

Negligence Framework

Elements of Negligence

A. Breach: Has the defendant created an unreasonable risk of harm?

B. Duty: Does the defendant owe a duty to the plaintiff?¹

C. Remoteness: Unreasonable risk *of what*? What is the scope of liability? Is the damage suffered by the plaintiff too remote?

D. Factual Causation: Did your negligence factually cause the injury?

E. Damage: What you factually caused has to be actual damage.

Note: To win, the plaintiff has to prove all five of these. A defendant can evade liability by knocking out any one of the five elements.

Defences to Negligence:

→ Voluntary Assumption of Risk

- An all or nothing defence
- Fairly narrow nowadays
- Ex: signing a waiver to join a sports team

→ Contributory Negligence

- If you did something that contributed to the negligence, liability can be divided
- Ex: listening to loud music when a car hits you, and if you weren't listening to music, you would have seen the car and moved
- The issue is how much to take off for contributory negligence: how much is someone contributorily negligent?

→ Illegality (*Ex Turpi Causa Non Oritur Actio*)

- From a base action, no legal right emerges.
- You can't recover losses arising from illegal acts.
- Defence of illegality is narrow. Just because somebody is doing something unlawful does not mean they can't sue you. Someone can sue you if they fell through your porch while breaking and entering.

→ Remoteness / Novus Actus (*Armstead*)

¹ Everybody agrees that reasonable foreseeability has something to do with this. People disagree on the other elements: Foreseeability + proximity? Foreseeability + policy? (*Anns/Cooper*) Foreseeability + rights? (Cardozo)

A. Proof and Procedure

Functions of Court and Jury

- Issue of law (ie. standard of care) → judge
- Issue of fact (ie. whether defendant has satisfied standard of care) → jury

Standard of Review

- If the trial court made a factual mistake, the standard for intervention is **palpable and overriding error**
- If the trial court made a legal error, the standard for intervention is **correctness**
- **Mixed mistake:**
 - If you can extract a pure question of law, the standard is correctness.
 - If you can't, the standard is palpable and overriding error.

Circumstantial Evidence

- Mere occurrence of an accident or injury is not enough to establish negligence. There must be evidence **that supports a reasonable inference of negligence.**

Non-Suit Motions

- If the defendant thinks there is not enough evidence for the case to go to the jury, the defendant can bring a non-suit motion.
- *Res ipsa loquitur* developed in response to debate surrounding whether merely circumstantial evidence is grounds for a non-suit.

Res ipsa loquitur ("the thing speaks for itself")

- RIL means that it is possible to infer negligence (no non-suit) when there's no direct evidence, the injury-causing item was under the defendant's control, and the accident would not have occurred without negligence.
 - Example 1: Two drivers killed in a head-on collision on a straight road at night → both liable (**Baker**)
 - Example 2: Barrel of flour falls from a second-story loft and hits the plaintiff. The barrel falling "spoke for itself"² (**Byrne**)
- Today, RIL is not a distinct doctrine. It's just another way to use circumstantial evidence (clues from the situation) to argue negligence when direct evidence is not available (**Fontaine v British Columbia**).
 - It does not shift the burden of proof, except in a tactical sense.
 - Evidence is weighed in relation to how much you can provide (**Snell**).

Remnants of RIL

- Has been invoked in cases of unusual injury during unconscious medical treatment: all defendants with control over the patient's body may be called to rebut inference of

² "A barrel could not roll out of a window without some negligence, and to say that a plaintiff who is injured by it must call some witnesses to...prove negligence seems to me preposterous."

negligence by explaining their conduct (*Anderson v Somberg, Ybarra v Spangard*³)

B. Breach?

I. General Principles

Whether the defendant has breached the objective standard is a question of **fact**. In general, the defendant is held to the standard of care a **reasonable person** would exercise in his circumstances (*Arland v Taylor, Vaughan v Menlove*). A reasonable person makes **prudence** a guide to his conduct (*Arland*). The objective standard does not require **perfection** and is not judged with **hindsight** (*Hill v Hamilton-Wentworth, Ter Neuzen*).

II. Which standard of care applies?

- ★ **General Rule → Reasonable Person:** In general, the defendant is held to the standard of care a reasonable person would exercise in his circumstances (*Arland v Taylor, Vaughan v Menlove*). The reasonable person is one of “normal intelligence” who “makes prudence a guide to their conduct” (*Arland*).
- ★ **Personal Characteristics → No Adjustment:** There is no adjustment for personal characteristics or infirmities such as low intelligence, poor decision-making skills (*Vaughan*), or a tendency to forget things (*Froom*).
- ★ **Automatism Exception → No Standard of Care:** If someone is incapable of choosing, no standard of care applies to their conduct (*Buckley*).
 - **Reflexes** are not conscious actions, so a reflex is not a breach of the objective standard (*Stokes v Carson*).
 - **Insanity** only negates SoC if D is a) unable to **understand** the duty of care or b) unable to **discharge** the duty of care (*Buckley*).
 - **Diminished capacity** does not negate standard of care, even due to sudden affliction such as a stroke or drop in blood sugar (*Roberts v Ramsbottom, Dunnage v Randall*). The loss of control must be **100%** complete (*Dunnage v Randall*).
 - *Mansfield v Weetabix* says SoC should consider mitigating factors beyond complete loss of control.⁴ However, this is not good law in Canada.
- ★ **Children Exception → Modified Standard of Care:** The standard of care for children should be adjusted incrementally, taking into account age, intelligence, and experience (*McHale, affirmed in Hill*).

³ Supreme Court of California 1944

⁴ Hypoglycemia unknown to the defendant impaired his judgement while driving. He did not have 100% lack of control, so following Ramsbottom and Dunnage he would be held to the objective standard. However, the England Court of Appeal conflated moral responsibility and legal responsibility.

- **Below 5 or 6** → No standard; little hedgehogs; not rational actors (McHale).
 - **Young Adults** → **Adult Standard** Children who have not attained the age of majority yet are as capable of foresight as adults (McHale). This is defined relative to Australia age of majority at time of McHale judgement, so roughly **18-20** year-olds.⁵
 - **In Between** → What it is reasonable to expect of children of like age, intelligence, and experience (McHale, Hill).
 - **Adult Activities** → **Objective Standard of Care**: However, children who engage in adult activities are entitled to no special privilege and must meet the standard of the reasonable person (McErulean). Adult activities are “fraught with danger” (McErulean).
- ★ **Professionals** → **Professional Standard of Care**: The standard of care is the standard behaviour of a competent professional in the field (Ter Neuzen). **Exception**: If the standard practice is “fraught with obvious risks,” the trier of fact may find it negligent in itself (Ter Neuzen).
- ★ **Doctors** → **Reasonable and Prudent Doctor** (Ter Neuzen). Custom and competing duties will be significant in reasonable care calculus.
- ★ **Police** → **Reasonable Officer** (Hill v Hamilton)
Accounts for:
- Time constraints and urgency,
 - Funding limitations (SoC must recognize what can be accomplished within a realistic and responsible financial framework),
 - Imperfections in real-world investigations,
 - Reasonable **discretion** exercised by law enforcement.
 - Standard is **not perfection or even the optimum**. Minor mistakes or “mere errors in judgment” will not necessarily amount to a breach of the standard.
- ★ **Employers** → **Vicarious Liability**: Employers can be vicariously liable if an a) employee b) in the course of employment c) commits a tort (Buckley).
- **Note**: In cases of vicarious liability, the standard is the reasonable person in the **employee’s** circumstances. The law sees the employee as the agent or proxy of the employer.
- ★ **Occupiers** → **Reasonable Care in the Circumstances** (Malcolm v Waldick).
- In Malcolm, failing to ice the driveway was not reasonable care.
- ★ **Government** → **Reasonable Public Authority** (Just v BC)
- Takes into consideration “budgetary constraints, personnel, equipment, and the vast

⁵ In Australia at the time of judgement, the age of majority was 21. ON judges often err in considering “young adults” relative to the ON age of majority.

territory” for which authority may be responsible. Standard is not perfection.

Note on Statutes

- Legislative enactments are relevant. However, the common law standard of care is not necessarily coextensive with statutory mandates (***Saskatchewan Wheat Pool, Froom***).
 - Statutory authority does not automatically make conduct reasonable, and a breach does not automatically make conduct unreasonable (***Froom***).
- A statute does not impose a duty of care or create a common law right unless it explicitly says so (***Saskatchewan Wheat Pool***).
 - Give the words their ordinary and grammatical meaning (***Gorris v Scott***).

III. Is *any* risk foreseeable to anyone?

The next issue is whether the risk was **real** (***Bolton***), or in other words, *at all* foreseeable to anyone. This is a threshold step. Reasonable people do not respond to unforeseeable or far-fetched risks, such as a dog crashing through a window (***Fardon***).

“Real” Risks:	Fantastical Risks:
→ A hayrick exploding when built near border of property; P had been warned of risk (<i>Vaughn v Menlove</i>) → Someone being hit by a cricket ball flying over a fence (<i>Bolton v Stone</i>) → A severe headache turning out to be a brain bleed (<i>Law Estate v Simcoe</i>) → A chip of metal flying into someone’s eye while they are knocking out bolts with a hammer (<i>Paris v Stephney</i>)	→ A dog crashing through a car window (<i>Fardon</i>)

IV. Reasonable Care Calculus

What constitutes reasonable care?

- ★ **Probability (P) and gravity (L) of injury** → is the risk **substantial** or **infinitesimal**? (***Bolton v Stone***)
 - **Gravity:** What would be the consequences for the victim? The more serious, the higher the SoC (***Paris v Stephney***).
 - **Note:** We should **multiply** P and L. It is an error of law to conflate these two variables. The conclusion that there is a serious risk of drowning does not follow from the fact that drowning is seriously injurious (Lord Hobhouse’s concurrence in ***Tomlinson***).

- **Note:** As Lord Denning points out in *Froom*, we should not call a risk infinitesimal just because we do not know when it may arise.⁶

★ **Cost of Precautions (B)** → In Canada, this factor **usually supports liability**. If the cost of precaution is very **small**, a reasonable person would normally take it (*TJ Hooper*, *Wagon Mound 2*).

- When the risk is **substantial and real** (function of PL - *Bolton*), cost of precaution is irrelevant (*Law Estate*).
- However, if the cost of precaution is more than very small AND the risk is infinitesimal, D may not be liable (*Latimer*).

3 Possible Scenarios:

- Substantial real risk → burden of precaution irrelevant; failure to prevent constitutes negligence (*Law Estate*).
- Infinitesimal risk + very small burden of precaution → liable (*WM 2*).
- Infinitesimal risk + burden of precaution more than “very small” → not liable (*Latimer*).

★ Custom:

- I. What is the approved practice, and did you adhere? (*Trimarco*)
- II. If not, would a reasonable person have deviated in the circumstances?
- III. Is the approved practice itself unreasonable?
 - **Note:** Juries cannot make this call for specialized fields, unless the practice is “fraught with obvious risk”: *Ter Neuzen*.
- Custom is not determinative (*Malcom v Waldick*).
- Whoever alleges that there is a custom or standard practice must provide evidence thereof (*Malcolm*).

★ **Social Utility:** Does the social value of the activity make the risk worthwhile? (*Tomlinson*).

- **Emergency Responders** → “One must balance the risk against the end to be achieved...The saving of life or limb justifies taking considerable risk” (*Watt v Hertfordshire*).

★ Conflicting Responsibilities or Duties

- A foreseeable risk may be impossible to prevent due to competing duties (*Wyong Shire, Syl Apps*).
- Examples:

⁶ The defendants argued that the risk of a car accident is so small that a reasonable person would only wear a seatbelt in circumstances which drive up the risk (ie. fog). Denning rejected the premise that the risk was small: “**You never know** when a risk may arise. It often happens suddenly and when least anticipated, when there is no time to fasten the seat belt.” Alternatively, a reasonable person would take the burden of precaution if it, too, is small.

- In Wyong Shire, while it was foreseeable that one person might misinterpret the sign, the Council had a duty to warn the other swimmers of the deep water.
- **Exception:**
 - When a doctor must choose between their duty to patients and their duty to medicare, the duty to patients must prevail (Law Estate).⁷
- ★ **Drivers and Passengers in a Motor Vehicle:** A reasonable person wears a seatbelt when riding in a motor vehicle (Froom).
 - Although seatbelts are not mandated by statute + many people believe wearing them makes one less safe, it was the “wise precaution which everyone should take” (Froom).
 - The risk may be small, but so is the burden of precaution (WM2).
- ★ **Manufacturers of Dangerous Products (Lambert v Lastoplex):**
 - **a)** Must warn of risks they know or ought to have known in relation to their products
 - **b)** Must warn of risks existing upon creation of a product, but also risks that arise subsequently.
 - **c)** Do not have to warn of risks that are **obvious** or well-known, unless the consumer is a child or somebody inexperienced.
 - **d)** Warning cannot be too general; must be explicit enough to protect the user from foreseeable dangers
 - **e)** Manufacturers need only warn consumers of the risks involved in the foreseeable use of their products
 - But if they know the product is going to be misused, they must warn about misuses.⁸
 - **f)** In some cases, the manufacturer can discharge their duty to warn by informing a learned intermediary.
 - However, if the manufacturer knows or should have known that the intermediary is not giving adequate warnings, the duty reverts back to the manufacturer.⁹
 - **Note:** The plaintiff’s education and experience will not lower the standard of care.

⁷ *Standard of Care is a question of fact. Not using the right formula is an error of law → could be a reason for appeal. Elderly people are generally held to the reasonable person standard*

⁸ Ex: Sniffing gasoline can cause brain damage. Therefore, you must warn consumers not to sniff.

⁹ Supremo W-200 manufacturer had 3 labels on the package stating the product was flammable. However, the warnings were insufficiently specific. The competitor’s label told consumers to turn off any switches in the vicinity capable of producing sparks.

Case	Facts	Reasonable Care?
<i>Vaughn v Menlove</i>	Built hayrick near edge of property, risk of fire, “would chance it”	✗
<i>Buckley</i>	Veered into an intersection, causing an accident	✗
<i>Malcolm</i>	Failed to ice driveway	✗: “Standard practice” $\neq$ reasonable care
<i>WM2</i>	Left oil fitting device on loosely	✗: Infinitesimal risk + very small burden of precaution
<i>Vaughn</i>	Failed to put up sign re: wet paint	✗: Infinitesimal risk + very small burden of precaution
<i>Law Estate</i>	Failed to order CT scan	✗: Substantial real risk = burden of precaution irrelevant
<i>Bolton</i>	Played cricket in yard; balls had flown over the fence 6 times in past 30 years	✓: Risk was infinitesimal – RP does not act on bare possibilities
<i>Wyong Shire</i>	Put up sign that said “DEEP WATER,” P misinterpreted it as an invitation to swim	✓: Risk foreseeable but impossible to prevent
<i>Butterfield</i>	Riding along street extremely hard	✗
<i>Froom</i>	Refused to wear seatbelt	✗: A “wise precaution everyone should take,” regardless of minority views
<i>Galaske</i>	Failed to take reasonable steps to provide for passengers’ safety	✗
<i>Lastoplex</i>	Provided insufficiently specific warning label on dangerous product	✗
<i>Tomlinson</i> (municipality)	Failed to put up a warning sign, P broke his neck	✓: Burden of precaution must be considered in relation to overall budget, also social value of activity at stake

<i>Watt</i>	Transported a jack without proper securing while responding to an emergency call	✓: saving of life and limb justifies taking serious risks
<i>Paris v Stephney</i>	Employer failed to give goggles to one-eyed plaintiff whose job was to knock out bolts with a hammer	✗: Gravity of harm higher where P is vulnerable. B also very small.
<i>Trimarco</i>	Landlord failed to provide shatter-proof glass	? Not clear. Retrial (probative value outweighed by prejudicial effect).
<i>TJ Hooper</i>	Tugs did not carry radio sets, got caught in storm	✗: Headsets inexpensive + essential for safety, even though not industry standard at time
<i>Ter Neuzen</i>	Failed to follow up with patients re: artificial insemination procedure & did not test donors for HIV (no test available at time)	✗: Doctor complied with SOC at the time. Not open to jury to find specialist SOC negligent.

C. Duty?

I. General Principles

Relational Wrongs

- Negligence is relational (***Palsgraf***). Thus, to succeed in a negligence action, P must prove D owes a duty of care (***DvS***).
- We owe duties to those the law considers our “**neighbours**”: those so closely and directly affected by our actions that we ought to have them in contemplation when we act (***DvS***).
- Duties in tort and contract can coexist (McMillan LJ in ***DvS***).¹⁰

Duties Exist Where

- There was a reasonably foreseeable interference with a **legal right** of the plaintiff (Cardozo in ***Palsgraf***).

Anns/Cooper Test for Duty of Care

Step 1A: Proximity (Most logical before reasonable foreseeability: ***Livent***)

¹⁰ **Contra:** Winterbottom v Wright (overturned)

i) Can the relationship be slotted into a sufficiently analogous **category**? If so, *prima facie* duty of care:

Categories from Precedent

- ☐ Harm to neighbour (***Donoghue v Steveson***)¹¹
 - ☐ Personal injury and property damage (***DvS***)
 - ☐ Nervous shock (***Mustapha*** cited in ***Cooper***)
 - ☐ Negligent misstatement (***Hercules*** cited in ***Cooper***)
- ☐ Undertakings (***Hedley Byrne, Livent***). See **economic loss**
- ☐ Creator of danger → rescuer (***Horsley***) and imperilled (***Haynes***)
 - ☐ Independent from duty to imperilled individual: ***Horsley***
 - ☐ *You can be liable to your own rescuer: Horsley*
 - ☐ No duty to unprompted rescuer: ***Smith v Tucker***
 - ☐ No duty to excessively foolhardy rescuer: ***Schlink***
- ☐ Manufacturer → consumer: ***Donoghue v Stevenson***
 - ☐ Not just food products: ***Australian Knitting Mills***
 - ☐ Not just when intermediate examination is impossible: ***Clay v AG Crump***
 - ☐ Manufacturer of defective car parts → drivers: ***Buick***
- ☐ Distributors who make representations about product safety → consumers: ***Watson v Buckley***
- ☐ Employers → employees: ***Clay v AG Crump***
- ☐ Mother → unborn child: ***Duval v Seguin***
 - ☐ Mother → unconceived child: ***Renslow***
 - ☐ **Contra: *Dobson*** (mother → born alive child is **no longer a recognized category** for policy reasons)
- ☐ Police investigators → suspects (***Hill v Hamilton***)
- ☐ Hospital / physician → patients (***MacKay dicta, Lacroix dicta, Paxton dicta***)
 - ☐ Hospital → infant injured during childbirth (once born: ***Leibig***)
- ☐ Regulatory body → general investing public, not individual investors (***Cooper***)
- ☐ Government → road users injured by gov failure to maintain road (***Just v BC, Nelson v Marchi***)
- ☐ Government → Indigenous people (***Brown***)¹²
- ☐ Drivers → other drivers on the road (***Duval v Seguin dicta***)
- ☐ Driver → pregnant woman's future child (***Paxton dicta***)
- ☐ Bailor → Bailee (***Deyong dicta***)¹³

¹¹ There is **controversy over whether DvS stands for a broad category of duty for foreseeable personal injury**. Majority in *Rankin* (2018 SCC) held no such category exists – categories must be narrower. Brown J stated DvS is a clear category.

¹² “Special relationship” arises from duty to consult + unique history

¹³ Just leaving your stuff in someone's possession is not bailment giving rise to a duty of care: *Deyong*. If someone has **undertaken to guard your stuff** it is more likely a bailment (*Deyong*) and would trigger a *Hedley Byrne* duty.

- ☐ Business → third party *foreseeably* injured following *foreseeable* vehicle theft (**Rankin's**)
- ☐ Owners/occupiers → visitors or neighbours (**Occupier's Liability Act, Malcolm v Waldick**)¹⁴
 - ☐ Limited duty of care to **trespassers** (usually only liable for intentional or reckless harm)¹⁵
 - ☐ Landowner → child trespassers (where it is known that children play in area: **United Grain Growers**)

*Categories of Duty in Nonfeasance and Pseudo-Nonfeasance Cases*¹⁶

- ☐ Defendant invites and attracts third parties to highly risky activities (**pseudo-nonfeasance: Crocker v Sundance**)¹⁷
 - ☐ A house party does not count (**Childs**)
 - ☐ A high-risk sport does (**Crocker**)
- ☐ Paternalistic relationships of supervision and control (parent-child, teacher-student: **Dziwenka, Bain**)¹⁸
 - ☐ Assumption of responsibility (ie doctor-patient, teacher-pupil: **Michael v Constable**)
 - ☐ Control over wrongdoer (ie suspect in police custody: **Michael v Constable**)
- ☐ Commercial hosts → patrons (**Childs**)
 - ☐ Not residential hosts (**Childs**)
- ☐ Undertakings inciting reasonable reliance (**Hedley Byrne**)
- ☐ **NO duty:**
 - ☐ To act in general (**Stovin**) or to ameliorate someone's rights (**Deyong**)
 - ☐ To rescue someone (**Michael v Chief Constable**)
 - ☐ To provide post-accident assistance where D did not negligently cause injury (**Union Pacific**)¹⁹

¹⁴ In general, occupiers have a statutory duty to make their premises reasonably safe for persons entering them: *Malcolm*

¹⁵ *Occupiers Liability Act* s.4(1): where risks are willingly assumed (ie. for trespassers), there is a lower SoC. An occupier ought not "create a danger with the deliberate intent of doing harm to the person or his or her property." Thus, if a trespasser wants to sue a landowner for personal injury, the trespasser must also establish that the landowner intended to harm them.

¹⁶ **3 categories listed in Childs.** Logically these would also apply to regular negligence cases.

¹⁷ D invites people to partake in dangerous activity (action) then fails to protect them (inaction). **Inaction should not immunize him** from consequences of his actions.

¹⁸ Rationale: **vulnerability of plaintiff and power of defendant** (*Childs*). Such a relationship does not exist between party hosts and guests (*Childs*).

¹⁹ Kansas case – Oke is CDN version. Nonfeasance can be tricky – even where it is RF that harm (or further harm) would arise from not helping, there is no duty to help unless your negligence caused the initial injury

- To prevent unforeseeable harm arising from a risk D did not negligently cause (*Oke v Weide*)²⁰

Statutory Duties

- Statutes do not create private rights or duties in Canadian law unless they say so (*Saskatchewan Wheat Pool*)
- If a statute imposes a duty to the public, that does not mean it also imposes a duty towards each individual within that public – and in fact those duties may conflict (*Cooper*)
- When a regulator is appointed by statute, “that statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street” (*Cooper*)

Note: The categories should be framed narrowly. If the facts do not clearly come within an existing category, we must conduct a pure proximity analysis (*Rankin's*).

ii) If no category, **pure proximity analysis:**

- A proximate relationship is “**close and direct**” (*Cooper*).
- The factors that may be considered are diverse and case-specific. The point is “to determine **whether it is just and fair** having regard to that relationship **to impose a duty of care.**”²¹
 - ◆ Expectations
 - ◆ Representations
 - ◆ Reliance (*Childs, Hedley Byrne*)
 - ◆ Property or other interests involved
 - ◆ Physical or conceptual closeness
- Proximity less likely if P is just **one in a pool** of many people to whom D owes duty (*Cooper*)²²
- Proximity more likely if D “**singled out**” P in some way (*Cooper, Hill v Hamilton*)
- Public duty ≠ private duty (*Michael v Chief Constable*)
- Mere possibility that another person may suffer harm if a duty is not performed does not impose a duty of care (*Deyong*)

Proximity in Nonfeasance

- Generally, we do not impose liability for omissions (*Stovin*)
- However, a positive duty to act may exist where (*Childs*)

²⁰ Even if D did cause the risk - what matters is whether he negligently caused it (in *Oke*, D non-negligently knocked over a traffic sign and failed to pick it up. The sign poked into someone’s car and caused injury – unforeseeable. Man CA held D owed no duty of care to the injured party.

²¹ Consider policy at this stage, then “residual policy concerns” at “policy negation” stage

²² Especially if imposing duty to P individually would conflict with duty to broader public

- a) The defendant is materially implicated in creation of risk
 - b) Aspects of the relationship give rise to reasonable reliance
- Note:** This is not a “test” but rather a common thread running through precedent.

Policy Reasons for Imposing or Not Imposing Proximity

- Imposing duty to individual would compromise statutory or public duty (**Cooper, Syl Apps**)
 - ◆ Public or statutory duty is paramount in cases of conflict (**Syl**)
 - ◆ Courts should hesitate to subject physicians to competing duties: duty to patient is paramount (**Paxton v Ramji, Lacroix**)²³
- Interests at stake for plaintiff (**Hill v Hamilton**)²⁴
- Consistency with *Charter* values (**Hill v Hamilton, Brown v Canada**)

Step 1B: Foreseeability

- What must be reasonably foreseeable? The type of harm to the class of plaintiff (**Rankin's**)²⁵
- RF must be present **prior** to the incident, **not with the aid of hindsight** (**Rankin's**).

If proximity + RF → **prima facie duty of care**

***Step 2: Policy Negation:** Are there **residual** policy concerns outside the relationship of the parties that “would make the imposition of a duty of care unwise”?

- **Note:** a robust application of stages 1 and 2 should leave a very minimal role for public policy (**Deloitte**).
- **Indeterminacy:** Would recognizing the duty create the “spectre of unlimited liability” to an unlimited class? (**Hercules Managements**)
 - ◆ **Must** consider:
 - **Value** indeterminacy (“liability in an indeterminate amount”)
 - **Temporal** indeterminacy (“liability for an indeterminate time”)
 - **Claimant** indeterminacy (“liability to an unlimited class”)
 - Note: mass liability is not indeterminate liability (Brown J in **Livent**)
 - ◆ **Examples:**

²³ Imposing competing duties could have a chilling effect: doctors may not want to prescribe meds to patients for fear of breaching other duties (ie to “possible future child”)

²⁴ “At stake are his freedom, his reputation, and how he may spend a good portion of his life. These high interests support a finding of a proximate relationship giving rise to a duty of care.” (McLachlin J)

²⁵ While theft may have been RF, harm to teenage thief from unsafe operation was not RF consequence of leaving keys in car (**Rankin's**)

- **Cooper** (floodgates would open from recognizing a duty to each individual investor – no cap on number of investors in brokerage system)
 - **Mackay** (duty to prevent disabled life would open floodgates for claims; handicapped children could start suing mothers or hospitals; + compensation impossible)
 - **Michael v Chief Constable** (duty on police to protect everybody from third party harm would open floodgates)
- **The effect of a duty on other legal obligations:** Would recognizing a duty in tort interfere with other aspects of the law?
- ◆ **Syl Apps** (children's aid), **Cooper** (insurance regulator), **Paxton** and **Lacroix** (teratogenic drugs), **Michael v Chief Constable** (duty to individual 911 callers would compromise duty to public at large)
 - ◆ This argument failed in **Hill v Hamilton** (imposing duty to suspects would not prevent police from fulfilling public duty)
- **Any potential negative effect on the legal system from recognizing the duty:** Would recognizing the duty have a negative effect on the legal system? Would it require judges to step out too far from their role? Would it be excessively burdensome? **Does the law already provide a remedy?**
- ◆ **Dobson** (difficulty of articulating judicial standard of review for pregnant women; reluctant to impose liability for "insurance rationale")
 - ◆ **Paxton** (duty from woman's doc to possible future child would compromise women's reproductive rights; + safeguards already in place)
 - ◆ **Hill v Hamilton** (already torts covering this, ie malicious prosecution)
- **Any potential negative effect on society in general**
- ◆ **Dobson** (privacy, liberty, and autonomy of women)
 - ◆ **Cooper** (duty would insure individual investors at cost to taxpaying public)
 - ◆ **Hill v Hamilton** (duty could have "chilling effect", prevent police from exercising discretion and moving on to more pressing cases)
 - ◆ **Mackay** (duty to prevent disabled life would violate the "sanctity of the human" and require courts to consider disabled children less valuable)
 - ◆ **Stovin** (duty would distort budgetary priorities of local authorities)
- **Operational Decisions vs Policy Decisions:** "Government actors are not liable in negligence for policy decisions, but only operational decisions."²⁶
- ◆ **Cooper** (registrar not carrying out pre-determined government policy but actively deciding what that policy should be)
 - ◆ **Policy** decisions are high-level choices about whether to undertake a public project. **Operational** decisions pertain to implementation details, such as frequency and manner of inspection (**Kamloops, Just v BC**)

²⁶ The reason for this immunity is that "policy is the prerogative of the elected legislature...it is inappropriate for courts to second-guess elected legislators on policy matters" (**Cooper**).

- Frequency of inspection is a policy decision (**Baratt**)
- *Contra*: **Brown v BC** (frequency of road inspections was a policy decision)

(McLachlin CJ and Major J for a unanimous court in **Cooper v Hobart** SCC 2001)

D. Remoteness?

The plaintiff must prove legal causation. If the harm is too remote, the plaintiff will not succeed in discharging this onus (**Doughty**). Although a recent UKSC decision held remoteness is a defence (**Armstead**), this seems to be a common fault of experts on rights.

The modern test is whether the *type* of harm (**Hughes, Jolley**) was reasonably foreseeable (**WM1**). To determine this, we ask whether the result was within the reasons for which we would call the defendant's conduct "negligent" (**SAMCO**).

Old Test: Directness (**Re Polemis**)

- Once duty and breach are established, D is liable for all harm flowing directly from his act, even if it is not RF.
- However, this rule led to absurd results (**FW Jeffrey**: tie-rods).

Modern Test: Reasonably Foreseeable Type of Harm (**WM1**)

a) Scope of Duty?

- Harm is RF if it is covered by the scope of the defendant's duty (**SAMCO**).
- To determine whether harm is covered by the scope of the duty, we look at the **purpose** of imposing the duty ("mom test": is the injury that actually occurred within the reasons for which we would call the defendant's conduct negligent?)
- To find the **purpose** of a **common law duty**, use the "mom test" (**WM1**): what risk does the duty aim to prevent? Why would the law say your conduct is negligent – what is at stake?
- To find the **purpose** of a **statutory duty**, use statutory interpretation. Look at language + context (**Gorris v Scott**).

Case	Facts	Too Remote?
SAMCO	Land surveyor overvalued	✓: We wouldn't warn a land

	property. Bank sued for money it lost due to the incorrect valuation and due to a market crash.	surveyor not to overvalue a property because there might be a market crash.
Mountaineer's Knees (SAMCO)	Doctor negligently checked man's knees before mountain-climbing. Man suffered an injury unrelated to knees.	✓: The doctor's duty was to take reasonable care to prevent knee-related injury. No knee-related injury occurred.
Gorris v Scott	D had a statutory duty to segregate sheep, so they would not become diseased . He did not segregate them and one washed overboard .	✓: The result was not within the risk.
Empire of Jamaica	Statute said second mates had to be licensed; purpose was to ensure competency. Unlicensed second mate with 35 years' experience crashed the ship.	✓: The purpose of the statute was to ensure he was competent, and he was.
WM2	A man continued oxyacetylene welding despite oil surrounding the wharf. A ship nearby exploded.	✗: Mom would have warned of this.

b) Rf Type of Harm?

- The *type* of damage must be foreseeable, not the extent (**Smith v Leech Brain**)²⁷
- Once the type of harm is foreseeable, the defendant is liable for the full **extent** (**Stephenson v Waite, Cotic v Gray**). Extent is a question of directness (use **Re Polemis**).

- ★ **Ex:** In **Smith v Leech Brain**, a man's job was to remove articles from a vat of oil. He had extra-sensitive skin. He got a burn on his face which became cancerous. His employer was liable, because **burn injuries were foreseeable** – the extent of injury did not have to be.²⁸
- ★ **Ex:** In **Stephenson v Waite**, exposed wire slashed P's hand at work. He became chronically disabled. Doctors could not decide whether this exacerbation came from a virus or a pre-existing psychological sensitivity in P. The Court held that

²⁷ **Thin skull rule:** a tortfeasor takes his victim as he finds him.

²⁸ However, the quantum of damages was reduced, as the man may have suffered cancer even without the burn.

it did not matter – the **additional harm flowed directly from the reasonably foreseeable injury**, so D was liable.

- ★ **Ex:** In *Cotic v Gray*, a man with underlying depression was negligently injured in a car accident, which worsened his depression, leading him to suicide. D (driver) was liable, because the suicide flowed in a direct causal chain from the RF injury.

→ Type means *genus*, not species (*Hughes, Jolley*)

- **Ex:** In *Hughes*, workers left a manhole unattended and surrounded by paraffin lamps. Some children knocked over a lamp, causing an unexpected explosion. The blast knocked a boy into the hole, where he suffered burns from hot surfaces. **Burn injuries from paraffin lamps** were foreseeable. Thus, the workers were liable.
- **Ex:** In *Jolley*, the defendant failed to remove an abandoned boat that looked sound, but was actually rotting. Children played on it and fell through the planks. The defendant was liable, as it was foreseeable that “children would meddle with the boat and get hurt.”²⁹

→ The **cause** of the injury must also be reasonably foreseeable (*Doughty*)

- ◆ Outcomes here may differ depending on the level of generality with which courts describe the risk (*Keeton*).
- ◆ **Ex:** In *Hughes*, the Court described the cause as “**burns from a paraffin lamp**.” They considered the explosion an unimportant fact and excluded it from the risk description.
- ◆ **Ex:** In *Doughty*, the Court described the cause as “**burns from a chemical explosion**.” The chemical explosion was part of Lord Diplock’s risk description, and it was unforeseeable. Therefore, the defendant was not liable.

c) *Novus Actus*?

→ **Test for Novus Actus:** Is the alleged intervener a reasonably foreseeable result of the defendant’s initial negligence (*Kanellos*)

- ◆ If so (“mom would have warned us of this”), it is not a *novus actus*.
- ◆ If the intervener is **unforeseeable** (“mom would never have warned of this”), it is a *novus actus*.

²⁹ The CA described the risk in more detail – it was unforeseeable that children would fall through rotten planks. This illustrates Keeton’s thesis: outcomes depend on level of generality in risk description. More general → more likely foreseeable. More specific → more likely unforeseeable.

- ◆ **Note:** Thin Skull – Courts will not ascribe causal significance to the “victim’s peculiar vulnerability” (ie: depression). Thus, a defendant cannot argue that such a vulnerability is an intervening cause (*Cotic v Gray*).

Case	Facts	Novus Actus?
<i>Home Office</i>	Security guards went to sleep instead of supervising delinquent teens; they stole a boat and crashed it. The yacht company sued	✗: The boys were not a NA, as their escape was “the very thing to be expected”
<i>Kanellos</i>	Restaurant’s greasy griddle started a small fire, quickly put out. Lady screamed and started a stampede, injuring P.	✓: Screaming lady was unforeseeable. Mom would never have warned us of this.
<i>Lamb v London Borough</i>	Construction ruptured a water main by P’s house, making it uninhabitable. She went to the US and left house unattended. Squatters broke in, causing damage. P sued city.	✓: Squatters were a NA. Mom would not warn city to be careful doing construction because squatters might break in.
<i>Cotic v Gray</i>	P’s husband had always had depression. After D’s negligence caused a car accident, it worsened and he committed suicide.	✗: A pre-existing vulnerability on the part of the plaintiff is never an NA (thin skull rule).

Special Issues in Remoteness:

Remoteness and Mental Distress

- Formerly, plaintiffs were “primary victims” or “secondary victims” (*Page v Smith*).
- ◆ Primary victims only had to show reasonable foreseeability (*White*).
 - ◆ Secondary victims had to show **3 proximities**: relational, spatiotemporal, and perceptual (*Alcock*).
- Now, to establish legal causation for psychiatric injury, the plaintiff must show that it was reasonably foreseeable that **a person of ordinary fortitude** would have suffered this type of damage due to the defendant’s negligence.
- ◆ In *Mustapha*, it was not RF that a person of ordinary fortitude would have suffered paranoid depression from seeing a fly in a water cooler.
 - ◆ In *Palmer*, it was not RF that a person of ordinary fortitude would suffer serious mental distress from an *infinitesimal* risk of developing cancer.

- ◆ In *Sadaati*, it was RF that a person would suffer depression and personality changes from a tractor accident (even without physical injury).

E. Factual Causation

General Issues

- I. What test do we apply here?
- II. Does the plaintiff satisfy the test?

General Rules

- There must be a causal link between the defendant's negligence and the plaintiff's injury (*Clements v Clements*).
- It's not sufficient to show that tortious conduct *could* have been a cause (*Wilsher*). The standard of proof is a balance of probabilities. It has to be more probable than not that the accident caused the injury (*Blackstock v Forster*).
- Causation is binary and outcome-based. Either the plaintiff caused the harm on a balance of probabilities, or he did not (*Althey v Leonati*; *Gregg v Scott*; *Laferrière v Lawson*).
 - ◆ Therefore, we do not adjust for contingencies (ie. calculate damages based on the likelihood the defendant was a cause: *Althey*, or based on a finding that the defendant caused a certain outcome to be more or less likely: *Gregg*, *Laferrière v Lawson*).
- The plaintiff never has to show that the defendant's negligence was the sole cause of the injury (*Althey*).

Analysis

Default Test: "But-For" + Robust, Common-Sense Inference (*Clements*)

But-For (test of necessity: *Barnett v Chelsea, Richard v CNR*)

- Counterfactual inquiry:
 - ◆ 1) What happened?
 - ◆ 2) Would the same thing have happened without D's negligence?
- If yes, no causation. If not, D is a but-for cause.
- D is **not a but-for cause** where:
 - ◆ An outcome is already (more than) 50% certain to occur before D's negligence.
 - **Example 1:** P drinks poisoned tea and goes to the hospital. D fails to treat P, and P dies. Evidence shows P *would have died anyway*. Thus, Y's failure to provide treatment is not a but-for cause (*Barnett*).

- **Example 2:** P drives off a ferry and sues owner for failure to put up a boat. Court finds P would have driven off the boat even with rope. Thus, the owner was not a but-for cause (**Richard v CNR**).
- **Example 3:** P doesn't know she is sick and has less than a 50% chance of survival. D fails to diagnose her, and she dies. D is not a but-for cause, because P **was already a goner** (**Gregg, Laferrière**).

+ Robust Common Sense Inference (**Althey, Clements**)

- **A)** Scientific evidence is not necessary to establish causation (**McGhee**). The trial judge must maintain a robust and pragmatic view of the facts (**Clements**).
 - ◆ However, if scientific evidence says causation is impossible, the plaintiff has failed to establish it.
- **B)** Burden of proof
 - ◆ Rests with claimant (**Snell**)
 - ◆ However, where the defendant is best positioned to provide evidence and he fails to do so, there is a "tactical" burden shift: if the defendant says nothing, it is open to the court to draw adverse inferences (**Snell**).

Note:

- A common sense inference **can** be drawn where:
 - ◆ We can **rule out** other causes as **unlikely or impractical** (**Snell**)
 - ◆ There is only **one agent** of injury (**McGhee**)
- A common sense inference **cannot** be drawn where:
 - ◆ All the causes are equally likely (**Wilsher**)

Case	Cause?	Application of But-For + Common Sense Inference
Althey: P injured himself. Caused by a combination of D's negligence and P's weak back.	✓	The trial judge inferred that D's negligence was likely a 25% cause, while P's pre-existing weak back was likely a 75% cause. Thus, D's negligence was necessary for the whole injury to occur.
Snell: P had a stroke and went blind after D proceeded to operate despite blood in P's eye.	✓	The other possible causes were not likely. • Glaucoma? No: causes blindness in both eyes; P only blind in one. • Diabetes? No: testified diabetes was controlled; no reason not to believe her. • High BP? No: not high enough to cause a

		stroke.
McGhee: D exposed P to dust at work (non-tortious). D failed to give P a shower (tortious), so P biked home dusty. Got dermatitis; unclear whether caused by negligence or non-tortious dust exposure.	✓	While two factual causes were possible, there was only one possible agent of dermatitis (the dust). Thus, it was a common sense inference, absent any evidence to the contrary, that the failure to take precaution materially contributed to the risk.
Wilsher: baby suffering RLF. One possible cause was D's negligence. Five other non-negligent causes; baby had them all.	✗	There was one tortious possible cause, and five non-tortious possible causes. A robust common sense inference could not be drawn. • Unlike in Snell, there was no basis for concluding that the innocent causes were less likely than the tortious one. • Unlike in McGhee, there was not just one agent of the illness.
Clements: two possible causes of motorcycle crash; one tortious (overloading bike) and one non tortious (nail in tire).	✗	Since not all the causes were tortious, the common-sense but-for test applied. Because of the nail in the tire, P could not establish that, on a balance of probabilities, the injury would not have occurred but for D overloading the bike.
Gregg: P's survival chance drops from 42% to 25% due to D's negligent misdiagnosis.	✗	Because his survival chance was only 42% (<50% at T1), P could not show that he would have survived but for D's negligence. The plaintiff could not sue for causing death to be more likely or survival less so.
Laferrière: D failed to diagnose P's breast cancer, and she died.	✗	Before she visited the doctor, she was already >50% likely to die. Thus, in the eyes of the law, she was already a goner . The doctor's negligence therefore was not a but-for cause .

Where But-For Fails:

"Typically, there are a **number of tortfeasors**. **All are at fault, and one or more has in fact caused the plaintiff's injury**. The plaintiff would not have been injured **"but for"** their

negligence, viewed globally. However, because **each can point the finger at the other**, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury” (*Clements*).

Type of Causation	Why But-For Fails	Cases
Duplicative: Two tortfeasors cause injury together, but each could have caused it independently.³⁰ Note: If one possible cause is of mysterious origin, the court assumes it is tortious until D proves otherwise (<i>Chicago and NW Ry</i>).	Where there are multiple independently sufficient conditions, neither is independently necessary: “each can point the finger at the other.” Yields a result of neither.	Lambton v Mellish: large and small organs, drove P mad. Each enough on its own, so neither a but-for cause. Corey v Havener: P riding carriage. D1 and D2 came up on either side and negligently spooked P’s horse. Each D would have caused the crash on his own, so neither was a but-for cause.
Preemptive: There are two independently sufficient causes, but one fully determines the outcome before the second one can work.	Again, multiple independently sufficient conditions → no independently necessary condition. Yields a result of neither.	Saunders: D rented G a car with defective brakes. G drove the car negligently and hit P. Neither D nor G was a but-for cause, as each would have been independently sufficient.
Factual Uncertainty: Two or more possible tortious causes + not clear which caused damage.	There’s not enough information to run the test.	Cook v Lewis: D1 and D2 both shot in P’s direction; not clear which bullet took P’s eye out.
Choice or Conduct Causation³¹	It is impossible to say what a particular person in the causal chain would have done but for the defendant’s negligence.	Walker Estate: impossible to prove whether donor would have given blood

³⁰ MUST be tortious + tortious. Any innocent cause in the mix → apply but-for.

³¹ **Resurice** identifies this (and specifically names **Walker Estate**) as a type of factual uncertainty where but-for fails and we apply material contribution to the risk test.

		anyways.
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Factual Uncertainty:

- There are three types of factual uncertainty cases.
 - **Type 1:** Multiple negligent defendants all before the court, who is the tortfeasor? (*Cook v Lewis*) → “**material contribution to risk**”
 - **Type 1A:** Multiple manufacturers of exact same product, unclear which manufactured the one that caused P’s injury, only some before the court (*Sindell*) → California says “**market share liability**,” but in Canada, **but-for + common-sense inference**³²
 - The case would probably fail in Canada unless we can rule out some defendants as likely causes.
 - **Type 1B:** Mesothelioma (*Fairchild, Barker*)
 - **Type 2:** One actor, two segments of action, one is tortious and one is arguably non-tortious (*McGhee*) → **but-for + common-sense inference**
 - **Type 3:** One tortious factor and one innocent factor independent of each other (medical negligence: *Gregg v Scott*) → **but-for + common-sense inference**

³² 1. Not all tortfeasors before the court → no material contribution test, but-for must apply (*Clements*).

2. But-for would fail. Where there are multiple independently sufficient causes, no single one can be a but-for cause (*Cook*).

3. However, if there is a factual basis to rule out some defendants as realistically probable causes – for example, they did not distribute in the plaintiff’s region – the court may draw a robust common-sense inference against one defendant (*Wilsher*).

4. But such an inference cannot be drawn against all defendants. There cannot be more than one independently sufficient but-for cause. There can only be multiple “but-for causes” together when each is independently insufficient. So at most, a plaintiff bringing such an action in Canada would succeed against one defendant.

Alternative Test: Material Contribution to the Risk (*Resurface, Clements*).→ Necessary Conditions (*Clements*):³³

- 1) There are multiple possible causes.
- 2) All the possible causes are negligent.

Note: If we do not know whether one cause is tortious or innocent, the court assumes it is tortious, until D proves otherwise (*Chicago and NW Ry*).

3) **Global but-for test** is satisfied: but for the existence of all the defendants, P would not have suffered the injury.

4) Proof on the regular but-for standard is **impossible** through no fault of the plaintiff.

→ A material contribution is “**more than *de minimis***” (*Athey*).

- ◆ “Material contribution” has been treated as a **test of sufficiency** (*Lambton, Corey, Kingston*). Thus, a duplicative cause is generally a material contribution.

→ The old formulation was “material contribution to the injury.” However, the proper formulation is “material contribution to the **risk**” (*Resurface, Clements*).◆ **Rationale:**

- Steps in where we cannot ascertain whether D contributed to P’s actual injury.
- “Imposes liability not because the evidence establishes that the defendant’s act caused the injury, but because the act contributed to the risk that injury would occur” (*Clements*)

Case	Did Material Contribution Test Apply?	Was a Material Contribution Established?
<i>Lambton v Mellish</i>	✓ : Duplicative	Yes, as both were independently sufficient to cause the harm. ³⁴
<i>Corey v Havener</i>	✓ : Duplicative	Yes, as both were independently sufficient to cause the harm, and the motorcycles backfired at the same time.

³³ **Note:** this means but-for always applies where

- **One** tortfeasor
- **Innocent** causes in the mix
- But-for “works” (yields a clear answer):
 - X drinks poisoned tea and goes to the hospital. Y fails to treat X, and X dies. Evidence shows treatment would not have saved X. Thus, Y is not a but-for cause (*Barnett*).

³⁴ Suggests we can frame material contribution as a test of sufficiency.

Kingston v Chicago and NW Railway (sparks from railway joined with big fire of mysterious origin)	✓: Duplicative, and we assume a possible cause of mysterious origin is tortious until the defendant proves it is innocent.	Yes, because both were independently sufficient to cause the harm.
Saunders (failure to push defective brakes)	✗: Pre-emptive. Preemptive causation is purely a factual issue – whichever cause actually determined the outcome is liable.	N/A

Minority Views

★ Rand J's concurrence in *Cook v Lewis*:

- Someone who introduces a confusing element into the scene in a negligent way has damaged the plaintiff's "**remedial right**" by destroying their "power of proof," and for that the defendant should be liable.
 - **Note:** applied by trial judge in *Joseph Brant*, to hold a nurse liable for negligently failing to take notes and thus preventing the plaintiff from proving whether the doctor caused his injury. Decision **set aside** on appeal.

★ Lord Wilberforce's dissent in *McGhee*:

- Once a defendant creates a risk of harm, and that specific harm occurs, the defendant should bear the burden, unless it can show another cause (result within risk → reverse onus).

Special Issues in Causation

★ Apportionment

- **General Rule:** Once at cause, you are responsible for 100% of the damages, regardless of whether there are multiple tortfeasors (*Arneil*).
 - We do not apportion between **duplicative** causes ever. Both are 100% liable, and they can cross-sue (*Lambton, Corey*).
 - There is no apportionment of liability for a **pre-existing vulnerability** on plaintiff's part (*Athey*).
- There are special rules for **successive causes**:

■ **Property damage**

- We never apportion for successive causes.
- The **first-in-time rule** applies: the first cause is liable for 100% of the damage, even if the subsequent cause is non-tortious (*Sunrise*).

■ **Personal injury**

- No apportionment for tortious subsequent causes. The first wrongdoer is liable for all losses: *Baker*.³⁵
- We do apportion for non-tortious subsequent causes: *Jobling* ("ordinary vicissitudes of life").³⁶

★ **Pre-Existing Injury**

- Major J's three scenarios (*Althey*):
 - 1) Disk herniation would have happened **at the same time anyways** → no factual causation ✗
 - 2) Herniation **required both** the pre-existing condition and the negligence → factual causation ✓
 - 3) Either the accident or the pre-existing condition could have caused the herniation alone → factual uncertainty³⁷ ?

★ **Joint Tortfeasors**

- Attributes the actions of one to everyone in the group where defendants act by:
 - Common design
 - Not just hunting together and sharing bag: *Cook*
 - Not playing music to attract customers: *Lambton v Mellish*
 - Conspiracy
 - Authorization or ratification
- **Result:** all defendants 100% liable, but they can sue one another.

★ **Indemnity**

- Wherever there are multiple tortfeasors and each are held 100% liable, **defendants can cross-sue** one another (*Corey*).
- Provincial legislation permits defendants to seek indemnity from each other:
 - **Negligence Act RSO 1990:** Tortfeasors seek indemnity from each other where they were found to be jointly liable or where the other would have been liable, had they been sued

³⁵ D1's negligence caused P to injure leg. Subsequently, D2 shot P in the leg, and it required immediate amputation. P sued D1 for all income loss. D1 owed P all losses.

³⁶ The tortfeasor does not have to pay for losses *only* attributable to the second non-tortious event, such as supervening illness.

³⁷ Apply material contribution test (assuming *Clements* criteria are satisfied)

★ Market Share Theory (*Sindell, Abel v Eli Lilly, Hymowitz v Eli Lilly*)

- ***Sindell***: Multiple manufacturers, uncertain which produced the pill that injured the plaintiff. Only 6 of 200 before the court.
 - Case would fail in Canada. We would apply robust common-sense but-for, not material contribution to risk.
 - In ***Cook***, each D was negligent towards the P. Here, each D was negligent towards a P, but not necessarily this one (***Abel v Eli Lilly***).
- **California approach**: once you have a “substantial percentage of the market” represented in court, each defendant is 100% liable, and they can cross-sue each other.
 - Income-based liability, deep pocket theory (***Hymowitz v Eli Lilly***).

★ Asbestos and Mesothelioma Cases

- ***Fairchild***³⁸: 3 negligent sources of asbestos exposure; not clear how much P inhaled at each site. Science did not know how much asbestos inhalation was necessary to cause mesothelioma.
 - The House of Lords applied the **material contribution to the risk test**.
 - This aligns with the Canadian approach post-*Clements*: there are three independently sufficient possible causes, all are before the court, and the global but-for test is satisfied.³⁹
- ***Barker***⁴⁰ (subsequent mesothelioma case): When we ascribe causation because a defendant *may* have caused harm, as in *Fairchild* or other cases of **scientific uncertainty**, we should **apportion liability based on the probability** the defendant caused harm.

F. Damage

Two Step Analysis:

1) Right: Does the plaintiff have a legally cognizable interest in the thing interfered with?

→ The law recognizes:

- ◆ A right to be free from negligent interference with your mental well-being (***Sadaati***). Zoë Sinel formulates this as “**a right to your mental means**.”
 - But not a right to happiness (***Sadaati***).
- ◆ Property rights

³⁸ 2002 HL

³⁹ Although we do not know exactly what causes mesothelioma, we know asbestos is statistically associated with the disease, and the onset of the plaintiff’s illness after workplace exposure suggests an inference that at least one of the defendants actually caused the plaintiff’s illness.

⁴⁰ 2006 HL

- ◆ A right to bodily integrity (*Palsgraf*)
- ◆ A right to the performance of an undertaking on which you rely reasonably (*Hedley Byrne*)
- **Note:** In general, rights are **exclusionary**, not **ameliorative**. Your “neighbours” have a duty not to interfere with your rights, but no duty to improve your rights (*Deyong v Sheyburn*).
- The law does not recognize:
 - ◆ A freestanding right to your economic situation (*Peet, Foot and Mouth Disease, Barber Lines*)
 - Exceptions: joint ventures, general average contribution, possessory or proprietary interest (*Bow Valley Husky*)

2) Damage: Has the interference with the thing reached an actionable level?

Physical

- Must be a negative physical change: *Rothwell*
- Anxiety about risk of developing future illness also does not amount to actionable damage: *Rothwell dicta*
- A physical change that limits one’s bodily capacity to work is compensable, because it **leaves you worse off**: *Greenway*
- However, death itself is not a compensable head of damage.

Change	Damage?
Symptomless pleural plaques (<i>Rothwell</i>)	✗ : They “would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases or shorten their expectation of life.”
Platinum salt sensitization (<i>Greenway</i>)	✓ : “Their bodily capacity to work has been limited.” Did not matter that claimants were about to retire. They had suffered damage.
Ingestion of chemicals (<i>Palmer</i>)	✗ : Infinitesimal risk of developing cancer did not leave plaintiffs worse off.

Mental

- To qualify as actionable damage, personal injury (including psychiatric) must be **serious and prolonged**, going **beyond minor transient upset or ordinary annoyances**,

anxieties, and fears that people living in society routinely, if sometimes reluctantly, accept (*Sadaati*).

- ◆ This means the injury **must make it difficult to set and pursue goals** – to set your means to an end (*Sadaati*).
- ◆ Psychiatric evidence is **no longer required** for establishing mental distress damage. Nor does the plaintiff have to have a recognized psychiatric illness (*Sadaati*).

Change	Damage?
Development of MDD + phobia and anxiety (<i>Mustapha</i>)	✓: Debilitating psychiatric disorder (action failed at remoteness stage)
Personality changes, inability to make quick and reasonable decisions as he could before, insomnia (<i>Sadaati</i>)	✓: Could no longer mobilize his mental means.
Grief	✗: The Court in <i>Saadati</i> cites Lord Denning's famous statement: "In English law no damages are awarded for grief or sorrow caused by a person's death. "
Pathological grief	✓ Probably, if it makes "your right – your right to your mental means – worse" (Sinel, Notes and Questions)
Anxiety (non-pathological: <i>Palmer</i>)	✗: The anxiety flowing from exposure to an infinitesimal cancer risk did not rise above the "serious and prolonged" threshold.

Note:

- It is trite law that consequential economic losses are recoverable. So, if an injury to your person or property results in monetary loss, you can recover.

G. Pure Economic Loss

("Negligent Misrepresentation" or "Negligent Provision of Services")

Breach	<i>Standard of Care</i> → If the defendant is holding themselves out as a professional, we measure their conduct against that of a competent professional in the field (<i>Ter Neuzen</i>). → If the defendant is a government agency, we hold them to the standard of a
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	reasonable public authority, accounting for the need to balance competing interests and not requiring perfection (Just v BC) <i>Reasonable Care</i> → See generally Reasonable Care Calculus
Duty	→ Generally, there is no duty of care for relational economic loss (Foot and Mouth, Barber Lines). One only owes a duty to those whose rights might foreseeably be injured (Foot and Mouth).⁴¹ ◆ However, McLachlin CJ might find a duty for relational economic loss (CNR v Norsk Pacific).⁴² <i>Anns/Cooper Test for Duty in Pure Economic Loss (Livent)</i> A. Proximity: Are the defendant and plaintiff in a “close and direct” relationship?⁴³ i) Categories: ☐ Auditor → corporate client in relation to a particular undertaking: Hercules ☐ Fiduciary → beneficiary (ie. lawyer-client, banker-client, doctor-patient): Hedley Byrne ☐ Contractual relationship (paying for advice): Lord Devlin in Hedley Byrne ☐ Would have been a contract if consideration: Lord Devlin in Hedley Byrne ☐ Indirect payment: Lord Devlin in Hedley Byrne ☐ Governmental liability for economic losses where operational decision, not policy decision (Kamloops) ☐ Relational economic loss (CNR v North Pacific) ii) Pure Proximity Analysis: Hedley Byrne → Assumption of responsibility + reasonable reliance = duty of care → Notes: ◆ An “adequate” limitation of liability clause will prevent a duty from

⁴¹ **Bridge example:** P has a mere license to run a business on the bridge → no duty as no foreseeable interference with his property right. However, if P has a lease, there may be a duty, as he now has a right.

⁴² She held that Norsk Pacific owed a duty to CNR because damage to the bridge was RF, and there was a proximate relationship between the Norsk Pacific and CNR. This was fallacious reasoning. The test is not whether damage to the bridge was reasonably foreseeable, but whether damage to the plaintiff’s legally cognizable right was reasonably foreseeable.

⁴³ This step must be applied first, because the nature of the proximate relationship tells us what was reasonably foreseeable (**Livent**).

arising.⁴⁴

- ◆ Even if you exclude liability, you can still be liable for fraud (**Aus HC**).
- ◆ Where there is a special relationship (**HB**), there is a tortious duty even without privity of contract (**Glanzer v Shepard**).

Case

Special Relationship?

Glanzer: Bean seller hires D to certify bean bags; P overpays and sues D.

✓: D specifically prepared weight certificates for buyers. Knew and intended them to rely on certificates.⁴⁵

Ultramares: D audited company's financial statements. P invested in the company based on the audits, lost money, sued D.

✗: D must have known and intended the report specifically for P's transaction. Vague awareness that statements "might be shown to investors" was not enough.

B. Reasonable Foreseeability: an injury to the plaintiff will be reasonably foreseeable if:

- i) The defendant should have reasonably foreseen the reliance.
 - ◆ It is reasonably foreseeable that a plaintiff will rely on an undertaking for its **intended purpose**. Reliance for any other purpose is not reasonably foreseeable.
- ii) The reliance is reasonable in the circumstances (**Hercules**)
 - ◆ Reasonable reliance = reliance for intended purpose
 - ◆ Unreasonable reliance = failure to inquire where a reasonable person would do so (**Grand Restaurants**)⁴⁶

C. Residual Policy Considerations

⁴⁴ "A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not" (Lord Devlin in **Hedley Byrne**).

⁴⁵ "Diligence was owing, **not only to him who ordered, but to him also who relied**... The surgeon who unskillfully sets the wounded arm of a child is liable for his negligence, though the father pays the bill"

⁴⁶ Unreasonable reliance / failure to inquire will not necessarily negate the duty; could instead allow a contributory negligence defence and apportionment of liability.

	→ This step should rarely factor into the analysis. A robust application of stages 1 and 2 should obviate need for public policy, aside from in cases of government decision-making (Brown J in <i>Livent</i>). → Some judges would consider indeterminate liability at this stage (McLachlin CJ's dissent in <i>Livent</i>). ◆ Mass liability is not indeterminate liability (Brown J) ◆ There would have to be value, temporal, and claimant indeterminacy for the quantum of damages to be so infinite as to exceed our legal tools (Brown J). ● Value: indeterminate amount of damages ● Temporal: for an indeterminate time ● Claimant: for an indeterminate class of plaintiffs
Remoteness	→ The purpose of the undertaking tells us the scope of the right it has created. → If the plaintiff's reliance does not correspond to the purpose of the undertaking, the harm is too remote (<i>Caparo Industries v Dickman</i>⁴⁷) → Note: Canadian courts have considered correspondence of purpose and use at the "policy negation" step, but that seems illogical (<i>Hercules</i>).
Causation	Note: Conduct Causation → Conduct causation issues may arise with pure economic loss, as such claims usually involve allegations that one person acted to their detriment on a negligent representation. → For example, in <i>Livent</i>, Chief Justice McLachlin argued that Livent could not prove they would have done anything differently if the 1997 report had been correct. ◆ However, Justice Brown drew a "robust common sense inference." He found that Livent's conduct in 1998 – firing the two managers – was sufficient evidence of what it would have done "but for" the auditors' negligence.
Damage	→ Damage happens to your rights → Thus, for economic losses to constitute damage at law, they must flow from the violation of a right: ◆ Bodily integrity (<i>Palsgraf</i>) ◆ Property (<i>Bow Valley Husky</i>)

⁴⁷ Auditors produced financial report for managerial oversight at annual meeting. Shareholders used report to decide whether to purchase additional shares and lost money. Losses were too remote.

	• Joint ventures, general average contribution, possessory or proprietary interests ◆ Right to rely on an undertaking (<i>Hedley Byrne</i>) → If we cannot “hook” them on a right, the losses are purely economic, meaning unrecoverable (<i>Derry v Peet</i>) → Notes: ◆ This means relational economic loss is generally unrecoverable. You cannot sue for economic losses flowing from a violation of someone else’s right (<i>Foot v Mouth Disease, Barber Lines</i>). • Exception: McLachlin CJ allowed recovery for relational economic loss in <i>CNR v Norsk Pacific</i>. She forgot about property rights. ◆ Pure economic loss flowing from negligent provision of goods and structures is also not recoverable, unless it actually flows from a personal or property right of the plaintiff’s (<i>Maple Leaf Foods</i>⁴⁸).
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H. Defences

Negligence Defences

- ☐ Remoteness or NA⁴⁹
- ☐ Statute of limitations
- ☐ Inevitable accident
- ☐ Contributory negligence
- ☐ Voluntary assumption of risk (*volenti*)
- ☐ Illegality (*ex turpi causa*)

Contributory Negligence

Issue 1: Did the plaintiff **breach the standard of care**?

Issue 2: How should we apportion damages?

→ **Common Law Defence:**

- ◆ Traditional view: all-or-nothing defence; any fault on P’s part relieves D of liability (*Butterfield*, 1809 KB).

⁴⁸ **Example:** Listeria contamination leads to meat recall; Subway loses profits. No duty of care was owed, as there had been no actual interference with person or property. (*Maple Leaf Foods*)

⁴⁹ *Armstead*, 2024 UKSC

- ◆ Development: “last clear chance” doctrine. D is liable if he still had a reasonable opportunity to prevent the harm (*Davies*, 1842 Ex Ct).⁵⁰

→ **Statutory Defence:**

- ◆ We apportion damages based on the degree of fault (*Negligence Act Section 3*). There are standard benchmarks to ensure legal predictability.

→ If evidence shows:

- ◆ Failure to wear a seatbelt made **no difference** (ie. P made no contribution) → P bears **none of the damages**.
- ◆ Failure to wear a seatbelt made **all the difference** (ie. damage would have been prevented altogether if P had worn a seatbelt) → P’s damages should be **reduced by 25%**.
- ◆ Failure to wear seatbelt made **a considerable difference** (ie. damage would have been less severe if P had worn a seatbelt) → P’s damages should be **reduced by 15%**.

(*Froom*, endorsed by SCC in *Galaske v O’Donnell*).

- If it is impossible to determine the causative potency of the plaintiff’s contribution, apportion damages 50/50 (*Negligence Act Section 4*).

Negligence Act 1990

Mutual Indemnification

1. Where tortfeasors are jointly and severally liable (each 100% liable as contributors), they can cross-sue for indemnification (*Lambton v Mellish*).
2. This is also true where the action settles rather than going to trial.

Contributory Negligence

3. **Apportionment + Comparative Fault** → If fault or negligence is found on the part of the plaintiff...the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively (*Froom*).
4. **Equal Division Where Apportionment is Impracticable** → If it is not practicable to determine the degree of fault for contributory negligence, apportion damages 50/50.

⁵⁰ P left his donkey tied up along the road. This was negligent. D, driving his wagon at a “smartish pace,” crashed into P’s donkey. D could have stopped the accident altogether. Thus, he was liable.

6. **Question of Fact** → In any action with a jury the degree of negligence of the respective parties is a question of fact for the jury.⁵¹

7. **Court Costs** → The judge can order a contributorily negligent plaintiff to pay some of the defendant's court costs.

Voluntary Assumption of Risk (*Volenti*)

→ *Volenti* is a complete defence (**Crocker**).

→ **Test for *Volenti* (*Dube*)**

- ◆ **Know of and agree to** the physical risk of the accident;
- ◆ **Know of and agree to** the legal risks of the accident (i.e., you won't sue the person who causes those risks to eventuate vis-à-vis you)

→ Assumption of risk can be **express or implied (*Dube*)**

- ◆ We can infer the assumption of risk where both parties understood that D assumed no responsibility for P and P did not expect D to assume any responsibility (***Dube***).
- ◆ **Constructive knowledge**: if P is wilfully blind to label or warning, we fix them with knowledge, even if they did not read it (***Birch***).

→ **Waivers and Warnings**:

- ◆ If a product warning or waiver is inadequate, the *volenti* defence probably does not apply (***Lambert v Lastoplex***).

→ **Note**: *Volenti* does not apply in rescue situations (***Wagner***)

Case	Facts	Volenti?
<i>Dube v Labar</i> (1986 SCC)	P and D went out drinking. P let D drive home, and there was an accident. D argued P assumed the risk by getting into the car with a drunk driver.	✗: Court could not infer P bargained away his right to sue. ⁵²
<i>Priestley v Gilbert</i> (1973 UK)	P and D, old friends, went out drinking and driving "to make an evening of it." D crashed the car.	✓: Inferred consent to physical and legal risk based on joint venture + longstanding friendship
<i>Birch v Thomas</i>	D had sticker on his car: passengers ride at their own risk + on condition no claims will be	✓: Statement re: insurance amounted

⁵¹ Recall that this means an appellate court should show deference to lower courts + the standard of review is overriding and palpable error.

⁵² Rare are the cases where someone truly consents to run the risk of another's negligence.

	brought. D pointed at sticker and told P he had no insurance, but court could not infer P actually read sticker	to telling P he rode at his own risk. ⁵³
Lambert v Lastoplex	P, engineer, bought lacquer seal. Flammable. Set floor on fire. Warning of flammability on bottle, but did not warn users to turn off switches.	✗: Could not infer assumption of physical + legal risks. Warning label was not adequate; engineer background irrelevant.

Illegality (*Ex Turpi Causa*)

1) *Ex turpi causa* is limited to where the plaintiff would otherwise profit from an illegal/wrongful act or evade a penalty prescribed by criminal law (**Hall v Herbert**)

→ Ex: Will preclude recovery for wage loss for time spent in incarceration (**BC v Zastowny**).

2) *Ex turpi causa* does not apply where the plaintiff is merely seeking compensation for personal injuries (**Hall**).

⁵³ “Everyone nowadays knows that, if injured in a car accident, one could recover only if the defendant was insured and that, in any case, one would not recover when the driver was only 19 years old with no visible assets.”