

# Foreseeability in the Law of Negligence

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# Foreseeability in Negligence

1. Duty of Care
2. Breach of Standard of Care
3. Remoteness/Proximate Cause
4. Intervening Acts/*Novus Actus*



# Foreseeability: Same Word, Different Elements



1. Important to understand the different uses in each context;
  2. Understand the limits;
  3. Understand the job and goals; and,
  4. Keep foreseeability in its proper lane in each element.
- lots of cases where concepts confused (and have to be sorted on appeal)

# Elements of a Negligence Action



1. Duty of Care
2. Standard of Care
3. Causation (Cause-in-Fact)
4. Remoteness (Proximate Cause, Foreseeability)
5. Damages

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- Defences? (i.e. contributory negligence)

# Overview: Foreseeability in Duty vs. Standard Breach vs. Remoteness

1. **Duty** – “does a certain category of people owe a duty not to harm another certain category of people?”
  - foreseeability asks – what categories of people are reasonably foreseeably at risk such that a certain other class of people may a duty to watch out for them?
2. **Breach of standard of care** – is about “did a specific defendant fall below the applicable standard of care and harm this victim?”
  - foreseeability asks – was this plaintiff a foreseeable victim who could be injured from this defendant’s risky action?
3. **Remoteness** – is about “could this defendant ever have foreseen that this breach of the standard of care would cause harm to this plaintiff?”
  - foreseeability as gatekeeper for fault-based tort liability: do we in society wish for liability to attach in these circumstances, if no defendant ever could have foreseen that such actions would lead to legal consequences?
  - *novus actus* is a subset of remoteness element

# Foreseeability in Duty of Care: *Anns/Cooper* Test

## First Stage

1. Foreseeability;
2. Proximity;

categories of  
people

relationships

## Second Stage

3. Policy.

beyond the  
relationship

# Duty Examples

- ground in the “neighbour” principle (*Donoghue v. Stevenson*) (“should X have to worry about Y?”)
- ask question about foreseeability of risk of categories/class of people

## Common:

- physician – patient;
- driver – pedestrian;
- teacher – student;

## Not so common:

- drowning victim – passerby (no duty)
- social host at BYOB – drunk driver (no duty)



# Foreseeability in Standard Breach

## Standard of Care

Two elements:

1. What is the applicable standard of care?

- “reasonable person” test

2. Was the standard breached?

- probability of loss
- gravity of loss
- burden of accident prevention

- was this plaintiff a reasonably foreseeable victim as a result of the defendant’s substandard conduct?



# Breach of Standard of Care

- “Reasonableness” exists on a continuum and is situation-specific;
- Depends on the various circumstances of each case;
- Depends upon what is reasonably foreseeable.



# Breach of Standard Examples

- ground in the foreseeable risk notion (*Bolton v. Stone*) (“would X have foreseen a risk to Y?”)
- ask question about whether defendant should have foreseen risk of harm to plaintiff
- **Common:**
  - McDonald’s serving hot coffee at 180 degrees F ;
  - texting and driving;
  - failure to supervise young child;

## **Not so common:**

- municipal park where teen falls out of tree (no breach)

# Foreseeability in Remoteness

- could defendant have reasonably foreseen that his or her breach of the standard of care could have caused the plaintiff some harm?
- is the defendant's negligence too remote to be a responsible cause of the accident?



# Foreseeability in Remoteness

- must foresee kind or type of harm:
  - *Saadati* (like in *Hughes v. Lord Advocate*: burns)
  - deals with extent of harm issues (thin skull)
- do not need to foresee precise mechanics of accident
- must be “reasonably” foreseeable (“possible” not enough)
- mental injury:
  - reasonably foreseeable in a “person of ordinary fortitude” (*Mustapha; Saadati*)
- non-mental liability rarely ousted for foreseeability reasons

# Remoteness Examples

- kind or type of harm must be foreseeable (*Saadati*) (“would X have foreseen that breach would result in that kind of harm to Y?”)
- ask: is this the kind of incident for which liability should attach? (NOT: “could anyone foresee all those events leading up to the loss?”)
  - fuel oil delivery 22 years later (*Bingley*)(foreseeable)
  - failure to order test leads to undetected cancer when patient exhibits cancer risk factors (*Hacopian*)
- what is “not” foreseeable? (flukes, freakish, one in a million)(*United Novelty* flaming rat still foreseeable)

# Recap: Foreseeability in Duty vs. Standard Breach vs. Remoteness

- **duty** – is about “does a certain category of people owe a duty to not harm another certain category of people?”
  - foreseeability asks – what categories of people are reasonably foreseeably at risk such that a certain other class of people may a duty to watch out for them?
  - very general, macro question (“neighbour” principle)
  - involves hypothetical categories of people with similar traits to the plaintiff and defendant (but not them specifically)
  - stage one of *Anns/Cooper* test

# Recap: Foreseeability in Duty vs. Standard Breach vs. Remoteness

- **standard of care** – is about “did a specific defendant fall below the applicable standard of care and harm this victim?”
- foreseeability asks – was this plaintiff a foreseeable victim who could be injured from this defendant’s risky action?
- if yes = breach of standard of care
- an evidence specific, micro question (foreseeability of risk to a specific plaintiff)

# Recap: Foreseeability in Duty vs. Standard Breach vs. Remoteness

- **remoteness** – is about “could this defendant ever have foreseen that this breach of the standard of care would cause harm to this plaintiff?”
- ultimate policy check on tort liability
- foreseeability as gatekeeper for fault-based tort liability: do we in society wish for liability to attach in these circumstances, if no defendant ever could have foreseen that such actions would lead to legal consequences?
- *novus actus* is a subset of remoteness element

# Intervening Act: *Novus Actus Interveniens*

- a subset of remoteness;
- simple test: “was the kind or type of harm that befell the plaintiff foreseeable to the defendant such that liability should sensibly be imposed?”
- key: focus on kind or type of harm foreseeable to victim, not specific interceding events
- drop language of “interrupted negligence,” “chains,” “nets,” “links” of causation
- stick with “reasonable foreseeability” of kind of harm
- NB: takes a great deal to absolve defendant of liability under this doctrine

# Examples: *Novus Actus*

- ask: is kind or type of harm foreseeable?
- defendant's negligence damages tarps covering pineapple plants in Florida, freak frost kills plants;
- nurse Ratched fails to chart patient's medication administration and physician checks chart, then double-doses patient;
- the *United Novelty v. Daniels* flaming rat;
- defendant charter plane company fails to provide sufficient fuel to plane, which must land on uncharted Pacific island – passenger exits plane and is killed by volcano eruption

# Examples: Intentional and Criminal Conduct

- *Fullowka v. Pinkerton's (S.C.C.):*
  - explosion-setting miner foreseeable to mine security
- *Liberty Ins. v. Weldon:*
  - aunt-in-law poisoning 2 year old for insurance - is insurer liable?
- *Cole v. German Savings & Loan:*
  - fake elevator operator sent customer through shaft door
- *Briscoe v. Amazing Products:*
  - “Liquid Fire” on the ‘boyfriend stealer;’
- *Jones v. Robbins:*
  - Gas station sold gas in a pink plastic bucket to 6 year old.

# *Jones v. Robbins* Majority



- “The duty not to place gasoline in the hands of an unsupervised incompetent six-year old was designed not only to protect that child, but also to protect those whom she would likely expose to the danger of the highly flammable substance. Moreover, it included the risk that another incompetent of tender age might engage in an activity of misuse which would actually ignite the gasoline and create the harm which the four year old Candy here suffered.”

# *Jones v. Robbins* Dissent



- “The court should not hold defendant responsible, an hour and a half after he sold the gasoline, for the improper supervision and care of children of tender years a block and a half away at their dwelling where the mother and other family members were present and able to exercise the needed supervision but did not... The limits of liability are often difficult to find, but there are limits.”

# Putting it all together...



- Jackson was an artist who worked with oil paints in a studio in a downtown rented home. After working for 20 hours straight, he fell asleep in a chair. He fell asleep with his cigarette he was smoking resting on a ceramic dish he was using for an ashtray. He thought his cigarette was extinguished. However, some smouldering ash rolled over and onto some fresh paint that had spilled on the floor.
- The fire spread quickly because of the flammable paint. It burned the house down. Sparks from the fire flew onto the neighbouring home's roof. That home also caught fire and burned.
- The neighbour, Judy, sued Jackson in tort for the loss of her house. Too remote?

# Putting it all together...



- **Duty** – does smoker who smokes near flammable material owe a duty to property owners at risk of fire to take care with cigarettes?
- not: did Jackson owe a duty to neighbour Judy?
- *Anns/Cooper test*:
- Stage 1:
  - proximity: are home-owning neighbours in a proximate relationship to smoker who smokes near flammable material?
  - foreseeability: are home-owning neighbours reasonably foreseeably at risk of harm from actions of smoker who smokes near flammable material?
- Stage 2: Policy

# Putting it all together...



- **Standard** – did Jackson breach the standard of care of a reasonable person in failing control his burning cigarette?
- was Judy a foreseeable victim who could reasonably foreseeably be injured by Jackson's breach?
- was the fire to Judy's home a foreseeable risk of Jackson's carelessness with his cigarette?

# Putting it all together...



- **Remoteness** – could Jackson have ever foreseen that his breach of the standard of care in not controlling his lit cigarette around flammable material could cause damage to Judy’s neighbouring house?
- is the kind or type of harm foreseeable? (fire to property)
- extent is not the plaintiff’s problem (thin skull)
- big question: is this the kind of negligent behaviour for which we would want tort liability to attach?

# Putting it all together...



- **Novus Actus** – is the kind or type of harm that befell Judy’s property reasonably foreseeable as a result of the defendant’s conduct?
- does it matter that the cigarette embers had to fall on fresh paint first, for the fire to ignite then spread?
- does it matter that the fire had to spread from Jackson’s home to Judy’s roof, and then her entire home?
- is the kind or type of harm foreseeable? (fire to property)

# Conclusion: Foreseeability in Duty vs. Standard Breach vs. Remoteness

1. **Duty** – question about broad categories of people
  - macro question
2. **Breach of standard of care** – evidence specific question about particular plaintiff and defendant (what did defendant know or ought to have known was a risk of conduct?)
  - micro question
3. **Remoteness** – evidence specific, specific question about particular plaintiff and defendant (would defendant ever have reasonably foreseen the kind or type of harm that befell the plaintiff?)
  - micro + policy question
  - *novus actus* = “reasonable foreseeability”



**Questions?**