

# Torts Wypadki Spring 2012



Torts II  
Eric E. Johnson  
Associate Professor of Law  
University of North Dakota School of Law

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# Spring 2012 Torts Wypadki

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# INTENTIONAL TORTS

## Intent

### Generally

- **Volition & Consciousness of likely consequences:** D **desires** the consequences of his acts OR is **substantially certain** his acts will cause the elements of the tort to occur.
  - **Garratt v. Daily:** *Remanded* to trial ct issue of whether 5 y/o Δ was substantially certain Π V would fall while attempting to sit on a chair Δ had moved.
  - **Bohrman v. Main Yankee Atomic Power Co.:** *Holding* several students could claim damages for battery b/c the nuclear plant they were touring was allegedly “substantially certain” the students would be exposed to excessive doses of radiation.

### Special Considerations

- **Transferred intent doctrine:** If Δ intends any of the 5 intentional torts, but her acts, instead or in addition, result in any of the other 5, Δ is liable even though she didn't intend the others. (not only does the intent to commit 1 tort satisfy intent req for the other, but the intent to commit a tort against one V can transfer to any other V)
  - **Applies to:** battery, assault, false imprisonment, trespass to chattel/land.
  - Not necessary Δ know or have reason even to suspect that the other is in the vicinity of the 3rd person.
  - Intent transfers when battery is intended on 1 person & accomplished on another [burglar/neighbor], when assault intended & battery accomplished [burglar/neighbor] & when false imprisonment intended & accomplished [burglar/guest].
- **Mistake doctrine:** If D intends to do acts which would constitute a tort, it is no defense that D mistakes, even reasonably, the identity of the property or person he acts upon or believes incorrectly there is a privilege.
- **Insanity and Infancy are not defenses**

### NOTES FROM DLB:

- [a] Intentional torts have to be done on purpose (D desires or knows to a substantial certainty the outcome will occur). Reasonable person standard is evidentiary but not dispositive.
- [b] desire is subjective, but is sometimes measured objectively (firing a loaded gun directly at someone, for instance).
- [c] substantial certainty is when D pretty much knows that their actions will satisfy the tort requirements, like intentionally blowing up a stagecoach, even if you didn't know Bob was on it, you intentionally injured Bob. Different from reckless conduct.
- [d] transferred intent applies to battery, assault, false imprisonment, trespass to chattel, and trespass to land. This means that if you intend to commit one of these torts but instead end up committing another, you are liable for the actual tort (even tho it wasn't the original intent). This can also transfer between victims (intended to hurt A but hurt B instead). Restatements

accept transferred intent only between assault and battery. Also transfer of victims for false imprisonment.

- [e] mistake doctrine. If the tort is intentional then mistaken identity is no defense as long as D has not wrongfully induced the mistake. Self-defense is still a valid protection. Effectively imposes strict liability on D's who make mistakes.
- [f] infancy and insanity are not defenses, however intent is subjective as discussed above, so an infant or mentally diminished person may not be able to have the requisite intent. Intent to prove serious harm is not required, just an understanding of/desire to cause what will happen when the action is taken.

## Battery

### 1. Harmful or Offensive Contact;

- Reasonable person standard
  - *Exception*: when D knows P is unusually sensitive
- **Without privilege**: Must not be consented to; in everyday life, consent is implied (bumping into someone on bus)
- *Egg shell P*: D liable for all harm that results if only a minor battery was intended
  - "A D takes his V as he finds him"
- V does not have to be aware of contact; i.e. unconscious
- includes contact of things set in motion, including particulates:
  - *See* *Leichtman v. WLW Jacor* -- blowing smoke in someone's face is a battery
  - *See* *Bohrmann v. Yankee Maine Power* -- causing radioactive particles to contact touring students is a battery.

### 2. To $\pi$ 's person;

- $\Pi$ 's body or "*anything which is attached to it & practically identified w/ it*" (purse, car)

### 3. Intent; and

- Once  $\Delta$  has engaged in even a mere technical battery against  $\Pi$ , the risk of unforeseen harm arising from battery is borne by  $\Delta$  → consequently:  $\Delta$  can be liable for greater damages than may be intended.
  - **Vosburg v. Putney**: Where boy playfully but w/o privilege slightly kicks a classmate w/o intending harm, he is responsible for the unexpected serious illness which resulted (unconsented horseplay resulted in V being impaled on a meat hook)

### 4. Causation

- Direct (hitting  $\pi$ ) or Indirect (setting an object in motion) contact

### NOTES FROM DLB:

- [a] intentional harmful or offensive contact with the victim's person. Physical and psychological.

- [b] intent required but not intent to harm, just intent to cause the contact. Once the intent is accomplished, D is responsible for harm even if none was intended.
- [c] Harmful or offensive contact. As long as society defines the contact as harmful or offensive, P is liable even if D isn't aware of the contact (D kisses P while she is sleeping without consent or privilege). This can go to a grey area when P is oversensitive, the touching is not considered offensive societally and D is unaware. If D is aware then it depends on the circumstances and precedent is ambiguous at best.
- [d] Causation - D must do the action voluntarily, but does not need to actually contact the victim (ie throwing a rock).
- [e] as a policy it's pretty easy to defend battery, but the downside is that the opportunity to sue, while preventing further violence, may not really be the desired outcome.

## Assault

- An *intentional* creation of an immediate *apprehension of a harmful or offensive touching*

### Elements

1. Act
2. Intent
3. Causation
4. Apprehension
5. Immediacy

#### 1. Act

- Imminent Harmful or Offensive Contact
  - Words alone are not enough.
- Source of Contact
  - It is not necessary that D be the perceived source of the threatened harmful or offensive contact.
  - Ex: telling someone a stick is a snake
- *Conditional Assault*: Assault made conditional on Π noncompliance w/ an unlawful demand still assault, even if Π confident no assault will actually occur if Plaintiff complies w/ request

#### 2. Intent

- Can be intent to effect an assault or intent to effect a battery
- D must desire or be substantially certain that her action will cause the apprehension of immediate harmful or offensive contact.
  - Accidental creation of apprehension= not assault but may be NIED

#### 3. Causation

- Apparent ability sufficient

#### 4. Apprehension

- V must perceive that harmful or offensive contact is about to happen to him

- Plaintiff must not be asleep, attacked from behind.
- Apprehension of imminent contact need not strike fear in V
  - Apprehension simply acknowledges Π awareness that imminent harmful or offensive conduct will occur unless Π takes effective evasive action (*expectation* of harm, rather than being *in fear*)
  - Π superior strength or evasive techniques do not immunize Δ from liability, provided Π apprehends imminent contact would occur in absence of evasive action
  - Apprehension is more of a sense of expectation, rather than being in fear.
- Words alone are not sufficient, but words can negate the effect of conduct

### 5. Imminent Harmful or Offensive Touching

- If too "forward looking": Insufficient to satisfy immediacy req.

### Case Law

- **I de S et ux. v. W de S**: Allowed H (W had no legal standing) for recover from Δ who wielded an axe at Π's W. Even though W not physically touched, attack caused her harm (fear of imminent physical injury)
  - this is a case from 1348 -- the mental damage has long been recognized as an injury.
- **Castro v. Local 1199**: threatening an emp while slamming a table was "*forward looking*" & was therefore insufficiently immediate to constitute assault

### NOTES FROM DLB:

- [a] this is about comping purely psychological injury. Tends to be construed very narrowly.
- [b] assault occurs when D's acts intentionally cause the victim's reasonable apprehension of immediate harmful or offensive contact. No requirement of reasonable. Different from criminal definition in that crim = attempted battery, where tort = apprehension (no apprehension with attempted battery = no assault).
  - [1] Intent same as discussed before. Transferred intent applies. Accidental creation of the apprehension would more likely be NIED.
  - [2] apprehension means the victim must be aware of the attempted touching (ie not asleep or looking the other way) and must believe D is capable of the act (ie an unloaded gun that D claims is loaded).
  - [3] the harmful or offensive contact must be imminent - future threats or threats without any action to back it up don't count.
  - [4] reasonable apprehension means generally that if I point a pencil at you and push the eraser and you are scared you will be shot, it probably isn't assault (but the restatements might make it so). However, if I knew you had a deadly fear of pencils and decorated your office with them, that could count.
  - [5] fear v. apprehension - the imminent contact doesn't need to make the victim afraid, just means that the victim is aware that the touching will occur unless they take evasive action (or something else intervenes like bodyguards). IE being spit at would not make me afraid but it IS offensive and I WOULD want to get out of the way.
  - [6] conditional assault = where D makes a threat of an unlawful nature so that if the victim chooses it they will avoid harm (ie give me your wallet or I'll kill you...while

brandishing a knife). That is still assault. If a delay is built in or another condition (I'd kill you if there weren't a cop standing right here) there is no assault.

- [7] source of contact does not need to be D directly, if they create the apprehension through other means assault can still happen (ie rigging a trap to scare someone).
- [c] Justifications:
  - [1] Moral justifications are that it is wrong to do this to someone. The apprehension requirement can make it under-inclusive from a standpoint of how the criminal law works. Over-inclusive morally, I mean really, being aware of potentially being touched offensively?
  - [2] this allows the distress to be comped and the imminent part gives a bright line... "future" threats may fall under IIED.
  - [3] can deter retaliation - if you know you can sue for the assault you are less likely to escalate the situation to battery. Also keeps that to self-defense, which is an acceptable sort of thing in this society.

## False Imprisonment

1. Unconsented **act** or omission with **intent** to **\*Intent to confine established by:**

- - Force or the immediate threat of force against P, P's family, or P's property
    - Implied threat sufficient
  - Withholding property
  - Omissions *where there is a duty to act*
    - A takes B out on boat & A promises to return upon B's request. A refuses to return to land. A has a legal duty (contractually) to act.

2. **Confine or restrain  $\pi$**

- Physical barriers, physical force, threats of force, failure to release, invalid assertion of legal authority (false arrest)
- Economic or moral pressure and future threats not enough
  - Use of threats of economic retaliation or termination of employment to coerce  $\pi$  to remain don't constitute FI
- Time irrelevant, *however*, amt of compensation reflects length
- **$\pi$  must know of the confinement**
  - Restatement modifies; would find liability even when  $\pi$  not aware of confinement but is injured.
- Types of lawful confinement
  - Restraint of shoplifters BUT must be:
    - rsbl belief theft occurred
    - detention in rsbl manner
    - for a rsbl period of time
  - Contractual Obligations (pilot must keep you on a plane before take-off)
  - Child discipline

3. **To a bounded area**

- Freedom of movement limited in all directions, not FI if P free to proceed in any direction, even if P prevented from going in direction P prefers
- **No reasonable means of escape known to  $\pi$** 
  - Not rsbl if requires  $\Pi$  to be heroic, endure excessive embarrassment or discomfort, or if  $\Pi$  unaware of means of escape
- Can be large

Note: **Contrast w/ Malicious Prosecution & Abuse of Process**

- FI compensates for unlawful confinement; confinement that is priv not unlawful
- When arrest is privileged & conforms to all legal reqs to justify, FI liability precluded
- Malicious prosecution: arrest pursuant to lawful procedures motivated by bad faith
- Abuse of process: improper use of certain compulsory processes (subpoenas) despite conforming to legal reqs

NOTES FROM DLB:

- [a] where D acts to unlawfully and intentionally cause confinement or restraint of the victim within a bounded area. Accidental confinement = negligence or strict liability. Victim must usually be aware of it.
- [b] the victim must be confined in an area bounded in all directions. Not being able to go the direction you want to (but being able to go in any other direction) is NOT imprisonment. The bounded area can be as large as a city or it can be a moving vehicle. REASONABLE means of escape precludes liability. Unaware/heroic measures, etc = not reasonable.
- [c] victim must be confined or restrained, maybe by 1) physical barriers, 2) force or immediate threat of force 3) omission where D has a legal duty to act or 4) improper assertion of legal authority.
  - [1] physical barriers: must surround v in all directions so that no reasonable means of escape exists.
  - [2] Force: May be directed at v, v's family, companions, or property. Future threats or threats against employment, etc don't count.
  - [3] Omissions: If you don't do something you said you would do, like "I'll unlock the door whenever you want" then if the other criteria are met this is too. P must establish that D had a duty to act.
  - [4] Improper assertion: aka false arrest. V must submit to it for it to count. this is met if D is not privileged under the circumstances to make the arrest. Different privileges for police v. private citizens.
- [d] Contract w/ malicious prosecution & abuse of process: privileged confinement is not unlawful. If it is a lawful arrest liability here is precluded. However the lawful arrest if motivated by bad faith and meeting other criteria may be malicious prosecution. Improper use of documents like subpoenas may be abuse of process (other requirements here too)
- [e] V must be conscious of the confinement at the time it occurs. Restatements would negate this requirement if harm occurs.
- [f] No minimum time. BUT compensation sill reflect the length of the detention.
- [g] Transferred intent applies here
- [h] policy issues include potential issues with the awareness requirement and what kinds of restraints are unlawful.

## Outrage (Intentional Infliction of Emotional Distress)

### 1. Act of extreme and outrageous conduct;

- Transcends all bounds of decency in society (must be truly outrageous)
  - Mere rudeness or callous offensiveness insufficient
- Vulnerability of V & relationship of  $\Delta$  to V can be critical
  - Cruelty toward young child or very ill patient more likely perceived as outrageous than comparable conducted directed towards healthy adult
  - Presence of superior-subordinate relationship taken into acct

### 2. Intent or recklessness: disregard for high probability that emotional distress will occur;

- P must prove that the D intended to cause severe emotional distress or acted with reckless disregard as to whether the victim would suffer severe distress.
  - **Recklessness will suffice -- this is the only intentional tort without intent absolutely required**
- Severe Mental Distress
  - mild distress will not suffice.

### 3. Causation; and

- Bystander: when  $\Delta$  harms 3rd party and  $\pi$  suffered emotional distress, may recover either by prima facie case for IIED or:
  - (i) P present when injury occurred,
  - (ii) P close relative of injured person and
  - (iii)  $\Delta$  knew (i) and (ii)

### 4. Severe emotional distress

- Some Jurisdictions require Plaintiff to seek non-psychiatric medical attention
  - This is a way to cut off spurious claims
- More outrageous conduct, the easier to prove damages

### Note: Sexual Harassment & Racial Epithets: Cts hesitate extending IIED to these

- Isolated proposition or attempts at seduction traditionally not actionable, nor liability extended solely b/c of racial slurs
- Ct more likely to impose liability where a pattern of harassment is constant & ongoing
- Most situations where liability imposed for racial or sexual harassment: combination of speech & conduct.
  - **Jones v. Clinton**:  $\Delta$  briefly exposed himself while propositioning a state emp. Conduct was sufficiently brief & w/o coercion so as not to be extreme & outrageous

### Exception for Innkeepers, Common Carriers, and Other Public Utilities

- Innkeepers, common carriers, and other public utilities are liable for intentional gross insults which cause patrons to suffer mental distress.

- The requirement that the D **ACT** in an extreme and outrageous manner to impose liability for intentional infliction of emotional distress is waived.
- The P must be a patron of the D.

NOTES FROM DLB:

- [a] this is newer and less rigidly defined which can be a good thing...until the 1st amendment comes into play
- [b] This started as a way to recover for mental distress that accompanied a severe physical injury. Usually a case of "outrageous behavior." Common carriers with insulting behavior was an exception to the physical injury requirement. Gradually increased to no injury required and then not even just to victim.
- [c] IIED = d's extreme and outrageous conduct intentionally or recklessly causes v severe mental distress.
  - [1] extreme and outrageous conduct = behavior which is "beyond all bounds of decency and to be regarded as atrocious, and utterly intolerable in civilized community." No objective standard but mere rudeness/callousness is not enough. definitely situational; knowledge of a weakness (like an unreasoning fear of flamingoes) and exploiting that usually counts too.
    - [a] IIED hasn't been widely extended to sexual harassment and racial epithets because they do not usually meet the "extreme and outrageous" standard. Same for isolated attempts at seduction and racial slurs, unless there is an established pattern of behavior.
    - [b] Public individuals have limited IIED rights when the conduct is a parody, not claimed/purported to be the truth, and would not be taken as truthful by a reasonable reader. Called the New York Times standard. No indication that the courts are going to limit the recovery rights for private individuals.
  - [2] Intent or recklessness: Recklessness counts for this where it won't for most other intentional torts. Endorsed by the restatement. Means a deliberate disregard of a high degree of probability that severe mental distress will result, even if that is not the intention.
  - [3] Originally physical manifestations (like a heart attack or miscarriage) were required to prove severe mental distress (to prevent fraudulent claims) but not so much any more. Evolution away recognizes that the outrageousness of D's behavior can interpret the distress, and tummy issues are easily faked. Most states do require some sort of proof of the distress also
- [d] IIED doesn't usually have transferred intent. This recognizes that there wasn't really a transfer, by the behavior, D intended to allow some harm to come to the 3P. Usually also requires P to be 1) close relative, 2) present at the scene of the incident when it happened and 3) D knows the 3P is present. Restatement is less restrictive, allows non-relatives to recover if present and suffer mental damage. Not widely accepted. These are not generally insured so allowing bystander recovery wouldn't have a large insurance impact. There are arguments both ways.
- [e] Common carriers are liable for gross intentional insults which cause severe mental distress. "Extreme and outrageous" requirement waived. P must be a patron of D (but no purchase requirement, just have to be an invitee). Intended to reflect the higher duty of care these D's have, but it is questionable in the modern light so courts usually will enforce the existing classifications but not extend them.

- [f] policy issues - too vague (uncertainty as to when it applies), where more specific torts could be created to take its place. It is, however limited by the high bar of “extreme and outrageous” behavior and addresses mental anguish where other torts might not.

## Trespass to Chattels

**definition:** the intentional interference with the right of possession of personal property.

- D act must intentionally damage the chattel, deprive the possessor of its use for a substantial period of time, or totally dispossess the chattel from V.

1. Act that interferes with  $\pi$ 's right of possession in a chattel;

- Intermeddling: directly damaging chattel (denting car)
- Dispossession: deprive  $\pi$  of right of possession
  - More than trivial or momentary interference

2. Intent;

- Does not require that the D act in bad faith or intend to interfere with the rights of others.
  - Sufficient that the actor intends to damage or possess a chattel which in fact is properly possessed by another.
- Mistake and good faith are not defenses (i.e. that you took someone else's umbrella b/c you thought it was your own- no defense)
- Transferred Intent applies.
  - Intent for battery, assault, trespass to land, or false imprisonment can be substituted to satisfy the requisite intent for trespass to chattel.

3. Causation; and

4. Damages

- Actual required
  - Usually measured as the cost to repair the chattel
    - Plaintiff has the chattel returned to her along with the money for repairs = make her whole

### Transferred Intent Application

- If A intends to hit B w/ rocks & misses, but hits B's or C's car, A liable for damage under trespass to chattel.
- Even if car totaled (a very big rock ala roadrunner-coyote?), NO CONVERSION b/c car's destruction not intentional & transferred intent n/a to conversion.

NOTES FROM DLB:

- [a] these can overlap (a conversion is usually also a trespass) but not always. Both involve wrongful possession of the chattel; conversion exists only when the damage or other interference is sufficiently serious to justify a forced sale to D.
- [b] TRESPASS TO CHATTEL - the intentional interference with the right of possession of personal property. D must intentionally damage, deprive the possessor of its use for a substantial period, or totally dispossess the chattel from the victim.
  - [1] bad faith not required. As long as the damage, etc, is intentional, mistake is no excuse.
  - [2] Actual damage, substantial deprivation, or dispossession required. A trivial interference is not a tort (unlike trespass to land) . Momentary dispossession - unless at a critical moment - doesn't count. Stealing, even if only for a bit, counts as D is challenging P's right to ownership.
  - [3] transferred intent applies.

## Conversion

**Definition:** an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be requires to pay the other the full value of the chattel.

**1. Act that interferes with  $\pi$ 's right of possession in a chattel;**•Only tangible personal property and intangibles that have been reduced to physical form (deed, promissory note)

**2. Interference is so serious that warrants requiring  $\Delta$  to pay chattels full value;**

- Theft, wrongful transfer, wrongful detention, substantially changing, severely damaging or misusing
- The longer the withholding and more extensive the use, likely to be conversion (less serious interference is Trespass to Chattels)

**3. Intent; and**

- Purchasing stolen prop, even if B was acting in good faith & not aware S didn't have title= conversion by both S & innocent B.

**4. Causation**

**Special Issues:**

- **Moore v. Regents of U of Cali:** P didn't retain sufficient interest in excised cells to state a cause of action for conversion. Refused to extend tort primarily b/c of policy issues (strong interest in socially useful scientific research). Blood shield laws prohibit the treatment of blood and blood derivatives as "products" (instead considered services) for the purposes of strict liability & implied warranty claims.
- Sentimental value in Chattels
  - Sometimes courts will award the cost of repair for sentimental chattel even if it outweighs the FMV.

NOTES FROM DLB:

- [c] CONVERSION: an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. Generally limited to tangible property unless the intangible property has distinct scientific, literary, or artistic value. 6 factors:
  - [1] the extent and duration on the exercise of dominion or control
  - [2] the intent to assert a right in fact consistent with O's right of control
  - [3] the actor's good faith
  - [4] the extent and duration on the interference with the other's right of control
  - [5] the harm done to the chattel
  - [6] the inconvenience and expense caused

## Trespass to Land

**Definition:** an actionable invasion of an interest in exclusive possession of land.

### 1. Physical invasion of $\pi$ 's real property;

- Person or object (throwing a ball is sufficient)
- Intangibles (odor, vibrations) are nuisance or strict liability if ultrahazardous
- Real property is land, air above, land below

### 2. Intent; and

- Intent to do the act that results in trespass is sufficient
  - do not have to intend to trespass
- Mistake of fact is not a defense
  - Mistaken belief of permission to enter is not a defense

### 3. Causation

- Causal intervention of natural conditions (wind, rain), in initiating or exacerbating the trespass will not absolve  $\Delta$  liability.
- Def. is liable for damages incidental to the trespass
  - ***Kopka v. Bell Telephone*** -- trespasser liable for personal injuries to land owner for digging hole on his land without any showing of negligence
    - This is almost like strict liability
- Nominal damages available where no physical injury to property or person occurred
  - can be useful for asserting a rightful claim to the property -- judgment says you are the landowner

NOTES FROM DLB:

- [a] an actionable invasion of an interest in exclusive possession of land. Protects the surface, subsurface, and airspace. "Possession" means anyone with a current OR reversionary interest (like a landlord). Trespass = invasion of property interests/exclusive right of possession; nuisance = interference with use and enjoyment of that right.
- [b] INTENT = the desire to cause the consequences of the act, or that the believe the consequences are substantially certain to result from it." Mistake is no excuse, and D doesn't

have to intend the trespass specifically as long as they intended the act that caused the trespass.

## DEFENSES

### Self Defense

**Scope:** Reasonable force can be used.

- Must sincerely believe the force is necessary for protection.
  - Belief need not be correct.
- Force must be in response to immediate threat
  - pre-emptive strike not justified
  - retaliation not justified.
- Can only use deadly force if deadly force is threatened.
  - Ex- can't shoot someone who throws a punch at you.
- Most Courts: Reject duty to retreat prior to use of non-deadly force.

NOTES FROM DLM:

- [a] reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm. Sincere but unreasonable actions are not privileged.
- [b] the threat must be immediate. A pre-emptive strike is not justified under common law. There is some argument about allowing a preemptive strike for harm threatened during the "immediate occasion" ie abusive relationships and prison cells, where the intended victim cannot get away and the actor has unlimited access. Retaliation is also not allowed.
- [c] The victim's response must be reasonable. You cannot kill someone for kicking you in the shins. The victim must believe that the force is necessary to avoid an attack, even if the belief is wrong, and that self defense is necessary. Lethal force is only reasonable if the victim believes that death would result from the attack. Threatening, however, may be reasonable even when the action would not.
- [d] Obligation to retreat from less-than-deadly force = NONE. From deadly force = none if you have the right to be present or to proceed (majority). Minority = retreat, except from your dwelling (unless the assailant also lives there), or a retreat cannot be safely or reasonably accomplished.

### Defense of Others

**Reasonable force** can be used to protect a 3rd person from imminent unlawful physical harm.

- 3rd party can only use force that victim could have used to defend himself.

**Majority Rule:** Reasonable force can be used to protect victim whenever intervenor reasonably believes the victim is entitled to self defense.

Minority--**Limited Privilege Rule:** Use of force in defense of a 3rd person exists only when the person being defended was privileged to use force.

- Intervenor must stand in the shoes of the person being protected.
- Act at your own peril

NOTES FROM DLM:

- [a] a person can use reasonable force to protect a 3P from immediate unlawful physical harm. No limit on who can do the protecting.
- [b] Some courts limit the privilege of defense to when the person in need of defense would have been able to use that privilege.
- [c] some courts toss out the above and say there is a privilege to use reasonable force to protect 3P whenever the actor reasonably believes that a 3P is entitled to use self-defense.
- [d] Policy considerations - a good Samaritan acting in good faith shouldn't be punished...but...there is the problem of stranger intervention targeting the wrong person.

## Defense and Recovery of Property

### Defense of Property

- Reasonable force can be used to protect land and chattels
- Reasonable mistake does not excuse force directed at innocent parties.
- Deadly force is never reasonable.
  - Even slight force is unreasonable if it is excessive.
- Mechanical devices are never justifiable.
  - Ex) *Kato v. Briney* - Spring loaded gun.

### Defense of Home

- Deadly force not justified unless intruder threatens occupant's safety.
  - Ex) Felony

### Recovery of Property

- Can use reasonable force to recover property when in "hot pursuit" of the wrongdoer.

NOTES FROM DLM:

- [a] there is a privilege to use reasonable force to prevent a tort against real or personal property. No excuse for reasonable mistakes.
- [b] lethal force is never reasonable. "Reasonable" is in context to the offense - if a verbal warning will suffice, then hitting with a shovel is unreasonable.
- [c] force used mistakenly against a privileged party is not excused, unless the victim causes the actor to believe that the intrusion is unprivileged.
- [d] Defense of habitation - deadly force/serious bodily harm not justified unless the intruder threatens the occupants' safety either by committing or intending to commit a dangerous felony on the property. Also you can't eject a non-threatening trespasser when doing so would cause harm.

- [e] defensive mechanical devices are strongly discouraged by the courts. It is not privileged unless such force would be justified if the owner of the device were inflicting the harm. Deterrents to enter land, like barbed-wire fences, are generally held to not be intended to inflict serious harm, and they are visible (not traps) so they are OK.
- [f] recovery of personal property - reasonable force when in “hot pursuit.” Act at your own peril - mistake doctrine does not apply. Merchant’s privilege allows retention for reasonable periods to investigate possible theft, this does usually include a reasonable mistake clause.

## Necessity

Allows the Defendant to interfere with property interests of an innocent party in order to avoid greater injury.

**Public Necessity** - Injuring private property interest to protect the community.

- Complete defense
- No compensatory damages are owed
  - Blowing up Plaintiff's store and all the contents is not compensable when doing so to create a fire break and prevent further damage to the city.

**Private Necessity** - Person injures private property to protect a private interest valued greater than the injured property.

- Incomplete defense
- Defendant must compensate Plaintiff
  - Ex) D ties his boat up to P's dock to get out of a storm and save his life. Any damage done to P's dock must be compensated by D.
  - Punitive damages unavailable

NOTES FROM DLM:

- [a] designed to protect those who act in a greater-good sort of situation
- [b] Private necessity - you can interfere with the property right of another to avoid a greater personal loss or harm, but have to pay damages.
- [c] public necessity - you can interfere or take someone’s property to avoid more substantial public harm. No liability. Some courts are going against this tho.
- [d] Intentional injury and killing - there is no clear authority but this book argues that if one life is to be sacrificed to save multitudes then it probably should be deemed OK.

## Consent

**Types of Consent**

1. **Express** Can be written / oral / gestures
2. **Implied in fact** under the circumstances conduct conveys consent

Ex) jumping into a boxing ring - consent to getting hit is implied.

- Measured by objective manifestations of consent by Victim

- Negated if Tortfeasor subjectively knows that those manifestations are not giving consent
- 1. **Implied by law** consent to medical treatment by medical professionals if unconscious.
- Implied by law can be negated - Ex) bracelet that expresses objective to treatment for religious reasons.
- Medical procedure without express or implied consent = battery

**Consent Invalid if Induced by:**

- Fraud
- Physical Threat
- Economic Pressure

**Lacks Capacity to Consent if:**

- Child
- Insane
- Mentally retarded
- Under the influence of drugs

**Scope** Typically a question of fact for the jury

- Did a 13 year old consent to being tackled violently by his football coach or to being tackled by players of like age and skill?

**NOTES FROM DLM:**

- [a] if a victim gives permission the tort becomes privileged. Can be express or implied.
- [b] **EXPRESS AND IMPLIED CONSENT.** This is a valid defense when objectively manifested - the victim's secret but unexpressed lack of consent cannot be relied upon. However if D knows of the unexpressed desire that invalidates the defense. Express consent can be words or pictorial gestures. Implied consent is when, under the circumstances, the conduct of the individual reasonably implies consent. Also implied by community custom.
- [c] **CONSENT BY LAW** - legislatures dictating when consent for something is given - usually unconscious person consenting to medical treatment. Can be negated by wearing a medical alert bracelet to that effect.
- [d] **INVALIDATING MANIFESTATIONS OF CONSENT**
  - [1] **INCAPACITY** - an individual can be held to lack capacity to consent, ie a child cannot consent to surgery. Insanity or retardation = lack of capacity. Drug ingestion (incl. alcohol) can incapacitate and negate. BUT if the incapacity is not known or cannot reasonably be known, that does not negate the consent in most cases.
  - [2] **ACTION BEYOND SCOPE OF CONSENT** - If you agree to being punched in the stomach and they beat you all over, that is beyond the scope of your consent so they are liable. In the medical field, procedures beyond consent except where immediately necessary to save the patient's life are usually liable as battery, but not always. Should be careful and play it safe!
  - [3] **FRAUD** negates consent (ie lying about the nature of the tort) but fraud about say the name brand of an item does not because it is collateral. Medical consent is usually

treated as negligence, and then the standard is if a reasonable physician would have informed.

- [4] DURESS - consent under physical threat is invalid. Economic pressure does not negate. Situational duress can also negate - A is trapped and B demands something before letting A out.
- [5] ILLEGALITY - a person cannot consent to a criminal act (majority rule). Minority says they can consent as far as the tort liability unless the criminal law is specifically designed to protect members of the victim's class.

# REMEDIES

## REMEDIES - DAMAGES

**definition:** the money awarded to the person injured by the tort of another.

- 3 kinds:
  - Nominal Damages
    - a symbolic award given to the P when liability for a tort is established but no actual harm occurred or is proven with sufficient certainty.
  - Compensatory Damages
    - damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.
  - Punitive Damages
    - awarded entirely to the plaintiff when a tort is committed with malice.

### Property Damages

- based upon conception of value
- permanent deprivation of the property results in the market value being used
  - Typically measured at the time of the tort
- if real property is damaged but not destroyed, courts generally compensate the victim for the diminished market value of the property
- where malice is established, punitive damages can also be awarded

### Personal Injury

- Can be compensated for:
  - Medical expenses
  - Lost wages and/or impaired earning capacity
  - Other incidental economic consequences caused by the injury
  - Pain and suffering
    - Typically need some other type of physical injury compensation before pain and suffering damages can be awarded
    - How to calculate?
      - Melvin Belli -- anesthesiologist cost \$400 per hour to prevent pain in surgery; Plaintiff will have pain for X number of hours. You do the math.
      - Many states have statutory limits on the amount of P&S damages for some torts (typically med. malpractice)

### Medical Expenses

- An injured  $\Pi$  can be awarded all reasonable medical expenses caused by the tortfeasor
- $\Pi$  can also recover anticipated medical expenses caused by the  $\Delta$

- Can pose difficult issues concerning V's future need for medical care and anticipated cost of such care
- ordinarily the Π must introduce expert medical testimony to support these claims

#### **Lost Wages of Diminished Earning Capacity**

- V can recover for past and future lost wages or diminished earning capacity
- Π can be entitled to be compensated for wages or lost business earnings during the period the injury has impacted, and in the future is anticipated to impact, negatively on those earnings (alternatively, Π may seek recovery for past and future impaired earning capacity)
- Under this approach, Δ cannot reduce his liability by arguing the Π would have, for example, chosen to have lived on another family member's income rather than pursuing his own career
- Impaired earning capacity requires proof of the victim's specific ability, skills, and aptitude for a career path prior to injury
  - this makes recover for diminished earning capacity of children tort victims particularly difficult

#### **Incidental Economic Consequences**

- Also recoverable; travel expenses to seek medical treatment as well as expenses incurred for housekeeping services because of the victim's incapacity

#### **Reduction to "Present Value"**

- Generally damages for medical and other expenses are awarded in a lump sum
  - Ex.) an award for future lost earnings is intended to cover the next 20 years, the actual award must be reduced to take into account that \$ is being transferred to V in advance
- Reflects that V is being compensated for losses he has not yet incurred

#### **Pain and Suffering**

- Only that which is proximately caused by the tortfeasor
- If patient is unconscious they usually cannot recover for this because they are not aware of their loss
- No obvious monetary equivalent, monetary recovery can never fully compensate for such intangible injuries

**The Collateral Source Rule** The coverage of damages suffered by Plaintiff from sources other than his own funds (insurance proceeds, rich uncle, etc.) do not lessen defendant's obligation for those damages.

- Subrogation clauses in most insurance contracts mean that Plaintiff does not get to double recover, once from defendant and once from the insurer.

#### **Punitive Damages**

- Malice is required for an award on punitive damages
  - usually defined as ill will, hatred, or reckless disregard for the rights of plaintiff.
- Justified as a form of retribution and as deterrence.

- The amounts of punitive damages awards have been subjected to constitutional due process analysis.
  - Factors to determining if there is a lack of due process:
    - The degree of reprehensibility of the tortious conduct
    - The ratio of the compensatory damages to punitive damages
      - No set ratio, but SCOTUS has intimated that 4:1 is upper limit of appropriate (but this is not hard and fast)
    - The civil penalties (fines) for such conduct.

## Other Remedies

### NOTES FROM DLM: OVERVIEW

- Damages = the money awarded to the person injured by the tort of another. Types are nominal, compensatory and punitive.
  - Nominal = symbolic (often \$1) to show liability was established but no harm occurred/is proven sufficiently. Basically serves as judicial recognition of the wrong (can be helpful for boundaries in trespass cases). Torts that require damages to be actionable never have nominal damages.
  - Compensatory = compensation, indemnity or restitution for harm. Can be awarded for pecuniary and non-pecuniary losses. Property = diminished market value, replacement value, or rental value. Pecuniary = medical expenses, lost wages, diminished earning capacity, and other economic expenses. Non-pecuniary = pain, suffering, mental distress.
  - Punitive = punish and deter particularly egregious conduct. Discretionary and for an act with malice. Usually go to P, but some states get a cut.
  - There has been some statutory modification (ie malpractice damages).

### PROPERTY DAMAGES

- Interference with property is compensable and based on a theory of value. Permanent deprivation/ destruction = market value @ the time of the tort, occasionally real value. If damaged but not destroyed = loss of market value, sometimes cost of reasonable repairs instead. Sentimental value of the property can factor into which is chosen. Prevented from using = loss of use or rental value (or rental value of substitute property even if it exceeds rental value of own property). Discomfort and annoyances are also compensable. If D is aware of the sentimental value sometimes mental distress damages are awarded too. No sentimental value = no distress damages, but if there is malice perhaps punitive.

### PERSONAL INJURY

- V can be comped for medical expenses, lost wages/earning capacity, other economic losses, and pain/suffering
- [a] medical expenses - all reasonable expenses caused by the tortfeasor, such as payments for doctors, hospitals, nursing care, PT, abd testing. Also anticipated medical care which can be difficult to prove - usually expert witnesses are needed/used.
- [b] Lost wages/earning capacity - pretty much what it says. Actual losses, lost raises. OR past and future impaired earning capacity (instead of trying to prove lost income). Measures v's lost

potential to earn income, not dependant upon proof that that income WOULD have been earned. Usually industry standard is used to value v's time (even if V would value it higher). Requires proof of a specific ability/skills/aptitude for the career path prior to the injury. Education can prove very persuasive. For infants/youths, it is a guess at best. The estimates for all include the life expectancy of V prior to the injury.

- [c] things like travel expenses, housekeeping services, etc.
- [d] Reduction to "present value" - this takes into account that P is getting the money in advance, so interest rates can reduce this (court is assuming P will invest wisely). On the flip side, inflation can reduce the lump sum. BUT they are not subject to income tax.
- [e] Pain and suffering - includes comp for loss of enjoyment of activities as well as mental distress over an injury and any disfigurement. Also for reduction in life expectancy or concern over illnesses they may now be subject to. If V is unconscious he cannot recover - V is not aware of the deprivation, therefore cannot suffer from it. Jury values this on a per diem basis then multiply by a # of days BUT you can't have a "golden rule" judgment (how much would you require to change places with P?). The issue here is that there is no obvious monetary equivalent. As such there is not usually reduction of present value. Not compensating this would ignore a very real aspect of the tort, and provides deterrence. However \$ can never truly comp for these things. Complicated by the fact that this is what usually covers the attorney's fees.

#### MITIGATION/DOCTRINE OF AVOIDABLE CONSEQUENCES

- Injured v's have a responsibility to act to reasonably to limit or "mitigate" the losses incurred. Things like going to the doctor to get stitches, etc. If V doesn't do that, D is not liable for incremental losses that could have been prevented. This is different from comparative/contributory negligence, where P contributes to the tort in the first place somehow.

## NON-DAMAGES REMEDIES

### Restitutionary Remedies

- **LEGAL**
  - Replevin – you can get this before trial – allows you to get possession of a chattel that has been seized by the Δ (you just need a hearing and you can get the chattel back before trial)
  - Trover -- like replevin, but instead you recover the value of the chattel, not the thing itself
  - Ejectment – for restoring possession of land (similar to replevin)
  - Quasi-Contract – award of money; based on the value of an unjustly obtained benefit (ex. you harvest your neighbor's grain before the storm comes – he could get compensation for providing that benefit; if you are injured and worked on in the ER – concept of quasi-contract allows them to be paid for working on you)
- **EQUITABLE**
  - Constructive Trust – "trust" is a concept of property ownership where the property is owned in "trust" for someone or something else's benefit; "constructive" means something fake (construing something to be a trust);

- Requirements: Δ must acquire title to some property, have to show that the Δ keeping the property would result in unjust enrichment, (in some courts) must be no adequate remedy at law
- Advantages (over quasi-contract) – if you can trace the property you can get the benefit of enhanced value of that property; you can become a secured creditor of the property (owns money and has security interest in a particular thing so that they are sure to get the money back – ex.) bank can get back your house if you do not pay mortgage; car loans, etc.
- 
- **Equitable Lien**
  - Lien placed on Δs property to secure payment to the Π
  - Different from a constructive trust in that you only have a security interest up to the amount of your claim (not enhanced value); (ex. selling stock and using proceeds to build an addition on your house)
  - Must be misappropriation of the Πs property
  - Traceable
  - Unjust enrichment
  - No equitable remedy at law (in some jurisdictions)
- 
- **Injunctions** – an order from the court that has somebody do or refrain from doing something
  - Injunctions are equitable (not legal)
  - Classic example – someone is going to demolish a building; if you represent a historical society who wants it to be preserved you can get a court ordered injunction to get them to NOT tear down the building
  - Three types:
    - TRO -- Obtained ex parte, last only until the prelim. hearing.
    - Preliminary injunction -- issued at a hearing to last for the duration of the legal action (could be fore years)
      - This is a huge deal as it may determine the whole outcome (i.e., business shuts down b/c prelim. inj. prevents operation of the business)
    - Permanent injunction -- part of the judgment and order of the court following the full proceedings
- 
- **Equitable Defenses**
  - Unclean hands – if your yourself are being unfair
  - Laches – like a statute of limitations, but no definite time period -- Plaintiff waited too long and now it is unfair to allow the claim
  - Transfer of legal title to a bonafide purchaser – did not know it was purchased through stolen means (no notice)
  - Equitable Estoppel -- Parties changed position in reliance on the parties' acts and Plaintiff had opportunity for claim before the change in position

## ENFORCING JUDGMENTS

- damages are awarded but how are they enforced?
- If someone does not have enough money to pay a debt, there are various ways to enforce it

- - Seize assets
  - Judgment creditors
  - Federal marshal seize something to scare them into giving you the money  
(Example from Prof: *II had a judgement for \$2000 against an airline; fed marshal went to LAX, seized a 757 plane and they cut her a check fast*)

# DEALING WITH ACCIDENTS OUTSIDE OF NEGLIGENCE

## DEALING WITH ACCIDENTS (OUTSIDE OF EX-POST NEGLIGENCE)

### Strict Liability for Animals

- Generally
  - Under special circumstances, liability may be imposed without a showing of negligence or other form of culpability
- Elements
  - Absolute responsibility for safety
  - Trespassing animals
    - 2d Restatement §504 - strict liability for the possessor of trespassing livestock unless (1) the harm is not a foreseeable one; (2) the trespass by animals being "driven" along the highway is confined to abutting land; or (3) state common law or statute requires the complaining land owner to have erected a fence.
      - Owner of land abutting highway would have to prove negligence; if animals strayed further onto some other owners land, then that owner can recover under strict liability.
  - Wild animals on property, to licensees and invitees
  - Domestic animals with known, uncommon, dangerous propensities
    - Cats, stallions, mules, steers, horses, heifers, bees and parrots are commonly held as domestic animals.
  - Ultrahazardous / abnormally dangerous activities
    - Factors
      - Degree of danger
        - Risk of serious harm
        - Inability to render safe
      - Uncommonness of activity in area
    - Examples
      - Blasting
      - Oil drilling
      - Fumigation
      - Crop dusting
  - Defective products
    - Defendant must be a "commercial supplier" of the product at issue
      - Manufacturers, wholesalers, and retailers are commercial suppliers
      - Not casual sellers
- Actual causation
  - Generally the same as for negligence
- Proximate causation
  - Generally the same as for negligence
- Damages
  - Generally the same as for negligence

## Safety Regulation

- Enabling Statute – gives agencies the power to regulate things within their area. (FAA, FDA etc.)
- **Agencies make laws in two ways:**
  - Rule making process = “mini statutes” that have the power of law.
  - Adjudication = Ability to make decisions when disputes arise.
- Congressional branch grants power to regulatory agencies through an enabling statute. They have the power to take this power away at anytime. Congress also has the power to take money away from a regulatory agency.
- Judicial branch reviews rulemaking, reviews adjudications and can overturn agency action when it is unconstitutional. Generally the courts defer to the agency unless they do something *really* stupid.

## Workers’ Compensation

**Overview** A statutory regime that replaces tort law. Employees give up right to sue, but are automatically compensated for almost any injuries arising out of their employment regardless whether their employer is negligent.

### Who is an employee?

- **Right-To-Control Common Law Test**
  - If the employer has the ability to control your work, then you’re an employee
  - This test is more narrow than the economic realities test
  - The IRS uses the Right-To-Control Test to determine whether workers are employees for the purposes of federal taxation.
- **Economic Realities Test**
  - If the worker is economically dependent on the hiring party, then the worker is an employee.
  - Factors considered:
    - **Control**
      - If a D controls the manner in which the work is done, rather than relinquishing control to the worker, the D is an employer
      - This factor is similar to the entire common-law test.
    - **Profit and Loss**
      - If the workers are more exposed to profit and loss, then they are likely an independent contractor
    - **Capital Investment**
      - Interrelated to profit-and-loss, the more of an investment workers make in tools, supplies, or other initial outlays, the less likely they are to be employees
    - **Degree of Skill Required**
      - High degree of skill militates in favor of workers not being employees
    - **Permanency**
      - The more temporary the relationship, the less likely it is to be an employment relationship. Permanent arrangements (even if they are seasonal and recurring) favor finding that workers are employees.
    - **Integral Part of Hiring Party’s Business**

- The more integral the work is to the would-be employer's business, the more likely it is that the persons doing such work are employees.
- **Dependence of Workers**
  - The more the workers depend upon income from the D, the more likely it is that they are employees. Independent contractors often have more than one party for which they work.
- Fair Labor Standards Act (FLSA) which requires minimum wage
- This test is more broad than the Common Law test due to FLSA (wanting people to get minimum wage)

#### **Pros and Cons for Workers**

- Pros for Workers
  - Don't have to prove fault, any injury from workplace qualifies for coverage
  - You can recover for accidents that did not happen with negligence
  - Causation and duty concepts taken away, replaced w/ "in the course of and arising out of employment"
  - Because you don't have to prove fault, there is no real need for lawyers
  - Generally get benefits like medical cost and part of lost wages
- Cons for Workers
  - Give up suing under tort law
  - Thus, can't get punitive damages or kinds of compensatory like pain and suffering

#### **Needs to Be a Personal Injury**

- Physical-Physical: Generally compensable in most jurisdiction
  - Where both the cause and the effect are physical
  - Ex- Security camera falls from ceiling and causes blackjack dealer to lose a finger.
- Physical-Mental: Generally compensable in most jurisdiction
  - Where the cause is physical and the effect is physical and mental
  - Ex. security camera falls in front of blackjack dealer, who loses her arm, causing a nervous breakdown.
- Mental-Physical: Generally compensable in most jurisdiction
  - Where the cause is mental and the effect is physical
  - Ex. Employee held up at gunpoint, suffers emotional distress causing her to injure herself.
- Mental-Mental: Not held compensable in most jurisdictions
  - Where both the cause and the effect are mental and there is no accompanying physical cause or effect
  - Ex. Employee is held up at gun point and suffers a nervous breakdown as a result.

#### **Has to Result From an Accident**

- Long term exposure is generally held to be not an accident
  - E.g. Asbestos linked cancer

#### **Has to Occur In the Course of Employment**

- Recreational Activities: not usually covered?

- E.g. Company softball game - may or may not be covered
- Reasonable Expectancy Test - if employee was expected to participate in recreational activity, then covered
  - must be met both subjectively and objectively
  - Relevant Factors: encouragement by employer, benefit to employer, involvement by employer
- Horseplay: usually covered
  - e.g. rubber band fights
  - Instigator Defense by employer - the person who started it doesn't get covered, generally
- Commuting and Travel
  - Coming and Going Rule:
    - Going to work and back home is generally not covered
    - Business Trips: Generally not covered, but increasingly are.
  - Exceptions
    - Necessary Narrow Passage
    - Special Hazards Near Employers Property
      - E.g. Avalanches on road up to ski resort
    - Returning to Work
      - When employee has been at work and goes home, but is called back in
      - Usually covered
    - Travel On Employer Owned Conveyances
      - Exception applies even if not clocked in yet
    - If Your Vehicle is Required at Work
      - E.g. Reporter at newspaper - commute is covered here because reported needs vehicle at work

### **Must Arise Out of the Employment**

- Replaces Causation
- Need to Ask "What Type of Risk Is This?"
  - Occupational Risk
    - Covered
  - Personal Risk
    - Not covered
    - I.E. Dying of a heart attack because of poor dieting
  - Neutral Risk
    - Proximate Cause Doctrine
      - If the employer did something creating a foreseeable risk of harm to the employee
      - Generally Covered, Not very Favored
      - Most Conservative
    - Peculiar Risk
      - Is there a risk peculiar to that workplace
      - Not Favored
      - Accident must be something the public would not normally be at risk from
      - I.E. Having a box of GAP sweaters fall on you

- Increased Risk
  - I.E. Like a delivery man
  - Used by courts
  - Ask-does employment put you at increased risk for harm?
- Actual Risk
  - Is the accident an actual risk of employment
  - Does not include acts of God like meteor strikes
- Positional Risk
  - If you were where you were because of your job.
  - Any accident
  - Includes Acts of God
  - Most Liberal

### **Types of Benefits**

- Disabilities Benefits
  - Pay for your inability to work: lost wages, death, permanent disability that harms ability to work
  - When reach a plateau, get lump sum permanent disability payment

### **Type of payments**

- Temporary Partial Disability
  - Doesn't prevent you from work but does prevent you from working to full capacity
- Temporary Total Disability
  - Can't work at all for certain amount of time
  - Cash payments equal to some percentage of wages (e.g. 2/3 - not taxed)
- Permanent Partial Disability
  - Different states have different ways of doing this - some uncheduled (case by case); others have schedules
    - Have nothing to do with reduced earning capacity (e.g. losing a leg as a typer and losing a leg as a supermodel - both get same amount if supermodel is an employee)
- Permanent Total Disability
  - Usually based on earnings capacity - what disabled party lost out on
- Death
  - Survivors get some kind of payment in most jurisdictions

### **Exclusivity**

- If the employer intentionally hurts you, then you can sue
- If it is wanton or reckless, it depends
- Can sue over worsening of injury even though initial injury covered by workers comp
- Dual capacity relationship with employer
  - E.g. Employee works for chicken company and eats chicken as consumer, employee can sue in court over tainted chicken

# SPECIAL ISSUES CONCERNING RIGHTS OF ACTION

## Implied Rights of Action

- Is a term used in United States statutory and constitutional law for circumstances when a court will determine that a law that creates rights also allows private parties to bring a lawsuit, even though no such remedy is explicitly provided for in the law.
- Implied causes of action arising under the Constitution of the United States are treated differently than those based on statutes.
- These are similar to *negligence per se*, but are a little more direct because they avoid negligence and the standard of care.

### Questions to ask to determine if a particular statute has an implied right of action

- What was the legislature's intent?
  - Explicit?
  - Implicit?
  - Is the plaintiff one of the class for whose especial benefit the statute was enacted?
  - Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
- Regularly used implied rights of action statutes:
  - Rule 10-b5 (SEC) -- unlawful deceit and fraud in securities transactions
  - Title IX -- gender discrimination in educational facilities (typically used in sports)

## Bivens Action

- Most public officials do not have absolute protection for violating constitutional rights
- If (1) constitutional rights are violated (2) by federal official(s) (3) under color of federal authority, there is an action for damages
  - Bivens v. Six Unknown Agents -- suit for violation of plaintiff's 4th Am. search and seizure rights
    - subsequent case law has extended Bivens to other constitutional violations
    - Under Bivens you are suing the individual in their individual capacity, not the government

## 1983 Action

- 42 U.S.C. § 1983 Civil action for deprivation of rights
- Constitutional tort against non-federal actors
  - Leaves out federal government, but is for government officials under color of state authority in federal action if civil rights are deprived
  - Prima facie case is:
    - Plaintiff was deprived of a constitutional right
    - by someone
    - acting under color of state or local authority

# SPECIAL ISSUES CONCERNING PARTIES TO THE LITIGATION

## Firefighter Rule

- *Precludes firefighters* from suing for injuries sustained fighting *negligently-started fires*
  - Immunity based on status of P (as opposed to D: see below)
  - Does not apply to ARSON (this is intentional fire and therefore is not negligence)
  - Assumption of risk & compensation reflects ordinary risks of responding to negligently-started fires
- Policy: Fire V's deterred from seeking assistance if risk of liability.

## NOTES FROM DLB:

- [C] THE FIREFIGHTER'S RULE - precludes firefighters from suing for injuries sustained fighting negligent fires. Generally accepted and suggests that pros shouldn't be able to recover for negligence they are supposed to fix. they are assuming the risk and public policy (ie we want people to report ALL fires).

## Immunities

- Immunities protects D from liability not because of P's behavior, but because of D's status and relationship to P

## Charitable Immunity

- Historically: charitable organizations immune from tort liability.
  - Justification: protect important work charities perform for their communities; those funds donated to charity w/ purpose of benefitting a certain cause shouldn't be diverted as a result of litigation; beneficiaries have implicitly waived their right to sue
- Today: many state abolished. Most remaining states have only partially retained the immunity (i.e. when P is a beneficiary).
  - Why abolish? Prevalence of liability insurances and the business-like operations of large charities make it harder to justify absolute immunity.

## Spousal Immunity

- Historically: Spouses could not sue each other.
  - Rationale:
    - Historically b/c of W's status as H's chattel. A chattel can't sue.
    - Recently: Suits damage marital harmony, risk fraudulent testimony & collusion where liability insurance involved, incites frivolously legal complaints over trivial, if heartfelt (!), disagreements.
- Today: Eliminated in majority of states. Those that have retained it tend to impose limitations. (no immunity for property & economic torts)

- Rationale: Tortious conduct, not liability, creates disharmony. Insurance fraud & frivolous suits can exist in many contexts & generally frivolity not used as a defense for denying legit recovery.

### Parent Child Immunity

- Historically: Precluded tort actions between parents and non-adult children.
- Today: Exists in many jurisdictions.
  - Justifications: Cts reluctant to impose judicial review of child-rearing.
    - However, immunity less compelling b/c domestic violence should be subject to judicial review. Cts can likely distinguish b/t a school of child-rearing and negligent child care.
  - Never held to bar property or purely economic torts; Immunity for intentional torts such as assault, battery & personal injuries caused by negligence.
  - Immunity cuts both ways: sometimes a parent WANTS to be sued for insurance purposes.

### Governmental Immunity

- CL: Complete immunity
- Today: Immunity **for discretionary** (policy-making) functions but **not ministerial** (policy implementation) acts. Most immunity for local govs abolished w/o reference to categories.
  - Ex: Gov decides to build a bridge & bridge is built negligently. A person injured by the negligently built bridge can sue b/c bridge building was a policy implementation.
  - Rationale:
    - Held accountable for discretionary functions through electoral. Immunity would interfere w/ democratic process & infringe on separation of gov.
    - Ministerial actions are not manifestations of pub policy decisions by electorate.
- See FTCA.
  - State law varies
    - Ex. Koffman v. Gaarnett -- 13 year old football tackled by coach had to state a claim of gross negligence or an intentional tort since Va. sovereign immunity covered the "simple" negligence of the coach as an employee of the school board.

### NOTES FROM DLB:

- [a] protects D from tort liability. Not dependant on behavior but on D's status or relationship to P. IE a husband can't "batter" his wife by kissing her.
- [b] charitable immunity - charitable organizations used to be immune but this is changing. it used to be a good-samaritan sort of thing but as these are becoming more and more businesslike it is harder to justify. Some states have abolished the immunity, others have only partially retained it.
- [c] spousal immunity - it used to be that spouses couldn't sue each other - legal ID of wife was not separate from husband. the reasoning changed to promoting harmony, etc in marriage but that isn't great either. the majority of states have eliminated spousal immunity, or have retained it with limitations.

- [d] parent-child immunity - precludes action between parents and non-adult children. still exists in some form in many jurisdictions. some have abolished, some have it with restrictions, usually to preclude negligent parenting. No real definition of that. the persistence is largely due to judicial reluctance to pass judgment on parenting styles. Domestic abuse is an exception. Also it forces parents to be more responsible.
- [e] governmental immunity - protects the government from tort liability. usually allows immunity for discretionary functions (policy making decisions) but not ministerial functions (government conduct which implements or executes policy decisions). This is subtle and not always consistent. The extent to which it applies varies between state and federal levels and between jurisdictions. see 28 USCS 2680(h) for the list, and also immune to strict liability. State torts claims acts detail what torts each state can be sued for. Also local governments, like cities, have “governmental” and “proprietary” functions and only can be held liable for the “proprietary” ones. now usually regulated by state statute.

## **Joint Tortfeasors**

### **Acting In Concert**

- A person acts in concert to commit a tort with another when she aids or encourages another in committing the tort
- If an individual intentionally aids or encourages another to commit a tort, they are equally liable

### **Independent Acts Acts Causing a Single Indivisible Injury**

- Two or more individuals who act independently but whose acts cause a single indivisible tortious injury are also joint tortfeasors.

### **Vicarious Liability**

- Employers are held liable for the actions of their employees within the scope of their employment. (Respondeat superior)
- Employers are generally not held liable for actions of independent contractors.
  - Exceptions
    - When Independent Contractors perform superhazardous activities
    - When an company closely supervises the contractor's day to day activities
- Parents, under common law, are not liable for their children's actions
  - Many states have enacted statutes creating liability for children's intentional torts
- Owners of motor vehicles are generally not liable for the negligence of a permitted user

### **Joint and Several Liability**

- Joint tortfeasors are "jointly and severally" liable for the plaintiff's damages
- Each individually is responsible for the entire damages

NOTES FROM DLB:

### **OVERVIEW AND DEFINITION**

- joint tortfeasors are 2+ individuals who either (1) act in concert to commit a tort, (2) act independently but cause a single indivisible tortious injury, or (3) share responsibility for a tort because of vicarious liability. they are both fully liable for to P for the damage award. This has been limited to protect more affluent d's from shouldering more than their fair share of liability. The method of sharing liability is controversial.

## JOINT TORTFEASORS

- [a] acting in concert - when an actor aids or encourages another in committing the tort. no requirement that it be the but for cause.
- [b] independent acts causing a single indivisible injury - this is only if V's injury cannot be separately allocated to either tortfeasor and there was no aiding or encouraging between the tortfeasors.
- [c] vicarious liability - where you can be held liable for someone else's tortious actions - ie respondeat superior. employers cannot insulate themselves by enacting safety rules or even by taking all possible precautions. because they are ultimately responsible for the acts of their employees within the scope of employment. not liable for contractors, except for public policy reasons or inherently dangerous activities, or if they are under close supervision. also parents can be held liable for acts of their children, usually per statute, same with car owners who loan the car to someone.
- [d] joint and several liability - "several" = more than one tortfeasor. "joint" = each of the tortfeasors is fully liable for all the damage. P can't get multiple damage amounts but any 1 tortfeasor can be tapped for the whole amount.

## SPECIAL PROBLEMS AFTER COMPARATIVE FAULT

- [a] allocations of liability among tortfeasors - when all are required and able to pay, how do you decide who pays how much? traditionally is was by pro-rata share. Has been replaced in many areas by comparative negligence model. Jurisdictions disagree about whether a negligent P should also share responsibility for a negligent tortfeasor defaulting. some states require the other tortfeasors to make P whole, others re-allocate according to original theory so p has to take on some of that.
- [b] impact of settlement on percentage shares - difference between settlements that act as satisfactions and those executed as releases. satisfaction = receipt of full compensation and no more liability for the injury. a release = P surrenders their claim against 1+tortfeasors. historically a release for one released all and was gotten around by a covenant not to sue. now a release only effects the named party. This effects in 1 of 2 ways:
  - (1) settling D's payment is deducted from damages, rest of tortfeasors split the difference. Often a hearing requirement to make sure this is a good faith settlement so the other tortfeasors don't overpay. popular because it encourages settlement over litigation.
  - (2) settling D's percentage of fault is deducted from the final award (regardless of it P got more or less than that amount). Puts P at risk but protects non-settling D's. Mary Carter agreements to reduce D's liability depending on the outcome of the trial are allowed some places, others only if public, and still others not at all.
- [c] contribution and indemnification - if P doesn't name someone they should have, how does the named D go about getting money from the other D? In most states they can seek contribution in court. They must prove the others liable. Procedural rules also allow D to implead the others. cannot seek contribution from an immune D. Some areas also allow

indemnification if the non-named D was far more liable, allows a complete shift of liability instead of just a contribution. usually allowed in employment or product liability situations (the retailer or employer can get indemnification from the employee or manufacturer). In pro rata jurisdictions, allows for equitable shifting of responsibility to the more liable tortfeasor. this also allows flexibility in deciding who pays more instead of who pays all.

- [d] policy issues - comparative responsibility has undermined the “joint and several liability” concept. has frequently been altered by statute. the problem is the minimally liable but deep-pocket Ds are held liable for far more than their share when insolvent D’s can’t pay. BUT that is really just a jury estimate, they all were liable so it is their joint responsibility to make P whole. “joint and several” better takes care of P but can harm deep-pocket D’s, but that can have negative consequences when D’s stop offering goods and services to avoid being held totally liable financially regardless of their actual fault. it was more appealing prior to contributory negligence theories. and comparative negligence is better still because it allows recovery but not full recovery based on P’s actions.

## **Allocation, Contribution, Indemnification**

### **Allocations of Liability Among Joint Tortfeasors**

- Traditional approach
  - Each defendant is liable for a pro rata share of the damages based on the number of tortfeasors
  - Replaced in most states
- Comparative approach
  - Liability is divided by the proportion of responsibility each defendant bears towards the plaintiff.
  - This approach does not alter joint liability - If one party is unable to pay, the others have to pay that parties share.

### **Impact of Settlement on Percentage Shares**

- If one party settles the remaining tortfeasors still remain liable
- Two primary approaches to dividing responsibility to remaining parties
  - Minority approach - The amount of any settlements is subtracted from the total awarded damages.
    - Example - Defendant #1 settles with plaintiff for 200,000. Plaintiff then wins \$1,000,000 in court against other two defendants. They are now liable for only 800,000.
  - Majority approach - Remaining defendants pay a portion of the total damages based their proportion of fault.
    - Example - Defendant #1 settles for 200,000. Plaintiff then wins \$1,000,000 in court against two other defendants. Jury rules that remaining defendant was only 50 percent at fault. The remaining defendant is only liable for \$500,000 instead of \$1,000,000 or \$800,000

### **Contribution**

- If a plaintiff fails to name one or more potential tortfeasors, the named parties are fully liable
- Originally, courts would not allow named parties to seek contribution from non-named parties

- Defendants can now seek appropriate contribution from unnamed parties
  - Exception: Intentional Torts
  - States differ whether any contribution must be sought after a court judgement or can be sought after settlement.
  - Cannot seek contribution from immune parties (Example: Cannot obtain contribution from parents if they are immune from suit from their child)

### **Indemnification**

- Defendants may seek indemnification from other parties.
  - Allowed where a defendant is vicariously liable for another's negligence
  - Allowed where a retailer is liable for selling a defective product negligently constructed by the manufacturer
- Can be established by contract
  - Example: Employer agree to accept all liability for employee's actions.

### **Wrongful Death**

#### *Overview*

- All jurisdictions, by statute, permit an action against a person who negligently inflicted wrongful death.
- Principal Issue is who has standing to sue

#### **Standing**

- Spouse, parents, and children are usually permitted to bring the action
- If the victim leaves his estate, for example, to a museum, the museum can bring a wrongful death and/or survival suit and receive the money.
- If the victim has no immediate family and is killed instantly, the defendant has no civil liability for anything.
- Courts tend to not allow cohabitants, including significant others and life companions, to sue

#### **Damages**

- Initially only pecuniary damages could be recovered, which usually led to minimal recovery in many cases.
- Damages has been expanded over time
  - Most jurisdictions permit dependents to recover lost support and other benefits arising from the death
  - Some states have expanded damages to included lost love and affection
  - Most states still do not permit recovery for grief, sorrow and upset.

#### **Proof Problems**

- Plaintiff must prove with some degree of certainty the losses suffered from the tortious act
- Must establish relevant time period for support, focus on the value of the support that would have been provided as well as value of lost services
- Plaintiffs need to provide factual support for claim of damages not pure speculation

## Defenses

- P's recovery may be limited or barred based upon P's own fault.
- Also, recovery could be limited if deceased contributed to their own death.
  - In contributory negligence jurisdictions, the wrongful death P's action is barred.
  - In comparative negligence states, recovery is reduced by the deceased's percentage of fault.

## Cases

- *Benally v. Navajo Nation*
  - When a Navajo dies, immediate family members are able to recover general damages, special damages, monetary value of the life of the deceased minor, and for the loss of affection, love, and companionship of the deceased minor child.

NOTES FROM DLB:

## LOSS OF CONSORTIUM, WRONGFUL DEATH, AND SURVIVAL

- [a] overview - sometimes a tort hurts more than just the direct victim. Loss of consortium and wrongful death are types of injury and the damages may be recovered outside of a negligence context. You have to look at WHO can recover, as well as WHAT is recoverable (duty issues).
- [b] Loss of consortium - If D inflicts serious physical harm on V, the P (who is married to V) can recover too. The original idea was to compensate a husband for the loss of his servant-wife services. Has expanded to include the loss of a husband as well as the loss of companionship, comfort, and sexual services. Recovery is not automatic - P must prove the loss (the injury led to an impairment of a formerly fulfilling and strong relationship). Courts are hesitant to expand the rights beyond spouses, largely because of how vastly that would increase liability (ie several children and a spouse v. just the spouse). This is slowly expanding to parents and children, especially noting the inconsistency that they can recover for wrongful death but not loss of consortium? Some courts get around this by defining it to be a sexual services thing. Life partners and cohabitators have been repeatedly denied.
- [c] Wrongful death - all jurisdictions provide for wrongful death recovery for a spouse and minor children. Common law used to not provide for this at all, and because of the death there was no loss of consortium charge. That was changed via statute in England in 1846, which influenced the US courts
  - [1] who may recover - P has to be a close relative, usually defined as spouse, parents, and children. Some states exclude siblings, or stepchildren who haven't been adopted.
  - [2] recoverable damages - it started out as pecuniary damages only, which meant minimal recovery for the young, the old, and those not working outside the home. Today there is a widespread loss-to-the-survivor approach: what is the survivor missing out on, such as lost support and replacement value of services provided. Some jurisdictions include consortium-type damages also. Most do not allow damages for grief, sorrow and upset arising out of the death.
  - [3] Proof problems - P must prove the losses with some degree of certainty. Start with the time period for support - usually the remainder of decedent's life or P's life, whichever is less. Then the value of the support provided - you can't take ALL of Dec's wages because some of them would have gone to Dec. Also Dec's character is important - if they were stingy you get less. Minor children are tough cause you don't

know what they would have done with their lives. Things like education level, and other professionals in the family can help establish a potential income level. Some jurisdictions limit this by saying any award should be lessened by what the parent would have spent on raising the child (food, clothing, etc) but others get around this by being liberal with the “pecuniary” damages or by allowing recovery for intangible damage like loss of comfort and companionship.

- [4] defenses - P’s negligence can be a factor (if P didn’t supervise her child closely enough for example). Or V’s wrongful actions, if contributing to the death, may reduce recovery for P. In contributory negligence jurisdictions, the action would be barred entirely, in comparative fault jurisdictions damages would be reduced.
- [d] Survival - Created by statute but different from wrongful death in that they are a continuation of the decedent’s action against the tortfeasor. It is not a new legal claim, it is a pre-existing one. Brought by the administrator, the executor or personal rep of the estate. That person works to recover any damages Dec. would have gotten if they had lived. Limited to no punitive damages and minimal pain and suffering, also any defenses that could have been used against Dec can still be used. Instant death = no survival action (no chance of surviving). The tortious conduct does not have to be the cause of death for a survival action: D injures P and P’s car, but P dies of natural causes before this could go to trial. No wrongful death suit but a survival action, sure. Usually wrongful death and survival are provided for in statute. You can do both if the wrongful conduct contributes to the death (survival to get pain and suffering, medical expenses, lost wages, etc). Then wrongful death to get post-death expenses and losses.

## Survival Actions

"Overview"

- An action created by statute allowing survivors to continue existing claims after plaintiff has die
  - The action is brought by the administrator, executor, or personal representative of the decedent's estate
  - The rep can recover any damages the decedent would have recovered if he/she had lived
  - Estate can usually recover the decedent's medical expenses, lost wages, and sometimes pain and suffering.
    - Pain and suffering can only be awarded if the decedent was aware of the pain prior to death
  - Damages are for the decedent not the family but they eventually pass to the family as a part of the estate.

## Defenses

- Any defenses that could have been raised against the decedent could be raised by the rep
- Where the defendant's tortious conduct leads to the instantaneous death of the plaintiff, there is no survival action available to the plaintiff's estate.

## Loss of Consortium

- Is a claim from someone who is related to (closely connected to) the direct victim of tortious conduct where the victim doesn't die to recover the lost value of the services the victim provided
- Allows compensation to spouse of person who was injured due to the negligent actions of a tortfeasor.
- Started with compensation to a husband for loss of his wife's services due to D's tortious conduct.
  - Gradually expanded to include more than the economic loss, but also loss of companionship, comfort, and sexual services.
- Virtually all states now permit either spouse to recover.
- Courts have been reluctant to expand beyond spousal recovery because the potential of double recovery (more than one child recovering, or parent and child).
  - But restricting recovery b/c the spouse context itself raise substantial concerns about potential collusion or double recovery.
- Economic loss as well as intangibles such as companionship, comfort, and sexual services. Is not an automatic recover. Must prove loss.
- Statutes broaden what and who can recover
- All states now allow for spousal loss of consortium
- Victim is still alive
- Conduct of the initially injured party may affect recovery
  - Recent movement to expand it to parents and children
- In some courts it only applies where you can show pecuniary (money) losses

## **Wrongful Birth, Conception, Life**

### **Wrongful Birth**

- Parents sue the physician for a negligently performed sterilization on one of them
  - attempt to obtain compensation for the costs of the pregnancy and delivery, cost of corrective sterilization, lost wages of mother, and loss of consortium for father -- universally compensable according to DLM
    - More controversial = cost of raising child to 18 years old -- most courts find this non-compensable
      - either "emotional bastardy" -- child is harmed emotionally by the forced judicial support by a stranger
      - OR, finding that the birth of a child is not a harm.
      - Some Courts use a "benefit rule" where the costs of raising the child are awarded, but the jury is required to offset that award by the emotional benefit of the child to the parents
        - Critique = this is comparing apples (\$) to oranges (emotions); how do we value the benefit to the parents?
          - Counter = juries have to do this type of valuation of the emotional strain on plaintiffs all the time

### **Wrongful Conception**

- Child is born with serious birth defects that Dr. was negligent in diagnosing in utero

- Parents essentially say that but for the misdiagnosis, the pregnancy would have been terminated
  - This is the parents suing in their capacity as parents
- An attempt to collect the funds necessary to pay for the tremendous costs of caring for children with these birth defects
- In jurisdictions that allow the Cause of action, these damages are available
  - Some also include emotional damages of the parents due to the disability
- Controversial because the mother/father have to prove to the jury by preponderance that given the right information, they would have terminated the pregnancy

### **Wrongful Life**

- Most controversial
- Cause of action of the child from the situation under wrongful conception
  - Essentially suing on the theory that the child is being injured by his or her own existence
    - This creates a huge damages hurdle -- how do we make someone whole when pre-injury state is non-existence?
- Most courts reject this claim -- damages unmeasurable and policy says life should always be chosen over nonexistence
- 
- Some courts allow the claim as a piggy back to a WC claim
  - Allows the child to recover for the costs of care for the child's life expectancy that out lasts that of her parents (WC cost of care limited to parent's life expectancy)
    - If cost of care for child's life expectancy = \$1,000,000 and parent's life expectancy is only half of the child's parents recover \$500,000 in WC claim and child recovers \$500,000 in WL claim

### **THE FEDERAL GOVERNMENT AS NEGLIGENCE DEFENDANT**

## **Federal Torts Claim Act**

### **Overview**

- Sovereign immunity prevents suits against the Federal Government
- The Federal Torts Claim act is a limited waiver of sovereign immunity.
- Law has both substantive and procedural components

### **Procedure**

- Plaintiffs must first file an administrative claim with the appropriate agency
- Agency then has six months to allow or deny claim
- Upon denial, a plaintiff may sue in federal district court

### **Substance**

- The court applies the relevant state law.

- If, under State law, a private actor would have a duty in negligence, then the U.S. has a duty for negligence
  - There is no strict liability for the Feds = nuclear accident you must prove negligence
- The tortious action must have been committed by a federal employee acting within the scope of his or her employment.
  - Contractors' generally cannot create federal liability.
- Many exceptions are provided that override state law
  - Cannot sue under these causes of action:
    - Assault
    - Battery
    - False imprisonment, false arrest
    - Defamation
    - Misrepresentation, deceit
    - Interference with contract rights
    - Actions using strict liability -- can sue for the harm but must prove negligence.
  - Combatant actions of the military
  - Claims arising in a foreign country
  - Prison inmates cannot sue for emotional injury absent unless related to a physical injury
- **Discretionary decisions are not subject to FTCA liability because to do so would allow anyone to sue the Feds over policy decisions.**
  - This is the biggest area of contention -- what is a discretionary function?
  - Examples:
    - Nat. hist. site in PR; guide recover for injuries sustained for falling over a low wall at site. Superintendent should have provided a fence?
      - Discretionary -- Superintendent could follow or disregard safety recommendation.
    - Yellowstone; Person fell into thermal pool; argued should have been rails or warning around the pool.
      - Discretionary -- 1974 -- US is not an insurer of safety. These are a natural occurrence. The danger is obvious, apparent and notorious.
    - National Forest service; Contractor hired to cut down dead trees previously killed by a deforestation effort. One dead tree fell on another K that was hired to cut down live trees. Should have warned of previous effort to deforest.
      - Not discretionary -- Did not immunize; relevant policy decision was to deforest, liability is from failure to warn of the policy decision.
    - Civil action brought by a woman and children for death of husband in working for Lockheed on an Air Force Base. Plane crashed during a maintenance flight.
      - Not discretionary -- based on neg. of the way the designed or installed elevator mechanism, not based on gov't decision to install a fail-safe elevator function.
- **FTCA is for when the policy is carried out in a negligent manner.**

# HIATUSES - CANADIAN AND INDIAN LAW

## Canadian Law and Courts

- "Bijural" system
  - English Style Common Law applies to every thing, except private law (torts, property, contracts, family) in Quebec
    - In Quebec, private law is covered by the Civil Code (ala France)
- Trial by jury
  - Guaranteed for serious criminal offenses
  - Available from some civil trials, but rarely used, if ever
- Federalism in the Court structure
  - Basically follows Federalism in US Court structure
  - Differences in Canada
    - Feds choose the provincial judges
    - Feds pay provincial judges and can remove them (but has never exercised the removal power)
  - Cases having Federal jurisdiction:
    - province vs. province
    - federal government vs. province
    - intellectual property cases (e.g., copyright)
    - citizenship appeals
    - Competition Act cases
    - cases involving Crown corporations or departments of the Government of Canada
    - review of decisions and actions by federal boards, commissions and tribunals
- Supreme Court of Canada
  - Final court of appeal
  - Appellate jurisdiction over all other Canadian courts
    - Similar appeal process as SCOTUS -- must be given leave to appeal by 3 justices
      - Exception: Criminal case where int. app. ct. had a dissent on a point of law require no leave to appeal to SCC

## Three things to know about Canadian Tort Law

- 1. Normally, civil cases do not have jury trials (it's usually judge alone).
- 2. The SCC has effectively capped personal injury damage awards, such that the multi-million dollar amounts awarded by some American courts/juries are simply impossible in Canada.
- 3. There are cost consequences for launching an unsuccessful lawsuit. This discourages frivolous litigation because if a plaintiff sues and loses, the plaintiff will be required to pay some portion of the defendant's legal fees.

## **Tribal Law and Courts**

Really there is a tri-level system of gov't/courts in the US -- Federal, state, and tribal.

- Tribal courts can obtain jurisdiction over non-tribe members under federal statute, by:
  - 1. non-tribal people can subject themselves through agreement
  - 2. non-tribal people threatening the health and welfare of people of the tribe
    - Federal Court have been hesitant to broadly construe these exceptions

# OBLIQUE TORTS

## Fraud

### Overview

- Intentional or reckless misrepresentation which induces a victim's reliance and causes economic damage.

### Elements

- A material misrepresentation
  - Must be of a past or present material fact
  - Material means that a reasonable person would regard it as important
  - Failure to disclose a fact can qualify
- The defendant acted with the requisite scienter:
  - the statement was false or made it with reckless disregard as to its truth or falsity
- The defendant intended to induce reliance:
  - A joke which is not intended to be taken seriously is not actionable
- The misrepresentation caused plaintiff's justifiable reliance
  - If the victim is not deceived, the tort is not actionable
  - Reliance must have been foreseeable by defendant
- Pecuniary damages resulted to the plaintiff
  - Majority view: Damages based on the "benefit of the bargain" if the representation had been true
  - Minority view: Damages limited to actual losses that would restore plaintiff to position prior to occurrence.
  - Mental distress generally not recoverable
  - Punitive damages available if done with malice.

NOTES FROM DLB:

### FRAUDULENT MISREPRESENTATION

- [a] provides recovery for pure economic loss with no real injury required. Can also get punitive damages if malice can be proven. The idea is that an intentional or reckless misrepresentation influences V's reliance and causes economic damages. Should be distinguished from liability for negligent or innocent misrepresentations. Can exist as part of other torts - a misrepresentation that causes physical harm for example. This is an attempt to address liars and how vast the impact can be.
- [b] definition - 5 elements: (1) a material misrepresentation, (2) D acted with the requisite scienter (knew the statement was false or made it with reckless disregard as to its truth or falsity), (3) D intended to induce reliance, (4) the misrepresentation caused P's justifiable reliance, and (5) pecuniary damages resulted to P.
  - [1] Material misrepresentation by D - the misrepresentation must be of a past or present material fact. Even if the statement is technically correct, if it is stated in

such a way as to mislead it can still count here. Does not have to be in words - physically disguising a defect works too. Generally of “present” fact - if D made a promise with no intention of keeping it will satisfy here but just a broken promise doesn’t if the promise was made in good faith. Misrepresentations of opinion are usually not actionable. Exceptions = an expert talking to a non-expert, or someone who represents that they are an expert or about their objectivity. Can happen with misrepresentations of law, too, but it is tough unless the liar represents themselves to be a law expert. The misrepresentation must also be material - a reasonable person would attach importance to it when they’re figuring out what to do, or the maker of the statement knows or should know that the person they are telling is likely to regard it as important. Sometimes there is a duty to disclose; courts have been expanding on that, also a duty to disclose and correct misimpression. Some courts have a rule that a seller must disclose material defects the purchaser wouldn’t discover.

- [2] Scierter - D has to know that the misrepresentation was false or D has to act with reckless disregard as to its truth or falsity. Recklessness = D said whatever but was aware that he had no idea if it was true or not.
- [3] intent to induce reliance - D must have intended for V to rely on the misrepresentation as being true. A joke not intended to be taken seriously is not covered here. V must be the intended recipient, or a recipient D had reason to expect would hear of it and rely on it. Generally a wider range of liability than negligent tort, due to the intentional nature but even then courts don’t like accidental or unforeseen V’s.
- [4] Causation - the misrepresentation must have caused reliance. If V is not deceived then D is not liable. It does not have to be the sole factor, just a substantial factor in the reliance.
- [5] justifiable reliance - reliance is not justified if it is immaterial to the transaction. Also if the V is knowledgeable but relies on an obvious falsity despite ability to easily recognize that, is unjustified in reliance. NOT like contributory negligence - P does not have to exercise the reasonable person caution.
- [6] Damages - usually either measured in terms of “the benefit of the bargain” if the lie had been true. More typical for breach of contract, but the majority rule. Minority rule = V’s out-of-pocket expenses only. Some are in-between allowing for out-of-pocket-plus, as long as the damages are certain enough. The first usually results in higher damages. Damages for mental distress are not usually awarded.

## **Intentional Interference with Contract**

### **Overview**

- Allows recovery when the defendant intentionally interferes with a valid contract between other parties

### **Elements**

- A valid contract or economic expectancy between the plaintiff and 3rd Party
- Knowledge of the valid contract or economic expectancy by defendant

- Just means defendant must know the facts from which she should have concluded a contract existed.
- Intent by defendant to interfere with the contract or economic expectancy
  - Substantial certainty counts as intent
- Interference caused by the defendant
- Damages to plaintiff
  - Damages in such cases can be awarded for: economic losses, mental distress, Punitive Damages if malice is proven

NOTE: This tort is applicable only to the intermeddler who disrupts a contract between other parties and is not applicable to parties who may breach or disrupt their own contracts.

NOTES FROM DLB:

### **INTENTIONAL INTERFERENCE WITH CONTRACT AND WITH PROSPECTIVE ECONOMIC RELATIONS**

- [a] overview - protect parties from intentional disruptions in economic relationships. Similar basic elements, but ec.rel. has wider definitions. IIwC = recovery when D intentionally interferes with a valid contract between 2 other parties. Damages = econ losses, mental distress, punitive damages (if malice is proven). Justifications are very limited - usually if the contract was illegal or against public policy. IIwER = D intentionally and unjustifiably disrupts V's expectations not embodied in an actual contract. Same justifications PLUS fair competition, and apply generally to at-will contracts.
- [b] Definitions - IIwC requires a valid contract, while IIwER requires a legitimate econ expectancy. Elements=
  - - (1) A valid contract or expectancy between P and 3P
    - (2) knowledge of (1) by D
    - (3) intent by D to interfere with (1)
    - (4) interference caused by D AND
    - (5) Damages to P.
  - This only applies to an intermeddler in the contract/expectancy, not one of the contracting/discussing parties who mess it up themselves.
  - [1] requires proof of a valid contract or of a valid economic expectation. Mere hope for customers or profit is not enough.
  - [2] D must know of the valid contract - generally means that D should know facts from which D should have concluded that a valid contract existed. Also similar for knowing of the valid econ expectancy.
  - [3] "intentional" per restatements means either purposeful interference or a substantial certainty that interference will occur.
  - [4] D must actually cause the interference - if the breach was already there then D didn't CAUSE the breach.
  - [5] Damages may be economic, mental distress, punitive (if malice is proven)
- [c] justifications for interference - first, the burden of proof is usually P's but check your jurisdiction. Justifications that cover both torts: statements of truthful information or honest advice within the scope of a request, interference by a person responsible for

the welfare of another while acting to protect that person's welfare, interference with a contract that is illegal or violates public policy, interference by someone when protecting his own legally protected interests in good faith and by appropriate means. IIwER/term at will contracts only: fair and ethical competition or ethical action to protect one's financial interest.

- Restatement sec 767 has 7 factors to determine when IIwER/term at will is OK:
  - [a] nature of actor's conduct
  - [b] actor's motive
  - [c] the interests of the other with which the actor's conduct interferes
  - [d] the interests sought to be advanced by the actor
  - [e] the social interests in protecting the freedom of action of the actor and the contractual interests of the other
  - [f] the proximity/remoteness of the actor's conduct to the interference  
AND
  - [g] the relations between the parties.
- Biggest issue is that IIwER can be seen as fair competition in a LOT of ways. There is an argument that this should be restricted to when D commits a definable wrong - otherwise the notice they have is limited at best.

## **Intentional Interference with Prospective Economic Relations**

### **Overview**

- Allows recovery when Defendant intentionally and unjustifiably disrupts Plaintiff's economic expectations not in an actual contract.
  - Ex. making it unpleasant to visit a competitor's business.

### **Elements**

- Valid economic expectancy between Plaintiff and a 3rd party
  - Mere hope of profit/customers not enough
- Knowledge of the economic expectancy by the Defendant
- Intent by the Defendant to interfere with the economic expectancy
  - Substantial certainty counts
- Interference caused by the Defendant
- Damages to the Plaintiff
  - Damages in such cases can be awarded for: economic losses, mental distress, Punitive Damages if malice is proven

NOTE: This tort is applicable only to the intermeddler who disrupts a economic relationship between other parties and is not applicable to parties who may breach or disrupt their own economic relationships.

### **Justifications for Interference**

- Providing statements of truthful information or honest advice within the scope of a request
- Interference by a person responsible for the welfare of another while actin to protect that person's welfare
- Interference wth a contract which is illegal or violates public policy

- interference by someone when protecting his or her own legally protected interests in good faith and by appropriate means
- Fair and equitable competition is a justification defense
  - Example: Employee can notify clients that he will be leaving before leaving and can solicit those clients after leaving.

## Defamation

### Overview

1. How many people must know to be a tort?
  1. At least 1
2. Does it have to be True or False?
  1. False
3. Does it have to be Highly Offensive?
  1. No
4. Does there have to be Intent?
  1. Sometimes- although negligence will count as intent where there is no malicious intent.

### Elements

- Defamatory statement
  - Must scorn, ridicule, or contempt the Plaintiff; harm the reputation of the Plaintiff.
  - Mere insults, pure opinion do not count.
  - Must show that a substantial and respectable minority or a right thinking minority would comprehend the defamatory nature of the statement.
  - A jury question
- Directed towards the plaintiff
  - Must show that the defamatory communication was understood as referring to the P.
  - Group Defamation
    - Depends on the size of the group
      - The larger the group, the less likely
- That was published
  - Means it must simply reach one person other than the P, and that other person must be able to understand it.
- Damages
  - General Damages
    - Damages for emotional distress and reputation
    - Plaintiff's reputational injury may be presumed
  - Special Damages
    - Covers economic losses such as profits
    - Difficult to prove
    - Damages may be presumed based on whether it is Libel, Slander, Slander Per Se

- Libel: Written, Photographic, Statute or Sculpture - Special Damages Must Be Proven
- Slander: Spoken - Special Damages Must Be Proven
- Slander Per Se (4 Categories) - Special Damages are Presumed
  - Communications that directly call into question the plaintiff's competence to perform adequately in her trade or profession
  - Statements claiming the plaintiff has a current, loathsome disease, such as syphilis or AIDS
  - Allegations of serious criminal misbehavior by the plaintiff, typically criminal activity involving moral turpitude.
  - Suggesting a lack of chastity in a woman.

### Defenses

- Substantial truth
- If the statement is substantially true, no defamation
- Absolute privilege
  - Judicial, legislative, and executive communications are absolutely privileged, as are spouse-to-spouse communications.
- Qualified privilege
  - Based on social utility of protecting communications made in connection with the D's moral, legal, or social obligations.
    - Includes accurate and fair reporting by the media, and employment references
  - Can be lost if:
    - D failed to have an honest belief that the statement was true
    - Failing to have an objectively reasonable belief that the statement was true
    - By disclosing the information to more people than necessary (excessive publication.)

### Constitutional Issues

- **Public Officials and Public Figures\*\*** Must be shown that D either knew that the statement was false or recklessly disregarded whether the communication was false - "actual malice"
  - - Failure to investigate the truth of the statement does not count.
    - Basically, a qualified privilege.
    - Public officials are those individuals who are positioned to affect policy.
    - Public Figures are those individuals who hold themselves out to the public (i.e., celebrities)
    - Actual Malice
      - P must prove that D knew of the falsity or was reckless as to truth or falsity if a public official, public figure, or private plaintiff in cases of public concern.
- Plaintiff also has the burden of showing that the statement is false

- There is no requirement for this under the common law
  - Shifting of the truth as a defense under the CL to the falsity as part of the prima facie case under 1st Am.
- **Private persons regarding a matter of public concern**
  - Same as for public official/figure but as an alternative to actual malice requirement, P can prove negligence and an actual injury to P
- **Limited purpose public figure**
  - Private individual who is so well known in a particular field/issue that for the purposes of that field/issue they are a public figure
  - Someone who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." - DLM s 21.03
    - Three prong test to determine:
      1. Was there a legit. public controversy that had ramifications beyond the parties in the defamation suit?
      2. Did the plaintiff thrust himself into the forefront of the dispute?
      3. Was the defamation related to the plaintiff's participation in the dispute?
- Examples:
  - Church pastor who is active in anti-abortion campaigns
    - LP public figure is defamed related to his activities in the anti-abortion context -- he has performed an abortion
    - Saying he is a pedophile is not related to abortions and therefore analyzed under only common law defamation

NOTES FROM DLB:

## OVERVIEW

- A blend of common law and 1st amendment issues. There are some rights but there are some constitutional limits to these claims. It is a big mess.

## COMMON LAW DEFAMATION

- A strict liability tort. Fault and falsity of the statement were presumed, as were damages. P only had to prove (1) a defamatory statement (2) about P (3) that was "published." That made it WAY too easy to recover.
- [a] defamatory statement - P had to persuade the jury that the statement was defamatory - must hold P up to scorn, ridicule or contempt. Restatement 559 says it damages the reputation to the point that it is lowered in the community or that 3P's won't do business with him. So the defamatory statement harms reputation by injuring a person's general character or causing personal disgrace. Insults, hyperbole, obvious jokes or pure opinion don't count. Matter of law = whether it COULD be defamatory, matter of fact = whether it WAS defamatory. Use the "fair ad natural meaning" of the words. Context and punctuation can matter.
  - [1] Defamatory to whom? It doesn't have to prejudice everyone, just a "substantial and respectable" or "right-thinking" minority. Unless the minority is blatantly anti-social (ie a Nazi allegedly marrying a Jew). IT is harder where

something like homosexuality is alleged, because “right thinking:” people wouldn’t hold that against someone...but it is still not accepted in society so it can cause harm.

- [2] Statements not facially defamatory: inducement and innuendo. If the statement is not facially defamatory, P needs to plead the extra facts needed to make the statement defamatory (inducement) or explain the defamatory impact (innuendo). IE X spends his evenings at Y address...P would have to point out the Y address is a brothel so that is why the statement is defamatory.
- [b] Of and concerning P - P must show that the statement was understood as referring to P. D’s intent therein was irrelevant, even if the character was fictional, as long as ppl can ID the character as P. Colloquium = if you are not named, you have to plead the facts that ID you from the statement.
  - [1] group defamation. If the comment is against members of a group, and the group is small, there are individual causes of action. The larger the group, the less likely a cause for action but there is no clear line.
  - [2] Corporate P’s can sue when the comment calls into question their business character, trustworthiness, etc. If the attack is on a product the claim is for product disparagement.
- [c] Publication and republication - “Published” for defamation means it must reach 1 person other than P and that person must understand its defamatory thrust. The # of recipients may be relevant to damages but not to establishing publication. Not usually tough to prove. Repetition of the defamatory material is the same thing even if it is attributed to the original source (that way [people can’t get away with publishing whatever they want under the guise of “accurately reporting what someone else said.”]). To solve problems, one edition is considered one publishing rather than every book in the edition being considered a new publishing.
- [d] damages - usually general damages for emotional trauma and harm suffered. Sometimes P has to prove specific damages first before general damages may be recovered. Depends on whether it’s libel or slander.
  - [1] libel/slander distinction. Slander is an oral utterance where libel is a more permanent expression like a writing, photo, statue or sculpture. Generally sight = libel, sound = slander. This can be tough...movies = libel but radio/TV? Check your jurisdiction. Majority = radio&TV = libel too.
  - [2] slander and slander per se. Generally requires special damages first. Slander per se doesn’t though - that is where the statement was deemed so horrible that reputation injury to P could be presumed without that. These are still generally followed:
    - (1) statements that directly call into question P’s competence to perform adequately in their trade or profession,
    - (2) statements claiming P has a current, loathsome disease,
    - (3) allegations of serious criminal misbehavior by P, often involving crimes of moral turpitude, or
    - (4) and most controversial, claiming lack of chastity in a woman.
  - [3] Libel and Libel per Quod. The majority approach allows presumed general damages, but the minority has narrowed this to libel per se. you have to prove special damages for libel per quod (libel that requires extrinsic evidence such as inducement or innuendo) unless it falls into a slander per se category.
- [e] Common law defenses - prima facie case was easy so D had to do a lot of work.

- [1] Substantial truth. If D told the truth, even if that truth was harmful there was no cause of action. At common law the statement was presumed false and D had to prove it was true (this has changed with constitutionalization, it is now P's burden to prove false). It does not mean the literal truth of the statement but the underlying accusation. Did not have to be the truth of every aspect, just of a substantial part.
- [2] Absolute privileges. These allow D to escape even if they did it on purpose. Usually happens in gov't proceedings like communications and trials. So if someone perjures to harm someone else, the harmed person cannot recover. The liar may be tried for perjury tho. Also applies to a legislator who deliberately makes a false statement during debate on the floor of the legislature. This gets attenuated very quickly - talking to the media in any way usually isn't covered. Private spousal communications and statutorily required broadcasts for the political process are protected too.
- [3] qualified privileges - if someone knows something that is truthful/opinionated and would harm another, they are privileged in giving that info. The 3P must need that info and be able to act on it (so no gossip) and it must be relevant, and if D and the recipient share a common interest (3P is about to hire P and D knows that P was fired for incompetence then D can say so). It has to be an honest belief of truth, it also has to be objectively reasonable to believe that was true, and P cannot disclose to more people than necessary or they lose the privilege. For media, if the report is a fair and accurate, unbiased report of public meetings, and probably info in public records, without liability.

#### CONSTITUTIONAL CONSTRAINTS

- Defamatory speech = false speech = not protected under the first amendment. BUT in 1964 the USSC decided that there were some limits in some contexts. Usually requires a determination of P's status (public official, public figure or private person) and the subject matter of the defamation (public or private concern).
- [a] Public officials - an MLK issue where there were significant errors printed resulted in public officials having to show that D either knew a statement was false or recklessly disregarded whether it was false ("actual malice"). There is no absolute privilege to defame public officials, but there is leeway. This was done out of a fear of repression of unpopular viewpoints. There is debate about who qualifies - police officers, teachers, gov't lawyers...
- [b] Public figures - public officials have to prove actual malice too. 2 categories here: all-purpose public figures: widely known people (Bill gates, Madonna) and a limited public figure: someone who voluntarily injects himself or is drawn into a public controversy and becomes a public figure for a limited range of issues (ie the CEO of Target within the retail store community only). #2 is fuzzier, but the USSC made it clear that this is to be narrowly defined.
- [c] private persons - USSC offers little guidance here, You have to figure out if it is a public or private concern then look at the content, form and context of the communication. Wider distribution = more likely a public concern. If there is a media D then it is probable that it is a public concern.
  - [1] Public concern - a public matter. Proof requirements depend on damages - private P's can recover for actual injury = proven impairment of reputation and standing in the community, humiliation and mental anguish and suffering under

- any standard other than strict liability. Actual malice is OK when P seeks presumed or punitive damages.
- o [2] private concern - private P and a private matter. Recovery is very limited if allowed at all. USSC says that the states don't have to use actual malice but didn't say what they should use. Most use negligence standard, it is unclear if they could go back to common law. Actual malice is OK if they want to use it, they don't HAVE to though.
- [d] Actual malice - P has to prove that D knew of the falsity or was reckless as to the truth or falsity. This can be done by D deliberately deciding not to acquire knowledge of facts that might confirm the probable falsity of a communication or the purposeful avoidance of the truth.
- [e] falsity - P has to prove the statement is false (common law overturned by USSC) but there is no info on whether an elevated burden of proof is required or if private/private can return to common law rules.
- [f] conclusion - The court made a LOT of changes in the 60's and 70's but is slowly backing away from that. That said, it is unlikely that a return to common law standards will be allowed.

## **Intrusion**

### **Overview**

- A person who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for the invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

### **Examples**

- Repeatedly making unwanted phone calls = liability
- Taking the picture of a drunk = no liability
- Placing a listening device in someone's bedroom = liability

### **Comparison Questions**

1. How many people must know to be a tort?
  1. Not Applicable,
2. Does it have to be True or False?
  1. Not Applicable
3. Does it have to be Highly Offensive?
  1. Yes
4. Does there have to be Intent?
  1. Yes

### **NOTES FROM DLB:**

- Restatement 652B definition is "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to

liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” Interference with a “zone of privacy” no communication required just the intrusion. No requirement for trespass although it may also qualify. Liability can still hold even if it would reveal crimes or corruption.

## **False Light**

- Similar to defamation.
  - Different in that the falsity does not have to damage your reputation
    - Ex. saying I am a war hero when I am in fact not even a veteran.

## **Comparison Questions**

- How many people must know to be a tort?
  - Must be to the Public
- Does it have to be True or False?
  - False
- Does it have to be Highly Offensive?
  - Yes
- Does there have to be Intent?
  - There must be Actual Malice

## **Elements**

- Publicizing
  - D must communicate the false facts to a substantial number of people (Defamation only requires one besides victim)
- False facts
- That a reasonable person would object to
- Actual malice required to be proven by all Ps.

## **NOTES FROM DLB:**

- Restatement 652E. Overlaps a lot with defamation. Some states either reject it or roll it into defamation.
- Elements = D
  - (1) publicizing (communicated to a substantial # of people),
  - (2) false facts
  - (3) that a reasonable person would object to
- both of the last 2 together = a very broad category that can include defamation stuff. But subtler things like docudramas or fabrications in a magazine feature are best addressed here
- If public interest matter there must be actual malice as per defamation, for public and private P's.
- Courts won't let you use false light and the lower requirements to plead something that should be defamation so don't try it.

## **Disclosure**

### Comparison Questions

- How many people must know to be a tort?
  - Must be to the Public
- Does it have to be True or False?
  - Must be True
- Does it have to be Highly Offensive?
  - Yes
- Does there have to be Intent?
  - Yes

### Elements

- Publicity of
  - Must be communicated to a significant group of people.
- Private facts
  - True facts
- Highly offensive to a reasonable person which are
- Not of a legitimate public interest.

### NOTES FROM DLB:

- Elements =
  - (1) publicity of
  - (2) private facts
  - (3) highly offensive to a reasonable person which are
  - (4) not of legitimate public interest.
- Restatement 652D.
  - (1) is the same as false light; a large group of people.
  - (2) has to be something that pretty much no one else knows, and if it's on public record you are SOL.
  - (3) means that it has to be something that would offend pretty much anyone - not just you in your close circle of friends.
  - (4) if the courts can find any possible "public interest" in the news, despite ALL of the above, you are SOL. This makes the communication of true facts subject to liability. Within these limits, though, if it's true you're SOL.

### Right of Publicity

#### Comparison Questions

- How many people must know to be a tort?
  - Must be Commercial
- Does it have to be True or False?
  - Can be True or False
- Does it have to be Highly Offensive?
  - No
- Does there have to be Intent?

- No intent required

#### **Elements**

- One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.
- Applies to unauthorized endorsement of a product.
  - Not to placing a person's picture on the cover of a magazine and writing an article about them.
- Heirs of a celebrity estate may sue for exploitation of celebrity's identity.
  - Duration of this right varies by jurisdiction -- possibly forever in Tenn. thanks to The King

NOTES FROM DLB:

#### **APPROPRIATION OF NAME OR PICTURE AND THE RIGHT OF PUBLICITY**

- Restatement 652C definition is "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."
- Tough boundaries -
  - unauthorized product endorsement = liable
  - journalistic articles or books (incl. unauthorized biography w/pics) = not liable
  - grey area = things like a calendar of sports magazine covers with people on the covers.
- Celebrities have a right of publicity
  - basically identical to privacy-appropriation tort but may be inheritable.
- Rest aren't generally inheritable.
- Satirical imitations - as long as its clear V isn't endorsing or performing anything - are OK but beyond that it gets fuzzy.
- If it is a performance stunt, broadcasting the entire act was appropriation of exhibition rights.

# THEORETICAL AND POLICY PERSPECTIVES

## Legal Philosophy

- 1. Natural law is a discredited idea that comes from the revolution.
  - the law is out there, we just need smart people who can figure it out by power of reason.
  - we must have contract law, and it must have these doctrines
  - God made that law, we must just figure it out
  - 8 things that make a system fail:
    - 1-Lack of rules of law
    - 2-Failure to publicize or make known the rules of law
    - 3-Obscure legislation that is hard to understand
    - 4-Retroactive legislation
    - 5-Contradictions in the law
    - 6-Demands that are beyond the power of the subjects in the rule
    - 7-Unstable legislation-things that get changed too much
    - 8-The law says one thing, but in fact, other things are done
- 2. Analytic Jurisprudence
  - you can't mash is and ought together
  - laws can be unjust, whereas natural law person would say that it's not a law if it's unjust
  - spectrum of ways of looking at things
  - 
  - Analytic Jurisprudence-should be seen on a spectrum
    - Legal positivism
      - I can tell you if you will win right now-I'll look it up in the restatement
    - Legal Realism
      - A judicial decision might be determined by what the judge had for breakfast
    - both are wrong-it's somewhere in the middle

## The Indignancy Matrix

	To how many?	True or false?	Highly offensive?	Intent requirement?	After death?
Intrusion	n/a	n/a	yes	intent	n/a
Disclosure	public	true	yes	intent	no
False light	public	false	yes	actual malice	no
Defamation	1	false	no	<i>[complex]</i>	no
Outrage / IIED	n/a	n/a	yes+ <small>(extreme &amp; outrageous)</small>	intent	n/a
Publicity right	commerical	either	no	none	often

**FIRST AMENDMENT APPLICABILITY:**

Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?

**NO** → the First Amendment does not come into play, just analyze under the common law



GO ON TO  
COMMON LAW  
ANALYSIS

**YES** → the First Amendment does come into play



Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

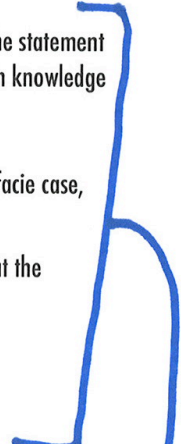
**PUBLIC OFFICIAL OR PUBLIC FIGURE** → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

**PRIVATE PERSON RE MATTER OF PUBLIC CONCERN** → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, **AND** the plaintiff must, either:

prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

OR

prove negligence plus **actual injury**



GO ON TO  
COMMON LAW  
ANALYSIS  
  
(modifying elements and  
defenses as advised)



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