

# CANADIAN ALCOHOL POLICY EVALUATION (CAPE) COMMUNITY OF PRACTICE

## *Legal aspects of duty to warn: the example of FASD*

Event #25: May 29, 2024



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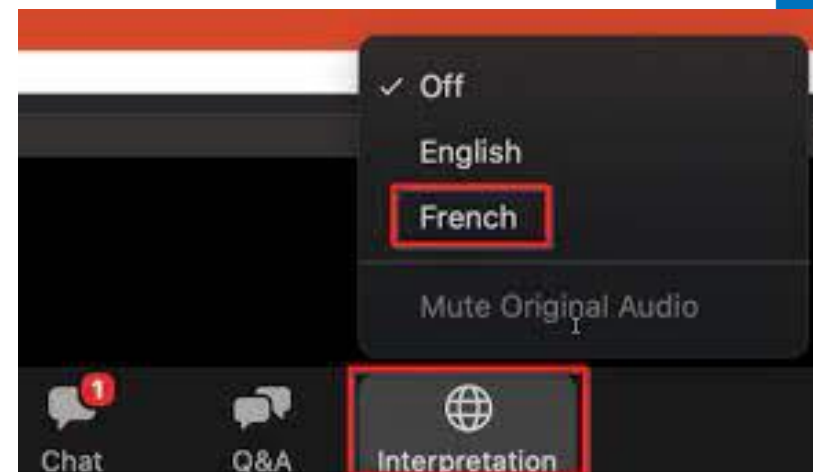
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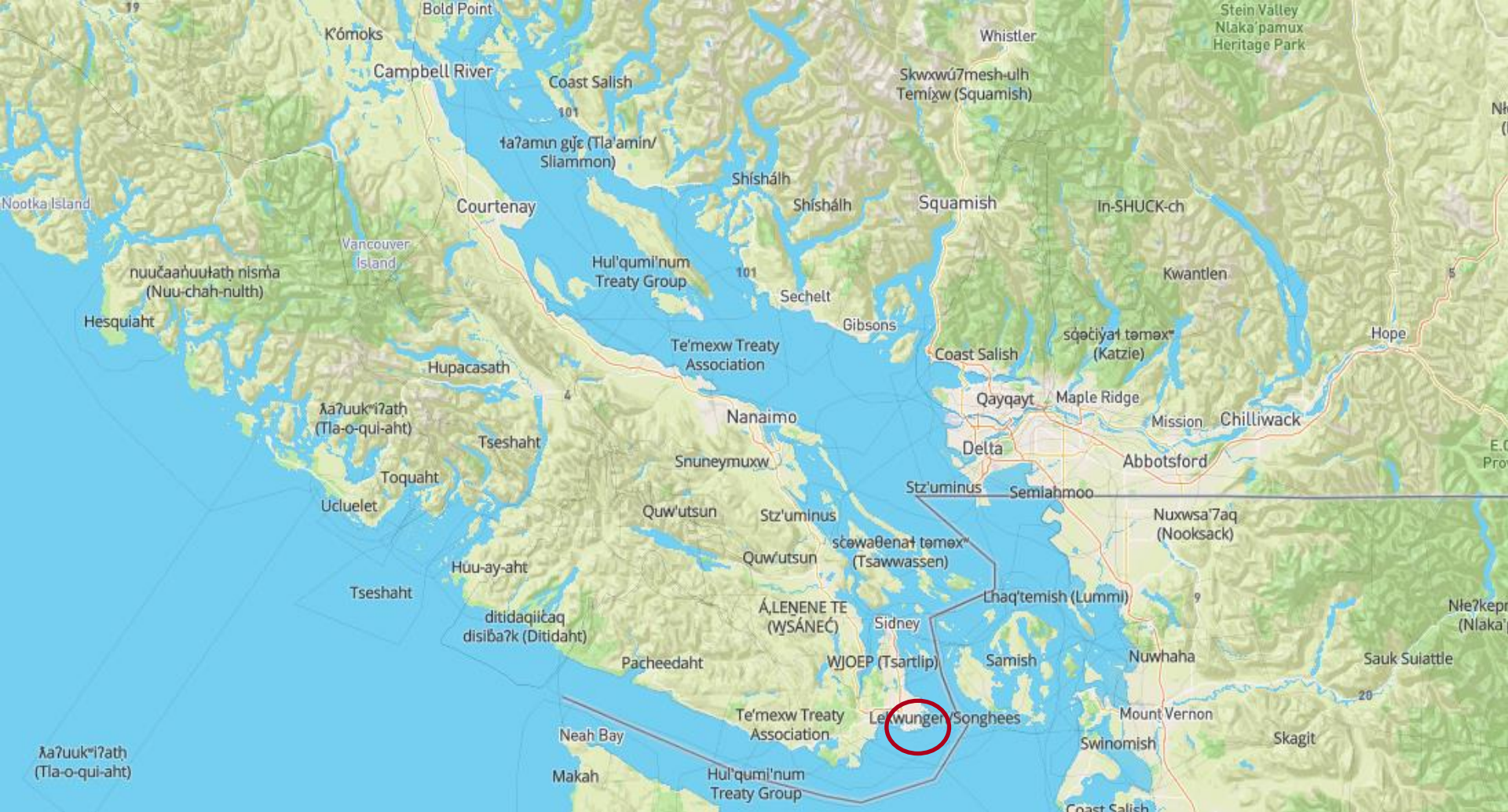
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# INTERPRÉTATION SIMULTANÉE EN FRANÇAIS

Interprétation simultanée en français est disponible  
**sauf** pour la section Q&R

Simultaneous French interpretation is available  
**except** for the Q&A portion  
(see Chat box for instructions)





We acknowledge and respect the Ləkʷəŋən (Songhees and Esquimalt) Peoples on whose territory the University of Victoria stands, and the Ləkʷəŋən and ƱSÁNEĆ Peoples whose historical relationships with the land continue to this day.

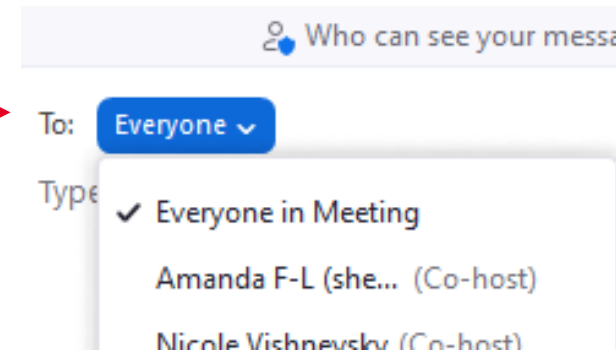
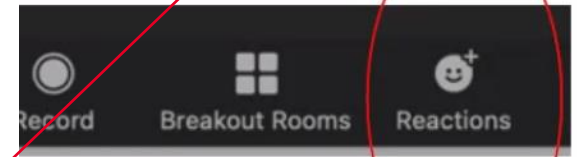
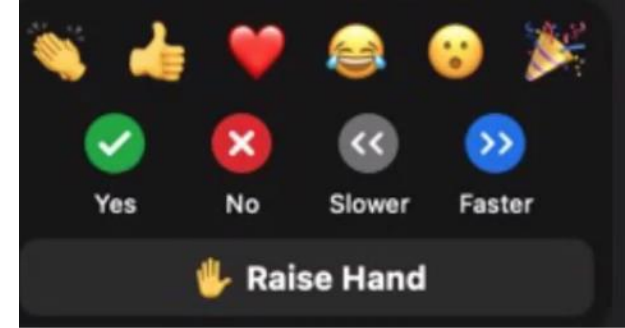
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- Today's webinar includes a presentation with Q&A = 90mins
- The presentation segment will be recorded.  
Links to the recording and webinar slides will be emailed.
- We invite your feedback about today's session.  
A survey link will be shared in the Chat box and via email.
- For persons with lived/living experience stipends, email [capecopcoord@uvic.ca](mailto:capecopcoord@uvic.ca)

*The views and opinions expressed as part of this event are those of the presenters alone and do not necessarily represent those of our funders or other organizations acknowledged*

# Q&A FORMAT

- Use chat box or Q&A tool to submit a question at any time.
- The moderator may read aloud questions typed in the chat or Q&A tool.
- Use 'raise hand' during Q&A segment. The moderator will ask you to unmute.
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# PRESENTER

Robert Solomon

Distinguished University Professor Emeritus  
Faculty of Law, University of Western Ontario

Robert has been involved in research and teaching in the fields of civil liability, health care law, impaired driving, and alcohol and drug policy for more than 50 years. He has served as a consultant to numerous government departments, provincial liquor authorities, universities, the insurance industry, and law firms on various aspects of alcohol-related civil liability. He has had a longstanding interest in the potential civil liability of alcohol manufactures and government alcohol suppliers for failing to inform consumers of the risks of FASD.

# **Canadian Alcohol Manufacturers' and Suppliers' Duty to Inform and Potential Liability for Fetal Alcohol Spectrum Disorder**

**Wednesday May 29, 2024**

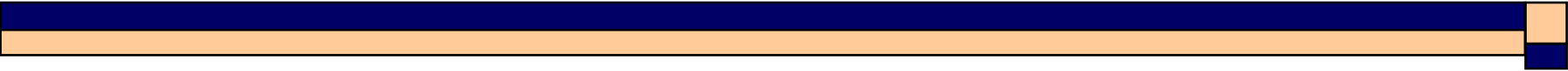
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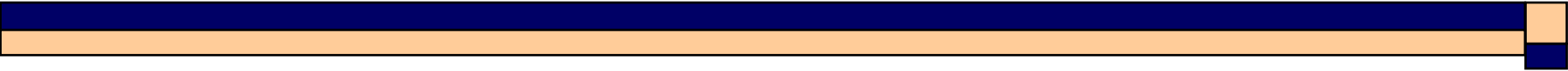
## Introduction

- Fetal Alcohol Spectrum Disorder (FASD) is generally accepted to be more common in Canada than the other major causes of developmental disabilities combined.
- FASD, a broad diagnostic term, includes at least three related conditions, commonly listed in descending order of severity as Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (pFAS), and Alcohol-Related Neurodevelopmental Disorder (ARND).
- Unlike the role alcohol plays in various cancers, heart disease, stroke, cirrhosis, and pancreatitis, FASD results exclusively from alcohol which facilitates proving causation in any related civil suit.
- Children with FASD may suffer anything from mild intellectual and behavioral deficits to profound disabilities and premature death.
- The extent of a child's FASD-related disabilities depends on the amount of alcohol his or her mother drank, when in the pregnancy it was consumed, the frequency of heavy drinking, genetics, and other factors.



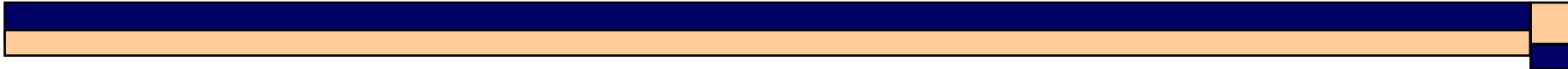
- Unlike tobacco and cannabis, alcohol is not subject to stringent federal advertising, marketing or packaging restrictions or health labelling requirements, despite accounting for about 18,000 deaths a year and \$19.7 billion in public costs.
- Contrary to what the alcohol industry has argued, there are no legal obstacles to enacting legislation requiring all alcohol products to include health information and warning labels.
  - The federal, provincial and territorial governments all have broad constitutional authority to enact stringent alcohol-related health labelling and warning legislation.
  - Such legislation would not violate the *Canadian Charter of Rights and Freedoms*.
  - The legislation would not violate international trade law or expose the government to liability for injurious falsehood or slander of goods.

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- Nine private members' bills requiring warning labels on alcohol products were introduced in Parliament from 1988 to 2006. The first eight died on the order papers. The ninth was defeated, with 163 opposed and only 91 in favour.
  - The most recent private member's bill calling for alcohol warning labels was introduced on November 2, 2022, and it is unlikely to fare any better.
  - The threat of being sued and held civilly liable provides another means of encouraging the alcohol industry and government liquor authorities to better inform women and their partners of the risks of FASD.

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- Prenatal injury cases, including those based on FASD, typically generate two related sets of claims:
    - one brought on the disabled child's behalf for injuries that he or she has suffered *in utero*; and
    - a second set of claims by the child's parents for any additional care that they have provided and costs that they have incurred attributable to their child's disabilities.
  - Both types of FASD-related claims are viable based on existing common law negligence principles that apply throughout Canada except for Québec.

# The Elements of a Common Law Negligence Suit

- All common law negligence actions involve the same six basic issues, which are outlined below, whether the claim is brought against an alcohol manufacturer for failing to inform a woman of the risks of FASD or a careless driver for crash injuries.
  1. **Duty of Care:** The plaintiff must establish that the defendant has a legal obligation to exercise care for his or her benefit in the circumstances of the case.
  2. **The Standard of Care and Its Breach:** The plaintiff must prove that, based on all the facts of the case, the defendant breached the requisite standard of care.
  3. **Causation:** The plaintiff must prove that the defendant's breach of the standard of care was a cause of his or her claimed loss.
  4. **Remoteness of Damages:** The plaintiff must establish that the causal relationship between his or her losses and the defendant's negligence was not too remote or tenuous to be recoverable.



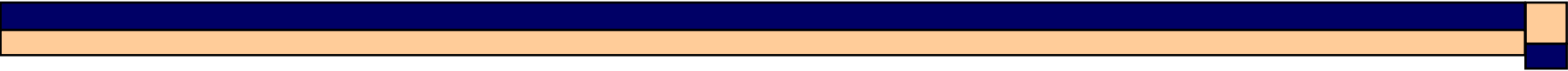
**5. Actual Loss (Damages):** The plaintiff must prove that he or she has suffered legally recognized losses and must establish their extent. Certain losses, such as death and grief are not, in and of themselves, recoverable at common law.

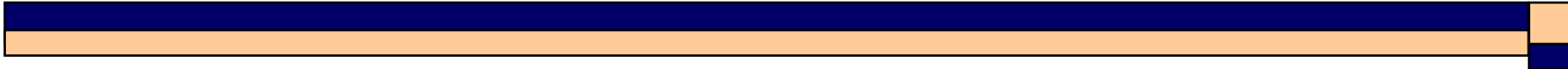
**6. Prejudicial Conduct (Defences):** Finally, the defendant must establish that the plaintiff's prejudicial conduct justifies reducing or negating the plaintiff's claim. The two most relevant defences are contributory negligence and voluntary assumption of risk.

- The plaintiff has the burden of establishing the first five elements on a balance of probabilities, and the defendant has the burden of establishing the sixth element to the same standard of proof.

# 1. The Duty of Care

- The Supreme Court of Canada (SCC) has repeatedly held that both manufacturers and suppliers have a broad common law duty to inform consumers of the risks inherent in using their products.
- The fact that an infant who was subsequently born alive was injured *in utero* is no bar to a cause of action being brought on his or her behalf against those who negligently caused or contributed to those injuries, with one exception.
- The SCC has held that for policy reasons a pregnant woman does not owe a duty of care to her foetus. This is important for current purposes because it would prevent manufacturers and suppliers who are held liable to an infant born with FASD from joining the infant's mother as a co-defendant or seeking contribution from her. It would also likely preclude them from raising her behaviour as a defence.

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- Given their monopoly over the wholesale alcohol market within their boundaries, the provincial and territorial liquor authorities are alcohol suppliers. Thus, like alcohol manufacturers, they have a duty to inform consumers of the risks of alcohol consumption.
  - Consumers do not have to be informed of obvious or well-known risks. However, situations involving such risks must be distinguished from those in which consumers have only a vague understanding of the nature, probability and severity of the risks or are aware of only some of the risks.
  - Although most women in Canada have heard of the term FASD and understand that they should limit their drinking during pregnancy, many are unaware that their foetus can suffer profound, lifelong alcohol-related injuries before they realize that they are pregnant.

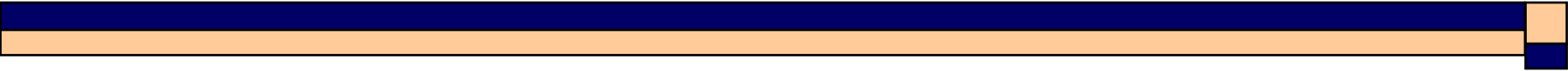
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- Similarly, many women may not be aware that FASD is the leading preventable cause of birth defects and developmental delay in Canada, and that as many as one in twenty-five Canadian children are born with FASD-related impairments of some kind.

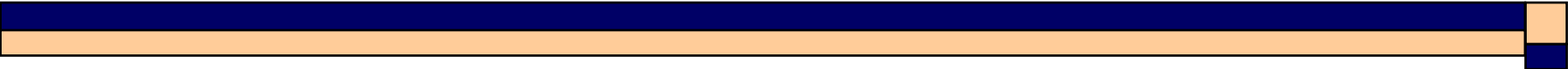
**Canadian alcohol manufacturers and suppliers, which include the provincial and territorial liquor authorities, have a broad common law duty of care to inform women of the risks that alcohol consumption poses of having an infant born with FASD.**



## 2. The Standard of Care and Its Breach

- Alcohol manufacturers and suppliers must disclose the risks posed by both the foreseeable use and foreseeable misuse of their products.
- Given the high rates of “binge” drinking among Canadian women of child-bearing age, the risks posed by this drinking pattern, including having an infant with severe FASD-related disabilities, cannot be written off as unforeseeable and must be disclosed.
- Manufacturers and suppliers are required to “tell the whole story.” They cannot bury, gloss over or otherwise obscure the risks associated with their products.
- If the risks are serious, a general or blanket warning will be insufficient.
- The Canadian courts have held manufacturers and suppliers of products intended for human consumption to very high standards of disclosure, which increase with the probability and severity of the risk.

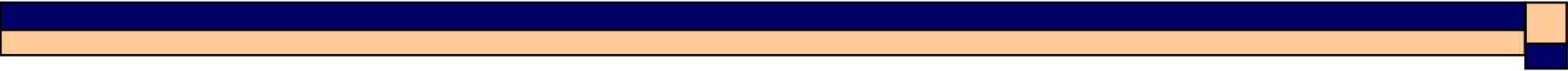
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- The information and warnings must be sufficiently specific, detailed and prominent to alert consumers to the nature, probability and severity of each known risk.
  - The standard of disclosure also reflects the consumers' sophistication. The obligation is generally greater for products, like alcohol, that are mass marketed to the public, particularly if the consumers include youth or other vulnerable constituencies.
  - Manufacturers and suppliers cannot ignore or discount objective medical research just because they believe that their products are safe or because they do not find the research compelling.
  - The fact that information on FASD is available from health agencies and other third parties does not lessen the obligation of alcohol manufacturers and suppliers to directly inform the public.
  - Even if a warning is provided, it will be assessed in terms of the totality of the defendant's marketing practices, including any counter-vailing messages or activities that would undermine the warning.

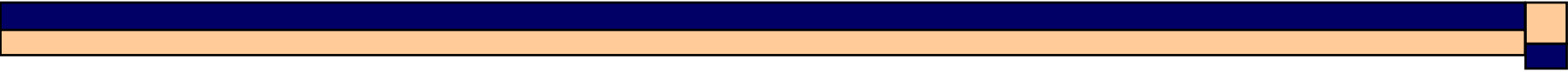
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- The fact that a manufacturer or supplier complied with the federal alcohol labelling legislation in Canada would not “pre-empt” or prevent them from being sued for breaching their common law duty to inform consumers.
  - Complying with federal, provincial or territorial labelling legislation is only relevant if the statutory requirements are “coextensive” with the common law duty to inform consumers.

**Canadian alcohol manufacturers and government liquor authorities have breached the standard of care by failing to clearly inform women of, among other things, the prevalence of FASD, its potentially lifelong catastrophic impact on their children, and the risk that their foetuses may suffer profound alcohol-related injuries before they realize that they are pregnant.**

### 3. Causation

- The plaintiff must prove on the balance of probabilities that the defendant's negligent failure to inform her was a cause of her claimed losses.
- First, the plaintiff must establish that alcohol was a cause of the losses.
  - Once a child has been diagnosed as suffering from FASD, alcohol will be held to be the cause of the disabilities attributable to that diagnosis. Children with the most profound disabilities, namely FAS and pFAS, are the easiest to diagnose.
  - Children suffering from ARND are harder to diagnose and many are not identified as having FASD. These challenges, coupled with the more limited range of potential damages, will result in fewer suits being brought on behalf of this larger group of children.
- Second, the plaintiff must establish that she would have abstained from or reduced her consumption had she been adequately informed.
  - The SCC has adopted what it has variously described as a “robust,” “pragmatic” and/or “common sense” approach to proof of causation, which permits an inference of causation to be drawn in the plaintiff's favor in the absence of evidence to the contrary.

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- The courts have tended to accept at face value a woman's testimony about the personal choices that she would have made, even if most other women would have made a different decision.
  - Third, the plaintiff must establish that abstaining from or reducing her drinking would have prevented her child from being born with FASD.
    - If the court accepts that the plaintiff would have abstained from drinking, then clearly her infant would not have been born with FASD.
    - However, complex causation and evidentiary issues arise if the court finds that the plaintiff would not have abstained from drinking but would have only moderated her consumption. As noted, there is no simple formula for determining the exact impact of a particular pattern of prenatal drinking.

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- While both the alcohol manufacturer and government liquor authority may be sued, fewer causation issues may arise in suing the government.
    - In a claim against a manufacturer, the plaintiff would have to establish that it was the manufacturer's product, as opposed to alcohol from other sources, that caused the claimed losses.
    - However, no such problem arises in suing the provincial and territorial liquor authorities because they are the suppliers of virtually all the alcohol that is sold and consumed within their borders.

**Children born with FAS and pFAS and their parents should have relatively little difficulty establishing causation, particularly in suing the government liquor authority. Proving causation will be more challenging in the case of children born with ARND.**

## 4. Remoteness of Damages

- The general test of remoteness is framed in terms of whether the plaintiff's losses are a foreseeable result of the defendant's negligence.
- The general test of remoteness has been broadened by the adoption of the "kind of injury" test and the "thin-skulled plaintiff" rule.
  - Once the kind of injury the plaintiff suffered is foreseeable (in this case FASD-disabilities and additional childrearing care and costs), all such injuries, care and costs are recoverable even if they far exceed what was anticipated.
  - Pursuant to the "thin-skulled plaintiff" rule, once the kind of injury the plaintiff suffered is foreseeable, the defendant is held liable for any unforeseeable consequences that resulted from the plaintiff's pre-existing susceptibility. Consequently, a defendant would not be relieved of liability simply because a woman's unique genetic make-up or age greatly increased her risks of having a child with FASD.

**The infant's FASD-related injuries and his or her parents' additional childrearing care and costs are foreseeable results of the defendants' failure to adequately disclose the risks of FASD. Consequently, these losses are not too remote in law and are recoverable.**

## 5. Actual Loss (Damages)

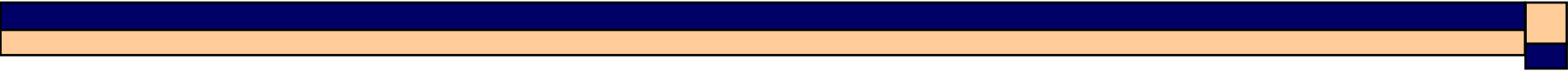
- The general principle for assessing compensatory damages is easy to state, namely putting the plaintiff in the position that he or she would have been in, to the extent that money can do so, had the wrong not been committed.
- However, applying the principle to children with significant disabilities involves complex calculations and assumptions about, among other things, the child's life expectancy and future need for care. These cases typically generate million-dollar damage awards and take years to resolve.
- Although parents cannot recover for their grief at having a child born with FASD, they can recover for any additional care that they provide and costs that they incur due to their child's disability. The parental damage awards tend to be less complicated and smaller than those made on behalf of the disabled child.

**Children born with FASD and their parents suffer a broad range of losses that are recoverable.**



## 6. Prejudicial Conduct (Defences)

- If the tobacco litigation is any indication, the alcohol manufacturers will likely raise numerous defences. Nevertheless, it is fanciful to suggest that the conduct of the disabled infant provides grounds for asserting any recognized defence to civil liability.
- However, the parental claim for additional childrearing care or costs would likely be challenged on the basis that the mother's drinking during her pregnancy gives rise to the defences of contributory negligence and voluntary assumption of risk.
- The SCC's decision that a pregnant woman does not owe a duty of care to her foetus would likely preclude raising her conduct as a defence. In any event, establishing contributory negligence or voluntary assumption of risk would be extremely difficult in an FASD case.

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- Even if a woman sued only the alcohol manufacturers, they would invariably draw the government into the litigation, either by making a third-party claim against, or seeking “contribution or indemnity” from, the government liquor authority.
  - Given that a pregnant woman does not owe a duty of care to her foetus, any attempt to make a third-party claim against her, or obtain contribution or indemnity from her would fail.

**Defendants sued for failing to disclose the risks of FASD will not be able to establish the defence of contributory negligence or voluntary assumption of risk.**

## Conclusions

- Alcohol manufacturers and government liquor authorities have fallen short of their obligation to disclose the risks of FASD, the leading cause of birth defects, cognitive impairment and physical disabilities among Canadian infants.
- Legal principles established almost 40 years ago provide these children and their parents with a viable basis for suing alcohol manufacturers and government liquor authorities for their FASD-related losses.
- The major barrier to such claims is not the governing legal principles, but rather the challenges that even knowledgeable plaintiffs face in suing billion-dollar defendants.
- The lack of successful FASD-related suits to date is reminiscent of the situation with the tobacco industry, which had evaded liability for decades. The Canadian alcohol industry appears to be on a similar trajectory.
- In my view, it is only a matter of time before Canadian alcohol manufacturers and government liquor authorities are sued and held liable for failing to warn of the risks of FASD.

# Questions?



# CAPE COMMUNITY OF PRACTICE

## ACKNOWLEDGMENT OF FUNDING AND SUPPORT



**Health Canada | Santé Canada**  
**Substance Use and Addictions Program | Programme sur l'usage et les dépendances aux substances**



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