



# Torts Review

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## **NOTE:**

- This is not a complete review of everything in the course or everything on the final exam!
- It's just a chance to go over some important things again.
- These slides overlap with my "Torts Lightning Review" audio lecture, which is online.

# Negligence

## Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

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Negligence: Duty of Care

## Duty of Care

- In general, owed to all foreseeable plaintiffs
- No affirmative duty to act
  - Exceptions
- Specific situations
  - Rescuers

## Affirmative Duty

- No affirmative duty to act (general rule)
- Exceptions
  - Assumption of duty by acting
  - Peril caused by D's negligence
  - Special relationships
    - E.g., parent to child
  - Common carriers, innkeepers, shopkeepers
  - Control of third persons where D has the ability and authority to do so and knows the third person is likely to do harm
    - Note: Generally, there is no obligation to control third persons

## Specific situation: Rescuers

- "Danger invites rescue"
- If you put someone else in harm's way, and a rescuer gets injured trying to help them, you are on the hook.
  - That is, you owed them a duty and you can't get out of it by claiming their rescue action was unforeseeable

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Negligence: Breach of Duty

## Breach of Duty

### Two questions:

- What is the standard of care?
- Can it be proven, by a preponderance of the evidence, that it was breached?

## Standard of care

- **General standard: Reasonable person**
- **Specific standards:**
  - Children
  - Bailment
  - Owners/occupiers of land
  - Negligence per se
  - Professionals

## Reasonable Person Standard

- This is the general standard.
- It's easy.
- You ask: Would the reasonable person have done what the defendant did? Or would they have undertaken some additional precaution or care?

## Reasonable Person Standard

Some elaborations (*think of this as the reasonable person "FAQ"*)

- It's an objective standard
- Mental limitations/deficiencies are not taken into account.
- Inexperience is not taken into account.
- Physical disabilities/limitations are taken into account.
- Custom is not dispositive.

## Specific Standard: Children

- Children are held to the standard of a child of like age, experience, and intelligence
  - ... unless engaged in an adult activity
  - in which case, it's the reasonable person standard.
- Children 4 and under generally cannot be held liable in negligence.

## Specific Standard: Bailment

- Bailee's standard of care:
  - if for sole benefit of bailor, low standard
  - if for mutual benefit, ordinary standard
  - if for sole benefit of bailee, high standard
- Bailor's standard of care:
  - if gratuitous bailment, must inform of known, dangerous defects in chattel
  - if bailment for hire, must inform of known and reasonably discoverable defects in chattel
    - i.o.w., there's a duty to inspect

## Specific Standard: Land owners/occupiers

- For activities:
  - reasonable person standard of care
- For conditions of the land:
  - Depends on status of plaintiff, whether
    - unknown trespasser
    - anticipated/discovered trespasser
    - infant trespasser
    - licensee
    - invitee



## Specific Standard: Land owners/occupiers for conditions upon the land

- unknown trespasser
  - no duty
- anticipated/discovered trespasser
  - warn of or make safe concealed artificial hazards that are known and that are capable of causing death or serious bodily injury

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**LACK:**  
Lethal  
Artificial  
Concealed  
Known

## Specific Standard: Land owners/occupiers for conditions upon the land

- infant trespasser
  - duty to avoid foreseeable risk to children caused by an artificial condition if the owner knows or should know that children frequent the area and that the condition is hazardous to children, and the cost of remedying condition is slight compared to risk of injury (cost-benefit analysis)
  - Note: this is a situation where a warning won't necessarily work
  - This is called "attractive nuisance doctrine," but that's a confusing name for it.

## Specific Standard: Land owners/occupiers for conditions upon the land

- licensee
  - regular non-trespassers
  - warn of or make safe concealed known hazards (whether artificial or natural)
- invitee
  - customers, patrons, members of public invited to a place like a shop, mall, park
  - warn of or make safe concealed known and reasonably knowable hazards (whether artificial or natural)
  - i.o.w., we add a duty to inspect

## Specific Standard: Land owners/occupiers

**REMEMBER:**  
Activities on land  
use the regular  
standard (that's  
reasonable person,  
usually)

## Specific Standard: Negligence Per Se

- This is an alternative that the plaintiff can use to make the case easier to prove.
- You use the standard from a relevant statute or regulation.
- The plaintiff must get by the class of persons / class of risks test for negligence per se.
  - Was the plaintiff within the class of persons the statute or reg was designed to protect?
  - Was the harm to the plaintiff within the class of risks the statute or reg was meant to address?

## Specific Standard: Professionals

- Professionals, in the case of professional malpractice, are held to the standard of a minimally qualified individual in that profession.
  - Generalist medical practitioners are traditionally held to the standard in a similar community.
  - Specialists are held to a higher, national standard for their specialty.
- Note: Custom is dispositive here!

## Proving breach

- Generally an issue for the jury or trier of fact.
  - Did the D's care fall below the applicable standard?
- Res ipsa loquitor
  - If we don't know about the D's care, but we can say:
    - this is something that ordinarily doesn't happen absent negligence (i.e., a breach of the duty of care), and
    - the instrumentalities of the accident were in the defendant's sole control,
  - then there is a rebuttable presumption of breach

# Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

Negligence: Actual Causation

## Actual Causation

- The plaintiff only needs to prove but-for causation.
- If the plaintiff can't prove but-for causation, there are some alternatives available for the plaintiff:
  - Multiple sufficient causes (a.k.a. "twin fires doctrine")
  - Summers v. Tice doctrine
  - Market-share liability

**but for**

**the but for**

~~the~~ but for

~~the~~ a but for

**You don't have  
to pick one  
defendant.**

**You can sue  
everybody who's  
a but-for cause.**



Multiple necessary causes

Multiple sufficient causes

Normal

Multiple necessary causes

Multiple sufficient causes

Normal

Multiple necessary causes

Multiple sufficient causes

Infrequent

Multiple necessary causes

When each of multiple careless acts is a necessary condition for an injury, each is deemed an actual cause of that injury.

## Multiple necessary causes

When each of multiple careless acts is a necessary condition for an injury, each is deemed an actual cause of that injury.

Normal

## Multiple necessary causes

**Hypo:** Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Knife lobber  
and bowling  
ball heaver

## Who's liable?

1. Lobber only
2. Heaver only
3. Lobber and heaver
4. Neither

Knife lobber  
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## Multiple necessary causes

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**Analysis:** Ask the "but for" question.

Knife lobber  
and bowling  
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**Analysis:** Ask the “but for” question.

*Is it correct to say that the plaintiff would not have been injured but for the actions of the heaver?*

*Is it correct to say that the plaintiff would not have been injured but for the actions of the lobber?*

## Multiple necessary causes

**Hypo:** Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

**Analysis:** Ask the “but for” question.

*Is it correct to say that the plaintiff would not have been injured but for the actions of the heaver? **YES***

*Is it correct to say that the plaintiff would not have been injured but for the actions of the lobber? **YES***

## Multiple necessary causes

**Hypo:** Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

**Result:** *The heaver and the lobber are both liable. The actions of both are but-for causes. Pointing to the other as an additional but-for cause does not release either from liability.*

## Multiple necessary causes

**Hypo:** Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Normal

**Result:** *The heaver and the lobber are both liable. The actions of both are but-for causes. Pointing to the other as an additional but-for cause does not release either from liability.*

# Let's go beyond but-for...

## Alternatives to but-for

- These only help, never hurt, the plaintiff! They allow proof of actual causation even without but-for causation.
  - Multiple sufficient causes (twin fires cases)
  - Summers v. Tice doctrine
  - Market-share liability

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## Multiple sufficient causes

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test.



## Multiple sufficient causes

Infrequent

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test.

## Multiple sufficient causes

Infrequent

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test. → Sometimes courts talk about "substantial factor" as a way of weeding out seemingly trivial/silly causes.


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~~the~~ but for

~~the~~  but for

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## Negligence: Proximate Causation

# Proximate Causation

- Essentially, a way of preventing plaintiffs from being able to recover from a greater scope of defendants than the legal system is comfortable with.
- A defendant's breach can be an actual cause without being a proximate cause.
- Two tests courts use are the foreseeability test and the harm-within-the-risk test.

# Negligence

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Negligence: Injury

## Injury (Damages)

- General rule: Plaintiff must suffer a personal injury or property damage (real property or chattel; "a dent or a bruise")
- Exceptions:
  - Pure economic harm in very particular situations (but usually not)
  - Negligent Infliction of Emotional Distress (perhaps better thought of as its own cause of action)

# Negligence Defenses


- **Plaintiff's negligence**
  - Contributory negligence
  - Pure comparative negligence
  - Partial comparative negligence
- **Assumption of risk**
  - Implied
  - Express
- **Waiver**
  - based on an exculpatory contract

# Negligence Defenses

- **Plaintiff's negligence**
  - Requires the defendant to prove by a preponderance of the evidence a negligence case against the plaintiff
  - Two elements are easy:
    - Duty (it's hard to imagine a case in which there's not a duty to yourself)
    - Injury (the plaintiff stipulates to this by filing the complaint)

# Negligence Defenses

- **Assumption of risk**
  - Two forms: express and implied
  - Requires:
    - Knowing and appreciating the risk
    - Encountering it voluntarily
  - Not valid for common carriers, hospitals, other public necessity providers
  - Not valid for gross negligence



**Strict  
Liability**

# Negligence

- Duty of care owed to plaintiff
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## **STRICT LIABILITY**

- Duty of care owed to plaintiff
- Absolute duty of safety**
- Actual causation
- Proximate causation
- Injury (Damages)



## **STRICT LIABILITY**

### **Absolute duty of safety**

- Keeping of wild animals
- Trespassing livestock
- Domesticated animals with known, dangerous propensities
- Abnormally dangerous (a/k/a "ultrahazardous") activities
- Defective products

## **STRICT LIABILITY**

### **Absolute duty of safety**

### **Ultrahazardous activities**

- "Ultrahazardous activities" and "abnormally dangerous activities" are two names for the same thing.
- Whether an activity qualifies is generally a question of law (meaning, for a judge to decide).
- Not about magnitude of harm: Something that is dangerous to just one person can qualify.
- Remember: This is not just for personal injury, it's for property damage too.

## **STRICT LIABILITY**

### **Absolute duty of safety**

## **Ultrahazardous activities**

Some key examples held to be ultrahazardous:

- blasting
- oil drilling
- fireworks (making, using, storing, transporting)
- explosives (making, using, storing, transporting)
- highly toxic chemicals (making, using, storing, transporting)
- crop dusting
- fumigation
- things involving radioactivity or nuclear reactions

## **STRICT LIABILITY**

### **Absolute duty of safety**

## **Ultrahazardous activities**

- No hard and fast rule about what activities qualify.
- Some oft-repeated, key ideas:
  - Danger cannot be eliminated even with utmost care
  - Uncommonness of activity
- "Ultrahazardous activities and substances all fall into the class where small triggers, physical or chemical, can release far larger forces." - Richard A. Epstein

# Products Liability

**Important note:**

## Products Liability

There are three paths to products liability (a plaintiff can use any or all).

- **Strict products liability**
  - *Our current topic*
- **Negligence**
  - *We already covered this*
- **Breach of warranty (UCC Article 2)**
  - *Not covered in this course*

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## **Strict Products Liability**

- **sold or supplied product** to plaintiff
- **defect exists**
- Actual causation
- Proximate causation
- Injury (Damages)

## **sold or supplied product**

- manufacturer
- wholesaler
- retailer
- *anywhere in the vertical distribution chain suffices*
- *but casual sellers are not included*

## **sold or supplied**

???????

a local car dealer, for a car it sold

- **yes**

an American subsidiary of an overseas automaker, where the subsidiary buys cars from the maker and sells them to local dealers, for a car ultimately sold to a consumer

- **yes**

your neighbor running a garage sale, for a used blender sold to a random person

- **no**

a consumer website that recommended a model of washing machine, for that washing machine

- **no**

# product

- a tangible item created by humans to be commercially sold distributed
  - includes food
    - even served in a restaurant!

# product

???????

- an automobile
  - yes
- a portable space heater
  - yes
- a cup of coffee at the donut shop
  - yes
- life insurance
  - no
- carpeting installed in your home
  - yes

**kinds of**

# **defect**

- manufacturing defects
- design defects
- warning defects

**kinds of**

# **defect**

- manufacturing defects
- design defects
- warning defects

courts use various tests to determine  
whether a product is truly defective ...



A graphic consisting of a red rounded rectangle. Inside, the word 'tests' is written in white, italicized, sans-serif font on a red pill-shaped background. To the right, the word 'defect' is written in a large, bold, red, sans-serif font. A red line connects the two shapes.

**tests**

**defect**

- **consumer expectations test**
  - esp. for manufacturing and design defects
- **risk-utility test**
  - esp. for design defects
- **reasonable under circumstances to avoid danger**
  - esp. for warning defects