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INTENTIONAL INTERFERENCE WITH THE PERSON

Intentional torts protect an individual's physical integrity. Battery, assault, and false imprisonment are derived from the writ of trespass, and therefore characterized by direct interference with the person.

Conduct must be intentional, i.e. plaintiff must demonstrate that the defendant intentionally engaged in the conduct prohibited by the tort (subjective state of mind). Intent is not synonymous with motive, but motive can help show intent.

Intent is proven by an articulation of intent, prior threats to indicate motive, conduct during the incident, the credibility of the accused, an assessment of what the accused might have been thinking.

Basic Principles of Liability

A defendant will be held liable only if his conduct is both voluntary and intentional.

Volition

Volition is present if D exercised control over his physical actions. A D's act is voluntary if it is directed by his conscious mind.

Smith v. Stone

D pleads that he was carried upon the land by force, and violence of others, and was not there voluntarily. Therefore, it is the trespass of the party that carried D upon the land, and not the trespass of D.

This is an exception. Generally you would infer if someone is on your property, they are committing a trespass because it is assumed they came there voluntarily (you can infer intention from the conduct).

In *Stokes v. Carlson*, the judge defined involuntary actions to include reflex reactions, convulsive movements, and movements during sleep and unconsciousness.

Intent

Intent: an actor's desire to bring about the results or consequences of his act, rather than his desire to do the physical act itself. A single act may bring about several consequences, only some of which may be intentional and only one of which may be relevant to the tort in question.

The essential issue is whether D desired to bring about the specific consequences giving rise to the tort in question.

Imputed (Constructive) Intent

The concept of intent includes not only the desired consequences of an act, but also those unintended consequences that are certain or substantially certain to result from it.

In *Bielitski v. Obadiak* (1922) court applied a broad test, based in part on the criminal law presumption that individuals are deemed to intend the natural and probable consequences of their acts.

Transferred Intent

Transferred intent is invoked when D intends to commit an intentional tort against one party, but unintentionally commit an intentional tort against P. The doctrine also applies if D intends to commit one type of intentional tort against P, but unintentionally commits another.

Related Issues: Motive, Mistake, and Accident

Motive

The concept of intent refers to the actor's desire to bring about a particular consequence, not his motive or reason for wanting that result to occur. P must prove the conduct was intentional, but P does not have to establish that D had a blameworthy motive. Unlike intent, motive is generally not an element of the cause of action.

Motive is an essential element of some intentional torts derived from the writ of trespass, e.g. malicious prosecution.

A praiseworthy motive is not a defence, but it may be an element of a valid defence.

There are several ways in which the parties' motives may be taken into account in assessing damages; a highly blameworthy motive may provide grounds for awarding aggravated or punitive damages.

Duress

Duress will neither negate volition and intent, nor serve as a defense. Rather, it is simply one factor that courts may consider in assessing damages.

Gilbert v. Stone

D pleads that he committed the trespass for fear of his life, and wounding of twelve armed men, who threatened to kill him if he did not go to P's house and take the horse. Judge decided that D was still held liable (allows the party injured to have some satisfaction since he cant go after the person who did the threatening).

Therefore, if someone has control over their actions and committed the tort, but did so for good reasons, that does not negate the intention (but it might be considered in assessing damages).

Provocation

No planning involved, must be in direct response to an act or insult, actions and behaviour have to show a loss of self-control, must consider how the person in the situation handled the provocation, not the reasonable person (will usually consider whether the provocation would make the reasonable person lose control, and then move to a more subjective test).

Mainly a factor in reducing compensatory damages.

Miska v. Sivec

Facts: P sued for injuries that he sustained when D intentionally shot him. D argued self-defence; P had cut him off and blocked his car on the road, P then emerged from the car and threatened him with a knife and iron bar. D fled to his house, fired two warning shots, P was injured after he moved into the line of fire. P denies the series of events. There was evidence of bad blood. P won at trial, D appealed.

Issue: was the defence of provocation applicable?

Ratio: Where there is evidence of provocation the jury should be instructed to consider it in assessing damages for assault. The conduct of P to be capable of being considered provocation must have been such as to cause D to lose his power of self-control and must have occurred at the time of or shortly before the assault.

Whether there was evidence of provocation, incidents occurring between the parties prior to the night of the assault are not to be considered. There was no evidence of any sudden passion, lack of self-control or any annoyance. D's conduct was careful and deliberate and belied the existence of any sudden and uncontrolled passion.

Mistake

A mistake occurs when D intends the consequences of their acts, but those consequences have a different factual or legal significance than that contemplated. Has no effect on the issue of intent, so it's not relevant in establishing a cause of action.

The impact of a mistake of fact on the validity of the defences varies. A D who strikes P in a reasonable but mistaken belief that the latter is about to attack may plead self-defence. However, an honest but mistaken belief that P consented provides no defence.

Hodgkinson v. Martin

Facts: D laid his hands upon P and wrongfully put him out of the office premises in question without using any more force than was necessary, the act was unlawful and therefore a trespass, but was done in the sincerely mistaken belief that D was justified in the protection of the interests of the Crown. (Mistake in law, not fact- D believed his actions were lawful)

Issue: Amount of damages that should be awarded

Ratio: While the sincere yet mistaken belief of D in the propriety of his illegal action is no excuse, it mitigates his liability, and must be taken into consideration where P has only suffered a very minor injury. (Judge reduced damages from \$500 to \$10).

Battery

Law broadly protects a person's autonomy and physical integrity. Battery involves physical interference with P that would be harmful or offensive to the reasonable person (i.e. physical interference without consent).

Involves: 1) a certain conduct; 2) that is intentionally engaged in (subjective); 3) a reasonable person would find it harmful or offence (objective component)

Bettel v. Yim

Facts: D owned and operated a variety store. P were lighting matches and throwing them in the store, lit a bag of charcoal. D then grabbed P by the arm, P denied that he set the fire, D grabbed him firmly by the collar with both hands and began shaking him. His purpose was to obtain a confession from P before he called the police D shook P two or three times and then his head came down and struck P's nose (accidentally). D then let him go, obtained Kleenex for him, and helped him to his feet.

Issue: Did D commit battery? (Intentional infliction upon the body of another of a harmful or offensive contact)

Holding: D intentionally grabbed P and shook him. This constituted battery. While he was shaking P, D's head injured P's nose. This was the end result of a brief chain of events set in motion by D. Subjectively, D did not intend to strike P's nose. Legally, because it was the result of D's intentional interference with P, responsibility for the injury which it caused must fall on D.

Ratio: The test is whether D was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and a more serious harm befalls P than was intended by D, D, and not the innocent P, must bear responsibility for the unintended result. If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference.

The Burden of Proof in Sexual Abuse Cases

Non-Marine Underwriters, Lloyd's of London v. Scalera [2000]

The tort of battery is a form of trespass against the person and is aimed at protecting the personal autonomy of the individual. When a person interferes with the body of another, a *prima facie* case of violation of P's autonomy is made out. D can then raise some defence, such as consent. If he can show that he acted with consent, the *prima facie* violation is negated and P's claim will fail. While P must generally prove all elements of the tort, the fact that contact must be harmful or offensive does not mean that P must prove that she did not consent.

- Consent is generally a full defence

- Two forms of consent: 1) person actually consented; 2) honest and reasonable but mistaken belief in consent
- Onus is important because if you have the onus, you have the responsibility to lead evidence,
- In cases of sexual battery, should P have the onus of proving a lack of consent?
- Argument in favour of P proving lack of consent: 1) the tort of sexual battery is contingent on a lack of consent, 2) prevent a flood of litigation
- Court rejects the argument and says that onus should stay with D:
- General place where we put onus for battery cases
- Area where allegations tend to be unreported
- D is in the best position to know whether he reasonably believed there was consent
- Forces D to bring forward evidence that he might otherwise not be inclined to do
- Want to create predictability in the law

False Imprisonment

Originally designed to provide a remedy for wrongful incarceration, it now encompasses most situations in which an individual's movement is intentionally restrained.

- The restraint of movement must be total, even if only momentary.
- Restraint may be imposed by barriers, other physical means, an implicit or explicit threat of force, or an implicit or explicit assertion of legal authority
-

The necessary elements are: volition, intent and a total restraint of movement

Court must also consider whether there were any reasonable means to escape, including the amount of inconvenience.

An individual may be liable in false imprisonment not only for restraining P, but also for ordering another person to do so. However, if the person merely provides information to P who, after assessing it, decides to make an arrest, P alone is responsible.

Bird v. Jones

Facts: P was prevented from crossing a bridge by the orders of D. P was at liberty to go in the other direction: no actual force or restraint on his person was used.

Issue: was there false imprisonment?

Holding: No, there was no imprisonment

Ratio: To call it false imprisonment would be to confound partial obstruction and disturbance with total obstruction and detention. Imprisonment is something more than mere loss of freedom; it includes the notion of restraint within some limits defined by a will or power exterior to our own... Imprisonment is total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him.

Dissent: It is not necessary that there be any particular boundary to constitute imprisonment, and imprisonment thus includes the restraint of a man's person from doing what he desires. As

long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else, (i.e. just because I can escape doesn't mean I am any less confined)?

Campbell v. S.S. Kresge Co

Facts: P was shopping at a K-mart. D, a police officer working as a security guard, was told by another shopper that she had seen P put something in her coat. D then followed P outside, where he showed her his badge, accused her of shop-lifting and asked her to come inside (to avoid embarrassment). She followed him inside, then stopped and asked what was going on, P was unable to see the other shopper, and let P go.

Issue: was there false imprisonment?

Holding: P was imprisoned by D, acting as a security guard, from the time she was confronted outside the store until the time she was told that she was free to go. While D did not believe he was arresting her, he was using the force of his position as a police officer to take her in a direction that she did not wish to go- she was not consenting but going out of fear of the consequences if she refused.

Herd v. Weardale Steel, Coal, and Coke Co. Ltd

Facts: P alleges that D wrongfully prevented him from using the cage, which was the only means of egress from the mine, whereby he was imprisoned. D denies the false imprisonment, and justified their refusal to raise P on the ground that P had been guilty of a breach of contract in refusing to do some work which he was ordered to do.

Issue: Is D liable for damages for false imprisonment?

Holding: It is no false imprisonment to hold a man to the conditions he has accepted when he goes down a mine.

Ratio: If a man chooses to go into a dangerous place, from which by nature of physical circumstances he cannot escape, it does not follow from that simply because no man can be restrained of his liberty without authority in law that he can compel the owner to bring him out of it. His right in contract was to come up at the end of his shift

Malicious Prosecution

Malicious prosecution is derived from trespass on the case. Consequently, it is concerned with indirect interferences, namely those that result from improper initiation of criminal proceedings against an individual. Moreover, it is not actionable per se; rather P must establish that he suffered some loss of harm.

Nelles v. Ontario

Facts: P was charged with first degree murder in the deaths of four babies at a hospital. After a lengthy and well-publicized preliminary hearing, all charges were dropped because of a lack of evidence.

There are four necessary elements that must be proved for P to succeed:

- The proceedings must have initiated by D
 - The proceedings must have terminated in favour of P
 - The absence of reasonable and probable cause
 - An honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man to the conclusion that the person charged was probably guilty
 - Test contains both a subjective and objective element
-
- Malice, or a primary purpose other than of carrying the law into effect
 - Malice in the form of a deliberate and improper use of the office of the AG or Crown Attorney, a use inconsistent with the status of “minister of justice”
 - Perpetuated a fraud on the process of criminal justice and in doing so has perverted or abused the office and the process of criminal justice

Policy considerations:

- Public confidence suffers when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through malicious prosecution
- Wrongdoer should be held accountable by the victim through the legal process
- “Chilling effect” argument is largely speculative, “flood-gates” argument ignores the fact that one element of the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and judgment are not actionable
- Built-in deterrents- burden on P is onerous and strict

Protection of Privacy

Privacy is protected in a piecemeal fashion- myriad of civil actions and statutory provisions. Most challenging problem is defining privacy; the broader the definition, the more it will conflict with other interests (freedom of speech, etc).

A Common Law Tort Action for the Invasion of Privacy?

Motherwell v. Motherwell

Facts: D (mentally unstable) harassed P, making false accusations by way of telephone and mail. After D refused to stop, P brought an action against her for invasion of privacy and nuisance, claiming nominal damages and an injunction.

Issue: Were D’s actions an invasion of privacy or simply nuisance? Is the invasion of privacy covered under CL?

Holding: P had a valid claim in private nuisance for the invasion of their privacy through the abuse of the telephone system.

Ratio: The developing jurisprudence would be better served by approaching invasion of privacy by abuse of the telephone system as a new category of private nuisance. P has no control over the incoming communications through the telephone (non-selective communication). Telephone is a necessity in daily society; it's a system for rational and reasonable communication and its abuse by invasion of privacy is a matter of general interest.

Subsequent Common Law Developments

Courts have provided some redress for particularly troubling and easily defined categories of privacy cases, but the exact state of the law cannot be determined.

The Statutory Protection of Privacy

Term "privacy" not used in the *Charter*, its an integral part of many fundamental freedoms in s. 2 and legal rights in ss. 7-15

Legislation may also protect privacy, ex. unauthorized electronic interception of private communications an indictable offence punishable by imprisonment

Hollinsworth v. BCTV

Facts: P entered into a contract with Look International and underwent tunnel graft surgery. Dr. W performed the surgery. P signed a release and consent that allowed the procedure to be filmed for instructional purposes only. Mr. Cable (camera man for BCTV) filmed the operation. Seven years later BCTV did a feature on baldness, Mr. C and Ms. A went to Dr. W's office, he was willing to given them the tape and said nothing about the confidentiality in relation to his patient. Ms. A expressed concerned about the confidentiality and asked whether there was consent. In the feature, you could see P's full face. He sued BCTV, Look International, and others for breach of confidentiality and breach of the provincial *Privacy Act*.

Holding: P was successful against Look International and Mr. V. BCTV could not be held liable in defamation because it had not made a false statement. BCTV was not liable for breach of confidence as there was no evidence that it knew or ought to have known that the videotape was confidential.

Privacy Act: tort is actionable without proof of damage where a person wilfully and without a claim of right violates the privacy of another.

- The degree of privacy to which a person is entitled is that which is reasonable in the circumstances.
- In determining whether the act violates privacy, regard must be given to the nature, incidence, and occasion of the act or conduct and to any domestic or other relationship between the parties.

'Wilfully' was interpreted as an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person- that was not established in this case.

THE DEFENCE OF CONSENT

The General Principles of Consent

Consent is an affirmative defence in “traditional” battery cases. Consent must be framed narrowly in terms of whether P consented to the specific act that gave rise to his tort action. P may consent explicitly (writing, verbally, gesture) or implicitly (participation, demeanour, other behaviour). When a person consents to an act, is generally presumed that they are consenting to the risks normally inherent in that act.

In order to establish the defence of consent, D must prove that P agreed to the act giving rise to the tort. P’s failure to physically resist D’s conduct falls short of the affirmative conduct, behaviour or demeanour necessary to establish consent. However, it is more difficult to determine the circumstances in which a failure to object verbally, a failure to withdraw or passivity will be viewed as constituting implied consent.

Norberg v. Wynrib

Facts: D (doctor) gave drugs to a chemically dependent woman patient in exchange for sexually contact.

Issue: Whether the defence of consent can be raised against the intentional tort of battery in such circumstances.

Analysis: Sexual assault in this case falls under the tort of battery (the intentional infliction of unlawful force on another person). Consent, express or implied, is a defence.

- Failure to resist or protest is an indication of consent if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection.
- Consent must be genuine; it must not be obtained by force or threat of force or be given under the influence of drugs
- Consent may also be vitiated by fraud or deceit as to the nature of D’s conduct
- A man cannot be said to be ‘willing’ unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will
- Interference with freedom of the will can occur with force, threats, of force, fraud or incapacity
- A position of relative weakness can, in some circumstances, interfere with the freedom of a person’s will, i.e. need to consider the power relationship between the parties
- In a situation where P is induced to enter into an unconscionable transaction because of an inequitable disparity in bargaining strength, it cannot be said that P’s act is voluntary
- Consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely

Holding: There was a marked inequality in the respective powers of the parties. A was a young woman with limited education, and was addicted to the heavy use of painkillers. P had a medical problem, an addition to the drug, D had knowledge of it. As a doctor, he had knowledge of the proper medical treatment, and knew she was motivated by her addition.

Instead of fulfilling his professional responsibility, he used his power and expertise to his own advantage and to her detriment. The unequal power between the parties and the exploitative nature of the relationship removed the possibility of P providing meaningful consent.

Implied Consent

Wright v. McLean

Facts: Four boys were playing, throwing mud balls. P was passing on his bicycle when he was hit by a mud ball. He dismounted his bike and joined in the game. P was injured when a stone hit his head. D stated that he would not deliberately pick up a stone and did not intend to do so.

Holding: harm suffered by consent is, not a cause of civil action. In sport where there is no malice, no anger, and no mutual ill will, it is presumed that combatants consent to take the ordinary risks of the sport in which they are engaged. While the play is fair, and according to rules, and blows are given in sport and not maliciously, then parties are remitted to their rights.

Exceeding Consent

Agar v. Canning

Facts: Action by a member of a hockey team against a member of the opposing team. P hooked D with his stick, hitting D with a painful blow on the back of the neck. D then brought his stick down on P's face. P fell to the ice unconscious.

Holding: The act of D in retaliation goes beyond the limit marking exemption from liability (but D acted on provocation and this was taken into account in assessing damages)

Ratio: It is presumed that those who engage in the sport have accepted the risk of injury as a condition of participating. But some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of implied consent.

Notes: In R v. McSorley- "Hockey players implicitly consent to physical contact that is permitted by the rules of the game. However, some forms of conduct are too dangerous for players to consent to"

Competency to Consent

In order for consent to be valid, the person giving it must be capable of appreciating the nature and consequences of the act to which it applies. If a person cannot make such a determination due to age, physical or mental illness, intoxication, or other incapacitating factors, the consent will be invalid.

Factors Vitiating Consent: Fraud, Mistake

Once D establishes that P consented to the act, P may raise factors that vitiate his consent. If the consent is vitiated, D will be held liable as there had been no consent.

Fraud

The fact that P's consent was based on a fraudulently induced belief will not necessarily vitiate the consent:

- Must be established that D was aware of, or responsible for, P's misapprehension
- Fraud will only negate consent if it relates to the nature and quality of the act
- D's conduct or failure to reveal info may constitute fraud in some situations
- Situations in which D either knowingly deceives P or acts in total disregard of the truth

R v. Cuerrier

Facts: C knew he was HIV-positive, but told the first complainant that he tested negative (and had sex with her numerous times), and did not respond to the second complainant's concerns over sexually transmitted diseases.

Holding: Court held that fraud as to the potentially harmful consequences of a sexual act could negate consent. Crown had to prove: 1) C was dishonest, could include lying or non-disclosure; 2) the dishonesty had to result in a deprivation (actual harm or exposing a person to a significant risk of harm); 3) the dishonesty induced the complainants to consent when they would not otherwise have done so. Given the serious consequences of HIV, court held the accused's failure to disclose his status prior to having unprotected intercourse constituted a deprivation.

Mistake

The fact that P's consent was induced by a mistaken belief will vitiate the consent only if D was responsible for creating P's misapprehension.

Consent to Treatment and Counselling

General Principles of Consent

As a general rule, healthcare professionals and counsellors must obtain consent to initiate any physical examination, test, procedure, surgery or counselling.

- Consent should be obtained in advance and cover the proposed intervention.
- Consent must relate to the specific procedure or treatment that is undertaken
- To be valid it must be voluntary- decision must be the product of a conscious mind
- Has to be based on a full and frank disclosure of the nature of the intervention and its risks
- A patient may consent implicitly by participation, other behaviour or demeanour, or explicitly

Exceptions to the General Principles of Consent

Courts have relaxed the strict requirements of consent in three situations:

- An unforeseen medical emergency, where it is impossible to obtain the patient's consent, a healthcare professional is allowed to intervene without consent to preserve the patient's health or life
- Patients who have given a general consent to a course of counselling, a treatment program or an operation. In such situations, patient is viewed as implicitly consenting to any subsequent counselling or subordinate tests and procedures that are necessarily incidental to the agreed treatment.
- At one time, courts held that healthcare professionals had a right to withhold info from a patient if it would undermine the patient's morale and discourage him from having needed treatment or surgery

Marshall v. Curry

Facts: While D was performing surgery on P to cure a hernia, D removed P's left testicle. D claims that the removal was a necessary part of the operation of the hernia, the necessity of removing it could have been reasonable ascertained before the operation, and consent was implied by P's request to cure the hernia

Holding: After starting the surgery, D discovered conditions he could not reasonably have foreseen, and in removing the testicle he acted in the interest of his patient and for the protection of his health and possibly his life. The removal was thus necessary and it was unreasonable to postpone it, despite the absence of express and possibly implied consent.

Ratio: In the ordinary case where there is opportunity to obtain the consent of the patient it must be had. Such consent may be express or implied; it may be implied from the conversation preceding an operation or from antecedent circumstances.

Malette v. Shulman

Facts: P was injured in a car accident, treated by Dr. S. P had a card indicating she was a JW- was not to be given blood. Dr. S was told about the card but gave her blood anyways to save her life. When P's daughter arrived, she confirmed the card and ordered the blood transfusions to stop. Dr. S stopped only after P's condition had stabilized. P sued in negligence and battery.

Issue: Did Dr. S commit battery and/ or negligence by refusing to follow the instruction of the card given P's life threatening situation?

Holding: The card constituted valid restriction of Dr. S' right to treat the patient and the administration of blood did constitute battery.

Ratio: The doctrine of informed consent does not extend to informed refusal. The card presents a clear, concise, statement essentially stating to apply in situations of life-threatening perils. The obvious purpose of the card is to speak in circumstances where the card carrier cannot (so as protection). Therefore, the card is a written declaration of a valid position which the

card carrier may legitimately take in imposing a written restriction on her contract with the doctor.

NB: The principle underlying the doctrine of informed consent finds its roots in the patient's right to self-determination. The treating doctor avoids liability only with valid (i.e. informed) consent. The same liability considerations do not apply to a patient's refusal to accept treatment- in that instance, the doctor is not exposed to a claim in battery.

Evidentiary Issues in Tort Waiver of Privilege

R v. Cambell [1999]

- Difficulty in pursuing drug traffickers
- With traditional sting operations, where police pose as buyers, only low-level dealers are caught, leaving the big-guys safe. To solve the problem, the police came up with a 'reverse-sting' - police would pose as sellers, controlled a major sale that only a big-guy would engage in
- Problem was that the police became drug dealers, which is against the law (at the time, there was no clause stating that the police could sell drugs for the purpose of police operations, but now there is)
- Defendant argued that the police conduct was so abhorrent that in order to preserve the integrity of the system, the whole case has to be thrown out
- Court argued if the police have done something illegal in the investigation, that doesn't necessarily mean that the whole case must be thrown out. Such a remedy is too huge; throwing out the whole case has societal costs, court needs to balance the crime and the police conduct

Issue: Before engaging in the reserve-sting operation, the police officer met with a lawyer to discuss the legality of it. The defendant requested a record of that conversation, while the Crown maintained that the information was privileged (client-solicitor)

D argued that: 1) It is not privileged because the conversation was between two government workers, not a private lawyer; 2) If it was solicitor-client relations, then it comes under an exception because the solicitor helped the client undertake an illegal activity; 3) The police officer waived privileged through his conduct- by mentioning the conversation in the factum

Court held that:

- This type of meeting, whereby legal advice is being provided, falls under the ambit of solicitor-client privilege
- While privilege doesn't apply where the lawyer is facilitating a criminal act, that isn't what happened in this case
- Waiver can be explicit or implicit- through their conduct, the party waives privilege, i.e. they try to only show a limited portion so that the judge ends up with a distorted picture, thus the judge will ask for all the information to evaluate the relevance of the portion given
- The police claimed in the factum that they were acting legally and in good-faith based on the legal advice that was sought

- The language used was strong: “The court must have regard to the following facts, one of which was that legal advice was sought...”
- Implies that the legal advice was helpful to their position
- Issue is that they are trying to keep secret what the actual legal advice was, therefore creating a distorted picture
- Court held, therefore, that privilege was waived under the circumstances, but only in relation to the legal advice given on the particular issue (the memorandum that was referenced)

Reid v. British Columbia 2006

Facts: Organic egg producers argue that they were discriminated against by the Board. The Board has the power to regulate the industry and came up with a pricing scheme that disfavours certain farmers but favours others who comply. P wants to obtain a document that deals with in-house legal advice because they believe it will help their case.

In order to resolve the issue, the memo was given to the judge to decide whether it was relevant to the case (i.e. whether it relates to an issue at hand)

In order to be classified as privileged information, the information has to be 1) communicated between a lawyer and a client; 2) pertain to legal advice; 3) was intended to be confidential

- The information was clearly communicated between a lawyer and client
- Whether it was related to legal advice can be difficult to ascertain for in house council, it is difficult to distinguish between legal advice and policy discussions. Legal advice means any advice that can be read in a legal context. The memo in question looks like traditional legal communication.
- Court considered whether the advice was facilitating illegal conduct.
- Court stated that improperly advising a client is not limited to criminal law, but applies to any illegal conduct, including breaches of a regulatory statute, contracts, torts and other legal duties
- Issue is that P is only making allegations of bad faith and presumes that the allegations will be proven. But, if they are allowed to waive privilege on the basis of bad faith, this makes privilege difficult to protect

Holding: The Board’s position was not dependent on any legal advice that they may have received, and argue that they have acted properly.

INTRODUCTION TO THE LAW OF NEGLIGENCE

Negligence: Cause of action concerned with liability for careless conduct

Carelessness: One particular element within that cause of action, namely, whether D’s conduct met the standard of care.

Duty of care: The threshold issue in every negligence case is whether D was subject to a legal obligation, or “duty”, to exercise care with respect to P’s interests.

Historical Development

Courts eventually held that P was entitled to relief only if D was at fault, that is, that D failed to conform to the standard of care in the circumstances. Both the duty of care and the fault principle were used by the courts as a means of controlling the expansive tendencies of the tort of negligence. The idea of establishing a synthesized and expansive duty of care in negligence was established in *Donoghue v. Stevenson*.

The liability of negligence is based upon a general public sentiment of moral wrongdoing for which the offender must pay... The rule that you are to love your neighbor becomes in law, you must not injure your neighbor- you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor... Your neighbor is 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.

Elements of a Negligence Action

Duty of Care

Court must decide, as a matter of law, whether D was under any legal obligation to exercise care with respect to P's interests in the type of care under consideration. Court must also determine the nature and scope of that obligation.

The Standard of Care and its Breach

Ordinarily, D is expected to meet the standard of care that would be exercised by a reasonable person in all the circumstances of the case. However, some professionals who have special training or qualifications are expected to meet the standard of their professional colleagues.

Causation

D will not be held liable unless careless conduct was a cause of P's loss.

Remoteness of Damages

Once it has been established that D carelessly caused P's injury, court must determine whether the relationship between the breach and the injury is too tenuous, or remote, to warrant recovery.

Actual Loss

P must establish that he suffered legally-recognized injuries and losses, as well as their nature and extent.

Defences

P's damages may be reduced or eliminated on account of his own conduct (contributory negligence, voluntary assumption of risk, or illegality) or on account of other considerations (inevitable accident)

A Case Illustration

Dunsmore v. Deshield

Facts: P was playing touch football when he collided with another player and one lens of his glasses broke and injured his right eye. Deshield, the optometrist (D1), supplied the glasses, and Imperial Optical (D2) manufactured the lenses. P had ordered special lenses from D1 (Hardex) that are specially treated by D2 to make it more impact resistant than ordinary lenses. The lenses were not Hardex. P alleges that if they were Hardex they would not have broken and he would not have been injured. The action against D1 is breach of contract or negligence, and against D2 negligence. Both D plea contributory negligence.

Holding: There was no contributory negligence. Both D were liable for the injury.

Duty of care: D2 was negligent in failing to supply Hardex lenses it failed to temper the lenses and failed to test them before delivery. D1 had a duty to P to test them, he did not and instead relied on D2, thus accepting or adopting D2's negligence.

Causation: D's wrong cannot be the cause of the injury if it would have happened without the wrong. P must prove that the impact, although sufficient to break ordinary lens, would probably not have been sufficient to break a Hardex lens. P's burden is to show that its more probable than not that the hit which caused the injury was less violent or of less force than the steel ball test employed by D2. P is not the type of man to take unnecessary risks; if he had known the lenses were not Hardex, he would not have worn them.

Damages: Part of the fractured lens entered P's right eye. Spent a few days in hospital and six days off work. Vision has not fully returned to level before the accident. Right eye tires earlier- works in government where he must do much reading.

Indemnity: D2 had no promise or undertaking or contract with D1 that he would test the lens- so cannot assume that D1 had a duty to D2 to test the lens. D1 was entitled to rely on D2's duty to supply Hardex lenses.

Donaldson v. John Doe (2009)

Facts: Oktoberfest event where souvenir glass beer mugs were distributed to patrons. After the event ended and the patrons had left the host premises, one patron was permanently injured when struck in the eye by a beer mug held by another patron.

Issue: Appeal concerns the liability of commercial hosts who serve alcohol when someone is injured by an intoxicated patron.

Duty of Care:

- Proximity established: commercial hosts owe a general duty to prevent foreseeable harm caused to third parties by their guests (*Childs v. Desormeaux*)
- The parties, however, focused on whether the injury from a beer mug was reasonably foreseeable in the circumstances of this case

- By focusing on how P sustained his injury, the parties have conflated the concept of foreseeability in a duty of care analysis, and foreseeability in a standard of care analysis (as did the TJ)
- In determining whether A owes a duty of care to B, foreseeability is a factor with respect to whether the relationship between them warrants imposing a duty of care
- The question is whether B falls within a class of persons who could reasonably be expected to be harmed by A's conduct
- If a duty of care is found to exist, then foreseeability with respect to the specific risk of harm is considered in determining whether A was negligent, i.e. whether there has been a breach of the standard of care.
- In this case, the duty of care question is not whether a commercial host owes a duty to third parties to protect them from injuries caused by intoxicated patrons who leave the host's premise with souvenir beer mugs but, rather, whether a commercial host owes a duty to third-parties to protect them from alcohol-related injuries caused by intoxicated patrons
- TJ, therefore, erred in finding that there was no duty of care because the injury was not foreseeable. The policy rationale for imposing a duty of care on commercial hosts arises from the profit-making nature of their activities, coupled with the inherent danger of intoxicants

Standard of Care

- P failed to adduce evidence with respect to Mr. Briggs's drinking and conduct
- This evidence was necessary to prove both a breach of the standard of care and the element of causation
- Even if D were negligent in that their actions fell below the required standard of care, evidence that P's injury would not have occurred "but-for" that negligence is lacking.
- Judge had difficulty accepting that the mere fact that a person who has been drinking leaves an alcohol-serving establishment with glassware gives rise to a foreseeable risk of harm to others
- But if that risk does exist, and the appropriate standard of care requires the establishment to have a monitoring system in place to reduce that risk, the establishment will only have failed to meet that standard if that person's level of intoxication is sufficient to objectively raise concerns that he may act, deliberately or carelessly, in such a way as to injure someone with glassware
- P doesn't have to show knowledge of intoxication, but that the defendant ought to have known

Causation

- P must prove on BOP that D's impugned conduct actually caused the loss complained of.
- In this case, the evidence against D is capable of proving only that Mr. Briggs drank some beer, left the event carrying the glass mug, and raised his arm injuring P
- This is not sufficient to satisfy the 'but-for' causation test, as it would be speculation to infer that alcohol was a factor in Mr. Briggs's actions (i.e. even if the monitoring was adequate, no proof that P would not have been injured)

THE DUTY OF CARE

The Classical Approach

- Legal responsibility for negligence did not flow inexorably from moral responsibility
- Acts were seen as more culpable than omissions. Judges drew a distinction between misfeasance and nonfeasance. The courts were more likely to impose liability if D did something that hurt P than if D merely failed to do something that would have helped P.
- Physical injuries to individuals and property were broadly compensable, but emotional harms and loss of commercial profits were not

The General Duty of Care Test

Donoghue v. Stevenson

Facts: P's friend purchased a dark, opaque bottle of ginger beer and gave it to P. P drank some before she discovered a decomposed snail in the bottle. P sued the manufacturer, alleging shock and severe stomach ache.

Issue: Does P have a valid cause of action? (i.e. whether the manufacturer of an article of drink sold to a distributor, in circumstances which prevent the ultimate purchaser from discovering by inspection any defect, is under any legal duty to the ultimate purchaser to take reasonable care that the article is free from defect.)

Holding: To support an action for damages in negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by D to take reasonable care to avoid such injury. Proximity is not confined to mere physical proximity, but such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

The Development of the Modern Law of Duty

- Extension of duty of care analysis in *Donoghue* to any act that causes physical injury
- In *Hedley Byrne & Co v. Heller & Partners* [1964] held that a duty of care could be imposed for negligent advice
- *Home Office v. Dorset Yacht Co* held that public authorities could be held liable in negligence with respect to their statutory functions and operations

Anns v. Merton London Borough Council [1977]

Sets out an approach for analyzing existing categories of negligence and for recognizing new categories in novel situations

Question of a duty of care approached in two stages:

- Whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the

reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises

- If the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise

But in *Caparo Industries plc v. Dickman* [1990] modified the test, now requires proof that:

- P's loss was reasonably foreseeable consequence of D's conduct
- There was a sufficiently proximate relationship between the parties
- It is "fair, just and reasonable" for the court to impose a duty of care in light of the applicable policy considerations

Anns and the SCC

Kamloops (City) v. Nielsen (1984)- in determining whether a duty of care should be recognized, two questions should be asked:

- Is there a sufficiently close relationship between the parties... so that, in the reasonable contemplation of D, carelessness on its part might cause damage to P? If so,
- Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

- Approach is flexible and expansive
- The first branch requires P to prove reasonable foreseeability of harm- relatively low threshold (and once prove a prima facie duty of care exists)
- The burden then falls on D to establish why a duty of care nevertheless should be refused or limited

Cooper v. Hobart

Facts: P invested money with Eron Mortgage. Eron was governed by the *Mortgage Brokers Act*. The statute allowed D, as Registrar, to investigate complaints, freeze funds, and suspend licenses of brokers who had breached their statutory obligation. D did in fact suspend Eron's license. At that point, owed more than \$180 million. P sued D for negligence, argued that if D had acted more quickly, would not have suffered the same loss

Issue: Whether, in the circumstances, D owed a duty of care to P? (Whether the law of negligence should be extended to reach this situation?)

Analysis:

- Foreseeability (negligence principle in *Donoghue*) is not enough, also must be a close and direct relationship of proximity or neighbourhood
- Problem is defining proximity
- *Anns* test- duplication of policy considerations? No, different types of policy considerations are involved at the two stages
- *Anns* continues to provide a useful framework in determining whether a duty of care should be imposed on a new situation

- The *Donogoe* foreseeability-negligence test conceals a balancing of interests, right balance is about prudent policy

Anns analysis:

- Was the harm that occurred the reasonably foreseeable consequence of D's act?
- Focuses on factors arising from the relationship between P and D
- The factors include questions of policy
- If Foreseeability and proximity are established, a prima facie duty of care arises
- 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
- Residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care
- Are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally (does the law already provide a remedy, would recognition create the spectre of unlimited liability to an unlimited cases)
- Second step generally arises only where the duty of care asserted doesn't fall into a recognized category; where it does, can assume that are no overriding policy considerations

Proximity:

- Reference to established categories
- The type of relationship in which a duty of care to guard against foreseeable negligence may be imposed
- Close and direct
- Defining the relationship may involve looking at expectations, representations, reliance and the property or other interests involved. These factors allow us to evaluate the closeness of the relationship between P and D to determine whether it is just and fair having regard to that relationship to impose a duty of care

Categories in which proximity has been recognized:

- D's act foreseeably causes physical harm to P or P's property
- Misfeasance in public office
- A duty to warn of the risk of danger

Holding:

- Whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care
- Whether the case falls within or is analogous to a category of cases in which a duty of care has already been recognized? NO
- Is this a situation in which a new duty of care should be recognized? In this case, factors giving rise to proximity, if they exist, must arise from the statute under which the registrar is appointed. In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole

- Even if there was a prima facie duty of care, it would be negated for overriding policy reasons (taxpayers did not assume the risk of private loss to persons in situation of the investors)

Ratio: Even though the Registrar might reasonably have foreseen that losses to investors in Eron would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a prima facie duty of care. The statute cannot be construed to impose a duty of care on the Registrar specific to investments with mortgage brokers. Such a duty would come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole.

Developments since *Cooper v. Hobart*

- Affirms that the first stage of the test involves both foreseeability and proximity
- Not clear whether the approach in *Cooper* was meant as a general test of duty, or was only to be applied in novel situations
- Did not explain how the recognized categories of proximate relationships were to be treated under the revised test
- Unclear which party bears the burden of proof in the second stage of the test

Odhavji Estate v. Woodhouse [2003]

In order to be successful, P must establish:

- That the harm complained of is a reasonably foreseeable consequence of the alleged breach
- That there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on D
- That there exist no policy reasons to negative or otherwise restrict that duty

* Appears to suggest that P has the burden of proof throughout out the test

Childs v. Desormeaux [2006]

Once P establishes a prima facie duty of care, the evidentiary burden of showing countervailing policy considerations shifts to D, following the general rule that the party asserting a point should be required to establish it

GENERAL GUIDE FOR DETERMINING WHETHER A DUTY OF CARE EXISTS:

- Is the alleged duty of care within an established category or analogous to an established category? If so, then its not generally necessary to proceed through the *Anns/Cooper* analysis.
- If the case alleges a novel duty of care, was the harm reasonably foreseeable?
- Even if the harm was foreseeable, was there a sufficient relationship of proximity between the parties to make it just and fair to impose a duty of care on D? at this stage, court will consider policy considerations arising from the relationship between the parties. Factors considered may include: expectations, representations and reliance; the

types of interests involved (physical, economic, emotional, etc); and any statutory or contractual framework

- If there was foreseeable harm and sufficient relationship of proximity, a *prima facie* duty of care exists. Then (according to *Childs*), the evidentiary burden shifts to D to raise any residual policy considerations that might negate or limit the scope of the duty of care

SPECIAL DUTIES OF CARE: AFFIRMATIVE ACTION

Introduction to Special Duties of Care

The decision in *Cooper v. Hobart* emphasized the role of policy, both in connection with the notion of proximity under the first branch of the test, and under the second branch to negate or limit a *prima facie* duty of care. The court also stressed the need to address policy considerations on a category-by-category basis. The next section addresses policy considerations that arise in various circumstances.

Introduction to Duties of Affirmative Action

As a general rule, courts have been willing to impose liability for misfeasance (positive acts) but not for nonfeasance (failures to act). Duties for affirmative action were sometimes recognized if parties shared a “special relationship”

The Duty to Rescue

Consider how much danger and inconvenience a bystander is required to withstand, how much the court is willing to infringe on personal autonomy

Osterlind v. Hill

Facts: P (administrator of the estate) is suing for damages for conscious suffering and death of his intestate. P alleges that while D was engaged in letting for hire pleasure boats, it was his duty to have reasonable regard for the safety of persons to whom he let boats and canoes. D neglected this duty by acting in wilful, wanton or reckless disregard of the natural and probable consequences of letting for hire a frail and dangerous canoe to the intestate knowing him to be intoxicated. The intestate flipped the canoe, hung on the side for approximately 30 min, making four calls for assistance, which D heard and ignored. The intestate eventually drowned.

Issue: Did D owe a duty of care to the intestate? Two counts of negligence: 1) not to rent a frail canoe to an intoxicated person; 2) to save the intestate from drowning after hearing his calls for help

Holding: D did not violate a duty of care in renting the canoe to a man in the condition of the intestate. The failure of D to respond to the intestate’s outcries is immaterial- no legal right of the intestate was infringed.

Analysis: In *Black v. New York* established that a duty of care was owed because P was so intoxicated as to be incapable of standing or walking or caring for himself in any way, D’s

employees placed a helpless man in a dangerous position. But in this case, the intestate was not in a helpless condition- he was able to take steps to protect himself. The allegation that the canoe was frail is a general characterization of canoes.

Matthews v. MacLaren; Horsley v. MacLaren

Facts: RM and JH were gratuitous passengers or invited guests on D's boat. RM fell of the boat. D then put the boat in reverse and tried to save him. JH jumped in to help. Some evidence that D had been drinking.

Issue: Whether there existed a legal duty on the part of D to come to the rescue of a passenger who fell overboard by reason of his own misfortune or carelessness, and without any negligence on the part of D.

Analysis:

Duty of Care

- There is no general duty to come to the rescue of a person who finds himself in peril from a source completely unrelated to D.
- However, there is strong support for a duty of affirmative care, including aid and rescue, incidental to certain special relations (employer and employee, carrier and passenger, occupier and his lawful visitors)
- Extending this quasi-contractual duty, the relation between the master of a pleasure boat and his invited guests should require a legal duty to rescue, provided it can be done without imperilling the safety of the vessel, her crew and passengers
- Sources of this duty: Canada Shipping Act (duty to rescue strangers found at sea)
- In any event, if D undertakes the rescue operation he is liable for negligence

Standard of Care

- What would the reasonable boat operator do in the circumstances, attributing to such person the reasonable skill and experience required of the master of a cabin cruiser who is responsible for the safety and rescue of his passengers?
- There are no statutory regulations or guidelines
- Expert witnesses outlined a common sense approach, D did not follow this approach
- D's adoption of the wrong procedure in the circumstances was negligent, being a failure to exercise reasonable care that the ordinary, prudent, reasonable operator would have shown in such a rescue

Causation

- Burden is on P to prove by a preponderance of evidence that D's negligence was the effective cause of death
- H died of shock immediately or shortly after his immersion, so its reasonable to think that M did not survive longer (no sign of consciousness after he hit the water)
- On the balance of probabilities, it has not been shown that M's life could have been saved

THE STANDARD OF CARE

Duty of care: inquiry into the existence, nature, and scope of the legal relationship between P and D. This involves legal and public policy analysis regarding the boundaries of legal responsibility in the particular factual circumstances

Standard of care: how D should have acted; a breach occurs if he acted without the requisite degree of care. Raises issues of both law and fact; the trier of fact must formulate a standard and determine whether D met the standard

The Common Law Standard of Care: The Reasonable Person Test

Arland v. Taylor

Facts: P was injured in a motor vehicle accident. At trial, jury held that D did not breach the standard of care. P appealed, objecting to the TJ's charge to the jury

Analysis: The standard of care is the care that would have been taken in the circumstances by a "reasonable and prudent man"

Reasonable man: a mythical creature of the law, he is not extraordinary or unusual creature, he is not superhuman, he is not required to display the highest skill of which anyone is capable, he is not a genius, he is a person of normal intelligence who makes prudence a guide to his conduct. He acts in accord with general and approved practice; his conduct is guided by consideration, which ordinarily regulate the conduct of human affairs.

Its an impersonal test; it eliminates the personal equation and is independent of the idiosyncracies of the particular person whose conduct is in question. The reasonable man is free both from over-apprehension and from over-confidence

Ryan v. Victoria (City)

Conduct is negligent if it creates an objectively unreasonable risk of harm... A person must exercise the standard of care that would be expected of an ordinary, reasonable, and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

Factors Considered in Determining Breach of the Standard of Care

Two most important facts are (i) the probability of injury and (ii) the potential severity of injury

Those considerations are balanced against private and social costs that would have been associated with avoiding the risk and the social utility of D's conduct.

These factors must be assessed at the time of the alleged breach, rather than in hindsight (i.e. how a reasonable person in D's circumstances would have acted at the relevant time)

Probability and Severity of the Harm

Bolton v. Stone

Facts: P was walking on a road adjacent to a cricket ground when she was struck and injured by a ball that had been hit out of the ground

Issue: What is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway?

- Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause damage (even if its improbable)
- Is he only bound to take into account the possibility of such damage if it's a likely or probable consequence of what he does or permits
- If the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material

Analysis: The test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of D, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering the matter, must take into account how remote is the chance that a person might be struck, but also how serious the consequence are likely to be in a person is struck.

Holding: The risk was extremely small, therefore D is not liable. The reasonable man, considering the matter from the point of view of safety, should not disregard risk any risk unless its extremely small.

Paris v. Stepney Borough Council

Issue: whether an ordinarily prudent employer would supply goggles to a one-eyed workman whose job was to knock bolts out of a chassis elevated on a ramp so that the workman's eye was close and under the bolt.

Holding: The risk of splinters breaking off and injuring the workman's eye may be small, and the damage to a two-eyed workman's eye may be serious, but the trial judge must weight up the risk of injury and the extent of the damage and decide whether, in all the circumstances, including the fact that the workman was known to be one-eyed and might become blind if his eye was struck, an ordinarily prudent employer would supply him with goggles. It is a simple and inexpensive precaution.

Dissent: Whether one is considering the likelihood of an accident occurring, or the gravity of the consequences if an accident happens, there is in each case a gradually ascending scale between an extremely remote risk and where there is a constant risk of accident, and between a trivial harm and a fatal injury. In considering the precautions, the employer must take into account the likelihood of an accident happening and the gravity of the consequences... the more serious the damage, the more thorough the precautions necessary.

Both a one-eyed man and a two-eyed man ran the same risk of injury; the only difference was the degree of harm that might result. Because of this, did the employer have a duty to provide

goggles to the one-eyed worker? No- the risk of an eye injury to any man was so remote that no employer could be found negligent in failing to take these precautions.

Cost of Risk Avoidance

Vaughn v. Halifax-Dartmouth Bridge Comm.

Facts: Flecks of paint were blown by wind onto nearby cars from a bridge. The owner of the cars sued for negligence.

Issue: Did D take all necessary and proper measures to prevent or to minimize injury to P from paint dripping from the bridge, so that it was not careless?

Holding: D did not take precautions that would have entailed relatively little expense and would have probably prevented or minimized P's damage. No policy was established of warning car owners or the dockyard authorities in advance of painting operations, D did not post any warning signs at the parking lot, or communicated any sort of warnings, hiring someone to wipe paint of the cars was inadequate (not enough men for it to be done promptly)

Law Estate v. Simice

Facts: P sued D (doctors) in negligence, claiming that her husband died because of their failure to provide timely, appropriate and skilful emergency care. In particular, they had not taken a CT scan of the patient because of financial constraints.

Holding: If it comes to a choice between a physician's responsibility to his individual patient and his responsibility to the medicare system overall, the former must take precedence in a case such as this. The severity of the harm that may occur to the patient who is undiagnosed is far greater than the financial harm that will occur to the medicare system if one more CT scan is used.

Social Utility

Watt v. Hertfordshire County Council

Facts: P, a fireman, responded to an emergency call requiring the use of a special jack. The jack had only been used once in the last 15 years. The truck fitted for carrying it was unavailable so they loaded it in the rear of another vehicle. P was injured when the jack became dislodged.

Holding: D is not liable. In measuring due care you must balance the risk against the measures necessary to eliminate the risk; you must also balance the risk against the end to be achieved. In this case, the purpose of saving a life or limb justified taking considerable risk; it was not a commercial activity to make profit.

CAUSATION

Causation links D's breach of the standard of care to P's loss. The general test is the but-for test, although it is subject to modifications and exceptions. P must prove, on the balance of probabilities, that D's breach of the standard of care was the cause of his loss.

P need not prove that D's negligence was the sole, immediate, direct, or even the most important cause of his loss. Rather, P only has to establish that D's negligence was a cause.

Some courts have failed to distinguish between causation and remoteness.

The But-For Test

If P's injury would not have occurred but for D's negligent act, then that act is a cause of the injury (causally effective). If P's injury would have occurred regardless of D's negligent act, then that act will generally not be held to be a cause.

Kauffman v. Toronto Transit Commission

Facts: Two youths began scuffling and fell back against a man who in turn fell back upon P. P fell upon the escalator steps with these two or three people on top of her. As a result of her fall and the continuing movement upwards, P sustained severe and permanent injuries.

Issue: Was D negligent in acquiring an escalator of radical departure in hand-rail design?

Holding: There was no evidence that the man ahead of P or P grasped or attempted to grasp the hand rail before or in the course of falling. Nor was there evidence that in the circumstances P would not have fallen if her hands had been grasping a rubber oval hand rail. There was no evidence that the type of hand rail was a contributing cause of P's accident. It is a fundamental principle that the causal relation between the alleged negligence and in the injury must be made out by the evidence.

Barnett v. Chelsea & Kensington Hospital Management Committee

Facts: Three men went to D (hospital) complaining about vomiting for several hours after drinking tea. Medical officer instructed the nurse to tell them to go home and call their own doctors. One of the men died of arsenic poisoning. Judge held that the doctor's dismissal of the deceased's complaints without seeing or examining them breached the standard of care.

Issue: Was the doctor's negligence a cause of the man's death?

Holding: When death results from arsenic poisoning it is brought about by two conditions: 1) dehydration and 2) disturbance of the enzyme processes. If the principle condition is enzyme disruption, as in this case, then the only method of treatment likely to succeed is a specific

antidote. But there was no evidence that the deceased would have been given the antidote before the time of his death. Therefore, P has failed to establish, on the balance of probabilities, that D's negligence caused the death of the deceased.

Established Exceptions to the But-for Test

Exceptions to the but-for test:

- The multiple negligent defendants rule
- The learned intermediary rule
- The objective/ subjective test in informed consent cases

The Multiple Negligent Defendants Rule

In *Cook v. Lewis*, P was shot by one of two negligent hunters who had fired at the same time. Each hunter denied that he had shot P, and P could not prove on the balance of probabilities who had shot him. The court held that if P could prove that the two D were negligent, one had to have caused his loss, and it was impossible to prove which one, then the burden of proving causation would shift to D. Each D would be held negligent unless he could disprove causation.

The Learned Intermediary Rule

Manufacturers of products that are not directly available to the public, such as prescription drugs, may discharge their duty to inform by adequately disclosing information to a learned intermediary (i.e. a doctor).

Informed Consent

Healthcare professionals have a duty to put patients in a position to make informed decisions about whether to consent to proposed treatment.

Subjective/ objective test of causation: whether a reasonable person in P's position would have consented if adequately informed (a purely subjective test would require the court to hypothesize about how the patient would have reacted, might result in patient's testimony being coloured by hindsight and bitterness).

Recent Attempts to Modify the But-For Test

Modifications or exceptions to the but-for test in three situations:

- Material contribution
- Materially increased risk
- Proportionate cause and loss of chance

Material Contribution

Walker Estate v. York Finch General Hospital

Facts: P contracted HIV from tainted blood products supplied by the Canadian Red Cross Society (CRCS). P claimed the CRCS was negligent in screening potential blood donors and that its

negligence resulted in their becoming infected. At the time when the tainted blood was donated, there was no test for determining if a blood donation was infected; donor screening was the only means of reducing the risk, and pamphlets were used for this purpose.

Issue: P must establish the duty of care and the standard of care owed to them by the CRCS, and that the CRCS caused their injuries.

Analysis: The general test for causation in cases where a single cause can be attributed to a harm is the “but-for” test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.

The question in cases of negligent donor screening should not be whether the CRCS’s conduct was a necessary condition for P’s injuries using the but-for test, but whether that conduct was a sufficient condition. The proper test in such cases is whether D’s negligence materially contributed to the occurrence of the injury. A contributing factor is material if it falls outside the *de minimis* range.

Holding: The trial judge should have asked whether the donator would have self-deferred or been excluded if the CRCS had followed the appropriate standard of care as represented by the *ARC March 1983 pamphlet*. The donator would have been deferred or excluded from donating had he seen the ARC 1983 pamphlet since it raised the issue of high-risk groups, something the CRCS 1984 pamphlet did not.

Hank v. Resurfice Corp: The but-for test is the standard test for causation for cases involving either a single cause or multiple causes. The material contribution test can only be applied if two requirements are met:

- P must establish that its impossible to prove causation using the but-for test and that this impossibility results from factors beyond his control (limits of scientific knowledge)
- P must establish that D breached the standard of care and that his injuries fell within the ambit of the risk created by D’s breach.
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Multiple Causes

When P’s injuries are brought about by two or more causes:

- Determine if the injuries are divisible, i.e. can the injuries be divided into distinct losses that are each readily attributable to the conduct of a particular tortfeasor? (If the injuries are divisible, P will have a separate cause of action against each tortfeasor)
- Two or more tortfeasors cause a single indivisible harm:
 - Those involving independent insufficient causes
 - Involving independent sufficient causes
- D are independent tortfeasors or joint tortfeasors
- Independent tortfeasor can only be liable for injuries that he causes
- Joint tortfeasor is liable for the torts committed by his fellow tortfeasor, even if he didn’t contribute to P’s loss (*Cook v. Lewis*)

Independent Insufficient Causes

Several factors combine to cause P's loss. Each factor is individually necessary, as the loss would not have occurred without it. However, no factor is individually sufficient to have caused the loss, in the absence of the other factor.

Athey v. Leonati

Facts: P had a pre-existing back condition, and suffered neck and head injuries in a traffic accident that D negligently caused. On his doctor's advice, P began an exercise program and one day sustained a herniated disc while stretching.

Issue: Was D part of the cause of the injury? In this case, there is a single indivisible injury- the disc herniation; the disc herniation and its consequences are one injury and any D found to have negligently caused or contributed to the injury will be fully liable for it.

Analysis:

Thin skull rule: makes the tortfeasor liable for P's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his victim as he finds him, and is therefore liable even though P's losses are more dramatic than they would be for the average person. D need not compensate P for any debilitating effects of the pre-existing condition which P would have experienced anyways. P must simply be returned to the position he would have been in, and not in a better position.

If the injuries sustained in the accident caused or contributed to the disc herniation, then D is fully liable for the damages flowing from the disc herniation. P must prove causation by meeting the "but-for" or material contribution test:

- If the disc herniation would likely have occurred without the accident, then causation is not proven
- If it was necessary to have both the accident and the pre-existing condition, then causation is proven (accident was a *necessary* contributing cause)
- If the accident alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it's unclear which was the cause-in-fact of the disc herniation. The TJ must determine, on a balance of probabilities, whether D's negligence materially contributed to the injury

Holding: There was no finding of any measurable risk that the disc herniation would have occurred without the accident. The findings indicate that it was necessary to have both the pre-existing condition and the injuries from the accidents to cause the disc herniation in this case. Although the accidents played a lesser role than the pre-existing condition, the accident was nevertheless a necessary ingredient in bringing about the herniation.

Nowlan v. Brunswick Construction Ltee

Facts: D's contractor had been negligent in constructing P's house, which suffered rot due to leaks. D argued no damage would have occurred, but for the architect's poor design.

Holding: While the structural design contributed greatly to the damage, the poor workmanship of D and the poor quality of materials used also contributed. D is a concurrent wrongdoer and the fact that the damage might not have occurred but for the poor design does not excuse him from the liability arising out of his poor workmanship and inadequate material supplied by him.

Independent Sufficient Causes

P's indivisible loss results from two or more sufficient causes.

A significant or substantial factor test of causation; might be reframed in terms of a material contribution test.

Lambton v. Mellish

Facts: The defendants Mellish and Cox were rival refreshment contractors who had a merry-go-rounds on their premises. The noise made by C's merry-go-round was much louder than M's. P sought an injunction restraining each D from playing any organs so as to cause a nuisance or injury to P.

Holding: P is entitled to the injunction against each D. The noise made by each D, taken separately, amounts to a nuisance.

D argued that if one man, not acting in concert with or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance; each hears the other, and is adding to the sum which makes up the nuisance. Each is separately liable.