Torts CAN

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Introduction to Tort Law

What is Tort Law?

- Tort: a civil wrong other than a breach of contract, which the law will redress with an award of damages
- A branch of private law
    - Usually between two individuals or corporations. Usually doesn't involve the state
- Not all wrongs are compensable
    - Wrongs the law deems as worth of compensation
- Torts must be proven on the balance of probabilities
- Focus on how people are able to treaty each other in society and what to do when things go wrong
- Goals of Tort Law
    - Compensation
    - Justice
    - Education
    - Deterrence
    - Punishment
    - Role as an ombudsmen: Function of audit and review in society

Oliver Wendell Homes

- Says don't confuse tort law with morality
    - Tort law should be a system of practical problem solving
    - Quest for a general principle of liability
- Fault
    - A failure to act reasonably or a failure to act in accordance with law or legal duty
    - Has to be proved
- Types of fault
    - Intentional torts
    - Negligent torts
    - Strict liability

Theories of Tort Law

- Economic theory
    - Regulating safety in the context of a broader focus on the efficient allocation of social resources
    - Seek the correct level of risk / harm for optimal social functioning

    - Eg we allow people to drive even though some will die
- Corrective Justice
    - Aristotle: transactional nature of a legally wrongful act (the action on one hand and the corresponding harm on the other); correct the impact of the transaction
    - Creates duties
        - Duty of conduct (what is allowed and what isn't)
        - Duty of repair (wrongdoer has a duty to correct the loss created by their conduct
- Analytical and Descriptive approach
    - Helps us understand and explain the role of tort law within our legal and social structures
- Normative approach
    - Helps us critique and question what the function of tort law ought to be and consider tort law reform or alternatives
- Essentialist view
    - Tort law seeks primarily to express certain political or moral principles
- Instrumentalist view
    - Tort law exist primarily to respond to a social problem
    - Optimal deterrence theory: tort law is to limit sum of accidents and cost of avoiding them

Tort Law Alternatives and Modifiers

- Insurance
    - A market-based approach to offset the problems of tort law
    - Reduces personal injury claims that people would not be able to afford
- Government administered statutory schemes
    - Eg Workers compensation
        - Codifies negligence law
        - Provide compensation for injuries that take place in the course of employment
        - Workers are unable to sue any worker or employer if they receive compensation from WCB
- No-fault scheme
    - Eg New Zealand Accident Compensation Corporation
        - Applies regardless of fault
        - May pay some of your medical and rehab costs
        - Cannot sue for any costs that relate to the injury or its negative effects
- Hybrid schemes

Tort Law Criticism

- Fault remains a problematic concept for grounding accident liability
    - Absence of full information/facts to ever determine fault unequivocally
    - Criteria are difficult to apply rationally or objectively in any accident
    - Award outcomes are ultimately based on arbitrary and unsound criterion
- Fault based approaches to negligence leave 25% of victims uncompensated and the other 75% undercompensated

    - Undervalue the victim's experience
    - Question of leaving compensation to the free market or bigger governmental involvement?
- Criticism of compensation schemes
    - Compensation ceilings under values victims and discriminate against high earners
    - Focus should shift from compensation to safety
    - Should be no government and a free market for competitive insurance products covering all manners of risk
- Deterrence
    - Little evidence of tort laws efficacy in this respect
    - Systems that are structured to include safety incentives and categorizations of risk are likely more efficient at allocating the costs of risk and harm

Tort Law Systemic Frailties

- Large discussion on if tort law is well equipped to compensate members of residential schools
- Credibility and Justice
    - Should the government be zealously defending itself using all possible legal arguments such as limitations period
    - How can we decide things that happened many years ago? Who do we believe?
        - Problematic assumptions that women and children are lying about sexual assault
        - Biases against minorities
    - Balance of probabilities threshold for sexual assault is typically higher
- Damages and Compensation
    - Restoration to original condition (before injury) is usually not possible
        - Try to find a quantitative equivalent
    - Tort law requires proof of loss
        - In cases of residential schools, often uses racialized data
        - How do we compensate for a program that impacted every aspect of life and culture
    - Types of Damages
        - Compensatory
            - General: Damages that are awarded based on non-monetary losses
            - Special: Quantifiable losses such as property damager or loss of wage
        - Aggravated
            - Limited to circumstances to where the victim has experienced special anguish or grief
        - Punitive
            - An exception situation where the courts award damages bases of egregious conduct of the defendant to punish them
- Vicarious Liability + Compensation/Deterrence
    - Proving the necessary connection between the employer and an employees actions its not clear cut and sometimes difficult
    - Does the employer create risks through its operations?

Trespass, Intentional Interference with the Person, and Nuisance

Historic Development of Intentional Torts (Trespass to Property)

- Write: Cause of action
- Historical writs of trespass
    - *Vie et armis* (with force and arms) against person or property
    - *De bonis asportatis* (for goods carried away) – stolen property
    - *Guare clausum fregit* (breaking the close) – unlawful entry
- No requirement of intentional interference or wrongful motivation to prove the writ
    - Must however be direct
    - Conduct deemed wrongful not on the basis of physical damage but rather because the plaintiff's security and society's tranquility had been disrupted
- Writ of trespass on the case
    - Recognized when the plaintiff's claim is based on a wrong the writs of trespass could not cover, such as a consequential injury
    - Defendants action could be indirect but proof that is wrongful and proof of damages required

Direct vs Indirect

- Direct-indirect distinction has not been eliminated but it is losing prominence in modern jurisdiction
    - A person is harmed; they are no more or less deserving of compensation whether it be direct or indirect
- Direct
    - Injury must flow naturally from the defendants act without the necessity of an intervention by another independent factor
- Indirect
    - Where the defendants act merely create the situation of danger and requires an additional act to produce the ultimate injury

Types of Conduct

- Consider the defendants state of knowledge and appreciation of consequences of the contemplated act and the steps which should have been taken to avoid them
- Accidental conduct
    - Where the consequences produced were not either reasonably foreseeable or reasonably preventable
- Negligent
    - Where the defendant out to have reasonably foreseen and avoided the result
- Intentional
    - Where the defendant acts knowing with substantial certainty what the consequences of the act would be
    - Focuses on the physical consequences of actions rather than knowledge of infringement on someone's legal rights
        - Eg Trespass to land under mistaken belief that the land belongs to you still constitutes a trespass

- To be actionable in trespass, direct interference with person/chattel/land must occur intentionally or negligently

Volition and Capacity

- Tortious liability is foundationally premised on the requirement that the act that caused the plaintiff's injury was the defendant's act
- Volition: presence or absence of the ability to exercise your own choice or will; "absence of consciousness or cognition" negates liability
    - External force: wind pushing you on to someone's property or people carrying you there
    - Internal force: heart attack, sleep walking, seizure
- When lack of volition is a defence
    - The defendant acted while unconscious, or
    - Acted while conscious but not in control of their action (from external or internal force)

- Capacity: the extent to which the defendant had an ability to appreciate the nature and actions of what is occurring
    - Typically arises in age, physical disability, mental illness
- Capacity test: lack of capacity requires that the defendant prove the inability, by reason of mental infirmity, to appreciate the nature and quality of his/her actions
    - To be liable, , the defendant need only be able to appreciate the physical (not the moral) consequences of the act

Criminal Law and Tort Law

- Common for overlap between both
- No civil remedy for an act is suspended or affect by reason that the act or omission is a criminal offence; they can occur in parallel
    - Criminal is for punishment, civil is for compensation, so a conviction won't influence tort law much in terms of damages
        - Only exception if a criminal conviction is successful, a court may decline to award punitive damages
- Advantages of tort law
    - Plaintiff rather than prosecutor controls the process
    - Less onerous burden of proof
    - Claimant can receive compensation including damages
    - Offers another avenue for justice in the event that criminal prosecution is unsuccessful
- Disadvantages
    - Costly
    - Time consuming
    - Limitation periods

Assault

- Originates from a writ of trespass *vi et armis* and qualified as a trespass of the person which serves to protect an individual's right to be free from the *threat* of imminent physical harm
    - There does not need to be any physical contact for there to be a tortious assault as the legal wrong is the disturbance of the victim's sense of security and safety

        - Rarely pled alone, almost always with battery because damages will be small for mean psychological harm without physical harm
- At criminal law, s265(1) defines 'Assault' as encompassing battery and assault torts

- The defendants intentional conduct created a reasonable apprehension of unwanted imminent harm
    - Intention: The perception of harm must come for a direct threat of a direct action
    - Reasonable: A reasonable person would have felt threatened
        - Does not matter if the defendant had the actual ability to cause harm
    - Imminent: Must be timely. Doesn't matter if the plaintiff was just in fear

Tuberville v Savage (1669 England)

- **Facts:** Men were arguing, and Tuberville said if this were not assize-time (judge time) I would not take such language for you. Savage responded with force causing Tuberville to lose an eye
- **Issue:** Was this actionable as an assault tort?
- **Held:** For the plaintiff. Tort of assault found.
- **Ratio:** No provocation or threat of imminent harm from Tuberville
    - The statement was conditional that he was not going to act while Court was in town
        - Reasonable person would say this is lacking intention to act
    - Savage did not have the right to respond in force. Not self defence

Mainland Sawmills Ltd. v U.S.W Local (2007 BCSC)

- **Facts:** Some union workers on strike, some are working. Disagreement between the two. Language was used along the lines of "you won't get hurt if you don't cross the picket line". In other words, we will hurt you if you go back to work.
- **Issue:** Was this actionable as an assault tort?
- **Held:** Tort of assault found.
- **Ratio:** No right to impose a condition that you have no authority to give
    - Cannot stop someone from doing a lawful activity

Stephens v Myers (1830 England)

- **Facts:** Plaintiff is a chairman at a parish meeting. Defendant was getting angry. Said he would rather pull the chairman out of the chair rather than be voted from the room. Approached the chairperson with a clenched fist but was stopped by another person
- **Issue:** Was this actionable as an assault tort?
- **Held:** In favour of the plaintiff, tort of assault found.
- **Ratio:** Put the plaintiff in a position of fear of violence
    - If he would have not been stopped, he most likely would have carried out the threat
        - Reasonable person would say this is a threat
    - Defendant argues no immanence factor as he was some chairs away
        - Leeway on this factor given

Herman v Graves (1998 ABQB)

- **Facts:** Jackson used Graves truck to chase and tailgate Hermes ca. Then Jackson hit Hermes with the car forcing it off the road. Graves exited the vehicle and attacked Graves
- **Issue:** Can the use of a vehicle constitute assault?
- **Held:** In favour of the plaintiff, tort of assault found.

- **Ratio:** Intention in the words and the body language
    - Had a reasonable apprehension of harm
    - Jackson is not a joint tortfeasor in battery but just assault
        - Severs the physical interference required because a car was used
    - Joint and severally liable – can sue multiple parties. Can collect damages from any amount of them, they fight it out to determine that

Battery

- Originates from a writ of trespass *vi et armis* which qualifies as a trespass of the person and serves to protect an individual's right to be free from offensive physical contact
    - The injuria is the actual, physical disturbance to the victim's sense of security and safety
    - Requires physical contact but does not require physical harm; law protects autonomy over body

- A direct, intentional, and physical interference with another person that is harmful or offensive to the ordinary sense of dignity and honour of a reasonable person
    - Direct: the immediate consequence of a force set in motion by an act of the defendant
    - Intentional: the defendant desired the consequences *or* ought to have been substantially certain that they would flow from the act
        - Intended an offensive, physical contract with the defendant
    - Physical: Requires physical contact but does not have to be person to person. Objects qualify
    - Offensiveness: Offensive contact does not equate to harmful/injurious contact
        - Eg surgery
        - Even trivial contact can be deemed offensive
            - All contact outside…what is expected in ordinary life is, *prima facie*, offensive
        - Everyday common and socially accepted activities do not constitute battery (eg shoulder tap)
        - Objective Test: ask whether the reasonable person would consider it appropriate
- Plaintiff has the burden to prove the elements of the offences on a balance of probabilities (50.1%)
    - If prove, the onus then switches to the defendant to establish the plaintiff consented or a reasonable person would think that they consented

Bettel v Yim (1978 Ontario)

- **Facts:** Yim owns a store, and six boys caused a ruckus. At one point, burning matches were thrown which cause a small fire. Who threw the match is unknown. Yim grabs the plaintiff's arm as he did not want him to leave. Yim shakes the boy in order to obtain a confession and in do so, his head struck the plaintiff's nose causing him to fall and a nosebleed. Yim helped him up then called the police
- **Issue:** Can an intentional wrongdoer be held liable for consequences he did not intend?
- **Held:** In favour of the plaintiff, tort of battery found.

- **Ratio:** Harm does not have to be foreseeable
    - Foreseeability is a negligence principle that cannot be applied to the field of intention torts
    - Doesn't have to result in actual physical harm; sufficient that it is offensive to honour and dignity
    - If unintended harm befalls the plaintiff, it is the defendant that must bear responsibility because battery protects the dignity of the individual and their right to insist that others keep their hands off
    - Need to bear the responsibility of consequences
        - Intended to grab him and that would be sufficient

Allan v New Mount Sinai Hospital (1980 Ontario)

- **Facts:** Defendant Dr. Hellman was responsible for administering an anaesthetic to Mrs Allan during the operation. Plaintiff said please do not use my left arm. Dr. Hellman says we know what we are doing, and plaintiff sees left arm being used as she goes to sleep. When she awoke, plaintiff claimed of terrible pain in her left arm. Caused pain and suffering and economic loss over the next view months. Defendant does not remember conversation well. Testified Dr. Hellman's actions were appropriate for the procedure (needle slipped out and he reapplied)
- **Issue:** Is there a tortious action?
- **Held:** In favour of the plaintiff, tort of battery found.
- **Ratio:** A doctor cannot proceed with a medial operation the patient has objected to
    - Onus of establishing consent is always on the doctor
    - Operation was important to the plaintiff and remembers the conversation distinctly
        - Further proven by the defendant's apology
    - Obligation to listen to wishes and discuss them if inadvisable
    - If found liable for batter, all consequences, foreseeable or not, are the defendants responsibility
        - Rarity of her reaction does not matter
        - Special damages for wage loss granted and general damages for loss of work
    - Not found liable for negligence
        - Plaintiff must prove the doctor departed from the standard
        - Mishaps may happen and Dr. Hellman exercised reasonable skill

Sexual Wrongdoing

- Plaintiff needs to tender evidence of the application of direct, offensive, and physical force
    - Force is physical contract of sexual nature
    - Direct meaning an immediate consequence of a force set in motion by the defendant
    - Defendant bears the burden of proving the plaintiff consented or a reasonable person would have thought they consented
    - Main issues of defence of consent and limitations periods

Alberta Limitations Act

- Claimant must bring action within
    - 2 years after the date on which the claimant first knew, or in the circumstances ought to have known
        - The injury occurred

        - The injury was attributable to the conduct of the defendant
        - the injury, assuming liability on the part of the defendant, warrants bringing a proceeding
    - or 10 years after the claim arose
- Whichever period expires first, the defendant on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim
- No limitation period in the respect of a claim that relates to a sexual assault or battery

Consent

- Actual consent negates liability
    - Can be express or implied
    - Must be voluntary
        - Not obtained under force or threat of force, or fraud
    - Must be free
        - Not following unequal power relations
    - Medical treatment requires informed consent with the emergency exception
- Treated as a defence that must be proven by the defendant
- There is no magic age of consent
    - A minor can consent so long as they have "sufficient intelligence and understanding"

Norberg v Wynrib (1992 SCC)

- **Facts:** Plaintiff was addicted to pain killers. Went to the defendant and lied about a hurt ankle to get the drug. Defendant said "if you're good to me, I will be good to you" in reference to his bedroom. Plaintiff initially refused and left but she eventually gave him sexual favours to get the drugs. She eventually asked for help with the addiction but the Dr. told her to just quit; this was impossible without medical intervention.
- **Issue:** Is there consent for the sexual favours?
- **Held:** In favour of the plaintiff, no consent given
- **Ratio:** In a relationship of unequal power, the defence of consent may not be provided to someone in a position of authority abusing their power
    - A feeling on constraint can interfere with the freedom of a persons will
    - In sexual assault torts, judge suggests
        - Proof of Inequality (nature of relationship)
            - Doctor patient relationship
            - She did not want to give sexual favours, but she was overwhelmed by her addition
                - Defendant senses her dependence and thus her sensitive state
        - Proof of Exploitation
            - A reasonable physician would have taken steps to help her addiction
            - Instead, Dr. Wynrib abused his power over her to pursue his own interests
    - Thus no consent
- **Issue:** Is there a battery
- **Held:** Tort of battery found

    - No proper consent given and this is an intentional infliction of unlawful force on another person
    - General and punitive damages given
- **Concurring Sopinka:** Plaintiff consented. Better to hold Wynrib accountable trough negligence in a breach of professional conduct
- **Concurring McLaughlin:** Should focus on fiduciary obligations. Dr. Wynrib is in a position of power; he could unilaterally change his actions to control her. Fiduciary, unlike tort or contract, focus on this imbalance and redresses where the power is abused; requires a more generous approach to remedies. Would set damages higher

Other Factors that Vitiate Consent

- Use of drugs (impair free and full consent)
- Transfer of a venereal disease that the defendant knew or ought to have known
- Fraudulent misrepresentation of the concealment of information
- Misrepresenting birth control status does not vitiate consent

Consent in Contact Sports

- If not express, consent is implied
- Violence of contact sports would constitute a battery in normal life
- Those engaging in contact sports consent to the degree of physical contact that is part of the sport in question
- Physical contact that is against the rules, but still part of the game albeit regularly penalized, is more likely than not consensual so long as it is reasonable
    - Contact that is committed maliciously or with the intention to cause serious harm is not consensual

Consent in the Medical Context

- Any medical treatment of a patient must not proceed without the patients consent – even if the treatment is beneficial for the patient
    - This is the common law, respecting individuals' autonomy and sense of dignity of their own body
- However, in emergencies where a treatment is necessary and patient is unable to consent, the doctor may proceed if:
    - Patient unconscious and no agent to make the decision for them
    - Time must be of the essence (delay would result in grave consequences)
    - A reasonable person would consent on the balance of probabilities

Malette v Shulman (1990 ONCA)

- **Facts:** Plaintiff was in a car crash, rushed to hospital unconscious. Card discovering her religious conviction discovered that refused blood transfusions in all circumstances. The card was not dated but did have her signature. Her condition worsened and the doctor conducted a transfusion accepting full responsibility
- **Issue:** Is there a tort of battery?
- **Held:** In favour of the plaintiff, no consent given
- **Ratio:** The state interest in preserving life must give way to the patient's stronger interest in directing the course of their own life

    - A doctor is not free to disregards a patient's instructions
        - The card was an express instruction not to conduct a blood transfusion
        - It was not ambiguous
- No law prohibiting a patient from declining necessary medical treatment
- Doctor is bound in law by the patient's choice even though that choice may be contrary to his own conscience and professional judgement

A.C v Manitoba (2009 SCC

- **Facts:** AC (plaintiff) was a 14-year-old child who was admitted to the hospital with complications of Crohn's disease. She was a Jehovah's Witness and therefore refused treatment requiring a blood transfusion. Hospital psychiatrists indicated that she understood the implications of this, and she was apprehended by a child welfare agency that authorized the decision on her behalf.
- This agency operated under the *Child and Family Services Act*, which gives them decision making authority for children under 16 who's parents do not consent to essential medical treatment. They instructed the doctors to give blood transfusions. AC and her parents brough action to rule the *Child and Family Services Act* unconstitutional

- **Issue:** Is there a tort of battery?
- **Held:** In favour of the defendant, no liability.
- **Ratio:** Consent is to be determined on an individual basis for 'mature minors', not their age
    - However, in this case, the court says that 14 is simply too young to consent to not having a life-or-death treatment
        - The more serious a treatment, the more scrutiny a maturity level of a minor will receive
        - Practitioners will often defer to a child's decision when nothing is at stake
    - Courts are empowered to order treatment when a mature minor is involved based on the courts *parens patriae* jurisdiction and the "best interests" test; consent is only one factor amongst many
        - State interest in protecting societies most vulnerable individuals
    - Also important to look at statute. Manitoba does not have a clarifying minimum age of consent

Riebel v Hughes (SCC 1980)

- **Facts:** Plaintiff had a serious surgery to remove a blockage and it was done by a qualified neurosurgeon. During or immediately following the surgery, the plaintiff had a massive stroke leaving him paralyzed on the right side of his body and impotent. Plaintiff did consent to the operation but alleges it was not informed consent. Plaintiff says he would not have undergone the surgery if he knew the risk of stroke
- **Issue:** Was there informed consent?
- **Held:** In favour of the plaintiff, tort of negligence found, but not battery
- **Ratio:** Doctors must inform patients of all material or unusual risks before a patient can give informed consent – what is normal, what could go wrong, etc
    - Objective reasonable person test
        - What would a reasonable person in the patient's position have done if there had been proper disclosure of attendant risks'
    - Found there was not adequate disclosure of the risks

        - Plaintiff was told no more or understood no more than that he would be better off the have the operation than not to have it
    - Liability for battery shall be limited to circumstances where the express consent that the patient had provided was not given for the actual procedure that was performed

Emergency Medical Aid Act

- In emergencies where a treatment is necessary and patient is unable to consent, the doctor may proceed if:
    - Patient unconscious and no agent to make the decision for them
    - Time must be of the essence (delay would result in grave consequences)
    - A reasonable person would consent on the balance of probabilities
- Protection from action
    - When a registered health discipline member voluntarily and without expectation of compensation renders emergency medical service or first aid assistance in a place without adequate medical facilities
    - Is not liable for damages for injuries or death to that person unless established the injuries or death were caused by gross negligence on their part

Public Health Act Recalcitrant Patient

- Medical establishments can get a certificate under s39 of the Act from the Ministry when a patient has a serious disease under the *Health Care Act* but refuses a medical examination
- Under s40, a police officer can receive a similar certificate to apprehend the person and the physician can perform the test to determine whether the person has a communicable disease and contain them in a location while treating them for the disease with or without consent

Invasion of Privacy

- Canadian common law does not recognize a general tort that guards against invasion of privacy
    - Covered under other causes of action
    - Courts say recognizing this tort would be too broad and ambiguous given that privacy is an amorphous concept
- Prosser 4 strands of privacy tort law
    - Intrusion upon the plaintiff's seclusion or solitude, or into his/her private affairs
    - Public disclosure of embarrassing, private facts about the plaintiff
    - Publicity which spaces the plaintiff in a false light in the public eye
    - Appropriation, for the defendant's advantage of the plaintiff's name or likeness

TW v Seo (2003 Ontario)

- **Facts:** Seo is an ultrasound technician. Seo admitted to videotaping the plaintiff in the change room and in the course of conducting an ultrasound transmission, engaged an unauthorized touch of the plaintiff. Struggle ensued once camera was found, and plaintiff suffered psychological damage. Plaintiff causes of action include battery. Sued the clinic for negligence and vicarious liability
- **Issue:** Is there an invasion of privacy?
- **Held:** for the plaintiff. No invasion of privacy but Seo for battery and Clinic for negligence.
- **Ratio:** The lack of case law means the actions do not constitute a violation of invasion of privacy
    - No infringement of constitutional protected privacy laws (criminal laws)

- No property rights at stake here
- No appropriation of one's personality in a manner that impacts her public image
  - Image was not publicly displayed
- Courts hesitant to make new law and can only make incremental changes

Jones v Tsige (2012 ONCA)

- **Facts:** Appellant found that the respondent have been surreptitiously looking at her banking records. Both worked at the same bank but did not know each other. Tsige is in a common law relationship with Jones ex husband. Tsige looked at Jones banking records at least 174 times in four years. Did not publish, distribute, or record the info in any way. Admitted to looking with no legitimate reason and understood it was contrary to BMO Code of Business conduct
- Tsgie claims she looked due to a financial dispute with the ex-husband and wanted to see if he was paying child support

- **Issue:** Is there an invasion of privacy?
- **Held:** for the plaintiff. Intrusion upon seclusion found.
- **Ratio:** Prosser's privacy torts should be applied on a case by case basis and confirms a new tort of intrusion upon seclusion. Held as an incremental common law change
  - Ontario courts were open to the proposition of a tort for this action being created
  - Charter identifies privacy as an important interest and integral to society
    - Informational privacy would include banking records
  - Need for common law to expand on legislation
    - Some provinces have privacy acts
  - Common law needs to evolve to the rapid evolution of technology and the problems posed by that
  - Facts cry out for a remedy
    - Defendants' actions were deliberate, prolonged, and shocking
    - Reasonable person would regard the invasion as highly offensive
    - Invaded the plaintiffs' private affairs without lawful justification
      - Above sets the elements of the tort

DOE 464533 V ND (2016 ONSC)

- **Facts:** Defendant is the plaintiff's ex boyfriend who posted a video of her on a pornography website without her knowledge or consent. Defendant admitted to posting the video (it was available for about 3 weeks) but advised that it had been removed. Defendant unwilling to defend his action in court. Defendant showed the video to some people they have attended high school with. Plaintiff had substantial emotional damage and is worried it will surface to harm her in the future. Plaintiff seeks damages and a permanent injunction in three causes breach of confidence, intentional inflection of mental distress and invasion of privacy
- **Issue:** Is there an invasion of privacy?
- **Held:** for the plaintiff. Public disclosure of private information tort found.
- **Ratio:**
- Breach of confidence
  - Test
    - Must have the necessary quality of confidence about it

        - Must have been imparted in circumstances importing an obligation of confidence; and
        - Must have been used in an unauthorized way to the detriment of the plaintiff
    - It was a private video that the defendant confirmed no one would see. Harm caused and breach of confidence established
- Intentional inflection of mental distress
    - Test
        - conduct that is flagrant and outrageous.
        - calculated to produce harm; and,
        - resulting in a visible and provable injury
    - Defendant knew she was reluctant to share. Consequences obviously foreseeable and psychological harmed caused (plaintiff taken to a crisis center)
- Invasion of privacy
    - Would fall under public disclosure of embarrassing private facts about the plaintiff
    - The matter publicized is highly offensive to the reasonable person, without her consent and not a legitimate concern to the public
- All three damage categories awarded and an injunction of non communication

Protecting Victims of Non-Consensual Distribution of Intimate Images Act, RSA 2017

- A person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or is reckless as to whether or not that person consented to the distribution, commits a tort against that other person
- Two cases of revenge porn went civil instead of going under this act
    - The year it was enacted was after the time of the alleged facts. Can't use this action cause the law can't be applied retroactively

Nuisance

- Seeks to protect against interference with property rights
- 2 forms: private or public
- Liability can be found even if the defendant did not intend and was not negligent in causing an interference
    - Can be a completely legal behaviour from one land that affects another

- Private Nuisance
    - An activity that results in an unreasonable and substantial interference with the use and enjoyment of land
        - Or causes physical damaged to land
    - Need to strike a balance between competing land uses
        - Reasonableness of the interference to be considered in all situations
            - Not reasonableness of the conduct
        - Look at the gravity of harm, severity of interference, character of the neighbourhood and sensitivity of the plaintiff
    - Most common defence is statutory authority
        - The impugned activity has been carried out by a public authority pursuant to statute

        - Must say there is no other option/ alternatives
        - No practical possibility otherwise
- Public Nuisance
    - Rare and difficult to plead
    - When a civil order affects public safety at large

Groat v Edmonton (City) (1928 SCC)

- **Facts:** Groat valley was a source of clean drinking water or at least for animals. City expansion led to a municipal dump and sewer system that affected the valley. Water became dirty and unusable
- **Issue:** Is there a nuisance
- **Held:** for the plaintiff. City is liable.
- **Ratio:** Language does not authorize the creation of nuisances
    - City said according to the city charter, it gave them the ability to pave roads, operate dumps
    - Statute does not protect wrongful behaviour from common law
        - Pollution is always unlawful and constitutes a nuisance
    - Court said they would need express language.

Smith v Inco (Ont CA 2011)

- **Facts:** Historical emissions from Inco's nickel refinery. Plaintiffs claim their property has been contaminated by the nickel particles. Value of property decreased due to the community's concern
- **Issue:** Is there a nuisance?
- **Held:** for the defendant. No nuisance found
- **Ratio:** Need actual material damage to property that poses a risk to health/well-being
    - Defendant must cause damage that is more than trivial, actually happened and can be observed or measured
    - The nicked levels at leas posed some risk to the health or wellness of the residence but does not amount to evidence that the presence of the particles caused actual, substantial harm or damage to the property

Strict and Vicarious Liability

Strict Liability

- Liability for non-negligent conduct where the defendant is held liable for injury despite take reasonable care to try to avoid it
- The defendant is liable based on causation of harm and not on culpability or the contemporary notion of fault
- Not significant in contemporary tort law because payout will be low if defendant is not liable, so a more consequential tort (negligence) is usually preferred

Vincent v Lake Erie Transportation Co (1910 Minnesota)
Smith v Inco (Ont CA 2011)

- **Facts:** Steamship owned by the defendant was moored to the plaintiff's dock. A large storm brewed so the boat could not leave. As the storm struck the boat was constantly lifted and thrown against the dock causing $500 worth of damage
- **Issue:** Is the defendant liable?
- **Held:** for the plaintiff. Liability found
- **Ratio:** Those in charge of the vessel deliberately and by their direct efforts held the ship in such a position that damage to the dock resulted
    - Preserved the ship at the expense of the dock so the ship owners are responsible (conditional privilege)
    - Not an act of God or unavoidable incident
    - Appellant contends that because of its conduct during the storm was rendered necessary by prudence and good seamanship by which they had no control, they cannot be held liable

Rylands v Fletcher (1865)

- **Facts:** Fletcher worked coal mines and Rylands had a mill near the mines. Rylands constructed a reservoir not knowing the site chosen was over abandoned coal mines that connected to Fletcher. Not negligence, but the contractors of Rylands did use a shaft where they did not use reasonable care to provide sufficient supports the reservoir. The old shaft gave way, eventually flooding Fletchers mines
- **Issue:** Is the defendant liable?
- **Held:** for the plaintiff. Liability found. Liable for chattel trespass and nuisance.
- **Ratio:** Bringing non-natural things on your land that are likely to do mischief if they escape, is actionable if this mischief occurs after escape. Harbouring things are at property owner's risk
    - The defendant had no right to pour water onto the plaintiffs works, even if they did so unwittingly
        - As a rule, the knowledge or ignorance of the damage done is immaterial
    - A person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape
        - Can use the defence that the escape happened because of the plaintiff's default
        - Or that it was an act of God
    - Must be a non-natural use of land
        - Not an ordinary use

Natural vs Non-Natural use of Land

- Problem of clarifying what is a non-natural use of land
    - Leads to important flexibility in operation of the principle
- Generally must be extraordinary, special, dangerous or extra-hazerdous
- Powell v Fall (1880)
    - Liability found for commercial use of trains that produces sparks and lights Powell hut on fire

        - Train ssparks are inherently dangerous and if the defendant cannot make enough money to compensate the plaintiff, it should then be outlawed
- Losee v Buchanan (1883)
    - Boiler explodes and causes damage to neighbours property
        - We must have factories and machines. If I have these on my land and they are not a nuisance, they are fine. My neighbor shouldn't get compensation for something I can't avoid My neigbour benefits from me operating this machine as a public good that is necessary for the modern functioning of society
- Rashiq v Derrick Golf and Winter Club (2019 ABQB)
    - House backed onto gold course flooded in a storm. Argued that a golf course is a non-natural use of land.
    - Seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user
        - Found not to be non-natural

Vicarious Liability

- An employer is liable for the tort committed by their employees committed in the course of employment
- To be vicariously liable is to be found liable for the actions of another, without having acted with fault, but rather having created the risk by bringing another under your supervision or control
- Three elements
    - Employee must have committed a tort
        - There is actual tortious conduct (not strict liability
        - Widens the ability net to encompass the employer
            - Enables financial recovery from someone more likely to be able to satisfy the judgment [deep pockets]
            - Corporations who employ others to advance their economic interests should be financially responsible for corresponding liabilities [fairness]
            - An employer is better positioned to pass losses through liability insurance [distribution]
            - An employer is better positioned to minimize and avoid risk through policies and practices that promote care and also by curating the scope of their activity [deterrence]
    - Person committing the tort must be an employee of the defendant
        - Traditionally defined by control which doesn't capture more complex employment situations
        - Now the organization test: is the supposed employee a cog in the defendant's organizational machinery?
            - Independent contractor does not satisfy this element
    - The tort is committed in the course of employment
        - An employer will not be liable for an employee who is 'on a frolic of his own'
        - If the tort was committed in a simple detour of tasks, the employer can be held liable and can be liable even if the accident came about from an employee conducting prohibited conduct

- Detour is a work associated task in a workaround way that isn't expected
- If prohibited task is so connected with acts of the job that they may rightly be regarded as modes – albeit improper – vicarious liability still applies
    - Still apply to a speeding worker even if speeding is a prohibited task

Jones v Hart (1698 England)

- **Facts:** Defendant is a pawnbroker. The defendant's servant lost goods belonging to the plaintiff
- **Issue:** Is the defendant liable?
- **Held:** for the plaintiff. Liability found.
- **Ratio:** The act of a servant is the act of his master, where he acts by authority of the master
    - *Respondeat superior* (let the superior answer)
        - Also referred to as agency

Bazley v Curry (1999 SCC)

- **Facts:** Curry worked for a children's foundation and sexually assaulted the plaintiff during bath time and bedtime routines in 1992. Curry has since died**.** Plaintiff sued the foundation. Foundation said it was not legally responsible because it took the proper steps to hiring and supervised Curry
- **Issue:** Is the Foundation vicariously liable?
- **Held:** for the plaintiff. Vicarious liability found.
- **Ratio:** The parental relationship and opportunity for intimate and private control of the child created by the employment terms enhanced the risk of sexual abuse. The enterprise created and fostered this risk.

- Issue 1: Should there be vicarious liability?

- Salmond test for vicarious liability
    - Employee acts authorized by the employer and
    - Unauthorized acts so connected with authorized acts that may be regarded as modes of doing an authorized act
- Both parties agree 2) applies. Approach the second part:
- Does precedent unambiguously decide if the conduct qualifies as vicarious liability?
    - Acting in furtherance of employers aim?
        - Employee with implied authority to conduct unauthorized activity (can worked for negligence but not for intentional torts or theft/fraud)
    - Situation of friction?
        - The employers' goals or enterprise creates friction and risk (can work for intentional torts, not for theft/fraud)
    - Dishonest employer scenario?
        - Employee is acting intentionally and fraudulently in a manner antiethical to the employers aim
    - In each situation, the employer's enterprise created the risk that led to the tortious conduct
- Policy considerations fundamental concerns

    - Provision of a just and practical remedy for the harm
        - A fair remedy will not only lead to compensation for the victim but will also be fair in the sense that it is justifiable to expose organizations operating in the community who have created some risk to this form of liability
    - Deterrence of future harm
        - The risk must be sufficiently close to the employment context to promote employer involvement
- Employer must materially enhance the risk in the sense of significantly contributing to it
    - Not looking for foreseeable harm (too specific) or causation (too broad)
    - Not only provide the opportunity
        - Wrongful act must be sufficiently connected to authorized conduct and what the employer asks of the employee
- If not precedent, do policy considerations suggest vicarious liability should be imposed here?
    - Is the wrongful act sufficiently related to conduct authorized by the employer?
    - Openly ask if the liability should rest with the employer?
    - Additional factors
        - Opportunity that the job provided for the wrongdoing
        - Extent to which the wrongful act furthered the employer's aim
        - Extent to which the wrongful act related to friction at the enterprise
        - Extent of the power the employer had over the victim
        - Vulnerability of the victim (from the power dynamic)
- Application
    - No precedent. Need policy
    - Factors of influence
        - Opportunity the job created: invited Curry to act like a parent (bathe, clothe) to Bazley
        - Furthered employers aim: doesn't really further the corporations aim
        - Related to friction: potentially, but the job itself is not very fractious
        - Power granted: Curry was put into a parent position; he had huge amount of power
        - Vulnerability: Bazley was a child: extremely vulnerable, especially to a parentlike figure
    - All of these sources were present for Mr. Curry.
    - The corporations' duties materially increased the chance of the wrongful act occurring.
        - The relationship granted in this employment is very connected to the wrongful doing and justifies vicarious liability
- **Issue 2: Should non-profits be exempt?**
    - Rather than focusing on the community service that is being provided, think about the child who is the victim of abuse + owing to the risk that was created, the organization should be vicariously liable
    - Institution has the same responsibility to screen volunteers
    - Will vicarious liability put non-for-profits out of business or disadvantage society at large?

        - Regardless of that outcome, the victims of abuse should not be expected to bear the cost of abuse without remed

Jacobi v Griffiths (1999 SCR)

- **Facts:** Defendant was a program director for an NFP. Cultivated relationships with two children who he drew to his home and sexually abused.
- **Issue:** Is the NFP vicariously liable?
- **Held:** No vicarious liability. The required connection between the employer's enterprise and the wrongful action was not established
- **Ratio:** Defendant subverted the mode of employment, and independently intervened beyond the terms of employment
    - Events that occurred were too remote and disconnected form the enterprise and the risk it created to find liability
        - Company only created a risk of working with children in a public space with other volunteers
            - The children went to this person's home with the mother's permission and as a result of a progressive grooming process
    - Mere opportunity is not sufficient enough to find vicarious liability and a strong connection is required
- **Dissent:** Resist the temptation to find that this conduct was simply a perverse personal frolic wholly unrelated to the employment. We shouldn't be overly focused on the when and where when the fact remains that the defendant used his position to 'forge bonds of intimacy and respect' that enabled the assaults. This, in turn, links the assaults to his employment and grounds vicarious liability

John Doe v Bennet (2004 SCC)

- **Facts:** Bennett (defendant, appellant), a Roman Catholic Priest in Newfoundland sexually assaulted many boys (36) in the church. Two bishops failed to stop the abuse. These boys (plaintiff, respondents) sued the priest, the bishop, the episcopal corporation, and the entire Roman Catholic Church for vicarious liability
- **Issue:** Can the Church and corporation be held vicariously liable?
- **Held:** in favour of the plaintiff. Vicarious liability found for the corporation but not the Church as a whole
- **Ratio:** The employer will be liable for the wrongs if the enterprise is connected enough with the tort
    - The relationship between the diocese enterprise and Father Bennett was sufficiently close (an employment like relationship) and the enterprise substantially enhanced the risk which led to the wrongs in question
        - The bishop provided the appellant the opportunity to abuse his power as work and special care of children was a prominent part of their job
            - Appellants acts were strongly related to psychological intimacy with the boys as well as the community
            - Bennet has an enormous degree of power relative to his victims
                - Authority figure in an isolated community with deep religious values

    - No vicarious liability for the Church
        - The church is a vast global organization
        - There is no clear picture of details of the Church's hierarchy, relationship between the Church and its constituent parts, the nature of its legal status and its potential liability

EB v Order of the Oblates of Mary Immaculate in the Province of British *Columbia (*2005 SCC)

- **Facts:** Appellant attended a residential school ran by the defendant and suffered sexual abuse from a lay employee (worked in the bakery and operated the school motorboat)
- **Issue:** Is the respondent vicariously liable?
- **Held:** in favour of the defendant. Vicarious liability not found
- **Ratio:** A strong connection must be established between the job-conferred authority and the tort to establish vicarious liability
    - Application of the Bazely factors
        - The Employer provided Saxey the opportunity, but it is low
        - The acts did not further the Company's aims
        - There is intimacy from employers, but not Saxey's position which required little contact
        - Company did not confer power to Saxey over the kids
        - Kids are vulnerable, but this is by the school, not Saxey
    - Not a strong connect between was the employer was asking the employee to do and the wrongful act
- **Dissent:** The acts were horrifying and abhorrent, the children and adults lay close at night, enabling this abuse
    - Opportunity for a power dynamic, and additional residential school context. These schools operated on fear and power imbalance, with Saxey exploited

Vicarious Liability in Statute

- Traffic Safety Act
    - Owner of a vehicle is vicariously liable for the negligence of a driver who is in possession of the owner's vehicle with express or implied consent
- Education Act
    - Parents are liable for damages done by their children at school
    - If multiple students act together, the students and all parents are jointly and severally liable: all are liable, they sort out compensation

Defamation

- Harming another person's reputation by making a false written or oral statement about that person to a third party
    - Seek to protect reputation from unfounded and/or unjustified attacks
    - Judged by the standards of an ordinary person
        - Excludes those that are sensitive to issues
- Tension to find a balance between protecting reputation and limiting freedom of speech which is a fundamental right
- Common law recognizes two forms

    - Libel: written or memorialized in some tangible form
    - Slander: Spoken and transitory
    - Difference isn't really recognized anymore
- Can be express meaning and implied meanings
    - Courts adopt a a holistic approach to the impugned statement
- Exceptions
    - Parody and satire are forms of journalism and public commentary

Defamation Criteria

- The words were defamatory because they lower the plaintiff's reputation
- The words are actually about the plaintiff
- The Words are published meaning there are communicated to at least one other person

- The plaintiff is not required to show the defendant intended to do harm
    - Plaintiff proves the elements, then the onus shifts to the defendant to advance a defence

Color Your World v Canadian Broadcasting Corp (1998 ON)

- **Facts:** CBC ran a segment called Mercury in Paint in which the plaintiff was mentioned in the broadcast, and CYW sued the defendants for defamation. Alleged that while the words about mercury in paint may have been true, their combination with certain visual images produced a defamatory broadcast. Used images about mercury poisoning in humans and pollutions and that the combination of these with their company would have the viewer falsely understand that the plaintiff sold products knowing that they would cause mercury poisoning

- **Issue:** Is there defamation?
- **Held:** in favour of the defendant. No defamation
- **Ratio:** Audio-visual is considered to be in combination with words and words are still the primary conveyor of a programs meaning
    - Use a reasonable person test to see if the statement is defamatory
        - Someone that is thoughtful and informed. Need a degree of common sense
        - Reasonable person would not form the impression that mercury in paint causes the same harm as the other mercury poisoning events
    - Focuses on the entire program
    - Program focuses on an uncertain health threat rather than indicating a real, attributable threat; the examples are historical and not directly connected to the paint issue
    - Any defamatory meaning was available only through innuendo or inference

Awan v Levant (2014 ONSC)

- **Facts:** Plaintiff read an article in which they thought Muslims were unfairly portrayed. Students met with Macleans (the magazine), it didn't go well. They decide to pursue relief through human rights legislation and were heavily criticized. Went to the BC human rights tribunal. Defendant was a heavy critic of human rights tribunals, calling them kangaroo courts. He attended the tribunal and live blogged it, writing a series of arguments calling the plaintiff (who was a witness at the trial), a liar, anti-Semite and incompetent through 9 blog posts. Plaintiff sues for defamation

- **Issue:** Is there defamation?
- **Held:** in favour of the plaintiff. Damages found
- **Ratio:**
    - The words referred to the plaintiff and they were published, not really a dispute
    - However, would they defamatory as to lower his reputation?
        - Defendant says his comments are outlandish and should be taken at face value (shock jock, says stuff for a reaction)
        - However, the test for 1 is an objective test. His comments obviously paint the plaintiff as a liar and decreases his casts doubt on his integrity, which hampers his career as a student at law.
    - In this case, malice is able to disprove all defences
        - Did them out of ill-will with a blatant disregard to check his facts for the truth

Hay v Platinum Equities Inc. (2012 ABQB)

- **Facts:** Company needed quick funding to buy a property. An employee of the company prepared an RER (review engagement report) and basically forged it with Hay's name as approval. He put the plaintiff as the name to sign off on the reports and the plaintiff did not know of the reports
- Plaintiff sues for defamation and appropriation of personality on the basis it hurts his professional career and the statements were not made up to standards with portrays him as incompetent
- **Issue:** Is there defamation?
- **Held:** in favour of the defendant, not defamation.
- **Ratio:**
    - There is no evidence that the RER's, at least as prepared, fell short of GAAP so there can be no innuendo.
    - Also the letter sent to the ICCA is not defamatory
        - they do not have the tendency to lower Hay's reputation in the estimation of reasonable persons
        - Qualified privilege applies
            - Duty to bring this information to the ICAA and they have a duty to receive and investigate it

Defamation Defences

- Justification
    - Defendant must adduce evidence showing that the statement was substantially true
- Privilege
    - Statement protected by virtue of a particular relationship
    - Absolute privilege
        - Covers criminal and quasi criminal professionals. Civil servants and politicians are not liable in slander or defamation in the course of legislative work in the chamber
        - Basically excludes words said in court, legislative proceedings, and administrative boards

        - Purpose to protect relationships that need untrammeled, frank, and passionate communication
    - Qualified privilege
        - Attaches to a comment on the basis of a moral, ethical, or legal obligation to make that comment. Statements made in the public interest
            - There is a duty to make a statement and another duty to receive it
        - Professionals (doctor/ lawyer/ engineer) who have protected statements by virtue of their particular relationship
        - Can argue a spousal relationship possible as well
        - Doesn't really apply to journalism because of the publication to the world, not a specific group of people
        - Can be defeated by malice
- Fair Comment: most used defence with 4 criteria
    - Comment must be a matter of public interest
    - Comment must be based on fact
    - Comment can include inferences of fact, must be recognizable as comment
    - Comment must satisfy objective test: could any person honestly express that opinion on the proved facts? (NB: Not a reasonable person, it is any person); and,
        - The objective test can be defeated if the plaintiff proves that the defendant was actuated by malice
- Responsible communication
    - Publication must be on a matter of public interest; and,
    - Defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegations(s) having regard to all the relevant circumstances
        - This helps journalists; cures the gap of the justification defence. If a journalist cannot prove a fact from years prior, but can prove they were diligent, it is an easier standard to meet to avoid liability
            - asfd

WIC Radio v Kari Simpson (2008 SCC)

- **Facts:** M is a radio host that engaged in the opposite side of a debate about introducing materials about homosexuality in public schools. M compared S to Hitler, the Ku Klux Klan and skinheads. M says no imputations of condoning violence against gays were intended or in fact made. Just wanted to state S was an intolerant bigot
- **Issue:** Are M's comments justified under fair comment?
- **Held:** in favour of the defendant, not defamation.
- **Ratio:** Modifies the 'honest belief' elements of the fair comment defence; it asks if *any* person could honestly express that opinion on the proved facts.
    - Public interest: met as the discussion included information on school education
    - Based on fact: met as it was based on a public meeting plus her prominent social activism
    - Recognizable as comment: comment formed that had a nexus to the facts Mair relied on (without the nexus, the test fails)
    - Honest belief: does not need to be a reasonableness analysis; it is an objective test, but not premised on a reasonable person (could *any* person believe this). So, while he did

not believe she would condone violence, it was not required. Her previous history comparing this to war could make any person believe she condones violence
        - Don't need a subjective determination that the defendant actually held this opinion
    - Malice: not present

Grant v Torstar Corp (2009 SCC)

- **Facts:** Libel action against a newspaper about an article concerning a proposed private golf course development. Local residents were critical of the courses environmental impact and suspicious that G was exercising political influence behind the scenes to secure government approval. Reporter attempted to verify all the allegations in the article, including asking G for a comment which they did not provide.
- **Issue:** Is there defamation?
- **Held:** in favour of the defendant, not defamation. Introduced new defense of responsible communication
- **Ratio:** Matter must be of a public interest and the defendant must show the publication was responsible in being diligent to verify the allegations.
- When the validity of purportedly factual statements is contested, the two primary defences are: justification and privilege
    - Privilege is never given to the media and justification is hard to prove
- Time to expand the law that protects public communicators
- Principled Perspective
    - Existing law currently accords no protection for statements on matters of public interest published to the world at large if they cannot (for whatever reason) be proven to be true
    - But these communications advance both free expression rationales
        - Democratic discourse
        - Truth finding
        - Self-fulfillment
- Public Interest
    - Matter for the judge to decide
    - Consider the subject matter as a whole
    - Must be shown to be on inviting public attention or about which the public has some substantive concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached
- Was the publication responsible?
    - Degree of verification should increase with respect to the potential effects on the person defamed
    - Public importance of the matter
    - Urgency of the matter
        - If a reasonable delay could have assisted the defendant in finding out the truth (rather than rushing to post a "scoop") without compromising the story's timelines, this will weigh in the plaintiff's favour
    - The less trustworthy the source, the greater the need to use other sources to verify the allegations

    - Was the plaintiff's side of the story sought and accurately reported?
    - Was the inclusion of the defamatory statement justifiable?
    - Is the public actually interested in the truth of the statement or just that the statement was made?
        - Repetition rule: repeating libel has the same consequences as saying it
    - Any other relevant circumstances

Defamation Act

- All provinces have a defamation act; does not oust common law

- S1b Definition of Defamation
    - defines defamation and collapses libel and slander
- S2: Presumption of damages
    - Damages shall be presumed when defamation is proved
        - Will vary depending on the person (are they a public politician?)
        - Corporations can also be defamed
- S4: Mitigation of damages by an apology
    - If defendant tries to mitigate some harm, it may be considered in trial for damages
- S9: Defence of fair comment
    - Confirms the reportage and repetition rule
- S10: Privileged publications
    - Fair report in newspaper or broadcast of a public meeting in legislature, committee, municipal meeting, school board… all qualify as privilege unless driven my malice
        - Court proceeding reporting (reporting without additional comment) are absolute privilege so no defamation
- S13: Notice of intention to bring action
    - When action is brought against a publisher, notice must be given to them; without the notice the defendant can have the claim struck
- S16: Special Damages
    - Sets out additional damages for something like loss of earnings (put on unpaid leave while under investigation)

Negligence

- Conduct that falls below a standard of care that the law has set as a way that people should conduct themselves
    - Also a cause of action, of which negligence conduct is one component
- Modern grown attributed to Donoghue v Stevenson
    - But recognized in common law for hundreds of years before
- Dominates tort law in terms of number of claims and theoretical importance
    - Knows no pre-conceived limits. Can be generally interpreted and applied
    - Societal and judicial interest in victim compensation
    - No bright line delineating negligent vs non-negligent conduct
- A vibrant a grown negligence law should be able to respond to new fact situations and new social conditions
- Impediments to negligence law growth
    - Inflation insurance prices

    - Philosophical and political pressure to eliminate systems that differentiate amongst disabled individuals
    - Equitable access to the judicial system
- Negligence is about the creation of unreasonable risk
- Best approach
    - Duty of care
    - Standard of care and its brach
    - Causation
    - Remoteness of damage and foreseeability (proximate cause)
    - Actual loss
    - Defences (contributory negligence)

Standard of Care

- Standard we must observe when living in society and interacting with others
    - Generally, view objectively not subjectively
    - Tension of defendants freedom of action vs the plaintiffs security against risks that the law deems unreasonable

Vaugh v Menlove (ER 1837)

Facts: Defendant lived in a hayrick near the plaintiffs property. Plaintiff repeatedly warned him of the hayrick and its flammability

- Defendant one day made ac chimney and lit a fire within the hayrick
- The hayrick caught fire that spread and burnt the plaintiffs cottage down

Issue: Did the defendant abide by the reasonable standard of care expected of him?

Held: Defendant found to be negligent

Ratio: Standard of care is an objective standard

- Defendant argued he used his best judgment but court held every individuals best judgment is infinitely various
    - Care taken by the reasonable man has always been the rule
        - This allows the jury to have a guiding rule when they decide on negligence

Standard of Care – Objective

- Confusing
    - The general view of tort law to gauge whether or not liability exists is to determine what we fairly expect from one another as members of society
    - Do we find an answer in looking for personal fault?
        - In negligence, that might mean looking at the defendant's state of mind
    - Humans act at their own peril; the consequence of voluntary action is that you can be held liable for harms that occur (whether they were intended or not)
    - It is hard to determine if people wanted to set up the circumstances
        - That it is why it is the consequences of voluntary action that allows someone to be accountable.
- Holmes view on Negligence
    - The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune

- The law must speak in generalities and cannot account for the "infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men
- We expect a certain average of conduct and sacrifice, to a certain extent, individual particularities, to better general welfare
  - For the benefit of society, clumsy, or accident-prone people are not forgiven

Reasonable Care

- Where is the line between reasonable and unreasonable?
- Can apply law and economics
  - The tools of economics are well suited to explain and justify the practice and study of law
  - General theory is that law is a told used by society to promote economic efficiency
    - Efficient distribution of resources
  - Can be used to justify the imposition of liability or to argue against imposing it
- Posner : Theory of Negligence
  - General retreat from strict liability to the negligence standard in the 19th century as a result of industrialization and changes to labour
  - Compensation plays a role in the negligence system, albeit an imperfect one
  - Must separate morality from negligence because they are difficult to reconcile
    - If going to use morality, then it must be a form of morality different than everyday life
  - Re-iteration of learned hand formula
    - Liability turns on the relation between investment in precaution (B) and the product of the probability (P) and magnitude (L) of harm resulting from the accident. If PL exceeds B, then the defendant should be liable
  - Efficiency (cost-justification)
    - When cost of avoidance outweighs cost of liability, the enterprise will not take those measures. When it does not, the enterprise will act to avoid risk
- McCarty v Pheasant Run Inc
  - Unreasonable conduct is conduct that fails to take precautions that provide greater benefits in accident avoidance than are accrued by taking the measure
  - The Learned Hand formula has greater analytic than operational significance
    - Would we expect someone in society to take cost effective steps or efficient avoidance approaches? Not likely
- Bender – Feminist Theory and Tort
  - Does reducing the standard of care to a question of efficiency dehumanize people, and especially defendants?
  - Couldn't we reconceive the standard of care/reasonableness as responsibility and consideration of other's safety and well-being?
    - Posner counters by saying people do not think about what would be best for their neighbors, rather what is best for themselves

United States v Carroll Towing Co (US 1947)

Facts: A barge is moored to a pier and the attendants leave it. At some point in the night, it becomes unmoored and drifts away from the pier

- It collided with a tanker, damaged that tankers propellor and then sunk

Issue: What was the reasonable care expected by the defendant?

Held: Defendant found to be negligent

Ratio: Cost-benefit analysis to determine reasonable ness standard. Burden or cost of harm avoidance vs the expected cost and probability of harm

- Standard is breached if burden of harm avoidance (adequate precautions) is less than the product of probability and expected cost of harm (gravity of resulting injury)
    - In this case, paying an attendant to stay with the barge overnight is probably less than the damage that occurred
- Burden of Harm Avoidance < Probability of Harm x Loss [expected cost of accident]
    - More than an equation. It's a thought process
    - If the odds that the barge breaks away is 1%, P = 0.01
    - If the loss was $5,000,000, L = 5,000,000
    - If the costs to have one employee on the barge at all time, say $150 B = 150
        - B < PB
        - 150 < 5,000,000 * 0.01
        - 150 < 50,000

Bolton v Stone (AC 1951)

Facts: A cricket ball exist the playing field and hits a woman in the head and causes harm

- Ball was struck 91m and cleared a 12-foot fence, on top of a vertical slope which means it cleared 17m vertically from the batter's box

Issue: What 'reasonable care' was expected for someone who promotes activities on their land that could affect users of the highways around them?

Held: Defendant not liable

Ratio: Foreseeability is also incorporated into the reasonableness analysis

- Not liable because the cricket pitch was acceptably large (a question of fact) and because the incident was so improbable that a reasonable person would not have foreseen it (i.e., the risk of it occurring was so small
    - Only six times in thirty years has a ball left the field
    - No exposing of society to harm
    - Not a foreseeable outcome for operating this pitch
- If using the Learned Hand Formula the probability would be so low that liability cannot be found
- Only acceptable to ignore such risks where there was a valid reason to do so
    - When the costs of prevention are overly burdensome or the probability of harm is extremely low

Notes: Case gives a good definition of negligence

- Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent and reasonable man would not do

Priestman v Colangelo (SCC 1959)

Facts: Police following a man driving a stolen vehicle and the man was driving dangerously

- The police officers shot the back tires, but missed and hit the driver who swerved and hit two women waiting at the bus stop

Issue: Were the police negligent?
Held: Defendant not liable
Ratio: Standard of care for a police officer is not that of a reasonable person, but of a reasonable officer

- Officer was not liable because he had acted reasonably in the course of his statutory duty to apprehend the suspect
    - Duty to preserve the peace and apprehend criminal carries with it a duty to of care to act reasonably in exercise of that authority
    - If his action is reasonable in the circumstances, he will not be civilly liable

Standard of Care – Children

McHale v Watson (CLR 1966)

Facts: Defendant (12-year-old boy) threw a piece of welding rod at the plaintiff (10 year old girl) causing the plaintiff to lose sight

- Defendant claims he was throwing it a post trying to make it stick,
- Claimant thinks he threw it right at her eye

Procedural History: Trial judge said plaintiff not liable. Reasonable for a body of his age
Issue: Was defendant's conduct unable to be negligent because of his age?
Held: Defendant not liable
Ratio: Features of objective standard: foresight (perception of risk), consideration of the safety of the others (prudent and attentiveness to others)

- There is an absence of the cognitive ability to foresee the risk
- There are three categories of children
    - Children who are so young to be manifestly incapable of exercising any of qualities necessary for the perception of risk (babies and young children)
    - Infants who are as capable of adults at foreseeing the probable consequences of their actions
    - Children who come in between the above categories
        - Standard of care required of these children is that which it is reasonable to expect of children of like age, intelligence and experience
- Concurrent: Plaintiff throwing the object is symbolic for boyhood
    - His age meant he did not have the ability to foresee, or ought to have foreseen, that the object may have deflected from the post and at the defendant
- Modified objective standard to incorporate the age of the boy
- Childhood is not an idiosyncrasy

Dissent: Would seek broader application of the reasonable person standard

- No need to correlate morality and legal liability
- Foreseeable risk is simply the potential harm of throwing sharpened metal in the vicinity of another

Notes:

- Strehlke v Camenzind
    - Three tests should be applied

        - An objective test to decide whether the infant exercised the care to be expected from a child of like age and intelligence and experience.
        - A subjective test, where it must be decided whether the child having regard to *his* age, *his* intelligence, *his* experience, *his* general knowledge and *his* alertness, is capable of being found negligent at law in the circumstances under investigation.
            - In other words we must consider the *particular* child, all the qualities and defects of the particular child and all of the opportunities or lack of them which might have had to become aware of any particular peril or duty of care
        - The actual experience of the infant concerned
- R v Hill
    - The standard of care is only "partially objective in that it must be adjusted incrementally in accordance with the age of the child in question… the semi-objective standard of the ordinary thirteen-year-old
    - The law does not attribute the same degree of responsibility to youth as adults owing to the developmental process
- McErlean v Sarel
    - A child participating in an "adult activity" will not be afforded special treatment or be afforded leniency by virtue of their immaturity
        - Applies to motorized vehicle use (all drivers are held to the same standard)
            - Thes activities are often insured
            - Makes sense considering the age of driving

Standard of Care – Disabilities

- Should the focus be on the diminished capacity of the defendant or the need to compensate the plaintiff?

Dunage v Randall (English court 2016)

Facts: Randall (defendant) was a schizophrenic person and showed up at the house of Dunnage (plaintiff) and Miss Butler. Randall was unusually agitated and was accusing Dunnage. Though annoyed, they did not find Randall dangerous

- He left and returned with petrol an a lighter and demanded Butler tell him about who was following him, and that Butler and Dunnage played a role in his son's imprisonment.
- He knocked the petrol and told them if they did not tell him the truth, he would light it
- He eventually poured petrol all over himself and Dunnage tried to grab the lighter but was also splashed with petrol.
    - Randall ignited the lighter, Dunnage kicked free but Randall died.

Procedural History: Trial judge found actions not voluntary

Issue: Were Randall's damaging acts non negligent as subverted by illness?

- Was the defendant acting freely, consciously, or purposefully or was his delusion so significant that it subverted his capacity to act and think freely, rendering him incapable of being a causative agent?

Held: Defendant found liable

Ratio: For capacity and volition to be eliminated from reasonable care, there needs to be a 100% elimination of ability to understand their actions. This is a very high threshold

- What is important is the effect of the ailment, not whether it is labelled as a physical condition or a mental condition
- Evidence did not conclusively demonstrate that his capacity was entirely (100%) eliminated

Concurrent 1: Would eliminate any exception for mental/physical deficiency, except when it can be conclusively demonstrated that the ailment completely eliminates fault/responsibility

Concurrent 2: The only exception to the objective reasonable person test is for children

- As a matter of policy, everyone should ow the same duty of care for the protection of innocent victims
- Negligent for brining the petrol and lighter into the victims house
- Shows a reluctance to deviate from a general objective test for anyone but children because it opens total immunity for disabled people

Fiala v MacDonald (ABCA 2001)

Facts: MacDonald (respondent) went for a run and experiences a manic disorder (bipolar disorder) where he needed to save people. To do so he began asking for telephone numbers.

- He approached a stopped car and beat on the drivers window and roof. He jumped on the roof and broke through the sunroof and began choking Cechmanek
- She involuntarily hit the gas pedal and collided with a car driven by Fiala (appellant) and injured her and her 17-year-old daughter
- Certified under Mental Health Act as a danger to society
- Doctors said he was manic and he had prior symptoms to bipolar disorder, but not severe enough than an unfamiliar person would conclude they had a medical condition

Procedural History: Concluded that the defendant was not in control of his mind and was incapable of appreciating either the nature or quality of his actions.

- Concluded that the defendant lacked the ability to foresee the risk or consequence of his actions

Issue: Was MacDonald liable despite mental condition?

Held: Defendant found not liable

Ratio: Defendant has to prove on the balance or probabilities that they:

1. Had no capacity due to mental illness
2. Discharged their duty of care because they did not have the meaningful control to respect the standard of their actions

- No liability in the absence of foreseeable harm
- Because the defendants disorder prevented him from foreseeing the injury that could result, he is not liable
- The court grapples with the way the law has treated and characterized/stigmatized mental disabilities and also asks whether the law is essentially creating a strict liability regime for those afflicted

Standard of Care – Professionals

Millette (Estate of) v Zung (ABQB 2005)

Facts: Plaintiff saw the defendant Dr. Zung due to severe headaches and s stiff neck

- Gave medication, ordered a CT head scare and told plaintiff to go to the ER if headaches increase

- Plaintiff went to ER next day, died of aneurysm
- Considerable reference to expert evidence and testimony from the medical profession; long wait times for CT scans was noted

Issue: Was Dr. Zung negligent for failing to consider the possibility of a bleeding aneurysm?
Held: Defendant found not liable
Ratio: Physicians' standard of care is one of a reasonable doctor, not a reasonable person

- Plaintiff must prove on BOP
    - The doctor owed the plaintiff a duty of care;
    - The doctor breached the applicable standard of care established by law;
    - The plaintiff suffered injury or loss; and
    - The doctor's conduct was the actual and legal cause of the plaintiff's injury/loss
- If the doctor followed the recognized commonly accepted community standard, there will be no liability unless the community standard is itself negligent
    - Depends on the average reasonable physician of your area
        - Eg if you are an orthopedic surgeon, you are judged against the average reasonable orthopedic surgeon
    - If your practice is out of date, then the court can say the practice overall is negligent
- Court cations looking in hindsight
    - We can diagnose in hindsight but must assess at the time
- Dr. Zungs request here was reasonable
    - The headache was not the worst of his life, and the other symptoms indicated a sentinel bleed was highly unlikely
    - Diagnosis was reasonable and so was her course of action.
- The radiologist was obliged to process Dr. Zung's "urgent" CT request in a timely manner.
    - The evidence indicates that the radiologist did follow hospital protocol and proceeded appropriately

Reibl v Hughes

Facts: Reibl (plaintiff-appellant) underwent an elective surgery by neurosurgeon Hughes (defendant-respondent) who performed it competently

- During surgery the plaintiff underwent a stroke that left him half paralyzed and impotent
- Plaintiff had consented to the operation but alleged it was not an 'informed consent' and sued for damages on the tort of battery and negligence

Procedural History: Doctor was liable in both battery and negligence because of a failure in "informed consent" and global damages set at $225,000
Issue: Is this negligence?
Held: Defendant found not liable
Ratio: Failure to disclose risks is negligence; manipulating the risks is battery

- The standard of disclosure of risk that is expected should not be left to expert medical evidence alone and should also extend to an objective analysis of what an individual in the plaintiff's position would decide
- The plaintiff was told no more than it would be more beneficial to have the surgery than not.
    - The risks of the surgery were not properly conveyed, he was not told about 10% of the surgeries ended in the death of the patient

- Any reasonable person would likely have not done the surgery on the balance of probabilities if the outcomes were fully disclosed

Ter Neuzen v Korn (SCC 1995)

Facts: Defendant is a doctor (OBGYN). Plaintiff received 35 treatments over 1981-1985. Agreed she became infected with HIV on her last treatment in 1985

- Defendant did not warn plaintiff of risk of HIV
  - He did not know of risk until July 1985
- His process accorded with all other standards
- Blood transfusions causing HIV only became aware in 1983

Issue: Could the treating physician be found negligent notwithstanding conformity with the standard medical practice and did the trial judge err in instructing the jury that the standard of practice itself could be negligent?

Held: Defendant found not liable

Ratio: Uncertain practice cannot be found negligent by trier of fact and thus cannot form part of a heightened standard of care

- Statement of law
  - Conformity with a standard of practice will generally exonerate a doctor of negligence
  - In rare circumstances, a medical standard of practice can be found so "fraught with obvious risk" that it is deemed negligent.
  - When a medical practice involves complexities and uncertainties, it is not open to the trier of fact to conclude that the practice itself is negligent
- Only open to the judge to instruct the jury to assess the general standard—whether the doctor conducted themselves in accordance with prevailing standards of practice

Central Trust Co v Rafuse (SCC 1986) (Lawyers)

- A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken
- The requisite standard of care has been variously referred to as that of the reasonably ordinary competent prudent solicitor
  - Would a reasonably informed and competent lawyer have done the same?
- This means protecting the client's interests, carrying out their instructions reasonably and properly to consult with the client in areas of doubt, and to keep the client reasonably informed
- Objective test, so no forgiveness afforded to an inexperienced practitioner
- Lawyers also do not specialize the same way doctors do. They end up in a niche area through experience, but if a lawyer is held as a specialist, they risk being held to a higher standard, more than a reasonably competent lawyer, but a reasonably competent lawyer with specialized knowledge

Standard of Care – Custom

Waldick v Malcolm (SCC 1991)

Facts: Plaintiff visitor attending at a farm, which is being rented by the Malcolms. Falls in the parking lot which is icy and slick and sues for personal injury

- The area had not been salted or sanded as few people in rural Ontario did so

Issue: Is this negligence?

Held: Defendant found liable

Ratio: Community custom is rarely considered, and if it is, if the custom is deemed unreasonable than it will not oust statutory duty of care

- Occupiers Liability act imposes on occupiers a duty to make the premisses reasonably safe for visitors by taking reasonable care to protect them from reasonable harm
- Malcolm argued both that the plaintiff voluntarily assumed the risk (s. 4(1) of the legislation) and that local custom in their rural community precluded sanding or salting of ice
    - Volenti: Voluntary assumption of risk; sometimes a defence of negligence. Failed because the plaintiff did not know of the risk

Occupiers Liability Act

Duty of care to visitors

5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

"Visitor" is essentially someone who is legally authorized to be there

"Occupier" means

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises, and for the purposes of this Act, there may be more than one occupier of the same premises

- Section 7 excuses liability when the risk is voluntarily accepted

Statutory Standard of Care

- Many statues and regulations contain general and specific obligations, and the breach of these obligations can constitute an offence and there are usually remedies attached
    - Usual remedy is a fine but sometimes jail time
- Most offences, in a regulatory context, are not true criminal mens rea offences, but rather a different category of offences called regulatory offences / strict liability offences
    - Generally negligence based
- Some legislation gives you the ability to seek a civil remedy such as an injunction or damages
    - Create a statutory cause of action
    - Don't have to plead negligence, can bring a civil claim under the statute if it provides for it (like the Canadian Environmental Protection Act)
- Some statutes does not expressly provide that someone who suffers harm as a result of a breach of that duty can sue the wrongdoer for compensation
    - Analyses requires to look for a legal rule and ways to approach and reconcile legislation with common law of torts
    - Modern rule of statutory interpretation is give words their ordinary meaning, then read them in the context of the legislative scheme and try to understand them within the broad objective of the legislation and Parliaments intention

The Queen (Can) v Saskatchewan Wheat Pool (SCC 1983)

Facts: Canadian Wheat Board seeking damages from the Sask Wheat Pool for delivery of infested grain

- The board sells and markets western wheat for inter-provincial trade
- When received in Thunder Bay for eastward shipping, samples are taken for insect infestation. Rusty beetles can be visually spotted but require a 6-hour test done at the headquarters to ensure there is no beetles present.
    - By the time the results are known, the grain could be in shipment (they don't wait)
- Grain in this case arrived and was put on a ship for transport, with a sample being took by the Canadian Grain Commission. There was a rusty beetle infestation, unbeknownst to everyone.
    - Visual inspection found no infestation, but the longer test did
- The Commission ordered the Board to fumigate the wheat. The Board diverted the wheat to Kingston for fumigation and was obliged to pay the vessel owner and the elevator $98,261.55
    - Board is claiming this against the Pool
    - Claim not of negligence but for statutory breach for the obligation to deliver uninfected grain

Issue: Does breach of a statutory duty (what duties were at play?) give rise to a civil cause of action? If so, is it absolute liability or is some degree of fault required?

Held: Defendant found not liable

Ratio: Breach of statue can serve as evidence of negligence rather than its own cause of action

- Negligence is broad and flexible enough to diminish the need for a nominate tort of breach of statute
    - Rejects English court approach in which breach of statute is its own tort
        - Plaintiff must demonstrate breach of statue and damage from breach
        - Too broad of rule so only statues that created a duty to recognizable individual can use it
            - Problem that legislation continued to rapidly expand creating lots of duties
        - Purpose of the legislation must relate to a class of individuals to which the individual in question belongs and must relate a particular type of injury type that the legislation tried to prevent
        - Essentially creates an absolute liability scheme in particular statutory regimes where this is deemed appropriate
- Proof of breach and damages may be used as evidence
    - Akin to US approach
        - The dominant position is that a breach of statute is negligence per se (in and of itself, but requires clear statutory language)
            - If language is not clear, the court won't allow the prima facie negligence claim to stand.
            - Courts are reluctant to give a generalized rule because there is a concern that different provisions engage different standards or proof or evidentiary role. Conflating criminal and civil standards is hard because defences are also different.
- In this case, the statute created penalties for violations (this is regulatory law); negligence was not pled, and thus the action must fail
- The beetle test came late because the statute allowed it to
    - Workers acted appropriately, there is no negligence

- Shines a light at the shortcoming of the statutory scheme. Need test results back before grain is being loaded

Canadian Environmental Protection Act, 1999

Action to Prevent or Compensate Loss

Injunction

39 Any person who suffers, or is about to suffer, loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may seek an injunction from a court of competent jurisdiction ordering the person engaging in the conduct

(a) to refrain from doing anything that it appears to the court causes or will cause the loss or damage; or

(b) to do anything that it appears to the court prevents or will prevent the loss or damage.

Action to Prevent or Compensate Loss

Civil cause of action

40 Any person who has suffered loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may, in any court of competent jurisdiction, bring an action to recover from the person who engaged in the conduct

(a) an amount equal to the loss or damage proved to have been suffered by the person; and

(b) an amount to compensate for the costs that the person incurs in connection with the matter and proceedings under this section.

Municipal Government Act

532(1) Every road or other public place that is subject to the direction, control and management of the municipality, including all public works in, on or above the roads or public place put there by the municipality or by any other person with the permission of the municipality, must be kept in a reasonable state of repair by the municipality, having regard to

(a) the character of the road, public place or public work, and

(b) the area of the municipality in which it is located.

(2) The municipality is liable for damage caused by the municipality failing to perform its duty under subsection (1).

Snow on roads

531(1) A municipality is only liable for an injury to a person or damage to property caused by snow, ice or slush on roads or sidewalks in the municipality if the municipality is grossly negligent.

- "Gross negligence" is behaviour that deviates considerably from the reasonable practice; a marked or extreme departure from reasonableness
- Black's Law Dictionary: "The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. "

- This is a high standard and, as such, many lawyers will not take on personal injury claims of this sort
- This is applicable to roads and sidewalks, as noted in the provision
- Built in safeguard to insulate the municipality from lawsuits
- Recent decision: *Pyke v Calgary (City)*, 2022 ABQB 198

Emergency Medical Aid Act

Protection from action

2 If, in respect of a person who is ill, injured or unconscious as the result of an accident or other emergency,

(a) a physician, registered health discipline member, or registered nurse voluntarily and without expectation of compensation or reward renders emergency medical services or first aid assistance and the services or assistance are not rendered at a hospital or other place having adequate medical facilities and equipment, or

(b) a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency,

the physician, registered health discipline member, registered nurse or other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his or her part in rendering the medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence on his or her part.

- Deviating from an objective standard can lead us to infinite possibilities for behaviour
- Tort law wants general principles of application for negligence
- Want the reasonable person test to avoid risk and act with prudent necessary caution

Proof of Negligence

- Plaintiff must establish the facts that the judge or jury can use to conclude or reasonably draw the inference that the defendant's wrongful act was the probable cause of the injury
- Types of evidence
    - Direct Evidence
        - Evidence that if believed, resolves an issue (eg eye-witness)
    - Circumstantial evidence
        - Requires inferences to be drawn from the facts that are available (eg skid marks on a road)
- Burden of proof is balance of probabilities
- Doctrine of *res ipsa loquitor*
    - "The thing speaks for itself"
    - An occurrence of an accident implies negligence
    - In Canadian law, holds no formal weight. Simply a phrase that gives us something to speak to in giving weight to circumstantial evidence
    - Schiff, Nutshell
        - The maxim does not shift the burden of proof; it still resides with the plaintiff

        - If there is no evidence introduced that can tend to prove the plaintiff's claim, the suit should be dismissed
        - If a motion to dismiss/nonsuit an action is not successful, it falls to the jury/judge to determine whether, from the occurrence alone, the defendant is negligent

- Prosser, Law of Torts – Functions of Court and Jury
    - Negligence claims are often framed as requiring determinations of both law and fact
        - When it is a judge + jury trial,
            - Court is to decide questions of law
            - Jury is to decide questions of fact
    - Distinguishing questions of law from questions of fact is not necessarily straight forward
    - While the judge is not the trier of fact when there is a jury, they have a gatekeeping duty for issues of fact
        - Judge will assess if there is sufficient evidence to permit the findings of fact to be made.
    - If the evidence is sufficient to warrant deliberation by the jury, then the application of the evidence is left to the jury
        - If not, the court will nonsuit the issue
    - The existence of a legal duty between the plaintiff and defendant is a question of law to be decided by the court
        - If no duty exists, the court shall find for the defendant
    - The court will articulate the general standard of care that is expected of the defendant and the jury will be instructed on it and tasked with applying it (*The Reasonable Person Standard*)
    - The jury will then decide whether the defendant has acted in accordance with the standard, which is close to a legal function
        - Unless the court decides that the defendant's conduct clearly could not meet the requisite community standard, and then this issue shall be removed from the jury and the judge must direct a verdict
    - Legal burden
        - The burden of proof for establishing the defendant's negligence rests with the plaintiff, who is asking the court/trier of fact for compensation
            - If she cannot prove this, her case must fail
    - Evidentiary burden
        - Civil matters have a balance of probabilities standard (>50.1%)
    - Evidence
        - Can be entered directly, brought forward through experts,
        - Or be circumstantial (inferred from the circumstances);
        - The mere presence of an accident in and of itself is not sufficient to find negligence ("negligence must be proved, and never will be presumed")

Baker v market Harborough Industrial Cooperative Society (WLR 1953)

Facts: The husbands of the plaintiffs were killed when their vehicles collided head on. Each plaintiff brought an action of negligence against the company-owner of the vehicle driven by the other (Market Harborough Industrial). Trial held evidence for the causes of the accident was meagre.
Issue: Does breach of a statutory duty (what duties were at play?) give rise to a civil cause of action? If so, is it absolute liability or is some degree of fault required?
Held: Damages for both equally
Ratio: Court should not wash its hands of the case simply because it cannot say which of the two caused the accident or was to blame and rather find a natural inference

- We can assume both encroached on the center lane, and they are both presumptively at fault
    - Each driver found to be equally guilty; only recover 50% of the claimed damages
- Only other option would be to dismiss both claims

Fontaine v British Columbia (Official Administration) (SCC 199)

Facts: Fontaine (plaintiff) and his friend Loewen went on a weekend hunting trip but were reported missing when they did not return. Their bodies were found two months later in Loewen's truck in a creek. There were no witnesses.

- There was extreme rain that weekend, and many of the highways in the area were closed off from damages. Police concluded the car tumbled down the embankment into the creek. Loewen was found in the driver's seat with his seatbelt on.

Procedural History: Dismissed on the basis that the mere fact that the vehicle left the highway did not, *prima facie*, constitute negligence and the plaintiff/appellant had not proved their case on a balance of probabilities
Issue: When does *res ipsa loquitor* apply?
Held: Defendant not liable
Ratio: Res ipsa loquitur is no longer good law – circumstantial evidence will be treated as supporting a reasonable inference if it convinces the trier of fact on a balance of probabilities

- Consider the persuasiveness of circumstantial evidence in the absence of direct evidence
- Here, alternative explanations that were reasonable and were not based on the defendants negligence
- From a legal perspective, bad outcomes do necessarily mean negligence
- When should an appellate court interfere with a trial court's findings of fact
    - Trial judge does factual record
    - Appellate court deals with errors, omissions, mistakes or contested outcomes
- Obiter: Court says that the standard of care for a driver is higher if it is in inclement driving conditions
    - Still objective and reasonable, but we are asking what would be reasonable in those conditions, and this is even higher if the driving conditions are poor

Traffic Safety Act

Traffic Safety Act (applies to pedestrians and cyclists)

Onus on owner or driver

186(1) If a person sustains loss or damage by reason of a motor vehicle being in motion, the onus of proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver.

(2) This section does not apply in the case of an accident between motor vehicles on a highway.

(3) In this section, "motor vehicle" includes a self-propelled implement of husbandry.

Here, the burden is shifted to the defendant who must prove that she was NOT negligent

Duty of Care

- Determining when a risk is unreasonable and worthy of liability is difficult
    - Necessitates a balancing act between the gravity of the risk create and social significance of impugned conduct
- Useful in categorizing who is considered within the ambit of risk created by the defendant's conduct
    - Conduct that falls below the required standard of care can impact a wide range of people; the duty analysis helps determine who should be protected and also what interests should be protected
- An absence of a duty of care is going to negate the presence of liability

Donoghue v Stevenson (HL 1932)

Facts: The appellant drank a bottle of ginger beer, manufactured by the respondent

- Beer has the decomposed remains of a snail in it which could have not been detected without the contents of the bottle being consumed
- Plaintiff got gastro-enteritis
- She brought action against the respondent as he sold an article in a receptacle that prevented inspection, and he breached his duty to the consumer to take care that no noxious elements occurred in his products

Issue: Is there a legal duty from manufacturer to the ultimate purchaser?

Held: Defendant not liable

Ratio: Majority recognized negligence as a tort (harm) that people could sue for in cases where they were owed a duty of care

- Manufacturers owe the final consumer of their product a duty of care (at least in the instance where the goods cannot be inspected between manufacturing and consumption).
- Defendant will be liable for reasonably foreseeable harm
- No need to analyze if there is a breach of a duty (question of fact, already determined). Question is if such duty exists
- You must not injure your neighbor, but who is your neighbor? Must take reasonable care to avoid acts or omissions that you can reasonably foresee that can injure your neighbor
    - Neighbors are 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 am directing my mind to the acts or omissions which are called in question
- Production for consumption is the basis of a manufacturers enterprise
    - Thus, those who consumer the products are closely involved with their enterprise

- Distinguishing between a dangerous article and one made dangerous by negligence is risky; the latter is a 'wolf in sheep's clothing'

Concurring: Is it contradictory to find that liability could rest in both contract and tort? If no, then what are the circumstances in society that give rise to a duty?

- Don't have to look at the facts, the general principle of duty of care is that they are malleable as circumstances change. So opening negligence to manufacturers does not mean it can't apply elsewhere; negligence is not closed. Criterion of judgement must adjust and adapt to the changing circumstances of life

Dissent: Liability should be limited for manufacturers in contractual circumstances. Otherwise would open a wide scope of liability that would subject a lot of society liable that otherwise would not be liable

- Exceptions of when where an item is dangerous in itself (duty to those in proximity); and where it is not dangerous in itself but has a defect that is known to the manufacturer (obligation to warn)

Palsgraf v Long Island Railroad Co (NY CA 1928)

Facts: Two men run to catch a train, carrying a package of fireworks. One man was unstable when he jumped on the train and a guard tried to grab him but caused the package to dislodge

- Fireworks exploded and caused a weigh scale to be thrown down onto the plaintiff who was standing on the platform and got injured

Issue: Is there a cause of action for negligence? Do the stationmen owe a duty?

Held: Defendant not liable

Ratio: Majority recognized negligence as a tort (harm) that people could sue for in cases where they were owed a duty of care

- Negligence is not a tort unless it results in the commission of the wrong and the commission of the wrong violates someone's rights
    - Right to bodily integrity is not always present – there are limits that are bounded by possibility of risk
- The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is a risk to another or to others within the range of apprehension
    - Here, there was no way that the workers could have known what was in the package, and even if they had, there was no way that they could have perceived the risk of the harm that would occur
- There must be a limit on the extension of the duty of care in negligence, and there must be some appearance of risk or possibility of danger to qualify
- A reasonably foreseeable harm could be the employees injuring the person they help or damaging the package if it was expensive
    - However, someone standing at the other end is not owed a duty by that company

Dissent: Focus here is on proximate cause

- Focuses on the negligence of the action and the duty owed to the public to act reasonably rather than any limit on who that duty is owed to
- Expands upon the duty of care to focus on he/she who is in fact injured rather than any limit on who would generally expect to be injured
- The damage must be so connected to the negligence to be considered a proximate cause—something without which the event would not happen; compensation should follow

Notes:

- Conduct that slips below the requisite standard of care may create risk for many people; but negligence is only concerned with risks/harms that impact protected people
- Duty of care asks whether, in the dispute before the court, the law will impose a duty upon the defendant to take reasonable care for the benefit of the plaintiff
    - Whether a duty exists is a question of law
        - Elements of the duty are reasonable foreseeability and some proximity
    - To qualify, the negligence must be unreasonable conduct *vis a vis* the plaintiff and can't be merely negligence at large. This is a necessary limit
        - Negligence at large is not actionable
    - Why limit it?
        - To allow a duty of care to exist whenever it is reasonably foreseeable that negligent conduct is likely to injure the plaintiff, and then to leave it up to the trier of fact to decide whether the conduct of the defendant was negligent or not, would extend the judicial process beyond its capacity.
        - To accomplish this, the court started to look at Lord Atkin's Neighbour Principle and then to limits its application through policy considerations.
        - The *Anns* case attempted to develop the Neighbor Principle in a manner that would allow for general application but also to be appropriately constrained

Anns v Merton London Borough Council (HL 1978)

Facts: The foundation of a block of flats was too shallow, and this caused a structural defect to which Anns was a tenant. Merton (defendant) were responsible for inspecting the flats during construction
Issue: Does Merton owe Anns a duty of care?
Held: Defendant not liable
Ratio:

- Ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises
- If the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise

Anns Test

- Is there sufficient proximity between parties such that negligence for one would damage that other? If yes, prima facie duty of care
    - Foreseeability base on proximity
- Are there policy considerations that need to be considered?
- Refined by Cooper v Hobart below

Cooper v Hobart (SCC 2001)

Facts: Investors brough a claim against the Registrar of Mortgage Brokers (regulators)

- Investors believe their losses were caused in part by failure of the registrar to reasonably protect them from dishonest third parties

    - Believed they failed to oversee an investment company that lost money for the investors
- Motions brought by the defendants to strike out the respective statements of claim on the basis that they disclosed no cause of action

Issue: Did the Register owe a private law duty of care to members of the investing public giving rise to liability in negligence for economic losses that the investors incurred?

To date this is *not* a duty of care recognized in Canadian law—so should it be extended?
Held: Defendant not liable
Ratio: New Anns-Cooper Test

- Stage 1
    - Was the harm that occurred the reasonably foreseeable consequence of the defendants act?
    - Are there reasons, notwithstanding the proximity, that tort liability should not be recognized here?
- Stage 2
    - Are there residual policy concerns outside the relationship of the parties that may negative the imposition of a duty of care?

- Can only be held responsible for negligence that has created a foreseeable risk
    - Foreseeability can be used to see if the parties are positioned in a sufficiently proximate relationship
- Court acknowledges that Anns introduced policy considerations
    - Policy in the context means the consideration of the social and economic implications of recognizing a duty of care
    - In the residual context, policy is concerned not about the relationship between plaintiff and defendant but about the impact of a duty of care on the judicial system and society at large
- Stage 1
    - Proximity analysis focus on factors arising from the relationship between the plaintiff and the defendant
        - Presence of a close and direct relationship
        - Factors include questions of policy
    - If foreseeability and proximity are established at the first stage, a prima facie duty of care arises
    - If foreseeable risk of harm asks whether the harm that occurred was a foreseeable consequence of the defendant's act, what is proximity?
    - Proximity is generally used "to characterize the type of relationship in which a duty of care may arise"
        - These types of sufficiently proximate relationships are identified through the use of categories
    - First step in a prima facie duty of care is to decide whether the relationship constitutes a novel duty of category or falls into a category analogous to a recognized category
        - Whether it is just and fair to impost a duty of care
        - Whether the relationship is close and direct

        - If the impugned action falls within a recognized category there is no need to do a full two-step Anns-Cooper duty of care analysis
    - Categories where proximity has been recognized:
        - Defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property, which has been extended to nervous shock
            - Somebody on TV got crush by something
            - Nervous shock extended to those watching on TV
        - Negligent misrepresentation and pure economic loss (special relationship between parties)
            - 1) negligent misrepresentation or performance of a service (Deloitte v Livent, 2017 SCC);
                - Requested financial records and got improper records and experienced a loss. Performance of a service that is relied upon to their economic detriment
            - (2) negligent supply of shoddy goods or structures (Winnipeg Condominium Corporation v Bird Construction, 1995 SCC);
                - Corp had to replace a bunch of faulty siding and go after constructor for costs. Has to be shoddy to a point of becoming a danger (didn't realize yet but had the potential
            - (3) relational economic loss (injury to third party; Norsk Pacific Steamship, 1992, SCC)
                - Steamship collides with a bridge and renders it inoperable, 85% of its use falls to CN. They don't have any direct ownership but use it. Able to seek damages against the steamship for the losses that they incurred for their inability to use the bridge
        - Misfeasance in public office (misuse or abuse of power)
        - Municipality owing a duty to prospective real estate purchasers to inspect housing developments without negligence (Kamloops v Nielsen)
        - Duty to warn of a risk of danger (Rivtow Marine v Washington Iron Works)
        - Public authority liability in certain situations (e.g., road maintenance, snow removal)
        - Duty to other users of the road (Steward v Pettie)
        - Police investigation of a suspect (Hill v Hamilton – Wentworth Services Board)
        - Commercial hosts
        - Doctor to patient

Stage 2

- Such residual policy considerations may not exist
- But important to ask when imposing a new duty of care despite the foreseeability and proximity of the relationship

Application

- Step 1
    - Does the case fall within or analogous to a category of cases where a duty has been recognized
        - No
    - Is this a situation in which a new duty should be recognized?

        - Negligence of the Registrar could have foreseeability affected economic interests
        - Was there a proximate relationship?
            - Court looks to the scope and purpose of the legislative provisions that established the Registrar
            - Concludes that to impose a private duty of care would "come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole" (policy)
        - Policy concerns prevent a proximate relationship. Thus no prima facie duty owed
- Step 2 (This step of analysis not needed on these facts but court does anyways)
    - The decision to suspend a broker engages significant policy and quasi-judicial considerations
    - The Regulator must act fairly to the broker, and in so doing must balance different public and private considerations unencumbered by independent duties
    - The Registrar must make discretionary decisions that engage the statutory powers that it has been granted with, and should not be encumbered by a private law duty to investors
    - Recognizing liability here raises concerns for indeterminate liability engaging an unquantifiable number of investors and sums of money
    - To add a private law duty to a statutory context would change the balance of the scheme
    - Finally, taxpayers should not be saddled with a court-created insurance scheme to indemnify investors when there is a loss to investors

Rankin (Rankin's Garage & Sales) v JJ (SCC 2018)

Facts: Two minors stole an unlocked car from a commercial garage. The garage had not been secured, and the keys to the car had been left in the car's ashtray. While driving the car, the unlicensed minor crashed and his passenger suffered a severe injury.

- Injured boy sued the commercial garage owner, the driver and the driver's mother

Issue: Is the impugned act (an unsecured vehicle) foreseeably linked to the harm suffered (the physical injury of the driver) and should this have been a reasonably foreseeable risk to someone in the defendant's position (i.e., the garage owner)?

Held: Defendant not liable, no duty
Ratio: Applies Anns-Cooper test

- Step 1: Prima facie duty of care? (Foreseeability, policy)
    - Can the court connect theft and unsafe driving thus making the risk reasonably foreseeable?
        - Does this case fall within, or close to, a category of cases where a duty has been recognized?
        - There are cases of foreseeable risk that are similar: car left running in a bar district at closing time, a car dealership aware that minors were targeting their lot, but they are not similar enough.

        - Does the fact that they were minors, more likely inexperienced and reckless, connect this risk to foreseeable harm.
            - No, the causal connection is too weak to suggest that the mere possibility of risk of theft by minors gives rise to foreseeable personal injury
            - No evidence to suggest that it was reasonably foreseeable that the stolen vehicle would be driven in a manner that would cause physical injury

- Step 2: Policy Considerations
    - Not needed because no duty found

Dissent: Currently established categories answers this, so an Anns Cooper test is not needed.

- This fits in 'foreseeable physical injury'
- This is objectively and reasonably foreseeable
- Should not interfere with the trial decisions finding of fact unless there was a palpable overriding error

Duty of Care – Rescue

- Common law distinguishes between misfeasance and nonfeasance
    - Misfeasance: wrongful application of harm, either negligently or intentionally
    - Nonfeasance: failure to prevent harm
- People are not under a duty to act
    - Saving someone's life is moral, but not required by law
    - You cannot be sued or liable for failing to help someone

Union Pacific v Cappier (P 1903)

Facts: Kid playing on a railway and looses his arms. The workers did not try to help (staunch the bleeding) but called 911

- By the time the ambulance came, the kid passed away

Issue: Negligence and duty to rescue

Held: Defendant not liable, no duty

Ratio: Law does not demand that someone intervenes to save another if that person did not create the situation of harm

- Only care about the legal duties that come in sphere of influence
- Relations of kindred values and generosity are to be excluded, no matter how little energy or danger is involved to perform them

Stovin v Wise (ER 1996)

- Nonfeasance from a:
    - Political perspective
        - It is less of an invasion for freedom for the law to require awareness of dangers, than it is to force them to save another
    - Moral perspective
        - Why should someone be liable over another if there are multiple people in the vicinity?
    - Economic perspective

        - Those who take on the activity should bear their own costs. It will always be suboptimal for a third party has to expend resources (their safety) to save someone from a situation they did not create
- A duty may exist in certain circumstances
    - Where someone has given an undertaking or has induced someone to believe such an undertaking exists or to act for the benefit of your neighbor or someone who has come on your property
        - Eg a fire starts on your property, and you do not contain it. Should act to the extent of your resources by calling fire department
- Can be mor complicated when the omission in question is a part of a broader series of actions by a defendant
    - Failure to apply the handbrake after parking; failure to inspect as part of a larger process
- Epstein "Theory of Strict Liability"
    - A Good Samaritan rule would interfere with individuals actions and freewill
        - If you are in the position to render assistance with little to no inconvenience, and the harm or risk of harm is high, you must act. And the state plus victims could sue if you don't do anything
    - Does this extend to a requirement to donate money to save a life in a foreign country, or for surgeons to travel distances to save someone if they are uniquely qualified to offer a particular medical intervention?
- Bender "Feminist Theory and Tort"
    - Is the loss of life more of an afront to autonomy than a duty to rescue?
    - Further, what knock-on effects does the preventable drowning of a stranger have in a connected society?
        - Drowning of one person doesn't just affect one person and the law should be concerned about relationships at large
    - The duty to aid could be contextual (proximity, skill, etc.) and informed by a basic conscious regard for another's safety

Oke v Wiede Transport Lt (Man CA 1963)

- Shoulder on a road. Truck driver collides with some infrastructure there and knocks over a sign. Cleans it up and goes on. Someone looks to pass another vehicle in the shoulder and runs over the post in the ground and kills him
- Majority said nonfeasance. Area that had been used but passing there was forbidden, second driver broke the law. Prof thinks this is borderline. The court says whichever way we cut it, it wasn't foreseeable
- Dissent says he thought to call the police, but didn't so isn't this objective fault?

Moch Co v Rensselaer Water co (NY CA 1928)

- Warehouse fire consumes a whole building in New York. There is a contract between the water company and NYC to provide hydrants around the city. The hydrant near the warehouse doesn't have enough water in it to put out the fire
- Owner of the warehouse takes action against the water company (they had a contract with the city).
- No proximity of contract between the business owner and company (no privity)

- Doesn't want to recognize a duty here because of some of the concerns around indeterminacy
- Losses through these sorts of harm are best dealt with fire insurance rather than civil litigation

Horsley v McLaren (SCC 1972)

Facts: There was a private boat on Lake Ontario captained by McLaren, with many people on board. Some 900m from the port, there was an accident, and Mr. Roly went overboard.

- McLaren tries to back the boat up rather than turning around because the water is cold so he wants to get him back in the boat.
    - This is not a good/recommended practice
- Horsley jumps in to save Roly, but Roly goes under and dies.
    - Horsley also goes into shock and dies.
    - His estate brings negligence action against McLaren

Issue: Is there a duty to rescue? Was McLaren negligent with his driving?

Held: Defendant not liable, duty but no breach

Ratio: No duty at common law to rescue to aid anyone in distress

- There is a duty to rescue in this scenario; a boat captain must rescue his passengers. Must do his best to rescue the passenger
- McLaren was not negligent to cause Roly to go overboard, he went overboard on his own
- Once overboard, the question becomes, is their liability to the rescuer because of that peril that McLaren created from the botched rescue?
    - Is the negligence of the first rescue the cause for the second rescue? Could then maybe ground liability then
    - Experts say best rescue is a bow turn
        - McLaren knew this but given his craft, thought a reverse would be faster
- Standard of care – no expectation of perfection.
    - Must behave reasonably.
    - In backing up the boat, not the best course or recommend course of action to attempt a nautical rescue, but court holds it is a reasonable effort
    - Not negligent but instead an error of judgement
    - Hard to say the rescue was so botched that Horsley had to jump in

Stewart v Pettie (SCC 1995)

Facts: Group of people go to dinner. The driver of the party got very drunk (showed no signs of inebriation).

- Plaintiff was the passenger in the single car accident. Plaintiff is a quadriplegic now, but evidence shows she was the only one not wearing a seatbelt and had she worn it, no injury would have happened.
- Plaintiff sues the restaurant saying the server should not have let this person drive.

Issue: Is there a duty to "rescue" from a commercial host?

Held: Defendant not liable, duty but no breach

Ratio: There is a duty of care from commercial establishments to drivers of the road, and this extends to a third party driver

- The court says there are liquor laws that prevent service to someone that is drunk. Is that rule sufficient to create a duty? And does breach of that lead to a duty?
    - Not necessarily, *Sask Wheat Pool*.
    - Statute can be evidence of a duty but not itself the duty; fits within the larger analysis

- Closeness and directness between patrons who become intoxicated and those others who are users of the road
    - Certainly foreseeability of risk of inebriated persons that became inebriated at their establishment and could leave and cause harm
        - Reasonable foreseeability is different in standard of care vs duty of care analysis
    - No public policy concerns to prevent a duty
- This is a special relationship
    - Restaurant has a positive obligation to mitigate or to act to stop reasonably foreseeable harm
    - There is a role to stop serving at a certain point, but liability doesn't exist for mere act of overserving because harm needs to be foreseeable
- What should Mayfield have done?
    - He didn't appear drunk, so this may have lowered the duty.
    - They served 2 people of the 4 patrons. It is not inappropriate to overserve if there are others to ensure they get home safely. It would thus be difficult for them to foresee the risk of the one really drunk person getting into the accident.
        - Reasonable for the waitress to assume the sober patrons would be driving. Risk of harm not reasonably foreseeable and the expectation of conduct was not breached. We do not expect the waitress to take positive action to ascertain the drunk guy wasn't driving
        - Additionally, the table was telling him not to drive, so it was reasonable for them to not intervene
    - Could also discharge the duty by calling a cab for the table for example

Crocker v Sundance Northwest Resorts Ltd

Facts: For profit race where participants pay to participate in an inner tube race to go down a mogul run. Crocker is drunk, signs a waiver releasing liability. He gets thrown from the tube and is rendered a quadriplegic

- The activity was official, the hill charged a fee to participate

Issue: Does the ski resort have a positive obligation to intervene?

Held: Defendant liable, positive duty held

- 75% ski hill, 25% individual for reckless behaviour

Ratio: A positive duty to take steps to prevent a visibly intoxicated individual from participating in an inherently dangerous activity

- The corporation was inviting these people to participate
- For a waiver to work in negligence, the waiver must operate in a particular way.
    - Waiver wouldn't work if its fraud, undue pressure, or inducement to sign the waiver and if there is uncertainty of the intention of the patron to actually sign away their ability to sue.
- Crocker says I never had the intention to sign away my ability to sue.
    - Need evidence the individual knew expressly what they were agreeing to and have read and turned their minds to the result. Attention must be drawn to the particular clauses
    - Need a directed approach (eg look at the clause here)

Childs v Desormeaux (SCC 2006)

Facts: There was a New Years Eve party where Desormeaux drank 12 beers in 2 hours. They went out with the host. The host made sure he was good to drive, but they got into an accident and injured another driver

Issue: Is there a duty on a social host? Is a commercial host duty sufficiently close?

Held: No duty as a social host

Ratio:

- Stage 1: Is the relationship sufficiently proximate?
    - Foreseeability
        - Injury not reasonably foreseeable on the evidence. There was no finding that the host knew of his intoxication or that it would be appropriate to infer from his past drinking/driving habits that he posed a reasonably foreseeable risk to motorists
            - Host only served champagne. Rest was what they brough
    - Nonfeasance
        - While an omission can be negligent, the common law guards autonomy
        - Here, we are concerned with a failure to act
        - Certain circumstances where a positive duty to act has be recognized
            - Where a defendant intentionally attracts and invites third parties into a risk that they created or control (boat captain with a duty to take reasonable care to rescue and the organizer of a dangerous inner-tube race with a duty to exclude people who cannot safely participate *[Crocker v Sundance Northwest Resorts,* 1988 SCR 1186*])*
            - Where there is the paternalistic relationship of supervision and control (child-parent, child-teacher)
            - Where a defendant exercises a public function or engages in a commercial enterprise that has implied responsibilities (commercial host)
        - These duties are unified by common themes
            - Creation of the risk or control of the risk
            - Concern for autonomy and only requiring intervention where there is a special relationship (server, high-risk sports organizer/operator, caregiver)
            - Reasonable reliance by plaintiff on the defendant to take an appropriate rescue action if a risk materializes
        - Social host does not fall into these categories generally speaking
- Reasons to distinguish social host from commercial host
    - In some contexts, there is a diminished capacity to monitor patrons, especially if it is BYOB
    - Liquor sales are regulated through the state and licensing gets public expectations that are not present in social parties
    - Contractual relationship between bar owner and patron that has an economic rationale. The duty is ok to be imposed because their goal is to make money.
    - Thus, Anns-Cooper test needed for novel duty

Emergency Medical Aid Act

Protection from action

2 If, in respect of a person who is ill, injured or unconscious as the result of an accident or other emergency,

(a) a physician, registered health discipline member, or registered nurse voluntarily and without expectation of compensation or reward renders emergency medical services or first aid assistance and the services or assistance are not rendered at a hospital or other place having adequate medical facilities and equipment, or

(b) a person other than a person mentioned in clause (a) voluntarily renders emergency first aid assistance and that assistance is rendered at the immediate scene of the accident or emergency,

the physician, registered health discipline member, registered nurse or other person is not liable for damages for injuries to or the death of that person alleged to have been caused by an act or omission on his or her part in rendering the medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence on his or her part.

[gross negligence: contextual—greater lack of care]

Notes

- Legislation cutting people some slack when they do rescue
    - No liability unless gross negligence (a significant departure from the standard of care)

Liability to the Rescuer

Wagner v International Railway Co

- Rail car going around steep corner. Two guys travelling together, one guy gets throwns out
- Train stops, friend goes to find him and suffers an injury while searching for him.
    - Negligence on the train for not closing the doors but is there negligence for the guy that went searching?
- Danger invites rescue and a wrong that imperils a victim also imperils a rescuer
    - The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal.
    - Eg The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path.
- Does it matter if a rescue was foreseeable in the situation at hand (e.g., remote location) or does any situation of peril that creates the risk invite a rescuer?
    - Does there need to be foreseeability or can it be standalone?
    - I don't know the answer to this

Horsley v MacLaren (SCC 1972)

- Boat example
- The legal protection afforded to the rescuer who has been foreseeably exposed to danger by the unreasonable conduct of a third party is based on an independent duty of the negligent person following from the tendency to induce rescue

    - If someone is acting in a dumb way that invites peril and thus a rescue, they are engaging a duty on that rescuer, such that they could be held liable for that rescuer as well
- This extends to the person who imperils himself and invites rescue (so not just third-party scenarios)

Urbanski v Patel (SCC 1978)

- Surgeon removes a kidney, mistaking it for an ovarian cyst
    - Gross negligence
- Need a transplant and father volunteers and gives a kidney
- Father ends up suffering harm and damage, is he a rescuer?
    - Court says yest. Reasonably foreseeable that a friend or family member would provide an organ
        - Doctor is then exposed to damages for both procedures
    - Outer limits of a rescue scenario

Special Duty of Care: Duty to the Unborn

Dobson (Litigation Guardian of) v Dobson

Facts: Pregnant woman (27 weeks) was driving and got into a car accident with traumatic injuries to the fetus, who was delivered the next day via C-section.

- Permanent developmental problems so the child eventually sued the mother on the grounds that the mother had a duty to protect the unborn child

Issue: Does a mother owe a duty to the unborn?

- A child born alive can sue a third-party in negligence for injuries suffered in utero (Montreal Tramways, SCC 1933)

Held: Defendant not liable, no duty

Ratio: Pregnant women do not owe a duty of care to the foetus in their womb

- Stage 1
    - Proximate relationship
        - Of course. Very close and direct. They are essentially one person
    - Foreseeability
        - Almost every action of the mother can put the fetus at risk?
- Stage 2
    - Policy considerations
        - Duty can be found, but will not be imposed upon a pregnant mother as a matter of public policy
        - If not imposed by the court, lets defer to the legislative branch
    - Privacy and autonomy rights
        - Mom-foetal relationship is so unique and connected
        - Imposition of liability on the mother would not advance the goals of tort law
            - Compensation
                - Suing your mother would bite the hand that feeds you
            - Deterrence
                - Trying to deter a harm that has already occurred

        - Every moment a mother has is would then be committed to the safety of the foetus, and could become an issue of legal liability for the courts to scrutinize
        - Imposition should not be through tort but legislatures (lack of sufficient resources available for caring for children born with disabilities; leave this to the legislature for their study and debate)
    - Difficulties in articulating a judicial standard for conduct
        - What standard should be expected?
            - Reasonable Pregnant Woman Standard? "Reasonably prudent expectant mother conducting herself under similar circumstances
            - Pregnancy is very subjecrive
        - How do we treat mothers with different financial situations, education, access to health care, ethnic and cultural backgrounds?
        - Rejecting that a general duty to users of the road can apply to the unborn child, since this would open application to any scenario of general duty, which may extend to 'lifestyle choices'
        - Opening this form of negligence would implicitly be predicated on insurance-based recovery, which would impose upon the mother the ability to pay through insurance; this is not the role of tort law

Concurrent: Role of the Charter in developing tort law, they grow in comparison to each other

- The rights that are engaged would be liberty and equality, and we cannot unduly restrict the autonomy of a certain class of Canadians (pregnant women)
- Weinrib v Wienrib (case afterwards)
    - Critiqued the Charter approach since they did not go down the s1 analysis
    - Says that liability should exist where the fetus fits within a class of persons who are owed a duty by the pregnant mother

Dissent: Freedom of action already constrained by her duty to other road users

- Would limit the unborn child's ability to recover to the same circumstances in which a third-party could recover
- Does not find sufficient policy justifications to negate a duty of care and the ability of a born alive child to sue

Maternal Tort Liability Act (2005)

Section 2

This Act applies in respect of the use or operation of an automobile after this Act comes into force.

Section 3 – Exception to maternal tort immunity

Sections 4 and 5 establish a limited exception to the immunity that a mother has at common law from actions in tort by her child for injuries suffered by the child on or after birth as a result of the mother's actions prior to the child's birth.

Section 4 – Use or Operation of Automobile

A mother may be liable to her child for injuries suffered by her child on or after birth that were caused by the mother's use or operation of an automobile during her pregnancy if, at the time of that use or

operation, the mother was insured under a contract of automobile insurance evidenced by a motor vehicle liability policy

Special Duty of Care: Public Officials

- Misfeasance in a public office
    - Intention tort
    - Elements: Deliberate unlawful conduct in the exercise of public functions with an awareness that the conduct is unlawful and likely to injure the plaintiff
    - Negligence?
        - Don't want to expose the government to indeterminate liability. A true core policy decision will be exempt from tortious liability. Operational and implementational decisions, liability can attach. Finding the difference is not easy

Liability of Crown in Tort

5(1) Except as otherwise provided in this Act and notwithstanding section 14 of the *Interpretation Act*, the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(a) in respect of a tort committed by any of its officers or agents,

(b) in respect of any breach of those duties that a person owes to that person's servants or agents by reason of being their employer,

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property, and

(d) under any statute or under any regulation or bylaw made or passed under the authority of any statute.

[imposition of liability on the Crown as if it were a natural person]

Anns v London Borough of Merton (AC 1978)

Facts: The foundation of a block of flats was too shallow, and this caused a structural defect to which Anns was a tenant. Merton (defendant) were responsible for inspecting the flats during construction.

- Power to inspect (but not an obligation to) under a by-law passed pursuant to Public Health Act
- Owed a duty of care to the tenants of the building to inspect reasonably once the decision to inspect was made
- The tenants were a determinable class which limited concerns of unbounded liability
- Based on the nature of the relationship, found a duty to inspect reasonably. Can put liability with the public authority
- Wilberforce says we need to be careful about assigning liability for real issues of policy

Just v British Columbia (SCC 1989)

Facts: Father and daughter were driving along a highway from Vancouver to Whistler. There was a boulder that was sliding down the slope and collided with the vehicle while in standstill traffic.

- Daughter died and the father was injured

- There was a government agency set up to inspect and control rock slope conditions. They have to inspect and make recommendations about their stability
    - The inspection process was someone would inspect the rock face from the road
    - If it looked bad, report to a supervisor
    - Supervisor makes the decision on where to deploy maintenance crew

Issue: Does the Crown (Department of Highways) owe the duty in negligence?
Held: New trial ordered; duty found
Ratio: If the court finds a true policy decision, the government will not be liable. If it is just implementation or operation of policy, they can still be found liable

- Anns test (pre Cooper)
    - *Prima facie* duty of care owed by the province to the users of the highway, which included reasonable maintenance of these roads
        - Users of the road were sufficiently proximate *and*
        - Foreseeable risk to the Department of Highways that highway users could be harmed if the roads were not reasonably maintained (incl'd falling rocks)
- Despite legislation, the Crown is *not* a person and should be free to make true policy decisions.
    - Still, the Crown should not have wide-ranging immunity by designating every decision as pure policy
- True policy = exempt for social, political and economic reasons
    - What is the proper route of accountability for true policy decisions?
        - Elections. Democracy decides what policy the country wants
- Operationalization/implementation of policy decisions = open to tort liability
    - Reluctancy to find duties to elected officials and departments that fall in their discretion
- A duty of care can be applied to the Crown unless there is a reason for its exclusion; a true policy decision is a valid exclusion, and so is a statutory exception
    - Government inspections have been a particular area of concern, which seem to blur the line between policy-operation
    - *City of Kamloops:* government agencies must act in a reasonable manner pertaining to inspections, which requires a bona fide exercise of discretion. They must consider whether to inspect, and if so the system of inspection must be reasonable. Bona fide exercises of discretion are unassailable
- True policy decision
    - A decision that generally comes from a person in a high level of authority that engages discretion; can also come from someone in a lower position
    - This characterization rests on the nature of the decision rather than the identity of the decision maker
    - As a general rule, budgetary allocations are policy decisions
    - Policy decisions can be challenged on the basis that they are not *bona fide* exercises of discretion (reasonable, rational, reasons)
    - If the Crown is not immune through statutory exemption or true policy decision, the court will proceed with a traditional negligence analysis
    - Lighthouse example
        - Budget cuts enacted, so shutdown lighthouse. Accident happens
            - That's policy. Elect people for resource allocation and risk analysis

        - What if we train half the inspectors to inspect planes instead so lighthouses are only checked once every two years instead every year.
            - This is still policy
        - Once a decision is made on how lighthouse inspections must proceed, those inspections must be done reasonably
            - This is operational
- Application
    - SCC said the manner and quality of an inspection system is operational and not policy and is subject to review
    - Must inspect if the inspections were done properly, reasonably and to what the policy decided
        - If the way a program is implemented is reasonable, cannot have liability
        - If the program misses stuff etc, then can have liability

Dissent: Believes that this is an unnecessary expansion of judicial review of policy since, in his opinion, the extent and manner of an inspection system is properly categorized as policy

- No statutory duty to inspect and opines that it should be beyond the reach of the court to review government policy

Seinamer v Nova Scotia (SCC 1994)

- Majority position in Just criticized
    - Reasoning expands private law's function in supervising a public authority's actions as it relates to legislative powers
        - A general duty owing a private law that can be excluded by the finding of a policy decision.
        - A private law duty doesn't exist but can be found in the two circumstances by Anns (legislative).
    - Criticism is also rooted in the fact that some courts have found frequency of inspection to qualify as a policy decision *(Barratt v District of North Vancouver* (1980), 114 DLR (3d) 577*)* while other courts have found it to be operational in nature *(Just)*

Stovin v Wise (ER 1996)

- A local authority noticed (but did not act on) clearing an obstruction (a bank of land) at an intersection. An accident subsequently occurred at the intersection. The authority is sued
- Retreat from *Anns* in that it represented the courts reluctance to find a private law duty in a public law context
- Here, statute allowed a local authority to remove obstructions, but this power was not construed as to give rise to a common law private duty of care that could be invoked for non-performance
    - To do so, the court reasoned, would greatly burden the authority's discretion in making budgetary decisions

Michael v Chief Constable of South Wales Police (AC 2015)

- Almost a full retreat of Anns framework
- Here the victim assaulted an ex-partner, and he says he will come back and assault her again.
    - She calls the police, and it doesn't go through/not answered

    - Ex comes back and murders the victim
    - Police force ended up being sued as if they had not discharged their duty of care to protect citizens, this would not have occurred
- A publicly funded protective system that fails to meet its statutory purpose through organizational or personal defects shall not be found liable by way of private law duty
    - Except in limited circumstances of representation and reliance
    - There needs an express degree of protection given to the public that the individual relied on
- Reluctance to find a duty of care to prevent the occurrence of harm (nonfeasance)
        - Full reversal of Anns test
- This was confirmed in the *Robinson v Chief Constable of West Yorkshire Police*, where the court found that an officer could be held liable for negligence in harming an innocent third party during the execution of an arrest.
    - Police are held to duty to avoid injury through normal negligence principles, but they will not find a duty to avoid harm through omission (nonfeasance)
    - If officer acts negligently through duty, there could be negligence claim, but they will not find a duty of care to avoid harm from a failure to act (like rescuers claim)

Jane Doe v Metropolitan Toronto Police (OR 1990)

Facts: Individual says there were left as bait by the Toronto Police, for a serial rapist

- She was sexually assault and sued the police for failure to warn
- She was the category of victim that the accused often sought out.
- She lived in the area that he usually perpetrated his offences
    - All other women lived on the second or third floor of this building and he entered through an unlocked balcony door

Issue: Is the Toronto Police liable for negligence?

Held: Defendant is liable; duty found

Ratio: Limited class of people of society at large that prompt a duty of care for police

- Police do not owe a private law duty to every member of society who might be at risk
    - Would open them up to far too much litigation
- However, do owe a duty of care to certain people in circumstances where they have
    - Requisite knowledge,
    - The harm was foreseeable and
    - A special relationship of proximity existed
- Decision to not warn the victim was negligent
    - If the decision was policy, it was not *bona fide* because it was arbitrary and irresponsible
    - If it was a matter of operation and a decision taken to "bait" the offender, it needs to be assessed for a breach of the requisite standard of care

R v Imperial Tobacco Canada Ltd (SCC 2011)

Facts: Imperial Tobacco claimed if they were liable for marketing, Canada should compensate them for their actions.

- They claimed that Health Canada used deceptive marketing techniques to pedal low tar cigarettes as less harmful and encouraged smoking Canadians to switch to them.

- They argued that Agriculture Canada was negligent because they researched low tar tobacco that would dominate the market
- They found that Canada was negligent and breached its private law duties by negligently misrepresenting the health attributed of low tar tobacco

Issue: If the tobacco companies are found liable, can they get compensation from the Government of Canada on the basis of negligent misrepresentation?
Held: Government is not liable, no duty between Health Canada and consumer
Ratio: Core policy decisions are ones whose course of action based on policy considerations (political, social, economic) that are not made in bad faith

Indeterminate liability is a big policy reason to negate prima facie duty of care

Negligent Misrepresentation and Economic Loss

- There must be a duty of care based on a "special relationship" between the speaker and the listener, or otherwise, the representation in question must be untrue, inaccurate, or misleading
- The speaker must have acted negligently in making the misrepresentation;
- The listener must have relied, in a reasonable manner, on the misrepresentation (e.g. it was reasonable for the listener to rely on the speaker's statement as accurate); and
- The reliance must have been detrimental to the listener in the sense that damages resulted (economic losses).

Stage 1: Does the required relationship exist?
- Proximity and foreseeability of harm will be found if the relationship is deemed "special", meaning that, between the parties
    - (1) the defendant ought to reasonably foresee the plaintiff's reliance on the representation and
    - (2) reliance by the plaintiff would be reasonable in the circumstances
- Proximity can be argued to be based on statutory duties and powers, although one cannot simply conflate public and private duties
- Proximity can also be found from the specific interactions between the government and a claimant

Application
- *Prima facie* duty of care be found based on proximity between Canada and the consumers *or* Canada and Imperial Tobacco
    - Consumers
        - No direct relationship; only broad statements to all Canadians about choosing light cigarettes.
        - The relevant statutes only create general public law duties to the public and nothing that grounds a private law duty; claim struck
    - Imperial Tobacco
        - Canada allegedly undertook action beyond general legislative duties and background regulator by researching and designing low-tar tobacco and then recommending low-tar cigarettes that they collected royalties off of from its sale; also by advising and directing tobacco companies to use it.
        - This included specific discussion and messaging to tobacco companies;

        - *Prima facie* duty found

Stage 2: Policy Considerations

- Policy consideration negate the prima facie duty
- Two approaches to true policy
    - Discretionary decision approach
        - Exempts liability when discretion is involved, unless the decision is irrational
    - Protected policy approach
        - Distinguishes true policy decisions engaging social, economic and political decisions from operational decisions
- The discretionary approach is generally viewed as being too broad to be appropriate whereas the policy approach is viewed as too ambiguous and difficult to apply
- Canada asserts that its decision to promote low-tar tobacco was a true policy decision that is immune to tort liability
    - It was at the highest level
    - It considered social and economic factors
    - It was developed for the health of Canadians and the institutional costs of tobacco related diseases
    - Court is loath to supplement this decision with its own consideration
    - This was not implementational and what followed from it was operational that related to that decision

Indeterminate Liability

- This is a case of economic loss and should be limited because Canada had no ability to control how many cigarettes were being sold or consumed
- All they could do is control their messaging, so they messaged to try and limit the harm of citizens
    - If every smoker wanted to find liability with Canada for related issues, the repercussions would be massive
- Indeterminate means there would be no way to constrain the liability they would be exposed to.
    - This is another way to limit liability and not allow negligence for Canada

Nelson v Marchi (SCC 2021)

Facts: The City of Nelson (appellant) started plowing and sanding streets after a heavy snowfall. They did so pursuant to its written policies and unwritten practices.

- The Snow Clearing Policy the City uses was to carry out removal "on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines" which included downtown core provisions, but made no specific mention of clearing parking stalls or creating snowbanks,
- In terms of unwritten practices, the City removes snow from sidewalk routes throughout the City.
    - They do not remove snow overnight because of noise complaints and starts with school areas before doing the downtown core to avoid rush hour
- One such practice was to clear snow in angled parking stalls in the downtown core. They plowed the snow to the top of the parking spaces and created a snowbank along the curb that separated the parking stalls and the sidewalk.

    - They did not clear a path for drivers to access the sidewalk from the lot.
- Ms. Marchi attempted to cross the snowbank after parking, but she dropped through the show and seriously injured her leg.
    - She sued the City for negligence
    - Both parties agree that she suffered $1,000,000 in damages.

Procedural History

- Trial – action dismissed because snow removal decisions qualify as "core policy", thus excluding a duty of care.
    - Alternatively, that the standard of care was not breached; further, that the plaintiff was the proximate cause of her injury
- Appeal – new trial ordered; trial judge erred on all three conclusions

Issue: Was there a duty of care owed to citizens by the City of Nelson to remove snow, or are these decisions core policy decisions that are immune from negligence liability?

Held: Government is liable; duty found

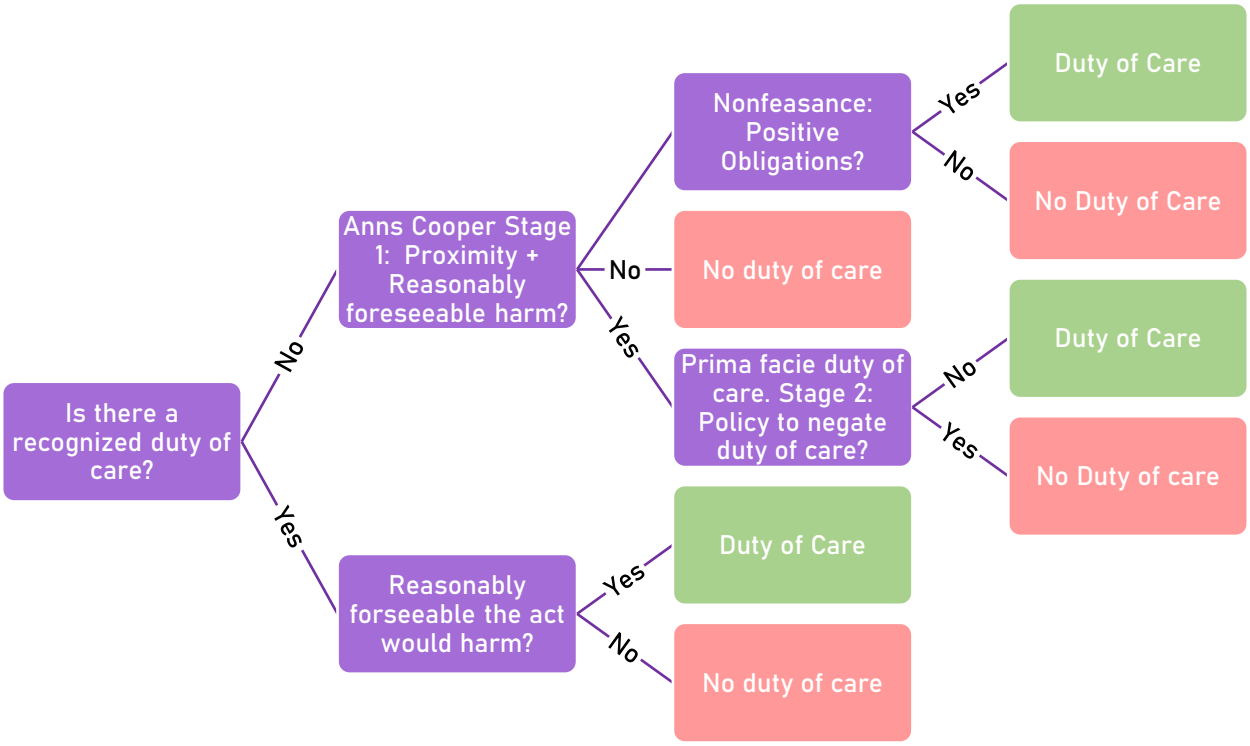
Ratio: Four factors to decide between true core policy and implementation

- The level and responsibilities of the decision-maker;
- The process by which the decision was made;
- The nature and extent of budgetary considerations; and
- The extent to which the decision was based on objective criteria

- Is there a duty of care?
    - Looks to Just case (this is not a novel analysis)
        - Public authorities with a duty to users of a road to keep roads reasonably safe through maintenance and inspection, but recognized that the duty was subject to a public authority's immunity for true policy decisions or statutory exclusion
    - No need for Anns/Cooper test as Just case applies
        - In this case, by paving the parking spaces, the City invited members of the public to use them to access the businesses. The plaintiff did so when she was injured.
            - The *Just* category covers prevention of injuries created by a government defendant on the sidewalk or road.
                - Road users are physically present on a space controlled by public authority
                - They are invited to the risk by the public authority
                - Public authority intends and plans for people to use roads and sidewalks
                - Reasonably foreseeable for the City that negligent snow removed could cause harm to those invited.
    - When to raise core policy immunity?
        - As per *Imperial Tobacco*, this is to be done in Stage 2 of the full *Anns/Cooper* test for a novel duty analysis;
        - When it is not a novel analysis, core policy can still be argued by the public authority to exclude liability
- Core policy decisions

    - Shield these decisions to maintain separation of powers; each branch of government performing the appropriate functions of the legislative and executive branches of government
        - See above factors
    - Mere presence of budgetary/financial considerations does not make a decision core policy
    - Policy is a broad term; just because a document is labelled "policy" isn't determinative
- Analysis of four factors
    - Level and responsibilities of the decision-maker
        - How close to a democratically accountable decision-maker; decisions made closer to his high executive function will more likely engage separation of powers concerns and is core policy
    - Process by which the decision was made
        - If the process was deliberative, publicly debated, engaged broad input, and intended broad application—tends towards core policy
    - Nature and extent of budgetary considerations
        - Budgetary allotments for departments and agencies is core policy and engage separation of powers but the day-to-day budgetary decisions of individual employees do not
    - Decision based on objective criteria
        - If a decision engages value judgments and weighing competing interests it is less suitable for court review; if it is based on objective standards of reasonableness (technical guidelines, etc) judicial review is more appropriate
- Application
    - No statutory exemption
    - No allegation of bad faith or irrationality (which precludes immunity)
    - Falls within the *Just* category
    - Exempt because the challenge is to a core policy decision
    - Existence of a duty is a question of law
    - Plaintiff asserts that the challenge isn't to the city's broad snow removal policy at large but rather to the one decision to pile and not provide for sidewalk access
    - Trial judge also put too much weight on the word "policy" and misconstrued the budgetary aspects of this decision
    - *Standard of care*: exercise the standard of care expected of an ordinary, reasonable and prudent person in the same circumstances—regardless of whether the defendant is a private actor or public official (but this can deviate given what is reasonable for the Crown)

Duty of Care Chart



Causation

- No liability can be found unless the defendants act resulted in injury to the plaintiff
    - This is materialization of risk into injury
- Two meanings of the word “cause”
    - Proximate Cause/Remoteness
        - Look at the connection between act and injury to ask whether the plaintiffs injury is within reason for regarding the defendants act as wrongful
        - Does the defendants unreasonable risk encompasses the plaintiffs injury?
            - This is fluid and indeterminate and a matter of policy
    - Cause in fact
        - Connects act with injury by asking did the defendant’s act cause the plaintiff injury?
        - Requires look at the evidence and drawing inferences what exists on the record
        - Pure question of fact

General Principles

- Standard approach: “but for” test
    - Would the plaintiff’s injury have occurred but for the defendant’s act?
        - If it would have occurred even in the absence of the defendant’s act then causation fails
    - Poses problems when there are multiple negligent parties and each act would have been sufficient to cause the injury in the absence of the others

        - In these cases, courts often find liability on the basis of "substantial factor" or "material contribution"
    - Burden of proof falls on the plaintiff
    - In some cases of causal uncertainty courts have been willing to find liability even when the plaintiff can not prove cause in fact
        - Usually in circumstances where the injury is intimately related to the risk the plaintiff created

Snell v Farrell (SCC 1990)

Facts: Medical malpractice suit for cataract surgery and right eye blindness

- Defendant doctor informed patient of risk and carried out surgery
- Noticed some discoloration but not signs of hemorrhage and continued with the surgery
- Retrobulbar bleed confirmed post-surgery, plaintiff in pain
- After nine months, vision lost in the eye and optic nerve atrophy is confirmed
- One possible cause for nerve atrophy is loss of blood flow from the pressure of the retrobulbar bleed
- Ms. Snell also had evidence of a stroke in her eye ball and had two pre-existing conditions; she also had severe glaucoma (fluid pressure), which can cause nerve atrophy, but could have been caused by the surgery

Procedural History:

- Trial found liability on the basis that in certain circumstances it was appropriate to shift the onus to the defendant to disprove causation, citing *McGhee v National Coal Board*, [1973] 1 WLR 1

Issue: Does the plaintiff in a malpractice suit have to prove causation?

Held: Doctor is liable; causation found

Ratio: Courts do not need to prove causation to a scientific standard, inferences can be drawn without formally shifting the burden of proof in instances where scientific proof of causation is absent

- Applies the but for test in a manner that acknowledges that scientific levels of proof are not necessary for causation and that a "robust and pragmatic approach" can be identified
    - Causation need not be applied with scientific certainty and both burden of proof and standard of proof can be "flexibly applied"
        - Look at probabilities, not certainties
    - Facts in a malpractice case fall primarily within the defendant's knowledge (medical evidence and expertise) yet we can work with the evidence and draw appropriate conclusions, through inference, without having to formally shifting the burden of proof
        - Nerve atrophy from the bleed is an inference the law can make, rather than scientific certainty
    - Look to see whether the defendant can draw any evidence to rebut the inference
        - Where the knowledge rests with the defendant and expert evidence can't conclusively prove causation, it is appropriate to draw inferences between the cause and the harm
        - Leave it to the defendant to point to alternatives that make more sense
- Not necessary to shift the onus to the defendant to disprove
    - Cites McGhee, which imports flexibility into the causation analysis by allowing, in circumstances where a defendant simply created the risk of a certain injury and that injury that then materialized, for the defendant to have to disprove causation

    - There are certain circumstances where alternatives will be required, but they are not required here
- No evidence that Snell's other health issues caused the stroke/atrophy, which is sufficient to draw the inference that the harm resulted from the operation, the continuation of which was negligent

Athey v Leonati (SCC 1996)

Facts: Athey (appellant) suffered back injuries in 2 motor accidents and then suffered a disc herniation during a mild stretching exercise. The herniation was determined to be caused by the two injuries and a pre-existing disposition.
Issue: Did the defendant's actions sufficiently cause the accident?
Held: Defendant is liable
Ratio: When the "but for" test is unworkable, courts will apply the "material contribution" test

- The negligence need not be the sole cause since "as long as the defendant is part of the cause of an injury, the defendant is liable, even though his/her act alone was not enough to create the injury"
    - Causation is established where a plaintiff proves to the civil standard (balance of probabilities) that the defendant caused or contributed to the injury
- When can apportionment occur?
    - Multiple Tortious Causes
        - Each tortious actor remains wholly liable to the defendant but they are permitted by legislation (Tortfeasors Act) to seek compensation and indemnification from each other
        - Plaintiff is still wholly compensated
    - Divisible Juries
        - Each tortious actor is responsible for the distinct and divisible injury that they caused
    - Adjustments for Contingencies
        - Future hypothetical events given a weigh based on their likelihood
        - Not to be conflated with past events
            - They are treated as certainties
            - Once the plaintiff reaches the burden that injuries contributed to their condition, causation is accepted as a certainty
        - Eg increase damages by 30% if it is 30% likely that the injury will worsen with time
    - Interdependent Intervening Events
        - Unrelated event occurs after the injury (and before trial)
        - Torts is about restoring to the "original position"; a true intervening event that is unrelated to the tort is an impact to the plaintiff's original position
        - Warner v Calgary Regional Health Authority
            - An independent intervening event is an event unrelated to the tort, such as a disease or a non-tortious accident that occurs after the plaintiff suffers injuries from the tort
            - A finding of an independent intervening event does not necessarily result in a break in the chain of causation and a finding of no liability

        - Can result in a reduction of damages which reflects the impact of the event and upholds the principle that a defendant must return the plaintiff to their original position
        - In essence, the intervening event changes the court's understanding of their "original position"
    - Thin Skull / Crumbling Skill Doctrines
        - Thin skull
            - A defendant is liable to a plaintiff for their injuries even if the injuries were unexpectedly severe because of a pre-existing condition
            - The defendant must take the victim as they find them with whatever peculiar weaknesses and predispositions they might have, and is liable even though the plaintiff's losses are more dramatic than they would be for the average person
        - Crumbling skull
            - Recognizes that a pre-existing condition can be inherent in the plaintiff's "original position" and a plaintiff need not be restored to a position better than their original position
            - Deals with a plaintiff that has an unstable pre-existing condition
            - The defendant need not compensate the plaintiff for the effects of their condition, which they would have experienced anyway
                - The defendant is liable for additional damage, but not the pre-existing damage.
    - Loss of Chance Doctrine
        - A plaintiff may be compensated when all that is lost is the chance of a favourable outcome or the avoidance of a detrimental outcome
        - Defendant asserted that they should only be liable for the increased risk of disc herniation. At trial, it was held that the accident contributed to the actual injury itself

- Application
    - Start with but for test
        - Move to looking at possible scenarios
        - This was a straightforward application of thin skull rule (accident exacerbated pre-existing condition)
    - The injuries played some causal role, even if minor
    - Did not find that the herniation could have occurred without the injuries

Resurface Corp v Hanke (SCC 2001)

Facts: Hanke (respondent) was the operator of a zamboni. He was badly burned when hot water overfilling the gas tank

- The vaporized gas ignited, causing an explosion and fire.
- Hanke sued Resurface Corp (appellant), the manufacturer of the machine.
    - He contended the gasoline and the water tank were similar in appearance and placed close together, making it easy to confuse them

Procedural History:

- Trial
    - The plaintiff was responsible for his own injuries and there was no negligent design that caused the damages. He admitted to knowing the difference between the two tanks – it was operator error
    - Applied the but for test
- Court of Appeal
    - Applied material contribution test
    - Argue there could be more than one potential cause for the injury

Issue: Is there causation?

Held: Causation not established

Ratio: But for test is the primary test. Material contribution only to be used in a few instances

- Impossibility of the plaintiff proving the defendant's negligence cause the injury for reasons beyond the plaintiffs control (eg scientific knowledge)
- Clear that the defendant breached a duty of care to the plaintiff, exposing the plaintiff to an unreasonable risk of injury in the form the plaintiff suffered (i.e., injury that occurred was the sort of injury the defendant exposed the plaintiff to)
- Use the but for still even in cases where there are multiple defendants or multiple potential causes of the injury

Clements v Clements (SCC 2012)

Facts: Defendants on a bike in the rain. Bike was about 100lbs overweight and defendant accelerated to 120km/h in a 100km/h zone to pass a car but lost control when the rear tire deflated

- Plaintiff was throw from the bike and suffered traumatic brain injury
- Expert testified that the accident would have occurred without the negligent act

Procedural History:

- Trial applied material contribution test
- Appeal applied but for test

Issue: Is there causation?

Held: New trial

Ratio: But for test is primary test

- Plaintiff needs to prove the negligence cause the injury
    - Uses corrective justice function to compensate the sufferer for negligence of the doer
- But for is the basic rule, but it can be displaced in exceptional situations
    - Where it is impossible to determine amongst various negligent actions/actors which caused the harm and corrective justice does not want a tortfeasor to escape liability
- Material contribution to risk" serves as a policy tool allowing the plaintiff to "jump the evidentiary gap" that can't be filled using the "but for" approach
- When to use material contribution to risk
    - Typically requires multiple tortfeasors, all are at fault, and one or more has actually caused the injury (globally, negligent)
    - The impossibility is that it cannot be determined which tortfeasor actually caused the harm
    - Avoid each tortfeasor pointing their finger at the others and saying "they did it"
        - Would defeat a finding of causation on a balance of probabilities against anyone

- Allowing recovery here achieves compensation, in a fair manner, that promotes deterrence by looking at the group of tortfeasors as a whole
- Is not meant to supplant the circumstance where the "but for" test can be used to determine which individuals amongst a group caused which type of harm

Cook v Lewis (SCC 1951)

Facts: Hunting party on Vancouver Island

- Cook (left), Akenhead (centre) and Wagstaff (right) advanced in a line
- Fitzgerald, who was to Cook's left, called out a warning for a clump of trees; the call was unclear but grouse emerged and both Akenhead and Cook shot; Lewis screams and emerges from the trees with bird shot in his face

Procedural History:

- Trial: Old rule that if the plaintiff can't prove which defendant cause the harm, neither will be liable

Issue: Is there causation?

Held: New trial

Ratio: Where both tortfeasors are acting negligently, and one caused the injury but it is unclear who, both should be held liable

- SCC looks to an American case (*Summers v Tice*): where each is negligent, as a matter of fairness, they should both be found liable
  - Has been infrequently applied by Canadian courts
- Instead of Material contribution, the American jurisprudence suggests that as a matter of negligence, they both were and should both be liable

Concurrent: The plaintiff establishing that one of the defendants shot him, the onus should shift to the defendants to disprove it was them. If they are unable, both should be liable

McGhee v National Coal Board (English 1972)

Facts: Brick kiln worker (who is usually a pipe kiln worker) got a diagnosis of dermatitis (sweating + micro abrasions + no washing)

- Sued the employer for negligence for not having washing facilities on sire
- Guy biked home after work, potentially exasperating some of the harm

Procedural History:

- Trial: Old rule that if the plaintiff can't prove which defendant cause the harm, neither will be liable

Issue: Is there causation?

Held: Yes, defendant liable

Ratio: Confuses the issues more than resolves them

- Problem is that the plaintiff couldn't prove how the dermatitis started.
  - But it is medically true that being made to bike home covered in grime and dust materially increases the risk. Liable!
  - This conflates material contribution to risk with contribution to injury given the medical evidence available (but for + contribution to injury)
- Legal causation is based on practicality
  - There is no difference in stating that the respondent materially increased the risk of the injury and stating that the respondent did make a material contribution to his injury

Concurrent: Would allow material contribution to be used and emphasizes what logical inferences are available to support a presumptive finding of causation

Fairchild v Glenhaven Funeral Services (HL 2002)

Facts: Plaintiffs suffer mesothelioma from the result of "either or both of two employers [exposing them to asbestos dust], but could not prove which of them had been the cause of the condition
Issue: Will either, or both employers be found liable?
Held: Yes, both will
Ratio:

- Side with the plaintiff in this situation of scientific impossibility to point to a specific harm
- Favour finding a route for compensation
    - Rather than avoid putting liability on a company who may have done nothing wrong
- The injury that results is the injury that the risk created
- But for test will not get us anyways because it cannot be proven which employer caused the cancer
- The issue with mesothelioma is that it has a long latency, it takes a long to show.
    - Most employers probably went out of business before the symptoms would show up

Sindell v Abbott Laboratories (Cali SF 1980)

Facts: Drug (DES) administered to pregnant women from the 1930s-1970s under the belief that it would reduce or prevent pregnancy complications (miscarriage)

- Results in serious complications for daughters born to mothers who were administered the medication
- Incidence of the particular cancer in question is between 30-90% and involves invasive and regular monitoring and observation
- Negligent in advertising and promoting the drug as safe without proper testing or warning or monitoring and reporting on adverse effects
- Complicated because over 200 companies made DES, any of which could have made the drugs that caused the injury

Issue: Will a plaintiff (injured in utero) who knows the type of drug but not the specific manufacturer of the pills taken by her mother be able to hold manufacturers that use the same formula accountable?
Held: Yes
Ratio: Market Share Liability can be used when assigning liability for products used by multiple suppliers and it is impossible to determine who caused the condition

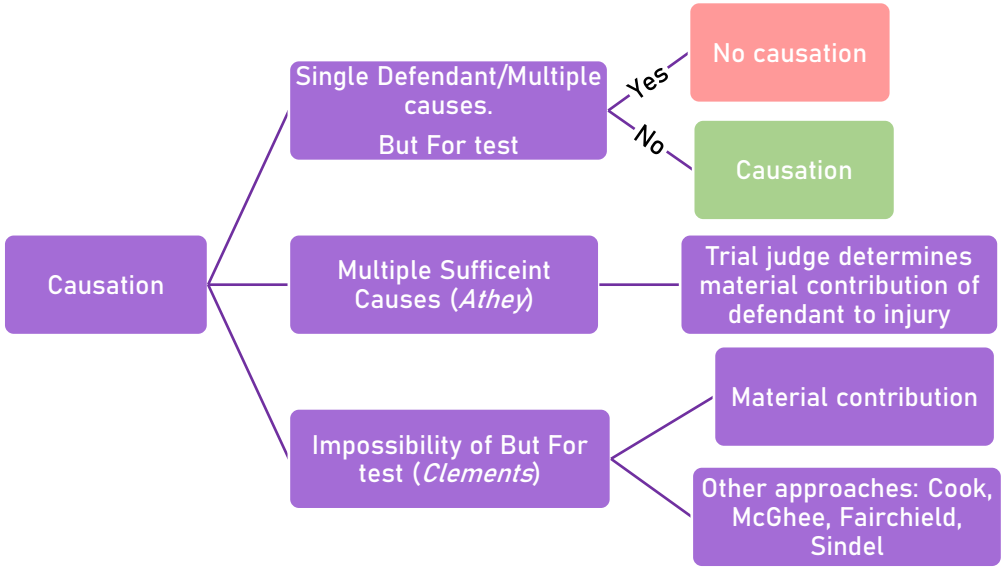
- Court is willing to be flexible in its application of the causation principles, observing that between an innocent plaintiff and negligent defendants, the negligent defendants should not be able to escape liability on causation
    - Plaintiff does not have to identify the specific manufacturer that provided her mother with the drug
- Market Share liability
    - Each defendant will be held liable for the proportion of the judgment represented by its share of that market that it held
        - Unless it can prove that its drug could not have harmed a particular plaintiff
            - For example, because the manufacturer was not operating when the plaintiff's mother consumed the product)

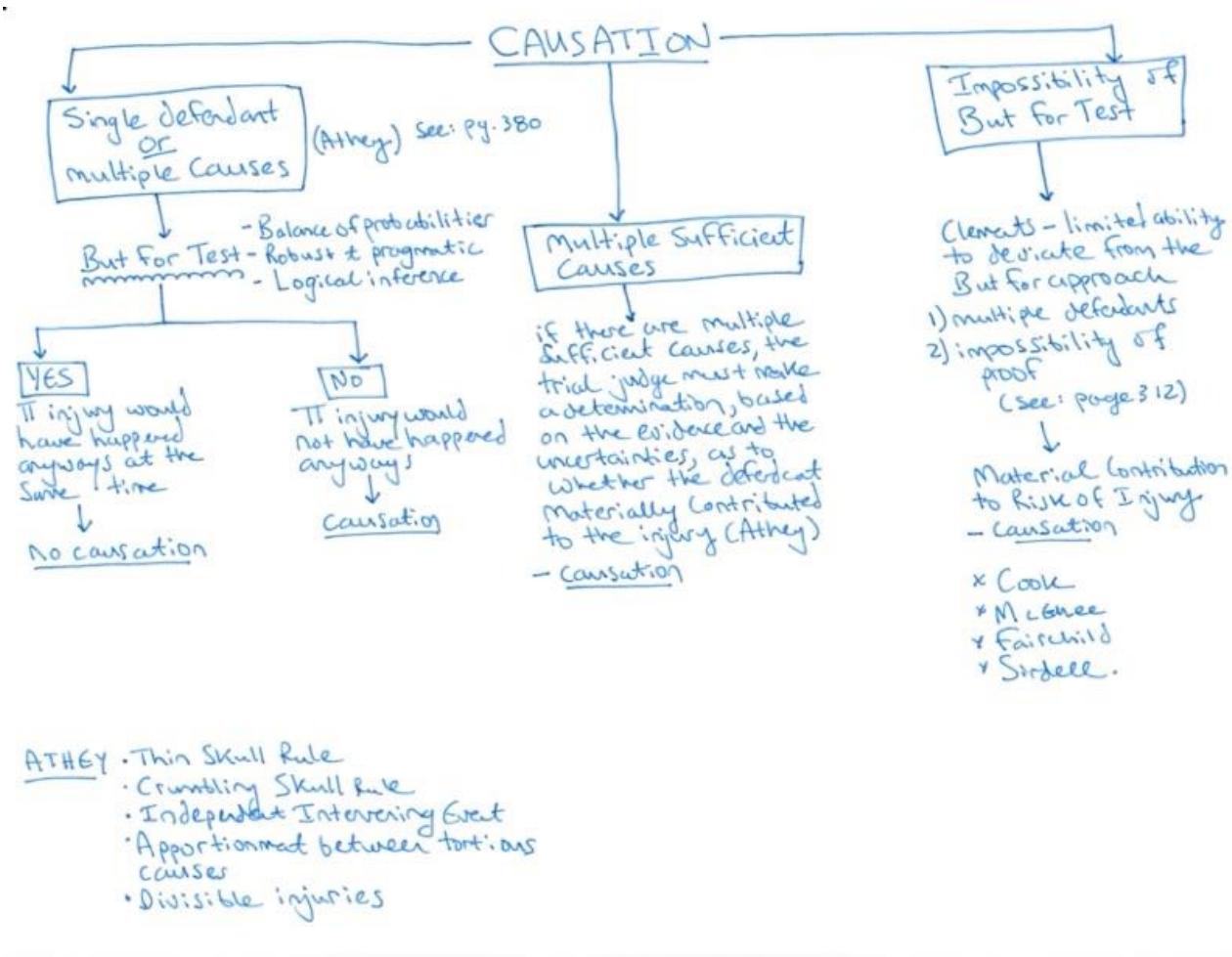
Dissent: This solution assigns liability to those who are truly tortfeasors but also those who are completely separate

- Negate the application of over 100 years of principled rationale requiring a matching of the defendant's conduct and the plaintiff's injury
- Concerned that these sorts of developments are justified on the basis of "deep pockets liability", which finds it more palatable for the rich to pay for the losses of ordinary citizens than for plaintiffs to be left uncompensated
    - Company's wealth should not indicate that they are more liable
- Plaintiffs are free to pick and choose their targets

Canadian context: This has only been applied under specific statutory causes of action created by provinces to recover damages from tobacco companies on the basis of relative market share

Causation Chart





Remoteness

- Even if a defendant is expected to take reasonable care for the protection of this plaintiff, and that duty has been breached, how far does legal liability of the defendant stretch?
- There are tests to try and explain remoteness but often comes down to common sense, pragmatism, policy and a court's view of its core function
    - Do we want to recognize and compensate in this particular circumstance?
    - Or is there something in the causal chain that suggests we should exclude liability
    - Core function division between compensatory approach or a gatekeeper of limits
- Explore remoteness after both duty and negligent conduct (breach of standard) have been establish
- Core is foreseeability
- Can raise both factual and legal questions
    - But the ultimate determinate resides with the jury as a question of fact

Re Polemis and Furness, Withy and Co (KB 1921)

- Dockworkers loading a ship dropped a plank of wood, which caused a spark, ignited some petrol fumes and burned down the entire ship

- Held that the stevedore company liable even though the fire was unforeseeable on the basis that liability would attached to all direct consequences of the negligence
    - Called the directness rule
    - The Court required directness and connectivity; anything connected the defendant can be held liable for

Overseas Tankship (UK) v Morts Dock & Engineering Co Ltd (1961)

Facts: Bunker oil negligently discharged into the Sydney Habour from the Wagon Mound (ship owned by Overseas)

- It spread across the harbour where it was ignited on the water after a spark from a welding operation (Morts) contacts a rage floating in the water/oil
- The ship and wharf burnt down

Issue: Duty, breach and causation established, what is the appropriate extent of the defendant's liability?

Held: Not liable

Ratio: New rule for remoteness: Essential factor in determining liability is whether the damage is of such a kind as the reasonable person should have foreseen

- Damages that are unforeseeable are unpreventable and not compensable
    - Directness is not in line with modern conceptions of fairness or justice
- No liability on Overseas because the fire was not reasonably foreseeable
    - Reasonable dockworkers would not know this discharge into the aquatic environment would result in a fire
- This overturns Re Polemis
    - Arguably not in line with loss distribution function of modern tort law and remained ambiguous as the directness rule

Hughes v Lord Advocate (HL 163)

Facts: Cable workers on subterranean infrastructure on a road. Canvas tent erected around the manhole with four lanterns as warning signals

- The lanterns have a combustible wax/gelatin and open flame
- Workers go for tea, cover man-hole loosely and take out ladder.
    - Negligent because they ought not to have left that worksite unattended.
- 2 boys arrive, take a lantern, put the ladder down and go exploring
- Way back up, one the of boys knocks the lantern into the hole and the boy falls in. Lantern explodes and 30-foot fire, boy suffers very bad burns. Boy sues for negligence.

Procedural History:

- Trial: no liability because fire was unforeseeable (big body of water).
- Appeal: Liability based on directness test and Re Polemis (Morts successful in getting damages hear, Overseas appeals)

Issue: Were the injuries foreseeable enough to ground a negligence claim?

Held: Yes

Ratio: Only way defendants can escape liability is it the type of injury differs that which is foreseeable; no matter how serious the injury is, if the type is foreseeable, that isn't remote enough to negate liability

- The unguarded manhole lit by lanterns is expected cause the kind of damage that occurred (burning)

    - Just because it was more significant harm than might have been foresee does not serve as a defence
- Narrowed the applicability of Wagon Mound 1 and generally been favourably applied in Canadian courts
    - Much more liberalized view of foreseeability

Smith v Leech Brain (QB 162)

Facts: Mr. Smith is a labourer. He gets a splash of molten lava on his lip which causes a burn and turns cancerous, spreads, and ultimately kills him

- He may have had a pre-malignant condition that rendered him susceptible from a previous job; but equally likely he would have developed cancer in any event
- Court is satisfied that negligence has been made out (was working behind an iron shield but it should should have been replaced by an operator box and but for the burn he may have never developed a cancerous lesion)

Issue: Was the harm too remote to be compensated?

Held: No, defendant liable for damages to Smiths widow

Ratio: A plaintiff with a thin skull will not negate liability, even if their outcome is severe

- The defendant need not have to reasonably foresee the cancer; all they need to reasonably foresee is the kind of harm
- *Wagon Mound* logic does not apply where the outcome was unforeseeable to a particular plaintiff because of a condition that he or she had; only for situations when the foreseeable connection between action and outcome is unreasonable

Mustapha v Culligan of Canada (SCC 2008)

Facts: Claimant was changing a Culligan water jug and sees a dead and decomposing fly in the water jug that he is about to install.

- He becomes obsessed and revolted and enters into a major depressive state with associated paranoia and anxiety

Issue: Was the recovery for "nervous shock" too remote to be compensated?

Held: Yes, defendant not liable

Ratio: The 'psychological disturbance' that amounts to physical harm as psychological injury must be distinguished from 'psychological upset' which everyone experiences.

- Personal injury means serious trauma or illness
    - The law does not recognize upset, disgust, or anxiety that does not amount to personal injury as compensable harm
- Remoteness asks whether the "harm is too unrelated to the wrongful conduct to hold the defendant fairly liable" and that what is required is "foresight of the reasonable[person which alone can determine responsibility"
    - Looking further for compensation would be too remote
- Remoteness requires that, to be compensable, the damage must be reasonably foreseeable (viewed from the perspective of the ordinary person)
    - Foreseeability is objective in nature
- If it is proven that the ordinary person would suffer harm, then any damage they suffer will be compensable (thin skull); reasonable foreseeability is a threshold test

- New: If the defendant knew that this plaintiff had a particular sensitivity, then they could argue that harm was reasonably foreseeable

Notes:

- Situations where nervous shock has been compensated
    - Fear for personal safety
    - Fear for the personal safety of children
    - Trauma from witnessing an accident or its immediate aftermath
        - Directly or through media if the necessary connection exists

Intervening Forces

- Novus actus intervenes ("new intervening act"
    - When does the negligent act of a third party, or subsequent negligent act by the plaintiff, intervenes between the defendant's conduct and the plaintiff's injury break causation?
    - Courts will ask whether the intervening negligence was within the risk of harm set in motion by the defendant's initial negligence and thus was reasonably foreseeable (i.e., not too remote to be compensable)
    - The original defendant will not be responsible for the loss that results from unforeseeable intervening negligence
    - Question of remoteness of damage

Bradford v Kanellos (SCC 1973)

Facts: Bradford (appellants, husband and wife) were customers at Kanellos (respondent) restaurant in Kingston. A flash fire occurred in the grill, which was equipped with an automatic fire extinguisher that used carbon dioxide. As such, the fire was extinguished quickly and caused no damage.

- The CO2 made a popping noise that caused one customer to yell that there was going to be an explosion which caused a panic and the wife was pushed and experienced an injury.
- The appellants brought action for the sustained injuries
- Trial found the restaurant liable

Issue: Was the injury sustained by the plaintiff too remote to ground the negligence claim?
Held: Yes, defendant not liable
Ratio: When there are safety measures that prevent dangerous outcomes from potentially negligent acts, the improbable outcomes that arise from it cannot be attributable to the first negligent act

- Injuries that relisted from the customers hysterical reaction to the kitchen fire and the outcome was not reasonably foreseeable
    - Restaurant was negligent in letting oil build up in the grill but offset that negligence by using an extinguisher to satisfy their standard of care
- The negligence must result in an injury in of in of itself

Dissent: The human who shouted was acting in a reasonable way considering the hissing noise, such that the panic and the injury were reasonably foreseeable

Wright Estate v Davidson (BCCA 1992)

Facts: Plaintiff in a motor accident of some kind and sustained soft tissue damage. After the accidents, Wright committed suicide 9 months later due to anxiety and depression
Issue: Was the suicide a foreseeable consequence of the accident or was it a *novus actus*?

Held: Actus Novus, defendant not liable

Ratio:

- Necessary to consider her state of mind and decision-making capacity.
- Wright made a conscious decision to take her life and her mental state was not disabled by the injuries suffered in the accident
    - No disabling mental illness indicative of a lack of capacity
    - Her suicide was not a reasonably foreseeable consequence of the accident and was a novus actus

Costello v Blakeson (BCSC 1993)

Facts: Plaintiff in a motor accident of some kind and sustained soft tissue damage. After the accidents Costello attempted suicide 9 months later and she suffers severe and permanent damage

Issue: Was the suicide a foreseeable consequence of the accident or was it a *novus actus*?

Held: Foreseeable consequence, defendant liable

Ratio:

- This case distinguishes from *Wright* by virtue that Costello had a pre-existing, mentally disabling mental health condition.
- As such, she qualifies for the Thin Skull Rule. This means it is not an actus novus, so there is no independent intervener.
    - The suicide was a reasonably foreseeable consequence of the accident.
    - She was in a fragile state, exacerbated by the accident that led to her suicide
        - Impacted her ability to make rational or logical decisions

Public Policy

Palsgraf v Long Island Railroad Co

Facts: Two men run to catch a train, carrying a package of fireworks. One man was unstable when he jumped on the train and a guard tried to grab him but caused the package to dislodge

- Fireworks exploded and caused a weigh scale to be thrown down onto the plaintiff who was standing on the platform and got injured

Dissent: Address remoteness

- What is needed is damage that is “so connected with the negligence that the latter may be said to be the proximate cause of the former”
- What is meant by “proximate” is difficult to define, which may be attributable to the fact that it is employed by courts for a public policy purpose: to decline to trace a series of events too far
- To qualify, a proximate cause must be something “without which the event would not happen”
- Would have found liability on the basis that the negligent act of knocking the package onto the train platform was necessary for the injury
    - Broad interpretation
- Judge finds that liability should only be declined if tracing of events is too much of a stretch. Stretching too far back breaks the causal chain and goes to intervening factors and remoteness

Lamb v London Borough of Camden (QB 1981)

Facts: Lamb went on a trip so he sent agents to check on her London home. The house was falling apart, so she asked the guards to put boards up. The City was repairing land around her house and a waterline broke and flooded her house

- The house was then vacated, so squatters eventually moved in.
    - Squatters damaged the house
- She claimed negligence against the city for the damage the squatters imposed and the flood

Issue: Can recovery occur for the damages incurred, or are they too remote?
Held: Too remote, defendant not liable
Ratio: Foreseeability and public policy both need to be considered when assessing if damages should be granted

- Duty, causation, and remoteness are all tools that a court may use to limit the scope of negligence liability
- Each is a policy decision made by the judge
- Who has the responsibility to defend against and keep out squatters? (The owner)
- Further, the malicious acts should be compensable by insurance (not the courts)

Concurrent: Endorses a robust and sensible approach to remoteness that will produce an "instinctive feeling that the event or act being weighed in the balance is too remote to sound in damages for the plaintiff". Has an instinctive feeling about this situation

Defences

- Unless the defendant can succeed in establish a defence, the plaintiff will be entitled to full compensation

Contributory Negligence

- Unreasonable conduct on the part of a victim which, along with the negligence of others, has in law contributed to the victims own injuries
    - This is a partial defence
- Premised on the idea that one has a duty to protect themselves as well as others
- Do not need to contribute to the accident to constitute contributory negligence; sufficient to be a causal contributor to the injuries sustained
    - Eg not wearing a seatbelt and getting in a car accident
- Negligence depends on the breach of duty, but contributory negligence does not. Negligence is a person's carelessness with a breach of duty, but contributory negligence is a persons carelessness in looking after their own safety.
    - They are guilty of contributory negligence if they ought to have foreseen that, if they did not act as a reasonable prudent person, they might hurt themselves
- Goals
    - Justice
    - Deterrence
    - Education
    - Recognition that tortious compensation is not a social safety net but rather the remedy that compensates for fault
- In theory, the standard is set at the reasonable person standard, but in practice courts tend to be a bit forgiving given that finding contributory negligence alters compensation and tort law's loss distribution function
- Available at both common law and through statute; in both instances, the relevant inquiry is whether the plaintiff's negligence
    - (1) contributed to the accident itself;

- (2) involved self-exposure to risk to involvement in an accident; or
- (3) involved failure to take precautions to prevent or minimize possible injuries should an accident occur

Butterfield v Forrester (KB 1809)

Facts: Plaintiff riding on his horse carelessly but not intoxicated. Defendant doing construction on his house and created an obstruction on the road

- Horse tripped on a pole and suffered damage

Issue: What portion of damages would the plaintiff be entitled to?
Held: Defendant not liable, plaintiff was negligence
Ratio:

- Jury found that the plaintiff was negligent in his riding. He thus contributed to the injury. It is only from that that he should not be able to seek damages if he did not use ordinary caution himself.
  - The defendant was being problematic, but comparing the plaintiff's unreasonable behaviour, he cannot recover for riding on the hazard and inviting the harm onto himself
- Harsh application, no apportionment

Davies v Mann (1842)

Facts: Davies (plaintiff) left his donkey shackled to the side of the rode, in a way that let it wander out. The donkey was then run over by Mann who was driving at a 'smartish pace'.
Issue: What portion of damages would the plaintiff be entitled to?
Held: Defendant liable
Ratio: Last Chance Rule: if the defendant was the last person to be able to avoid the accident, but instead acted negligently, can be held liable.

- If the defendant had the last chance to avoid the collision with the donkey (slowing down, swerving), then the plaintiff should be able to recover.
  - The defendant could have avoided the accident by exercising reasonable care

Notes:

- The common law's approach to contributory negligence developed alongside tensions in the expansion of negligence, growth in compensatory awards and changing societal relationships that were now subsumed within tortious duties of care

Contributory Negligence Act

- Every province has legislation that departs from the common law
- Only applicable to negligence actions (not intentional torts)
- Default is 50-50 responsibility between plaintiff and defendant
- Use the statute first, then common law

Section 1 – Apportionment of Liability

(1) When by fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this section operates to render a person liable for damage or loss to which the person's fault has not contributed.

Section 2 – Determination of degree of fault

(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.
(2) When 2 or more persons are found at fault, they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

Section 3 – Questions of Fact

In every action,

(a) The amount of damage or loss,
(b) The fault, if any, and
(c) The degrees of fault,

Are questions of fact.

Section 3.1 – Last clear chance rule not applicable

This Act applies if damage is caused or contributed to by the act or omission of a person, whether or not another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

Notes:

- Section 1 states that responsibility for loss/damage will be proportional to the negligent fault.
    - If you are responsible for 70% of damage (not fault!) you will pay 70%
- If it is not possible to determine proportions, liability will be apportioned equally (s1(1)).

- Section 2 lays out that if there are a series of events, contributory negligence will not be applicable to all losses, only to those which the person's fault has contributed to.
    - Contributory negligence may only be available in the absence of seatbelt/helmet, but there could be other damages (property damage) that would not be attributable to the contributory negligence of the party.
    - This section was drafted poorly so not widely applicable.
        - This act remedies the common law, it is no longer just all or nothing.

- Section 3.1 does away with the last chance rule, so it no longer applies in Canada.

Galaske v O'Donnell (SCC 1994) – Seat Belt Cases

Facts: Appellant was in the car to visit the respondent's vegetable garden. The appellant was a little boy, and he sat between the respondent and his father, but no one wore seatbelts. The respondent did not say anything to force their seatbelts

- The respondent approached a busy interaction and got hit by a car
- The father died and the kid was rendered paraplegic

- There was expert evidence that if the seatbelts were worn, the injures would not have occurred

Issue: Can damages be apportioned based on contributory negligence?
Held: Plaintiff contributory liable
Ratio: It is usually negligent to not wear a safety device, and drivers are expected to encourage passengers to buckle up

- Drivers are expected to encourage youth who are in their vehicle to wear their safety devices, even if there is a parent present, because the driver shares in this responsibility
- The court looked to a "sensible and compelling" apportionment of liability and reduction of damages between 5-25% for contributory negligence
- To qualify as contributory negligence, the failure to wear the seat belt must have been a causal factor in the injuries
- Presence or absence of legislative requirement to wear a safety device is not determinative for contributory negligence, but it does provide guidance on a reasonable standard of expected conduct
- Failure of parents or drivers to ensure a child is using a safety device properly (or at all) may be negligent

Voluntary Assumption of Risk (Volenti)

- Has declined in importance with the availability of contributory negligence
- If successful, it exonerates the defendant of liability (full defence!)
- Arises in the situation where two or more people agree to participate in an activity that involves the risk of injury and they consent to give up their right to sue if injury occurs
- The agreement can be express (by words) or implied (by conduct) and must be entered into in advance of the activity
    - Express agreement
        - Waivers
        - In *Sundance*, waivers are not always sufficient since it was unsuccessfully brough to the plaintiff's attention.
            - This is why you have to initial everywhere, so they bring attention to every point
    - Implied agreement
        - A court has to locate consent in actions/behaviours.
        - This has been argued in drunk driver/willing passenger cases.
            - The defendant has to prove that in addition to willingly accepting the ride the passenger also agreed to absolve the defendant of liability
- Why does it abolish all liability?
    - It goes to the core of whether there can be a duty of care between people when such a duty has been waived
    - It qualifies the duty between the parties (what can reasonably be expected in the circumstances and what constitutes a breach)
    - It is a true defence meaning it will be argued after negligence (duty and breach) have been proved and operates to extinguishes liability
- This defence has been argued successfully in instances of joint participation in unreasonably dangerous activities, many (but not all) of which involve criminal activity

Dube v Labar (SCC 1986)

Facts: Dube and Labar are coworkers. One evening, they engage in a night out drinking. They switch roles as driver and passenger, pick up hitch hikers.

- They drive carelessly and crash
- The passenger who was the driver initially, sues the driver who was initially the passenger.

Issue: Was the passenger voluntarily assuming the risk?

Held: Yes; volenti established

Ratio: Volenti is only available in limited circumstances where, expressly or by implication, the plaintiff, who knows of the virtual certainty of risk of harm, absolves the defendant of liability

- Need to prove on the evidence plaintiffs has both awareness of the circumstances and of the consequences of his actions
- Plaintiff needs to be aware of virtual certainty of harm and they act in a way that absolves the defendant of all harm
- The voluntary nature needs to be such that they accepted the relinquishment to sue
    - This is a very high threshold
- Even if volenti was not possible, contributory negligence would still be possible

Illegality (Ex Turpi)

- Has been virtually eliminated from application in Canadian tort law in cases where negligence causes harm and compensation is being sought
- This defence states that the plaintiff cannot bring action if the incident arose from their own tortious behaviour

Hall v Hebert (SCC 1993)

Facts: Hebert (vehicle owner) is drinking with Hall (driver). They consumed many beers and Hall was driving down a gravel road. They try to start the car using a rolling start, which ends up overturning the vehicle in the ditch

- Hall discovers he has head injuries, sues Hebert as the vehicle owner in negligence for allowing him to drive
- BCCA accepted the illegality defence in situations where the plaintiff's conduct giving rise to the claim is so tainted by criminality or culpable immorality that public policy justifies dismissing the claim

Issue: Is Hebert able to use the ex turpi defence against Hall?

Held: No; ex turpi not allowed

Ratio: Ex turpi cannot be used to circumvent criminal act or profit off of the system

- Application of defence construed very narrowly
    - The goal is to preserve the integrity of the justice system
    - Should be applicable to circumstances where a plaintiff would be allowed to recover or profit from illegal/wrongful conduct (e.g., a drug dealer claiming for lost wages as a head of compensatory damages after a motor vehicle accident); and should remain as a limited defence
        - Duty of care is all or nothing. Exists or nothing. So the reason why illegality is a defence so the dealer could still bring a personal injury claim, just preventing the loss of wages claim. Couldn't do that under duty of care
    - Tort law exists to compensate victims of negligent conduct and this should not be eliminated by illegality/a wrongdoing plaintiff

Concurrent: E*x turpi* should be eliminated as a defence

- the issue of criminality could be weighed in Stage 2 of the *Anns*/*Cooper* as a policy matter and, in this circumstances, he doesn't see the plaintiff's intoxication as a bar to recovery for personal injury

British Columbia v Zastowny (SCC 2008)

Facts: Plaintiff is incarcerated for break and enters that were done to support a drug habit. While in jail, he is sexually assaulted by a prison official. Upon release, his drug addiction escalated and he spent the majority of the next 15 years in jail

- Interactions were from the results based on psych evidence
- Plaintiff brought action for damages associated with the sexual assault, and included in the claim for damages compensation for lost wages while incarcerated

Issue: Ex turpi?

Held: Not allowed

Ratio:

- Application of *ex turpi* in a limited circumstance; no ability to seek compensation while incarcerated (unless wrongfully convicted)
    - Would erode the principles of fundamental justice
- Incarceration is the result of illegal activity, and that includes giving up certain things, including making a living wage.

Rankin (Rankin's Garage & Sales) v J.J (SCC 2018)

Facts: Two minors stole an unlocked car from a commercial garage. The garage had not been secured, and the keys to the car had been left in the car's ashtray. While driving the car, the unlicensed minor crashed and his passenger suffered a severe injury.

- Injured boy sued the commercial garage owner, the driver and the driver's mother

Issue: Ex turpi?

Held: Not allowed

Ratio:

- Majority established no duty of care
- SCC re-visits whether illegality can sever a proximate relationship or negate a *prima facie* duty of care
- Rankin's Garage argues that the plaintiff's illegality should preclude the finding of proximity or, alternatively, negate a *prima facie* duty. Rejected
    - Tort law does not seek to punish wrongdoing in the abstract
    - Rather, private law is corrective and based on compensation for harm that results from the defendant's unreasonable creation of the risk of that harm.
    - If the mere fact of illegal behaviour could eliminate a duty, this would effectively immunize negligent defendants from the consequences of their actions.
        - Seriously injured victims would be entirely denied recovery, even when the defendant bears most of the fault
    - While illegality can operate as a defence to a tort action in limited circumstances when it is necessary to preserve the integrity of the legal system, this concern does not arise in the circumstances of this case

        - Plaintiff wrongdoing is integrated into the analysis through contributory negligence, as occurred here

Limitations Periods

- Plaintiff brings action outside the limitations period
    - A defendant will be immune no matter how liable they would have been
- No claim can be brough either a) 2 years after the defendant knew (or ought to have known) that the claim first arose (all three i, ii, iii need to be met for the 2-year clock to start, see below act), or b) 10 years after the claim arose (ultimate limitation period)
    - 2 years has discoverability, 10 years does not
        - The 10-year ultimate limitations period commences at the time of the act/omission and does not depend on discoverability so a claim will be statute barred after 10 years regardless of whether the prospective plaintiff knew or ought to have known
        - Certain claims are not going to be apparent on their face.
        - Unlike egregious assault or trespass, what happens when you try to take action against a construction company that did negligent work but you could not have known until the issue presented itself
            - The issue could arise 5 years after construction, so the 2 years is not an ultimate period of liability and discoverability extends the period
            - The act tells us that the period starts when 1) the injury that is 2) attributable to the defendant and is not 3) de minimis. All three are needed for the clock to start. From this point, the person has 2 years
            - But discoverability can only extend within the 10-year period
        - If construction occurred but negligent issues do not present until 12 years after, the complainant will be statute barred from civil action against the construction company.
- Once the limitations period expires, the claim is statute barred
- Courts do not have discretion to extend a limitations period
- Running of the clock can be paused if
    - The claimant is a minor (s.5.1)
    - If the claimant has a disability or is a dependant adult (s.5(1))
    - If there has been fraud by the defendant to conceal the claim (s.4)
- There is no limitations period for a sexual assault/sexual battery/sexual misconduct claim (s. 3.1)
- Claims for contribution by a named defendant are also subject to a 2/10 rule in s. 3(1.1), being able to commence a claim within the earlier of:
    - (1) the date on which the claimant was served with a pleading by which a claim for the injury is brought against the claimant *or* the date on which the claimant first knew, or in the circumstances ought to have known, that the defendant was liable;
    - (2) ten years after the claim of contribution arose

Limitations Act

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

Or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Damages

- Goal is to restore the plaintiff to the position that they would have been in had the wrong not occurred (*restitutio in integrum*)
    - Not possible for personal injury
        - The best a court can do is to make the defendant pay a sum in compensation (money is the proxy to make whole)
- Finding an appropriate sum is meant to be ascertainable by calculation, but this is difficult
- Two major categories
    - **Compensatory damages:** recompense for harms that have been suffered and that are the direct result of the tortious act; this category can include injury, property damage, lost opportunity
        - **Pecuniary damages:** Quantifiable, court cant look to statistics for mathematical approach
            - **Special Damages:** expenses, services incurred leading up to the trial
                - Medical costs, repair costs, loss of work costs
            - **General Damages:** damages or losses from the accident
                - Medical expenses, future care costs, lost wages, loss of prospective earning potential, physical damage
        - **Non-pecuniary Damage: N**on-quantifiable damages
            - Pain and suffering, impairment of life or mental abilities, emotional or mental distress, impairment of relationships
    - **Non-compensatory Damages**
        - **Punitive damages** - to punish the defendant and further deter egregious behaviour
        - **Aggravated damages** - to recognize and compensate this particular plaintiff's feelings/anxiety/mental shock beyond what is quantified as monetary losses
        - **Nominal damages** – awarded when there is only a slight infringement or minimal impairment of legal rights and are offered to commemorate the plaintiff's success in court (Not awarded in negligence actions since harm/damage is a necessary element of the tort)

Andrews v Grand & Toy Alberta Ltd (SCC 1978)

Facts: Personal injury involving Andrews rendered quadriplegic in a traffic accident for which Anderson, through Grand& Toy (defendant) were found partially liable.

- He had a dislocation of the cervical spine, compound fracture of tibia and left humerus, fracture left patella, left radial nerve was damaged, lesion of spinal cord.
- Paralysis involving most of the upper limbs, spine and lower limbs
    - He did not have normal bladder, bowel and sex functions
    - He had no chance of improvement
- Andrews was 21 years of age and unmarried; he was an apprentice for the City of Edmonton.
- The trial found he was 25% contributorily negligent, 75% was Grant & Toy

Issue: What sort of damages are available to the plaintiff?

Held:

Ratio:

Pecuniary losses

- Future Care
    - In home ($4,000/month) or institutional ($1,000), Plaintiff requested in home, SCC awards in home
    - Plaintiff does not have a duty to mitigate the damage award by accepting a lesser standard of care
    - Social burden of the expenditure should not weigh in the decision, especially since costs are largely dissipated through insurance programs
        - Minimizing the social burden of expense may be a factor influencing a choice between acceptable alternatives. It should never compel the choice of the unacceptable
        - Perspective, preferences and context of hospital auxiliary make it worse; it would have a huge impact on his life
        - He is 23, in full faculty and he would be surrounded by terminal people, and that is not conducive to his quality of life
            - Would exacerbate his mental anguish
    - Life expectancy
        - Acceptance that the life expectancy of a 23-year-old quadriplegic would be statistically speaking 5 years less than the statistical grouping of 23 year old's
    - Contingencies of life
        - Something added or taken away where payment is not needed
        - Speculative measures that looks to discount or add to the future care on the basis of either government benefits or periods where care isn't needed for a particular reason
        - Periods of intense hospitalization will occur, so he will not need at home care then. Take 20% off
- Prospective loss of earnings
    - Level of earnings
        - He was making $830/month at the time of accident
        - The maximum he could get is $1,750/month
            - Split the difference and give $1,200/month

    - Length of Working Life
        - He would retire at 55 with a full pension if he stayed in that position.
        - No discount for potential post-accident mortality
        - 30.81 years working going forward
    - Contingencies
        - What could have impacted future earning capacity?
        - Illness, unemployment, accidents, depression in business
        - Evidence shows 20% reduction is questionable but maintained
    - Duplication of the cost of future basic maintenance
        - Cost of food, shelter, and clothing is included in the cost of future care category, so no need to duplicate this expense in the category where these expenses would normally be incurred from
        - Reduced by 53% to $564/month
- Considerations relevant to both future care and loss of earnings
    - Capitalization/inflation
        - Award will be a lump sum, so there should be adjustment to account for inflation and rate of return in investments
        - Ignoring inflation is unfair to plaintiff, so offset needed for rate of return on long-term investments and adjusts for future inflation
        - 10% investment rate, 3.5% inflation so discounts award of 7%
    - Allowance for Tax
        - Largely governed by relevant legislation, including the *Income Tax Act*, so no tax deductions here

Non-Pecuniary Loss

- Monetary evaluation of these losses is a philosophical and policy exercise more than a legal or logical one
    - Must be fair and reasonable but also of necessity be arbitrary or conventional
    - No money can provide true restitution
- Area of damages that is susceptible to extravagant claims as seen in the United States
- Requires moderation. Three competing approaches
    - Conceptual approach: each attribute or faculty is a proprietary asset (e.g., English tariff system: King Alfred – a thumb is worth 30 shillings)
    - Personal approach: measures the impact on personal happiness to the person in question
    - Functional approach: accepts personal impact but looks for a measure of compensation that serves as "reasonable solace for the misfortune"
        - Since the expenses needed to make life "endurable" are calculated in other ways (i.e., future care), this looks to determine what is necessary above and beyond that
        - What is needed above and beyond the necessities accounted for under the pecuniary head of damages
        - Loss of enjoyment, loss of ability to establish relationships
- Look to qualifiers such as "loss of amenities" and "enjoyment" or "expectation of life" and set it at <u>$100,000 (cap for this sort of loss)</u>

- $400,000 is now the current cap for non-pecuniary damages awards

McCabe v Westlock Roman Catholic Separate School District

- Plaintiff a 16 year old girl who was rendered quadriplegic in grade 11 gym class
- Court found the teacher and the district 100% liable for her injuries
- Issue was that the trial judge used male actuarial wage tables rather than female ones to assess McCabe's loss of future income
    - Decided due to historical inequities between women and men, it would be inappropriate to assess McCabe's loss of future earning capacity on the basis of actuarial tables for contingencies for women. Thus, she calculated McCabe's damages based on contingency tables for men.
- The court found that they should not have used male tables, since she wanted to have children and stay at home with them, so she could not work typical male physiotherapist schedules
    - While principles of equality should inform tort law, the learned trial judge's application of equitable principles resulted in her ignoring some of the relevant material facts
    - There was no evidence to indicate it was more likely that McCabe would not have had children and chosen not to take time off from full time paid employment as a physiotherapist. Thus, it would be inappropriate to apply male contingencies to her when there was no evidentiary basis that she would have worked a typical male pattern
- ***McLean v Parmar*, 2015 ABQB 62** – non-gendered actuarial tables for loss of future income as an accountant

Minor Injuries

- Insurance Act authorizes the promulgation and regular update of the *Minor Injury Regulation*
    - This system, in force in Alberta since 2004, sets a legislated cap on non-pecuniary general damage awards (pain and suffering) for "less severe" soft tissue injuries that do not have long term impact
        - Soft tissue: ligaments, muscles, tendons
        - Injury types: sprains, strains, whiplash, temporal mandibular jaw disorders and associated psychological conditions
    - There is no cap for compensation for pecuniary general damage awards for the same accident and, further, if an injury presents as a serious impairment that impacts employment, education or training then the cap will be excluded
        - As of January 1, 2022, the cap is $5,488

Survival of Actions and Dependents Claims for Wrongful Death or Injury

Fatal Accidents Act

Section 2 – Actions for Damages

When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

Section 3 – Persons entitled to benefits

(1) An action under this Act,

(a) Shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and
(b) Shall be brought by and in the name of the executor or administrator of the person deceased

And in action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death

Section 5 – Death of Person Liable for Damages

(1) If a person dies who would have been liable to an action for damages under this Act had the person continued to live, then, whether the person died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default, an action may be brought and maintained or, if pending, may be continued against the executor or administrator of the deceased person.

Section 7 – Damages

If an action is brought under this Act and if any of the following expenses and fees were reasonably incurred by any of the persons by whom or for whose benefit the action is brought, then those expenses and fees, in a reasonable amount, may be included in the damages awarded:

(a) expenses incurred for the care and well-being of the deceased person between time of injury and death;
(b) travel and accommodation expenses incurred in visiting the deceased between time of the injury and death;
(c) expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection with the funeral and disposal;
(d) fees paid for grief counselling that was provided for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person deceased.

Section 8 – Damages for bereavement

(1) In this section,
  (a) 'child' means a son or a daughter
  (b) 'parent' means a mother or father
(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of
  (a) subject to subsection (3), $82 000 to the spouse or adult interdependent partner of the deceased person,
  (b) $82 000 to the parent or parents of the deceased person to be divided equally if the action is brought for the benefit of both parents, and
  (c) $49 000 to each child of the deceased person.

Notes:

This is a long way to set out the limits of compensation for a fatal injury

- Overall, you can claim as the estate of someone deceased (s3)

    - Common law said that cause of action died if the party did, so this is gone
    - Action is brought on behalf of individual's executor and estate
- Damages
    - Closed list, so does not apply to friends
    - These are on the more non-pecuniary side of things
- Bereavement: limited to child or payment
    - This is the pecuniary side of things
- This is action pursuant to legislation, not the common law
- Section 5(1)
    - If the negligent driver in a car accident also perishes, doesn't extinguish the ability to have a cause of action

Survival of Actions Act

Section 5 – Recovery of Damages

(1) If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or the deceased's estate are recoverable

(2) Without restricting the generality of subsection (1), the following are not recoverable:

(a) punitive or exemplary damages;

(b) damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities;

(c) damages in relation to future earnings, including damages for loss of earning capacity, ability to earn or chance of future earnings.

(1) Subsection (2)(c) applies only to causes of action that arise after the coming into force of this section

Notes:

- General common law rule was that causes of action did not survive for or against a deceased person
- This legislation reverses that common law position and allows actions to survive for the benefit of, or against, a deceased person (via their estate) (ss. 2 and 3)
    - This act is not for dependants
- The executor of the estate stands in and will continue the action for or against the estate; if no personal representative exists, the court will appoint one
- Usually to compensate damages that have been incurred against the state

Flow Charts

Fault → the failure to act reasonably or in accordance with the law/duty.
- → Can be an act or omision
- → different torts have different fault expectations.
- → must be proven to find tort liability.

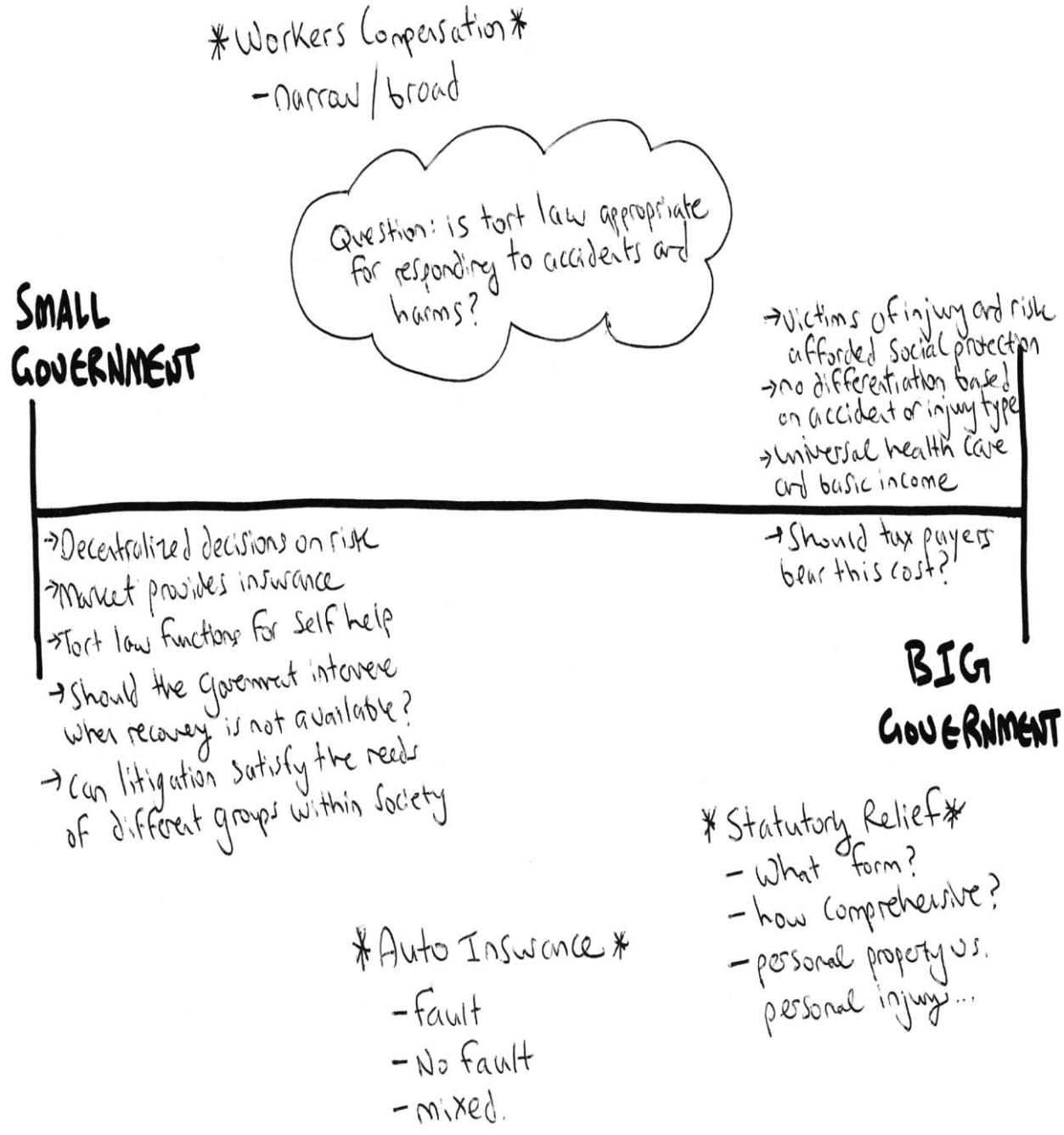
→ how do we conceive of fault?

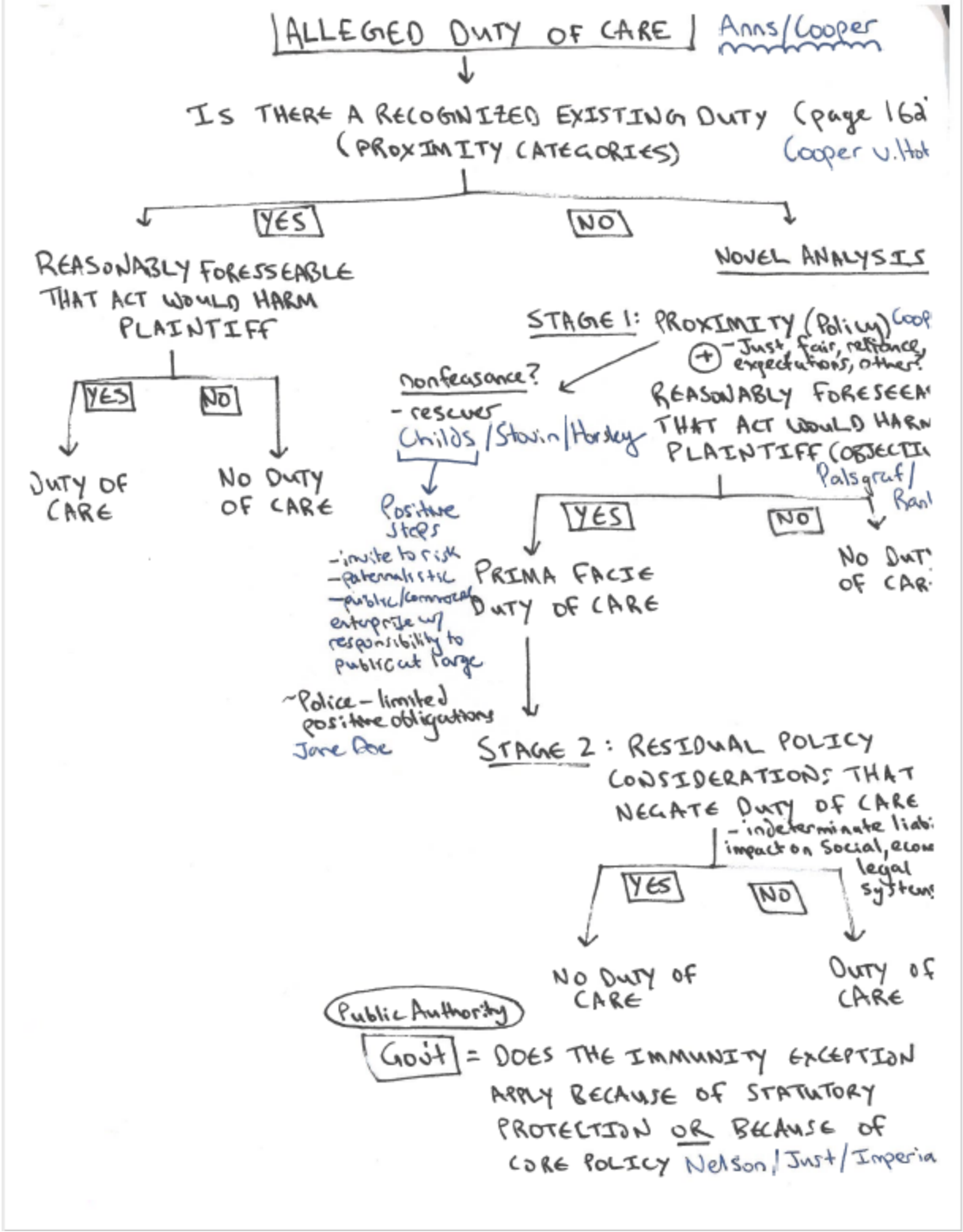
Goals of Tort Law

1. Compensation ✓✓
2. "Justice" - Fault/lawfulness.
3. Deterrence
4. Education - public awareness.
5. Ombudsman - Supervise actions w/in a dynamic society - against private & public institutions.

Third party liability insurance - protects you if you cause personal or property harm.

Collision - harm to your vehicle
Comprehensive - no accident


Workers Compensation
-narrow / broad
Question: is tort law appropriate for responding to accidents and harms?
SMALL GOVERNMENT
→Victims of injury and risk afforded social protection
→no differentiation based on accident or injury type
→Universal health care and basic income
→Decentralized decisions on risk
→Market provides insurance
→Tort law functions for self help
→Should the Government intervene when recovery is not available?
→Can litigation satisfy the needs of different groups within society
→Should tax payers bear this cost?
BIG GOVERNMENT
Statutory Relief
- What form?
- how comprehensive?
- personal property vs. personal injury...
Auto Insurance
- Fault
- No fault
- mixed.


ALLEGED DUTY OF CARE
Anns/Cooper
IS THERE A RECOGNIZED EXISTING DUTY (page 162)
(PROXIMITY CATEGORIES)
Cooper v. Hob
YES
NO
REASONABLY FORESEEABLE THAT ACT WOULD HARM PLAINTIFF
NOVEL ANALYSIS
YES
NO
DUTY OF CARE
NO DUTY OF CARE
STAGE 1: PROXIMITY (Policy) Coop
+ - Just, fair, reliance, expectations, other?
nonfeasance?
- rescuer
Childs / Stovin / Horsley
REASONABLY FORESEEA
THAT ACT WOULD HARM
PLAINTIFF (OBJECTI
Palsgraf/
Ranl
Positive steps
- invite to risk
- paternalistic
- public/commercial enterprise w/ responsibility to public at large
YES
NO
PRIMA FACIE DUTY OF CARE
No Dut
of Car
~Police - limited positive obligations
Jane Doe
STAGE 2: RESIDUAL POLICY CONSIDERATIONS; THAT NEGATE DUTY OF CARE
- indeterminate liabi
impact on social, econ
legal
syster
YES
NO
NO DUTY OF CARE
DUTY OF CARE
Public Authority
Govt = DOES THE IMMUNITY EXCEPTION APPLY BECAUSE OF STATUTORY PROTECTION OR BECAUSE OF CORE POLICY Nelson / Just / Imperia