

TORTS OUTLINE
Professor Popper - Fall 1998

I. INTENTIONAL TORTS

A. Intent

Evaluation of defendant's behavior

1. Substantial Certainty

Intent must be proven by substantial certainty or probability of contact/harm.

Example: Garrett v. Dailey - five year old child pulled out chair from under plaintiff. -- Even without knowledge of the child's purpose or motive, if the child knew with substantial certainty that harm would occur as a result of the action, the child will be held liable.

2. Transferred intent

If an individual intends to harm someone, but inflicts an unwarranted injury on another, the defendant will be held liable.

Intent is transferrable between victims, as long as the act is tortious.

Example: Talmage v. Smith □ defendant intends to throw a stick at a trespassing boy and hits another boy □ If the defendant threw the stick intending to harm the boys, regardless of who the stick was intended for, and throwing the stick was an unreasonable tortious act, then the defendant is liable for injury.

B. Battery

Battery is the intentional infliction of a harmful or offensive bodily contact.

- 1) Intent to make contact.
- 2) Probability that contact will do harm.
- 3) Bodily harm

1. Harmful or Offensive Contact

Subjective question that the contact has to be offensive enough (humiliating, socially unacceptable behavior)

Example: Fisher v. Carrousel Motor Hotel, Inc.

2. Unforeseen Consequences

Once the defendant intends to commit a harmful or offensive touching and the harm does occur, the defendant is liable for any consequences, even if the harm is greater than what is foreseen or reasonably foreseen □ responsible for totality of the harm.

Breakpoint: □ corporal harm, about the body

3. Extends to Personal Effects

A battery may be committed not only by a contact with the plaintiff's body but also by a contact with his clothing, an object he is holding, or anything else that is so closely identified with his body that contact with it is as offensive as contact with the body would be.

Example: Fisher v. Carrousel Motor Hotel, Inc. □ Even though a man was not physically injured or bodily touched, the plate was an extension of his body, in control by his person.

4. Damages

If the plaintiff can establish that the intentional harmful or offensive contact occurred, he may recover nominal damages even if he suffered no physical injury.

a) Mental Suffering

An individual can recover compensation for any pain, suffering, embarrassment or other mental effect, even in absence of physical harm, only if emotional distress is the immediate consequence of offensive touching .

Example: Fisher v. Carrousel Motor Hotel, Inc. □ 1) the offensive touching was the fault; and 2) emotional harm was the immediate consequence of the offensive touching.

C. **Assault**

Assault is the wellfounded fear of imminent ability and apparent ability to the plaintiff to carry out a harmful or offensive contact.

Imminent harm

a) Pl.'s reasonable perception that the defendant will carry out a threat.

b) Defendant's behavior appears to have the present ability to commit threatened harm.

Example: Western Union v. Hill □ drunk man made suggestive comments reached, beyond counter and grabbed at plaintiff □ The def. had the apparent capacity to carry out an assault and in combination with suggestive words, where the plaintiff therefore believed and feared imminent battery.

D. **False Imprisonment**

Intentional act of confining another.

1. Confinement to defined area

2. Confinement without consent of person confined

Even though an individual consented initially, the consent is not binding and the individual can retract his consent.

One person cannot consent for another

Example: Big Town Nursing Home v. Newman □ son cannot consent for his father; his father did initially consent to go to the home, but later retracted his consent.

3. Confinement without authority

There is no general public authority to confine someone against their will.

Conflicts with right to be free (human rights)

4. Moral Suasion/Economic threat is not sufficient

5. No reasonable means of exit

6. No obligation to resist

7. Necessity that the plaintiff know of confinement/Awareness

The Courts require that only awareness **at the time** of the confinement, not necessarily the ability to remember, is sufficient to find for false imprisonment.

Example: Parvi v. City of Kingston □ drunk man is picked up by policemen, and drove him to an abandoned golf course to sleep it off □ Court found that although he did not remember the incident, he was conscious of being confined at the time when it was actually taking place, as illustrated by his responses and conversations with the police and request to be let go.

8. Transferred intent

9. Duty to Aid in Escape or Release

If the plaintiff consents to an initial confinement, intending to be confined under terms, where the defendant is under a duty to release the plaintiff, if the defendant does not release the plaintiff, he will be liable for false imprisonment.

Example: Whittaker v. Sandford □ Defendant (religious cult leader) refused to let woman leave boat when they arrived in the U.S. or give her a row boat so she could leave the yacht. □ Defendant had implicitly agreed to furnish Plaintiff with whatever was necessary to enable her to leave yacht.

E. Intentional Infliction of Emotional Distress

Intentional or reckless infliction, by extreme and outrageous conduct, or severe emotional or mental distress, even in the absence of physical harm.

Prove 1) conduct is outrageous, AND
2) severe distress

Insulting Language

Insulting words, even if they are profane, are not sufficient by themselves to be actionable.

Example: Slocum v. Food Fair Stores □ Plaintiff asked an Food Fair Stores employee for the price of an item. The employee replied, "... you stink to me." *Held*, for D. D's statement would not cause severe emotional distress to a "person of ordinary sensibilities."

Children: lower threshold for offensive behavior than expected with adults

Example: debt collectors are normally not subject to liability b/c state & fed laws.
But, when the debt collector directs conduct to child, claim is actionable.

Defendant's knowledge of plaintiff's sensitivity

Where the defendant's conduct was extreme and outrageous only because of the plaintiff's particular characteristics, defendant must have been aware of these characteristics to be held liable.

Actual severe distress

a) Medical effects: At minimum, the plaintiff must always show that his mental distress was sufficiently severe that he sought medical aid.

Example: Harris v. Jones □ defendant aware that plaintiff suffers from speech impediment, and verbally and physically imitates plaintiff, resulting in plaintiff's extreme nervousness. Plaintiff has sought medical care for preexisting condition for six years. Plaintiff calimed that nervousness and speech impediment worsened as a result of defendant's conduct.

Held, for D. While D's conduct was intentional and outrageous, P did not suffer emotional distress sufficiently severe to allow him to recover.

b) Physical harm

The courts have ruled that an individual, subjected to threats of violence, can recover even though he was not physically harmed.

Example: State Rubbish Collectors v. Siliznoff □ no question of outrageousness of behavior. Courts look to bodily harm as an indicator of validity of threat and emotional distress.

No transferred Intent/Bystander issue

*Aware of presence, AND

*Aware of relationship between plaintiff and subject of outrageous conduct, intending or substantially certain of causing plaintiff to suffer from severe emotional distress.

Example: Taylor v. Vallelunga □ plaintiff sees father being beat up. Defendants did not see plaintiff and was not aware she was there.

Held, Plaintiff does not have cause of action, because defendants did not know that plaintiff was present, nor intended to cause her emotional distress.

F. Trespass to Land

Right to exclusive possession

1. Intent

Even if the defendant made a mistake, such as thinking he was on his own land or thinking that he was entitled to be there, still trespass b/c knowingly on property of another.

2. Indirect Invasions

actionable if prove:

1) invasion affected an interest in the exclusive possession of his property.

2) an intentional doing of the act which results in the invasion.

length in time □ dissipation/accumulation

3) reasonable foreseeability that the act could result in an invasion of pl.'s possessory interest. and

4) substantial damages. □ some measure of measurable particulate

3. Vs. Nuisance

Nuisance is the intrusion to the general use and enjoyment of land.

vs. Trespass is the intrusion to the possession of the land.

Air Space

Preemption □ federal laws have stated that trespass damages cannot be awarded for any flight occurring above the federally-prescribed minimum altitude.

Example: City of Newark v. Eastern Airlines □ no evidence that the flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above where they could reasonably use it.

Except, can recover using nuisance theory, where claim that flights over minimum altitude, interfered with general use and enjoyment of land.

G. Trespass to Chattels

Right to own property and action against one who interferes with his use or possession of that good; right to unfettered, exclusive possession

H. Conversion

If defendant completely and substantially interferes with the plaintiff's control, use and enjoyment of property (like nuisance), it is fair to require the defendant to pay the property's full value. (deprived of use and enjoyment of property)

1) Damage/Diminution in value

Example: Pearson v Dodd □ The defendants made copies of files, replaced the originals and turned the copies to journalists who published articles revealing the plaintiff's misdeeds. *Held*, No conversion. D did not convert physical contents of files, because physical documents not removed from files and pl. not deprived of use of files. & generally information or ideas are not subject to legal protection, except: where exchanged on market as commodity, ideas in literary works or scientific research, where info used to promote fair and effective commercial competition.

and 2) recovery for commercial vehicle (ie stock fraud, equipment leasing)

Example: Russell-Vaughn Ford, Inc. v. Rouse □ The court held that the defendants did commit conversion by refusing to give the keys to the plaintiff, the defendant was refusing to return the car to the owner and therefore subject to the conversion of the car. (forced sale- you bought it, it's yours, pay up. = full recovery.

II. Privileges

A. Consent

If the plaintiff consented to an intentional interference with his person or property, the defendant will not be liable for interference.

1. Implied Consent

Plaintiff's consent is implied from his conduct, from custom or circumstances.

Rules of conduct come from reasonability/patterns of behavior

□ social expectation, general social rules/values and unstated biases.

2. Exceeding Scope of Consent

If the plaintiff does give actual consent to an invasion of his interests, the defendant will not be privileged if he goes substantially beyond the scope of that consent.

Example: Hackbart v. Cincinnati Bengals □ A player, who intentionally hits or injures his opponent, may be liable. The rules of pro football expressly prohibit intentionally striking someone. Even though nature of the game is violent, and did consent knowing that certain conduct/injuries are expected, the rules of conduct are subject to reasonability.

3. Informed Consent

B. Defense of Property

Reasonable perception of threat weighed against reasonable response

Mistakes are allowed, if it is reasonable to believe that forceful defense is necessary.

Use of deadly force is only permitted when the threat is perceived to be life threatening/great bodily harm/death

C. Recover of Property

Shopkeeper's privilege: A shopkeeper has the right to defend property, and therefore a right to detain an individual, if he is reasonably detained and under reasonable suspicion.

III. NEGLIGENCE

A. Elements of Cause of Action

1. Duty Duty of Care
2. Breach Breach of Duty
3. Cause Breach Causally connected to injury/harm
4. Injury Injury or Actual Damage

B. Negligence Formula

1. Unreasonable Risk

To demonstrate that the defendant's conduct failed to meet the duty of care imposed on him, the plaintiff must show that the defendant's conduct imposed an unreasonable risk of harm on the plaintiff.

*Reasonably foreseeable? □ Is the anticipated risk the kind of risk that an ordinary prudent man would guard against it?

a. Risk?

Inherently dangerous objects -- Inherently dangerous objects are so dangerous that there is a duty to guard against the harm.

b. Foreseeable danger?

2. Balancing Test

In determining whether the risk of harm from the defendant's conduct is so great as to be "unreasonable," the test is whether a "reasonable man" would have recognized the risk, and striven to avoid it.

Liability exists if: (J. Learned Hand)

$$B < L \times P$$

B=Defendant's burden to avoid risk

L=Gravity of Potential Injury

P=Probability of harm from Def's conduct.

Duty of care when:

1. actual notice
2. high magnitude of harm

Risk perceived = Duty owed

a. Threat of serious injury (L)/ Magnitude of Risk

*The greater the magnitude of harm, the higher the standard of care

*The more serious the potential injury, the less probable the occurrence need be before the defendant will be held negligent for not guarding against it.

- b. Probability of Risk
- c. Cost of Prevention
- d. Social utility

Would society be better off if all defendants in the position of D were permitted to act as D did, or were instead required to change their conduct so as to avoid the kind of risk which resulted in injury to P? value without repair?

Balance the burden of avoiding risk against the magnitude of that risk. □
If the burden of avoiding risk is so small that the danger of not doing it outweighs the burden, then liable for negligence.

3. Advances in Technology

*Duty to reasonable care, not guarantee to safety.

Although magnitude of harm and the probability of the risk of harm are high, the cost of repair is too high (the burden on the defendant)

The cost of repair is not economically feasible without impeding development/preventing use of essential facility.

C. Standard of Care

1. *The Reasonable and Prudent Person*

a. Objective Standard (v. subjective standard)

Whether the defendant behaved as a reasonable man would under the circumstances that confronted the defendant?

Risk Perceived = Duty Owed

b. Knowledge

Knowledge is direct notice of a risk

1) Notice indicates foreseeability

Example: hayrick case □ def. given notice of risk, knew risk, therefore duty owed

2) Duty to Inspect

Duty to inspect because of high probability of harm and high risk.

Expected knowledge is notice of risk

Example: Delair v. McAdoo □ defendant trying to pass plaintiff on road, tire blew out, causing it to swerve and hit plaintiff's car. The tire was worn. No direct notice that tire worn. *Held*, b/c of high probability of harm and high risk, D. had duty to inspect. Relevance of warranty and social interaction with products that bear risk

c. Custom

Although a defendant could have used a better and safer practice, the safer practice was not a standard of care required by the defendant.

*subsequent remedial measures □ foreseeable risks are abated by taking steps to avoid/prevent that risk (public policy)

Example: Trimarco v. Klein □ glass doors. D. replacing doors in other buildings, but did not do this apartment building b/c doors are not known to have defects. *Held*, Although safer practice, not a reasonable or practical custom, where the defendant would incur an impossible or devastating fiscal loss.

d. Emergency

Whether the defendant behaved as would a reasonable man confronted with the same emergency?

In an emergency, the duty of care expands for a reasonable person to act in an emergency situation

Still follow negligence formula: no duty breached; therefore, no negligence, even if someone is injured.

Emergency, where:

- 1) genuine emergency
- 2) happen suddenly
- 3) emergency not of own making*
- 4) only moment to act

e. Diminished Capacity

Issue: Whether a reasonable man with the physical attributes of the defendant would have behaved as the defendant did?

Rule: A person with impairments should take same precautions as a reasonable and prudent person with the same differential capacity; not an elevated duty of care by the one with diminished capacity and other's obligation to accommodate

- 1) Blindness
- 2) Children

A child must merely conform to the conduct of a reasonable person of like age, intelligence and experience under the circumstances.

Adult activity exception:

When a child engages in a potentially dangerous activity that is normally pursued only by adults, he will be held to the standard of care that a reasonable man doing that activity would exercise.

3) Insanity

The general rule is that insanity is no defense to negligence.

An insane person is held to the same standard of care as a reasonably prudent person.

Minority ruling □ If sudden and unforeseen mental incapacity, in effect like a stroke/heart attack, should be treated like an emergency, where the def. cannot be held responsible for his conduct, where he lacked the capacity to sense physical realities, was incapable of avoiding and had no warning or knowledge that such disability would occur, and therefore could not act responsibly.

4) Lessened Mental Capacity

*If the defendant is aware of plaintiff's lessened capacity, the defendant owes a greater duty of care to the plaintiff.

*Generally, where the plaintiff's reduced mental capacity is so low that it prevents the pl. from even understanding that danger exists or take action to avoid it, a defendant cannot use contributory negligence for a defense to defendant's negligent conduct.

2. ***The Professional (Malpractice)***

a. Superior Knowledge or Ability

If the defendant has a higher degree of knowledge, skill or expertise than the reasonable man, the defendant will be held responsible for using that higher level and will be held liable for using only the skill of an ordinary reasonable man.

b. *General Rule:* Professionals (doctors, lawyers, etc.) must act with the level of skill and learning commonly possessed by members of the profession in good standing. He is expected to conform to the appropriate level of care and the entire profession is expected to perform at that level.

c. Objective Standard

Whether defendant acted with the minimum objective standard of care commonly found among other members of the same profession?

*The defendant's own experience and training are irrelevant in determining whether he behaved with due care.

d. No guarantee of successful results

The professional will not normally be held to guarantee a successful result. He is liable for malpractice only if he acted without the requisite minimum skill and competence, not merely because the operation, lawsuit, etc. was successful.

e. "Standards of the community"/Locality Rule

The court has generally ruled that professionals are measured by the national standard; expert testimony is used as support.

f. Informed Consent:

What should be disclosed before treatment:

- 1) risks
- 2) consequences of risk
- 3) feasible alternatives
- 4) nature of treatment

Rule: 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, provided that the patient's well-being would not be unduly disturbed by such disclosure.

A doctor is under a legal obligation to disclose sufficient information to a patient to enable him to make an informed decision regarding a proposed medical treatment.

Negligence, where:

- 1) duty to inform
- 2) breached duty by failing to inform

- 3) causation □ the lack of information cause the patient to go forward with treatment; if she had known, she would not have gone forward.
- 4) injury □ side effects.

3. **Aggravated Negligence**

1. Defendant responsible for worse misconduct
2. Conscious, flagrant disregard of one's well-being
3. Proof easier with more egregious misconduct

D. **Violation of Statute**

Legislature has passed a statute defining reasonable conduct in a certain kind of situation.

Violation of the statute creates a presumption of negligence. → negligence per se.

→ Rebut presumption by showing an adequate excuse for the violation.

- Excuses:*
- 1) actor's incapacity
 - 2) justifiably unaware of the need for compliance
 - 3) unable, due to circumstances to comply with statute
 - 4) emergency not caused by his own conduct
 - 5) compliance would create a greater risk of harm to the actor or to others.

Example: Zeni v. Anderson (p.221)

-Defendant maintained that plaintiff's failure to use sidewalk constituted contributory negligence b/c it violated statute requiring that pedestrians use sidewalks.

→ Violation of the statute which has been found to apply to a particular set of facts establishes only prima facie case of negligence, a presumption which may be rebutted by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case.

E. **Proof of Negligence**

1. **Court and Jury** □ Circumstantial Evidence (evidence of fact)

*Evidence of one fact from which the existence of the fact to be determined may reasonably be inferred, where an inference to a conclusion can be drawn.

*Circumstantial evidence can satisfy a plaintiff's burden of proof of negligence only if a reasonable jury can interpret from the evidence the positive inference that the defendant was negligent. Inference through proof:

Time □ actual knowledge of risk related to injury
 employees
 degree of duty
 insufficiency of care
 constructive notice of a dangerous condition
 exception: where the dangerous condition is continuous or easily foreseeable, don't need to meet notice requirement.

- a. Court decides law:
 - 1) state of facts
 - 2) existence of duty
 - 3) directed verdict
- b. Jury's role
 - 1) what happened
 - 2) particular standard of care

2. **Res Ipsa Loquitur** ("The thing speaks for itself") □ lack causation

Requirements:

1) Seldom occurs without negligence

Event that normally would not occur unless breach of duty of care

2) In defendant's control

source of breach has to be under defendant's exclusive control at time of breach

a. Aid in proving the case

Allows the plaintiff to point to the fact of the accident, and to create an inference that, even without a precise showing of how the defendant behaved, the defendant was probably negligent.

Proof-assisting device that forces the defendant to come forward.

b. Negating other causes

The plaintiff is not required to demonstrate that there were no other possible causes of the accident. Plaintiff needs only to prove that negligence was more probably than not the cause of the accident.

Burden is on the defendant to introduce contrary evidence.

Ex. - Cox v. Northwest □ Although D showed that normal procedures showed due care, D failed to bring credible/alternative hypothesis to rebut inference of negligence.

c. "More likely than not" standard

Where a particular injury is more likely than not the cause of the accident, then the defendant is liable for negligence.

The plaintiff has a duty to eliminate other likely causes.

d. Exclusive control

If the cause of injury is shown to be under the exclusive control and management of the defendant, the doctrine of res ipsa loquitur applies.

Ex.- Larson v. St. Francis Hotel - chair thrown out of hotel

The hotel does not have exclusive control, either actual or potential of its furniture. The guests have at least partial control. therefore, P. failed to establish res ipsa loquitur.

Rationale: Even if the defendant had used reasonable care, the accident might have happened anyway.

e. Multiple Defendants (new duty by defendant to ascertain causation)

Where the plaintiff can demonstrate the possibility that his injury was caused by the negligence of at least one of the defendants, but cannot show which one, res ipsa loquitur applies against all of them.

Rationale: Each defendant owed a duty to the plaintiff to see that he was not harmed, and each defendant who had any control over the plaintiff must bear the burden of rebutting the inference of negligence by explaining/disclosing how & why event occurred where would not ordinarily occur.

Ex. - Ybarra □ Plaintiff hospitalized for surgery and suffered injury. Under the care of six doctors/hospital employees.

f. Effect

Does not create liability, only satisfies initial presentation/initial presentation of plaintiff to satisfy his burden.

Forces people to come forward and break silence.

Rationale: by threatening liability, smoke out the cause of injury.

Applying doctrine means that the jury could find negligence, not that it was required to.

F. Proof of Causation

Causation Factors:

- 1) Is the breach a substantial factor in bringing out loss?
- 2) Did the breach compound/multiply that probability of harm?
- 3) What is foreseeable?
- 4) What was natural & probable?
- 5) Would this kind of injury be expected from initial wrong?

1. Market Share Liability

Where several manufacturers produce and distribute a dangerously defective product, each should bear part of the damages due an injured plaintiff in proportion to the share of the total market it supplied.

Rationale: All profited from/marketed product, designed product, in position to discover risk & harm, understood risk and anticipated risk bred in price of product. All liable, unless defendants demonstrate that they could not have made the product which caused the plaintiff's injuries.

% sold by each manufacturer
entire production

G. Causation

Evaluate relations between cause and duty

Formulae for causation:

1. Time
2. Space/distance
3. Factual complexity (ie. intervening events, public policy)
4. Proximity (immediate)

1. Proximate Cause:

Two approaches:

a. Direct Causation/ Hindsight Approach

Defendant is liable for the ordinary, natural, probable, immediate, necessary, usual, nonremote or proximate consequences flowing from his negligent act.

Rationale: Limitations to liability; To hold defendant liable for all resulting damage would be to create a liability too great for any individual

Ex.- Ryan v. New York - spark from train engine ignited a wood shed, which spread through several houses before destroying plaintiff's house.

a) Take situation as find it.

The fact that the kind of damage which an act might probably cause was not the damage anticipated is immaterial, so long as the resulting damage

is directly traceable to the negligent act, and not due to the independent cause having no connection with the negligent act.

Rationale: Defendant engaged in duty with foreseeable/anticipated harm, breached that duty and is now responsible for all foreseeable and unforeseeable acts that are a direct/proximate cause from breach.

b) Defendant must take the plaintiff as he finds him.

Is the injury within the scope of foreseeable risk of the original negligent act?

Ex - Bartolone v. Jeckovich - suffered psychotic breakdown as a result of minor injuries from a car accident. *Held*, Although psychotic breakdown not foreseeable harm from car accident, Defendant liable for aggravation of pre-existing illness. Accident aggravated pre-existing schizophrenic condition, leaving him totally & permanently disabled.

b. Foreseeability Approach

Defendant is liable for those consequences of his negligent act that are reasonably foreseeable at the time he acted.

a) unforeseeable result

Even though the injury may result from a negligent act, liability for that injury is limited to the risk reasonably to be foreseen.

Rationale: One should be responsible only for the probable consequences of his act, otherwise would be unjust to hold defendant responsible for unforeseeable/unanticipated consequence.

b) foreseeable but highly unlikely

One who has knowledge of a risk and can reasonably prevent it, is liable for damages resulting from his failure to prevent it, even though the consequences were highly unlikely.

Rationale: As long as the risk is remotely foreseeable, even though its occurrence is highly unlikely, a reasonable person should not dismiss a risk when it is easy to remove it.

c) unforeseeable plaintiff

The defendant does not owe a duty to an unforeseeable plaintiff.

Rationale: The risk reasonably to be perceived defines the duty to be owed. A defendant is liable to a plaintiff to whom his conduct imposed a foreseeable risk. The defendant did not violate a duty to the plaintiff to whom there was no foreseeable risk. There must be a duty to the injured party which could have been averted or avoided by observance of the duty. The range of duty is limited to the range of danger. There can be no duty owed to an injured party when the wrong was committed towards someone else.

Ex - Palsgraf □ firecrackers in newspaper. remoteness of plaintiffs; def. did not owe a duty to pl., therefore did not breach a duty of care to the plaintiff and no liability.

2. Intervening Cause

A force which takes effect after the defendant's negligence, and which contributes to that negligence producing the plaintiff's injury.

?Is this a risk foreseen within the scope of the original risk?

1. Foreseeability

If the defendant should have foreseen the possibility that the intervening cause might occur, or if the kind of harm suffered by the plaintiff was foreseeable (even if the intervening cause was not itself foreseeable), the defendant's conduct will be the proximate cause.

a) The more foreseeable the intervening event, the less likely the original negligent act is proximate cause/liable.

Ex. - Derdiarian v. Felix - car, driven by P suffering epileptic seizure, hit worker. D's conduct (employer failed to provide adequate protection around excavation site) was negligent in that created a risk of injury due to car accidents. Even though the risk materialized in a different fashion than anticipated, or that the intervening cause was also negligent, D's conduct is proximate cause of P's injuries and liable for negligence.

b) The more unforeseeable the intervening event, the more it cuts off the liability of the original negligent act.

If a criminal act is part of an intervening event, it becomes unforeseeable b/c cannot anticipate a crime. Rationale - make criminal responsible.

c) policy grounds

Duty defined by risk perceived in serving visibly drunk guest.

Although cannot guarantee outcome, ask social host to use reasonable care.

d) Irresistible impulse:

The Defendant may be liable for the wrongful acts of a third party if foreseeable, where the initial act led to an unforeseeable intervening event.

Ex - suicide case after a car accident -- An act of suicide is not a superseding cause in negligence law precluding liability.

3. Shifting Responsibility

Shifting Responsibility: 2 careless acts, at a point where one act becomes more dominant that responsibility shifts from original offender to another/intervenor.

a. factors to consider:

1. passage of time

-enough time goes by that the even is w/in intervenor's control.

2. contract

- relationship between original actor & intervenor, where there is a passage of responsibility & therefore, accountability.

3. control (exclusive control)

-the more control the intervenor assumes, the more liability is cut off from the original offender.

IV. Joint Tortfeasors

A. Types

1. Vicarious Liability [field]

- a. One party is being held liable for another; no one is let off.
- b. Passive - imposed not because something is done, but because of the relationship between parties.

2. Concurrent Cause [field]

- a. 2 events contemporaneously occur that harms a third party.

3. Single Satisfaction Rule

- a. Every plaintiff is entitled to a single satisfaction.
- b. Plaintiff cannot get more than total sum of his losses
100% - Plaintiff cannot receive more than 100% harm for loss.
- c. Collateral source rule
- plaintiff's own resources (ie, insurance) are not included in total.
-bet on plaintiff's well-being - put money in, get money out.

4. Subrogation

How money is exchanged when sued:

a. Release

- 1) settling a lawsuit
- agreement signed by P to release D from totality of claim.
- 2) P's acknowledgement that claim is unconditionally over.
- 3) historically, has caused endless problems

b. Covenant not to sue

- 1) D1 offers \$ for P's promise not to sue D1.
- 2) D1 is released, if K is valid w/consideration.
- 3) Only a party (D1) is released, not the entire claim
P can still sue D2, D3, etc.

c. Contribution Action

- 1) independent of impleading
- 2) P sues D1 for 100% of damages
- 3) D1 loses lawsuit, holds D2 (3d party) responsible, D1 sues D2.
- 4) *There must be a viable cause of action (and potential for lawsuit) between P and D2, where there is a continuation of an existing cause of action. Had P brought suit against D2, the suit must be valid.*
- 5) has the suit been barred by the statute of limitations?
- 6) P can choose who he wants to sue and recover from.
- 7) If multiple Ds involved in harm, does not matter whether D is involved in the original trial.
- 8) in most states, contribution action is not available for *intentional torts* b/c don't want wrongdoer sharing payment of damages.
- 9) for intentional tort, D1 must implead others before suit is complete.

Example: Knell v. Feltman - 2 parties both at fault, both caused P harm
P sued D1, D1 sues D2. D1 wants D2 to pay for share of liability in P's harm. D2 is liable under contribution.

d. Indemnity [field]

- 1) Not necessarily liable, but agree to pay for liability (ie, insurance).

e. Mary Carter Agreements

1. multiple Ds. (designer, manufacturer, retailer, wholesaler, supplier)
2. Wager on outcome of trial -
Wager on outcome of trial through agreements/settlements made among multiple Ds. P settles w/liability cap with D1, D1 puts certain sum of \$ aside in escrow acct. for P to draw from until litigation ends.
3. sets floor and ceiling in dealing w/ multiple Ds.
(redistributes damages allocated)
Gives D assurance that he won't pay above the cap.
Gives P assurance that he will receive something, win or lose.
4. Application:
 - a. void as a matter of public policy (most states)
-incentives b/c good for P, but unfair to remaining Ds.
 - b. allow but control through jury instructions
 - c. allow but made in secret & leave to judge to disclose.
-creates ill will

Example: \$1million. 4 Ds. \$250,000 for D's exposure (P's opinion)
Agreement that if P loses, D will give P 50,000.
if P wins, worth \$150,000.
D gives \$150,000 now to bet on outcome of trial.

Example: Bierczynski v. Rogers - (D1 and D2 drag racing, D2 crashes into P, D1 in suit). Both Ds behaved collectively, a third party was harmed. wrongful conduct, duty of care owed to P, risk foreseen, D2 did not cause harm, P both D1 and D2 are collectively liable for concurrent negligence.

vs.

Electrician hypo: electrician owed duty, created a risk, risk manifested, electrician did not cause harm, BUT electrician did not act jointly w/ lightning. electrician won't be joined as a defendant.

V. Limited Duty

In some situations, D does not owe P duty of reasonable care and is not liable, even though D's conduct is negligent, P is injured, danger is obvious & risk is entirely unreasonable.
?Is liability owed where no existing *person* is injured?

A. Emotional Distress from Negligent Act

1. Exceptions to physical manifestation requirement for recovery of emotional distress:
 - a. Negligent delivery of death information ("death telegram cases")
 - b. Negligent handling of someone's body after they have died.
→These cases are so predictable that they will create emotional distress that they are compensable, although they are not necessarily large damage rewards.
2. **Mental Disturbance and Resulting Injury**

→Whenever a definite and objective physical injury is produced as a natural result of emotional distress proximately caused by D's negligent conduct, P may recover damages for the negligent infliction of emotional distress absent of any physical impact upon P at the time of the emotional shock.

→Court *overruled impact rule* of IIED & does not require physical impact

→*Plaintiff has burden* to prove that physical harm or illness is the natural result of the fright proximately caused by D's conduct.

→Bartolone rule (take plaintiff as they are) not applicable to IIED cases

-D won't be held liable where P harmed due to sensitivities, unless D has knowledge of P's sensitivities.

→impact vs. illness -

physical illness - different manifestations of emotional distress;

-undercompensate some who have no physical manifestations even tho suffered severe distress.

Example: Daley v. LaCroix - car crashes into utility pole, sends electricity to D's home, D suffered mental and psych. upset. (used Cardoso risk-perceived analysis)

3. Bystander

Mental distress caused by observation as a third party.

Rule: For a bystander to recover for negligent infliction of emotional distress, req.

1. close relationship to victim.
2. present at scene of accident/injury
3. emotional harm has to be direct, not reflective
4. emotional relationship with victim
 - was aware and observed physical injury of victim
5. victim has to be free of contributing negligence
6. no "*zone of risk*" requirement (negative requirement)
 - does not matter whether P in personal physical jeopardy or not.

Example: Thing v. LaChusa (P's son in car accident, P did not see but was informed (not within zone of danger, later saw son laying injured in street, no contributory negligence)

→ Limitations on P's actions -direct observation- Recovery for damages from emotional distress caused by observing a negligent act.

-distinguishes everyday distress people suffer when hear bad news about loved ones.

→Cardozo case - foreseeability of harm would be limitless in IIED cases; in hindsight can foresee.

Death ends rights

2 legal actions for those who have died to pursue claims if reason for death related to negligent act:

1. wrongful death action:

- a. brought by dependents of decedent.
- b. bring action, where decedent supported dependants (children), for their loss
- c. action not brought via estate
 - decedent's creditors are barred from funds
 - decedent's debts are limited to decedent.
- d. cannot receive damages for pain & suffering

- e. cannot receive punitive damages
- 2. survival action
 - a. brought by estate
 - b. can receive damages for pain & suffering
 - c. can get punitive damages
 - d. creditors can access damages b/c becomes part of the estate to pay creditors

4. Volunteering/Rescue

→ No duty or obligation to volunteer or rescue, but one who initiates rescue, has a duty to carry it out reasonably.

Example: Marasalis v. LaSalle (D volunteered to keep cat indoors. cat bit P during rabies scare) → no duty to keep cat in basement during rabies scare. But D volunteered to keep cat in basement. D has duty to carry out act.

5. Failure to Act

→ Generally, not responsible for other's behavior, unless...

→ To hold a 3d party (ie, parent) liable for D's (ie, child) actions, P must establish that 3d party had a foreseeable but limited duty.

Criteria:

1. **Notice** of dangerous propensity (imputes foreseeability of risk)
2. **Reasonability** - at most obligated to do is exercise reasonable care, not guarantee, where foreseeable harm & real violence.
3. **Capacity** to control D (physically)
4. **Legal Authority** to control (legal duty/right to impose control -ie. parent-child)
5. **Special Relationship** that allows 3d party to impose control over D
 - ie, with adult offspring, parent does not have a right to control, but has a special relationship where parent could have control over adult offspring.

example: Linder v. Bidner (teenager beats up others at school)

→ Parents are 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 not liability on the part of the parents for the general incorrigibility of the child.

- failed to control, but not responsible for other's behavior

example: Tarasoff v. Regents of UC (psych Dr. learns patient intended to kill P's daughter) Duty to Warn?

→ general rule: one has no duty to control conduct of another, nor to warn those endangered by conduct, unless one has special relationship to the other or to foreseeable victim.

→ D liable b/c there was direct notice & P was foreseeable victim.

Once the therapist determines, or should have determined, that patient poses danger of violence to others, the therapist bears a duty to exercise reasonable care to protect the foreseeable victim of that danger, including warning the victim.

→ defense - special relationship of doctor-patient confidentiality obligation.

→ confidentiality is maintained except where disclosed information puts another in jeopardy of life/death; right to disclose > right to maintain confidentiality

→ balance of public policy interests:

safety from violence vs. patient's right to confidentiality

economic interests:

risk of losing victims > risk of unnecessary warnings.

→Duty to protect subsumes a duty to warn

Lipari v. Sears (P sued D for selling gun to mental/psych disturbed vet, D lost suit, sued VA for contributory damages and indemnification)

P was unforeseeable victim.

5. Unborn Children

Prior to 1946, no fetal injury cases; fetus must be alive outside of the womb to bring claim.

2 Classes of cases (types of injuries)

1. *Pre-Conception* □ injured occurred before egg is fertilized (ie, DES cases)

2. *Post-Conception* □ injury to fetus after conception

2 categories for unborn children under limited duty

1. unborn child - *wrongful life* □ fetus injured then *born alive*

→ injuries are actionable

2. stillborn child - *wrongful death* □ fetus injured then *born dead*

→injuries are not actionable.

Rule: It is against public policy to extend liability to those yet unborn

Moment of birth is most clear & recognizable line for commencement of legal life.

Child injured & born alive & suffers from injuries has a claim

Child born dead has no loss that can be calculated; would be unjust enrichment.

-Damages recovered by parent is sufficient redress for wrong done.

Public policy problem: Court cannot evaluate life w/impairments vs. death/non-life.

Wrongful life □ cause of action brought by child, born alive w/birth defects who would not have been born had doctor properly advised or treated mother.

-Damages →P (child) can only recover for medical expenses (breach of duty to mother) beyond ordinary birth expenses.

→P cannot recover for pain & suffering/diminished childhood.

-Informed consent & public policy problem: Roe gives birthing mother right to abort. *BUT* does not protect right of fetus not be born.

-impossible to cause injury by lack of informed consent, where defect is caused by disease, not by doctor's negligence.

-negligence would be in allowing parents to choose between life or terminating pregnancy.

Wrongful birth □ parent's cause of action for deprivation of right to choose abortion.

-born alive w/ defects, damages for expenses that would not ordinarily have incurred with other children.

6. Owners and Occupiers

Liability determined by *who is injured* and parameters of lease.

Common law attached categories to limit duty of landowners:

low duty 1. trespassers: w/o invitation or consent of owner (continuum of responsibility)

a. unexpected

lowest duty

- b. anticipated
 - c. anticipated children (ie, common path frequented by children)
 - d. discovered (known that present on property) higher duty
- middle duty 2. licensee: social guest w/consent, but not for business
→reasonable level of due care
(includes police, firefighters)
- high duty 3. invitee: on property for *mutual benefit* w/ landowner (business purposes)
(ie, meter readers, plumbers)

A. Rejection of common law doctrine

1. "off land" cases: injury from land that comes off land
If an injury results from an artificial condition →liable
except, property damage value - falling tree on another's house.
2. Rowlands v. Christian (social guest cut hand on cracked faucet handle)
→(due care is due care, regardless of common law categories) Where the occupier of the land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact w/it, failing to warn or repair condition constitutes negligence →due care to a social guest. A man's life or limb should not be considered less worthy of protection b/c he came onto another's land w/o business purpose or w/o permission.

B. Lessor and Lessee

General Rule: Landlords (LL) have no duty to tenants or others entering the land for defective conditions existing at time of lease, w/ exceptions...

- When property is rented, LL surrendered possession & control of premises & risks passed onto tenant.
- Tenants, as possessors have burden of maintaining premises.

Exceptions, where LL can be held liable:

1. When dangers are known to LL (or LL has reason to know) but unknown to T.
2. Conditions are dangerous to person outside of premise
> dangerous conditions existing when LL transfers possession.
3. Premise leased for admission of public
4. Parts of land retained in LL's control which T is entitled to use.
5. Where LL contracts to repair.
6. Negligence by LL in making repairs.
7. Statutory
8. Implied warranty of habitability.

Examples:

Borders v. Rosenberry (P visiting D's tenant, slipped on ice) →tenant bears responsibility.
vs.

Pagelsdorf v. Safeco Ins. Co. of America (social guest (P) assisting tenant in moving furniture, injured due to dryrot - latent defect, not overtly foreseeable).

→LL owes tenant/anyone on premises w/tenant's consent, duty to exercise ordinary care.

-Lease is a *contract*, not a conveyance of property, where the landlord still has control over the property & there exists an *implied warranty of habitability* (counters Borders).

-If P is lawfully on premise & is injured due to LL's negligence in maintaining premise, P is entitled to recovery.

-Duty of care b/c of public policy incentives to maintain safer premises.

Kline v. 1500 Mass Ave. Apt. (woman assaulted & robbed in *common hallway* of apt. bldg. D had implied notice of criminal acts; there had been a guard)

→LL has a duty to tenant b/c by his control of areas of common use & common danger, LL is the only party who has the power to make necessary repairs or to provide necessary protective measures in common areas (hallways, garages, etc.) (minority opinion).
-economic analysis: tenant does not have economic/technical power to protect self & lease does not allow it; w/o power, LL has a heightened responsibility to make repairs (exception to Borders).

-foreseeable event - generally, LL not responsible for criminal acts, except, when criminal intervening act is a foreseeable event.

-LL is justified in passing on cost of increased protection to tenants.

VII. Punitive Damages

A. Requirements, in order to be Constitutional:

1. Punish (including for past conduct)
2. Deter
3. Proportional to wrongdoing

-the more egregious D's conduct, the more money D has to pay

→Conduct must be egregious, not just ordinary negligence.

→minimum of misconduct □ gross negligence

B. Standard of care

1. Willful, reckless disregard
- or 2. conscious, flagrant disregard (today's standard)

Factors in determining whether P's conduct was in willful or reckless disregard:

1. existence & magnitude of product danger to the public.
2. cost or feasibility of reducing danger to an acceptable level
3. manufacturer's awareness of danger, the magnitude of danger, & availability of a feasible remedy.
4. nature & duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or reduce the danger.
5. extent to which manufacturer purposefully created danger.
6. extent to which D is subject to federal safety regulation.
7. probability that compensatory damages might be awarded against Ds in other cases □ D's economic hardship.
8. Amount of time which has passed since the action sought to be deterred.

→compliance w/ gov't standard does not bar punitive damages □ not dispositive

C. Weight of evidence -- Proof

requires "preponderance of evidence" (some states)
or "clear and convincing evidence" (tort reform)

D. Application

- Generally permitted for intentional torts & defamation
- Do not usually award punitive damages in strict liability for product liability cases. Product is on trial, not the manufacturer(D) where D may have exercised due care.
- Applied, unless state limits damages or cap damages

Example: Gryc v. Dayton-Hudson Corp. (flannelette pajamas caught on fire)

complied w/ minimum govt standard.

→but did not meet 3rd Restatement requirement to prove product is defective in design, P must present feasible alternative design that could have been made safely & affordably.

E. Requirements for Reviewing Award

Hammond Test for determining whether award is excessive or adequate, and reasonably related to goals of deterrence and retribution: (outline for jury instructions)

1. Whether there is reasonable relationship between punitive damage award and harm likely to result from D's conduct as well as the harm that actually occurred.
2. Degree of reprehensibility of D's conduct, duration of that conduct, D's awareness, any concealment, and existence and frequency of similar past conduct.
3. Profitability to D of wrongful conduct and desirability of removing profit and having D sustain loss.
4. "financial position" of D
5. all costs of litigation
6. imposition of criminal sanctions of D for conduct, to be taken in at mitigation
7. existence of other civil awards against D for same conduct, these also to be taken in mitigation.

Bad Faith Claims □ claims against insurance co. where D knew that had to cover obligation & decided not to pay→produces big punitive damage awards.

Due Process:

Post-trial appellate review makes certain that punitive damages are reasonable in amount and purpose, to ensure due process (fairness)

- state system should give trial judge some discretion over chance to review jury award
 - Additur - add \$
 - Remittitur - letter to P/D & settle for lower amount.

VIII. Defenses

A. Last Clear Chance Rule

If D has the opportunity to avoid the accident after the opportunity was no longer available to P, D is the one who should bear the loss

- P's rebuttal against D's defense that P was contributorily negligent.
- whole loss placed on D even though P was partially responsible.

B. Comparative Negligence

→Compare P's wrongdoing vs. D's wrongdoing

1. contributory negligence -- *all-or-nothing* rule of contributory negligence, where P's contributory negligence completely bars recovery.

- compare P's harm, not comparing injuries.

exceptions, where P's recovery not barred:

1. D's conduct was intentional
2. D's conduct was "grossly negligent"
3. D had the "last clear chance" where D could have avoided P's injury by ordinary care.
4. P's negligence may be classified as "remote"

2. *Comparative Fault*

Comparison of injuries

1. Two forms:

- a. special verdict: P's damages (%) are reduced in proportion to total negligence.
(example: P responsible for 90% of own injuries, P can still recover for 10% of damages from D)
- b. general verdict: (49% rule) in cases of multiple tortfeasors, P will be entitled to recover as long as P's fault is less than the combined fault of all tortfeasors.
-P's negligence < Ds negligence.
-P's negligence cannot exceed (50%); P is less than D's negligence (49%)

2. Doctrines become obsolete: 1) joint & several liability, 2) remote contributory negligence, 3) last clear chance → P does not recover 100%

3. P can recover as long as P's negligence is less than total of multiple causes of negligence (ie., D1, D2, D3, weather, leaves, rain = 60%)
- compare levels of fault vis-a-vis P's injuries

4. As affirmative defense, D can allege other causes of action (non-party) as contributor of damages.

C. *Assumption of Risk*

Express assumption of risk - overt, clear, conscious confrontation of risk.

Implied assumption of risk: P engages in an 1) voluntary; 2) knowing, 3) unreasonable confrontation of risk.

→ *absolute bar* to recovery in every state.

Example: exculpatory agreements/contracts where party agrees not to sue for negligence in exchange for services.

1. Requirements:

- a. contract of adhesion
equal bargaining power/exercise of free will
consideration
- b. transaction w/in public interests. or public well-being.
- c. knowledge or notice (knowing & voluntary act)
- d. not assuming a risk w/ intentional torts
(cannot assent to be shot/harmed, except in sports activities)
- e. essential facility
- f. scope (broad enough to include what actually happened?)

D. *Statute of Limitations*

1. When does it begin?

- a. date of breach of duty of care (D-centered) (ie, pt. of design)
- b. date of injury

- c. date of discovery of injury (P-centered)
- 2. When does it stop?
 - a. Tolling
 - 1. D has made self unavailable for suit (fled country)
 - 2. P is a minor (minor does not have a legal personality until of age)
- 3. Types
 - a. Sue govt - special statute - shortest time period
 - b. intentional torts - 1 year
 - c. negligence/product liability - 2 years, depending on state
 - d. special statute of limitations (ie, medical malpractice)
 - discovery doctrine - statute does not begin to run until injury is, or should have been discovered.
 - Notice of claim needs to be filed w/ state w/in 3 months then, drop into regular statute of limitation period.

D. Immunity

→exemption for liability in tort under all circumstances, due to D's status.
D causes harm but no accountability.

1. Types:

a. Family Immunity

parents v. children; husband v. wife
no liability for spousal abuse, child abuse

b. Government Immunity

Reasons:

- 1) States are not guaranteeing peace; don't exist to preserve peace.
- 2) Those who pay for damages are those not responsible for liability
→the people (not a legitimate use of resources)
- 3) If the government were exposed to liability, govt would be subjected to litigation that would shut it down. and Govt officials would be discouraged from enforcing unpopular policy.

except:

Federal Tort Claims Act: allows for litigation, if fed govt has harmed someone.

Restrictions:

- 1) have to exhaust administrative remedies
- 2) no right to a jury trial
- 3) attorney fees are limited by statute
(won't be able to cover costs)
- 4) no right to prejudgment interest
- 5) no liability for discretionary act, if discretionary judgment by govt official
example: pyromaniac foster child - balancing of interests

IX. Strict Liability

Due care is irrelevant

A. Approaches

- 1. Ultrahazardous dangerous approach (1st Restatement)
 - a. Strict liability for only the overtly, obviously dangerous
 - b. no defenses (anticipated losses, cover losses)

- c. small # of products
- 2. Abnormal Danger approach
 - a. an activity that produces a risk that due care will not address.
 - b. many defenses
 - great value to society if carried out in place it supposed to be carried out.
 - c. many # of products

B. Animals

- 1. non-domesticated/wild animals - if they harm & you own them, you are strictly liable.
- 2. domesticated - negligence, unless statute says differently
 - may be held strictly liable, if shown that owner had notice of animals vicious propensity.
- 3. "fencing out" - requires owner of animals to fence them in, or held strictly liable.

C. Requirements for strict liability

- 1. something happens that is *not natural*
- 2. dangerous
- 3. causes an injury
- 4. due care would not help

Abnormally dangerous activity: -

Example: Rylands v. Fletcher (D's reservoir floods P's coal mine)

→The fault was in the preexisting condition - digging the hole, (abnormal use) & storing large amounts of water. Even though there was no negligence, reservoir itself was a abnormal level of risk, where even w/ due care would not have prevented harm to P.

Ultrahazardous activity

Example: Yukon Equip't Inc. v. Fireman's Fund Ins. (thieves stole D's dynamite, blew up P's preoperty 3 years later)

→Ultradangerous activity -- per se rule of liability □ maintained a risk of serious harm which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage, that P is held strictly liable, despite intervening cause (thieves) and even though P was not negligent.

vs.

Example: Bridges v. Kentucky Stone Co. (same facts as Yukon, explosion 3 weeks later)

→Abnormally dangerous activity

defense - shifting responsibility/ transferrability of risk & mode of incitement

P exercised due care by adequately storing dynamite.

& even if P failed to exercise due care, other factors take over P's risk:

time, control, distance

& superseding intervening cause

→Can transfer liability in strict liability cases.

D. Factors considered in deciding whether an activity is abnormally dangerous and actor is therefore strictly liable:

- 1. the risk (probability) of harm was great
- 2. the extent/magnitude of harm that would ensue if risk materialized.
- 3. due care would not have prevented harm
- 4. activity was not a matter of common usage & not a highly valuable activity

5. inappropriateness of activity in relation to place
6. value of activity to the community.

E. Defenses against strict liability

1. Assumption of Risk
2. Acts of God (mode of incitement - other natural events that take over the risk)
3. Ultrasensitive P
 - if person is injured only b/c of sensitivity, not strict liability

→strict liability theory is not about negligence, therefore no defense in contributory negligence.

X. Product Liability

Liability that attaches when products are defective

Ds - designer/manufacturer/wholesaler/retailer other Ds - endorsers/inspectors

Ps - purchasers/users/nonusers who are injured

A. Causes of action to pursue:

1. Negligence
2. Implied Warranty
3. Express Warranty
4. Strict Liability
 - 402(a) 2nd Restatement
 - 2(b) 3d Restatement
 - Approaches:

B. Negligence

Manufacturers are expected to exercise due care in:

1. construction
2. design
3. warning of risks (provided along w/ product)
4. packaging
5. labeling (affixed to product & can't be removed)

→not obligated to guarantee product

When does that responsibility cease to exist?

post-sale duty to warn

Rule: If a reasonable person would have foreseen that product would create risk of harm if not carefully made or supplied, then the manufacturer & supplier are under a duty to all foreseeable users to reasonable care in manufacture and supply of the product.

→no privity between manufacturer and purchaser is required -
privity exists to any P w/in foreseeable zone of danger

→Knowledge of defect is imputed - manufacturer had duty to know

Example: MacPherson v. Buick Motor Co. (wheel on Buick made of defective wood)

→manufacturer of the finished product has a *duty to inspect* the product before putting it on the market, where the product is *inherently dangerous* and there is *foreseeable danger* where a negligently constructed car would be imminently dangerous.

C. Express Warranties

Contractual understanding with the user or consumer that fails.

Plaintiff has a right to rely on the information

Info that one would reasonably rely on in purchasing product & affected decision.

1. Requirements:

- a. Representation that product has a certain quality
- b. That representation is false
- c. Causal relationship between failed representation & harm.
- d. Reasonably anticipated to be *relied* upon
- e. No privity required.

→Warranty is limited to those engaged in the relationship b/c not nec. in privity.

2. includes both innocent & negligent misrepresentations:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though 1) it is not made fraudulently or negligently and 2) the consumer has not bought the chattel from or entered into any contract relation with the seller (no privity required).

Example: Baxter v. Ford Motor Co. (D manuf. misrepresented windshield as shatter-proof glass) →D, as manuf, is liable notwithstanding lack of privity, b/c its misrepresentation as to quality of product was not readily discoverable by P.

D. Implied Warranties

Rule: Although a warranty is not actually stated by the manufacturer, when products are sold, products have an implied warranty that they are fit for their purpose and are merchantable. = warranty of merchantability and fitness for a particular purpose
→Consumer expectation test: If the product did not perform the way the consumer expected, the manufacturer is liable.

-warranty of fitness for a particular purpose - buyer wants product for particular purpose and buyer relies on seller's judgment to recommend suitable product.

→Even where there is no negligence, no privity, no breach of an expressed warranty and even where a buyer signs a disclaimer, the court will impose liability, b/c

1. *unequal bargaining power* or economic position of parties where the buyer does not have power to negotiate the contract.
2. producer should be held accountable for their failed products.
3. warranty runs with the good and not with the contract.
warranty was not supported by consideration.
4. manufacturer puts product into the stream of commerce & promotes its purchase to the public & profits from it
-redistributing losses - those who profit, are the ones who should pay.
5. public policy

→Under modern marketing conditions (*mass advertisements*), when a manufacturer puts a product into the stream of commerce and promotes its purchase to public, an implied warranty that it is reasonably suitable for use accompanies it into the hands of the ultimate purchaser.

-advertisement implies some reasonable level of competence in product/warranty

-when product does not perform, the advertisement warranty has failed & the co. will be held liable.

→treat as if *strict liability*

→Approaches:

Defect at point of manufacture & alternative designs (favor manufacturers)

Defect at point of injury & consumer expectations (favor plaintiffs)

Example: Henningesen v. Bloomfield Motors Inc. (p received car as present, disclaimer on K in □ inch of fine print.)

E. Strict Liability

402A 2d RS: Special Liability of Seller of Product for Physical Harm to User or Consumer:

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

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 sold.

Even where:

(*due care not req.*)

a) seller has exercised all possible care in preparation and sale of his product,

and

b) user or consumer has not brought product from or entered into any K relation

(*no privity required*)

w/ seller.

1. Rationale

Social cost - product liability bred into consumer price.

does not change price significantly b/c national price.

no one is hurt b/c affects everyone nationally.

Example: Greenman v. Yuba Products inc. (P injured by power tools, didn't give notice of breach of warranty w/in statute of limitations)

→Notice and requirement and express warranty are not appropriate for strict liability.

When manuf. places an article on market knowing that it will be used w/o inspection for defects, he will be strictly liable in tort if that article proves to be defective.

2. Preventive Counseling

-counsel clients in advance to prepare in advance for loss/problem.

Questions:

1. What is your quality control system & how does it function?

2. Who is in the loss coordinating committee? (risk analysis & loss coordination)

3. Insurance?

4. Training program for all employees re: product quality & integrity

5. How are you tracing & checking self?

How are you evaluating your products?

6. Response to trace geneology of product failure?

who is responsible for what

how are you going to organize & respond

7. Who in company is expert witness?

F. Product Defect

1. Design Defect

a. 3 ways to test defective design:

1. risk-utility analysis :a product is defective if risks outweigh utility of product w/o mandatory RAD. (2b - 3rd Restatement)

a) **risk utility analysis at point of use/purchase**

b) **risk-utility analysis at point of production/manufacture**

2. consumer expectation test (402A - 2nd Restatement)

Did the product perform as consumer might expect?

3. Reasonable Alternative Design (RAD) (2b - 3rd Restatement)

→Negligence; no strict liability for design defect

b. Negligence theory not favorable to P

1. evidence is hard to produce in negligence case

-hard to prove & expensive

2. consumers cannot test product; cannot breed risks into risk of product.

3. not question of due care □ so unsafe that should not be produced?

c. Strict liability & consequences:

manufacturers think too harsh

insurance co □ liability by innocent companies is too harsh

d. spread costs:

1. look at product

2. risks presented

3. benefits posed

4. tolerable risk in society

5. let costs be passed to those that pay for goods; pay for risk.

e. Defenses

1. Comparative Fault

2. Assumption of Risk

3. State-of-the-Art evidence

-custom standards of industry; best available technological product at time of manufacture

-Not absolute defense;

→manufacturer may still fail risk-utility test even if design

meets state of the art b/c product may be so dangerous, its utility

is so small that product should not even be on market.

Unavoidably unsafe products

Rule: *Drug manufacturer* is not strictly liable for defective design in pharmaceutical products, but should be measured by negligent standard of Comment K of 2nd Restatement 402A.

Comment K: *not strictly liable if:*

1. unavoidably unsafe products (can't be made safe □ ie, blood)

2. w/high social utility

3. Notice of risk (knowledge of risks)

→problem lies in #3 where risks are known now.

→negligence standard - defect at time of distribution

-strict liability limited to warning cases

→Public Policy consideration -

- deters manufacturers from doing wrong under comment K
- P followed directions on bottle, and now P is dead (warning/label/manufacture)
- vs. if overdeter, discourage/impede research in products where risks are good.
- all drugs are essentially unsafe
- cannot make co. responsible for unknowable risks.

Unreasonably dangerous risk - risks that extend beyond that would be contemplated by any ordinary consumer

vs. reasonable risk - (ie., sharp knives)

→If P can appreciate, contemplate & avoid danger, not an unreasonably dangerous risk.

Defense: In failure to warn case, P must lose if there is an *adequate warning*, unless exercised in bad faith. If there is a preemptive federal law to state law, and D used adequate warning under federal law, P will lose.

2. Warning Defects

A. Knowledge

-knowable inadequacy of warning at time of manufacture and/or distribution is defect →*strict liability*

-*negligence* →*reasonable manufacturer* may not be liable if acted as a reasonable prudent manufacturer in deciding not to warn

B. Defenses

1. State of the Art evidence
2. Sophisticated Users

C. Learned Intermediary Rule -

Warnings and instructions should be provided to physician, who is a "learned intermediary" and is the best person to understand the patient's needs and assess the risk and benefits of a particular course of treatment.

-Assume that doctor will decide which warning to pass on to patient.

D. Post-Sale Duty to Warn

-Duty to provide warnings at time a product is marketed and additional duty on manufacturer to provide post-sale warnings about risks that are discovered after the sale.

G. Interests Protected

→402A does not apply to consequential *economic loss* of product, where product failed to meet consumer's desired level of performance, where the consumer is not injured.

-consumer cannot recover for economic loss of personal property.

-unless, other property affected by defective property →compensable

H. Defenses

1. Comparative Negligence

→Comparative fault applies in strict liability

- P gets taxed for using product inappropriately.

a. Change in consumer expectation about use

-consumer has a duty to inspect, test, understand product

-require learning of product before use

vs. reality, considering way products are marketed.

b. Where comparative fault is adopted, P's *Assumption of Risk* is complete defense to strict liability → P is liable

c. *Unforeseeable misuse*

- Unforeseeable misuse of product will allow manufacturer to avoid liability
example: use shears to cut dog's hair
- Manufacturer will be liable for foreseeable misuse.

I. Defendants Other Than Manufacturers

1. Other suppliers of chattels □ *sellers*
(example: used car dealer)

→retailer/seller should not be held liable to strict liability if he does not assume risk or *design* product □ he is outside of marketing chain; retailer is like a consumer
-even with probability of product alterations, where product is highly altered, even if positive reconditioning, buyer recognizes that he is buying altered product as assumed by the lower prices. →would drive up prices and destroy 2nd-hand goods market.

unless...retailer does participate in the design of the product.

2. Real Property

(minority case) Becker v. IRM Corp.

→Landlord may be held for strict liability for latent defects in premises when defect existed at time premises were let to tenant.

→ real property is like a consumer good, not a used good:

Each time the Landlord puts the apartment into the stream of commerce, LL is continually modifying & marketing it as a new product, not a random sale of a used good. - LL has control of real property since its conception & subsequent sales

→Application

Applying to mobile homes, mass-produced residences (sold like mass-produced consumer goods)

Does not apply to rentals

→Implied warranty of inhabitability.

3. Services

→Service providers are not subject to strict liability, but must exercise reasonable care in rendering services.

b/c service provider (ie, hospital) not part of chain of distribution of product, not req. to test, not part of selection process (more a conduit).

→learned intermediary counterargument -

-patient goes to physician for info re: health, hospital has absolute control of selection/brand, hospital in position to select, choose brand.

→unless, service provider provides more, such as participates in design, chain of distribution, receives profits → strict liability.

C. Tort

-defect in manufacture - does not comply w/ standards

- or -defective design - evaluates thinking process of design & human judgment
 - were choices made in designing product reasonable?

XI. Defamation

Quasi-intentional tort : tort & negligence

A. Requirements

1. untrue statement
2. malice (standard of care taken in making statements, not in language itself)
 - a. reckless disregard of the truth
 - considerations: ?two sources
 - ?how much evidence
 - ?when to print info
 - or b. knowledge of falsehood
3. caused injury

B. Per se liability for defamation:

Accusation of:

1. loathesome disease
2. crime
3. lack of chastity
4. impune one's business/professional reputation

C. *Single Publication Rule*

→Each time a statement is published produces a new defamation act, not a new cause of action.
 -damages = # of people who see it

D. Two standards: knowledge of falsity

1. **serious doubt test** - serious doubt of the source & publish anyway (intuitive feeling)
2. **red flag test** - if in business of producing info, know way that info was collected that info is likely to be untrue, & publish anyway. (ie., delete info from tape)

E. Defense:

Truth is complete defense, even if someone is harmed by statement.

-Require only that language is substantially correct

F. First Amendment problem □ privacy rights vs. free speech rights

qualified right balancing privacy & free speech

certain groups are protected under First Amendment:

- First Amendment - press clause
- media clause
- general speech clause

New York Times Co. v. Sullivan

→Constitutional guarantees of free speech & press require a federal rule that prohibits a public official from recovering damages for defamation unless statement were made with actual malice.

-Actual malice is in standard of care in making statement, not in language.

-state by state choices as to whether state will impose liability on media entity involved w/private person, as long as not automatic liability.

media vs. private entity

Negligence

1. Duty

1. Notice (indicates foreseeability)
 - a. Direct/actual notice
 - b. Knowledge
expected knowledge
 - c. Custom
2. High Magnitude of Harm

2. Breach of Duty

3. Causation

4. Injury