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In England, 2 parallel systems developed.

King's Bench	Lord Chancellor
Common Pleas	Courts of Chancery
Exchequer	Equity

Battery = harmful or offensive contact without consent.

Cole v. Turner (1795 Eng.)

Statement: (1) Least touching of another in anger = battery
(2) 2 meet in narrow passage and touch gently w/o violence or intent to harm = no battery
(3) use of violence to force way = battery
(4) struggle that might do harm = battery

Contact is intentional if you meant it to occur. You don't have to mean harm.
- Intent can be inferred from knowledge of the consequences. Therefore, if you don't know the consequences, you don't have intent.

Statement of Claim – the facts.
- Ought to disclose that a legal wrong has been committed.
- If not, other side can say, "This statement of claim does not disclose a cause of action."

Historically, writ was a formula into which the facts were made to fit. Writ of trespass, covenant, battery, etc. Battery was actionable w/o proof of damage – injury to dignity was actionable. Early law frequently focused only on facts and not on statements, state of mind.

Garratt v. Dailey (1955 Washington SC)

F 5 yr old pulled lawn chair out fr/under π as sitting down. At trial, found child did not intend injury.
I What is intent?
D Intent, in tort, is either desiring the consequences of the act, or the actor being substantially certain of the consequences of the act. New trial ordered to determine if child knew the consequences.
R Assault/battery, must show intent (motive or consequent harm irrelevant) otherwise, tort incomplete.

Motive – insurance? parents' household insurance would cover it

If intent is found, on the balance of probabilities, he's liable.

The law is reluctant to say, "You're liable if you just sit there."
- The problems of imposing a duty outweigh the problems of not imposing a duty.

Carnes v. Thomson (1932 Missouri SC)

F During an argument, Δ struck at π's husband with pliers, missed, and hit the π
I Can the intent be transferred, given that the Δ never meant to hit the π
H Yes, intent can be transferred
R If one person, intending to strike another, hits a third, an assault/battery is committed, given that Δ intended to strike an unlawful blow. Also, blow need not have been intended to be offensive.

- Intent to injure constitutes assault/battery no matter who you end up hurting.

Fillipowich v. Nahachewsky (1969 Sask QB)

Fails test of joint tortfeasors: Separate Tortfeasors
While π drives Δ's cattle to the pound, Δ and son start fight; Δ hits π w/ stone

I Was action of father Δ in self-defense? Is son also liable for battery?
H Father did not act in self-defense since π did not provoke Δ, and son is not liable
R: No self-defense since Δ never in any danger from π

- There was no reasonable *proportion* between the aggression and the defense.
- Anything you have a legal right to do cannot constitute provocation.

Bruce v. Coliseum Mgmt Ltd.

F Doorman inflicted injury while ejecting patron.
I Whether Δ used force disproportionately.
H Force used was disproportionate both to eject patron and to defend self.
R Defences only good if reasonable force used.

- Doorman had right to kick him out (trespass) and right to defend self (self-defence)
- There was provocation but that only reduced damages by 30%
  - Provocation counts as contributory negligence – mitigation, not defence
- Damages doubled on appeal
- Self-defence is not evening things out, but warding off the imminent threat

If there is provocation, court can reduce punitive damages but not compensatory damages.

Damages
Compensatory – compensate victim
- general (future, pain) – pecuniary & non-pecuniary
- special (provable expenses > receipts)

Punitive/exemplary – to punish when there was an egregious offence against rights or for $

I. de S. & Wife v. W. de S. (1348 Eng. Assizes)

F Δ pounded on door until π wife appeared; Δ struck at her but missed. Action brought in Assault
I Was there an Assault?
H Yes
R π had a fear of hurt, ∴ an Assault occurred

Assault is apprehension that you're going to be hurt.

Stephens v. Meyers (1830 Nisi Prius)

F π was chairing a board meeting, told Δ to leave, Δ advanced on π in a threatening manner, but was stopped by others before making contact
I Did the Δ's threats constitute an assault although he couldn't have reached π?
H Yes, verdict for π, nominal damages
R The π felt threatened, and the Δ had the apparent means to carry out a battery until stopped

If contact is imminent to victim's eye, it's assault because he doesn't foresee it will be stopped.

Tuberville v. Savage (1699 KB)

F π put hand on sword and said "If it were not assize-time, I would not take such language from you", so Δ stabbed out his eye. In defense, Δ claims that π's words constitute an Assault
I Was it self-defense?
H No self-defense; Judgment for the π
R The π made a conditional threat, and gave no imminent threat of attack. Not a credible threat

Battery
Cause of action:
- Direct application of physical force

- Force must be non-innocent (innocent social contact)
- Force must be intentional

Viable defenses:
- defense of third party
- self-defense
- defense of property
- consent
- legal authority

Provocation is NOT a defense. At most, it reduces damages.

Setting a trap for someone = action on the case.

THIN SKULL RULE: You take your victims as you find them and are responsible for the unintended consequences of your violence

Bruce v. Dyer (1966 Ont. HC)

Road Rage: π cuts Δ off to prevent him from entering lane; Δ tailgates π; π stops suddenly endangering Δ, gets out of car, waves fist and advances towards Δ menacingly. Δ punches π and fractures π's jaw

I Was π's driving an assault? Was shaking fist an assault?
Did Δ act w/ reasonable force? Does thin skull rule apply?

H Finds for Δ w/o costs - π's actions an assault

R: If Δ believes he's in danger, he may act to ward off violence - but cannot use excessive force
Δ thought π waving his fist to fight

π: endangered Δ while Δ trying to pass
- stopped on highway & blocked him
- approached him threateningly

Self-defence
- is not retaliation – must be response to *immediate* threat
- turns on whether you *reasonably* responded to threat
- if self-defence valid, unintended results are not your fault
  - if you are found liable, *then* unintended results *are* your fault

M. (K.) v. M. (H.) (1992 SCC)

F π, now adult, sexually assaulted by Δ (father) from 8 to 16 yrs. π told various people of assault over the years, but did not get counseling until 20's. Statute of Limitations expired on Tort

I When does the clock start on the Limitation period
π argues not until all elements are present, including knowledge of harm done her
damage includes long-term psych damage

H Statute has not expired, action for π allowed

R Limitation period does not apply to minors or mentally infirm, ∴ it cannot apply until victim is reasonably aware of the cause of action (reasonable discoverability)
- appellant was of unsound mind until she began therapy

Assault is taken as a given, no issue of consent (Age, Relationship & Coercion)
- Judge also finds a breach of fiduciary responsibility, in the parent's obligations to welfare of child
- Tort limitation period does not commence until π is out of parental authority & aware of harm to self.
- "It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes." – from case

Incest is now a separate cause of action in BC – limitation (?)
- constitutes breach of fiduciary duty

Harm is not the cause of action in battery.

You can have a cause of action without any harm.

But harm ties into limitation period – if you don't realize you've been harmed for awhile.

BC has no limitation re sex abuse.

demur < even if everything the other side says is true, it doesn't help him – "so what"

Smith v. Stone (1647 KB)

F π claims Δ trespassed on his land, but Δ contends that he was carried there by force
I Is Δ responsible for his own trespass, given that he was carried?
H No trespass
R Δ did not intend to commit trespass, had no control over actions. Those who carried Δ committed trespass

Shipwreck would technically be trespass, but raises defence of necessity.

Basely v. Clarkson (1681 KB)

F Δ cut neighbor's grass, thinking was his, carried it away. Offered compensation, but π demurred
I Does Δ's error excuse his action, in that he thought the land was his?
H No, Δ is still guilty of trespass
R Only intent required of Δ is to cut grass. Intent to break law not relevant, only his intent to commit act.

It was trespass because it was *voluntary*. His intent could not be known.

Gilbert v. Stone (1648 KB)

F Δ entered π's property and stole his horse. Δ claims he was threatened with death if he didn't steal the horse, so his actions were involuntary. π brings action for trespass.
I Does duress render the Δ's acts involuntary?
H Δ guilty of trespass, judgment to the π
Can the Δ also make a claim?
R Δ was threatened but not physically coerced, i.e. used as a passive instrument (Not carried).
The 12 armed men did not take direct action against π's land, but Δ did
If Δ is not liable, then no one is, so Δ must be liable.
Δ could bring an action of assault against 12 armed men

Duress is no defence to an action in trespass, but it may reduce damages.

Turner v. Thorne (1959 Ont. HC)

F Δ mistakenly delivers boxes to π's garage; π trips over boxes, is injured
π sues for trespass >
- being there, placing/leaving things (continuing trespass) + damage from trespass

π also makes a parallel claim for negligence
I Can mistake of fact be a defense from trespass?
H No, Liable for both > same damages for both
R Δ's unlawful entry and use resulted in damages – Classic Trespass

Accidental trespass is still trespass. It was trespass to be there & trespass to leave the boxes.
If Thorne had left boxes at correct address but in dangerous place, not trespass but negligence.

Costello v. Calgary (1997 Alta CA)

F City expropriated land from mother/daughter (πs) to build an intersection
Later, found that expropriation was improper – daughter not given 21 days notice as required
Costellos sue in trespass
City argues only "technical" trespass, no intent

I Is the intent of the trespasser relevant?
H Judgment for πs, big damages
R Intent is not an issue in trespass
Trespass was hardly a technicality, city realized profits from rent of land

City's good faith didn't matter.

Costellos could sue tenants. Tenants could then sue city.

Anderson v. Skender (1994 BCCA)

F Dispute over three trees, parts of which extend over property line; Δ does major trimming and excavating of roots; Δ entered airspace of π to trim trees
π sues for trespass, seeks damages for trees
I Was damage to trees a trespass, or just action over property line?
H At Trial, given damages for all 3 trees
On Appeal, compensation for 2 trees, where actual line-crossing occurred
-Full value of trees
- R You can lop off overhanging branches but can't cut off so much roots you destroy the tree

"Tree trespass"

Anderson succeeded in part because clearly Skender had chainsawed trees that were mostly on A. side
- Ownership is decided by where the trunk is at ground level.

The line is with damage that *kills* the tree. You can do any cutting that doesn't go over the property line as long as it doesn't kill the tree. "Reasonable steps to abate the nuisance."

Nuisance would make a difference – Nuisance does not include a right to sunshine or a view.

Tillander v. Gosselin (1966 Ont. HC)

F 3 year old Δ carried/dragged/dropped baby, considerable injury. Action in trespass brought
I Was the Δ capable of forming intention for tort?
Could Δ be liable for negligence?
H Action dismissed without costs
R Δ could not be negligent, since he had no knowledge or duty of care
Δ had no understanding of the nature or consequences of his actions

- An injury without fault is just bad luck, chance is not enough
- Tort law has origins in quasi-criminal proceedings, and the guilty should be the ones to pay
- Intent > voluntariness of act, some understanding of nature of act & possible consequences
  - a rough idea is enough

Pollock v. Lipkowitz (1970 Man. QB)

F 13 year old Δ threw nitric acid on π, causing substantial, though not life-threatening injuries
Action in battery against Δ, and negligence against the parents
I Was there intent?
Is age of Δ a defense in tort?
Are the parents liable for Δ having the acid?
Can punitive damages be awarded?
H Δ liable for battery, costs and damages to π and parents
Negligence action against parents dismissed to avoid powerful and dangerous precedent
R Δ, given his age, could reasonably know the consequences of throwing nitric acid at someone
Δ's parents could not reasonably have known about his possession of the acid (kid concealed)
Punitive damages would require malice, and none was proven

"You can bet the parents end up paying, but legally only the child's assets are *exigible/attachable.*"

CAPACITY: MENTAL ABNORMALITY
Insanity alone is not an excuse for liability. Need an understanding of the consequences of the act to be held liable. Δ liable when he understands nature of act, not whether or not it's wrong

Onus on Δ to establish defence of insanity: prove no intent

Gerigs v. Rose (1979 Ont. HC)

F π policeman investigating man with gun threatening people, entered house, was shot by Δ
I Δ claimed contributory negligence- π (cop) aided in his own injury
Δ also claimed defense of mental incapacity
H Negligence defense rejected - cop acted properly, following police procedure
Mental incapacity defense also failed
Judgment for π
R Mental incapacity requires that Δ be unaware of consequences of aiming a gun at a person and pulling the trigger. That he didn't know π was a cop is not relevant

Notes from LAWSON WELLAND HOSPITAL
- "Where a person by reason of mental illness cannot appreciate the nature of his action, they do not commit a tort, which would require intent, obviously not present in this case."

McNaughton Rules (criminal) – incapable of understanding nature & quality of act OR
- incapable of understanding that it's wrong

Does not apply in tort – wanting to do harm is not an element of tort.

Cook v. Lewis (1952 SCC)

F Two hunters (Δs) fired simultaneously in direction of π, walking through trees, hit by pellets
π made a claim of battery against both
Jury found that since neither Δ could be definitely blamed, neither was culpable
BCCA found this ruling perverse – mere fact that Lewis was hit means one was negligent
- , ordered new trial – Cook appealed new trial to SCC

I On whom does onus to prove culpability or nonculpability fall?
H Ruling for a new trial upheld, the Δs must disprove negligence
R Because the damage is clear and can be proven, but which of the two Δs was the tortfeasor cannot be determined, the onus is on one of the Δs to exculpate himself
Both acted in a way that was at least potentially negligent.
The trial judge should have instructed the jury to find negligence unless it could be disproved

Not joint tortfeasors b/c actions of both did not produce tort – only one

2 Rules
1. Negligence that was a trespass before 1875 should be treated differently > use old pleading rules (reverse onus)
   - Prof Blom says this is somewhat nuts
   - indirect, burden of proof is on π
   - direct, onus is on Δ (para bottom p. 28)
   - he says "arbitrary" – but SCC authority, never overruled
   - if onus is really on Δ, sufficient to plead "Δ shot me"
2. If 2 people are proved to be negligent in similar ways, but the confused situation makes the actual origin of the injury impossible to determine, a finding against both is fair

- By treating this case as a negligence claim, the onus is shifted to the Δ
  - The onus is usually not very important, only a factor when case extremely close, or no evidence
- It is very rare to prove that two people are liable for negligence when only one injured the π

Bottom line: if you can't prove which one, and if they were BOTH negligent, they're BOTH liable

2 main issues here:

1. Who has the onus of proof on the issue of negligence? < This case says if it could have been pleaded as a trespass – direct force – onus on Δ. Blom disagrees.
2. What if the finder of fact finds that 2 people have been negligent but it cannot be found which negligence causes injury? > Find them both liable unless either can prove it wasn't their act that caused the harm.

There hasn't been a case since where either ratio has been an issue.

Cook v Lewis had 2 main points.

Ratio: If it's something that could qualify as trespass – direct – the onus is on the defendant to show that harm was not intentional or negligent.

Ratio: If two are simultaneously negligent but it can't be proven which one caused the harm, the onus is on each of them to prove they are not responsible. – balance of probability 50/50, their responsibility to change the percentage if possible. cf *Summers v Tice* (quoted p. 31)

These are **Reverse Onus Rules**

Reverse onus says if it's a trespass, the onus is on the defendant to prove it wasn't negligence.

The only incidence of burden of proof (onus) is to do with trespass on the highway.

But:
Fowler v Lanning – the plaintiff just said "he shot me" – he doesn't have to prove anything b/c direct trespass – up to the defendant to exculpate himself.

- Judge said pleading insufficient, does not describe cause of action – π has to show either negligence or intention

So unintentional shooting is no longer trespass, it's negligence. If intentional, battery.

Intentional, direct	Battery (a form of Trespass)
Unintentional, direct	Negligence
Intentional, indirect	Trespass on the case*
Unintentional, indirect	Negligence

- *For example, setting a trap.

Klar argues that negligent trespass should be a thing of the past.

Larin v. Goshen (1974 NSCA)

F Δ, ref at wrestling match, made unpopular call, escorted to dressing room by cops. Δ holding out hand in front, struck π, who is claiming battery.
I Where does onus lie?
H No cause of action
R Δ was justified in his actions, reasonable self-defense with no intent to injure

First judge said "no intent, but he was negligent"
- appeal judge cites *Cook v Lewis*, says onus is on Δ
- but in this case not negligent – behaviour reasonable under the circs

In an action for trespass where π proves he has been injured by the direct action of Δ, the onus falls upon Δ to prove that his act was both unintentional and without negligence.

Snell v Farrell – cataract surgery – blood got into pt's eye during surgery – 9 mos to clear – ended up blind in that eye b/c optic nerve atrophied
- no doubt about injury
- but she must prove fault on dr's part
  - was it b/c operation?
  - if so, was dr negligent?

Plaintiff's case – (cause was eyeball hemorrhage
(surgeon saw some sign of bleeding behind the eyeball from anaesth. inject.
(surgeon should not have proceeded
(b/c didn't stop, bleeding got much worse – open eyeball loses pressure, blood vessels behind eye expand
(b/c more bleeding, optic nerve atrophied

Defendant's case – (could have been other reasons for atrophy < stroke
(can't be proven

Possible to infer causation when facts proven that fairly lead to inference based on common sense, without strict scientific proof, even in medical cases. Onus remains on π, but in absence of evidence to contrary introduced by Δ, causation can be inferred even without positive/scientific proof.

Snell v. Farrell (1990 SCC)

F Patient blinded after operation; there's doubt about cause
Months after, optic nerve atrophied – there was bleeding
Operation likely cause of bleeding, but atrophy possibly caused by stroke -Experts unclear
- Negligence alleged – Dr. should have stopped operation when discoloration was detected, which is apparently standard procedure

I How to decide cause of damage, when Δ's actual negligence may not be directly related to harm?

TJ Adopts *McGhee* (brick dust, dermatitis, no washing-up facilities), decides onus reversed
If negligence creates a risk, which materializes, then the onus is on the Δ to disprove causation
Δ's negligence created a risk, and damage is within the realm of the risk created
-The Dr. is also in a better position to give evidence

SCC Decided that *McGhee* did not really reverse onus, but allowed inference to be made - *Wilshire*
-In this case there is enough evidence to draw inference that there was a causal link

R **Inferences can be made if reasonable and consistent with evidence of harm causation**
- π can show that the negligence materially contributed to the injury
- Also, really no evidence to substantiate any other theory.

- Not scientific proof, but balance of probabilities. Legal proof is not scientific proof.
- There are cases that can be decided by inference (unlike *Fontaine*, R.I.L.)
- The greater the number of possible/reasonable explanations, the weaker an inference of liability

There is a difference between facts *testified* and facts *inferred*.
- Most facts turning on states of mind are *inferred*, i.e., intention.

Directly observed facts – discolouration, bleeding, atrophy
Inference – surgery caused atrophy

Could have been an unrelated stroke.

Burden of proof in causation: in this case on π

McGhee case < reverse onus.
When do you presume causation? < If Δ did sth that could have caused harm. "Increased risk of harm."

Wilshire case < onus should remain on π
- but judges can still infer causation based on evidence – in some cases π just can't <u>prove</u>
- where π's means of proof are very limited, inference can be drawn

"palpable and overriding error" – the only grounds on which you can overturn findings of fact.

Res Ipsa Loquitur – "the thing speaks for itself"
- where you logically *have* to infer the fact

- SCC killed Res Ipsa Loquitur – it's not a question of you do or don't have to infer – there's a continuum from you *can* infer to you *should* infer to you *pretty much have to* infer

Bettel v. Yim (1978 Ont. CA)

F Δ, small shopkeeper, shook π to force confession of setting fire in Δ's store. While shaking him, Δ's head accidentally hit π's nose, injuring it badly. Δ claims injury was unintentional. π brought action in Battery
I Is intentional wrongdoer liable for all harm caused, even that which he did not intend to cause?
H Yes
R Battery because Δ intended harmful or offensive conduct, though he did not desire final result
This is an application of the Thin Skull rule

PROVOCATION
- Any act inciting irrational response
- Conduct of the plaintiff "such as to cause the defendant to lose his power of self control and must have occurred at the time of or shortly before the assault" (p81)
- Self defence is a complete defence and should not be confused w/ provocation
- Provocation is merely a factor to be considered in the mitigation of damages.

Once π proves injury caused by direct act of Δ, onus is on Δ to establish absence of intentional tort. If Δ guilty of intentional, unlawful violence, Δ bears responsibility for result, even if it exceeds all reasonable or intended outcomes. Concept of foreseeability should not be imported into field of intentional torts.

Theory behind foreseeability principle is proportion between fault & liability. In negligence, unforeseen damage is not totally liable. In intentional tort it is totally liable because of moral culpability.

Shaking π's collar was retribution, not prevention. You can only argue self-defence or defence of property if it's intended to prevent harm.

DAMAGES
1. compensatory – pain, suffering, emotional, financial loss – open to review
2. punitive – justified only where compensatory are insufficient to achieve deterrence/denunciation

DEFENCES TO INTENTIONAL TORTS

Wade v. Martin (1955 Newfoundland SC)
F P and D were at a bar, defendant was sober, plaintiff was drunk. Wade insulted D's girlfriend's father. D offered to take it outside.
I Can D be held liable?
H No. Both were consenting parties.
R If one person convinces another to engage in an unlawful activity, they cannot sue for damages arising out of that activity. It's also kind of like contributory negligence. Blom says this is a stretch.

Y.(S.) v. C.(F.G.) (1996 BCCA)

F Stepfather (Δ) sex-assaults π from age 7-14, no criminal prosecution of Δ. Jury awards large Punitive and Compensatory damages
I Appeal of trial - Δ claims:
Judge should have directed jury to regard the "cap" on Compensatory Damages
Compensatory Damage award is so high as to be erroneous
High Compensatory Damages obviate need for high Punitive Damages
Cross-Appeal
Unfair not to award for loss of Future Income, and more for loss of Past Income
Judge should have instructed jury about damages for breach of fiduciary responsibility
H Award is out of proportion – Punitive and Compensatory lowered
Cross-Appeal dismissed
R On the Appeal:
Cap is not relevant in this case, not a case of negligence
Compensatory Damages reduced to $250,000

Punitive Damages reduced to $50,000
On the Cross-Appeal:
Jury's "No" stands
Judge did not err, and anyway result would be the same

- Less attention is paid to Jury on Punitive than on Compensatory
- Canadian Jurists fear American-style, run-away Punitive Damages
- Delay in joining the workforce is compensated, though not all possible future potential

How do you measure compensatory damages?

C of A reduced from 350K to 250K (comp damages incl aggravated damages) b/c found 175K was most serious

Judge forbidden to quote numbers to a jury, but then afterwards you get discussion re whether jury award can stand.

"double damages" = aggravated + punitive – punitive was reduced 250K > 50K

1. Should there be a cap on compensatory damages re sexual assault?*
2. Was the jury's award disproportionately high?
3. Should punitive dmges have been less re comp. dmges? Also, did publicity compensate re punitive dmges?

* No, because not so many to cause problems as there would be in personal injury and bankruptcy insurance. Also, serious, mitigating factors, non-pecuniary loss.

Jury awarded 350K comp, 250K punitive, 50K income loss

"The Trilogy"
- if you're injured thru negligence, you're entitled to all your pecuniary loss
  - medical expenses – past & future
  - loss of income
- but claim for pain & suffering has to be capped – upper limit is $100K
  - these awards are totally arbitrary – how do you put a dollar figure on pain & suffering?

Does not apply in this type of case because
1. intentional (not like car accident)
2. core of medical cases is medical expenses – in this kind of case, core is pain & suffering
3. no insurance component

Joint tortfeasors = doing the same thing
Concurrent tortfeasors = doing different things that produce the same result

Cockcroft v. Smith (1705 QB)

F π poked at Δ's eye, so Δ bit off his finger
π sues for mayhem (Rendering a person unfit for battle)
I Was action self-defense?
No, Δ is liable
R There was delay in the response, and disproportionate force was used
Revenge is not Self-Defense

(1) Self-defense must occur at the same time as the act which you are defending against.
(2) Response must be proportionate.

"It's not enough to say, 'He hit me first' – you can say 'He hit me first, and I responded reasonably.'"

MacDonald v. Hees (1974 NSTD)

F π enters Δ's hotel room in middle of night, mistakenly believing he'd been invited in; Δ throws π out violently > Through a door; Δ much larger than π, admitted he was not in fear of π
I Is this Self-Defense?

H No, Δ liable, no real threat or fear
R In peaceful trespass, must first ask trespasser to leave or ejectment is assault/battery - cited *Green v. Goddard*
Only force needed to eject may be used, no excessive beating etc.
Force used was disproportionate to the evil sought to be avoided

(1) It's lawful to use reasonable degree/force for protection/oneself or another against unlawful use/force.
(2) Force is not reasonable where it is
(a) unnecessary (greater than what is required for the purpose) or
(b) disproportionate to the evil being prevented.
(3) If no forcible entry, no justification for use/force – if forcible entry, OK, but must be proportionate

Holt v. Verbruggen (1981 BCSC)

F Rough hockey, including π slashing Δ, led to Δ swinging stick overhand and breaking π's arm with inordinately hard blow. π action in Battery.
I Is playing in the game an implicit acceptance of risk?
Should the provocation reduce damages?
Can the Δ excuse his actions as self-defense and/or a reflex?
H No, because Δ's action was not normal hockey
Yes, it can reduce punitive, and in this case even compensatory
No, this was retribution - π's back was turned at the time
R π is entitled to damages, but reduced due to provocation

Provocation operates to reduce an award of damages.
Damages NOT reduced by π's insurance payout – this is general rule.
Damages frequently go to insurance co. – therefore ins. co. is frequently the one bringing suit on behalf.
Important to be aware of insurance aspect – often really a contest btwn 2 ins. co's.

Gambriell v. Caparelli (1974 Ont. Co. Ct.)

F π & Δ's son fighting over car accident; Δ aids son by striking π w/gardening tool, first on shoulder, then on head
I Was this legitimate defense of others?
H Not liable, legitimate defense of son
R Force was not disproportionate, belief in real and imminent danger
Law should encourage people to help others in danger

Green v. Goddard (1704 QB)

F π tries to stop Δ from taking his bull to the pound; Δ gently whips π with small whip
I Was it legitimate defense of property?
H Not liable, attempt to take bull was itself a violence
R Physical force may be answered by reasonable force

If someone peaceably enters onto your land, you must ask him to leave before you can use force to turn him out. If someone forcibly enters your land, you may use force immediately.

Bird v. Holbrook (1828 Ct. of Common Pleadings)

F π chasing stray fowl over fence is shot by spring gun set by Δ as booby-trap to protect his garden
*Action on the Case b/c it is an indirect application of force by the Δ
I Is a spring gun a legitimate defense of property?
H Δ liable
R Purpose of gun was to injure, not to deter & Δ may not do indirectly what he is not entitled to do directly. π was a trespasser, not a thief, so force or arrest was not warranted
"If I give notice, I shall not catch him" shows Δ's true intent
Notice must be given when harmful traps are used to defend property

You cannot do indirectly what you cannot do directly. If the defendant does something for the express purpose of doing injury (ex. Spring gun), the defendant is liable where he fails to give notice.

If self-defense or defense of others or property – must be reasonable & proportionate.
If it's to get even – provocation, maybe

- has to be in the heat of the moment
- no justification in law for cold-blooded revenge, ever.

Consent is a defence to what would otherwise be a battery.

Validity of Consent

Mulloy v. Hop Sang (1935 Alta CA)

F Δ (A) in MVA, severely injured, taken to hospital, told Dr. not to amputate. Dr. answered equivocally, but found it necessary to amputate
Δ sued for cost of artificial hand and lost wages
Surgeon (A π) appealing trial decision, asking for his fees
I Was there trespass and/or battery > disobeying instructions
Was the immediate amputation necessary
H Judge finds good procedure, hand would have been lost
Dr. liable for $50 trespass, action on body without permission
Amputation still a battery despite medical necessity b/c against pt's instructions
R Dr. could have gotten him to own doctor in accordance w/ his wishes
Treatment was inevitable, but not urgent - could have waited for consent

Consent must be obtained, even where the action taken is within the best interests of the plaintiff.

Dr. cannot be liable for obeying a patient's instructions

Malette v. Shulman (1990 Ont. CA)

F Woman(π) involved in MVA, brought to hospital unconscious, in need of blood transfusion; Card found, Jehovah's Witness > Prohibits transfusions - Doctor gave transfusion anyway, saved her life
π brings action for battery
Δ's defenses:
Wasn't sure if card was still current
Cannot refuse consent while unconscious
I Is this violation of her wishes a violation of her physical person?
H Liable for battery, $20K – Dr battery by proceeding w/ transfusion in face/her expressed wishes
No reason to disbelieve the card. P and D both appealed, P because she wanted costs. Ruling was upheld on appeal.
R Acting on a person's body against their wishes is battery
The card must be taken at face value, or else it is useless
Patient's right to determine fate is paramount

(1) A medical intervention in which the doctor touches the body of a patient will constitute a battery if the patient did not consent to the intervention.
(2) Doctrine of informed consent: must obtain consent based on patient's knowledge of all the material risks. Patient has right to reject treatment, even if that rejection entails significant risks.
(3) In emergency situations where the patient is incapable of giving consent, the doctor may proceed without consent. The patient must be unable to make the decision, time must be of the essence, and it must be a case where, under the circumstances a reasonable person would consent.
(4) Patient may carry a card that restricts treatment, even in emergency situations.

Marshall v. Curry (1933 NSSC)

F π went into surgery for hernia operation; while under, Dr.(Δ) also removed malignant testicle
Procedure was necessary to safety of patient, backed up by experts
Action in Battery and Trespass
I Was this a case of sufficient urgency to warrant surgery without consent?
H No Negligence > Δ acted properly

No Battery > The surgeon cannot always obtain consent
not a battery b/c emergency – nec. to save life < necessity

R Doctor may act without consent to preserve health and life of patient when to delay would be unreasonable.
Further, in this case, there was no express refusal
There was a need for immediate action
Impossible to gain consent at the time

- No real underlying reason except for fairness and common sense

Where possible, consent must be obtained – otherwise it is technically a battery. Such consent may be expressed or implied; consent may be implied from conversation preceding operation or from antecedent circumstances. Where a great emergency arises (during operation) which could not be anticipated, surgeon should act to save life or preserve health of patient and will not be exposed to legal liability.

Non-Marine Underwriters, Lloyds v. Scalia

Tried to get insurance payout for his sexual assault suit
Insurer said – not liable b/c intentional
Claimant said – not intentional battery b/c believed girl consented
SC said – sexual battery is intentional & onus is on Δ
- minority view - π has to show that Δ knew or ought to have known she wasn't consenting

Informed Consent

Halushka v. U. Sask. (1965)

F π participated in research trial of experimental new anesthetic; not accurately informed about procedure, much more dangerous than he was told; nearly died during tests
Sued for trespass and negligence, awarded $22,500 - Appeal brought, based on fact π had "given consent"

I Is Dr./University liable in battery, since consent was based on misleading information?
How inadequate must the information be for case to be battery>

H Liable in battery

R π did not understand the essential nature and risks of the procedure; therefore battery; no informed consent = battery.

Consent, to be effective, must be informed consent. Patient entitled to full/frank disclosure of all facts, probabilities, & opinions that a reasonable man would consider before giving his consent.

Test subject not adequately informed of risks of untested anaesthetic, catheter into heart.
- A lot of misleading was done: "all the scary parts withheld"
- omitted info needn't relate to cause of harm – could just be sth that might have caused pt to refuse (catheter)

Consent was not ***valid*** b/c he was inadequately informed.
Failure to give adequate info can ***vitiate*** consent.

What should pt be told?
- essential nature
- threshold is higher for research
- special or unusual risks
- probability of risk
- serious health risks & their probable effects
- what reas. pers. would want to know
- anything that might have influenced their choice

Reibl v. Hughes (1980 SCC)

F Patient (π) consented to an operation to clear an arterial blockage near his heart
Stroke afterwards – paralyzed, impotent
High risk of stroke 1/7 during operation, π not told this
Action for: Negligence: giving inadequate info
Battery: Consent based on inadequate info, not fully informed ∴ not consent

Δ argued that there was also grave risk w/o operation
π said he would have waited until retirement (pension)
would have chosen shorter, normal life
- knowledge would have changed decision

I 1)Did inadequate info lead to battery?
2)Does failure to inform about high risk constitute negligence?
H 1)No, there was still consent
2)Yes
R 1)π's knowledge of procedure was complete ∴ no battery
2)withholding info led to harm ∴ negligence

- Negligent malpractice is not battery
- SCC makes point that Dr. is liable in negligence only where harm occurs
- Only battery if there is no consent
- In Battery, the onus to prove consent is on the Δ, though π must show evidence of actual battering
- In Negligence, the π must prove all the elements of the case
- Battery > Question: the existence of consent
- Negligence > Question: fully informed consent

Ont CA went too far – leaving to judgment of dr
- the pt's right to know trumps "it's better not to tell"

pt. is entitled to know everything material
- some exceptions – mentally weak, etc.
- but normal person has the right to know everything

Risk was material – work, etc.
- surgeon in breach of duty not to tell him

You can waive your right to know – but dr. has to be careful b/c has to be fully informed waiver!
- MUST tell serious risks

Actions of battery wrt surgical/other med treatment should be confined to cases where there's no consent at all, or where, emergency situations aside, surgery has been performed beyond that consented to.
In a situation where the material risks have not been disclosed < negligence.

If it's not battery, you still have a claim in negligence.

Modified Objective Test

What would the reasonable person, in the patient's position, agree or not agree to, if all material and special risks of going ahead with the surgery or forgoing it were known to him?

Argument has to be: "If you'd told me, I would have refused"

Arndt v. Smith (1997 SCC)

F π had chickenpox while pregnant, then had defective child; claims Dr.(Δ) did not tell her risks; if known, she would have aborted; claiming Negligence – trying to recover costs of raising child
Risk to fetus was severe, but very unlikely
Δ argues that she would not have aborted, given beliefs, 2nd trimester & medical advice
I Might the withheld info have caused the π to make a different decision?
H No
R Given all evidence, π would have made same decision < no $ loss < no harm < no negligence
Causal link between Dr.'s actions and her decision was not proven

The "Modified Objective Test" was applied:
- What a reasonable woman, given the π's known prior beliefs, would have done?

- Requirements for negligent non-disclosure:
  - Duty of Care Dr. > Patient (Point of Law)
  - Breach of Standard of Care, i.e. inadequate info (Mix of Law & Fact)

- A Causal Link to Damage (Point of Fact)
- The Damage not Being too remote (Point of Law)

- Usu as in *Arndt* battery requires hands-on w/o permission; *Halushka* exception b/c misinformation so gross
- The Dr. should still disclose all material risks, and the patient decides what is material
- Exception: (Rare) If disclosure of info itself would be immediately injurious to the patient
- Negligence (non-disclosure) > Then establish damage, using pt's hypothetical decision as causal link

- The "Modified Objective Test" is a compromise between Objective and Subjective
  - Subj: Based on patient's word of what they would have done
  - Obj: Based on what a reasonable person would do
  - Mod-Obj: A reasonable person in her position – with her motivations

Test is not what *she* would have done – test is what *reas pers in her position* would have done

- Really wanted a baby
- Pregnancy was quite advanced
- Some distrust of mainstream medicine
- Court's holding is an affirmation of *Reibl v Hughes*
- McLaghlin thinks Subj test was applied, but π failed to establish credibility – was deluding herself
- With either test, the onus is still on the π to prove loss

Did the dr.'s negligence cause pt to do sth different? If not, not actionable.

Dissent – Wood said "mere deprivation of choice thru misinformation should be actionable"

Modified objective test leaves out unreasonable fears – Blom thinks spurious
- "reasonable person who has all the qualities of the pt. except the funny ones"

But reas. person test protects drs. from disgruntled pts.

Van Mol v. Ashmore (1999 BCCA)

F Girl π paralyzed by operation. Said Dr. Δ should have (1) used alternate circulation method (Goss shunt) (2) should have warned girl/parents of risks if not used.
I Was Δ negligent? Did he obtain informed consent?
H Not negligent, but π not adequately informed of risks and alternatives, ∴ consent vitiated
R Sufficiently mature child is the one to give consent on own medical procedures

Lambert did not reverse finding that Dr. was not negligent, despite evidence.
- Standard of review of appeal court = "palpable or overriding error"
- Negligence is not a factual thing – it's a legal standard < mixed law & fact

SC has recently said the standard for overturning is "correctness"
- "I don't think the judge applied the correct standard"

This only turned into an informed consent case on the appeal.
1. Who had to give consent?
2. Was it informed consent?

L. concluded Melanie's consent was needed. As soon as child gains ability to consent, parents lose it.
- CL – If child is old enough to consent, her consent is valid, and parents' consent is not.

Dissenting judge said - Δ treated Mel/parents as one group just as he had in the past

1. Whose consent needed? Melanie's.
2. Did Dr. meet standard of disclosure? Sort of to parents, No to Melanie.

para 103 – standard of disclosure: that there was prophylactic protection, that Dr. did not propose to use it, and that she could get second opinion and have either Dr. or other Dr. use protection.

Infants Act, RSBC 1979

s16(2) any infant may give consent to health care without consent from parents

s.16(3) for consent to be genuine health care provider explained and made sure infant understood

1. the care
2. the nature
3. the consequences
4. the *reasonably foreseeable* benefits & risks

&

s.16(3b)has made reasonable effort to determine that the health care is in the best interests of the child.

Good Samaritan Act: if there is an accident and someone happens to be in the scene (or a sudden emergency) and renders assistance, they are not liable unless they were grossly negligent.

Norberg v. Wynrib (1992 SCC)

F Dr. (Δ) trades painkillers to young woman addict (π) in return for sex favors, tho not intercourse

1) Sexual Assault (Force w/o consent)
2) Negligence
3) Breach of Fiduciary Duty (duty to serve interests of beneficiary (patient)
4) Breach of Contract – Implied Dr.'s duty, Hippocratic oath

I 1) Did she consent to sexual activity, or was "consent" coerced & ∴ vitiated?
2) Was there malpractice, stemming from negligence?
3) Did Dr. break his duty to serve loyally?
4) Was the Dr.-Patient Contract breached?

H 1) There was no consent; it was an exploitive relationship - *Battery*
Yes to other 3, but not dealt with
Damages: $20,000 Aggravated General
$10,000 Punitive

R 1) The relationship had a severe power imbalance

Before this ruling, sexual consent was valid w/o physical threat

Up to this point consent was treated as factual issue, not legal issue

- A whole new rule about consent – Not a question of fact anymore

** Consent legally invalid b/c improperly obtained

- Analogy made to K law, and remedy through Equity Law, where exploited party can get K set aside
  - duress, undue influence, unconscionability
- Dissenting Justices found for π, but held for more damages – breach of fiduciary duty
  - Fiduciary duty – s/o undertakes to take care of your interests even at the expense of their own

Necessity – when you violate s/o's rights for the greater good
Marshall v Curry – other's interest
Mostly in own interest

Laforest-- Dr./Pt relationship is a power dynamic. Because MD has more power, she could not consent. --> abuse/ exploitation of an unequal position.

Dwyer v. Staunton (1947 Alta DC)

F Snow closure on road forced Δ to drive across π's field & π warned him not to return; Δ returned later that day, and drove thru a fence; π brought action for damages for trespass to land

I Was trespass a necessity?

H Case dismissed

R Public good overrides private property rights

*If public road is impassable, driver may cross private land, doing no unnecessary damage

Necessity: interference w/private ppty dictated/justified by immediate urgency/situation. Public highway becomes impassable, travelers entitled/deviate from road onto private land, taking care/do no unnecessary damage. Salus populi suprema lex – public welfare is highest law – private nuisance shall be endured over public inconvenience.

Vincent v. Lake Erie Transportation Co. (1910 Minn SC)

F Δ's boat damaged π's dock during a storm; No real negligence, but damage done
I Is this a trespass?
H Held for π, claim in restitution
R Fair compensation for use of other's property to preserve your property

Necessity may require taking of private ppty for own use, but compensation must be made for damages which result.

Distinction btwn misfeasance and nonfeasance – if boat had been left moored to dock, no liability. But ropes broke & were replaced < liable. Not act of God, occurred thru positive action.

Distinction btwn public & private good - Private good ∴ actionable. No specific tort, just damages.

Southwark London Borough Council v. Williams (1971 Eng. CA)

F Squatters occupying building; council tries to eject them; Squatters claim necessity
I Was this a case of necessity?
H No, defense of necessity does not hold
R Danger of cold is not immediate enough for necessity to operate
Must be great and imminent danger

Denning: No necessity for homeless/hungry b/c "open door which no man could shut"
In cases of great/imminent danger, to preserve life, law permits encroachment on private property. There are limits to defense of necessity – cannot justify killing and does not apply to hungry and homeless.

Intentional Infliction of Nervous Shock

Wilkinson v. Downton (1897 QB)

F Δ told π her husband had 2 broken legs – not true; practical joke causing physical illness, shock etc. – severe suffering; Fraud – the cost of train fare to see "injured" husband; Action on the Case - Willful injury to another person
-A new variety of action- emotional blow treated as a physical blow
I Were Δ's acts calculated to cause physical harm?
H Δ held liable, behavior was reckless
R The Δ's act had intention (to commit the act) and it resulted in harm

- This is a new variety of action on the case- an ancestor to negligence

Covers wrongs that do not fall under trespass – i.e. things that are physically indirect

Tort of fraud – "a misrepresentation intended to be acted on to the damage of the π"

Wainwright v. Home Office (2002 WLR)

F Prison staff strip-searched mom & mentally disabled son wanting to visit brother; they signed consent form mother believed she could be seen; son was interfered with; both v. upset
I 1) Was strip search a battery?
2) Was it intentional infliction of nervous shock?
H/R 1) Yes to son, because it went way beyond what was indicated/necessary
2) No, b/c no harm was intended, as per Downton

Consent was vitiated b/c told they had to sign to see son; also cops did not have legal right to strip search

Removed award to mother and reduced award to son

- Standard of intent – intending person to suffer bodily harm – not accepted in Cda, as per *Clark v. Canada*

Clark v. Canada (1994 FTCD)

F Female RCMP member quit after systemic harassment
Seeking damages for:
1) Breach of Contract
2) Intentional Infliction of Nervous Shock
3) Negligence

I 1) Did constructive dismissal constitute breach of K?
2) Can Int Inf Ner Shock occur over a long time, and from different people?
Is the Crown liable for actions of employees acting badly?
3) Is harassment the same as negligence?

H Damages awarded for lost income
1) No breach – action dismissed – RCMP & Crown "special relationship"
2) Yes, there was Intentional Infliction of Nervous Shock – "willful injuria"
3) Yes, there was negligence

R Judge awards damages based on ten years total service, less some time off
2) Infliction was over long time, and from different people
Crown is liable for the actions of its employees, even when doing their job poorly
Some quantifiable harm could be foreseen as a result
3) π's supervisors are responsible for her well-being in the workplace; instead they condoned or participated in harassment
Although the exact outcome of the harassment was not foreseen, the action was

Plaintiff became depressed, asthma was worsened
Wilkinson v Downton tort requires harm to be caused

False Imprisonment

Bird v. Jones (1845 QB)

F Δ blocked a public bridge to erect a viewing stand & charge to watch boat races
Δ's private police blocked π from going where he wanted- but could go back

I Is one imprisoned if there is an exit, but not the preferred one?

H No, action dismissed

R Imprisonment requires inability to leave – Unless you're fully restrained, you're not imprisoned

Denman dissented – imprisonment should be any prevention of anything you're legally entitled to do - Δ was not legally entitled to block bridge

Chaytor v. London, New York & Paris Assn. of Fashions Ltd. (1961 Nfld SC)

F 2 employees of a store (πs) were price-checking at Δ'store; detained, turned over to police & then released

I Can there be imprisonment without actual physical restraint (there were exits)?
Are the Police also liable?

H Yes, judgment for πs
No, police acting on (Δ's) bad instructions, including lying

R
(1) There can be restraint of freedom without any touching of the person. If π is under impression that if he attempted to leave he would be physically restrained, he is effectively detained.
(2) If detainment results from Δ making charge against π, π right of action (even if went willingly w/police).
(3) Where consent is given, must be genuine – if person believes no other choice but to comply, not consent.

πs were convinced/restraint, incl embarrassment if they caused scene – "psychological imprisonment"
Low damages > innocence widely known, no lasting embarrassment

Murray v. Minister of Defense (1988)

F π (Woman) in Ulster held prisoner by soldiers without her knowledge

R Yes, you can be imprisoned without express knowledge, and it is still a tort > Min. damage
*USA goes opposite way; No Cdn authority

Citizen's Arrest – you're ok if: you see s/o running away from cops & tackle; find committing indictable offence. Defined in s.494 and s.495 of criminal code. Also s.25 says about reasonable and probably grounds.

- In determining False Imprisonment, 2 key questions:
  - Was there imprisonment?
  - Was the imprisoner entitled to imprison the detainee?

Lebrun v. High-Low Foods Ltd. (1968 BCSC)

F π shopping in a suspicious manner, store management (Δ) thought he lifted carton of cigs; After π left, Δ phoned cops and reported suspicions, in strong terms; Cop stops π, asks for permission, gets permission, and searches car > no cigs; π seeks damages for false imprisonment
I Was there false imprisonment by: The store/manager? The cop?
H Yes, damages to π from supermarket
R Manager liable for false imprisonment, ∴ store is liable
Cop was unwitting agent of the manager/store, ∴ not liable
Permission to search car was not really consent; cops are too intimidating

Imprisonment occurs when total restraint of liberty of person, however short a time. If person consents b/c feels no alternative, still imprisonment. If cop acts as matter of duty & on basis of reas/prob grounds, not liable for false imprisonment. Even if agent excused, principal actor still liable if set about chain of events resulting in confinement.

Bahner v. Marwest Hotel Co. Ltd. (1969 BCSC)

F π orders (on waiter's suggestion), wine bottle at 11:30; Waiter brings 11:45, tells π must finish by midnight, π won't pay for wine; Manager (Δ) calls Rocky (Δ) to detain until police arrive; Cpl Muir takes π to jail, tries to charge w/obtaining goods under false pretenses. Denied so tries public drunkenness (demonstrably untrue)
I Did Rocky (Δ) falsely imprison the π? Did Cpl Muir(Δ) falsely imprison the π?
H Yes, $3,500 damages against Hotel (inc. manager and Rocky)
Yes, $2,500 + $75 (night lawyer) against Cpl Muir
Each award includes $1000 for punitive damages
R The hotel had no cause
Cpl Muir arrested π for something that was not a crime; deliberate, aggravating behavior
Hotel not responsible for Muir's behaviour – Muir is
- An available exit does not nullify imprisonment, when faced with threat (Rocky) for using it

In the case of false imprisonment, the damages are increased if the elements of malice or arrogance are present.

Once charges have been laid (even if there are malicious/false) there is no longer false imprisonment. At the moment officer laid charges, F/I ended b/c B was now being confined by the law.

False Imprisonment
Intentional tort – not accidental or negligent
Variety of trespass to the person
- Is it imprisonment? (no tort otherwise)
- Did Δ have statutory authority? (there's no CL power of arrest – all codified)
- Was there a power of arrest?
- Was Δ justified by s. 25? (on reasonable grounds)

In *Lebrun* – constable was justified but store officials were liable b/c no reas. grounds to assume theft
Bahner – hotel had no reas. grounds to detain; cop had no reas. grounds to arrest
- Not covered by statutory authority b/c no reas. grounds

Crampton v Walton (2005 Alt. CA)

F Cops enter home of plaintiff after obtaining a search warrant for a grow-op. The home was inhabited by a man who had a small child. Tac Team Cop asked P. to get on the ground, and as he was kneeling down, cop forced him down and put knee on P's back to make him stay there. P sustained numerous injuries including collapsed lung and broken ribs.

I Was the use of this much force justified? (Trial)
Were the police entitled to a s25(1) defence? (Appeal)
H No on both counts.
R Cops are not justified under s25(1), which allows them to use reasonable force in the course of their duties, because the amount of force they used was unnecessary in this instance (Trial decision). This was upheld in Appeal court but the reasoning was due to the fact that the cops were not able to adequately defend themselves under s25(1).

Why doesn't s. 25 protect the cops from lawsuit?
- Because the opening words of the s. say you have to be authorized or required by law.
- s. 25 takes care/reas. mistakes of *fact* – if you reas. believe set of *facts* that would justify you.
- But not in this case – P was complying with cop's orders and cop had backup.
- Manning (cop) wasn't liable because he wasn't sued personally, but whole force was sued

Koechlin v. Waugh (1957 Ont. CA)

F 2 youths stopped by cops & asked for ID; π didn't cooperate, scuffle ensued & π arrested; not told reason for arrest; Communication with father denied; Suing for false imprisonment
I Did the cops have reasonable grounds? Was it false imprisonment?
H No reas. grounds; false imprisonment
R No reas. grounds to believe they were about to commit indictable offense, ∴ fails under Sect 495

The cops' excuse was that a robber had similar shoes to π's friend.

- Many occasions when cops have right to ask for ID (defined in statutes) – this wasn't one of them
- Cops cannot use force to ID a person
- Arrestee must be told reason for arrest
- Imprisoned person must be given a chance at communication within 12 hrs

Misfeasance in Public Office

Odhavji Estate v. Woodhouse (2003 SCC)

F Odhavji was killed by police
Claims that police were not cooperating with Special Investigations Unit
Claims were made that police withheld or delayed giving over evidence
I Did the family suffer harm through the misfeasance of the police?
Did the alleged harm satisfy the tort?
H Yes.
Not if it was just sadness, but needed to satisfy "visible and provable illness" or "recognizable psychiatric harm"
R Must be deliberate unlawful conduct in the exercise of public functions
Must be aware the action is unlawful
Must be aware the action is likely to injure the plaintiff. Ought to have known is negligence, but to KNOW is misfeasance.

Other claims were launched in negligence.

Northern Territory of Australia v. Mengel (1995 Aus HC)

F Cattle were illegally quarantined
Mengel sued gov't officials < had acted w/o authorization
I Does he have a tort claim?
H No
R Tort is fault-based < has to be either negligence or intentional
- Not negligent < reasonable belief
- No intent < no intent to harm farmer; acted innocently

It would be tortious if the gov't officials *know* they're acting w/o authority & *know* what they're doing is likely to cause harm < Cdn law says that's a tort.

Just breaching statutory rule isn't tortious.

MALICIOUS PROSECUTION and ABUSE OF PROCESS

- *Both torts are designed to protect against the improper use of the legal system*
- Interests protected include:
    1. Integrity of Criminal and Civil justice systems
    2. Taxpayer's interest in effective justice
    3. Individual interest in not having to experience the cost, embarrassment, damage to reputation and emotional distress of an unwarranted criminal charge or civil suit
- These torts are narrowly defined and hard to establish, so not used frequently
- However, the countervailing policy is not to discourage individuals from assisting in enforcement of criminal law or asserting rights through civil courts

A. MALICIOUS PROSECUTION

Elements: (1) There must be a prosecution; prosecution commences when all poss. info has been given.
(2) Prosecution fails for any reason (i.e. person found not guilty, or π withdraws charge).
(3) Absence of reas/prob grounds (objective).
(4) Malice actor had some motive other than bringing accused to justice (subjective).

Damages are presumed.

There is a defence to MP: if Δ honestly believes guilt of another & desires only enforcement of law (ie. no malice), not liable if wrongly lays information ie. negligent prosecution is not malicious prosecution

What is a PROSECUTION?

- ALWAYS: Information is accepted as disclosing an offense
- POSSIBLY: When Information is presented to a judicial officer

What are REASONABLE GROUNDS?

- Information that would lead RP to become suspicious that a crime MAY HAVE been committed and that the "now π" is guilty

What are PROBABLE GROUNDS?

- When RP believes that if info turns out to be accurate, more likely than not "now π" is guilty

What is MALICE?

- In law: A <u>motive or purpose</u> <u>other than an honest belief</u> that the person has committed a crime and the desire to bring them before a judiciary – whether or not belief is reasonable
- Absence of reas/prob grounds may be used to infer malice, but it's not malice per se
- Spite, hatred ill will, desire for vengeance < evidence of malice, don't constitute malice
- Problem with Concurrent Motives:
    Must <u>honest</u> desire be the only, dominant, or sufficient motive?
    Can be more than one motive, doesn't have to be dominant, sufficient at best

Who may be sued?

- Since <u>Nelles v. Ontario</u>, Prosecutors are no longer immune
    - , their immunity is now "qualified" & not "absolute."
    - Therefore, immunity may be lost if malice is proven
- POLICE OFFICERS not immune
- EXPERT WITNESSES probably immune but open to challenge
- ORDINARY WITNESSES immune

Should tort of Malicious Prosecution be abolished?

FOR: Rarely used
Police, prosecutors and courts filter out bad cases
Law of defamation could handle these cases
Punishment for perjury is a sufficient deterrent

AGAINST:

System must have integrity - used rarely, but good deterrent
Damage to falsely accused: to reputation, embarrassment, emotional security, legal costs
Must keep control over cost of unnecessary prosecutions

TEST FOR MALICIOUS PROSECUTION

1. Initiated by the defendant (of the tort suit)
2. Terminated in favor of the plaintiff (of the tort suit)
3. Must have not had reasonable grounds for doing what they did/must have acted out of malice.
4.

Casey v. Automobiles Renault Cda Ltd. (1965 SCC)

F π storing cars for Δ. π sold 26 but didn't pay for them. Δ lays an information for theft against π so he will pay.
I Had a prosecution been commenced against π?
D Yes, once an information was laid, the judge could judicially consider it.
R As soon as the person has done all that is required to commence action, it is a prosecution.

Note: A Justice of the Peace must take an information if it's believed a crime has been committed.
Stages: (1) J.P. hears information (acts administratively),
(2) issues process (acts judicially).

*Good case for determining the basic elements of the tort.
Shows that "prosecution" commences when information is sworn before JP.
Not necessary for JP to issue "process", i.e. summons/warrant.
Tort of MP can only occur when an arrest or information laid. Not just when someone calls the cops.

Watters v. Pacific Delivery Service Ltd. (1964 BCCA)

F π gave company a cheque drawn on wrong bank branch for delivery; corrected on request but Δ went to police and laid an information; lied to cops. π arrested. Charge dismissed on hearing.
I Was there malicious prosecution?
D Yes. All 4 elements fulfilled. All that could be done to set law in motion against π was done.
R The four elements of malicious prosecution are:
(1) There must be a prosecution,
(2) prosecution must fail,
(3) absence of reas/prob grounds, and,
(4) malice evidenced.

All four elements were present. However, police not liable because found to be acting on reas/prob grounds.

*Good case to define the meaning of "malice".
Difference btwn *evidence* from which malice inferred and *malice per se* clearly set out.
Shows that negligent prosecution is not MP.

Nelles v. Ontario (1989 SCC)

F Nurse charged w/child murders; found innocent; sues MP against Crown/AG's using her as scapegoat
I Can Crown and or A.G. be held liable for malicious prosecution?
H No - Crown has immunity under 5(6) of *Proceedings Against the Crown Act* even if it acts maliciously
Yes - AG & servants not immune from MP; protection no longer absolute, b/ qualified (lost if malice).

- if abuse office, powers, fraud, malice...can sue civil servants personally for MP
- immunity for errors in judgment/discretion and even professional negligence b/ not for MP
- Prosecutor admitted that he did not believe the children's evidence and did not think D was guilty.

*Clearly changes the law & opens door for holding other potential Δ's liable -expert witnesses

Norman v. Soule (1990 BCSC)

F☒ π & others sued by Chem-Pro; π believes suit was to stop him testifying against CP; action in MP

I Can a suit for MP succeed in a CIVIL case? -all other cases dealt with were criminal cases
H No - in ordinary civil action it is not the bringing of suit that causes harm but rather, the publicity
- Neg publicity negated in civil cases b/c accused is given opportunity to clear name in defamation
- MP exists only for criminal charges where maliciousness is the motivation

*Casts doubt on whether action in malicious prosecution can be sustained in civil disputes
Comes down on side of requiring threat/act in furtherance of improper purpose

ABUSE OF PROCESS
- Δ must have used a legal process for a purpose outside and extraneous to the legal action itself
- Key Element: **A collateral and improper purpose**
  - A purpose other than that which legal action was designed to achieve – ulterior motive
  - Use civil process to achieve result not available in court
    Eg. force π into bankruptcy, to sell property to Δ at reduced price, other blackmail
  - cts/academics think "overt act/threat" to collateral/improper purpose must be proved. Others think "overt act" requirement may be dispensed w/if improper purpose clear from pleadings or inferred from action itself
- If improper purpose proved: "properly constituted" civil action or one Δ wins may form basis of action

- <u>To sue in Abuse of Process, π must show:</u>
  1. Δ used the legal process (w/ or w/o reas/prob grounds)
  2. for purpose other than that which process was designed to serve (ie. collateral & illicit purpose)
  3. Δ did some definite act or threat in furtherance of that purpose
  4. causing some measure of special damages (overlooked in some cases b/c presumed)

- <u>Hardball tactics do not constitute/prove the necessary collateral or improper purpose</u>:
  Calling unnecessary witnesses; Using adjournments and other delaying tactics; Initiating counter suits; Over use of pretrial motions and other costly devices; Seeking maximum allowable damage; Pursuing actions and appeals with little merit; Refusing reasonable offers of settlement

<u>Unlike malicious prosecution, it is not necessary to prove either:</u>
1. Absence of reasonable and probable grounds
2. Termination in favour of "now" π

- It is difficult to prove improper motive – judges reluctant to infer such a purpose unless clear
- The Law Society rarely disciplines lawyers who abuse the system by pursuing actions w/o merit
- This tort does not address the problems of:
  - Unnecessary litigation – cases w/o merit – no incentives for lawyers to be cost effective
- Possible solutions:
  - Make abuse of process claims easier – remove overt act requirement, expand def'n of abuse
  - No fault insurance – can reduce litigation & higher % of damages to π
    BUT w/no fault ins, damages will be reduced over time, as will damages for pain/suffering
  - Award costs directly against counsel – now only done in rare circumstances
    Must show counsel's tactics had no merit/advance legit interest/client/only for $ - resisted

Grainger v. Hill (1838 CP)

F[illegible] π mortgaged ship to Δ b/ retained right to use for year or until mortgage paid. Δ's wanted ship immediately & knowing π could not afford bail, had him arrested. Under duress, gave up poss'n
I Was this MP or Abuse of Process? Why?
H <u>Abuse of Process</u> - ulterior motive for prosecution was to extract from π what Δ's couldn't by action itself (ie. jailing for debt unpaid,really wanted ownership of ship which action would not have given if successful)
- π allowed to recover ship w/o showing reasonable & probable grounds OR that 1st action had terminated in his favour (Δ's initial case against him was still pending)

*Classic case of using civil process to extort property that could not be achieved by action itself

Guilford Industries Ltd. v. Hankinson Mgmt Svcs Ltd. (1974 BCSC)

F[illegible] π [illegible]owned lands for developing. Δ did construction on land & wanted to be part of deal; π wanted nothing to do w/ Δ. Δ, trying to prevent π from selling or developing land, filed outrageous/invalid lien on land.

I 1. Was there an abuse of process?
2. Is it necessary for suit against π [illegible] to be ended before suit for abuse of process begins?

H 1. Yes - Δ was disbarred lawyer & knew lien was no good, did so only to extort the property
2. No - in MP it is necessary for the suit against π to have finished (to est. prosecution terminated in π's favour) but not necessary in suits of abuse of process

Pacific Aquafoods Ltd. v. CP Koch Ltd. (1988 BCSC)

F [illegible] π's fish died, claims due to faulty machinery of Δ; Δ counterclaims abuse of process

I Is there ground for counterclaim in abuse of process?

H No - no abuse of process b/c no ulterior motive or wrongful purpose on part of π
- If π trying to prolong hearings as claimed by Δ's, still not abuse of process b/c motive is to receive damages from the action within the scope of the action.
- Fact that Δ may look bad b/c of complaint is not enough to give rise to action

1. Chattels

Tangible personal property
- Has physical existence – jewelry, ships, cash, horses etc.
- Includes *Severed Realty*- i.e. minerals and lumber severed from the land
- Incl. documents representing intangible ppty (title, bonds, cheques etc.); only actual physical manifestation
- Excludes *Real Property*- Land
- Excludes *Choses in Action* - Shares, Debts, Patents etc.

2. Title, Possession & Right to Immediate Possession

-Title "Absolute Property" ultimate right to decide who may exercise rights over it; "ownership"
-Acquired by creation, acquisition (gift or purchase), or ownership of land from which severed

-Possession Exercising physical control – legitimately (lease, bailment) or illegitimately (find, steal)

-Chattel law is often more concerned with possession than title

-Right to Immediate Possession – The right to have the possessor deliver up the chattel on demand
- Owner's right against a thief
- Bailor's right against a bailee at will

3. Acquiring Title

-Some kind of clear expression to pass title is paramount

-A transfers title to B with an act (sale, gift) that manifest intention to transfer

-In sale, property usually passes upon delivery, but may be agreed otherwise
-Property may pass before delivery
-May also be delivery before passing – retention of title for payment, but delivery

-Title cannot be acquired if giver/seller does not have title *Nemo dat quod non habet*

4. Nemo Dat Rule and Contract

1. Only a *valid* contract of sale passes title
2. A *void* contract of sale doesn't pass title b/c intent to pass is nullified by the invalidating cause.
3. A *voidable* contract of sale (obtained by misrepresentation) does pass title, but title is voidable and revests in seller if K rescinded before a bona fide 3rd party acquires title (S.G.A. s.28)
   - Recession not possible against a bona fide purchase for value without notice

Cdn Laboratory Supplies Ltd. v. Engelhard Industries of Cda Ltd. (1979 SCC)

F Cook bought platinum from Engelhard (Δ) for Canlab (π); resold plat as scrap to Engelhard; Canlab never had benefit of plat they paid for; Cook never really had authority for transactions; π sues Δ for conversion

I 1) Did Canlab have title? 2) Did Englhard convert? 3) * Key* Did Cook have apparent authority?

H 1) Yes – Cook was their agent, using their funds
2) Yes – They derived benefit from someone else's property
3) At first no, but yes for last 2 yrs b/c Canlab gave Cook apparent authority via Δ's talk w/Snook

R Perfectly innocent people can still be liable - Δ should have checked Cook's authority
A void contract > No valid expression of intention, so no passing of title
- Cook's purchases were valid because Canlab issued purchase orders, and paid
- Cook's sales before 11 Oct '66 were unauthorized by his employer, so void- Englhard got no title
- Cook's sales after 11 Oct '66 were valid b/c Canlab effectively held him out as their agent

Hollins v. Fowler (1875 HL)

F Fowler(π) sold cotton to Bayley, believing acting for Seddon. Bayley acting for self, resold to Hollins (Δ), who sold to Mitchie. Bayley never paid Fowler. Fowler sues Hollins for conversion
I Did Hollins convert the cotton himself? Can an "innocent" party be liable?
H Hollins held liable for conversion; Fowler's K void b/c K not supposed to be with Bayley, but with Seddon
R Usually a mere agent is not liable, but Hollins was acing on spec, not as an agent
The law puts the risk on the buyer

- Fowler intended to contract with Seddon, not rogue Bayley for Bayley's benefit, ∴ no contract, no title transfer
  > Fowler never lost right against Bailey or his customers

5. Right to Possession – A Relative Concept

A asserts a possessory right to a chattel against B by suing B in one of the chattel torts
Question is who had the right to possession as between them

- A thief has possession right as against thief who steals from him
- A finder on someone else's property has a right as against someone with no claim at all
- Owner or occupier of land has right against finder
- True owner of chattel has right against land owner/occupier

Armory v. Delamirie (1721 KB)

F π (Chimney Sweep Boy) finds ring, takes it to jeweler, where apprentice steals stones
I Does finder have rights against jewelry shop?(Δ)
H Yes, π had more rights than others, and Master responsible for Apprentice
R Finder has right to possession except as against owner

Simpson v. Gowers (1981 Ont. CA)

F π stored beans in barn sold to Δ. Δ sold beans, π sues in conversion. Defence was abandonment.
I Conversion?
D Yes, Δ didn't prove abandonment.
R Onus on Δ not to do anything which may usurp π's rights, regardless of knowledge of π's interest.

- One must make sure that "found" property is truly abandoned

6. Bailment

- Bailee is willingly/with authority in possession of chattels to which bailor retains better title
- Bailee's authority created by bailor's consent/operation of law (Goods seized by Sheriff)
- Bailment may be gratuitous (no benefit) or for reward
- Duty to look after goods depends on amount of bailee's benefit- greatest for greatest
- If bailee cannot produce chattel, he has onus to show chattel not lost thru his fault

Mason v. Westside Cemeteries Ltd. (1996 Ont. Gen Div)

Son paid cemetery to keep ashes of parents; 14 years later asked ashes placed in his plot – cemetery can't find – sue in bailment for loss of ashes (detinue and conversion)
R: Reverse onus on B'ee (cemetery) to prove urn lost w/o fault

7. How the Right to Possession of Property can be Interfered With

- The 3 main chattel torts cover some, but not all of the following:
  Δ uses π's property
  Δ takes it from π
  Δ refuses to give it to π
  Δ destroys it
  Δ transfers possession to a third party
  Δ asserts ownership over it

1. The 3 Main Chattel Torts – Trespass, Detinue, Conversion

Trespass – an Intentional Tort

- **act of direct, physical interference with chattel in *possession* of another (π) w/o justification**
- **not a question of interference w/title, but w/possession**
    - damage = must have a direct, causal link to physical act of interference
    - intention = doesn't mean intention to do harm, but to do physical act of interference
    - unlike other trespass, not actionable per se; must prove damages (ie. interfered w/use)
        - no damage, no deprivation, no interference = no cause of action.
    - no liability in trespass if no fault (not negligent, not intentional)
    - remedy = damages, possibly injunction
    - Who can sue for Trespass? Anyone in possession or with immediate right to possession

Detinue

- **Δ fails to return, on demand, property to which π has immediate right of possession**
    - **Detinue sur bailment** (older form) - when Δ Bailee who had/has possession when demand made
        - π bails chattel to Δ and at end of bailment, Δ either refuses to return item or cannot return it because Δ deliberately or negligently destroyed it, lost it, or let it be destroyed
        - Δ can be liable even if no longer possession/chattel, but no liability if lost chattel w/out fault
    - **Detinue sur trover** - when Δ is anyone else who has possession when demand is made
        - π has immediate right of possession against Δ (not a bailee), but Δ refuses to give item to π
        - Δ could be finder, thief or innocent third party – w/ no right of possession against π
        - Remedy: damages + specific restitution – incl. Δ returning item or paying its **current** value
        - Material elements for pleading detinue sur trover:
            1. π was possessed of chattel
            2. π lost it (non-traversable)
            3. Δ found it (non-traversable)
            4. Δ refuses to return it

Conversion

- **Any intentional, unjustified act by Δ that is inconsistent w/ π's right to immediate possession**
    - whereby π is deprived of use and possession
    - An intentional tort – intend to do the act, not necessarily harm item
    - Inaction (failing to protect the chattel) is never a conversion
    - Chattel finder is exception to the rule
    - Δ may intentionally interfere with chattel w/o being aware that chattel is someone else's
    - Ignorance is no defence - eg. auctioneer unaware they sold stolen property will suffer suit
    - Historically: from detinue sur trover
    - Changed # 4 above to: Δ converts chattel for own use
    - Thus, π had action although Δ no longer in possession, doesn't matter how Δ got item
        - Conversion is, in effect, a forced sale.
        - When tort is serious, sue in conversion not trespass

- **Δ engages in act(s) that are intended to exercise control over chattel over which π has right to immediate possession and Δ's act is inconsistent w/ π's right to immediate possession**

Examples of Different Acts of Conversion:

1. Taking away chattel – if intended nature of taking led to denial of π's right to possession (ie theft)
2. Intentionally destroying chattel
3. Damaging or altering chattel to change its identity (ie flour into bread)
4. Receiving chattel in transaction where Δ intends to acquire right of possession but doesn't
5. Using chattel in way inconsistent w/π's right to possession (ie to better self)
6. Withholding possession from π w/intent to deny π's right to possession
7. Selling or transferring possession of chattel to another
8. Possibly acting as agent for another. Law unclear. (ie auctioneer almost certainly liable)
9. Bank collecting payment on chq to which drawer has right to immediate possession (*Boma)*

Detinue & Conversion

- If Δ has possession chattel π immediate right of possession to, Δ refuses to deliver to π on demand, Δ is liable:
  in detinue (for detaining)
  in conversion (for denying Δ's right to possession)
- If Δ, not a bailee, formerly had possession but lost possession:

Δ not liable in detinue sur trover
Δ liable in conversion if Δ intentionally destroyed it, lost it, sold it, etc.

- If Δ was bailee, and lost possession of chattel:
  Δ is liable in detinue sur bailment if loss was Δ's fault (intentionally or through negligence)
  Δ liable in conversion if loss was intentional

Boma Mfg Ltd. v. CIBC (1996 SCC)

F Employee preprinted chqs made payable to 1st husband, deposited into her own account
I Is CIBC guilty of conversion?
H CIBC liable in conversion
R: Boma still true owner of cheque as employee not entitled to it

Remedies

Trespass: damages for harm done to π's possessory interest
Detinue: order Δ to return chattel if still in Δ's possession
or damages based on value of chattel at end of trial
and damages for detention
Conversion: damages for value of chattel at time of conversion
or time thereafter when π could have replaced it
plus any other foreseeable damages

3 Considerations when to sue in detinue or conversion:

1. **results are different:**
   - Want chattel back, sue in detinue - C.L. crt could give Δ choice paying damages/return chattel; if π specifically wanted chattel return (not common, sentimental), Chancery & get order for 'specific restitution'; Crt Equity would give order if found mere damages not equitable. Today in detinue just plead for specific restitution.
   - Want damages awarded, sue in conversion

2. **method of calculating damages is different:**
   - detinue assessment is based on value at time of trial judgment
   - conversion assessment is value at moment tort occurred

Steinman v. Steinman (1982 Man CA)

F Appeal of judgment giving value of jewels at time of trial and not at time of conversion.
I When is chattel appraised in Conversion?
H Pay replacement cost at time of tort of conversion.

3. **limitation periods are different:**
   - each has limitation period of 6 yrs b/ begin at different times
   - at time of demand/refusal in detinue; when cause of action commences
   - at time of sale in conversion

Other Torts that Protect Interest in Chattels

Negligence - when Δ unintentionally harms chattel in which π has an interest
If π is in possession of chattel and interference is direct, trespass is an alternative

Replevin - not tort; procedure where person claim ppty could "replevy" (get it back) by posting security

Action on the Case for Injury to Reversionary Interest
π had neither possession/right to immediate possession at time chattel harmed, but had reversionary interest; usually the owner who bailed chattel for a term (eg. person damages a leased car)

Defence based on Δ's Acquisition of Title by Statute (exception to Nemo Dat)

- If Δ1 has no title and sells to Δ2, the SGA says Δ2 does get title against true owner (π) when:
  1.Δ2 buys from Δ1 on market overt (SGA s.27)
  2.π bought chattel (got title) from Δ1 but left in Δ1's possession, who then sells to Δ2 (SGA s. 30(1))
  3.π sold/agreed to sell chattel to Δ1; not yet xferred title but Δ1 poss'n; Δ1 sells to Δ2 (SGA s. 30(2))

4.π left chattel in possession of mercantile agent Δ1 who sells, pledges or disposes of goods in ordinary course of business to Δ2 (SGA s.58)

- In each case: Δ1 is liable for conversion to π for unauthorised sale
  Δ2 not liable because SGA gives good title to Δ2

Defence *jus tertii (3rd Party)*

- Required element for action in detinue or conversion:
  π has possession or right to immediate possession at time of refusal to deliver or conversion
- If π has higher right to possession than Δ, then no excuse by Δ that 3rd party has more right to possession than π
- When π had actual possession at time of conversion, third party has no rights
- When π relies on right to immediate possession, Δ can say someone else actually has that right
  but bailee cannot deny bailor's right to immediate possession if bailment terminated

Defamation

"An untrue publication that tends to injure reputation in the popular sense, to diminish esteem, respect, goodwill or confidence in which π is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against him/her."

False statement to person's discredit.

Libel – written
Slander – oral

Defamatory words in broadcast < published < libel

Libel is actionable per se – don't need to prove special damages to get damages

Slander – do need to prove special damages to get damages

Both torts require sth about plaintiff to be communicated to 3rd party.

Link to criminal law – "defamatory libel" – doesn't need to be communicated to 3rd person – committed if you only say the words to person being defamed – actionable per se.

Charter wrt defamation?

- s2 – freedom of expression
- has no direct role to play in litigation btwn private individuals
- has to do with individuals and the state
- Indirect role – if court considers modifying CL, modification must be consistent with Charter values

Slander – emerged medieval, orig. dealt with in (eccles?)

- CL courts gradually assumed jurisdiction
- floodgates – so created requirements
  - plaintiff must demonstrate material damage

Libel – coincided w/ devpment of private press & Crown's desire to suppress printed sedition

- Crown created defamatory libel
  - Association w/crime – no need to prove damages

Anomalous slander – actionable per se (generally you require proof of damage)

1. Words imputing the commission of a crime.

Conyd v. Brekelmans (1971 BCSC)

F Δ sued for remarks made at mtg to determine whether π should be entitled to govt grant; Δ "everyone knows he did not make honest living & if he gets $ he will pocket it." Δ did not get grant, claims was due to defamation.

H slander not actionable per se; onus is on π to prove special damages; π couldn't est'b Δ's words responsible for losing grant [slander only actionable per se if imputes indictable criminal offence].

- didn't allege attempted crime b/c didn't allege obtaining by false pretences

- words which merely impute intentions not actionable per se
    - must leave you open to legal penalty

2. Words imputing that one has a loathsome disease.
    - probably based on social rejection
    - restricted to most extreme varieties – leprosy, syphilis (AIDS?)
    - if true, not defamatory, but may be invasion of privacy

3. Words affecting one's trade or profession; imputing unfitness for trade or office
    - Limitation – must have been spoken of π in nature of calling. Must be related to fitness to carry out office.

Jones v. Jones

- said headmaster having sex w/ cleaning lady
- HL said not actionable per se b/c chastity is not an essential requirement of teachers
- could not establish temporal damage

Elements of Defamation

1. Words must be defamatory.
2. Words must be published – other than π.
    - Once publication established, π does not have to prove untruth – onus on Δ to prove truth
3. Words must refer to π.

Youssoupoff v. MGM (1934 CA)

F Movie released about Rasputin's death, included seduction/rape of Russian lady – wife of one of Rasputin's assassins. π alleges movie portrays her, friends agree. Suit for libel.

I *1)Is movie a libel or slander?*
2)Does it refer to Princess Irina specifically?
Test: Would reasonable people w/ knowledge of facts identify π after seeing film?
3)Was it defamatory?
4)Were damages excessive?

H *1)Libel, ∴ need not prove damage – movie constitutes publication*
2)Yes, movie portrayed π
3)Yes, it decreases her reputation/esteem in society
4)No, no change

Defence: "We didn't intend to refer to her." Court: "It doesn't matter what you intended."

Byrne v. Dean (1937 KB)

F Golf club illegal slot machines, s/o snitched to cops. Notice posted insinuating π was the one who snitched.

I 1) Was club secretary (Deane, Δ) responsible?
2) Was poem defamatory?

H 1) By failing to remove poem, Δ published it – had control over words and failed to remove them
2) Not defamation – test of defamation, in view of "worthy subject of Crown" – impossible to call it defamation if someone says you gave info to cops resulting in prevention of crime.

Innuendo

If relying on ordinary meaning/words, don't have to outline defamatory meaning, b/c it's obvious. Where words not defamatory in ordinary sense, and π relying on innuendo, must outline meaning & show facts to support interpretation; i.e. must establish meaning based on facts. π must also plead innuendo in claim.

- ie – "Quisling" – few people understand today – would have to prove special meaning
- It is harder, in innuendo, to prove that defamation refers to π if not mentioned by name. Must demonstrate that a reasonable person, who knew π, would have believed that the words referred to π.

May also be defamatory in ordinary sense as well & have special additional meaning b/c of facts/circs.

Libel and Slander Act

S. 13 Allegations in libel and slander actions:
π may allege words were used in a defamatory sense, and must specify the sense unless obvious

Rule 19, B.B.S.C. Rules
S. 12 a In action in libel or slander where the words complained of were used in a derogatory sense, other than their ordinary/normal meaning, particulars of facts must be given on which the π relies to support the interpretation of the words

Tolley v. Fry (1931 HL)

F π brings action for libel. Action is not because of what ad said but rather innuendo that he used his reputation for his own gain. This was perceived to be in very bad taste as an amateur golfer. Trial court held there was no need to plead innuendo b/c the inference was obvious and found for the P. C.A. reversed trial court. H.L. agreed with trial court and restored original judgment.
ISSUE: trial court: was the ad defamatory? (yes) At H.L.: does innuendo have to be pleaded?
HELD: for π, restored original judgment

- RATIO: If inference from publication obvious, innuendo need not be pleaded, jury can decide whether it was defamatory. If inference not obvious, innuendo must be proven.

For innuendo plea not to be needed, audience would have to know that golf clubs would not allow pros to play. True that H of L would know this, but not average reader.

If you even *think* innuendo's involved, plead it. Can't be struck down for pleading it.

Reference to the Plaintiff/ Identification
The words must refer to π. There's no requirement that Δ *intended* to refer to plaintiff or intended to defame – if reas. pers. would identify and think defamation, it is.

- strict liability tort – does not require proof of intention
- absence of intent, mistaken fact not defences

E. Hulton & Co. v. Jones (1909 HL)

F Former employee Artemus Jones (π) sues newspaper in libel. Paper printed defamatory article, using π's name; Δ claims they used a fictional name, no intent to defame π.
I Would others reasonably thinks that the words defamed the π?
H Yes, Friends of π believed that article referred to π
Damages large, reckless behaviour by paper; π's name well known to paper, and it was a reprehensible article to be condemned
Δ cannot say he did not intend to defame, and did not know π, b/c π is a former employee
R *Innocence or absence of fault is not a defense in tort of defamation*

Strict Liability Test - Intention of libeler is irrelevant (if Δ writes and publishes facts in good faith, unaware that another has the same name or the words are false, it is irrelevant b/c π is still injured

Cassidy v. Daily Mirror (1929 CA)

F Picture of man and "fiancee" published in paper. Wife (π) defamed, implied she lied about marital status. Husband lied to reporter, and paper printed this. π sues in libel
I 1)Was alleged libel capable of defamatory meaning?
2)As Δs were unaware of facts, are they liable for inferences made?
H 1)Yes, friends thought she'd lied about marriage
Reasonable person would believe words about π
Statements about A may indirectly defame B
2)Yes, strict liability test applied
Publisher should be responsible for inquiring into the truth
R Repeating a lie is still a lie, still leaves one liable for defamation

Daily Mirror did not apologize – big mistake.

- Always apologize immediately if in the wrong – it reduces damages.

Class Defamation
For group defamation, π must establish that words referred to π, as well as whole class defamed. Mere membership in class does not allow π to use that membership as claim in defamation. If group small, claim more likely to succeed, b/c members can more easily be ID'd. i.e. more reasonable that RP would believe words referred to you.

Ex – The lawyers in this town are thieves (In a 2 lawyer town)

Test: *1) In Law- Is language in law capable of referring to the π? – Judge Rules*
2) In Fact- Did the language in fact refer to the π? – Jury Rules

Knupfer v. London Express (1944 HL)

F Δ published article defamatory of "Young Russians" an expatriate Russian origination- called them fascists. π claims that article refers to him, friends agreed
I 1) Can you sue over words defamatory to class of individuals? and if so, when? (Limited Group)
2) Can this article be capable of referring to the π?
3) Does this article lead a reasonable person to believe that it refers to the π
H 1) Yes
2) No- claim fails critical test, if article is not capable of referring to π, no cause
This article is not about π, nor is it capable of being so
R If π not specifically named, tough to prove defamation, especially from a wide group

What is Publication?
To "Publish" requires communication to at least one person other than the person being defamed.
-Usually, once publication is proven, intent to publish assumed, though Δ may be able to rebut assumption
-The fact of publication is crucial

3 Types of Publication
1. Dissemination of defamatory material to world – Strict liability – absence of fault not defence
2. Dissemination to π, and incidentally to 3rd person(s) – absence of fault may be defence
3. Dissemination by subordinate or mechanical distribution
-Absence of fault may be defense
Ex –The paperboy
In (2) and (3), onus is on Δ

McNichol v. Grandy (1931 SCC)

F Δ slandered π, and employee overheard through hole in the wall
I 1) Does this constitute publication?
2) On whom does the onus lie?
3) Is Δ liable in intentional tort?
H 1) Yes, publication occurs when at least one other person hears the remark
2) Onus is on π to prove publication
-Words are defamatory
-Words are about π
-Words are published
3) Δ is liable prima facie, until he proves no intention to publish
-If Δ can prove absence of fault, i.e. he did not intend to publish, and was not negligent or reckless in his communication.
-In this case, Δ argued he was unaware of 3rd party's presence, and not negligent in being unaware- i.e. reasonable person, in that situation, would have expectation of privacy

Who is a Publisher?
Anyone who repeats defamatory words in fresh publication can be held liable - all repetitions considered separately

Vizetelly v. Mudie's Select Library Ltd. (1900 CA)

F Private Library was circulating material already ruled defamatory; That material was to be withdrawn was already made known in trade publications; Δ claims they were unaware of recall

I 1) When is the disseminator of libel, liable?
2) What test to apply when considering liability?
3) Where is onus of proof?

H 1) A 3rd party is only liable when they negligently allow defamation to spread
2) Test:
Δ must have no knowledge of libel upon dissemination
Circumstance around Δ's receipt of info must not have indicated presence of libel
It was not by Δ's negligence that he was unaware of libel upon dissemination
3) Onus is on the Δ to pass the above test
Held that Δ was liable – he failed test, did not prove absence of fault

DEFENSES to Defamation

1) **Consent** – π has assented to publication of material in question
2) **Justification or Truth** – Δ has burden of proof to prove truth, both literal and innuendo
-Must prove that all material is true; Repetition is no defense
-Truth is a dangerous defense - if it fails, compensatory and aggravated damages will rise
-Standard is on the Balance of Probabilities
3) **Privilege** – When the public's interest in knowing is greater than π's right to reputation
a) Absolute Privilege – communication of supreme importance, even if outrageous or malicious
1) Statements made in Parliament, Legislative Assembly, Judicial Proceedings or Admin. Tribunals, to ensure that people talk freely. If defamatory, subject to Ab Priv
-Legislative Assembly Privilege Act S.1
Leg. Assy., Committees & Members have Ab Priv/Immunity
-BC Constitution Act 1996 S.51(2)(a),(3)
Protects Leg Assy - words/documents presented/course/gov't business
May not be express/actual malice
2) Lawyer-Client Privilege
3) Between high officials of state

b) Qualified Privilege – Conditional immunity attached to certain occasions of lesser importance than absolute. Certain communications for certain purposes excused liability if made w/o malice.
- Malice will rebut
- Must be honest
- Communicator has interest/duty - legal, social, moral - to communicate to person, this person has corresponding interest/duty to receive it. Reciprocity essential.
1) Communicator has interest, recipient has duty
2) Communicator has duty, recipient has interest
3) Both party have common interest in making and receiving

This protection applies

A) BC Constitution Act 1996 S.51(2)(b)
Protects introduction of documents/papers to Leg. Assy w/o actual or express malice
B) Fair and Accurate Reports of Parliamentary Proceedings
C) Fair and Accurate Reports of Judicial Proceedings
Cdn Judicial Proceedings – Always Priv
Commonwealth Judicial proceedings – Likely Priv
Foreign & Int'l – Only in public interest
D) Special Relationship Between Publisher and Recipient
E) Statements to Authorities to Obtain Redress for Public Grievances
F) Libel and Slander Act B.C. S.4
any publication of public proceedings are given qualified privilege unless it can be proven that reporter used actual/express malice
G) Fair Comment on Matter of Public Interest

Royal Aquarium v. Parkinson (1892 Eng CA)

F Δ defamed π in council meeting about issuance to π of license for music & dancing

I Is a City Council meeting privileged?
When is a member of the meeting liable in slander?

H Meeting can be privileged if in the selfless performance of public duty, w/o malice
In this case Δ abused the situation, and is liable for slander

Hill v. Church of Scientology (1995 SCC)

F π (Hill, Crown Attorney) accused by church lawyer (Manning, Δ)- contempt of court for allowing release/ sealed documents. In fact docs not released. Δ made accusation on steps of Osgoode Hall in front of media. Δ knew at time of accusation there was no contempt of court
I Did the common law doctrine of defamation violate the CCRF?
H CCRF only applies when insulting gov't
Gov't was not impugned, only Hill himself
Δ's statement was covered by Qualified Priv, but presence of express malice vacated privilege
Manning highhanded, willfully blind and careless. Incapable of objectivity ∴ privilege is negated
There is no cap on general damages for defamation
General $300,000; Aggravated $500,000; Punitive $800,000
* This is the case to cite re defence/offence of agg/pun damages. para 188 – agg, para 196 – pun.

Watt v. Longsdon (1929 Eng. CA)

F Δ claimed in letter to business associates and π's wife that π having affair with housekeeper
Δ claimed interests gave him privilege
I When does privilege apply to letters to associates? to letter to π's wife?
H Priv applies when Δ has a duty to receiver, and receiver has corresponding interest - reciprocal
Yes, Priv applies to associates; No, Priv does not apply to the wife
- He had no duty to tell her, even though she may have had an interest

Priv is defeated by malice (abuse of Priv) or when Priv exceeded by going beyond limits of duty/interest
CA. Says that jury must be left to decide malice

Jones v. Bennett (1969 SCC)

F Δ (Prem. BC) made defamatory remarks re π at political meeting, knowing reporters present
Δ claims moral duty to inform party he was properly doing his job
I Does Priv apply, or was this slander?
H Priv does not apply. Knowledge of presence/reporters meant that Δ intended to publish to world (which did not have an interest) ∴ there can be no qualified Priv
Also, had there been Priv, it would have been defeated by malice
See rule 2 duty/interest

Fair Comment on matter of public interest
Fair comment on matters of public concern or interest is protected form liability for defamation provided it is based on fact. Right of every citizen to make comments on matters of public interest. There must be:

1. public interest – judge to decide as matter of law
2. expression of opinion, not fact
3. comments must rest on fact
4. no malice
5. honestly believed by the Δ

Test of Fairness: Burden on the Δ
Could an honest, though possibly prejudiced person, hold the opinion of Δ?
If yes, then did Δ hold this view?

Rules of Court of BC – Rule 19, s. 12(b)
Where Δ claims words complained of are stmts of fact, in so far as they comment on matter of public interest, Δ shall give particulars on how they are true

Cherneskey v. Armadale Publishers Ltd. (1978 SCC)

F Δ, a newspaper publisher, ran letter defaming the π as racist
I Does privilege protect publication of opinions that publisher does not support?

H Trial: authors not called to give evidence and newspaper itself didn't hold the opinion
- trial judge withheld defenses of privilege and fair comment because no evidence as to whether Δ had tried to find out if authors honestly held those beliefs

Appeal: reversed
SCC: restore trial judgment

R For fair comment, pub. holds same responsibility as original authors. Words used in letter must be honest expression of their opinion.

Vander Zalm v. Times Publishers (1980 BCCA)

F Editorial cartoon depicts VZ picking wings off flies
I Is this fair comment by newspaper and cartoonist? Is it their honest opinion?
H Δ succeeds and action dismissed
Passes Cherneskey test - pub. honestly believes communication

Moises v. Cdn Newspaper Co. (1996 BCCA)

F π defamed as terrorist official by Δ, Victoria Times Columnist
I Does public's interest in knowing invoke qualified privilege?
H No – there was no reciprocal duty-interest relationship in this case
R Only in cases of <u>public safety</u> would newspaper have duty to publish

The Palliatory Defence of Apology

Reduces damages only
- Newspaper – special statutory defence if published

Damages
General damages don't require specific injury - assessed by jury for public vindication of π's reputation.
- As in other torts, aggravated damages awarded for particularly high-handed behavior by Δ
- Punitive damages awarded when other damages not sufficient to punish and deter.

Cap for defamation awards has been rejected in Canada – common sense applies
Only in rarest/clearest of cases will injunction to restrain publication of libel be awarded, so not inhibit free speech.
Also See ***Hill v. Church of Scientology*** under Qualified Privilege

INVASION OF PRIVACY
US cases have strongly influenced BC law.
Prosser (US) says it's a complex of 4 separate torts, invasion of 4 different interests:
1. intrusion into π's solitude or private affairs
2. public disclosure of private facts
3. placing π in false light in public eye
4. appropriation of π's name/likeness for commercial gain

Intrusion
- home physically invaded
- eavesdropping (wiretaps)
- harassment by phone calls (Motherwell)
- peeping tom (Lee v. Jacobson)
- must be regarded as objectionable by RP of ordinary sensibilities

*These are accepted by the T.J. in *Davis*

(1) Intrusion Into Privacy of Life
- The most general - Unwarranted interference with solitude or seclusion
- Eavesdropping by mic, wire taps; Threatening telephone calls; Peeping Toms

Lee v. Jacobson (1992-4 BCSC/BCCA)

F π rented cabin, heard cough in middle of night; discovered peephole that looked into her bedroom
π sues owner of cabin(Δ) for invasion of privacy

I At trial, was it Δ who coughed?
H At trial – YES -Δ was the cougher, Judgment for πs
I On Appeal – Did T.J. err in finding that there was sufficient evidence against Δ?
H Yes – Legal Error, ID not established, timeline was not clear, Δ may have had a valid alibi
Appeal Allowed, New Trial
R For action to proceed, ID of tortfeasor must be established; T.J. may not speculate

Davis v. McArthur (1970 BCCA)

F Δ P.I. followed π for 6 months at wife's behest, even used tracking device; π claimed was also someone else following him, no real evidence; π became aware of surveillance, said made him ill; sues under BC Privacy Act
I Was there unreasonable invasion of privacy?
H Trial – YES - $1000.00 damages
Appeal - NO, Δ's appeal allowed, Case Thrown Out
R Invasion depends on circumstances
T.J. paid too much attention to "other surveillance"
Reasons no unreasonable surveillance:
1) Δ agent of the π's wife, legitimate interest in his activities
2) Δ acted circumspectly – no malice, curiosity
3) Surveillance was in a non-ostentatious manner > did not draw public attention
- It was wrong for the T.J. to consider the effect on π's health, given that he was normal, healthy
  - Must first find Tort, then assess damages
  - Might be different if Δ knew of π's health problems

*Prosser says – The thing invaded into must be private, and intended to be so
On the street, following and watching will normally be legal

Silber v. BCTV Ltd. (1986 BCSC)

F BCTV sends reporter to Stacey's Furniture during strike; kicked off ppty by mgr; returned, filmed, led to scuffle, including cops; BCTV airs edited version of report, makes Stacey's look bad
π sues for trespass to land and invasion of privacy
H Trespass to Land > YES, $100.00
Invasion of Privacy > NO
R 2 Aspects:
1) Filming in Parking Lot, no expectation of privacy, full public view – could see from street
2) Broadcast of News, a matter of public interest under S.2(3)(a)

(2) Public Disclosure of Private Facts
- Violation of privacy even if info is true and not defamatory

- Limits:
  1. Disclosure must be truly public, telling one or two people doesn't count
  2. Must be private info; must not be public record or common knowledge
  3. Must be objectionable to RP

- Public Figures – To what extent are their lives private?
- In the USA celebs have (sometimes) less protection
  - They have sought publicity > Consent
  - Personal lives are already public, too late to stay private (*Melvin v. Reid)*
  - Their lives have become matters of public interest

Melvin v. Reid (1931 Calif. CA)

F π retired, reformed prostitute, murder suspect; Δ makes movie about her life, using former name – present married name used in publicity; Several claims, including Invasion of Privacy
I Were these private facts?
H YES, held liable
R Private Fact, the π's *present* name was not a matter of public record
Coupling the old facts with the present ID was tortious

Mere use of past incidents would not be tortious < public record

(3) False Light in the Public Eye

- Must be false info that, while maybe not defamatory, would be offensive to RP
  - Still, in many of these cases, defamation will lie
- In *Silber* the π claimed editing put him in a false light
- J Says no, doctrine only operates when falsity published as a fact
  - Incomplete & Misleading does not equal False

(4) Appropriation of Name or Likeness for Business Benefit

- S.3 of the Privacy Act
- Under USA law a broader range of activity is caught; Any pecuniary advantage, not just business persons
- In Equity there is "Passing Off" > yourself as someone else

Joseph v. Daniels (1986 BCSC)

F π amateur bodybuilder, picture of his torso was used on posters without his permission
π sues: Wrongful Misappropriation of Personality; Invasion of Privacy; and Breach of Contract

H NO Misappropriation b/c picture headless
NO Invasion, again, not a recognizable likeness
YES Breach of K – Awarded scale rate of $550.00

R One cannot borrow an identity without the identity being recognizable

Motherwell v. Motherwell (1976 Alta CA)

F relative harassing other relatives via phone and mail; action in invasion of privacy and trespass.

I Can this form be invasion of privacy? trespass?

H yes; is invasion of privacy b/c court not willing to make this a new recognized category of tort, so says they succeed in claim for private nuisance - constant phone calls interfered with use of their property - success is based only on phone calls not mail; action in trespass cannot be sustained

- 1968, BC introduced the **Privacy Act, R.S.B.C. 1996, c. 373**

S.1(1) –Makes it a Tort to willfully violate the privacy of another > Actionable per se
-"Without claim of right"- legal right to invade- very unclear
S.1(2) –The Court is left to determine the degree of the violation
S.1(3) –All facts will be considered
S.1(4) –Eavesdropping and Surveillance are not automatically a violation of privacy

S.2(1) –Defines court and crime
S.2(2) –Defenses, including: Consent; Defense of Person or Property; Proper Discharge of the Law
S.2(3) –Defense for Public Interest, Fair Comment, and Privilege

S.3(2) – Merely having the Same Name
(3) - Group Photo rule – exempt unless ID highlighted
(4) –Appropriation of name or likeness for business purposes, with exemptions
*Also, mimicry of voice is not included as a violation i.e. Arnie's voice in a radio ad

Intentional Violation of Civil Rights

Seneca College v. Bhadauria (1981 SCC)

F East Indian woman with PhD, etc., applied 10x for teaching jobs; less qualified white people hired; she couldn't get interview; College demurred < this doesn't disclose a reasonable cause of action
Ont. CA said this was a tort: "unjustified invasion of interest not to be discriminated against in respect of a prospect of employment on grounds of race or national origin"

I Is this a tort?

H No

R Legislation (HRC) covers the field and doesn't allow CL remedy

- otherwise, 2 parallel sets rights/remedies – HRC procedure, enquiry, damages & CL remedy

- could be liable under one and not under the other

Ont. CA recognized a new tort: to refuse s/o a benefit on the basis of race or other impermissible ground
Elements:
1. Economic harm
2. Discrimination
3. Denial of employment

Ratio above – but there are lots of cases where statutes don't remove CL remedies
- but in this case – no clear cause of action; they ARE removing CL remedies

Civil Rights Protection Act
Enacted in '70's in response to Klan scare in BC
Creates tort, actionable w/o damages:
1. promoting hatred
2. promoting superiority or inferiority of a class of persons on basis of race, colour, religion, ethnic origin, place of origin (not gender, class)

Wouldn't cover Bhaduria b/c the college wasn't *promoting* hatred or superiority/inferiority

2 possible avenues – HRCommission & tort < if legislature creates, overrides SCC

Smith v. New Brunswick Human Rights Commission (1997 NBCA)

F Law professor not rehired; said he would've been if not for pro-female affirmative action
HRC dismissed claim b/c aff. action OK under Code
- they had ok'd uni's action

Sues HRC & uni & union < for not fighting it
Argues that Code is the problem < the Code is violating his rights b/c they ok'd aff. action
HRC says not suable entity; entire action should be struck

I Is HRC suable?

H No

R NBHRC is a quasi-judicial body created by ordinary statute, without a real capacity to enforce its decisions without aid from the Minister ∴ not suable

TJ was not willing to say this was an impossible claim.

Case rejected on appeal – HRC not suable entity.

It's difficult now to find new intentional torts.

MEDICAL NEGLIGENCE
The four elements of a negligence action:
1. Duty
2. Injury
3. Negligence
4. Causation

In negligence action, π must prove:
1. Injured
2. Injury caused by negligence of Δ

If unexpected occurrence < RP couldn't foresee < no negligence
ex. HIV from artificial insemination – at the time, nobody knew that could happen – no neg.

Q's of fact > injury, negligence < go before jury on balance of probabilities
Duty < Q of law < judge decides

Negligent means that Δ

1. did something RP in *defendant's shoes* would not have done
2. did not do something RP in *defendant's shoes* would have done

In med neg > Reasonable Doctor < jury decides

In medical negligence, π alleges Δ doctor/nurse/hospital was negligent in:

a. diagnosing π's illness, and/or
b. establishing treatment protocol, and/or
c. implementing treatment protocol

Can also allege that if Δ not negligent in any of above, Δ negligent in failing to properly disclose risks of treatment – **no informed consent**

Informed consent = disclosure of risks (2 sides of same coin)

Proper disclosure = informed consent

Proper disclosure means telling patient

1. all the things anyone in his position would want to know; and
2. any special things the Δ knows or ought to know the particular patient would want to know.

Informed consent is an aspect of causation.

- This allegation implies if Δ properly disclosed risks, π wouldn't've consented to treatmt.

The burden of proving informed consent in medical negligence is burden of proving consent in battery.

- If you touch s/o else that is battery unless they consented.
- Consent is implied in many, perhaps most circumstances.

Reibl v. Hughes changed the law.

- battery in med. reserved for no consent at all or going beyond consent (barring emergency)
- when no informed consent, negligence

Negligence is less π-friendly than battery.

- battery – defendant must prove consent
- negligence - π must prove lack of consent

Objective test < what would ANY RP want?
Subjective test < what did THIS person want?
Modified Objective Test > what would a RP in THIS person's shoes want?

Donoghue & Stevenson < big breakthrough. Foundation of modern Negligence law. Before this, only real avenue was breach of K; not an option b/c π's "K" was w/vendor, who was not negligent. Also, *friend* bought drink. So K not w/Donoghue.

Donoghue v. Stevenson (1932 HL)

F π, drinking ginger beer mfrd by Δ, finds snail, becomes ill from shock & sues Δ, claiming he owed her a DOC
I Does mfr owe DOC to eventual consumer of product?
H Yes
R DOC not limited to specific relships; based on general concept of proximity- neighbor policy
If mfr's product intended to reach consumer w/o inspection, DOC.

New law, now mfr owed DOC to consumer. Before, negligence cause of action only if inherently dangerous items, or known defect. Lord Atkin says leads to injustices (e.g.. if mfr negligently allows poison to enter product there is no remedy b/c mfr unaware of it!)

Atkin's neighbour theory: Love thy neighbour = in law, do not injure thy neighbour
Who is thy neighbour = in law, those who are so closely & directly affected by your actions that you ought reasonably to think of them when doing or not doing an act that may injure them.

Duty is balanced against both the remoteness of damage & the std of care.

Ct overcame privity of K; said same facts should allow King party to sue for breach & 3rd party had right to sue in tort.
Dissent invoked floodgates if mfrs generally liable. Winning argument: mfr has DOC to anybody injured by product.

- Dominant idea for a very long time was that commerce should not be exposed to sweeping liability.

Began w/ *Donoghue* & developed by *Anns* v. *Merton London Borough Council* [1977], 2 WLR 1024 (HL); English law was affirmed by the SCC in *Kamloops* v. *Nielsen* [1984], 2 SCR 2 at 10, & more recently in *CNR* v. *Norsk Pacific Steamship* (1992) SCC. At present the rule in Canada is:

1. **Is relship sufficiently close so it's reasonable that carelessness of one might cause damage to other?**
2. **If so, can DOC, class of persons or breach itself be negated or limited?**

Duty defined subjectively against objective std in each jurisdiction (matter of policy). Cts must be careful in determining DOC to not open floodgates. Some specifically excused from liability when acting on good faith (ie judges, soldiers in battle). Goal of negligence law is to deter negligent conduct & provide incentives for cautious behaviour.

Duty is a matter of *foreseeability*. If you can foresee harm you are under a DOC to be careful.

- DOC exists where mfr can reasonably foresee harm if they don't take care.
- Limitations – only talks about physical damage; not financial or psychological.
- Foreseeability defines DOC here – works reas. well in physical damage situations. Not so well w/other types of damage.

Palsgraf v. Long Island Railroad Co. (1928 NYCA)

F π on train station platform; conductor boosted late passenger onto train, causing him to drop package of explosives. Explosion knocked over scales that fell on π, causing severe hiccups. π sues conductor/ train co. in negligence.
I Was there a DOC to π? Was negligence sufficiently proximate to π?
H No DOC to π - too remote/beyond range of foreseeable danger - ∴ Δs not liable.
R DOC cannot be in the abstract, must have a DOC to the person suing.

- Concept of risk & foreseeability helps to determine whether π covered by DOC:
- Majority: Duty victim-specific. You only have duty to those you can foresee will be harmed by your actions.
- Dissent: Duty not victim-specific; proximate cause theory. There was duty, & it caused harm in a proximate way. *Duty is to avoid harming anyone at all.* Since risk of harm created by pushing passenger, Δ liable for all harm caused by negligence.

Questions to ask:

- Was there a duty?
- Was there breach of duty?
- Did negligence cause harm?
- Was damage too remote?

DOC - Is there any potential legal responsibility to *that* person?

- Foreseeability is the key to remoteness of damages & DOC.
- Seen as too extreme to make s/o liable if no foreseeability. DOC limits range of people to whom liable.

Bourhill v. Young (1934 HL)

The Unforeseen π < confirms *Palsgraf*

F π miscarries after hearing crash & seeing blood of motorcycle crash; not involved in crash or witness; sues estate of cyclist for negligence causing nervous shock & bodily damage.
I Did Δ owe π a DOC?
H No liability - π not foreseeable at time of accident; appeal (by π) dismissed.
R DOC is only owed to those people a reasonable person might foresee would be injured.
π was particularly vulnerable; ordinary person would not have suffered that kind of shock.

- If π at actual scene during accident, might have recovered dmges, b/c reasonably foreseeable harm.

Argument at trial re whether all her losses caused by accident. TJ said some of it was.

Here you have negligence & causation. Is there duty? HL said depends on foreseeability. Young couldn't have foreseen s/o where Bourhill was would be injured at all. Injured b/c of unusual susceptibility. People can't be deemed to foresee unusual susceptibility.

- No DOC b/c injury not foreseeable.
- You have to pay damages for anything foreseeable < **Thin skull rule kicks in only if there's DOC.**
- Negligence = creation of risk of harm. If not creating risk of harm, not negligent.

Dobson v. Dobson (1999 SCC)

F Son sued mother for prenatal injuries due to her negligence @ 6 mos. pregnant. (Point = to get driver's insurance.)
H Majority said forget it - 2 are like 1 person, can't sue self.
Dissent < should be OK.

General rule - injury to fetuses later born alive, actionable.
But majority said no DOC owed by mother to fetus.
Mother owes no DOC to child in her body. Once child born entire, DOC comes into existence.
Minority < In sitches where you owe DOC to world, should also owe DOC to fetus.

***Duval v. Sequin*, 1972 Ont HC - Unborn Children**

F π & her unborn child are injured in a car crash as a result of the other driver's negligence.
I Was damage to the child w/in the range of foreseeability?
H Yes, Δ liable.
R A pregnant mother riding in a car is certainly a foreseeable event.
Side Issue: Is there DOC to a foetus?
Yes, once born, child becomes a legal person & can recover damages.
Until then, No, although mom can recover for loss of child if it doesn't survive.

Standard of Care
Question of Law; an Objective Std (Reasonable Person test)
For different activities, std can vary for different classes of people (ie children)

Unreasonable Risk:
Law of negligence seeks to prevent only those acts that produce unreasonable risk of harm. Test: *hazard of act (ie danger created by conduct) v. social value (ie utility of conduct)*.
Probability - Risk must be reasonably likely to occur. Would RP have taken precautions?
Loss - When potential for loss is great, creation of even slight risk may give rise to liability. More precautions must be taken.
Purpose - Can excuse liability if high social value - ie police. Allowances made for risks taken to save life as social value great.
Cost As against probability of risk or severity of damages.

Bolton v. Stone (1951 HL)

F π hit on head by cricket ball from park. Sues owner/operator for negligence, not erecting high enough fence.
I Was negligence foreseeable?
H Δ not liable
R Escape unlikely; possibility of harm small.

Cricket people had built extremely high fence - balls had gone over 6 times in 3 yrs.

- Not approached as a duty question since there was obviously duty; even though chance of anyone actually being hit was infinitesimally small, it was foreseeable/probable.
- However, Δ not negligent b/c took reasonable precautions < slim likelihood of incident
- Measure not only foreseeability but likelihood c/w severity of injury - RP wouldn't do more than club did

****Checklist from *Bolton v. Stone:***

1) examine probability of harm (foreseeability),
2) severity of harm,
3) burden of precautions (and its difficulty), and,
4) sometimes social utility of Δ's conduct.

IF (LIKELIHOOD OF HARM) x (SEVERITY OF DAMAGE) > $ OF AVOIDANCE = NEGLIGENCE

If "burden of avoidance" less than probability of harm multiplied by severity of possible accident, & you don't do it, you're negligent. Negligence = not taking steps that would reduce risk.

OK to create foreseeable risk of injury if risk is small & severity of injury unlikely.

Priestman v. Colangelo (1959 SCC)

F Cops chase stolen car thru residential area. Cop shoots tire, but bump makes shot go high, & driver injured. Car goes out of control, killing two young women.
2 Suits for Negligence: 1. Thief (π) sues cop (Δ)
2. Estates of victims (π) sue cop (Δ) & thief

I Did police act reasonably, given the circs & their duty?

H Dismissed negligence suit against cop
Only thief is liable in negligence (to the estates)

R Social value of police activity outweighs risk involved since thieves likely to harm others in car

s.25 CC - Cop justified in acting reas/prob grounds, no more force than necessary
- held to bar lawsuit by thief < cops justified wrt him
- innocent bystanders v. cops < that's different
  - q. of negligence < balance DOC w. need to catch criminals
  - dissent said cop negligent; majority disagreed < danger posed by car thief

Proof of Negligence By Inference

Leaman v. Rea (1954 NBCA)

in BC each liable to the other if no other proof to exculpate

F 2 cars collide traveling along a road in winter. Suing each other, each claims other was on his side of road

H Each driver found 100% liable for the other's damages

BC Neg. Act S.1(1) & (2): If judge cannot decide who is at fault, he shall hold them both equally liable

TJ dismissed both claims b/c evidence contradicted < CA said legally wrong; TJ had to make finding of fact
you can find them BOTH at fault

Old CL < both would lose b/c contributory negligence
New < reduces damages; each recovers from the other

Burden of proof:
There are 2 types of BOP:
1. persuasive burden: usu more than one b/c each issue has p.b. e.g. breach, causation, damages. These go to trier of fact b/c questions of fact. P.b.'s can be on either π (affirmative) or Δ (negative).
2. evidentiary burden: decided by judge alone & decided during trial; deals only w/ questions of law e.g. duty.

If π cannot meet its p.b.'s, Δ can say there is no cause of action; if π does meet p.b.'s, Δ has burden of disproving.

Res Ipsa Loquitur
RIL applies where π unable to give evidence of negligence but reasonable inference arises from accident itself that Δ's negligence caused [i.e. improbable accident would occur w/o; before RIL can apply there must be evidence of Δ negligence in circs] - plane crashes, MVA. Doesn't apply if no hint of negligence or if likely other causes or too many other people intervened. [illegible]

Δ only has to give *reasonable* explanation that he was not cause or point to plausible way in which accident could occur w/o Δ's negligence. Whether or not Δ produces explanation, initial & ultimate burden of establishing negligence still remains w/π. Legal presumption ***not*** created which Δ ***must*** rebut.

1. Findings of Fact - 1(a) Findings of future events; hypothetical events
2. Findings of Mixed Fact & Law
3. Principles of Law

1. Findings of Fact: What has already happened – findings made on a balance of probabilities.

1(a) Future events - Sometimes Ct has to make these assessments – jury also does this. Discussion based on probabilities.

True future question < How much will medical bills be? Not probability.
Hypothetical question < How much would this guy have earned? Probability.

2. Findings of Mixed Fact & Law: Was Δ negligent? Did Δ fall below std of RP or reas std of care? Also a Jury question.
   - Not a balance of probability question. Given the facts we have *found*, was there negligence?

3. Principles of Law: For the Judge.
   - Was there duty of care?
   - Judge may exclude causation (Snell v. Farrell) < Did event (a) lead physically to (b)? Can you find that (a) caused the injury? You can infer. < This is a factual question.
   - Remoteness of damage < legal qstn. Negligence caused damage, but was it too remote? Judge decides.

Fontaine v. BC (Official Administrator) (1998 SCC)

F 2 guys go hunting together, disappear; found months later dead in truck off Hope-Princeton Hwy. At likely time of accident, weather very bad, evidence of depression in road, ∴ Hydroplaning likely. Passenger's estate brought suit against driver's estate under Family Compensation Act for loss of support. π's lost at all three levels as they were unable to prove negligence.

SCC discards *Res Ipsa Loquitor – The thing speaks for itself*

I Can Crt draw inference of fault only from evidence that truck left road?

H No

R evidence adduced did not point overwhelmingly at negligence on part of driver
Res Ipsa Loquitur is <u>DEAD</u>
Merely asks whether accident could have occurred w/o evidence to prove negligence involved

There is *inference of negligence* based on evidence damage caused by negligence of driver. This works when no other explanation possible and/or when π has not satisfied burden of proof (balance of probabilities). However, SCC says RIL has outlived its usefulness so we now look at all the facts to determine damages.

Idea behind RIL > truck going off road is evidence of negligence. But could truck go off road w/o wrongdoing? Under RIL, circumstantial evidence can be used to prove negligence b/c allows conclusion from facts & common sense linkage. Idea is to prevent motion for non-suit since allows case to go to jury w/o absolute evidence. Δ can give evidence to prove no negligence on his part. Judge decides whether RIL applies at law, & jury decides whether it satisfies BOP for negligence. π may win on RIL alone, but unlikely.

- Most direct evidence, an admission of negligence by Δ < Usually pretty rare (esp. in ct)
- Witnesses about speed, driving, or other events > Hard evidence about actual conduct
- *Then compare evidence to the std to be maintained by RP.*
- Seldom is there direct evidence, so how circumstantial can evidence get?

RIL came from case where barrel came out of window & hit guy on head. Judge said "RIL" & it took on a life of its own.
In Fontaine, SCC said "let's dump RIL b/c it doesn't really help the analysis."

What the finder of fact must do is ask self: What probably happened wrt raw facts, & can we infer negligence?

- Here, ct said TJ can't be faulted for saying the evidence didn't support a finding of negligence.

Cf Snell v. Farrell – Can you fill gap in factual knowledge w/ inference? This is a finding of mixed fact & law; i.e., inferring facts & then deciding whether or not this was conduct amounting to negligence.

<u>Stds of Care</u>
Exceptions to general std of care, as determined by statute, mental capacity of Δ, age of Δ, & profession of Δ.

Breach of Statute
Statutes may affect std of care. Statute may create tort for non-compliance. If not, statute examined to determine purpose, ie who statute designed to protect.

Gorris v. Scott (1874 Exch.)

F π's sheep washed overboard, claims this occurred b/c of Δ's failure to abide by *Contagious Diseases Act*.

I Can π succeed in his claim?
H No
R B/c object of statute & damage caused by Δ not related, π cannot rely on breach of statute for recovery.

Today, π try to show std of care breached - based industry stds. Breach of stat can be *evidence* of this, but not actionable per se.
Statute needs to be directly correlated to damage claimed. If damage were sick sheep, damage would have been different.

Canada v. Sask. Wheat Pool (1983 SCC)

F Cdn Wheat Board seeks damages from Sask. Wheat Pool for delivery of infested grain. Grain in transit when infestation found - ship had to be fumigated - suing for cost of diversion & fumigation. Statutory duty not to deliver infested grain.
I When A breaches statutory duty causing injury to B, does B have a civil cause of action against A? If so, is A absolutely liable or can he disprove liability through due diligence etc?
H No claim in negligence b/c larvae difficult to find
R Jury decides whether infraction relied on as evidence ∴ breach of statute itself not actionable, but evidence of negligence.

Recovery possible but not in this case. Proof of statutory breach evidence of negligence, but not in itself conclusive. First, if statute doesn't create special tort, shouldn't automatically be civil liability for breach. Second, stds may differ btwn requirements of statute & requirements of negligence.
1. no separate action known as statutory negligence anymore
2. strict liability rejected as coming from straightforward breach
3. proof of breach of statute causing damage "may" be evidence of negligence. Trier of fact can accept or reject.

Infants & Persons w/Mental Abnormalities
Children - Are given relaxed std of RP; is a buffer & not a complete excuse
- Tender Age (until about 5): Children totally immune, including contributory negligence (*Tillander* v *Gosselin*); however, capacity to understand & appreciate danger is also considered along w/ age
- Test: *Did child exercise care expected from child of like age, intelligence, & experience?*
- Children can also be found guilty of contributory negligence in certain instances of carelessness.

Heisler v. Moke (1971 Ont. HC)

F Δ injured kid's leg, then kid broke leg before it was properly healed
I Can a 9 year old be (contributorily) negligent? Was there contributory negligence?
H Yes, a 9 year old can, but **NO**, not in this case.
R Canadian Test when children involved:
OBJECTIVE - std of the reasonable person
SUBJECTIVE - Also gauge child's individual maturity to determine whether kid should be found negligent in circs - test for breach of std must be that of child of similar age, intelligence, experience.

Mental Illness
Negligence is more concerned w/redress for injured than punishment of guilty. No mercy to those influenced by drugs or alcohol. O*nus is on person w/mental illness to prove inability to comply w/RP std.*

Fiala v. MacDonald (2001 Alta CA)

F Man w/bipolar attacks driver & causes accident & injuries. Δ not aware of his mental illness before episode.
H Fault essential in tort. Here, no fault. Act causing dmge must be voluntary; Δ must have capacity to commit tort.

Onus is on Δ to show either of the following:
1. As result of mental illness, had no capacity to understand/appreciate DOC;
2. ", unable to discharge DOC b/c no meaningful control of actions when conduct fell below std of care.

If so screwed up can't understand what it means to be careful OR do understand but have no control over actions – Not liable.
No imposition of liability b/c really no fault.
It's generally difficult to defend based on assertion Δ unable to observe std of care. Have to fit into above parameters.
Also, you may be taking unreasonable risk if you know you're prone to fall into unreas. state - case-by-case.

Ter Neuzen v. Korn (1995 SCC)

F Doctor fertilized woman - semen donor is HIV positive, woman gets HIV – doc knew x-mission possible. π sues for breach of K (dismissed) (using SOG: goods must be of merchantable quality) & negligence
Want to prove the professional was negligent - fault is essential, so bring in experts to testify

I What is std of reasonable professional?

H New trial ordered

R 2 allegations of Negligence:

- Fertilization w/ fresh semen not frozen – should have known possible risk – when risk became known, Dr. closed clinic until testing available – evidence is clear – Jury Cannot Decide On This Issue
    - This turns on what Dr knew/should have known re risk when understanding had huge gaps
- Failing to screen donors thoroughly – sexual history relevant – evidence less clear – Jury Could Decide On This Issue - Also turns on knowledge of sexual history re safety of patients
- If evidence establishes professional std, jury cannot disagree w/std. Not a topic non-medicals may pass judgment on. If Dr. met std, jury must find Dr. non-liable. Jury can judge issues wrt common sense (ie counting sponges at end of operation).
- Q) How does jury know what it can decide? A) Judge will tell them (Matter of law)
- Jury's award was too high in non-pecuniary damages, must obey cap
- TJ should have fixed award after jury returned, though correct in not telling jury about cap beforehand. Jury should only be told beforehand if apparent award will be very high. Otherwise knowledge might skew award

Damages:

Compensatory

Pecuniary

- Actual expenses
- Lost income
- Costs of care

Non-pecuniary

- Pain & suffering
- Loss of amenities
- Loss of expectation of life

Aggravated

Punitive

- Deter
- Punish

Snell & Farrell – on balance of probabilities for lay person, not for scientists

- Scientists said you can't be sure

Walker Estate v. York-Finch General Hospital (2001 SCC)

F HIV infection case - Walker received tainted blood from donor Robert M. RC had used pamphlet, asked donors to read < pamphlet referred to gay men w/multiple partners. Robert M. testified no partners for two years – "Have" multiple partners > I don't anymore < assumed he was in good health. In each case victim or family said RC was negligent in not screening blood.

I Was RC negligent?

H Yes, should have met ARC std of care

RC negligent – hadn't adequately warned potentially infected donors < std very demanding b/c of huge risk. ARC had much more explicit warning about high-risk groups & "even though you feel fine you may still be infected"

Suppose they had given proper warning? Causation depends on what s/o would have done in hypothetical situation. Would donor have been deterred? RM kept on giving blood even after more stringent Cdn pamphlet available - SC said question judge should have asked was would RM have been deterred by warning in Am. 1983 pamphlet? Yes b/c said "even if you're healthy don't assume you're infection-free" & *history* of homo partners.

SCC said causation established b/c if proper warning given it was open to TJ to find & he should have found RM would have been deterred from giving blood

Notice before they get going they say: "may be difficult or impossible to prove hypothetically what the donor would have done".

"but for" test: Would injury have occurred "but for" RC negligence? Could work unfairly b/c you can't prove what he would have done if he'd been properly warned. Even he can't say w/absolute certainty.

Proper test for causation is whether Δ's negligence materially contributed to occurrence of injury. Adequate warning would have been material influence on donor's conduct. Would have altered risks significantly. That's enough. You don't have to prove he WOULD have been deterred, just that it was a material factor.

Use this test when negligence leads to decision re human behaviour. <> Snell & Farrell where it led to a physical occurrence.

Another example is where they act on negligent misrep. Investment. TJ said they hadn't adequately proven wouldn't have invested. C of A said wrong test, you only have to prove it was *material* factor, not that it was *decisive* factor.

Fairchild v. Glenhaven Funeral Services Ltd. (2002 HL)

F Mesophilioma (heart lining tumour) almost invariably due to asbestos < five different employers < which one?
H Can recover from all

All were negligent w/asbestos floating around, but can't prove which one

One option < you lose, can't prove which injured you
Other < people negligent, exposing workers to disease; then worker can't recover b/c causation a problem

McGhee v. National Coal Board – dermatitis – < no showers < had to bicycle home covered in brick dust
Causation < a certain amount of brick dust on skin not negligent < extra exposure from not having shower negligent
Couldn't prove that he would not have got dermatitis but for the lack of showers
H of L found employer liable b/c their negligence *increased risk of injury & injury was w/in the risk*

McGhee interpreted as saying you infer that negligence did materially contribute to injury
HL said no; couldn't even prove that; dust may not have contributed to injury at all; but it *made it more likely*
McGhee - *if you do sth that causes a risk of injury & something happens that falls w/in that risk, we treat that as proof of causation*
Doing this b/c in McGhee "but for" test & material contribution test won't work < unfair to not hold employer liable b/c they WERE negligent & employee did get injury consistent w/risk

Wilsher case < malpractice; baby born, negligently administer excess oxygen < baby develops blindness, RLF; baby sues hospital
Hospital puts in evidence RLF can be caused by excess oxygen but can also be caused by 4 other conditions baby exposed to during first 2 mos. of life < these alternative explanations have nothing to do w/hospital.
H of L said you haven't proved causation b/c you can't show excess oxygen more likely cause than any of other things.
Like Snell, except prepared to say dr's negligence was much more likely to be cause, so you could infer it WAS cause. In Wilsher equally likely. But if less than 50/50 chance they caused it, they shouldn't be liable.
Difference from McGhee & Fairchild is cause can't be identified

"conduct of A & B in exposing C made a material contribution to C getting condition from which A & B should have protected him"

Causation

1. Physical cause & effect
2. Determining π's loss on basis of hypotheticals

When it's #2 you start getting into percentage chances

Knee case – the issue wasn't "what would have happened if", the issue was "was there anything Dr could have done?" TJ found knee wasn't necessarily savable anyway so Dr wasn't liable

On the balance of probabilities is how you find the facts – Then it's treated as certain

Even if you're negligent, onus doesn't shift to Δ to disprove causation – π still has to prove causation
In Snell, π proved causation as a matter of inference

Harm might have been caused by
- Δ's negligence
- Other non-culpable causes

This is a factual issue & burden is on π to prove as a matter of fact it was Δ's negligence

A single agency caused the harm
- Δ responsible for some of the agency (ie brick dust case)
- But evidence doesn't allow you to say but for Δ's contribution it wouldn't have happened
- McGhee & Fairchild – impossible to find on evidence whether or not contribution made the difference –
- But what could be proved, & what was sufficient, was Δ's negligence contributed to risk that produced injury – material contribution to risk
- Material contribution to risk = contribution to injury

π has to prove that Δ was more than 50% likely to have been cause of the harm – more likely than not

When harm might have been caused by Δ's negligence or other people's negligence but not both (Cook & Lewis):
- Both liable – even if one not there to get sued < onus would still be on Δ
- Fairchild case variant of this – all turns on interpretation of medical evidence – but finding was the way disease developed, could have been caused by 1 employer or another or a combination
- Each one's liable for 100% of the loss < there's a system for apportionment

One other case mentioned in Fairchild – DES case – Sindell & Abbott laboratories
- Large number of plaintiffs & large number of mfrs < as a group, mfrs 100% liable
- Is each mfr liable for all the damage for each of the victims (Fairchild solution)?
- "too draconian" "lead to chaos" – not jointly & severally liable but severally liable < each liable for diff. amount < proportion of damage corresponding to market share at time < pool of $ used to pay victims
- Fairchild not similarly apportioned b/c too hard on victim < have to collect from all employers, some of whom went out of business < DES was class action litigation so workable

Athey v. Leonati (1996 SCC)

F π, w/history of back problems, injured in 2 major car accidents, less than 2 months apart. After 1st crash, back hurt, goes to physiotherapy, gets better. 2nd crash makes things worse, but slowly recovers & Dr. says he can again exercise as normal. Herniates a disk 1st time out, now has a lower-paying job due to continuing injury

I Who's liable here, & in what proportion?

TJ Apportion btwn the accidents (collective) (25%) & the existing conditions (75%)

SCC Wrong - π gets 100% of damages b/c negligence caused extended damage - *the But For rule applies*

R Apportionment of damages - consider extent that injury affects π beyond original injury

<u>6 ways Δ tried to persuade ct not responsible for 100%:</u> (SCC said none apply)

1. **Multiple Tortious Causes** - multiple people's negligence combine to cause one injury < everyone liable 100%. Responsibility of tortfeasors decided by allocation of damages. Does not apply here b/c π thus considered tortfeasor so both liable for injury & given damages for injury.
   Can't say only a certain proportion of injury from accident < this only works in cases where you already have a pre-existing condition & accident makes it worse < herniation 100% caused by accident

2. **Divisible Injuries**

3. **Adjustments for Contingencies** - (*consider past, what might have been, actual future & what might have happened in future*) Assess how injury will & has affected π's life when assessing damages. However, if likely/ possible π could've been injured anyhow (bad back might've herniated from some other activity/natural causes), Δ shouldn't be held liable for 100% of damage since injury might have occurred anyway. Future occurrences also considered, actual future & what might have been, especially wrt earning potential, pain & suffering, longevity, & enjoyment.
   - *Here, SCC said that but for accident, disk would not have herniated.*

4. **Independent Intervening Events** -where victim injured by Δ but afterwards (before trial) something else happens < victim dies in unrelated accident or sth < you take that into account – have been cases where victim injured by Δ & then worse injured or die < had they lived Δ liable for years of future earnings etc., but b/c they died Δ's off the hook < Athey not intervening event

5. **"Crumbling Skull Rule"** - Must prove condition would've deteriorated regardless of Δ's actions. Usu requires expert evidence that trier of fact must agree with. To reduce amt of dmgs, argue you only hastened inevitable. Timeline very important. (Damages = Full amount of damage less contingent factors)
   Crumbling skull < even if accident hadn't occurred, victim would have ended up w/disability anyhow < accident only sped it up or made it certain < Victim not to be put in better position than would have been in w/o tort < What victim has lost is not life w/o herniated disk but 50% chance of life w/o herniated disk

Athey is thin skull case. Injury wouldn't have happened but for your fault, but injury esp. severe b/c victim vulnerable; take victim as you find them.

6. **Loss of Chance Doctrine** - Deprivation of a chance as result of injury can also be considered. For example, contestant awarded 1/24 of prize money since this was her chance of winning pageant.

- Beyond *de minimus* expectation, Δ not liable for damage that might've occurred anyway or if life expectation already diminished by previous accident or old age, etc.
- Here - all these thrown out. Δ caused herniated disk; no evidence to show disk would've herniated anyway (ie w/o accident). As result, "but for" accident, even though π had bad back, Δ still fully responsible for injury.
- Issues of fact vs. issues of probability - facts can be proven but probabilities remain uncertain.

Was herniated disc caused by accidents? Δs said accidents caused 25% of harm < 75% caused by pre-existing condition

SCC – factual question, what was effect of accidents on back? < SCC 25% not supported by facts found < he had back trouble before accidents but not bad < no evidence disc would have herniated w/out accidents
May have herniated b/c accidents had effect on weak back < so what? thin skull principle

- But for accidents injury would not have occurred

Determining π's loss on basis of hypotheticals – comparing victim's life as it IS to what it WOULD HAVE BEEN

1. Causation involves estimating future events:
   - Basis of probabilities (deduct/add contingency factor)
   - Std personal damage issues

2. Causation involves estimating hypothetical events (future or past):
   - If damage would not have occurred but for tort, π recovers full loss (Athey)

3. Harm involves comparison w/ π's physical or financial condition if tort had not been committed
   - If substantial chance dmge would have happened even w/o tort, assess that chance & reduce π's recovery accordingly
   - Crumbling skull rule < chance would have crumbled anyway
   - If π claims Δ's tort caused loss of hypothetical past or future gains, estimate gains on basis of probabilities (eg by deducting contingencies) - Typical in lost income cases

4. Harm involves comparison w/ what π would have done if tort had not been committed:
   - If tort negligently or fraudulently inducing π to act, causation proved by showing Δ's inducement was significant factor contributing to π's decision (material contribution; "but for" test)
   - If tort negligently failing to warn, causation proved by evidence π (or RP in π's position) would've decided differently
   - Hollis v. Dow Corning (subjective)
   - Arndt v. Smith (modified objective) < in medical cases

- In certain cases get in trouble w/ "but for" test b/c sometimes π unable to prove < "material contribution" test
- Some difficult cases like Fairchild – 2 unfair possibilities:
  1. π loses b/c can't prove which employer caused it
  2. Hold both employers liable < rather give π redress than let Δs off the hook
- Compensate victim for loss/difference injury has made in his life
  - Past events < medical bills
  - Future events < future loss of income, cost of care
  - Basis: victim's life as it would have been compared to his life as it is

- Victim has insurance, insurance co gets $ from judgment. Judgment not led by whether victim has insurance.

Multiple Causes
- Damages stem from negligence of more than one wrongdoer, maybe also from π.
- Joint tortfeasors < get together to do sth (common enterprise) < single tort by multiple people
- Several concurrent tortfeasors < unconnected but both combined activities caused same damage
- This works against victim in cases of contributory negligence < if π caused 100%, barred from recovery

Negligence Act
Contributory negligence: apportion fault btwn them < victim recovers proportion for which not responsible (ct decides)
Joint & several tortfeasors: joint & several liability still the rule but split among tortfeasors based on ct's apportionment of fault < how bad was their negligence (degree of fault)? Eg 20% person who paid 100% entitled to recover 80% from other tortfeasors
Peculiarity of Act: if negligent π & multiple tortfeasors, Δs only severally liable (each Δ pay only his % of dmge)

If there's no duty you may be careless but not liable. (no breach of std). Causation - prove sufficient connection btwn what you did & what happened. Remoteness - proving connection btwn wrong & damage. 3 stages:
1. Duty – sufficient connection btwn wrongdoer & victim?
2. Causation – was physical connection btwn negligence & harm sufficient?
3. Remoteness – if there is duty & it was broken & harm caused, was harm nevertheless too tenuously connected?

Duty of Care – any legal responsibility at all?
Causation of Damage – if responsibility, did A harm B?
If Causation of Damage, Remoteness of Damage < was harm connected? Or was it a one in a million freak accident?

***In Re Polemis & Furness, Withy & Co. Ltd*, 1921 Eng. C.A.**
F Plank falls into holding area of ship causing spark that ignites fire & causes much damage
I Is damage too remote?
H NO, damage is sufficiently proximate to negligence of Δ
R It's known that falling plank can harm, so too bad harm greater than anticipated; Δ still liable for negligence

Explosion DIRECTLY caused by negligence. < If damage direct result of negligence, foreseeability not an issue
Like Paalsgraf case dissent – shouldn't worry about remoteness, should just ask – was the injury directly caused?

Wagon Mound (No. 1) (1961 NSW PC)
F Oil spill in harbor ignited by repair to π's wharf, causing extensive damage to wharf & 2 boats
I Was damage foreseeable?
PC Allows appeal - Δ not responsible for unforeseeable damage
R You can have causation, duty, breach of duty, but when there is no foreseeability, Δ is *not* liable.

Fire directly caused by spillage of oil. PC says that's not enough. Don't like directness test, like foreseeability test. Crucial finding of fact; no-one could've foreseen floating oil catch fire. So unusual, judge held as fact, not foreseeable.

Why preference for foreseeability over directness? At some point line of causation becomes too remote. When in chain of events is it no longer direct? Foreseeability more workable b/c not dealing w/mysteries of causation.

Hughes v. Lord Advocate (1963 HL)
F Telephone Co. employees left paraffin lamps burning to mark an open manhole, then went for tea. A young boy tripped & dropped lamp into manhole causing explosion & fire; severely burned.
I Was damage foreseeable?
TJ & CA Dismissed case based on *Wagon Mound (1).*
HL Reversed TJ/CA - shifts issue of foreseeability from injury from explosion to injury from burning.
R Type of accident (fire, burning etc) foreseeable, though not exact events that led to damage.

What is the thing that has to be foreseen? Not exact events or extent of damage, but accident & type of damage.

Smith v. Leech Brain & Co.
F Man gets cancer from a burn received at work, dies
I Remoteness/ Thin Skull Rule?
H Liable, though damages reduced. Probably not all damages are from burn.
R You take victims as you find them, Thin Skull Rule applies (victim prob. predisposed to cancer)
Test is not whether you could foresee what the burn would do, but the injury that occurred

Doughty v. Turner Manufacturing Co. Ltd **- Opposite of *Hughes***
F Concrete/asbestos lid slides into cauldron; chemical reaction causes explosion that severely burns π.
I Remoteness/ Foreseeablity.
H No liability.
R Not foreseeable. *Hughes* doesn't apply b/c explosion damage unforeseeable; splash damage foreseeable.
Logically inconsistent w/ *Hughes*, but distinguished b/c foreseeable cause of damage did not operate – Blom says Δ should be liable "w/o question" – "don't be too impressed by foreseeability test – get wonky results"

- Classic question: Are you responsible for negligent driving of a car thief if you leave keys in ignition?
- Usu. If crime committed by 3rd party is exactly foreseeable < you've created risk that 3rd party will do sth
- Some might say YES – does not break chain of causation if foreseeable
- Or; NO, based on independent intervening factor – not foreseeable
- Immediacy & Proximity may also operate to decide if negligence obtains

Wagon Mound (No. 2) (1967 NSW PC)
F Same as above, but now π is owner of ship being repaired at 1st π's wharf, instead of dock owner
I Was damage foreseeable?
H Δ found liable for damage
R Δ's ship's engineer should have foreseen some kind of damage from a big fuel spill. πs showed there was foreseeability of fire.
No potential contrib negligence (welding over oil) as in WM #1 At time of No.1, CNwas complete bar to recovery in NSW
No.1, π can't argue Δ should've foreseen oil catching fire, while its employees (welders) didn't foresee possibility

In this case, Foreseeability means even a very small chance of the event happening is foreseeable
- One in 1000 chance, but still foreseeable

Liability may be imposed though loss not reasonably foreseeable if there is "possibility" or "real risk" of damage.

- Unlike *Bolton* v. *Stone*, where damage small & expense to avoid high, in this case act was stupid, illegal, costs nothing to stop, & carries potential to cause a huge fire - Not the sort of risk of damage that a reasonable person would disregard

- Why is this a remoteness case? B/c breaches of std of care & DOC are well established.
- But the expected type of damage is so different, that remoteness becomes the issue.

Res inter alios acta – the thing was done btwn other parties.
- A finding that something happened btwn two parties is not binding or even evidence in a subsequent proceeding if either or both of the parties is different.
- That's why WM 1 irrelevant – had to prove the facts all over again, & they did.

Assiniboine South School Division v. Greater Winnipeg Gas Co. (1971 Man CA)
F 14 yr old boy wrongly starts Ski-Doo that gets away & severs gas pipe near school causing gas to leak into school; gas explodes & causes much damage. School sues Gas Co., Dad & Son
I Was damage too remote for any of these?
H Kid 25%, Dad 25% & Gas Co. 50% Liable
R Gas Co. - Possibility of accident very small, but expected damage huge, ∴ duty to exercise very high std of care. – pipe negligently constructed, no protection from impact
Son - Letting a Ski-Doo get away is bound to cause some kind of damage.
Dad – Letting son operate the Ski-Doo w/o supervision

*Dad, Son, Gas Co. found to be jointly & severally liable - concurrent tortfeasors
Dad & son are joint tortfeasors

Joint tortfeasors – if you settle w/one you've settled w/all
Concurrent – can settle w/one & then sue another

An example of stretching class or character of damage to impose liability
- Damage was of type that RP might foresee
- Act so loaded w/potential negligence, it was OK to stretch Foreseeability & Remoteness

Contributory Negligence
Traditionally, apportionment of damages not available in intentional tort cases as Δ held either liable or not.
Conduct of π only relevant if amounted to a complete defence for Δ since Δ's wrongful intention outweighed π's contributory fault/negligence in such a way as to entirely discount π's actions.
Under the *Negligence Act*, you can now apportion damages so responsibility shared amongst tortfeasors.

***Negligence Act* (BC) Ss. 1-2**
s.1 Liability of damage is in proportion to the fault
- If different degrees of fault cannot be apportioned, they will be equal
- No person is liable for damage to which he has not contributed

s.2 Damages must be expressed as a dollar figure, & a % of fault
If 2 people liable to each other for damages, the one entitled to greater amount can get judgment against other for the difference.

Linden: Defenses to Negligence: Conduct of the π Contributes to the Tort
Stalemate Rule - The Law should only assist those deemed worthy of its protection
Historically, when CN was complete defense, cts didn't consider sharing responsibility amongst those involved. B/c CL sought to isolate cause of accident rather than find multiple causes, π often deemed sole cause of own misfortune rather than only part of it. As well, central aim of CN is deterrence of future incidents: it was hoped π's would take greater care for own safety rather than collecting compensation when negligently contributed to tort. But this hope undermined by protection it offered negligent Δ.

Meaning of Contributory Negligence:
Std of Care
π must act as RP to protect own safety & safety of others. This includes reasonable steps required to protect ppty.

To extent one must avoid endangering others by own conduct, CN π MAY owe duty to s/o else. Ex, if 2 motorists negligently collide w/ one another, may both be liable to each other & CN in own safety.

In Canada, defence of contributory negligence is available even if Δ is in violation of a statute.

Emergencies
In emergency, those injured while taking steps to protect selves judged compassionately - std of perfection not expected. Test is:
Did π do something that ordinarily prudent person might reasonably have done under stress of emergency, not whether π was careful & prudent in what he did.
ie after Δ negligently started fire in π's garage, π threw snow on it instead of using near-by extinguisher. π not CN.
Also, Police officers injured in course of duties usually excused from contributory negligence.

Causation & Proximate Cause
CN of π must be a cause of loss to count against him, & "but for" test often employed to determine causation. CN must also be proximate cause of accident rather than condition. Ie - boy standing on running board injured when truck ran into tree. TJ found boy 25% CN for his injuries since riding dangerously. But SCC found risk did not culminate from risk of the boy on running board. However, boy would have been CN if had fallen off truck.

Onus on Δ
Δ must provide evidence in order to plead CN. Also, this cannot be raised for the first time on appeal.

Apportionment Legislation - For concurrent negligence of two or more individuals
Act limited Δ's right to rely on CN as complete defence, allowed apportioning of blame on % basis. Also states where fault of negligence can't be agreed upon, both parties deemed to be equally at fault. Where negligence exists, jury can apportion fault, but when judge alone decides, appellate ct generally won't change awards.

- Look at causative conduct wrt relative/comparative blameworthiness/culpability using common sense approach.
- Apportionment is used in more than negligence actions: Trespass, Battery, Fraud, Defamation, & K'ual lawsuits

Victim's Acceptance of Risk (volenti non fit injuria) = *CONSENT*
Volenti - Voluntary assumption of risk- defense that must be pleaded & proved by Δ.
- A question of fact

π *otherwise entitled to tort recovery may be denied if voluntarily assumed risk*. Price for freedom to control one's own destiny is agrmt to encounter risks w/o judicial interference. If people consent to risk, should not get protection of CL b/c accepted some fault themselves (fault principle). Assumption of risk by one party should shield other party from responsibility.

The defense of volenti may arise either by express agreement or may be implied by conduct of π. But mere knowledge of danger not enough for defense. π must have given some sort of agrmt to accept risk.

Traditional Requirements for *volenti*

1. π ***clearly knew & appreciated the nature & character of the risk he ran***
   If there is no knowledge of the danger, there is no assumption of the risk
2. π ***incurred the risk voluntarily***
   Rescuers & those employed do not assume the risk if they undertake a risk not of their own free choice

SCC now restricts doctrine to instances where ct can find agmt (express/implied) to exempt Δ from liability. Δ must show π either gave real consent to assumption of risk w/o compensation or that he absolved Δ from any DOC. - Used in a very limited way

Defense of Volenti sometimes unavailable to Δ who violate a statute. ie municipality who does not keep roads in good repair contravenes legislation & cannot expect π to voluntarily assume risk. However, employer can rely on *volenti* where statute violated by one of its workers & not by employer himself.

Spectators - assume risks peculiar to form of entertainment. However, spectators not responsible for assuming risk of injuries resulting from negligent/improper conduct on part of player. Ie - being hit by puck while in front row is general assumption of risk but being injured as a result of stick fight (negligent conduct of players) is not.
Participants - denied recovery b/c of assumption of inherent risk during course of play. However, consent limited to non-negligent actions on behalf of players/stds of reas. conduct. Each case decided on its own facts.

Volenti should not be assumed invoked unless s/o is negligent & wants to avoid liability on the basis of consent of victim. However, when cts find negligence, they do not usually apply the volenti defense.

Lehnert v. Stein (1963 SCC)

F π willing passenger in car of drunk driver; claims she did not know extent of drunkenness. After car crashed, Δ claimed π knew he was drinking, & that she had assumed risk. However, he had already drunk quite a bit before they met, & she would've only been aware of the later drinking, which was still quite substantial.
I Did π waive her rights in getting into the car? Or, was she contributorily negligent?
TC Dismissed on grounds of *volenti*
CA Found Δ liable despite 25% contributory negligence of π.
SCC Aff'd C.A b/c π only gave reluctant consent
R It is only *Volenti* if you expressly agree to assume the legal risk - ie a Kual waiver

Burden on Δ to prove π, expressly or by necessary implication, agreed to exempt Δ from liability. π assumed **physical risk**, but she had not assumed **legal risk**, nor waived her rights, nor had she communicated this to Δ..

The *Nike* Case (v. *Jacobsen) - led to free bus tickets at our beer ups* (BCSC)
F Company rewards employees w/beer for helping to set up display at BC Place. Employee (π) drinks a lot, then goes to bars & drinks some more. Later drives out of control & makes himself a quadriplegic. Sues *Nike* for failing to exercise its DOC (*Negligence)*. It was found as a *fact* that π displayed impairment as he left BC Place Stadium.
H Nike found 70% liable for damage to π.
R Key that it was an employer that **gave** the booze to π; If choose to use booze to boost company morale, take on responsibility.

Ex Turpi Causa - π Injured as a Result of Own Illegal Conduct

π harmed while acting illegally/immorally may be denied tort recovery. No longer available at all in personal injury cases; severely limited by SCC. In *Hall v Hebert* said π's illegal conduct may be raised as defence if Δ can prove illegal conduct amounts to such a violation of integrity of legal system, ct must deny recovery where claim otherwise valid.
-"No action shall rise out of a corrupt cause"
- SCC has done a real number on it, significantly different from England & Australia, thanks to *Hall v. Hebert*

Hall v. Hebert (1993 SCC)

F Both drunk, Hall drives Δ's car off road into gravel pit. Both walk away; π receives severe head injuries.
I 1. Does owner of car owe DOC to prevent another from driving it drunk?
2. Was there a joint criminal enterprise, activating *Ex Turpi Causa?*
3. Did Hebert owe Hall DOC, given that Hall's activity was criminal?
TC Δ 75% liable, π 25% liable
There was no joint criminal enterprise, ∴ No *Ex Turpi Causa*
CA Ex Turpi – doesn't have to be common enterprise - π's action so criminal he shouldn't recover
Also, no real DOC owed to π, since both parties were drunk.
SCC Finds 50-50% liability – Lots of Negligence by both parties
Hall does not profit from illegality – pers. injury damages just mitigate his loss
Cory (DISSENTING) wants to eliminate *Ex Turpi Causa* < majority didn't go for that
if illegality is such as to eliminate damages, just say there's no DOC

McLachlin (MAJORITY) wants to severely limit doctrine
Ex Turpi viable doctrine. Doesn't operate by way of barring DOC, comes in as defence. But doesn't apply here - Should prevent you from profiting from own wrong doings, doesn't include suing for personal injury compensation. Doctrine meant to prevent one criminal from suing another for bungling robbery etc. Ex Turpi only applies where law would allow to benefit from wrong.
This reform of the doctrine means that Jointness of action no longer matters

Ex Turpi rarely used in Canada: only to prevent suing for profits or for reduction of punishment
Ex Turpi will never prevent Personal Injury Claims, b/c they are not profits; but CN will often reduce damages
Applies when claim has to do w/financial benefits of illegal activity

Limitations
***Limitation Act* R.S.B.C.** III-66
s.3(2) – There is 2 year limitation on actions: Trespass; Defamation; False Imprisonment; Malicious Prosecution; *Privacy Act* violations; *Family Compensation Act* actions; Seduction; s.21 *Engineers & Geoscientists Act.*
s.3(5) – Any other action not specifically provided for in this Act or other Acts has a limitation period of 6 years.

Municipal Act R.S.B.C. III-82
s.285 – Actions against municipality must usually be made w/in 6 mos of cause arising, unless council grants special permission.

Vancouver Charter III-107
s.294(1) – Actions against City of Van must be commenced w/in 6 mos of cause arising, unless council grants special permission.

Basic limitation principle: depends on nature of injury.
- Injury to person, ppty including economic loss arising from, 2 yrs from time when right to sue arose. When cause of action complete (remember sexual abuse case) Other than that, 6 yrs.
- Claims for financial loss unassociated w/physical damage – 6 years

s.6 provides for variety of circs in which running of cause of action postponed (list). Not explicit in many jurisdictions – SCC says should be read in. If damage has been fraudulently concealed, etc. Until victim could reasonably know they had a claim. No limitation now for sex abuse against minors.

Injury Covered by Worker's Compensation
Workers Compensation Act R.S.B.C. III-110
s.2 The act applies to all workers, unless exempted by the Board. Also, employers may be included by the Board
s.5 The board must pay compensation for work related injuries, but:
-Crumbling Skull Rule still applies.

-And, compensation will not be paid where injury due solely to serious/willful misconduct of worker.
s.6 Compensation payable for occupational diseases Ked in course of work as if disease were normal injury.

In Cda, law of tort has basically been abolished btwn employer/employee & replaced w/insurance scheme. Does not turn on fault, simply on whether it's work-related. Worker cannot sue employer.

DOC to Rescuers
Negligent wrongdoer is liable to reimburse rescuer for losses incurred during rescue attempt.

In past, causation & volenti used to deny rescuers compensation. Later decided **rescuer could recover from negligent wrongdoer on grounds attempting to save another is one of noblest things man can do for another**, especially if victim infirm or helpless. Must take into account "energy & courage" of RP, amount of danger, & response of rescuer.

Videan v. British Transport Commission (1963 Eng. CA)

F -Station-Master killed while saving son from oncoming train. Wife sues RR co for loss of husband, & for son's injuries.
I 1. Is there a DOC, since victim was a "trespasser" & ∴ unforeseen?
2. If victim unforeseen, is rescue also unforeseen?
H Recovery for Father, not son
R Foreseeable that station-master may be on tracks, so owed special DOC as employee of rr
Cts will make an extra effort to give recovery to rescuers

- Negligent persons owe a duty to all rescuers, & this is not based on a primary duty to those injured.

Duty of the Rescued to Rescuers
Negligent actors are liable to those injured while helping third persons they endangered, & to their own rescuers.

Rescue of Property
Generally, persons injured in seeking to avoid damage to ppty entitled to recover from orig. wrongdoer, though they voluntarily assumed risk of injury. This also covers personal injuries & dmge to ppty in course of rescue.

Conduct of the Rescuer
Reasonably Perceived Danger - danger need not be actual but reasonably perceived in order for rescuer to collect compensation for injuries suffered during rescue. If situation completely devoid of inherent danger, Δ not liable.

Foolhardy Rescuer - Not only must there be reasonably perceived danger, response of rescuer must be rational. Cts rightly feel it wrong/unfair to make original wrongdoers pay for additional losses caused by foolish rescuer. *Tort law seeks to encourage people to aid one another, but not to do so stupidly.*

Contributorily Negligent Rescuer - Cts now utilize comparative negligence where appropriate so as to apportion damages on a lesser scale than "all or nothing" (ie the foolhardy rescuer). We now consider legislation in our decision of whether rescuer acted as RP would have under circs.

The onus of proof rests on Δ to show that π was foolhardy or contributorily negligent.

Jones v. Wabigwan (1969 Ont. CA)

F Δ wanted to borrow π's car, who refused b/c Δ was drunk, but Δ stole car anyway. π followed Δ after spotting his car. Δ crashed car, π tried to rescue, but severely injured (burns, leg amputated) by fallen electrical cable.
I Was the rescue itself foreseeable?
TC - NO DOC owed b/c not foreseeable that π would follow & try to rescue him
CA - Foreseeability is less specific, & is owed to the generic probable rescuer ∴Δ **liable**
Foreseeable that *s/o* would try to help & be hurt; doesn't matter who or why they were there
R Again, the law tries to help rescuer. Moreover, drunk driving is inherently negligent behaviour.

- This is not to be confused w/a duty to rescue- Which, in fact, does not exist in law.
- Also, rescuer can be liable for botched rescue, though it has to be pretty badly botched to be held accountable

Products Liability
Donoghue & Stevenson is "the ultimate products liability case". Mfr owes DOC to consumer.

Std of Care

Negligence:

Std of care demanded in Canada from mfrs, distributors, & & repairers is to use "reasonable care in circs & nothing more." Thus, if possibility of injury is very remote, no liability will be imposed.

Warning:

Mfrs have duty to warn customers about any dangerous properties of products, whether inherent or "attendant on use." However, no amount of warning exonerates mfrs who could've made products safer prior to releasing. Also, consumer under corresponding duty to read/heed warnings; not doing so might reduce or eliminate compensation. Nevertheless, all warnings must be reasonably communicated, especially if related to specific use of product. Superfluous warnings not necessary.

Disclaimers:

Only binding if consumer accepts it in some way. No consideration for you giving up your rights.

Strict Liability in Tort – an idea stated by Riddell J, in 1936, that food mfrs should be held liable on a strict basis. This gained great popularity in US, but very little in Cda. As it stands, no strict liability in Cda.

IF (LIKELIHOOD HARM) X (SEVERITY DAMAGE) > $ AVOIDANCE = NEGLIGENCE

3 ways you can be at fault:
1. product badly made
2. product inadequately designed
3. failure to warn of risk

Phillips v. Chrysler Corp. of Cda Ltd. (1962 Ont. HC)

F πs are widow of owner & 2 other passengers. Car serviced by another garage more recently than by dealer (Δ). Suit for negligence & breach of warranty against dealer (Δ).
I Did mfr's or dealer's negligence cause accident?
H No
R High std to meet; too many intervening variables in this case < anything could've happened since bought Products liability much harder to prove w/used products.

Hollis v. Dow Corning (1995 SCC)

F Breast implant ruptured; gel removed but not envelope. Ended up having mastectomy. There was warning of rupture from heavy blow but no warning of rupture from normal use.
I Dow/surgeons negligent not warning re rupture < normal use? (70-80 known instances) Dow negligent in not warning physicians? < Dow argued that later more explicit warnings given, doc did not pass them on Had warning been given, what would she have done?
H Dow negligent; had enough info that they should have given "clear, complete & current warnings"
R Pt. wouldn't have had implants if dr. given warning to pass on

Dow argues all we need to do is warn the "learned intermediary" < SC says yes, in this case < patient does not select & use themselves so warning to dr. is effective in that it will reach every case (?)

Dow argues pt. would've had implants even if she'd been warned < Ct uses subjective test: what would *this individual* have done? Uses subj test in this case b/c mfr/consumer relship, not dr/patient. No reason to be protective of mfr as of drs. who aren't for profit.

***Good-Wear Treaders Ltd.* v. *D & B Holdings Ltd.* (1979) N.S.S.C.**

F Δ sold tires to trucking company that put them on vehicle too heavy for them. Δ warned truckers about weight of truck, nonetheless knew what truckers intended. Tire blows out & truck demolishes a car w/passengers (Widow is π).
I Does the Tire Company have a DOC to the general public?
H Δ tire company liable to π.
R Δ sold tires knowing full well they would be used improperly.

***Rea* v. *T Eaton Co.* (oral) NS (1961) -** *Inherently Dangerous Things*

F Child uses aerosol can of spray-snow as hammer, valve pops out & takes out eye
I Was there sufficient warning on the can (Flammability, Explosive nature etc.)

H Warning sufficient, NO ACTION – use as hammer not foreseeable
R Warning need not be overly detailed tho higher std of care exists for inherently dangerous things

Linden on Inherently Dangerous Things
Stricter std of care still required for things dangerous in themselves. This led to greater care by mfrs of these articles to ensure fewer injuries - almost to strict liab. level. Test for liab. not whether item itself dangerous, but considering its nature & all relevant circs, whether mfr breached duty to injured. (Also consider duty of injured to use due care of RP.) Once π establishes injury caused by mfr's product, onus on Δ to show absence of negligence.

***Lambert* v. *Lastoplex Chemicals [1972] SCC* (oral) -** *SCC commitment to specific labeling*
F π using floor sealant; blows self up fumes ignite from pilot light, though furnace turned off, shows π took some care.
I How much detail required in warnings on can? Said flammable but not "pilot light"
H More; Δ liable.
R In the case of highly dangerous products, very specific instructions can be required.

Hypothetical negligence
- Doctor "non-passer-on" – but SCC used Cook v. Lewis – Dow created risk & made it hard for π to prove case
- Dow cannot raise this hypothetical issue – assume Dr. would have passed on warnings
- Majority: π shouldn't have to prove Dr. would not have been negligent > prof agrees but thinks SCC could have just said *law does not presume negligence*

Goodwear - Mfr warned user < misuse > hurt 3rd party
Warnings don't immunize you if you know they'll be ignored.

Occupier's Liability
CL
Eng cts have established 3 categories of entrants onto land: trespassers, licensees & invitees - & diff std of care applies to each. "Trespassers" enter w/o permission of occupier, & licensees/invitees may become trespassers by exceeding scope of invitation.
- Act establishes common DOC: duty to ensure that in all circs, reasonable care taken to avoid injury to ppty or those upon it. However, std does not create presumption of negligence against occupier whenever s/o injured. π must be able to point some act or omission on part of occupier which caused injury.
- Liability of landlords to tenants is same as occupier to invitees even though tenant is actual occupier of premises. Also, duty is in relation to riskiness of ppty - ie swimming pool v field.

***Occupier's Liability Act,* B.S.B.C.** III-93
s.3 (3.1) Subject to provisions below, trespasser committing crime or w/ criminal intent deemed to have willingly accepted all risks, absolving occupier of liability.
s.3 (3.2) A trespasser also accepts all liability for things that happen in certain rural settings, laid out in s.3(3.3)
s.3 (3) There remains, even w/trespassers, a duty not to:
1. Create a danger w/intent to do harm to person or damage to person's ppty; or
2. Act w/reckless disregard to safety of person or integrity of person's ppty.

Weiss v. YMCA (1979 BCCA)
F π walks through ground floor window, believing it to be doorway, & injures self. Some decals on windows, but extremely faded
I Did occupier take such care as to ensure π would be safe in using premises?
TC π 20% responsible (CN), & Δ 80%
Δ appealed, arguing no breach of 3(1), or too little CN found on part of π
π cross-appealed, saying no CN
H Proportion of fault changed: Δ 1/3, π 2/3
R Δ took inadequate care, but π needed to be more careful

CA unequivocally rejected attempt to use old CL rules in favour of new Act. Also held s. 3(1) comprehensive in that it fully & clearly imposes duty on occupier & defines std of care necessary to fulfill that duty.

Waldick v. Malcolm (1989 SCC) - Didn't salt driveway, but nobody else in neighbourhood did. Community std found not reasonable (not a matter of expertise so judge/jury can say). Can eliminate risk at no expense

Horsley v. MacLaren (1971 SCC)

F Horsley dives into lake to rescue another boat passenger (Mathews); both die from sudden immersion into cold water. π sues Δ operator of boat for negligently performing rescue of Mathews, which necessitated dive into frigid lake
I Was there negligence by Δ to π?
TC YES: negligent since booze prevented him from acting as RP - liable for taking too long reversing boat
H NO: Δ's efforts <u>didn't</u> worsen Mathews' situation. π's actions not foreseeable so Δ not resp. for them
R Δ's procedure, while not optimal, was reasonably good, would have worked if Mathews was conscious
Not liable w/o some act of negligence, & none proven
Did not owe distinct duty to Horsley, who *chose* to take risk to effect rescue
- Even if Δ negligent during rescue, causation prob < didn't cause π jump in b/c didn't create distinct new sitch of peril

***<u>Rationale/ Rule</u>*:** You are liable if you attempt rescue & do it negligently - but law considers CN of victim & danger you put yourself into - you are not always required to attempt a rescue; but if you have duty or previous relship w/ victim, you are liable for both rescue & those who attempt to rescue (this is also a question of causation)

***Blom*:**

- Δ not responsible for Matthews accident - if so, claim for π's death would be likely - *you are liable to rescuer if you put s/o in danger*. Also, there was special relship, since Δ owned boat & others were his guests.

Zelenko v. Gimbel Bros. Inc (1935 NYSC)

F Victim (π's intestate) taken ill in Δ's store. Taken to store infirmary, & left w/o medical-care for 6 hours. Died.
I Was there DOC from store owner to victim? All Δ did was move victim
H Yes. Intervention created obligation to assist victim non-negligently - duty not to make matters worse
R By interfering in matters not legally its concern, Δ created DOC.
Had Δ done nothing, passerby would have certainly summoned ambulance. Δ's acts actually put victim in much worse position.

Blom:

Further examples of the same point. Notice all the ways you can be liable to a rescuer:

1. If you negligently cause danger to A, & B attempts to rescue A but is injured, you are liable to both A & B
2. Also applies where you are not liable to A, but B rescues, so you are liable to B (*Videan)*
3. If you cause accident for yourself, liable to B if B attempts to rescue you - *Jones Case*
4. If you rescue A & bungle it, & B attempts to rescue, you are liable to B -

- In each case except *Videan*, you are resp. for triggering rescue - by neg. to A, to self or bungling rescue to A.

Stewart v. Pettie (1995 SCC)

F 4 people leave dinner theater w/drunk driver though 2 of party did not drink at all. Driver & bartender sued for negligence.
H There is DOC from patron, but on facts of this case, patron NOT LIABLE
R No reason to assume that the drunkest of the four would drive home (when 2 are sober)
- Establishment entitled to assume sober wives would drive
- Also no causal link b/c would have decided out in parking lot
- Important duty to take care

Prevost v. Vetter 2002 BCCA 202

House party w/underagers – adult strangers showed up drinking beer. Cops showed up 1 am – took ½ hour to get rid of people. Scott woke up mom & told her; she went back to sleep. Niece Vetter who'd been drinking drove w/ Prevost as passenger; accident – argument was parents' tolerance of drinking had established "paternalistic relationship w/intoxicated teens" so they had assumed DOC. Went to summary trial (you can put evidence in in affidavit form; judge can decide some issues on that basis if he thinks fit). Judge decided there was DOC & they had been negligent but didn't decide whether there was causation – left for trial.

Goldman v. Hargrave (1966 Aus JCPC)

F Lightning strike starts tree fire on Δ's property, which he did fight, though not too well in last stages. Δ chose to let tree burn itself out, but correct method was to douse w/ water. Fire later spreads to π's property b/c was never properly extinguished.
I Is there legal negligence, ie was there DOC?
H Yes.

R There is a DOC
If risk is on your land there is duty to control it, if could be foreseen to cause damage to adjacent landowner.

Δ felled tree to let it burn out, left; fire got out of control, damaged neighbour's land. Duty imposed as Δ knew of hazard; foreseeable consequences of felling tree; had ability to abate hazard; actions not reasonable wrt these considerations. Need to take reas. steps to avoid harm. Not reas. to let fire burn out in 110 degree temperature. High risk factor & low burden of precautions. He should've doused fire w/water & made sure was out – like putting out campfire. Thought would burn itself out, but it didn't.

- Sometimes a hazard is created by natural forces but may result in liability on the part of one party

Defense: "I don't have positive duty to stop fire in my ppty to protect your ppty since I didn't start it in the first place" - BUT duty comes from the ownership of ppty itself. Ct: "There is DOC btwn neighbors to prevent negligent foreseeable harm as btwn them." *Thus, when there is foreseeable risk, duty exists.*

Liability extends to knowledge of hazard, ability to foresee consequences of not removing or checking it, & ability to abate it - includes dangers landowner doesn't start himself. No responsibility to take extreme measures – small, poor landowner not under same duty as rich one.

Special relationship here is btwn neighbours.

Always brought back to std of reasonableness - substantial damage & cost of abatement v. risk of harm

DOC & Public Functions
Governmental Liability
Historically, "King could do no wrong" so gov't provided w/immunity. However, this has evolved over time to where municipalities are governed by specific legislative provisions in each province.

Liability of public authority tricky. Statute sets up power & possibly duty. But if authority doesn't do X, or does X negligently so victim suffers harm as result of omission/commission, remedy rarely provided except to review decision. Not always helpful since, historically, tort law not available as remedy. Ct not there to second guess gov't policy. Now, public authorities who don't do jobs properly can be liable in negligence. Individual civil servants not liable if act in good faith, but Crown can be vicariously liable.

Anns v. Merton London Borough Council (1978 HL)

F πs holders of 999-year leases on some flats that developed structural failures after less than 10 years. Foundations were not sunk to depth required in approved plan. πs suing Δ, the local council, for failing to properly inspect/ regulate.
I 1) Can public body be liable for doing their job badly?
2) Was there DOC to π's which was improperly discharged?
H Liability Found
R 1) Public body may be liable in tort for discharging its duties badly
Wilberforce makes distinction btwn *policy & operational* decisions
Policy decisions may not be reviewed by the cts, but *Operational* can
2) B/c this was Operational decision, there is DOC owed to π's

Two duty issues –
(1) Can you sue them in negligence if they don't inspect at all?
(2) Can you sue them in negligence if they do it but not properly?

Ct found (1) in certain cases (2) yes

****The *ANNS* TEST for Negligence****
1. Is there sufficient proximity btwn parties, that, in reasonable contemplation of harming party, carelessness on his part likely to cause damage to latter, causing prima facie DOC to arise? (Proximity Branch)
2. Are there any policy considerations that ought to negate, reduce or limit scope of duty or class of person to whom duty is owed - or damages to which a breach of duty may give rise? (Policy Branch)

Policy v. operations – when they set things up a certain way, that's a question of gov't, can't really go behind that. Unreviewable, not justiciable. Operational questions aren't policy questions, are usually about carrying out policies that have already been established. TJ has to decide whether it's policy or operations. Cts not there to exercise

powers of gov't (set policy). All they can do is say whether it's a question of policy or a question of not carrying out policy competently < determine liability. (Wilberforce) Some wiggle room on policy if not created in good faith; but cts very reluctant to interfere.

Linden
They can be liable for not inspecting, if current policy required it, & there is no policy reason for not carrying out inspection. If inspection begun, duty to do it right, even if no duty to inspect in the first place. A decision not to inspect may be negligent if it runs contrary to the policy (ie maintaining public health & safety.

Differentiating Policy & Operational difficult, & for Judges to decide. If rules set (policy), & Authority fails to live up to them, it is clearly an operational failing. If, however, body w/ statutory authority writes inspection doctrine, this is clearly policy. Net result is to ensure public bodies held to *Donoghue* v. *Stevenson* level of care, provided sufficient proximity, including reasonable foreseeability of harm. Ambiguity occurs where administrative entity, created by statute, creates or decides on a regime. These cases can go either way, & do.

Blom on Anns:
First of really big negligent inspection cases - usually tort gave minimal remedies for those who buy lousy bldg - better remedy in breach of K. If it fell down, you had *Donoghue v. Stevenson* claim - but need for repairs not tortious. But HL agreed since inspection carried out, inspectors had duty to do so competently & w/o negligence.

Kamloops (City) v. Nielsen (1984 SCC)

F Home built w/ poor foundations, not according to plans; inspected, stop-work order issued, but work continued. City followed rules, did not issue occupancy permit. Municipal strike occurred, but city lawyer informed 1st owner problems. Said he would deal w/ problems; moved in w/o occupancy permit
Later, π bought house from 1st owner, not informed of problems by anyone, not seen by his inspector.
π sues Vendor & City, for negligent failure to enforce by-laws (Occupancy Permit)

I Did City owe π DOC, leading to negligence?

H Vendor 75% liable, & Kamloops (Δ) 25% liable

R The 2 part *Anns* test for DOC was applied, & found relevant.
1.Proximity & Foreseeability present
2.No legit policy excuse

Once a process begins, regardless of obligation to begin, process must be carried out properly

There was no Bona Fide policy decision that city could adduce; merely claimed it was policy.
Public body that takes duty upon itself may be liable for nonfeasance. **In this case, not doing something akin to doing it wrong**. At very least, there was duty to decide whether to inspect, on reasonable policy grounds.

Cts don't like to analyze policy decisions. Would be seen as infringement into functions of govt. Important distinction btwn acts & omissions, b/c often a duty on officials to avoid or prevent harm. May be duties to confer benefits where no policy reasons not to. But where policy concerns can be shown, such as allocation of funds or manpower, no interference likely.

Response to the Nielsen case was a change to Municipal Act which limits liability to $50,000.

Local Government Act (BC)
s. 287 – Provides immunity officials/employees of munic. bodies, unless conduct grossly negligent, malicious, dishonest, or c of a is libel/slander. Doesn't absolve munic. bodies of vicarious liab. for employees' tortious acts.
s.289 – Exempts Municipalities & employees from liability from damage as result of failure to enforce a bylaw.
s.700 – Sets out procedure for inspecting, etc. Also provides immunity for failing to carry out the procedure.
- *There may still be some liability for negligent inspection*
- *Definitely no liability for failure to enforce the by-laws*

***Vancouver Charter*, s. 294(8) –** Provides immunity for city & employees for most stuff discussed above.
s.294 ss.8 of Vancouver Charter (the only city w/ own statute) < No liab. whatsoever on part of city. City has no legal duty on which action can be based to see things comply w. bylaws. Eliminated DOC. Re bldgs, etc.
- *Under charter, city has no DOC of any kind wrt by-law enforcement (including inspection).*

Just v. BC (1989 SCC)

F Father/Daughter (πs) stopped Hwy 99; boulder rolled down slope onto car, killing daughter, injuring dad. Dad claims Prov. negligent in its maintenance of highway. (Neg. failure to deal w/boulder). Prov. claims followed the std inspection procedure, which appears cursory, but matter of policy. Cited *Barratt* v. *North Vancouver*

District, 1980 SCC, where District escaped liability for cyclist who crashed into pothole, b/c City followed policy. Sometimes things get missed, but all a matter of policy

I Despite apparent DOC, is gov't exempt from liability b/c the decisions made were policy?

TC, CA Inspection process was a policy matter that could not give rise to liability.

SCC Ordered a new trial to find whether Δ met DOC. Found unexempted DOC.

"Manner & quality of inspection system clearly part of operational aspect of governmental activity & falls to be assessed in consideration of the std of care issue."

"Open to crt in pre-trial to see if inspection system reasonable" – not policy b/c policy decision is to inspect < structure is implementation of policy decision. Effectiveness of inspection system reviewable.

R 1. DOC should apply to public authority unless there is valid basis for exclusion - "true policy decision" - this must be decided upon budgetary or similar considerations
2. Operational decisions by Province held to normal duty & std of care

- Proximity-Duty: Public body (Hwys Dept) clearly foresee if negligent, hwy users will likely become hurt.
- *Conclusion*: At Re-Trial, Province found *liable* as it was shown that the operation of inspection system did not meet std of care, thus, inspection was not exempted as a policy decision.

Linden on Just:

SCC significantly simplified law on Govt liability. Though TC & CA dismissed action, holding hwy inspection system matter of planning/policy out of which no tort duty could arise, SCC distinguished btwn 2 types of govt. activity: "true policy decisions" & "implementation." Limited availability of immunity to true policy decisions involving social, political & economic factors made at higher levels. When govt. supplies svcs to general public, should be subject to ordinary negligence principles. Thus, immunity for "governing" & not for "servicing."

The 3 questions regarding Govt. liability to distinguish btwn operational & true policy:

1. *What was level of officials involved & in what capacity were they making decision?*
   The more senior the official, the more likely it's a policy decision.
   Inspectors & regulators more liable than cabinet ministers
2. *What is the nature of the decision & what type of activity is in question?*
   Likely liable: policing, enforcing, prosecuting, implementation or maintenance schemes
   Likely immune: legislative, judicial & quasi-judicial
3. *What level of Gov't was involved? (Fed/Prov/Municipal)*
   Cts more likely to find liability at municipal levels than at federal levels since this is where most direct implementation occurs. - ie zoning & inspection

Brown v. BC (1994 SCC)

F π driving Gold River - Campbell River, hits black ice, slides off highway damaging car & injuring self. Several other recent accidents in same spot & sanding truck arrived after π's accident. RCMP had notified Ministry, but response time slow. Still on summer shifts in mid-Nov. Sues Ministry of Highways; negligence alleged:

H A policy matter, or alternatively a lack of causation ∴ not actionable.

R How to reconcile w/*Just* ? - Regime in use was matter of budgetary & other true policy factors, ∴ it is not liable to negligence claims. – in Just, it was a matter of choices w/in budget

Province not liable b/c:

1. Policy - decisions were a matter of budgetary constraints, & labour/collective bargaining etc.
2. Causality -lack of phone number was negligent, but even if they had it, call would not have come in time to prevent accident, so no chain of causation to accident.
   Causation – Gov't action must be negligent & cause loss

"I think you can say Brown represents a bit of a retreat from Just."

Is there duty here? Is there relship btwn Cwn & hwy users? Here, yes in both cases. No to argument it's taken away by statute. Proximity based on fact gov't basically invites people on hwy. "Constructs these things & lures people to their doom." Therefore DOC. (McLachlin doesn't like this)

Liability For the Negligence of Others (Vicarious Liability)

Basically an employment/agent thing. Means liability w/o fault on part of agent.
Employee must be tortfeasor, employer is jointly & severally liable.
There can be fault on part of employer, but doesn't turn on this – arises from simple fact of being employer
Employer tells employee to do sth > employee causes harm > employer should pay b/c put employee in position
Not liable if employee's tort committed on job, but has nothing to do w/job

671122 Ontario Ltd. v. Sagaz Industries Cda (2001 SCC)

F Sagaz mfrs fake sheepskin car seats, Canadian Tire has 60% of artificial sheepskin car seat market in Canada. Sagaz hires US mktg co. to promote seat covers. AIM bribes CT purchasing manager to buy them; they become primary mfr. The co. that used to supply seat covers – Design Industries – 30 yrs, most of their business done w/CT. Loss of business due to criminal act. Alleged conspiracy btwn AIM, Sagaz.
H Americans independent Kor, not employee. No VL.

TJ didn't like conspiracy idea < scheme to do harm to somebody. Has to be getting together & plotting against victim. Tort was intentional interference w. economic relationship. Inducing breach of K.

Who's liable? AIM b/c they did it. But is Sagaz liable? They were beneficiary. Is AIM employee of Sagaz? If so, Sagaz vicariously liable.

Crux whether AIM bribed on own or as part of Sagaz' business. Ct held they did as saw fit; not part of Sagaz organization.

Vicarious Liability
Employer>Employee Tort – commits tort "while in scope of employment" = Joint & several liability.
Nothing to do w/fault of employer, i.e. negligent hiring practice. If employer is negligent, can be sued in own right < not vicarious.

Bazely v. Curry (1999 SCC)

F Bazely sexually abused by Curry as child in care of non-profit.
I Is Children's Foundation liable for the abuse?
H Yes
R "It is right & just that the person who creates a risk bear the loss when the risk ripens into harm."
Policy grounds are fair compensation for victims & deterrence of poor hiring practices
"only where wrong so connected w/employment can be said employer introduced risk of wrong"

"To say the employer's enterprise created or materially enhanced risk of tortious act is ∴ diff. from saying reas. employer should have foreseen harm in trad. negligence sense."

Employer can say "We hired him to do exact opposite of what he did – you can't sue us"

Falls w/in ambit of risk that employer's enterprise creates or exacerbates – did employers create a risk?

McL's summary:
"Fundamental question whether wrongful act sufficiently related to conduct authorized by employer to justify VL... generally appropriate where significant connection btwn creation/enhancement of risk & wrong that accrues therefrom."

Relevant factors:
a) opportunity employment afforded employee to abuse power;
b) extent wrongful act may have furthered employer's aims;
c) extent to which act related to friction, confrontation or intimacy inherent in enterprise;
d) extent of power conferred on employee in relation to victim;
e) vulnerability of potential victims to wrongful exercise of employee's power.

Jacobi v. Griffiths (1999 SCC)

F Brother & sister both sex assaulted by employee of Boys & Girls Club
I Is B&G C vicariously liable?
H No
R Enterprises' activities public, not parental as in Bazely; Griffiths did assaults on his own time

Strong dissent by McLachlin < Griffiths got his "in" to the kids via his job

Lewis (Guardian of) v. BC (1997 SCC)

F Gov't privatized hwy work. Kor doing scaling work, negligently missed an obviously hazardous rock. Man killed by rock.
I Can Crown be liable for negligence of its Kor?

H Highways Ministry Liable
A. Vicarious liability for the acts of its Kor?
No: A Kor is not an employee; is independent legal entity, engaged by Province
B.Hwys Dept breached separate DOC to maintain road via whatever means necessary
1. Duty Established
2. Duty not Delegable, ∴Prov. retains duty & concomitant liability
R Under (B2) above, Ministry failed in duty to make sure Kor not negligent. B/c Kor negligent, Ministry liable since its DOC is non-delegable under *Highway Act*.

When is there a non-delegable duty? (This is fairly new Law)
- *A non-delegable duty is a duty to ensure that care is taken* rather than a duty to take care
- According to terms of Statute wrt Ministry's resp. to maintain hwy properly, *that duty cannot be delegated*.
- There is a level of care users of hwy might reasonably expect from Gov't Authority
- This situation is the exception, not the rule

SCC – No vicarious liability, but liable anyway
- Kor clearly negligent
- Crown still has their own crews & they are liable through a "non-delegable duty"
- No fault on part of Crown or its employees, but their duty is non-delegable.

Lewis is at the moment the leading case

Devji v. Burnaby (1999 BCCA)

F πs' daughter/sister killed in car crash; claim nervous shock after seeing body at hospital
I Can they recover?
H No
R "π seeking damages for nervous shock must suffer shocking experience as consequence of Δ's conduct"
"psych. injury in circs where view body of person they know has died not reas. foreseeable"

- Must be more than an ordinary death.
- No foreseeability of type of damage (Bourhill v. Young)
- You can recover for nervous shock when it's more than just grief (medical name) & it's foreseeable
- They would have had to either come upon the accident or see the body mutilated
- If liable for shock when just foreseeable, floodgates > foreseeability is part of it but must also have close connection btwn Δ's conduct & π's injury
- Must be horror, terror, shock.
- Closeness of relation is part of foreseeability
- Negligence was not showing body, but causing accident (failure to maintain roads); Devjis saw aftermath
- Range of people & situations where you can recover is limited

Pure Economic Loss
- Not the consequence of any physical injury, i.e., consequential $ loss, or damage to property
- Before, no liability in negligence if no damage to person or ppty

Rivtow Marine Ltd. v. Washington Iron Works (1973 SCC)

F π couldn't use crane during busy logging season b/c cracks developed in structure. Though Δ knew of cracking, didn't inform, found out when another crane collapsed, killing operator. Claim against mfr for negligent design & negligent failure to warn
I Is π entitled to recover for economic loss of having crane out of operation?
H For π
R Knowledge of risk substantially exceeded foreseeability, compounded by Δ's nasty behavior, ∴ recovery.
Liable for duty to warn b/c loss was a direct consequence & there was exact knowledge of risk
Duty to warn tied to physical risk, but if loss purely $ < recover anyway

-Claimed (1) cost of repair, (2) $ loss assoc. w/ repair, (3) extra loss of profits from late warning
-SCC gave (3) but not (1) & (2) b/c the latter are K problem (should sue owner of ship)
-Dissent would have given (1) & (2) < the view in *Winnipeg*
-SCC agreed that can recover from failure to warn of dangerous sitch although pure $ loss
- Not cost of repairs (design not negligent), but loss of extra profits diff. btwn repairing in slack or busy season.

Said recovery for *defect* of chattel intrinsic type of claim that should be handled in K not tort; Laskin dissents b/c money spent to prevent this kind of damage, mfr not liable. Not fair for user, mfrs should be liable if chattel not at safe operating std (ie requires preventative maintenance). View later adopted by SCC in *Winnipeg Condo*.

Negligent failure to warn actionable b/c chattel could have been fixed in off-season, reducing amt of lost profits. Here, SCC allows π to recover extra loss of profits "Just b/c." Ritchie notes *Hedley Byrne,* economic loss recoverable w/o physical damage. Physical risk created duty to warn. Furthermore, failure to warn (direct & demonstrable breach of duty) caused economic loss that was direct & foreseeable, recoverable. Thus, failure to warn can be recoverable in PEL.

WRT buildings there's DOC re physical danger but none re economic loss. If you buy older building there's absolutely no warranty

Anns II stage analysis
- Is there foreseeability of economic loss if you don't build the building properly? Of course there is
- All the discussion is about the second stage – what are the considerations of policy?
- Usu. argument against DOC is floodgates. But in cases of poor construction claimant pool is limited.

Winnipeg Condo Corp v. Bird Construction (1995 SCC)

F Kor negligently made bldg; substantial repairs made for defects that could have caused substantive damage to person or ppty.
I Can recovery be allowed for repairs where there was no injury to persons or ppty but only threat thereof?
H Yes.
- Can recover for PEL for repairing defects causing **real & substantive threat** to safety if repairs needed b/c of other's negligent work; can only recover for repairs nec. to bring bldg into safe state.
- compelling **policy reasons** for Kors' liability for repair of dangerous defects: if one has capacity to cause serious dmge to other persons & ppty, should be held to reas. std of care: preventative policy decision encouraging socially responsible behaviour.

  - Areas where PEL is now allowed:
  1. independent liability of statutory public authorities
  2. negligent misrepresentation
  3. negligent performance of service
  4. negligent supply of shoddy goods or structures (this case)
  5. relational economic loss (Norsk)

  - in Cda, DOC in tort can rise w/K duty BUT such duties must be independent of each other - in this case they are.
  - duty in K flows from terms of K; duty in tort flows from Kor's duty to ensure bldg meets reas. & safe std - tort duty not limited by K duty.
  - this case met *Anns* test of proximity to give rise to DOC (reasonably foreseeable negligence would cause damage to person or ppty of subsequent purchasers); no limits on duty (no indeterminacy b/c only repairs nec. to avert real/substantial danger allowed & it falls on π to prove risk, caused by negligence of Δ & repairs required to negate risk. No indeterminacy re time b/c only liable for defects during useful life of bldg, & w/ time becomes increasingly difficult to prove defect due to negligence of Δ & not normal wear & tear of bldg).
  - the key is foreseeability, not privity

  - **history:** only could have recovery for economic loss related to damage to person/ppty; then *Hedley* rejected broad exclusionary rule; *Anns* also rejected broad excl rule, said should est'b DOC based on Wilberforce's test. *Anns* adopted Laskin's dissent in *Rivtow* (why liable if sth hurts s/o but not if fixed before hurts s/o? perverse & discourages repairs).
  - Physical danger creates DOC, but DOC extends to cost of necessary repairs < must be real & substantial danger to occupants & sometimes their ppty
  - Argument for leaving risk w/buyer *caveat emptor*. SCC didn't like b/c buyer may not be able to detect. In this case, advised by competent experts no problems. Not discoverable by new owners until 15 yrs on, that's when cause of action arises.

"These guys created a physical danger & they should be liable for the cost of eliminating it."

What if defect not dangerous but very defective? Not decided. Problem here b/c if you extend this beyond dangerous defects, what std are you applying for proper construction? Defective if doesn't live up to K specifications but in this case not covered in K. In Australia covered in residential construction.
Some argument that law should put a time limit on this kind of thing. Difficult to carry insurance for work you did 15 years ago. Construction companies now tort-proofing themselves by reincorporating (numbered companies)

Rivtow would now presumably be decided the other way. Rivtow is its own category.

Negligent statement

Hedley Byrne v. Heller (1964 HL)

F π advertising firm asked, through own bank, Δ bank for $ information on E (π's client on credit & Δ's banking customers); Δs negligently responded to π's bank E good for $ owed & added disclaimer of responsibility for info given, said info was for π's bank only. Later E went bankrupt & π lost all $ owing. π is suing Δ bank.
I Is Δ liable for negligent words on which 3rd party relied & where is no fiduciary relship to 3rd party?
H No
- Case turned on informal way question posed to bank. "could you tell us in confidence & w/o responsibility" "It is respectably constituted co. considered good for own ordinary business engagement. For your private use & w/o resp. on part of bank."
- Δ accepted no resp. for advice; disclaimer relieved Δ from liability (if no disclaimer would've been liable) note: could've allowed recovery for economic loss based on negligent statements relied on & where no damage to person or ppty & where injured party not in fiduciary relship).
- ct distinguished Donoghue v. Stevenson b/c that involved negligent acts not words; in law innocent but negligent misrep gives no C of A unless speaker (or writer) has undertaken responsibility i.e.. special relship exists where party seeking advice trusting other to exercise degree of care reas. to circs & where party giving advice knew or ought to have known info being relied on.
  - **note:** in negligence the objective std/test is applied
  - ct says giver of info has 3 options: 1)keep silent or 2)give answer but disclaim responsibility or 3)give answer w/o disclaimer of responsibility. Only on 3rd did giver accept responsibility & he will be liable.
  - law in Eng was absent K, maker of stmt of fact/opinion owed to person whom he could reasonably foresee rely (economically) on info, duty to be honest in giving info. But did not owe duty to be careful unless relship was fiduciary. This case expanded relship beyond fiduciary to include non-fiduciary relships.

This case created liability for negligent advice by professionals.

Negligent Misrepresentation < leading case Hedley Burns
Advice has to be serious advice that the giver knows will be taken seriously. There has to be
- Special relship" btwn advisor & advisee
- Foreseeable reliance
- Assumption of responsibility
- Reasonableness of reliance
- Context indicating serious advisement < not only professional, but clear serious purpose.

Was advice sought? Makes it more serious.
Did Δ have financial interest?
Great bulk of cases are either pros < lawyers, stockbrokers, etc. or free Kual statements by somebody trying to persuade you. Not fraud b/c no intent to deceive, just wrong & negligent in giving info.

Relational Economic Loss
Economic loss to a 3rd party when s/o else suffers.

CNR v. Norsk (1992 SCC)

F: Bridge owned by another but CNR primary user by K. Norsk tugboat pulled barge into bridge & damaged it. Repair of bridge took some time; during time CNR suffered PEL.
H CNR allowed to recover PEL.
R: If π's K is to use ppty of another & that ppty damaged by negligence of Δ, & this causes PEL for π, π can recover PEL. Proximity btwn π & Δ is important, as is foreseeability of damage.

Δs argued CNR should have insurance, K allocation of risk < better to leave to K btwn parties using bridge

Ct. held Kamloops test should be sensitive to the above

Stage 1, prima facie duty: Yes, CNR so tied to bridge owners < dissent based on above

McLachlin says CNR working w/Public Works so closely, almost joint venture; proximity for purpose of economic loss. CNR had duties of fixing, upkeep, etc. Damage foreseeable.

Stage 2, If there's damage to s/o else's property that causes you loss & you have a K w/them that gives you a stake in functioning of property, you have a claim if there's enough proximity

McLachlin - applies *Anns* (as accepted in Cdn context of *Kamloops*) in different way than in *Hercules*. Gives more weight to proximity question than policy limitations. Also addresses indeterminate liability in first part rather than second. She determines intimacy of CNR to bridge & deems it "joint venture w/public works" - & *joint ventures are acceptable examples of proximity* - thus PEL awarded for damage to another's property

La Foret (Dissent) - Proximity argument doesn't make sense, relied on *limited exclusionary rule*: You can't recover PEL for K obligations unless suffer physical dmge. Moral fault, proximity & deterrence of little value.

Rationale - Here Majority recognised new exception to law against recovery for PEL for 3rd parties. Ct takes restrictive view to prevent floodgates problem by stressing importance of true & sufficient proximity (ie joint venture). Nevertheless, no clear view since decided under odd circs of CNR being almost exclusive user.

- *CNR v Norsk* superseded by *Bow Valley*.

Hercules Mgmt. Ltd. v. Ernst & Young (1997 SCC)

Rule 1: there must be "special relship"

F π hired Δ to audit company; relying on reports, π invested & lost $600,000

I 1. Do accountants owe DOC to shareholders who claim losses from reliance on audited stmts?
2. Did accountant also breach K'l obligation to protect shareholder's individual interests?

SCC Stage 1 YES – Stage 2 NO
1.There was a limited class of people who could rely on statements, and
2.The way statements would be relied upon was foreseeable

R Reliance must be reasonable, foreseeable; special relship must exist btwn π & Δ. Policy must be considered. Here Anns test/Kamloops test considered acceptable for determining if duty exists for negligent misstatement.

Could Δ foresee π would rely? Would reliance be reasonable? (Stage 1) Yes in this case, DOC.

Stage 2 < purpose of audit to describe mgmt, not for personal investment. Auditors not giving opinion re $ stmt to assist investment decision. Purpose to allow shareholders to assess whether mgmt was running co. well.

Indeterminate liab. (floodgates) major factor in Stge 2 assmnt < auditors wld become insurers of investments

Bow Valley Husky v. St. John Shipbuilding Ltd. (1997 SCC)

F Oil rig damaged by fire in heating rack off Nfld. coast when insulating material caught fire < heat trace system on outside pipes; prevents freezing. K to keep paying for rig even when not operational. Sues for *failure to warn* material was flammable.

H NO LIABILITY

R Although a duty in K was determined, it was negated by policy considerations.

SCC Builder off hook for K liability since rig owned by BVH, but only leased by BVI & HO so no duty to 3rd party. Although duty in K liability was determined, it was negated by policy considerations.

MaLachlin - Unanimous:

a. Was there a *Prima Facie* DOC towards BVI & HO from supplier of insulating material?
- Failure to warn about risk of fire could foreseeably cause pure financial loss

b. Considerations which limit or negate - Limitations: the floodgate argument
- Negates DOC for policy since unable to warn all to whom DOC could be owed
- Workers also suffered economic loss; could sue too
-Emphasize proximity & categories of recovery

Hercules (1997) S.C.C. discussed as example of indeterminate responsibility & problems of remoteness & foreseeability of those who might be affected by your negligence

R Thus, there is a very limited exception to no recovery for pure economic loss for 3rd parties
-After *Bow Valley*, ct agreed negligent damage to 3rd person's ppty difficult to recover unless in joint venture
-Applies LaForet's reasoning from *CNR* that *limited exclusionary rule* applies
-To determine whether duty exists beyond K obligations, apply *Anns* test of proximity & policy limitations
-How to distinguish true duty? Cts always remember floodgates argument so limit class (not indeterminate)

Obiter: *Bow Valley* changes law as defined in *CNR v Norsk.* Relational economic loss recoverable only in spec circs where spec conditions met; circs defined wrt categories that make law predictable; cats not limited but only 3 so far: Ct has allowed recovery where π has possessory/proprietary interest, is in joint venture w/owner, & in general average situations. Here *Anns* Test as applied in *Hercules* used to determine if *prima facie* duty exists after K economic loss established. Where duty exists, & there is proximity, negligent damage must foreseeably cause damage to other parties; & policy limitations must be considered.

After Bow Valley, going to be very difficult to recover for 3rd party K loss < indeterminacy always a problem

City of Kamloops v. Nielsen - city failed to enforce bylaws regarding foundations of bldg; liable as this was an operational decision & not a policy one.

Nielsens were claiming PEL. Defective house requires money for repairs. Does this play a role in deciding whether there's DOC? Ct said yes, significant, have to look at whether statute geared to this type of loss. Is it w/in the scope of statutory function to protect people from buying defective property? Yes.

They dropped a pretty heavy hint they didn't think Rivtow was good law; later Rivtow overturned. Also floodgates argument came up; answer was no problem b/c negligence only affects specific bldg, ∴potential claims circumscribed, limited to person who suffers $ loss associated.

Kamloops & Nielsen finds DOC on inspection authority; this is one purpose of statutory scheme. Argued geared to safety, not money, but they don't accept this < one function of bylaws is to make sure bldgs of adequate quality, consumer protection.

Had said Part 1 is foreseeability but generally have thought about policy as coming in at 2nd stage. In Cooper they said it comes in at the first stage too but they're different policies. 1st stage policy = relship btwn 2 parties;

1. Foreseeability + policies flowing from relship btwn parties (but see below)
2. Other policies not tied into relship; ex. indeterminacy problem (systemic rather than particular)

Cooper v. Hobart (2001 SCC)

F Registrar (of Mtge Brokers) Hobart suspended Eron Mtge Co's mtge broker licence, froze assets; went out of business. Funds provided by investors used by Eron for unauth. purposes. $222 mil outstanding on loans. Cooper one of 3000 investors SOL, sued Registrar, alleging breached DOC. Said aware of violations in Aug '96 but didn't suspend licence until Oct '97.

I Did Registrar owe private DOC to members of investing public?

H No.

I Should new DOC be recognized?

H No – "Factors giving rise to proximity, if exist, must arise from statute under which Registrar appointed. That statute is only source of his duties, private or public…duty must be in statute… statute does not impose DOC on Registrar to investors w/mortgage brokers... rather to public as a whole. Indeed, duty to individual investors would potentially conflict w/Registrar's overarching duty to the public." "s. 20 exempts Registrar.. from any action… in performance of duties… unless done in bad faith."

In other words, no prima facie DOC, so no need to proceed to Stage 2.
But even if established, negated at stage 2 - policy reasons. Registrar quasi-judicial, requirements inconsistent w/ DOC to investors.

Considerations in deciding no DOC: efficiency of process, public interest. Ct says relship creature of statute so statutory scheme IS relship, so public policy to be considered at stage 1. If registrar has to consider individual depositors may interfere w/duties. Can't serve general public interest & look after interests of individual depositors at same time.

Cts give lip service to foreseeability but usu. decide everything's foreseeable. Always end up at stage 2, which includes intrinsic & extrinsic policy considerations. If no clear distinction btwn stage 1 & stage 2 policy, why did they separate the two? From Kamloops on, ct is crystal clear that stage 1 is foreseeability & stage 2 is policy. Ct mixes up the two in this case. Why restructure the test? Presuming prima facie DOC exists puts burden of persuasion on Δ to defend self. By denying it in the first stage you prevent the presumption. Sends a message that they want to slow tort law down.

"The importance of Anns lies in its recognition that policy considerations play an important role in determining proximity in new situations. Long before Anns, cts in Canada & elsewhere had recognized that the decision of how far to extend liability for negligence involved policy considerations."

H of L ditched Anns 20 yrs previously b/c didn't like idea of prima facie DOC. Said we're not going to impose DOC unless fair, just, & reasonable. SCC doing the same thing here but in a different way; not prepared to reject after 20 years of acceptance.

"The Anns test, properly understood, does not involve duplication b/c different types of policy consideration are involved at the two stages… there must be reasonable foreseeability of the harm plus something more… On the first branch of the Anns test, reasonable foreseeability of the harm must be supplemented by proximity." Proximity is Atkin's neighbour test. "The factors which may satisfy the requirement of proximity are diverse & depend on the circs of the case."

Policies are important in determining DOC < What policies are legitimate for cts to use here? In Cooper they use impact on taxpayers of liability. Should that deny DOC? In Hercules one was premiums going up & having to pay lawyers to draft exclusion clauses, having to worry about avoiding liability rather than auditing.

Blom - investors expected to take risks, caveat emptor. Cts clearly reluctant to provide insurance scheme for investors.

Distinction btwn principle & policy: Principle is std of ideology or morality that cts want law to reflect. (people should take their own risks when investing) Donoghue & Stevenson articulated principle. Precedent is a principle. Taxpayers probably policy.

Edwards v. Law Society of Upper Canada (2001 SCC)

F Edwards lost $300 K in gold scam. Money went into lawyer's trust acct, so sued Law Society for "failing to take any effective steps to ensure Mills operating trust acct. in prescribed manner." The year before Mills had sent them a letter re "unorthodox" use of his own trust acct, they should have taken steps or warned plaintiffs.

I Does Law Society owe DOC to people who put money into lawyer's trust account wrt losses resulting from misuse? If so, do policy considerations negate this?

H No.

R SCC agrees w/CA re no proximity. "The Law Society Act is geared for the protection of clients & thereby the public as a whole, it does not mean that the Law Society owes a private law DOC to a member of the public who deposits money into a solicitor's trust account." Public rather than private law duties.

Policy considerations:
"Section 9 (good faith) precludes any inference of an intention to provide compensation in circs that fall outside the lawyers' professional indemnity insurance & the lawyers' fund for client compensation."
"Edwards really just does what Cooper does – would be incompatible w/quasi-judicial function for them to owe DOC to individuals participating in scheme"
Cooper – "it is inappropriate for cts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial, see Edwards."

Nuisance
Two kinds – public & private.
Public = nuisance to neighbourhood, etc. Private – something to you on your property.
Not an intentional tort. Not necessarily fault-based or involving negligence.

1. Public Nuisance
A punishable crime in Canada that comes from common nuisances including blocking roads
Can claim private suit of public nuisance if *claimant suffers "special& particular damage," ie worse than rest of community*. Nuisance must affect the whole public, but it must especially harm one person, for a private suit.

For the following cases take in to account the cost of avoidance & the importance of the activity.

Stein v. Gonzales (1984 BCSC)

F π hotelier seeks injunction against prostitutes using public & private areas outside business; has caused serious inconvenience & economic loss to π/hotelier

I Private or public nuisance? If public, special or particular damages?

H Private nuisance; no special/particular damages
R Private nuisance is when π's use of land interfered with; prostitutes outside, not on hotel ppty.
This is public nuisance; no evidence π suffered special/partic. damages above other businesses in area or public at large. Action must come from AG.

- Public nuisance criminal offence, private nuisance civil wrong. Policy behind limitation is public & criminal jurisdiction of ct not usurped in civil proceeding & prevent "multiplicity of civil actions for same cause".
  - ct says authorities suggest spec/partic dmge giving rise to action must differ in degree & type from public.

Ryan v. Victoria (1999 SCC)

F Motorcyclist injured on railway tracks; signs warned of danger to bicyclists but not motorcyclists. Sues city & railway in nuisance & negligence. Personal injury as result of public nuisance (spec/partic)
I Railway liable in either?
H Yes, both.
R Is there special rule that as long as railways work w/in railway act, not subject to ordinary laws of negligence & exempt from liability? SCC said NO. Have to show neg/nuis *inevitable consequence* of carrying out statutory authority. They had choice of flangeway size; Parl didn't authorize any width no matter how dangerous. So both neg. & nuis. to have this size on this section of track even though statutorily possible. Law of neg/nuis obliged to choose narrower size b/c wider size dangerous.

Railways say they have statutory authority defence < complied w/all rules & regulations.
π says not necessary consequence of fulfilling statute < not inevitable consequence of exercising stat authority

You can sometimes show nuisance w/o negligence. In this case can't have one w/o the other. Question is whether railway created unreasonably hazardous sitch.

Re statutory authority, key is that SCC approves inevitable consequence test. You're not saved by legislation just b/c what you did was okay under statute. You have to be able to say, no way to do this w/o creating a nuisance, even if other way more expensive.

Private Nuisance

Sutherland v. Canada (AG) (2002 BCCA)

F Vancouver airport flight paths going east over π's ppty; bring case in nuisance. Public or private? If public, AG unless spec/partic. πs saying private b/c it's what we do on our ppty, couldn't sit outside.
I Public or private? Liable?
H Ct said could be private b/c own land. A lot of private nuisances happening at once means it is public nuisance but conclusion is, fact it could be considered public doesn't mean it's not private, two not exclusive. B/c on private ppty, considered private. Different from Stein where nothing actually going on in hotel ppty.
But not liable b/c statutory authority.

Is noisy airplanes nuisance? Judge said yes, CA agreed. Is it unreasonable interference? Judge said yes, beyond what even airport neighbours should have to put up with. Goes beyond annoyance. Is the airport authority protected by statutory authority? TJ said no, but CA disagreed, says if you look at regulations & legislation authorizing transfer of airport to Vancouver Airport Authority, all done under relevant legislation. Term of the lease that airport authority had to build this runway, terms stated exactly where it was to be built. CA said when you boil it all down the legislature ordered this runway to be built in this exact spot. & obviously authorized it to be used. Test from Ryan is, is it an inevitable consequence? Answer is yes.

Environmental review at time of design, recommended compensation to ppty owners. Gov't accepted every recommendation except that one, took "noise reduction measures"

Class action, ct has to certify claim of class of people can be considered together. Have to be issues common to all claims so one decision would settle for all. Won't work where position of each potential claimant might be different. This one didn't work probably b/c extent to which each π injured differed. So opted for a test case.

Private nuisance - *unreasonable interference w/ use or enjoyment of property*. Real, not personal property. Who can sue? Only person w/possessory interest, or related people affected by nuisance? Cdn cts tend to say yes.

What is unreasonable interference? Not like negligence where there's a std of RP. It's a test of appropriateness. What is appropriate under all the circs, including character of neighbourhood, utility of activity, Nor-Video "we are

not concerned w/elegant or dainty modes of living" – there's a Right to Farm Act that attempts to protect farmers against nuisance actions.

Vital point < it's not who got there first that matters. Doesn't matter if you moved *to* the nuisance. Protects residential expansion < don't want to inhibit development. Otherwise you'd would freeze rights < create prescriptive right to nuisance.

Nuisances can be intangible – vibration, smell. Not ugliness or right to view. Physical damage almost always nuisance < continuous or one-off. Russell Transport - iron foundry creating nuisance b/c smokestack particles landing on new cars in π's lot, finish damaged. Judge said physical damage almost by definition unreasonable.

PRIVATE Nuisance:
In determining whether there has been an unreasonable interference w/land the ct looks at

1. type & severity of harm (interference must be substantial),
2. character of locale (std expected in the area),
3. abnormal sensitivity (likely bar recovery b/c obj std - but could still get recovery if Δ could have easily carried operations elsewhere),
4. utility of Δ's conduct, (questionable).

Nor-Video v. Ontario Hydro (1978)

F Δ built hydro plant in area that interfered w/π's business of sending cable t.v.
I Was Hydro negligent?
Is π's interest in land one that the law will protect?
Is conduct of π such that it should be subject to liability?
H yes; other locations were feasible & Hydro assured π no damage would be caused, said if any did occur they would remedy; Hydro could/should have foreseen they would have interfered w/π's use of land

- yes; reasonable to require free reception (compares situation to what 'normal' home user would reasonably expect); reception integral part of enjoyment & use of ppty, reasonable; users *not* abnormally sensitive so as to preclude protection under law (any normal household would have reception disturbed by Hydro).
- yes; "just as all interferences w/use & enjoyment of land are not actionable, so all types of conduct causing such interferences are not actionable wrongs"; this was act of foreseeability & negligence.
- Note: b/c Δ negligent leads to increased likelihood they will be found liable in nuisance; these 2 concepts are supposed to be kept separate but they often are not.
- Note: if cable company had built itself after Hydro already there they would not win if reception was interfered w/b/c they should have foreseen the possibility w/their sensitive industry.

Reception of TV stations not reasonable use & enjoyment of land according to CA, but it was to SCC. Note judge treating cable co. as representative of TV watchers in the area, but remedy based on co's loss. Wouldn't grant money necessary to restore channel 2 as they weren't losing subscribers, b/c only cable co. in town. Damages quite minor b/c didn't lose revenues, only put to costs in investigating/dealing w. nuisance.

Private Nuisance
Unreasonable interference w/use & enjoyment of land that is not tolerated by the ordinary occupier
"Unreasonable" Interference
After π has proven Δ caused "unreasonable" interference w/ land, onus on Δ to show interference was reasonable

a) Type & Severity of Harm
b) Character of Locale
c) Abnormal Sensitivity of π can result in denial of nuisance claims unless interference is excessive (obj test)
d) Utility of Δ's Conduct: conduct negligent or intentional? all precautions taken? Foreknowledge of nuisance?
e) Negligent-Like Behaviour
f) Malice as a Factor

Nuisance	**Negligence**
Fault/ Intention not necessary	Fault necessary (breached DOC)
No DOC to others required	DOC – did Δ take all reasonable care to prevent tort
Material harm essential element	Unintentional interference w/ person or property

Damages mount up as the nuisance continues. In that case you'll get an injunction. If damages are already done like in Nor-Video it's too late, you just get damages as compensation.

RYLANDS V. FLETCHER < sui generis tort, *called* Rylands & Fletcher

Strict liability (R v. F) will be imposed for;
1) non-natural use of land,
2) which is likely to cause mischief if it escapes,
3) there is an escape;
4) causing harm.

Escape – A "Requirement" to operate R v. F
From a place where Δ has occupation or control over to a place outside of this occupation or control
Escape must not be caused by deliberate act of 3rd party < owner's act or accident

Fault not a part of it. Other thing like this is animals < cattle trespass. < Domestic animals, not liable if you didn't know had vicious tendencies < if you do, liable even if take care to keep tied. Wild animals, liable for anything.

Rylands v. Fletcher (1868 HL)

F Δs build water reservoir on their land, floods a neighbouring mine
H Δ liable
R Person who for his own purposes *brings on his land* anything not naturally there & *likely to do mischief* if escapes, must keep at his peril; is *prima facie* answerable for all damages; can only excuse self by showing escape was 3rd party fault or act of God.

- no matter how careful & cautious one is not to let 'it' escape from his land he will still be liable. If you bring sth potentially dangerous onto your ppty & it causes damages you're liable no matter what

Reservoir construction arguably negligent – over disused mines.
This looks like a nuisance case but that word is not used at all. People who built reservoirs not liable – owners liable. Similar to cattle trespass. - "enterprise liability"

Judges ruled on term "non-natural" to exempt common ordinary operations from *Rylands* rule despite mischief caused. (Ex. Bathroom on 5th floor, sewers, found natural) Blackburn never said "non-natural use"; just about bringing thing onto land that wasn't naturally there. But natural use idea has triumphed.

- Water - For escape during commercial use
- Fire - used for industrial or transportation purposes; but not for domestic purposes of keeping warm
- Electrical, Gas & Explosives - those who transport large quantities of gas or electricity are held strictly liable

Read v. J. Lyons & Co. Ltd. (1947 HL)

F Explosion in Δ's munitions factory injured π who was working as a factory inspector
I Can R v. F operate w/o escape?
H No
R No escape; Bomb factory is normal use of land in time of war

- in R.v.F., 'escape' meant from where Δ has control or occupation to a place outside his control or occupation; thus, R.v.F. inapplicable here & ct will not expand its application.
- if injured party not on Δ's ppty but outside of it, Δ would be liable for any harm caused despite lack of negligence (b/c R.v.F. rule would apply)
- for personal injuries you must prove negligence & there is no evidence of negligence here.
- **Note:** what constitutes natural user & dangerous depends on time & circs.

π couldn't prove negligence; nuisance impossible b/c no interference w/ use/enjoyment of ppty, so tried RvF < H of L said forget it, RvF about escapes FROM ppty; this about explosion ON ppty

Everybody thought RvF was starting to look like strict liability for dangerous activity, especially risky things. But in RvL they refused to do it, kept RvF tied to its limits. One judge said RvF never about pers injury, only about land

Aldridge v. Van Patter (1952 Ont. HC)

F πs hit by race car driven by Δ at race track, came over fence. Neg, Nuis & R v F.
I Can R.v.F. apply to personal injury on land Δ is occupying?

H yes; non-natural use of land & dangerous thing escaped.
R There was "escape" of something from Δ's land & potential injury foreseeable.

- Ct accepts R.v.F. doesn't only apply to adjacent land owners but to occupiers of land nor restricted to damages in ppty but can include claims of personal injury. Says liability extends under R.v.F. "to anyone whom probability of such damage would naturally be foreseen".

Non-Natural Use
Exceptional, unusual or out of the ordinary.

Tock v. St. John's Metropolitan Area Board (1989 SCC)

F: π's basement flooded & damaged by blocked sewer constructed by Δ municipality.
I: Did statutory authority give a defence to nuisance?
H: For π. Succeeded in nuisance, failed in RvF.
R: Natural use of land.

- Tried RvF b/c blockage could happen w/o fault. Failed b/c natural use of land. (Sewer natural) Flooding basement unreasonable interference, not inevitable. Here, statute permissive & location/manner not specified, Δ had to implement in strict accordance w/ private rights (if caused nuisance, liable). Route chosen not only available, even though most cost friendly. Almost all statutes permissive, "inevitable consequences" won't apply.

Wilson (majority):
Key is (1) distinction btwn <u>permissive or mandatory statute</u> & (2) <u>concept of inevitable consequence</u>.
If <u>mandatory</u>:
1. and nuisance is the inevitable consequences, then no liability in nuisance.
2. and not inevitable, then actionable in nuisance.
   If mandatory, & if nuisance is inevitable consequence & there is also negligence, liability for negligence

If <u>permissive</u> (municipality given power but not given a required duty):
1. & language of statute is specific as to location or manner of doing thing authorised & nuisance is inevitable consequence of doing thing authorised, then no liability in nuisance.
2. & language of statute doesn't specify manner/location, then municipality must do in manner & at location which will avoid creation of nuisance, ie conform strictly to private rights. If does not, liable in nuisance.

NOTE: even though municipality may be immune to recovery in nuisance, they can still be liable in negligence.

Cambridge Water Co. v. Easter Leather PLC (1994 HL)

F Δs allowed effluent to escape factory into water supply over a period of years.
I Nuisance & R v. F?
H No
R At time of use of chemical, dmge not reasonably foreseen - no knowledge would be bad; water far away

TJ said tannery was natural b/c benefit of community < H of L disagreed

- seepage unforeseeable event as its effects were unknown to that era; [contrary to R.v.F which says negligence/foreseeability is irrelevant if damage caused by unnatural thing escaping from your land].
- case shows problems from allowing claims of pers injury under R.v.F.; says pers injury claims should've been restricted to negligence & not allowed under law of nuisance/R.v.F (note: ct finds similarity btwn nuisance & R.v.F.). Says R.v.F. should've been limited to claims from adjoining ppty owners/ppty damage claims only.
- ct says R.v.F. meant to have element of foreseeability. Problem is R.v.F. is strict liability; foreseeability irrelevant under SL & Blackburn says "quite immaterial whether escape by negligence or not". But did say "likely to do mischief, liable for natural consequences" < not totally unforeseen consequences
- ct says historically foreseeability is a prerequisite: if common experience of mankind, thing introduced onto land was not proved to be dangerous (i.e.. technologically speaking didn't know harm could be caused)
- Judge says strict liability should be imposed by Parliament, not the cts (against R.v.F.)

Said R v F just a special sort of nuisance; illogical/anomalous to have different rules for foreseeability in nuisance & RvF "They don't quite kill it but it's twitching"

They say this is a good ex. why there shouldn't be strict liability < historic pollution, carry on business according to stds of day, then stds tighten up < liable for what you did then? Better left to legislation

Foreseeability part of test "b/c it makes some sense"

Couldn't use negligence b/c too remote; couldn't use nuisance b/c unforeseeable

The Demise of *Rylands v. Fletcher?*
Canadian Cts – Very conservative, follow R v F closely, though hints of change
Aus says should be dumped in favour of negligence

Aus case < fire was dangerous thing, spread btwn warehouses < wanted to hold owner of bldg liable for escape < caused by welding spark < independent contractors < couldn't show owners under fault, so tried RvF < HC said RvF is a crock < totally out of sync w/tort law b/c tort that's not fault-based doesn't fit anymore < strict liability is relic of middle ages < they said this sort of case owner's liability really ought to be handled on basis of non-delegable duty (Lewis v. BC) < activities that posed a special danger

Damages
Law of negligence developed early 1700's < stagecoach accidents < element of fault evolved.

Nothing on damages until mid 19th C < before that they were left to jury, no reasons required.

Milestone case < Philips v. London SW Railway
Catastrophic injury to π earning L5000/yr
Ry had deep pockets; jury awarded L7000

CA concluded more guidance needed to juries on heads of damages: bodily injury sustained, pain & suffering, effects on activities & health of π, loss of amenities/enjoyment of life, expenses (out of pocket), cost of future care, pecuniary loss (loss of future income).

Principle became more important & jury receded < effectively abolished by Denning in 1955.
Some provinces have virtually none < probably more in BC.

Pre-1970's ICBC π's usu asked for jury – more recently it's ICBC that wants jury & π resists
- π will often ask for Rule 18A summary that on affidavit juries not sympathetic to πs in soft tissue/psych injuries, skeptical if not cynical

1960's global award <all general damages in 1 figure < only special damages itemized.

SCC 1966 < damages for loss of earnings assessed offsets π's disadvantages elsewhere

Then cts decided they'd itemize everything by 1970 -two other external developments < burst of inflation & dramatic medical advances in treating quads & brain injury victims – started surviving longer

Quadriplegics need constant care

3 big quadriplegic cases

Anders & Grand & Toy
Thornton & Prince George
Tino & Arnold < brain injury, girl hit by truck

2 main problems: inflation & what kind of care?

BC case Thornton < Lawyers from Edmonton developed innovative approach accepted by TJ
TJ awarded $1,122,000 for cost of future care < a staggering sum at the time
It was appealed < when it got to C of A Mr. Justice Taggart said : "the evidence makes it clear respondent will need constant care to live as long as anybody else his age. But should he get it in a home of his own or live w/s/o w/ similar injuries? 2 basic considerations: first, attention on constant basis (detailed); second, effect of his surroundings. Optimum is care in his own home rather than chronic care home. Control over daily life vs. rules/ regimen in institution. Significant effect on life expectancy."

C of A effectively flinched at cost of all this "I am of opinion that award resulted from errors of principle & judge chose unrealistically high std of care". Reduced award to $210,000 for institutional care.

SCC Dixon said "Taggart trenchant finding – expectancy enhanced via optimum care. Should optimum care plus cost be imposed on respondents? Ability to pay reason for denying appellant care he needs. Wrong principle. Correct principle is proper compensation for injuries. Fairness to Δ achieved by assuring π's claims are fair & justifiable" SCC said $650,000 for optimum care. This raises other dimension of case; the inflation problem

To put that problem in context go back to Bissen v.Powell River, BCCA 1967. π quad as result of diving accident. Jury awarded $236,000 pecuniary losses based on post-accident 28-year life expectancy. Loss of income & cost of care over 28 prospective years. π called actuary to do capital sum calculation. Said inflation 3% & interest 5%. So he needed 3% more each year to stay in the same place. This net rate was later to become known as the real rate of return or the real interest rate. It produced a larger sum than would have been produced at higher rate of interest. CA rejected this approach in intemperate terms. Ct said firstly, $189,000 at 5% produces $9,450/yr leaving capital intact. Actuary's figure wrong or ? Inflationary trends properly considered; but to accept as matter of course decrease in value of money at 3% per years speculative. Assumption gov't wouldn't be able to control inflation unwarranted. But since 1967 value of capital sum has gone way down b/c of inflation. At least 300% overall since 1967. Explanation for reaction was award large by stds of time; largest award in Cda or England up to that time. Inflation implications dramatic for size of award & Js didn't want to accept implications, went into state of denial.

Problem came up again in Bissen; went beyond CA & SCC had to address problem in Bissen & another Ont case that reached same conclusion. Dixon said: Bull in BCCA voiced disapproval of recognition of inflation. I don't agree w/basic principle of conclusion. I'm satisfied current high rates of interest represent… blah blah economics. IMO this analysis manifestly in error. Fear of inflation not confined to Eng. High interest rates reflect expectation of future inflation. Recog'n of this fact must be made in damage award. He adopts 7% after talking a lot.

Principle is correct, nominal interest less than inflation reduces capital. Problem was that 7% was wrong. 5% was closer. SCC increased award to $650,000 from $210K. Still well below TJ 1.2 million. Illustrates importance of discount rate.

s.51 Law & Equity Act allows CJ of SCC to prescribe real interest or discount rate. After this 2.5% for loss of future earnings & 3.5% for cost of care. This illustrates fluctuations in inflation & interest rates, spread btwn them hasn't changed that much.

Problem not solved in this trilogy worked out in future cases. In retrospect most controversial aspect of trilogy is treatment of non-pecuniary damages in catastrophic injury cases; pain, suffering, loss of amenity. In Thornton TJ awarded $200,000 for that. Same in Ontario in penal case? Andrews $150,000, reduced to $100K. SCC picked lowest figure of $100K in Andrews & applied it in all other cases. Treated as matter of law even though damage assessments are clearly question of fact. SCC was upholding high award for pecuniary damages & low award for non-pec was trade-off. Fear of escalating awards. In Man. particularly suspicious of juries. Ct also properly concerned about uniformity. So $100K became rough upper limit for non-pec. In trilogy ct left door ajar for higher awards in exceptional circs but closed later in case called ???. Limit adjusted for inflation so amt now is something in excess of $250K. Depends on actuarial calculation wrt CPI. Not controversial. Problem in BC is rate too low compared to awards for lesser injuries. Chilling effect on lesser injury cases. Cts solved by saying unless catastrophic injury there should be no reference to upper limit. Juries left completely at large in terms of non-pec; neither counsel nor judge can give guidance on figures. TJs tend to ignore upper limit in non-cat cases as well. Recent difficulty wrt rough upper limit in context of child sexual abuse cases. In absence of limitation it can go back a very long way so you have historic sexual abuse cases & sense is rough upper limit too low in these cases esp. as these people generally can't substantiate upper award for pecuniary damages so trade-off goes the other way.

This somewhat unfair; juries & cts still undecided on this question. BCCA has said limit doesn't apply in sex assault cases but this hasn't been addressed by SCC & remains open question.

Assessment of dmgs in cat injury cases is by & large technical but not controversial. There are tax implications of award for cost of future care b/c that will be provided by earnings on lump sum, which are taxable. So after tax, if award just enough to cover cost of pre-tax, won't be enough. So cts award a bit extra for this. This is complex calculation, practice in most cases is to tell judge at trial, don't worry about tax gross-up, just calculate damages w/o ref to it & after that we'll take it to actuary & get gross-up calculation. Only if can't agree on gross-up they come back, otherwise that's end of it.

Most cat injury cases settled out of ct these days. Disagreements re future earnings. "Structured settlement" < instead of lump sum, stream of periodic payments, can be adjusted for rate increases. Latter has tax advantages. Can also be practical advantages in that π in these cases usu. young, looking to receive big fat sum w/no financial

experience & esp in brain injury cases there's diminished mental capacity but not enough to appoint cttee. So real potential for dissipation.

Cts have traditionally been restricted to awarding lump sums so structured could only be obtained by settlement. That has now been changed by s.55 of insurance motor vehicle act which allows them to impose structured in motor vehicle cases only. This hasn't been around long enough to really know how it'll work.

Most controversial cases are those where injuries are not cat. Typically sore necks & other soft tissue injuries to muscles & ligaments w/emotional/social overlay. Difficulty, in majority of cases victim makes recovery w/o complications but in some cases condition becomes chronic & doesn't improve in normal course. These conditions very difficult to diagnose & assess, & typically you get a whole range of experts coming forward giving evidence. Unfortunately it's a case of the blind men looking at the elephant. ICBC likes juries b/c they tend to be unsympathetic in assessing this type of case.

Another area is cases of historical sexual assault & child abuse. Almost by def'n what's involved is psychological scarring. A number of legal problems: Are complainants genuine or is π malingering? Some % undoubtedly the case. Big problem in causation: what part does incident of abuse have to play vis-à-vis other causes? One dimension of this is thin skull problem. Smith & Leech Brain case where guy got burned by hot metal & developed cancer, fatal accident claim by widow. Defence was unusual susceptibility, can't attribute his death to burn. Ct rejected that & said it's no defense that person has susceptibility. Flip side is in terms of contingency deduction, "wonderful" case from Ont. π was homemaker who began to suffer from symptoms diagnosed as Parkinson's & she became partially disabled. One day she fell in kitchen & hit her head, got amnesia & all her P's symptoms disappeared. Specialist says if I bring your memory back, symptoms will come back. She got in accident a few years later, banged her head on dash, memory & Parkinson's came back, she sued for recurrence of symptoms. Ct accepted thin skull argument but said we have to take into account something might have brought symptoms back anyway so have to discount award, discounted by 40%.

Thin skull conditions are asymptomatic at time of accident. If you have active condition like back pain that's aggravated by accident, we're into a different area < leading case Prior & Baines. In that sitch you assess condition before accident & then award difference btwn the two. This problem also comes up in the multi-accident problems where π involved in more than one accident, typically victims of rear-end collisions, very difficult to apportion. Approach taken is that developed in Long & Thiessen case, following decision of HL in Baker & Willoughby, which is a tort lawyer's dream < π involved in MVA, broke ankle, left w/frozen ankle. Before case went to trial, got shot in leg & had to have leg amputated below knee. Defendant says frozen ankle no problem anymore, so? Argument accepted by C of A unanimously! HL overturned CA & found liability for stiff ankle for rest of his life expectancy on basis that what robbers shot off was disabled ankle rather than good ankle. Long & Thiessen, two accidents, you assess total damages at end of 2nd accident & then apportion btwn accidents. Limited to situation of successive torts, doesn't apply to non-tortious causes.

Athey & Leonati leading case in SCC on this problem. If causes are non-tortious causes then you apportion causation in making assessment. Treat as thin skull case. But if there is evidence that this non-tortious condition would have become symptomatic anyway you take it into account in terms of contingencies. SCC didn't do that in Athey, they said b/c TJ had characterized problem inaccurately in terms of causation there would be no contingency deduction. Result is questionable on facts. A & L restates of principles. <Major's opinion good summary of these.

Still leads to factual problems of how long symptoms will last, secondary gain & malingering. Once trial over & damages assessed, plaintiff will make miraculous recovery. A good deal of skepticism. That's what you're seeing in the attitudes of juries in MVA cases. Or are they thinking about their own insurance rates?

Damages limited to particular tort for which Δ responsible. If mix of tortious & non-tortious can be very difficult. If π sexually abused by a number of tortfeasors? There can be evidence that as result of first assault, π became vulnerable to future assaults so causal relship btwn first & subsequent. Gets very murky from causation standpoint & typically is also involved w/ non-tortious factors. How these factors relate to tortious factors is a real muddle. This is where we are at the moment. Generally accepted that A & L applies to these cases but application difficult.

Insurance (Motor Vehicle) Act **(B.C.) s.55** III-51
Statute provides that ct must order major (100,000+) award be paid over time instead of in lump sum, if would help π's income tax position. Also Δ must be capable of meeting pymt schedule. Only applies to MVAs.
- provides govt must impose structured settlement in certain conditions, but not if parties don't have sufficient means to fund order or if it would prevent full recovery for damages.

No math on exam but principles of damages < compensation for loss, what is loss? What types?

Damages:

1. Intended to take the plaintiff from their actual position, to the position in which they would be had the tort never occurred.
2. So far as it turns on questions of fact, you just prove facts
    a. Often you are talking about things that have not yet happened
        i. Medical Expenses
        ii. Lost Wages
        iii. Guesses and estimates
    b. You need to determine what, in fact, the plaintiff's position really is.
    c. You need to work with probabilities, either expressly or intuitively
3. In determining where the plaintiff would be, had the tort not occurred, you need to take a hypothetical course of events.
    a. What their earnings may have been
        i. This is where a feminist critique comes in: estimates of earnings are based on statistics
        ii. Statistics are gendered because women and men have different earning gaps
            1. Argument goes that they're the best guess we have
            2. What about the housework that a (likely) female plaintiff may not be able to do?
                a. Courts must consider cost of hiring someone to do the work in plaintiff's stead.
                    i. Fobel v. Dean (1991)
                    ii. McTavish v. McGillivray (2000)
        iii. Minus the contingency
    b. Whether there were health problems
        i. Would they have stayed the same or worsened?
        ii. Were they aggravated by the tort?
        iii. How was their health affected?
    c.
4. There is a percentage figure subtracted for contingencies, because the future is unpredictable.
    a. This is gendered, because female plaintiffs are subject to a greater number of contingencies
    b. The law would rather "respect reality" than overcompensate the plaintiff.
5. Costs of a caregiver must be considered as well.
    a. If a family member or spouse looks after you, there is some money awarded in that regard
    b. Problematic because something that is invaluable needs valuation
    c. Damages are claimed by person who is cared for, except in some Jurisdictions (like Ontario) where family members can sue for losses caused by a tort to another person.
    d. The math is done the same way as it is in housekeeping duties. Damages are based on the value of the care provided.
6. The standard that is applied to determine fault is the standard of the reasonable person.
    f. The reasonable person is still "the reasonable man in drag"
    g. This legal concept does not adequately reflect the way in which women and men think about their responsibilities.
    h. Standard of care has been argued that it should be a standard of "care and concern" instead