THE ELEMENTS OF NEGLIGENCE

DUTY OF CARE

(a) Duty Generally

Recognized Duties:

A Summary of the Anns/Cooper Jurisprudence

Donoghue v. Stevenson, HoL (1932)

Home Office v. Dorset Yacht (Borstal Boys Case)

Anns v. Merton London Borough Council

Kamloops v. Neilson

Cooper v. Hobart, SCC (2001)


R. v. Imperial Tobacco, SCC (2011)

(b) Unforeseeable Plaintiff

General Principle

Hay (Bourhill) v. Young, HL (1943)

Palsgraf v. Long Island Railroad Co. (1928)

Farrugia v. Great Western Railway

Unborn Children

Duval v. Seguin (1972)

Dobson v. Dobson, SCC (1999)

Rescue and Rescuers

Horsley v. MacLaren, SCC (1972)

(c) Failure to Act

Relationships of Economic Benefit (Social Host Liability)


Crocker v. Sundance Northwest Resorts (1988)


Childs Test for Social Hosts:

Kelly v. Gwinnell

Johnston v. KFC National Management (1990)

Employee injured a third part after getting drunk at a Christmas party (no liability)

Jacobsen v. Nike Canada (1996)

Relationships of Control of Supervision

Reevers v. Commissioner of Police of the Metropolis (1999)

Fallister v. Waikato Hospital Board


Creation of Dangerous Situations

Oke v. Weide Transport, Manitoba CoAppeal (1963)

Ziomer v. Wheeler (2014 BCSC)

Reliance Relationships and Undertakings


Barnett v. Chelsea and Kensington Hospital Management Committee (1967)

R. v. Nord-Deutsche et al. (1971)

Statutory Duties

O’Rourke v. Schacht, Ont. CA (1972)

Jane Doe v. Toronto (Metropolitan) Commissioners of Police (1998)

Hill v. Chief Constable of West Yorkshire (1988)

Colonial Coach Lines v. Bennet and CPR (1968)

Eliopoulos v. Ontario (Minister of Health and Longterm care) (2006)

Stermer v. Lawson

FORESEEABILITY AND STANDARD OF CARE

(a) Generally

Bolton v. Stone, HL (1951)

(b) The Reasonable Person
<table>
<thead>
<tr>
<th>(c) Custom</th>
<th>14</th>
</tr>
</thead>
<tbody>
<tr>
<td>(d) Statutory Standards</td>
<td>15</td>
</tr>
<tr>
<td>Gorris v. Scott, Exchequer (1874)</td>
<td>15</td>
</tr>
<tr>
<td>Ryan v. Victoria (City), SCC (1999)</td>
<td>15</td>
</tr>
<tr>
<td>(e) Exceptions to the Reasonable Person Standard</td>
<td>15</td>
</tr>
<tr>
<td>The Young</td>
<td>15</td>
</tr>
<tr>
<td>Heisler v. Moke, Ont. High Court (1972, Ont HC))</td>
<td>16</td>
</tr>
<tr>
<td>Mental and Physical Disability</td>
<td>16</td>
</tr>
<tr>
<td>Fiala v. Cechmanek (2001 ABCA)</td>
<td>16</td>
</tr>
<tr>
<td>Professional Negligence</td>
<td>16</td>
</tr>
<tr>
<td>(i) Doctors:</td>
<td>16</td>
</tr>
<tr>
<td>Challand v. Bell (1959, ABSC)</td>
<td>16</td>
</tr>
<tr>
<td>Reibl v. Hughes (1980; SCC)</td>
<td>17</td>
</tr>
<tr>
<td>(ii) Lawyers:</td>
<td>17</td>
</tr>
<tr>
<td>Brenner v. Gregory (1973, Ont H.C.)</td>
<td>17</td>
</tr>
<tr>
<td>Emergency</td>
<td>17</td>
</tr>
<tr>
<td>BC Good Samaritan Act RSBC 1996, c. 172</td>
<td>17</td>
</tr>
<tr>
<td>DAMAGE</td>
<td>18</td>
</tr>
<tr>
<td>Rothwell v. Chemical &amp; Insulation</td>
<td>18</td>
</tr>
<tr>
<td>CAUSATION</td>
<td>18</td>
</tr>
<tr>
<td>(a) Causation Generally</td>
<td>18</td>
</tr>
<tr>
<td>(b) But For Test</td>
<td>19</td>
</tr>
<tr>
<td>Kauffman v. TTC, Ont CA (1959)</td>
<td>19</td>
</tr>
<tr>
<td>(c) The Basic Principles</td>
<td>19</td>
</tr>
<tr>
<td>Athey v Leonati SCC (1996)</td>
<td>19</td>
</tr>
<tr>
<td>(d) Inferring Causation</td>
<td>20</td>
</tr>
<tr>
<td>Snell v. Farrell, SCC (1990)</td>
<td>20</td>
</tr>
<tr>
<td>(d) Material Increase in Risk</td>
<td>20</td>
</tr>
<tr>
<td>Clements v Clements, SCC (2012)</td>
<td>20</td>
</tr>
<tr>
<td>(e) Multiple Cases: Two Negligent Defendants, One Cause of Accident</td>
<td>20</td>
</tr>
<tr>
<td>Cook v Lewis, SCC (1951)</td>
<td>20</td>
</tr>
</tbody>
</table>
THE ELEMENTS OF NEGLIGENCE
(SIX PART TEST):

1. There must be a duty recognized by the law to avoid this damage

2. The defendants conduct must be negligent; in breach of the standard of care set by the law

3. The claimant must suffer some damage

4. The damage suffered must be caused by the negligent conduct of the defendant

5. The damage must not too remote a result of the defendants conduct

6. Are there any factors in the P's conduct which would justify a reduction or eliminate of the damages which otherwise would have been awarded?

DUTY OF CARE

(a) Duty Generally

- Duty of care is question of law for judge to determine
- P establishes prima facie duty of care, then evidentiary burden shifts to D to show countervailing policy considerations
- "Neighbour principle" establishes that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour … persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation" (Donoghue v. Stevenson)

Recognized Duties:

- Manufacturers have a duty to the ultimate consumers (Donoghue v. Stevenson)
- A duty of care exists if there is foreseeable harm to specific individual (Palsgraf v. Long Island Ry.)
- A duty of care may be owed to third party (Stewart v. Pettie)
- Commercial hosts have duty of care (Stewart v. Pettie); social hosts do not (Childs v. Desormeaux)
- Hosts do not owe a duty of care unless: intentionally attract third party to inherent/obvious risk, paternalistic relationship, public function/commercial enterprise (Childs v. Desormeaux)
- Police's duty of care is measured against modified objective standard (Hill v. Hamilton-Wentworth)

A Summary of the Anns/Cooper Jurisprudence

Preliminary question: Is there an established or analogous category of duty?

Stage One: Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care?

1. Foreseeability & Proximity in fact: Was the harm foreseeable in fact? (would the reasonable person have been able to foresee it? - this is usually a given - when this stage is analyzed it is usually done so as to limit liability (ex. Mustafa)

2. Foreseeability & Proximity in law: Did the defendant have an obligation to take care in the particular circumstances or the relationship between the parties themselves? This subsumes a further inquiry: are there policy reasons to support either extending or restricting the liability in the context of that relationship? Does the case disclose factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care (must be “close and direct” - not necessarily in physical proximity but in that the actions have a close direct effect on the victim)
Stage Two: If yes to the first two questions, are there any policy concerns that might negate or limit the liability?
How would recognizing a duty of care affect other legal obligations, the legal system and society more generally? (Examples: the spectre of indeterminate liability, other means of recourse, whether it interferes with legislative authority)

Donoghue v. Stevenson, HoL (1932)

**Neighbour principle: foreseeability establishes proximity: duty to anybody, where you can foresee that your carelessness might injure them**

**F:** Snail in ginger beer - after drinking the contaminated contents she contracted a serious illness

**I/C:** Do manufacturers owe a duty of care to consumers? YES

**R:** The manufacturer owes a duty of care to the eventual consumers knowing upon production that the goal of their product is to be consumed and cannot be visually inspected - you must take reasonable care when proceeding with actions or omissions that you can reasonably foresee harming your good neighbour - neighbours are persons who are reasonably foreseeable as being affected by your actions or omissions

Home Office v. Dorset Yacht (Borstal Boys Case)

**First distinction of Donoghue**

**F:** Borstal Boys got out institution one night and ruined some yachts - Yacht owners went after gov’t for liability

**I/C:** Is there a duty? Crown no longer exempt from tort liability - applied new restriction as to stop the “floodgates to unlimited recovery”

**R:** In new situations the characteristics of that situation must be compared to situations accepted to constitute negligence - if discrepancy one must decide if what the new case is lacking is enough to prevent duty from being established - in this case he decides that the fact that they were on an island made the escape by boat a very foreseeable outcome of the negligence, and therefore it should have been prevented

Anns v. Merton London Borough Council

**Depth of foundations - Ann’s test developed with the help of Donoghue**

**F:** Condos were built on specifications pursuant to a by-law making sure the foundations were 3ft deep - years later they began to crack and when they looked at them they found out they were not 3ft deep - owners sued the council for their failure to inspect and ensure that the builders complied with the bylaw

**I/C:** Was there a duty on behalf of the Council (Crown)?

**R:** Developed the two stage test with help from Donoghue

Kamloops v. Neilson

**Adopted Ann’s test in Canada**

**F:** Stop order on building with insufficient foundations issued but not enforced, sold to Nielsens

**I/C:** Is city liable? NO. Meets step 1 of Ann’s test but negated at step 2 for floodgates argument

**A:** Adopts Ann’s test in Canada. Step 1 is low threshold, Step 2 recognizes that even if test of promixity is met, liability does not necessarily follow; must be considered in light of all relevant circumstances. "Floodgates" argument – municipalities can’t be liable, responsibility on builders, taxpayers

Cooper v Hobart, SCC (2001)

**Introduced policy considerations into the first stage of Ann’s**

**F:** Eron worked as a broker for large syndicated loans - it is alleged that the funds provided by investors were used by Eron for several unauthorized purposes - Hobart suspended Eron’s broker’s license and soon after
Eron went out of business - Cooper, an investor of Eron, brought an action against the registrar claiming that he breached the duty of care he owed to investors in notifying them of the suspension.

I/C: Private law duty of care to investors for failing to oversee conduct of investment company? NO!
A: Proximity: the statute does not impose a duty of care on Hobart (the Registrar) to investors with mortgage brokers regulated by the Act - the duty is to the public as a whole - therefore, even though (Hobart) might reasonably have foreseen that losses to investors would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a prima facie duty of care - the statute cannot be construed to impose a duty of care on the Registrar specific to investments with mortgage brokers, as this duty would come at the expense of other important interests (public, efficiency, etc)


F: Police suspected that Hill, an aboriginal man, had committed 10 robberies - two similar robberies occurred while Hill was in custody - was eventually acquitted and sued police

I/C: Do Police owe a duty of care during investigations? YES! (but did not breach the standard of care)
A: Reasonable foreseeability: established: clearly negligent police investigation of a suspect may cause harm to the suspect - Proximity: relationship between police and suspect is personal, close, and direct (singled him out) - targeted suspect has a personal interest in the conduct of the investigation - high interests of his freedom, reputation, and how he may spend a good portion of his life signify interests that support a proximate relationship - Standard of care: reasonable investigating police officer in those circumstances (generally applicable in cases of negligent investigation) - Conflicting duties: you have to be careful when establishing a duty that it does not conflict with another (if you owe a duty to the public to aggressively investigate, and now you have to back off of the aggressive investigation, these are conflicting duties) - Court said that there was no conflict because the duty to the public is not to just get as many suspects as possible, but to responsibly investigate and make sure the right person is persecuted for those crimes

R. v Imperial Tobacco, SCC (2011)

F: Concerns two cases - in the Costs Recovery case, BC is seeking to recover the cost of medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial - Knight is a class action case brought against Imperial alone seeking a refund of the cost of the cigarettes and punitive damages - they allege that the levels of tar and nicotine listed on Imperial’s packages did not reflect the actual deliveries of toxic emissions to smokers and the smoke was just as harmful - in both cases, the tobacco companies issued third-party notices to the gov’t alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity

I/C: Does Canada have a duty of care to the Tobacco Companies? Was Canada negligent in misrepresenting the health attributes?
A: Liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and the defendant - tobacco companies were not able to point to any case where the gov’t had been held liable for negligent misrepresentation for statements made to an industry - Canada did not owe a duty of care to the tobacco companies b/c the potential damages that they could incur under CRA were not foreseeable - Canada could not have foreseen the precise statutory vehicle that would result in the tobacco companies liability - However, it is sufficient that Canada could have reasonably foreseen in a general way that the appellants would suffer harm if the light or mild cigarettes were more hazardous to the health of smokers than the regular kind - (reasonable reliance) it is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada’s statements about the advantages of light or mild cigarettes

(b) Unforeseeable Plaintiff

General Principle

Hay (Bourhill) v. Young, HL (1943)
No duty to the unforeseeable plaintiff

F: Hay got off a bus and heard the collision of a speeding motor cycle and car 45 to 50 ft ahead - later after the cyclists body was removed and she saw the blood in the roadway, she went in to shock and claimed to have sustained a wrenched back - about a month later her child was stillborn which she attributed to shock and reaction to the event - she sued the driver of the car

I/C: Unforeseeable plaintiff? YES - not reasonably foreseeable, driver not in breach of duty

A: Duty to prevent harm is not to the world at large – it must be tested by asking with reference to each several complainant - Young was negligent in the issue of himself and the owner of the car which he ran into, but is he negligent vis-a-vis Hay? - cannot build on a wrong to someone else (has to be a wrong to herself)(court trying to limit unlimited liability) - before this time that witness shock is actually foreseeable harm - not really foreseeable in fact - not something that everyone would have in their contemplation while driving their vehicle

Palsgraf v. Long Island Railroad Co. (1928)

A duty of care exists if there is foreseeable harm to specific individual

F: Palsgraf was standing on a Long Island Railroad train platform when two men ran to catch a train - the second man was carrying a small package containing fireworks - he was helped aboard the train by one guard on the platform and another on the train - the man dropped the package which exploded when it hit the tracks - the shock of the explosion caused scales at the other end of the platform many feet away to fall, striking and injuring P - P brought a personal injury lawsuit against Long Island Railroad

I/C: Duty? NO - Negligence in this case would entail liability for any and all circumstances however novel and extraordinary

A: There may have been causation in fact but not in law - defendant is the railway company and not the actual man carrying the fireworks - if it had’ve been the man carrying the fireworks maybe the case would have succeeded - in the case of the railroad employee, it would be reasonably foreseeable that harm may have been cause helping someone onto the train possibly to that person (who may fall over) or other people around, but to foresee fireworks going off and shocking a scale which then falls over on the plaintiff - is this really foreseeable - despite the remoteness of foreseeability, the court is more apt to impose a broader impact of foreseeability in the case of risky behaviours (this has almost become a case of manipulation of foreseeability) - social utility - we attribute greater fault to acts that seem more uncommon or unusual

Farrugia v Great Western Railway

Different then Palsgraf in finding a duty possibly b/c of the type of harm - if the type of harm is foreseeable than a duty is more likely to be imposed then if the type of harm is not foreseeable (Mustafa)

F: Truck carrying a large box or container that struck an overpass and fell on a man who had been riding on the back of the truck but had just gotten off

I/C: Duty? YES - owed a duty of care to anyone who may be on the highway while they were driving on it

A: Reasonably foreseeable that an overloaded truck would have something knocked off and could hit someone in the community

Unborn Children

Duval v. Seguin (1972)

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

I/C: Can a defendant be liable for injuries caused to another before their birth? YES

A: Was foreseeable that some users of the highway were pregnant women and that an unborn child could be hurt in an accident - when they are born alive and become a person, the courts say that they have a right to recover based upon harm to the foetus - the actual tort is then caused at birth
**Dobson v. Dobson, SCC (1999)**

**Example of where a special category has been developed on policy grounds to pull its analysis outside of Ann’s (friendly dispute)**

**F:** Mother was negligently driving a car while she was pregnant

**I/C:** Does a pregnant mother owe a duty of care to her unborn child? NO!

**A:** A duty of care would impose very extensive and unacceptable intrusions into the bodily integrity, privacy, and autonomy of rights of women - the inseparable unity between an expectant mother and her foetus is what distinguishes the situation of mother to be from that of a negligent third party - matter best left to the legislature - psychological and emotional repercussions for a mother who was sued for this type of negligence - the imposition of tort liability on a mother for prenatal negligence would provide neither compensation nor deterrence - policy considerations in the first part of Ann’s: The relationship is so interdependent between mothers and their foetus’s that it would prohibit women from carrying out the daily activities that it would be so desensitizing - the woman would potentially become hostage to the foetus - is the tort of negligence really the answer in these cases?

**Dissent:** What is actionable is not what happened to the respondent as a foetus but what is now happening to him as a child (cerebral palsy) - while there is no liability for prenatal injuries, there is liability for post-natal injuries resulting from prenatal events caused by third party negligence - a pregnant woman cannot owe a duty of care to her foetus any more than she can owe a duty of care to herself, the duty of care is owed to the born alive child

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**Rescue and Rescuers**

- Historically the courts had no sympathy for rescuers; now the courts encourage altruistic conduct by protecting rescuers from virtually all losses arising from the rescue attempt
- Denning: “Persons, who as consequence of their own negligence, place themselves in positions of peril, owe a duty of care to their rescuers”
- Liability can only be imposed if the rescue was conducted negligently (Horsely)
- “The Halfway Rescuer” What if you go half way but not the whole way? As seen in Oke the Court seems to impose a liability. Imposing liability on half way rescues may prevent people from trying to rescue at all or only doing it when it is safe to.

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**Horsley v MacLaren, SCC (1972)**

**Someone who creates a situation of risk owes a duty to the individuals who become rescuers themselves**

**F:** Family of Matthews and Horsley sued Maclaren who was the owner and operator of a boat - Maclaren invited Matthews and Horsley onto his boat - Matthews fell overboard - the crew attempted to rescue Matthews but the conditions were windy and water choppy and cold - Horsley jumped into help Matthews - Mrs. Jones jumped in as well to help - Matthews sank; Horsley was picked up but could not be resuscitated; Jones was picked up and saved

**I/C:** Duty? Liability could be imposed only if the first rescue was conducted negligently. In this case, they found that Maclaren made a mistake rather than was negligent

**A:** Common law indicates that there is no duty - there is no general duty to come to the rescue of a person who finds himself in peril from a source completely unrelated to the defendant, even where little risk or effort would be involved in assisting - the law leaves the remedy to a person’s conscience, however, there can be a duty under special circumstances/relationships (that of a carrier to a passenger in peril overboard – often about implied contract) - if a person does attempt to rescue, then he is regarded as entering voluntarily into a relation of responsibility and therefore assuming the duty then, he will be liable for any failure to use reasonable care in dealing with him (and particularly if he abandons him in a position of danger) - what would the reasonable boat operator do in the circumstances? - the defendant’s adoption of the wrong procedure in attempting to rescue was negligent - given the context of the defendant consuming alcohol and the extraordinary conduct during the rescue, there is probably causation between the alcohol and conduct - but liability does not follow negligence unless the defendant’s conduct is the effective cause of the loss

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**(c) Failure to Act**
• Negligence law dictates that you must not expose people to the risk of injury, not that you must help them
• Nonfeasance is a term that describes a failure to act that results in harm to another party - misfeasance, by contrast, describes some affirmative act that, though legal, causes harm
• The ‘good samaritan’ continues to portray an ideal standard of conduct for the moral person, not the legal obligation of a reasonable person
• Though the exception to this is the person with the “special relationship” because they are under a duty of affirmative action because they would have a special relationship with the plaintiff, unlike other persons

**Relationships of Economic Benefit (Social Host Liability)**

**Jordan House Ltd. v. Menow, SCC (1974)**

**F:** M was a frequent patron of the plaintiffs hotel bar and was well known to the operator of the hotel (Fernick) - M had a tendency to drink to excess and then act recklessly do after about year of events he had been barred from the hotel for a period of time - employees instructed not to serve him unless he was accompanied by a responsible person - on the night in question, M and his employer arrived at the hotel and drank beer - the employer departed within a short time, leaving M there alone - Fernick came on duty at 7pm and saw that M was sober - he was a served a beer from time to time and at around 10pm Fernick was aware that M was drinking in excess and that he had become intoxicated - was ejected from the hotel by employees and it was known to Fernick that he would probably travel home by foot - was picked up by a third person and dropped off on the highway to travel the rest of the distance on foot - he was then struck by Honsberger

**I/C:** Does the operator of a hotel owe a duty of care to a patron of a hotel? YES!!

**A:** Ride had not been arranged by the hotel - Honsberger at 1/3 fault - may be said from one view that M created a risk of injury to himself by excessive drinking - if the hotels only involvement was supplying beer to M than it would be difficult to support the imposition of common law liability - other persons on the highway were not under a legal duty to steer him in to safety - there was a probable risk to M if he was turned out of the hotel - there is nothing unreasonable in calling upon the hotel in such circumstances to take care and see that Menow is not exposed to injury because of his intoxication - hotel operator had in other instances provided rides and had rooms available on the night in question - breach of this duty because of the knowledge of his history, his intoxication, and the orders not to serve him unless in the company of a responsible person was breached - the short period of time which elapsed between him getting ejected from the hotel and the accident are telling in that the risk was not increased by the third party picking him up and dropping him off

**Note on Statutory Duty:** No automatic tort for breach of statute: but it is not irrelevant and can be evidence of a standard of care. In this case it is not to serve drunk people more alcohol (Liquor Control Act). The statute effects both proximity and standard of care. If you were arguing for Jordan House, you would work the statute: the state did not create duties of care to protect drunk people from getting hit, but it is to protect the public generally. If they were really trying to establish firm duties through the legislation then they would have been more strict in defining intoxication and such. If you were Honsburger you would attempt to argue that the statute attaches a duty not just to the person drinking but to people who could foreseeably be hurt as a consequence of that

**Crocker v. Sundance Northwest Resorts (1988)**

The SCC reaffirmed its support for the Jordan House principle in this case whereby the defendant company was a ski resort which ran a tubing race - the contestants raced down mogul ski hills in oversized tubes - the plaintiff competitor was inebriated but still permitted to compete - he seriously injured himself - in finding for the plaintiff the justice noted that “when a ski resort establishes a competition in a highly dangerous sport and runs the competition for profit, it owes a duty of care towards visibly intoxicated patrons”

**Stewart v. Pettie (1995)**

SCC again expressed its fidelity to Jordan House when they ruled that “there was no question that commercial vendors of alcohol owe a general duty of care to persons who can be expected to use highways”

A social host at a party where alcohol is served is not under a duty of care to members at the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk.

F: After leaving a private New Years Eve party, D was impaired and drove his vehicle into oncoming traffic and collided head on with another vehicle carrying the appellant - Child's spine was severed and as a result she is now paralyzed from the waist down - the party, hosted by Courrier and Zimmerman in their home, was a BYOB event, and the only alcohol served by them was three quarters a bottle of champagne in small glasses at midnight - although D was known to be a heavy drinker, they made no point to monitor his drinking over the night.

I/C: NO DUTY, NO NEGLIGENCE

A: Closest comparison is to that of commercial alcohol providers such as that in Stewart v. Pettie - however, there is three main differences (1) commercial hosts enjoy an important advantage in being able to monitor consumption (2) the sale and consumption of alcohol is strictly regulated by legislatures (and where there are bouncers and cut offs, there is no such tool in a social sense); (3) the contractual nature between a commercial host and consumer is fundamentally different - the duty in this case is therefore novel - necessary proximity has not been established, and even if foreseeability can be established, no duty would arise because the wrong alleged is a failure to act (nonfeasance) in circumstances where there is no positive duty to act - Courrier accompanied Desormeaux to his car but there is no evidence which suggests that he showed signs of intoxication during this short encounter - the injury was not reasonably foreseeable on the facts established in this case.

Childs Test for Social Hosts:

Three categories where the Courts have imposed a positive duty to act

1. Where the defendant intentionally invites and attracts third parties to an inherent and obvious risk which he or she has created and controls
2. Where there is a paternalistic relationship of supervision and control (such as parent-child, landlords-tenants, pupil-teacher, prison guard-inmate, passenger-carrier)
3. Where the defendants exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large

In order for nonfeasance to be actionable there must be foreseeability and be able to fall under one of the Child's exceptions.

Kelly v. Gwinnell

Social host was held liable for an injury to a third person in a car accident caused by his guest while driving home - the host caused the driver to get drunk and continued to serve him alcohol despite this.

Employers serving alcohol:

Johnston v. KFC National Management (1990)
Employee injured a third part after getting drunk at a Christmas party (no liability)

Jacobsen v. Nike Canada (1996)
Partial liability was found where beer was served to an employee at work who later fell asleep while driving home and caused an accident. With an employee/employer relationship it may impose something different - you may be disinclined to refuse whereas you would socially. The fact that Nike was providing the booze was important here - they were creating and controlling the danger.
Relationships of Control of Supervision

- There are several relationships of control or supervision which require dominant parties to take affirmative steps to either prevent injury or to assist others in vulnerable positions
- *Those who enter into them do so willingly, knowing that situations may develop which will require them to act in order to assist others* - thus, the imposition of duties of affirmative action in these cases is not inconsistent with the common laws desire to interfere unduly with one's freedom of action
- Some relationships of control or supervision are governed by contract while others are not - even in the absence of contract there is tort obligation to assist
- Most obvious relationship of control which requires a duty to assist is between **parent and child**
- Other relationships of control or supervision include teacher and pupil, employer and employee, carrier and passenger, prisons and inmates, and hospitals and patients, landowner to those entering their land (lawfully)

**Reevers v. Commissioner of Police of the Metropolis (1999)**

Plaintiff sued on behalf of a prisoner who committed suicide while in police custody - he was known to be suicidal but was of sound mind at the time of suicide - police and prisoner held 50 percent liable each - the duty is a "very unusual one, arising from complete control over the prisoner, combined with special danger of people in prison taking their own lives"

**Pallister v. Waikato Hospital Board**

Hospital failed to protect suicidal patient


A suspected criminal was injured when he jumped from his bedroom window to avoid being arrested - majority denied liability on the basis of ex turpi causa and no duty but dissenting judge was of the view he should be able to recover one-third of the damages because “the state owes a duty of care to those whom, against their will, it takes into custody”

**Creation of Dangerous Situations**

**Oke v Weide Transport, Manitoba CoAppeal (1963)**

*Even if you are under a legal duty to take responsibility for your negligent actions, a failure to act (nonfeasance) to prevent future harm is not negligent if the type of harm that occurred was not foreseeable*

**F:** The defendant driver, w/o negligence, knocked down a traffic sign located in the middle of a gravel strip dividing the eastbound and westbound lanes of a highway - he stopped his vehicle and removed the debris except for a metal post that was too securely embedded - the post was left bent over and projecting toward the eastbound lane - the defendant mentioned the accident to the garage attendant but was persuaded not to report it - the next day, while completing a forbidden act and using the gravel strip to pass another vehicle, a driver passed over the metal post and was fatally injured when “speared” by the post which deflected upwards

**I:** *Is the truck driver liable for Oke's death? NO!* Not foreseeable

**A:** Even if the defendant was under a duty to report the accident, the accident was unforeseeable and therefore a negligence claim could not be made - in the

**Dissent:** Freedman argued that the accident satisfied the requirement of foreseeability - while the majority argued that the defendant had no more special duty than would arise in any motorist who noticed the broken pole, the Freedman disagreed and states that his unique role in causing the damage puts him in a special class of his own - *Participation in the creation of the hazard*: it wasn't nonfeasance but it wasn’t misfeasance either
Ziemer v. Wheeler (2014 BCSC)

F: W non-negligently struck a moose on the highway and left the carcass on the road - 9 minutes later, W non-negligently struck the moose and lost control of his pickup truck - crossing over into the oncoming lane - Ziemer collides head on with Walter’s vehicle

I/C: Is Wheeler liable to Ziemer? YES he was held liable - but one of the main factors for the Court was that he had not even pulled over to see if there was a hazard

A: Causation problem - we need to know ‘but for’ him not alerting the police this would have not happened - plaintiff would have to say that the SoC was something so high that it would have avoided the accident within the time frame (ex. the standard to do more - pull over and turn on your lights and guard the road and stay there until someone is in the position to move the hazard) - from Oke, you have to weigh in the seriousness of the risk and all you have to do to avoid it was pick up the phone - in this case, you would have to pull over and turn on the lights and put yourself at risk - he goes back 21 mins later - does this show caring as the basis for liability? That he showed regret?

Reliance Relationships and Undertakings


F: Plaintiff fell ill in the defendants store - the defendant owed the plaintiff no duty at all and could have let her die - but the plaintiff attempted to render her medical aid and kept her in an infirmary with no medical care for 6 hours

I/C: Does the store owner owe a duty of care to the plaintiff? YES!

A: The general proposition of law is that if a defendant owes a plaintiff no duty, then the refusal to act is not negligence - but if the defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing that task - if the defendant had left the plaintiff alone, beyond doubt, some bystander would have called an ambulance - defendant segregated the plaintiff where such aid could not be given and then left her alone - the defendant assumed duty by meddling in the matter which he had no concern


F: Defendants had made a practice of keeping their wicket gate locked to pedestrians when a train was passing - this practice was known to the plaintiff and he was injured by a passing train when, on the carelessness of the defendants servant, the gate was left unlocked

I/C: No legal duty but there was a self-imposed duty

A: Those who know if it will draw an inference if on a given occasion it was not performed (the entire act of putting up the gate and keeping it locked - by leaving it open it enticed people to come through) - does this not have a problem for behaviour modification? We do not want to discourage people from doing something but if you are enticing someone down a road of reliance was to stop it - all they had to do to avoid liability is put up a sign

Barnett v. Chelsea and Kensington Hospital Management Committee (1967)

F: A watchman, after drinking some tea which made him vomit, went to the casualty department of the defendants hospital - the watchman “entered the hospital without hinderance, made complaints to the nurse who then passed them on to the medical casualty office and advised him to go home and see his own doctor - he died some hours later from arsenical poisoning

I/C: YES DUTY

A: Though the negligence did not cause his death. the close and direct relationship between the hospital and the
plaintiff imposed a duty of care on the hospital - they said there would be no liability if they turned away everyone - goes to the Ann’s test to look at proximity - once you engage in a process of diagnoses, then you bring that person into your “legal neighbourhood”

**R. v. Nord-Deutsche et al. (1971)**

**F:** Employees of the Crown negligently permitted a set of range lights, upon which pilots relied, to become displaced and thereby contributed to a collision between two ships

**A:** Crown had “engendered reliance on the guidance afforded by the lights and was therefore required to keep them in good working order” - SCC divided liability among the Crown and ship owners and explained there was a breach of duty on the part of the Crown responsible for care and maintenance of the range lights

**Statutory Duties**

**O'Rourke v Schacht, Ont. CA (1972)**

**F:** A well lighted barrier that marked a detour around some highway construction was knocked over by a car, at night, so that it was no longer visible to other motorists on the highway - the OPP investigated the accident but failed to warn traffic about the danger on the road - the plaintiff was injured when he drove his automobile into the unmarked excavation - the **Police Act** of Ontario required that the OPP inter alia shall empower the police officer to direct traffic in order to ensure orderly movement and to prevent injury or damage to persons or property

**I/C:** Police have legal duty? Should be assessed on a case by case basis. Court allowed plaintiff to recover 50 percent of his damages against the police administration - in the case of public servants it is not a mere social obligation but a legal obligation, it was nonfeasance amounting to misfeasance

**A:** The courts should decide on a case by case basis and under requirement of the public interest whether the police are under a legal duty in the particular circumstances - the respondent PO’s were under a statutory duty to maintain atrophic patrol of the highway in question - there is a definite purpose in requiring the police to patrol highways in their jurisdiction - the common law does not recognize inaction or nonfeasance - but it is an entirely different position in the case of public servants - these officers were under a positive duty by virtue of their office to take appropriate measures in the face of a hazardous condition such as they encountered her to warn approaching traffic of its presence - signs were readily available - all it would've took was some flashing lights on a police car to block it off - if they did not apply liability then police protection would be hollow and meaningless

**After O'Rourke**

- If the police have a positive duty to prevent crime, then doesn't any victim of a crime have a case against the police?
- This case kind of turned on how easy it was to prevent the accident
- No immunity of police officers
- Even in a non-negligent accident there is duties that “pop up” - one will be imposed on the driver if they caused another accident and another on the police if they could have prevented it
- Must differentiate these from other statutory duties
- There is now precedent establishing the police within these parameters - so the issue would be dealing with SoC
- Cannot say this falls on every government actor but you can look at this case as reference


A rape victim succeeded in an action against the police for failing to live up to its statutory duty under the **Police Act** of Ontario to, inter alia, prevent crime - police knew that there was a serial rapist at work and knew that he was targeting a particular type of woman (young white women) and those that lived one floor up (“the balcony rapist”) - there was a lack of priority given to these crimes - a little far to say they used jane doe as bait but they knew that there was a particular group of people were vulnerable and they didn't do anything to warn them - S.57 of the **Police Act** says “that members of police forces… are charged with the duty of preserving the peace,
preventing robberies and other crimes…”

**Hill v. Chief Constable of West Yorkshire (1988)**

Court struck out the plaintiffs statement of claim seeking damages against the police for negligently failing to arrest a serial killer before he killed their daughter - it was said that there was no duty owed to victims of crime unless the killer committed the crime while in custody after escaping from custody.

**Colonial Coach Lines v. Bennet and CPR (1968)**

Plaintiff’s bus was damaged when it collided with a cow that had escaped from a farmers land onto the highway through a defective fence along the railways right of way - the railways was partially responsible to the plaintiff present to the *Railway Act* which provides that they must erect fences “suitable to prevent cattle from getting on the railways lands”

**Eliopoulos v. Ontario (Minister of health and longterm care) (2006)**

Negligence alleging that Ontario could have and should have prevented the outbreak of West Nile Virus in 2002 - Ontario did not owe him a private duty of care to prevent the spread of the virus - they are discretionary powers not capable of creating a private law duty

**Stermer v. Lawson**

Defendant loaned his motorcycle to an unlicensed rider - the motor vehicle legislation prohibits such a loan Is the duty to ensure that the person does have a license? What is the intention of the legislation? Is it just for collection of a registration fee? Probably not. Fairly safe to presume that the reason for the statute is to enhance safety by ensuring that riders are qualified

**FORESEEABILITY AND STANDARD OF CARE**

**(a) Generally**

- Foreseeability is a question of fact
- Objective test - would the reasonable person see a foreseeable risk of injury in P’s shoes at the time of the activity in question
- Risk of injury must be foreseeable and somewhat likely (*Bolton v. Stone*)

**Bolton v. Stone, HL (1951)**

*Cricket club ball - Foreseeable risk must be somewhat likely*

**F:** P hit by ball from cricket club 100 yards away while walking down highway - 6 occasions of balls over 17 ft fence in 30 years

**I/C:** Was cricket club negligent? NO

**R:** Where the risk is substantially small and the reasonable person can disregard it, then it is not a breach of the standard of care - while the harm was reasonably foreseeable, there was a remote chance of occurrence and the consequences were minimal - there is a tendency to base duty on the likelihood of damage rather than foreseeability alone - fantastic possibility - just because it is possible does not mean you have to guard against it
### (b) The Reasonable Person

- Normative standard of conduct - the reasonably careful person
- The reasonable person is more alert to risk, and cautious by nature, than most of us
- Malleable concept

### Vaughn v. Menlove (1837)

**Cottage fire - One standard (the reasonable person) for everyone**

**F:** The plaintiff was the owner of two cottages - the defendant was an owner of land close to these cottages - the defendants caught fire and spread to the plaintiff's cottages which were destroyed - defendant was repeatedly warned of the probability of fire and on advice to take the rick down he said he would chance it

**I/C:** Failure of the standard of care? YES - apply the test of the reasonable person in the same situation

**R:** Defence attempted to argue below level intelligence - Court ruled that there is one standard for everyone - he had to be held to the same standard of the ordinary man

### Blyth v. Birmingham Water Works (1856)

**Fire plugs - Reasonable man test applied - response to avg circ.**

**F:** D's installed a fire plug made according to the best known system - due to an exceptionally severe frost in 1855, damage was caused to the plug resulting in the P's premises being flooded - the plugged had worked satisfactory for 25 years

**I/C:** Negligence? NO - apply the reasonable person

**R:** A company must not be held liable in the case of extreme measures of which no reasonable, prudent man could have provided against - a reasonable man would have acted with reference to the average circumstances of the temp in ordinary years - the precautions of the company would have proved sufficient in ordinary years - cannot impose the obligation to foresee everything that could possibly go wrong

### (c) Custom

- Person that claims custom has the onus of proof to show that the custom does actually exist
- It is not impossible to foresee that the custom of a person or an area would effect the standard of care
- By imposing the standard of uniformity the Court going to bring the people up to everyone else (enforcing a higher standard) rather than reduce the law to what their standards are - therefore it is a very strict test and used in rare circumstances
- Courts are reluctant to acknowledge local customs of smaller nature (*Waldick v. Malcolm*)


**Icy parking area - Negligent conduct is not reasonable in light of custom**

**F:** W fell on icy parking area of the M’s rented farmhouse - had not been salted or sanded - few people in the region did so - argued that there was a custom in the area not to put sand or salt on the icy parking areas

**I/C:** Does custom render this negligent conduct as reasonable? NO - negligent conduct cannot be countenanced even when a large group is continually guilty of it

**R:** No amount of general community compliance will render negligent conduct as reasonable in all circumstances
(d) Statutory Standards

- Statutes establish the standard of care (ie. *Saskatchewan Wheat Pool* and most driving cases) but they also link the duty - they give some indication of whom they are trying to protect and in what circumstances - you cannot rely on the statute outside of these circumstances
- Breach of statute can be not a tort in itself but that the statute breaches *prima facie* standard of care
- In order to use a statute as evidence of a breach of standard of care: (1) Is the behaviour at issue what the statute was designed to address? (2) Is the victim the type of person that the statute was designed to protect?
- Breach of statutory duty is not a tort; statutory duty in themselves do not give rise to duty of care (*Canada v. Saskatchewan Wheat Pool*)
- Cannot recover for breach of statute with another purpose that results in harm (*Gorris v. Scott*)


*Grain infestation - Breach of statutory duty is not a tort*

**F:** Canadian Wheat Board is seeking to recover damages from the SWP for the delivery of infested grain out of a terminal elevator - during the loading routine samples were taken from the wheat with Board scrutiny - no one had knowledge of the infestation and it was not visually apparent - only after the ship sailed did the Board test the wheat and determined there was an infestation - it was the first infestation (of rusty beetle larvae) known to occur in a ship - the grain commission ordered that the infested wheat be fumigated by the Board of which costed just under $100,000

**I/C:** Can Wheat Board recover? NO

**R:** Breach of statutory duty is not a tort; statutory duties in themselves do not give rise to duty of care

**Gorris v. Scott, Exchequer (1874)**

*No recovery for non-compliance with statute resulting in harm*

**F:** Sheep washed overboard when ship owner didn't comply with *Contagious Diseases Act* which required shippers to place animals in pens and have their feet in footholds during shipping

**I/C:** Can sheep owner recover? NO - Act not intended to protect against such damage

**R:** One is not liable for a violation of a statute if the damage complained of is separate from the purpose of the statute - there was no direct or indirect purpose to protect against said damage - the Act does not provide any provisions that deal with the dangers of loss by the perils of the sea

**Ryan v. Victoria (City), SCC (1999)**

*Followed common law as higher SOC than statute*

**F:** R was injured when he was thrown from his motorcycle after the front tire became trapped in a “flangeway” gap running alongside the railroad tracks - suing the railway company and the city

**I/C:** Can R recover? YES - city's compliance with statutory rules for its railway tracks does not preclude an action in negligence - negligence still follows a CL SoC

**R:** There is a common law rule given to Railway companies because of their original role in industry - the SoC of the statute does not override the common law standard of care (if the statutory standard of care is higher then you would be forced to follow it - based on the fact that you should be held to a higher standard) - if it is a general statute, the more the common law SoC will be applied b/c there is more discretion; the more specific the statute, the less there is a need for the common law SoC to apply

(e) Exceptions to the Reasonable Person Standard

*The Young*
Children may be found negligent on objective standard ("reasonable child") with subjective input such as age, education, experience (Heisler v. Moke)

**Heisler v. Moke, Ont. High Court (1972, Ont HC)**

**Hurt leg - Children may be found negligent using the “reasonable child” standard with subjective input**

- **F:** Child hurt his leg while jumping and was warned not to do it again - behind the wheel of a tractor he was engaging the leg in a different way but the clutch failed and someone was injured in the result of that
- **I/C:** *Is child contributorily negligent? NO -* Child was warned that the first act could be harmful, but was not warned that the second act would be - while it is reasonable to foreseeable in the eyes of an adult he would not be expected to realize or foresee the consequences of his act
- **R:** Subjective test to determine whether the child, with regard to his age, intelligence, experience, general knowledge, and alertness, is capable to be found negligent - if he can be found to be negligent, you can apply the test of the objective reasonable child of that age

**Mental and Physical Disability**

- Individual with sudden mental illness will not be liable if he can prove on BOP that he could not understand, appreciate, or discharge duty of care (Fiala v. MacDonald)
- The law accommodates persons who suffer from serious physical disabilities with a SOC that is compatible with their condition (Osborne)
- This adjustment seems to be applicable only to major physical disabilities (ex. the blind, deaf, paraplegics) - or obvious physical disabilities (Osborne)
- Concealed disabilities such as elderly, arthritic, slow, short sighted, and uncoordinated are not usually adjusted for (Osborne)

**Fiala v. Cechmanek (2001 ABCA)**

**Sudden manic episode - Suddenly insane are not liable if they can prove unable to understand duty**

- **F:** Macdonald suffered a severe manic episode - approached the C’s car - M broke through the sunroof and began choking C - she involuntarily hit the gas pedal and accelerated through an intersection hitting F’s car
- **I/C:** *Is M liable for negligence? NO -* was afflicted suddenly w/o warning - had no meaningful control over his behaviour - inability to appreciate duty of care - could not have foreseen or prevented manic episode
- **R:** If a person is suddenly, without warning, afflicted with mental illness to be relieved of tort liability defendant must show either of the following on a BOP: (1) As a result of his or her own mental illness, the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time or; (2) As a result of mental illness, the defendant was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective SOC

**Professional Negligence**

- A higher SOC is applied to people who represent themselves as having special skill and knowledge
- The SOC is thus the reasonable prudent and competent member of the particular profession or vocation

(i) Doctors:

**Challand v. Bell (1959, ABSC)**

**GP fracture - apply the reasonable prudent and competent member of the particular profession or vocation standard**

- **F:** C suffered open fracture wound and was taken to B, a general practitioner - B cleaned the wound and reset the fracture - made periodic checks and noted some swelling - checked the next day and swelling was worse so made cuts in the cast - after still not improving B became aware of circulatory changes in the plaintiff’s
hand and suggested he go to a specialist - arm was amputated b/c of gangrene - a form commonly found in soil near farm animals and commonly found on the clothes of a farmer

I/C: Was B negligent? NO - B’s treatment was correct for a GP - experts agreed to the treatment given - his SOC was different than that of the specialist


*Occlusion removal surgery - apply the reasonable prudent and competent member of the particular profession or vocation standard*

**F:** R underwent surgery for removal of an occlusion - surgery competently performed by H - after surgery R had a massive stroke which left him paralyzed on one side of his body - says he did not give “informed consent” to surgery - suing for negligence and battery - 1.5 years from earning a lifetime retirement pension - would have postponed is he knew of material risks

**I/C:** Is H liable for battery/negligence? YES - liable for both

**A:** There was a failure on his part to disclose the risks regardless of remoteness - obj. test declared that the ORP would have submitted to the surgery regardless of the risks but this does not matter b/c R says he would not have

**Battery** is distinguishable from the tort of an assault because the tort of assault is not the physical contact but the impression that it is about to happen - battery is the intentional application of force to another w/o consent - not sensical to constitute something as battery when you have consented to the nature and quality of the procedure but not necessarily all of the risks

(ii) Lawyers:

Unlike doctors, lawyers cannot “specialize” in one area of law so the SOC is the same for all of them - but this becomes problematic when a lawyer more read in mergers and acquisitions goes to court for a criminal case

**Brenner v. Gregory (1973, Ont H.C.)**

*Property survey - a solicitor will be liable if his error or ignorance was such that a reasonably competent and diligent solicitor would not have made or shown it*

**F:** B wanted to purchase property - G was his lawyer - there was a building on the land in question which encroached on the street - only a survey could prove that this was correct and one was not done - B claims G was negligent in not obtaining one - admitted by all parties that there was no discussion about it prior to closing - G knew that B had seen the property on multiple occasions and was apparent that the building had been there for many years

**I/C:** Was the lawyer negligent? NO

**A:** The fact that B did not bring up the surveys to the defendant indicates that they were prepared to deal with it themselves - B did not lose anything by reason of the failure of the defendant to advise them about a survey

**R:** A solicitor will be liable for damages in negligence if his error or ignorance was such that a reasonably competent and diligent solicitor would not have made or shown it

**Emergency**

**BC Good Samaritan Act RSBC 1996, c. 172**

*A person who renders emergency services to another at the immediate scene of an emergency is not liable for damages unless they are grossly negligent*

No liability for emergency aid unless gross negligence:

1. A person who renders emergency medical services or aid to an ill, injured or unconscious person, at the immediate scene of an accident or emergency that has caused the illness, injury or unconsciousness, is not liable for damages for injury to or death of that person caused by the person's act or omission in rendering the medical services or aid unless that person is grossly negligent

**Exceptions:**

2. Section 1 does not apply if the person rendering the medical services or aid
   (a) is employed expressly for that purpose, or
(b) does so with a view to gain.

- Key word is grossly negligent - encourage reasonable rescue but not encourage grossly negligent acts
- SOC regulated by the Act - “grossly negligent”
- May be a different SOC when it comes to this Act between the regular person and a physician: ORP vs. a reasonably prudent physician standard

### DAMAGE

- No liability can arise in negligence unless the plaintiff suffers damage as a result of the defendants wrongful act
- Is any physical injury, but also may be situations of non physical damage that is recoverable
- The main reason for tort law is to recover damages
- For a while the courts did not recognize economic loss as a damage
- **Torts actionable per se - “actionable without proof of damage” (ex. trespass)**
  - Do not have to show proof of damage
  - Why: society wants to express things that we are morally uncomfortable with
  - Tort actions *per se* are trying to prohibit actions all together, but in other torts we are trying to achieve the imposition of an appropriate level of precaution (trying to get people to regulate their behaviour and take appropriate precautions)
  - Will be more successful if there is actually damage caused - otherwise it is a case where nominal damages are awarded
  - Things that tend to be actionable *per se* tend to be criminal (what makes something criminal is prohibition coupled with a penalty)
  - Privacy Act (1996) - “It is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another”

**Rothwell v. Chemical & Insulation**

Asbestos - Without damage there is no suit

F: The appellants had been negligently exposed to asbestos at work and developed pleural plaques - pleural plaques not harmful

I/C: Can they recover? NO - neither the pleural plaques nor anxiety without psychiatric injury represented damage in law on their own

### CAUSATION

(a) Causation Generally

- "But for" test is primary test for causation: can it be proved on a BOP that the P's injuries would not have occurred but for the D's negligence? If so, the causal connection is established
- "But for" test does not require that the D's negligence was the sole causal factor, only a "*materially contributing*" (Athey v. Leonati)
  - If other causes were non-tortious, D will bear the entire burden (*"thin skull"* rule – take victim as you find him and apply damages)
  - If other causes were tortious, D's fault will be apportioned (joint several liability)
  - If other causes were P's own fault, contributory negligence (*"crumbling skull"* scenario – condition with measurable risk that may reduce damage award - you are not responsible to put the plaintiff into the position before the accident)
- If you can say on the BOP that it was somebody's negligence who caused the harm but you don't know whose, then there is liability
• Non-tortious cause is the nail in the tire - if between the nail in the tire and the possible negligence of the driver by overloading the bike make up 50% of negligence then there is liability
• After Clements, courts are 99% going to apply the “but for” test - in most of those cases it won't be any trouble
• You can use the robust inference of causation when there is not enough evidence to put you past this 50% inference threshold - the more remote the activity from the injury, the harder it is to have robust inference - cannot call it the reverse onus because the courts don't like to do this
• If there are multiple tortfeasors then it is joint several liability - they are jointly responsible for the harm but the damages are severed among them - the onus of proof is on them to prove why they were not negligent or why another way

| Cause-in fact | Plaintiff must prove that the defendants negligence cause his loss
|             | Yes = damage would have occurred regardless
|             | No = D's negligence is cause in fact of the damage
|             | [Alternative test: "material contribution" test for more than one cause: "material contribution" to a risk is treated as materially contributing to causation of injury (used in rare circumstances - must have a good reason for not using 'but for' approach)]
| Alternative Liability (Cook v. Lewis) | Applies where it is clear that only one of a small number of negligent persons caused the plaintiffs loss, but the plaintiff is unable to establish which person it was
|             | If all negligent persons are joined as defendants, the BoP of causation is reversed and each defendant is held jointly liable unless they can prove on a BoP that he did not cause the loss to the plaintiff
| Joint Tortfeasers | A number of people may be responsible for one single tortious act of one of them
|             | Ex. when the defendants have some sort of special relationship or participate in a common venture or joint enterprise involving tortious conduct
|             | Can be known as joint tortfeasors if: one instigates or encourages another to commit a tort; are an employer and employee; are principal and agent; or guilt by participation not association

(b) But For Test

**Kauffman v. TTC, Ont CA (1959)**

"But for" test is the primary test for causation

F: Woman injured on an escalator when two scuffling youths fell back on a man who in turn fell back on her
I/C: Can causation be established? NO use “but for test” - no evidence that anyone attempted to grab handrail - if they had held on to the hand rail then no one would have been injured
R: If there negligence, but for the negligence would the accident have occurred? (onus of proof on the plaintiff though this makes it difficult and has been often critiqued for it)

(c) The Basic Principles

**Athey v Leonati SCC (1996)**

"But for" test (multiple causes of injury) - app. of thin skull rule

F: The appellant suffered back injuries in two successive motor vehicle accidents - soon after she suffered a disc herniation caused by a combination of the injuries from the accidents and pre-existing disposition
I/C: Can causation be established? YES, use “but for” test - the preexisting condition would not have caused the herniation but for the respondents' actions, it simply made the resulting damages worse (thin skull rule)
R: “But for” test does not require D’s negligence to be the sole causal factor for injury; need only to establish
that D’s conduct “materially contributed” to the injury - when preexisting conditions would not have caused the injury but for the defendant's actions, then it is the “thin skull” rule that applies and the defendant will be totally liable for the plaintiff's losses (non-tortious)

(d) Inferring Causation

**Snell v. Farrell, SCC (1990)**

**Robust inference (McGhee)**

**F:** S became blind following eye cataract surgery performed by F- found negligent for continuing the surgery after noticing bleeding in the plaintiffs eye - carrying on with the surgery was one of the possible causes of blindness

**I/C:** Can causation be established? YES, robust inference/reverse onus (McGhee reverses ordinary burden of proof with respect to causation - only adopt in certain circumstances if convinced that the defendants who have a substantial connection to the injury were escaping liability because the plaintiff could not prove causation)

**R:** The court was able to deviate from the “but for” test b/c causation in malpractice cases are inherently difficult - the defendants, who are the doctors and physicians, are in a better position to argue causation - rational to require evidence to rebut the inference but there was no evidence to rebut in this case (reverse onus = robust inference - DO NOT CALL IT REVERSE ONUS b/c court did not want to say this in the abhorrence of relaxing the “but for” test)

(d) Material Increase in Risk

**Clements v Clements, SCC (2012)**

**“Material contribution” test - rare and limited**

**F:** Clements was driving an overloaded bike on a wet highway and lost control - his wife suffered severe injuries and thus sued him for negligence

**I/C:** Whether the “but for” test applied or the “material contribution” test

**R:** Circumstances did not give rise to a situation where the test could be applied (it is a very limited and rare exception) - test has never been dealt with by the SCC (and even then, can only be applied in cases of multi-tort feasers)

(e) Multiple Cases: Two Negligent Defendants, One Cause of Accident

**Cook v Lewis, SCC (1951)**

**2 negligent people - uncertainty - reverse onus of proof - novel**

**F:** C was part of a hunting group and L part of another - shortly after seeing each others party in the same hunting area, Lewis was injured by a gun shot from C’s party (2 shots happened simultaneously from different people)

**I/C:** If it is uncertain who is guilty what happens? Lower court said uncertainty meant neither could be convicted - SCC disagrees - novel approach following US precedent

**R:** When there are multiple tort feasers, and negligence and causation has been established, both parties do not escape liability because both of them were negligent - rather, the burden of proof must be shifted to the appellants to prove which one of them did it - if neither has proof then they are both equally liable (the onus is on each appellant to prove that the other is the guilty party)