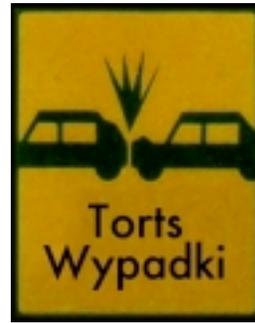


# Torts Wypadki

## Fall 2010



Torts I  
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# Fall 2010 Torts Wypadki

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# 'Black Letter Law'

## Part I: Preliminaries'

### Module 1: Models of Tort Law and Context of Torts

#### Elements of a Tort

1. Act
2. Causation
  1. actual causation - "but-for" - it wouldn't have happened "but for" this happening .
  - ..
  2. proximate causation - "close to" - causation must be closely related to act
3. Damages
4. Culpability

#### TERMS

- *cause of action* - legal entitlement to sue someone
  - *prima facie case* - P can prove all elements of a cause of action (if all elements are NOT present=no case)
  - *defenses*
1. disprove one of the elements in the prima facie case
  2. assert a defense

### Module 2: Overview of Tort Law

#### Generally

1. Act
  1. Volitional movement
  2. Not reflex
2. Intent
  1. Standard of intent differs from tort to tort
  2. Substantial certainty sufficient for intent
  3. Intent can be transferred person to person and tort to tort
  4. Motive is irrelevant
3. No issue of incompetence - children as well as mentally ill, developmentally disabled, and demented can commit intentional torts
  1. Example - Garratt v. Dailey - 5 year old pulled chair out from under older woman
4. Causation - Important in all torts. Considered in-depth under the heading of negligence (same concepts apply)
  1. Actual

## 2. Proximate

### **STRICT LIABILITY**

- 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
  - Wild animals on property, to licensees and invitees
  - Domestic animals with known, uncommon, dangerous propensities
  - 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

### **Module 4: Examples of a Tort Lawsuit: Walter v Wal-Mart**

*Walter v. Wal-Mart*

#### **Complaint**

- Wal-Mart (D) pharmacist gave wrong prescription to Walter (P). Caused prolonged hospitalization and severe physical and emotional injuries.

#### **Answer/Wal-Mart's Defense**

- D denied negligence on behalf of pharmacist
- At a later point changed to a defense of contributory negligence,
  - P failed to seek timely medical help and blood test

### Verdict

- Lower Ct granted \$550,000.00 in damages
- Appellate Opinion
  - affirmed
  - D had a duty to P which was breached
  - Caused P harm
  - P was not negligent or not negligent as to add to harm
  - damages (determination of jury)

## The Prima Facie Case for Negligence

### Generally

#### Elements: Five elements to establish prima facie case

**1. Duty:** legally recognized relationship between parties. No affirmative duty to act -Can only be sued by someone to whom you owe a duty.

**2. Breach of Duty:** failure to meet the standard of care. Were you in fact careless?

**3. Cause-in-fact(Actual Causation):** Plaintiff's harm caused by Defendant's breach of duty. Did your act actually cause the damages? ("But-For Test," Substantial Factor Test)

**4. Proximate Cause:** no reason to relieve Defendant of liability. Is there a close enough causation between your acts and the damages? (Foreseeability Test, Eggshell Plaintiff Rule, Strict Liability).

**5. Damages:** Plaintiff suffered a cognizable injury. 3 types: 1)compensatory-ex: hospital bills; 2)punitive-punish defendants; 3)nominal-No compensatory damages but can get \$1, or \$5 for example. Not available in negligence cases-Need real damages. Duty to Mitigate.

- Plaintiff must establish each of the following elements by a preponderance of the evidence (50.00001%)
- One cause of action with several permutations, different than strict liability - proving a blame.
- Defined- Conduct falling below the standard of care established by law for the protection of others against the unreasonable risk of harm. You did not want to hurt person but you did create a reasonable risk.

#### Two phases in a negligence issue

- Whether the defendant was negligent at all

- Unreasonably risked harm to someone else
- Decided under the rubric of negligence
- Whether the harm was a foreseeable result of the negligence
  - Decided under the rubric of proximate cause
  - Asks a particular question about the nature of the relation between the defendant's negligence and what actually happened to plaintiff

## *Subpart A: The Duty Element*

### **Module 5: Foreseeability**

- - **1. Duty**
    - **a. General duty**
      - i. A general duty of care is owed to all foreseeable plaintiffs
        - 
        - 
        - The plaintiff must show that defendant's negligence created foreseeable risks of harm to persons in her position.
    - **b. Specific Situations**
      - i. **Rescuers**
        - 1. A rescuer is a foreseeable plaintiff where the defendant negligently put the self or a third person in peril. "Danger invites rescue."
    - **c. Unborn, unconceived children**
      - i. Differs by jurisdiction.
      - ii. **Wrongful birth**
        - Parents of child sue doctors for failing to diagnose birth defects.
        - Must prove abortion would have occurred if defect was known
        - Provides financially strapped parents means to pay for lifelong care of a child.
      - iii. **Wrongful life**
        - When child sues, "wish I had never been born" case.
        - Provides \$\$ for child's medical problems
        - **Dobson v. Dobson** - Mother injures unborn from her negligence in car accident. Court held that Mother was not liable because it infringes on the rights of the mother and negligence would be pursued by unborn kids.

### **Basics**

1. If the harm was a foreseeable result – act is negligent
  2. Was the Defendant negligent at all – unreasonably risked harming someone or some thing
  3. Whether harm to a particular Defendant (class) was a foreseeable result of negligence
    1. All-risks-considered whether the Plaintiff was negligent
    2. Nature of the relation between Defendant’s negligence and what actually happened to Plaintiff
- **Weirum v. RKO General, Inc.** - Radio show contest where listener had to find a mobile DJ. A minor listener attempted to follow and negligently forced another car off road and other driver killed. Surviving wife won suit against radio station because the negligent driving of their listeners was deemed foreseeable.
    - **If one’s affirmative act creates an undue risk of harm, is he liable for any actions taken by third parties resulting from that risk of harm?**
      - Yes. Station created unreasonable risk of harm and intervening act of 3rd party was irrelevant because this was foreseeable.

#### **Harm-Within-The-Risk Test**

- general risk foreseeable/imaginable by negligent act
  - Is the risk of the injury suffered by the plaintiff one of the risks that makes the defendant negligent in his action?
1. *Berry v. The Borough of Sugar Notch* - whether a tree falling on a speeding trolley is a foreseeable harm from that negligent operation.
    1. Speeding did not increase risk (coincidence)
    2. The tree falling was not a foreseeable risk of speeding

#### **General Categories of Unforeseeableness**

1. **Unforeseeable P**
  1. *Palsgraf v. Long Island Railway* - dropping an unlabeled package cannot foreseeably harm a person on the other end of the RR platform
    1. Reasoning - it was not reasonable to hold the railroad's alleged negligence was the cause of the passenger's injuries (under foreseeability test). The explosion was the proximate cause and the railroad could not have reasonably expected such a disaster.
2. **Unforeseeable types of harm**
  1. proximate cause determination
3. **Unforeseeable extent of harm**
  1. foreseeable P who suffers an unforeseeable extent of harm - not a valid defense that P had an unforeseeable weakness that caused injury
  2. Thin-Skull Rule ("Eggshell P Doctrine")
    1. rejection of the rule would create practical problems
    2. imposes a desirable kind of strict liability - promotes optimal deterrence

#### 4. Unforeseeable manner of harm

1. act is unforeseeable to P who is foreseeable and type of injury is foreseeable
2. *Marshall v. Nugent* - D's driving forced P's car off the road. P was unharmed from initial accident and struck by second car while attempting to warn oncoming traffic of initial accident.
  1. General rule: unforeseeable manner of harm does not bar recovery if P and type of harm is foreseeable.

#### Special Plaintiff Categories

Special Relationships: Mother and Child

**Dobson v. Dobson** - Supreme Court of Canada July 9, 1999 - Cynthia Dobson (appellant) – mother of respondent – allegedly drove negligently causing harm to her unborn child after birth (mental defects including cerebral palsy) - Issue: Should a mother be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the fetus in her womb? - No, Mother can't be sued for damage to her unborn fetus – Her freedoms would be invaded – Baby born alive could sue 3rd party for damages caused when it was in the womb

#### Module 6: Failure to Act

There is no general affirmative duty to act (Nonfeasance)

- - - Misfeasance/Feasance – If a person is by circumstances placed in a position where if he did not use ordinary care and skill in his own conduct, he would cause danger of injury to another person or property, a duty arises to use ordinary care and skill to avoid such danger. – Active Misconduct or Risk Creating Omission = Duty
    - Nonfeasance – when the defendant has failed to aid plaintiff through beneficial intervention. - - Liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established. – Passive Inaction = No Duty (usually). In some instances (exceptions), however, courts will impose liability for nonfeasance.
- **Example (Nonfeasance):** *Osterlind v. Hill* - Defendant canoe renter had no duty to rescue his drunk lessee from drowning. (No special relationship found).
  - *Theobald v. Dolcimascola* - Defendant friends/party guests are under no duty to prevent the son from playing russian roulette.
- Exceptions:
  - Assumption of duty by acting (start helping someone)
    - Once you undertake an attempt to rescue, the rescue has to be done reasonably (have a duty).
      - **Reliance:** courts have found a duty where the defendant caused the plaintiff to rely on promised aid.

- Exception: good samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone
- Peril caused by Plaintiff's conduct - Defendant has a duty to assist someone in peril because of the defendant's actions (especially negligent actions)
  - Duty to Aid Another Harmed by Actor's Conduct
  - If person knows or has reason to know that by his conduct he has caused bodily harm to another to make him helpless and in danger of further harm, the person is under a duty to exercise reasonable care to prevent further harm.
  - *Example: South v. Amtrak* - Plaintiff's view was obstructed while driving & collided with train. Court held that duty is owed to Plaintiff where Defendant knows or has reason to know his conduct, whether innocent or tortuous, has caused harm to another - has affirmative duty to render assistance to prevent further harm.
  - Not all jurisdictions are so strict, but the trend is moving that way. Previously, only negligent actions created a duty to aid.
- Common carriers, innkeepers, shopkeepers (duty is justified by *special relationships* between the parties)
  - Those who solicit and gather the public for their own profit owe a duty to aid patrons
    - Ex.-If someone has a heart attack at Target, Target needs to help...But, you need to be in or on their property
    - *Example: Boyd v. Racine Currency Exchange* - Patron in bank was shot by robber after teller refused to give the robber money. Court held the duty did not include complying with the robbers demands.
- Public Duty Doctrine: a government actor performing improperly is not usually liable to individuals harmed by the misperformance, because any duty owed is limited to the public at large rather than to any specific individual.
- Police Duty: Police departments are typically not liable for failing to protect individual citizens. (Reasoning = Limited Resources). Most courts have limited a finding of duty to situations where the defendant police undertook to act and created reliance, enlisted the aid of the plaintiff, or increased the risk of harm to the plaintiff.
- Duty to Inform of Threats to Another
  - **Tarasoff** - parents of slain college student sued campus police, two doctors, and University for not warning daughter about a patient's desire to harm her.
  - one person owed no duty to control conduct of another nor to warn those endangered by such conduct. However, the exception is when defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. In this case, defendant therapists relationship to plaintiff daughter **or** the killer suffices to establish a duty of care.
    - Restatement 2d Torts: duty of care may arise from either

- Special relation... btwn actor & 3rd person which imposes a duty upon the actor to control 3rd person's conduct
- Special relation... btwn actor and the other which gives to the other a right of protection

## Module 7: Landowners and Occupiers

### Traditional categorization of duty based on the type of entrant

#### Type of entrant-----Condition-----Activity

Unknown, unauth. trespasser-----no duty-----reasonable care

anticipated, known trespasser----known, manmade death traps----reasonable care

Licensee-----Known, concealed dangerous traps----reasonable care

Invitee-----known traps & duty to inspect-----reasonable care

Licensee = person on land as social guest or visiting for their own personal business.

Invitee = buisness invitees on land for land owner's financial benefit, and public invitees onn land open to the public at large.

**Example:** *Campbell v. Weathers*--lunch counter patron who fell down a hole on the way to the (nonpublic?) bathroom is an invitee, despite no proof that on this occasion he was conducting business. Lunch counter failed to warn of the hole and is liable for broken leg.

Professional rescuers are licensees; firefighter's law prevents recovery from negligence which created the emergency. Does not bar recovery for negligence happening after that.

**Child Standard** - "attractive nuisance doctrine" (child trespasser) - A possessor of land is liable for harm caused by **artificial** conditions if:

1. know or has reason to know children are likely to trespass
2. knows the condition is dangerous
3. child does not know of the risk
4. the burden of making safe is slight compared to utility of the condition, and
5. fails to take reasonable care to make safe.

## Unitary Standard

Replace the approach based on status with a general reasonable person standard to all land entrants.

This has been the trend since the late 1950s, but still the minority of jurisdictions. Some take a third approach by still distinguishing trespassers, but collapsing the others.

**Example:** *Rowland v. Christian* - The status of the man who cut his hand on the sink faucet is irrelevant; the tenant had a duty to warn him of the cracked faucet that she was aware of.

## Subpart B: The Breach Element

### Module 8: Determining Breach, In General

Plaintiff must put on enough evidence that the jury may conclude that the defendant did not act reasonably.

Circumstantial evidence in a slip and fall case: old dirty banana peel (it has been on the ground a while and the train platform operator should have picked it up but failed to do so in a reasonable amount of time)

The risk causing activity of the defendant must be unreasonable.

**Example:** *Rogers v. Restrum* - Defendant school district is not liable for the wrongful death of some of their students who are killed in a car wreck because the school's open campus policy is not unreasonably enlarging the general risk of car accidents. This is despite the foreseeability of students leaving campus and getting in a car wreck.

### Module 9: Res Ipsa Loquitor

- **Res ipsa loquitor**-thing speaks for itself
- **Objective:** it permits a jury to infer that the plaintiff's injury was caused by the defendant's carelessness even when the P presents no evidence of particular acts or omissions on the part of the D that might constitute carelessness(common sense theory)
- Special type of circumstantial evidence establishing defendant acted unreasonably without any other inferences needed
- The very occurrence of an event may rebuttably establish negligence, if:
  - The accident is of the type that would not normally occur absent negligence
  - The instrumentalities of the accident were in defendant's sole control

#### Elements

- The accident would normally not occur absent negligence: the injury must be of a kind that ordinarily does not result absent carelessness of D
- The Defendant had exclusive control over the cause of the injury
- The Plaintiff did not contribute to the cause of the injury, nor did a 3rd party.
- **Example:** *Byrne v. Boadle* - Guy walking down sidewalk gets hit with barrel of flour. Owner of flour warehouse is found negligent because barrels do not fall out of windows

without carelessness, the flour warehouse had control over the barrel and plaintiff did nothing to cause the accident.

### **Burden of Proof**

- The Plaintiff has the burden of proving that the defendant breached a duty
- The burden then switches to the defendant to prove that they acted reasonably

### **Application**

#### **“Smoking out the Evidence” from the Defendant**

- The doctrine of Res ipsa Loquitor creates an artificial inference of negligence, in order to give the defendant the incentive to explain what actually happened.
- Therefore Res ipsa Loquitor can be used to “smoke out” or “give incentive” for the defendant(s) to divulge information that the Plaintiff would not have known/couldn’t obtain otherwise.

### **The Ybarra Problem**

- Illustrates that in order for Res ipsa Loquitor’s “smoking out” device to activate, 2 basic elements must be met:
  - One or more defendant must actually have some knowledge about the cause of the plaintiff’s injury.
  - Any defendant having evidence would be willing to lie under oath in a deposition, but willing to tell the truth under oath at trial.
- The Multiple Defendant Problem: See Ybarra v. Spangard
  - The source of the negligence falls within the scope of the duty owed by the defendant to the plaintiff; this usually (but not necessarily) arises where the instrument causing the injury was within the exclusive control of the defendant, or where there is an inability to identify the specific source of harm. [Frequently it arises where the source of negligence lies within a group of people who are unwilling or unable to divulge the actual source.]

A patient's shoulder was injured while he was on the operating table for an appendectomy. The court allowed him to sue all the medical staff under res ipsa loquitor because he did not know who injured him or how and getting the answer out of the medical team would be problematic.

## **Module 10: The Reasonable-Person Standard of Care**

### **General standard**

- Reasonable person
  - The care that would be exercised by a reasonable person under the circumstances
  - Example: Looking in the rear-view mirror before backing up

## Objective standard

- Mental deficiencies not taken into account
- Inexperience not taken into account
- Physical disabilities and limitations are taken into account
- Defendant acting in good faith or trying their best is no defense.
  - **Example:** *Vaughn v. Menlove* - the defendant is liable for the "rick" fire that burned down his neighbor's house when the community knew not to stack hay like he did, despite the defendant's action being according to his best judgment.

## Flexibility in the Reasonable Person Standard

- Example: Reasonable person will be more careful when walking on an icy sidewalk and even more careful if walking on an icy sidewalk with a newborn baby.

## Emergency

- An emergency is "an event that requires a decision within an extremely short duration and that is sufficiently unusual so that the actor cannot draw on a ready body of personal experience or general community knowledge as to which choice of conduct is best."
- Defendant is held to a standard of what a reasonable person would do under emergency circumstances
- This does not absolve from negligence liability but a jury may consider if the mistake is one that a reasonable person would make in a similar situation.
- Emergency doctrine unavailable where the defendant created the emergency situation.
- There are contexts where defendants can be liable for failing to anticipate an emergency situation.
  - Fire in a business or drowning in a pool.

## Physical Conditions

- To some degree, intoxication can be viewed as a physical condition. However, because the reasonable person is viewed as sober, the voluntarily intoxicated defendant will be required to perform as well as a sober person, not as well as a reasonable person at that level of intoxication.

## Characteristics of a Reasonable Person

- Jury must compare the conduct of the Defendant to that of a reasonable person in the community.
- Represents community norms
- Ignorance is irrelevant, must rise to level of community one is in
- The reasonable person is not a real person or any member of a jury.
- The reasonable person is expected to be aware of well known hazards.

- Example: fire, loaded firearms, etc.
- The reasonable person is not infallible, should possess weaknesses of others in the community
- Can be held liable for not seeing that which should have reasonably been noticed
  - Example: Should know when tire is worn, it needs repair because could potentially harm others if continue to drive on it

## **Specific Standards**

### **1. Professionals**

- General practitioner
  - The knowledge, skill, and custom of practice among practitioners in the local community
- Specialist
  - The knowledge, skill, and custom of practice among members of the specialty across the nation

### **2. Bailment - Caretakers of Property**

- Bailor
  - Gratuitous bailment
    - Must inform of known, dangerous defects in chattel
  - Bailment for hire
    - Must inform of known and reasonably discoverable defects in the chattel
- Bailee
  - Sole benefit of bailor
    - Low standard
  - Mutual benefit of bailor and bailee
    - Ordinary care standard
  - Sole benefit of bailee
    - High standard of care

### **3. Children**

- Children under the age of 5 are not negligent
- Children above 5 are expected to exercise the degree of care that would be reasonable of a child of similar age, intelligence, and experience.
  - Children of higher intelligence are held to it. (Adults of higher intelligence are not; just to the intelligence of a standard person).
  - There is usually little reason to sue a child as they often have few assets.
- Children engaged in adult activities are held to the adult standard of care
  - example: a child driving a car has to drive as well as the reasonable adult

### **4. Infirm Adults**

- Physical infirmities are visible, measurable and verifiable and are taken into account in judging the reasonableness of behavior.
- Mental infirmities are not visible and hard to measure, therefore, defendant are responsible and liable for their torts.
  - See - **Breunig v. American Family Insurance Co.** (no exception to objective standard of care for a mental deficiency)
    - $\pi$ 's truck struck by Defendant's car when Defendant was driving wrong way on hwy. Psychiatrist's testimony revealed Defendant believed God was steering the car.
      - **Should an insane individual be held liable for negligence for actions occurring as a result of the sudden onset of a mental disorder?**
        - Yes. Insanity is not a defense. If an individual had forewarning of the onset of a sudden mental disability then that individual can be held liable for his/her actions.
          - However, when a mental disorder interferes with an individual's ability to understand and appreciate the duty to follow a standard of care or interferes with one's physical ability to do so, it may be enough to avoid liability from negligence. A person cannot be held responsible for an accident which she was incapable of avoiding.

### Foreseeable Requirement

- Known or knowable possibility that there exists a risk that will result in harm.
  - Defendant is not negligent unless he knew or should have reasonably known that his actions posed a risk of harm.

### 5. Owners/occupiers of land

- Trespassers
  - Undiscovered = No duty
  - Discovered/anticipated = Duty to warn or make safe concealed artificial conditions, known to the owner/occupier, involving risk of death or serious bodily injury
  - Infant trespassers
    - "Attractive nuisance" doctrine
      - Duty to avoid foreseeable risk to children caused by artificial conditions, if:
        - A dangerous artificial condition the owner/occupier does or should know about
        - The owner/occupier knows or should know that children frequent the area
        - The condition is dangerous to children

- Cost/benefit analysis: the expense of remedying condition is slight compared to magnitude of risk
- Licensees
  - Persons who enter land with permission for their own benefit, rather than the benefit of the owner/occupier. (Licensees include friends and contractors coming on to the premises to make sales or repairs.)
  - Duty to warn of or make safe any known, concealed dangerous condition (whether natural or artificial)
  - No duty to inspect
- Invitees
  - Persons entering land with permission for the owner/occupier's business or as members of the public on land open to the public
  - Same duty as to licensees, plus a duty to inspect and render safe concealed dangers
  - Statutory standard (negligence per se)
    - When applicable, statute's specific standard replaces the general negligence standard
    - Test: class-of-persons/class-of-risk
      - The plaintiff is in the class of persons the statute was designed to protect
      - The harm suffered is among the risks that the statute was designed to protect against

## Module 11: Negligence per se

- Negligence Per Se / Statutory Standard of Care
- Requirements for Statutory Standard to Apply -- "Class of persons, class of risk" test
  - Plaintiff must fall within the protected class.
  - Statute must protect against this kind of harm.
- **Example:** *Gorris v. Scott* - While the pens on the ship requirement would likely have saved the sheep from being washed overboard, the Plaintiff cannot use the statute requiring them to show a breach of duty. The statute was enacted to protect the general population (not specific sheep owners - P not in the class of persons) from the spreading of contagious diseases (not preventing sheep from going overboard - not the risk the statute tries to ameliorate).
- **Example:** *Martin v. Herzog* - the lamp on the buggy requirement applied to the plaintiff, and the requirement is to prevent traffic accidents, so the jury needed an instruction that the buggy driver's omission is negligence per se
  - remember this is just showing the breach of duty--the other elements of the negligence tort must be satisfied--P might not have been barred from recovery under contributory negligence because the jury does not find the lack of the lamp was a proximate cause.
- If statute applies there is negligence per se

- but NOT necessarily liability since there might be no damages
- Violation of some statutes may be excused if:
  - Where compliance would caused more danger than violation.
  - Where compliance would be beyond defendant's control.
- Regulations are a big area to look to for negligence per se violations

## **Module 12: Custom and the Negligence Calculus**

### **Learned Hand Calculus**

- Liability depends upon whether Burden (B) is less than Loss (L) multiplied by Probability (P).
- P and L measure cost of taking risky action.
- B, measures the cost of reducing or avoiding the risk of harm.
- B is the cost (burden) of taking precautions, and P is the probability of loss (L). L is the gravity of loss. The product of  $P \times L$  must be a greater amount than B to create a duty of due care for the defendant.

**U.S. v. Carroll Towing**- Learned Hand's BPL Formula; Unmanned barge sank. Court held that if the probability & gravity of loss is greater than the burden, then negligence. Defendant was liable because burden was less than the high probability multiplied by high potential loss

### **Economic View of Negligence Calculus**

- Plaintiff generally tried to prove that there was a particular precaution that the defendant should have taken, and if the precaution should have been taken, plaintiff would not have been harmed.
- The economic theory of negligence will be used by parties that engage in risky actions to determine whether or not the risk is worth taking.

### **The Untaken Precaution**

- A precaution that the defendant should have taken and chose not to. Had the defendant taken that precaution, the plaintiff would not have been harmed.

### **Custom Application**

- Relevant because it reflects the thoughts of a large number of people.
- Dispositive because a large number of people could be wrong.
- It does not have to be universal to be considered a custom, it can be specific to a certain area, industry, group etc.
- A reason for admitting evidence of compliance with custom is to inform jury that if it finds a party negligent, it is actually finding that entire community or industry that follows that custom as negligent.

- Regardless of whether custom evidence is put in front of the jury, they will often have an idea of customs in their minds anyways.
- Custom is evidence for the jury to consider in its determination of breach of duty

### Custom Rationale

- Evidence of non-compliance or compliance with custom is not only relevant but dispositive
- Compliance tends to prove reasonableness
- Non-compliance tends to prove negligence
- Evidence of industry custom as well as non-compliance aids in educating jurors of current custom and serves as a coordinating function.

### Example

- **T.J. Hooper** - Whether or not something was the industry custom does not in and of itself answer the question of whether the owners breached a standard of care by not supplying their tug boats with radios. Just because it was not custom to carry radios does not mean it was not the standard of care to require them to carry radios. Custom does not dictate standard of care! (but relevant in determining standard of care). The court held that the tugs were unseaworthy (comparative to not reasonable in reasonable person standard) because they did not have receiving sets, even though such sets were not standard in the industry. (The court also said the barges were unseaworthy, but that wasn't important in regard to the custom question. Custom question involved whether radios on tugs were industry custom.)

### *Subpart C: The Actual-Causation Element*

#### Module 13: Proof and Preponderance

- Short Intro: After finding there has been a breach of duty, consider actual cause. Actual Cause is another way to say **Cause in Fact**.
- Tests to determine the Cause in Fact
  - But For Test
    - “But for” Defendant's conduct would the injury have occurred?
    - Example: Would the injury still occur, even without defendant's negligence?
      - Answer to the above question is Yes → No to Causation → No to Liability
      - Answer to the above question is No → Yes to Causation → Yes to Liability
  - Substantial Factor Test
    - If multiple factors bring about an injury, and any one of those factors alone would have been sufficient to cause the injury, then it is sufficient to show defendant's conduct was a “substantial factor.”

- A cause can be a substantial factor without satisfying the “but for” test.
- **Example:** *Kingston v. Chicago and Northwestern Railroad* - The fire that the railroad started is a substantial factor of the timber's destruction when it combined with an equal fire and combined they consume the timber. This is Prof. Johnson's Beavis and Butt-head example.

## Module 14: Multiplicity

### Multiple Necessary Causes

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

Example: Someone heaves bowling ball. Someone else lobs knife. The bowling ball that deflects the knife hits a pedestrian. The heaver and the lobber are both liable

- Ask the "but-for" question
- In these cases, never say *the* actual cause; think *an* actual cause

**Example:** *McDonald v. Robinson* - the negligent driving of both defendants that ran into each other is the cause of plaintiff pedestrians damage when they hit him as a result of their collision.

### Multiple Sufficient Causes

- When each of multiple discrete careless acts committed by different multiple actions, by itself, cause the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfied the but-for test.
- Caveat: if the act is only a trivial necessary condition, then proximate causation is not satisfied.

Example: Two companies dump equal amounts of toxic chemicals into the ground which seep into the soil and contaminate a residential well. The well has 1000 ppm of the chemical. The resident drinks the water and dies because a dosage of 300 ppm is enough to kill someone...both companies are liable. -- /or/ If you and your neighbor play w/ fireworks and start a fire that hurts your neighbor. The "But For" claim does not work cause' you can say "but for" this your burns would have still happend for my neighobr's actions would have caused you harm regardless. So judges made the JOINT CAUSES charge to help people get damages.

### Burden Shifting and Problems in Cause-In-Fact *Summers v. Tice*

Facts: Two hunters both negligently fired their guns, but plaintiff cannot establish which one fired at him. Multiple defendants acted, but only one caused injury

Rule: Where a small number of defendants are engaged in substantially simultaneous, culpable conduct imposing similar risks, the burden of proof shifted to defendants to negate his or her own negligence, ie make defendant prove that he was not the cause.

Holding: In this case, plaintiff won damages from both defendants because neither could negate negligence.

## Market share liability

- Theory of causation used by consumers who allege that they were injured by a product but cannot identify who made it. This is so that Plaintiffs that do not know exactly how they were injured are still able to recover damages.
- Burden of proof is on the defendants to prove that they did not manufacture the product that caused the injury
- If defendant cannot prove that it wasn't the cause of the injury, that manufacturer is liable for its percentage share of the market at the time the injury took place. For example, if Defendant's product accounted for 10% of the market at the time of the incident, then damages are awarded respective of the market they hold (10% of the damages).
- Plaintiffs must join enough defendants to represent a substantial share of the market of manufacturers of the product at the time of the injury

**Example:** *Sindell v. Abbott Labs* - Mfgs. are liable in proportion for their market share when it cannot be proven whose DES medication was taken by specific plaintiffs (pregnant mothers who took DES to prevent miscarriage that resulted in serious birth defects to babies).

## Medical Uncertainty Cases

- Alternative theory of causation that allows plaintiff to permit recovery for malpractice even when they cannot prove the malpractice more than likely caused death (e.g. negligence causing only 14% less likelihood of survival when patient had less than a 50% chance of surviving prior to the act/omission)

**See Herskovits** -  $\pi$  argued that misdiagnosis cut chances of survival by 14%.

- The estate can show probable reduction in statistical chance for survival but cannot show and/or prove that with timely diagnosis and treatment, decedent probably would have lived to normal life expectancy.
- **Is there an actionable claim for failure to timely diagnose a life threatening condition when there is very little evidence that even if it were diagnosed earlier that the decedent would still live?**
  - Court held that negligent misdiagnosis was a substantial factor leading to  $\pi$ 's death.
  - If reduce a 49% chance of survival to 1% --> probably should be found liable for your negligence. On the other hand, if you reduce the chance of survival from 49% to 48% or 2% to 1%, we may not want to hold the defendant liable or quite as liable.
- Some courts make the loss of opportunity to survive the cause of action. Lost opportunity can be compensated and valued as an appropriate percentage of wrongful death claim

Example: Beswick v. CareStat - 911-dispatcher and private ambulance company increased the risk of Mr. Beswick to survive his heart attack (16 minutes slower than city ambulance)

### Causation and Medical Malpractice Three Views

1. Traditional and Majority View
  1. negligence of medical professional is a "but-for" cause of  $\pi$ 's injury
  2.  $\pi$  bears the burden of proving more likely than not that  $\Delta$ 's negligence caused harm
  3. using this approach in Herskovits,  $\pi$  would not recover
2. Relaxed "but-for"
  1. court asks jury whether or not causation is established under a more elastic concept of causation
  2. substantial factor: w/o "but-for" test whether malpractice caused death and doctor is liable
  3. recovery limited to certain types of damages per Herskovits (lost earnings, add'l med expenses, etc.)
3. Lost Opportunity
  1. court assesses value of reduction in  $\pi$ 's chances of recovery and compensates for the value of lost chance of recovery

Abraham mentions the greater trend is toward the lost opportunity approach

### ***Subpart D: The Proximate-causation element***

#### **Module 15: The Place of Proximate Causation**

- Plasgraf v Long Island Railroad
  - Railroad not liable for injury to P when they dropped an unlabeled box with fireworks in it causing an explosion scales to fall on a person on the platform.
  - Under foreseeability test, it was not reasonable to hold railroad's alleged negligence was cause of P's injuries. The *explosion* was proximate cause, and railroad could not have reasonably expected such a disaster.
- older court decisions used to explain proximate cause in terms of space
  - **Example:** *Ryan v. NY Central Railroad* - The railroad was liable for the fire in the first building caused by their train, but not for subsequent ones. The A-Z opinion.

#### **Module 16: Various Tests for Proximate Causation**

**Proximate Causation:** When the cause is close enough to hold one liable A cause that does not necessarily or immediately cause an event or injury Most issues of proximate cause can be resolved by the foreseeability test or by the harm-within-the-risk-test.

#### **Foreseeability Test**

- the basic test of proximate causation
- The defendant's negligence is a proximate cause of the plaintiff's harm if causing that harm was a foreseeable result of acting as the defendant did
- Ex: defendant fails to stop at a red light and collides with the plaintiff's vehicle
  - was the defendant's negligence a "proximate" cause of the plaintiff's harm?
    - Yes - it was highly foreseeable that someone passing through the intersection would be harmed if the defendant did not stop at the red light

### Objects of Foreseeability

- Plaintiffs--*Palsgraff*
- extent of harm--**NO PROXIMATE CAUSATION PROBLEM**--"egg shell plaintiff rule"
- Type of harm--*Wagon Mound* - releasing oil into the harbor is negligent because it "fouls the dock" but not foreseeable that it will light on fire and burn down the dock.
- Manner of harm--**NO PROXIMATE CAUSATION PROBLEM**--*Marshall v. Nugent*-P forced off the road by D's negligence and is hit by a third car because he had to walk to town for help. The type of harm [getting hit by a car] is right, but the manner [as a pedestrian] was not; there is still liability.

### Harm-Within-The-Risk-Test

- this can be thought of as a way of clarifying the foreseeability test
- Did the defendant's negligence increase the risk that the same general type of harm that the plaintiff suffered would occur?
- Ex: A defendant negligently parks his car next to a fire hydrant. Suppose now that the plaintiff, driving by the hydrant where the defendant parked, skids on the road and collides with the defendant's parked car.
  - Is the risk of the injury the plaintiff suffered one of the risks that makes the defendant negligent for blocking access to the fire hydrant?
    - NO - because the act of parking by the hydrant instead of a dozen feet further down the street does not increase the risk of the harm materialized. A motorist passing by that spot is no more likely to skid into a car parked negligently than into a car parked a legal distance away from the hydrant.

### *Subpart E: The Damages Element*

#### Module 17: Existence of Damages

- **Compensatory are the most common form of damages**
- Money given to make P whole again. Intended to represent the closest possible financial equivalent of the loss or harm suffered by P.

#### Sufficient kinds of compensatory damages

- Personal injury - physical pain and suffering can be included
- Property damage (tangible)
- Severe emotional distress (for NIED only)
- Not mere economic damages, harm to reputation, or other oblique injuries
  - But economic damages that flow from Personal or property damages are allowed (lost wages if disabled)
  - But note that oblique injuries may create liability covered under the heading of oblique torts
- Pecuniary injury - damages include compensation for the victim's medical expenses, lost wages or diminished earning capacity, and other economic expenses because of the injury.
- Non-pecuniary injury - pain, suffering, and other variations of mental distress.

**"Collateral Source" Rule**-P may recover damages even for benefits that have been paid from her own sources of insurance.

- subrogation allows the insurance carries to recover any payouts to the plaintiff if plaintiff recovers an award

**The successful plaintiff in a personal injury case is entitled to recover:**

- 1. the "special," (specific) or out-of-pocket, losses proximately resulting from the defendant's tortious action
- 2. "general" damages for pain and suffering

**Burden of Proof** "P must prove by a preponderance of the evidence that she has suffered, or will in the future suffer, the losses for which she claims damages."

**The Principle of a Single Recover: Compensation for Both Past and Future Loss**

#### 1. Advantages

- The case does not go on forever
- The defendant gets repose similar to the running of a statute of limitations
- The legal system avoids multiple judicial proceedings

#### 2. Disadvantages

- Less accuracy in estimating future damages compared to if there were periodic awards
- P must be a good investor

#### 3. Discounting Awards to Present Value

- "This principle requires the jury to "discount to present value" awards made for future losses by awarding less than the absolute dollar amount of those losses"

**Punitive Damages**

- Punishes defendant
- Compensatory damages are a prerequisite
- Conduct must be wonton, willful, reckless, or malicious
  - The conduct for which the plaintiff being sued can be beyond the conduct at issue

### **Nominal Damages**

- Never awarded in negligence
  - fails the 5th element of damages required.
- Damages that are symbolic
- awarded when the harm is not proven with certainty or to establish rights (trespass award of \$1 establishes boundry line)

## **Defenses to Negligence**

### **Module 18: Contributory and Comparative Negligence**

Note: PLAINTIFF BEARS BURDEN OF ALL 5 ELEMENTS A NEGLIGENCE CLAIM-If plaintiff fails on just one element, defense wins!!

#### **1. *Contributory Negligence***

1. Definition: Conduct on the part of the plaintiff which falls below the standard of conduct to which he should conform for his own protection; and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.
2. Complete bar to recovery- if plaintiff contributes to negligence, no recovery
3. Most jurisdictions have rejected contributory negligence in favor of comparative negligence

#### **2. *Comparative Negligence***

##### **1. Pure comparative negligence**

1. Plaintiff's award is reduced by plaintiff's percentage of fault
2. Example: If P is responsible for 90% of the negligence that caused his injuries, he may still recover 10% of his damages.

##### **2. Partial comparative negligence**

1. Plaintiff's award is contingent upon defendant meeting a certain threshold percentage of fault
2. Plaintiff's award is then reduced by percentage of fault
3. Two types of Partial Comparative Negligence depending on the jurisdiction:
  1. In order for Plaintiff to recover, Defendant's negligence has to be equal to or greater than 50% (tie would go to the Plaintiff)

2. In order for Plaintiff to recover, Defendant's negligence has to be greater than 50% (tie would go to Defendant)
  1. **Example:** *Hunt v. Ohio Dep't of Rehab. and Corrections* - judge finds the Dep't 60% liable for hand being chopped off in snowblower because he is aware that finding equal fault will bar all recovery (and making it 50.01% just looks bad).

## Module 19 and 20: Assumption of Risk(Implied and Express)

1. Definition: A plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover.
2. **Elements**
  1. Knowledge of a Particular Risk: plaintiff must have actual and conscious knowledge of the particular risk.
  2. Voluntary: plaintiff must voluntarily expose herself or her property to the risk to assume the risk.
  3. Assuming the risk: the defense of assumption of risk only applies to the particular risk which the plaintiff has knowingly and voluntarily assumed.
3. **Classifications of Assumption of Risk**
  1. Express agreement
    1. Not valid for certain defendants, including common carriers, and hospitals (e.g. airlines)
      1. **Example:** *Tunkl v. Regents of Univ. of Cal.* - hospital cannot require waiver because it is an essential service; this goes against public policy.
    2. Not valid for gross negligence or willful acts
    3. Signing a release form is generally an acknowledgement of the risk rather than a contract.
      1. This is really good evidence that you have expressly assumed the risk; you still need to know what you signed.
      2. **Example:** *Hulsey v. Elsinore Parachute Center* - it is hard to believe that the parachuter did not know that parachuting was dangerous and waiving liability when his initials appeared next to bold words saying as much.
  2. Implied: Based on the circumstances, plaintiff impliedly assumed the risk
    1. **Example:** *Murphy v. Steeplechase* - Plaintiff was injured on a amusement park ride. Court barred recovery for injuries because plaintiff assumed the risk. The court stated that the risk of being injured was part of the thrill and plaintiff knew being thrown off was the likely outcome of participating.

# Liability Relating to Medical Care

## Module 21: Medical Malpractice/Professional Negligence

- A “regular” or "general" malpractice case against a physician involves professional negligence (prof. neg. also governs conduct of attorneys and accountants):
- Elements of negligence [Note difference in breach]:
  - Duty
  - Breach – standard of care is key difference
    - In Ordinary negligence failure to comply with custom is **not** automatically a breach of duty
      - it may be persuasive evidence of breach, but it need not be followed by the jury
    - **In medical malpractice failure to comply with custom constitutes breach of duty**
      - Standard of care
        - Custom (aka accepted practice) is dispositive
        - Sword and shield, it works for and against a physician
          - If the custom is to leave things in the chest cavity then I cannot be held liable for doing so
          - If custom is to check on the patient 20 times a day and I only check 19, I am liable
  - Actual causation
  - Proximate causation
  - Damages
    - Damages are necessary for negligence (but not medical battery)
    - Consent issue is irrelevant here if it causes harm
- Good results are not guaranteed.
- New physicians are judged by the same standard as experienced physicians.
- Can result from negligent diagnosis or treatment
- Must cause damages
- Many states have statutory reforms or limitations
  - Statutory Changes:
    - Caps on pain-and-suffering damages
    - Threshold determination of merit by panel or administrative before lawsuit can go forward
    - ERISA (federal statute) effectively bars most lawsuits against insurance companies for wrongful denial of coverage
      - Damages are limited to cost of denied benefits
      - Only applies to employer-provided
- - **Traditional, common law rule:**

- General practitioners standard: Minimally qualified general practitioners in the community (or a similar one) [LOCAL AREA COMPARISON]
- Specialist standard: Minimally qualified specialists in the nation. [WHOLE NATION COMPARISON]
- Problem with traditional rule: Difficult to find experts to testify against neighbor to establish community standards.
  - Trend is to hold general practitioners to a national standard.
    - Allows meritorious lawsuits that would not survive the local area comparison
    - With new methods of transportation/information access doctors have the ability to become well informed
    - *Example: Campbell v. Pitt County Memorial Hospital*'- Breech baby delivered regularly instead of by c-section, baby gets cerebral palsy. Issue is whether Defendant followed custom of profession. Rule: Doctor held to local standard, acted against custom here; but for nurse not reporting to supervising dr, supervising dr would've intervened and delivered baby by c-section

## Module 22: Informed Consent

### Informed Consent Actions

- Counts as a negligence action
- Policy premise: Patients should get enough information ahead of time to make an intelligent, reasoned decision about care.
- Typical facts for suit: A complication of treatment arises about which the patient was not apprised ahead of time.
- May also be applied to:
  - Lack of disclosure about treatment alternatives
  - Lack of disclosure of risks of forgoing treatment
- As a negligence action, the 5 elements of negligence are required.
- The elements of negligence:
  - Duty
  - Breach
    - Two types (see below):
      - Patient centered
      - Physician centered
  - Actual causation
    - A key issue in many cases; need to show "but for" the lack of disclosure, you would not have had the procedure
  - Proximate causation
  - Damages
    - Required to have a cause of action

### Key Points:

- Damages are necessary to make out a case. The patient who is not told of a risk, but suffers no physical injury, has no cause of action
- Actual causation is a barrier to many suits. **The patient must show that but for the lack of disclosure about risk, the patient would have refused treatment.**
- The standard of care is an important point of contention. Some courts use the “physician rule”, others a “patient rule”

#### **Example: Heart Bypass Surgery**

- A patient with severe blockage in coronary arteries undergoes a triple bypass operation. The Surgeon never discloses that there is a rare risk of chest wound infection. The patient suffers a chest wound infection, resulting in considerable injury. Even if the patient had been told about the risk, the patient would have undergone the surgery.
- Result: no action for informed consent.
- Why? Actual causation is lacking. The patient would have had the surgery anyway [not "but for" causation].

#### **Standard of Care:**

- **Physician Rule:**
  - Question: Is it the custom among physicians to disclose the risk?
  - Custom sets the standard as in regular professional negligence actions
  - Criticized as paternalistic: (1) Should the physician decide what you know or think about? (2) Patients made not be able to decide what they need to know.
- **Patient Rule:**
  - Question: Is the undisclosed risk or alternative course of treatment material information a reasonable patient would want to know?
  - A risk is material if it would affect a patient’s decision about the treatment
  - Two approaches for materiality
    - Objective: would a reasonable patient have cared about the risk?
    - Subjective: Would that particular patient in front of the doctor care about the risk?
  - Growth of recognition of doctrine in late 1960s and 1970s
  - No liability for failure to disclose risk where in certain situations when justified
    - Emergency
    - Patient requests non-disclosure
- **Therapeutic privilege:**
  - Justifies non-disclosure where disclosure would have detrimental effect on the patients physical or psychological well being
  - The therapeutic privilege is only recognized in some jurisdictions
  - Substantially undermined significance of the patient rule

#### **Module 24: Medical Battery**

- Medical battery

- Intentional tort
- Elements of battery
  - Act
  - Intent
  - Causation (actual and proximate)
  - Touching
  - Harmful or offensive
- **Example:** Undergoing an operation on the left ear, but doctor decides to operate on right ear and the right ear is made better.
  - Lack of damages does not invalidate an intentional tort action. However, there is no negligence because there are no damages.
    - No battery if hospital and physicians can prove an affirmative defense of consent. For a patient incapable of giving or withholding consent, consent is implied by law. However, there is negligence because the hospital and physicians had a duty to perform the surgery competently. Consent is irrelevant.
    - Damages are not necessary to make out a case for battery. Thus, the patient who is not injured, and is in fact better off because of the touching, still has a case.
  - Note: A “harmful” touching for purposes of battery is not necessarily one that causes harm
    - it is a touching that is unwanted
  - Consent for emergency treatment is implied by law for public policy reasons.

**Three ways to sue health care providers:**

- Medical battery
- Professional negligence
- Informed consent

**Module 24: ERISA pre-emption**

- Employee Retirement Income Security Act (1974)-- Federal Law
  - Covers any private sector voluntary employee benefit plan
  - Section 502 allows recovery of wrongfully denied benefits
    - Does not allow for recovery of consequential damages
  - Section 514 preempts all state laws that relate to benefit plans.
- **Example:** *Corcoran v. United Healthcare* - parents of unborn child who dies because the insurer did not authorize hospitalization of the mother cannot recover for wrongful death because of ERISA preemption.