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# INTENTIONAL TORTS

## Intent

* 1. No Intent to Harm: Intent must be at least to bring about some sort of physical or mental effect upon another person, but does not need to include the desire to “harm” that person.
     1. ***Vosburg v. Putney* (Wis. 1891)** Tool: Have to intend contact that is inappropriate. “Eggshell skull” rule – liable for all injuries resulting from contact even if not foreseeable. Synopsis: Putney kicked Vosburg on knee in class and revived serious injury (lost use of leg).
  2. Substantial Certainty: Intent established if actor didn’t desire it, but knew with substantial certainty that it would occur as a result of his action.
     1. ***Garratt v. Dailey* (Wash. 1955)** Tool: Intent established if P knows with substantial certainty that his action would bring about result. Synopsis: Dailey (5) pulls chair from under P. Dailey did not desire that she hit the ground but question of whether he knew she would likely hit the ground.
  3. Less than Substantial Certainty: Intent not established even though it may be reckless and give rise to liability for negligence.
  4. Act Distinguished from Consequences: Consequence does not need to be intended, substantially certain or even foreseeable.
  5. Ignorance of Law is No Excuse
  6. Insane persons do not automatically escape liability for committing intentional torts.
  7. Transferred Intent: As long as D held the necessary intent with respect to one person, he will be held to have committed an intentional tort against any other person who happens to be injured.
     1. Four versions
        1. Same victim, different intentional tort
           1. Nelson v. Carroll (Md. 1999)
        2. Different victim, same intentional tort
           1. ***In re White* (Bankr. E.D. Va. 1982)** Tool: Transferred intent – liable for battery when unexpectedly hit unintended victim. Synopsis: White shot at Tipton on motorcycle but hit Davis instead.
        3. Different victim, different intentional tort
           1. ***In re White* (Bankr. E.D. Va. 1982)** Tool: Transferred intent – liable for battery when unexpectedly hit unintended victim (assuming White only intended to scare Tipton). Synopsis: White shot at Tipton on motorcycle but hit Davis instead.
        4. From things to persons?
           1. Lynn v. Burnette (NC Ct. App. 2000)
  8. Intent to Commit Different Tort: Intent established no matter which kinds of torts are involved.

## Battery

* 1. General Rule: Intentionally causing another to suffer a harmful or offensive contact.
  2. Elements of Prima Facie Case
     1. A **acts**
     2. **intending** to cause a
     3. **contact** with P;
     4. The contact with P that A intends is of a **harmful** or **offensive** type; and
     5. A’s act **causes** P to suffer a contact that is harmful or offensive.
  3. Intent
     1. Intent to cause harmful or offensive bodily contact; OR
        1. Spectrum
           1. Most Expansive – intent to take the action that ends up causing the contact (Did you mean to move your arm?)
           2. Intent to touch (Did you mean to cause any bodily contact w/ P?)

***Wagner v. State* (UT 2005)** Tool: Intent established by intent to cause contact, not intent to harm, injure, or offend through the contact; otherwise, protect right to touch w/o accountability for consequences 🡪 greater burden on plaintiff. Mental capacity not relevant. Synopsis: State mental patient attacked Wagner. Constituted battery even if no intent to harm.

* + - * 1. Intent to engage in an unacceptable form of touching (Did you mean to perform the relevant act-type (e.g. the kicking)?

***Vosburg v. Putney* (Wis. 1891)** Tool: Intent established by intent to cause contact that is inappropriate/unlawful. “Eggshell skull Rule” – liable for all injuries resulting from contact even if not foreseeable Synopsis: Putney kicked Vosburg on knee in class and revived serious injury (lost use of leg).

***Cole v. Hibberd* (OH App. 1994)** Tool: Intent to cause certain kind of contact, not intent to harm, establishes intent for assault/battery. Synopsis: Hibberd drunkenly kicked Cole. Cole argued Hibberd did not intend to harm so negligence for statute of limitation purposes.

* + - * 1. Intent to harm or offend (Did you mean to injure P in some way?)
        2. Most Restrictive – Intent to produce the act’s exact consequences (Did you mean for P to lose those teeth?)
      1. Knowledge to a near certainty
         1. R3d Torts – “A person acts with the intent to produce a consequence if: (a) the person acts wih the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.”
         2. ***Garratt v. Dailey* (Wash. 1955)** Tool: Intent established if P knows with substantial certainty that his action would bring about result. Synopsis: Dailey (5) pulls chair from under P. Dailey did not desire that she hit the ground but question of whether he knew she would likely hit the ground.
         3. Being aware of a risk is not sufficient.
    1. Intent to cause an imminent apprehension of harmful or offensive contact. (Intent to commit an assault.)
  1. Contact
     1. Some degree of physicality (***Leichtman***)
     2. “Extended Personality” (***Fisher***)
  2. Harmful or Offensive
     1. Harmful Contact
        1. ***Cecarelli v. Maher* (Conn. Com. Pl. 1943)**Tool: Classic battery case – damages small compared to Walter even though purposeful harm Synopsis: Cecarelli beat up and greatly injured by men after agreeing to drive women home after dance.
     2. Offensive Contact
        1. Objective Test – reasonable standard for “offensive” contact:
           1. Where “an ordinary person not unduly sensitive as to his “dignity” would have been offended.

R2d Torts § 19: “offends a reasonable sense of personal dignity”

***Paul v. Holbrook* (Fla. App. 1997)** Tool: Battery requires intent to contact and contact was offensive. Don’t need to intend to offend. Synopsis: Holbrook massaged Paul, a coworker. Paul sued for battery. App. Ct. found TCt. Erred in granting SJ for battery for Holbrook.

* + - * 1. Where defendant has knowledge of plaintiff’s sensitivity.
    1. Contact beyond level consented to.
    2. Extends to personal effects. E.g. clothing, object plaintiff is holding, or anything closely identified with her body.
       1. Indirect contact. E.g. ordering dog to attack, D tricks P into eating cookies with peanuts (knowing P is allergic to peanuts).
    3. Plaintiff’s awareness of contact not necessary.
    4. Unforeseen consequences: D liable for any consequences which ensue (“Eggshell skull rule”).

## Assault

* 1. General Rule: Intentionally causing another reasonably to apprehend imminent harmful or offensive contact.
     1. Assault is completed tort (not an attempt tort)
     2. A violation of another’s right to be free from certain threats.
        1. ***Beach v. Hancock* (NH 1853)** Tool: Assault because even though gun not loaded, pointing a gun at someone causes apprehension. We have a right to live in society without being put in fear of personal harm. Synopsis: P and D arguing. D points unloaded gun at P. P did not know gun not loaded.
  2. Elements of Prima Facie Case
     1. A Acts
     2. Intending to cause in P apprehension of imminent harmful or offensive contact; and
     3. A’s act causes P reasonably to apprehend such contact.
  3. Intent
     1. Requisite intent established if:
        1. Intended apprehension: D intends to cause apprehension but no contact.
        2. Attempted battery: D intends to commit battery but not apprehension of a contact.
     2. No hostility, harm or intent to harm required.
     3. Transferred intent
     4. “Words alone” rule: generally, words must be accompanied by some overt act.
  4. Actual contact or apprehension required
     1. Ability to carry out threat – P must believe that D had the ability to carry out threat. Where threat by itself incapable of performance, there is no assault.
     2. Threat to third person not actionable.
     3. Conditional threat of harmful or offensive contact counts unless D had legal right to compel P to perform the act in question.
     4. Has to be reasonable apprehension
        1. ***Brooker v. Silverthorne* (SC 1919)** Tool: No assault because (1) threat not imminent and (2) apprehension not reasonable. (Want to give people room to vent and speak their mind.) Synopsis: Brooker, a telephone operator, threatened by Silverthorne over the phone.
     5. Apprehension is not the same as fear – It is sufficient that P believes that if she does not take action, a harmful or offensive contact will occur in the near future. P’s right to recover is not negated by the fact that she is confident of her own ability to take action to avoid contact.
        1. Threat incapable of performance – if it appears to P that even with action on her or a third person’s part, D will be unable to make good his threat of harm, there is no assault.
        2. ***Vetter v. Morgan* (Kan. App. 1995)** Tool: Assault is not negated if P can avoid harmful or offensive contact if P reasonably believes either can occur imminently. Synopsis: D in car next to P. D yells and threatens Vetter. Evidence mixed as to whether D intended for P to apprehend imminent harm or offensive contact and whether P actually and reasonably apprehended imminent h/o contact. TCT erred in granting SJ for D.
  5. Imminence: Must appear to P that harmful or offensive contact is imminent.
     1. Future threats do not constitute assault.
     2. Must have present ability to commit harm.
        1. ***Brooker v. Silverthorne* (SC 1919)** Tool: No assault because (1) no intent to cause apprehension of imminent h/o contact and (2) apprehension of imminent h/o contact not reasonable. (Want to give people room to vent and speak their mind.) Synopsis: Brooker, a telephone operator, threatened by Silverthorne over the phone.
        2. ***Vetter v. Morgan* (Kan. App. 1995)**Tool: Assault is not negated if P can avoid harmful or offensive contact if P reasonably believes either can occur imminently. Synopsis: D in car next to P. D yells and threatens Vetter. Evidence mixed as to whether D intended for P to apprehend imminent harm or offensive contact and whether P actually and reasonably apprehended imminent h/o contact. TCT erred in granting SJ for D.

## False Imprisonment

* 1. General Rule – Intentionally confining another against her will.
  2. Prima Facie Case
     1. A acts;
     2. Intending to confine P;
     3. A’s act causes P to be confined; and
     4. [P is aware of her confinement]…**some jurisdictions add**…
     5. P did not consent to be confined; and
     6. A was not legally authorized to confine P (**but most treat these as affirmative defenses**).
  3. Intent – P must show that D intended to confine him and that D knew with a “substantial certainty” that confinement would result.
     1. Transferred intent applies
  4. Nature of Confinement
     1. Definite physical boundaries – P is held within certain limits. This does not include preventing P from entering certain places.
     2. No reasonable means of escape
        1. Unreasonable – physically dangerous, offensive to reasonable sense of decency or dangerous to third person. R2d.
     3. Means by which confinement enforced
        1. Physical
        2. Use of threats – explicit or implied
           1. P’s desire to clear himself – if P’s confinement is due solely to his own desire to clear himself of suspicion, there is no false imprisonment.
           2. Shopkeepers Privilege

If the detention of a suspected shoplifter is not voluntary, storeowner may detain suspected shoplifter, if:

D has reasonable grounds for believing that P has stolen or is attempting to steal goods;

The detention is reasonable in manner, (alters common law rule of ‘detain at your peril.’

And reasonable in duration.

***Grant v. Stop-N-Go Market of Texas, Inc.* (Tex. Ct. App. 1999)** Tool: Shopkeeper’s privilege provides that a person who reasonably believes another person has stolen/attempting to steal property, is privileged to detain that person in a reasonable manner and for a reasonable time to investigate ownership of the property Synopsis: Store manager thought Grant stole cigarettes, grabbed Grant by arm and called police. Question of whether store manager had reasonable grounds for suspecting shoplifting because did not produce security camera footage.

* + - * 1. Purely verbal – If P voluntarily submits to commands that are purely verbal and unaccompanied by force or threats, there is no false imprisonment.

***Fojtik v. Charter Med. Corp.* (Tex. Ct. App. 1999)** Tool: When detention effected by threat as opposed to physical restraint, plaintiff must demonstrate that threat was such as would inspire a just fear of injury to person, reputation or property to establish false imprisonment. Synopsis: Fojtik committed himself to Charter after intervention by family. Given Fojtik’s age and experience, Charter’s non-coercive means of inducing Fojtik to stay put were not sufficient to overcome his free will.

* + - 1. Threat to harm others
      2. Threat to property. E.g. seizing purse
      3. Assertion of legal authority when confinement invalid
  1. P must be aware of confinement

## Intentional Infliction of Emotional Distress (IIED)

* 1. Prima Facie Case – R2d Torts § 46(1)
     1. Extreme and outrageous conduct
     2. Intentionally or recklessly causing
     3. Severe emotional distress
  2. Extreme and Outrageous Conduct
     1. R2d
        1. Beyond all possible bounds of decency
        2. Atrocious
        3. Utterly intolerable
        4. Would lead someone to exclaim, “Outrageous!”
        5. Insults, indignities, threats, annoyances, petty oppressions or other trivialities are not outrageous (other times found to cause reasonable person to suffer severe distress).
     2. Individual circumstances of case
        1. P’s situation – if P is very young, or retarded or senile, D’s conduct might be held to be outrageous even though it would not be so if P were a normal adult.
           1. D must have been aware of these characteristics.
     3. Difficult line to draw
        1. Not Outrageous Examples
           1. Johnson: D yelled and cursed at P causing P to hyperventilate and faint, allegedly suffering a minor stroke.
           2. Arlinghaus: priest has affair with man’s wife after they go to him for marriage counseling.
           3. Carroll: P’s insurer concluded that house fire was caused by P deliberately for racist assumptions contrary to the evidence that later led fire department to conclude that the fire was caused accidentally. As a result, the insurer denied coverage for damage to P’s personal property.
           4. Clinton v. Jones
           5. Dawson: P entered D’s department store and D called P a “nigger.”
        2. Outrageous Examples
           1. Cheatam: D, P’s ex-husband, posted in P’s neighborhood pictures of P naked having sex.
           2. Burgess: Jurors found doctor guilty of medical malpractice. Another doctor, D, put information on each juror in each physician’s mailbox who worked at the local hospital.
           3. Kloepfel: In violation of several restraining order, D stalked P by means of hundred of phone calls and issuing nonspecific threats of physical harm.
           4. Doe: D, police officer, did not break into house in time to keep P’s daughter from being raped by assailant who had just raped P.
  3. Intent
     1. Purpose – D desires to cause P emotional distress
     2. Knowledge – D knows with substantial certainty that P will suffer emotional distress
     3. Recklessness – D recklessly disregards high probability that emotional distress will occur.
        1. Reckless (R3d Torts)
           1. D knows of risk of harm (to P’s emotional well-being) or knows facts that make that risk obvious to anyone in D’s situation and
           2. Burden of eliminating or reducing risk is slight.
        2. ***164 Mulberry Street Corp. v. Columbia University* (NY App. Div. 2004)** Tool: IIED established with reckless infliction of severe distress via outrageous conduct. If another tort claim survives, IIED claim fails. Synopsis: Prof. Flynn sent letters to NYC restaurants claiming food poisoning to study crisis responses. Da Nico libel claim survives so IIED claim fails. Chez Josephine libel claim fails, so IIED claim survives.
        3. Transferred intent
           1. R2d § 46(2) – Where outrageous conduct is directed at a third person, D liable to P for recklessly causing severe emotional distress if:

P is immediate family member who is present at the time or

P suffers bodily harm as a result of IIED.

* + - * 1. Some jurisdictions only allow for transferred intent when immediate family member.
        2. Some jurisdiction do not have any limitations of transferred intent. E.g. Doe and R3d § 45.
    1. IIED cannot occur without another tort 🡪 isn’t it the opposite?
       1. ***Dickens v. Puryear* (NC 1981)** Tool: IIED established by future threats is not also assault which requires imminent threat. Since IIED is gap-filler, P can only benefit from IIED statute of limitations if there is conduct that is IIED but not other tort. Synopsis: Puryear & Co. beat up Dickens and threatened to kill him if he didn’t leave the state.
       2. ***164 Mulberry Street Corp. v. Columbia University* (NY App. Div. 2004)** Tool: IIED established with reckless infliction of severe distress via outrageous conduct. If another tort claim survives, IIED claim fails. Synopsis: Prof. Flynn sent letters to NYC restaurants claiming food poisoning to study crisis responses. Da Nico libel claim survives so IIED claim fails. Chez Josephine libel claim fails, so IIED claim survives.
  1. Actual severe distress
     1. Medical effects – P must always show that his mental distress was sufficiently severe that he sought medical aid.
     2. Physical manifestation – Some cases hold that there must be physical harm in addition to emotional distress
        1. ***Littlefield v. McGuffey* (7th Cir. 1992)** Tool: Can prove severe emotional distress w/o proof of physical manifestations. Synopsis: Learning of P’s inter-racial relationship, D reneges on lease and threatens and harasses P.
     3. Reasonable standard – D’s conduct must be such that a reasonable person would suffer such distress
        1. Exception – D has notice that P is unusually sensitive.
           1. ***Nickerson v. Hodges* (LA 1920)** Tool: Even if a reasonable person would not suffer severe distress, conduct is extreme and outrageous if D is aware of P’s sensitivity. Synopsis: P is superstitious woman looking for buried gold. D, as a practical joke, plants a pot of gold. P finds pot and opens it in town hall where she is humiliated.
  2. Defenses
     1. Standard defenses apply (e.g. consent, self-defense, etc.) but facts establishing defenses tend to show failure of P’s prima facie case (e.g. if P consents, D’s conduct was probably not outrageous).
     2. First Amendment Limits
        1. Public Figures
           1. ***Hustler v. Falwell* (SCOTUS 1988)** Tool: Vagueness of ‘outrageousness’ creates an unconstitutional risk that juries will use IIED to punish speech just because they find it distasteful. Synopsis: Jerry Falwell sues for crude, upsetting ad parody.
        2. Private Figures
           1. ***Snyder v. Phelps* (SCOTUS 2011)** Tool: Unconstitutional to impose liability for speech just because society deems it offensive. Synopsis: P sues for Westboro Baptist Church’s disruption of son’s funeral.

# PROPERTY TORTS

## Trespass to Land

* 1. General Rule
     1. D enters P’s land, or causes another person or an object to enter P’s land
     2. D enters P’s land rightfully but remains on land without right to be there.
     3. D fails to remove object from P’s land which D is under duty to move.
  2. Prima Facie Case
     1. A causes a physical invasion of property lawfully possessed by another and
     2. A intended to make contact with the property invaded.
  3. Invasion
     1. In person or
     2. By animals, devices or substances for which the actor is responsible.
  4. Intent
     1. A need not know, or have reason to know that the property is in the possession of another (part strict liability).
        1. ***Burns Philip Food, Inc. v. Cavalea Cont’l Freight Inc.* (7th Cir. 1998)** Tool: Innocent trespass is still a trespass. Knowledge of trespass does not equal consent. Synopsis: BPF built fence on C’s land. BFP did not know or have reason to know that fence crossed C’s land. C knew but did not say anything for a while.
     2. Intent to cause harm not required
     3. Mistake of legal title or mistake of consent is not a defense (actual consent is a defense).
  5. Bringing Suit
     1. Standing to sue – P must have a possessory interest in the invaded property
     2. Damages
        1. Nominal or compensatory damages – trespass actions that result in nominal damages still valuable if they settle boundary disputes.
           1. Damages for trespass in principle extend to compensatory for personal injury.

Kopka

Beavers. Tool: For a no-fault trespass, P in theory can recover for bodily harm w/o proof of D’s fault; but P still might face proximate cause issues.

* + - * 1. Harm caused

***Vincent v. Lake Erie Transp. Co.* (Minn. 1910)** Tool: Plain-vanilla trespass case – a prudent trespass is still a trespass: unreasonableness in not an element. D owes P compensatory damages but not punitive because not malicious. Synopsis: Lake moors boat in Vincent’s dock. Boat stuck because of storm. Renew ropes to hold boat down. Boat damages dock.

* + - 1. Punitive damages
         1. For PDs, a trespass must meet common-law standard for PDs (intentional, willful or malicious harm)
         2. PDs permit redress for willful violations of property rights that do not generate property damage or harm.

***Jacque v. Steenberg Homes, Inc.* (Wis. 1997)**

## Nuisance

* 1. Prima Facie Case
     1. Unreasonable interference with P’s use of her property
  2. Intent
     1. Intent to make contact not required.
  3. Unreasonable Interference
     1. Doesn’t require proof of physical damage to property
     2. Doesn’t require proof of D’s failure to act reasonably.
  4. Bringing Suit
     1. P must have a possessory interest in affected property
     2. Frequently involved requests for injunctive relief
     3. Liability turns in part on D’s interest in continuing the allegedly offending act.
  5. ***Sturges v. Bridgman* (Eng. CA 1879)** Tool: “Coming to the nuisance” is not defense. Must take neighborhood into account. Synopsis: P built shed near next to D’s confectionary, which had been operating for years. P sought injunction and damages because noise disrupted his private practice.
  6. Coase Theorem
     1. Issue is whether the court should confer right to P (to quiet) or D (to make noise).
        1. Statements about legal rights are conclusions, not premises.
     2. Issue best determined by efficiency considerations – given that only one activity can take place, society wants the activity that puts the land to a higher value use.
     3. One might think courts should try directly to determine which use is higher value, but this is mistake.
        1. Courts are not good at making these judgments
        2. In any event, assuming no impediments, the market, not the court will decide.
     4. Real world payoff – courts should aim to assign rights in a way that minimizes impediments to bargaining solutions.
        1. How rights are assigned does not change overall wealth, only its distribution.
  7. Nuisance v. Trespass
     1. Like trespass:
        1. Requires P to have a possessory interest in affected property area
        2. Frequently involves a requests for injunctive relief
        3. Doesn’t require proof of physical damage to property
        4. Doesn’t require proof of D’s failure to act reasonably
     2. Unlike trespass:
        1. Intent to make contact w/ relevant physical space not required
        2. Usually a continuing rather than one-off interference
        3. Requires unreasonable interference with P’s use of her property
           1. Inquiry concerns the nature of the interference, not D’s conduct
        4. Liability turns in part on D’s interest in continuing the allegedly offending activity
  8. Remedies
     1. Injunction – presumed right when nuisance established
        1. Undue Hardship Exception – award damages when hardship to D greatly outweighs benefit to P
           1. ***Penland v. Redwood Sanitary Sewer Serv. Distr.* (Or. Ct. App. 1988)** Tool: Right to injunction of nuisance overcome if hardship to D greatly outweighs benefit to P. See five factors on p. 854. Synopsis: Compost facility released odors that interfered with neighbor’s lives. No undue hardship because D chose to expand after complaints and cost can manageably be spread across ratepayers.
           2. ***Boomer v. Atlantic Cement Co.* (NY 1970)** Tool: Undue hardship rule – when D’s hardship outweighs P’s benefit, award damages instead of injunction. Synopsis: Atlantic polluted. Neighbors complained. NY law entitles nuisance victim to injunction even if there is marked disparity between the costs and benefits of the injunction. Injunction issued subject to being vacated on payment by D of permanent damages (essentially awarded damages).
     2. Damages

# DEFENSES TO INTENTIONAL TORTS

## Introduction

* 1. General Rule – if affirmative defense established, defeats P’s prima facie case.
     1. D has burden of proof for affirmative defense.
     2. Standard tort defenses tend to be justifications, not excuses.
        1. Justifications – D’s conduct meets the definition of a tort but, all things considered, was not wrongful. E.g. self-defense.
        2. Excuses – D’s conduct meets the definition of a tort and is wrong all things considered, but the situation was such that it’d be too much to expect even a resilient person to refrain from wrongdoing.
  2. Standard Defenses
     1. Consent
     2. Self-Defense
     3. Defense of Others
     4. Defense and Recapture of Property
  3. Not Defenses
     1. D’s fault

## Consent

* 1. Express consent
  2. Implied consent
     1. Consent inferred from P’s acts, circumstances. If it reasonably seemed to D that P consented, consent will be held to exist regardless of P’s subjective state of mind. That is, P’s objective manifestations are taken into account.
        1. ***O’Brien v. Cunard* (Mass. 1891)** Tool: If it reasonably appeared to D that P consented, P is deemed to have consented even if D mistakenly inferred consent from P’s gestures. Synopsis: P on ship and got in vaccination line. She held up arm. D vaccinates her. P sues D for battery. D claims P consented.
  3. Lack of Capacity to Consent
  4. Exceeding Scope of Consent
     1. If P gives consent, D will not be privileged if she goes beyond the scope of that consent.
     2. Surgery
        1. ***Mohr v. Williams* (Minn. 1905)** Tool: If P gives consent to certain surgical procedure, D will not be privileged to go beyond scope of surgical procedure. Synopsis: P agreed to surgery on right ear. Doctor decides left ear needs surgery and operates on it. P sues for batter. Doctor raises the defense of consent.
        2. Hospital consent forms – not as relevant today because most surgery is now performed in hospitals pursuant to extremely general consent forms.
     3. Athlete
        1. ***Koffman v. Garnett* (Va. 2003)** Tool: Battery can occur when P consents to a certain level of bodily contact but D goes beyond scope. Rule-violation is relevant but not dispositive. Synopsis: Koffman (13) was tackled and slammed to ground by Coach Garnett and broke his arm.
     4. Property
        1. ***Copeland v. Hubbard Broadcasting, Inc.* (Minn. Ct. App. 1995)** Tool: Consent as defense limited by purposes for which entry has been authorized not just geographical boundaries. Synopsis: KTSP employee permitted to enter with vet to treat cat but also secretly films inside Copeland home for investigative report on vets which is broadcast.
        2. ***Desnick* (7th Cir. 1995)** Tool: No trespass because consented to entry. Consent secured by fraud is usually not effective but (1) no interference with P’s interest in controlling access to their offices and (2) essential to investigative journalism (analogy to restaurant critic). Synopsis: Reporters pose as patients at P’s clinics, secretly videotape eye exams for expose that is later broadcast.
        3. ***Food Lion* (4th Cir. 1999)** Tool: No consent because consent obtained by fraud. Synopsis: Reporters use fake resumes to obtain behind-the-counter jobs at P’s store; record unsanitary practices for expose that is later broadcast.
  5. Consent due to Mistake
     1. Medical cases – questions of mistaken consent often arise in medical cases, where P alleges D did not adequately inform him of the risks of the proposed treatment.
        1. Active misrepresentation – if doctor affirmatively misstated probability of risks, mist courts hold this is enough to render P’s consent to treatment ineffective.
        2. Non-disclosure – if doctor fails to mention risk, most courts hold that this is merely negligent.
  6. Consent to criminal acts
     1. Majority rule – most courts hold that P’s consent is ineffective if the act consented to is a crime.
     2. Minority view – R2d and eight states hold that P’s consent to D’s criminal act is always effective even where a breach of the peace is involved.
     3. Certain class protected – where the purpose of a law in making conduct a crime is to protect a class of persons against their own poor judgment and P is member of protected class, his consent will generally be ineffective even under the minority view. E.g. statutory rape

## Self-Defense

* 1. General Rule: A person is entitled to use reasonable force to prevent any threatened harmful or offensive bodily contact, and any threatened confinement or imprisonment.
     1. ***Haeussler v. De Loretto* (Cal. Ct. App. 1952)** Tool: Self-defense can be invoked if D actually and reasonably perceives an imminent risk of bodily injury to himself and uses amount of force that is necessary and justifiable under the circumstances. Synopsis: P was upset and yelling at D. D believed P was going to hit him so D hit him first.
  2. Two Issues
     1. Was D privileged to use some kind of force?
     2. Was D privileged to use the degree of force that she did?
  3. Burden of Proof – D bears the burden of proving that the privilege if self-defense existed.
  4. Apparent Necessity – Self-defense may be used not only where there is a real threat of harm, but also where D reasonably believes that there is one.
  5. Protection Only
     1. Force cannot be used in retaliation or as punishment
     2. D may not use force once P disarmed or helpless
     3. Verbal provocation – D may not use force in response to verbal provocation, such as taunting or insults
        1. Words alone will usually not constitute an assault, so that they will not by themselves justify the use of any degree of force. But when insults or threats are coupled with any kind of hostile act, they may contribute to D’s overall belief that she is in imminent danger of physical harm, in which D has right to use force in self-defense.
     4. Harm must be imminent
  6. Degree of Force – D should not use more force than necessary
     1. Deadly Force – D may not use deadly force unless she herself is in danger of death or serious bodily harm or rape.
  7. Duty to Retreat
     1. Must retreat if you can do so safely unless in your own home
     2. Stand Your Ground (Fla Stat. §§ 776.012-.013, 776.031-.032)
        1. Zone/Space 1: occupied house or vehicle
           1. If P forcible enters D’s occupied home or vehicle, D is presumed to have reasonably apprehended a risk of imminent, serious bodily harm.

Presumption is irrebuttable.

* + - 1. Zone/Space 2: any other place one has a right to be
         1. No duty to retreat (even if easy & safe), but
         2. If D provokes P to attack him, D faces liability for injuries to P caused by use of defensive force unless:

P continues altercation after D breaks off; or

During the engagement, D has no option but to use force to save himself from serious harm (i.e., no retreat available)

## Defense of Others

* 1. General Rule – a person has a right to use reasonable force to defend another person
  2. Degree of Force – intervenor is subject to the same rules of reasonable force as the person being attacked would be.
  3. Reasonable Mistake
     1. Courts split but modern view is if a person makes a reasonable mistake about the need for force and the degree of danger to the third person, the defense of others defense is not forfeited.
     2. Unreasonable mistake – all courts agree that if D makes a negligent mistake about whether a third person is in physical danger, or about whether D’s proposed physical contact will help avoid danger, D will not be able to use the defense of others defense.

## Defense of Property

* 1. General Rule: There is a privilege to defend property (both land and chattels) on essentially the same basis as the right to defend oneself.
     1. Reasonable force
        1. ***Ploof v. Putnam* (VT 1908)** Tool: D has no right to interfere with P’s exercise of private necessity. D exceeded scope of privilege to react to trespassers. Synopsis: P moors at D’s dock for safety from storm. D unmoors boat, causing injury to P and family.
     2. Verbal demand required first – owner must first make a verbal demand before using force unless it reasonably appears that violence or other harm will occur immediately, or that the request will be useless.
     3. R2d § 77 – Use of reasonable force permitted if D reasonably believes it will be effective and after request to desist is ignored.
  2. Deadly Force
     1. Owner does not have general right to use deadly force even when the intrusion can only be prevented this way.
     2. Serious bodily harm – Owner may use deadly force against the intruder only if she believes that the latter will cause death or serious bodily harm.
        1. Property owner may be privileged to use deadly force to prevent certain felonies, namely those involving death, serious bodily harm, or the breaking and entering of a dwelling place.
        2. Burglary – The privilege to prevent breaking and entering crimes in dwellings means that a homeowner may use deadly force against a burglar, provided that she reasonably believes that nothing short of this force will safely keep the burglar out or get him out.
           1. Limited to dwelling place
           2. Not applicable to trespasser
     3. ***Katko v. Briney* (Iowa, 1971)** Tool: Owner has no general privilege to use deathly/serious force to prevent entry onto one’s property unless the intrusion threatens death or serious bodily harm. Synopsis: Brineys set up shotgun trap in unoccupied farmhouse, which shoots Katko in leg.
     4. Where expulsion would injure intruder – owner may not eject intruder if this is likely to cause him serious injury.
        1. ***Ploof v. Putnam*** Synopsis: D was held liable to P for unmooring P’s boat during a storm and thereby injuring P.
  3. Mechanical Device – barbed wire, dogs, spring guns, etc.
     1. Spring gun
        1. ***Katko v. Briney* (Iowa, 1971)** Tool: Owner has no privilege to use deathly/serious force to prevent entry onto one’s property unless the intrusion threatens death or serious bodily harm. Synopsis: Brineys set up shotgun trap in unoccupied farmhouse, which shoots Katko in leg.
     2. Warning – in the case of non-deadly mechanical devices, most courts have held that the owner must post some kind of warning of the existence of the device, unless its existence of the device in the area is so common that it is reasonable to assume an intruder is aware that it may be present.
        1. Deadly devices – If the deadly device meets the requirements for use of deadly force, normally no warning will be required. If the deadly device does not meet the requirements of use of deadly force, a warning will not save the owner from liability.

## Recapture of Chattels

* 1. General Rule – property owner may sometimes have the right to use force to regain possession of chattels or land taken from her.
     1. Reasonable mistake – no privilege
        1. Exception – shoplifting
     2. Fresh pursuit – privilege exists only if the property owner is in fresh pursuit to recover her property.
     3. Reasonable force and deadly force can never be used.
        1. Resistance by wrongdoer may give rise to use of deadly force in self-defense.
     4. Wrongful taking – privilege only exists if the property was taken wrongfully from the owner.
  2. Shopkeeper’s Privilege – shopkeepers and employees have a privilege to temporarily detain for investigation a person who is reasonably suspected of stealing property.

## Necessity

* 1. General Rule – D is privileged to harm the property interest of P where it is necessary to do so in order to prevent great harm to third persons or D herself.
  2. Two Types
     1. Public necessity – class of persons being protected is the public as a whole, or a substantial number of persons
        1. Usually acts by public officials
        2. Damages – P does not get reimbursed unless state statute states otherwise.
     2. Private necessity – D is only protecting her own interests, or those of a few private citizens
        1. To determine if privilege exists, the harm to P’s property must be weighed against the severity and likelihood of the danger that D seeks to avoid.
        2. Extent of privilege
           1. No harm – no damages
           2. Harm –must pay for damage caused.

***Vincent v. Lake Erie Transp. Co.* (Minn. 1910)** Tool: Plain-vanilla trespass case – a prudent trespass is still a trespass: unreasonableness in not an element. D owes P compensatory damages but not punitive because not malicious. Synopsis: Lake moors boat in Vincent’s dock. Boat stuck because of storm. Renew ropes to hold boat down. Boat damages dock.

Contract **–** Dissent said this is contract case in which contract put risk of dock damage on P.

Restitution – D unjustly enriched at P’s expense. P is entitled to benefit conferred but if benefit is saving ship, should P get much more in damages?

Incomplete Privilege – Private necessity supplies an incomplete privilege to commit trespass, because D still liable for compensatory damages.

* 1. Owner may not resist
     1. ***Ploof v. Putnam* (VT 1908)** Tool: D has no right to interfere with P’s exercise of private necessity. Synopsis: P moors at D’s dock for safety from storm. D unmoors boat, causing injury to P and family.
  2. Apparent Necessity – Privilege exists as long as the necessity was reasonably apparent, whether or not it in fact existed.

## Arrest and Under Authority of Law

* 1. General Rule – acts done under authority of law are generally privileged.
     1. Exception – proper procedure is not followed.
  2. Common law rules
     1. Arrest with warrant
     2. Arrest without warrant
        1. Felony or breach of the peace in presence of officer
        2. Past felony
     3. Reasonable force

# NEGLIGENCE

## Overview

* 1. Definition: A breach of duty to avoid causing injury to another through conduct that is careless.
  2. Prima Facie Case – Elements:
     1. Injury
     2. Duty
     3. Breach of Duty
     4. Causation
        1. Actual
        2. Proximate

## Injury

* 1. Corresponding Duty: General/Unqualified
     1. Bodily Harms
     2. Property Damage
  2. Corresponding Duty: Limited/Qualified
     1. Economic Loss
     2. Emotional Distress

## Duty

* 1. Historical Conceptions
     1. ***Winterbottom v. Wright*** Tool: no duty without contractual privity. Synopsis: coach wheel collapses; P driver injured. Duty arises from the contract owed only to carriage owner and not P.
     2. ***Thomas v. Winchester***: D liable for mislabeling poison before selling to store who then sold to P 🡪 special duty since product was “imminently dangerous”
     3. ***Heaven v. Pender***: Tool: duty to P if D reasonably should foresee that carelessness would risk injury to a person such as P
  2. General/Unqualified – to take ordinary care to avoid causing physical harm to foreseeable victims (ask question: If I were to take some action, whom might be physically harmed?)
     1. ***MacPherson v. Buick Motor Co.* (NY 1916)** (Cardozo) Synopsis: MacPherson injured when Buick car wheel collapsed. Buick bought defective wheel from another manufacturer and did not inspect it. Buick appealed saying no duty (question of law).
        1. Options:
           1. Apply ***Winterbottom*** and treat the “inherently dangerous” exception narrowly, so as not to cover cars. (See Bartleet, C.J. (dissenting)).
           2. Recognize a special, broader duty rule for “inherently dangerous products” and include cars in this category (See ***Thomas***).
           3. Induce a still-broader, foresight-based duty rule from earlier decisions (See ***Heaven***).
        2. Holding
           1. Read Narrowly: If a product, when carelessly made, is reasonably certain to place life & limb in peril, and if the manufacturer know the product will (1) be used by non-purchasers, and (2) not be inspected for safety after sale, the manufacturer owes a duty to product users to make it carefully.
           2. Read Broadly: Manufacturer owes a duty to anyone whom it can reasonably foresee injuring by its carelessly made product. (Compare with ***Heaven***)
     2. There must be a meaningful possibility of harm to a person such as P (need not be a large statistical probability (need not be > 50%)).
        1. ***Mussivand v. David* (OH 1989)** Tool: There is a duty if a “reasonably prudent” person would have foreseen injury to third party. Synopsis: David gave sexual disease to Mussivand’s wife who gave it to Mussivand. Mussivand sued David for negligence. Court holds that one who knows or should know that he has an STD, and who is having sex with a married person (i.e., whom he knows or should know is married?), owes the married person’s spouse a duty to take care against infecting the spouse, but only until the married person knows or should know that she is infected.
     3. Why reasonable foreseeability?
        1. If one can anticipate that one’s acts might injure certain others, one is morally obligated to those persons to take reasonable steps to avoid injuring them.
        2. It wouldn’t be fair for law to impose a duty and liability for failures to take steps against causing injuries that one could not have anticipated.
  3. Limited/Qualified
     1. Affirmative duties to rescue or protect
        1. Generally no duty to aid/rescue/no duty for nonfeasance
           1. ***Osterlind v. Hill* (Mass.1928)** Tool: You don’t have to rescue someone if you don’t have affirmative duty to rescue and protect. Synopsis: Osterlind drunk and rented canoe from Hill. Canoe tipped and Osterling called for help. Hill did not help. Osterlind drowned. Court found this was nonfeasance so no duty. Could argue malfeasance (careless canoe rental).
        2. Exceptions to no duty to rescue rule
           1. Duty-to rescue statutes – rare in the U.S. and criminal not tort
           2. Voluntary undertakings – A promises or chooses to aid B
           3. Imperilment – A, with or w/o fault, puts B in peril (***Osterlind***?)
           4. Special Relationships

R2d/R3d – innkeeper-guest, business-customer, carrier-passenger, school-minor student

Not: social host-adult guest, friend-friend

Business-Customer: ***Baker v. Fenneman & Brown Properties, LLC* (Ind. App. 2003)** Tool: If a possessor of land knows, or should know, that an invitee on the premises needs assistance, the possessor must take steps to assist, even if the possessor did not create the need. Synopsis: Baker falls twice from fainting, injures himself and alleges that Taco Bell employees did not help him. D argues duty to rescue only if the peril is generated by an instrumentality under D’s control. P argues duty to rescue invitee on the premises whenever D knows or should know P needs assistance. Court ruled for P.

Therapist-potential victim of patient: ***Tarasoff v. The Regents of the University of California* (Cal. 1976)** Tool: A treating therapist who knows or should know that her patient poses a serious danger to an indentifiable potential victim owes a duty to take reasonable steps to warn the victim. Synopsis: Therapist’s patient says he wants to kill Tarasoff. Patient let go and Tarasoff not warned.

Favoring duty: protection of would-be victims; manageable for MDs (only a duty to take steps to warn); less liberty-infringing for patients than confinement.

Against Duty: patients’ interest in confidentiality; society’s interest in not discouraging therapy; ineffectual or generative of too many warnings (amici curae)

* + - 1. Scope of duty when it exists
         1. ***Verdugo v. Target* (Cal. 2014)** Store’s special relationship affirmative duty to customers does not require installation of automatic defibrillators (partly statutory).
    1. Duty to provide reasonably safe premises (premises liability)
       1. Traditional Duty Rules for Unsafe Conditions Claims – 3 categories (30% states)

|  |  |
| --- | --- |
| **P’s status** | **Duty Owed** |
| **Invitee**: enters at invitation of possessor in furtherance of possessor’s business or mission | * Use ordinary care to provide safe premises * (or provide reasonably safe premises?) |
| **Licensee**: enters w/ permission of possessor but not in furtherance of possessor’s business or mission | * Warn of hidden dangers about which the possessor knows (or should know) |
| **Trespasser**: enters without permission | * No duty of care owed to adults (exception for some known trespassers) * Duty owed to children not to maintain attractive nuisance (or foreseeably dangerous condition) |

* + - * 1. ***Leffler v. Sharp* (Miss. 2004)** Tool: Duty owed to trespasser is to refrain from willfully or wantonly injuring the trespasser. Synopsis: Leffler went through small window onto hotel roof and fell through. Court found that Leffler became trespasser when he went through window and wasn’t supposed to.
      1. Two categories (50%) – distinction between invitee and licensee abandoned; trespasser category retained
      2. All categories abandoned (20%)
         1. ***Rowland v. Christian* (Cal. 1968)** Tool: Social guest is entitled to a warning of a dangerous condition. Liability determined by whether property owner has acted as a reasonable person in view of probability to others. Distinction between trespasser, licensee or invitee is not determinative. Therefore, duty of care is owed to all entrants and should take into account other duty factors (see IRAC) Synopsis: Christian injured by broken faucet and not warned by Rowland. Question of fact whether condition was obvious.

Shifts decision-making from judge to jury – what was duty issue becomes breach/comparative fault issue.

* + - * 1. CA legislature later responds with statute – no duty of care owed to felonious trespassers.
    1. Duty to take reasonable care to avoid causing non-physical harm (pure economic loss and emotional distress).
       1. Pure Economic Loss
          1. Majority – no duty to take care to avoid causing pure economic loss

***Aikens v. Debow* (W. VA 2000)** Tool: Individual who sustains purely economic loss from an interruption in commerce caused by another’s negligence may not recover damages in the absence of physical harm; a contractual relationship; or a special relationship. No liability even if economic loss to a nearby business was a foreseeable consequence of careless driving and even if D drove carelessly, because no duty to take care to avoid causing this sort of loss. Synopsis: Aikens’ truck damages and closes down overpass Debow uses to get to motel/restaurant. Motel less accessible so loss in potential revenue.

Special relationship exceptions

Attorney – 3rd party beneficiary (estate planning)

Accountant – 3rd part known to be relying on accounting

* + - * 1. Minority – Heightened Foreseeability Test

***People Express Airlines v. Consolidated Rail Corp.* (NJ 1985)** Tool: Duty of care based on foreseeability of economic loss to P comprising an identifiable class. Synopsis: D carelessly releases toxic gas. P, nearby, evacuates offices and loses money. Court ruled that D aware that P’s nearby offices would have to be evacuated in the event of a toxic spill so there was duty of care.

* + - 1. Emotional Distress (Ch. 10)

## Breach

* 1. AKA fault or negligence
  2. Definition – a failure to conduct oneself as would a person of ordinary prudence (aka failure to take ordinary or reasonable care)
  3. Highly fact-dependent – typically for jury
  4. Liability Standards Spectrum (Least Onerous 🡪 Most Onerous)
     1. Duty to avoid recklessly injuring another – Beausoleil
     2. Duty to avoid causing injury through gross negligence – Good Samaritan Statutes
     3. Duty to take ordinary care to avoid injuring another – ***Myers*** and ***Martin*** (Question for jury but see limits of jury discretion)
     4. Duty to take extraordinary care to avoid injuring another – ***Jones***
     5. Strict liability: duty to avoid injuring another - ***Pingaro***
  5. Ordinary Standard of Care
     1. Question for Jury: ***Martin v. Evans* (Pa. 1988)** Tool: Credibility determinations should be left up to jury, not judge unless jury’s conclusion shocks the audience. Synopsis: Evans backed truck into Martin. Conflicting testimonies. Trial judge grants new trial because disagrees with jury’s verdict in favor of Evans. Evans appeals. Court finds that reasonable jury could have found for Evans so decision does not shock the conscience.
     2. Compared to Professional standard of care: ***Myers v. Heritage Enters., Inc*. (Ill. App. 2004)** Tool: Ordinary standard of care (jury told up to them to decide what is ordinary standard of care) not professional standard of care (jury told they must rely on expert and not personal knowledge) instructions were appropriate because transferring patient not technical and nursing assistant position not professional position. (issue of law – what is duty – up to judge) Synopsis: Patient fell and injured herself in nursing home when two nurse assistants were transferring her from a wheelchair to her bed using a Hoyer lift. P appealed saying jury instructions on breach were wrong 🡪 should be ordinary standard of care.
     3. Objectivity v. Subjectivity
        1. Objective Standard: ***Vaughan v. Menlove* (Eng. Rep. 1837)** Tool: Standard for reasonable care is objective. Should not take into account specific defendant. Synopsis: P warned D that hay would ignite and burn cottages. D did nothing. Hay ignited and burned down cottages. D argues that client was prudent for being an idiot. Court ruled that standard of degree of care is that of a man of ordinary prudence so ruled in favor of P.
        2. Adjusting the standard – Did D act with the prudence that would have been exercised by an ordinarily constituted person under the circumstances?
           1. Not taken into account: clumsiness; imprudence; mental illness; old age
           2. Taken into account: youth; physical disability; expertise (higher standard)

Tender years doctrine: 0-7 years old

***Appelhans v. McFall* (Ill. App. 2001)** Tool: Tender years doctrine – in some states, child incapable of negligence if younger than 7; parents are not strictly liable for their child’s negligence. Synopsis: 5-year-old was carelessly riding bike and hit elderly lady who broke hip.

7-14 years old: Duty to act as prudently as a child of like age and experience unless engaged in “adult activity.” E.g. driving car

* + 1. Customary Care
       1. TJ Hooper Rule: Ordinary care is not necessarily customary care (applies to most negligence cases)
          1. ***The T.J. Hooper* (2d Cir.), *cert denied* (SCOTUS 1932)** Tool: If a new technology has been shown to be so extensive as to be a nearly universal practice or custom, but not required by statute, a party not using the technology is still liable for damage that the new technology could have prevented. Reasonable prudence is often customary prudence but customary prudence is never strictly its measure because it can sometimes lag behind. Synopsis: Tugboats did not carry radio sets to receive storm warning and lost barges in storm.

Custom applies in this case because technology is feasible, not very expensive and effective.

* + - 1. Anti-TJ Hooper Rule: No breach when D adheres to professional custom (ordinary care is customary care)
         1. ***Johnson v. Riverdale Anesthesia Associates* (GA 2002)** Tool: Standard of care in medical malpractice is that which employed by the medical profession generally and not what one individual physician would do. Therefore, expert witness cannot be cross-examined on what he would personally do in given circumstance. Synopsis: P died from anesthesia. P tried to cross examine D’s expert witness on what he would have personally done in circumstances. Court ruled that expert testimony was not relevant to standard of care. (what about witness credibility?)
         2. Why different rule for professionals? Epistemic (professional knowledge shouldn’t be second-guessed); training/discipline/self-monitoring within profession
      2. Back to TJ Hooper Rule for Professionals
         1. ***Condra v. Atlanta Orthopaedic Group* (GA 2009)** Tool: Overrule Johnson. Evidence regarding an expert witness’ personal practices is admissible both as substantive evidence and to impeach the expert’s opinion regarding applicable standard of care. Synopsis: Orthopedic prescribed Condra a medicine that made her sick and orthopedic did not monitor taking of medicine.
         2. Why?Refers toGeorgia Tort Reform Act (2005) – in medical malpractice, expert testimony is admissible only if the putative expert (1) has “actual professional knowledge and experience” in the relevant specialty or area of practice and (2) has “actively practiced such area of specialty…for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge…” (it was supposed to limit medical liability so does it really aim to support ***Condra***?)
      3. Informed Consent: TJ Hooper Rule – custom probative, not dispositive
         1. ***Largey v. Rothman* (NJ Supreme Court 1988)** Synopsis: P brought malpractice suit against D for failing to inform P of risk she suffered from. Tool: The appropriate standard for determining whether a physician obtained a patient’s informed consent is the prudent patient standard (as opposed to reasonable physician standard), which requires that a physician disclose all material risks and the choices available with respect to the proposed treatment in order that a patient who is competent might make an informed decision. Causation determined by objective standard – would a prudent patient in P’s circumstances have declined the procedure given proper disclosure of the risks?
         2. Why exception for informed consent cases?

Existence of custom on disclosure is doubtful

Primarily a non-medical decision

“Community of silence” among MDs

Battery/patient’s right of self-determination

* + 1. Cost-Benefit Analysis
       1. ***United States v. Carroll Towing Co.* (2d Cir. 1947)** Tool: Hand Test – When burden is less than the injury multiplied by the probability B<IxP, then liable to some extent. Synopsis: Barge owner held partly liable for damage to a barge and lost cargo for not having attendant aboard when it broke free from pier.
       2. Hand did not mean for it to be strict formula but sometimes attached as such.
          1. Posner – a monetized Hand Formula induces rational actors to take only cost-efficient precautions (cost-internalization). We don’t want all precautions; only those for which the societal gain outweighs societal costs.
          2. Part of a broader thinking of torts – a privately and judicially enforced regulatory regime for inducing efficient precaution-taking
       3. Hand Formula in Action – ***Rhode Island Hosp. Trust Nat’l Bank v. Zapata Corp.* (1st Cir. 1988)** Tool: Reasonable ordinary care determined by costs of prevention compared with correlative risks of loss. Synopsis: Employee stole from company by forging checks. Company sued bank for money lost on grounds that bank did not exercise ordinary care. Ct. ruled in favor of bank because its practices saved money and did not lead to increase in undetected forged checks.
       4. Questions
          1. Can courts and jurors accurately value B, P, and L? (Compare ***Carroll Towing*** and ***Zapata***)
          2. Which Bs, Ps, and Ls should we measure?
          3. Even if factors relevant, why should they be related in this formula? What about B >>P\*L?
          4. Is it a plausible interpretation of ordinary care?

Does it apply to inadvertent carelessness?

Should juries be instructed on HF? (D doesn’t usually make such arguments)

* 1. Extraordinary Care
     1. ***Jones v. Port Authority of Alleghany County* (Pa. Comm. 1990)** Tool: Court gave wrong instruction on duty of care because common carriers owe highest duty of care to passengers. Synopsis: Jones injured on PAT bus. Tct instructs that there is reasonable duty of care as opposed to highest duty of care. Court finds that a common carrier owes it passengers the “highest degree of diligence and care in the…operation of its vehicle…”
        1. Common carrier: “a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.”
  2. Strict Liability
     1. Neither reasonable nor even extraordinary precautions defeat liability.
     2. ***Pingaro v. Rossi* (NJ Super. App. Div. 1999)** Tool: Dog bite statute creates duty with strict liability. Synopsis: Meter reader bitten by dog because she went into backyard when nobody answered the door even though she was warned of “bad dogs.”
     3. Strict Liability much less common than negligence. However, not necessarily if you take into account workers’ compensation (but is it tort law or a substitute for tort law?) and strict products liability (but is it really strict liability?)
     4. Policy Arguments

|  |  |  |
| --- | --- | --- |
|  | **Negligence** | **Strict Liability** |
| **Fairness** | It’s not fair to hold someone liable for an accident if they’ve taken care. | At least as btw an innocent injurer and an innocent victim, it’s not fair to leave the victim w/ the loss |
| **Incentives/**  **Deterrence** | SL may or may not induce excessive care, but it will sometimes overly discourage productive activities | Negligence induces care in our activities (drive carefully!), but SL further induces us to limit or avoid unsafe activities (Drive less!) |
| **Legal Process** | Judges and jurors can reliably determine if an actor was careless; the extra process-related costs are worth it. | It is difficult to determine what counts as carelessness; negligence introduces uncertainty into law and generates excessive litigation costs. |

* 1. Limits of Jury Discretion
     1. Breach is ordinarily for the jury, subject to tct’s power to rule AMOL.
     2. ***Campbell v. Kovich* (Mich. App. 2006)** Tool: When no issue of fact over breach, summary judgment is acceptable. Synopsis: Karie struck in eye while Ashton mowing lawn. Karie admits that Ashton was mowing reasonably (looking ahead, working slowly and he inspected lawn beforehand). Court issues SJ in favor of D.
     3. ***Adams v. Bullock* (NY Ct. App. 1919)** (Cardozo) Tool: Duty of reasonable care does not require defendant to see foresee very unlikely events. Synopsis: Boy electrocuted when he swung a wire that touched trolley wire under bridge. D appeals jury verdict for P on ground that no reasonable jury could deem D careless. Court reversed finding no breach AMOL.
  2. Res Ipsa Loquitur
     1. “The thing speaks for itself”
     2. Prerequisites
        1. Accident that harmed P is of a type that tends not to occur w/o carelessness
        2. Instrumentality of harm in D’s exclusive control
        3. P was a passive victim
     3. Significance
        1. Even though P has no evidence on breach, D can’t get case dismissed
        2. But D can try to rebut inference of breach
        3. Jury decides (i.e. D must disprove breach)
     4. Scenarios
        1. Plausible
           1. Object falls out of window and lands on P

***Byrne v. Boadle* (Exch. 1863)** Tool: Res ipsa loquitur – nature of case is evidence of negligence even without direct evidence of how the defendant behaved. Synopsis: P hit by bag of flour that fell from D’s shop. No evidence of D’s behavior but accident itself found to be enough evidence of breach of duty.

* + - * 1. Airline crash (plane and evidence destroyed)
        2. Mishap during surgery on unconscious P, unrelated to underlying medical condition (***Ybarra***: medical team treated as single actor; allows P to satisfy exclusive control requirement).

***Kambat v. St. Francis Hosp.* (NY 1997)** Tool: A prima facie case exists and P is entitled to have res ipsa loquitur when following three conditions exist: (1) event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of D; (3) it must not have been due to any voluntary action or contribution on the part of P. P need not conclusively eliminate the possibility of all other causes of injury because evidence supporting the three conditions afford a rational basis for concluding that “it is more likely than not” that the injury was caused by D’s negligence. Synopsis: P’s decedent had surgery performed by D’s doctor. P’s decedent had pad inside her and later died. P sued D for malpractice. Court found that Tct should have given res ipsa instruction.

* + - 1. Implausible
         1. Multiple car collision
         2. Slip and fall in store
         3. Improperly designed product causes injury (but see products liability)

## Causation

* 1. Actual – cause-in-fact or “factual cause” (Did D’s carelessness play a role in bringing about D’s injury?)
     1. Why require proof of actual causation? Deterrence, accountability, loss-spreading, blame, etc.?
     2. Jury Question subject to court’s power to rule AMOL.
     3. Standard Test: “but-for test”
     4. Proving Actual Cause: Burden of persuasion = “preponderance of the evidence” – P must prove D’s breach probably needed to happen for P to be injured
        1. P must give the fact-finder a basis for concluding that P’s account of what happened is more plausible than alternative accounts in which P gets injured even absent D’s breach.
        2. Not enough
           1. ***Skinner v. Square D Co.* (Mich. 1994)** Tool: P’s circumstantial evidence must facilitate reasonable inferences of causation, not mere speculation. P has burden to present evidence that permits a reasonable jury to find that P probably would not have been injured if not for D’s breach. Synopsis: P electrocuted by machine that used D’ switch. No eyewitness of electrocution. P offered different theories to prove causation. Ct. found evidence insufficient to show that P probably wouldn’t have been injured if D’s switch did not have a phantom zone.
           2. ***Howe* (Mich. 1926)** train brakeman falls off bridge. Did lack of space or stumble cause fall? No actual causation AMOL.
        3. Enough – jury decides whether breach caused injury
           1. ***Kaminski* (Mich. 1956)** P sees trailer parked beside track. No object other than D’s train could have moved trailer. Conductor hears screech on side of train where trailer and P were.
           2. ***Schedblauer* (Mich. 1968)** P hears engine run rough. P’s expert opines engine would run rough (not stall) if fuel pump was leaky so leaky fuel pump caused explosion.
        4. Loss of Chance
           1. ***Falcon v. Memorial Hospital* (Mich. 1990)** Synopsis: Medical malpractice suit where doctor omitted procedure that would have increased patient’s chance of survival by 37.5%.

Loss-of-a-chance doctrine – D is liable for breach of duty to take care not to reduce P’s opportunity for avoiding death or bodily harm, even if opportunity was less than 50%. Claim is not D’s breach probably caused P’s death (because IV would have only increased change by 37.5%) but that D’s breach deprived P of a meaningful chance for life.

Damages – Loss of x% chance of survival 🡪 P recovers x% of wrongful death damages; Compare with P proves 51% likelihood that D’s fault caused death 🡪 100% damages

* + - * 1. ***Falcon*** Distinguished – ***O’Neal v. St. John Hospital*** (Mich. 2010) Synopsis: P alleges stroke caused by D’s misdiagnoses. Expert testified that D’s error increased chance of stroke. Mich. SCt: injury is not the reduced chance of avoiding stroke but the stroke itself. Where D’s error adds a 3x incremenet to P’s small risk of stroke, a jury can conclude that, probably, there would have been no stroke absent error.
        2. Limited Acceptance

Michigan legislature made it so that it had to be more than 50% loss of chance of life

Where accepted, almost never applied outside medical malpractice/wrongful death context

* + 1. Multiple Necessary Causes
       1. Two or more D’s, acting independently
       2. Each D’s fault is an actual cause (was probably necessary for P’s injury)
       3. ***McDonald v. Robinson* (Iowa 1929)** Tool: If the acts of two or more persons concur in contributing to causing an accident, and but for each person’s act, the accident would not have happened, the injured person may sue the actors jointly or severally, and recover against one or all. Synopsis: D1 and D2 cars collided. D1 car hit P, pedestrian.
    2. Exception to But-For Test: Multiple Sufficient Causes and Substantial Factor
       1. ***Aldridge v. Goodyear Tire & Rubber Co.* (D. Md. 1999)** Tool: In a case involving multiple causes, each cause must be sufficient before it is substantial. Daubert Test for admissibility of expert opinion. Synopsis: Ps or their decedents sued D for illnesses that were allegedly a result of chemicals that D provided to plant they worked at.
       2. ***Anderson v. Minn. St. P. & S.S.M. Ry.* (Minn. 1920)** Synopsis: D stared fire which joined with other fire that burned P’s property. Each fire on its own was capable of burning down P’s house. D can’t prove actual causation under but-for test. Court held that jury can find for P if evidence suggests D’s fire was a “material factor” in the destruction of the house.
       3. R3d: Multiple Sufficient Causes: if multiple acts occur, each of which would have been an actual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as an actual cause of the harm.
    3. Exceptions to Burden of Proof – Shift Burden to D’s
       1. Alternative Liability
          1. Two or more D’s acting independently
          2. Both (all) possible tortfeasors before the court
          3. Fault of only one was necessary for P’s injury, but which one is unknown.
          4. Shifts burden on causation – each D must disprove that his carelessness was a cause of P’s injury; otherwise, actual causation is presumed and each D is subject to liability. (apportionment determined by the rule of joint & several liability)
          5. ***Summers v. Tice* (Cal. 1948)** Tool: Alternative Causation – If P proves that one of two or more persons is negligent toward P, then the Ds have the burden of proving that the other person(s) was the sole cause of the harm or all Ds are liable. Synopsis: Both Ds negligently fired in P’s direction, one hit him. P has problem of proving that one D probably shot P (50/50 chance). Both Ds held liable under alternative liability.

Narrow interpretation – applies when two actors

Broad interpretation – applies when two or more actors

* + - 1. Market Share Liability
         1. ***Sindell v. Abbott Labs.* (SCOTUS 1980)** Synopsis: P and class developed cancer as a result of a drug her mother took while pregnant. General causation established (drug can cause this sort of cancer). Specific causation tortfeasor identification problem (did this D’s drug cause P’s injuries?). Court adopted Market Share Liability approach.

Rejected other approaches

Alternative Liability – unlike in Summers, not all potential tortfeasors are before the court.

Concert-of-Action – no evidence that drug manufacturers jointly planned their actions

Industry-Wide Liability – drug manufacturers did not act as single entity; not sufficiently centralized.

Market Share Liability – In certain circumstances where P is unable to identify the actual tortfeasor and it is unjust to preclude them from recovery, then the group responsible for the overall harm can be held liable and each individual is proportionally liable for market share.

P has to sue substantial share of the relevant market

Each D is subject to liability unless they can disprove that their breach caused injury.

P can recover % of damages based on each D’s market share.

* + - * 1. NY’s alternative approach (***Hymowitz***) – irrebuttable presumption of causation – each D liable to each P in proportion to national market share.
  1. Proximate – “legal cause” or “scope of liability” (Was the actual causal connection between D’s carelessness and P’s injury too fortuitous or remote to hold D responsible for the injury?)
     1. Aligning of the Elements
        1. Proximate Cause: Aligning of Actual Cause and Injury – D’s breach was a actual cause of P’s injury, but did it cause the injury in the right way?
        2. Relationality of Breach of Duty – D acted carelessly, but was D careless as to persons such as P?
     2. Terminology – ***Union Pump Co. v. Allbritton* (Tex. 1995)** Synopsis: P extinguished fire resulting from D’s product. After fire extinguished and P away from scene, P slipped on wet pipe rack and injured.
        1. Majority: Proximate cause is not established if
           1. Link between D’s fault and P’s injury is too remote or too attenuated
           2. D’s fault was not a substantial factor ( ☹ ) in bringing about P’s injury
           3. D’s fault does no more than furnish the condition that makes P’s injury possible.
           4. The forces generated by D’s carelessness had come to rest before P was injured.
        2. Dissent: Forces had not come to rest and this is issue of comparative fault, not proximate cause.
     3. Previous Formulations
        1. Was P’s injury a natural and ordinary consequence of D’s breach?
           1. ***Ryan v. New York Central R.R. Co.* (NY 1866)**  It is not natural and ordinary for fire to spread from its source beyond the first structure it ignites (the ‘one-leap rule’) (???)
        2. Was P’s injury directly caused by D’s breach?
           1. ***In re Polemis* (Eng. 1921)** Fire was an unforeseeable consequence of plank being dropped, but it followed directly (no intervening events), therefore proximate cause.
        3. Was P’s injury a reasonably foreseeable consequence of D’s breach?
           1. ***Wagon Mound (No. 1)* (Eng. 1961)** Oil spill not a proximate cause of fire because ignition of slick was unforeseeable.
           2. ***Wagon Mound (No. 2)* (Eng. 1965)** Same spill and fire, different P; fire damage now deemed reasonably foreseeable therefore proximate cause.
     4. Foreseeability Test
        1. ***Jolley v. Sutton London Borough Council* (Eng. 2000)** Tool: Proximate cause limited to harms resulting from foreseeable scenarios but not the specific manner in which the injury occurred or its extent. Synopsis: D left abandoned boat on lot. P, a teenager, was repairing boat from underneath when injured.
        2. Level of generality problem
           1. Too broad: was it foreseeable that D’s carelessness would somehow harm someone?
           2. Too narrow: was it foreseeable that a teen would try to repair the boat, jack it up, crawl under it and have the boat fall on him?
           3. Correct (but how is type defined?): Was a sequence of this type a foreseeable consequence of D’s carelessness?
     5. Scope of the Risk Test/R3d
        1. SoR Test – P’s injury is proximately caused by D’s breach if the injury is the realization of one of the risks that rendered D’s conduct careless.
        2. Tends to reach same result as Foreseeablity Test and both raise the level of generality problem.
        3. ***Ventricelli* (NY 1978)** Synopsis: P’s rental car has defective trunk latch; while car is parked curbside, P, standing behind car to close trunk lid, is struck by another car. Court held no proximate cause because it was not reasonably foreseeable that P would be injured when dealing with the trunk lid in a safe location (in scenario that occurred).
     6. Superseding Cause
        1. Features: two wrongdoers are acting independently; their wrongs are committed in a sequence
        2. When does a third party’s intervening, wrongful injuring of P spare D from liability, even though D’s carelessness was also an actual cause of P’s injury.
        3. Pollard and Clark – D ceases to be responsible when third party’s acts so transformthe situation as to introduce “a new power of doing mischief”
           1. ***Pollard v. Oklahoma City Ry. Co.* (Okla. 1912)** Tool: Superseding Cause – In cases where two wrongdoers independently commit wrongs in sequence, an intervening party/event can make the first wrongdoer’s wrong too remote to hold him liable. Synopsis: Railway leaves explosive powder out. Boy collects powder and when he explodes it, his friend gets hurt. Court finds that railways negligent action is not proximate.
           2. ***Clark v. E.I. Du Pont de Nemours Powder Co.* (Kan 1915)** Tool: When intervening acts do not break causal chain, then there is concurrent negligence. Synopsis: Explosives manufacturer left volatile glycerin on farm. Teenager takes it and buries it. Two young boys find it, it explodes, and they are seriously injured. Court found that teenager’s intervening act did not break causal chain.
        4. Intervening third party negligence usually will not count as superseding cause. E.g. a tortfeasor’s liability for EMT/MD malpractice in treating the victim’s tort-related injuries
           1. Even intervening recklessness or intentional wrongdoing won’t always spare D.
        5. R3d rejects superseding cause, relies instead on apportionment
        6. Affirmative Duty
           1. ***Port Authority of New York & New Jersey v. Arcadian Corp.* (3d Cir. 1999)** Tool: (1) Manufacturer of raw material that is not inherently dangerous has no legal duty to prevent buyer from making it dangerous. (2) Manufacturers have no duty to prevent a criminal misuse of their products which is entirely foreign to the purpose for which the product was intended. Synopsis: Ds sold fertilizer ingredients that were used by terrorists to make bomb used in WTC attack. Ct. found that terrorists’ actions were superseding and intervening events breaking the chain of causation.

Misfeasance: D carelessly damaged my building

Carelessness = selling product that can easily be made into bomb

But terrorist use of product counts as superseding cause. i.e. terrorist introduced a “new power of doing mischief”

Nonfeasance: D careless failed to protect my building

Takes care of superseding cause but needs to prove that such a duty exists and it doesn’t.

* + - * 1. ***Fast Eddie’s v. Hall* (Ind. App. 1997)** Tool: Murderous attack = superseding cause (misfeasance) + no duty to protect victim when off the premises (nonfeasance). Tavern owner has duty to protect patrons from foreseeable acts of other patrons. Tavern owner is not guarantor of each departing patron’s safety. Party’s act is proximate cause of an injury if it is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of circumstances. However, a willful, malicious criminal act of a third party is an intervening act which breaks the causal chain between the alleged negligence and the resulting harm. Synopsis: Tavern employee asks Lamb to take drunken Hall out of tavern. Schooley takes Hall to his place. Lamb later takes Hall and sexually assaults and kills her. Appellate court reverses denial of summary judgment for Tavern owner.

## Relationality of Breach and Duty

* 1. Question – D acted carelessly, but was D careless as to persons such as P?
  2. ***Palsgraf v. Long Island Railroad Co.* (NY 1928)** Tool: Duty depends on the foreseeability of the harm between the parties.Synopsis: D helped push a man aboard a train. The man’s package fell. Inside were firecrackers, which exploded causing some scales to fall and injure P.
     1. Cardozo says this is NOT about proximate cause.
     2. Cardozo’s Two-Step Analysis
        1. Jury could not find that D was careless with reference to P.
        2. Anti-piggybacking rule: A negligence suit that P brings cannot piggyback on D’s carelessness toward a differently situated person.
     3. Andrew’s Dissent:
        1. Everyone owes a duty to everyone to refrain from those acts that may unreasonably threaten their safety
        2. Tort is about antisocial conduct, not affront so someone specific.
        3. Proximate cause is about drawing the line somewhere via common sense and jury should be given the opportunity to do that.
  3. ***Petitions of the Kinsman Transit Co.* (2d Cir. 1964)** Synopsis: P’s boat came loose, crashed into and loosed one boat and damaged another. Both boats crashed into bridge which city did not raise although it was warned. Caused damage to surrounding property and dammed river which led to flooding upstream that damaged other properties.
     1. Continental – dock owner/operator: faulty deadman; Kinsman: owner/operator of Shiras: failed to drop anchor; City of Buffalo – bridge owner/operator: failed to raise bridge
     2. Relationality of breach:
        1. Continental, Kinsman: unleashing a hug ship is careless as to downstream Ps
        2. City: careless failure to raise a bridge is careless as to upstream Ps
     3. Proximate Cause
        1. Kinsman, City: flooding damage is among the injuries risked if one does not respond with care to a huge ship careening down a crowded, icy river toward a bridge
        2. Continental: flooding damage was not reasonably foreseeable before the emergency began to unfold,but it’s still fair to hold Continental liable because some form of property damage was foreseeable (collision damage)

## Negligence Per Se

* 1. Displaces jury’s usual role in determining breach.
  2. Rationale
     1. Legislative Supremacy – ***Martin v. Herzog* (NY 1920)** (Cardozo, J.)“Jurors” have no dispensing power by which they may relax the duty that one…owes under…statute to another.’
     2. Fairness/reliance – P was entitled to rely on others’ compliance with legislated standards; D was no notice that non-compliance = trouble
     3. Instrumental – easier for P to prove negligence 🡪 greater incentive to comply with statutes
     4. Efficiency/rule of law – bypass jury and gain advantage of a bright-line rule (e.g. evenhandedness across cases, less litigation) without losing and even upgrading, at least in theory, the legal standard’s democratic pedigree.
  3. Steps: (elements comparable to common law negligence)
     1. Does the statute (or regulation) set a standard of conduct?
        1. Did D violate it without any excuse? 🡪 Breach
        2. Was the violation an actual cause of P’s injury? 🡪 Actual Cause
     2. Is P a member of the statute’s protected class? 🡪 Duty
     3. Was the incident among those that the statute was intended to prevent? 🡪 Proximate cause
     4. If yes to all steps, then: P makes out prima facie case of negligence without having to establish that D failed to exercise ordinary care.
     5. If no to any step, then: P cannot rely on negligence per se, but might still be able to introduce the violation as evidence suggesting that D failed to conform to the common law’s ordinary care standard.
  4. Violations by safety regulations count – ***Bayne v. Todd Shipyards Corp.* (Wash. 1977)** Tool: Violation of an applicable statute, ordinance or regulation counts for negligence per se. Also, P must be part of class of persons protected by statute.Synopsis: P sued D for injury sustained because D violated safety regulation. Trial court refused to instruct that violation of regulation was negligence per se but did instruct that it was evidence of negligence. Court ruled that just because it is regulation does not mean it should hold less force.
  5. ***Dalal v. City of New York* (NY App. Div. 1999)** Tool: Unexcused violation of a statutory standard of care constitutes negligence per se/is a per se breach.Synopsis: P and D collide in intersection. Jury finds only P negligent. P contends negligence per se because D not wearing glasses as required on her license which is in violation of statute. Court found that jury should have been instructed on negligence per se. However, jury still has to determine: was there any excuse for D’s violation?; was the violation an actual cause of the crash?; was P’s carelessness also a cause of the crash?; What damages are owed?
  6. Running Through the Elements – ***Victor v. Hedges* (Cal. Ct. App. 1999)** Synopsis: D parked car partly on sidewalk. P hit by another car while with D near parked car. P sues D for violating statute prohibiting parking on sidewalk. Court finds that P #3 and #4 not met. P also did not establish ordinary negligence because D was not careless as to P (no breach? Sounds like Palsgraff). Tool: Negligence per se requires
     1. D violated a statute –yes (breach)
     2. Is P among those whom the legislature intended to protect? – yes (pedestrian) (Duty)
     3. Was the accident of a type the legislature meant to discourage by enacting the statute – no! (proximate cause)
  7. Some jurisdiction find that not following statute is evidence of negligence but not negligence per se.

# AFFIRMATIVE DEFENSES

## Contributory Negligence

* 1. Complete defense to negligence: When D and P are at fault for P’s injury, P loses.
  2. Why not concurrent negligence? P’s fault is treated as superseding cause.
  3. “Last clear chance exception” – if D’s fault comes after P’s, no contributory negligence defense.
  4. Most states have switched over to comparative fault. Only four states plus D.C. still have contributory negligence.

## Comparative Fault

* 1. D must prove that P was at fault and that P’s fault was an actual cause of P’s injury.
  2. Pure Form – P can recover portion of damages even if 99% at fault
     1. ***United States v. Reliable Transfer Co.* (SCOTUS 1975)** Tool: In comparative fault cases, liability for damages is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.Synopsis: P’s tanker stranded on sandbar. P sued U.S. for not maintaining flashing light. District Court found 25-75 comparative fault but apportioned damages 50-50 per law. SCOTUS reversed this law requiring proportional allocation.
  3. Modified Comparative Fault – proportional recovery until P is 50 or 51%, then no recovery. (MCF has been adopted by 2/3 of the 46 states that use comparative fault.)
     1. ***Hunt v. Ohio Dept. of Rehabilitation & Correction* (OH Ct. Cl. 1997)** Tool: OH’s comparative negligence statute bars P from recovery if his or her actions were a greater cause (more than 50%) of his injuries (MCF). Damages apportioned by percent contributorily negligent.Synopsis: Inmate sues state on negligence for improper instruction on how to use snowblower. Inmate found 40% negligent so state owed 60% of total damages.

## Statutes of Limitations and Repose

* 1. Statutes of Repose – Start ticking with D acts which eventually gives rise to injury
  2. Statutes of Limitations – Start ticking when P’s injury and its possible tortious cause are discoverable.
  3. Discovery Rule – starts ticking when P could have or should have found out about injury (See ***Ramney*** in slides)

## Assumption of Risk

* 1. Ordinarily a complete bar to recovery
  2. Two Types
     1. Express: agreement between D and P, P agrees in advance to waive right to sue for injury caused by D’s wrongdoing. Written waiver.
        1. Outside of extreme recreational activities, waivers of personal injury and property damage claims often unenforceable (back-of-ticket waivers).
        2. ***Jones v. Dressel* (Colo. 1981)** Synopsis: P signed contract with D that allowed P to use D’s recreational skydiving facilities. A covenant not to sue and a clause exempting D from liability (for everything) were included in the contract. P injured in D’s plane crash. P sues D.
           1. Contract Law

Was the accident in the scope of the waiver?

Was P competent to waive? Courts have protected minors from imprudent contractual commitments by declaring that the contract of a minor is voidable at the election of the minor after he attains his majority within a reasonable time. However, acts recognizing the contract, will ratify it. P showed up and participated after turned 18 which ratified contract.

Was this an adhesion contract? No, it wasn’t a take it or leave it contract. P could ‘buy back’ the right to sue.

* + - * 1. Public Policy

For policy reasons, courts sometimes will not enforce an otherwise valid contract (Tunkl factors, see p.440) – those reasons don’t apply here.

* + - 1. ***Dalury v. S-K-I, Ltd.* (Vt. 1995)** Synopsis: A skier and his wife, the plaintiffs, appealed a Vermont court's decision which granted summary judgment for the ski resort operators (defendants in this case), which were based on exculpatory agreements that were signed by the plaintiff skier that released the resort from all liability that resulted from negligence. Court voids the waiver as against public policy.
         1. Similar to ***Jones*** but court voids waiver as against public policy. How is ***Dalury*** distinguished from ***Jones***?

No buy-back option

Skydiving more obviously dangerous than skiing

Nature of D’s duty: service provider v. premises – business invitee has a right to assume that the premises, aside from obvious dangers, are reasonably safe for the purpose for which he is upon them, and that proper precaution has been taken to make them so.

Rugged west v. nanny-state northeast

Skiing far more common, triggering a public interest in resort-owner’s duties.

* + 1. Implied: no agreement, but P freely and knowingly chooses to encounter a danger posed by D’s carelessness.
       1. IAoR still exists where there is CF – ***Smollett v. Skayting Dev. Corp.* (3d Cir. 1986)** Tool: Assumption of risk is still available as a complete defense to a negligence claim although it has been limited by enactment of comparative fault statute. Synopsis: P sued skating rink for negligence. Jury found comparative negligence. D appealed. 3d Cir. found there was insufficient evidence to find that P had not assumed the risk of injury. Question of which better characterizes P’s contribution to her injury: P chose to face the danger posed by the missing rail (IAOR) v. P failed to exercise ordinary care for her own safety (CF).
          1. Note: R3d embraces collapse of IAoR into CF.
       2. Largely limited to recreational activities.
          1. Workers’ compensation laws were adopted in part because courts misapplied IAoR.
       3. Mere awareness of a background risk does not entail P has assumed the risk. E.g. pedestrian does not assume risk of D’s careless driving because she goes for a walk knowing that drivers are often careless
       4. IAoR v. No Breach AMOL: Murphy (the “Flopper”)
          1. Assume P’s injury caused by the ride’s expected (smooth) motion – IaoR not necessary because D not careless (no breach)
          2. Assume P’s injury was caused by ride’s unexpected (jerking) motion – colorable breach claim, but not clear that P assumed this risk.
       5. IAoR v. No Duty – no duty of care owed among voluntary participants in a recreational activity

## Immunities and Exemptions

* 1. Spousal
     1. At common law – domestic abuse a private matter; allowing negligence claims enables collusive litigation, e.g. car crash
     2. By 1970’s, most states reject blanket spousal immunity
  2. Parental – Limited or Abolished
     1. Worries remain that parents and children might collude
     2. Privilege to discipline exception
  3. Charitable
     1. Has been modified in most states
     2. Charitable hospitals now liable for doctors’ negligence (resp. superior), but special liability limits sometimes still apply.
  4. Sovereign Immunity
     1. History
        1. Common Law – no respondeat superior for Fed/State governments but individual officials subject to tort liability.
        2. FTCA (1946) – statutory waiver of immunity
           1. A version of respondeat superior applies to US
           2. Lex loci rule
           3. Special protections for governed as tort D

No juries, no punitive damages

n/a to torts related military service (***Feres***)

Discretionary function exemption (DFE)

Rationale:

Separation of powers: courts should not judge co-equal branches

Allows early dismissal of claims

Best cases for DFE: genuine policy decisions (macro economic policy – Yes; Mailbox placement? - ?; USPS driver error? – no)

* + 1. DFE ***– Riley v. United States* (8th Cir. 2007)** Tool: Discretionary Function Exemption to FTCA waiving Government Immunity – The FTCA (Federal Torts Claims Act) does not waive immunity for “the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” Two part Berkovitz test for when the discretionary function exception applies: (1) conduct at issue must be discretionary; (2) judgment at issue be of the kind that the discretionary function exception was designed to shield (has to deal with policy decision). Synopsis: P sued U.S. because USPS mailboxes blocked his line of site while driving and he got into accident.
    2. No Duty as an Immunity-Like Exemption
       1. ***Riss v. City of New York* (NY 1968)** Tool: Public Duty Rule (DFE counterpart?) – no liability on 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. To allow liability would inevitable determine how limited police resources should be allocated. Thus, no individual has standing to sue for damages caused by the breach of such a duty. Synopsis: P reported threats to police. Police did not take action. P had lye thrown at her face which led to loss of eye sight and physical injuries.
          1. Note: city can incur duty by certain affirmative undertakings to P. e.g. ***Kircher*** (note case)
       2. ***Strauss v. Belle Realty Co.* (NY 1985)** Tool: Utility has no duty to those it is not in contract with to take care to prevent unnecessary blackouts and the physical injuries one might expect to attend a blackout. Is this about foreseeability or as the dissent says, is this a ruling that the utility might be entitled to a special affirmative defense that excuses it from liability notwithstanding that P can made out all the traditional elements of a negligence cause of action? Synopsis: Utility’s power system failure left city in the dark. P had contract with utility in apartment but not in common area of apartment. P hurt himself going down stairs of common area. Court held utility had no duty to P in common area.

# NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (NIED)

Definition**:** D careless as to P’s emotional well-being, causing trauma but not a discrete physical harm.

* 1. Breach of Duty to take care not to cause emotional distress (in and of itself)
  2. Is NOT: physical harm with pain and suffering or discrete physical harm from carelessly caused trauma.
  3. R2d: An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:
     1. Places the other in immediate danger of bodily harm and the emotional disturbance results from the danger OR
     2. Occurs in the course of specified categories of activities, undertakings or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.

## Special Relationships and Undertakings

* 1. Includes: MD-patient; attorney-client
     1. ***Beul v. ASSE Int’l Inc.* (7th Cir. 2000)** Tool: Contractual relationship can create special relationship that when breached will support NIED. Synopsis: Exchange student’s parents sue program for not taking care of student who was raped by host father and entered into relationship with him. Host father killed himself after being charged with statutory rape and this allegedly caused student NIED. Court found that ASSE obligated to clients to protect them from hosts. No negligence per se, but USIA regs and industry custom are relevant.
  2. Does not include: med. Examiner-criminal suspect; employer-employee
  3. Bystander Claims
     1. Zone of danger
        1. ***Waube v. Warrington* (Wis. 1935)** Tool: The right to be free from emotional distress cannot be extended to people out of the range of ordinary physical peril as a result of the shock of witnessing another’s danger. Synopsis: Mother witnessed daughter run over. Husband sued driver for NIED on mother. Court found that D’s carelessness toward child was not a breach of any duty owed to mother. Court refused to recognize duty to take care against causing foreseeable distress (this would overcome Palsgraf problem).
        2. ***Amaya* (1963)** Have to be within zone of danger to recover for emotional distress. Sister was in ZOD but Mom wasn’t so she can’t recover.
     2. Reversal of ZOD – consider factors
        1. ***Dillon v. Legg* (Cal. 1968)** Tool: In determining whether D should reasonably foresee the injury to P, or in other words whether D owes P a duty of care in a case in which P suffered a shock which resulted in physical injury, the courts will take into account such factors as the following: (1) whether plaintiff was located near the scene of the accident; (2) whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident; and (3) whether plaintiff and victim were closely related. Synopsis: While driving his car, D struck a child as she was crossing a public street. Mother and sister sued for negligent infliction of emotional distress.
           1. Policy Considerations: Fraud can be managed via trial; Floodgates can be managed by the usual duty requirement of foreseeability.
     3. Guidelines become stricter Rules
        1. ***Thing v. La Chusa* (Cal. 1989)** Tool: P may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person only if: (1) the plaintiff is closely related to the victim; (2) the plaintiff is present at the scene at the time the injury occurs and is then aware of the injury being caused to the victim; (3) as a result suffers serious emotional distress beyond which would be expected of a disinterested witness. Synopsis: P’s son struck by car. P did not witness accident but arrived shortly thereafter. P sued car driver for NIED.

# WRONGFUL DEATH ACTS

## History

* 1. Tort claim dies with the victim or the tortfeasor
  2. Loss of consortium action – doesn’t bar claim by husband for tortious killing of wife because husband deemed to own wife’s services
  3. Felony-merger rule – if tort is also felony (e.g. murder), D forfeits all assets to crown so action pointless

## Wrongful Death Acts

* 1. Authorize survival actions (direct action)
     1. Tort claims now survive the death of P or D; pursued and defended by estate
     2. Compensation is for losses incurred by decedent during life (plus funeral expenses)
     3. Scope of Liability (damages): injury to death
  2. Authorize wrongful death actions (derivative action)
     1. Empowers decedent’s surviving family members to seek compensation for los of support they have incurred as a result of the tortious killing of their decedent
     2. Scope of Liability (damages): death to expected retirement
  3. Scope of Liability (see supra)
     1. ***Nelson v. Dolan* (Neb. 1989)** Tool: Under survival actions, decedent’s estate can recover for pain and mental suffering caused by fear and apprehension of impending death. In wrongful death actions, next of kin cannot recover for their own mental suffering and anguish (odd since loss of companionship is monetizable as lost services?). Synopsis: Decedent’s motorcycle locked with car for five seconds before decedent was dragged under and killed.
  4. Do not create new torts but confer standing on new claimants
  5. Relationality of breach and duty reconsidered

# DAMAGES AND APPORTIONMENT

## Three types of Damages

* 1. Nominal – a token ($1) for a tort w/o loss
  2. Compensatory – $$ owed by D to P as compensation for what P suffered at the hands of D
     1. Legal standard: P entitled to fair, adequate, and/or reasonable damages given D’s conduct and P’s losses.
     2. Eggshell skull rule
        1. ***Smith v. Leech Brain & Co. Ltd.* (QB 1962)** Tool: Eggshell skull rule – tortfeasor takes his victim as he finds them. Question is not whether D could have reasonably foreseen extent and consequences of injury but whether D could have reasonable foreseen type of injury. Synopsis: P’s husband burned lip at D’s factory while working which turned into cancer and died. D found negligent and injury found to be but for cause so D held liable for injury and resulting death.
        2. ***Mustapha*** – does not seem to apply to emotional distress (p. 501)
     3. Calculation
        1. Economic: past and future lost earnings; past and future costs
        2. Noneconomic: victimization, disfigurement, past and future pain and suffering
        3. ***Kenton v. Hyatt Hotels Corp* (Mo. 1985)** Tool: Compensatory damages include economic/out-of-pocket losses (past and future) and noneconomic losses (pain and suffering). Synopsis: P injured to D’s fallen skywalk. Jury granted $4M. Trial court allowed for $250K remittitur. Appealed. Court found that $4M was reasonable. Tcts should not fine-tune jury verdicts.
        4. Modern Tort Reform often focused on non-economic damages
           1. Too unpredicatable or arbitrary? Too large on average?
           2. Statutory caps (e.g. CA maximum non-econ damages in med. Mal. = $250K) – who bears the burden of caps? Most traumatized and Ps with minimal economic losses (e.g. retirees)?
  3. Punitive - $$ owed by D to P as punishment for egregious mistreatment or to further deter
     1. Common law threshold – purpose or recklessness; note: meeting this threshold does not entitle P to PDs (up to fact-finder)
        1. ***National By-Products, Inc. v. Searcy House Moving Co.* (Ark. 1987)** Tool: Punitive damages does not require purpose/malice but just wantoness/recklessness. Synopsis: National truck crashed into car which crashed into Searcy house. Searcy awarded punitive damages. Court reversed because no recklessness just gross negligence by National truck driver.
     2. Rationale
        1. Traditional view – allow victims of egregious wrongs to make an example out of D
        2. Law and Economic view – prevent under-deterrence of acts that are:
           1. Not likely to be prosecuted criminally
           2. Cause minor injuries (no one P has incentive to sue for compensatory damages)
           3. Difficult to detect (e.g., fraud), and/or
           4. Undertaken by pertinacious D’s.
        3. ***Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003)** Tool: Punitive damages should be proportional to crime. Factors to consider: (1) probability of wrong being detected; (2) D should have reasonable notice of sanction; (3) Sanctions should be based on wrong and not status of D. Synopsis: P sued Motel for bedbugs and was awarded $186K in punitive damages. Motel knew about bedbugs and still rented out rooms. Court found punitive damages not excessive.
     3. In context
        1. Very rare (tort claims rarely go to verdict and PDs awarded in only 5% of these cases)
        2. Intentional torts – often, but not always awarded
        3. Negligence – usually ineligible because no willfulness or wantonness
     4. Tort Reform
        1. State Law Reforms
           1. Bifurcation/trifurcation: separate trial of PDs
           2. Robust judicial review of jury PD awards
           3. Safe harbors for regulatory compliance
           4. Splitting statutes: x% of PD award goes to state
        2. Federal constitutional limits: D’s 14t Amendment Due Process rights
           1. ***Haslip*** – due process requires non-deferential court review of jury PD awards
           2. ***Gore*** – Excessive PDs violate D’s DP rights; excessiveness assess by: (1) reprehensibility of D’s acts; (2) ratio of PDs to CDs (< 10:1 strongly preferred); (3) civil, criminal penalties for similar acts
           3. ***Williams*** – P’s attorney cannot ask jury to multiply PD award by # of non-party victims; but jury can consider evidence of similar torts by D in assessing reprehensibility

## **Apportionment** – from whom is P entitled to collect Damages?

* 1. Vicarious liability: Respondeat Superior
     1. VL = a person or entity held liable for another’s tort because of the relationship between that person orentity and the tortfeasor.
     2. Respondeat superior – master liable for servants’ tort committed in the course of employment even if master was careful in hiring and supervising servant.
     3. Doesn’t usually apply to intentional torts
     4. Contrast “direct” employer liability (negligent hiring or supervising)
     5. ***Taber v. Maine* (2d. Cir. 1995)** Synopsis: D got drunk on navy base off-duty. Drove off base and crashed into another vehicle injuring passenger. FTCA imposes respondeat superior liability. Scope of employment = in the line of duty. Tool:
        1. Respondeat superior liability attaches only to employee torts committed within the scope of employment.
           1. Older narrow test for scope of employment: was employee furthering employer’s interest, or acting for employer’s benefit?
           2. Modern, broader test: was employee’s conduct “characteristic” of his employment? – whenever broad potential effects on morale and customer relations exist or where the employer has implicitly permitted or endorsed the recreational practices that led to the harm.
        2. Policy rationale: Navy = cheapest cost avoider (in best position to control on-base drunk driving)
  2. Multiple tortfeasors causing single injury
     1. ***Ravo v. Rogatnick* (NY 1987)** Tool: Comparative fault and joint and several liability are compatible with one another. Synopsis: Two doctors (Ds) caused P’s brain damage. Jury assigned percentages of fault so D asked to be liable for damages up to percentage of fault. D argues that adoption of comparative fault eliminates the idea of indivisible injury and hence joint and several liability. Court rejected saying that this is case of joint and several liability so could be liable for total damages.
     2. Joint and Several Liability v. Alternatives
        1. Is JSL unfair?
           1. D might pay damages disproportionate to fault
           2. But an overpaying D has potential recourse – contribution: D1 can bring claim against D2

If all Ds are solvent and reachable, JSL makes collection simpler for P, leaving the Ds to work out things.

* + - * 1. Problem: when a D is insolvent or unreachable

JSL allocates the risk to solvent, reachable Ds

Who should bear the risk of an insolvent D? better to split the difference or according to % fault?

* + - 1. 14 states have abolished JSL and 28 others have limited JSL
    1. JSL and Absent Tortfeasors
       1. ***Bencivenga v. J.J.A.M.M., Inc.* (NJ Super. App. Div. 1992)** Tool: The fault of a fictitious person may not be considered when apportioning negligence among parties to the lawsuit. This will incentivize named parties to find unnamed parties. Synopsis: Club (D) did nothing when P hit by other club patron. D requested jury instruction that negligence of the club, P, and unknown intentional tortfeasor be compared for purposes of apportioning liability under the comparative negligence Act. Court ruled that you can’t assign fault to unnamed partyso D is in effect subject to JSL (?).
  1. Third-party sources of compensation. E.g. liability insurance
     1. ***Interinsurance Exch. Of the Automobile Club v. Flores* (Cal. Ct. App. 1996)** Tool: Public policy bar against insuring for intentional wrongs. Synopsis: P sought declaratory judgment on whether it had to defend and indemnify D for damages caused by driving car in which another person shot victim.

# ABNORMALLY DANGEROUS ACTIVITIES

Strict liability for abnormally dangerous activities

## True strict liability in tort

* 1. The intentional aspect of property torts is absent
  2. Common law doctrine (not part of a tort replacement scheme such as workers’ compensation)

## Very limited in application

* 1. Keeping of wild animals
  2. Use of explosives, radioactive materials
  3. Keeping of reservoirs

## Doctrinal Origin

* 1. ***Rylands v. Fletcher (HL 1868)*** Tool: A person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape (strict liability). Synopsis: D builds a reservoir of water next to P’s old mine shafts. Reservoir leaks and floods mines.

## R2d

* 1. ***Klein v. Pyrodyne Corp.* (Wash. 1991)** Tool: R2d – Six factors that are to be considered in determining whether an activity is abnormally dangerous. The factors are as follows: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. Synopsis: P’s injured in fireworks show by D. Court found that fireworks show is abnormally dangerous activity so strict liability should be imposed.
  2. Note:Courts split on fireworks

R3d – an activity is abnormally dangerous if it:

* 1. Creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
  2. Is not one of common usage

## Limits

* 1. Must be the right kind of victim – a bystander, not a participant
  2. Injury must come about in the right manner
     1. ***Foster v. Preston Mill Co.* (Wash. 1954)** – mink eating cubs outside the scope of risk)
     2. ***Klein*** – fireworks manufacturer’s possible negligence not a superseding cause
  3. Defenses such as comparative fault and assumption of risk will typically today apply on the same terms as they do for negligence claims.

# PRODUCTS LIABILITY

## General

* 1. Prima Facie Case
     1. Injury
     2. Product Sold by D
     3. D = Commercial Seller of Product
     4. Product was defective at time of sale
     5. Causation – actual and proximate
  2. Who is Potential SPL D?
     1. Yes: manufacturer, distributor, commercial retailer
  3. Not: casual sellers, sellers of services (generally), sellers of used goods Defect Based v. Absolute Liability
     1. Liability turns on the existence of a defect in the product. E.g. manufacturer not liable if coke bottle falls on someone’s foot an injures it.
     2. Spectrum of more strict to less strict
        1. Absolute liability – D’s product harmed me
        2. Defect-Based liability – D’s defective product harmed me
        3. Fault-based liability – D’s carelessly made product harmed me
  4. What makes product defective?
     1. Types
        1. Manufacturing Defect (flawed unit)
        2. Design Defect (flawed product line)
           1. Consumer Expectation Test – Is the product that injured P more dangerous than an ordinary consumer would expect it to be?
           2. Risk-Utility Test (majority today – looks more like negligence because introduces question of carelessness) – do the risks of the design outweigh the benefits of the design?

R3d – foreseeable risks v. foreseeable utility at time of manufacturing (could foreseeable risks have been avoided in reasonable alternative design?)

Linked with Hand Formula

Defense lawyers like it because often requires expert witnesses which becomes expensive for P.

Hindsight test (NY version) – Weight risks and utility at time of trial regardless of whether manufacturer could have foreseen

* + - 1. Failure to Warn (information flaw)
    1. Three Types in Action
       1. ***Gower v. Savage Arms, Inc.* (ED Pa. 2001)** Synopsis: P shot in foot when his gun accidentally discharges as he is holding it; sues manufacturer.
          1. Manufacturing defect (this particular gun) – imperfection (metal ridge) prevented gun’s safety lock from engaging
          2. Design Defect (all savage model 99 guns) – SJ granted for D cause no actual causation AMOL

No detent system to indicate safety lock is engaged

Safety lock must be disengaged to unload gun

* + - * 1. Failure to warn (no instructions, labels) – users not warned of risk of accidental firing – SJ granted for D, no defect and no causation AMOL

## **Timeline**: Theories of Liability for Product-Related Injuries

* 1. History
     1. Before 1916: Negligence – privity required
     2. 1916: ***MacPherson v. Buick*** – negligence (no privity required)
     3. 1963: ***Greenman*** / 1965: R2d – Strict Products liability
     4. Spanning entire timeline: Misrepresentation and Breach of Warranty
  2. Warranty
     1. Definition: an assurance of promise of quality
     2. Pro-Consumer: warranty liability is strict, not fault-based (seller warrants quality, not mere reasonable care as to quality)
     3. Pro-Seller:
        1. Source of duty if contract 🡪 privity often remains a limit
        2. Seller can try to disclaim all warranties
        3. Prior to suit, consumer may be required to give timely notice of breach and opportunity to cure
     4. Henningsen (NY 1960): (the MacPherson of warranty law) – warranty is more tort like, and liability for breach is strict
        1. Warranty of fitness is implied with any sale of car
        2. Warranty disclaimers, limits held void against public policy
        3. Warranty to product users not in privity
  3. Emergence of Strict Products Liability
     1. ***Escola v. Coca Cola Bottling Co. of Fresno* (Cal. 1944)** Tool: The majority held that the inference of negligence under the doctrine of res ipsa loquitur shifted the burden of proof to the Defendant. In J. Traynor’s concurring opinion, Defendant is strictly liable to Plaintiff. Plaintiff need not utilize the doctrine of res ipsa loquitur. Synopsis: A bottle of Coke manufactured by D exploded in P’s hand.
     2. Traynor’s Concurrence
        1. Manufacturer should be liable if:
           1. Places the product on the market
           2. The product contains a defect (strict because proof of fault not required)
           3. Manufacturer knows that product is to be used without inspection; and
           4. The product causes personal injury during normal use
        2. Why special rule for products?
           1. Precedent – criminal liability for tainted food sales; warranty
           2. Procedural Fairness – for many product-injuries fault is too difficult to prove
           3. Judicial Candor – fault liability is often strict in practice (juries)
           4. Consumer Protection – SL vindicates the consumer’s right to safety
           5. Deterrence – SL will better promote safe products
           6. Compensation – SL achieves better loss-spreading
  4. Adoption of Strict Products Liability
     1. ***Greenman v. Yuba Power Prods., Inc.* (Cal. 1963)** Synopsis: P was injured when his Shopsmith combination power tool threw a piece of wood, striking him in the head. P sued the manufacturer (D). D claimed that P’s breach of warranty claim was barred due to his failure to give timely notice. Tool: (Traynor for unanimous verdict) Liability is in tort, not warranty. Strict liability established if: (1) injury occurred while P used product as intended and (2) injury was caused by a defect in the product (a) of which P wasn’t aware (b) that rendered product unsafe for intended use.
     2. R2d
        1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to hisproperty,if:
           1. The seller is engaged in the business of selling such a product, and
           2. It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
        2. The rule state above applies although
           1. The seller has exercised all possible care in the preparation and sale of his product (no fault)
           2. The user or consumer has not bought the product from or entered into an contractual relation with the seller (no privity)