

CHAPTER 6 NEGLIGENCE

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TEACHING APPROACH

The previous three chapters provided a general overview of tort law and a brief introduction to several specific torts. This chapter contains a much more detailed discussion of the most significant tort: negligence. In terms of the organization and presentation of the materials, it is important to bear in mind two considerations.

Discrete Components and Holistic Analysis

First, there is a persistent tension as to the manner in which the cause of action in negligence is analyzed. It is common to discuss negligence in terms of four discrete stages: (i) duty of care, (ii) standard of care, (iii) causation of harm, including remoteness, and (iv) defences. From a pedagogical perspective, there is much to recommend that approach, which is generally adopted in the text. Negligence as a whole is much more accessible and much more easily understood if it is addressed step-by-step. While the concept of a duty of care often still seems rather obscure, the constituent elements of negligence are, for the most part, comprehensible. Even the but-for test, which occasionally creates initial difficulties because of its awkward phrasing, can quite easily be isolated and explained.

At the same time, however, it is important for students to appreciate that, in practice, courts often adopt a more holistic approach. Judges are sometimes candid in that regard.

Lord Denning, for instance, once said, in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 at 37 (CA):

“The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: “There is no duty.” In others I say: “The damage was too remote.” So much so that I think that the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable or not.”

When deciding a case in negligence, judges frequently reach an intuitive conclusion and then manipulate the various elements of the cause of action accordingly. There is nothing sinister about that approach. The open-ended nature of the claim all but demands it. The concept of reasonable foreseeability, which is used in conjunction with the duty of care, the standard of care, and remoteness of damage, is inherently indeterminate. The concept of “the reasonable person” is, in many respects, an empty vessel capable of containing many plausible concoctions. Likewise, the explicit reference to policy considerations in connection with the duty of care requires the court to assess the societal impact of admitting or rejecting the possibility of liability.

The competing approaches to the action in negligence can be exploited for teaching purposes. If presented simply with the discrete stages of inquiry, students often experience two reactions. They initially are pleased to receive seemingly concrete tools with which to resolve specific cases. Quite soon, however, they realize the indeterminate nature of the action in negligence, especially the concept of reasonable foreseeability. At that point, frustration may set in. Students may begin to question their understanding of the material because they cannot explain *precisely* how a judge decided a particular case. It is possible to assuage much of that unease, however, by stressing the fact that the action in negligence is, to a considerable degree, society’s mechanism for striking a balance between the various competing interests. The plaintiff wants to be protected from harm and to receive compensation for injuries. The defendant wants freedom of choice and predictability in risk management. And society wants to discourage some risky activities (*eg* the careless manufacture of defective products) while supporting others (*eg* the ability of an ambulance driver to occasionally run a red light). Inevitably, individual judges will be required to exercise individual judgment. They almost certainly will express themselves in terms of the four stages of the action in negligence, and they quite likely will take guidance from those factors. But at the end of the day, in any interesting case, the judge simply has to make a decision. A student’s discomfort with a particular decision therefore may reflect not a failure to understand the basic rules, but rather simply a difference of opinion. The student would have struck a different balance and would have reached a different conclusion.

It is, however, important to place a caveat on the preceding discussion. Some claims in negligence are uncontroversial. Often, there is a “correct” answer, which any judge, properly informed, would reach. Judges do not enjoy an entirely unfettered discretion under the action in negligence to impose or withhold liability as they wish. A drunken

vandal who throws a brick through the front window of a home *will* be held liable. In other cases, the governing principles are clearly established, but the judge does have some leeway in their application. Finally, as usual, the cases that appear in the text tend to fall into a third category. *Donoghue v Stevenson* is a landmark decision precisely because it broke new ground. Lord Atkin did not merely exercise his intuition in a new way. Much more significantly, he formulated a new framework within which other judges must exercise their discretion. The same idea remains true today in Canadian law. The element of policy that appears expressly in connection with the duty of care is not exercised on an *ad hoc* basis. For the most part, it is used to determine *categories* of cases in which a duty of care may or may not be recognized. Once that determination had been made, subsequent courts must follow suit. The text contains several recent examples, including *Dobson v Dobson* in Ethical Perspective 6.1 and *Hercules Management Ltd v Ernst & Young* in Case Brief 6.2.

Professional Negligence and Product Liability

The second general point to bear in mind from a teaching perspective concerns the scope of the action in negligence. Areas like professional negligence and product liability are sometimes treated as though they were governed by independent torts. In fact, in Canadian law, both of those topics are subsumed within the general cause of action in negligence.

That fact is pedagogically important. It demonstrates the tremendous breadth of negligence. That cause of action is used to resolve a wide variety of claims, ranging from pure economic losses caused by the careless preparation of financial statements, to collapsing buildings caused by a municipality's failure to enforce its own construction regulations, to scalding burns caused by the careless overheating of coffee, to fatal injuries caused by the careless design of automobiles.

The fact that professional negligence, product liability, and so much more are all addressed by the action in negligence also demonstrates the remarkable flexibility of that claim. As the text explains, for instance, there is no tort of professional negligence *per se*. Nevertheless, the constituent elements of the generalized action in negligence are malleable enough to sensitively resolve disputes within that narrow topic. Perhaps most noticeably, the standard of care requires the defendant to act as the reasonable person would act in similar circumstances. Although the reasonable layperson is not expected to have a high degree of legal knowledge, the situation obviously is different for a reasonable lawyer.

ADDITIONAL TEACHING SUGGESTIONS

Duty of Care and the Careless Infliction of Psychiatric Injury

The text explained that the courts are reluctant to recognize a duty of care with respect to negligent statements that give rise to pure economic losses. The primary reason is the fear of “opening the floodgates to litigation.” The same concern similarly inhibits the recognition of a duty of care in other situations. An important illustration concerns the careless infliction of psychiatric injury, or “nervous shock” as it is sometimes called. Although that situation could not be addressed in the text, it could serve as a useful topic

for discussion. Students could be asked for their responses to the exercises that appear below. In doing so, they could test their understanding of the law of negligence, and in particular, the extent to which policy considerations limit liability.

Historically, at least, judges were sceptical of “nervous shock” claims partially because injuries to the mind cannot be verified in the same way as injuries to the body, and therefore may be easier to fake. An x-ray can prove that a leg really is broken, but it cannot prove that a person really has suffered a nervous breakdown. Furthermore, whereas a single careless act can usually inflict only a limited amount of physical damage, it can psychologically affect an almost infinite number of people. The courts, therefore, have developed a number of rather artificial rules in order to limit the scope of liability. Some of those rules are examined in the following hypothetical exercise.

Duty of Care and Psychological Injury – The General Rules

Question: Game seven of the Stanley Cup final between the Toronto Maple Leafs and the Edmonton Oilers was broadcast to a Canadian television audience of approximately 12 000 000 people. In addition, the venue for the game was capable of seating 18 000 fans. Unfortunately, because of an administrative error, almost three times as many tickets had been sold and distributed. Consequently, when the pre-game broadcast began, television viewers learned that security had broken down at the arena and that chaos was erupting as ticket holders were scrambling to secure seats. As the broadcast continued, the scene grew worse – many people were trampled under foot or crushed against barriers. All the while, the television cameras continued to roll. When calm finally was restored, the death toll stood at 126. The disaster resulted in a very large number of actions being brought against the game’s organizers by people who claimed to have suffered psychological injuries as a result of the incident. Although the law on point remains unsettled in many respects, it is possible to suggest how the courts likely would respond to some of the cases.

1. Evan and Joanna attended the game together and, while neither was actually physically hurt, both were at risk of being trampled or crushed. Joanna understandably becomes temporarily upset whenever the riot is mentioned. Evan, in contrast, has developed a permanent psychological disorder that prevents him from working.

The courts are willing to recognize a duty of care in favour of a person who was physically endangered. However, they will not recognize a duty of care unless a person suffered “nervous shock” – that is, severe trauma that results in a physical ailment or an established psychological disorder, such as clinical depression. A duty will not be recognized if a person merely suffered sorrow or grief. Consequently, a duty of care would be owed to Evan, but not to Joanna: *Dulieu v White & Sons* [1901] 2 KB 669 (DC).

2. Myriam, Rene, and Fenna all suffered forms of nervous shock as a result of separately watching the events on television. Although Myriam did not know anyone in attendance at the game, she was greatly affected by the sight of the carnage. Rene, in contrast, knew that a work colleague had attended the game. Likewise, Fenna knew that her son held a ticket for the game.

If the plaintiff was not actually involved in a tragic event, the courts often refuse to impose a duty of care unless that person at least had a close relationship with someone who was directly involved in the events. Consequently, Myriam's action probably will be dismissed on the ground that she did not know anyone attending the game. Rene's action will probably fail as well, assuming that he simply shared a professional relationship with his co-worker. Fenna's claim is more likely to succeed because her son was imperilled by the riot. However, the court nevertheless may refuse to recognize a duty of care in favour of someone who merely witnessed a tragedy on television, rather than in person: *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057 (HL).

3. Neither Gunther nor Maria attended the game or watched it on television. Gunther, however, rushed to the arena immediately after being told of the riot. When he arrived, he saw his daughter's lifeless body being pulled from beneath a pile of rubble and he suffered nervous shock. Three days after the riot, Maria was called to the morgue to identify her son, who had been crushed to death. When she learned what had happened, she suffered severe nervous shock.

While Gunther's claim may succeed, Maria's may fail. The courts generally refuse to extend a duty of care to a person who neither saw the tragic event nor attended its immediate aftermath: *Rhodes v CNR* (1989) 75 DLR (4th) 248 (BC CA).

Students could be asked if those various rules are fair. They could be asked if the scope of liability for nervous shock should be expanded. If they answer in the affirmative, they could be asked if the courts will be flooded with litigation.

Duty of Care and Psychological Injury – Additional Exercise

Question: The Western Trunk Railway Co (WTR) operates a passenger train on tracks that it owns in Alberta and British Columbia. As a result of its careless failure to inspect and maintain its equipment, one of its trains left the tracks at a high rate of speed and crashed into the side of a mountain. More than 100 passengers were killed or severely injured. One of those passengers was a young man named Pierre. An acquaintance of his in New Brunswick, Manon, became very upset several weeks later when she learned of the tragedy from a mutual friend. Indeed, although

she had planned to leave on vacation to Bermuda the next day, she was too distraught to go. She consequently wasted \$5000 on a trip that she never took. She has sued WTR in negligence, claiming that it is responsible for that expense. Will she succeed?

Answer: Manon's claim will fail. In essence, she is claiming compensation for nervous shock. Because of the fear of opening the floodgates to litigation, and because of the fear of false claims, the courts rely on policy considerations to carefully restrict the scope of the duty of care in such circumstances. A number of those restrictions will preclude Manon's claim.

- It appears that she may have suffered mere grief or sorrow, rather than nervous shock – there is no evidence that she suffered a physical condition or a recognized psychological disorder as a result of learning of the accident.
- Manon and Pierre were not close relations, nor does it appear that they shared a special relationship – the evidence merely suggests at most that they were casual friends.
- Manon did not see the accident, nor did she attend the aftermath – she was on the other side of the country when she was told of the tragedy.
- Manon did not learn of the accident until several weeks after it occurred. Consequently, although it may be foreseeable that a person such as Manon would be upset by news of Pierre's carelessly caused death, policy considerations will prevent her from recovering compensation in negligence.

Breach of Standard of Care and Compliance with Approved Practice

The text explained that the defendant *generally will not* be held to have breached the standard of care if the alleged act of carelessness complied with an approved professional practice. If the alleged carelessness pertained to a complex or technical matter that is beyond the ken of the average judge or juror, the proposition can be stated even more forcefully: the defendant *cannot* be held to be in breach. That is the effect of the Supreme Court of Canada's decision in *ter Neuzen v Korn*, which is discussed below in a Case Brief.

It is important for students to realize, however, that the stronger rule does not apply if the defendant's alleged carelessness pertained to a matter that can be understood and evaluated by a layperson. That point is usefully illustrated by the Supreme Court of Canada's decision in *Anderson v Chasney* [1950] 4 DLR 223. The defendant, a surgeon, removed a child's tonsils. After the surgery, a nurse suggested that some of the sponges that were used during the procedure may not have been removed. The doctor re-examined the child but found nothing. The child nevertheless later died when he choked on a sponge. The child's estate sued in negligence, arguing that the surgeon should have either counted the number of sponges that were employed during the surgery or used sponges that had tapes attached. In response, the defendant argued that he had acted in accordance

with the standard procedure at his hospital, which did not involve counting sponges or using sponges with tapes attached. The Supreme Court of Canada held that the doctor was carelessly responsible for the child's death. Although the defendant had acted in accordance with customary practice, that practice itself was careless. The court was able to reach that conclusion because the issue did not involve a complex or technical matter. Any reasonable person, regardless of medical training, would have recognized that the defendant's approach was unnecessarily risky.

Remoteness of Damage

Assuming that a claim in negligence is analyzed sequentially in terms of the three-stage cause of action, the final item for proof by the plaintiff concerns remoteness. That topic may strike students as somewhat curious. To reach that point, the court must already be satisfied that: (i) the defendant owed a duty of care to the plaintiff, (ii) breached the standard of care, and (iii) thereby caused the plaintiff to suffer a loss. Some students might believe that liability therefore should be imposed as a matter of right. The concept of remoteness nevertheless serves an important function. Accepting that the defendant carelessly caused the plaintiff to suffer a loss *in fact*, the question remains whether or not the defendant should be held causally responsible *in law*. And the answer to that question requires a sensitive balancing of the parties' competing interests: the plaintiff's desire to receive compensation for a carelessly inflicted loss and the defendant's desire to avoid being unfairly burdened with liability.

By way of introduction to the issue, students might be referred to Benjamin Franklin's statement from *Poor Richard's Almanac* (1757).

For the want of a nail the shoe was lost,
For the want of a shoe the horse was lost,
For the want of a horse the rider was lost,
For the want of a rider the battle was lost,
For the want of a battle the kingdom was lost,
And all for the want of a horseshoe nail.

Students could be asked to place themselves in the position of a person who was charged with the responsibility of shoeing a horse, but who carelessly failed to secure that shoe in place with a nail. In Franklin's statement, there is a causal link, in fact, between the simple act of carelessness and the loss of the kingdom. It seems inconceivable, however, that the negligent farrier could be held fully liable for that loss. Regardless of duty, breach, and factual causation, it is necessary to have some means of protecting the defendant from excessive liability.

As explained in the text, Canadian courts use the flexible concept of *reasonable foreseeability* to resolve issues of remoteness. The defendant is liable for the plaintiff's loss only if it was reasonably foreseeable that such a loss might be brought about through carelessness. As long as the type of harm is reasonably foreseeable, the precise sequence of events leading up to its creation need not be. Moreover, under the thin skull rule, the defendant is liable for *all* of the plaintiff's loss, even if the plaintiff was unusually

susceptible to harm, as long as it was reasonably foreseeable that a normal person would have suffered *some* loss.

The topic might, however, be opened up for discussion. Students could be asked, as a matter of policy, whether some other test should be used to determine the issue of legal causation. Should the defendant be better protected? Should the plaintiff be entitled to recover damages more easily?

In that regard, it might be pointed out that the common law traditionally used a test of *directness*, rather than a test of reasonable foreseeability. The defendant was held liable for any loss that was a direct result of its carelessness. In the leading case of *Re Polemis and Furness Withy & Co Ltd* [1921] 3 KB 560, the defendant carelessly dropped a plank into the hold of a ship. When the plank struck the hold, it caused a spark. That spark ignited some gas that had leaked into the hold. The resulting fire destroyed the entire ship. The defendant was held fully liable because the fire was a direct result of the careless act of dropping the plank. The result does not seem too far removed from Benjamin Franklin’s story of the negligent farrier.

The test of directness eventually became heavily criticized for imposing an intolerable burden upon defendants. The decision in *Polemis* may have been defensible in 1921 because, at that time, the courts recognized a duty of care in very limited circumstances. The possibility of liability therefore was carefully limited at the beginning of the negligence analysis. That limitation was lost, however, when the House of Lords recognized a generalized duty of care in *Donoghue v Stevenson*. It therefore became necessary to limit liability at the end of the negligence analysis through a more stringent test of remoteness.

The solution to that problem was provided by *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388 (PC). The defendant spilled fuel oil into Sydney Harbour. The plaintiff was repairing its ship nearby. Sparks from the plaintiff’s welder ignited a rag that was soaked with the oil that the defendant had spilled into the water. The fire substantially damaged the plaintiff’s ship. The defendant’s carelessness clearly was a factual cause of the plaintiff’s loss. The question for the court, however, was whether the carelessness and the loss were too remote such that the defendant should not be held legally responsible. The Privy Council decided that the issue of remoteness should be decided on the basis of a “reasonable person” test. Liability would arise if, but only if, a reasonable person would have realized that the defendant’s carelessness could result in the plaintiff’s loss. The Court also held that a loss may be considered to be reasonably foreseeable even if it was not likely or probable to occur. It is sufficient if the possibility of loss was not far-fetched. On the facts, however, the Court denied liability. The evidence indicated that the fire was not reasonably foreseeable.

Interestingly, precisely the same events gave rise to another case in the Privy Council: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd, The Wagon Mound (No 2)*. The same defendant was sued by another plaintiff, whose ship was also damaged in the

fire. In that case, however, liability was imposed. The difference between the decisions turned on the evidence. The evidence in *Wagon Mound (No 1)* indicated that the possibility of a fire was not reasonably foreseeable. The evidence in *Wagon Mound (No 2)*, in contrast, indicated that there *was* a possibility of fire “in very exceptional circumstances.” That was enough to justify liability. The difference between the two *Wagon Mound* cases illustrates the importance of good evidence. It also illustrates the difference between actual fact and legal fact. The actual facts were identical in both cases. There was, however, a significant difference in the legal facts as found by the judges.

Voluntary Assumption of Risk

As explained in the text, Canadian courts have greatly limited the scope of the concept of voluntary assumption of risk, largely because of the potential unfairness of a complete defence. (A complete defence is one which precludes the plaintiff from recovering *any* damages, regardless of the defendant’s wrongdoing. It is to be contrasted with the statutory defence of contributory negligence, which allows for the apportionment of responsibility between the parties.) That law’s general attitude toward the *volenti* defence is illustrated in the text by Case Brief 6.5, which examines the Supreme Court of Canada’s decision in *Crocker v Sundance Northwest Resorts Ltd.* Because the result in *Crocker* is, in some respects, counterintuitive and unsympathetic, students might be inclined to believe that voluntary assumption of risk virtually never applies. That is not true.

A nice counterpoint is provided by the Supreme Court of Canada’s decision in *Dyck v Manitoba Snowmobile Association Inc* (1985) 18 DLR (4th) 635. The defendant organized a snowmobile race. Before being permitted to compete, the plaintiff was required to read and sign a contract in which he promised not to bring an action in negligence if he was injured as a result of carelessness by the defendant or its employees. During the race, one of the defendant’s employees ran on to the course, causing the plaintiff to swerve into a wall. The plaintiff subsequently claimed compensation for the injuries that he sustained. The Supreme Court of Canada enforced the terms of the parties’ contract. It held that the plaintiff voluntarily had assumed both the physical and the legal risk of injury. His claim therefore was rejected.

DISCUSSION BOXES

Ethical Perspective 6.1

Duty of Care

Ethical Perspective 6.1 is designed to facilitate a certain amount of heated, but respectful, discussion among students. What makes this area of law ripe for debate is the fact that a finding in favour of either party’s interests necessarily denies the rights of the other. Students should be encouraged to consider the policy reasons for and against imposing a duty of care on a pregnant woman with respect to her fetus. The class should also be reminded to consider the dual functions of tort law: compensation and deterrence.

In preparation for the exercise, students should know the decision in *Dobson* was consistent with a general trend in Canadian law toward minimizing the legal duties that

are imposed on a pregnant woman. In *R v Morgentaler* (1988) 44 DLR (4th) 385 (SCC), the Supreme Court of Canada decided that a Canadian woman is free to have an abortion any time between conception and birth. And in *Winnipeg Child and Family Services v RDG* (1997) 152 DLR (4th) 193 (SCC), it was held that a woman cannot be restrained by injunction during pregnancy if she engages in activities that could potentially injure her fetus.

The situation supports a variety of competing arguments. They can be addressed in pairs.

- *Freedom of action* On the one hand, the imposition of a duty of care on a pregnant woman would arguably result in extensive and unacceptable intrusion into the bodily integrity, privacy and autonomy rights of women. Since the mother and fetus are physically one, virtually every aspect of her behaviour could affect the fetus. On the other hand, liability would only attach to careless acts. That is to say, the mother's autonomy would be limited only in some, not all, circumstances. Indeed, pregnant women, like everyone else, owe a duty of care to third parties. If a pregnant woman already owes a duty of care to a third party and therefore is precluded from engaging in certain forms of behaviour (*eg* careless driving), she has relatively little basis for saying that her freedom of action would be restricted by owing a duty to her fetus as well.
- *Effects on the family unit* On the one hand, litigation could have detrimental consequences for the relationships between and amongst mother, child, and other family members. On the other hand, the denial of liability may traumatize the family even more. Without compensation, the family will have to worry about the injured child's physical, emotional, and financial security. And it may be unjustifiable, in any event, that the child should have to suffer a non-compensable loss for the sake of family harmony.
- *Insurance* On the one hand, the existence of insurance is not an appropriate basis for the determination of tort liability between litigants. In other words, tort liability cannot be predicated on the financial means of the defendant. That factor, of course, works both ways. The fact that the defendant has no way of compensating the plaintiff is not a good reason to deny a duty of care. If liability was automatically imposed on the basis that the defendant held an insurance policy, individuals would be discouraged from taking out insurance and insurance companies would be deterred from offering liability coverage. On the other hand, in light of the compensatory function of tort law, it may be justifiable to use insurance in order to compensate the injured victim of an accident. That is particularly the case in the automobile context, where insurance coverage is required.

Business Decision 6.1

Reasonable Foreseeability and Risk Management

1. If the courier had neither actual nor constructive knowledge of Mercury's losses, it would not be fair to hold it liable. The reason for that is twofold. First, the defendant cannot sensibly take precautions to prevent an injury that is unforeseeable and unpredictable. And second, the defendant has no way of knowing how to arrange liability insurance for an unforeseeable injury.

It is worth emphasizing the fact that the reasonable foreseeability is an objective test. The plaintiff does not have to prove that the defendant actually knew that its activities might injure the plaintiff. It is enough to prove that the defendant should have known that its activities might injure the plaintiff. Put another way, it is enough if a reasonable person in the defendant's position would have recognized that possibility.

2. This illustrates two things in particular. First, it shows the frequent interface between different areas of law. In this situation, students should notice the close relationship between tort and contract. If the courier had acquired knowledge of the extent of the risk at the outset, it probably would have bargained for different rights and obligations under its contract with Hermes.

Second, it shows the importance of risk management from a financial perspective. A business with foresight into the nature of the risks that may occur can more adequately prepare for liability. The business may do so, for instance by increasing the price for its services or by acquiring greater insurance coverage.

Ethical Perspective 6.2

Tobacco Litigation

1. There are no “correct” answers to most of these questions. The goal, rather, is to encourage students to reflect on the ethical perspectives inherent in tobacco litigation — especially the need to balance the desire to award compensation against a company that profitably manufactured a harmful product *and* the desire to hold consumers responsible for their own individual choices. For each student, that balance will reflect personal philosophy as much as legal analysis.

It may be useful to alert students to the fact that even as Canadian tobacco litigation continues to make progress, it is unlikely to have as much impact as the American lawsuits. There are important differences between the two legal systems. The constant factor is that tobacco litigation is notoriously complex and hence expensive. Those obstacles are overcome in the United States largely because of the general acceptance of contingency fees and the prospect of enormous awards of punitive damages. As discussed in Chapter 2, the situation in Canada is significantly different. Although contingency fees have become accepted, they remain relatively uncommon. Moreover, the Supreme Court of Canada has kept a fairly tight lid on punitive damages. Consequently, there is less incentive for Canadian lawyers to take on such cases. Unlike their American counterparts, they do not have the hope of collecting astronomical awards in successful cases, thereby off-setting the sunk costs in unsuccessful cases.

2. Tobacco litigation has been occurring in the United States since the 1950s. The early claims failed for two reasons. First, judges and juries refused to accept medical evidence linking smoking to disease. Second, even after it was possible to establish that causal connection, judges and juries held that smokers could not sue for risks to which they knowingly exposed themselves. Up until 1996, tobacco companies were protected by relatively general warnings and by the fact that the public was generally aware of the dangers of smoking.

It is, however, extremely doubtful that the defence of voluntary assumption of risk would succeed in a Canadian court today. The crucial fact is that *volenti* is a complete defence — if the court agreed with the defendant’s argument, then the plaintiff would be denied any recovery. For that reason, Canadian courts have confined the defence of voluntary assumption of risk to instances in which the plaintiff clearly chose to assume both the physical risk *and* the legal risk of injury. There is no evidence that Carey did so.

The defence of contributory negligence is different insofar as it operates as a partial defence. It allows the court to apportion responsibility between the parties. A judge might, for instance, hold the defendant company liable in negligence, but reduce Carey’s damages by (say) 25 per cent to reflect the fact that he chose to smoke despite knowing the health risks.

3. Carey would likely allege that: (i) the defendant’s products were harmful by design, and (ii) that the defendant failed to issue adequate warnings.

Interestingly, as to the first allegation, it does not appear that it is possible to manufacture a “safe” cigarette. Tobacco inherently contains chemicals that are, *inter alia*, carcinogenic. Consequently, to the extent that that argument succeeds, the defendant company has a simple choice: stop producing cigarettes *or* sell cigarettes and pay damages to those people who eventually are injured.

The second allegation is perhaps more complicated. Carey began smoking thirty years ago. At that time, cigarettes were known to be harmful, but they did not carry the same warnings that are prevalent today. Moreover, Carey would be able to argue that by the time he was sufficiently warned, he had become addicted and consequently could not stop smoking. It might be interesting to ask students whether a court should ever find in favour of a person who starts smoking today — in the face of explicit package warnings. Is it legitimate to say that, despite such warnings, people are sufficiently “pressured” into smoking by social forces (including those emanating from the tobacco companies) and that there really is no “choice” at all?

4. This question requires students to re-assess their positions in light of the fact that, to some extent at least, *someone* will have to pay for Carey’s medical expenses. Is it fair to use tort law to place that financial burden on the cigarette companies? Though those defendants may seem unsympathetic, it must be remembered that the government already collects substantial revenue on each cigarette sold. It has even been suggested that that “sin tax” generates more in revenue than the government spends on health care for smoking-related illnesses. In the circumstances, it is fair to require the tobacco industry to pay “again”?

You Be the Judge 6.1

The But-For Test

1. The causation issue can be resolved by asking the following question: but-for the doctor’s carelessness, would the man have later died of arsenic poisoning? If the evidence indicates that the man would have lived if he had received proper diagnosis and treatment, that question can be answered in the negative. Consequently, the doctor may be held liable.

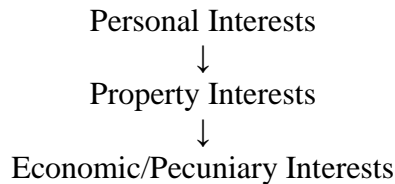
2. The question that needs to be asked for this scenario is the same: but-for the doctor’s carelessness, would the man have later died of arsenic poisoning? If the evidence

indicates that the poisoning was so serious that the man could not have been saved even if he had been properly diagnosed, the question can be answered in the affirmative. Consequently, the man would still have died and the doctor cannot be held liable.

Business Decision 6.2

Remoteness and Thin Wallets

These questions allow students to examine, in greater detail, the reasons why economic interests traditionally have not been assigned the same importance as personal and property interests. The following diagram illustrates the hierarchy of interests that the courts seek to protect:



Students should be encouraged to give reasons for that hierarchy. Personal interests (such as health and bodily integrity) take precedence over economic interests for the simple reason that it is almost always possible for the plaintiff to get more money. But if the plaintiff is personally injured – say, by losing a limb – that loss is irreplaceable. It is less obvious why property interests take precedence over economic interests, but it is probably because of the way in which property interests are acquired. Generally speaking, a certain amount of time and effort goes into the acquisition of property. If that property is somehow violated, the breach affects the plaintiff in a more personal way. Furthermore, while money is always fungible, many other types of property are not. The law traditionally considered every parcel of land and some instances of personal property to be unique. That proposition remains largely true today, even though the principle was recently modified by the Supreme Court of Canada in *Semelhago v Paramadevan* (1996) 136 DLR (4th) 1. In that case, the Court held that specific performance was no longer automatically available to a buyer of land. On the contrary, the buyer must first show that the land was unique and that monetary damages were an inadequate remedy. (*Semelhago v Paramadevan* is discussed in Chapter 12 and it is the subject of *Case Brief* 12.1.)

Students should also consider several other points about economic losses.

- Economic losses resulting from personal injury or property damage are different from pure economic losses. The courts have always allowed recovery for economic losses stemming from personal injury or property damage. For instance, if a person is injured and can no longer work for a living, that person is entitled to damages for loss of future income. Similarly, if income-earning property is damaged, the plaintiff is entitled to compensation for the income lost while the property was out of service. Both of those losses are economic. However, they differ from pure economic losses insofar as they flow from the original injury.
- There is a fear that recognizing pure economic interests may open the floodgates of litigation. With personal injury or property damage, losses are usually confined to a limited number of people. For pure economic losses, however, there is a

greater risk of “liability in an indeterminate amount for an indeterminate time to an indeterminate class”: *Ultramares Corp v Touche* (1931) 255 NY 170 (CA) *per* Cardozo JA. Students will recall seeing that notion expressed earlier in this chapter with respect to negligent statements.

- For the preceding reasons, liability for pure economic losses is often premised on intentional wrongdoing, rather than negligence. Historically, the courts were far more willing to impose liability if the defendant’s behaviour was intentional, rather than merely careless. Students will recall that the defendant can be held liable under the tort of deceit if it intentionally misleads the plaintiff. Similarly, if two or more people act in concert with the intent of causing economic loss to someone else, they may be held liable under the tort of conspiracy.

REVIEW QUESTIONS

1. The tension between the desire to provide compensation and the desire to encourage socially useful activities appears in all areas of tort law. For instance, as we saw in the last chapter, the tort of defamation attempts to strike an appropriate balance between the plaintiff’s desire to receive compensation for a damaged reputation and the social desire to promote freedom of speech. The relevant tension is, however, particularly pronounced in negligence. That is true for several reasons and in several respects. First, the tort of negligence must be flexible because it is used to resolve disputes in a remarkably wide range of circumstances. Moreover, courts often want, even in the context of a single case, sufficient flexibility to reach a desired conclusion. For those reasons, the tort of negligence relies, in many respects (*ie* duty of care, standard of care, remoteness), upon the reasonable person test. That test provides courts with generous latitude. Because it refers to a hypothetical person, rather than to a real person, it is malleable. Within limits, it can be stretched or compressed, as the occasion requires.

2. Canadian courts now use a four stage test in order to determine whether or not a duty of care exists in a particular case.

- *Pre-Determined Answer* — The judge will first ask whether the issue has already been settled. The test for a duty of care applies to *types* of cases, rather than to *individual* cases. The judge may therefore find that there is already a binding precedent to the effect that a duty does or does not exist. If that question has not already been answered, then the judge will ask three questions.
- *Reasonable Foreseeability* — A duty of care cannot exist unless it was reasonably foreseeable that the defendant’s carelessness would hurt the plaintiff.
- *Proximity* — Even if there was reasonable foreseeability of harm, a duty of care will not exist unless there was proximity between the parties. That means that the parties must have been so closely and directly connected that it would be appropriate to impose a duty of care. The concept of proximity is difficult to define, but it generally deals with the relationship that exists between the plaintiff and the defendant.
- *Policy* — If there is reasonable foreseeability and proximity, then a duty of care *prima facie* will exist. Nevertheless, the judge may still refuse to recognize a duty of care on policy grounds. The concept of policy is very broad. It allows the judge

to refuse to recognize a duty if the possibility of liability in negligence would adversely affect the legal system (*eg* by opening the floodgates to litigation) or society as a whole (*eg* by imposing an intolerable burden on taxpayers by exposing public officials to liability.)

3. Courts also are reluctant to recognize a duty of care to avoid acts that cause *psychological*, rather than *physical*, injury. Broken bones can be proven by x-rays, but it is far more difficult to be sure that a person has suffered a broken mind. Furthermore, while a single careless act may be able to physically hurt one or two people, it may cause many more to suffer “nervous shock.”

4. The statement is true. The tort of negligence generally applies in business context — including within employment relationships — just as it may apply in other circumstances. Exceptionally, however, public policy demands otherwise.

An employee’s ability to sue an employer for negligent infliction of mental distress is determined at the duty of care stage. In deciding whether a duty of care exists in a novel situation, a court considers *reasonable foreseeability*, *proximity*, and *public policy*: *Cooper v Hobart*.¹

- *Reasonable Foreseeability* It is reasonably foreseeable that an employer’s carelessness may cause an employee to suffer mental distress.
- *Proximity* The relationship between employee and employer is very close.
- *Public Policy* The Ontario Court of Appeal nevertheless has refused recognition of a duty of care on grounds of public policy: *Piresferreira v Ayotte*.² The court held that recognition of a duty of care would be “a considerable intrusion ... into the workplace,” it would limit a business’s ability to increase efficient production, and it would create a great deal of uncertainty.

5. The reasonable foreseeability test is *objective*. The issue is not whether the defendant *personally knew* that its activities might injure the plaintiff. It is whether a *reasonable person* in the defendant’s position would have recognized that possibility.

Significantly, the concept of reasonable foreseeability does not refer to “probable” or “likely” risks. As long as it is not fanciful, something may be reasonably foreseeable even if it is unlikely to occur. A 1-in-100 or 1-in-1000 chance may be sufficient. At the same time, however, there is no need to take precautions against unforeseeable risks. The reasonable person does not guard against every conceivable danger.

The concept of reasonable foreseeability is intended to strike a balance between the parties. It would be unfair to deny compensation simply because the defendant was unaware of a danger. The plaintiff should not have to suffer simply because the defendant was not paying attention. But at the same time, it would be unfair to hold the defendant liable for *every* injury that it creates, even those that were unforeseeable. A person cannot

¹ (2001) 206 DLR (4th) 193 (SCC).

² (2010) 319 DLR (4th) 665 (Ont CA).

take precautions against a hidden danger. Similarly, it is difficult to arrange liability insurance for an unpredictable event.

Reasonable foreseeability therefore is closely tied to the issue of risk management. It identifies those risks that the defendant realistically could guard against and it therefore identifies those risks that the defendant is required to guard against.

Reasonable foreseeability is relevant at three stages of the negligence analysis. (1) Along with the concepts of proximity and policy, it determines whether a *duty of care* exists between the parties. (2) Along with a large number of other factors, it determines the content of the *standard of care* in any particular case. (3) Assuming that the defendant's breach *in fact* has caused the plaintiff to suffer a compensable loss, reasonable foreseeability determines whether the legal connection between the breach and the injury are too *remote*.

Although not mentioned in the text, the different manifestations of reasonable foreseeability were addressed in the Australian case of *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastien Pty Ltd.*³

A recognition has emerged that the foreseeability inquiry at the duty, breach and remoteness stages raises different issues which progressively decline from the general to the particular. The proximity upon which a *Donoghue* type duty rests depends upon proof that the defendant and plaintiff are so placed in relation to each other than it is reasonably foreseeable as a possibility that careless conduct of *any* kind on the part of the former may result in damage of *some* kind to the person or property of the latter.... The breach question requires proof that it was reasonably foreseeable as a possibility that *the kind* of carelessness charged against the defendant might cause damage of *some kind* to the plaintiff's person or property.... The remoteness test is passed only if the plaintiff proves that *the kind* of damage suffered by him was foreseeable as a possible outcome of *the kind* of carelessness charged against the defendant....

6. The statements are not true. The standard of care is an objective standard. It generally does not take the defendant's personal characteristics into account. A naturally clumsy adult, for instance, is held to the standard of a naturally careful adult. A slight exception to the general principle applies, however, with respect to children. A child is not expected to act like an adult. A child instead is expected to act like a reasonable child of similar age, intelligence, and experience.

The statements also indicate that tort law applies a high standard to children in order to allow a plaintiff to recover from a defendant's child's parents by means of the doctrine of vicarious liability. Vicarious liability (as most thoroughly explained in Chapter 3) allows the courts to hold one person (*eg* an employer) liable for the tort of another person (*eg* an employee). The doctrine of vicarious liability, however, does not apply as between parents and children. Parents are not responsible for their children's torts. That is true even under "parental responsibility" legislation. Parental liability arises only if a parent

³ [1983] 2 NSWLR 268 at 295-96 (CA) (emphasis in original).

personally breached an obligation owed to the claimant. That may be true, for instance, if the plaintiff was injured as a result of a parent's carelessness in giving a loaded weapon to a child. The child may be liable for carelessly discharging the weapon in the plaintiff's direction. The parent may be held *personally* liable for carelessly creating the danger in the first place.

7. The reasonable person test gives the judge a great deal of flexibility in deciding whether or not the defendant breached the standard of care. The following is a non-exhaustive list of the factors that may be considered in deciding whether the defendant acted carefully enough.

- *Subjective characteristics* As a general rule, the reasonable person test does not take account of the defendant's subjective characteristics. It is no excuse, for instance, for the defendant to say that he or she is unusually slow or clumsy. However, in some situations, the reasonable person test does take account of some of the defendant's personal characteristics. A child is generally not expected to live up to the standard of an adult (unless the child is involved in an adult activity, such as driving a boat). It is enough to satisfy the standard of a reasonable child of similar age, intelligence and experience. Likewise, a person with a disability is not expected to overcome that disability. A blind person, for instance, is not required to see. However, a person with a disability is expected to recognize his or her limitations. A blind person therefore should not attempt to drive.
- *Foreseeability of harm* The judge will be influenced by the degree to which harm was reasonably foreseeable. As long as the risk was a possibility, a danger may be reasonably foreseeable, even if it is unlikely to occur.
- *Likelihood of injury and severity of harm* The judge will also be influenced by the foreseeable likelihood of harm and potential severity of the injury.
- *Affordable precautions* The judge may take into consideration whether the defendant adopted affordable precautions.
- *Social utility* The judge may take into consideration the social utility of the action that the defendant was engaged in when the risk occurred.
- *Sudden peril doctrine* The reasonable person test requires the defendant to act as a reasonable person would have acted *in similar circumstances*. The standard of care therefore encompasses the sudden peril doctrine. Even a reasonable person may make mistakes in an emergency.

8. A professional must also act as the reasonable professional would in similar circumstances. As a general rule, a professional who follows an approved practice cannot be held liable. That means that the standard of care is usually met if the defendant complies with requirements established by a professional organization or does what other professionals in the same field normally do. Sometimes, however, an approved practice is itself careless. A court can only reach that conclusion if the activity in question can be judged by common sense and does not involve technical or complex matters.

9. The but-for test requires the plaintiff to prove that it would not have suffered a loss but-for the defendant's carelessness. The plaintiff must prove causation on a balance of probabilities, which means there must be at least a 51 percent chance that the

defendant's carelessness caused the plaintiff's loss. If that is the case, the defendant is liable for 100 percent of the plaintiff's loss. If that is not the case—say, for example, that there is only a 40 percent chance that the defendant caused the plaintiff's losses—then the court will not award any damages for the plaintiff's loss.

10. In contrast to the United States, Canada does not have a separate tort of *product liability*. A person who is injured by a defective product instead must satisfy the usual elements of the tort of negligence.

In terms of breach of the standard of care, a manufacturer act carelessly in three ways.

- *Manufacture* The defendant may carelessly *manufacture* a product and thereby create a risk of injury. In *Donoghue v Stevenson*, for instance, the defendant carelessly allowed a snail to crawl into a bottle of ginger beer during the bottling process.
- *Design* The defendant may carelessly *design* a product and thereby create a risk of injury. A medicinal drug, for example, may be formulated in a manner that creates undesirable side effects.
- *Warning* The defendant may carelessly fail to issue a *warning* and thereby fail to avert a risk of injury. The manufacturer of a small, gas-powered engine, for example, may fail to warn consumers of the dangers of operating the units in closed, indoor areas.

Although all three types of carelessness may lead to liability, the courts grow more cautious as they move down the list. Excessive liability may have undesirable consequences (eg the unavailability of otherwise socially-desirable products). Because a *manufacturing* defect is unlikely to render every item dangerous, there is little need to inhibit the scope of liability. In contrast, a careless *design* is apt to render every manufactured item dangerous. A generalized failure to issue a warning similarly may threaten to open the floodgates of litigation.

11. A court may refuse to use the but-for test if it would lead to an unfair result. In certain situations, the plaintiff may not be able to prove on the balance of probabilities (51 percent) that its losses are attributable to one of two (or more) defendants. In other words, it may be that there is an equal chance that any one of the defendants caused the plaintiff's losses. The best illustration of that possibility comes from *Cook v Lewis*.⁴ In that case, two hunters fired their guns simultaneously in the direction of the plaintiff. The plaintiff was struck by a single bullet, but had no way of knowing which hunter was responsible. In that case, there was a 50 percent chance that either hunter caused the plaintiff's losses. According to the but-for test, neither defendant could be held liable because the plaintiff could not prove, as against either hunter in isolation, causation on a balance of probabilities (that is, at least 51 percent). The court therefore held both hunters jointly and severally liable for the plaintiff's losses.

⁴ [1952] 1 DLR 1 (SCC).

12. “Joint” liability means that all of the defendants are liable for the same tort. “Several” liability means each defendant is individually liable to the plaintiff for the entire amount. “Joint and several” liability therefore means that while all of the defendants are liable for the tort, the plaintiff is entitled to decide which of the defendants she will collect from.

Joint and several liability would arise if two or more defendants carelessly combine to cause the plaintiff to suffer a single injury. Assume that you slip on my neighbour’s sidewalk after leaving my party. You lost your balance and fell only because (i) I secretly drugged your drinks, *and* (ii) my neighbour, Shannon, failed to shovel her sidewalk. Shannon and I will be held *jointly and severally liable*. That means that you can recover all of your damages from her, *or* all of your damages from me, *or* some of your damages from each of us. The choice is yours. As between ourselves, Shannon and I are responsible in proportion to our share of the blame. Suppose the court said that she was 30 percent to blame and that I was 70 percent to blame. If you recovered all of your damages from Shannon, she could demand 70 percent of that money from me.

13. Even if the defendant’s carelessness in fact caused the plaintiff to suffer a loss, liability will not be imposed if that loss was too remote from the breach of the standard of care. A loss is remote if it would be unfair to hold the defendant responsible for it. The test used in a negligence action is whether or not the type of harm that the plaintiff suffered was a reasonably foreseeable result of the defendant’s carelessness. As always, the phrase “reasonably foreseeable” does not mean “probable” or “likely” – it simply refers to a possibility that is not completely unlikely. The plaintiff is not required to prove that a reasonable person would have foreseen both the type of harm and the manner in which it occurred. If the type of harm that the plaintiff suffered was reasonably foreseeable, it is irrelevant that the manner in which it occurred was not.

14. The concepts of *thin skulls* and *crumbling skulls* apply within the context of the doctrine of *remoteness*.

Even if the defendant owed a duty of care, breached the standard of care, and thereby in fact caused the plaintiff to suffer a compensable loss, damages will be denied if the claimant’s loss is too *remote* from the defendant’s carelessness. Remoteness is based upon principles of fairness, rather than strict logic. Notwithstanding a factual causal connection between breach and harm, liability at some point becomes unfair. Remoteness is assessed by means of a test of *reasonable foreseeability*. The plaintiff’s injury is too remote — and hence non-compensable — if it was not a reasonably foreseeable result of the defendant’s carelessness. And that concept of reasonable foreseeability may be affected by the fact that the plaintiff was unusually susceptible to injury. The thin skull rule and the crumbling skull rule determine whether or not that pre-disposition renders the plaintiff’s injury too remote.

The *thin skull principle* states that the defendant normally must take the plaintiff as the plaintiff exists. Consequently, as long as the defendant’s carelessness would have caused

an ordinary person to suffer *some* loss, then the defendant is fully liable for *all* of the plaintiff's losses, even if the plaintiff, because of some special vulnerability, suffers physical harm to an unusual degree. To take a literal example, assume that the defendant lightly hit the plaintiff upon the head. Because the plaintiff has an abnormally thin skull, she suffers a horrendous brain injury as a result. If the reasonable person would not have suffered any injury at all, then the plaintiff's loss is too remote and the defendant is relieved of liability. In contrast, however, if the reasonable person would have suffered *some* injury (eg slight bruising), then the defendant is responsible for *all* of the plaintiff's injury even though the plaintiff suffered to an unusual degree.

While the thin skull doctrine may hold the defendant fully liable for the plaintiff's injury, damages are reduced if the plaintiff's skull was not only thin but also *crumbling*. The plaintiff is denied compensation to the extent that his condition was so fragile that he eventually would have suffered the same injury, even without the defendant's carelessness. In that situation, the defendant merely caused the plaintiff's injury to happen sooner than expected. Damages are therefore available only for the period leading up to the time when the plaintiff would have suffered the loss in any event. Suppose, for instance, that the plaintiff's crumbling skull was destined to result in a brain injury within four years even under the best conditions. Suppose further that the defendant, one year into that four- year period, carelessly caused the plaintiff to suffer a brain injury. The defendant would be liable to the plaintiff, but only for hastening the onset of the brain damage. The plaintiff's compensation therefore would be confined to three years.

15. An intervening act is an event that occurs after the defendant has been careless and that causes the plaintiff to suffer a new injury or an additional injury. For instance, the defendant may cause an accident that breaks the plaintiff's leg. Several days later, the plaintiff breaks her arm after falling down a flight of stairs because she was unaccustomed to walking with a cast on her leg. As a matter of fact, the defendant is causally responsible for that ultimate injury. The question, however, is whether the defendant should also be held legally responsible. That question is answered, under the rubric of remoteness, on the basis of the reasonable foreseeability test. A court would ask whether or not it was reasonably foreseeable that the defendant's act of carelessness would cause not only the initial injury, but also the injury that was ultimately caused by the intervening act.

16. The defence of contributory negligence allows the courts, under statute, to apportion responsibility for the plaintiff's loss between the parties. Consequently, if the defendant was 75 percent to blame, and the plaintiff was 25 percent to blame, the plaintiff's damages will be reduced by 25 percent. That approach allows the courts to strike a sensitive balance between the parties. In contrast, voluntary assumption of risk and illegality are complete defences. That means that if either applies the plaintiff cannot recover any damages, even if the defendant's carelessness was the predominant cause of a loss. Because those defences insensitively work on an all-or-nothing basis, the courts have greatly narrowed their scope such that they seldom apply.

17. Contributory negligence occurs when a loss is caused partly by the defendant's carelessness and partly by the plaintiff's own carelessness. It can arise in several situations.

- If the plaintiff unreasonably steps into a dangerous situation (*eg* by accepting a drive from a drunk driver),
- If the plaintiff unreasonably contributes not to the causation of an accident, but rather to the injury that results from it (*eg* by failing to wear a seatbelt in a car), or
- If the plaintiff unreasonably contributes to the actual causation of an accident, rather than to the injury that results from it (*eg* by carelessly distracting a driver's attention).

18. In the context of tort law, *apportionment* refers to the division of responsibility for a loss and the consequent reduction of damages to reflect the plaintiff's contribution to a loss.

Apportionment was introduced into Canadian tort law because the courts traditionally applied contributory negligence as a complete defence. That meant that if the plaintiff's own negligence contributed to an injury, then the defendant was entirely relieved of liability, even if the defendant bore the bulk of responsibility.

Apportionment was introduced statutorily in all of Canada's common law jurisdictions.

19. The defence of voluntary assumption of risk applies if the plaintiff freely agreed to be exposed to a risk of injury. The defendant has to prove that the plaintiff expressly or impliedly agreed to be exposed to both the physical risk of injury *and* the legal risk of injury. The last part of that test is not satisfied unless the plaintiff agreed to give up the right to sue the defendant for negligence. Consequently, the defence rarely succeeds.

To be protected by the defence, business people should take the following steps.

- Have the person who agreed to be exposed to the risk of injury sign an exclusion clause or waiver.
- Ensure that the exclusion clause is drawn to the customer's attention and that the person has read it.
- As a further precaution, the business person should explain the purpose of the exclusion clause to the person assuming the risk.
- Finally, as the decision in *Crocker v Sundance* cautions, the person assuming the risk should not be drunk at the time that the exclusion clause is signed. Moreover, if that person has been drinking, he or she should not be allowed to assume any sort of risk whatsoever.

20. A *learned intermediary* is a person of expertise who is expected to occupy an intermediary position between a manufacturer of a potentially dangerous product and a consumer who may be injured by such a product.

That concept is relevant, within the tort of negligence, to the standard of care. A manufacturer may be held liable for carelessly failing to issue a warning regarding the

risks presented by a particular product. Warnings generally are issued to the ultimate consumers, so as to allow them to make informed decisions regarding purchase and use. Some products, however, are not intended to be purchased directly by consumers. Instead, they invariably are sold to professionals, who then provide or apply the product to the consumers. Breast implants, for instance, are not sold on open shelves—they are sold to physicians, who in turn use them for surgical purposes.

The learned intermediary rule states that a manufacturer will not be held liable for failing to warn a consumer if an adequate warning was provided to the learned intermediary.

CASES AND PROBLEMS

1. Because the defendants have admitted liability, it may appear that the only issue pertains to damages. As a general rule, tortfeasors are liable for the losses that they wrongfully cause. In this instance, the trial judge already has found that the issue of *factual causation* is satisfied on the basis of the but-for test. A further issue may arise in connection with the concept of *legal causation*. In other words, the claimant's losses must not be too *remote* from the defendants' breach. The test for remoteness merely requires that the loss be *reasonably foreseeable*—it cannot be “far-fetched or fanciful.” That standard appears to be met in this case. Although not every sexual assault has such consequences, it was reasonably foreseeable that the guard's sexual assaults would cause the claimant to develop personality disorders, which in turn would lead to anti-social behaviour. (In the case upon which this exercise is based, the Supreme Court of Canada further found that the plaintiff's behaviour did not break the chain of causation—it was not a *novus actus interveniens*.)

The preceding analysis suggests that Zastowny should receive compensation for both past and future loss of income. That outcome is apt to sit badly with (some) students, however, since the claimant's loss of income is largely attributable to the fact that he was imprisoned for crimes that he undoubtedly committed. The key issue in this case consequently pertains to the defence of illegality or, as it sometimes is phrased, *ex turpi causa non oritur actio*.

As explained in the text, illegality (like voluntary assumption of risk, but unlike contributory negligence) is a complete defence. If successful, it entirely defeats that claimant's right to relief—it does not merely reduce the measure of damages. For that reason, the defence of illegality is very narrowly defined. As the Supreme Court of Canada explained in *Hall v Hebert* (discussed in Case Brief 6.6), the defence applies only if an award of damages would undermine the integrity of the legal system. That is true if damages would allow the claimant to (1) profit from a wrong, or (2) escape the consequences or effects of some legal sanction.

In the case upon which this exercise is based, the trial judge awarded damages for the loss of both past and future income. On appeal to the Supreme Court of Canada, however, a distinction was drawn between the various heads of loss of income damages.

- *Past Income Lost During Periods of Non-Incarceration* Although the claimant was imprisoned for 12 of the past 15 years, he was at liberty to earn an income during a three period. As the trial judge found as a fact, however, the personality disorders stemming from the sexual assaults prevented the plaintiff from actually doing so. And since there is no question of illegality during that time, the defendants *are* liable for the loss of income.
- *Past Income Lost During Periods of Incarceration* Although the trial judge in Zastowny’s actual case award full damages for the income that the plaintiff lost as a result of being sent back to prison, the Supreme Court of Canada overturned that decision on the basis of the illegality defence. Rothstein J explained:

[T]he *ex turpi* doctrine bars Zastowny from recovering damages for time spent in prison because such an award would introduce an inconsistency in the fabric of law. This is because such an award would be, as McLachlin J. described in *Hall v Hebert*, “giving with one hand what it takes away with the other.” When a person receives a criminal sanction, he or she is subject to a criminal penalty as well as the civil consequences that are the natural result of the criminal sanction. The consequences of imprisonment include wage loss. ... An award of damages for wages lost while incarcerated would constitute a rebate of the natural consequence of the penalty provided by the criminal law. ...

In asking for damages for wage loss for time spent in prison, Zastowny is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. Zastowny was punished for his illegal acts on the basis that he possessed sufficient *mens rea* to be held criminally responsible for them. He is personally responsible for his criminal acts and the consequences that flow from them. He cannot attribute them to others and evade or seek rebate of those consequences.

- *Future Income Lost During Periods of Non-Incarceration* It initially may appear that this head of damages falls into the same category as the first. To the extent that the sexual assaults will prevent the claimant from earning income while he is not in prison, general compensatory principles suggest that he should enjoy relief. As the Supreme Court of Canada held in Zastowny’s actual case, however, it is necessary to reduce damages for future loss of income to reflect the chance that Zastowny will again commit crimes that lead to incarceration. That likelihood was assessed at 30%.

[Based on *Zastowny v McDougall* (2008) 290 DLR (4th) 219 (SCC)]

2. This question requires the student to consider the duty of care and the standard of care.

A duty of care will generally be recognized if there was reasonable foreseeability of harm, proximity between the parties, and no overriding policy considerations. In *Hercules Management Ltd v Ernst & Young*, the Supreme Court of Canada suggested how the basic theory should be applied in the context of *negligent statements*. For the

reasons that were discussed in the text, the courts are more reluctant to impose a duty of care if the plaintiff's complaint is that the defendant's careless statement (as opposed to careless action) caused a pure economic loss (as opposed to physical harm). The requirements that the court established are satisfied in this case.

- Hauser had, or claimed to have, *special knowledge* regarding the value of the property
- the statement was made on a *serious occasion*
- Hauser's statement came in response to an *inquiry*
- Hauser received a *financial benefit* for his work
- Hauser's statement consisted of a *statement of fact* or at least a statement of opinion that was based on a supposed fact
- Hauser did not *disclaim* responsibility for the statement
- Hauser knew that a *specific individual* (Brokaw) would be relying upon the statement
- Brokaw used the statement for the *intended purpose*

Hauser therefore owed a duty of care to Brokaw. Hauser breached the standard of care by failing to act as a reasonable person would act in similar circumstances. It was not reasonable for Hauser to simply *assume* that each apartment would generate \$650 per month in rent. Brokaw paid for a careful analysis — not for assumptions. In the circumstances, a reasonable appraiser would have investigated the situation and discovered that many of the apartments were rented at a reduced rate to married tenants.

As a result of Hauser's carelessness, Brokaw suffered a financial loss. He paid \$1 400 000 for a building that was really only worth \$1 000 000. He is entitled to be compensated for that loss.

[Based on *VSH Management Inc v Neufeld* [2003] 9 WWR 709 (BC SC).]

3.

This exercise is based on *Oke v Weide Transport Ltd*. The deceased's widow brought an action in negligence against Carra and WTL. Although WTL had no independently committed any tort, it potentially was vicariously liable for the acts that its employee performed in the normal course of his duties. The trial judge imposed liability, but the Manitoba Court of Appeal, in a split decision, upheld the defendant's appeal. As that procedural history suggests, the issues are finely balanced and the question of liability ultimately requires a judgment call.

- *Reasonable Foreseeability* The primary issue on appeal pertained to the foreseeability of Oke's death. Miller CJM, writing for the majority in the Court of Appeal, characterized the facts in terms of a "freak accident."

It seems wrong to come to the conclusion that Carra, after an innocent collision with the sign in question, should be deemed to have anticipated that somebody would endeavour to pass a slow-moving vehicle at a point where it was obviously wrong and dangerous to do so and that the damaged post would come up through the floor boards of the car and cause a fatal accident. It seems to me that Carra could not possibly have

visualized such a happening and could not have anticipated or reasonably foreseen such an event and, of course, could not be expected to have foreseen that such an unusual accident would occur.

In a strong dissenting judgment, however, Freedman JA disagreed.

It may well be that the defendant could not foresee either the precise manner in which the accident would occur or that its consequences would be so tragic. But that is not necessary to impose liability upon him. It is enough that he ought to have foreseen that with the sign-post left in the state it was, it could be a source of danger to any motorist entering upon the centre strip even a distance of only two or three feet, and thus become the cause of an automobile accident. Only the day before, he himself had entered upon that very centre strip. He ought to have calculated upon the likelihood of some other motorist doing the same thing. Indeed something like that must have been in his mind when he cleared the area of loose debris, and even more so when ... he felt the need of reporting the situation to the police but allowed himself to be dissuaded from doing so.... It would appear that he sensed that the situation had in it elements of danger, and that some action on his part was required. It is regrettable that he did not proceed with his intended course of action and report the matter to the police. But it is not pushing the foreseeability rule too far to say that the defendant ought to have perceived the danger of an automobile accident occurring through the presence on the highway of the broken sign-post. Automobile accidents can take many forms and can have diverse consequences. In this particular accident the broken sign-post performed the role of a spear, impaling the driver thereon and causing his death. That the accident was unusual and its result fatal does not relieve the defendant of liability. An automobile accident of some kind was a potential consequence of the hazardous situation, and the defendant ought to have had it in contemplation.

- *Duty of Care* Carra was *not* legally liable for the initial accident that left the sign post protruding from the ground. The defendants argue that they consequently “did not do anything wrong” and cannot be held responsible. That argument raises a difficult point that students may not fully appreciate at first glance. As mentioned in the text, the tort of negligence is usually restricted to careless *acts*. The courts traditionally were most reluctant to impose liability with respect to *omissions*. Simply stated, there is no general duty of rescue. That doctrine might appear to apply here. In effect, since Carra was not responsible for the initial accident, his only “wrong” consisted of his failure to “rescue” other motorists by notifying police of the danger. The general doctrine, however, has always been subject to certain exceptions. One such exception applies if the defendant caused—even non-culpably caused—a danger to exist. Another motorist who saw the bent sign post probably would not be obliged to report the situation to the authorities. Carra, however, fell into a different category because he had created the peril.
- *Contributory Negligence* If liability *prima facie* did arise on the facts, damages very likely would be reduced on account of the claimant’s contributory

negligence. Although he presumably was unaware of the danger presented by the damaged sign post, Oke carelessly contributed to his own death by driving on the gravel divider in order to pass a car, despite being in a no-passing zone. (Although Oke's actions likely constituted a driving offence, the defence of *illegality* would not apply. As a complete defence, illegality has the capacity to create hardship and therefore is narrowly confined to situations in which liability would allow a claimant to either profit from a wrong or escape punishment.)

4. Franz's arguments will fail and Renata's claim will succeed. Even though Franz is not really a professional, he will be treated as one for the purposes of Renata's claim because he held himself out as a qualified lawyer. Moreover, Franz will not be allowed to avoid liability on the basis that he was inexperienced and did not claim to have expertise in trade law. Even an inexperienced lawyer is expected to meet the standard of a reasonably competent professional. And while Franz did not hold himself out as a specialist, and therefore will not be held to the standard of such a person, his carelessness arose in circumstances that did not call for special skills. Any competent lawyer could have read the statute and realized that Renata's application required a corporate seal.

5. The CRCS did not breach the standard of care. Although its failure to screen blood donors would be considered careless today, the reasonable person in its position in January of 1982 might have acted in the same way. The standard of care must be assessed on the date of the alleged breach. The reasonable person is only guided by information that is reasonably available at that time. And when the donation occurred, there was no reason to believe that the blood might cause harm to someone in Pia's position.

[Based on *Walker Estate v York Finch General Hospital* (2001) 198 DLR (4th) 193 (SCC) – as discussed below in a Case Brief and *Roe v Minister of Health* [1954] 2 QB 66 (CA).]

6. Canadian courts have not yet settled this sort of issue. The facts are, however, based on the House of Lords' decision in *Fairchild v Glenhaven Funeral Services Ltd.* The problem, of course, is that while the plaintiff was certainly injured by the carelessness of one of the defendants, he cannot prove which employer actually supplied the fatal asbestos fibre. And if the orthodox causation rules are applied, he will be denied recovery.

The text states that a court may reject the usual but-for test where it would create an unfair result. The best Canadian example, as noted in the text and as explained in a Case Brief that appears below, is *Cook v Lewis*. This case is analogous in some respects. In *Cook v Lewis*, both defendants were careless, but only one actually shot the plaintiff. Their carelessness, however, prevented the plaintiff from proving who was responsible. The Supreme Court of Canada therefore held that they were both liable. In other words, the court simply altered the applicable rule. It was satisfied with something less than the usual standard of proof. The difference in this case, of course, is that there are five defendants rather than two. Consequently, there was a 20 percent chance (rather than a 50 percent chance) that any particular defendant was in fact responsible. It is not clear if that

fact should make a difference — especially since *all* of the defendants were undoubtedly careless.

This case is also similar to *Sindell v Abbott Industries*, which was discussed in Business Decision 6.1. In that case, the defendants were liable in proportion to their share of the market. A defendant that sold 20 percent of the harmful drugs was liable for 20 percent of the plaintiff's damages, and so on. A similar theory might be applied here.

On the facts of *Fairchild*, the House of Lords adopted a different — and arguably less honest — approach. It said that “a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease.” In reality, of course, there is a significant difference between increasing the risk of injury and actually causing an injury. The former simply pertains to a *possibility*. The latter pertains to an *actuality*.

In the final analysis, students should not be expected to reach any particularly conclusion. They should, however, realize that the but-for test occasionally causes problems, and that the courts sometimes struggle to find ways around it.

[Based on *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 AC 32 (HL).]

7. When determining whether or not the Funch's carelessness caused Clint's damage, the court would require Clint to prove the different parts of the cause of action in negligence, including causation, on a balance of probabilities. However, once that claim was established, the court would take an all-or-nothing approach to liability. Consequently, because it is more probable than not that the cancer was caused by the gum, Funch would be held fully liable for Clint's injury.

8. This case is based closely on the facts of *Mustapha v Culligan of Canada Ltd*. In that decision, the Supreme Court of Canada addressed the application of the negligence action in circumstances involving *psychiatric injury* or “nervous shock,” rather than *physical injury* or property damage. Although the issue of nervous shock was not discussed in detail in the text, students can be expected to understand and apply the general principles, and to recognize, from a reference in the text, that psychiatric injuries raise special problems, especially at the duty of care stage.

Duty of Care

As noted in the text, courts traditionally have been reluctant to award compensation for psychiatric injuries for several reasons. Broken bones can be proven by x-rays, but it is far more difficult to be sure that a person has suffered a broken mind. Furthermore, while a single careless act may be able to physically hurt one or two people, it may cause many more to suffer “nervous shock.” As a result, even if psychiatric harm is a reasonably foreseeable effect of the defendant's carelessness, policy may negate the existence of a duty of care.

As the Supreme Court of Canada explained in *Mustapha*, however, a duty of care should be recognized on the current facts. Following the approach formulated in *Cooper v Hobart*, there is no need to conduct a full duty of care inquiry. It already has been established by precedent that a manufacturer of potable products owes a duty of care to ensure that consumers do not encounter the noxious remains of dead creatures in their beverages. In *Donoghue v Stevenson*, the facts involved a decomposed snail in a bottle of ginger beer; in *Mustapha*, the facts involved a dead fly in bottled water. Although the nature of the injury — psychiatric harm — could conceivably lead a court to feel the need to consider the duty question anew, *Donoghue v Stevenson* probably ought to apply in this instance.

Standard of Care

Assuming the existence of a duty of care, the defendant must exercise reasonable care. As this dispute turns upon product liability, it is necessary to classify the precise allegation of negligence. The plaintiff's complaint pertains not to design or warning, but rather to manufacture. As in *Donoghue v Stevenson*, the defendant was required to take reasonable care to ensure that its beverage was free of dead animals. A court would have no difficulty in finding that the evidence clearly demonstrates that the defendant fell below that standard.

Causation of Harm

Assuming that the defendant owed a duty of care and failed to meet the standard of care, the plaintiff must prove that the breach in fact caused him to suffer a compensable injury. That issue would be assessed on the “but for” test. The facts strongly indicate that the plaintiff's various ailments would not have occurred if the defendant had not acted carelessly.

Remoteness

Finally, even if the defendant's breach caused the plaintiff to suffer harm, liability may be denied if the connection between the breach and the harm are too *remote*. Remoteness is a concept of fairness. Notwithstanding factual causation, the defendant will not be held responsible if the plaintiff's loss was not a *reasonably foreseeable* consequence of the breach.

Within the concept of remoteness, the “thin skull” rule applies if, because of an unusual vulnerability, the defendant's carelessness caused the plaintiff to suffer far more than a normal person would have suffered. That idea arguably applies here. The facts state that the claimant suffered to an unusual and extreme extent and that the claimant was “fastidiously clean,” which seems to imply an obsession with health matters. The thin skull rule allows recovery to the full extent of the claimant's actual harm if the normal person would have suffered *some* compensable harm. However, since the facts state that a normal person would not have experienced any real lasting injury, the defendant would be denied any damages.

In *Mustapha*, McLachlin CJC addressed the plaintiff's unusual vulnerability to psychiatric harm under the rubric of *remoteness*. She held that it was not reasonably

foreseeable that someone would suffer the plaintiff's reaction to the simple sight of tainted water. The defendant therefore was not liable.

[Based on *Mustapha v Culligan of Canada Ltd* (2008) 293 DLR (4th) 29 (SCC)]

9. It is unlikely that Claire was guilty of contributory negligence. In resolving that issue, the courts rely upon the same factors that they consider when determining whether or not there has been a breach of the standard of care by a defendant. One of those factors is the sudden peril doctrine, which holds that even reasonable people make mistakes in emergencies. On that basis, while Claire clearly made a mistake, her decision to douse the flame with snow probably was not legally negligent.

10. The facts raise an issue of remoteness. As a result of his own impecuniousness, the plaintiff was able to mitigate his loss, and obtain a replacement vehicle, only at an unusually high cost. While it is clear that the additional fee charged by DRI was caused, in fact, by O'Connor's carelessness, she may be able to persuade a court that the loss is too remote.

The courts generally are willing to apply a *thin skull* principle. As long as a normal person would have suffered some damage as a result of the defendant's carelessness, the plaintiff is entitled to recover full damages even though, because it was unusually susceptible to injury, it suffered to an unusual extent. In contrast, the courts traditionally were not willing to apply a *thin wallet* principle. The leading case of *The Dredger Liesbosch* accordingly held that a claimant cannot recover extra damages simply because it suffers to an unusual extent because it is poor.

That rule may continue to exist in Canada. Significantly, however, both the Privy Council⁵ and the House of Lords⁶ have indicated that the traditional thin wallet rule no longer should apply. The emerging rule instead allows recovery for any losses that fall within the reasonable foreseeability test that generally governs remoteness. Thin wallets are to be treated in the same manner as thin skulls.

If the emerging rule is applied, Lagden presumably is entitled to recover the *full* cost of renting a replacement vehicle from DRI. It presumably was reasonably foreseeable not only that carelessness by O'Connor would cause an accident victim to rent a car, but also that, because of impecuniosity, that rental would cost more than usual.

11. This exercise focuses on the nature of the defences that are available in response to an allegation of tortious negligence. It requires students to appreciate the difference between morality and law.

⁵ *Alcoa Minerals of Jamaica v Broderick* [2000] 3 WLR 23 (PC).

⁶ *Lagden v O'Connor* [2004] 1 AC 1067 (HL).

The claim obviously will be brought by Casey against Rusty. Rusty owed a *duty of care* to Casey (as well as other drivers and pedestrians), *breached* the *standard of care* by failing to keep a proper lookout for red lights and by becoming distracted by the rabbit, and carelessly *caused* Casey to suffer a compensable injury. Rusty therefore *prima facie* is liable for Casey's losses.

Of course, Casey also owed a duty of care to Rusty, and breached the standard of care by driving under the influence of drugs and alcohol. The tort of negligence, however, cannot exist in the abstract. Because there is no evidence that Casey's carelessness caused Rusty (or anyone else) to suffer a loss, she is not a tortfeasor and she does not incur tortiously liability.

It might be suggested that Casey's impaired state prevented her from reacting quickly enough to avoid being hit by Rusty. There is no evidence, however, to support that allegation. Rusty could not discharge the burden of proof to demonstrate that Casey negligently caused him some loss.

In response to Casey's *prima facie* right to compensation, Rusty presumably would argue two defences. Neither would succeed. The defence of *illegality* may apply if the plaintiff suffered a loss while participating in an illegal act. Casey certainly was involved in illegal acts. She was driving impaired, she had consumed illegal drugs, and she unlawfully was carrying an unregistered firearm. The relevance of those facts, however, is limited to criminal prosecution against Casey. Her various crimes have nothing to do with her claim against Rusty. Illegality constitutes a tort defence only if it would undermine the integrity of the tort system — *ie* if the plaintiff tries to profit from a crime or avoid a criminal penalty. That is not true in this instance.

Rusty also would fail by pleading the defence of *contributory negligence*. The principles of negligence generally apply, *mutatis mutandis*, with respect to the defence as well. Accordingly, although Casey was careless, that carelessness is not legally relevant because it did not contribute to the accident or the injury that she sustained. Moreover, while she undoubtedly was careless in entering into a dangerous situation, by driving while impaired, that danger again did not eventuate. Her injuries were a result of Rusty's carelessness and Casey's own carelessness played no part in the tort.

12. This question requires students to recognize the issue of remoteness and to decide whether the thief's intervening act was sufficient to "break the chain of causation" and relieve Jake of liability.

There is no doubt that Jake's carelessness *in fact* was a but-for cause of Mysty's damage. Liability will nevertheless be denied if Jake's breach and Mysty's harm were too remote. Remoteness in this case involves the issue of an intervening cause. The text says that the judge will ask whether the sequence of event was reasonably foreseeable, and suggests that that test is broad enough to facilitate a range of results.

The judge in the case upon which this question is based held that the defendant was not liable. He said that since there were no apparent witnesses to the theft, there was no reason to believe that the thief would become panicked and crash the car.

While that result may be acceptable, that reasoning may not be entirely convincing. It would have been equally plausible to say that it *is* reasonably foreseeable that car thieves generally will drive carelessly. Many steal cars for joy-rides. Many others unsurprisingly drive with little reason for the vehicles. It certainly would not be surprising to find a high correlation between car thefts and car accidents.

The point, of course, is that the concept of remoteness, like the tort of negligence in general, is very flexible and often result-oriented.

[Based on *Tong v Bidwell* [2002] 6 WWR 327 (Alta QB).]

CASE BRIEFS

Reibl v Hughes (1980) 114 DLR (3d) 1 (SCC)—note 2

The defendant doctor diagnosed the plaintiff patient as suffering from a blocked artery. Although that condition carried some risk of stroke, paralysis or death, it did not constitute an emergency or require immediate surgery. The non-imperative nature of the procedure eventually proved important because the plaintiff had been employed by Ford Motor Company for the better part of a decade and would have become entitled to a lifetime pension if he worked for an additional eighteen months. The defendant physician removed the arterial obstruction, but the patient suffered a stroke during or shortly after surgery. The stroke caused partial paralysis and consequently precluded the plaintiff from acquiring a vested pension from his employer. Significantly, the injury was not attributable to surgical incompetence. The defendant had performed the procedure with due care and skill. Rather, it represented the manifestation of a risk inherent in the procedure itself. The doctor was aware of that risk, but he did not inform the patient about it. The plaintiff alleged that the defendant negligently had failed to disclose material risks attendant upon the treatment.

The case raised two related issues: (i) the standard of disclosure, and (ii) the test of causation. The trial judge applied traditional tests on each count. With respect to the former, he held the defendant to the “professional standard.” The doctor was required to inform the patient of those risks that the *reasonable surgeon* would have disclosed in like circumstances. With respect to the latter, he applied a *subjective test*. The patient was required to prove that, but-for the doctor’s non-disclosure, he probably would have postponed treatment and thereby avoided the debilitating stroke. Both issues were resolved in the plaintiff’s favour. The defendant was held liable on the basis that: (i) he failed to inform the patient that the procedure carried risks beyond those attendant upon any surgery, and (ii) if properly informed, the patient would have declined the treatment or at least postponed it until after his pension had vested.

The decision was eventually affirmed by the Supreme Court of Canada, but for substantially different reasons. Laskin CJC took a broad approach to the first issue. He

held that the relevant question turned not on what the reasonable physician would have disclosed, but rather on what the *reasonable patient* would want disclosed. However, on the second issue, Laskin CJC adopted an unusually restrictive approach. Causation was traditionally reckoned on a subjective basis by asking what the plaintiff himself would have done if properly informed of a risk. Laskin CJC, however, altered that test to generally ask what an objective, *reasonable patient* would have done in similar circumstances. That test was satisfied on the facts of *Reibl*. In a number of other cases, however, compensation has been denied on the basis that while the plaintiff would have refused an operation if informed of a risk, and thereby would have avoided an injury, he or she would have done so for an idiosyncratic reason that would not have swayed the reasonable patient. The effect is to insulate physicians somewhat from liability in tort.

ter Neuzen v Korn (1995) 127 DLR (4th) 577 (SCC)—note 2 and note 29

The defendant physician artificially inseminated the plaintiff in 1985. Tragically, he used infected semen and the plaintiff contracted HIV. She sued him in negligence and argued that he carelessly failed to realize that HIV could be transmitted through artificial insemination. In response, the defendant argued that, at the time of the procedure, it was not generally known that HIV could be transmitted in that way.

The Supreme Court of Canada held that the defendant had not breached the standard of care:

C]ourts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field.... 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 will not be open to find a standard medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.

The facts fell into the first category. When the procedure was performed in 1985, HIV was poorly understood, even by leading scientists. The court therefore could not decide that the practice that was being used by a respectable body of physicians—including the defendant—was careless.

Dobson v Dobson (1999) 174 DLR (4th) 1 (SCC)—note 3

An action was brought on behalf of a boy against his mother. During pregnancy, the mother carelessly became involved in a car accident. That accident damaged the fetus and the boy was subsequently born with disabilities. The mother supported the action, which was really against her insurance company, because she too wanted her son to receive compensation for his injuries.

The Supreme Court of Canada denied the possibility of imposing liability. While accepting that injury to the son was a reasonably foreseeable result of the mother's carelessness, the court held that policy factors negated a duty of care. The majority was concerned that a duty of care would intolerably infringe upon a pregnant woman's

freedom of choice for a nine-month period. It was also dissuaded by the task of formulating a standard of care. In contrast to the dissenting judge, it did not believe that the obligation to act carefully, if recognized, could be confined to activities like driving.

Neilsen v Kamloops (City) (1984) 10 DLR (4th) 641 (SCC)—note 4

A construction company was building a house in Kamloops. Acting under municipal regulations, a city official inspected the project in its earlier stages and noted that it was not, contrary to the regulations, built on solid foundations. The inspector ordered the builder to remedy that defect. The builder ignored that order. Furthermore, the city did not take effective steps for the enforcement of its order. As a result, the house was completed with weak foundations. The house then passed through several hands before being purchased by the plaintiff. The plaintiff suffered a loss when the house subsided as a result of its weak foundations. The plaintiff sued the city for failing to properly enforce its own building regulations.

The Supreme Court of Canada imposed liability. Although its decision is important for several reasons, it was cited in the text because it introduced a general two-stage test for the recognition of a duty of care. The Court held that a defendant owes a duty of care to the plaintiff if: (i) it was reasonably foreseeable that carelessness by the defendant would result in a loss or injury to the plaintiff, and (ii) there are no policy factors for refusing to recognize a duty of care. That test was satisfied on the facts. It was clearly foreseeable that a subsequent purchaser like the plaintiff might suffer a loss if the defendant carelessly failed to enforce its own building regulations by taking reasonable steps to ensure that houses are built on solid foundations. Furthermore, there were no policy reasons to deny the existence of a duty of care. More significantly, a majority of the Court rejected the argument that the recognition of a duty of care would open the floodgates to litigation by allowing people to sue municipalities too often.

That two-part test was replaced, in *Cooper v Hobart*, by a three-part test. A *prima facie* duty of care will now arise only if there was reasonable foreseeability and proximity. That duty may then be negated, at a third stage, by policy considerations. That development was examined above as an Additional Teaching Suggestion.

Neilsen also established the general rules that determine when an action in negligence can be brought against a government. The Court distinguished between two types of cases.

- In the first, the plaintiff complains about a *policy or planning* decision that was made by a government. For instance, the plaintiff may complain that she was injured because the government carelessly chose not to plow snow from secondary roads (and because she subsequently slid off such a road and into a ditch). Unless that decision was made in bad faith or arose by default because the government simply failed to make any decision at all, the plaintiff's claim in negligence will fail. The courts are not prepared to second guess the manner in which a government determines its priorities or allocates its resources.
- In the second type of case, the plaintiff complains about the government's *operational* behaviour. The plaintiff says that the government chose to do something, but then did it in a careless manner. That was the situation in *Neilsen*.

The City of Kamloops decided to regulate construction projects, but then carelessly failed to enforce an order issued by one of its inspectors. As *Neilsen* illustrates, a government generally can be held liable with respect to operational matters.

Design Services Ltd v Canada (2008) 293 DLR (4th) 437 (SCC)—note 20

The defendant issued a call for tenders with respect to a building project. A bid was received from a contractor. The plaintiff was interested in that bid in its capacity as sub-contractor. The defendant breached the tendering process by awarding the project to a non-compliant bid. The defendant settled a claim by the contractor. The sub-contractor, however, believed that it was entitled to compensation as well. Because it did not have any contract with the defendant, it sued under the tort of negligence. The claim pertained to pure economic loss: the plaintiff alleged that the defendant's breach cost it the profits that it would have earned on the project.

The Supreme Court of Canada denied that the defendant, in issuing a call for tenders, owed a duty of care to the plaintiff sub-contractor with respect to pure economic loss. The court saw no justification for imposing such a duty. In the circumstances, the plaintiff could have protected itself against pure economic loss by participating in the contractor's bid not as a sub-contractor, but rather as a joint venturer. To impose a duty on the actual facts was contrary to public policy because it upset the *contractual* allocation of risks that the parties themselves had contemplated.

Danicek v Alexander Holburn Beaudin & Lang (2010) 8 BCLR (5th) 316 (BC SC)—note 19

The plaintiff was an articling student with the defendant firm. Following a dinner held by the firm, the plaintiff and some of her colleagues went to a Vancouver nightclub. All of the parties had consumed significant amounts of alcohol. While attempting to dance, one of her colleagues, Jeremy Poole, knocked the plaintiff over, landed on top of her, and temporarily rendered her unconscious. The plaintiff struck her head hard on the dance floor. Although the damage was described as a “mild traumatic brain injury,” the plaintiff developed severe and debilitating headaches that prevented her from practicing law.

The firm, the restaurant, and the nightclub settled with the plaintiff on undisclosed terms. The action against Poole went to trial and the court imposed liability in negligence. Because the plaintiff, aged 32 at the time of the accident, had been an unusually capable and driven lawyer, damages — mostly for loss of income — were assessed at approximately \$6 000 000.

Piresferreira v Ayotte (2010) 319 DLR (4th) 665 (Ont CA)—note 21

The plaintiff worked for Bell Mobility for about ten years. She enjoyed consistently excellent performance assessments until 2004, when the defendant became her supervisor. The court described the defendant as “critical, demanding, loud and aggressive.” His managerial style involved a great deal of yelling and cussing. The plaintiff, in contrast, was nervous and sensitive by nature.

The plaintiff's performance deteriorated under the defendant's supervision. That caused him to focus even more heavily on her perceived shortcomings. The situation came to a head when the defendant formed the opinion that the plaintiff had failed to make adequate contact with a particular client. When she tried to explain herself by holding up her Blackberry, which contained communications with the client, the defendant pushed her left shoulder, causing her to briefly lose her balance. She followed him into his office and offered the opinion that he had acted wrongfully. He shouted, "Get the hell out!" She left work immediately and never returned. Although she was not physically injured, she developed post-traumatic stress disorder.

At trial, the defendant was held liable for battery, intentional infliction of mental suffering, and negligent infliction of mental suffering. In addition to being vicariously liable, Bell Mobility was personally liable for negligent infliction of mental suffering and constructive dismissal. Damages were calculated at approximately \$500 000: general damages of \$50 000 plus loss of income of \$500 000 (minus 10 percent for contingencies).

The Ontario Court of Appeal reduced damages to approximately \$150 000: the battery was assessed at \$15 000, lost wages under breach of contract was pegged at \$90 000, and \$45 000 was awarded for the aggravated manner of the constructive dismissal.

The Court of Appeal rejected the trial judge's finding that the defendant manager had committed the tort of *intentional* infliction of mental suffering. Although such a tort exists, it requires proof that the defendant perpetrated outrageous acts either with the subjective intent to cause mental distress or at least with knowledge that such harm was likely to occur. The trial judge improperly lowered the threshold to proof of recklessness. Such a development would intolerably interfere with employment relations.

The most important aspect of the decision was the appellate court's rejection of the trial judge's application of the tort of *negligence* to facts involving the infliction of mental suffering in the workplace. Loss undoubtedly was reasonably foreseeable. As explained in the text, however, the Court of Appeal found that the recognition of such a duty of care was undesirable from a policy perspective. Tortious liability for the careless infliction of mental distress in the workplace was best left to the legislatures.

Cooper v Hobart (2001) 206 DLR (4th) 193 (SCC)—note 4

The facts and decision are discussed in Case Brief 6.3. On facts similar to *Cooper v. Hobart*, the Privy Council in *Yuen Kun-yeu v. A.G. of Hong Kong*, [1987] 2 All E.R. 705 (P.C.) and the House of Lords in *Davis v. Radcliffe*, [1990] 1 W.L.R. 821 (H.L.), reached the same conclusion as the Supreme Court of Canada.

BDC Ltd v Hofstrand Farms Ltd (1986) 26 DLR (4th) 1 (SCC)—note 5

The Province of British Columbia issued a grant of land to the plaintiff. The plaintiff entered into a contract under which it agreed to sell that grant to another party. Under the terms of that contract, however, the purchaser was entitled to withdraw from the sale if the grant was not registered by 13 December 1976. BC entered into a contract with the

defendant courier company to deliver the grant to the plaintiff. The defendant was not told what the package contained, nor that the plaintiff could suffer a substantial loss if the package was not delivered on time. The defendant delivered the package to the plaintiff late. As a result, the plaintiff's purchaser cancelled the sales contract and the plaintiff suffered a loss. It then sued the defendant in negligence for carelessly failing to deliver the land grant on time.

The Supreme Court of Canada held that the defendant did not owe a duty of care to the plaintiff and therefore was not held liable. Given that the defendant was unaware of the circumstances surrounding the contents of the package, it was not reasonably foreseeable that late delivery would cause the plaintiff to lose the benefit of a sales contract with another party. Furthermore, the plaintiff had not relied upon the defendant. Although the plaintiff's position was vulnerable, that vulnerability arose from the term of the agreement that it accepted when it contracted with the purchaser. Finally, imposition of a duty of care in such circumstances would create problems of indeterminacy. A person in the defendant's position would be exposed to an unforeseeable loss as a result of a negligent act.

***Jordan House Ltd v Menow & Honsberger* (1973) 38 DLR (3d) 105 (SCC)—note 6**

The plaintiff was a regular patron of the defendant's tavern and the defendant therefore knew of his tendency to become drunk and irresponsible. After serving the plaintiff past the point of intoxication one evening, the defendant ejected the plaintiff from the bar. The defendant knew that the plaintiff would have to walk home along a dark, rural road. The plaintiff was struck by a car while weaving his way down the middle of the road. He sued the defendant in negligence.

The Supreme Court of Canada held that there is no general duty to rescue. Consequently, one person normally is not under any obligation to protect another from harm. However, on the facts, the Court recognized an exception to that general rule because the parties shared a special relationship. That was true primarily because the defendant obtained an economic benefit as a result of serving alcohol to the defendant. The Court stressed, however, that not every tavern owner would be expected to act as a watch-dog for every drunken patron. The imposition of the duty of care in *Jordan House* also reflected the fact that the plaintiff was well known to the defendant, the fact that the plaintiff was required to walk alone along a dark highway, and so on.

***Childs v Desormeaux* (2006) 266 DLR (4th) 257 (SCC)—note 6**

The defendant hosted a New Year's Eve party at which guests supplied and served their own alcohol. One of the guests was Desmond Desormeaux, who, to the defendants' knowledge, was an alcoholic with several convictions for drunk driving. Although Desormeaux had become severely intoxicated during the party, the defendants took no steps to dissuade him from driving home. After leaving the defendants' party, Desormeaux caused a traffic accident that left the plaintiff, 18-year-old Zoe Childs, paraplegic. The plaintiff sued the defendants in negligence. Because a duty of care had not previously been recognized in similar circumstances, the trial judge applied test formulated by the Supreme Court of Canada in *Cooper v. Hobart*. He first found that the

plaintiff's injuries were a reasonably foreseeable consequence of the defendants' failure to restrain Desormeaux from driving. He also found that there was a relationship of proximity between the defendants and Desormeaux (though he did not directly consider the issue of proximity between the defendants and the plaintiff). At the third stage of the test, however, the trial judge saw several policy reasons for negating the *prima facie* duty of care. First, he was concerned that the imposition of liability "would place an inordinate burden on all social hosts." Second, he doubted that recognition of a duty of care would substantially deter undesirable behaviour. Third, he stressed that such a duty had not previously been recognized by the courts and therefore would be novel. And finally, he suggested that, given the difficulty of defining the scope of any such duty, the matter should be left to the government, which "has both the financial resources and legislative ability to regulate social host responsibility, if they so desire."

The Court of Appeal affirmed that decision. While it did not deny that a social host could ever be held liable to a third party, it rejected the plaintiff's claim on the facts. It said that social hosts do not have the same obligations as commercial hosts. It stressed that the recognition of a duty of care would be a substantial development in the law of negligence. And it held that the facts did not support the imposition of a duty. Although the hosts knew of Desormeaux's problems with alcohol, they did not provide him with liquor (he brought his own) and they did not know how much he had had to drink.

The defendant won again on further appeal to the Supreme Court of Canada. The court reached that conclusion on several grounds.

- The court held that the plaintiff's injury was not *reasonably foreseeable* on the facts. There was no finding that the hosts knew, or should have known, that their guest was intoxicated.
- Even if the risk was reasonable foreseeable, the court refused to depart from the general presumption against any *positive duty to act*. A social host is not required to monitor or control its guests' alcohol consumption. A guest instead is treated as an autonomous agent. getting drunk is a personal choice.
- Finally, there is no evidence that the plaintiff belonged to a class that *reasonably relied* upon the defendant's control over its guests' alcohol intake.

The court stressed throughout that the situation of a social host fundamentally differs from that of a business that sells alcohol for profit.

Star Valley Tavern v Nield (1976) 71 DLR (3d) 439 (Man QB)—note 7

The plaintiff owned a tavern outside of Selkirk, Manitoba. There were two routes from Selkirk to the tavern. The first route, which was less than two miles long, crossed a bridge. The second route, which was about fifteen miles long, went around the bridge. The defendant carelessly rammed a car into the bridge. He was clearly liable to the bridge owner for the cost of repairs. Those repairs took about a month to complete. During that time, the plaintiff's business dropped off significantly because customers were unwilling to drive fifteen miles for a drink. The plaintiff sued the defendant. The court held that the defendant did not owe a duty of care to the plaintiff. He held that it would be unreasonable to expect the defendant to compensate every person who suffered a financial loss as a result of the damage to the bridge. Expressed in the language of

Cooper v Hobart, it might be said that while there was proximity between the defendant and the bridge owner, there was none between the defendant and the plaintiff. Liability might also be denied on policy grounds. Allowing claims of this sort could open the floodgates to litigation, as well as impose an intolerable burden on the defendant.

Soulsby v Toronto (1907) 15 OLR 13 (Ont HCJ)—note 8

A railway passed through a property owned by the defendant. The defendant constructed a crossing bar and, as a means of protecting the public, regularly stationed a guard to lower the gate when a train was about to pass. The claimant, relying upon that practice, proceeded over the tracks when the gate was up. He was struck by a train and lost an arm as a result of the accident. Although it had induced that reliance, and although it had failed to employ a guard at the relevant time, the defendant was held not liable for failing to protect the claimant.

Mustapha v Culligan Canada Ltd (2008) 293 DLR (4th) 29 (SCC)—note 9

The plaintiff was a fastidiously clean man who ran a fastidiously clean house. For health reasons, his family consumed only bottled water, which he purchased from the defendant company. While replacing an empty bottle with a new bottle, the plaintiff discovered that it contained the remains of a fly. Although the contaminated water was not consumed and did not cause anyone to suffer any physical injury, the plaintiff became obsessed with the event and its “revolting implications” for the health of his family. As found at trial:

He pictures flies walking on animal feces or rotten food and then being in his supposedly pure water. The worst thought was that his wife would carefully sterilize a bottle, for the health and safety of his baby daughter but then would put into that bottle, formula made with Culligan water.

...

Mr. Mustapha’s self description is that he could not get the fly in the bottle out of his mind, he had nightmares, he was only sleeping four hours or so a night, he has been unable to drink water since the incident, he has lost his sense of humour and instead become argumentative and edgy, he has been constipated, is bothered by revolting mental images of flies on feces etc., can no longer take long and enjoyable showers and instead, after lengthy treatment, can only take perfunctory showers with his head down so the water does not strike his face. It took lengthy treatment before he could drink coffee made with water. He has to take a variety of medications which he says leave him feeling that he is not in full control and draggy. He can’t get up and get off to work in the mornings as he always used to. He has lost clients because of the changes in his personality and mood and also because of the reduction in his previous skills as a hairstylist. He has lost interest in, and ability to perform sexually. He had initial complaints of nausea and present complaints of constant, unexplained abdominal pain or discomfort.

The plaintiff also adduced evidence that he had suffered a major depressive disorder. The evidence also indicated that the plaintiff’s reaction, while extreme, was a function of his upbringing and his culture.

Liability for nervous shock was imposed at trial, but overturned in the Ontario Court of Appeal. The Supreme Court of Canada similarly held that the claim must fail. Such

claims sometimes are resolved at the duty of care stage of analysis. McLachlin CJC, however, addressed the plaintiff's unusual vulnerability as a matter of *remoteness*. She held that it was not reasonably foreseeable that someone would suffer the plaintiff's reaction to the simple sight of tainted water.

Hedley Byrne & Co v Heller & Partners Ltd [1963] 2 All ER 575 (HL)—note 10

The plaintiff was an advertising agency. One of its customers wanted to receive services on credit. The plaintiff therefore asked the defendant, which was its banker, to assess the customer's credit-worthiness. The defendant carelessly reported that the customer was in sound financial condition. In fact, that was not true and the plaintiff subsequently suffered a loss when it was unable to receive payment from the customer. The plaintiff then sued the defendant for negligence. That claim was rejected at trial and in the Court of Appeal on the ground that the defendant did not owe a duty of care to the plaintiff with respect to a pure economic loss that was created by a negligent misstatement. The House of Lords agreed with the result reached in the lower courts, but for a different reason. It held that a duty of care could be recognized in such circumstances. It nevertheless refused liability because the defendant had issued its statement to the plaintiff subject to a disclaimer clause.

Ultramares Corp v Touche 255 NY 170 (1931 CA)—note 11

The plaintiff invested in a company. In doing so, it relied on financial statements that had been prepared by the defendant on behalf of the company. The defendant knew that the statements would be used by the company for general financial purposes and that they consequently would be shown to other parties. The defendant did not know, however, that the statements would be used for the particular purpose of obtaining financial assistance from people like the plaintiff. The New York Court of Appeal denied liability. The case is famous for Cardozo JA's suggestion that liability on the facts would threaten to create "liability in an indeterminate amount for an indeterminate time to an indeterminate class." As explained in the text, the effects of negligent statements, as opposed to other forms of negligent conduct, are not naturally confined by time or space.

Robson v Chrysler Corp (Canada) (1962) 32 DLR (2d) 49 (Alta CA)—note 12

The defendant, a snowmobile manufacturer, arranged a stage show to display its latest products. It hired the plaintiff, the operator of a modelling agency, to assist in the show. During the show, only part of the stage was lit. The plaintiff, who was standing in a darkened area, asked the defendant where she should walk. As a result of following the defendant's careless instructions, the plaintiff fell off the stage and suffered injuries. She sued for negligence. That action was successful. The defendant owed the plaintiff a duty of care to protect her during the show. The defendant breached the standard of care by providing poor instructions. That careless act caused the plaintiff to suffer a compensable loss.

Swinamer v Nova Scotia (Attorney General) (1994) 112 DLR (4th) 18 (SCC)—note 17

The plaintiff was driving on a public highway when a tree crashed through his vehicle and rendered him a paraplegic. He sued the province and alleged that it had negligently failed to check the area for rotten or dangerous trees. The claim was unsuccessful. The

Supreme Court of Canada refused to recognize a duty of care. The province had implemented a limited system for identifying and removing rotten trees. That system was limited in scope because of financial constraints. The court held that the decision to employ that particular system was made as a matter of government policy, and that it therefore could not form the basis of an action in negligence. The courts will not interfere in political matters.

Swinamer is one in a long line of Supreme Court of Canada cases dealing with the duty of care of a public authority. (*Neilsen v Kamloops (City)*, which was discussed in an earlier Case Brief, is another.) The basic idea is clear enough. When analyzing allegations of negligence against government bodies, the courts draw a distinction between *policy* and *operational* matters. A *policy* matter is one that involves a political decision (eg how much funding to allocate to a system for eliminating roadside dangers). An *operational* matter is one that involves the actual implementation of a policy. A policy decision is generally immune from liability in negligence unless the defendant acted in bad faith or failed to address the issue altogether. The courts do not feel equipped to second-guess difficult political choices. The remedy for poor policies lies in the ballot box, rather than in the courts. In contrast, once the government has adopted a certain policy, it can be held liable in negligence if it fails to properly carry out the operational aspects.

Unfortunately, while the distinction between policy and operations is attractive in theory, it is often difficult to draw in practice. The case law has therefore tended to be somewhat inconsistent. Government activity is not always easy to classify as entirely policy or entirely operational. In some situations, important decisions are exercised at various levels.

Edwards v Law Society of Upper Canada (2001) 206 DLR (4th) 211 (SCC)—note 22

The plaintiff entered into a contract with a company to buy gold. Under the terms of that contract, the purchase price was to be held in trust by the company's lawyer. The contract was breached and the plaintiff never received any gold. Moreover, the purchase money had been wrongfully dissipated from the lawyer's trust account. The plaintiff brought an action in negligence against the defendant, which is the body that regulates lawyers in Ontario. The plaintiff claimed that his loss was caused by the defendant's careless failure to execute its obligation to ensure that the lawyer's trust accounts were properly managed. As in *Cooper v Hobart*, the defendant in *Edwards* brought a motion to strike the plaintiff's statement of claim on the ground that the circumstances did not support the recognition of a duty of care.

The Supreme Court of Canada held that the defendant did not owe a duty of care to the plaintiff. Since the facts did not fall within any pre-existing duty category, it was necessary apply the *Cooper v Hobart* test. The Court held that a *prima facie* duty of care did not arise under the first branch of that test because there was not a relationship of sufficient proximity between the parties. In that regard, the Court was particularly influenced by: (i) the fact that the plaintiff was not himself a "client" of the lawyer, and (ii) the fact that the legislative scheme under which the defendant operated did not contemplate a private law right of action in the circumstances of the case. The Court also

held that even if a *prima facie* duty of care had been established, it would have been negated on policy grounds, essentially for the same reasons that would have had effect in *Cooper v Hobart*.

Arland v Taylor [1955] 3 DLR 358 (Ont CA)—note 23

The plaintiff, a nine-year-old boy, was struck by the defendant's car while he walked down a foggy road. The jury found in favour of the defendant. The plaintiff took the case to the Court of Appeal on the basis that the trial judge had not instructed the jury properly on the issue of the standard of care. That appeal was dismissed. In the course of his decision, Laidlaw JA made the statement quoted in the text.

McEllistrum v Etches (1956) 6 DLR (2d) 1 (SCC)—note 27

The defendant driver struck and killed a six-year-old boy. The boy's father sued the defendant in negligence. The defendant argued that damages should be reduced to reflect the boy's contributory negligence in darting out onto a busy road. The Supreme Court of Canada rejected the plaintiff's argument that the notion of contributory negligence is inapplicable to a child. The Court held that unless the child is so young as to make the exercise absurd, the jury is entitled to ask whether the child exercised the level of "care to be expected from a child of like age, intelligence and experience."

Walker Estate v York Finch General Hospital (2001) 198 DLR (4th) 193 (SCC)—note 28

The plaintiffs contracted HIV after receiving blood from the defendant organization. The donors of the blood were men in a high-risk group (*ie* they were sexually active homosexuals). The plaintiffs sued in negligence and alleged that the defendant carelessly failed to establish a screening procedure that would have prevented individuals in high-risk groups from donating blood. The defendant argued that its screening procedure was not careless at the time that the donations were received between 1983 and 1985. The defendant also pointed to expert medical evidence in support of that position.

The Supreme Court of Canada held the defendant liable. On the issue of breach, Major J stated that the reasonable person test must be applied at the time of the allegedly carelessly act. He also said, in distinguishing the comments made in *ter Neuzen v Korn* (as discussed below in a Case Brief), that while the courts should defer to an approved medical practice in connection with complex scientific matters, there is no similar need for deference on matters that are equally accessible to laypeople. He then found that, notwithstanding the expert medical evidence, the defendant's screening procedure at the relevant time was careless. Major J reached that decision after noting that, during the same period, blood collection agencies in the United States used a much more detailed and explicit set of questions. If the defendant had used those questions in Canada, the donors who provided the blood that infected the plaintiffs probably would have been dissuaded from doing so.

R v Saskatchewan Wheat Pool (1983) 143 DLR (3d) 9 (SCC)—note 30

It was an offence under the *Canada Grain Act* to deliver infested grain. Despite otherwise exercising reasonable care, the defendant violated that provision when it delivered

infested what to the plaintiff. The plaintiff sued to recover the cost of fumigating the grain. The Supreme Court of Canada made a number of important decisions.

First, it held that there is no automatic, independent tort of breach of statutory duty. Some statutes create statutory causes of action. Leaving such legislation aside, the plaintiff's complaint must be expressed in terms of a nominate tort, usually the tort of negligence.

Second, the court held that, in contrast to the prevailing American position, a statutory standard does not always constitute the standard of care in negligence, so that breach of a statute is not *per se* evidence of carelessness. Instead, breach of a statute merely provides some evidence of the defendant's carelessness. That evidence is not determinative and must be considered in light of all of the circumstances.

Galaske v O'Donnell (1994) 112 DLR (4th) 109 (SCC)—note 30

An eight-year-old boy was injured while riding in a car driven by the defendant. The boy was injured in an accident because, contrary to a statutory provision, the defendant had not taken steps to ensure that the boy was wearing a seatbelt. A question arose as to whether that statutory breach constituted a breach of the standard of care in negligence. The Supreme Court of Canada ultimately imposed liability, but only after finding that the circumstances *as a whole* demonstrated the defendant's carelessness. Breach of the statute, in itself, was not conclusive of the issue.

Varcoe v Sterling (1992) 7 OR (3d) 204 (Gen Div), *aff'd* (1992) 10 OR (3d) 574 (CA)—note 32

An experienced investor lost a very large amount of money in the highly speculative futures market. The investor, who had not relied on his broker and who made all of his own decisions, sued the broker for his losses. The court held the broker liable in negligence under common law principles, referring at length to the broker's violation of both statutory regulations and industry practice concerning margin calls, trading limits and the transfer of funds between the investor's various stock accounts.

Rentway Canada Ltd v Laidlaw Transport Ltd (1989) 49 CCLT 150 (Ont H CJ)—note 34

There was a head-on collision between two trucks. Both drivers were killed and their vehicles were destroyed. The company that owned one of the vehicles sued the owner of the other, as well as the company that designed the headlight system that was used in the defendant's vehicle. The plaintiff's allegations were as follows. A tire on the defendant's vehicle burst. The defendant was responsible for that rupture because it carelessly failed to inspect its vehicles for damage or excessive wear. Part of the burst tire popped the left headlight from its socket and severed a supply wire, thereby causing a short circuit in the electrical system. That short circuit in turn caused the other headlight to fail. The accident occurred because the plaintiff's driver failed to see the defendant's vehicle approaching in the dark. The plaintiff argued that the manufacturer of the headlight system was negligent in placing both headlights on the same circuit. As the manufacturer knew even before the accident happened, the danger could have been eliminated easily and at little

expense by placing each headlight on a separate system. If that had been done, the plaintiff argued, the right headlight would have continued to work after the tire burst.

The trial judge held that the defendant company was liable for failing to inspect its vehicles and for failing to notice that its vehicle's tires were worn thin. However, he also held that the manufacturer of the headlight system was not liable. The evidence indicated that the manufacturer knew of the risk in advance. Moreover, it indicated that while the probability of a short circuit was small, the potential severity of damage was great. Finally, the evidence indicated that the danger could have been averted, at relatively little cost, by using a system design that put each headlight on a separate circuit. The plaintiff's theory consequently was correct with respect to the standard of care: the manufacturer had been careless. Liability nevertheless was refused because there was no proof of causation. Although the headlight system might have failed in the manner suggested, that proposition was not established on a balance of probabilities.

Hollis v Dow Corning Corp (1995) 129 DLR (4th) 609 (SCC)—note 35

A surgeon inserted a silicone breast implant manufactured by the defendant company into the plaintiff. The implant ruptured and injured the plaintiff. The plaintiff sued the company and alleged that she would not have agreed to have the surgery if she had been properly warned about the associated risks. In defence, the company argued that the plaintiff had not established a causal link between the careless failure to warn and the injury. There was no way for the company to warn the plaintiff directly because breast implant materials are always sold to physicians, and never directly to patients. Furthermore, the company argued that even if it had issued a suitable warning to the physician, there was no evidence that the physician would have passed that information along to the plaintiff. Consequently, the company argued that, even if it had met the standard of care, the plaintiff still would have suffered the same injury.

The Supreme Court of Canada rejected that argument. It held that a manufacturer can sometimes discharge its obligation to issue a warning by relying upon the “learned intermediary rule.” That is true if the manufacturer creates a product (like breast implants) that are always administered by a professional. Consequently, on the facts of *Hollis*, if the company had issued a warning to the physician, it could not have been held liable to the plaintiff even if she had suffered an injury because the physician chose not to pass that warning along to her. However, the Court also said that the defendant could not hide behind the learned intermediary rule because, in fact, it had failed to issue a warning to the learned intermediary.

Although the Court appeared to reach an acceptable conclusion in *Hollis*, its reasoning raises a number of complex causal issues. For a general discussion, see M McInnes “Causation in Tort Law: A Decade in the Supreme Court of Canada” (2000) 63 Sask L Rev 445.

Barnett v Chelsea & Kensington Hospital Mgmt Committee [1969] 1 QB 428 – note 40

The facts appear in You Be the Judge 6.1. The court held that the defendant hospital was not liable because, even if it had provided a proper diagnosis, the deceased would have

died because it would not have been possible to save him. By the time that the deceased reached the hospital, the effects of the arsenic poisoning were too far advanced to reverse.

Athey v Leonati (1996) 140 DLR (4th) 235 (SCC)—note 41

The plaintiff had a history of back problems. He then suffered a back injury as a result of an accident that was caused by the defendant's carelessness. While performing a series of rehabilitation exercises that his doctor had prescribed, the plaintiff herniated a disk. The trial judge held that that herniation was caused 25 percent by the plaintiff's pre-existing back condition and 75 percent by the defendant's carelessness. She therefore awarded him 75 percent of his damages. The Supreme Court of Canada, however, held that the plaintiff was entitled to damages for 100 percent of his losses. It was sufficient that the defendant's carelessness was *a* cause of the full injury. It did not matter that the defendant's pre-existing problems also contributed to the herniation.

The situation would have been different, however, if the plaintiff had a pre-existing loss, rather than a pre-existing susceptibility to loss. In that situation, the defendant would have been liable only to the extent that it exacerbated the plaintiff's condition.

The situation also would have been different if the plaintiff's pre-existing condition was such that he would have suffered a herniated disk at some point in the future, regardless of the defendant's carelessness. In that case, the defendant would be held liable merely for the fact that it hastened the onset of the plaintiff's inevitable loss.

For a case comment on *Athey v Leonati* that canvasses the general rules of causation, see M McInnes "Causation in Tort Law: Back to Basics at the Supreme Court of Canada" (1997) 35 Alberta Law Rev 1013.

Cook v Lewis [1952] 1 DLR 1 (SCC)—note 43

The plaintiff was hunting with the two defendants. The defendants both simultaneously and carelessly shot toward the plaintiff. The plaintiff was hit by one shot. The harmful shot was obviously discharged by one of the defendants, but the evidence could not indicate which defendant actually caused the injury.

Under the usual rule of causation, the plaintiff would be denied recovery altogether. He could not prove, on a balance of probabilities (*ie* at least 51 percent), that the first defendant was responsible. Nor could he prove, on a balance of probabilities (*ie* at least 51 percent), that the second defendant was responsible. There was an equal chance (*ie* 50 percent) that each defendant was responsible. The Supreme Court of Canada nevertheless imposed liability on both defendants. Both defendants had acted carelessly. Moreover, their carelessness was such that they precluded the plaintiff from satisfying the usual rules of causation. The Court therefore created an exception to the usual rule.

The Court also held that the plaintiff is *prima facie* entitled to succeed in the tort of battery by simply proving that the defendant directly interfered in a harmful or offensive manner. The burden then shifts to the defendant to prove that the impugned action was neither intentional nor careless (or that some defence applies).

Clement v Clement (2012) 346 DLR (4th) 577 (SCC)—note 43

Joan and Joseph Clements set out to visit their daughter. He drove his motorcycle and she was a passenger. The bike was overloaded by at least 100 pounds and unbeknownst to Joseph, a small nail had punctured his rear tire. When he increased his speed to 120 km/h and cross the centre line in order to pass a vehicle on the highway, the tire blew out and both parties were thrown from the motorcycle. Joan, having suffered catastrophic brain injuries, sued Joseph with a view to gaining access to his insurance company.

Given the complexities of the accident reconstruction evidence, the trial judge held that Joan could not prove that but for Joseph's carelessness, she would not have been injured. The trial judge, however, believed that because the evidence defied precise scientific causation, Joan was entitled to use the "material contribution" test. He further held that she had satisfied that test. The British Columbia Court of Appeal set aside liability on the basis that the but for test had not been satisfied and the material contribution test was inapplicable.

In the Supreme Court of Canada, the Chief Justice disagreed with the lower courts. She emphasized that the but for test does not require precision. It may be satisfied on the basis of common sense inferences of fact even if the scientific evidence is less than conclusive. She also held, however, that the trial judge erred in applying the material contribution test. That test applies, in very exceptional circumstances, only if (as in *Cook v Lewis*) the plaintiff has shown that the injury was caused by two or more careless defendants, but the evidence cannot identify which of the defendants actually was responsible. Finally, McLachlin CJ held that since the correct analysis could not be performed on the written record, the case needed to be re-tried.

Oke v Weide Transport Ltd (1963) 41 DLR (2d) 53 (Man CA)—note 44

The defendant non-negligently knocked over a sign post on a highway. The post was left protruding from the ground at an angle. The plaintiff was killed when he drove over that post, which penetrated the floor of his car and impaled him. The trial judge imposed liability upon the defendant for failing to inform the police of the danger that he had created on the highway. In the course of doing so, the judge said that the defendant could not escape liability merely by showing that the plaintiff's car was unusually vulnerable to being penetrated by the post because its engine was located at the back, rather than at the front. The Court of Appeal reversed the decision on liability because it did not accept that the accident that killed the plaintiff was reasonably foreseeable. The appellate court, however, did not question the trial judge's comments regarding the applicability of the "thin skull" rule to property.

Alcoa Minerals of Jamaica v Broderick [2000] 3 WLR 23 (PC)—note 46

The facts took place in Jamaica. The defendant committed the tort of nuisance by operating a smelting plant that emitted corrosive materials. Those materials caused substantial damage to the roof of the plaintiff's house. The plaintiff commenced an action in 1989, at which time the cost of repairing the roof was \$211 000. In the following years, the Jamaican economy suffered through a recession and inflation increased markedly. By 1994, when the matter was decided at trial, the cost of repairing the plaintiff's roof was \$938 000. The trial judge awarded damages in that amount. The defendant eventually

appealed to the Privy Council on the ground that the plaintiff was limited, by the decision in *Liesbosch*, to the initial value of its loss. The defendant argued that the plaintiff should have repaired the roof immediately, and that the increased cost of repair was due to the plaintiff's own impecuniosity in being unable to afford immediate repairs.

The Privy Council found in favour of the plaintiff and affirmed the trial judge's decision to award damages of \$938 000. The court said that there is no absolute rule that requires damages to be assessed at the date of the initial damage. It also said that there is no absolute rule to the effect that the plaintiff cannot recover the full value of a loss that was exacerbated by its own impecuniosity. The availability of damages in such circumstances is determined by an application of the usual test of reasonable foreseeability. And on the facts of the case, it was reasonably foreseeable that a person in the plaintiff's position might not be able to afford to immediately repair the damage caused by the defendant's nuisance and that economic factors would render later repairs more costly.

Lagden v O'Connor [2004] 1 AC 1067 (HL)—note 46

The defendant negligently damaged the plaintiff's car. The plaintiff was unemployed and a poor credit risk. It therefore was impossible for him, during the period of repair, to rent a replacement vehicle, in the usual manner, by using either pre-existing resources or borrowed money.

The plaintiff was able, however, to obtain a replacement vehicle from a "credit hire company." That type of company effectively allows a renter to obtain a vehicle without direct cost. Instead, the company ultimately receives payment, after the renter has successfully sued the negligent defendant, from the defendant's insurer. In exchange for that special credit facility, credit hire companies charge an additional fee, over and above the market rate for a simple car rental.

The facts consequently raised the issues of remoteness and the "thin wallet" rule. As a result of his own impecuniousness, the plaintiff was able to mitigate his loss only at an unusually high cost. The House of Lords accordingly was asked whether *The Dredger Liesbosch* continued to apply in English law. It answered in the negative. In the words of Lord Scott, that "the law has moved on, and the correct test of remoteness today is whether the loss was reasonably foreseeable."⁷ And since it was reasonably foreseeable that the defendant's carelessness might affect an impecunious claimant who could not afford to rent a replacement vehicle in the usual manner, the plaintiff's additional expenses were recoverable.

The Dredger Liesbosch v SS Edison [1933] AC 449 (HL)—note 47

A ship named the *Liesbosch* was sunk and lost due to the negligence of the owners of a ship called the *Edison*. The court held that the plaintiff, which was the owner of the *Liesbosch*, was entitled to damages representing the cost of replacing their ship.

The plaintiff also asked for damages under another head. Before the *Liesbosch* was sunk, its owner contractually promised to use the ship to provide services to a third party. As a

⁷ [2004] 1 AC 1067 at 1088 (HL).

result of the accident, however, the *Liesbosch* was not available for the purpose. Furthermore, because of the plaintiff's generally tight financial situation, it was unable to buy a replacement ship immediately. Consequently, it was required to rent another ship, called the *Adria*, for the purpose of fulfilling its contractual obligation. The plaintiff therefore claimed that it was entitled to damages representing the additional cost that it sustained as a result of being required to rent the *Adria*. The House of Lords rejected that claim on the ground that the defendant cannot be held responsible for the plaintiff's impecuniosity. That decision established the proposition that the plaintiff cannot claim additional damages that flow from the fact that it had a "thin wallet" and therefore was unusually susceptible to economic harm.

***Dubé v Labor* (1986) 27 DLR (4th) 653 (SCC)—note 49**

The plaintiff was injured as a result of being a passenger in a vehicle driven by the defendant. As the plaintiff was aware, the defendant was drunk at the time of the accident. As against the plaintiff's claim for damages, the defendant pleaded voluntary assumption of risk. Estey J explained the scope of the defence:

Thus, *volenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.

Common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant's negligence. ...

The defence of *volenti* will, furthermore, necessarily be inapplicable in the great majority of drunken driver-willing passenger cases. It requires an awareness of the circumstances and the consequences of action that are rarely present on the facts of such cases at the relevant time.

The defence failed on the facts.

***British Columbia v Zastowny* (2008) 290 DLR (4th) 219 (SCC)—note 50 and note 51**

In 1988, the claimant committed a break and enter in an attempt to support his crack cocaine habit. He was convicted and imprisoned. While in prison, he was sexually assaulted twice by a prison employee. After being released from prison in 1989, the claimant committed a series of crimes that caused him to be imprisoned for twelve or the next fifteen years. In 2003, he sued the defendant, on the theory that it was vicariously liable for the torts committed by its employee. The plaintiff sought damages for, *inter alia*, income lost during incarceration. The claimant argued that the torts had caused him to suffer psychologically injuries, which in turn caused him to become anti-social, which in turn caused him to commit crimes, which in turn prevented him from earning an income while imprison.

The trial judge accepted the claimant's argument and consequently awarded damages for loss of income. Moreover, that award covered both past and future losses. The trial judge

held not only that the torts had caused the claimant to be imprisoned in the past, but probably would continue to do so in the future.

The British Columbia Court of Appeal was divided on the merits of the claim, but the Supreme Court of Canada unanimously reversed the trial judgment. The court reached that conclusion on the basis of the defence of *ex turpi* or illegality. Rothstein J explained.

[22] Zastowny’s wage loss while incarcerated is occasioned by the illegal acts for which he was convicted and sentenced to serve time. In my view, therefore, the *ex turpi* doctrine bars Zastowny from recovering damages for time spent in prison because such an award would introduce an inconsistency in the fabric of law. This is because such an award would be, as McLachlin J described in *Hall v Hebert*, “giving with one hand what it takes away with the other.” When a person receives a criminal sanction, he or she is subject to a criminal penalty as well as the civil consequences that are the natural result of the criminal sanction. The consequences of imprisonment include wage loss. As Deschamps J found in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc*, 2003 SCC 68 at 33, “[e]very incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability.” An award of damages for wages lost while incarcerated would constitute a rebate of the natural consequence of the penalty provided by the criminal law.

[23] Preserving the integrity of the justice system by preventing inconsistency in the law is a matter of judicial policy that underlies the *ex turpi* doctrine. ...

[30] The judicial policy that underlies the *ex turpi* doctrine precludes damages for wage loss due to time spent in incarceration because it introduces an inconsistency in the fabric of the law that compromises the integrity of the justice system. In asking for damages for wage loss for time spent in prison, Zastowny is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. Zastowny was punished for his illegal acts on the basis that he possessed sufficient *mens rea* to be held criminally responsible for them. He is personally responsible for his criminal acts and the consequences that flow from them. He cannot attribute them to others and evade or seek rebate of those consequences. [T]o grant a civil remedy for any time spent in prison suggests that criminally sanctioned conduct of an individual can be attributed elsewhere. ...

[32] Zastowny was serving a lawfully imposed criminal sentence. ... To award damages for any period of incarceration pursuant to a lawfully imposed sentence would create that conflict between the criminal and civil law which the judicial policy underlying the *ex turpi* doctrine requires be precluded. In the words of McLachlin J in *Hall v Hebert*, “concern for the integrity of the legal system trumps the concern that the defendant be responsible.” It would be inconsistent to incarcerate a person for a criminal offence and then compensate him for the

incarceration. Zastowny was serving the sentence imposed for his criminal conduct. He cannot attribute part of his lawfully imposed sentence to someone else in order to obtain a partial rebate of the consequences of his criminal conduct.