Torts Summary

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# Duty of care

## Donoghue v Stevenson

* Facts: Woman drank ginger beer through an opaque bottle that her friend bought and found a decomposed snail in it; had food poisoning and sued the manufacturer
* Very fact specific ratio (later broadened)
	+ a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care
* manufacturer owes consumer duty of care

## Cooper

* Facts: P invested money into Eron and sued Mortgage Registrar (D) for not revoking Eron’s licence earlier, which would have resulted in a smaller loss suffered by the P
* Held: The Registrar was held not to be sufficiently proximate to the investor
	+ Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar’s duty of care is not owed to investors exclusively but to the public as a whole
* Even if a *prima facie*duty of care had been established under the first branch of the *Anns*test, it would have been negated at the second stage for overriding policy reasons
	+ Impact on taxpayers (acting as an insurer)
	+ Competing interests

## Hill

* Facts: Negligent police investigation
* Held: even though there may be some residual policy considerations against finding a duty, there are also residual policy consideration in favour of finding a duty (namely, better policework)

## Edwards (do not really need to know this)

* Facts: victim of bad lawyering (trust account funds gone); LSUC owes duty to victim?
* Held: No; legislative intent is clear through statutory immunity
	+ Duty is owed to the public at large; no intent to create a private law duty to individuals

## Childs

* Facts: after leaving party held in a private home, a guest decided to drive while impaired and collided head-on with another vehicle; killing a passenger in the other car. Action against social hosts
* Held: social hosts does not have a duty
	+ Sufficient proximity as between the parties
		- No reliance on the social hosts (but in the commercial context probably)
		- No expectation of the host to monitor guests drinking
		- Short of implication, social host has not duty

## Syl Apps

* Facts: child taken to treatment centre; treated as if physically/sexually abused; caused child not to return to her family. Family sued treatment centre for negligence
* Held: no duty of care owed.
	+ Sufficient as between the parties
		- **Conflicting duties**
			* **Duties owed to child**; duty only owed to parent when those duties owed to the child have been fulfilled

## Palsgraf (ignore this!)

* Facts: D (train employee) tried to boost a person onto the train to help him catch it, but the person’s package fell and exploded because he had fireworks inside. The explosion toppled luggage onto P (another patron on the platform). P sues D in negligence
* Held:
* Cardozo
	+ D.O.C. is relational
	+ D’s conduct was negligent with respect to the man holding the package and not P, who was standing very far away
	+ The duty is personal and the wrong is personal and relational. Only if YOUR right has been injured do you have the right to sue.
	+ Thus, you owe a duty to all those who you can reasonably foresee would be injured by your actions.
	+ The risk here is that the man’s package might drop, NOT that it might contain explosives and explode
	+ Internal limit
* Andrews
	+ D.O.C. is practical politics, a balancing of best interests
	+ Duty = don’t act so that you might harm others
	+ No internal limit; practical politics

# Standard of Care

## Arland

* Reasonable person description
* Standard of care is objective

## First: Special standard of care?

### Children

### Joyal

* Facts: Infant was 6 years old and was told about the dangers of crossing the road by her father
* She looked one way, where there was a car and horns sounding, waited for it to pass, but then ran across while on the other side there was a car who was negligently driving too fast, and as a result she was severely injured
* Issue: is she guilty of contributory negligence?
* Held: no, she is not.
* Children of tender years are cannot be found liable of negligence.
* Otherwise, the SOC for children is to exercise the care to be expected from a child of *like age, intelligence, and experience*
* Child of like age, intelligence, experience, would have done as she did
* But children engaging in adult activities are held to the standard of care of a reasonable person engaging in that activity (same thing with inexperienced people, e.g. drivers) (*Imbree*)

### Elderly – no different SOC

### Physically disabled

* What a reasonable person with the same disability would do (*Fiala*)

### Mentally disabled

### Fiala

* Facts: MacDonald experienced a mental illness (bipolar disorder, had a manic episode which he never had prior) which made him be crazy (jumping on cars, yelling obscenities), and resulted in a car crash with a few injured people
* Held: Test is based on foundational principles of negligence: volition and capacity
* **Test:** (onus on D)
	+ (1) Where D is suddenly and without warning inflicted with the mental illness:
	+ AND
	+ (a) D does not have capacity to understand or appreciate that he owes a duty
	+ OR
	+ (b) D cannot fulfill the duty because he lacks meaningful control over his actions

### Parents: negligent supervision

### LaPlante

* Let 16 year old who recently got licence drive in icy conditions; liable for negligent supervision

### CS

* Camp supervisor held negligent for negligent supervision because the supervisor witnessed a sexual assault and did not do anything

### Professionals

### Ter Neuzen

* Facts: P contracted HIV as a result of artificial insemination
* Held: professionals must act as reasonable professionals

### White

* Facts: D conducted breast reduction and turned out substandard
* Held: negligent because (1) operation was done too quickly, and (2) suturing started before a proper check was made to see if enough tissue was removed

## Second: did the D run an unreasonable risk?

Preliminary comment

### Roe

* assessed at the time of the breach

First: Did the D run a real risk or far fetched and fantastic? If a risk real, move on to next step; otherwise, D did not create an unreasonable risk

### Bolton v Stone

* Facts: cricket; ball out of bounds 6 times in 30 years; hits a lady
* Held: real risk established; low threshold

Second: was the risk substantial? If so, the D ran an unreasonable risk. Or was the risk small? If so, move on to next step.

Consider two factors: probability of injury and potential severity of injury

### Bolton

* Mere foreseeability is not enough
* P\*L not considered in a vacuum; considered together
* Here the risk is small

### Paris

* Facts: One-eyed man loses his eye at work
* Held: Liable. Potential severity of injury to one-eyed worker is larger than two-eyed worker; need to take this into account in the analysis
	+ I.e. losing an eye vs blindness

Third: if it’s a small risk, consider burden of precautions, custom, economic analysis, utility (if public official)

COST

### Vaughn

* Facts: paint dripping on cars while D was constructing a bridge
* Held: multiple precautions could be taken to avoid this; not expensive

### Law Estate

* Facts: CT scan not ordered because of cost; resulted in death
* Held: small chance of finding something and saving a person justifies the extra cost

### Bateman

* Court accepted argument of non-availability of physicians

### Lovely v Kamloops

* Guardrail simple and cheap solution to avoid accident; held liable

CUSTOM

### Ter Neuzen

* For medical:
	+ If it involves complex scientific matter, courts should defer to standard practices; not in a position to question the standard practice
	+ Exception: if the risk is obvious to the reasonable person, then the court may find that he standard practice itself is negligent

Valid reason? Potentially a consideration

### Carroll towing

* No valid reason for being away from the boat

### Bolton

* Valid reason: playing cricket

UTILITY

### Watt

* Firefighter injured because jack was not secure when he had to go on a call
* Sometimes the ends justify the means; potentially saving a life worth the small risk

### Priestman

* Police share; bystander injured; D was under an affirmative statutory duty; justifying in taking a small risk due to utility factor

**ECONOMIC UNDERSTANDING OF SOC**

### Carroll Towing

* Facts: Case of barge breaking away and injuring other vessels
	+ The bargee left from Jan 3 5pm and the barge escaped at 2pm the following day; 21 hours later
	+ Not expected that the bargee would be aboard overnight, but during working hours it is expected that the bargee be aboard
* Held: economic analysis
* PL > B = negligent
* PL < B = not negligent
* Heavily criticized

# Damage

* P must show that she suffered **legally cognizable damage** (actionable damage)

## Rothwell

* Facts: Ps exposed to asbestos but did not yet develop mesothelioma; developed plural plaques which is symptomless
* Held: Physical injury has a *de minimus threshold*
* Plural plaques; symptomless are not compensable (does not meet *de minimus* threshold)

## Mustapha

* Facts: P found dead fly inside the water provided by manufacturer; caused severe as severe mental distress (suffered major depressive disorder associated with phobia and anxiety)
* Held: not liable;
* For purely psychological injuries, requires a person of ordinary fortitude to suffer some mental injury; otherwise not compensable
	+ But if person of ordinary fortitude suffers some injury, then liable for the full extent
* Psychological injuries require more than mere ordinary annoyances, anxieties, and fears
	+ Must be serious and prolonged

## Saadadi

* Facts: P was involved in a car crash, and experienced some physical damage as well as psychological damage (his personality changed and slurred speech; which deteriorated relationships with family)
* However, this was not on the basis of a medically recognized psychiatric illness/condition, but rather on the basis of testimonies from lay witnesses
* Held: Law does not require claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury
* Considered things such as the length of impairment, cognitive functioning impaired, interruption of daily activities, treatable

# Factual Causation

Standard test: but-for (*Clements*)

## Clements

* Facts: Motorcycle injury as a result of wet road, overloading, speeding, and nail (some tortious and other non-tortious causes)
	+ Could not prove definitively that the tortious cause was a necessary cause
* Held: D liable
	+ Do not need scientific proof to prove causation
	+ Do not need certainty; only preponderance of doubt (balance of probabilities)
	+ Pragmatic and robust approach to causation (robust and common sense approach)

## Athey

* Facts: P had pre-existing back condition (non-tortious cause). Suffered neck and back injuries from two Ds (tortious causes). Suffered injury while stretching (non-tortious cause)
* Held: does not need to be the sole cause, only a cause (above de minimus)
* P would not have suffered the injury but-for the D’s negligence

Shifting the burden of proof may be appropriate in then following instances

(1) Two Ds; both negligent and one of which in fact caused the injury

## Cook v Lewis

* Facts: Two Ds both negligently shot at the direction of P
* Only one of them caused the injury in fact but impossible to tell
* Held: Appropriate to shift burden on D

(2) Where the reason the P cannot prove causation is because of the D’s negligence

## Snell

* Facts: D doctor treating P and noticed bleeding. Stopped operation for a little while and when bleeding stopped he continued P went blind.
* Issue: D’s negligence a necessary cause of P’s injury? would the P have suffered the injury but-for the D’s negligence?
* what caused the injury? His conduct or natural causes? Medical evidence could not tell.
* Held: may be appropriate to shift burden in this circumstance because it was the D’s fault that they could not prove causation

(3) Materially increases the risk (McGhee) (how does this reconcile with the test below)

## McGhee

* Involved a brick and developed dermatitis
* D’s failure to provide showers materially increased the risk of the P developing dermatitis
* Could not say it is more likely than not that it was not caused by an innocent cause
* Appropriate to shift burden
* **Note: overruled by Wilsure!!!**

CHARACTERIZING THE RISK IS IMPORTANT

## Kauffman

* Two youths scrapping and hit another man below who falls on the P and then P suffers injuries
* TTC handrail design was abnormal
* No evidence that anyone tried to reach for the handrail or that it would have in fact stopped the accident had they grabbed it
* Needed to characterize the risk as failing to supervise the area for scaffolding

## Barnett

* Arsenic poisoning; negligently sent away
* Even if they would have acted carefully and admitted them; they would have died prior to receiving treatment

## Qualcast

* Protective spats not worn by worker not required, and worker was injured
* Negligence characterized as not advising worker to wear protective spats
* In dicta: fails on causation because worker would not have worn it even if advised; thus accident would have happened anyway

## Richard

* On ferry, someone yells “we’re here” and the guy backs off the ferry
* Lawyers argued that safety rope not attached (negligence) but even if it was, he would have still
* Needed to characterize the risk as not having a backstop to stop cars from falling off

**Exceptional test: material contribution to risk** (never applied in Canada by the SCC)

## Clements

* P only needs to prove that D materially contributed to the risk of the harm IF:
* (1) P has proven that the P would not have suffered the loss but-for the negligence of multiple Ds collectively, each possibly in fact caused the injury
* (2) It is impossible for the P to prove that any of the Ds were a but-for cause of the injury because they can each point their fingers at each other to escape liability
	+ Evidentiary possibility; not a factual possibility

## Fairchild (UK example)

* P contracted mesothelioma (occurs when a single fibre of asbestos is inhaled). P was exposed to asbestos over the course of many years of employment with different employers, thus unable to prove which employer had done it on a balance of probabilities
* All causes of exposure to asbestos
* All the Ds were held jointly and severally liable

## Baker (remedy)

* Same thing but one of the causes was non-tortious; self-employed and exposed himself in a non-tortious manner
* Proportionate share approach
* Each employer liable only for the share of time that he was exposed to asbestos

## Sindell (remedy #2)

* Facts: P developed a deadly cancer caused by a drug called DES
* DES taken by pregnant women
* Could not prove who in fact supplied the DES that harmed the person (About 200 pharmaceutical companies produced it and it was a generic pill with no markings)
* Held: *proportionate market share approach*

MULTIPLE DEFENDANTS

1. Injury divisible or indivisible?
	1. If divisible, no need to move on; if indivisible, move on
2. Independent or joint tortfeasors?
	1. If joint, they are jointly responsible for the torts committed. If independent, move on.
	2. Joint tortfeasors in three instances:
	3. (1) principal-agent
	4. (2) employer-employee
	5. (3) Ds acting in concert with a common end that is illegal or inherently dangerous
		1. *Newcastle*: three drunk youths plan break and enter into a home in order to steal. One of the youths commits arson; all three liable; held liable as joint tortfeasors
		2. *Martin*: Ps came to Ds house to collect money (not in a friendly way) and one of the Ds assaulted the P; held as joint tortfeasors

**Multiple insufficient causes**

* Standard but-for test is used

## Athey

* P had pre-existing back condition (non-tortious cause). Suffered neck and back injuries from two Ds (tortious causes). Suffered injury while stretching (non-tortious cause)
* multiple causes; each a necessary cause; Ds held liable

## Nowlan

* negligent contractor + architect = lack; both held liable

## Arneil

* two dogs worry a sheep to death
* each a but-for cause

**Multiple sufficient causes**

* causes problems for the but-for test

**tortious and non-tortious**

Ask: in a world without wrong, would the P had suffered the injury to the same extent?

## Penner

* injury caused 13 months
* would not be able to work 3 months anyway
* award reduced to 10 months to account for this
	+ crumbling skull rule: do not need to pay for damages that the D would have suffered anyway

## Sunrise

* First incident (tortious): grounded for 27 weeks; second incident (non-tortious): repairs done simultaneously
* Whether D is liable for 27 weeks of lost profit or should account for second grounding?
* 27 weeks; second grounding did not affect it at all
* Damages crystallize at the moment the tort occurs

## Snell

* D liable for full extent
* Recall: found to be a cause in fact

**tortious and tortious**

Simultaneous

Significant factor test is used

Sequential

Only relevant during the appeal prior (afterward not relevant)

Each D is responsible for the injury they have caused

## Baker

* D negligently injured left leg; had a stiff leg; then shot by second D and leg was amputated
* D1 liable for stiff leg that he caused; does not alleviate him
* D2 if caught would be liable for difference in value between stiff leg and amputated leg
* Damages crystallize at the moment the tort occurs

# Remoteness

Remoteness inquires about whether the harm is too unrelated to the D’s conduct to hold the D liable (*Mustapha*)

Directness is rejected as the standard (*Polemis*)

Harm is not too remote if it is reasonably foreseeable (*Mustapha*)

Reasonably foreseeable: is the D’s conduct a “real risk” or is it far fetched and fantastic?

* *Bolton*: ball flew out 6 times in 30 years playing cricket and met this; indicates a low threshold
* **Two tests considered:**
	+ **Type of inquiry** (*Hughes*)
		- Liable for full extent of the same *type* of injury
		- Even if the full extent is not reasonably foreseeable
	+ **Ambit of the risk** (*Doughty*)
		- Scope of the risk

## Type of injury

### Hughes

* Lamps with a tent in a manhole
* Child grabs lamp and falls into manhole; explosion occurs and he is seriously injured
* Burning from the lamp was reasonably foreseeable
	+ As well as him going inside (“lured inside”) and falling into the hole
* But explosion was not reasonably foreseeable
* Held liable for the explosion; type of injury is the same

### Pike

* D carelessly failed to control rat population on his farm. P, a farmhand, contracted Weil’s disease after coming into contact with rat urine
* Though injury from rat bites was reasonably foreseeable, rat urine not reasonably foreseeable to be problematic

### Jolley

* Decrepit boat left by D and found by boys who tried repair it but it fell and rendered the P paraplegic
* Children’s play can take form of mimicking adult behaviour and it was reasonably foreseeable that the children would meddle with the boat at some risk of injury

### Lauritzan

* Facts: D’s negligence caused his car to be stuck in snow during a bad storm on a relatively unused portion of a rural highway. P and D forced to stay in vehicle for 36 hours. P left for help after that but got severe frostbite. Had to have both feet amputated. P’s wife of 26 years left him because she did not want to live with a disabled man.
* Held: physical injuries not too remote, but loss of consortium is not a reasonably foreseeable injury

### Trevison

* D was entrusted with P’s house key. D’s son stole house key and set fire to P’s house in order to cover up a series of thefts.
* Losses due to fire too remote from D’s negligent failure to supervise and control frequently delinquent son. D only liable for P’s losses due to theft (that was reasonably foreseeable, the fire was not)

### Doughty – contrast with Hughes

* Two risks:
	+ (1) splash: if dropping an object, the liquid will splash any person within 1 foot
	+ (2) splosh: if it is disintegrated and placed inside, it will undergo a chemical change underwater and create an explosion
* First risk – reasonably foreseeable; second risk- not reasonably foreseeable
* Not liable: did not run risk #1 (the lid slid in; it did not drop in and splash), only ran risk #2
* Not liable because there was no obligation not to run risk #2 (only not to run risk #1)
	+ It was not reasonably foreseeable

## Ambit of the risk

### Doughty – see above

* Splash vs splosh distinction

### Assiniboine

* Negligence causes snow mobile to run at large
* Snow mobile hits gas pipe and a school blows up as a result
* When a snow mobile is allowed to run at large in a middle of a city street, the ambit of foreseeable damage is broad

### Mortimer

* Even though for analysis done for contributory negligence, it is still applicable here
* Boys ran the risk of falling down the stairs, but not through the wall (not reasonably foreseeable that it did not have any support in the middle)
* P injured severely because of this

## Thin skull rule

* D takes his P as he finds him
* Liable for all injuries if he causes some injury (not de minimus = liable for all injuries)

### Smith v Leech Brain

* Piece of metal flew off and burned a man on the lip. Because of this burn and a predisposition, he got cancer and died.
* Held: thin skull rule = a tortfeasor takes his victim as he finds him
* The test is NOT whether the burn would, with reasonable foreseeability, cause cancer, but rather whether D could reasonably foresee the burn
* The amount of damage that he suffers relates to his constitution

**But with PSYCHOLOGICAL INJURIES**

* Requirement of *some* damage to a person of ordinary fortitude (thin-skinned vs thin-skulled 🡪 distinction)
* If you cause an ordinary person some psychiatric injury, then you are liable for ALL psychiatric injury
* **EXCEPTION**: Once you’re established liability for negligence for personal injury, the psychological injury follows (even if an ordinary person would not suffer any psychological damage) (*Marconato*)

### Marconato

* Woman was physically injured in a motor vehicle accident in which D was negligent. She became depressed, hostile, and anxious (personality change), but she had pre-existing paranoid tendencies
* P can recover for psychological injuries once some physical injury is established (consequential loss recoverable)
* Distinguished from *Mustapha* because P suffered no physical injury there. Might have been successful had he experienced physical injury first.

## Suicide

Whether D is liable for D’s suicide resulting from injuries that resulted from D’s negligence

Two competing tests:

* (1) distinction between sanity and insanity at the time of suicide
	+ Swami 🡪 suicide committed by a sane person at the time of suicide; then too remote
	+ Gray v Cotic 🡪 D’s negligence leads to insanity, then suicide occurs as a result; not too remote
* (2) whether D’s negligence caused P’s suicide
	+ Swami 🡪 caused it (note: not the approach that the court took

## Novus Actus Interveniens

* Whether an intervening cause
* Test: “Within the scope of risk” (*Bradford*)
* Traditionally three categories:
	+ (1) acts of nature – almost never considered an intervening cause
	+ (2) subsequent negligent acts – sometimes considered an intervening cause
	+ (3) intentional acts of others – almost always considered an intervening act except when it is your sole duty to stop that person from doing that act

### Bradford

* Facts: Grill in a restaurant (D) built up grease, and the kitchen staff failed to clean it.
* The grill had a fire-prevention system. When it caught fire, the workers competently used the system, which caused a hissing and popping sound
* A patron heard the sound and yelled “gas” which caused panic and P got trambled
* Issue: is patron’s yelling of “gas” an intervening act?
* Majority: yes; characterized as “idiot”; stated that state-of-the-art fire extinguisher was there for the purpose of stopping the fire; should be held liable for using preventative measures
* Dissent: yes; normal reaction of a person to hearing such a noise and seeing a fire
	+ Sees it as a natural consequence of the fire (and fire extinguishment system)

### Oke

* Facts: D knocked down traffic sign on gravel strip and stopped, removed some debris, but was unable to move the sign. Notified garage attendant, but not the police or highway authorities
* Next day, driver was killed when he was trying to pass *illegally* and the sign pierced his chest.
* Held: Even if D was careless in not reporting the incident, could not be liable because deceased’s intervening act and its consequences could not have been foreseen

### Price v Milawski

* Facts: P injured ankle; goes to doctor who negligently takes an improper x-ray which came back negative
* P went to another doctor who relied on
* P went to a third doctor who ordered new x-rays and found the break. P suffered permanent disabilities because of the delays in proper treatment.
* Issue: is the first D liable or is the second D’s negligence an intervening cause?
* Held: Reasonably foreseeable for negligent x-ray to be relied upon by other doctors
	+ Not a risk that a reasonable man would brush aside as far-fetched

### Spencer

* P suffered minor injury, but eventually led to amputation. Fitted with prosthesis. Stopped at a gas station, didn’t put on prosthesis when he exited the car, tripped and fell, seriously injuring other leg
* For P, not too remote but reduced due to contributory negligence

### Bourgoin v Leamington

* P suffered ankle injury while walking on uneven sidewalk, developed chronic intractable pain. D argued she failed to reduce damages by refusing to undergo recommended amputation which was 95% likely to eliminate pain
* Not unreasonable for P to not want to amputate leg

### Hewson v Red Deer

* Tractor owned by the city was left on a pile of gravel by its operator, who took a break and left the key inside. Returned to find it had crashed into the house below. Someone clearly used the truck
* Held: liable; should have taken the key out; foreseeable in a college town that someone would try and use the machine; not a novus actus
	+ note: reversed on appeal

### Tong v Bedwell

* D stopped at traffic light when someone smashed his windshield. He got out and ran after him leaving the keys behind, but his car was stolen when he did that. The thief crashed his car into P’s car
* Reasonably foreseeable that car would be stolen, but not that the thief would drive in such a manner as to cause damage

### Lamb v LBC

* P owned a house and leased the property to a tenant
* The London Borough Council were replacing a sewer and a water main broke—with the escaping water undermining the foundation of the house
* The tenant moved out because it was inhabitable
* During this time, squatters invaded the home on two occasions and had caused damages of $30k
* Issue: is the D (the city council) liable?
* Held: Ultimately it is a question of *policy* by the judges
* Question of policy concealed under question of duty, reasonably foreseeability, etc. (all aspects of negligence)
* Who’s job was it to do something about the squatters?
* Her responsibility to kick swatters out
* it was unfurnished and vacant 🡪 attractive for squatters
* She should have taken out insurance

### Dorset Yacht

* Facts: Youth offenders in correctional institution on an island
* Youths had escaped before
* Youths escaped and stole a yacht and crashed it
* D sued correctional institution
* Issue: are the actions of the Bristol boys reasonably foreseeable?
* Lord Reid
	+ “very likely” standard used by Lord Reid
	+ Mere foreseeability is not enough
	+ Sinel: unsatisfying test
* Lord Diplock
	+ Duty owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention which the detainee was likely to steal in the course of eluding immediate pursuit and recapture
	+ VERY FACT SPECIFIC 🡪 **good example of what needs to be done on the exam**
	+ Not because they are likely to do damage to property because of the type of people they are
	+ Rather, when people escape, they will likely use things to help them escape, and they are likely to break them
* Held: liable to the P for the damage the boys had caused

# Defences

## Contributory Negligence

### Mortimer

* Facts: P attended a party while drinking, though everything was friendly and the mood was relatively subdued
* P engaged the D and that natured some friendly horseplay
* They eventually fell down the stairs that were beside them, and despite gently hitting a wall, it fell due to being poorly constructed, and they fell down a 10-foot fall rendering the P a complete quadriplegic
* Issue: Is the P contributorily negligent?
* Held: injury was not reasonably foreseeable
* The risk they exposed themselves to was falling down the stairs or onto he exterior landing or hitting the exterior wall
* The risk that materialized was of a different nature (Risk of falling through a defectively constructed and unprotected wall was beyond their reasonable contemplation)
* Not within the scope of risk created by their horseplay

### Walls v Mussens

* D, Morrison, employed as a serviceman for Mussens, drove a machine to the P’s service station where be obtained permission to repair the front drive shaft of the timberjack
* Shortly afterward, a gas torch ignited a pool containing gasoline on the floor beneath the machine
* When the fire started, the P was back home having left a 17-year old employed to do basic servicing in charge of the service station
* Others were extinguishing the fire
* He heard someone call out “fire, bring a fire extinguisher” but instead of bringing one, he attempted to smother the fire by throwing snow at it
* P entitled to invoke “*agony of the moment*” rule
	+ whether the P exercised a careful and prudent judgment in doing what he did, but whether what he did was something an ordinarily prudent person might reasonably have done under the stress of an emergency

### Heeney v Best

* Facts: P’s chickens died when D negligently cut off power supply to P’s barn
	+ Alarm system that P had but was not functioning would have warned him before the deaths
	+ P argued that less than half of barns have this system and it’s not customary
* Held: Nonetheless P was found to have been contributorily negligent for failing to take reasonable care of his own property

### Rewcastle

* Facts: 6 people in the car with 4 seat belts
* P asked to sit in the front but was refused
* She then sat on the lap of another passenger
* She died following an accident
* It was late at the time, considerable distance to her house, and close to midnight with no money
* Held: not contributorily negligent

### Pilon

* Facts: P injured as passenger in a car driver by an impaired driver
* Held: P contributorily negligent for accepting a ride from an impaired driver AND failing to wear a seat belt

### Gagon

* Facts: D was driving and the P riding as a front seat passenger when the D rear ended a pick up truck stopped at a railway
	+ P was not wearing a seatbelt
* Issue: P contributorily negligent for not wearing a seatbelt? Yes.
* *Need to show that the seatbelt would have prevented or lessened the injury* (factual causation?)

### Keller (not important)

* Facts: High-speed chase; officer driving 85 miles per hour on icy conditions; cruiser went out of control and hit a pole
* Held: officer not contributorily negligent because his actions were no more than was reasonably necessary to carry out his statutory duty

### Lewis (not important)

* Facts: Police officer killed by driver while investigating a traffic accident
	+ He was working alone and while ignoring traffic relied on the warnings given by several flashing lights
* Held: that he was not contributorily negligent for not keeping a proper lookout

## Volenti: voluntary assumption of risk

### Dube v Labar

* Facts: P and D were co-workers drinking all night and more in the morning
	+ They decided to drive to find two girls that they met the previous night, and which point they picked them up and drove them 50-60 miles
	+ D while a passenger was still drinking in the car
	+ They were driving back and they decided to pick up two hitchhikers
	+ The D began driving instead of the P after the P stalled the car
	+ The D turned to talk to the hitchhiker while driving and the car veered to the right, at which point the D tried to correct the car’s course but it resulted in the car’s overturning, which caused injuries to the P
	+ The jury found that the D voluntarily assumed the risk
* Held: SCC unwilling to interfere with jury’s verdict, but states that this is a borderline case
* Test for volenti:
	+ (1) it is **clear** that the P, **knowing of the virtually certain risk of harm**, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the D’s part
	+ (2) This acceptance of risk may be **express or may arise by necessary implication from the conduct** of the parties
	+ (3) but it will **arise only** where there can truly be said to be a **understanding** on the part of **both parties** that the **D assumed no responsibility to take due care for the safety of the P and the P did not expect him to**
* Needs to appreciate and accept both the physical and legal risk
	+ Common sense dictates that only rarely will a P genuinely consent to accept the risk of the D’s negligence

### Loychuk (outlier)

* **Note**: this case is an outlier
* Facts: Ps went ziplining and signed a waiver
	+ P1: recent law school graduate
	+ P2: operated kickboxing business and required clients to sign similar waivers
* The first P gets stuck in the middle and there are lots of trees so the D does not see the P got stuck, so the second P smashed into the first one
* Issue: is the waiver valid?
* Held: waiver is valid; voluntary assumption of risk

## Ex turpi: defence of illegality

### Hall v Hebert

* Facts: P sues the D for allowing him to drive in the intoxicated state
* Issue: can the D rely on the defence of *ex turpi*?
* Held: Not the case that just because you do something illegal that no one owes you a duty of care
* Defence only applies in situations where *if you allowed the P’s claim, it would threaten the integrity of the legal system* (very high threshold)
	+ (1) Cannot use tort action to make a direct profit from the illegal conduct
	+ (2) cannot use a tort action to circumvent a criminal penalty
* Rather the person is contributorily negligent

### John Bead v Soni

* Facts: P claimed that D had stolen $1.6M from his company
* D pleaded ex turpi causa on the basis that P had also illegally stolen money from the company
* Defence does not apply merely because the P was engaged in an illegal activity that was unrelated to the facts underlying the P’s claim
* Where it does apply:
	+ (1) where one wrongdoer claims in tort against another for financial loss ***arising*** from an illegal activity
		- Not compensatory 🡪 profiting off (higher standard)
	+ (2) where the P claims as a head of damage suffered in a personal injury claim, loss of earnings from an illegal activity (*Beljanski*)

### Beljanski

* Dependent children of career criminal sue for negligence when their father was negligently killed
* Court refused to base the award on any illegal income the deceased would have made through criminal activities

### Zastowny

* P sued D for sexual battery
* Court refused to compensation for portions of time he had subsequently spent in jail for various offences

### Vellino

* P injured while jumping out from a window to escape police custody
* Court denied his claim in part because attempting to escape was a criminal offence

### Situations where it could conceivably apply

* D liable (firearm manufacturer) when the P is shooting someone else (not for a valid reason, like self defence, but think of a gang-related incident) and gets injured
* Run away from the scene of a crime and you trip on the sidewalk
	+ SEE CASE POTENTIALLY?