WINTER 2022 | TORTS | LAW 430

GLOSSARY

Misfeasance: negligence for a positive action you did in which you did not exercise a duty of care.
- A wrongful infliction of harm.

Negligence: when you create a risk or put somebody else at risk, the risk is unreasonable (a reasonable person would not have created) and the risk is created towards a person to whom you owe a duty of care.

Nonfeasance: negligence for mere failure to prevent harm. Defendant under no duty to act and can be subject to no liability in strict nonfeasance.
- For something that you ***failed*** to do and therefore you failed to exercise a duty of care.

NEGLIGENCE

Negligence: when you create a risk or put somebody else at risk, the risk is unreasonable (a reasonable person would not have created) and the risk is created towards a person to whom you owe a duty of care.
- You cannot be negligent in the abstract, you have to be negligent toward someone.
- Must be toward someone you owe a duty to take care not to create an unreasonable risk towards.
- This unreasonable risk must have materialized and caused the person damage and damage must have been reasonably foreseeable.

Onus: Plaintiff must satisfy all of the negligence requirements > defences shift to defendant to come up with a defence
- Is onerous on the plaintiff as they must satisfy all of the components
  - All is on a balance of probabilities

STAGES OF ANALYSIS

1. **Duty of Care**
2. **Breach of Standard of Care**
3. **Causation In Fact**
4. **Remoteness (Causation in Law = 'proximate cause')**
5. **Damages**

If ALL are satisfied, there is liability for negligence

6. **Defences**

Do NOT discuss defences unless they are liable for negligence

Duty of Care

Duty of Care: Duty to act reasonably towards people falling within a risk created by the D's conduct. Is plaintiff such a person?
- Cannot be liable if you do not owe a duty of care (duty to act reasonably) toward that plaintiff
- Plaintiff has to be a reasonably foreseeable plaintiff
- Some kind of proximate relationship between the defendant and plaintiff

If YES, move to breach of standard of care

Breach of Standard of Care

Breach of Standard of Care: conduct that falls below a certain standard (a reasonable person of ordinary prudence). Did the defendant fail to meet this standard?
- You can have a duty but you must also breach standard of care when duty is found
  - Some people are held to a higher standard, how we expect them to behave/conduct themselves in situations
  - A reasonable person of ordinary prudence would have acted differently
- Basic test is objective, some categories of people have a modified objective test (children, mentally incapacitated)

If YES, move to causation in fact

Causation In Fact

Causation in Fact: the cause without which the event could not have occurred. 'But for' the D's conduct, would P suffer the injury?

- Factual matrix, what actually happened?
- Did the conduct 'cause in fact' the event that occurred (damage to the plaintiff)
- Plaintiff's lawyer arguing for answer to be NO, P would not have suffered the harm 'but for' the conduct of D
  - If plaintiff would have suffered harm anyways, then D did not cause it
  - If they cannot show that 'but for' what the defendant did, they cannot show negligence because causation will fail
  - If answer is YES to the 'but for' test, causation fails

If NO, move to remoteness

Remoteness (Causation in Law = 'proximate cause')

Remoteness: Does the P's injury reasonably fall within risk created by D's conduct?

- Does the injury reasonably fall within risk created by D's conduct?
- Is a very similar question to duty of care question, but object of question is different
  - Remoteness = does P's injury fall within scope of risk created by D?
  - Duty of care = duty to act reasonably toward people falling within a risk created by the D's conduct

If YES, move to damages

Damages

Damages: Did P suffer actual harm (physical/mental)?

- There is no liability without harm that the law recognizes as compensable harm (this can be physical or mental)
- Negligence law recognizes certain categories of psychological injuries in Canada
- If there is no actual harm, nothing to be compensated for (you can find liability but P will not recover any damages)

If YES, all are satisfied and there is liability for negligence (D held liable to P for negligence)

- Defences should be considered if there is liability

Defences

Defences: Can the defendant do anything to negate or reduce their liability?

- Defences to negligence may include contributory negligence, voluntary assumption of risk, and illegality.
- **Contributory Negligence** = plaintiff did something to contribute to their own injury
  - To decide whether there was contributory negligence, go through entire analysis again aside from the duty of care (because you owe a duty of care to yourself)
  - Can result in reduction of damage amount
  - By far the most common defence
- **Voluntary Assumption of Risks** = notwithstanding all of the above, the plaintiff voluntarily assumed the risk (not easy to show) and therefore defendant should be absolved of all liability
  - Negates liability entirely, not just reducing damage amount
  - Less common but a complete defence
- **Illegality** = type of illegal acts engaged in by plaintiff when they got injured by the defendant that would absolve the defendant entirely of liability
  - Negates liability entirely, not just reducing damage amount
  - Less common but a complete defence

Only consider defences if there is liability in negligence

Remedies: Damages are the usual remedy, goal of tort law is to compensate and place P back in position before injury

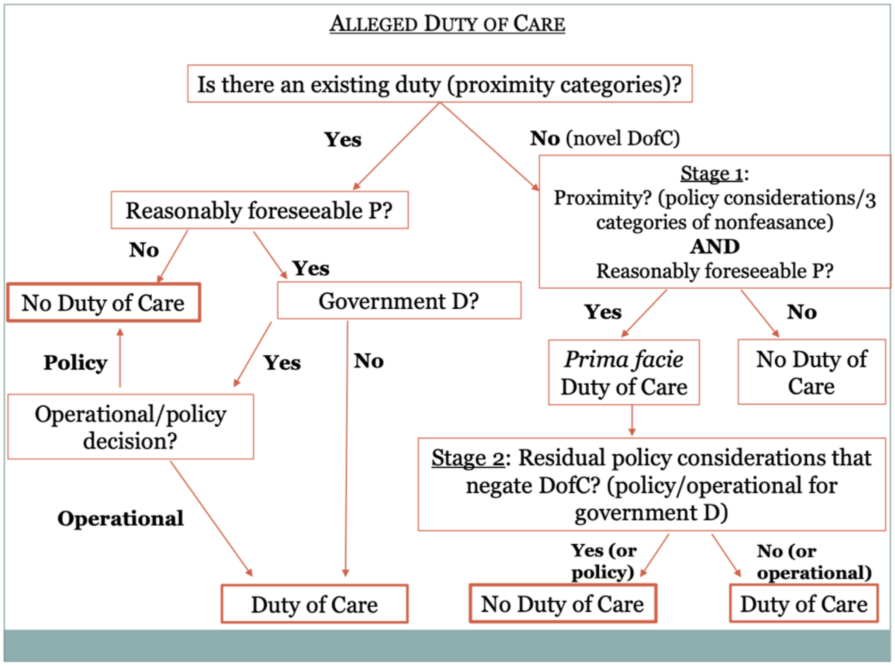
- Specific performance generally only allow if damages cannot properly compensate the plaintiff

DUTY OF CARE

MISFEASANCE

Misfeasance is negligence for something you ***did*** in which you did not exercise a duty of care

- A wrongful infliction of harm



Winterbottom v Wright / old law of DOC, pre-Donoghue

Ratio	**Pre-Donoghue, only parties in contract had DOC to each other. Can only sue for negligence arising out of contract.**
Facts	Mailcoachman (P) supposed to deliver mail coach which third party purchased from D. - Mailcoach broke down, P thrown from seat and sustained injuries. - P attempted to sue D (previous owner) for injuries.
Issues	Can P sue D?
Analysis	No such thing as negligence without contract, can only sue for negligent conduct arising from contract. - D had no contract with third party, so no liability could incur from D to P. - The law at the time was that one could only sue for rights, obligations, duties and breach if they arise from contract.
Holding	Claim rejected due to privity of contract, action dismissed.

Donoghue v Stevenson / starting point for negligence, duty of care derived from this case

Ratio	**Ratio: One must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. P has to be considered a *neighbour* of D.** **Ratio: Categories of negligence are never closed → DOC is an open list that can be added to (refer to this when finding new DOC).** **Ratio: A manufacturer of products, which he sells in a form so to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.**

Facts	P drank a bottle of ginger beer at a pub, bottle was purchased by her cousin in a pub. - Ginger beer was manufactured by D. - Ginger beer contained decomposed remains of a snail which cause P gastro-issues (for which she was hospitalized) in addition to shock and dismay. - P sues manufacturer of ginger beer (the beer was not opened between leaving manufacturer and being opened for P to drink.
Issues	Whether manufacturer of an article of consumption and contained in a receptable which prevented inspection, owed a duty to her as a consumer of the article to take care that there was no noxious element in the goods, the he neglected such duty and is consequently liable for any damage caused by such neglect? - Does D owe a duty of care to P being that there is no contract?

Analysis (Majority)	The law should be moved away from Winterbottom.
	- You must take reasonable care to avoid acts or omissions which you could reasonably foresee would be likely to injure your neighbour.
	    o About anyone who defendant should keep in contemplation when doing something or omitting to do something as a result of your conduct that person may be injured.
	- Neighbour → legal concept → persons who are so closely and directly affected by one's act that one ought reasonably to have the person in contemplation as being so affected when one directs one's mind to the acts or omissions which are called into question.
	- The categories of negligence are never closed → court uses this whenever they find a novel duty
	    o A novel duty may come up in which court has to go through analysis to determine whether new category of duty of care should be recognized

Analysis (Dissent)	Follows *Winterbottom* and holds that negligent manufacturing is not possible because torts arise through contract or statute only. - Recognized exception → item that is dangerous in and of itself or if the article becomes dangerous for a reason known to the manufacturer. - Manufacturer did not know product was dangerous and it was not inherently dangerous, should not be held liable.
Holding	Defendant liable.
Takeaways	- This sets out the law but is not a Canadian case. There are more recent SCC cases to use in an exam situation. - For purposes of DOC today, does not really matter whether product itself is dangerous.

Palsgraf v Long Island / limiting 'neighbour'

Ratio	**Negligence arises from a relationship that exists between a defined defendant and plaintiff where the risk is within the range of apprehension (is reasonably foreseeable).**
Facts	Plaintiff standing on train platform, man tried to run and get on train and one of the guards attempted to help him. - The man was holding a package which was dropped when he was attempting to get onto the train, the package contained fireworks which exploded on the impact when dropped. - From impact explosion, scales from ceiling fell onto platform and injured P. P sued railroad for what happened.
Issues	Does the defendant owe a duty of care to the plaintiff? - Is P within range of foreseeability for a DOC to be owed?

Analysis	Nobody owes a duty of care in the abstract
	- Negligence protects P's rights against foreseeable interferences, but there are limitations.
	    o P must show violation of her own right, and not merely a wrong down to someone else or conduct that is 'wrongful' because antisocial.
	    o Negligence has to arise from a relationship that exists between a defined defendant and plaintiff that are foreseeable.
	- Reasonably perceived risk is a risk to others within the 'range of apprehension' (must be a reasonably foreseeable plaintiff)

	○ Court says anyone standing on platform cannot be a reasonably foreseeable plaintiff because person standing on opposite and remote side of the railroad tracks is not a person who D should have kept in contemplation → no relationship of neighbours/not a reasonably foreseeable plaintiff/did not fall within range of apprehension (all synonymous) ○ D did not owe a duty of care to P
Holding	D not liable for negligence because P was not within range of apprehension.

Dobson v Dobson / anns test pre-cooper

Ratio	**Ratio: Absent legislation, allowing children to sue their mothers' motor vehicle insurance for injuries caused to the child by their mother's negligent driving during their pregnancy is not possible. Duty of care should not be imposed for negligent acts of a pregnant woman that may injure her fetus.** **Ratio: Negligence requires an objective standard of DOC.**
Facts	Lawsuit brought by child/infant through litigation guardian against insurance company Mother was insured with as a driver. - Damages for mental and physical impairments child suffered as a result of being born prematurely because of a car accident that the mother allegedly caused negligently while driving the car pregnant. - Arguing child should not be treated any differently than another person who would sue mother for negligence while driving. - This was the first time suggested to SCC that a duty of care should be recognized/owed by a mother for a born alive child for injuries caused in vitro (novel duty of care suggested).
Issues	Should a duty of care be imposed for negligent acts of a pregnant person that might injure their fetus?
Majority – Cory J	Applies the *Anns* test 1. Sufficiently close relationship (proximity) and injury to P is reasonably foreseeable. ○ Court found quickly stage 1 was satisfied ○ Unborn child in body of mother, cannot get much closer than that ○ Injury to P is reasonably foreseeable as a result of negligent act by mother ○ Court finds *prima facie* duty of care 2. Public policy considerations that militate against imposition of maternal tort liability for pre-natal negligence ○ Consideration 1: Bodily integrity, privacy, and autonomy rights of women → pregnant mother does not equal third party because they have a unique and inseparable relationship with the child. ▪ No other relationship can be analogous, if DOC found there would be several instances mother's actions could be called negligence and no limit as to what could be considered negligence. ○ Consideration 2: Difficulties articulating a judicial standard of conduct for pregnant women → it would be very difficult to articulate the standard that would/wouldn't constitute a DOC. No principled limit on the type of claims the born alive child could potentially bring. ▪ Everything from smoking to exercising or not exercising could potentially been seen as negligent if injury results to fetus ▪ Potential liability for lifestyle choices ▪ The real social issue is lack of social support for these injured children • Should not impose liability on mother for lack of financial support available to children with special needs from the public Application of liability not appropriate due to policy considerations, even though first step of Anns test was satisfied.

	- Policy considerations negate the prima facie duty of care - Novel category not recognized by court, mother does not owe duty of care to born alive child and liability not imposed.
Concurring – McLachlin J	Highlights policy concerns (constitutional values underpinning autonomy interests of pregnant women) and says only legislation could permit children to access motor vehicle insurance in these circumstances, not law. - Liberty → pregnant women should get to make decisions for themselves - Equality → pregnant women cannot isolate themselves from their fetus to prevent themselves from being a tortfeasor (choosing to be pregnant is not enough to say that pregnant people waive right to equality)
Dissenting – Major J	A duty of care to a third party already exists in respect of the same behaviour. - Can easily draw a line between situations/lifestyle choices that we should not regulate where pregnant woman does not owe third party a duty of care. - Policy considerations regarding pregnant woman's freedom of action do not negate the child's prima facie right to sue. - Child should have de facto access to mother's motor insurance. This DOC is already established and creates a right for child to sue, only legislator can revoke the right of the child to sue.
Holding	No DOC from pregnant woman to fetus.

Maternal Tort Liability Act (AB)

After Dobson, AB passed the Maternal Tort Liability Act.
- Gives child limited ability to hold pregnant woman liable when they caused accident and if there was insurance at the time of the accident.
- Negligence only applies here before the child is born.
- Legislation establishes a DOC from pregnant parent to fetus.
- Amount of money child can recover is limited to the amount of the policy.
- Alberta exception for Dobson.

Act only for use and operation of an automobile.
- Section 4 and 5 establishes a limited exception to immunity that a mother has at common law from actions in tort by her child for injuries suffered by child as a result of mothers actions prior to the child's birth.
- Section 4 states that a mother may be liable for injuries caused by mothers use or operation of automobile during pregnancy if she was insured under a contract of auto insurance evidenced by a motor vehicle liability policy.
- Under section 5(1) a mothers liability is limited to amount of insurance money payable.

Anns Test

The modern approach seeks a single comprehensive principle, as established in *Anns v Merton.*
1. One must ask whether the relationship between alleged wrongdoer and person who has suffered damage is of sufficient proximity or neighbourhood such that in the reasonable contemplation carelessness on the part of wrongdoer may be likely to cause damage to the latter in which case a prima facie duty of care arises.
2. If first question is answered affirmatively, it is necessary to consider whether there are any considerations that negative or reduce the scope of duty or class of persons to whom it is owed or damages to which a breach may give rise.

Two-stage test adopted by the SCC in *Kamloops v Nielsen* is formulated as:
1. Is there a sufficiently close relationship between the parties (defendant and person who suffered damage) so that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the person and, if so
2. Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

After Cooper, however, the test to be used is the *Anns-Cooper* test to determine whether or not to impose a new DOC .

Cooper v Hobart / modified Anns test, current test now referred to as Anns-Cooper

<table>
<tr><td>Ratio</td><td>Ratio: Anns-Cooper test to be used to determine whether or not to impose a new DOC.

Ratio: There are two types of policy considerations in the Anns-Cooper analysis. Stage 1 → considerations that are specific to parties and situation. Stage 2 → residual policy considerations.

Ratio: Anns-Cooper test:
1. Is there a prima facie DOC?
a. Was the harm to P a reasonably foreseeable consequence of D's act?
b. Is there are relationship of proximity between P and D (based on expectations, representations, reliance, property, or other interests involved)?
▪ The considerations (expectations, representations, etc.) are the policy considerations animating stage 1.
▪ Proximate relationships identified through use of categories (not closed), if there is a pre-existing category the stage 1 analysis focuses on factors arising from the parties' relationship. If there is no pre-existing category, do the entire two-step analysis.
2. Residual policy considerations
Sometimes overlap between the two stages, make sure to explain why it fits in both the specific and residual policy considerations.</td></tr>
<tr><td>Facts</td><td>Plaintiff an investor, sued registrar of mortgage brokers.
- Sued regulatory body for negligence in failing to supervise the conduct of an investment company which the plaintiff invested his money with.
- Plaintiff claimed it was registrars fault because they failed to supervise conduct of the company.</td></tr>
<tr><td>Issues</td><td>Whether the registrar owes a private law DOC to members of investing public giving rise to liability in negligence for economic losses that the investors sustained?</td></tr>
<tr><td>Analysis</td><td>Policy considerations should be undertaken in both steps of the analysis, first thing you ask is whether there is already a recognized/existing category of proximate relationships.
<u>Stage 1</u>:
a. Was harm to the P the reasonably foreseeable consequence of D's act?
○ A reasonably foreseeable plaintiff?
b. Is it just and fair to impose a duty of care on D in light of parties' relationship (proximity)?
○ Proximity based on:
▪ Expectations → What can be said about P's expectation vis a vis the behaviour of D?
▪ Representations
▪ Reliance → Did P rely on these representations and their own expectations?
▪ Property or other interests involved
○ These policy considerations animate the first stage of the Anns-Cooper test
○ Proximate relationships are identified through use of categories (not closed)
▪ If there is not pre-existing category of proximity, the analysis focuses on factors arising from the relationship
○ Categories where proximity has been recognized:
▪ Situations where D's act foreseeably causes physical harm to P or P's property
▪ Negligent misstatement
▪ Misfeasance in public officer
▪ Duty to warn of risk of danger
▪ A municipality owes a duty to prospective buyers of real estate to inspect housing developments</td></tr>
</table>

	▪ Governmental authorities who have undertaken a policy of road maintenance ▪ Economic loss related to contract performance - No proximity in this relationship → Cooper focuses on language of statute → D had no duty to investors (registrar has to balance competing public and private interests.) Even if P is a foreseeable P, there is insufficient proximity between the registrar and individual investors. - They owe a duty to community or investors more broadly rather than to individual investors. Stage 2: Whether there are residual policy considerations outside the parties' relationship that may negative the imposition of a duty of care? - Examples: Does law already provide a remedy for P? Would recognition of DOC lead to limitless liability? - Related to effects of recognition of a duty on other legal obligations, the legal system, and society generally. o Not necessarily specific to P and D, to do with society and broader implications. o Potential implications of recognizing novel DOC. - Only move to this stage in case of a novel duty, do not do this stage if a pre-existing duty exists. - Even if stage 1 was successful and there was a prima facie DOC, Registrar had quasi-judicial powers and was therefore less likely to owe a DOC to complainants; every person in the country could become an investor which would lead to a potentially indeterminate class of Ps; effect on taxpayers would create an insurance scheme for investors because taxpayers fund this government body.
Holding	No novel DOC recognized, appeal dismissed.

Anns-Cooper Test

1. Is there a prima facie DOC?
   a. Was the harm to P a reasonably foreseeable consequence of D's act?
   b. Is there are relationship of proximity between P and D (based on expectations, representations, reliance, property, or other interests involved)?
      - Proximity based on policy considerations including:
        - Expectations → What can be said about P's expectation vis a vis the behaviour of D?
        - Representations
        - Reliance → Did P rely on these representations and their own expectations?
        - Property or other interests involved
      - Proximate relationships identified through use of categories (not closed), if there is a pre-existing category the stage 1 analysis focuses on factors arising from the parties' relationship. If there is no pre-existing category, do the entire two-step analysis.
      - Categories where proximity has been recognized:
        - Situations where D's act foreseeably causes physical harm to P or P's property
        - Negligent misstatement
        - Misfeasance in public officer
        - Duty to warn of risk of danger
        - A municipality owes a duty to prospective buyers of real estate to inspect housing developments
        - Governmental authorities who have undertaken a policy of road maintenance
        - Economic loss related to contract performance
2. Residual policy considerations
   - Does law already provide a remedy for P? Would recognition of DOC lead to limitless liability?
   - Related to effects of recognition of a duty on other legal obligations, the legal system, and society generally.
   - Only move to this stage if there is a novel duty, do not if a pre-existing duty exists.

Hill v Hamilton-Wentworth Regional Police Services Board / duty of care for police

Ratio	**Ratio: Police are not immune from liability in negligence; their conduct during investigation should be measures against the standard of how a reasonable officer in like circumstances would have acted.** **Ratio: Residual policy considerations must be more than speculative ‘a real potential for negative consequences’ must be apparent.**
Facts	Case resulted in innocent person being investigated by police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit. - Appellant alleges police were negligent in investigating crime.
Issues	Can police be held liable if their conduct during the course of an investigation falls below an acceptable standard and harm to a suspect results? - What standard should be used? - Should police be immune on public policy grounds from liability under law of negligence?
Analysis	There is no existing DOC recognized, have to go through the entire *Anns-Cooper* test. <u>Stage 1:</u> Does the relationship establish a prima facie duty of care? a. Reasonable foreseeability → whether it was reasonably foreseeable that the actions of D would cause harm to P. o Reasonable foreseeability of harm was clear. b. Proximity → was the relationship between the parties sufficiently close and direct to give rise to a duty of care? o Does not have to be physical proximity o Do not have to have a personal relationship as such, are actions or lack of actions of D having a close/direct effect on P so that the D should have kept the P in contemplation when doing or not doing something as someone who might get injured or harmed by it? o Includes policy considerations: ▪ Expectations → Reasonable expectations of party being investigated. How would a reasonable person being investigated expect police to conduct themselves? • Balance need for governmental body to investigate suspects effectively and protecting fundamental rights of suspects. ▪ Representations → No representations here, but P had a critical interest in how the investigation was conducted. ▪ Reliance → Did P rely on the representations and their own expectations? Yes, probably in the investigation. ▪ Property or other interests involved → public interest in responding to failures of the justice system (ie. Wrongful convictions). o Relationship was personal, close, and direct. Suspect was singled out. - Court finds a prima facie DOC, interests of plaintiff in freedom, reputation, etc. means the expectation is that the should be investigated in a way that is not negligent. o Balance with police duties to investigate effectively. <u>Stage 2:</u> Are there broader policy considerations not concerned with the parties’ relationships that negate the recognition of a DOC? - Policy considerations: Quasi-judicial nature of police work, discretion in police work, do not want to regulate police work too much, effects on investigation, indeterminate liability, etc. o Policy considerations in this case support the recognition of DOC and do not negate them. ▪ No existing remedies that law provides for P to sue police for wrongful prosecution and conviction. ▪ Public interest responding to failures of justice system.

	▪ No negating factors/policy considerations but there are supporting considerations. - Policy considerations must be more than speculative, 'a real potential for negative consequences' and must be apparent.
Holding	Appeal allowed. Police owe a DOC in negligence to suspects being investigated.

NONFEASANCE

Nonfeasance is negligence for something that you failed to do and therefore you failed to exercise a duty of care.

- A failure to prevent P harm.
- Pure nonfeasance = bystander
    - Law does not impose a duty on a true bystander
    - Can still be negligent if you are not 'truly a bystander' and you had something to do with what happened to P

Stovin v Wise / general principles for nonfeasance

Ratio	**Generally there is no liability for omission unless one has undertaken to act or induces a person to rely upon one doing so.**
Ratio	**Distinction between pure omission (pure nonfeasance) or omission which is part of a larger course of action set in motion by D (ie. Misfeasance).** - **Pure nonfeasance → pure omission; a bystander who had nothing to do with P's injury** - **Misfeasance → omission which part of a larger course of action set in motion by D** - **Nonfeasance requires that something more is present for a duty to be imposed than merely being a bystander. There needs to be another reason why it is fair and reasonable for someone to have a duty to the P.**

Union Pacific v Cappier / negligence for charity, gratitude, generosity and kindred virtues

Ratio	**There can be no actionable negligence for failure to observe obligations imposed by 'charity, gratitude, generosity, and the kindred virtues'. DOC not owed in the abstract or to the public at large, there must be a reason why DOC would be owed.**
Facts	P bringing action for death of her son who died by being hit by a train (committed suicide) and she sued the employees of the train company saying they were negligent in hitting him. - Employees not found to have operated train in a negligent manner (no failure of acting/no misfeasance) - Mother said they should still be held liable because employees failed to give medical treatment to son
Issues	Should the court impose a DOC on employees to help someone who is responsible for their own injury?

Analysis	Since the injury was self-inflicted, employees could not be liable for the injury itself. The employees are pure bystanders.
	- There can be no actionable negligence for failure to observe obligations imposed by charity, gratitude, generosity, and the kindred virtues
	    ○ Law does not require you to be a good person,
	    ○ Duty has to be owed in an individual capacity
	    ○ No D owes a DOC in the abstract or to the public at large. You owe a DOC to a particular P and there needs to be a reason why you would owe a DOC
	- Imposing a duty on D would impose a duty to act when they have nothing to do with a P (we can't impose duty in the abstract)

Holding	Rail workers not liable because this is pure nonfeasance. Court will not impose duty in the abstract to assist P.
Takeaways	Meshel reasons that this is not really a PURE bystander situation, train drivers still operating the train that hit him.

	- There is an argument to be made that they may not be PURELY a bystander but this is what the court still found.

Oke v Weide Transport / creator of a peril

Ratio	**Creator of the peril must take reasonable steps to abate it or warn.**
Facts	Defendant was a truck driver on the road and knocked down a traffic sign. - The sign was in a gravel strip in the centre of the road, he tried to fix the sign or remove it but did not do a good job and left a metal post sticking out of the ground. - Plaintiff drove over gravel strip to pass another car and hit the pole which killed him.
Issues	Did the D have a duty to report the metal post sticking out of the ground, and owe a DOC to the P who died as a result of running over the post? - Can you say that D is purely a bystander?
Analysis (Majority)	Majority avoided the DOC question and analyzed under remoteness. Their decision is not helpful for our purposes.
Analysis (Dissenting)	Disagrees that the injury is too remote to hold D liable. Stage 1: - Accident that injured P was reasonably foreseeable. - Proximity → D was not a pure bystander and cannot be compared to other passing drivers who had not duty. D caused the pole to stick up so he had a duty to report it (contrasted to people driving who did not cause the pole to stick up, no duty to report) - Although he was not negligent in creating the risk, he should be held negligent since he did not act appropriately to eliminate the risk - Not a case of pure nonfeasance, defendant created the danger

Childs v Desormeaux / modifies proximity in Anns-Cooper test, the authority in Canada on nonfeasance

Ratio	**Ratio: Hosting a party at which alcohol is served does not, without more, establish degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest.** **Ratio: Three situations that give rise to a positive duty to act in situations of nonfeasance:** **1. D Intentionally attracts and invites third party to an inherent and obvious risk that they create or control** **2. Paternalistic relationships of supervision or control** **3. Ds who either exercise a public function or engage in commercial enterprise that includes implied responsibilities to the public at large** **These situations go in Stage 1 of the Anns-Cooper test in situations of nonfeasance.**
Facts	D was driving drunk, hit P's car causing very significant injuries. - D was drunk after attending BYOB party in friend's private home. - D was known to party hosts and friends knew he was a heavy drinker but they did not keep tabs on him during the party to see how much he was drinking. Before D left the party, host asked if he was okay to drive, D said he was okay to drive and the accident occurred.
Issues	Whether a social (non-commercial) host owes a DOC to third parties who happen to drive at the same time as a drunk guest drives and causes a third party's injuries?

Analysis	Duty of care alleged is a duty from social host to member of the public that is injured by a drunk guest from a private party.
	Is there an established DOC? Court says no.
	- The closest category was commercial alcohol providers.
	    o They have a duty of care to third parties injured by drunk patrons.
	    o Is it close and analogous when it is not a commercial owner but private host?

	- This is not analogous for three reasons: a. Capacity to monitor alcohol consumption (easy in a bar because they charge you and serve you, expected to have ability to identify and know when someone is intoxicated) b. Different regulatory context (laws govern alcohol serving in commercial establishment, there are licensing requirements and mandatory training, none of this applies to social hosts) c. Contractual nature of the relationship (it is in commercial interest to get you to drink as much as possible, there is a profit making incentive, with this comes a duty to ensure that if they serve you they are not creating the risk to members of public that you will go off and injure someone) - No existing category to draw from – is a novel duty of care Must proceed with Anns/Cooper analysis Stage 1: Is there a prima facie duty? - No RF of injury to P → cannot assume that because hosts knew he drank a lot that they would know he was drunk. o No finding of fact supports that they knew he was drunk. o Just because he drank a lot in the past did not mean he was intoxicated at this time, cannot infer from previous conduct. o This is not a plaintiff that walls within range of apprehension. - Proximity → case sets the principle for proximity analysis in a nonfeasance situation, can only impose duty in nonfeasance if situation falls in one of the three categories the court sets out. o Where alleged conduct is failure to act (as in this case because the couple is a pure bystander) the situation must fall in 1 or more categories in order for there to be a duty to act: i. Where D intentionally attracts and invites 3rd parties to an inherent and obvious risk that they create or control • Proximity based on origin of risk or steps taken to submit others to risk → private party in D's home does not mean risky behaviour ii. Paternalistic relationships of supervision and control • May include relationships like parent/child, teacher/student, etc. • Power justifies imposing positive duty to act on D • Party guests do not 'park their autonomy' at the door iii. D's who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large • No one monitors a guest's alcohol intake in a private home party o These are situations where bystander not a pure bystander and D did something where they have a close and direct relationship that they should have kept P in contemplation ▪ Social host serving alcohol does not fall within the three categories and does not represent an appropriate extension to them
Holding	No prima facie duty of care.

Rankin v JJ / reasonable foreseeability analysis in Anns-Cooper test for nonfeasance

Ratio	**Ratio: A business will only owe a duty to someone who is injured following the theft of a vehicle when, in addition to the theft, the physical injury to the P was reasonably foreseeable.** **Ratio: The fact that something is possible does not mean it is reasonably foreseeable. To determine RF remember that:** - **It is an objective test that considers connection between wrong and injury suffered by P** - **Foreseeability must be present prior to the incident occurring**
Facts	Two teens were drunk and stole a car from D's commercial garage. The garage was not secured nor was the car.

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Teens crashed and P who was in passenger seat suffered a severe brain injury.
P argues that positive duty should be imposed on owners of commercial garage to properly secure cars → owes a duty of care to teens/minors who may steal car.
D argues not reasonably foreseeable that teens would steal a car from garage and operate it in a dangerous manner, cause accident, and suffer injuries.

</td></tr>
<tr><td>Issue</td><td>Whether there is a duty of care owed by a business that stores vehicles to minors who are injured following the theft of a vehicle?</td></tr>
<tr><td>Analysis (Majority)</td><td>
There is no pre-existing category of proximity owed by business to someone injured following theft of a vehicle. The only conceivable category of proximity that may apply is the broad one of physical injury in Cooper but this collapses the two-part test into just one test and we should frame categories more narrowly. They go on to do a full Anns-Cooper analysis.
Stage 1:
<u>Reasonable Foreseeability:</u>

RF is an objective test that considers the connection between wrong and injury suffered by the P

Has to be connection between alleged negligent act and injury suffered by P
While risk of theft was reasonably foreseeable, the evidence did not establish that it was reasonably foreseeable that someone could be injured by a stolen vehicle operated by a minor in an unsafe manner

Foreseeability must be present prior to the incident occurring

No hindsight
Judge prior to the event
Circumstances where would be a connection between miner and unsafe driving resulting in physical injury:

D leaves vehicle running in an area with bars just after closing time
Owner of car dealership knew young people were perpetrators of theft → dealership aware teens hanging around the area and if car stolen it would most likely be in a manner that is dangerous
Risk of erratic driving flowing from driver fleeing police in a stolen vehicle

The fact that something is possible does not mean it is reasonably foreseeable

A business will only owe a duty to someone who is injured following theft of a vehicle when, in addition to theft, the physical injury to P was reasonably foreseeable
The risk of theft was RF but the evidence did not establish that the risk of the injury was RF

Risk of theft does not automatically include risk of injury

<u>Proximity (Nonfeasance – Childs analysis):</u>

No analogy to bar owners under Childs

Commercial benefit does not come from people stealing a car

Cars not inherently dangerous in a way requiring them to be stored carefully to protect the public
Fact that P was a minor does not automatically create an obligation to act
Not falling within any of the three categories in Childs

</td></tr>
<tr><td>Analysis (Dissent)</td><td>Duties of care are not conditioned upon reasonable foreseeability of the particular circumstances which gave rise to P’s actual injury.</td></tr>
<tr><td>Holding</td><td>No DOC</td></tr>
</table>

TORT LIABILITY OF GOVERNMENT AGENCIES

Why should governments be treated differently than other defendants?

- Balance public aspect of their duties and authorities
- Want governments to be able to do what it needs to do in regulatory sphere but don’t want them to never be held legally responsible if they harm someone with their actions

When can you hold government liable in negligence?

- Look to *Just v The Queen* and *Nelson v Marchi*

Just v The Queen / authority before nelson

Ratio	**Ratio: When dealing with DOC for public authorities, follow the steps:** **1. Review applicable legislation (Does statute impose a DOC?)** **2. Determine whether public authority is exempt from liability (policy decision = exempt, operational decision = may be liable)** **Ratio: Elements of a policy decision** - **'Involved or dictated by financial, economic social, or political factors or constraints'** - **Decision usually made at a high level (but not determinative)** - **Government must generally act 'in a reasonable manner which constitutes a bona fide exercise of discretion'** - **Most common examples are budgetary decisions** o **Classically considered as true policy**
Facts	Heavy boulder fell from slopes above highway and crashed into plaintiff's car - Killed the plaintiff's daughter and severely injured him - Plaintiff sued the province for negligently maintaining the highway o Not frequently enough inspecting slopes and making sure they are safe
Issues	Did the government owe a duty of care to the plaintiff?

Analysis	There is reasonable foreseeability and proximity. The analysis needs to be expanded due to the significance of this being a government defendant.
	- In the case of public authorities it is necessary to:
	  1. Review applicable legislation
	    ▪ The statutes do not absolve province from DOC to maintain highways reasonably but imposed an obligation on province to maintain highways → a general duty of care, but was the policy the Dept of Highways had in place a policy or operational decision?
	  2. Determine whether the public authority is exempt from liability since its conduct constitutes a 'true policy' decision
	    ▪ Either a true policy or operational decision
	    ▪ Liability truly hinges on whether true policy or operational
	    ▪ If policy, even if there is reasonable foreseeability and proximity, government entity will not be liable
	    ▪ If operational, government can be liable
	- Policy decision definition adopted as 'involving or dictating financial, economic, social, or political factors or constraints'
	  o What constitutes policy may vary infinitely and may be made at different levels although usually at a high level
	  o To be true policy, government must generally act in 'a reasonable manner which constitutes a bona fide exercise in discretion'
	    ▪ Policy decisions need to be made in good faith and can still be liable if not
	  o The most common example mentioned are budgetary decisions
	    ▪ Classically true policy
	- Operational decision is 'an action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or generally standards of reasonableness'
	- In this case, decisions were operational in nature
	  o Manifestations or implementations of policy

Holding	Reverses lower court's finding on DOC. Called for new trial of finding of fact to see if gov complied with DOC.

Takeaways/Notes	Additions to Anns/Cooper test for governmental bodies. If there is a pre-existing category, you still need to determine whether it is a policy decision/operational and look to legislation. - If not, you go through the entire analysis

Bona Fide Exercise of Discretion

In ***Roncarelli v Duplessis*** the court defined the 'bona fide exercise of discretion'
- No absolute governmental discretion
    - This would mean the action can be taken on any ground or for any reason that can be suggested to the mind of the administrator
    - No legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose of the statute
- No unlimited arbitrary power gov can exercise for any person
    - Anything this is corruption and fraud are also bad faith, they are implied exceptions
    - This is never considered a bona fide exercise of discretion
- 'Discretion' necessarily implies good faith in discharging public duty, there is always a perspective within which a statute is intended to operate; any clear departure is just as objectionable as fraud or corruption
    - Any clear departure is objectionable, if you are created by a statute to do X and you did Y, this can be challenged

In ***Kamloops v Nielson*** there was an example of not acting in bona fide discretion
- **Ratio: If government fails to even consider a matter and this harms P, government body cannot be said to have acted bona fide exercise of discretion**
- P bought house unaware of bad foundation and when foundation collapses P sued the city
    - The municipal counsel did not take steps to prevent construction of house that they knew was being built with shaky foundations
    - Not acting bona fide → failed to take steps to prevent construction of a house built without a proper foundation
- Court found them liable → not a matter of operational or policy decisions because the city did not make a decision at all.
    - At the very least was not considered in good faith
    - Inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion

Nelson (City) v Marchi / clarifies operational v core policy decisions

Ratio	**Ratio: Core policy decision → decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational or in bad faith** **Ratio: Operational decision → the practical implementations of formulated policies, the performance or carrying out of a policy, generally made on basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness** **Ratio: Relevant factors to determine if something is a policy or operational decision** **1. Level and responsibilities of the decision-maker: how close the decision-maker is to a democratically elected official (closer = more likely policy, farther = more likely operational)** **2. Process by which decision was made → the more the process for reaching the decision was deliberative, requiring debate, possibly in public forum, extent to which required input from different authorities, broad, prospective in nature, the more it will engage separation of powers rationale and more likely be core policy** **3. The nature and extent of budgetary considerations → gov decisions that concern budgetary allotments are more likely to be core policy decisions because they are more**

	likely to fall within core competencies of legislative branches whereas day to day budgetary decisions of employees are more likely operational 4. **Extent to which the decision was based on objective criteria → the more a decision weighs competing interests and makes value judgments, the more likely it will be a policy decision**
Facts	City cleared snow in downtown Nelson, including in angled parking stalls in downtown core - Employees plowed snow to the top of the parking spaces which created massive snow bank on curb, separating stalls from sidewalk - However, they did not clear the snow bank/did not clear access route to the sidewalk - P parked in angled stall and did not have a route, went across the snowbank and seriously injured her leg - She sued the city
Procedural History	Trial judge said the city does not owe Marchi a DOC because this is a true policy decision - The COA overturned the decision of the trial judge and the SCC affirmed the COA
Issue	Does the city owe Marchi a DOC? Ie. Was the most of clearing and leaving banks separating the sidewalk from parking stalls an operational or policy decision?
Analysis	**Anns-Cooper analysis** <u>Reasonable Foreseeability:</u> city plans and intends for public to use roads/sidewalks/parking stalls → it is reasonably foreseeable that carrying out snow removal could harm people <u>Proximity Element</u>: Just established a category of proximity: a public authority has undertaken to maintain a public road/sidewalk to which public is invited and P alleges that they suffered a personal injury as a result of the authority's failure to maintain the road/sidewalk in a reasonably safe condition. Court says it is still possible city will be found not to owe a DOC because you always have to deal with question of whether it was policy or operational. 1. Level and responsibilities of the decision maker o Supervisor was a low-level employee who did not have responsibility for policy-making 2. Process by which decision was made o No evidence that method of plowing parked stalls was made through deliberation, debate, public forum, input from different authorities, etc. 3. The nature and extent of the budgetary considerations o Although it was clear budget considerations were involved, these were day to day budgetary considerations of individual employees 4. Extent to which decision was based on objective criteria o No risk of court replacing its own subjective value judgment for that of the government, this can be easily assessed on objective criteria **Legal Errors by the Trial Judge** 1. TJ described decisions and issues too broadly → focused on entire issue of snow removal instead of particular method of clearing parking stalls and leaving banks 2. TJ placed too much weight on policy label on unwritten policies o Writing the word 'policy' does not mean specific act was a policy decision to fail to remove snow and create snow banks o City was negligent in how they plowed the snow, the how is operational (how you carry out or execute something) 3. TJ treated budgetary considerations as determinative → mundane budget considerations can be operational
Holding	SCC affirmed the COA. The City had a DOC and could potentially be held liable. This was not a true policy decision but an operational decision.

STANDARD OF CARE

Standard of care that must be observed in one's interactions with another person

- Tort law insists that standard is generally objective rather than subjective
    - Makes allowances for incapacities, such as young and insane

Step 1: Which standard of care applies?
- Objective
- Modified Subjective

OBJECTIVE STANDARD

What would a reasonable person do in the position of the defendant?
- Presumptive standard where D judged based on what reasonable person in their circumstances would do

Vaughan v Menlove / presumptive standard is objective

Ratio	**Rule should be to require all cases a regard to caution that 'a man of ordinary prudence' would observe (the presumptive standard is an objective standard)**
Facts	Haystack made by D near boundary of his property - Hay was put together to give rise to probability of fire, D was repeatedly warned of this peril - He made an aperture or chimney through the rick and it burst into flames from spontaneous heating of materials - Flames went to barn and stables and to P's cottages which were destroyed entirely
Procedural History	Verdict for P - Ruling for new trial on grounds that jury was instructed wrongly - Try to claim they should be instructed to consider not whether D was guilty of gross negligence with reference to standard of ordinary prudence but whether he acted bona fide to the best of his judgment
Issues	Should the standard of care be objective or subjective?

Analysis	The rule of a prudent man has always been adopted in the courts
	- Leaving it up to D's best judgment would create no rule at all, degree of judgment for each individual infinitely varies
	    o This subjective standard is too vague, individual judgments are different
	    o Would result in zero predictability in the law
	    o D argued it should be adjusted to his particular intelligence
	- We ought to adhere to rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe

Holding	COA says trial judge was correct in using objective standard - Case sets forth the principle that the standard is objective

EXCEPTIONS TO OBJECTIVE STANDARD

Exceptions to the objective standard:
1. Mental Illness – did illness make the D unable to understand the duty that rested on him and unable to discharge the duty? (*Buckley*)
2. Physical Illness – standard of care is independent of idiosyncrasies of particular person whose conduct is in question unless (1) a sudden affliction has rendered the person unconscious or otherwise wholly incapable of controlling their conduct rebuts negligence (*Roberts)* OR (2) the person is unaware that they may be suffering from a condition that impaired their conduct (*Mansfield)*
3. Children – three categories for children (*McHale v Watson*)
    a. Children who are so young to be manifestly incapable of exercising any qualities necessary to the perceptions of risk
    b. Children that fall between the very young and practically adult, the SOC required of these children is that which reasonable to expect of children with like age, intelligence, experience (age 5-14)
        i. Foresight
        ii. Prudence
    c. Children who are not yet legally adults but capable as adults of foreseeing the probable consequences of their actions – objective standard of adults (age 14-17)

Buckley v Smith Transport Limited / mental illness exception to Vaughan

Ratio	**For mental illness exception → Did the insane delusion make the D unable to understand the duty that rested on him and unable to discharge the duty? If so, the SOC is a modified subjective standard.**
Facts	- A truck driven by an employee of D came to intersection at high speed and rammed into streetcar operated by P - When sued for negligence on basis of employer's VL for torts of employees, the defendant pleaded that employee had become insane and imagined that the truck was under some kind of remote electrical control manipulated from employer's head office - Doctors found the employee suffered syphilis of the brain and died of disease one month later
Analysis	Court held that no liability could attach - Test for insanity was: Did the insane delusion made D unable to understand the duty that rested on him and unable to discharge that duty? - The onus of proof in connection is always on party alleging it - Court found at time of collision, the mind was so affected he could not understand and was unable to discharge the DOC
Holding	Not liable

Roberts v Ramsbottom / physical illness exception to Vaughan

Ratio	**Standard of care is independent of idiosyncrasies of particular person whose conduct is in question unless a sudden affliction has rendered the person unconscious or otherwise wholly incapable of controlling their conduct rebuts negligence** - **A physical condition that justifies not applying objective SOC**
Facts	Plaintiff was emerging from car when struck by car driven by D - Plaintiff and daughter were injured, car damages beyond repair - Before collision D had rear-ended a van and knocked a boy of his bike
Procedural History	Trial judge found he suffered a stroke - No previous signs or symptoms and his consciousness was impaired - At no time was he aware he was unfit to drive and no moral blame can be attached
Analysis	Every driver's actions are judged on an objective standard - A defendant may be able to rebut prima facie case of negligence showing a sudden affliction rendered him unconscious or otherwise incapable of controlling vehicle - In this case, no total loss of consciousness but impairment of consciousness - D was not fully unconscious, guilty in law because he continued to drive and was aware of disabling symptoms and noted he was feeling strange
Holding	D liable in law for driving

Mansfield v Weetabix / physical illness exception to Vaughan

Ratio	**Standard of care is independent of idiosyncrasies of particular person whose conduct is in question unless person is unaware that they may be suffering a condition that impaired their conduct.**
Facts	- D's employee did not know he had a condition that caused brain to malfunction on low blood sugar - He caused a series of accidents by driving after not eating much
Analysis	Court overruled *Roberts* on this point - Held that he was not liable for damage resulting from impaired degree of consciousness caused by condition - To not take into account his condition would be to impose strict liability Court add another exception to incapacitation due to illness → applicable standard is that of reasonable competent person unaware that they may be suffering from a condition that impaired their conduct - Condition was such that they were unaware they had it, cannot be fairly held to the objective standard of person not suffering from condition

Holding	D liable in law for driving

McHale v Watson / children exception to Vaughan

Ratio	**Vaughan exceptions for children:** **1. Children who are so young as to be manifestly incapable of exercising any qualities necessary to the perception of risk = not liable for negligence.** **2. Children that fall between the very young and practically adult. The SOC required is that which it is reasonable to expect children of like age, intelligence, and experience. (Age 5-14)** **a. Foresight: what level of foresight is expected of kids this age and did D meet that level?** **b. Prudence: what level of prudence is expected of kids this age and did D meet that level?** **3. Children who are not legally adults, but are capable as adults of foreseeing the probable consequences of their action. Same objective standard as adults. (Age 14-17)**
Facts	- D threw sharp object in front of him while playing with other kids - The object bounced off pole and hit plaintiff in eye causing severe injury
Procedural History	Trial judge decided that age is not some idiosyncrasy that should be ignored - We should take age into account - Decided defendant not mature enough to foresee the injury - Decision appealed on grounds that it was error holding D to different SOC than an adult
Issues	Whether judge was in error holding liability of D or standard of care to be exercised differed from liability or standard of care of an adult? - Whether the judge should have made a finding of negligence whether he applied the standard of ordinary reasonable man or standard appropriate to 12 year old boy?
Analysis	Judge does not agree with either of these grounds - There is ample evidence for lowing the standard of care for young children - The categories are as follows: 1. Children so young as to be manifestly incapable of exercising necessary perception of risk 2. Infants who have not yet attained majority, capable as adults of foreseeing probable consequences of actions 3. Children who come between the extremes, whose capacities are infinitely various - The standard for the in between children is one of like age, intelligence, and experience - The evidence does not suggest that he was anything other than normal 12 year old boy, no grounds for disagreeing with TJ that considering age was appropriate
Analysis (Kitto J)	A defendant does not escape liability by proving he is abnormal in some respect which reduces capacity for foresight or prudence - This applies to children - The question remains is one of fact – did he throw aware of proximity of appellant? - The boy could not have been aware given age and experience - Boys of twelve may behave as boys of twelve and that sometimes is a risk
Analysis (Dissent)	Standard of care is objective - Except in special categories, this is applied to everyone - As the DOC respondent owed was to take care ordinary reasonable man would have, the appeal should succeed - Even if it was standard of reasonable boy he would still be negligent (a reasonable boy would not throw 3 inch piece of metal head high in direction of another person)
Holding	D not liable for negligence. They behaved as a normal 12 year old boy who possesses the foresight and prudence that would be expected of a child of a similar age, intelligence and experience. Court found not child comparable to this one would have the foresight and prudence to understand that they shouldn't do that/it may cause an injury.

McErlean v Sarel / children engaged in adult activity (exception to McHale)

Ratio	**Objective SOC applied when child engaged in 'adult activity' → here, the use of a motorized vehicle will use the objective SOC instead of exception for children**

Facts	- Case involving collision between two trail bikes driven by teens
Analysis	Standard expected of children not the same as adults, this is a subjective test recognizing capacities are infinitely various and treats them on individual basis - Looks to children of like age, intelligence, and experience - There are exceptions to this general rule, however, where child engages in 'adult activity' they will not be given special treatment and held to same standard of care as adults Law cannot permit youths in motorized vehicles to be judged by standards other than those expected by others engaging in the same activity, it would be dangerous to public to permit youths to operate power-driven vehicles at a lower standard - Single standard of care for such activities - Motorized vehicles include trail bikes, snowmobiling, driving a car - Whether or not there are statutory restrictions about age when child can operate a vehicle, the critical factor is the motor powered nature of vehicle and susceptibilities of injury it can cause Court decides on basis of policy considerations → dangerous to public interest to use lesser SOC when a child is involved in the operation of motor powered vehicle, so when child is operating a motorized vehicle, objective SOC is used
Holding	D liable in law for driving

REASONABLE CARE

Within standard of care, you first have to decide the applicable standard:

- Objective
- Modified subjective

Then, regardless of standard, the court will have to decide what actually would be considered reasonable care

- How would we decide how we expect the person to behave?
- The next question in the inquiry, what is reasonable care?
- What is D actually required to do to comply with the objective or modified subjective standard?

US v Carroll Towing Co / posner's learned hand formula

Ratio	**Learned hand formula: liability when cost of avoiding an accident is less than the probability of the accident times gravity of the resulting injury (expected average cost of accident)**
Facts	Owner of barge left unattended in harbour for several hours - While unattended it broke away and collided with ship
Issues	Whether it was negligent for company, owner of a barge, to leave it unattended for several hours in a busy harbour?
Analysis	There is no general rule to determine whether absence of bargee or attendant will make owner liable. To provide against resulting injuries is a function of 3 variables: 1. Probability that it will break away 2. Gravity of resulting injury if it does 3. Burden of adequate precautions In this case, it was not beyond reasonable expectation that work might be done with adequate care - By redefining two terms we bring the economic character out of the formula: a. Burden of precautions lost = cost of avoiding accident b. Loss if accident occurs = cost of accident itself - Expected cost is average cost incurred over period of time long enough for predicted number of accidents to be the actual number If the cost of avoiding is higher, let accident happen - If cost of injury is cheaper, let injury happen - Benefits of accident avoidance exceed costs here, should have prevented, he did not prevent and was negligent
Holding	D liable in law for driving

Notes	There are practical difficulties with this formula - Cannot implement in every case - If you cannot put dollar value on elements, this collapses - Do NOT use exact formula in exam, only theoretical components as part of consideration

McCarty v Pheasant Run, Inc. / commentary on learned hand formula

Ratio	**The three elements that form learned hand formula are still valid and likely be examined to extent possible by courts. Courts have moved away from the formulaic holdings, instead, looking to full circumstances and seeing what is relevant in given case.**
Analysis	Formula translates into economic terms the conventional test for negligence - Unreasonable conduct the failure to take precautions that would generate greater benefits in avoiding accidents than precautions would cot - Formula has greater analytic than operational significance - Conceptual and practical difficulties in monetizing personal injuries Shows us how learned hand has been modified and changed as courts move away from the formulaic approach.

Bolton v Stone / social utility + removes burden of precaution

Ratio	**Ratio: Fourth factor added to learned hand formula → whether or not D's conduct is socially useful** **Ratio: Learned hand is revised. Take into account:** **1. Foreseeability isn't sufficient to require precautions** **2. Likelihood/degree of risk** **3. Don't need to take cost of precautions/difficulty of remedial measures into account unless probability of injury is reasonably high** **4. Social utility of D's conduct**
Facts	- Balls driven into public road from time to time during cricket matches, obvious if person was where ball fell they may be injured - The chance of this happening was small, no more than 6 times in 30 years - Chance of person being struck on this road was very small but P was hit by a cricket ball on the head
Issues	What is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway?
Analysis	Judge had tendency to base duty on likelihood of damage to others rather than foreseeability alone - A careful man tries not to make a risk that is substantial - Test is whether risk of damage to a person on the road was so small that a reasonable man in their position, considering from a point of view of safety, would have thought it right to refrain from taking steps to prevent the danger - A question of fact and degree - Unable to decide in favour of respondent, would have reached a different conclusion if risk was higher but risk was so small a reasonable man would not have thought of it - A reasonable person would not do anything if risk is not substantial enough, cricket is a socially useful activity and lawful
Holding	SOC not breached. Appeal allowed.
Takeaways	Example of court taking out of learned hand formula the cost of avoiding the accident - Looks to how probable and gravity instead

Overseas Tankships v Miller Steamship Co / leans away from Bolton

Ratio	**There must be a valid reason for disregarding even a small risk, such as considerable expense because the general principle is that person is negligent if they don't take steps to get rid of a real risk.**
Analysis	The judge discussed Bolton. Before Bolton the cases fell into two categories:

	1. Those where before the event happened, the risk would have been regarded as unreal because it was physically impossible or possibility would have been so far-fetched that no reasonable man would have ever thought of it 2. Those where there was a real and substantial risk or chance that something might occur and reasonable man would have taken steps to eliminate the risk Bolton posed a new problem – not a fantastic or impossible probability of risk - It was plainly foreseeable but the chance was very small - Reasonable man would only neglect such risk if he had valid reason for doing so - The decision recognized and gave effect to qualification that it is justifiable not to take steps to eliminate a real risk if it is small and circumstances are such that a reasonable man careful of safety of his neighbours would think right to neglect it
Holding	Liability found. SOC breached.

Latimer v AEC / leans away from Bolton, considers precautions

Ratio	**We can consider precautions when the cost of the precautions is sizeable when compared to the social utility and probability of injury.**
Facts	- Exceptional rainfall flooded factory floor - When it was drained, it became slippery and employer spread sawdust on floor but it did not cover all areas - Plaintiff was a worker who fell and hurt his ankle, sued employer for negligence
Issues	What is the SOC we would expect of D in this case? What would a reasonable factory owner do in the circumstances?
Analysis	Probability of workman slipping must be borne in mind but it must be remembered that no one else slipped - The possibility did not seem to have occurred to anyone at the time - It appears to never have occurred to him that there was any danger or further steps needed - Seriousness of shutting down work and importance of carrying on work should be considered - Employee has not established that a reasonably careful employer would have shut down the works or taken drastic step of closing factory The only question is: Was the floor so slippery that remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run risks involved in continuing work? - Not enough to impose liability - Degree of risk in mind too small to justify closing down If we think about seriousness of closing factory, we see huge cost (cost of precaution) → to what lengths do we expect D to go to prevent injury of low probability?
Holding	No breach of SOC.

Tomlinson v Congleton Borough Council / leans towards Bolton

Ratio	**When social value is high and chance of injury is low, we can disregard the cost of precautions (affirming Bolton).**
Facts	- Defendant municipality maintained a park in which there was a shallow lake artificially formed - P swimming plunged forward too sharp an angle and hit bottom with head, suffering broken neck and paralysis - P sued alleging it was D's duty to take care in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for purposes for which he is invited or permitted by occupier to be there
Issues	What SOC was owed by D to the P?
Analysis	Courts in past have balanced risk and whether it is a socially useful and lawful activity

	- The cost of preventing was not excessive, the social value is another important consideration - Whether council should be entitled to allow people of full capacity to decide for themselves which risks to take is another consideration The likelihood of injury → very low, but seriousness of injury → very high - Social value of activity → park has a good social value, we don't want to close it - Cost of preventive measures → cost of precautions don't matter because chances of injury are so low and social value is present - Law does not require disproportionate or unreasonable responses

Watt v Hertfordshire County Council / balance social end/utility of D's conduct

Ratio	**Social utility needs to be balanced against cost of preventative measures. The higher the social utility, the less important it is to consider preventive measures.**
Facts	- P was a fireman who was sent to answer emergency call for woman trapped under heavy vehicle near the station - On the way, driver applied brakes suddenly and P was thrown of balance causing the jack to slide forward and injure the plaintiff - P sued employers but lost at trial and appealed
Issues	What SOC was owed by D to the P?
Analysis	One must balance risk against measures necessary to eliminate risk - One must also balance risk against end to be achieved - In this case, risk involved was not so greater as to prohibit the attempt to save a life - It is always a question of balancing risk against the end, high level of social utility and risk not so great as to outweigh this

Factors to Determine Reasonable Care

1. Probability/likelihood of accident (Carroll and McCarty)
2. Cost of accident/gravity (Carroll and McCarty)
3. Cost of precaution (Carroll and McCarty)
4. Social utility to be achieved by D's conduct (Bolton, Latimer, Tankship, Tomlinson, Watt)
5. Custom and usage
6. Statutes - useful but not determinative

CUSTOM AND USAGE

Additional factors in the reasonable care analysis.

Trimarco v Klein / custom must be reasonable, used to show D was below SOC

Ratio	**Ratio: Customary practice must be reasonable in itself.** **Ratio: When certain dangers have been removed in customary way, this custom may be proved to show that D has fallen below required standard. This proof must bear on what is reasonable in ALL the circumstances.** **Ratio: What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.**
Facts	- P was a tenant of apartment, was sliding door open to exit bathtub - Occurrence was sudden, unexpected, and he had severe injuries when the bathtubs enclosure shattered - Experts testified that it was common practice to use shatter proof glazing materials

	- The door was installed before legislation requiring shatterproof doors was developed, but landlord still installed when it was custom to use shatterproof - Landlord admitted it was customary but argued probability was low and cost of door was high, P succeeded at trial and appealed on evidence of custom and usage
Issues	Role of proof P produced on custom and usage, ultimate issue is whether case is made out or not.
Analysis	- When certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that one charged with dereliction has fallen below the standard - When proof of customary practice is coupled with showing that it was ignored and departure was a proximate cause of accident, it may give rise to liability - Proof of common practice aids in formulating general expectation of society as to how an individual will act Custom and usage does not need to be universal, just well-defined in same business/calling - The question in each instance is whether it meets the test for reasonableness - Pay attention to reasonableness in all circumstances
Holding	Reversed and ordered new trial, General Business Law sections should have been excluded. Statutes protected only those tenants for whom shower glazing was installed after statutory effective date, P was not in that class. Cost to install was modest and glass was widely available, Landlord knew of the customs and had duty of reasonable care to install shatterproof glass.

TJ Hooper / classic statement on custom

Ratio	**There are precautions so imperative that even their universal disregard will not excuse their omission**
Facts	- Barges towed by tugs were caught in storm and sank - Tugs were alleged to be unseaworthy because they did not carry a radio receiving set to receive warnings of weather
Issues	Does custom and usage show that D breached SOC of reasonable care?
Analysis	Tugs could have had protections from dangers which they could learn of no other way - In most cases, reasonable prudence is common prudence, here there was no custom at all as to have receiving sets - Receiving sets not yet custom but would have been the reasonable thing to do
Holding	Notwithstanding there not being a general practice, court held that practice was so imperative that D was liable.

Ter Neuzen v Korn / general rule for highly technical terms and custom

Ratio	**Ratio: As a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matter that are beyond ordinary experience and understanding of judge or jury, it will not be open to find a standard medical practice negligent** **Ratio: As an exception, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim he or she was merely conforming to such a negligent common practice**
Facts	- Respondent was physician, appellant participate in AI program and became infected by HIV as a result - Respondent did not warn her of risk of infection, there was no link between HIV and AI at the time, no literature mentioned it before 1986 - The knowledge was still limited, no test for HIV in semen or blood until 1985 - Respondent later learned 4 women contracted in Australia through AI and immediately discontinued procedure, telling patients to get tested - Was not aware it could be transmitted until July, 1985 - Respondent personally interviewed all prospective donors and only one of his donors had been infected, later telling respondent he was bisexual

Issues	Can you find that a D breached the SOC notwithstanding he performed with standard medical practice at the time?
Analysis	- Physicians have duty to conduct practice in accordance with prevailing standards of professional knowledge - Review of evidence leads to conclusion that jury could not have found respondent ought to have known the risk – can only then be established if they find standard itself departed from that of a prudent and diligent physician and respondent then failed to conform with this higher standard Common practice plays conspicuous role in medical negligence actions - There are situations where practice itself may be negligent - If a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to ordinary finder of fact, it is not excuse for practitioner to claim he or she was merely conforming to a negligent practice - Evidence no the state of knowledge was highly variable, a finding of negligence without expert evidence was not supportable
Holding	D not negligent, did not violate SOC - This was a technical matter that required expertise and knowledge, non-expert cannot find negligence because an act was fraught with obvious risks and therefore they could not find the standard itself was negligent

Hill v Hamilton-Wentworth Regional Police Services Board / SOC for police

Ratio	**Appropriate standard to apply = 'reasonable police officer in like circumstances'** - **Factors:** **1. Likelihood of known or foreseeable harm (learned hand formula)** **2. Gravity of harm (learned hand formula)** **3. Burden or cost to prevent injury (learned hand formula)** **4. External indicators of reasonable conduct (custom and usage/professional standards)** **5. Statutory standards (evidence but not determinative)** **6. Social utility of D's conduct → court did not explicitly list as factor but they did consider and we should in an exam**
Facts	Case resulted in innocent person being investigated by police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit. Appellant alleges police were negligent in investigating crime.
Issues	Can police be liable if they fall below acceptable standard and harm results? What standard should be used in the context of police?
Analysis	The standard of a reasonable police officer in like circumstances - In professional negligence, where D has special skills and experience they must live up to standards of a person of reasonable skill and experience in that calling - The nature and importance of police work and relevant common law factors reinforce a standard of reasonable officer in like circumstances <u>Was the conduct negligent?</u> - Court concludes it did not breach standard - Arrest itself was not negligent - Evidence does not establish that reasonable officer in 1995 would not have followed similar practices in the circumstances (no rules regarding photo lineups at the time, for example) - Falls within difficult area of exercise of discretion → he made wrong decision but police discretion necessary to do job in time of incident (this goes to external indicators) - It has not been established he breached standard of reasonable police officer similarly placed
Holding	While the investigation was flawed, did not breach SOC of reasonable officer in similar circumstances judged by standards of 1995 including state of knowledge then prevailing. Dismissed appeal with costs.

ROLE OF STATUTES

When doing a negligence/SOC analysis, we ask:

- What role do statutes play in the analysis?
- Does the existence of a statute breached by D give rise to a cause of action in negligence in itself or is that determinative of whether SOC was breached or not?

Littley v Brooks / relevant but inapplicable legislation

Ratio	**Relevant but inapplicable legislation can be used to determine a SOC.**
Facts	- Plaintiffs were the widow and infant son of deceased, sued D train company and employee whose electric train collided with the deceased's car at a crossing - Killed him and his three children - P pointed to order of Ontario Railway and Municipal Board restricting speed of trains at crossings to 5 mph - In 1919, the D company was made to federal company and governed by federal regulations, provincial order no longer binding on it
Analysis	Order was admissible not as a rule to be enforced against D but as affording evidence of an adjudication of the tribunal upon dangerous character of crossing - Admissible as evidence because it contained results of inquiries made by public authority on matter of public concern - Was a particularly dangerous crossing where caution was required - We cannot say D breached SOC because they violated the statute but it still did present standard of reasonableness the court found suitable as evidence of what would've been a reasonable act in D's position If the rule were to be set aside or superseded it would cease to have evidentiary value
Holding	D breached the SOC.

Chipchase v British Titan Products / relevant but inapplicable legislation

Ratio	**A tort claim has to be considered independently of particular legislation and court cannot consider all statutory regulations that 'nearly apply' but don't actually apply to D.**
Facts	- Plaintiff was a painter, he was painting a factory and got a pair of step ladders - Put them up and then fell and injured himself on them - He claims against employers saying they were at fault in common law - Statute suggested that if he was at 6'6" he would be entitled to bigger plank but he was lower and legislation did not apply - P argued he was nearly within the regulation so court should take the standard described into account to determine what standard of reasonableness applies
Analysis	Court says argument is not correct, gave no weight to the legislation - Tort claim has to be considered independently of particular legislation - Court cannot consider all statutory regulations that nearly apply but don't actually apply. - Court says it is a matter of common sense whether staging should have been wider - They were also entitled to consider that P set up the ladders and plank himself without complaint and worked on it
Holding	D did not breach the SOC.

Queen in Right of Canada v SK Wheat Pool / breach of statutory obligation

Ratio	**Statute can provide specific standard and breach may provide evidence of negligence, but question remains whether D has failed to act with reasonable care when compared to reasonably prudent persons in the circumstances.**

Facts	- Respondent is a grain dealer, receives large quantities of grain, samples are usually scrutinized for insect infestation but the test results not known for 2-3 days - Board is agent for Crown under Wheat Board Act, received infested grain from the respondent - Infestation later found after test run and no infestation of the kind was known to occur on a ship - Board is claiming amount it cost them in claims, unloading and reloading grain and fumigation of grain holds
Issues	What is the impact of a breach of statutory duty?
Analysis	Court examined approaches from the UK, USA, and Canada. 1. English Position – independent tort for statutory breach distinct from negligence o The duty owed to P need only show breach of statute and damage caused by breach o Some limitations: P needs to show that legislators intended violation of statute would be tortious o This idea is unsatisfactory 2. American Position – assimilated civil liability for statutory breach into general law of negligence o Breach of statute could be considered negligence per se → automatically a breach of standard o When it comes to SOC, if you can show breach of statute you automatically satisfy requirement for breach of SOC o Criticism is that this approach is inflexible and applies crim standards of conduct to civil cases 3. Canadian Position – regards statutory breach under law of negligence, more intellectually acceptable and consolable with other developments in the law o The statutory breach must have caused damage of which P complains and should this be the case, the violation of statute is EVIDENCE of negligence on part of D o Is not a per se case and auto breach of standard like USA, just provides evidence o If legislation already imposes a penalty, no reason to assert additional sanctions and create independent action where statute already has penalty o Statute needs to expressly state that if breached, there is absolute liability in addition to any regulatory fine In this case, Parliament does not have express provision for damages for holder of a terminal elevator receipt who receives infested grain - Obligation under Canada Grain Act was discharged in this case - This case is presented solely on basis of statutory breach, no evidence of negligence on their part - Heavy financial burden should not be imposed without showing D is at fault, there was no statutory provision of additional liability and no route to claim breach of SOC so no negligence
Holding	Notwithstanding statute and proof that D breached, this is not determinative of breach of SOC of reasonable care because this standard is set by the court unless statute explicitly states otherwise. The action must fail.
Takeaways	1. Civil consequences of breach of statute subsumed in law of negligence 2. Notion of nominate tort of statutory breach giving right of recovery on proof of breach and damages should be rejected as should view that unexcused breach constitutes negligence per se giving rise to absolute liability 3. Proof of statutory breach causing damages may be evidence of negligence 4. Statutory formulation of duty may afford a specific and useful standard of conduct 5. In case at bar, negligence neither pleaded nor proven

CAUSATION (CAUSE IN FACT)

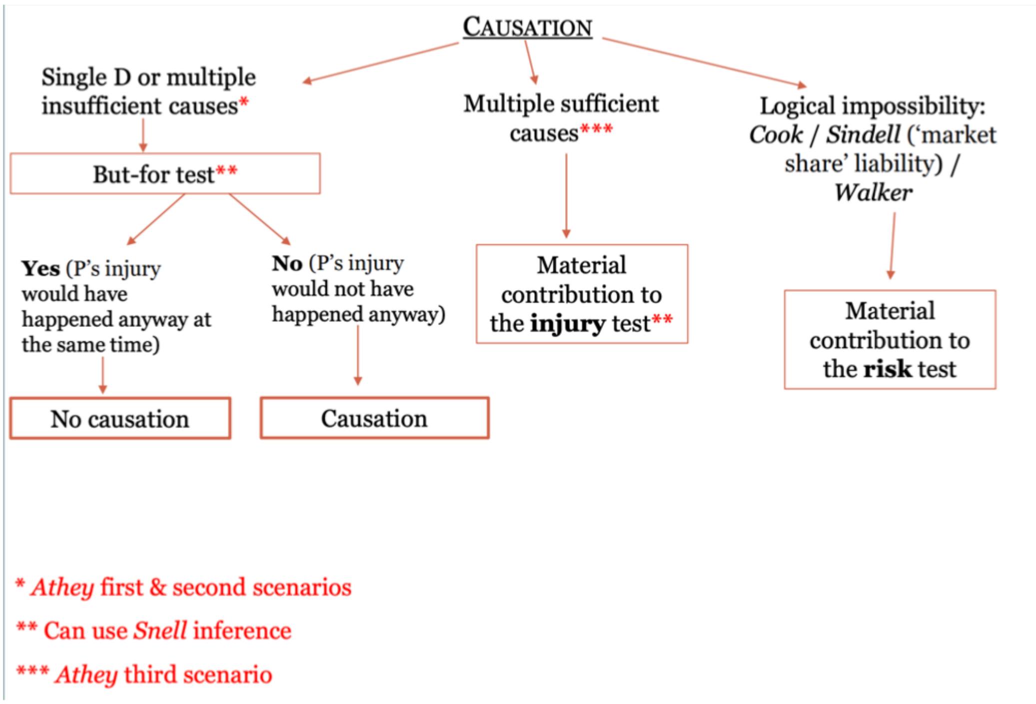
Materialization of risk into injury

- Injury is essential for liability for negligence
- Without materialization of risk into injury → no liability

Cause in fact connected act and injury, asking whether former caused the latter

- Standard approach is the 'but for' test
    - Asks whether one P's injury would have occurred but for D's act
    - Law recognizes the test is inadequate in some cases, where several parties are negligent for example

- Burden of proving cause in fact falls on P
    - In some situation, they will still hold D liable if P hasn't proven causal connection



Analysis

1. What does the evidence indicate?
    a. Single D or multiple insufficient causes? → apply but for test (*Barnett*)
    b. Multiple sufficient causes → apply MC to injury test (*Athey*)
    c. Logical impossibility → apply MC to risk test
        i. Situation 1: Three people in causal chain, impossible to tell which is responsible (*Walker*)
        ii. Situation 2: When there are more than 2 defendants and the defendants have a substantial % of the market (*Sindell*)
        iii. Situation 3: 2 potential defendants + no evidence to indicate who caused the injury in fact (*Cook*)
2. Did D contribute more than de minimis on BOP (*Athey*) → some sort of contribution at all
3. Cite any relevant cases
4. Conclude

Barnett v Chelsea / but for test and nature of factual causation

Ratio	**Ratio: Would injury to P have occurred 'but for' D's act? If yes → no causation, if no → causation** **Ratio: Use the but for test when there is one cause or multiple insufficient causes**
Facts	- P is widow of Barnett who died on Jan 11 from arsenical poisoning - She claims damages on behalf of her and her kids for his estate - D committee were responsible for management of St. Stephen's hospital - Deceased was employed as watchman and drank tea from flask with other watchmen - They started complaining of heat in room and all men got very ill, they drove to casualty department of the hospital, doctor told them to go to bed and call their own doctors - Deceased drove two men back to college and went and laid down, died at 1:30 PM
Issues	Was the deceased's death caused by the hospital breaching the duty to treat him? → if the hospital had treated him properly, would that have saved his life? - 'But for' the hospital not treating him, would P have still died?
Analysis	Yes, P would have still died even if hospital hadn't breached duty and treated him

	- No reasonable prospect the antidote would have been given before his death would have cured him - Causation is all about the facts → what P and D can show is D's role in causing the injury
Holding	No causation. Chelsea not liable.

Multiple Actual (Sufficient) Causes

When there are multiple sufficient causes, we use the material contribution to the injury test

- Multiple sufficient causes = each cause is sufficient in itself to cause the ultimate injury. But for test would not work here because P would always lose.

Athey v Leonati / material contribution to injury test

Ratio	**Ratio: If there are multiple sufficient injuries, D is liable for any injury caused or contributed to by his negligence, regardless of the presence of other contributing causes.** **Ratio: Three situations** **1. Barnett situation – if disc herniation would likely have occurred at same time without accidents → no causation** **2. Insufficient cause situation (new to Athey) – If both accidents and pre-existing condition were necessary for herniation → causation is proven** **3. Material contribution to injury test (new to Athey, but not used) – if accidents alone could have been a sufficient cause of herniation and pre-existing condition alone could have been a sufficient cause → must determine on balance of probabilities whether D's negligence materially contributed to the injury**
Facts	- P got two back injuries in two accidents, combined with pre-existing condition leading to disc herniation injury - P sues two Ds that caused the accidents leading to injury - DOC and SOC both present
Issues	Did the D's cause the disc herniation as a matter of fact?

Analysis	- SCC confirms general test is 'but for' but that test is unworkable in some situations
	- If there are multiple sufficient injuries, D is liable for any injury caused or contributed to by his negligence regardless of presence of other contributing causes (material contribution to injury – does not need to be sole cause)
	- No basis for reduction of liability due to other preconditions
	
	Respondent made six arguments:
	1. Multiple tortious causes – where multiple tortfeasors cause activity there is apportionment
	    o Two are not analogous, each D remains fully liable for injury but compensation is just apportioned
	    o P would not be adequately compensated if apportioned here
	2. Divisible injuries – apportionment permitted where injuries caused by two Ds are divisible
	    o Separation of these is not truly apportionment, just making each D liable for injury they caused
	    o Here this is a single indivisible injury
	3. Adjustment for contingencies – hypothetical events need not be proven, they are given weight according to likelihood. Past events must be proven on balance.
	    o Negligent conduct either was or was not a cause
	    o Disc herniation occurred prior, not assessed in terms of probabilities
	4. Independent intervening events – draws analogy to cases where unrelated event occurs after P is injured
	    o In the present case, disc herniation not independent intervening event, product of accidents and does not affect assessment of original position and reduce net loss

	5. Thin Skull and Crumbling Skull doctrines – crumbling skull doctrine recognizes pre-existing conditions that were inherent to p's original position ○ D need not put P in position better than original position, does not need to compensate for debilitating effects from pre-existing position they would have experienced anyways ○ Does not succeed here, no measurable risk that disc herniation would have occurred without the accident 6. Loss of chances doctrine – submitted the accidents merely increased risk and D is liable only for increase in risk ○ Loss of chances doctrine = p's may be compensated where their only loss is loss of a chance at a favourable opportunity or of a chance of avoiding a detrimental event ○ Loss would be loss of chance at avoiding disc herniation ○ Finding at trial was that accident contributed to cannot be used here **Application to the facts:** P must proving causation by meeting the but for or material contribution test - If it was necessary to have both accidents and pre-existing condition, Ds would be fully liable - If accidents alone could have been sufficient or pre-existing condition alone, then it is unclear which was cause in fact and trial judge would have had to determine whether D's negligence materially contributed Findings of TJ indicate it was necessary to have both pre-existing condition and accidents - Accidents played some causative role, however minor - Finding at trial was one of material contribution to render D fully liable
Holding	D both liable. D1 accident necessary but insufficient, D2 accident necessary but insufficient, pre-existing condition necessary but insufficient. P entitled to full amount of damages awarded by TJ.

Logical Impossibility

There are 3 situations where logical impossibility (multiple causes test) is appropriate:
1. 3 people in causal chain, impossible to tell which is responsible (*Walker)*
2. When there are more than 2 defendants and the defendants have a substantial % of the market (*Sindell*)
3. 2 potential defendants + no evidence to indicate who caused the injury in fact (*Cook*)

Cook v Lewis / multiple causes when 2 potential defendants

Ratio	**Ratio: If it is logically impossible to know which of 2 people caused an injury, we use the multiple causes to risk of injury test to find liability**
Facts	P shot when hunting, claims both D's are liable even though only one shot him in fact (but it is logically impossible to tell which one shot him) - Both shot negligently in direction of P with same type of gun at same time and only one actually hit him so it is logically impossible
Issues	How can liability for negligence be assigned when it is not possible to tell which D actually created the injury ?
Analysis	<u>Prior to *Cook*</u> If you could not show on BOP who actually caused the injury, then you could not hold D liable - *Cook* changes this rule <u>After *Cook*</u> Applying *Summers v Tice (USA)* → Both D's can be found liable if each breached a duty to the P - Court is saying that they both contributed to the risk of him being shot; if you shoot negligently somewhere where humans might be you contribute to the risk of injuring them, despite not contributing to actual injury (burden then shifts to Ds to prove which of them caused the injury) - This is distinguished from multiple actual causes; cannot say all Ds actually caused or contributed to Ps injury, they had to do it simultaneously

	- All P needs to show is that they both voluntarily contributed to the RISK of him being shot and if they cannot show which one did it, then they both will be liable
Holding	In this case, both D's contributed to the risk of P's injury so both are held liable

Sindell v Abbott Labs / market share liability

Ratio	**Ratio: Market share liability is used when there are more than 2 defendants. To use MSL, defendants must have a 'substantial percentage' of the market** **Ratio: Share of liability determined by looking at $ which the drug sold by each defendant bears to the entire production of the drug sold by all**
Facts	Class action, P who was part of class action suffered injuries as a result of mother taking drug during pregnancy - There were 200 pharmaceutical companies that were manufacturing the drug at this time - They were violating rules and did not warn of potential dangers - P could not identify the drug that caused the injury out of the 200 companies, the specific retailer/manufacturer could not be traced back to which specific bottle the drugs came from that injured her - Only one manufacturer manufactured the drug that her mother eventually consumed
Legal Rule	**Snell Test:** does not need a justification; just say 'since there is weak evidence, the court may choose to use the snell inference'
Issues	When there are several potential D's how can P get relief?
Analysis	Court says it is difficult for consumers to trace back all the way to producer where there are 200 potential producers operating; in grand scheme, is it better to have consumer holding the bag or manufacturer? Court utilized market share liability theory - There are policy reasons to find causation even though it is impossible to show which company actually caused the injury - P shouldn't bear the cost, companies did something wrong; drug was experimental and they sold it anyway; regardless of who did it all pharma companies had a DOC and breached the SOC - Causation test showed they all materially contributed to risk of injury to P Court changes apportionment when more than 2 defendants: - Market share liability → assess the % which the drug sold by each defendant bears to the entire production of the drug sold by all; all D's combined must have 'substantial percentage' of the market share - If D represents 'substantial percentage' then more likely than not it was one of them, the 5 big companies in this case were responsible for 90% of the market shares so it was easy to apply the test (court is okay holding the 'big players' liable so long as they represent a substantial percentage) - Here, MSL of 90% justifies shifting onus on BOP to defendants to show which one of them actually did it (and they could not → they are all liable) Market share liability is most common in class actions - Policy rationale: prevents us from holding too many companies liable at one, avoids 'opening the floodgates' of liability - MSL allows us to waive direct causation & look only to material contribution to risk - This also serves as a means for apportioning damages among the defendants
Holding	Causation determined through MC to risk; pharma companies held liable through market share liability
Notes	This is a US case and the MSL is an American doctrine; has been adopted by some Canadian provinces in the context of Tabaco - Only applies if you have product inability and logical impossibility

Snell v Farrell / snell inference for 'weak evidence'

Ratio	**Ratio: test can be used when applying 'but for' or 'material contribution to injury' where P has weak evidence to show on BOP that D caused or contributed to their injury under but for or multiple causes to injury test (when we have weak evidence, apply the *Snell* Inference)** - **Causation does not need to be determined by scientific precision but is a practical question of fact which can best be answered by ordinary common sense** **Ratio: snell inference does not apply to logical impossibility (and therefore not to multiple causes to risk)**
Facts	Dr. breached SOC performing surgery on P's eye, after surgery P had a stroke that led to atrophy of her optic nerve and blindness - Evidence showed the stroke could have been caused by D's negligence in the surgery OR P's pre-existing injury - TJ wrongful applied material contribution to risk test when should've used *Snell* inference, there was not enough evidence to prove that D materially contributed to the stroke which de facto leaves a P without a remedy
Issues	When we have weak evidence and are unable to prove 'but for' or 'material contribution' how do we test for causation?
Analysis	TJ applied the wrong test, was looking for too high a level of evidence; it does not need to be scientific precision, it is a practical question of fact which can best be answered by ordinary common sense - This is dealing with 2 possible sufficient causes: her pre-existing condition COULD have been enough and the surgeons actions COULD in and of itself have been enough - You need to show on evidence more likely than not on BOP that he did actually materially contribute to the stroke What does P need to show? - Very little scientific evidence is required from P for the court to infer causation - SCC will exercise common sense and infer the D materially contributed to stroke in these kinds of circumstances (to show beyond *de minimis*) - Can we conclude that what he did wrong contributed beyond de minimus to the stroke? → If yes, then this stage is satisfied - Where the facts lie within knowledge of D, very little positive or scientific evidence is needed from P for an inference of causation if there is no evidence to the contrary - The burden does NOT shift to D, P still has to bring evidence but it does not have to be as strong because the knowledge lies with D - Imbalance of knowledge and power means that D has all evidence about what happened/went wrong (SOC has already been breached, so we know they are a cause but P can't quite bring forward enough evidence because this evidence is not in their possession) - Court should otherwise take a robust and pragmatic approach to the facts even though P's evidence is not strong enough otherwise
Holding	When there is weak evidence, we apply the Snell inference to infer D actually contributed to the injury - If no evidence to contradict, or not strong enough on BOP, then we pass this stage of the test - TJ should have done material contribution to the injury WITH the snell inference

Walker State v York Finch General Hospital, 2000 / 3 people in causal chain

Ratio	**Ratio: The proper test for causation in cases of negligent donor screening is whether D's negligence materially contributed to the risk**
Facts	P got AIDs from blood transfusion, sued Canadian Blood Services for failing to properly screen blood donors - DOC found, SOC breached
Issues	Did the D in fact, cause P's injury?
Analysis	D argued that its failure to properly screen donors and inform them about AIDS did not cause P's injury, D said that the donor would have continued to donate blood even if screened and informed about AIDS

	- TJ found that donor continued to donate blood even after D informed donors about AIDS - What a 3rd party would do differently is hypothetical → not relevant to the evidence - In light of added element of donor conduct the 'but for' test could operate unfairly (would always fail) and the test is whether D's negligent 'materially contributed to the injury' - Case brought about confusion between material contribution to the injury test (multiple sufficient causes) and material contribution to the risk test (logical impossibility)

Resurfice Corp v Hanke, 2007 / applies MC to risk, gets rid of MC to injury

Ratio	**Ratio: Affirms the 'but for' is that basic test & applies when there are multi-cause injuries, in special circumstances, a 'material contribution' test can be applied where:** **1) It is impossible for P to prove that D's negligence caused P's injury using the 'but for' test due to factors outside of P's control** **2) D breached a DOC owed to P, thereby exposing P to an unreasonable risk of injury** **Gets rid of MC to the injury**

Clements v Clements, 2012 / MC to risk, no MC To injury, but do MC to injury in test anyway

Ratio	**Ratio: Material contribution to risk of injury test can replace the but for test where (affirms Resurfice):** **1) P's loss would not have occurred but for the negligence of 2 or more tortfeasors, each possibly responsible for the loss, and** **2) P through no fault of their own, is unable to show that any one of the possible tortfeasors in fact caused her injury**
Facts	Driving a bike with P on passenger seat in back, D drove above speed limit and overloaded the bike with cargo which breached the SOC - Expert witness testified at trial that probable cause of accident was a tire fracture that would have caused the accident anyways
Procedural History	TJ rejected expert evidence, finding that the but for test could not be used/failed because of limitation of scientific evidence (erred because we don't need evidence, just can use snell inference) and applied MC to the risk - In Meshel's opinion, court erred because we do not have a logical impossibility issue here
Legal Rule	P must establish on BOP that D caused their injury on the but for test; scientific proof of causation is not required; this applies also in the case of multiple actors - Ignores that since Athey we've applied MC to injury when we have multiple sufficient causes, but this is not qualified in the application of the but for test
Analysis	Court acknowledges that we once had MC to injury, but court MEANT To say MC to the risk, MC as a substitute for the but for where it is impossible to say a defendant's negligent act in fact caused the injury - Material contribution does not signify a test of causation at all; rather a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation - In such cases Ps are permitted to jump the evidentiary gap, because to deny liability would offend the basic notion of fairness and justice
Holding	COA overturned TJ's decision, finding MC to risk does not apply & but for should've been applied - MC to risk not proven on evidence, causation fails, D not liable

REMOTENESS

Is the type of injury suffered by P reasonably foreseeable? Is it not too remote?

- Type or kind of injury needs to be reasonably foreseeable or else it is too remote in nature to be liable for that injury
- Remoteness decided on basis of judicial policy & based on a sense of fairness

<u>Remoteness Analysis</u>

1) Physical or mental?
   a. If mental, is it compensable? Give evidence (*Mustapha, Saadati*)
2) Is the type of harm reasonably foreseeable?
   a. For mental, must be person of ordinary fortitude who would suffer from it (*Mustapha*)

3) [Potential Step] Thin skull/crumbling skull?
    a. Thin skull: D takes P as they find them (*Smith*)
    b. Crumbling skull: Reduced damages if P is thin skull (*Smith*)
4) [Potential Step for Bizarre Circumstances]: Scope of risk?
    a. Narrow: more likely court will find type of injury was not reasonably foreseeable given D's negligence & not hold D liable
    b. Broad risk: likely with children, court more likely to find injury was RF and find D liable

EVOLUTION OF REMOTENESS

Remoteness was not part of the original analysis → more recent cases made it very hard for P to satisfy remoteness requirement → as the law evolved, courts now emphasize compensation to P and loss distribution + not as strongly as pro-defendant policy anymore

- It is possible for courts to find injury not too remote and establish liability but in certain circumstances may also be found that damage is too remote

Evolved from pro-plaintiff → pro defendant → somewhere between pro-P and pro-D

In Re Polemis / old test of 'directness'

Ratio	**Ratio: Old test of directness → if act caused damage (established DOC, SOC, causation), then the type and extent of damages are inconsequential (essentially, the RF of damage or remoteness does not matter)**
Facts	D chartered a ship from P and use it to transfer petrol - Petrol leaked and there was a spark which ignited and there was an explosion that destroyed the ship - D claimed the damage was too remote, not reasonably foreseeable that D's employees would unload petrol cargo from ship in negligent way that would result in an explosion that would destroy the ship
Issue	What is the claim of being too remote? Do we require injury to be reasonably foreseeable in a claim for negligence?
Analysis	Court would not hear this argument, in the circumstances, once employees breached the SOC it does not matter that the way that the explosion ultimately happened was convoluted from some spark - Does not matter that harm was severe - No distinction between extent or type of damage, did not need to foresee either one (this later changed, now type of damage needs to be reasonably foreseeable) Instead of remoteness, court applied the directness test - If you directly cause the damage, you are liable for it in this case - Analysis ended with cause in fact element
Holding	Court does not required P to prove damage reasonably foreseeable, does not need to anticipate extent of the damage because applying the test of directness - If act caused damage, type and extent are inconsequential

Overseas Tankships (Wagon Mound No. 1) / foreseeability as probable consequence

Ratio	**Ratio: Test is foreseeability, where foreseeability is defined as 'probable consequence'** - **Liability is founded not on the negligent act but on its consequences, the kind of which must be foreseeable**
Facts	Involved boat with oil on it stored at P's wharf - The D's employees were negligent in some way and oil spilled from boat into the bay - P's work manager was of opinion that oil was not flammable on water, he saw the oil spill and continued working (instructed workers to keep working on a different boat) - As a result of some random piece of cotton floating under wharf, it caught fire from the sparks from the work done on the boat (sparks flying on water)

	- Ignited entire oil spill in water and exploded - Owner of wharf sued D (owner of boat from which oil leaked) - TJ said D could not have reasonably known that oil would catch fire in water
Issue	Was it reasonable foreseeable that explosion might occur and this type of harm would result from negligent of the D's employees?
Analysis	Court overturned *Re Polemis,* becomes more pro-defendant in the analysis - Not every slight act of negligence no matter how unforeseeable consequences are - Liability is founded on consequences of negligent act, the kind of consequences must be foreseeable - In this case, the 'property damage' must be foreseeable (nobody was injured) - Test is 'foreseeability' = probable consequences (has to be probable, not only possible) The ultimate injury must be reasonably foreseeable, P did not put forward any evidence re foreseeability of outcome (because that evidence would undermine their defence in *Wagon Mound 2* where P became defendant)
Holding	D not liable because damage to the wharf from the fire was not a probable consequence (not reasonably foreseeable)
Notes	This case made is harder for the plaintiff and was more pro-defendant

Overseas Tankships (Wagon Mound No. 2) / foreseeability as possible consequence

Ratio	**Test is foreseeability where foreseeability is defined as a possible consequence (advantage shifts to P because a possible consequence is easier to prove)**
Facts	P was owner of wharf in Wagon Mound No. 1, suing owner of boat that leaked the oil - In number 2, owner of wharf became the defendant because he was sued by owners of another ship that was at the wharf and damaged by the fire - Sued owner for failing to prevent fire, said outcome was reasonably foreseeable - P would not argue in the first case that damage was reasonably foreseeable, then turn around and argue it was not reasonably foreseeable in this case so they lost the first case
Issue	Was it reasonable foreseeable that explosion might occur and this type of harm would result?
Analysis	Court says it is possible that oil on water in wharf will result in an explosion that could cause property damage (evidence was established that work manager should have discontinued work when they noticed oil leak on the water) - This test is less strict for the plaintiff - Test is 'foreseeability' of the type of consequence as a 'possible consequence' - A much lower threshold for P to meet, it is enough to simply be possible
Holding	D liable because this is a possible consequence
Notes	This case made is easier for P and more less pro-defendant

REMOTENESS IN CANADA

Test for Remoteness: whether harm is a 'real risk' that is not 'far-fetched' or a mere 'possibility'

- **Real risk** = would occur to mind of a reasonable person in the position of the defendant
- This test has been cited by the SCC in multiple cases
- According to this standard, Wagon Mound 2 is not enough
  - Court in Canada did not go all the way and required 'probable consequence' but used more vague language 'whether harm is real risk, not far-fetched'
- Harder to foresee details, easier to reasonably foresee the broad categories of harm
  - Remoteness is policy driven and there is room for characterizing injury in different ways impacting the courts remoteness determination

<u>Common Questions</u>

1) What exactly needs to be reasonably foreseeable?
   - Type or extent of injury?

        - Type = this kind of illness or that kind of illness
        - Extent = not just type or kind, extent speaks to gravity of harm caused to P but not so much type of injury (how severe the injury is)
    - How much emphasis should courts place on way injury happened?
        - Does chain of events matter?
        - Does it matter that it came about in very bizarre way?

Thin Skull Rule

Thin Skull = pre-existing susceptibility

- Variation in the extent of injuries
    - Injury leads to more injuries → are the more injuries reasonably foreseeable?
        - Depends on what made the injury 'so much worse'
        - If final injury is 'so much worse' than original injury D caused & is due to P having a thin skull (pre-existing susceptibility) that made the existing injury so much worse or if initial injury introduced to P to a new risk that caused the next injury, D is liable

Thin Skull P = D trying to use pre-existing susceptibility as tool to argue that it wasn't D's fault/D should not be liable because the ultimate injury is too remote (they are a thin skull plaintiff) → this argument does not work (*Smith*)

Crumbling Skull = for damages, not liability. When P has susceptibility/is a thin skull P, crumbling skull rule reduces D's ultimate damages by the amount court determines would put P back in original position (only applies when P would have suffered injury later in life anyways)

Smith v Leech Brain & Co Ltd. / arguing thin skull will not help D; crumbling skull rule

Ratio	**Ratio: a tortfeasor takes victim as he finds them (even with thin skull, still liable)** **Ratio: focus on type/kind of initial injury and whether reasonably foreseeable, NOT extent of the injury (if you can show initial injury wasn't too remote from D, then remoteness of extent of injury or follow-up injuries is inconsequential to liability)** **Ratio: crumbling skull rule → for damages, not liability. When P has susceptibility/is a thin skull P, crumbling skull rule reduces D's ultimate damages by the amount court determines would put P back in original position (only applies when P would have suffered injury later in life anyways)**
Facts	Plaintiff was widow, her husband worked as galvanizer for D - Work carried out in vicinity of a tank containing hot liquid metal - D employed P's husband and gave him an iron shield to protect from hot metal sparks - Nonetheless, deceased had a burn on his lip from the hot metal (iron shield not enough to protect him) and he developed cancer from which he ultimately died (predisposed) - The initial injury was the burn - Court found P already prone to cancer & the trauma from the burn accelerated the development of the cancer
Issue	Is deceased's predisposition a defence that D can use to avoid liability? Is the dead too remote from D's negligence b/c P was a thin skull P?
Analysis	Just the type of initial injury needs to be reasonably foreseeable, then this is reasonably foreseeable that worker may suffer burn by liquid metal tanks - Does the extent need to be foreseeable? This is where thin skull comes into plays - Tortfeasor takes victim as they find him, if you cause initial injury whether or not they were more susceptible to developing more serious outcome, this is not an excuse to protect you from liability (still caused initial injury → take victim as you find him) Distinction between: 1) Foreseeability of type of injury 2) Foreseeability of extent of injury

	Test is not about whether D would see a far worse injury would happen or that the death was RF or not too remote, but whether type of initial injury was reasonably foreseeable THEN, everything the P ultimately suffered from does not need to be shown to be reasonably foreseeable - From this case → just the TYPE of injury is required 'Crumbling Skull' is a rule for damages - Reduces D's damages according to difference between when P would have presumably suffered the damages anyways and when he actually suffered it earlier (damages are mitigated, does not mitigate liability but damages may be lowered to reflect the fact that it is probable that P would have suffered harm anyways, just later in life)

Stephenson v Waite Tileman Ltd. / thin skull rule w pre-existing susceptibility and new risk

Ratio	**Ratio: There can be liability for both:** **1) Consequences flowing from pre-existing susceptibility of P; and** **2) From a new risk created by initial foreseeable injury (the thin skull rule still applies, and parties are liable for all subsequent injuries that develop as a result of the original foreseeable injury)**
Facts	Plaintiff cut hand from wire rope not secured properly by his employer and became severely ill as a result of the cut - At trial, two expert doctors gave contradictory evidence - First said that ultimate illness caused by virus entering wound in hospital and P had no pre-existing susceptibility - Second said that illness was result of nervous disorder that P was already susceptible to but became worse as a result of infection (basically a thin skull argument, pre-existing susceptibility and hospitalization led to it)
Analysis	If second doctors argument is accepted, there is no defence (not looking for extent, just type) - No question that hand cut was reasonably foreseeable initial injury resulting from failure to secure the wire - Court did not accept the second doctors testimony - Considered whether it is caused by something else entirely has nothing to do with pre-existing susceptibility - A new risk was introduced to P being the virus in hospital that made ultimate injury much worse than initial cut on the hand Court said they do not care whether it is new risk introduced to P as result of D's negligent act that made injury worse OR if it is a situation where P was susceptible more than average person to develop more serious injury and as a result of that the extent of the injury was more severe than reasonably expected - There can be liability for consequences flowing from pre-existing susceptibility as well as from a new risk created by the initial foreseeable injury Question remains the same: was the kind or type of initial injury that D caused P reasonably foreseeable? - If yes and only reason they ended with more serious ultimate injury was pre-existing susceptibility OR new risk created as a result of initial foreseeable injury then neither argument provides D with a defence - Neither argument can be used to yes the harm was too remote and D should not be held liable - As long as type or kind injury RF → ultimate consequence cannot be too remote to hold D liable
Holding	COA reverses TJ decision, D liable
Notes	Does not overturn *Smith v Leeche* but reinforced what it stands for in this situation

Cotic v Gray / thin skull & psychological injury

Ratio	**Ratio: D takes victim as they find him → 'a psychological vulnerable person'**
Facts	P's husband seriously injured in car accident that D negligently caused

	- Prior to accident, he suffered depression, condition worsened after the car accident and he became psychotic - 16 months after accident, he committed suicide and sued for his death - Jury in trial found D to be negligent, liable for ultimate death of deceased
Analysis	Defendant appealed on remoteness issue: although physical injury might reasonably lead to death, he did not die as a result of physical injury was accident and died due to committing suicide - D tried to argue ultimate, more serious outcome was not reasonably foreseeable because it was caused by psychological, pre-existing issue - Trier to argue thin skull does not apply here, not for psychological pre-existing issues only physical D takes victim as he finds him – a psychologically vulnerable person - Just the type, not the extent of the injury needed to be foreseeable

How did P Incur the Harm?

Do we care how the P incurred the harm?

Hughes v Lord Advocate / child shenanigans; broad scope of risk created for children

Ratio	**Ratio: Scope of risk is variable depending on the court.** - **If scope is narrow → less likely injury is RF and therefore D likely liable.** - **If scope is broad → more likely injury is RF and therefore D more likely liable** **Ratio: When children are involved, courts tend to define scope of risk broadly and find injury to P was not too remote from D's negligent act**
Facts	Defendant left manhole unattended and covered work with a tent and warning lamps - 8 year old P entered manhole and on his way out one of the lamps fell into the manhole, broke and exploded - P fell back into manhole and sustained severe burns - No question that employees owed DOC to P and breached standard, but is it too remote to hold D liable? - TJ found explosion of lamp was not reasonably foreseeable but the type/kind of injury was, D not liable
Issues	Was the way P incurred the burns reasonably foreseeable? - Must the way that P sustained the injury be foreseeable (in addition to type of injury as well)
Analysis	The type of P's injury was foreseeable even if not its extent or way it came about - Not looking at way it came about - In this circumstance, lamp was known source of danger whether it ultimately caused the harm because it fell and exploded or if it had caused burns to P in some other way it does not matter It was a known source of danger, even if behaved in unforeseen ways we do not care (type of injury still foreseeable) - Not necessary for precise cause to be foreseeable but ONLY the type of injury (whether burns caused by explosion or otherwise does not matter) P's injury fell within scope of risk broadly viewed - As long as type of injury reasonably foreseeable, we do not care how it happened - View of court of scope of risk was broad (broadly risk of individual getting burn from lamp in ANY way because it was left unattended) - In cases involving children, courts define the scope broadly - Pretty much any way child got injured will be RF as long as type of injury foreseeable
Holding	D liable

Doughty v Turner Manufacturing / narrow scope of risk

Ratio	**Where scope of risk is narrow, risk of type of injury is likewise narrow (with really random and unlikely event, may be more narrow)** - **Likely defined more narrowly for adults than for children**
Facts	D had two containers in factory with hot metal liquid, cement cover placed on top of each container and accidentally dropped inside one container - P stood next to one and the cover fell in and exploded inside the container - P suffered an injury from the hot metal liquid
Procedural History	TJ said risk of hot metal liquid splashing on people if cover fell in container in certain way wasn't RF - However, there is an overall risk and even though P did not suffer burns in the way/places you would expect - Found the defendant liable and construed the risk broadly
Issues	Does the way injury happened need to be RF or just type/kind of injury?
Analysis	The court distinguishes from *Hughes* – in *Hughes* the duty breached was broader to guard against children being attracted to danger - Here, D's duty was more narrow, merely to avoid the hot metal splashing and not avoiding metal cover falling in and causing an explosion - P's injury did not fall within the scope of the risk created by D (narrowly viewed) - All D had to do was prevent splashing, exploding not RF - Court refused to accept that scope of risk included cement cover inside and exploding Type/kind of injury still RF but defined scope of risk in very narrow way - Court in this case said we care very much about how the event happened and defined scope of risk narrowly
Holding	D not liable b/c scope of risk created by D was narrow (risk of protective cover on hot metal falling into vat and causing an explosion) - As P did not suffer injury in the very specific way court thought would not be too remote, the injury is too remote from the scope of the risk
Notes	A lot rests on how courts define scope of risk → no way of knowing in advance which way courts will go other than general rule from *Jolley* - If it involves children, most likely to define broadly

Jolley v Sutton London Borough Council / narrow scope for children

Ratio	**What must be foreseen is not the precise injury which occurred but injury of a given 'description'; the description of the injury is formulate <u>by reference to the nature of the risk which out to have been foreseen</u>** - **Foreseeability is not as to the particular of the injury but the genus (the type)** - **A broad description of risk is appropriate in cases involving children more so than in cases not involving children**
Facts	D owned boat that was abandoned & brought in - P teenager jacked up boat which fell and caused P serious injuries
Procedural History	TJ defined scope of the risk broadly; risk that children would meddle with boat at the risk of some physical injury - Don't care about how it happened, it is reasonably foreseeable COA defined risk more narrowly, following *Doughty* - The COA defined risk as children drawn to boat → would climb on it → would be injured by rotten planking giving way beneath them - Specific, narrow way of looking how injury came about - Likely won't find such narrow injury to be RF
Issues	How broad/narrow will court define scope of risk and whether details of how injury came about will be seen as significant or not?

Analysis	What must be foreseen is not precise injury that occurred, but injury of given 'description' - The description of injury is formulated by reference to nature of risk which ought to have been foreseen - Not defined by particular of injury but rather the 'genus' of the injury Risk of children coming to abandoned boat and suffering physical injury in some way is foreseeable, this is all they needed to show - Does not need to show how it happened, this case involved children and broad definition in cases involving children - A broad description of risk is appropriate in cases involving children more so than in cases not involving children
Holding	The injury was reasonably foreseeable, the TJ's decision should be restored and remitted to COA for damages

Intervening Act

Intervening Act: event that happens after D's alleged negligent act, D is now claiming that intervening act triggered or worsened P's injury making the injury too remote

- An event that happened AFTER D's negligent that triggers or worsens injury to P
- Key question: whether intervening act fell within scope of risk created by the D?
  - If it is → D should still be liable
  - If intervening act outside scope of risk created by D → should be released from liability because intervening act not RF, however, courts are more reluctant to release from liability based on intervening act in more recent cases
- Is the same test for foreseeability applied to intervening act

Bradford v Kanellos / leading case in Canada for intervening act

Ratio	**Ratio: an intervening act won't clear a D if it can fairly be considered a normal incident of risk created by him** - **It will clear a D if there is a human intervening act that in itself is not reasonably foreseeable**
Facts	P was a customer at D's restaurant, small fire broke out on grill at back of kitchen because D was negligent at maintaining the grill - Staff in kitchen extinguished fire, immediately used the fire extinguisher - No damage caused or injury but extinguished when used makes hissing or popping sound and this caused someone in the restaurant to yell out that there was going to be a gas explosion causing hysteria in the restaurant and everyone rant to the door - P was knocked off chair, fell down and injured herself
Procedural History	TJ found panic caused by noise was foreseeable - Foreseeable that using extinguisher, extinguisher makes noise, someone thinks explosion is foreseeable - The alleged intervening act here is person yelling 'explosion' and causing panic and P falling of chair COA reversed finding, D oculd not have reasonably anticipated the intervening act being panic that was actual cause of the injury, P appealed to SCC
Issues	Was person yelling explosion and creating panic reasonably foreseeable?
Analysis	Majority of SCC upheld COA finding, this was not an intervening act because it was not reasonably foreseeable - Hysterical conduct of customer that occurred when safety appliance properly functioned was not within the scope of the risk created by D's negligence in failing to clean the grill → not foreseeable - An intervening act will not clear D if it can fairly be considered normal incident of risk created by him In remoteness, the panic was a human intervening act that was not in itself reasonably foreseeable

	- Can't hold D liable → too remote
Holding	D not liable; injury too remote
Dissent (Laskin)	Disagreed with application of test to the facts - Person who shouted explosion acting in a human, usual, foreseeable way - Actions part of natural consequences of events leading to Ps injury - Found it was reasonably foreseeable - Agreed on test for intervening act, disagreed on application to the facts

Home Office v Dorset Yacht Co Ltd. / liability for human intervening act?

Ratio	**If what is relied upon as a human intervening act is the 'very kind of thing' that is likely to happen (natural and probable result of D's negligent action) then it is not an intervening act and D should be held liable** - **If human intervening act is not natural/probable result of D's negligent action, it is an intervening act and D should not be held liable**
Facts	Young offenders in youth corrections centre on an island, they were having a party under supervision of D officers - D officers went to sleep leaving guys unattended and they stole P's boat and escaped
Analysis	If what is relied upon as a human intervening act is the 'very kind of thing' that is likely to happen (natural and probable result of D's negligent action) then it is not an intervening act and D should be held liable - Intervention of human action does not ultimately prevent liability for D - If what you rely on as alleged human intervening act is the very kind of thing likely to happen → it should not sever D's liability This damage was very thing D guards should see as happening, if they leave the boys unattended during this party
Holding	Was a natural and probable result, not an intervening act; D liable

Psychiatric Harm

Is psychological harm too remote to hold D liable for it?

Principles:
1) *Mustapha* sets basic principles → must be compensable, serious illness or trauma, more than mere annoyance
2) *Saadati* comes to determine what needs to be shown in terms of evidence → does not need to be recognized illness
3) Apply the RF test → real risk, not far-fetched (person of ordinary fortitude would suffer and likely react in that way)

Test set in *Mustapha* applies to all injuries
- Apply test to physical injuries as well, but include 'reasonable person of ordinary fortitude' for psychological injuries
- Real risk, not far-fetched applies to all injuries including physical → cite in remoteness analysis

Mustapha v Culligan of Canada Ltd. / remoteness & psychiatric harm

Ratio	**Ratio: When we have psych injury; first ask whether injury is compensable, if compensable P, we take P as we find him:** **1) Must be compensable → must be serious and prolonged & rise above ordinary annoyance, anxieties and fears** **2) The type of mental injury must be a 'real risk', not far-fetched such that it would occur in person of ordinary fortitude → usual or extreme reactions to events caused by negligence that are merely imaginable not RF do not confer liability** **3) Once 1&2 are satisfied, D must take P as he finds him for the purposes of extent of the damages**
Facts	P developed depressive disorder from seeing dead flies in water supplied by D manufacturer - P claims image severely scarred him and is suing for psychiatric harm resulting from negligence saying he could no longer drink, shower, or have sex as a result

	- It was found that D breached the standard and owed a DOC and caused injury in fact
Issues	Was the kind or type of harm too remote toe hold D liable for it?
Analysis	Both physical and psychological injuries are compensable in tort law - The difference is that for psychological, has to be 'serious illness or trauma' - This is because law does not recognize upset, disgust, anxiety, or other states that fall short of an injury - Must be serious and prolonged rising above ordinary annoyance, anxiety, and fear The RF test requires a real risk – one that would occur to mind of a reasonable man in position of D and which he would not brush aside as far fetched - Must be reasonably foreseeable like any other injury - Cannot say test was satisfied unless injury would occur in person of ordinary fortitude and rises above to serious trauma or illness Type must be such that it occurs in person of ordinary fortitude - In this case, it was serious enough to be compensable but court found on application of RF that the reactions were highly unusual, very individual, and failed to prove person of ordinary fortitude would suffer that kind of injury Sets out the principles for psychiatric harm/injury 1) Compensable personal injury in tort law includes physical and psychological, latter must be serious trauma or illness 2) Tort law does not compensate/recognize upset, disgust, anxiety, agitation, or other states falling short of injury (must be serious, prolonged, rise above ordinary annoyances, anxieties or fears) 3) Type of injury must be such that it would occur in a person of ordinary fortitude (contrast to physical where this does not need to be shown) → unusual or extreme reactions caused by negligence that are merely imaginable (not reasonably foreseeable) do not confer liability 4) Once P establishes mental injury would occur in person of ordinary fortitude; D must take P as he finds him for purposes of extent of damages a. This is where P failed, unusual and extreme events not in persons of ordinary fortitude b. If he had ordinary fortitude, we would have used the thin skull & D would have taken P as he found him
Holding	SCC found he developed psychiatric illness that constituted trauma, P was successful up until last element of the analysis - D not liable

Saadati v Moorhead / build on Mustapha, evidence needed for psych harm

Ratio	**Ratio: Ps alleging mental injury are NOT required to provide expert testimony/evidence of a 'recognized psychiatric illness'** - **This can assist in establishing mental injury, but not required as matter of law** - **Instead, Ps must show disturbance is serious and prolonged and rises above ordinary annoyance, anxieties, and fears that come with living in a society**
Facts	P starting in 2005 involved in car accident caused by D - Car accident in 2005 involved D being negligent causing accident but did not cause any physical injury - This was not Ps first accident, they already had an accident 2 years prior in 2003, where he suffered physical injury and chronic pain - The car accident D caused in 2005 was followed by another one and then involved in 2 additional ones in 2008, 2009 - By 2010, the plaintiff was declared mentally incompetent from trauma of all accidents - Sued D not for physical injury but claimed he wanted compensation for the mental injury
Procedural History	TJ found P did not suffer physical injury but accident did cause psychological injury - Concluded he had requisite level

	- Evidence here was not medical, just family and friends testified he was a completely different person BCCA reversed, erred in awarding damages because P did not prove a medically recognized illness or condition - Need to show expert evidence to satisfy Mustapha's requirement for serious illness or trauma
Issues	Is it necessary for finding of compensable mental injury for a claimant to put forward proof of recognized psychiatric illness?
Analysis	Claimants alleging mental injury not required to provide expert testimony of recognized psychiatric illness - Expert testimony not required, mental injury not often readily apparent - Does not necessarily mean that it has to be recognized psychiatric illness - Expert evidence can assist but not required as matter of law - Ps must show that disturbance is serious and prolonged rising above ordinary annoyance, anxiety, and fears that come with living in civil society - Expert evidence can assist in establishing a mental injury but not required a matter of law
Holding	Court reinstated the TJ opinion, did support finding of mental injury rising to level required by Mustapha despite lack of expert medical testimony - What matters is substance of symptoms and not label put on them

DEFENCES

Burden shifts to D if P establishes liability in all of the first steps → can D either lower damages or entirely negate liability?

- Defences negating liability are hard to show
- Idea with all defences is that P did something justifying lowering the damages that D needs to pay them or allowing D to walk entirely as P did something to justify

DEFENCE	COMPLETE OR INCOMPLETE?
Contributory negligence (most common)	Incomplete (limits recovery for P)
Voluntary assumption of risk (less common)	Complete (no recovery for P)
Illegality (rarely established)	Complete (no recovery for P)

CONTRIBUTORY NEGLIGENCE

Used to be a complete defence at common law but is now only a partial defence

- You establish P's liability in almost the exact same way as you establish D's liability
    - Standard, causation, remoteness except for duty as a P always owes duty to themselves
    - D has to show standard, causation and remoteness with respect to Ps own actions to themselves
- Contributory negligence is defence was can always fall back on because it does not rise to level of complete defence but can reduce damages
- State that they breached standard to themselves, cause in part of their own injury (multiple causes cause P and D contributed) and remoteness (injury from P perspective cannot be too remote)
    - If scenario not in AB, cannot apply the *Contributory Negligence Act* and you do not need to know other provincial acts

Froom v Butcher / contributory negligence mirroring liability analysis

Ratio	**Ratio: In seat belt cases, negligent driver still bears greater shares of responsibility but damages should be reduced if it could have been lessened by wearing seatbelt** **Ratio: P has to bear consequences of their choice** **Ratio: Defence of contributory negligence must satisfy SOC, causation, and remoteness on P's part:** **(1) P has to have breached SOC**

	(2) P's actions must have causation in fact (cause or contribute → but for or material contribution to injury, but maybe MC to risk however it is unlikely) **(3) Remoteness (real risk, mental or physical)**
Facts	P injured in car accident that D negligently caused and P was not wearing his seatbelt - Some of his injuries would have been prevented by wearing a seatbelt
Procedural History	TJ found damages should not be reduced, notwithstanding him not wearing seatbelt (was not contributory negligence on part of P) - D should be fully liable for injuries
Issues	IS a defence of contributory negligence available to D?
Analysis	Notwithstanding that D is liable, did the P do something to make them liable themselves or contribute to their own injury and do we allow for this type of defence? - In seat belt cases, the negligent driver bears greater share but damages should be reduced if it could have been lessened by wearing a seat belt (general principle for contributory negligence) - D is at fault, but contributed to own injury by not wearing seat belt
Holding	Contributory negligence found; damages reduced

Contributory Negligence Act

In AB, legislation dictates how damages should be reduced when negligence is found

- Court will apportion in proportion to degree of fault that parties are found to have respectively contributed to the injury of P
- If there is enough evidence that D contributed 40% and P contributed 60% for example, court has discretion to apportion
- If court cannot figure out on the evidence, then it is 50/50 (not what is just or equitable, it is what the evidence shows and if evidence does not show anything on BOP → 50/50)

VOLUNTARY ASSUMPTION OF RISK

Is a complete defence showing P voluntarily assumed the risk

- If P voluntarily assumed risk of being injured, cannot turn around and blame D for the injury
- Very narrow and difficult to show
- Defence was originally developed in context of drunk driving but applies in any context (more and more common in waiver cases agreed to participate in dangerous activity)
    - Waiver is not 100% free from liability and depends on circumstances in which waiver was signed and cannot contract out of every liability

Applies frequently to (1) drunk driving and (2) waiver

Dube v Labor / leading case about voluntary assumption of risk from the 80s

Ratio	**Ratio: Defence will only be available in rare circumstances: P must have agreed expressly or by implication to exempt D from liability for damages occasioned by D's negligence** - **Not sufficient that P knew of the physical risk and chose to undertake it, but circumstances must be such that legal risk was voluntarily incurred by P and she/he bargained away the right to sue for injuries resulting from the negligence** - **P's acceptance can be express or implied but will arise only where there is an understanding by both parties that D assumed no responsibility to take due care for safety of P and that P did not expect him to**
Facts	D was driving, P was passenger and both were drunk - Got into an accident causing Ps injury who sued the defendant for the injuries - Jury dismissed Ps claim based on voluntary assumption of risk by getting into a car with a drunk driver
Issues	Was any defence available?

Analysis	The defence of voluntary assumption of risk only available in rare circumstances, and this is one of the rare circumstances where the defence applies - P must have bargained away the right to sue and D must show that P actually consciously with understanding bargained away the right to sue for any future injuries they might incur - Not sufficient that P knew of risk and agreed to undertake, but circumstances must be such that legal risk was voluntarily incurred by P and bargained away right to sue for injuries from Ds negligence (have to bargain away the physical risk) Is a high bar for knowledge and understanding, D must show that P actually bargained away and participated in whatever activity by understanding not only the risk of car accident but also the physical risk involved and that they will not be able to sue for it - Must have understood D took no responsibility to drive carefully for safety of P and P did not expect him to drive carefully in this case
Holding	No recovery for P

Priestley v Gilbert / inference of consent to risk in joint ventures

Ratio	**Ratio: P must be taken by implication to have consented to the physical and legal risk of injury as can be inferred from the joint venture undertaken by him and D**
Facts	P was passenger in car, injured by D when drunk - D negligently caused collision with another car resulting in serious injuries to P - P and D met up before and drank in car, judge found they embarked on a joint venture to drive around drunk so P knew or should have known that this would endanger their life and voluntarily accepted the risk - There was not only risk of physical injury but TJ found they also accepted or waived/agreed not to hold D liable for injuries that would happen - At trial, D was absolved on liability on basis of voluntary assumption of risk
Analysis	P must be taken by implication to have consented to the physical and legal risk of injury as can be inferred from the joint venture undertaken by him and D - If you participate in planning of entire event, cannot then come and say you were not waiving the right to sue driver - If P participated in entire circumstance, this is a much easier defence to make out
Holding	P assumed legal and physical risk, no recovery for P

Birch v Thomas / P agrees to exempt D from liability (waiver) → cannot recover

Ratio	**Ratio: If P impliedly, explicitly or by conduct agrees to exempt D from liability, then D cannot be held liable**
Facts	Involved car accident, D was not insured against passenger liability with his car - Placed a sticker on passenger window saying he was not insured for passenger liability (essentially saying 'enter car at your own risk') - D told P expressly he was not insured by P nonetheless chose to ride in car - Evidence shows P did not actually read notice on window
Analysis	Found the defence applied, P entered car knowing they assumed physical risk of injury and legal risk of not being able to sue if injured - There was a notice of no insurance, legal right to sue waived - Although P did not read notice, D's verbal warning and P's decision to enter nonetheless exempted D from liability
Holding	P had assumed risk of precisely kind of injury that occurred and therefore P could not recover
Notes	Meshel says this is questionable whether P truly waived right for D to take the care to drive safely

ILLEGALITY

A complete defence, justification is that P behaved or conducted themselves in a manner that violates a legal or moral rule

- P engaged in some illegal behaviour that justifies releasing D from liability
- Narrow → specific definition (not just anything illegal)
- Illegality hinges on what it is that P is looking for compensation for → if P wants compensation for actual harm suffered (*Hall*), illegality often won't work. BUT if P wants compensation that would allow them to profit off their illegality, then the defence will work (*Zastowny*)
    - Does not have to do what caused the negligence, it depends on what P wants compensation for

Hall v Hebert / illegality is a defence that applies only in limited circumstances

Ratio	**Ratio: Defence only applies in limited circumstances. It applies when:** **(1) Allowing P's tort claim would permit P to profit from their wrong OR** **(2) Allowing P to recover would create internal inconsistency in the law** **Ratio: There are public policy considerations that justify illegality as a defence; to preserve the integrity of the legal system and judicial process by not allowing recovery for what is illegal and maintain internal consistency in the law**
Facts	P&D consumed alcohol in public place (illegal) - D allowed P to drive his car while drunk in rough road conditions, P sued defendant who was owner of car for allowing him to drive the car - D argued that P engaged in criminal conduct, negating D's liability and should not be liable under defence of illegality
Procedural	TJ found liability – only criminal activity was consuming alcohol in public place and this occurred before alleged negligent acts of D took place - Finished drinking, then P later got into car and drove (no link between illegal activities and acts of Ps alleged negligence) - It also was not illegal enough to negate liability COA reversed the finding, even if there was liability the defence applies in this case - Was appealed to the SCC
Analysis	Restored TJ, elements of liability were satisfied and illegality defence was not available (defendant remained liable) - The underlying rationale is to preserve integrity of legal system and judicial process by not allowing recovery for what is illegal and maintaining internal consistency in the law - Defence will not operate to deny damages as compensation for personal injury in tort Generally there is no problem for P to be compensated for injury suffered as a result of Ds negligence, regardless of their own illegal conduct - Can never be used to just negate compensation simply because P engaged in some illegal conduct Applies in very limited circumstances such as where: (1) Allowing Ps tort claim would permit P to profit from wrong (preserving integrity of legal system) o Eg. If P claims loss of future earnings as result of injury but earnings come from an illegal occupation o For defence to be available, damages award needs to result in direct profit to P from their illegal conduct (2) Allowing P to recovery would create internal inconsistency in the law o Eg. If P and D broke into house and P got injured while breaking in as a result of Ds negligence and caught because of Ds negligence and then P sues to recover from D a fine he received as a result of breaking in o This would create internal inconsistency – criminal law will punish P who will turn around and use tort to get away/get out of paying penalty Not simply to deny compensation for injury to P, the defence will not deny P the compensation for actual personal injury and it will only apply to prevent them from profiting from actual illegal activities

Holding	Defence was not applicable - Not seeking to profit from illegal conduct, only compensating for injury - Drinking in public had nothing to do with injury, not seeking to use tort to profit from illegal conduct and no internal inconsistency with the law, defence was rejected - Contributory negligence was found and reduced recovery for P by 50%
Concurring (Cory J)	In a separate opinion, Cory J said this should not be a defence but part of DOC analysis - This has been rejected by SCC twice - Fairly certain now that this is a defence in Canadian law

BC v Zastowny / only successful case of illegality defence

Ratio	**If P profits from wrong and/or P's recovery would create internal inconsistency in the law, illegality defence might apply (*Hall*)** - **Facts of the case useful for distinguishing/comparing where illegality might be found**
Facts	P was released from jail and was sexually assaulted while in jail, did drugs then sent to jail again for next 12 years - Sued prison for damages for sexual assault and lost wages during time in jail - Can ask for income while recuperating or past income lost after injury because he was in jail - Brought evidence linking behaviour for why he ended up in jail the second time (drug dependency) to sexual assaults that happened to him the first time he was in jail
Analysis	Wages lost while in jail result from his illegal activity for which he was convicted - The illegality defence prohibited him from recovering compensation/damages for time in jail as this was his punishment under the legal system - If we allow him to recover through tort for something the criminal system imposed, we are creating an internal inconsistency in the law - Will not allow him to recover through tort, SCC said tort law does not have to play criminal laws conscience - This would effectively compensate him for the time he spent in jail
Holding	Defence successful

Rankin v JJ / confirms illegality as defence

Ratio	**Ratio: Confirms illegality remains a defence in negligence in Canada** **Ratio: Illegal conduct of P is not considered at DOC stage but as a defence**

DAMAGES

Order of Analysis:
1. Liability
2. Defences
3. Damages

Key question: What kind of losses is the P asking to be compensated for and how do you determine the appropriate amount of money?

Andrews v Grand & Toy AB Ltd. / main heads of damage apportionment

Ratio	**Ratio: we only have to remember one number – the Canadian cap on non-pecuniary losses at $100,000 in 1978. This is around $400,000 today. (do not calculate, just apply principles to facts)** **Ratio: Pecuniary losses includes two heads:** **(1) Cost of future care (must be reasonable in circumstances to ensure P is comfortable, but not more than that). Cost of future care is based off of the following:**

	○ **Standard of care (what type of care does P need for rest of their life and what amount of money is reasonable in the circumstances to make sure that P is comfortable/well taken care of, but not more than that)** ○ **Life expectancy (how long will P live, how long should damages be provided?)** ○ **Contingencies of life (duration of expense may shift by no fault the D, so court may allow some % discount to compensate for potential contingencies)** **(2) Prospective loss of earning:** ○ **Level of earnings: how much would they have earn** ○ **Length of working life: court uses typical working life of 23-55** ○ **Contingencies (downturn in economy, etc.)** ○ **Cost of future basic maintenance: avoid duplication by ensuring no additional money for things P would buy whether or not D (necessities of life they have to pay for anyways)** **Ratio: Non-pecuniary losses, capped at $100,000 in 1978 ($400,000 today)** - **Definition: damages for P's loss of enjoyment of life, pain and suffering (is a policy exercise)** - **Calculation: calculate using a functional approach, which values injury in terms of loss of human enjoyment by the victim. Assesses compensation require to provide P reasonable solace for his misfortune beyond the cost of future care and is motivated by utilitarianism. While the functional approach recognizes that loss cannot be replaced in a direct way, it ensures some type of compensation (up to 100,000 in 1978 dollars) that considers the situation of the victim (ie. Losing finger for pianist not same for non-pianist)**
Facts	21 year old P rendered paraplegic due to the defendant's negligent conduct - P had no hope of functional improvement & required continuous care for the rest of his life - No one appealed liability, only lower court's assessment of damages ended up in the SCC - Trial judge said 1 million (cost of future care in home @ 4,000/month, 20$ reduction for future care contingencies and 20% reduction of employment contingencies) - COA said 0.5 million (cost of future car in home @ 1,000/month and additional 10% reduction for contingencies) - Appealed to the SCC
Analysis	Two heads of damages will cover: **(1) Pecuniary losses** (monetary, actual expenses). Two heads under pecuniary: **a. Cost of future care** ▪ What is the amount that can be reasonably expected to be expended by P? ▪ Amount of money claimed has to be reasonable in the circumstances to make sure P is comfortable/well taken care of but no more than that ▪ Not mere provision of $ but court looks to compensate (amount should not be determined by sympathy alone but should be reasonable) ▪ Circumstances taken into account to determine future care: • **Standard of care -** what type of healthcare does P need for rest of their life? (In this case – institutional home care? SCC says since he is closer to the beginning of the life and requires this $4k would be a reasonable amount) • **Life expectancy** – how long will the P live for, how long should damages be provided? (look at average life expectancy) • **Contingencies of life** – duration of expense may shift (ex. health becomes serious enough that individual transitions from home care to less expensive hospital care) so court may allow some % discount to compensate for certain contingencies (SCC reversed the COA and upheld TJ 20% contingency reduction) **b. Prospective loss of earnings** ▪ **Level of earnings:** how much would they have earned? (harder when younger to determine). Take into account pension. ▪ **Length of working life:** age 23-55

	▪ **Contingencies:** what might affect future earnings? (negative or positive – usually small but depends on the line of work) • **Negative** = illness, depression, etc. • **Positive =** promotions, inflation, etc. ▪ **Cost of future basic maintenance (duplication):** whether or not D was injured by P, they still would have had to pay rent and buy clothes, food, etc. These are not the fault of D and would presumably come from P's income, so we do not want to duplicate them. **(2) Non-Pecuniary losses** (capped in Canada, not in the USA: damages for P's loss of enjoyment, life, pain, suffering, etc. and is a policy exercise – has to be fair and reasonable which is why there is a cap in Canada) o Andrews introduced a cap (open floodgates for Ps danger of expensive burden of expense on D) o **Functional Approach:** values injury in terms of loss of human enjoyment by victim but assesses the compensation required to provide the P reasonable solace for his misfortune ▪ The idea is to provide comfort for misfortune beyond cost of future care → provide extra comfortable physical arrangements to make life more comfortable than just future care would provide, not motivated by sympathy but by utilitarianism ▪ Approach is appropriate because it recognizes that money serves to make up for what has been lost in the only way possible ▪ Recognizes that loss is incapable of being replaced in a direct way, but functional perspective ensures large amounts are not rewarded once court is satisfied P is properly compensated in terms of future care (beyond future care that is out of pocket) ▪ Court must consider the situation of the victim (ex. finger of pianist not same as finger of non-pianist) but there should be a rough upper parameter on these awards. In the case of young adult quadriplegic here → $100,000 (1978)