

Breach of Privacy

Breach of Confidence

- (1)
- Spitting on someone's face is battery *Alcorn v. Mitchell* 1872
 - Pouring water on a person is battery (*Pursell v. Horn* (1838))
 - Cutting another person's hair (*Forde v. Skinner* (1830)).
 - A person doesn't need to suffer any physical injury to make a claim in battery (*Malette v. Shulman* (1990)),

Bettel v. Yim (1978) (Ont. Co. Ct.)

- The defendant described the incident as the following, "I shook him by the head maybe three times and my head and his nose accidentally hit; I didn't intend to hit him". The defendant claimed it was an accident.
- Yim shakes Bettel and to correct his behaviour and in the process their heads collide and Bettel's nose is broken

Held:

- Elements of Battery are (a) Intentional infliction on (b) body of another by (c) offensive or harmful contact.
- Foreseeability of negligence is not relevant here - we are dealing with an intentional tort; this is the essential difference between intentional infliction of harm (battery) and unintentional infliction of harm (negligence).
- If physical contact was intended, then the fact that the magnitude of its consequences exceeded the expectation is irrelevant. (Yim is liable)

Holcombe v. Whitaker Ala. S.C. 1975

- The plaintiff wanted an annulment. The defendant told her in response, "If you take me to court, I will kill you."
- The defendant said this again after the plaintiff filed the suit. The defendant went to her apartment and banged on the door, trying to break it open. He said again, "If you take me to court, I will kill you".

Held:

- While words standing alone cannot constitute an assault, they may give meaning to an act and both, taken together, may constitute an assault.
- "...a show of force accompanied by an unlawful or unjustifiable demand, compliance with which will avert the threatened battery, is an assault".
- It is clear the plaintiff was seriously frightened. She asked friends to stay over with her at night. She never left her apartment alone due to fear.
- The defendant threatened to kill the plaintiff if she did something, she had a legal right to do.

Police v. Greaves [1964] N.Z.L.R. 295 (C.A.)

- A conditional threat can be assault (Greaves to Police "if you don't leave I will stab you")
- Where there is a threat of violence exhibiting an intention to assault and a present ability to carry the threat out, the elements of an assault are made out. The fact that there was an alternative – to leave the house – did not prevent the conditional threat from constituting an assault.
- North P.: "...if the other conditions of the definition were met...there is no reason why a conditional threat should not constitute an assault. A threat in its very nature usually provides the person threatened with an alternative, unpleasant though it may often be".

Bird v. Jones

- False imprisonment requires a total restraint of movement
- Bird is stopped from crossing a bridge by police, who act under Jones' orders. Bird could go in other directions
- Can't confuse False Imprisonment with restriction of freedom.
- If you have some reasonable means of escape, then no false imprisonment
- Don't have to be touched
- *"Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."*
- This did not constitute false imprisonment

Campbell v. SS Kresge

- If, as a result of the defendant's intentional conduct, a person reasonably feels totally restrained, however that result is obtained, it amounts to an imprisonment.
- Someone called store security and accused Campbell of shoplifting; Security accosted Campbell and asked her to come in with him. Campbell was fearful and complied. Nothing was found and she was released, but felt very upset.
- Total restraint doesn't need to be physical confinement
- Court draws distinctions between someone who submits against will and someone who cooperates reluctantly
- If Campbell had actually been shoplifting, there would still have been false imprisonment, but there would have been some legal justification for it,
- Campbell was awarded compensatory damages

***Shopkeeper's Privilege** - will allow a shopkeeper to temporarily detain for the purpose of investigation. This is nascent in US, but will likely fail miserably in Canada.

Herd v. Weardale Steel

- It is not a false imprisonment to hold a plaintiff to the conditions he has accepted.
- Weardale Steel prevented Herd was using the lift cage, which was the only means of egress from the mine. Herd was detained in the mine for extra hours.
- The defendant's reasons for refusal were that Herd has agreed contractually to perform work, and was trying to leave early.
- Thus, Herd had accepted the conditions when he went into the mine
- Court says it's not false imprisonment where you've consented to confinement

Robinson v. Balmain New Ferry Co., [1910]

- The plaintiff paid a penny to take a ferry. He then changed his mind because the ferry was not leaving for some time.
- To get off the ferry, there was a fee (another penny). The plaintiff didn't want to pay the additional fee, so he was detained on the wharf for a short period of time before being left out.

The court held that the defendants were allowed to "impose a reasonable condition for exiting, which in their view included charging an additional penny".

Intentional Infliction of Nervous Shock

Intentionally causing another person severe mental suffering.

Elements of intentionally inflicting nervous shock are:

- Intentional and "outrageous" conduct
- designed to inflict emotional distress or that a reasonable person would have known would cause emotional distress;
- The defendant need not intend to cause nervous shock. It is sufficient if D acted in reckless disregard for this possibility, or if it was foreseeable that profound distress would ensue (ie, imputed intent). That more harm was done than was anticipated is irrelevant (*Wilkinson*).
- that causes a visible and provable illness.

Unlike battery or trespass, intentional infliction of nervous shock is not actionable without proof of actual harm. The plaintiff bears the onus of showing that, as a result of the defendant's conduct, the plaintiff suffered some kind of "visible and provable" illness. That being said, this test has been recently relaxed

Wilknison v. Downton

- There is a cause of action when the defendant has willfully done an act calculated to cause physical harm to the plaintiff and that has in fact caused harm.
- As practical joke, Downton tells Wilkinson that her husband is hurt; she goes into nervous shock, w/o a history of bad nerves
- There was definite intent to cause some degree of distress, and this is enough to impute the full liability of the onset of nervous shock. The defendant was awarded full damages

Radovis v. Tomm (1957 (Man. Q.B.))

- The physical consequences of the shock must be present to amount to a "visible and provable" illness.
- Daughter is raped; mother tries to recover by being distraught. Must show that there is some physical or psychological manifestation of injury
- Case dismissed due to lack of physical or psychological evidence. No medical evidence was offered and the mother did not give evidence

More recent decision of *Rahemtulla* held that it is not necessary to show that the defendant intended to cause nervous shock; reckless disregard to this possibility is sufficient.

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4 continued

Rahemtulla v. Vanfed Credit Union (1984)

the plaintiff was accused of theft and was, as a result, fired from her job. She was awarded \$5,000 for the intentional infliction of nervous shock.

McLachlin J. held the criteria in *Wilkinson* that the defendant's action has to be plainly calculated to cause injury would be satisfied if the defendant's act was flagrant or outrageous. McLachlin stated that a lack of expert medical evidence would not be fatal to the claim: "the most significant cause of her depression and continuing unhappiness" was the defendant's action and its impact on her career prospects.

Prinzo v. Baycrest Centre for Geriatric Care (2002)

Relying on *Rahemtulla*, the Court of Appeal stated that the defendant's conduct must be flagrant and outrageous, calculated to produce harm, and result in visible provable injury. The court upheld the \$15,000 award of general damages but overturned the \$5,000 punitive damage award".

*employee of 17 years, terminated, treated
badly leading up to
termination, supervisor
using her medically required
time off against her,
repeatedly calling her even
after her lawyer got
involved & requested calls to go
through him*

Mustapha v. Culligan of Canada Ltd., 2008 SCC

this was a negligent infliction of "mental injury" case.

McLachlin C.J. at para. 9 stated "The law does not recognize upset, disgust, anxiety, agitation, or other mental states that fall short of injury. I would not purpose to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept".

Saadati v. Moorhead, 2017 SCC

the plaintiff brought a claim for psychological harm including personality alteration and cognitive challenges, following a collision. The plaintiff did not present expert evidence to support the claim he suffered a recognized psychiatric illness.

The court allowed the claims to proceed, stating at para. 2: "Just as recovery for *physical injury* is not, as a matter of law, condition upon a claimant adducing expert diagnostic evidence in support, recovery for *mental injury* does not require proof of a recognizable psychiatric illness".

Invasion of Privacy

- The nominate intentional torts were not designed to redress invasions of privacy and only incidentally protect these interests
- In Canadian common law the prevailing opinion would appear to be, as in other common law jurisdictions, that there is no general right to privacy per se and, consequently, no action in tort for conduct said to amount to “an invasion of privacy”
- In large part this is because what is meant by privacy has never been satisfactorily concluded, despite the many efforts to make this nebulous concept more specific and precise, which, in turn, has made it impossible to define and limit what conduct should in law be treated as an invasion of privacy

Motherwell v. Motherwell

- The Supreme Court of Alberta was able to utilize the law of nuisance to grant a remedy, by way of injunction, to restrain the defendant from making objectionable, but not obscene or criminal, telephone calls

Jones v. Tsige

- Action was for what was termed intrusion upon the plaintiff's seclusion of solitude, or into his private affairs.
- For several years the plaintiff using her workplace computer, gained access at least 174 times to the plaintiff's personal bank accounts
- At first instance the defendant was successful on summary motion because the tort of invasion of privacy does not exist in Ontario
- The court of Appeal reversed this decision and allowed a nominal award

Discrimination

Bhadauria v. Board of Governors of Seneca College

- The Ontario Human Rights Code should be applied to discrimination cases
- According to Laskin C.J.C. the Ontario Human Rights Code forecloses any civil action based directly upon a breach of the Code and also excludes any common law action based on an invocation of the public policy expressed in the Code
- In many cases the courts have been able to sidestep Bhadauria and provide redress for the defendant's discriminatory conduct on the basis of wrongful dismissal or the intentional infliction of nervous shock

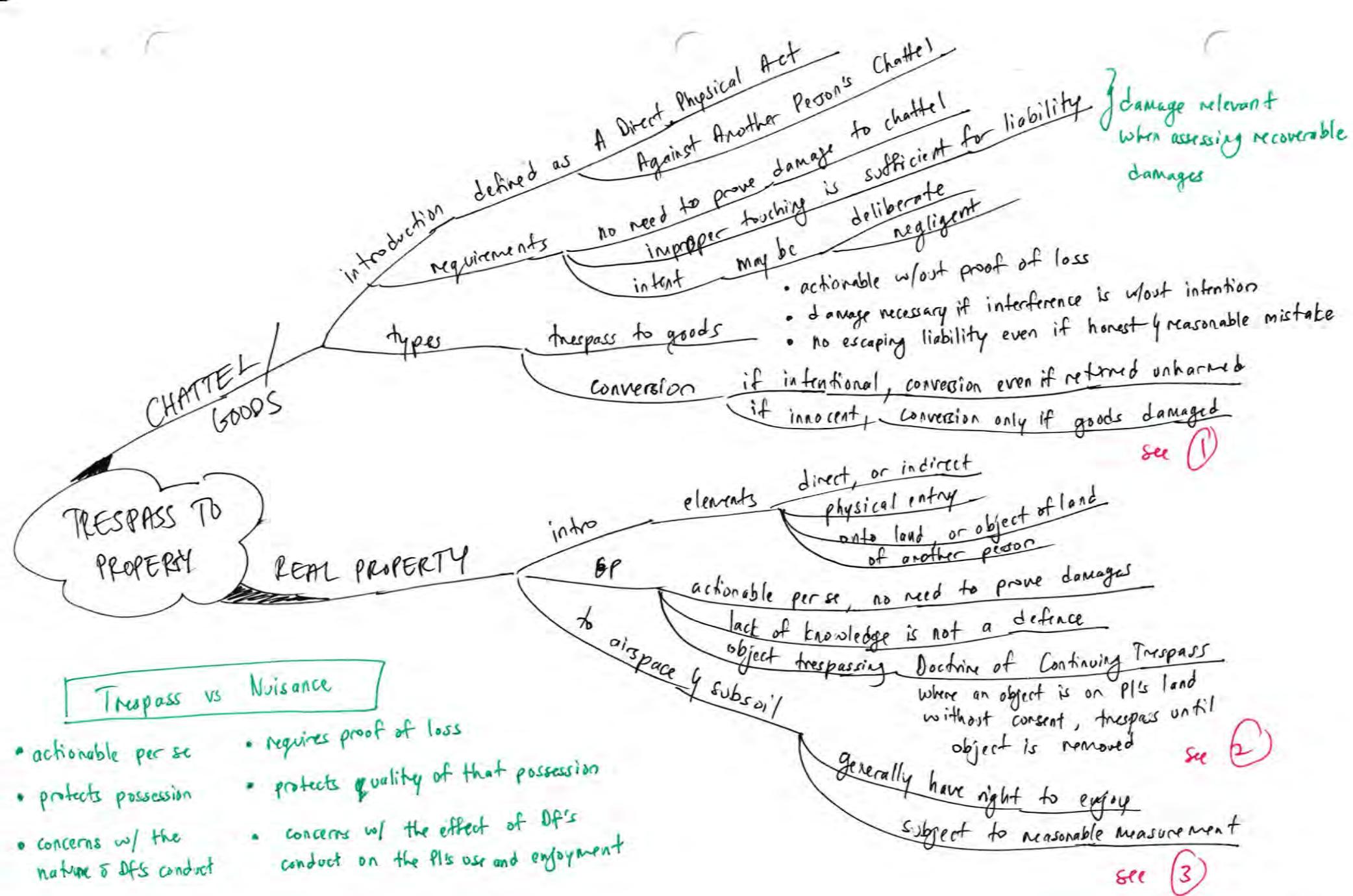
Breach of Confidence

- Used to protect the privacy of sensitive business and personal information

Lac Minerals Ltd. v. International Corona resources Ltd.

The court held that in order to recover for breach of confidence, the plaintiff had to establish that:

1. The information was confidential in nature;
2. It was disclosed in circumstances creating an obligation of confidentiality; and
3. Its unauthorized use was detrimental to the confider.



(1)

(2)

Foulkes v. Willoughby

In order to constitute a conversion (wrongful appropriation of the claimant's chattel), it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner

Mackenzie v. Scotia Lumber Co. 1913 (N.S. S.C.)

Facts:

- The plaintiff's raft and defendant's two rafts went astray. All the rafts were stranded together.
- The defendants' sent their servants to gather their rafts. The servants saw all three rafts together and assumed they all belonged to the defendants.
- The defendants may or may not have known the raft did not belong to them.

Held: that the right of action, having once arisen, the plaintiff must recover nominal damages, but he should not be awarded the full value of the property which was returned to him and which he accepted back from the defendants,

373409 Alberta Ltd. (Receiver Of) v. Bank of Montreal (2002), (S.C.C.)

Is the Bank liable in conversion to the Receiver and Manager of 373409 for having deposited the proceeds of the cheque into Legacy's account, as authorized by Lakusta, the sole shareholder and directing mind of 373409?

Held: the Bank did not wrongfully interfere with 373409's cheque, as it did not deal with that cheque in a manner inconsistent with 373409's instructions.

Wong v. Rashidi, 2011 BCCA

A trespass can be "committed by bringing an object onto the plaintiff's land and wrongfully failing to remove it. the doctrine of continuing trespass applies in such situations, allowing the plaintiff to maintain successive actions until the object is removed. Damages are assessed at the date of each action"

Williams v. Mulgrave (Town), 2000 NSCA

the defendant ran a drain on the property of the plaintiff. This drain resulted in flooding. The plaintiff did not take legal action for many years, even after he discovered that the defendant was not entitled to the action he took. Because the plaintiff took more than six years to start a claim, the judge dismissed the trespass claim as statute barred.

Townsview Properties Ltd. v. Sun Construction and Equipment Co. Ltd. (1974),

The plaintiff/claimant must be in possession of the property or land at the time of intrusion

Hoffman v. Monsanto Canada Inc., 2007 SKCA

Trespass to land is restricted to direct intrusions on the property or land that is in the possession of another person. In the case of the defendants were farmers; they planted seeds that were genetically modified. When these seeds grew and made their way onto the neighbouring land, the defendants were not found liable in trespass.

Costello v. Calgary (City) (1997),

Picard J.A. stated that "a trespass occurs, regardless of consciousness of wrongdoing, if the defendant intends to conduct itself in a certain manner and exercises its volition to do so"

① continued

Once a defendant is found to be a trespasser, he or she will be liable for all the ramifications of the trespass, regardless if they are foreseeable or not (*Mee v. Gardiner*, [1949] 3 D.L.R. 852).

In *Russo v. Ontario Jockey Club* (1987), 62 O.R. (2d) 731 (H.C.): the plaintiff attended the defendant's racetracks and won a large amount of money. She was found at another one of his racetracks and served with a notice under the provincial trespass act. She was ordered to leave. There was no claim she had done anything wrong. The judge dismissed her challenge to the notice. The court held that the defendant, as a property owner, held an "absolute right to deny entry to anyone under both the common law and the applicable trespass legislation".

R v. Breeden, 2009 BCCA

Breeden was ordered to stop protesting inside a court and other governmental buildings. He was charged and convicted under the *Trespass Act*. The court held at para. 34 that the "discomfiting of staff and members of the public going about necessary business in these places is an unwarranted interference with the proper function of these premises".

Entick v Carrington

- Carrington, claiming authority under a warrant, broke into Entick's house and carried away some papers.
- By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass or even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered him or excused him.

Penney v Gosse

- One does not have to hold a legal title to land. Any possession is good against those who have a weaker right of possession themselves.
- A squatter without title maintained a trespass action against a subsequent trespasser.
- "Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action for trespass against a wrongdoer."
- Actual possession is good against all except those who can show a better right of possession in themselves."

Harrison v Carswell

- The owner of a mall has enough possessory interest in common areas of the mall to claim trespass
- The public areas of a private shopping mall are private property for the purposes of trespass law. The plaintiff is therefore entitled to seek an injunction against the defendant (a picketer) to prevent her from entering the public areas for the purpose of picketing. A different decision would require an amendment by the legislature to the Petty Trespasses Act.

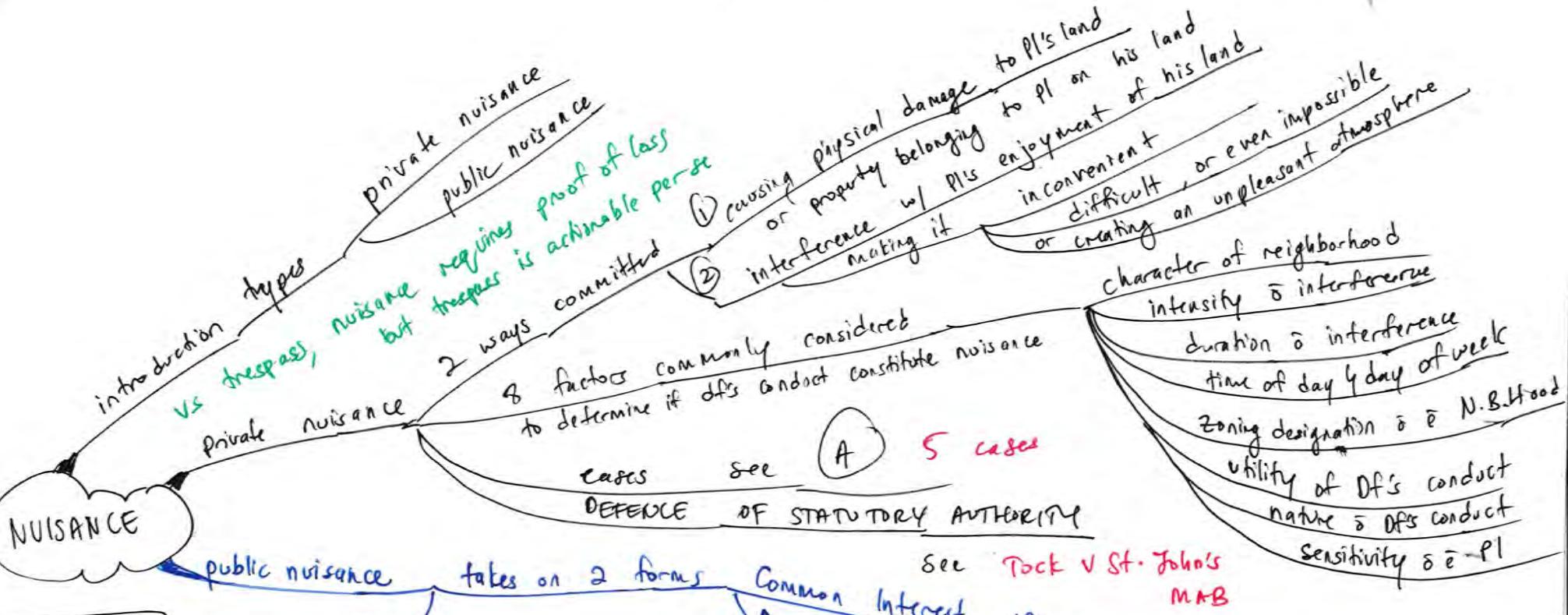
Kerr v Revelstoke Building Materials Ltd

- A case where debris and sound from the defendant's property drifted to the plaintiff's property causing disturbances
- The fly ash, smoke and dust which assaulted the plaintiff's premises from time to time was serious enough in itself, but the objectionable sounds which emanated from the sawmill operations were such that they constituted a nuisance which was so serious it substantially interfered with the operations of the plaintiff's motel business and with their use and enjoyment of the land
- The defendant's succeeded in trespass (the ash smoke and dust) and nuisance (the noise)

(3)

Trespass to Airspace and Subsoil

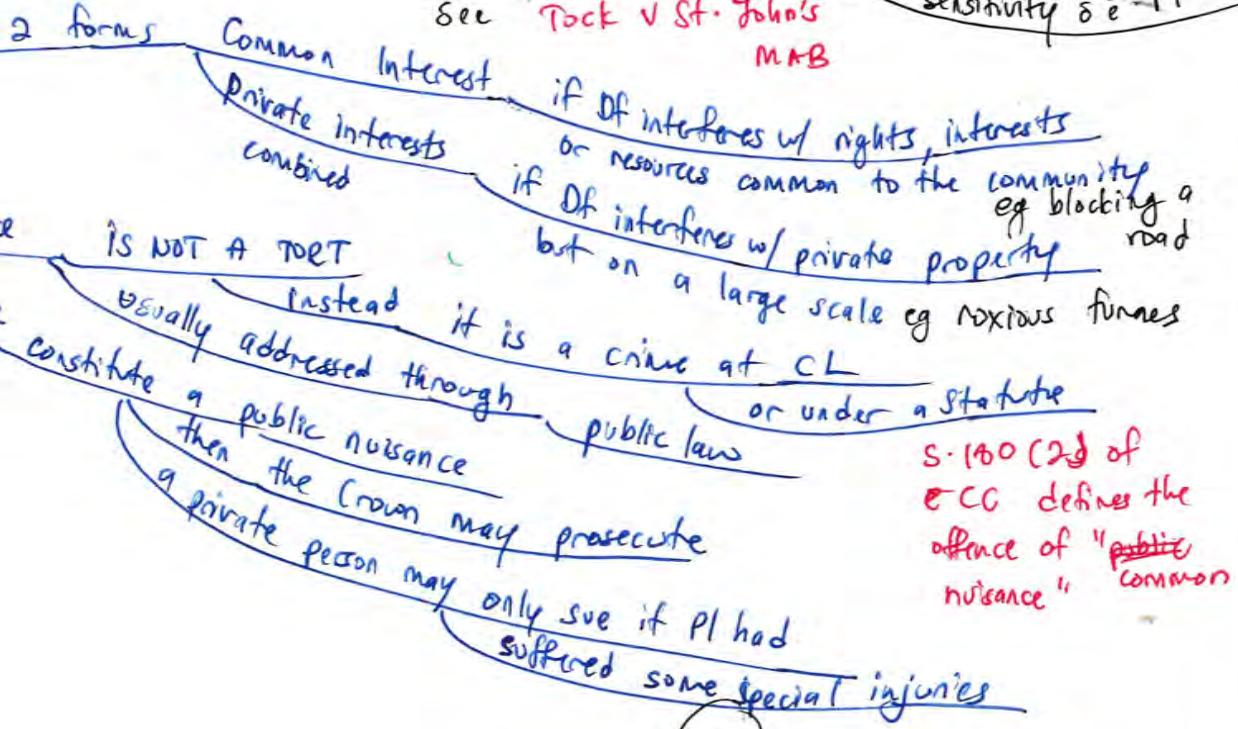
- Bernstein v. Skyviews & General Ltd
 - The rights of a homeowner to airspace above his land is restricted to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and above that height he has no greater rights in the air space than any other member of the public
- Boehringer v. Montalto
 - The court concluded that a landowner's title to the subsoil extends only to the depth which he or she can reasonably use
 - A sewer 150 feet underground was beyond reasonable use



REMEDIES

- typically injunctions, damages, and the self-help solution Abatement is also available
- damages are usually compensatory, but some scenarios may attract punitive damages

(C) 4 cases



See (B) 2 cases

A

Antrim Truck Centre Ltd. v. Ontario (Transportation), 2013 SCC

Facts: Highway construction significantly and permanently interfered with access to P's land and diminished its value. At trial P was awarded damages. COA reversed this decision and said D's interference was not unreasonable given the important public purposes served by highway's construction.

Issues: How to decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose?

Ratio: The reasonableness of the interference must be determined by balancing the competing interests. The individual claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear w/o compensation. P should not be expected to bear such a loss for the greater public good w/o compensation.

- it has been said by some courts that an intrusion that "falls short of causing material damage must be continuous before it will constitute a nuisance" (*Andrews v. R.A. Douglas* (1977), and *Chu v. Dawson* (1984))
- Liability can be imposed if "an occupier (a) knew, or ought to have known, of a hazard created by a third party or by nature, and (b) failed to take reasonable steps to protect neighbouring properties". A remedy was thus available in a situation wherein an occupier did not take action to abate a nuisance produced after a trespasser's unsanctioned drainage work caused flooding (*Sedleigh-Denfield v. O'Callaghan*, [1940] A.C.).
- "It is no defence to say, for instance, that an intolerable noise emanates from a vehicle parked on a public street rather than a nightclub located in a nearby building" (*Hussain v. Lancaster City Council*, [2002] Q.B.)

Two part test:

- ① Is it substantial?
- ② Is it unreasonable?

Part
Environmental protection
Environmental protection

1990 ONCA

34099 Ont. Ltd. v Huron Steel Products

A press is built that causes excessive noise, resulting in a loss of value and loss of renters. **Only one had EPA approval**, sounds from both noise can constitute a nuisance were consistently over the EPA guideline. What constitutes unreasonable interference:

The severity of the interference, having regard to its nature and duration and effect:

1. The character of the locale;
2. The utility of the defendant's conduct;
3. The sensitivity of the use interfered with - not considered as **private residential use**

Held: D's actions were unreasonable interference w/ the use & enjoyment of land by the PI = private nuisance

Decision: damages for the loss of rental income to date and **for reduction in value of the property - no punitive damage**. Df prohibited remedial work was done from operating the offending press

Tock v. St. John's metropolitan area board, [1989] 2 SCR 1181

Case illustrates Courts' recent willingness to permit claims against public bodies for nuisance.

FACTS:- municipality operated and maintained a sewer

- Tock tries to sue the Board in negligence because his property is damaged by flooding caused by heavy rain and storm sewer blockage, which prevents proper drainage
- legislation authorized a sewage system to be constructed but did not specify how or where it was to be done; respondent had obliged and did so, but in such a way as to create a nuisance to the plaintiff

ISSUE:

- is this considered a 'nuisance'? (i.e. is it reasonable to deny compensation because of damage suffered at the hands of a body exercising statutory authority?)

HOLDING: - YES the appellants are entitled to recover damages resulting from nuisance (absent negligence)

REASONS:

- the SCC defines actionable nuisance as only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes
- a law only intervenes to shield persons from interferences to enjoyment of property that are unreasonable in light of circumstances
- Linden, J considers the defence of statutory authority, but argues this doesn't meet the defence because although the construction of the sewage system was authorized, the ensuing damage was not necessarily inevitable
- the respondent was given discretion and could have carried out its duty without creating a nuisance (e.g. could have chosen different location)

RATIO: - a public body can be held liable in nuisance

- the defence of statutory authority will fail if the legislation gives the public body discretion and it acts in a manner/location that does not avoid the nuisance

A.-G. Ont. V. Orange Productions Ltd. (1971), 21 D.L.R. (3d) 257 (Ont. H.C.)

Facts:

- An interim injunction was sought by the Attorney General to stop the defendants from hosting a rock concert outdoors. The Attorney General argued that the concert would be a public nuisance. Evidence had been provided that trespass had occurred on private property, there was public sexual intercourse occurring and alcohol consumption in public was taking place, as well as illegal drugs.

Held:

Wells C.J.H.C.:

"In my opinion, the whole festival with the weight of numbers and the noise and dust, was a painful and troublesome experience for all those living in the neighbourhood and was, in fact, a social disaster to those who normally live there...I do not think the festival should take place. It is unfair to the neighbourhood. It is actually unfair to those who attend it and it is operated at considerable risk as to health and well-being both of the guests of the park and those who live in the neighbourhood and who are entitled to quiet enjoyment of their property. The pressure on the neighbourhood when these festivals are held is...grossly excessive and is something that should be restrained". [Interim injunction granted]

- In this case, public nuisance is applicable because a common interest of the public was affected (all the fisherman in the area were impacted and their livelihood was affected).

Hickey v. Electricity Reduction Co. (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.)

- The defendants polluted the waters by discharging toxic waste; as a result, fish life was destroyed and this in turn impacted the livelihood of fisherman in the region.
- Furlong C.J.: "I think it is clear that the facts...can only support the view that there has been pollution of the waters of this area...which amounts to a public nuisance. If I am right in this view then the law is clear that a private action by the plaintiffs is not sustainable...the right view is that any person who suffers peculiar damage has a right of action, but where the damage is common to all persons of the same class, then a personal right of action is not maintainable".

C

- In a suitable scenario, nuisance may attract punitive damages. This type of relieve is used to punish, deter and denounce (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18).
- In the case of *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 at para.122, the defendants were “subject to punitive damages of \$50,000 each after toxic substances buried on their property leaked and contaminated the soil and groundwater on the plaintiff’s property”.

Mendez v. Palazzi (1976), 68 D.L.R. (3d) 582 (Ont. Co. Ct.)

Hollingworth Co. Ct. J.:

Facts: roots from poplar trees have allegedly ruined the plaintiffs' lawn, rock-garden and patio, and are allegedly threatening the septic tank, weeping tiles, and indeed the foundation of the plaintiffs' home and have gravely interfered with the enjoyment of their property.

What are the plaintiffs' remedies? It is necessary to decide whether damages are a proper remedy or whether a mandatory injunction shall issue or perhaps at the very least a *qua timet* injunction.

In order for an injunction to issue, there must be two conditions precedent. First, there must be actual damage; second, that damage must be substantial.

In the case at bar there is actual damage to the lawn, as I have found as a fact, but not that degree of substantial damage, for example, damage to the house foundation or the tile beds, to merit issuing a mandatory injunction.

Here, there was no evidence at all that the roots had reached the tile bed. Although one root shoot was found near the house, there is no probative evidence before me that the basement has settled or has been damaged as a result of root action. Finally, although plaintiffs' counsel argued for a *qua timet* injunction, his pleadings are silent on this matter.

Therefore, a *qua timet* injunction shall not issue. Having found that damages are an adequate remedy, I must endeavour to assess them. Dealing as best I can with the evidence on damages, which I found to be somewhat nebulous, I assess general and special damages at \$500.

***Sammut v. Islington Golf Club Ltd.* (2005), (Ont. S.C.J.)**

- Hundreds of golf balls went into the backyard of the plaintiff. Some of the golf balls broke windows, damaged the stucco walls and decimated ornamental statues.

The court granted an award of \$5,000 for the past nuisance, \$9,000 for past damage, and “enjoined the defendant from allowing golfers to play the hole in question until sufficient remedial measures were in place”.

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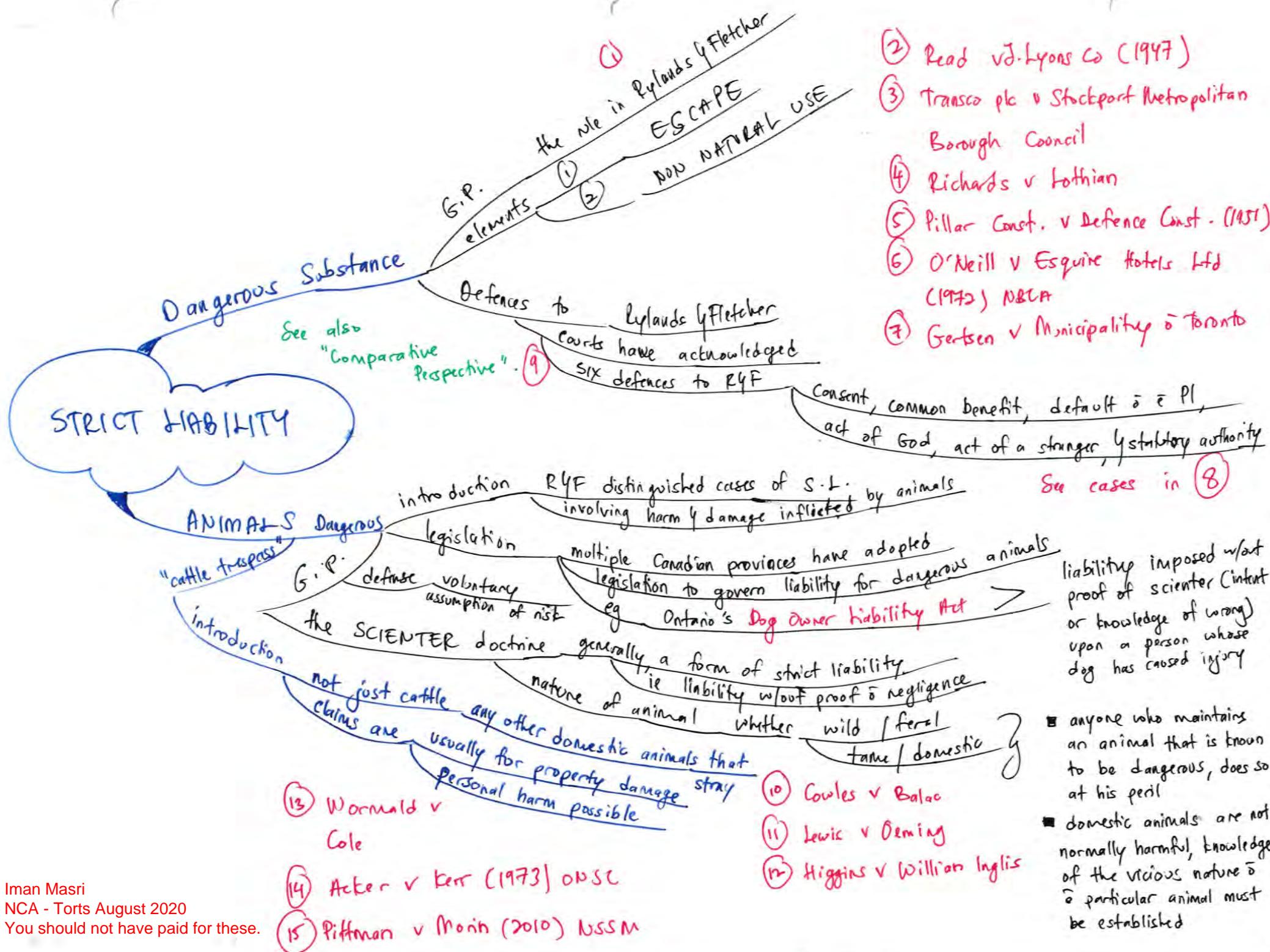
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(1)

Rylands v. Fletcher (1868) 10 H.L.

Facts: The defendants in this case created a reservoir on their land to offer regular water supply to their mill. They did not realize at the time that their reservoir was built over a mineshaft which had been abandoned. This mineshaft was adjoined with the plaintiff's land. Water from the reservoir broke and flooded the plaintiff's property.

Held: If a person brings or accumulates on his land anything which, if it should escape, may cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. And the doctrine is founded on good sense. For one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer

- Rule from *Rylands v Fletcher*: the defendant is liable on a strict liability basis if he permits a dangerous element on his land to escape and damage the plaintiff's property or land; proving negligence is not necessary.

(2)

Read v. J. Lyons & Co. [1947] A.C.

"Escape" for the purpose of applying the proposition in *Rylands v. Fletcher* means escape from a place which the defendant has occupation of or control over to a place which is outside his occupation or control."

Facts: Respondents operated a factory filled with shell cases w/ high explosives. Appellant was employed by the Ministry to inspect this filling of shell cases. She was not enthusiastic. There was an explosion that killed one and injured appellant and others.

Held: did not fulfill elements of escape - no R&F liability on respondents

(3)

Transco plc v Stockport Metropolitan Borough Council [2004] 2 A.C.

Lord Bingham said, "I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place."

Facts: Transco sued the city council for repair of one of its pipe - the ground beneath the pipe had washed away when the council's water pipe had leaked.

Held: council not liable as the quantity of water from an ordinary pipe is not dangerous or unnatural in the course of things

Held: Df not liable:

① Water supplied to building is a natural use of land

② No RGF liability when damage caused by wrongful and malicious third party.

(4) Richards v. Lothian, [1913] A.C.

The court said in regard to "non-natural use" that "there must be some special use bringing with it increased danger to others...not merely the ordinary use of the land or such a use as is property for the general benefit of the community". Rylands has been applied to water, gas, electricity, sparks from a steam locomotive, strips of metal foil, caravan dwellers and a car with a full gas tank in a garage"

- Early case law held that an occupier was strictly liable if a fire in his control escaped and inflicted harm or damage to someone else's land or property. The common law rule has been superseded by legislation in all the provinces in Canada that do away with strict liability for accidental fires.
- Nonetheless, "it has been held that these statutes do not affect the rule Rylands. Therefore, the escape of a "non-natural fire", such as that used in an industrial setting, may give rise to strict liability".

Facts: df landlord sued by tenant when someone maliciously sabotaged sinks and plumbing causing flooding to df's building and damage to pl's property.

(5) Pillar Const. v. Defence Const. (1951) Ltd. (1974) (Ont. C.A.):

storing highly flammable material near a heater was deemed a non-natural use (fire = non-natural use)

Facts: contractor brought highly inflammable material onto pl's premises and stored it near a source of ignition - fire broke out causing damage to pl's premises

Held: different w/ T & T on applicability of RGF, CA judge

(6) O'Neill v. Esquire Hotels Ltd. (1972), (N.B.C.A.): propane gas used for cooking was considered a natural use of fire

applied the test used in Musgrave v. Pandelis: SL if Df:

① brought onto his land things likely to catch fire, and kept them in a condition where if they ignite would likely spread to pl's land;

② he did so in the course of some non-natural use;

③ fire ignited, spread, and caused damage to pl.

Iman Masri

NCA - Torts August 2020

You should not have paid for these.

↑ Borough of York (2nd df)

Gertsen v. Municipality of Metropolitan Toronto (1973)(ONHC)

Facts: In this action the plaintiffs claim damages from both defendants as a result of an explosion caused by the escape of methane gas generated by buried garbage. This destroyed their detached garage, damaged their motorcar and caused bodily injury to the plaintiff Floris Gertsen.

Toronto legally dumped waste in York, causing methane gas to collect, exploded pl's car when started

Held: When the use of the element or thing which the law regards as the potential source of mischief is an accepted incident of some ordinary purpose to which land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way. In applying this qualification, the Courts have looked not only to the thing or activity in isolation, but also to the place and manner in which it is maintained and its relation to its surroundings. Time, place and circumstance, not excluding purpose, are most material. The distinction between natural and non-natural user is both relative and capable of adjustment to the changing patterns of social existence:

I must now decide whether this garbage-fill project was natural or non-natural user of the land.

Decision: Liable in SL, nuisance & negligence. For SL, both

criteria of (1) unnatural use of land and (2) emanation of something damaging from that land, due to unnatural use. Landfill in midst of residential area was unnatural. [Plus] defence of public utility failed as public not benefited as a whole, only landfill owners-

Facts: widow sued hotel for fire that killed her husband - T & T found negligence was not proven. on appeal, held: gas for cooking purposes was not a

"non-natural": quantities of the combustible material, use of land, no SL liability (RGF) on the hotel

Further, Toronto had st. authority to pass by-laws for acquiring land for the purpose of disposing of garbage but this landfill project was not carried out pursuant to that authority.

(8)

Consent Facts: theatre sprinkler system burst due to cold weather, no SL as sprinkler for common benefit, Pl deemed to have consented as if was installed pre-lease	If a defendant can prove that the plaintiff either implicitly or explicitly consented to the existence of the danger is entitled to a complete defence (<i>Rylands</i>). "The courts may imply consent from the nature of the legal relationship between the parties or from the physical circumstances" (<i>Peters v. Prince of Wales Theatre (Birmingham) Ltd.</i> , [1943])
Common Benefit Facts: box collecting rainwater on rooftop leaked due to rat gnawing on it; no SL, also considered as an act of God	Liability will not be imposed in a situation where the source of the danger is sustained for the common benefit of the plaintiff and defendant (<i>Rylands</i>). In <i>Carstairs v. Taylor</i> (1871), the water was gathered for the mutual benefit of both parties, the plaintiff and defendant. <i>act of God</i>
Default of the Plaintiff Facts: Pl worked at mine under the canal & it df, water escaped & damaged the mine. Held: no SL when Pl had good reason to know/conting danger	An individual who voluntarily/willingly and unreasonably "encounters a known danger cannot recover under <i>Rylands</i> . Recovery also will be denied if the plaintiff's wanton, wilful or reckless misconduct materially increased the probability of injury. Nor will the defendant be liable for damages which are caused by the abnormal sensitivity of the plaintiff's property" (<i>Dunn v. Birmingham Canal Co.</i> (1872))
Act of God Facts: Df built ornamental pools on his land and installed safeguards against flooding. A "freak rainfall" overwhelmed the safeguards causing flooding onto Pl's land.	"An act of God is a force of nature that arises without human intervention. To provide a defence, the natural force must be so unexpected that it could not have been reasonably foreseen, and thus its effects could not have been prevented" (<i>Nichols v. Marsland</i> (1875) <i>also Carstairs v. Taylor</i>)

Q An act of God is an act of nature which is not reasonably foreseeable.

Comparative Perspectives on *Rylands v. Fletcher*

- Judges in the Commonwealth has grown unsatisfied with the principle of strict liability in the case of *Rylands v Fletcher*. The doctrine is problematic in two ways
- First, the main elements of the action are not precise. "Phrases such as 'dangerous substance' and 'non-natural use' resist consistent interpretation and application".
- Secondly, multiple judges are critical of the level of fairness of strict liability.
- In *Cambridge Water Co. v. Easter Counties Leather plc*, [1994] 2 A.C. 264 (H.L.), the court held that "knowledge, or at least foreseeability of risk" is a condition for even so-called "strict" liability. Because the plaintiff was not able to demonstrate that the leakage of substances into his well had been foreseeable, the defendant, under the principle in *Rylands*, was held to NOT be liable.
- In the case of *Transco plc. V. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.), the court declined to eradicate the rule in *Rylands*. The Lords did, however, take the chance to reiterate the doctrine. Because in England, *Rylands* now subsists as a category of the tort of private nuisance, "strict liability no longer is available with respect to personal injuries, as opposed to property damages. The court also attempted to refine *Rylands* by restating the conditions of liability. The traditionally troublesome requirements of dangerousness and non-natural use of land now are combined into a single concept that is governed by ordinary contemporary standards".

10

Cowles v Balac (2005) ONSC

Facts: couple on an African lion Safari - a tiger got into their vehicle and mauled them causing severe injuries

Held: whether the keeper of a wild vicious animal will be strictly liable for damage caused by the animal regardless of fault?

Applying the doctrine of scienter, TJ found A.S.L. - liable and awarded 2.5 mil

Contributory negligence was not considered as this was a SL, not negligence. Upon appeal, ONCA dismissed appeal on liability, although there is dissent as to if cont. negligence applies in cases of SL.

Lewis v Denning (1983) ABQB

Facts: Pl was an employee at Df's game farm - Pl walked into an enclosure of a tiger to retrieve a cap on the ground and was mauled by a tiger

Held: Pl assumed risk as he voluntarily entered the cage, no SL liability on Df for damage

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tiger
You should not have paid for these.

12

Higgins v William Tuglis & Son Pty Ltd (1978) NSW

Facts: a bull who "would butt people from time to time" was held to be as sufficiently vicious to attract strict liability - bull injured Pl after inspecting cattle at an auction sale

Held: SL based on keeping an animal with KNOWLEDGE of its dangerous propensities

13

Wormald v Cole (1954) QB

Facts: C was awarded damages for cattle trespass when she was knocked down and injured by D's trespassing heifer in her garden

Note: Civil liability for animals ruled out personal injury but she may succeed on a negligence claim while property loss is easier on a SL claim

14

Acker v Kerr (1973) ONSC

Facts: Pl. claim for damages caused by Df's cattle straying onto his land on multiple occasions in 1969, 1970 & 1971

Held: regardless of which part of the fence that allowed the cattle to stray (whether it be df or pl resp. to repair those fences), the cattle that escaped was the Df's and if it is such the df's responsibility to contain them.

15

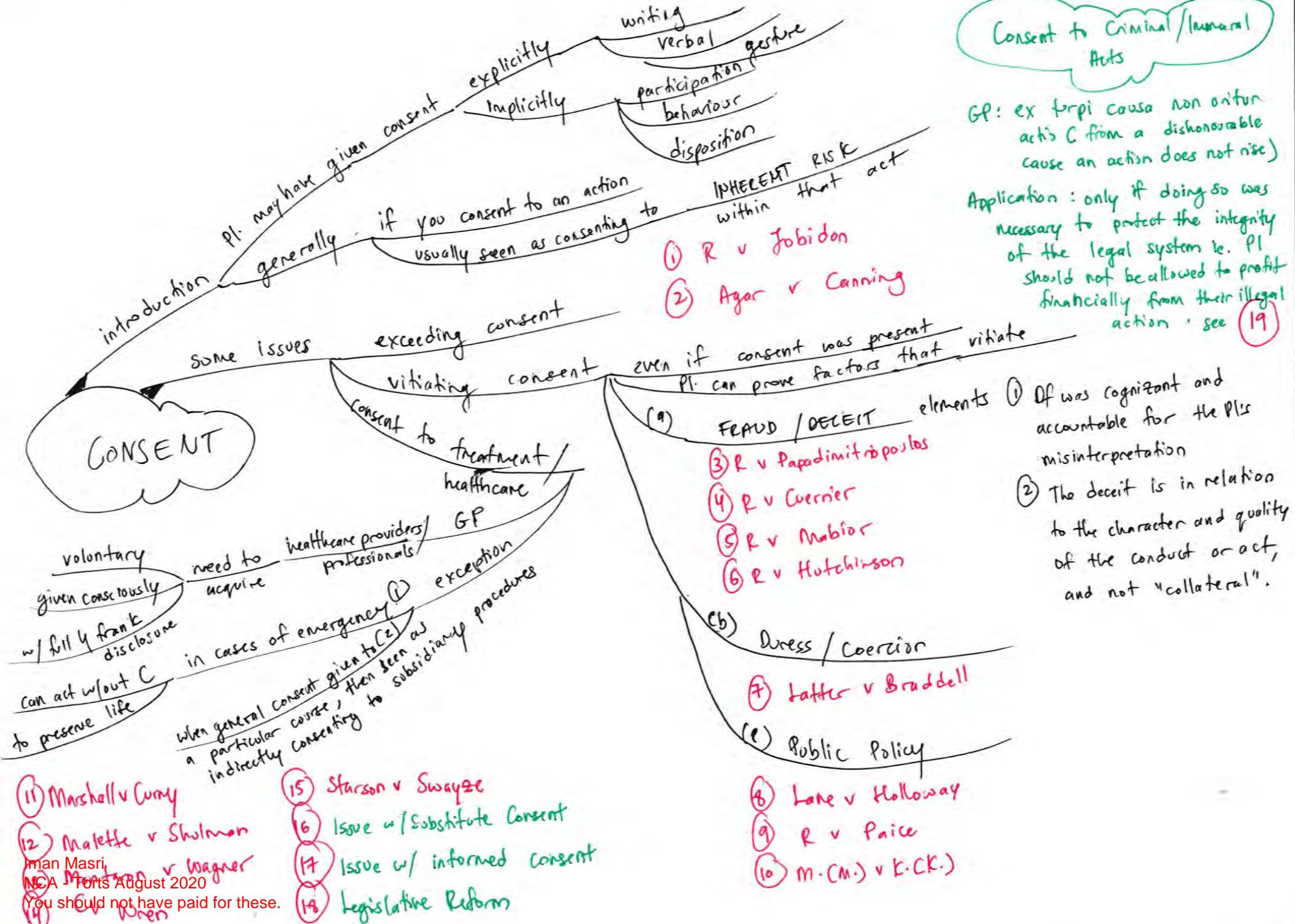
Pittman v Morin (2010) NSSM

Facts: a goat ranmed into Pl's car as it was chasing down a child, causing damage to the car

Held: Df liable for damages caused by his goat

Ratio: domesticated animals who show a vicious streak is treated as a wild animal

third party for whom the Df is not responsible for in law



(1)

R. v. Jobidon, [1991] 2 S.C.R.

there was a consensual fight and the accused was charged with manslaughter after the death of one of the people involved in the fight.

The accused was first acquitted by the trial judge who said it was a fair fight and the victim's consent had not in fact been exceeded. However, the Court of Appeal stated that "the common law concept of consent applies to the *Criminal Code* offence of assault, and that therefore the defence is only available if bodily harm is neither intended nor caused". The Court of Appeal found the accused guilty of manslaughter. The Supreme Court confirmed the decision ruling that in a consensual fight between adults, the participants' consent is NEGATED if they intentionally "apply force causing serious hurt or non-trivial bodily harm".

(2)

Agar v. Canning (1965)(Man Q.B.)

Facts: The defendant and plaintiff were playing hockey. The defendant retaliated to a blow from the plaintiff by "holding his stick with both hands, bringing it down on the plaintiff's face, hitting him with the blade between the nose and right eye". The plaintiff fell unconscious.

Held: Hockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental .. (however) **some limit must be placed on a player's immunity from liability**. Each case must be decided on its own facts, **But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of implied consent.** (Thus,) the act of the defendant in striking the plaintiff in the face with a hockey stick, in retaliation for the blow he received, goes beyond the limit marking exemption from liability.

(3)

Papadimitropoulos v. R (1958)

a man lies about being married to have sexual intercourse with a woman, this will not vitiate or negate her consent (i.e. she can't claim she didn't consent, and he raped her just because he lied about not being married).

(4)

R v. Cuverier, [1998] 2 S.C.R. 371

(5)

R. v. Mabior, 2012 SCC 47,

the court held that fraud as to the potential harmful and detrimental consequences of an action will vitiate consent if the fraud physically injured or harmed the complained or exposed them to a substantial risk of serious bodily harm. As per the court, "a significant risk of seriously bodily harm would exist if there was a 'realistic possibility' of HIV transmission. It also stated that such a possibility would exist unless the accused both had a low viral load and used a condom".

(6)

R v. Hutchinson, 2014 SCC 19,

the complainant insisted the accused wear a condom. She consented to the sexual intercourse; however, she thought he was wearing protection. The accused poked holes in the condom. The court held that even though she had consented to the physical act, the deception on the part of the accused vitiated her consent.

(7) *Latter v. Braddell* (1880)

Lindley J. stated that "The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress's orders, and there was no evidence whatever to shew that anything improper or illegal was threatened to be done if she had not complied... The question, therefore is reduced to this: Can the plaintiff, having complied with the orders of her mistress, although reluctantly, maintain this action upon the ground that what was done to her by the doctor was against her will, or might properly be so regarded by a jury? I think not".

Facts:

(8) *Lane v. Holloway* [1968]

the court reject the defence of consent as it was plain and obvious that the older plaintiff was not going to win the fight against the young defendant.

Facts:

(9) *R. v. Paice* [2005], 1 S.C.R.

the court held an accused cannot bring forth the defence of consent even if a fight is fair when severe physical injury or harm was intentional and caused.

Facts:

(10) *M. (M) v. K. (K)* (1989)

There have been courts that have vitiated the defence of consent if the defendant exploited or took advantage of his position of trust (i.e. breach of trust and breach of duty)

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You should not have paid for these.

(11)

Marshall v. Curry [1933] (N.S.S.C.),

the plaintiff went to the defendant doctor for a hernia. The defendant removed his testicle during the hernia operation, as he used his professional judgment and believed that if the testicle was not removed it could have resulted in blood-poisoning.

The court concluded that the doctor did what was in the patient's best interests and it was for the protection of his health and life. However Chisholm CJ thinks that to say "consent has been impliedly given or that surgeon gives consent as his representative" is an unrealistic view. Instead Chisholm CJ prefers to set aside the requirement for consent altogether: and to rule that it is the surgeon's duty to act in order to save the life or preserve the health of the patient; and that in the honest execution of that duty he should not be exposed to legal liability".

(12)

Malette v. Shulman 1987 (ON SC)

Dr. Shulman, on being confronted by an unconscious patient in a life-threatening situation in whose possession was found a card refusing blood as a Jehovah's Witness, faced a dilemma of dreadful finality. An immediate decision was required, either to follow the instruction given by the card or to administer the blood transfusion which he regarded as medically essential.

The doctrine of informed consent does not extend to informed refusal. The written direction contained in the card was not properly disregarded on the basis that circumstances prohibited verification of that decision as an informed choice.

The card constituted a valid restriction of Dr. Shulman's right to treat the patient and the administration of blood by Dr. Shulman did constitute battery.

(13)

Montaron v. Wagner (1988)

the plaintiff did not fully understand the English language and signed a consent form. No effort was made to guarantee he comprehended the process. As such, the court stated the consent form was not valid.

(14)

C. v. Wren (1986)

The judge, Kerans J.A., started by focusing on the fact that the case was not about abortion or foetal rights; instead, the only issue at hand was the competency of the 16 year-old mother to consent to the procedure. The parents sued the doctor.

"In light of the foregoing I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".

it is conceded that she is a 'normal intelligent 16-year-old'. We infer that she did have sufficient intelligence and understanding to make up her own mind and did so. At her age and level of understanding, the law is that she is to be permitted to do so. Accordingly, we dismiss the appeal".

(15)

Starson v. Swayze [2003] 1 S.C.R.

the "patient had been frequently institutionalized. His latest psychiatric admission resulted from being found not criminally responsible by reason of mental disability for making death threats

The Supreme Court stated that there was ample evidence that Starson was in 'almost total' denial of his mental illness. This denial was compounded by his inability, because of his delusional state, to understand the information relevant to making a treatment decision.

(16)

Substitute Consent to Treatment / consent by next of kin

There are patients who are obviously not capable of providing or refusing consent to treatment (i.e. children). In such cases, the approach has been for health care professionals to acquire substitute consent from the patient's next-of-kin. If the patient is incompetent, the next-of-kin (family member) acted in good faith and the decision was in the best interest of the patient, then the consent will be deemed valid by the court.

In *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, the court stated that the "non-therapeutic sterilization of a mentally incompetent adult could never be justified as being in the patient's best interest".

In the case of *Re B (a minor) (wardship: sterilization)*, [1987] 2 All E.R. 206 at 213 (H.L.), the court reached a contrary verdict.

In the case of *C.M.G. v. D.W.S.*, 2015 ONSC 2201, the parents had joint custody and were fighting over whether their daughter should be vaccinated before a holiday. The mother did not want her to get vaccinated, as she believed in homeopathic medicine. The judge ruled it was in the daughter's best interest to receive the vaccination and granted the father's motion.

In *Re A (Children) (Conjoined Twins: Surgical Separation)*, [2000] 4 All E.R. 961 (C.A.), two twins were joined at the pelvis. If they remained joined, the twins would both die; if they were separated, only one would die and the other would survive. The parents were devout Catholics and didn't want the children to be separated. Nonetheless, the court held it was bound to select "the lesser of two evils". Thus, the twins were separated.

17

Informed Consent: Battery or Negligence?

In *Reibl v. Hughes*, [1980] 2 S.C.R. 880 and *Hopp v. Lepp* [1980] 2 S.C.R. 192., the Supreme Court of Canada held that as soon as patients are aware and cognizant of the general nature of the procedure or treatment, they are not able to make a claim for battery “alleging that they were not informed of the risks. Rather batter claims are limited to cases in which the patient did not consent at all, the consent was exceeded, or the consent was obtained fraudulently. In all other cases, the plaintiff must bring a negligence claim for the failure to disclose risks”.

18

Legislative Reform

- Most of the provinces in Canada have incorporated the notion of informed consent into their healthcare legislation.
- In Ontario, there is the Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A. Part II addresses treatment. Section 10 states:

No treatment without consent

10 (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

- (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
- (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person’s substitute decision-maker has given consent on the person’s behalf in accordance with this Act. 1996, c. 2, Sched. A, s. 10 (1).

Opinion of Board or court governs

(2) If the health practitioner is of the opinion that the person is incapable with respect to the treatment, but the person is found to be capable with respect to the treatment by the Board on an application for review of the health practitioner’s finding, or by a court on an appeal of the Board’s decision, the health practitioner shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless the person has given consent. 1996, c. 2, Sched. A, s. 10 (2).

Ex Turpi Causa Non Oritur Actio

Consent to Criminal
or Immoral Acts

Hegarty v. Shine (1878)

the female sued her partner for giving her venereal disease. The court rejected her claim stating that a person is not able to recover in tort law for the results of her own unlawful or immoral action.

Holman v. Johnston (1775)

"No Court will lend its aid to a man who founds his cause upon an immoral or an illegal act if from the plaintiff's own stating or otherwise the cause of action appears to arise ex Turpi causa or from the transgression of a positive law of this country then the Court says he has not right to be assisted. It is upon that ground the Court goes: not for the sake of the defendant".

In Canada, Hall v Herbert, [1993] 2 S.C.R. 159:

the court held that recovery could be rejected "based on a plaintiff's illegal or immoral acts, but only if doing so was necessary to protect the integrity of the legal system .. the court then discussed the limited circumstances in which the doctrine would apply...the court stated that while *ex Turpi causa* could be invoked to prevent a plaintiff from profiting financially from his or her illegal or immoral behaviour, it would rarely apply to a plaintiff seeking compensation for actual physical injuries".

Respondent, who owned a "souped-up" muscle car, and his passenger (appellant) had been drinking. When the car stalled on an unlit and particularly rough gravel road with a sharp drop off to one side, respondent decided the only way to start it was "a rolling start" when he could not find the keys after they had shaken out of the ignition. At appellant's request, respondent allowed appellant to drive when they tried the rolling start. Respondent had been aware that appellant had

consumed 11 or 12 bottles of beer that evening, three within the last hour prior to the accident. Despite this, he did not consider the appellant drunk. Appellant lost control of the car; it left the road, went down the steep slope and turned upside down. Both were able to walk away from the accident and reached the house of an acquaintance who described them as being drunk. It was later discovered that the appellant had suffered significant head injuries.

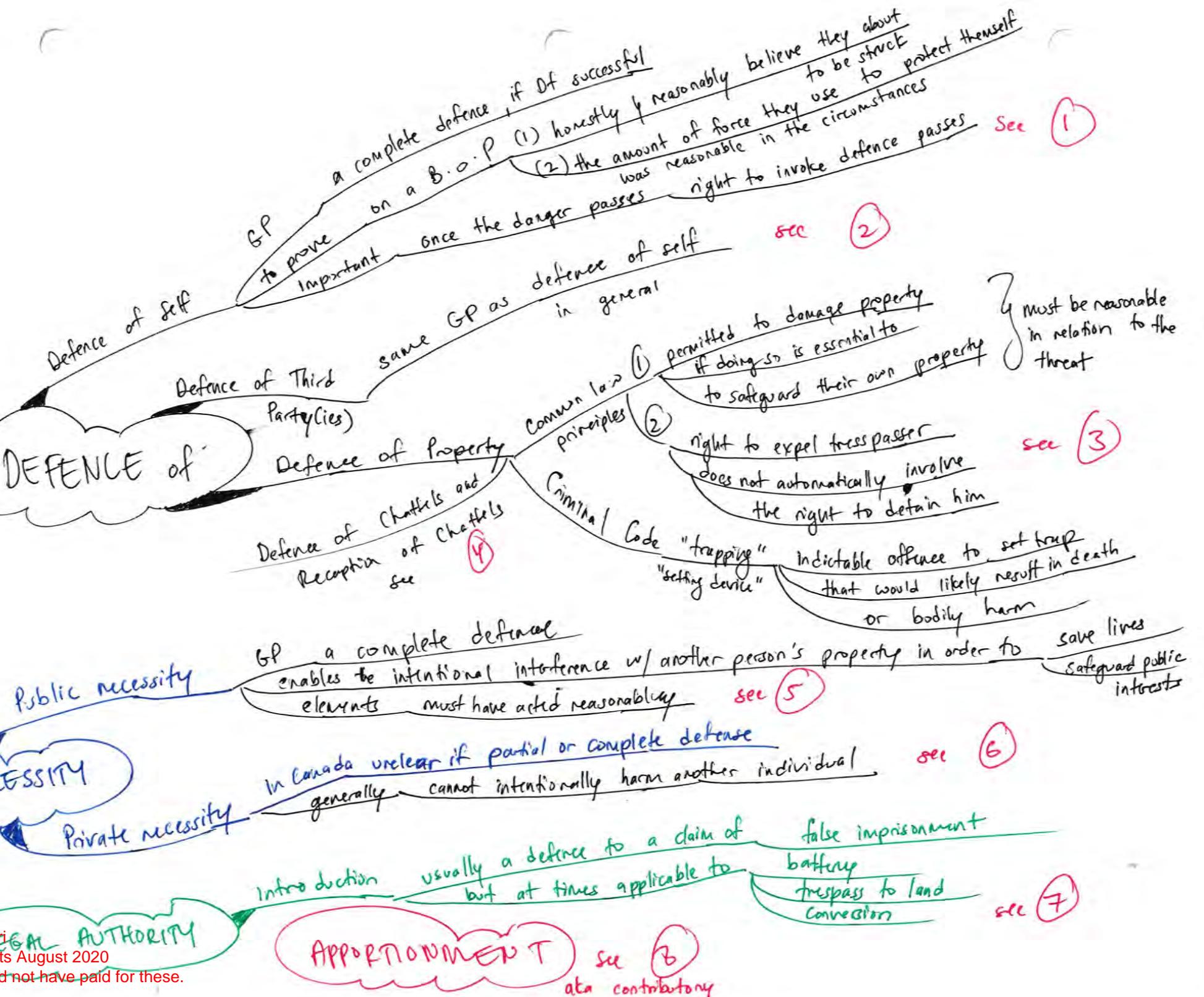
[The plaintiff sued the defendant for allowing him to drive while drunk.]

Per La Forest, L'Heureux-Dubé, McLachlin and Iacobucci JJ: The appellant need not be denied recovery here because the compensation sought was for injuries received. This compensation can be reduced to the extent of the appellant's contributory negligence, but cannot be wholly denied by reason of his disreputable or criminal conduct.

Apportionment of Liability The trial judge attributed 75 per cent of the responsibility of the accident to the respondent and 25 per cent to the appellant. I cannot agree with that assessment. The liability should be divided equally between the appellant and the respondent.

John Bead Corp. v. Soni 2002 (Ont. C.A.)

① the court discussed the impact of *Hall*. The plaintiff alleged the defendant had stolen \$1.6M from the corporation of the plaintiff. The allegation was denied by the defendant. He plead *ex turpi causa* on the ground that the plaintiff also had unlawfully taken funds from the corporation. The Court of Appeal held that the defence is not applicable simply due to the fact the plaintiff was involved in unlawful conduct (illegal activity). Further, the court gave two examples of when damages will be denied to avoid the plaintiff from profiting from his own wrongful behaviour: (i) "where one wrongdoer claims in tort against another for financial loss arising from an illegal activity," and (ii) "where the plaintiff claims as a head of damage suffered in a personal injury claim, loss of earnings from an illegal activity".



① *Wackett v. Calder* (1965)(B.C.C.A.)

Bull J.A. stated that **The appellant was entitled to reject force with force and, under the authorities, not being bound to take a passive defence, is entitled to return blow for blow. He could act in the light of the apparent urgency of the situation, but he could not trespass beyond the reasonable limits thereof.** However, it has been long held that an attacked person defending himself and confronted with a provoking situation is not held down to measure with exactitude or nicety the weight of power of his blows".

Essentially, it is hard in a provoked situation or reactive state (i.e. someone runs at you to attack you) to use the same amount of force in return. If you are defending yourself, it is difficult to measure your actions against the attacker. By and large, reasonable, comparable force should be used. For example, if someone punches you and you punch them back, this would be fairly equivalent. However, if A punched B and to defend himself, B pulled out a gun and shot him, B could not claim self-defence. On the other hand, if A went to slap B and B punched A, this may not be an exact weight of power of blows (i.e. the slap and punch may not be exact in terms of force), but it is close enough.

Brown v. Wilson (1975), (B.C.S.C.)

"In determining whether the force used was excessive, the court should consider the nature of the force used and the circumstances, but not necessarily the resulting injuries"

R. v. Scopelliti (1981), (Ont. C.A.A)

It is not necessary for a defendant to wait for the other person to make the first move (i.e. strike first). If a person feels the pre-empt an assault, they can still invoke self-defence.

② *Gambriell v. Caparelli* (1974), (Ont. Co. Ct.),

stated "...where a person in intervening to rescue another holds an honest (though mistaken) belief that the other person is in imminent danger of injury, he is justified in using force, provided that such force is reasonable; and the necessity for intervention and the reasonableness of the force employed are questions to be decided by the trier of fact...when the defendant appeared on the scene and saw her son at the mercy of the plaintiff, and being of the belief that her son was in imminent danger of injury, she was justified in using force to prevent that injury occurring...The next question is – Was the force she used reasonable in the circumstances?...When she saw her son with the plaintiff's hand about his neck, she shouted for the plaintiff to stop, to no avail. Then she ran and seized the nearest implement she could fine, which happened to be a cultivator fork...I think the fact that the plaintiff sustained only lacerations to his head rather than a fractured skull is indicative of the fact that the force she used in striking the plaintiff was not, in the circumstances excessive".

Cachay v. Nemeth (1972), (Sask. Q.B.),

the plaintiff tried to kiss the defendant's wife. The defendant fractured the plaintiff's lower jaw and broke two of his teeth. "The Court rejected the defendant's argument that he acted in defence of his wife because the force used was excessive in the circumstances".

R v. Duffy (1973), (Ont. C.A.)

The defence of third parties is not confined to just safeguarding and protecting family members or relatives

3

Dunn v. Dominion Atlantic Railways Co. (1920), 60 S.C.R.

In Canada, the courts have found that an occupier can be mandated to "tolerate the presence of a trespasser if ejecting him or her would pose a foreseeable risk of physical injury"

Ball v. Manthorpe (1970)

The right under common law to expel a trespasser does not automatically involve the right to detain him

Bird v. Holbrook (1828).

the main issue in this case was whether the defendant was allowed to set up a spring gun trap to safeguard his property. The court held that the defendant (homeowner) was not permitted to do this. Burrough J. stated that "the plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly".

The court held that if a property owner sets up a spring gun trap to catch a trespasser without posting a notice, that owner will be liable for damages. Thus, notice of the spring trap should have been provided (i.e. sign). If the Defendant only really wanted to protect his land, he would have then arranged to set up the trap at night alone.

MacDonald v. Hees (1974), 46 D.L.R. (3d) 720 (N.S.S.C.)

It is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to control his movements or to eject him after entry. However, that a trespasser cannot be forcibly repelled or ejected until he has been requested to leave the premises and in a reasonable opportunity of doing so peaceably has been afforded to him.

Even in such a case, however, the amount of force that may be used must not exceed that which is indicated in the old forms of pleading by the phrase *molliter manus imposuit*. It must amount to nothing more than forcible removal and must not include beating, wounding, or other physical injury.

In the present case I find that there was no forcible entry by the plaintiff of the motel unit occupied by the defendant. I find that the use of force by the defendant to eject the plaintiff was not justified, in the circumstances, and that in, any event, the force was excessive.

The principles and rules that govern the defence of real property essentially are applicable to the defence of chattels. To invoke this defence, the defendant must be in possession of the chattel, attempting to immediately regain possession, or in hot pursuit of the person who had just taken the chattel.

- (1) If a person innocently picks up the defendant's chattel, the defendant must request its return before using any force. On the other hand, if the individual takes the chattel right from the defendant, the defendant is allowed to use force to take it back without first having to make a request.

Recaption, or recapture (as it is sometimes referred to) is a remedy that puts the dispossessed owner in the position of a possible aggressor who is trying to regain possession of the items or objects from another individual.

- o The remedy has been described and defined in a narrow fashion.
- o It can only be used by a person who has an immediate right to possession, and ONLY after a request for the return of the item or good has been made
- o Though there has not been a consensus amongst authorities, "it appears that only peaceful means can be used to recapture a chattel from a person who came into possession lawfully. Thus, an individual could not use force to recapture a chattel from a bailee who refused to return it".

Under common law, there is a privilege to enter another individual's land or property to recapture goods (chattels) in restricted and limited situations. "If the chattel came onto the land accidentally or was left there by a wrongdoer, the owner could enter the property to retake his or her chattel, provided he or she did not use force or cause a breach of the peace. If the occupier of the land came into possession of the chattel unlawfully, its owner could make a forced entry if his or her request for its return had been denied".

If an owner recaptures a chattel he may or may not need to pay for any enhancements or improvements made to it by the other party (*Greenwood v. Bennett*, [1973] Q.B. 195 (C.A.)). This depends on whether the chattel is reacquired through court action or personally (i.e. court action may require owner to pay for improvement).

(5)

Surocco v. Geary (Cal. S.C. 1853),

Murray C.J. stated "The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the building adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed. The right to destroy property, to prevent the spread of conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government...in every case, the necessity must be clearly shown... The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing".

Facts :

Rigby v. Chief Constable of Northamptonshire, [1985]

the "police burned down the plaintiff's shop by firing tear gas canisters into the building in an effort to force out a dangerous psychopath. The police were absolved of liability in trespass on the basis of public necessity, although they were held liable in negligence for not having any firefighting equipment available".

Facts :

Bell Telephone Co. v. The Mar-Tirenno (1974)

If a person negligently inflicted, caused or contributed to the emergency circumstances, that individual will not be permitted to benefit from the defence of public necessity

(6)

Depue v. Flateau 111 N.W.1 (Minn. S.C. 1907)

No right exists to intentionally harm another individual in the assertion of public or private necessity, however, physical force can be applied to overcome resistance to the application of necessity

Vincent v. Lake Erie Tpt. Co. 124 N.W. 221 (Minn. S.C. 1910),

"The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiff's dock, the plaintiff would have not recovered... This is not a case where life or property was menaced by an object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiff's property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done".

Three matters have to be addressed:

1. Did the defendant have legal authority to undertake the act that resulted in the tort?
2. Was the defendant legally privileged (i.e. protected from liability in both civil and criminal law)?
3. Did the defendant adhere to all the other duties imposed on him during the process? For instance, a police officer may be held civilly liable, even if they were permitted, authorized and privileged during an arrest, if they did not inform the arrested individual of the reasons for the arrest.

Authority or Privilege to Arrest Without a Warrant

- The defence of legal authority is typically raised when peace officers or citizens arrest or detain a suspect and that suspect sues them for false imprisonment and/or battery.
- In such a circumstance, the onus is on the defendant to demonstrate that the particular action that gave rise to the tort was permitted and authorized by the common law or a statute.

A Peace Officer's Power to Arrest Without A Warrant

- A peace officer does not mean a police officer. Section 2 of the *Criminal Code* defines a peace officer as including police officers, sheriffs, mayors, commercial pilots, fishery officers and others. The term does not consist of private security guards or detectives.
- Peace officers are permitted to invoke ss. 494 and 495 powers. Peace officers are granted a more extensive authority to arrest than private citizens. section 495(1)(a) enables peace officers to arrest any person who they have reasonable grounds to believe has committed or is about to commit an indictable offence.

R v. Burke [2009] S.C.R.

the accused was arrested under s 495(1)(c) based on an outstanding warrant that had been issued for his brother whom he resembled. The officer searched the accused pursuant to the arrest and seized a bag of crack cocaine. When the accused was brought to the station, it was confirmed that he was not the person in the arrest warrant. The accused was charged for trafficking. The judge held that the officer did not have reasonable grounds for arrest. The crack cocaine was excluded from evidence and the accused was acquitted.

A Private Citizen's Authority and Privilege to Arrest Without a Warrant

The authority and privilege of both peace officers and private citizens in Canada to arrest with no warrant for the purpose of criminal law is now established in federal and provincial statutes. When it comes to private citizens, the most critical sections are section 494 and section 25 in the *Criminal Code*.

R v. Chen 2010 ONCJ

Chen, a grocer, was charged with assault and unlawful confinement for arresting a career thief who had stolen from him earlier in the day. When the thief returned, Chen confronted him. The thief fled, but was chased, subdued and restrained by Chen and two co-workers. The judge held that the return to the store was a continuation of the earlier theft. Based on this justification, Chen was "authorized" to arrest the thief.

After the case of *Chen*, Parliament enacted the *Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9. Although the statute provisions fundamentally changed the *Criminal Code*'s self-defence and defence of property provisions, it did not expand the grounds for making an arrest under s. 494(1) or (2). Instead, if section 494(2) conditions are met, private citizens can arrest the suspect immediately OR within a reasonable time after the crime was committed if they reasonably believe that it is not practicable or possible for a police officer to make the arrest in the situation (I.e. the police can't come in time and the suspect will escape).

(8)

Apportionment of Fault (Liability) in Intentional Torts

GP:

- It used to be that if a plaintiff contributed negligently to his own injuries or harm, then the defendant could get off completely.
- However, this all-or-nothing approach is now no longer applied. Instead, legislation was developed to apportion losses in negligence actions and divide them between the defendant and plaintiff according to their level of fault.

Bell Canada v. Cope (Sarnia) Ltd. (1980).

due to the plaintiff's contributory negligence, the defendant's damages in trespass were lessened by 33%.

The Negligence Act, R.S.O. 1990

s. 1 holds: Apportionment is also relevant to various defendants, not just the plaintiff and defendant. 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 contributing and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

"The apportionment legislation only applies when two or more parties have caused or contributed to the same loss or injury. This issue is often framed in terms of whether the plaintiff's loss or injury is 'indivisible'.

Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce, [1996]

the court stated that "contributory negligence would not be available in the context of a strict liability tort. While this argument would be available in an action for negligence, the notion of strict liability involved in an action for conversion is *prima facie* antithetical to the concept of contributory negligence".

Nature and History of Torts

- A tort is a civil wrong compensable by a common law remedy in damages. A tort is not a crime, a breach of contract or an infringement of an equitable right, although they could occur together.
- There are two major sub-categories of actions based on their underlying theories of liability:
 - Torts of intent—based on a defendant's subjective intention to interfere with the plaintiff's person or property
 - Torts of negligence—based on carelessness or unintentional wrongdoings of the defendant
 - 3rd small category—strict liability torts (no evidence of being either negligent or intentional)

Functions of Tort Law

- Compensation for Injury: This is the dominant function of Tort law
- To Deter Wrongdoing: Deterrence fails if damages flow to the customers without penalizing the wrongdoer.
- Corrective Justice: Tort litigation seeks to identify and remedy specific action of wrongdoers, and correct personal injustice to victim
- Retribution: Addresses the plaintiff's anger and resentment – civilized vehicle for securing retribution
- Educational dimension: Litigants are taught about requisite standards of conduct and the need to recognize and accommodate the legitimate interests of others.
- Accountability: Holding people responsible for non-criminal conduct e.g. holding tobacco companies and arms manufacturers liable

Types of Liability

- Absolute Liability
 - The person who committed the tortious action is held liable if his conduct causes the plaintiff's loss.
 - No defences.
 - Essential issue is causation, not fault.
 - No modern instances of this.
- Strict Liability
 - Constitutes liability in the absence of wrongful intent or negligence.
- Negligence
 - The failure to take reasonable care to prevent foreseeable harm to others.
 - The plaintiff must prove that the defendant failed to take reasonable care to prevent the risk that caused the harm.
- Intentional Torts
 - The plaintiff must show actual subjective intent on the part of the defendant.

Remedies

- Remedies may be
 - ordered by the court,
 - achieved by way of agreement (settlement) between the person claiming harm and the person he believes has caused it, or
 - by the automatic operation of law.
- Being awarded a remedy is the objective of a claim in tort law and is usually the last element of the claim.

Available Remedies in a Tort Claim

- Injunction
 - An injunction directs the defendant to act in a particular way.
 - It either restrains the defendant from continuing to do something, or compels him/her to do something.
- Damages
 - A monetary award in favour of the plaintiff.
 - An award of damages gives the plaintiff a legal right to a specific sum of money.

There are many different types of damages but they all address two specific forms of loss:

1. Pecuniary (monetary) losses (also known as special damages)
2. Non-pecuniary (non-monetary) losses (also known as general damages).

Types of Damages

- Nominal Damages
 - Usually awarded in a token amount to address a violation of a legal right that the law deems worthy of protection, even in the absence of actual harm.
 - Rarely awarded.
- Compensatory Damages
 - Awarded to compensate for actual loss, whether pecuniary or non-pecuniary.
- Aggravated Damages
 - Aggravated damages are awarded when the defendant's conduct is so outrageous that the harm done is worse than it otherwise would have been had the defendant acted appropriately after the tortious action.
 - Aggravated damages are designed to compensate the plaintiff for injury to their dignity.
- Punitive (or exemplary) damages
 - Punitive damages have, as their general objective, punishment, deterrence and denunciation (i.e. they are not compensatory).
 - Usually awarded in cases where the defendant has demonstrated some particularly unacceptable or egregious behaviour.
- Disgorgement Damages
 - Rarely applied in Canadian law
 - Disgorgements are intended to strip the defendant of any benefits that he obtained as a result of his/her own wrongdoing.

Vicarious Liability

- A court can hold an employer vicariously liable and an employee personally liable.
 - While the doctrine of vicarious liability provides the plaintiff with an alternative source of relief, it does not relieve the employee of responsibility.
- An employer can be personally liable for his or her own tort. For example, if an employer fails to adequately supervise employees, doesn't provide appropriate equipment, doesn't conduct record checks etc, the employer can be personally liable in negligence as well.
- Vicarious liability comes in several forms:
 - 1) Statutory vicarious liability;
 - 2) Principal-agent relationship;
 - 3) Employer/employee relationship

Vicarious Liability in the Employer/Employee Context

- Vicarious liability in the employer/employee context requires that three elements be met:
 - 1) A tort must have been committed
 - 2) The tortfeasor (person who committed the tortious action) must be an employee of the defendant (or be in an employment-like relationship)
 - 3) The tort must be committed in the "course and scope of employment"
- Whether the individual is in an "employment-like relationship" turns on whether the employer exercises "control" over the alleged employee.
- Evidence of control can be found in: whether the worker provides his/her own equipment; whether the worker hires his/her own helpers, the worker's personal level of financial risk, the worker's responsibility for management and investment, the worker's opportunity for profit. The more independent the worker, the less likely it is an employer/employee relationship.

Salmond Test:

- An employee's wrongful conduct is said to fall within the course of his or her employment where it consists of either:
 - Acts authorized by the employer OR
 - Unauthorized acts that are so connected with acts that the employer has authorized that they may rightly be regarded as modes (though improper modes) of doing what has been authorized.
- The theme unifying vicarious liability cases is the notion of "enterprise risk". The idea of enterprise risk derives from the idea that where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong.
- In other words, if the employer's enterprise fosters or encourages the environment/context in which the tort could occur, they are vicariously liable if it does.

West & West v. MacDonald's Consolidated Ltd & Malcom [1931] AB SC

- The employee is accustomed to returning the company truck to the employer's facility at the end of the day. He takes a small detour to pick up a wrench. On the way back, he is involved in an accident, of which he is negligent.
- "If the servant was doing something appertaining to the course of his employment, even if at the same time he may be also carrying out a purpose of his own, or, to put the matter in another form, unless the proper finding is that the servant was on an independent and separate journey of his own, unconnected with the work for which he was employed, the employer is liable.
- It is immaterial that the servant may also be going on private business of his own if he is also on his master's business.
- The Employer is liable.
- One can mix private business with their employment, and still be acting in the course of the employment.

Wills v. Bell

- The employee delivers ice, and is supposed to return the cart back at the end of the day. He stops at the bar, drinks to the point of becoming drunk, drives the cart back and hits someone.
- The plaintiff is found to have been on the frolic of his own.
- The difference between this case and West & West seems to be the presence of alcohol, and the extra time spent at the bar (as opposed to the instantaneous pick up of the wrench)
- The Employer is not liable.
- One can't mix private business with their employment, and still be acting in the course of the employment.

The Salmond test has been revisited in Bazley v Curry. However, there is some doubt as to whether Bazley applies only to intentional torts and not negligence.

Bazley v. Curry [1999] SCC

- Salmond Test is overruled for intentional torts.
- In cases of negligence, the courts have largely continued to apply the Salmond test
 - Thus far, the new Bazley analysis has been confined to institutional abuse cases.
- Vicarious liability is all about public policy
- The test should be replaced with a contextualized, policy oriented three staged process:
 1. Should there be liability based on public policy?
 2. Whether the wrongful act of the employee is sufficiently connected to the contact authorized by the employer to justify the finding of liability? The focus is not on the scope of the employment, but whether the employer created or enhanced the possibility of the risk.
 3. In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. When related to an intentional tort they may include, but are not limited to:
 - The opportunity the enterprise afforded the employee to abuse his or her power;
 - The extent to which the wrongful act may have furthered the employer's aims
 - The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise
 - The extent of the power conferred on the employee in relation to the victim

Vicarious Liability and Independent Contractors

- An employer will not be held vicariously liable for torts committed by an independent contractor

671122 Ontario Ltd. v. Sagaz Industries Canada Inc.

If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account

In making this determination, the level of control the employer has over the worker's activities will always be a factor

Other factors to consider include:

- Whether the worker provides his own equipment
- Whether the worker hires his own helpers
- The degree of financial risk taken by the worker
- The degree of responsibility for the investment and management held by the worker
- Workers opportunity for profit in the performance of his tasks

The Burden of Proof in a Negligence Action

- There are legal and evidentiary burdens of proof
- The plaintiff usually bears the legal burden of proving all of the elements of a negligence action and the defendant has the legal burden of proving any defence
- Legal burden is proving the test whereas evidentiary burden is proving the evidence
- If the plaintiff fails to establish his case the judge may order a nonsuit

Exceptions to the Burden of Proof – Shifting Burdens of Proof

SEE NEXT PAGE

Motor vehicle accidents in which a pedestrian is struck

Section 193 Highway Traffic Act

- 193. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner, driver, lessee or operator of the motor vehicle is upon the owner, driver, lessee or operator of the motor vehicle.
- (2) This section does not apply in cases of a collision between motor vehicles or to an action brought by a passenger in a motor vehicle in respect of any injuries sustained while a passenger. 2005, c. 31, Sched. 10, s. 3.

MacDonald v. Woodward

- This case used the above statute when it was s. 133 (the section has been updated)
- The statute creates, as against the owners and drivers of motor vehicles ... a rebuttable presumption of negligence. The onus of disproving negligence remains throughout the proceedings. If, at the conclusion of evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, by force of the statute, the plaintiff is entitled to succeed.

Directly Caused Injury: Unintended Trespass

Dahlberg v. Nayduk

- In this case the defendant fired at a deer, but missed. The bullet carried 250-300 yards and struck the plaintiff, who was working on his farm. The defendant had obtained consent to hunt from the owner of the land on which he was situated but he had not sought the plaintiff's permission to fire over, or hunt on, the farm.
- Defendant was sued in both negligence and trespass
- Trespass is a reverse onus and the defendant must prove the act was unintentional and not negligent

Multiple Negligent Defendants

Cook v. Lewis

- Having found that either A or B had been the cause of injury to C had not satisfied the jury as to whether A or B caused the injury.
- The legal consequence of this is that the onus is shifted to A and B to demonstrate their respective innocence.
- If neither A nor B can demonstrate their innocence the liability is shared

Clements v. Clements

- As a general rule a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
- Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of plaintiff injury, where
 1. The plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and
 2. The plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors was in fact the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

Remoteness:

- whether the injury is too remote to justify recovery
- liability limited to those losses that were foreseeable consequences of Df's act

Damages / Actual Loss:

- unlike most intentional torts, negligence is not actionable per se

- only actionable where PI suffered actual legal recognized injuries & loss

NEGLIGENCE

ELEMENTS of NEGLIGENCE

- Duty of Care
- Standard of Care & its Breach
- Causation Cause in Fact
- Remoteness of Damages cause in fact
- Damage / Actual Loss

Once established a prima facie case of Negligence, court to address if there is any **Defences**

origins in act of trespass
 used in cases of injury caused by forceful interferences w/ person or property
 developed to surgons breaching standard of care
 synthesized in those who was carelessly run down public roads
Judges recognize legal duties of care in the absence of contract or prior risk/btw P's & Df's
Donoghue v Stevenson (1932)
House of Lords established the DofC in Negligence

Defences:

- defences to Neg. will limit or negate liability

DofC:

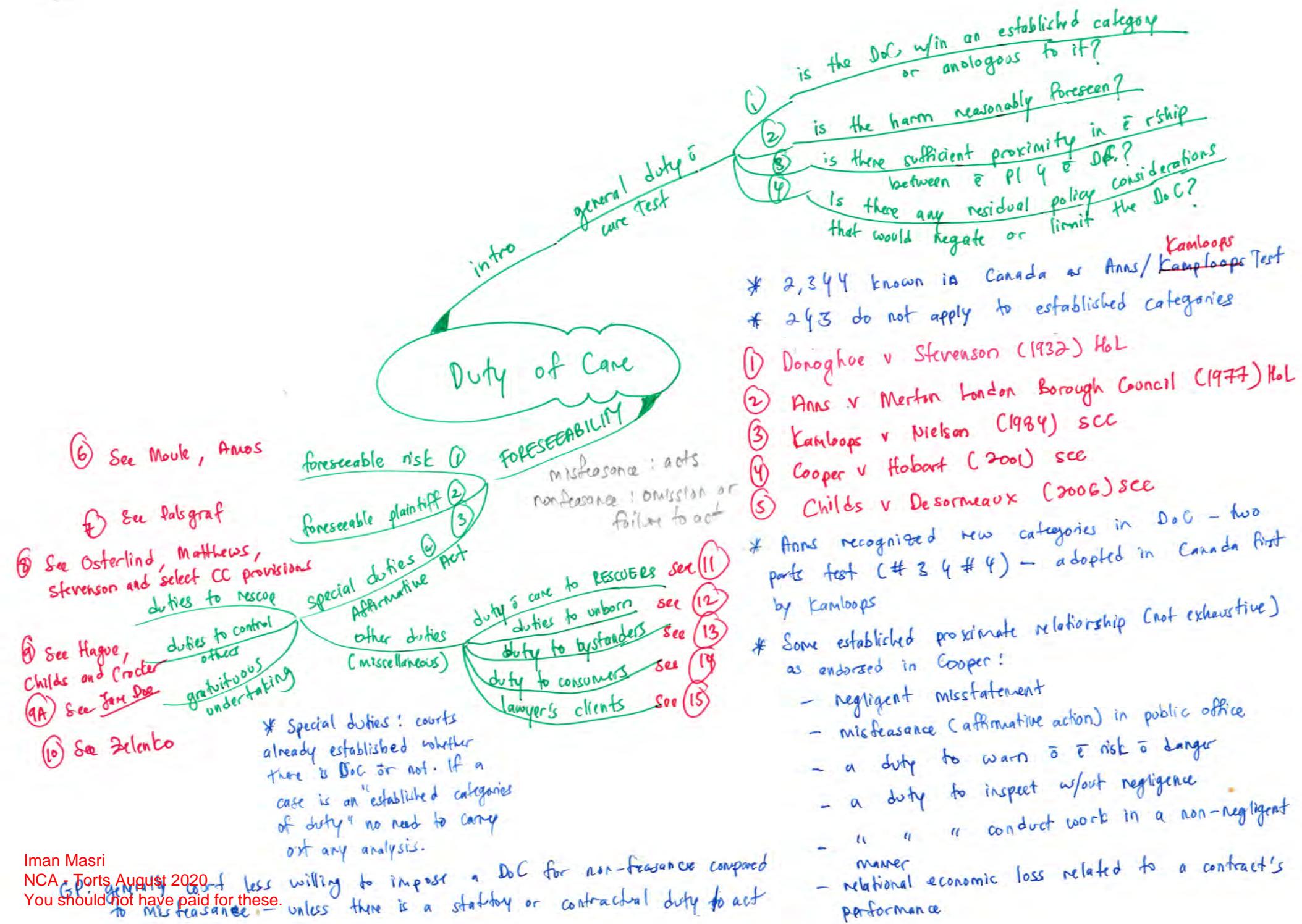
- a legal obligation to exercise care w/ respect to the PI's interests
- "neighborhood principle"
- generally elements:
 - foreseeable risk & injury
 - proximity b/w Df & P's
 - no policy reasons for not imposing a duty

SOC:

- whether Df's actions fell below the appropriate standard of care
- general SOC is that of the "reasonable person" in the circumstances & in case

Causation:

- a link b/w Df's breach & the standard of care w/ & PI's loss
- generally using the "but for" test
- there are other tests as well when "but for" is inadequate



1

Donoghue v Stevenson (1932) H.L.

F: Pl. drinks a bottle of root beer that has snail in it, complains of gastric pains

H.L.: duty of care arises when df. is proximate & pl. and pl. can reasonably foresee harm

GP: must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your "neighbor": someone so closely & directly affected by my act that I ought to reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions in question

aka ϵ proximity concept

2

Anns v Merton London Borough Council (1977) H.L.

F: Df was informed of completion of building, did not inspect but issued a building permit, tenants years later found structural movements causing damages due to inadequate foundations

H.L.: new DoC categories established in two step test

Iman Masri
NCA - Torts August 2020
You should not have paid for these.
① sufficient relationship/proximity based on foreseeability
② consideration of reasons why there should not be a DoC?

3

City of Kamloops v Nielsen (1984) SCC

F: a house foundations had structural deficiencies - city inspected & issued stop work orders - contractor continued despite city's warnings - house later sold without notice to ϵ issues

TJ: vendor & city negligent 75% : 25%

CA: upheld

SCC: city negligent in allowing building to continue, vendor-contractor resp. was primary: city has a sufficiently proximate relationship to ϵ pl.

* applied Ann's

4

Cooper v Hobart (2001) SCC

F: Registrar of Mortgage Brokers, a statutory regulatory suspended a mortgage broker's license & froze assets due to alleged unauthorized acts. Investors sued the Registrar - allege if acted faster would avoid loss

SCC: the policy consideration under Ann's test applies here - an indefinite liability would arise if a DoC was recognized b/w Registrar and investors, so even if proximity is proven, policy reasons would negate a finding of DoC here

5

Childs v Desormeaux (2006) SCC

F: Pl sued Df who hosted a private party at which a person became intoxicated and caused a MVA which caused death and injuries to several ppl incl Pl.

TJ & CA held no DoC
SCC: social hosts do not owe DoC to general public. 1st limb of Ann's test not established. Even if foreseeability is established (eg driver past history) in this case not, there is no legal duty of hosts to monitor guests drinking or prevent them from driving.

The guest has autonomy and assumes all risk with ϵ consumption of alcohol.

Moule v NB Electric Power Co [1960]

- Only reasonably foreseeable risks will lead to a Duty of Care
- It is foreseeable that children will climb trees power companies should respond by placing their wires such that children will not come unexpectedly in contact with them. However, a company is not necessarily responsible for every accidental contact with its wires by climbing children or that it is deemed to be endowed with provision of every harmful contingency
- In placing the wires 33ft from the ground and causing the adjacent trees to be limbed as they were at the place of this accident, the defendant had taken adequate precautions against such dangers inherent in the presence of the wires as could be reasonably foreseen.
- The accident as it happened was a result of a number of unlikely events, which were outside of the range of reasonable foreseeability

Amos v. NB Electric Power Co [1976]

- Those who erect electric lines carrying heavy charges have a duty to take proper precautions against all foreseeable injuries
- The plaintiff climbs a young tree, which sways under his weight, and makes contact with the power line causing the boy to be electrocuted
- His parents sue the electrical company for negligence in not trimming the tree sufficiently or placing the lines far away.
- It was held that the tree was not trimmed sufficiently
- Those who erect electric lines have a duty to take proper precautions against all foreseeable injuries
- **Unlike in *Moule*, the defendant had failed to take adequate precautions against reasonably foreseeable dangers inherent in the presence of the wires.**
- Accident was one which could have been foreseen and which was almost inevitable
- Foreseeability (and thus a duty of care) cannot be transferred from one plaintiff to another. This does not mean that each individual plaintiff must be foreseeable, but rather that the plaintiff must belong to a class of persons foreseeably at risk (such as all drivers on the road).

(i) Foreseeable Risk

- Whether, at the time of the alleged tort, it was reasonably foreseeable to a person in the defendant's position that ANY carelessness on his or her part could create a risk of ANY injury to the plaintiff.

7

(ii) Foreseeable Plaintiff

American case

Palsgraf v Long Island Railway Co (C.A 1928)

- In this case the conduct of the D guard, if a wrong in its relationship to the holder of the package was not a wrong to its relation to the P, standing far away

on the other side of the train platform. Relatively to her it was not negligence at all. Nothing in this situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.

- Cardoso C.J.'s approach in *Palsgraf* has been accepted by the English and Canadian courts: the P must prove both that the D's conduct gave rise to a duty of care and that the duty was owed to him/her
- This does not mean that the individual P must be foreseeable but rather that the **P must belong to a class of persons foreseeable at risk**
- In other words, The defendant need not have foreseen the particular plaintiff, the fact that the plaintiff belonged to a class of persons that was foreseeable to the defendant is enough to establish foreseeability
- The breadth of the foreseeable P test varies with the type of interest at stake. For example a very broad test is applied in case of rescuers, whereas a narrower test is applied in psychiatric harm cases
- By manipulating the foreseeable P test, the courts have been able to control the ambit of recovery in negligence

TlDR: guard (railway) employee owed no DDC to Palsgraf as injury to her is not a foreseeable harm from his act of aiding a man w/ his package

F: package fell, exploded, causing a coin-operated scale on the train to fall & hit Pl.

Canadian authorities on foreseeable Pl.



① Dobson v Dobson (1999) SCC

- negligence requires a specific DDC owed to a foreseeable pl

② Berger v Bulker (2015) BCCA

- sequence of events does not have to be foreseeable in precision, but only need to foresee that person or class of persons may be harmed by df's wrongful conduct i.e. the foreseeable pl

8

Osterlind v Hill (1928) Massachusetts

F: boat renter ignored his rentor's cries for help when they capsized due to intoxication

H: no duty of care to rescue, df did not create the situation of peril

TDR: no duty to rescue even if easy

Stevenson v Clearview Riverside Resort (ONSC) 2000

F: an intoxicated Pl dove into river, during a rescue Pl suffered additional spine injury an ambulance attendant was present during rescue

H: no general duty to intervene in the rescue efforts to correct them

Matthews & Horsley v MacLaren (1969) ONSC

M & H were guests aboard Df's boat when M fell overboard. Df and others onboard attempted to rescue by reversing boat at which time H jumped into water to rescue - died due to shock to cold water

Held: Df x liable to M but is liable to H. Df negligent in *effecting M's rescue inducing H to jump into the water - a risk created by Df's conduct.

SCC in 1971 upheld CA decision to

dismiss H's family claim. (Majority only)

Held: MacLaren had duty to do his best,

even if his ~~manoeuvring~~ was not the best

He did not show this induced H to risk his life.

Even if there is error, it is an excusable judgment to error.

statutory provisions in CC

s. 129 (b) duty to assist police in keeping peace if requested

s. 252 - repealed 2018

s. 217 - undating - if failure dangerous to life

⑨

Hague v Billings (1993) ONCA

- Pls sue driver, tavern & hotel
 - tavern stopped serving after 1 beer due to signs of intoxication - driver went to hotel, employee served three-four beers
- TJ: Driver & hotel liable. Tavern had duty to call police, but in light of this case, accident won't be prevented even if they did 50-50.
- CA: Driver 85, hotel 15.

Ratio: S.53(6) of Liquor Licensing Act and common law for serving alcohol to someone w/ obvious intoxication sign, in danger of causing injury to others

Jan

Jane Doe

- balcony rapist
- police have a duty of care to proximate, foreseeable victims

Stewart v Pettie (1995) SCC

F: Driver drnt caused accident & hurt his passengers

HELD: mere over-serving of alcohol does not give rise to liability - injury must be foreseeable by the commercial host to be required to take action

SCC: no evidence that if the bar intervened, the result would be different, the parties stepped out and independently made the decision to let DF drive - no evidence that they would have decided differently

Crocker v Sundance Northwest Resorts Ltd (1988) SCC

F: Pl at DF's resort to enter a snow tubing contest, signed waiver. Pl purchased & consumed alcohol, gets drnt. Manager notes question Pl's capacity to enter contest, Pl insisted he was okay. Injured - quadriplegic

SCC: r'ship btw resort & Pl mirrored those of bar & patron:

- ① DF knew Pl factually intoxicated
- ② DF kept providing Pl more liquor
- ③ DF aware of risk but did nothing
- ④ DF profited from Pl's action

HELD: there is positive duty, resort liable. Upheld TJ's finding of Pl being contributory negligent so only get 75% damages

Jene Doe v Metropolitan Toronto Police

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Stewart v Peffie (1995) SCC

F: Driver drunk caused accident & hurt his passengers

HELD: mere over-serving of alcohol does not give rise to liability - injury must be foreseeable by the commercial host to be required to take action

SCC: no evidence that if the bar intervened, the result would be different / the parties stepped out and independently made the decision to let DF drive - no evidence that they would have decided differently

Crocker v Sundance Northwest Resorts Ltd (1988) @ SCC

F: Pl at DF's resort to enter a snow tubing contest, signed waiver. Pl purchased & consumed alcohol, gets drunk. Manager notes question Pl's capacity to enter contest, Pl insisted he was okay. Injured - quadriplegic

SCC: r'ship b/w resort & Pl mirrored those of bar & patron :

- (1) DF knew Pl factually intoxicated
- (2) DF kept providing Pl more liquor
- (3) DF aware of risk but did nothing
- (4) DF profited from Pl's action

- Police have a duty to prevent crime in situations where the PL falls into a category of foreseeable and proximate victims.
- The plaintiff is raped by an established balcony rapist with a set modus operandi.
 - ↓ He had perpetrated several rapes in the area and was under investigation by the police.
 - ↓ The police chose not to warn the women in the neighbourhood, because they would become hysterical and jeopardize the investigation.
 - ↓ The investigation was low key, as it was not violent, but "just rape".
 - ↓ The plaintiff sues the police for negligence
- The rape could have been prevented, since the rapist followed the same procedure all the time.
- The police decided that the best way to catch the rapist was after another rape
 - ↓ Thus the plaintiff was used as bait.
- SCC applies the Cooper test:
 - ↓ It was reasonably foreseeable that the rapist would rape again
 - ↓ At the time that she was raped, the plaintiff had become a member of a small specific group that were vulnerable to attack
 - ↓ Thus, proximity is present, in respect to the plaintiff being a member of a class of potential victims
 - ↓ There is no policy reasons for preventing such a duty
 - ↓ Police do not have a Duty of Care to a larger populace, only to the proximate, foreseeable victims.
- There is a Duty of Care which is not a general duty to prevent crime, but rather a duty to warn the potential specific victims
- A plaintiff has to argue that they are not a random victim.
- The police were liable as they did not treat the crime of rape seriously and did not warn the readily identifiable group of the threat

HELD: there is positive duty, resort liable. Upheld TJ's finding of Pl being contributory negligent so only get 75% damages

10

Zelento v Gimbel Bros (1935) NYSC

F: Deceased fell ill in Df's store. Df undertook to render medical aid but kept her in its infirmary for 6 hours w/out medical care.

Held: if a Df undertakes a task, even if under no duty to undertake it, the Df must not omit to do what an ordinary man would do in performing the task

Goodwin v Mainroad North Island Contracting Ltd (2007) BCCA

F: Pl in a truck which skidded on black ice. RCMP called the Df - highway contractor. Df's despatch informed RCMP that they will send crew but did not, as that road is actually on the District and not them.

BCCA: found the facts analogous to the undertaking to render assistance in Zelento v Gimbel (confirmed by

English case Kent v Griffiths (2020): one an undertaking is given a duty & care arose

} Held: admit back to trial court to determine, assuming the existence of Dd C whether there was a breach

(11)

(i) Duty of Care Owed to the Rescuers

Videan v. British Transport Commission: (1963) English case

- If a person by his fault creates a situation of peril, he must answer for it to any who attempt to rescue the person who is in danger.
- **Though it is possible, courts rarely hold rescuers contributorily negligent for their rescue attempts.**
- It is presumed that because the plaintiffs are responding to an emergency situation the plaintiff's should not be held to the same standard of care as those acting in less extreme circumstances.
- The defence of voluntary assumption of risk has been pretty much eliminated in rescue cases.

Wagner v. Intl. Ry. Co: (1921) NYCA

- The presence of rescuers is foreseeable and therefore creates a duty of care, since "danger invites rescue"
- The principles of rescue apply to cases where plaintiffs are injured while attempting to save themselves or their property

Dufault v Excelsior Mortgage Company: (2003) ABCA

- A rescuer can sue the person being rescued in the event that the person being rescued negligently imperilled him or herself

Horsley v Maclarens (1972) SCC

Pl lost eye when trying to assist hotel clerk during an assault by 6 youths. TJ found hotel failed to ensure safety of staff & guests given its location & prevalence of crime. CA: TY correct to find Pl a

- If one by his fault creates a situation of peril, he has a duty of care to anyone who attempts to rescue the person who is in danger.
- For the defendant to be responsible for the plaintiff's death there must be such negligence in his method of rescue as to place the plaintiff in an apparent position of increased danger subsequent to and distinct from the danger to which he had been initially exposed by his accidental fall.
- Any duty owing to the plaintiff must stem from the fact that a new situation of peril was created by defendant's negligence which induced the plaintiff to act as he did.

} 2 y.o. child trespassed onto railway line, father killed while attempting to rescue

HELD: D liable as trolley driver was going too fast in a wet condition and failed to keep a proper lookout, but only to the father, no duty owed to the "trespassing" child

→ "the state that leaves an opening in a bridge is liable to a child that falls into a stream, but liable also to the parent who plunges to its aid" - Cardozo

acted reasonably, hotel liable to his rescue.

Held: Maclarens X responsible for Matthews falling overboard to his death. In order to be held liable for Horsley's death, it must be proven Maclarens created a situation of peril (a new peril)

Paxton v Ranji 2003 ONCA

F: DF prescribed an acne drug that is known to cause fetal malformation, being aware that the PI's husband had a vasectomy. Vasectomy had failed by PI pregnant & birthed w/ considerable damage due to drugs.

TJ: there is no wrongful life claim in Canadian law

ONCA: wrong question on wrongful death. Instead need to analyze if DF owed Doc to an unborn child - Anna test.

Upon analysis, even if there is proximity, policy consideration negates Doc as doctors should not be faced w/ a conflict of interest b/w a future unborn child and their patient - to impose such Doc would deprive female patients autonomy.

Dobson (litigation Guardian of) v

Jones v Rossmig (1999) BCSC

F: infant born w/ down syndrome

Held: infants claim cannot succeed, no duty under law or recoverable damages - no wrongful life cause in action

Jones v Rossmig (2003) BCSC

parents claim for the cost of care of infant - court awarded damages

Kedley v Berezowski (1996) ONSC

- PI's tubal ligation was found to be negligently performed, PI gave birth to a healthy child
- Held - wrongful pregnancy = PM - conception
- Judge considered the claim as "analogous to a pure economic loss" as the PI's desire to plan family was due to a financial consideration

Awarded: damages for

- pregnancy, labour, delivery and costs of a second tubal ligation
- stress, difficulty & caring for 2 children during pregnancy
- loss of income for father & mother

BUT NO AWARD FOR CHILD REARING COSTS as parents independently chose to carry to term and have the unplanned child. Cannot ask tortfeasor to be liable

Ardnt v Smith (1997) SCC

F: PI allege DF doctor's non-disclosure of risk to fetus due to chickenpox - sought costs for raising disabled child - claimed if she had known she would have terminated

TJ: concluded on a balance of probabilities would NOT have aborted even if informed

CA: TJ incorrect - to refusal

SCC: TJ correctly entitled to find evidence that failure of DF to

disclose did not affect PI's decision to carry pregnancy to term. Allowed appeal. Restored TJ decision

McLaughlin v O'Brien (1982)

F: Df. caused a serious accident.
Pl is wife to victim, suffered psychiatric injury including clinical depression and personality changes, due to trauma & witnessing her family seriously injured - 1 child died and 11 and 2 other children seriously injured.

Hol: nervous shock is reasonably foreseeable and policy consideration did not inhibit decision in Pl's favor

Test:

- (1) close familial relationship btw victim and claimant (bystander disqualified)
- (2) close proximity in time and space (this includes aftermath)
- (3) Shock suffered must have come through SIGHT or HEARING & event or of its immediate aftermath.

¶ In this case W heard & news 2 hours after it happened and Iman Masri
NCA - Torts August 2020 family after being driven to the hospital
You should not have paid for these.

Devji v Burnaby (District) 1999 BCCA

F: Y died in an accident. Mom, dad & 2 sisters claim they suffered nervous shock and sued the municipality for failure to maintain a safe road

TJ: claims for nervous claim dismissed held that "viewing & body can be brought within the aftermath & accident." (1992)

CA: applied the test in ALCOCK and White (1999) which have three requirements:

- (1) close tie of love and affection
- (2) close to & incident in time & space
- (3) that he directly perceived the incident, rather than hearing abt it from a third party

HLD: TJ correct to find viewing & body outside the aftermath & & incident

Vanek v The Great Atlantic & Pacific of Canada Ltd (1999) ONCA

F: a child consumed contaminated juice and became sick. Parents took her to hospital - doctor observed no alarming symptoms and child returned to school the next day. After tested, juice was found to contain a hydrocarbon mix similar to gasoline.

Parents became extremely concerned, up to the point of being prescribed tranquilizers and father hospitalized for heart issues

Mustapha v Culligan & Canada Ltd (2006) ONCA

F: Df supplied water bottles to Pl. One unopened bottle had a dead fly in it. Pl suffered from phobia and anxiety

CA: TJ erred in failing to take into account the objective reasonable foreseeability and instead focused on Pl's particular sensibilities and ensuing reaction. At the time contract entered into, it is not reasonably foreseen that Pl's psychiatric injury would flow from seeing a dead fly in a bottle

SCC: • damage too remote to recover.

- Df owed Pl a duty & care in supplying water and by providing contaminated water, BREACHED that DofC. However Pl failed to show that such injury was reasonably foreseeable.
- TJ erred in applying a subjective test
- Df breach caused & injury in fact but not in law

CA: TJ erred in awarding damages

for psychiatric injury. The damages suffered by the parents are not reasonably foreseen as a result & contaminated juice. Vanek's reaction was not what is expected from an average concerned parent - they displayed a particular hypersensitivity -

Df and third party not at fault for psychiatric damages as there was no foreseeability

14

Hollis v Dow Corning Corp
(1993) BC CA

F: Pl had breast implants which ruptured in her body. Pl's suit against doctor and sales agent was dismissed.

TJ: award damages against Df for negligent manufacture. Df appeals

CA: Appeal dismissed. Manufacturer had a duty to warn about risk of rupture. CA considered a reasonable woman would not have consented to implants had she been warned of possibility of rupture. CA also allowed cross appeal on Doctor's liability.

15

Central Trust Co v Ratuse (1986) SCC

F: Solicitors retained to perform legal services relating to mortgage. Mortgage later found void due to non-compliance w/ Companies Act

Held: Solicitors were negligent - compliance w/ Companies Act is basic knowledge and a reasonably competent solicitor must be held to possess it.

Iman Masri

NQA - Torts August 2020e found negligent, they are liable in contract as well as tort.

Folland v Reardon (2005) CA

F: convicted of sexual assault but acquitted upon appeal w/ new DNA evidence. F sued R, his criminal counsel for not using the DNA evidence

H: judgment call by lawyers not more difficult than other professionals, rejected the "egregious error" standard

Calvert v LS & UC (1981)

H: LS cannot be held liable for negligently admitting or failing to bar a lawyer. Such decisions are quasi-judicial and cannot be reviewed by the courts unless LS acted maliciously

Finney v Barreau de Quebec (2004) SCC

- Barreau found liable for failing to take disciplinary actions
- lawyer had multiple complaints
- SCC Barreau not immune as utter inaction amounts to bad faith



5 Indicia of Reasonable Reliance

- ① Df had direct or indirect financial interest in the transaction when the representation was made
- ② Df is a professional or possess special knowledge
- ③ Advice is in course of Df's business
- ④ Advice given deliberately & socially
- ⑤ Advice given in response to a specific request or inquiry.

8

Bow Valley Husky v St John Shipbuilding Ho (1997) SCC

Raychem - subcontractor of SJSL did not do proper installation of heat tracing, causing fire to oil rig. Oil rig owned by BVH - wholly owned by Hoot and BVI. Hoot and BVI seek to recover day rates contractually obligated to pay BVH during the period oil rig is out of service due to fire.

Held: SJSL (and Raychem) not liable in tort to BVI and Hoot.

Iman Masri
NCA - Torts August 2020

You should not have paid for these.

Held: Unlike UK, relational economic loss can be recovered in Canada, but in EXCEPTIONAL CASES.

Duty to warn arise where Df could reasonably foresee PI suffer as a result of product about which the warning should have been made.

In this case, proximity exist. But, next question: Should duty to warn be negated by policy consideration: SCC: YES.
Due to indeterminate liability.

RATIO: Duty of care for contractual relational economic loss may exist but can be negated by indeterminate liability.

D'Amato v. Badger, [1996] 2 S.C.R. 1071

Felice D'Amato and Arbor Body Shop v. Donald Badger and Russell Frazee

The appellant D owned 50 percent of the appellant company. He was injured by an automobile owned by one of the respondents and operated negligently by the other. Liability was admitted.

Until the accident occurred, D supervised and performed repairs. As a result of the injuries he could no longer perform the physical labour required for autobody repair, but continued to manage, supervise and prepare estimates.

After the accident, D continued to receive the same salary from the company of \$55,000 per year. Because D was unable to perform repair work, the company hired replacement labour, and as a result suffered a loss of profits.

The trial judge awarded \$73,299 to the company for economic loss suffered as a result of the accident and awarded \$290,000 to D for loss of earning capacity.

The Court of Appeal allowed the respondents' appeal in part, disallowing the company's award for economic loss. D personally was allowed to recover 50 percent of that loss under the *alter ego* principle. The award for loss of earning capacity was reduced to \$50,000.

This appeal is to determine whether the company is entitled to damages for pure economic loss in the circumstances of this case and whether the Court of Appeal was correct to reduce the trial judge's award to D for loss of earning capacity.

Held: The appeal should be allowed in part.

This Court's decision in *Norsk* reflects the current state of the law in Canada regarding pure economic loss. While the tests of La Forest and McLachlin JJ. in *Norsk* are different, they will usually achieve the same result.

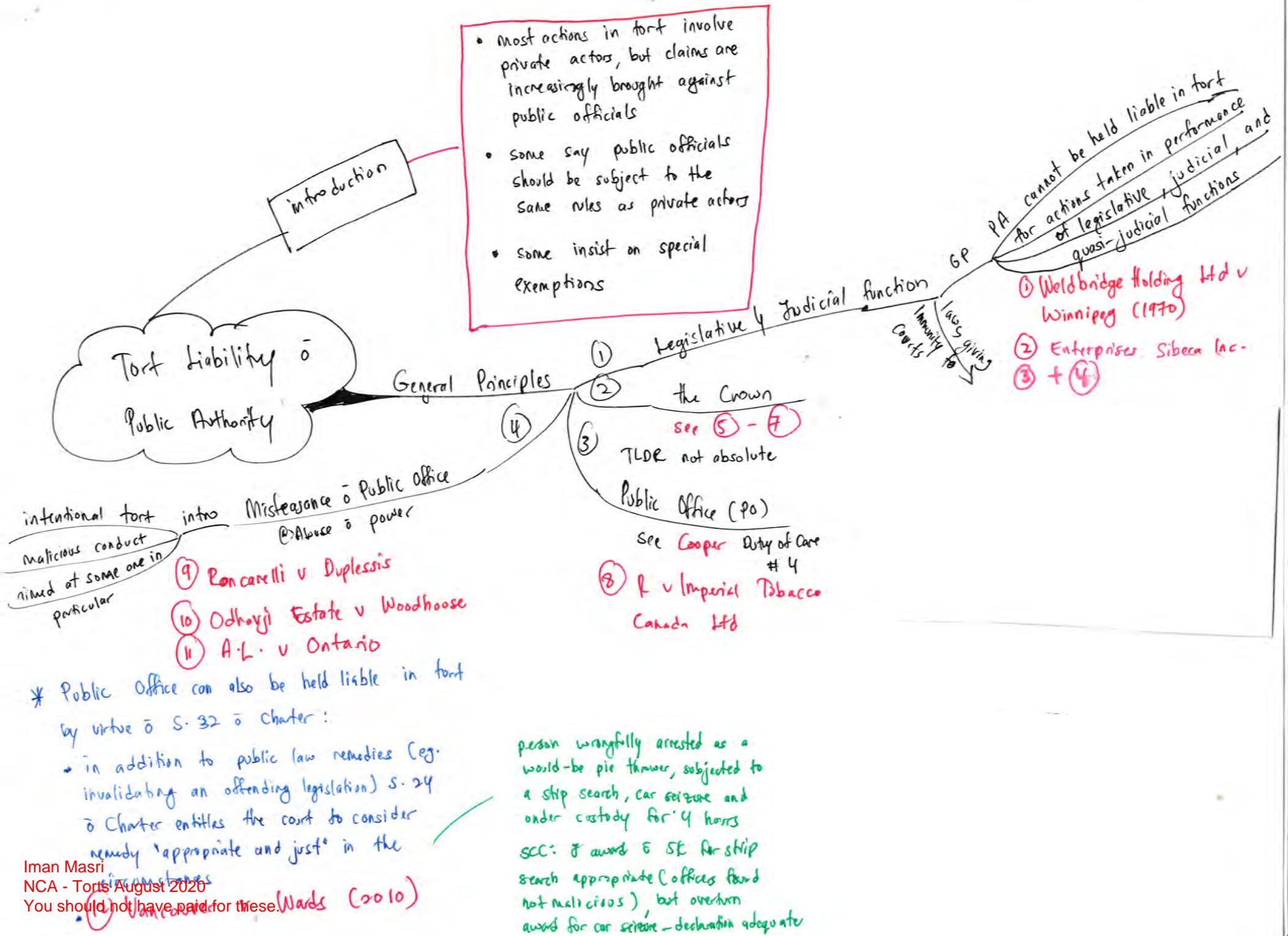
The company cannot succeed in its claim for pure economic loss under the *Iman Masri*, La Forest J. approach. This is a case of contractual relational economic loss, NCA - Torts August 2020
You should not have paid for these.

since the company's loss arises solely because of the contractual relationship between the company and its employee/shareholder D, and there do not appear to be any good policy reasons to depart from the exclusionary rule, if such a rule is to be adopted.

Even using the somewhat broader McLachlin J. approach, the company cannot succeed, since there is insufficient proximity between the negligent act and the damage to ground liability. The loss was neither foreseeable nor sufficiently proximate to the act of negligence to warrant recovery.

Finally, even if one can say that defendants in the position of the respondents should have reasonably contemplated persons in the position of the company, the second stage of the *Anns* test, dealing with policy reasons to limit recovery, would deny recovery to the company. If the company is allowed to recover pure economic loss arising from the loss of key shareholder and employee, the problem of indeterminacy arises. Since the respondents did not cross-appeal on the damages awarded to D under the *alter ego* principle, the award should stand.

The trial judge's calculation of loss of earning capacity should not be disturbed unless patently unreasonable or based on incorrect legal principles. It is obvious that the trial judge did not ignore D's involvement with the company when calculating loss of earning capacity. He was entitled to find, as he did, that D would have difficulty finding work as repairman because of his injuries and as an owner because of his lack of English skills and education. This finding of fact justified the trial judge's conclusion. In suggesting its own "more realistic" approach to the assessment of future earning capacity, the Court of Appeal merely disagreed with the trial judge's decision. Since it failed to identify any palpable and overriding error such as to permit its interference, the trial judge's award for loss of future earning capacity should be restored.



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- most actions in tort involve private actors, but claims are increasingly brought against public officials
- some say public officials should be subject to the same rules as private actors
- some insist on special exemptions

General Principles

Public Office
power

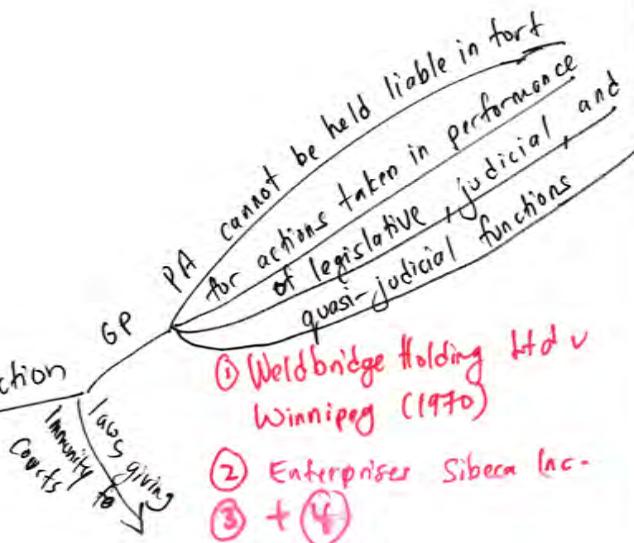
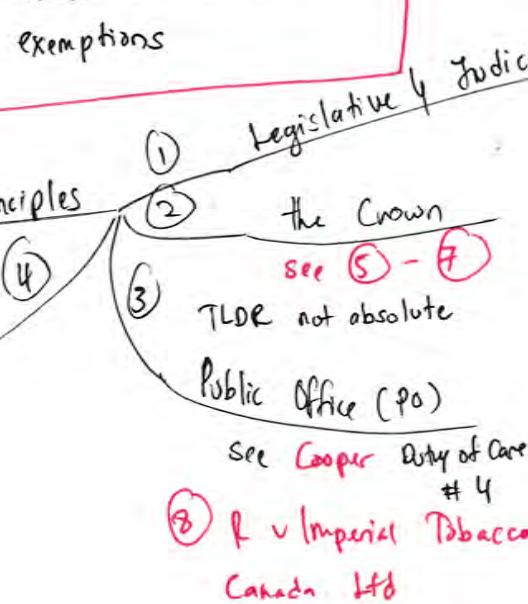
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in Iman Masri
NCA - Torts August 2020
You should not have paid for these
(2010)

person wrongfully arrested as a
would-be pie thrower, subjected to
a strip search, car seizure and
under custody for 4 hours

SCC: & award \$ 5K for strip
search, appropriate (officers found
not malicious), but overturn
(\$ 10K) because of police underestimating



- > **Court of Justice Act R.S.O 1990 c. C-43, s.82:** Legislation in Canada's common law jurisdictions provides for the immunity of judges at all levels
- > **Provincial Court Act, CCSM c. C275:** Legislation regarding judicial immunity provides that a judge can only be held liable in tort if the P can establish that he acted maliciously and without reasonable and probable grounds
- > Criminal Code RSC 1985 c. C-46, s.783 permits a reviewing court, upon quashing a conviction, order to issue an order protecting the original judge from tort liability, it can also issue a protection order for anyone acting in accordance with the order



Welbridge Holdings v Greater Winnipeg (1971) SCC

The City of Winnipeg passed a by-law permitting companies to erect high rise apartments in a certain area. Welbridge was incorporated after this by-law was passed, and made plans to build apartments in the area and acquired some land in this area approximately 16 months later. The by-law was struck down by the courts as not being valid. Welbridge sued stating the city was negligent in passing an invalid by-law.

Issue

Does the fact that a company did not exist when a by-law was passed mean that it cannot have been owed a duty of care?

Decision

Appeal dismissed.

Reasons

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.

A narrower basis of liability was, however, proposed in the present case, one founded on the failure to carry out certain anterior procedural requirements for the enactment of the zoning by-law. Those requirements provided for notice to affected parties and although they were held in the *Wiswell* case to be expressions of a quasi-judicial function, this did not mean that the hearing to which they were relevant was a step unrelated to the legislative exercise in which the defendant was engaged. Moreover, even if the quasi-judicial function were taken in isolation, it was not accepted that the defendant in holding a public hearing as required by statute would, in bringing it on and in carrying it to a conclusion, come under a private tort duty to use due care to see that the dictates of natural justice were observed.

Also, there was nothing false or misleading or careless in the representations made to the plaintiff and it could not be accepted that those representations involved an assumption of responsibility to the plaintiff for the procedural regularity of the rezoning proceedings.

②

Entreprises Sibeca Inc. v. Freightsburg [2004] **SCE**

- Found that a municipality has a margin of legitimate error and will not be liable for the exercise of its regulatory power if its acts in good faith or if the exercise of the power cannot be characterized as irrational
- Developer facing delays - having to reapply for development permit after adoption of new by laws which require more stringent planning - developer ends up subdividing land and selling it by piece - sued municipality for loss of profit
facts CA correct to set aside T&G award based on municipality's failure to prove good faith - burden is on PL to prove bad faith

followed by
Towers v Mackenzie
1980 [BCCA]

(3) Everett v. Griffiths [1921] *HOL* - upheld doctor liable

- Courts have extended judicial immunity to public authorities other than judges who perform quasi judicial functions. However, no clear position has emerged to determine which boards/tribunals and officials will be granted immunity

Facts: Pl who has been detained as a lunatic sees ① the doctor who signed his certificate and ② Justice of Peace, Chairman of Board of Guardians.

Held: Doctor liable for negligence but Justice not liable or required to make an inquiry into Pl's sanity

Ratio: if empowered by statute to make discretionary decision affecting another person, enjoys immunity from suit by the person affected provided he acts w/in jurisdiction and acts bona fide and honestly at making decision

(4) Sirros v Moore [1974]

- Longstanding debate as to whether judicial immunity should be limited to judges of superior courts, extended to judges of any court or applied to all judges
- Lord Denning indicated that immunity rule ought to cover all judges and justices *However, doctrine of judicial immunity does not apply if a J was not acting judicially, knowing he had no jurisdiction*

(5) SCC, Nelles v Ont [1989], *SCE*

- Court held that the Crown was protected by statute from civil claims based on how it discharged its judicial responsibilities, however it denied immunity to the AG and Crown Attorneys personally.

→ See also - Samaroo →

(6) SCC, MacKeigan v Hickman [1989] *SCC*

- Court affirmed judicial immunity from being compelled to testify the decision making process or composition of the court in a particular case. The immunity principle is grounded in constitutional theory about the independence of the judiciary from legislative control

(5) *Nelles v. Ontario* (1989) SCC

Facts: a woman who had been charged with the murder of four infants but all charges were dismissed in the preliminary inquiry. The woman subsequently brought an action against the Crown, several police officers and Ontario's Attorney General alleging that the charges and prosecution were motivated by malice.

Decision: Charges were dropped against police and dismissed against the Crown, but the Supreme Court decided that Nelles could continue her action against the Attorney General.

Principle: In order for a malicious prosecution charge to be successful, the plaintiff must prove the following required elements.

1. The proceeding must have been initiated by the defendant;
2. The proceeding must have concluded in favour of the plaintiff;
3. There was an absence of reasonable and probable cause; and
4. Malice, where there was a primary purpose other than that of carrying out the law.

TLDR: The Crown should not be immune from charges of malicious prosecution because the criminal prosecution system suffers when abuses are committed and then protected from civil liability.

Note: The element of malice, as defined in *Nelles*, may include any 'improper purpose', including a spirit of vengeance, spite or ill-will, and/or intent to gain a private collateral advantage. However, malicious prosecution is held to a high standard of proof and cannot be established in cases of an error in judgement, incompetence or even, professional negligence. Rather, malicious prosecution requires proof that the prosecutor or another defendant was wilfully acting with improper purpose or with a motive that abuses the intended purpose of the criminal justice system.

(6) *Amaroo v. Canada Revenue Agency* (2018), the Supreme Court of B.C. awarded a husband and wife almost \$1.4 Million in damages after they accused the Canada Revenue Agency (CRA) and the Crown of malicious prosecution. The plaintiffs are co-owners of several business on Vancouver Island and were aggressively pursued by the CRA and charged with multiple counts of tax evasion for allegedly skimming \$1.7 Million from their businesses. In 2010, a B.C. Court found the couple not guilty on all charges and the judge concluded that the CRA used 'voodoo accounting' evidence to advance its case. The couple sued the Crown Prosecutor

**Iman Maan
NCA - Torts August 2020**

You should not have paid for these.

(7) *MacKeigan v. Hickman*, [1989] 2 S.C.R.

Issues:

1. Whether ss. 3 and 4 of the *Public Inquiries Act* could be used to compel superior court judges to testify before the Commission
2. Whether the direction to the Commission to inquire into a reference by the Minister of Justice was *ultra vires* the Province because it is a matter of criminal law and procedure reserved exclusively to the federal Parliament under s. 91(27) of the *Constitution Act, 1867*.

Held (Wilson and Cory JJ. dissenting in part): The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier and McLachlin JJ.: Sections 3 and 4 of the *Public Inquiries Act* do not empower the Commission to compel the justices who sat on the Marshall Reference to testify as to the grounds for their decision. Provisions of a statute dealing with the same subject should be read together, where possible, so as to avoid conflict. Accordingly, the Commission is granted power to "summon" any person under s. 3 but it does not have greater powers under s. 4 than those exercisable by a Supreme Court judge sitting on a civil case when enforcing attendance and compelling witnesses to testify against their will.

Judicial independence requires that relations between the judiciary and other branches of government not impinge on the essential "authority and function" of the court. The authorities and the general principles of judicial independence which have been summarized by this Court in *Valente v. The Queen* and *Beauregard v. Canada* clearly establish that a judge of the Supreme Court hearing a civil case would not have the power to compel another judge to testify as to how and why that judge arrived at his or her conclusions. That is a matter of privilege going to judicial impartiality in adjudication and to the role arbiter and protector of the Constitution. Similarly, one judge cannot compel another to testify as to why a particular judge sat on a particular case. That matter goes to the administrative or institutional aspect of judicial independence. The courts must control administrative matters related to adjudication without interference from the Legislature or executive. To allow the executive a role in selecting what judges hear what cases or to inquire after the fact would constitute an unacceptable interference with the independence of the judiciary. The requirements of s. 4 of the *Public Inquiries Act* are not met.

The language of s. 3, read alone, is not specific enough to override the fundamental principle of judicial immunity from being compelled to testify about the decision-making process or the reasons for the composition of the court in a particular case.

SCC, R. v. Imperial Tobacco Canada Ltd [2011]

- The Supreme Court of Canada's latest pronouncement on government liability for negligence has muddied the waters. It is now more difficult than ever to determine whether particular government conduct falls within the protected realm of policy, foreclosing any negligence claim.
- **R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42** arose from two lawsuits against tobacco companies alleging wrongful conduct towards smokers in British Columbia. A central plank of the lawsuits was that the tobacco companies communicated to smokers that low-tar cigarettes were safer than regular cigarettes when they allegedly were not.
- While denying the allegations against them, the tobacco companies made third-party claims against the government of Canada. The companies alleged that Health Canada had told them, and smokers, that low-tar cigarettes were safer and had urged smokers to switch to those cigarettes. It had also told the companies when and how to warn smokers about the risks of smoking. For its part, Agriculture Canada had designed, manufactured, promoted and licensed new breeds of tobacco for use in low-tar cigarettes.
- The federal government moved to strike the third-party claims on the basis that they had no reasonable prospect of success. On appeal, one major question for the Supreme Court was whether the third-party claims attacked policy decisions. Since *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, the law in Canada's common

law provinces has been that the government owes no duty of care with respect to policy decisions, but that the implementation of those decisions – so-called operational conduct – is actionable, if not done with reasonable care.

- Writing for the court, Chief Justice McLachlin began by describing the "elusiveness of a workable test" for identifying policy decisions. After reviewing jurisprudence from the United Kingdom, Australia and the United States, the Chief Justice defined policy decisions as "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."
- Applying that definition to the third-party claims, the Chief Justice said it was plain and obvious that the government had, out of concern for the health of Canadians and the costs associated with tobacco-related disease, made a policy decision to encourage smokers to switch to low-tar cigarettes. Since the government's impugned conduct was all "part and parcel of," "integral to" or "relate[d] to" that policy decision, none of it was actionable in negligence.

➤ McCarthy Tétrault Notes

- On its own, *Imperial Tobacco*'s new definition of policy decisions is nothing remarkable; more than two decades ago, in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the Supreme Court similarly endorsed the view that policy decisions "involve or are dictated by financial, economic, social or political factors or constraints."
- However, by situating all of the government's impugned conduct within the policy realm, *Imperial Tobacco* blurs the scope of the government's immunity for negligence.
- It may be plausible to describe a high-level government strategy to reduce the risks of smoking as a policy decision driven by on the one hand, concerns about health and, on the other, societal acceptance of smoking's risks, and the importance of taxes on cigarettes to the public purse. However, it is doubtful that the choice to promote low-tar cigarettes to implement this strategy was itself public policy. It seems more likely that this choice was driven by scientific and expert judgments as to the health qualities of those cigarettes and their palatability to smokers. Under *Just*, the choice would have been operational conduct and subject to a duty of care.
- It is also a significant development to treat government conduct as immune from liability in tort to the extent that it is part and parcel of, integral to or related to a policy decision. As a result of this development, the viability of a negligence claim against government may no longer depend on the old distinction between policy and its implementation. The central debate may now concern the strength of the link between policy and the government conduct in question.
- In light of *Imperial Tobacco*, parties who wish to sue the government, for negligence in the absence of clear irrationality or bad faith will need to closely consider whether the government conduct in question is a policy decision or perhaps just integral to one. They must be prepared to deal with increased uncertainty in the event that they bring suit.

9

Roncanelli v Duplessis (1959) SCC

- the Court held that Maurice Duplessis, the premier of Quebec, had overstepped his authority by revoking the liquor licence of a Jehovah's Witness.
- Justice Rand wrote in his often-quoted reasons that the unwritten constitutional principle of the "rule of law" meant no public official was above the law and so could neither suspend nor dispense it.
- Although Duplessis had authority under the relevant legislation, his decision was not based on any factors related to the operation of the licence but was made for unrelated reasons and so was held to be exercised arbitrarily and without good faith

applied the two elements
test to find
misfeasance info



10

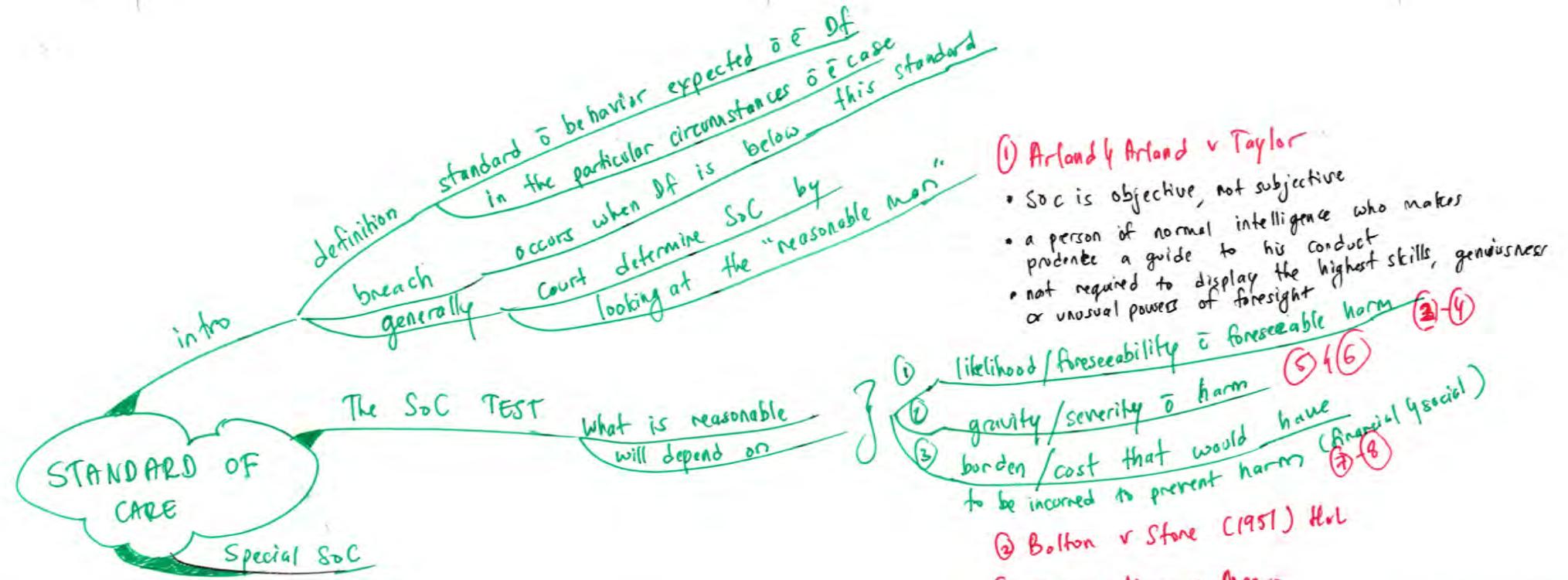
Modern developments

Odhavji Estate v. Woodhouse [2003]

- The HoL decision in *Three Rivers District Council v. Bank of England*, [2000] was cited with approval by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse* case
- This case was also a decision on a preliminary motion to strike.
- The Court accepted that there are two branches to the tort of misfeasance in public office, which it labelled "Category A" and "Category B".
- Iacobucci J. states as follows at paragraph 22: "*Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.*"
- The Court went on to find that there were two elements common to each form of the tort.
 1. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer.
 2. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

See also (11) A.L.v Ontario
(2006) ONCA

f: pl bring a proposed class action against
Ontario Ministry of Community and Social Services
for allegedly refusing to enter into new S30
agreements under the Child and Family Services
Act (provide services for special needs)
Pl claim refusal to enter a misfeasance of office
Held: ① law cannot impose duty in tort to
enter an agreement which in itself requires
voluntary consent to create legal relations
② failure to discharge functions of office
due to budget & deliberate disregard of duty



① Arlond & Arlond v Taylor

- SoC is objective, not subjective
- a person of normal intelligence who makes prudent a guide to his conduct
- not required to display the highest skills, geniusness or unusual powers of foresight

likelihood / foreseeability = foreseeable harm (2)-(4)

(1) gravity / severity of harm (5)-(6)

(2) burden / cost that would have to be incurred to prevent harm (financial / social) (3)-(8)

② Bolton v Stone (1951) HCA

③ Jordan House v Menzies

④ Wm. L. Chaff & Son Ltd v Murphy (2011) NLCA

⑤ Paris v Stepney Borough Council (1950) HCA

⑥ Stewart et al v Routhier (1973) SCE

⑦ Vaughn v Halifax-Dartmouth Bridge Commission (1961) SCC

⑧ Law Estate v Simice (1995) BCCA

⑨ Watt v Hertfordshire CC

- WET social burdens (social utility) ⑩ Child v Vancouver GH
- in addition to considering the burden placed on the defendant to take precaution, the court also weighs the social utility (ie positive public contribution) of the defendant's action

- if the Df's conduct had some utility, this should be factored into gravity, probability & cost formula to favor the Df

- generally social utility only considered where a Df is a public officer or employed by a public authority

Types	Summary
① Person w/ Disabilities	GP: A physically disabled Df is required to only meet the SoC of a reasonable man with similar disability (11) Roberts v State of Louisiana (1961) (12) Flala v Macdonald (2001) ABQB
② Children	GP: SoC is a child determined by what a child of that age, (13) Joyal v Basby (1965) ⑯ Heisler v Moke However, if child is involved in an adult activity - such as driving a car, hunting or snowmobiling - will be required to meet the SoC of a reasonable adult (15) Pope v RGC Management Inc. (2002) ABQB (16) Ryan v Hickson (1975) ONCA
③ Professionals	GP: SoC for a professional is determined based on industry specific SoP and experts testimony. (17) White, Layden, Tir Naogen, Leibl

①

Arland and Arland v. Taylor., 1955 CanLII 145 (ON CA)

Plaintiff was injured in a motor vehicle accident. At trial, the jury held that the defendant had not breached the requisite standard of care. The plaintiff appealed, objecting to the trial judge's charge to the jury (asking them to "put yourself in the driver's seat")

LEGAL ISSUE:

- What is the **standard of care** to which people are held?

HELD:

- The standard of care by which a jury is to judge the conduct of parties is the care that would have been taken in the circumstances by "a reasonable and prudent man"
- The reasonable man:
 - "is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances. The reasonable man is not superhuman";
 - "he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct"
- It is improper for a juryman to judge the conduct of a person in given circumstances by considering, after the event, what he (the juryman himself) would or would not have done in the circumstances
- Appeal dismissed. Although the judge had misdirected the, there was no substantial wrong caused by the misdirection

②

Bolton v. Stone [1951] AC House of Lords

During a game of cricket a ball flew out of the ground, hitting the claimant Miss S, who was standing outside her house, approximately 100 yards (91 m) from the batsman.

The claimant argued that the ball being hit so far even once was sufficient to give the club warning that there was a risk of injuring a passer-by, fixing the defendant with liability in negligence for the plaintiff's injuries. The claimant also claimed under the principle in *Rylands v Fletcher*, that the ball was a dangerous thing that had "escaped" from the cricket ground, and in nuisance.

The House of Lords unanimously found that there was no negligence, although most considered it a close call based on whether the reasonable person would foresee this as anything more than an extremely remote risk.

The key issue was that of making the key question one of determining the fact of what the reasonable person would have in mind regarding assumptions of risk. This was not considered to be a point of law, which is the province of judges, but a factual question, which may also be determined by a jury. In this case the risk was considered (just) too remote for the reasonable person to foresee, in spite of the observation by Lord Porter that hitting a ball out of the ground was an objective of the game, "and indeed, one which the batsman would wish to bring about".

In words of Lord Atkin in *Donoghue v Stevenson*, "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Whether the defendant had a duty to the claimant to take precautions to take into account the foreseeability of the risk and the cost of measures to prevent the risk.

The risk in this case may have been foreseeable, but it was so highly improbable that a reasonable person could not have anticipated the harm to the claimant and would not have taken any action to avoid it. In the words of Lord Normand, "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."

3 Jordan House Ltd. v. Menow, [1974] S.C.R

Patron of hotel beverage room ejected after becoming intoxicated.

Within half an hour after M was ejected, and while he was walking near the centre line of the highway, he was struck by a vehicle driven by the defendant H and as a result sustained serious injuries. On the basis of the concurrent findings of fact by the trial judge and by the Court of Appeal M was awarded damages against the defendant hotel and against the defendant H under an equal apportionment of fault among all three parties.

The defendant hotel appealed to this Court from the judgment of the Court of Appeal.

Held: The appeal should be dismissed.

On probability/foreseeability referred to *Bolton v Stone*:

There was a probable risk of personal injury to M if he was turned out of the hotel to proceed on foot on a much-travelled highway passing in front of the hotel.

There is, in my opinion, nothing unreasonable in calling upon the hotel in such circumstances to take care to see that M is not exposed to injury because of his intoxication. No inordinate burden would be placed upon it in obliging it to respond to M's need for protection. A call to the police or a call to his employer immediately come to mind as easily available preventive measures; or a taxi-cab could be summoned to take him home, or arrangements made to this end with another patron able and willing to do so.

4 Wm. L. Chafe and Son Limited v. Murphy, 2011 NLCA 18

BACKGROUND

The Murphys had purchased the property in 1995 and did not have an electrical inspection of the property performed at the time of purchase or subsequently. The previous owner had considerable electrical work undertaken in 1982 by a qualified electrician.

A fire occurred in the cellar or crawlspace area of the Murphys' property. The fire quickly spread to adjoining properties including the Chafe buildings which sustained extensive damage.

Chafe sued the Murphys under negligence and nuisance:

Held: A finding of negligence must be based on a failure to take reasonable care and therefore relates to the actual or constructive knowledge of the alleged tortfeasor prior to the fire. Reasonable care, the established standard in negligence is an objective standard – it is the care that would have been taken in the circumstances by a person of ordinary intelligence and prudence. A reasonable person will conduct himself or herself so as to prevent the creation of reasonably foreseeable risks of harm.

Counsel for Chafe contended that the Murphys did not take reasonable care in that they failed to inspect their electrical system, though there was a reasonably foreseeable risk of harm. The evidence and findings of the trial judge however do not support the conclusion that the defect in the electrical system causing the fire was reasonably foreseeable. The Murphys had continued the longstanding commercial use of the property. There was evidence of prior problems with the electrical system and the trial judge specifically found that the Murphys had no indication of any deficiency in the electrical system.

With respect to the potential for harm it must be borne in mind that the use of electric wiring for domestic or, as in this case, commercial use is an ordinary incident of modern life. In the absence of cause for concern the continued use of an existing electrical system cannot be regarded as inherently dangerous. It is often useful in determining whether a person's conduct was reasonable to have regard to evidence of general practice. In this case there was no evidence of general practice with respect to electrical inspections of commercial properties. As noted above there are regulatory directions respecting periodic electrical inspections.

Decision: Murphys did not breach the standard of care required by them.

As for nuisance: in order for ordinary conduct, such as the use of the electrical system in operating a store, to constitute a private nuisance, a single isolated act causing damage should not be regarded as sufficient. Referred: *Bolton v Stone*.

5

Paris v Stepney [1951] AC 367 House of Lords

The claimant only had sight in one eye due to an injury sustained in the war. During the course of his employment as a garage hand, a splinter of metal went into his sighted eye causing him to become completely blind. The employer did not provide safety goggles to workers engaged in the type of work the claimant was undertaking. The defendant argued there was no breach of duty as they did not provide goggles to workers with vision in both eyes and it was not standard practice to do so. There was therefore no obligation to provide the claimant with goggles.

Held:

There was a breach of duty. The employer should have provided goggles to the claimant because the seriousness of harm to him would have been greater than that experienced by workers with sight in both eyes. The duty is owed to the particular claimant, not to a class of persons of reasonable workers. (Unlike Bolton, court here considered the cost of avoidance as an important factor and found it to be small.)

6 Stewart et al. v. Routhier, [1975] 1 S.C.R.

A driver decided to make use of the respondents' motel facilities and turned off the highway onto the private roadway leading to the motel. The motor vehicle was proceeding over the private roadway at a slow rate of speed. At the point at which a railway line crossed the roadway, a railway locomotive struck the rear of the motor vehicle, killing the driver and his wife, injuring their infant seriously and injuring their brother. The signs erected to warn motorists of the level crossing were either badly placed or obscured by foliage and did not give adequate warning of the unusual danger presented at this main line level crossing.

Held: The occupier had failed in his duty to give adequate warning of a **most unusual danger** and is accordingly liable. Charles Routhier was the lessee of the private crossing and the judgment should be against him only. The driver of the car was negligent in failing to bring the vehicle to a complete stop before entering the crossing and in the circumstances the fault should be apportioned 25 per cent to the driver and 75 per cent to the occupier.

Iman Masri
NCA - Torts August 2020

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6

Vaughn v. Halifax-Dartmouth Bridge Comm. (1961) NSCA

Facts: Flecks of paint were blown by wind onto nearby cars from a bridge. The owner of the cars sued for negligence. The only precaution that the defendant took was employing one person to wipe off the paint from cars. Defendant argued that it had taken all reasonable measures and that to expect any more from them would constitute a prohibitive cost to them.

Held: Court found there are cheap and straightforward methods that the Defendant could have employed to meet his Standard of Care,

- Defendant could have had the parking authority to post warning signs or issued warning via radio or newspapers.
- The Defendant had issued such warnings before and cars were moved.

8

Law Estate v. Simice (1994) BCSC

Facts: P sued D (doctors) in negligence, claiming that her husband died because of their failure to provide timely, appropriate and skilful emergency care. In particular, they had not taken a CT scan of the patient because of financial constraints. Defendant claims they were underfunded and did not have sufficient staff and resources to be thoroughly diligent.

Held: If it comes to a choice between a physician's responsibility to an individual patient and his responsibility to the medicare system overall, the former must take precedence in a case such as this. The severity of the harm that may occur to the patient who is undiagnosed is far greater than the financial harm that will occur to the medicare system if one more CT scan is used. Defendants were negligent.

Two of the Defendants appealed to BCCA but was dismissed, CA agreed with TJ's findings.

9

Watt v. Hertfordshire County Council (1954)

Facts: The plaintiff, a fireman, responded to an emergency call requiring the use of a special jack. The jack had only been used once in the last 15 years. The truck fitted for carrying it was unavailable, so they loaded it in the rear of another vehicle.

There was no means for securing the jack on the truck and the firemen were instructed to hold it on the short journey. In the event the truck braked and the jack fell onto the claimant's leg causing severe injuries.

Holding: There was no breach of duty. The emergency of the situation and utility of the defendant's conduct in saving a life outweighed the need to take precautions. In measuring due care, you must balance the risk against the measures necessary to eliminate the risk; you must also balance the risk against the end to be achieved. In this case, the purpose of saving a life or limb justified taking considerable risk; it was not a commercial activity to make profit.

10

Child v. Vancouver General Hospital et al., [1970] S.C.R.

Hospital patient quiet after suffering several irrational spells—Doctor's opinion that patient much improved and would continue to do well—Nurse leaving for coffee break—Patient escaping through window and sustaining injuries as result of fall—Whether jury's verdict in favour of nurse perverse—Whether misdirection of jury.

The plaintiff brought action against the hospital and T (the nurse) claiming damages in negligence. The action was tried before a judge and a jury and was dismissed. CA dismissed the appeal. Further appeal to SCC.

Held : The appeal should be dismissed.

To suggest that T was negligent when the opinion upon which she acted coincided with that of the certified surgeon who was in charge of the case, is, in my opinion, to ask more than is required of a reasonably careful and capable nurse.

Iman Masri

NCA - Torts August 2020

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Roberts v. State of Louisiana (1981) (Court of Appeal, LA)

Brief Fact Summary. The Plaintiff, Roberts (Plaintiff), fell and broke his hip when a blind man bumped him into.

Synopsis of Rule of Law. The handicapped are held to a reasonable standard of care for a person with their disability, the handicap is considered part of the circumstances.

Facts. The Plaintiff, an elderly gentleman, sued the Defendant, the State of Louisiana (Defendant), when he fell and broke his hip after being bumped into by the blind operator of the concession stand at the United States Post Office Building. The concession operator failed to use his cane while walking from his stand to the bathroom when the accident occurred. At trial, the Plaintiff's suit was dismissed.

Issue. Was it reasonable for a blind man to walk from his place of employment to the restroom without the use of his cane?

Held. The concession operator was not negligent and therefore the trial court's ruling is upheld.

Discussion. Because the blind operator, B, had worked at the vending station for several years and because he testified that he does not use a cane for short trips within familiar buildings, B was not acting negligently when bumped into the Plaintiff. The court also looked at the testimony of the director of the Division of Blind Services who said that nine out of ten blind persons do not use their canes when moving about familiar surroundings. The court also considered B's testimony that he had special training in moving about without a cane. B's actions were reasonable for a blind person, working in a familiar setting, with special training on moving about without the use of a cane.

n

Fiala v MacDonald (2001) ABCA

MacDonald was diagnosed later, but never previously, as bipolar disorder, type 1. One day, he went for a run during which, he experienced a severe manic episode. An hour and a half later, far from his regular running route, he jumped upon a roof of a car being operated by Ms. Cechmanek, broke through the sun roof and grabbed her by the throat. At the time of this event, Ms. Cechmanek had been stopped at an intersection. When Mr. MacDonald attacked her, she involuntary took her foot off the brake and apparently hit the gas pedal, causing her car to accelerate into a car being driven by Ms. Fiala. Injuries were sustained by Ms. Fiala and her daughter, Lenka, as well as by Ms. Cechmanek.

Issue: Whether Ms. Cechmanek and Mr. MacDonald or either of them should be held liable for any or all of the injuries sustained.

TJ: Although it might seem that the Plaintiffs, at least, should be compensated for their injuries since they were certainly not negligent in any manner, I find that neither Ms. Cechmanek nor Mr. MacDonald can be held liable for their actions.

CA: In order to be relieved of tort liability when a defendant is afflicted suddenly and without warning with a mental illness, that defendant must show either of the following on a balance of probabilities:

(1) As a result of his or her mental illness, the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time; or

(2) As a result of mental illness, the defendant was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care.

This test will not erode the objective reasonable person standard to such a degree that the courts will be imposing a standard "as variable as the length of the foot". It will preserve the notion that a defendant must have acted voluntarily and must have had the capacity to be liable. Fault will still be an essential element of tort law.

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NCA - Torts August 2020

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Joyal v. Barsby (1965)

Facts: A 6 year old girl crossed a highway and was hit by a car sustaining severe injuries.

Issue: Is the girl contributorily negligent, in consideration of factors such as her knowledge of the dangers of the highway?

Reasons: Very young children typically aren't capable of negligence, but a child of 6 likely can be.

TEST (subjective):

- Look at the particular child and ask if s/he is capable of being held negligent.
- If affirmative, did the child act as would a child of like age, intelligence, and experience, if so, would they be found as negligent and to what degree?

However, a slightly different approach was taken in a later case in Ontario. According to the decision in:

14

Heisler v. Moke (1971) [ON HC]

Here, the court argued that in tort law, the question of whether a child can be held liable for negligence should depend on capacity rather than age. Went on to suggest that the law should distinguish between very young children (those of tender age) and older children:

Tender age: Child is not capable of appreciating the reasonable risk. Cannot be liable in tort. No set age for this (maybe 5). **Above tender age:** Modified objective test should be used. Did the D exercise the care expected of a child of that age, intelligence, and experience?

15

Pope v. RGC Management 2002 BCSC

- Child playing golf, injures someone
- Golf an adult activity
- Child had acted appropriately, plaintiff had walked in front of shot

Held: Child was held to the adult standard, but was found to have acted reasonably (No negligence)

16

Ryan v. Hickson (1975) ONHC

Boy of 12 operating snowmobile -- Nine-year-old passenger falling off -- Struck by following snowmobile driven by 14-year-old -- Whether drivers negligent -- Whether passenger contributorily negligent.

Held: 12 and 14 yo liable b/c adult activity doctrine, 9 yo contributorily negligent: he was experienced driver. Found parents liable b/c the way they trained and supervised

Ratio: Negligent for parents to allow kids to drive motorized vehicle, unless

- 1) Children are trained in use of vehicle with an emphasis on safety
- 2) That children are of age, character and intelligence that parents can safely assume that kids would follow instructions
- 3) Children are physically capable of operating vehicle and following instructions

17

White v. Turner (1981) ONSC

a professional should be judged by the standard of care of his profession.

Pl had bad breast reduction operation - Doctor testified surgery usually takes 2.5-3.5 hours, DF did it in 1.5 hours didn't remove enough tissue & didn't properly check

ABQB

General practitioners are required to exercise the standard of care of a reasonable, competent general practitioner, including knowing when a patient needs a specialist.

*Iman Masri
NCA - Torts August 2020
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negligence - should have referred to a specialist.*

Ter Neuzen v. Korn (1995) SCC

Facts: Plaintiff contracted HIV as a result of artificial insemination in 1985.

Issue: The defendant doctor was responsible for screening semen donor and had adopted standard medical practices; does the standard practice fall short of the standard of care?

Reasons:

When there are customary behaviours in a certain field, courts should respect them as appropriate standards of care.

The more technical the field, the more likely the court will accept the customs as the standard of care. Common practice may be considered negligence fraught with obvious risks.

Standard expected of a doctor is that of a prudent and diligent doctor in the same circumstances. As a result, specialists must be assessed in light of the conduct of other ordinary specialists

Held: not open for jury to find standard practice fall short

Reibl v. Hughes (1980) SCC, Judgment for DF.

SCC

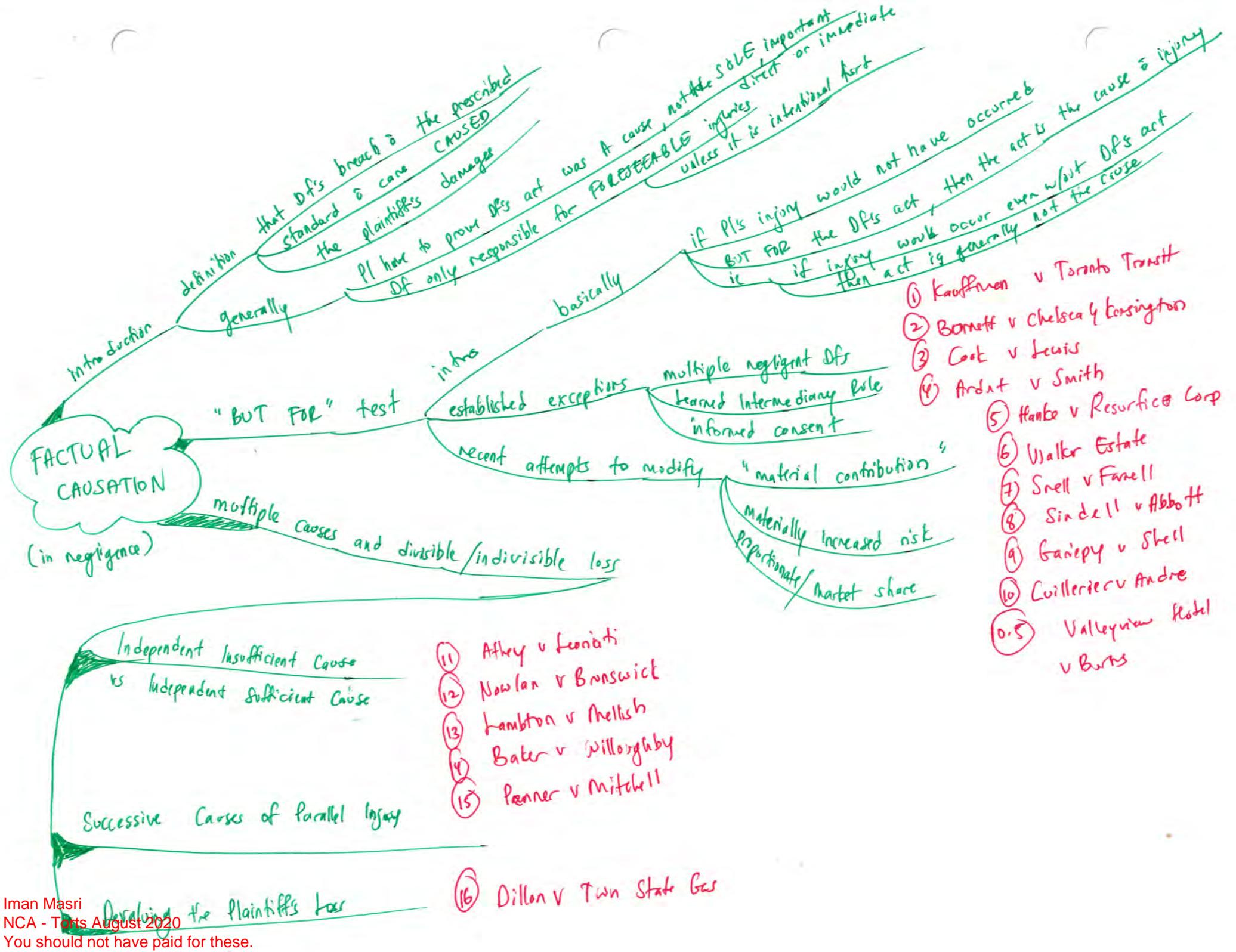
Doctor's duty to disclose. It can be important to determine what action the patient would have taken if they had been informed of other options. The reasonable person test may apply - would the reasonable person have made a different choice if they were fully informed?

This test doesn't account for individual preference and circumstances. A modified-objective standard should therefore be applied - what would the reasonable person in the position of the plaintiff have done?

RATIO: If a doctor fails to disclose all information necessary for a patient to make their decision, there is negligence. Settled doctor battery debate.

Doctors must disclose material risks - this includes serious problems with low probability of occurring and non-serious problems with a high probability of occurring. Can also include a non-material risk that this particular patient would care about.

Rule: use modified objective test - Reasonable man with characteristics of pl such as age, sex, family circumstances, but not consider irrational belief



① Kauffman v. Toronto Transit Commission, [1960] SCR 251

FACTS: Plaintiff gets injured on the way up an escalator because some boys are playing around and push a man that falls on the Plaintiff. Plaintiff alleges that the TTC was negligent in not having the proper handrail at that station. Had the handrail been there the plaintiff claims she would have been able to grab on and prevent her injury. **LEGAL ISSUE:** Was the negligence a cause of the plaintiff's injury?

HELD: Appeal allowed, action dismissed

RATIO: It is a fundamental principle that the causal relation between the alleged negligence and the injury must be made out by the evidence and not left to the conjecture of the jury

REASONS FOR JUDGMENT: There was a total absence of evidence that the man immediately ahead of the plaintiff or the two reckless youths ahead of him were grasping or attempted to grasp the handrail before or in the course of the scuffle and consequent falling. Nor was there any evidence that in the circumstances the plaintiff would not have fallen if her hands had been grasping a rubber oval handrail.

② Barnett v. Chelsea & Kensington Hospital Management Committee, [1968] 3 All ER 1068

Barnett's husband died from arsenic poisoning. He felt sick after drinking tea at work and went to the hospital. He was not admitted and treated but was told to go home. The doctor was at home and would not have been able to first see the man until approximately 11:00 AM. Barnett subsequently died at about 1:30 PM.

Issue: Was the defendant's negligence the cause of the death, or would it have inevitably happened anyway? **Decision:** Judgment for the defendant.

Reasons: Based on the evidence, decides that even if the man had been admitted to the hospital upon his arrival he would likely have died. There was only one antidote for arsenic poisoning, and it was not readily available and could probably not have been administered in time to save his life. In cases of cause in fact the burden is on the plaintiff to prove that the defendant's negligence caused the harm. That means that they must prove that without the negligence, the harm would not have occurred. The wife does not do this here, as it is probable that the man would have died even without the hospital's negligent refusal.

Iman Masri
NCA - Torts August 2020
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③ Cook v. Lewis, [1951] SCR 830

All of the parties were hunting. Lewis was hiding in a bush, and his brother tried to warn Cook and his companions of this but it was misunderstood. Few grouses flew out of the bush, and Cook and his companions fired shots. Lewis was hit in the face, and lost an eye. Cook and his companions gave statements claiming that they could not have shot Lewis. The jury found that it was one of their shots that hit him, but they could not decide whose shot it was. The Court of Appeal ordered a new trial, which Cook appealed.

Issue

When there are two parties, and it is proven that one of their actions caused harm, but it cannot be proven which one it was, who, if anyone, is liable?

Decision: Appeal dismissed.

Reasons

The decision in the lower court was based upon the general Canadian rule that stated that when it is certain that one of two individuals committed the offence but it is uncertain which one was the guilty agent, then neither of them can be convicted. Cartwright, writing for the majority, decides not to follow this and to follow US precedent instead, from Summers v. Tice and Oliver v. Mil, which state that to allow both parties to escape liability is unfair because both of them were negligent. Lewis is put in an unfair position in having to prove which of the parties did it and will not recover because of the unfair position. He agrees with this, and states that both parties must be held liable, as they were both negligent in firing their shots.

Rand concurs but goes further to say that this burden is so unfair on Lewis that the burden must shift to the appellants to prove which one of them did it. If neither has proof then they are both equally liable, however the onus is on each appellant to prove that the other is the guilty party. This is fairer because the appellants have a better idea of what really happened than Lewis.

TLDR: If the plaintiff can prove that one of the defendants were negligent but impossible to prove which one, the burden of proof shifts to the defendant. Each defendant will then be held liable, unless one defendant can disprove causation.

(4)

Arndt v. Smith (1997) SCC

SCC reversed the decision of the B.C. Court of Appeal that a new trial should be held for a physician who failed to inform her pregnant patient about all of the risks to a fetus from a chickenpox infection.

In a seven to two decision, the Supreme Court reaffirmed the 'modified objective test' of informed consent set out in its 1980 Reibl v. Hughes judgment; this test requires that the court consider what the reasonable patient in the plaintiff's circumstances would have done in the situation had she been fully informed. In Arndt v. Smith the Supreme Court concluded that "it is appropriate to infer from the evidence that a reasonable person in the plaintiff's position would not have decided to terminate her pregnancy in the face of the very small increased risk to the fetus posed by her exposure to the virus which causes chickenpox. It follows that the failure to disclose did not cause the financial losses for which the plaintiff is seeking compensation."

Much of the judgment is devoted to an analysis and defense of the Reibl v. Hughes reasoning - rejection of both the purely subjective and purely objective tests for determining whether an undesired outcome was caused by a failure to adequately inform the patient.

Also note: Laskin's **modified objective test** had been reaffirmed by the Supreme Court as recently as 1995 in Hollis v. Dow Corning Corp. In summary, The Reibl v. Hughes test has had the desired effect of ensuring that patients have all the requisite information to make an informed decision regarding the medical procedure they are contemplating. Members of the medical and legal professions are familiar with its requirements. It strikes a reasonable balance, which cannot be obtained through either a purely objective or a purely subjective approach.

Modified Objective Test: whether a reasonable person in the plaintiff's position would have consented if adequately informed

(5)

Resurface Corp. v. Hanke, 2007 SCC

FACTS: Plaintiff was injured when a water hose was placed into the gas tank of a ice-resurfacing machine. Vaporized gasoline was released into the air and caused an explosion which badly burned the plaintiff. Plaintiff sued the manufacturer and distributor of the machine alleging that there were design flaws because the gas and water taken were similar in appearance and were placed too close together on the machine, making it easy to confuse the two.

Iman Masud
NCA Torts, August 2020
Trial Judge: Siegel
that the plaintiff could not prove that the defendant's
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negligence caused his loss. Appeal court ordered a new trial as the judge erred in applying the but-for test instead of the material contribution test

HELD: Court of appeal erred in failing to recognize that the basic test of causation remained the but-for test. Judgment for defendant

RATIO: The basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute

However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements:

- (1) It must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but-for' test due to facts outside the plaintiff's control (i.e. current limits of scientific knowledge)
- (2) It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered from that injury

ANALYSIS:

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to facts unconnected to the defendant and not the fault of anyone".

The court is inadvertently defining 'but-for' as meaning 'substantial connection' in multiple cause cases

One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury (Cooper v. Lewis). A second situation requiring an exception to the "but for" test might be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission (like in Walker where no one knows what the donor would have done if properly informed).

6

Walker Estate v. York Finch General Hospital, 2001 SCC 23

FACTS:

W was one of 3 Ps who contracted HIV from tainted blood products supplied by the Canadian Red Cross Society. 1983 – a time when there was relatively little known about HIV, no test for determining if a blood donation was infected. 3 versions of information pamphlets by the American and Canadian Red Cross were relevant to the case. The CRCS used a vague version that didn't have info about the symptoms or vulnerable populations, which the trial judge held as negligent because the information was available at this time, meaning that their pamphlet fell below that standard of care. The donor continued to give blood long after the time when he donated the tainted blood to W.

Trial judge said that even if CRCS hadn't been negligent, the infected would have still donated so W couldn't prove that CRCS's negligence was the cause of her loss.

COA of Ontario reversed, finding causation using *Hollis*.

Analysis: the question in cases of negligent donor screening shouldn't be whether the CRCS's conduct was a necessary condition for the P's injuries using the but-for test, but **whether that conduct was a sufficient condition**. Whether D's negligence "materially contributed" to the occurrence of the injury – material if it falls outside the *de minimis* range (*Althey v Leonati*). Trial judge found that the infected person would have donated anyways because he thought he was in good health and there was no issue raised in the pamphlet as to symptoms not appearing but still being infected. When the proper standard of care is applied, causation is found.

Holding: appeal dismissed – P wins.

7

Snell v. Farrell, [1990] SCC

FACTS:

Defendant was an eye surgeon and the plaintiff was a patient that had an operation on her eye. During surgery, the doctor noticed some blood in the eye, waited 30 minutes, and performed the surgery anyways. The operation did not work and the plaintiff was rendered blind. Expert witnesses were not willing to say that proceeding with the surgery caused the loss on a balance of probabilities as this type of injury happened sometimes after 20 days.

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NCA - Tom August 2020
You should not have paid for these.

LEGAL ISSUE:

Whether the plaintiff in a malpractice suit must prove causation in accordance with traditional principles or whether recent developments in the law justify a finding of liability based on some less onerous standard.

HELD: Appeal dismissed with costs, judgment for plaintiff

RATIO: The burden of proving causation is not immutable, but could be shifted where reasons of 'experience and fairness' made it appropriate to do so. Some examples are situations in which the evidence of causation lay exclusively in the defendant's hands and cases in which the negligent conduct of two defendants destroyed the means of proving causation.

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, **an inference of causation may be drawn although positive or scientific proof has not been adduced. Plaintiffs can still win their case by showing negligence and that they suffered a loss that may have been caused by the defendant**

ANALYSIS:

Probability-based evidence is problematic because it is not necessarily certain whether a loss has been caused by the defendant. Our judgments must be based on law, not science. We must take a robust, pragmatic approach to causation.

This means that sometimes we will find that a defendant's negligence caused a loss even where science might say otherwise. The problem is that in many malpractice cases the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary.

Sopinka J. stated that it would be inappropriate to shift the burden of proof for any injury that may well be due to factors unconnected to the defendant and not the fault of anyone.

Accepted US *Sindell v Abbott* approach allowing apportionment of liability among Df manufacturers on the basis of market share.

8

Sindell v Abbott Laboratories et al., (1980) SC California

Facts: Sindell's mother was issued the drug DES during pregnancy in an attempt to limit the risk of miscarriage. However, it resulted in Sindell developing cancer. This happened to many women and their daughters throughout the United States at this time, as the drug was found to be carcinogenic. Sindell cannot identify the exact company that produced the drug that her mother was given, as more than 200 companies produced the same drug. She is suing five of the biggest producers.

Issue: If it is clear that a group of defendants were negligent, but not clear that any of them caused harm to the plaintiff are they liable and if so to what extent?

Decision: Judgment for the plaintiff.

Reasons

Mosk, writing for the majority, adopts radically new reasoning. He states that in cases like this where the plaintiff cannot possibly prove which specific company caused the harm, it is not fair that the defendants can get off merely because proof is impossible. They state that when there is an innocent plaintiff and negligent defendants, the latter must bear the cost of the injury – particularly here where the companies have deep pockets. Therefore they hold that the defendants are liable for the injury, and they assess damages based on the percentage of the total market of DES that each individual defendant produces. The court reasons that although the companies might not have harmed Sindell in particular, these damages are fair as they are approximate measures that they have caused by their production of DES. They also say that the defendants can turn around and sue other producers for their share. Finally, they say that if companies that can prove on a balance of probabilities that they did not cause the harm to the particular plaintiff then they would be excluded from liability.

Richardson, in the dissent, vehemently disagrees. He says that this is a large departure from the common law, and that the probability that any one of these five companies caused the injury is minuscule. This sidesteps the essential element of tort law – connecting the plaintiff and the defendant. Instead, this "sprinkles the rain of liability" over all who maybe tortfeasors. He also says that the "deep pockets" argument is against public policy, because it effectively creates a two tiered system of law – one for the rich, and one for the rest. Finally, he argues that a decision which so

obviously departs from the common law like this must be given by the legislature.

Ratio: When a particular class of defendants can be identified as being responsible for an injury, but the specific party that caused the injury cannot be determined, then all of the defendants must share liability for the damages proportionally to the probability that they caused the injury.

9

Gariepy v. Shell Oil Co., 2000 CanLII 22706 (ON SC)

It is not the defendants' position in the industrial supply chain that determines the issue of potential liability in tort. Rather, the real question is whether the defendant "knows or ought to know" that a consumer may be injured as a result of his or her carelessness. See Moran v. Pyle National (Canada) Ltd., 1973 (SCC), per Dickson J., as he then was (hereinafter Moran). If a foreign defendant negligently manufactures a product outside Ontario which enters into the normal channels of trade and it is reasonably foreseeable that the product would be used in Ontario and that a consumer may be injured or suffer damages because of the manufacturer's carelessness, then an Ontario court is entitled to exercise jurisdiction over that foreign defendant.

This definition of the duty owed to the consumer is sufficiently broad to encompass manufacturers and suppliers alike. Therefore, it is arguable that all three defendants could reasonably foresee that the product could have been used for manufacturing polybutylene plumbing pipes and fittings which would be sold in Ontario through the normal channels of trade.

TLDR: accepts "market share" approach to apportionment of liability against manufacturers

10

Cuillerier v. André's Furnace, 2011 ONSC

Oil leak in tank supplied by defendant. In PI's SOC allege defective fittings, Df instituted third party against both his fitting suppliers. Third party applied for motion to strike stating Df's claim against them cannot succeed.

Court dismiss motion as there is triable issue, even if the fittings cannot be traced to either supplier, Court accepts "market share" approach in Sindell v Abbott as one way to determine.

Valleyview Hotel Ltd. v. Burns Estate (1985) SKCA

Hotel burned down, source traced to cigarettes smouldering in mattress. Hotel sued Estate of deceased guest as guest was registered to the room where cigarettes were found. Hotel pleads *res ipsa loquitur* (In some cases the inability of the plaintiff to fasten specific acts of negligence on the defendant in order to establish the exact cause of the loss or injury will not be fatal because under the doctrine of *res ipsa loquitur*. The fact of the accident by itself may be sufficient, in the absence of explanation, to justify the conclusion that the defendant was negligent and that his negligence caused the injury and loss)

Held: three conditions, must co-exist to infer negligence through application of the doctrine of *res ipsa loquitur*:

"(1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of some one for whom he is responsible or whom he has the right to control;

"(2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible must have been negligent. There is, however a further negative condition;

"(3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence."

There is no evidence indicating **which registered guest in Room 19 had control of the cigarette that started the fire**. The doctrine of *res ipsa loquitur* cannot be applied where any one of several defendants wholly independent of each other may be responsible for the plaintiff's injury and loss.

TLDR: *Cook v. Lewis*, does not apply because there is no evidence of contemporaneous carelessness or negligence on the part of both guests in Room 19. In the circumstances of this case, liability of the defendant should not arise merely because the deceased falls within the category of a person **who had an opportunity** to cause the injury.

Athey v. Leonati, 1995 (BC CA)

FACTS: The plaintiff suffered a back injury as a result of car accident that the defendant negligently caused. Plaintiff had a pre-existing back problem (a herniated disc) which was made worse by the accident. The combination of the pre-existing injury and the accident rendered the plaintiff unable to work at his job and he thus lost income

LEGAL ISSUE: Whether or not the plaintiff's pre-existing back injury negatives the defendant's fault as a cause of his loss

HELD: Judgment for the plaintiff, entitled to recover 100% of his damages

RATIO: It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of preconditions: defendants remain liable for all injuries caused or contributed to by their negligence. Where multiple acts are necessary for an injury to occur, then causation is proven on any of the negligent acts, since the loss would not have occurred but-for any one of the negligent acts

REASONS FOR JUDGMENT:

There is a single indivisible injury in this case, the disc herniation. The herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury must be fully liable for it. Defendant argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the 'crumbling skull' rule applies.

The 'crumbling skull' rule simply recognizes that the pre-existing condition was inherent in the plaintiff's original position. The defendant need to put the plaintiff in a position better than he was originally in. Defendant need not compensate for anything the plaintiff would have experienced anyways. In this case however, there was no finding of any measurable risk that the disc herniation would have occurred without the accident.

12

Brunswick Construction Ltée v. Nowlan, [1975] SCC

Facts: D contractor negligent in constructing P's house, which suffered extensive rot due to leaks in the structure. D argues that no damage would have occurred but for the architect's poor design which hadn't provided for proper ventilation.

Issue: Who is liable and for how much?

Analysis: where there are concurrent torts, breaches of contract or a breach of contract and a concurrent tort both contributing to the same damage, whether or not the damage would have occurred in the absence of either cause, the liability is a joint and several liability and either party causing or contributing to the damage is liable for the whole damage the person suffers from. D is a concurrent wrongdoer.

Holding: appeal allowed – P wins.

13

Lambton v Mellish, [1894] Eng.

Mellish and Cox were refreshment contractors who lived near Lambton's property. They both used organs, although one is much louder than the other. They are played constantly and create a nuisance for Lambton and his family.

Issue

If the true nuisance is the aggregate of two smaller nuisances that may not be large enough to themselves give rise to a cause of action, is there truly a nuisance?

Decision: Judgment for the plaintiff, interim injunction granted.

Reasons: In cases where the actionable offense is the aggregate of two or more smaller offenses that know of each other's existence, then each is liable for the remedy against the aggregate complaint. Therefore in this case, although the true nuisance is the combination of both organs, both of them must cease their playing when the injunction is granted, even if one might not be loud enough to create an actionable offence. Each defendant must be restrained in respect of his own share of the offence.

14

Baker v Willoughby, [1970] AC

Iman Masti
Baker's leg and ankle was severely injured due to the negligent driving of NCA - ~~Torts August 2020~~ to this Baker had to seek new employment. He was You should not have paid for these.

suing the Willoughby for loss of potential income resulting from the injury. However, before the trial Baker's new place of employment (a scrap metal plant) was robbed and he was shot by one of the robbers in his already injured leg. The preexisting symptoms combined with the new wound resulted in his leg having to be amputated.

Issue: Is the respondent liable for the appellant's lost income after the date of the robbery?

Decision: Appeal allowed.

Reasons: Lord Reid determines that because the actions of Willoughby and the robber were concurrent causes of the loss of income, Willoughby must compensate Baker for the losses that he had caused – which included lost wages after the amputation of his leg. If Willoughby had not been negligent, then Baker would not have lost his leg.

Ratio: When two accidents happen concurrently and contribute to the same injury, then the parties are liable for the damages resulting from the overall injury.

15

Penner v. Mitchell, 1978 ALTASCAD 201

FACTS: The plaintiff was injured in an accident that was the result of the defendant's negligence. Trial judge awarded the plaintiff compensation for 13 months of lost wages however the plaintiff would have lost wages for 3 of those months anyways because of heart condition. The defendant thus appealed that he should only be liable for 10 months of lost wages

LEGAL ISSUE: Whether the loss caused by the second injury is irrelevant to the award of damages from the first injury

HELD: Judgment for defendant, 10 months lost wages are owed

RATIO: In assessing prospective loss of income, the only contingencies which should be taken into account are those that occur in non-culpable circumstances (situations that do not give rise to a cause of action).

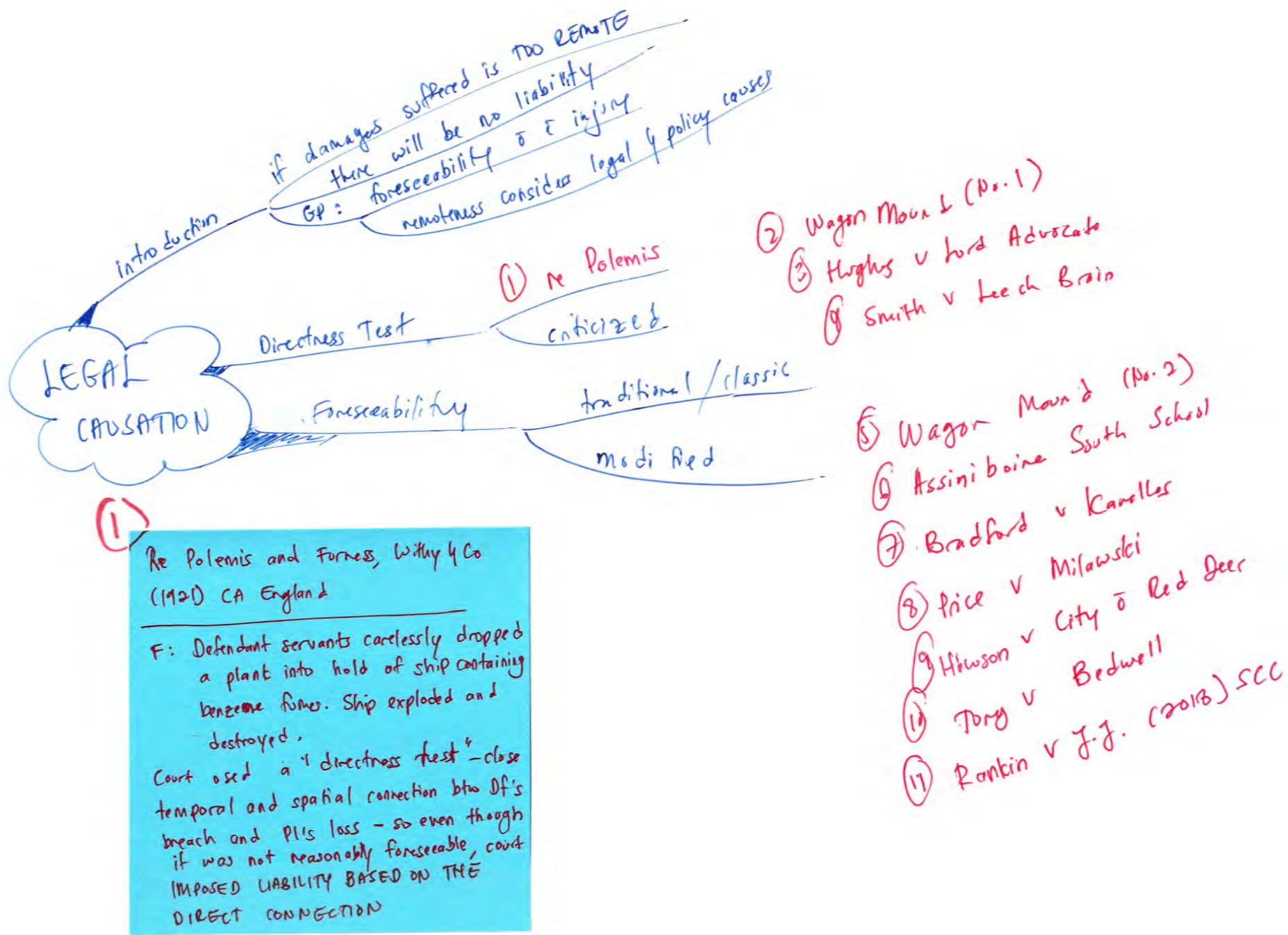
In Canada, where an illness happens subsequent to an injury, you compensate the plaintiff less the time they would be sick

REASONS FOR JUDGMENT: Future contingencies arising in culpable circumstances should not be taken into account in assessing damages such as prospective loss of income because if they were the plaintiff would receive less than full compensation from the two wrongdoers

Dillon v. Twin State Gas & Electric Co., 163 A. 111 (1932) New Hampshire

a young boy playing on the superstructure of a bridge lost his balance and was electrocuted when he grabbed a high voltage wire maintained by the defendant.

In a wrongful death action against the defendant for failing to take precautions against accidental electrocution, the court held that the jury must decide what would have happened to the boy if the wire had not been charged with electricity. If the jury decided that the boy would have regained his balance, it should award damages for loss of earning capacity for a life of normal duration. However, if the jury felt the boy would have been seriously injured, it should award damages for his capacity to earn in that injured condition. If the jury determined that he would have been killed, it should award no damages for lost earning capacity.



2
Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd
[1961] 1 All ER 404

- Commonly known as Wagon Mound (No. 1)
- a landmark tort law case
- imposed a remoteness rule for causation in negligence.
- The Privy Council held that a party can be held liable only for loss that was reasonably foreseeable.

Facts: Pl. had a ship, the Wagon Mound, docked in Sydney Harbour. The crew had carelessly allowed furnace oil (also referred to as Bunker oil) to leak from their ship. The oil drifted under a wharf thickly coating the water and the shore where other ships were being repaired. Hot metal produced by welders using oxyacetylene torches on the respondent's wharf fell and ignited the oil on the water. The wharf and ships moored there sustained substantial fire damage.

Mort's Dock sued for damages for negligence. It was found as a fact that the defendants did not know and could not reasonably have been expected to know that the oil was capable of being set alight when spread on water. The dock owners knew the oil was there, and continued to use welders.

The leading case on proximate cause at the time was *Re Polemis*, Df found liable up to the Appeal Court. The defendant appealed to the Privy Council.

The Privy Council found in favour of the defendant, agreeing with the expert witness who provided evidence that the defendant, in spite of the furnace oil being innately flammable, could not reasonably expect it to burn on water.

The Privy Council's advice soundly disapproved the rule established in *Re Polemis*, as being "out of the current of contemporary thought" and held that to find a party liable for negligence the damage must be reasonably foreseeable. The council found that even though the crew were careless and breached their duty of care, the resulting extensive damage by fire was not foreseeable by a reasonable person, although the minor damage of oil on metal on the slipway would have been foreseeable.

3
Hughes v Lord Advocate [1963] UKHL 31 (House of Lords)

Facts:

Some Royal Mail employees had removed a manhole to work under the road. They had marked it clearly as dangerous. They took a tea break, and when they returned Hughes, a young boy, went into the manhole to explore. After getting back out, a lamp was either dropped or knocked into the hole and an explosion resulted, causing Hughes to fall back in where he was badly burned.

The lower court dismissed the case stating that the actual event that led to the injuries was the explosion, and that it was not foreseeable as it resulted from numerous unlikely events, and Hughes appealed.

Does the foreseeability of the actual event that caused the injury matter, or just the foreseeability of injury?

Appeal allowed.

Ratio:

Reid, in a unanimous decision, holds that what is truly of importance whether the lighting of a fire outside of the manhole was a reasonably foreseeable result of leaving the manhole unwatched, and they determine that it was as the lamps were left there. He focuses on the lamp, and states that the types of injuries that are reasonably foreseeable from lamps are burns, which is exactly what we have here. Therefore, the injury is not different in kind from what should have been expected. As long as you can foresee in a general way the type of injury that occurs then you have proximate cause.

4

Smith v Leech Brain & Co., Ltd. (1962) QB Eng.

Facts: Smith's husband worked in a factory owned by Leech Brain galvanizing steel. He had previously worked in the gas industry, making him prone to cancer. One day at work he came out from behind his protective shield when working and was struck in the lip by molten metal. The burn was treated, but he eventually developed cancer and died three years later. The protection provided to employees during their work was very shoddy.

Issue:

Which test applies – Polemis or Wagon Mound?

Does the man's special sensitivity matter?

Decision

Judgment for the plaintiff.

Reasons:

Parker does not think that the decision in Wagon Mound is relevant to this case. He states that the "thin skull" rule differentiates the two cases, and that this is a case of "taking your plaintiffs as they come" rather than insufficient proximity. Therefore, as it is found that the burn was a negligent action on the part of Leech Brain as they did not provide ample safety, and it at least partially led to the development of the cancer, the defendants are liable.

Ratio

The ruling in Wagon Mound does not apply to cases where the outcome was unforeseeable to a particular plaintiff because of a condition that he or she had; rather it is used in situations when the foreseeable connection between the action and the outcome is unreasonable.

For actions in tort, you take a plaintiff as he or she comes - the fact that they have a condition that led to more damages than normal is not a factor in determining damages (the "thin skull" rule).

Iman Masri

NCA - Torts August 2020

You should not have paid for these.

5

Overseas Tankship (UK) Ltd. v The Miller Steamship Co. (The Wag Mound, No. 2)

TLDR: loss will be recoverable where the extent of possible harm is so great that a reasonable man would guard against it (even if the chance of the loss occurring was very small).

Facts:

Overseas Tankship were charterers of a freighter ship named the Wag Mound which was moored at a dock. Miller owned two ships that were moored nearby. At some point during this period the Wagon Mound leaked furnace oil into the harbour while some welders were working on a ship. The sparks from the welders caused the leaked oil to ignite destroying all three ships. Miller sued seeking damages.

Trial: J found that (1) that the officers of the Wagon Mound would regard the ignition of oil as very difficult, but not impossible, to ignite on water (2) ignition of oil on waters had very rarely happened, and (3) it was a possibility that would only eventuate in very exceptional circumstances. Overseas Tankship were not liable for negligence, but that the large quantity of oil was a public nuisance and the Overseas Tankship were liable to pay damages for nuisance.

Overseas Tankship obtained leave to appeal directly to the Privy Council against the verdict of nuisance and the Miller Steamship Co obtained leave to appeal against the verdict of negligence.

Judgment

The Privy Council upheld both the appeal and the cross-appeal. They held that it was not sufficient that the damage to the Miller Steamship vessels was the direct result of the nuisance if that damage was unforeseeable. In relation to negligence the Privy Council held that a reasonable person in the position of the ship's engineer would have been aware of the risk of fire. Since the gravity of the potential damage from fire was so great there was no excuse for allowing the oil to be discharged even if the probability or risk of fire was low. A reasonable person, the Council held, would only neglect a risk of such potentially great magnitude if he or she had a reason to do so, e.g. if it were cost prohibitive.

School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Company Limited, 1971 (MB CA)

This case arose out of a claim for damages for property damage to a school building caused by an explosion. The explosion was caused by a gas leak which arose when a snowmobile struck a gas pipe riser near the outside wall of a school building. The gas pipe riser was unprotected. The snowmobile struck the riser after it ran away from a 14 year old boy who was in the process of starting the snowmobile. The 14 year old boy started the snowmobile by rapping a rag around the gas throttle and by using his two hands to pull on the starter rope. The boy's father instructed the boy to start the machine in such a manner when it was cold. The boy disregarded the father's instruction to put the snowmobile on a kick stand when starting it in such a manner so that the snowmobile would not run away when it started.

The trial judge held the father and the son and the gas company jointly and severally liable for the damages to the plaintiff's school building. On appeal to the Manitoba Court of Appeal the appeal was dismissed and the liability of the defendants was affirmed.

On appeal to the Supreme Court of Canada the appeal was dismissed and the judgment of the Manitoba Court of Appeal was affirmed.

Principles:

- Injury must be possible, not probable.
- The extent of damage and its manner of incidence need not be foreseeable, as long as the physical damage of its kind is foreseeable (Hughes principle)

Held: the property damage was foreseeable, no matter if it was by collision or fire. The test of foreseeability of damage is a question of what is possible rather than what is probable.

Bradford v Kanellos (1973) SCC

Facts: The Bradfords were at a restaurant owned by Kanellos when a fire broke out on the cooking grill. A fire extinguisher was used, which completely put out the fire and no one was injured. However, the extinguisher made a noise that caused one of the patrons in the restaurant to shout out that there was a gas leak and that there was going to be an explosion. Chaos ensued, and the Bradfords were injured in the havoc and sued for damages.

The Bradfords were successful at trial, but this was overturned on appeal.

SCC held: "it is very clear that the injury resulted from the hysterical conduct of a customer that was in reaction to the fire extinguisher performing its proper function. The negligent act was allowing too much grease to build up on the grill but the respondents had discharged their burden of care having the extinguisher present. This outcome cannot reasonably be seen as a consequence created by allowing too much grease to build up, and therefore Kanellos should not be liable."

Spence, in the dissent, says that the panic could have been foreseen. It was foreseeable that the buildup of grease would necessitate the use of the extinguisher, and it is reasonable that the noise of the extinguisher would cause the hysteria, and further it is reasonable that the hysteria would result in injury. He says that it is "human nature" to react this way in such circumstances.

Notes: Canada employs the Wagon Mound test.

When there are measures in place to eliminate potential injuries from negligent acts, and they work properly in eliminating the risk when such an act occurs, then improbable outcomes resulting from the correct employment of the measure cannot be attributed to the original negligent act.

8 Price v Milawski et al (1977) ONCA

FACTS: Plaintiff injured his right ankle while playing soccer. He told Dr. Murray that he heard his ankle crack and thought it was broken. Dr. Murray only x-rayed his right foot and not his right ankle and concluded there was no fracture and that the ankle was only sprained. The ankle continued to remain swollen and painful so he was referred by his family doctor to Dr. Carbin, an orthopaedic surgeon. Dr. Carbin called the original hospital, discovered the original x-rays were negative and despite the plaintiff's complaints, did not order new x-rays even though he had a machine available to him. He diagnosed the plaintiff's injuries as a strained ligament and applied a cast. When the cast was removed weeks later, the ankle began to swell and the plaintiff went to another surgeon who discovered the ankle was broken and since it was not treated properly, the boy suffered some permanent disabilities.

LEGAL ISSUE: Is Dr. Murray still liable given Dr. Carbin's subsequent (intervening) negligence?

HELD: Each of the doctors is fully liable for damage

RATIO: A person doing a negligent act may, in circumstances lending themselves to that conclusion, be held liable for future damages arising in part from the subsequent negligent act of another, and in part from his own negligence, where such subsequent negligence and consequent damage were reasonably foreseeable as a possible result of his own negligence.

REASONS FOR JUDGMENT:

It was reasonably foreseeable by Dr. Murray that once the information generated by his negligent error got into the hospital records, other doctors subsequently treating the plaintiff might well rely on the accuracy of that information.

The later negligence of Dr. Carbin compounded the effects of the earlier negligence of Dr. Murray. It did not put a halt to the consequences of the first act and attract liability for all damage from that point forward.

TLDR: an intervening cause will not break the chain of causation if it is a NCA consequence of the original negligence.
You should not have paid for these.

9 Hewson v. Red Deer (City), 1977 (ABQB)

FACTS:

Plaintiff claimed damages against the defendant (City) from when a tractor owned by the City crashed into the plaintiff's dwelling house. The tractor had been turned on before it crashed into the plaintiff's house. The tractor was set in motion by an unknown person who raised the blade and put the engine into high gear (intervening act). It is argued that if there was negligence on the part of the City, the damages that occurred were too remote to be attributed to them and that the defence of *novus actus interveniens* is applicable.

LEGAL ISSUE: What is the relationship between foreseeability and the *novus actus interveniens* doctrine?

HELD: The plaintiff is entitled to damages against the City

RATIO: The defence of *novus actus interveniens* is not available if the defendant failed to guard against the very thing that was likely to occur. Where the negligence was failing to prevent the intervening act, you cannot claim that the intervening act made the loss too remote.

REASONS FOR JUDGMENT:

The injury might have been prevented by taking the elementary precautions of removing the ignition key, engaging the safety lever, and locking the cab door, none of which was done.

It was reasonably foreseeable that any one of such persons (located near the construction site) might become aware that the tractor was being left at the stockpile unattended and might be tempted to put it in motion.

11 Tong v. Bedwell (2002) ABQB

While stopped at the intersection, the defendant in Tong abandoned his vehicle (with the keys in the ignition) to pursue a vandal who smashed his front windshield. When the defendant returned to the intersection, the vehicle had disappeared, having been stolen by an unidentified person who proceeded to crash it into the plaintiff's parked vehicle. The plaintiff had no prior relationship to the defendant car owner or unidentified thief.

Affirming the decision of the Provincial Court Judge, the Alberta Court of Queen's Bench concluded that the facts in the case were such that the defendant was not negligent in leaving his vehicle unattended with the keys in the vehicle.

The Alberta Court of Queen's Bench in Tong refused to find it would have been reasonably foreseeable to the defendant car owner that a thief would operate his vehicle in such a manner that would cause damage to the plaintiff's vehicle. Further, the thief's acts constituted *novus actus interveniens*, and the defendant could not be contributorily negligent for the damages suffered by the plaintiff's vehicle as a consequence.

Applying the reasoning of the courts below to the facts in Tong would result in the thief being owed a duty of care by the defendant car owner to prevent him stealing his vehicle and crashing it into the plaintiff's vehicle.

12 Rankin (Rankin's Garage & Sales) v. I.J. 2018 SCC 19

reinforces that foreseeability of harm operates as a critical limiting principle in the law of negligence.

Background

In this case, a minor plaintiff (15 years old) suffered catastrophic injury following an accident in a stolen vehicle. The vehicle was being operated by a friend, also a minor (16 years old), who did not have a driver's licence or any driving experience. The teens stole the vehicle from Rankin's Garage & Sales — a business that serviced and sold cars and trucks. The garage property was not secured, and the two teens found the vehicle unlocked with its keys in the ashtray.

The Trial Judge held that the garage owed a duty of care to the plaintiff and a jury apportioned 37 percent responsibility to the garage for the plaintiff's injuries. The Court of Appeal upheld the Trial Judge's finding that the garage owed a duty of care to the plaintiff. In particular, the Court of Appeal held that

it was reasonably foreseeable that minors might steal an unlocked car with keys in it from Rankin's Garage and, further, that it was a "matter of common sense" that minors might injure themselves while operating the vehicle.

SCC Decision

A seven-judge majority of the Supreme Court overturned the decision of the Court of Appeal.

The Majority emphasized the importance of framing the foreseeability inquiry with "sufficient analytical rigor" to connect the defendant's failure to take care (e.g., leaving the vehicle unsecured) to the harm ultimately caused (e.g., physical injury). Accordingly, in the context of this case, it was not enough to simply determine whether the theft of the vehicle was foreseeable. Further evidence of a connection between the theft and the unsafe operation of the stolen vehicle was necessary.

The Majority held that the evidence relating to the practices of Rankin's Garage or the history of theft in the area concerned the risk of theft but could not suggest that a stolen vehicle would be operated in an unsafe manner. The Majority emphasized that reasonable foreseeability is an objective test that is not to be conducted with the benefit of hindsight. The Majority warned that "Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur."

Majority rejected the suggestion that a foreseeable risk of injury automatically flows from a risk of theft. Such an approach would "extend liability too far." Rather, evidence of specific circumstances making it reasonably foreseeable that a stolen car might be driven in a way that would cause personal injury was required.

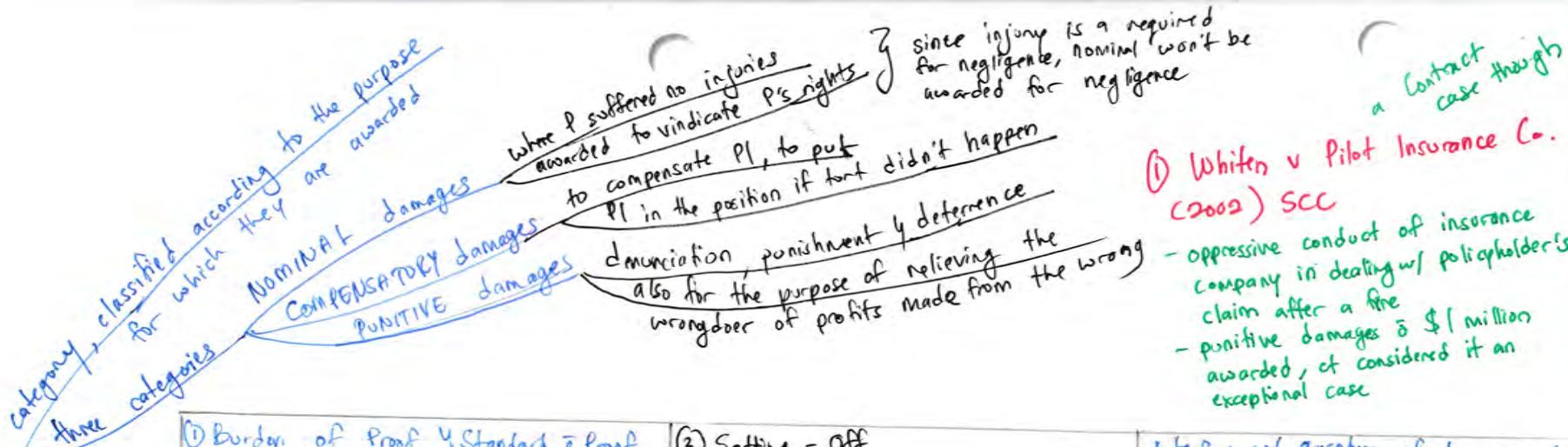
After finding that reasonable foreseeability was not established, the Majority went on to consider whether: (1) Rankin's Garage had a positive duty to secure the vehicles against theft by minors; and (2) illegal conduct could sever the proximate relationship between the parties or negate a duty of care. The Majority rejected the notion of a positive duty on a car garage to prevent harm, finding that analogies between car storage and alcohol service or between vehicles and firearms were misplaced. The Majority also noted that the fact that the plaintiff was a minor did not automatically create a positive duty to act. With respect to the second residual question, the Majority confirmed that "the notion that illegal or immoral conduct by the plaintiff precludes the existence of a duty of care has consistently been rejected except in circumstances where the legislature has opted to modify the common law."

See Takeaway! —

Takeaways

While the decision of the Majority in *Rankin* does not alter the law of negligence, it does in our view reinvigorate the role of reasonable foreseeability in determining whether a duty of care is owed between parties. To establish a duty, there must be some evidence to suggest that a person in the position of the defendant ought to have reasonably foreseen the risk of injury, not just the event from which it ultimately resulted. We expect *Rankin* to result in greater attention being paid to the foreseeability inquiry in future negligence cases.

From a risk management perspective, *Rankin* does not suggest that businesses, municipalities or other entities with care and control of vehicles may be less vigilant in their security measures. Rather, the decision emphasizes that these entities should take steps to consider the harm specific to their circumstances that could result from the theft of vehicles in their care and control. As an example, additional measures to mitigate the risk of theft may be required of entities storing vehicles which are not roadworthy or vehicles which require special training or experience to operate.



(1) Whitten v Pilot Insurance Co. (2002) SCC

- oppressive conduct of insurance company in dealing w/ policyholder's claim after a fire
- punitive damages $\geq \$1$ million awarded, ct considered it an exceptional case

a contract case though

interfere w/ quantum of damages unless clear error of law or if the amount is greatly out of line

(2) Setting - Off

- Df is allowed to set-off against Pl's damages claims any parallel expenditures that Pl would have incurred anyway if the tort hasn't been committed.
- Eg. Pl claim full cost of nursing home care which includes food, the Df may be permitted to reduce claim by the amount Df would have spent on food anyway.

(3) Jury Trial

- In a jury trial, it is the jury's responsibility to assess damages. Judge and counsel isn't supposed to assist.
- Special damages - not so much of an issue since it is specific and incurred.
- General damages - non-pecuniary, pain, suffering, future expenses, income etc - jury are generally provided little guidance

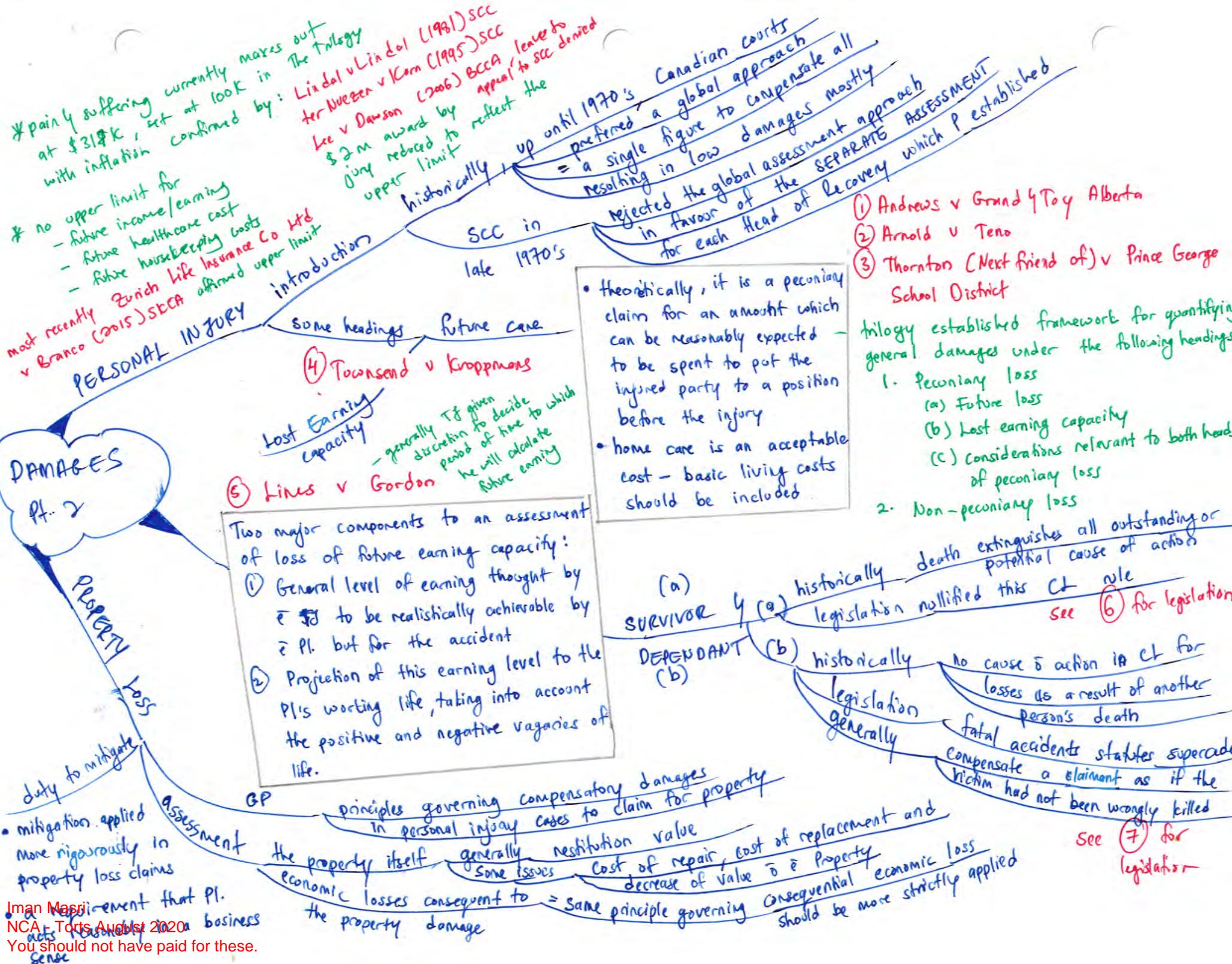
- in Common Law, counsel and judges are precluded from referring the jury to previous awards made in similar cases
- Counsel may refer to previous awards in appeal, but appeal courts generally do not

(1) Burden of Proof & Standard of Proof

- The Burden of Proof is on Pl to prove that he suffered a type of loss recognized as being recoverable in tort
- The standard of proof is the balance of probabilities for losses suffered before the trial. If proven, Pl can get 100% of the claim. If not proven, gets nothing.
- For losses that may occur after trial, (future loss), development have moved towards a standard of proof of Reasonable or Substantial Possibility of Injury (RSPI). If Pl. able to prove RSPI he can recover the loss based on the likelihood of it occurring. Eg. if Pl can prove he has 25% of suffering blindness, he is entitled to 25% of the damages.

(2) Mitigation of Damages

- Pl is obliged to act reasonably at all times to mitigate his damage
- Df has the burden to prove that Pl has failed to mitigate
- Pl cannot recover losses that successfully mitigated



① Andrews v Grand & Toy Alberta Ltd. (1978) SCC

Facts: Andrews, a 21 year old man, was injured in a car accident with an employee of Grand & Toy and is rendered a quadriplegic after the accident. At trial, Grand & Toy were found entirely liable and damages of \$1,022,477.48 were awarded. On appeal, the defendant was found 75% liable and Andrews 25% liable and damages were further reduced to \$516,544.48, which was appealed to the Supreme Court.

Issue:

1. Does Andrews require home-care or could he settle for (cheaper) hospital care?
2. Does the court have to take into account what the injured party might do with the awarded money?
3. Can there be a limit on non-pecuniary damages?

Decision: Appeal allowed in part; award changed to 75% of \$817,344 (\$613,008).

Reason:

The court finds that Andrews reasonably should be awarded home-care in the circumstances, as he would have cared for himself at home had there been no accident. They say that what he chooses to do with his money should not be taken into consideration when assessing damages – the courts have no control over the plaintiff's expenditure of the award (nor would Andrews have been limited in expenditure of his earnings had he been able to work). Dickson sets \$100,000 as the upper limit for non-pecuniary loss in cases such as this, stating that a cap needs to be implemented as they were constantly rising, specifically commenting on the situation in the United States.

Ratio:

- Full compensation is the paramount concern of the courts in cases of severely injured victims.
- Damage awards should serve a useful function; neither high compensation for pain and suffering nor punitive awards help the plaintiff, but they do unfairly burden the defendant.

② Arnold v Teno (1978) SCC

Diane Teno, a four-and-a-half-year-old girl, crossed a street with her six-year-old brother (having first obtained permission and money from her mother, Yvonne Teno) to make a purchase from an ice cream truck owned by J.B. Jackson Limited and operated by Galloway. After passing around the front of the truck, Diane was struck by a car owned by Wallace Arnold and driven by Brian Arnold. Diane's mobility was seriously lessened, although technically she was not paralysed, and she suffered a considerable degree of mental impairment.

Decision

Defendants	TJ	CA
Car driver & Owner Arnolds	1/3	1/4
Jackson & Galloway (Owner & Operator)	1/3	1/4
Jackson (Owner)	1/3	1/4
Yvonne Teno (Mother)		1/4
	200 K non Pec 750 K pecuniary	-75K for pecuniary

What is the appropriate method for determining the prospective loss of future earnings of a child?

Decision: Appeal allowed; damages fixed at \$540,000.

Reasons:

The lower court had decided to use the yearly salary of the little girl's mother (\$10,000/year) in the absence of any other guide. The court held that this cannot be used because they cannot rely merely upon speculation. They say that an award of \$5,000 yearly would be too low as it would place her below the poverty line. As a result they split the difference and award lost earnings of \$7,500/year and use a discount rate of 7% in assessing the total.

Thornton v. School Dist. No. 57 (Prince George) et al., 1978 (SCC)

While in attendance at a secondary school in Prince George, the appellant sustained severe injuries in an accident which occurred as a result of the negligence of the school authorities in failing to exercise due care during physical education classes. An injury to the appellant's neck caused total or partial paralysis to each of his four limbs. An action for damages followed. Prior to the injury the appellant was 6 feet 3 inches in height and described in evidence as being the epitome of the all-round athlete. At the date of trial he was 18 years of age, physically disabled, unemployable, and wholly dependent upon male orderly assistance for his day-to-day needs, yet with mental faculties wholly intact.

The trial judge assessed damages in the sum of \$1,534,058.93, under the following heads.

1. Special damages	\$ 42,128.87
2. Cost of future basic care needs:	
(a) Equipment, home, motor vehicle	65,500.00
(b) Cost of care (\$4,305 monthly; life expectancy 49 years; capitalization rate 4%)	1,122,571.80
3. Loss of ability to earn income in the future	103,858.26
4. Non-economic related head of damage	200,000.00

On appeal by the defendants, the Court of Appeal varied the award as follows:

1. Cost of future care (\$ 1,500 monthly; life expectancy 49 years; capitalization rate 7 1/2—9%; contingencies 10%)	\$ 210,000.00
(a) Medical supplies and equipment	12,000.00
2. Future income loss	120,000.00
3. Pain and suffering, loss of amenities, loss of expectation of life	200,000.00

SCC:

General Damages

A. PECUNIARY LOSS

I. Cost of Future Care

(a) Initial Capital Outlay for:	
Home	\$45,000
Econo-van Motor Vehicle	8,500
Home Care Equipment	12,000
(b) Capitalized annual cost of future care (monthly amount of \$4,305; life expectancy 49 years; contingencies 20%; capitalization rate 7%)	586,989

II. Loss of Future Earnings

(\$407 per month; workspan 43 years; contingencies 10%; capitalization rate 7%)	61,254
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B. NON-PECUNIARY LOSS

Compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life	100,000
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Total General Damages	\$813,743
Rounded off at	810,000

Townsend v Kropmanns, 2004 SCC

After assessing damages against Kropmanns and Currie in an action arising out of a motor vehicle accident, the trial judge issued supplementary reasons to deal with the tax gross-up and management fees. Townsend had already received partial payment and spent part of it purchasing a house and paying legal fees. The trial judge deducted the capital expenditure and the legal fees in calculating management fees and the tax gross-up. He also reduced the fee award by 50% to account for a predicted increased return, assumed to result from the investment counselling for which the management fee award was granted. In British Columbia, the discount rates are fixed by the Law and Equity Regulation and a four-level classification for calculating management fees is regularly applied by the courts. The Court of Appeal unanimously held that the evidence did not support the reduction of the award for management fees and that management fees and the tax gross-up were to be calculated in relation to the full amount of damages awarded, without deducting Townsend's legal fees and the capital investment.

Issue: Does a plaintiff's decisions regarding how to use their damages affect the award of items such as management fees?

Decision: Appeal dismissed

Reasons

Deschamps, writing for a unanimous court, rejected the appellant's argument; she will not increase the discount based on the fact that management fees were awarded. She holds that the whole point of the legislature setting discount rates was to take considerations like this out of the court's hands. She also finds that to reduce the damages because the plaintiff had spent money on a house would defeat the very purpose of ensuring full compensation. The principle of finality demands a clean break between the parties; allowing repeated revisiting of the evidence every time money is spent would be inconsistent with this principle.

Ratio: Legislated discount fees must be strictly followed, including in the calculation of tax gross-ups and management fees.

Introduction

DEFENCES & CONSIDERATIONS (in negligence)

1

CONTRIBUTORY NEGLIGENCE

Apportionment of liability

Iman Masri
NCA - Torts August 2020

You should not have paid for these.

- once all the elements of Negligence is established, consider if there are any defences
- Df bears the burden to prove defences
- historically contributory negligence was an absolute defense
- this approach has been replaced with Apportionment legislation eg Negligent Act R.S.O 1990

not aware
does not accept
sports
is
Volenti
*

2

VOLUNTARY ASSUMPTION OF RISK

- maxim Volenti Non Fit Ijonaia
 - an absolute defence, courts interpret narrowly
 - Miller v Becker (1957) SCC
 - Schwindt v Giesbrecht (1958)
 - Dube v Tabar (1986) SCC
 - maxim ex turpi causa non oritur action = participation in illegal or immoral activity
 - Hall v Hebert (1993) SCR
 - BC v Zastowny (2008) SCC
- * after Hall v Hebert ex turpi narrowly applied

- Walls v Musseur Limited (1969) NBCA
- Gagnon v Beaulieu (1976) SCSC

3 Inevitable Accident

* must show D had no control and could not be avoided by greatest skill & care - rare cases

- Martineau v Cameron (1994) ONCA
- Rintoul v X-Ray & Radium Industries

4

- Joint & Several liability
 - where there are two or more Df's at fault
 - Df can sue EITHER or BOTH

5 Contributory Negligence

- where Df is found negligent but PI contributed to the damages

Apportionment legislation allows the court to divide responsibility for damages between the parties according to their relative degree of fault

① Walls v Mossen

- D caused fire at Pl's bays causing destruction to the service station and its contents
- No one thought to use a fire extinguisher. Expert testified this would probably put out the fire
- Trial J: P's failure to use fire extinguisher is NOT C.N.
- CA: Agreed. Emergency created by Df's sole negligence. Pl's act is something an ORDINARILY PRUDENT PERSON MIGHT HAVE REASONABLY DONE UNDER THE STRESS OF EMERGENCY.

② Gagnon v Beauchew

- Df caused an MVA which injured Pl
- Court found Pl to be CN due to not wearing seatbelt
- Fault apportioned at 75% Df and 25% Pl.
- Reasoning: Pl. knew or ought to have known that wearing a seat belt would reduce possibility of injury in a collision.

③ Mortimer v Cameron

- M & C horseplaying on stairwell, fell down against a wall that broke and both fell 10 ft
- C was unhurt but M paralyzed
- M sued C, the construction company and the city

Trial Judge: C & M both negligent for horseplaying but the resulting injuries are not within realm of foreseeability. City 80%, C 20%

CA: Agree C not liable. Charged apportionment to 60% Company & 40% City.

Ratio: M&C's acts were not proximate cause of the injuries. City negligent as a proper final inspection would reveal a faulty wall. Company had a PRIMARY and ONGOING responsibility to inspect premises = MORE PROXIMATE

(4) Miller v Decker

- Pl & Df went "beering" and after that to go dance
- later went driving and Df caused accident and injury
- Trial Judge: Ex Turpi Causa Non Oritor Actio
- SCC: Pl could not recover as Pl had full knowledge of the nature and extent of risk from his driving and assumed the risk. (SCC found both Pl & Df had set a common purpose (making drinking plans) at the beginning of the evening)

Some sports cases:

Ontario: Dunn v University of Ottawa (1995)

- recklessness / intent to cause injury & within implied consent
- no intent eg accident, no liability

BC: not look at intent or recklessness, but ask what would a reasonable competitor do?

Iman Masri
NCA - Torts August 2020
You should not have paid for these.

(5) Schwindt v Giesbrecht

- Pl urged the Df driver to outrace a police car, agreeing to share the fine if caught
- = Pl INCITED the risk, no recovery

(6) Osbe v Lubar

- Pl & Df both drunk
- Pl stopped driving but Df took over, causing accident / injury
- Jury found Pl to have consented to the risk in whole
- SCC: jury was not confused / erred to find voluntary

W W R
body check from behind caused Pl to become quadriplegic
Held: liable as WWR CD did not pass

⑦ Hall v Hebert

TJ: 75% of 25 Pl, both drunk and caused accident to Pl due to of asking Pl to drive drunk

SCC: ① ex turpi should only bar recovery in limited circumstances - if integrity of legal system is being undermined eg Pl trying to profit ② ex turpi cannot negate duty of care, otherwise Pl will be burdened to show absence of immoral conduct

In this case: Pl ~~NOT trying to profit from the ~~intentional~~ (drinking & driving) nor was he trying to circumvent criminal law but Pl was contributory negligent, = damages reduced to 50%~~

⑧ BC v Eastway

F: prisoner abused - became repeat offender due to abuse held: not entitled to compensation for unemployment during prison sentence ≠ wrongful conviction

last was entitled to personal injury for physical & psychological injury for rape by prison guard = clash of criminal & civil law and compromise integrity of justice system

⑨ Rinfoul v Xray & Radium Industries

- failure of brakes - rear ended Pl
 - Df pleaded inevitable ~~negligible~~ accident
- SCC: to operate a defence of INEVITABLE ACCIDENT, Df has to show damage caused by event which Df had no control over and cannot be avoided even by exercising greatest care and skill