

Contents

BURDEN OF PROOF	1
DUTY OF CARE	2
RECOVERY OF PURE ECONOMIC LOSS IN NEGLIGENCE.....	5
STANDARD OF CARE.....	6
CAUSATION.....	7
RE MOTENESS	9
DEFENCES	10
DAMAGES.....	12
THE TORT LIABILITY OF PUBLIC AUTHORITIES.....	15
NEGLIGENT MISREPRESENTATION.....	18
INTENTIONAL TORTS.....	19
VICARIOUS LIABILITY.....	22
INFORMED CONSENT & DOCTOR'S DUTY TO DISCLOSE	24
NUISANCE	25
TORT LAW: THEORIES, CRITICISMS, AND ALTERNATIVES	26

BURDEN OF PROOF

There is a burden of proof on whoever asserts a claim. In general, the onus is on the plaintiff (P) to prove on a balance of probabilities that the defendant (D) owed a duty of care to P, the standard of care and its breach by D, causation of P's loss by D, and that such loss was of the nature recognized as compensable in tort law. The burden of proof then shifts to D to assert any defences.

EXCEPTIONS:

- Impossible to prove cause between two tortfeasors
 - After P proves one of the D's caused loss, burden shifts to D's to prove who caused loss (*Cook v. Lewis*)
- Highway Traffic Act (*MacDonald v. Woodard*)
 - As per the Highway Traffic Act, when loss is sustained by a Plaintiff pedestrian by reason of MV on highway, the onus of proof shifts to the owner of the MV (D) to prove that the loss was not caused by D's negligent conduct
- Parental Responsibility Act (*Shannon v. T.W.*)
 - Under the Parental Responsibility Act, when a child takes, damages, or destroys property, an owner may bring an action against the parent of the child. The parent is liable for the damages unless the parent prove he/she **exercised reasonable supervision** over the child and made **reasonable efforts** to prevent/discourage child from engaging in that activity. (Max damages 25K in property) **OR** that the actions were not intentional.
- Market Share Liability (*Sindell v. Abbott*)
 - The plaintiff is unable to identify the specific manufacturer who caused the damage. The burden of proof shifts to the defendants to prove whose product is was
 - Damage is apportioned based on their market share

DUTY OF CARE

First, the defendant must be found to have owed the plaintiff a **duty of care**. This is a determination of whether the class of persons to whom the plaintiff belongs and the class of persons to whom the defendant belongs are said to enjoy a relationship of “**neighbourhood**” (*Donoghue v. Stevenson*).

1. Lord Atkin wrote that “you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.” This element of neighbourhood must exist between classes of persons for their relationship to give rise to a duty.
2. Realizing that new duty of care relationships may be recognized in future, Lord Macmillan wrote that “the categories of negligence are never closed.”

To determine whether there is a duty of care owed we must first ask whether that relationship is the same as, or is analogous to, a relationship which the courts have previously recognized as giving rise to a duty of care [*Cooper v Hobart*].

Specific Relationships Recognized as Giving Rise to a Duty of Care:

Doctor – Patient (*Marshall v. Curry; Arndt v. Smith*)
 Manufacturer – Consumer (*Donoghue v. Stevenson*)
 Drug manufacturer – Consumer (*Sindell v. Abbott; Buchan v. Ortho*)
 Medical device Manuf – Doctor -- Patient (*Hollis v. Dow Corning*)
 Employer – Employee (*Paris v. Stepney*)
 Department of Highways – Patrons of Highways (*Just v. British Columbia*)
 City – Users of areas owned/kept by city (*Kennedy v. London – bicyclist post*)
 Operator of Dangerous Competition – Intoxicated Competitor (*Crocker v. Sundance*)
 Police Officers – Identified Victims of Serial Offenders (*Jane Doe v. Toronto*)
 Commercial Hosts – Members of Public Injured by Intoxicated Customers (*Stewart v. Pettie*)
 Highway drivers – Pedestrians/Other Highway users (*MacDonald v. Woodard*)
 Builder – subsequent users of building (*Winnipeg Condo Corp. v. Bird Construction*)

General Relationships Recognized as Giving Rise to a Duty of Care:

Carrier----- Passenger----- [*Matthews v Maclaren/Good Samaritan Act*]
 Rescuer ----- Rescued----- [*Horsley v MacLaren*]
 Driver -----Driver----- [*Athey*]
 Employer----- Employee----- [*Paris; Queen v Cognos - account move no job*]
 Highway drivers-----Pedestrians----- [*MacDonald v. Woodard*]
 Risk Creator-----Injured by Risk-----[*Crocker, Stewart, many omissions cases*]

Misfeasance duty - Positive acts - Taking inappropriate action

Manufacturer – end consumer [*Donoghue v Stevenson - snail ginger beer*]
 Registrar ≠ investors [*Cooper v Hobart*]
 Cops – citizens (duty to protect/warn) [*Jane Doe v Metro Toronto Police - serial rapist*]
 Student – professor [*Bella v Young - no footnotes*]
 Doctor – Patient [*Paxton v Ramji - acne medication harmed child*]
 Doctor ≠ unborn child [*Paxton v Ramji- acne medication harmed child*]
 Mom ≠ unborn child (Unless unborn child in Alberta, in car, injury suffered in utero - main idea is to allow child to access mother’s insurance without compromising mother’s rights and autonomy) [*Maternal Tort Liability Act + Rewega*]
 Mom ≠ unborn children [*Dobon v Dobson - same facts as above*]
 Health care providers – babies during birth [*Liebig v Guelph General Hospital*]
 Health care providers ≠ human cells prior to implantation [*A(A Minor) v. A Health & Social Services Trust*]

NO PRE-EXISTING COMMON LAW OR STATUTORY RELATIONSHIP

To my knowledge, the specific relationship between plaintiff and defendant has not yet been defined by the courts or statute, so we must apply the two stage **Anns** test originally established by **Anns v. Merton District Borough Council**, adopted in Canada by **Kamloops v. Nielsen**, and modified by **Cooper v Hobart**.

Applying the Anns Test:

Step 1 of this test determines if a prima facie duty of care exists by examining foreseeability and proximity, as well as any policy considerations related specifically to the plaintiff-defendant relationship that may negate a duty of care.

FORESEEABILITY: relationship is such that it is reasonably foreseeable that careless conduct of (i) **any kind** by the defendant may result in damage of **some kind** to the (ii) **this** plaintiff (*met in Cooper as between the registrar and investors*)

Foreseeable Risk of Injury - [*Moule - climbing tree*]

“There is a duty of care to take reasonable precautions, but only against foreseeable consequences.”

Foreseeable Plaintiff [*Palsgraf - fireworks train, range of danger*]

*“The scope of the duty of care is limited, and is owed to a class of people who could reasonably be in apprehension of danger. Although **Palsgraf** is an American decision, it has been adopted by Canadian courts.”*

PROXIMITY: refers to a “close and direct” relationship. Factors included here evaluate the closeness of the relationship and determine whether it is just and fair having regard to that relationship to impose a duty of care in law. *In establishing proximity we include any **policy considerations specific to the relationship** between these classes that ought to negate the duty of care* [*Cooper v. Hobart*]

- Representations
- Reliance/dependence
- Property or other interests involved
- Conflict of interest
- Relationship of economic benefit (*Stewart v. Pettie*)
- Control/supervision
- P belongs to specially identifiable plaintiff class (*Jane Doe*)
- Defendant participated in the creation of a risk (*Crocker*)
- Statute obligations/affirmative duty imposed by statute (*Jane Doe, Just*)

*Given that a prima facie duty of care exists, the **SECOND STAGE OF** Anns test asks whether there are any **residual policy considerations** that ought to negate that duty.*

TYPES OF RESIDUAL POLICY CONSIDERATIONS:

- Arguments about judicial administration (**floodgates**)
 - *Finding that this class of defendant owes this class of plaintiff a duty is not appropriate because to do so would be to open the **floodgates** to opportunistic individuals pursuing litigation of spurious claims. (**Mustapha**)*
- Arguments about **institutional competence**
 - *Finding that a duty of care is owed is appropriate because the courts are the proper arena to make decisions regarding _____. The courts are specifically designed to deal with complex factual issues and respond to changing social circumstances while maintaining their objectivity.*

- *Finding that this class of defendant owes a duty of care to this class of plaintiff is not appropriate because the courts are not the proper arena to make decisions regarding _____. Engaging as it does with issues of change, the legislatures – a body that is designed to change with fluctuating public opinion – are instead the proper arena. Regulation is the job of the legislature and administration; the courts should apply, and not make, the law.*
- **Nature of the damage** – emotional harm, pure economic loss
- **Economic** - cost-benefit analysis
- Arguments about **deterrence** and **social utility**
 - *Finding that a duty of care is owed is appropriate because that would encourage good conduct and deter bad conduct.*
 - *Or, by contrast, arguing that a finding of duty would encourage good conduct and deter bad conduct is a formal assumption. Not everyone knows of new regulations and adjusts their conduct accordingly.*
 - *Finding that a duty of care is owed is not appropriate because that would deter good conduct and encourage bad conduct.*
- Arguments about **privacy and autonomy rights**
 - *Finding that a duty of care is owed is not appropriate because that would unduly infringe upon the privacy and autonomy rights of members of the class to which the plaintiff belongs (**Dobson v. Dobson**).*
- Arguments about **bearing costs** of litigation
 - *Finding that a duty of care is owed is appropriate because members of the class to which the defendant belongs are better equipped to bear the costs of injuries suffered by members of the class to which the plaintiff belongs.*
 - *Finding that a duty is owed is not appropriate because members of the class to which the defendant belongs are not better equipped to bear the costs of injuries suffered by members of the class to which the plaintiff belongs.*
- Arguments about identifying and **rectifying defects**
 - *Finding that a duty of care is owed is appropriate because members of the class to which the defendant belongs are in a better position to identify and rectify defects in products before they are distributed and consumed by members of the class to which the plaintiff belongs. (**Sindell v. Abbott** - dissent says not fair to hold liab based on ‘deep pockets’)*
 - *Finding that a duty of care is owed is not appropriate because members of the class to which the defendant belongs are not in a better position to identify and rectify defects in products before they are distributed and consumed by members of the class to which the plaintiff belongs.*

DUTIES OF AFFIRMATIVE ACTION & NONFEASANCE DUTY

“The courts are generally unwilling to impose liability for losses caused by a failure to act. However, duties of affirmative action have been recognized in limited form where there is a special relationship.”

Three situations where nonfeasance has been recognized (discussed in **Childs v Desormeaux**)

- Host attracts others to participate in inherently risky activity they control [**Crocker**]
- Host enters into paternalistic relationship of supervision and control [**Stewart & Childs**]
- Host exercises a public role or benefited from a commercial enterprise offering service to public [**Crocker & Liquor Licence Act**]

NOTE: Social hosts ≠ invited guest [**Childs v Desormeaux**]

Rescue

Master – invited guests on pleasure craft: [**Horsley v MacLaren**]

Assume voluntary assumption of duty:

- D puts P in perilous situation [[Matthews v. MacLaren](#)]
- D physically worsened P's position [[Matthews v. MacLaren](#)]
- D worsened P's opportunity for aid [[Matthews v. MacLaren](#)]
- In rescuing, new situation of peril must be created [[Horsley v McLaren](#)]

[Good Samaritan Act](#) – Provides some defence for rescuers. Legislation is included at the end.

Negligent Infliction of Mental Shock

The claim for negligent infliction of nervous shock is that one has suffered **sudden mental shock** as a result of **witnessing the physical injury** of someone else, generally resulting **in a recognized psychiatric illness** (does not encompass grief and sorry). The claimant must be of **reasonable fortitude and robustness**. Must be a **reasonably foreseeable consequence (remoteness)**:

- Limits the consequences to the effects that the event might engender in a reasonable plaintiff.
- The thin skull argument is rejected (tortfeasor does not take his victim as he finds him).
- The thin skull rule only applies after you have established liability.

If the defendant knew that the plaintiff had a particular vulnerability to psychiatric harm before the breach, then psychiatric harm is reasonably foreseeable. [[Mustapha](#)]

RECOVERY OF PURE ECONOMIC LOSS IN NEGLIGENCE

There are limited cases in which pure economic loss is recoverable. Economic loss that does not flow from personal injury or property damage is available in cases of [relational economic loss (Bow Valley Husky) (or) negligent supply of shoddy goods or structure (Winnipeg Condo Corp)].

NOTE: There is no duty of care in a negotiation process. It would defeat the essence of negotiation to label a party's failure to disclose its bottom line, motives, or final position as negligent [[Martel](#)]

(1) NEGLIGENT SUPPLY OF SHODDY GOOD/STRUCTURE: (WINNIPEG CONDO CORP)

A duty of care can arise in tort between a builder and a subsequent user or subsequent occupier (non-privity) of the building if it is reasonably foreseeable that a defect in construction causes a risk of danger to those persons or to their property (the threat of harm is front and center and quite significant).

*The repair costs are claimable, though they do not arise from injury to person or damage to property aside from the defective structure itself. A claim for this loss is allowed based on **policy concerns** over the risk of danger to individuals. Owners/occupiers of shoddily built buildings would be encouraged to hold off from making repairs until someone actually gets hurt if claims could only succeed after the fact.*

(2) RELATIONAL ECONOMIC LOSS (BOW VALLEY HUSKY)

This type of claim arises when the defendant, as a result of negligently damaging property belonging to a third party, also causes a pure economic loss to the plaintiff with whom the third party had a relationship (usually contractual).

RECOGNIZED CATEGORIES - PROXIMITY

- Where the claimant has a proprietary or possessory interest in the damaged property.
- General average cases (Different people share a loss even though it wasn't their goods lost).
- Where the relationship between claimant and the property owner constitutes a joint venture.

These categories are not closed.

- Claimant's opportunity to allocate the risk by contract is slight, either due to the type of transaction or inequalities of bargaining power (possible new category)

If it is not a recognized category, do the Anns test.

Policy Considerations

Indeterminate liability

Other opportunities to regulate loss (contract) [Bow Valley]

Deterrence

STANDARD OF CARE

To meet the required standard of care, the defendant must have exercised the care expected of a reasonable person. The Reasonable Person Standard is considered an objective standard (though there are some exceptions). Generally, the RP is not perfect, does make judgment errors, but not negligent errors; is a fictional legal construct, not an “average” person; and most importantly is put in the shoes of the defendant, not given an outside perspective [Arland v. Taylor] There are four criteria for assessing the standard of care, in addition to considerations of custom.”

- ✓ **Probability** of injury [Bolton – cricket match – too remote] (**P**)
- ✓ **Severity** of injury [Paris v Stepney – goggles – cost of avoiding x severity] (**L**)
- ✓ **Burden** of adequate precautions [Vaughan v Halifax – bridge paint – measures and cost] (**B**)
- ✓ **Social utility** [Watt v Hertfordshire – firefighter + no jack]
 - Only applicable to activities of high social utility: lifesaving/altruistic goals
 - Applies to ppl who are public officials or whose job it is to protect the public
 - Hand formula – [US v Carroll Towing] – liability depends upon whether $B < LP$

SPECIFIC STANDARDS

Manufacturers of products

(1) Ensure the product is free of defects (*Donoghue*)

(2) To provide adequate warning of dangers inherent in use of product (of which is known or has reason to know) to the consumer (*Buchan v. Ortho*)

- 1) Warnings must be adequate – communicated clearly nature + extent of risk, in terms commensurate with gravity of danger + not neutralized
- 2) Continuing duty – warn of dangers at time of sale + discovered after product sold/delivered

Learned Intermediary Rule

In cases where the product is highly technical or expected to be used only under supervision of experts, then manufacturer’s warning to a learned intermediary will suffice. (**exception = birth control**, must inform doctor + end user *Buchan*)

STANDARD OF CARE REQUIRED OF CHILDREN

Modified objective test: [Joyal v Barsby – runs into truck]

- ✓ Reasonable care of child with similar same age, experience, intelligence, knowledge,
- ✓ Children under age of 5/6 generally immune from tort liability

NOTE: Child engages in adult activity = adult standard

STANDARD OF CARE REQUIRED OF THE DISABLED

Modified objective: Reasonable care of a person with similar disability

Unforeseen Medical Condition [*Fiala* – bipolar disorder]

“In order to be relieved of tort liability a Defendant who is suddenly and without warning afflicted by a mental illness, the Defendant must prove on the BOP that as a result of his medical condition, he had:

- No capacity to understand/appreciate the duty of care owed at the time;

OR

- Was unable to discharge his DOC as he had no meaningful control over his actions

STANDARD OF CARE REQUIRED OF PROFESSIONALS

- “Professionals are held to a higher standard than an ordinary person. The **standard of care** expected of professionals is that of a **reasonably diligent and prudent professional** [[White v. Turner](#)]
- If someone **passes themselves off as being a professional**, they will likely be held to the standard of one.
- If **volunteer**: not expected to have professional SOC, but have some training, and they are expected to know their limits (they can be held liable to pro standard if they say they have degree/expertise)

CHALLENGING THE CUSTOM

If professional acts within respectable practice, not negligent [[Ter Neuzen v Korn](#)]

- UNLESS the standard is so fraught with risks [[Girard v General Hospital](#) – patient falls, not neg here]
- Judge or jury can’t find that a standard professional practice is negligent if it “involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience or understanding of a judge or jury” [[ter Neuzen](#)]. Of course, if standard professional practice does not fall within this category, then it can be found negligent on same grounds as any other custom.

CAUSATION

The plaintiff must establish that the defendant’s breach factually caused the plaintiff’s damages.

“Causation is generally determined by an application of the but-for test which asks whether or not the plaintiff’s loss would have occurred but-for the Defendant’s negligence [[Kauffman v. TTC](#)] The breach does not need to be the sole and exclusive cause of the damage, but rather a contributing cause of the damage. [[Athey v. Leonati](#)]

□ What kind of damages is it?

- **Divisible** – loss attributable to a single tort – single cause approach
- **Indivisible** – loss attributable to multiple tort-feasors – multiple cause approach – “joint and severally”

□ BUT-FOR TEST

- Would the damages have occurred but for the D’s negligence [[Barnett v Chelsea](#) – arsenic]

□ EXCEPTIONS TO BUT-FOR

- **Multiple negligent Ds rule** [[Cook](#) – multiple shooters]
 - Injury is indivisible
 - If the but-for test were applied both negligent parties would be absolved of liability
 - If the P can prove both parties are negligent the burden of proving causation shifts to the Ds
- **Learned intermediary rule** [[Hollis](#) – breast implant mishap]
 - Manufacturers can discharge duty to inform to learned intermediaries
 - BUT, manufacturers cannot use LIR to shield themselves from negligence claims if they don’t properly inform doctors of risks
 - The nature of some products may be such that they also need to inform the end user [[Buchan](#)]
- **Informed Consent** [[Arndt v Smith](#) – chickenpox pregnancy]

- Modified objective standard: whether a reasonable person in the P's position would have consented if he/she had been adequately informed
- P has to prove that the failure to get the informed consent made a difference to the plaintiff's decision making

□ **Multiple Causes** [Nowlan – faulty house]

- “Where there are **concurrent torts** which both contributed the same damage, whether or not the damage would have occurred in the absence of either cause, that's an indivisible harm and the liability is joint and several and either tortfeasor can be held liable for the whole damage.”

□ **Independent Insufficient Causes** [Athey, Nowlan]

- Several factors combine to cause the loss, and each one is a necessary factor without which the loss would not have occurred.
- Where you have multiple torts that lead to a harm, liability is joint and several so either party is responsible to the plaintiff for the whole of the loss

□ **Successive Parallel Injuries** [Baker, Penner]

- When the plaintiff suffers from two or more distinct injuries

□ **Modifications of But-for / Limiting the Material Contribution Test**

Need a substantial connection between the injuries and conduct before compensation can be awarded

□ **Material Contribution** [Walker Estate – HIV - tainted blood]

- D's actions can be less than 50% of cause – not strict formula as per but-for
- Ex. Walker – Courts strive to prevent unjust outcome - plaintiff not being compensated
- P must prove on BoP that D's negligence materially contributed to injury (de minimis)

□ **Material Contribution Test** [Resurface, Clements]

1. Impossible to prove causation using But-For test; due to factors outside the P's control
2. D breached standard of care; harm was within the ambit of risk created by D's breach
3. First use but-for test globally

□ **Material Contribution to Risk Test** [Clements]

1. Impossible to determine which of a number of negligent acts by multiple defendants caused injury
2. Able to establish that one or more caused
3. Each Def who contributed can be faulted
4. Liability is imposed because Def's act contributed to risk of injury
5. *Use but-for test globally on the Defs first.*

□ **Materially Increased Risk** [Snell – eye surgery]

- Relaxed burden of proof where the facts relating to causation lie particularly within the knowledge of the defendant. Evidentiary burden shifts (i.e. courts infer causation unless it is disproved).

□ **Multiple Causes**

□ Concurrent torts [Nowlan v Brunswick – faulty home] – liability is joint and several

□ Successive torts [Penner v Mitchell – tortious + non tortious]

- **1st tortfeasor** - responsible for all damages from 1st tort (only account for 2nd tort if it reduces damage)
- **2nd tortfeasor** – responsible for damages from injuries that flow from 2nd tort (take victim how you find them)

□ If injury is **indivisible**

- torts simultaneous/concurrent contributing to same damage, liability is joint and several so either party is responsible to the P for the whole of the loss [Nowlan – contractor builds shoddy house, blames architect]
 - Market-Share Liability [Sindell – fertility drug] * not the law in Canada, though was used with Tobacco
 - Requirements: Identical drugs, D’s = substantial market share, Not P’s fault that D can’t be identified
- If injury suffered > normal because of **thin skull**
- Take P as you find him – responsible for all the damages (Even if greater than expected) if the tort is a materially contributing cause [Athey v Leonati – pre-existing back injury + car crash]
 - Pre-condition is not limited to non-tort pre condition [EDG v Hammer – night janitor + Uncle sexual abuse]
- **Joint tortfeasors - Vicarious Liability?**
- jointly and severally liable for damages of fellow tortfeasors when:
 1. agent committing tort on principle’s behalf
 2. employee committing tort on employer’s behalf
 3. 2+ individuals acting in concert to bring about an end which is illegal, inherently dangerous or where negligence can be anticipated

REMOTENESS

Even if the defendant breached the standard of care in a way that caused the plaintiff to suffer a loss, liability will be denied if plaintiff cannot prove on the balance of probabilities that the connection is too tenuous, or remote, to warrant recovery.

REASONABLE FORESEEABILITY TEST: “Is it a real risk that would occur in the mind of a reasonable person in D’s position, who would not brush it aside as far-fetched? [Wagon Mound #2 – wharf, oil, fired, damages to ship]”

Reasonable foreseeability - “as long as it’s a possibility” [Wagon Mound #2]

If the accident is foreseeable with some reasonably foreseeable injury, the defendant will be liable even if the extent or type of damage or the manner of the damage is greater or different than what would be reasonably foreseen. [Hughes v. Lord Advocate - manhole, Smith v. Leech Brain - lip burn, Marconato - personality shift after MVA]

“Crumbling skull” doctrine - Def need not compensate Plntf for any debilitating effects of pre-existing condition Plntf would have experienced anyway. Def need not put Plntf in better position than he was, so liable for any additional damage but not inevitable pre-existing. [Athey]

“Thin skull” doctrine - Latent pre-existing, Def must take plntf as they come, even though injuries are more severe due to pre-existing than they would be for an average person. [Smith v. Leech]

INTERVENING CAUSES

Even if initial injury is reasonably foreseeable, recovery can be denied on remoteness grounds if causal sequence is interrupted by novus actus (independent cause). An intervening cause arises when a new act effectively breaks the chain of causation. In this type of scenario, the first wrongdoer is generally not held liable for any further consequences.

TEST: Is the novus actus within the scope of risk that is created by the original tortious conduct?

If an intervening act is unforeseeable, though caused by the negligent conduct, the defendant is not liable for the consequences flowing from that intervening act. [[Bradford v. Kanellos](#) - “Gas explosion”]
 Later negligent conduct by a 2nd TF may compound the effects of initial negligent conduct by the 1st TF, but it will not halt the chain of causation, thus both TFs will be liable for the damages. [[Price v. Milaski](#) - misdiagnosed ankle]

PSYCHIATRIC HARM:

Psychiatric harm is reasonably foreseeable if a person of ordinary fortitude would possibly experience the same effects ([Mustapha v. Culligan](#))

- However, if a plaintiff’s subjective physical or psychiatric sensitivity (i.e. a plaintiff’s “thin skull”) is known to the defendant, it may be reasonably foreseeable that the defendant’s breach could cause extraordinary harm, and the defendant would be liable for that.
 - If the harm would affect a person of ordinary fortitude, then the plaintiff’s harm in excess (thin skull) is claimable.

Negligent Infliction of Mental Shock

The claim for negligent infliction of nervous shock is that one has suffered **sudden mental shock** resulting in a **recognized psychiatric illness** (does not encompass grief and sorrow). The claimant must be of **reasonable fortitude and robustness**. Must be a **reasonably foreseeable consequence (remoteness)**:

- Limits the consequences to the effects that the event might engender in a reasonable plaintiff.
- The thin skull argument is rejected (tortfeasor does not take his victim as he finds him).
- The thin skull rule only applies after you have established liability.

If the defendant knew that the plaintiff had a particular vulnerability to psychiatric harm before the breach, then psychiatric harm is reasonably foreseeable. [[Mustapha](#)]

THE NERVOUS SHOCK TEST:

*First, we must define the nature of the plaintiff’s harm to ensure that it is a **recognizable psychiatric injury** – nervous shock (must be more significant than grief or sadness etc.)*

*Second, the defendant must have been able to **reasonably foresee** that his/her breach would cause the plaintiff’s nervous shock, not just harm in general. Objective test applied; what a person of normal fortitude would experience* [[Mustapha](#)]

DEFENCES

Once the defendant is found to have been negligent, the burden of proof shifts to the defendant to assert any defences, which must be proven on the balance of probabilities.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a partial defence which apportions liability based on the parties’ relative degrees of fault.

- *Plaintiff carelessly enters dangerous situation*
- *Plaintiff carelessly contributes to the creation of an accident*
- *Plaintiff carelessly contributes to resulting harm*

LIMIT ON CONTRIBUTORY NEGLIGENCE

Agony of the Moment: A person’s conduct in the face of a sudden emergency cannot be judged from the standpoint of what would have been reasonable behaviour in the light of hind-knowledge and in a calmer atmosphere conducive to a nice evaluation of alternative. Standard isn’t careful and prudent judgement, it’s whether or not the plaintiff did something that an ordinarily prudent person might reasonably have done under the stress of the emergency [[Walls v. Mussens](#) - snow on gas fire]

ELEMENTS

(a) Reasonable precautions weren't taken by plaintiff

(b) Had those steps been taken, the injuries would have been prevented or lessened. [[Gagnon v. Beaulieu](#)]

NOTE RE: INTERVENING CAUSES: Defendant's negligence is actionable only with respect to harm that is within the scope of the risk that makes the offending conduct actionable – plaintiff's contributory negligence will not limit his recovery unless it is a proximate cause of his injury. [[Mortimer v. Cameron - through wall](#)]

NEGLIGENCE ACT, RSO 1990, c N.1

(2) Deals with apportioning liability between two defendants. Two tortfeasors who are jointly and severally liable (for indivisible injuries):

- Defendants can recover to the extent that they are not liable for their loss – can look to each other for indemnity for the amount that they are not responsible for.

(3) If plaintiff's contributory negligence is also a part of the cause of harm, court will decide on evidence how to proportion liability (proportion of fault).

(4) If the jury cannot allot degrees of fault, the fallback is 50/50 fault for the plaintiff and the defendant.

SEATBELTS

1. One has a **legal duty** to oneself to wear a seatbelt when riding in a car. If someone does not wear a seatbelt, they breach that duty and may be found contributorily negligent for injuries sustained in an accident [[Gagnon v. Beaulieu](#)]
2. The range of contributory negligence for failing to wear a seat belt should always be between 5% and 25%. In cases where wearing a seatbelt would, as a matter of causation, prevented 100% of the injuries, 25% is appropriate [[Snushall v. Fulsang](#)]

NOTE: Contributory negligence is not always capped at 25% [[Kennedy v. London - bike post, 60%](#)]

VOLUNTARY ASSUMPTION OF RISK

*With the introduction of apportionment legislation Canadian courts have become reluctant to apply the defence of voluntary assumption of risk. Voluntary assumption of risk is a **complete defence**, precluding recovery altogether, notwithstanding the fact that the defendant negligently caused the plaintiff's injury.*

RECOGNIZED CATEGORIES:

- Participants and spectators of sporting events.
- Plaintiff encouraged defendant's conduct

TEST:

A plaintiff must have **consented to potential injuries** being suffered prior to the commencement of dangerous activities with the defendant and **consented to waiving his legal right** to recover damages in tort. This consent may be either **expressly** or **impliedly** communicated. Express consent is communicated with words in speech or a written waiver, and implied consent is reasonably inferred from conduct. ([Dube v. Labar](#))

ILLEGALITY

"In theory, participation in a criminal or immoral act precludes recovery altogether. However, this has been narrowly interpreted. The defence of ex turpi causa non oritur action only applies when the plaintiff was engaged in an illegal activity when the injuries were incurred, and:

- Where the plaintiff generally seeks to profit from his illegal conduct.

- The claimed compensation would amount to an evasion of the criminal sanction.
[Hall v Hebert, BC v Zastowny]

Illegality can be claimed as a defence when:

- Where one wrongdoer claims in tort against another for financial loss arising from an illegal activity.
- Where the plaintiff claims as a head of damage suffered in a personal injury claim, loss of earnings from an illegal activity. [John Bead Corp]

DAMAGES

Damages are classified into three categories: Nominal, compensatory, and punitive. The general principle is fairness to both parties. The court strives to neither over nor undercompensate.

Nominal damages are awarded to vindicate P's rights in situations where s/he has suffered no injury. This type of damage is not available in negligence actions since P must establish loss/injury in a negligence claim.

Compensatory damages are the normal damages for negligence claims. The purpose is to put P in the position s/he would have been had the tort not been committed.

Punitive damages are awarded for punishment, deterrence, denunciation or to relieve wrongdoer of profits made from the wrong. There must be intent to harm, maliciousness or disregard for every principle of decency [Kraft v. Oshawa General]

ELEMENTS OF CALCULATING DAMAGES:

Burden of Proof

The plaintiff has to prove that they have suffered a type of loss that is compensable as a tort.

Standard of Proof

- Distinction between pre-trial and post-trial losses.
- When losses are suffered and finished before the trial, the plaintiff must prove them on a balance of probabilities (more probable than not). Once the plaintiff can establish this, they are entitled to recover 100% of the claim.
- Post-trial losses are treated differently (future loss of wages, on-going need for future care, etc.)

Substantial possibility test: if the plaintiff establishes that there is a reasonable possibility of injury in the future, she can recover, but it will be subject to the likelihood of that occurring. The plaintiff can still recover but only for that **percentage of likelihood** of the damages.

This recognizes that future damages are more probable than not caused by the defendant.

Mitigation

- The onus is on the plaintiff to mitigate damages (all reasonable steps).
- Onus to prove the plaintiff failed to mitigate falls on the defendant.
- The plaintiff is entitled to recover for expenses spent mitigating the loss.
- The plaintiff cannot recover for losses that they avoided.
- More restrictive for losses in terms of property damage over personal injury.

Set-off (parallel expenditures)

- Defendant wants to prove there are expenditures the plaintiff would have incurred regardless of the accident. If this can be established, it would benefit the defendant because it would set-off some damages (Onus is on the defendant).

- Other expenditures that had nothing to do with the initial accident, that the plaintiff would have had to pay anyways:
 - Cost of living, future care, etc.
 - These would set-off some of the damages.

Lump sum payments

- **General rule:** damages are awarded in a lump sum on one occasion at the end of a trial.
- Essentially the parties get one try at convincing the courts what the damages should be.
- If the plaintiff requires more funds in the future (they outlive their expectancy), there are no means of reassessment. This ensures some certainty and finality for both parties.

Roles

- Assessment of damages is on the trier of fact (jury, if it's a jury trial)
- The appellate courts will only interfere if there was a clear error in law or a wholly erroneous estimate of damages, otherwise the courts do not like to interfere with the decision of the trier of fact.

Special Damages

Amounts that have already been spent by the time of trial: prescription painkillers.

Quantifiable amounts already spent.

General Damages

Future care costs, assistive devices, loss of earning capacity.

PECUNIARY DAMAGES

Pecuniary damages are subdivided into future loss, lost earning capacity, and considerations relevant to both heads of pecuniary loss. [Andrews v. Grand & Toy]

FUTURE LOSS

Cost of future care

- *To the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.*
- There is no duty to mitigate, in the sense of being forced to accept less than real loss
- There is a duty to be reasonable. An award must be moderate, and fair to both parties, without consideration of the defendant's ability to pay.
- Deduct contingencies of life -- emergencies and hazards of life.

Lost earning capacity

- Focus is on level of earnings and length of working life
- Deduct contingencies (periods of unemployment or sick leave)

Considerations relevant to both heads of pecuniary loss

Capitalization rate - rate of inflation and rate of return on investments. This is set out by statute.

NON-PECUNIARY DAMAGES

Non-Pecuniary damages refer to things such as pain, suffering, loss of enjoyment in life and are not easily calculable as a monetary value. The goal is to provide the injured person with "reasonable solace for his misfortune" physical arrangements to make life endurable (not sympathy)

NOTE: Permanently unconscious plaintiffs are not awarded non-pecuniary losses. Plaintiff cannot appreciate additional provisions being made for them. [Knutson v. Farr]

The upper limit on non-pecuniary damages is in the low 300k range.

EXCEPTIONS/OTHER RULES:

Blackwater v. Plint

1. Tort law only compensates for loss caused by actionable wrong. Thus, one's background, previous statute-barred wrongs are to be considered factors inherent in one's position, distinct from actionable wrong.
2. Pre-existing conditions do not affect causation (but-for D's negligence, P's loss would have occurred, but it can decrease assessment of DMs depending if it is:
 - a. Thin skull: Was the effect of the sexual assault greater because of the prior injury? If so, then this is thin skull and it is taken into account in assessing DMs. P can claim all loss resulting from his thin skull
 - b. Crumbling skull: the tortfeasor is entitled to have DMs reduced. If there is no increase in loss by sexual assault, TF can reduce DM.

J. CASSELLS, REMEDIES: THE LAW OF DAMAGES

- It is incredibly difficult to predict wage loss for a child (*Teno v Arnold*). Court would not assume the young girl would even achieve the modest economic success of her mother. Court instead set expected compensation at \$6000, just \$1000 above the poverty line.
- Female plaintiffs tend to receive a great deal less than males concerning the damages for lost earning capacity.
- With the wage gap closing it is standard practice to adjust the wage-loss figure of women upwards to take into account the trend towards wage parity.

Marriage Contingency

- For women this is generally treated as a negative contingency (pregnancy, retire early, take care of the home, etc.)
- For men this is considered as a positive contingency, they will be more attached to the workforce to support their family.

SECTION 61, FAMILY LAW ACT, RSO 1990, c F. 3

- Spouse (common law, same-sex), children, grandchildren, parents, grandparents and brothers/sisters may recover their **pecuniary losses** (expenses incurred, housekeeping) as resulting from the death of the person.
- Loss of guidance, care and companionship are classified as pecuniary losses by legislation and are recoverable. Grief and sorrow are not.
- Their ability to sue depends on the deceased's ability to sue. If the deceased would have had no cause of action, then his dependents would have no cause of action either. The dependents' action is derivative.

TRUSTEE ACT, RSO 1990, c T.23

The Trustee Act allows the deceased's estate to maintain legal actions that the deceased could have otherwise brought. They also allow for actions to be brought against the deceased estate that could have been brought against the deceased.

NOTE: No defamation actions

Death of a Provider: *The family may claim loss of support that the deceased would have provided* [*Keizer v. Hanna*] Factors: Provider's income as base, less contingencies (money deceased would have spent on himself) and income tax amount and applying a discount rate.

Death of a Dependant: As the legislation primarily compensates for pecuniary loss only, the relief is generally much less. Compensation for death of dependant may be increased in special circumstances (immigrant family, sole English speaker)

COLLATERAL BENEFITS

In the absence of statutory or contractual provisions, collateral benefits are not deducted from the plaintiff's damages.

RULE: If the plaintiff has made some form of payment for a certain benefit, then they should receive that benefit (the defendant cannot try to have it deducted from the claim). However, if the plaintiff automatically receives this payment, then it can be deducted [[Raytch v. Bloomer & Cunningham v. Wheeler](#)]

POLICY: Concerns about double recovery/overcompensation.

THE TORT LIABILITY OF PUBLIC AUTHORITIES

While there is no absolute liability in a civil claim for statutory breach ([R. in Right of Canada v. Sask. Wheat Board](#)), a government agency may still owe a duty in the context of a negligence claim.

- Public authorities can be vicariously liable for torts committed by their employees unless exempted by express statutory language to the contrary. Liability depends on relationship, not on any fault or wrongdoing by the authority itself.
- Public authorities may be independently liable for alleged negligence in policy-making and implementation of policy.
- Proof of statutory breach, causative of damages, may be evidence of negligence. However, that isn't to say that a breach is always negligence.
- The statutory formulation of the duty may afford a specific and useful standard of reasonable conduct. [[R. v. Sask Wheat Pool](#)]

Statutory duty arises when legislation requires public authority to take a particular course of action.

1. There is **no liability in negligence** for doing what was required by statute
2. There **can be liability** if the public authority negligently performed the statutory duty OR failed to fulfil the statutory duty AND the court determines a common law cause of action exists.

Statutory power

If the public authority has discretion under the legislation (not required to take a particular course of action) then it is exercising a statutory power not a statutory duty. Courts have been more cautious about establishing a duty of care enforceable by an individual through a private tort action.

Policy decisions – the decision by the government about what acts to perform under a given statute – are exempt from liability.

- Decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions.
- A decision not to inspect at all, this would be unassailable.

Operational decisions – the decision by the government about how to perform those acts once they have been decided - are not exempt from liability. If it has been decided that inspections must be made (policy), the system of inspections must be reasonable and they must be made properly (operations).

Government agency need only demonstrate that standard of care exhibited was reasonable in light of:

- A. The nature of and quantity of the risk involved.
- B. Budgetary limits.
- C. Personnel and equipment available.

Pure Economic Loss - Recovery from Public Authorities

- SCC does not distinguish between cases that involve physical loss, personal, injury and pure economic loss when the government is the defendant.

Government misrepresentations, plus a failure to correct those misrepresentations despite knowing they posed a serious and ongoing risk to a clearly definable and relatively small group of consumers, including a decision not to notify some of the people known to be a risk, plus an inadequate warning given to other people COULD justify imposing a private law duty of care.

Taylor v. Canada (Attorney General), (2011, ONCA)

While there is no absolute liability in a civil claim for statutory breach (R. in Right of Canada v. Sask. Wheat Board), a government agency may still owe a duty in the context of a negligence claim.

1. Public authorities can be **vicariously liable** for torts committed by their employees. Liability depends on relationship, not on any fault or wrongdoing by the authority itself.
2. Public authorities may be **independently liable** for alleged negligence in policy-making and implementation of policy.

1st, One must ask whether the impugned conduct was a statutory duty or statutory power:

STAT DUTY

Statutory duty arises when legislation requires public authority to take a particular course of action.

3. There is **no liability in negligence** for doing what was required by statute
4. There **can be liability** if the public authority negligently performed the statutory duty OR failed to fulfil the statutory duty AND the court determines a common law cause of action exists.

STAT POWER

Statutory power arises when legislation gives public authority discretion.

***Express stat exemption will bar a prima facie duty of care (Just v. BC)**

2nd, one must decide whether the decision was a policy decision or operational (Just v. BC)

If the impugned government decision is a matter of operation, the agency is not immune from liability, assuming there is a duty of care owed (go to Ann's test now)

1. Operational decisions are usually made at the lower levels, and are often the product of administrative direction, expert opinion, technical standards, or standards of reasonableness. (Just v. BC)
2. Implementing a judicial decree is an operational act (*Holland v. Saskatchewan*)

*If the impugned government decision is a matter of **policy**, the agency is immune from liability, unless the agency's policies are not made in a **bona fide exercise** of discretion or are not made in good faith (Taylor v. Canada)*

3. Policy decisions are usually made at higher levels, and are often grounded by financial, economic, budgetary, or social reasons.

3rd, one looks at whether the public authority is liable in negligence. Here a traditional tort analysis is applied, beginning with *whether there should be a duty of care owed.*

To determine whether there is a duty of care relationship, we first ask whether that relationship has been previously recognized as giving rise to a duty OR if the statute explicitly imposes a private or public law duty on the public authority.

Department of Highways/Agency implementing maintenance policy – Patrons of Highways (*Just v. British Columbia*)

Agency – discrete group for which agency has created or contributed to a foreseeable risk of harm (*Taylor v. Canada*)

Agency - plaintiff expecting implementation of Judicial decree (*Holland v. Saskatchewan*)

Municipality – prospective purchaser of housing (*Anns, Kamloops*)

Given that the relationship has not been previously recognized, we must apply the two stage Anns test originally established by Anns v. Merton District Borough Council, adopted in Canada by Kamloops (City of) v. Nielson, and modified by Cooper v. Hobart to determine whether a new relationship ought to be recognized.

Applying the Anns Test:

1. *The first stage asks whether there was sufficient **foreseeability** of harm and **proximity** of relationship between the classes of parties to which the plaintiff and defendant belong to find that a prima facie duty of care exists. (application)*
 - a. *Foreseeability of harm is established when it is reasonably foreseeable... (fill in)*
 - b. *Also in the first stage of the Anns test, we must ask whether there are any **policy considerations specific to the relationship** between these classes that proximity should be found. (Cooper v. Hobart).*
 - i. **(against)** Where imposing duty of care of a public authority towards certain class of **individuals could conflict with overarching duty to the public**, no proximity is established and no private law duty should be found. (*Abarquez v. Ontario*)
 - ii. **(for)** Proximity found where an public authority creates or contributes to foreseeable risk of harm to a discrete group (*Taylor v. Canada*)
2. *Given that a prima facie duty of care exists, the second stage of the Anns test asks whether there are any **residual policy considerations** that ought to negate that duty. Given that the defendant in this case is a government agency, the Just test must be used to make this determination (Just v. British Columbia).*
 - a. *One consideration is whether the impugned conduct was a **policy decision or operational**. (as per above, it was decided that this operational, so it is not immune to liability)*
 - b. *Indeterminate liability, insurance scheme, chill gov't ability to balance interests, inconsistent with advancing medicine/tech, indeterminate liability in similar cases, liability for devices not regulated or unable to be regulated. (Taylor v. Canada)*

Standard of Care and it's Breach

*After finding that there is a duty of care, the standard of care must be established. This breach is “mere” **persuasive evidence** that a standard of care in negligence has been breached. It is not determinative (*The Queen v. Saskatchewan Wheat Pool*).*

The requisite standard of care to be applied to the particular operation, must be assessed in light of all the surrounding circumstances including budgetary restraints and availability of qualified personnel and equipment. (*Just v. BC*)

Causation

(see above) breach must have *caused* loss

Injury to the Plaintiff

(see above)

Often, standards of reasonableness are grounded in regulatory statutes. Sometimes, these statutes will explicitly protect violators from tortious liability. More often than not, however, these protections are not included in statutes, and violators may be found negligent in tort. Sometimes, statutes establish non-tortious penalties for non-compliance.

Policy Considerations Surrounding the Role of Statutory Breach in Negligence:

1. If the legislatures seek to regulate certain conduct, that conduct is possibly unreasonable.
2. However, questions abound regarding **what role statutes** ought to play in determining **whether a standard of care has been breached**.
 - a. The first argument that **statutes ought to play a large role** is that such a finding would show respect for the legislatures.
 - b. The second argument is that the legislatures have expertise and resources to investigate and research particular areas of activity, which the courts simply do not. It follows that these matters are best decided in that forum.
 - c. The third argument is that attaching tort penalties to statutes may strengthen their deterrent effect.
 - d. The fourth argument is that it is more administratively efficient to attach tort penalties to existing statutes than it is to crystallize new standards of care elsewhere.
 - e. The fifth argument is that it is easier for juries to determine whether a standard has been breached by looking to the statutes for guidance.
 - f. The first argument that **statutes ought to play a small role** is that it is actually more “respectful” of the legislatures to honour their decision *not* to align tortious liability with non-compliant conduct, in the event that the statutes do not address the issue.
 - g. The second argument is that we may create a proportionality problem if we align potentially ruinous tortious liability with minor regulatory violations.

TORT - NEGLIGENT MISREPRESENTATION

A claim for negligent misrepresentation arises when a defendant through written or oral communication causes the plaintiff to suffer loss through reliance on that communication. In [Hedley v Byrne](#) the House of Lords held that a negligent misrepresentation could possibly be maintained against defendants who were in the business or profession of giving relevant advice.

ESTABLISHED DUTIES

- Accountant-shareholder [[Hercules](#)]
- Bank-3rd party [[Hedley v Byrne](#)]
- Employer – potential employee [[Queen](#)]

NO ESTABLISHED DUTY

*In order to establish whether there is a duty of care between the plaintiff and the defendant, one must apply the Anns test. Step one is to establish a **relationship of proximity and sufficient foreseeability of harm**. This involves establishing:*

- (1) *The defendant ought reasonably to foresee that P will rely on his/her representation*
- (2) *Reliance by the plaintiff is reasonable, on the facts of the case.*

Reliance is reasonable when [[Feldthusen, in Hercules](#)]

- The D had a direct or indirect financial interest in the transaction in respect of which the representation was made
- The D was a professional or someone who possessed special skill, judgment or knowledge
- The advice/info was provided in the course of the defendant's business
- The info/advice was given deliberately, and not on a social occasion
- The information or advice was given in response to a specific enquiry or request

POLICY CONSIDERATIONS

- Consider indeterminate liability
- Social benefit v social cost (deterrence vs. higher insurance, floodgates of litigation, reduced auditing)
- D knows identity or class of Ps who would rely on the statement
- P (limited class) uses statement for its intended purposes

SOC AND BREACH:

The established SOC is for the defendant to not have acted negligently in making the statement at issue. This depends on what the defendant knew and ought to have known. Breach of the SOC is proved when the representation/statement in question is untrue, inaccurate or misleading, and the defendant was negligent in making the statement [[Queen v. Cognos](#)]

CAUSATION

The plaintiff must have reasonably and detrimentally relied on the statement [[Queen v. Cognos](#)]

CONTRACT AND TORT

Concurrent liability (tort and contract): While there is no possibility of double recovery, the plaintiff may see some advantage to suing in tort rather than contract. However, some terms in a contract may oust or negate a duty of care.

Three scenarios: (Unlikely to sue in Tort)

- Where a contract stipulates a more stringent obligation than the general law of tort would impose.
- Where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances (waivers, ski lift tickets). You need very clear terms here.
- Where the duty in contract and the common law duty in tort are co-extensive. Plaintiff can sue alternatively or concurrently.

INTENTIONAL TORTS

"A defendant will be held liable for intentional tort only if their conduct is both voluntary and intentional"

DEFINITIONS

Volition: When an individual has control over his conduct his conduct is voluntary.

Intent: The actor's **desire to bring about the consequences of their act**. Either express or implied consent can vitiate intent. It is not enough to escape liability to say that the defendant didn't want to bring about this result (plaintiff can rely on imputed intent or transferred intent).

Imputed intent: When a defendant does an action that produces a result the defendant didn't want, but they were **certain or substantially certain to result** from his or her act [[Bettel v Yim](#) - variety store headbutt].

Transferred intent: A defendant has the intent against one party, but unintentionally commits a tort against another party (the plaintiff). This can also apply if the defendant intends to commit one type of intentional tort against the plaintiff, but unintentionally commits another [[Bettel v Yim](#) - variety store headbutt]

Motive: It matters that the actor wanted to bring about a certain result. It does not generally matter why the defendant wanted that result to occur – at least not for liability. Motive may aggravate or reduce damages once liability has been established [[Warman v Grossman](#) - campaign of terror].

Mistake: When the defendant intends the consequences of his act, but the consequences have different legal or factual consequences than intended. **Neither a mistake of fact or law is recognized as a defence for an intentional tort.**

Accident: Any situation where the defendant unintentionally and without negligence injures the plaintiff. If there is no intent and no negligence then it is an accident not a mistake.

Children: Whether the specific defendant was capable of understanding the nature and quality of their acts. Parents and guardians can be held liable for deficiencies in monitoring. They cannot be held vicariously liable for that harm.

INTENTIONAL TORTS – BATTERY

Battery is the intentional infliction on the person of another a harmful or offensive contact. To be responsible, the Defendant must intend to make contact. The defendant does not need to have the intention to inflict bodily harm to be liable. Once the defendant intends the contact he is responsible for all consequences of the battery, even unforeseen consequences. The burden of proof is on the plaintiff to prove direct and intention physical conduct. The burden then shifts to the defendant, who must prove absence of intent, volition, or a defence such as consent. [Bettel v Yim]

POLICY CONSIDERATIONS SURROUNDING BATTERY:

1. The tort of battery is meant to protect a person's interest in **bodily security** from deliberate interference from others, as well as a person's **dignity** that may be compromised by such interference.
2. In a way, the tort of battery is also a socially acceptable outlet for vengeance. Rather than meeting violence with violence, the existence of the tort allows injured parties to meet violence with a civil action for damages.

ELEMENTS OF BATTERY

- The defendant must have **intended** the contact upon the plaintiff, and
- Harmful or offensive contact must actually have occurred [Bettel v. Yim]
 - All contact outside that expected in normal everyday life is prima facie "Harmful or offensive contact" [Non-Marine Underwriters]

CONSENT

Consent is a defence to battery, and may be implied or express. Absence of consent is assumed on the part of the plaintiff [Non-Marine Underwriters]

- Consent cannot be extorted by force, threats of force, or under the influence of drugs. [Norberg]
- Failure to resist or protest is an indication of consent "if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection." [Norberg]
- Defendant's belief in consent must be reasonable [Norberg]
- Consent must be voluntary and is negated if given in a relationship of inequality AND exploitation [Norberg – drugs for sex]

Professor Coleman "Power Dependency Relationships" - consent to a sexual relationship in such circumstances is inherently suspect:

Parent – child	Therapist – patient	Clergy – penitent	Professor – student
Physician – patient	Employer – employee	Attorney – client	

INTENTIONAL TORTS – ASSAULT

To commit assault is to arouse a reasonable apprehension of imminent battery, or harmful or offensive contact, in another person [Warman v. Grosvenor]

ELEMENTS

To successfully find that an assault occurred,

1. *The defendant's conduct must have been **intentional**, and must have raised a **reasonable apprehension of harm**. Words alone are generally insufficient to give rise to assault, but can give meaning to an act.*
 - Conditional threats can constitute assaults if they cause the threatened person to believe on reasonable grounds that the threatener has present ability to effect his purpose. [[Police v. Greaves](#) - Run you through]
2. *Frightening or threatening someone, however, does not constitute an assault unless the event feared is **imminent**.*
 - Factors such as repetitiveness, specific detail to the plaintiff, and level of malevolence will affect whether a threat constitutes assault (as opposed to insults/empty threats) [[Warman v. Grosvenor](#)]
 - Generally future threats will not constitute assault because of the requirement of immediacy, although there has been an increased focus on what is subjectively experienced by the plaintiff.

INTENTIONAL INFLICTION OF NERVOUS SHOCK

Intentional infliction of mental suffering is almost always inflicted with words, rather than actions. The tort originated in [Wilkinson v. Downton](#), and was adopted in Canada by [Clark v. Canada](#).

*To successfully argue that a defendant has **intentionally inflicted mental suffering** on a plaintiff, the following **3 elements** are required:*

1. *The impugned conduct (act or statement) must be **outrageous or flagrant and extreme**, as opposed to merely insulting ([Wilkinson v. Downton](#)).*
 - Need not involve physical touching or a threat to physical safety.
 - The nature and **context** of the relationship between the parties is relevant to a determination of what is “outrageous, flagrant, or extreme.”
2. *The defendant's conduct must be “calculated to produce some effect of the kind that was produced.” This means the defendant must have had **intent** to scare or shock the plaintiff, but intent to cause the full injurious consequences of the plaintiff's scare or shock is not necessary ([Wilkinson v. Downton](#)).*
 - Intent may be **imputed** if the shock inflicted was certain or substantially certain to result a person of ordinary fortitude, with an exception existing for people with known susceptibilities.
3. *The defendant's conduct must have produced a “**visible and provable illness**,” ([Wilkinson](#)) rather than mere anguish or fright ([Radovski v. Tomm](#)).*
 - **Shock:** Visible/provable illness must be the natural consequence of violent emotion. Illness, not shock, is the recoverable damage ([Radovski v Tomm](#))
4. Emotional shock may be sufficient for a good claim when the Defendant's conduct was
 - Direct and immediate
 - Intended or foreseeable or the a probable consequence ([Bell-Ginsburg](#) - bi-sexual husband)

NOTE: Bell-Ginsburg is evidence of the broadening of liability.

There has been a trend in Canadian law to employ the tort of intentional infliction of mental suffering in cases where a **systematic pattern of injurious contact** is alleged [[Samms v. Eccles](#), [Clark v. Canada](#)], rather than in cases where a one-time, “practical joke” scenario exists [[Wilkinson v. Downton](#)].

INTENTIONAL TORTS - DISCRIMINATION

No tort of discrimination exists. One cannot sue civilly on the basis of the Human Rights Code or public policy set out in the code. There is a procedure set out in the code that you follow when these kinds of situations arise [[Bhadauria v. Seneca College](#)]

INTENTIONAL TORTS - INVASION OF PRIVACY

“There are four proposed categories for the tort of invasion of privacy. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs, was specifically adopted in Jones v. Tsige” An expansive reading of Jones v. Tsige would suggest all of these categories have been adopted.

1. “One who intentionally or recklessly intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the invasion would be highly offensive to a reasonable person.” [Jones v. Tsige]
 - Financial or health records,
 - Sexual practices and orientation
 - Employment
 - Diary or private correspondence
 - Damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.
2. Public disclosure of embarrassing private facts about the plaintiff
3. Publicity which places the plaintiff in a false light in the public eye
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness

VICARIOUS LIABILITY

Liability may be imposed even though the defendant did not breach any obligation at all, if there is a special relationship that gives rise to vicarious liability between the tortfeasor and another entity.

Statutory - owner of a MV is liable for loss when someone else uses the car with consent

Agency - principle authorized agent to act on their behalf, is responsible for agent’s negligence in the course of his employment [T. G. Bright & Co. v. Kerr]

Employment - master-servant relationship [Bazeley v. Curry]

- Vicarious liability does not relieve a tortfeasor of responsibility, merely provides plaintiff with an alternative source of relief.
- Employer may have a right to recover the same amount he was held liable for from the employee.
- Employer’s limited liability clause may extend to employees.
- Employer may be held personally responsible for their own tort.
- Parents may be personally liable (not vicariously) for failing to supervise.

EMPLOYMENT [Bazeley v. Curry - employee sexually assaults child]

Employers are vicariously liable for employees torts that fall within the scope of the employment (acts authorized by the employer, or unauthorized acts that are so connected with acts the employer authorized that they may rightly be regarded as modes (although improper modes) of doing what was authorized).

SALMOND TEST

Step 1: Do we have relevant precedent?

Step 2: Is there a connection between the employment enterprise and the wrong that would justify imposing vicarious liability? Should vicarious liability be imposed in light of broader policy rationales?

Furtherance of employer aims - agency type of rational (vicarious liability)

- Employer’s business has created a situation of friction
- Provoked bartender cases, obnoxious customers, bartender commits battery.
- This is a risk that is attendant on carrying out employer business.
- Employer may not have wanted bartender to punch customers, but circumstances of a bar are such that kind of instance can be expected to arise (vicarious liability)

Dishonest employee actions (employee theft or fraud)

- If the employee's wrongdoing was random act wholly unconnected to the nature of the enterprise, there would not be vicarious liability.
- Employee of drycleaner steals coat, this is connected to the enterprise (vicarious liability)

IS THE CONNECTION SUFFICIENT?

- The opportunity that the enterprise afforded the employee to abuse their power.
- The extent to which the wrongful act may have furthered the employer's aims (and hence would have been more likely to be committed by the employee).
- The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise.
- The extent of power conferred on the employee in relation to the victim.
- The vulnerability of potential victims to wrongful exercise of the employer's power.

[[Bazeley v. Curry](#)]

POLICY CONSIDERATIONS

First: to provide a just and practical remedy for those who suffer harm because of the employee's wrongs. Second: deterrence. Those who employ others to advance their economic interest should be liable for resulting risks.

Liability will only be imposed when compensation and deterrence will be satisfied. They will not be satisfied when the wrong is coincidentally linked to employer's actions.

Wrong must be so connected with the employment that it can be said the employer has introduced the risk of the wrong, and therefore it is fair and useful to charge the employer with managing that risk and minimizing its occurrence.

[[Bazeley v. Curry](#) - employee sexually assaults child]

IS IT AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

Factors:

- Control
- Ownership of tools, assistants, etc.
- Chance of profit/degree of financial risk
- Does the company provide its own equipment, helpers?
- Who has the capacity to reduce the risk of loss?
- Are they in business on their own account?

NOTE: Look to the totality of the relationship.

[[671122 Ontario Ltd. v. Sagaz](#) - car seat business marketing agency]

EXCEPTIONS TO INDEPENDENT CONTRACTOR LIABILITY

- Employer is negligent in employing a certain contractor.
- Employer is supervising the contractor when they do something unlawful
- Employer liability in hiring the independent contractor to do something unlawful.

NON-DELEGABLE DUTIES

Generally the commissioning body is not liable for independent contractor's negligence.

However, non-delegable duties are an exception to this rule. A party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability by delegating the work to an independent contractor. The party can delegate performance, but not responsibility.

The Employer may end up liable where a person has a duty and cannot discharge that duty to a contractor (non-delegable duty of care). [[Lewis v. BC](#)]

INFORMED CONSENT & DOCTOR'S DUTY TO DISCLOSE

Doctors owe a positive duty to their patients to obtain consent to initiate any physical examination, test, procedure, surgery or counselling [Marshall]. A battery claim will arise when consent is obtained fraudulently, not obtained at all [Malette], or exceeded [Marshall]

NEGLIGENCE

DoC is established (doctor-patient as recognized category). SoC is to obtain informed consent. Doctors owe a positive duty to obtain informed consent. A negligence claim will arise if the patient was not properly informed (breach of the standard of care) [Arndt v. Smith]

CAUSATION

What would a reasonable patient in the circumstances/position of the plaintiff have done faced in the same situation if all material and special risks were known to him/her? Particular concerns/fears of the plaintiff are taken into account but they must also be reasonably based.

GENERAL PRINCIPLES OF CONSENT [Healthcare Consent Act]

- HCP must obtain consent to initiate a physical exam, test, procedure, surgery or counseling
- HCP cannot administer treatment unless **capable** patient has given consent or substitute decision-maker has given consent on behalf
- Consent is informed if person received answers to his/her questions and also received information that reasonable person in the same circumstances would require in order to make a decision about treatment
- HCP can presume consent is consent to variations or adjustments in treatment, if the nature, expected benefits, material risks, and material side effects are not significantly different.

EMERGENCIES [Marshall v Curry – removed testicle]

Where emergency couldn't be anticipated, HCPs shouldn't be held liable for fulfilling duty in saving life of patient.

- Consent can be expressed or implied.
- Can't imply consent if patient refuses and then passes out

PATIENT REFUSAL [Malette v Shulman- Jehova's Blood]

If patient gives some sign of desire to abstain from treatment (not necessarily verbal), HCP is restricted from right to treat. Patients can give binding advance instruction (refusal) in case they become incapable.

CHILDREN'S CONSENT [C v Wren – kid wants abortion]

Age is not a barrier to consent; all that matters is that the person is able to understand the risks and benefits of treatment.

TEST: Did the patient have sufficient understanding and intelligence to enable him or her to fully understand what was proposed?

EXCEPTIONS TO GENERAL PRINCIPLES OF CONSENT

1. Unforeseen medical emergency – right to proceed without consent (*Marshall*)
2. Patient given general consent to treatment is considered implicitly consenting to subsequent and subordinate treatment, unless they expressly object
3. "Therapeutic privilege to withhold info" When disclosure of info would undermine patient's morale and discourage him/her from needed tx - VERY RARE
4. Emergency treatment can be administered to an incapable person where absent consent will prolong the person's suffering or put them at risk of serious bodily harm.

NUISANCE

*“The tort of nuisance protects the plaintiff from **unreasonable interference** by the defendant with the plaintiff’s enjoyment of land. The tort of nuisance involves striking a balance between the conflicting claims of landowners, each invoking the privilege to exploit resources and enjoy the amenities of his property without undue subordination to the reciprocal interest of the others.”*

PRIVATE NUISANCE

In order to sue for private nuisance, the defendant must have unreasonably interfered with property in which the plaintiff has a possessory or proprietary interest.

What Constitutes “Unreasonable Interference?” [340909 Ont. Ltd. v. Huron Steel - steel stamping]

- (1) The severity of the interference, having regard to its nature and duration and effect
- (2) The character of the local
- (3) The utility of the defendant’s conduct
- (4) The sensitivity of the use interfered with
- (5) Malice [Hollywood Silver Fox]

General Information

- The defendant cannot escape liability because the plaintiff moved to the nuisance. This can be considered in determining whether the defendant’s conduct constitutes an unreasonable interference.
- An abnormally sensitive plaintiff will not be enough to make a normally innocuous conduct a nuisance.
- Strict liability for private nuisance - doesn’t matter if it was negligent, intentional, unintentional with no fault, you can still be liable for nuisance.
- A private nuisance typically consists of a continuing state of affairs
- New cause of action for nuisance each day the nuisance continues [Kerlenmar Holdings]
- Liability may be precluded if the P encouraged or clearly consented to D’s activities.
- Public and private interest must be considered in cases of nuisance and weighed in an equitable manner [Miller v Jackson - cricket]
- When a developer has brought into a previously agricultural or industrial area the population, which makes the granting of an injunction necessary (as it became a nuisance), the developer must indemnify the enjoined business if the impending injunction was foreseeable by the developer. [Spur industries v Del E webb- smelly farm]

Types of Nuisance

1. Physical damage of P’s property (easiest to prove) - requires actual, substantial physical harm [Smith v Inco]
2. Impairment of the enjoyment (pig farm causes stench)
3. Non-intrusive (i.e. D’s brothel may attract seedy ppl into P’s area)

EIGHT FACTORS TO CONSIDER - IS THE DEFENDANT’S CONDUCT IS A NUISANCE? [Osbourne]

Character of the neighbourhood	Zoning designation of the neighbourhood
Intensity of interference	Utility of D’s conduct
Duration of interference	Nature of D’s conduct
Time of day and day of week	Sensitivity of P

DEFENCE OF STATUTORY AUTHORITY

First check the statute to see if there is statutory immunity.

- The defence of statutory auth. only applies if the D proves that it was practically impossible to avoid creating a nuisance, thus it was authorized by statute.

- If the nuisance was inevitable and the public authority had no discretion, then as long as there is no negligence the public authority has a good defence - the nuisance is authorized.
- If the public authority has discretion about where and how to act, then it must do so in such a way to avoid creating a nuisance.

PUBLIC NUISANCE

Common Interests: *A public nuisance may arise if the defendant's conduct unreasonably interferes with rights, resources, or interests that are common to the entire community (defendant blocks public highway).*

Private Interests Combined: *A public nuisance may arise if the defendant's conduct unreasonably interferes, on a large scale, with the use and enjoyment of private property. Homeowners may seek redress together in an action for public nuisance, or individually in private nuisance.*

- *Private action for public nuisance is only sustainable where the private damage is peculiar, particular, and distinct from that of the general public. Where the damage is common to all persons of the same class, then a personal right of action is not maintainable. [Hickey]*

Sphere of nuisance: *"The neighborhood." The question is whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact.*

REMEDIES

Injunction - a court order directing a person to act in a particular way.

Prohibitory injunctions compel the defendant to refrain from a certain act.

Mandatory injunctions compel the performance of a certain act.

Interlocutory - when the court temporarily restrains the defendant while the plaintiff attempts to establish a case for a permanent order.

Quia timet - when the court grants an injunction in an effort to prevent an anticipated harm.

Considerations For/Against Injunctions [[Mendez v Palazzi](#) - poplar trees ruined law]

1. If injury to P's legal rights is small
2. And is one which is being capable of being estimated in money (not injunction)
3. And is one which can be adequately compensated by a small money payment (not injunction)
4. And the case is one in which it would be oppressive to the defendant to grant an injunction

There must be two conditions for an injunction: [[Mendez v Palazzi](#) - poplar trees ruined law]

- (1) There must be actual damage.
- (2) Damage must be substantial.

For a quia timet injunction [[Mendez v Palazzi](#) - poplar trees ruined law]

- (1) There must, if no actual damage is proved, be proof of *imminent danger*
- (2) There must be proof that the apprehended danger will, if it comes, be very substantial
- (3) It must be shown that if the damage does occur at any time, it will be impossible for the plaintiffs to protect themselves against it if relief is denied to them in a *quia timet* injunction

TORT LAW: THEORIES, CRITICISMS, AND ALTERNATIVES

FELDTHUSEN: IF THIS IS TORTS, NEGLIGENCE MUST BE DEAD

Proponents of no-fault insurance have conclusively demonstrated that the negligence regime is woefully inadequate as an accident compensation scheme.

First party disability insurance that pays out regardless of how or where the loss occurs is least expensive way to deliver fair compensation

Critiquing Deterrence

Potential negligence liability has no direct impact on cases of inadvertent carelessness.

Negligence claims will not be brought against isolated individuals unless they have liability insurance or deep pockets

With respect to planning, total liability costs tend to be relatively small in a company's overall picture, suggesting that there will be more fruitful areas for profit maximizing than promotion of safety.

When rational firms predict their negligence will be under-detected or under-priced, negligence law will encourage them to under-invest in safety.

The longer legal academics and practitioners continue to encourage the notion that negligence law promotes "optimum" deterrence, the less likely we are to move to far more promising activity-specific safety incentives.

SLATER REPORT

The prevalence of insurance liability fundamentally altered the moralistic nature of the loss-shifting function of fault. The fault system is more of a fault-insurance system. The punitive and deterrent aspects of fault were diminished and compensation has become the norm.

Insurance undermines deterrence.

The success of modern liability insurance has led to the inevitable failure of tort.

Insurance has resulted in judges finding fault where none exists, so that totally innocent plaintiffs who suffer catastrophic injury can be adequately compensated by the wealthier insurers of equally blameless defendants.

Modern tort system has reached the limits of its capacity. It cannot operation as a compensation system using notions of negligence or fault.

Torts cannot promote socially optimal insurance and deterrence objectives simultaneously.

The Need for Reform

Compensation function needs to be separated from the deterrence function.

The Tort System and Deterrence

The inability of the tort-insurance system to achieve a significant deterrence objective has been documented. It is a "haphazard and ineffective means of deterrence."

For market deterrence to be at all workable requires a high degree of product information, victim initiative, judicial care and capability, supplier responsiveness, and insurance industry precision.

Flaws:

- Most injured people don't sue
- The process is imprecise and unpredictable
- There is no relationship between the severity of the sanction and the degree of fault
- Insurance and not the wrongdoer absorb the impact

The Tort System and Compensation

Compensation is paid on an irrational basis. If the compensation mechanism is intended to compensate for accidental injury, it should compensate for all accidental injury, regardless of fault.

Only 1/3 to 1/2 of accident victims get compensation through the tort system.

The tort system has enormous delays.

Critics have described the tort system as a lottery.

The tort system has incredibly high transaction costs - 50 cents of the premium dollar is paid out in compensation under tort. 80 to 90 cents are paid out under no-tort insurance plans.

Towards a Non-Tort System of Accident Compensation

Non-tort system should be delivered by the private insurance industry, and fault should only be relevant to premium-pricing.

THE OSBORNE REPORT

Five Compensation Systems:

- 1) **Pure tort system:** A step back, not justified by social policy or cost savings.
- 2) **Mixed tort/no-fault:** This is the current system. Report suggests a substantial increase in no-fault benefits.
- 3) **Pure no-fault in MVAs:** Rejected by the Osborne Report.
- 4) **Threshold no-fault:** claimant must meet minimum threshold to recovery - this was rejected.
- 5) **Comprehensive no-fault:** Worth future consideration.

A “Made in Ontario” Compensation Scheme

Many changes in Ontario have made it easier for victims of MVAs to make tort claims and receive increased awards - expansion of FLA claimants, damage assessment principles, contributory negligence, lengthier limitations, etc.

Ontario has mandatory insurance, with average third party coverage of more than 500k.

The Costs

Osborne report refutes cost-efficiency claims made in Slater. In Ontario’s existing mixed fault and no fault system 35% of earned premium goes to expenses, and 64.7% goes to pay claims.

- There would not be a significant reduction of this with a switch to no-fault.
 - No-fault would leave 69.7% of earned premiums available to pay claims.

A conversation from the existing system of fault and no-fault compensation to a pure or threshold no-fault system cannot be justified upon an existing “cost crisis.”

Deterrence

Although liability insurance does weaken the deterrent sting of a tort judgement, the threat of increased premiums, insurance companies seeking indemnity, and the possibility of policy limits being exceeded are factors that create a deterrent effect, despite insurance.

Tort law does influence behaviour and deter accident producing conduct beyond criminal law. Tort does enough to caution against its abolition.

Justice and Fairness

The concept of some individual responsibility for individual actions, at least in a humanely modified form, is central to what reasonable people regard as just.

The public’s sense of fairness will not be satisfied if fault is left to be dealt with solely through the criminal justice system and premium rating system.

Problem of Delay

Much of the problem with delay stems from the “lump sum damage award,” which requires that plaintiffs wait until their medical condition has stabilized and can be assessed.

The lump sum method is not a necessary component of fault-based compensation law, and tort law should not be blamed for it. Periodic payment would be preferable.

Litigation process has been accused of being slow-moving, expensive, risky and embittering.

- Changes should be made to the Rules of Civil Procedure to simply and expedite matters.

Litigation is actually the rare exception in the resolution of MVA claims. It is still a large number overall though, and improvements should be made in this area.

Conclusions

“A MVA compensation system should deal humanely with all those who are injured, and provide reasonably generous rehabilitation and long-term care benefits on a no fault basis while at the same time preserving a compensation distinction between those who cause accidents and those who don’t”
No-fault benefits and eligibility criteria for these benefits should be expanded.

CRIMINAL INJURIES COMPENSATION BOARD: PROGRAM DESCRIPTION (2009-2010)

CICB provides compensation to victims of violent crimes occurring in Ontario. Applications may be made by or on behalf of victims who have been injured and for expenses and for pecuniary loss incurred as a result of death arising from a criminal act as defined under the Criminal Code. Applicants must prove OBOP that a violent time took place, and financial loss. If the accused has been criminally convicted, that conviction is deemed conclusive evidence the offense was committed.

Eligible for compensation

Individuals injured as a result of crime of violence, individuals responsible for the care of a victim of a violent crime, dependents of deceased victim, police officers injured while attempt to make an arrest.

What compensation is available

Expenses incurred, medical expenses, loss of wages to a maximum of \$1000 per month, pecuniary losses to dependents, pain and suffering, maintenance of a child born as a result of sexual assault.

No compensation available

Stolen/damaged property, MVA, legal fees, distress of attending criminal court, workplace accidents, grief and sorrow.

Types of awards

Lump sum: Max of 25k for the injury arising out of an incident. 150k max award to all applicant sin respect to any one occurrence if multiple people are affected by occurrences.

Periodic awards: Max payment of 1k per month, totally 365k for all applicants affected by a single occurrence.

OMBUDSMAN REPORT

Criminal Injuries Compensation Board (CICB) is in deplorable shape, adding insult to injury. Many of the problems stem from unwillingness of government to fund the promises they made to crime victims. They are given an unrealistically low budget, and forced to pay their operating costs and compensation out of that budget.

The CICB is forced to limit how much it pays and delay payment so as not to exceed the budget.

QUICK SUMMARY: “The CIBC functions, even in the unimpressive way it does, by flying under the radar so that only a miniscule number of entitled claimants ever come forward. It creates hyper-technical barriers that discourage applicants and stockpiles the claims made by those who are uncommonly persistent.”

Governments are unwilling to give the board the funding it needs, and unprepared to absorb the political fallout from abolishing a scheme that looks so fine on paper.

TOWARDS A COMPREHENSIVE NO-TORT COMPENSATION SYSTEM?

New Zealand has completely rejected the tort system.

Fundamental values were community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

Cost is about \$1/day per New Zealander + 7% cost admin (way higher in Canada for motor vehicle)

Coverage is comprehensive, cost is relatively low, lessening of human suffering is clear.

Critical of common law failure to compensate large number of victims, administrative expenses, delays, fault, lack of deterrence, lump sum damages, lack of accident prevention.

New regime depended on reallocating all money being spent on tort liability to no-fault.

There has been some concern about an erosion of responsibility for behaviour and an absence of economic incentives for improving safety.

There is no community expectation that the restoration needs to be carried out by the person who inflicted the injury, or that anything is to be gained socially by compelling those who cause personal injury to provide redress in damages to their victims. System is grounded in distributive justice, not corrective justice.

Problems

The number of claims escalated

A lot of claims they weren't anticipating arose (sexual abuse charges against parents, non-economic).

Claims were being calculated differently.

Lump sum payments provided some incentive for injured people to dwell upon their plight.

Too much money was going to those who were not at the high end of the continuum of incapacity.

Changes led to payouts being incredibly low, contrary to the principle of real compensation.

Corrective justice has been sacrificed for distributive justice, but not enough is being distributed to make it fair.

"While an accident compensation scheme based on distributive justice may not be incompatible with a tort-based system of corrective justice, both cannot survive together."

RELEVANT LEGISLATION

Good Samaritan Act, 2001, SO 2001, C 2

Protection from liability

2. (1) Despite the rules of common law, a person described in subsection (2) who voluntarily and without reasonable expectation of compensation or reward provides the services described in that subsection is not liable for damages that result from the person's negligence in acting or failing to act while providing the services, unless it is established that the damages were caused by the gross negligence of the person. 2001, c. 2, s. 2 (1).

Persons covered

(2) Subsection (1) applies to,

(a) a health care professional who provides emergency health care services or first aid assistance to a person who is ill, injured or unconscious as a result of an accident or other emergency, if the health care professional does not provide the services or assistance at a hospital or other place having appropriate health care facilities and equipment for that purpose; and

(b) an individual, other than a health care professional described in clause (a), who provides emergency first aid assistance to a person who is ill, injured or unconscious as a result of an accident or other emergency, if the individual provides the assistance at the immediate scene of the accident or emergency. 2001, c. 2, s. 2 (2).

Maternal Tort Liability Act, SA 2005, c M-7.5

Application

2 This Act applies in respect of the use or operation of an automobile after this Act comes into force.

Exception to maternal tort immunity

3 Sections 4 and 5 establish a limited exception to the immunity that a mother has at common law from actions in tort by her child for injuries suffered by the child on or after birth as a result of the mother's actions prior to the child's birth.

Use or operation of automobile

4 A mother may be liable to her child for injuries suffered by her child on or after birth that were caused by the mother's use or operation of an automobile during her pregnancy if, at the time of that use or operation, the mother was insured under a contract of automobile insurance evidenced by a motor vehicle liability policy.

Limit of liability

5(1) A mother's liability under section 4 is limited to the amount of insurance money payable under contracts of automobile insurance indemnifying the mother that the child can recover as a creditor under section 579 of the Insurance Act.

(2) Notwithstanding any other Act, a judgment against a mother resulting from the exception to tort immunity established by this Act may be enforced only under section 635 of the Insurance Act.

Negligence Act, RSO 1990, c N.1**Extent of liability, remedy over**

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. R.S.O. 1990, c. N.1, s. 1.

Recovery as between tortfeasors

2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled. R.S.O. 1990, c. N.1, s. 2.

Plaintiff guilty of contributory negligence

3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. R.S.O. 1990, c. N.1, s. 3.

Where parties to be deemed equally at fault

4. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent. R.S.O. 1990, c. N.1, s. 4.

Adding parties

5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon

such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties. R.S.O. 1990, c. N.1, s. 5.

Jury to determine degrees of negligence of parties

6. In any action tried with a jury, the degree of fault or negligence of the respective parties is a question of fact for the jury. R.S.O. 1990, c. N.1, s. 6.

When plaintiff may be liable for costs

7. Where the damages are occasioned by the fault or negligence of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just. R.S.O. 1990, c. N.1, s. 7.

Family Law Act, RSO 1990, C F. 3, s 61

Right of dependants to sue in tort

61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).

Damages in case of injury

(2) The damages recoverable in a claim under subsection (1) may include,

- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) actual funeral expenses reasonably incurred;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

Parental Responsibility Act, 2000

S.O. 2000, CHAPTER 4

Consolidation Period: From May 1, 2007 to the e-Laws currency date.

Last amendment: 2006, c. 21, Sched. C, s. 126.

Definitions

1. In this Act, except as otherwise provided in section 10,

- “child” means a person who is under the age of 18 years; (“enfant”)
- “parent” means,
 - (a) a biological parent of a child, unless section 158 of the Child and Family Services Act applies to the child,
 - (b) an adoptive parent of a child,
 - (c) an individual declared to be a parent of a child under the Children’s Law Reform Act,

- (d) an individual who has lawful custody of a child, and
- (e) an individual who has a lawful right of access to a child. (“père ou mère”, “parents”) 2000, c. 4, s. 1; 2006, c. 21, Sched. C, s. 126 (1).

Parents’ liability

2. (1) Where a child takes, damages or destroys property, an owner or a person entitled to possession of the property may bring an action in the Small Claims Court against a parent of the child to recover damages, not in excess of the monetary jurisdiction of the **Small Claims Court**,
- (a) for loss of or damage to the property suffered as a result of the activity of the child; and
 - (b) for economic loss suffered as a consequence of that loss of or damage to property. 2000, c. 4, s. 2 (1).

Same

- (2) The parent is liable for the damages unless the parent satisfies the court that,
- (a) he or she was exercising reasonable supervision over the child at the time the child engaged in the activity that caused the loss or damage and made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that resulted in the loss or damage; or
 - (b) the activity that caused the loss or damage was not intentional. 2000, c. 4, s. 2 (2).

Factors

- (3) For the purposes of clause (2) (a), in determining whether a parent exercised reasonable supervision over a child or made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that resulted in the loss or damage, the court may consider,
- (a) the age of the child;
 - (b) the prior conduct of the child;
 - (c) the potential danger of the activity;
 - (d) the physical or mental capacity of the child;
 - (e) any psychological or other medical disorders of the child;
 - (f) whether the child was under the direct supervision of the parent at the time when the child was engaged in the activity;
 - (g) if the child was not under the direct supervision of the parent when the child engaged in the activity, whether the parent acted unreasonably in failing to make reasonable arrangements for the supervision of the child;
 - (h) whether the parent has sought to improve his or her parenting skills by attending parenting courses or otherwise;
 - (i) whether the parent has sought professional assistance for the child designed to discourage activity of the kind that resulted in the loss or damage; and
 - (j) any other matter that the court considers relevant. 2000, c. 4, s. 2 (3).

Definition

3. (1) In this section,
- “offence” has the same meaning as in the Young Offenders Act (Canada) and the Youth Criminal Justice Act (Canada); (“infraction”)
- “representative” means, in respect of a proceeding under this Act, a person authorized under the Law Society Act to represent the claimant, the child, or the child’s parents in that proceeding. (“représentant”) 2006, c. 19, Sched. D, s. 16 (1); 2006, c. 21, Sched. C, s. 126 (2).

Proof of conviction

- (2) In an action brought under this Act, proof that a child has been found guilty under the Young Offenders Act (Canada) or the Youth Criminal Justice Act (Canada) of an offence is proof, in the absence of evidence to the contrary, that the offence was committed by the child, if,
- (a) no appeal of the finding of guilt was taken and the time for an appeal has expired; or

(b) an appeal of the finding of guilt was taken but was dismissed or abandoned and no further appeal is available. 2000, c. 4, s. 3 (2); 2006, c. 19, Sched. D, s. 16 (2).

Same

(3) For the purposes of subsection (2), a copy of a sentence order under the Youth Criminal Justice Act (Canada) showing that the original order appeared to be signed by the officer having custody of the records of the court that made the order is, on proof of the identity of the child named as guilty of the offence in the order, sufficient evidence that the child was found guilty of the offence, without proof of the signature or of the official character of the person appearing to have signed the order. 2006, c. 19, Sched. D, s. 16 (3).

Notice re evidence obtained under Youth Criminal Justice Act (Canada)

(4) A person who presents evidence obtained under the Youth Criminal Justice Act (Canada) in an action brought under this Act shall first give the court notice, in the prescribed form. 2000, c. 4, s. 3 (4); 2006, c. 19, Sched. D, s. 16 (4).

Record sealed

(5) When evidence obtained under the Youth Criminal Justice Act (Canada) is presented in an action brought under this Act,

(a) the court file shall not be disclosed to any person except,

(i) the court and authorized court employees,

(ii) the claimant and the claimant's representative, and

(iii) the child, his or her parents and their representatives; and

(b) once the action has been finally disposed of, the court file shall be sealed up and shall not be disclosed to any person, except one mentioned in clause (a). 2000, c. 4, s. 3 (5); 2006, c. 19, Sched. D, s. 16 (5); 2006, c. 21, Sched. C, s. 126 (3).

Youth Criminal Justice Act (Canada)

4. For greater certainty, when information from records under the Youth Criminal Justice Act (Canada) is made available for the purposes of an action brought under this Act or presented as evidence in such an action, nothing in this Act affects any provision of the Youth Criminal Justice Act limiting disclosure or publication of the information. 2000, c. 4, s. 4; 2006, c. 19, Sched. D, s. 16 (6).

Restitution

5. In determining the amount of damages in an action brought under this Act, the court may take into account any amount ordered by a court as restitution or paid voluntarily as restitution. 2000, c. 4, s. 5.

Joint and several liability

6. Where more than one parent is liable in an action brought under this Act for a child's activity, their liability is joint and several. 2000, c. 4, s. 6.

Method of payment

7. (1) In awarding damages in an action brought under this Act, the court may order payment of the damages,

(a) to be made in full on or before a fixed date; or

(b) to be made in instalments on or before fixed dates, if the court considers that a lump sum payment is beyond the financial resources of the parent or will otherwise impose an unreasonable financial burden on the parent. 2000, c. 4, s. 7 (1).

Security

(2) The court may order security to be provided by the parent in any form that the court considers appropriate. 2000, c. 4, s. 7 (2).

Insurers subrogated

8. An insurer who has paid an amount as compensation to a person in connection with the loss or damage is subrogated to the rights of the person under this Act to the extent of the amount. 2000, c. 4, s. 8.

Other remedies

9. Nothing in this Act shall be interpreted to limit remedies otherwise available under existing law or to preclude the development of remedies under the law. 2000, c. 4, s. 9.

Parents' onus of proof in actions not under this Act

10. (1) This section applies to any action brought otherwise than under this Act. 2000, c. 4, s. 10 (1).

Same

(2) In an action against a parent for damage to property or for personal injury or death caused by the fault or neglect of a child who is a minor, the onus of establishing that the parent exercised reasonable supervision and control over the child rests with the parent. 2000, c. 4, s. 10 (2).