled quantity of furnace oil into water. Not believed to be flammable, so made no attempts to disperse. Oil was ignited, caused damages.
    - Issue
        - Damage was without a doubt related to the escape of the oil; however, was caused by the ignition and combustion of oil, not due to congealing, which would be expected. Therefore, are damages sought too remote from harm created?
    - Rule
        - Reasonable foreseeability is the benchmark of remoteness.
    - Principles
        - Not consonant with justice that negligent actors be held liable for all consequences of act; only responsible for the probable consequences of the act. Only that which would have been foreseeable by reasonable man is actionable.
        - The rule that, if one is negligent and has caused some small, reasonably foreseeable harm (eg. fouling slipways with oil) that this should lead to liability for unforeseeable harms also caused (eg. destroying Sydney Harbour) is unjust.

- *Wagon Mound No. 2* (JCPC 1966)

    - Recovery may be had, provided that the event giving rise to the damage is not impossible; though it very rarely happened and only in exceptional circumstances, still recoverability. Remoteness a test of *possibility*, not *probability*.

- *Hughes v. Lord Advocate* (HL 1963)

    - Facts

        - D. leaves open manhole, covered by tent, lit with paraffin lamps unattended. Boys explore tent, cause paraffin lamp to explode leading to harm.

    - Issue

        - One might have expected that boys would interfere with items in tent, fall down manhole, burn themselves. Would not foresee

    - Rule

        - Key question in remoteness is the *type* of damage incurred. If the damage is of the type which would be reasonably foreseen, then the precise concatenation of circumstances leading up to the accident are irrelevant, as is the severity of damages.

    - Principles (Morris)

        - That the exact way in which the damage occurred could not have been contemplated does not alter the fact that the damage itself was reasonably foreseeable. Nor does the fact that the injuries were more grave than would have been expected take damages outside of reasonable foreseeability.

        - Key question in remoteness is the *type* of damage incurred. If the damage is of the type which would be reasonably foreseen, then the precise concatenation of circumstances leading up to the accident are irrelevant, as is the severity of damages.

    - Principles (Guest)

        - Precise details are not necessary in consideration of remoteness; sufficient if the damage which occurred is of a *type* which should have been foreseeable by a reasonably careful person.

    - Principles (Reid)

- D.'s are liable, regardless of whether the damage is a good deal greater in extent than what was foreseeable; only escape liability if damage is different in kind.

- Principles (Jenkins)

- Danger foreseen does not have to be identical to danger materialized.

- Principles (Pearce)

- Facets of misadventure are innumerable, particularly with children it will be difficult to see with precision what the exact shape of the disaster will be.

- *Assiniboine School Division No. 3 v. Hoffer*

- Facts

- Snowmobile started in manner which causes it to run amok if kickstand not up. Runs amok, strikes school, causing explosion through gas pipe.

- Issue

- Would expect that snowmobile running amok would cause impact damage, not explosion. Therefore, damages too remote?

- Rule

- Gas pipes are common, and damage to such pipes not unforeseeable.

- Principles

- Sufficient for liability if one can foresee in a general way the sort of thing that happened. The extent of damage, manner of incidence does not need to be foreseeable if the damage itself is of a foreseeable type. When one fires a rifle down the street, the limits of reasonable provision are broad, not narrow.

- *Lauritzen v. Barstead* (ABSC, 1965)

- Facts

- D. employer of Plf., intoxicated, demands to be driven to bar. Plf. refuses, D. grabs wheel of car, causing it to run into ditch. Night time, blizzard conditions. Plf. has to walk for help, suffers frostbite damage.

- Issue

- Frostbite damage to feet too remote where D.'s negligent act was to grab steering wheel?

- Rule

- Plf. entitled to damages concerning frostbite, but not for loss of consortium with wife.

- Principles

- Circumstances are such that all incidents following initial negligent act comprised efforts by parties to extricate themselves from difficult situation brought about by that negligent act.

- Reasonably foreseeable Plf. would come to harm from elements as a result of the D.'s negligent act, which destroyed their transportation. Not reasonably foreseeable that this would cause the Plf. to lose consortium with wife.

- *Bishop v. Arts & Letters Club of Toronto et al.* (ONSC 1978)

- Facts

- Plf. fell while leaving D.'s premises due to negligently altered door.

- Issue

- As Plf.'s preexisting haemophiliac condition made damages much worse, is D. liable for full damages, or only those which would have been foreseeable?

- Rule

- Tortfeasor must accept victim as found; concerning compensation, this is based on the special requirements of the Plf.

- *Stansbie v. Troman* (KB 1948)

- Facts

- Contractor carrying out decoration of house, leaves to buy paint, neglects to lock door, thief enters house and steals items.

- Issue

- Does the act of the thief, in robbing the house, constitute an intervening act thereby relieving the D. of liability?

- Rule

    - The act of the thief was of the very type which the D. had a duty to guard against; therefore, not an intervening cause, but in fact the outcome.

- Principles

    - Negligence of the D. was not the direct cause of the Plf.'s loss - this was in fact the crime of the thief in robbing the house. However, the D. increased the problematic risk, which matured into a certainty. Negligence was in failing to take care to guard against the very outcome which came about.

- *Bradford v. Astor Delicatessen & Steak House* (SCC 1974)

    - Facts

        - Fire in restaurant, caused by negligence on part of D. in cleaning grill. Fire extinguished, but extinguisher caused hissing which led some customers to panic. Plf. injured in ensuing panic.

    - Issue

        - Was the panic, initiated by patrons in the restaurant, an intervening act which relieves the D. of their liability?

    - Rule

        - The hysteric conduct of certain patrons is an intervening act relieving the D. of liability.

    - Principles

        - Hysterical conduct is not a foreseeable result of the operation of the fire extinguisher system; therefore causing hysteria by allowing grease to accumulate on the grill cannot be considered as being within the risk created by the D. Therefore, the D. is relieved of liability.

    - Dissent (Spence)

        - Damage is recoverable if, despite intervening negligence, person guilty of negligence should have anticipated the subsequent intervening negligence, which, in occurrence, could lead to loss or damage. One would anticipate that a panic would result from a fire, and that ergo people could be injured.

        - Intervening force will not ordinary clear a defendant from responsibility if it can be considered a normal incident of the risk created by the D. - part of the

ordinary course of things. Even negligent interference, where part of the ordinary course of things, foreseeable, expected, does not alleviate liability.

- *Smith v. Inglis* (NSCA 1978)

    - Facts

        - Plf. receives electric shock from refrigerator. The grounding prong had been removed, allowing shock to occur, but also had design defect.

    - Issue

        - Does the removal of the grounding prong constitute an intervening act which alleviates the D. of liability?

    - Rule

        - Common that plug modified or adaptor used in order to circumvent safety measures; known in industry, therefore should have been foreseeable by manufacturer. Act which occurs within ordinary course of things does not offer relief.

- *Good-Wear Treaders Ltd. v. D&B Holdings Ltd. et al.,* (NSCA 1979)

    - Facts

        - Pash wants tires for hauling gravel on highway. D. advises that their tires not suitable, recommends against purchase. Pash buys anyways; blowout, accident causing death of three people.

    - Issue

        - Is D. liable for supplying tire to Pash, knowing that it was to be put to inappropriate use which would lead to danger for users of highway?

    - Rule

        - Yes.

    - Principles

        - Warning concerning the use of tires avoids liability between the D. and Pash, but does not avoid liability to highway users if it sells tires to Pash, knowing they will be put to an inappropriate use.

- Knowing that warnings will be ignored and thus rendered nugatory, a manufacturer cannot rely on those warnings to exculpate one from liability to third parties, but only to the parties to whom the warnings have been given.

- Application of existing law to unusual situation, as rarely would a seller know that a prospective buyer firmly intended to use a normal, safe product in an unsafe way, dangerous to persons other than the buyer, persons who cannot be warned or otherwise protected.

    - This seems to incentivize a lack of knowledge on the part of the seller / manufacturer. Provide warnings, but no opportunity to determine whether they will be heeded.

- Distinguished from case of intermediate buyer, who acquires dangerous goods and resells them without warning user; in such a circumstance, the responsibility of the intermediate supersedes that of the original seller (presuming that the original seller had no knowledge of seller's plan to resell without warning).

- The act of a party which increases the risk created by a negligent act does not block the causal flow of that act.

- *Victorian Rly Comrs. v. Coultas* (UKCA 1888)

    - Near collision between train and buggy; to allow Plf. to recover without having suffered physical injury would open floodgates for imaginary claims.

- *Dulieu v. White and Sons* (KB 1901)

    - Plf. frightened when horse-drawn van driven negligently into pub where she was employed. Claim succeeded, but only on basis that she had reasonable fear of immed. personal injury.

- *Hambrook v. Stokes Bros* (KB 1925)

    - Mother suffered shock at sight of accident where child injured due to D.'s negligent act; claim succeeded.

- *Hay v. Young* (HL 1943)

    - Woman getting off of train heard motorcycle crash; did not see crash nor deceased. Not compensable, as not reasonably foreseeable that accident would cause nervous shock to those within earshot who did not witness it, were not exposed to aftermath etc.

- *Boardman v. Sanderson* (UKCA 1964)

- Plf. within earshot of accident which killed son; went to scene immediately, suffered shock, recovered damages.

- *Chadwick v. British Transport Commission* (UKCA 1967)

  - Damages awarded to Plf. who suffered damages while acting as rescuer; Plf. was in the grip of the calamity, however, so very special case. z

- *Dillon v. Legg* (USSC 1968)

  - Plf. suffered nervous shock after seeing daughter killed while crossing road. Harm to mother was reasonably foreseeable, had actually witnessed accident. Moved away from rigid formulations, suggested need for control mechanisms.

- *McLoughlin v. O'Brian*

  - Plf. told of accident involving family members, goes to hospital to view, sues driver who injured members for psychiatric injury. dismissed; while it was reasonably foreseeable, public policy limits recovery to those on the the roads. Overturned on appeal, holding that the shock injury was reasonably foreseeable, ergo compensable.

  - Control measures: class of persons who can make claims (family members, etc.), proximity of persons to the accident (immediate aftermath at least), means by which shock is caused (must be direct perception).

- *Beecham v Hughes et al.,* (BCCA 1988)

  - Plf.'s injury dismissed, as caused not by accident, but rather by profound sorrow as a *result* of accident.

- *Rhodes Estate v. CNR* (BCCA 1990)

  - Shock not reasonably foreseeable, eg. that misdirection, runaround, receiving remains by mail would cause nervous shock.

  - Must be exposure to experience which is alarming, horrifying, shocking, or frightening; more than misfortune, annoyance, sorrow, or grief; plea of fright, terror, or horror that could cause scars on the mind of the Plf.

  - Consider relational proximity (to the victims), locational proximity (to the accident), temporal proximity (b/w exposure and onset of symptoms)

- *Alcock and Others v. Chief Constable of the South Yorkshire Police* (HL 1991)

  - Football stadium collapse, leading to 95 deaths, 400 injuries. Plf.'s sue for psychiatric injury caused by nervous shock; relatives of deceased, injured, etc. Were not in area of

casualty.

- Duty of care owed to primary victims, but not to the Plf.'s because they were either not at the match, or did not have sufficient relationship to enable recovery.

- *White v. Chief Constable of the South Yorkshire Police (HL 1991)*

  - Action by police officers on duty at football stadium collapse.

  - Insufficiently close relationship to primary victims, and arguments concerning special status as rescuers failed. While the harm may have been foreseeable, fails due to control mechanisms driven by policy concerns. Principled approach thus abandoned in favour of cautious pragmatism.

- *Devji v. Burnaby* (BCCA 1999)

  - Facts

    - Plf. family member dies in accident. Police inform family, request that they identify body at hospital. Plf. do so, claim that incident traumatic, caused psychiatric harm - nervous shock. Body was not mutilated.

  - Issue

    - What is the test for liability for psychiatric harm?

  - Rule

    - Reasonable foreseeability combined with control mechanisms, involving various formulations of proximity (locational, temporal, relational) as well as severity of shock.

  - Principles (McEachern)

    - Two visions of psychiatric harm: usual test for liability is reasonable foreseeability of harm, therefore this is the apt benchmark. Alternately, control mechanisms espoused for limiting liability to family members, primary victims. Either case, psychiatric harm is only actionable where the damage is *caused by and not resulting from* tortious act.

    - *Modern requirements for UK* - (1) Plf. must have close ties with victim, can be presumptive (spousal) or established by evidence (others), (2) Plf. must have been present at accident or immediate aftermath, (3) injury must have been caused by direct perception of accident or immediate aftermath. Not so in BC.

- Nervous damage for shock cannot be recovered without exposure to a shocking experience arising from exposure to the D.'s negligence, and not merely exposure to the consequences of the D.'s negligence.

- Not convinced that unmeritorious claims can be identified successfully; for instance, may be claims advanced by those who believe they have suffered psychiatric harm, where real condition is grief or sorrow, difficult to disprove.

- *Requirements* - generally, accords with the *Anns / Kamloops* test, psychiatric harm (1) must be reasonably foreseeable, (2) must occur within the context of a sufficiently close relationship so as to establish a duty of care, and (3) must not be negated by any policy requirements - where controls become relevant.

- Aftermath of the accident can be extended to the hospital immediately after the casualty.

- *Must accord with usual fortitude* - common experience demonstrates that the usual fortitude of our citizens protects against psychiatric injury, and therefore makes such injury reasonably foreseeably. Eggshell rule only applicable to the quantum of damages, and cannot be used to found liability.

    - Bodies of persons killed in accidents ordinarily identified by family members, does not lead to psychiatric harm.

- Must be shocking exposure - must be exposure to experience which is alarming, horrifying, shocking, or frightening; more than misfortune, annoyance, sorrow, or grief; plea of fright, terror, or horror that could cause scars on the mind of the Plf.

    - That the Plf. had been informed of family member's death previous to viewing body would likely negate liability had viewing been shocking; in this case, was not mutilated or shocking in any case.

- Principles (Mackenzie)

    - Medical opinion posits no difference between physical and psychiatric harm; however, pragmatically, psychiatric diagnoses are more uncertain, ergo judges wary re: compensation.

    - If reasonable foreseeability to be the benchmark for compensation in psychiatric harm cases, control limits must be imposed; should adopt test from *White*, excepting the decision concerning the status of rescuers.

- *Mustapha v. Culligan of Canada Ltd.* (SCC 2008)

- Facts

    - Plf. saw dead flies in water bottle; had been using that same brand for 15 years. Obsessed with event, led to depressive disorder / psychiatric harm.

- Issue

    - Can the Plf. claim psychiatric harm damages?

- Rule

    - No; person of ordinary fortitude would not have suffered damage.

- Principles

    - *Possibility* not a meaningful standard in tort law; the harm in any litigation claim has materialized, come to fruition, and therefore is *de facto* possible in every circumstance. Instead, consider remoteness as a *real risk*.

    - Concerning duty of care, we look to a person of ordinary fortitude in determining whether a duty of care is owed.

    - There are certain people with such a degree of susceptibility to psychiatric injury that it is unreasonable to expect strangers to have in contemplation the possibility of harm to them - strangers cannot be expected to take care re: such harm. Extreme reactions are imaginable, but not reasonably foreseeable.

    - Knowledge of special sensibilities - Where a party is aware of the particular sensibilities, the consequences of acting in a way which will upset those sensibilities would be clear to a reasonable person, and therefore an extreme reaction could be reasonably foreseeable.

        - Culligan had no knowledge of Plf.'s sensibilities, and therefore unable to foresee that he would have an extreme reaction.

    - The ordinary fortitude rule is not to be mistaken with the thin skull rule: ordinary fortitude determines whether there was a duty to take care, and the thin skull rule deals with the quantum of damages owed where liability is established.

    - Previous history, particular circumstances (including concern over cleanliness), and cultural factors (particular concern re: health and well being of family) are not relevant to considerations re: person of ordinary fortitude in position of Plf.

- *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* (HL 1964)

- Facts

    - Plf. advertising agency, bought advertising space for client on credit, attempted credit check of client through D. bank, received negligent information, relied to their detriment, now seek to recoup economic losses; no contract, so tort action necessary.

- Issue

    - When can economic losses caused by a negligent misrepresentation be compensable?

- Rule

    - The D. never undertook responsibility, as shown by providing answer with disclaimer "without responsibility on our part."

- Principles (Reid)

    - Immaterial that the D. were not aware of the identity of the party to whom they were providing the negligent statement; there is no specialty which could have influenced the D. in deciding whether to give information, or in what form.

    - *Negligent words are different from negligent acts* - Can give opinion in social situation without taking same care that would be taken in business situation, no duty of care. However, cannot negligently provide poisonous wine in social situation and expect there not to be a duty of care. Further, negligently made article will only cause one accident; negligent words can be repeated, relied on by unlimited class without consent of maker, leading to indeterminate liability.

    - *Responsibility required* - negligent misrepresentation gives no cause of action generally; must be something more than mere misstatement. Requires that expressly or by implication from circumstances, the speaker has undertaken some responsibility. Thereby, there is a duty of care in making statements independent of contract.

    - *Objective test applies* - in all relationships (fiduciary, express contracts, etc.) where it is plain that the party seeking information was trusting the other to exercise care, where it was reasonable for that party to do so, and the other party gave information, and knew or ought to know that this would be relied upon.

    - *Nature of action by giver of information* - person enquired of can keep silent, give answer with qualification that it is not intended to be relied upon, or could answer without qualification. Only where unqualified and unconditional has responsibility been adopted, and therefore can liability fall for neg. misrep.

- Principles (Morris)

    - Many situations arise where a person gratuitously undertakes to do something for another person, and in so doing comes under a duty of care.

    - Where a person is called upon to give information or advice, does so, and allows this information to be passed onto another person who he knows or ought to know will rely on it, a duty of care arises. However, if this information is given on the basis that it cannot be relied upon, or that the giver is not responsible for it, then no action can lie for neg. misrep.

- *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (SCC 1993)

    - Facts

        - D. called for tenders re: building transmission towers. Allegedly made representations to winning bidder Plf. concerning the state of the right-of-way, which caused Plf. economic losses.

    - Issue

        - Can a D. be liable for economic loss due to negligent misrepresentation in tort, where the agreement between the parties is also governed by contract?

    - Principles (Iacobucci, partial dissent)

        - *Concurrency in contract and tort* - contracts between parties do not preclude duties of care at common law, unless K. expressly negatives tort duty through risk allocation. Liability and duty of care can be concurrent in contract and tort. Plf. can choose cause of action. Specific obligations and duties created by express terms of contracts can override tort duties. Therefore, if parties choose to define duty as express term, then consequences of breach will be dealt with by contract.

    - Principles (LaForest / McLachlin)

        - Iacobucci's approach not appropriate, because it moves away from concurrency in tort an contract. Must ensure that those who have suffered wrongs have full access to all remedies.

        - Right to sue in tort is not taken away by contract where there is an express term. Contract can limit the scope of tort duty, and thereby limit or negate tort liability. However, action still lies. Therefore, regardless of contractual provisions, Plf. can sue in either or both contract and tort where appropriate.

        - *Private ordering* - right of individuals to allocate for risk in different manner than would normally be done via tort. Tort duties only diminished in light of

primacy of private ordering. Ergo, Plf. may sue in either contract or in tort, subject to any limit the parties themselves have placed on rights in contract, concerning waivers of liability or risk allocation.

- *Three situations concerning concurrency* - (1) where contract stipulates more stringent obligation than tort, Plf. will sue in contract (most commercial transactions), (2) where contract stipulates lower duty than tort, Plf. will only sue in tort to avoid limitation periods or to gain other procedural advantages (limitation of liability), (3) where duties are coextensive, Plf. will sue concurrently, or in tort for procedural advantages.

- *Hercules Managements Ltd. v. Ernst & Young* (SCC 1997)

  - Facts

    - D. accountants prepare audit of company negligently. Plf. investment company relies on document to inform investment decisions to their detriment.

  - Issue

    - Do auditors owe a duty of care to shareholders in preparing financial statements?

  - Rule

    - Sets out test for negligent misrepresentation liability; holds that the statements prepared for admin management of company, not to inform investment decisions.

  - Principles (LaForest)

    - *Duty of care* - normal duty of care considerations apply in negligent misrepresentation case, no reason to create *pocket* of such cases although they involve economic loss, not physical damage. (1) sufficient proximity so as to imply reasonable contemplation re: damage, (2) policy considerations present which negative liability?

    - *Nature of proximity in duty of care* - generally, the relationship between D. and Plf. such that D. under obligation to be mindful of Plf. in affairs. In negligent misrepresentation specifically (1) D. could or ought to foresee reliance of Plf., (2) Plf.'s reliance was reasonable under the circumstances.

    - *Policy limitations due to breadth of liability* - (1) D. must know the identity of Plf. or class of Plf.'s that will rely on statements, (2) harm must stem from transaction respecting which statement was made. These are policy reasons for which liability is limited, and not truly means for establishing proximity; they

ensure that liability is not indeterminate.

- *Auditor's liability could be indeterminate* - financial reports relied on many people for many reasons. As prepared by skilled professionals, almost always reasonable to rely - could lead to indeterminate liability. While deterrence of negligent conduct on part of auditors is important, outweighed by socially undesirable consequences of indeterminate liability (higher costs); better to circumscribe duty of care than to hope that this is solved by evidentiary issues via litigation.

- *Feldthusen's indicators of reasonable reliance* - neither exhaustive nor determinative, (1) D. had direct financial interest in transaction in respect of which representation was made, (2) D. professional or someone with special skill, (3) advice provided in the course of D.'s business, (4) not provided during social situation, provided deliberately, and (5) provided in response to specific request.

- *Avco Financial Services Realty v. Norman* (ONCA 2003)

  - Facts

    - Plf. arranges for mortgage, unaware that insurance would have to be renewed with mortgage. Plf. wife contracts cancer, no longer eligible for insurance on renewal. Plf. wife dies, Plf. defaults, sues re: negligent misrepresentation.

  - Issue

    - Where a Plf. has *unreasonably* relied on negligent misrepresentations of the D., can this lead to a finding of contributory negligence, or alternately is the D. absolved of liability?

  - Rule

    - Contributory negligence can coexist with reliance requirement in negligent misrepresentation; however, where basis of contrib. neg. claim is unreasonable reliance, this is effectively asking the same question. Plf. did not rely reasonably, therefore D. not liable.

  - Principles

    - Following Hercules, should not create pocket of negligent misrepresentation cases which are treated differently from other causes of action. Contributory negligence in negligent misrepresentation should be treated the same as it is elsewhere.

    - Contributory negligence is not necessarily inconsistent with the reasonable reliance test in negligent misrepresentation. Former involves foreseeability of harm to oneself, must consider the possibility of others being reckless in this

consideration. If allegation of contributory negligence is based on contention that Plf. acted unreasonably in relying on statement, then claim will already have been defeated by the time contributory negligence is considered.

- *Haskett v. Equifax Canada Inc., et al.* (ONCA 2003)

    - Facts

        - Plf. went bankrupt in early 1990s, since then healthy credit record; D. provided improper, inaccurate, illegal information in Plf.'s credit report, not entitled to do so under statute.

    - Issue

        - As negligent misrepresentation was not relied upon by the Plf. but rather by third party creditors, can Plf. yet claim damages from D.?

    - Rule

        - Yes.

    - Principles

        - Reasonably foreseeable that if the D. was negligent concerning gathering and reporting of credit information that this could cause damage to Plf. by causing denial of credit or increase in borrowing costs.

        - Credit is an integral part of life in modern society; need it for housing, utilities, conducting basic transactions. Therefore, incumbent on credit reporters to carry out function honestly and in accordance with statute.

        - Reliance on representation not necessary for establishing duty of care necessarily, but needed to prove causal sequence leading to liability, and the assumption of responsibility by the representer.

        - In spite of lack of reliance by the Plf. on the statement, the D. has assumed responsibility for the accuracy of the information because of the harm which could be caused to the consumer if the contents are inaccurate.

        - Even if negligent misrepresentation is not a category analogous to present situation due to lack of reliance by the Plf., the categories of negligence are not closed. Present both proximity of relationship and proximity of causation of harm, as between a credit reporting agency and a consumer, can establish *prima facie* duty of care.

- *Indeterminacy is a critical policy determination* - consists of three components, temporal, class, and liability. Timing of harm and liability not indefinite, as credit reports are prepared for specific purposes and acted upon accordingly. Class not unlimited where within knowledge and control of D., even if large. Quantum of damages may be high, but limited by nature of transaction.

- *Statute does not exhaust liability* - while there are statutory means for dealing with the problem, this does not bar cause of action in damages. Alternative means may not be as beneficial or effective (because they do not provide for punitive damages, for instance). Effectiveness of statutory measures can be a matter at trial, however.

- *Negligent misrepresentation w/o reliance not defamation* - this does not encroach on defamation; the latter action recognizes qualified privilege, and therefore inadequate remedies in circumstances such as these. Further, at issue is not general reputation in community, but specific facts relevant to credit history.

- *B.D.C. Ltd. v. Hofstrand Farms Ltd.* (SCC 1986)

  - Facts

    - Plf. required delivery of document by BC Govn't before certain date, otherwise would suffer economic losses. Govn't hires D. courier company to do so; D. fails.

  - Issue

    - Plf. was not privy to the courier contract between D. and the Govn't; can action against D. succeed in negligent provision of services?

  - Rule

    - While the tort of negligent provision of services exists, there is no proximity in the present matter, as there was no actual or constructive knowledge on the part of the D. such that the Plf. should have been within their contemplation.

  - Principles

    - For the D. to have a duty to the Plf., absent a contract, it must have been reasonably foreseeable that D.'s failure would cause injury to third party such as the D. This cannot be imputed from the instructions given to the D. by Govn't.

    - D. had no knowledge of the existence of the Plf., could not know of the existence of class of persons whose interests depended upon timely transmission of document; no actual or constructive knowledge. Ergo, no proximity.

- *Haig v. Bamford* (SCC 1977)

    - Accountant liable to investor for negligence in preparation of financial statement; investor relied on statement in making investment, so liable in spite of the fact that they were strangers to one another.

- *Wilhelm v. Hickson* (SKCA 2000)

    - Facts

        - Can a disappointed beneficiary of a will recover damages from the testator's lawyer for failing to carry out intent of testator in drafting document?

    - Issue

        - Plf. has no privity of contract with the D., who is testator's solicitor. Therefore, can claim lie based on negligent provision of service?

    - Rule

        - Yes.

    - Principles

        - Lawyer can protect self from testator by virtue of retainer agreement, which would not apply to third party relying on tort. This is an issue; however, not determinative.

        - Duty of care can be found in Hedley Byrne principle via negligent provision of service, recognized also in Haskett, via assumption of responsibility. If no such claim recognized, then only person with a claim has suffered no loss (testator), and only person who has suffered loss has no claim (beneficiary). Lawyer who draws will knows of import re: economic dependence, so responsibility assumed.

        - Indeterminate liability possible, as could also apply to inter vivos gifts, class of persons to whom liability is owed could be massive (seems like a weak argument, since liability would really be limited to those implicated in transactions undertaken by the liability, so...).

        - Could increase the size of the testator's estate. The testator does not owe a duty to those to whom property is left; cannot recover from other beneficiaries, therefore the net amount of property dispersed would be greater than otherwise would have been (within power of lawyer to prevent this outcome, and public relies on lawyers to make accurate documents, so...)

- *Winnipeg Condominium Corporation no. 36 v. Bird Construction Co.* (SCC 1995)

    - Facts

        - D. builds condo. Negligent construction renders this dangerous, requires replacement of exterior cladding, cost of $1.5m; D. liable to subsequent purchaser?

    - Issue

        - Can D. be held liable for dangerous construction of building to subsequent purchaser of building, in spite of lack of contract between parties?

    - Rule

        - Duty of care is owed, and not negatived by policy considerations; therefore, D. liable for dangerous construction of building - must compensate for reasonable costs of rendering building safe.

    - Principles (LaForest)

        - Duty of care?

            - Recoverability for economic loss must be approached with reference to unique policy issues prevalent in each category of economic loss; determines the proper
            ambit of tort law.

            - *Complex structure theory* - damage to one part of structure caused by a hidden defect in another part of structure can be considered actionable as property damage (no need for economic loss). But, circumstances envisioned relate to positive malfunction (eg. explosion of boiler), not merely failure of component in sustaining other parts (as in this case).

            - Where builder has constructed defective building which poses a *real and substantial* danger, reasonable costs of putting building into non-dangerous state are recoverable in tort by *occupants* - contract not required. Relates to policy requirements; construction of large, permanent structure, has capacity to cause serious damage to other persons and property, must be held to standard of care; will be occupied by succession of tenants

            - Contractor's duty to take reasonable care does not relate to special interests in contract with original owner, for instance to use high-grade building materials or special ornamentation. Only issues relating to *real and substantial danger* are actionable in tort. Merely shoddy or

substandard work is also not sufficient to breach duty of care.

- Further policy implications, want to incentivize plaintiffs to take action before defect causes injury to persons or property. Otherwise, Plf.'s who neglect defects benefit at law from costly and tragic consequences - encourages reckless behaviour.

    - However, LaForest appears to miss the point, that these Plf.'s would themselves very likely be held liable if they were negligent to this end, and so already have an incentive to act.

- Policy also holds that analogy to defective articles (which are thrown away so as to not cause harm) must fail due to nature of homes in our society. Choice to discard a home is no choice at all; represents long term investment, and so few home owners will choose to abandon rather than repair or sell.

    - However, what of non-occupants? Or office buildings, particularly where occupants are lessees? Policy consideration doesn't cover these circumstances.

- Negating policy concerns?

    - Contracts already account for risk allocation, which is complex in case of building agreements due to numerous parties involved in various aspects of the construction. Negligent provision of shoddy structures duty interferes with doctrine of caveat emptor. These are merely shades of argument concerning indeterminate liability, however.

    - However, tort duty can tun concurrently with contract duty (subject to stipulations from *Checo*); further, duty to construct building safely will always be separate from contract, since tort duty is not subject to contractual standards; where building is permanent, subject to occupation, etc., then must be built safely regardless of contract.

    - Liability in class is limited to occupants; liability in amount is limited to the reasonable amount needed to remedy the defect; while this could be disproportionate to the cost of remedying, this is allowable due to the fact that it counters a real and substantial danger. Time is limited to useful life of the building; shorter than that, in fact, since as time progresses, construction defects will gradually become indistinguishable from the decay caused by age.

    - Caveat emptor does not serve as a shield to tort liability; this doctrine is offset by the knowledge advantage of the building constructor

concerning the structural integrity, presence of latent defects, etc.

- This is evidenced by the fact that the Plf. did due diligence and still did not discover defect until manifested in real danger.

- *Junior Books v. Veitchi*

  - Facts

    - Plf. hired contractors to build factory; contractors make agreement with subcontractors to build special floor. This floor defective; Plf. has no action against subcontractors due to lack of privity. Would normally sue contractors, but they are bankrupt.

  - Issue

    - Can action against subcontractors succeed, despite the fact that the floor is not dangerously defective, nor is there privity between Plf. and subcontractors?

  - Rule

    - Yes; based on special relationship between subcontractors and users with a view to reasonable foreseeability, reliance on skill, assumption of responsibility. Not good law in Canada, however, as accepted only in obiter, and not followed in *Hasegawa*.

  - Principles

    - Where the proximity between party who produced faulty work / article and user is sufficiently close, the duty of care owed by the producer to the user extends beyond duty to prevent harm, includes duty to avoid faults in work or article.

    - Relationship just short of contractual; D. would have known that owners relied on their skill to lay a proper floor, damage caused (economic loss) direct and foreseeable result of negligence in laying defective floor. Similar to Hedley Byrne principle, in that proximity means that there must be assumption of responsibility.

- *Hasegawa & Co. v. Pepsi Bottling Group (Canada)* (BCCA 2002)

  - Facts

    - Plf. purchases water from Aqua, contaminated by mould flocs; destroyed in accordance with order from Japanese government prohibiting sale (although plf. first tried to sell elsewhere). Cannot sue Aqua due to contractual limitation of liability, therefore pursuing action against D. in negligent provision of product /

service.

- Issue

    - Can Plf. recover from D. for pure economic loss stemming from purchase of defective water bottled by D., bought via third party?

- Rule

    - No; no evidence adduced to show that there was a *real and substantial danger*, ergo action cannot succeed. *Junior Books* principle re: mere shoddy article is not good law in Canada.

- Principles

    - Not a negligent purchase of service, but of product; Plf. contends that this was service, bottling of water - attempts to get around requirement that the defect have been dangerous (required in shoddy products cases). However, court interprets agreement as purchase of bottled water, not of provision of service.

    - The duty of a manufacturer is to avoid causing physical damage to persons or property; products which are merely defective or shoddy, but not dangerous, do not give rise to a duty of care under this tort. Must be *real and substantial* danger. Otherwise, action fails; and evidence indicates contrary in this matter (esp. as Plf. willing to resell water elsewhere).

    - Plf. contended that as the goods at hand were intended for human consumption, there is always a reasonably foreseeable risk of harm if the product was negligently manufactured. Therefore, real and substantial risk is not necessary; this would effectively be creation of a new category of economic loss. Argument not accepted, no authority to support this contention.

    - Junior Books does not apply in Canada.

- *CNR Co. v. Norsk Pacific Steamship Co.* (SCC 1992)

    - Facts

        - Barge belonging to D. damaged railway owned by Public Works. Plf. sues D. due to interference of their business caused by D.'s negligence, although Plf. has no ownership interest in bridge.

    - Issue

        - Lacking an ownership interest in the bridge, no contract, no provision of goods / services, can Plf. claim economic losses on the basis of the fact that D.'s

negligence damaged a third party's property, thus causing Plf. to suffer economically?

- Rule

  - Loss recoverable; relationship is sufficiently proximate to ground recovery; but no *clear* rule due to split decision.

- Principles (McLachlin)

  - This domain is particularly susceptible to the spectre of indeterminate liability. While House of Lords prefers a principled approach, rule which deals with problem exhaustively and definitively, Canadian jurisprudence, under *Kamloops/ Anns*, prefers incremental and flexible approach; proximity limits liability.

  - While physical damage valued more greatly at tort law than economic loss, no reason why it shouldn't be recompensed in many circumstances; for instance, one who invests in a bridge in order to use it cannot be distinguished from someone who leases a bridge in order to use it; therefore, should not both have claims?

  - Essence of proximity - must be connection b/w D.'s negligence and Plf.'s loss to make it just for D. to indemnify Plf. Cannot identify single criterion to this end; must view circumstances in which it has been found to determine whether matter at hand sufficiently similar.

  - Concerning proximity, court must review all factors connecting the negligent act with the loss; not only relationship between parties, but all forms of proximity, including physical, circumstantial, causal, or assumed indicators of closeness. Precision will increase where those relationships which are sufficiently proximate are found, where closeness between negligence and loss exists.

- *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (SCC 1997)

  - Facts

    - Plf. owns drilling rig, leased to other corporations. Caught on fire due to manufacturer's use of wrap on heat exchange system.

  - Issue

    - Did manufacturer owe duty to owner and sub-lessees concerning equipment on rig? If so, damages in contractual relational economic loss?

  - Rule

- No duty to sub-lessees, negatived for policy reasons.

- Dissent (McLachlin, LaForest - latter's view seems to have won the day)

  - Economic interests less worthy of protection than physical damages; represent indeterminate liability; may be more efficient to place loss on Plf., better placed to anticipate and insure; confining economic claims to contract discourages multiplicity of lawsuits.

  - If Plf. and third party owner of property damaged by D.'s negligence, then Plf. can recover economic loss related to this damage. In *Norsk*, McLachlin and LaForest split on definition of what constitutes a *joint venture*.

  - *Requirements* - (1) relational economic loss only recoverable in special circumstances with apt conditions, (2) circumstances defined by reference to categories which make the law predictable, (3) these categories are not closed, can be expanded through *Anns/Kamloops* analysis.

  - *Categories identified to date* - (1) cases where the claimant has a possessory or proprietary interest in damaged property, (2) general average cases where cargo owners and ship owners share risk of sea dangers, and (3) where relationship between claimant and owner of property is a joint venture. Where case does not meet categories, must see if new category to be created on defensible policy grounds.

  - *General rule against recovery for policy-based reasons relaxed* - (1) where the deterrent effect of potential liability to property owner is low, or (2) despite risk of indeterminate liability, where claimant's opportunity to allocate risk by contract is slight because of type of transaction *or* inequality of bargaining power.

  - *Foreseeability governs duty of care in duty to warn* - where failure to warn is alleged, the issue is not reliance, as there is nothing to rely upon, but whether the D. ought to have reasonably foreseen that the Plf. might suffer loss as a result of the use of the product about which the warning should have been made. This is the mechanism through which liability can extend beyond owners *prima facie*.

  - *Duty of care negatived for policy reasons* - D. owes duty to warn Plf., so difficult to see why similar duty would not also be owed to a host of other parties that would foreseeably lose money if the rig was shut down as a result of damage. This is the spectre of indeterminate liability; could not cut off at any logical point, no reason to weigh one relationship as better than another.

- *Design Services Ltd. v. Canada* (SCC 2008)

- Facts

    - D. creates tender process, awards contract to non-compliant bidder; settles with compliant bidder that would otherwise have won contract. Plf.. subcontractor of compliant bidder sues in economic loss due to lack of privity with D.

- Issue

    - Should the court recognize a new category of duty of care in pure economic loss, where the plaintiff claims damages as a result of a breach of contract between D. and a third party, *apart from* where that breach has resulted in physical damage to the third party (relational economic loss)?

- Rule

    - No duty owed; no prima facie duty of care (on facts of this case), and negativing policy factors present.

- Principles

    - Not negligent misrepresentation, not negligent performance of services, not negligent supply or shoddy good / structure, not independent liability of statutory public authority; relational economic loss does not apply because no property of the third party has been damaged by the D. (contracts are not property).

    - *Independent liability of statutory public authority* - deals with government's unique power to convey discretionary benefits such as the power to enforce bylaws, inspect homes and roadways, etc.

    - Joint venture is not a category of economic loss itself; rather, it is an example of where there may be sufficient proximity to award damages in circumstances of relational economic loss. However, relational economic loss requires damage to the property (and not merely to a contract) of the third party.

    - In weighing proximity in the first branch of the *Cooper* analysis, must consider expectations, representations, reliance, and the property or other interests involved. Beyond consideration as to whether the damage was foreseeable, these help determine whether it is fair and just to impose a legal duty of care.

        - While breach of contract between third party and D. would directly affect the Plf., the Plf. had the opportunity to protect itself in contract through submission of joint venture bid. Deliberately arranged affairs in contract in certain way, now asking court to reorder ex post facto.

- *Just v. British Columbia* (SCC 1989)

    - Facts

        - Plf.'s vehicle struck by boulder, killing daughter. Action against BC government, responsible for maintaining the road; reasonable inspection would have demonstrated danger posed.

    - Issue

        - What is the nature of the duty owed by a government to citizens concerning the inspection and maintenance of highways?

    - Rule

        - Duty same as b/w individuals re: policy, assuming no exemption in statute. SOC lower (reasonable in circumstances). New trial ordered, as implementation of inspection regime held to be operational, ergo open to scrutiny and actionable.

    - Principles

        - Duty of care is owed by government to those that use its highways, including reasonable maintenance. Readily foreseeable that harm would befall users of highway were it not reasonably maintained.

        - *Further inquiry required beyond DOC* - once duty is established, must (1) review legislation to determine whether there are statutory obligations concerning maintenance, or exemptions relating to liability concerning maintenance. Must also (2) determine whether the decision was an exercise of policy, rather than operation, and therefore exempt from liability.

        - *Implementation is not exempt from liability* - once a policy is established, it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion and to demonstrate that in all the circumstances (eg. budgetary restraints) that it is apt for court to make a finding concerning this exercise of power.

        - *Differentiation between policy and operation* - authorities are not under a duty of care concerning to decisions which involve or are dictated by financial, economic, social, or political factors / constraints. However, actions or inactions which are the product of administrative direction, expert / professional opinion, technical or standards of reasonableness.

            - Manner and quality of inspection system is an operational, not policy activity; mere implementations of the policy decision to inspect.

- *Policy can arise at any level of authority* - not policy merely because made by high level v. lower level of government. It is the nature of the decision and not the identity of the actors which is key.

- *SOC of government lower / different than for individuals* - the duty of care owed by governments where not exempted from liability by statute or by virtue of its action being a policy decision is the same as that owed by one individual to another. However, the standard of care is lower; if govn't can demonstrate that operational decisions *reasonable in light of*: budgetary limits, personnel, equipment available, all other circ. then it has met standard of care.

- *Kamloops v. Nielsen* (SCC 1984)

  - Facts

    - Alderman convinces city to allow house to be constructed with faulty foundations. Sells to third party, who discover damage, bring action against city for failing to intervene in construction which it knew to be substandard.

  - Issue

    - Policy decision to inspect buildings; operational obligation imposed on inspector to intervene in substandard buildings. In breaching this obligation, did D.'s breach DOC to Plf.?

  - Rule

    - Yes.

  - Principle

    - *Nonfeasance / misfeasance irrelevant present statutory duty* - where there is a statutory duty to carry out some task, then in failure to perform that duty, the nonfeasance / misfeasance dichotomy is not relevant.

    - *Duties at both public and private law* - public law duty to prevent the continuation of the construction of substandard building once aware of it; private law duty arose when actual damage occurred.

    - *More operational, increasing likelihood of DOC* - Many operational duties or powers have within them some element of discretion. Can be said that the more operational the power or duty is, the easier it is to superimpose a common law duty of care on it.

    - *Exercise of discretion must be bona fide* - open to authorities to exercise discretion at both policy and operational levels. However, this must be a bona fide exercise

of discretion. Not open to a public authority to not consider available course of actions; inaction for no reason or for an improper reason is *not bona fide*.

- *Requirements for recoverability* - (1) private law duty - for action to lie, must be a private law duty established by statute, alongside public duty / obligation, (2) must not involve a policy decision or *bona fide* discretion, (3) must be the type of loss which the statute intended to guard against.

- *Hill v. Hamilton-Wentworth Regional Police Services Board* (SCC 2007)

  - Facts

    - Suspect in police investigation alleges harm a result of that investigation having been carried out in a substandard manner.

  - Issue

    - Police liable if investigation falls below acceptable standards, leading to harm to a suspect?

  - Rule

    - Yes.

  - Principles

    - *Police owe DOC to particularized suspects* - police are not immune from liability, owe a duty of care in negligence to particularized suspects, and conduct during investigation should meet SOC re: reasonable officer under the circumstances. Can help responding to failures of justice system re: wrongful convictions, institutional racism, accords with spirit of the *Charter*. New analysis would be needed re: DOC to other persons subject to consequences of police conduct.

    - *No conflict between DOC to suspect and DOC to public* - conflict does not negate a duty of care per se, unless novel duty proposed conflicts with an overarching public duty in a manner which could potentially create negative policy consequences. Both suspects and public have interest in seeing investigations undertaken reasonably, not unreasonably.

    - *Proximity usually requires close and direct relationship* - while this may exists where there is a personal relationship, it can also exist where there is no relationships.

    - *Police work is not quasi judicial* - fact based, investigative; police not required to evaluate evidence according to legal standards or make legal judgments which require immunity from liability. Defence attorneys, prosecutors, and judges make such judgments. Police are not held liable for the unreasonable conduct of other

actors in the CJS.

- *Discretion does not negate DOC owed by police* - this is taken into account in formulating the SOC; irrelevant to the DOC. Cannot say that it is unbound by requirements of reasonableness; police are professionals, and therefore must exercise discretion reasonably, with skill, bona fide. Courts will not second guess reasonable discretion by police, but will hold police liable for unreasonable exercise of discretion.

- *DOC will not create chilling effect in police work* - reasonable for officer to investigate in circumstances of lack of overwhelming evidence, through discretion; in fact, only through investigation that evidence can become overwhelming. When acting reasonably, officers can investigate on whatever basis and in whatever circumstances they deem necessary.

- *Floodgates will not be opened* - does not ground indeterminate liability; class of litigants limited by suspects under investigation, and claimants must establish that investigation was negligent; this will lead to small number of lawsuits, not sufficient to negate DOC.

- *Safeguards for erroneous damages* - Plf. must prove every element of the offence, including that the damaging outcome would not have occurred *but for* the D.'s negligence. Further, acquittal at trial is not necessarily conclusive proof of evidence in an ensuing civil trial. Finally, litigants always have the right of appeal; safeguards in place to ensure that claims can be pursued and evaluated, therefore no reason to deny claimants their right to have claim heard.

- *Fullowka v. Pinkerton's of Canada* (SCC 2010)

  - Facts

    - Violent strike at mine; explosive device caused nine deaths. Government sued for failing to shut down mine in accordance with *Mining Safety Act*.

  - Issue

    - Purpose of governing legislation is to protect miners from unsafe working conditions, not intentional criminal conduct; since the damage occurred in the realm of the latter, not the former, can the government be liable for breach of statutory duty?

  - Rule

    - Government had statutory duty to inspect the mine, order the cessation of work if it was considered unsafe.

- Principles

    - *Three issues concerning proximity* - (1) smaller, more clearly defined group than those at issue in *Cooper / Edwards;* in these cases, extended to public at large via clients of all lawyers / mortgage brokers (and not miners working at a specific mine), (2) miners have more direct and personal contact with inspector than stat. authorities have clients of lawyers / mortgage brokers, (3) stat. duties related directly to conduct of miners, rather than to clients.

    - *Categorization of conduct as criminal or labour related artificial* - for instance, deliberately ignoring safety regulations can constitute a crime. Fighting / theft / explosive use are all criminal matters, but can result from labour relations. Therefore, no categorization scheme will necessary meet all circumstances.

        - If inspectors had actually known that there was a bomb in the mine, would they not have closed it down for reasons of safety?