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| Law 435C.001 | Personal Injury Advocacy | 2023 Term 2 |
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**WEEK 2 - January 16, 2023: Tort Liability**

**1.1 Teaching Objectives (Assigned Readings: all bolded cases)**

* The elements of proving liability in negligence:
  + Duty of care – ***Rankin (Rankin’s Garage) v. J.J.,*** [**2018 SCC 19**](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do); *Nelson v. Marchi,* [2021 SCC 41](https://www.canlii.org/en/ca/scc/doc/2021/2021scc41/2021scc41.html?autocompleteStr=2021%20SCC%2041&autocompletePos=1)
  + Breach of that duty (an actionable wrong) - *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007 SCC 41](https://www.canlii.org/en/ca/scc/doc/2007/2007scc41/2007scc41.html?autocompleteStr=2007%20SCC%2041%2C&autocompletePos=1)
  + Causation – *Clements v. Clements*, [2012 SCC 32](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?resultIndex=1)
  + Damages – *Andrews v. Grand & Toy Alberta Ltd.,* [[1978] 2 SCR 229](file:///\\klcdc\data\UBC%20Law%20Course\2022\canlii.org\en\ca\scc\doc\1978\1978canlii1\1978canlii1.html%3fautocompleteStr=andrews&autocompletePos=1); *Morrison v. Van Den Tillaart*, [2012 BCSC 383](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc383/2012bcsc383.html?autocompleteStr=2012%20BCSC%20383&autocompletePos=1)
* Burden of proof – *Snell v. Farrell,* [[1990] 2 SCR 311](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii70/1990canlii70.html?autocompleteStr=snell&autocompletePos=1)
* Standard of proof – *F.H. v. McDougall*, [2008 SCC 53](https://www.canlii.org/en/ca/scc/doc/2008/2008scc53/2008scc53.html?autocompleteStr=2008%20SCC%2053&autocompletePos=1)
* Apportionment of fault – ***Alragheb v. Francis*,** [**2021 BCCA 457**](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca457/2021bcca457.html?autocompleteStr=2021%20BCCA%20457&autocompletePos=1)**;**  *Aberdeen v. Zanatta et al.,* [2007 BCSC 993](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc993/2007bcsc993.html?resultIndex=1), varied [2008 BCCA 420](https://www.kazlaw.ca/wp-content/uploads/2019/10/cd08b4_a6471f1eda2c4084800d3c7106fb64e2.pdf)
* Vicarious liability: why, how, and when – *Bowe v. Bowe,* [2019 BCSC 1454](https://www.bccourts.ca/jdb-txt/sc/19/14/2019BCSC1454.htm), varied [2022 BCCA 35](https://canlii.ca/t/jm245);*John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John’s*, [2020 NLCA 27](https://www.canlii.org/en/nl/nlca/doc/2020/2020nlca27/2020nlca27.html?autocompleteStr=2020%20NLCA%2027&autocompletePos=1)
* Applying the theory of proving liability in motor vehicle collisions, with reference to real case examples:
  + Left turn collisions – *Salaam v. Abramovic*, [2010 BCCA 212](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca212/2010bcca212.html?autocompleteStr=2010%20BCCA%20212&autocompletePos=1); *Nerval v. Khehra*, [2012 BCCA 436](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca436/2012bcca436.html?autocompleteStr=2012%20BCCA%20436&autocompletePos=1)
  + Pedestrian collisions – ***Dewar v.******Finnigan,*** [**2020 BCSC 1721**](https://www.bccourts.ca/jdb-txt/sc/20/17/2020BCSC1721.htm)
  + Rear-end collision – *Skinner v. Fu*, [2010 BCCA 321](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca321/2010bcca321.html?autocompleteStr=2010%20BCCA%20321&autocompletePos=1); *Wallman v John Doe*, [2014 BCSC 79](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc79/2014bcsc79.html?autocompleteStr=2014%20BCSC%2079%20&autocompletePos=1); ***Uy v. Dhillon****,* [**2019 BCSC 1136**](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1136/2019bcsc1136.html?autocompleteStr=2019%20BCSC%201136&autocompletePos=1)**, aff’d** [**2020 BCCA 163**](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.html?autocompleteStr=uy%20v%20&autocompletePos=4)
  + Agony of the collision – ***Uy v. Dhillon****,* [**2019 BCSC 1136**](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1136/2019bcsc1136.html?autocompleteStr=2019%20BCSC%201136&autocompletePos=1)**, aff’d** [**2020 BCCA 163**](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.html?autocompleteStr=uy%20v%20&autocompletePos=4)
* Applying the theory of proving assault and battery for sexual assault – ***Anderson v. Molon*,** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?resultIndex=1)
* Applying the theory of proving Occupier’s liability – *Waldick v Malcolm* [[1991] 2 SCR 456](https://www.canlii.org/en/ca/scc/doc/1991/1991canlii71/1991canlii71.html?autocompleteStr=%5B1991%5D%202%20SCR%20456%20&autocompletePos=1); *Agar v Weber*, [2014 BCCA 297](https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca297/2014bcca297.html?autocompleteStr=2014%20BCCA%20297%20&autocompletePos=1); *Abdi v. Burnaby (City)*, [2020 BCCA 125](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca125/2020bcca125.html?autocompleteStr=Abdi%20v.%20Burnaby%20(City)%2C%202020%20BCCA%20125&autocompletePos=1)

**1.2 Elements of proving liability in negligence**

* What do we mean by “negligence”?
  + “Failure to act as a reasonable person would be expected to act in similar circumstances”.
  + In *Ryan v. Victoria (City),* [[1999] 1 S.C.R. 201](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii706/1999canlii706.html?resultIndex=1) the Supreme Court of Canada summarized negligence as follows: Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury.
* What are the elements of negligence - what do you have to prove:
* First, the defendant owed a duty of care to the plaintiff;
* Second, the defendant breached the applicable standard of care;
* Third, that breach of duty *caused* damage (or injury) to the plaintiff; and
* Fourth, there must be damage (or injury) to the plaintiff.

**1.3 First Element: Duty of Care**

* What do we mean by a “duty of care” in negligence: “legal obligation imposed on an individual requiring adherence to a standard of reasonable care while performing an act”.
* The Supreme Court of Canada addressed the test for duty of care in ***Rankin (Rankin’s Garage) v. J.J.,*** [**2018 SCC 19**](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do)**.** 
  + In July 2006, in Paisley, Ontario, the plaintiff JJ and his friend CC (then 15 and 16 years old) were in the home of CC’s mother. The mother supplied the teenagers with alcohol. Mom went to bed and the boys continued to drink and smoke marijuana. Thereafter, the boys left the house with the intention of stealing valuables from unlocked cars. The pair eventually made their way to Rankin’s Garage, where they found an unlocked Toyota Camry with the keys in the ashtray. CC and JJ decided to steal the car even though neither had a driver’s license and neither had previously operated a vehicle. CC lost control of the vehicle on the highway. JJ, the passenger, experienced a catastrophic brain injury.
  + The action proceeded to a liability-only trial. The trial judge (the trial judge decides a pure question of law) found that Rankin owed a duty to JJ and she instructed the jury accordingly. The Jury accepted the evidence of several witnesses who testified that Rankin’s Garage had a practice of leaving cars unlocked with keys in the vehicles. Ultimately, the Jury found all parties negligent and apportioned liability as follows:

Rankin’s Garage:    37%

CC’s mother:           30%

The friend, CC:       23%

The Plaintiff, JJ:      10%

* + In a 7-2 majority decision, the Supreme Court of Canada held there was **no duty of care owed** by Rankin to JJ **on these facts**. Writing for the majority, Karakatsanis, J. stressed that determining whether something is “reasonably foreseeable” is an objective test, and that Courts must be vigorous in determining whether foreseeability is present prior to the incident occurring and not with the benefit of hindsight.

*“…I am not satisfied that the evidence here demonstrates that bodily harm resulting from the theft of the vehicle was reasonably foreseeable. I conclude that the plaintiff did not satisfy the onus to establish that the defendant ought to have contemplated the risk of personal injury when considering its security practices. The inferential chain of reasoning was too weak to support the establishment of reasonable foreseeability…For these reasons, the plaintiff has not met his burden of establishing a prima facie duty of care owed by Rankin’s Garage to him. Reasonable foreseeability could not be established on this record.”*

* In reaching its conclusion the Supreme Court reaffirmed that the Plaintiff’s criminal conduct was irrelevant in analyzing whether a duty of care existed. As found in the Court’s previous judgments, the Court held that a Plaintiff engaging in immoral or illegal conduct is not precluded from successfully claiming against tortfeasors. Such behaviour can, however, form a part of the contributory negligence analysis.
* In the recent decision of *Nelson v. Marchi,* [2021 SCC 41](https://www.canlii.org/en/ca/scc/doc/2021/2021scc41/2021scc41.html?autocompleteStr=2021%20SCC%2041&autocompletePos=1), the respondent sued the City of Nelson after suffering serious injuries to her leg while walking over a snowbank in the downtown core. City crews had plowed the street, but they had created a snowbank along the curb of the sidewalk in doing so.
* **For Discussion, re: Duty of Care: *Crawford and Rizos v. Osuteye et al.***

**See:** <https://www.cbc.ca/news/canada/british-columbia/attacked-b-c-senior-sues-hospital-over-suspect-release-1.1991137>

**1.4 Second Element: Breach of the standard of care**

* Negligence refers to conduct that falls below the standard required by society. Generally, conduct is considered negligent if it creates an unreasonable risk of harm. For example, driving through a red light without stopping and colliding with another vehicle, rear-ending another vehicle, and driving on the wrong side of the road and causing a collision are all instances where the driver has breached the standard of care.
* As stated by the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007 SCC 41](https://www.canlii.org/en/ca/scc/doc/2007/2007scc41/2007scc41.html?autocompleteStr=2007%20SCC%2041%2C&autocompletePos=1) at para. 69:

*… the general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances. In cases of professional negligence, this rule is qualified by an additional principle: where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling". (See L. N. Klar, Tort Law (3rd ed. 2003), at p. 306.) …*

* How do we prove whether an individual has breached the standard of care:
  + Industry practices and regulatory standards.
    - Note that that trade/professional customs are *prima facie* proof of the standard of care and there is accordingly a heavy burden on the plaintiff to show that a defendant who has followed standards set by government or industry is nonetheless negligent. However, while industry and regulatory standards may be a useful benchmark in determining the standard of care, simply because a defendant adheres to an industry code or regulatory standard will not necessarily be proof that it has met the standard of care. Rather, Canadian courts will evaluate the code or standard to determine whether, considering all of the circumstances, it reflects the appropriate standard of care. This will largely be a question of fact determined by the trier of fact.
  + Professional codes of conduct.
  + The defendant’s own policies, procedures and protocols (and whether these have been followed).
  + Criminal code.
  + Statutory obligations and the common law that interprets those statutes, for example, the *Motor Vehicle Act* in BC.

**1.4.1 The *Motor Vehicle Act***

* Each province has legislation governing the safe operation of motor vehicles. In B.C., regulating drivers is the mandate of the Office of the Superintendent of Motor Vehicles (OSMV). OSMV develops BC road laws and policies (the rules of the road) to make travelling safe for drivers, passengers, pedestrians, cyclists and other road users alike.
* The [*Motor Vehicle Act,* RSBC 1996 c. 318](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96318_00) defines the law that governs the operation of motor vehicles on BC roads – defining the rules of the road and related offences and infractions. In addition, the *Criminal Code of Canada* defines criminal motor vehicle offences. The police enforce road laws by ticketing drivers for traffic violations, issuing sanctions for disobeying the rules (driving bans), and/or laying criminal charges.
* For example, in circumstances where one driver rear ends another vehicle the defendant’s statutory duties are set out in the *Motor Vehicle Act* as follows:

**Careless driving prohibited**

144 (1) A person must not drive a motor vehicle on a highway: (a) without due care and attention, (b) without reasonable consideration for other persons using the highway, or

(c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

**Following too closely**

162 (1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

* + 1. **Common Law Consideration of Statutory Duties**
* The standard of care required in any particular situation is often articulated in judicial decisions. The statutory provisions of the *Motor Vehicle Act* supplement the common law duty of all highway users to exercise what constitutes, in all of the circumstances, due care: *Cook v. Teh*, [[1990] BCJ No. 776 (BCCA)](https://www.canlii.org/en/bc/bcca/doc/1990/1990canlii1077/1990canlii1077.html?autocompleteStr=Cook%20v.%20Teh&autocompletePos=1). These cases articulate the statutory duties, where applicable, and fill in gaps required for the interpretation of the standard of care.

**1.5 Third Element: Causation**

* What do we mean by causation? For a defendant to be found liable in negligence, the law requires a causal link between an act or omission and the harm suffered by the plaintiff.
* There are three cases that you need to know for causation – they come up repeatedly and they form the cornerstone of any contentious case involving causation:
  + *Athey v. Leonati* [1996 3 SCR 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?resultIndex=1)
  + *Resurfice Corp. v. Hanke*, [2007 1 SCR 333](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?resultIndex=1)
  + *Clements v. Clements*, [2012 SCC 32](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?resultIndex=1)
* These three cases are read together – meaning you have to know all three to properly understand the causation analysis.
* For the purpose of this week’s brief discussion of causation, we are going to focus on the *Clements* decision. In this case the plaintiff was riding on the back of her husband’s motorcycle when he crashed and caused serious injury. The defendant (husband) acknowledged that he was negligent for driving too fast and for overloading the motorcycle. The defendant disputed liability on the basis that his negligence did not cause the accident because there was a nail in the tire. Therefore, the primary issue at trial was weather the defendant’s negligence caused the plaintiff’s injuries.
* Let’s review the facts in *Clements v. Clements*:
* Mr. and Mrs. Clements were riding their motorcycle from BC to Alberta.
* Mr. Clements (the defendant) was driving while Mrs. Clements (the plaintiff) was his passenger.
* At the time, the bike was 100 pounds overloaded.
* They stopped for gas shortly before the accident and Mr. Clements did not conduct a visual inspection of his motor cycle.
* Mr. Clements did not have much sleep and was tired but wanted to “push on”.
* It was wet weather conditions.
* They crashed when passing another vehicle at a speed of 120 km/h, a speed that was about 30 km/h over a ‘safe’ speed for the road, according to experts.
* Mrs. Clements suffered a severe traumatic brain injury.
* It was subsequently discovered that the rear tire had a nail puncture.
* Mrs. Clements had brought action against her husband, claiming that his negligence in the operation of the bike caused her brain injury.
* Mr. Clements agreed that he was negligent, however, Mr. Clements argued that his negligence did not cause the crash and injury. In particular, Mr. Clements called an expert witness, who testified that the probable cause of the accident was the tire puncture and subsequent deflation. The accident, the defence said, would have happened no matter what Mr. Clements did. It could not be said that “but for” his (admittedly) negligent acts, the crash and injuries would have not occurred.
* What happened at trial is well summarized by the Supreme Court in its judgment at para 3:

*“The trial judge rejected [the defendant’s expert’s] conclusion, and found that Mr. Clements’ negligence in fact contributed to Mrs. Clements’ injury. However, he held that the plaintiff “through no fault of her own is unable to prove that ‘but for’ the defendant’s breaches, she would not have been injured”, due to the limitations of the scientific reconstruction evidence. The trial judge went on to hold that in view of this impossibility of precise proof of the amount each factor contributed to the injury, “but for” causation should be dispensed with and a “material contribution” test applied. He found Mr. Clements liable on this basis.”*

* The Court of Appeal overturned the trial judgement and found that Mrs. Clements did not prove the cause on a “but for” standard, and that the material contribution test did not apply to the circumstances.
* The Supreme Court of Canada overturned the Court of Appeal decision and affirmed a number of basic principles:

* In Canadian law, the test for showing causation is the “but for” test.   *“The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury ― in other words that the injury would not have occurred without the defendant’s negligence.”* This is a factual determination and the onus remains on the plaintiff to prove this.
* However*, “…the “but for” causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant’s negligence made to the injury.”*
* *“Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.”*
* *“Where “but for” causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant’s negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable.”*
* Having confirmed those principles, the Court turned to the issue of when, if ever, the “material contribution test” can apply.
* The Court first noted that the material contribution test is not really a causation test at all, but a substitution for it. The Court explained at para 14:

*. . . “material contribution” does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to “jump the evidentiary gap”: That is because to deny liability “would offend basic notions of fairness and justice”: Hanke v. Resurfice Corp., para. 25.*

* So what then are these exceptional cases in which proof of factual causation can be replaced by proof of a material contribution to the risk that gave rise to the injury? The answer is:
* Where the defendant has acted negligently in a way that exposed the plaintiff to an unreasonable risk of injury, and
* It is “impossible to prove” that the defendant’s negligence caused the injury by a “but for” analysis.

*“What then are the cases referring to when they say that it must be “impossible” to prove “but for” causation as a precondition to a material contribution to risk approach?  The answer emerges from the facts of the cases that have adopted such an approach.  Typically, there are a number of tortfeasors.  All are at fault, and one or more has in fact caused the plaintiff’s injury.  The plaintiff would not have been injured “but for” their negligence, viewed globally.  However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury.  This is the impossibility of which Cook and the multiple employer mesothelioma cases speak”.*

* 1. **The Fourth Element – Damages:**
* The final element of an action in negligence is that of proving damages. This element of the course will have its own lecture devoted to it, but we will be briefly introducing the concept here.
* As shall be seen in later lectures, there is a substantial amount of jurisprudence relating to each head of damage, and each requires its own evidentiary burden and legal tests that must be met.
* The driving force behind the law of torts, and the justification for awarding damages, was described in *Andrews v. Grand & Toy Alberta Ltd.,* [[1978] 2 SCR 229](file:///\\klcdc\data\UBC%20Law%20Course\2022\canlii.org\en\ca\scc\doc\1978\1978canlii1\1978canlii1.html%3fautocompleteStr=andrews&autocompletePos=1) by Dickson C.J. at para. 24:

*24 To the same effect, see Kemp and Kemp, Quantum of Damages, 3rd ed. (1967), vol. 1, at p. 4: "The person suffering the damage is entitled to full compensation for the financial loss suffered." This broad principle was propounded by Lord Blackburn at an early date in Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25 at 39 (H.L.), in these words:*

*I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.*

* Damages are typically divided into several categories/heads:
  + Non-pecuniary (pain and suffering);
  + Past wage-loss;
  + Loss of future earnings capacity;
  + Cost of future care;
  + Loss of housekeeping capacity (which is sometimes included in non-pecuniary damage awards); and
  + Special damages.
* It is imperative that damages be proven, as without proof of actionable damage, a claim in negligence cannot succeed. In the case of *Morrison v. Van Den Tillaart*, [2012 BCSC 383](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc383/2012bcsc383.html?autocompleteStr=2012%20BCSC%20383&autocompletePos=1), at paras. 28 & 32 it was confirmed that the plaintiff must proved evidence that actual damage arose from the alleged wrongful conduct of the defendant.
* Merely threatening future harm or exposing another to danger is not actionable — there must be actual damage for a claim in negligence to succeed.
  1. **Burden of Proof & Standard of Proof**
* In *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* the burden of proof is assigned two separate meanings:

*In the first sense, the term refers to the obligation imposed on a party to prove or disprove a fact or issue to either a balance of probabilities or beyond a reasonable doubt.*

*In the second sense, it refers to a party’s obligation to adduce or point to evidence on the record to raise an issue to the satisfaction of the trial judge.*

* The first sense of the burden of proof is the legal obligation upon a party to establish contested facts in order to succeed in the action in question. The second sense is what we are referring to as the standard of proof for the purposes of this course.

**Burden of Proof**

* In *Snell v. Farrell,* [[1990] 2 SCR 311](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii70/1990canlii70.html?autocompleteStr=snell&autocompletePos=1), Sopinka J., writing for the Court, commented on the burden of proof, and stated that the presumption is that the burden of proof will typically lie with the plaintiff:

*… The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 Wigmore on Evidence, 4th ed. (Boston: Little, Brown & Co., 1981), s. 2486, at p. 292. In a civil case, the two broad principles are:*

*1. that the onus is on the party who asserts a proposition, usually the plaintiff; and*

*2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.*

* In any civil action, in negligence or otherwise, the burden of proof rests with the plaintiff.
  + This means that in order to bring a successful action in negligence, the plaintiff must prove that the defendant had a duty of care, that the standard of care was not met, that the defendant caused the damages, and then prove the extent of the damages.
  + There are instances where the burden of proof may be reversed, such as in cases of medical malpractice.
* Similarly, in criminal actions, the burden of proof is placed upon the prosecution. This is enshrined in Canadian law through the presumption of innocence under s.11(d) of the *Charter of Rights and Freedoms.***tandard of Proof**
* As stated above, the standard of proof relates to the evidentiary threshold that a party must meet in order to prove the case that they are presenting to a judge.
* *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* states that the standard of proof differs whether it is in the context of a civil or criminal matter. In a criminal matter, the standard is that of “beyond a reasonable doubt”. In civil proceedings, the standard is that of “a balance of probabilities”.
* In the decision of *F.H. v. McDougall*, [2008 SCC 53](https://www.canlii.org/en/ca/scc/doc/2008/2008scc53/2008scc53.html?autocompleteStr=2008%20SCC%2053&autocompletePos=1), Rothstein J., writing for a unanimous Court, commented on the “shifting standard of proof” in civil matters. In prior jurisprudence, the standard for the balance of probabilities would shift in relation to the severity of the allegations made against the defendant.
* After a review of the jurisprudence from Canada and United Kingdom on the subject, Rothstein J. came to the following conclusion at para. 40:

*40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof…*

* At paras. 45 & 46, Rothstein J. expanded upon what the balance of probabilities entails:

*45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.*

*46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.*

* 1. **Apportionment of fault**

***Contributory negligence***

* Even though a plaintiff may have suffered damage or loss attributable to another’s negligence, the plaintiff’s claim to damages may be reduced or eliminated if the plaintiff has failed to take reasonable care for his or her own safety, and his or her own negligence has contributed to that loss. In other words, where the plaintiff’s own negligence contributes to his or her injury, his or her right to fully recover is for that loss may be correspondingly affected.
* The definition of contributory negligence was re-stated by the Supreme Court of Canada in *Bow Valley Jusky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [[1997] 3 S.C.R. 1210](https://www.canlii.org/en/ca/scc/doc/1997/1997canlii307/1997canlii307.html?resultIndex=1) where the Court stated:

“ *…when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiffs claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full*.”

* Examples of contributory negligence include a plaintiff injured in a motor vehicle accident caused by another but not wearing a seat belt at the time of collision, jay-walking across a road without looking for traffic, or the fact that a plaintiff, at the time the damages occurred, was under the influence of alcohol.
* Historically, contributory negligence was a complete defence to a plaintiff’s claim. Once the defendant was able to establish that the plaintiff contributed to his or her own loss, the plaintiff would be denied any means of recovery. That traditional contributory negligence bar has been replaced by provincial legislation which apportions liability between negligent defendants and contributorily negligent plaintiffs. While the provincial statutes have many similarities, some differ significantly as to whether defendants will be jointly and severally liable, as opposed to severally liable, where a plaintiff is contributorily negligent.
* In BC the [*Negligence Act,* RSBC 1996, c. 333](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96333_01)governs the apportionment of liability between negligent parties. Sections 1, 2(c), and 4 of the *Act* read as follows:

*1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.*

*(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.*

*(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.*

*2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules: …*

*(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;*

*4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.*

*(2) Except as provided in section 5 if 2 or more persons are found at fault (a) they are jointly and severally liable to the person suffering the damage or loss, and (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.*

* The effect of these sections was explained by the BC Court of Appeal in *Leischner et al v. West Kootenay Power and Light Company, et al*. (1986), [70 B.C.L.R. 145](https://www.canlii.org/en/bc/bcca/doc/1986/1986canlii889/1986canlii889.html?resultIndex=2), as follows:
  + *“Sections 1 and 4 apply to different situations; s. 4 applies to cases where two or more persons cause damage to the plaintiff; s. 1 applies where the plaintiff himself is one of the persons found to have caused his damage or loss; s. 2(c) provides that in a s. 1 case the plaintiff shall recover from a defendant only the proportion of the loss that corresponds to that defendant's fault… then by ss.1 and 2(c) he obtains several judgments against the defendants liable for his loss.”*
* Where the plaintiff’s own negligence contributes to their injury, their right to full recovery may be proportionately affected. For example, if the plaintiff is found to be 20% contributorily negligent then he/she would only be paid 80% of the value of their claim.
* The defendant has the onus of proving contributory negligence and must show: (1) there has been some breach by the plaintiff (and error or omission); and (2) that this breach caused or contributed to the plaintiff’s loss. For example, a plaintiff could be negligent for riding a bicycle without a helmet but there would be no deduction for contributory negligence if they suffered an injury
* Contributory negligence is a partial defence (as opposed to “voluntary assumption of risk” or “criminal act” which are complete defences). Proving contributory negligence against a plaintiff is much like establishing negligence against a defendant.
* Marzari, J. engaged in an analysis of the defence of contributory negligence **in *Uy v. Dhillon****,* [**2019 BCSC 1136**](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1136/2019bcsc1136.html?autocompleteStr=2019%20BCSC%201136&autocompletePos=1)**, aff’d** [**2020 BCCA 163**](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.html?autocompleteStr=uy%20v%20&autocompletePos=4) at paras. 178-187:

*[**178]     As I discussed above, there is a presumption or onus in rear‑end collisions that the following driver is at fault for failing to keep a safe distance for the conditions. In the ordinary case these are conditions that involve one vehicle following another and failing to stop in time when the lead car stops unexpectedly.*

*[**179]     This is not that typical case. Both vehicles were moving at speed, and I have found that the accident was caused by Mr. Dhillon moving into Mr. Uy's lane of travel suddenly and unexpectedly, rather than unexpectedly stopping in front of him. Mr. Uy was anticipating passing Mr. Dhillon to his left in the moments prior to the collision, and there is no reasonable basis to suggest that he should have been keeping a safe distance from the rear of Mr. Dhillon's trailer while he was in a different path of travel.*

*[**180]     Given these circumstances, I find that the defendants are not able to rely on the presumption of liability in rear‑end collisions, or putting it another way I find that the presumption in those cases has been rebutted on the proven facts.*

*[**181]     The defendants have led no other evidence of inattentiveness or carelessness on Mr. Uy's part. Rather they say I should find that Mr. Uy's speed of 70 to 80 kilometres an hour is objectively unreasonable in these circumstances and that had he been driving more slowly, he could have avoided the collision.*

*[**182]     It is not enough for a defendant to point at the plaintiff and allege wrongdoing. It is critical that the defendant also prove that a plaintiff's failure to take reasonable care contributed to the injuries suffered: See Wormald v. Chiarot, 2016 BCCA 415 (CanLII), at paragraphs 14 to 15, which read as follows:*

*[14]  The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained:  Enviro West Inc. v. Copper Mountain Mining Corporation, 2012 BCCA 23 (CanLII) at para. 37.*

*[15] To satisfy the requirement of a causal connection between the plaintiff’s breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. The plaintiff’s conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself:  Bevilacqua v. Altenkirk, 2004 BCSC 945 (CanLII) at paras. 39–43 (per Groberman J., as he then was). In other words, the plaintiff’s carelessness must relate to the risk that made the actual harm which occurred foreseeable:  Cempel v. Harrison Hot Springs Hotel Ltd. (1997), 1997 CanLII 2374 (BC CA), 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para. 13.*

*[**183]     The defendants rely upon Mawani v. Pitcairn, 2012 BCSC 1288 (CanLII), to support their argument for contributory negligence on grounds that Mr. Uy was going too fast for the conditions. However, I note in that case evidence was led about causation in the form of perception response time to support the finding (at para. 72).*

*[**184]     In this case I have no such evidence. While I do accept that I do not need evidence on standard of care to determine what the appropriate standard is, I cannot find on the evidence before me that Mr. Uy's speed of 70 to 80 kilometres was careless or negligent. Mr. Jackson said that he considered 80 kilometres an hour to be an appropriate speed for the conditions for a passenger vehicle equipped with snow tires, and Mr. Uy's vehicle was so equipped. I do not agree with the defendants that while that speed may have been appropriate for Mr. Jackson, who knew this portion of the highway intimately, it was negligent in Mr. Uy's case.*

*[**185]     Nor do I have any evidentiary foundation upon which to find that Mr. Uy would have avoided the accident at any speed lower than the one he was driving at short of not exceeding the speed of Mr. Dhillon's tractor‑trailer. The evidence before me, however, does establish that tractor‑trailer combinations are required to go significantly slower than passenger vehicles down the steep grade involved here and that indeed Mr. Dhillon fully expected to be passed by such vehicles.*

*[**186]     I conclude that there was nothing that Mr. Uy could have reasonably done to avoid the collision. He was driving well below the speed limit. His Honda had snow tires and his headlights were activated. There is no evidence to suggest that Mr. Uy's Honda had any mechanical problems that could have contributed to the collision. There is no reliable evidence to suggest that Mr. Uy was distracted.*

*[**187]     I find the defendants have not established that Mr. Uy was contributorily negligent or that he contributed to Ms. De Leon's injuries.*

***Alragheb v. Francis*,** [**2021 BCCA 457**](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca457/2021bcca457.html?autocompleteStr=alraghe&autocompletePos=2)

* This recent BC Court of Appeal decision comments on the issue of contributory negligence by a plaintiff in a motor vehicle action where there are concurrent torts and indivisible injuries. In this decision, the apportionment of liability was to be considered between two separate MVAs that Mr. Alragheb was involved in.
* On June 22, 2016, Mr. Alragheb suffered minor injuries when he was struck by one of the respondents, Mr. Francis, while riding his bicycle on the sidewalk of No.4 Road in Richmond. Liability was apportioned equally for this accident.
* On January 19, 2017, Mr. Alragheb was stopped at a traffic signal when he was rear-ended by one of the respondents, Ms. Gibbon. Liability was apportioned entirely to Ms. Gibbon in this accident. The trial judge concluded that Mr. Alragheb suffered **multiple indivisible injuries** between the two MVAs. The injuries suffered by Mr. Alragheb, and the trial judge’s apportionment of liability are summarized in paras. 4-6 of the decision.
* Wilcock J.A., writing for the Court, summarized the principles of apportionment of liability at paras. 26-30:

*[26] First, the law does not apportion liability for damages between tortious and non‑tortious conduct: Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 22–23.*

*[27] Second, the rule that damages are assessed with a view toward putting the plaintiff in the position they would have occupied but for the tort is a rule that governs the assessment of damages, not the apportionment of liability. It is the means by which allowance is made for non‑tortious causes. Cases in which pre‑existing conditions or prior injuries are weighed in the assessment of damages are not of assistance in understanding the principles of apportionment.*

*[28] Third, where by the fault of two or more persons damage or loss is caused to one or more of them (as is the case where concurrent torts cause an indivisible injury), the liability to make good the damage or loss is in proportion to the degree to which each person was at fault. That is our statutory regime.*

*[29] Fourth, where the plaintiff is one of the persons at fault, the liability of all parties at fault (which in the absence of contributory negligence would have been joint and several) is severed. Contributory negligence severs the liability of the separate tortfeasors, in effect causing the plaintiff to bear the pain caused by absent, impecunious or uninsured tortfeasors. The Act does not otherwise call for the application of distinct rules of apportionment where there is contributory negligence (except that where there is several rather than joint liability, the court may have to determine the extent to which non‑parties may have been at fault: see Leischner v. West Kootenay Power & Light Co. Ltd. …. The fact that liability is severed does not affect the rule that liability is apportioned by degrees of fault.*

*[30] Last, where liability and damages arising from a prior tort have been finally assessed, that effectively severs liability, even where a subsequent tort causes aggravation and contributes to what might otherwise have been considered to be an indivisible, cumulative injury. The issue was addressed by this Court in Ashcroft v. Dhaliwal, 2008 BCCA 352. In such a case, the first judgment is taken to have effectively apportioned damages between accidents. It does not assist in identifying the guiding principles of apportionment to consider how rules of apportionment may unsettle or be inconsistent with prior assessments of liability.*

* Wilcock J.A. went on to critique the trial judge’s application of the *Negligence Act,* and stated that the correct approach to the apportionment of liability where multiple torts and indivisible injuries are involved in one action is as follows:

*[46] Where, as here, damages are caused by one tort and a second tort acts in combination with the first to cause further injury and indivisible damages, it is necessary to allocate fault twice: once for the damages attributable to the first accident and arising in the interval before exacerbation, and then globally, for the indivisible damages. The trial judge was properly concerned that the allocation of “findings in the successive accident could disturb the findings of fact (fault) in the initial accident” (at para. 27). To that end, the separate assessment of fault in relation to the first accident must be consistent with the expression of fault as a percentage of total fault in relation to the indivisible injury. However, that concern does not justify or necessitate apportionment on any basis other than blameworthiness.*

* In paras. 50 & 51, Wilcock J.A. stated laid out the proper approach under the “blameworthiness approach” that is to be undertaken when apportioning liability under the *Negligence Act*:

*[50] The “blameworthiness approach” is exemplified by the judgment in Bilanik v. Ferman,* [*2014 BCSC 732*](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc732/2014bcsc732.html)*. In that case, the plaintiff was injured in two motor vehicle accidents. The first was caused solely by the negligence of the defendant; liability for the second was apportioned: 20% to the plaintiff and 80% to the defendant. The plaintiff suffered injury that was found to be indivisible. The case is on all fours with the case at bar insofar as the injury was the result of two accidents, one of which was contributed to by the negligence of the plaintiff. The trial judge held:*

*[175] In this case, the injuries are indivisible and the global assessment of damages at $60,000 stands. Long v. Thiessen has no application here. Hence, the necessary inquiry is to determine the degree of fault of each of [the tortfeasors] and the plaintiff in respect of her indivisible injury based on the extent to which each party departed from the standard of care owed in the circumstances. The defendants are not jointly liable for the global assessment of damages.*

*[176] The first accident was undoubtedly less severe than the second accident. [The first tortfeasor] showed a minor lapse of care in conduct. The plaintiff appeared on the road to recovery prior to the August 11, 2008 accident. [The second tortfeasor] showed a more major lapse of care in his conduct, showing a disregard for the safety of others. The plaintiff’s symptoms from the May accident not only returned but worsened as a result of it. The major residual complaint that the plaintiff has today - headaches - arose from the August 2008 accident. The plaintiff, found to be 20% liable for causing the second accident, is in my view, less blameworthy in terms of her departure from the standard of care owed in the circumstances. Her lapse of care in conduct was minor, comparatively.*

*[Emphasis added.]*

*[51] In Lane v. Wahl,* [*2015 BCSC 1779*](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1779/2015bcsc1779.html)*, the plaintiff sued for damages arising from injuries suffered in a series of three accidents. He was found to be solely responsible for the second. He suffered depression as a result of the cumulative effect of injuries suffered in the second and third accidents. The trial judge adopted the analysis in Bilanik, holding:*

*[84] The law is clear that apportionment of liability under the Negligence Act, R.S.B.C. 1996, c. 333, should be based on the relative fault of the persons responsible for the damage as opposed to the degree to which they are found to be responsible for the injuries [citing Alberta Wheat Pool v. Northwest Pile, 2000 BCCA 505: [which, in turn relied upon the judgment in Cempel v. Harrison Hot Springs Hotel Ltd. (1997), 1997 CanLII 2374 (BC CA), 43 B.C.L.R. (3d) 219 (C.A.)].*

*…*

*[62] Similarly, in Lane v. Ou,* [[2019 BCSC 928]](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc928/2019bcsc928.html?autocompleteStr=2019%20bcsc%20928&autocompletePos=1)*, the plaintiff suffered an indivisible injury as a result of two accidents, the first of which was entirely his fault and the second of which was entirely the fault of the defendant. In a judgment that deals primarily with assessment of damages but does so in the language of apportionment, the judge began by noting that the defendant need not compensate the plaintiff for what she referred to as “non‑compensable pre‑existing damage” (at para. 165). In doing so, she cited a passage from the judgment in Blackwater dealing with the assessment of damages, after the task of apportionment had been completed. The trial judge referred to Demidas and Blenkarn as cases in which the plaintiff had suffered indivisible injuries in sequential accidents, where the loss and damage from “at fault accidents” was considered and then “removed” from the overall award so that the defendants were not liable for that amount.*

*…*

*[78] As I have noted above, it is arguable the approach in Bilanik and Lane v. Ou received the imprimatur of this Court on the Lane appeal. In my view, the outcome and logic in those cases are consistent with the principles of apportionment adopted in our legislation and if this Court did not say so in Lane, we should say so here.*

* Wilcock J.A. concluded that the law of apportionment is correctly described in *Bilanik,* and at para. 82 concluded that:

*Where a plaintiff suffers an indivisible injury as a result of several concurrent torts and his own contributory negligence, liability must be apportioned between those at fault in proportion to their degrees of fault.*

* In applying the law of apportionment of blameworthiness to the case, Wilcock J.A. came to the conclusion the liability was to be apportioned at 25% each to Mr. Alragheb and Mr. Francis, and 50% to Ms. Gibbon.

***Joint and several liability***

* Joint and several liability allows the innocent plaintiff to recover the entire claim for damages from one of several negligent defendants regardless of the degree of fault between the defendants. The defendants should contribute and indemnify each other in the degree to which they are found to be at fault. This scheme ensures that an injured plaintiff can collect from the most solvent defendant and gives the paying defendant the right to pursue the other liable defendants for their proportionate contributions.
* Joint and several liability arises in circumstances where there are joint torts or independent torts that combine to cause a single indivisible injury.
* Example 1 – The plaintiff is struck by a vehicle driven by an intoxicated driver (defendant 1), who was served an excessive amount of alcohol in a tavern (defendant 2). Defendants 1 and 2 may be held jointly and severally liable for the plaintiff’s injuries. If the plaintiff’s claim is 1M and defendant 1 is 90% at fault and defendant 2 is 10% at fault, the plaintiff may recover the full damages from either of the defendants.
* Example 2 – Defendant 1 injuries the plaintiff in a motor vehicle accident causing soft tissue injuries. Defendant 2 injuries the plaintiff in a second motor vehicle accident causing a further aggravation of those injuries. The plaintiff’s injuries are indivisible and the defendant’s are jointly and severally liable for the plaintiff’s damages.
* In cases where the plaintiff is partially at fault for the accident (meaning they are contributorily negligent), the *Negligence Act* severs liability and requires the court to apportion liability in “proportion to the degree in which each person was at fault”.
* Example: The plaintiff is found 25% contributorily negligent for an accident. Defendant A (an insured corporation) is found 25% at fault. Defendant B (an individual) is found 50% at fault. Under the *Negligence Act*, the plaintiff can only seek 25% of their judgment from Defendant A, and must seek the remaining 50% from Defendant B. If Defendant B has no funds, the plaintiff is left with no recourse.
* Note that the BC *Negligence Act* is unique amongst many provinces in this regard. Consider the philosophical/policy reason behind a statute that allows the innocent (non-liable) plaintiff to collect 100% of the damages from a defendant that may only be 1% at fault.
  + Joint and several liability is efficient, promotes access to justice
  + The defendants are in the best position to apportion damages amongst themselves.
  + Once liability has been established and damages awarded, the defendants are free to litigate amongst themselves to better divide liability.
  + It should not be the responsibility of those harmed as a result of multiple defendant to have to seek out all those responsible in order to obtain full compensation. The burden should rest on those found responsible to pursue indemnification from each other.
  + J and S liability protects victims from being under compensated if one of the defendants cannot pay his or her share of proportionate liability.
  + Opponents of the principle of J and S liability note that its use (instead of proportionate responsibility) has led to cases in which a party with a very minor part of the responsibility unfairly shoulders the burden of damages.
* ***Aberdeen v. Township of Langley et al.,*** [**2007 BCSC 993**](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc993/2007bcsc993.html?resultIndex=1)**, rev’d** [**2008 BCCA 420**](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca420/2008bcca420.html?resultIndex=1) is an excellent example of a liability analysis (how negligence is proven), the issues of joint and several liability, and the allocation of fault (based upon moral blameworthiness). The facts of the case are relatively straightforward:
* Zanatta (van driver) – crossed the yellow line of 272nd street creating a hazard which caused Aberdeen’s accident (para 26-30).
* Township of Langley – gap between the metal barrier and a cement no-post barrier; gravel on the side of the road (para 31-41).
* Aberdeen – possible contributory negligence relating to speed (paras 23 -25), however, no evidence of speeding and confirmation that Aberdeen was an expert cyclist (paras 42-53).
* Para 67 – the key inquiry in assessing the allocation of liability is comparative blameworthiness – this is the relative degree by which each of the parties departed from the standard of care to be expected in the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.
* Para 68 – plaintiff claims that Zanatta’s negligence was a minor departure from the standard of care imposed on motorists. In contrast, the plaintiff argues that Langley’s departure from the standard of care imposed on municipalities was extreme: Langley created the gap, failed to take action to remedy the gap for three years, and vehicles would have been redirected the metal barrier and then speared by the no-post barrier. Cyclists were at risk of being directed by the barrier and directed through the gap into the ravine. The plaintiff argued that negligence should be apportioned at 10-20% to Zanatta and 80-90% to Langley
* Para 78 – Liability apportioned at 25% to the Zanatta defendants and 75% to Langley.
* In the Court of Appeal *(****Aberdeen v. Township of Langley et al.*** [**2008 BCCA 420**](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca420/2008bcca420.html?resultIndex=1)) the defendants appealed liability, including the finding that the plaintiff was not contributory negligent, and the quantum of damages for future care costs, which were assessed at $4,151,504 plus $388,639 for the replacement of the plaintiff’s house with one specially equipped for him. The Court of Appeal affirms the award of damages but remits the issue of contributory negligence against the plaintiff for retrial. In particular, at paragraphs 23 – 26 the Court of Appeal states that the trial judge erred in failing to consider specifically whether Mr. Aberdeen had been taking reasonable care for his own safety.
  1. **Vicarious liability**
* Vicarious liability is a legal doctrine that holds one person or entity legally responsible for the acts or omissions of another – if the wrongdoer was acting within the scope and course of the control and/or authority of the secondary entity or person, such as an employer, or the owner of a vehicle.
* Why is vicarious liability important? Because the vicariously liable entity will often have assets or insurance where the tortfeasor does not.
  + For example, a Catholic Diocese is usually vicariously liable for the sexual assaults of its clergy, and a clergyman often has no assets of his own and is judgment proof.

**Vicarious liability in the context of motor vehicle accidents:**

* In ***Bowe v. Bowe,*** [**2019 BCSC 1454**](https://www.bccourts.ca/jdb-txt/sc/19/14/2019BCSC1454.htm) **(varied in** [**2022 BCCA 35**](https://canlii.ca/t/jm245)) the plaintiff passenger, Tyson Bowe, age 15, had taken his stepfather Ray Boltz’s keys without permission. His 15-year-old cousin, Dale Bowe, who did not live in the household, was on the joyride. Neither had a driver’s license. Both took turns driving the vehicle. Dale crashed the car when he was driving, and Tyson, a passenger at the material time, was seriously injured. A jury found him to be contributory negligent to his own injuries.
* Section 86 of BC’s Motor Vehicle Act establishes vicarious liability for vehicle owners when their vehicle is being driven by a household member or by anyone who acquired the vehicle with the owner’s consent:

**Responsibility of owner or lessee in certain cases**

86(1)    In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person **driving or operating** the motor vehicle who:

(a)      is living with, and as a member of the family of, the owner

* As trial judge, Mr. Justice Voith (as he then was) found that, even though Cousin Dale was not a household member, vicarious liability was triggered by this section and the registered owner was vicariously liable for the collision:

[65]         It is important in this case not to be swayed by the fact that the Plaintiff took Mr. Boltz’s car keys without his permission.  This lack of consent, on the part of Mr. Boltz, is irrelevant, on a principled basis, to the intention and operation of s. 86(1)(a).  The provision is, instead, engaged in the first instance on account of the family relationship that exists between Mr. Boltz and the Plaintiff.  The Plaintiff’s own fault and contributory negligence, in taking the keys to the vehicle and in the events that gave rise to his injuries, are addressed by the jury’s specific findings on that issue.

[66]         Furthermore, the application of s. 86(1)(a) is not influenced by whether the injured party in a motor vehicle accident is an innocent and unknown third party who is struck by a vehicle or a passenger in that vehicle.  Under s. 86(1)(a), the same result necessarily ensues whether Dale struck an innocent person crossing the street or whether he injured the Plaintiff who was sitting beside him at the time of the Accident.  If the Defendants are correct, an innocent third party would have no recourse against Mr. Boltz.  I raise these matters because the result of this application must be consonant with the language of s. 86(1)(a) and with the object of that provision in the various circumstances that I have described.

[67]         The purview of s. 86(1)(a) clearly extends beyond those cases where a family member of the owner of the vehicle is involved in a motor vehicle accident while “driving” the vehicle.  It extends to cases where the family member is “operating” the vehicle.  How the words “operate” or “operating” are interpreted is a function of the meaning of those words and, to the extent different meanings are reasonably possible, a consideration of what meaning best achieves the intended purpose of the provision.

[68]         “Operate” in the MVA is, in other provisions, defined as having “the care or control” of a motor vehicle.  A somewhat extended definition of “operate”, found in the IVR, has earlier been considered in the context of s. 86.  That definition “includes” instances where an individual is in the “care, custody or control” of the vehicle.  The word “includes” in the IVR contemplates an even broader definition.  Furthermore, the specific words “care, custody or control” operate disjunctively.

…

[71]         In this case, over the course of the evening, the Plaintiff and Dale drove Mr. Boltz’s vehicle and were passengers at different times.  When they changed roles, one would “drive” and the other would not.  This narrow set of activities only addresses the question of who was “driving” at different times.

[72]         When the Plaintiff obtained Mr. Boltz’s car keys, he initially sat in the driver seat and he held the car keys in his hand.  At that point, though he was not “driving”, the vehicle was in his “care, custody or control”.  I do not consider that that would change when he gave the keys to Dale.

[73]         To be specific, if the Plaintiff no longer held the keys he would likely no longer overtly have “control” of the vehicle.  He would, however, still have “care or custody” of the vehicle.  It would be open to him to ask for the return of the keys.  It would be open to him to require that they return to the Plaintiff’s home and that they return Mr. Boltz’s vehicle.

[74]         I posit an example that arises in a slightly different context but one that mirrors, on a principled basis, the circumstances of this case.  If a father gives his son his vehicle keys and his son, while on a trip, allows a friend to drive, while he sits in the passenger seat, can it be said that the son no longer has “care” or “custody” of his father’s vehicle?  Can it be said that he is not “using” the vehicle?  Based on the common sense meaning of these words, and on the authorities I have referred to, I do not consider that this is so.  To determine otherwise would be to make the words “drive” or “operate” virtually synonymous in circumstances where it is clear that the two words are both intended to, and do, have different meanings.

[75]         These conclusions are further informed by the intended remedial purpose of s. 86(1).  It is to be recalled that the “only policy reasons underlying s. 86(1) to be considered are those in favour of protecting innocent third parties seeking compensation for injuries suffered at the hands of negligent automobile drivers and, vicariously, owners”: Barreiro at para. 28.

[76]         Having regard to the foregoing considerations, I am satisfied the Plaintiff was, at the time of the Accident, “operating” Mr. Boltz’s vehicle notwithstanding the fact that he was a passenger in the vehicle.

[77]         This conclusion recognizes and gives effect to each of the words “drive” and “operate”.  It is consistent with the meaning of the word “operate” in the MVA and the IVR––a related enactment.  It is consistent with the object and remedial purposes of s. 86(1).  Still further it is consistent with the relevant authorities.

[78]         Based on this conclusion, and on the deeming provision in s. 86(1), Mr. Boltz is vicariously liable for the Accident.  There is no need to consider whether the circumstances of this case would establish vicarious liability at common law: Morrison at para. 23.

* In [2022 BCCA 35](https://canlii.ca/t/jm245), the Court of Appeal found that Voith, J. (as he then was) as trial judge had erred in construing s. 86(1) of the *MVA* and concluding that Tyson, a front seat passenger at the material time, was “operating” the vehicle at the time of the Accident.
  + To “operate” a vehicle within the meaning of s. 86(1), the “operator” must generally have physical control over the vehicle.
  + At the time of the accident, Tyson did not have physical control over the vehicle.
  + The panel rejected the “secondary agency theory” in that Tyson was operating the vehicle as a family member of Mr. Boltz when he allowed Dale to drive (thereby engaging s. 86(1)(a)), and that, as an agent of Mr. Boltz, he consented to Dale driving (thereby engaging s. 86(1)(b)).

*[**133]   In my view, Tyson’s secondary agency theory also fails on policy grounds. It would make vehicle owners liable for the negligence of anyone given permission by the owner’s family member to drive or operate the owner’s vehicle, if consent was given while the family member was operating it. In my view, the theory entails a significant expansion of liability that goes beyond achievement of the policy objectives of the provision. As noted in the Law Reform Commission of British Columbia’s Report on Vicarious Liability under the Vehicle Act, 1989, Report No. 106 at 10–11:*

*It is the owner who decides who will or will not operate his motor vehicle. He decides the nature and extent of the insurance that is to cover its operation. He is in a position to set down rules as to where, when and how it will be operated. This analysis, however, breaks down if the owner is not in a position to exercise effective supervision and control over the use of a motor vehicle. It is important, therefore, that the concept of ownership employed in subsection 79(1) [now subsection 86(1)] should embrace in some way the notion of effective supervision and control.*

*[Emphasis added.]*

**Vicarious liability in the context of sexual battery:**

* In *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John’s*, [2020 NLCA 27](https://www.canlii.org/en/nl/nlca/doc/2020/2020nlca27/2020nlca27.html?autocompleteStr=2020%20NLCA%2027&autocompletePos=1), the Newfoundland Court of Appeal (NLCA) considered the appeals of four plaintiffs, who claimed that they were sexually abused by members of the Christian Brothers Institute while they were living at the Mount Cashel Orphanage in St. John’s during the 1950s.
* The issue of whether or not the Roman Catholic Episcopal Corporation of St. John's (the Diocese or Archdiocese) were vicariously liable for the abuse was one of the issue on appeal.
* In the *per curiam* judgement, the NLCA reviewed the principles of vicarious liability in the context of sexual battery from the Supreme Court of Canada’s jurisprudence at paras. 45-73. This included a summary of the principles of vicarious liability from the following cases:
  + *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001 SCC 59](https://www.canlii.org/en/ca/scc/doc/2001/2001scc59/2001scc59.html?autocompleteStr=2001%20SCC%2059&autocompletePos=1) – vicarious liability in general (paras. 46-49 of *John Doe*);
  + *Bazley v. Curry*, [[1999] 2 SCR 534](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii692/1999canlii692.html?autocompleteStr=%20%2C%20%5B1999%5D%202%20S.C.R.%20534&autocompletePos=1) – the application of vicarious liability in the context of sexual battery of children, committed by the employee of a foundation, the policy considerations for the application of vicarious liability in these actions, and the application/alteration of the *Salmond* test (paras. 50-61 of *John Doe*);
  + *K.L.B. v. British Columbia*, [2003 SCC 51](https://www.canlii.org/en/ca/scc/doc/2003/2003scc51/2003scc51.html?autocompleteStr=2003%20scc%2051&autocompletePos=1) – further expansion on the policy considerations of vicariously liability, and further defining the relationship required for the establishment of vicarious liability (para. 63);
  + *John Doe v. Bennett,* [2004 SCC 17](https://www.canlii.org/en/ca/scc/doc/2004/2004scc17/2004scc17.html?autocompleteStr=2004%20scc17&autocompletePos=1) – the application of vicariously liability to a diocese for sexual assaults perpetrated by one of its priests on young boys in his parish (para. 64);
  + *Broome v. Prince Edward Island*, [2010 SCC 11](https://www.canlii.org/en/ca/scc/doc/2010/2010scc11/2010scc11.html?autocompleteStr=2010%20SCC%2011%20&autocompletePos=1) – a decision where it was determined that the province of Prince Edward Island did not have a legal duty of care to children who were residents of a privately-operated home (paras. 67-68); and
  + *Blackwater v. Plint*, [2005 SCC 58](https://www.canlii.org/en/ca/scc/doc/2005/2005scc58/2005scc58.html?autocompleteStr=2005%20SCC%2058%20&autocompletePos=1) – a decision where the issue of whether two or more entities are in a sufficiently close relationship with the wrongdoer that could justify the imposition of vicarious liability on both entities (paras. 69-70);
* At para. 185, the NLCA applied these principles and ultimately found that the trial judge’s decision to not find the Archdiocese of St. John’s vicariously liable constituted a palpable and overriding error. The NLCA’s analysis of the evidence found that the imposition of vicarious liability on the Archdiocese for the sexual abuse of the plaintiffs was appropriate.

**1.10 Applying the theory of proving liability in motor vehicle collisions**

**Pedestrian collisions**

***Dewar v. Finnigan*,** [**2020 BCSC 1721**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1721/2020bcsc1721.html?resultIndex=1)

* This case involved a pedestrian crossing a residential road mid-block at night who was struck by a vehicle and grievously injured.
* The plaintiff argued that he had crossed more than half of the roadway by the time the defendant’s vehicle struck him, and that the defendant was speeding above the 30 km/h limit and driving on the wrong side of the road. The plaintiff further argued that the defendant was not exercising due care and attention to see and avoid pedestrians crossing the road, and that the collision could reasonably have been avoided if she had done so.
* ICBC argued that the plaintiff was jaywalking and/or that the vehicle was so close to him at the time he began crossing, that it constituted an immediate hazard to which the plaintiff should have yielded the right of way. ICBC submitted that the plaintiff was wholly liable for not taking care of his own safety, and that the defendant was largely not liable or wholly not liable for the collision.
* The liability trial was five days and the court ultimately concluded that the driver was 65% at fault for the collision.
* While several witnesses and police officers attended the scene of the collision immediately after it occurred, only the plaintiff and the defendant witnessed the collision itself. Although the police took photographs of the scene, they did not take any measurements. As a result, the critical evidence was the expert engineering evidence, that of Dr. Amrit Toor, P. Eng, for the plaintiff, and Mr. Kurt Ising, P. Eng, for the defendant.
* Dr. Toor provided a primary engineer report which estimated that the defendant’s speed was likely between 40-48 km/h at the point of impact, and concluded that the defendant’s vehicle was wholly situated in the northbound section of the road prior to and at the point of impact. Dr. Toor’s report further concluded that the defendant could have avoided the collision if she had applied her brakes before the point of impact.
* Mr. Ising provided a responsive expert report which estimated that the defendant’s speed was likely as low as 35 km/h at the point of impact. Using assumptions Mr. Ising made about the ambient lighting at the collision scene including halogen headlamps for the defendant vehicle, Mr. Ising calculated that the defendant could have only seen a darkly-clad pedestrian from 25 metres away. Mr. Ising concluded that the defendant, at 36-38 m away from the plaintiff at the time when he first emerged between parked cars immediately after stepping out onto the road, could not have seen the plaintiff and avoided the collision.
* At trial, Mr. Ising conceded that the Olsen study he used to calculate a 25 m detection hazard range was done on a dark rural road with no street lights or ambient lights. It was further revealed that the defendant vehicle was equipped with high-intensity headlamps and not halogen headlamps as assumed by Mr. Ising in his report. Mr. Ising also disclosed that his speed analysis determined a likely speed of 41 km/h and a likely range of up to 44 km/h. Ultimately, Mr. Ising agreed that the collision would not have occurred if the defendant had been driving the speed limit, or had been driving in correct (southbound) portion of the roadway, or had seen the plaintiff and steered or applied the brakes prior to impact.
* What happened in the moments before the defendant vehicle struck the plaintiff was crucial to determining liability. Was the defendant paying due care and attention? Was the defendant driving just above the speed limit at 35 km/h, or was she driving at an excessive speed between 40-48 km/h? Was the defendant driving her vehicle in the centre of the roadway, or had her vehicle crossed the centre-line, travelling southbound in the northbound section of the road?
* With the expert engineering evidence being critical to the determination of liability, the competing evidence of Dr. Toor and Mr. Ising was very much in issue. Gomery J. reconciled that evidence in his reasons, and concluded that the defendant was in a position, at 35-40 m away, to see the plaintiff from the moment he emerged from between the parked cars. He further concluded that the defendant vehicle was likely travelling at 40-44 km/h at the point of impact, and that the defendant was travelling south in the northbound lane when she struck the plaintiff.
* In his analysis, Gomery J. first summarized the applicable duty of care owed by the defendant to other users of the roadway, which is derived from the legislated rules of the road and extends to the reasonably foreseeable actions of a pedestrian who may create a hazardous situation or disregard the law (at paras. 39-41):

*[39] As the driver of a vehicle, Ms. Finnigan owed other users of the roadway a  
duty to take reasonable care for their safety. The driver’s duty of care is informed  
but not exhausted by legislated rules of the road;* Cook v. Teh *(1990), 45 B.C.L.R.  
(2d) 194 (C.A.) at paras. 17–19;* Salaam v. Abramovic, *2010 BCCA 212 at paras.  
18–21. The duty extends to anticipating the reasonably foreseeable actions of a  
pedestrian who is creating a hazardous situation, even disregarding the law;* Hmaiedv. Wilkinson, *2010 BCSC 1074 at para. 23.*

*[**40]      While Mr. Dewar was not in a cross-walk, neither was he crossing illegally.  Section 12(2) of City of Vancouver Street and Traffic By-Law No. 2849 [By-Law 2849] prohibits jaywalking, but not where the street in question is a “Minor Street” without lane markings.*

*[41] The following legislated rules bear on an assessment of Ms. Finnigan’s  
conduct:*

*a) Wall Street is a highway as defined in s. 1 of the* Motor Vehicle Act, *R.S.B.C. 1996, c. 318 [*MVA*];*

*b) A person must not drive a motor vehicle on a highway without due care and attention, without reasonable consideration for other persons using the highway, or at a speed which is excessive relative to the road, traffic, visibility, or weather conditions;* MVA *s. 144(1);*

*c) A person must not drive on a highway at a speed in excess of the posted speed;* MVA *s. 146(7);*

*d) A driver on a highway without marked lanes must confine the course of the vehicle to the right-hand half of the roadway if the roadway is of sufficient width and it is practicable to do so, subject to certain exceptions that do not apply in this case;* MVA *ss. 150, 151;*

*e) While there are circumstances set out in ss. 179 and 180 of the* MVA *in which a pedestrian on the highway must yield the right of way over a driver, in these cases the driver must still exercise due care to avoid colliding with the pedestrian and give warning by sounding the horn when necessary; s. 181(a) and (b).*

* Gomery J. ultimately determined that the collision was caused by the defendant’s conduct which was negligent in three ways, each of which independently caused the collision: driving without due care and attention, at an excessive speed, and on the wrong side of the road (at paras. 42-46):

*[42] At the time of the collision, Ms. Finnigan was breaching these rules. She was  
driving at 40 to 44 kph, well in excess of the posted speed limit of 30 kph. She was  
driving on the left-hand half of the roadway when there was room for her to drive on the right.*

*[43] Ms. Finnigan was also driving without due care and attention. While the poor  
visibility and Mr. Dewar’s dark clothing would inhibit her reaction time, once he was on the travelled part of the roadway, he was there to be seen, illuminated by her  
headlights. Ms. Finnigan testifies that it is her habit to check her mirrors on entering  
a new street and this may be the reason she failed to see Mr. Dewar as she  
approached him. If this is what occurred, she should not have been travelling so  
quickly on a residential street, under conditions of poor visibility, that she could not  
check her mirrors without leaving herself time to spot and react to a pedestrian  
crossing the street directly in front of her.*

*[44] I find that Ms. Finnigan was driving negligently, without taking reasonable  
care for the safety of Mr. Dewar or any other pedestrian who might have been  
crossing the street.*

*[45] The collision occurred because of Ms. Finnigan’s negligence. Had she been  
driving more slowly, at the speed limit, I find that Mr. Dewar would have reached the  
other side of the travelled roadway before Ms. Finnigan’s vehicle reached him. Had  
Ms. Finnigan kept to the right-hand side of the road, Ms. Finnigan’s vehicle would  
have passed behind Mr. Dewar as he crossed the road.*

*[46] Ms. Finnigan’s failure to drive with due care and attention also caused the  
accident. The reaction time of a driver labouring under conditions of poor visibility  
would be approximately 2.4 seconds. Had she maintained a proper lookout, it is  
likely that she would have spotted Mr. Dewar and would have had time to brake or  
swerve sufficiently to avoid the collision.*

* In the second part of his analysis, Gomery J. then went on to summarize the applicable duty of care of a pedestrian entering the roadway for his own safety in anticipating irregular or illegal conduct by drivers, which is derived from both statute and the common law (at paras. 49-51):

*[49] In entering the roadway, Mr. Dewar was required to take reasonable care for his own safety. Just as drivers are required to take reasonable care to anticipate apparent potential hazards arising even from irregular or illegal conduct on the part of pedestrians, pedestrians must take reasonable care to anticipate equivalent conduct on the part of drivers. The duties of drivers and pedestrians are symmetrical; each owes an equivalent duty; Liston v. Striegler (1996), 25 B.C.L.R. (3d) 57 (C.A.) at para. 14, leave ref’d [1996] S.C.C.A. No. 477; Mawani v. Pitcairn, 2012 BCSC 1288 at paras. 103–106, aff’d 2013 BCCA 338.*

*[50] As with drivers, the content of a pedestrian’s duty to take care is informed by legislated rules. A rule of significance in this case is stated in s. 180 of the MVA: When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.*

*[51] In addition to s. 180, the defendant relies on s. 12(1) of By-Law 2849. It states: Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, shall give the right-of-way to all vehicles upon the roadway.*

* Gomery J. agreed with the plaintiff’s argument that neither of the above legislated rules required the plaintiff to yield the right of way to a vehicle driving on the wrong side of the road. Gomery J. thus reframed the issue as whether the plaintiff took reasonable care for his own safety and concluded he had not, and that a cause of the collision was the plaintiff’s contributorily negligence (at paras. 52-53, 66):

*[52] Mr. Dewar maintains that neither* MVA *s. 180 nor s. 12(1) of By-Law 2849 go  
so far as to require him to yield the right of way to a vehicle travelling up the wrong  
side of the street.*

*[53] I agree with Mr. Dewar that, given Ms. Finnigan’s position on the wrong side  
of the road, it is not helpful to frame the issue in this case by asking who had the  
right-of-way. The fundamental question is whether Mr. Dewar took reasonable care  
for his own safety.*

*[…]*

*[66] I find that, had Mr. Dewar exercised reasonable care, he would have waited  
to cross the street and avoided being hit. His contributory negligence was a cause  
of the accident.*

* In apportioning liability between the defendant and the plaintiff, Gomery J. summarized the applicable statute and common law, balancing the defendant’s negligence against the plaintiff’s contributory negligence and finding the defendant 65% at fault (paras. 67-71):

*[67] Section 1(1) of the* Negligence Act, *R.S.B.C. 1996, c. 333, requires me to  
apportion the liability to make good the damage or loss suffered by Mr. Dewar “in  
proportion to the degree to which each person was at fault”. By s. 1(2), if it is not  
possible to establish different degrees of fault, the liability must be apportioned  
equally.*

*[68] In this context, “fault” means blameworthiness, and the court must evaluate  
the extent to which each party’s conduct departed from the standard of reasonable  
care;* Alberta Wheat Pool v. Northwest Pile, *2000 BCCA 505 at para. 46;* Randhawav. Evans, *2020 BCCA 292 at paras. 22–23.*

*[69] In* Aberdeen v. Langley (Township), *2007 BCSC 993 at para. 62, varied on  
other grounds 2008 BCCA 420, Justice Groves summarized the factors that courts  
have taken into account in assessing moral blameworthiness and contributory  
negligence. In* Howell v. Machi, *2017 BCSC 1806 at para. 117, Justice  
MacNaughton considered* Aberdeen *and other cases and refined the* Aberdeen *factors to the specific context of pedestrian-motor vehicle collisions. MacNaughton  
J.’s list of factors is worth quoting in its entirety:*

* + *whether the driver or pedestrian was keeping an adequate look-out for cars or pedestrians, including jaywalking pedestrians;*
  + *whether the driver or pedestrian took reasonable precautions, such as modifying speed in areas where pedestrians might be or looking both ways before proceeding into a crosswalk;*
  + *the speed of the driver compared to the speed limit and the conditions;*
  + *whether the driver obeyed the rules of the road, such as signaling;*
  + *whether the pedestrian or car was ‘there to be seen’ including an assessment of the weather, time of day, state of traffic, use of headlights, light or dark clothing for pedestrians, and other visibility factors;*
  + *the nature of the area where the accident occurred, such as whether it is a busy street or whether there are frequent jaywalkers;*
  + *the presence of nearby crosswalks;*
  + *where the pedestrian crosses, mid-block or nearer to an intersection where any reasonable adult might be expected to attempt to cross;*
  + *whether the pedestrian was wearing headphones; and*
  + *generally, what could reasonably be foreseen by either the driver or pedestrian.*

*[70] Considerations from this list that favour a finding of greater blameworthiness  
on the part of Ms. Finnigan are: her failure to keep a proper lookout; her excessive  
speed on a residential street with a 30 kph limit; and her breach of the rules of the  
road by driving on the wrong side. Considerations that favour a finding of greater  
blameworthiness on the part of Mr. Dewar are: his dark clothing, making it more  
difficult for him to be seen (specifically noted in Howell at para. 141); that he was not in a crosswalk or at an intersection; and that he was aware that Ms. Finnigan was approaching and was in a better position to foresee what was about to occur.*

*[71] In my view, Ms. Finnigan is more to blame for the collision, because she  
breached multiple rules of the road, while Mr. Dewar was simply careless in a snap  
judgment. However, Mr. Dewar’s contributory negligence is more than simply  
nominal because it was to some degree advertent. Balancing these considerations  
and taking everything into account as best I can, I apportion liability for the accident  
65% to Ms. Finnigan and 35% to Mr. Dewar.*

**Left turn intersection collisions:**

* The statutory duty that is imposed on drivers when completing a left turn is listed under s.174 of the *Motor Vehicle Act,* which states:

***Yielding right of way on left turn***

***174***  *When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the  
opposite direction must yield the right of way to the vehicle making the left turn*.

***Salaam v. Abramovic*,** [**2010 BCCA 212**](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca212/2010bcca212.html?autocompleteStr=2010%20BCCA%20212&autocompletePos=1)**.**

* The common law supplement to this statutory duty of care that was expanded upon in the case of *Salaam v. Abramovic*, [2010 BCCA 212](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca212/2010bcca212.html?autocompleteStr=2010%20BCCA%20212&autocompletePos=1). This appeal dealt with a collision that occurred at a “T” intersection of Scott Road and 100th avenue in Surrey BC in 2005. When the defendant was approximately 450 feet from the intersection, he noticed the plaintiff's car approaching the stop sign on 120 Street. Its left turn signal was flashing. The plaintiff did not completely stop at the stop sign, but crept forward into the intersection. The defendant was about 350 feet away when he realized that the plaintiff's vehicle was proceeding "with hesitations" into the right-hand northbound lane of Scott Road, where she "paused", but did not stop. Liability was apportioned 100% with the plaintiff.
* Groberman J.A., writing for the Court, summarized the ruling in *Carich v. Cook* [(1992), 90 D.L.R. (4th) 322 (B.C. C.A.)](https://www.canlii.org/en/bc/bcca/doc/1992/1992canlii995/1992canlii995.html?autocompleteStr=Carich%20v.%20Cook&autocompletePos=1), at 326, where Lambert J.A. considered s.174 of the *Act*:

*The question as a driver turns left is whether there is any vehicle in any approaching lanes that constitutes an immediate hazard. If there is, the turn should not be made. If there is not, then the turn can be made and of course, care should be taken throughout the turn and as each new lane is entered to make sure that the situation as it was assessed when the turn started has not changed in the meantime. But that care is more a matter of the ordinary duty of a reasonably careful driver and not a duty, in my view, imposed specifically by s. 176 [now s. 174] which, in my view, states the situation when the turn is commenced. Once the turn is commenced both of the drivers in that situation, the one who is doing a left turn and the ones that are approaching straight ahead in a situation where a vehicle could turn in front of them, all must keep a proper look-out.*

* In a left turn scenario there is a driver who is in a dominant position, and one who is in a servient position. These positions are defined by who has the duty to yield, which will most often be the driver who is making the left turn, will be in the servient position with the driver proceeding straight through the intersection being in the dominant position. At para. 26, Groberman J.A. looked to the concurring judgements of Cartwright and Locke JJ. in *Walker v. Brownlee*, [[1952] 2 D.L.R. 450 (S.C.C.)](https://www.canlii.org/en/ca/scc/doc/1952/1952canlii328/1952canlii328.html?autocompleteStr=%20Walker%20v.%20Brownlee%2C%20%5B1952%5D%202%20D.L.R.%20450%20&autocompletePos=1), at 460-61, which supports the proposition that the servient driver is under a duty to yield, and as such, is in the best position to avoid a collision.
* At para. 25, Groberman J.A. built upon this duty, and ruled that drivers are entitled to rely upon the following presumption:

*25 A driver like the defendant, who is in a dominant position, will not typically be found to be liable for an accident. Drivers are generally entitled to assume that others will obey the rules of the road. Further, though defensive driving and courteous operation of motor vehicles are to be encouraged, they do not necessarily represent the standard of care for the purposes of a negligence action. A driver will not be held to have breached the standard of care simply because he or she failed to take extraordinary steps to avoid an accident or to show exceptional proficiency in the operation of a motor vehicle.*

* At para. 33, Groberman J.A. explained that the use of the words “immediate hazard” in *Walker v. Brownlee*, and s.174 of the *Act* are what is used to determine when a vehicle may lawfully enter an intersection.
* The defendant attempted to proceed through the intersection, despite seeing the “immediate hazard” that the plaintiff presented by not stopping at their stop sign. As such, Groberman J.A. found that on the facts of this case, the trial judge had made an error, and reapportioned liability 75% to the plaintiff and 25% to the defendant.

*Nerval v. Khehra,* [2012 BCCA 436](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca436/2012bcca436.html?autocompleteStr=2012%20BCCA%20436&autocompletePos=1)

* In this casethe BC Court of Appeal considered an appeal where Ms. Nerval was performing a left turn across an oncoming wide single lane, and was struck by the vehicle driven by Ms. Khehra, who was proceeding straight through the intersection. At first instance, the trial judge apportioned 60% of the fault for the accident to Ms. Nerval, and 40% of the fault to Ms. Khehra.
* Writing for the Court, Harris J.A., at para. 29 endorsed the authority of *Pacheco (Guardian ad litem of) v. Robinson* [(1993), 75 B.C.L.R. (2d) 273 (B.C. C.A.)](https://www.canlii.org/en/bc/bcca/doc/1993/1993canlii383/1993canlii383.html?autocompleteStr=Pacheco%20(Guardian%20ad%20litem%20of)%20v.%20Robinson&autocompletePos=1) where at para. 15 Legg J.A. stated:

*In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 per cent at fault for a collision which occurs.*

* Harris J.A. went on to explain at para. 35 that the effect of s.174 of the *Act* is to place a burden on the left turning driver to prove an absence of an immediate hazard when they commenced their left turn. At para. 37, Harris J.A. explained that there is a second aspect to the burden placed on the left turning driver by s. 174. This burden is that it must be proved that despite being the dominant driver, that the other driver was negligent and at fault for causing or contributing to the accident.
* Harris J.A. explained this analysis at para. 38:

*38 Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that negligence on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.*

* In applying this analysis to the facts of the case, Harris J.A. was unable to find any fault with the trial judge’s apportionment of liability, and the appeal was dismissed.

**Rear-end collisions / Agony of the collision**

* Under s.162(1) of the *Motor Vehicle Act,* a driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.
* This statutory obligation supplements the common law duty of all highway users to operate their vehicle at the appropriate standard of care. In the context of rear-end collisions, the result of this interaction of statutory obligations and common law jurisprudence is that there is a presumption of negligence on the part of the following vehicle in rear-end collisions, a position that has been endorsed by the BCCA in *Skinner v. Fu*, [2010 BCCA 321](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca321/2010bcca321.html?autocompleteStr=2010%20BCCA%20321&autocompletePos=1) at para 23.
* The interaction between the statutory and common law duty of care in relation to rear-end collisions was explained in *Wallman v John Doe*, [2014 BCSC 79](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc79/2014bcsc79.html?autocompleteStr=2014%20BCSC%2079%20&autocompletePos=1) at paras 409-411:

*409 When one vehicle rear ends another, the onus is on the rear-ending vehicle to demonstrate the absence of negligence: Robbie v. King, 2003 BCSC 1553 (B.C. S.C.), at para. 13; Cannon v. Clouda, 2002 BCPC 26 (B.C. Prov. Ct.) at para. 9; Cue v. Breitkreuz, 2010 BCSC 617 (B.C. S.C.) at para. 15; Stanikzai v. Bola, 2012 BCSC 846 (B.C. S.C.) at para. 7.*

*410 This is because the following driver owes a duty to drive at a distance from the leading vehicle that allows reasonably for the speed, the traffic and the road conditions: Barrie v. Marshall, 2010 BCSC 981 (B.C. S.C.), at paras. 23-24; Rai v. Fowler, 2007 BCSC 1678 (B.C. S.C. [In Chambers]), at para. 29. This duty is codified in ss. 144 and 162 of the Motor Vehicle Act.*

*411 Driving with due care and attention assumes being on the lookout for the unexpected: Power v. White, 2010 BCSC 1084 (B.C. S.C.) at para. 28, aff'd 2012 BCCA 197 (B.C. C.A.).*

***Uy v. Dhillon,*** [**2019 BCSC 1136**](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1136/2019bcsc1136.html?autocompleteStr=2019%20BCSC%201136&autocompletePos=1)**, aff’d** [**2020 BCCA 163**](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.html?autocompleteStr=uy%20v%20&autocompletePos=4)

* On January 31, 2014 at 2:30 a.m., Johnberlyn Uy was driving the Coquihalla Highway after picking up his passenger, his girlfriend Ma Cezza De Leon after her evening shift at work in Kelowna. The couple were on their way to Vancouver to celebrate Chinese New Year. There had been a significant snowfall the day before, leaving portions of the highway snow-covered with some snow banks still accumulated on the shoulders of the highway.
* On the descent toward the snow shed tunnel, Mr. Uy’s Honda Element collided with the rear of a B-combo tractor-trailer unit. The collision was severe. The point of impact was directly to the driver’s side.
* Johnberlyn suffered a severe traumatic brain injury. He has no memory of the collision.
* The tractor-trailer driver, Mr. Dhillon, admitted he was in the course of passing another Super-B tractor-trailer unit at the time of the collision. He insisted the area of the collision was functioning as a three-lane highway.
* Mr. Uy’s passenger, Ms. De Leon, had been consistent since the day of the collision that Dhillon’s trailer intruded into Mr. Uy’s lane of travel, causing him to take evasive action, leading to the collision. She insisted the area of the collision was only a two-lane highway.
* Dhillon and his employer, the owner of the tractor-trailer unit, Day & Ross, argued Mr. Uy was wholly at fault for rear-ending the tractor-trailer or, in the alternative, that he was contributory negligent.
* The defendants’ private insurer’s entrenched position on liability ensured that settlement negotiations failed. The matter proceeded to a ten-day liability-only trial before Marzari, J. in June, 2019. She gave oral reasons on Day Ten.
* One significant challenge for the plaintiff was that engineering evidence was inconclusive in explaining just how the collision happened, largely because the snow and gravel-covered accident scene was contaminated with tire marks from first responders. For this reason, the plaintiff did not commission or serve a primary expert opinion at the 84-day deadline. Instead, the plaintiff relied upon lay witness evidence from two key sources: the passenger, Ms. De Leon, and the road maintenance worker Mr. Jackson was one of the first responders on scene.
* The defendants did serve a primary engineering report at the 84-day deadline, from Trevor Dinn, P.Eng. He relied on photo-modelling, tire marks, and survey measurements to opine that the impact point was in the “centre” lane. Below is Mr. Dinn’s diagram of the accident scene.
* Critically, Mr. Dinn conceded that the roadway line markings were not visible at the material time, and that there was a “bare-like” traveled portion of the roadway on the left side of the highway.
* There were two critical factual assumptions Mr. Dinn did not account for in his opinion: the existence of encroaching snow banks on the sides of the highway and, most critically, the fact that Mr. Dhillon admitted he was trying to pass another Super-B tractor-trailer on the highway at the time of the collision.
* These two facts critically change the defence expert’s modelling of the tractor-trailer’s unit at the point of impact.
* What happened in the moments before impact was obviously crucial to a determination of liability. Did Mr. Uy take evasive action to avoid Mr. Dhillon’s suddenly encroaching trailer?
* While the experts assisted in answering this question, the critical evidence was the lay evidence, that of Ms. De Leon and Mr. Dhillon, and the credibility and reliability of their competing evidence was very much in issue. Marzari J. reconciled that evidence in her reasons, accepting Ms. De Leon’s evidence and rejecting Mr. Dhillon’s.
* First, she summarized the applicable duty of care and standard of care, derivative from both statute and the common law (at paras. 11-36), addressing the law with regard to rear-end accidents and the burden of proof.

*… One way in which a driver of a rear‑ending vehicle may discharge the onus of showing he was not negligent is to show that the driver of the front vehicle suddenly changed lanes in front of him, not allowing sufficient time to stop….*

* Marzari, J. correctly identified the disputed facts she was tasked with finding (at paras. 37-38):

*[**37]        On the basis of the above case law, it is necessary for me to determine first whether Mr. Uy has established on the evidence that Mr. Dhillon encroached into his lane or path of travel suddenly and without warning causing him to lose control of his vehicle. As I stated above, this largely involved the resolution of factual questions and depends on my interpretation of the physical evidence and my assessment of the credibility of Ms. De Leon and Mr. Dhillon where their accounts differ.*

*[**38]        The main areas of contention that I must resolve on the evidence to reach a conclusion in this regard are:*

*a)   Whether the highway was operating as two lanes or three lanes at the time of the collision;*

*b)   The likely location of the impact;*

*c)   Where each of the involved vehicles were located immediately before the impact; and*

*d)   Ultimately, whether Mr. Dhillon was established in his lane at the time of the collision or whether he was suddenly and without warning moving to the left encroaching on Mr. Uy's primarily lane of travel just prior to the collision.*

* What happened in the moments before the collision ultimately came down to a credibility contest between Ms. De Leon and Mr. Dhillon. Mr. Dhillon was inconsistent in his evidence under Oath on five material issues, and Ms. DeLeon had no vested interest in the outcome of liability, since she was a passenger and had sued both Mr. Dhillon and Johnberlyn. The trial judge’s conclusions:

*[**158]     I have not reviewed all of Mr. Dhillon's inconsistencies and inaccuracies in his evidence. I think it is sufficient to say that where the evidence of Ms. De Leon and Mr. Dhillon conflict, I prefer the evidence of Ms. De Leon.*

*…*

*[**167]     Given Mr. Dhillon's carelessness to the traffic approaching from behind and the many self‑serving discrepancies in his evidence, I cannot accept his evidence over that of Ms. De Leon as to whether he was signalling.*

***Mr. Uy's Evasive Action***

*[**168]     I have found that Mr. Dhillon's tractor‑trailer combination encroached on Mr. Uy's lane of travel suddenly and without warning. I find that in reaction and in order to evade this sudden and unexpected hazard, Mr. Uy steered aggressively to the right in the opposite direction he saw that the tractor trailer was moving. Mr. Uy lost control of the car, and it rotated clockwise hitting the rear left corner of the tractor trailer in the driver area and causing his injuries.*

*[**169]     In this moment, it was not incumbent on Mr. Uy to pick the best type of evasive action. Mr. Dhillon says that Mr. Uy could have and should have moved to his left, where Mr. Dhillon says the left lane was not obstructed. Indeed Mr. Dinn's final opinions about the likely cause of the accident, which I have rejected, are premised on this presumption.*

*[**170]     However, it is not clear to me, and it would not have been clear to Mr. Uy, that moving to the left, the same direction as the tractor‑trailer was moving, would have been a safer option. I have found that Mr. Dhillon was moving to the left to overtake a large Super B combination that itself was shifted to the left by a snow bank in the right lane that Mr. Dhillon was not aware of. In order to overtake this Super B, Mr. Dhillon was required to continue to move further to the left and I find he was in the process of doing at the time of impact.*

*[**171]     As has often been quoted from Brook v. Tod Estate, citing Carswell's Manual of Motor Vehicle Law, , Volume III, 3rd edition, at page 22:*

*Where an emergency arises, it is not necessary for a driver to possess extraordinary skill, presence of mind, poise or self‑control, and his failure to act as an ordinary person in an emergency is not held to be negligence. He is not necessarily required to adopt the most prudent course and is entitled to a reasonable time, depending on the circumstances, to exercise his judgment as to what steps should be taken to avoid a collision [citations omitted].*

*[**172]     I find nothing careless or negligent in Mr. Uy's spontaneous evasive manoeuvre in the "agony of the collision" to steer aggressively to the right in an attempt to avoid the tractor trailer.*

* Dhillon was found 100% at fault for the collision, and his employer and owner of the tractor-trailer, Day & Ross, vicariously liable for his negligence.
* The decision was affirmed on appeal **- *Uy v. Dhillon***[**, 2020 BCCA 163**](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.html?autocompleteStr=uy%20v%20&autocompletePos=4).
  1. **Liability in the context of Occupier’s liability**
* In a slip, or trip, and fall case the [*Occupier’s Liability Act,* RSBC 1996, c. 337](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96337_01) and its provisions are applied to any property, whether it be indoor, outdoor, residential, or commercial. S.1 of the *Occupier’s Liability Act* defines an “occupiers” s.1, as a person who:

*(a) is in physical possession of premises, or*

*(b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,*

*and, for this Act, there may be more than one occupier of the same premises;*

* S. 3(1) of the *Act* outlines the duty of care that is imposed on all “occupiers”. It states that “*An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises*”.
* According to s.3(2) of the *Act,* this duty of care applies to the condition of the premises, the activities that take place on the premises, and the conduct of third parties on the premises.
* S. 3(3) of the *Act* states that an occupier will have no duty of care to a person respecting risks that are willingly assumed by the individual who enters onto the premises. Under this section, the “occupier” will have a duty not to create a danger with intent to do harm to the person or damage to the person’s property, or to act with reckless disregard to the safety of the person o the integrity of the person’s property

*Abdi v. Burnaby (City)*, [2020 BCCA 125](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca125/2020bcca125.html?autocompleteStr=Abdi%20v.%20Burnaby%20(City)%2C%202020%20BCCA%20125&autocompletePos=1)

* In this decision, the BC Court of Appeal commented on whether or not a municipality may be held liable under the *Occupier’s Liability Act*. In this case, the tenants of the property, which was owned and rented out by the City of Burnaby, added used motor oil to the large open pit fire that was taking place on the property, causing a large fire ball. This fireball engulfed the plaintiff, Ms. Abdi, entirely in flames and caused her severe burns. The tenants had a history of having large open pit fires on the property going back to 2008, and of adding accelerants to these fires to make them larger. There was an open fire pit that had been maintained on the property for some time, and these fires contravened municipal bye-laws.
  + At first instance, the trial judge determined that the tenants and the City owed guests to the property a duty of care. The jury found that the defendants had breached the standard of care, and liability was assigned 66 per cent to the tenants, 5 per cent to the tenant's wife, and 29 percent to the City.
  + Writing for the Court, Griffin J.A. stated that the duty of care in this case was specifically related to take care of the safety of persons who might come to the property, and as such was distinguishable from the duty of care imposed upon the garage owner in *Rankin.*
  + Griffin J.A. referred to the UK House of Lords case of *Hughes v. Lord Advocate,* [[1963] UKHL 1 (Scotland H.L.)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1963/1.html&query=(Hughes)+AND+(v.)+AND+(Lord)+AND+(Advocate)). In this case workmen were found to have been liable for the burns caused by an explosion at an unguarded manhole. Two boys went to explore the tent over the manhole, and in the process of doing so, knocked a paraffin lamp into the manhole when one of the boys fell in. The House of Lords ruled that damage from fire was foreseeable, and just because it came in the form of an explosion did not negate this foreseeability.
  + The logic in *Hughes* was adopted by the Manitoba Court of Appeal in *Assiniboine South School Division No. 3 v. Greater Winnipeg Gas Co.,*[1971 CanLII 959 (MB CA)](https://www.canlii.org/en/mb/mbca/doc/1971/1971canlii959/1971canlii959.html?autocompleteStr=Assiniboine%20South%20School%20Division%20No.%203%20v.%20Greater%20Winnipeg%20Gas%20Co&autocompletePos=1). At para 107, Griffin J.A. adopted the ruling *Assiniboine,* where at 614 of Dickson J.A. held:

*It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. In the case at bar I would hold that the damage was of the type or kind which any reasonable person might foresee. Gas-riser pipes on the outside of Tuxedo buildings are common. Damage to such a pipe is not of a kind that no one could anticipate. When one permits a power toboggan to run at large, or when one fires a rifle blindly down a city street, one must not define narrowly the outer limits of reasonable provision. The ambit of foreseeable damage is indeed broad.*

*[Italic emphasis in original; underline emphasis added.]*

* + At paras 112 – 113, Griffin J.A. ruled that the trial judge did not err in finding that the City, by virtue of being the owner of the property and thus an “occupier” under the *Act,* owed Ms. Abdi a duty of care. The circumstances of the case did not require that the precise mechanism or events that caused the injury be specifically foreseen. Griffin J.A. emphasized that the *Rankin* decision makes it clear that it is only the type of harm that must be foreseeable.

**1.13 Liability in the context of suing a municipality, the government, or the Crown**

* While municipalities, the government, and the Crown are all subject to all the liabilities to which it would be liable for if it was as a person by virtue of the [*Crown Proceedings Act*, RSBC 1996, c.89](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96089_01), there are legal hurdles which must be considered prior to attempting to bring an action against any of these entities.
* S.8(1) of the *Occupier’s Liability Act* states that while the *Act* does apply to municipalities, the government, and to the Crown (as evidenced by s.8(1) of the *Act* and the decision in *Abdi*), there are exceptions.
* S.8(2) of the *Act* states that the *Act* does not apply to the government, the Crown, or a municipality if they are the occupier of:

*(a) a public highway, other than a recreational trail referred to in section 3 (3.3) (c),*

*(b) a public road,*

*(c) a road under the Forest Act,*

*(d) a private road as defined in section 2 (1) of the Motor Vehicle Act, other than a private road referred to in section 3 (3.3) (b) (iv) of this Act, or*

*(e) an industrial road as defined in the Industrial Roads Act.*

* Furthermore, municipalities, the government, and the Crown, are all subject to immunity from negligence liability when the allegedly negligent act stems from decisions that are of a “core policy decision” making character.

***Nelson (City) v. Marchi*,** [**2021 SCC 41**](https://www.canlii.org/en/ca/scc/doc/2021/2021scc41/2021scc41.html?autocompleteStr=2021%20SCC%2041&autocompletePos=1)

* In this case, the City of Nelson argued that it should not have to pay any damages to Ms. Marchi for the injuries that she suffered while crossing a snowbank created by the City, because snow clearing decisions are “core policy decisions” that are immune from negligence claims.
* At first instance, the judge agreed with the City that its snow clearing decision was a core policy decision and the City did not have to pay any damages to Ms. Marchi. She appealed to the BC Court of Appeal, which disagreed with the trial judge and ordered a new trial. The City of Nelson appealed that decision to the Supreme Court of Canada.
* Karakatsanis & Martin J, writing for the unanimous Court, explained how the “*Just* category” as explained in *Just v. British Columbia*, [[1989] 2 SCR 1228](https://www.canlii.org/en/ca/scc/doc/1989/1989canlii16/1989canlii16.html), of previously established duties of care for provincial entities, interacts with core policy decisions.
  + The Court outlined that in *Just* there was a sufficiently proximate relationship between users of a highway and the province, because in the creation of highways, the province creates a physical risk to which road users are invited. Risk is immediately foreseeable if maintenance is not upheld.
  + The Court described how in *Just* it was ruled that the duty of care should apply to public authority defendants “*unless there is a valid basis for its exclusion.”* These valid bases were deemed to be 1) a statutory provision that exempts the defendant from liability, and 2) immunity for “true” policy decisions.
  + At para. 29, the Court stated that the *Just* categories of cases are defined by the following criteria, and will not require the application of a *Cooper/Anns* analysis:

[the *Just* category will apply where] *a public authority has undertaken to maintain a public road or sidewalk to which the public is invited, and the plaintiff alleges they suffered personal injury as a result of the public authority’s failure to maintain the road or sidewalk in a reasonably safe condition.*

* + At paras. 50-51, the Court explained the distinction between “core policy decisions” and “operational implementation of policy”.

*[51] Nevertheless, our jurisprudence provides helpful guidance. Core policy decisions, shielded from negligence liability, are “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” (Imperial Tobacco, at para. 90). They are a “narrow subset of discretionary decisions” because discretion “can imbue even routine tasks” and protecting all discretionary government decisions would therefore cast “the net of immunity too broadly” (paras. 84 and 88).*

*[52] Activities falling outside this protected sphere of core policy — that is, activities that open up a public authority to liability for negligence — have been defined as “the practical implementation of the formulated policies” or “the performance or carrying out of a policy” (Brown, at p. 441; see also Laurentide Motels, at p. 718). Such “operational” decisions are generally “made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness” (Brown, at p. 441).*

* + At para. 67, the Court emphasized that:

*… core policy decisions are “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” (Imperial Tobacco, at para. 90). They are a “narrow subset of discretionary decisions” — meaning, the presence of choice is not a marker of core policy (ibid., at paras. 84 and 88). Core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary’s private law oversight. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity.*

* With these definitions in place, the Court concluded that the trial judge erred in the application of the core policy immunity, as the City’s actions fell outside its scope, and that the incident fell into the *Just* category. A new trial was ordered.
  1. **Liability in the context of sexual assault**
* This is an area of the law that has been under-litigated for far too long given the catastrophic harm that sexual assault has on its victims. This has started to change, as this area of tort law has received renewed attention in light of the #Metoo movement, and with the ongoing discoveries of the reprehensible conduct of clergy members of the Roman Catholic Church.

**Battery of a sexual nature– A variation of an existing tort**

* McLachlin J., as she then was, in *Non-Marine Underwriters, Lloyd's London v Scalera*, [2000 SCC 24](https://www.canlii.org/en/ca/scc/doc/2000/2000scc24/2000scc24.html?autocompleteStr=2000%20SCC%2024&autocompletePos=1), at para. 2 stated that the law of battery is in place to protect the inviolability of each individual’s person, and that it is for those who violate the physical integrity of others to justify their actions. McLachlin J. applied this logic to the context of battery that is of a sexual nature:

*…Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. "Force," in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented...*

* Battery of a sexual nature materially differs from conventional battery, as the protections for guarding against trivial contacts that define conventional battery disappear. As McLachlin J. stated in *Non-Marine Underwriters* at para. 21:

*Sexual contact does not fall into this category. It is not the casual, accidental or inevitable consequence of general human activity and interaction. It involves singling out another person's body in a deliberate, targeted act.*

* With this in mind, McLachlin J. concluded at para. 43 that battery of a sexual nature needs only to prove one thing in order to establish liability, that there was direct contact of a sexual nature by the defendant. Once this has been established, this then shifts the burden to the defendant to prove consent. Should this burden not be met by the defendant, then liability is established.

**Sexual battery where power dependency is present**

* Sexual battery within the confines of a power dependency relationship (such as that of a lawyer/client, doctor/patient, teacher/student, or priest/parishioner) was most authoritatively outlined in the case of *Norberg v. Wynrib*, [[1992] 2 S.C.R. 226](https://www.canlii.org/en/ca/scc/doc/1992/1992canlii65/1992canlii65.html?autocompleteStr=%5B1992%5D%202%20S.C.R.%20226&autocompletePos=1). La Forest J. (Gontier & Cory JJ. concurring) outlined the tort and provided the definition of effective consent at para. 26:

*… A battery is the intentional infliction of unlawful force on another person. Consent, express or implied, is a defence to battery. Failure to resist or protest is an indication of consent "if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection"; see Fleming, The Law of Torts (7th ed., 1987), at pp. 72-73. However, the consent must be genuine; it must not be obtained by force or threat of force or be given under the influence of drugs. Consent may also be vitiated by fraud or deceit as to the nature of the defendant's conduct. The courts below considered these to be the only factors that would vitiate consent*.

* This decision dealt with a doctor who exchanged sexual favours with his pain killer addicted patient in order for her to receive further medication. Within the context of a power dependency relationship, it is the case that any consent given by the battered party will be rendered legally ineffective. This is will be the case, as explained by La Forest J. at para 34, where “*it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely*.”
* At para. 41, La Forest J. expanded upon this aspect of the tort by borrowing the principle of unconscionability from the law of contracts, and applied it to battery of a sexual nature.

*41 It must be noted that in the law of contracts proof of an unconscionable transaction involves a two-step process: (1) proof of inequality in the position of the parties, and (2) proof of an improvident bargain. Similarly, a two-step process is involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which, as already noted, will ordinarily occur within the context of a special "power dependency" relationship. The second step, I suggest, is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of exploitation. Community standards of conduct may also be of some assistance…*

***Anderson v. Molon*,** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?resultIndex=1)

* Liability in Battery and Consent:

*[181] In any case, the plaintiff argues that she could not have consented to the sexual activity, because of the power imbalance between her and Fr. Molon. Consent must be meaningful, voluntary, and genuine to be effective: P.P. v D.D., 2016 ONSC 258 at para. 83. In this context, consent obtained through the exploitation of a position of power is often referred to as vitiated consent.* ***In my view, this is a phrase that ought to leave the lexicon in this area. Consent obtained through the exploitation of a position of power is no consent at all.*** *I am satisfied that Fr. Molon is liable in battery for the sexual abuse on the plaintiff that took place between September 1976 and May 1977.*

* Vicarious liability and institutional (direct) negligence:

*[182] The Diocese has conceded vicarious liability: it is therefore jointly and severally liable for this same abuse.*

*[183] In addition, the plaintiff claims the Diocese was directly liable for failing to take reasonable steps to protect the plaintiff from a risk of harm it knew or ought to have known existed. The significance of this allegation relates primarily to the plaintiff’s claim for punitive damages against the Diocese.*

*[184] In particular, the plaintiff alleges Bishop Exner failed to: a) take adequate steps to investigate Fr. Molon’s sexual improprieties; b) document any investigation of the allegations against Fr. Molon in the spring of 1976, contrary to the church’s own Canon Law policy; c) terminate Fr. Molon in the spring of 1976; d) restrict or limit Fr. Molon’s duties; e) warn parishioners of the risk of harm by Fr. Molon; and f) prioritize the protection of the parishioners above the avoidance of a scandal.*

*[185] For the purpose of this analysis, Bishop Exner and the Diocese are to be considered one and the same: John Doe v. Bennett, 2004 SCC 17 at para. 14. If a bishop is negligent in the discharge of his duties, the diocese is directly liable, because the office of the bishop, the enterprise of the diocese, and the episcopal corporation are legally synonymous: Bennett at para. 7.*

*[186] The plaintiff’s claim against the Diocese, like any claim in negligence, requires proof of the following elements:*

*a) the existence of a duty of care;*

*b) a breach of the standard of care; and*

*c) that the breach caused damage to the plaintiff.*

*[187] In this case, I am satisfied that all of these elements were present.*

*[188] It well established that a diocese owes its parishioners a duty of care to prevent their abuse at the hands of its priests: K. (W.) v. Pornbacher (1997), 32 B.C.L.R. (3d) 360 (S.C.). Although these cases typically deal with the abuse of children, I see no reason why that duty should not also encompass vulnerable, adult parishioners. In any case, at the time Bishop Exner became aware of rumours of Fr. Molon’s sexual improprieties, there was undoubtedly sufficient proximity and foreseeability to found a duty of care. Accordingly, I find the Diocese owed the plaintiff a duty of care to take reasonable steps to prevent her abuse at the hands of Fr. Molon.*

*[189] The findings of fact I have made in this matter leave no question that Bishop Exner failed to take any such reasonable steps. His conduct fell far short of the applicable standard of care. That said, I do not conclude that the evidence supports a finding Bishop Exner deliberately failed to document the investigation; as was urged by the plaintiff.*

*[190] Finally, it is clear that but for Bishop Exner’s negligence, Fr. Molon would not have committed the assaults. Had Bishop Exner taken appropriate steps prior to the arrival of the plaintiff, Fr. Molon would never have engaged in the abuse of the plaintiff starting that fall. Whatever damages flow from Fr. Molon’s abuse therefore also flow from the Diocese’s negligence: both were necessary causes of this damage.*

For Discussion: Should ‘grooming’ be a stand-alone actionable tort? *Walsh v. Byrne* [[2015] IEHC 414](https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2015/H414.html&query=((2015))+AND+(IEHC)+AND+(414)) – Irish High Court decision on the novel tort of sexual grooming. For an article written by the UK law firm Clyde & Co. on this decision and one following it, please see this link [here](https://www.lexology.com/library/detail.aspx?g=6b5b3e69-eb2b-4adc-b4c3-71c9d6462924).

**NEXT WEEK, Monday, January 23, 2023: WEEK 3, CAUSATION**

**Please read in advance of class:**

* 1. ***Athey v. Leonati*** [**[1996] 3 SCR 458**](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=1996%203%20SCR%20458%20&autocompletePos=1)
  2. ***Resurfice Corp. v. Hanke,*** [**2007 1 SCR 333**](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?resultIndex=1)
  3. ***Clements v. Clements*,** [**2012 SCC 32**](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?autocompleteStr=2012%20SCC%2032&autocompletePos=1)
  4. ***Foster v. Kindlan and Pineau*,** [**2012 BCSC 681**](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc681/2012bcsc681.html?autocompleteStr=2012%20BCSC%20681&autocompletePos=1)
  5. ***Shongu v Jing*,** [**2016 BCSC 901**](http://canlii.ca/t/grsdh)