

## 1. Intentional Torts

### a. Battery

#### i. A acts

#### ii. Intending to cause harmful or offensive contact

1. Intent is present when the defendant desires or is substantially certain the elements will occur (Garratt citing what is now R2 Torts §8A) (These are the Purpose and Knowledge prongs of intent)

a. Knowledge Prong is a separate liability standard. If actor knew his actions would result in harm, it is presumed he intended for the results to happen

i. Subjective Standard. Sufficient but NOT necessary. **Garratt High std**

b. If in the process of an attack, attacker accidentally does something to cause attackee to be hurt more than the attacker intended then the attacker is still liable. Once attack is commenced, intent is no longer an issue. Intention to harm apparent and undeniable. Nelson v. Carroll

#### 2. Standards:

a. Intent to touch, any touch (Wagner)

i. Caveat-we all implicitly consent to certain socially accepted types of touching

b. Intent to harm or offend by touching

c. Middle Option-Intent to cause “unlawful” (against social norms) contact (Vosburg shin kicking), but no need for intent to cause harmful contact (Cole v. Hibberd).

#### 3. Transferred Intent (R2 Torts §13)

a. Same Victim Different Tort-transfer from tort to tort-Intend to assault but end up battering=Intent to batter

b. Victim to Victim. In re White-Tortfeasor liable for the direct, natural, and probable consequences of his actions, even if he ended up shooting someone he did not mean to.

c. Across tort and victim.

#### 4. Harmful/Offensive:

a. Test for Offensiveness is OBJECTIVE-would the contact offend a reasonable sense of personal dignity. R2

i. Contact must violate some prevailing social standard

#### iii. Such contact occurs

1. Extended Personality – contact need not be skin-to-skin if thing touched deemed to be part of personality (Fisher plate snatching)

### b. Assault

#### i. Elements

1. A acts

2. Intending to cause P the apprehension of IMMEDIATE harmful or offensive contact in P

3. A's acts causes P reasonably to apprehend such a contact

#### ii. For mere words to constitute an assault, they must create a reasonable apprehension of imminent harmful contact

1. Brooker-no assault because of distance and conditional nature of threat

2. Vetter-threat causing reasonable apprehension that it will be carried out based on things like gender of parties, time of day, proximity, etc. can be assault.

**c. False Imprisonment**

- i. A acts,
    1. This does NOT mean that A has to do the confining. He can order others to confine and still be liable. His "act" is the ordering.
  - ii. Intending to confine P;
    1. The confinement must be in a bounded area.
      - a. If area is too broad and allows free movement, no imprisonment (Shen v. Leo A. Daly Co.)
      - b. Area of confinement can be mobile, like a car (Wilson v. Houston Funeral Homes)
      - c. If the victim reasonably perceives that the tortfeasor will prevent her from leaving, she is confined. Ball v. Wal-Mart
      - d. If the victim's only means of egress is one that would risk harm to herself or others, she is confined.
      - e. If the victim's family or property, and perhaps even reputation, are threatened if the victim leaves, she may be deemed confined.
        - i. Threats that will supposedly be carried out after the end of confinement are generally insufficient
      2. If the confined can leave with minimal effort, or has no reason to believe he will be met with resistance, no confinement. (see Fojtik v. Charter Med. Corp.)
    - iii. A must actually intend to confine P. This is an intentional tort.
      1. Unintentional confinements sound in negligence.
    - iv. A's act causes P to be confined; and
    - v. P is aware of her confinement
  - d. Shopkeeper's Privilege
    - i. reasonable belief person had stolen/attempting to steal
    - ii. Detention for rsble time
    - iii. Detention in rsble manner. Grant v. Shop-N-Go Market
2. Affirmative Defenses
- a. Consent-key is to figure out exactly what P consented to
    - i. Express
    - ii. Implicit-drawn from inferences from how P acted
      1. "Actually and reasonably believed" standard: the defendant must have actually and reasonably believed consent was given (O'Brien v. Cunard S.S. Co. vaccination case)
      2. Consent cannot be secured by fraud, misrepresentation, or coercion.
        - a. "Apparent consent will sometimes be deemed ineffective if the defendant had reason to know that the consent was not freely given. Often in such cases a critical issue will be whether the alleged tortfeasor occupied a position of power or authority in relation to the victim."
      3. Scope of Consent: Giving consent for one thing (certain kinds of football instruction, operation on a certain ear) does NOT mean you've given consent for another thing (being slammed to the ground by coach, having other ear worked on.)

b. Self Defense

- i. Reasonable force may be used by a victim who actually and reasonably believes it necessary to protect himself from imminent injures (e.g. harmful contact or confinement) (R2 §63)
- ii. Victim must reasonably believe force to be necessary, however belief need not be correct
- iii. Force must be proportional – force intended to inflict death or SBI only justified if victim believes he would suffer SBI or death from the attack (Haeussler one punch ok for self defense from neighbor in doorway)
- iv. Deadly Force allowed
  1. When under threat of imminent death/serious bodily injury. Caveat-if safe retreat, no deadly force.
  2. When being attacked in one's dwelling.
  3. If a safe retreat is available, no deadly force allowed unless attack is in one's dwelling
- v. Defense of Others – privilege to use reasonable force to protect third party whenever actor reasonably believes a third party is entitled to exercise self-defense

c. Defense and Recapture of Property

- i. Reasonable force may be used to prevent a tort against real or personal property. Unlike self-defense, reasonable mistake will not excuse force directed against innocent party
- ii. No deadly force --may only be used to avert felony of violence – disproportionate to save property

d. Defense of Habitation

- i. Can use deadly force to protect ones dwelling when intrusion threatens death or SBI
- ii. CANNOT use deadly force to protect non dwelling real property. Katko
  1. Further, cannot install mechanical devises to do what you couldn't do

3. Damages

- a. Compensatory-economic and non economic loss
- b. Punitive-available if P can prove tortfeasor acted maliciously or willfully and wantonly
  - i. award of punitive damages is entirely at the discretion of the fact finder (typ. jury)

**4. Intentional Infliction of Emotional Distress**

- a. IIED arose to fill gaps in between other intentional torts. Has a threshold.
- b. IIED Elements
  - i. Outrageous or abominable conduct
    1. Test for outrageousness-cause a rsble person to cry outrageous. Beyond all bounds of decency.
    2. Mere threats not outrageous. Threats combined with supportive behavior composing a campaign of harassment is. *Littlefield v. McGuffey*
    3. Factors that lower outrageous standard:
      - a. Abuse of power,
      - b. D exploiting known vulnerability in P
  - ii. Done for purpose of causing severe distress in victim.
    1. RECKLESSNESS is also allowed for IIED
    2. Transferred intent DOES NOT apply to IIED.

- 3. Bystanders and Derivative Actions: Members of immediate family at the time and anyone who is present and suffers emotional distress can recover. (This in some ways EXPANDS BYSTANDER CLAIMS beyond standard loss of consortium or wrongful death actions by providing an independent cause of action in the family member)
- 4. Things like time off work, visits to therapist, physical reactions are helpful.
- iii. Causes severe emotional distress.
  - 1. so severe that no reasonable person could be expected to endure it
- c. Outrageousness is a matter of law=judicial discretion. *164 Mulberry v. Columbia University*
- d. IIED unique among intentional torts in that claims can go forward on a showing that D was only reckless.
  - i. Recklessness has higher standard than negligence. R-D did not intend but should have known that his conduct would most likely cause severe distress.
- e. IIED is broad and narrow. Its elements are broad and subjective. Narrow-judges are reluctant to call something IIED. They use judicial discretion to keep IIED's application narrow. Jones v. Clinton
- f. No transferred intent for IIED. 46(2) P, as a third party, can recover if D's actions reckless in regards to P and P is present when D's outrageous conduct occurs. Wife watching husband beaten.
- g. IIED and Employment Discrimination
  - i. The injury MUST NOT fall under a workers' comp statute
  - ii. Perhaps the most likely setting for a successful IIED claim. (Wilson for age discrimination; Stockett v. Tolin for sexual harassment.)
  - iii. Charges must first be filed with the EEOC, who notifies the employer and decides whether it is going to sue.
  - iv. Employees can now get punitives as well as compensatory damages based on the economic harm they suffered

## 5. Negligence

### a. Elements

- i. P suffered an Injury
  - 1. Physical harm
    - a. Bodily Harm
    - b. Damage to property
  - 2. Emotional Distress
  - 3. Economic Loss
- ii. A owed a duty to a class of persons including P to take care not to cause an injury of the kind suffered by P
  - 1. Duty is a question of law for judges
  - 2. Duty is Relational. This means that there must be an "alignment" between duty and breach such that the breach constitutes "carelessness toward [the plaintiff]," not just in general. (Palsgraf—Cardozo).
    - a. "[Tort law] empowers . . . P to complain about another's conduct only if that conduct constitutes a wrong to P (or persons similarly situated to P), as opposed to a wrong to someone else that happens to injury P.

- b. The question: Is it a wrong to P, or is it a wrong to someone else that happens to injury P? (This question "aligns" duty and breach in the Palsgraf way)
3. General Duty of Reasonable Care
- a. Duty to avoid causing reasonably foreseeable harm to others (Heaven v. Pender)
    - i. This kind of duty is what a reasonable and prudent person would do under similar circumstances
  - b. If D can envision a certain class of people being injured by D's product if it is negligently made, D's owes that class of people a duty of care. Manufacturer bears responsibility to inspect when buyer typically not sophisticated, but might be free from liability if someone else does an inspection after product is manufactured. Duty does not come from contract. It comes from tort law. MacPherson v. Buick
  - c. Courts cautious in extending duty. Foreseeability not just a threshold. Court factors in other normative issues. Thus, it is rsble foreseeability and often court looks for what class of people is the **most** foreseeable and extends duty just to that class. Mussivand v. David (adulterer with STD's duty extends to spouse of paramour but not to paramour's other partners.)
4. Affirmative Duty to Rescue or Warn (**Unreasonably FAILED to act**)
- a. No duty to rescue, but there are some exceptions when there is duty
  - b. Maybe be morally wrong to rent canoe to drunk guy and then let him drown, but this is nonfeasance and no duty is owed. Osterlind
  - c. Exceptions-When a duty to rescue/warn is owed
    - i. If you caused the danger, but danger must be imminent
    - ii. If you have a special relationship with the person (railroad/customer, hospital/prisoner, perhaps friend/friend)
      - 1. Heffern, where the court held that a person who purchases narcotics for someone else has a duty to help in case of an overdose.
      - 2. Narrow exception for special relationship, not between P and D, but between D and 3rd party. Exception **applies only to therapist-patient relationship**.
        - a. Therapist therefore has duty to warn foreseeable victim when therapist knows or should have known that patient poses a serious danger of violence to victim. Tarasoff (Accepted by 1/2 of states)
    - iii. If you are a business and you invite people onto your property (Baker v. Fenneman and Brown).
    - iv. If you begin undertaking to help rescue
      - 1. Under common law, you have to use reasonable care in rescuing, but many states now have "Good Samaritan" laws which immunize rescue workers from liability.
5. Premises Liability-Special Duty Rule

a. Owner owes **invitee** duty to keep premises safely safe. When not safely safe, owner has duty to warn only when the danger is hidden and not in plain, open view.

1. Remember to look at scope of invitation. If invitee goes beyond scope, he becomes a trespasser. Leffler

b. Owner owes **trespasser** no duty to keep premises safely safe.

i. Exceptions to no duty to trespassers

1. owner must take reasonable care to avoid causing injury to child trespassers. Previously, owner had duty to not maintain an attractive nuisance. Today, owner has duty only if owner had reason to foresee that children might enter on the property and be endangered by something on it i.e., a pool.

2. Limited duty owed when owner knows or should have known that trespassers constantly intrude upon a portion of owner's land. Owner has duty to take steps to warn these habitual trespassers of risk posed by artificial conditions on the land.

c. **Licensee** owed intermediate level of care i.e., owner who knows of hidden danger has duty to inform licensee, not trespasser. Leffler

i. About 1/2 of states reject Licensee distinction. Treat them as invitees

d. Some states enacted Recreational Use Statutes to immunize owners of properties that are used for recreational purposes.

e. Rowland v. Christian-duty owed to trespasser/invitee/licensee. Distinction between them no matter.

i. Judges should not use duty, a legal issue, to short circuit negligence claims under premises liability. Jury should decide whether or not P should recover. Only 6 or 7 states have accepted Rowland. But Rowland has led to licensees being treated like invitees in 21 states.

ii. Duty expansion of Rowland and McPherson is a transfer of power from judge to jury.

6. **Pure Economic Loss.** Heaven/McPherson duty applies only to physical injury/damage to property

a. Aikens v. Debow-Courts hesitant to say duty owed for just economic loss. D could foresee that this class of persons including the P would suffer economic loss, Still NO Duty. **Majority Rule**

i. Not willing to extend limitless liability. Why? Too many suits would be brought and people would be forced to act so cautious that they would accomplish nothing.

ii. Valdez-only commercial fisherman can recover for economic loss from oil spill. they have a quasi property claim to fish.

iii. Robins Dry Dock-economic loss alone does not warrant recovery absent special relationship. Lessor's rights insufficient to warrant recovery.

iv. J'Aire-tenant able to recover based on fisherman exception.

Lease=property interest-McPherson applies

v. Some states allow recovery when the defendant knows or has reason to know a particular class of plaintiffs will suffer damages (People Express Airlines).

iii. Breach of duty- **Always identify P's theory of breach, always!**

1. Breach is a question for the jury.

2. Breach is when you FAIL to act as a reasonable person would under the same or similar circumstances.

a. Breach does not automatically exist if we can imagine something else that could have been done. It has to be something that a reasonable person should have done but the defendant didn't, or should not have done but defendant did.

b. Some have tried to formalize the breach inquiry

i. Hand Formula: If Burden (B) < Probability (P) x Loss (L), then there is liability (Carroll Towing).

ii. But it is very difficult to set the scope of B, P, and L. Some limit P and L to foreseeable losses.

iii. May be helpful when  $B \ll \ll \ll P \times L$  and vice versa Zapata

iv. Works well in \$ for \$ cases where data is available.

c. OBJECTIVE, not subjective standard. (Vaughan v. Menlove)

i. People who are NOT CAPABLE of living up to the standard are still held to the standard.

ii. Caveat:

1. the blind person is held to the reasonable blind person standard.

2. "Tender Years" Doctrine: Under common law, children under 13 were not liable for their torts. Some states have a modified system in which children from like 7-13 where there's a modified "objective reasonable child of that age" standard. (Applehans upholds the tender years doctrine).

3. Parental Liability-i. Negligent Supervision-(1) parent aware of specific prior conduct sufficient to put them on notice that such conduct likely to happen again, (2) parent had opportunity to control child. R2 §316. ii. negligent entrustment-parent carelessly gives child access to dangerous instrumentality. Rios v. Smith

4. BUT the dumb person is NOT held to the reasonable dumb person standard.

3. Judge can rule on breach when D acted with ordinary care to the extent that no reasonable jury could find otherwise. Campbell v. Kovich (D quickly inspected lawn and watched where he was mowing. AMOL, no breach.)

4. Foreseeability-Ordinary care does not require extraordinary foresight. If circumstance generating P's injury unforeseeable, court/jury may be willing to say no breach. Further, to hold D liable for circumstances out of D's control would make D an insurer. Adams v. Bullock (Cardozo-electric lines for trolley cannot be insulated nor buried)

5. Extraordinary Care-Common Carriers. Jones v. Port Authority

6. Custom and Ordinary Care

a. Non-Professional Customs-Ordinary standard of care applies regardless of industry custom. Jury can second guess custom. The T.J. Hooper

b. Professionals-**anti-TJ Hooper**

i. For doctors and lawyers and other professions, customary care IS ordinary care under the breach standard. If you are following the customary care, YOU CAN'T BREACH. (Johnson v. Riverdell Anaesthesiological Associates).

ii. Exception-Informed Consent Tort-when claim of professional malpractice alleges (1) failure to provide sufficient info and (2) said failure results in P being harmed, prudent patient standard applies-did doctor provide all the info a prudent patient would require. Jury can second guess, back in T.J. Hooper Land. Largey

7. Res Ipsa Loquitur-mere accident's occurrence suggests/proves there was negligence

a. Allows plaintiff to survive a motion for summary judgment on breach. The issue then goes to the jury, and the jury is allowed, but not required, to infer from the mere injury that breach occurred. Bryne v. Boadle

b. Requirements for Res Ipsa Loquitur Kambat-swallowed sponge case

i. The defendant is in exclusive control of the instrumentality of injury

ii. This has to be the kind of thing that just doesn't normally happen without someone being careless (applies to all factors involved)

iii. The plaintiff didn't do anything to bring about their harm

#### iv. **Breach was Actual and Proximate Cause of P's Injuries**

1. Actual Cause

a. Legal Test-But for Test (99% of the time). Usually applied by Jury. But for D's careless actions would P be injured. If yes, no causation.

b. Preponderance of the Evidence Standard

c. Burden Shift-If two Ds are known to exhaust the universe of possible tortfeasors, and there is only one actual tortfeasor, but we can't figure out which one of the two did it, then we will hold both liable unless one can prove the other did it. Summers v. Tice. This shifts burden of proof to defendant. Doesn't apply for if more than 2 Ds

d. **AC and Toxic torts.**

i. 2 prongs both must be satisfied.

ii. (1) General. Is substance capable of causing the kind of harm P suffered.

iii. (2) Specific. Did substance cause P harm. Expert testimony is the only way for P to satisfy his burden of persuasion for these prongs

1. Rule of Evidence 702-Expert testimony/evidence must be qualified. Considerations 1.has it been tested, 2.subject to peer review, 3. does expert have history with topic, 4. does it have widespread acceptance? Daubert v. Merrell Dow (overruling Frye test which looked only at



widespread acceptance)

a. This was meant to make it easier to have experts testify, but the opposite has happened. Judges are now more willing to throw out experts. Thus, SCOTUS through Daubert has had a huge impact on tort litigation, an area of law which SCOTUS itself says it has no duty to define.

e. **Loss of Chance Injury**-Redefine P's injury to allow recovery-recognized by few jurisdictions

i. D caused P to lose the chance to survive i.e. chance of surviving went from 37% to 0% because of something D did not do. 37% of damages recoverable. Falcon v. Memorial (loss of chance outlawed by statute shortly after this decision in Michigan)

ii. Only applies when D owed it to P to give P the best chance of survival. Almost exclusive to medical malpractice and wrongful death suits

iii. Only applies when P dies. Also, need good, hard data for LoC to apply

f. **Zone of Danger Test**-applies when emotional distress is the only injury suffered. P who has in the zone of imminent peril created by D's careless act but escaped without physical injury may be able to recover. Typically in NEID cases.

g. Peril must be imminent. Buckley (also holding P must have suffered an injury before recovery is allowed.)

h. **Multiple Necessary Causes**-There can be multiple but-for causes. For D to be liable his actions need not be the only cause, just a but-for cause. McDonald

i. Multiple Sufficient Causes-But-for test fails. Substantial Factor Test Applies

i. P *must* establish that D's actions were a sufficient cause before substantial factor test available. Aldridge v. Goodyear

1. **Proximate Cause**-All other elements must be satisfied before analyzing PC

i. Injury must be caused by harm created by D's carelessness. Allbritton (no PC because P injured as a result of fire caused by D and not *in response* to fire. Injury must occur within the scope of the risk created by D's carelessness. Fire was out, no rush, P choose to talk dangerous short cut. P's actions, although primarily used in comparative fault, provide insight into PC analysis.

ii. 3rd Restatement replaces PC with scope of risk. Was P's injury within scope of risk created by D's carelessness

iii. Foreseeability question-was the manner in which P injured foreseeable result of D's carelessness. Jolley

iv. Was P's injury both natural and probable based on D's carelessness

v. **Proximate Cause and Superseding Cause**-Does nature of 3rd party intervener let D's carelessness of the hook.

- a. Factors in determining whether act superseding to necessary extent. Pollard
  - 1. Were 3rd party's actions foreseeable by D
  - 2. Did 3rd party take "ownership" of risk created by D's carelessness (3rd party's actions planned, methodical, and/or consistent?)
  - 3. Did 3rd party add mischief to or increase dangerousness of risk created by D
- b. Clark-example-3rd party's actions not enough. Boy did not add any danger to explosives Both 3rd p and D liable.

vi. **Palsgraf Issue**-Is the duty owed by D to P the duty that was actually breached.

- a. Was it foreseeable to D that his careless action would injure P? In other words, were D's actions careless unto P? If no, then no breach as to P. Thus, D not liable. Palsgraf (important that package was unmarked and that P was standing some distance from Conductor D. D truly had no way of knowing helping man with package would hurt P. Thus, in helping, D may have breached duty to man with package, but D did not breach duty to P—D fulfilled duty to take ordinary care as to P.)
- b. **Palsgraf Prong**-Could D foresee injuring a person like P by acting carelessly. P must show that the duty owed P was the SAME duty that D breached. (RR owed Palsgraf a duty of care, but not a duty to protect her from unmarked packages exploding)
- c. **Proximate Cause Prong**-could D foresee this type of injury happening to person like P by undertaking careless act. Kinsman applies this prong VERY broadly.
- d. **Both must be satisfied for there to be causation**

vii. **PC and Affirmative Duties**-If D owes P affirmative duty whether there was a superseding cause is irrelevant. D owed P a duty regardless. Tarasoff (intentional murder does not erase D psychiatrist's duty to warn)

a. Courts reluctant to assign affirmative duties to social hosts and gun manufacturers.

- 1. Reluctant in general. Fast Eddie's

## 2. **Negligence Per Se**

- a. In the First Instance NPS relates to breach.
  - i. A violation of a statutory standard of care constitutes NPS i.e. the breach standard is satisfied). Dalal. The legislature has spoken on the issue so the jury has no authority.
  - ii. Not all statutes qualify because they fail to establish a standard of care e.g. licensing standards.
  - iii. In NPS D can still be found not liable if I, D, or C not satisfied.
- b. In the Second Instance NPS is about Palsgraf and PC. (1)Was statutory standard care enacted for people like P Bayne v. Todd, and (2) was the injury the kind of injury the legislature considered when drafting the statutory standard of care. Victor. Both must be satisfied. If no NPS, P can

still attempt to recover under ordinary Negligence, i.e., pretend the statute doesn't exist. But, if P can't prove NPS, it is unlikely that he will be able to prove N.

- c. Excused violations.
  - 1. Young Children
  - 2. When violation of the statute was the more prudent course of conduct for the defendant to follow. Tedla.
- d. Regulatory Compliance is usually treated as demonstrative of reasonableness but not dispositive.
  - 1. Exception-for some products manufacturers, especially in heavily regulated industries, e.g. auto, compliance=carefulness

### 11/04 Affirmative Defenses to the Tort of Negligence

1. Contributory Negligence-if P negligent, careless, at all, D not liable. Only exists in AL, NC, VA, MD, and D.C.
2. Comparative Fault-Majority Rule
  - a. Pure CF-P can recover regardless of P's level of fault. About 1/3 of the states have this.
  - b. Modified CF-P barred from recovering if level of P's fault rises to or above a certain level, usually 50%. 2/3 of the states have this. Trend is in this direction.
  - c. Damages determined based on percentage fault. If P 40% at fault, P can recover 60% of damages awarded. Hunt
    - i. This apportionment is highly subjective
  - d. Burden on D arguing that there is CF to show that P's negligence was a but for cause of P's injury. Martin v. Hezog (P would have been injured even if P had not been negligent. Thus, CF does not apply).
3. Assumption of Risk-Did P KNOWINGLY and VOLUNTARILY take on the risk presented by D's carelessness. **Complete defense**, i.e., if it applies D wins
  - a. Express AOR-Signed Waivers the most common form. Usually only deemed enforceable for recreational activities and even then not all the time.
    - i. Validity of Waivers. Tunkl test.
      1. Is the business of a type thought suitable for regulation?
      2. Is the service of great importance to the community?
      3. Does the party hold itself as willing to perform service for all?
      4. Did the party have a "decisive advantage" in bargaining?
      5. Did the party provide optional reasonable insurance coverage?
      6. As a result of the transaction, was the person or property of the buyer placed under control of the seller?
    - ii. Skiing central to Vermont, so state has interest in ensuring safety. Waiver held **unenforceable**. Dalury. Industry that is central to the State cannot opt out of tort law through contract.
    - iii. Skydiving not central or important to state. Waiver **enforceable**. Jones v. Dressel

- b. Implied AOR-No contract/express waiver. P's conduct suggests a willing and voluntary acceptance of the risks associated with D's carelessness. Applies almost exclusively to recreational activities.
  - i. For implied AOR to apply, P must have **subjective** knowledge of the risks created by D's carelessness. Not an objective standard.
  - ii. Many states have held that comparative fault completely eliminates IAOR.
  - iii. Some states have an intermediate position such that comparative fault eliminates assumption of risk IF THE PLAINTIFF ACTED UNREASONABLY in assuming the risk. However, if the plaintiff acted **reasonably** in assuming the risk, implied assumption of risk will be a complete bar to recovery. (Smollett). Thus, IAOR should apply when P assumed risk but did not act carelessly.
  - iv. IAOR-P must have assumed the risks created by D's breach.
  - v. Some courts have adopted Primary secondary AOR
    - 1. Primary Assumption of Risk-no duty owed to P regardless of P's subjective knowledge of risk. Applies to inherently dangerous activities (recreational sports) and is accepted in only a few jurisdictions. Knight
    - 2. Secondary AOR-affirmative defense cases like Smollett

#### 4. Immunities

- a. Intrafamilial immunity-can't sue dad because he's dad. almost completely gone.
- b. Charitable Immunity-no respondeat superior for charitable hospitals. Can sue the doc but not the hospital. Only remains in form of things like damage caps.
- c. Sovereign Immunity-historically no respondeat superior for govt. Enactment of FTCA now allows respondeat superior but with
  - 1. no jury
  - 2. no punitive damages, ever
  - 3. discretionary function exception-If govt. employee careless in performing discretionary function, SI still applies. Govt. not liable.
    - a. Function must include a judgment or choice, and
    - b. the judgment must be the kind that the exception was designed to shield, e.g., policy considerations (don't want judiciary to second guess governmental policy decisions. Riley -where to put mailboxes is a policy choice?)

#### 5. No Duty Rules for Local Govt. and Private Entities

- a. Obligation owed, but no liability because of whom is being sued. Prima facie case satisfied but still no liability.
- b. "When they invoke the public duty rule, courts deny liability on the ground that, although government owes certain duties to the public at large, it does not owe those duties to any individual member of the public. Thus, no individual has 'standing' to sue for damages caused by the breach of such a duty."
- c. not court's place to second guess policy decisions of executive or legislative branch. Riss (Cops not liable in deciding to how to allocate resources which

results in someone being hurt) (dissent-we should require showing from govt. that prove it decided how to allocate finite resources).

**d. By saying it is a no duty issue rather than affirmative defense, the court keeps the burden on the P. If it was an AD, the D would be required to provide support for the policy decision it made.**

e. Too Much Liability-line has to be drawn somewhere. Applies to private entities that provide what can be “deemed public service,” e.g., utility companies.  
i. to hold entity liable for all injuries it caused would result in higher prices which hurts the public at large. Strauss (drew the line that P would have to be injured, as a result of power loss, in the area over which P has a contract with Power Co. Because P tenant injured in common area, where LL is in contractual privity with power co, no duty=no liability).

## 11/10 Property Torts

### I. **Trespass** of land or chattel.

#### 1. Elements

a. D’s intervening act must be intentionally undertaken (D need not know that the land is someone else’s), and

b. D’s act must result in contact with P’s land. Burns Philp. Contact can be minimal. It need not be harmful. Contact can be below, on, or above the prop. Only legal possessor or members of her household can bring trespass suit.

#### 2. Remedy

a. P can undertake reasonable self-help to remove trespassing item. But self help is undertaken at P’s own risk. Court may find that P acted unrsbly.

b. P can recover for injuries parasitic on the invasion. Kopka rule

#### 3. What if trespass done out of necessity?

a. Incomplete Privilege of Necessity-trespasser gets the privilege of staying, but he has to pay for any damage the trespass causes. Vincent

b. GOLDBERG-IPN is garbage. If you intend to touch land, you touch it, and it turns out to belong to someone else you have committed trespass. If the trespass caused damage you are liable.

i. BUT maybe IPN is important when the property owner tries to refuse access to trespasser who needs to trespass to be safe. Plouf (unhook)

#### 4. Defense of Consent-May be either explicit or implicit

a. Scope of Consent-Entrant becomes a trespasser by moving beyond possessor’s invitation. Scope may be limited geographically, temporally, or by purpose. Copeland

b. Consent Must be given knowingly and voluntarily. Invalid if acquired by fraud

c. Reasonable mistake about who owns the property is generally NOT a defense. (Strict liability, baby!)

#### 5. Media Trespass

a. As courts have become reluctant to find liability in invasion of privacy cases due to first amendment concerns, plaintiffs have sought relief in trespass. Courts are split on these claims, but the only damages they may receive are for the trespass, not the dissemination of the information.

1. **Nuisance**-no physical invasion req.
    - a. D caused 1.unrsble and 2.continuous interference with P's use and enjoyment of real prop
    - b. Lends itself to INJUNCTIVE relief. Problem is ongoing.
      - i. Example-Sturges-here no one is to blame; both prop owners are using prop rsbly. Court must decide which use should be allowed. Confectioner's activity does not fit in with the surrounding area. Doc wins. Injunction banning confectioner's use. Doc \$150 profits, Confectioner \$100=Doc wins
      - ii. Coase Theorem very applicable here-no wrongdoer-Steps of Coasean analysis
        1. Which use of the land is more profitable? Goal is to make the pie as big as possible.
        2. BUT, it doesn't matter who get assigned the property right. Property will be put to the highest value use regardless.
          - a. Even if Confectioner wins, Doc will pay him  $150 > x > 100$  to use property for doctoring.
          - b. BUT, this only works if transaction costs are low/0, i.e., rational parties, free info.
        3. SO, Judge should focus on what decision will allow the lowest cost bargaining to go on. Try to minimize transaction costs.
          - a. Trying to do this is more likely to lead to highest use that trying to decipher what the "best" use is.
      - iii. Coase and Calabresi like Boomer-injunction granted but it will be lifted once Cement Co. pays homeowners that amount their props are reduced because of Cement Co.'s nuisance.
      - iv. When deciding on whether to grant injunction court must compare the benefits to the P of granting the injunction to the hardship on D.
        1. Look at whether the current use is making private Ps bear the cost of the public benefit of the current use. Penland
2. **Ultrahazardous Activities**
  - a. Traditional Ultrahazardous activities-Strict Liability
    - i. Dam/Reservoir Building
      1. Rylands-reservoir creation was a non-natural use because it was out of place.
    - ii. Wild animals
      1. Pingaro-state statute created strict liability for dog owners
  - b. Modern View-Ultrahazardous or abnormally dangerous (no longer care if it is natural or not)
    - i. R2d §520 tries to define abnormally dangerous based on 6 factors. BUT none of the factors are necessary or sufficient.
      1. High degree of risk to person or property of others
      2. Likelihood that harm resulting will be great
      3. Inability to eliminate the risk by exercise of reasonable care;
      4. Perhaps this tracks the "unnatural" part of Rylands flood decision.
        - a. Extent to which the activity is not a matter of common usage;
      5. Inappropriateness of activity to location;

- 6. Extent to which value to community is outweighed by dangerousness.
- ii. Klein-applying the above finds putting on a fireworks show is Ultrahazardous activity.
  - 1. adds factors-is this the sort of thing people do often
  - iii. Only bystanders can recover. Participants can recover under Negligence
- c. This doctrine really only applies to explosions, reservoir keeping, and wild animals. These three things are about containing things that are desperate to get out and cause harm. Persons undertaking these activities are strictly liable if harm is caused.

### 3. **Products Liability-new idea, 1963**

- a. Escola v. Coca Cola
  - i. Majority resolves case using res ipsa loquitur, but majority is bending the doctrine to make it apply here. The bottles were not really in the exclusive control of Coke.
  - ii. Judge Traynor in concurrence says it is time to rethink how we approach products liability cases.
    - 1. Elements of Traynor's products liability COA:
      - 1. Injury
      - 2. Manufacturer (MFR) sells product
      - 3. Product has a defect
      - 4. MFR knows product won't be inspected by consumers
      - 5. defect causes injury
    - 2. Traynor cites MacPherson as support, but MacPherson was a negligence case not a PL case.
      - a. He offers the following reasons why this change for products cases is desirable:
        - i. Plaintiff's injured by products have poor access to evidence of MFR fault
        - ii. MFR in best position to prevent product related injuries
        - iii. Exposing MFR to strict liability creates incentive to make safe products
        - iv. Loss spreading (MFR can pass cost incurred from liability onto consumers)
        - v. Traynor trying to show why product injury cases should be treated differently from other tort cases. Similar to ultrahazardous activities.
- b. Greenman v. Yuba, 19 years after Escola. Traynor writes for the *majority*.
  - i. Court accepts Traynor's concurrence from Escola.
  - ii. Court actually expands Escola
    - 1. Escola was a manufacturing defect. Only a few bottles explode. The one that did was a lemon. It was not up to manufacturer's standards
      - a. Greenman is more aggressive because it dealt with a design defect. Shopsmith tool deficiently designed. All shopsmiths have this defect.

- b. Shortly after Greenman decided it was incorporated into the 2nd restatement as §402(A). Within 10 yrs this approach to products liability was accepted by essentially every state.
- 4. Products Liability
  - a. Note: THERE IS NO UNIFORM LIST OF "ELEMENTS" OF A PRODUCT LIABILITY CASE
  - b. Prima Facie Case
    - i. Actor A is subject to liability to person P in products liability if:
      - 1. P has suffered an injury
        - a. Products liability is much more likely to give compensation for physical harm
        - b. At least one court, CA, (Shepard) has allowed products liability in a bystander NIED case (people watched family member fall to death because of defective car door); pure economic loss subject to general NO DUTY except in negligently prepared will circumstances.
        - c. Can you recover if the defect destroys the product itself?
          - i. The general rule is "NO." All you get is whatever your contract gives you.
            - 1. You can recover if it damages another piece of property.
      - 2. A sold a product
        - a. "Services, even when provided commercially, are not products."
        - b. LOTS of things are products for products liability.
          - i. Human body parts are usually not considered products.
          - ii. Live animals sold as pets are livestock are frequently not considered products.
            - 1. One. Depends on context. Dog sold with disease was held a product once.
          - iii. Textual material is not generally a product, while maps sometimes are.
          - iv. Intangibles like electricity and x-rays are borderline, but usually not counted as products.
          - v. Used products are not normally "subject to strict products liability, although detailed doctrine now exists that qualifies this rule."
          - vi. Some things called "products" by courts are still specifically exempted by them from products liability (like prescription drugs.)
    - 3. A is a commercial seller of such products
      - a. Who is a seller?
        - i. Retailers, distributors, and manufacturers are all liable as "sellers."
          - 1. You have to be "in the business" of selling the product in question.
            - a. A seller is anyone who "take[s] steps to place the product on the market, or figured in the distributional chain through which the product is placed on the market."



- b. People who use products in their services aren't liable as sellers (the surgeon who put the hip in isn't liable).
  - 2. Two. Component Parts
    - a. If the manufacturer can show its product is not defective the part that was defective on the product, it may avoid liability.
    - b. HOWEVER, if the supplier is intimately aware with the manufacturing processes and such of the larger part maker, liability may be assigned.
- 4. At the time it was sold by A, the product was in a defective condition; and
- 5. The defect functioned as an **actual** and **proximate** cause of P's injury. Grower
  - a. The Three Kinds of Defect:
    - i. Manufacturing Defect: The product was made in a way which was out of conformity with the company's own design specifications for that product.
      - 1. R3D-A kind of res ipsa loquitur is allowed here. Circumstantial evidence can establish manufacturing defect if the accident were of the kind such that:
        - a. it normally only happens because of manufacturing defect, it can be assumed
        - b. Incident not solely the result of causes other than product defect
    - ii. Design Defect: An entire product line was defective in its design
      - 1. Two Tests:
        - a. The Consumer Expectations Test (roots in contract/warranty) Usually favors P
          - i. "A product is defective in design if aspects of its design render it more dangerous than an ordinary consumer would expect it to be."
        - b. The Risk-Utility Test (roots in negligence)
          - i. "A product is defectively designed if the risks of its design outweigh its utility."
          - ii. Seven Wade/Keeton Factors: None are necessary or sufficient
            - One. Usefulness and desirability of the product
            - Two. Likelihood of injury and seriousness of probable injury
            - Three. Availability of a safe substitute product
            - Four. Manufacturer's ability to eliminate risk while maintaining effectiveness and reasonable cost
            - Five. User's ability to avoid danger through care

Six. User's anticipated awareness of dangers inherent in product and their avoidability

Seven. Feasibility of the manufacturer spreading loss through pricing and insurance

c. Is the R/U test different from negligence test?

i. R/U is a hindsight test

ii. RU-Burden of Proof on D, Neg.-burden on P

d. NOTE: SOME COURTS ALLOW THE PLAINTIFF TO RECOVER IF THEY CAN SATISFY EITHER OF THE TESTS

2. Product Misuse

a. Majority view-**sellers obligated to make design and warning choices with all foreseeable uses of the product in mind.**

b. Even if P's misuse is foreseeable, it may still form the basis for plaintiff conduct defenses

i. Comparative fault, IAOR

ii. Suter-refused to apply comparative fault even as a partial defense when employee in "industrial setting" is injured while using in a foreseeable manner an evidently dangerous product supplied by his employer. These encounters presumed involuntary.

3. Regulatory Compliance

a. Some states have statutes that recognize complete/partial defense to PL based on compliance with relevant state/fed safety laws.

iii. Failure to Warn Defect: The company did not include adequate safety warnings with the product, or the company MISLABELED the product.

1. Line between FTW and Negligence is very fuzzy if not nonexistent

2. Difference between Negligent FTW and strict FTW-neg factors in if a rsbly prudent person would warn of the danger. In strict FTW, MFR reasonableness irrelevant.

3. MFR has duty to warn of risks that were known or rsbly scientifically knowable at the time of distribution that would render the product unsafe. Anderson

4. For there to be a difference #3, must be warnings that a reasonable MFR would not give and yet the omission of such warnings would render the product unsafe.

5. No duty to warn of obvious dangers

6. Warning must be adequate to notify consumer of existence and nature of hazard.

a. D must warn of the specific risk(s) Schwoerer

b. Prominence of warning must match the danger

7. Proving ACTUAL CAUSE in FTW-P must prove warning inadequate and that it caused his injuries.
  - a. Had the warning been given, would P not have been injured?
    - i. Minority-Heeding presumption-had warning been given it would have been heeded. D can overcome presumption with evidence. Burden shift
8. Prescription drugs, FTW, and AC
  - a. Learned Intermediary Doctrine-sellers of prescription drugs have duty to warn only prescribing Docs, not the consumer. Motus (echoes MacPherson-importance of an intermediary inspector)
    - i. This leaves P with burden of proving that the Doc would not have prescribed the drug had Doc been warned. PROBLEM-Docs are wined and dined by prescription drug companies.
    - ii. P can sue Doc for negligent medical malpractice
    - iii. LID is under assault. Will probably be narrowed/eliminated in near future

c. Prescription Drugs and Product Liability

- i. Prescription drugs are different. They are highly regulated, are only given out by a Doc (provides second layer of inspection), and have huge upfront investments
- ii. Standard for defectiveness
  1. Some states refuse to use products liability in prescription drug cases.
  2. Some states say "Drugs are products, we don't need a special test."
  3. R3D-If any rsble Doc, knowing the foreseeable risks/benefits, would prescribe the drug for *any* class of patients, the drug is not defective. Demanding standard
  4. Nebraska uses the products liability test (consumer expectations version) with defendant getting an affirmative defense that the drug's benefits outweigh the risks. (Freeman) Court hates R3D
    - a. But in internet age all info is at the consumer's fingertips. Does this change things?
- iii. Market Share Liability-really only applies to prescription drugs
  1. In Sindell, the court ruled that DES manufacturers were liable in proportion to their market share of the manufacture of the drug. (This seems to fit in both the "causation" and the "apportionment" sections of tort liability, although Sindell talks about it more as a causation issue.)
  2. Summers doesn't apply because all possible tortfeasors aren't parties here
  3. Reqs.
    - a. Ds must make up a substantial portion of the market
    - b. Product manufactured by all Ds must be indistinguishable.

4. If a D can show that it did not mfr the drug that injured the P, D not liable
  - a. MSL-Shifts burden to D to disprove causation-like Summers
5. MSL has not caught on. Very rarely applied
- iv. Reasons unwilling to extend / unique factors for market share liability to attach.
  1. DES had interesting evidentiary problems such that the plaintiffs COULD NOT prove who caused their harm despite their diligence.
  2. The plaintiffs could bring before the court those defendants responsible for ALMOST ALL sales of the product.
  3. The product in question was entirely generic and identical in all important aspects.
  4. There was at least some reliable data on market share.
  5. Goldberg: The injury was surely caused by tortious conduct, and the defendants were surely careless, whereas in other situations these might be questioned.
5. Damages and Apportionment-P entitled to be made whole
  - a. Compensatory Damages
    - i. Economic-things like medical bills, lost wages, lost future earnings (Kenton)
    - ii. Noneconomic-pain and suffering includes disfigurement
    - iii. The Eggshell Skull Rule: "The tortfeasor takes his victim as he finds them." If the plaintiff has a "hidden vulnerability," the tortfeasor must pay for damages resulting from his act plus this hidden vulnerability.
      1. Intentional Torts (Vosburg v. Putney)
      2. Negligence and Friends (Smith v. Leech Brain & Co. Ltd.) lip cancer
      3. Some courts mitigate the effect of the eggshell skull rule by considering whether the hidden vulnerability would have resulted in the injury anyway during damage phase. (Smith v. Leech Brain & Co. Ltd.) So when valuing things like future expected income, they'll lower the life expectancy when calculating damages.
    - iv. Other hidden sources of great damage are also in theory compensable in tort. What's the lesson: Run over the poor guy, not the rich guy, and don't have the bad luck to hit the guy with the Van Gogh in his trunk.
    - v. Additur--the judge finds that the jury's awarded damages are too low and gives the defendant the option of accepting a higher amount or having a new trial. (may be unconstitutional?)
    - vi. Remittitur--the judge finds that the jury's awarded damages are too high and gives the plaintiff the choice of accepting a lower amount or going to a new trial.
    - vii. The Collateral Source Rule: Juries are NOT allowed to hear evidence that someone other than the plaintiff (like an insurance company) paid the plaintiff's medical bills.
      1. As many as half the states have greatly modified or abolished this rule in medical malpractice.

- viii. Pain and Suffering
  - 1. These damages have historically always been compensable.
  - 2. Modern tort reformers have sought things like caps on these damages or heightened appellate review of them, especially in medical malpractice cases.
- ix. Some states have capped noneconomic compensatory damages, at least for some torts.
- b. Punitive Damages
  - i. Stand independent of compensatory damages
  - ii. Some states require at least compensatory damages to recover punitive, while others will allow nominal damages alone to be accompanied by punitive.
  - iii. PUNITIVE DAMAGES ARE ALWAYS DISCRETIONARY.
  - iv. Threshold Requirement
    - 1. Require a showing that plaintiff has been a victim of "aggravated" forms of tortious conduct that was "malice, insult, oppression, [or] wanton or willful violence."
    - 2. Not available in negligence actions UNLESS it's "willful or wanton" negligence. Since there's no tort of "recklessness," this fits into the weird middle ground.
  - v. PD and Vicarious liability
    - 1. MGT liable for PD if MGT endorsed/ratified the tortfeasor employee's behavior.
  - vi. Things like size of injury and what was damaged shouldn't matter but they seem to National By-Products
  - vii. Posner's reasons in Mathias for PD-Go completely against precedent. Not tied to any threshold
    - 1. PD separate way to punish crimes that will never be prosecuted. (spitting in the face) Delegation of prosecutorial function
    - 2. Certain kinds of torts cause small amount of harm to lots of Ps. PD should create reward for the P that brings the suit. Absent PD it would not be economical, so no suit would be filed
    - 3. Jerk Ds who brings tons of frivolous motions to stonewall P. Creates deterrent for this kind of D behavior, same with 2.
  - viii. Some states require proof of malice or wantonness "by clear-and-convincing evidence." More onerous than preponderance of the evidence but less than beyond reasonable doubt standard.
  - ix. Punitive damages also face more scrutiny on appellate review. SCOTUS decision-PD can be so large that it is a taking of D's prop without just compensation.
- 6. Joint and Several Liability
  - a. Joint and Several Liability allows the plaintiff to recover the full amount from either party in two cases: indivisible harms and "joint tortfeasors"
    - i. Joint Tortfeasors
      - a. A and B agree to beat up C. They are jointly and severally liable for all injuries
    - ii. Indivisible Harms

1. When two tortfeasors independently cause an "indivisible" harm, joint and several liability attaches. (Imagine the "getting hit by two cars at the same time" example). (Ravo)
- iii. Relation to Comparative Fault
  1. It's a bit odd because Comparative Fault looks like it "divides" "indivisible" injuries.
  2. Jury divides blame not injury. Injury still indivisible
- iv. Contribution-D who paid more than his fair share sues other D to recoup the amount he overpaid.
  1. Joint and Several Liability thus shifts the burden of insolvency to defendants.
- v. TORT REFORM-People want to get rid of JSL
  1. The question is whom do we want to bear the unfairness of not being able to collect.
    - a. Wrong doing D or
    - b. Injured P
    - c. Maybe we could split the difference-if D2 is insolvent and responsible for 80%, we could put 40% on D1 and 40% on P.
    - d. Some states have eliminated JSL for indivisible injuries or have required D to be at fault enough, i.e., 60%, before D can be held jointly and severally liable.