I. NEGLIGENCE

1. Unreasonable Risk
   
   Bolton v Stone HL [1951] (Cricket ball, Test for Standard of Care)
   
   Priestman v. Colangelo and Smythson (Police shoot car thief in head, breach justified under social utility).
   
   Paris v Stephney County Council CA [1951] (One-eyed worker, blind, greater risk of injury, gravity/extent of harm)
   
   Watt v Herfordshire County Council (Fireman injured by jack, balance risk w/measures to eliminate risk and the end to be achieved)

2. Reasonable Person
   
   Defining/explaining the reasonable person
   
   Vaughan v Menlove NC [1837] (Hayrick burns neighbours property, standard of the reasonably prudent person)
   
   Blyth v Birmingham Water Works CE [1856] (Fire Plug freezes in extreme cold, ROP in normal circumstances)
   
   Prasad v. Frandsen (foreigner, seatbelt law; apply reasonable person based on knowledge)
   
   Caminer v Northern and London Investment Trust
   
   Quinn v Scott: (when a reasonable person consults an expert)
   
   Cone v Weslock SCC [1970] (“oil”/Gasoline burns down hunting lodge)
   
   Nettleship v Weston QB [1971] (Beginner Driver injures Instructor)

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   Haley v London Electricity Board AC [1965] (Blind falls on sidewalk, reasonably foreseeable that blind walk on sidewalks, not difficult or costly to protect against this danger)
   
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**Evaniuk v 79846 Manitoba Inc. (1990) Manitoba QB**

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<tr>
<td>Female plaintiff (Evaniuk) involved in altercation at a bar (Pandora Inn), when she is thrown out by bouncers she is injured</td>
<td>- Is the bar vicariously liable for the actions of its staff (the bouncers)</td>
<td><strong>Vicarious Liability Test</strong></td>
<td>- The removal of Evaniuk, although not specifically authorized by the defendant (Pandora Inn), the supposed act of battery was closely connected with the other responsibilities of their job.</td>
<td>- The employer (Pandora Inn) is vicariously liable for the actions of its employees.</td>
<td>- The plaintiff’s goal was compensation, thus suing the employer (who has more money) not the employees involved.</td>
</tr>
<tr>
<td>- Bar claims that plaintiff was unruly.</td>
<td>- Tort of battery</td>
<td>1. Employee/employer relationship (how closely are they connected)</td>
<td>2. Tort committed in the course and scope of employment.</td>
<td>- The removal of Evaniuk, although not specifically authorized by the defendant (Pandora Inn), the supposed act of battery was closely connected with the other responsibilities of their job.</td>
<td>- The employer (Pandora Inn) is vicariously liable for the actions of its employees.</td>
</tr>
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**I. NEGLIGENCE**

1. **Duty** – threshold question based on what a reasonable person would do?

2. **Breach** – has there been a breach of the standard of care?
   - A breach is small “n” negligence.

3. **Damage flowing from the breach.**
   - “Fault” in tort is not moral wrongfulness, but departure from, (failure to meet), this standard of care.
   - Standard of care assumed that we are all reasonable people capable of meeting the standard of a reasonable person. If we are unable to do so, we are (small n) negligent, and at fault.
- Standard of care - no requirements of perfection, “reasonableness” standard draws a limit around liability.
- Damage needs to have been caused by the breach (proximate cause).

**A. Standard of Care: Breach of Duty**

1. Unreasonable Risk

- The standard of care required is not perfection, it is just reasonableness, this sets a limit to tort liability.
- Actors should not create or proceed in the face of “unreasonable risk”
- The measure of what is reasonable depends on the facts of the case. Including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost, which would be incurred to prevent the injury.

**Bolton v Stone HL [1951] (Cricket ball, Test for Standard of Care)**

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<td>- Plaintiff brings action in nuisance and negligence</td>
<td>- Was the cricket pitch in breach of duty for not having taken necessary precautions to prevent such occurrences?</td>
<td>Standard of care exists if injury to another person from the defendant’s acts is reasonably foreseeable, the chance that the injury will result is substantial.</td>
<td>Test for risk: 1. Gravity of Harm 2. Probability of Occurrence 3. Cost of prevention 4. Benefits, utility 5. (Lawful) Accepted Practice 6. Foreseeability</td>
<td>Defendant owed a certain duty of care</td>
</tr>
<tr>
<td>- Cricket ball hits woman in head. She suffers injuries</td>
<td>- What is the standard of care required by a defendant in the position of this defendant?</td>
<td>weigh the risk</td>
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<td>- 100 yards outside pitch, on public highway</td>
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<td>- Pitch used for 90 years, no incident</td>
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<td>- 6 balls over fence in 30 years</td>
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<td>- there is a 7’ fence around the ground</td>
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**Priestman v. Colangelo and Smythson (Police shoot car thief in head, breach justified under social utility)**

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<td>- 17 year old steals a car, police chase him they can’t get him to stop so in warning the shot at his tire.</td>
<td>- Did the officer breach their standard of care? - What is the standard of care required of an officer in this position?</td>
<td>Social utility of an action can override citizens personal freedoms and liberties</td>
<td>- the court determines that the hazard created by the officers was not too great in light of the social value of capturing the criminal. - as there was no other means of stopping the car the court justified the police actions under s.25(4) Criminal Code.</td>
<td>- Police not held negligent - Means were justifiable.</td>
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<td>- As they are shooting they hit a bump and shoot the boy in the head.</td>
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<td>- The boys car then goes out of control and crashes into two girls, killing them</td>
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**Paris v Stephney County Council CA [1951](One-eyed worker, blind, greater risk of injury, gravity/extent of harm)**

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<td>- Plaintiff is blind in one eye.</td>
<td>- Was his injury the result of undue care on behalf of the workplace?</td>
<td>in considering negligence 2 factors must be considered: magnitude of the risk and likelihood of injury being caused. - The gravity of harm likely to be caused, should influence a reasonable person to provide goggles and so there was a duty of care owed to a one-eyed employee. - magnitude of risk + likelihood of harm.</td>
<td>Duty of care owed to one eyed employee was higher than that to two eyed employees - Although no goggles might have been “usual custom” this was not the “usual workman.” - if precautions are taken that would have been reasonable in the case of persons possessed of the usual faculties of sight and hearing, these will be sufficient to meet the standard of care owed to a person who is not possessed of those faculties, unless the defendant is aware of the plaintiff’s disability</td>
<td>- Workplace found negligent - Duty of care found to include providing goggles - (Magnitude of risk + Likelihood of harm) - Duty of care owed to a one eyed employee includes providing goggles</td>
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<td>- While at work he suffers damage to his good eye.</td>
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<td>- Plaintiff claims damages alleging negligence in the failure of the defendant to supply goggles.</td>
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<td>- Usual practice of workplace is to not supply goggles</td>
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**Watt v Herfordshire County Council (Fireman injured by jack, balance risk w/measures to eliminate risk and end to be achieved)**

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- Fire station has a jack to be used in emergency but only one vehicle is properly equipped, that truck is gone.
- A call comes in and they need the jack so they load it in an ill equipped vehicle.
- It comes lose and injures a foreman.
- He sues for damages caused by the defendant’s negligence in failing to use reasonable care.

- Did the fireman practice due care?
- The social utility of the event must be taken into account
- Reasonable person is an objective standard.
- Questions to ask are:
  1) likelihood
  2) gravity
  3) end pursued
  4) emergency
  5) prevention/reduction
- The risk that this could happen was apparent (ill equipped vehicle), however b/c this was considered an “emergency situation” the saving of life or limb justifies taking a considerable risk.
- If this had happened in a commercial enterprise there would have been a different result.
- In measuring due care one must balance the risk against the measures necessary to eliminate the risk and the end to be achieved
- This was an okay course of action in light of the emergency situation.

2. Reasonable Person

Defining/explaining the reasonable person

- The (objective) reasonable person standard will take into account his or her circumstances; the reasonable person is not required to be omniscient, and reasonable limitations on available knowledge are relevant

Vaughan v Menlove NC [1837] (Hayrick burns neighbours property, standard of the reasonably prudent person)

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<td>Defendant built a hayrick that was told was a fire risk</td>
<td></td>
<td>- Did the defendant “proceed with such a reasonable caution as a prudent man would have exercised under the circumstances” the [objective standard], or whether he acted bona fide to the best of his judgment [subjective standard]?</td>
<td>- Objective standard of the reasonably prudent person. (Coggs v Bernard)</td>
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<td>He said he was “willing to risk it”</td>
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<tr>
<td>Defendant’s hayrick spontaneously ignites and the fire spreads to the plaintiffs cottages and destroys them.</td>
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Blyth v Birmingham Water Works CE [1856] (Fire Plug freezes in extreme cold, ROP in normal circumstances)

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<td>Defendant installs a fire hydrant of “the best design” it works for 25 yrs, there was also no breach in installation.</td>
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<td>Did the waterworks company breach the standard of care?</td>
<td>- Without precedent there was no foreseeability of those weather conditions.</td>
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<td>There is an exceptionally severe frost one winter which damages the plug.</td>
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<td>- The reasonable person standard doesn’t expect people to prediction conditions that are outside the expected realm.</td>
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<td>As a result the plaintiff’s premises were flooded.</td>
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<td>- The standard of care is applied in the normal circumstances.</td>
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Prasad v Frandsen (foreigner, seatbelt law; apply reasonable person based on knowledge)

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<td>Within 48 hours of entering country, English plaintiff was involved in motor-vehicle accident.</td>
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<td>- Is the plaintiff “contributorily negligent” for her injuries?</td>
<td>- At the time of the accident there were no seatbelt laws in England.</td>
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<tr>
<td>She was not wearing a seatbelt.</td>
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<td>- If we are in an accident and both negligent then the court will balance the compensation to the negligence levels.</td>
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<td>Plaintiff was struck by another vehicle driving above speed limit.</td>
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<td>- What questions should the reasonable person ask?</td>
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<td>Both drivers originally held equally at fault.</td>
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Caminer v Northern and London Investment Trust

Quinn v Scott: (when a reasonable person consults an expert)

Issue: When would a reasonable person consult an expert?

Analysis: In both are cases there are trees that are suffering rot. However the facts differ because in Caminer there was no external indication of the problem and thusly no requirement to consult an expert. However in Quinn v Scott, the company had a professional forestry advisor and if the problem had been reported he would have recognized it, there was external indications (thinning)

Rule: Together these cases can be understood for the rule that a reasonable person will be required to consult and expert if there are external indicators of a problem and an expert is available.

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<td>- This was an okay course of action in light of the emergency situation.</td>
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<td>- This was not an example of undue care, no negligence found.</td>
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<td>- Question of balancing the risk with the ends.</td>
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### Cone v Weslock SCC [1970] ("oil"/Gasoline burns down hunting lodge)

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<td>- Guest at a hunting lodge tried to start a fire with substance he wrongly believed to be furnace oil</td>
<td>- Was his behavior reasonable in the circumstances?</td>
<td>- Behavior must be &quot;reasonable&quot; under the circumstances.</td>
<td>- The facts adding up indicate that there was a reasonable standard of care met by Cone.</td>
<td>- Cone owed no duty to take greater care than he did.</td>
</tr>
<tr>
<td>- Substance was gasoline in can marked “galvanized oil”</td>
<td>- If no, he breach the standard of care, if yes then there is no breach and no liability.</td>
<td></td>
<td>- No negligence.</td>
<td>- He took the steps that a reasonable person would have been expected to take.</td>
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<tr>
<td>- Defendant felt substance with finger, claiming it felt “oily”</td>
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<td>- Defendant poured substance on stove, threw on a match, resulting in an explosion.</td>
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<td>- Cabin burnt down</td>
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### Nettleship v Weston Q8 [1971] (Beginner Driver injures Instructor)

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<td>- Learner driver loses control of car and injures instructor.</td>
<td>- Should we have a lower standard of care for beginners?</td>
<td>- Too fine gradations of standards create confusion. (Denning)</td>
<td>- There should be applied dilute objective standard of care.</td>
<td>- Learner driver held responsible for accident.</td>
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<td>- Standard is necessary for policy reasons (insurance).</td>
<td>- Different standards will create confusion and dilute the objective standard of care.</td>
<td>- (This objectivity shows the importance of insurance)</td>
</tr>
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### Carroll v Chicken Palace OR [1955] ( Blind patron falls down stairs, duty to a reasonably expected standard)

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<td>- Blind woman falls down stairs into cellar at Chicken Palace after door was left open.</td>
<td>- Did the Chicken Palace not meet the reasonable standard of care by keeping the door open?</td>
<td>- A person with a disability is required to take special care of themselves to avoid unusual dangers.</td>
<td>- The Chicken Palace premises were full of unusual dangers that would not be dangers to a sighted person.</td>
<td>- No breach of duty owed by Chicken Palace to Carroll</td>
</tr>
<tr>
<td>- Woman suffers significant damage.</td>
<td></td>
<td>- It is unreasonable to hold others responsible for danger because to a person with no disability there was no unusual danger and they had no knowledge.</td>
<td>- It was unreasonable to expect Chicken Palace employees to anticipate that the woman would move around w/o assistance, which was readily available and she knew about.</td>
<td>- Their duty was to the reasonably expected standard.</td>
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<td>- In a new establishment the onus is on the disabled person.</td>
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### Haley v London Electricity Board AC [1965] (Blind falls on sidewalk, reasonably foreseeable that blind walk on sidewalks, not difficult or costly to protect against this danger)

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<td>- Blind plaintiff takes the same route every day to work</td>
<td>1) Was it reasonably foreseeable that a blind person might walk down the sidewalk?</td>
<td>- A measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others who know, or ought to anticipate, the presence of such persons within the scope and hazard of their own operation.</td>
<td>- The sign placed to warn of the obstacle would be sufficient for ordinary people to meet the standard of care, but it a threat to blind people.</td>
<td>- The workmen had not met a standard of care.</td>
<td>In the public sphere, commonly used areas, the onus is on anyone who has changed or created a special peril. Otherwise blind people couldn’t use sidewalks for fear of a lack of safety.</td>
</tr>
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<td>- On this day, workmen had begun excavating a trench in the sidewalk</td>
<td>2) If this was foreseeable, was the chance of this happening so light that the difficulty of affording protection to a blind person was so great that it would be unreasonable?</td>
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<td>- However the class of people that could reasonably be expected to be using the pavement included blind people.</td>
<td>- It is important to consider the common knowledge in the circumstances.</td>
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<td>- There was an obstacle at the end of the trench, which the appellant tripped over and struck their head and became deaf.</td>
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<td>- Also this blind person knew the route and the danger created wasn’t one they could have taken precautions to avoid.</td>
<td>- A high degree of care and skill can be expected of a blind person, higher than an ordinary person.</td>
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<td>- The workers didn’t need knowledge about this specific blind person just blind people in general.</td>
<td>- In this situation.</td>
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<td>- Also there wasn’t great cost or difficulty to protect blind people in this situation.</td>
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### Dziwenka v the Queen in Right of Alberta SCC [1972] (Shop teacher supervising mute and deaf student, a higher degree of risk, a reasonable person would have recognized this)

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- A shop teacher took steps to show a mute and deaf student how to operate a power saw  
- The safety guard was taken off the power saw to allow the work to be done  
- There was a student assisting the disabled student  
- During a brief moment of inattention on behalf of the instructor who was tending to other students, the disabled boy was injured

- Did the teacher breach his duty to a particular standard of care?  
- The standard of care owed to persons with known physical disabilities must include precautions against harm towards person with that type of disability in activities that have foreseeable risks. Consider the high degree of possible risk.  
- The teacher was aware of the boy’s disabilities  
- There was a moment of inattention on behalf of the teacher.  
- The court argues it was possible for him to stay with the plaintiff until the job was done b/c it wasn’t improbable that the accident wouldn’t have happened if the boy had been directly supervised.  
- The teacher was found at fault in the trial. On appeal this fault was balanced between him and the student himself.  

**Standard of care owed to people w/disabilities:** **General rule:** if precautions are taken which would have been reasonable in the case of persons possessed of the usual faculties of sight and hearing, this will be sufficient to meet the standard of care owe to a person who is not possessed of those faculties, unless the defendant was aware of the plaintiff’s infirmity – *(Paris v Stepney Borough Council)*  
- Directly related to knowledge of the disability, if there are precautions necessary/expected then there is a higher standard of care. Particularly when it is a public space with a wide variety of reasonably foreseeable people, which would include people with disabilities.

**3. Custom and the Standard of Care**
- Standard of custom – “What do reasonably people normally do?” Custom doesn’t mean meeting the standard of care of a reasonable person  
- *Custom is not conclusive evidence of what is or is not reasonable in a particular set of circumstances,* but it does provide a useful guideline for what will be reasonable  
- Customs can, however, be unreasonable – generalized negligence  
- Just as compliance with custom is not conclusive of reasonable care, so deviation from custom is not conclusive of negligence *(See Brown v Rolls Royce).* It is a guideline for the court.

**Brown v Rolls Royce WLF [1960] (Contracted dermatitis b/c no cream was provided though it was the custom)**

**Holding:** Court found that while it might have been common practice there was no proof that using the barrier cream would have prevented the dermatitis, which is evidence for a possible lack of causation. Also the evidence that this was customarily provided was non conclusive. Therefore the court found not following the custom wasn’t proof of negligence.

**Waldick v Malcom SCC [1991] (Local Custom of not Salting Parking Lots, unreasonably customs won’t be upheld)**

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| Malcoms did not salt or sand their parking lot  
- It is the custom of the area to not salt or sand parking lots  
- Plaintiff slipped and fell. | Would the reasonable person have salted their parking lot?  
- Did the defendant meet the standard of care imposed by “Occupiers Liability Act”? | Although custom can act as a defence against negligence, rulings come from the “reasonable person” standard.  
- Customary practices can be unreasonable and if so they are unacceptable, they also do not displace statutory duties. | Relying on custom carries the problem of proof. Custom cannot merely be asserted, there must be evidence of general practice.  
**Occupiers Liability Act** 3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person’s property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises. | Malcoms held responsible. They did not meet the standard of care set as set by the Act. |

**4. Statutory Standards**

**Per Se negligence:** **Evidence that it IS “ = ”**
- Breach of the Statutory standard = breach of negligent standard of care, always  
- If statutory standard wasn’t met, standard of care wasn’t met.  
- It could also be said that breach of these standards are

**Prima Facie negligence:** **Evidence that is so strong that it appears to be “on its face”**
- It has the *presumption* of being a breach of standard of care. It is still open to the defendant to prove that it *isn’t really* a breach, but on it’s face it seems to be and could be taken as.

**Evidence of negligence:** proof of a statutory breach causing damages may be evidence of negligence.

**Compliance with statute**
- A statutory breach does not automatically give rise to a finding of negligence, mere compliance with a statute does not preclude a finding of negligence, although statutory standards can be highly relevant to an assessment of what is reasonable in a particular case.
R v Saskatchewan Wheat Pool SCC [1983] (Beetle infested Wheat, statutes as evidence to find a duty)

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| - Beetle invested wheat is delivered from a grain elevator operated by the SK Wheat Pool.  
- The Canada Wheat Board loads the grain onto a boat, it isn’t until it is on the boat that they notice the beetle infestation.  
- The board had to incur significant costs remediing the situation.  
- They are no claiming these expenses on basis of statutory breach. | Is there a tort of “breach of statute”?  
If not is a breach of statute evidence of negligence?  
If so to what degree?  
They are arguing that a breach of statute is = to a breach of the standard of care. | Statutory duty may be evidence (like custom) to help understand what a useful standard of reasonable conduct is. | Court decides to move contrary to UK in nominate tort of statutory breach.  
However the statutory standard can still provide useful evidence about what should be the standard of care.  
Statutes can help assist in figuring out standard of care, but there are no avenues for civil action in statutes. | In this case there is already a penalty imposed. The court realizes to apply liability in this way would require reading too far into the statute and this would be going against the division of powers.  
A breach of statutory standards should only be evidence of negligence in industrial legislation, unless explicitly provided for.  
The rationale is that if Parliament had intended for a person who breached to be liable then it would have been law. |

Gorris v Scott CB [1874] (Sheep on ship swept to sea, statute must be meant to prevent the incident that occurs)

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| - Plaintiff trying to recover losses after a their sheep are swept off the deck of a ship  
- The “Contagious disease Act” states that the animals must be kept in pens, however the Act was concerned with preventing diseases. | - Does this statute apply to this type of breach of care?  
- Incident must be of the type the statute was meant to prevent and the connected to the purpose or reasons for which the statute was enacted | - The statute was in place to protect the animals from the spread of disease  
- The sheep were not lost from spread of disease, but rather from ocean waves, therefore the breach that occurred wasn’t meant to be covered by the Act. | - Not held to pay damages, as the loss was not due to the breach of statute. |

Hatch v Ford Motor Co (ie. of a breach not upheld b/c statute not intended to protect from that type of breach)

**Facts:** A boy runs into a pointed hood ornament on a stationary car and injures himself. The defendant contravenes a statute that forbids the use of any ornament “which extends or protrudes to the front of the face of the radiator grill.”

**Holding:** The court finds that the manufacturer had no duty “to render a vehicle safe to collide with rather than simply a duty to so manufacture it as to make it safe for the use for which it is intended.”

**Paulsen v CPR (Negligent action may be found if statutory duties aren’t met and claimant is someone the statute meant to protect)**

**Facts:** The Railway Act prescribed that there must be fences that would be suitable and sufficient to prevent cattle and other animals from getting on the railway lands, 4ft by 6ft. However these fences were absent and a child was hit by a train.

**Issue:** Was CPR negligent in not having replaced parts of the fence?

**Analysis:** Manitoba argued negligence b/c fence was lacking, CPR responded that the section was passed for the safe passage of trains (clearly from cattle, because of the damage they would cause to the train).

**Holding:** Court of Appeal held that the statute could be read more broadly and should have enforced higher fences, and that in the absence of a fence the child’s injuries were caused by negligent and they were liable in damages.

**City of Vancouver v Burchill (Breach of standard as evidence for standard of care)**

**Facts:** Taxi driver failed to obtain a license from the municipality he was working in under the BC Motor Vehicle Act. He was injured b/c of a highway in disrepair.

**Holding:** SCC held he was entitled to recover against the municipality despite his lack of license. The court’s concern here was that there was no causal connection b/w the failure to have a license and the accident that occurred. So his failure can’t defeat the right to recovery.

**Ryan v Victoria SCC [1999] (Motorcyclist tire stuck in railway track, when w/statutory standards may satisfy the standard of care)**

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| - Plaintiff thrown from motorcycle when front tire was caught in railway tracks that were built according to industry standards.  
- *compliance w/standards doesn’t abrogate obligation to comply w/ common law standard of care. | - Did the city fail to meet a reasonable standard of care | - Complying with regulations act as mere evidence towards a finding that the standard of care has been satisfied. | - Controlling standard is common law standard of reasonable care.  
- Less weight given to general and discretionary standards, more weight given to specific standards.  
- When a statute authorizes certain activities and strictly defines the manner of performance it is more likely to be found that compliance w/statute constitutes reasonable care.  
- If a statute is general or permits discretion as to performance or where unusual circumstances exist | - The statute wasn’t meant to cover this type of incident and therefore it wasn’t rationally connected to the goal of the legislation.  
- Social change may justify a change in |

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In some circumstances compliance w/ statutory standards may satisfy the standard of care. which aren’t clearly within the scope of the statue, mere compliance is unlikely to exhaust the standard of care.

5. Particular Cases:

A) Liability of the young

The “reasonable person” standard is relaxed for the young because they are less developed, we expect less.

This is a two-part test for liability of the young:

1. Is this child capable of negligence liability (subjective)?
   - Able to foresee reasonable risk?
   - Take responsibility for actions?
   - The ability to understand that you owe a duty
   - Able to understand that you have a duty to be careful
   - (Essentially this is the child version of the reasonable person standard)

2. (If Yes): Would the reasonable child of similar age, experience and intelligence understand and appreciate the danger or risk where “the age is not such as to make discussion of negligence absurd” (McEllistrum v Etches)
   - This is the child standard of the reasonable person standard.
   - Canadian courts recognize that the capacities of children are infinitely various and accordingly treats them on an individual basis (as opposed to “ordinary”/prudent reasonable child test in English courts). This is out of a public interest in their welfare and protection.

Heisler v. Moke ON HC [1972] (Child injured jumping from tractor, test for standard of care expected in youth)

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<td>- Child is hurt in act that had been advised against by an adult. (Jumping off tractor) - Child had been warned about danger (however, it is not clear by whom)</td>
<td>How are the children in this case to be judged, to what standard should they be held?</td>
<td>2 step articulation of the rule: (objective/subjective) test. 1) Consider the age, intelligence, experience of the child and whether he is capable of being found negligent at law in the circumstances? 2) If he is capable, then whether the child exercised the care to be expected from a child of like age, intelligence and experience?</td>
<td>- The court applied this test and found it possible to find the child negligent. - However on the second stage of the test they found he couldn’t be guilty of negligence here because of his lack of awareness of the consequences.</td>
<td>- Child was found capable of being liable in negligence, however in the circumstances of the case he couldn’t be guilty of negligence because he couldn’t be expected to realize or foresee the consequences. - This differs from the UK prudent child test which is harsher but still wouldn’t have found him negligent.</td>
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Young People Engaged in Adult Activities

- Held to the objective standard of reasonable care as if they were adults.

McEarlen v Sarel: When a child engages in what may be classified as an adult activity’ [in this case racing trail bikes] he or she will not be accorded special treatment and no allowance will be made for his or her immaturity. In these circumstances the minor will be held to the same standard of care as an adult engaged in the same activity…”

“the circumstances of contemporary life require a single standard of care with regard to such activities”

Nespolon v Alford CA [1998] (Drunk teen hit by car after being dropped off, look @ specific act not the overall activity)

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- 16 year olds driving inebriated 14-year old home.
- Drops him off nearby (at 14 year old’s request); 14 year old wanders into road; accident ensues, causing death to 14 year old, nervous shock to third party (driver who struck him)

- Possible negligence of 16 year old?
- Which standard of care (16 year old reasonable adult person) or McEllistrum standard should be applied?

- When children engage in adult activity they will be held to the same standard as adults (McErlean v Sarel, Sipra, at p. 412).
- But it is the specific activity giving rise to the allegation of negligence one examines, not whether the overall activity is normally an adult one.

- What is the “act” of the 16 yr old her, why and how does this make a difference?
- We did not have to apply the first part of the threshold question of McEllistrum test (Adult or not) because they were 16.
- We are concerned with the specific act of “dropping off” which is not an adult act, so we do not hold them to the adult standard.
- We look @ the specific activity giving rise to the allegation of negligence, not whether the overall activity is normally an adult one.
- However based on the boys knowledge of being drunk and what its effects would be there is no evidence that their decision was negligent.
- There was no reason for them to suspect he was at risk.

- There was no reasonable foreseeability, that there was any risk created by any of the boy’s behavior.
- The possibility of what occurred was too remote to be predicted.
- There is also remoteness about the fact that the driver who hit the boy would suffer posttraumatic shock as a result.
- There is no liability.

B) Mental and Physical Disability
Fiala v Cecmanek AB CA [2001] (Sudden mental attack causes man to choke driver, causes crash, Test for mental illness defence)

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<td>“Sudden onset delusion”.</td>
<td>To what standard should this man be held?</td>
<td>Test for determining mental standard of care:</td>
<td>The expert evidence preferred by the trial judge found that his mental illness was manifestly incapacitating.</td>
<td>Found not liable for negligence.</td>
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<td>Sudden onset illness: nothing of this sort had every happened to the man before</td>
<td>Was he in breach of required standard?</td>
<td>1) Requires that as a result of their mental illness the defendant has no capacity to understand the duty of care owed @ a specific time.</td>
<td>Standard of care not breached.</td>
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<td>Delusional in nature because he had an “altered perception” which made him believe in an altered reality</td>
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<td>2) As a result of mental illness the defendant was unable to discharge his duty of care because he had no meaningful control over his action at the time of the relevant conduct which fell below the objective reasonable standard of care.</td>
<td>- If he had been aware of the mental illness then his defence wouldn’t hold b/c you could foresee the possible risk.</td>
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<td>(the type of episode is important to understanding the standard that should apply in these circumstances)</td>
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<td>This test goes to the essential elements for negligence: foreseeability, and standard of care.</td>
<td>- Raises questions about people who have heart conditions who suffer heart attacks and cause damage, could they have foreseen the risk?</td>
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<td>He began to choke a person in vehicle, resulting in the vehicle crashing into another car. Resulting in injuries.</td>
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<td>Burden of proof on defendant.</td>
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Slattery v Haley: The accused had no previous symptoms and then suddenly became unwell fell unconscious and killed a boy while driving. It was found he was not liable because a negligent act “must be shown to have been the conscious act of the defendant’s volition.

Roberts v Ramsbottom: Defendant had a minor stroke, went out and drove anyway, had two accidents, court held that he was liable because he retained control and he should have not driven.

C) Professional Negligence
Doctors Standard of Care: “A surgeon is expected to apply the degree of care which a normally skilled member of his profession may be reasonably expected to exercise.” They are not required to be perfect or omniscience, just must meet ordinary standard for that position.

Challand v Bell AB SC [1959] (Farmer’s arm amputated, Test for Dr’s standard of care)

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- Farmer fell in his barn (rural area) and broke his arm, bone protruded through skin.
- Doctor determines the wound to be "clean" and puts it in a cast w/o cleaning.
- After injury swells Dr. notices, cuts the cast, then makes a further cut.
- The next day the Dr phones a specialist, diagnoses acute fulminating gas gangrene; amputates arm below elbow.
- Factures that are open to air in barns are often particularly susceptible to this type of infection. Debridement the common use to prevent infection isn't done here.

- Did the doctor breach his standard of care?
- Does it matter if the Dr. is a beginner?
- Test from Wilson v Swanson is reiterated:
  1) Physician undertakes that he possesses the skill, knowledge and judgment of the average.
  2) In judging that average, regard must be had to the special group to which he belongs, (ie)general practitioner to specialist.
  3) if the decision was a result of exercising that average standard, there is no liability for an error in judgment.
- The skill required of beginners is the same as those in that profession. Beginner Dr. held to old Dr.

- In this case the specialist affirm that he treated many wounds in the same manner the defendant did.
- Tight cast complaints are common and not necessarily indicative of further problems.
- And that the wound itself was small.

- Doctor held not negligent, considered an "error in judgment", not a breach in standard of care.
- Error in judgment is not the same thing as failure to meet standard of care

**Ter Neuzen v Korn SCC [1995]** (Contracted HIV from Sperm Donor, specialist held to average specialist in the field, except in cases where an ordinary trier of fact could see a problem)

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<td>A Patient contracted HIV as a result of artificial insemination</td>
<td>Doctor did not perform an HIV scan</td>
<td>Patient contracts HIV from donor sperm.</td>
<td>- By artificially inseminating w/o screening for HIV did the physician breach their standard of care?</td>
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<td>- Custom is important here!</td>
<td>- The specialist standard of care is that of the ordinary specialist.</td>
<td>- As a general rule where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury it won’t be up to the court to find a medical practice negligent.</td>
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<td>- Doctor determined the wound to be</td>
<td>- The exception is if they fail to meet reasonable standards and to adopt precautions as would be obvious to the general finder. <strong>Ter Neuzen exception.</strong></td>
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*Anderson v Chasney:* An example of a *Ter Neuzen* exception, the defendants were found negligent for leaving a sponge in a patient even though it wasn’t standard practice to count for sponges. Court held it would be obvious to a normal person that foreign objects shouldn’t be left in the body and that there was a simple way to ensure this.

- *Ter Neuzen* exception will not apply when resort must be had to expert medical evidence to identify the risk, or to set the standard of care to be met, *Tailleur v Grande Prairie General and Auxiliary Hospital and Nursing Home District No. 14, 1999.*

**Duty to consult:** Exists when it is outside the scope of a Dr’s confidence and he knows something is wrong, than he is required to consult w/someone else.

**MacDonald v York County Hospital:** the court held that the failure to consult a specialist when the doctor was unable to diagnose the cause of the rapidly deteriorating condition constituted a breach of duty to the respondent and that the lack of concern manifested by the doctor in the weeks following the diagnostic operation and his failure to prescribe anticoagulants at an earlier stage, amounted to negligence. This was different than an “error in judgment.”

**Reasonably Competent Intern**

- Standard of care required of an intern that of a *reasonably competent intern* and not *a practicing physician (Vancouver General Hospital v Fraser)*
- What does this mean, and how is it different from the physician’s reasonable standard of care?
- There is a certain responsibility on the limits of interns though to seek consultation because they should be aware of their own limitations. Interns are expected to know less.

**Brown v University of Alberta (Sets out the 4 part test for medical practitioners)**

**Issue:** Is a doctor liable for failing to report a case of child abuse?

**Test:** 1) Standard of care of a practitioner is that of a “normal prudent practitioner”
2) Specialists are held to a higher standard of care then GP’s
3) Same principle applies to diagnosis as to treatment
4) Standard applied is that that was the standard at the time the events took place

**Kelly v Lundgard (Medical report as part of medical treatment services, policy rationale)**

**Issue:** Can a doctor be liable for a negligent statement in a medical report?

**Holding:** Dr. has an ethical obligation to provide a patient w/ a medical/legal report when requested. So from the medical perspective treating a patient includes supplying this report. There are *sound policy reasons* for why these are characterized under treatment services.
Also to complete a report the Dr. may have ongoing relations w/ the patient. Third the distinction b/w a medical report and a medical-legal report is difficult so the better question is whether the service provided was in the context of a Dr./patient relationship. As a result the medical-legal report is held to the standard expected of a reasonable and diligent Dr. in the same circumstances.

**Duty to Disclose:** The duty to disclose is now considered a question of negligence, doctors have a duty to disclose risks of the procedure to the patients so patients can decide to have the procedure or not. This was previously considered battery. As a result it is now a question of the standard of care and if the standard of breach whether there is causation.

- Whether the failure to disclose adequately caused the plaintiff’s loss because it caused him to make a choice to his own detriment that otherwise he would not have made (loss flowing from the breach of the standard of care).
- Medical battery only occurs when there is no consent at all.

**Reibel v Hughes SCC [1980] (Patient suffers stroke during surgery, not warned of risk)**

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<td>- Plaintiff had surgery (for hypertension) and suffered a stroke during the operation.</td>
<td>- Was the patient made aware of all the potential risks so as to be able to give informed consent?</td>
<td>- Doctors must disclose all material risks to the patients regarding procedures and operations. - A material risk is defined in <em>White v Turner</em> where you balance the severity of the potential result and the likelihood of it occurring. If a special or unusual risk is quite dangerous and fairly frequently encountered, it could be classified as a material risk. - This is the doctor’s responsibility. - There is a full test set out in <em>Videto v Kennedy</em>: 1. Professional standards are a factor to be considered. 2. Duty of disclosure also embraces what surgeon knows or should know what the patient deems relevant to the decisions 3. If a risk has serious consequences it should be treated as a material risk 4. Patient is entitled to an explanation 5. Danger inherent do not have to be disclosed 6. Scope of duty &amp; breach decided in relation to circumstances 7. Emotional condition of patient may justify a surgeon withholding info. 8. Question is whether a particular risk is a material risk is a matter for the trier of fact.</td>
<td>- This case used to be covered under battery. - The cause of action comes from the breach of the standard of care based on the negligent non-disclosure of risks. - Look at the specific circumstances; he would have not gotten the surgery for a couple years until his pension was full. - The standard of care here has been breached, causation is established, now examine whether a reasonable person in the plaintiff’s circumstances would have had the surgery. - Negligence occurs when insufficient information is provided (or non-informed consent is given)</td>
<td>- No, the patient was not given adequate information about the risks in order to make an informed consent. - Doctor found guilty at the SCC</td>
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**Brenner v Gregory (Lawyer’s Standard of Care, reasonable competent lawyer)**

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<td>Lawyer was retained to search the title and close the transaction of land for the defendants. He did this.</td>
<td>Is the reasonable lawyers professional standard to warn the plaintiff about buying the land w/o a survey?</td>
<td>Lawyers are held to the standard of a reasonably competent lawyer. <em>Elean Acceptance Ltd</em> Unless the practice they are being asked to do is inconsistent with prudent precautions against a known risk, for example where they fail to carry out particular instructions. Like doctors less is not expected of beginners.</td>
<td>Conversations w/ clients show that clients were aware of the potential issue, and therefore the failure was on the part of the clients.</td>
<td>The court holds there is no negligence. He followed the normal competent practice of a lawyer.</td>
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**D) Emergency**

**GOOD SAMARITAN ACT**

[*RSBC 1996*] CHAPTER 172

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.

**Health Care (Consent) and Care Facility (Admission) Act**

3 The *Health Care (Consent) and Care Facility (Admission) Act* does not affect anything in this Act.

### C. Damage

- Even where a duty of care exists and the standard of care required has been breached, there can be no liability in negligence unless there has been some damage.
- Damage: some head of loss for which compensation will be awarded, may consist of several items; medical expenses, hospital bills, pain, suffering, etc.

### D. Causation

- Liability will only exist if the act caused the plaintiff’s damage (damage *flowing* from breach)
- Causation is an expression of the relationship that must be found to exist between the tortuous act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former (*Snell v Farrell*)
- This is usually established by applying the “but for” test, if loss wouldn’t have occurred but for the act of the defendant.

#### 1) But For Test

**Kauffman v Toronto Traffic Transit Commission ON CA [1959] (But for test)**

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| - The plaintiff and a friend were on an escalator in a subway station.  
- Ahead of them is a man and 2 youths.  
- The youths get in a scuffle and they fall on the man, he loses his balance and falls on the plaintiff.  
- The plaintiff is injured.  
- Plaintiff sues the subway for not having suitable handrails. | - But for the inadequate handrails would the accident have occurred? | - This sets out the “but for” test, of causation.  
- If there is damage it must be but for the breach. | - The court finds no evidence that the man or the youth tried to grab the handrail before falling.  
- Therefore there is no evidence that the handrail was a contributing factor.  
- There is no causation to say that but for a different handrail the incident would not have occurred. | - There is no causation, the “but for” test fails because the handrails weren’t a relevant factor. |

#### 2) Reverse Onus and Inference

**Snell v Farrell SCC [1990] (Eye surgery, inference approach to finding “but for” causation)**

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| - The doctor performed a cataract surgery  
- During surgery he noticed they eye was bleeding, but continued after waiting 30 minutes.  
- As a result to damage to the optical nerve the eye is blind. | - Was the damage to the eye the result of negligent actions by the doctor?  
- Should *McGhee* reverse onus be applied in this kind of case? | - *McGhee* reverse onus; where the defendant has to prove that they did not cause the damage, this was not applied.  
- Traditionally the onus is on the plaintiff to prove that the breach caused the damage.  
- Held that reverse onus would be harmful to tort law instead inference can be used.  
- Instead apply inference of causation, where if the defendant overcomes the interference then they are not guilty of negligence. | - Application of *McGhee*, reverse onus test questioned.  
- Usually the onus is on the plaintiff to prove the breach caused the damage (traditionally). Found that this type of onus shouldn’t be applied here instead inference should be used.  
- An inference of causation may be drawn by the court w/o any scientific or positive proof. | - Based on an inference analysis the court finds that there was negligence by the doctor that caused the blindness.  
- This was held to be a conservative approach. |
Cook v Lewis SCC [1951] (Two hunters shot @ same time, application of reverse onus)

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| - The defendants were hunting grouse in a field where the plaintiff was also hunting.  
- Lewis was injured by a stray shot however it was found that both defendants shot at the same time though in different directions. | - Whose shot injured Lewis, how can we know that one or the others shot was the cause? | - Reverse onus will be applied when to compensate a plaintiff it is necessary to revert the burden of proof b/c the injury could be due to different factors. | - Applies Summers v Tice where 2 wrongdoers bring about a situation where the negligence of one injured the plaintiff. It is up to each to exculpate themselves.  
- There are two breaches of the standard of care, how do we know which caused the injury?  
- We can’t prove who shot the plaintiff b/c both shot. Therefore the onus is on the shooters to show which shot did not cause the damage (reverse onus) | - It was determined that the only way to find out who the onus should be on was to put the onus on both shooters to prove which of them did not cause the damage. |

3) Loss of a Chance

Laferier v Lawson SCC [1991] (Breast tumor, failure to advise was not found to be cause of generalized cancer)

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| - The plaintiff had a tumor removed from her breast in 1971.  
- Although the tumor was found malignant the deceased wasn’t told of this nor advised of available cancer treatments.  
- In 1975 she discovered she was suffering from generalized cancer, died in 1978.  
- Before death she began an action against her doctor complaining the doctor’s failure to inform her of the cancer deprived her the chance to obtain treatment.  
- Facts indicate that even if the deceased had been informed of the earlier cancer and received treatment it wasn’t certain or probable that her cancer would have been cured. | - Whether the doctors failure to inform her of the cancer had on a balance of probabilities caused any injuries? | - To materially increase the risk of injury is an injury in itself, it is a loss of chance.  
- So to negligently deprive a person of his/her chance to avoid injury=damage.  
- The facts of a case must be examined to determine whether there was causation. | - Problem of whether there was proof of causation such that if the plaintiff had been informed was it certain that her cancer would have been avoided.  
- Did failure to advise (breach) cause generalized cancer? Or did this breach cause her to lose her chance to get treatment and this is damage?  
- Reference to Snell and the inferential approach, inference of causation raised but not met. | - Court finds insufficient proof that the failure to advise caused her death.  
- The fact that if she had received treatment she would have been cured/gone into remission was not more than a chance.  
- The damage that resulted wasn’t found to be caused by not advising. |

4) Material Contribution

- Courts have accepted that while the plaintiff may be able to recover on the basis of “material contribution to risk of injury” where that risk materializes as that injury, without showing factual “but for” contribution.
- This will be used where it’s impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury but it is established that one or more did in fact cause it.
- This is so to not allow someone to escape liability by pointing fingers at others.
- What is required is proof of material contribution to risk (rare step).
- In applying material contribution you look to instances where the courts have found material contributions and make analogies to develop new instances where it could be appropriate.
- Cases where material contribution could have been applied: Cook (reverse onus), Snell (inference of but for), Atthey (robust but for), Walker Estate (but for). Therefore it is obvious the court will prefer “but for”

Walker Estate v York Finch General Hospital SCC [2001] (HIV screening, material contribution test)

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| - The case came to court as a result of blood transfusions that gave three people AIDS and HIV.  
- The complication here is that there is a 3rd party actor is the donor, would he not have donated blood if there was a screening | - Whether the defendant’s failure to use proper blood donor screening procedures caused the death of the deceased?  
- Whether “but” | - The “but for” test doesn’t work when there are multiple independent causes that may bring about a single harm.  
- Here we use a material contribution test to assess whether the | - The plaintiff has to prove that the actions of the Canadian Red Cross Society and their lack of a screening procedure caused him to get AIDS.  
- The “but for” test doesn’t apply w/ multiple actors.  
- The burden is still on the plaintiff to prove that the | - Action is dismissed on appeal,wrong standard of liability was applied.  
- There was a discrepancy at trial about whether the judge believed the donor when he said |
### Sindell v Abbott Laboratories SC Cal [1980] (Market share of liability application)

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<td>- The US Red Cross Society did have a screening system in place.</td>
<td>- For this breach, damage would not have occurred.</td>
<td>- Defendants negligence materially contributed to the plaintiff's damage.</td>
<td>- Failure of the CRCS to screen materially contributed to Walker getting AIDS</td>
<td>- He might not have donated had he seen the US screening questions.</td>
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### Resurface v Hanke SCC [2007] (Burnt hand zambonie, exceptions for but for, when material contribution is applied)

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<td>- The plaintiff was burned when he mistakenly poured water into the gas tank of a ice-surfacing machine.</td>
<td>- But for the inadequate handrails would the accident have occurred?</td>
<td>- Material contribution should only be applied when:</td>
<td>- The Court outlines 2 instances as exceptions for the application of but for:</td>
<td>- The SCC held that the material contribution test should not have been applied b/c it should only be applied in exceptional circumstances where factors outside the plaintiff’s control makes it impossible for the plaintiff to prove that the defendant’s negligence cause the plaintiff’s injury using “but for” and the plaintiff’s injury falls within the ambit of risk created by the defendant’s breach of his duty of care owed to the plaintiff.</td>
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<td>- The defendant in this case is the manufacturer of the machine.</td>
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<td>- 1) Must be impossible for the plaintiff to prove causation using “but for” and</td>
<td>- 1) where its impossible to say which of 2 tortious sources caused the injury (Cook v Lewis)</td>
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<td>- The plaintiff alleges that there is a design flaw in that the gasoline and water tanks look similar and are placed close together, and it is therefore easy to confuse the two.</td>
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<td>- 2) must be clear that the defendant breached duty of care exposing the plaintiff to a risk and that risk then materialized.</td>
<td>- 2) where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission.</td>
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### Fairchild v Glenhaven Funeral Services HoL [2002]: It is known that there is no natural cause for the disease therefore if people are negligently exposing others to asbestos’s then that breach must have created the risk that the person would get the disease. Thusly the risk materialized in the ambit of the breach.

### 5) Market Share

**Sindell v Abbott Laboratories SC Cal [1980] (Market share of liability application)**

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### E. Duty of Care

#### 1. Duty Generally

- In the area of negligence this is the 1st question we ask, the threshold question.
- Whether or not a duty of care exists. If not then you want to stop here.

**Donoghue v Stevenson HL [1932] (Ginger beer, establishes neighbour principle. Test for when duty of care exists)**

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<td>The plaintiff consumes a ginger beer in a café. While drinking it the remains of a snail come out of the bottle. She alleges she contracts a stomach sickness as a result and sues the defendant. The defendant is the ginger beer producer.</td>
<td>Whether the manufacturer of the drink owes the consumer that they take reasonable care that the article is free from defect? (narrow) Does the manufacturer have a duty of care to the ultimate purchaser or consumer of the product (a duty not to breach the standard of care)? (general)</td>
<td>Introduces the “neighbour principle” You must take reasonable care to avoid acts or omissions, which you can reasonably foresee, would be likely to injury your neighbour. Your neighbour being someone you could see being directly affected by your actions.</td>
<td>Historically duties have been found in a random way. The court conjectures that there must be a general conception of relations that give rise to a duty of care. The categories of negligence aren’t closed the law can refer only to standards as a reasonable man would to assess whether a particular relationship gives rise to a duty of care.</td>
<td>In this case the court finds that the manufacturer owed the appellant a duty of care because it was reasonably foreseeable that purchasers would buy the product and that you wouldn’t want to cause them injury.</td>
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**Home Office v Dorset Yacht AC [1970] (Stolen yachts Borstal boys, application of Donoghue, high foreseeability)**

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<td>A group of Borstal boys are taken camping on an island. The officers are meant to be supervising them but on one evening the boys escape and steal a boat and destroy some nearby yachts. It is important to know the facts well in assessing a duty.</td>
<td>Do the supervisors owe a duty to the yacht owners? Are the supervisors responsible in negligence for the damage done by the boys? Should they have reasonably foreseen that their negligence would cause damage to yacht owners?</td>
<td>The foreseeability sets the limit to when the neighbourhood principle applies. This must be a case of high foreseeability. Look at whether it there are recognized principles apply to it such that duty has been applied before in a similar circumstance. Foreseeability is the limit for who is your neighbour</td>
<td>This would be a novel form of duty. Must apply the test from Donoghue: 1) Is this a case where the neighbourhood principle should be applied? 2) could the supervisors reasonably foreseen that their negligence would cause injury to the yacht owners? the court then had to look at the human action aspect and whether it was foreseeable and whether it was likely to happen. The court recognizes three things: 1) that a duty has never been found in this relationship, 2) that a person can’t be liable for a wrong done by someone who is of full age and capacity and 3) that public policy reasons prevent these officers from being liable. Held that what occurred was exactly what was reasonably foreseeable for why they had guards.</td>
<td>The court holds that yes the action that occurred was the very action that the officers were meant to be foreseeing and protecting against.</td>
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Anns v Merton London Borough Council

**Two Part Test:**
1. Whether, there is a relationship of proximity of neighbourhood between the wrongdoer and the person who suffered damage such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, if yes, a prima facie duty arises. (restatement of Donoghue, adds proximity)
2. If yes, whether there are any considerations, which ought to negate, reduce or limit the scope of the duty or class of persons to whom it is owed of the damages to which a breach of it may give rise. (there are residual policy considerations that must be acknowledged in determining whether this prima facie duty should not apply)

Kamloops v Neilsen (Articulation of Anns, greater clarity)
1. Is there a sufficiently close relationship b/w the parties, so that in the reasonable contemplation of the defendant carelessness on its part may cause damage to that person? If so,
2. Are there any considerations which ought to limit:
   a. The scope of the duty and
   b. The class of persons to whom it is owed, or
   c. The damages to which a breach of it may give rise?

Caparo v Dickman (a retreat from Anns, more obscure)
1. Foreseeability
2. Proximity
3. Whether it is “fair, just and reasonable” to impose a duty in the circumstances

Hill v Hamilton-Wenthworth Regional Police Service Board (Police investigation, application of Hill, what is a proximate relationship, new duty of care)

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<td>- The police suspended Hill on 10 robberies, while suspended another similar robbery occurs.</td>
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<td>- Brings a case that the police were negligent in their investigation.</td>
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<td>- Do the police owe a duty of care to the investigatee during an investigation?</td>
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<td>- Was this duty breached?</td>
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<td>- Important b/c it clears up the test from Anns.</td>
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<td>1) Does the relationship b/w the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care?</td>
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<td>2) If yes, are there any residual policy considerations, which ought to negate or limit that duty of care?</td>
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<td>- The factors in determining proximity are; expectations, representations, reliance, property/other interests. This is an umbrella of factors that would make the relationship proximate.</td>
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<td>- Adds a preliminary step; look for a precedent of this type of duty.</td>
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<td>- Proximity it a close and direct relationship, diff from foreseeability.</td>
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<td>- Apply test from Hill.</td>
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<td>- Finds the relationship is sufficiently proximate to establish a prima facie duty of care.</td>
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<td>- The courts reject the arguments by the police that a prima facie duty of care would restrict them and find no policy reasons why this shouldn’t be a duty.</td>
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<td>- The SCC accepts that there is a tort of negligent investigation (police owe a duty of care to subjects of investigations) but that duty wasn’t breached in this case (duty established articulation of the test-but no breach of the standard of care).</td>
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<td>- In this case police acted within the reasonable standard of care and upheld their duty (Victoria)</td>
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Primer on Cooper v Hobart: illustrates where courts have found analogous cases and where they haven’t. On first analysis look to see whether the court has already found a duty that is similar. If so then the law is settled, don’t do Anns first.

**Issue:** “whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized?”

Syl Apps Secure Treatment Center v BD: There is no set list of what duties exist.

**Issue:** Whether a treatment facility where a team is being treated owes a duty of care to the families of the team?

**Analysis:** Is there a relationship of foreseeable risks to the family? It is reasonable that carelessness by the substance abuse center will cause damage to the family of the person being treated? Is there a close and direct relationship? What factors should we consider?

**Conclusion:** It is found that the primary duty is owed to the child and owing a duty to the family could create a conflict of duty. This would be a branch 2 of Anns reason for limiting duties owed to families.
2. Unforeseeable Plaintiff

a. General Principle:
1. Threshold determination: is this an existing category or analogous to one?
2. Foreseeability and proximity
3. Residual policy considerations/implications (residual b/c not considered in 2)

Palsgraff v Long Island Railway Co NY CA [1928] (Railway scales, outside foreseeable realm)
Issue: Was it reasonably foreseeable that Palsgraff who was waiting to board a train in the station would be injured by the scales, which fell as a result of the guard knocking over the man holding the package of fireworks?
Rule: There is no duty owed to unforeseen plaintiffs. The ROP must be able to have reasonably foreseen the likelihood that anyone in the position of the plaintiff would be effected by events in the way that the plaintiff was, if not, a defendant in the position of the ROP would not owe that plaintiff a duty of care—they were not a foreseeable plaintiff.
Conclusion: No she is found to be outside the realm of foreseeable danger.

Hay v Young HL [1943] (Pregnant woman tragic crash, no secondary duty if unforeseeable)

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<td>The plaintiff a pregnant woman alleged that as a consequence of her witnessing the aftermath of a tragic accident involving a motorcycle. She suffered after shock, which is why her child was stillborn.</td>
<td>- Was the damage that occurred to this woman reasonably foreseeable?</td>
<td>- A secondary or derivative duty can’t be owed to someone who is not reasonably foreseeable.</td>
<td>- The court finds that no it was not reasonably foreseeable that the woman would suffer damages as a result of the accident.</td>
<td>- The appeal fails because there is no duty of care owed.</td>
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Farrugia v Great Western Railway (Passenger chasing truck, duty to anyone in foreseeable neighbourhood)

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<td>A truck was loaded so high that when passing an overhead bridge a container was knocked off and fell onto the plaintiff a former passenger who was running behind the truck attempting to get back on.</td>
<td>- Was the passenger running behind the car within the realm of foreseeability?</td>
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Issue: Was the passenger running behind the car within the realm of foreseeability?

Holding: The truck drove owed a duty to anyone in the vicinity that might be in the neighbourhood of the crucial moment. It didn’t matter that the passenger was trying to sneak back onto the truck.

b) Unborn Children

Duval v Seguin OR [1972] (Children can make negligence claims once born against negligent actors)

Facts: A mother is driving and as a result of her injury her child is born damaged.

Issue: Was the child within the realm of foreseeable plaintiffs?

Holding: Under the neighbourhood principle, the court holds an unborn child is within the foreseeable risk, so that when the child becomes a living person and suffers damages as a result of that negligent action then they have an action. This is now enshrined in Ontario legislation “No person is disentitled from recovering damages in respect of injuries for the reason only that the injuries were incurred before his or her birth.” It is reasonably foreseeable that pregnant women will be on the roads.

Dobson v Dobson SCC [1999] (Duty of a mother to unborn child, no duty of care in negligence)

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<td>The mother was in a car accident while pregnant and sustained injuries that resulted in damages in her unborn child.</td>
<td>- Whether to immunize a mother from negligence to an unborn child?</td>
<td>- There is no negligent duty of care between a mother and her unborn child, for policy reasons.</td>
<td>- The appeal is made that for the purposes of tort law there is no available compensation here.</td>
<td>- Majority holding is that no this duty shouldn’t be recognized for public policy reasons, it would be intrusive to mothers and affect their bodily control.</td>
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In dissent: this differs from Duval where a child can sue 3rd parties for damage to them as a fetus.
Applying 1st branch of Kamloops a duty would be found by the mother to the child.
The 2nd stage of Ann is where the court finds the duty fails.

- There is a common law duty applied to rescuers; such that once a rescue is undertaken there is a duty to undertake it non-negligently (this standard isn’t high). This is also an affirmative duty.

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- Applying 1st branch of Kamloops a duty would be found by the mother to the child.
- The 2nd stage of Ann is where the court finds the duty fails.
- The creation of danger, invites rescue, so I should expect if I create a dangerous situation that might cause someone to come to the ‘rescue’ then that rescuer is in the scope of the reasonably foreseeable plaintiffs.
- There is a principled basis for finding independent duty, “danger invites rescue ... the wrong that imperils life is a wrong to the imperilled victim; it’s a wrong to his rescuer” (Wagner v International Railway Co)(Seymour v Winnipeg Electric Ry)(Moddejonge v Huron County)
- Videan v British Transport Commission, “if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others.”

**Horsley v McLaren (Ogopogo, rescuer standard of care to 2nd rescuers)**

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| - There is a boating mishap and Matthews who was on deck falls overboard. No one is at fault.  
- By the time it is noticed and they get back Horsley jumps into the water to attempt a rescue.  
- However a few minutes later he appears to be lifeless.  
- Then Mrs Jones jumps in but she can’t help and gets back in the boat.  
- Both Matthews and Horsley die. | - What duty of care did McLaren owe to Horsley the 2nd rescuer?  
- On what basis is this duty found? | - The rule from Videan is that the duty arises from a specific connection between the defendant and the creation of a perilous situation.  
- If a rescuer performs the rescue negligently so as to aggravate the situation inviting a 2nd rescuer then rescuer #1 owes a duty to rescuer #2 if it can be shown that the first rescue was performed negligently and it caused the 2nd rescuer to act. | - The court analyzes McLaren’s rescue and whether it was negligent and created a situation of peril that invited Horsley to respond.  
- If a rescuer rescues negligently they can be held liable.  
- Court looks @ McLaren’s rescue and finds that he did things wrong but acceptable in the panicked circumstances.  
- The court must find the 2nd rescuer induced. | - Court finds no duty was owed to Matthews, no negligent act.  
- The rescue wasn’t performed negligently so as to have caused Horsely to have to get involved.  
Dissent: Argued MacLaren was under an affirmative duty to rescue he carried this out negligently and this induced Horsely to rescue. |

**Rescuer’s of Property (outside of special circumstances no duty found to property in rescues)**

- Question of whether the duty to the rescuer extends to the rescuer’s property? Such that if A’s breach creates a situation of peril that causes damages to B’s property should they be owed damages?
- Held that liability will only be held when the situation is an emergency that could potentially also cause damage to people outside the damage to the property.
- Hutterly v Imperial Oil, a car is on fire, the emergency nature is found significant.
- Connell v Prescott, escaping horses, the plaintiffs were faced with an emergency that reasonably required them to take steps to protect their property. Emergency allowed extension of duty to horses.
- Sacconne v Fandrakis, to acknowledge a duty of care by a tortfeasor in order to give a remedy to people to protect their economic interests could in cases such as this be seen as an unwarranted extension of the law.

**Professional Rescuer:**

**Ogwo v Taylor:** firemen have a duty to use their best endeavors, and obviously regardless of this there will be unavoidable risks of injury. There is no reason to hold them at a disadvantage by holding them to a different duty of care, however they may be held to a different standard of care because of their knowledge.

- In contrast Linden argues that they are held to a higher standard because of policy reasons, to discourage carelessness.
- Have to think about how their higher degree of knowledge changes their duty.
- They will only be held to a higher standard of care not a higher standard of duty, under the 2nd branch of Anns.
- Good Samaritan legislation is intended to make things easier for rescuers in that there can be no negligence unless there is gross negligence, however this isn’t much different than the common law standard.

3. Failure to Act

a) Affirmative Duties

- An affirmative duty will arise in situations like w/a lifeguard on a beach.
- An affirmative duty is a duty to do something, a positive duty.
- When there is a liability for the failure to do something this could also be understood as a duty to do something (affirmative).
- Some relationships that support an affirmative duty are; those of economic benefit, control of supervision, when there has is a creator of a dangerous situation, reliance relationships, statutory duties, or when certain factors come together.

**Jordan House v Menow and Honsberger SCC [1973] (Drunk hotel, novel affirmative duties require sufficient proximity (nexus))**

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### Crocker v Sundance Northwest Resorts Ltd (Ski hill tubing, affirmative duty of care found)

**Facts**
- Crocker was drunk.
- He was allowed by ski hill staff who knew he was drunk to participate in the contest.
- He fell off his tube and broke his neck.
- Was it a duty of care to intoxicated patrons?
- Did the ski hill owe Crocker a duty of care?
- Look for analogous cases to where courts found a positive duty owed to intoxicated persons, *Jordan House*.
- Applied the *Jordan House* principles such that they looked for whether there was vicarious liability in the relationship between the two parties. And how this relationship could be affirmative.
- They held that the ski hill created the situation and they did not act as a reasonable person in light of the gravity of danger and possibility.

**Analysis**
- Applied the *Anns* test; 1) foreseeability, 2) proximity (nexus) – look to cases where proximity has been established, find themes.
- Themes that have been identified are: 1) Commercial relationships where someone has been intentionally attracted and invited to a risk that has been created or is controlled, 2) paternalistic relationships where there is a special vulnerability (supervision, *Dziwenka, Borstal boys*), 3) where defendants exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large, (*Dunn v Dominion Railway* as a similar case where an affirmative duty was found (train passenger kicked off)).

**Conclusion**
- The court held that the ski hill did owe Crocker an affirmative duty of care.
- The dissent disagrees w/ reasons and argues that they breached not by over serving him.

### Steward v Pettie: Held that commercial vendors of alcohol of a general duty of care to persons who can be expected to use the highways. Though in this case there was no negligence by the defendant and therefore no causation was established. This was because the server thought that the sober person at the table was the designated driver.

### Childs v Desormeaux SCC [2006] (no affirmative duty owed by a social host, sets out the categories where an affirmative duty is found)

**Facts**
- Upon leaving a new years party D was impaired and drove his vehicle into oncoming traffic injuring Childs.
- The party itself was BYOB and only minimal alcohol was served.
- D was known to be a drinker but neither of the social hosts monitored his drinking or was aware of his level of intoxication.

**Issue**
- Is this a novel or analogous duty of care?
- Whether social hosts owe a duty of care to third parties who are injured by intoxicated guests?
- Whether social hosts should be held to the same standard as commercial social hosts?

**Rule**
- In imposing duties regarding human actors the threshold is high because they are unpredictable, and self autonomy.
- Apply the *Anns* test; 1) foreseeability, 2) proximity (nexus) – look to cases where proximity has been established, find themes.
- The common theme is the creation/control of risk and concern for autonomy, and reasonable reliance.

**Analysis**
- Court finds it is a novel duty of care because it is not the same as a bar because there is no economic benefit motivation.
- Commercial hosts are held to having a special ability to monitor consumption, special knowledge about intoxication. There are also statutes regarding this.
- The injury to the 3rd party wasn’t reasonably foreseeable b/c there was no evidence they knew he was drunk, so no *prima facie* duty.
- There is no foreseeability.
- A positive duty may be found if foreseeability of harm is present and if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity.

**Conclusion**
- Held that under these circumstances and conditions a social host won’t owe a duty of care to a third party who is injured.