

Does the law recognize a duty of care?

"whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances" (Cooper ¶127)

Burden of Proof (Childs ¶13):

- (1) plaintiff = *prima facie* duty of care
- (2) defendant = countervailing policy considerations

(1) does the case fit one of the existing categories of relationships that give rise to a duty of care? (Cooper ¶23; Childs ¶15)

(2) if the case does not fit a recognized category of relationships, should a new duty be recognized?

No further analysis required if recognized category of relationship

(1a) "is there a sufficiently close relationship between the parties or proximity to justify imposition of a duty"? (Childs ¶11); "was the harm that occurred a reasonably foreseeable consequence of the defendant's act"? (Cooper ¶30)

(1b) If a sufficiently close relationship or proximity is found, are there reasons, notwithstanding the above finding, that tort liability should not be recognized? (Cooper ¶30)

(2) are there "any residual policy considerations outside the relationship of the parties that may negate the imposition of duty"? (Cooper ¶30)

Recognized categories*:

commercial hosts to guests and 3rd party highway users (Stewart); "inherently dangerous competition" + financial profit/control/knowledge (Crocker); building inspectors if discretionary (Kamloops); drivers of motorized vehicles to anyone (Assinboine); people who open doors (Bishop); dangerous items/locations unattended (Hughes)

*non-exhaustive list

Proximity = "close and direct" relationship in Donoghue (Cooper ¶32); "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act" (Cooper ¶32)

Factors considered: "expectations, representations, reliance, and the property or other interests involved"; "whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (Cooper ¶34)

Macro policy considerations: "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (Cooper ¶37)

Examples: floodgates; deference to overnment policy; autonomy of quasi-judicial bodies; burden on taxpayers

Did the defendant expose the plaintiff to an unreasonable risk of injury?

Basic standard of care is to not expose people to unreasonable risk (*Bolton*)

Basic standard of behaviour is that of a reasonable person (*Vaughan*)

(1) factors considered in determining the level (reasonableness) of risk

seriousness of the injury
(*Bolton, Paris*)

degree (likelihood) of risk
(*Bolton, Paris*)

cost of adequate precautions
(*Rentway*)

benefit of activity
(*Watt*)

(2) other indices of reasonable behaviour

customary standards
(*Warren, Waldick, Brown*)

statutory standards
(*Saskatchewan Wheat Pool, Gorris, Ryan*)

professional standards
(*Brenner, ter Neuzen*)

(3) special standards

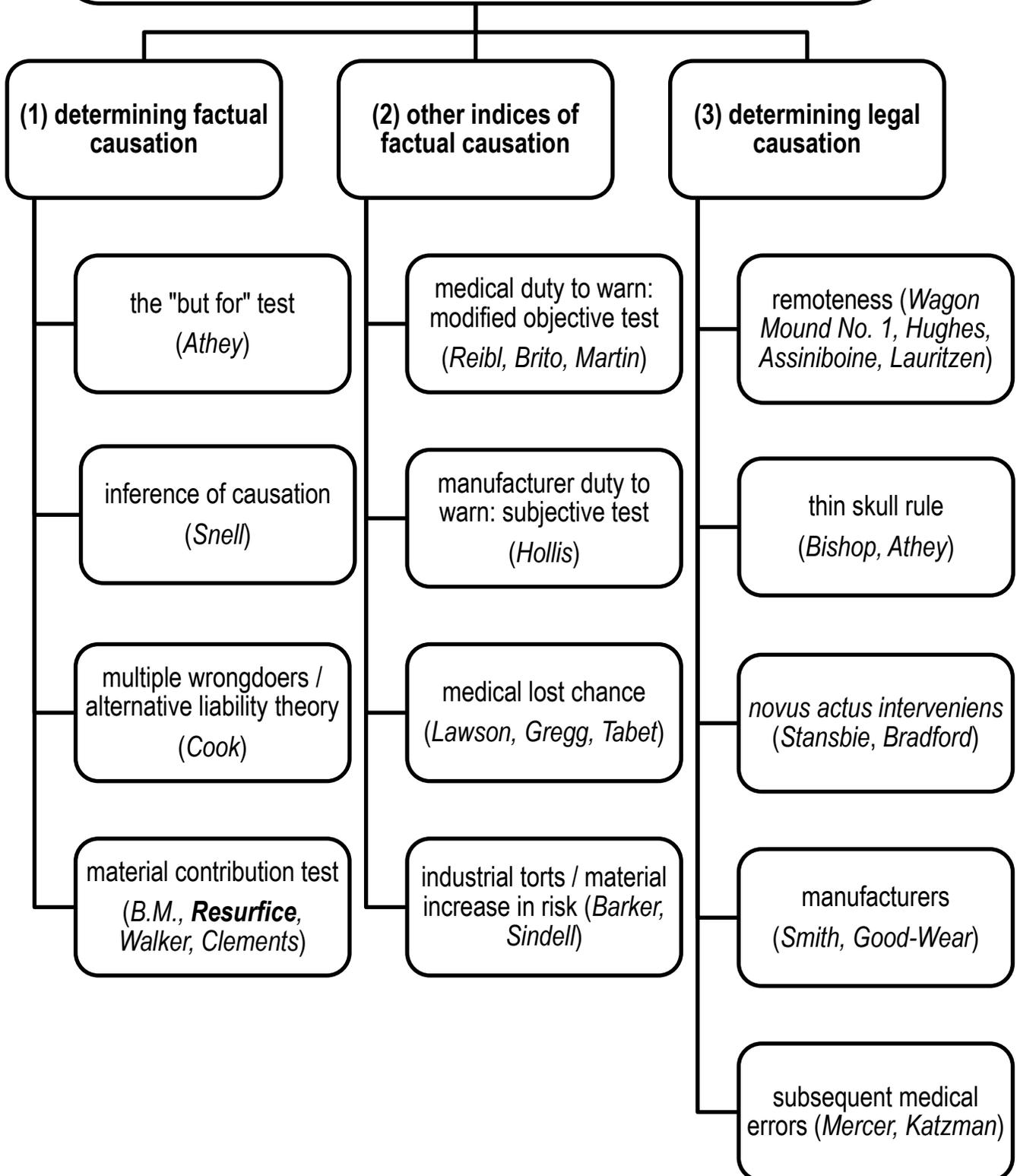
children
(*Heisler*)
exception: adult activities
(*Pope, Nespolon*)

mentally ill
(*Fiala*)

Did the defendant's breach of duty cause the harm?

The general causation test applied is the "but for" test (*Athey, Resurfice, Clements*).

The general test is a subjective test of the plaintiff.



Remoteness

If events unfold in an unusual way, is the defendant responsible for all consequences?

General Principle:

Defendant only responsible for the **reasonably foreseeable** consequences of the acts (*Wagon Mound No. 1*)

(1) the harm need merely be **possibly foreseeable**, not necessarily probably foreseeable (*Assiniboine*)

(2) type of harm must be foreseeable, not "the precise concatenation of events" (*Hughes*)

Thin Skull Rule

A plaintiff's susceptibility to harm is no defence to a claim of negligence; tortfeasors must take their victims as they find them (*Bishop*)

Crumbling Skull Rule

Δ isn't liable for effects of a pre-existing condition that π would have suffered without Δ's negligence (i.e. Δ need not place π in a better position than before) (*Athey*)

Intervening Factors/Events: what constitutes a reasonably foreseeable event or intervening act to determining the limits of the defendant's liability?

Defendant is liable for all damage s that are reasonably foreseeable (including intervening acts) if the intervening act is reasonably foreseeable.

Within the scope of the duty = within the defendant's liability

"the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened" (*Stansbie* CP 154)

Outside the created risk = outside the defendant's liability

Intervening factors that **are not fairly within the risk created by the defendant's negligence** are not the defendant's responsibility (*Bradford* CP 156, majority)

"damage is recoverable if, despite the intervening negligence of a third party, the person guilty of the original negligence **ought reasonably to have anticipated such subsequent intervening negligence** and to have foreseen that if it occurred the result would be that **his negligence would lead to loss or damage**" (*Martin* cited in *Bradford* CP 156, dissent)