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Private Law: Torts

Christopher Scott

Outline for LAW 108C A01, as taught by Professor Donald Galloway

Table of Contents

| | |
|---|-----------|
| NEGLIGENCE (CONTINUED) | 1 |
| Standard of Care (Continued) | 1 |
| Standards of Reasonable Behaviour | 1 |
| Special Standards: Children and the Mentally Ill | 1 |
| Causation | 2 |
| The “But For” and “Material Contribution” Tests | 2 |
| Failure to Warn and Causation | 2 |
| Lost Chances and Medical Malpractice | 3 |
| Emerging Law: Causation and Industrial Torts | 3 |
| Remoteness | 3 |
| <i>Novus Actus Interveniens</i> | 3 |
| Multiple Medical Errors | 4 |
| Defences to Negligence Actions | 4 |
| LIABILITY FOR PSYCHIATRIC HARM | 5 |
| The Law Today | 5 |
| Historical Developments | 5 |
| LIABILITY FOR PURE ECONOMIC LOSS | 6 |
| Negligent Misrepresentation | 6 |
| Negligent Provision of a Service | 6 |
| Negligent Supply of Dangerous/Shoddy Goods | 6 |
| Relational Economic Loss | 7 |
| Policy Considerations in Recognizing New Categories of Relationship | 7 |
| TORT LIABILITY OF GOVERNMENT | 8 |
| TORT LAW AND REPRODUCTION | 9 |
| The Immunity of Mothers | 9 |
| Negligence and Reproduction | 9 |
| MEDICAL BATTERY AND INFORMED CONSENT | 10 |
| INDEX OF CASES | 10 |

Negligence (Continued)

Standard of Care (Continued)

- Generally, the standard for behaviour is that of an ordinarily prudent person, regardless of personal incompetence (**objective test**) (Vaughan)

Standards of Reasonable Behaviour

Customary Standards

- A technical custom (based on science, or common business practice) can be a strong, or even deciding, factor in determining negligence (Warren)
 - A custom may be strong evidence, but it does not require the court to infer negligence (Brown)
- Mere community practice (e.g. not salting driveways) is insufficient (Waldick)

Statutory Standards

- There is no tort of breach of statutory obligation, but it can be evidence in negligence (Wheat Pool)
- A statute only provides a standard of care when the purpose of the provision is to prevent the sort of harm that was suffered as a result of the breach. (Gorris)
 - e.g. preventing sheep from falling off of a ship \neq preventing sheep from falling ill. (Gorris)
- Obeying a statute cannot be tortious. However, if the statute affords discretion that is exercised negligently, merely satisfying statutory obligations may be insufficient to avoid liability. (Ryan)

Professional Standards

- **Lawyers** are held to the same standard of reasonableness as are other professionals (Folland)
 - A lawyer who makes an error that an **ordinarily competent lawyer** would not make is liable for negligence. (Brenner)
- **Doctors** need only conform to common practice to avoid liability for negligence, unless that practice is "fraught with obvious risks" and there are obvious, reasonable precautions. (ter Neuzen)
 - Specialists are held to standard of the average specialist. (ter Neuzen)
 - What the actual professional practice *is* is a question of fact. Whether this exonerates the professional is a question of law (ter Neuzen)

Special Standards: Children and the Mentally Ill

Children

- Children are given a **grace period** (starting at birth) where they are "incapable of being found negligent" due to age (≤ 7 ish), intelligence, experience, general knowledge, and alertness. (Heisler)
 - After which they are held to the standard of a **reasonable child** of the same age/etc. (Heisler)
- When engaged in an **adult activity** (e.g. driving), children are held to the adult standard. (Pope)
 - "It is the **specific activity** giving rise to the allegation of negligence one examines, not whether the overall activity is normally an adult one." i.e. The driving itself must be negligent. (Nespolon)

The Mentally Ill

- The onus is on the defendant to show one of the following to avoid liability for negligence: (Fiala)
 - As a result of illness, the defendant had **no capacity to understand** the duty of care owed, or
 - Unable to discharge the duty of care due to **no meaningful control** over his actions.
- Mental illnesses that aren't serious (e.g. low IQ, being "a bit slow") will not be considered. (Fiala)
- **Doctrinal Justification:** Negligence is founded on fault, so incapacities must be accounted for. (Fiala)
 - Distinguish this from strict liability (no fault required). Strict liability is only justified where people choose to act for their own profit in a way that increases the risk of harm to others.

Causation

The “But For” and “Material Contribution” Tests

- **But For (BFT):** π must show that the injury would not have occurred **but for** Δ 's negligence. (*Athey*)
 - Failing the BFT doesn't imply that the act wasn't a cause; that case is inconclusive.
 - **Reformulation:** Δ 's act need only be a sufficient condition (not necessary). (*Walker*)
 - **Prof. Galloway** dismisses this as a terrible reformulation of an already overbroad test.
- **Material Contribution (MCT):** This test supplements the BFT, and succeeds when: (*Resurfice*)
 - It is impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the BFT (**unworkability**), and (*Resurfice*)
 - Must be due to factors outside of π 's control (e.g. limits of scientific knowledge) (*Resurfice*)
 - The defendant breached a duty of care owed to π , thereby exposing π to an unreasonable risk of injury, and π must have suffered that form of injury. (**ambit of risk**) (*Resurfice*)
 - That is, the risk was **materially increased** (*B.M.*)
 - A contributing factor is said to be material if it falls outside of the *de minimis* range (*Athey*)
- **Onus:** The onus is on the plaintiff to prove causation on the balance of probabilities. (*Snell*)
 - This is a “reasonable degree of certainty”, not a “medical certainty”. (*Snell*)
 - The court will apply a **robust and pragmatic approach**, where the trier of fact is free to infer causation “as a matter of common sense” even if there is less than 51% certainty. (*Snell*)
 - This is particularly relevant where Δ has control over all the information, so π can't prove the case (e.g. where the Δ is a doctor and doesn't testify) (*Snell*)
 - **Exception:** If there are **multiple wrongdoers**, and all acted negligently, the **onus is reversed**; each defendant must show that he did not cause the harm. (*Cook*)
- **Doctrinal Theory:**
 - The BFT is "excessively inclusive" – **Prof. Galloway**.
 - Almost anyone in the chain of causation can satisfy this test. Is a gun salesman responsible for the harm caused by the gunman? The manufacturer? The saltpeter miner?
 - UK courts have suggested that if π can show that Δ increased the risk of harm, and that harm occurred, then Δ should have the onus of showing that his act was not the but for cause. (*McGhee*)
 - The unreformulated BFT doesn't handle overdetermination or pre-emption.
 - **Overdetermination:** There is a sufficient collection of factors such that the event is still caused even if one is removed. (e.g. two people shoot at the same time – *Cook*). Use MCT.
 - **Pre-emption:** The sufficient act would have been performed regardless (e.g. you dig a hole that π falls into. If you hadn't, someone else would have)

Failure to Warn and Causation

- Test for failure to obtain informed consent: (*Martin*)
 - Did Δ owe a duty of care to π to make full disclosure of all material risks?
 - Did the Dr. "fully and adequately" explain the material risks to π ?
 - Includes risks that the medical profession would deem material, and those that doctor knew or ought to have known the patient would have found material (**patient-centric approach**)
 - **Therapeutic privilege:** "Emotional condition" of π may allow Dr. to withhold information.
 - Any risk with serious consequences must be disclosed, even if only a “mere possibility”.
 - Would a reasonable person in π 's place have consented to the operation if informed correctly?
 - If they'd have chosen to delay treatment, that is sufficient to show causation. (*Martin, Chester*)
 - Did the failure to inform cause the damage that was suffered?
- **See 1st semester:** Manufacturer duty to warn (*Hollis, Lastoplex*) and *Reibl* on informed consent.

Lost Chances and Medical Malpractice

- Failure to inform that results in a loss of a [slim] chance does not establish contribution to (or causation of) the illness. (Lafferriere)
 - **E.g.** Failing to inform patient about a tumour that is only rarely curable was held not to be a contribution to the cancer, so the Dr. was only liable for psychological damages. (Lafferriere)

Emerging Law: Causation and Industrial Torts

- **Market Share Liability:** Each manufacturer is liable for an amount proportional to their market share, if the particular manufacturer causing the harm cannot be determined. (Sindell (US))
- **Mesothelioma cases:** 6-part test to impose joint and several liability on employers whose employees are exposed to asbestos and later contract mesothelioma. (Fairchild (UK))
 - If a party materially increases the risk of contracting mesothelioma and may have indeed caused it, but this cannot be proven on the BoP due to limitations of science, then they are liable for damages proportional to the degree to which they increased that risk (and no more) (Barker)

Remoteness

- Anything not **foreseeable by a reasonable person** is too remote to affix liability. (Wagon Mound 1)
 - The harm need merely be foreseeably **possible**, not necessarily foreseeably probable. (Hoffer)
 - The **type of harm** is what must be foreseeable, not the “precise concatenation of events” or the degree of harm suffered. (Hughes)
 - **E.g.** if it is foreseeable that a lamp might burn someone, the fact that an unforeseeable series of events lead to an explosion and caused major burns isn’t too remote. (Hughes)
- Remoteness is considered when **determining liability**, and when **assessing damages**. (Lauritzen)
- **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)
 - **Exception:** Doesn’t apply to psychological weakness (e.g. hysteria) (Bradford, Mustapha (?))
 - **Doctrinal Note:** This is an exception to the foreseeability requirement. Discuss?
 - **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)

Novus Actus Interveniens

- A negligent act may be followed by an intervening act that is so extraordinary that it actually breaks the causal chain. (Bradford)
 - **E.g.** The “hysterical conduct” of an “idiotic person”, responding to properly-functioning safety equipment, is too remote to be foreseeable, and so is a *novus actus interveniens*. (Bradford)
- If the intervening act is part of the "ordinary course of events", Δ is also liable for the consequences of that act (**e.g.** Dr. negligently treats patient harmed by Δ – Δ liable, but note MMEs, below)(Katzman)
 - This case was in the medical context, but this principle should have general applicability.
- Ordinary intervening negligence is something that wrongdoers should foresee. (Smith)
 - See “Manufacturers, Vendors, Contractors and Remoteness”, below.
- Liability for breaching a duty to guard against particular intervening acts cannot be avoided by showing that that very act is what occurred. (Stansbie)
 - **E.g.** If a contractor breaks his duty to lock a customer’s door (to prevent theft), and someone then enters through that door and thieves, that theft is not a *novus actus interveniens*. (Stansbie)

Manufacturers, Vendors, Contractors and Remoteness

- A **manufacturer** who knows that customers commonly use their products in a particular manner may be liable for a negligent defect that is triggered by that act. (Smith)
 - **E.g.** customers commonly remove ground prong from fridges; an internal defect results in electric shocks. Manufacturer liable, as they were aware of this common removal. (Smith)
- **Examination by Consumer:** If examination isn't made when it ought to have been, the consumer can't claim that the defect didn't arise later (so manufacturer not liable). Conversely, if the defect is hidden from inspection, the manufacturer can't blame the consumer for not noticing it. (Smith)
- **Warning** a consumer of the dangers of using a product in a particular way absolves the manufacturer/vendor of liability towards that consumer. (Good-Wear)
 - If a seller knows (or should know) that the buyer will disregard his warning, then liability is not waived to any **3rd parties** to whom the seller owes a duty. (Good-Wear)
 - **E.g.** Tire vendor sells unsafe tires to gravel truck driver, with warning not to drive while loaded. Trucker does so, tires explode, 3 people die. Vendor liable – duty to road users. (Good-Wear)

Multiple Medical Errors

- Medical complications and **genuine medical errors** are reasonably foreseeable consequences of the defendant's negligence. (Mercer)
- **Negligent medical treatment:** There has been conflicting judicial treatment; the law is unclear:
 - Negligent medical treatment that aggravates the plaintiff's original injuries is a *novus actus interveniens* and the original defendant is not to be held liable for the additional injuries. (Mercer)
 - **Onus** of proving that the medical treatment was negligent is on the original defendant. (Mercer)
 - If treatment was negligent, the doctor is liable for the aggravated damages only, and the original defendant is liable for the damages that would have existed without negligent treatment. (Katzman)

Defences to Negligence Actions

- The **illegality** defence in torts is only applicable: (Hall)
 - To prevent a person from profiting from illegal conduct, or
 - Where a person seeks damages in order to evade criminal penalty
- **Voluntary assumption of risk** (*Volenti non fit injuria*) arises where a person voluntarily consents to the risk of injury arising from the defendant's negligence, absolving liability completely. (Crocker)
 - The plaintiff must agree to both the *physical risk of injury* (the danger of being injured in fact by the conduct in question), and the *legal risk* (waive right to seek compensation from defendant should the risk of injury materialize)
 - Agreement may be express (e.g. contractual waiver) or implied (e.g. accepting a ride from a visibly intoxicated driver)
- **Contributory negligence** arises where the plaintiff is partly responsible. This is a partial defence, resulting in an apportionment of damages. (cf. BC *Negligence Act*, ss. 1, 2)
- There is no defence of **inevitable accident** to the tort of negligence. (Paul v. Ebert)
- **Note:** Courts rarely apply voluntary assumption of risk or illegality, as they preclude liability. They prefer to apply contributory negligence where an act is illegal or shows a disregard for safety.

Liability for Psychiatric Harm

The Law Today

- Personal injury at law connotes serious trauma or illness, and includes psychological injury. Thus, psychological injury is compensable at law in the same way that physical injury is. (*Mustapha*)
 - To be compensable, a psychological injury must be **serious** and **prolonged** and **rise above** the ordinary annoyances, anxieties and fears that people living in society routinely accept.
 - Mental states falling short of injury (e.g. upset, disgust, anxiety, agitation) aren't compensable.
- **Note:** Most of the analysis under *Mustapha* occurs in under the heading of **remoteness**. (*Mustapha*)
 - It must be foreseeable that a mental injury would occur in a person of ordinary fortitude (even if it wouldn't have resulted in the same level of injury – π 's **eggshell skull** is no defence)
 - If Δ had knowledge of π 's particular sensibilities, an unusual harm may have been foreseeable.
- **Psychological harm without breach of established duty to π :** Factors for finding proximity: (*Devji*)
 - **Locational** proximity: π close in space to the event? (cf. *McLoughlin, Dulieu, Bourhill, White*)
 - **Temporal** proximity: Damage must occur immediately after the event. (cf. *Alcock, Coultas*)
 - **Relational** proximity: Close ties of love/affection to injured party?(cf. *Alcock, White, McLoughlin*)

These factors are
balanced – there is
no formula

Historical Developments

- UK pre-1901: No recovery for nervous shock in near-accident (floodgates) (*Coultas*)
- UK 1901: Can recover for nervous shock resulting from reasonable fear of personal injury. (*Dulieu*)
- UK 1925: Mother's shock at sight of her child being injured is compensable. (*Hambrook*)
- UK 1943: Bystander sees aftermath of accident; test for liability is "foreseeability of injury by shock". Persons are expected to possess "customary phlegm" (i.e. constitution) (*Bourhill v. Young*)
- UK 1964: Father hears accident to child, sees aftermath, recovers damages. (*Boardman*)
- UK 1967: Rescuer in train crash gets damages (from negligent party) for shock. (*Chadwick*)
- UK 1982: Mom rushes to hospital, sees dead child, injured children/husband. Recovers. (*McLoughlin*)
 - The court will balance the following factors to determine whether there should be liability:
 - **Class** of possible claimants: Only closest relatives
 - **Proximity** of the wrongdoing: Must be proximate in time and space
 - **Stimulus** causing shock: Seeing or hearing the event is good, but not less direct stimuli.
- UK 1991: People watch disaster where relatives get crushed on TV. No recovery – not proximate in space, didn't see aftermath personally (TV is less direct than ordinary sight). (*Alcock*)
- UK 1992: Police rescuers in *Alcock*-scenario. No recovery; police trained, unlike *Chadwick* (*White*)
 - Where the psychological injury arises from physical injury to another, the test is:
 - π has **close ties** of love and affection with the victim. (e.g. spouse, child)
 - π was present at the accident or its **immediate aftermath**. (this includes the hospital)
 - The psychiatric injury must have been **caused by direct perception** of the accident or its immediate aftermath, and not upon hearing about it from someone else.
 - Court also notes that there are policy factors for denying compensation for psychiatric harms; if recovery is available, people are more likely to become [honestly] psychologically harmed.
- BCCA 1988: π and wife are in accident. Wife is brain damaged; π visits her constantly. π becomes depressed; his life is devoid of enjoyment. No recovery; π is suffering from sorrow, not the shock of the accident. Sorrow is a *novus actus interveniens* – too remote. (*Beecham*)
- BCCA 1990: Mother hears of train accident; her child is onboard. Due to Δ 's negligence, doesn't find out that child is dead for days; lives in anxious suspense. No recovery – no shock. (*Rhodes*)
- BCCA 1999: Family sees bandaged body of daughter after accident; no recovery, family had opportunity to steel themselves. Experience must be **shocking**/horrifying/*etc.*, not usual grief. (*Devji*)

Liability for Pure Economic Loss

- Liability in contract and tort is concurrent, and tort liability cannot be reduced or removed except by clear language to that effect in the contract. (BG Checo)
- Each of the following has been recognized as a basis for recovery (Winnipeg Condo)

Negligent Misrepresentation

- A statement is a **negligent misrepresentation** when: (Hedley Byrne, aff'd Haskett)
 - There is a duty of care based on **special relationship**.
 - The representation is **untrue** or misleading.
 - The misrepresentation is made **negligently**.
 - The listener **reasonably relied** on the misrepresentation.
 - The reliance was **detrimental**.
- Reliance was originally considered the key factor in finding proximity, but it's now unclear (Hercules)
 - Finding close proximity and assumed or imposed obligations (e.g. statutory obligations) has been enough for *Anns* stage 1, even when there is no reliance on the statement. (Haskett)
- **Reasonable reliance** is still a sufficient condition for finding proximity (*Anns* stage 1). Indicia of reliance include (not all are necessary – only 4 found in *Hercules*): (Hercules)
 - Speaker has a direct financial interest
 - Speaker is a professional or someone with special skill
 - Advice given in the course of business.
 - Advice given deliberately, not on a social occasion.
 - Advice given in response to a specific inquiry or request.
- For **policy** reasons (indeterminacy of liability), the speaker should be liable only when: (Hercules)
 - The speaker knows the identity of the plaintiff (or the class to which the plaintiff belongs), and
 - The statements are used for the specific purpose for which they were made.
- A finding of reasonable reliance does not preclude a finding of **contributory negligence**. (Avco)
 - The test for negligent misrepresentation focuses on the circumstances surrounding the misrepresentation, whereas the test for contributory fault focuses on the circumstances surrounding the event that occasioned the loss. Thus, reliance might have been reasonable, but the plaintiff might have acted negligently in the events that brought about the loss. (Avco)
 - It may be negligent to fail to protect yourself against foreseeable carelessness of others. (Avco)

Note: *Hedley Byrne* had differing views on when a negligent misrepresentation should be found; this is the view taken in *Haskett*.

Negligent Provision of a Service

- A duty of care is owed to party A by the provider of a service when that provider knows that A's interests are dependent on non-negligent provisions of the service. (BDC)
 - Knowledge is a key factor; harm to a 3rd party who is known to depend on the contract may be compensable, but if they are unknown, there cannot be recovery (privity/indeterminacy) (BDC)
- Lawyers are liable to disappointed beneficiaries for negligent provision of a service. (Wilhelm)

Negligent Supply of Dangerous/Shoddy Goods

- Where **negligent** construction or planning creates **defects** that pose a **real and substantial danger** to the occupants of the building, the costs of repairing the building are **recoverable** by the occupants, even if there is no contractual relationship between builder & occupants. (*Winnipeg Condo*)
 - **Note:** *Winnipeg Condo* claims that this applies only to houses, because they cannot be easily discarded, but subsequent cases have applied this to dangerous products generally (e.g. *Hasegawa*)
- No recognized duty not to negligently supply merely shoddy (non-dangerous) goods (Hasegawa)
 - There's been reluctance to expand *Winnipeg Condo* to merely shoddy goods, out of concerns of treating tort law as insurance, interfering with contract, & indeterminacy. (*Hasegawa, Rivtow, Roy*)

- **Note** *Rivtow Marine*: Δ sells defective crane to D, who installs it on π 's boat. Δ and π have no contractual relationship, but they do have a close working relationship (Δ talks to π about the crane frequently). Δ fails to disclose crane's defects upon discovery, π suffers economic loss. Δ liable.
 - This was adopted in the UK in *Junior Books*, where, again, the parties didn't have a contractual relationship but *did* have a very close working relationship. *Hasegawa* rejects *Junior Books*.
 - These cases state that, where the parties share a proximate relationship and a duty is breached (e.g. failure to warn, or to conform to representations), there's liability even without a contract.

Relational Economic Loss

- Relational economic loss is only recoverable when the circumstances fall within an established category where liability has been recognized. The list of categories isn't closed. (*Bow Valley*)
 - **Categories**: π has a proprietary interest, "general average" cases, joint ventures. (*Bow Valley*)
- To recognize a new category, apply *Hercules* (which applies *Anns*). To proximity: (*Bow Valley*)
 - *Kamloops*: Was the plaintiff's reliance reasonable and foreseeable? (*Kamloops*)
 - If reliance isn't possible (e.g. duty to warn), foreseeability is sufficient. (*Bow Valley*)
 - Proximity exists if one is under an **obligation** to be mindful of another's interests. (*Hercules*)
 - This will be found if one has [constructive] **knowledge** of the existence of another and that one's actions might cause economic harm to them. (*Bow Valley*)
- **Note**: *Norsk* applies a very broad test (pure economic loss is found where there is negligence, foreseeable loss, and proximity between the act and the loss), essentially abolishing the distinction between physical and economic harm. However, due to a split in the court, not precedential. (*Norsk*)
 - Proximity is based on the relationship between the parties, physical propinquity (closeness), assumed or imposed obligations, and/or a close causal connection. (*Norsk*)

Policy Considerations in Recognizing New Categories of Relationship

- Policy factors **opposing** the recognition of proximity in the 1st stage of *Anns*:
 - A court will not insert standards of care that the parties were capable of contracting for themselves; e.g. if the parties had the option to create a joint venture, and that would have avoided the loss, then proximity will not be found. (*Design Services*)
- Policy factors **opposing** the recognition of liability in the 2nd stage of *Anns*:
 - **Indeterminacy**: Liability to/in/for an indeterminate class/amount/time. (*Winnipeg Condo*)
 - The **construction context** is prone to indeterminacy; subcontractors have suppliers, who in turn have subcontractors, etc. The class of π s is often indeterminate. (*Design Services*)
 - **Alternative Legal Remedies** available. (*Haskett*)
 - Inappropriate to extend liability to **Contractual** context: (*Wilhelm, Haskett*)
 - This can be based on **privity** issues (*Wilhelm*)
 - Tort law doesn't compensate for lost expectations (except for *Heldey Byrne*) (*Wilhelm*)
 - **Illogical** (e.g. to put a duty on lawyer drafting a will, but not on the testator) (*Wilhelm*)
 - **Chilling Effect**. (*Hill*)
 - **Quasi-Judicial** role: A duty to act fairly and impartially is inconsistent with private duties to particular individuals. This is only at issue for government actors. (*Cooper*)
 - But note *Hill*: police are not quasi-judicial. (*Hill*)
 - **Impact on Taxpayers**: Laws that would cost the public large sums ought to be legislated. (*Cooper*)
- Policy factors **supporting** recognition of liability in the 2nd stage of *Anns*:
 - **Lacuna** in the law; the right to claim is held by an unharmed party. (*Wilhelm*)
 - **No injustice** in making this wrongdoer pay for harm caused. (*Wilhelm*)
 - **Public reliance** on the relationship or service in question. (*Wilhelm*)
- The possibility of mistake (π recovering unjustly) won't stop the courts from imposing liability. (*Hill*)

Tort Liability of Government

- **Proximity** with government is determined in the same way as it is with private individuals. *(Just)*
 - **Note:** Legislation may impose or exempt liability on the government. *(Just)*
 - If the government actor is created by statute (e.g. mortgage registrar), proximity factors must be found in the statute; i.e. the statute must specify a duty to the claimant. *(Cooper)*
 - Proximity will not be found where a private law duty conflicts with the government body's "overarching duty" to the public. *(Cooper)*
 - An individual with a "critical personal interest" in the government's activity is likely to be in a proximate relationship (e.g. a suspect in a police investigation who's been singled out), even in the absence of representations or reliance. *(Hill)*
- Government action may be **policy** or **operational**: *(Just)*
 - **Policy:** Decisions that involve financial, economic, social or political factors or constraints. *(Just)*
 - Policy decisions are usually (but not always) made by high-level officials. *(Just)*
 - There is **no duty of care** governing policy decisions. *(Just)*
 - However, a policy decision that is **not bona fide** might be tortious. *(Roncarelli, Kamloops)*
 - **Examples:**
 - Budgetary allotments are policy decisions. *(Just)*
 - A decision not to act at all, or a failure to decide to act, is not a policy choice. *(Kamloops)*
 - Statutes may confer discretion to craft policy *(Cooper)*
 - ❖ A regulatory body's choice of when to report audited information is policy *(Cooper)*
 - ❖ However, discretion akin to that of other professionals (e.g. police) is not policy *(Hill)*
 - **Operations:** Action or inaction that is the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness. *(Just)*
 - The manner and quality of an inspection system is operational: Once a policy decision has been made, the system implementing it must be reasonable (manner) and carried out in a reasonable and non-negligent way (quality). *(Just)*
- The **standard of care** may be lower for government, due to greater responsibilities. *(Just)*
 - E.g. **Budgetary, staffing, and equipment** limits might affect the reasonable standard.
 - Concerns about **limited resources** are addressed at the standard of care stage. *(Hill)*

Tort Law and Reproduction

The Immunity of Mothers

- Pregnant women cannot be held liable for negligent lifestyle choices that harm a foetus, and they cannot be ordered to stop such acts. *(Winnipeg Child)*
- Where a foetus is negligently harmed (prenatally) and is subsequently born, that child may sue the person who caused that harm for any injuries resulting post-birth. *(Duval)*
 - The foetus doesn't have legal status; only the born-alive child does. The duty is to the child, and the liability is for the **post-natal** injury, not the harm to the foetus. *(Duval)*
- **Mothers are immune** to negligence claims against them for pre-natal harms resulting in post-natal injuries to their children. *(Dobson)*
 - Although they share a proximate relationship, there are overwhelming policy reasons rejecting a duty of care: intrusion into women's autonomy, unique relationship between mother and foetus (everything the mother does could result in liability), institutional competence issues, family reasons (psychological blow to mother), no deterrence or compensatory benefit. *(Dobson)*
- Negligent mothers cannot be found to be **contributorily at fault** (and thus, doctors are 100% liable for injuries, regardless of mothers' negligence) *(Preston)*

Negligence and Reproduction

- Doctors don't owe a duty to future children while treating mothers. *(Paxton)*
 - This applies only to negligence occurring prior to conception (i.e. before there is a foetus) *(Ediger)*
 - Once there is a foetus, a doctor owes a duty to two patients; the mother and (future) child. The duty to the mother takes precedence over the duty to the child, if there is a conflict. *(Ediger)*
- **Wrongful birth**: If a doctor's negligence results in a child being born, he is liable for **non-pecuniary** damages "adequate to compensate the plaintiffs". *(Bevilacqua)*
 - **Note**: Although a non-patient wife has been allowed to make a claim for wrongful birth *(Bevilacqua)*, a non-patient boyfriend was not *(Freeman)*. Is the different gender? Marriage?
 - Factors in assessing adequacy of damages include: *(Bevilacqua)*
 - Parents' reasons for having wanted to limit the size of their family
 - E.g. Wanting certain lifestyle options to be available, or having roomier finances.
 - Parents' actual circumstances both at the time of the sterilization.
 - Parents' actual circumstances at the time of the pregnancy and childbirth.
 - **Note**: Do **not** attempt to assess the relationship of the child with the parent
 - These damages do not include the cost of raising the child *(Bevilacqua)*
 - **Mitigation**: Parents may not select lifestyle choices that give rise to unreasonable damages.
 - **Note**: Choosing not to abort or to give up for adoption will rarely be considered unreasonable (if at all). *(Bevilacqua)*

Medical Battery and Informed Consent

- A (adult) patient has an absolute right to refuse treatment, even if it isn't an informed refusal. (*Malette*)
- Where consent has not been obtained for the procedure in question, the patient may claim battery. Otherwise, if they were merely inadequately informed, then they may only claim in negligence. (*Reibl*)
- *Health Care (Consent) and Care Facility (Admission) Act*
 - Appears to supplant *Malette* and *Reibl*.
 - s. 4: All capable adults have the right to give or refuse consent (incl. on religious ground, *etc.*)
 - s. 5: Health care must not be provided without consent, subject to exceptions in ss. 11-15.
 - Reasonable efforts to get consent must be made before relying on those sections.
 - s. 6: Defines criteria of consent (voluntary, informed, *etc.*)
 - s. 11: Consent can be given by substitute decision maker (under certain circumstances).
 - s. 12: Emergency health care exceptions (incapable of consent, no substitute, emergency)
 - s. 12.1: No emergency health care contrary to the patient's wishes (i.e. refusal).
 - s. 12.2: A substitute decision maker's refusal can be ignored if they have contravened the *Act* and it is an emergency.
- *Infants Act*
 - s. 17(2),(3) identify the circumstances in which a minor can consent to health care.
 - s. 17(3): a minor's consent is only valid if:
 - The minor understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care [**NB** – the common law position in *Walker*], and
 - The health care practitioner reasonably believes that the treatment is the minor's best interests [**NB** – this is an extension to the common law].
- *Child, Family and Community Service Act* s. 29: Doctors can get a court order to treat a child in severe need, regardless of the consent of the minor or parents.
 - The *CFCSA* is a complete and exclusive code that supersedes the common law rule. (SJB)

Index of Cases

| Short Name | Ct./Year | Description | Page |
|------------------------|-----------|---|-------|
| <i>Athey</i> | SCC 1996 | The crumbling skull rule. | C 260 |
| <i>Athey</i> | SCC 1996 | π pre-disposed to back injury. Accident with Δ . "But for" test. | C 193 |
| <i>Avco</i> | OCA 2003 | Δ signs bad life insurance. Contrib. neg. & neg. misrep.? | C 310 |
| <i>B.M.</i> | BCCA 2004 | RCMP fail to investigate domestic abuse. Liable for later injury? | C 205 |
| <i>Barker</i> | UK 2006 | Revisiting Fairchild (mesothelioma cases) | C 233 |
| <i>BDC</i> | SCC 1986 | Crown grant delivered late. Negligent provision of service. | C 324 |
| <i>Bevilacqua</i> | BCSC 2004 | Vasectomy doesn't take; parents sue for wrongful birth. | C 427 |
| <i>BG Checo</i> | SCC 1993 | Concurrent liability in contract and tort | C 294 |
| <i>Bishop</i> | OHC 1978 | π is a hæmophiliac – falls down steps. Thin Skull rule. | C 258 |
| <i>Bow Valley</i> | SCC 1997 | Oil drilling rig catches fire. Relational economic loss. | C 351 |
| <i>Bradford</i> | SCC 1974 | Fire in restaurant – hissing extinguisher. Novus actus. | C 261 |
| <i>Chester</i> | UK 2004 | Travel journalist gets paralyzed by operation. | C 228 |
| <i>Cook</i> | SCC 1951 | 2 shooters; 1 injury. Causation? | C 202 |
| <i>Cooper</i> | SCC 2001 | Gov't mortgage registrar negligent; investors lose money. | C 379 |
| <i>Design Services</i> | SCC 2008 | Gov't tendering. 1 name on bid; but others involved. | C 356 |
| <i>Devji</i> | BCCA 1999 | Daughter killed in car crash – Trauma at seeing body. | C 273 |
| <i>Dobson</i> | SCC 1999 | Mom drives negligently; foetus is harmed. No duty of care. | C 395 |
| <i>Ediger</i> | BCSC 2009 | Dr. can't place forceps; baby gets brain damage. | C 242 |
| <i>Fairchild</i> | UK 2003 | 6 criteria for recovery in a mesothelioma case | C 233 |

| Short Name | Ct./Year | Description | Page |
|-----------------------|-----------|---|--------|
| <i>Fiala</i> | ACA 2001 | Bipolar guy chokes Δ ; drives into π . Mental disorder. | C 184 |
| <i>Freeman</i> | MCA 1996 | Father suing for negligent abortion. | C 438 |
| <i>Good-Wear</i> | NCSA 1979 | π warns Δ that tires are unsafe; π sells them anyways. | C 266 |
| <i>Gregg</i> | UK 2005 | No compensation for loss of a chance of better treatment. | C 232 |
| <i>Hall</i> | SCC 1991 | Availability of the illegality defence | C 272 |
| <i>Hasegawa</i> | BCCA 2002 | Pepsi lets mold into bottled water; Japan won't buy it. | C 342 |
| <i>Haskett</i> | OCA 2003 | Credit reporter includes bankruptcy info. illegally. Econ. loss. | C 315 |
| <i>Hedley Byrne</i> | UK 1964 | Bank issues inaccurate credit report. Economic loss. | C 288 |
| <i>Heisler</i> | OHC 1971 | 9-y.o. Δ driving tractor; reasonable child std. | C 173 |
| <i>Hercules</i> | SCC 1997 | Auditors negligently prepare statements; shareholders rely. | C 299 |
| <i>Hill</i> | SCC 2007 | π negligently arrested/imprisoned by police. Gov't liability. | C 384 |
| <i>Hoffer</i> | MCA 1971 | Toboggan hits gas main; school burned. Remoteness. | C 252 |
| <i>Hughes</i> | UK 1963 | Kids knock lamp into manhole – explosion. Remoteness. | C 248 |
| <i>Just</i> | SCC 1989 | Boulder crushes car; kills π 's daughter. Hwy dept. liable? | C 365 |
| <i>Kamloops</i> | SCC 1984 | City counsellor gets house built not-to-code; sells it. | C 372 |
| <i>Katzman</i> | OCA 1982 | Medical negligence only carries liability for aggravation | C 271 |
| <i>Laferrière</i> | SCC 1991 | Dr. forgets to mention π 's tumour – π dies. | C 231 |
| <i>Lauritzen</i> | ASC 1965 | Drunk boss gets π stuck in blizzard. Loses toes & wife. | C 256 |
| <i>Malette</i> | OCA 1990 | Blood transfusion to unconscious J.W. Consent. | Moodle |
| <i>Martin</i> | ABQB 2007 | π wants to dance at daughter's wedding; gets paralyzed. | C 217 |
| <i>McGhee</i> | UK 1973 | The "McGhee extension" to Fairchild. Mesothelioma. | C 234 |
| <i>Mercer</i> | OCA 1941 | Medical complications/errors are not intervening acts | C 271 |
| <i>Mustapha</i> | SCC 2008 | Dead flies in bottled water. Psychiatric harm? | C 284 |
| <i>Nespolon</i> | OCA 1998 | Drunk teen run over by π ; π seeks dmgs for distress. | C 178 |
| <i>Norsk</i> | SCC 1992 | Barge hits bridge that CN uses; but have an interest in. | C 348 |
| <i>Paxton</i> | OCA 2008 | Doctors owe no duty of care to future children. | C 413 |
| <i>Pope</i> | AQB 2002 | 12-y.o. Δ hits π 's teeth with golf ball. Adult activities. | C 175 |
| <i>Preston</i> | MCA 2002 | Mom-to-be gives baby STD; contributory maternal neg. | C 410 |
| <i>Reibl</i> | SCC 1980 | When to sue Dr.s in negligence vs. battery. | Moodle |
| <i>Resurfice</i> | SCC 2007 | Water hose in a Zamboni's gas tank. Tanks looked similar. | C 212 |
| <i>Sindell</i> | US 1980 | DES causes cancer in babies. Market share liability. | C 242 |
| <i>SJB</i> | BCSC 2005 | 14-year-old J.W. refusing blood transfusions. | Moodle |
| <i>Smith</i> | NSSC 1978 | Fridge w/o ground prong – inspection period; novus actus. | C 265 |
| <i>Snell</i> | SCC 1990 | π loses sight in eye after operation by Δ – uncertain causation. | C 194 |
| <i>Stansbie</i> | UK 1948 | Decorator leaves house unlocked – liable for 3rd party's theft? | C 269 |
| <i>Vaughan</i> | UK 1837 | π warns Δ of fire hazard; Δ doesn't fix. Reasonable person std. | C 171 |
| <i>Wagon Mound I</i> | UK 1961 | Oil released from ship; fire on dock. Remoteness. | C 243 |
| <i>Walker</i> | NBCA 1994 | Mature minor refuses blood transfusions. | Moodle |
| <i>Walker</i> | SCC 2001 | Red Cross doesn't screen for high-risk HIV donors. | C 214 |
| <i>Wilhelm</i> | SCA 2000 | Lawyer negligently draws up will; π loses inheritance. | C 328 |
| <i>Winnipeg Condo</i> | SCC 1995 | Negligent construction of building; builder liable for repairs? | C 332 |

○ is the Osbourne text

C is the coursepack