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Damages

General Damages

- Damages that are yet to be incurred
- Future earnings
- Future medical costs etc

Special Damages

- Damages that have been incurred
- Money that you have spent already, lost earnings already
- Have receipts etc

Information on Damages

- Not reevaluated if circumstances change
    - If victim makes a miraculous recovery after being awarded damages and starts working again the defendant doesn't get the money back
    - If the victim gets way worse and needs even more money that defendant won't have to pay again
- Only lump sums being given
    - Why lump sums:
        - Ensures people don't remain sick in order to get more payments
        - The defendant can write a cheque and then walk away
        - Big companies don't want to have to pay in installments because it gets to complicated
        - The victim can get the money and get on with their life
    - Plaintiff and defendant can agree on installments themselves but the issue is if the defendant becomes insolvent and cannot make the payments anymore
- Courts are compensating for loss of earning capacity and not actual loss of earnings
    - Capital has been lost (plaintiff is capital) what is its value?
        - Young professionals most expensive
        - Old/retired individuals usually cheaper
- Hutch:
    - Debated on the fact that women get compensated less than men, is this fair?
- Goal of damages is to put back the plaintiff into the situation they were in before the accident
- Interest rates: courts will discount damages by a discount rate that take into account the predicted real interest rate and inflation

Posner, Economic Analysis of Law:

- A nonfatal accident may have three economic consequences for the victim:

1. Medical and related expenses
2. Impair their earning capacity
3. Cause pain and suffering

- Computing lump sums you discount for future interest rates
  - This is so you don't overcompensate the victim
- Hard to calculate compensation for damages from pain and suffering
  - Posner thinks victims are usually undercompensated for this

Calculating Damages:

Andrews v Grand & Toy Alberta Ltd (Supreme Court of Canada 1978)

Facts:

- Andrews is a young man who was rendered a quadriplegic in a traffic accident.
- He has been physically injured but remains mentally intact. He can also see, hear and talk.
- The defendant, Anderson and his employer, Grand & Toy Alberta Ltd were found partially liable for the accident
- Trial judge awarded $1,022,477.48 to plaintiff
- Appellate Division reduced sum to $516,544.48

Issue:

- Whether the Appellant Division of the Supreme Court of Alberta erred in law in the assessment of damages

Held:

- Appeal allowed, damages increased to $613,008.

Ratio:

Who you injure and how you injure them is very important when assessing damages.

Analysis:

DICKSON J:

- Three heads of damages, medical, earnings, pain/suffering
- Medical expenses:
  - What is the standard we are trying to provide for the person?
    - Andrews want to remain at home and be cared for there but defendant argues he should not have to pay for home care when Andrews can go into an auxiliary home which is much cheaper.
    - Court favours at home care because plaintiff should be put in the position they were in before the accident
  - How long is he going to live? In medical costs we use what he is going to live for and not what he would have lived for if he weren't injured.
    - Medical actuaries decide his life expectancy is 45 years
  - Contingencies:
    - Looking at aspects in his life that could have happened to incur medical costs: such as getting into another accident
    - They reduce his medical damages by 20%

- Lost earning capacity:
    - Level of earnings:
        - The potential earnings of Andrews are most definitely higher than what he was earning when the accident occurred.
        - Compensated him for more than he was earning at the time of the accident but less than the maximum amount someone in his position could earn.
    - Length of working life:
        - Compensate him for earning up until they believe he would have retired (here they say he would have retired by 55)
    - Court takes into account interest and inflation
    - Contingencies:
        - Take into account things that might have affected future earnings such as unemployment, illness, accidents and business depression.
        - Takes off 20% from this section
    - Duplication of costs:
        - Food and shelter were included in costs of future care under medical costs, therefore they should be deducted from earning capacity
        - Court will award him 53% of his future earnings
- Pain and suffering
    - He is in one of the highest pain and suffering groups
    - Dickson wants "assess the compensation required to provide the injured person with "reasonable solace for his misfortune"
        - Solace meaning physical arrangements which can make his life more endurable rather than "solace" as in sympathy
    - Dickson uses this case as an opportunity to set an upper limit on non-pecuniary damages.
    - He says that unless there are very extreme circumstances, the limit should be set at $100,000.00
    - He awards Andrews $100,000.00

Property:

- Property is easier to value because it is a capital asset
- Three values we can put on property (pay whichever is lowest):
    - Market value
    - Replacement cost
    - Repair cost

Double Dipping/Insurance:

- First party insurance: When you're insured
- Third party insurance: When you're insured for other people
- Insurance is not equally distributed in terms of who has it and in terms of how much
- There are limits on insurance policies
- Doctrine of subrogation
    - The insurance company has the right to step into your shoes when you make a claim
    - They can make decisions instead of you when/who/how much to sue people
- Insurance companies sue for different reasons than we would
    - Cost of litigation is high therefore they only use when chances of winning are high
- Insurance companies fix the premiums at a rate that allows them to have some losses
- If you're well off you're likely to get more damages but your also more likely to have insurance
- Moral Hazard of insurance: the loss of incentives to earn or reduce medical expenses if one's earnings or medical expenses are completely insured.

- Moral hazard suggest several propositions:
  - Periodic payment plan that offers full insurance will always be more expensive than a lump-sum benefit
  - If there is no market insurance coverage because of moral hazard, the tort victim with representative risk aversion will prefer the conventional lump-sum benefit to a periodic contingent benefit of equal costs
  - Has the level of risk faced by the victim changed as a result of the accident?
  - If victim faces more risk as result of accident and there is market insurance, the court need only award damages equal to insurance that would fully cover victim for this increase in risk
  - If victim faces more risk but no market insurance the court must assess an amount that would compensate the victim for the additional risk

Childs v Desormeaux:

- They went after the host because they had insurance, they wouldn't have brought this case if the hosts didn't have insurance
- The people who were injured never got the money that they were entitled to because the people guilty of the accident did not have enough $$
- Why wouldn't we let the victim access the hosts insurance to give them the rest of their damages?

Collateral benefits:

- Gifts
  - Gifts are not considered when assessing damages
- Private insurance
  - The richer you are the more you have of this
  - If plaintiff has individual insurance it is not considered towards assessing damages (why should the defendant get a benefit to something the plaintiff paid for?)

- Employment/Work insurance
  - Issues on whether this should be considered in damages or not
- Social benefits
  - The poorer you are the more likely you are to have this
  - This is usually considered when assessing damages and taken off the amount the defendant has to pay (how is this fair??)

Watkins v Olafson (1989): Periodic Payments

- McLachlin:

- Issue: In the absence of enabling legislation or the consent of all parties, can or should a court order a plaintiff to forgo his traditional right to a lump-sum judgment for a series of periodic payments?
- Judiciary bound to follow precedents and legislation
- Courts don't like to introduce major and far-reaching changes in the rules
  - Major changes in the law should be predicated on a wider view of how the rule will operate in a broad generality of cases
  - Court can't fully appreciate the economic and policy issues
- Conclusion: The well-established limits on judicial law-making powers as well as the complexities associated with introduction of the concept of periodic payments into the law, preclude the court from ordering periodic reviewable payments for future cost of care in the stead of the lump-sum judgment to which the plaintiff is entitled under existing legal principles

Townsend v Kroppmann (2004 SCC):

- Deschamps J:
  - Issues: Should the award take into account the rate of return by the victim and should the tax gross-up and management fees be calculated on the estimated amount established at the time of the trial or on some other figure likely to become known at a later date?
  - There is a statutory discount rate is mandatory and renders irrelevant any evidence on the actual or potential rates of return or inflation.
    - A policy choice was made by the legislature to allow the parties to avoid the hurdles of evidence on rate of return. In addition to enhancing trial efficiency and saving valuable court time, it is likely that the important concerns of consistency in compensation awards and fairness to victims also motivated the imposition of a deemed rate.
  - Three main principles used in this case to award damages:
    - Damages are assessed and not calculated
      - Use evidence from actuaries
    - Award a one-time lump sum
    - The plaintiff has property over the award
      - Dickson J from Andrews: the plaintiff is free to do with that sum of money as he likes
  - We should not alter damages because of how we thing the plaintiff will invest/spend their damages

Wilson v Martinello (1995 Ontario Court of Appeal)

- Family Law Reform Act, RSO 1990: provides that specified relatives of a person who has been tortiously injured or killed are entitled to compensation for, *inter alia*, the loss of guidance, care and companionship

- Facts: the respondent's wife and daughter were killed in a car accident that the appellant was liable for. The respondent wanted a lump-sum award because he wanted to invest in a franchise.
- Finlayson JA:
    - Issue: Circumstances in which a trial judge is entitled to include an allowance for gross-up for income taxes and a management fee in a lump sum award for future pecuniary loss
    - "Gross-up": the practice of increasing lump sum awards for future care costs and pecuniary losses in person injury cases and for pecuniary losses in fatal accident cases to take into account the impact of taxation on the income generated by the lump sum awards in respect of those heads of damages
    - Appellant wants a structured settlement, which is a method of paying an agreed future loss on a periodic basis. In this method the amounts paid to the plaintiff are not eroded by income tax. Appellant wants this because it is less money since you do not have to compensate for loss due to income tax
        - Respondent wants a lump sum because he needs to invest it all right away.
    - A plaintiff is not obligated to accept a structured settlement and courts have no jurisdiction to impose one on them (McErlean v Sarel)
    - Courts are supposed to award damages to the plaintiffs best interest
    - Since a structured settlement is not in the plaintiffs best interest the court will not impose it
    - The plaintiff is legally entitled to a lump sum judgment with gross-up

Cunningham and Wheeler:

- Car accident and Wheeler is injured
- Wheeler sues from work lost among other things
- Wheeler received disability payments through his work for his loss of not being at work ($5,300.00)
- Can he sue for his losses and what can he sue them for?
- Cory (Majority)
  - Two Rules:
    - Plaintiff is entitled to full damages from the defendant and also from gifts
      - Therefore gifts are not accountable
    - Private insurance is also not accountable and plaintiff should still get full damages from defendant
      - Why should the defendant get the benefit of the plaintiff's sure sightedness
  - Is work insurance accountable?
    - Work insurance is more like private insurance
    - Not accountable-plaintiff kept the $5,300.00 and continued with their claim that included $5,300.00
  - From the defendants side we want them to carry the full loss of their actions because we want them to be more careful next time
- McLachlin (Dissenting Judgment):
  - The plaintiff should not be allowed to keep the $5,300.00 because they'll be double dipping
  - She thinks there's no perfect solution and we need to rethink the precedents that set gifts and private insurance and non accountable

- Two sides of a precedent:
  - It's so old it's basically part of the law and we have to uphold it
  - It's so old and outdated we need to change it

MB v. British Columbia

- McLachlin:
  - Looks at social benefits as collateral, should they be accountable?
    - Yes they are
    - She thinks that private insurance, work insurance and social benefits should be accounted for but only social benefits are counted
  - So the poorest people have to account for social benefits
  - Damages are reduced because of social benefits; people who have social benefits are usually the poorest of society. How is this fair?

Standard of Care

Textbook: pp 49-94

Lectures: September 18, 23
**Note: The case briefs in charts with bigger headings (level 2) are the primary cases in the text, the others are those contained in the notes (heading level 3)

- Subject to some exceptions, one is liable for the harms caused by one's negligence
- Negligence is conceived as the creation of unreasonable risk
- Raises three questions - What counts as harm; What counts as a cause; What counts as negligence (focus of this section)
- Allows demarcation of the line where losses will be transferred (from P to D)
- Losses will "lie where they fall" (Hutch) unless D was negligent – acted without sufficient care (measured by adherence to the SOC)

The Objective Standard

- SOC is an objective basis which must be observed in interactions with others
- Negligence law marks the boundary between the defendant's freedom to act and the plaintiff's interest in security

Vaughan v Menlove (1837) (UK)

Textbook – p 50

Facts	• After being warned repeatedly of the probability of fire, the defendant's haystack, barn and stables – on the boundary of the plaintiff's property, catch fire spontaneously and burn down the plaintiff's cottages • Defendant knew that haystacks catch fire – he built a chimney • At trial, ruled in favour of plaintiff, appeal made for new trial on the argument that the jury should have been instructed to consider whether the defendant was acting in his best judgment, rather than as a reasonable prudent man
Issue	Should liability be determined based on the standard of care tailored to the defendant's subjective best judgment?
Decision	Appeal dismissed
Reasons	TINDAL CJ • Looking at the subjective judgment of the defendant would be too vague and inconsistent • Plaintiff's right to recover should not be affected by poor judgment of the defendant
Ratio	Rule that we ought to adhere in all cases to caution such as a man of ordinary prudence would observe - This remains the basic common law doctrine for negligence
Notes	Is the measure of "ordinary prudence" obvious? • Like subjective approach, also vague • Ordinary does not mean average – may constitute a higher standard (ie average driver would likely not be considered a "prudent" driver) • Aspirational – this is what people of ordinary prudence should do • Is "man" just linguistic, or should the standard vary (it does in certain contexts – car insurance) • So do/should we vary by other factors? ie age, expertise

Buckley v Smith Transport Limited (1946) (ONCA)

Textbook 51

Facts	Employee of Smith Transport caused an accident while suffering syphilis of the brain, thought the truck was being "controlled from headquarters" and out of his control, hit into a streetcar. P argued a driver of ordinary prudence would not have acted in this way, not have thought his car was being controlled from a far. D argued the insane delusion prevented acting as a prudent driver – can't appreciate responsibility Note: D is not the driver, example of "deep pockets" strategy, vicarious liability of employers for their employees in the course of their employment
Issue	Should the driver be held liable for the actions of the employee while suffering an unexpected delusion?
Decision	No liability
Reasons	Test regarding insanity applied by the court: did the delusion make D unable to understand the duty that rested on him and render him unable to discharge this duty • Court finds that at the time of the accident, the employees mind was so afflicted by the disease that he neither understood nor was able to discharge the duty to take care
Ratio	Objective standard is varied for capacity to understand and discharge the duty
Notes	• Did he drive like a prudent driver? No. So then the losses fall on P– how is this fair? Losses lie where they fall, despite being blameless. Should they carry the consequences for him driving in a way that no one else would drive? Sure he did not know, but in the context of the whole accident the innocent parties are the ones on the streetcar • Why would the driver's syphilis trump the injuries of P? IF the general standard is <u>objective</u> • Is this the right decision? If we do not apply the measure of ordinary prudence the loss falls to the plaintiffs – not an equitable outcome. The business should carry the cost of their actions – and they likely have insurance – why deny recovery - What if he had been drunk? Drugged? Are they going to get off? • If it was a criminal case insanity may be more applicable, but here is justice being done? Is cognitive function an apt standard for tort law? Why are we so worried about the defendant and not the plaintiff? Both are in an 'unfair' situation, so why should the later carry the loss? **Two questions: Is P deserving? Is D responsible?** - Another consideration: Does the company have a duty to ensure all drivers are sane?

Roberts v Ramsbottom (1980) (UK Queen's Bench)

P 51

Facts	Driver has a stroke which onsets as he is driving, knocks a boy off his bike and hits a van, hits P as she is emerging from her parked car, injuring her and her daughter and damaging their car beyond repair. Has no previous symptoms, did experience feelings of strangeness but was not at anytime aware he was unfit to drive – judge finds no "moral blame" can be attributed to him for continuing to drive.

Issue	Does impaired consciousness excuse someone from the standards of a prudent person?
Decision	No, found liable
Reasons	• The standard by which actions are judged is objective – liability in tort is **strict liability** to adhere to the reasonable standard • Only able to escape liability of his actions if they were wholly out of his control at the time of the accident (state of automatism)
Ratio	Standard of care is an objective measure. Moral blameworthiness is not relevant to liability – impairment of judgment does not provide a defense (unless to a level of involuntariness)

Mansfield v Weetabix (1998) (UK CA)

P 52

Facts	Truck driver does not know he has a medical condition causing brain malfunction with low blood sugar, drives without much to eat and causes accidents.
Issue	What standard should be applied (ordinary prudent person or person with the level of consciousness of the accused)?
Decision	Not liable.
Reasons	LEGGATT LJ Court overrules reasoning of *Roberts* and finds that the standard of care required is that of a reasonably competent driver unaware he might be suffering from a condition that impairs driving – his actions fall below the standard
Ratio	Strict liability is not the law, if the defendant is not blameworthy in the context of his circumstances, then there is no liability
Notes	• Was he never aware of his condition? Could he not have stopped after the first accident? Lots of people get low blood sugar… • Should he have known one of the effects of his low blood sugar would be poor driving? • Inquiry into the defendant doesn't even matter – he should be liable, he did not drive prudently

Holmes, *The Common Law* (1881)

P 53 (start)

- Seeking a general principle of civil liability and common law
- Differentiates from contract law: tort harm is harm which has never been consented to
- Balancing moral reasoning with the alternative that man is answerable to every consequence of his actions irrespective of his state of consciousness
- P 54: Austin's theory – criminalist: Law as a sanction threatened by the sovereign for disobedience – punishing for personal fault
- Popular theory in common law: man acts freely and voluntarily, if damage ensues he has chosen to act – every person has the right to be free from detriment, the party whose voluntary conduct should suffer rather than the one who had no share in the action
- Has there been an opportunity of choice with reference to the consequence – what was one bound as a reasonable man to contemplate
- P 56: There could be alternatives to the use of tort law: the state could make mutual insurance, individuals could adopt a mutual insurance principle to divide damage, or all loss could be put on the actor, irrespective of fault

- The law takes no account of the varieties of temperament, intellect, education which make the character of different men different
    - Average/ordinary rather than individual peculiarities
    - Law considers what would be blameworthy in the average man of ordinary intelligence and prudence – **averages rather than individuals**
- P 57: Exceptions
    - Distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held liable
    - No general rule for insanity
    - On the one hand the law presumes a man to possess ordinary capacity to avoid harm to his neighbours, unless a clear and manifest incapacity be shown – but it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have forseen the danger: unless a man of ordinary intelligence and forethought would have been to blame for acting as he did

McHale v Watson (1966) Australian High Court

P 58

Facts	Defendant, age 12, threw a piece of welding rod, which he had sharpened, in the direction of the Plaintiff – it hit her in the eye and her sight was destroyed. Claimed he had been aiming for a corner post, and it bounced off, girls claimed it was thrown directly. Accepted at trial that it was not intentional.
Issue	Is Watson liable? Should children be held to the objective standard of care applied to adults or an objective standard of a 12 year old?
Decision	Not liable.

Reasons	• Trial judge found that the injury was not caused by the defendant's negligence in the legal sense. Appeal looks to American authority favouring applying lower standard of care in cases involving the primary negligence of young children
	• *American Restatement of the Law of Tort,* par 283, divides infants to 3 groups
	  o Children so young as to be manifestly incapable of exercising any of the qualities necessary to the perception of risk – incapable of negligence
	  o Those who although not at the age of majority, are capable of foreseeing the probable consequences of their actions
	  o Between extremes – infinitely various capacities: standard of care is that which is reasonable to expect of children of like age, intelligence, experience
	• 2 judges decide on the standard of a **reasonable child**: Defendant played as a child, evidence does not suggest he was anything other than a normal 12 year old – what is a "reasonable 12 year old"? (realistically limited in decision making)
	  o No grounds that he ought to have foreseen that the "dart" would not stick in the post
	  o Emphasis on "normal" – in the normal stages of development
	  o Acted in an unpremeditated and impulsive way
	• DISSENT: Menzies J - Fundamental principle of negligence is that the standard of care fixed by law to determine actionable negligence is an objective standard
	  o The issue is not moral culpability – focus is on compensation
	  o If the law required the exercise of what the defendat was capable of, it would be a different standard

	○ On this basis, D owed P the same duty as the ordinary man ○ Further, even if judged as an ordinary boy of 12 rather than a man, he had still been negligent – no prudent boy of 12 could reasonably think his missile would penetrate the wood
Ratio	The standard of care will vary based on the development of the defendant
Notes	• She will be blind either way – issue is will she get money damages – court says because D is 12 the answer is no • So focused on the defendant (how courts focus), they do not focus on the plaintiff – to reasonable equity, to come to a fair result • Blame is not helpful – this is not a moral inquiry into fault, issue is liability: who should pay

Varying the Standard of Care:

(based on comments of Hutch)

- "Cognitive impairment" (Mansfield, Buckley)
- Age: McHale – if D was older there would have been liability
- Exception to age: When kids engage in "adult activities" (ie driving) they are held to the standard of adults – this contradicts the logic of Australian courts
- There are also some safeguards to the public through the obligation of parents and school authorities to observe reasonable care over children under their supervision
- What about people who can do more (resources) should they be required to do more? Should we have a minimum, and ask more of those who can do more?
    - Law says only in the case of experts

Experts

- Vaughan v Menlove: having more (or less) logic than a prudent person does not mater
- Specialized expertise held to vary the standard: while a reasonable person trying to help at the scene of an accident is held to the standard of a reasonable person, a doctor coming to the scene is held to the standard of a reasonable practitioner (without equipment)
- If a general person takes on an expert task they are judged by the standard of the expert – person of ordinary prudence would not have done it (i.e. doing someone's plumbing, pulling someone's tooth out) – except in the case of emergency

Custom / Commonly Accepted Practice

- Especially in areas of expertise – what would a reasonable person in that field do
- Defendant has to prove there is a custom, and what it is, and has to prove that they complied with the custom (see last case Ter Neuzen)
- Plaintiff would then have to prove the custom itself was unreasonable and it was unreasonable for the defendant to comply with it
- Don't just have to do what is considered to be reasonable, but rather what ought to be reasonable – not just reasonable because that's how people do it that way

Moran, *Rethinking the reasonable person* (2003)

P 63

- Comments/observations on McHale
- Court struggles with how far and where the standard of care ought to be tailored to reflect the capacities of the defendant

- 2 elements:
    - Foresight – cognitive and perceptive abilities: intellectual limits
    - Prudence – normative abilities, attentiveness to others
- McHale goes on to treat these as indistinguishable
    1. Foresight of harm: Identification of risk requires a sophisticated cognitive apparatus limited for a child – rests on the characterization of facts (i.e. dissenting view that the risks were more obvious, should have been seen)
    2. Prudence: Inattentiveness to the security of others, adjusting the standard of care to account for this shortcoming
- Why should we be willing to weaken the degree of attentiveness to others as the standard requires? Carelessness to others is usually the grounds for, rather than the excuse for, legal liability

R v Hill (1986) SCC

P 66

Comments of WILSON J (dissent) on the legal position of children

- Children are considered to be in a process of development, standard will culminate in the objective standard of an adult
- Ordinary children are expected to conform to the standard of ordinary children of their level of development – standard applicable to children is only partially objective
- Basic principles of equality and individual responsibility are embodied in the test to the extent corresponding with the age and capacities of the accused

McErlean v Sarel (1987) SCC

P 67

- Two teens collide in trail bikes: Established that their conduct is to be judged by the standard of children of similar age
- Subjective test which recognizes the capacity of children varies and therefore they should be treated on an individualized basis
- Exceptions:
    - Where a child engages in "adult activity" he or she ill not be accorded special treatment, held to the standard of adults in that activity
    - Rights of adulthood (i.e. driving) = responsibilities of maturity
    - Critical factor with vehicles is that they are motor powered – equally lethal as in the hands of adults
    - Circumstances of life require a single standard in respect to such activities

Fleming, *The Law of Torts* (1992)

P 68

- "Reasonable man of ordinary prudence" is a central figure employed in passing of negligence" – qualities which we demand of the good citizen – an external, objective standard – a standard that many people cannot meet – based on an abstraction
- Moral qualities and knowledge
    - Reasonable man is assumed to be free from over apprehension and overcondifence
    - Lacking knowledge of a reasonable man is not considered an excuse – determined by what a man with this knowledge would regard as probable

- Physicians – judged by the standard of their profession
- Beginners – held to the standard of those reasonably skilled (compensation for injury victims takes precedent)
- If laymen engage in expert activities they will be judged by the expert standard
- Physical attributes (tangible/visible – easily verified compared to mental deficiency) – physically disabled person is judged by the standard of a prudent person with the disability (but may be expected to take greater precautions)
- Objective test prevails for mental and emotional characteristics
- For lunatics, must be capable of foreseeing harm

Reasonable Care

Posner, "The Learned Hand Formula for Determining Liability" (1982)

P 72

- "Hand Formula" comes out the of judgment of Judge Learned Hand (US) in *United States v Carroll Towing Co* (1947) - Liability depends on whether the burden of adequate precautions (cost of avoiding the accident) is less than the injury multiplied by the probability of the accident/harm happening
- Law + economics: cost benefit analysis – resources must be efficiently distributed
- Losses will be move/be left where they most efficiently lie – putting accidents on the market
    1. Accident costs (AC) (property damage, medical expenses, lost earnings, pain + suffering)
    2. Prevention costs (PC)

AC x probability of it occurring

Losses should be transferred when the prevention cost is less than the accident cost : PC<AC

- EX: if the cost of the accident is $1000 and there is a 1/1000 chance of it happening, AC = $1 – therefore investment in prevention can be efficiently invested up to $1: PC<$1
- From a law + economics perspective, investment in safety should be expected up to the cost of accidents, not more
- We do not expect people to take no precautions, nor do we expect them to take unreasonably onerous precautions – burden must lie at probability x liability
- A balancing of risks and consequences

NOTES:

- The value for liability entered into the equation represents damage to an actual person – the common law monetizes plaintiffs as capital assets (ie Andrews)
- As liability (value of the capital asset) goes down (ie with age, low socio-economic status), the precaution cost also goes down
- Agency is with the defendant to decide whether to take precautions or to pay the liability

Posner "A Theory of Negligence" and comments in *McCarthy v Pheasant Run*

P 75

- Rejection of moral criteria as a basis for liability follows from the conception of the fault system as a compensation scheme: Negligence is an objective standard
- Rejects "traditional views" (ie that the purpose of civil liability for accidents is to compensate the victim, negligence is a moral standard
- Hand formula is a fresh approach – the dominant function served by the fault system is generate rules of liability that if followed will bring about the efficient level of accidents and safety

- There is a social function of economic efficiency in liability for negligent acts: If the cost of safety measures exceeds the benefit in accident voidance to be gained incurring that cost, society would be better off in economic terms to forgo accident prevention
- Decision of a "rational profit maximizing enterprise" to pay torts rather than take precautions

Bender: "A Lawyer's Primer on Feminist Theory and Tort" (1988)

P 76

- People are dehumanized when abstracted from their suffering
- Alternative perspective of standard of care – caring, prioritization of safety and interconnectedness instead of on economic formula
- Replace the "reasonable man" with the caring neighbour

Posner's reply: "Conservative Feminism"(1989)

P 77

- Liability would not induce people to take greater care that would cost more than the accident
- Might as well apply strict liability – which can lead to burdens borne by consumers (inefficient rise in prices)

Bolton v Stone (1951) HL

P 78

Facts	A cricket ball is driven out of a match and onto an infrequently used public road, hits and injures the Plaintiff. Balls are driven onto the road once in a while (6 times in 28 years) and people pass on the road from time to time.
Issue	What is the duty of a person operating a next to a public highway? Did the owners act in a way that was reasonable?
Decision	The owners are not liable, not expected to take onerous precaution for small risk
Reasons	REID: • Foreseeable that an accident like the one that happened might occur – balls go out once in a while, if a person were to be where a ball fell, they could receive injuries • Chance of a serious injury, however, is small – the road is not night in traffic • Duty based on likelihood of damage rather than foreseeability alone • "…people must guard against reasonable probabilities, but they are not bound to guard against fantastic probabilities." • Test: whether the risk of damage to a person on the road was so small that a reasonable man, considering the matter from the POV of safety, would have thought it right to refrain from taking steps to prevent the danger • "I do not think a reasonable man…would or should disregard any risk unless it is extremely small" – in this particular case, risk assessed as small enough to disregard RADCLIFFE • "I can see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she has received as a result of the sport that they have organized…*but the law of negligence is concerned less with what is fair than with what is culpable*, and I cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case…"
Ratio	A reasonable man, considering the matter from the POV of safety, would not nor should not disregard any risk unless extremely small

Notes	Application of Learned Hand: Cost of her injuries x probability (ie 1/1,000,000) – even if her injuries are worth $1,000,000, the socially responsible investment is no greater than $1 • This is what REID did – it is not socially valuable to take more precautions (waste of resources) **Social Value** – weighing social utility of the dangerous activity as a factor in determining reasonable prevention Issue of relative inequities • D may not be "culpable" but P is still injured, she is not culpable whatsoever

Overseas Tankship (UK) Ltd v. The Miller Steamship Co (Wagon Mound 2) (1967)

P 81

- REID glosses Bolton – before that case, it had been understood that there were two classes of cases: those that were so unforeseeable and far fetched that it would not be reasonable to expect someone to take precautions and those where there was a real and substantial risk such that necessary steps to eliminate the risk should be taken
- Bolton poses new problem: the accident was plainly foreseeable but the chance of it happening is "infinitesimal"
- While the House of Lords held that the risk was so small a reasonable man would have been justified in disregarding it, it does not follow that it is justifiable to neglect (even small) risks – only if there is a good reason to do so: considerable expense, social utility of the activity
- So if instead of cricket, it had been an illegal or socially worthless activity, there could have been recovery
- Modifies his rule: it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it

Latimer v. AEC (1953) HL

P 81

- Employee slips on factory floor after flood water from rainfall mixed with a oily substance (risk), sawdust (a precaution) used to cover but not enough for all areas
- What actions in the circumstances would a prudent man have taken?
- There is a risk, but they do take precautions
- Did they take reasonable precautions – Concluded that the stairway is normally slippery, why did they not have enough sawdust? Were there other materials they could have used to clean up? Could they have closed off part of the factory? Prioritize where they put the sawdust?
  - What is reasonable changes over time – this case = 1953: today similar questions would be asked but the standard for safety changes
- LORD PORTER: The employer did their best. Employee did not establish that a reasonably careful employer would have taken the drastic step of shutting down the factory
- Social value? It was a corporation, though the employee was not injured in the profit making activity: If they closed, employees would not have been paid – is it to their benefit to close – social value? Consequences negative to social value
- Based on the balancing of the risk and the cost of taking further (more drastic) precautions, HL finds the employer was not negligent

English scholars sometimes conclude from this case that negligence always involves balancing the risk against cost of precautions

Tomlinson v Congleton Borough Council (2004) HL

P 83

- Plaintiff injured swimming in a public park
- LORD HOFFMAN: Test of whether the care taken was reasonable depends on assessing not only the likelihood of someone being injured and the seriousness of the injury, but also the social value of the activity which gives rise to the risk and the cost of preventative measures
- No social value to not taking preventative steps = liable
- In *Bolton v.Stone* – cricket club was carrying out a lawful and socially useful activity, would have had to stop to prevent
- The risk here was so small, the activity (swimming) is enjoyed by many safely

Watt v Hertfordshire County Council (1954) (CA)

P 85

- Fireman sent to a call with a heavy jack in the truck, needed for the job but with no way to tie down, is injured on the way when it falls and hits him
- Lost at trial and dismissed on appeal
- Social value of the enterprise the employee is involved in
    - Not a commercial enterprise – community serving
- But should someone performing a social act be taken care of? DENNING says if it had been a commercial activity the action would have been allowed, but here the risk is justified for the social value
- NOTES
    - Does this make sense?
    - If you want fireman, should they not receive protection
    - Taking the risk of getting injured to serve others, but then don't compensate them
- **Ratio:** In addition to the measuring of due care by balancing the risk against the measures necc to eliminate the risk, it ought to be added that one must balance the risk against the end to be achieved – greater the end, more justifiable the risk

Trimarco v Klein (1982) NYCA

P 85

Facts	Plaintiff suffered injuries when his glass tub broke, awarded. With the aid of expert testimony he sought to demonstrate the glass door no longer adhered to accepted safety standards (custom). • At trial, Court allowed sections of the New York's General Business Law to be admitted as evidence, though not effective until after the plaintiff's bathroom was put in - $240,000 in damages
Issue	What evidence/proof is admissible to establish the standard/custom practise of an industry?
Decision	New trial
Reasons	FUCHSBERG: • At trial, modest cost and ready availability of safety glass and growing custom if its use support the verdict reached • The General Business Act specified only "safety glazing material" be used in

	all bathrooms • A common practise or usage is not necessarily a conclusive or compelling test of negligence, the jury must be satisfied of the behaviour of adhering to the custom and the reasonableness of the standard itself • While it appears that this test has been met, the General Business Law sections are inadmissible and should have been excluded – prejudicial to the defendants
Ratio	Valid/effective custom/common practise is admissible as evidence of a standard of care, but must be assessed as reasonable

The TJ Hooper (1932) US

- Classic case on custom: tugs were alleged to be unseaworthy because they did not carry radio receiving sets to receive warnings/weather changes
- LEARNED HAND: While it is not fair to say that there was a general custom of carrying radios, and while in most cases reasonable prudence is common prudence, there are precautions so imperative that even if everyone else disregards taking it, that is not an excuse for the omission

Weiler "Groping Toward a Canadian Tort Law: The role of the SCC"

P 88

- Significance of custom in Canada:
  - Custom is necessarily feasible in a technical and economic sense, it is precise standard of care, can be learned and utilized as a practical matter, can produce informed and objective judgment
  - Compelling but not conclusive: We must recognize the real likelihood of distinction between what people actually do and what they ought to do – including considering the pressure of budgets and market competition

Ter Neuzen v Korn (1995) SCC

P 89

Facts	Gynecologist/obstetrician conducted artificial insemination procedure which resulted in patient contracting HIV through infected donor semen • By the time the case reached the SCC, knowledge of transmission had changed – custom/standard • Evidence that his knowledge and practise were in line with what was known and the precautions that were taken at the time: No recognized link between AI and HIV, knowledge was growing • His recruitment and screening process was in line with Canadian standard, he discontinued his program as soon as he found out about the risk, had patients get tested – donor had withheld the information that he was bisexual (risk factor) • Jury found him negligent, court of appeal reviewed the verdict and found that on the evidence this should not have been possible
Issue	Did the doctor breach the standard of care of a reasonable gynaecologist/obstetrician at the time?
Decision	Appeal dismissed, uphold court of appeal finding that there is no liability
Reasons	SOPINKA • The conduct of physicians must be judged in light of the knowledge that ought to have been reasonably possessed at the time of the alleged negligence • Agree with the CA's view of the evidence and the jury's verdict – impossible

	for a jury acting judicially to have found the doctor negligent given his knowledge and the custom at the time • Recognition that while in most cases compliance with the common practise will exonerate doctors from a finding of negligence, there are situations where the standard practise itself may be found to be negligent • Where, as a general rule, procedures are complex and scientific, it is not the place of judges to find a standard medical practise negligent • In this case the evidence was virtually conclusive, the jury should be instructed that once they have determined on the evidence what the standard is, the only issue is whether the defendant conformed • No jury is capable on its own of figuring out the impact of recent medical developments – jury is confined to prevailing standards of practise
Ratio	As a general rule, where a procedure involves difficult or uncertain medical/tech questions that are beyond ordinary experience and understanding of a judge and jury, it will not be open to find a standard medical practice negligent.

Duty of Care

DUTY OF CARE

*First, the defendant must be found to have owed the plaintiff a **duty of care**. This is a determination of whether the class of persons to whom the plaintiff belongs and the class of persons to whom the defendant belongs are said to enjoy a relationship of "**neighbourhood**"- **LORD ATKIN*** in *(Donoghue v. Stevenson). Is the defendant under a legal obligation to exercise reasonable care in favor of the plaintiff?*

1. **Lord Atkin** *(Donoghue v. Stevenson)* wrote that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your **neighbour.**" This element of neighbourhood must exist between classes of persons for their relationship to give rise to a duty. This principle brought about "proximity" and "foreseeability" of damage to plaintiff
    - A neighbor is any persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question

2. Realizing that new duty of care relationships may be recognized in future, **Lord Macmillan** wrote "the categories of negligence are never closed."

*To determine whether there is a duty of care owed we must first ask whether that relationship is the same as, or is analogous to, a relationship which the courts have previously recognized as giving rise to a duty of care [Cooper v Hobart]. (*See list below of recognized relationships - If it is not previously recognized, go down to **NO PRE-EXISTING COMMON LAW OR STATUTORY RELATIONSHIP**)

Specific Relationships Recognized as Giving Rise to a Duty of Care:

The relationship between the parties in this case is "legally proximate" to earlier authorities and thus in reflecting the common law process of incremental extension of the law a Duty of Care is imposed.

Doctor – Patient *(Urbanski v Patel; Renslow v Mennonite Hospital)*
Manufacturer – Consumer (*Donoghue v. Stevenson*) – *owes a DOC to ultimate consumer to take reasonable care to prevent defects in its products which are likely to cause damage to person or property. – Because Donoghue didn't BUY the beer she did not have a claim for breach of contract.*
Drug manufacturer – Consumer (*Sindell v. Abbott)*
Employer – Employee (*Clay v AJ Crump & Sons Ltd.)*
Distributor – End User of Product *(Watson v Buckley & Osborne, Garrett & Co Ltd (Ogee Ltd)*
Commercial Hosts – Members of Public Injured by Intoxicated Customers/Patron (*Stewart v. Pettie*)
Between two Contracting Parties *(Winterbottom v Wright)*
Driver- Unborn Child of the Injured *(Duval et al v Seguin et al)*
Culprit of dangerous situation – Rescuer *(Horsley v MacLaren)*
Negligent Party – Rescuer (police) *(Haynes v Harwood)*

General Relationships Recognized as Giving Rise to a Duty of Care:

Carrier------------------ Passenger---------------------- [*Matthews v Maclaren/Good Samaritan Act*]
Rescuer ---------------- Rescued------------------------ [*Horsley v MacLaren*]
Driver -------------------Driver------------------------- [*Athey*]
Risk Creator-------------Injured by Risk-------------[*Crocker, Stewart,* many omissions cases]
Driver---Passenger (**McLaughlin** – *Galaske v O'Donnell*)

Misfeasance duty - Positive acts - Taking inappropriate action

Manufacturer – end consumer [*Donaghue v Stevenson* - snail ginger beer]
Registrar ≠ investors [Cooper v Hobart] –*Failed on proximity and later policy implications– too large a scope – "Specter of Liability" **MCLACHLIN**)*
Cops – citizens (duty to protect/warn)
Student – professor
Doctor – Patient [*Paxton v Ramji* - acne medication harmed child]
Doctor ≠ unborn child [*Paxton v Ramji*- acne medication harmed child]
Mom ≠ unborn children [*Dobon v Dobson*]
Health care providers – babies during birth [*Liebig v Guelph General Hospital*]

No Pre-Existing Common Law or Statutory Relationship

To my knowledge, the specific relationship between plaintiff and defendant has not yet been defined by the courts or statute, so we must apply the two stage Anns *test originally established by* Anns v.

Merton District Borough Council, *adopted in Canada by* Kamloops v. Nielsen, *and modified by* Cooper v Hobart.

Applying the *Anns* Test:

Step 1 *of this test determines if a prima facie duty of care exists by examining foreseeability and proximity, as well as any policy considerations related specifically to the plaintiff-defendant relationship that may negative a duty of care.*

- ***Foreseeability****: relationship is such that it is reasonably foreseeable that careless conduct of (i)* ***any kind*** *by the defendant may result in damage of* ***some kind*** *to the (ii)* ***this*** *plaintiff.* ***FORESEEABILITY OF DAMAGE TO THE PLAINTIFF-****Duty of care is not owed to the world, but is owed to anyone whom the defendant might reasonably foresee as being adversely affected by his failure to take care.* *(met in Cooper as between the registrar and investors)(Childs v D failed on foreseeability aspect- social host of BYOB party could not have foreseen that a user of the highway might be harmed by a guest driving from the party)*

Foreseeable Risk of Injury - *[Moule - climbing tree]*
"There is a duty of care to take reasonable precautions, but only against foreseeable consequences."

Foreseeable Plaintiff *[Palsgraf - fireworks train, range of danger- plaintiff was beyond the range of foreseeable danger]*
*"The scope of the duty of care is limited, and is owed to a class of people who could reasonably be in apprehension of danger. Although Palsgraf is an American decision, it has been adopted by Canadian courts." –****DON'T NEED TO FORESEE THE SPECIFIC INDIVIDUAL, BUT A "CLASS" OF PEOPLE THE PLAINTIFF BELONGS TO.***

- ***Proximity****: refers to a "close and direct" relationship. Factors included here evaluate the closeness of the relationship between the two parties and determine whether it is just and fair having regard to that relationship to impose a duty of care in law. In establishing proximity we include any* ***policy considerations specific to the relationship*** *between these classes that ought to negate the duty of care* [Cooper v. Hobart failed here-it was not fair to impose a DOC to a wide range of investors with whom the registrar had no direct communication)

- *The court must be convinced that the imposition of a duty of care on the defendant is a good idea*

- **MICRO** *Policy considerations looking at the relationship*

- Closeness created by a Representation
- Physical closeness
- Social closeness
- Circumstantial closeness

- ◯ Casual closeness
- ◯ Assumption of responsibility, reliance/dependence
- ◯ Property or other interests involved
- ◯ Conflict of interest
- ◯ Relationship of economic benefit (*Stewart v. Pettie*)
- ◯ Control/supervision
- ◯ P belongs to specially identifiable plaintiff class
- ◯ Defendant participated in the creation of a risk
- ◯ Statute obligations/affirmative duty imposed by statute

Step 2: *Given that a* prima facie *duty of care exists, the* ***SECOND STAGE OF*** Anns *test asks whether there are any* ***residual policy considerations*** *that ought to negate that duty.*

Types of Residual Policy Considerations (MACRO/Society):

Defendant has to show that the policy reasons are compelling to negate the DOC

- ◯ Arguments about judicial administration (**floodgates)**
  - *Finding that this class of defendant owes this class of plaintiff a duty is not appropriate because to do so would be to open the* ***floodgates*** *to opportunistic individuals pursuing litigation of spurious claims.* (**Mustapha**)
- ◯ Arguments about **institutional competence**
  - *Finding that a duty of care is owed is appropriate because the courts are the proper arena to make decisions regarding _____.*
  - *Finding that this class of defendant owes a duty of care to this class of plaintiff is not appropriate because the courts are not the proper arena to make decisions regarding _____. Engaging as it does with issues of change, the legislatures – a body that is designed to change with fluctuating public opinion – are instead the proper arena.*
- ◯ **Nature of the damage** – emotional harm, pure economic loss
- ◯ **Economic** - cost-benefit analysis
- ◯ Arguments about **deterrence** and **social utility**
  - *Finding that a duty of care is owed is appropriate because that would encourage good conduct and deter bad conduct.*
    - Or, by contrast, *arguing that a finding of duty would encourage good conduct and deter bad conduct is a formal assumption. Not everyone knows of new regulations and adjusts their conduct accordingly.*
  - *Finding that a duty of care is owed is not appropriate because that would deter good conduct and encourage bad conduct.*
- ◯ Arguments about **privacy and autonomy rights**
  - *Finding that a duty of care is owed is not appropriate because that would unduly infringe upon the privacy and autonomy rights of members of the class to which the plaintiff belongs* (**Dobson v. Dobson**).
- ◯ Arguments about **bearing costs** of litigation
  - *Finding that a duty of care is owed is appropriate because members of the class to which the defendant belongs are better equipped to bear the costs of injuries suffered by members of the class to which the plaintiff belongs.*

- *Finding that a duty is owed is not appropriate because members of the class to which the defendant belongs are not better equipped to bear the costs of injuries suffered b members of the class to which the plaintiff belongs.*

*(*Sindell v. Abbott** - dissent says not fair to hold liable based on 'deep pockets')

- Arguments about identifying and **rectifying defects**
  - *Finding that a duty of care is owed is appropriate because members of the class to which the defendant belongs are in a better position to identify and rectify defects in products before they are distributed and consumed by members of the class to which the plaintiff belongs.*
  - *Finding that a duty of care is owed is not appropriate because members of the class to which the defendant belongs are not in a better position to identify and rectify defects in products before they are distributed and consumed by members of the class to which the plaintiff belongs.*
- Arguments about Statutory Function
  - *Finding that a duty of care is owed is not appropriate because the nature of the defendants statutory function as a governing body would make them liable for damages of an indeterminate number of plaintiffs. (*Cooper v. Hobart)

Three Existing Categories of DOC:

Duties of Affirmative Action & Nonfeasance duty

*"The courts are generally unwilling to impose liability for losses caused by a failure to act. However, duties of affirmative action have been recognized in limited form where there is a "**special relationship"** (A defendant is under a DUTY of affirmative action if she stands in a special relationship to the plaintiff)*

Cases recognizing duties of affirmative action fall into 3 broad categories: (These 3 discussed in Childs v Desormeax)

- Host attracts others to participate in inherently risky activity they control [Crocker]
- Host enters into paternalistic relationship of supervision and control [Stewart v Pettie & Childs v Desormeaux]
- Host exercises a public role or benefited from a commercial enterprise offering service to public [Crocker & Liquor License Act]

Recognized "Special Relationships"

- Contractual and quasi contractual relationships (ie. Employer and employee)
- Fiduciary relationships (parent and child)
- Professional relationships (doctor and patient)
- Relationships of Authority, control & supervision (teacher and student, custodian and prisoner)
- Relationship of occupier and visitor
- Relationship between professional rescuers (police, fire, paramedic and endangered citizen)

If the situation does not involve one of the above- Look to see if the defendant has authority, control, supervision over the plaintiff, commercial benefits derived, close family bonds, dependence by the plaintiff on defendant, any special expertise the defendant may have that should have been used in the rescue situation (ie. Lifeguard), any contribution by the defendant to the plaintiffs peril,

statutory obligations resting on the defendant, comparison of the cost of affirmative action to the defendant with the extent of the benefit it would bestow on the plaintiff, the extent of the burden that would be imposed on the defendant. – if there are enough of these a special relationship is there

Stewart v Pettie – DOC owed to the third party plaintiff because commercial host should have taken steps to control the conduct of the intoxicated customer drinking on their property in order to protect innocent highway users.

NOTE: Social hosts ≠ invited guest [Childs v Desormeaux]

Duty of Care Owed to Rescuers

The courts have continued to assert that there is no general duty to rescue a person who finds herself in danger from a source completely unrelated to the defendant. Courts are no encouraging altruistic behavior by protecting rescuers from virtually all losses arising from the rescue attempt.

Urbanski v Patel – Negligent doctor owed a DOC to father (rescuer) who donated his kidney to his daughter

Master – invited guests on pleasure craft: [Horsley v McLaren]
Assume voluntary assumption of duty:

- ◯ D puts P in perilous situation [Matthews (man overboard) v. MacLaren]
- ◯ D physically worsened P's position [Matthews v. MacLaren]
- ◯ D worsened P's opportunity for aid [Matthews v. MacLaren]
- ◯ In rescuing, new situation of peril must be created [Horsley (initial rescuer) v McLaren]

Good Samaritan Act – Provides some defence for rescuers. Legislation is included at the end.

LORD DENNING: *The person who created the negligent situation/ danger owes damages to any rescuer who attempts to rescue them or the injured party and is thus injured as a result. Provided the rescuer does not worsen the situation. Also don't have to foresee the specific emergency, just an emergency in general (Videan v British Transport Commission)*

NOTE*:* even if a DOC is not found to be owed to the plaintiff, it could still be found to be owed to the rescuer

Negligent Infliction of Mental Shock (Duty to Avoid Causing Psychiatric Harm)

The claim for negligent infliction of nervous shock is that one has suffered ***sudden mental shock*** *as a result of* ***witnessing the physical injury*** *of someone else, generally resulting* ***in a recognized psychiatric illness*** *(does not encompass grief and sorry- must be PTSD or Clinical depression suffered). The claimant must be of* ***reasonable fortitude and robustness.*** *Must be a* ***reasonably foreseeable consequence (remoteness):***

- Limits the consequences to the effects that the event might engender in a reasonable plaintiff.
- The thin skull argument is rejected (tortfeasor does not take his victim as he finds him).
- The thin skull rule only applies after you have established liability.

If the defendant knew that the plaintiff had a particular vulnerability to psychiatric harm before the breach, then psychiatric harm is reasonably foreseeable. [Mustapha]

POLICY Courts less likely to grant damages for psychiatric injuries- Floodgate argument

**The main control device on the extent of recovery for psychiatric injury is DOC*

Examples of When a DOC is Owed by Causing Psychiatric Harm:

- Supplying grossly adulterated food to the plaintiff
- Causing the death of the plaintiffs baby in the course of labor
- By exposing the plaintiff to a toxic chemical
- By giving false and shocking information such that a family member has died or illness diagnosis

Consider, Relational proximity (bond between plaintiff and person injured/killed), Locational proximity (plaintiff close the scene of the accident), Temporal proximity (nervous shock must have arose from the traumatic and tragic event – not a subsequent reaction to the circumstances/conseqeunces)

STILL APPLY ANNS TEST IN CASES OF PSYCHIATRIC HARM WHEN LOOKING FOR DOC- might not always work though – ***MCLACHLIN*** Mustapha

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Quick Summary of Anns/Kamloops Test:

- ***First ask***: have we recognized the duty of care in these circumstances before? (Manufacturer v. Distributor).
- ***If so*** then we are off and running. ***If no***, then ask: is there reasonable foreseeability, and even if there is, then there still has to be proximity.
- ***If there is a duty of care*** (above are met) then are there policy reasons that negate the duty of care?

Stage 1: proximity & foreseeability

- Was the harm that occurred the reasonably foreseeable consequence of the defendants act?
- Are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

*if foreseeability and proximity are established- a prima facie duty of care arises

*to establish proximity look to expectations, representations, reliance, and the property or other interest involved. – these factors allow us to evaluate the “closeness” of the plaintiff and defendant and to determine whether it is fair and just to impose a duty of care.

Categories in which proximity has been recognized (Textbook pg. 166):

-Defendants act foreseeably causes physical harm to the plaintiff or their property
-Liability for negligent misstatement
-Misfeasance in public office
-Duty to warn of the risk of danger
-Governmenal Authorities constructing road maintenance have been held to a duty of car to execute the work in a non negligent manner
-Relational economic loss

Stage 2: Policy Considerations

- Are there residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care? (For example, would the recognition of a duty of care in this case create the spectre of unlimited liability to an unlimited class- would it set precedent that would allow anyone to sue/claim damages?)

*policy considerations refer to the effects on society at large, the legal system, and whether or not the law already has a remedy in place for the specific situation- in other words it looks at other legal obligations

If the duty of care established in step one is one that has already been recognized (categories of proximity) then you know that no policy considerations interfered with it and step 2 is complete and no policy considerations negate the duty of care. Step 2 will only happen in situations where a duty of care arises in a novel situation.

Applying the Anns Test:

1. Does the case fall within or is analogous to a category of cases in which a duty of care has previously been recognized (if NO go to next step)
2. Is this a situation in which a new duty of care should be recognized? (to answer this you must show that there was proximity AND foreseeability) - you must point to factors arising from the circumstance of the relationship that impose a duty
3. Also no policy considerations must conflict with this to void the prima facie duty of care
4. If there are no policy conflicts then you go to step 2 of the Anns test and look for further overriding policy considerations

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Additional Notes on DOC – Recover of Pure Economic Loss in Negligence

RECOVERY OF PURE ECONOMIC LOSS IN NEGLIGENCE

There are limited cases in which pure economic loss is recoverable. Economic loss that does not flow from personal injury or property damage is available in cases of [relational economic loss (Bow Valley Husky) (or) negligent supply of shoddy goods or structure (Winnipeg Condo Corp)].

NOTE: There is no duty of care in a negotiation process. It would defeat the essence of negotiation to label a party's failure to disclose its bottom line, motives, or final position as negligent [Martel]

(1) Negligent supply of shoddy good/structure: (Winnipeg Condo Corp)

A duty of care can arise in tort between a builder and a subsequent user or subsequent occupier (non-privity) of the building if it is reasonably foreseeable that a defect in construction causes a risk of danger to those persons or to their property (the threat of harm is front and center and quite significant).

The repair costs are claimable, though they do not arise from injury to person or damage to property aside from the defective structure itself. A claim for this loss is allowed based on ***policy concerns*** *over the risk of danger to individuals. Owners/occupiers of shoddily built buildings would be encouraged to hold off from making repairs until someone actually gets hurt if claims could only succeed after the fact.*

(2) Relational economic loss (*CNR v Norsk*)

This type of claim arises when the defendant, as a result of negligently damaging property belonging to a third party, also causes a pure economic loss to the plaintiff with whom the third party had a relationship (usually contractual).

RECOGNIZED CATEGORIES - PROXIMITY

- Where the claimant has a proprietary or possessory interest in the damaged property.
- General average cases (Different people share a loss even though it wasn't their goods lost).
- Where the relationship between claimant and the property owner constitutes a joint venture (MCLACHLIN- ***CNR v NORSK***

These categories are not closed.

- Claimant's opportunity to allocate the risk by contract is slight, either due to the type of transaction or inequalities of bargaining power (possible new category)

If it is not a recognized category, do the Anns test.

Policy Considerations

Indeterminate liability
Other opportunities to regulate loss (contract) [Norsk]

Deterrence

Main Duty of Care Cases:

- *Dobson v Dobson* (**Dissent** opinion in this case is very important)
- *Cooper v Hobart*-(No DOC, there may be foreseeability but no proximity) This case is responsible for reformatting the Anns/Kamloops test in a way that was better tailored to our society.

Highlighting Legend:

- Majority
- Dissent
- HUTCH

Donoghue v. Stevenson (pg. 117)

1932 House of Lords (England)

- You owe people a duty before you enter a contract if they are in your **"neighborhood"**

Facts:

- Involved Mrs Donoghue drinking a bottle of ginger beer
- Finding a dead snail in the bottom of the drink
- She fell ill, and she sued the ginger beer manufacturer,
- Stevenson appealed decision so it went to the House of Lords

Issue:

- Does the manufacturer owe a duty of care to Mrs. Donoghue? Can they be found negligent?

Decision:

- The House of Lords held that the **manufacturer owed a duty of care** to her (consumer), which was breached, because **it was reasonably foreseeable that failure to ensure the product's safety would lead to harm of consumers**.

Reasoning:

- Injuries resulting from defective products were normally claimed on the basis of a contract of sale between the seller and the consumer, However, Donoghue had no contractual relationship with Minghella as she had not purchased the ginger beer; while her friend did have a contract through having placed the order, she had not suffered any injury. Moreover, neither had a contract with Stevenson, the manufacturer. Donoghue was therefore required to claim damages for negligence.
- Donoghue's counsel argued that manufacturers also owed a duty of care to their ultimate consumers if it was not possible for the seller to examine the goods before they were used, an exception that would apply to Donoghue.

- **Lord Atkin (MAJORITY):** requiring a duty of care for negligence to be found and explained his general neighbour principle on when that duty of care arises- also the situation poses a great threat to public health****:
    - You don't owe duty to strangers
    - Differentiate between neighbors and strangers
    - You owe certain duties to people and not to others (draw a boundary)
    - Don't get too caught up on the literal meaning of a neighbor
    - Neighbor is not a legal term but we use it to distinguish
    - **Reasonable foreseeability was used as a measure to determine whether someone as a "neighbor" –** this reasonable foreseeability gives you a framework to work with, not an algorithm
- Goes beyond the purchaser to the consumer – Stevenson has a duty to know that the consumer will be affected- " A manufacturer puts up an article of food in a container that he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer"- **thus manufacturer has to owe DOC to consumer!!!!**

-Atkin is more of a reformer.

- **Lord MACMILLAN** (with majority) held that, according to this standard, Stevenson had demonstrated carelessness by leaving bottles where snails could access them; that he owed Donoghue a duty of care as commercial manufacturer of food and drink; and that Donoghue's injury was reasonably foreseeable- When a manufacturer creates a product it is reasonably foreseeable to them that a human is going to use or consume it. Thus if it is dangerous it will injure the consumer.
- **Lord Buckmaster** (Dissent): Few cases/precedent exist to support the plaintiff. It is not up to the judiciary to be making new laws- we must follow what exists. *If we make Stevenson liable then we would have to make all manufacturers liable. He cites *Winterbottom v Wright* as being closely analogous and says that the case shows that manufacturers of any article is not liable to a third party injured by the negligent construction – we should be allowing those entered in the contract to recover but if we allowed third parties, how far would this go? Everyone could recover. **– ONLY THOSE IN A CONTRACT CAN RECOVER**

Ratio:

- You must take reasonable care when proceeding with actions or omissions that you can reasonably foresee harming your neighbour.
- Neighbours are persons who are reasonably foreseeable as being affected by your actions or omissions.
- A duty of care is not owed to the world at large; it is owed to your neighbours.

Law is now being extended out of contract zone to neighbor zone, but you do not owe a duty of care to the world so it draws a line on how far the duty of care goes. In a way it extends but it also sets a boundary line.

Winterbottom v. Wright (Pg. 114)

1842 England

- ***Duty of Care in Contracts & Torts*** – liability limited to contractual parties in order to avoid slippery slope. This is the precedent up until *Donoghue!*

Facts:

- The plaintiff Winterbottom had entered into a contract with the postmaster- general to drive a mail coach supplied by the Postmaster.
- The defendant Wright had been contracted by the Postmaster to maintain the coach in a safe state.
- The coach collapsed while Winterbottom was driving and he was injured. He claimed that Wright had "negligently conducted himself, and so utterly disregarded his aforesaid contract and so wholly and negligently failed to perform his duty in this behalf."

*Winterbottom could have sued his employer the postmaster, but the postmaster was not negligent- so he had to go after someone else- the person who was supposed to maintain the carriage

Issue:

Does duty of care extend beyond contracting parties? Does it cover the employees injury?

Decision:

Judgment made for Defendant (he was negligent, but does not owe a duty beyond his contract- he does not owe to the employee) – **NO DOC**

Reasoning:

- **LORD ABINGER** (MAJORITY): Here the action is brought simply beacsue the defendant was a contractor with a third person; and it is contented that thereupon he became liable to every body who might use the carriage—this would lead to infinity of actions brought to court.
- The case was also possibly influenced by public policy. If the plaintiff were able to sue “there would be unlimited actions” and the public utility of the Postmaster-General was such that allowing such actions would be undesirable for society.- ***Floodgate Argument***
- They said they would be entering into a slippery slope if they allowed this to occur. “If one step why not 50” – **Hutch:** the law is already a slippery slope
- It held that since the defendant had a duty of care in contract it could not also have a duty of care in tort.
- **ALDERSON:** As the plaintiff was not in a contract with the defendant the court ruled in favor of the defendant on the basis of the doctrine of privity of contract. We must

confine the right to recover to only those who entered into the contract. – Plaintiff should have made himself a party to the contract

***"Hard cases are apt to introduce bad law"** – we can't let bad cases make us change the law all the time or else we may end up with bad laws

Ratio:

- No duty of care is owed to individuals not involved in the contract (The maker was not found to have a DOC to the users) – that ends the contract action

-POLICY IS GUIDING THEIR DECISION HERE. THEY WOULD BE EXTENDING THE LAW NOT TO ANYONE IN PUBLIC BUT TO AN EMPLOYEE – you could extend the law to cover a specific class of people (employees)

Watson v. Buckley and Osborne, Garrett and Co Ltd (Ogee Ltd) (Pg. 124)

1940 Court of Kings Bench – England

Facts:

- A hairdresser made a contract with a distributor (Ogee Ltd.) to purchase hair dye.
- It was said that the hair dye must not contain more than 4% chromic acid, however this was not placed in writing.
- The distributor did not test the product, and gave it to a client (Watson) to use stating that it was perfectly safe as the distributor had told her.
- As it happened, the product contained 10% chromic acid and Watson developed dermatitis as a result.
- He sued the distributor even though the error occurred in the manufacture.

Issue:

Does the distributor owe a duty of care to the end user of a product that they promote, even if they do not manufacture it?

Decision:

Judgment for the plaintiff. Distributor was liable – they were dealing with a new manufacturer but they should have tested the product.

Reasoning:

- **STABLE** (MAJORITY) states that the distributor must be held liable because a duty was indeed owed to the end user and they were careless to promote the product as safe without having tested it.
- The initial tortious act was the manufacturer putting more acid in the dye, however the distributor cannot escape liability for their carelessness simply by stating that they were not the original creators of the negligence.

- They knew that the product was designed to be used by the end users, and therefore they owed a duty of care to reasonable insure that the product was safe, which they failed to uphold.
- STABLE also finds that Watson would have been successful in an action against the manufacturer
- **Distributor omitted to test the product and falsely advertised.**

*Compare this to donaghue and Stevenson – the distributor should have tested. In Donoghue it was an opaque bottle so mancella would not open someones drink to check it – so no duty. But in this case they get the dye in a vat and have control over checking it. In here they are suing the distributor in *Donoghue v Stevenson* it is the manufacturer being sued. This shows that the **distributor can owe a duty where they have control over the product.**

Ratio:
Omissions, as well as actions, can result in liability in negligence.

Clay v. AJ Crump & Sons Ltd (Pg. 125)

Court of appeal of England 1964

- duty of care to employee and multiple checks on safety?

Facts:

- The owner of a garage contracted an architect, a demolition contractor, and a building contractor to renovate it.
- The owner asked the architect to leave a particular wall standing to prevent people from entering the premises during the construction. The architect did so without inspecting the wall. The wall had been left standing in a dangerous condition- one that would have been apparent to anyone who inspected it.
- The wall collapsed, killing two men and injuring Clay (a worker) who was in a nearby building constructed by the building contractors.
- At trial, the judge held the architect, demolition and building contractors liable in the amounts of 42%, 38%, and 20% respectively.
- This was appealed to the Court of Appeal.

Issue:

- Who owes a duty of care? And to whom?
- How is the liability to be apportioned between the parties?

Decision:
Appeal Dismissed- judgment for the plaintiff **DOC owed**.

Reasoning:

- The appeal judge upholds the trial judge's decision. He states that the architect is liable because he should have inspected the wall before leaving it up, the demolition contractors are liable because they should have inspected it and realized that it needed to be demolished, and the building contractors are liable as they were the employer of the

plaintiff and should have exercised reasonable care for his safety and failed to do so by building the structure close to the unsafe wall without inspecting it first.

- The judge holds that the decision in *Donoghue v Stevenson* was not to be interpreted that in order for a person to be liable in negligence there must have been no reasonable chance for intermediate inspection.- **In this case there was a chance for inspection and one was conducted by the building contractors who failed to identify the problems with the wall during the inspection- with their experience they should have seen the problems.**

*If going down the line, each person has a chance to check the product/process and they don't, they can each be liable. Each person has a duty to protect the end user.

Ratio:

- Liability in negligence can be shared among multiple responsible parties.
- *Donoghue* does not only apply if there is no chance of intermediate inspection

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Palsgraf v. Long Island Railroad Co (pg. 126)

(1928) New York court of Appeal

- Proximate Cause (limitation of negligence with respect to scope of liability)

Facts:

- A passenger carrying a package, while hurrying to catch and board a moving train, appeared to two of the railroad's (Defendant's) employees to be falling. The employees were guards, one of whom was located on the car, the other of whom was located on the platform. The guard on the car attempted to pull the passenger into the car and the guard on the platform attempted to push him into the car from behind.
- The guards' efforts to aid the passenger caused the passenger to drop the package he was holding onto the rails. Unbeknownst to the guards, the package, wrapped in newspaper, contained fireworks, and the package exploded when it hit the rails.
- The shock reportedly knocked down scales at the other end of the platform (although later accounts suggest that a panicking bystander may have upset the scale), which injured Mrs. Palsgraf
- Palsgraf sued the railroad, claiming her injury resulted from negligent acts of the employee.
- The trial court and the intermediate appeals court found for Palsgraf (Plaintiff) by verdict from a jury, and Long Island Rail Road appealed the judgment.

Issue:

- The question is Mrs. Palsgraf a neighbor? Was it reasonable foreseeable? Is there a duty of care owed by the railroad company?

Decision:

- **The Court of Appeals reversed and dismissed Palsgraf's complaint,** deciding that the relationship of the guard's action to Palsgraf's **injury was too indirect to make him liable**. Mrs. Palsgraf was also ordered, as a matter of routine practice at the time, to pay the railroad's legal expenses, estimated at $350---- **NO DOC**

Reasoning:

- **CARDOZO** (MAJORITY): wrote that there was no way that the guard could have known that the package wrapped in newspaper was dangerous, and that pushing the passenger would thereby cause an explosion. The court wrote "there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him." **Without any perception that one's actions could harm someone, there could be no duty towards that person**, and therefore no negligence for which to impose liability.- rules there is not a sufficient relation between the two parties- no duty owed.

*You only owe a duty to someone who you could foresee being injured by your actions

- The court also stated that whether the guard had acted negligently to the passenger he pushed was irrelevant for her claim, because the only negligence that a person can sue for is a wrongful act that violates their own rights. **Palsgraf could not sue the guard for pushing the other passenger because that act did not violate a duty to her, as is required for liability under a negligence theory.**
- This concept of *foreseeability* in tort law tends to limit liability to the overall consequences of an act that could reasonably be foreseen rather than every single consequence that follows. Otherwise, liability could be unlimited in scope, as causes never truly cease having effects far removed in time and space- **POLICY**
- **ANDREWS** (DISSENT): saw the case as a matter of **proximate cause—***Palsgraf's* injury could be immediately traced to the wrong committed by the guard, and the fact of the wrong and the fact of the injury should be enough to find negligence. Doesn't really like the idea of proximity as Cardozo applied it- just sees it as a public policy

*Your neighborhood is anyone who could be injured by your acts – despite if they are outside danger zone
*Everyone owes a duty to the world at large to refrain from acting negligently

- Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone. Cites *Polemis Case* (Dropping plank/cargo ship) The fact that the unloader was negligent by dropping the plank- he could have injured anyone – because of this possibility -he must make good for his loss. The act is wrongful so the doer is liable**. The act of knocking the package to the platform**

was negligent. For its proximate consequences the defendant is liable- there were minimal intervening acts (Scale). Briefly mentions relative inequities

- The *Palsgraf* case established ***foreseeability as the test for proximate cause***.

Ratio:
There is a reasonable limit on the extension of duty in negligent acts - if the harm is not willful, then the plaintiff must prove that the resulting injury resulted from an apparent danger inherent in the act.

Commentaries:
Seavey: Cardozo more consistent with negligence. Cardozo would be more easily applied (Andrews = too arbitrary)
Keaton- relative inequities- the person who is negligent should be responsible – but is this a moral judgment opposed to legal?
Weinrib- the defendant cannot be liable without relations to the plaintiff. Both sides need to be considered – defendant's duty has to relate to the loss. Andrew does not satisfy the correlation – he has to actually look at the relationship between the two people.
Prosser - this is never going to happen again. A rule is only precedent if it applies to cases that will reoccur but this never will. Andrews is less arbitrary than Cardozo but still both sides have faults (they don't show where the duty or liability stops) and the precedent is worthless. Someone has to bare the loss and its unjust on both sides.

Haynes v. Harwood (pg. 142)
England Court of Appeal (1935)

- Shows how you need to foresee the class of accident, not the exact/particular chain of events (discussing remoteness)

Facts:

- Harwood's servant brought a twohorse carriage into a residential neighbourhood and parked it across the street from a police station while he was off doing work.
- While the servant was away, children upset the horses, they broke free and were going to injure people. Haynes, a police officer, saw this from a window.
- He ran out and stopped the horses, however one of them fell and injured him.
- He brought an action for damages but was unsuccessful at trial and appealed.
- Is the police officer a neighbor? Is this reasonably foreseeable?

Issue:

- When someone knowingly puts himself or herself in danger to protect others, is the negligent party liable for damages suffered in the protection effort? Can you as the rescuer recover?

Decision:
Appeal Allowed. They were liable. **DOC owed**

Reasoning:

- **GREER** (MAJORITY) holds that in cases such as these, the *volenti non fit injuria* maxim does not apply. If someone acts to help those in danger as a result of a person's negligent actions, that person is liable for damages resulting from their actions as long as they are reasonable in the circumstances. Taking risk upon yourself is not applicable in rescue circumstances.
- The courts here say that they take the American approach to how they will deal with risk to the rescuer in this case (so they look to American precedent)
- Is it reasonably foreseeable when the defendant was negligent (in leaving the horses unattended) that this might be a direct effect/consequence of the negligence- He could have foreseen that they might run away.. Assesses the fact of whether or not it is important in determining if the police man responded deliberately or on impulse because the police officer could have assessed the situation and ruled that it was too risky to intervene. – Doesn't matter
- Policeman should get some compensation – it would be grossly unjust for the policeman not to recover here (pg. 144) you don't have to predict the exact sequence of events but determine whether it is hugely unreasonable action. **It only wouldn't have counted if it was so obvious that no one should intervene because it is too dangerous.**
- Duty to the rescuer is seen as independent to that of the injured person
- *Reference to Palsgraf*- do you have to foresee the whole chain of events? Or can you set up a general relationship? -Its not the particular accident, it's the accident of that class

******POLICY***: if the person did not recover then no one would ever rescue others.

***Similar to Watt case with the fireman and jack- he was told he was not going to receive damages for his injuries sustained during rescue efforts**

Ratio:

- The doctrine of the assumption of risk does not apply where the plaintiff has, under exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is owed a duty of care by the plaintiff or not.
- **You have to be owed a duty of care and someone has to be negligent in order to recover**. Thus you don't know when you perform a rescue if you will recover. Unless you can prove someone was negligent

***in this case the children are liable – similar to McHale and Watson case (kids throwing rocks) but so why aren't the kids being sued? They have no money. This is an example of when torts obviously know who the culprit is, but they have to go elsewhere to seek compensation. So they go after the employer- THUS, When the obvious culprit is not around are we willing to impose liability elsewhere? (aka to the employer)**

NOTE: we are extending the "neighbor" here, but if we don't compensate the police officer then there are policy implications

Commentaries

***Wagner*- references CARDOZO** "danger invites rescue" the law does not ignore that it is normal for people to take action and step in and help

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Wagner v. International Railway Co (pg. 144)

New York Court of Appeal (1921)

Reasoning:

CARDOZO: Statement of the basis of liability to the rescuer. The law recognizes that it is a natural instinct to help someone when in crisis and take on the role of rescuer

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Horsley v. MacLaren (pg. 145)

SCC 1972

Reasoning:

- **LASKIN** Legal protection is now afforded to one who risks injury to himself in going to the rescue of another who has been foreseeable exposed to danger by the unreasonable conduct of a third person. – **the third person is now subject to liability at the suit of the rescuer as well as at the suit of the imperiled person** – provided that the rescuers intervention was not foolish and beyond contributory negligence. A person who causes their own trouble could also be subject to liability at the suit of the rescuer.

Urbanski v. Patel (pg. 145)

1978 - Manitoba Court of Queens Bench

Facts:

- Patel, a surgeon, removed the only kidney of Ms. Firman believing that it was an ovarian cyst.
- As a result, she had to be placed on dialysis until she could find a kidney.
- Urbanski, Shirley's father, tried to donate his kidney to her, but it was rejected.
- Urbanski brought an action for the losses he experienced from the removal of his kidney.

***Therefore doctor is negligent we have that established. *Doctors* also owe a duty of care to patients – that is established – so <u>patient</u> could sue and recover damages. But can the father sue?**

Issue:

Is donating a kidney a reasonable action attempting to protect his daughter from the harms of the doctor's negligence? Is a duty of care owed to the father? Can the father sue?

Decision:
Judgment for the plaintiffs – **DOC owed to "rescuer"**

Reasoning:

- **WILSON (Majority)** found that in the medical world, the donating of a kidney is accepted as a usual solution to a problem of this type. **It is foreseeable that a member of the patients family would donate a kidney to help her.** As a result, Urbanski was acting perfectly reasonably. This case, therefore, follows the ratio of *Haynes v Harwood* and Urbanski was entitled to recover.
- Fathers action was a reasonably foreseeable consequence of the actions of the doctor– you just have to show that this was not a widely unforeseeable situation/action- if a doctor screws up not only the patient but others might be harmed.
- ***HAYNES v HARWOOD*** analogy- danger invites rescue – it is reasonable to expect that someone else will help

Ratio:
*You would have to produce evidence that it would be a reasonably foreseeable consequence that the father would donate a kidney.

Dobson (Litigation Guardian of) v. Dobson (Pg. 146)

(1999) –SCC

- **NOTE** thought "Hard cases make bad law"- are the facts of Dobson represented of negligence cases out there? NO therefore the court gets itself into a bind. If you ask the wrong question you will get the wrong answer

- The case went through the whole anns test and foreseeability and proximity were found but because of policy reasons (pregnant women do not owe duty to fetuses) the whole anns test was scraped and no duty was imposed.
- **Kamloops and Anns test is reaffirmed in this case**
- Sidenote: House of lords ditched anns because they wanted to categorize their plaintiffs

Facts:

- Cynthia Dobson was a pregnant woman.
- In the 27th week of pregnancy she was driving her car when her negligent actions caused a car accident.
- The fetus was permanently injured, and was born prematurely that day. Her son, Ryan Dobson, suffered physical and mental injuries, including cerebral palsy.
- His grandfather launched a tort claim for damages against his mother. (Not a hostile action launched…but going after insurance money)
- The mother was onside for this action – she wasn't an outlier, she was onboard- she wanted the insurance money – if the damages are not paid then she and her son are the losers- she needs to money to take care of him.
- The father owned the vehicle and had insurance

Issue:

- Should a mother be liable in tort for damages to her child arising from a prenatal negligent act that allegedly injured the fetus in her womb?

Decision:

Appeal Allowed – Although a DOC to the born alive child may exist, for policy reasons the duty should not be imposed upon pregnant women. **NO DOC**

Reasoning:

- **CORY:** (MAJORITY) finds that the mother should not be held liable in the situation because of the policy implications. (Pg. 152 – For the court to say we wont take on an issue solely for insurance ...HEAD IN THE SAND –NOTE: there could not be a case without insurance- the grandfather would not have put this forward if there was not insurance. Insurance made a deal with the mom saying they would give her a reduced rate if she took this court on appeal- insurance was prepared to pay her off.
- **BIG QUESTION: are you going to let Mrs. Dobson access the insurance? (Everyone else can, but not her?)**
- They employ/affirm the *Kamloops* test (Anns test?) to determine if a duty of care should be owed.
    - Is the relationship close enough to create a reasonable duty? Sufficient proximity?
    - Are there any public policy implications that negate or limit the scope of the duty?

- They find that the first part is satisfied (proximity between mom and fetus – considering them to be two separate people) – sidenote: there was an argument made that the law has always ruled that mother and fetus are one (**MCLACHLIN**- ruled this in another case) however the public policy implications negate the duty (There are policy reasons as to why there is no DOC here). Considering they are 2 legal entities they are in the closest of proximity and it is foreseeable that any injury to the mother would also injure/impact the fetus' development. **POLICY** reasons considered relate to the privacy and autonomy of women and difficulties in articulating standard of conduct for pregnant women. Possible charter right breach. The very unique relationship between mother and fetus is not analogous to that of two other parties. Every single thing the mother does influences the fetus. – women wouldn't want to get pregnant because of the limitations that would need to be set on their conduct to avoid tort claims. **POLICY** Courts are also not in a place to impose such rules for pregnant women.

- **MCLAUCHLIN**, in a concurring judgment, states that another main reason why this duty cannot be imposed is that it would violate pregnant women's rights under the *Charter* – specifically liberty and equality. They would lose their liberty, and not be treated equally with other women in society. It is not the duty of the court to

monitor the lifestyles of pregnant women. To distinguish based on "general DOC"- that is the mother already owed a duty to others on the highway- also does not make sense, since this violates the precept that a common law DOC arises from the relationship of the parties before the court, and not the relationship between D and a hypothetical P- She understands that a child born with disabilities resulting from the negligence should be able to benefit from insurance money- but it is hard to find a way to go about this without policy implications. Decides that the courts should stay out of it and it is a matter requiring legislative action.

- **MAJOR** (DISSENT) -(When pregnant women drive do they have a duty to drive with caution? YES because they could be criminally negligent – MAJOR says so what are we doing here….everyone has to drive cautiously not just pregnant people-
    - But in response to MAJOR's point they state that there are two main reasons for this:
        - it would violate the privacy and autonomy of women
        - it is impossible to judicially define a reasonable standard of conduct for pregnant women.

- **MAJOR Continued**- states that in order for the public policy implications to negate the duty they must restrict the woman's actions in a way that was not present before- He says that this is not the case, because she had a duty of care to everyone else on the road, and extending that to the fetus would not change the reasonable standard of her conduct. He says that this case deals specifically with pregnant women driving automobiles, and if the creation of duty imposed a limitation on her actions that was not there previously then the outcome would be different. He uses the example with another pregnant woman in the car – if the same outcome occurred, then there is no question that the other woman's fetus could sue her for negligence. He agrees that the *Kamloops* test applies, but says that the **policy implications here do not negate the duty**.- So why are we preventing the one person in the world who may need support here, from suing? **In situations where you already owe a duty of care to third parties…. surly your own child should be able to sue.- he cant sue in situations where another third party would not be able to** (ie. Something the mother eats). They wont do it if there is no insurance. He disagrees with McLaughlin's point that the liberty and equality of women is at issue in this case. He is saying that in this case by enforcing your rules, you are going to disadvantage the child and mother who need the monetary support in this case.
- The duty of care that a mother has for a child is not forced on the mother by courts through public policy

- **The majority of the Court found that tort claims cannot be brought against women for *negligence toward the fetus* during pregnancy.**

Ratio:

- Pregnant women do not owe a duty of care to the foetus in their womb.

- The test to determine if a duty of care is owed has two parts:
  - Is the relationship close enough to create a reasonable duty?
  - Are there public policy grounds to negate or limit the scope of the duty?

Commentaries

Duval et al v. Seguin et al

1972 Ontario High Court & 1974 Court of Appeal

Facts:

- Seguin negligently injured a pregnant woman in a car accident.
- Duval was the child she was then carrying, who sued for the damages that she had suffered since birth and that she would continue to bear.

Issue:

Can a defendant be liable for injuries caused to another before their birth?

Decision:

Judgment for the plaintiff – **DOC owed**

Reasoning:

Fraser stated that Seguin owed a duty of care to Duval as it was foreseeable that some users of the highway were pregnant women and that an unborn child could be hurt in an accident.

Ratio:

No person is disentitled from recovering damages in respect of injuries for the only reason that the two parties are parent and child, or because the injuries occurred before his or her birth.

Weinrib: A women's constitutional right has to be assessed in light of the baby's rights. In Dobson they only looked at the women's rights and not the babies. **The baby has the right as do any other person to seek claims.**

Renslow v Mennonite Hospital (pg. 158)

1976 Court of Appeal for Illinois

DOC can be owed to future generations and that the neighborhood is extended

- Mother is given wrong blood type during transfusion as a teen (but did not know until she gave birth to child)
- Can the plaintiff (child) sue the doctor?
- Doctor admits he was negligent
- Does he owe a duty of care to the mother (yes) what about to the child/future generations? There is no formula to figure this out- Use the neighborhood idea as a screen to assist you
- Can you owe a duty to something that doesn't exist when the negligent act occurs?
- *Analogous to Donoghue and Stevenson* – was it **reasonably foreseeable** to say that when the doctor made his mistake it may affect someone who might or might not exist in the future? Was it reasonable to assume that that women may or may not have children eventually (look at stats, yes)

***You can establish proximity here but like are judges and lawyers able to comment on policy, what credit do they have?**

Cooper v. Hobart (pg. 163)-Reconfirm Kamloops

SCC 2001

- The first case to say that in order to establish a DOC where a DOC already exists we don't need to redo the Anns test. (So if the case is analogous)

Facts:

- Eron Mortgage Corporation was a mortgage broker under the *Mortgage Brokers Act*.
- Cooper had advanced money to Eron.
- Eron's mortgage license was suspended and they went out of business when it was discovered that they used money of over 6,000 investors for unauthorized purposes.
- Cooper alleges that the registrar breached a duty of care that it allegedly owed to her and other investors as it had been aware of the serious violations of the *Act* committed by Eron and not suspended its license soon enough.
- Cooper was successful at the lower court which Hobart and the Crown appealed.

Issue:

- Should this new type of negligence be recognized?
- Should the *Anns* test still hold?

Decision:

Appeal Allowed, **No DOC**

Reasoning:

MCLACHLIN and MAJOR: (MAJORITY) **hold first that the *Anns* test must still apply**. They decide first that this is not a type of negligence that can be likened to any other case as it deals only with pure **economic loss**. However, as there was insufficient proximity between Cooper and the registrar **there was no duty of care owed.** DOC arises when there is a relationship in which you have to protect others from the foreseeable consequences of your negligent actions. Even if it was reasonably foreseeable by the registrar that Eron may suffer financially by the mortgage brokers conduct. The registrar and Eron were not in sufficient proximity for Registrar to have to warn Eron. **By including proximity into the first part of the test we need to take into account Expectations, representations, reliance, and property or other policy interests.** You do examine policy consideration in the first step only as they relate to the proximate relationship between the 2 parties- other types of policy considerations go into later step. If a duty were owed, it would open up an insurance scheme (**POLICY**). - They also cite that people would lose confidence in the system as a whole and efficiency and would decrease.

Main Residual Policy reason behind no DOC found - People would invest knowing that if they loss money they could just claim that the mortgage broker did not properly oversee their money and recover what they loss. **Indeterminate Liability!**

- Pg. 168 They then state in *obiter* that even if a duty had been established, it would have been negated in the second part of the *Anns* test for policy reasons. (These policy reasons would probably be that the registrar is a public body, do we want to impose a DOC on public bodies in the same way? Do we want to make them liable for economic losses? This could raise taxes, or lead to removal of the registrar)

NOTE: A better SCC decision would have been to say there is proximity here but we are not going impose liability for public policy reasons. – Instead of the final decision that said there is no proximity- they are not in the same neighborhood

COMPARISON TO *Donoghue v Stevenson*
*Proximity and foreseeability to determine if there is a duty of care between the Investors and the mortgage broker- YES there is. But the mortgage broker is bankrupt and has no money to give for damages. SO the investors sue the Registrar. **2 Main Questions:**

- Registrar is a public official (*Donoghue v Stevenson*- **How does the registrar differ from Stevenson**- Stevenson is a private manufacturer) If there is a DOC, did the registrar breach a standard of care? Should the investors be able to sue the negligent registrar?
- **How do the investors in this case differ from Mrs. Donoghue –** not injured physically, but economically/financially

-It is then asked whether this fall into a previous category with an **analogous relationship- NO** never between investors and registrars. So we go to the Anns test

- Is it reasonably foreseeable that if the registrar fails to disclose info that could influence the investors that it may cause them to loose money?- YES

- But what about unlimited liability to an unlimited class; the larger the group of potential plaintiffs the more we are going to get nervous about imposing DOC. *Donoghue v Stevenson* the relationship was between consumer and manufacturer of ginger beer (rare occurrence) whereas a lot of people invest in brokers- bigger category.

Ratio:
Canada still uses the Anns test in negligence cases

****Pg. 166 MAJOR AND MCLACHLIN lay out situations similar this where proximity WAS found.**

Remoteness

Lecture Notes
Decisions
Notes
Supplements to Lecture Notes from Reading Notes
Cases in Text but not Discussed in Class

Key Terms/Concepts

- Even if you're in the "neighbourhood", still have to deal with the issue of remoteness
- Remoteness: whether the damages themselves are too remote, whether the particular damages caused to the plaintiff were reasonably foreseeable by the defendant
  - You need to reasonably foresee the type, but not necessarily the extent of the injury
- Remoteness is connected with damages (be careful not to confuse it with proximity)
  - In remoteness: reasonable foreseeability refers to damages
  - In duty of care analysis: reasonable foreseeability refers to relationship between plaintiff and defendant
- Do not consider whether remoteness is an issue until you've established that a duty of care exists through the *Anns* Test

Cases Discussed in Class (Oct. 2, 2014)

Re Polemis and Furness, Withy & Co. (1921)

Situation: petro vapor (a flammable gas) is leaking on a ship in a wharf, a crewmember dropped a wooden plank into the hold, which caused a spark, igniting the vapor and burning down the ship.

- The employers of the crewmembers accept that they will be responsible for letting the plank drop and certain types of damages that occurred but submit that they are not responsible for the entirety of the damages.
- Decision: regardless of foreseeability, if the consequences were direct, the plaintiff will recover full damages (unanimous decision by 3 judges)

Wagon Mound No. 1 (1961)

→ This case changes the law

Situation: A ship (the "Wagon Mound") contained furnace oil, which was being unloaded in the harbor. While unloading the oil, a large amount spilled into the water and they made no effort to clean it up, and left the next day. The oil spread across the water to Mort's Dock where they were repairing a ship (the "Corrimal") out of the water. The supervisor of the "Corrimal" project asked the manager of Caltex (who partly owned the "Wagon Mound") whether it was safe to continue work, and he received confirmation that furnace oil did not catch fire in water. As a result of this conversation, they continued work on the "Corrimal"

(taking every precation), when a spark from the work went into the water, igniting a cotton rag, which ignited the oil, which burned down part of Mort's Dock and destroyed the "Corrimal".

- They were negligent twice, first in allowing the oil to spill, and then again by making no effort to clean it up.
- Mort's Dock brings an action against the "Wagon Mound"
  - Established the "Wagon Mound" owed them a duty of care (reasonable foreseeability, proximity both met – they were some 600 ft. away)
  - Established that they were negligent in failing to clean up (make an effort to clean up) the furnace oil
- "Wagon Mound" says they are prepared to pay for the oil damage to the dock so far as it prevented other things from happening but not for the fire because that damage was too remote
  - Mort's Dock cites *Polemis*, saying that any direct harm is recoverable (fact pattern is quite similar to *Polemis*)
  - "Wagon Mound" says damages should be assessed on the basis of "reasonable foreseeability of damages"
- The complicating fact is that the spark causing the fire was caused by Mort's Dock (plaintiff)
- Expert evidence at trial confirmed that the Caltex supervisor was correct, in that it was highly improbable/not foreseeable that furnace oil would ignite on water
- Decision (given by Simmons): the *Polemis* decision has been shaken…"it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be direct."

Wagon Mound No. 2 (1967)

→ This case confirms the rule of reasonable foreseeability

Situation: the facts remain the same as *Wagon Mound No. 1*, but here the owners of the "Corrimal" are suing the "Wagon Mound"

- Principle of *stare decisis* refers to being bound by earlier decisions
- Principle of *res judicata* refers to rules about facts – any factual findings in earlier cases will be binding in later cases between the same parties
  - This does not apply to the present case because the "Corrimal" was not a party to the previous decision
- They make an opposite factual finding in this case (from *Wagon Mound No. 1*), and say that the damage is reasonably foreseeable
- Decision: "Corrimal" wins due to the change in factual finding
- Obviously this is really frustrating to Mort's Docks who sued for the exact same thing and lost. They couldn't bring another case because of the principle of *res judicata*

Smith v Leech Brain & Co., Ltd. (1962)

→ Rule becomes that you have to reasonably foresee the type and not the extent of the injury.

Situation: A widow sues her husband's former employer after he had been splashed by molten metal, causing a blister on his lip, which developed into cancer and killed him. He had been splashed when he craned his neck around the "protective shield" the employer provided. He craned his neck either to see what he was doing or to look at the man who was giving him instructions.

- It is established that the employer did owe a duty of care to the employee, and that this duty was breached
- The employer agrees that they are responsible and so agree to pay for the damaged lip as far as it may have been a source of pain and kept him from work but argue that it was not reasonably foreseeable that his being splashed with this liquid would cause death by cancer. They also argue that he was predisposed to cancer due to a former position he held in an oil refinery.
- Lord Parker writes the decision: by applying the thin-skull rule that you take your victim as you find him, Smith's widow won in this case and recovered for his death. Any reasonable employer must have foreseen the risks involved with a man being so close to the tank of molten metal where items were being dipped. It is natural that sooner or later the man would look around. The burn was the promoting agency which made the cancer develop.
- This case was before the *Wagon Mound*. The *Wagon Mound* did not over-rule the thin-skull rule.

Cotic v Gray (1981)

Situation: A man got into a motor accident (caused by defendant's negligence) – he was already suffering from depression and neurotic behaviour. After the accident he became psychotic and 16 months later committed suicide.

- Applying the rule from *Smith v Leech Brain*, the suicide does not have to be reasonably foreseeable, all that needs to be foreseeable is that this person would suffer this type of injury (psychological trauma), application of the thin-skull rule

Mustapha v Culligan of Canada Ltd. (2008)

→ Concept of proportionality

Situation: A man found a dead fly floating in his water and had a complete meltdown

- Court had to ask whether it was reasonably foreseeable that he would have this type of reaction
- The facts would have to prove that he suffered from a psychological disorder and that it is causally connected to this reaction
- In this case, the injury was not foreseeable, given that a reasonable person would not suffer this (or any) injury. Raise the idea of proportionality: if you leave a little fly in water, you should not be liable for such serious injuries.

Stevenson v Waite Tileman Limited (1973)

Situation: A man working as a steeplejack was injured when a steel rope comes apart and cuts his hand. An infection eventually gets into the cut and he becomes chronically infirm, barely able to look after himself.

- The employer acknowledges responsibility for the cut but denies liability for the infection and subsequent traumas (they were negligent in allowing the wire ropes to get into such a dangerous condition)
- Court is asked to decide whether those injuries are of the type/character that the employer may have reasonably foreseen
- Potential issue: once we include psychological with physical injuries, we're moving into *Polemis* territory, where if you cause any injury you'll be responsible for all consequences that follow
- The jury found the initial cut on his hand was an injury of a kind that was reasonably foreseeable by the respondents, but that the appellant's ultimate disability, although caused by the initial injury was not damage that the respondents could reasonably have foreseen.
- The thin skull rule was on a whole a justifiable exception to the foreseeability of risk principle but was an exception which should be confined to cases of bodily injury
- We should accept as part of our law the principle of liability for harmful consequences arising from a new risk created by a foreseeable kind of injury

Hughes v Lord Advocate (1963)

Situation: Post Office employees working on telephone cables on a road with no homes on it, they had to enter a manhole and in accordance with procedures, erected a canvas shelter tent and placed four red warning lamps before leaving for ~15 minutes. In that time, two children (aged 8 and 10, one of whom was McHale – the kid that threw the dart at Susan's eye) decided to enter the shelter, they placed a ladder in position to explore the manhole. Once they exited the manhole, the lamp was either knocked or dropped into the manhole and a violent explosion occurred which caused the appellant (the 8 year old) to fall into the manhole where he sustained severe burning injuries.

- At trial, defendants found not to owe damages because the injuries were of a kind which were not reasonably foreseeable
- Establishes that what has to be reasonably foreseeable are not the particular circumstances in which the accident occurred, rather simply that injury might occur – you do not need to be able to see the precise chain of events, just that it was possible that someone would be injured as a result of the defendant's negligence
  - This seems to conflict with *Wagon Mound No. 1*; applying these rules, it could be foreseen that someone (Mort's Dock) may be affected by an oil spill, and that the fire was immaterial. But, this kind of brings us back to *Polemis* which is too extreme
- Lord Reid writes the appellate court decision: the cause of the accident was a known source of danger (the lamp) but it behaved in an unpredictable way, but this affords no defence.

- Lord Guest writes a concurring decision: the explosion was an immaterial event in the chain of causation, it was simply one way in which burning might be caused by the potentially dangerous paraffin lamp.

Cases Discussed in Class (Oct. 7, 2014)

Bradford v Kanellos (1974)

Situation: Husband and wife were customers in the respondent's restaurant when a flash fire occurred on the grill. Shortly after this, the fire extinguisher was activated and the fire was put out. But, the extinguisher made a popping noise which an unidentified patron heard and then shouted that gas was escaping and that there would be an explosion. This caused panic in the restaurant, and while people were running away, the appellant wife was pushed or fell from her seat at the counter and sustained injury.

- Does the defendant (restaurant) owe a duty of care to the patron (plaintiff)? Yes. Can put together an argument using *Cooper v Hobart*
- Was the defendant negligent? Did they fail to live up to the standard of care (where the standard is that of a reasonable restaurant)? Yes. They were negligent in terms of allowing grease to build up on the grill.
- Were the damages too remote? To assign damages, need reasonable foreseeability and a degree of proportionality. The type of foreseeable injury would be burning, but she was trampled.
- Were there intervening actors (*novus actus interveniens*)? If the intervening act is reasonably foreseeable, you will be liable for those acts
  - Both sides of the Supreme Court of Canada agreed on this point, but disagreed when it came to application
- Trial judge found the defendants guilty of negligence and awarded damages of $3582.43 to the husband and $6400 to the wife saying the grill was not cleaned in the way it should have been and the panic could have been foreseen
- Court of Appeal allowed the appeal, saying that they couldn't reasonably anticipate the subsequent intervening acts which were the direct cause of the injury
- Supreme Court of Canada Decision: no liability because the intervening act of the "idiots" was not reasonably foreseeable. The restaurant had proper safety mechanisms in place.
- The plaintiff is deserving of compensation because they have done nothing to contribute to their injuries, but the defendant is not deserving of paying the compensation because they took safety precautions and cannot be held liable for some idiot over-reacting (issue of relative inequities: negligent defendant + blameless plaintiff, and somebody is going to either pay or not get paid, somebody is getting a raw result)
- Dissent is written by Spence who says that the whole affair was almost instantaneous and even if the actions of the person who called out that there would be an explosion were negligent (which he doesn't think they were), says the plaintiffs still have a right of action against the defendants

Home Office v Dorset Yacht Co. (1970)

→ Probability instead of reasonable foreseeability is the test applied here.

<u>Situation</u>: Three borstal officers take a group of borstal boys on an outdoor trip, and when they go to bed, some (7) of the boys escape, take a yacht, crash that yacht into another yacht, and boarded the yacht causing damage.

- The owners of the second yacht sue the Home Office (government department) for damages, arguing that they were owed a duty of care (the fact that it is the government being sued may change things)
- First, need to establish whether the government owed a duty of care to the plaintiff (via the *Anns* Test) – could make a valid argument for both yes and no. The court goes back and forth between treating this as a duty of care analysis and an intervening actor analysis.
  - Issue with the intervening actor argument is that the intervening act by the third party is in the control of the defendant
- <u>Decision</u> is written by Reid who takes the case to be an issue of remoteness and an intervening act, says that it was probable that if the borstal officers were negligent, the boys would go off and do something bad and says that it is not necessary to foresee the intervening act, rather that it has to be probable (probability seems to be a tighter control of reasonable foreseeability)
  - It has never been the law that intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness
  - "I can see no good ground in public policy for giving this immunity to a government department" ← in response to arguments that there are valid public policy concerns for not finding the Home Office liable
- Diplock undertakes an analysis of the relationship between the parties to see if the plaintiff is distinguishable because there is nothing concrete tying the plaintiff to the defendant – decides that there was a duty owed by the defendant to the plaintiff and that this duty was breached by allowing them to run free and cause damage
- Dilhorne writes the dissent. Says that if the government is made liable, it will result in a change in the law and that such a change is up to the Legislature, not the judiciary.

Lamb v London Borough of Camden (1981)

<u>Situation</u>: London Council is doing work on the sewer and they break a water main, which damages the foundation of Mrs. Lamb's home. The house is boarded up and taken care of by her family members and solicitors while she is in America. Squatters invade the home and cause damage

- Mrs. Lamb brings an action against the municipality
- Municipality willing to compensate her for the water damage but not for the damage caused by the squatters because they were an independent third party and are not a reasonable consequence of breaking the water pipe (also a contributory negligence problem because she left the country and didn't do a good job boarding up the house)

- Mrs. Lamb submits that the squatters' damage was reasonably foreseeable because if certain properties were left empty they would be invaded
  - Court of Appeal said this was too remote (*Home Office v Dorset Yacht Co* was decided interest he House of Lords which is a higher court than the Court of Appeal so interesting to note that the judge here is calling into question the judgment of a higher court)
- Lord Denning says that Reid's test of probability (in *Dorset Yacht*) is wrong, says that everything is policy and the rules don't really do anything, that this case doesn't matter because it would be covered by insurance anyways and that it was Mrs. Lamb's job through her agents to keep squatters out
- Lord Oliver says that it is the degree of likelihood that matters, and that the requisite degree is "almost inevitability" when it comes to intervening actors (this is a difficult test to prove)
- Lord Watkins says the *Wagon Mound* test should always be applied without all of the gloss that is being applied to it (common sense approach), talks about an instinctive feeling – basically saying he has a gut feeling and then uses rules to justify his view

Cases in Text Not Discussed in Class

Palsgraf Revisited

- Situation: Defendant, delivering a parcel, drives his truck up a private driveway – on the way up he notices at the side of the driveway a large paper box, open and visibly empty. Two minutes later, coming down the driveway, he negligently runs over the box. In the meantime, a 2-year-old child, whose presence could not reasonably be anticipated has concealed himself in the box.
  - Driver would be liable
  - The child is essentially a part of the box
  - The connection is one of close proximity in time and space, and direct and immediate application of force

Doughty v Turner Manufacturing Co. Ltd. (1964)

- Situation: Defendants had in their factory two cauldrons in which metal parts were heated by immersing them in hot molten liquid. They placed an asbestos cement cover that had been bought from reliable manufacturers on top of each cauldron. No one knew that any serious consequences would result if the covers were immersed in the liquid. One of the defendant's employees inadvertently knocked one of the covers into the cauldron. The plaintiff (an employee) had been sent to the heating room to deliver a message and, as he stood next to the cauldron, the molten liquid in it suddenly erupted causing him personal injuries
- Court of Appeal unanimously reversed the trial judge's decision and found the defendants not liable
  - Use of such a cover (we now know) presents 2 risks of injury: (1) splashing (2) eruption

- The eruption was not a risk of which defendants at the time of the accident knew, or ought to have known
    - This was not an act or omission which they could reasonably foresee would cause damage
    - The defendants' duty owed to the plaintiff in relation to the only foreseeable risk, that is of splashing, was to take reasonable care to avoid knocking the cover into the liquid or allowing it to slip in in such a way as to cause a splash which would injure the plaintiff

Jolley v Sutton London Borough Council (2000)

- Teenage plaintiff and a friend jacked a rotten/abandoned boat up and were in the process of repairing it when it fell and caused serious injuries
- Court of Appeal found that although it was reasonably foreseeable that children would play on the boat and be injured, it was not foreseeable that they would prop up the boat and be injured by its falling off the prop – decision for the defendant
- House of Lords reversed this decision:
    - Plaintiff must show that the injury which he suffered fell within the scope of the council's duty and that in cases of physical injury, the scope of the duty is determined by whether or not the injury fell within a description which could be said to have been reasonably foreseen
    - Foreseeability is not as to the particulars but the genus
    - The defendants admit that they should have removed the boat – they make this concession solely on the ground that there was a risk that children would suffer minor injuries if the rotten planking gave way beneath them – wider risk would also fall within the scope of the council's duty unless it was different in kind from that which should have been foreseen
    - A finding or admission of want of care on the part of the defendant establishes that it would have cost the defendant no more trouble to avoid the injury which happened than he should in any case have taken
- Judgment: The judge's broad description of the risk as being that children would "meddle with the boat at the risk of some physical injury" was the correct one to adopt, the actual injury fell within that description and I would therefore allow the appeal

Causation

textbook 217-275
lectures October 9th, October 14th & October 20th

Concept

Causation relates to the materialization of risk into injury. A defendant cannot be held liable for negligence unless the defendant's act resulted in an injury to the plaintiff.
Distinguish between *proximate cause,* which looks at whether the injury is within the reason we regard the act as wrong (related to duty and remoteness, heavily policy dependent), and *cause in fact*, which simply whether the defendant's act cause the plaintiff's injury. An inquiry into cause in fact requires a factual and historical inquiry into what occurred based on the evidence produced. Temporal order is not enough to prove causation.
Difficulties with causation

1. The standard "but for" test is not applicable to many cases, especially those with multiple causation. These cases refer to a "material contribution" on the part of the defendant.
2. The burden of proof to establish cause in fact, based on evidence, is always on the plaintiff, however courts may find liability even where the plaintiff has not established causation – signals a shift in the law.

It is enough to show causation on a balance of probabilities, plaintiffs do not have to exclude the operation of other possible causes (Malone "Ruminations on Cause-in-Fact" page 253)
NOTES: The idea that "Cause in Fact" can be limited to just factual analysis is inaccurate. Courts are not interested in causation for causation's sake – they want to determine liability. They have to ask the right questions. While they seem to be asking "was the defendant the cause of the plaintiff's injuries", what they are really asking is:
<u>Was there a sufficient connection between D's act and P's injury to shift the loss for P to D?</u>
The key idea is that causation can only be understood within a specific evaluative framework. An attempt is made to determine what would have happened "but for" the actions of the defendant. This evaluative framework brings fault into the discussion. At the end of the day it is a POLICY question – are we willing to shift the losses from the plaintiff to the defendant, and this comes down to a qualitative assessment of what the defendant did and what the plaintiff did.
Causation is interrelated to the other concepts of negligence, duty and remoteness - you should not approach causation outside of the consideration of these factors. Courts are more willing to find causation where negligence is established, or where they know there was a duty between parties. These factors sway the determination of causation. It always comes back to whether there is enough of a connection to shift the losses.
In most cases causation is not an issue, but where it is an issue it can be very difficult to link a plaintiff's loss to a defendant.
SINGLE TORTFEASOR – one defendant causes the injury to the plaintiff, apply the standard "but for" test.

MULTIPLE TORTFEASORS – "but for" test doesn't apply. There are 3 ways to deal with multiple defendants:

1. Alternative liability – two parties are negligent, but only one could have caused – both parties may be held liable Cook v Lewis.
2. Joint liability – if one party is negligent, members of a group on a joint venture may be held liable – this scenario is open to defense of *volenti* – agreement to assume risks.
3. Indivisible liability – two defendants cause indivisible injury, both may be liable for the resulting injury Lambton v Mellish

In cases involving multiple causes, where it is impossible for the plaintiff to prove factual causation using the "but for" test "due to factors outside the plaintiff's control" and where "it is clear that the defendant[s] breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury" of the type which the plaintiff suffered, an exception to the "but for" test will be made and the material contribution test will be applied Resurface Corp v. Hanke.
Wright "Causation in Tort Law" – Wright argues for a NESS test (necessary element of a sufficient set). A condition is a cause if and only if it was a necessary element of a set of conditions that allowed for the consequence to occur. The action of one defendant alone might not be sufficient to cause the damage, but each defendant's contribution was a necessary component of the set of conditions that caused the damage. The fact that there is some duplication does not change the fact that each defendant contributed to the sufficient set. Example: If two of three fires was sufficient to cause the damage, but none on their own was sufficient, then they all are the cause since each was necessary for the sufficiency set. The effect of the size of the contribution on the division of liability is a matter for POLICY.
Peaslee, "Multiple Causation and Damage" – the fact that damage has been done is an essential component of a negligence action. Distinguishes the case of two culpable causes and one culpable with an innocent cause. Where two defendants are negligent, we hold both responsible for all the damages. Where one cause is negligent and another innocent, we look at whether the damage was increased by the negligence - damage that would have happened anyway is not caused by the defendant, and he/she will not be liable. As long as the innocent cause is in operation before the wrongful act, how can we say that the wrongful ac can be the cause?
LOSS OF CHANCE – Courts have not allowed a separate cause of action for loss of chance. Greg v Scott.

Tests

BUT FOR TEST - single cause

The threshold test for factual causation is the "but for" test. Test asks the hypothetical question:

<u>But for the defendant's breach, would the plaintiff's damage have occurred?</u>

- NO → the damage would not have occurred without the defendant's breach, and factual causation is established.
- YES → it would have occurred regardless, but depending on the facts of the case we can apply other tests

RELAXED ONUS OF PROOF (*Snell v. Farrell*)

Where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it. The legal burden remains with the plaintiff, but in the absence of evidence to the contrary introduced by the defendant, an inference of causation may be drawn.

- The facts relating to causation lie particularly within the knowledge of D
- Very little affirmative evidence is required from P to draw inference of causation
- D must provide evidence to the contrary or minimal evidence from P will prove causation
    - *Tactical Burden of proof on D (it's not actually a shift in onus per the court)*
- POLICY – court said this is NOT a shift in onus – it could open doors to many malpractice suits

ALTERNATIVE LIABILITY (Cook v Lewis) - single cause, multiple negligent parties.

- Two defendants who both breached their respective duties
- Only one cause
- P's inability to prove causation is attributable to the D's breaches
- Onus shifts to D's to disprove causation

MATERIAL CONTRIBUTION (Athey, Resurface, Clements) - multiple causes

Where it is impossible for the plaintiff to prove causation on the "but for" test, "due to factors outside the plaintiff's control" and where "it is clear that the defendant[s] breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury" of the type which the plaintiff suffered, an exception to the "but for" test will be made and the material contribution test will be applied. Impossibility of proof will typically arise where there are a number of tortfeasors, all are a fault, and one or more has caused the plaintiff's injury.
A plaintiff may succeed by showing that the defendant's conduct materially contributed to the risk of the plaintiffs' injury by establishing:

a. The injuries would not have occurred but for the negligence of two or more parties
   OR

b. The plaintiff, through no fault of her own is unable to establish the “but for” test because each defendant can point to the other

A contributing factor is significant where it falls outside of the de minimis range (Athey)
MARKET SHARE LIABILITY (Sindell) – multiple negligent manufactures and multiple plaintiffs

- A number of defendants manufacture the same generic product:
- P is unable, through no fault of their own, to pinpoint which of the D’s was the source of the damage
- P sues a substantial share of the market (around 85%);
- The onus shifts to the D’s to exculpate themselves. (e.g. did not ship drug to that region during that time).
- Damages will be apportioned among those unable to do so in accordance with their share of the market.

Note that this test has never been applied in Canada. However legislation that followed this scheme has been upheld (Imperial Tobacco)

Cases

Barnett v. Chelsea & Kensington Hospital Management Committee – 1968 (UK)

Page 218

- Facts:
  - Plaintiff is the wife of the deceased suing for support
  - Her husband was a night watchman for the defendant hospital
  - Husband drank tea and began vomiting
  - 8:10 AM - Went to the hospital but the doctor was also sick and didn't want to come in
  - Sent them home and told them to call their own doctors
  - Went home, fell asleep and died by 1:30 pm
- Issue: Did the defendant cause the death of the victim?
- Held: The defendants breached a duty owed to the victim, but the plaintiff failed to establish (balance of probabilities) that the defendants negligence caused the death
- Reasons:
  - Timetable is key.
  - Defendant argues that even if the doctor had come in and he had been admitted, there would have likely not been enough time to administer the antidote
  - No chance he would have survived even if the doctor had gotten up to treat him
  - The factual cause of the injury is the arsenic
- NOTES:
  - Judge accept the defendant's argument that they would likely not have had time to administer the antidote and Barnett didn't have a good chance as meaning he would have died anyway, and therefore, the defendant's negligence was not the cause.
  - Even if the doctor was not negligent, he would have died anyway. There was no "but for" on the balance of probabilities.
  - The obvious defendant was whoever put the arsenic in the tea. The arsenic was the cause of the death. But this person is not available. What was the cause? The arsenic. But this person is unknown.
  - Was the doctor's clear negligence the cause of his death? No it was the arsenic. But if you ask whether he was a sufficient cause, this is more useful.
  - Plaintiff is deserving and the defendant is negligent – unless it is categorically clear that there is zero chance he could have helped, then we should be saying he was a sufficient cause.

Lambton v Mellish 1894

Page 220

- Facts:
  - Plaintiff rents a house in between the two defendants
  - The defendants are rival entertainers and play organs all day at high volumes between 10 AM -7PM causing a noise which is "maddening"
  - Mellish has a small hand organ
  - The other defendant Cox has a large organ
  - Plaintiff seeks an injunction for both
- Issue: If multiple causes combine to create a nuisance, can all parties be held liable, even if on their own, each one may have not caused the nuisance?
- Held: injunction granted.
- Reasons:
  - Mellish argues he should only be responsible for the noise he mad
  - Noise made by the plaintiffs would have been enough for each on his own to be guilty of nuisance
  - Difference in volume between one and the other does not make a difference
  - BUT even if they did not amount to nuisance on their own, they created the situation together and are each separately liable for its results.
  - If 100 people causing a block – it is no defence for any one person to claim they didn't create a block.
- Ratio: Even where one defendant's contribution is smaller, he is never the less contributing which makes him liable for the whole harm.

Corey v Havener 1902 (US)

Page 221

- Plaintiff riding in a carriage when the defendants came up on either side on motorcycles and startled his horse.
- Held: in favour of the plaintiff – both defendants were wrongdoers, if each contributed to the injury they are both bound.
- Entitled to judgement in the full amount against both [no double recovery though - no more that the full amount total]

Kingston v Chicago 1927 (US)

Page 221

- Sparks from the defendants train started a fire which combined with another fire (origin unknown)
- Held: any one of the two or more torsfeasor are each individually liable for the whole amount

- BUT liability exempt where the other cause is a natural cause.
- Burden is on the defendant to show that the fire set by him is not a proximate cause.
- We can't permit each of two wrongdoers to blame the other, since that would allow them to escape.

INTERVENING INCIDENTS

Sunrise Co v Lake Winnipeg (1991) SCC

- Facts:
  - Kalliopi L met the Lake Winnipeg and swerved, did not hit, but caused the Kalliopi to run aground.
  - On its way to port, the Kalliopi again ran aground.
  - Each would have required the ship to be dry docked and repaired
  - Required 27 days in dry dock total. The first incident alone required 27 days and the second incident would have required 14 days if the ship was not already in dry dock.
- Issue: Who is responsible for the loss of profit for the 27 days?
- Held: defendant is liable
- Reasons:
  - L'HEUREUX-DUBE: Defendant is responsible for the full 27 days
    - The nature of the second incident is irrelevant
    - The first incident prevented the continued operation of the ship for a length of time greater than any the length of time of any of the other repairs, therefore the docking expenses should be covered in full by the defendant
    - No causal link between the second incident and loss of profit during repairs.
- DISSENT : McLACHLIN (in part)
  - Principles of tort require the plaintiff is only restored to the position they would have been if there was no tortious incident.
  - If they would have still run aground on their own, then the defendant should not be responsible for the portion of the damage that would have happened anyway.
  - Would have awarded 20 days (the 13 required exclusively by the first incident and half of the 14 days shared by both)
  - Canada Shipping Act: losses should be proportioned by the degree which each vessel was in fault.
  - Ontario negligence act also enforces the principle of apportionment.
- NOTES:

- McLachlin is thinking ahead
- On the majority reasoning, if the first accident was not negligent and the second negligent, the plaintiff should not recover anything – each defendant could just point to the other cause.
- McLachlin is better placed to give damages to the plaintiff in flexible circumstances

Baker v Willoughby 1970 (House of Lords) * used as an example by L'Heureux-Dube to say that shipping cases are different than personal injury case. Page 227

- Plaintiff received an injury to his leg because of the defendants negligent driving.
- Before trial he was shot and lost his leg
- Defendant argued that he was not responsible for the losses because the leg would have been lost anyway
- The court rejected this – Both were concurrent causes and the defendant had to compensate the victim.

Jobling v. Associated Dairy 1982 (House of Lords) * used as an example by L'Heureux-Dube to say that shipping cases are different than personal injury case. Page 228

- Plaintiff suffered a back injury caused by the defendant, which prevented him from doing more than light work.
- Before the trial it was found out that he was suffering from a disease which prevented him from working at all.
- The court rejected Baker v Willoughby, reasoning that the disease would have overtaken him anyway.
- Necessary to deduct the award from the second injury and award the balance against the first tortfeasor.
- Distinction made between tortious and non-tortious intervening factors

Saunders System Birmingham v Adams 1928 (US)
Page 229

- Defendant rented a car to Mrs. Green which had defective breaks and the plaintiff was injured by Mrs. Green in an accident.
- Defendant argued that Mrs. Green was distracted and braked so late that even if the breaks had worked she would have still injured the plaintiff.
- Suggests that two tortfeasors can point to the other from to prevent themselves from being a cause.
- This is in conflict with BAKER (not both liable) and JOBLING (doesn't adjust based on an intervening act).

Wright v Cambridge Medical Group 2012 (UK)

Page 229

- A doctor negligently failed to refer a patient to the hospital
- He argued that even if he had referred the plaintiff, negligent systemic failings at the hospital would have meant he wouldn't have treated the plaintiff in time to prevent the injury anyway
- Cannot escape liability for breaching his duty, just because he would have subsequently breached again.
- A PARTY CANNOT RELY ON HIS OWN WRONG.
- The doctor prevented the patient from the opportunity to be treated appropriately. If the treatment was negligent there would still be a claim.
- This case as received a lot of criticism

Athey v Leonati (1996) SCC

Page 231

- Facts:
    - Plaintiff was in two separate, unrelated car accidents
    - He was stretching and had a disk herniation
    - Predisposed to disk herniation (particularly vulnerable)
    - Sues a negligent driver from one of the accidents
    - Defendant argues with 6 analogies to other cases. Concede some liability but I should not be responsible for the whole thing, just my portion. Might have occurred even if I hadn't been negligent (judge concedes this is true)
    - Trial judge makes a finding that the defendant was 25% responsible. The defendant takes this and says I should only pay 25%
- Issue: if the defendant is not the dominant cause, can the loss be apportioned?
- Held: Appeal upheld.
- Ratio: For a defendant to be liable the defendant's actions need not be the only or the dominant cause of the injury.
- Reasons:
    - The important fact here is that the defendant was negligent. Looking for fault
    - MAJOR says that once it is found that your negligence is a cause of the injury – you are responsible for the whole injury (gets us into policy reasons about why)
    - The trial judge found the 25% is above the *de minimis* (not trivial) and this is a material contribution.
    - If the defendants negligence is found to be a cause, non-tortious causes do not undo the full liability on the defendant

  - Application of the thin skull rule: the pre-existing injuries may have aggravated the injuries but the defendant has to take the plaintiff as he finds him – if the negligence exacerbates the predisposition, the negligence is the cause of the injury.
  - DISTINGUISH from Cook v. Lewis (only one could have done it) here they both contributed.
  - BUT FOR test doesn't work here – can't say yes or no.
  - Not necessary for the plaintiff to establish that the defendant is the sole cause – a contributing cause is enough to establish liability for the full amount
- Defendant's Analogies:
  1) Multiple Tortious Causes [Apportionment]: Defendants want apportionment to apply to tortious and non-tortious causes. With multiple tortious causes, the law is that the plaintiff can get 100% from either, then the defendant can seek contribution from the other defendant. But the second defendant is often missing - POLICY who is going to carry the difference? The law says the defendant. Better that the plaintiff gets 100% - relative inequities. (Bradford and Kanelis) Major finds that the other causes here are not tortious – and so apportionment doesn't apply – it would not adequately compensate the plaintiff.
  2) Divisible injuries – defendant argues that apportionment is allowed where injuries are divisible. MAJOR – there is only 1 indivisible injury.
  3) Contingencies – want the court to adjust of probable contingencies like in damages. BUT contingencies are about future possibilities, we are looking a past events and once paste events are proven they are treated as certainties. Plaintiff met their burden of proving causation.
  4) Independent intervening events -someone gets a fatal injury but they were going to die anyway. Either before or after the accident. Take Andrews – if he then got a disease that he was going to die in 6 months – court won't give you 30 years in damages. Court will only but you back in the position he was in before [Jobling v Associated Dairies]. MAJOR this was not an independent event – the herniation was caused in some way by the accidents, it wasn't going to happen anyway.
  5) Thin skull/crumbling skull: take your plaintiff as you find them – as long as you foresee the type of injury, you are responsible for the extent. But this doesn't help you escape liability, so defendant argues a "Crumbling skull" have a condition that might happen or not. MAJOR says it might be a good argument, but the finding was that without the accident the herniation would not have happened without the accident, so not applicable.

6) Loss of chance – Could have been used in Barnett. Portion the damages based on the chance that he might've survived – MAJOR rejects this (page 277). Canadian courts do not recognize the loss of chance, but US courts do.

THIS ESTABLISHED THE IDEA OF MATERIAL CONTRIBUTION

Blackstock v Foster 1958 (New South Wales)

Page 236

- Facts:
  - Respondent in the appeal won damages against the appellant. Appellant is asking for a new trial.
  - Plaintiff (respondent) was sitting in a stationary car and the defendant (appellant) drove into the back of it
  - The plaintiff was thrown forward into the steering wheel, hurting his chest
  - Since the accident it has been discovered that the plaintiff has an inoperable malignant tumour under his ribs.
  - Medical evidence at trial suggested that a heavy blow to the chest could possibly cause a pre-existing benign growth to become malignant.
- Issue: is it open to the jury to find that there was a causal connection between the blow to the chest and the tumor
- Held: appeal upheld
- Reasons:
  - Evidence insufficient to establish on a balance of probabilities that the blow caused the tumor to become benign
  - Burden is on the plaintiff to establish that it was more probable than not that the blow caused the malignant tumor.
  - Little is known of medical conditions – difficult to establish causation.

Cook v Lewis 1951 (SCC)

Page 237

- Facts:
  - Group of hunters.
  - Two walking together and a third shouted a warning, the two shot at birds and accidentally hit the fourth in the face with shot from a shotgun, which caused the loss of an eye.
  - Only one person could have hit him, but it cannot be determined which
  - both defendants were negligent in shooting
- Issue: Jury unable to determine which shot him – can they both be liable?
- Held: both defendants should have been held liable

- Reasons:
  - CARTWRIGHT: Starkie on Evidence: when it is certain that one of two committed the crime, but indeterminable which, then neither can be liable
    - Applies to civil cases except in special circumstances
  - Special circumstances are: the tortfeasors were employed in a joint venture.
  - Each is liable for the resulting injury
  - RAND: the consequences of the two shot cannot be separated. The onus then shifts to the defendants try to prove that they were not the one who caused the injury.
- DISSENT (LOCKE): not in a joint venture. The action was properly dismissed.
- Ratio: Where two parties are negligent, but only one can be the cause, they are both presumed liable and the onus shifts to the defendants to rebut this presumption. (Alternative Liability)
- NOTES:
  - as against each one, the "but for" test is not met
  - Material contribution won't help because it was one OR the other, not both.
  - Sets out Alternative Liability
  - big case – opens up the discussion of relative inequities - we know that one didn't do it but they will both be held liable
  - Prefers Cartwright's approach - joint enterprise. But can't find authority that hunting together and splitting meat are a joint venture. You would just have to prove they were acting together and they are all liable and owe duties to each other. Then you aren't making one innocent guilty – this is open to defense of volenti – agreement to assume risks
  - If you followed McLachlin in Clements today, there would be no liability – against each one the "but for" test would not be met.

Joesph Brant Hospital v Koziol 1978 (SCC)

Page 241

- Patient died from aspirating gastric juices; nurse negligently did not keep notes and a cause of death was unknown.
- At trial the nurse was held liable on RAND J's reasoning in Cook v Lewis, but rejected on appeal.
- Has to be negligence causing death and if we don't know the cause of death, you can't hold someone liable.

Sindell v Abbott Labs 1980 (US)

Page 242

- Facts:
    - Plaintiff's mother given DES during pregnancy
    - Plaintiff got cancer as a result of this drug.
    - Sued biggest 5 companies of the 200 manufacturers
    - Defendants claim between the defendants there is not even a reasonable possibility that they made the drug the defendants mother prescribed
    - This is a signature injury and we know that the drug caused the cancer, just not which company negligently manufactured the drug taken by each plaintiff's mother.
- Issue: can all the manufacturers of a drug be held responsible, if it is unknown which manufactures drug caused the injury?
- Held: plaintiff can recover
- Reasons:
    - This is a case of indivisible liability
    - The burden is on the plaintiff to prove the identity of the manufacturer OBP
    - MOSK recognises the relative inequities created here – between an innocent victim and the negligent manufacturers who should bear the cost of an injury. From a POLICY standpoint: manufacturers
    - In an industrial society it is hard to know which manufacturer – we need an applicable test
    - Reasonable to measure the likelihood of the defendants providing the drug based on market share.
        - Shift burden to plaintiff to prove OBP that they didn't
        - Easy way to apportion liability
        - Liability would be proximate to the damage their production of DES created.
- DISSENT (RICHARDSON); rejects 100 years of tort law. Possibility of causation is not enough. "Deep pocket theory of liability creates a two tiered system: a defendant's wealth cannot be an indicator of liability. This should be up to the legislature. Deep pocket liability has appeal BUT it is an unreliable indicator of fault.
- NOTES: What would the SCC - Cook v Lewis: look at probability that D1 caused P1's injuries – chances of picking the right company is less than 1% even given market share only 3-4%. Cook and Lewis would not justify shifting the onus - if you allow P1 to win on these facts then on the same basis all the plaintiffs could recover and Sindell absolutely did not cause all of the injuries, just the 3-4%.

- Instead, they split the total damages between ALL the defendants, paying based on their market. Rationale: MOSK – Defendants would pay the proportional amount to each company – not paying nothing and not one defendant paying all, which would both be unjust. Allows us around the All or none of Cook v Lewis.
- NOTES: thinks Mosk's most persuasive reason is relative inequities - as between innocent and negligent defendant – the latter should bear the cost. Defendants are better able to carry this loss.
- NOTES: criticizes the dissent distinction – not going after them because they are wealthy. They were making profit out of their negligence – they were a commercial enterprise that was negligent. Not just picking them for wealth : 1) they were negligent 2) that negligence directly increased their wealth. Pockets got deep through their negligence.
- It has been suggested that you could run Sindell for pollution. BUT there you can't link between company and illnesses.

Abel v Eli Lilly 1984 (US)

Page 247

- Each of the defendants could have caused the injury could not have caused the injury to each of the plaintiffs, but each was negligent toward a plaintiff.

Hymowitz v Eli Lilly 1989 (US)

Page 247

- Apportion liability to match the culpability of each defendant.
- This provides the relief clients deserve while distributing responsibility
- Burden shifts to the drug company to show that they were not the one who produced the drug taken by the plaintiff

BC v. Imperial Tobacco Canada Ltd. 2005 (SCC)

Page 248

- Statute created on the same scheme as Sindell to allow a direct action recover healthcare costs from a tobacco related wrong
- Recover expenses caused by exposure to tobacco in BC whether or not the manufacturer was in BC, as long as the manufacturer was negligent.
- Recovery is proportional to the market share of the manufacturer in the BC market

McGhee v. National Coal Board

Page 249

- Facts

- Worker in the brick kiln
    - No showers provided by the coal board
    - biked home after work, before showering
    - Developed dermatitis.
    - Duty owed – they are his employer
    - Standard of care – showers
    - Negligence – no showers
    - The cause of the dermatitis is not known for sure
    - Coal board said the sweating from the biking was what caused the dermatitis.
    - But would he have been ahead of the game if he showered - yes. He would have been less likely to get it if he had a shower
- Issue: did the failure to provide showers caused the dermatitis?
- Held: appeal allowed
- Ratio: It is enough to prove that the defendant increases the risk
- Reasons: RIED:
    - Plaintiff has the burden – show on a balance of probabilities that the negligence was a contribution (out of the de minimis – can be less than 50%)
    - It has always been the law that a plaintiff succeeds if they can show the defendant caused or materially contributed to their injury. But for also means the negligence materially contributed to the injury.
    - No substantial difference between materially increasing the risk and materially contributing to the injury.
    - NOTES: Key word here is MATERIAL – substantial, not trivial. .
    - There are only two potential causes - biking and no showers. AND the plaintiff did nothing wrong, while the coal board was negligent. [relative inequities] Very important that they increased the risk.
    - LORD SIMON and LORD SALMON agree –as a rule when an employer has been negligent and this has materially increased the risk, , even if the injury is likely to begin with, they must still be liable for their material contribution.
    - Lord WILBERFORCE goes a step further: Develops a different rule: prepared to switch the burden to the defendant in certain circumstances.
        - If you engage in negligent activities and create a risk of certain conditions occurring, and the plaintiff comes down with the certain condition the negligence created the risk for, the employer should be liable. Employers are liable for injuries squarely within the risks they created.
        - Don’t have to prove causation in the “but for” sense – just have to prove the risk was increased for the illness you can recover unless the defendant can’t prove they are not the cause.

- NOTES: If you apply WILBERFORCE to tobacco cases, this makes a big difference. If you apply a "but for" test you can't prove you wouldn't have gotten cancer otherwise. Plaintiff can't prove this so can't recover unless you apply Wilberforce.
- Traditional "but for" puts plaintiffs at a disadvantage. They would just have to prove that they had exposure, and that they have a smoking related disease – show that the companies were negligent in creating an increased risk and they got the disease. Basic premise – we do not know the cause of the cancer.
- POLICY: This Corporation is making profit out of their negligence. From a policy point of view it isn't that unfair to make them hold the burden. Also the company is in a way better position to research into the causes of those diseases.
- POLICY: Under the "but for" test there is no incentive to further scientific knowledge.

Zuchowicz v United States 1998 (US)

- Doctor negligently prescribed twice the dose of a drug to the plaintiff
- Plaintiff later developed a disease and died
- Must establish that the overdose caused the illness and death, not just exposure to the drug – because the negligence was the overdose
- If a negligent act is deemed wrongful because it increased the chances that a particular type of accident would occur and a mishap of that very nature occurs, this is enough to establish causation.

Wilsher v Essex Area Health Authority 1998 (UK)

- Facts:
    - Plaintiff is a premature infant
    - Plaintiff has retrolental fibroplasia (RLF) which he claims was caused by the defendant's negligence in monitoring pressure of oxygen
    - He got too much oxygen and there was evidence that this can lead to blindness.
    - DUTY – hospital delivering
    - BREACH? – negligent monitoring of the oxygen
    - BUT defendant introduces 4 other causes – not negligent because they are not attributable to a defendant
- Issue: did the negligence cause the injury?
- NOTES:
    - Did the failure to monitor the oxygen increase the risk of blindness? In McGhee the cause both contributed, but here the 5 causes did not interact. If it was one it was not the other. Only 1 was negligent.
    - Do not know what truly caused the illness

- Different from McGhee 1) don't interact 2) 5 causes not 2.
- Plaintiff will argue – The negligence would have increased the risk and it is up to the defendant to disprove causation. The defendant can disprove by looking to the other 4 causes.
- 5 Causes so 20% chance that they were the cause – is that a material cause of the risk? Consider: if you allow recovery here, what about future cases? Then recovery in all future cases 80% were likely caused not by the negligence.
- Here the court ignored Wilberforce in McGhee – the plaintiff has to prove the material contribution.

Fairchild v Glen Funeral Service 2002 (UK)

- Plaintiff suffered mesothelioma as a result of the negligence of either or both of two employers but could not determine which.
- Found that Wilsher was incorrect in holding that McGee was merely a robust approach to the test, finding that McGee developed the law by adapting a test to meet the needs of the a case
- The employers should be liable for any injury that fell squarely within the risk that they created, they should suffer the consequence s of impossibility foreseeability inherent in the injury = of segregating the precise consequence.
- Recognises relative inequities

Snell v Farrell 1990 (SCC)

Page 258

- Facts:
  - Snell had a cataract and went to Farrell
  - During surgery Farrell caused a bleed in her eye and should have stopped the surgery
  - Didn't stop the surgery
  - Snell lost her vision.
  - The bleed is one of the possible causes of her blindness
  - DUTY – doctor/patient
  - Was he Negligent? Yes
  - Standard? Operation should not be continued
  - Farrell argued that Snell would have lost her sight anyway
- Issue: Whether causation must be proved in accordance with traditional principles or recent developments justify liability on a lower standard?
- Held: Appeal dismissed (for the plaintiff)

- Ratio: The ultimate burden remains with the plaintiff but in the absence of evidence to the contrary, an inference of causation may be drawn although scientific proof has not been adduced.
- Reasons - SOPINKA:
    - Onus is on the party who asserts a proposition (in this case the plaintiff to proof causation), but where the subject matter of the allegation lies particularity within the knowledge of one party, that party may be required to prove it
    - Trial judge was satisfied that the fact brought this case within the developing are of law, whereby the burden of proof can be shifted (McGhee – WIBERFORCE).
    - The alternative from McGhee – if the defendant was escaping liability I wouldn't hesitate to shift. Here it is fine to use the normal burden, but it depends on the case.
    - In medical malpractice cases the pacts lie within the knowledge of the defendant
    - The appellant was in a better position to observe what happened, and interpret from a medical standpoint.
    - The ultimate burden remains with the plaintiff but in the absence of evidence to the contrary, an inference of causation may be drawn although scientific proof has not been adduced.
    - "Substantial connection" is the test applied by Sopkina. Not essential to have a positive medical opinion – use common sense. This is a simple case.
- NOTES: Begin with the operating assumption that we don't know why she lost her sight. Science is not 100% so it comes to a policy question about shifting the loss from the plaintiff to the defendant. Has to be a substantial connection between the defendant's negligence and the plaintiffs injury.

Resurface Corp v. Hanke

- How to deal with causal uncertainty.
- Basic test for determining causation remains the "but for" test. Plaintiff bears the burden
- Compensation for negligence should only be made where a substantial connection between the injury and defendants conduct is present.
- In special circumstances the law has recognized exceptions to the "but for" test and applied a material contribution test.
    a. Must be impossible for the plaintiff to prove that the defendant's negligence caused the injury using the "but for" test
    b. Clear the defendant breached their duty of care, thereby exposing the plaintiff to unreasonable risk & the plaintiff suffered an injury that falls within the zone of risk created by the defendant's negligence.

- NOTES: We will go for but for common sense, but In circumstances that we don't know impossibility we will apply increase of risk (where the impossibility is no fault of the plaintiff)

Clements v Clements 2012 (SCC)

Page 265

- Facts:
  - Man driving in his motorcycle with his wife on the back.
  - The bike is overloaded and the defendant was driving too fast
  - A nail had punctured the rear tire, and as they were driving the nail fell out and the tire deflated.
  - This resulted in a crash where Mrs. Clements is injured.
  - His Negligence: He was exceeding the speed limit and the bike was overloaded
  - Duty owed to passenger – yes
- Issue: he was negligent BUT did this negligence cause the injury
- Held: new trial because of errors made by the trial judge. But causation not found.
- Reasons:
  - Material contribution does not apply here. The rule excludes cases where injury may be due to factors unconnected to the defendant and not the fault of anyone.
  - Apply robust application of the "but for" test – even if he wasn't speeding and even if he wasn't overloaded, it would have burst at some point. NOTES: BUT how can you be certain? At a minimum he contributed something with his negligence. In the usual case, even with multiple actors the "but for" test still applies and then degrees of fault are calculated.
  - Material contribution only applies when the "but for" test cannot be proven against any of the defendants.
  - Even if the bike hadn't been overloaded and even if not speeding there would still have been an accident because the nail would still have burst the tire.
- RULE: a plaintiff cannot succeed unless she shows as a matter of fact that she would not have recovered except for the negligent acts of the defendant – the judge is to take a robust and pragmatic approach. Exceptionally a plaintiff may succeed by establishing material contribution, where the injury would not have occurred but for two or more tortfeasors or through no fault of the plaintiff the "but for" test cannot be met because each can point to the other.
- DISSENT – no recovery: we should not disturb the trial judge's finding of fact. If you can't go down material contribution route then he found no recovery under but for.
- NOTES:
  - Note that this is a cooperating suit – just trying to access the insurance.

- The court got lost in the "but for" test here.
- McLachlin changes her mind from the Resurface Corp case.
- Expert witness – how could you say there was absolutely no connection between the speeding and the weight and the burst tire – at a minimum it contributes to the severity of the injury? Easier to stop if you had less weight on the bike.
- SCC suggests that Mr. Clements might not liable because the accident might have happened even if he wasn't negligent. BUT it did happen when he was negligent
- *Snell* and *Resurface* are just a robust application of the "but for" – the major requirement for an exception to "but for" is multiple tortfeasors – in this case there was only one, so the test is "but for" –BUT this test doesn't work here. What is the injustice done if he was found liable? Come back to the idea of thinking that we can determine the cause instead of POLICY reasons for why we would want to shift the loss to the defendant in this case.
- MCLACHLIN says we just need a robust and common sense application of the "but for" test – BUT what does that look like? It just isn't going to give you the answer you want – maybe – we don't know. We are only one step away from WATKINS here. Did he increase the risk? Yes! Did he materially contribute to her injury? Yes. At least McLachlin remains consistent with DOBSON because she doesn't recognize insurance.
- Really we have just gone backward, all the way back to the "BUT FOR". The case decisions are just covers – ways they want to present the outcome.

THIS IS THE MOST RECENT CASE ON CAUSATION RIGHT NOW

***Greg v Scott* 2005 (House of Lords)**

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- Facts:
  - Plaintiff has a lump and doctor says it is not malignant, 9 months later he find out it is malignant. Chance of recovery from 42% to 25%.
- Issue: Can there be recovery for loss of chance?
- Court holds No recovery 3:2.
- Reasons:
  - If the plaintiff had died there would be a loss – loss of the chance of survival, went down 17/42 (40%) – could allow 40% damages. BUT here he is still alive so what did he lose?
  - BUT if he had had a 50% chance of survival he would have won.

- NOTES: This is a bizarre decision – his chances of survival have been halved why is 50% a magic number. Did the doctor *cause* the death? Is the loss of chance the cause of death – NO. Deprived of the opportunity to have the proper treatment.
- Ratio: NO recovery for loss of chance.

Laferriere v Lawson 1991 (SCC)

Page 273

- Canadian case on loss of chance
- Doctor removed a cancerous lump but failed to inform the patient it was cancerous – she didn't find out for 4 years. Died 3 years after that.
- No proof that finding out the diagnosis right away would have prevented her death
- Claimed the doctors failure deprived her of her chance to seek proper medical care
- GONTHIER dismissed the claim " I do not feel that it is appropriate to focus on the degree of probability of success and to compensate accordingly"

Kaminsky v Hertz Corp 1979 (US)

Page 274

- Plaintiff injured by ice that flew off a passing truck with the Hertz logo
- Trial found for the defendant because not all the logoed trucks are owned by them
- Appeal reversed – they own enough to establish a prima facie ownership that the defendants can submit evidence to rebut.

Defenses

Background Information

-In Tort law, you still remain in the condition that you were put in by the accident but you get compensated to ease the burden of carrying those injuries.
-Bare this in mind when we talk about defenses: the plaintiff remains injured.

Three defenses for an action in negligence

-In the cases we will see that these defenses are progressively limited and now have a very restricted scope
-Two of them are 100% defenses and one is a proportional defence

1) Contributory Negligence

-Defined as failure of the plaintiff to take reasonable care for her own safety which contributes to the accident or her loss
-Under old common law this was a complete defence (loss could be shifted to plaintiff in full; single cause of accident's were determined).

-It became injustice to put loss on plaintiff in particular cases so the ***last clear chance*** rule was developed. Rule says in cases where defendant had the last clear opportunity to avoid the accident, the defendant was the sole cause of the accident and fully responsible for the plaintiff's losses
-The rule allowed courts to allocate losses to both parties. However courts still had trouble doing this, which is why the Negligence Act was developed to give courts guidance.
-Contributory negligence can arise in three ways:
1) Plaintiff's negligence may be a cause of the accident.
2) Plaintiff's negligence is not a cause of the accident but he has put himself in a position of foreseeable harm from the defendant's negligence
3) Plaintiff may fail to take protective measures in the face of foreseeable danger such as a failure to use an available seat belt in an automobile or aircraft

2) Voluntary Assumption (Volenti Non Fit Injuria)

-Defence of voluntary assumption of risk arises where a plaintiff has indicated that she consented (volenti non fit injuria) to the risk of harm generated by the defendant's negligence
-Early in the 20th century courts interpreted the defence broadly and merely exposing oneself to a known risk and wrongful risk was sufficient to establish this defence
-The defence was limited in order to maintain some deterrent effect on the defendant
-Currently the defense is limited in scope and is difficult to establish
-The test for this defence is that the defendant must prove an express or implies agreement between the parties whereby the plaintiff has consented to accept both the physical and the legal risk of the injury from the defendant's negligence act
-Example: cases involving a passenger of a drunk driver obviously assumes the physical risk when he gets in but defendant has to prove that he also withdrew his right to hold the driver liable in case of injury

3) Illegality (Ex Turpi Causa Non Oritur Actio)

-Defined as: no action may arise from a base cause. A plaintiff who is involved in illegal conduct and other serious wrongdoings when they suffer damage should not be permitted to engage in the legal system to pursue a remedy
-Judges began to broaden the scope of the defence First it could only be used in stitautions of joint criminal enterprise. But judges starting suggesting that "the conduct of the plaintiff giving rise to the claim is so tainted with criminality or culpable immorality that as a matter of public policy the Court will assist him to recover"
-The broadening of the defence was short-lived. (Hall v Herbet showed restriction of defence)

Contributory negligence

-Use to be complete defence as portrayed in Butterfield.

Butterfield v Forrester, 1809

Facts:
The plaintiff was **riding his horse negligently** down the road in daylight when he hit a pole that the defendant had placed across the road **negligently** while making repairs to his house. The plaintiff was thrown from his horse. Witnesses said that if the plaintiff was not riding fast he would have seen the obstruction. Judge charged the jury on whether a person riding with reasonable and ordinary care could have seen and avoided the obstruction and if they were satisfied that the plaintiff was riding along the street extremely hard, and without care, they should find verdict for the defendant.
Issue:
Should the defendant be held liable although the plaintiff contributed to his own injury?
Held:
Defendant NOT liable.
Analysis:
Bayley J:
-Accident happened entirely due to plaintiff's own fault. If he was using ordinary care this would not have occurred
Lord Ellenborough CJ:
-Says that two things must occur to support this action: an obstruction on road by fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff.
Hutch:
-This is stupid. We have two negligent people, split the damages 50/50.
-This is a case like Winter Bottom and Wright. Denial of liability.
-100 years later the courts decided to keep this rule but change the threshold for finding plaintiff negligent to a high one
Notes:
-Case is relevant for historical context. Shows when the defence was a complete defence.
-Make sure in facts you include that they **negligently put the pole there** and that **plaintiff was negligently driving horse**. **Negligent** is important.

Notes Page 278 to 280

Note 1: Davies v Mann

Facts:
The plaintiff ties his donkey's legs together and sets it to graze. The defendant's servant killed the donkey when he carelessly drove a horse and wagon down the road too fast and ran into the donkey. Defendant argued that plaintiff was at fault for leaving his animal on the highway

Issue:
Should the defendant be liable although the plaintiff contributed to his own injury?

Decision:
Defendant liable.

Rule:
Last clear chance rule—when both the plaintiff and the defendant are negligent, the person who had the last clear chance to avoid the accident will bear the loss.

Analysis:

Abinger CB:
-Defendant might by proper care have avoided injuring animal and he did not so is liable for consequences

Park B:
-Plaintiff leaving donkey on the road does not answer question of negligence. Jury was told they need to look at whether the donkey being there was the immediate cause of injury, and if they believed that the injury was caused by the mere fact that defendant was driving to fast (if this was the case, putting donkey on road would not matter)
-Although the donkey was wrongfully put there, the defendant was bound to go along the road at a pace where mischief would be avoided
-Made analogy of donkey being on road to person being on road, person running against a carriage on the wrong side of the road; would you not need to watch out for this stuff?

Note:
This case restricted the contributory negligence defence

Note 2:

Prosser: Discusses arguments both for and against the contributory negligence rule. A reason that the courts applied the rule is because it was considered a "penal basis", and intended to punish the plaintiff for his own misconduct; it was the idea that the court will not aid someone who himself is at fault, he must come into court with clean hands. It is seen a rule which discourages accidents making people take proper care for their own safety. The reason against this argument is that it may encourage accidents through encouraging the negligent defendant. A common idea as to why this defence arose is to keep the liabilities of a rapidly growing industry curbed and within bounds during the 19th century.

Note 3:

Fleming: Idea that the contributory negligence defence subsidised the growth of industrial and business enterprise by lightening the burden of compensation losses for accidents inevitably associated with a rapidly expanding economy and the faster and greater volume of transport.

Note 4:

Bohlen: In the 19th century after industrial revolution, relationships between individuals were becoming more complex and multitude. Social duties of one citizen to another became large. It would be burdensome and unrealistic to expect people to take care of others. Therefore the duty of care for others should be no higher than the duty of self-protection. *"To hold that, where the only wrong alleged is the defendant's failure to take care for the plaintiff's safety, the plaintiff's own failure to protect himself debars him from recovery, is but a logical and legitimate extension of the conception underlying consent and voluntary assumption of risk—that the plaintiff can ask from others no higher respect for his rights than he himself pays to them."*

Negligence Act 1990 (280)

-Enactment of legislation allowing for apportionment of damages in cases of contributory negligence

-**NOTE:** From here on in there is no complete defence of contributory negligence

3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

-**Hutch:** Do not why they say fault or negligence. He says there is no difference.

4. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action such parties shall be deemed to be equally at fault or negligent. …

6. In any action tried with a jury the degree of fault or negligence of the respective parties is a question of fact for the jury.

7. Where the damages are occasioned by the fault or negligence of more than one party the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

Notes Pages 280-281

Note 1: Posner

-Hand Formula applied in contributory negligence states that if the platiniff could have prevented the accident at a lower cost than the discounted accident cost, he cannot recover. Vice versa, if the plaintiff could have prevented the accident at a cost lower then the accident cost, the defendant will not be required to take preventive measures. Plaintiff will be held liable.

-Many states have adopted a comparative negligence standard whereby the plaintiff's damages are reduced by the percentage by which his own negligence contributed to the accident. Posner

says this is also an incorrect way to assess because parties would end up spending a lot more then necessary on accident prevention.

Froom v Butcher, 1975

Facts: Plaintiff was driving. Defendant was trying to overtake by driving on the wrong side of the road. He hit Froom's car head on. Driver was convicted on careless driving. Froom was not wearing a seatbelt. Some injuries would've been avoided if he had been wearing a seatbelt others would have still occurred. **-Defendant was negligent and was the sole cause of the accident. Nothing that plaintiff did brought about the accident. Head on collision solely contributable to the defendant. Problem was, plaintiff did not use safety devices available. Plaintiff did not affect the accident and its occurrence; they affected the damage that was caused.**
Issue: Whether injuries should be reduced because Mr. Froom was not wearing a seatbelt? Should damages be reduced because you contributed to your own injury?
Decision: -Trial judge held they were not. -Appeal allowed. Plaintiff is also liable.
Analysis: **Lord Denning:** -Starts by stating that judges are split on the view of whether a person is guilty of contributory negligence when they do not wear a seat beat and whether damages should be reduced as a result **-Denning says, what would the reasonable person do: wear a seat belt. Therefore the plaintiff is negligent. You are taking an added risk by not wearing a seatbelt. When it comes to the plaintiff, the same reasonable standard would apply.** Pg 284. **- Denning says the question we have to ask is what was the cause of the damage not what the cause of the accident was.** He continues to say in seatbelt cases, the cause of the damage was partly the negligent driving on the defendant but also in part by the failure of the plaintiff to wear a seatbelt. Thus, the plaintiff must bear some share in responsibility for the damage -Denning says some judges think seat belts only need to be worn when there are circumstances that carry a high risk (example: fog, snow, ice). Denning disagrees and says you never know when a risk may arise and you may not have time to fasten your seatbelt then. He also says it becomes easy to forget when you are only required to do it in certain circumstances; if you do it regularly it becomes automatic. Every time a car goes out on the road there is a risk of accident. The prudent man will guard himself against this risk -Some judges say that if a person forgets to wear a seatbelt they will not be held accountable for their own damage. Denning disagrees and says if we impose this view then people can simply always argue they forgot. If you do not wear a seatbelt and something happens you should be responsible; seatbelts are important. -Denning says the only time someone can be excused from wearing a seatbelt is when they are pregnant or fat and they know that it might cause more damage in an accident **-Denning says how do we work out the damages, we can access every case or we work out a presumption. There should be a general rule that if your not wearing a seatbelt your damages should be reduced by 25%. However the 25% can be decreased in other circumstances.** The negligent driver should bear most of the losses however there should be a standard percentage reduced from damages if injuries occurred that would have been avoided or limited if a seatbelt was worn. Example: in cases where injuries would've been prevented altogether by seatbelt damages should be

reduced by 25%, in cases where the injury would've been less severe but still existed damages should be reduced by 15%

NOTE:

-The rationale behind Denning's view is deterrence. To get people to worry more about safety and wear their seatbelts.
-Failure to wear a safety device will reduce your damages by generally 25%.
-Could thin skull apply here? What if the reason for not wearing the seatbelt or safety device (helmet) had a religious basis? Example: A Sikh has to cover his head, cannot wear his helmet. Should that be held against the person when assessing damage or should there be an exception? If you say that if you do not want to wear a helmet do not ride the motorcycle, isn't that imposing on someone's religious beliefs? Section 2 of Charter says freedom of conscious & religion and courts have given a lot of weight to this. Before you even get to the this question, you need to answer threshold questions 1) There is a reason in your religion for not doing this 2) You are a part of that religion. Are we going to reduce damages because someone religious attire did not allow them to wear the safety device? An argument may be, if you are not injuring someone else by doing that it could be fine.
-We take people as we find them. Can we not treat religion as thin skull.
-We have varying objective standards for defendants (old people, children, people with disabilities) but may we should do the same for the plaintiffs
-Denning says take out the personal – true if he means not subjective, but wrong if he means we wont vary the standard based on categories of people
-If person did have a religious religion and died in circumstances where they would have otherwise lived, would the defendant be liable for the death? Thin skull comes into effect here.
-in general contributory negligent says damages will be reduced – highly unlikely they will be reduced by more then 50%

Policy reasons discussed by Denning:

-He says that Parliament passed regulation that every motorcar should a seatbelt, they must have though it was sensible for people to wear them
-The Road Traffic Act [1972] states that if someone does not wear a seatbelt they are not liable to criminal proceedings but it can be relied on in civil proceedings to establish or negative liability. A person is free to wear the seat belt if he wants just as he is free to run into a brick wall but he does it at his own fault therefore he only has himself to thank for the consequences
-Then went on to say that Parliament has spent dos much money on advertising seatbelt safety and they are also pushing legislation to make seatbelt use compulsory therefore judges should plainly say that it is sensible for all drivers and passengers in front seas to wear seat belts it is a wide precaution which everyone should take

Judges on the other side of argument argued:

Neild J

-to wear a seatbelt is the freedom of choice of the motorist. If they think they were less likely to be injured by wearing seatbelt (Mr. Froom though he would not be able to escape the car in an accident if wearing a seatbelt) they should not bear any responsibility
-**Denning criticizes** this by saying that in determining responsibility law eliminates the personal equation. Doesn't take individual views into account, you only need to look at what reasonable/ ordinary person would do or observe

Ratio:

If you contribute to the injury by not taking precautions, damages will be reduced as you are guilty of

contributory negligence in the case of seatbelts.

Notes Pages 285-287

Note 1 Klar :

Canadian jurisprudence on seat belt is as follows:

-The fact that wearing a seat belt did not contribute to the accident itself is not relevant in so far as the defence of contributory negligence. The rest of the note discusses the arguments for and against seat belt employment and contributory negligence.

Note 2 Posner:

Didn't really understand this note. The note discusses the economic theory and seat belt requirement. It states that if people wear seatbelts they may driver fast etc. therefore there may be an increase in pedestrian injuries and in automobile deaths and injuries due to seat-belt requirement.

Atiyah, Accidents, Compensation and the Law, 1975

-NOTE: this is problematic. There is an insurance company paying money for the defendant. If you do not have an insurance company then they won't be sued.

-Contributory negligence is an unjust procedure that on its face may appear obvious that if two people are negligent it should affect liability.

-The effect of a finding of contributory negligence is very different from the effect of finding of negligence. Finding a defendant negligent shifts a loss away from plaintiff and spreads it by means of insurance or other processes. If one is found of contributory negligence, the plaintiff must bear all the losses; they have to pay for their own consequences.

-if contributory negligence is found then plaintiffs damages will be reduced according to his fault ***relative*** to that of the defendant

-Author is arguing that the doctrine of contributory negligence appears today to serve no legitimate purpose. It not needed to spare individual defendant the injustice of being made to compensate a plaintiff who should be blamed for his own injuries. It just serves as a penal device denying some compensation to plaintiff that they would otherwise be entitled to. **NOTE: You are punishing the plaintiff in a way you are not punishing the offence. If you take off a % you could be taking off hundreds of thousands. This is penal.**

-Second argument. Deterrence. What's the problem with the deterrence argument? If your not taking or avoiding steps that you may be rendered a qudrapaledic (maybe) why would your damages be the swing to make you do something safer. It's not enough of an incentive to avoid injury to yourselves that may affect your life forever.

-Penal laws are justified on the grounds of deterrence, but does deterrence in personal injury law have any value? Does someone need to be deterred to refrain from injuring themselves?

-However we can not get rid of this defence in todays tort system because if we did, two people who crashed each other could sue each other for full damages. This makes no sense and would increase the cost of motor insurance by adding to the administrative cost.

1) Penal Sanction 2) if the fear of injury was going to drive you in taking safety devices, why would the idea that your damages are going to be reduced have a greater effect on deterrence ?

-This defence is still in the system but judges are limiting the imposition because the effects could be devastating on the plaintiff.

II. Voluntary Assumption of Risk

NOTE:

1) You need knowledge of the risk that's involved. If you do not have knowledge, it's hard to assume that you could assume the risk.
2) Having knowledge of the risk is not the same as saying you agreed to legal consequences of the risk.

    -By being involved in an activity does not mean that you assumed that risk. There is a high barrier to take.

-You need knowledge of the risk and assumption of the risk. Does not have to be explicit. It can be implicit based on behavior. Example: Waivers. If you join a gym you sign a waiver regarding legal rights. You are waiving the right to sue if there are injuries and damages in the club. Hutch says, you may have agreed to the risk that if a pull a muscle while working out gym won't be liable. However, if you are working out and roof falls will the gym still not be liable? Gym will argue that yes we are negligent but we are not liable because you signed a paper waiving your rights. However you did not assume that risk, and you more importantly did not engage in risk that was negligently caused.

-In recent years, the courts have been extremely unwilling to rely on the waiver clauses because it is a 100% defence of contributory negligence. If the defendant was negligent it is highly unlikely that the waiver will get them off.

-Waiver of rights is something we need to cautious about. Do people know by signing a waiver they have waived all legal rights?

-Example of case we'll do later Sunrise. Goes down ski hill drunk and breaks his neck. Sues and defendants bring about waiver. However you did not tell him what he is consenting to.

-Basic rule should be that if you are consenting to something, you should know what you are consenting to. If it is implicit consent the threshold must be really high.

Lambert v Lastoplex Chemicals, SCC 1972

Facts: Lambert, a mechanical engineer, used the Lastoplex's product Supremeo W-200, a lacquer sealer, in his basement when he was installing new floors. There were warnings on the can that risked that the product was flammable, and that it should be kept away from open flame. The plaintiff did not turn off his furnace or his hot water heater, both of which had natural gas pilot lights, as they were in a different room from the new flooring. The vapor of the sealer caused an explosion that burned the plaintiff and damaged the house. His basis to bring the suit was that the warning labels on a competitor's product were more direct and stated to turn off all pilot lights before using. **-Does not turn off the furnace, fumes go in furnace and a fire starts.** **-They were negligent in not providing an adequate warning like their consumers did. But they went on to say we do not need to provide an adequate warning he should've known better he was an engineer. SC says I don't think so.**
Issue: Did the manufacturer knowing of their hazardous nature have a duty to specify the attendant dangers, which it must be taken to appreciate in a detail not known to the ordinary consumer or user?

-**What is the liability of people who produce dangerous products?**
<u>Held:</u> Ruling in favor of plaintiff. Appeal allowed.
<u>Judicial History</u>: **Trial:** -Held in favor of plaintiff. Said that the packaged lacked explicitness related to degree of danger. **Court of Appeal:** - The plaintiff used the product in an enclosed space and that contributed to the flame -Further argued that the plaintiff had special knowledge being an engineer and knows about the dangers of working with this type of product near open flame
<u>Analysis</u> (Laskin J):
-Said that a manufacturer owes a duty of care to consumers of their products to see that there is no defect, which could give rise to injury. This duty does not end with a simple warning sign. He says that warnings must be very explicit and a general warning will not suffice to eliminate liability when the danger is reasonably expected by use of product but was not contained in the warning. Explicitness of warning varies with danger likely to be encountered in ordinary use of product. -The defendant having special knowledge does not mean that manufactures duty regarding caution labels is discharged to the defendant. **Supreme Court says the test is not subjective. Its objective.** -The only way that duty would not be owed to plaintiff was if it was proved that he or she voluntary assumed the risk of injury. This was not the case in this scenario. Plaintiff did not know that pilot lights would cause flame; there was no conscious choice to leave the pilot light on. No judgment error on part of plaintiff. He ought to have known or foreseen that the failure to turn off the pilot lights would result in harm but he had know knowledge of this. **<u>NOTE:</u>** -Knowing the risk does not mean you have accepted the legal risk -Subjective test apply when an expert is involved example Doctor

Dube v Labar, SCC 1986

<u>Facts:</u>
Both P and D involved in a joint venture of heavy drinking and driving. P was driving. D jumped into drivers seat when P left car. P returned and had a conversation with D, D then told P he was okay to drive. D started stopped paying attention and lost control over the car. P tried to swerve car back onto road. Car flipped. P suffered injuries.
<u>Issue:</u> Can the defence of violenti non fit injuria apply in this case?

Analysis: (Estey J)
-Jury found that plaintiff has voluntarily assumed the risk of the defendant's bad driving which caused the accident -> SCC agreed with the juries finding on this part of the test -Referred to principles in old case, which said *"to constitute a defence there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence… not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff"* -Judge said in this case, there was an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to
Notes: -Although the defence is usually not accepted in drunk-driving offences because it requires an awareness of the circumstances and the consequences of the action (its hard for someone to assume risk in an intoxicated state; when the alleged agreement was entered) the court allowed the defence in this case because they were unwilling to interfere with jury's decision as they answered many questions that made the defence clear to them

Priestley v Gilbert

Facts:
Plaintiff was occupant in defendant's vehicle. They were both drinking. Defendant in advanced state of intoxication drove car to other side of the road and collided with another car. Plaintiff suffered injuries & 2 people died. Defendant argued defence of maxim volenti non fit in injuria was entitled to prevail (plaintiff voluntarily took on the risk).
Judicial History: Trial judge found for defendant. Maxim volenti non fit in injuria applied in this case.
Issue: Did trial judge apply defence of maxim properly?
Test for Maxim Volenti non fit in injuria Did the plaintiff accept both physical risk and legal risk of injury and damage?
Analysis (Schroeder JA):
'he judge states clearly that the appellant voluntarily assumed the risk associated with being in the car with e respondent by drinking together with him all day and having no reservations about driving with him. -Plaintiff's counsel tried to argue that his state of mine did not allow him to appreciate nature and extent of the risk which could occur. Judge said: It is identical in law to a situation where he was sober, realized how drunk the defendant was, but still knowingly got in the car as a passenger. This assent is not negated simply because he was intoxicated. -In cross-examination, he was asked whether he knew a risk would arise. He answered yes. -**"Joint venture" part in text** **-If it was a voluntary risk, we might want to contain our rights not ignore them**

Notes:
-In cases where both parties are drunk, the necessary agreement can be found when the litigants, at a time of sobriety plan a course of reckless drunk conduct. At this point they are at least in a position to understand the degree of risk that they are about to incur and might more plausibly be releasing each other from all adverse legal consequences of the venture
-Important to note this defence is usually not applied in drunk driving cases, contributory negligence is

-Both these cases are about drunk people driving together and getting into an accident
-Defendant says I am not liable because you voluntary assumed the risk
-Court says: Can not recover because they voluntarily assumed the risk.

Note Page 296-197

Birch v Thomas

-Example of a case where defence of Volenti was applicable.
-This case involved a plaintiff driver and 19-year-old defendant. Plaintiff was not able to get insurance against passenger liability and on advice of his insurance company placed a sticker that red passengers ride at their own risk and on the condition no claims shall be made against the driver or owner. Plaintiff told defendant he was not insured against passenger liability. In this case the plaintiff argued the defence of Maxim Volenti non fit in injuria and succeeded. Court said that defendant took on risk of physical injury& legal risk when he got into the car after plaintiff told him he was not insured. The statement about the absence about the absence of insurance was equal to a statement that the passenger rode at his own risk even if he was not able to read the sticker.

III. Illegality

-When will the illegality that the plaintiff's are involved in deny them of their legal rights?
-Example you go to rob a house, their stairs collapse, can you sue the homeowner?

Hall v Hebert

Facts:
-Litigants, two young men spent the evening drinking to excess and driving around in the defendant's car. When the car stalled, the plaintiff passenger asked if he could drive. Defendant agreed, and in the course of roll starting the powerful manual-shift-car, the plaintiff lost control of it and was injured. Defendant was held liable because he surrendered control of his car to an intoxicated driver. -Defendant argued the defence of ex turpi causa non oritur action alleging that both parties were engaged in criminal enterprise and as a result he could be held liable

Judicial History
Trial:
-Held in favor of plaintiff. A mere acceptance of a ride knowing that the driver was impaired does not constitutes as a common enterprise
-said there no connection between the illegal act of drinking in a public place and the actions that followed (accident)
-Breach of liquor control Act was not misconduct of such moral gravity that court should decline to compensate the plaintiff
Court of Appeal:
-Allowed the defendant to argue this defence, said that unless SCC says otherwise common law allows the defence

Issue:
Is the defence of ex turpi causa non oritur applicable in this case?

Held:
Defence does not apply in these; integrity of the court is not in question. However they said that plaintiff was 50% negligent in his injuries.

Analysis:
Cory J:
-No reason why person should not be able to recover on public policy grounds. Allowing recovery would not offend or shock the general public
-Said we need to eliminate this defence; the court should be granted the power to disallow a plaintiffs claim under the duty of care test under the second branch of the test (idea that there is a policy reason for defendant not owing duty of care to plaintiff)
-Cory says you have this discussion in the last part of the Ann's via Cooper test where we discuss residual policy factors.
-Would it be sufficient to deprive them of a valid claim?

McLachlin:
-Said the defence can only be allowed if integrity of legal system is threatened by allowing the claim. This arises in two situations:
1) Plaintiff cannot make tort claim to make a direct profit from criminal penalty
-Example: A plaintiff can recover for damages related to injury. However if they tried to recover under loss of future earnings, where earnings were from illegal activity they could not.
-if courts allow damages for illegal activity it may create inconsistency in the law (essentially you are saying even though its illegal, you can profit from it suggesting it may be legal)
2) A tort action can not be used to avoid or negate criminal penalty
-Example: Two accomplices commit a burglary. They get because due to negligent act of one of them. They are now required to pay a fine. The partner who's actions did not get them caught cannot sue the other partner for damages. If this was allowed, he would be getting away from his penalty for the criminal behavior
-If court allowed this it would be giving on one hand and taking away on another (inconsistency)
-Does not agree with Cory that the defence should be dropped. She says that we need it because the duty of care test does not provide no new insight into the fundamental question of whether courts should be entitled to deny recover in tort on the grounds of plaintiff's immoral or illegal conduct. Furthermore the defence allows the court to specifically state that the defendant has acted wrongly and make it clear that responsibility for this wrong is denied due to integrity of legal system

-She says that if we use the duty of care test to say that plaintiff should not recover due to immoral or legal actions then the onus will be on the plaintiff to prove his acts were not illegal or moral and he should still be allowed recovery. This onus according to McLachlin should lie on the defendant. Plaintiff should be required to disprove the existence and relevance of his or her illegal or immoral conduct
-Further states we would run into procedural problems. In contracts onus would be on defendant and in torts onus would be on plaintiff to prove stuff related to illegal or immoral conduct if it was put under duty of care
-Said in this case, the integrity of system was not threatened. However plaintiff contributed to the negligent act.
-Disagrees with Cory. Illegality is a defence. You go through the duty and deal with it through a defence. It's better to deal with it as a defence.
1) Onus will be it plaintiff to show that the defendant were acting illegally if we discuss it in Duty of Care test. If you leave it as a defence then defendant has the onus to prove this. It's more appropriate that the defendant show why the innocent plaintiff should be deprived.

- **She thinks that the onus should be on defendant to show illegality.**

NOTE:

xExample of Scenario: People go to the "bank job". On the way, they get into an accident. They are are red. Can they recover? First question to address: were they committing a negligent act at the the time e accident? Is it a criminal offence to sit at home and plan the bank job? Yes. Is it a criminal offence to drive to commit the bank job? No. There is a duty of care.

-In our case, it's hard to say why "our gang" should not recover. Defendant had no idea this was going on. They were not committing negligent act at the time of the accident.

-However, if Scenario changes and the gang slips on the stairs after committing the robbery. It would be problematic if the bank had to compensate the plaintiff's after they wrong did the bank.

-Test by McLachin: Are they profiting from their wrongdoing by allowing this tort?

-If scenario was switched and robber fell while coming up the stairs to rob the bank because they were icy, should the bank be liable? If you use Major's argument in Dobson, if everyone else can recover in that case, why can't the robber?

-If you do not allow the bank robber to recover, we are at the issue of "double penalty". They would be deprived one because they would be going to jail and two they would be deprived of recovering. Tort law is not about punishing people, so shouldn't bank robber recover for his health problems?

-Argument could be: If you want to punish the person for being a bank robber punish him, but if he falls, slips and injures himself then he should be able to recover if anyone else can. (Major from Dobson)

-Another scenario: If bank robber is trying to get in through a window in the middle of the night and trips on something should they be able to recover? Bank could argue this was not reasonably foreseeable. We locked up and did not clear because no one was suppose to come there.

-Middle of the day there could be a duty, reasonable foreseeable someone may be climbing those stairs but in the middle of the night this changes.

-Key to these examples: In other circumstances, recovery may be allowed. But because of the "negligent act" should we allow it

-McLachlins phase: Justice system into disrepute. If there was a scenario, where you rape someone and then fall down the stairs due to something in the stair should they recover? If we allow them to recover this may bring system into disrepute. Is it fair to make the person pay? He says in this situation probably not, but in other cases the homeowner has insurance, don't double punish the person.

-Scenario: Escaping bank, get into car and race off and there is an accident caused completely by the third party. McLachlin would not allow this type of action, they're all involved in a criminal enterprise and should they be able to sue each other in the criminal enterprise?

-McLachlin and Cory get to the same place, but just through different ways.

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British Columbia v Zastowny, SCC 2008

Facts:
Defendant was imprisoned. He was sexually assaulted by prison official. Upon release he sold heroin and committed offences. He was imprisoned again. He sued for loss of earnings during incarceration. Psychologist said that the reason he engaged in the criminal behavior was linked to the sexual assaults.
Issue:
Can he recover loss of earnings during incarceration period?
Held:

Appellant is not entitled to compensation for lost wages while he was incarcerated
Analysis (Rothstein J)
-Part of the punishment of incarceration is to deprive one of his earnings in the workforce (consequence of imprisonment is loosing your wages) -It would be inconsistent to imprison someone on the grounds that he was responsible for a serious offence and then to compensate him for the detention -If we apply the ex turpi doctrine, it would be cause inconsistency in the law (taking one on hand and giving with the other). He would be recovering for money he would've made through illegal act
Policy:
Judicial policy that underlies the ex turpi doctrine precludes damages for wage loss due to time spent in incarceration because it introduces an inconsistency in the fabric of the law that comprises the integrity of the system. In asking for damages, Z is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. He is personally responsible for his criminal acts and the consequences that flow from them.

Contribution

Background Information

-In law, the plaintiff is able to execute whichever defendant he or she wishes as compensation does not exceed damages suffered
-Contribution refers to the power of the defendant to call on other tort feasors to bear their share of the damages
-Common law historically denied this, but statute has been changed now to allow a tortfeasor to recover a proportional share from the others

Merryweather v. Nixan

Facts:
Judgment had been obtained against the then plaintiff and defendant for an injury done by them to a reversionary estate in a mill. The opinion states as to the first judgment creditor: "Having recovered 840 1.he levied the whole on the present plaintiff who thereupon brought this action against the defendant for a contribution of a moiety as for so much money paid to his use.
Held: Appeal dismissed.
Ratio: Law could claim no contribution as between joint wrongdoers.

Negligence Act, 1990

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of a contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tort feasor, in which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

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Note 1: Justifications for Contribution:

-Based on principles of justice, law should treat wrongdoers fairly and that in the absence of a compelling reason o the contrary, fairness requires that a burden, which the law imposes on two parties, should not be borne wholly by one of them.
-Contribution is not considered when the defendants breach their separate contracts/duties to plaintiff.

Note 2: Bow Valley Husky (Bermuda) v Saint John Shipbuilding Ltd, SCC 1997

-In this case the SCC held that Merry Weather v Nixan does not exclude a common law right to contribution among tortfeasors.
-McLachlin said that the idea there can be contribution between tortfeasors is anachronistic and not in keeping with modern notions of fairness
-Contribution could not now be applied

Note 3: Bryanston Finance Ltd v de Vries, 1975

-Lord Denning said that any sum paid by one wrongdoer under the settlement to be taken into account when assessing damages against the other wrongdoer. If the plaintiff recovers more, he gets the extra. He if he recovers less, he loses and has to pay the costs.

Parkland (County of) v Stetar et al, SCC 1975

Facts:
Stetar was driving hit into Poirier's car (which was rented) at an intersection which was not controlled. Piorier had the right of way. There was usually warning signs however on that day the

sign was down. Piorier brought suit against Stetar and the country. They failed in their suit against the country.

Issue:

1) Was the country of Parkland No 31 under any duty, the breach of which contributed to the accident?
2) Can the Poiriers and Car Rentals recover 100% of their damages from Stetar although he was only 75% resposinble for accident?

-Poirirers claiming that Stetar can get 25% of money from country. Country says you lost your suit against us you can not get money from us either indirectly or directly.

Held:

Stetar was negligent not Poiriers.

Analysis (Dickson J):

-Answered the first question in the affirmative
-Answer to Second Question:

-Section 3(2) of Contributory Negligence Act says that a tort feasor is only liable to make contribution and indemnify each other in the degree in which they are found to be at fault or negligent. There are many other statues which state that there is no basis for claim for contribution by one tort feasor against another when the other has been sued by the injured person and has not been held liable

-Stetar can not sue the country for contribution

-The plaintiff has the right to full recovery from the tort-feasor whom he or she has sued whether or not contribution exists. No subsection in the act limits right of defendants to full recovery.

Fitzgerald v Lane

Facts:

-Plaintiff was crossing the road during red light. He hit the first car, bounced off the windshield and hit the second car coming in opposite direction. Plaintiff suffered many injures.

Judicial History:

Queens Bench:
-Sir Douglas Frank believed all three parties were negligent. He said it was impossible to say which one was more or less to blame. They were all responsible for paying 1/3. Entered judgment for plaintiff against the defendants for two thirds of the total damages.
Court of Appeal:
-Entered judgment for plaintiff against defendants, 50% each

Issue: Did the trial judge error in the process of assessing damages when more then one defendant is found liable and the plaintiff has also held negligence?

Held:

Analysis (Lord Ackner):

-Said the trial judge erred because he applied the two stages at once. He allowed his judgment on issue of contributory negligence to be colored by his decision as the proper apportionment of blame between the defendants. Trial judge said: "I find that it is impossible to say that one of the parties is more or less to blame than the other and hold that the responsibility should be borne equally by all

three."
-Plaintiff's actions led to chain of events causing accident. He is liable. However both defendants were found negligent in response to the dangerous situation created by the plaintiff which established their joint and several liability because they were driving to fast and not keeping a look out -In order to assess claimant's share in responsibility of damages, judge must separately ask himself "to what extent if any, the plaintiff had been part author of his own damage?"
Ratio:
Determination of the extent of each of the defendant's responsibility for the damage is not made in the main action but in the contribution proceedings between the defendant's inter se and which does not concern the plaintiff
Notes:
-When a plaintiff successfully sues more then one defendant for damages and there is a claim between co-defendants for contribution, there are two different and distinct stages in the decision-making process, the one in the main action and the other in the contribution proceedings -First determine if plaintiff established liability. Second what is the total damage plaintiff sustained due to negligence? Third have defendants proved that plaintiff is also negligent? If so, then last step is to reduce damages.

Negligent Statements

Candler v Crane Christmas and Co.

Facts:

- Defendant accounting firm (hired by mining company) puts out ad for investors in the mining company
- Plaintiff investor wants to invest in company, before he does so asks for balance sheet
- Accountants asked by mining company to prepare balance sheets for revision of specific potential investor
- Investor sues for false information after he invests and loses money
- Accountants say that they only owe a contractual duty to the company that hired them – therefore not liable for negligence to a person to whom they were under no contractual duty
- Suggestion made by plaintiff is that Donoghue v. Stevenson should apply
- Two differences in this case from D. v. S.
    - Physical vs. financial damage – not given a lot of weight in these cases
    - Act vs. Statement
- At trial Donoghue ruled to apply only to acts, not statements (unless fraudulent) therefore no liability
- Case goes to Court of Appeal

Issue: Can Candler sue Crane Christmas?

Decision: Appeal dismissed – Candler cannot recover against Crane Christmas.

Analysis (Denning LJ – <u>Dissenting):</u>
- Did the accountants owe a duty of care to the plaintiff?
- Denning says clearly they did – they were *professional* accountants who prepared the accounts and put them before the plaintiff, knowing he was going to be guided by them in making an investment in the company
- Plaintiffs had every right to rely on accounts being prepared with proper care
- Rejects the defendant's argument that since no action has been allowed for negligent statements before, it should not be allowed in this case
  - Quotes Lord Macmillan in D. v. S.: "The categories of negligence are never closed."
- In response to argument that duty of care only arises where the result of failure to take care will cause physical damage to persons or property: in some cases of financial loss there may not be sufficiently proximate relationship to give rise to duty of care – but once a duty does exist, the liability does not depend on the nature of the damage

<u>- Who is under a duty to use care in statement?</u>

Those persons such as accountants…whose profession and occupation is to examine books, accounts, and other things, and to make reports on which other people – other than their clients – rely in the ordinary course of business. Their duty is not merely to use care in their reports. They have also a duty to use care in their work which results in their reports.

<u>- To whom do these professional people owe this duty?</u>

They owe the duty to their employer or client; and also to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. Duty does not extend to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts.

<u>- To what transactions does the duty of care extend?</u>

It extends only to those transactions for which the accountants knew their accounts were required.

(E.g. in this case, it applies to the initial 2000 invested by plaintiffs in reliance on the accounts, but not to the subsequent 200)

- Denning recognizes that there needs to be a tight hold on who the duty is owed to – should not make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business – would expose him to "…liability in an indeterminate amount for an indeterminate time to an indeterminate class" (Cardozo CJ in Ultramares)

Analysis (Asquith LJ – Majority):

- “A merely negligent misrepresentation made by a director to potential subscribers for shares, on which some of them act to their detriment, affords the latter no remedy.” (based on *Derry v. Peek*) – does not buy the argument that Donoghue’s case overrules this
- Donoghue has never been applied where the damage complained of was not physical – singular consequences would follow if the principle laid down in the snail case were applied to negligent misrepresentation in every case in which the representee were proximate to the representor
- Different rules apply to negligent misstatement – Dongohue does not abolish these differences

Cardozo’s conflicting judgments (note – these are American cases):

Glanzer v Shepard

Facts:

- Defendants were pubic weighers hired by a vendor to certify the weight of bags of beans that had been sold to the plaintiff
- Copy of certificate sent to vendor and to plaintiff
- Plaintiff paid for the beans on the faith of the certificate
- On discovering weight was less than certified plaintiff sued defendants for amount overpaid

Decision: Finding for the plaintiff

Cardozo Judgment:

- Plaintiff’s use of the certificates was not an indirect/collateral consequence of the action of the weighers
    - It was a consequence which, to the weigher’s knowledge, was the end and aim of the transaction
    - Defendant’s knew beans had been sold and that on faith of their certificate that payment would be made
    - Sent a copy to the plaintiffs for very purpose of inducing action
- Long established that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all

Ultramares v Touche

Facts:

- Defendants were a firm of public accountants who were alleged to have negligently prepared an audit that was relied upon by the plaintiffs in lending money to the audited firm

Decision: Appeal dismissed, finding for the defendant

Cardozo Judgment:

- Defendants knew that in the usual course of business balance sheet when certified would be exhibited by the Stern company to banks, creditors, stockholders, purchasers or sellers, according to the needs of the occasion as basis for financial dealings
- Range of the transactions in which a certificate of audit might be expected to play a part was indefinite and wide
- As a condition of any loans the plaintiff insisted that it receive a balance sheet and was given one of the certificates signed by defendant's and then in Stern's possession
    - On faith of the certificate plaintiff invested
- If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class
- Difference from Glanzer:
    - The transmission of the certificate was not merely one possibility among many but the "end and aim of the transaction" (specific purpose)
    - Not so in the case at hand
    - In the case at hand the service was primarily for the benefit of the Stern company (convenient instrument for use in development of business) and only incidentally or collaterally for the use of those to whom Stern and his associates might exhibit it thereafter

Hedley Byrne & Co Ltd v Heller

Facts:

- Appellant Hedley (ad firm) had entered into contract with Easipower
- HB were going to put out a variety of ads on behalf of Easipower and Easipower would pay on credit
- HB questions whether they will spend money on EP's behalf without knowing their creditworthiness
- HB ask their own bank (National Provincial) to obtain report about EP from EP's bank (Heller)
    - HB cannot go directly to Heller because of privacy issues
- The first time around NP asks whether they will be suitable for normal business relations
    - Heller passes on message that EP is suitable but letter is headed with disclaimer "In confidence and without responsibility"
- The second time around NP asks Heller whether EP would be able to handle large order and letter again came back with similar disclaimer
- HB puts out money on behalf of EP, EP does not have money and HB ends up in the hole
- Obvious person that owes them money is EP but they look to deep pockets of Heller
- Did Heller know why they were being asked for this information?
    - Yes – they were asked the second time around whether EP would be good for about $100,000 pound/year and answered in the affirmative

Decision: Appeal dismissed - No liability on the bank.

Reid, Devlin, Pearce: There was a duty BUT not applicable in this case because of the disclaimer

Hodgson and Morriss: No duty BUT there might be one in certain circumstances (although it is hard to imagine what those circumstances might be)

- Duty is much tighter and narrower than it is in Donoghue
- Zone of liability is reduced for negligent statements – smaller neighbourhood than for negligent acts
- 2 factors at play:
    - The nature of statements
    - The nature of the loss – less inclined to compensate for economic loss than physical injury

Does D. v. S. apply? No. Negligent statements are different than negligent acts.
Really only two relationships in this case: HB to National Provincial, and NP to Heller

HUTCH/CLASS STUFF
How does the court go about defining the neighbourhood of liability?
1) There has to be a special relationship and has to be in course of business
2) Has to be some form of reasonable reliance
- House of Lords view if you give advice in a casual context and someone relies on it:
    - You won't be liable because it is a social event, not a business event
    - But whyyyy
- Imagine you're at a party and someone serves homemade ginger beer with a snail in it. Are they liable for the injury?
    - Yes
    - Why is this different than giving out advice?
    - **The whole point of Donoghue and Stevenson was that duties can be owed even where there is no contractual relationship**
- Why should we let professional off the hook when they are not in a business context?
    - If you can't be bothered to give a disclaimer, why should you be protected?
- Lord Reid: Rule as of 1964 is that it must be in business setting

Analysis (Lord Reid – leading judgment):
- Stresses the difference between negligent acts and negligent statements
- Donoghue v Stevenson cannot apply to conversations in social/informal occasions, even if it is clear that others are likely to be influenced by their statements
- Another difference is that a negligently made article will only cause one accident, so you can easily find necessary degree of proximity or neighbourhood between negligent manufacturer and person injured – but words can be broadcast with or without consent or foresight of

speaker/writer – we should not say that the speaker owes a duty to every ultimate "consumer" who acts on those words to his detriment
- An innocent but negligent misrepresentation gives no cause to action
- A reasonable man knowing that he was being trusted or that his skill and judgment were being relied on would have 3 courses open to him:
1) He could keep silent or decline to give the information or advice sought.
2) He could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require
3) He could simply answer without any such qualification – he must be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require
- *Candler v. Crane, Christmas & Co.* was wrongly decided
- Duty of care limited to "those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him"

Analysis (Lord Pearce):
- "Words are more volatile than deeds" (368)
- "If persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession they have a duty of skill and care…to those who as they know are relying on their skill and care although proximity is not contractual" (369)
    - Only people in the business giving advice, there will be not just proximity but close proximity necessary to be subject to liability
- Duty existed but Heller's disclaimer was effective

Analysis (Lord Devlin):
- Special relationships involving duty are not limited to contractual relationships or fiduciary duty but include also relationships which are "equivalent to contract" (370)
"Wherever there is a relationship equivalent to contract there is a duty of care" (371)
    - this is taking us down the wrong road… this is taking us back to before Donoghue
    - all this does is confirm that Donoghue is not a sufficient degree of proximity and that the zone for these cases must be narrower

Queen v Cognos Inc
Facts:
- Guy gets offered a job in Ottawa, moves from Calgary to Ottawa, but it becomes clear that company is not going to get the work they thought they would so he does not have a job
- Have to assume the company was being negligent in making their statement to him that he would have a job

Analysis (Iacobucci J):

- Difference from Candler, Haig, Hedley Byrne
  - The other cases were about statements made by professionals (accountants, banks, etc.)
  - In this case the company is a computer software company, they are not in the business of giving out advice
- Note: not enough to just point out a difference, it has to be a sufficient difference that would warrant a similar or different result
- Page 362 (Iaccobucci) – confining duty to professionals is over simplistic
  - Special relationship can exist between any parties if they make negligent statements and people reasonably rely on them

Note 3 (Page 362)

- House of Lords has stated that principle of Hedley Byrne is not restricted negligent misrepresentations on which the plaintiff has detrimentally relied, but includes situations where defendant has assumed responsibility to perform professional services for the plaintiff who is harmed by their being negligently performed

Haig v Bamford et al

Facts:

- The accountants were to produce audited financial statements to be relied on by potential investors
- Negligently prepared these statements – they have to be negligent for them to be liable
- They do not know who the specific plaintiffs are that will be relying on the statements
- Plaintiff invests money based on negligent statements, later realized the company is going down, invests more in hopes of saving some of their money

Decision: Plaintiff can recover

Analysis (Dickson J):

- Dickson says there can be liability for negligent statements
- Question is what is the scope of that liability?
  - Could be foreseeability of use of the statement by plaintiff and reliance on it
  - **Knowledge of limited class of plaintiffs who will rely on it – this is the test in this case**
  - Knowledge of identity of specific plaintiffs who will rely on it
- Compare the test to Donoghue v Stevenson
  - Possible group of plaintiffs is larger in Donoghue (more possible ginger beer drinkers than possible investors in this company)

- In this case, the accountants knew that the financial statements were being prepared for the very purpose of influencing, a limited number of potential investors – names of the potential investors is not material – what's important was the nature of the transaction(s) for which the statements were intended for that is what delineated the limits of potential liability
- Was there reasonable reliance by the plaintiff?
    - Yes, except for the last $2500 he invested because he knew it was going down – at this time he knew the statements were negligent
    - He relied on the audited statements for the first $20000 invested so he should get that back
- The accountants owed Haig a duty to use reasonable care in the preparation of the accounts
- Note: If the investment was supposed to earn 5% per annum, is the loss just $20000 or is it $20000 plus the profit that your made?
    - In tort law we are trying to put people back in the position they would have been in had the investment not occurred, so they should just get the $20000 back

Caparo Industries v Dickman

Facts:

- A large public company (Fidelity) needs its company accounts audited each year
- They hire accountants (Dickman) to audit accounts and they sign off for statutory purposes
- Accounts are then circulated but there is a mistake
- The share price drops and investors think that because share price drops but value of company still remains strong, now would be a good time to buy into the company
- This is what is done by Caparro – but the company's assets have been incorrectly valued
- Caparro says if they had known the true value of the company they would not have bought all the shares in the company

Issue: Is a duty owed by the defendant accountant in auditing the company to the plaintiff company?

Decisions: Appeal allowed – no recovery for Caparro.

Analysis (Lord Bridge of Harwich):

- This situation is different from past cases of negligent misrepresentation regarding statements because it is a case where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate
- To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to anyone for any purpose which they may choose to rely on it subjects him to

"liability in an indeterminate amount for an indeterminate time to an indeterminate class" (Cardozo CJ in *Ultramares*)
- What is the extent of the shareholder's interest which the auditor has a duty to protect?
    - The scope of the duty does not extend beyond the protection of any individual shareholder from losses in the value of shares which he holds – as a purchaser of additional shares in reliance on the auditor's report, he stands in no different position from any other investing member of the public to whom the auditor owes no duty
- Court struggled to find a device whereby they can limit the liability of accountants – but clearly they want to put limits on what accountants are liable for

Analysis (Lord Oliver of Aylmerton):
- The original, central and primary purpose of the legislative requirement for carrying out of an annual audit and the circulation of the accounts is the informed exercise by those interested in the property of the company, whether as proprietors of shares in the company or as the holders of rights secured by a debenture trust deed, of such powers as are vested in them by virtue of their respective proprietary interests
- Caparro says there is a wider purpose – to enable those who receive the accounts to make informed investment decisions (e.g. to dispose of their shares in the market, etc.) – Oliver doesn't buy that this was the legislatures intention
- "Proximity" in cases such as this is an expression used not necessarily as indicating literally "closeness" in a physical or metaphorical sense but merely as a convenient label to describe circumstances from which the law will attribute a duty of care. It has to be borne in mind that the duty of care is inseparable form the damage which the plaintiff claims to have suffered from its breach. It is nota duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained. (371)
- To ascertain whether the auditor should have a duty to avoid the occurrence of the kind of damage which the plaintiff claims to have suffered it is not sufficient to just ask whether there was "closeness" between them in the sense that plaintiff had a legal entitlement to receive the information upon the basis of which he has acted or in the sense that the information was intended to serve his interests or protect him – must go further and ask **in what capacity was his interest to be served and from what was he intended to be protected?**
- The purpose for which the auditors' certificate is made and published is that of providing those entitled to receive the report with information to enable them to exercise in conjunction those powers which their respective proprietary interests confer upon them and not for the purposes of individual speculation with a view to profit
- The same considerations that limit the existence of a duty of care also limit the scope of the duty – the duty of care is owed to the shareholders as a body and not to individual shareholders
- To widen the scope of the duty to include loss cause to an individual by reliance upon the accounts for a purpose for which they were not supplied and were not intended would to extend it beyond the limits which are so far deductible from the decisions of this House

– difference between protecting someone drinking ginger beer and protecting speculative investors
*Main thing about Caparro – struggling to find a way to limit liability of accountants

Hercules Managements Ltd v Ernst and Young – LEADING CASE – ANN'S TEST FOR NEGLIGENT STATEMENTS

Facts:

- 1997
- Auditors make a report, someone relies on it, report was negligent, person loses their investment

Analysis (LaForest J):
- Applied two-stage approach to duty (*Anns* test)
1) **Proximity giving rise to a *prima facie* duty exists when:**
 a) the defendant ought **reasonably to foresee** that the plaintiff will rely on his or her representation and;
 b) **reliance** by the plaintiff would, in the particular circumstances of the case, be **reasonable**
- LaForest found that **a prima facie duty arose** because **reliance of shareholders on statements was reasonably foreseeable** (especially considering the statutory requirement to place financial statements before shareholders at the annual meeting) **AND** the **plaintiff's reliance was reasonable** because the information was given deliberately and in the course of business by the defendant, who was a professional who had an indirect financial interest in the transaction in respect of which the representation was made
2) **Policy reasons to negate *prima facie* duty of care:**
- LaForest agreed that deterrence of negligent conduct by auditors is an important policy consideration but "in the final analysis it is outweighed by the socially undesirable consequences to which the imposition of indeterminate liability on auditors might lead."
 - Increased insurance premiums, higher costs faced by accountants, opportunity costs in time spend on litigation rather than on generating accounting revenue, etc.
- Although the defendant knew the identity of the shareholders who relied on the audit reports, the reports were not used for precisely the purpose or transaction for which they were prepared (purpose was to enable them collectively to oversee the management of the corporation)

NOTE:

- Courts are trying to find ways to limit liability of accountants for negligent statements
- They went to the Anns test – moved off idea that negligent statements are some special area – no more "special relationships"
- They affirm the test but how you apply it is pretty open
- Anns test provides a framework for thinking about problems – does not resolve them

- Negligent statements are much the same as negligent acts so we will apply Anns test but bear in mind that they are statements not acts

Economic Loss

Introduction:

-When we did D v. S we were dealing with acts that led to physical injury (Anns Kamloops, Cooper v Hobart)
-Then we arrived at statements, resulting in economic loss not physical injury
-Now faced with question with whether acts that lead to economic loss?

- why should statements be an exception? Which is why the test has come to be applied to statements as well BUT --> The zone of liability/neighborhood in statements is SMALLER

-It was particularly important to court not to allow recovery in Cooper v Hobart as a result of it being a public body
-Here in the case law we will investigate, it will be the private-public dichotomy
-Also, all of these entities making statements tended to be professionals; it is similar to acts in that they could be conducted by professionals

Synopsis of Leading Rules:

- ***NORSK:*** If the plaintiff's operations are so closely allied to the operations of the party suffering physical damage and to its property that it can be considered a joint venturer with the owner of the property, P can recover its economic loss even though they had suffered no physical damage to their own property
- ***MARTEL:*** How to deal with contractual economic loss?
  - McLachlin affirmed that recovery for Contractual Relational Economic Loss is **presumptively excluded** subject to categorical exceptions -
    - Exceptions:
      1) Where the claimant has a possessory or proprietary interest in the damaged property
      2) General average cases (shipping cases)
      3) Where the rship b/c the claimant and the property owner constitutes a joint venture
      ****THESE CATEGORIES ARE NOT CLOSED**

- ***WINNIPEG CONDOMINIUMS:*** the reasonable costs of repairing the defects & putting building back into non-dangerous state are recoverable economic loss under law of tort in Canada (to prevent injury)

- ***WHITE:*** the assumption of responsibility by solicitor towards his client should be held in law to EXTEND (from *Hedley)* to the intended beneficiary who may be deprived of his intended legacy as a result of solicitor's negligence

Weller v. Foot & Mouth Disease Research Institute

Case Ratio: a plaintiff suing in negligence for damages suffered b/c of an act or omission of def cannot recover if that act or omission did not directly injure or at least threaten to injure the plaintiff's person or property

(citation)	***Weller v. Foot & Mouth Disease Research Institute* (1966) (QBD) txt. pg. 396**
Facts	-Defs owned land they conducted experimental work relating to foot & mouth disease (publically funded, however not clear if entirely public or private enterprise) -The escape of the disease was NEGLIGENT -Cattle in neighboring vicinity become infected; government ordered closing of two markets in area -Plaintiff cattle auctioneers sustain financial loss from inability to auction cattle -Court assumed infection due to virus that escaped from def's premises -Plaintiffs (Weller) brings action against def. for negligently causing the business losses **<u>*Plaintiff Counsel's Arg:</u>** -referenced "neighbor" principle from D v. S, stating that since defendants should have foreseen the damage to his clients but still failed to take proper precaution against escape of virus, their liability is established
Issue	Do defendants owe cattle auctioneers a duty of care? Are economic losses the same as physical losses?
Decision	Action dismissed. No duty owed.
Reasons	**Widgery J:** -If plaintiff's argument is sound, then the liability of def's is likely to extend far beyond the loss suffered by auctioneers i.e. affected cattle must be slaughtered, others to whom disease has spread to, other farmers prohibited from moving their cattle or unable to bring them to market at profitable time, dairy men go short of milk, sellers of cattle food suffer loss of business too Although magnitude of these consequences is great, it should NOT deprive plaintiffs of their rights if they are sound -Difficulty with P's council argument is that there is a lot of authority pre & post Dv.S holding that ***a plaintiff suing in negligence for damages suffered b/c of an act or omission of def cannot recover if that act or omission did not directly injure or at least threaten to injure the plaintiff's person or property*** (i.e. the farmers could have sued the institute with no issue) **D v. S. does not apply in those circumstances said the judge ***Application:** -DofC is owed to the owners of cattle in the neighborhood but the plaintiffs in this care not the owners of cattle, but auctioneers of them. They have NO PROPRIETARY interest in anything which might conceivably be damaged by virus if it escaped.
Ratio	Rule in 1966 (post Hedley Byrne): ***a plaintiff suing in negligence for damages suffered b/c of an act or omission of def cannot recover if that act or omission did not directly injure or at least threaten to injure the plaintiff's person or property***
Notes	"The categories of negligence never close, but when the court is asked to recognize a new category, it

	must proceed with some caution"
	NOTE-Think back to *Candler;* what was the nature of the losses? INVESTMENT; they gave money to defendant & lost their money. Here is it different because they failed to make money in the first place → NOT THE SAME THING (they lost money they thought they would get but didn't)
	-They could have drawn an analogy with Hedley Byrne where even if D v S did not apply that there still may be liability applied in such a way specific to circumstances

Weller v. Foot Reading Notes

1. Barber Lines A/S v. M/V Donau Maru (1985) txt. pg. 397

- Facts:
  -Oil spilled by defendant's ship into Boston Harbor prevented plaintiff's ship from docking at a nearby berth
  -Result: plaintiff incurred significant extra labour, fuel, transport, and docking costs.
- Decision:
  -Court denied recovery for extra expenses

- Analysis: Court outlined policy reasons for law's antipathy to damages for economic losses (Pg. 397)

a. **Pragmatic or Practical Administrative Considerations which together support a rule for limiting recovery for negligently caused pure financial harm**

i. The number of persons suffering foreseeable financial harm in a typical accident is far greater than those who suffer traditional (recoverable) physical harm

→ **they may be far greater but are they more deserving claims?**

i.e. Negligently caused oil spill foreseeably harms not only ships, docks, piers, beaches, wildlife that are covered in it, but marina business & suppliers.
-It opens up the doors to a vast number of injured persons within the class of potential plaintiffs

→ This threatens to raise significantly the cost of even relatively simple tort actions when the tort action in of itself is already a very expensive administrative device

→ While victims who insure themselves directly recover much more via their insurance companies

ii. Many of financially injured will find it easier than the physically injured to arrange for cheaper, alternative compensation (pg. 398)

-Typical financial plaintiff is likely to be a business firm that in any event buys insurance & may well be able to arrange for a 'first-party' loss compensation

-there seems to be an idea that physical injury is more important than financial harm (you eradicate the loss when you compensate but you don't with physical injury which will persevere after compensation but will simply lessen the burden of it)

iii. Some of the financially injured will have suffered harm that is in any event non-compensable because it isn't sufficiently distinguishable from minor harms typical of ordinary living (pg. 398)

****All of these limitations reflect a fear of creating victim compensation costs that, from an administrative point of view, are unnecessarily high*

b. The Disproportionality b/w liability and fault

-It is recognized that tort liability provides a power set of economic incentives and disincentives to engage in economic activity or to make it safer

-But liability for pure financial harm, in so far as it is proved vast and inherently unknowable in amount could create incentives that are unrealistic

-i.e. unbounded liability for foreseeable financial damage would made car insurance premiums too expensive for average driver

-& given the existing liability for physical injury, can it really be the case that even higher premiums are needed to make the public realize that driving is socially expensive and requires more incentive to be conducted safely?

-NOTE: Lord Symon in *Wagon mound* in talking about remoteness made a great connection b/w degree of fault and liability --> he claimed a small degree of fault should not lead to a great amount of liability

***While all these considerations are plausible and offer good policy support for court's reluctance, they are highly abstract and general, and have highly inaccessible empirical info that can validate or negate them SO courts can't weigh them or apply them case by case easily (pg. 399)

SO: *Courts have neither enforced once clear rule nor considered the matter case by case; instead, spoke of a general principle against liability for negligently caused financial harm while creating many exceptions*

-Exceptions designed to pick out broad categories of cases where the administrative and disproportionality problems intuitively seem insignificant --> I.e. an award of financial damages to one also caused physical harm b/c it wouldn't threaten a proliferation of law suits since plaintiff could sue anyways for physical harm

2. Comparing Barber Lines with Benson's "The Basis for Excluding Liability for Economic Loss in Tort Law" (1995) txt pg. 400:

*Financial loss arising from physical damage to something which the P neither owns nor possess is often referred to in these decisions as **"Relational Economic Loss"**

*The rule that precludes liability here became known as the **"Exclusionary Rule"**

- 1st example of "Exclusionary Situation" → defendant damages something in which the plaintiff may have a contractual interest and this impairs P's interest, causing him financial loss
  - -Ever since English case of *Cattle v. Stockton*, consistently held that in such circumstances D can't be held liable in negligence for the loss whether or not it was foreseeable

- 2nd example of "Exclusionary Situation" → A proprietary or possessory right entitles a person to exclude anyone else from using it without consent.
  - -If a plaintiff lacks a proprietary or possessory right in something, he has no legal standing to constrain a defendant from intentionally using it as the defendant sees fit, even if it impairs or interferes with P's interests; D can't be liable to P for such harmful consequences

- 3rd example of "Exclusionary Situation" → a contract; however, contractual rights are personal rights that are against a definite individual(s) so that there may be a contractual right against one person but that does not in itself imply that there is an exclusive right against anyone else.

Background Information before Canadian National Railway v. Norsk Pacific Steamship (Lecture)

- Many areas in which there are contracts are at play
  - -i.e. Thomas Minchella & Stevenson probably had contracts; whoever bought the ginger beer had a contract with Minchella
- What is the relationship b/w torts & contract?
  - -What if there is a contract between plaintiff and defendant? What impact does that have on tort liability?
    - -i.e. What if Donoghue bought the beer from Minchella? She would have a contract with him.
- A clause that is common in contracts today b/c there is a massive inequality in bargaining power b/w parties:

- **There will be a limit on recovery** → contract may say that anything that occurs under this contract our liability is limited to (price you paid for product for example)
  NOTE: problematic to i.e. Donoghue b/c if she paid a $1 for her ginger beer, her injuries may be a lot higher than that but will recover only that via the contract

- *Checo* case: **Majority held that you can have concurrent liability b/w torts & contracts; even if they are about exactly the same thing --> contract will not supersede Tort unless there is an express term that says that should be the case**
  - -There is no inequality in bargaining power in this case *(Checo)*
  - -Existence of the contract will not squeeze out tort law --> world is full of tort duties; contracts can add to that but it will only take away from it when it is explicit that it should
    - **NOTE:** This notion has massive ramifications in the effect it will have on contracts
      - -We learn that in contracts ordinarily people do not owe duty unless explicitly listed in contracts; but we know that isn't true by virtue of neighborhood principle b/c we do owe each other duties
      - -This becomes particularly difficult in Railway Case b/c it seems to be that they are bringing an action for what it is commonly thought to be contractual obligations

*****Looking onto cases going forward make sure to keep mind the relationship b/w torts and contracts (they run together)***

SIDE NOTE: Relational economic loss is a sub category of economic loss
-Relational relates to those losses that flow from contracts and whether they could be recovered

LEADING: Canadian National Railway v. Norsk Pacific Steamship (1992) (SCC) txt pg. 409

Case Ratio: Brings this situation into a "JOINT VENTURE" category → the plaintiff's operations are so closely allied to the operations of the party suffering physical damage and to its property that it can be considered a joint venturer with the owner of the property, so that the P can recover its economic loss even though they had suffered no physical damage to their own property (pg. 415)

Facts:

- A tug owned and operated by the Norsk Pacific Steamship Co. and Norsk Pacific Marine Services Ltd. (Norsk) negligently struck a railway bridge owned by Public Works Canada (PWC) near the mouth of the Fraser River in BC.
- Canadian National Railway (CNR) was one of several railway companies which held contracts with PWC to use the bridge. CNR was the primary user of the bridge (86% of total use) and the bridge was known locally as the "CNR Bridge". The bridge is the sole direct link between CNR rails on the north and south shores of the Fraser.
- The tug owners were familiar with the area and were at all times aware that the bridge was mainly used by CN and was essential to their operations.
- After the accident, it took several weeks to repair the bridge, during which time CN and other railways were forced to re-route traffic. This increased the cost of operations and reduced the freight capacity during that time (pg. 409-410)
- CNR sued Norsk for additional cost incurred as a result of the closure of the bridge
- Norsk stated that they are willing to pay for damage of bridge but they should not pay for the economic losses caused to CNR b/c this applies the classic *Weller* rule
- There is NO contract b/w PWC and Norsk

  -NOTE: There could be a simple tort action in play here that PWC (Canada) would sue Norsk for negligent damage of their bridge

  -They could also attempt to claim for the economic losses they would have otherwise have gotten from the people that pay a fee to use their bridge

  - CNR has a contract with PWC for the use of the bridge (powerful organization with sophisticated capabilities)

ISSUE: Should the contract b/w PWC and CNR have any effect on the claim CNR would bring against Norsk?

-NOTE: what is the nature of the contract they had and did they envisage such damage occurring and what the repercussions would be contractually?

-WE DO NOT KNOW ALL OF THESE DETAILS

Court analysis:

-Hold that this is a classic situation of a negligent act so the controlling framework will be the *Anns test:*

-Foreseeability

-The issue will primarily be proximity and if it will be sufficient

-Policy Reasons

Majority decision given by McLachlin:

-There is a spectre haunting tort law; that being unlimited liability (quoting Cardozo's liability in an indeterminate amount for an indeterminate time to an indeterminate class)

-The search for a principled mechanism of limitation has proved elusive --> controversial and disorderly (pg. 410)

-She gets into a major discussion on proximity

-May be usefully viewed not so much as a test in itself but as a broad concept which is capable of subsuming different categories of cases involving different factors
-Authorities suggest that pure economic loss is prima facie recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity b/w the negligent act and the loss.

-In determining whether liability should be extended to a new situation, courts will look to the factors traditionally relevant to proximity → rship b/w parties, PHYSICAL PROPINQUITY, assumed or imposed obligations, and close causal connection
-Where there is physical injury or damage, then there is a greater indication of there being proximity b/c one is close enough to someone or something to do physical damages to it → physical injury has the advantage of being a clear & simple indictor of proximity (pg. 411)

****BUT:** it should not be taken as the only indicator b/c it does not always indicate liability and the necessary proximity to found legal liability fairly in tort may well arise in circumstances where there is no physical damage (pg. 412)

***Goes through series of arguments in regards to the second stage of the test regarding policy reasons that would limit or negative the duty:** *Are there practical reasons why recovery of economic loss should be confined to cases where plaintiff sustained physical damage or injury ?*

(1) Comparative Evidence:

-Comparative historical perspectives provide little support for the need for a rule which confines recovery of economic loss to cases where plaintiff has suffered physical loss
-In common law jurisdictions of Canada where availability of damages for pure economic loss has been accepted, the twin spectre of unlimited recovery & unworkable uncertainty have NOT materialized
-Instead, it seems to instead have satisfies the public demand for justice

(2) Economic Theory:

- Premise that a certain type of loss should not be seen in terms of fault but as more or less the inevitable by-product of desirable but inherently dangerous activity; so it would be just to distribute its costs among all who benefit from that activity

- Three sub-arguments advanced by this premise:
  a. **<u>Insurance Argument →</u>** plaintiff is in a better position to predict economic loss consequent on an accident & so better able to obtain cheap insurance against the contingency

**She identifies a number of questionable assumptions this is dependent on (pg. 413)

b. **<u>Loss spreading argument →</u>** it is better for the economic well-being of society to spread the risk among many parties rather than place it on the shoulders of the tortfeasor alone

**She identifies a number of questionable assumptions this is dependent on i.e. this rationale can't justify the many cases where there is only one victim (pg. 413)

c. **<u>Contractual allocation of risk →</u>** focuses on ability of persons who stand to suffer economic loss due to damage to property or another, to allocate the risk within their contracts effectively with property owners

**She identifies a number of questionable assumptions this is dependent:

- assumes that all persons or business entities organize their affairs in accordance with the laws of economic efficiency
- assumes that all parties to transaction share an equality of bargaining power which will result in the effective allocation of risk
- overlooks centrality of person fault to our concept of negligence and the role it may play in curbing negligent conduct

Application to Case:

-Apply the ***Anns* test**; the right to recover by CNR depends on -

1. <u>Whether it can establish sufficient proximity or closeness:</u>
   -Rship b/w CNR & Norsk close enough to satisfy this stage, including but not only CNR's connection with property damaged and CN's own property being in close proximity to the bridge & can only be enjoyed via access from the bridge

- **<u>RULE</u>**: Brings this situation into a "JOINT VENTURE" category → the plaintiff's operations are so closely allied to the operations of the party suffering physical damage and to its property that it can be considered a joint venturer with the owner of the property, so that the P can recover its economic loss even though they had suffered no physical damage to their own property (pg. 415)

<u>Reiterating the rule:</u>

-General rule should be that there will be recovery b/w parties b/c they are in a common and joint venture b/w the two parties who certainly were not in unequal bargaining powers

<u>NOTE:</u> what about the remainder of user of the bridge making up the remaining 14% --> the consensus seems to be NO; big users seems to be

able to recover economic losses but smaller users can't; this seems an odd way to divide liability

2. <u>Whether the extension of the recovery to this type of loss is desirable from a practical point of view (Policy Considerations)</u> (pg. 415)
   -Held that it doesn't open floodgates to unlimited liability
   -Category is a limited one --> it doesn't include casual users of property or those secondarily & incidentally affected by damage done to property *(this goes back to small users & Hutch's concern with them not recovering)*
   -It has been applied in England and US without difficulty

DECISION: Recovery Should be Permitted.

<u>La Forrest (Dissenting):</u>

- There should NOT be recovery for economic loss; this should be the exceptional case
- For sound policy reasons, courts have established a clear rule ("Bright Line" Rule) that persons cannot sue a tortfeasor for suffering losses to their contractual rights with the owner of property by reason of damages caused to that property by the tortfeasor
- There may be exceptions to this rule **but there is no reason to exclude CNR** from the Bright Line rule in this case (should not recover from Norsk): (pg. 416)
  - Parties were well aware of the risk of bridge failure; CNR knew what it was doing
  - The said bridge had been damaged on a number of previous occasions
  - CNR is able to protect itself through the contract with the property owner AND to some degree through its contractual arrangements with clients & suppliers
    → It could have planned ahead for the case of unavailability of the property in question
- CN has a superior risk bearing capacity on the facts of the case: (pg. 420)
  → Better position to bear the loss than Norsk
  →It was at least as equally competent, if not more, in estimating the potential risks of bridge failure
  → Better position than PWC to estimate potential costs of bridge failure to THEIR operations while Norsk is poorly placed to estimate the value of the use of various people & companies get out of the bridges that cross the rivers its tugs sail on
  → CN better placed to protect itself from the consequences of those losses; "hard to imagine a more sophisticated group of plaintiffs than the users of railway bridges"
    -Have access to a slew of protective options i.e. first-party commercial insurance, self-insurance, contracts with bridge owners and with railway customers
- Denial of recovery places incentives on all parties to act in ways that will minimize overall losses

HYPOTHETICAL:

- What if it was a swing bridge and the ship gets stuck in the middle & it damages nothing, but the bridge is prevented from swinging back.
- What would the situation be there?
  - -There is a very subtle distinction here between the original circumstances of the case b/c ultimately it is the in-operation of the bridge that caused the economic loss, just arrived at differently; that being that there was no damage caused directly to the bridge
    - -How much was the property damage a crucial ingredient to this?
      - -If there is no physical damage the courts seem very fixated on not liking to compensate for economic loss
        - -This strikes back to McLachlin's point that physical damage is simply a really good indicator of there having been proximity, it is simply a good analytical tool; there is absolutely a chance that there would be liability b/c of proximity without there being physical damage

****NOTE:** McLachlin's judgement is muddy b/c we do not know WHERE the line will be drawn but we know that the line will be drawn

CNR v. Norsk Reading Notes

1. Martel Building v. Canada (2000) txt pg. 409

Iacobucci & Major JJ summed up the law on economic loss in the aftermath of *Norsk* as follows:

- As a cause of action, claims concerning economic loss are identical to any other claim in negligence so that the plaintiff must establish a duty, a breach, damage, and causation.
- Traditionally, common law did not allow for recovery of economic loss where plaintiff didn't suffer physical harm nor property damage --> this has been reconsidered overtime
- In an effort to identify & separate the types of cases that give rise to potentially compensable economic loss, La Forest J in *Norsk* endorsed those categories: (pg. 422-423)
  - 1-Independent liability of statutory public authorities
  - 2-Negligent misrepresentation
  - 3-Negligent performance of a service
  - 4-Negligent supply of shoddy goods or structures
  - 5-Relational economic loss --> economic loss suffered via a plaintiff's contractual relationship with a 3rd party to whom the defendant is already liable property damage

- In ***Bow Valley,*** McLachlin resolved the debate (b/w her differing approach with that of La Forest's) on how to recognize a contractual economic loss: She affirmed that recovery for Contractual Relational Economic Loss is **presumptively excluded** subject to categorical exceptions

Exceptions:

1) Where the claimant has a possessory or proprietary interest in the damaged property
2) General average cases (shipping cases)
3) Where the rship b/c the claimant and the property owner constitutes a joint venture

****THESE CATEGORIES ARE NOT CLOSED**

LEADING: Winnipeg Condominium Corp No. 36 v. Bird Construction (1995) (SCC)

Case Ratio : The reasonable costs of repairing the defects & putting building back into non-dangerous state are recoverable economic loss under law of tort in Canada (to prevent injury)

(citation)	***Winnipeg Condominium Corp No. 36 v. Bird Construction* (1995) (SCC) txt pg. 426**
Facts	-Winnipeg land developer (Tuxedo) entered into contract with general contractor (Bird-defendant) for construction of apartment building. Bird was to construct according to plans prepped by architectural firm of Smith Carter -Bird entered into subcontract with Masonry subcontractor (Kornovski) to complete masonry portion of work -Building converted to condominium, then Winnipeg Cond. Corp (WCC) became registered owner of land & building -WCC became concerned with exterior cladding of building (cracking) installed by Kornovski; retained inspection from structural engineers & Smith Carter (original architects) → they recommended minor remedial work but said building was structurally sound -Some time after, storey-high section of cladding fell from 9th storey to ground; WCC retained engineering consultants & had entire cladding replaced for +$1.5 million -WCC brought action against Bird (& Smith Carter & Kornovski) in negligence for inadequacies in design & workmanship -Bird filed notice for summary judgement & motion to strike WCC's claim b/c there was no reasonable cause of action
Issue	Can a general contractor, responsible for construction of a building, be held to be tortuously liable for negligence to a subsequent purchaser of the building when that purchaser is NOT in contractual privity with the contracting for costs of repairing defects arising out of negligence in its construction?
Decision	Appeal allowed in favour of the Plaintiff (WCC) → **the reasonable costs of repairing the defects & putting building back into *non-dangerous* state are recoverable economic loss under law of tort in Canada (to prevent injury)**
Reasons	<u>**La Forest Delivered Judgement -**</u> ***Applied Two Stage *Anns* Test:** <u>Stage 1</u> **-** Was there sufficiently close rship b/w parties so that in the reasonable contemplation of Bird, carelessness on its part might cause damage to subsequent purchaser of the building like WCC? • Reasonably foreseeable to contractors, that if they design or construct a building negligently & if building contains latent defects b/c of that negligence, that subsequent purchasers may suffer personal injury or damage to other property when those defects manifest themselves • Lack of contractual privity b/w contractor & occupiers of building at time the defect surfaces does not diminish the foreseeability of that potential • <u>POLICY CONSIDERATION Under Stage 1:</u> Maintaining a bar against recoverability for cost of repair for dangerous defects provides no incentive for Plaintiffs to mitigate potential losses & can encourage

economically inefficient behavior; allowing recovery serves a preventative function by encouraging socially responsible behavior

- Application to Case: Clear that masonry work on building was poor enough as to constitute a real & substantial danger to inhabitants & passer-bys
  - Bird agreed that WCC behaved reasonably in fixing the defects but that they shouldn't be held liable for cost of repairs; they quoted Lord Keith's argument in case of *Murphy v. Brentwood District Council* that cost of repair can't be characterized as recoverable loss b/c owner of defective article may simply discard it & therefore remove the danger
  - This court held that argument to be an unrealistic view of the choice faced by home-owners; most of them buy a home as a long term investment and very few will choose to abandon or sell it upon discovering a dangerous defect
- Stage 1 Conclusion: Contractors who take part in design & construction of a building will owe a duty in tort to subsequent purchasers if it can be shown:
  - That it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to health & safety of occupants
  - Where negligence is established & such defects manifest themselves before any damage to persons or property occurs, they should be liable for reasonable cost of repairing the defects & putting building back into non-dangerous state
- **NOTE:** this is a bit of a stretch in terms of proximity isn't it? They made a contract, if they benefit from increased value from property then they get to keep it but if they made a bad deal then why does the law of tort have to bail them out?

Stage 2. Are there any considerations that ought to negate a) Scope of Duty b) Class of Persons to whom it is Owed or c) the Damages to which a Breach may give rise to?

-Two concerns to be analyzed:

- Warranties respecting quality of construction are primarily contractual in nature SO they can't be easily defined or limited in tort
- Recognition of such duty interferes with Doctrine of Caveat Emptor (C.E.) → in the absence of an express warranty, there is no implied warranty of fitness for human habitation upon purchase of a house that's already completed at time of sale

**Both concerns held to be expression of the more traditional concern that allowing recovery for economic loss will open the doors to indeterminate liability of defendant (Cardozo quote)

> -Both contracts and caveat emptor give courts a mechanism by which to limit liability in Torts BUT La Forest finds no other justification for their use besides that

Analysis I:

- Duty to construct building according to reasonable standards & without dangerous defects arises independently of contractual terms b/w original owner and contractor (not relying on contractual standards of quality solely)
  - Since it is independent, there's no reason to allow contractor rely upon contract made with original owner to shield them from liability to subsequent purchasers
    a. It does not create a risk of liability to indeterminate class → limited only to very persons for whom the building is constructed (inhabitants) even if it includes successors in title lacking a contractual rship with contractor
    b. It does not create a risk of liability in an indeterminate amount → amount will always be limited by the REASONABLE cost of repairing the dangerous defect in the building and restoring building to a non-dangerous state

       **Burden of Proof will be on plaintiff to demonstrate there is a serious risk to safety, that it was caused by def's negligence, and the repairs were REQUIRED to remove the risk

    c) It does not create a risk of liability for an indeterminate time → contractor only liable for cost of repair during useful life of building; overtime it will be even more difficult for owners to prove at trial that any deterioration in building is a result of initial negligence of contract & not such

	normal wear and tear with time **Analysis II:** **-**Thus far, courts have not addressed the question of whether C.E. serves to negate a duty in tort (this must be resolved on the level of principle) -Assumption of this doctrine is that purchaser of building is better placed than seller/builder to inspect it and bear the risk that latent defects will surface requiring repair costs La Forest → simply not a responsive assumption to realities of modern housing market ; he quotes Supreme Court of New Hampshire case which lists several policy factors against rigid application of this doctrine • Latent defects will not manifest for a considerable period of time (original purchaser likely to have sold property to subsequent unsuspecting buyer) • Society increasingly mobile; contractor should know that a house they build may be resold in a short period of time so it's unrealistic to expect that warranty applies only to number of days original owner had the property • Subsequent purchasers have little opportunity to inspect & little experience/knowledge about construction • Builder already owes a duty to construct the building in a workman-like manner; an extension of the warranty to a subsequent purchaser doesn't change this basic obligation • Making first purchaser a bar to recovery may encourage sham first sales to insulate builders from liability • Contractors & builders, by virtue of their knowledge/skill/expertise are in the best position to ensure the reasonable structural integrity of buildings; imposing liability on them is an incentive for taking care in construction of buildings i.e. WCC acted diligently in seeking expertise to assess condition of building, but experts failed to detect the latent defects. This shows unreality of assumption that purchaser is in better place to detect & bear risk of hidden defects **Stage 2 Conclusion:** No adequate policy considerations exist to negate contractor's duty in tort to subsequent purchasers of buildings **NOTE:** Does this not go against La Forest's judgement in Norsk; he did not allow recovery then b/c he said these parties should deal with it contractually. Why did he change his mind here?
Notes	Is the duty of torts to bail out contractors (maybe in Donoghue situation but maybe not in this case) b/c it seems to me that WCC just seems to be wanting to go behind the contracts they established -They should have been better in making contracts b/c they could have had many remedial options as such -How would Bird be aware of WCC in the time that they are building when they are simply aware of Tuxedo (and their directives) via the contract? This makes the builders that much more vulnerable.
	In general NO ECONOMIC LOSS RECOVERY UNLESS IT IS DANGEROUS

HYPOTHETICAL:

1. Imagine you buy a toaster & it turns out to have a defect that renders it dangerous to users; can you recover the repair costs OUTSIDE the contract?
   -What would the owner of the toaster have to do to avoid injury? JUST NOT USE IT. Why would torts bail out the toaster owner outside the frame of the contract?
   -WCC is in a slightly different position b/c they can't simply not use the building
2. What if WCC was not a subsequent owner and Tuxedo wanted to bring an action against Bird as being the original owner? It could be said that there is certainly more proximity b/w them to satisfy the test but at the same time they were privy to the original contract and could have dictated the provisions that would cover such issues from arising. Wouldn't it be odd to say that Tuxedo shouldn't recover but WCC should?

Winnipeg Condominiums Reading Notes

1. Murphy v. Brentwood (1990) (HL) txt pg. 432

- This case was referenced in Winnipeg Condominiums; HL took a more restriction approach to liability for defectiveness of a building or chattel

FACTS:

- District council (defendant) negligently approved the design of the foundations of houses in a new housing development. Plaintiff purchases house from def. & later notices serious cracks; can't afford the cost of fixing the defect so P sold house for £35,000 less than what it would be worth if it was structurally sound; plaintiff sued unsuccessfully to recover amount from def.

COURT ANALYSIS:

- If a manufacturer produces and sells a chattel that's merely defective in quality (rather than one that makes it dangerous to persons/property), even to the extent that it is valueless for the purpose it was intended for, the manufacturer's liability at common law arises only under the terms of any contract to which he is party
- If a dangerous defect in a chattel is discovered before it causes any personal injury or property damage, because the danger is now known and chattel can't be safely used, the defect becomes merely a defect in quality → chattel is either capable of repair at economic cost or it is wortheless and must be scrapped
  - Loss in either case would be purely economic but it is NOT recoverable in tort in absence of special relationship of proximity which imposes on tortfeasor a duty of care
  - NO SUCH SPECIAL RSHIP EXISTS B/W MANUFACTURER OF A CHATTEL AND A REMOTE OWNER OR HIRER
  - These principles equally apply to buildings
- Economic losses are recoverable if they flow from breach of a relevant contractual duty, which in the absence of a special relationship of proximity would NOT be recoverable in tort
  - **EXCEPTION:** if the building stands so close to boundary of the building owner;s land that after discovery of dangerous defect it remains a potential source of injury to persons or property on neighbouring land or highway → owner ought to recover in torn from negligent builder the cost of eliminating that danger whether through repair or demolition (pg. 433)

- To hold that a builder owed such DOC to any person acquiring an interest in the product of the builder's work would be to impose upon him the obligations of an indefinitely transmissible warranty of quality.

2. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law"

His analysis in response to whether the SCC or House of Lord's analysis is more persuasive on the topic of economic/relational economic loss: (txt pg. 435)

- Sees a similar factor at play in *Winnipeg Condominiums* situation as was present in *Norsk*
- *Situation:* Plaintiff's financial loss consists in the cost of repairing something defective which he owns so that he can continue to use it without danger of injury to himself or to his property; defect resulted from defendant's lack of due care; no contract between parties.

- Among the several leading decisions that have recently denied liability in these situations the most clearly expressed is of Lord' Oliver's in *Murphy v. Brentwood:*
  - He characterized P's loss as purely economic even though situation involved risk of physical injury
  - Expenditure is incurred not in preventing an otherwise inevitable injury by in order to enable him to continue to use the property or chattel
  - P sought to protect an interest in being able to use something in a certain condition & the cost was for putting his defective property in shape so that he could have the benefit of its use in an improved condition
  - P may have owned the property he wished to restructure, but what he actually owned at the moment he discovered the defect & danger it posed was just defective property; the property in an improved condition was not his prevent property or possession
  - And P did not have a contractual right to future possession and enjoyment of the property in a non-defective condition

***Difficulty with P's claim is that it seems to be based on his having a protected interest in the use of something which he could not even establish any right as against the defendant

(Clearly then, Benson is endorsing the view of Lord Oliver in *Murphy)*

3. Bryan v. Maloney (1995) Australian High Court txt pg. 436

FACTS:

- Plaintiff, who was third owner of house, sued builder for negligence in constructing the house with inadequate footings; judgment in favor of P.

COURT ANALYSIS

- Court expressed there must be a requisite degree of proximity to give ruse to a duty to take reasonable care on part of builder to avoid the kind of economic loss sustained by P
- Likely that the only connection b/w the two parties is the house itself; this is a substantial link b/w it is a permanent structure and possibly the most significant investment which subsequent owner will make during his/her lifetime
- Obviously foreseeable by such a builder that negligent construction of the house with inadequate footings is likely to cause economic loss
- When such loss is actually sustained, & there is no intervening negligence or other causative event, the causal proximity b/w the loss & builder's negligence are not voided by either the lapse of time or change of ownership
- A subsequent owner is likely to be unskilled in building matters and real property investment → any builder SHOULD BE aware that a subsequent owner will be likely to assume that the house has been competently built and footings are adequate
- **POLICY REASONS** for recognizing such a rship:
  - Consideration that, by virtue of superior knowledge/skill/experience in the construction of houses, it is likely that builder will be better qualified and position to avoid, evaluate, and/or guard against financial risk posed by latent defect

DISSENT

- These interests are appropriately governed by law of contract; work to be performed, the quality and value of that work and cost of repairing defects in work done badly are all concerns of contract law
- Parties should fix their own rights and liabilities on issues of purely economic significance
- Opting to recognize a duty of care in these circumstances will impose on builder a transmissible warranty of quality
- In absence of compelling legal principle reflecting the enduring values of community, the courts shouldn't decide to extend remedies not available to remote purchasers of buildings without considering the cost to builders & economic effects of such an extension
  - Courts NOT suited to make such considerations; better left to parliament

White v. Jones (1995) (HL)

Case's Ratio: beneficiary should be extended a remedy under the Hedley Byrne principle → the assumption of responsibility by solicitor towards his client should be held in law to EXTEND to the intended beneficiary who may be deprived of his intended legacy as a result of solicitor's negligence

(citation)	White v. Jones (1995) (HL) txt pg. 438
Facts	-family fight induces father of plaintiffs (P) to execute a will cutting the plaintiffs out of his estate. -They reconcile & father instructs his solicitors (defendants) to prepare a new will leaving each P with £9000 -Solicitors neglected to act on these instructions for several weeks ; before new will was executed, father dies of a heart attack -P's sue the solicitors for the negligent delay which deprived them of the amount they each would have received from the new will
Issue	Can a beneficiary not privy to contract sue a solicitor for the duty he owed their client?
Decision	Appeal dismissed. (Judgement in favor of plaintiffs)
Reasons	Was the lawyer negligent in breaching the standard of care? The answer has to be yes -They did not operate in a timely fashion, otherwise we wouldn't be discussing any of this -Rship b/w lawyer & client is a contractual and fiduciary one as well (acting in the best interests of the other party) --> they breached that **NOTE:** what would the damages be here? -Lawyer admits he owed a duty to the client but technically the client did not experience any loss, with the exception of maybe a spoiled expectation (but they are dead, how would they even know about this; they went to their death thinking the wish has been fulfilled) -The law says that if you want to give your property away, you can do that but making a valid will that follows certain guidelines. If you don't' have a will, there is a system by which to distribute your money (usually goes to next of kin if alive, and if not it goes to state) -In this case, they did not follow the formalities. **-NOTE:** When the daughters make a claim, aren't you in fact imposing a theoretical will that did not exist? -Daughters argue that lawyers owed them a duty of care

	-But once again we arrive at the difficult question of what the loss was really in this? It is at most an EXPECTATION of 9000 b/c even if the father did NOT die, he may still have modified the will again to remove the daughters out of it) **Lord Goff -** ***Reasons why a duty should be owed by the a testator's solicitor to a beneficiary:** 1. If there is no duty, the only persons who might have a valid claim (testator and his estate) have suffered no loss by virtue of a negligently executed will. And the only person(s) who has suffered a loss (disappointed beneficiary) has no claim **This forms what he deems a gap in the law that must be filled 2. Injustice of denying such a remedy exemplified by the importance of legacies in society which allow the right of citizens to leave their assets to whom they please 3. A solstice's profession isn't harmed if such a liability is imposed b/c it is not unjust 4. The role played by solicitors allows for such a conclusion b/c in practice, the public relies on them to prepare effective wills -Hedley Byrne principle would apply easily here if considering the rship b/w solicitor and his client so that a solicitor who undertakes to perform services for his client may be liable for failure to exercise due care & skill in performance of those services -The case at hand is more difficult b/c the solicitor did not directly assume any responsibility towards an intended beneficiary -However, Lord Geoff recognizes the need to fashion a remedy & holds that in cases such as this, the beneficiary should be extended a remedy under the Hedley Byrne principle → the assumption of responsibility by solicitor towards his client should be held in law to EXTEND to the intended beneficiary who may be deprived of his intended legacy as a result of solicitor's negligence **<u>Limits:</u> does not apply in cases where the defect in the will comes to light before death of testator and testator either leaves the will as is OR continues to exclude previously intended beneficiary **<u>NOTE:</u>** his fixation is on how we can just allow professionals to negligently perform their functions. But it seems to me that he is running into a lot of doctrinal trouble here in terms of trying to make this stick from a legal framework -Court seems to be concerned with if lawyers were not found to be negligent here that this will really look like a case of special pleading for lawyers by lawyers **Lord Browne-Wilkinson:** -Agrees that appeal should be dismissed; Solicitors where under duty of care to plaintiffs arising from extension of the principle of assumption of responsibility as in *Hedley Byrne* -Even though present case is not directly covered by *Hedley,* it is nevertheless legitimate to extend the law to the limited extent using the incremental approach by way of analogy employed in *Caparo Industries* -Solicitor who accepts instructions to draw will knows the future economic welfare of intended beneficiary is dependent upon his careful execution of task -It is unacceptable that a technical rule of law should allow the defeat of the wishes of testators & beneficiaries generally by the negligent actions of solicitors without any remedy **Lord Nolan:** -Appellants were acting in the role of family solicitors; contract was with head of family. But it would be "astonishing" if solicitors owed duty of care to him alone & to the exclusion of other members of the family -Degree of proximity to plaintiffs could hardly have been closer **Lord Mustil (Dissenting):** -Does NOT accept proposition that solicitor owed to intended beneficiary a direct & free-standing duty

	to prepare a will simply because he was doing a job, that if promptly done, would produce a benefit to them -Does NOT accept that a special feature of present situation, the delay from the solicitor as a breach of his professional duty, adds validity to this claim -The cardinal feature in *Hedley Byrne* was that the defendants undertook the job for the plaintiffs. That is absent from case at hands & so it destroys the possibility of using that principle as a stepping stone towards the recognition of a cause of action in the present case. **Lord Keith of Kinkel (Dissenting):** -To allow plaintiffs` claim in present case would be to give them the benefit of a contract to which they were not parties

White v. Jones Reading Notes

1. Hill v. Van Erp (1997) (HC) txt pg. 445

FACTS:

- Testatrix (female will drafter) instructed defendant solicitor to draw up a will under which Plaintiff was a beneficiary; when executing will solicitor negligently had plaintiff's husband sign as an attesting witness which rendered the will null & void
- 5/1 Majority in court found in favor of plaintiff but for different justifications for liability

COURT ANALYSIS:

a) Brennan CJ- Liability could be based on plaintiff's loss even without the infringement of a right (pg. 446)

- It's not only in contract that damages may be recovered for loss of something to which plaintiff has no prior legal right
- A benefit that a plaintiff would have received but for the negligence of the def. is a loss, whether or not the benefit would have been gratuitous
    - It is sufficient if the links b/w the negligent act or omission of def and the plaintiff's loss of the benefit are established
- Therefore, the loss of that property is economic loss which the law of tort can recognize

b) Dawson J – "general reliance" combined with solicitor's assumption of responsibility sufficed for a tort duty (pg. 446)

- When solicitor accepts responsibility for carrying out a client's will intentions, he/she cannot be regarded as being devoid of any responsibility to an intended beneficiary
- Responsibility is not contractual but arises from solicitor undertaking the duty of ensuring the testator's intention of conferring a benefit upon a beneficiary
- Importance is in the position of a solicitor as a professional person of specialised skill and knowledge → important in regards to drawing up and executing of a will b/c the failure to exercise due care may affect not only the interests of the client but also interest of others whom the client has in mind as beneficiaries
    - There is a general reliance extending beyond their clients

- The solicitor's mistake is not easily discoverable by anyone other than themselves; they only have access to it along with the client; client can't be expected to review the will for regularity & even if they did can't be depended on to find the mistake
  - Defect likely to become apparent only after death of client at which point the error is irreversible
- This isn't to say that whenever a person's performance of a contractual obligation, if performed negligently, injure a third party's economic interests, that person owes 3rd party duty of care
  - Simply that in a case of the present kind, the duty is extended

c) Gaudron J – defendant infringed on a right of the plaintiff's (pg. 447)
- The intended beneficiary has lost a LEGAL right, the right to testator's estate, properly administered in accordance with the terms of the will
- There isn't anything novel about imposing liability in tort for the loss or impairment of a legal right
- Doesn't think the possibility of liability in an indeterminate amount for an indeterminate time and class will arise
- By virtue of the solicitor's position of control over drafting/execution of will, there was a rship of proximity b/w the P and Def such that Def was under duty of care to take reasonable steps to ensure the intentions of the will were not defeated

d) Gummow J – the rship b/w P and Def was equivalent to a contract, tort law could complete the contractual obligation (pg. 448)
- There was a contract here but Van Erp wasn't party it, but if it was performed than she would have benefitted
- Expression "equivalent to contract" can be understood as entailing a situation where
  i. The transmission of the property in question from client of def to P was the objective sought to be accomplished by the contract
  ii. P had no interest in the matter adverse to that of the client, yet default by def in performance of her contractual obligations otherwise sounds only in ineffective legal remedies

**Law of tort operates in such circumstances to complete & vindicate fulfilment of that contractual obligation

DISSENT:
McHugh J – in absence of the infringement of an existing right of the P, tort liability would disturd the doctrinal integrity of the law (pg. 449)
- True that solicitor owes DOC to testator, but there is no social, moral, or economic principle in which the law permits the beneficiary to be a free rider on contract b/w solic. And the client → can't be because careless conduct of solic. May cause economic loss to beneficiary & this has never been recognized in Anglo-Australian law
- *ANALOGY:* In free enterprise society, no one questions the right of the trader to increase its advertising or cut its prices even though that action is done witht the intention og taking the market share of its rivals
- Also, P suffered no loss in sense of damage to her person, property or existing legal rights → she seeks compensation for her failure to secure a benefit; damages for expectation losses are the mainstay of contract law

- Tort law on other hand imposes obligation on a defendant in respect of some existing interest of plaintiff
- There is an absence of a special rship b/w P and Def; the common law imposes no affirmative duty on a person to protect another in such circumstances
- Like cases must be decided alike and in accordance with a principle that transcends the immediate facts of the case; to give a beneficiary a remedy in negligence involves too great a departure from accepted doctrine
  - If change is to be made, should be done by the legislature

Psychiatric Harm

Introduction

- Has to be a recognizable psychiatric condition "mere grief is not enough"
- Need causal evidence, will always be a problem with psychiatric harm; with physical harm, much easier to establish
- **NOTE:** if you allow recovery for economic loss and statements, why nervous about extending this to psychiatric harm? B/c we still don't really understand psychiatric harm, suspicion is still there with a belief that depression is a "moral failing". This is a terrible way to think about it, can't just 'buck up'

LEADING CASE IN PSYCHIATRIC HARM IN CANADA (Mustapha):

Mustapha v. Culligan of Canada [case brief] (pg. 431)

SCC – 2008

Mustapha v. Culligan of Canada Ltd 2008 SCC 27, [2008] 2 SCR 114
Facts
• P suing for psychiatric injury sustained as a result of seeing dead flies in a bottle of water supplied by D. P became obsessed with the "revolting implications" and developed a depressive disorder with associated phobia and anxiety
Issue
• Can a manufacturer be held liable for psychiatric injuries as a result of their negligence?
Analysis
• Successful action in negligence requires P to demonstrate: 1) D owed him a duty of care 2) D's behaviour breached the SOC 3) P sustained damages 4) damages were caused by D's breach (not too remote) • Relationship is not novel, recognized since Donoghue v. Stevenson that manufacturer owes consumers a DOC • SOC was breached by the dead flies being in the water

• Personal injury at law connotes serious trauma or illness. It must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears of everyday life. Minor and transient upsets do not constitute personal injury and don't amount to damage. P suffered severe depression. Successfully showed existence of damages. • Remoteness: whether the harm is too unrelated to the wrongful conduct to hold the D liable? P must show that it was foreseeable that a person of *ordinary fortitude* would suffer serious injury from seeing the flies in the bottle of water. Failed to do this, expert evidence showed his reaction was "highly unusual" and "very individual:" • Standard for remoteness with psychiatric harm is not subjective, the law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals
Ratio
• The question is what a person of ordinary fortitude would suffer. Once P established the foreseeability that a mental injury would occur in a person of ordinary fortitude, the D must take the P as he finds him for purposes of damages.
Held
• P failed at remoteness stage of negligence test. Appeal allowed (for Crown).
Notes
• Majority by McLachlin CJC • Exception: if the D had actual knowledge of the P's particular sensibilities, the ordinary fortitude requirement need not be applied strictly, in such a case the P's injuries may be reasonably foreseeable and pass the remoteness stage • Court endorses Lord Lloyd in *Page v. Smith,* stating that it is not sensible to distinguish b/w physical and psychiatric injury—nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests of law • **NOTE**: problem with this case is that Mustapha was obsessed PRIOR to the incident. The kinds of people who seek this service were already a unique group. He didn't just come across the water bottle; he was seeking the specific service Culligan was in the business of providing→ was the injury in this sense foreseeable? To get to the thin-skull principle have to say there is a foreseeable injury (i.e. if you could say a reasonable person may suffer SOME psychiatric harm, principle would kick in and cover the extent of Mustapha's injuries). We have the "ordinary fortitude" category that we don't break down for psychological harm at remoteness stage, yet we do for "reasonableness" in physical injury analyses (i.e. age, expertise) etc. "Ordinary fortitude" principle ultimately undermines different mental health states

Mustapha @ Court of Appeal [Reading Notes] (pg. 434)

- Blair JA: Initially psychiatric injury was considered too remote for recovery unless accompanied by a physical injury
- In *Dulieu v. White & Sons*, court allowed recovery for psychiatric injury caused from immediate fear for ones family members
- In the UK they divided psychiatric injury cases into two categories:

  - 1) those in which the injured plaintiff was involved either mediately or immediately as a participant (primary victims)
  - 2) Those where the P is no more than a passive and unwilling witness of injury caused to others
- In *Page v. Smith (HL*) it was held that primary victims need only establish reasonable foreseeability of physical injury in order to recover, reasonably foreseeable psychiatric injury of some form is not necessary in such situations, BUT if a secondary victim must show that the psychiatric injury would have arisen in a person of normal fortitude and was reasonably foreseeable in order to recover
- *Mustapha* at the SCC has made it now that for both primary and secondary victims to recover it needs to be proven that the psychiatric injury would result in someone of normal fortitude and was reasonably foreseeable

Alcock v. Chief Constable of the South Yorkshire Police [case brief] (pg. 417)

House of Lords – 1991

Alcock v. Chief Constable of the South Yorkshire Police [1991] 4 AII ER 907 (HL)
Facts
• Appeals concerned with disaster at Hillsborough Stadium (Sheffield) • Football match where the South Yorkshire Police were responsible for crowd control • They allowed excessively large numbers of spectators in a particular area which resulted in a "crush", 95 people killed and over 400 physically injured • All plaintiffs in case at bar are claiming damages for nervous shock resulting in psychiatric illness which they allege was caused by the disaster (some were watching from TV and not actually physically at the scene of the disaster)
Issue
• Did the police owe a DOC to the secondary victims who suffered nervous shock from viewing the consequences of the police's actions? Can the boundaries of a cause of action for negligence be extended by: 1) Removing any restrictions on the categories of persons who may sue; 2) Extend the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on TV of the incident which caused the shock; 3) Modify the present requirement that the aftermath bust be immediate
Analysis
• Lord Wilberforce in McLaughlin v. O'Brian established that proximity needed to be limited by: • 1. The class of persons whose claims should be recognized; • 2. The proximity of such persons to the accident—in time and space; • 3. The means by which the shock has been caused • Proximity to the accident must be close both in time and space; direct and immediate sight or hearing of the accident is not required • Was reasonably foreseeable that family would be watching the broadcast but broadcaster have ethical standards to live up to and cannot focus on a recognizable individual suffering

(and if they did would constitute a novus actus and break the causal link)
Ratio
• In order to recover, the plaintiff must have reasonable proximity in space and time to the event that causes the shock, making them reasonably foreseeable sufferers of the event.
Held
• Appeals dismissed
Notes
• Court held that there are some instances where damages from psychiatric injuries suffered from the shock of viewing simultaneous broadcasting may be recoverable • Is necessary to reach decisions on a case-by-case analysis • Facts were summarized by Lord Keith of Kinkel • Judgment rendered by Lord Ackner • Distinguish b/w primary and secondary victims • **NOTE** court required proof of 'special' relationships for recovery, isn't the fact they went into a psychiatric decline enough to prove that they were close enough for this to happen?

Alcock v. Chief Constable [Reading Notes]

Lord Ackner:

- *McLoughlin v. O'Brian* established that (pg. 419):

    1) A claim for damages for psychiatric illness resulting from shock caused by negligence can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear or personal injury and;
    2) A claim for damages for such illness can be made when the shock results:
        a. From death or injury to the plaintiff's spouse or child or the fear of such death or injury, and;
        b. The shock has come about through the sight or hearing of the event, or its immediate aftermath

- To succeed in the present appeal, the plaintiffs seek to extend the above boundaries by (pg. 419):

    1) Removing any restrictions on the categories of persons who may sue;
    2) Extending the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on TV of the incident which caused the shock, and;
    3) Modifying the present requirement that the aftermath must be "immediate"

- The extent of liability for shock induced psychiatric illness has been greatly expanded over the last century due to a better understanding of mental illness and its relation to shock, plaintiffs are seeking to expand this further by the application of established legal principles (419)

Nature of the Cause of Action:

- Shock is no longer a variant of physical injury but a separate kind of damage
- Application of the reasonable foreseeability test is far from being operative, this is due to (pg. 420-21):

    1) Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if they psychiatric injury was not induced by shock (i.e. psychiatric illness caused by coping with the loss of a loved one is not recoverable)
    2) Even where the nervous shock and subsequent illness was reasonably foreseeable it has generally been held that damages for merely being informed of, reading, or hearing about the accident are not recoverable ("[a] psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential")
    3) Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages
    4) No authority establishing this liability because at some point there needs to be a limit on the DOC owed to third parties
    5) "Shock" in the context of this case, is the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. *This has yet come to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system*

The Three Elements

- Lord Wilberforce in McLoughlin v. O'Brian concluded there was a real need to limit the extent of admissible claims, in this context he considered 3 elements inherent to any claim that introduce the requirement of "proximity" as condition the DOC (pg. 421):

    1) The class of persons whose claims should be recognized;
    2) The proximity of such persons to the accident—in time and space;
    3) The means by which the shock has been caused

The Class of Persons Whose Claim Should be Recognized

- Why is DOC confined to the case of parent or guardian and child and does not extend to other relations of life, intimate associations and eventually bystanders?
- Whether the degree of love and affection in any given relationship is such that the defendant, in light of the plaintiff's proximity to the scene of the accident should have reasonably foreseen the shock-induced illness, has to be decided on a case-by-case basis (422)

The Proximity of the Plaintiff to the Accident (pg. 422)

- Proximity to the accident must be close both in time and space; direct and immediate sight or hearing of the accident is not required
- Only two of the plaintiffs at bar were at the ground
- Subsequent identification can be regarded as part of the "immediate aftermath", but Mr. Alcock was the earliest of identifications at 8 hours after the accident, not immediate
- Thus, no sufficient proximity in time and space to the accident

The Means by Which the Shock is Caused (pg. 422-23)

- Lord Wilberforce concluded that shock must come through sight or hearing of the event or its immediate aftermath but specifically left open whether some equivalent of sight or hearing (i.e. TV) would suffice
- It is reasonably foreseeable that parents, friends and family members would be watching the live broadcast of the events, however, due to TV ethics, there will not be pictures shown of recognizable individuals suffering, if there is, it would constitute a "novus actus" and break the chain of causation b/w the chief constable and the illness suffered
- Court leaves open possibility of simultaneous TV broadcasts (i.e. kids up in air balloon, broadcast about that, it bursts into flames) potentially more harmful than seeing it in person

Conclusion (pg. 423)

- The two plaintiffs on the ground claims' fail b/c they were not reasonably foreseeable as potential sufferers from shock-induced psychiatric illness, in default of very special facts that were not established
- The other plaintiffs, not being there, did not satisfy requirements of proximity

White v. Chief Constable of South Yorkshire Police [case brief] (pg. 423)

House of Lords – 1999

White v. Chief Constable of South Yorkshire Police, [1999] 2 AC 455 (HL)
Facts
• Plaintiffs are police officers who suffered psychiatric injury as a result of tending to victims at the Hillsborough soccer disaster
Issue
• Can liability for psychiatric injury be extended to "rescuers" and "helpers" as a class?
Analysis
• In *Alcock* HL decided that psychiatric injury should be limited by "control mechanisms", or arbitrary conditions which a plaintiff has to satisfy—were intended to keep liability within what was regarded as acceptable bounds • This view has not been universally accepted • To allow rescuers to recover would offend notions of distributive justice; the reasonable man may be confused why they could recover, but the family members of the victims (or secondary victims) could not • Under adverse conditions, goal of Court should be to preserve the general perception of the law as a system of rule which is fair b/w one citizen and another • Question is not whether a policeman should be disqualified in circumstances which he would otherwise recover, *it is whether there should be liability to rescuers and helpers as a class* • Must also take into account many members that fit this class are from occupations in which they are trained and required to run such risk, and as such, usually have the appropriate benefits if they should suffer such injuries
Ratio
• Such an extension would be unacceptable because it offends notions of distributive justice
Held
• Claim dismissed
Notes
• Lord Hoffmann for majority • Lord Goff, dissenting: it is misleading to think of one class of plaintiffs as being "better off" than another. The true requirement is that the claim of each plaintiff should be judged by reference to the same legal principles

Tame v New South Wales; Annets v. Australian Stations Pty [case brief] (pg. 426)

Australian High Court – 2002

Tame v. New South Wales; Annets v. Australian Stations Pty (2002), 191 ALR 449
Facts
• Plaintiffs are parents of a 16 year old boy who was working for the defendant as a "jackaroo" at their cattle station. The plaintiffs were reassured that their son would be supervised at all times. Unfortunately he was negligently sent off on his own, went missing and many weeks later was found dead in the dessert from dehydration and exhaustion

• Parents suffered psychiatric harm during the lengthy search for their son, it was not induced by sudden shock or direct perception of a disaster
Issue
• Can there be recovery for psychiatric harm that is a result of an event that is agonizingly protracted and not sudden?
Analysis
• **Gleeson J:** there is a danger in treating factual indicators of the presence or absence of proximity of relationships as inflexible and indispensible. Reasonableness defies rigorous categorization of its elements. P's and D relationship had sufficient proximity combined with reasonable foreseeability of harm to give rise to a DOC. Relationship b/w P's and D was of such a nature that it was reasonable to require the respondent to have in contemplation the kind of injury to the P's that they suffered. Liability in negligence should turn on proof of a recognizable psychiatric disorder, not on the aetiology of that disorder. • **Gummow and Kirby JJ**: The requirements of "sudden shock" and "direct perception" of a distressing phenomenon or its "immediate aftermath" have operated in an arbitrary and capricious manner. Emergence of a coherent body of law is impeded, not assisted, by such fixed system of categories. At base of justification for "control mechanisms" is a perceived distinction b/w physical injuries and psychological injuries**: 1)** that psychiatric harm is less objectively observable and more likely to be trivial or fabricated and is more captive to shifting medical theories **2)** the litigation is likely to operate as an unconscious disincentive to rehabilitation **3)** permitting full recovery risks indeterminate liability and increases class of persons who may recover and **4)** liability may impose an unreasonable or disproportionate burden on defendants. These concerns can also be applied to physical injuries, they recede for psychiatric injuries when you distinguish b/w emotional distress and a recognizable psychiatric illness. Law of negligence provides its own limiting device: P must establish fault, causation, lack of remoteness of damage etc.
Ratio
• Individuals may sustain recognizable psychiatric illness without experiencing shock. Cases of protracted suffering as opposed to "sudden shock" may raise difficult issues of causation and remoteness of damages; these difficulties should be dealt with reference to the principles of causation and remoteness, not through an absolute denial of liability. The P's physical and temporal proximity to the accident or its aftermath, or the means by which the P learns of it, should be irrelevant. A rule that renders liability on geographic and temporal distance of the P from the distressing phenomenon is apt to produce arbitrary outcomes and is also disjointed from the realities of modern telecommunications
Held
• Claim allowed for plaintiffs.
Notes

Greatorex v. Greatorex [case brief] (pg. 429)

UK Queen's Bench Division – 2000

Greatorex v. Greatorex [2000] 4 AII ER 769 (QBD)
Facts
• D was injured in a car accident caused by his own negligence, while unconscious trapped in his vehicle, fire dpt responded. His father was one of them, who went to his aid in the course of his employment, as a result he suffered severe long-term PTSD. Sued his son for negligently inflicting psychiatric injury.
Issue
• Can someone who negligently injures himself or herself be liable for the psychiatric injury sustained by another?
Analysis
• To impose such liability would curtail the right of self-determination and the liberty of the individual • First *Alcock* control mechanism means that such claims must of necessity be between two close relatives. Regrettably the suffering of close relatives for self-induced or natural reasons is an inherent part of family life. Only when they are injured by someone else does the incident move from everyday family life into the law of tort • Policy considerations around the functioning of the family, allowing this type of action can have adverse effects on familial relations •
Ratio
• Liability does not extend because it impinges on self-determination and liberty of the individual
Held
• Claim dismissed
Notes
• Cazelet J for majority

Wrongful Life

Introduction

- General principle is that a child not yet born who is negligently harmed can bring an action (confirmed in *Dobson v. Dobson*)
- 3 possible claimants in these cases: 1) Patient is bringing the claim 2) Partner of the patient is bringing the claim, or 3) the child is bringing the claim
- **NOTE:** things to consider: these are professionals in the business of doing these types of procedures who are well paid with 'whacking' insurance; socio-economic status of the parties injured; nature of these claims are pure economic losses; why should Doctors be in any better position than Stevenson, or the accountants? Should they not bear the huge consequences?
- In addition to the 3 possible claimants, these cases look at 3 things: 1) who's claiming (patient, partner, child) 2) What are they claiming for? (i.e. botched

surgery? Wrongful information?) 3) the extent of the claim (cost of pregnancy; maintenance; is the child disabled or not-disabled?)
- **NOTE**: does gender, race etc. have an effect on judicial functioning? Impacts from different lived experiences? Looks to the blatant difference in judges b/w HL and Hale at COA level (Hale is a woman)

LEADING CASE IN WRONGFUL LIFE IN CANADA (undetermined):

- A broad general principle has not been clearly defined across CAN
- Ontario has conflicting judgments: in *Paxton*, the ONCA took the DOC approach, holding that an infant P failed the Anns test at the remoteness stage (i.e. did not have a "close and direct" relationship with the Doctor and thus, could not recover→they then went on and also disclosed policy reasons why this should be so)
- Following this, in *Leibig* the court rejected this judgment as a general principle, arguing that *Paxton* and *Bovingdon* must be read in light of their precise facts, the issues they addressed, and in a proper legal context. **Thus, ultimately arguing that a general principle (that born alive child can sue for injury caused before birth) remains intact** (at least in Ontario)
- Most of the English cases cite *McFarlane* (leading case in UK); although, there were progressive decisions passed in *Parkinson*, and at the COA stage of *Rees* (by Hale) that allowed for recovery. In *Rees* HL cited *McFarlane* and overturned this
- Can use all other cases as persuasive authority

MacKay v. Essex Area Health Authority [case brief] (pg. 435)

English Court of Appeal – 1982

***MacKay v. Essex Area Health Authority* [1982] 2 WLR 890 (Eng CA)**
Facts
• Infant P born (dis)abled as result of mother getting German measles • D negligently misdiagnosed and did not inform the mother of the measles or the possibility of the child being born with (dis)abilities • Mother claims she would have aborted the fetus had she known • Infant P claims damages on ground that the D's failure to diagnose the disease was in breach of the DOC owed by them to her and are thus responsible for her injury (which was to be born)
Issue
• Do doctors owe DOC to born alive children for injuries they received naturally (no fault of doctors)? • Should the claim be struck out as disclosing no reasonable cause of action?
Analysis
• Doctor's owe a DOC to mothers and their fetus during pregnancy but that is not what is at issue in this case (child's injury was result of no action by the doctors, but natural cause) • The only supposed right infringed was to be aborted, DOC does not extend this far • To hold D's responsible would be to punish them for something they didn't do

• How can there be a duty to take away life? Court discusses possibilities where the life would be so "certainly awful and intolerable", but on facts of this case, this is not present here • Doctor owed DOC to mother to provide her with the opportunity of abortion, that DOC does not extend to the fetus • Policy considerations: would create a dis-valuing of the lives of those with (dis)abilities, also questions the sanctity of life • Floodgates: potential for (dis)abled children suing mothers for NOT aborting them • Main concern, how do you possibly measure the damages? Would be almost impossible to do so—would have to measure injured life against uninjured life
Ratio
• If there is no measure of damage which is not unjustified and indeed unjust, the courts of law cannot entertain claims by a child affected with pre-natal damage against those who fail to provide its mother with the opportunity to end its damaged life, however carless and unskilled they may have been and however liable they may be to the mother for that negligent failure
Held
• Appeal allowed (for D's)
Notes
• Judgment by Stephenson LJ • Infant P, wrongful life case

Zaitsov v. Katz [case brief] (pg. 438)

Israel Supreme Court – 1986

Zaitsov v. Katz (1986), 40(2) Piskei Din 85 at 116 (Israel SC)
Facts
• Infant P born with (dis)abilities as result of doctors negligence
Issue
• What is the proper measure for damages?
Analysis
• There is an inability to compare life and its absence. Damages are not measured on a comparison of life and non life, but non-injured life and injured life • The infant P was born with injuries as a result of the D's negligence, thus you evaluate the defect which is the damage the D is responsible for • The damage that the negligence caused the infant P and that the D is responsible for is not the very giving of life (infant does not have a right to non-life) but the giving of life with a defect
Ratio
• The essence of the harm is to be conceived not through a comparison of life with a defect and non-life, but through a comparison of life with a defect and life without a defect
Held
• Found for the Plaintiff
Notes

- Judgment by Barak J
- **In Hammer v. Amit [2012] 1327/07, SC of Israel reversed Zaitsov**:
- Rivlin VP: difficulty in determining the causal connection b/w negligence and the harm of a life with a (dis)ability flows from the fact that it is indisputable that the negligence of the D did not cause the (dis)ability, even with proper medical care the child worn have been born with them

"Rights, Justice and the Bounds of Liberty" – Feinberg (pg. 439)

- Focuses on the Williams v. State 1966 case
- Infant plaintiff suing state for being born out of wedlock to an incompetent mother
- Mother was patient at state institution (suffered mental illness) was sexually assaulted by an attendant which resulted in the P's birthing
- Come up against floodgates arguments: i.e. what if people start suing for being born a certain race, class, gender, to parents the don't like etc.
- Objection to this is that not all interests of a newborn child should or can qualify for prenatal legal protection, but only those very basic ones whose satisfaction is indispensible to a decent life
- COA rejected case on basis that the State did not owe a DOC to a person not yet conceived
- Author believes this judgment was too hasty: the State didn't owe a duty to a "shadowy creature waiting in its metaphysical limbo to be born" but it DID owe a DOC to the mother, to prevent her assault and rape, which resulted in a breach of the SOC, which also affected the daughter later born whose prenatal rights were thus violated
- Perhaps duty of the state is to anybody likely affected by its conduct
- Concurring judgment at COA by Kenneth Keating: damages awarded in torts are based on a comparison b/w the position the P would have been in had the D not committed the acts causing the injury. In this case that comparison is non life with an illegitimate life
- Cannot accept this comparison
- Will always be hard to assess damages of an injury that occurs at the moment of conception because the comparison is non-life, but perhaps an assessment made on admittedly arbitrary grounds would better serve justice than if no damages are awarded at all
- Talk of "right not to be born" is a compendious way of referring to the plausible moral requirement that no child be brought into the world unless certain very minimal conditions of well-being are assured, and certain basic "future interests" are protected in advance, at least in sense that the possibility of fulfilling those interests are kept open
- When a child is brought into existence when even those bare minimum requirements have not been met, he has been wronged

Paxton v Ramji [case brief] (pg. 441)

Ontario Court of Appeal – 2008

Paxton v Ramji 2008 ONCA 697, 92 OR (3d) 401

Facts

- Accutane (acne drug) that carries the risk of causing fetal malformation
- Dr. prescribed it to Paxton under assumption she wouldn't become pregnant (her partner had a successful vasectomy 4 ½ years earlier
- Unfortunately it failed just as she began using Accutane
- Baby born with considerable damage caused by the Accutane
- Sued Doc for negligence in prescribing Accutane to mother
- Because of risk of Accutane, manufacturer developed a "Pregnancy Protection Mainpro-C Program" (PPP) for doctors to implement before prescribing the drug to women of child bearing age
- Doc was aware of this (took a course on Accutane)

Issue

- Does a doctor also owe a tort law DOC to a future child of the doctor's patient?

Analysis

- Must go through Anns Test
  1) First establishes that this is a novel relationship distinguishable from mother-child relationship (as that is too unique of one to be comparable); also distinguishable from relationship negligent driver's as third party highway users owe Mother's (as Doc's relationship to mother and thereby the fetus is unique)
  2) Establishes that on facts of the case harm to the unborn child was reasonably foreseeable when there was a possibility of pregnancy (need to focus on foreseeability of harm, not conception)
- At next stage of Ann's test (proximity) case fails
  3) Proximity requires the relationship to be "close and direct", a doctors relationship to a fetus is inherently "indirect" as relationship is mediated through the mother
  4) Policy for not finding proximity: conflicting interests if DOC is owed to both mother and fetus, may result in "chilling" affect on Doc's (will be reluctant to prescribe drugs) takes away a mother's autonomous choice to use that drug etc.
- Thus, no prima facie DOC arises
- Don't have to go to third bar (residual policy considerations) but does
- Policy reasons for not Find a DOC: chilling affect on doctor, impact on woman's autonomy
- Reasons FOR finding a DOC:
  a. Child born with (dis)abilities as result of Doc's negligence won't be able to recover or receive compensation for damage suffered, cost of lifetime care, loss of income, pain and suffering etc.
  b. These costs are only somewhat mitigated by the claim the parents can make against the Doc
  c. BUT it is up to legislature to decide what to do in these circumstances and what sort of remedies should be available to such a child
  d. If no DOC, how to ensure Doc's maintain the appropriate SOC when prescribing teratogenic drugs to woman of child bearing age?

e. This is concern is met by DOC doc owes to mom (such as full information on potential risks, if breached she can claim damages) f. Other answer is Doc's have ethical standards they have to meet as a professionals • Thus, ultimately better to find no DOC, because even without it there are safeguards in place
Ratio
• Analysis of a case where an infant P is suing a Doc for negligence causing injuries before conception or while in utero are not necessarily "wrongful life" claims, but are better dealt as an inquiry into whether a DOC exists.
Held
• Trial judgment overturned. No DOC.
Notes
• Judgment by Feldman JA for the court • Infant P, DOC case • **NOTE:** this case went off in the wrong direction. Would have been better dealt under a SOC analysis. Easier to have establish that there IS a relationship and DOC owed b/w a doctor and infant P, but to negate on policy considerations. Feldman's inclusion of policy considerations at proximity stage of Ann's test will only make proximity more elusive. Hard to see the relationship b/w CN and Public Works as close as a "joint venture" in *Norsk*, but not finding a relationship b/w doctor and infant P. This case tries to say it is turning on the protection of the autonomy of women, yet it is the woman herself bringing the claim on behalf of her child. Analysis of the case is very doctor centered despite being done in the name of the woman

Paxton v. Ramji [reading notes]

Intro (pg. 441)

- Where a doctor is looking after a woman who is pregnant (or may become) the doctor owes a DOC to that woman as the patient
- Doc must always consider and advise the woman of the material risks of any prescription or procedure on a potential future child

DOC (pg. 442)

- Issue of whether a child born with birth defect should be entitled to recovery from a negligent Doctor has "tested the mettle" of many courts in CAN and internationally
- Typically courts struggle with assessing damages where the assessment would be based on a comparison b/w the value of the P's existence in a disabled state and the value of non-existence
- Courts in most foreign common-law jurisdictions have refused to recognize claims for wrongful life

- *MacKay* refused to recognized based on public policy and legal principle
- In the 3 states in the US that have allowed claims for wrongful life they have restricted damages to "special damages" such as extraordinary medical expenses, and have refused to award general damages for pain and suffering b/c of the impossibility of comparing existence with non-existence
- Wrongful life claims not the same as wrongful birth claims
- Actions for wrongful birth are brought by parents who claim that their child would not have been conceived or born but for the doctor's negligence (i.e. sterilization procedures gone wrong)
- International courts have generally allowed claims for wrongful birth but have divided over what damages are recoverable
- In CAN, where claims have been brought by children with disabilities, if taken from the vantage of "wrongful life claims" courts have held that such a claim should not be recognized by law
- BUT when not taken from this vantage point, Courts have concluded that a claim lies for the injury the Doc caused to the child before birth
- By asking whether or not the claim should be characterized as one for wrongful life or not, Courts have asked the wrong Q
- Need to as whether or not the Doctor owed the infant P a DOC (as under Ann's Test)

<u>Does the Claim Fall Within, or is it Analogous to, A Recognized DOC? (pg. 443)</u>

- Manitoba COA 2000 decision in *Lacroix* observed 2 categories of claims by children born with abnormalities:

1) Cases in which the abnormalities have been caused by the wrongful act or omission of another; and
2) Cases in which, but for the wrongful act or omission, the child would not have been born at all
    a. If the claim was in first category doctor would be liable for causing direct damage but if in the 2nd, no liability b/c it would be a wrongful life action

- In *Lacroix* Court decided no liability b/c child fell into 2nd category
- In this case can be argued both ways: on one hand, DOC owed by doctor was to ensure Paxton doesn't get pregnant (seems like wrongful life claim); on other, view taken by trial judge, DOC was to refuse to prescribe Accutane to Paxton (as a woman of child bearing age) and daughter would have been born healthily (444)
- This highlights how the categories illustrated in Lacroix are malleable and do not provide a rigorous analytical framework
- No settled jurisprudence in CAN on the question of whether a Doc can be in a proximate relationship with a future child who was not yet conceived or born at the time of the Doc's impugned conduct
- Thus, the proposed DOC does not fall into an established category of relationship giving rise to a DOC

- Nor is there an existing relationship that is analogous (i.e. a mother does not owe a DOC to her future child)
    - A woman's relationship with her child is unique and thus cannot be applied by analogy to the relationship of other persons to her future child
- Other potentially analogous relationship is a negligent driver (i.e. if child is injured while in womb and born with injuries can sue for damages)
    - This is also not analogous given a doctor's unique relationship to a mother's unborn child as a patient in a way not similarly owed by third-party highway users
- Thus, is a novel category and court must proceed with the 2-stage Anns test to determine DOC or not

Stage 1: Prima Facie DOC (pg. 445)

- *Reasonable Foreseeability:*
    - The potential future risk faced by children by prescribing the drug to woman of child bearing age is reasonably foreseeable given the PPP program
    - This has the potential to get way laid by focusing not on foreseeability of harm but of conception
    - Trial judge looked at it from foreseeability of conception standpoint (and decided Doc right in concluding she was not of child bearing age given husband's vasectomy
    - This outlook follows the line of argument that harm to the future child can't be foreseeable if the child is not foreseeable BUT this approach confuses the DOC with the SOC
    - If as a matter of law there is a DOC not to harm future children by prescribing Accutane to women of child bearing age, then Doc can meet the standard by doing everything he can to ensure she doesn't become pregnant while taking the drug
    - **Of course if there is no one to whom a duty is owed can there be a DOC, BUT as long as there is a potential for a future child, the harm is reasonable foreseeable**
- *Proximity:*
    - It is policy considerations that militate against finding a relationship of proximity
    - Irreconcilable conflict of owing a DOC to the mother and the fetus: interests may be in conflict
    - Policy: chilling affect on doctors, may stop prescribing certain drugs for fear of being sued
    - Could also then deprive women of the autonomous choice of choosing to take certain drugs (if the Doc doesn't even propose it to them)
    - (above was all part of the first policy consideration)

- 2) proximity must be "close and direct" yet a doctor's relationship with an unborn child is necessarily indirect → the relationship is "mediated" through the patient
- Because woman is the autonomous decision maker, they neither make the decision on behalf of the future child, nor do they owe them a DOC
- The relationship and DOC owed by the Doc to the mother prevent a relationship of the requisite proximity b/w the doctor and future child b/c the interests of the mother and her future child may possibly conflict
- Thus NO prima facie DOC arises

Stage 2: Residual Policy Considerations (pg. 448)

- No need then to go on to this stage of test BUT if you had to:
- Recognizing this DOC would impact the Doc's relationship to the patient
- Would also impact a woman's autonomous choice to abort a fetus (how could Doc owe DOC to both?)
- Also bad policy outcomes of NOT recognizing this relationship:
  - Child born with (dis)abilities as result of Doc's negligence won't be able to recover or receive compensation for damage suffered, cost of lifetime care, loss of income, pain and suffering etc.
  - These costs are only somewhat mitigated by the claim the parents can make against the Doc
  - Up to legislature to decide what to do in these circumstances and what sort of remedies should be available to such a child
  - If no DOC, how to ensure Doc's maintain the appropriate SOC when prescribing teratogenic drugs to woman of child bearing age?
  - This is concern is met by DOC doc owes to mom (such as full information on potential risks, if breached she can claim damages)
  - Other answer is Doc's have ethical standards they have to meet as a professional
- Therefore without imposing a DOC on doc's to unborn children there are still safeguards in place
- Trial judge erred in law in finding Doc liable to future child
- This conclusion does not turn on this being a claim for wrongful life (b/c it is not) it is a Q about DOC

Leibig v Guelph Hospital (pg. 450)

Leibig v Guelph Hospital, 2010 (ONCA) 450

- **Facts:** infant P injured during child birth resulting in cerebral palsy, allegedly due to the negligence of the D's

- Court highlights that the general principle has been that an infant, once born alive, may sue for damages sustained as a result of the negligence of healthcare providers during labour and delivery
- ONCA decisions in Bovingdon v. Hergott (2008); and Paxton v. Ramji (2008) took different approaches that is a fundamental change to the law
- In Paxton, court cast the issue in terms of a DOC to a child "not yet conceived or born" D's in this case want the court to rely on a strict reading of this
- Court rejects this, says that Paxton and Bovingdon must be read in light of their precise facts, the issues they addressed, and in a proper legal context
- **Thus, general principle (that born alive child can sue for injury caused before birth) remains intact**
- Court states that a common law court should be cautious about laying down principles or rules that are not required to decide the case at hand (sometimes not possible to have an over-arching principle that solves all cases)

Kealey v Berezowski [case brief] (pg. 451)

Ontario General Division – 1996

Kealey v Berezowski (1996), 136 DLR (4th) 708 (Ont Gen Div)
Facts
• Doctor negligently performed a tubal ligation with the result that the P became pregnant and gave birth to a healthy child
Issue
• Can the birth of a healthy child constitute an 'injury'?
Analysis
• There are 3 principal approaches the Courts have used in cases of wrongful pregnancy: 1) Total recovery for all foreseeable damages based on ordinary principles of recovery in tort law 2) The "offset/benefits" approach where recovery is permitted for birth costs as well as the consequent economic costs of child-rearing, BUT recoverable damages are offset by the "benefits" which rearing a child normally brings its parents 3) The "limited damages" approach which permits recovery for the unplanned pregnancy but no the unplanned child • First approach counter intuitively assumes the birth of a healthy child is an injury • Parents have high combined income, ended up being happy about having the unplanned child, could care for her etc. • If focus of tort law is solely foreseeability these facts wouldn't matter, but If its also about compensating injuries they may be important • 2nd approach is also not good because the "benefits" could completely offset any possible damages • This case is not determinative for all cases (i.e. result may be different if the parent's couldn't have supported the child, a hereditary they were trying to avoid passing to a child was past on, they didn't love the child etc.

Ratio
• The general principles for the award of damages for child-rearing costs should evolve as cases present themselves→ this will create some uncertainty but will allow for the development of sound rules appropriate to the varied circumstances which can arise in wrongful pregnancy cases
Held
• Awarded General damages of $30 000
Notes
• Judgment by Lax J. Ended up endorsing the 3rd option "limited damages" approach, but explicitly said it will be different on a case by case basis • P is patient mother, seeking child-rearing costs

McFarlane v Tayside Health Board [case brief] (pg. 454)

House of Lords – 2002

McFarlane v. Tayside Health Board, [2002] 2 AC 59 (HL)
Facts
• P's already had 4 children; husband underwent a vasectomy and was informed that his sperm count was negative. Wife ended up pregnant, gave birth to daughter • P's recovered for the discomfort and extra cost associated with the pregnancy, but not for the costs of maintaining the child
Issue
• Can P be allowed full recovery for 'pure economic loss' of having an unplanned child due to a botched vasectomy? (i.e. is seeking recovery for the cost of child rearing)
Analysis
• **Lord Slynn**: highlights that when it is economic loss the proximity test is of a higher threshold (foreseeability is not enough) • **Lord Stryn**: distributive justice approach, does see there as being a causative link in proximity, but this is negated by policy consideration that the birth of a healthy child is a benefit • **Lord Hope**: question of law not social policy, also states that economic loss has a higher threshold for proximity, sees recovery as unfair, P's would be getting too much, cost doesn't outweigh benefits and is thus disproportionate to the negligence • **Lord Clyde**: expense of child rearing is wholly disproportionate to the negligence • **Lord Miller**: question of law not morality (but then goes on to say that it would be morally reprehensible for parents to argue that the child is more trouble and expense than it is worth) thinks the law should see the birth of a healthy child as always a good thing, also sees disproportionality b/w the wrong and remedy. But, sees the P's as still suffering a harm (loss of their autonomous choice to limit size of family) so awards damages of a 'conventional sum' not to exceed 5 000 pounds
Ratio
• The law should see the birth of a healthy child as a good thing. Cannot recover for the cost of

child rearing
Held
• No, cannot have full recovery. 5 000 pounds in damages for lost autonomy
Notes
• Husband is P, seeking child-rearing costs

McFarlane v Tayside Health Board [Reading Notes]

- Lord Slynn (pg. 454):
  - Concerned only with liability for economic loss
  - Not enough to say the loss is foreseeable
  - In relation to economic loss, in order to create liability there may have to be a closer link b/w the act and the damage than foreseeability provides to create liability
- Lord Steyn (pg. 454):
  - On corrective justice approach, parents must succeed (they wronged her and must indemnify her)
  - But, under distributive justice, would require spreading the losses amongst society
  - Average person would be against remedies for the child's upbringing (until about 18), see the birth of a healthy child as a good thing, moral concerns about parents arguing the child is more trouble than its worth etc.
  - Believe it unrealistic to say the reasons parents don't recover is b/c there is no loss or causative link→ there is, the real reason they don't recover is distributive justice
  - Tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven
  - Wants to take the distributive justice approach, which doesn't allow recovery for costs of upbringing
- Lord Hope (pg. 455):
  - Might be thought that the extent of damages claimed for upbringing are disproportionate to the extent of the negligence
  - Question before the court is one of law not social policy
  - If the law is unsatisfactory the remedy is in the hands of the legislature
  - It is not suggested by the law that recovery doesn't come for rearing of children due to remoteness, the costs associated are foreseeable but in purely economic claims that is not the only criterion
  - There must be a relationship of proximity b/w the negligence and the loss which is said to have been caused by it and the attachment of liability for the harm must be fair, just and reasonable

- Doesn't think its fair, pursuers would be getting too much and not giving anything back to the wrongdoer for the benefits of having a child
- Value of these benefits is incalculable (but costs are)
- Doesn't see the cost ever outweighing the benefits
- This type of economic loss falls outside of the necessary ambit of DOC for recovery

- Lord Clyde (pg. 456)
  - The offset and benefits analysis is attempting to set off factors of a different character against themselves that does not accord with principle
  - Like requires to be offset against like
  - i.e. a parent's claim for the death of their child is not off-set by the savings in maintenance they will make
  - Sees this approach as requiring the parent to make the argument that the child is more expensive than its worth
  - Reasonableness includes a consideration of proportionality b/w wrongdoing and loss suffered
    - Expense of child rearing would be wholly disproportionate to the doctor's culpability
- Lord Millet (pg. 457)
  - As this is an economic claim, comes under *Hedley Byrne* principle
  - DOC judged on a tighter scale
  - Doesn't think the question should depend on whether the economic loss is characterized as pure or consequential
  - Daughter's birth was exactly what the D's professional services were called upon to prevent
  - In principle then, any losses occasioned thereby are recoverable however they may be characterized
  - Morality should play no part in this discussion
  - Not convinced by Lax in *Kealey v. Berezowski*: parents aren't claiming that they have sustained loss by the impairment of their ability to discharge their existing liabilities, they claim they have sustained loss by the incurring of an additional liability
  - Also doesn't see the remedy as disproportionate to the wrong
    - Comes back to the idea that the result was exactly what the operation was sought to prevent
  - Law must take the birth of a healthy child as a blessing
  - Society must regard the balances of losses and benefits as ultimately beneficial
  - Morally offensive to regard a baby as more trouble and expense than its worth
  - Sees the advantages and disadvantages of parenthood as inextricably linked
  - Law insists that he who takes the benefit must also take the burden

- Sees that the parents still suffered some harm (i.e. not being able to have their autonomous choice of limiting the size of their family)
- Awards them a 'conventional sum' to not exceed 5 000 pounds

Cattanach v Melchior [case brief] (pg. 458)

High Court of Australia – 2003

Cattanach v Melchior (2003), 215 CLR 1
Facts
• Doctor's negligent resulted in a pregnancy and birth of a healthy 3rd child to the P's
Issue
• Are damages recoverable for child-rearing?
Analysis
• **McHugh and Gummow JJ**: it is incorrect to say that the damage the P's suffered was the parent-child relationship coming into existence→ this examines the case from the wrong perspective. In tort law damage is either physical injury to person or property or the suffering of a loss measurable in money terms or the incurring of expenditure as the result of the invasion of an interest protected by law. In this case that expenditure is the future creation of a parent-child relationship. The unplanned child is not the harm, what was wrongful was not the birth of the child but the negligence of the doctor. Awarding such damages does not require the court to balance the 'monetary value of the child" against the cost of maintaining the child. In assessing damages impermissible to balance the benefits of one legal interest against the loss occasioned by a separate legal interest, benefits of having a child are irrelevant to the head of damages that compensates for the maintenance of that child. The proper head of damage to balance with is the financial damage the parents will suffer as the result of their legal responsibility to raise the child • **Kirby J**: judges have no authority to adopt arbitrary departures from basic doctrine. They also can't, in a secular society, on the footing of their personal religious beliefs or "morals" make assessments that are concealed as legal principle or legal policy. The application of the general rule, requiring the tortfeasor to pay victims of wrongdoing for the reasonably foreseeable consequences of any proved negligence, obliges the inclusion in the recoverable damages of a sum for the costs of child-rearing • **Callinan J**: the reciprocal joy and affection of parenthood have no financial equivalence to the costs of rearing children, one is not the substitute of the other. That a negligent person should pay furthers the ends of justice
Ratio
• Parents can recover damages for child-rearing, has nothing to do with morality, benefits of parenthood are separate legal interests to the concern of maintenance
Held
• Parent's were allowed to recover expenses for child-rearing until he was 18
Notes

Parkinson v St James and Seacroft University Hospital [case brief] (pg. 461)

England and Wales COA Civil Division – 2002

Parkinson v. St James and Seacroft University Hospital NHS Trust [2002] QB 266 (Ca Civ Div)
Facts
• Doc negligently performed a sterilization procedure on a woman who later became pregnant • She already had 4 children and could not afford another, husband couldn't deal with the strain of supporting 5 children and left 3 months before birth of the child • Woman was told there was a possibility the child would be born with (dis)abilities but had the baby anyways, it was born with symptoms of autism • Acknowledged that the autism was not a result of the doc's negligence • P claiming for child's maintenance
Issue
• Can a P, who gave birth as a result of a negligent sterilization procedure claim damages for maintenance of the child?
Analysis
• Law of tort puts more emphasis on one's right to physical autonomy and the right to not be subjected to bodily injury or harm, economic interests come much lower than this • In the middle are cases where the invasion of bodily integrity has caused not just physical injury but also economic loss • When the wrong results in conception and childbirth, they are none the less an invasion b/c they are the result of natural processes • With pregnancy comes physical can emotional changes and with those changes a curtailment in personal autonomy • It is not reasonable to expect any woman to mitigate her losses by having an abortion • Birth brings pregnancy to an end but it does not bring the changes brought on by pregnancy to an end • Law recognizes that a woman may not recover her pre-pregnancy psychological health for at least 6 weeks • The invasion of mother's autonomy also doesn't stop with birth • Adoption is also not considered a reasonable option to be put upon women • Parental responsibility not just financial • Analysis needs to give disabled children same worth while acknowledging that they cost more • Argument is that the major damage was caused at conception; this is what the P's sought to prevent • Conception is where losses start but they don't end here, D's also undertook to prevent pregnancy and childbirth • Normal principle is that all losses, past, present or future, foreseeably flowing from the tort are recoverable • Second principle is that the "deemed benefits" only begin when the child is born, which

denies the claim in respect of "normal children" • If object of operation was to prevent that particular mother becoming pregnant, the proximity b/w her and the D is as close as it can be • If there is a sufficient relationship of proximity b/w the D and the father who not only has but meets his parental responsibility to care for the child, then the father too should have a claim
Ratio
• Any disability arising from genetic causes or foreseeable events during pregnancy (like rubella, or oxygen deprivation) up until the child is born alive, and which are not *novus actus interveniens*, will suffice to found a claim
Held
• Claim allowed.
Notes
• Judgment by Hale LJ • Also ruled on possibility of a father P: If there is a sufficient relationship of proximity b/w the D and the father who not only has but meets his parental responsibility to care for the child, then the father too should have a claim

Rees v Darlington Memorial Hospital [case brief] (pg. 465)

House of Lords – 2003

Rees v Darlington Memorial Hospital NHS Trust, [2003] 4 All ER 987 (HL)
Facts
• P mother had genetic condition that was causing her to go blind • She decided she would not be able to take care of a baby if she were to get pregnant after becoming blind; sought sterilization procedure that was performed negligently • Became pregnant and gave birth to healthy child • Claiming for maintenance of the child • COA held that just as the extra costs involved in discharging that responsibility toward a disabled child can be recovered (*Parkinson*), so too can extra costs involved in a disabled parent discharging that responsibility toward a healthy child • This was reversed by the HL
Issue
• Can a disabled mother claim maintenance for a healthy child that resulted from a negligently performed sterilization surgery?
Analysis
• Lord Millet: disability is best dealt by the government, funded by tax payers, not the responsibility of a private citizen whose conduct has neither caused nor contributed to the disability. *McFarlane* holds that maintenance of healthy child by an unimpaired parent do not sound in damages. Sees the award of 'extra' costs attributable to the fact that the parent is disabled is an award of damages for the disability. Believes care must be taken not to do this. The difficulty in it is that the costs associated with the maintenance of the child and the disability are intertwined (i.e. if she has to employ someone to help raise the child, result of

both the child being born and her disability)→ sees this as a single cost with composite causes. Sees the COA's decision as destructive of the concept of distributive justice, thinks there approach obscures the line to be drawn b/w costs that are recoverable and those that are not. Should be drawn b/w those costs which are referable to the characteristics of the child and those of the parent.
Ratio
• Proper outcome in these cases it to award parents a modest conventional sum by way of general damages, not for the birth of the child but the loss in personal autonomy (right to limit size of family) • In a straightforward case damages should not exceed 5 000 pounds, one at hand was unique, awarded 15 000 on the circumstances
Held
• Overturned COA ruling. 15 000 pounds in general damages
Notes
• Lord Steyn: does not agree with the 'conventional sum', believes judges don't have authority to create such a remedy, would be better dealt by the legislature • **NOTE:** if Parkinson is upheld as a good decision, why can't this case follow it?