TORTS 2020

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TORTS CAN (2019-2020)

GENERAL DUTY OF CARE

Elements of Negligence

1. Duty of care: duty to act reasonably towards people falling within a risk created by the defendant's conduct
    a. Is the plaintiff such a person? If YES, then duty of care
    b. Concept of duty is about who is the plaintiff and what is the relationship between plaintiff and defendant - defendant doesn't owe a duty of care to everyone in the world, needs to be some proximate relationship
    c. Question: *Is the plaintiff a reasonably foreseeable plaintiff?* Should they have kept the plaintiff in their mind when doing (or not doing) what they were?
    d. *Donoghue v Stevenson*
2. Breach of standard of care: conduct that falls below a certain standard (a reasonable person of ordinary prudence)
    a. Question: *Did the defendant fail to meet the standard of the reasonable person?*
    b. Reasonable person standard used - how would a reasonable person act? (not entirely objective or subjective)
3. Causation in fact: the cause without which the event could not have occurred.
    a. Question: *'But for' the defendant's conduct would the plaintiff suffer the injury?*
    b. Causation of fact - factual, evidentiary question - did they actually cause the harm? Use the 'but for' test
    c. If the plaintiff would have suffered the harm anyways, no causation
4. Remoteness (causation in law = 'proximate cause'): did the breach of duty result in the harm so that liability can be imposed on the defendant.
    a. Question: *Does the plaintiff's injury reasonably fall within the risk created by the defendant's conduct?*
    b. If YES (damage not too remote) - then the defendant can be said to have caused it in law

If YES, then liability for NEGLIGENCE - then proceed to defences / damages

1. Defences: contributory negligence, voluntary assumption of risk, illegality
    a. Defences are different in scope
    b. Contributory negligence (incomplete defence): the defendant contributed in some way to their own harm (not a complete defence for the defendant, damages usually reduced)
    c. Other two are complete defences, very hard to prove
        i. Voluntary assumption of risk
        ii. Illegality
2. Damages: plaintiff must show actual harm (physical/mental injury)
    a. Can prove negligence if the harm is only psychological, but must show evidence (different evidence required for physical versus psychological harm)

Winterbottom v Wright (1842)

Facts: Winterbottom was a coachman who drove a horse-pulled mail coach. His employers entered into a contract with Wright to maintain the coach and keep it in good working order. Wright failed to do this, and Winterbottom fell off the coach and injured himself. He sued Wright claiming that a duty arose out of the relating contracts, although they had no contractual relationship to one another

Issue: Does a duty of care extend beyond contracting parties?

Reasons: The judges find that it has always been held that duty does not extend beyond contracting parties. They are unwilling to change this standard because of the potentially unreasonable extension of liability that it could create. They recognize that this is a hard case, because Winterbottom has obviously been wronged, however they find that Wright had no direct duty to the plaintiff as they were not both parties to the contract

Holding: For the defendant

Ratio: A plaintiff cannot bring tort claims against a defendant for nonfeasance that resulted from a contract which plaintiff was not privy to (this case is no longer good law, but shows elements of duty of care)

Donoghue v Stevenson (1932)

Facts: Donoghue drank some of the contents of a ginger beer from a café. The remains of a snail in a state of decomposition were found in the bottle. Donoghue was not able to claim through breach of warranty of a contract: she was not party to any contract. She issued proceedings against Stevenson, the manufacture

Issue: Did the manufacturer owe Donoghue a standard of care?

Reasons:

- Prior to this, a manufacturer owed no duty of care to a consumer when putting a product on the market except:
    - If the manufacturer was aware that the product was dangerous because of a defect and it was concealed from the consumer (fraud), or
    - The product was dangerous per se and failed to warn the consumer of this
- Development of the neighbor rule by Lord Atkin
- **Must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor**
    - Person must be reasonably foreseeable to be injured
    - Injury that resulted must've been reasonably foreseeable.
- **"Neighbor" = "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question."**
-

Holding: For the defendant

Ratios:

- Negligence is distinct and separate in tort
- There does not need to be a contractual relationship for a duty to be established
- Manufacturers owe a duty to the consumers who they intend to use their product
- The requirements are: foreseeability, proximity, and fairness (policy considerations)

Palsgraf v Long Island Railway Co (1928)

Facts: The Plaintiff was standing on a railroad platform purchasing a ticket, when a train stopped and two men ran forward to catch it. One of the men nearly fell, and two railroad employees attempted to help him. In the process, a package containing fireworks fell and the contents exploded. As a result of the explosion some scales at the other end of the platform fell and struck the Plaintiff. Plaintiff sued and a jury found in her favor. The Appellate Division affirmed this decision, but the Court of Appeals of New York reversed

Issue: What constitutes negligence?

Reasons: Plaintiff must show that some wrong was done to herself, i.e., that there was a violation of her own rights, not merely a wrong done to someone else

- In this case, there was nothing to indicate that the package contained fireworks, and if dropped, would cause an explosion. The guards, who were assisting the passenger on the train, were negligent in doing so, and caused the package to be dislodged, which fell causing an explosion
- The explosion caused some scales at the other end of the platform to fall, striking Plaintiff. The guards were not negligent in relation to the Plaintiff, who was standing far away when the package was dropped
- If the court had decided that Defendant was negligent in respect to the Plaintiff, then the majority concludes that a defendant would be liable for any and all consequences of its negligence, "however novel or extraordinary."

Holding: Reversed appellate judgment. Complaint dismissed

Ratio: To recover for negligence, the plaintiff must establish each of the following elements: duty, standard of care, breach of duty, cause-in-fact, proximate cause (scope of liability) and damages

Rules:

- Negligence isn't actionable unless it involves the violation of a legally protected interest, the violation of a right
- Plaintiff must show a violation of their own right, and not merely a wrong done to someone else or conduct that's wrongful because unsocial
- The reasonably perceived risk defines the duty – it is risk to others within the 'range of apprehension' (out of the range of apprehension)
- Unintentional wrong is defined in terms of the "natural and probable"

- Even if the guy with the package got harmed and he was suing the guard, the lady can't sue the guard on that basis, she would need to show her own harm as a result.

Anns Test: Two-Step Test for Duty of Care

Adopted by SCC in Kamloops (and later revised by *Cooper*), for determining duty of care

- On exam don't put original Anns test on, because it was revised by cooper, so use that one.

1) Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the D, carelessness on its part might cause damage to the P? if so:
    a. Reasonable foreseeability and proximity is what the Scc implemented into this step in cooper and set out what this question really means. If answer to this is yes, you have a prima facie duty of care. Can be rebutted by policy considerations in the second step.
    b. Only do this step if no other relationship has yet been established
2) Are there any considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise?

Dobson v Dobson (1999)

Facts: The appellant was pregnant, and lost control of her vehicle while driving (allegedly by her negligent driving). The infant respondent was allegedly injured in utero and was delivered prematurely. He suffers from permanent mental and physical impairment. The infant, through his litigation guardian, launched a tort claim against the appellant for the damages sustained
Issue: Should a mother be held liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the fetus in her womb?
Reasons:

- ***Kamloops v Nielsen*** recognized that even where a duty of care exists, it may not be imposed for reasons of public policy
    - Held that before imposing a duty of care, the court must be satisfied that **1)** there is a sufficiently close relationship between the parties to give rise to a duty of care, **2)** that there are no public policy considerations which ought to negative or limit the scope of duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise
    - **Here, significant policy concerns militate against the imposition of maternal tort liability for prenatal negligence (privacy and autonomy rights for women and the difficulties inherent in articulating a judicial standard of conduct for pregnant women)**
    - Also a potential gender-based tort in contravention of s. 15 of the Charter
- Policy concerns include privacy and autonomy rights of women, and the difficulties of articulating a judicial standard of conduct for pregnant women

Holding: Appeal allowed
Ratio: Pregnant women do not owe a duty of care to the fetus in their womb

- The test to determine if a duty of care is owed has two parts: 1) is the relationship close enough to create a reasonable duty? 2) are there public policy grounds to negate or limit the scope of the duty?

Note: ***Alberta Maternal Tort Liability Act***

- Circumvents the *Dobson* decision while placing clear limits on when it will be allowed
- Only applies to motor vehicles, does not give a duty of care for any other potential negligent act of a pregnant woman
- Establishes a limited exception to the immunity - a mother may be liable to her child for injuries suffered by her child during her pregnancy in an automobile IF the mother is insured
- Liability is limited to the amount that the mother was insured for
- Potentially gives rise to a duty of care, but still need to prove that there was actual negligence - this Act circumvents *Dobson* in terms of duty of care, in this very narrow circumstance

Cooper v Hobart (2001)

Facts: Appellant is an investor who alleges that a statutory regulator is liable in negligence for failing to oversee the conduct of an investment company which the Registrar licensed
Issue: Does the Registrar owe a private duty of care to members of the investing public giving rise to liability in negligence for economic losses that the investors sustained? (not yet recognized)
Reasons:

- Reaffirms *Anns,* held that the *Anns* two-stage test does not involve duplication because different types of policy considerations are involved at the two stages
- **First branch of the test: reasonable foreseeability of the harm must be supplemented by proximity**
    - Proximity: categories may be used to determine when a duty of care is owed, but the factors that satisfy this are diverse and depend on the facts of the case.
    - "Circumstances of the relationship that are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs" - can look at expectations, representations, reliance, property or other interests
    - Where has proximity been recognized: where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property, duty to warn of the risk of danger, relational economic loss sometimes
- **Second branch: Distinction between government policy and execution of policy is considered**
    - Gov't actors not liable for negligence in policy decisions, but operational decisions. A gov't actor may be liable in negligence for the manner in which it executes or carries out policy
    - This second step only arises where the duty of care doesn't fall into a previously recognized category. It seldom arises, but where novel claims are alleged then it will

Holding: Appeal dismissed. The statute does not impose a duty of care to the investors, but to the public as a whole. Insufficient proximity for a *prima facie* duty of care
Ratio: Revised *Anns* test

NOVEL DUTY OF CARE

Hill v Hamilton – Wentworth Regional Police Services Board (2007)

Application of revised *Anns-Cooper* test
Facts: Innocent person investigated, tried, wrongfully convicted, spent more than 20 months in jail
Issue: Can the police be held liable if their conduct during an investigation falls below an acceptable standard and harm to a suspect results?
Reasons:

- Did the actions of the alleged wrongdoer have a close or direct effect on the victim, so that the wrongdoer ought to have had the victim in mind as a person potentially harmed? (Plaintiff has the formal onus of establishing duty of care) YES
    - Here there was a personal relationship, Hill had been singled out as a suspect
    - Duty of care in line with Charter values
    - Justness of the justice system - virtually no other recourse
- Broader policy reasons for declining to recognize a duty of care?
    - No compelling reason given

Holding: In favour of the plaintiff. Police can be held liable if their conduct falls below an acceptable standard
Ratio: Resulted in the tort of negligent investigation – police owe a duty of care to suspects being investigated

- Policy considerations at the second stage must be more than speculative – a real potential for negative consequences must be apparent

DUTY TO RESCUE

Haynes v Harwood (1935)

Uses old Cooper analysis – here the focus is on duty to rescue
Facts: Harwood's servant brought a two-horse carriage into a residential neighborhood and parked it across the street from a police station while he was off doing work. While the servant was away, children upset the horses and they broke free and were on a path to injure people. Haynes, a police office, ran out and stopped the horses but was injured in the process
Issue: When someone knowingly puts himself or herself in danger to protect others, is the negligent party liable for damages suffered in the protection effort?
Reasons:

- The court holds that in cases such as these, *the volenti non fit injuria* maxim does not apply. If someone acts to help those in danger as a result of a person's negligent actions, that person is liable for damages resulting from their actions as long as they are reasonable in the circumstances. Taking risk upon yourself is not applicable in rescue commitment

Holding: In favour of the plaintiff
Ratio: The doctrine of the assumption of risk does not apply where the plaintiff has, under exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk to rescue another from imminent danger of personal injury or death, whether the person endangered is owed a duty of care by the plaintiff or not

Note: It is immaterial that the imperiled person doesn't suffer an injury

Horsley v MacLaren

Facts: Person fell off boat, another jumped in to rescue them - summary of the principles of a duty to rescuers in Canada
Reasons:

- Legal protection is afforded to one who risks injury to himself in going to the rescue of another who has been foreseeably exposed to danger by the unreasonable conduct of a third person (recognized category)
- Intervention of the rescuer must not be 'so utterly foolhardy as to be outside of any accountable risk'
- This is an independent duty of the negligent person - not that the duty of the rescuer is some kind of derivative duty - this is a separate, independent duty of care to the rescuer
    - Doesn't matter if the first person doesn't suffer any injuries - if the rescuer was injured a duty of care is still owed
- If you are the tortfeasor and you are your own victim (imperil yourself), you still owe them a duty of care even though you weren't negligent to any original victim
    - 'A person who imperils himself by his carelessness may be as fully liable to a rescuer as a third person would be who imperils another'

Ratio: Summary of principles of a duty to rescuers in Canada

Urbanski v Patel

- Defendant was a surgeon; accidently removed the patient's only kidney. Her father volunteered one of his kidneys to be transplanted but it was unsuccessful. The father then sued the doctor for his loss of his kidney - court found this to be a rescuer situation, fathers effort to help the daughter was a consequence of the doctor's negligence towards the daughter
- Was entirely foreseeable that a member of the family would donate a kidney

NONFEASANCE

General principles: tort law distinguished between failing to prevent harm **(nonfeasance)** and taking action **(misfeasance)**

Stovin v Wise (1996)

- Omissions require different treatment from positive conduct - less of an invasion on individual freedom
- A duty to prevent harm to others or give assistance may apply to a large and indeterminate class of people who happen to be able to do something - efficient allocation of resources generally requires that an activity should bear its own costs

Union Pacific v Cappier (1903)

Facts: Action brought by a mother to recover damages on behalf of her son, who was run over by the train of the plaintiff by accident and died. She alleged that her son had died from injuries that the workers on the train had failed to treat, and thus acted negligently
Issue: Did Union Pacific owe a duty of care to the deceased?
Reasons:

- When the injuries result from one's own negligence, as in this case, a third party owes no duty to protect or aid the negligent individual. Although these acts might be required by morality, they are not recognized as legal duties
- The agents of Union Pacific played no role in causing the injuries of Cappier's son. There must be a duty owed in order for negligence; there was no duty owed in this case, and therefore there can be no finding of negligence

Holding: In favour of the defendant
Ratio: There is no duty to act to help or aid an individual who has been injured solely by his or her own actions; a party cannot be found negligent for failing to prevent harm if they have not contributed to the risk of harm

Oke v Weide Transport

- Drove into a post on the highway, cleared away the debris but there was a pole sticking out of the ground, which he left. He didn't report the accident. Later a man was driving, hit the pole and died
- Majority - even if the D was under a legal obligation to report the damage to the sign (wasn't decided), the accident that occurred was unenforceable

- Dissent - defendant can't be compared to other passing drivers who had no duty
    - While the defendant wasn't negligent in creasing the risk, he was negligent if once the risk was created, he didn't act appropriately to eliminate it

Childs v Desmoreaux

If nonfeasance, must apply this case!
Facts: The plaintiff was struck and injured by the defendant who was driving drunk on his way home from a party hosted by Zimmerman. The plaintiff sought damages from the defendant and Zimmerman
Issue: Is the host of the party liable if inebriated guests drive and injure someone?
Principles:

- Private hosts do not owe a duty of care to those injured by harm caused by an inebriated guest
- In cases of nonfeasance, foreseeability alone does not make a duty of care – foreseeability *may* establish a duty of care, generally where an overt act of the defendant has directly caused foreseeable harm to the plaintiff
- Generally, the fact that someone is in danger or poses a danger to others does not impose a duty to act
- A duty to act is only imposed where:
    1) A defendant intentionally invites a third party to an inherent and obvious risk which he created or controls
    2) A paternalistic relationship exists
        a. E.g. Parent – Child, Teacher – Student
        b. One party is in a position of reduced autonomy which invites control
    3) The defendant by his position or commercial enterprise takes on responsibilities to the public at large

Rankin v JJ (2018)

Facts: J and C were carhopping after drinking at C's mother's house. C stole a car, which R had left unlocked with the keys inside. C crashed the car with J inside, causing serious injury to J
Issue: Does one who stores vehicles owe a duty of care to minors who might steal them?
Holding: R could not have reasonably foreseen the injury as he ought to have been aware only of the right of theft, not the risk of the theft by minors who drove recklessly and were thereby injured
Dissent: Where the plaintiff has already sustained an injury, it is rare for a court to find that a duty of care is not established for a lack of reasonably foreseeable harm
Ratio:

- Illegal conduct by the plaintiff does not preclude the existence of a duty of care
- Illegality is only a defence where it is necessary to preserve the integrity of the legal system
- Illegality does not sever proximity
- A business will only owe a duty of care to someone who is injured following the theft of a vehicle when, in addition to theft, the physical injury to the plaintiff was reasonably foreseeable
- Cars are not inherently dangerous such that they are required to be stored carefully to protect the public

GOVERNMENT AGENCIES

Just v British Columbia (1989)

*Not the latest on negligence, *Imperial Tobacco* is
Facts: The plaintiff's daughter was killed when a boulder dislodged from a hill onto the highway. The plaintiff claims BC was negligent in maintaining the highway
Issue: When can a government agency be held liable in negligence?
Reasons:

- Govt's can not be held liable for policy decisions, but also don't have complete immunity
- Must establish between policy decisions (exempt from liability) and their operational implementation (subject to liability)
- Policy decisions are those dictated by economic, financial, social or political factors or constraints. An operational decision is an action or inaction that is merely the product of an administrative direction, expert or professional opinion, technical standard or general standards of reasonableness
- To constitute a policy decision, the government must generally act in a reasonable manner which constitute bona fide (good faith) exercise of discretion

Holding: The conduct was held to be operational in nature, so subject to review

Ratio:
In the case of public authorities it is necessary to:

(1) Review the applicable legislation to see if it imposes any obligation or provides an exemption from liability for failure;
(2) Determine whether the public authority is exempted from liability since its conduct constitutes a 'policy' decision (if policy decision, it is not reviewable by the courts and can't be the foundation for an action. If an operation decision, can be the basis for a negligence action)

Roncarelli v Duplessis

- This case is about the meaning of a 'bona fide' exercise of discretion
- Cannot have absolute discretion
- Fraud of corruption always show no bona fide exercise of discretion
- Must be exercised in good faith
- Clear departure from statute may be objectionable

Kamloops v Nielsen

- Example of when there will not be a bona fide exercise of discretion
- Municipal council of Kamloops knew about faulty foundation of a house, house collapsed, were sued for negligence
- It wasn't that they considered the situation and decided on policy grounds to go ahead with the construction, it was never considered in the first place
- Inaction for no reason or inaction for an improper reason can't be a policy decision taken in the bona fide exercise of discretion
- Plaintiff has to belong to the limited class of people the statute creates a private law duty to

R v Imperial Tobacco Canada Ltd (2011)

Facts: In response to the SCC holding that BC's Tobacco Damages and Health Care Costs Recovery Act was intra vires, the tobacco industry attempted to recoup damages from the fed government by alleging that the gov't should also be responsible for any damages that might be found against the tobacco companies because Canada has actively participated in the Canadian tobacco industry on an operational level
Issue: Does the gov't owe a duty of care to the tobacco company, or to the consumers?
Reasons:
Holding: Court held in favour of the Canadian gov't. Claims to negligent misrepresentation, failure to warn and negligent design were struck out b/c related to policy decisions
Ratio:

- Government actors have no duties in negligence with respect to policy decisions, yet they may attract tort liability when they are negligent in carrying out prescribed duties
- Core policy decision should not be defined as a "non-operational" decision but should be defined positively as a decision that is grounded in social, economic and political considerations
- "Core" policy governmental decisions protected from judicial review are "decisions as to a course or principle of action that are based on public policy consideration, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."
- 3 situations may give rise to a proximity relationship establishing a duty of care for government agency:
    1) *Prima facie* duties of care can at ise from statute (this is rare)
    2) A duty of care may arise from specific interactions between P and the government agency
    3) Both
- Policy decisions are: "discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations"

STANDARD OF CARE

Generally an objective standard - what would a reasonable person in the situation do?
Once a duty of care is established, the standard of care must be determined

OBJECTIVE STANDARD

The reasonable person of ordinary prudence (*Vaughan*) Exceptions:

1) Insanity/Illness: If the insane/ ill D was unable to understand the duty that rested on him and unable to discharge that duty – the applicable standard of care is that of a reasonably competent person unaware that he is or may be suffering from a condition that impairs his ability (Buckley; Mansfield)
2) Children (*McHale*; *McErlean*)
   - Babies and very young children are incapable of negligence
   - Children who have not yet attained majority but are capable of foreseeing the probable consequences of their actions – same standard as adults
   - Children who are in between – the standard of care is that which is reasonable to expect of children of like age, intelligence, and experience, unless child engages in 'adult activity'

Vaughn v Manlove (1837)

Facts: The defendant made a haystack around his premises that, though he was warned it may be a fire hazard, chose to keep up. It caught fire and the fire spread to the plaintiff's cottage
Issue: Should the standard of care be subjective or objective?
Ratio: The standard of care is based on ordinary prudence expected of a person. The standard of care does not regard the specific intelligence of the defendant

McHale v Watson (1966)

*Slightly modified test for children
Facts: A young boy threw an object that seriously damages the eye of a young girl. He did not intend for the object to hit her
Issue: What is the reasonable standard of care applicable to children?
Reasons:
American precedent divides standard of care into three classes as relates to children:

1) Children too young to perceive risk at all
   a. This group is immune from liability in negligence
2) Children fully capable of foreseeing the consequences of their actions
   a. To them the standard of reasonable person is applied as if to an adult
3) Children who are still developing the ability to perceive risks and consequences of their actions
   a. To them is applied the standard of a reasonable child of like age, intellect and experience

- Foresight: The mental ability to foresee a risk
- Prudence: The mental ability to prevent a risk

Ratio: slightly modified test for children. Need to look at similar children (reasonable child of similar circumstances)

McErlean v Sorel

- **The general rule is that children are held to a standard of care expected of children of like age, intelligence and experience**
- Exception - where a child engaged in **'adult activities'** - e.g. driving, snowmobiling
  - Operation of any motorized vehicle, whether there are statutory restrictions regarding age or not

Note:

- Defendant with substandard or experience - not an excuse (other than *maybe* for children)
- If the defendant has more extensive knowledge:
  - Physician - average standard of the class of practitioners that they fall within
  - Specialists are held to the standard of other specialists
- If you're less experienced - e.g. if you're an associate, you're held to the standard of the reasonably prudent lawyer

The "Reasonable Man of Ordinary Prudence"

- The embodiment of all the qualities of the good citizen
- An objective test, but with subjective elements
- The reasonable man is 'presumed to be free from over apprehension and from overconfidence'
- Substandard experience or knowledge isn't an excuse (other than for children), but if D has more extensive knowledge the standard is a man with such knowledge
- Physicians → the standard of the average practitioner of the class to which she belongs or holds herself to belong
- Beginners → the standard of those who are reasonably skilled and proficient in the particular profession or activity
- Tasks demanding expert skills-> even layman will be judged by the standard of the expert

So long as its not a child/insane person/ usually they'll be found to have failed the standard of care
The next question is what is the actual reasonable care that is desired

REASONABLE STANDARD OF CARE

What is the reasonable standard to which we are held liable before we are held liable for breach?

The Learned Hand Formula: Liability depends on whether the cost of avoiding the accident is less than the probability of the accident multiplied by the cost of the accident. Applied differently over time (*Carrol Towing)*

Bolton: Considered likelihood/degree of risk and how serious consequences are likely to be, but not difficulty of remedial measures

Oversees Tankship **and** ***Tomlinson:*** Considered likelihood and seriousness of the injury, as well as, social value of the activity and the cost of preventative measures

Role of Custom and Usage
Trimarco: Need to look at what is customary in the applicable industry in the context of where the defendant is operating. Customary practice and usage don't have to be universal, only "fairly well defined and in the same calling or business"

- Even when customary practice exists, this is not necessarily a conclusive test of negligence – it must be reasonable in itself
- "What is usually done is evidence of what ought to be done, but what ought to be done is fixed by a reasonable prudence, whether it usually is complied with or not"

TJ Hooper: "there are precautions so imperative that even their universal disregard will not excuse their omission"

Ter Neuzen: Specialists are held to a higher standard; must be assessed without the benefit of hindsight; conformity with practice will generally exonerate physicians of negligence, however even a common practice may itself be negligent if 'fraught with obvious risks' such that anyone is capable of finding it negligent without needing any expertise.

Hill: Considered likelihood of known/foreseeable harm, gravity of harm, cost to prevent the injury, external indicators of reasonable conduct, statutory standards

- Police discretion must be reasonable but not perfect
- Distinction between 'unreasonable mistakes' breaching the standard of care and errors in judgment

United States v Carroll Towing Co

Facts: The defendant left a ship unattached in a busy harbor. It broke away from its mooring and collided with another ship
Issue: How to determine the applicable standard of care
Principles:

- Set out the learned hand formula: 3 variables include
    - The probability of the accident
    - The gravity of the resulting injury
    - The burden of adequate precautions
- Purely economic cost benefit analysis
- The reasonable person would not avoid an accident if it does not make economic sense to do so

- Criticism from ***McCarty v Pheasant Run:*** the formula has greater analytical than operational significance

Bolton v Stone

Facts: The plaintiff was struck by a cricket ball hit by the defendant while on a nearby public road
Issue: What is the nature and extent of the duty imposed on one who promotes on his land operations which may cause damage to persons on adjoining public land?
Principles:

- Likelihood of damage may be considered in addition to foreseeability
- Reasonable people do consider the degree of risk and not its mere possibility
- People must guard against reasonable possibilities, but they are not compelled to guard against fantastical ones
- People must not create a risk which is substantial
- Does not consider the cost of prevention

Overseas Tankship v The Miller Steamship

Facts: A ship leaked oil onto the harbor while some laborers were working on a ship. Sparks caused the oil to ignite and the ships were destroyed. Miller sued seeking damages
Issue: Should the defendant be liable for damages that were not foreseeable?
Principles:

- Adds the element of social utility
- Holds that there must be a reason for disregarding even an improbable risk
    - Such as a high cost of risk prevention
- A person is negligent if he or she does not take steps to eliminate a risk which they know is real

Latimer v AEC (1953)

Facts: A flood rendered the floor of a factory slippery. An employer spread as much sawdust as available to remedy this, but was unable to fix the hazard. Another employee was hurt and sued
Issue: Was it reasonable for the employer to take only the steps that he did?
Principles:

- Given the high cost of shutting down the whole factory to avoid all risk, it was reasonable for the employer to take only the steps that he did to reduce the hazard
- The degree of risk matched the steps taken to mitigate it
- A reasonably careful employer would not have shut down the factory
- *Reaffirms the element of social utility

Tomlinson v Congleton City Council (2004)

Facts: The plaintiff dove headfirst into a man-made lake maintained by the defendant and broke his neck
Issue: Did the premises create a risk that the claimant should have been able to expect protection from?
Holding: The council had no liability to the claimant because the danger of risk was so obvious and arose from the claimant's own actions
Principles:

- It may be justifiable not to avoid a foreseeable risk if the risk is unlikely to bare out and the cost to remedy it is high
- Cost may be economic, but also come in the form of prohibiting socially valuable activity, or in the form of unduly limiting choice in whether or not to engage in risky activity
- Just because a risk can have serious consequences doesn't mean it is a serious risk if it is unlikely to occur
- Seriousness of outcome is not the same as degree of risk

Watt v Herfordshire County Council (1954)

Facts: The plaintiff was a fire fighter who was injured when equipment he was hauling in slipped and injured him
Issue: Is the only thing that risk needs to be balanced against truly the burden of taking the measures necessary to eliminate the risk?
Principles:

- The risk that the equipment might slip was worth the risk as to avoid this would risk more serious harm to the victim of the accident which was being responded to

- The saving of life and limb justifies taking considerable risks
- There is more to the cost of prevention than the monetary cost - must balance risk against both social utility and the cost of prevention
- End to be achieved must be taken into account

ROLE OF CUSTOM AND USAGE

Trimarco v Klein (1982)

Facts: The plaintiff was injured when the glass shower door in his apartment (owned by the defendant) unexpectedly shattered. Generally accepted practice was to replace traditional glass shower doors with safer plastic or safe glass ones
Issue: Did the defendant have a duty to comply with the generally adopted safety precaution? Can the court rely on custom and usage in the industry to establish a standard of care?
Reasons: Customary practice and usage doesn't have to be universal, only "fairly well defined and in the same calling or business"
Holding: The evidence supported the conclusion that there was a general custom and that the showed door had become unsafe at the time of the accident
Principles:

- Where there is a generally recognized way of doing things safety, anyone who fails to act in this way falls below the standard of care
- When proof of an accepted practice is accompanied by evidence that the defendant conformed to it, this may establish due care
- When proof of customary practice is coupled with a showing that it was ignored and that this was the proximate cause of the accident, it may serve to establish liability
- What is usually done may evidence what ought to be done, but what ought to be done is fixed by the standard of reasonable prudence, whether it usually is complied with or not

The TJ Hooper (1935)

Facts: A barge pulled by two tugs sank in a storm. They were not equipped with standard radio receivers which could have received warning about the oncoming storm
Holing: The owner of the tug was found liable, as the radio receiver could be cheaply bought and greatly reduced the risk (despite the fact that equipping radio receivers was not yet a widely accepted practice)
Principles:

- Common prudence usually satisfies reasonable prudence, but not always
- **There are precautions so imperative that even their universal disregard will not excuse their omission**

Ter Neuzan v Korn (1995)

Facts: Doctor performed artificial insemination on a patient using customary practice in the industry. The patient contracted AIDS. The risk of contracting AIDS via AI was not known broadly to the medical community. No test was available for HIV in semen. Doctor immediately discontinued AI program once he learned of the risk (after she was infected)
Issue: Can there be liability for negligence notwithstanding that medical practice was conformed to?
Reasons:

- Physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances
- A specialist physician is assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field
- The conduct of physicians must be judged in light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of negligence
- Conformity with practice will generally exonerate physicians of negligence, however even a common practice may itself be negligent if it is fraught with obvious risks, such that anyone is capable of finding it negligent without needing any expertise

Holding: in this case, it was impossible for the jury to find that, given the state of knowledge, the reasonable practitioner ought to have discontinued AI or warned the plaintiff of the risk; this wasn't the kind of case where a judge could properly instruct the jury that it could decide the general practice was negligent
Principles:

- As a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent

- As **an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions** which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice

Hill v Hamilton (2007)

Facts: Plaintiff was wrongfully convicted and spent more than 20 months in prison
Issue: What is the appropriate standard of care?
Holding:

- The standard of care is that of a reasonable police officer in all the circumstances
- When new information emerges that could be relevant to the suspect's innocence, reasonable police conduct may require the file to be reopened and the matter reinvestigated

Principles:

- Where the defendant has special skills and experience, the defendant must **"live up to the standards possessed by persons of reasonable skill and experience in that calling**
- A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached
- **Factors for determining the standard of care: likelihood of known or foreseeable harm, gravity harm, burden or cost to prevent injury, external indicators of reasonable conduct, statutory standards**
- Only decisions outside of reasonable discretion are liable for negligence
- Based on circumstances which existed at the time
- **Only unreasonable mistakes and not errors of judgment which produce liability**

ROLE OF STATUTES

Littley v Brooks (1940)

Facts: The plaintiff is the widow of a man struck and killed by the defendant's train. There was a non-binding provincial regulation limiting the speed of the train below what it was going at the time of the collision
Issue: Can an inapplicable regulation evidence a standard of care?
Holding: Although not binding on the defendant, the regulation was admitted as evidence of a standard of care
Reasons:

- While the order was not binding on the defendant, it constituted evidence that the crossing was dangerous and that precautions were required. It was admissible as such since it contained the results of inquiries made by a public authority on a matter of public concern
- Such evidence could also be rejected if it's superseded or set aside by a subsequent injury made by the same or similar public authority
- Contrast with *Chipchase* - exact opposite outcome from *Littley* - plaintiff was a painter, provided two ladders and a plank with which to paint by his employer. Fell off and sued defendant, claimed the plank was too narrow. According to the legislation, if the plaintiff had been working at a certain height there was a requirement for the width of the plank. It didn't directly apply to this scenario. Plaintiff claimed that since he almost fell within the regulations so the court should take it into account as evidence.
    - Court rejected this, said it has to be considered independently of the regulations, shouldn't consider all the statutes that almost apply but don't exactly (indeterminate)
    - Not a matter of common sense that the plank should have been wider, the plaintiff himself selected the plan

Principles:

- Regulations about how an act is to be safely performed may evidence a standard of care even if not directly binding on the entity in question

The Queen in the Right of Canada v Saskatchewan Wheat Pool

Facts: Pool operated a grain elevator and shipped grain to eastern provinces. The Commissioner detected rust beetle larvae on the wheat and had to pay to fumigate the wheat. The Commission is seeking compensation for the cost of the fumigation, not claiming any negligence, only a breach of the pool's statutory duty to provide uninfected grain
Issue: Where A has breached a statutory duty causing injury to B, does B have a civil cause of action against A? If so, is this liability dependent on A's level of fault?

Holding: Breach of statute is not a tort, there was no negligence therefore there is no case here
Principles:

- This is the authority on the role of statutes
- Proof of statutory breach causing damages may be evidence of negligence (continue to apply the full negligence analysis and standard of care analysis, taking into account that the statute was breached)
- Where there is no negligence, breach of legislation shouldn't affect civil liability unless the statute so provides
- A statute can provide a specific standard and its breach may provide evidence of negligence, but the question remains whether the defendant failed to act with reasonable care

CAUSATION

- Here we are dealing with causation in fact - different from causation in law (remoteness, asks what is the type of injury the plaintiff suffered, and if it was too remote)
- Question for causation in fact: Did the defendant actually, in fact, cause the plaintiff's injury on a balance of probability?

Test: "but for" test - would the injury to the plaintiff have occurred 'but for' the defendant's act? *(Barnett v Chelsea)* - only used with one defendant/cause

If yes - no causation
If no – causation

Two difficulties with the 'but for' test:

1) **Multiple actual causes** (two defendants/two simultaneous negligent acts) - use the 'material contribution to the injury' test
    a. Need to ask: Was each cause sufficient in itself? If each cause was sufficient in itself to cause the plaintiff's injury, the 'but for' test fails because it would technically let all the defendants off the hook
    b. For multiple, sufficient causes - cannot use the 'but for' test
    c. **Material contribution to the injury test:** Did the defendants, each of whose negligence was sufficient in itself in terms of the evidence, contribute to the plaintiff's injury? All are held liable because they all contributed materially to the plaintiff's injury
2) **Logical impossibility** (inability to determine which of two or more defendants that did something potentially negligent actually caused the injury) - use the 'material contribution to the risk' test
    a. **Material contribution to the risk test:** lower threshold - did each defendant materially contribute to the risk of injury?

MULTIPLE ACTUAL CAUSES

Athey v Leonati

Main case on multiple actual causes
Facts: Plaintiff had a pre-existing medical condition. Accident #1 happened - defendant #1's fault. Accident #2 happened - defendant #2's fault. Plaintiff later did some stretching and had a herniated disk. He claims the injury was both defendant's fault
General principles:

- The general test for causation is 'but for'
- The defendant's negligence doesn't need to be the sole cause of the injury - could have potential causes and multiple liability
- The question is whether the defendant's negligence **materially contributed to the injury (test from here)**
- Defendant is liable for any injury **caused or contributed** to by his negligence, regardless of the presence of other contributing causes (did each defendant materially contribute, or cause the injury?)
- Plaintiff is to be placed in the same position he or she would have been in absent the defendant's negligence, but not in a better position (not trying to get the plaintiff to a place past the pre-existing condition)

Multiple tortious causes: when there are two tortious causes each defendant is fully liable for the plaintiff's injury; there can be no apportionment when there is a tortious and non-tortious cause

- Human defendant cannot claim that their liability should be less because the non-tortious (not human, an act of god) cause should carry some of the damages
- Only can apportion liability between human defendants, not between a tortious and non-tortious cause

Divisible injuries: when injuries have two causes that are distinct and divisible, apportionment of damages is permitted

- Not possible when there is one, indivisible injury (e.g. generally when a person is dead, or the disk herniation)

In this case:

- If the disc herniation would likely have occurred at the same time without the accidents, then no causation ('but for')
- If both the accidents and the pre-existing conditions were necessary for the herniation then causation is proven; even if the accidents played a minor role, the defendants would be fully liable
- If the accidents alone could have been a sufficient cause of the herniation and the pre-existing condition alone could have been a sufficient cause of the hernatiation, must determine on a balance of probabilities whether the defendant's negligence "materially contributed" to the injury

Holding: Each defendant held liable for 100% of the plaintiff's disc herniation

LOGICAL IMPOSSIBILITY

- Here there are multiple *possible* causes – if the plaintiff cannot show it is logically impossible which of the multiple possible causes actually caused or contributed

Cook v Lewis (1951)

Facts: C and L were hunting when C accidentally shot L. Both C and another hunter had both fired shots in L's direction. It was unclear whose shot hit L

Issue: Two negligent defendants, but only one ultimately caused the injury. Jury could not determine who had done it

Reasons:

- SCC set out the old rule from the CL: when its certain that one of the two individuals committed the offence, but its unclear which one was the guilty party, then neither are liable (essentially innocent until proven guilty), unless special circumstances arise
- Court departed from this rule, referred to the case of *Summers v Tice:* **both Ds could be found liable if each breached a duty to the P; the burden of proof then shifts to the Ds to prove which one of them caused the injury. If they can't, then both are held liable**
    - Here it was held that both contributed to the risk of him being shot, so both are held liable
- Dissent: Because there's no evidence that either defendant shot the plaintiff in actuality, there is no legal reason to hold them responsible for each other's action and they should not be held liable

Principles:

- **Doctrine of alternative liability** - if it is logically impossible to show which of the causes actually caused or contributed to the act, if both breached the duty to the plaintiff, the burden shifts to the plaintiff to show which of them caused the act. If they can't, they are both held liable (reversal of burden of proof)

Sindell v Abbott Labs (1980)

Doctrine of market share liability - modified version of material contribution to the risk test

Facts: Plaintiff was a part of a class action. Suffered harm as a result of her mother taking the drug DES during pregnancy. The defendants were multiple drug manufacturing companies who failed to warn of potential harms of the drug. P knew the type of drug, but couldn't identify the actual manufacturer that sold the precise drug her mother consumed (logical impossibility)

Issue:

Reasons:

- Facts of *Summers* distinguished here - in *Summers* all the parties who could have been responsible to the plaintiff were joined as defendants, meaning there was a 50% chance one of them were responsible. Here, there were actually 200 drug companies that could have made the drug at that time (different from *Cook*), so requiring the plaintiff to identify the manufacturer who actually supplied it or to join all 200 manufacturers would essentially mean she couldn't recover
    - Policy reasons in favour of finding causation:
        - Difficult for consumers to trace harm in a complex industrial society
        - Defendant should bear the burden - delayed effects for many years, not fair the defendant should be able to use the onset of the injury as a defence to causation
        - Defendants are better able to bear the cost of the injury resulting from manufacturing a defective product with insurance
- **Assess the percentage which the drug sold by each defendant bears to the entire production of the drugs sold by all - a 'substantial' percentage is required - if this is not found, the defendant isn't liable (only works for class actions)**

- Court didn't want to measure the chance of all the potential defendants by dividing it by the number of defendants (e.g. 200). Instead, wants to measure the chance that any of the defendants supplied the drug by the percentage which the defendant's share of the market for that drug was (e.g. 1/5)
- This justifies saying that once the defendants have significant or substantial control of the market, the burden then shifts to the defendants to show which one of them actually made the drug
- If they cannot find this, then they are all liable
- This also serves as a means for apportioning damages among defendants - pay according to market share, but still jointly and severally liable

Dissent: say the majority's decision permits recovery from a hand full of defendants, each of whom individually may account for a small share of business as long as the aggregate share of all of them is substantial (problem with 'what is substantial')

Principles:

- Second situation with a logical impossibility situation, somewhat modified test because of the number of potential defendants. Not a 50% chance so use **market share liability theory**

Note: Adopted in Canada, but primarily within Legislatures, not very much by courts

Snell v Farrell

Facts: Medical negligence case (usually the scenario when there is a weak evidence case). D doctor was negligent in performing surgery on the P's eye. After surgery, P suffered a stroke which led to blindness. On the evidence it was found that the stroke could have been caused by the D's negligence in the surgery, OR by the plaintiff's pre-existing condition (here we have two *actual* causes, two *sufficient* causes).

Issue:

Reasons:

- SCC held that risk of material contribution to the risk test should not be applied here because the P can prove, just have to lower the standard of proof to show 'but for' (material contribution to the injury)
- Reversing the burden of proof is justified in the *Cook* scenario, where it is logically impossible to show which one caused the injury - **causation doesn't have to be determined by scientific precision (*Snell* inference) - it is a practical question of fact which can best be answered by ordinary common sense**
    - Where the facts lie within the knowledge of the defendant, very little positive or scientific evidence is needed from the P for an inference of causation against the D if there is no evidence to the contrary
    - Problem is weak evidence - usually because it is in a medical context, not the plaintiff's fault they can't show sufficient evidence
- The court should take a robust and pragmatic approach to the facts
- The onus is on the party who asserts a claim, except where only one party has knowledge about the issue – then it may fall to them to prove it
- In this case: an inference that the D's negligence caused or contributed to the P's injury could be made from the evidence and there was no evidence to the contrary

Principles:

- This case shows when it is truly a logical impossibility situation, where you appropriately should apply material contribution to the risk test, when its not and you don't have a logical impossibility situation, just a weak evidence situation
- In the latter, you are **not** use the material contribution to the risk test (because not a logical impossibility), instead use the 'but for' test (now called ***Snell* inference** where causation can be shown even when evidence is weak)
- Causation need not be determined by scientific precision – it is a practical question of fact

Walker Estate v York Finch General Hospital (2001)

Facts: Plaintiff contracted AIDS from a blood transfusion (defendant was Canadian Red Cross). Held that defendant breached its duty to the plaintiff by not informing donors of the risks or adequately screening donors

Issue: What is the appropriate causation test? This is a logical impossibility test because there is a third party in the chain of causation - impossible to know if they would have not donated blood if they had known they had AIDS

Reasons:

- In light of the added element of donor conduct the 'but for' test could operate unfairly, therefore the test is whether the D's negligence 'materially contributed to the injury' - MESHEL SAYS THIS IS WRONG
    - Here they ignore material contribution to the risk test and only apply the injury test, even though this is not a situation of multiple sufficient actual causes, it is a logical impossibility problem

Principles:

- Third scenario where you can apply material contribution to the risk test

- Court should have used material contribution to the risk not material contribution to the injury
    - This is an impossibility of proof scenario
- If the answer to the but-for test depends on what a 3rd party would have done differently but for is impossible to prove
- An example of factual uncertainty, logical impossibility, and multiple possible causes

Resurfice v Hanke (2007)

Facts:

- This case did the exact opposite of *Walker* - used material contribution to the risk and ignored material contribution to injury
- **Basic test is always 'but for', for causation cases**
- **A "material contribution" test can be substituted where:**
    - **Its impossible for the plaintiff to prove that D's negligence caused P's injury using the 'but for' test due to factors outside of P's control**
    - **D breached a duty of care owed to P, thereby exposing P to an unreasonable risk of injury**
- This is basically the material contribution to the risk test even though that test was already established
- In *Walker* they applied the wrong test, and here they ignore the injury test

Clements v Clements

Facts: Facts: D was driving a bike, P was behind in the passenger seat. D was negligently driving, and a tire punctured at the same time that caused P's injuries (non-tortious cause). Witness testified that the probable cause of the accident was the tire puncture, would have happened even if D was driving slower. TJ rejected this evidence and found that the 'but for' test could not be satisfied because of limitations of scientific evidence to show on B of P that the tire and not the negligence was responsible

Reasons:

Principles:

- The but-for test is the primary test for causation, and it should only be supplanted by material contribution to the risk where is it impossible to determine which of multiple acts by multiple negligent actors caused the damage
- Material contribution to the risk does not prove causation, but substitutes for it where to fail to do so would offend basic notions of fairness
- **P may succeed by showing that D's conduct materially contributed to risk of P's injury if:**
    1) P has established that her loss would not have occurred but-for the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and
    2) P, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact caused her injury (applies only in logical impossibility situations, doesn't mean weak evidence)
- **The material contribution to the risk test is very limited** (*Cook, Walker* situations)
    - Either use 'but for' for anything other than logical impossibility OR if you fall within this very narrow test, can use material contribution to the risk
    - If weak evidence situation can use *Snell* inference

Remoteness

Test for remoteness in Canada today: whether the harm is a "real risk" that isn't "far fetched" or a mere "possibility"

- Courts reluctant to find liability for negligence where:
    - The loss might be very different from what one might reasonably expect
        - Disproportionate or the way it happened was bizarre
    - Less of a factual question and more of a policy question

Evolution of Remoteness

***In Re Polemis*:** old philosophy of remoteness, no concept of an injury being too remote - not used anymore

- Facts: Defendants chartered a ship, petrol leaked, then a spark was ignited and the plaintiff's ship was destroyed. Defendants claim the accident was too remote
- Its immaterial that the way the fire was caused couldn't have been reasonably anticipated
- There's no distinction between the extent and type of damage resulting from the negligent act

- Court used test of 'directness' - if the act caused the damage, nothing else matters and the defendant should be held liable (this approach favours the plaintiff)

Overseas Tankship (The Wagon Mound No 1): overturned *In Re Polemis*

- Facts: Defendants boat was moored at the same harbour of the plaintiff's wharf, oil spilled from the boat into the bay. Plaintiff's work manager believed that the oil was not flammable so continued to work, fire broke out, destroyed the boat
- Held that the directness test is not fair because a slight act of negligence which could result in damage can lead to more grave and unforeseeable consequences
- Liability is founded not on the negligent act, but on its consequences, the kind of which must be foreseeable
    - Test here is pro-defendant: the test is foreseeability (means 'probable consequences') - high threshold, plaintiff needed to show that the oil leaked would lead to the oil and explosion
- No liability here because damage to the wharf was not foreseeable
- The test is reasonable foreseeability of the kind/type of damage

Wagon Mound No 2

- Plaintiff in #1 becomes defendant in #2
- Put forward evidence that the manager's order to keep working was negligence because it was foreseeable that the oil would ignite and cause fire
- Court found negligence here
- Test is 'foreseeability' (means possible consequences) - has to show the injury was 'possible', much easier to fulfill than 'probable'. The damage must be a ‘real risk’

THIN SKULL RULE

Smith v Leech Brain & Co

Facts: husband died, wife was plaintiff. D employer supplied the plaintiff's late husband with iron shields, husband sustained a burn - but this was not the injury the husband died from. The burn developed into cancer, which killed him. TJ found that plaintiff was prone to cancer so the trauma from the burn could have caused it to develop, but it also could have developed regardless of the burn
Issue: is there liability for injury to a particularly sensitive plaintiff? Policy decision of who should bear the burden?
Reasons: Duty and standard found in this case, either caused or contributed to the cancer and the death
Principles:
A tortfeasor takes his victim as he finds him (policy dilemma ruled in favour of the plaintiff)

- Distinction maintained between: (1) foreseeability of a type of injury, and (2) the extent of injury of a foreseeable type (need to establish that the type of kind of injury was reasonably foreseeable, BUT EXTENT of the injury is not required to be shown)
- **"Crumbling skull" rule for damages** - damages can be reduced if the plaintiff would have suffered the harm anyways at a later date

Stephenson v Waite Tileman Limited

Facts: Plaintiff cut his hand from a wire rope that wasn't secured properly by his employer. He became severely ill and sued the employer for the illness. Conflicting info from expert doctors - some said the illness was not due to pre-existing condition, others said it was a thin skull situation
Issue: Should only the initial cut be reasonably foreseeable, or all consequences?
Reasons: Doesn't matter which expert evidence we accept, either way no remoteness issue was found and defendant is liable
Principles:

- **There can be liability for both consequences flowing from a pre-existing special susceptibility of P and from a new risk or susceptibility created by the initial foreseeable injury**
- **The question of foreseeability is limited to the initial injury**

Cotic v Grey

Thin skull rule in psychiatric harm

Facts: plaintiff's husband was seriously injured in a car accident caused by D's negligence. Before the accident the husband had suffered from depression. After the accident he committed suicide

Principles:

- **Thin skull rule should be applied in psychiatric cases - D takes the victim as he finds him - a 'psychologically vulnerable person'**
    - Some controversy if suicide should be considered too remote or not - not clear here, on the facts of every case

Note:

- *Smith* and *Stephenson* for physical injury
- *Wagon Mound* for injury of property (and for principle of remoteness, that it is something the plaintiff needs to show)
- *Cotic* for thin skull in psychiatric harm

HOW THE PLAINTIFF INCURRED THE HARM

Hughes v Lord Advocate (1963)

Facts: P was a young boy who fell into an unattended manhole following an explosion caused by him dropping a lamp into the manhole

Reasons:

- What happened fell within the scope of the risk, so they should be held liable
- The type of the plaintiff's injury was foreseeable, even if its extent was not

Principles:

- D is liable for foreseeable kinds damage though it may be greater then was foreseeable. He only escapes liability if the injury is of a different kind
- Only the kind of injury needs to be foreseeable, not the precise cause of the injury
- If P's injury falls within the scope of the risk created by D then D will be liable
- **If the type of danger was foreseeable, we don't need to see how it came about**

Note: in cases with children courts tend to find the risk not too remote (policy reasons - risk defined widely). If no children, more likely to use *Doughty* than *Hughes* or *Jolley*

Doughtey v Turner Manufacturing Ltd

Court distinguished this case from *Hughes* – partially because no children were involved

Facts: P's owned factory, hot metal liquid inside. The cover of the liquid was accidently dropped into the cauldron containing the liquid. P stood next to one, the cover caused it to erupt, P was covered in the liquid

Reasons:

- Neither P nor D knew the cover would explode upon contact with the molten metal
- Although there was a foreseeable risk of burns by splashing, the defendant was not found liable as the plaintiff was not in a position to be burned by a splash, and the explosion was unforeseeable
- The duty of the plaintiff was not to avoid the cover falling, but to avoid it falling in such a way as to splash those nearby, so the injury didn't result from the foreseeable risk created by the defendant

Principles:

- Risk defined very narrowly in this case (as compared to *Hughes*) – because the risk that the defendant created wasn't what actually happened, there was no liability
- **Generally if the details are not significant (court decides to use a wide scope of the risk created), what happened to the P will be held as foreseeable. If the details are significant (risk defined with a narrow scope) courts usually find it to be unforeseeable**

Options that the courts might decide in issues of remoteness

1. E.g. dropping a brick on someone's head - this will be found to be foreseeable, no remoteness issue
2. Case where the D drove a truck and negligently left it on the highway at night. A car crashes into the truck and it catches fire. The P comes to the rescue of the car occupants. After the P gets them out of the car he returns to his own car and a gun was

lying on the floor of his car, he picked it up and handed it to one of the car occupants, who shot the rescuer in the leg - demonstrates cases where it is so extreme hard to see coming (matter of how much detail you place on the risk, if it falls within the scope)
    a. Rescuer tried to sue the owner of the truck
3. Everything else that isn't extremely hard to see coming, but also not clearly foreseeable
    a. How the court defines the scope of the risk and how much emphasis the court puts on the details will determine if the court finds the ultimate injury foreseeable or not

Jolley v Sutton London Borough Council

Facts: Defendants failed to remove an abandoned boat that was rotten. The teenage plaintiff jacked up the boat; it fell and caused him serious injuries

Reasons:

- What must be foreseen is NOT the precise injury which occurred, but an injury of a given description
- The description of the injury is formulated by reference to the risk which ought to have been foreseen

Principles:

- What must be foreseen is not the precise injury or way it occurred, but an injury of a given 'description'; the description of the injury is formulated by reference to the nature of the risk which ought to have been foreseen
- Foreseeability is not as to the particulars of the injury, but the genus
- The wider risk would be foreseeable unless it was different in kind from that which should have been foreseen, and either wholly unforeseeable or so remote that it could be brushed aside as far-fetched
- In cases involving children, a broad description of the risk is appropriate

INTERVENING ACT

- An event (either someone else's tortious behaviour, an act of god, etc.) that happened **after** the defendant's negligent act. It triggers, or usually worsens the plaintiff's injury
- Main questions:
    - Should the original defendant by liable?
    - When does that act after sever the original defendant from the causal chain because the damage ultimately suffered was too remote to hold the defendant liable?
- Modern courts quite reluctant to protect D's from the consequences of their negligence because something else happened afterwards
- **Test: same test as for remoteness generally - reasonable foreseeability**
    - **Was the intervening act reasonably foreseeable? A real risk falling within the scope of the risk created by the defendant**
    - **If yes - then it was reasonably foreseeable**

Bradford v Kanellos (1974)

Facts: small fire occurred in the grill in a restaurant kitchen due to the defendant's negligence in not cleaning it. The fire was extinguished, no one was hurt. The extinguisher made a popping noise, which caused someone in the restaurant to yell that there was going to be an explosion, resulting in panic and people running out. One person was pushed, fell and was injured. They sued the restaurant owner

Issue: What is the role of an intervening act? When can it sever or negate the liability of the defendant?

Reasons:

- Majority: The hysterical conduct of a customer which occurred when the safety appliance properly fulfilled its function wasn't within the risk created by the defendant's negligence in failing to properly clean the grill - not foreseeable
- Dissent (Laskin J): an intervening act won't clear a defendant if it can fairly be considered a normal incident of the risk created by him - reasonably foreseeable that negligent maintenance of the grill would result in a fire, use of an extinguisher, and a customer would panic

Principles:

- Test of foreseeability applied to determine whether D is liable for the damage triggered/worsened by the intervening act – if the intervening act was broadly within the scope of the foreseeable risk created by D, he remains liable for the damage

Note: more recent interpretation has followed Laskin's dissent more - if natural consequence happening in the course of things, less reason to release defendant from liability

Home Office v Dorset Yacht Co (1970)

Facts: Under England's Prison Act, young offenders could be brought in as "borstal boys", a rehabilitation program administered by the Home Office (HO). Several borstal boys escaped a work facility and snuck aboard a yacht, and crashed it into DY's yacht
Issue: When do the independent actions of another break the chain of causation between the defendant's negligence and the plaintiff's damage?
Reasons:

- The actions of the boys are found to be the natural and probable consequence of the officer's carelessness and HO is therefore held to be vicariously liable

Principles:

- Where the human action forms one of the links between the original wrongdoing of the defendant and the loss to the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens,* breaking the chain of causation
- A mere foreseeable possibility isn't sufficient
- If the action is highly probable it will not break the chain of causation, regardless of whether it was innocent, tortious, or criminal
- In order for the defendant to be liable for the actions of another who is not his servant, the other's act must be the natural and probable consequence of the defendant's wrongdoing

Lamb v London Borough of Camden (1981)

Facts: While repairing sewers near the plaintiff's home, the defendant caused subsidence and severe damage to the plaintiff's home. While the home was waiting to be repaired it was invaded by squatters who caused $30K in additional damages
Reasons:

- It was not reasonably foreseeable that in puncturing a water line it would lead to squatters invading a nearby home

Principles:

- The very likely to occur test from *Home Office* should be rejected
- **A degree of likelihood amounting to inevitability is required for a defendant to be liable for the acts of a third party which resulted from this own negligence**

PSYCHIATRIC HARM

Mustapha v Culligan of Canada (2008)

Facts: plaintiff sued for depressive disorder that he developed as a result of seeing dead flies in a bottle of water manufactured by the defendant. Manufacturer owed a duty of care, breached the standard of care and caused in the injury in fact
Issue: Is the type of harm suffered by the plaintiff (psychiatric) too remote to hold the defendant liable?
Reasons:

- Compensable personal injury in tort law *includes both physical and psychological injury, but the latter must be* ***serious trauma or illness***
- The law doesn't recognize 'upset, disgust, anxiety, agitation or other mental states that fall short of injury'
  - It *must be serious and prolonged, and rise above ordinary annoyances, anxieties and fears*
  - Here: Court found that there was an illness that rose to that level and qualified as a personal injury that can be compensated in tort law
- **The test for remoteness is 'the foresight of the reasonable man'**
  - Real risk, more than far fetched, that would occur in a person of ordinary fortitude (applies to both physical and psychiatric)
  - Possibility isn't the standard for the application of the reasonably foreseeable test; rather it is **"real risk"**
- The *mental injury must be such that it would occur in a person of 'ordinary fortitude'*
  - Unusual or extreme events may be extreme but
  - Don't confuse with thin skull rule
- Once the plaintiff establishes the foreseeability that a mental injury would incur in a person of ordinary fortitude, the defendant must take the plaintiff as he finds him for the purposes of extent of damages

Principles:

- Test:

    - **Step 1:** need to establish a mental or physical injury that the plaintiff has suffered - reasonable foreseeability
        - Test is a real risk, that is not far-fetched
        - How to determine: ask if a person of ordinary fortitude would suffer
    - **Step 2:** defendant must take the plaintiff as he finds him
- Stands for the general test of reasonable foreseeability and what it means
- What kind of psychiatric harm would be compensable in tort law, and what level of injury you have to show
- Can't have mere disgust or agitation, needs a serious illness
- Whether physical or psychiatric, need to show that the harm was reasonably foreseeable, meaning a real risk, not far fetched, a person of ordinary fortitude would suffer

Saadati v Moorhead

Facts: In 2005 the plaintiff was involved in a car accident caused by D's negligence. At the time of the accident the plaintiff appeared to be uninjured but was in an earlier car accident two years before, he suffered from chronic pain, this aggravated the plaintiff's claim. Involved in two additional accidents in 2008 and 2009. Later was declared mentally incompetent.
Issue: is it necessary for a finding of compensable mental injury for a claimant to show proof of a recognized psychiatric illness
Reasons:

- Duty of care exists to take reasonable care to avoid causing foreseeable mental injury, as well as physical injury
- *Claimants alleging mental injury are not required to provide expert testimony of a "recognized psychiatric illness"*
    - Such a diagnostic threshold is unnecessary
    - Expert evidence can *assist* in establishing mental injury, but is *not required as a matter of law*
    - Trier of fact can find that the plaintiff has proved a mental injury on the balance of probabilities on other evidence, e.g. testimony from friends and family
- Plaintiffs must show that the disturbance is 'serious and prolonged, and arises above the ordinary annoyances, anxieties and fears that come with living in civil society
- Expert evidence can assist in establishing a mental injury, but it isn't required as a matter of law

Principles:

- Have to show more than mere annoyance for compensability, but don't have to show an identifiable, diagnostic mental illness 'from the book' - can be evidenced by other kinds of things in addition to or in lieu of expert medical opinion that show a disorder is present

DEFENCES

- Assess defences after the entire liability analysis is done
- Need to ask: does the defendant have any defence to negate their liability entirely, or reduce damages?

Contributory Negligence

- Rationale - one person being at fault will not dispense with another using ordinary care for himself
    - Don't where a situation where the defendant is responsible for 100% of the injury even though the plaintiff was responsible in some way themselves
- Not a complete defence, only serves to lower the defendant's damages
- Provincial legislation imposes apportionment of damages
    - Alberta ***Contributory Negligence Act*** - the court shall apportion the damages in proportion to the degree of fault of the parties; if this isn't possible, liability is apportioned equally
- Plaintiff must have been found to have acted negligently in order to hold them (at least in part) responsible for their own injury
- Defendant must show:
    - Plaintiff failed to take reasonable care
    - Plaintiff's conduct must be a cause of, or contribute to, the injury (*Davies, Froom*)
    - Plaintiff's conduct must have created a risk of reasonably foreseeable injury and his loss must be a type that falls within the scope of risk
- If defendant can show this, court will apportion damages between the plaintiff and the defendant

Voluntary Assumption of Risk

- A complete defence - courts have interpreted narrowly

- Will only be applied in rare circumstances: (*Dube*)
    - Plaintiff must have agreed expressly or by implication to exempt the defendant from liability for damages occasioned by the defendant's negligence (*Priestley*)
    - Not sufficient that the plaintiff knew of the physical risk and chose to undertake it (express or implied), but the circumstances must be such that the legal risk was voluntarily incurred by the plaintiff and she bargained away the right to sue for injuries resulting from the defendant's negligence
    - Plaintiff's acceptance of the risk will arise only where there is an understanding by both parties that the defendant 'assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to (*Birch*)
- Often arises in cases of waiver
- Question becomes, even if the plaintiff read and signed the document, does it represent their understanding and acceptance of the physical risk of injury that they might sustain
    - What steps has the defendant taken to make sure the plaintiff understands the activity, that they won't be able to sue after they sign, etc.

Illegality

- A complete defence intended to preserve the integrity of the legal system and the judicial process by not allowing recovery for what is illegal and by maintaining internal consistency in the law
    - Plaintiff shouldn't be allowed to recover when they are engaged in illegal or immoral conduct
    - SCC has interpreted narrowly, rarely applies
    - Idea that it will not generally operate to deny damages as compensation for personal injury in tort (*Zastowny*)
- Generally the defence will not operate to deny damages as compensation for personal injury in tort
- The defence applies only in very limited circumstances, such as where:
    - Allowing the plaintiff's tort claim would permit the plaintiff to **profit** from his/her wrong
        - Need to make a distinction in 'profit' - by being paid for direct damages caused to you by an injury resulting from defendant's negligence - this is not the sense in which the term profit is used
            - It is used to prevent the plaintiff from profiting directly from their illegal act, rather than directly from their injury
            - Would apply to a particular head of damages that would compensate the plaintiff above and beyond the direct pecuniary damages they are entitled to
                - E.g. loss of future earnings - but if these are based on an illegal job, the idea of this defence is to prevent them from being compensated or earning a profit under this head of damage
            - Intended to deter and punish the plaintiff
    - Allowing the plaintiff to recover would create internal inconsistency in the law
        - E.g. a burglar plaintiff has been fined under criminal law for breaking into homes, but then allowed to sue the defendant for that amount as part of their claim for the defendant's negligence
        - Plaintiff shouldn't be able to profit from their illegality, and the *law shouldn't be able to give with one hand what it takes away with the other*
- This should be applied as a defence and not as part of duty of care

DAMAGES

- Idea is to compensate the plaintiff for the harm and bring them back to their original position
- Questions concern the kind of items for which the defendant has to compensate the plaintiff, how the court is to determine a sum that will adequately compensate at the current moment and into the future

Andrews v Grand & Toy Alberta Ltd

- Facts: 21-year-old plaintiff rendered quadriplegic in a traffic accident. Required continuous care for the rest of his life. Appeal was about damages, no debate about liability (cost of future care, loss of future earnings, etc.)
- Ratio: General principles of law when the courts are to assess damages. On the facts of this case where a young person suffers wholly incapacitating injuries - called 'million dollar award' case, very extreme injuries

Principles of damages:

- **Pecuniary losses -** monetary losses, out of pocket expenses or future loss of earnings expenses
    - Future care: standard of care, life expectancy, contingencies of life
        - Claim for the amount which may reasonably be expected to be expended to put the P in the position he would be in if not in this situation
        - 'Money as a substitute' especially where money can never fully repay
        - To determine:
            - Standard of care - should the future care of the plaintiff be in an institutional or home care environment?
                - Mitigation of damages - P has to be reasonable, but no place for this here
                - Not mere provision - an award must be moderate and fair to both parties, but *compensation* should be the driving rationale behind the amount of future care
                - Compensation not sought on the basis of sympathy, but where both courts below favour the home environment then this is what should be awarded
            - Life expectancy - not to look at the statistics of 23 year old's generally, but of a male quadriplegic specifically
            - Contingencies of life - relate to the duration of expense, things that are unexpected that might still happen generally in life. Often relate to the length for which future care will have to be paid
    - Prospective loss of earnings: level of earnings, length of working life, contingencies, cost of future basic maintenance (duplication)
        - Aimed to represent the loss of earning capacity of the plaintiff
        - Look at their career, prospects and potential prior to the injury
        - Level of earnings - value of the plaintiff's earning capacity over his working life (higher than earnings at the time of the accident)
        - Length of working life - how many years they have left
        - Contingencies - with respect to future earnings, the kind of unexpected events which might affect future earnings -e.g. business depression, accidents, etc. or something positive like promotions. Turns of the facts. Court will look at the nature of the plaintiff's occupation
        - Duplication of costs of future basic maintenance - costs of basics for the plaintiff before the accident, which is assumed to continue
    - Take inflation and rate of return into account - impacts the value of money into the future
    - Allow for tax to be accounted for

- **Non-pecuniary losses –** damages for the plaintiff's loss and enjoyment of life, pain and suffering
    - Mainly a policy consideration - the social burden of large awards
        - Generally guided by fair and reasonable considerations, keeping in mind this is somewhat arbitrary
        - Social burden of large awards - danger of excessive burden of expense
            - Court wanted to cap awards so Canadian negligence cases don't result in millions of dollars in awards like in the US
    - 'Functional approach' - to determining amount of non-pecuniary
        - Values in the injury in the loss of human happiness of the victim and assesses the compensation that is required to provide the plaintiff for "reasonable solace for their situation"
        - Large amounts should not be awarded once a person is properly compensated in terms of future care. Additional money should be providing more general physical arrangements above those directly related to the injury
        - Must consider individual situation - e.g. finger broken for a pianist versus an ordinary person
    - The courts must consider the individual situation of the victim, but there should be a rough upper parameter on these awards
        - Customary to set only one figure for all non-pecuniary losses
    - In the case of a young adult quadriplegic like in this case - $100 000
        - Other than in exceptional circumstances
        - In dollars today: $376 000
        - This is still the ceiling/max amount that plaintiffs generally can recover for non-pecuniary losses
        - Also includes an overall assessment of reasonableness

- Total of both damages: $817 000 in this case, then reduced 25% because of contributory negligence
- Ratio: Damages guided by this case in Canada. Cap is still the same but changes based on the dollar
    - Useful for category of damages and factors the courts will take into account