Torts – Winter 2019 – Professor Neyers

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# Negligence: The Standard of Care

Negligence:

You do not intend to do X, but X occurs and someone has a violation of their rights.

Negligence = tort; negligent = you breached standard of care (breach of duty in U.K.)

The five requirements to prove a claim in negligence

1. Standard of Care: The Defendant breached the standard of care
2. Duty of Care: The Defendant owed a duty of care to the Plaintiff
3. Causation: The breach of the standard of care caused damage to the plaintiff
4. Remoteness: The damage was caused by the negligence
5. Damage: The type of damage suffered was reasonably foreseeable- not too remote or too far from the negligent act
6. The Standard of Care and its Breach
   1. What standard applies to the D? Objective standard
   2. Has the D breached that standard?

Ordinarily this means that the 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 D breached his obligation.

BUT: Those who have higher qualifications, skills or hold themselves out to be so will be held to a higher standard of care. So, professionals and experts = higher standard of care than lay persons. Most cases turn on this element

1. Duty of Care

You owe a duty not to injure your neighbour or interfere with their rights. Your neighbours are those that you could reasonably foresee would likely be directly affected by your actions. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In order to have a successful claim in negligence, you have to prove a duty of care exists.

1. Causation (“cause in fact”)

Negligent conduct (breach of the standard of care) must have been a (not the sole, or largest) cause of P’s loss. A factual issue determined on a balance of probabilities. So even if there was a duty and the SOC was breached – if the D actions did not cause or was not a cause of P’s loss = D will not be held liable. Meaning if the harm would have happened anyways (“but for the carelessness of the D, the harm would have happened anyways”) = NO LIABILITY because no causation!

1. Remoteness of Damages

Once it has been established that the D carelessly caused the P’s injury, the court must determine whether or not the damage is of such a type or kind that was reasonably foreseeable. Liability for losses in negligence is limited to consequences that were reasonably foreseeable (not like in intentional torts where D are liable for all consequences of wrongful conduct.).

1. Actual Loss / Damages

Damages are not just a remedy. It’s an actual element of Negligence. P has to prove damages – because Negligence is not actionable per se. P must prove that she suffered a legally recognized injury or loss – as well as their nature and extent. P must establish he has had legally recognized damages recoverable in tort law.

Note: Grief and death are not recoverable at common law. However, Ontario Statute (FLA section 61) now provides that you are entitled to loss of care, guidance and companionship stemming from loss of a family member (small amount). Also entitled to economic losses resulting from death (potentially larger amount). Because kids are a drain on assets, damage claims involving death of children are small.

**Defences**

Once the P has established a prima facie claim, the court must address the issues of defences. The burden shifts to D at this point 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 – apportionment - Mirror of the Ps claim against D, now D is proving same elements of Neg of P = if the D can prove that the 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, the award of damages will be reduced to reflect their contribution to the loss/injury. Usually reduced by 20-35%. Loss is apportioned in terms of the relevant degrees of fault.

# PART 1: THE STANDARD OF CARE

## Objective Standard

### Vaughan v. Menlove (1873), 132 ER 490 (CP) [Hay fire – standard is for a 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. To the best of his abilities he didn’t want the fire to happen because he thought the chimney would fix the problem.

**Defence**: What kind of law would it be if we punish a dumb man for not knowing the consequences?

**Held**: Guilty; The appeal judges did not buy this argument and said that the standard cannot be this vague because it is not OBJECTIVE, and the world would be chaotic (reasonable person standard).

**Ratio**: Need to look at what a reasonable person would think.

**BLL: In the law of negligence, the test is an objective standard for a reasonable person (Vaughan v Menlove).**

Who is this reasonable person? Arland v Taylor – not extraordinary or unreasonable – not required to display the highest skill, or a genius – does nothing that a prudent would not do, does what a prudent man would do – average person, average knowledge of the world.

### Buckley v. Smith Transport Ltd., [1946] OR 798 (CA) [Syphilis car crash; Insane means no breach of standard of care if unable to understand duty]

**Facts**: Employee of D drove his truck into streetcar operated by P; D argued he had suffered an insane delusion; Doctors clarified that employee suffered from syphilis of the brain from which he later died. P sued for negligence based on vicarious liability of employer

**Issue**: Can insanity be used as a defence for negligence?

**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 rested upon him and unable to discharge that duty. (Buckley v Smith Transport)

**Held**: D not liable b/c employee was unable to discharge duty to take care.

* Insanity isn’t technically considered 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
* Employers can be liable for actions of employees by vicarious liability if 2 criteria are met:
  + They have to be your employee
  + They have to be in the course of their employment (i.e doing something work-related)
  + 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

**BLL: if the person is insane, or has an insane episode, there is no standard of care.**

### Stokes v Carson (Not in text) - [not liable if unconscious, since no control over actions]

**Facts**: Guy was asleep in backseat of car, accidentally knocked arm into driver, causing an accident

**Held**: Not liable

**Ratio**: Action must be conscious, not reflexive (Stokes v Carson)

**Reasons**: Didn’t have control over his actions since he was not awake.

### Roberts v. Ramsbottom [1980] 1 All ER 7 (QBD) [Stroke, car accidents] Objective standard applies to cases of diminished capacity]

**Facts**: D suffered a stroke (no symptoms in advance); prior to hitting the P, hit 2 ppl before but kept driving

**Issue**: Is the D liable in negligence?

**Ratio**: An impairment of judgment 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 the control is imperfect), the objective standard applies. Doesn’t matter if he’s morally blameless, he’s still legally liable (Roberts v Ramsbottom).

### Mansfield v. Weetabix [1998] 1 WLR 1263 (CA) [WRONG] Court equates moral liability with legal liability which is wrong; COUNTER-ARGUMENT for STANDARD OF CARE

**Facts**: D’s employee suffered from condition that caused his brain to malfunction if he didn’t eat, which he was unaware of caused a series of accidents

**Issue**: Is D vicariously liable in negligence?

**Ratio**: The standard of care 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**: He was in no way to blame, so can’t be found negligent - Not right to apply an objective standard that didn’t consider his special circumstances - Guilty in negligence because continued to drive even though he was aware of his disabling symptoms, still retained some control - Only loss of consciousness would have applied

**Held**: Not liable for damage resulting from impaired degree of consciousness caused by his condition.

* Previous cases seemed to indicate that unless you were completely incapacitated, you are held at reasonable person standard; here, however, this clearly didn’t apply according to the Court of Appeal. The CA says test should be what a reasonable person suffering from the same medical ailment would’ve done—in this case, they find he shouldn’t be held liable if he’s not morally wrong; they equate moral liability with legal liability—court should not have held this—wrongly decided—could be a good case to reference if you’re arguing on behalf of a defendant however

**BLL: Negligence is not a state of mind. Would a reasonable person have smashed into cars? – no way.** So, someone who does this is negligent.

* Consistent with 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. One cannot except of exculpation anything less than total unconsciousness.

### Dunnage v Randall (2016)

**Facts**: P at home having dinner with partner – D comes into house and accuses P of conspiring against them for a variety of wrongs. D comes back in with gas and lighter. Gas is poured on both D and P. D burns to death, P is badly injured.

Voluntary conduct: Doctors say he was 95% not voluntary because of an episode.

P sues D for his estate.

Trial Judge – completely lost control, shouldn’t be held liable

**Reasons:** Appeal court judges – say yes there should be liability.

1. Just because in criminal law, there would be no liability, does not mean there isn’t liability in civil

law. There must be liability because we know the test from past cases – must be complete incapacity and no control for there to be no liability.

1. Don’t excuse people from living up to reasonable person standard because they have a medical problem – unless the medical problem is complete unconsciousness.
2. Tries to distinguish from Mansfield v Weedabix – the accused was in control when they started driving in Mansfield; the accused was not in control in this case when he returned with the gasoline.

### Fiala v Cecmanek (2001)

Law of Canada is Roberts v Ramsbottom, Buckley v Smith, Vaughn v Menslove – but not Mansfield v Weedabix.

### McHale v. Watson (1966), 115 CLR 199 (Aust. HC) [12 yr old blinded girl – objective standard dependent on age

**Facts**: Barry (12 yrs old) threw a piece of welding rod at the corner post of a structure 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**: Is age relevant in determining the appropriate standard of care?

**Ratio**: The standard of care is age dependent. The standard by which the conduct is to be measured is that to be expected of a reasonable person of the same age. Judge McTiernan is precedent in Canada:

**McTiernan J**: 3 categories of cases involving children (McEllistrum v Etches):

1. Infants—no standard of care—incapable of negligence
2. Young Adults (i.e. 15)—held to adult standard of care
3. Children—standard of care dependent on age—held to standard based on what a reasonable kid their age would do – age, intelligence, experience

It was right for trial judge to consider Barry’s age in considering whether he ought to have foreseen the consequences of his actions—12 yr old would not have been able to recognize the risk

Depends on special circumstances of case, not on general principle that young boy cannot be guilty of negligence

**Kitto J**:

* Agrees age should be considered, but argues intelligence and experience should not be considered (to be consistent with adult standard of care in previous cases)—he says childhood isn’t idiosyncratic (unlike other shortcomings like intelligence/experience)—childhood is a normal stage of development—the exception to the reasonable standard based on age is fair to both parties because it is a shared experience
* Boy exercised degree of prudence expected of average 12-year-old boy
* Unlikely he would be able to identify the risk

**Menzies J (dissent):**

* The standard of care fixed by the law to determine actionable negligence is an objective standard – the care to be expected of an ordinary reasonable man
* This standard should be applied to any person capable of negligence
* Law of negligence is primarily concerned with allowing person who is injured to recover, not concerned with connection b/w legal liability and moral culpability
* The duty of care which Barry owed was to take such care as an ordinary reasonable man would have taken
* Therefore, appeal should succeed
* Even if judged by the standard of a reasonable boy, still would be negligent
* Risk should have clearly apparent to Barry

**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.
* **Held**: Appeal dismissed, Barry lacked requisite foresight for liability in negligence.

**Notes**:

* Mayo Moran, Rethinking the Unreasonable Person: McHale provides more detailed analysis of the objective standard of care
* Distinguishes b/w foresight and prudence
* But then goes on to treat them as indistinguishable in the analysis.

### The Queen v. Hill [1986] 1 SCR 313 [affirms McHale decision is BLL in Canada]

* The McTiernan decision from McHale (age, intelligence, experience) is considered BLL in Canada based on this decision.
* A criminal law case dealing with the application of the “ordinary person” standard to the defence of provocation
* **Wilson J**, when dissenting made some comments about kids (he likes Kitto J’s decision):
  + All kids are on track to eventually reach the usual standard when they become adults
  + 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 (like Kitto in McHale)

### McErlean v. Sarel (1987) 61 OR 386; OCA (Canadian case) WRONG [Kids hurt ATVing – Wrongly decided; Claim insurance consideration is relevant if kids engaging in adult activities—held to adult standard]

**Facts**: Case involved a collision of two dirt bikes driven by kids and a third party is hurt

The court summarized its position on children:

* Children not held to adult standard normally
* Conduct is judged by the standard expected of children of like age, intelligence, and experience.

**Held**: There are exceptions:

* When a child engages in adult activities, they are expected to meet the adult objective standard – no exceptions (\*\*this is BLL in Canada\*\*). Based on US cases (like boys snowmobiling). They also based this decision on the fact that it is ok to hold kids responsible because in these adult situations there is insurance.
* Reasons do not explain the result. Court argued if it’s an insured activity, defendants should be held liable, so victim gets compensated. The courts have never used insurance to decide on liability. Furthermore, no insurance is required to drive in the backcountry.
* Courts also tried to make a link between licensed activities (like driving) to unlicensed activities (like trail biking)—these are 2 different things that shouldn’t be compared on the same playing field.

What do we make all of these kid’s cases?

* People criticize the Australian High Court decision by McHale because they do not believe that we should make allowances for the idiosyncrasies of children (we might argue that childhood is not an idiosyncrasy [like being accident prone], because everyone goes through it).

**Standard of care can be raised**—ie. if you go to a surgeon, conduct of a reasonable person is that of a reasonable surgeon; Beaver says standard is based on how you’re interacting with someone else—i.e. if a surgeon drops his coffee on u at timmies, he’s not interacting with you as a doctor; he’s interacting with you as a citizen—that being said if he does something wrong to you in his office, he’s held to surgeon standard

**BLL in Canada: Age, experience, and intelligence make up the objective standard for kids in the middle category (kids who aren’t infants/young adults) [McTiernan in McHale- adopted by Canada in The Queen v Hill]. The exception to this is when the child is taking part in an adult activity (one that is fraught with danger) [McErlean v Sarel]—this is the BLL even though wrongly decided (too concerned with policy/insurance).**

### 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 doing something fraught with danger (motors)
* How do we justify this line of reasoning to all the cases we looked at?
* 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.
* **What is the standard of care? Reasonable person standard**
  + Mental disabilities – depends – has to go to the rational agency of the person – is their reasonableness impaired?
  + Children – depends – age – infants (no standard of care, wild animals), young adults (18 and up, close to age of majority – in leading cases, age of majority was 21, reasonable person standard of care), children (around 5 years old – 17 years old – standard of care is the age, intelligence and experience of that age) – EXCEPT – where children (NOT INFANTS/TODDLERS) are engaged in dangerous (adult) activities, use the adult standard of care.
  + Elderly – reasonable person standard applies
  + Professionals – engaged in their job – other professionals in their field. If engaged in non-work-related activities, reasonable person standard.
* **And has it been breached? - Not always clear**

## Reasonable Care

I) Economic Approach to the Standard of Care (American Approach: Learned Hand)

II) Canadian Common Law Vies: (Bolton v Stone method/later adaptations)

### United States v. Carroll Towing Co. (2nd Cir. 1947) [Carroll Towing]—Learned Hand Formula

* In this case a ship was tied up in the harbour but broke free and crashed into another ship. The question is whether the captain had taken reasonable care (he had not assigned any employees to stay on the ship to monitor its moorings)

**Issue:** Was leaving the ship unattended for 24 hours negligent?

The Judge named Learned Hand coined a new type of test (Learned Hand Formula) which was economic in nature: the owner’s duty, as in similar situations, is a function of three variables:

1. The probability that it will break away (P) – how likely is it, if this happened a million time, the damage would have happened?
2. The gravity of injury if she does (L) – how much damage would that cause?
3. The burden of adequate precautions (B) – how much would it have cost to do something differently, or make sure that the accident would not have happened.

* If (Burden < Cost of Injury x Probability of occurrence), then the accused will not have met the standard of care required. B < L\*P
* If (Burden ≥ Cost of injury x Probability of occurrence), then the accused may have met the standard of care.
* Issue with formula is unknowns—ie probability—how are u supposed to know that? The formula may sound great, but it’s pretty hard to use it accurately in practice. This is the law of torts in an economic formula. Judges are bad at math so shouldn’t have to use this. Also, its odd as to why the party, not the government gets the money.
* You are negligent when the 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 – damage would cause $10,000, probably of it happening is 0.001
  + B ? (0.001 x $10,000)
  + B ? $10 (expected cost of the accident)
  + If you could have prevented accident for $9 but you didn’t, then you were negligent
  + 9$ < $10
  + So it is clear that society would be $9 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.
* Ford Pinto logic of Learned Hand Formula—amoral; also, hard to apply – were sued for negligence and had large punitive damages paid out to families for disregarding human lives.
* 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.

### Commonwealth View: Bolton v. Stone [1951] AC 850 (HL) Cricket case, old woman; [Negligent when you create a substantial real risk of harm; 2-part test]

**Facts**: Cricket field-- 6 times in 30 years a sixer has been hit onto a road where people sometimes walk (read rarely walk). Guy hits a sixer and nails some old lady in the face.

**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?

* Up to this point we would have just asked – what would a reasonable person have done. But in this case that test probably wouldn’t yield any valuable results because we all would have a very different opinion. That’s why this is such an important case – we couldn’t just use reasonable man test.
* **Lord Reid** delivers the decision and says that in our old test we would have found that the activity was foreseeable or unforeseeable (because it happened before, albeit rarely) and therefore it would have been negligent – but we need a new standard because this one is too high – need new distinction between foreseeable real risk that is infinitesimal or a foreseeable real risk that is substantial. There will usually not be liability for unforeseeable risks or infinitesimal risks; only substantially foreseeable risks.
* “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”
* “People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.”
* Judge agrees, but says that this is not the only factor.
* Need to consider DEGREE OF RISK
* Need to consider SERIOUSNESS OF INJURY
* The difference in this case is degree of risk. Need to consider how remote the chance is that someone gets struck, and how serious the consequences are likely to be if someone is struck. Judge says DO NOT consider the difficulty of remedial measures (B). In this case, the risk was infinitesimal BUT it was very close to liability.

### New Test for Standard of Care (ORTHODOX TEST) [Bolton v Stone]

1. Was the risk foreseeable or unforeseeable?
   1. If unforeseeable, the case is over, since no breach of standard of care
2. 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
3. If foreseeable, was the risk a small or infinitesimal real risk or a substantial real risk?
4. If substantial risk, then negligent; if small risk, then not negligent
5. If there is a substantial risk and action continues, it is negligence; cost of precautions is irrelevant (anti- Learned Hand formula)

* Reason the Learned Hand formula is mentioned is that courts are trying to figure out what a reasonable person would do. U.S. Academic view on reasonable care is based on Learned Hand test (cost of injury \* likelihood vs burden of precautions--- if B > PL, reasonable person would let the accident happen)
* In this case, risk is small/infinitesimal since 6 balls in 30 years is very small risk; although judge said in this case it was close to being a substantial risk because of the seriousness of the injury (i.e. if used a curling stone, it might have been considered a substantial real risk)—threshold to be found negligent is fairly low--- N.b. just because someone gets hurt, doesn’t mean their legal rights have been violated, since goal of law is to balance rights of people—your right to personal integrity is not absolute

**BLL: The standard of care (what a reasonable person would do in the situation) is more an issue of fact then it is of law. \*So whether someone is negligent is a question for the jury, not for the judge \***

**BLL: A careful (reasonable) person tries to avoid creating 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: Summary: the reasonable person avoids creating substantial real risk of foreseeable harm. Aka a person is negligent when they create a substantial real risk of injury. The likely range of injuries that could occur during the activity.**

### Wagon Mound #2 – Privy Council 1967 - [Burden of precautions balanced against Probability and Likelihood but ONLY IN CASES OF SMALL/INFINITESIMAL REAL RISK]

**Facts**: Ship in Sydney harbour being filled with oil. While being filled, oil is spilling into the harbour. Owner says he doesn’t care, just keep pumping. The oil actually catches fire and burns down the entire harbour.

* In WM #2 the judge says that although it was foreseeable that oil might catch on fire in the water, the risk was small because of the likelihood (required temps > 1000F) and seriousness.
* Reid (JCPC) gives the advice of the privy council and talks about his decision in Bolton
* Reid says that he didn’t mean to say that if the risk of occurrence was small, then it was automatically not negligent (Reid judged both cases).
* Before there were two possible scenarios. Bolton gave us a third branch where we have to decide whether it is negligent.
* The Bolton decision recognized that “it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.”
* WM 2: Reid adds to the negligence test from Bolton v Stone the question of the cost of precautions—question of whether the effort or cost of precautions to avoid the small real risk is low or high.
* Cost of precautions (you could have taken) is relevant in cases of Small/infinitesimal risk

In this case, cost of precautions (screwing the cap back on to stop the flow of oil) was negligible—hence liable

**Steps:**

1. Was it foreseeable or unforeseeable?
2. Was it substantial real risk or infinitesimal risk?
3. Bolton and Stone would say no, not negligent BUT
4. TJ adds – with a small risk, its OK to ignore if it would be difficult to get rid of the risk BUT if the risk can be easily reduced or negated, the reasonable person would not impose on his neighbours the risk because of expense or difficulty.
5. Cost of precautions were extremely small, so by not taking the precautions, they are negligible.
6. Judges usually say, that where the risk is substantial, the cost of precautions aren’t relevant. But where the risk is infinitesimal, the cost of precautions are relevant, to make the person liable.

**BLL (applies in Canada): A reasonable person would not disregard even a small or infinitesimal real risk if that risk could have been avoided without difficulty, disadvantage, or expense.**

**BLL (applies in Canada): 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**

* This case is controversial—lots of people think shouldn’t take burden of precautions into account
* Case is called Wagon Mound because in English law, ships can be sued (instead of people)—so ship cases are called by the name of the ship
* This case itself isn’t binding in Canada (although Wyong Shire is) because Privy Council decisions from other countries’ cases are not binding in Canada; case also not binding on English judges (although English courts will follow Privy Council cases normally)—its only binding on Australians since its from there.
* Note also that Privy decisions aren’t judgements—they’re advice (just an FYI for any memo/assignment we have to do)—this why there are no dissenting judgements—since they’re advice, not judgements

### Vaughn v Halifax Bridge

**Facts**: Painting the bridge, had tarps up, and scraped paint off the bridge – paint & chips of paint got all over Vaughn’s car, and he had to have it repainted, and he sued for damages.

**Bolton/Stone test:**

1. Was it reasonably foreseeable that paint would drip/chip onto the car? Yes.
2. Substantial real risk of injury or infinitesimal risk of injury? Infinitesimal risk of injury – property damage from overspray
3. Was there something easy that the city could have done to reduce risk/injury? Yes – put up a sign to let patrons know that the bridge was being repainted and not to park under it/near it.

### Law Estate

**Facts**: Man goes to hospital with serious head pains, DR thinks he has a migraine or aneurism. DR was told only to send for MRIs if they are sure. So, did some tests first before MRI, and man bleeds out from aneurism and dies.

**Judge**:

1. Foreseeable
2. Substantial
3. Costs of precautions are irrelevant because there was a serious risk.

### Wyong Shire Council v. Shirt (1979) 29 Aust. LR 217 (HC) [Consider conflicting responsibilities in the SofC]

* Another case that reflects on the judgement in BOLTON and the Wagon Mound. Australia judge tries to clarify these two cases.
* Foreseeability and negligence are not the same thing. Foreseeability is a necessary requirement but NOT SUFFICIENT
* How can it be that in Bolton there was foreseeability of injury, but the cricket club was not negligent? It’s because:
  + The risk was small
  + The cost of avoidance was high
  + Why was there liability in Wagon Mound #2?
  + The risk was small BUT
  + The cost avoidance was low
  + Wyong Shire lays out Australia’s 2 step process (similar process in Canada), adds to Bolton v Stone and Wagon Mound:
* Foreseeable or unforeseeable
  + If foreseeable, must look at what a reasonable person’s response would have been, taking into account P,L,B (probability, liability, burden), and any other conflicting responsibilities
  + Martini shaker (throw all these things together and figure it out—also can add in Social Utility of the defendants’ conduct from Watt)

ON EXAM: Build up to WyongShire by referencing others; Wyong Shire adds more policy; Watt adds further to this i.e. teacher supervising 10 kids, cant help all of them

* Courts in Canada never apply learned hand formula seriously (which is basically what was just described)—courts in Canada, if there was serious bodily injury, won’t listen to your argument—courts will say there’s a substantial real risk in these cases to avoid the issue
* \*\*In Canada: Costs of precautions generally used to show that you should have done something, rather than getting you off as a defence (so different then learned hand test which is framed as a defence, not a way to make you liable) \*\*\*

### Latimer v. AEC [1953] AC 643 (HL) [Slipping in an oily factory – application of Bolton]

**Facts**: Rainfall flooded a factory floor and agitated some of the grease, making it slippery. The manager spread sawdust and worked all night to try to clean it, but didn’t have enough dust for all areas – man slipped on area not treated with sawdust, broke ankle, and sued for negligence.

**Issue**: Was the employer justified in staying open?

**Lord Porter** (No Negligence—didn’t breach standard of care)

Seemed to say that there was not enough evidence to show that a reasonably careful employer would have taken the drastic step of closing the entire factory.

**Lord Tucker (Concur)**

The problem is simple: 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 rather than allow his employees to run the risks involved in continuing work?

The absence of any complaints about slipperiness, or any other falls during the night point to the conclusion that the danger was in fact not such as to impose upon a reasonable employer the obligation placed upon the respondents by the trial judge.

**Lord Asquith (Concur)**

What evidence the learned judge had before him suggests to my mind that the degree of risk was too small to justify, let alone require, closing down.

We can argue that this case is the exact same situation as Bolton and Stone. It is foreseeable, the risk (based on likelihood and seriousness) is small (infinitesimal real risk), and the cost of prevention is high.

* Note people weren’t likely to die in this case—Learned Hand formula would not have applied if that was the case
* \*CITE THIS CASE AS AN EXAMPLE OF A LOW RISK CASE WITH HIGH COST OF PREVENTION

### Watt v. Hertfordshire County Council [1954] 1 WLR 835 (CA) [Hurt fireman – the social utility of the defendant’s conduct is also relevant factor for determining breach of standard of care]

**Facts**: Fireman needs to transport jaws of life (to nearby accident scene), but usual truck is gone so he and another fireman steady it on the back of another truck (manually). Driver hits brakes, and jaws of life crushes fireman (doesn’t die).

Fireman sues employer; Fireman loses in court and his appeal is dismissed by Denning.

**Denning says**:

* You need to also add into our decision tree the social goal of the action. “it is well settled that in measuring due care one must balance the risk against the measures necessary to eliminate the risk. To that proposition there should be added this. One must balance the risk against the end to be achieved.”
* We can accept more risk when the purpose is important (life saving) [Watt]

**BLL: The social utility of the defendant’s conduct is also a relevant factor to be considered when deciding whether someone breached the standard of care (Watt)**

* Utility – considered in government services only or all cases?
* This case may not jive well with our thoughts on rights: why should the fireman have to give up his rights just because his service is important.
* Involuntary assumption of risk analysis? The firefighter should have understood the risks, and so has waived his protection under negligence. Not an ordinary view.

### Tomlinson – House of Lords

**Facts**: P broke neck diving into shallow beach – alleged the city was negligent for not having roped off or made the beach inaccessible to the public.

**Lord Hoffman**: weigh the P and L with the cost of B and the social value of the activity. Where the activity has no social value (criminal or malicious) then it is very easy to find liability. But where the activity has high social value, it is harder to find liability. Beaches are fun!

**Lord Hobhouse**: no utility needed – just use Bolton & Stone

1. Is it foreseeable that someone would injure themselves? Yes.
2. Is this a substantial real risk or infinitesimal real risk? Court of Appeal confused the seriousness of something happening with the risk of the thing happening. Given that over 100,000 have used the beach this year, and there was only a handful of injuries, the risk is infinitesimal, and no negligence.

### Paris v Stepany (1951 HL case)

**Facts**: D runs factory, P is a worker who knocks out bolts on assembly line (car factory). Risk of pounding bolt – stray metal fragment can get into eye and cause blindness. P already had only one eye, and got a fragment in his eye, and went blind.

Does it matter that he only had one eye? Should the employer have provided safety goggles?

**Judge 1**:

1. Foreseeable risk? Yes.
2. Substantial risk? No. Infinitesimal real risk of injury – can usually get the metal out.

**Judge 2:**

1. BUT it was negligent not to provide the P with goggles because he was one eyed, and giving him goggles would be a small cost.

**There is a difference between voluntarily assumed and non-voluntarily assumed relationships.**

Standard of Care Exam Template – fill in cases to this template for exam

1. What standard or care applies?

2. Was the standard breached?

a. Was the harm to anyone or anyone’s legal rights foreseeable?

b. Additional factors

i. P – probability of the risk – how likely is it that the worst-case scenario is likely to happen? – infinitesimal risk or substantial risk?

ii. L – what sort of injuries are likely to occur?

iii. B – the cost of mitigating the risk? Is it something that a reasonable person would consider? If the P & L is small, cost should be small; BUT if P & L are high, should take all precautions.

iv. Customs

v. Social Utility – cases disagree on the weight to be given here

vi. Conflicting obligations -

CUSTOMS—4 relevant questions: Add this to the martini shaker as another way to determine if their actions were reasonable

3. What is the relevance of customs? Why would the court want to know what the custom is?

4. What is the relevance of the conduct of the average person?

5. Once we know what ordinary people do (custom), does that conclude anything?

6. Can what everybody does be unreasonable?

## Customs: When Does a Custom Become Part of the Reasonable Standard

### Trimarco v. Klein 436 NE 2d 502 (NY CA 1982) [Shower door- Custom may be good evidence of what constitutes reasonable conduct]

**Facts**: In this case P rents an apartment and is hurt when the glass shower door, which was not shatter-proof, shatters. He sues landlord. The case hinges on whether using safety glass had become a widely accepted custom by this point which would be done by a reasonable person.

* “When certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that the [one charged with the dereliction] has fallen below the required standard (Garth v. Rupert)

**Arguments of the plaintiff**: argues custom, Consumer Reports that said it was a serious issue, police were planning on making it a crime

* Courts said you’re allowed to use custom because it helps to show what other people have done in the circumstances (custom is admissible evidence); custom does not have to be universal. All you have to prove is that most/many people in this business/situation would have performed an action (a well-defined group of people in the same profession or situation). What real people actually do in the real world to reduce common risks.
* Proving a custom is not sufficient—you must then prove that the custom is reasonable.
* Test to see if custom is part of Standard of Care:
  + Judge finds that jurors were exposed to some inadmissible evidence (it was going to be made a crime, but was not yet a crime at time of act; hence, evidence shouldn’t have been brought up); judge ordered a new trial
  + Test used to determine whether evidence should be admissible: Prejudice of the evidence (implying he’s a criminal) outweighed any probative value that the evidence had (P > PV; hence not admissible)

**BLL: When certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that the defendant has fallen below the required standard of care. (Trimarco v Klein)**

**BLL: Custom and standard practice can be very good evidence of what is reasonable, but are not necessarily conclusive evidence. (Trimarco v Klein)**

### T.J. Hooper 60 F2d 737 (2nd Cir. 1932) [Tugboat radios – the whole custom may be negligent]

Case on the significance of a custom; judged by Learned Hand (doesn’t use his formula in this

case)

**Facts**: Tugboats towing ships did not have weather radios and ships sank; plaintiff argues negligence. Defendant argues that it wasn’t the industry standard to have weather radios—custom is not to

have the radios

**Issue**: Were the ships unseaworthy? Were weather radios a part of the reasonable standard?

**Learned Hand** says that even if they weren’t used by many of the boats, they are not that expensive, and they make a huge difference in safety so they should be a part of the standard of care. Tugboats are liable. “There are precautions so imperative, that even their universal disregard will not excuse their omission” (TJ Hooper)

**BLL: Sometimes the whole custom is unsafe; if so, it is no excuse for negligence that everyone was doing/not doing something. (TJ Hooper)**

* Rule in 2nd circuit court – where you’ve proved a custom, that is the rule. BUT judge says to think more about reasonableness here.
* Learned Hand didn’t apply his formula in an economic way (P\*L)—he applied it in the manner a common law court would apply it (generally, not in a numerical way)—he didn’t apply his own formula—interesting

### Weiler: Canadian Tort Law

* Custom should not always be the reasonable standard of care in consumer products industries
* Adds to the custom doctrine that in unregulated industries there is always a “race to the bottom”. Customers want to spend less, so companies will often strip out safety.
* \*So it might not be good to look at what most people do. People are notoriously cheap so often what most people are doing is probably not as safe as it should be. \*

### ter Neuzen v. Korn SCC (1995) [OBGYN gives HIV –Juries not allowed to find technical standards negligent unless risks are obvious to anyone]

**Facts**: Plaintiff contracted HIV from an artificial insemination procedure done by OBGYN (defendant)

**Issue**: Question is whether doing AI at this time without warning patients was a breach of the standard of reasonable care

* In Jan ’85 (when incident occurred) could the average OBGYN be expected to know the risks associated with HIV and AI?--- no—risks weren’t well known in North America at the time
* Denning Quote (from another case): “we must not look at the 1947 accident with 1954 spectacles”
* Trial judge instructs the jury that they can either find negligence through one of two grounds:
  + Find that the doctor was negligent on the basis that he failed to comply with the standard medical practice at that time. OR
  + Find that the approved practice itself was negligent
* The problem with this case was that at trial, the jury just ruled negligent but didn’t say why they were negligent.

**Sopinka** says there are two ways that the Dr could be found negligent:

1. Doctor breached medical standard/deviated from professional practice;
   1. How can a regular jury and judge be expected to make a call on a complicated medical standard of practice? This is why SCC ordered new trial – it is crazy to let jury of schmucks decide whether a medical procedure itself is unsafe (unless fraught with danger –i.e forgetting sponge inside patient)
2. The medical standard itself is negligent

**BLL: As a general rule, where a procedure involves difficult or uncertain questions of medical treatment, or complex, scientific, highly-technical matters, it will not be open to find the standard practice negligent (since juries don’t have expertise to figure this out) [ter Neuzen].**

* The judge decides whether you make it into this exception and then tells the jury they can’t find the standard negligent. In these cases, the jury can only find that the doctor didn’t adhere to the standard.
* \*Evidence of conformity with common practice will generally exonerate physicians of any complaint of negligence [ter Neuzen]
* There are, however, situations where the standard practice itself may be found to be negligent – when it is “fraught with obvious risks” the jury might be able to make a call on it.
* SCC sends it back to trial with a way more specific question – whether the Dr. not following up with the patients was negligent

**BLL: Conversely, where a standard practice (including medical, etc) is fraught with obvious risks, that any lay person would understand, a finding of negligence may be made. i.e. not washing your hands, smoking in a hospital, leaving a sponge inside a patient during surgery, practice of keeping young doctors awake for 24 hrs at a time (this may be found to be a negligent practice), etc [ter Neuzen]**

**BLL: As long as a doctor is following a well-respected custom (i.e. 40% of all doctors agree with it—that’s good enough), then they won’t be held liable. [ter Neuzen]**

\*\*Lawyers are not given the same protection as doctors—judges feel well-enough equipped to figure out what a reasonable lawyer should do [ter Neuzen]

### Malcolm et al. V. Waldick et al. SCC (1991) [Slipping on rural driveway- some customs are unacceptable]

**Facts**: Insurance companies from both parties (brother suing sister) are arguing about a lady slipping on the driveway because it was not salted. The defendant argued that the accident happened in a rural area where it was customary to salt the steps, but not the whole long driveway. The defendant loses and appeals on the basis that the CA judge failed to consider the custom they were trying to show

**SCC says:**

1. The judges did consider the local standard (custom), but the judge just didn’t subscribe to your argument. The judge considered it – and dismissed it.
2. When you are claiming a custom exists, the onus is on the defendant to prove that it exists (need expert advice) on the balance of probabilities – need people to testify
3. Even if you prove something is a custom, the custom might be completely unacceptable (Iacobucci said not salting was unacceptable [he seemed to use our negligence tree and factor in P and L]), even though it was the custom in St. Thomas to only salt the steps.

**CUSTOM from Malcolm: Canadian Case—ON EXAM: cite other cases to lead up and then say BLL in Canada is from Malcolm**

**BLL: Custom and standard practice does not always absolve you of taking reasonable care.**

**BLL: A standard practice can be negligent in and of itself.**

**BLL: No amount of community adherence can make an unreasonable behaviour reasonable.**

**BLL: If you want to raise the argument that something is custom, you need to prove it by cogent (persuasive) evidence on the balance of probabilities**

Case is relevant because it’s a Canadian case—seems to be consistent with previous 2 U.S. cases

# Part 3: DUTY: GENERAL CONCEPTS

Every activity has a certain amount of risk. When you are negligent, we are saying that you created unreasonable risk of injury.

Did I create an unreasonable risk? 2 questions to ask:

1. An unreasonable risk to whom? [This is the question of duty]: To whom did I create an unreasonable risk?
2. An unreasonable risk of what? [The remoteness question]

The questions get narrower and narrower.

1. Concept of Duty: when a question arises concerning the person or persons who may be considered within a risk created by the defendant’s conduct.
2. Concept of Remoteness: when a question arises concerning the ways in which a risk may culminate in harm.

Conduct which falls below the standard of care may create risks to various people concerning various particular interests and the impact on those interests may arise in various ways. What the law must attempt to do is to extract the person and the interests that are to be protected.

### Winterbottom v. Wright (1842) (Ex. Ct.) WRONG [Postmaster case where no contract found]

**Facts**: Defendant ------K-----Atkinson------K-------Postmaster------K-----Plaintiff. The plaintiff Winterbottom had been contracted by the Postmaster-General to drive a mail coach supplied by the Postmaster. The defendant Wright had been contracted by Atkinson (a subcontractor of Postmaster) to maintain the coach in a safe state. The coach collapsed (wheel fell off) while Winterbottom was driving, and he was injured. He claimed that Wright had "negligently conducted himself, and so utterly disregarded his aforesaid contract and so wholly and neglectfully failed to perform his duty in this behalf."

**Privity of Contract Doctrine: Only those parties to a contract can sue on a contract (only person to whom offer was made and who gave consideration can sue on a contract). Contract is about personal rights so a third party has no claim, since 3rd party has no rights to the contract**

Only person who could have sued was the Postmaster General, and they clearly didn’t want to waste their money on that

**Plaintiff**: I only drove the coach because I believed that the chain of contracts would protect me.

**Defendant**: the plaintiff and I are not in a contract, I was just in a contract with Atkinson

**Lord Abinger (CB):**

* There is no evidence in the history of a precedent situation similar to this. Therefore, it must be wrong. Everyone else in the same situation must have thought that this legal situation was hopeless (no chance to win).
* I don’t care if you are hurt, I only care if you are hurt if you had a legal right.
* The plaintiff’s case must fail.

**Barron Alderson:**

* Plaintiff is arguing that we don’t have to jump up too many contracts to make his claim valid.
* But if you are saying I should take one step, why shouldn’t I go 50 steps in contract tracing. This would open the floodgates to litigation.
* If the plaintiff was concerned, he should have made a direct contract with the defendant.

**Barron Rolfe:**

* You only have a duty to someone you are in contract with. It has to be a wrong to you.
* Says it’s a case of damnum absque injuria: loss without legal injury (i.e. like Bradford v Pickles)
* Injury alone does not create legal entitlement unless your rights have been violated
* The problem with this case is that the judges did not recognize that a person has other rights beyond just contract rights. Didn’t the defendant have a right to bodily integrity?

### \*\*Donoghue v. Stevenson (1932 – HL) [Beer Snail – you owe a duty not to injure your neighbour]

**Facts**: Decomposing snail in a bottle of ginger beer, plaintiff suffered shock/gastroenteritis. The plaintiff and defendant were not in a contract. Defendant----K----Supplier-----K---Store----K----Friend----gift----Plaintiff.

Doesn’t this case look like Winterbottom?

**Issue**: The question is whether the maker of a product in an opaque container (can’t inspect yourself) owes a duty to the consumer to ensure the product is free from poisons. Remember, this is an appeal to determine whether she has a cause of action and has the right to a trial (this is not actually the trial- so we assume her facts are true)

**BUCKMASTER** (dissent):

* There is no precedent to extend duty beyond those in a contract
* The only exceptions are where the manufacturer has a duty to warn people who will come in contact in 2 situations:

1. Things that are dangerous in and of itself
2. Things that are not usually dangerous but are dangerous in this case because there is a defect that the manufacturer is aware of (i.e. Ford Pinto)

**The opaqueness of the bottle or none of the other facts of the case distinguish it from Winterbottom so it must be decided the same—manufacturer wasn’t aware of snail, so exception doesn’t apply.**

**ATKIN (Majority):** Atkin said every instance has to have a principle, and over time, courts must determine whether the principle is too broad or too narrow—Atkin substitutes law of tort (neighbour principle) for law of contract.

* The common law method is to look at a number of cases and to look for the principles that hold all of the cases together
* If this isn’t the case, then the law of England is purely arbitrary
* There must be a common law general principle; the neighbour principle is defined BUT it won’t be a perfect summary of the common law.
* You have a duty in tort not to injure your neighbour (not to interfere with their rights) [Donoghue v Stevenson] established duty in tort
* Your ‘neighbours’ are those that you could reasonably foresee would likely be directly affected by your actions
* Winterbottom was argued on the wrong basis. The parties argued about privity of contract when they should have based their claim on their right to bodily integrity. He should have sued in tort law, not contract.
* “The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be:
* My neighbours are: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”
* It would be crazy if a manufacturer poisoned drink (not capable of inspection) and then sold it to a husband and was not liable when his wife died. What kind of a law would this be? The person most likely to be injured would have no suit; but others along the line would have suits.
* The mfg and Donoghue were neighbours, and mfg had a duty to consumers.
* Not suing because of breach of contract; suing for negligence.
* There must be reasonable foreseeability for the plaintiff to have rights to sue the defendant: close and direct interference—rights are limited to those affected in life and property

**MACMILLIAN (Concurring):**

* You can have claims in two different areas of private law.
* Winterbottom just said that he didn’t have a claim in contract, but that doesn’t mean that you can’t sue them in tort
* If you want to sue in tort, you need to be able to show that someone had a duty to you.
* Non-existence of a contract does not mean that you cannot sue in tort.

**BLL: Breach of contract and an action in negligence can co-exist on the same set of facts. Just because you have a duty in contract, doesn’t mean you can’t also have a duty in tort (although an exclusion clause in the contract can limit your duties in tort) [Donoghue]**

**BLL: In order to have a successful claim in negligence, you have to prove a duty of care exists [Donoghue]**

**BLL: You owe a duty of care not to injure your neighbour. Your neighbour is someone so closely and directly affected by your actions that they ought to have reasonably been foreseen as being affected. [Donoghue]**

**Comments on Donoghue**

What about the problem that Buckmaster (dissent) made about this opening the floodgates to unlimited litigation?

* Atkin handled this problem by limiting the number of people who qualify as your “neighbour”.
* Doesn’t Donoghue contradict Fontainebleau, Bradford v Pickles, and Canary Wharf?
* No. The reason that the Donoghue case is consistent with Fontainebleau is because Atkin still says that there must be an infringement of a right that you have.
* There must be a reasonably foreseeable interference with a right—rights weren’t violated in Fontainebleau/BvP/Canary
* What does it mean to be injured? It has to be an injury to your person or your property (reasonably foreseeable interference with your rights).
* More to privity than just rights.

### Palsgraf v. Long Island Railroad Co. (1928 NY CA) [Train Fireworks- Duty = RF+Right]

Palsgraf is the 2nd most famous negligence case, but THE MOST IMPORTANTANT NEGLIGENCE CASE

THIS IS THE NEYERS/Cardozo VIEW

**Facts**: Two railroad employees shove a guy onto the train, but he drops his package (just a little newspaper wrapped box) containing fireworks which explode and knock over a big scale which was 20 feet away and injure Plaintiff (different person). P sues railroad company saying their employees caused her injury. Freak accident situation. P sues railway company (by way of being vicariously liable for the actions of the conductor) because they have loads of money

**Held**: Trial judge finds that D is liable

Standard of care question (not super applicable but use our tree):

* The conductor breached the standard of care by pushing the person onto the train; but was a duty owed to Palsgraf?
* They don’t really address this in the case, but it is fair for us to conclude that shoving someone onto a moving train creates small foreseeable risk that is easy to avoid and therefore negligent.
* Damage is not necessarily a requirement of negligent behaviour.
* We have a duty not to be negligent, we have a duty to everyone in the world; if someone was injured, they can sue, regardless of the extent of the damage.

1. The negligence has to factually cause the injury.
2. Proximate cause (legal cause) – damages suffered must be connected to the negligent act. Because of convenience, public policy, sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.

**NEW YORK COURT OF APPEAL**

* Cardozo (+3) NOT LIABLE [THIS IS THE COMMONWEALTH VIEW OF DUTY] Consistent with Donoghue v Stevenson

1. Disagrees with Andrews fundamentally because the case isn’t about proximate cause or factual cause – it is only about DUTY. DUTY = RF(are you a neighbour) + RIGHTS\*\*Cardozo: Duty analysis is two part:
   1. Right
   2. Wrong in relation to that right (reasonably foreseeable interference that an injury could occur)\*\*
2. Cardozo’s analysis explains cases in both nuisance and negligence—must be right and RF violation of that right
3. Do you have a right?
   1. Woman clearly has the right to her bodily integrity – so Cardozo focuses on 2nd step
4. Wrong in relation to that right—damage to that person must be reasonably foreseeable?
   1. She wasn’t a neighbour (using Donoghue logic): It wasn’t reasonably foreseeable that she could be hurt – so you don’t owe her a duty. The railroad owed a duty to the passenger they were pushing onto the train, but not some random lady
      1. "There was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and wilfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him." Without any perception that one's actions could harm someone, there could be no duty towards that person, and therefore no negligence for which to impose liability.”
      2. The court also stated that whether the guard had acted negligently to the passenger he pushed was irrelevant for her claim, because the only negligence that a person can sue for is a wrongful act that violates their own rights. Palsgraf could not sue the guard for pushing the other passenger because that act did not violate a duty to her.
      3. Privity – only people’s whose rights are being interfered with can sue.
      4. What about the Andrews logic of bad = punishment. Cardozo says that is for criminal law, not tort law.

**Andrews (+2) [Dissent – HE IS LIABLE] THIS IS THE POPULAR U.S .VIEW [FAULT + LOSS]**

* You have a responsibility to not cause injury to others. He has the (FAULT + LOSS) view of tort law. You were not carefully loading passengers, and someone was hurt and suffered loss – you need to compensate these peoples
* There are two limitations on your liability (two cases where you are negligent, but you can get away scot-free):

1. Factual cause: the negligence must factually cause the injury. If you are bad and then someone is randomly hurt, you are not liable
2. Proximate cause: how far do we trace the line of the liability (sleeping in, caused horse to escape, caused kid to run into butcher shop, caused beheading). Andrews says we draw the line on the basis of practical policy. We can’t have the line of liability going on forever.

The decision on where to chop the line according to Andrews can be based on (martini shaker):

1. Natural and continuing sequence
2. Is one thing a substantial cause that induces the other
3. Direct result without intervention
4. Was what happened foreseeable
5. Time and space (how close were the scale to the train tracks, and how long after the explosion the scales fell)
6. Should be liable in this case according to Andrews: although it wasn’t foreseeable, it was a substantial cause, wasn’t too remote in time and space, was a natural and continuance sequence, no intervention; martini-shaker
7. Cardozo’s reasoning is like a big circle: if a right/reasonable foreseeability is outside the circle, then you lose; you win when you have both a right and there was reasonable foreseeability—the reason why you lose/win is the same
8. Andrew’s reasoning is akin to a line: Bad + Causation; the reason you aren’t liable is because of policy—you’re infinitely liable until you hit the policy point on the line -------------policy------->

**BLL: Cardozo is the BLL in Canada. It is also an excellent example of the principles in Donoghue in action.**

**“Mr. Justice Cardozo and the Law of Torts” –Columbia Law Review**

Look at three criteria to evaluate Andrews v. Cardozo: Fits cases, coherent, justified (Can use this to justify why we adopt Cardozo’s view)

COLUMBIA LAW REVIEW OUTLINES REASONS WHY CARDOZO IS BETTER VIEW:

1. Coherent
   1. Reasons for imposing liability should be same as reasons limiting liability—same thing/theme animates all principles. Hence, Cardozo is better
2. Fits the Cases
   1. He says Cardozo better explains the outcomes in the cases (Donoghue v Stevenson/Deyong v Shenburn, etc), whereas Andrew’s view is based mostly on the judge’s decision of where to cut the line.
3. Easier to Apply
   1. Andrews’ criteria for deciding where to cut the line (direct, intervening causes) are all very washy and anything could factor into the analysis since it’s mostly a political question. Cardozo is much simpler.

### McPherson – applying Andrews & Cardozo

Facts: M is buying a car in Florida, it is manufactured in Detroit. M gets into car and as he is driving the wheel doesn’t work, he crashes and injures himself.

Andrews liability? It happened a long time ago, Detroit is far from Florida, and the car passed through many hands, so under this view it is likely there would be no liability.

Cardozo says yes liability – even though there were lots of contracts/hands that the car passed through, a risk was created, and M was injured.

1. Does the plaintiff have a right?
2. Was the defendant wrong in relation to that right?
   1. If either of these answers are no, there is no liability.

Prosser says: there must be a close connection between the harm threatened and the harm done.

Duty to Rescuers: Do you owe a duty of care to rescuers? Is this a direct duty, or a duty vicarious?

### Haynes v. Harwood [1935] KB (CA) [Police stops runaway horse- you owe a duty to rescuer]

**Facts**: Horse and carriage left unattended. Boys startle horse with stones. Horse gets loose. Police officer runs out, trying to save a woman with a child, and the cop gets injured. Is the owner of the carriage liable to the cop?

Defendant raises 3 arguments why he shouldn’t be liable:

1. The act probably isn’t negligent – no breach of standard of care, no duty of care to the police officer.
2. There was an intervener in this situation (novus actus) – you should go sue the boy throwing rocks or the school who let him out early. The actions of the boy broke the line of causation.
3. A volenti argument: He may have been negligent, but P’s actions were voluntary. If you want to be a hero –don’t come to me to complain.

**Held**: Leaving horses unattended breached the standard of care based on the business of the street, the proximity of the school, and his failure to use the brakes – he was negligent.

1. You do owe a duty to the police officer. Someone getting hurt is exactly the kind of thing we would expect to happen (RF) and the police had a right to personal integrity.
2. \*\*It’s not about if it was reasonably foreseeable that a specific person would be injured, but rather that a certain class of people (i.e. anyone on the street) would be hurt (Haynes v Harwood)
3. The intervening act (novus actus) was also foreseeable. You can’t use the boys as a cop out. The chain of causation was not broken since his actions were foreseeable.
4. Reasons to justify the view that the defendant is liable (DEFENCE OF VOLENTI):
   1. What about the fact that the cop decided on his own to intervene? Well he didn’t actually consent to take on the risk.
   2. Volenti doesn’t apply in situations of emergency: In a rescue situation, there is no time to consent to assuming risk. Whenever you feel that you had a moral duty, you also did not consent.

**BLL: If rescue is foreseeable, then a defendant can be liable to the rescuer as well as the person injured or threatened to be injured (Haynes v Harwood)**

**Rescue doctrine: Hordsley v MacLaren – If you create a situation where it is reasonably foreseeable that a rescue will need to take place, you are liable.**

**POLICY: Some people critique this as being a policy preference to encourage people to intervene in rescuer cases.**

## Duty to Unborn Children

### Duval v Seguin

**Facts**: Mother pregnant in car, gets in car accident. Fetus brakes bones but they are able to deliver the baby.

**Issue:** Can the fetus recover for its injuries? Yes. People owe duties to the lawful users of the road. It is foreseeable that there are pregnant women on the road, so you owe damages to the fetus.

Once a child is born alive, it can sue for prenatal injuries as long as it is a foreseeable plaintiff.

**Family Law Act**: No one is disentitled from bringing an action against another even if they are parent-child. No person is disentitled from bringing an action even if their injuries occurred before birth.

### Dobson v Dobson

**Facts**: Pregnant mother is driving in the slush and is involved in an accident where she is found negligent. Son is born with cerebral palsy. Grandfather sues boy’s mother because she has automobile insurance (insurance company takes over defence for pregnant mother—they have a right to do so since mom wants to lose to get $$).

**Issue**: Whether a mother should be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the fetus.

**Trial Judge**: If we look at Duval v. Seguin then we see that a baby can recover for injuries received by a third party while in the womb provided, they are born after. Family Amendment Act (legislation) allows child to sue their parents.

**CA**: Should be liability, but cut it back. Only things that a mother does that she is liable to for third parties. A mother would be liable to others on the road, so liability is found here. TJ is correct.

**SCC**: Should there be liability on this set of facts?

**Cory (majority)**

Anne’s test:

1. Reasonably foreseeable harm (doesn’t care about proximity) – YES. It is reasonably foreseeable that a mother could harm their fetus.
2. Policy negation step (need the escape valve to avoid tons of litigation)

When does a fetus become a person? What rights are they entitled to at that time? And are the rights retro-active or at that moment?

Policy Reasons:

1. The difficulties inherent in articulating a judicial standard of care for pregnant women—would be punishing poor women who can’t afford to look after their fetus.
2. If we say she is liable, then it would affect women’s lifestyles because we would scrutinize what they ate, when they worked etc.
3. Autonomy.
4. The fact that there is insurance money available is irrelevant.
5. Road users – violates Palsgraf – duty cannot be derivative of another duty to a third party. The duty must exist on its own.

**McLachlin (+LD) Concurrence (female perspective)**

Applying common law liability for negligence to pregnant women is to trench unacceptably on the liberty and equality/autonomy interests of pregnant women.

1. Rules in tort law must be consistent with Charter values.

If we want to hold mothers liable, then Parliament needs to legislate this.

**Major – Dissent** – there is test that you owe duties, and there must be good policy reasons to remove them.

The child should have a claim unless there’s a good reason to take away a child’s rights. To grant a pregnant women immunity, would create a legal distortion.

You don’t have autonomy rights to commit torts. In situations where the mother owes a duty to a class of persons, there is no reason to take away the fetus’s rights. Different from Palsgraf. The duty here is owed.

**BLL: Pregnant mothers do not owe duties to their fetuses.**

**BLL: The common law must be developed such that it is in accord with Charter values.**

So what rights do fetuses have? There is no answer in the common law. Dobson says one thing, and Duval says the opposite.

Weinrib says: Think about possible classes of people effected – if fetus is in a class of many, the mother should be liable. If the fetus is the only one in the class, mother shouldn’t be liable.

### Cooper v. Hobart (2001) SCC

THE CURRENT LAW IN CANADA IS COOPER V HOBART

**Facts**: Investor invests with a company and loses tons of money. The investing company is found to have committed some questionable practices. The investor is pissed that the regulator did not catch the company earlier and shut the company down. Accuses investing company of negligent supervision

**Trial Judge**: Regulator is liable

British Columbia Supreme Court: There is a policy valve (BC taxpayers shouldn’t be on the hook for this), so there is no liability.

**SCC (unanimous):**

Anns’ test is still valid. It just has been a touch misunderstood. Court says we need to work policy more into the analysis in the new test.

The tweaked test has two steps:

1. a) Is it reasonably foreseeable that the plaintiff or class of plaintiffs could be harmed?

b) Is there sufficient or close enough proximity between the parties [(a) and b) seem to be all about policy between the two parties]—it’s about the relationship between the parties

*i) Is it an established principle (has another case already answered this proximity issue by the SCC)?—if yes, go to other case, and apply that case.*

Cases where a duty has already found to be owed:

* 1. Act that causes physical harm/damage to personal property or body? (Look at whatever was said in Donoghue v Stevenson)
  2. Nervous Shock? (Alcock, Sudaati)
  3. Negligent misrepresentation (Hedley, Byrne, Heller)
  4. Governmental Liability
  5. Fetuses not listed, but go to cases we’ve done

---if it falls into a bucket, you must follow the test from those cases (apparently)

*ii) If New Case, look at Proximity (“Freshness”):*

• Statute involved? Always look at the statute

• Physical closeness in time and space?

• Reliance? Reasonable in circumstances?

• Expectations?

• Property rights

• Martini shake this shit—and say i.e. they may be physically close, blah blah, then conclude if there should be a duty based on proximity

2. Policy (I’m GUESSING YOU STILL HAVE TO DO THIS, EVEN IF THERE WAS AN EXISTING DUTY- THERE MAY BE NEW POLICY REASONS):

* This step of policy is more far-reaching. It is no longer about the relationships between the parties. It is about the effect of recognizing a duty on the other areas of the law and the courts. Ex: would recognizing a duty lead to unlimited liability, would it hurt women’s rights etc.
  + Coherence – would recognizing a duty in tort interfere with another type of law (ie. contracts or equitable mortgages)
  + Legal system – would it require the judges to step outside of their role or take up too much judicial time
  + Society – would it interfere with things we like to do? Alcohol at parties, playground equipment.
  + Indeterminate liability – too much liability for too many people for too long.
  + Policy v. operational (only applies to government liability). Ex. Could you sue Ontario for not having autism programs? This part of the test says that you can’t sue the government just because it was government policy to do/not do something. However, if they do have a program, but they make a mistake and hurt your kid, you can sue because this is operational – to protect the democratic nature of the legislature.

On EXAM: If there is an SCC case that has already been decided that says yes and put them into the Cooper v Hobarts test where you think they belong (under proximity or policy).

Applying to Cooper v Hobarts case – example for exam:

1. Reasonably foreseeable – is damage to the investor reasonably foreseeable? Yes.
2. **Proximity** (IMPORTANT PART) – not existing category – what factors to look at to determine proximity – statute is involved so look to that – statute is imposed for the benefit of the public, so there can’t possibly be duties owed to individual members of the public (ie private duties) – No proximity.
3. Many public policy reasons liability would not be involved
   1. Registrars role is quasi-judicial – must be fair in judgements – recognizing a duty in tort would be inconsistent with the quasi judicial role
   2. Would lead to indeterminate liability
   3. Unfair to tax payers – uses tax payers’ money to pay for judicial hearings
   4. Policy v Operational – here the registrar is engaged in policy decisions – inconsistent with imposing tort duties on the registrar.

**BLL: this whole crazy analysis (Anne’s Cooper Test) is the BLL in Canada on duty.**

**BLL: for government to be liable, must be an operational decision, not a policy one.**

**In contrast to Palsgraf and Cardozo: 1) Reasonably foreseeable, 2) Rights being interfered with.**

Applying Cardozo:

1. Yes, it is reasonably foreseeable.
2. If there was a contract, then yes. If there is a statute that regulates the duty, then yes. If none of these are there, then no right is interfered with and no duty.

Some Australian High Court decisions:

Dean J on Proximity:

Proximity explains why there doesn’t exist duty where damage is reasonably foreseeable.

Proximity is a concept which has some definitive content – to negligence.

Having all these categories that make no sense would make tort law incoherent.

Dawson J on Proximity:

Proximity says nothing about duty – it has no substantive content and doesn’t really mean anything.

### Deyong v. Shenburn [1946] KB (CA) [Actor stolen clothes – supports “right protecting” view]

**Facts**: Actor sues his producer for failing to secure his dressing room and allowing someone to break in and steal his clothes.

**Issue**: Did the defendant breach the STANDARD OF CARE? (not duty, separate concept)

* Right creating or right protecting?

Parcq LJ says that the theft was foreseeable but says that the employee DOES NOT have an entitlement to have his clothes secured. He has a right to his clothing only in the state that they are currently in. Your right to your things is a right to exclude other people from them; you don’t have a right to make others look after you things---- Theft was foreseeable, but there’s no right to have other person look after your stuff, so not negligence (it’s like baby in puddle—there’s no legal liability that makes me save them). Donoghue v Stevenson only applies to your actions, not your non-actions.

**Reasons**: Judge adopts the right protecting view.

* If he was taking the right creating view, then he would have found differently because it was foreseeable and proximate – and there doesn’t appear to be any public policy considerations why this shouldn’t be a rule.
* Neyers likes this case—Deyong v Shenburn is an example supporting the RIGHT PROTECTING VIEW

**BLL: The classic right protecting view is correct. In order for there to be a duty of care, there needs to be a right that his duty can correlate to.**

**BLL: There is no liability for pure omission. Merely failing to help someone does not generate a duty.**

This case jives perfectly with Fontainebleau and Canary Wharf. If we take the classic view from Donoghue, we get negligence and nuisance working together –woo!

How do we find out what rights we have?

* Property law rules say who owns what, when, and how those rights operate
* Contract rules
* Family law says you have certain rights vis a vis your spouse and children

Notes: What about person rights? Civil law has a “persons” course; common law never fully articulated this. In common law you need to infer your personal rights from torts – this may be why people think that torts create rights. NOT the case in criminal law; Criminal law is about offending the rules of the state. Also remember that your personal rights at criminal law can be different than tort personal rights.

### Michaels (England court)

**Facts**: Women called in saying her abusive boyfriend was going to come back and kill her. Her call wasn’t transferred properly to police and she was killed by her boyfriend.

**Held**: No one has additional duties under Canadian tort law based on their job/profession.

### Childs v Desormeaux (2006) SCC 18

**Facts**: Someone hosts a party where the guests drink alcohol. Desmoreaux is drunk, and drives away and causes an accident. He hits Childs’s car. One person is killed, three others seriously injured. The party was hosted by Courrier and Zimmerman at their house.

**Issue**: Is the host (organizer of social parties) liable to the persons injured in the accident?

**Held**:

**Notes**:

* Has there been a case where we have held someone liable for serving alcohol? There are commercial cases (involved bars, pubs, etc.), which make it a separate category. Why does this make it a separate category from private residence?
  + Economic reasons – incentive to over-serve people to make money.
  + Strict legislative rules that govern commercial hosts, but these don’t really exist for private hosts (with exceptions obviously)
  + Relationship is different – pay for alcohol at bar; don’t pay at private residence
  + Smart Serve
* Cooper Hobarts test time:
  + 1. Reasonable foreseeability? McLachlin says no; no reason to suppose that he would drink and drive even though he was an alcoholic and has done this before. Would have needed a specific finding of fact to determine that the host knew he was drunk before he left and this was not found by the trial judge.
  + 2. Proximity? McLachlin says: think of situations where there is proximity and see if any of those exists.
    - 1. Attract people to a dangerous activity – owe a duty to 3rd parties to be careful. – applying – not risky enough of an activity.
    - 2. Paternalism – right to control/see to children’s best interest (also prisoners-prison guards, teachers-students) – applying – no duty/right to control those who are drinking/hanging out at your home/party.
    - 3. Duty to public – then you can owe duties to individuals in the public (public law obligation that is somehow actionable in private law) – No, not a public/commercial business, so no liability.
    - 4. Other exception: Special relationship with the person – created under Hedley Byrne Heller – will discuss later.

**Non-feasance** = inaction cases. Cases where inaction is tied to an action, are pseudo-non-feasance cases.

### Rankin’s Garage and Sales v JJ (2018) SCC

**Facts**: A vehicle is stolen from a commercial garage by two minors (15 & 16-year-old). The car was left unlocked with the keys in it), and they crash it; one of the boys suffered a catastrophic brain injury requiring round the clock care.

**Issue**: Does the business owe a duty of care to the injured party?

**Notes**:

Does it fit in an existing category? No specific category that describes this so start with Cooper v Hobarts from scratch.

1. Reasonable foreseeability – Personal injury is not reasonably foreseeable as a consequence of stealing a car. Reasonably foreseeable that the car may be damaged, but definitely not a person – specifically not a child. The risk of leaving keys in a car is that it will be stolen and maybe damaged – not that children will be injured.
   1. In previous case law – there was always some fact that made something riskier (ie. leaving a car running, outside of a bar, with the door open).
   2. Would need concrete finding of fact that Rankin knew it was reasonably foreseeable that a child would steal the car and injure someone.

Dissent: Brown J: Use Donoghue v Stevenson – plus this is reasonably foreseeable. No case exists where the risk of theft does not include the risk of theft by minors. Rankin himself testified that cars had been stolen by minors.

Weinrib says: Leaving a car unlocked, risk of theft; people who steal cars are irresponsible, and therefore drive dangerously – therefore there must be liability.

Duty Principles – must be analyzed differently:

1. Liable for reasonably foreseeable and proximate interferences with pre-existing rights (D v S, Cardozo in Palsgraf)
2. Undertakings, and reliance on those undertakings – based on the creation of new rights and then tells us whether or not those new rights have been interfered with (Hedley Byrne v Heller)

## Negligent Misrepresentation

### Hedley Byrne & Co Ltd. v. Heller (1964, HL)—SPECIAL RELATIONSHIP between the parties

One of the most famous cases in the law of negligence. (In confidence, without responsibility)

**Facts**: P runs a company that works with advertisers. P’s business required them to extend a lot of credit to their clients. No credit bureaus. P calls up D (bank) and asks about 3rd party’s reputation. D writes back that (“in confidence, but that they don’t assume any responsibility for their statement”) the client is good for money. P writes back and checks if the 3rd party would be good for 100,000 // D writes back and says this is more than usual, but they have no reason to be concerned with the client. 3rd party goes bust, and they still owe 17,000 to P. This case is at pleadings—not at trial—so all that’s discussed is Duty.

Court says you can be liable for negligent misrepresentation, but not in this case.

**Judge Reid (acts just like Denning) focused more on RF (D vs S / Ann’s type of reasoning):**

* Words are more dangerous than actions because: i) Once you tell one person you have no idea how far it will go. II) Even prudent people will say things at a social event that normally they wouldn’t intend other people to rely on.
* Traditionally the law has shown a lot of caution (Peet case) about imposing duty on what is said (no PEL unless fraud)
* The correct approach is to impose liability for PEL only where P and D are in a special relationship or if there is fraud
* What makes a special relationship?
* Where the P places reliance and trust on the D, the reliance is reasonable, and the D knew about the reliance, then there is a special relationship (Reid in Hedley Byrne). This special relationship may be either explicit or inferred (inferred in this case).
  + The reliance must be reasonable in the circumstances
  + The bank needs to know, or ought to know that the trust is being placed with them
  + This will strike a balance between professionals and those that rely
  + The balance is struck because professionals can protect themselves in this situation by:
    - Ignoring the request for information
    - Making an explicit disclaimer that this information is not to be relied upon
* IN THIS CASE THE BANK HAD A DISCLAIMER—so no responsibility, so no special relationship.
  + No undertaking but there may have been reliance – but you need both to make out a special relationship

**Pearce, J.**

He says in all situations in law where you assume responsibility and someone relies on it, there should be responsibility

He compares this to bailment (where you’re liable for taking on responsibility)

**Devlin, J. (acts just like Cardozo) Focused more on contracts:**

Sees this as a contract law problem

If you offered the banker a peppercorn for the credit report then there would have been a contract and the banker would have been liable. A contract is an undertaking and you can sue in contract or tort law.

Devlin thinks that in situations where ‘but-for’ the absence of consideration you would have treated it like a contract, then it should be construed as a special relationship (NEYERS LIKES THIS VIEW—but its NOT THE LAW).

The common law needs a way to deal with undertakings that are not contractual in nature – and this is what torts does; when you rely on these undertakings to your detriment.

3 circumstances where there is a special relationship:

* Paid for (fiduciary exchange) the advice
* Consideration and therefore a contract
* OR, but-for the absence of consideration, there would have been a contract.

Some situations where special relationship is a given:

* Doctor to their patient
* Lawyer to their client
* Banker to their client

Apply to this case:

* It isn’t one of the pre-approved special relationship categories
* It wasn’t paid for, but it was formal, there was some kickback
* So usually this would lead to a special relationship – but in this case there was no special relationship because of the disclaimer

This case is important:

* You can be liable for pure economic loss
* You need to have a special relationship – and we have a sort of test

\*\*\*SCC will later just turn this into Anne’s test. They will say that Hedley means that you take RF and then you mix in policy

* Problem with this is that it can’t explain why he got 2000 bucks back, but didn’t get the 200 back
* 2 possible interpretations of Hedley Byrne:

1. Not that different then D v S: foreseeability + proximity and some policy (SCC view)
2. Need to have rights—normally you don’t have rights to protection of your economic position—but you have a right here bc contracts create legal rights and obligations—the contract-like thing here is being created by the assumption of responsibility, coupled with the reasonable reliance on the assumption of responsibility [Cardozo Rule—Neyers likes this but its not the BLL]

\*\*ON EXAM: DO WHAT THE SCC SAYS- NOT WHAT NEYERS SAID (so ignore the 2nd view)\*\*

Deloitte & Touch v Livent (2017 SCC) – basically HB v H disguised as Cooper v Hobarts

**Issue**: How is one supposed to approach a negligent misrepresentation case in Canada?

Rearrange the order of Cooper & Hobarts:

1. Start with proximity – there will be proximity if there is an undertaking, with reasonable reliance.
2. Was it reasonably foreseeable as coming within the scope of the undertaking? Determined on facts of said – what was said and the context of what was said.
3. Policy

Four important notes:

1. SCC has now said to dismantle all cases prior to Cooper & Hobarts, and put them back together with these 3 steps (RF, Proximity, Policy).
2. May be helpful in many cases to start with proximity analysis rather than starting with foreseeability – can usually help to determine applicability faster.
3. In relation to cases that would, in England be covered by HB v H principles; in those cases, in Canada, the steps for the proximity analysis are undertaking and reliance.
4. If you do proximity and foreseeability correctly, you should very rarely be talking about the idea of indeterminate liability (policy).

* Fraud is regulated by the CC so these principles do not apply; liability for fraud cannot be disclaimed.

### Glanzer v. Sheppard (1921, NYCA)

**Facts**: D is public weigher who had been hired by vendor to certify the weight of bags of beans sold to P. P purchased beans based on the weight stated by D; but it was wrong and P overpaid. P sued D for amount overpaid.

**Issue**: Can the P recover from the weigher even though there is no privity of contract?

**Held**: Cardozo says that there is a special relationship between P and D.

D knew the purpose of the certificate of weight. There is a special relationship, so there is liability

Cardozo says: As long as you assume a responsibility and someone foreseeably relies on your responsibility, you can be liable in tort (Glanzer v Sheppard).

### Ultramares v. Touche (1931 NYCA)

**Facts**: Some accountants (Touche) knew that the accounts when certified would be used to raise money and for that purpose supplied 32 certified and serially numbered copies. On the faith of one of those copies, given to it on its demand, the plaintiff lent the company money. The audit was found to be negligent.

Issue: Are the accountants liable?

1 view: Accountants are professionals, so they should be liable; however, Cardozo disagrees:

Cardozo: “If you impose liability on accountants, you will be imposing a duty on an indeterminate number of people for an indeterminate amount of time to an indeterminate class” [Ultramares]

He didn’t make this call based on policy (like SCC would later mistake), he said it was a conceptual problem to have a private law duty owed to the whole world—it’s a RIGHTS problem, not a policy problem.

* Cardozo distinguishes this case from Glanzer v Sheppard

In Glanzer, duty was owed to a specific individual (because they assumed a responsibility—said they would do something for P-- = contract-like)

In Ultramares, the accountants (according to that line of thinking) didn’t assume a responsibility to random people they had never talked to = not contract-like. There was no guarantee made to P in this case—a contract is one way to guarantee things—another way is outside of contract law, yet it still must look like a contract (just without consideration)—not contract-like in this case. Has nothing to do with the facts—SCC gets this wrong and then resorts to policy to try to justify their misunderstanding

Think about it in terms of assumption of responsibility (to whom, for what purpose)—if you aren’t one of the people to whom they assumed responsibility or it was for a different purpose, then you can’t sue them.

To prove responsibility: If I’m a professional and you ask me to do something, and I do it, then I’ve assumed a responsibility to you. Why else would I do this but for my responsibility to you (cases infer this assumption of responsibility. But if you explicitly assume responsibility, then its even easier).

**BLL of Two Cardozo Cases: they are struggling to try to balance the needs and responsibilities of the professionals and those who rely on them.**

**-1 side of debate = Donoghue v Stevenson + Policy (RIGHT-CREATING VIEW)—CANADIAN position**

**-Other side: Contract-like view—no policy (RIGHT- PROTECTING VIEW)—UK position (his preference)**

### Re Polemis and Furness, Wilthy & Co. [1921] KB [Exploding ship – directness=proximity]

Facts: The defendant's employees were loading cargo into a ship. Due to an employee's negligence, a plank fell into the hold of the ship. The ship had been through a bad storm and some gas had spilled into the hold. The plank caused a spark, which ignited some benzene stored in the hold, causing an explosion that sunk the ship.

1. Breach of standard of care: Kicking a plank into the hold of the ship does breach the standard of care because it is reasonably foreseeable that it could injure someone (your mom would say not to do this)
2. Owe a duty: Employee does owe a duty of care to the employer because he is a neighbour (RF+Right)
3. Remoteness: Is the damage too farfetched and fanciful for the employee to be held liable (remoteness)?

The employee had no idea the boat had gas in it

If you asked your mom she would not list “the ship exploding” as one of the possible consequences of the action.

What is the test for remoteness: is it RF, or is it causation and directness?

* The court said that RF was for duty and not for remoteness
* \*\*Re Polemis: The proper test for remoteness is causation and directness [ISN’T THIS JUST LIKE ANDREWS in Palsgraf?]- court says you don’t have to look at RF
* This isn’t the law in Canada
* So employee is liable.
* You are responsible for any damage that is direct, even if it is not reasonably foreseeable.
* Foreseeability goes to duty, not remoteness;
  + Is it reasonably foreseeable that a ship might be damaged if you kicked a plank into it?
    - Yes – therefore liability.
* Two problems with having duty and remoteness test conflated:
  + Judges would hold people liable even if there was no duty (FW Jeffrey).
  + Situations where we don’t think like cases are being treated alike (unfairness).

### F.W. Jeffrey and Sons Ltd. and Finlayson v. Copeland Flour Mills Ltd. [1923] 4 DLR (Ont SCAD)

18 D (digs)-- 17A -- 17B -- 16 (P)

**Facts**: Case where a guy has a bunch of buildings that are connected. D asks if he can excavate near one of the walls. He does not excavate properly. When he excavates, all the walls fall down. This happened because (no one knew) there were tie rods between all the buildings which led to a domino effect. Plaintiff and Defendant didn’t live next to each other (17A and B were in between)

Issue: Is 18D liable to 16P:

1. There was a breach of standard of care
2. He had a duty (WRONG- based on Cardozo he wasn’t a neighbour)
3. Remoteness?

There was causation and it was a direct consequence. Doesn’t matter that the damage was not RF. Court rules that D is responsible for the damage to 16.

**Problems with this ruling**:

With regards to the lot 16, the judge appears to be wrong because there was no duty. Wrong conclusion for Plaintiff #2, right conclusion for Plaintiff #1. Case not really relevant—just another example.

### (WAGON MOUND #1) [1961] AC 388

Facts: WM is docked and is getting filled with oil. The oil is leaking but employee doesn’t care and keeps filling boat. WM leaves the harbour. Another boat 600 ft away is being welded on. They see the oil leaking. Foreman sends the men for lunch and calls oil supplier next to boat and checks if it is ok to still weld. Oil company tells them it should be fine, so boss tells the guys to keep welding. The harbour burns down.

Issue: Was the harbour burning down (damage) reasonably foreseeable?

1. No way. Mom would have never warned against this. TJ found as a fact that it was unforeseeable for the oil to burn on the water.
2. So, for the plaintiff to prove his case, he would need to do a Donoghue test for duty and a Polemis test for unreasonably foreseeable damage which was direct. The plaintiff did not want to admit that the fire was RF because at time in Australia, would’ve been charged with contributory negligence. It was however, RF that the oil would cause the dock to get dirty.

Issue: What is the correct test for remoteness? (WM 1)

1. Polemis is bad law because it doesn’t treat similar ppl’s cases the same—A might recover for fire and B would not, even if they’ve suffered same damage
2. The actual test is whether the type of damage was reasonably foreseeable. The type of damage (not the extent) must be reasonably foreseeable.
   1. Damage by fire was not RF.
      1. A recovers for ropes because it was RF since they were in the water, B doesn’t recover bc they didn’t have ropes
   2. A doesn’t recover for damage by fire because it wasn’t RF; B also doesn’t recover for same reason.
3. Directness (Directness = being part of the causal chain of events—i.e. Palsgraf was direct but not RF) is good evidence of RF, but they are not the same.
4. You should also be liable/be able to recover for reasonably foreseeable INDIRECT damage. –can recover for both direct + indirect damage
5. Basically what Viscount Simons is saying is that duty and remoteness are similar concepts.
   1. Should get rid of directness. There is no liability because damage is a necessary requirement – the test for remoteness should be RF of type of damage. It is irrelevant if you did or did not suffer other unforeseeable types of damage.
   2. Is damage by fire a RF consequence of releasing oil in the harbour; No - given that the TJ found that it was not.
   3. It doesn’t matter that you can recover for one type of foreseeable damage, you can’t recover for a type of unforeseeable damage.

The WM#1 jives perfectly with the Cardozo decision in Palsgraf. This case also says that we must analyze remoteness only in connection with the duty analysis. They are not separate tests.

**BLL: Damage suffered by plaintiff must have been RF to recover in negligence (WM #1). It can be direct or indirect; as long as the consequences are of a type that are reasonably foreseeable.**

### Saamco Principle:

It is not enough for liability to show that somebody owed you a duty, that they failed to comply with the duty, and you suffered a loss. This is not enough. Have to prove that the scope of the duty actually covered the loss.

Put boundaries on liability – injury that occurred has to be within the reasons by which it has been classified that your actions were negligent.

What are the 3 or 4 reasons why your mother would have warned you about doing this? If it is within this, it is reasonably foreseeable. If it is not, no liability.

Examples of this:

### Gorris v Scott

Fact: Act of parliament that says, all sheep, when transported, have to be individually penned in by place of origin and person shipping. Sheep go on ship, not penned in, and a wave takes them all off the ship and they all die.

Issue: is the ship owner responsible for the death of all the sheep?

Did they owe a duty? Yes

Comply? No

Owners of sheep suffer loss? Yes

Court says: purpose of penning in was not to protect the sheep but to stop them from cross-contaminating each other, and allow customs officials to identify sheep that may be contaminated (ill) – because the loss was outside the scope of the duty, there is no reliability.

### Empire v Jamaica

Fact: All second mates have to have a licence and be certified, so they can be proven to be competent and safe to run a ship. D hired second mate who was not certified. Accident on ship where someone was hurt and the second mate was involved.

Found: no liability – the owners were not treated as responsible because there was nothing about him being uncertified that contributed to the injury.

Facts: Someone wants to go mountaineering and goes to Dr to ask about their knee; says it is fine to go. Knee actually not fine, and if he had have known, he would have stayed home. He suffers a terrible injury that has nothing to do with his knee.

Issue: Did the Dr owe a duty to this person?

Dr owed duty; person relied on Dr advice; no liability because the injury was not undertaken by the Dr – outside the scope of the undertaking.

# Remoteness

Morriss (in Weinrib)

Remoteness divide into 3 categories:

1. Easy cases – easily RF
2. Freak accidents – not RF
3. Everything else in between – must convince that damage suffered was RF – all cases will depend on how they are described.

Keeton says: whether or not what actually occurred was within the scope of the risk? Was one of the reasons that we would have said that what you did was negligent?

Relationship between breach of standard of care and remoteness is very important.

### The Carey Case

**Facts**: someone is carrying gasoline in the back of their truck with a snap cap on top; the person does not put these on properly and as they drive, the caps pop off. P1 is parked on the side of the road, P1’s pregnant wife is in the trailer. One cap flies off and hits P1 in the head. Wife sees blood and has miscarriage.

**Issue**: Is there liability and to whom?

TJ says: liability to both of them. AP says: neither of them. Supreme court says: liability to P1 but not P1’s wife.

**Issue**: Why is it negligent to drive down the road with unsecured gas caps? Because someone is likely to get hurt if a cap flies off and hits someone or a car. Damage to the person on the side of the road is negligent, and is within the scope of the risk. The miscarriage is not foreseeable as it is not within the scope of the risk.

### Hughes v. Lord Advocate [1965] HL [manhole explosion – HL its genus not species of injury]

**Facts**: Case where they leave an open manhole unattended (with lamps around it) and a couple boys drop a lamp in. One of the boys gets burned badly by manhole explosion.

**Issue**: So the question is whether the employer is liable for the injuries to the boys?

**Arguments**:

D would argue that injury by fire was RF, but injury by explosion was NOT RF (the paraffin wax vaporizing was VERY unusual). This was a one-time deal so the D should not be responsible because it is too remote.

P would argue that it is RF that by leaving a hot dangerous lamp around that someone would get burned. So, P got burned (doesn’t matter whether it was hot wax, or an explosion) so the D should be liable. (P is looking for RF of a broad type of injury)

Lord Reid: It is about RF of the TYPE OF INJURY. It is RF that if you leave a lamp around where kids might play that one of them might get burnt.

What is the reason for negligence? Leaving an unattended hole with fire around it; mom would say: someone could fall in or get burned. You don’t have to foresee the exact mechanism of the injury, just the type of injury.

ON EXAM: CAN ALSO DISCUSS THE MOTHER TEST—therefore, its RF

**\*\*Note for RF for remoteness, SCC view is to list 5-6 things that your mom would say are foreseeable; contrasted with 2-3 things for novus actus according to Lord Reid in Home Office**

\*\*\*Would the case have been decided the same if the kid’s only injury was deafness?

\*\*\*Probably not, because you can’t tell the story without an explosion (which was NOT RF). With the burning, you can tell the story without the explosion (it could be fire or explosion—both would RF cause injury).

What are the unreasonable risks – why would you say that what they did was below the standard of care? Sphere of risk.

### Doughty v. Turner Manufacturing (1964 QB CA) [caldron explosion was too remote]

**Facts**: An asbestos lid was accidentally knocked into a cauldron of molten liquid. A few moments later an explosion occurred. The claimant was standing close by and suffered burns from the explosion (there was no splash). The explosion occurred as a result of the asbestos reacting with the chemicals in the liquid in the high temperature. At the time of the incident it was not known that the asbestos could react in that way.

**Arguments**:

* P says this is just like Hughes v Lord Advocate where we say there is a broad understanding of the type of injury from burning. Type of damage is foreseeable while the actual mechanism was not foreseeable.

**Held**:

* Diplock says that it is too remote because there was no splash and it was not RF that the explosion would hurt them many meters away (the splash would not have gone that far). Injury that actually occurred was outside of the scope of the risk that the D had a duty to protect their employees from.
* The damage was too remote. It was not foreseeable that an explosion would occur. While it may be foreseeable the lid may have caused a splash resulting in a scald, it was not foreseeable that an explosion would occur resulting in burns. (ask your grandma)

**Notes**:

How do we reconcile this with the Hughes case?

Doughty is an example of a case where a non-RF injury occurred—Doughty v Turner Manufacturing is an example where damage was too remote. If everyone had have followed the standard of care, the injury still would have happened, so it is too remote.

### Jolley v. Sutton London Borough Council [2000] 3 All ER 409 [old boat tips over]

**Fact**: Council has an old boat on its property. Kids jack up boat to fix it, boat falls off jack (because it was rotten). Kids are hurt (paralyzed) and question is whether injury was too remote. It is foreseeable that kids would sneak in and mess with boat, but is it RF that they would jack it up to try to fix it?

**Held**:

TJ says that it was not too remote.

CA says it is too remote. They say that it was RF that kids might get splinters, or trip, but not that they would jack it up.

TJ asked is it reasonably foreseeable that children would play with a boat and suffer some sort of physical injury? But CA says the only thing that was reasonably foreseeable was that a child would stand on the boat and fall through it.

**Lord Hoffman:**

* Judge does a nice re-cap of remoteness, reconciling Donoghue, WM, and Hughes.
* The concept of duty is whether some form of harm is reasonably foreseeable to a person.
* In WM the test for remoteness became RF and directness put together
* Some people think that Hughes overruled WM1, this is not true. Hughes is an application of WM1. They just added that you shouldn’t be too specific on the type of injury. Hughes was only a generous application of WM1.
* “The present law is that unless the injury is of a description which was reasonably foreseeable, it is ‘outside the scope of the duty’ or ‘too remote’”.
* “It is also agreed that what must have been foreseen is not the precise injury which occurred but injury of a given description.”
* Two views:
  + General: it is not too remote that kids would get hurt around an old boat
    - Hoffman agrees with this. He is willing to be general with the standard because children are unpredictable, and also because in this case, the council admitted that they should have destroyed the old boat because a kid could have fallen on one of its rotten planks. The court has no problem extending this risk to include the boat shifting and hurting the kids.
  + Leaving the boat on the property clearly breaches the standard of care.
    - Specific: it is too remote that the kids would have the boat fall on them
* If it would cost the same to remove the boat to prevent the kids falling through it, and also to prevent them from playing under it, then it is not too remote.
* Children always win negligence cases – because they are crazy, you never know what they will do, so everything they do is reasonably foreseeable.

**BLL: there is not a contradiction between Hughes and WM1 (see below)**

**BLL: Remoteness is a question of whether the injury is of a type that was RF (genus not species) [Jolley v Sutton]**

**BLL: in order to choose between a specific or general risk analysis, you look to whether the wider risk would have been taken away by the ordinary standard of care.**

**To decide between a general or specific description of risk is to ask (REFERENCING KEETON ARTICLE):**

* Whether the wider risk would have been prevented through the use of ordinary care?
  + In Sutton: had the company removed the boat (not breached SofC) = no loss.
  + In Hughes: if they had not left the worksite unattended, then no injury could have occurred (burning, falling, exploding).
  + In Doughty (lid in the cauldron): the explosion occurred even though they stood back and tried to remove the lid carefully
* Why was it negligent to do what you did? Would your aunt have predicted the type of loss that actually occurred from the action that breached the SofC?
  + In WM1, if you had given the oil re-filler the reasons why he shouldn’t let the oil spill, he would have never thought about the harbour burning down
  + In Hughes, if you were telling the workers why not to leave it unattended, you would say that someone could fall in, or someone could get burned.
  + In Sutton, if you were advising the council, you would probably say that kids might play on it and get hurt

## Novus Actus Interveniens (remoteness with people)

* This is an action (factor, event) that breaks the line of causation and means that the original defendant is no longer legally responsible.
* Want to figure out if the 3rd party should be responsible, rather than the defendant
* Novus Actus is really just a question of remoteness, involving people
* Plaintiff needs to then try to sue the Novus (if it is a person and not an act of God)
* What is our test for a Novus (there’s no consensus)
  + Canada: Was the act of the third party Reasonably Foreseeable in the circumstances
  + How do we know what is RF?
  + Ask our aunt why it was wrong to do what we did. Was the actual loss something that she guessed.
  + Other: If the actions of the 3rd party was the very thing to be expected, then not too remote.
  + Other: natural and probable result
* It is not easy to make these decisions. There might not be any right answer, but you just need to reason well.

### Bradford v. Kanellos (1973, SCC) [Grease Fire – if not RF then it was a NAI]

**Fact**: Restaurant has a grease fire which is put out by auto extinguisher. Another customer hears the extinguisher, mistakes it for a gas leak, and creates panic which causes woman’s injury from falling. (she’s suing the restaurant—not the 3rd party)

**Arguments**:

Owner is negligent because grill was not being properly cleaned which could lead to fire.

Defendant argues that although I started the chain (the grease build-up), it was the idiot who yelled gas leak who should be responsible. The scream was a novus.

**Issue**: Was lady’s injury too remote

**Held**: TJ says she and the husband should recover (no novus). CA says that it is too remote so no one recovers (there was a novus actus). SCC (3-2 remoteness is hard).

**Reasons**:

Majority

* The third person who yelled ‘gas leak’ was an idiot and he is the novus.
* Too remote. When you let grease build up, injury from fire was RF, not stampede by foolish customer yelling ‘gas’.
* Judge actually talks about the asking your mother concept (i.e. you ask your mom if you should leave grease on the stove—your mom wouldn’t suggest that someone would yell fire and cause woman to fall off stool—stampede is not foreseeable). **Scope of the Risk test (Saamco, Bradford)**

Dissent

* They don’t dispute our RF test (so RF is definitely Canada’s test)
* The patron yelling “gas” was not an intervening factor. It is RF that there will be commotion and confusion and mistaken claims when there is an emergency situation. Actions of 3rd party were foreseeable and acceptable

**BLL: I) The test for novus actus is whether the actions of the third party are RF. (Bradford v Kanellos)**

**BLL: II) Proving someone is a novus actus is a complete ‘defence’ to a claim against negligence. (Bradford v Kanellos)**

**BLL: III) If the third party is not a novus actus and is negligent, they can be a joint tortfeasor with the defendant. This means that either can be sued for 100% of the damages and then they are responsible to sue the other if they want to recoup the losses. (Bradford v Kanellos)**

**BLL: IV) If the third party is a novus actus, no liability for defendant (can only sue the novus actus, not the defendant)**

-both answers (majority + dissent) make sense—so can make either argument on exam from this case.

### Home Office v Dorset Yacht

**Facts**: Three officers of detention center have boy criminals on an island doing work. Officers go to sleep, boys escape and try to flee island on a yacht they stole and crash it another yacht where they party and then burn the yacht to the ground and it sinks.  
**Issue**: Could the officers owe a duty to the people who owned the yacht, and the property that had been damaged? (Question of Law only – no trial)  
Held: Could be no duty owed on these facts?  
**Arguments**:

1. No authority on this – no case law to support the idea.
2. The boys themselves are a novus actus – they aren’t insane, or children – they should be responsible for their actions as someone of full age and capacity.
3. Public policy
   1. Would have to get rid of the program
   2. Massive liability – would open up the floodgates anytime a prisoner escapes, the home office would be held liable.

**Lord Reid:**

1. The tort of negligence is not closed. Donoghue gave us a general principle.
   1. They do have a duty
   2. RF that the boys would try to escape – YES.
2. Reid doesn’t like the test for novus actus, that it just has to be reasonably foreseeable. He prefers: “is it the very thing that could be expected in the circumstances?” (If yes, then it isn’t a novus actus). In this case, the actions of the boys were the very thing that could have been expected in the circumstances, therefore they aren’t a novus actus.
3. Doesn’t agree with public policy argument.

**Lord Diplock (tries to explain the theory of judging):**

1. How do judges make law? What is the common law methodology?
   1. Inductive - Review all cases you think are relevant – and come up with a proposition about them.
   2. Deductive – Come up with a principle from your research – the rule you can apply.
   3. Choice – decide that something in the list is irrelevant OR whether you can add to the list
   4. The rule is not universal – BLL may not consider all the criteria available in all case law. BLL rules are not universal.

* The requirements for a duty of care by the guard (from previous cases)

a. Defendant had a right to detain 3rd party

b. Defendant has actual control at the time [MISSING IN THIS CASE]

c. Causation

d. Defendant could also control the actions of the plaintiff [MISSING IN THIS CASE]

e. Defendant could reasonably foresee that plaintiff is likely to sustain damage.

* So Diplock says 2,4 are missing in this case. Can we recognize the duty without these 2 factors, or can we substitute other factors?
* Diplock says that he is willing to allow recovery to occur, absent 2,4, so long as the damaged property is in the vicinity (close proximity) of the escape
  + He bases this decision on policy, and that there is a background risk of crime in England and not everyone should be able to recover. He adds in the vicinity thing because he doesn’t want to make everyone liable—bc almost any victim of criminal act otherwise might have a claim
  + He says his decision must be consistent with other English law
  + So, he says that because boat damage was so close to the escape that it is not too remote in this instance.

Viscount Dilhorne

Proper test for novus actus?

### Lamb v London Borough of Camden (1981, QB CA)

**Facts**: The town council breaks a water main (negligently) while replacing a sewer and it floods an absentee landlord’s flat, causing house to bend over. The tenant leaves (bc house is bent) and the landlord (in USA) has furniture removed and is starting to have house fixed up. Squatters keep invading flat causing loss (using electricity, etc). Landlord shut off hydro/gas. Squatters strip walls bare, sell copper wire, and then use drywall to make fires—basically destroy the whole house. Landlord had just been told there was a little damage by Squatters—she gets home, see the actual damages, and sues the city. Is council responsible for loss caused by squatters (was it too remote)? It’s a novus actus question.

Judges:

Denning:

* Says the reasonable foreseeability test won’t work, and Reid’s test won’t either. They can’t answer the question, because of how uncivilized England has become.
* No Duty, Damage is too Remote, Causation isn’t made out – ways Denning uses to arbitrarily cut off damages/find no liability if he wants.
* All the law is policy – which should be preferred? Whose job is it to get squatters out of a house? Not the city’s job – it is the home owners’ job. And the insurance company should be paying for it (and if they don’t have insurance, then it is their fault).

Oliver:

* Not reasonably foreseeable that the city breaking a water main, would cause squatters to take over someone’s house – therefore too remote.
* Tries to make a new standard – “likelihood amounting to inevitability”

Watkins:

* Remoteness is hard.
* Use the Wagon Mount #1 test – remember that it is not determinative.
  + Just because something is reasonably foreseeable, doesn’t mean you are liable for it
  + This case is not reasonably foreseeable
    - Anti-social intent of the person who committed the crime
    - The time, nature of the act – city shouldn’t be responsible

Wagon Mound #1 – only liable for things that are reasonably foreseeable

What about the thin skull principle? How do these two principles fit together?

Smith v Leech Brain – Thin Skull v RF – liable if type of injury was reasonably foreseeable

Qu is: did WM #1 overrule thin-skull principle?

Facts: Guy works in factory that galvanizes steal. He gets a burn when he is putting things in the vat-- it turns into cancer and he dies. His job was very dangerous bc he had to dip steal with his back turned wrong way, and his back wasn’t fully covered.

Argument:

* D argues that he must have already had cancer because he died so quickly. TJ says he might have a weakened immune system from his work in the gas industry
* D then argues that it is not reasonably foreseeable (now that WM#1 is the law) that the burn would kill someone.
* P argues the thin skull rule – take victims as you find them. WM #1 was never meant to apply to personal injury.

Judge:

* Has to balance thin skull reasoning v reasonable foreseeability
* WM #1 – says type of damage has to be reasonably foreseeability – personal injury is a type of damage
* The thin skull rule doesn’t come into play until the type of injury is found – extent of liability once you have a foreseeable type of damage
* P is reasonable for employee’s death as personal injury was foreseeable
* Damages given were less because those who work in the gas industry tend to die young, so instead of 30 years of damages to his wife, they only have him around 6 years.

### Stephenson v Waite Tileman Ltd. 1973 NZ CA [thin skull – psychological injury]

Facts: P is working for D as a steeplejack (works at heights on crane). He injures his hand when a wire rope breaks. It was rusty, and he got an infection. Psychological injury then resulted.

Judge: Combination of WM #1 and Thin Skull rule:

* Is it reasonably foreseeable that a steeplejack could be injured by equipment working at heights?
  + Yes.
* Then the thin skull principle applies to the full extent of the injury. There must first be a legal injury for this principle to apply (a right that was interfered with).
* Why do we have interference with bodily integrity as the broad test of what needs to be reasonably foreseeable?
  + We do not fully understand the human body, so we cannot make these kinds of distinctions that could lead to a lot of victims failing to collect
* Was it causally connected?
  + You need to foresee that it would interfere with someone’s bodily integrity
  + The P is responsible for all injuries following the interference which was caused by negligence.

### Cotic v Gray (1981 ON CA) [car crash then suicide – psych injury is not too remote]

**Facts**: There was a car crash where a husband and wife were injured by a negligent P. The husband was already depressed, but his injuries were severe, so he decided to kill himself.

**Issue**: Is it reasonably foreseeable that the husband would commit suicide?

**Held**: Awarded damages to wife.

**Reasons**: Court says that you just need to show that it was RF that there was a bodily injury. Judges generally think that psychological injury is a different body of injuries than physical injuries. Judge uses a public policy argument for damages, but this doesn’t explain all the other cases where liability isn’t found.

## Cause in Fact

Whether or not the unreasonable risk that was created within the scope of it being unreasonable actually manifested itself in an injury to the plaintiff. If you cannot prove that the risk manifested in an injury, then you cannot sue in negligence. Necessary element of claim to negligence.

What actually happened – did the defendant’s act factually cause the plaintiffs injury?

Two aspects:

1. What test is applied on the certain set of facts?
   1. Question of Law – for a judge to decide.
   2. But-for test – but for the act, the injury would not have occurred.
2. Given that test, was there causation?
   1. Question of Fact – for a jury to decide.
   2. On a balance of probabilities (plaintiff must prove)

### Barnett v. Chelsea & Kensington Hospital MGMT Committee (1968 All ER (QBD))- But for test

**Facts**: Night watchmen who drinks tea, got arsenic poisoning. He went to the hospital and the Dr fails to do anything; they just send him home. He dies from arsenic poisoning.

**Issue**: Was the Dr negligent in doing nothing?

**Dr argument**: Negligence didn’t factually cause his death; expert testimony that he would have died anyway because he had gone too far – if they had tried to treat him, he still would have died.

What happened, and what would have happened had their been no negligence? He would have died anyway, so no factual causation.

### Richard v CNR (1970s, NFLD)

P takes a ferry routinely from NS to NFLD. P often fell asleep on ferry. A yellow rope would block the exit. P drove off the ferry before they had arrived because the yellow rope was not there.

BUT given that P wasn’t paying much attention, and probably wouldn’t have noticed the rope anyway, there is no factual causation.

Problems with but-for test:

1. Pre-emptive causation – A shoots B just as B was about to drink a cup of poisoned tea.
2. Duplicative causation – C starts a fire. D starts another fire. Each fire was big enough to destroy a house. The fires unite and then burn down your house.

Nobody caused either of these things to happen according to these but-for tests. In some cases, judges supply different tests because of these problems.

### Lambton v. Mellish (1894 3 CH 163)- Duplicative Causation—alternative to But-for Test Needed

**Facts**: Two guys that have rides at a fair are constantly playing organs all day, and the noise is an unreasonable interference of the use and enjoyment of land.

**D argues**: Not factually causing P’s pain, because either of the organ players could be causing the noise. Duplicative causation case.

**Chitty says**: Where there are two tortfeasors and they are aware of what the other is doing, then they are each liable. If they were not aware of each other, there would be no liability.

### Arneil v Paterson (1931) – case of negligence – to transfer the NESS test over from nuisance

**Facts**: Two people had hunting dogs, released them and they escaped. They cornered a sheep, it had a heart attack and died. The sheep owner sued the dog owners.

**Held**: Material contribution – both dogs came together to cause the sheep to have a heart attack, so they are both responsible.

Negligence Act of Ontario – joint defendants can sue each other and force the court to decide who owes each other more for the injury.

### Corey v. Havener (Mass. SCJ 1902)- Uses Material Contribution Test instead of But-for

**Facts**: Two motor tricycles pass a horse & buggy on both sides at the same time, and it spooks the horse, and crashes the buggy.

**Held**: Both D are held liable. D argues factual causation – duplicative causation – material contribution case, they are both liable – 100% liable.

**BLL: When there are joint tortfeasors, they will both be held liable if they are both found to have materially contributed to the injury.**

**BLL: Defendant who has been sued can sue the other defendant to recover part of the amount. You cannot get 100% of the damages from both tortfeasors.**

### Kingston v Chicago Railway (1927, Wisconsin)

**BLL: When you have duplicative causation (each was wrong), and if one of the causes is innocent, then D if not liable. This is in a simultaneous case, not a sequential case, so property and personal injury distinction isn’t relevant.**

**BLL: Onus is on the defendant to prove that the 2nd cause wasn’t tortious, court will assume that both causes were tortious unless the defendant proves otherwise.**

**BLL: If we cannot tell it one act is negligent, then Cory v Havener applies and both are 100% liable.**

### The NESS Test

* **N**ecessary **E**lement of **S**ufficient **S**et (NESS) test is an alternative to the but-for test.
* A particular condition is a cause of a specific consequence only if it is a necessary element of a set of conditions that is necessary for the consequence.
* The but-for test generally works; with the two exceptions listed above.
* In pre-emptive cases, you just have to decide what actually caused the consequences. This is a question of fact, not a question for the but for or NESS test.
* If there are situations where the NESS test is made out, but the judges are saying there is no liability, then there is another principle at play, not factual causation.

### Material Contribution – not a great understanding of factual causation – the NESS test is better:

* Example: A gives $99, B gives $1 for a $100 gift for C. According to the but-for test, B is a factual cause. If using the material contribution test, is $1 a material contribution? No, because it’s not “very big” – the problem with this test, it is not specific.
* NESS test says yes, B is a factual cause.
* BUT the NESS test still hasn’t been verified by the SCC; in Ontario/Canada, use the but-for test, and the material contribution test on exam.

### Lake Winnipeg (1991, SCC) – Sequential Causation

**Facts**: Lake Winnipeg ship is driving negligently, and causes another ship to swerve and run aground. Later, that same injured ship runs aground again (this time it was their own fault). So, there is negligent injury and innocent injury. It takes 27 days to fix the damage the first time. It would have taken 13 days to fix the damage from the 2nd incident. BUT, the damage is repaired during the 27 days needed to fix from the first incident as they can repair both parts simultaneously.

**Issue**: Who is responsible to pay for the profits during the down town?

**Held**: There was no causal link between the second incident and the loss of profit because the ship already needed to be out of commission for 27 days. First-in-time rule for sequential causation: first person needs to pay for all 27 days.

### Baker v. Willoughby (1970, HL) [Assessing PERSONAL damage with an intervening tortuous act]

Facts: a guy is injured at work, so we he can’t work. During trial, he is robbed and shot in leg, so it gets amputated.

Should employer have to pay for the total time it would have taken for the broken leg to heal, or just the time from the leg break to the leg amputation caused by the robber?

HL says: concurrent cause, so employer has to pay full amount.

### Jobling v. Associated Dairy (1982, HL) [PERSONAL Damage with an intervening non-tortuous act]

Facts: The claimant's employer negligently caused a slipped disk, which reduced his earning capacity by half. Four years later, the claimant was found to have a pre-existing spinal disease unrelated to the accident which gradually rendered him unable to work.

Issue: Is employer on the hook for the cost of only doing light work for his employable life, or the cost of light work until time of diagnosis?

Held: **The employer liability was limited to four years' loss of earnings because, whatever had happened, this illness would have caused the disability and was a “vicissitude of life”.** The Lords considered that *Baker* should be regarded as an exception to the general "but-for" test, which was justified on its facts but not representing a general precedent.

* Judge says that when deciding, we look at the whole situation and make sure total compensation is just enough to put victim in same place. **Don’t pay full amount.**
* Work backwards: total loss by victim – what could be recovered if disease was tortious
* **If subsequent act is non-tortious in a PERSONAL INJURY case, the damages owed by the 1st tortfeasor will be diminished (*Jobling*)**
* **The court must do its best to work backwards to properly assess the damages (*Jobling*)**

### Athey v Leoneti

Facts: Appellant suffered injuries from car accidents, and was forced to work at other job. Was then in another accident, and goes to chiro, who recommends that he stretches. While stretching, he developed a disk problem.

Issue: Are the tortfeasors who caused the car accidents liable? Should a court apportion between tortious causes and the non-tortious causes?

Court says: P should receive full compensation, because we don’t apportion between causes that happened pre-injury. If that were the case, then you would never get the full amount from an injury.

Three possibilities of combination of fact:

1. injury would have happened at same time even without motor vehicle accident 🡪 if TJ found this there would be no liability
2. necessary to have both the pre-existing condition AND the motor vehicle accident 🡪 combined, both cause the injury – if this is the case, there is causation
3. not sure if it is 1 or 2 🡪 then TJ must decide using a balance of probabilities (TJ chose option 1, so there WAS causation based on the facts of this case) – doesn’t matter the relevant weight, just need some causation

As long as there is a material contribution; where it is overlapping more than de minimus, then there is liability.

What about future contingencies? There were no measurable risks that the disk herniation would have happened but for the motor vehicle accident; therefore, no adjustments made to contingencies for the future.

**BLL:**

1. **Causation is established where P proves on the balance of probabilities that the D caused or materially contributed to their injury**
2. **The but- for test is the general test for causation in tort law**
3. **Where the but-for test is “unworkable” then the courts can use the material contribution to injury test**
4. **The law does not allow apportionment between tortious and non- tortious pre-injury causes; but allow apportionment for subsequent intervening events provided they are non-tortious.**
5. **In multiple tortfeasor cases, provincial legislation permits defendants to seek contribution and indemnity from each other**

# Factual Uncertainty

Gaps in the facts of a case – what to do?

3 Archetypes for Factual Uncertainty – need to know which you are working with – solutions in justice to determine the right answer. And knowing which one you are working in is the MOST important.

1. Who is the tortfeasor? If there are multiple people who are negligent, and you can’t determine who the tortfeasor is, there are rules to figure it out. Cook v Lewis, Fairchild.
2. Where there are tortious and non-tortious causes – which cause brought about the injury? McGee case. Issues where the tortious and non-tortious cause are created by the same person.
3. Where the tortious and non-tortious causes are created by different people/things. Make a distinction between the duties from Donoghue v Stevenson, and Hedley Byrne v Heller.

### Blackstock v Foster

**Fact**: Guy gets in car accident and his chest jams into the steering wheel. At the hospital they also find a tumour growing that was there for awhile. The growth is malignant but it is unclear whether the accident caused the growth to become cancerous.

**Held**: Not proven, so Court of Appeal says no causation.

**Problem**: Standard of proof is on the balance of probabilities – it wasn’t more probably than not that the accident caused the growth. If science doesn’t have the answer, the court doesn’t either.

Downloading up judicial function onto scientists – unless scientists can prove/state something for the Plaintiff, then the P is out of luck. The threshold of proof is different for science (95%), and law (50% plus a feather).

### Cook v Lewis

**Facts**: Two hunters negligently shoot at some grouse but there is a guy hidden in the bushes. One of them hits him in the face. Impossible to tell whose shot hit the guy hidden in the bush.

Issue: Who can be held liable for hitting the plaintiff if they each shot at the same time?

**Carthwright (Majority):**

* Special circumstances must exist in a case like this; they were in a joint venture, so every member of the joint venture technically did it (committed the tort) – but what the hunters were doing was not a joint venture.
* Because we know that the shooters are more likely to know the answer – reverse the onus/burden of proof onto the defendants, to get to the truth of the matter.
  + Limitation
    - It multiple defendants before the court, one of them must have done it, so the truth will come out.

**Rand**

* Two rights existed – the right to his body and the right to prove his case by firing simultaneously. So flip the burden of proof.

**Locke** says no remedy.

**BLL: If there are 2 (and only 2) tortfeasors who acted at the same time and one of them must have done it, but its unclear who, then the courts reverse the burden of proof.**

### Joseph Brant Memorial Hospital v Kozoil

**Facts**: An operation with a lot of doctors and nurses; the nurse that was supposed to keep track of who was there and what happened lost her notes.

**Held**: OCA says: Hospital liable – nurse destroyed the remedial right of the patient because she lost her notes.

BUT SCC Says: **The negligence must be brought down to 2 people only, and there is a reason to think that one of them knows who actually did it. From Cook v Lewis – this case is not similar to Cook because of the number of tortfeasors.**

Difference between Cook and Syndell – each D was negligent because they committed the tort together; in Syndell, each D was negligent but they were negligent to different P. Does this actually make a difference as a matter of principle?

### McGhee v National Coal Board

**Facts**: Guy cleans out brick ovens all day, it is super dusty and sweaty and there were no showers. He bikes home. He develops dermatitis. D should have provided the showers (adequate washing facilities).

**Issue**: two causes of dermatitis? Time 1 – exposure to brick dust. No shower, Time 2 – bike riding. Time 1 was not negligent, but time 2 was.

P failed to prove that failing to provide showers caused the dermatitis. It is more likely that the 8 hours in the brick kiln caused the dermatitis not the ride home without a shower.

**What do the Drs say?** It is unknown what causes dermatitis most of the time (ie. the unlucky scratch). However, the longer the dust is on your skin, the risk of getting dermatitis is increased.

D says, is this is the case, then it cannot be proved that the P got the dermatitis from the brick kiln.

**Reid**: There’s a different between increasing the risk of something and actually causing it. But on these facts, it doesn’t matter (longer on skin, it is more likely to get). So, he made a common-sense decision to choose the theory that the risk of the disease is increased with more time of the dust on the skin.

If you can prove that D’s negligence materially increased the risk of you having a certain outcome, then the judges may infer that outcome was caused by D’s negligence.

### Wilsher v Essex Area Health Authority

**Facts**: Baby is born premature – suffers from blindness after he gets out of the hospital. One cause of the blindness is that your blood oxygen level is not property monitored, and too much oxygen did occur. There are 5 other things that cause this blindness; and the baby actually had all of these things. Each thing was equal in its ability to give this blindness.

**Issue**: Did the hospital breach its duty to the patient?

**BLL**: Courts should take a robust and pragmatic look at the causes to determine if a legitimate inference can be made.

McGhee was a case of overlapping causation, not pre-emptive causation. Here it is impossible to make the same inference on the facts of this case, because each one of the 5 causes of the blindness, the baby suffered from each and each was equally likely to cause the blindness.

### Farrell v Snell – Scientific Uncertainty Case

**Facts**: Lady gets cataract surgery, ends up with blindness in one of her eyes – Dr sees a red spot after putting in a numbing agent, which was a sign of bleeding, but he does the surgery anyway.

Possible causes of blindness include the surgery, high blood pressure, diabetes, or glaucoma (all of which can cause a stroke, leading to the blindness).

TJ uses McGhee and flips burden of proof to find for the P.

Goes to SCC, Sopinka:

* Too much liability under the McGhee/Wilberforce burden flip.
* Need to apply the rules of evidence properly – not the rules of science
* Use the balance of probabilities (50% plus a feather)
* Whoever makes the assertion must prove the burden of asserting it
* Where the circumstances of one party, means they have more knowledge of the evidence or what happened, then they must also assert their knowledge – if they do not testify, with more knowledge, it is likely that they are guilty and have knowledge of it – balance of probabilities is most important here (not a crim trial, not beyond a reasonable doubt)
* On these facts:
  + Unlikely to be glaucoma because this would have occurred in both eyes
  + She had mild diabetes, and mild high blood pressure – also unlikely to cause a stroke
  + Therefore, the surgery (and the retro-bilobular bleed) are the most likely culprit
  + The judge can make a common-sense inference here that the surgery caused the stroke.

**BLL: Factual causation is a common-sense exercise that allows the court to take a robust and pragmatic view of the facts. Rules of evidence and the balance of probabilities, combined with the facts of the case.**

**BLL: Where there is prima facie evidence of cause and 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. Its not a shift in the legal burden of proof, it just means that if the D refuses to put anything on the scale, they might lose.**

### Clements v Clements

Facts: P and D are married, riding motorcycle on a wet day. There was a nail in the tire. It fell out while they were riding and he lost control of the bike. She suffered a traumatic brain injury and is suing her husband’s insurance company.

Issue: What caused the crash? Has to be negligence to win.

Negligent - He was speeding, and their combined weight was too heavy for the motorcycle.

Non negligent – wet weather, nail in the tire

SCC – when to use the material increase in the risk test?

First, use but-for test (from Farrell v Snell), with robust, common sense view (default rule). Can use the material contribution to risk if the facts are as follows:

1. There are a group of people, one of whom must have injured you, but as a group, the but-for test is made out (Cook v Lewis) (Global but-for test).
2. The reason why it is impossible to make out the case, is that each of the person in the collective can point to the other person as causing the injury.

Where there is only one person involved, you must use the but-for test with the robust and common-sense inference. So, it would have to be the nail in the tire as the inference made.

### Walker Estate v CRC

**Facts**: Estate of dead guy sues because he got AIDS from a blood donor. Estate sues the CRC because they were not warning donors not to give blood if they are homosexual.

CRC says they shouldn’t be held liable because they can’t be certain whether the donor would have given blood even if the warning had existed.

**SCC says**: CRC would be liable because they materially contributed to the risk of someone contracting HIV. This test can be applied to this case, because the CRC points to someone else as the cause.

### Gregg v Scott (HL case)

**Facts**: Gregg had a lump looked at, found out it was cancerous, and he had a 45% survival. The doctor however told him that the lump was benign. 9 months later, cancer was discovered, and his chance of survival decreased to 25%.

In Canada, you cannot sue for loss of chance – unless you can prove some sort of concrete benefit or loss that the failure to treat you caused (Lawson v Laferriere).

Weinrib article

Courts don’t properly segregate the cases.

Snell v Farrell rule, these are the exceptions:

**Dr cases** – they have forgotten an elementary principle of negligence – duty principles – 2 of them. They are rights and undertakings.

Gregg v Scott is rightly decided under Donoghue v Stevenson principle; you had a right to bodily integrity/survival and the Dr took it away (was over 50% and then it went under).

Hedley Bryne Heller – creating rights through undertakings – a right not to be left worse off because you relied on someone’s undertaking.

**McGhee situation** – presumption that the disease is caused by the tortious aspect of the activity, not the non-tortious aspect. Inference of tortious cause – both possible causes are caused by the activities of the defendant.

**Cook v Lewis cases** – multiple tortfeasors – P has to suffer an injustice, and all potential causes of the injury have to be tortious (if there is a non-tortious cause, cannot be applied); each defendant must have behaved tortuously towards the plaintiff. To be negligent to substantive rights and your remedial rights (by making it impossible to prove who did it), injury that occurs has to be within the scope of what is likely to occur. All rights have a substantive aspect and a remedial aspect – damages make your legal rights whole again. Remedial rights are just part of your rights.

DES cases are wrongly decided – not all of the possible defendants were negligent towards the plaintiff – some were negligent to other people (not the plaintiff).

# Damage

* Prove that you’ve suffered something that the law recognizes as damage
* Originally, death did not fall under damage
* Must not be too remote or too far from the negligent act

### Mustapha v Culligan (2008) – SCC – see for negligence for exam structure!

Facts: Mustapha gets Culligan to deliver bottled water to his house. There is a dead fly in one of the bottles. He suffers a major depressive disorder because of this.

SCC:

* Is there a duty? Yes – manufacturers always owe duty to their customers.
* Breach of standard of care – Yes.
* Factual causation – Yes.
* Did he suffer damage? Very important part of analysis
  + Not every emotional state/not everything that upsets you will count as damage in negligence
    - TEST FOR psychological DAMAGE:
    - **Injury must be serious trauma and prolonged; rise above the ordinary annoyances, anxieties and fears that people living in society, routinely accept.**
  + Yes, he suffered damage.
* BUT – case **fails because of remoteness**. Used the mother test?
  + Not reasonably foreseeable from the perspective of the reasonable person (ordinary fortitude)
  + Did they have to prove that it was a recognized psychiatric illness? Has to have a name, in order to recover.

### 

### Saadati v Moorehead – The right to psychological integrity.

**Facts**: D struck P’s vehicle. P wasn’t physically injured, but it caused them psychological injuries.

**TJ awarded damages** – he had suffered damage under the law, as he met the Mustapha criteria.

BC CoA said no, he did not have a recognized psychiatric illness.

Did he actually have to give a name to the thing he was suffering from?

**SCC** has never required proof of a psychiatric illness to recover for psychological injury. You don’t have to do this for a physical injury, so why would you have to do it for psychological injury.

In Canadian law, you have a right to psychological integrity; not right to happiness. High threshold to meet.

For damage in the tort of negligence – what the claimant has suffered is severe and prolonged…

Experts help in cases but are not necessary for proof – the law doesn’t have to defer to psychiatrists.

Neyers says – pathological/non-pathological

# Defences

3 defences – admits to all elements of the cause of action, but should still win: Illegality, voluntary assumption of risk, contributory negligence

## Illegality

### Hall v Hebert

**Facts**: Two drunk guys at a party; leave and go down a gravel road. Car stalls, so they push start it. Driver goes too fast and crashes car into a pit.

**Issue**: Do criminals lose their right to bodily integrity because they are doing something illegal?

**SCC**: You cannot collect damages for personal injuries to profit from a wrong.

Principles relevant in illegality cases:

1. Not allowing the integrity of the legal system to be destroyed – the defence of illegality protects the legal system.
   1. If the claim is for an illegal enterprise, you cannot recover a loss of profits
   2. If you are claiming punitive damages for something that, the activity was illegal
   3. If you’re trying to offload a penalty that another area of law has laid on you (criminal law to tort law)

* Coherence of the law is not about the relationship of the parties; it is about everyone else in the legal system.
* If someone falls through your deck, when breaking into your home, in a place where everyone would have fallen through, the thief can sue. But if it is somewhere that only a thief/someone breaking into your home would injure themselves, as there is no class of people that would otherwise be injured, they cannot sue.
* The defendant must raise the illegality.

## Voluntary Assumption of Risk

### Dube v Labar – TEST for Voluntary Assumption of Risk

**Facts**: Two guys driving around, getting drunk, they get in an accident. The passenger gets badly injured.

**Issue**: Did the passenger voluntarily assume the risk because he knew his friend was drunk?

**Test: 1. The plaintiff accepted the physical risk. 2. They also need to accept the legal risk.**

In drunk driving cases – almost never works as they are too drunk to understand the legal risk when they get into the car; unless the parties were sober when they started the adventure.

Usually works for sporting events where you accept the risk prior to participating (by filling out waiver/form).

Whole case is done if this defence works.

## Contributory Negligence - Defence that the plaintiff was also negligent.

### Butterfield v Forrester (1809 KB)

**Facts**: P is riding his horse as fast as possible after spending the time drinking in a bar. A rod is across the road and his trips on it, and he flies off. If he had been riding at a normal speed, he would have seen the rod, and he would have stopped.

**Court rules**: P cannot recover, as if he was riding without reasonable care, he gets nothing. All that was needed was negligence by the defendant and fault-ful behaviour of the plaintiff.

**Now**: court would apportion the damage between the parties – based on the courts opinion as to who contributed more to the negligence. NEGLIGENCE ACT OF ONTARIO

### Froom v Butcher (UK CA, 1975)

**Facts**: Guy and his wife are not wearing their seatbelts, and another driver negligently hits him. He sustains some injuries that would have happened regardless, and other that only happened because he wasn’t wearing his seatbelt.

**Issue**: Does it seem fair that a negligent driver will not have to pay for all the injuries they caused – just because P wasn’t wearing a seat belt?

**Denning**:

**Arguments**:

1. Wasn’t the P that caused the accident, it was the D.
   1. Cause of accident and cause of damages are two separate things – you can be contributorily negligent if you contribute to the damages.
2. Sensibility – thought he would be better off not wearing the seatbelt – thrown from the car instead
   1. Doesn’t matter – not wearing your seatbelt is negligent as it is the sensible thing to do
3. Not illegal not to wear seatbelt (at this time in UK)
   1. Reasonableness actually matters – doesn’t matter that it isn’t illegal.
4. Safe driver, only need to wear it if the weather is bad
   1. Accidents are unpredictable – things change too quickly to be able to put your seatbelt on at a moment’s notice. Use Wagon Mound #2 argument – a reasonable person takes precautions for a low risk activity – easy to do at no cost to you.
5. Forgot my seatbelt
   1. Forgetfulness is negligent.

* Need to be held to the reasonable person standard (**Vaughan v Menlove**). No argument where not wearing the seatbelt is reasonable.
* This is contributory negligence. Denning gave guidelines for contributory negligence damages:
  + If you would have been hurt anyways – then full recovery
  + If your failure to wear the seatbelt made all the difference – 25% reduction in damages
  + If some injuries were caused by no seatbelt, but not all – 15% reduction in damages
* On the facts of this case, he got a 10% reduction.

Judges usually give reductions from the global amount of damages - $1 M in damages, so reduce by 10% for contributory negligence.