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Private Law: Torts

Christopher Scott

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

University of Victoria Faculty of Law

Table of Contents

Establishing Liability of Parties

Joint Tortfeasors

- Four categories of joint tortfeasors: (*Cook*)
  1. One party encouraging or instigating another to commit a tort.
  2. An employer and employee, where the employee commits a tort within the scope of employment.
  3. Principal and agent, where the agent commits a tort within the actual or apparent authority of the agent.
  4. Other, fact-specific cases where two or more individuals act in concert to commit a tort.

Vicarious Liability

- In certain relationships, a party not directly involved in the commission of a tort may be vicariously liable for a subordinate's actions. This is a **strict** (i.e. faultless) liability. (*Sagaz*)
- Factors considered in determining the requisite "closeness" of the relationship (i.e. in assessing the relative autonomy of the subordinate): (*Sagaz*)
  - Control over the subordinate's actions.
  - Whether the subordinate supplies his own tools.
  - Whether the subordinate is given a wage vs. profiting for performing specific tasks.
  - Whether the subordinate is responsible for the investment of the superior's resources.
  - Whether the subordinate has his own helpers.
  - The degree of financial risk taken by the subordinate.
- The relationship between an **independent contractor** and its employer is not generally close enough to establish vicarious liability. (*Sagaz*)
- To establish an **employer's** vicarious liability for an employee's tort, there must be a "strong connection" between the employment and the wrongdoing. The employer must have created or enhanced the risk that an employee would commit an intentional tort. (*E.B.*)
  - The ***Bazley* factors** may be considered when assessing whether an employer created or enhanced the risk of an employee committing an intentional tort: (*E.B.*)
    - The opportunity that the employer afforded the employee to abuse power.
    - The extent to which the act may have furthered the employer's aims.
    - The extent to which the act was related to friction/confrontation/intimacy inherent in the employer's enterprise.
    - The extent of power conferred on the employee in relation to the victim.
    - The vulnerability of potential victims to wrongful exercise of the employee's power.
- **Hospitals** may be vicariously liable for the tortious conduct of their staff (e.g. staff doctors, residents and nurses), but not for the tortious conduct of those with "hospital privileges." The latter are not "employees", although they may use hospital facilities. (*Yepremian*)
  - The exclusion of "privileged" doctors is disputed by some later authorities. (*Jaman*)
- At common law, **parents** are not vicariously liable for the torts of their children (unless in an employee-employer or principle-agent relationship), but the BC *Parental Responsibility Act* ss. 3 and 6 allow vicarious liability for property damage of up to $10,000. (*see C 29*)

Joint and Several Liability

- In a tort with multiple wrongdoers, liability is "**joint and several**". Any tortfeasor may be sued for the full amount of damages, and it is the responsibility of the defendants to apportion liability and payment between themselves.
  - This ensures that the plaintiff will be compensated, even if some tortfeasors are broke.
  - Thus, a tortfeasor who is 10% at fault (but also wealthy) may pay 100% of the damages if other tortfeasors are insolvent.
    - **Exception**: In BC, liability is merely several if contributory negligence is a factor; see *Negligence Act* s. 2(c). Thus, tortfeasors need only pay for their allotment of blame.
- Joint and several liability for all torts (not just negligence) is governed by the BC *Negligence Act* s. 4.

Contributory Negligence

- If the plaintiff is partially at fault due to their own negligence, damages may be reduced.
- The BC *Negligence Act* governs contributory negligence:
  - Section 2(c): Liability is **several** if contributory negligence is found.
    - This is not the case in all jurisdictions (e.g. Ontario).
  - Section 1(2): If degrees of fault cannot be determined, liability is split 50-50.
- **Formerly**, the rule at common law was much more rigid:
  - *Any* contributory negligence would preclude damages being awarded.
  - As a result, the **Last Opportunity Rule** developed: 100% of the liability will rest on whoever had the last opportunity to prevent the harm from occurring.
    - Consider the un-seatbelted person hit by a drunk driver.

Negligence

Overview

- Whether or not damages are available for breach of a contract does not prevent damages for the tort of negligence from being claimed independently. (*BG Checo*)
- The tort of negligence has three **components**:
  1. The negligent act. This is restricted by:
     - Duty of care (did the defendant owe the plaintiff a duty?)
     - Standard of care (if a duty was owed, what was the defendant required to do?)
  2. Causation (did the negligent act *cause* the damages?)
  3. Damages. This is restricted by:
     - Remoteness (were the damages too improbably to be fairly compensated?)
- There are four **defences** to negligence:
  1. Contributory negligence (partial defence; see above)
  2. Voluntary assumption of risk (complete defence)
  3. Illegality (prevents claims that would undermine the legal system)
  4. Inevitable accident (complete defence)

Duty of Care

Origins of the Duty of Care

- *Palsgraf* (US 1926) – Courts struggle with issues of duty and remoteness.
  - **Majority** (Cardozo CJ.): Negligence is a term of relation, with two components:
    1. The "Eye of Ordinary Vigilance" (is the harm *to the plaintiff* foreseeable?)
    2. "Orbit of Danger" (a duty is owed only to those who might be foreseeably harmed, as determined by the eye of ordinary vigilance)
       - **Test**: At the moment prior to action, ask: who might be affected? How might they be affected? What is the level of risk? If the plaintiff's interest counts as a reason for not going ahead, then the plaintiff has a right for the defendant not to proceed.
  - **Dissent** (Andrews J.): People owe a duty of reasonable care to society at large.
    - **Test**: Does the defendant's act unreasonably threaten the safety of others? If so, any persons harmed can claim compensation unless the harm suffered is too remote.
- *Donoghue* (UK 1932) – "**The Neighbour Principle**":
  - There is a duty to avoid causing reasonably foreseeable harm to your neighbour.
  - "Neighbour": "People so closely and directly affected by your act that you ought to have them in contemplation as being so affected".
- *Dorset Yacht* (UK 1970) – The rule in *Donoghue* **may not apply** in some cases for policy reasons. For example, it should not apply in the following cases:
  - Where the plaintiff has suffered only economic loss.
  - Where the defendant has failed to relieve someone in distress
  - Previously settled cases where no duty has been recognized (e.g. landlord-tenant)

- *Kamloops* (SCC 1984) – Adopts the 2-stage *Anns* test for applying the neighbour principle:
  1. Was the relationship sufficiently close that it should have been in the reasonable contemplation of one party that carelessness might cause damage to the other party?
  2. Are there (policy) considerations that ought to negate or limit any of the following:
     - The scope of the duty.
     - The class of persons to whom it is owed.
     - The damages to which it may give rise.

Current Approach to the Duty of Care

- The *Cooper/Anns* test is used to determine whether a duty of care should be recognized for a new category of relationship: (*Cooper*)
  1. Was the harm that occurred the reasonably foreseeable consequence of the defendant's act? Do the parties also share a proximate relationship? (*Cooper*)
     - **Foreseeability**: Nothing new; was the harm in the parties' reasonable contemplation?
     - **Proximity**: Is it just and fair to impose a duty on this type of relationship?
       - This is a policy analysis, like stage 2, but restricted to the parties, not society.
       - Considerations that involved in determining assessing "just and fair"-ness:
         - Expectations (*Cooper*)
         - Representations (*Cooper*)
         - Reasonable reliance (*Cooper*, *Childs*)
         - The property or other interests involved (*Cooper*)
         - Implication in the creation or control of risk. (*Childs*)
         - Effects on party autonomy (*Childs*)
  2. Do other, "residual" policy considerations suggest that a duty of care should not be recognized? Not concerned with the relationship but rather "the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally".
     - The availability of other avenues of remedy is insufficient to reject the duty. (*Odhavji*)
- Foreseeability and proximity may overlap in the case of a positive act that will foreseeably interfere with the physical wellbeing of others (e.g. bringing uranium into the room). (*Cooper*)
- Government officials engaged in policy-making are immune from tort liability (*Cooper*)
  - "It is inappropriate for courts to second-guess legislators on public policy" (*Cooper*)
- Government officials involved in *administering* government policy are not immune. (*Cooper*)

Examples of Proximity

- Features of a relationship that will give rise to a finding of proximity:
  - Intentionally inviting a person to an inherent risk that you create or control. (*Childs*)
  - Paternalistic relationships of supervision (e.g. parent-child, teacher-student). (*Childs*)
  - Public/commercial enterprise that includes implied responsibilities to the public. (*Childs*)
- Factors that suggest (but might not require) that it is "just and fair" to recognize a proximate relationship:
  - Extremely close causal connection between negligent act and the resultant harm. (*Odhavji*)
  - Reasonable expectation that public officials (e.g. police chief) will be mindful of potential harm to members of the public. (*Odhavji*)
  - Economic interests of the parties. (*Childs*)
  - The duty is consistent with statutory duties already in force. (*Odhavji*, *Jordan House*)
    - **Note**: This is not sufficient to establish a proximate relationship. (*Stewart*)

- Invitor-invitee relationship. (*Jordan House*)
  - **Note**: This is not sufficient to establish a proximate relationship. (*Childs*)
- Aware of reduced capacity of other party (e.g. youth, intoxication) (*Jordan House*, *Crocker*)
  - This may be constructive; depends on capacity to monitor (*Childs*)
- In cases of intoxication, the defendant's supply of alcohol is a factor. (*Jordan House*)
  - **Note**: This is not sufficient to establish a proximate relationship (*Jordan House*)
- Aware of increased vulnerability of other party (e.g. injured condition) (*Crocker*)
- Foreseeability of harm (or a "heightened probability of injury") (*Jordan House*, *Crocker*)
  - Intentionally structuring the environment so that it is impossible for a party to know whether harm is foreseeable (e.g. whether a driver is drunk) is no defence. (*Stewart*)
- Knowledge of other party's propensities (e.g. excessive drinking) (*Jordan House*)
  - **Note**: This was revoked in a later case. (*Childs*)
- Instructions given to employees to avoid the negligent act (e.g. serving beer) (*Jordan House*)
  - **Note**: There are obvious problems with this; ignored in later cases.
- No unreasonable burden imposed by duty (*Jordan House*)
- The defendant admitted the plaintiff into an inherently dangerous event (*Crocker*)
- The plaintiff was participating in an event that promoted the defendant's business. (*Crocker*)
- The defendant was in charge of the circumstances (e.g. hosting the event). (*Crocker*)

- "One is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury." (*Crocker*)
- Bars have a duty of care to the driving public to prevent drunken patrons from driving. (*Stewart*)
  - This is an extension of bars' duty to their patrons. The court calls it a "logical step", but Galloway disagrees – bars and patrons share a special relationship. (*Stewart*)
  - The standard of care here is to ensure that they are being cared for by someone (either putting them in a room overnight or ensuring they have a sober partner) (*Stewart*)
- Private party hosts do not owe a duty to the driving public to protect them from drunken guests if they are not aware that the guest is drunk (and have no obligation to find out). (*Childs*)

Duty to Warn

- Manufacturers are under a duty to take reasonable steps to provide warnings that permit the product to be used safely. (*Lambert*)
  - The nature and extent of the warning required depends on the nature and degree of the danger, the size/distinctiveness/intensity/clarity/extent of the written warning, the practice of manufacturers of similar products, habits of reasonable consumers, *etc*. (*Lambert*)
    - The level of harm is very significant for medical products that are implanted or ingested, and therefore the duty to warn is substantial, even for improbable risks. (*Hollis*)
- A duty to warn arises when a product: (*Lambert*)
  - is placed on the market for use by the general public, and
  - is dangerous when used for its intended purpose, and
  - the manufacturer knows or ought to know of the danger, and
  - the public does not have the same awareness of the danger as the manufacturer
- The duty to warn is **continuing**; if new dangers come to the manufacturer's attention, they have an obligation to issue new warnings (to existing customers as well as new ones) (*Hollis*)
- **The Learned Intermediary Rule**: A manufacturer may discharge its duty to warn by providing warnings to a *learned intermediary* if: (*Hollis*)
  - The product is highly technical and only used under expert supervision, *or*

  - The nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer prior to use.
- **Causation**: To obtain damages, it must be shown that the failure to warn *caused* the harm suffered. That is, it must be shown that the plaintiff would not have used the product in the offending manner if the duty to warn had been discharged. (*Hollis*)
  - A **subjective test** is used: does the plaintiff believe that they wouldn't have used it? (*Hollis*)

Medical Malpractice

- Surgeons have a duty to:
  - Discuss available alternative treatments (and their risks) that are in widespread use.(*Van Mol*)
  - Discuss the treatment that the doctor has chosen, including: (*Van Mol*)
    - Answering specific questions about the procedure. (*Hopp*, *Reibl*, *Videto*)
      - Whether this includes the doctor's success rate is not addressed.
    - Disclosing nature of operation. (*Hopp*, *Reibl*, *Videto*)
    - Disclosing gravity of operation. (*Hopp*, *Reibl*, *Videto*)
    - Disclosing any "material" risks. (*Hopp*, *Reibl*, *Videto*)
      - Generally, paralysis or death are material risks; scarring isn't (but see below)(*Videto*)
      - Materiality of risk is a combination of probability and magnitude, and its scope is determined according to the circumstances of the case. No hard and fast rule!(*Videto*)
      - "Mere possibilities" needn't be disclosed, unless the harm is serious. (*Brito*)
    - Disclosing any special or unusual risks. (*Hopp*, *Reibl*, *Videto*)
      - Only "serious" special risks need be disclosed. (*Brito*)
  - Explain why the chosen treatment was selected. (*Van Mol*)
  - Ensure that the patient understands what they have been told (*Reibl*)
    - E.g. A patient whose grasp of English is poor will require additional clarity (*Reibl*)
- Factors to consider when quantifying the duty to warn:
  - Professional standards (generally [not] disclosed by doctors?) – not determinative. (*Videto*)
  - The doctor's knowledge of the patient (e.g. scarring may be unusually important) (*Videto*)
  - Cosmetic/elective treatment has a much higher standard for informed consent. (*Videto*)
  - Needn't disclose **dangers inherent** in any operation (e.g. infection, anesthetic risks) (*Videto*)
  - **Therapeutic Privilege**: Patients who are "emotionally taut" might not require complete disclosure (consider the impact on the tort value of anti-paternalism). (*Reibl*, *Videto*)
  - An emergency may justify lack of full disclosure. (*Reibl*)
- **Causation**: Use the **modified objective test** – would a reasonable patient in the same [medical] circumstances as the plaintiff, fully informed, have consented? (*Brito*)
  - **Note**: Some cases drop the "modified" and simply use an objective test. (*Reibl*, *Van Mol*)
- *See notes for Nov. 18 for more on **informed consent**.*

Rescuers and Good Samaritans

- If person C has a duty to rescue person A and is negligent in that duty, and person B is induced by that negligence to mount his own rescue of A, then C has a duty to rescue B. (*Horsley*)
  - Doesn't apply if B is completely foolhardy (beyond std. of contributory negligence)(*Horsley*)
- A similar duty exists even if C and A share no proximate relationship, but C exposes A to risk. Here, C need not fail to rescue, and is liable even for contemporaneous rescuers. (*Horsley*)
- Ship captains have a duty to rescue any guests who fall overboard (for any reason). (*Horsley*)
- Rescuers are held to the standard of *gross negligence*. (see *Good Samaritans Act* (C 127))

Standard of Care

Overview

- The basic standard of care is not to expose people to unreasonable risk. (*Bolton*)
- Considerations in determining the level (reasonableness) of risk:
  - The **seriousness** of the injury (*Bolton*)
    - Known vulnerability of the plaintiff may increase the seriousness of harm. (*Paris*)
  - The **degree** (likelihood) of risk (*Bolton*)
    - The likelihood increases with the number of people exposed to the risk. (*Bolton*)
      - Galloway thinks this is curious, since tort law usually only considers the parties.
  - **Cost** of adequate precautions: (*Paris*, *Rentway*)
    - **Expensive Precautions**: When the risk is serious, the high cost of precautions is not a factor when assessing reasonableness of risk; if the activity is too expensive when the proper precautions are taken, too bad. (*Bolton*)
    - **Inexpensive Precautions**: It is generally unreasonable not to take inexpensive precautions (if available) for serious harms (*Paris*)
    - **Learned Hand Formula**: Liability for negligence arises if B < P•L (i.e., if the burden of adequate precautions is less than the probability of the injury times the loss)(*Rentway*)
  - **Benefit** achieved of activity:
    - The end to be achieved is to be balanced against the risk imposed. (*Watt*)
    - Altruistic goals, such as saving little old ladies (*Watt*), reduce the standard of care, whereas commercial enterprises (*Bolton*, *Paris*, *Rentway*) have a higher standard. (*Watt*)
- Additionally, there may be standards set by custom, statute, or professional bodies that are relevant in determining whether an act is reasonable. See below.

Customary Standards

- Customs are "very strong" evidence of the standard for reasonableness. (*Warren*, *Brown*)
- The onus is on the party alleging the custom to prove that it exists. (*Warren*)
- If there is a custom not to take a particular precaution, then that omission will be **presumed reasonable**. (*Warren*)
  - To **override** this presumption, must show that it is "clearly very unreasonable", or that it must "offend logic or common sense" or "flow from a gross error in weight". (*Warren*)
- Courts should not take judicial notice of custom; expert testimony is generally needed. (*Waldick*)
- Only customs that reflect **considered judgment** about safety will be considered. (*Waldick*)
  - Mere community "habits" won't render negligent conduct reasonable. (*Waldick*)
- **Failure to follow** a custom is *prima facie* evidence (though not necessarily conclusive) supporting negligence. It allows the court to infer negligence, but doesn't require it. (*Brown*)
  - This shifts a "provisional burden" (onus) on the defendant to explain the departure. (*Brown*)

Statutory Standards

- There is no tort of "breach of statutory duty". (*Wheat Pool*)
- A **specific** statutory standard may be used as a standard of reasonableness, but it is not conclusive (esp. since there may be defences in tort that don't exist in the statute) (*Wheat Pool*)
  - The greater the discretion left in the statute (i.e. the less specific it is), the less weighty it will be in determining the standard of care. The contrapositive also holds. (*Ryan*)
- A statutory standard is only relevant if the statute's **purpose** is to protect against the harm actually suffered. (*Gorris*)
- Non-compliance does not imply lack of reasonableness (but it is evidence). (*Wheat Pool*)
- Compliance does not imply reasonableness (but it is evidence). (*Ryan*)

Professional Standards

- **Lawyers** are held to the standard of the ordinarily competent lawyer. Ignorance of or errors in the law that the ordinarily competent lawyer wouldn't show (or make) are negligent.(*Brenner*)
  - An obligation of due care in protecting clients' interests is discharged if the lawyer acts in accordance with the generally accepted practice (unless it isn't prudent). (*Brenner*)
  - This is the same standard of reasonableness that **other professionals** are held to. (*Folland*)
- **Doctors** have specific rules regarding professional standards: (*ter Neuzen*)
  - Conformity with common practice will generally exonerate doctors of negligence, unless that practice is "fraught with obvious risks"
  - Specialists are compared to the standard of the average specialist.
  - Where a procedure involves difficult/uncertain questions of medical treatment or complex/scientific/technical matters beyond the experience of the judge or jury, the common practice may not be found to be negligent unless obvious and reasonable precautions are readily apparent.

Policy Considerations Checklist

Private

- Compensation for victims (e.g. joint and several liability; *Negligence Act*)
  - Other remedies available? (*E.B.*)
    - Availability of other remedies might not be relevant. (*BG Checo*)
  - Insurance available (accessible?) (*Childs*)
- Assigning blame to guilty parties (*Cook*)
- Who is in the best position to safeguard the public?
  (Manufacturers – *Hollis*, Professionals – *Reibl*, *Brito*, *Videto*, *Van Mol*, *ter Neuzen*)
- Principal concern of torts is **private wrongs** (i.e. between individuals)
- Protecting sensitive/vulnerable people (*Paris*)

Public

- Promote social welfare
- Loss spreading/distribution (apportioning liability between multiple defendants)
- Protection of public re: commercial enterprises (*Crocker*, *Jordan House*, *Stewart*, *Donoghue*)
- Deterrence of negative behaviour and encouraging socially responsible behaviour
- Efficiency: promote adoption of low-cost precautions: (*Rentway*, *Paris*)
- Social utility: Is this activity useful? Will finding liability put a "chill" on it?
  (*Childs*, *Cook*, *Dorset Yacht*, *Stone*, *Horsley*, *Watt*)
- Social inequalities re: marginalized groups
- **Floodgates**: indeterminate liability (*Cooper*, *Palsgraf*, *Childs*)
- **Statutory compliance** (*Odhavji*, *Cooper*, *Gorris*, *Ryan*, *Wheat Pool*)
- Customs and standards *(Warren*, *Waldick*, *Brown*)

Index of Cases

Short Name	Style of Cause	Ct./Year	Keywords	Page
BG Checo	*BC Checo v. BC Hydro and Power*	SCC 1993	Dmgs for K breach don't preclude negligence.	C 32
Brenner	*Brenner et al. v. Gregory et al.*	UK 1973	Lawyers held to std. of ord. competent lawyer	C 163
Brito	*Brito v. Wooly*	BCCA 2003	Baby's umbilical cord prolapses. Duty to warn.	C 107
Brown	*Brown v. Rolls Royce*	UK 1960	No barrier cream for mechanic. Custom. practice?	C 149
Bolton	*Bolton and Others v. Stone*	UK 1951	Cricket club. Galloway's favourite case.	C 128
Carroll	*US v. Carroll Towing*	US 1947	Learned Hand formula for standard of care.	C 136
Childs	*Childs v. Desormeaux*	SCC 2006	Δ drinks at house party, drives, hits π. Host liable?	C 82
Crocker	*Crocker v. Sundance…Resorts*	SCC 1988	Hosts of dangerous events liable (drunk tubing)	C 62
Cook	*Cook v. Lewis*	SCC 1951	2 Δs shoot, one hits π. Not joint tortfeasors.	C 3
Cooper	*Cooper v. Hobart*	SCC 2001	Anns/Cooper test; regulators liable for $ losses?	C 52
Donoghue	*Donoghue v. Stevenson*	UK 1932	Snail in beer. "Neighbour principle"	C 40
Dorset Yacht	*Home Office v. Dorset Yacht*	UK 1970	Prisoners escape, take Δ's yacht. π owes duty to Δ.	C 45
E.B.	*E.B. v. Order of the Oblates of Mary*	SCC 2005	π abused by Δ's employee. Δ not vicariously liable	C 14
Folland	*Folland v. Reardon*	OCA 2005	Lawyers held to same std. as other professionals.	C 164
Gorris	*Gorris v. Scott*	UK 1874	Sheep slide off ship. Use of statute in negligence?	C 155
Hollis	*Hollis v. Dow Corning*	SCC 1995	Bursting implants. Learned intermediary rule.	C 92
Hopp	*Hopp v. Lepp*	SCC 1980	MDs' duty to warn.	C 101
Horsley	*Horsley (Next friend of) v. MacLaren*	SCC 1971	Captain negligent in rescue. Duty to rescuers?	C 118
Jaman	*Jaman Estate v. Hussain*	MCA 2002	*Yepremian* should be limited; incl. privilged MDs	C 27
Jordan House	*Jordan House Ltd v. Menow*	SCC 1974	"Car keys" case; are taverns & drunks proximate?	C 65
Kamloops	*Kamloops v. Nielsen*	SCC 1984	Anns/Kamloops test; house has faulty foundations	C 49
Lambert	*Lambert v. Lastoplex Chemicals*	SCC 1972	Flammable lacquer spray; duty to warn.	O 134
Odhavji	*Odhavji Estate v. Woodhouse*	SCC 2003	Police chief owes duty of care to π's family.	C 57
Palsgraf	*Palsgraf v. Long Island Railroad*	US 1926	Box of fireworks falls off train. Ambit of danger.	C 34
Paris	*Paris v. Stepney Borough Council*	UK 1951	1-eyed mechanic; duty to provide goggles?	C 133
Reibl	*Reibl v. Hughes*	SCC 1980	π ½ paralyzed in surg. Duty for MDs to disclose.	C 100
Rentway	*Rentway Canada v. Laidlaw Trans.*	OHJ 1989	Truck's lights fail; did designer meet std. of care?	C 137
Ryan	*Ryan v. Victoria (City)*	SCC 1999	Biker hurt on rail tracks. Compliance with statute ≠> reasonable conduct.	C 157
Sagaz	*671122 Ontario v. Sagaz Ind. Ltd.*	SCC 2001	Δ's consultant bribes others; not joint tortfeasors	C 6
Stewart	*Stewart v. Pettie*	SCC 1995	Group of 4 picks one of the 2 drunks to drive.	C 72
ter Neuzen	*ter Neuzen v. Korn*	SCC 1995	Artificial insemination. Professional std. for MDs?	C 165
Van Mol	*Van Mol v. Ashmore*	BCCA 1999	Duty to discuss med. alternatives, prophylactics.	C 113
Videto	*Videto v. Kennedy*	OCA 1981	Medical disclosure of minor, low-prob. risks?	C 104
Waldick	*Waldick v. Malcolm*	SCC 1991	Is not sanding driveways a customary practice?	C 146
Warren	*Warren v. Camrose (City)*	ABCA 1989	π injured diving into a pool. No signs; Δ liable?	C 143
Watt	*Watt v. Hertfordshire*	UK 1954	Firefighter injured by 300lb jack. Std of care met?	C 141
Wheat Pool	*Canada v. Saskatchewan Wheat Pool*	SCC 1983	Infested wheat. No tort of statutory breach.	C 151
Yepremian	*Yepremian v. Scarborough General…*	OCA 1980	No vicarious liability for "privileged" doctors.	C 27

O is the Osborne text

C is the course package