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**Fall**

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## Negligence: The standard of Care

* You don't intend to do X, but X occurs and someone has a violation of their rights because of it.
* one is liable or the harms caused by one’s negligence
* negligence: the creation of unreasonable risk
* 5 requirements to prove a claim in negligence
  + **1) Standard of Care:** Defendant breached the standard of care
    - D must have acted as a reasonable person of ordinary prudence would have acted in similar circumstances. The court will then apply that standard in order to determine whether or not D breached his obligation.
    - the standard of care that applies to the insane is the reasonable care of someone with that disability but it depends. The dividing point in Canadian law is those who can make rational choices and those who cannot
    - the standard of care that applies to children also depends on their age of development. There are three categories for those under the age of majority, (1) infants (no standard of care, they are like wild animals, they can be grouped into a category of people who do not have enough rational agency), (2) Young adults who are capable of the rational thinking of an actual adult at the age of majority, people who are very close to the age of majority, and (3) Age, intelligence and experience of a thirteen year old. EXCEPTION: If you are engaged in adult activities then the standard of care is the adult standard. To be able to apply this exception, defendant must be in the middle range between infant and being close to the age of majority
    - standard of care to the elderly is the reasonably person with ordinary prudence
    - standard of care for professionals is when they are engaged in their jobs as professionals they are engaged in the same standard care as other professionals in their position but if they are acting outside the jurisdiction of their jobs, then it is the standard of a reasonable person with ordinary prudence. Those who have higher qualifications, skills or hold themselves out to be so will be held to a higher standard of care.
    - D must have acted as a reasonable person would have acted in similar circumstances. The court will then apply that standard in order to determine whether or not the C breached his obligation.
  + **2) Duty of Care:** Defendant owed a duty of care to the plaintiff
  + **3) Causation:** The breach of the standard of care caused damage to the plaintiff
    - Negligent conduct must have been (not necessarily the sole or largest) cause of P’s loss. This is a factual issue determined on a balance of probabilities.
    - Even if there was a duty and the SOC was breached- if D’s actions did not cause or was not a cause of P’s loss then D will not be held liable. This means that if the harm would have happened anyways (“but for the carelessness of the D, the harm would have happened anyways”) then there is no liability because no causation
  + **4) Remoteness:** The damage was caused by the negligence
    - Court must determine whether the damage is of such a type or kind that it was reasonable foreseeable.
    - Liability for losses in negligence is limited to consequences that were reasonably foreseeable
    - Once it has been established that D carelessly caused the P’s injury, the court must determine whether or not the damage is of such a type of kind that was reasonable foreseeable. Liability for losses in negligence is limited to consequences that were reasonable foreseeable (not like in intentional torts where D are liable for all consequences of wrongful conduct)
  + **5) Damage:** The type or damage suffered was reasonably foreseeable - not too remote or too far form negligent act
    - Damages are not just a remedy. It is an actual element of negligence.
    - P has to prove damages because negligence is not action per se. P must prove that she suffered a legally recognized injury or loss- as well as their nature and extent. P must established that they had legally recognized damages recoverable in tort law.
    - Grief and death are not recoverable at common law. However, Ontario statute now provides that you are entitled to loss of care, guidance and companionship stemming from the loss of a family member (small amount).
    - Entitled to economic losses resulting from death (potentially larger amount)
    - Since kids are seen to be a drain on assets, damage claims involving death of children are small.
  + **6) Defences:**
    - Once P has established a prime facie negligence claim, the court must address the issues of defences.
    - the burden now shifts to D to prove on BOP that P somehow contributed to the negligence and that therefore the award amount should be apportioned to account for such CONTRIBUTORY NEGLIGENCE
    - Contributory negligence: mirror of P’s claim against D, now D is proving the same element of Neg of P= If D can prove that P has failed to exercise a reasonable standard of care for their own protection, and can establish that P’s negligence was a cause of their loss/injury, damages will be reduced to reflect their contribution. Usually reduced by 20-35%. Loss is apportioned in terms of the relevant degrees of fault.

# Duty in Canadian law

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| **Test for Duty of Care in Canada**  **Step 1:**   1. **Reasonable Foreseeability:** Was any harm reasonably foreseeable? 2. **Proximity:** Harm must be supplemented by proximity. It also describes the type of relationship (eg expectations, representations, reliance, property interests). Two types of proximity to consider: 3. **Precedent:** Is there a SCC case that decided this category of issue? apply tests from precedent (even if its inconsistent with the Ann’s test)   Six categories of cases already exist, so apply the tests from those:   * + 1. Harm from acts that harm person or property (*Donoghue v Steveson* – there is a duty where the D’s act causes RF harm to P or P’s property)     2. Claims of nervous shock (we did not cover this)     3. Negligent misstatement (*Hercules Managements* – see case brief)     4. Failure to warn you of risk (*Rivtow Marine* – there is a duty to warn of the risk of danger)     5. Governmental liability for economic losses (*Kamloops* – municipalities owe a duty to prospective purchasers of real estate to inspect housing developments without negligence)     6. Relational economic loss (*CNR v North Pacific* – see case brief)  1. **Pure proximity**: consider the following factors:    1. Physical closeness Expectations    2. Representations    3. Reliance    4. Property    5. Or any other interest    6. If there is a statutory regime, then you must also consider what the statute says    7. And, it must be **fair, just and reasonable** to impose this relationship of proximity on the parties    8. And it must be fair, just and reasonable to impose this relationship of proximity on the parties |

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| --- |
| **Step 2:**  Negating the duty. Ask, is public policy independent / different than the relationship between the parties (government actors are not liable in negligence for policy reasons, but only operation decisions)?   1. The **effect** of a duty on other legal obligations? E.g. would it destroy the law of contract? 2. Would duty negatively impact the legal system? E.g. unconditional immunity for judges 3. Society more generally: even if the decision would not affect the legal system, or duty of other legal obligations, are there real public policy concerns? 4. Policy v operational: SCC came to the view that you can sue the government for operational things they do but not policy decisions made. No liability for true policy decisions of governmemnt. 5. E.g. 1: True Policy. terrible winter, lots of snow. You get into car accident b/c bad road conditions. Sue Gov’t since they did nothing about it. If the gov’t comes to Court and says they’d rather give more money to homeless shelters, then the P will lose (must defer to government’s policy…don’t like it, vote them out) 6. E.g. 2: Operational decision: snowfall, gov’t regularly plows the snow. This day, they choose not to. You can sue |

* duty of care= to whom do I have a legal obligation not to act carelessly towards so not to expose them to an unreasonable risk
* If there is a pre-existing duty then use that analysis and move on, if there is no pre-existing duty then do Cooper/Anns test

## General Duty Cases

### Winterbottom v Wright (1952) UK- duty and contractual privity: duty of care does not extent beyond contracting parties

* **Facts:** Manufacturer of a coach has a contact with Post Master General saying that he will supply one coach and will send a service technician every so often to tune up the coach. Post Master has a contract with Atkinson which wanted him to arrange for the delivery of mail and provided him with a coach. He subcontracts that to the plaintiff and provides him with a coach to deliver the mail. P coachman suing D coach repair company. Post Master has contract with each party separately. Coach breaks and P is injured severely, sues D.
* **Issue:** Whether or not the defendant can be liable to the plaintiff.
* **Held:** Judgement for the defendant. No claim in negligence, no right (Privity issue)
* **Ratio:** duty of care does not extend beyond contracting parties. Right to recover is confined to parties who entered into a contract (privity of contract)
* **Reasons:** No privity of contract between these parties. Must confine the operation of such contracts to the parties who entered into them, otherwise there would be no limit on who could sue.

### Donoghue v Stevenson (1932) HL- General Duty of Care test. Neighbour principle for duty: one owes a duty of care to those that are reasonably foreseeable to be affected by one’s acts

* **Facts:** Defendant manufactures ginger beer, who sells it to a distributor, who sells it to a store who sells it to Ms. Donoghue’s friend who then gives it to Ms. Donoghue. P drank ginger beer, which was in dark bottle, and there was a snail in it. Shock and stomach ache. Friend had bought the ginger beer (so P no contract with anyone). Plaintiff sued manufacturer alleging shock and severe gastroenteritis.
* **Issue:** Did the respondent owe a duty to take reasonable care that the article was free from defect? If so, did he neglect that duty? Can she bring a claim in the tort of negligence if she is not contracted with the defendant?
* **Ratio:** one owes a duty of care to those that are reasonably foreseeable to be affected by one’s acts. A manufacturer who sells goods intending that they reach the consumer in the same form and who knows that the absence of reasonable care will injure the consumer’s life or property owes a duty to the consumer to take reasonable care. **General principle**: reasonable foreseeability of injury to another (neighbour) generates a duty of care.
* **Held:** Appeal allowed. Judgement for the plaintiff. Duty owed between manufacture and customer (even if no contract)
* **Majority, Lord Atkin:** Needs to be some general principle that rationalize cases of duty. Why do some duties exist? What holds duty together? Distinguishes from *Winterbottom*: *Winterbottom* is acceptable to its own facts (breach of contract). Here, we have duty owed, even though there may not be a contract. He says the common law method is a method to decide specific cases but underneath all the cases that have been decided there must be something that rationalizes them and holds them together. There must be a vernal principal which rationalizes all the English law for tortious duties. He says that no-one in *Winterbottom* claimed there was a claim in negligence and so *Winterbottom* was rightly decided on its own facts, you cannot use someone for breaching their contract to a third party but that is not what we are doing here, here we are suing them because they exposed me to an injury, and that exposure was reasonably foreseeable and the type of exposure that a reasonable person should have been worried about.
  + Donoghue has a right to bodily health (as it was before drinking beer). Before drinking the beer, she was healthy. After drinking it, she fell ill and this is why she has a right to sue. Liability for negligence is based upon a general public sentiment of moral wrongdoing for which the offender must pay. But there is a limit to the range of complainants and the extent of their remedy. Must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour. Distinguished from *Winterbottom* because the wrong arose out of breach of contract; did not state that the defendant knew or ought to have known of the defect.
* **Black Letter Law:** Neighbour Principle: must take reasonable care not harm neighbour (a person close enough that you ought to reasonably have them in your thoughts when you are contemplating the acts or omissions at issue). You must not injure your neighbour and the lawyers question of who is my neighbour receives a restrictive reply. The answer is persons who are so closely and direct affected by my act that I ought reasonable to have them in contemplation when thinking about doing the act. Neighbour is someone you can reasonable foresee as being affected but eh tortious action. I owe a duty to all people who can reasonably be foreseen to be injured by my actions.
  + Test for duty: reasonable foreseeability that action could interfere with right of neighbour

→ If no duty in these situations = hole in law (hole in law if person wants to use product can’t sue manf)

* Duty owed between manufacture and customer (even if no contract)
  + - Winterbottom is still good law, this is duty for tort
* **MacMillan:** Winterbottom is a privity of contract case, did not consider tort rights (more than just what is in the contract, i.e. right to personal integrity). Need privity in negligence – get this via neighbour principle: if you can foresee act would harm neighbour. If I have a contract with my doctor I can sue him in contract or tort but I do not have a contract if the doctor decides to hand it over to someone else.

**What does *Donoghue* decide? Three views:**

1. If damage is reasonably foreseeably, you’re liable for it (this establishes duty); old Canadian and NZ view – but SCC says this has to be limited by policy, so:
2. Test for duty = reasonable foreseeability + proximity/policy (modern Canadian Australian view)
3. NEYERS view: The first two are a misunderstanding, the actual test = reasonable foreseeability of **infringement of right**

**NOTE:** *Donoghue* is not meant for omissions, it deals with infringements of rights

**Canada:** Neighbour Principle = owe duty to one’s neighbour. **Test for duty** = reasonable + some proximity element

**What Does it mean to be Injured?** Lord Atkin makes it clear that injury has to be to your person or your property. Has to be reasonable and foreseeable interference with your person or your property. By injury, he means a foreseeable interference with your rights or entitlements.

## Omission

### Deyong v Sherburn (1946) Eng CA- Donoghue duty principle does not extend to omissions.

* **Facts:** P is actor at audition. Asks where to put his coat, director says to put it in the coat room. Coat is stolen, sues for value of coat. Argues owed duty to guard room and RF that it could be stolen.
* **Issue:** Do I owe a duty to my servant to lock the doors for their benefit? Was Shenburn liable for failing to take reasonable care? How far does the duty of care extend?
* **Held:** Judgement for the D, no duty. Shenburn was not liable
* **Ratio:** cannot stretch the ratio in ***Donoghue*** to omissions, it was not meant to apply in such circumstances. Forseeability of harm is not enough. Plaintiff must have legal right to be protected from what happened.
* **Reasons:** Shenburn did not owe a duty to Deyong to secure his goods while he was rehearsing. Relied on ***Donoghue***that you owe a duty to everyone who it is reasonable foreseeable that they could suffer because of your negligence

### Childs v Desormeaux, 2006 SCC 18, [2006] 1 SCR 643

* **Facts:** Mr. D was at a house party hosted by Dwight Courrier and Julie Zimmerman. Mr. D had a history of heavy drinking and had 12 beers and left to drive home. Mr. C walked out to the car with him and asked if he was ok, he did not show any signs of intoxication. He drove away with 2 passengers and collided with a car, killing of the other car’s passengers and severely injuring Ms. Childs, a teenager. Child’s spine was severed, and she was paralyzed from the waist down. Mr. D pled guilty in court and was sentenced to 10 years in prison. Ms. C is now suing the hosts of the party saying that they are liable for her injuries
* **Issue:** (1) Is the host at a party liable for the actions of an inebriated guest who left their party? (2) Do the hosts owe a duty of care to parties that might be injured by the inebriated person’s conduct?
* **Held:** Appeal dismissed.
* **Reasons:** McLachlin states that there is no duty of care owed by the hosts to potential victims of the inebriated guests’s actions. Using framework from ***Cooper v Hobart***, Mclachlan states that this test should be compared with similar cases to see if it falls into one existing area of law, or if it is a novel case. She compares it with the situation of commercial alcohol providers (***Stewart v Tape, Jordan***), who have been found to be liable to third party members of the public who are injured as a result of the drunken driving of a patient. But there are 3 reasons why this case can be distinguished from causes involving commercial hosts. (1) First, commercial hosts have direct control over alcohol consumption of their patrons. (2) Second, there are strict legislative rules governing commercial hosts, while no laws exist for private parties. (3) Finally, there is a contractual relationship between commercial hosts and their patrons – this is fundamentally different from the range of relationships that characterize private parties. You may for the booze at the bar. Everyone in a bar has to have safe server training but not at your house
* Therefore, as this is a novel case, it must be put through the two stage [Anns](https://casebrief.fandom.com/wiki/Anns_v_Merton_London_Borough_Council) test to determine if a duty is owed.
* *Cooper v Hobart*'s test
  + **step 1: reasonable forseeability:** she says there is no reasonable forseeability. Just because he has gotten drunk, driven drunk and doesn't have a license is no reason to suppose that he came to your party and was drunk on this particular occasion. She said it is not reasonably foreseeable and so we would need a finding of fact that there was evidence to the fact that the host knew the individual was drunk and the TJ did not find such a fact.
  + step 2: proximity: she starts by saying let’s look at three situations where there could be proximity. These are exceptions to the nonfeasance: (i) if you attract people to a dangerous activity then you generally owe a duty to a third party (she says they did not because having party is not risky enough in order to come over the creating a risk exception, the case they cite for what is risky enough is taking someone out on a boat), (ii) relationship of paternalism or supervision or control - when I have a right to control somebody then I have duty to see see to their best interest (parent-child, teacher-student, prisoners-prising guard) (no you do not get to physically restrain your friends) and (iii) people who exercise a public function or engage in a commercial enterprise which owes duties to the public. When you owe duties to the public then you can owe duties to individuals in the public. (no this is not a public calling or government so you cannot owe an obligation here)
  + therefore she says there is no proximity as well as not being reasonable foreseeable
    - one other relationship they don't mention: if you are in specific undertaking such as promising them they are safe
  + The first step of the test is whether or not the two parties are proximate enough for a duty to be established – it must be foreseeable that the defendant’s actions could cause harm to the plaintiff. McLachlin concludes that there was not foreseeability in this case – it was found as a fact that the hosts did not know that Mr. Desormeaux was too drunk to drive, and simply knowing that he had a drinking problem does not mean they were liable for the consequences of his driving.
  + McLachlin then examines nonfeasance. She says that foreseeability is not the only hurdle that Ms. Childs' case has to jump in order to establish a duty. When the conduct alleged against the defendant is a failure to act, then foreseeability alone cannot establish a duty of care. The plaintiff tries to argue that by organizing the party, the hosts created a risky situation and therefore their failure to act thereafter does not protect them from liability. Although this would be true if it were the case, McLachlin finds that the hosts did not create a "risky situation" and therefore their failure to act was merely nonfeasance. She also goes on to say that positive duties of care exist in situations of paternalistic relationships, and when a defendant is exercising a public function that includes liability to the public at large – but neither of these apply
  + Overall, she says that it is only when third parties have a special relationship with the party in danger or a material role in managing the risk that the law may impinge on their autonomy and demand a positive duty of care.
  + McLachlin concludes that partygoers do not check their autonomy at the door of the party – they remain responsible for their own actions. Unless partygoers are reasonably relying on the hosts for their safety (such as a party on a boat), the partygoers are solely responsible for the outcomes of their own actions. She does not need to consider the second step of the [Anns](https://casebrief.fandom.com/wiki/Anns_v_Merton_London_Borough_Council) test (public policy) because there was no foreseeability established here, and therefore no duty was owed.
* **Ratio:** Social Host liability does not exist: social host at party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest’s actions, unless host’s conduct implicated them in creation or exacerbation of the risk

### Rankins Garage & Sales v JJ

* **Facts:** In July 2006, JJ and his friend CC (15 and 16) were in the home of CC’s mother, DC. The mother supplied the teenagers with alcohol. DC went to bed and the boys continued to drink and smoke marijuana. Boys left the house with the intention of stealing valuables from unlocked cars. The pair eventually made their way to Rankin’s Garage, where they found an unlocked car with the keys in the ashtray. CC and JJ decided to steal the car even though neither had a driver’s license and neither had previously operated a vehicle. A single vehicle accident occurred.. JJ experience a catastrophic brain injury and commenced proceedings against his friend, CC, CC’s mother and the garage owner.
* **Prior Proceedings:** TJ found that Rankin owed a duty to JJ (based on previous cases) and she instructed the jury accordingly. The jury accepted the evidence that Rankin’s Garage had a practice of leaving cars unlocked with keys in the car. Jury found all parties negligent and apportioned liability as follows: Rankin’s Garage (37)%, C’smother (30%), CC (23%), and JJ (10%). CA held that the TJ erred in concluding that a duty of care had already been recognized and so conducted a full duty of care analysis following ***Anns*** test and ***Copper v Hobart***. They looked at whether the harm was a reasonably foreseeable consequence of the Defendant’s Act and whether there were any reasons that tort liability should not be recognized here. CA held that Rankin’s Garage was easily accessible by anyone, ad that the risk of theft was clear. Court held that it was foreseeable that minors might take a car and that it was a “matter of common sense” that minors might harm themselves while joyriding, especially if impaired by alcohol or drugs. CA upheld the trial decision.
* **Held:** Appeal allowed and the claim against Rankin’s Garages dismissed.Majority held no duty of care owed by Rankin to JJ.
* **Reasons:** Stressed that determining whether something is “reasonably foreseeable” is an objective test and forseeability must be present prior to the incident occurring and not with the aid of hidsight. SCC reaffirmed that the plaintiff’s criminal conduct was irrelevant in analyzing whether a duty of care existed. Court held that a plaintiff engaging in immoral illegal conduct is not precluded from successfully claiming against tortfeasors. Such behaviour can, however form a part of the CN analysis. Rejected arguments made by the plaintiff that RG as a commercial enterprise owed a positive, duty of care because vehicles are dangerous and JJ was a minor. Said that we don’t want to have people liable for not locking your cars.

### Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465 (HL)

* **Facts:** HB were advertising agents placing contracts on behalf of client on credit terms. HB would be personally liable should client default. To protect themselves, HB asked their bankers to obtain a credit reference from Heller & Partners who were the client’s bankers. The reference contains an exclusion clause to the effect that the information was given “without responsibility on the part of this Bank or its officials”. HB relied upon this reference and suffered financial loss when client went into liquidation.
* **Held:** H&P’s disclaimer was sufficient to protect them from liability and that HB’s claim failed. Damages from pure economic loss could arise in situations where the following 4 conditions are met: (1) a fiduciary relationship of trust & confidence arises/exists between the parties; (b) the party preparing the advice/information has voluntarily assumed the risk; (c) there has been reliance on the advice/info by the other party, and (d) such reliance was reasonable in the circumstances.

### Watson v Buckley (1940) UK – Donoghue extends to omissions and actions for distributors of products. Omissions and actions can result in liability in negligence. Distributors, as well as manufacturers, owe the final customer a duty of care.

* **Facts:** Acid in shampoo from Spanish company. Distributor asked for 4% acid, manufacturer put 10%. Advertise that will be friendly on skin, but acid in shampoo causes dermatitis for P. No steps taken to confirm/test % of acid. The Plaintiff used the product and contracted dermatitis. She sued the distributor for its alleged negligence. Should have sued the *manufacturer*, but this was complicated, so the P sued instead the *distributor*.
* **Ratio:** Omissions, as well as actions, can result in liability in negligence.
* **Held:** Judgment for P, distributor was liable
* **Reasons:** Distributor had duty to the P. Advertising induces consumers, which engages the neighbour principle. It is RF that consumer would buy product for which the Distributor advertised. Thus, the distributor had a duty to ensure product was safe.

### Clay v Crump (1964) CA – Donoghue does not require absence of intermediate possibility for examination

* **Facts:** The owner contracted D, a demolition contractor, and a building contractor to renovate building. Owner asked the architect to leave a particular wall standing to prevent people from entering the premises during the construction. The architect did so without inspecting the wall. The wall collapsed, killing two men and injuring Clay.
* **Issue:** Does the neighbour principle apply?
* **Ratio:** Intermediate ability for someone else to inspect did not dissolve duty. Donoghue applies even where there is a chance of intermediate inspection. Every party who fails to take reasonable care contributes to the injury
* **Held:** All liable: it was RF that worker could be affected by negligence + workers are neighbours of all parties = duty.
* **Reasons:** Architect and contractors liable. They should have inspected the wall and realized it needed to be demolished.

### Palsgraf (1928) NYCA – Cardozo test for duty

* **Facts:** Palsgraf is standing on the platform waiting for her train. Defendant is the Railway Company. Third party is trying to get on the train it begins to move. Conductor grabs him to pull him in, and conductor on platform pushes him to get him it and he drops the package he is carrying containing fireworks.Explodes, shakes station, scale tips, lands on and injures P. No-one is injured on the train or platform except for P because the shockwave makes the industrial scale fall over and crush her.
* **Issue:** Does railway owe P a duty? Was there a duty owed to the plaintiff by the guard? Was the guard negligent?
* **Held:** No, no duty of care. Complaint dismissed. There was no negligence. Guard’s conduct was not a wrong in relation to P
* **Ratio:** Duty is relational. Two Step test for duty (1) Plaintiff must have a recognized right. (2) Reasonably foreseeable interference with that right

**1. Cardozo = RF of existing rights being infringed (harm does not create a right)**

* + Nothing to do with factual causation or remoteness – can be decided on existence of duty
  + you do not owe duties to the world you owe duty to particular people in the world
  + if it is reasonable foreseeable that my negligence could injure them then you owe them a duty, if it is not reasonably foreseeable that my negligence could injure them then I do not owe them duty
  + P must prove a wrong to them, an interference with their rights not someone else’s
  + also says that it is not just an interference with them that tort law requires, but his test for liability is that there has to be a reasonably foreseeable interference with something that the law says you have an entitlement to.
  + The standard of care question is did I behave in a way that was wrong? the answer is yes. Next, the duty question is to whom did I owe this duty? You owe a duty to the person boarding the train because they could reasonably be foreseen to be injured from it. That person clearly had a right to the package they were carrying.
  + Conductor did breach the standard of care. But he did not owe a duty because it was not reasonably foreseeable that she would be injured 20 feet away. He says that her claim fails because the conductor, and therefore the company does not owe her a duty. The exact same wrong can lead to duties to some people and not to other people!

**TEST**: P must prove wrong done to her was a violation of her existing right. Requires:

1. She had a right
2. Someone was negligent/wrong in relation to that right

* **Duty is relational** (neighbour principle from *Donoghue*): it must be RF that act will affect her right
* This is just a relationship between **two people (P and D)**
* ⇒ Duty is owed to those who you can RF your actions interfering with their rights

**Application to case:**

1. Palsgraf does have the right to personal integrity and bodily security
2. Harm to P is not RF from conduct of D; the conduct is not a wrong to the plaintiff, but to the person the conductor pushed, i.e. not RF that pushing the man would result in P’s injury. There was no reasonably foreseeable interference with that right. The plaintiff’s right is not absolute: only protected from unwanted touching or reasonable interference. There was no warning that the package was dangerous to bystanders. Injury to plaintiff was not reasonable foreseeable. Guard’s behaviour was not a wrong to the plaintiff.

**P was not in class of people whose rights were foreseeably affected by Ds unreasonable creation of risk**

**2. Dissent, Andrews (American View) - current law in US - that you owe duties to the world to be careful**

* + Duty owed to everyone not to be negligent. You are wrong doer to everyone when negligent.
  + says that to be liable in negligence, must have: duty, breach, injury, factual causation and legal causation
  + He says that negligence is an act or commission which unreasonable affects the interests of someone else. Damage is not necessarily a retirement of an action in negligence. That means we owe duties to the entire world not to be negligent and therefore, that the people who can sue us are all the people who are in fact injured by our negligence.
  + Dealing with “remoteness”. Duty is owed to society, not individual members. We all have a duty not to be negligent. Would have entered judgement for plaintiff because her injuries weren't too remote, they were proximate to be the negligent act. Conductor breach standard of care, plaintiff was injured, explosion factually caused injury (but for), and legally cause injury (proximate cause); therefore, there is liability.
  + Who are you responsible for? Everyone you injure has right to sue, everyone who is factually injured
  + drawback: it is arbitrary. Like cases not treated alike if different judges can decide differently based on different cases.
  + Limits?

1. Factual causation – you must actually cause injury. Negligence must actually cause the injury
2. Proximate cause/remoteness or legal cause meaning the damage suffered has to be connected to the act. Injury has to be proximately or legally caused by the negligence. This means that the damages suffered must be connected in some way to your negligent act. By proximate, because of convenience, public policy and a rough sense of justice the law arbitrarily declines to trace a series of events beyond a certain point.
   1. Direct consequence
   2. Substantial factor
   3. Reasonable foreseeable at each step in the chain
   4. Time and space
   5. Likely to cause in ordinary course : are explosions likely to cause that type of injury

Legal causation test (proximate cause):

1. Was there a natural continuous sequence between cause and effect?
2. Was one a substantial factor in producing the other?
3. Was there a direct connection (without too many intervening causes)?
4. Is the cause too attenuated?
5. Was injury reasonably foreseeable at each step of the analysis?
   1. Was it reasonably foreseeable the package would fall? Reasonably foreseeable the package would explode? Reasonably foreseeable the vibrations (from explosion) would cause the scale to vibrate? Etc.
6. Was the injury too remote (in time and space)?

**Application to case:**

1. Duty (to everyone)? – yes, not to shove
2. Injury? – yes, to P
3. Proximate cause? – yes:
   * RF on chain basis
   * Factual causation
   * Explosion was substantial factor to scale causing
   * Happened quickly (time)
     + ⇒ D is liable. Explosion and negligence of conductor is the proximate and legal cause of her injury and therefore they are liable.

Commonwealth: Cardozo view, USA: Andrews view, **Canada: somewhere in between**

## Seavey, Cardozo and Law of Torts – *Cardozo vs. Andrews*

1. Which view had fair result? Seems to be a tie… Says he will give three criteria to think about
   1. (1) intuitive sense of fairness: when you read facts who should win? On this point don't know who wins
   2. (2) Negligence Theory: who shows the tort of negligence to be making sense? On this criteria, Cardozo winds hands down because Andrews just says it is whatever you want to do but Cardozo tries to give you a template. Cardozo’s view is a coherent one: the reasons for liability risk are the same reasons for no liability no risk. Cardozo’s is coherent and rationalizes the cases but Andrews is incoherent and does no rationalizing
   3. (3) Ease of Application: which of the two theories can be more easily applied? Cardozo’s is not super easy but in comparison to Andrews his is clearly easier. Another problem with Andrews is that it gets some of the cases wrong. Think of *Donoghue* *v Stevenson*, they were hundreds of miles apart and manufactured years ago so since the lack of closeness in time and space, Andrews view might not think they are liable but under Cardozo’s view, they are absolutely liable.
2. Theory of Negligence **(Cardozo)**

* Cardozo’s view – based in a theory of rights/duty (a legal view) = coherent
* Andrews’s view – based on a view of man, not legal, based on feeling

1. Andrews could result in wrong decision **(Cardozo); forces you to look outside of law to answer legal question**

* Andrews: not direct in time/space
* *Donoghue* + Cardozo: liable, RF that no pin would cause injury, customer is a neighbour

1. Ease of application **(Cardozo)** – Andrews too many factors, Cardozo has two steps and about law

* Cardozo wins because ….
  + 1) Intuitive fairness doesn't get us where we need to do
  + 2) Cardozo’s explanation is better: liable for the materialization of unreasonable risks, but not liable where there was no unreasonable risk. This helps reconcile the cases
    - This is good theory, it cites the same reasons for why you do and why you do not do something (liability and no liability)
  + 3) Easy to apply

### McPherson v Buick [1916] NYCA - Cardozo: Reasonable Foreseeable

* **Facts:** McPherson is buying a Buick car in Florida, it is manufactured in Detroit. The car has been supplied through a chain of manufacturers, distributors and car dealer ships. He is accelerating and he goes to turn the wheel and the wheel does not work and he gets in an accident. In Detroit, they forgot to put in the pin to attach the steering wheel to the wheels.
* If we apply Andrews
  + might not be liability because it happened a long time ago, Detroit is far from Florida and car went through many people
  + not proximate, there was a break in time and space (months), inspection was an intervening act therefore, no liability
* If we apply Cardozo
  + there is a duty because it was RF that someone would drive car and be injured if it didn’t work. Manufacturer owed a duty

## Weinreb, Passing of Palsgraf – Cardozo Approach is Correct

* Cordozo’s two step analysis fits with the structure of private law – relationship between two people (P and D): Weird says that anything you talk about in tort law must apply equally to plaintiffs and defendants. What links them together are the rights and duties that plaintiffs and defendants owe eachother. (1) Does the plaintiff have a right? (2) Was the plaintiff wagoned in relation to that right?
* Private law is a relationship between two people that are correlatively situation. Must be able to look at something from both the plaintiff’s perspective and defendant’s and get the same answer
* Andrews: seems to determine that a defendant committed wrong, then connects the wrong to plaintiff’s damage
  + Rights link P and D together
  + Right correlative with duty – what right of P is protected by the duty of D
  + Wrong must be in relation to right

## Duty to the Unborn

### Duval v Seguin (1972) – born-alive child can sue third party for prenatal injury; no rights until born-alive

* **Facts:** Car accident with pregnant woman, when her child was born he was injured from the accident. Fetus suffered broken bones and terrible physical injuries but the fetus was able to be extracted and born alive.
* **Issue:** Can a born-alive child sue a negligent driver? Can the plaintiff sue, even though he was born alive?
* **Ratio:** Born-alive child can sue 3rd party for prenatal injury if RF
* **Held:** Yes, baby can sue for prenatal injury.
* **Reasons:** It is RF that someone who uses the road might be pregnant, therefore, a duty is owed to people using the road. Defendant owed a duty of care to the plaintiff. Therefore, the plaintiff can sue. Limitation is that the fetus has to be born alive. Traditionally, no one can have legal rights/duties before they are born. If the accident caused the fetus to die, could not sue.
* Why born alive? Before born alive = no rights (fetus has no legal personality). Once born has rights, can sue.
* Ontario legislated this law by amending the Family Law Act:

1. No one disentitled from suing their parent. Old CL rule of parental immunity saying you can’t sue parents for torts.
2. Damage done to unborn children is statutorily protected. No person is disentitled from recovering damages for the reason that the injuries were incurred before his or her birth.

### Dobson (Guardian of) v Dobson (1999) SCC – Dvual principle does not apply to mother’s duty to fetus; 2 step Anns Test; tort law is not about compensation and deterrence

* **Facts:** Baby plaintiff. Mother’s negligent driving injures fetus in car accident. Child born horribly injured. Grandfather now legal guardian. Mother wants the grandfather to sue her, so that they can get at the mother’s insurance money. Mother was compulsory insured, she wanted to be found negligent so that they could access that money.
* **Issue:** Can the born alive child sue its mother for pre-natal injuries?
* **Held**: No liability to baby for prenatal negligence arising from mother’s actions.
* **Ratio:** Babies cannot sue mothers for pre-natal injuries, even if born alive. Mother’s duty to fetus negated for policy reasons.
* Adopted Anns Test for duty:

1. RF (was harm RF)? = prima facie duty
2. Are there public policy reasons to negate duty?

* **Reasons:** (1) Sufficiently close relationship between the parties to give rise to a duty of care (ie. is harm reasonable foreseeable)? **YES**. (2) Are there public policy reasons to negate the duty? **YES**
  + bodily integrity, privacy and authority rights of women
    - distinguished from prenatal case against 3rd party because this is a special relationship; inseparable
    - if held liable, every decision of pregnant woman could be scrutinized (e.g. failing to provide the best nutrients)
    - imposing liability would affect every women and person in Canadian society
  + the legislature should be the ones to implement tort liability (if anyone)
  + Family harmony: Detrimental effect on future relationship between mom and baby (psychological + emotional trauma)
    - Tort law compensates injured and deters tortfeasor; this kind of liability would neither compensate nor deter
  + Difficulties inherent in articulating a standard of conduct for pregnant women
    - Decisions involving SOC focus upon generally accepted norms, rather than on the individual woman
      * uniform standard unfair because of disparities in financial situations, access to health services, etc.
  + Judges should not ‘judge’ lifestyle choices
  + Insurance-dependent rational fails because tort law is not results-oriented in this way; the existence of insurance is irrelevant to determining liability

**Accepted damage was RF. Issue with second stage of Anns Test:**

* + **Majority: Cory and McLachlin**
    - Bad for families
    - Interferes with autonomy of women (allowing fetus to sue would be telling them they cannot smoke/drink)
    - Cannot apply standard of care that would apply to all equally
    - Special relationship between mother/fetus: but usually when someone has a unique relationship it does not mean you have no duties to it, it means you have even higher duties.
    - Floodgate argument: anything mother does could create liability for fetus
    - LHD/McLachlin: Charter values
    - Cory:
      * says this is a question of duty and you answer questions of duty by using the two part Anns Kamloops test which is: (1) is harm to the plaintiff reasonably foreseeable? and (2)
      * he says that no two pregnant ladies are the same, so you cannot possibly make SOC
      * he also says that we all have entitlements to do what we want, and most of us can check out of society by just staying home but pregnant women cannot do that because they are subject to the demands of the fetus and that would not be consistent with their autonomy or privacy rights.
      * he says that insurance is irrelevant.
      * he says that we cannot tell pregnant women that they cannot live the life that they want to live.
    - McLachlin and LHD (concurring judgement):
      * they add 2 interesting things: (1) in developing the private law, it should be consistent with Charter values. They say that liberty and autonomy if we had this duty everything she does would be sacrificed for the fetus which violates her right to liberty. (2) intrinsic to womanhood- becoming pregnant is not a choice it is inherent to them being a woman.
      * Think about CL in light of Charter values- even though there are no government actors here. This would be close to creating a gender-based tort. This is against the vales of liberty and equality. To say there is a choice to become pregnant is wrong- childbirth is so tied to womanhood.
  + **Dissent:** 
    - Not applied coherently
    - No autonomy/right to drive recklessly – already owed duty to class of people using road, why not fetus?
    - Immunity to duty could be when freedom restricted (i.e. smoking, drinking) – when only affecting herself
    - Not based on SOC/RP – argument too broad
    - Anns test looks out side of relationship
    - SOC needs to be breached and harm needs to occur
    - Not government vs. citizens – charter should not apply
    - test says you owe duties unless there are good policy reasons to negate those duties
    - majority presents arguments that are all one sided (for the mother) but there is more than one person involved. You need a good reason to take away the rights of the child.
    - says that autonomy and liberty are not engaged when acting negligently in relation to a class of people. Only where mother owes a duty to 3rd parties, there is no reason to negate the duty. Taking this argument seriously proves too much- it only gets us the right result here, but not elsewhere. It would mean no family member could ever sue another family member.

***Application of Cardozo***

* + Fetus has no legal rights – no right no duty (Dobson right decision, wrong reason)
  + Third parties should then be liable to mothers but not fetus (*Duval v Seguin* would thus be decided wrong)
  + When baby born alive = now legal personality, can he sue? – only has rights to body and integrity he has

***Professor Winerib’s analysis of the result in Dobson v Dobson:***

* + Woman has rights in the Charter, but even Charter rights are limited, so the view that rights are unlimited is flawed
  + No private law right is unilateral, it always must be limited by the rights of other parties – there must be transactional equality between plaintiffs and defendants
  + Thus, two things are taken off the table right away:
    - Women cannot be liable for everything in terms of their fetus
    - BUT the view of Dobson that there is NO liability in terms of the fetus is also wrong
  + The only difference between those two positions is the party that it favours
  + Think of things in terms of classes of plaintiffs
    - When the fetus is only one of a class of plaintiffs to which a mother owes a duty e.g. when driving negligently you owe a duty to your “neighbours”, within which the fetus is included just the same as people on the road, sidewalk, etc.
      * The extend her autonomy right beyond that goes beyond what is necessary to secure her autonomy in the common law
      * This seems to imply that he thinks the common law definition of fetus’ as not legal persons is wrong
    - When the fetus is the only one in the class of plaintiffs that can be affected than the mother should not be liable because the fetus is especially sensitive just like *Rogers v Elliott* and thus there is no liability
  + On this view, *Duval v Sugin* is rightly decided
  + On this view, Winerib would accept the dissenters in *Dobson* that there is no reason the fetus could not sue
  + transactional equality: since the plaintiff and defendant have equal status in their relationship, the decision cannot just reflect the interests of one party
  + excludes two solutions:
    - the women would be liable for any actions that might foreseeable injure the fetus (this would hold the woman hostage to the interests of the fetus)
    - the importance of the women’s autonomy precludes any liability to the child
  + A tort duty to the plaintiff exists if the plaintiff is within the class foreseeably at risk by the defendant’s unreasonable act. The plaintiff should have recovered because the defendant would be liable to anyone who might be injured by her negligent driving. Defendant would not be liable for lifestyle choices (e.g. smoking) because the fetus is the only one in the class affected. Does not think legal personality begins only at birth.

### Renslow v Mennonite Hospital – duty to fetus before conception

* **Facts:** Hospital negligently transfused wrong type of blood into mother with no immediate effects, 8 years later, when pregnant had to give birth prematurely
* **Issue:** Can the baby sue if the wrongful act occurred before birth **and** before conception?
* **Held:** Plaintiff successful in suit for resulting injuries. Duty owed.
* **Ratio:** Baby can sue for injury due to the negligent act of a third party prior to conception.
* **Reasons:** It was reasonable foreseeable that the woman would become pregnant and that there would be complications.
* **Legislative Solution:**

1. Natural parents excluded as defendants
2. 5-year cap for negligence caused by non-medical people
3. First generation cap for negligence, including by medical people

* **Weinreb:** rights begin from conception
* **CL:** rights begin at birth
* **Civil law:** rights start from conception, but cannot sue until born alive (so rights not actionable with termination of pregnancy) – Neyers: technically if someone has right third party can be appointed to bring action on persons behalf

## Rescue Cases

### Haynes v Harwood (1935) Eng CA – danger invites rescue

* **Facts**: D’s horses escape from parked carriage because kids were throwing stones at it because it was parked in an inconvenient location. Police officer stops horses to prevent harm to children and gets injured in the process.
* **Issue**: When someone knowingly puts himself or herself in danger to protect others, is the negligent party liable for damages suffered in the protection effort?
* **Ratio**: Rescue principle/ doctrine: if the rescue is foreseeable, then the defendant can be liable to the rescuer as well as to the person who was injured or in danger. Assumption of risk does not apply if someone acts to help those in danger as a result of a person's negligent actions; that person is liable for damages resulting from their actions as long as they are reasonable in the circumstances.
* D’s arguments:

1. Did not breach SOC (everyone leaves their horses out all over London).
2. Duty: neighborhood test (duty to lawful user of the road). Owed a duty to the lady on the road but not to the officer.
3. Causation (novus actus interveniens) – sue the children, not D. There was intervening act. There was somebody’s negligence who superseded (the children/ their parents). Their wrong was worse. Children are responsible.
4. Volenti non fit injuria (the officer brought the injury on himself by being overzealous). Police actions were voluntary.

* **Held**: D liable for harm caused by P’s rescue.
* **Reasons**: (1) D had duty to police officer, just as he had duty to users of the road, (2) D breached that duty (RF injury could be caused), Duties are not to people only, they are to classes of people and there you owe a duty to everyone who is lawfully using the road which the police officer was doing. (3) Novus Actus Interveniens not applicable; children not enough to break chain of causation. Where the novus actus actions are the very thing to be expected then you cannot claim that they are novus actus. (4) Volenti Non Fit injuria does not apply in circumstances of emergency or in these circumstances for lack of consent; the police didn’t ***consent*** for 2 reasons (a) he thought he had a moral duty to save, and (b) he didn’t have a duty at all and did it anyway (involuntary).
* **Reasons:**
  + owner argued there was no negligence; servant was only gone for a minute. It was reasonable to leave the brake off
    - Must have had regard for the character of the neighbourhood (working class neighbourhood, with lots of children running around) shouldn’t have left the brake off.
    - Duty: it is RF that if you leave your horses unattended, they might injure your neighbours
      * The officer was within the category of those lawfully using the highway
  + owner argued that he should not be liable because the children were a “novus actus interveniens” (new intervening act)
    - Where actions of a 3rd party is the very thing to be expected (reasonably foreseeable), they don’t break chain of causation (*novus actus interveniens* is no defence)
  + argues the officer was “volenti”: he knew what he was doing and took the risk upon himself
    - People don’t ‘consent’ to being injured
    - Sometimes people act spontaneously in situations of emergencies (this is not consent)
    - If a person acts under their moral duty, they are not consenting to being injured
    - Rescuers will almost never be ‘volenti’

### Wagner v International Railway Co - NYCA [1921] - Cardozo & Liability to Rescuer

* **Ratio:** The person who’s wrong creates danger is liable to the person in danger and also to the rescuer
* **Reasons:** The person who creates the danger is inviting people to intervene. The wrongdoer may not have foreseen an intervening rescuer, but he is liable as though he had.

### Horsley v MacLaren- SCC [1972] - Duty is Owed to Rescuers

* **Facts:** M owned a boat. He invited his friends aboard. One friend fell overboard. Another friend, H, dove into the icy water to save him, but the water caused him to suffer a heart attack and he died.
* **Issue:** Was M responsible for the death of H (the rescuer)?
* **Held:** Yes, M owed a duty to the rescuer.
* **Ratio:** (1) Duty owed tor rescuer is not derivative, it is independent. It is based on the wrong-doer’s tendency to induce the rescuer to encounter the danger. (2) This means that you can be responsible if the only person you peril is yourself. If someone tries to rescue you and they get injured, you might be responsible under the rescue doctrine as well.
* **Reasons:** Rescue just cannot be outside of the normal reaction of human beings. Protection is given to someone who risks injury to himself in rescuing another who has been foreseeable exposed to danger by the unreasonable conduct of a third person. Third party may be subject to liability at the suit of the rescuer and the person who was injured.

### Ubranski v Patel (1978) Man QB – donating an organ to save someone from a Dr’s negligence can be a rescue case

* **Facts:** Father gave his kidney to daughter who had the wrong kidney taken out by a negligent doctor. The father sued the doctor and the father said that he rescued the girl by donating a kidney.
* **Issue:** Was the doctor responsible for the father’s donation of the kidney?
* **Held:** Yes, doctor was responsible, owing to his negligence. Judgment for the P.
* **Ratio:** evidence of the outer scope of recovery.
* **Reasons:** The father’s effort to help his daughter was a consequence of doctor’s mistake. It is entirely foreseeable that a member of the plaintiff’s family would donate his organ to help her.

## Anns/Cooper Tests

### Kamloops v Neilsen (1984) SCC – Anns Test adopted by Canadian courts

**Anns Test:**

1. RF of damage/harm = prima facie duty
2. Are there public policy reasons to negate duty?

### Caparo – overruled Anns in England

* **New English Test:** (1) RF, (2) proximity, and (3) fair, just and reasonable results

## Professor Winerib’s Four Critiques of the Anns Test

1. In the Anns Test almost every important case comes to step two, i.e. policy issues, two problems:

* (a) These issues might be outside of the competence of the judge
* (b) This might be outside the means of the parties to prove
* This causes expropriation of the plaintiff’s rights without compensation in the name of policy concerns (note: usually in Canadian law you are compensated for expropriation of rights) – this seems to be a poor thing to do from the perspective of the plaintiff

1. Policies in the Anns Test are one-sided - it is all about policy reasons to negate liability, but judges are not concerned with policy reasons to impose liability, if policy arguments are going to be used then there should be a balance on both sides

* ***Dobson v Dobson*** – policy reasons to take away liability included protecting women, their lifestyle decisions, etc.; the policy reason they did NOT take into account in favour of the child was that the mother would not actually be paying anything, there was mandatory insurance that would cover it so, on policy reasons, perhaps liability should be imposed because there is a pot of money for exactly such instances of causing harm

1. Under the Anns Test you have two currencies, simple justice (step one) and public policy (step two) – there is no exchange rate between simple justice and public policy, we don’t know how much public policy outweighs simple justice or vice versa, and thus, every decision must be arbitrary because it cannot be proven how one outweighs the other
2. Because the judges have lost the Cordozo view, they have a very distorted view of reasonable foreseeability (i.e. foreseeability of anything, rather than of interferences with rights), the view is so broad that it is not particularly helpful at all

## Other Criticisms of the Ann’s Test:

* *Anns* can’t explain situations of omissions very well, except to resort to policy arguments
* Test is incoherent because the reasons imposing liability are not the same reasons for limiting liability – line is arbitrarily cut off

### Cooper v Hobart (2001) SCC –NEW TEST for duty in Canada

**\*Revisits Anns Test**

* **Facts**: Mortgage broker steals people’s money, effectively a Ponzie scheme that collapses. Rather than suing the mortgage broker, appellant sues the regulator. Argument: the regulator knew the mortgage broker was bad apple, a reasonably competent regulatory would have shut down the broker long time ago. Registrar later suspended this mortgage broker for bad behaviour and plaintiff says that the Registrar should have known this.
* **Issue**: Does the registrar owe a duty of care to members of the investing public, giving rise to liability in negligence for economic losses investors sustained? Whether the registrar owes a private law duty of care to members of the investing public giving rise to liability in negligence for economic losses investors sustained.
* **Held:** No duty of care owed.
* **Ratio**: New test for duty:

1. Stage 1: Step one has two parts:
   1. Was the harm that occurred the **reasonably foreseeable** consequence of the defendants act? (*Palsgraf*)
   2. If yes, then **proximity analysis** (also two steps) – focuses on **the relationship between the plaintiff and the defendant** (has to do with policy because the relationship has lots of policy considerations as existing between the two of them). Is there a close enough proximity such that it is fair between the parties to impose a duty of care?
      1. Ask whether or not there is a category of tort law/negligence cases that already exist on the issue. If there is a category of case where the SCC has said that there exists proximity then you should just apply that case, and proximity will be satisfied.
         1. If yes, then go to old cases and do what they told you to do; categories include:
            1. **Harm from acts that harm person or property** (*Donoghue v Steveson*). Physical damage to a persons property or their body through an act then you do not have to do Cooper v Hobart's analysis you can just assume there is proximity there.
            2. Claims of nervous shock (*Mustapha* and *Alcock*). This is a psychological injury, you do not have to do Cooper v Hobart’s analysis just do what we do in this case. (*Allcock*) (*Saadati v Moorhead*)
            3. Negligent misstatement (*Hercules Managements*). (*Heley Byrne v Heller*).
            4. Failure to warn you of risk (*Rivto Marine*)
            5. Governmental liability for economic losses (*Kamloops*)
            6. Relational economic loss (*CNR v North Pacific*)
         2. If no (if it is a new case not covered by a category), then **pure proximity analysis**: evaluate whether there was a proximal relationship linking the parties by considering anything you can think of…. Proximity from scratch analysis essentially. Proximity characterizes the type of relationship in which a duty of care arises; proximity is “policy” in the context of relationships, must find a balance and consider the following to determine whether the relationship between the parties is proximate…
            1. Physical closeness. The facts, directness etc., Expectations of the parties, Representations, Reliance, Property involved, Or any other interest that are involved. If there is a statutory regime, then you must also consider what the statute says. If there are statutes involved, if the area of law is somehow touching on a statute then you must always look at a statute. And, it **must be fair, just and reasonable** to impose this relationship of proximity on the parties
2. **Stage 2: Policy concerns** – Are there residual policy considerations outside relationship of the parties that may negate the imposition of a duty of care? Concerned with things **outside of the relationship between the parties**:
   1. The effect of a duty on other legal obligations. Would recognizing a duty in tort interfere with other aspects of the law.
   2. Any potential negative effect on the legal system from recognizing the duty. Would recognizing the duty have a negative effect on the legal system, would it require judges to step out too far form their role, would it take up too much judicial time?
   3. Any potential negative effect on society in general. Would recognizing this duty interfere with society too much, would it interfere with other things we like to do. Whether recognizing liability would lead to indeterminate liability- would there be too much liability to too many people for too long?
   4. Policy vs. operational question – the SCC has come to a view that you can sue government for operational things that they do, but not for true policy decisions that they make – but, if it is an operational decision then you can sue. Government cannot be liable for policy decisions they make but they might be able to be liable for operation decisions which is to protect the democratic mandate of the legislature because that is why we have governments to do things. Government can be liable if they chose something but they do not do it well. Operations of policy you maybe can be liable for said the SCC.

* **Held**: D not liable.
* **Reasons**: Cost to pubic is too high to recognize a duty of care to individual investors.
  + **Step 1:** No duty. Factors giving rise to proximity arise from statute. But, statute does not impose a duty of care on registrar to investors, but to the public as a whole. If it were the case, then it would come at the expense of other important interests and at the expense of the system as a whole.
  + **Step 2:** Government policy v execution: where a governmental actor is given discretionary powers, court must give deference to those decisions. Recognizing a duty in tort would be inconsistent with quasi judicial role
  + they said that recognizing this city would be wrong because it would lead to indeterminate liability. Registrar has no means of controlled who invests in mortgages they can only look after registered mortgage brokers. To impose liability would lead to indeterminate liability.
  + they say this would be unfair to tax payers because the mortgage Registrar is not being payed by himself. Tax payers did not agree to pay for everyone’s mortgage losses
  + they have this concern of policy vs. operation and here they think the Registrar is engaged in policy decisions.
* this whole test turns on proximity. The whole test hinges and only makes sense on proximity.

**First stage: application to the facts**

Was harm reasonably foreseeable? - **Yes**

Does the case fall within a category in which a duty has been recognized? - **No**

Should a new duty be recognized? - **No**

1. It may have been foreseeable that the alleged negligence would result in loss to plaintiff. But, mere foreseeability is not enough to establish a prima facie duty of care
2. No proximity by category. Insufficient ‘pure’ proximity between Registrar and investors to give rise to duty. Duty would come at expense of efficiency and public confidence in the system.
   1. The factors giving rise to proximity must arise from the statute under which the Registrar operates. The statute does not impose a duty to individual investors; the Registrar’s duty is to the public as a whole.

**Second Stage**

Would have failed. Registrar had to get evidence, hear a case, present a case, before he kicked out the company. Can’t act swiftly and judicially simultaneously. This would have profound impacts on Canadian society – Registrar would become an insurance scheme for people who invested in mortgages. Taxes would go up. Therefore no claim on the facts of the case under the test.

## Difference Between Anns and Cooper

* difference is proximity. In ***Dobson*** (application of *Anns*), no mention of proximity. Whereas, in *Cooper*, proximity holds duty of care analysis together. Applying *Cooper* to *Bradford v Pickles*, we would get a different result (they were neighbours - proximate, and Pickles knew Bradford would be affected). Relying on factual/pure proximity, results are hard to square.

## Criticism of Cooper v Hobart Test

* Thistest imposes more policy, not less (seems like less, but it’s embedded in step 1b). policy is important under proximity, under whether you should have a duty and in relation to governments because governments cannot be liable for policy.
* England: SCC said they were keeping the *Anns* test…but do we really have a two part test in Canada? NO
  + Really, it’s a three-step test (the UK and Australia both have 3 part tests).
* Proximity step incoherent, aside from things you can think about to knock out liability. No content to proximity, except for relevant factors case by case
  + test cannot explain past decisions
  + E.g. *Braford v Pickles* (percolating water / well). Under the *Anns* test, the result would be different
* RF? Yes
* Proximity (i) imagine no precedent, apply test (ii) pure proximity = YES (but original holding, no liability)
* You could get to the same holding for policy reasons… but it still doesn’t explain the CL
* How much policy can there be in a legal test and still be a legal test? Common fault
* It is not the SCC’s role to figure out what is good for Canada (re public policy), this properly belongs to the legislature; the courts are there to determine what is **just and fair between litigants**
* Proximity Debate, 2 views:
  + Content: Denotes something important between litigants; a relationship
    - It is like saying you have to have RF in colour: eg. There’s a case that said Red, Green; they all have something in common- of colours
    - RF plus colour (does not have content)
  + Contentless: Proximity means you have to add something else in addition to RF (no more unity than that)
    - If this is the case, it falls afoul of *Donoghue*, which says that there has to be unifying content
    - No unity in the category, goes against the rule of law

Standard of Care

|  |
| --- |
| 1. **Foreseeability** → to breach the standard of care, the risk of that harm must be foreseeable and constitute a real risk of injury i.e. it is probable to occur (*Bolton v Stone*). Could you think about someone being injured from doing what you are about to do. 2. Balancing of a variety of factors → to avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable, and prudent person in the same circumstances, which is an objective standard (*Arland v Taylor*; *Vaughn v Menlove*). What is reasonable depends on the facts. Factors to be considered include: P, L and B (*Ryan v Victoria City*; *US v Carroll Towing* – economic analysis)    1. **Probability of Loss (P)** (*Ryan v Victoria City*)    2. **Severity of Likely Harm (L)** (*Ryan v Victoria City*) 3. Substantial risk = negligent, we don’t care about the cost of precautions (B) (*Bolton v Stone*; *Law Estate*) 4. Infinitesimal risk = maybe negligent (*Bolton v Stone*)    1. **Cost of Precautions (B)** (*Ryan v Victoria City*) 5. The duty of the defendant is to take all reasonable precautions to prevent or minimize foreseeable injury to the plaintiff must prove there was a reasonably practical precaution that the defendant failed to adopt (*Vaughn v Halifax Bridge Commission*) 6. If the cost of precaution is little/zero then a D may be liable even for an infinitesimal risk (*Wagonmound #2*)    1. **Custom** → (a) what have other people been doing? reasonable? (b) has behaviour fallen below it?       1. Not a trump card, custom itself can be negligent (*The TJ Hooper*; *Malcom v Waldeck*)       2. In specialized, complex cases, living up to custom may eliminate liability (*Ter Neuzen*)       3. Burden of proof is on the person alleging custom (*Malcom v Waldeck*)    2. **Utility** (*Tomlinson*) → the more useful the actions of D, the more likely the D will not be liable 7. Public utility can be relevant to lowering risk for infinitesimal and substantial real risks (*Watt*)    1. **Conflicting Obligations** → does the D have more than one person to look out for? |

1. Ask yourself, was harm to anybody’s legal rights foreseeable? If the answer is no, then what you did did not breach the standard of care
2. b) If yes, then go on to look at additional factors. (also below)
3. **(P) Probability of Loss.** How likely is it that the worse case scenarios actually happen?
4. **(L) Severity of Likely Harm.** What sort of injuries are likely to occur? If they are devastating injuries then I might moderate my behaviour. Must look at the relationship between the seriousness of the injuries and the probability of them occurring.
5. (**B) Cost of Precautions.** How much would person have to modify behaviour to stop that risk. Where risk is very small, and I have to do a lot to accommodate then I probably wont have to. If P and L are big, must accommodate.
6. **Custom**
7. **Social Utility:** would saying that this is a risk to your neighbour mean that there are fun or socially useful things that you would be precluded from doing. Cases sometimes disagree as to the weight given to social utility
8. **Whether there are conflicting obligations**

## The Objective Standard

### Vaughn v Menlove (1837), 132 ER 490 (CP) – objective test is for the reasonable person

* **Facts:** D was stacking his hay in a way that was dangerous (fire hazard). People told D that it was dangerous. D acknowledged this and built a chimney. Hay burned and destroyed P’s house. Lower court said that D was liable. Defendant appeals, arguing that the rule in negligence should just look at his good faith attempt to do his best and that the SOC is what that particular person is capable of doing, not reasonable person standard. D said he was not intelligent and therefore could not do much. He did not want the fire to happen because he thought the chimney would fix the problem.
* **Issue:** Was there negligence?
* **Held:** Guilty; The appeal judges said that the standard cannot be this vague because it is not OBJECTIVE and the world would be chaotic. Courts say they will apply the reasonable man standard and judge his conformity to whether or not they lived up to the standard of the reasonable man on the facts of this case he did not because reasonable people do not build hay stacks in this fashion because they are likely to catch on fire. Objective standard is the only standard which is fair in a society where people have different abilities.
* **Ratio:** SOC= reasonable person standard, personal intelligence level does not matter.
* **Reasons:** The optometrist: (1) The reasonable optometrist would not have sold unbreakable glasses without changing them because in industry that usually do. The manufacturer: (1) It is negligent for the manufacturer to mislabel process. (2) es, there is a duty. (3) Yes, there is causation because if he had been wearing the unbreakable glasses there would have been no injury. (4) Yes, this is reasonably foreseeable because you would only wear these glasses to play sports and cutes to eyes and face would be likely to occur otherwise. (5) Yes there was damage to his eyes and to his face.

### Arland v Taylor - who is the reasonable person

* **Ratio:** He is not an extraordinary creature or required to display the highest skill, nor is he possess of unusual powers of foresight, he is a person of normal intelligence who makes prudence a guide to his conduct.

### Buckley and TTC v Smith Transport, (1946) OR 798 (ONCA)– Insane means no breach of standard of care if they are unable to understand duty. Rational agent requirement for breach of standard of care

* **Facts:** Employee of D drove truck into a streetcar operated by P and D argued that he had an insane delusion. Doctors clarified employee suffered from syphilis of the brain. P sued for negligence based on vicarious liability of employer. Alleged that he committed negligence and they are concerned with whether he breached the SOC.
* **Issue:** Can insanity be used as a defence for negligence?
* \*\*If mental illness, and unable to understand and discharge duty = will not be held liable
* **Ratio:** An insane delusion can be used as a defence for negligence if it is proven that it made the defendant unable to understand the duty that tested upon him and unable to discharge that duty. Minimum requirement to breach duty of SOC = must be a rational agent. **The test for insanity:** did the insane delusion make the defendant unable to understand the duty that rested on him and unable to discharge that duty?
* **Held:** Employee was not rational agent at time of breaching duty (so not liable). D not liable because employee was unable to discharge duty. Not every insane delusion however will be enough to make it so that no SOC applies to you. There are two ways: if it does not impair you enough or the type of insane delusion you have has nothing to do with ability to reason.
* **Reasons:** Not anyone with mental illness escape liability – insanity must go to ability to discharge duty (if insanity not connected/sufficiently connected with inability to discharge duty = liable). An insane delusion alone is not enough to eliminate liability. If it isn’t sufficiently connected with the inability to understand and discharge the duty, an insane defendant would still be liable for negligence. The defendant’s mind was so affected by the disease that he neither understood nor was able to discharge the duty to take care.
* **BLL:** If the person is insane, or has an insane episode, there is not standard of care.
* Employers can be liable for actions of employees by vicarious liability if 2 criteria are met:
  + (i) they have to be your employee
  + (ii) they have to be in the course of their employment (i.e. doing something work related)
  + (iii) the employee commits a tort
* Employers can also be held liable for direct liability
  + in this case, it wasn't evident to the employers that their employee was insane

**Note:** Insanity is not technically a defence in torts - rather, insanity will prevent the plaintiff from proving negligence since the defendant will not be able to meet the requisite standard of care

### Stokes v Carson (1951) – not liable if unconscious, since no control over actions

* **Facts:** D was asleep in the backseat of car during a college road trip. D had a nightmare and accidentally knocked arm into driver, causing an accident. P sued D in negligence.
* **Held:** Not liable because the person was not in control or making choices because there is no volitional act
  + ==> asleep, unconscious, sick (if not in control) = not liable
* **Reasons:** D did not have control over his actions since he was not awake
* **Ratio:** Action must be conscious, not reflexive

### Roberts v Ramsbottom, (1980) 1 All ER 7 (QBD) – total loss of control is required to negate liability in negligence, not just imperfect control. Objective standard applies in cases of diminished capacity.

* **Facts:** D suffered a stroke (no symptoms in advance); prior to hitting the P, hit 2 people before but kept driving. D said that it was not fair to hold him liable because he was having stroke and there were no volitional acts
* **Issue:** Is D liable in negligence?
* **Held:** D is liable for negligence, SOC breached
* **Ratio:** To escape liability due to lack of control, actions at the relevant time must have been wholly beyond control (total loss of control). Impairment of judgement does not constitute a defence for negligence unless his actions at the relevant time were wholly beyond his control. As long as you maintain some control (even if imperfect), objective standard applies. Does’t matter if he is morally blameless, he is still legally liable. Anything less than total loss of consciousness = you will be liable.
  + narrow to escape negligence = almost need complete incapacitation (as opposed to imperfect control)
* **Reasons:** Guilty in negligence because he continued to drive even though he was aware of his disabling symptoms, still retained some control. Only a loss of consciousness would have applied. Court was forced to make a distinction between stations of completed incapacity (cannot be found liable) and imperfect control (you are held to a reasonable person standard). D still had some sense of what he was doing and he was able to control his car and therefore this is a situation of imperfect control rather than complete incapacity. Standard of care by which a driver’s actions are to be judged in an action based on negligence is an objective standard. A defendant may be able to rebut a prime facie case of negligence by showing that a sudden affliction rendered him unconscious or otherwise wholly incapable of controlling the vehicle. An impairment of judgement does not negate the cause of action.
* This case is consistent with the above cases: *Buckley* is a case of no control, *Roberts* is a case of diminished capacity, *Vaughan* (objective standard) applies to cases of diminished capacity

### Mansfield v Weetabix, (1998) 1 WLR 1263 (CA) [WRONG}– not morally blameworthy, cannot be liable for a medical condition D does not know about. Court equates moral liability with legal liability which is wrong

* **Facts:** D’s employee suffered from a condition that cause this brain to malfunction if he did not eat which he was unaware of. This caused a series of accidents.
* **Issue:** Is D vicariously liable in negligence?
* **Ratio:** Overturns *Roberts*. Must take into account the surrounding circumstances to determine liability. The SOC was that to be expected of a reasonably competent driver unaware that he is suffering from a condition that impairs his ability to drive.
* **Reasons:** The driver was not at fault; his actions did not fall below the SOC required. To apply an objective standard that did not account for his condition would be to impose strict liability; he was not to blame and was not negligent. He was in no way to blame so he cannot be found negligent. It is not right to apply an objective standard that did not take into account his special circumstances.
* **Held:** Not liable for damage resulting from impaired degree of consciousness caused by his condition. Say he cannot be liable for a medial condition that he does not know about. He is not bad and could not have done anything differently and so he is not liable.
* **Note**: this case confuses moral blameworthiness and legal blameworthiness
* Not good law – Canada follows *Roberts v Ramsbottom*
  + previous cases seem to indicate that unless you were completely incapacitated, you are held at reasonable person standard but the CA did not take this approach. The CA here said that the test should be what a reasonable person suffering from the same medical ailment would have done and they find that he should not eb held liable if he is not morally wrong. They mistakenly equals moral liability with legal liability. **BUT could use this case to argue on behalf of a defendant.**
* **BLL:** Negligence is not a state of mind. Would a reasonable person have smashed into cars? - no way. So s someone who does this is therefore negligence

### Dunnage v Randall, [2015] EWCA Civ 673 - standard of care remains an objective test and personal characteristics are not taken into account unless they completely eliminate fault or responsibility.

* **Facts:** P is at home having dinner with his partner. D come in saying that she said things about him on the phone, they are conspiring against him and the reason his step son is in jail. P and partner have no idea what D is talking about and D seems to calm down. D runs to his car and comes back with a tank of gas and a lighter and asks the same questions. D douses himself in gasoline, his best friend tried to save him but they are both burned. D dies and his friend suffers severe burns. D was suffering from a schizophrenic episode and doctors said that he was 95% not voluntary at the time. P sues D’ estate. TJ said that this is just like *Buckley*, someplace loss of control and therefore can be no liability on the facts of this case.
* **Issue:** should there be liability?
* **Held:** D is liable.
* **Ratio:** The standard of care is an objective test and will not be adjusted to take account that lack of capacity or having a mental illness will excuse a person from liability in negligence unless the illness entirely eliminates fault or responsibility.
* **Reasons (Rafferty):** Just because in criminal law there would be no liability on this set of facts, does not mean that there is no liability in civil law. There has to be liability because the test is complete incapacity versus imperfect control and since doctors have said that he has 5% capacity then it is not complete incapacity. So, the reasonable person standard applies and he has breached this because you usually do not douse yourself in gasoline.
* **Reasons (another judge):** liability because we should not take into account specific characteristics of the person
* **Reasons (Justice Arden):** Distinguished Mansfield because here he was already psychotic when he doused himself in gasoline but in Mansfield he started reasonable and in this case he was never reasonable.

### Fiala v Chechmanek (2001 CA)– mental illness can negate liability where D has no capacity to appreciate the duty of care or has no meaningful control over his actions

* **Facts:** D has manic episode, jumps in a car, chokes driver, car crashes.
* **Ratio:** Says that the law is not *Mansfield*, but rather it is *Roberts, Stokes and Buckley*. D not liable for mental illness if:

1. No capacity to appreciate SOC; not rational being; OR
2. Mental illness, unable to control body at time of breach (knows wrong, but cannot control)

* **Ratio:** If there is no loss of consciousness, insanity will not negate liability (negligence). Mental illness can negate liability where defendant has no capacity to appreciate the duty of care or has no meaningful control over his actions.
* **Held:** No control, no liability

## Holmes- The Common Law

* **in this essay, he is trying to justify why we have the current theory of objective standard**
* the competing theories on negligence in torts are:
  + subjective morality:
    - asks what would you be capable of doing (*Vaughan v Menlove*)
    - reasons it does not make sense:
      * you do not know what people are thinking. For practical purposes, it is very difficult to be certain of what someone is thinking at a particular time. How can we tell that the hay man did not know that his hay would burn down?
      * Just because someone is not morally responsible does not make the plaintiff happy - your rights would be based upon someone else’s attributes. We live in a legal not moral world
    - however we make allowances for disabilities: blindness or deafness, children and insane people
  + strict liability:
    - theory of strict liability is against the case law. You would be liable for leaving your house instead of spurring your horse because you could foresee that spurring your horse may cause damage and you should not have done that action. You could sue people for living if this were the case.
    - People can get off of strict liability for non convincing reasons so it is not good!
  + objective fault:
    - Objective fault is a limited external morality. It does not care about what you think or feel, only cares about your actions and whether they impinge on somebody else
    - Actions are wrongful when reasonable person could foresee those actions would affect someone else's rights.

## Standard for Children

### McHale v Watson (1966), 115 CLR 199 (Aust HC)– standard of care for children. Objective standard dependant on age.

* **Facts:** Barry, 12 years old, threw a piece of welding rod at the corner post of a structure that he was facing and it hit D (child) in the eye, causing her to lose her sight. At trial, Barry was found not negligent.
* **Issue:** Do we make special allowances for children and if we do, what are the special allowances? Is age relevant in determining the appropriate standard of care?
* **Ratio:** The standard by which the conduct is to be measured its that to be expected of a reasonable person of the same age. A child of similar age, intelligence and experience is the standard of care applicable to children. It is only partially objective in that it must be adjusted incrementally in accordance with the age of the child. At some point there is a cut off so the full objective standard operates
* **Held:** Appeal dismissed, Barry lacked the requisite foresight for liability in negligence. No breach of standard of care which is the standard of care of a reasonably 12 year old boy.
* **McTiernan**: Said that appeal should be dismissed and Barry’s age should be considered. A subjective standard applies. Evidence does not suggest that the defendant was other than a normal age 12 boy. Non-adults, three categories:

1. Infants: can’t appreciate the risk, no standard/not rational. Incapable of perceiving risk
2. Young adults: not yet age of majority, but held to RP (adult) standard of care. Infants capable as adults of foreseeing the probably consequences of their actions standard is the sam required of adults
3. Children (between 1 and 2): test looks at age, intelligence, experience. Standard of care dependant on age - held to standard based on what a reasonable his their age would do. Also take into account intelligence and experience.

* reasonable 12yo with same intelligence and experience = not liable (did not do anything R boy wouldn’t do)
* **Kitto J:** Believes that appeal should be dismissed and says that everyone starts as a child and works up to the adult standard of care. Objective test – reasonable 12 year old standard (don’t include subjective factors of intelligence, experience)
  + does not like the age, intelligence, experience test. Agrees that age should be taken into account but argued that intelligence and experience should no be considered. Childhood is a normal stage of development and so the exception to the reasonable standard based on age is fair to both parties because it is a shared experience.
  + Intelligence and experience are subjective and so they should not be taken into account
  + Says that the boy exercised the degree of prudence expected of a 12 year old boy and it is unlikely he would be unable to identify the risks as the plaintiff was subjected to the same risks as everyone else.
  + to expect that a 12 year old boy would weigh the changes of the spike sticking in the post and foresee that it might ricochet and hit the girl is beyond what is reasonable.
* **Menzies (dissent):** Appeal allowed. Objective standard apples to any person capable of negligence in absence of consensual modification. Duty of care required of Barry was to take such care as a reasonable person would have in circumstances.
  + negligence allows an injured person to recover, not connection between legal liability and moral culpability
  + Said that the duty of care which Barry owed was to take such care as an ordinary reasonable man would have taken and therefore the appeal should succeed as a standard of care was clearly breached but said that even if he was judged by the standard of care of a reasonable boy, it still would have been breached.
* **Owen J:** Appeal dismissed on grounds that should take into consideration the fact that Barry was only 12 and he exercised the degree of care reasonably to be expected of a boy that age.

Notes:

* McHale allowed for the possibility of distinguishing between...
  + **Foresight:** implicates the defendant’s cognitive and perceptive abilities
  + **Prudence:** turns on the defendant’s normative abilities or attentiveness to others
* can defend against liability in negligence by proving limitation in capacity of foresight or prudence as long as it is normal

1. Foresight of Harm

(a) There is considerable normative significant in the manner in which the risk is described

1. Prudence

(a) Barry was inattentive to the security of others (attributable to childhood, therefore non-culpable)

(b) Those who's actions reveal that they do not care about others (fault-worthy)

(c) Fault- based understanding of negligence limits liability to acts involving a shortcoming on the part of the defendant

(d) Carelessness of others is a shortcoming that ordinarily grounds legal liability

(i) Majority holds that because it is a “boyish impulse” it is normal of the reasonable boy; so non-culpable

* The incorporation of the accused’s age into the objective “ordinary person” standard is an attempt tor effect the extent of the legal rights and responsibilities of children in the legal system

### McEllistrum v Etches (1956) SCC – SOC for children is a modified objective test based on age, intelligence, experience

* There are children so young as to be manifestly incapable of assessing the qualities of risk; children who have not attained adulthood but are capable as adults, and children between the two categories. As such, we must consider all three factors when assessing what the reasonable SOC is for a child
* **Ratio:** There are three categories and in the category of children, you apply age, intelligence and experience

### The Queen v Hill (1986) 1 SCR 313- affirms McHale decision is BLL in Canada

* **Facts:** a criminal law case dealing with the application of the “ordinary person” standard to the defence of provocation
* **Ratio:** McTiernan decision from *McHale* (age, intelligence, experience) is considered BLL in Canada
* **Wilson J (Dissent):** Which test was best from *McHale*? – children logically culminate in adult standard, which does not consider intelligence/experience. Relying on youth is not subjective; it is an objective fact. Would apply a 12 year old standard. The standard of the ordinary person applicable to adults raising the provocation defence must be adjusted to an incremental scale reflecting the reduced responsibility of the young accused. Age is relevant but experience and intelligence are irrelevant.

### McErulean v Sarel (1987) – exception to the child rule, adult activity = adult standard

* **Facts:** Case involved a collision of 2 motorcycles driven by kids and a third party is injured. D said that he is a child and cannot be expected to ride a motorcycle the same way that an adult could and the court should take into account his age.
* **Issue:** When kids engaged in “adult activities” should they be judged under an adjusted standard of care?
* **Held:** Exceptions to the position that children are not held to adult standard and that conduct is judged by the standard expected of children of like age, intelligence, and experience. When child engages in adult activities, they are expected to meet the adult objective standard and they will not be accorded special treatment, no allowance will be made for immaturity.
* **Reasons:** While teenagers may, be judged by standards according to their age, intelligence and experience, it would be unfair and dangerous to the public to permit them to observe a less standard than that required of all bother drivers of such vehicles.
* **Exception:** child engaged in adult activity = revert back to regular RP standard of an adult, no accommodation for immaturity
  + Kids playing = child standard, playing as kids; Kid driving = RP standard, not relationship of playing child
  + Doctor at wok = R doctor standard; Doctor at coffee shop = RP standard

## Alan Beaver Reconciliation of Child Cases

* reasonable ordinary standard can be deviated depending on who they are acting with. Children playing with other children, standard is ratcheted down since you are acting like a kid; when parties are dealing with each other in a professional manner, the standard should be the adult standard, regardless of their age
* Doesn’t square perfectly- if you hit an adult when he’s not playing with you, then you could be found liable. If you are playing with a child and you give the child an ATV and he hits you- he wouldn’t be liable because you were playing with him.
* SOC can also be raised when you go to surgeon the conduct of a reasonably person is that of a reasonable surgeon. Beaver said that this standard is based on how you are interacting with someone. In what capacity are you interacting with them in.
* when parties are acting with each other as adults, then the reasonable person standard applies

**Recap of the Objective Standard:**

* The standard of care: what a reasonable person who is ordinary would do
* Exception: for children (in Canada) it is what a reasonable child of similar age, intelligence and experience
* unless the child is going something fraught with danger (motors)
* How do we justify the cases?
  + We don’t necessarily agree with *McErlean* because basing the standard of care on whether people had insurance was wrong. The court in this case was too concerned with policy.
  + If we use Kitto J’s arguments we can say that being a child is not idiosyncratic because everyone has been, at one point in time, a child. And when a child wants a license he is moving into the third category of a child under the age of majority but who is held to the adult standard.
  + We could also use Allan Beaver’s way and say it is about how the 2 people are interacting.

## Comparative Analysis

## Fleming, Law of Torts – Exceptions to the Standard of Care of a Reasonable Person

* although the legal SOC of reasonable man is objective, it is inevitable that in practice, subjective facts are not wholly ignored
* negligence consists in failure to do what the reasonable man would have done under the same or similar circumstances
  + - 1. **Moral Qualities and Knowledge**
* the reasonable person is a baseline: being stupid is not an excuse, but being particularly clever doe mean that you have a higher standard (professionals are held to a higher standard within their sphere of knowledge)
* courts sometimes hold you liable if you had more knowledge than the reasonable person
* Beginners (no change in SOC so there is no exception). Held to same standard of those reasonable skilled/proficient (no accommodation). The need to compensate accident victims outweighs competing considerations; the beginner is held to the standard of those who are reasonably skilled and proficient in the particular calling or activity.
* Doing something a second time – can sometime increase standard
* More knowledge = more liability, less knowledge not a defence

1. **Experts/Professionals - standard of care raised**

* Physicians must show that their actions and knowledge matched a reasonable physician in similar class. Physicians are judged by average practitioners of the class to which he belongs; higher level of skill demanded from a specialist; acquitted based on what is accepted as proper by a responsible section their profession and cannot be liable simple because there is a contrary view
* Standard of reasonable expert (ie. doctor = reasonable doctor standard)
* Judges by average in their field (GP not held to standard of regional specialist)
* If neurosurgeon misses brain tumour, they are held to a high standard of neurologists. If they are at Starbucks and spill coffee they will be held to a regular man standard despite that neurosurgeons are expected to have great hands.

1. **Need for Experts**

* if you do things like renovations on your own (and knock down supporting wall), you will be held to standard of expert
* law is generally lenient in matters like household maintenance, the reasonable man may rest on his own humble skills. For tasks demanding expert skill, like those affecting public safety, even layman will be judged by expert standard

1. **Handicap**

* SOC for a person with a disability is the reasonable expectation for someone with their liability. Not reasonable for a blind person to drive a car but it is reasonable for a blind person to venture onto the sidewalks
* Physical handicap – held to standard of RP with same disability (except some things can’t do, ie. blind/drive)
* Mental/emotional – objective test seems to prevail (except if not rational/completely incapacitated) . Standard does not take into consideration temperaments, intellectual ability, accident prone-ness etc.
* reasonable person with disability must moderate their behaviour according to disability
* physically handicapped are judged by what can be expected from reasonably prudent person suffering from disability

1. **Age and Lunacy**

* there is a lot of leniency for your people except for kids engaging in adult activities
* No exceptions for elderly. May give them some lenience and allowance for their lack of mobility has been made when charged with contributory negligence as pedestrians, but not as drivers
* A child must conform to the standard appropriate for normal children of similar age and experience some safeguard is the obligation of parents and school authorities to observe reasonable care in the supervision of children in their care
  + minor engaging in adult activities must conform to the standard of the reasonably prudent adult
  + lunatics: generally viewed as unfairly prejudicial to accident victims if allowances were made for the defendant’s mental abnormality

## Factors In Determining the Breach of the Standard of Care : Reasonable Care

1. Economic Approach to the Standard of Care: (American Approach: Learned Hand)
   1. negligent when the burden is less expensive than PL. Use the formula.
2. Canadian Common Law Vies: (Bolton v Stone method/later adaptations)

### US v Carroll Towing (1947) – Learned Hand test; economic analysis of SOC

* **Facts:** there was a ship moored in a busy harbour. The company left the ship unattended for 24 hours and because of the waves it broke away from it moorings and got into an accident
* **Issue:** Whether or not leaving the ship unattended for 24 hours was negligent?
* **Held:** In favour of the plaintiff. Fair requirement that a barge should have been aboard unless there was an excuse.
* **Negligence:** failing to avoid an accident where the benefits of avoidance exceed the costs
* **The Hand Test:** Take precautions where B < PL (to avoid negligence). Somebody is negligent where the cost of precautions is less than the probability of accident times the costs of the injury. The owner’s duty, is a function of three variables:
  + B = cost of precautions - How much would it have cost to make sure the accident did not happen?
  + P = probability of accident - how likely is it if you did this a million times, that accident would occur?
  + L = cost/gravity of injury - when something bad goes on- how much damage would that cause in the world?
  + PL = expected cost of the accident (of benefits of accident avoidance); average cost incurred over a period of time long enough for the predicted number of accidents to be the actual number

**If B< Cost of Injury x the Probability of occurrence then the accused will not have met the standard of care required. (B<L\*P).**

**If B > or equal to Cost of injury x Probability of occurrence, then the accused may have met the standard of care.**

* + If the product of the **probability** of the accident occurring and the **gravity** of the injury if it occurs is ***greater than the burden*** of precautions, the failure to take the precautions is **negligence**
* **Example:** if B = $10. Take precautions if B < $10 to avoid negligence
  + If B = $9 and don’t take = negligent
  + If B = $11 and don’t take = not negligent because costs of precautions is more than the expected costs of the accident
* Hard to get numbers for P and L (easier for B)
* Problem – if B very large could kill children (B may be so large to never take precautions)

## Posner: “The Learned Hand Formula for Determining Liability:

* This academic loved Learned Hand’s formula from US v. Carroll Towing
* The Hand formula allows us to bring out the economic character of a situation
  + - * negligent when precautionary costs are less than the probability of the accident multiplied by the expected cost, and you refrain from acting.
* Posner wanted to give an example
  + - B ? (0.001 x $10,000)
    - B ? $10
    - If you could have prevented accident for <10 but you didn’t, then you were negligent
    - 5$ < $10
    - So it is clear that society would be $5 better off if they kept someone on the boat to monitor the moorings.
    - And if B was $15 then it is obvious that the boat company should NOT keep someone on the boat because he is wasting $5.

## Posner: “A Theory of Negligence”

* Posner takes on the traditional American view of tort law that was prevalent in 1965
  + - The traditional view was that at some point all Tort Law was strict liability (1600s) but when it came over to the US we had all these little industries that we wanted to protect so we decided to relax the standard.
    - In 1960s many people thought that now we should start to bring back the tough standard because it is not moral or anything , it is just about compensation for losses.
* Posner attacks these arguments:
  + - Tort law is not about compensation. If it was about compensation we could all buy insurance and just compensate each other. This is a fallacy that they are subscribing to.
      * He argues: Tort law is actually all about bribes. It is a system of bribes created by the state to minimize their costs. The state says that if anyone out there can find someone who is not minimizing their costs (B<LP), you can bring action against them and the court will give you money.
    - Tort Law is about subsidizing American industry.
      * No way. Not a subsidy unless you think repealing unfair taxes on someone is a subsidy.
    - Posner: Tort law and negligence should be based on subjective morality
      * Neyers: No it is about the morality of the marketplace. We look at the formula and get mad at someone if they don’t follow the B><PL formula.

### Ford Pinto

* **Facts:** used the Lincoln car design but the gas tank was too close to the bumper so when people got in accidents things exploded. People sued Ford. There was a question then whether Ford should withdraw the Ford Pinto and have a recall on it. Advisors said that it was the Lerned Hand formula and the people who buy the Ford Pinto’s are poor so they don’t cost much but to recall the Ford Pinto’s will costs a lot of money.

### Ryan v Victoria City (1999) SCC – SOC is that of an ordinary, reasonable, and prudent person in the same circumstances; determined by considering the Lerned Hand factors

* To avoid liability, a person must exercise the standard of care that would be expected of an **ordinary, reasonable, and prudent person in the same circumstances.** The measure of **what is reasonable** depends on the facts of each case. Factors to be considered include:
  + The **probability of harm** (known or foreseeable)
  + The **degree of harm** that could be caused
  + The **costs of prevention** (Plaintiff must prove a reasonably practical solution)
  + one may look to external indicators of reasonable conduct such as custom, industry practice, or regulatory standards.

## Common Law View

### Bolton v Stone (1951) AC 850 (HL) – standard of care must be based on likelihood of injury rather than foreseeability alone; infinitesimal vs. substantial real risks. Negligent when you create a substantial real risk of harm; 2 part test.

* **Facts:** cricket field, sometimes 6’s go over wall (6 in 30 years). One day 6 hits lady walking on non busy public road. Is it negligent to play cricket? Crickets matches taking place near public road and someone got hit by a cricket ball. Judge estimated that the balls go over very infrequently and so that chances of getting hit were very small.
* **Issue:** 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 adjoining highways? Had the cricket club breached the standard of care?
* **Held:** Appeal allowed in favour of the appellant (cricket player). The risk is small/Infinitesimal since only 6 balls in 30 years.
* **Ratio:** Reasonable persons will only avoid substantial risks (not infinitesimal)
* **Test:** Whether risks of injury was so small that reasonable person would refrain from taking steps to prevent the danger.
  + Consider: foreseeability of harm, and the likelihood of occurrence
* **Reasons:** If cricket cannot be played without creating a substantial risk, it shouldn't be played. A reasonable man shouldn't disregard any risk unless it is extremely small. Tendency to base duty on the likelihood of damage to others rather than on foreseeability alone. On foreseeability alone, it would be irrelevant how often a ball might land in the road or whether the road was the busiest street or the quietest country lane. Reasonable persons take into account the degree of risk and don’t act on a bare possibility as they would if the risk were more substantial.
* **Case:** How likely? = rare; Injury? = small PL or property damage
  + ==> foreseeable, but so small can disregard – a reasonable person thinking about safety would disregard (infinitesimal real risk), therefore P was not negligent
  + Court here said that the risk was very small and a reasonable person would go ahead with that risk knowing other people would impose it on them
  + there was no liability and no breach of the standard of care because this was an infinitesimal risk, not substantial
  + A reasonable person avoids creating substantial real risk of foreseeable harm.
  + **Ratio:** The standard of care must be based on **likelihood of injury rather than foreseeability alone**. If a risk is **unreal**, there will be no liability because it is either (1) physically impossible or (2) fantastic and farfetched. When a risk is **sufficiently small**, a reasonable man may disregard it. Risk may have been foreseeable, but was so highly improbable it is reasonable (it is a **mere possibility**).
  + **BLL:** The standard of care (what a reasonable person would do in the situation) is more an issue of fact than it is of law. A careful person tries to avoid creating a foreseeable risk of injury to others. But the concept of foreseeability is a necessary, but not sufficient, condition for negligence- you need to show more.
  + **BLL:** a reasonable person takes greater care when there is a higher likelihood of damage, and the severity of the threatened harm is greater. The reasonable person can take less care when the damage and severity is less.
  + **BLL:** a person is negligent when they create a substantial real risk of injury.
  + **BLL:** The reasonable person avoid creating substantial real risk of foreseeable harm. AKA a person is negligent when they create a substantial real risk of injury

**New Test for SOC - Bolton v Stone:**

1. Was the risk foreseeable or unforeseeable?
   * If unforeseeable, the case is over, since no breach of standard of care
   * If foreseeable (which in this case it was since the ball had been hit there before, even though only 6 times in 30 years); therefore
2. If foreseeable, was the risk a small or infinitesimal real risk or a substantial real risk?

* if substantial risk and action continues, then negligent, if small risk then not negligent
* If infinitesimal (extremely small) real risk then maybe negligent
* If here is a substantial risk ad action continues, it is negligence; cost of precautions is irrelevant (anti-Learned Hand formula)

***Wagonmound #2* (1967) PC – burden and infinitesimal real risks**

* **Facts:** Boat getting oil in harbour, leaks. Someone mentions, they say ok. Spark from welding, log catches fire, Sydney harbour up in flames. They were filling up their ship with oil that should only burn at 500 degree Celsius but the oil ignited and dock caught on fire. In Wagonmound #1 both sides argued that he fire was unforeseeable but here the plaintiff did not have a tactile reason to argue that the fire was unforeseeable. TJ said that this very very rarely ever happen because the oil had to be 800 degree Fahrenheit and the temperature of the harbour was usually 72 Fahrenheit. Someone was welding, a t-shirt got lit on fire, the t-shirt lit the log on fire which then caused the whole Sydney Harbour to burn down. But this had happened before about 30 years earlier in San Diego Harbour. Negligent via *Bolton v Stone*?
  + - 1. Likely? Rare, but still foreseeable (very rare, but happened once before)
      2. Serious injury? Could be bad
    - Infinitesimal real risk = not breach of standard of care
* **Ratio/Adds:** infinitesimal real risk – may be negligent if could get rid of risk if precautions available at little/no expense. When an infinitesimal real risk could have been avoided without difficult, disadvantage, or expense, a defendant may be held liable. (weigh the risk against the difficult of eliminating it)
  + RP would not disregard infinitesimal real risk if risk could be avoided without difficulty/disadvantage
  + said that where the precautions are low that a reasonable person would not even impost an infinitesimal real risk that he could get rid of at little expense or difficulty
* Infinitesimal risk:

1. burden high = not negligent
2. burden low = negligent

* **Held:** liable because the costs of precautions were extremely small!
* **Reasons:** It was rare that the oil would catch fire. However, it happened once in the past, so it was foreseeable. It was also foreseeable that if the oil caught fire, the damage could be serious. This was an infinitesimal real risk. There is liability because the risk could have been avoided without difficult and without incurring serious damage or expense. Cost of avoidance was relevant because it allowed the court to hold D liable (low cost, so D should have paid to avoid the injury).
* **BLL****:** Burden of precautions balanced against Probability and Likelihood but ONLY IN CASES OF SMALL/INFINITESIMAL REAL RISK—don’t need to balance the burden of precautions in cases of real substantial risk

## Difference Between Learned Hand and CL Position

* when substantial real risk of injury judges usually say costs of precautions is irrelevant but where there is an Infinitesimal risk then the costs of precautions are relevant. Costs of precautions usually make you liable rather than take away liability.

## Discussion of *Bolton v Stone* by Lord Reid

* + In *Bolton v Stone*, the HL held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it. It does follow that no matter the circumstances it is justifiable to neglect a risk of small magnitude; there must be a valid reason for doing so
    - weigh the risk against the difficulty of eliminating it
  + Bolton v Stone did not alter the general principle (a person is negligence if he does not take steps to eliminate a real risk); it recognizes that it is justifiable not to take steps to eliminate a small real risk if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it

### Vaughn v Halifax Bridge Commission (1961) NSCA– burden and infinitesimal real risk

* **Facts:** Painting bridge and wind blows paint onto cars parked nearby. Plaintiff had to get his car repainted. Halifax Bridge Commission said they were not negligent because they did everything a reasonable bridge owner would do by putting tarps.
* **Issue:** Were they liable?
* **Held:** City liable
* Foreseeable that paint may spray. Likely – maybe high. Injury – mundane injuries ==> Infinitesimal real risk
* Precautions? Could have put up sign = no disadvantage/cost (B low) = negligent
* **Ratio:** The duty of the defendant was to take all reasonable measures to prevent or to minimize injury to the plaintiff. From a reasonable person perspective, that duty was not followed; there were cheap and effective means of minimizing damage. Plaintiff must prove there was a reasonably practical precaution that was not adopted.
* Reasons: Could have painted on a different day or put up warning up in the parking lot. Even though there was a small real risk it wasn’t hard to mitigate and should have been done.

### Law Estate v Simice (1995) BCCA – burden and substantial real risk

* **Facts:** Guy goes to hospital and is having serious headaches and pains. Doctor thinks it is either a migraine or he is having brain aneurism but he is told by the Head of Surgery that they are doing too many MRIs and so they should only send people to get MRI’s if they are sure. Doctor wants to give CT scan. Chief Med says no, wait: lineup and too expensive. Guys dies because it was a brain aneurism. Negligent?
* Unforeseeable? No – had pain, could die
* Likely/Injury? – Judge ruled substantial real risk
* **Ratio:** If substantial real risk, don’t care about cost of precautions (B) – will be held negligent.
* where there is a serious risk, the cost of precautions are irrelevant

### Latimer v AEC (1953) HL – high cost of precaution + infinitesimal real risk = not negligent

* **Facts:** Flood at factory, floor slippery and covered with sawdust. There was unexpected heavy rainfall that got water into the plant. Water made the plant slippery because it mixed with grease and oil on the floor. They spread sawdust until they ran out of it. Guy slips on uncovered part. Sues. He argues that this was negligent because they should of shut the plant down as soon as they realized they did not have enough sawdust to cover everything.
* **Issue:** Has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory?
* **Held:** Defendant not negligent.
* **Ratio:** Example of infinitesimal risk where the burden of precaution/avoidance was high, therefore no negligence
* **Reasons:** No one other than the plaintiff slipped or experience difficulty, or voiced concern. The defendant did his best to make the floor less slippery. The appellant did not establish that a reasonable employer would have shut down the work
* Choice (precautions available) = to shut down factory or continue operation. Not negligent keeping factory open
* Just a case of an infinitesimal real risk where B was very high = not negligent
* prior to putting sawdust there was a substantial real risk of injury that would of warranted shutting the plant down. But, after you spread the sawdust, there is no longer a substantial real risk of injury but only a small or Infinitesimal risk of injury
* this is a case about an Infinitesimal risk. Shutting down the factory would be a great expense which would not be justified but the small or Infinitesimal risk that lingered after putting the sawdust down

### Wyong Shire

* sometimes reasonably person would have to taken into account their other responsibilities to other people. If you have a statutory responsibility that may have to be taken into account. If you are suing a parent for negligence, it may depend on how many children they are supervising at the time in question.
* sometimes what is negligent might depend on the alternative responsibilities that the person has

### Watt v Hertfordshire (1954) CA – public utility + substantial real risk can = not negligent

* **Facts:** Plaintiff is a firefighter. They get a call that someone needs to be cracked out of car. The truck that carries the jaws of life is out on another call and wont get back in time so they decide to put the jack on the back of another firetruck and just hold it. Jack crushes the firefighter who sues the fire chief for telling them to put the jack on top of the firefighter that way.
* **Issue:** Is the defendant liable for breaching the standard of care?
* **Held:** Appeal dismissed in favour of the defendants.
* Foreseeable. Likelihood/injury = substantial real risk ==> B should be irrelevant, but need to balance with public utility
* Denning said you have to balance the risk against the end to be achieved. But this is not a commercial case, this is a case of rescue and rescue requires the taking and justifying of greater risks. The right to be saved must be balanced against the right to be free from injury.
* **Ratio:** Public utility in infinitesimal or substantial risk = not negligent. Public utility (saving life or limb) justifies taking considerable risk.
* The standard of care required for situations of **social utility** is different from ordinary commercial situations. In measuring due care, you must **balance the risk against the measures** necessary to eliminate the risk. The saving of life or limb justifies taking considerable risk.
* **Reasons (Denning):** Saving life justifies taking considerable risk. The risk in sending out the jack was not so severe as to prohibit the attempt to save life. It is always a question of balancing the risk against the end

### Tomlinson v Conleton Borough (2004) HL – serious harm vs. serious risk of harm

* **Facts**: Municipality maintained a park with a shallow late. While swimming, the plaintiff plunged sharply and hit the bottom with his head, suffering a broken neck and paralysis. Plaintiff sued, alleging the defendant breached its duty under *Occupier's Liability Act* to take reasonable care to ensure the reasonable safety of a visitor using the premises for the purposes for which he was invited or permitted by the occupier to be there.
* **Issue:** What amounts to reasonable care in the circumstances? Should the council be entitled to allow people of full capacity to decide for themselves whether to take the risk?
* **Held:** Plaintiff lost
* **Ratio:** Must assess the likelihood that someone may be injured, the seriousness of potential injury, and balance it against the social value of the activity which gives risk to the risk and cost of preventative measures
* **Reasons (Lord Hoffman - majority):** In *Wagon Mound*, no social value = liable. In *Bolton*, social value = not liable. No evidence of risk of harm that occurred. There was a small likelihood. A reasonable person wouldn't have done anything differently. Where the activity has no social value, where it is criminal or malicious, then it is very easy to find liability but where the activity has high social value, then liability is not so easily imposed. He says that a beach is like playing cricket, they are fun and therefore council was not negligent in failing to destroy the beach and to make it unusable by the people
* **Lord Hobhouse offers a different formula:** Serious harm does not equal serious risk of harm. The accident suffered by the claimant was unique. The probability of a broken neck was so remote that the risk was minimal. Shouldn't confuse the seriousness of the outcome with the degree of risk (probability). The risk was too small to trigger liability under the Act, otherwise every injury would suffice because it must imply the existence of some risk. The degree of risk is central to the assessment of what reasonably should be expected of the occupier and what a reasonable response is to the existence of that risk. Response must be proportionate to the degree and seriousness of the risk. If the risk so slight and remote it is unlikely to materialize, it may not be reasonable to expect the occupier to take steps to protect against it. The law does not require disproportionate or unreasonable responses. Just because downing or paralysis is a serious matter does not mean there is a serious risk of drowning or paralysis. There has only been a handful of injuries reported to the city council and so the closing of the beach would be too drastic a burden for the Council to have to do, it was an Infinitesimal risk.
* one has to way the P and the L with B and the social value of the activity.
* PL = small - infinitesimal real risk. B of closing beach is high = not negligent (cost of precaution not only in $).

### Paris v Stepney Borough Council (1951) HL – the duty of an employer is to take reasonable care for the employee’s safety in all the circumstances of the case

* **Facts:** D runs a factory. P works in Ds factory and knocks bolt off metal with steel hammer. Metal hits his one good eye, blinds him. The factory fires him, he sues.
* **Issue:** From who’s perspective do you ask if the risks substantial? Whether or not his employers were negligent for not giving him safety goggles? Should his special disability be taken into account or should it be disregarded?
* **Held:** Employer was negligent
* Dissenters said:
  + this is not a serious risk real injury because most of us have 2 eyes. The cost of giving the goggles to everyone was not cost justified. The one eyed man should not have a remedy where a two eyed men would not have a remedy. They said it was Infinitesimal because most of the time you can pluck the metal out.
* Lord Oaksie
  + it was negligent not to provide him with goggles because he was one eyed. There was a substantial real risk of injury to him of blindness and therefore it is not justifiable to use cost precautions to justify not giving him goggles
* Foreseeable. Likely/Injury?
  + if substantial = B irrelevant = negligent
  + if infinitesimal = B low (goggles) = negligent
* **Ratio:** More and more courts will consider the suspect abilities of specific people that differ from the norm. The standard of care is what a reasonable person would do with respect to the plaintiff, even those with known particulars. In this case, the one-eyed worker was a **foreseeable plaintiff.** The duty of an employer is to take reasonable care for the employee’s safety **in all the circumstances** of the case. Providing goggles would have been a simple and inexpensive solution.
* says that where you voluntarily undertake the responsibility of someone, then you become liable for their special sensitivities but you may not be if you do not voluntarily take the responsibility of someone
* Majority position is that given he had a serious real risk of injury to his eye that they should have provided him with goggles!

## Custom

### Trimarco v Klein (1982) NYCA – custom not conclusive, but is evidence

* **Facts:** Plaintiff renting an apartment that had shower door made of glass. Glass around shower broke and injured P. Common practice that glass should be replaced in shower with safety glass. He sues and says that his landlord was negligent for supplying him with a shower with that type of glass. A reasonable landlord would of given him a shower with non-breakable glass. The claim was that it was negligent to not have safety glass in shower because it was custom in the industry
* **Issue:** Should a new trial be ordered because of inappropriate evidence being supplied to the jury? Did the plaintiff make a case for negligence due to personal injuries? (concern is with the role of the proof the plaintiff produced on custom and usage)
* **Trial:** Court told jury that because the General Business Law statute did not apply to existing installations (like in this case), it was to be considered along with all other proof, as a standard by which to measure the conduct of the defendants
* **Held:** Decision reversed, New trial ordered because the General Business Law sections should have been excluded. Sent back for a new trial because there is a rule in evidence that says the probative value has to outweigh prejudice and judge said that was violated on the facts of this case because the probative value of telling the jury about the crime was outweighed by the unfair prejudice because the crime did not actually apply to this defendant.
* Why custom? – shows collective judgement/wisdom, shows feasibility of doing something
* he got another landlord to testify and got the judge to charge to the jury with respect to consumer law which made it illegal to have showers with those glass after 1973
* **Ratio:** The question in each case is whether the custom/usage meets the test of reasonableness, Once a custom is proved, not conclusive for RP standard. May be evidence of what ought to be done, but still must look at what RP standard is
  + custom does not need to be universal, just well-defined. A well defined group of people in the same profession such that the negligent actor can be charged with knowledge and we can say “they should have known”
  + looking to custom may be easy way to find someone negligent if they are not living up to that custom
* there is also the question of whether the custom is reasonable. Custom is fine but it is not totally determinative.
* **Reasons:** Proof of a common practice form expectations as to how individuals will act, and thus guide the common sense of a jury when called on to judge particular conduct. Proof of custom and usage focuses on the practicality of a precaution in actual operation and the readiness with which it can be employed. Custom and usage does not have to be universal; if it is fairly well defined and in the same calling/business the actor may be charged with knowledge of it or negligence ignorance. When certain dangers have been removed by customary way of doing things safely, custom may be provided to show that the defendant has fallen below the required standard. However, proof must bear on what is **reasonable conduct** given the circumstances.

### Malcom v Waldick (1991) SCC – custom may be negligent, burden of proof is on the person alleging custom

* **Facts:** Brother goes to visit sister in St. Thomas and slips on unsalted driveway and breaks his leg. Sues sister, claims custom in St. Thomas that no farmers salt their driveways. Sisters home owner insurance is being sued by brothers car or disability insurance. If they were found to be negligent, home owner insurance would have to pay but if not, auto or disability insurance.
* **Issue:** Was it negligent to fail to salt the area between where the car was parked and the steps
* Their argument is that nobody salts between that area and so that is the custom here. TJ and CA did not agree so they appealed to SCC arguing that every level of court did not take into account the custom
* SCC disagrees for 3 reasons:
  + Just because you lost, doesn't mean it wasn't taken into account. It was just found to be not that relevant
  + It is up to the party alleging the custom to prove it on the balance of probabilities. You cannot say there is a custom and then not get people to testify. The only evidence they had was one neighbour who said he doesn't salt his either.
* **Held:** Malcolm was negligent. Customary practice was unreasonable.
* **Ratio:** (i) The party alleging the custom must prove it on a balance of probability. (ii) No amount of community compliance will render a negligent practice reasonable
* **Case:** D failed to prove custom – only residents testified, not enough evidence
  + And, even if proved, court may still have said custom was negligent

### The TJ Hooper (1932) USA – custom may be negligent: need to take reasonable care

* **Facts:** Barges towed by tugs were caught in a storm and sank. Tugs were allegedly unseaworthy because they did not carry radios through which they could have received warnings about changes in the weather.
* **Issue:** Were the tub owner negligent?
* P said should have had radios, D says no, custom is to not use radios (no other owners use them)
* **Held:** Tug owners liable. Did D take reasonable care? No, easy to get radios (precaution) – negligent. Did not matter that not industry standard, need to take reasonable care. (Seems like simple case of infinitesimal risk, with B low = negligent)
* **Ratio:** There are precautions so imperative that even their universal disregard will no excuse their omission (i.e. must still meet the standard of reasonable care)
* **Reasons:** The courts must say what is required. Here, it was not a custom to carry a radio, and radios weren't generally used (only some people thought they were necessary). However, the precaution was imperative.
* **Weiler:** don’t use industry standard – industry looking for cheapest option, race to bottom (only if highly regulated could you rely on standard). Says the custom was unreasonable on its facts.

### Ter Neuzen v Korn (1995) SCC – in complex cases living up to the custom is sufficient to eliminate liability in negligence

* **Facts:** Respondent physician conducted AI, which resulted in appellant contracting HIV through infected semen of donor. Respondent did not warn appellant of risk of HIV infection due to AI procedure. It was impossible to test donor semen for HIV at the time the appellant was infected and the Respondent was unaware HIV could be transmitted by AI. After reading the article about transmission through AI in September 1985, the respondent immediately discontinued his AI program and recommended that his donors and the appellant be tested. Expert evidence suggested that the respondent's AI practice confirmed to general practices across Canada.
* **Issue:** Can the respondent physician be found negligent, notwithstanding conformity with standard medical practice? Did the trial judge err in instructing the jury that the prevailing standard of practice could itself be found to be negligent?
* Two possibilities of negligence by doctor:
  + - 1. Did doctor’s conduct breach SOC of reasonable doctor? Whether the doctor deviated from professional practice. Whether he did something different than other doctors specializing in AI
      2. Practice (custom) of all doctors negligent (based on *Malcom v Waldeck*). The standard practice itself was negligent. Not that he did not live up to it, but whatever they were doing was not the right one.
* **Held:** Appeal dismissed for physician; not possible to find respondent ought to have known of risk, or that he was negligent.
  + - 1. No, no reason to believe risk at time of infection; doctor took all reasonable steps available at the time
      2. Not available for doctors – too technical/specific for jury (would need expert). Almost impossible because the general rule is that where a medical procedure is complex and therefore beyond the competence of the trial of fact, it is not up to the trier of fact to find that it was negligent.
    - But, possible to find custom of doctor negligent if custom is fraught with obvious risk apparent to ordinary person. When you don't need a medical degree to see that it is obviously negligent, then you can find the standard of practice negligent.
* **Ratio:** General rule: where a procedure involves difficult or uncertain questions of medical treatment or complex matters beyond ordinary experience and understanding of a judge/jury, it will not be open to find standard medical practice negligence. The Exception is that if a standard practice fails to adopt obvious, reasonable precautions, which are apparent to the ordinary finder of fact, it is no excuse to claim conformance to such a negligent common practice. In specialized, scientific, complex cases, living up to the custom is sufficient to eliminate liability in negligence. Compliance with custom provides **some** evidence of reasonableness; conversely, breach of customary practice provides **some** evidence of unreasonableness.
* **Reasons:** Physicians have a duty to conduct their practice in accordance with the conduct of prudent and diligent doctor in the same circumstances. Physicians conduct must be judged in light of the knowledge that ought to have been reasonable at the time of the alleged negligence. Generally, when a doctor acts in accordance with a recognized and respective practice, they will not be found to be negligent. The medial profession as a whole is assumed to have adopted procedures which are in the best interests of patients and not inherently negligent. Certain situations where the standard practice itself may be found to be negligence is only where the standard practice is "fraught with obvious risks" such that anyone is capable of finding it negligent. Where the trier of fact can find a standard practice negligence is question of law: judgement determine on the evidence what the standard practice was and once the standard is determined, the issue becomes whether the defendant conformed to the standard. The expert evidence partially exonerated the physician. The only proper instruction was that the jury should decide whether the defendant conducted himself as a reasonable physician would in similar circumstances

1. **General Rule: The But-For Test** is the typical standard by which causation should be measured, but it is not always conclusive (*Athey*; *Resurfice*).
   1. Would the plaintiff’s injury have occurred but for the defendant’s act?
   2. Must be proved to the civil standard (balance of probabilities)
   3. May make a robust common sense inference concerning what happened (*McGhee*)
      1. E.g. Usain Bolt vs Neyers (can draw an inference) or Usain Bolt vs Other Olympians (cannot draw an inference)
   4. If scientists say that the thing is impossible, the claim fails. Remember: *post hoc ergo propter hoc*
   5. If you cannot prove that the negligence was a but-for cause of the damage, the claim fails **unless** the P can make out the *Clements* exception (below)
   6. Examples:
      1. The fire in *Wagonmound* would not have occurred but-for the oil spill, therefore there is factual causation; the injury in *Palsgraf* would not have occurred but for the shove to the back, thus there is factual causation (but no liability because no duty)
   7. But, the but-for test gives the wrong answers in situations of:
      1. Pre-emptive causation – someone is about to eat poison given to them by one person but then someone else shoots them in the head first – neither is technically a “but-for” cause
      2. Duplicative causation – independent causes are insufficient to cause the damage, but when they join together they cause the damage – none are individually a “but-for” cause
2. Where it is impossible to prove liability on the but-for test, the plaintiff may succeed where he can show that the defendant **materially contributed to the *risk of the plaintiff’s injury*** in two situations (***Clements v Clements***):
   1. **Global fault** – the P would not have been injured ‘but for’ their negligence, viewed globally → P must show that one or more D’s negligence was a necessary cause of injury
   2. **Individual fault impossible to determine** – the P is unable to show that any one of the possible tortfeasors in fact was the necessary or ‘but for’ cause of her injury because each tortfeasor can point the finger at the other

Cause in Fact

* this is a question of whether or not the injury could be said in law to be caused by the defendant
* cause in law: whether or not you will be liable for the cause in fact; scope of the risk
* legal causation: examining remoteness, whether or not the injury that occurred is within the scope of the risk
* factual causation: a question of what actually happened, did D’s act factually cause P’s injury?
* factual causation has 2 aspects:
  + 1. What test? (question of law)
    - the one you use as a default, is the “but for test”. But for the negligence, would the injury still have occurred. If yes, then there is no factual causation. If you need the negligence then there is factual causation
  + 2. Given that test, was there causation? (question of fact) - standard of proof for a question of fact is a balance of probabilities. It is for the plaintiff to prove this on the balance of probabilities.
* Negligence deals with liability for the consequences of unreasonable risk creation. Without the materialization of risk into injury, no liability can arise. Cause in fact deals with this feature of liability. To test whether the wrongful act produced the injury we use the “but for” test (but for the defendant’s act, the plaintiff would have been injured)
* But for test gives the wrong answer in 2 cases:
  + (1) Pre-emptive causation (shot dead vs if I hadn’t been I would have been poisoned immediately thereafter)
  + (2) Duplicative Causation (two pyromaniacs create separate fires which both cause property damage to plaintiff
* If the “but for” test doesn't work, use the material contribution “test”. Material contribution “test” seems to mix scope of liability with factual causation. NESS “test” is best

## Multiple Insufficient Causes

**Tortious & Non-Tortious Causes**

* Defendant is liable based on the “but-for” test and the principles of restoration
  + In a case of tortious and non-tortious **insufficient** causes (not independently sufficient but together are), apportionment of liability is not available; the environment in which an injury is suffered is not a non-tortious cause of the injury (*Athey v Leonati*).
  + If non-tortious factors reduced damages, plaintiff would never fully recover – violates the restoration principle
  + But-for the D’s negligence, injury would not have occurred; non-tortious causes do not reduce liability (*Clements)*

**Tortious Causes**

* Defendant is liable based on the “but-for” test and the principles of restoration
  + The plaintiff may look to any defendant who contributed a tortious cause for full damages or apportion between defendants
  + If the plaintiff seeks full damages from one party, the defendant must then seek contribution from the other tortfeasors (joint and several liability)

## Multiple Sufficient Causes

***Tortious & Non-Tortious Causes***

**Tortious followed by Non-Tortious**

* Defendants are not liable for the damages that would follow from a non-tortious cause on the basis of the principles of restoration and vicissitudes
  + The defendant is **only liable for the losses suffered due to the tortious cause** prior to the onset of the second non-tortious cause (*Jobling*)
  + Claimant is not entitled to all damages after a wrong, rather only ones causally connected to the wrong
* So long as the non-tortious, non-compensable loss **would have occurred anyways** (*Barnett v Chelsea*)
* **Exception for property damage** where a tortious act occurs before a non-tortious act and the tortious act causes as much or more damage than the non-tortious act (*Lake Winnipeg*) - the defendant is liable for the full damages despite the supervening non-tortious cause

**Non-Tortious followed by Tortious**

* Defendants take the victim as they find them, however, defendant is not liable to compensate for losses stemming from a previous non-tortious cause (restoration; vicissitudes)

**Simultaneous Tortious & Non-Tortious**

* Defendant is not liable to the extent that the causal factors overlap
  + Defendant is not liable for the same damages that the plaintiff would suffer from simultaneous non-tortious cause (*Kingston v Chicago Northwest Railway*)
  + Defendant is liable only to the extent that they **exacerbate** the plaintiff’s losses
  + So long as both causes are independently sufficient to produce the same injury
    - Is timing irrelevant for multiple sufficient causes that are tortious and non-tortious??

***Tortious Causes***

**Simultaneous Tortious**

* Defendant is fully liable for all resulting losses even though the “but-for” test seems to exculpate all defendants (*Lambton v Mellish*)
  + Resolved through common sense and the restoration principle (***Clements v Clements***)
* Defendants sue each other for contribution of damages
* True even where it is not possible to prove there were multiple tortfeasors (*Cook v Lewis*)
  + Circumvents evidentiary difficulty of an indivisible injury by applying the concept of joint tortfeasance.
* Global application of but-for test (*Clements*)

**Successive Tortious**

* Each of the separate torts were capable of independently producing the relevant loss
* “But-for” test seems to exculpate all defendants
  + Option 1 – first tortfeasor is fully liable and the second tortfeasor is entitled to “take your victim” principle and only liable for exacerbated damages (*Baker v Willoughby* endorsed in *Penner*)
  + Option 2 – the second tortfeasor is fully liable because the first tortfeasor should be able to rely on principle of vicissitudes
  + Option 3 – both tortfeasors should be jointly liable
* Canadian approach has endorsed **option 1**
* The first tortfeasor remains liable for the losses caused to the plaintiff because the second tortfeasor has not changed any of these losses
  + Second tortfeasor liable only for the exacerbated losses not already caused by the first tortfeasor
* Timing is relevant when multiple sufficient causes are tortious

## General Principles

### Richard v CNR – no liability where injury would have occurred anyways

* **Facts**: P in car on ferry falls asleep. He hears someone yell ‘we’re here’, so he guns it and drives off the end of ferry. He sues CNR and says they were negligent because they did not put the yellow tape at end of the ferry to warn him to stop.
* **Held:** no liability. Not actual causation.
* **Reasons:** given that he was in a sleepy state he would have driven off the boat regardless. So does not pass but for test. Rope would not have made a difference. Richards would have driven off even without a rope.

### Barnett v Chelsear & Kensington Hospital (1968) QB – no liability where injury is not factually caused by D’s negligence

* **Facts**: man ingest tea poisoned with arsenic. Goes to hospital, but doctor’s refuse to treat him, thinking he was simply drinking too much booze. He dies several hours later. Clearly, there was a duty and that he was negligent. Hospital admits they owed him duty and admit that they were negligent through the actions of the doctor. But they argue they are not liable because their negligence did not factually cause his death because he still would have died because he would have been dead before the antidote could have been administered.
* **Issue:** Would the deceased have died anyways or was his death due to the negligence of the defendants?
* **Ratio**: If the injury would have occurred anyway, then no factual causation. For factual causation: plaintiff must establish, on a balance of probabilities that “but for” the defendant’s negligence, his/her injury would not have occurred. If the injury would have occurred regardless, there is no cause in fact.
* **Held**: hospital not liable. Judgement for the defendants
* **Reasons**: Even though doctor had duty and breached it, the doctor’s negligence did not factually cause the death; treatment would not have been administered in time to save his life. The defendants breached their duty to the deceased by not admitting and treating him. Not too remote (likely that turning away a patient will cause injury). Death was likely due to a disturbance of the enzyme process. The only way to treat this is the use of an antidote. There was no reasonable prospect of the deceased being given the antidote before he died. Therefore, he would have died regardless of whether he was admitted. The plaintiff failed to establish, on BOP, the defendant negligence caused the death.

## Duplicative Causes

NESS test helpful in solving multiple contributing causes (asks, is their contribution sufficient for the necessary condition)

Example: Contracting a disease requires 5 elements / portions of pollution. There are 7 D’s, each one emits one pollutant.

→ But for = no liability, since each D could point to the other as cause of disease.

→ NESS (necessary element of sufficient set)= necessary condition is 5. The sufficient set is 4 plus 1. Therefore on these facts there is a sufficient set of conditions. So EACH ONE is a factual cause.

* C and D both start a fire. Each is big enough to burn down a house. They come together and burn down your house. So you sue the first person but they say that they were not at fault because of the other person’s negligence.

### Lambton v Mellish (1984) – cases with multiple causes call for an alternative to the “but-for” test

* **Facts**: P occupies apartment in building with D1 and D2. D1 and D2 both play music; the aggregate sum of their playing gives rise to the level of nuisance. P sues D1 and D2, requests an injunction. P sues them both and says that the two of them combined are causing him a nuisance and was an interference with the reasonable enjoyment of his land. D said that they re not factually causing P’s claim because the only test we have is the “but for test” which means we have to prove without my wrong, it would not have occurred. This is a duplicative case.
* **Issue:** Is Mellish liable even though Cox’s organ created most of the noise?
* **Held**: Judgement for the plaintiff. Both defendants liable because when you have an aggregate cause, they are both contributing so they are both liable. Injunction granted.
* **Ratio**: As long as the noise you make is a **substantial contributing factor to the whole injury**, you can be liable. If the acts of two persons, each aware of what the other is doing, amounts in sum to an actionable wrong, each must comply with a remedy against the total cause of complaint.
* **Reasons:** Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. Each noise separately constitutes a nuisance. Each is separately liable. “it is no defence to any one person among the hundred to say that what he does causes no damage to the complainant”. Even though they are not acting in purposeful combination with each other, Mellish nevertheless contributed to the noise and is responsible with Cox for the total noise, which constitutes the nuisance complained of. The amount of noise caused by one may not amount to a nuisance, but the noise vacuumed by both causes a nuisance.

### Arneil v Patterson [1931] HL- material contribution test also applies to negligence claims

* **Facts:** Two people had hunting dogs and they escaped and cornered a sheep and they growled at it and scared it and the sheep had a heart attack and died. Owner of the sheep sued for the value of the sheep and they said that they were not liable.
* They apply the material contribution test.
* **NESS test says:** they are both a factual cause
* **But for test:** Neither are liable
* **Held:** Both are liable.

### Negligence Act

* negligence act allows joint defendants to sue each other and figure out how much each of them is responsible

### Corey v Havener (1902) Mass – multiple causation case uses material contribution test; Ds are joint and severally liable

* **Facts:** P on road in horse and buggy. Two D’s drive by in their motorcars, emitting smoke and loud noise in their wake. This frightens the P’s horse, which causes carriage to crash, causing injury to the P. D says that they are not liable because you cannot prove factual causation because without the first motor-cyclist the second one would of backfired. But court said that as long as they materially contributed to the injury then they are both 100% liable
* **Issue:** Are both defendants liable?
* **Ratio**: “Both be held to have caused the accident if they materially contributed to the injury despite the fact that they did not meet the but for test.” In situations of joint tortfeasors, both will be held liable if they materially contributed to the injury, despite that they do not meet the but for test. Each tortfeasor is individual responsible for 100% of the damages (plaintiff only has to sue one to get 100% of the damages)
* **Held:** Judgement for the P; joint and severally liable for the injury.
* **Reasons:** Both D’s were causal wrongdoers, both contributed to the injury and so each is 100% liable. P is entitled to judgment against each or the full amount; no injustice in this for a satisfaction of one judgment is all that the plaintiff entitled to.
* **Note on damages:** Each one is 100% RESPONSIBLE. But once one has paid, then the two D can sue each other for contribution “can claim only 50% responsible” but this doesn’t affect the liability.
* does not pass but for test
* but does pass the NESS test, they are each a necessary element of a sufficient set of conditions. Each responsible no matter how contribution is apportioned

## Richard Wright, “Causation in Tort Law” – The NESS Test (i.e. Necessary Element of a Sufficient Set)

* he argues for the NESS test
* where but for test does not work, (1) pre-emptive and (2) duplicative there must be something else- NESS test
* Under this test, a particular condition is the cause of a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of that consequence.
* his argument is that the but for test works in the vast majority of cases but it fails own situations of over-determinative cautions such as pre-emptive or duplicative causation.
* First decide if it’s pre-emptive or duplicative (this is a question of fact). Only when it is duplicative can you apply NESS.
* NESS: necessary element of a sufficient set (a txt of cause in fact)- doesn't deal with remoteness, duty of care etc
* i.e. merged fire, pollution
  + Pollution: In order to get cancer, need 5 particles of a chemical. 7 of us in the class, and each one of us put one particle in the air. Anthony sucks in the particles and gets the disease.
    - “But-for” Test – No liability
    - NESS – There is liability; each one of your particles were a necessary element of a sufficient set of four other particles to bring about 5.
      * 5 = (1+4) therefore each one is a factual cause of the cancer because each one of them, combined with 4 others create a situation where it is enough to cause the cancer
  + Pollution: Neyers discharges 5 elements, and Y discharges 2. Anthony gets the disease.
    - “But-for” Test – Person who discharged 2, not responsible because the cancer still would have happened anyways. Person who discharged 5, responsible.
    - NESS – Both liable. The person who discharged 2 grabs 3 from Neyers. 5 is a sufficient set of 5 in relation to Neyers but Y can make a sufficient set because if I need 5, I can get 2 form Y and 3 from Neyers and therefore 2 is a necessary element to a set which is sufficient to have caused the cancer
  + Fire: Two fires burning and any two would be enough to burn down the house.
    - “But-for” Test – Wouldn’t work (either D would say that it’s the others fault). Neither of them was the cause.
    - NESS – Each one is an element of a sufficient set so they all caused it. Both the cause because you can create a sufficient set from the two fires that is necessary to burn down the house.
  + Fire: X is big enough for you to die. Y is not big enough. They join together.
    - “But-for” Test – Only the big fire is a cause, Y is not.
    - NESS – With enough from the big fire, is enough to cause damage therefore liability for both. They both are a cause of your house burning down so they are both a factual cause.
* **Two acts that are overlapping in time**
* **NOTE:** Judges don’t say NESS; they tend to talk about material contribution.
* Examples of NESS:
  + (a) In order to get a disease you must inhale 5 particles. There are 7 defendants, and each released 1 particle. NESS: you need 5 articles to get the disease, each defendant was a necessary part of the 5 (necessary element of a sufficient set) that caused the disease (any one pollutant can be added to court others to get the disease). Doesn't mean you can sue all 7. You can only recover the damages that you suffered
  + (b) You need 5 units of pollution to get the disease. X discharges 5, Y discharges 2. According to ‘but for’ test X is a cause of the disease (without him there is no disease) but, Y would not be liable (X has all 5). Under NESS: X factually caused the damage as he gave all 5 elements of the sufficient set. Y gave 2 elements plus 3 from X therefore Y is a necessary element of a sufficient set (factual causation, unless overlapping).
  + (c) Fire example: Three fires. Any two of which would have caused damage. Under ‘but for’ there is no liability (there would have been damage without each one). NESS: each person factually caused the damage; each is a necessary element of a sufficient set (the set was any two of the fires) that caused the damage.
  + (d) Fire: Two fires. X is big enough, Y is not big enough to cause the damage. The fires come together to form a bigger fire. Under ‘but for’ test X is the cause, Y is not. NESS: both factually caused the damage. Both are necessary elements of a sufficient set. X= injury and Y + part of X = injury.

### Kingston v Chicago (1927) Wisc SC — two causes, one tortious and one non-tortious = no liability

* **Facts**: Sparks from D’s locomotive started a fire, which merged with a fire of unknown origin (non tortious fire) close to P’s home; the fires unite, destroying the P’s home.
* **Issue:** Is the defendant liable?
* **Held**: Defendant is liable for the whole injury
* **Ratio:** Where there are two duplicate causes, one tortious and one non-tortious, there is no material contribution by the tortious cause. The law assumes unknown causes are tortious. The onus is on the defendant to prove it was natural. If there is one tortious and one innocent duplicative causes, then there is no liability. If there are two tortious duplicative causes then there is liability.
* **Reasons:** Either fire on its own would have destroyed the plaintiff’s property. Here, the fires were of comparatively equal rank, so neither can be considered an intervening or superseding cause. No causation for “but for” test - could always say the other fire would have burned it down, to escape liability (penalizes the innocent plaintiff). If we assume both are tortious, this looks like *Lambton v Mellish*. If the defendant proves the second fire was not tortious, there is to be no liability. Turns on policy: plaintiff should be able to recover. We should be able to live in a world without torts. General principle is that there are no torts committed. Therefore argument that there is no liability because of other torts doesn't make sense.
* **But for test:** No liability
* **NESS:** you can have had of each of the fires to build the sufficient set
* **Court said:** there is causation only when they are tortious

|  |
| --- |
| **Black Letter Law:** Where there are two sufficient causes, each of which are tortious, law will apply material contribution test (*Corey v Havener*). Where there are two causes, one tortious, the other innocent, the law will say no material contribution by the tortious cause (*Kingston*) |

## What is the Current Law in Ontario?

* material contribution. Both tortious- liability. Tortious and not tortious no liability. Tortious and cannot figure out what the other one is then liability.

## Successive Multiple Causes/ Sequential Causation

## Property Damage:

### Sunrise Co v Lake Winnipeg (1991) SCC – sequential causes, one tortious and one non-tortious; does not matter what happens afterwards unless the second act is an independent intervening act

* **Facts**: The Kalliopi L met, but did not collide with, the Lake Winipeg. Immediately after, the Kalliopi ran aground. Lake Winnipeg and her owners were entirely responsible for this. While going to a dock, the Kalliopi ran around again (not defendant’s fault, unrelated). Each grounding alone would have required the Kalliopi to be docked and repaired. The time in dock due to both incidents was 27 days. However, if the groundings were separate, would have been docked for 27 days for the 1st incident, and 14 days for the 2nd.
* **Issue**: Who is responsible for the loss of profit resulting from the detention for 27 days of the Kalliopi L? How much is the D responsible for the loss of profit resulting from 27 days of repair? Can damages be reduced in the event of independent, successive non tortious injury? How much damages does the owner of Lake Winnipeg get?
* **Held**: Judgement for the plaintiff. Winnipeg liable for full 27 days of repair (notwithstanding second incident). Responsible for the injury it caused, which was 27 days of repair.
* **Ratio**: in the case of damage to personal property, the tortfeasor is responsible for damages no matter what happens after tortious event; the second event, tortious or non tortious, is irrelevant to the estimation of damages, and will not result in diminution of losses UNLESS it is an independent intervening event. In situations of property damage, the first in time rule is appropriate when dealing with successive causes; i.e. no apportionment between wrongdoer and a subsequent non-tortious/tortious event. Note: If second incident was tortious, T1 could sue T2 for indemnity. Tort fear is responsible for subsequent events, unless there is a novus actus.
* **Reasons:** no causal link between the second incident and loss of profit suffered by the owners of the Kallipoli, such damage being coincidental. Therefore the nature of the second casualty, tortious or otherwise, is irrelevant. General principle in shipping and personal injury is the same, application is different. Inherent differences in the injuries sustained mitigate against any meaningful comparison between the two areas. The second casualty is irrelevant in this determination.
  + The first incident directly prevented the vessel from continuing her profit-making venture and the length of the period of repairs exceeded that of any repairs resulting from the second incident. First in time rule - the first incident was responsible for 27 days. Therefore, defendant is wholly responsible. There is no causal link between the second incident and the loss of profit; the damage was coincidental.
* Majority says we do not take into account the 14 days so they can get the full 27 days
* General principle of apportionment applies- it recognizes that there were 2 causes. 14 days is solely attributable to the defendant’s fault; the defendant must bear the full amount of loss resulting from the detention for this period. The remaining 14 days were used to repair damage from both incidents. The loss flowing from this period must be divided equally between the incidents. In the result. the defendants are required to pay damages for 20 days of detention. This conforms with the principle that plaintiffs are entitled to be placed in the same position as they would have been in had the tort never occurred.

## Personal Injury:

* Once the appeal period ends, the plaintiff’s subsequent fate has no impact on the original tortfeasor’s liability
* *Example* -assume that the original tortfeasor paid $2.5 million to provide the plaintiff with 20 years of future care and that the plaintiff was negligently killed in an unrelated crash three years after the first case was settled. The original tortfeasor cannot recoup the unspent funds for the 17 years of future care that was not required.

### Baker v Willoughby (1970) HL – personal injury damages with intervening tortious acts: losses will not be diminished due to successive tortfeasor, court considers the two tortious acts “concurrent causes”

* **Facts**: Two independent torts occurred before trial. The plaintiff was in a car accident that the first tortfeasor caused (in which the plaintiff injured his left leg) and shortly thereafter a robber shot him in his left leg during the course of a robbery. The later injury necessitated immediate amputation of his leg. The D argued that he should not be liable for the P’s lost income after the date of the robbery. Person is injured tortiously but before the trial is done they are shot and their leg was blown off.
* **Issue**: Is the defendant still liable? Whether the first tortfeasor could pay reduced damages on the ground that the disability plaintiff suffered in his left leg resulting from the first tort ceased to be an effective cause of further loss after robbery
* **Held**: Judgement for the plaintiff. D liable for all losses (even after robbery). No diminishment of damages for a tortious second event. **But if there is a non tortious independent event, that must be taken into account.**
* **Ratio:** If there is an intervening and independent event then we do not take into account what happened in the second tort. Person responsible for the first tort is responsible for the whole injury.
* **Reasons**: Actions of D and robber were concurrent causes of income loss, therefore the D had to compensate for entire loss.

### Jobling v Associated Dairy (1982) HL – personal injury damages with non-tortious intervening injury will reduce losses

* **Facts**: D’s negligence caused the P to suffer a back injury, and incapacitated him to the extent that he was limited to light work only. Before trial, P developed spinal disease, which completely incapacitated him, precluding him from all work. P wants compensation for all income lost representing the totality of work.
* **Issue**: Was D was liable for loss of earnings on the basis of partial incapacity continuing throughout the period which, in the absence of the onset of the spinal disease would have represented the balance of the D’s normal working life, or if it was limited to loss of earnings up to the time when the disease resulted in total incapacity?
* **Held:** Defendant liable for loss of earning up to when disease result in total incapacity.
* **Ratio**: If there is a subsequent non-tortious event, must take this into account- damages will be reduced (tortfeasor does not have to pay for it). D is liable for injuries caused or contributed to by his negligence; presence of other non tortious contributing causes will reduce the extent of the D’s liability. damages will be limited to the period before the disease was discovered, or at least reduced.

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| **Black letter law – independent intervening events, tortious and non tortious, property and personal injury:**  **Property damage:** no diminishment if independent non tortious act occurs (second event irrelevant)  **Personal injury:** diminishment for non tortious independent act (second event relevant)  \*\* if first injury makes it so one cannot work again, and second injury (sky diving, non tortious act) makes it so that one cannot work again, law says first tortfeasor responsible for time of injury to time of second injury.  NESS test says *Sunrise* is correct as matter of factual causation, but if *Jobling* is correct, then the answer is coming from not factual causation, but somewhere else: because someone can’t sue natural disaster, and the purpose of tort law is to put you back into position, we do not take into account subsequent tortious events, but we do take into account non tortious event (this is only available to remedy a tort, not a natural inury). This has nothing to do with factual causation. |

## Pre-Emptive Causation

### Saunders System Birmingham v Adams (1928) Ala SC – no liability for pre-emptive causation because but-for test fails

* **Facts**: D rented a car that had defective brakes to Ms. Green, who in turn injured the P, through her negligent driving. Ms Green didn’t push the breaks, but the rental car provider’s brakes were defective. So Ms. Green would have run down the P anyway. Judge instructed jury that there would be no liability even if applying the brakes could not have stopped the injury.
* **Issue:** Who factually caused the person’s injury (ran her down)?
* Jury Instructions: The jury had been instructed that if Mrs. Green did not use the brake until she was so close to MRs. Adams that it would have been impossible to avoid striking her, damages could not be awarded to Mrs. Adams.
* **Held:** no liability as of ‘but for’ test (accident still would have happened due to defective breaks)
* **NESS test:** pre-emptive causation. Only Ms. Green driving car should be responsible because her negligence not pushing breaks means that the negligence of the garage did not come into effect.

### Wright v Cambridge Medical Group (2012) UKCA – a party may not use the potential subsequent negligence of another to escape liability from his own negligence which factually caused the damage

* **Facts**: D physician negligently failed to refer the P to hospital, but at hospital, because of negligent system failings within relevant department, would also not have provide the appropriate treatment in the time to prevent the P’s injury
* **Issue**: who should be responsible, the failings of hospital or first doctor?
* **Held**: First doctor liable
* **Ratio**: Doctor cannot escape liability by proving that without his actions, injury still would have occurred. (1) where a Dr has negligently failed to refer a patient to the hospital, and as a consequence, she has lost opportunity to be treated as she should have been by a hospital, Doctor cannot escape liability by establishing that the hospital would have negligently failed to treat the patient appropriately, even if he had referred her. (2) proper clinical treatment encompasses the monetary equivalent of proper clinical treatment provided by the ability to sue if one does not receive proper clinical treatment
* **Reasons:** Doctor cannot escape liability - he deprive her of the opportunity to be treated properly, which would have been reflected by the fact that she would have been able to recover damages from them if she was treated improperly.
* **Wright:** NESS test: preemptive causation - first doctor was liable
* **Note:** There could be situations of omissions where both people are liable (e.g. both people have to turn a level to turn off something if it doesn't matter what order they do them in.

### Athey v Leonati (1996) SCC – pre-existing condition; material contribution test

* **Facts**: P suffered back injury due to D’s negligent car accident. P subsequently herniated her disk during mild stretching routine which causes his extreme pain. Herniation was caused by combination of car accident and pre-existing disposition.
* **D’s argument:** where loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation
* TJ held that the D liable on material contribution basis (25% pre-existing, 75% to the D)
* **Issue**: Is the defendant liable for total injury? Should apportionment occur with presence of non tortious pre-injuries ?
* **Held**: No, P is entitled to the full amount of damages (no apportionment).
* **Ratio:** There is no apportionment between tortious and non-tortious causes which operate pre-injury (because for almost everything there is a tortious and non-tortious cause and if this were correct, plaintiffs could never get 100% compensation.) (1) Causation is established where the plaintiff proves the defendant caused or contributed to the injury. (2) Default test is the "but for” test. (3) Where “but for” test is unworkable, use test of material contribution. (4) The law does not permit apportionment between tortious and non-tortious causes which operate pre-injury
* In personal injury cases, where the subsequent even is not tortious then it has to be taken into account.

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| **Black Letter law:**   1. Causation is established where p proves civil standard that the D caused or contributed to their injury. 2. But-for test is general but not conclusive test for causation. 3. Obiter in Athley, where the but for test is unworkable causation can be established where the D actions materially contributed to the occurrence of the injury (Lambton). 4. **Law does not permit apportionment between tortious and non tortious pre injury (Athey) but will allow apportionment where the subsequent injury is non tortious.** |

* **Reasons:** If injuries sustained by the D’s negligence caused or contributed to injury, then the defendants are fully liable for the damages flowing from the second injury. The P must prove causation by meeting the ‘but for’ or material contribution test. Future Hypotheticals can be factored into calculation according to degree of probability. D’s actions were outside the de minimus range, meaning a ‘material contribution’ to injury, and therefore the D fully liable for damages flowing from disc herniation. D’s negligence exacerbated the existing condition (thin skull rule).
  + pre-existing condition was 75% responsible for the disc herniation. Car accident was 25% responsible for it. Policy reason we don't apportion is because it puts plaintiffs in position they would have been in had there been no tort.
* ASK: three possibilities for pre-injuries (questions of fact):

1. If disc herniation /injury would have likely occurred anyway, then no liability. If the herniation would have happened at the same time because of his back condition even without the accident, then there is no liability - the car accident would not have caused or contributed to the injury because it would have happened anyways.
2. If it was necessary for both injuries / causes to have occurred for herniation, then liable. As long as it is a material contribution then there is liable if you are necessary to have both.
3. If accidents alone could have been sufficient cause, and the pre existing back injury alone could have been the cause, then unclear of cause in fact determination; TJ must then determine if the negligence MATERIALLY CONTRIBUTED to the injury (like *Lambton v Mellish*).

* **Court’s Responses to D’s Arguments:**
  1. **Multiple Tortious Causes** → where multiple tortfeasors cause the injury, the loss may be apportioned between them
     + However, the P still receives 100% of their loss when that loss is apportioned across multiple tortfeasors. If the court did so in this case, the P would not be adequately compensated.
     + In *Lambton v Mellish*, each paid 50% of the damages – however, this case was distinguished from *Lambton* because P could only sue one guy.
     + apportionment between tortious and non-tortious causes is contrary to established principles: it would allow defendants to escape liability and stop plaintiffs from recovering
  2. **Divisible Injuries** (somebody shoots your arm and someone shoots your leg, the person who shoots your arm should not have to pay for your shot leg)→ not applicable. The separation of distinct injuries is not apportionment, but rather making each D liable for what he caused. In this case there is only one single injury (disc herniation), and so divisibility was neither possible nor conceptually appropriate.
     + this isn’t true apportionment; it just holds each defendant liable for the injury he caused per the usual rule
  3. **Adjustments for Contingencies** → the disc herniation was a past event, so it could not be addressed in terms of probabilities as adjustments for contingencies could be. What happens in a usually tort case, is that one of the arguments would be how long you would of been liable to work without the tort.
     + court says that this is only used when adjusting damages (e.g. 30% likelihood of worsened condition) and for future events. Past events must be proven (was/wasn’t a cause)
  4. **Independent Intervening Events** → The P’s loss is the difference between his original position and his injured position. Cases involving independent intervening events involve an adjustment of the P’s original position. The herniation in this case was the result of the D’s negligence, and did not involve any adjustment of the P’s original position.
     + here, the accident caused the disc herniation. It was not an independent intervening act
  5. **The Thin Skull and Crumbling Skull Doctrines** → The D argued that the P was pre-disposed to the dis herniation. The pre-existing condition was inherent to the P’s original position, and the D is liable for additional damage but not pre-existing damage. However, there was no finding of any measurable risk that the disc herniation would have occurred without the accident.
     + crumbling skill recognizes the pre-existing condition as inherent in the plaintiff's “original position" - defendant wouldn’t compensate for debilitating effects of pre-existing condition. Defendant liable for additional damage, not pre-existing damage. No finding that the herniation would have occurred without accident.
  6. **Loss of Chance** → not supported by the factual finding
     + suggests a plaintiff be compensated where their only loss is the loss of change at a favourable opportunity or of a change of avoiding a detrimental event. Loss here is the loss of change of avoiding the herniation.
  7. Plaintiff must prove causation by meeting the “but for” or material contribution test. It was necessary to have **both** the pre-existing condition and the injuries from the accidents to cause the disc herniation. The accident injuries were a necessary ingredient in bringing on the herniation. The plaintiff proved this on a balance of probabilities. The contribution was 25% (outside the de minimis range) and is a material contribution, rendering defendant fully liable for the damages flowing from the disc herniation (must take plaintiff as found).

## Criticisms of Material Contribution Test:

* Problematic because it requires “material” contribution
  + “Material” is ill-defined. What constitutes a “material” contribution? 5%, 10%, 40%, 75%?
* Assume buying a present for Neyers. One person puts in $99 and another person puts in $1.
  + “But-for” Test: Both are a cause
  + NESS: Both
  + Material Contribution: First person
* One person puts in $105 and the other person puts in $1 simultaneously
  + “But-for” Test: Only first person
  + NESS: Both
  + Material Contribution: Still the first person
* One person puts in $105 and the other gives $55.
  + Finally, maybe a material contribution. But who can define when a “material contribution” starts? What if it was $105 and $35?

## BLL for Causation:

1. Causation is established when plaintiff proves on BOP that defendant caused or materially contributed to their injury.
2. The but for test is the general, but not conclusive test for causation (default test).
3. Where for whatever reason, the but for test is unworkable, causation can be established suing the material contribution to injury test.
4. In multiple tort teasers cases, provincial legislation permits defendants to seek contribution and indemnity from each other
5. The law does not permit apportionment between tortious and non tortious causes which operate pre injury but allows apportion ate for subsequent intervening events where they are non-tortious.
6. (a) In this case, the court found the disk herniation would not have happened just from the pre-existing condition- that is why they do not apportion; and also because it was pre-injury
7. Jobling is good law in Canada, and you make allowances for independent intervening events that are non-tortious.

## Factual Uncertainty

## Three Categories of Factual Uncertainty Cases:

1. Who is the negligent party?
   1. Cook v Lewis, Joseph Brant Memorial Hospital
   2. Weinrib → the SCC often only thinks about this
   3. In these cases, apply Clements part 2 → global but-for, impossibility
2. Was the injury caused by an innocent cause, or a negligent cause?
   1. McGhee, Wilsher, Snell v Farrell (Canada), Fairchild (UK)
   2. In these cases, apply Clements part 1 → “but-for”, robust common sense inference
3. When can “loss of chance” count as an injury?
   1. Gregg v Scott, Lawson
   2. In these cases, the likelihood of success is very low unless there is (a) a contract or (b) an undertaking

## Innocence or Negligence?

### Blackstock v Foster (1958) NSWSC – scientific evidence determinative; P’s evidence fails to establish BOP connection

* **Facts:** P was sitting in his car, not moving. D rear-ended him, throwing P’s chest against the steering wheel and causing injury. It was subsequently discovered that P had a malignant growth in his chest. P was successful at trial and D appealed, arguing that the damages award was too large. Some doctors said that it was possible but improbable that the growth was caused by the negligence, others said it was impossible etc.
* **Issue:** Was there a causal connection between the crash and the malignant growth? Was it open to the jury to find that there was a causal connection between the blow to the chest and the malignant growth?
  + If the blow didn’t cause the growth, the damages award would be excessive.
* **Held:** Appeal allowed. Verdict set aside. Judgment for the D. Evidence was insufficient to prove a causal connection between the accident and the malignant growth.
* **Ratio:** The evidence must justify an inference that it was more probable than not that there was a causal connection between the accident and the injury sustained.
* **BLL:** Reasoning concerning causation is justified only when positive knowledge or common experience supplies adequate ground for believing that events are connected. When factual uncertainty concerning causation of injury, evidence is required.
* **Reasons:** The respondent had a growth in his chest before the accident. Experts gave evidence that a heavy blow could cause a benign growth to develop into malignant one. Another expert said that although possible, it was improbable. The evidence doesn't justify the inference that it was more probable than not that there was a causal connection between the blow and the malignancy of the growth. Respondent had to prove it was more probable than not that the blow sustained in the accident caused a benign growth to become malignant. The evidence was insufficient.

### Cook v Lewis (1951) SCC – two indiscernible tortfeasors liable; Ds must absolve themselves since wronged party should not be deprived of right to redress

* **Facts:** Cook and Lewis were hunting with several other people. Lewis was shot in the face; he claims it was Cook and another in the party, but Cook alleges that he shot in a different direction than in the one Lewis was crouching. Each defendant shot at the same time in the direction of the plaintiff but the evidence was that only one of them could hit him. At trial, the jury found that Cook and his friend did fire in his direction, but they were unsure as to which one it was.
* **Issue**: Are Cook and Akenhead liable for the injury sustained by the plaintiff? When there are two parties, and it is proven that one of their actions caused harm, but it cannot be proven which one it was, who, if anyone, is liable?
* **Held:** Both defendants liable.
* **Ratio:** When A proves he was negligently injured by either B or C but is unable to established on a balance of probabilities which of two two caused the injury, his action must fail against both unless there are special circumstances rendering the rule inapplicable (i.e. being a joint tortfeasor). If there are two (and only two) tortfeasors who acted at the same time and one of them must have caused the injury but it’s *unclear* who actually did, courts reverse the burden of proof and the D must prove that he did **not** injure the P.
* **Cartwright J:** Flips the burden to the D in multiple but discernible tortfeasor to absolve themselves. because they were joint in this venture, then they are agreeing to common set of action, therefore joint tortfeasors – if jury found that they shot in direction of Cook, then they breached their duty and therefore are liable.
  + if the jury decides that both shot negligently in the plaintiff’s direction, both should be found liable even though the jury is unable to decide which of the two shot Lewis
* **Rand J:** Onus should be on D to prove he did not do it because they violated his right to bodily integrity and by both discharging at the same time, they took away his remedial right (to prove who injured his body). If both acts bear this culpability, then burden shifts to BOTH wrongdoers, and sole responsibility should be between them.
  + Two wrongs: (1) Shot negligently (breached standard of care) (2) RF and wrongful interference with plaintiff’s ability to prove cause in fact. Once it is decided that the defendants were negligent, the onus shifts to the guilty party. Each hunter would know of the shooting by the other and each has culpably participated in the proof-destroying fact
* **Locke J (dissenting):** If P cannot prove that it was D who shot him, then he has not sufficiently proved that his injuries were caused by D. The action should be dismissed.

## Weinrib’s Notes on *Cook v Lewis*:

* Not two rights involved in *Cook v Lewis*, only one – the right to personal integrity.
* Damages are meant to substitute for your right to personal integrity.
* The hunter who actually hit him violated the right to personal integrity; the one who didn’t hit him also violated his right to personal integrity because he made it impossible to prove who did it (remedial right and substantive right are the same).
* Rand is on to something but, Cartwright has the right form of liability (Beever agreed). Rand was wrong to think that are two rights. There is one right that has two aspects. The right to personal integrity has a substantive and a remedial aspect. When the one person fires a gun and injures you, they interfere with the substantive aspect. The other person who fired a gun but didn’t cause injuries interfered with the remedial aspect. This could apply to multiple tortfeasors. The nurse in *Brant* did not interfere with either aspect. If you can prove you got a drug from a pharmacy and they only sold 10 DES, you can sue those 10 companies because each of them of wronged you. This is consistent with *Clements v Clements.*

## Weinrib’s Test (Combo of Cartwright and Rand)

1. There must be negligence in relation to the right of the victim – Everyone must have been negligent.
2. Everyone has to be negligent vis-à-vis you (like if you shoot in a different direction)
3. The actions of the Ds have to be not too remote (similar to the mother test)
   * + If these three things exist, then it wouldn’t be limited to just two people (the test would work for as many people as are involved)

### Joseph Brant Memorial Hospital v Koziol (1978) SCC – Cook applies only to situations of two people where one of whom must have caused the injury

* **Facts:** Post-op patient died as a result of choking on gastric juices. Cause of death was found to be unknown due to negligent nurse’s inability to keep proper notes. Nurse forgot to take her logs or lost them therefore nobody knew what happened during the surgery. TJ found nurse liable on Rand’s reasoning in *Cook,* it said that the nurse had defeated or destroyed the remedial right of the patient by failing to take the notes. But SCC rejects this reasoning noting that here, there were not 2 parties on which guilt must be ascertained. Here, they are simply asking whether the nurse’s conduct amounts to negligence for which the hospital would be responsible for in law, and whether that negligence caused victim’s regurgitation and subsequent death.
* **Issue:** Is the nurse liable for the patent’s death?
* **Ratio:** *Cook v Lewis* is limited to 2 people, one of whom must be responsible for the injury. In *Cook*, there were two negligent persons and an inability to find whether the negligence of one or the other cause the injury. There must be negligence causing injury, not just negligence, before there can be recovery. In order to apply *Cook v Lewis*, The negligence must be brought down to two people and two people only with an inability to prove which of those two did it and some reason to think that those two know better than what the plaintiff knows about what went on
* **Held:** Appeal allowed. Nurse not liable
* **Reasons:** The death was a mystery. Therefore, cannot determine guilty or negligence causing the death. There has to be negligence causing the injury before there can be recovery, not just negligence. ONCA applied *Cook* incorrectly.

### Sindell v Abott Laboratories (1980) Cali SC – multiple manufacturers of fungible negligent drugs; market share duty of liability

* Facts: P brings Class action against D drug companies alleging the Ds promoted and administered an unsafe drug to their mothers for miscarriage prevention, knowing it would cause birth defects. However, the P cannot identify the manufacturer of the precise product. Similar actions have been brought against drug companies, however, the judgements found in favour of the Defendants because of failure of the P to identify the manufacturer of the DES prescribed to their mothers. D argues that since there are over 200 manufacturers, there is no rational basis to infer that any D in this action caused the P’s injuries or possibility that they were the ones responsible. Argues the rule in *Summers*, that the P cannot relieve the P of the burden of proving that company caused the injury.
* Issue: Can a plaintiff hold manufacturers of identical drugs liable even though she cannot identify the specific company who manufactured the drug that caused her injury?
* **Held**: D liable for substantial proportion. Made out in this case since 6 companies had 90% of market share.
* **Ratio**: Once the plaintiff proves (1) She took DES (2) The defendant has a substantial share of the market, the burden shifts to the defendant to prove that they did not do the wrongful act. If they cannot, each defendant will be held liable for the portion of the judgement represented by its market share. Each manufacturer’s liability for an injury would be approximate equivalent to the damage caused by DES it manufactured (deep pocket theory) (1) The plaintiff cannot identify *which defendant* produced the fungible product which harmed *her* in particular, through no fault of her own (2) A *substantial share* of the manufacturers who produced the product during the relevant time period are named as defendants in the action
* **Reasons**: Over time, all liability based on market share will more or less match the actual factual causation (the D’s will sue each other). If P had to prove identity, then she would likely not be able to recover for injury, since many of the manufacturers are out of businesses. As in summers, P is not at fault for failing to provide evidence of causation, and although such absence is not attributable to the D, their conduct in marketing an unsafe drug the effects of which are delayed for many years plays a role in creating unavailability of proof. So, measure the likelihood that any D supplied the product by: the percentage of DES sold by each of manufacturer. for the p Summer’s rule will be amended
* Mask:
  + None of the 5 may have actually produced the exact drug the plaintiff’s mom took. However they represent 90% of the market. The burden then shifts to the manufacturers to establish they could not have manufactured the drug, otherwise they will each be held liable for the portion of the judgment represented by its share of the market. Policy reasons: defendants have deeper pockets and are better able to bear the cost of the injury. Tort law is about spreading losses. This is an easy was to spread loss. Each defendant will be liable based on their market share.
  + he thinks that innocent third parties should not be liable for these damages. He says this would be unfair because there are all these children that have cancer and need testing and to enforce fact causation would be to destroy all claims. They are innocent, drug companies are scumbags and so policy demands that we come up with some way that allows this suit to go forward
  + wants to hold each manufacturer liable on the basis of their market share which means that the plaintiff can sue whatever drug company they want for 100% and that sued drug company can sue any of the other ones
  + one limitation of this will be that if a manufacturer could prove that they could not have been the one who injured this plaintiff they could be released from the suit
* Dissent:
  + Majority’s decision is not the law – the law states the defendant’s conduct must have caused the plaintiff’s injury. A mere possibility of causation isn’t enough. There is too much speculation. Market share liability falls unevenly and disproportionately on manufacturers who can be sued in California. Majority suggests the drug companies are better able to bear the cost. But a defendant’s wealth is an unreliable indicator of fault and shouldn’t play a part in the legal analysis of the problem. This would create 2 different rules of law.

### Abel v Eli Lilly- Mich SC [1984]

* The difference between *Cook* and *Sindell* is that in *Cook* each defendant was negligent toward the sole plaintiff – each could have caused the injury. Here, the plaintiffs don’t claim each defendant was negligent to each plaintiff. Each defendant couldn’t have caused injury to each plaintiff. Defendant must interfere with your right to personal integrity, not just someone’s right.
* *Cook:* each defendant was negligent toward **the** plaintiff
* DES: each defendant was negligent toward **a** plaintiff, but not toward **each** plaintiff.

### McGhee v National Coal Board (1972) HL – courts must take a pragmatic, robust common sense approach to factual uncertainty

* **Facts**: P works in brick kiln. Risk inherent to this field of work is that one would get dermatitis. In order to make working in kilns safe, every other person who operates a factor must provide showers for the worker. Most of those who use this procedure do not get dermatitis. This employer does not provide a shower. The P here works in kiln, asks for shower, but is not provided one. Next day he has dermatitis. Problem is in 70’s no one knew how it worked. One theory, one cut spreads to rest of body. Second theory is that you need many abrasions together. So one theory is preemptive causation, the other is overlapping causation. Employer’s defence: P loses because of the frailties of scientific evidence, he cannot prove that D's negligence caused him to get dermatitis. On judges view, there was one bit of negligence here (not working in brick kiln), but the bike ride home. What he had to prove was the bike ride home caused the injury. But this is impossible.
* **Issue:** Did the respondent cause the appellant’s dermatitis?
* **Defendant’s argument:** defendant said that plaintiff could not prove that the time riding home is what caused his dermatitis but that it was more likely that the time spent in the brick kiln is what gave it to him but they all agreed that was not negligent
* **Held**: Appeal allowed. D liable
* **Ratio**: No difference between increasing the risk of injury and materially contributing to the injury. **Courts must take a pragmatic, robust common sense approach to factual uncertainty**. The P does not have to prove that the act contributes more than materially to the injury; it is sufficient to prove that it contributed to the *risk* of injury
* **Reasons**: → there was only one possible agent that caused dermatitis viz the brick dust and that the dermatitis that he suffered was caused by the brick dust. The question is whether the continued presence of the brick dust on his skin after the time he should have been provided with a shower caused or materially contributed to the dermatitis which he contracted. The court follows *Cook v Lewis*, in that the burden of proof should be reversed (that the D must prove they did *not* increase the risk of injury). Not because employer will know more about dermatitis, but because it is fair. Follows Rand, re material increase to the risk. Here, there was undisputed evidence that brick dust caused dermatitis. McGhee dealt with only *one* possible agent which could have caused the dermatitis, and a failure to take preventative measures against brick dust causing dermatitis was *followed* by dermatitis caused by brick dust. This is sufficient to infer a causal connection to the increase in risk of injury. That this can be interpreted as **duplicative causation**, not pre-emptive (i.e it is not predestined to get dermatitis, riding home therefore makes a difference. Science tells us that longer stuff on skin more likely you’ll get dermatitis).
* **Reid: appeal allowed (Binding)**
  + Employer said they were negligent, but that the biking caused dermatitis. Scientists say the longer dust is left on skin, the greater the chance of dermatitis. The evidence doesn’t show how dermatitis begins. But we know the dust particles can adhere to skin and somehow cause injury. Washing is the only practical method of removing the danger of further injury. The fact the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. No substantial difference between saying that what the respondents did materially increased the risk of injury (failing to provide shower) and saying that what the respondents did materially contributed to injury.
  + as long as P can prove the defendant is responsible for increasing the risk for contracting the dermatitis was sufficient
* Wilberforce: appeal allowed
  + Where a person breaches the duty of care, creating a risk, and injury occurs within that risk, the loss should be borne by him unless he shows there was another cause.
  + Plaintiff shouldn’t have to prove it was the addition to the risk, caused by the breach, that caused or materially contributed to the injury because it may be impossible to prove.
  + danger of liking this approach is that there will be liability inc cases when defendants did not cause real damage
* Salmon: appeal allowed
  + It isn’t necessary to prove that the respondents’ negligence was the only cause of injury. A factor by itself may not be enough to cause injury but if, with other factors, it materially contributes to causing injury, it is clearly a cause of injury. The negligence which materially increased the risk of injury thus materially contributed to causing the injury.
  + agreed with Reid. He thinks that it seems to be unfair to say that if prior to him getting in the shower he had a 52% chance of getting dermatitis and after having that shower that was raised to 90%, on the balance of probabilities there would be no liability.

**Wienrib’s take on *McGhee*:**

* Totally ok to apply common sense inference
* But in McGhee, the employer is trying to say there are 2 aspects to its actions (1) negligent = not giving shower, and (2) non negligent = working in brick kiln
* This is false. Not giving shower but putting you in a brick kiln is negligent, therefore putting you in brick kiln is negligent

What Did McGhee Decide? Three Views:

1. **Canadian view:** application of a robust, common sense inference to fact finding on a BOP (not scientific standard)
2. Common Sense Inferences possible only on certain facts of a case—*McGhee* does not introduce anything new

### Wilsher v Essex Area Health Authority (1988) – common sense inference not possible where multiple pre-emptive causes

* **Facts**: baby born premature, goes blind to RLF. 5 possible causes of RLF. 1 cause, doctor injected too much oxygen into blood stream, 4 other causes = pre-existing conditions. Evidence of the doctor is that each of these things is equal in its ability to give the plaintiff this type of blindness.
* **Issue**: is the doctor liable for the baby’s RLF?
* **Held:** Plaintiff couldn't prove on balance of probabilities the negligence caused the injuries
* **COA held:** hospital liable, applies what they believed McGhee stood for. Stood by the rule of the hospital breaching the duty, failed to live up to the SOC, he suffered recognizable head of damage and it was within the scope of the reason why they should not pump too much oxygen so they flipped the burden and since hospital cannot prove that it didn’t cause it then liable.
* **Ratio:** Must take a robust, pragmatic look at the possible causes to determine if an inference can be made between the negligent act and the injury. If there are sufficient pre-emptive causes, court cannot make robust common sense inference on a BOP.
* **Reasons COA:** A sufficiently high level of PO can have a toxic effect in a premature baby and cause RLF. It is also equally common that RLF can occur in premies who have survived without any artificial administration of oxygen, and there is evidence to indicate a correlation between RLF and a number of other conditions, although causation has not been proved. Having found that the that the hospital’s negligence was ONE of the possible causes of RLF, that it was sufficient to conclude that the negligence ‘caused the injury.’ Applied Wilberforce’s ruling on shifting burden of proof; hospital could not disprove that it materially contributed to the risk of RLF. *McGhee* said that it was possible to draw inferences of causation even without scientific certainty. Unlike *McGhee*, case involved multiple causes and each was just as likely. On the facts of this case, cannot draw an inference that the negligent act caused blindness.
* **HL Held:** Hospital not liable; Since sufficient pre-emptive causes, we cannot make robust common sense inference on a BOP.
* **HL:** COA wrong; *McGhee* applies where there is only one possible cause, here there are 5, one of which may or may not have been caused by Doc. Failure to take preventative measures against one of 5 possible causes is no evidence as to which caused the injury. Since sufficient pre-emptive causes, we cannot make robust common sense inference on a BOP.
* said that all that was decided in *McGhee* was that the disease he suffered would not have occurred or been as bad without the ride home on the bike and they inferred this by material increase of risk
  + but cannot make this inference in this cases because each of the causes is a cause the baby suffered and there is no evidence that one was more important or more causally relevant than the other

### Snell v Farrell (1990) SCC – robust common sense inference in light of rules of evidence

* **Facts**: D, doctor preforms cataract operation on the P. D inject anesthetic into P’s eye which starts bleeding, but D proceeds w/ operation. P goes blind after operation. Could have occurred naturally (diabetes) or as a result of continuing the surgery.
* **Prior Proceedings:** Found for P based on *McGhee*. Since doctor cannot prove that he was not liable then he is liable.
* **Issue:** Can an inference be drawn that the appellant’s negligent caused the injury?
* **Held**: Appeal dismissed. Doctor liable. Evidence not in conflict here. A finding of causation has been inferred from the evidence adduced in the absence of evidence to the contrary. No evidence to rebut the inference, or if there was, it was weak.
* **Ratio**: Legal burden remains with the plaintiff. In the absence of evidence to the contrary (provided by defendant), an inference can be drawn that is adverse to the defendant (even though positive or scientific proof of causation has not been adduced). Causation need not be determined with scientific precision. A robust, common sense inference will suffice. **Whether an inference is drawn is a matter of weighing the potency of the evidence.** D runs the risk of an adverse inference in the absence of evidence to the contrary, but this is not the same as shifting the burden. Ultimate burden lies with the P.
* **Reasons, Sopinka**: *McGhee*: reversing burden of proof may be justified in circumstances specific to *McGhee*, where two actors negligently fire in the direction of the P, and by their tortious conduct destroy the means of proof at his disposal; it is clear that the injury was caused by neutral conduct. But to compensate a P by flipping the burden for an injury that may be caused by factors unconnected to the D and not the fault of anyone is quite another matter. That the P gave more potent evidence on a BOP results in a win. Potency of that evidence should be judged on what was possible for them to give.
* **Reasons:** Causation is a question of fact that can be answered by common sense. The appellant was negligent in continuing the operation when retrobulbar bleeding occurred. There were two causes of the loss of vision (i) natural (ii) continued operation. The plaintiff said as much as she possibly could. She adduced evidence that her blood pressure and diabetes were on the low end, and that Glaucoma would have affected both eyes, not one. The doctor should know more. Since he did not say much, inferences can be drawn about why he did not say more.
* **BLL 1:** The determination of factual causation is a common sense exercise that allows the court to take a robust and pragmatic view of the facts to determine what actually caused the injury.
* **BLL 2:** Where there is *prima facie* evidence of cause in fact, AND the D is in a better position to explain the facts, then a **tactical** shift in the burden of proof occurs. If D says nothing, he runs the risk of losing. This shift is not in the **legal** burden of proof – it just means that if the D refuses to put anything on the “scale”, he might lose.
* **BLL 3:** Outside of its specific facts, *Cook v Lewis* is of limited utility.
* **Neyers:** The decision in Cook v Lewis may also have been amended by the decision in Resurfice v Hanke

### Fairchild v Glenhaven (2002) HL – UK approach; says McGhee applies no new rule; where there is scientific uncertainty P only needs to prove that D materially increased the risk of injury on a balance of probabilities

* **Facts:** P suffered from mesothelioma as a result of negligence (presence of asbestos) of either of his two employers, but could not prove which of them had been the factual cause. Three scientific views of how one gets this disease.
* **Issue:** Are both employers liable?
* **Held:** Each employer is liable for their share of the risk.
* **Ratio**: McGhee stands for the proposition that the test for factual causation is material contribution to risk. In situations of scientific uncertainty, in employer /employee relationships, employer liable for materially increasing the risk
* **Reasons, Bingham:** Duty was owed as employer. Breached their duty. Mother test: do not throw asbestos around because people could get cancer. Robust common sense inference is silly, and in *McGhee* there was no scientific evidence. That inference drawn in McGhee was fictional. There must be another legal principle: policy (1) don’t want to hold liable those who didn’t cause harm (2) P shouldn’t have to suffer because we don’t know the truth. Not fair that they should have to bear burden of our scientific uncertainty. **New test: material contribution to risk. In situations of scientific uncertainty, you will be liable for materially increasing the risk**. Therefore each one of the 3 is liable.
* Canadian view: Material contribution to risk
* BLL 1: The D caused a material increase in risk + The P got the disease = Causation
* **BLL 2:** Where there is scientific uncertainty and we don’t know how a disease works, then the P only needs to prove on BOP that the D materially increased their risk of injury, not that the D actually caused the injury.

### Walker Estate v York Finch General Hospital (Red Cross) (2001) SCC — adopts Athey material contribution to risk test

* **Facts**: P gets tainted blood from Canadian red cross and dies of aids. RC did not warn donors about the risk of donating blood. RC says not responsible b/c they did everything possible to mitigate contamination (donors are informed that only those ‘in good health’ can give blood), so P should sue the man who gave blood, not RC. Walker argues in the US, blood clinics circulate info stating that those within high risk groups like gay men should not supply blood, even if they think they are in ‘good health.’ Gay man in question alleges that had he known of these risks, he would not have donated blood.
* **Issue:** Should CRCS be held liable for negligence?
* **Held**: Red Cross liable
* **Ratio**: General test for single cause is “but for” test. The proper test in negligent donor screening cases is whether the D’s conduct materially contributed to the occurrence (risk) of the injury (adopts Athey material contribution test)
* **Reasons**: “But-for” doesn’t work in this situation, for technical reasons (preemptive duplicative, uncertainty) and ethical reasons (depriving P of compensation). In these circumstances, the test should be whether the conduct was a material contribution to the **risk**of harm. Pamphlet was not adequate. American RC identified high risk groups and expressly mentions HIV and individual may still feel in good health.

### Resurfice v Hanke (2007) SCC – to apply the material contribution to risk test a P must prove: (1) it is impossible to prove but-for causation, and (2) all other facts of the case i.e. duty, standard of care, etc.

* **Facts:** Hanke was the operator of Zamboni. Overfilled the gas tank of the machine, releasing vaporized gas which was ignited by an overhead heater. The explosion and fire caused Hanke to be badly burned. Hanke sued the manufacturer of the Zamboni for negligence (design defect), arguing that the gas and water tanks were similar in appearance and close together on the machine, making it easy to confuse the two.
* **Issue 1:** Did manufacturer materially contribute to Hanke’s injury? Was it appropriate to apply Material Contribution?
* **Held:** Judgment for the D. Resurfice Corp was not liable to Hanke.
* **Ratio:**
  1. (1) The basic test for determining causation is the but for test. This applies to multi-cause injuries. The test recognizes that compensation for negligence should only be made where a substantial connection between the injury and defendant’s conduct is present. It ensures a defendant wont be held liable where the injuries may be due to factors unconnected to the defendant and not the fault of anyone.
  2. (2) Where but for test cannot be applied, a “material contribution” to risk test will be used. Two requirements:
     1. That it’s impossible to prove causation using the “but for” standard
        1. i.e scientific uncertainty, *Fairchild* situation (2 employers), *Walker* situation (donor or CRC)
     2. All the other facts of the case (standard of care, breach of duty, damage/injury, no remoteness).
  3. (3) Material contribution test may be applied there it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act/omission, thus breaking the “but for” chain of cause (Walker Estate)
* **Reasons:** The general test for causation is the “but-for” test, which should be used unless it is impossible to do so. The cases which do not use the but-for causation test are all cases where it would be impossible to do so (*Lambton*, *Corey*, *Athey*).
* Neyers’ Criticism of *Resurfice Corp*:
  + SCC gives a couple examples (but Neyers says they don’t really fit for what the SCC is trying to use them):
  + *Cook v Lewis* situation → simultaneous shooting
    - However, this is not an example of scientific uncertainty. It is not a material increase to risk situation because the risk actually happened. The parties didn’t “materially increase the risk” – both of them shot, one of them struck the P, and the court had to determine who should bear the loss
  + *Walker* situation → Donor or CRC
    - However, this situation doesn’t fit either. Not being able to read someone’s mind regarding their HIV status ≠ scientific uncertainty. Although it is beyond the P’s control, it is not “scientific uncertainty”
  + Note that the facts of *Resurfice* have nothing to do with medical negligence
  + So, the SCC’s test does not fit with the cases. According to this test, *Fairchild* is wrongly decided. However, in the last SCC case discussing *Fairchild* (*Walker*), the court said that the decision in *Fairchild* was correct.
    - The test also doesn’t deal with material contribution to injury cases (*Athey*).
    - The test also gives a different result in *Blackstock*

### Clements v Clements (2012) SCC – new Canadian test for material contribution to risk (Case for exam)- all we need for causation except for sequential thing for tortious/non tortious

* **Facts:** P wife, D husband. Riding motorcycle on a wet day. D overloaded bike. He went 20km over speed limit, nail in the tire came out and gets into accident, P suffers brain damage. Three possible causes, two of which are negligent (1) overloading bike (2) going too fast and (3) non negligent cause, a nail in tire. For P to win she must prove negligence was cause
* **Prior Proceedings:** TJ said we have two tests: Material contribution which says you are liable when you material increase the risk of the injury and (2) the but for test. We were told in *Resurface v Hankey* that we can depart from but for test where it is impossible for P to prove their case using the but for test. TJ said it was impossible to prove which of those 2 causes caused the injury but no-one could be sure. She tried but for test but it was impossible because of the uncertainty of science and therefore, we will allow her to sue because the negligence of the husband materially contributed to the risk of falling off bike.
* **Issue:** Does “but for” test for causation apply, or does “material contribution” test apply?
* **Held:** Appeal allowed. New trial ordered. TJ committed two errors: (i) insisting that scientific precision was necessary to find “but for” causation (ii) applying a material contribution to risk test to a case that did not involve establishing which of several negligent defendants caused the injury
  + SCC says first you have to use the but for test, that is the default rule for causation. You can use a material contribution to risk analysis where the following facts are made out: (1) **global but for:** must prove that there were a group of people, one of whom must have injured you, but as a group but for test is made out (2) **the finger point:** the reason why it is impossible to make out your case is because each of the people can point to the other person as causing injury. Where you can prove these two things, then you can prove causation using material contribution test
    - can she use material contribution to risk analysis- there was not a group of people that contributed to her injury so when there is only one person involved you are STUCK using the but for test
* **SCC**: *Resurfice* was not meant to be applied in this case (i.e. cases involving a possible innocent cause of the injury – *Snell v Farrell*) so they tried to clear up the law of causation: 1. But-for test standard operating procedure. 2. However, when but-for test doesn’t work, plaintiff will win if they can prove defendant materially contributed to risk of injury.
* Ratio:
  + Generally, but for test is used where:
    - there is one tort feasor. TJ must maintain robust and pragmatic view of facts. Scientific evidence not required
  + Exception: Material contribution test Used where
    - Plaintiff has established that her loss wouldn't have occurred “but for” the negligence of two + tortfeasors, each possibly in fact responsible for loss (global view)
    - The plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the “but for” cause of her injury because each can point to another as the cause, defeating a finding of causation on a balance of probabilities against anyone
* **Reasons:** “Material contribution to risk” is the more accurate formulation. It imposes liability not because the evidence established that the defendant’s act caused the injury, but because the act contributed to the risk that injury would occur.

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| **NEW TEST:**  P may succeed by showing that the D conduct materially contributed to risk of the P’s injury where:   1. P needs to meet a **global** but-for test. The P must show that, but for the existence of all of the D, he would not have suffered the injury    * **Examples of the “Global But-For”:**      + *Cook v Lewis* → But for the hunters, the P would not have suffered the injury      + *Fairchild* → But for the employers, the P would not have suffered the injury      + If there is one innocent cause possible, then the but-for test cannot be applied. 2. Proof on the but-for standard must be **impossible**.    * Not necessarily scientific impossibility, but situations where each side can point to different things as a but-for cause, thereby rendering it impossible to determine what actually caused the injury.  * All the cases dealt with by (2) will be decided using the Robust Common Sense Inference (*McGhee*, *Snell*)   + The only cases where there are separate sets of rules (i.e. both parties might be liable) are the hunter cases (*Cook v Lewis*) |

## Problem with Clements

* doesn’t explain *Lambton v Mellish*. Could say that P going crazy due to global cause of music. And he could not point to single wrongdoer. But they weren’t guilty because they increased risk, but because they were each *in their own right liable.* BUT the only area of law where we have special rules is hunter cases. (McGhee etc stand on their own, and yes, Sopinka’s test still valid *on those facts*)*.* You are holding someone liable for someone who MAY have increased risk?
  + assumes there is only one causal problem: who did it

## Loss of Chance

### Chaplin v Hicks- no liability for loss of chance in tort

* **Facts:** D entered beauty contest. She wins regionals, but organizers refuse to judge her on the second round. Sued for breach of K. P awarded with 1/12 of beauty pageant prize (this represented her chance of winning). Here the P was able to recover for loss of chance on K law, not tort law.
* **Ratio:** No liability for loss of chance in tort law.

### Gregg v Scott (2005) HL – cannot sue for loss of chance of greater outcomes; must prove P would have survived on BOP (51%)- This is the law in Canada, you cannot sue for loss of chance for medical practice unless you can prove some sort of concrete benefit or loss that the failure to treat you caused

* **Facts:** Patient had cancer, less than 50% chance of recovery. Doctor negligently diagnosed the cancer as benign. At T1, P had 42% of recovery. At T2, when they found out that the cancer was benign, his chance of recovery was 25%. If the P had been properly diagnosed at the proper time, the P would have had a greater chance of recovery. P sued for loss of chance.
* **Issue:** Can P prove that the D reduced his chance of surviving? Can the patient recover damages from the doctor?
* **Held:** Judgment for D. Cannot sue for loss of chance of greater outcomes.
* **Ratio:** Patient can only recover if initial prospect of recovery greater than 50%. Cannot sue for loss of chance of a greater outcome. Must prove on BOP, you would have survived- if the plaintiff can, she will be entitled to all her damages.
* **Majority**: focus in causation is outcome, not loss of outcome / chance. But the CL looks at the outcome. And in the CL, it is a binary that switches at 50%. Reason we cannot uphold lord Nichols suggestion is that it would be unfair to the D doctor. Implication of allowing a claim for loss of outcome is that P could almost always be successful at proving on BOP that D contributed to loss of outcome. Doctor would never escape litigation; either they’d lose something or everything, not nothing.
* **Dissent Lord Hoffman (Neyers’ view):** Tort law is about outcomes, not chances. P was not able to prove on BOP that he was more likely than not to survive. Therefore, his claim should fail.
  + T1: 51%, T2: 25% → P gets all their damages
  + T1: 49%, T2: 25% → P gets no damages

### Laferriere v Lawson (1991) SCC – Canadian Statement on Loss of Chance

* **Facts:** Doctor removed a lump from his patient, and diagnosed it as cancerous. However, he did not inform the patient. The patient did not discover she had cancer until 4 years later. She died 3 years after that. The plaintiff claims that doctor’s failure to inform her prevented her from following up on her condition and deprived her of the change to get treatment.
* **Issue:** Can the patient be compensated?
* **Held:** Claim dismissed
* **Ratio:** Loss of chance argument is not compensable. However, plaintiff proves, she would have altered her behaviour, that might be compensable
* **Reasons:** It is not appropriate to focus on the degree of probability of success and to compensate on that basis. There must be a probability of success that is of benefit to the patient, which she can be said to have lost as a result of the doctor’s fault. In negligence, question is whether there was interference with right to personal integrity. This means loss of chance is not actionable because you have not suffered damage.
* **BLL:** Can’t sue for loss of chance BUT can sue when you have right to that chance (breach of contract, *Chaplin*)
* **Weinrib** → there are a variety of non-contractual undertakings which create rights (i.e. bailments, truts). Therefore, in cases where one party gives an undertaking to another, the P should have some sort of right to performance and be able to sue for loss of chance. Should be able to make *Chaplin v Hicks* argument.

## Rights Existing vs. Rights Created

* Tort law, and the cases we’ve read so far, deal with an infringement of a **right already existing** (like right to bodily integrity and personal property)
  + There is no claim available for a loss of chance based on these rights
* **The other option is to sue based on the breach of a duty of the doctor’s undertaking**; such duty is not contractual
  + Under *Hedly Bryne*, **It is possible to create duties through undertakings that are not contractual**
  + So, the doctor in *Gregg v Scott* would be liable because they’ve created a *right* by undertaking the P’s care. This relationship creates the right
  + It is akin to K law
  + And like in K law, the right arises from the doc’s duty to undertake the performance.
    - If he doesn’t not perform duty, he violates the right
  + *Hedley Bryne* = principle of undertaking, in which the relationship creates the right. You cannot be liable for not undertaking something.
  + *Donoghue*  = protects you from rights that you already have

**This is how you explain *Cook v Lewis***

1. Plaintiff has to suffer an injustice so all the potential causes of his or her injury has to be tortious. If there is one non tortious cause then you cannot apply this case
2. Each defendant must have behaved tortiously towards plaintiff. They must have both shot towards plaintiff. If they shot in opposite directions then cannot apply this case. That is why the Brant case was decided this way excuse they were not negligent towards the patient they were negligent towards keeping the records
3. Injury actually incurred cannot be too remote, it must be within the scope of the reasons for which we would say there should be liability

# Remoteness

Legal causation: When one should or should not be responsible for negligent action causing injury

Two tests:

1. **Traditional Test: Directness**
   1. but this did not fit well with the duty test which focused on reasonable foreseeability. Wagonmound Number 1, gives test for remoteness: type of damage must be reasonable foreseeable. Hughes says don't be too specific. Thun skull rule says take your victim as you find them.
   2. Essential question is does the plaintiff’s injury fall within the reason for regarding the defendant’s act as negligent?
2. **Current Test: Reasonable Foreseeability**

Old Test: Directness

* Reasonable foreseeability only applies to the duty of care and the breach of the standard of care stages.
* Once the claimant proves a breach of a standard of care, the defendant is liable for all the consequences that are directly traceable to the negligence (*Re Polemis*).
* Re Polemis- English CA was asked what the test was for remoteness and they said that it was directness, you are liable for all damage that is direct even if that damage is not reasonably foreseeable

Test for Whether an Injury Suffered is Too Remote

* Wagon Mound #1 test: whether or not the damage was reasonably foreseeable. Two little nuances to it.
  + what has to be reasonably foreseeable is the type of damage (not the extent)
  + from *Hughes v Lord Advocate*  we know that type of damage is fairly broad. Genus rather than the species. You don’t want to be too specific but category can also not be too broad.

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| **Current Test for Remoteness: Reasonable Foreseeability**   * Once the claimant proves a breach of a standard of care, the defendant is only liable for the **reasonably foreseeable** injuries that are caused by the negligence (*Wagonmound #1*). * Only the type or kind of injury need to be reasonable foreseeable, the manner in which they manifest is irrelevant (*Smith v Leech*; *Hughes v Lord Advocate*). * A defendant is also liable if the extent of the risk was so serious such that a reasonable person would not ignore the danger and steps would be taken to avert the risk (*Wagonmound #2*).   + A low risk of injury, combined with high degree of harm if manifested is sufficient as the possibility of injury makes it reasonably foreseeable. * The injury caused must be a risk of the negligent conduct, i.e. within the scope of the duty (*Lamb v London Borough*; *Bradford v Kanellos*) * There must not be an unforeseeable intervening act (*Bradford v Kanellos*)   + Liability is not necessarily negated simply because a third party performed the act that caused the damage as a result of the initial negligent act (*Home Office*) * Reasonable foreseeability is the proper test because it would be wrong and unjust to hold a defendant liable for all injuries which were unforeseeable as there is no fault element (would be a strict liability regime). * In terms of remoteness, the verbal formulation is reasonably foreseeable and so the sophisticated judges say that you should ask yourself what are these unreasonable risks, why is it that we would say that what you did was a breach of the standard of care. |

### Re Polemis & Furness, Whitney & Co (1921) CA – directness test for remoteness, reasonable foreseeability irrelevant

* **Facts**: Respondent chartered a steamship to the appellants, who wanted to transport petrol. Due to rough weather, the petrol leaked below the decks. The appellant employed servants to unload the cargo. While doing so, an employee knocked over a plank, igniting a spark which caused the ship to explode and be completely destroyed. The arbitrator found the fire was caused by the appellant’s employees negligence.
* **Issue**: was the D’s actions too remote for liability? Does the fact that the appellant could not reasonably have anticipated the type of damage that suited have weight in determining whether the damages are too remote?
* **Ratio:** Once you’ve established duty, you are liable even if the harm was not RF.
* **Held:** Liability on these facts; not so remote.
* **Ratio:** Presence or absence of reasonable anticipation of damage is irrelevant; directness deals with the scope of liability.
* **Reasons:** test for remoteness was directness. That RF went to duty. So there is liability on these facts for this reason (you could foresee that injury could occur if you let a plank drop in a ship. Is there a duty? Yes, duty to those beneath. Remote? Damage directly caused. The fire was directly caused by the negligence of the employee. Given the breach of duty and the resulting damage, the anticipations of the person whose acts produced the damage are irrelevant. The damages claimed are not too remote.

\*\*\*Note: *Re Polemis* was explicitly overruled by the HL In Wagon Mound (No 1)\*\*\*\*

### FW Jeffrey and Sons Ltd and Finlayson v Copeland Flour (1924) ON – application of directness test

* **Facts:** lots connected by tie rods.The D obtained permission to dig under the north wall of the Finlayson’s block; wall fell, causing the tie rod to pull on the other buildings in the lot, causing damage to all the P’s buildings. P’s sued, awarded damages. The D appealed, arguing liability should stop at the north shop of the Finlayson building. (court establishes he breaches the Bolton v Stone test, and Duty test).
* **Issue:** Should liability stop at P1’s lot?
* **Held:** appeal dismissed. The liability of the defendant is established
* **Ratio:** Negligence can be transferred to closely connected plaintiffs.
* **Reasons:** Harm to lot 17 not so remote; what could be more direct than tie rods connecting every building? Court says that the damage is director so why shouldn't there be liability?
  + Does defendant owe duty to plaintiff? **Yes**: proximity - neighbour principle (*Donoghue*)
  + Remoteness: (i.e. directness) is the damage direct? **YES** (*Re Polemis*)
  + The appellants failed to take reasonable care. It was apparent that if the defendant disturbed P1’s lot, they would cause damage. They negligently disturbed P1’s lot. P2 sustained damages, which resulted directly from the negligent act. Therefore, they have a cause of action even if the appellants did not reasonably anticipate damage to them
* Criticism: Prosser says lets skip over duty if we’re taking directness into consideration (couldn’t this all be resolved on directness, he suggests).
  + E.g. *Palsgraf;* why woman couldn’t recover based on directness
  + Question, why can’t Palsgraf recover if the harm is a result of the same cause? Wagonmound tries to resolve this inconsistency….

### Wagonmound #1 (1961) PC – the test for remoteness is no longer directness, new test is reasonable foreseeability

**\*\* The essential factor in determining liability is whether the damage is of such a *kind* as the reasonable person should have foreseen (probable consequence)**

* **Facts:** D charterers of Wagon mound ship. They spill oil into Sydney Harbour, which is carried by tide to P’s wharf. P’s employees welding causes sparks, igniting the water, causing damage to the P’s wharf. P’s argument: in fear of contributory negligence, they concede that it was not reasonably foreseeable that a welder’s spark would ignite water. However, conceding that, the P argues they win on breach, duty and that damage was factually caused.
* **Issue**: Was it Reasonably foreseeable you could cause damage ?
* **Held**: Appeal allowed. Damage was not reasonably foreseeable, too remote.
* **Ratio:** Remoteness test: is damage of a kind/type that reasonable foreseeable? (doesn’t have to be direct)
* **Reasons**: Ask: is the damage actually suffered a reasonably foreseeable type? Damage by burning was not damage that could reasonably be said to have been foreseen. There should be no recovery for unforeseeable damage. Just like it should be wrong to allow someone tor cover for unforeseeable direct damage, no-one should space foreseeable indirect damage. Even though crew breached duty of care, the resulting extensive damage by fire was not reasonably foreseeable. *Re Polemis* as being too harsh, especially on the facts of this case, therefore *Re Polemis* **should no longer be regarded as good law**.It does not align with current ideas of justice that for an act of negligence which results in some trivial foreseeable damage, that the actor should be liable for all consequence however unforeseeable and however grave, so long as they can be said to be “direct”. It is a principle of civil liability that a man must be considered to be responsible for the probable consequences of his act. *To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour.*
* Viscount Simon says the test for remoteness should be reasonably foreseeability of type of damage and it is irrelevant if you did or did not suffer other unforeseeable or foreseeable types of damage
* Plaintiff argued the old test:
  + **Breach of standard of care:** it is wrong to throw oil in harbours -oil in engine/ropes)
  + **Duty was owed:** reasonable foreseeable that the oil would ruin moorings
  + **Direct** (release of oil caused injury) - recovery even though not foreseeable oil would fire

### Wagonmound #2 (1966) PC – a defendant is liable if the extent of the harm risked was serious enough that a RP would take steps to avert the risk, even if it was unlikely to occur

* **Facts**: P were the owners of the ship lying at the wharf and damaged by the fire. P held that the outbreak of fire was a consequence of the wharf manager’s act of resuming oxyacetylene welding and cutting while the wharf was surrounded by oil; this consequence was reasonably foreseeable.
* **Issue:** Are the defendants liable for the fire?
* **Ratio:** Must consider surrounding circumstances to determine whether damage was RF. A defendant may be liable for a risk that was unlikely to occur if the harm of that risk was serious and there was little/no cost to mitigate the risk.
* **Held**: D liable on the grounds that “a properly qualified and alert chief engineer would have realized that there was a real risk
* **Reasons:** The defendants would regard the oil as difficult, but not impossible to ignore on water. Their experience would probably have been that this rarely happened, and they would have regarded it as a possibility but one that could only become reality in exceptional circumstances. Reasonable person could have foreseen that the oil would burn.

### South Australia Asset Management Co v York Ltd (1996) HL – damage/injury caused must be a result of the risk that D was negligent to, i.e. within the scope of the duty

* **Facts**: a valuer had (in breach of an implied term to exercise reasonable care and skill) negligently advised his client bank that property which it proposed to take as security for a loan was worth more than its actual market value. Question was whether he should be liable not only for losses attributable to deficient security but also for further losses attributable to a fall in property market. The House decided that he should not be liable for this kind of loss.
* Lord Hoffman says that it is not enough for liability to show that someone owed you a duty, that they failed to comply with the duty and you suffered loss, you have to prove that the scope of the duty covered the loss that you actually suffered
  + Hoffman says that you must show that the loss suffered was within the duty that was breached. Person who sues for breach of a duty must show that a duty was owned to him and that it was a duty in respect of the kind of loss which he suffered. Not only must there be foreseeability, there must also be a sufficient causal connection between the injury and the subject matter of the duty.
* **Ratio:** In order to find legal cause, the injury caused must be a manifestation of the risk.
  + Example: Gorvis and Scott (duty to pen sheep) and mountain climber / bad knee / bad advice. Someone wants to go mountaineering and they go to their doctor and ask if their knee is fit to do so and doctor says it is fine. Knee is not fine and had he been told that he would not have gone. He suffers a terrible injury that has nothing to do with his knee. If you believe CA there would be liability because doctor owed duty but there is no liability because the undertaking was to protect you of risks of mountaineering that would occur because of an unfitness with your knee but the injury that a actually occurred was something that was not undertaken by the doctor and so that injury is outside the scope of the undertaking.
  + Example: Empire Jamaica. There is an act which says that all second mates must be certified and have a second license so that they can be proven competent. Defendant hired second mate who was not certified but he had worked for many years as a second mate. There was an accident and they sued the company saying they had a duty to have a second mate with a license and they reached it. Court said there was no duty. Court said the company was not responsible for all the circumstances of the second mate but only for those relating to him not being certified.
* **Issue**: what is the duty of the valuer to his client?
* **Held**: Not liable for losses that result from market fluctuations.
* **Significance:** Criticizes the English COA: It is not enough that you’ve done something wrong and that you owed a duty to someone, but the damage you suffer must be in the scope of the duty that you breached. As for RF, that alone can’t answer the question of legal causation…it’s a short hand way of making this determination.
* **Personal Injury and the Thin Skull Rule** – any injury will satisfy the RF test

### Gorris v Scott [1874] ExChq- SAAMCO Application: Injury must be within scope of duty

* **Facts:** Statute said all sheep on ships must be separately penned due to risk of disease. Sheep were not separately penned. Wave knock the sheep overboard and they drowned. Sheep owner said duty was owed and that the loss was not too remote
* **Held:** No liability, cannot recover
* **Ratio:** If injury is outside the scope of duty, there will be no liability. Must link duty and injury
* **Reasons:** Scope of duty was not to protect sheep from going overboard bur rather to protect owners from having sheep cross contaminated. Injury was outside scope of duty and therefore there is no recovery. Damage was too more.

## Thin Skull Principle

* generally was taken to say that one takes their victim as you find them. If someone has a heart condition and you poke them and scare them and they die you are liable
* still requires a legal wrong in order to apply, it does not change the classification of legal wrongs, it changes the quantification of damages of legal wrongs. Still have to prove that there was a duty and that you owed that duty, if not there then is no liability.
* thin skull does not apply until what I have done to you was a legal wrong and then I am responsible for the full extent of the consequences
* Thin skull rule is a rule about the extent of the damage not a rule of liability.

### Smith v Leech (1962) QB – WagonMound No 1 does not overrule Thin Skull Principle. Reasonable foreseeability goes to type of injury, not extent of that injury (thin skull rule)

* **Facts:** P widow of deceased Crane operator at D’s galvanizing plant. Operating procedure requires crane operator to shield face w/ piece of metal while looking away from both the crane and vat of molten metal. One day he exposes face, molten metal splashes onto his lip. Burn turns into cancer and dies three years later. But he worked in gas industry and was predisposed to carcinogens, thus strong likelihood that cancer would have developed regardless of the burn. D argued death from cancer is too remote from the injury.
* **Defendants argument:** we admit to being negligent, we probably should of given them more than the piece of metal and yes we owe a duty because it is foreseeable that employees can be injured but the injury he suffered was too remote because you cannot foresee that the burn would of cause death and cancer
* **Plaintiffs argument:** liable because they have to take the victim as they find him.
* **Issue:** Was the harm (splash of metal) too remote? Is Leech liable for Smith’s death?
* **Ratio:** In personal injury cases, any extent of harm is foreseeable. Everything else (death) goes to extent, rather than a different type of injury. Therefore, once type of injury is acknowledged, you are responsible for the full extent of injury.
* **Reasons:** neither of the parties arguments were correct, you can rationalize the thin skull rule with the Wagonmound with some creativity. Wagonmound says that the type of damage has to be reasonably foreseeable and for most personal injury cases the injury that is reasonably foreseeable is personal injury therefore the type of damage is reasonably foreseeable. Thin skull rule only comes into play once you say that the type of damage is reasonably foreseeable because then you are responsible, by mere causation principles, for the full extent. Wagonmound is foreseeability of type and thin skull rule goes to the extent of the liability once you have reasonable forseeability
  + There was a clear, known danger of molten spitting from the bath. Reasonable foreseeable that a workman, unless protected, would get molten metal on him, and any reasonable employer could see that even speck could cause serious damage. The minimal protection in the factory seems inappropriate. Any reasonable employer must reasonably foresee that the protection wouldn't have been enough. Plus, other galvanizers had advanced from this temporary shelter and provided a proper shelter with a window affording complete safety.
* **Held:** Plaintiff can recover. Burn contributed to or partially caused cancer and death. D responsible for employee’s death because the injury was reasonably foreseeable it just happened to be death rather than a burn. However, since many people in the gas industry don't live very long, they gave less damages because he probably would not have died that much later.

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| Thin skull rule continues to apply. What one has to foresee under *Wagonmound* is type of damage, not  extent of damage. Once type is established, you are responsible for full extent. |

### Stephenson v Waite Tileman Ltd (1973) NZCA – application of thin skull rule, D liable for full extent of injury

* **Fact:** P worked for D’s company. He was a steeple jack (climbed steeples). Wire from D’s company crane breaks, cutting P’s hand. Rope was rusty and fraying. P developed serious virus from cut, and becomes chronically infirm, he has headaches, cannot balance and cannot concentrate. It is unclear whether he had a pre-existing condition that led to this outcome, or whether it was simply a result of a virus entering the wound. Two different doctors say two things (1) pre-existing nervous condition that caused him to freak out and (2) while in the hospital he got a terrible nervous infection. Waite successful at trial based on the *Wagonmound* reasoning – the jury found the outcome to be unforeseeable, and Stephenson appealed.
* **Issue:** Is the respondent liable?
* **Held:** Appeal allowed, D liable for extent of injury (being infirm). Judgement for plaintiff.
* **Ratio:** If initial injury is RF, the link between the initial injury and the defendant’s negligence is one causation.
* **Reasons:** it was RF that broken wire would cause injury. Therefore, employer is responsible for extent of injury, regardless that it was not RF. Is it reasonably foreseeable that if you supply worker with bad equipment that he could be injured? Yes. So it is reasonably foreseeable and the the thin skull rule says that they are then liable for the full extent of the injury. Once you have foreseeable damage the limit on the thin skull principle is only that they have to be causally related.
  + In the case of damage by physical injury, we accept the “thin skull” rule (liability for consequences flowing from the pre-existing special susceptibility of the victim and/or from new risk or susceptibility created by the initial injurt). The question of foreseeability is limited too the initial injury. We do not know why people get cancer so defendants should not be able tog et off by talking about types of injuries to human bodies.
* This case states that the reason we have the thin skull rule is because of the frailties of the human body and our lack of understanding about how the human body works
* was the initial injury reasonably foreseeable - **YES**
* was the final outcome (chronic illness) caused by initial injury? - **YES**, without grated wire would not have been incapacitated

### Cotic v Gray (1981) ONCA – takes thin skull rule to its furthest extent; can recover for consequential psychiatric harm

* **Facts:** P, deceased, suffered from depression. D injures P in car accident, after which the P’s condition worsened, and he commit suicide. TJ found accident caused or contributed death. Insurance argues that suicide was not RF due to car accident.
* **Issue:** What is the extent of the defendant’s liability?
* **Held:** Defendant had to take victim as he found him. Had to compensate wife for his death.
* **Ratio:** Reasonably foreseeable a breach would cause injury. Once causation is established, defendant is liable for the extent of the injury that results. Thin-skull principle trumps reasonable foreseeability to protect the vulnerable.
* **Reasons:**The reason we have thin skull principle is because persons are exceptional beings we do not completely understand. Must have a rule that is fair to both. To be liable, defendant must first breach SOC (do something that is wrong to the ordinary person). Once this happens, defendant is responsible for all the consequences. This protects the plaintiff (given fragility) and defendant. Causal link between defendant’s acts and death was established. Although it wasn’t RF that a car accident could cause suicide, it did not break the chain of causation: thin-skull principle would be thwarted by giving independent causal significance to victim’s odd vulnerability.

1. RF that negligent driving would cause injury to the person? Then yes, responsible for all injuries that result.
2. Thin skull rule trumps RF

* Interesting thing is that the justification for this rule by the ONCA is policy reasons. Justice Wilson said that this was all about policy and they prefer compensation over no compensation so they will hold them liable in accordance with thin skull principle. Her view of the thin skull rule is not correct because it explains what it wants to explain but cannot explain why that policy does not apply to all the other situations where compensation would demand that there would be liability.

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| **GENERAL RULE:** Psychiatric illness treated differently than personal injury.  Neyers thinks that the psychiatric illness flowed from the harm caused to his rights of personal / bodily integrity.  So common law **allows consequential losses** (economic, and psychiatric). Cannot recover on pure economic loss / psychiatric illness (right has not been infringed, with a few exceptions). |

## Framing the Damage: General vs. Specific

In order to sue in the tort of negligence you have to prove damage. Traditional rule was that death did not count as damage. No Mental states are ever damage, but SCC has repudiated that original CL proposition.

## Morris “Duty, Negligence and Causation”- Framing the RF: Generalty v Specificty

* Whether the particular accident and resulting damage is foreseeable. Three classes of foreseeability:

1. Ordinary: damage from misconduct impossible to convince judges that they were unforeseeable (falling brick). Risk of injury is clear.
2. Extraordinary unarguably unforeseeable (car accident and getting shot) – Can’t convince that the shooting of another human is caused by driving negligently (can’t assume that rescue will invite someone shooting them)
3. In Between- winnable or losable. Consequences that are neither typical nor wildly freakish

* Details are significant
  + If significant, consequences are unforeseeable
  + If insignificant, consequences are foreseeable.
* Foreseeability can be determined only after significant facts have been described
  + If general, accident is foreseeable – win for the plaintiff
  + If detailed, accident is unforeseeable – win for the defendant
* Danger is that if too much or too little detail will become suspect to a jury
* Foreseeability requirement cannot function as a “test” of the scope of liability, yet the idea that responsibility should be limited to foreseeable consequences remains potent. This influences decisions
* Must find reasonable description of facts (not impartial to either)

### Hughes v Lord Advocate (1963) HL – the focus is on genus of injury (i.e. the foreseeability of some injury), not species (i.e. the event that would cause the specific injury)

* **Facts**: Boy climbs into unattended manhole; lamp falls over, causes explosion, boy gets knocked back into hole, tries to climb out but is burnt due to heat of ladder caused by the explosion. dismissed the case stating that the actual event that led to the injuries was the explosion, and that it was not RF as it resulted from numerous unlikely events, and Hughes appealed.
* **Issue**: Are the defendants liable? Was the injury of a description that was RF? Does foreseeability of the actual event caused the injury matter, or foreseeability of injury (species v genus?) Are the workman responsible for having their fingers burnt off?
* **Workman’s arguments:** injuries suffered were not RF because paraffin almost never explodes.
* **Held:** appeal allowed, D liable for damages. Post Office workers were negligent in leaving their manhood unattended
* **Ratio:** it is the genus of the injury, not species, that must be within the scope of duty contemplated. Should not be too specific/general with respect to the type of injury. As long as the injury can be foreseen, there will be proximate cause, regardless of whether or not the means to the injury were different than expected (i.e. no liability if injury is different in type than was reasonably foreseeable)
* **Reasons:** the injury sustained was within the scope of the duty of the post officers. If the lamp fell and broke, it was not unlikely the plaintiff would be burned. However, no-one would have expected that the fallen lamp would cause an explosion. It was so unlikely as to be unforeseeable. The accident was caused by a known source of danger, but caused in a way, which could not have been foreseen. This is no defence. The explosion was an immaterial event in the chain of causation. The Post Office workers’ negligence (leaving the clamps unattended) were a cause of the plaintiff’s burns. Mum test: why should you not guard an exposed manhole surrounded by gas lamps? Someone could fall in, and maybe get burned.
  + → if boy had gone deaf, this would have been outside the genus of injury contemplated by the duty owed.
  + HL says that there is liability on these facts and the Judges use the Mother Test- what is the reason by which we say that you are negligent. You are negligent for leaving an unattended hole and your mother would tell you not to do this because someone could fall in or get burned and what happened here so therefore what happened is within the scope of the risk. You don't have to foresee exactly how the injury came about but just that it is possible to come about.
* what if the boy was suing because he went deaf from the explosion? Would there be liability?
  + no because you have to basically get the explosion in there to explain the mechanism of the injury, it is very hard to say how from boring you would go deaf and so once you have to rely on the explosion the whole thing becomes less and less foreseeable. Depending on the injury suffered, it may dictate the type of description of the risk you will have to give to the particular judge.

### Doughty v Turner Manufacturing (1964) QB – foreseeability of the injury must be within the scope of the standard of care

* **Facts**: D had a factory in which two cauldrons were used to heat up metal parts. No-one knew the lids would explode if they fell into the liquid. Lid explodes when it falls into vat of molten liquid, injuring the P with the spilled hot liquid. P sues employer.
* **Issue:** Are the defendants liable for the plaintiff’s injuries?
* **Plaintiffs arguments:** since it was negligent to bump the lid in, which could of caused a spillage which would of caused the injuries he did receive which was from the molten metal. He said this was similar to Hughes v Lord Advocate. He got injured from a type of damage you could foresee although the mechanism was not foreseeable and so if we ignore the mechanism just as we did in Hughes client should be able to recover.
* **Held**: No liability on these facts; the chemical explosion was unforeseeable. No recovery because the injury that actually occurred was outside of the scope of the risk that the defendant had a duty to protect himself from.
* **Ratio**: If no duty owed to the plaintiff in regard to the initial action that led to injury, then defendants not liable damages.
* **Reasons**: foreseeability of injury must be linked to the breach of the standard of care. The only duty owed to Doughty was to ensure that he would not be injured if the top fell in the molten liquid and splashed some over the side. The only reason he was injured was because of the unforeseeable explosion. Turner did not have a duty to protect Doughty from this, as they could not have foreseen it. Distinguished from *Hughes*. If everyone followed the SOC, the injury still would of happened so it is not related to a breach of the standard of care it is related to an unknown risk.
* **Reasons:** The duty owed to the plaintiff in relation to the only foreseeable risk (splashing) was to take reasonable care to avoid knocking the cover into the liquid in a way as to cause a splash, which would injure the plaintiff. Failure to avoid knocking the cover into the liquid was of itself no breach of duty to the plaintiff. It is not clear whether the topping of the cover made a splash at all. even if there was a splash, the splash did not injure the plaintiff. No breach of duty in inadvertently knocking the cover into the liquid. Plaintiff’s description of risk is too general. There are two risks (1) the lid might fall and splash (2) unforeseeable, that if you submerse the cover in hot metal, it will explode. Plaintiff was injured by the unforeseeable risk. Must distinguish between two types of injuries; what happened did not fall within the reasonably foreseeable risks.

## *Keeton,* Legal Cause in the Law of Torts 1963

* As a matter of legal realism, RF and remoteness tests do not determine outcome
  + E.g. husband and wife are in a camper near a road, a truck carrying barrels of oil passes by; a barrel dislodges, hits the husband in the head and he suffers severe injuries. The wife was pregnant at that time, then miscarries. The case went to the supreme court on whether the D was liable for the miscarriage. The SCC held that recovery for the head injury should be allowed, while recovery for the wife should be reversed because it was too much to foresee the injuries such as Ms. Carey received. Resolved on the basis of likelihood.
* TJ says there is liability to both, SC says that there is liability to the husband but not to wife for miscarriage
* Liability determined in relation to the risks by which we say the D is negligent

→ not liable if harm is outside scope of risk for which we’ve said he’s negligent. So the duty in the example above has nothing to do with causing miscarriages (*SAMCO*)

* Can’t figure out remoteness if you can’t figure out why they were negligent in the first place.

→ yes and no simultaneously? Resolve this question within *scope of the duty.*

* Also, she couldn’t recover because miscarriage is pure loss
* miscarriages are out because they are outside the scope of the risk
* the descriptions of risk and result are fact oriented. Risk description is a more significant influence on a particular decision than the choice of rule on legal cause
* Judges make a choice related to the orientation of the description of risk: either toward generality (type of harm) or toward particularity (mechanism of harm)

### Jolley v Sutton London Borough (2002) HL – foreseeability is to genus, not particulars

* **Facts**: D failed to remove abandoned boat from shore. Boys find it, jack it up, but due to rotten floor boards, the boat falls on boy causing serious injuries, rendered a quadriplegic. He sues the Council Estate and says that they had a duty to remove the boat or at least render it non dangerous, they reached that duty, were negligent, breached the SOC and therefore owed him damages. But CA found that kind of injury suffered was not RF and therefore the P’s accident was of a different kind than the D could reasonably have foreseen. TJ said the test was whether it was RF that children would play with a boat and suffer injury? CA said the only thing that was reasonably foreseeable was that the child would stand on the boat and fall through, other than that the boat is no different than a heavy rock and it is not RF that a child would prop up a rock therefore it was not RF they would play with boat. D liable for failing to protect people from falling through the boat, not it falling on to them.
* **Issue:** Was the wider risk reasonably foreseeable or only a narrow risk?
* **Held**: Appeal allowed. The actual injury fell within that description. Agrees with TJ that the more general description of the risk is the better one on these facts. D is liable for the injury because the genus is what matters, not the particulars
* **Ratio**: Injury must only fall within a type that was reasonably foreseeable. Foreseeability is not as to the particulars but to the genus; unless the injury is of a description which is reasonably foreseeable, it is outside the scope of duty or too remote.
* **Reasons:** Both specific and general risk could be avoided by removing boat. Injury should be assessed in general terms. Says one way to test is to ask if the SOC had been complied with, whether the bigger injury would also have been taken away. If the Council had taken away the boat both the specific injury (falling through it) and the general injury (crushing) would of been taken away without much more expense to Council. He also says the boat was different than a stone or rock because the boat was an attractive nuisance that was abandoned which told the children that it was theirs to play with. “Injured while playing” is the better description because if Council had done what to was supposed to do, both risks would have been taken way. Treating them as one set of risk doesn't create any additional burden on Council. Boat should have been taken away.
* Reconciles past cases:

1. *Donoghue*: Duty; harm must come to plaintiff by breach of a duty owed. The test for duty owed is whether or not it is reasonably foreseeable that a person who can see you could be injured. Clear here that a person can be injured so that answers the duty question. To have a duty, the harm must be reasonably foreseeable
2. *Wagonmound #1*: Overrules *Polemis*; need to have damage that was also RF. If the type of injury sustained is not of the description that is RF, then it is outside the scope of the duty. Wagonmound said that test type of injury suffered has to be of a description that was reasonably foreseeable. Have to have a person suffer an injury of a characterization that was reasonably foreseeable. Remoteness is a question of whether or not the injury suffered is of a type that is reasonably foreseeable
3. *Hughes v Lord Advocate*: not at conflict with *Wagonmound*. *Hughes* agrees, insists that type of injury must be RF. Adds to *Wagonmound*, that what has to be foreseen is not precise injury, but the genus of injury (reasonable description of injury). Hughes is mainly an application of Wagonmound #1 and only issue in Hughes was whether the damage was of a description that was reasonably foreseeable. Take away from Hughes is that the description should be of a genus burning rather than a species burning. It isn't the precise injury that has to be RF, only an injury of a particular level of generality that must be RF. Should be too specific or general with type of injury. To choose between a specific/general description, look at whether the general risk would have been prevented by the use of ordinary care (if the same thing could have happened without breach of standard of care, then maybe they are 2 different types of risks)

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| **The test for intervening causes:**  If subsequent intervening event was itself a foreseeable risk as a result of the negligence then the defendant will  be held liable. If you can prove that someone is an actus novus, it is a complete defence. If not, the  contemplated actus novus can also be liable. The test is whether or not the actions of the third party were reasonably forseeable. If they were reasonably foreseeable then it is not an novus actus but if they are not reasonably foreseeable then it is a novus actus. |

1. Principle from cases is RF of kind of damage, it has similarities. Principles, not facts, determine the outcome of cases

* **BLL:** no contradiction between Hughes and Wagonmound. Remoteness is a question of whether the injury suffered was of a type that was RF. Type is a genus rather than species. To choose between a specific or general characterization of the risks for your remoteness analysis, one which look to whether the wider risk would of been prevented by the use of ordinary care.

## Actus Nous Interveniens

when something is actus novus that means it is outside the scope of liability of the original tort user because a new person has come in and they are the one that is responsible

**Novus actus interveniens:** there can be things that happen after the original negligence, which break the chain of causation such txt the originally negligent party will not be liable.

The test is not entirely clear. Use “Mother” (*Keeton*) test: whether or not intervention of 3rd party was within the scope of the risk. Then explain the answer in the way the judges give the verbal formula of the facts.

Two types of intervening acts that could break the chain of causation (1) Act of God, (2) Intervening act of a person

**Test:** mother test. Would actions have led to the intervening act?

### Bradford v Kanellos (174) SCC – if an intervening act is not a foreseeable risk, then there is no liability

* **Facts:** P is a customer at a restaurant. Gas griddle catches fire, immediately extinguished with internal system. System makes a popping sound, someone shouts that there was a gas leak and building was going to explode. Patrons rush out, woman knocked over and injured by the crowd. P claimed restaurant was negligent in letting the griddle get greasy. Restaurant admits that they should have cleaned oven, but he did everything correctly afterward. Restaurant says the person sued should be the customer who yelled and their negligence broke the chain of causation of restaurants liability. TJ said restaurant is liable because actions of the third party were RF. Court of Appeal, guy shouting was an actus nous that broke the chain of causation and if they want to charge anyone they have to charge the person who yelled.
* **Issue:** Is the respondent liable for the wife’s injuries? Are the actions of the person who yelled ‘gas’ an actus novus? What is the test for figuring out whether something is a novus actus. If they’re not a novus actus, that means the restaurant owner could be sued, plus the person who intervened could be responsible (if they did so negligently).
* **Held**: Appeal dismissed. Wife’s injury was not reasonably foreseeable. The person who yelled was the novus actus interveniens. No liability on restaurant
* **Ratio:** There is no separate test for novus actus: use remoteness test from Wagon Mound No 1 (reasonable forseeability). Novus actus is a complete denial of cause of actions and a complete “defence”. If the 3rd party is not a novus actus, they can be a joint tortfeasor with the defendant
* **Reasons:** injury sustained from hysterical conduct of patron. greasy griddle too remote; not foreseeable that someone would should ‘ it’s going to explode.’ Furthermore, even the hysterical conduct could not be considered negligent- it was a very human response to a situation. What happened isn’t one of the risks of the negligent conduct (not foreseeable that a stampede would occur as a result of a small stove fire). Ask yourself was the consequence that occurred, a stampede in fear of a gas explosion, fairly to be regarded within the risk of the defendant failure to properly clean the grill. Wife’s injuries resulted from the conduct of a 3rd party, which occurred then the safety appliance properly fulfilled its function. This was not within the risk created by the respondent’s negligence in permitting grease to accumulate on the grill. Was the consequence (stampede) fairly to be regarded as within the risk of the defendant’s failure to clean the grill? No.
* **BLL:** (1) scope of the risk test (the mom test- *Bradford* and *Samco*), (2) the test for novus is whether the actions of a third party were reasonably foreseeable (3) if you find that a third party is a novus actus that is a complete defence to a crime of negligence (4) if the third party is not a nous actus but is found to be negligent they can be a joint tort teaser with the first defendant. It does not have to be one person responsible for everything, they can share responsibility and the way they solve this is they all sue each other and then the court decides between them who is responsible for how much of what happened.

### Home Office v Dorset Yacht Co (1970) HL – liability is not necessarily negated simply because a third party performed the act that caused the damage as a result of the initial negligent act

* **Facts**: Borstal trainees were under the supervision of Home Office officers. During the night, the officers slept instead of overseeing the boys. 7 boys escaped on a yacht. They crashed into another yacht and cause significant damage to it. Home Office is alleged to be vicariously liable for the officer’s conduct.
* **Home Office arguments:** there could be no duty owed, no matter how negligent the officers were because (1) the escaped boys are adults, intervening acts that break the causation to Home Office. The boys were not insane, they were not children and therefore you should sue them, not the government because when they decided to escape and set the yacht on fire that is when their responsibility started (2) Policy arguments: Floodgate issue If liability is found, then rehabilitation will be impossible, since the gov’t would be compelled to put boys in prison in order to avoid harm to all people. You would have to get rid of the program and there would be massive liability because this is not the only time we let people out without supervision so are they supposed to be responsible for all those situations. If this liability is increased they just wont do these rehabilitation arguments, they will just lock them up. (3) no precedent; if it were grounds for liability then there would have been a case w/ similar facts. This is not the first time someone who has been in prison, has escaped and caused damage and yet no case says that the officers should be responsible and therefore they are not responsible.
* **Issue:** whether the home office owed any duty of care to the respondents capable of giving rise to liability in damage. Can Home Office owe a duty to people in the vicinity? If so, what is the scope?
* **Held:** There is a duty of care owed. The damage is not too remote.
* **Ratio:** Where human actions links the original wrongdoing of the defendant and the loss suffered by the plaintiff, if that actual was likely to happen, it will not be a novus actus, and will not break the chain of causation. Governments do not have a special tort duty which other individuals would not have. Government are not liable unless individuals would be liable.
* Reasons (Lord Reid):
  + **1) Look for a test:** Rather than asking where there is authority, must see if there is a test that applies. In this case, use Donoghue Duty test: whether or not injury is reasonably foreseeable. If the test is met, look for reasons why you should not impose liability. If you leave delinquent boys alone, they will likely try to escape. No reason there should not be a duty. \* Donoghue cannot explain every case
  + **2) Novus Actus:** If the intervening act was likely to happen, then it cannot be regarded as a novus actus. The actions of the borstal boys were the very thing to be expected. Therefore, their actions were not a novus actus.
  + **3) Public Policy:** There is no issue. Decision will not open up the Home Office to liability for burglary committed on parole because first the parole decision would have to be “unreasonable”. Second, a breach of the standard of care must be shown (i.e. offence must have been natural and probably- distinct from merely foreseeable). Decision foist dissuade officers- Queen’s servants are tough and not easily dissuaded. If officers just did their job it would of been fine.
* **Reid:** Falling asleep and Boys escaping / causing damage is RF: it is the very thing to be expected if supervisors fail to pay attention to boys. Default rule is that you should be responsible for anything that is RF and the only exception is for commissions (e..g you don't have to stop a blind person from walking off a cliff). They should have foreseen that the boys would escape and there are no good reasons in relation to the policy argument to not impose liability. In relation to whether the boys are novus actus, Reid does not like RF, he prefers the test of “the very thing to be expected” because it gives the right level of chance. If what happens is the very thing to be expected then it is not a novus actus, if it is below that then it is a novus actus. T he very thing to be expected if you leave juvenile delinquents on an island is they will try to escape therefore it cannot be that they are a novus actus. In terms of public policy argument, Reid says that he does not believe that anything he says in the tort of negligence will stop them from doing their duty.
* **Diplock**: Says he does not believe the prima facie liability nonsense. He said sophisticated judges should be deciding cases is to look at all the past cases you think are relevant and you say some proposition about them. (1) You read all the cases and you come up with a statement of principle. Process of induction / deduction is not universal. (2) After having the statement you then come up with a rule that you can apply to the facts of the case (*Donoghue*). If the case does not meet those principles, you would look at the discrepancies and determine if the discrepancy is irrelevant or if you can add to it. He says you have a choice whether or not to extend the law. You have to keep in mind that *Donoghue* is not universal—it applies to personal injury cases, to apply it further (like Reid did) is manifestly wrong. You must always be able tor realize that there is a duty of care when there is a, b, c and d but not where x, y, z are present. The neighbour test would find liability where there are no rights e.g. (1) baby in puddle (2) deprive customers from business (3) take percolating water (4) failure to warn another of physical danger (5) rescue. He says the question is: I have a choice about whether or not to extend liability or to make substitution for liability and his rational principle is that the prisoner officers should be liable for the prisoners to the people who have an increased risk due to the prisoners escape.
* *Donoghue* not applicable because: The facts of this case contemplate ‘my brother’s keeper;’ here, actual damage by the P was caused by 3rd party responsible in law for their own actions; there are two separate neighbour relationships of the Home Office—to the injuring party and the P.
* **BLL:** (1) Debate between what is the proper test: forseeability versus the very thing to be expected (2) tension between the activist view of the law of torts, a conservative view and an intermediate view

### Lamb v London Borough (1981) Eng CA – defendant is only liable for the act of a 3rd party where the party intervention is a foreseeable consequence of the original negligence, but policy considerations may negate awarding damages

* **Facts:** The plaintiff Mrs. Lamb, who owned a house off Hamstead Heath in London, had leased this property to a tenant and then travelled to America. Whilst away, the defendant Camden London Borough Council carried out building works nearby which included the digging of a trench. This caused a water main to burst, which in turn caused subsidence. The house became uninhabitable and the tenant moved out. Mrs. Lamb returned from America for six weeks to prepare the house for repair work and one of the things she did was to put all the furniture into storage. She then returned to America. However, the house was now invaded by squatters who caused some £30,000 worth of damage. Having finally evicted the squatters and carried out the repair work, Mrs. Lamb sued the Council, who admitted liability for nuisance. She could of sued the squatters but they had no money. There was thus no issue with the Council paying for the subsidence damage on its own (£50,000).
* **Issue:** Can Mrs. Lamb recover from the council for the squatters’ damage? Is the damage a foreseeable consequence of the Borough’s negligence? Are the squatters a novus actus meaning they are the ones responsible?
* **Held:** Appeal dismissed. Council not liable for acts of the squatters. Judgment for D. Damage was too remote
* **Reasons:**
  + Denning: He said he doesn't care about the binding authority and says that Reid’s test in ***Dorset Yacht*** was wrong because it extends liability beyond all reason. the test is too expansive and allows damages to be assessed when they should not. Two tests kicking around: 1) reasonable foreseeability, and 2) very thing to be expected. He says either of these tests do not answer the question beach of how uncivilized England has become. He says that they have ways to make people not liable in English law; (1) no duty, (2) damage is too remote (3) change the rules of causation to say that causation has not been made out. Ways that he uses to make people he doesn't think should be liable not liable.
  + Said that determining when a duty is owed is a question of policy. Must ask who had the duty then reverse engineer it. Ask whose job was to do something to keep out the squatters, and if they got in, to evict them? It was the job of the homeowner through her agents. Mrs. Lamb paved the way for squatters by leaving the house empty. There was a reasonably foreseeable risk squatters might enter. If Lamb had insured against damage, insurer should pay the loss.
    - He decides who wants to win, and then uses policy to get that result. Everything judges use are just smoke and mirrors (like remoteness, RF, duty) → Use this on exam to indicate how policy may influence judge’s decisions.
    - Whose responsibility is it to keep out the squatters? it’s the woman’s responsibility. Didn't believe she did not have enough money and she should of spent the money to look after her property.
    - He says he has no doubt that she is liable or her insurers and not the London Borough.
  + **Watkins LJ: Says that in situations like these, judges should use their instincts to decide whether or not the outcome is too remote to deserve damages. Usually there is a clear common sense answer.** 
    - Wagonmound test was not meant to be totally determinative. If it is not RF you cannot be responsible for it but just because it is RF does not necessarily mean D is liable.
    - Watkins said he had a gut-feeling (even though it was RF) that the city should win (so he says it wasn’t RF)
      * The time, nature of the act makes me think city shouldn’t be responsible
      * Think about the person committing it
      * Think about the antisocial intent of the person committing it. Person committing it was a criminal
    - All this makes me think that the squatters and not the city should be responsible.
    - Talks about intuitions, but ends up with the right result.
  + **Oliver: Appeal dismissed. Agrees with Denning. Reid’s test does not limit damage assessment enough and should include a more stringent standard. Neyers also agrees**
    - reasonable person would not RF that puncturing a water main would fill the plaintiff’s house with squatters.
    - Says that Reid’s test was wrong. It did not do enough to restrict the duty. He understated the degree of likelihood required before the law can attribute the act of a third party to the tort feasor.
    - If your mother told you not to swing the pick axe, what reasons would she list? You might flood the house, you might hurt each other, etc. Ask yourself why is it wrong to dig in a ditch? No-one would ever think that you should be careful not to swing a pick axe was because squatters would take over your property? Therefore it is not RF. Used the mother test to come to a conclusion where foreseeability does not give you the answer.
    - She would never warn that squatters might rip the walls, so NOT RF that squatters would arise.
    - But in the second part of his judgment, Oliver flip-flops and starts to doubt himself.
      * London is a hell hole and so anything really could be RF or “the thing to be expected.” But the problem is that this would lead to indeterminate liability. So maybe we need “likelihood also amounting to inevitability” – so he is trying to make a new standard.
* Which is the best? We like Oliver until he starts flip-flopping (says Neyers). Watkins might not be wrong to think that judges have instinctive feelings (so long as this comes from their long study of the law).
* Denning’s view in *Lamb v London Borough* on “insurance guiding legal liability” is no good. Denning thinks it is all about policy but Oliver’s view shows that it does not have to be because he uses the basic principles and gets to the same result. In *Dobson*, the SCC outlines that the decision on legal liability should be independent of insurance.

## Defences

Historically, the common law has focused on **three** types of complete/partial defences to negligence:

1. **Contributory Negligence** → The P also might have been negligent; must have contributed to the injury
   1. Should the P be able to recover where his own acts contributed to his injury?
2. **Voluntary Assumption of Risk** → P voluntarily assumed the risk of injury

* *Volenti non fit injuria* → No wrong occurs to one who wishes it
* Should P be able to recover when he voluntarily accepted the risk?

1. **Illegality** → P was injured as a consequence of his own illegal act

* *Ex turpi cause non oritur actio* → No liability arises out of a base cause
* Should the P be able to recover when the act the P was carrying out was illegal?

Also: consider...

1. Statutes of Limitations → more than 2 years after the tort has been discovered, usually. There are rules of civil procedure that say you have to launch your litigation in a timely manner and if you don’t, even if you should win you are not going to because the limitation period has expired.
2. Inevitable Accident → whatever happened was inevitable, there is nothing that the D could not have done to stop it (Not a true defence – merely negates the standard of care.

However, these defences have now been limited and restricted in scope.

## Contributory Negligence

Contributory negligence was at one point a complete defence (*Butterfield*) but now only allows for **apportionment between the plaintiff and defendant** based on blameworthiness of “fault”, not on the degree of causation of the loss by each party (*Negligence Act*).

|  |
| --- |
| Contributory Negligence Summary:   * Where the plaintiff’s negligence contributed to the damage, the damages will be apportioned. The default is 50/50 where it is not practical to determine the actual degree of fault (*Negligence Act*). * This is a question of fact to be determined by a jury and thus is difficult to overturn. |

* **the party raising the defence has the onus. This is the most important defence.**

### Butterfield v Forrester (1809 KB) – contributory negligence as a complete defence historically

* **Facts:** P was riding along road. D put a pole across the road, thereby obstructing P’s path. P was thrown off his horse and injured. Part of the reason why the P hit the pole was because he was riding his horse “violently”, not carefully.
* **Issue:** Was D liable in negligence for P’s injuries?
* **Held:** Judgment for D. P contributed to his own injury. If he had been riding at a normal speed he would have seen the obstruction and would have stopped but because he was going so fast it was his own fault that he fell over.
* **Ratio**: A defendant’s negligence does not excuse a plaintiff from exercising ordinary care. Contributory negligence is a defence- it is an all or nothing defence.
* **BLL:** For liability in negligence, two things must occur: (a) D must be negligent, and (b) P must exercise ordinary care. If P does **not** exercise ordinary care, he has no action.
* **Reasons:** Although there was an obstruction in the road because of D, P was negligent because he did not take ordinary care to avoid it. P would not have been hurt if he was riding with ordinary care. Therefore, D completely absolved of liability.

### Davies v Mann (1842) Ex Ct – “Last Clear Chance” rule: if D had the last clear chance to avoid the injury then P’s contributory negligence does not apply

* **Facts:** Wagon rider driving too fast. P left donkey on road. Wagon hit and killed donkey. Plaintiff has donkey’s feet shackled.
* **Issue:** Was the plaintiff also negligent?
* **Held:** Judgement for the plaintiff, defendant was liable.
* **Ratio:** Contributory negligence does not apply where plaintiff’s negligence contributed to the injury but the defendant could still have avoided causing the injury (last clear chance)
* **Reasons:** The defendant said the plaintiff was negligent in shackling his donkey and steering him onto the road. Although the donkey may have wrongfully been in the road, D was still bound to exercise due care to prevent injury. D had the last clear chance and therefore plaintiff can sue for injury.

## Prosser – What are the reasons for contributory negligence

* Contributory negligence was enacted in mind of the industrial complex → need to absolve companies from liability in order to encourage industrial development
* Weinrib → industrial complex arguments not good. In some cases, the industrial complex is represented by D; in others, the P.
* Common arguments used to justify contributory negligence:
  + “Proximate cause”: P’s negligence is an intervening, insulating cause between D’s negligence and the injury (*novus actus*)
    - This can’t be supported – e.g. two cars collide and injure a bystander, one driver’s negligence isn’t a superseding cause which relieves the other of liability
  + Penal basis: meant to punish the plaintiff or his own misconduct
    - This doesn’t align with case law – e.g. last clear chance, plaintiff at fault can recover
  + Discourages accidents: denies recovery to those who fail to use proper care for their own safety
    - The opposite seems to be true – it encourages the negligent defendant
* Contributory negligence is more likely an instrument to control the jury, by which liabilities of rapidly growing industry were curbed and kept within bounds (i.e. *Fleming*)

## Fleming, The Law of Torts - Justifying Contributory Negligence

* Contributory negligence lightened the burden of compensation losses for accidents associated with a rapidly growing economy and transportation. Don’t want big industries paralyzed by negligence claims.
* **Weinrib:** Fleming is wrong because in *Davies*, big industry lost.

## Boland – Relational Duty- Duty of Self-Protection & Duty of Care

* If I owe you a duty, you owe me a duty. Contributory negligence is thus the other side of relational duties. If I am to owe a duty not to run you down, you owe me a duty not to put yourself in that position
* Unless each person is to be regarded as his brother’s keeper, it is necessary that the duty of self-protection should be extended to correct this (you need to take care, just as I need to take care; if you don’t take care, you don’t win).
* *Note: doesn’t say contributory negligence must be all or nothing*

## *Negligence Act* – 50/50 apportionment default if it is not practical to determine respective degrees of fault

* section 3- **Apportionment** In any action for damages that is founded upon the fault or negligence of the defendant **if fault or negligence is found on the part of the plaintiff that contributed to the damages** the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.
  + only applies to torts where negligence is part of it, does not apply to intentional torts. Allegation of negligence required
  + has to contribute to the damages not necessarily to the injury
  + court will apportion damages on the basis of comparative fault
* section 4- **50/50 default** if it is **not practicable to determine the respective degree of fault** or negligence as between any parties to an action such parties shall be deemed to be equally at fault or negligent. … . But if you can figure it out then you can divide it however you want!
* **Question of Fact** In any action tried with a jury the degree of fault or negligence is a **question of fact** for the jury.
* Where the damages are occasioned by the fault or negligence of more than one party the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.
* **Section 1:** If 2 people caused an injury, and 1 is found 100% liable, they can seek an indemnity from the other (i.e. *Lambton*)
* **Section 3:** in any action that is founded upon the negligence or fault of defendant, if negligence is found on part of plaintiff that contribute to the damages, court shall apportion the damages in relation to the degree of fault of each party
  + Might not apply to nuisance because contributory negligence is founded on negligence
  + “In relation to”: must be comparative
* **Section 4:** if it is a tough case and you can’t figure out how to apportion damages, the default is 50/50 (equally at fault)
* **Section 6:** if there is a judge and jury, the degree of fault or negligence of each party is a question of fact. *Note:* can only appeal if there was an overriding and palpable error
* **Section 7:** if the damages are due to the fault or negligence of more than one party, court may direct that the plaintiff bear some portion of the costs (where just).
  + Even though you are contributorily negligent, you may be liable for opposing legal fees

## Arguments Why our Negligence Act is Not So Great

1. not a defence anymore, it is a principle to figure out damages. It is not saying It is about mitigating damages
2. from macro perspective, defence of CN is not fair (*Ateyah*). Unfair because you are paying out of your own pocket and also even if they behave completely outrageously they might still get 25% of their damages at least. not fair that someone through no fault of their own is off work or has a terrible disease and they get 0 but the guy on the assembly line smoking pot hurts himself and can get damages

## Posner – The Old Law was more efficient

* Accident cost $1000, D could have taken precautions for $100. In that case, D should be liable
* Accident cost $1000, D could have taken precautions for $100, P could have taken for $50. The old law incentivized P’s to take cost-efficient precautions
* New system → Accident cost $666 for D, cost for P is $333. Old rule cost $100 and $50 to avoid, and both D and P would choose to spend that money, therefore the new law is inefficient
* Which is more efficient, contributory (old) or comparative negligence (modern)? Applied only to the defendant, Learned Hand formula won’t always produce efficient solution. Contributory negligence encourages people to take cost-justified precautions.
* Cost of accident (P\*L): $1000. Accident could be prevented by defendant for $100 or plaintiff for $50, who should pay? Efficient solution (contributory negligence) is to bar P from recovery. Otherwise no incentive to take preventative measures.
* Under comparative negligence, might split liability (1/3 liable - $333.33 or 2/3 – 666.66). The modern scheme is less efficient.

## Atiyah – Fairness

* If you are an insured D, and you are 100% liable you don’t care. Your insurer pays.
* If you are found contributorily negligent, you pay **out of your own pocket**. Therefore, it is unfair in practice.
* Examples:
  + Assume P and D are deemed to be 50% at fault for a $100 loss. P was grossly negligent.
    - P owes $50
  + Assume P is deemed to be 10% at fault for a $10,000. P only slightly negligent.
    - P owes $1000. Is that fair compared to the first scenario?
    - Deals with comparative fault instead of absolute fault. Assume someone is grossly negligent and runs into your car, but you are slightly negligent. 90%-10% breakdown. Assume $1000 loss
      * $900 loss
  + Assume you are at a factory. You get baked on your break. Due to a fault of the factory, you get injured. But, if you weren’t high, it wouldn’t have happened. So, you only get 10% of damages.
    - Imagine same guy is perfectly upstanding citizen, suffers the same injury, but they cannot prove that the factory was negligent.
    - Why does high guy get 10% for exact same injuries, while upstanding citizen gets nothing?
* To find a defendant guilty of negligence shifts loss away from the plaintiff. A finding of contributory negligence has the opposite effect: it leaves part or all of the loss on the plaintiff. Therefore, it falls more heavily on the plaintiff than negligence falls on defendants.
* Contributory negligence reduces the plaintiff’s damages, having regard to the degree of his fault *relative* to that of the defendant. The amount of loss the plaintiff must bear where he is partly to blame depends on the extent of his fault and the extent of the loss.
* Today, contributory negligence doesn’t serve a purpose in PI claims. It is no longer needed to spare defendants the injustice of compensating a plaintiff who was partly to blame. It operates as a penal device, punishing the plaintiff. It can’t be justified as ‘deterrence.’
* *Note:* Contributory negligence shouldn’t be repealed in relation to property damage; to do so would just increase the cost of car insurance and be a wasteful use of tort liability.
  + - 1. Contributory negligence is always done in %, not absolute numbers
* Comparative rather than absolute fault. It depends on the plaintiff’s behaviour. 2 defendants that do the same thing may have different reductions because of the plaintiff’s behaviour.
* It isn’t fair that someone who is completely negligent can get some damages and someone who is totally innocent and has the exact same injury gets nothing.
  + E.g. someone gets drunk at work and injured. Even if the employer was a little negligent, they can still recover. If an innocent person falls down stairs but suffers the same injuries they may get nothing.

**Principles by which to evaluate contributory negligence:**

1. Is it **efficient**?
2. Is it **fair**?

Weinrib’s point is that old scheme wasn’t so bad. Whig Fallacy → things are always getting better. Law does not always improve.

### Froom v Butcher (1975) UKCA – Where P’s negligence contributed, damages will be reduced by either 0, 15% or 25%

* **Facts:** P was driving his car home, with his wife beside him and his daughter in the back. Neither P nor his wife were wearing seatbelt, because they did not want to. P would rather be thrown out through the windshield than trapped in the car. P’s car was struck by D, who, driving carelessly, had come into their lane to pass another car. TJ held that, even though P was not wearing a seatbelt, his damages should not be reduced. P was awarded $450.
* **Issue:** Should P’s damages be reduced because he was not wearing a seatbelt?
* **Held:** Judgment for D. Because of P’s contributory negligence, damages reduced by $100. Damages were reduced by 10%.
* **Ratio:** If P’s decision not to wear a seat belt contributed to damage, he should be liable for damages relative to that failure.
  + Failure made no difference → damages are not reduced. If CN would not have made a difference then no reduction
  + Failure made “considerable”/ some difference, injuries would not have been as severe → damages reduced by 15%.
  + Failure made all the difference → damages reduced by 25%. If you would have suffered no injuries but you suffered a lot because of your CN then damages are reduced by 25%.
* **Reasons:** P’s arguments and Denning’s responses...

1. I did not cause the accident!

* What matters is not the cause of the accident (negligent driver), but cause of the damage (i.e. the negligent driver + the P not wearing a seatbelt). Insofar as damage might have been avoided or lessened by the P wearing a seatbelt, then P should have done so.
* possible to be morally blameless for the accident but blameworthy for the damage.

1. I don’t believe that wearing a seatbelt is sensible

* Regardless of why a P wasn’t wearing a seatbelt, in the grand majority of cases assessing a share of responsibility will be just and equitable. On the reasonable person standard, one who does not wear a seat belt is contributorily negligent, regardless of why they did so.

1. It is not illegal to not wear my seatbelt
   * It doesn't matter if it is not illegal , it is abut if it is reasonable
2. There was no high risk – a reasonable person could choose not to wear a seat belt

* Risks can change quickly: there are unforeseen circumstances so you have to be prepared for them and things will change so quickly that you will not be able to actually get your seatbelt on
* *Wagonmound #2* → small risk, but cost of precautions is very low (Denning didn’t argue this but Neyers thinks this is the right answer). Reasonable person take precautions even if the risk is small if the precaution is easy to do

1. Old people might forget to put on seat belts!

* Forgetfulness is negligence.
* **Apportioning damages:** In some cases, the evidence will show that the damage would have been no different – in those cases, the P will bear none of the damages. At other times, the evidence will show that the failure made all the difference, in which case the damages should be reduced by 25%. In cases where the failure only made a considerable difference, the damages will be reduced by 15%.
  + If no common standard, no certainty in law. Rough numbers allow people to know the cost and settle cases

## Klar, 1996 – The Law on Seat Belts in Canada

One can summarize the following conclusions which emerge from the numerous seat belt cases:

1. A plaintiff’s **failure to employ a seat belt may or may not be unreasonable**, depending on circumstances.

* The courts have accepted as excuses the fact that a plaintiff was an asthmatic who believed that wearing a seat belt would detrimentally affect asthma, the fact it was a “fine day for driving,” “the road was straight and in good condition for driving,” “traffic was not heavy,” and the driver was “cautious,” the fact that it was a short drive and the plaintiff did not foresee the risk, and the fact that the plaintiff found the shoulder part uncomfortable. …

1. The **failure to employ the safety device must have been a cause of the plaintiff’s injuries.**

* Courts ought to isolate injuries that were contributed to by plaintiff’s failure to wear seat belt, and only then apply the plaintiff’s contributory negligence reduction to latter injuries.
* Courts simplify apportioning damages by applying percentage reduction to the plaintiff’s global damage award. …

1. The fact that the plaintiff’s failure to employ a safety device was, or was not, in breach of a **legislative provision cannot conclusively determine the contributory negligence issue**.

* There are many unreasonable acts which courts consider to constitute contributory negligence which are not legislatively prohibited. It is incorrect for a court to decide that since the failure to employ the safety device was not a statutory offence, it cannot constitute contributory negligence. As discussed previously, however, a statutory duty to wear a seat belt creates a useful standard of conduct which courts may adopt in setting a standard of reasonable care in tort actions. Since all Canadian provinces have legislation requiring the use of seat belts in certain conditions, it is now even more likely that the failure to employ them will constitute contributory negligence.

1. The **failure of parents or drivers to ensure that young children are secured** in a seat belt or car seat may be negligent conduct (parents may be contributorily negligent for injuries to children)

* regardless of if there is legislation requiring drivers or parents to ensure young passengers are properly protected
* *Migliore v Gerard* → relieved parents of liability on the basis of the accepted SOC by parents in 1981

## Voluntary Assumption of Risk

* Usually a complete defence. If you can prove that the person voluntarily accepted the risk, then D is absolved of liability.
* **tendency of judges:** don’t find P *volenti*, instead contributorily negligent. Allows judges to give P some damages, not all.

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| **Two Steps for Voluntary Assumption of Risk (*Dube*):**   1. Voluntarily assumes (*volenti* to) the physical risk 2. Voluntarily accepts the legal risks    1. Must have the capacity to accept the risk in order to be *volenti*   Note: *Volenti* may be express or implied |

* All of nothing defence – either there is or is not,

### Lambert v Lastoplex Chemicals (1972) SCC – manufacturer’s duty to warn

* **Facts:** P bought two cans of lacquer seal manufactured by D. P read all the labels on the cans, which included a variety of warnings communicating that the lacquer was flammable. P applied the lacquer in his basement, where he housed his natural gas heater. Lacquer caught fire and caused an explosion, injuring the P and causing property damage.
* **Issue:** Whether a manufacturer of a flammable product is liable to a user who, aware of certain conditions, uses the product.
* **D’s argument:** We warned you! You used it anyway. We should not be responsible for the damage caused by the fire.
* **Held:** Appeal allowed. Judgment for P. No defence of *volenti*. Manufacturer had a duty to specify the dangers associated with product. Though they included some warnings, warnings were insufficient.
* **Ratio:** Voluntary assumption of risk only occurs if there is proof that P appreciated the risk and willingly took it. Manufacturers have a duty to warn the public about dangerous products as they are presumed to appreciate the danger in a detail not known to the ordinary user. Explicitness of warning varies with danger. Warning must be explicit enough to warn P of all RF dangers (sparks, lights etc.). P who has not been adequately warned of dangers cannot be said to have voluntarily assumed risk.
* **Reasons:** Warnings not explicit enough, custom was to have more detailed warnings on bottles. Wasn’t CN because turning off pilot light was outside scope of foreseeable risks. Giving a warning is necessary to make the selling non-tortious. Duty prevents a finding of breach of SOC. Product had very serious risks the reasonable person wouldn’t expect. Manufacturers owe duty to consumers to ensure there are no defects likely to cause injury in the course of usual use. This duty applies to products that are dangerous to use. Manufacturers can’t, without more, pass the risk of injury to the consumer. Where products sold to the general public are dangerous, and the manufacturer knew of the danger, the manufacturer has a **duty** to specify this. Manufacturer is presumed to appreciate the danger in a detail not known to the ordinary user. A general warning is not sufficient. The required explicitness of the warning varies with the danger likely to be encountered in the ordinary use of the product. The cautions on the lacquer lacked explicitness, which the degree of its danger demanded. A usual user can’t reasonably be expected to realize that the product’s vapours could become ignited from a spark or from a pilot light in another part of the house. Just because the appellant was an engineer and knew it was dangerous to work with lacquer near a flame does not warrant concluding the manufacturer discharged its duty. The facts do not support the defence of voluntary assumption – the appellant did not known there was a probable risk of fire when the pilot lights were in another room.
* **Notes concerning manufacturer’s duty to warn:** Manufacturer’s duty to warn is **objective**. Must be specific (not enough to say it will explode, but must say the way in which it will explode). Duty is ongoing – if you learn a risk later on, need to warn concerning those risks. Only need to warn concerning reasonably foreseeable uses of the product (i.e. sniffing glue example). However, if manufacturer learns of a common use, must warn of that use (i.e. sniffing glue again).

### Dube v Labar (1986) SCC – two steps for volenti (accept physical risk + legal risk); may be express or implied

* **Facts:** P and D were co-workers at a construction site. P and D were drinking together and decided to get D’s car. P and D drove two girls home to Whitehorse, P driving while D drank a beer. P and D switched spots and D began to drive. P tried to drive instead of D, and knew D had been drinking. Accident occurred while D was driving. P’s trial claim against D was dismissed because P voluntarily accepted the risk.
* **Issue:** Was D liable to P? Did P accept the legal risk? Is there a defence of voluntary assumption of risk?
* **Held:** Appeal dismissed. Judgment for the D. P accepted both risks. However, this was because P was **contributorily negligent**. The court found that P **did not** voluntarily accept the risk.
* **Ratio:** Voluntary assumption of risk only arises where it is clear (expressly or impliedly) that the plaintiff, knowing of the virtually certain risk of harm, bargained away his right to sue for injuries incurred as a result of the defendant's negligence,.
* **BLL1:** *Volenti* will only arise where the circumstances are clear that the P, knowing of the risk of harm, in essence bargained away his right to sue for any negligence on the part of the D. The acceptance of risk may be express or implied from conduct.
* **BLL 2:** In order to make a defence of voluntary assumption of risk P must have accepted 2 things.P must accept both the **physical risk** and the **legal risk** of the accident. Must have conscious understanding of the legal risk.
* **BLL 3:** *Volenti* may be express or implied.
* **Reasons:** Volenti will arise only where there is a true understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to. Volenti is inapplicable in most drunk driver-willing passenger cases because it requires awareness of the circumstances and consequences of action
  + In drunk-driving accidents, the standard for *volenti* is very high. Only rarely will a P ever genuinely consent to accept the risk of the D’s negligence when he knows that the D is drunk.
  + Must prove that the P should have reasonably understood (a) the physical risk of the accident and (b) that they accepted that they would accept the legal risk of the accident (i.e. waiving right to sue)

### Priestley v Gilbert (1973) ONCA – deals with the issue of capacity, initially sober then agree to get as drunk as possible

* **Facts:** P and D were drinking for most of the day. P was passenger in D’s vehicle. D, in an advanced state of intoxication, drove on the wrong side of the road and collided head-on with a vehicle approaching, killing both occupants of other vehicle and severely injuring P. P’s trial claim was dismissed because the P voluntarily accepted the risk.
* **Issue:** Was the voluntary assumption of risk principle properly applied by the trial judge?
* **Held:** Appeal dismissed. Violent defence applies. Judgment for D. P voluntarily assumed the risk.
* **Ratio:** Joint venture evidences volenti. Getting drunk then getting in the car while they drive implies acceptance of the risk involved. Just because passenger is intoxicated and cannot comprehend severity of risk does not make defence inapplicable
* **Reasons:** It appears that P consented to the physical and legal risk of injury involved. The P and D got together before they started drinking. This was a joint venture in which P knew or should have known had physical risks, and he voluntarily accepted those risks. The conditions then existing, their inevitable development, and the obvious hazards were theirs equally and jointly. If P was sober, and he had gotten in the car, there would be no doubt of his acceptance, His intoxication does not qualify his acceptance. P and D were initially sober, then agreed to get as drunk as possible and drive around in D’s car.

### Birch v Thomas (1972) – insufficient warning of risk, volenti doesn't apply; P must appreciate risk and proceed anyways

* **Facts:** D was unable to get passenger liability insurance. On the advice of his insurance company, he put a sticker on his car communicating that he had no passenger insurance. P got into D’s car, and D alerted him to the sticker and his lack of insurance. P chose to ride in the car. A serious car accident occurred, where the P suffered head injuries and amnesia.
* **Issue:** Does volenti defence apple?
* **Ratio:** P’s conduct can demonstrate an implied, voluntary assumption of risk
* **Reasons:** P agreed to the exemption from liability - he assumed the risk of the kind of injury that occurred and therefore could not recover. The statement about the absence of insurance was equal to a statement that the passenger rode at his own risk, as P could only recover if D was insured and that, no one would be able to recover against a 19-year-old with no assets.
* **Held:** Judgment for D. P voluntarily assumed the risk. No recovery.
* **Note:** Neyers thinks this is stupid. The court confused not being likely to sue with being precluded from suing. What if the guy’s dad was rich? Also, “I don’t have insurance” is different than“You must accept the physical and legal risk of harm”.

## Illegality

Plaintiff can’t pursue legal remedy in connection with his own illegal act

Defence of illegality can only be used in narrow circumstances to avoid creating inconsistency in legal system (*Hall v Hebert*):

1. Punitive damages
2. Plaintiff attempting to profit from illegal activities
3. Plaintiff attempting to offload criminal liability through the law of tort

* if none of these apply the court will likely not allow a defence of illegality

### Hall v Hebert (1993) SCC – three circumstances where defence of illegality can be used

* **Facts:** D owned a muscle car. D went to a party and drank a bunch of beer. P and D went to drive down a gravel road after the party. Gravel road was beside a steep pit. Car stalled, needed to be re-started. P asked if he could drive, D said “Sure”. P lost control, went into the gravel pit and turned upside down.
* **Issue:** Could D use defence that P was engaged in illegal behaviour?
* **Held:** Appeal allowed. Appellant entitled to recover for compensation of his injuries (reduced because of CN)
* **Ratio:** Limited to where the plaintiff would otherwise profit from illegal/wrongful act or evade a penalty prescribed by criminal law. (1) Basis of doctrine of ex turpi causa: applies where to allow recovery would be to introduce inconsistency or incoherence int he law. (2) Limitation periods are also a defence.
* **Reasons:** Illegality in this case is that he was driving impaired so we should not reward him for driving impaired by rewarding him with a tort action. There is a need in the law of tort for a principle which allows judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of justice system. Limited to where the plaintiff would otherwise profit from illegal/wrongful act or evade a penalty prescribed by criminal law. Not applicable where the plaintiff claims compensation for injuries sustained as a consequence of the negligence of the defendant. (if a person tries to break into your house and falls through your porch you will be liable for their injuries. They did not give up their right to personal integrity)
* This principle is best as a defence because it is extrinsic to the relationship between the parties. Extrinsic consideration of the plaintiff’s conduct (illegality/immorality), shouldn’t distort the duty of care.
  + 1) All or nothing: ex turpi causa is a reason why a cause of action, otherwise fully made out, should not succeed.
  + 2) Onus on defendant to establish illegality/immorality of plaintiff’s conduct. Plaintiff bears burden of proof in relation to all elements of cause of action. If illegality was part of proof of duty, they would always have to prove what they were doing wasn’t illegal. Better to have it as a defence so the person raising it must prove it.
  + 3) Possible to sue someone both in torts and contracts. Defence of illegality can be raised in both. In contracts, defence is true defence defendant must prove. Would introduce inconsistency to have P prove the defence in tort.
* **Cory J dissent:** Says that the young teenager can sue because no-one would be really shocked by this! Policy – wants to abolish defence of illegality because public would think it was bad that P could not recover in these circumstances
  + says illegality sounds like policy and they usually do the policy stuff at the second stage of the Cooper Anns test and wants to throw it under there and ask themselves whether or not there is a duty here.
* **Majority (McLaughlin J):** Policy reasoning not the proper method here, rather we should be concerned with preventing inconsistencies in legal system. As such, defence of illegality can only be used when:

1. Punitive damages. You cannot claim punitive damages if what you re doing was illegal (trespassing to someones house and you step on spring guns (landmines in property and a gun would spring up and just shoot automatically)
2. Plaintiff attempting to profit from illegal activities. (prostitution ring, illegal casino or running an illegal business)
3. Plaintiff attempting to offload criminal liability through the law of tort. Cant get damages that would offload a penalty that another area of law would impose on you.

### British Columbia v Zastowny (2008) SCC – application of Hall v Hebert

* **Facts:** Residential school and sexual assault victim, became drug addict and spent time in prison. Tried to claim loss of income for time in jail, given he only ended up there because of damage done by sexual abuse committed by state actors.
* **Issue:** Can he claim loss of income for his time incarcerated?
* **Held:** No, cannot claim for lost wages during incarceration.
* **Ratio:** Ex turpi precludes damages for wage loss due to time spent incarcerated because it would introduce inconsistency in the legal system. Cannot be indemnified for consequence of illegal act for which you are found criminally responsible.
* **Reasons:** The criminal court would have taken the fact that he was an Aboriginal sexual assault victim into account when he was sentenced, one cannot claim loss of income for time incarcerated when criminal law has deemed them worthy of punishment, that **would create inconsistency in legal system**. Consequences of imprisonment include wage loss. His wage loss is occasioned by the illegal acts for which he was convicted. Giving damages for being in jail would give you a “rebate” on your sentence; you are trying to off load your penalties on someone else.

## Psychiatric Harm

* old english law distinguished between primary and secondary victims
* primary victims were within the scope of the danger activity but did not suffer physical harm. Test for primary victim reasonable foreseeability of personal injury that culminated in a recognized psychiatric illness (Paige v Smith)
* Secondary victims weren't within the zone of danger but witnessed things that went on in the zone of danger (Alcock)

### Alcock v Police (Hillsborough Disaster) [1991] HL - Secondary victims

* **Facts:** FA Cup final, Police allow standing room only. The people get pushed to the front. There was a chain link fence around the pitch with barbed wire at the top. People get crush to death. Family members of those who die suffered grief.
* **Held:** no recovery
* **Ratio:** In relation to secondary victims, must reasonable foresee a psychiatric illness = must prove three proximities (i) locational: were actually there or part of the immediate after math; ii) Temporal: must hear/see it with your own eyes or hears; iii) Relational: must prove the person is in a specific type of relationship with you- child, spouses parent)

### White v Police [1998] HL - rescuers aren't primary victims (policy reasons)

* **Issue:** Are rescuers primary victims because they are digging people out?
* **Ratio:** As a matter of policy rescuers (police officers) cannot recover (because brothers cannot recover)

### Mustapha v Culligan SCC [2008] - psychiatric injury includes…

* **Facts:** Mustapha sues for psychiatric injury sustained as a result of seeing dead flies in water supplied by Mulligan. Mustafa and family drank water for 15 years prior to incident. Since then redeveloped a major depressive disorder + phobia+ anxiety
* **Issue:** Was Culligan negligent and therefore liable for the defendant’s psychiatric injury? Could he recover from Culligan?
* **Held:** Mustapha’s claim fails. He failed to establish the injury was reasonably foreseeable.
* **Ratio:** Personal injury includes physical and psychiatric injury. Psychiatric injury is a prolonged, serious trauma or illness. It doesn’t recognize upset, disgust, anxiety, agitation (ordinary anxiety, fears, annoyance).
* 5 Elements of Negligence: i. duty, ii. Breach of standard of care, iii. Factual causation, iv. Damage vi. Remoteness
* **Reasons:**
  + Duty of care: manufacturer of a consumable good owes duty of care to ultimate consumer (*Donoghue*); Culligan owed Mustapha duty of care in supplying him water
  + Breach of standard of care: conduct is negligent if it creates unreasonable risk of harm; Culligan breached the standard by providing contaminated water
  + Factual causation: but for seeing the flies, Mustapaha wouldn’t have suffered the illness
  + Plaintiff suffered damage: some sort of loss recognized by the law as actionable
  + No distinction between physical and psychiatric injury; psychological disturbance must be proved to rise to the level of personal injury (as opposed to psychological upset). Personal injury is a serious trauma or illness that is prolonged. It goes beyond minor transient upset. Must rise above ordinary annoyance, anxieties and fears people usually have.
  + Mustapha had a debilitating psychiatric illness. It qualifies as personal injury at law.
  + court says that not every emotional state will count as damage in the tort of negligence.
  + plaintiff did suffer damages as he suffered illnesses more than what ordinary people would suffer
  + prior to this case it used to be that you had to be able to give it a name for you to recover and if a psychiatrist could not give it a name then you could not recover. It had to be a recognizable injury.
  + Remoteness: was damage caused by breach? - Case fails here
  + ask mother why should I not allow a fly in a bottle? Answer will not be that P will suffer mental illness - **Case fails**
  + Damage was factually caused by Culligan.
  + Damage was **not** reasonably foreseeable, and therefore not caused by Culligan. Medical experts described Mustapha’s reaction as ‘highly unusual’ and ‘very individual.’ No evidence a **reasonable person** would have suffered injury. It must be reasonably foreseeable for a person of ordinary fortitude.
* *Note:* If D knew of P’s special sensitivity, might not be reasonable person standard (but in this case the defendant didn’t know).

### Saadati v Moorehead SCC [2017] - how to deal with pure psychiatric illness

* **Facts:** Saadati’s tractor-truck was struck by Moorehead’s vehicle. Accident caused Saadati psychological injuries, no physical injury. The judge awarded $100,000 non-pecuniary damages. Moore appeals.
* **Issue:** Is it necessary for a claimant to adduce proof of a recognized psychiatric illness to support a finding of legally compensable mental injury?
* **Held:** Appeal allowed. Accident caused severe psychological injuries (personality change and cognitive difficulties).
* **Ratio:**
* Recovery for *mental* injury does not require proof of a recognizable psychiatric illness, just as recovery for *physical* injury doesn’t depend on expert diagnostic evidence.
  1. A negligent defendant must only foresee injury, not a specific psychiatric illness.
  2. *Alcock* is not the law
  3. Follow the 5 elements in *Mustapha*.

**Reasons:**

* + *Mustapha*: recovery for mental injury depends on the claimant satisfying the criteria applicable to any successful action in negligence – (i) duty of care, (ii) breach, (iii) damage, (iv) legal and factual causation between breach and damage
  + The view that courts should require more is founded on policy reasons – that mental illness is ‘subjective’ and is easily exaggerated. Those with mental illness face a stigma that impedes their participation in society. Tort law shouldn’t perpetuate this. Negligence law recognizes a duty to take reasonable care to avoid causing foreseeable mental injury.
  + says SCC has never required a recognizable psychiatric illness as proof because for physical injury you don;t need to have a doctor come into court and give it a name all you have to do is prove that the thing they are suffering is damage
  + **test for damage for mental interference:** says that you have to prove that he claimant has suffered a serious and prolonged and rises above the ordinary annoyance, anxieties and fears that come with living in a crowded society
  + Duty & Breach: do *Cooper v. Hobart,* ask if it is RF plaintiff would be injured, and then look at proximity.
  + Damage: must show requisite degree of disturbance (serious prolonged injury beyond ordinary fear, annoyance, anxiety)
    - Expert evidence can help determine whether mental injury has been shown (how seriously claimant’s cognition and daily activities have been impaired, length of impairment, and any effect of any treatment). Expert evidence can help, its **not** required. Defendant can also call expert testimony to show there was no interference.
  + No right to be happy. We have a right to one’s mental health
  + Remoteness: traumatic events can interfere with cognition and ordinary functioning
* *Neyers*: Psychiatric injury must be something that makes it difficult to set and pursue goals; grief doesn’t do this, doesn’t count as injury because it is just a person working through negative consequence of a relationship you might have with someone.

## Pure Economic Loss

Typically cannot recover for pure economic loss, there is **no violation of a personal or proprietary right**.

**SCC thought there are 5 categories of pure economic loss:**

1. PEL flows from exercise of statutory authority (e.g. *Cooper v Hogarth)*
   1. Explainable re: right granted by statute or where you can argue that it is really category 2 or 3
2. Negligent misrepresentation (*Hobart*)
3. Negligent performance of a service
4. Relational economic loss
   1. Explainable re: possessory rights opposable against the defendant (see Bensen discussion of CNR)
5. Defective products – no recovery in Canadian law unless defective products are dangerous (*Winnipeg Condomineum*)

## Relational Economic Loss

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| **Relational economic loss is not recoverable unless there are three situations present (*Martel*):**   1. Joint venture → situation of mutual agency 2. (General average contribution) – don’t need to know about this 3. Possessory interest |

### Canadian National Railway Co v Norsk Pacific Steamship Co (1992) SCC – original relational economic loss case, allowed to recover because of a joint venture

* **Facts:** One of Norsk’s steamships ran into a bridge owned by PWS. Main user of the bridge was CN. Damage caused to bridge prevented CN from fulfilling its contractual obligations to many third parties, resulting in contractual liability and lost profit. CN sued Norsk for the damages incurred as result of these losses.
* **Issues:** Can a person who Ks for the use of the property of another sue a person who damages that property for losses resulting from his inability to use the property during the period of repair?
* **Held:** Yes, CN can sue because it was a **joint venture**. Recovery is permitted. The necessary duty and proximity are established
* **Ratio:** Pure economic loss is *prima facie* recoverable where there is sufficient proximity between the negligent act and the loss (in addition to negligence and reasonable foreseeability). Proximity limits liability. To determine whether liability should extend to a new category, courts must consider the normal factors in assessing proximity (physical closeness, assumed or imposed obligations, close causal connection). Follow *Kamloops*. Someone may recover for pure economic loss if part of a joint venture (you have a right to the injured thing).
* **McLaughlin (+2):** test for duty = foreseeability + proximity + policy reasons
  + On this test there is liability on the facts of the case
* *Cooper v Hobarts* Test

1. Reasonable forseeability
   1. It is reasonably foreseeable that if you hit a bridge it would cause loss to those who used the bridge.
2. Sufficient proximity between negligent act and loss? look at cases where proximity was found and see if this case is similar. Follow Kamloops
   1. CN had property close in proximity to bridge, which couldn’t be enjoyed without the bridge; CN supplied materials and inspection for the bridge, was its dominant user, and was recognized in negotiations to close the bridge
   2. Where the plaintiff’s operations are so closely tied to the operations of the party suffering the physical damage and to its property that it can be considered a joint venturer with the owner of the property, plaintiff can recover pure economic loss
3. Is recovery desirable from a practical point of view? (any policy considerations that limit this kind of recovery?)
   1. The category is limited: doesn’t include casual users of the property or those secondarily and incidentally affected by the damage; potential tortfeasors can gauge the scope of their liability in advance
   2. Loss spreading doesn’t work because loss either falls entirely on boat or CN **LaForest (+2)** thinks should apply reverse *Cooper* test – the law is justified unless you can find reasons why the law is NOT justified - the rule is that you cannot recover for PEL, and there are no reasons to depart from this long standing rule

* **Dissent: LaForest** thinks the purpose is (1) compensation – smart CNR could have been compensated, (2) deterrence of bad behaviour – there is already deterrence because if hit bridges you will be liable, (3) loss spreading, (4) economic efficiency – CNR is the best risk bearer because CNR knows the type of damages it has, the type of trains it has, and therefore how much insurance should actually get whereas anyone else does not know how much they should get to protect CNR

Proximity analysis should examine the situation of both the defendant and plaintiff (esp. plaintiff’s ability to foresee and provide for the particular damage in question). Consider which party can best bear the loss (which party is in a better position to predict the frequency and severity of CN’s economic loss, and plan accordingly).

1. Policy concerns related to deterrence are substantially met by tortfeasor’s primary liability to the property owner
   1. Imposing further liability can’t be justified as ‘deterrence’
2. Policy concerns related to who can best bear the loss can be raised since current law denies recovery
   1. CN knows more about the risks and losses and so should bear the risk
3. Recovery of this type must remain exceptional to limit liability (avoid indeterminate liability)

CN is in a better position to bear the loss. CN knows the use it gets out of the bridge, and any alternatives. Norsk can’t estimate the value of such use, and can’t estimate the potential cost of an interruption in bridge service. CN is also better able to protect itself from the consequences of those losses (commercial or self- insurance, contracts with PWC and customers).

Contractual allocation of risk in this case is good reason to refuse recovery: CN was aware of the risk and the traditional legal rule. CN could protect itself through contract with PWC, its clients, and its suppliers.

Can’t recover for contractual relational economic losses unless…

1. The claimant has a possessory or proprietary interest in the damaged property
2. There is a general average contribution cases (on the high seas)
3. The relationship between claimant and property owner constitutes a joint venture
   1. Joint venture: mutual agents (could be contractual or non-contractual)

### Martel Building (2000) SCC – three requirements to recover for relational economic loss

* **Facts:** P (Martel) owned a building and leased space to D (Department of Public Works). Lease was about to expire so both parties entered into negotiations for renewal. D led P to believe that it would be willing to renewing lease on certain terms. P extended an offer on those terms, but D rejected it and called for tenders, accepting a tender from a third party.
* **Issue:** What is the law on economic loss?
* **Ratio:** For recovery of economic loss; P must established a duty, a breach damage and causation.
* SCC agreed that LaForest was right in CNR, McLaughlin gave up
  + Relational economic loss is not recoverable unless there are three situations present:

1. Joint venture → situation of mutual agency
2. (General average contribution) – don’t need to know about this
3. Possessory interest

* Peter Bensen:
  + Why is it that a person who uses a bridge but does not own it cannot sue?
  + You need a right to sue, and you do not have a right to a bridge you do not own - CORDOZO VIEW
  + But, does CN have a contractual right? Even if they do, that is not opposable against the tug boat owner
  + They could claim if they had a lease because that gives them possessory rights
  + SCC (LaForest) actually comes to the conclusion that you can sue when someone hits a bridge that you use WHEN you have a right to the bridge (when you have a lease or a joint venture) - he is basically saying that you can sue when you can show you have a right to the bridge that is opposable against the defendant

## Types of cases that give rise to potentially compensable economic loss:

* + 1. Independent liability of statutory public authorities (*Cooper v. Hobarts*)
       1. Must be a right to sue in the statute, unless individual can prove the government was behaving in a way under 2-5
    2. Negligent misrepresentation (*Hedley*) **not on exam**
       1. Undertaking gives a right
    3. Negligent performance of a service (*Hedley*) **not on exam**
    4. Negligent supply of shoddy goods or structures (*Winnipeg Condo* – SCC) **not on exam**
       1. Can sue someone if it is dangerous; can’t recover for the fact it isn’t very good
       2. Violates right to personal integrity
    5. Relational economic loss - LaForest (*Bow Valley*, *Martel*)
       1. Loss flows from the fact that you’re deprived of something someone else has a right to (*CNR*, *Martel*).
       2. Recovery for contractual relational economic loss is presumptively excluded, subject to categorical exceptions:

1. Claimant has a possessory or proprietary interest in damaged property
2. General average contribution cases (on the high seas)
3. Where the relationship between claimant and property owner constitutes a joint venture

*Note: new categories can still be recognized*

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| --- |
| 1. Duty (*Hedley Byrne*): 2. P must have placed reliance/trust in D to exercise duty of care, 3. Reliance by P was reasonable, and 4. Reasonable reliance requires an examination of (*Hercules Management*): 5. D had a direct or indirect financial interest in the transaction in respect of which the representation was made. 6. The D was a professional or someone who possessed special skill, judgment or knowledge. 7. The advice or information was provided in the course of the D’s business. 8. The information or advice was given deliberately, and not on a social occasion. 9. The information or advice was given in response to a specific enquiry or request. 10. D knew/ought to have known about the reliance 11. Absence of policy concerns to negate duty. Policy concerns will not exist where (*Hercules*): 12. The D knows the identity of the P (or the class of Ps) who would rely on the statement at issue, & 13. Where the statement itself was used by the P for precisely the purpose or transaction for which it was prepared 14. Standard of Care 15. Causation 16. Remoteness 17. Defences 18. Contributory negligence can still be used in negligent misrep cases (*Grant Restaurants* |

## Negligent Misrepresentation

**The test to be imposed for liability is as follows:**

1. There must be a duty of care based on a "special relationship" between the representor and the representee;
   * + See *Hercules Managements Ltd. v. Ernst and Young* (SCC 1997)
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making said misrepresentation;
4. The representee must have relied on said negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

### Glazner v Shepard – Cordozo: there is an exception to privity where there is a special relationship due to the proximity of the parties, an assumption of responsibility on one side and reasonable reliance on another

* **Facts:** P (X) bought 905 bags of beans from a corporation (A). Beans were paid for in accordance with weight. A instructed and paid D (B), who are weighers, to weigh the beans and deliver them to X. B did so and sent certificates to A and X stating that the 905 bags weighed 228,380 pounds. B was paid by A. X, upon attempting a resale, found that the actual weight was 11,854 pounds under what B had told them. X brought a suit for amount overpaid.
* **Issue:** Can X sue B despite no promise or consideration?
* **Held:** Judgement for P (X).
* **Ratio:** An exception to privity is where a **tortious duty** arises between B and X even though there is no contractual duty. **Cordozo:** X can sue B because there is a **special relationship** that arises due to **proximity** between the parties, an **assumption of responsibility** on one side (B) and **reasonable reliance** on the other side (X) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) HL – second most important case in the law of torts
* **Facts:** P asked D, a bank, for a credit report for the purposes of advancing credit to a third party. Prior to giving the report, D stated “for your private use and **without responsibility** on the part of the bank or its officials”. P relied on the positive report from D in advancing credit to the third party and then suffered substantial loss. P sued for negligent misrepresentation.
* **Issue:** Can the duty of care be owed?
* **Held:** Defendant is not liable because they disclaimed their responsibility. Judgement for D, there was no assumption of responsibility in these circumstances; they provided the report gratuitously and included the clause waiving liability.
* Ratio: There can be liability in tort law based on assumption of responsibility. This is because the undertaking itself creates a non-contractual right to the non-negligent performance of the undertaking. Where a relationship is equivalent to a K, there is a duty of care. Such a relationship may be either general or particular. To make out a duty of care you need: (1) P must have placed reliance/trust in D to exercise duty of care, (2) reliance by P was reasonable, and (3) D knew/ought to have known about the reliance.
* **Where can we infer assumption of liability?**
  + Paying for advice is a good indicator
  + The more formal the situation, the more likely an assumption of reasonable reliance
    - Just have to prove the existence of a formal relationship and duty follows (e.g. lawyer-client)
  + Whether the advice provider is receiving some kind of indirect benefit or acting purely of good nature
* principle which creates new rights and then tells us if those rights have been interfered with
* key for this principle is that there are undertakings and then there are reliance on those undertakings
* where there is this undertaking reasonable reliance dynamic then there will be liability but this liability is different from *Donoghue v Stevenson*
* Lord Reids said there was not a special relationship
  + thinks about foreseeability and proximity
  + *Derry v. Peak*: can never be liable for misstatement that isn’t fraudulent.
  + *Derry* is wrong. You can be responsible where there is a special relationship between the plaintiff and the defendant. Special relationship: where a plaintiff tells the defendant they put their trust and confidence in the defendant and the defendant gives that information (they assume responsibility). Assumption of responsibility + reasonable reliance.
  + Accident potential of words is greater than accident potential of physical harm. Professionals have an option when someone asks them for advice:
  1. Walk away
  2. Disclaim: ‘don’t rely on what I say for legal advice’
  3. Advise and risk liability if advice is negligent (because assumed responsibility)
  + No responsibility on these facts because the bank explicitly disclaimed liability.
* Lord Develin
  + he says that this is fundamentally a product of the doctrine of consideration
  + if you have a contract with someone you can always sue them under this case because it is a special relationship and you can sue them either in contract or in tort
  + claim fails because there is no assumption of responsibility. A man cannot be said to be voluntarily undertaking responsibility at the very same moment that he is accepting it that he claims he is not by using the language “without responsibility”
  + Special relationship: if the other side gave you a peppercorn there would have been a contract. You and your lawyer/doctor are always special.
  + *Note: this is not currently the law in Canada but it will likely become the law.*
  1. The independent liability of statutory public authorities \*right = statutory right
  2. Negligent misrepresentation \*Undertaking gives you a right
  3. Negligent performance of a service \*Undertaking gives you a right
  4. Negligent supply of shoddy goods or structures \*right to personal integrity
  5. Relational economic loss \*no recovery for relational economic loss because there is no interference with a right unless there was JV or possessory right

### Deloitte and Touche v Livent

* 4 proportions arise from this case:

1. Reassemble all old SCC authority prior to Cooper into a three part test of foreseeability, proximity and policy
2. It might be helpful to start with proximity analysis rather than forseeability because proximity might held you figure out forseeability
3. In situations where you are using covered by Hedley principle, the proximity analysis is only undertakings and reliance
4. If you do proximity and foreseeability correctly, you should very rarely be talking about indeterminate liability. There should be no indeterminate liability once you find that it was foreseeable and proximate

### Hercules Management (1997) SCC – test for duty in negligent misrepresentation cases

Duty

**Part I: Foreseeability**

A prima facie duty of care will exist if:

1. The D could reasonably foresee that the P would rely on his or her representation; and
2. Was the reliance by the P reasonable

Reasonable reliance requires an examination of if:

1. The D had a direct or indirect financial interest in the transaction in respect of which the representation was made.
2. The D was a professional or someone who possessed special skill, judgment or knowledge.
3. The advice or information was provided in the course of the D’s business.
4. The information or advice was given deliberately, and not on a social occasion.
5. The information or advice was given in response to a specific enquiry or request.

**Part II: Policy**

Policy concerns (re: limitless liability) will not exist to negate the duty when:

1. The D knows the identity of the P (or the class of Ps) who would rely on the statement at issue, &
2. Where the statement itself was used by the P for precisely the purpose or transaction for which it was prepared

### Queen v Cognos (1993) SCC – test for liability in negligent misrepresentation cases

1. The Hedley Byrne principle is not limited to professionals who were in the business of giving advice.
2. Just because there is a duty of care, does not mean that there will be liability unless you have met the other requirements of negligence.

### Grand Restaurants – it is possible to have contributory negligence and reasonable reliance at the same time

* Given that you need reasonable reliance to have a duty, can you ever have a contributory negligence claim? How can reliance be reasonable if it is also contributorily negligent?
* Canadian courts say yes it is possible to have reliance that is reasonable enough for the duty but also contributorily negligent
* There are cases that say it is possible

## Negligent Provision of Services

Neyers suggests to think about it in terms of undertakings and reliance → Hedley Byrne standard