

## **Torts Outline**

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### Exam Analysis

- Chart out all of the torts that are in the fact pattern.
- Who are the plaintiffs and defendants?
- Make the prima facie case.
- Raise the defenses to the prima facie case.
- General considerations, if any.
  - Vicarious liability
  - Joint tortfeasors

### Intentional Torts – Attacking the fact pattern

- Always treat the plaintiff as an average person (no super sensitivities except when D is aware of them.)
- Everyone is liable for an intentional tort!

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### 1) Introduction

- a) Definition – A tort is a *civil wrong*, other than breach of contract, for which the law provides a remedy. A person who breaches a tort duty (i.e., a duty to act in a manner that will not injure another person) has committed a tort and may be liable in a lawsuit brought by a person injured because of that tort. Torts is a fault-based system.
- b) Purposes of tort law: (1) to provide a peaceful means for adjusting the rights of parties who might otherwise “take the law into their own hands”; (2) to deter wrongful action; (3) to encourage socially responsible behavior; and, (4) to restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury.

### 2) Intentional Torts

- a) Assault, battery, false imprisonment, trespass to chattels, and trespass to land.
- b) Intent
  - i) Meaning of intent: There is no general meaning of “intent” when discussing intentional torts. For each individual tort, you have to memorize a different definition of “intent.” All that the intentional torts have in common is that D must have intended to bring about some sort of physical or mental effect upon another person.
    - (1) No intent to harm: The intentional torts are generally *not* defined in such a way as to require D to have intended to *harm* the plaintiff. (*Example: D points a water gun at P, making it seem like a robbery, when in fact it is a practical joke. If D has intended to put P in fear of imminent harmful bodily contact, the intent for assault is present, even though D intended no harm to P.*)
    - (2) Substantial certainty: If D knows with substantial certainty that a particular effect will occur as a result of her action, she is deemed to have intended that result.
      - (a) Garratt v. Dailey – Brian Dailey, five years old, pulls a chair out from under P as she is sitting down. The evidence at trial shows that he did not desire that she hit the ground, but he may have known with substantial certainty that she was trying to sit, and would hit the ground. Held, the case must be remanded to the trial court, to determine whether Brian indeed knew with substantial certainty that P would fall. If so, he meets the intent requirement for battery.

On remand, the trial court found that Brian knew with substantial certainty that P was trying to sit when he pulled the chair away and that there was therefore the intentional tort of battery.

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(ii) Regarding intentional torts, we treat those with diminished mental capacity the same as undiminished adults. As between a person injured and the one who has the diminished capacity, the equity lies with the victim.

(iii) Children:

1. Children are liable for intentional torts. Although the child may be liable, the parents may not have to pay.
2. As plaintiffs with respect to comparative fault, children are given credit for their modified capacity as minors.

(b) High likelihood: But if it is merely “highly likely” and not “substantially certain,” that the bad consequences will occur, then the act is not an intentional tort. “Recklessness” by D is not enough.

(3) Act distinguished from consequences: Distinguish D’s act from the *consequences* of that act. The act must be intentional or substantially certain, but the consequences need not be. (*Example*: D intends to tap P lightly on the chin to annoy him. If P has a “glass jaw,” which is broken by the light blow, D has still “intended” to cause the contact, and the intentional tort of battery has taken place, even though the consequences – broken jaw – were not intended.)

ii) Distinguish:

- (1) The intent to do an act. The defendant fires a rifle.
- (2) The intent to bring about the consequences. The bullet hits someone (intentionally or unintentionally?)
- (3) The defendant does not act. He is carried onto someone’s land against his will.
- (4) He acts intentionally, but under fear or threats.
- (5) He acts intentionally, but without any desire to affect the plaintiff, or any certainty that that he will do so. He rides a horse, which runs away with him and runs the plaintiff down.
- (6) He acts with the desire to affect the plaintiff, but for an entirely permissible or laudable purpose. He shoots the plaintiff in self-defense.

iii) Transferred intent – Under the doctrine of “*transferred intent*,” if D held the necessary intent with respect to person A, he will be held to have committed an intentional tort against *any other person* who happens to be injured. (*Example*: D shoots at A, and accidentally hits B. D is liable to B for the intentional tort of battery.) Transferred intent only applies to intentional torts.

- (1) Talmage v. Smith – D sees Smith and X on D’s shed. D throws a stick at Smith or X, and accidentally hits P. *Held*, assuming that D used an unreasonable degree of force, he is liable to P, even though it was not P he was trying to hit.

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Intent is something constructed. Intent must be borne from the defendant's actions, not from the defendant's motivations.

- (2) Different kind of tort intended: We saw above that if a defendant intended to commit an assault, and in fact struck the plaintiff, he will be deemed to have had the intent necessary for battery. This rule applies in the "transferred intent" situation as well. Thus if A intends to frighten B by shooting near her, and the bullet accidentally hits C, A has committed a battery upon C.
- iv) Five "trespass writ" torts: (1) battery; (2) assault; (3) false imprisonment; (4) trespass to land; and (5) trespass to chattels. If the defendant intends any one of these and any one of these occurs, he is liable. For example, he is liable when he shoots to frighten A (assault) and the bullet unforeseeably hits a stranger (battery). Transfer only applies to trespass writs. Not always upheld in courts (Popper).
- v) Children and intentional torts:
  - (1) Kids, as plaintiffs are different than kids as defendants.
  - (2) Children defendants are treated as adults. We treat those whose mental capacity is diminished as adults. Why? As between a person injured and the one who has diminished capacity, the equity lies with the victim. This puts pressure on society to control children and those with diminished capacity.
  - (3) In comparative fault, children plaintiffs are given credit for their modified capacity as minors.

### c) Battery

- i) Definition: Battery is: 1) **intentional**, (2) **harmful or offensive** (3) **contact** with the (4) **plaintiff**. (*Example*: A intentionally punches B in the nose. A has committed battery.)
- ii) **Intent**: It is not necessary that D desires to harm P. D has the necessary intent for battery if it is the case *either* that: (1) D intended to cause a harmful or offensive bodily contact; or (2) D intended to cause an *imminent apprehension* on P's part of a harmful or offensive bodily contact.
  - (1) Example 1: D shoots at P, intending to hit him with a bullet. D has the necessary intent for battery.
  - (2) Example 2: D shoots at P, intending to miss P, but also intending to make P think that P would be hit. D has the intent needed for battery (i.e., the "intent to commit an assault" suffices as intent for battery).
- iii) **Harmful or offensive contact**: If the contact is "harmful" – i.e., it causes pain or bodily damage – this qualifies. But battery also covers contacts, which are merely "*offensive*," i.e., damaging to a "*reasonable sense of dignity*." The test is whether or not the contact was **permitted** by the plaintiff.

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- iv) **Extends to personal effects:** Battery may be committed not only by contact with plaintiff's body, but also contact with her clothing, an object she is holding (e.g., a cane), etc. This applies to indirect contact, too (e.g., by ordering his dog to attack the plaintiff).
    - (1) Fisher v. Carrousel Motor Hotel, Inc. – P, who is Black, is attending a luncheon at the Brass Ring Club, located in D hotel. As P is standing in line waiting for his food, one of D's employees snatches the plate from P's hand, and shouts that because P is Black, he cannot be served in the club. P is not actually touched, nor is he frightened. He is, however, highly embarrassed. *Held*, P has suffered a battery. "The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with his body." Furthermore, P can recover compensatory damages for his mental suffering, even though there was no physical injury.
  - v) Plaintiff need not be aware: It is *not* necessary that the plaintiff have *actual awareness* of the contact at the time it occurs. (*Example*: D kisses P while she is asleep. D has committed a battery.)
  - vi) Scope of harm: If you put a course of harm into motion, you are responsible for all the harms to that person regardless of foreseeability.
  - vii) Medical malpractice: Completely unsolicited, unconsented touching (e.g., unwarranted surgery) is a battery.
  - viii) Questions of consent: Athletic injuries, date rape, sexual harassment, transmission of AIDS
- d) **Assault**
- i) Definition: Assault is: (1) **intentionally** (2) causing **apprehension** of (3) **harmful or offensive contact**.
    - (1) *Example*: D, a bill collector, threatens to punch P in the face if P does not pay a bill immediately. Since D has intended to put P in imminent apprehension of a harmful bodily contact, this is assault, whether D intends to in fact hit P or not.
    - (2) I D E S E T U X v. W D E S – P runs a tavern with her husband. One night when the tavern is closed, D demands wine. P leans out the window to tell him to go away and D swings at her with a hatchet. D misses, but P is frightened by the attempt. *Held*, D has committed the tort of assault, even though P was not touched.
  - ii) **Intent**: The defendant must either have intended to cause the apprehension or contact, or have intended to cause the contact itself.
    - (1) Intended apprehension: First, D intends to put P in *imminent apprehension* of the harmful or offensive contact, even if D does not intend to follow through (e.g. D threatens to shoot P, but does not intend to actually shoot P). Intention to frighten, but not actual contact = intent.

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- (2) Intent to make contact: Alternatively, D intends to in fact *cause* a harmful or offensive bodily contact. (*Example*: D shoots a gun at P, trying to hit him. D hopes P won't see him, but P does. P is frightened, but his shot misses. This is assault.) Attempted battery = assault.
  - (3) Summary: So D has the requisite intent for assault if D either "intends to commit an assault" or "intends to commit a battery."
- iii) Apprehension test:
- (1) Must be reasonable
  - (2) Apprehension is not to be confused with fear or intimidation.
  - (3) Apparentability will meet the apprehension requirement.
- iv) No hostility: It is not necessary that D bears malice towards P, or intends to *harm* her. (*Example*: D as a practical joke points a toy pistol at P, hoping that P will falsely think that P is about to be shot. D has one of the two alternative intents required for assault – the intent to put P in imminent apprehension of a harmful or offensive contact – so the fact that D does not desire to "harm" P is irrelevant.)
- v) "**Words alone**" rule: Ordinarily *words alone* are not sufficient, by themselves, to give rise to an assault. Normally, there must be some overt act – a physical act or gesture by D – before P can claim to have been assaulted. (*Example*: During an argument, D says to P "I'm gonna hit you in the face." This is probably not an assault, if D does not make any gestures like forming a fist or stepping towards P.)
- (1) Special circumstances: However, the *surrounding circumstances*, or D's past acts, may occasionally make it reasonable for P to interpret D's words alone creating the required apprehension of imminent contact.
- vi) **Imminence**: It must appear to P that the harm being threatened is *imminent*, and that D has the *present ability* to carry out the threat. (*Example*: D threatens to shoot P, and leaves the room for the stated purpose of getting his revolver. D has not committed an assault on P.) The circumstances must create in the mind of the party alleging the assault a well-founded fear of imminent battery, coupled with the apparent present ability to effectuate the attempt.
- (1) Western Union Telegraph Co. v. Hill – P comes into a telegraph office managed by D, and reminds D that he is under contract to fix her clock. D, standing behind the counter says, "if you will come back here and let me love you and pet you, I will fix your clock." D then leans across the counter, attempting to touch P. *Held*, it is a question for the jury whether or not the counter was so wide that D could not have leaned over and touched P. (By implication, if the counter was so wide that D could not have touched P, there could be no assault, even though P may have worried that D would have come around the counter and chased her.)

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- vii) P unaware of danger: P must be *aware* of the threatened contact. There is no assault if the plaintiff does not realize that the act has occurred. *Example:* there is no assault where the P did not know that a gun was aimed at him with the intent to shoot him.
- viii) Threat to third persons: P must have an apprehension that *she herself* will be subjected to a bodily contact. She may not recover for her apprehension that *someone else* will be so touched. (*Example:* P sees D raise a pistol at P's husband. D shoots and misses. P cannot recover for assault, because she did not fear a contact with her own body.)
- ix) Conditional treat: Where D threatens the harm only if P does not obey D's demands, the existence of an assault depends on whether D had the *legal right* to compel P to perform the act in question. (*Example:* P, a burglar, breaks into D's house. D says, "If you don't get out, I'll throw you out." There is no assault on P, since D has the legal right to force P to leave.)
- x) Transferred intent: Intending any of the intentional torts and completing another...intent was transferred and defendant is liable.
- xi) Criminal v. civil (tortious) assault:
  - (1) Criminal: A victim need not have an apprehension or fear of contact. A criminal assault occurs if the defendant intends to injure the victim and has the ability to do so.
  - (2) Assault in tort: The victim must have an apprehension of contact and it is not necessary that the defendant have the actual ability to carry out the threat.

### e) False Imprisonment

- i) Definition: False imprisonment is: (1) a sufficient **act of restraint** that (2) **confines P** to a (3) **bounded area**.
  - (1) *Example:* D wants to have sex with P, and locks her in his bedroom for two hours hoping that P will agree. She does not, and D lets her go. This is false imprisonment, because D has intentionally confined P.
  - (2) Big Town Nursing Home, Inc. v. Newman – Plaintiff was locked up against his will in a nursing home by the staff of the home. *Held*, False imprisonment is the direct restraint of one person of physical liberty by another without adequate legal justification.
    - (a) One person cannot give away the rights to liberty of another unless there is (1) a power of attorney, or (2) legal guardianship, or (3) mental incompetency.
    - (b) There is no general right for medical members to take away the liberty of others.
- ii) Intent: P must show that D either *intended* to confine him, or at least that D *knew with substantial certainty* that P would be confined by D's actions. The tort of false imprisonment cannot be committed merely by negligent or

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reckless acts. (*Example*: D, a shopkeeper, negligently locks the store while P, a customer, is in the bathroom. This is not false imprisonment, since D did not intend to confine P.)

- iii) “**Confinement**”: The idea of confinement is that P is held *within* certain limits, not that she is prevented from entering certain places. (*Example*: D refuses to allow P to return to her own home. This is not false imprisonment – P can go anywhere else, so she has not been “confined.”)
- (1) Whittaker v. Sandford – D induces P to sail with him from Syria to America, promising to let P off the boat as soon as it arrives in the U.S. The boat arrives at a U.S. port, but D refuses to give P a rowboat so that she can leave the yacht. *Held*, P committed false imprisonment, since he implicitly agreed to furnish P with whatever was necessary (here, a rowboat) to enable her to leave the yacht.
  - (2) Nature of confinement: If you are confined in a large area, it is still confinement and, hence, false imprisonment.
  - (3) An area is not bounded if there is a **reasonable means of escape** and **P is aware** of the egress point.
  - (4) **Inaction** is enough for an act of restraint.
- iv) **Means used**: The imprisonment can be carried out by direct **physical means**, but also by *threats* or by the assertion of *legal authority*.
- (1) Threats: If D threatens to use force if P tries to escape, confinement exists.
  - (2) Assertion of legal authority: Also, confinement may be caused by D’s assertion that he has the *legal authority* to confine P – this is true even if D does not in fact have the legal authority, so long as P reasonably believes that D does, or is in doubt about whether D does. (*Example*: Storekeeper suspects P of shoplifting, and says, “I hereby make a citizen’s arrest of you.” Putting aside whether the storekeeper has a privilege to act this way, Storekeeper has “confined” P, if a reasonable person in P’s position would think that Storekeeper had the authority to make such an arrest, even if under local law Storekeeper did not have that authority.)
  - (3) Hardy v. LaBelle’s Distributing Co. – Plaintiff’s manager took P to an office and closed the door. While she was there, P’s managers questioned P about stealing a watch. P claimed false imprisonment. *Held*, false imprisonment requires that the P be held against her will unlawfully. The individual may be restrained by acts or merely by words, which she fears to disregard. However, it is not enough to *feel* confined, you must actually be confined. P must demonstrate that she *felt compelled* to obey.
- v) **Awareness**: P must know of confinement: P must either be *aware* of the confinement, or must suffer some actual harm. (*Example*: P is locked in her hotel room by D, but P is asleep for the entire three-hour period, and learns only later that the door was locked. This is probably not false imprisonment.)

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- (1) Parvi v. City of Kingston – Police take the intoxicated P out to an abandoned golf course to “dry out.” After police leave P, he wanders into a highway and is struck by a car. *Held*, false imprisonment is not suffered unless its victim knows of the dignitary invasion at the time of the incident or confinement. In this case it was the awareness *at the time of the confinement*, not the inability to recall the confinement, that makes it false imprisonment.
- (2) Potential exceptions:
  - (a) Awareness of confinement might not be necessary when the one confined is a child.
  - (b) If you are injured while you are confined and you cannot remember it ... this is false imprisonment.
  - (c) There is no general right for law enforcement (police) to take away the liberties of another.
- vi) False imprisonment must be against the will of the plaintiff.
  - (1) Consent for partial confinement is OK. However, P may revoke their consent to confinement at any time. There is no consent when it is based on fraud.
- vii) **Time**: The amount of time one is confined is irrelevant.
- viii) **Escape**
  - (1) If there is a reasonable means of escape (e.g., a known way out), there is no false imprisonment. If one exit of a room or a building is locked with a plaintiff inside, but another reasonable means of exit is available, there is no imprisonment.
  - (2) Escape is unreasonable if: (1) it involves exposure of the person; (2) there will be material harm to clothing to escape; (3) there is danger of substantial harm; or (4) P does not know of its existence or it is not apparent.
  - (3) A person who is confined does not have to try and escape.
- ix) Liberty: One person cannot give away the right to liberty of another. With respect to the medical community, there is no general right to take away the liberty of others.
  - (1) Unless there is a power of attorney.
  - (2) Unless there is a legal guardianship
  - (3) Unless there is mental incapacity.
  - (4) Enright v. Groves – Woman in car/police officer arrests her for not producing license. *Held*, false arrest (imprisonment) arises when one is taken into custody by a person who claims but does not have proper legal authority.

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(a) Imprisonment or confinement must be based on lawful reasons.

### f) Intentional Infliction of Emotional Distress

- i) Definition: This tort is the intentional or reckless infliction, by ***extreme and outrageous conduct***, of ***severe emotional or mental distress***, even in the absence of physical harm.
- (1) State Rubbish Collectors Ass'n v. Siliznoff – D threatens that if P, a garbage collector, does not pay over part of his garbage collection proceeds to D and his henchmen, D will severely beat P. Since D's conduct is extreme and outrageous, and since he has intended to cause P distress (which he has succeeded in doing), D is liable for infliction of emotional distress. The body of law is shifting to recognize not only bodily harm, but also serious, unprivileged, intentional invasions against emotional and mental tranquility.
- ii) Intent: "Intent" for this tort is a bit broader than for others. There are three types of culpability by D:
- (1) D *desires* to cause P emotional distress.
- (2) D knows with *substantial certainty* that P will suffer emotional distress.
- (3) D *recklessly* disregards the high probability that emotional distress will occur. (*Example: D commits suicide by slitting his throat in P's kitchen. D, or his estate, is liable for intentional infliction of emotional distress because although D did not desire to cause distress to P, or even know that the distress was substantially certain, he recklessly disregarded the high risk that distress would occur.*)
- (4) Transferred intent: The doctrine of "*transferred intent*" is applied only in a very *limited* fashion for emotional distress torts (i.e., **it is almost always not transferable**). So if D attempts to cause emotional distress to X (or to commit some other tort on him), and P suffers emotional distress, P usually will not recover.
- (a) **Exception:** The main exception is that the transferred intent doctrine is applied if: (1) D directs his conduct to a member of P's *immediate family*; (2) P is *present*; and (3) P's presence is *known* to D.
- (b) Taylor v. Vallelunga – P watches her father being beaten up by D, and as a result of seeing this beating, suffers severe emotional distress. *Held*, since P does not allege that D *knew* of her presence (nor that D intended to cause her emotional distress), P's claim does not state a cause of action. P cannot recover because D did not know of P's presence.
- (i) For IIED, the conduct must be directed at the plaintiff (contrast with negligent infliction of emotional distress).
- iii) "**Extreme and outrageous**": P must show that D's conduct was *extreme and outrageous*. D's conduct has to be "beyond all possible bounds of decency."

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- (1) *Example*: D, as a practical joke, tells P that her husband has been badly injured in an accident, and is lying in the hospital with broken legs. This conduct is sufficiently outrageous to qualify.
  - (2) Slocum v. Food Fair Stores of Florida – P, a shopper, asked D, an employee of a grocery store, for the price of an item. D said, “If you want to know the price, you’ll have to find out the best way you can ... you stink to me.” *Held*, The intentional infliction of emotional distress is tortious when one experiences an unwarranted intrusion calculated to cause “*severe emotional distress*” to a person of ordinary sensibilities, in the absence of special knowledge or notice.
  - (3) **Offensive language is, by itself, not sufficient for the tort.** This is the balancing of the First Amendment. Courts expect a “tough skin.”
  - (4) **Exceptions**:
    - (a) Where the conduct is **continuous**.
    - (b) Where the defendant is aware of **super sensitivities** (children, elderly).
    - (c) **Innkeeper/common carrier** – same conduct, different defendant. Their conduct must be directed at the right type of plaintiff (guests, passengers).
  - iv) **Actual severe distress**: P must suffer *severe emotional distress*. P must show at least that her distress was severe enough that she *sought medical aid*. Most cases do not require P to show that the distress resulted in bodily harm.
    - (1) Harris v. Jones – P has a speech impediment. D physically and verbally mimicked his handicap. P sued for IIED and for the physical ailments he suffered. *Held*, the court did not find the harm severe enough to hold D liable. **Four elements must coalesce to impose liability**: (1) conduct must be intentional or reckless; (2) conduct must be extreme or outrageous; (3) must be a causal connection between conduct and harm; and (4) the emotional distress must be severe.
    - (2) When considering those with a *preexisting condition*, the harm must in some way exacerbate the condition. There must be a measurable increased in the disability.
  - v) Future threats are generally *not* actionable. To an extent, all threats are prospective. The question is imminence.
  - vi) Children: The standard of the outrageous behavior is lowered when the victim is a child. The act does not have to be as extreme to be actionable.
  - vii) Automatic examples of intentional infliction of emotional distress:
    - (1) Intentional false reports of death.
    - (2) Intentional disfigurements of corpses.
- g) Trespass to Land**
- i) Definition: As generally used, “*trespass*” occurs when either:

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- (1) D *intentionally enters P's land*, without permission.
  - (2) D *remains* on P's land without the right to be there, even if she entered rightfully.
  - (3) D *puts an object on* (or refuses to remove an object from) P's land without permission.
- ii) Intent: The term "trespass" today refers only to *intentional* interference with P's interest in property. There is no strict liability. (*Example*: D, a pilot, loses control of the aircraft, and the aircraft lands on P's property. This is not trespass to land.)
- (1) If you intend to be on another's property, it is trespass. If you did not intend to be on one's property, it is not trespass.
  - (2) Negligence: If D *negligently* enters P's land, this is generally treated, as the tort of negligence, not trespass.
- iii) Particles and gases: If D knowingly causes *objects*, including particles or gases, to enter P's property, most courts consider this trespass.
- (1) Bradley v. American Smelting & Refining Co. – Gases emitted from a copper smelter land on the P's land making it unusable for livestock feeding. *Held*, a **trespass to land must include**: (1) an invasion affecting an interest in the exclusive possession of one's property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion to plaintiff's possessory interest; and (4) substantial damage to the res.
- iv) Air space: It can be trespass for a plane to fly over P's property. However, today, most courts find liability only if:
- (1) The plane enters into the *immediate reaches* of the airspace (below federally-prescribed minimum flight altitudes); and
  - (2) The flight *substantially interferes* with P's use and enjoyment of his land (e.g., by causing undue noise, vibration, and pollution).
  - (3) City of Newark v. Eastern Airlines – P's claimed that airline D was flying so low to their property as to constitute a nuisance and a trespass to land. *Held*, a landowner owns not only as much of the space above the ground as he occupies, but also as much thereof as he may use in connection with the land. The airspace, which lies above the *immediate reaches of his land*, is the public domain.
  - (4) Rights of airspace are based on use & function.
- v) Other factors:
- (1) Trespass requires some sort of *damage*, but not always.
  - (2) *Visibility*: If the substance is invisible, but it accumulates, it can be trespass (air pollution).

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(3) *Nuisance*: Something that interferes with the enjoyment of the land. Requires a balancing of factors between the harms & benefits of that which is creating the nuisance.

(a) Trespass to land is about *possession* and nuisance is about *use*.

### h) Trespass to Chattels

i) Definition: “Trespass to chattels” is defined as any *intentional interference* with a person’s *use or possession* of a chattel. D only has to pay damages, not the full value of the property (as in conversion below).

(1) Loss of possession: If P *loses possession* of the chattel for any time, recovery is allowed even if the chattel is returned unharmed. (*Example*: D takes P’s car for a five-minute “joy ride,” and returns it unharmed. D has committed a trespass to chattels.)

(2) Trespass to chattels protects the right to unfettered possession of things.

(3) Trespass to chattels is about *possession* (requires damage). Conversion is about *usage* (does not require damage).

### i) Conversion

i) Definition: Conversion is an *intentional* interference with a P’s possession or ownership of property *so substantial* that D should be required to pay the property’s *full value*.

(1) *Example*: D steals P’s car, then seriously (though not irreparably) damages it in a collision. D is liable for conversion, and will be required to pay P the full value of the car (though D gets to keep the car).

ii) Intent: Conversion is an intentional tort, but all that is required is that D have intended to take possession of the property. Mistake as to ownership will not be a defense. (*Example*: D buys an old painting from an art dealer, and reasonably believes that the art dealer has good title. In fact, the painting was stolen from P years before. D keeps the painting in his house for 10 years. D is liable for conversion, notwithstanding his honest mistake about title.)

iii) Distinguished from trespass to chattels: Courts consider several factors in determining whether D’s interference with P’s possessory rights is severe enough to be conversion, or just trespass to chattels. Factors include:

(1) Duration of D’s *dominion* over the property.

(2) D’s *good or bad faith*.

(3) The *harm* done to the property.

(4) The *inconvenience* caused to P.

iv) Different ways to commit: There are different ways in which conversion may be committed:

(1) Acquiring possession: D takes *possession* of the property from P.

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- (a) Bona fide purchaser: A *bona fide purchaser* of *stolen goods* is still a converter, even if there was no way for him to know they were stolen.
- (2) Transfer to third party: D can also commit conversion by *transferring* a chattel to one who is not entitled to it. (*Example*: D, a messenger service, delivers a package to the wrong person, X. X absconds with the goods. D has committed conversion, even though D did not end up with possession of the goods.)
- (3) Withholding good: D may commit conversion by *refusing to return* good to their owner. (*Example*: D, a parking garage, refuses to give P back her car for a day.) The essence of the conversion claim is that the defendant has exercised *dominion* over the goods. There is generally no liability for conversion until the plaintiff has *demand*ed return of the chattel and has been refused.
  - (a) Russell-Vaughn Ford, Inc. v. Rouse – P goes to D car dealer, to discuss trading in his old car for a new one. D’s sales associate asks P for his old car keys during inspection of the new cars, and he gives them to him. After P declines to do the trade-in, D’s employees refuse to give him back his keys, and laughs at him. P is compelled to call the police department, after which the keys are returned. *Held*, D has committed conversion of P’s automobile, and the jury’s verdict of \$5,000 must be upheld. Even though D did not make use of the car, and did not harm it, its employees keeping of the keys constituted the exercise of dominion over the car in “defiance of the plaintiff’s right.”

Furthermore, it is no defense that P could have obtained a second set of keys from his wife, since P is not required to “exhaust all possible means of gaining possession of a chattel which is withheld from him by the defendant...” And it is the entire automobile, not merely the keys, which have been converted, since use of the entire vehicle was denied to P.

    - (i) Does the conversion of a symbol of ownership constitute a conversion of the object as well? Yes.
    - (ii) The owner gets the \$5,000 for the time that he cannot use his car. He also gets his car back.
- (4) Destruction: Conversion may occur if D *destroys* or fundamentally alters the goods.
- (5) If something is taken away and returned, without the use or contemplation of the owner, then it is *not* conversion.
- v) Forced sale: If P is successful with her tort suit, a *forced sale* occurs: D is required to pay the *full value* of the goods (not just the amount of the use of damage, as in trespass to chattels), but gets to keep the goods.

### vi) Elements

- (1) Nature of the Tort

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(a) Pearson v. Dodd – Former employees of U.S. Senator enter office, remove files, make copies and return files. Copies given to journalist who writes expose on senator. P sued for conversion of the documents. *Held*, information and ideas are not subject to legal protection except where ideas or information is gathered at some cost and sold on the market, where ideas are formulated with labor & inventive genius, and where they constitute instruments of fair and effective commercial competition.

### (2) Effect of Good Faith

(a) When the defendant intends to affect the chattel in a manner inconsistent with the plaintiff's right to control, the fact that he acted in good faith, and under a mistake, does not prevent liability for conversion.

(b) The other major area in which an innocent conversion may take place concerns good faith purchasers. An innocent purchaser cannot obtain title from a thief. The purchaser acts at her peril and may be sued for conversion by the true owner.

### (3) Necessity of Demand; Return of Chattel

(a) *Demand*: In most states, a conversion occurs as soon as the defendant takes dominion and control over the goods in a manner inconsistent with the plaintiff's ownership. Owner does not have to demand the chattels back.

(b) *Return*: When the plaintiff refuses to accept the offered return, the older rule was that the defendant could not force the goods back upon him in reduction of damages.

### (4) Damages

(a) The measure of damages for conversion is the value of the property converted.

(b) The market value is determined at the time and place of the conversion.

### (5) What May Be Converted

(a) Because of its origin as an action against the finder of lost goods, trover was limited to the conversion of things that were capable of being lost and found.

(b) The decisions are still in agreement that there can be no conversion of intangible rights, which are not customarily merged in an instrument, such as the goodwill of a business.

### (6) Who May Maintain the Action

j) Notes on Intentional Torts:

i) Children and diminished capacity:

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- (1) Those with diminished capacity (children and mentally handicapped) are liable for the harm they do (battery, assault, IIED), but are given some slack when harm is done to them (FI).

### 3) Privileges (Defenses to Intentional Torts)

- a) **Consent** – first defense against an intentional tort.
  - i) **Analysis:**
    - (1) Determine that the plaintiff had the **capacity** to give consent.
    - (2) What **kind** of consent:
      - (a) **Express** – words or writing was used.
      - (b) **Implied** – apparent implied consent. Evident by: (1) plaintiff's conduct or (2) custom/usage.
    - (3) If there was **mistake, fraud, or coercion**, the consent is invalid.
    - (4) If consent was given, did the plaintiff **exceed the boundary** of the consent?
    - (5) Was the consent against a strongly held public policy and therefore void?
    - (6) Consent is always retrievable.
  - ii) Hackbart v. Cincinnati Bengals, Inc. – Booby Clark, a player for the Bengals, hit P on the back of the head and neck with his forearm, knocking him to the ground. (Clark claimed that he was frustrated that his team was losing the game.) The court held that P could bring a tort suit. The rules of pro football expressly prohibit “striking on the head, face, or neck with...the hand...[or] forearm....” Therefore, it could not be said that the generally violent nature of the game, and the fact that fouls are often overlooked, meant that P had no remedy except retaliation.
    - (1) Who will decide consent? Society. (Gladiators – no, football – yes).
  - iii) **Express consent:** If P expressly *consents* to an intentional interference with his person or property, D will not be liable for that interference. (*Example:* P says to D, “Go ahead, hit me in the stomach – I’ll show you how strong I am.” If D does so, P’s consent prevents P from suing for battery.)
  - iv) **Implied consent:** Existence of consent may also be *implied* from P’s conduct, from custom, or from circumstances.
    - (1) Objective manifestation: It is the *objective manifestations* by P that count – if it reasonably seemed to one in D’s position that P consented, consent exists regardless of P’s subjective state of mind. (*Example:* D offers to vaccinate all passengers on their ship. P holds up her arm and receives the vaccination. Since it reasonable appeared to D that P consented, there will be consent regardless of P’s actual state of mind.)
  - v) **Lack of capacity:** Consent will be invalidated if P is *incapable* of giving that consent, because she is a child, intoxicated, unconscious, etc.

## Torts Outline

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- (1) Consent as a matter of law: But even if P is incapable of truly giving consent, consent will be *implied* “as a matter of law” if these factors exist:
  - (a) P is unable to give consent;
  - (b) Immediate action is required to save P’s life or health;
  - (c) There is no indication that P would not consent if able; and
  - (d) A reasonable person would consent in the circumstances.
- (2) *Example*: P is brought unconscious to the emergency room of D, a hospital. D can perform emergency surgery without P’s actual consent – consent will be implied as a matter of law. Therefore, P cannot sue for battery.)
- vi) **Exceeding scope**: Even if P does consent to an invasion of her interests, D will not be privileged if he goes substantially *beyond the scope* of the consent.
  - (1) *Example*: P visits D, a doctor, and consents to an operation on her right ear. While P is under anesthetic, D decides that P’s left ear needs an operation as well, and does it. P’s consent does not block an action for battery for the left-ear operation, since the operation went beyond the scope of P’s consent.
  - (2) Emergency: However, in the surgery case, an *emergency* may justify extending the surgery beyond that consented to.
  - (3) Athletic interactions, sexual intercourse: Intent can be waived or voided.
- vii) Consent to criminal acts: Where D’s act against P is a *criminal act*, courts are split. The majority rule is that P’s consent is *ineffective* if the act consented to a crime. (Example: P and D agree to fight with each other. In most states, each may recover from the other, on the theory that consent to a crime – such as breach of the peace – is ineffective.)
- viii) Consent due to mistake: Suppose the plaintiff’s consent would not have been given except for the fact that he is *mistaken* about some material aspect of the transaction. As a general rule, such a mistake is *not* by itself enough to make the consent ineffective. But if the defendant knew of the plaintiff’s mistake, or induced that mistake (as by lying to the plaintiff), then the mistake would vitiate the consent. Thus, in the above example, if D knew that he had herpes, and was lying to P when he said he didn’t, P’s consent would be ineffective, and she could sue for battery.
  - (1) DeMay v. Roberts – P, a woman in labor, summons D<sub>1</sub>, a doctor, to her house to help her in childbirth. To help carry certain essential items, D<sub>1</sub> brings with him D<sub>2</sub>, who is young, unmarried, and not a doctor; these facts are known to D<sub>1</sub> but not to P. P permits D<sub>2</sub> to be present during the birth, and to hold P’s hand. *Held*, P’s consent to D<sub>2</sub>’s presence and contact is ineffective, because it was a mistake induced by D<sub>1</sub>’s and D<sub>2</sub>’s deceit. Therefore, P may recover against both.

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- (a) This case is about battery and privacy. It recognizes the privacy issue early on (1881). Recognizes a women's right to privacy.
- (b) The case recognizes the fact that one's presence can be a tort (assault, battery, invasion of privacy) when there is no consent.

### b) Defense of Property

- i) General rule: A person may use reasonable force to *defend her property*, both land and chattels.
  - (1) You are entitled to self-defense if your perception of the threat is reasonable and the response to the threat is reasonable.
  - (2) **Timing requirement must be satisfied:** You must show that threat is imminent.
  - (3) **Test to use defense of a tort:**
    - (a) *Self defense* – a reasonable belief that the tort is being committed and that your life is in danger. There is no duty to retreat.
    - (b) *Defense of others* – You can defend others, but you must be right.
    - (c) *Defense of property* – Reasonable belief that someone is infringing on your property.
  - (4) **Test to see if the D exceeded the defense of a tort:**
    - (a) *Did the D use too much force?* How much:
      - (i) Self-defense/defense of others – reasonable force (including deadly force).
      - (ii) Defense of property – reasonable force (but never deadly force).
  - (5) Warning required first: The owner must first make a *verbal demand* that the intruder stop, unless it reasonably appears that the violence or harm will occur immediately, or that the request to stop will be useless.
- ii) **Mistake:** The effect of a *reasonable mistake* by D varies:
  - (1) Mistake as a danger: If D's mistake is about whether force is necessary, D is protected by a reasonable mistake. (*Example:* D uses non-deadly force to stop a burglar whom he reasonably believes to be armed. In fact, the burglar is not armed. D can rely on the defense of property.)
  - (2) Privilege: But if owner's mistake is about whether the intruder has a *right* to be there, the owner's use of force will not be privileged. (*Example:* D reasonably believes that P is a burglar. In fact, P is a friend who has entered D's house to retrieve her purse, without wanting to bother D. Even non-deadly force by D will not be privileged.)
- iii) Deadly force: The owner may use *deadly force* only where: (1) non-deadly force will not suffice; and (2) the owner reasonably believes that without deadly force, *death or serious bodily harm* will occur. (*Example:* D sees P trespassing in D's backyard. D asks P to leave, but P refuses. Even if there is

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no way to make P leave except by shooting him, D may not do so, since P's conduct does not threaten D with death or serious bodily harm.)

(a) Burglary: A homeowner is generally *allowed* to use deadly force against a *burglar*, provided that she reasonably believes that nothing short of this force will safely keep the burglar out.

iv) Mechanical devices: An owner may use a *mechanical device* to protect her property only if she would be privileged to use a similar degree of force if she were present and acting herself.

(1) Reasonable mistake: An owner's right to use a dangerous mechanical device in a particular case will be measured by whether deadly force could have been used against *that particular intruder*.

(a) Katko v. Briney – D uses a spring gun to protect his house while he is away. If the gun shoots an actual burglar, and state law would have allowed D to shoot the burglar if D was present, then D will not be liable for using the spring gun. But if a neighbor, postal carrier, or someone else not engaged in a crime happened to enter and was shot, D would not have a “reasonable mistake” defense – since D could not have fired the gun at such a person directly, the spring gun may not be used either.) In this case, the property owners were found liable.

(i) Once someone enters a dwelling house, they are burglarizing and you can defend yourself and property through the use of deadly force.

v) Defense of others:

(1) You can defend yourself to the extent that the person you are defending can defend themselves.

(2) *Defense of necessity* – Usually done by police officials. Sometimes a public official does something in response on behalf of the public.

(3) *Defense of discipline* – Teachers slapping students. States have passed statutes to deal with this. The U.S. Supreme Court found that this does not violate the 8<sup>th</sup> Amendment. There must be some process before discipline.

(4) *Defenses of justification* – School settings. Bus driver throwing the kid who is making noise off the bus.

c) Recovery of Property

i) Generally: A property owner has the general right to use reasonable force to *regain* possession of *chattels* taken from her by someone else.

(1) Fresh pursuit: The privilege exists only if the property owner is in “*fresh pursuit*” to recover his property. That is, the owner must act without unreasonable delay (immediate pursuit). (*Example*: A learns that B has stolen a stereo and is in possession of it. A may use reasonable force to reclaim the stereo if he acts immediately, but not if he waits, say, a week between learning that D has the property and attempting to regain it.)

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- (2) Reasonable force: The force must be reasonable and *deadly force* can never be used.
  - (3) Wrongful taking: The privilege exists only if the property was taken *wrongfully* from the owner. If the owner parts willingly with possession, and an event then occurs which gives him the right to repossess, he generally will not be able to use force to regain it. (*Example*: O rents a TV to A. A refuses to return the TV to O on time. O probably may not use reasonable force to enter A's home and repossess the set, because A's original possession was not wrongful.)
- ii) Merchant: Where a merchant reasonably believes that a person is stealing his property, many courts give the merchant a privilege to *temporarily detain* the person for investigation.
- (1) Limited time: The detention must be limited to a short time, generally 10-15 minutes or less, just long enough to determine whether the person has really shoplifted or not. Then the police must be called (the merchant may not purport to arrest the suspect himself).
  - (2) Bonkowski v. Arlan's Department Store – Privilege of detention extended to cover the area immediately around the store. Privilege held applicable where store detective stops P who is outside store and walking toward next door parking lot). A court would probably be more likely to find the privilege applicable if the stop occurred on the store's own property (e.g., store-owned parking lot) than if it happened elsewhere (e.g., in the street, or in a parking lot not owned by the store).
    - (a) Shop owner's dilemma – This privilege exists because if the shop owner stops the individual in the store, he can be liable for false imprisonment. If he lets her go, he could lose his property.
    - (b) Storeowner can use reasonable force to detain the suspect.

#### 4) Negligence

- a) Components of Tort of Negligence
  - i) Generally: The tort of "negligence" occurs when D's conduct imposes an *unreasonable risk* upon another, which results in injury to that other. The negligent tortfeasor's mental state is irrelevant.
- b) **Prima facie case**: The components of a negligent cause of action are:
  - i) Duty – A *duty* to use reasonable care. The actor must conform to a certain standard of conduct for the protection of others against unreasonable risks.
  - ii) Breach – A failure to by D to conform his conduct to the required standard. This is breach of duty. It can be thought of as "*carelessness*."
  - iii) Causation – A reasonably close *causal connection* between the conduct (D's act of negligence) and the resulting injury (harm suffered by P). This is "*proximate cause*."

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- (1) Causation in fact
- (2) Legal or “proximate” causation
- iv) Actual damage – *Actual loss or damage* suffered by P. (Compare this to most intentional torts, such as trespass, where P can recover nominal damages even without actual injury.)
- c) Negligence Formula
- d) Restatement (Second) of Torts (1965)
  - i) **Unreasonableness**; How Determined; Magnitude of Risk and Utility of Conduct
    - (1) Where an act is one which a *reasonable* man would recognize as involving a risk of harm to another, the *risk is unreasonable* and the act is *negligent* if the risk is of such *magnitude* as to outweigh what the law regards as the *utility of the act* or of the peculiar manner in which it is done.
  - ii) Factors Considered in Determining **Utility of Actor’s Conduct**
    - (1) The *social value* which the law attaches to the interest which is to be advanced or protected by the conduct
    - (2) The *extent of the chance* that this interest will be advanced or protected by the particular course of conduct
    - (3) The extent of the chance that such interest can be adequately advanced or protected by *another and less dangerous course of conduct*.
  - iii) Factors Considered in Determining **Magnitude of Risk**
    - (1) The *social value* which the law attaches to the interests which are imperiled.
    - (2) The *extent of the chance that the actor’s conduct will cause* an invasion of any interest of the other or of one of a class which the other is a member.
    - (3) The *extent of the harm likely to be caused* to the interests imperiled.
    - (4) The *number of persons* whose interests are likely to be invaded if the risk takes effect in harm.
- e) Standard of Care
  - i) Unreasonable Risk
    - (1) Generally: P must show that D’s conduct imposed an *unreasonable risk of harm* on P (or on a class of persons of whom P is a member).
      - (a) Lubitz v. Wells – D<sub>1</sub> leaves a golf club lying in the backyard of his house. D<sub>2</sub>, D<sub>1</sub>’s 11 year old son, swings the club in order to hit a stone, and in doing so strikes P in the jaw and chin. P sues both D<sub>1</sub> and D<sub>2</sub> on a negligence theory. *Held*, for D<sub>1</sub>. A golf club is not so “obviously and intrinsically dangerous” that by leaving it on the

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ground D<sub>1</sub> committed negligence. But D<sub>2</sub> was negligent in the way he swung the club and in failing to warn P.

1. The duty of care is based on the intrinsic danger of the instrument.
2. Children can be liable for intentional torts and negligence torts.
3. In some situations, however, it may be negligence not to anticipate the negligence of others. Thus if D<sub>1</sub> knew that his son had a history of injuring people, the leaving of the club might have been combined with D<sub>1</sub>'s lack of supervision of D<sub>2</sub> to result in D<sub>1</sub>'s liability.

(b) Blyth v. Birmingham Waterworks Co. – D, a water company, installs water mains in the street, leading to fire hydrants. Twenty-five years after D does so, a hydrant in front of P's house springs a leak caused by the expansion of freezing water, during a winter of unprecedented severity. As a result, P's house is flooded. *Held*, D's conduct was not negligent because the risk of such heavy frost was so remote as not to be the kind of risk that an ordinary prudent person would guard against in doing the work.

(i) *Risk perceived defines the duty of care.*

(ii) The fact that the weather was so extreme was beyond that reasonably foreseeable by the D. Since it was, D could not foresee it, and therefore, he did not have a duty of care to prevent damage.

(iii) Preclusion might defeat this line of reasoning. By burying the water mains, they were not available to inspection and general monitoring so foreseeability may have been obscured.

(c) Not judged by results: It is not enough for P to show that D's conduct resulted in a terrible injury. P must show that D's conduct, viewed *as of the time it occurred*, without benefit of hindsight, imposed an unreasonable risk of harm.

(2) Balancing: In determining whether the risk of harm from D's conduct was so great as to be "unreasonable," courts use the *balancing test*: "Where an act is one which a reasonable person would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to *outweigh* what the law regards as the *utility* of the actor or of that particular manner in which it is done."

(a) Gulf Refining Co. v. Williams – D sells a drum of gasoline to P's employer for P's use in operating a tractor. The threads in the cap of the drum are defective, and when P tries to remove the cap, a spark is caused which the gasoline on fire. P is severely burned, and sues D on a negligence theory *Held*, for P. It is irrelevant that there may have been less than a 50-50 chance that such an accident could occur. In view of the fact that that the potential harm in question was a fire or

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explosion, a reasonable person in D's position would have mended the cap, since there was at least some substantial chance of an accident.

- (i) There was an employee who actually saw *the frayed threads on the bunghole cap*.
- (ii) The knowledge of the defendant made the company aware of the risk. Since the defendant had *actual notice*, it is clear that the risk was perceived (*was foreseeable*). This is not about *imputed knowledge*.
- (iii) Duty of care is increased by a higher magnitude of risk (gasoline and potential loss).
- (iv) **Test for duty of care:**
  1. Probability of event:
  2. Magnitude of damage:
  3. Cost of prevention:
  4. Social utility of the act:
- (v) This was negligence of omission rather than commission.

(b) Chicago, B. & Q.R. Co. v. Kravenbuhl – D Railroad maintains a railway turntable (a rotating platform with a track for turning a locomotive) near a publicly traveled path. P, a child, discovers that the turntable is unlocked, climbs on it, and while playing on it with a group of children gets his foot caught between the rails and it is severed at the ankle joint. *Held*, it was negligent of D not to keep the turntable locked and guarded. The business of railroading is facilitated by the use of turntables, so the public good demands that their use not be entirely outlawed, since their utility is out of proportion to the occasional injuries which result. But the burden of keeping the turntable locked is so small that the danger of not doing so outweighs this burden.

- (i) All of commerce relies on the railroad – high social utility.
- (ii) Defendant does not have to *ensure* safety, just to take reasonable care.
- (iii) The turntable is a dangerous instrumentality, which creates a new duty of care. The turntable is an attractive nuisance and mitigates liability defenses because the child could not foresee the harm.
- (iv) **Test for duty of care:** A duty was owed to the child.
  1. Probability of event: high (foreseeable that someone would trespass).
  2. Magnitude of damage: high (physical damage to a child).
  3. Cost of prevention: low (fix the lock).

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4. Social utility of the act: high (railroad link to commerce)

(c) Davison v. Snohomish County – In the 1920's, little technology was available to keep cars from running off roadways. Therefore, it might not have been negligent for a municipality that built a road to fail to install guardrails strong enough to keep a car from leaving the roadway or crossing into the other lane. But today, guardrail technology has probably advanced sufficiently that installation of a 1920's guardrail (or none at all) would be negligent. Davison held that it was not negligent to fail to construct road barriers sufficient to keep car on the road. **There is no duty of care above the existing technology of the day.**

(d) U.S. v. Carroll Towing Co. – P's barge, docked at a pier, broke away from its moorings due to D's negligence in shifting the lines that moored it. D, however, argues that P was also negligent in not having an employee on the barge, and that, according to the rules of admiralty, the damage should be divided between D and P according to their respective degrees of negligence. *Held*, it is burdensome, to a degree, to have an employee on board at all times. However, there was wartime activity going on in the harbor, and ships coming in and out all the time. Therefore, the risk that the mooring line would come undone, and the danger to the barge and to other ships if they did, was sufficiently great that P should have borne the burden of supplying a watchman during working hours.

(i) **Learned Hand's Balancing Test** (to determine whether defendant's conduct amounts to an *unreasonable risk*):

1. **B < L \* P**

Where **B** equals the burden, which the defendant would have had to bear to avoid the risk, **L** equals the gravity of the potential injury, and **P** equals the probability that the harm will occur from the defendant's conduct.

ii) **The Reasonable and Prudent Person**

(1) Objective standard: The reasonableness of D's conduct is viewed under an *objective standard*: Would a "**reasonable person of ordinary prudence**," in D's position, do as D did? D does not escape liability merely because she intended to behave carefully or thought she was behaving carefully.

(2) Physical and mental characteristics: The question is whether D behaved reasonably "under the circumstances." "The circumstances" generally include the *physical characteristics* of D himself.

(a) **Physical disability**: Thus if D has a physical *disability*, the standard for negligence is what a reasonable person with that disability would have done. (*Example*: P is blind and is struck while crossing the street using a cane. If the issue is whether P is contributorily negligent, the

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issue will be whether a blind person would have crossed the street in that manner.)

(i) Roberts v. State of Louisiana – Blind worker bumps into another person in a state building, knocking him down. *Held*, A handicapped person must take precautions be they more or less, which the ordinary reasonable person would take if he were handicapped.

1. The physical limitations are relevant to the duty of care. In this case, it could be formulated as the “reasonably prudent blind person” standard.

(b) **Mental characteristics:** The ordinary reasonable person is not deemed to have the particular *mental* characteristics of D. (*Example:* If D is more stupid, or more careless, than an ordinary person is, this will not be a defense.)

(i) Vaughan v. Menlove – D builds a hayrick (a device for drying hay) near the edge of his property. P is afraid that the stack will ignite, burning his nearby cottages. He repeatedly warns D, but D says he will “chance it.” The hay spontaneously catches fire, and the resulting conflagration destroys P’s cottages. *Held*, D is not entitled to a jury instruction that he is not negligent if he acted in good faith and according to his best judgement, and that he should not be penalized for not being of the highest intelligence. Such a standard would be “as variable as the length of the foot of each individual,” and would be impossible to administer. Instead, *an objective standard, the prudence of an ordinary person, must be applied.*

(ii) Breunig v. American Family Ins. Co. – D, driving her car, suddenly becomes convinced that God is taking hold of the steering wheel and she runs into a truck. *Held*, the general rule that insanity is no defense to negligence is too broad. This rule is motivated by several policy considerations: (1) Where loss must be borne by one of two innocent persons, the one who caused the loss should bear it; (2) Person’s interested in the insane defendant’s estate (if she has one) should be induced to restrain and control her; and (3) an insanity defense may lead to false claims of insanity to avoid liability. However, where insanity strikes suddenly and without forewarning, so that the defendant has no chance of avoiding the danger, the rule that insanity is no defense is unjust.

1. Does not apply to self-inflicted delusional event (i.e., caused by injection of drugs, alcohol).

(iii) Lynch v. Rosenthal – Mentally incompetent boy was walking behind a corn picker when he tripped and fell into picker. *Held*, if a person, by reason of his mental incapacity, does not fully realize

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or appreciate a danger or risk, then he is not contributorily negligent. In addition, the defendant has a more stringent duty of care.

1. Defendant was actually aware of plaintiff's diminished capacity. Because of this, there is a smaller range of actions the defendant can get away with.
  2. As the plaintiff's capacity diminishes, defendant's duty of care increases.
- (c) Intoxication: Intoxication is no defense – even if D is drunk, she is held to the standard of conduct of a reasonably *sober* person.
- (d) **Children:** A *child* is held to the level of conduct of a child of like *age*, *intelligence* and *experience*, not that of an adult. This is the reasonable child standard.
- (i) Children under 4 are not held liable for negligence (but are for intentional torts).
  - (ii) Adult activity: But where a child engages in a potentially *dangerous activity* normally pursued only by *adults*, she will be held to the standard of care that a reasonable adult doing that activity would exercise. (*Example:* If D operates a motorboat, an activity that is potentially dangerous and normally pursued by adults, D must match the standard of care of a reasonable adult boater.)
    1. Robinson v. Lindsay – Minor on a snowmobile causes injury to his passenger. *Held*, when the activity a child engages in is inherently dangerous, as in the operation of powerful mechanized vehicles, the child should be held to an adult standard of care.
      - a. Standard of care for children: “A child of like age, experience, and training.”
      - b. This is about making adults responsible for their children's actions.
- (3) Custom: Courts generally allow evidence as to *custom* for the purpose of showing presence or absence of reasonable care. However, this evidence is generally *not conclusive*.
- (a) Evidence by D: Thus where D shows that everyone else in the industry does things the way D did them, the jury is still free to conclude that the industry custom is unreasonably dangerous and thus negligent. (*Example:* D operates a tugboat without a radio; the fact that most tugboats in the industry do not yet have radios does not prevent the jury from holding that D's lack of a radio was negligent.)

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- (b) Proof by plaintiff: Conversely, proof offered by P that others in the industry followed a certain precaution that D did not, will be suggestive but not conclusive evidence that D was negligent.
- (i) Trimarco v. Klein – Plaintiff was exiting the shower when the glass door shattered cutting his forearm. *Held*, a person may be held negligently liable if, through his failure to observe a standard, another person is injured.
1. **Custom** and **usage** evidence does contribute to the duty of care.
  2. If the defendant becomes aware of the risk and takes corrective actions, this evidence is inadmissible as proof of D's knowledge of the problem because it would create a disincentive to timely investigation and repair.
  3. Statutes create evidence of due care three ways:
    - a. If a statute is violated, it might be *evidence per se* that a duty has been breached.
    - b. If a statute is violated, it might be *prima facie evidence* that a duty has been breached.
    - c. If a statute is violated, it might be *some evidence* that a duty has been breached.
  4. Applying a statute – the statute must apply to:
    - a. The kind of injury the plaintiff sustains;
    - b. To the class of persons the statute was meant to protect; and
    - c. There must be causal connection between the violation of the statute and the harm
- (c) Knowledge of a hazardous condition:
- (i) DeLair v. McAdoo – As D's car is passing P's car, D has a blowout causing a collision. There is evidence at trial that D's tires were badly worn. *Held*, D is under a duty to know of the condition of the tires (whether in fact he knew or not), and was also under a duty to know that worn tires are dangerous.
1. The duty of care exists even though no one is complying with it. Even though most people do not inspect their tires, the duty still exists.
  2. Negligence can arise from neglecting a *duty to inspect*.
  3. Superior ability and knowledge comports a higher duty of care. Risk perceived defines the duty of care. Greater ability to perceive means the duty is higher.

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- (4) Emergencies: If D is confronted with an *emergency*, and is forced to act with little time for reflection, D must merely behave as a reasonable person would if confronted with the same emergency, not as a reasonable person would with plenty of time to think.
- (a) Cordas v. Peerless Transportation Co. – D is a cab driver. A thief jumps in the cab, points a gun at D’s head, and tells him to drive fast. D, in a panic, mistakenly puts the car in reverse and injures P. The issue is whether a cab driver confronted with a gun-pointing thief would or might have behaved as D did, not whether a cab driver in ordinary circumstances would have behaved that way.) *Held*, if under normal circumstances an act is done which might be considered negligent, it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making.
- (i) There was ***no reflection***; he just reacted due to an emergency.
- (5) Anticipating the conduct of others: A reasonable person possesses at least limited ability to *anticipate the conduct of others*.
- (a) Negligence: D may be required to anticipate the possibility of *negligence* on the part of others. (*Example*: It may be negligence for D to presume that all drivers near him will behave non-negligently, and that these others will not speed, signal properly, etc.)
- (b) Criminal or intentionally tortious acts: Normally the reasonable person (and, hence, D) is entitled to presume that third persons will *not* commit *crimes* or intentional torts.
- (i) Special knowledge: But if D has a *special relationship* with either P or a third person, or special knowledge of the situation, then it may be negligence for D not to anticipate a crime or intentional tort.
1. Tarasoff v. Regents of the University of California – It may be negligence for D, a psychiatrist, not to warn P that a patient of D’s is dangerous to P.

### iii) The Professional (Malpractice)

- (1) Superior ability or knowledge: If D has a *higher degree of knowledge, skill or experience* than the “reasonable person,” D must use that higher level. (*Example*: D, because she is a local resident, knows that a stretch of highway is exceptionally curvy and thus dangerous. D drives at a rate of speed that one who did not know the terrain well, would think was reasonable, and crashes, injuring her passenger, P. Even though D’s driving would not have represented carelessness if done by a reasonable person with ordinary knowledge of the road, D was responsible for using her special knowledge and is negligent for not doing so.)

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- (2) Malpractice generally: Professionals, including doctors, lawyers, accountants, engineers, etc., must act with the level of skill and learning *commonly possessed by members of the profession in good standing*.
- (a) Heath v. Swift Wings, Inc. – Pilot overloaded and unbalanced aircraft, which crashed shortly after takeoff. *Held*, One who engages in a business, occupation or profession must exercise the requisite degree of learning, skill, and ability of that calling with reasonable and ordinary care.
- (i) What the person holds out as his abilities is what is relevant to the standard of care. The standard of care is elevated for a professional – it is that of one of the same training and experience.
- (b) Good results not guaranteed: The professional will not normally be held to guarantee that a *successful result* will occur; only that she will use the requisite minimum skill and competence.
- (i) Hodges v. Carter – The Ds, lawyers, handle a suit for P against an out-of-state insurance company. Appellate court finds that the service on the defendant is invalid after trial court determined it was valid. P sues for malpractice. *Held*, A lawyer is not liable for a “mere error of judgement,” or for a “mistake in a point of law which has not been settled by the court of last resort...and on which reasonable doubt may be entertained by well-informed lawyers.”
- (c) Differing schools: If there are *conflicting schools* of thought within the profession, D must be judged by reference to the belief of the *school he follows*. (*Example*: An osteopath is judged by the standards of osteopathy, not the standards of medicine at large.)
- (d) Specialists: If D holds herself out as a *specialist* in a certain niche in her profession, she will be held to the minimum standard of that specialty. (*Example*: An M.D. who holds herself out as an ophthalmologist must perform to the level of a minimally competent ophthalmologist, not merely to the minimum level of the internist or general practitioner.)
- (e) Minimally qualified member: It is not enough for P to prove that D performed with less skill than the *average* member of the profession. D must be shown to have lacked the skill level of the *minimally qualified member* in good standing.
- (i) Novice: One who is just *beginning* the practice of his special profession is held to the same level of competence as a member of the profession generally. (*Example*: A lawyer who has just passed the bar does not get the benefit of a lower standard – he must perform at the level of minimally competent lawyers generally, not novices.)

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- (f) Community standards: Traditionally, doctors and other professionals have been bound by the professional standards prevailing in the *community, in which they practice*, not by a national standard. (*Example*: Traditionally, the “country doctor” need not perform with the skill commonly found in cities.)
- (i) Change in rule: But this rule is on its way out, and most courts would today apply a *national* standard. In “modern” courts, P may therefore use expert testimony from an expert who practices outside of D’s community.
- (ii) Morrison v. MacNamara – Urethral smear test/test was administered to the patient while he was standing/patient fell and hit his head. The “national standard of care” for the test required the patient to sit or lie down during the procedure. *Held*, health care professionals who are trained according to national standards and who hold themselves out to the public as such, should be held to a national standard of care.
- (g) **Informed consent**: In the case of a physician, part of the professional duty is to adequately disclose the *risks* of the proposed treatment to the patient in advance. The rule requiring adequate disclosure is called the rule of “*informed consent*.” The doctor must disclose to the patient all risks inherent in the proposed treatment which are sufficiently *material* that a reasonable patient *would take them into account* in deciding whether to undergo the treatment. Failure to get the patient’s adequate consent is deemed a form of malpractice and thus a form of negligence. (In some cases, usually older ones, failure to get informed consent transforms treatment into battery.) See Morrison.
- (i) **Elements**:
1. *Duty to inform*
  2. *Causation* – had there been a warning, the patient might not have gone through with the procedure.
  3. *Injury*
- (ii) **What must be disclosed**:
1. What is the **nature** of the treatment?
  2. What is the **risk** of the treatment?
  3. What are the feasible **alternatives**?
  4. What are the consequences of **non-treatment**?
- (iii) **What does not have to be disclosed**:
1. **Known & obvious**. No duty to inform what should be reasonably known by others.
  2. Where knowledge of risk **may cause harm**.

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3. **Emergencies** – no need to give informed consent.
  4. **Immaterial risks** – Things that are not of consequence; only material risks are required.
    - (iv) Scott v. Bradford – Woman not aware of the consequences of undergoing a hysterectomy. The plaintiff must show that he would have probably *declined the treatment* had full disclosure been made.
- iv) Notes – Medical Malpractice
- (1) Hospital liability – Malpractice that occurs within the walls of the hospital.
    - (a) **Learned intermediary doctrine** – means that the physician has a critical relationship with the patient. The doctor is the intermediary between the hospital and the patient.
    - (b) Hospitals do not assume liability for physician directed actions. However, they will be liable if they fail to train or for inadequate facilities.
- v) Aggravated Negligence
- (1) Lies somewhere between gross negligence and wanton behavior.
- f) Violation of a Statute (establishes duty and breach)
- i) Restatement (Second) of Torts § 228(A).
    - (1) An excused violation of a legislative enactment or an administrative regulation is not negligence.
    - (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when:
      - (a) The violation is reasonable because of the actor's incapacity;
      - (b) He neither knows or should know of the occasion for compliance;
      - (c) He is unable after reasonable diligence or care to comply;
      - (d) He is confronted by an emergency not due to his own misconduct;
      - (e) Compliance would involve a greater risk of harm to the actor or to others.
  - ii) Zeni v. Anderson – Nurse walking to work on a snow path in the street when she was struck by a woman driving a vehicle. *Held*, an excused violation of a legislative enactment or an administrative regulation is not negligence unless the enactment or regulation is construed not to permit such excuse.
    - (1) Violation of statute as *negligence per se*.
    - (2) Violation of statute as *prima facie evidence (rebuttable presumption)*.
    - (3) Violation of statute as *evidence of negligence*.

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- iii) “Negligence *per se*” doctrine: Most courts apply the “*negligence per se*” doctrine: when a safety statute has a sufficiently close application to the facts of the case at hand, an unexcused *violation* of that statute by D is “negligence *per se*,” and thus *conclusively establishes that D was negligent*.
- (1) *Example*: D drives at 65 mph in a 55-mph zone. While so driving, he strikes and injures P, a pedestrian. Because the 55 mph limit is a safety measure designed to protect against accidents, the fact that D has violated the statute without excuse conclusively establishes that D was negligent – D will not be permitted to argue that it was in fact safe to drive at 55 mph.
  - (2) Ordinances and regulations: In virtually all states, the negligence *per se* doctrine applies to the violation of a *statute*. Where the violation is of an *ordinance* or *regulation*, courts are split whether the doctrine should apply.
- iv) **Statutes must apply to facts**: The negligence *per se* doctrine will apply only where P shows that the statute was intended to guard against the *very kind of injury* in question.
- (1) **Class of persons protected**: This means that P must be a member of the *class of persons* whom the statute was *designed to protect*. (*Example*: A statute requires all factory elevators to be provided with a certain safety device. The legislative history shows that the purpose was only to protect injuries to employees. P, a business visitor, is injured when the elevator falls due to lack of the device. P cannot use the negligence *per se* doctrine, because he was not a member of the class of persons whom the statute was designed to protect.)
  - (2) Protection against particular harm: Second, the statute must have been intended to protect against the *particular kind of harm* that P seeks to recover for. (*Example*: A statute requires that when animals are transported, each breed must be kept in a separate pen. D, a ship operator, violates the statute by herding P’s sheep together with other animals. Because there are no pens, the sheep are washed overboard during a storm. P cannot use the negligence *per se* doctrine, because the statute was obviously intended to protect only against the spread of disease, not washing overboard.)
  - (3) Excuse of violation: The court is always free to find that the statutory violation was *excused*, as long as the statute itself does not show that no excuses are permitted.
    - (a) Rebuttable presumption: Sometimes, the statute is viewed as merely establishing a rebuttable presumption of negligence; the defendant can then introduce evidence of due care in order to rebut the presumption.
    - (b) Excuses (typical reasons): Some typical reasons for finding D’s violation to be excused are: (1) D was reasonably *unaware* of the particular occasion for compliance; (2) D made a reasonable and diligent *attempt* to comply; (3) D was confronted with an *emergency*

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not of his own making or (4) compliance would have involved a *greater risk of harm*. (Example: A statute requires all brakes to be maintained in good working order. D's brakes fail, and he can't stop, so he runs over P. If D can show that he had no way to know that his brakes were not in working order, his violation of the statute would be excused, and the negligence *per se* doctrine would not apply.)

- (4) Contributory negligence *per se*: If the jurisdiction recognizes *contributory negligence*, D may get the benefit of contributory negligence *per se* where P violates a statute. (Example: Cars driven by P and D collide. If P was violating the speed limit, and the jurisdiction recognizes contributory negligence, D can probably use the negligence *per se* doctrine to establish that P was contributorily negligent.)
- (5) Compliance not dispositive: The fact that D has *fully complied* with all applicable safety statutes does not by itself establish that he was not negligent – the finder of fact is always free to conclude that a reasonable person would take precautions beyond those required by the statute.

### g) Other duty considerations

#### i) Negligent infliction of emotional distress

(1) Must be able to show some physical injury.

(a) Intentional tort – do not need physical harm, just emotional distress.

(b) Negligent tort – need physical harm.

(2) “Zone of danger”

(a) Majority: no recovery if you are outside the “zone of danger.”

(b) Minority trend: “zone of danger” rejected if you are a **family member** and you are **present** at the time of the tort.

#### ii) Affirmative duty to act

(1) No affirmative duty to act.

(2) *Exceptions*:

(a) **Relationship** – family members, employers/employees, innkeepers, business invitees. Cannot ignore these plaintiffs.

(b) Where the defendant has **control over 3<sup>rd</sup> persons**. Need two elements:

(i) You have to have the *right* and *ability to control*; and

(ii) You *knew* or *should have known* the facts that would require you to act.

### h) Proof of Negligence

#### i) Breach

(1) Negligent conduct = breach.

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(2) Did the defendant violate the reasonable standard?

ii) Court and Jury: Circumstantial Evidence

- (1) Goddard v. Boston & Maine R.R. Co. – While leaving a train at a train station, the plaintiff slipped on a banana peel and fell. *Held*, a defendant cannot be held liable for negligence if the plaintiff cannot show that the defendant caused the act, which resulted in the plaintiff's harm. Need facts to prove causation and negligence.
- (2) Anjou v. Boston Elevated Railway Co. - While following a train employee at a train station, the plaintiff slipped on a banana peel and fell. The banana was black, flattened and dirty. *Held*, A person is negligently liable for the harm caused to another if, through his lack of actions (maintaining a safe public environment), he does not exercise due care.
- (3) Joye v. Great Atlantic and Pacific Tea Co. - While in an A&P store, the plaintiff slipped on a banana peel and fell. *Held*, A person is not liable for negligence if that person exercises a reasonable duty of care and does not notice a dangerous condition, which injures someone. This case is about notice. The plaintiff fails to prove that the defendant had adequate notice of the dangerous condition.
- (4) Jasko v. F.W. Woolworth Co. – Plaintiff slipped on a piece of pizza in a store where the pizza was being served to people standing up. *Held*, when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, actual or constructive notice of the specific condition need not be proven.
  - (a) This case is about inference and notice.

iii) **Res Ipsa Loquitur**

- (1) Generally: The doctrine of *res ipsa loquitur* (“the thing speaks for itself”) allows P to point to the fact of the accident, and to create the *inference* that, even without a precise showing of how D behaved, D was probably negligent. Does not mean that D is liable, it just gets the case to the jury and may survive a motion to dismiss.
  - (a) Establishes duty and breach, not necessarily causation.
  - (b) Byrne v. Boadle – A barrel of flour falls on P's head as he walks below a window on the street. At trial, P shows that the barrel fell out of a window of D's shop, and that barrels do not fall out of windows without some negligence. By use of the *res ipsa loquitur* doctrine, P has presented enough evidence to justify a verdict for him, so unless D comes up with rebuttal evidence that the barrel did not come from the his shop or was not dropped by negligence, D will lose.
- (2) **Requirements for:** Courts generally impose 4 requirements for the *res ipsa* doctrine:

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- (a) **No direct evidence of D's conduct:** There must be *no direct evidence* of how D behaved in connection with the event.
- (b) **Seldom occurring without negligence:** P must demonstrate that the harm, which occurred, *does not normally occur* except through the negligence of someone. P only has to prove that *most of the time*, negligence is the cause of such occurrences.
- (i) Cox v. Northwest Airlines, Inc. – P's husband is killed in a plane crash. P produces no evidence of negligence. D produces evidence that airplane was properly maintained, etc. *Held*, D's showing of general due care in its operations is not sufficient to deprive the finder of fact of the right to infer that negligence was more probably than not the cause of the accident. If an airplane crashes without explanation, P will be generally able to establish that airplanes usually do not crash without some negligence, thus meeting this requirement.
1. D loses this case because he did not go far enough in providing another explanation besides negligence that could have caused the accident.
  2. Res ipsa is a proof shifting mechanism: P → D
- (ii) Holmes v. Gamble – Plaintiff injured when the ditch he was in collapsed. He was moved to the hospital and operated on there. He lost feeling in three of his fingers and he alleged that the surgeon and the hospital did not lay him properly on the operating table. *Held*, because there was an equally plausible, non-negligence explanation for the injury, the P had not established a prima facie case for negligence under the res ipsa loquitur doctrine.
- (c) **Exclusive control of defendant:** P must demonstrate that the instrumentality, which caused the harm, was at all times within the *exclusive control* of D.
- (i) Larsen v. St. Francis Hotel – P, while walking on the sidewalk next to D hotel, is hit by a falling armchair. Without more proof, P has not satisfied the “exclusive control” requirement, because a guest, rather than the hotel, may have had control of the chair at the moment it was dropped.
- (ii) Multiple defendants: If there are *two or more defendants*, and P can show that at least one of the defendants was in control, some cases allow P to recover. This is especially likely where all the D's participate in an integrated relationship.
1. Ybarra v. Spangard – P is injured while on the operating table, and shows that either the surgeon, the attending physician, the hospital, or the anesthesiologist must have been at fault, but is unable to show which one. P gets the benefit of *res ipsa*

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*loquitur*, and it is up to each individual defendant to exculpate himself.

- a. This doctrine creates an inference of negligence, not a rebuttable presumption of negligence.
- b. P says that each defendant, *seriatim*, had control. Making them all potentially liable helps to break down the code of silence.

(d) **Not due to plaintiff:** P must establish that the accident was probably not due to his *own* conduct.

(e) Evidence more available to D: Some courts also require that *evidence* of what really happened be *more available to D* than to P. (*Example:* This requirement is satisfied on the facts of Ybarra since the Ds obviously knew more than the unconscious patient about who was at fault.)

(3) Effect of *res ipsa*: Usually, the effect of *res ipsa* is to permit an inference that D was negligent, even though there is no direct evidence of negligence. *Res ipsa* thus allows a particular kind of circumstantial evidence. When *res ipsa* is used, P has *met his burden of production*, and is thus entitled to go to the jury.

(4) Rebuttal evidence:

(a) General evidence of due care: If D's rebuttal is merely in the form of evidence showing that he was *in fact careful*, this will almost never be enough to give D a directed verdict – the case will still go to the jury.

(b) Rebuttal of *res ipsa* requirements: But if D's evidence directly disproves one of the requirements for the doctrine's application, then D will get a directed verdict (assuming there is no *prima facie* case apart from *res ipsa*). *Example:* If D can show that the instrument that caused the harm was not within his control at all relevant times, the doctrine will not apply, and D may get a directed verdict.)

(c) Sullivan v. Crabtree – Boy killed as a passenger in a truck whose driver lost control of the vehicle. Driver cannot tell cause of the crash. *Held*, the case was a proper one for *res ipsa loquitur*, since the vehicle was under D's control, and vehicles usually don't suddenly run off the road without negligence. But application of the doctrine merely means that the jury *could* find negligence, not that it was required to.

### 5) Actual and Proximate Causation

#### a) Causation In Fact (Actual Causation)

i) Generally: P must show that D's conduct was the "*cause in fact*" of P's injury.

(1) When discussing causation, consider the following:

(a) Substantiality of the thing that causes the harm.

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- (b) Is the thing that caused the harm a “magnifier” (alcohol)?
  - (c) The foreseeability of the causation – was it a risk perceived?
  - (d) Was it the natural outcome?
  - (e) Class of injuries – ask whether the injuries are in the class of causation?
- ii) **“But for” test:** The vast majority of the time, the way P shows “cause in fact” is to show that D’s conduct was a “*but for*” cause of P’s injuries – *had D not acted negligently, P’s injuries would not have resulted.*
- (1) *Example:* A statute requires all vessels to have lifeboats. D sends out a boat without lifeboats. P, a sailor, falls overboard in a storm so heavy that, even had there been a lifeboat, it could not have been launched. P drowns. Even assuming that P was negligent *per se*, D’s failure to provide lifeboats is not a cause in fact of P’s death, because that death would have occurred even without the failure. Therefore, D is not liable.
  - (2) Joint tortfeasors: There can be *multiple* “but for” causes of an event. D<sub>1</sub> cannot defend on the grounds that D<sub>2</sub> was a “but for” cause of P’s injuries – as long as D<sub>1</sub> was also a “but for” cause, D<sub>1</sub> is viewed as the “cause in fact.”
- iii) **Concurrent causes:** Sometimes D’s conduct can meet the “cause in fact” requirement even though it is *not* a “but for” cause. This happens when two events *concur* to cause harm, and **either one would have been sufficient to cause substantially the same harm without the other.** *Each* of these concurring events is deemed a cause in fact of the injury, since it would have been sufficient to bring about the injury. (*Example:* Sparks from D’s locomotive start a forest fire; the fire merges with some other unknown fire, and the combine fires burn P’s property. Either fire alone would be sufficient to burn P’s property. Therefore, D’s fire is a cause in fact of P’s damage, even though it is not a “but for” cause.)
- iv) **Multiple fault:** If P can show that each of the two (or more) defendants was at fault, but only one could have caused the injury, **the burden shifts to each defendant to show that the other caused the harm.** (*Example:* P, D<sub>1</sub> and D<sub>2</sub> go hunting together. D<sub>1</sub> and D<sub>2</sub> simultaneously fire negligently, and P is struck by one of the shots. It is not known who fire the fatal shot. The court will put the burden on each of the Ds to show that it was the other shot which hit P – if neither D can make this strong showing, both will be liable. Summers v. Tice.)
- (1) The “market share” theory: In *product liability* cases, courts often apply the “*market share*” theory. If P cannot prove which of three or more persons caused his injury, but can show that all produced a defective product, the court will require each of the Ds to pay that percentage of P’s injuries which that D’s sales bore to the total market sales of that type of product at the time of the injuries. The theory is used most often in cases involving prescription drugs.

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- (a) Sindell v. Abbott Laboratories – 200 manufacturers make the drug DES. P shows that her mother took the drug during pregnancy, and that the drug caused P to develop cancer. P cannot show which DES manufacturer produced the drug taken by her mother. *Held*, any manufacturer who cannot show that it could not have produced the particular doses taken by P's mother will be liable for the proportion of any judgement represented by that manufacturer's share of the overall DES market.
- (i) **Enterprise liability** – It is about presumptive, collective conspiracy. Since common law elements will not work, this is a public policy matter.
- (b) Exculpation: Courts are split on whether each defendant should be allowed to *exculpate* itself by showing that it *did not make* the particular items in question – some more modern cases hold that once a given defendant is shown to have produced drugs for the national market, no exculpation will be allowed.
- (c) National market share: In determining market share, courts usually use a *national*, rather than local, market concept.
- (d) No joint and several liability: Courts adopting the “market share” approach often *reject joint-and-several liability* – they allow P to collect from any defendant only that defendant's proportional share of the harm caused. (*Example*: P sues a single D, and shows that D counted for 10% of the market. P's total damages are \$1 million. If “market share is the theory of liability, most courts will allow P only to recover \$100,000 from D – D will not be made jointly and severally liable for P's entire injuries.)
- (e) Socially valuable products: The more *socially valuable* the court perceives the product to be, the less likely it is to apply a market-share doctrine. For instance, a court is likely to reject the doctrine where the product is a vaccine.
- v) Increased risk, not yet followed by actual damage: Where D's conduct has increased the *risk* that P will suffer some later damage, but the damage has *not yet occurred*, most courts *deny* P any recovery for the later damage unless he can show that it is more likely than not to occur eventually. But some courts now allow for recovery for such damage, discounted by the likelihood that the damage will occur. (*Example*: D, and M.D., negligently operates on P. The operation leaves P with a 20% risk of contracting a particular disease in the future. At the time of the trial, P does not yet have the disease. Most courts would not let P recover anything for the risk of getting the disease in the future. But some might let P recover damages for having the disease, discounting by 80% to reflect the 80% chance that P won't get the disease after all.)

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vi) “Indeterminate plaintiff”: Sometimes it’s clear that D has behaved negligently and injured some people, but not clear exactly *which people* have been injured. This happens most often in toxic tort and other mass-tort cases. Courts today sometimes allow a *class action* suit, in which people who show that they were exposed to a toxic substance made or released by D, and that they suffer a particular medical problem, can recover something, even if they can’t show that it’s more probable than not that their particular injuries were caused by the defendant’s toxic substance.

(1) *Example*: D makes a silicone breast implant, which hundreds of plastic surgeons implant into thousands of women. Epidemiological evidence shows that a substantial percentage of these women getting such implants will suffer a particular auto-immune disease (but there can be other causes of the disease as well.) Many courts today would let a class action proceed on these facts. Any women who received a breast implant made by D and who has the auto-immune condition could be a member of the plaintiff class, and could recover at least some damages, even if she couldn’t show that her particular disease was more likely than not caused by D’s product.

### b) Proximate Cause Generally

i) General: Even after P has shown that D was the “cause in fact” of P’s injuries, P must still show that D was the “*proximate cause*” of those injuries. The proximate cause requirement is a *policy determination* that a defendant, even one who has behaved negligently, should not automatically be liable for all the consequences, no matter how *far-reaching* and *improbable*, of his act. Today, the proximate cause requirement usually means that D will not be liable for the consequences that are very *unforeseeable*.

#### (1) In general:

(a) If the result of the act was unforeseeable, let the D go.

(b) If the result of the act was foreseeable, hold the D liable.

(i) *Exception*: In a indirect cause case (an affirmative intervening act by another person or act of god disrupts the uninterrupted chain of events leading to harm), if the intervening act was an unforeseeable intentional tort or crime, let the first D go even though the result was foreseeable.

(2) *Example*: D, driving carelessly, collides with a car driven by X. Unbeknownst to D, the car contains dynamite which explodes. Ten blocks away, a nurse who was carrying P, an infant, is startled by the explosion, and drops P. P will not be able to recover against D, because the episode was so far-fetched – it was so unforeseeable that the injury would occur from D’s negligence – that courts will hold that D’s careless driving was not the “proximate cause of P’s injuries.

(3) Multiple proximate causes: Just as an occurrence can have many “causes in fact,” so it may well have more than one proximate cause. (*Example*:

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Each of two drivers drives negligently, and P is injured. Each driver is probably a proximate cause of the accident.)

- ii) Atlantic Coast Line R. Co. v. Daniels – Reasons to make causation “proximate” and cut off liability are: (1) policy reasons; (2) consequences were not foreseeable; (3) other intervening acts; and (4) contributory/comparative negligence.
- iii) Enright v. Eli Lilly & Co. – Patricia Enright’s mother takes the drug DES, manufactured by D, while she is pregnant in 1960. The mother gives birth to Patricia in 1960. Patricia, when she reaches adulthood, has several miscarriages, and then gives birth prematurely to a daughter Karen. Karen has cerebral palsy and other developmental disorders. Patricia and Karen both sue D. The issue here is whether Karen can recover from D for injuries caused to her by the drug ingested by her grandmother.

*Held*, for D. The court declines to change the traditional view that a child has no cause of action for pre-conception torts committed against the mother. “Public policy favors the availability of prescription drugs even though most carry some risks.

(1) The *identity* of the plaintiff matters in *causation* and perhaps *duty* as well.

(2) Duty of design vs. duty to warn:

- (a) You cannot have a duty to warn for unforeseeable consequences.  
Failure of a duty to warn does not give rise to strict liability.

c) Elements to consider for proximity:

i) Breach → (*time*) → (*actions*) → (*distance*) → Injury

d) Unforeseeable Consequences

- i) Ryan v. New York Central R.R. Co. – D, a railroad, operates one of its engines in a negligent manner. The engine sets fire to D’s woodshed, which in turn causes P’s house, located nearby, to be consumed by the fire. *Held*, for D. While the destruction of the woodshed is the “ordinary and natural result” of the negligent operation of the engine, to place liability on D for the destruction of P’s house is too remote.
- ii) Bartolone v. Jeckovich – P was involved in a car accident and suffered minor immediate injuries. Later, as a result of the accident, P suffered a complete psychotic breakdown and never recovered. *Held*, a **defendant must take the plaintiff as he finds him** and hence may be found liable in damages for aggravation of a preexisting condition.
  - (1) If a P gets injured and is injured further in an ambulance, D is liable for those injuries, too.

iii) In re Arbitration Between Polemis and Furness, Withy & Co. LTD. – D chartered a boat from P. While unloading it, D dropped a plank into the hold, which ignited a spark and blew up the boat. *Held*, D was negligent in dropping the plank and that the spark ignition was unforeseeable.

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Nonetheless, because the fire was the “direct” result of the negligent act, D was liable. If the act would or might cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act. This was overruled by Wagon Mound 1.

(1) There is no foreseeability here – there was no way to think that the plank would cause a spark.

e) Proximate Cause – Foreseeability

i) The foreseeability rule generally: Most courts hold that D is liable, as a general rule, only for those consequences of his negligence which were *reasonably foreseeable* at the time she acted.

(1) Overseas Tankship (U.K.) LTD v. Morts Dock & Engineering Co., LTD (Wagon Mound No. 1) – D’s ship spills oil into a bay. Some of the oil adheres to P’s wharf. The oil is then set afire by some molten metal dropped by P’s worker, which ignites a cotton rag floating in the water. P’s whole dock burns. *Held*, D is not liable, because the burning of P’s dock was not the foreseeable consequence of D’s oil spill, and thus the oil spill was not the proximate cause of the damage. This is true even though the burning may have been the “direct” result of D’s negligence.

(a) Can D be liable for consequences of an unforeseeable harm when the harm is directly linked to the negligent act? This court holds no.

(2) Overseas Tankship (U.K.) LTD v. Miller Steamship Co., LTD (Wagon Mound No. 2) – Same facts as #1. There is a finding of fact that D should have foreseen that discharge of oil posed some small risk of fire. *Held*, for the P. The D should have weighed the risk against the difficulty of eliminating the risk, and avoiding the spillage would have been so free from burden that it should have been done.

(a) Review two models of foreseeability:

(i) Foreseeability in duty of care:

(ii) Foreseeability in breach:

ii) **Unforeseeable plaintiff**: The general rule that D is liable only for the foreseeable consequences is also usually applied to the “*unforeseeable plaintiff*” problem. That is, if D’s conduct is negligent as to X (in the sense that it imposes an unreasonable risk of harm upon X), but not negligent as to P (i.e., does not impose an unreasonable risk of harm upon P), P will not be able to recover if through some fluke he is injured.

(1) Palsgraf v. Long Island R.R. Co. – X, trying to board D’s train, is pushed by D’s employee. X drops a package, which (unknown to anybody) contains fireworks, which explode when they fall. The shock of the explosion makes some scales at the other end of the platform fall down, hitting P. *Held*, P may not recover against D. D’s employee may have

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been negligent towards X (by pushing him), but the employee's conduct did not involve any foreseeable risk of harm to P, and the damage to her was not foreseeable. The fact that the conduct was unjustifiably risky to X is irrelevant. D's conduct was not the "proximate cause" of the harm to P. Rule: The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation. ***The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is the risk to another or to others within the range of apprehension.***

(2) **Foreseeable plaintiff causation approaches:**

(a) **Cardozo:** D is only liable if P was a foreseeable plaintiff.

Foreseeability determined by whether P was in the "foreseeable zone of danger" of the conduct.

(i) Since the defendant's conduct did not involve an unreasonable risk of harm to the plaintiff, and the damage to her was not foreseeable, the fact that the conduct was unjustifiably risky to someone else is irrelevant.

(b) **Andrews:** If a negligent act against one person injures a second person, the second person is a foreseeable plaintiff and the defendant is liable for that harm.

iii) Extensive consequences from physical injuries: A key *exception* to the general rule that D is liable only for foreseeable consequences is: once P suffers any foreseeable impact or injury, even if relatively minor, D is liable for *any additional unforeseen physical consequences*.

(1) **Eggshell skull:** Thus if P, unbeknownst to D, has a very *thin skull* (a skull of "eggshell thinness"), and D negligently inflicts a minor impact on his skull, D will be liable if, because of the hidden skull defect, P dies. The defendant "***takes the plaintiff as he finds him.***"

(a) Bartolone v. Jeckovich – *see above*.

iv) **General class of harm but not same manner:** Another exception to the "foreseeable consequences only" rule is that as long as the harm suffered by P is of the **same general sort** that made D's conduct negligent, it is irrelevant that the harm occurred in an *unusual manner*.

(1) **Example:** D gives a loaded pistol to X, an eight year old, to carry to P. In handing the pistol to P, X drops it, injuring the bare foot of Y, his playmate. The fall sets off the gun, wounding P. D is liable to P, since the same general kind of risk that made D's conduct negligent (the risk of accidental discharge) has materialized to injure P; the fact that the discharge occurred in an unforeseeable manner – by dropping the gun – is irrelevant. (But D is not liable to Y, since Y's foot injury was not foreseeable, and the risk of it was not one of the risks that made D's conduct initially negligent.)

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- v) Plaintiff part of foreseeable class: Another exception to the foreseeability rule: that fact that injury to the particular plaintiff was not especially foreseeable is irrelevant, as long as P is a *member of a class* as to which there was general foreseeability of harm.
    - (1) Petition of Kinsman Transit Co. – D negligently moors ship, and the ship breaks away. It smashes into a drawbridge, causing it to create a dam, which results in a flood. The Ps, various riparian owners, whose property is flooded, sue. *Held*, these owners can recover against D, even though it would be hard to foresee which particular owners might be flooded. All of the Ps were members of the general class of riverbank property owners, as to which class there was a risk of harm from flooding.
  - vi) The “extraordinary in hindsight” rule: Many courts, and the Second Restatement, articulate the foreseeability rule as an “*extraordinary in hindsight*” rule. D’s conduct will not be the proximate cause of P’s harm if, “after the event and the *looking back* from the harm to [D’s] negligent conduct, it appears to the court *highly extraordinary* that it should have brought about the harm.”
- f) Proximate Cause – Intervening Causes
- i) Definition of “intervening cause”: Most proximate cause issues arise where P’s injury is precipitated by an “*intervening cause*.” An intervening cause is a force which takes effect *after* D’s negligence, and which contributes to that negligence in producing P’s injury.
    - (1) Superseding cause: Some, but not all, intervening causes are sufficient to prevent D’s negligence from being held to be the proximate cause of the injury. Intervening causes that are sufficient to prevent D from being negligent are called “*superseding*” causes, since they supersede or cancel D’s liability.
  - ii) Foreseeability rule: Generally courts use a *foreseeability* rule to determine whether a particular intervening cause is superseding.
    - (1) Test: If D should have *foreseen* the possibility that the intervening cause (or one like it) might occur, or if the *kind of harm* suffered by P was foreseeable (even if the intervening cause was not itself foreseeable), D’s conduct will nonetheless be the proximate cause. But if *neither* the intervening cause nor the kind of harm was foreseeable, the intervening cause will be a superseding one, relieving D of liability.
  - iii) Foreseeable intervening causes: Often the risk of a particular kind of intervening cause is the *very risk* (or one of the risks) which made D’s conduct negligent in the first place. Where this is the case, the intervening cause will almost never relieve D of liability.
    - (1) *Example*: D leaves his car keys in the ignition, and the car is unlocked, while going into the store to do an errand. X comes along, steals the car, and while driving fast to get out of the neighborhood, runs over P. If the court believes that the risk of theft is one of the things that makes leaving

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one's keys in the ignition negligent, the court will almost certainly conclude that X's intervening act was not superseding.

- (2) Foreseeable negligence: The *negligence of third persons* may similarly be an intervening force that is sufficiently foreseeable that it will not relieve D of liability. (*Example*: D is a tavern owner, who serves too much liquor to X, knowing that X arrived alone by car. D also does not object when X gets out his car keys and leaves. If X drunkenly runs over P, a court will probably hold that X's conduct in negligently (drunkenly) driving, although intervening, was sufficiently foreseeable that it should not absolve D of liability.)
  - (3) Criminally or intentionally tortious conduct: A third person's *criminal conduct*, or *intentionally tortious acts*, may also be so foreseeable that they will not be superseding. But in general, the court is more likely to find the act superseding if it is criminal or intentionally tortious than where it is merely negligent.
- iv) Responses to defendant's actions: Where a third party's intervention is a "normal" response to the defendant's act, that response will generally not be considered superseding. This is true even if the response was not all that foreseeable.
- (1) Escape: For instance, if in response to the danger created by D, P or someone else attempts to *escape* that danger, the attempted escape will not be a superseding cause so long as it was not completely irrational or bizarre. (*Example*: D, driving negligently, sideswipes P's car on the highway. P panics, thrusts the wheel to the right, and slams into the railing. Even though most drivers in P's position might not have reacted in such an extreme or unhelpful manner, P's response is not sufficiently bizarre to constitute a superseding cause.)
  - (2) Rescue: Similarly, if D's negligence creates a danger which causes some third person to attempt a *rescue*, this rescue will normally not be an intervening cause, unless it is performed in a *grossly careless* manner. D may be liable to the *person being rescued* (even if part or all of his injuries are due to the rescuer's ordinary negligence), or *to the rescuer*.
  - (3) Aggravation of injury by medical treatment: If D negligently injures P, who then undergoes *medical treatment*, D will be liable for anything that happens to P as the result of negligence in the medical treatment, infection, etc. (*Example*: P is further injured when the ambulance carrying her gets into a collision, or when, due to the surgeon's negligence, P's condition is worsened rather than improved.)
    - (a) Gross mistreatment: But some results of attempted medical treatment are so gross and unusual that they are regarded as superseding. (*Examples*: P is further injured when the ambulance carrying her gets into an a collision, or when, due to the surgeon's negligence, P's condition is worsened rather than improved.)

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- v) Unforeseeable intervention, foreseeable result: If an intervention is neither foreseeable nor normal, but leads to the *same type of harm* as that which was threatened by D's negligence, the negligence is usually *not* superseding.
- (1) *Example*: D negligently maintains a telephone pole, letting it get infested with termites. X drives into the pole. The pole breaks and falls on P. A properly maintained telephone pole would not have broken under the blow. Even though the chain of events (termite infestation followed by car crash) was bizarre, X's intervention will not be superseding, because the result that occurred was the same general *type* of harm as that which was threatened by D's negligence – that the pole would somehow fall down.
- vi) Unforeseeable intervention, unforeseeable results: If an intervention was not foreseeable or normal, and it produced results which are *not* of the same general nature as those that made D's conduct negligent, the intervention will probably be *superseding*.
- (1) Extraordinary act of nature: Thus an *extraordinary act of nature* is likely to be superseding. (*Example*: Assume that it is negligent to one's neighbors to build a large wood pile in one's back yard, because this may attract termites which will then spread. D builds a large woodpile. An unprecedentedly strong hurricane sweeps through, takes one of the logs, and blows it into P's bedroom, killing him. The hurricane will probably be held to be a superseding intervening cause, because it was so strong as to be virtually unforeseeable, and the type of harm it produced was not of the type that made D's conduct negligent in the first place.)
- vii) Dependent vs. independent intervention: Courts sometimes distinguish between "*dependent*" intervening causes and "*independent*" ones. A dependent intervening cause is one which occurs only in *response* to D's negligence. An independent intervention is one which would have occurred even had D not been negligent (but which combined with D's negligence to produce the harm). Dependent intervening events are probably somewhat more foreseeable on average, and thus somewhat less likely to be superseding, than independent ones. But a dependent cause can be superseding (e.g., a grossly negligent rescue attempt), and an independent intervention can be non-superseding.
- viii) Third person's failure to discover: A third person's *failure to discover and prevent* a danger will almost never be superseding. For instance, if a manufacturer negligently produces a dangerous product, it will never be absolved merely because some person further down the distribution chain (e.g., a retailer) negligently fails to discover the danger, and thus fails to warn P about it.
- (1) Third person does discover: But if the third person does *discover* the defect, and then willfully and negligently fails to warn P, D may escape liability if D took all reasonable steps to remedy the danger. (*Example*: D manufactures a machine, and sells it to X. D then learns that the machine

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may crush the hands of users. D offers to X to fix the machines for free. X declines. P, a worker for X, gets his hand crushed. X's failure to warn P or allow the machine to be fixed by D probably supersedes, and relieves D of liability because D tried to do everything it could.)

- g) Derdiarian v. Felix Contracting Corp. – Worker in a construction area was burned when the driver of a car travelling along the adjacent roadway had an epileptic seizure, lost control of the car, crashed into the work area, hit a kettle of hot enamel, and spilled the material on the worker. *Held*, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, it may well be a superseding act, which breaks the causal nexus. Not so in this case.
- i) Defendant → [intervening act or something] → Plaintiff
  - ii) An intervention that is most likely to cut off liability is one that is **unforeseeable, substantial**, with a result that you would foresee from the original negligence.
- h) Watson v. Kentucky & Indiana Bridge & R.R. Co. – D Railroad negligently derails a tank car full of gasoline and the gasoline spills into the street. X then throws down a lighted match, which ignites the gasoline, leading to an explosion, which injures P. *Held*, if X acted merely negligently, D is liable, since the risk of such a casual act by someone was one of the risks, which made D's derailment negligent. But if X set the fire intentionally, such an intervention was so unlikely that D could not reasonably have been expected to guard against it.
- i) Some courts find that malicious intervening acts cut off liability. Some do not.
  - ii) Rescues: Negligent rescue is within the scope of the original duty (original risk). A negligent rescue is an intervening event that will not cut off liability.
- i) Kelley v. Gwinnell – Host served guest drinks in house and watched as guest got into a car and drove away. Guest got into a car accident and injured plaintiff. *Held*, a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and that he will thereafter be operating a motor vehicle, is liable for injuries inflicted on a 3<sup>rd</sup> party as the result of the negligent operation of a motor vehicle by the adult guest. Liability on *social hosts* who *directly serve* their guest, knowing that he will be driving.
- j) Fuller v. Preis – A doctor in a car accident hit his head. After 38 seizures, the doctor committed suicide 7 months later. Executor filed suit against driver of car for liability for the suicide. *Held*, a harm which causes an “irresistible impulse” to commit suicide may make a party who caused that harm negligent. Suicide is not a superseding event.
- k) Synthesis (*Prosser, et al.*, p. 336)

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- i) Approach: There are two general approaches to the problem of proximate cause – the hindsight, or direct-causation approach and the foreseeability approach.
- l) Shifting Responsibility
  - i) Usually, when the defendant has negligently created a risk of harm to the plaintiff, the failure of a third person to intervene and take some action to prevent the risk from being realized, that is, to prevent the harm, will not affect the liability of the defendant when the harm in fact occurs.
  - ii) There are, however, a few cases in which the conduct of the third person, whether action or inaction, has been held to relieve the defendant because the responsibility has been shifted from his shoulders.
  - iii) Test (see notes).
- 6) Terminology
  - a) **Joint tortfeasors** – more than one defendant can be found liable to the plaintiff.
  - b) **Vicarious liability** – one person is liable for what someone else has done. Employer/employee: both are liable. It is a field of liability, not a tort.
  - c) **Indemnification** – where one entity is responsible for the harms caused by another. That one entity removes the liability from the 3<sup>rd</sup> party. The entity stands in the shoes of the 3<sup>rd</sup> party (e.g., insurance companies).
  - d) **Single satisfaction rule** – The plaintiff is entitled to a cap of money no matter how many defendants. 100% of relief cannot be increased.
  - e) **Collateral source rule** – The extent to which other funds, outside what the plaintiff claims, can be added in the recovery to the plaintiff. Most states say that the insurance payments made to plaintiffs is a collateral source.
  - f) **Subrogation claim** – Right of action for a 3<sup>rd</sup> party to collect damages that it paid to a plaintiff on your behalf where it believes another, besides you, was responsible. In many jurisdictions, you cannot recover both a \$100,000 recovery from an insurance company and from the defendant. This is often specified in the insurance contract and/or by statute.
  - g) **Release** – a written release of a claim against another. If you sign a release of one of the parties, you release all the parties (e.g., the 4 auto parties: designer, manufacturer, distributor, retailer).
  - h) **Covenant not to sue** – Contract between two people that one gives another for the protection that the other will not sue.
  - i) **Contribution** – A cause of action between defendants. A plaintiff may sue anyone he wants (e.g., manufacturer). If the plaintiff wins, he is entitled to 100% of the loss. Under joint & several liability the manufacturer would pay 100%. The manufacture may go to 3<sup>rd</sup> parties to get contribution.

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- i) In a contribution action, there has to be a viable cause of action against the party who contribution is sought and the original plaintiff. Real problem is statute of limitations.
- ii) No contribution in intentional torts.

### 7) Joint Tortfeasors

#### a) Joint Liability

- i) Joint and several liability generally: If more than one person is a proximate cause of P's harm, and the harm is *indivisible*, each defendant is liable for the *entire harm*. The liability is said to be "*joint and several*." (Example: D<sub>1</sub> negligently scratches P. P goes to the hospital, where she is negligently treated by D<sub>2</sub>, a doctor, causing her to lose her arm. P can recover her entire damages from D<sub>1</sub>, or her entire damages from D<sub>2</sub>, though she cannot collect twice.)

(1) Indivisible versus divisible harms: This rule of joint and several liability applies only where P's harm is "*indivisible*," i.e., not capable of being *apportioned* between or among the defendants. If there is a rational basis for apportionment – that is, for saying that some of the harm is the result of D<sub>1</sub>'s act and the remainder is the result of D<sub>2</sub>'s act – then each will be responsible only for that directly-attributable harm.

(2) Release rule: A release of one tortfeasor does not release any other tortfeasor.

#### ii) Rules on apportionment:

(1) Action in concert: If the two defendants can be said to have acted *in concert*, each will be liable for injuries directly caused by the other. In other words, apportionment does not take place.

(a) Bierczynski v. Rogers – Two teenagers racing their cars when one lost control of his car and hit Rogers. Rogers sues Bierczynski for negligence. Bierczynski claims he is not negligent because he did not hit Rogers (no proximate causation) and cause the accident. *Held*, all parties acting in concert in a reasonably foreseeable dangerous act are liable for harm to a 3<sup>rd</sup> person arising from the tortious conduct of the other, because he has induced or encouraged the tort.

(i) Two parties can be held liable of *concurrent negligence*.

(2) Successive injuries: Courts often are able to apportion harm if the harm occurred in successive incidents, separated by substantial periods of time. (Example: D<sub>1</sub>, owner of a factory, pollutes P's property from 1970-1980. D<sub>1</sub> sells to D<sub>2</sub>, who pollutes P's property from 1981-1990. The court will apportion the damage – neither defendant will have to pay for damage done by the other.)

(a) Overlapping: In may be the case that D<sub>1</sub> is jointly and severally liable for the harm caused by both her acts and D<sub>2</sub>'s, but that D<sub>2</sub> is liable only

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for his own. This is especially likely where D<sub>2</sub>'s negligence is in *response* to D<sub>1</sub>'s. (Example: D<sub>1</sub> negligently breaks P's arm. D<sub>2</sub> negligently sets the arm, leading to gangrene and then amputation. D<sub>1</sub> is liable for all harm, including the amputation. D<sub>2</sub> is only liable for the amount by which his negligence worsened the condition – that is, liable for the difference between a broken and amputated arm.)

(3) Indivisible harms: Some harms are *indivisible* (making each co-defendant jointly and severally liable for the entire harm).

(a) Death or single injury: Thus the plaintiff's *death* or any *single personal injury* (e.g., a broken arm) is not divisible.

(b) Fires: Similarly, if P's property is *burned* or otherwise destroyed, this will be an indivisible result. (Example: D<sub>1</sub> and D<sub>2</sub> each negligently contribute to the starting of a fire, which then destroys P's house. There will be no apportionment, so D<sub>1</sub> and D<sub>2</sub> will each be liable for P's full damages.)

iii) One satisfaction only: Even if D<sub>1</sub> and D<sub>2</sub> are jointly and severally liable, P is only entitled to a *single satisfaction* of her claim. (Example: P suffers harm of \$1 million, for which the court holds D<sub>1</sub> and D<sub>2</sub> jointly and severally liable. If P recovers the full \$1 million from D<sub>1</sub>, she may not recover anything from D<sub>2</sub>.)

### b) Contribution

i) Contribution generally: If two D's are jointly and severally liable, and one D pays more than his *pro rata share*, he may usually obtain partial *reimbursement* from the other D. This is called "*contribution*." (Example: A court holds that D<sub>1</sub> and D<sub>2</sub> are jointly and severally liable to P for \$1 million. P collects the full \$1 million from D<sub>1</sub>. In most instances, D<sub>1</sub> may recover \$500,000 contribution from D<sub>2</sub>, so that they will end up having each paid the same amount.)

(1) Amount: As a general rule, each joint and severally liable defendant is required to pay an *equal share*.

(a) Comparative negligence: But in *comparative negligence* states, the duty of contribution is usually *proportional to fault*. (Example: A jury finds that P was not at fault at all, that D<sub>1</sub> was at fault 2/3 and D<sub>2</sub> was at fault 1/3. P's damages are \$1 million. P can recover the entire sum from either D. But if P recovers the entire sum from D<sub>1</sub>, D<sub>1</sub> may recover \$333,333 from D<sub>2</sub>.)

ii) Limits on doctrine: Most states *limit* contribution as follows:

(1) No intentional torts: Usually an *intentional* tortfeasor may *not* get contribution from his co-tortfeasors (even if they, too, behaved intentionally).

(2) Contribution defendant must have liability: The contribution defendant (that is, the co-tortfeasor who is being sued for contribution) must *in fact*

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*be liable* to the original plaintiff. (Example: Husband drives a car in which Wife is a passenger. The car collides with a car driven by D. The jury finds that Husband and D were both negligent. Wife recovers the full jury verdict from D. If intra-family immunity would prevent Wife from recovering directly from Husband, then D may not recover contribution from Husband either, since Husband has no underlying liability to the original plaintiff.)

iii) Settlements:

- (1) Settlement by contribution plaintiff: If D *settles*, he may then generally obtain contribution from other potential defendants. (Of course, he has to prove that these other defendants would indeed have been liable to P.)
- (2) Settlement by contribution defendant: Where D<sub>1</sub> settles, and D<sub>2</sub> – against whom P later gets a judgement – sues D<sub>1</sub> for contribution, courts are split among three approaches:
  - (a) Traditional rule: The traditional – and probably still majority – rule is that D<sub>1</sub>, the settling defendant, is *liable* for contribution.
  - (b) “Reduction of P’s claim” rule: Some courts *reject* contribution, but reduce P’s claim against D<sub>2</sub> pro-rata (so that D<sub>2</sub> comes out the same as if contribution had been allowed, but P loses out if what she received from D<sub>1</sub> in settlement was less than half of the total damages she suffered).
  - (c) “No contribution” rule: Some courts now *discharge* D<sub>1</sub>, the settling defendant, from contribution liability completely. This approach is increasingly popular, since it gives defendants strong incentives to settle.
- iv) Knell v. Feltman – While a passenger in a car, Langland was injured when the car was struck by a taxicab being driven by Feltman. Langland sued Feltman to recover damages for his injuries. Feltman sued Knell, the driver of the vehicle for contributory negligence. *Held*, when a tort is committed by the concurrent negligence of two or more persons who are not intentional wrongdoers, contribution should be enforced.
  - (1) D<sub>1</sub> can sue D<sub>2</sub> even if the P did not sue D<sub>2</sub>.

c) **Indemnity**

- i) Definition: Sometimes the court will not merely order two joint and severally liable defendants to split the cost (contribution), but will instead completely *shift* the responsibility from one D to the other. This is the doctrine of “*indemnity*” – a 100% shifting of liability, as opposed to the sharing involved in contribution.
- ii) Sample situations: Here are two important contexts in which indemnity is often applied:

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- (1) **Vicarious liability:** If D<sub>1</sub> is only *vicariously liable* for D<sub>2</sub>'s conduct, D<sub>2</sub> will be required to indemnify D<sub>1</sub>. (*Example:* Employee injures P. P recovers against Employer on a theory of *respondeat superior*. Employer will be entitled to indemnity from Employee; that is, Employee will be required to pay to Employer the full amount of any judgement that Employer has paid.)
- (2) Products liability (retailer versus manufacturer): A *retailer* who is held strictly liable for settling a defective injury-causing product claim will get indemnity from others further up the distribution chain, including the *manufacturer*.

### 8) Limited Duty

- a) A standard negligence analysis would make defendant liable. However, because finding someone negligent in all cases would effect other rights, duty is limited.
- b) Mental Disturbance and Resulting Injury
  - i) Accompanied by physical impact: If D causes an actual *physical impact* to P's person, D is liable not only for the physical consequences of that act, but also for all the *emotional* or *mental suffering* which flows naturally from it. Such mental-suffering damages are called "parasitic" – they attach to the physical injury.
  - ii) Mental suffering without physical impact: But where there has been *no physical impact* or direct physical injury to P, courts *limit* P's right to recover for mental suffering.
    - (1) No physical symptoms: Where there is not only no impact, but no *physical symptoms* of the emotional distress at all, nearly all courts *deny recovery*. (*Example:* D narrowly misses running over P. No one is hurt. P has no physical symptoms, but is distraught for weeks. Few, if any, courts will allow P to recover for her emotional distress.)
      - (a) Exceptions: Some courts recognize an exception to this rule in special circumstances (e.g., negligence by telegraph companies in wording messages and in funeral homes handling corpses).
      - (b) Abandoned: About six states, including California and probably New York, have simply abandoned the rule against recovery for the negligent infliction of purely emotional harm.
      - (c) The "at risk" plaintiff: The general rule means that if P, by virtue of his exposure to a certain substance, suffers an *increased likelihood* of a particular disease, P may generally not recover from the purely emotional harm of being at risk. (*Example:* D releases toxic chemicals into the water. This causes P to have a greatly advanced risk of throat cancer. Most courts will not allow P to recover for distress at being extra vulnerable to cancer.)
      - (d) Intentional torts: Remember that the general rule applies only to *negligent* conduct by D – if D's conduct is intentional or willful, P

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may recover for purely emotional harm with no physical symptoms, by use of the tort of intentional infliction of emotional distress.

- (2) Physical injury without impact: Where D's negligent act (1) physically *endangers* P, (2) does not result in physical *impact* on P, and (3) causes P to suffer emotional distress that has *physical consequences*, nearly all courts *allow* recovery. (Example: D narrowly avoids running over P. P is so frightened that she suffers a miscarriage. P may recover.)
  - (3) Fear for other's safety: If P suffers purely emotional distress (without physical consequences), and P's distress is due solely to fear or grief about the danger or harm to *third persons*, courts are split.
    - (a) **Zone of danger:** If P was in the "*zone of danger*" (i.e., Physically endangered but not struck), nearly all courts *allow* him to recover for emotional distress due to another person's plight. (Example: D narrowly avoids running over P, and in fact runs over P's child S. Most courts will allow P to recover for her emotional distress at seeing S injured.)
    - (b) Abandonment of zone requirement: A number of states – probably still a minority – have abandoned the "zone of danger" requirement. In these courts, so long as P *observes* the danger or injury to X, and X is a *close relative* of P, P may recover. (Example: P is on the sidewalk when D runs over P's son, S. In a court which has abandoned the "zone of danger" requirement, P will be able to recover for his emotional distress at seeing his son injured, even though P himself was never in physical danger.
- iii) Daley v. LaCroix – D was travelling down a road outside P's house. D's car became airborne, sheared off a utility pole, snapping wires which made a loud noise. P claimed she suffered traumatic neurosis and emotional disturbance from the event and sued D for negligent infliction of emotional distress. *Held*, where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proven action may recover in damages for such physical consequences to himself notwithstanding the *absence of any physical impact* upon P at the time of the mental shock.
- (1) It is the seeing and experiencing the negligent act that gives rise to the cause of action.
  - (2) Impact is *not* a requirement.
- iv) Thing v. La Chusa – A boy was struck by D's car. The boy's mother, P, was nearby but did not see or hear the accident. Because she was not present when the accident occurred, she was not allowed to recover for her emotional distress. *Held*, a plaintiff who is not within the zone of danger must satisfy three requirements to recover:
- (1) Plaintiff must be ***closely related*** to the injury victim (apparently spouse, parents, siblings, children and grandparents of the victim;

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- (2) Plaintiff must have been *present at the scene* of the injury-producing event, and have been *aware* that the event was causing injury to the victim; and
- (3) The plaintiff must as a result have suffered serious emotional distress (a reaction beyond which would be anticipated in a disinterested witness).

### c) Failure to Act

- i) No general duty to act: A person generally cannot be liable in tort solely on the grounds that she has *failed to act*.
  - (1) Duty to protect or give aid: This means that if D sees that P is in danger and fails to render assistance (even though D could do so easily and safely), D is *not liable for refusing to assist*. (*Example*: D, passing by, sees P drowning in a pond. D could easily pull P to safety without risk to D, but instead, D walks on by. D is not liable to P.)
- ii) Exceptions: But there are a number of commonly-recognized *exceptions* to the “no duty to act” rule:
  - (1) Business premises: In most courts, anyone who maintains *business premises* must furnish warning and assistance to a business visitor, regardless of the source of the danger or harm. (Traditionally, this rule applied to common carriers and innkeepers, and has since been expanded to business premises generally.) (*Example*: P gets his finger stuck in an escalator operated by D, a store where P is a customer. If D does not give P assistance, D will be liable.)
    - (a) Employers and universities: Similarly, *employers* must give assistance to employees, and universities must give assistance to students.
  - (2) Defendant involved in injury: If the danger or injury to P is *due to D’s own conduct*, or to an instrument under D’s control, D has a duty of assistance. This is true today even if D acted without fault. (*Example*: A car driven by D strikes P, a pedestrian. Even though D has driven completely non-negligently, and the accident is due to P’s carelessness in crossing the street, D today has a common-law duty to stop and give reasonable assistance to P.
  - (3) Defendant and victim as co-venturers: Where the victim and defendant are engaged in a *common pursuit*, so that they may be said to be *co-venturers*, some courts have imposed on the defendant a duty of warning and assistance. For instance, if two friends went on a jog together, or on a camping trip, their joint pursuit might be enough to give rise to a duty on each to aid the other.
  - (4) Assumption of duty: Once D *voluntarily begins* to render assistance to P (even if D was under no legal obligation to do so), D must *proceed with reasonable care*.
    - (a) Preventing assistance by others: D is especially likely to be found liable if he begins to render assistance, and this has the effect of

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*dissuading others* from helping P. (Example: If D stops by the roadside to help P, an injured pedestrian, and other passers-by decline to help because they think the problem is taken care of, D may then not abandon the attempt to help P.)

(b) Mere promise: Traditionally, a mere *promise* by D to help P (without actual commencement of assistance) was *not* enough to make D liable for not following through. But many modern courts would make D liable even in this situation if P has a reliance interest.

(5) Duty to control others: If D has a duty to *control third persons*, D can be negligent for failing to exercise that control.

(a) Special relationship: A duty to control a third person may arise either because of a special relationship between D and P, or a special relationship between D and a third person. For instance, some courts now hold that any *business* open to the public must protect its patrons from wrongdoing by third parties. (Example: D, a storekeeper, fails to take action when X, obviously a deranged man, comes into the store wielding a knife. P, a patron, is stabbed. Most courts would find D liable for failing to take action.

iii) Linder v. Bidner – Bidner’s son had a propensity for mistreating other children. The son mistreats another child and the child sues the parents of the son. *Held*, a parent is negligent when there has been a failure to adopt reasonable measures to prevent a definite type of harmful conduct on the part of the child, but there is no liability on the part of the parents for the general incorrigibility of the child.

(1) One’s duty of care for another’s actions depends upon:

(a) Parents need *notice* of specific propensities;

(b) *Reasonable care* if you are responsible (reasonable steps under the circumstances);

(c) *Capacity to control* the person involved;

(d) *Authority* to control;

(e) Have to have a *special relationship* between parties.

iv) Tarasoff v. Regents of University of California – Patient tells psychologist that he wants to kill P’s daughter. Psychologist reports incident to medical group, but does nothing else. Patient kills P’s daughter and P brings wrongful death claim against University. *Held*, a therapist (or other individual) who has determined, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of danger.

(1) The magnitude of the risk (killing someone) is what determines the quantum of the duty.

### d) Unborn Children

- i) Modern view: Most courts have rejected the traditional view that an infant injured in a prenatal accident could never recover if born alive. Today, recovery for prenatal injuries varies:
  - (1) **Child born alive:** If the child is eventually born alive, nearly all courts allow recovery.
  - (2) **Child not born alive:** Courts are split about whether suit can be brought on behalf of a child who was not born alive. Usually, a court will allow recovery only if it finds that a fetus never born alive is a “person” for purposes of the wrongful death statute.
    - (a) Endresz v. Friedberg – P, 7 months pregnant, was injured in an automobile accident. P gave birth to two *stillborn* children. P brought wrongful death claim against D. *Held*, a wrongful death action may not be maintained for the death of an unborn child.
      - (i) Before a wrongful death action can be pressed, a child must be born alive...even for just a second.
  - (3) **Pre-conception injuries:** The above decision assumes that the child was injured in utero. Suppose, however, that the injury occurred before the child was even conceived, but that some effect from the injury is nonetheless suffered by the later conceived child. Here the courts are split as to whether the child can recover.
    - (a) Enright v. Eli Lilly & Co. – P’s mother, before getting pregnant with P, takes a drug made by D. The drug damages the mother’s reproductive system. When P is conceived, she suffers from some congenital disease or defect (e.g., sterility) as a result. P’s mother can clearly recover from D for her own injuries, but courts are split as to whether P can recover against D for these pre-conception events.
  - (4) **Wrongful life:** If a child is born illegitimate, or with an unpreventable congenital disease, the child may argue that it should be entitled to recover for “wrongful life,” in the sense that it would have been better off aborted. But almost no courts have allowed the child to make such a wrongful life recovery. Courts do, however, often allow the parents to recover for their medical expenses, and perhaps their emotional distress from the child’s condition.
    - (a) Procanik By Procanik v. Cillo – P’s mother contracted German Measles during her first trimester of pregnancy. P was born with birth defects. P contests that had P’s mother known about the risks to P from the German Measles, P’s mother would have aborted the pregnancy and P *would have never been born*. Wrongful life claim. *Held*, A child may not recover for wrongful life, emotional distress, or impaired childhood, but may recover for extraordinary medical costs to the child.

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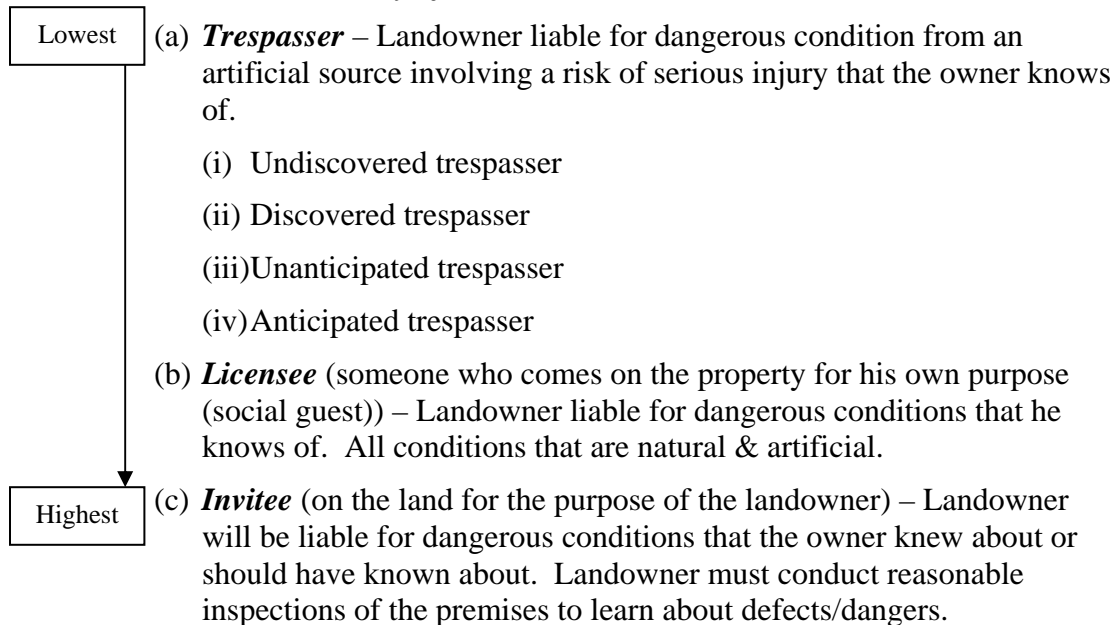
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- (i) The breach of the duty of care is the failure by the physicians to provide adequate information.

### 9) Owners and Occupiers of Land

#### a) Test for a duty of care and liability:

- i) Make sure that D is an owner or operator of land or one who is on privity with one.
- ii) Did the injury occur on or off the land? (Usually it happened on the land).
- iii) Is the plaintiff an undiscovered trespasser? If so, there is no duty – no standard of care owed to the plaintiff. The plaintiff always loses.
- iv) If the plaintiff was anyone else, ask was the injury caused by an activity or a dangerous condition:
  - (1) Activity: If you were doing something on the property, treat as ordinary negligence. Do not worry about who the plaintiff is.
  - (2) Dangerous condition (e.g., rotted banisters): If the injury occurs due to a dangerous condition, must consider who P is. ***Who the plaintiff is determines the duty of care owed:***



#### b) On the Premises

##### i) Rejection or Merging of Categories

- (1) Rowland v. Christian – P was a social guest at D's apartment. While using D's bathroom, P cut his hand on the faucet handle. D knew of the cracked glass handle and failed to warn P. *Held*, Where the occupier of land is aware of a concealed defective condition and is aware that a person is about to come into contact with it and fails to warn, this constitutes negligence.

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(a) This case rejects the categories for the duty of care.

c) Lessor and Lessee

- i) Borders v. Roseberry – Social guest is visiting the apartment of a tenant. Guest slipped on ice that had accumulated on the porch of the apartment building. The tenant was aware of the condition but the landlord was not. *Held*, A **landlord generally does not have a duty of care** to the social guest of a tenant with 6 exceptions:
  - (1) Undisclosed or dangerous conditions known to the lessor and unknown to the lessee.
  - (2) Conditions dangerous to persons outside the premises.
  - (3) Premises leased for admission of the public.
  - (4) Parts of land retained in lessor's control which lessee is entitled to use.
  - (5) Where lessor controls to repair, he must repair.
  - (6) Negligence by lessor in making repairs.
- ii) Pagelsdorf v. Safeco Ins. Co. of America – P was helping tenant move furniture. He leaned against a railing, it snapped, and he fell to the ground below. The railing was dry rotted – latent defect. *Held*, D owed ordinary care to his tenant and to others on the premises with permission. Since modern social conditions no longer support special tort immunity for occupiers of land, there is no logical basis for a general rule of non-liability for landlords either.
  - (1) Classifications don't provide the right incentives.
  - (2) There is an implied warranty of habitability – a continuing duty to the tenant.
  - (3) Owner has the most control over the maintenance of the building.
- iii) Kline v. 1500 Massachusetts Ave. Apartment Corp. – P, a tenant, was assaulted and robbed in the common area of the building. Landlord had notice that there were an increasing number of assaults in the building. *Held*, a landlord has a duty to protect tenants from foreseeable criminal acts committed by 3<sup>rd</sup> parties in areas of the building where the landlord has control over security (common areas, lobbies, etc.).
  - (1) Landlord has the power to make the area safe.

### 10) Negligence Damages

- a) Punitive Damages: They are supposed to: (1) punish, (2) deter, and (3) be in proportion to the harm.
- b) Gryc v. Dayton-Hudson Corp. – 4 year old child wearing “flannelette” pajamas burned when pajamas ignited. *Held*, punitive damages will be awarded where the defendant acted with a willful or reckless disregard for plaintiff's rights.

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- i) Could view the severity of the defect by using a *Hand* analysis (D knew it was flammable, there were alternatives, cheap to make the alterations).
- ii) **Elements of willful or reckless disregard of plaintiff's rights:**
  - (1) The existence and magnitude of the product danger to the public;
  - (2) The cost or feasibility of reducing the danger to an acceptable level;
  - (3) The manufacturer's awareness of the danger, the magnitude of the danger, and the availability of a feasible remedy;
  - (4) The nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or reduce the danger;
  - (5) The extent to which the manufacturer purposefully created the danger;
  - (6) The extent to which the defendants are subject to federal safety regulation;
  - (7) The probability that compensatory damages might be awarded against the defendants in other cases; and
  - (8) The amount of time which has passed since the actions sought to be deterred.
- c) Pacific Mutual Life Ins. Co. v. Haslip – Agent was representing defendant, collecting premiums and pocketing them. P attempted to make a claim against her policy but discovered that it did not exist. *Held*, punitive damages assessed by the jury against a defendant do not violate the Due Process Clause of the 14<sup>th</sup> Amendment.
  - i) Pacific did not pay the claim – bad faith – IIED
  - ii) The size of the punitive damage award will apparently never be enough to make out a due process violation. Only if the defendant can show that inadequate guidance was given to the jury will the award be reversed on due process grounds.

### 11) Negligence Defenses

#### a) Plaintiff's Conduct

##### i) Contributory Negligence

- (1) **Knowing contributory negligence**/implied assumption of risk.
  - (a) One sees the risk.
  - (b) Unreasonably, voluntarily takes on the risk.
- (2) **Unknowing contributory negligence**
  - (a) P doesn't see the precise risk.
  - (b) P is just careless.
- (3) Only with knowing contributory negligence do you write about implied assumption of risk. Must know the difference for strict liability defense.

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- (4) Any contributory negligence completely bars recovery.
- (5) Contributory negligence defense is not a good defense to **reckless tortious conduct**.
- (6) Davies v. Mann – P tied his ass to a public highway. D, driving a wagon, ran over and killed the ass. *Held*, a duty of reasonable care is not mitigated by the lawful or unlawful actions of another.
  - (a) *Last clear chance* used to provide a way out of contributory negligence. However, it has no merit.

### ii) Comparative Negligence

- (1) P's actions offset the amount of recovery in a comparative negligence state.
- (2) **Pure comparative negligence** states – More negligent plaintiff can still recover. A P's damages are reduced in proportion to the percentage of negligence attributed to him.
- (3) **Modified comparative negligence** states – There is no recovery if P is more negligent than D. P can only recover if P's negligence either (1) does not exceed (50% jurisdictions) or (2) is less than (49% jurisdictions) the D's negligence.
- (4) Wanton, reckless conduct will be considered against the D when jury considers the appropriate percentage of liability.
- (5) McIntyre v. Balentine – Two drivers were in an automobile accident. One driver was drunk and the other was speeding. *Held*, Tennessee Supreme Court abandoned the outmoded and unjust common law doctrine of contributory negligence and adopted in its place comparative fault.
  - (a) Comparative fault makes doctrines of remote contributory negligence and last clear chance obsolete.
  - (b) In cases of multiple tortfeasors, P will be able to recover so long as P's fault < combined fault of the tortfeasors.
  - (c) Joint & several liability is obsolete.

### iii) Assumption of Risk

- (1) Express
  - (a) Winterstein v. Wilcom – P was injured when the car he was driving hit a cylinder head lying on a racetrack. P signed an express release. *Held*, in the absence of an intentional tort, willful, wanton, reckless or gross negligence, and no disadvantage of bargaining power, releases (exculpatory agreements) do not subvert public policy.
    - (i) ***Voluntary, knowing, unreasonable confrontation with risk.***
    - (ii) **Elements:**

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1. Parties may agree that there shall be no obligation to take precautions and hence no liability for negligence.
2. Bargaining must be free and open.
3. Against public policy to permit exculpatory agreements as to transactions involving the public interest, as for example with regard to public utilities, common carriers, and innkeepers.
4. These agreements are generally invalid where they involve business suitable for public relation.
5. Cannot override a safety statute.

### (2) Implied

- (a) Found in a contributory negligence states and not applied in comparative negligence states.

### iv) Last clear chance doctrine

- (1) Found in contributory negligence states and out in comparative negligence states
- (2) In comparative negligence states, last clear chance is not used but facts will be used to consider the amount of the award.

## 12) Strict Liability

### a) General

- i) Liability without fault on the part of the defendant. *Policy based* – has nothing to do with fault.
- ii) Prima facie case:
  - (1) Standard of care is that D has to make sure that nothing happens to P.

### b) Animals

- i) Trespassing animals: The owner of livestock or other animals is strictly liable if those animals trespass on another's land.
- ii) Non-trespass liability: A person is also strictly liable for all damage done by any "dangerous animal" he keeps.
  - (1) Wild animals: A person who keeps a "wild" animal is strictly liable for all damage done by it, as long as the damage results from a "dangerous propensity" that is typical of the species in question.
  - (2) Domestic animals: But injuries caused by a "domestic" animal such as a cat or a dog do not give rise to strict liability unless the owner *knows* or has *reason to know* of an animal's dangerous characteristics.

### c) Abnormally Dangerous Activities

- i) General rule: A person is strictly liable for any damage, which occurs while he is conducting an "abnormally dangerous" activity.

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- (1) Six factors: Courts consider six factors in determining whether an activity is “abnormally dangerous” (Restatement § 560):
  - (a) there is a **high degree of risk** of some harm to others;
  - (b) the harm that results is likely to be **serious**;
  - (c) the risk **cannot be eliminated** by the exercise of reasonable care;
  - (d) the activity is **not common**;
  - (e) the activity is not **appropriate** for the place where it is carried on; and
  - (f) the danger outweighs the activity’s **value** to the **community**.
- (2) Requirement of unavoidable danger: Probably the single most important factor is that **the activity be one which cannot be carried out safely, even with the exercise of reasonable care**.
- ii) Examples: (1) nuclear reactor; (2) explosives; (3) crop-dusting; (4) airplane accidents.

### d) Limitations On Strict Liability

- i) Scope of risk: There is strict liability only for damage, which results from the *kind of risk* that made the activity abnormally dangerous.
  - (1) Abnormally sensitive activity by plaintiff: A related rule is that D will not be liable for his abnormally dangerous activities if the harm would not have occurred except for the fact that P conducts an “*abnormally sensitive*” activity.
- ii) Contributory negligence no defense: Ordinary *contributory negligence* by P will usually *not* bar her from strict liability recovery.
  - (1) Unreasonable assumption of risk: But assumption of risk is a defense to strict liability. Thus if P knowingly and voluntarily subjects herself to danger, this will be a defense, whether P acted reasonably or unreasonably in doing so.
- iii) Rylands v. Fletcher – Reservoir collapsed on miners. See elements above for the test of abnormally dangerous.
  - (1) Key question: What extent will due care matter? If not, strict liability.
- iv) Bridges v. The Kentucky Stone Co., Inc. – P’s son was killed when someone maliciously detonated dynamite in their home. The dynamite was stolen from the D’s storehouse, but was used 100 miles away and several weeks later. *Held*, the determination of “ultra-hazardous” activity must be determined on a case-by-case basis as per the various factors outlined in the Restatement (2<sup>nd</sup>).
  - (1) Proximate causation applies – D (warehouse) is displaced by time and distance from P.
  - (2) Here, the risk manifested is not the risk perceived.

### v) Incentives and economic analysis

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- (1) Indiana Harbor Belt R.R. Co. v. American Cyanamid Co. – D manufactures 20,000 gallons of liquid acrylonitrile, and puts it into a railroad car it has leased. It then causes the X Railroad to transport this substance to a railroad yard owned by P, located in the Chicago metropolitan area. Acrylonitrile is a hazardous and flammable substance. While the car is in P’s railroad yard, it leaks. Authorities require P to decontaminate the soil at a cost of nearly \$1 million. P sues D, arguing that even if D exercised reasonable care in maintaining the rail car and putting the chemical into it, D should be strictly liable because the chemical is by its nature ultra hazardous.

*Held*, for D. “We have been given no reason ... for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars....” Even though the substance is toxic and flammable, it will not leak from a properly maintained rail car. The accident here was, therefore, caused by carelessness (though it is not clear whose carelessness). Since this type of accident can be completely eliminated by the use of due care on the part of all concerned, there is no reason to make rail transport of the chemical more expensive by imposing strict liability on one party, the shipper/manufacturer. While P claims that it is unduly dangerous to ship toxic or flammable materials through a congested metropolitan area, most railroad routes involve “hubs” that are in metropolitan areas, and routing such cargo around metro areas would be prohibitively expensive and might involve other risks (e.g., the use of poorer tracks). The emphasis is and should be on “picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing the liability there.” For this type of activity, the liability regime is negligence.

Note: The author of Indiana Harbor Belt was Judge Posner, who before taking the bench was a law professor well known for advocating the application of economics to law. The case illustrates an increasing judicial awareness that when a wider rule of liability is imposed than necessary, costs (in this case, shipping costs) will go up, and that the narrowest rule of liability sufficient to give actors adequate incentive to control risks is all that should be used.

- (a) This is about vicarious strict liability and the difference between the shipper and the carrier. Liability is *transferred* from the shipper to the carrier because the goods could have been shipped safely.

### e) Defenses to Strict Liability

- i) General defenses:
- (1) Assumption of risk
  - (2) Act of God.
  - (3) Highly sensitive plaintiffs

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- ii) No defense: (1) comparative fault; (2) contributory negligence; (3) due care.
- iii) Majority view: If you have *knowing contributory negligence*, that is a complete **defense** to strict liability. If what you have is *unknowing contributory negligence*, that is **no defense** to strict liability.
- iv) Modern trend: Use the comparative negligence analysis in strict liability. (*Example*: Not reading instructions on mower before operating).
- v) Where used?
  - (1) Animals: *Domestic* – not liable for the first bite, strictly liable for all the rest. *Wild* – Always strictly liable.
  - (2) Ultra-hazardous activities – no matter what happens, D is always strictly liable.

### 13) Products Liability

- a) Introduction
  - i) It is a tort designation; an umbrella designation. This is not a tort. You sue under one or more of three theories.
  - ii) Most products liability cases are tried as negligence cases.
  - iii) Most of the action is with *design defect* and strict liability.
  - iv) Three theories: “Product liability” refers to the liability of a seller of a tangible item, which because of a defect causes injury to its purchaser, user, or sometimes bystanders. Usually the injury is a personal injury. The liability can be based upon any of three theories:
    - (1) *Negligence*;
    - (2) *Warranty*;
    - (3) “*Strict tort liability*.”
- b) **Negligence**
  - i) Negligence and privity: Ordinary negligence principles apply to a case in which personal injury has been caused by a carelessly manufactured product. (*Example*: D, a car manufacturer, carelessly fails to inspect brakes on a car that it makes. P buys the car directly from D and crashes when the brakes don’t work. P can recover from D under ordinary negligence principles.)
    - (1) Privity: Historically, the use of negligence in product liability actions was limited by the requirement of *privity*, i.e., the requirement that P must show that he contracted *directly* with D. But every state has now *rejected* the privity requirement where a negligently manufactured product has caused personal injuries. It is now the case that *one who negligently manufactures a product is liable for any personal injuries proximately caused by his negligence*.
      - (a) *Example*: D manufactures a car, and negligently fails to make the brakes work properly. D sells the car to dealer, X, who resells to P.

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While P is driving, the car crashes due to the defective brakes. P may sue D on a negligence theory, even though P never contracted directly with D.

(b) Bystander: Even where P is a *bystander* (as opposed to a purchaser or other user of the product), P can recover in negligence if he can show that he was a “foreseeable plaintiff.” (*Example*: A negligently manufactured car driven by Owner fails to stop due to defective brakes, and smashes into P, a pedestrian. P can sue the manufacturer on a negligence theory.)

ii) **Conduct is critical** – four types (breach of a duty of care).

(1) Negligent *design* – all products are defective.

(2) Negligent *manufacture* – only that product is defective.

(3) Negligent *warnings*.

(4) Negligent *inspection*.

iii) **Who can be a plaintiff?**

(1) Anyone who is in the foreseeable “zone of risk” including bystanders.

iv) **Classes of defendants**: Several different classes of people are frequently defendants in negligence-based product liability actions:

(1) **Manufacturers**: The manufacturer is the person in the distribution chain most likely to have been negligent. He may be negligent because he: (1) carelessly *designed* the product; (2) carelessly *manufactured* the product; (3) carelessly performed (or failed to perform) reasonable *inspections* and tests of finished products; (4) failed to package and ship the product in a reasonably safe way; or (5) did not take reasonable care to obtain quality *components* from a reliable source.

(2) **Retailers**: A *retailer* who sells a defective product may be, but usually is not, liable in negligence. The mere fact that D has sold a negligently manufactured or designed product is *not by itself* enough to show that she failed to use due care. The retailer ordinarily has *no duty to inspect* the goods. Thus suit against the retailer is now normally brought on a warranty or strict liability theory, not negligence.

(3) Other suppliers: *Bailors* of tangible property (e.g., rental car companies), *sellers* and *lessors* of real estate, and suppliers of product-related *services* (e.g., hospitals performing blood transfusions) may all be sued on a negligence theory.

v) MacPherson v. Buick Motor Co. – Defective spokes of the car tires. **Rule**: *one who negligently manufactures a product* is liable for *any personal injuries that are proximately caused by his negligence*.

(1) Effectively ends *caveat emptor*.

(2) This case establishes negligence as a cause of action for product liability.

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(3) The *casual bystander* may recover if he is a *foreseeable plaintiff*.

c) **Warranty**

- i) General: A buyer of goods, which are not as they are contracted to be, may bring an action for *breach of warranty*. The law of warranty is mainly embodied in the *Uniform Commercial Code* (UCC), in effect in every state except Louisiana. There are two sorts of warranties, “*express*” ones and “*implied*” ones.
- ii) **Express warranties:** A seller may *expressly represent* that her goods have certain qualities. If the goods turn out not to have these qualities, the purchaser may sue for this breach of warranty.
  - (1) Baxter v. Ford Motor Co. – P buys a Model A Ford from St. John Motors, a Ford dealer. Before the sale, Ford had given its dealers brochures, one of which describes the Model A’s windshield as “Triplex, shatterproof glass ... So made that it will not fly or shatter under the hardest impact.” While P is driving the car, a pebble hits the windshield, making the glass shatter, in turn damaging P’s eyes. *Held*, Ford expressly warranted that the glass was shatterproof, and P had a right to rely on these representations, particularly since their falsity was not readily apparent. Furthermore, P may recover from Ford for breach of warranty even though he purchased not from Ford, but from the dealer.
    - (a) There was an express warranty that was clearly breached.
    - (b) No privity of contract required anymore. Baxter removes privity.
    - (c) Elements:
      - (i) There is a representation that is put forth to the buyer who relied upon it.
      - (ii) The representation is not true.
      - (iii) The failure of the warranty was the proximate causation of the harm.
  - (2) UCC: UCC § 2-313 gives a number of ways that an express warranty may arise: (1) a statement of fact or promise about the goods; (2) a description of the goods (e.g., “shatterproof glass”); and (3) the use of a sample or model.
    - (a) Privity: There is usually *no* requirement of *privity* for breach of express warranty.
  - (3) Strict liability: D’s liability for breach of an express warranty is *a kind of strict liability* – as long as P can show that the representation was not in fact true, it does not matter that D reasonably believed it to be true, or even that D could not possibly have known that it was untrue.
- iii) **Implied warranties:** The existence of a warranty as to the quality of goods can also be *implied* from the fact that the seller has offered the goods for sale.

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- (1) Warranty of merchantability: The UCC imposes several implied warranties *as a matter of law*. Most important is the warranty of *merchantability*. Section 2-314(1) provides that “*a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.*”
- (a) Meaning of “merchantable”: To be *merchantable*, the goods must be “fit for the ordinary purposes for which such goods are used.”
- (b) Seller must be a merchant: The UCC implied warranty of merchantability arises only if the seller is a “*merchant with respect to goods of that kind.*” Thus the seller must be in business and must regularly sell the *kind of goods* in question.
- (2) Fitness for particular purposes: A second UCC implied warranty is that the goods are “*fit for a particular purpose.*” Under § 2-315, this warranty arises where: (1) the seller knows that the buyer wants the goods for a particular (and not customary) purpose; and (2) the buyer *relies on the seller’s judgement* to recommend a suitable product.
- (3) Privity: States have nearly all *rejected* any *privity* requirement for the implied warranties.
- (a) Vertical privity: Thus “*vertical*” privity is not required. In other words, a manufacturer’s warranty extends to *remote purchasers* further down the line.
- (i) Henningsen v. Bloomfield Motors, Inc. – The defendant, Chrysler Corporation, produced a car with a defective steering mechanism. One of its dealers, Bloomfield Motors, sold the car to Mr. Henningsen, who gave it to his wife. She was injured when the steering failed. *Held*, Mrs. Henningsen could recover from Chrysler for breach of the implied warranty of merchantability (imposed by the then effective Uniform Sales Act, a predecessor of the UCC). She could recover notwithstanding the fact that she never contracted with Chrysler directly.
1. Theories of defense against implied warranty tried: (1) disclaimer and (2) privity.
  2. Disclaimer can work if it is clearly communicated to the buyer.
  3. Courts want more bargaining power between buyer and seller.
  4. Burden of loss should be shouldered by those in the position to control the risk.
- (b) Horizontal privity: Similarly, “*horizontal*” privity is usually not required. In all states, any member of the *household* of the purchaser can recover if the member uses the product. In most states, *any* user, and even any foreseeable *bystander*, may recover.
- (4) Warranty defenses: Here are three *defenses* unique to warranty claims:

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- (a) Disclaimers: A seller may, under the UCC, *disclaim* both implied and express warranties.
  - (i) Merchantability: A seller may make a written disclaimer of the warranty of merchantability, but only if it is “*conspicuous*” (in capital letters or in bold print). Also, the word “merchantability” must be specifically mentioned. (Also the circumstances may give rise to an implied disclaimer, as where used goods are sold “*as is.*”)
  - (b) Limitation of consequential damages: Sellers may try to *limit the remedies* available for breach (e.g., “Our sole remedy is to repair or replace the defective product”). But in the case of goods designed for personal use (“consumer goods”), limitation-of-damages clauses for *personal injury* are automatically *unconscionable* and thus unenforceable.
- (5) Where warranty useful: Generally, any plaintiff who could bring a warranty suit will fare better with a strict liability suit. But there are a couple of exceptions:
  - (a) Pure economic harm: If P has suffered only *pure economic harm*, he will usually do better suing on a breach of warranty theory than in strict liability. For instance, loss of profits is more readily recoverable on a warranty theory.
  - (b) Statute of limitations: The *statute of limitations* usually runs sooner on a strict liability claim than on a warranty claim.

### d) Strict Liability in Tort

- i) General
  - (1) D’s conduct is irrelevant.
  - (2) Need to prove an unreasonably dangerous condition, which caused the injury.
  - (3) Who can be the plaintiff? Same rules apply as negligence.
  - (4) Who can be a defendant? All parties (manufacturer, wholesaler, retailer).
  - (5) Indemnification principles will apply.
- ii) Refinements:
  - (1) Adequate warnings will generally insulate from liability.
  - (2) Feasible alternatives approach – If you could have cured the defects easily and cheaply, you are liable. Warnings will not insulate you. (*Example*: four-year old, clothing, flammable).
  - (3) Where product use is incidental to a performance of a service, strict liability is usually not an option. However, you can recover for negligence (fault).

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- iii) General rule: Nearly all states apply the doctrine of “*strict product liability*.” Most have based their approach on Restatement (Second) § 402A. The basic rule is that a *seller* of a product is *liable without fault* for personal injuries (or other physical harm) caused by the product if the product is sold: (1) in a ***defective condition*** that is (2) ***unreasonably dangerous*** to the user or consumer. Once these requirements are satisfied, the seller is liable even though he used all possible care, and even though the plaintiff did not buy the product from or have any contractual relationship with the seller.
- (1) Greenman v. Yuba Power Products, Inc. – D<sub>1</sub> manufactures, and D<sub>2</sub> retails, the “Shopsmith,” a power tool that can be used as a saw, a drill, or a wood lathe. P sees one on display, and has his wife buy it for him. While he is using it as a lathe, a piece of wood clamped to the machine flies out and hits him on the head, severely injuring him. P does not give timely notice of breach of warranty to D<sub>1</sub>, as is required in warranty actions by California law.
- Held*, by Justice Traynor, P’s failure to give notice of breach does not bar his action, since D<sub>1</sub> is strictly liable in tort. “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being.” The law of sales warranties is not a good way to protect consumers like P, because of requirements (like the notice of breach requirement) that are suitable only for commercial transactions. (The liability of D<sub>2</sub> was not discussed.)
- (a) Note relevant time frame: point of purchase → point of injury.
- (b) Designers made the wrong choice in the design of the set-screws (design vs. manufacturing defect).
- (c) Traynor says express warranties = implied warranties = strict liability.
- (d) ***This case invents strict liability theory for products liability.***
- (e) Individual consumers should not be expected to be “steeped in the business practices.” The court defines the consumer-manufacturer relationship.
- (2) Non-manufacturer: Strict product liability applies not only to the product’s manufacturer, but also to its *retailer*, and any other person in the distributive train (e.g., a wholesaler) who is in the business of selling such products. (*Example*: On the above example, Consumer can recover against Dealer, even though Dealer merely resold the product and behaved completely carefully.)
- iv) **Restatement (Second) of Torts § 402A – Strict Liability**
- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

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- (a) The seller is engaged in the business of selling such a product, and
  - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
- (2) The rule stated in Subsection (1) applies although
- (a) The seller has exercised all possible care in the preparation and sale of his product, and
  - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.
- v) What product meets test: A product gives rise to strict liability only if it is “defective” and also “unreasonably dangerous.”
- (1) Meaning of “defective and unreasonably dangerous”: A product meets these twin requirements of “defective” and “unreasonably dangerous” if it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” (Therefore, if a product *obviously* presents a particular danger to all reasonable consumers, it is not defective or unreasonably dangerous because of that condition.)
- (a) Phillips v. Kimwood Machine Co. – P is employed to operate a sanding machine manufactured by D. He is injured when the machine ejects a piece of wood that is too thin to be properly held by it. P sues D in strict liability. *Held*, the **test for whether the machine is unreasonably dangerous** is whether it is “...one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test therefore is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product.” In making this determination, the trier of fact should take into account the likelihood of such injury, and the cost of preventing it, just as it would in a negligence case. Also, liability might be predicated on the fact that D failed to give P’s employer adequate warning about the danger of trying to feed thin pieces.
- (i) Plaintiff-centered, strict liability case. Compare with Prentis.
  - (ii) The timing of the tort is key: the temporal fix is **when the product is being bought and used**, not when it is being manufactured.
  - (iii) Wade risk utility test: Applied to all theories
    1. The usefulness and desirability of the product – its utility to the user and to the public as a whole.
    2. The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.

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3. The availability of a substitute product which would meet the same need and not be as unsafe.
  4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
  5. The user's ability to avoid danger by the exercise of care in the use of the product.
  6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general knowledge and the obvious condition of the product, or of the existence of suitable warnings or instructions.
  7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.
- vi) Unavoidably unsafe products: A product will not give rise to strict liability if it is *unavoidably unsafe*, and its *benefits outweigh its dangers*.
- (1) Prescription drugs: For instance, a *prescription drug* is not "defective and unreasonably dangerous" merely because it causes some side effects and may in an individual case cause more damage than it cures. This is also true of *vaccines*.
  - (2) Measured by time of sale: Generally, "unreasonable danger" and "defectiveness" are measured by reference to the state of human knowledge at the *time the product was sold*, not the time the products liability case comes to trial. In other words, *if the manufacturer did not and could not reasonably have known of the danger at the time of the manufacture, it will not be strictly liable*. This is often called the "*state of the art*" defense.
    - (a) Brown v. Superior Court – P's mother, while pregnant, takes DES, a drug designed to prevent miscarriage. After P is born and reaches adulthood, she (and others similarly situated) sues the Ds, manufacturers of DES, arguing that she has suffered cancer as a result of her mother's injection of DES years before. The evidence indicates that at the time D sold the drug to P's mother, neither D nor any other DES manufacturer knew about the cancer danger to daughters of those taking the drugs, and this was not in fact knowable based on scientific techniques existing at the time. P nonetheless seeks to hold D liable on the theory that DES was a "defective" and dangerous drug at the time it was sold to P's mother.

*Held*, for D. "A drug manufacturer's liability for a defectively designed drug should not be measured by the standards of strict liability." Because of the public interest in the development, availability, and reasonable price of drugs," the court will use the test stated in Comment k to Restatement (Second), § 402A (by which a

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drug with proper warnings, not known or knowable to be defective, is not “unreasonably dangerous”). In other words, “a manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution.

(i) Strict liability (402A) & prescription drugs – cannot hold manufacturers strictly liable for design defects in prescription drugs. *A drug, properly prepared, accompanied by proper directions and warnings, is not defective nor is it unreasonably dangerous.*

(ii) Rest., *Comment k deals with unavoidably unsafe products:*

1. Strict liability does not apply – negligence does.
2. Why? Products have a high social utility.

(3) No way to discover individual defect: A similar rule applies where the manufacturer knows that *certain items* may be defective, but there is no way for it to discover which particular ones fall in this category – such a product is usually held to be “unavoidably unsafe,” and strict liability will not apply. (*Example: D operates a blood bank. D knows that some units of blood may be infected with the HIV virus but no blood test for such infection yet exists. If a particular unit of blood causes P to contract AIDS, P will probably not be able to recover from D, because the product was “unavoidably unsafe.”*)

(4) Low social utility: Plaintiffs have argued that certain products – such as *cigarettes, liquor and convertible cars* – are of *so little social utility* that their dangers outweigh their benefits, and that they should give rise to strict liability because they are “unreasonable dangerous” even though they do not contain any “defect.” But courts have almost always *rejected* this concept of “*generically risky*” products.

(a) Roysden v. R.J. Reynolds Tobacco Co. – Thus plaintiffs who received lung cancer from smoking cigarettes have been unsuccessful with the argument that the dangers of smoking outweigh its benefits, so that cigarettes are an “unreasonably dangerous” product for which there should be strict liability. “Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.” Therefore, ordinary cigarettes are not considered “unreasonably dangerous.”

(i) In order to win a products liability case, you have to show that there would be a risk that ordinary consumers would not expect. Risks that are well known are not unreasonable.

(5) “Foreign-natural” distinction for food: Some courts make a special distinction in the case of *food*. These courts distinguish between “*foreign*” and “*natural*” objects. Under this approach, there is strict liability for

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“foreign” matter found in food (e.g., a piece of metal inside a can of tuna fish), but there is no strict liability for the vendor’s failure to remove a naturally-occurring substance from the food (e.g., bone fragments in canned tuna, or pits in cherries). In essence, these courts are saying that the naturally occurring substance is inherent in the product, even though technology exists for removing it.

- vii) Obvious dangers: If the danger posed by a product is very *obvious* or *commonly known* to consumers in general, the product will generally be found not to be defective or unreasonably dangerous.
- (1) Cigarettes: For instance, a court would almost certainly hold that although *cigarettes* are dangerous, the dangers they pose are so obvious and well known that a cigarette manufacturer cannot be held strictly liable for making an unreasonably dangerous or defective product.
- viii) Proving the case: P in a strict liability case must prove a number of different elements:
- (1) Manufacture or sale by defendant: She must show that the item was in fact manufactured, or sold, by the defendant.
- (2) Existence of defect: She must show that the product was *defective*.
- (a) Subsequent remedial measures: Most courts *do not* allow defectiveness to be proved by evidence that D subsequently *redesigned* the product to make it safer.
- (b) Toxic torts: In the case of a “*mass toxic tort*,” plaintiffs often use *epidemiological* evidence of defectiveness. (*Example*: To prove that DES causes cancer, P offers expert testimony that daughters of women who took DES in pregnancy have a much higher incidence of cancer than those whose mothers did not.)
- (3) Causation: P must show that the product, and its defective aspects, were the *cause in fact*, and the *proximate cause*, of her injuries.
- (a) Epidemiology: In *mass toxic tort* cases, this element, like existence of “defect,” will often be proved by *epidemiological* evidence. (*Example*: Expert testimony showing that daughters of women who took DES in pregnancy get 10 times as much of a particular rare cancer as those whose mothers did not would probably suffice to establish that P’s cancer of this rare sort was in fact caused by DES, assuming that P showed her mother took the drug.)
- (4) Defect existed in hands of defendant: Finally, P must show that the defect existed *at the time the product left D’s hands*.
- (a) Res ipsa: But an inference similar to *res ipsa loquitur* is permitted – once P shows that the product did not behave in the usual way, and the manufacturer fails to come forward with evidence that anyone tampered with it, the requirement of defect in the hands of the defendant is satisfied.

### e) Design Defects

i) Definition of “design defect”: A “*design defect*” must be distinguished from a “manufacturing defect.” In a design defect case, all the similar products manufactured by D are the same, and they all bear a feature whose design is itself defective and unreasonably dangerous.

(1) Prentis v. Yale Manufacturing Co. – A man operating a forklift, slipped and fell when the forklift surged. It appeared that the plaintiff’s injuries were caused by the fall alone. The plaintiff alleged that there was a defect in the design of the forklift and that the design of the forklift failed to properly incorporate the operator as a “human factor” into the machine’s function. When is a design defective? *Held*, a pure negligence, risk-utility test in products liability against manufacturers of products should be used where liability is predicated on defective design.

(a) Defendant-centered, negligence case. Compare with Phillips.

(b) Design defect cases are negligence cases.

*Risk-utility balancing test* – The competing factors are the alternatives and risks faced by the manufacturer and whether in light of these the manufacturer exercised reasonable care in making the design choices he made. Adoption of the Model Uniform Products Liability Act (UPLA) adopts a *negligence system* for design defects. Rationale: (1) design defects result from deliberate and documentable decisions on the part of manufacturers; (2) negligence standard would reward the careful manufacturer and penalize the careless one; (3) a verdict for the plaintiff in a design defect case is the equivalent of determining that the entire product line is defective; and (4) It is fairer – the safety-oriented manufacturer will not bear the burden of paying for losses.

ii) Negligence predominates: Most design defect claims have a heavy *negligence* aspect, even though the complaint claims strict liability. A design defect claim requires P to show that D chose a design that posed an *unreasonable danger* to P.

(1) Practical other design: The defectiveness of a design is judged by comparing it to *other possible designs*. A product’s design will be deemed defective if two conditions are met: (1) there was a *feasible alternative design* which, consistent with the consumer’s expected use of the product, would have avoided the particular injuries; and (2) the *costs* of the alternative design are *less* than the costs of the injuries thereby avoidable.

iii) Type of claims: Two types of common design defect claims are as follows:

(1) Structural defects: P shows that because of D’s choice of materials, the product had a *structural weakness*, which caused it to break or otherwise become dangerous.

(2) Lack of safety features: P shows that a *safety feature* could have been installed on the product with so little expense (compared with both the

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cost of the product and the magnitude of the danger without the feature) that it is a defective design not to install that feature.

(a) State of the art: D will be permitted to rebut this by showing that competitive products similarly lack the safety feature. But such a showing will not be dispositive – the trier of fact is always free to conclude that all products in the marketplace are defective due to lack of and easily added feature.

(i) O'Brien v. Muskin Corp – P dives into an above-the-ground swimming pool manufactured by D. When his hands touch the bottom, they slip, and he injures his head. P claims that the vinyl liner making up the bottom of the pool was defective because of its extreme slipperiness and proximately caused his injury.

*Held* (on appeal), D is entitled to prove its state-of-the-art defense (i.e., to show that no alternative pool liner material was available). However, even if D makes such a showing, P will not necessarily lose – a jury could reasonably conclude that despite the lack of alternative methods of making bottoms for above-ground pools, the risks posed by such pools outweigh their utility (at least in the absence of better warnings).

1. Uses the risk-utility analysis.
2. This analytical approach can be used for both *strict liability* and *negligence* cases.
3. Bottom line question: Was there justification for putting this on the market?

iv) Suitability for unintended uses: D may be liable not only for injuries incurring when the product is used as intended, but also for some types of injury stemming from *unintended uses* of the product.

(1) Unforeseeable misuse: If the misuse of the product is *not reasonably foreseeable*, D has no duty to design the product so as to protect against misuse.

(2) Foreseeable misuse: But if the misuse is *reasonably foreseeable* by D, D must take at least reasonable design precautions to guard against the danger from that use. (Alternatively, a warning to the purchaser against the misuse may sometimes suffice.) (*Example*: A car is not “intended” to be used in a collision, and most collisions are in a sense “misuse” of the product. Nonetheless, a car manufacturer must design a reasonably *crashworthy* vehicle if feasible to do so, because collisions are reasonably foreseeable.)

v) Military products sold to and approved by government: If the product is *sold* to the *U.S. Government* for *military use*, and the government *approves* the product’s specifications, the manufacturer will generally be immune from product liability even if the design is grossly negligent.

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- vi) Regulatory compliance defense: Suppose the manufacturer has *complied with federal or state regulations* governing the design of the product. At common law, this compliance does not absolve D of product liability – regulatory compliance is an item of *evidence* that the jury may consider, but it is not dispositive.
  - (1) Labeling: Thus if Congress or a state requires that a substance be labeled in a particular way, and a manufacturer follows that requirement, P can still bring a product liability suit on the theory that the labeling was inadequate and constituted a design defect. (But if the requirement was imposed by Congress, and the Court finds that Congress intended to *preempt* the states from requiring stricter or different warnings, then D has a defense.)
  - (2) Design or manufacture: Similarly, if the government regulations imposes a particular *design* or manufacturing technique, regulatory compliance is in most states not a defense, merely an item of evidence.

### f) Warnings Defect (Duty to Warn)

- i) Phillips: A *failure to warn* may make a product unreasonably dangerous.
- ii) Significance of the duty to warn: The “*duty to warn*” is essentially an *extra* obligation placed on a manufacturer.
  - (1) Manufacturing defect: Thus if a product is *defectively manufactured, no warning can save D from strict liability*.
  - (2) Design defect: Similarly, if a product is *defectively designed*, a warning will generally not shield D from strict product liability.
  - (3) Properly manufactured and designed product: If a product is *properly designed and properly manufactured*, D must nonetheless give a warning if there is *non-obvious* risk of personal injury from using the product. Similarly, in this situation, D may be liable for not giving *instructions concerning correct use*, if a reasonable consumer might misuse the product in a foreseeable way.
    - (a) “**Learned intermediary**” doctrine for drugs: In the case of prescription drugs, the warning generally needs to be given only to the *physician* – who is a “*learned intermediary*” between the manufacturer and the user – not to the user.
    - (b) Cigarettes: In the case of *cigarettes* sold before 1966 (the year federally mandated labeling requirements came into effect), a court might find that the manufacturer had a duty to warn of lung cancer and other dangers.
- iii) Unknown and unknowable dangers: If D can show that it *neither knew* nor, in the exercise of reasonable care *should have known* of a danger at the time of sale, most courts hold that there was *no duty to warn* of the unknown danger.

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- (1) Anderson v. Owens-Corning Fiberglas Corp. – P sues D, an asbestos manufacturer. P claims that his lung ailments resulted from his exposure to asbestos products while he worked in a shipyard from 1941-1976. P asserts D should have warned him of the dangers from asbestos. D wishes to defend by showing that at the same time of the exposure, it neither knew nor, in light of then-current scientific and medical knowledge could have known, that its product was dangerous to human beings.

*Held*, for D. “[K]nowledge or knowability is a component of strict liability for failure to warn.” It is true that this requirement of “knowledge or knowability” is to some extent “rooted in negligence.” But, “How can one warn of something that is unknowable?” While one of the goals of strict liability is to spread the risks and costs of injury to those most able to bear them, strict liability was never intended “to make the manufacturer or distributor the insurer of the safety of their products or to impose absolute liability.” (However, if some danger was known to the scientific community at the time of manufacture, the manufacturer had an obligation to warn even though the risk may have been so small as to be outweighed, in the manufacturer’s reasonable judgement, by the benefits of the product – a true negligence standard is not used, so long as the known or knowable risk was enough to make the product “unsafe.”)

- (a) In a failure to warn case relying on strict liability, you still have to show that the product is defective.
- (i) A product is defective if a warning would have made it safer.
  - (ii) Plaintiff’s position: Scientific knowledge at the time of production is irrelevant. There is a duty to warn about any risk regardless of the manufacturer’s knowledge.
  - (iii) Defendant’s position: Have to be able to offer into evidence knowledge of scientific evidence at the time of manufacture.
  - (iv) This court says that there is room for “state of the art” at the time of the manufacture. Negligence applies.

### iv) Additional Notes

- (1) Sophisticated users: Most jurisdictions employ some form of the “sophisticated user” defense in failure to warn cases.
- (2) Presumption that warning will be read and heeded: In most jurisdictions plaintiff is entitled to a presumption that the user would have read and heeded an adequate warning. This presumption assists the plaintiff in proving causation after the plaintiff has proved inadequate warning. This presumption is rebuttable.
- (3) Adequacy of warnings: Sometimes one can discern a difference on the issue of whether warnings were adequate between strict liability and negligence. Under the negligence standard, the manufacturer’s duty is to give a reasonable warning, not the best possible one.

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- (4) Post-Sale Duty to Warn: Courts generally have held manufacturers to a reasonableness standard for post-sale warnings and may consider a number of factors.
- v) Government labeling standards: The scope of D's duty to warn may be affected by the fact that the *government* imposes certain *labeling* requirements.
  - (1) Evidence: If D can show that it has complied with a federal or state labeling requirement, most courts permit this to be shown as *evidence* that the warning was adequate. But in most courts, this evidence is not dispositive – the jury is always free to conclude that a reasonable manufacturer would have given a more specific, or different, warning.
  - (2) Preemption: But where the labeling requirement is imposed by the *federal government*, and the court finds that Congress intended to *preempt* more demanding state labeling rules, then compliance with the federal standard is a complete defense to P's "failure to warn" claim. (*Example*: Congress has passed a statute controlling what warnings must be printed on cigarette packs. *Held*, by the Supreme Court, a cigarette smoker's state common-law damage claim for failure to warn is pre-empted by this federal statute.
- vi) Obvious danger: If the danger is *obvious* to most people, this will be a factor reducing D's obligation to warn. But where a warning could easily have been given, and a substantial minority of people might not otherwise know of the danger, the court may nonetheless find a duty to warn.

### g) Interests That May Be Protected

- i) Property Damage: All the above analysis assumes that P's injury consists of *personal injury*. If P's damages consist only of *property damage*, special rules may apply.
  - (1) Strict liability and negligence: P may recover in *strict liability* and *negligence* even though his damage consists only of property damage rather than personal injury.
    - (a) Warranties: But he may not win on a *warranty* theory. If P is suing a *remote defendant* (one with whom he did not contract), two of the three alternative versions of UCC § 2-318 do *not* allow P to recover for property damage unaccompanied by personal injury.
  - (2) "Property damage" defined: Since the rules for recovering for property damage are easier for the plaintiff to satisfy than those for recovering "pure economic" damages, the two must be distinguished. If P's property apart from the defective product is destroyed (e.g., the product causes a fire), this obviously counts as property damage. Also, if the defect causes the *product itself* to be destroyed or visibly harmed (e.g., an automobile catches on fire due to a defective radiator), this is probably property damage, and thus recoverable in strict liability or negligence.

## Torts Outline

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- (a) Loss of bargain: But if P's damages stem from the fact that the product simply *doesn't work* because of the defect, or is *worth less* with the defect than without it, courts are split – most would probably treat this as intangible economic harm.
  - (b) Two Rivers Co. v. Curtiss Breeding Serv. – P, a cattle breeding company, purchases from D semen for Chianina Cattle. The semen turns out to have a recessive genetic defect known as syndactylism, which causes some of the resulting calves to be stillborn, and which (P claims) causes the rest of the resulting calves to have a lower market value. P sues D on both strict liability and implied warranty theories. *Held*, for D. There can be no strict liability recovery because P's losses are essentially economic, not property damage. The essence of P's claim is that, as a purchaser of bull semen, its commercial expectations have not been fulfilled by the product. Thus, the general principles of contract law (i.e., the UCC's warranty provisions), not strict liability principles of tort law, should control. (Also, even if the semen is considered to be defective, it is not "unreasonably dangerous.")
    - (i) **Rule:** Can you recover economic loss under 402(a)? Not usually, but sometimes.
- ii) Intangible economic harm: Where P's damages are found to be solely *intangible economic* ones (as opposed to personal injury or property damage), P will find it much harder to recover.
- (1) Direct purchaser: If P is suing the person who sold the goods to him:
- (a) Warranty: P can readily recover for breach of *implied or express warranty*. P can recover the difference between what the product would have been worth had it been as warranted, and what it is in fact worth with its defect. He can also generally recover consequential damages including lost profits.
  - (b) Strict liability and negligence: P may not be able to recover for the intangible economic harm in *strict liability or negligence* – the court might well hold that the UCC warranty claims were intended as the *sole remedy* for intangible economic harm by a purchaser against his immediate seller.
- (2) Remote purchaser: Where P is suing not his own seller, but a *remote person* (e.g., the manufacturer), he will probably *not* recover anything if his only harm is an intangible economic one.
- (a) Warranty: Most courts will deny an implied *warranty* claim, on the grounds that P must sue his own immediate seller for such breaches.
  - (b) Strict liability: Almost all courts would deny recovery to the remote buyer for economic for economic harm on a *strict liability* theory.

## Torts Outline

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- (c) Negligence: Most courts deny P recovery in *negligence* for pure intangible economic harm.
- (d) Combined: But remember that if P can show that he has received either physical injury or “property damage,” he may then be able to “*tack on*” his intangible economic harm as an *additional* element of damages. This would certainly be the case in a negligence action, and might possibly be true in a strict liability or warranty action.

### h) Defenses Based On Plaintiff’s Conduct

- i) Contributory negligence: A defendant is not quite as free to use contributory negligence to defend against a strict liability or warranty claim as against a negligence claim.
  - (1) Strict liability: Only certain types of contributory negligence are defenses to a strict liability claim.
    - (a) Failure to discover danger: If P’s contributory negligence lies in *failing to inspect* the product, or otherwise failing to become aware of the danger from it, virtually all courts agree that this is not a defense.
    - (b) Abnormal use: If P’s contributory negligence consists of her *abnormal use* or misuse of the product, this is a defense to strict liability, but only if the misuse was *not relatively foreseeable*.
    - (c) Comparative negligence: In states following *comparative* negligence, courts are split about whether P’s contributory negligence should result in a proportionate reduction in her strict liability recovery.
      - (i) Daly v. General Motors Corp. – P, the driver of an automobile manufactured by D, is involved in an accident. P is thrown from the vehicle when the car door opens due to a defect in the door latch. Evidence is introduced to show that P was intoxicated at the time of the accident, that he had not engaged the shoulder harness of the seat belt system, and that he had not locked the car door. *Held*, the principals of comparative negligence (and necessarily, the doctrine of contributory negligence) are extended to strict liability. P will still be relieved of proving that D was negligent, since D will continue to be strictly liable for injuries caused by a defective product. However, P’s recovery will be reduced to the extent that his lack of reasonable care caused the injury.

The application of comparative negligence principles will not reduce a manufacturer’s incentive to produce safe products, since there is no way a manufacturer can predict, in a particular case, that a potential plaintiff will be contributorily negligent. Also, it is not true that the jurors are unable to make a fair apportionment of liability because they cannot compare P’s negligence with D’s strict liability.

1. Failure by plaintiff to take precautionary measures.

## Torts Outline

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2. Rule: Can you use comparative fault under 402(a)? Yes, in the vast majority of states.
3. Remember the product liability defenses:
  - a. **Assumption of risk** – This is a defense in product liability cases even with comparative fault.
  - b. **Unforeseeable misuse** – Ds are not liable for the unforeseeable misuse of their products – complete defense.

(2) Warranty claims: More or less the same rules described above apply concerning the effect of contributory negligence on *warranty* claims. (Example: If the buyer discovers the defect and uses the goods anyway, this will probably be a defense to a warranty claim.)

ii) Assumption of risk: The defense of *assumption of risk* applies in general the same way in *strict liability* cases and *warranty* cases as it does in negligence cases.

(1) Must be voluntary and unreasonable: But, again, as in negligence cases, P's use must be both voluntary and unreasonable.

### i) Defendants Other Than Principal Manufacturers

i) Other Suppliers of Chattels

(1) Peterson v. Lou Bachrodt – P<sub>1</sub> and P<sub>2</sub>, young children, are walking home from school when they are hit by a used car. A suit claiming that the car's brakes were defective is brought against the driver and the used car dealer. *Held*, strict liability will not be imposed upon the used car dealer, absent a showing that the defects were caused by him. Otherwise, "the used car dealer would in effect become an insurer against all defects which had come into existence after the chain of distribution was completed, and while the product was under the control of one or more consumers.)

(a) **Rule:** Retailer of used products: 402(a) should not apply because of the chance of alteration. Courts uniformly say that there is no strict liability to retailers and used products.

ii) Real Property

(1) Becker v. IRM Corp. – The court impose strict liability on the lessor, where a latent defect in the property resulted in personal injury. The California Supreme Court held that P could recover for injuries he had incurred when he broke a shower door in an apartment leased to him by D, even though the average person inspecting the glass would not have seen that it was of a dangerous "untempered" variety, and even though the glass was already part of the premises when D acquired them. "A landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant." (The court relied on the fact that the landlord is in a better position to inspect for latent

## Torts Outline

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defects, and on the general rationale – derived from product liability cases – the one who markets a product must bear the cost of injuries resulting therefrom.)

(a) Petersen v. Superior Court overruled Becker.

(b) **Rule:** Generally, 402(a) does not work with real property. You might get to liability with the IWH.

### iii) Services

(1) Hector v. Cedars-Sinai Medical Center – Hospital not strictly liable for injuries from implantation of a defective pacemaker performed in the hospital, because such liability would raise medical costs and because the hospital does not select the pacemaker so in a poor position to protect itself by testing, using a different brand, etc. **Rule:** One who sells services, rather than goods, does not fall within Restatement (2d), § 402A, or within the UCC implied warranties.

(a) **Rule:** A hospital cannot usually be held strictly liable when it is used as an entity, which is a conduit of services.

(b) Hospital is not a seller of a product.

(c) The learned intermediary doctrine shields the hospital.

### j) Other Defenses

i) State of the Art defense – always in a negligence case. Questionable in a strict liability case. If proven in a strict liability case, it will dismiss the case.

ii) In a case of a manufacturing defect, strict liability is a correct usage as well as negligence.

iii) No punitive damages or evaluation of strict liability.

## 14) Defamation

a) Meaning of “defamation”: The tort called “defamation” is actually two sub-torts, “libel” and “slander.” Libel is written (has permanence) and Slander is spoken (in the moment). They both protect a person’s interest in his reputation. A state’s freedom to define these torts as it wishes is sharply curtailed by the First Amendment.

b) Prima facie case: To establish a prima facie case for either libel or slander, P must prove:

i) Defamatory statement: A false and defamatory statement concerning him;

ii) Publication: A communicating of that statement to a person other than the plaintiff (a “publication”);

iii) Fault: Fault on the part of D, amounting to at least negligence, and in some instances a greater degree of fault; and

iv) Special harm: Either “special harm” of a pecuniary nature, or the actionability of the statement despite the non-existence of such special harm.

## Torts Outline

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- c) Basis of liability:
  - i) New York Times v. Sullivan – Plaintiff was a public official, part of whose duties was the supervision of the Montgomery Police force. He alleged that the Times had libeled him by printing an advertisement that stated that the police had attempted to terrorize Martin Luther King. **Rule:** The First Amendment requires that, if he be a public official, the plaintiff must show that the defendant made a statement with *knowledge that it was false* or in “*reckless disregard*” of whether it was true or not. Court said that the defendant had to have exhibited *actual malice*.
    - (1) Supreme Court blows away strict liability, automatic damages, or *per se* defamation.
    - (2) D must make a statement with malice if it is about a public official.
  - d) Public figure: If P is a “*public figure*,” he can recover only if he shows that D made the statement with either: (1) *knowledge that it was false*; or (2) “*reckless disregard*” of whether it was true or false. (These two alternate states of mind are collectively called “actual malice,” which is a term of art.)
  - e) Actual Malice, Burdens of Proof, and the Press
    - i) St. Amant v. Thompson – Reckless disregard of the truth. It is not enough to show that a reasonably prudent man would no have published, or would not have published without further investigation. Rather, there must be evidence to permit the conclusion that “The defendant *in fact entertained serious doubts* as to the truth of his publication.
  - f) Private Plaintiffs
    - i) Gertz v. Robert Welch, Inc. – Plaintiff was a locally well-known lawyer who represented the family of a youth who was killed by a police officer. Defendant, publisher of a John Birch Society magazine, falsely attacked plaintiff as a criminal and communist. **Rule:** If the plaintiff is neither a public official nor a public figure, there is *no constitutional requirement* that he prove knowledge of truth or reckless disregard for the truth. Two requirements concerning the defendant’s state of mind required in actions brought by private figures:
      - (1) The First Amendment requires that strict liability not be sufficient; in other words, the plaintiff must prove either that the defendant knew his statement was false or that he was at least negligent in not ascertaining its falsity.
      - (2) The states are free to decide whether they wish to establish negligence, recklessness, or intent as the standard.

### 15) Invasion of Privacy

- a) Four torts: The so-called “invasion of privacy” cause of action is essentially four distinct torts. They all involve P’s “right to be left alone.” The four are: (1)

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misappropriation of P's name or picture; (2) intrusion on P's solitude; (3) undue publicity given to P's private life; and (4) the placing of P in a false light.

- b) Cox Broadcasting Corp. v. Cohn – The details divulged must be truly “private” ones, which are not contained anywhere on the public record. This requirement was spelled out as a constitutional principle. The defendant broadcasting company broadcast the name of a deceased rape victim, in violation of a state law. The Supreme Court held that the girl's parents could not constitutionally be given recovery for invasion of privacy. The Court relied on the fact that the name of the victim was given in indictments made available for public inspection at the rapist's trial, and held that the First Amendment required that dissemination of such publicly available information not be prohibited.

### 16) Miscellaneous

#### a) Economics and Law

##### i) Four factors:

- (1) **Risk or probability of harm** – Probability that something will go wrong and that there will be harm.
- (2) **Magnitude of harm** – If something does go wrong, what is the magnitude of the loss.
- (3) **Cost or prevention** – Compared to the cost of harm.
- (4) **Social utility** – What is the value of the product or service without making any changes (e.g., blood as a product for transfusions; too much testing will make the blood unusable).

## Torts Outline

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### Products Liability Scheme

Theories	<b>DEFECT</b>	Defect Characteristics (failure to exercise due care in):	Tests for Defective Design	Resulting Theories	Liability Viewpoints
Negligence		<b>Design</b> <ul style="list-style-type: none"> <li>▪ Time of manuf. (D)</li> <li>▪ Time of use (P)</li> <li>▪ Time of trial (P)</li> </ul>	Consumer expectations (2 <sup>nd</sup> Rest. – 402(a))	Strict liability or negligence	Plaintiff view: high science/state of the art – strict liability or negligence.
Implied Warranty		Manufacture/Construction	Reasonable Alternative Design (3 <sup>rd</sup> Rest. – 2(b))	Negligence	Defendant view: reasonably prudent manufacturer – negligence
Express Warranty		Warnings/Instruction	Risk-Utility Analysis with RAD as a non-mandatory factor (402(a))	<i>Hand, Cardozo/Andrews Traynor</i> Analysis Causation → Injury	
Strict Liability (2 <sup>nd</sup> Rest. – 402(a)/3 <sup>rd</sup> Rest. – 2(b): RAD)		Labeling (machine tool plate)			
		Packaging			
		Post sale due care obligations			