

# Torts I Fall 2014 Wypadki

(including regular wypadki)

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## **NOT AUTHORIZED** **FOR EXAM**

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Fall 2014  
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### MASTER TABLE OF CONTENTS

Regular Wypadki ..... 2

### REGULAR WYPADKI TABLE OF CONTENTS

01.01 Negligence in General .....	2
01.02 The Duty Element.....	7
01.03 The Breach Element.....	11
01.04 The Actual-Causation Element.....	21
01.05 The Proximate-Causation Element ...	23
01.06 The Damages Element .....	24
01.07 Affirmative Defenses to Negligence.	25
02.01 Liability Relating to Health Care.....	26
03.01 Intentional Torts.....	26

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## 1. 01.01 Negligence in General

### Tort claim in general

In any tort claim, (P) has the burden of proof to establish all the elements, and if the (P) established all the elements (P) made out a prima facie case.

**(D) can win a case in 3 ways:**

1. The (P) failure to establish the prima facie case by preponderance of evidence
2. Rebuttal defense, the (D) offer evidence to disprove just one element of (P)'s prima facie case.
3. Affirmative defense or assumption of risk, the (D) actually stipulate the (P)'s prima facie case, but offer evidence such as self-defense, consent, or insanity to defeat the (P)'s case.

**Tie-breaker:**

1. If the question is whether the (P) established a prima facie case, then any tie will go to the (D).
2. If the question is whether the (D) established an affirmative defense, then any tie will go to the (P).

### Negligence: Prima Facie Elements

Generally - (D) may be held liable for his unintentional conduct to (P) for negligence if it can be determined that the (D) owed a duty to the (P), the (D) breached that duty, and the (P) suffered damages which were the actual and proximate cause by (D)'s breach.

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

**1. Duty:** A duty is an obligation imposed by law requiring one party to conform to a particular standard of conduct toward another. Duty is a question of law meaning the judge will decide whether the duty owed to (P)

- The duty must be reasonable under the circumstances.
  - A general duty of care is owed to all foreseeable (P)
  - Rescuers - If the (D) negligently put himself or the third person in a peril. "Danger invites rescue"
  - No affirmative duty to act - people do not have a duty to help or rescue or help someone. There are 3 exceptions:
    - 1) common carriers to passengers, innkeepers to guests, shopkeepers to customers, landlord to tenants, schools to student, employer to employee, jailer to prisoner, daycare provider, to children or adults being cared for, possessor of public land open to the public, to members of the public lawfully present, and those who solicit and gather public for their own profit OWE a duty to aid.
    - 2) Anyone created a hazardous environment, he has the duty to help.
    - 3) medical professional are exempt from liability for ordinary, but not gross negligence acting to, help someone.
  - If no duty, there is no liability
- 2. Breach of Duty:** failure to meet the standard of care. Were you in fact careless?
- **Reasonable Person:** the care that would be exercised under the circumstance.

- **Objective test** - 1) Mental deficiencies and inexperience not taken into account. 2) Physical disabilities and limitations are taken into account.
- **Professionals** - Professionals will not be compared to a reasonable person standard, they will be compared to that professional standard of care.
- **General Practitioner**: A general practitioner's knowledge, skills, and custom will be compared to other general practitioners in that "Community."
- **Specialist**: will be compared to the other specialists across the "Nation."
- **Children**: will not apply the "reasonable person" standard. Age (under 4 do not have the capacity to be negligent), education, intelligence, and experience are taken to account. There is an exception: if a child will be engaged in an adult activities, like shooting gun, or in one case playing golf.

3. **Cause-in-fact (Actual Causation)**: Plaintiff's harm caused by Defendant's breach of duty. The cause-and-effect relationship between the (D) carelessness and the (P)'s damages or injury. In another word, (D)'s conduct = (P)'s injury or damages. Did your act actually cause the damages? ("But-For Test," Substantial Factor Test). "But for the (D)'s conduct, the (P) would not have been injured."

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. **Existence of an Injury or damages**: bodily injury to (P) himself or damages (P)'s property. Need real damages.

- Plaintiff must establish each of the following elements by a preponderance of the evidence (>50%, 50.00001%)

**Georgetown v. Wheeler - Negligence case was established** A mal-practice case. The (D) who is a "specialist" breach his duties to detect the problem. The (P) was found "comparative negligence" because the (P) failed to followup with the doctor's advice.

- 1) The (D) as a "specialist" doctor owed a duty of care to (P), and 2) (D) breached his duty because he did not properly diagnosed the (P)'s health problems since the specialist standard of care is compared to other specialists across the nation, and 3) (D)'s breach was the actual cause of the (P)'s injury because "But for" the (D)'s breach to properly diagnose the (P)'s problem, the (P) would not have been injured, and 4) the (D)'s breach of duty of care was the proximate cause because it was foreseeable that the extent of the (P)'s injury was caused by the (D)'s breach of duty, and 5) the (P) suffered bodily injury.
- **Comparative Negligence**: is a defense for (D). when the (P)'s own negligence partly contributed to (P)'s injury. Therefore, the (D) is not liable for the full amount of the (P)'s damages.

### **Cases for Duty Element**

1. **Weirum v. RKO** – Negligence case was established
  - Radio station contest killed motorist
  - Negligent driving of listeners was deemed foreseeable
  - If one's actions creates an undue risk of harm, then liable for any actions taken by third parties resulting from that risk of harm
2. **Kubert v. Colonna** - No Negligence. No duty
  - Remote texter (D), who was not aware that her friend was texting while driving, had no duty toward the (P) because of the injuries that (D)'s friend caused it.
3. **Boyd v. Racine CurrencyExchange** -No negligence case because (D) as a shopowner had no duty to protect its customer.

- Bank robber shoots customer
- Invitee status (high SOC) does not apply b/c the incident didn't occur b/c of a condition of the place, but b/c of something that occurred at the place
- Duty didn't include complying w/ robber's demands
- 4. **Yania v. Bigan** – No negligence. No duty to rescue
  - persuaded to jump into water-filled trench, then drowns
  - (D) wasn't liable for failing to rescue, even though (D) conduct led to harm.
- 5. **Theobald v. Dolcimascola** – No negligence, No affirmative duty to rescue
  - teenager plays w/ gun in presence of friends (Russian roulette)
  - No duty to rescue if Δs are merely bystanders/observers to decedent's dangerous actions
  - Distinction b/t moral and legal obligation
  - (Exception: if Δs had placed friend in peril and he was injured due to that peril, then they'd be liable)
- 6. **South v. Amtrak** – Negligence case was established
  - engineer refused to assist injured motorist
  - Duty to aid is owed to π where Δ knows or has reason to know that own conduct has caused harm to another
  - Must exercise reasonable care to prevent further harm
- 7. **Tarasoff v. U.C. Regents** - Negligence case because the doctor (D) was aware of his patient mental stage.
  - doctors were aware of possible killing that eventually occurred
  - Was w/in psychologist's authority to do something to prevent the harm; obligation to use reasonable care to protect potential victim from harm
  - When the avoidance of foreseeable harm requires Δ to control the conduct of another (or to warn of such danger), common law imposes liability (but only if Δ bears a special relationship to the dangerous person or potential victim – satisfied in this case: doctor/patient)

## **Cases for Breach of Duty Element**

1. **Rogers v. Retrum** – No negligence because (P)'s injury was not a result within an unreasonable risk created by (D)
  - teacher gives student a failing grade; friend crashes car
  - There was a duty – a student car accident is foreseeable risk to school's open campus policy
  - No breach of duty – school was not unreasonable; superseding cause
2. **Vaughan v. Menlove** – Negligence case was established because a reasonable person knows that stacking wet hay next to (P)'s cottage will cause fire.
  - Δ liable b/c held to objective standard of reasonableness
  - Duty to deal w/ property so not to damage property of others
  - Must use care a prudent person would take under the circumstances,
  - A person's subjective considerations are immaterial
3. **Breunig v. American Family Insurance** - The negligence case was established because the (D)'s mental disability, instantly, will not be taken into account because the mental aberrations were not constant, and the (D) had prior knowledge of her condition. Therefore, (D) breached her duty to exercise the reasonable person standard of care under the circumstance to avoid the accident.
4. **Gorris v. Scott** – Negligence per se was not satisfied because the statute was not designed to cover the harm to (P)'s animals
  - sheep overboard
  - Can't use particular statute b/c it was enacted for a different purpose (to prevent transmission of disease, not to prevent animals from drowning)
  - Can't show breach of duty
5. **Martin v. Herzog** - Negligence per se case was not satisfied because the (P)'s own violation of the statute barred them to recover in a contributory negligence jurisdiction.
6. **The T.J. Hooper** – Negligence case was established because the whole industry custom was "unreasonable"
  - tugboats didn't have radios, no knowledge of weather
  - The law should not be bound by what is customary; customs don't prove reasonableness

7. **U.S. v. Carroll Towing Co.** – Negligence case was established by applying the BPL analysis because the burden to avoid the harm by having an attendant on the barge was less than loss the (P) suffered.
  - unattended barge broke away and caused damage
  - Calculus of negligence (Hand Test)– Loss vs. benefit (utility of keeping condition vs. costs of preventing harm)
8. **Byrne v. Boadle** - Negligence case was established by applying the Res ipsa loquitur doctrine. Flour barrel falls from shop window on top of the (P) and injured him.
9. **Flower v. Seaton** - The (P) established the negligence case by applying the Res Ipsa Loquitur doctrine because (P) daughter's injury does not normally occur in nursery schools if the children are properly supervised.
10. **Campbell v. Weathers** - Negligence case was established because the (P), as an invitee though (P) did not purchase anything, was injured at the (D)'s business, and the (D) failed to notify the (P) of the trap.

## **Cases for Actual Causation Element**

**Ybarra v. Spangard** –  $\pi$  was unconsciously injured, any doctor/nurse could've been responsible

- Several instrumentalities; all in a position to know who was solely responsible
- Res ipsa loquitur can be applied to create group liability b/c all those involved are potentially liable for the wrongful actions

**Byrne v. Boadle** – flour barrel falls from shop window

- Res ipsa loquitur
- More than just the happening of an accident is required for  $\pi$  to prove  $\Delta$ 's breach of duty
  - The harm-causing event has to be tied to  $\Delta$ , and the event must be one that generally doesn't occur absent negligence
- Nature of accident proved breach of reasonable care
- Burden of proof shifted to  $\Delta$  to prove that duty wasn't breached

**Beswick v. CareStat** – ambulance was inappropriately dispatched

- Loss of a chance to survive (there may have been a chance of survival if ambulance would've arrived on time/earlier)
- Reliance interest being protected – rescuers generate an expectation among individuals who turn to them
- A person who undertakes to render services to another which are recognized as necessary for the protection of the other person is subject to liability for physical harm resulting from failure to exercise reasonable care to perform undertaking if failure to exercise such care increases risk of harm

**Anderson v. Cryovac** – water contamination leads to illness and death of city residents

**Kingston v. Chicago and Northwestern Railway** – fires unite

- Multiple sufficient causes – when there are multiple causes, where each factor is of sufficient magnitude to cause the injury but neither is a sole 'but for' cause, all parties are liable

**Summers v. Tice** – quail hunters

- When at multiple actors are equally negligent/act independently of each other to cause injury to  $\pi$  and  $\pi$  is unable to establish which  $\Delta$  caused the specific injury (not due to  $\pi$  lack of diligence), then there's a presumption that both are responsible until

one can show that the other is solely responsible ( $\Delta$ s have burden to prove) – both  $\Delta$ s are jointly and severally liable

- $\pi$  had the obligation to establish that both  $\Delta$ s had breached a duty of care
  - $\pi$  is then compensated due to  $\Delta$ s behavioral (not casual) responsibility for the accident

- ‘But for’ test doesn’t apply b/c there’s a 50% chance either  $\Delta$  caused the injury
  - Has to be ‘more likely than not’ that each  $\Delta$  is a ‘but for’ cause for preponderance of the evidence – in this case, there’s not – hunters can say that it’s ‘just as likely’ not ‘more than likely’

**Palsgraf v. Long Island RR** – package fell while loading moving train, exploded, object hits  $\pi$

- $\pi$ s injury not a foreseeable risk, so no breach of duty b/c only a duty to guard against foreseeable risks

- $\pi$  must prove that conduct was a wrong to the  $\pi$ , not anyone else

- There are different conceptions of tort law

- Cardozo: Tort law is about remedying wrongs b/t particular individuals in a certain relationship w/ each other (wrongdoers owe duties of repair to persons that they wrong and only those persons –  $\pi$  isn’t owed a duty; negligence isn’t actionable unless it involves the invasion of a legally protected interest, the violation of a right (specifically a violation of  $\pi$ s right);  $\pi$  must’ve suffered a wrong at the hands of  $\pi$ , not enough that  $\pi$  committed a general/societal wrong

- Andrews: Tort law is valuable b/c it regulates risks and compensates accident victims; case should be analyzed by proximate cause, duty is irrelevant

**Ryan v. New York Central RR** – train caused spark and set shed on fire which then burned house

- Natural and ordinary doctrine – “one leap” away consequences should be looked for, not necessarily all injuries that could ever occur

- $\Delta$  not liable b/c more than one leap away

- Damages weren’t immediate, they were too remote ( $\pi$  can’t recover)

**Hulsey v. Elsinore Parachute Center** –

**Hiatt v. Lake Barcroft Community Association** –

**Sawyer v. St. Joseph’s Hospital** –

**Campbell v. Pitt County Memorial Hospital** – baby born w/ condition due to hospital’s choice of delivery

- Doctor held to local standard and acted against custom

## 01.02 The Duty Element

### **Subpart A: The Duty Element - is the question of law not jury**

1. Did the (D) create foreseeable risk of harm to the (P)?
2. "Foreseeability of the risk" is the primary consideration in establishing the duty of element
3. You (D) have a duty to be careful to all foreseeable Plaintiff(s) and to Foreseeable Rescuer(s)
4. Plaintiff has the burden of Proof to show that defendant's negligence created foreseeable risks of harm to persons in her position

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- General duty - A general duty of care is owed to all foreseeable plaintiffs
- Specific Situations

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- Rescuers - A rescuer is a foreseeable plaintiff where the defendant negligently put the self or a third person in peril. "Danger invites rescue"

#### 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

#### Following Cases are about the DUTY element:

1. **Weirum v. RKO** - Radio show contest. Negligence case was established because it was foreseeable that (D)'s contest would the (D)'s listener to race and drive negligently and cause harm to (P)
  - The remote (P) sued the (D) because (P)'s husband was killed by the (D)'s listener. (D) conducted a contest where listener had to find a mobile DJ. (D)'s listener attempted to follow and negligently forced another car off road and killed (P)'s husband.
  - 1) Duty: The (D) is owed the duty because it was foreseeable that by conducting the contest, the (D)'s listeners would race and drive negligently and disregard the demands of the highway safety to arrive first at the announced location to collect the prize, and 2) the (D)'s breached its duty because it such contest deemed to unreasonable because the gravity and likelihood of the danger outweigh the utility of the conduct. 3) The (D)'s contest was the actual cause of the (P)'s injury because "But for" the (D)'s contest the listener would not have raced and drove negligently. 4) The (D)'s contest was the proximate cause because the extent of the (P)'s injury and the (D)'s conduct was foreseeable. 5) the (P)'s husband was killed.
  - **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.
  - **McCollum v. CBS** - In contrast to *Weirum v. RKO*, No negligence because the duty element was not satisfied.
  - The (P)'s son killed himself with a gun after listening to Ozzy Osbourne song, "Suicide Solution." The court held that the accident was not foreseeable because artists cannot limit and restrict their creativity and speech which may adversely effect an individual emotionally.
2. **Kubert v. Colonna** - No negligence because the (D), a remote textor, was not aware her friend is texting while driving.
  - The court held, if the sender of a text knows or should have known the recipient of the text would view the text while driving and thus be distracted, then the sender is liable if an accident caused by texting.

- 1) No duty to (P) because the (D) was unaware that her friend was texting while driving, therefore, it was not foreseeable that the (D)'s text could injure the (P), 2) Since the (D) had no duty, she did breach her duty, 3) Actual cause is satisfied because but for the (D)'s text the driver would not have caused the accident and the (P)'s injury would not have happened. 4) Proximate cause is not satisfied because it is not foreseeable that (D)'s text would cause the injury to (P). 5) (P) suffered injury.
- 3. **Boyd v. Racine** - No negligence because the (D), a shop owner had no duty toward its customer.
- 0. BAD case to illustrate the duty element. [in fact the (D) as a owner of the business who solicit and gather public for its own benefit owed a duty to aid the (P)'s husband.]
  - (P)'s husband was killed in (D)'s shop by an armed robber.
- 4. **Yania v. Bigan** - No negligence because the (D) had no affirmative duty to rescue (P)
  - 1) No duty to rescue his friend because the (P) voluntarily placed himself in the way of danger, and the mere fact that (D) saw (P) in a position of peril, the law imposed no legal duty upon (D) to rescue the (P). 2) Since the (D) had no duty, (D) did not breach his duty. 3) Actual causation is satisfied because but for the (D)'s asking for help, the (P) would have not been injured. 4) Proximate causation is satisfied because it was foreseeable when the (D) asked the (P) to aid him in starting the jump at (D)'s home, an injury could occur, 5) the (P) was drowned.
- 5. **Theobald v. Dolcimascola** - No negligence because (D) had no affirmative duty to rescue (P)
  - (D)s were invited to (P) house, and (D)s witnessed the (P)'s son killed himself playing Russian Roulette.
- 6. **South v. Amtrak** - Negligence because the (D) had an affirmative duty to rescue the (P) in a situation that the peril was created by (D)'s conduct.
  - When the (D) knows or should have known that his conduct, innocent or tortious, caused the (P) harm, the (D) has affirmative duty to render assistance to prevent further harm.
  - 1) The (D) had an affirmative duty to help the (P) when (D)'s conduct caused the (P)'s harm, and 2) (D) breached his duty when he refuse to help (P), 3) actual causation is satisfied because but for the (D)'s breach of duty to help the (P), the (P)'s injury would not occurred, 4) the proximate causation is satisfied because it was foreseeable the (D)'s refusal to help the (P) would cause the injury, 5) the plaintiff suffered bodily injury.
- 7. **Tarasoff v. Regents of U.C** - Negligence case because (D) as a doctor had to exercise a reasonable person standard of care under the circumstance to warn the (P) that the (D)'s patient was planning to kill him.
  - (D) was a psychiatrist, a specialist, had a patient that informed the (D) he plans to kill the (P)'s daughter.
  - (D) warned the authorities, but the court found that was enough because the law impose a duty on the therapist (D) to exercise a reasonable degree of knowledge and skill to detect and determine if the patient poses serious danger of violence to others, and when the (D) determined that, the (D) bears a duty to exercise reasonable care under the circumstance to protect the foreseeable victim of that danger.



**Affirmative Duties( A Defendant has no affirmative duty to act unless: 1. You assume the duty by acting (Exception: Good Samaritan statutes exempting medical professionals from liability for ordinary, but not gross, negligence in voluntarily acting to help someone) 2. Put Plaintiff in peril, and/ or 3. A common carrier (those who solicit and gather the public for their own profit owe a duty to aid patrons)**

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 Defendant'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

## 2. 01.03 The Breach Element

**Subpart B: The Breach Element-** issue for the jury or the judge to resolve it.

- Breach element can be established by:
  1. **Objective Standard:**
    1. **Reasonable person standard**
      - Roger v. Retrum - (P) did not establish the breach (P)'s injury did not result from an unreasonable risk.
      - Vaughan v. Menlove - Plaintiff established the breach element because of the reasonable person standard of care
    2. **Mental Disability will not taken to account.**
      - Breunig v. American Family Insurance - (D)'s mental disability was not taken to account, therefore (P) established the breach element.
    2. **Professional standard of care like for mal practice cases**
    3. **Bailmont**
    4. **Owner or occupier**
      - If it is a condition on the land, use: Trespass, licensee, and Invitee
      - If it is an activity on the land, use: Reasonable person standard of care
    5. **Negligence Per se** - violation of a statute or regulation caused the (P)'s injury, and there are two steps that must be met:
      0. Class of person - did the statute was designed to protect this class of person?
      1. Class of risk - did the statute was designed to protect this risk?
        - Gorris v. Scott - (P) did not establish the breach element because the statute was not designed to prevent the harm to (P)'s animal
        - Martin v. Hezog - (P) did not establish the breach element because (P)'s was contributory negligence by violating the statute, therefore, the (P) is barred to recovery.
    6. **BLP Analysis** - If  $B < PL$ , the breach element is satisfied.
      - U.S. v. Carroll Towing
    7. **Custom** - custom is not dispositive because the whole custom may be "Unreasonable"
      - TJ Hooper -
    8. **Res Ipsa Liquitor** - things speak for itself
      - Brune v. Boadle  
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.

### **Did the (D) act within a standard of reasonable care?**

1. **General Standard** - Reasonable person standard is an objective standard. Ordinary people are subjective.
  - The care that would be exercised by a reasonable person under circumstances. Looking in the rear-view mirror before backing up
  - **Objective Standard:**
    - Mental deficiencies and inexperience will not taken into account
    - If the (D) had a superior knowledge or skill then the (P) can those to argue for the breach element.
    - physical disabilities and limitations will be taken to account.
    - Acting in a good faith or tried the best is not an objective standard.
2. **Specific Standard:**

- **Professionals** - lawyers, doctors, nurses will not be compared to a reasonable standard test. Those professional will be compared to the reasonable care standard in that particular profession. There are two exceptions to general practitioner v. specialist
- General Practitioner's knowledge, skill, and custom of practice will be compared to other general practitioners in the "Local" community.
- Specialist's knowledge, skill, and custom of practice will be compared to other specialists across the "nation"
- **Children:** The children will not be compared to a "reasonable person" standard.
- Factors to consider are child's age, education, intelligence and experience
- Children under 4 generally do not have the capacity to be negligent
- The only exception to children standard is when a child is engaged in an adult activity, therefore, the child will be compared to adult standard of care for the activity.
- 
- There was a case when a child fired a shut gun did not, the court did not apply the adult, or reasonable person standard of care, and the court applied the "child" standard of care
- There was another case the court find a 11-year child playing golf was engaged in adult activity.
- **Bailment** -caretaker of a chattel
- **Bailor** - Lender
  - 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**- Borrower
  - Sole benefit of bailor - Low standard
  - **Ex. The bailor asks his neighbor, the bailee, to take in the bailor's mail while the Bailor is gone on vacation, the bailee is only liable for being grossly negligence.**
  - Mutual benefit of bailor and bailee - Ordinary care standard
  - Sole benefit of bailee - High standard of care
  - **Ex. The Bailor loans a lawnmower to the Bailee, for the sole benefit of the bailee. The bailee is liable if the bailee is slightly negligent with the lawnmower**
- **Owner/Occupier of Land:**
- **Conditions:**
  - Trespassers -
    - Undiscovered - No Duty
    - Discovered or anticipated - Duty to warn or make safe concealed artificial conditions, known to the owner/occupier, involving risk of death or serious bodily injury.
    - The remedy can: obviate the condition or create an effective warning such as posted signs
    - Discovered Child Trespassers - "attractive nuisance doctrine" duty to avoid foreseeable risk to children caused by artificial condition, if:
      - The owner or the occupier knows or should have known about the dangerous artificial condition
      - The owner or the occupier knows or should have known that children come the area frequently
      - The artificial condition is dangerous to children
      - The remedy can be: remediate a dangerous artificial condition on the land capable of causing death or serious bodily injury, so long as the conition can be remedied without imposing an unreasonable burden on the occupier/owner.
    - Cost/ benefit analysis: the expense of remedying the artificial condition is slight compared to magnitude of risk, then the owner will be held liable.
  - Licensees - persons who enter the land with permission for their own benefit, rather than the benefit of the owner/occupier, including friends, visitor, and contractors coming on the premise to make sales or repairs.
    - The owner or the occupier has a duty to warn or make safe of any known, concealed dangerous condition whether it is natural or artificial
    - The owner or the occupier has no duty to inspect the premise
  - Invitees - Persons entering the land with permission from the owner/occupier's business or as a member of public on the land that is open to public.
    - In some jurisdiction, public employees like firefighter, mail carriers to be invitee even in private homes, as long as they are privileged to be there.
    - Invitees are owed the highest duty by the landowner/occupier.

- Duty to adequately warn or render safe concealed hazards plus to make a diligent effort to inspect for unknown dangers.
- **Activity:**
  - Everybody - Reasonable person standard of care
  - **Statutory Standard - Negligence Per Se**
  - When applicable, statute's specific standard replaces the general negligence, reasonable person standard
  - The violation of the statute must caused the injury
  - The test is: class of person/class of risk
    - The (P) is in the class of person the statute was designed to protect
    - The harm suffered is among the risk that the statute was designed to protect against.
  - **Negligence Per Se used by (P)** - when a (P) uses per se for prove the breach element, the (P) uses a violation of a statute or regulation to prove the breach element. Using a violation of a statute, negligence per se, is a free pass to prove the breach element. Even there is a violation of the statute by the (D), it does not grantee the (P) has satisfied the breach element. There is a two steps process the (P) must show: 1) (P) must show that he is in the class of person the statute was designed to protect, and 2) (P)'s harm is among the risk the statute was designed to protect. If the (P) satisfied both of the steps, then the (P) does not need to make argument about the reasonable person standard.
    - If the (P) cannot satisfy the negligence per se, for example, (P) can satisfy only one step for the negligence per se requirements, it does not mean the (P) cannot establish the breach element. It means the (P) cannot use the violation of the statute, and (P) must use the reasonable person standard.
  - **Negligence Per Se used by (D)** - It is a defense for the (D). When a (P) violated a statute or regulation, and (P)'s is party or completely is the blame for his own injury.
    - Ex: if the (D) caused the accident, but (P)'s over the speed limit was partly a fault of his own injury, then the (D) can use the statute or regulation that (P)'s excess speed contributed to his injury.
    - Negligence per se can be use for contributory/comparative negligence.
    - Negligence Per Se for Contributory Negligence - It is used in minority of jurisdictions, and contributory negligence is (D) friendly. Under this view, if the (P)'s own negligence for not complying with the statute contributed even slightly to his own injury, then (D) is not liable at all.
    - Negligence Per Se for Comparative Negligence - it is used in majority of jurisdictions, and comparative negligence is (P) friendly. Under this view, if the (P)'s own negligence for not complying with the statute partly contributed to his own injury, then (P) will not recover the full amount for his injury.
    - **Excuse for Complying with a Statute or Regulation** - Courts may excuse failure to comply with a statute or regulation only if the person who failed to comply 1) used the reasonable care, 2) acted in a good faith, and 3) complying with the statute would be more dangerous than violating the statute under the circumstances.
    - **Complying with Statutes or Regulation as a Defense** - The question is, since (P) can use the violation of the statute to establish the breach element under the negligence-per-se, can the (D) used complying with a statute to show that there was no breach?
      - (D) may use the complying with the statute or regulation as a defense, but (D) must also show the reasonable person standard of care. In another word, only complying with statutes or regulations as a defense is not a complete argument, and the (D) must be able to show the reasonable person standard of care under the circumstances.
- 3. **Special case - Res Ipsa Loquitur: Things speak for itself.**
  - 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 the (D)'s sole control.
- 4. **Custom or Standard Practices** - Custom cannot usurp the reasonable person standard of care under the circumstances because the whole custom may turn out to be unreasonable.
- 5. **BPL Analysis or Hand Formula** - it is known as the "cost-benefit" analysis, and it is has been embraced by law-and economic scholars. A party breached its duty of care when the **Burden** to take precaution to avoid the harm is less than the total amount of risk which is **Probability** of the kind of accident times the gravity of **Loss** occurred

- If  $B < PL$ , then the breach element is satisfied because the (D)'s burden is lower than the total amount of risk to avoid the harm.
- If  $B \geq PL$ , then the breach element is not established because the (D)'s burden is equal or higher than the total amount of risk to avoid the harm.
- $P \times L =$  the total amount of risk.
- **B and L must be in the same unit.**
- **B = Burden**, and it is measured in dollars or other unit in comparison like Euros, Pound. How much money the (D) must spend to avoid the loss.
- **L = Loss**, and it is measured in dollars or other unit in comparison like Euros, Pound. How much the (P) stand to lose if the preventable accident comes to pass.
- **P = Probability** and is measured between 0...1. Probability is measured as fraction, the likelihood that the preventable accident comes to pass.
- 6. **Res Ipsa Loquitur** - Things speak for itself
  - (P) prevail when there is a lack of specific evidence showing a breach of the duty of care.
  - There are two requirements: 1) the accident was likely negligence, and 2) the likely the conduct of the (D).
  - More than just the happening of an accident is required for (P) to prove (D)'s breach of duty
  - The harm-causing event has to be tied to (D), and the event must be one that generally doesn't occur absent negligence
  - Nature of accident proved breach of reasonable care
  - If the (P) convinces the court that the Res Ipsa Loquitur could be allowed, jurisdictions have two different views:
    - In some, jury is permitted but not required to draw inferences that the (D) breached the duty of care.
    - In some other, the burden shift to (D) who can rebut the presumption of breach with specific evidence.

#### **Characteristics of a Reasonable Person**

- Jury must compare the conduct of the Defendant to that of a reasonable person under the circumstances.
- Represents community norms
- Ignorance is irrelevant, must rise to level of community one is in
- 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

#### **Cases For Breach Element**

1. **Rogers v. Retrum** - No negligence because the (D) did not breach his duty because the (P)'s injury did not result from an unreasonable risk.
  - The school had an open campus policy, and the (P) and his friend left school. (P)'s friend was driving over the speed limit when he got into an accident.
  - 1) (D) had the duty toward the (P) because of the school-student relationship, 2) (D) did not breach because the (P)'s injury was not a result within an unreasonable risk created by (D), 3) The actual causation is satisfied because but for the open campus policy, the (P) would not be injured. 4) The proximate cause is not satisfied in this case because the extent of the harm the (P) suffered due to accident was foreseeable by (D)'s permission to leave the campus. 5) (P) suffered bodily injury.
2. **Vaughn v. Menlove** - Negligence case because the (D) breached a reasonable person would not stack wet hay near the (P)'s home.
  - The (D) is liable for the "rick" fire that burned down his neighbor's house when the reasonable person knows not to stack hay like he did, despite the defendant's action being according to his best judgment.

- The standard for negligence is to look whether one has acted as would a reasonably prudent person would have acted under the similar circumstances.
- weakness or inexperience will not be taken into account because those are subjective standard.
- 3. **Breunig v. American Family Insurance** - Negligence case because the (D)'s mental deficiencies will not taken into account.
  - (D) has knowledge of her mental condition, and she drove her car into (P)'s car and injured her.
  - Insanity is not a defense in tort case except for intentional torts.
- 4. **Gorris v. Scott** - No negligence case was established because the statute did not protect the animals from being washed overboard, the purpose of the statute was to protect the animals against spreading diseases.
  - The statute: Animals to be placed in separate pens to prevent the spread of disease.
  - First Q: did the statute protected the (P)'s animals? Yes
  - Second Q: Did the statute was designed to protect such injury to (P)'s animal? No
  - Therefore, No negligence per se.
  - Though the the (P) cannot use the negligence per se (the statute) to satisfy the breach element, the (P) may be able to establish the breach of duty element under the reasonable person standard of care.
- 5. **Martin v. Herzog** - The negligence case was established but the (P)s are liable for their own injury
  - (P)s was driving a buggy without using lights, and (P)'s husband was killed
  - there was a statute to protect travelers on the roads at night, and by violating the statute (P) is blamed for her husband's death.
  - This case is about contributory negligence which is used in minority of jurisdictions. Under contributory negligence view, if the (P)'s own negligence contributed even slightly to the (P)'s injury, the (D) is not liable at all. Contributory negligence is (D) friendly
  - In contrast, comparative negligence which is (P) friendly, which is used in the majority of jurisdictions. Under comparative negligence view, if the (P)'s own negligence contributed to his own injury (P) cannot recover the full amount of the injury.
  - Both contributory and comparative negligence are used as a defense by the (D).
- 6. **The T.J Hooper** - The negligence case was established though the (D) complied with the custom because the whole industry's custom was not reasonable under the circumstances.
  - (P)'s barges was towed by (D)'s tugboat, and the (P)'s barges were lost in a storm because (D)'s tugboat was not equipped with a radio.
  - Though the custom admiralty law did not require for (D) to install radio, but the court found if the (D) had radio installed in his tugboat, the (D) would have voided the storm because the radio would have announced the storm was in its way.
  - Another concept can be applied to this case that is the Hand formula analysis which is the (D) had breached its duty of care, when the burden (B) of installing the radio is less than (PL) the probability and the magnitude of the loss. Therefore, breach of duty is found If  $B < PL$ . The burden to installing the radio on the boat was lower than total risk of harm.
- 7. **U.S. v. Carrol Towing** - the (P) established the breach element by applying the BPL analysis because the burden to having an attendant aboard the barge was less than the total amount of the risk.
  - There was no custom or general rule to have an attendant on the barge. Therefore, the whole custom was unreasonable.
  - The court applied the BPL analysis to determine if the (D) is liable to damages.
  - Beside applying the BPL analysis, a reasonable person under the circumstances would have an attendant on the board because a reasonable person knows or should have known if the barge break free from the pier, the damages or the injury to (P)'s goods was greater than paying an attendant.
- 8. **Bryne v. Boadle** - the (P) established the negligence case by applying the Res Ipsa Loquitor doctrine because the the barrel of flour would not have dropped on top of the (P) for no reason if the owner of the flour warehouse (D) acted reasonably.

9. **Flower v. Seaton** - The (P) established the negligence case by applying the Res Ipsa Loquitur doctrine because (P) daughter's injury does not normally occur in nursery schools if the children are properly supervised.
  - (P)' daughter, a minor, was delivered healthy to the (D) business, a nursery school.
  - When the (P) picked the child up the (P) noticed she had crossed eye.
10. **Campbell v. Weathers** - Negligence case was established because the (P), as an invitee though (P) did not purchased anything, was injured at the (D)'s business, and the (D) failed to notify the (P) of the trap.
  - (P) had been the (D)'s customer for a number of years.
  - (D) never told the (P) the toilet was not for the public use.
11. **Rowland v. Christan** - Negligence case was established because the (D) breached her duty of care as the occupier of the land, where the (D) was aware of the defective faucet in her bathroom and failed to inform the (P), a licensee.
  - (P) was the (D)'s guest, and the (P) suffered injury from a defective faucet at the (D)'s bathroom, and the court found that (D) had a duty to warn the (P) about the dangerous condition.

### 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.

-

### 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)
- - π'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.



### 3. Negligence Per Se (are specific standard of care that is borrowed usually from statute or regulation, which sets the standard of care).

- Negligence Per Se / Statutory Standard of Care
  - 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
- 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* - There was a statute that stated, "Animals to be placed in separate pens to prevent the spread of diseases." Defendant puts all of Plaintiff's animals in 1 pen. Then Plaintiff's animal washes away. Plaintiff claims that defendant violated the statute therefore breached defendant's duty of care. Plaintiff lost and defendant wins. The object of the statute was not to prevent the animals from being washed overboard, but to protect them against spreading diseases.
- **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 cause 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

### 4. The Role of Custom or Standard Practices

#### 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.

## 5. 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 x 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.

### Modern View of Hand Formula

- There is not much use of hand formula today when it comes to real-world negligence. In reality, it is not always possible to assign numbers to components.
- However, hand formula has a lot of use when it comes to design defects in products liability because numbers can be pinned down.
- Note: that in analyzing hand formula problem, remember that numerical value can definitely be assigned to a human life. Examples: EPA values human life at \$6.1M; DOT values human life at \$3M.

### 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.)

## 6. Res Ipsa Loquitur( likely Defendant breached the duty of care. and likely Defendant undertook the careless conduct).

- **Res ipsa loquitur**-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* - Defendant's barrel rolled out from their warehouse and hit Plaintiff on the head. A barrel cannot roll out of a warehouse without the defendant being negligent and without Defendant breaching its' duty to be careful. This is a good example of the thing speaking for itself.

## 7. Land Owners and Occupiers

**Trespassers**( adult trespassers and Children Trespassers). ( a trespasser is one who comes onto the land without permission or privilege).

- - Undiscovered/ Unanticipated = a landowner owes No duty to an undiscovered trespasser. He has no duty to inspect in order to ascertain whether persons are coming onto his property.
  - Discovered/anticipated = Duty to warn or make safe concealed artificial conditions( man-made death traps), 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:
        - There is a dangerous artificial condition present on the land of which the owner is or should be aware of;
        - The owner/occupier knows or should know that children frequent the area
        - The condition is likely to cause injury or is dangerous, because of child's inability to appreciate the risk and;
        - Cost/benefit analysis: the expense of remedying condition is slight compared to magnitude of risk.
  - **Licensees**( is one who enters on the land with the landowner's permission, express or implied. ( Licensees include friends, contractors coming on to the premises to make sales or repairs and etc).
- - Duty to warn of or make safe any known, concealed dangerous condition (whether natural or artificial) that a licensee is unlikely to discover.
  - **Invitees** ( are people who are allowed to come on land to conduct business related to the owner/occupiers business, or who are members of the public on the land that is held open to the general public, such as parks, museums, churches, airports, etc).
- Same duty as to licensees, plus a duty to inspect and render safe concealed dangers

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

4 categories further defined:

### 9.04 Land Possessor Duty to Those Outside the Land

- Parallel to a large degree those regarding the duty owed to those entering the land
-

- Land possessor owes no duty to those outside the land for natural conditions on the land
- Where the harm is by an artificial condition or the land possessor's activity : duty owed
- No-Duty-for-natural-conditions rule: land owners has to exercise care that trees on the property do not pose unreasonable risks to those on outside lands

9.05 Landlord - Tenant Relations

- Liability imposed for
  - - Defects in common areas
    - Undisclosed dangerous conditions to the lesser
    - Negligent repairs
    - Lesser's covenant to repair
    - Condition dangerous to persons outside leased premises
- Liability extends to those who are foreseeable on the property

<b><u>TRESPASSERS</u></b>	<b>Conditions (on the land)</b>	<b>Activities (on the land)</b>
<b>Unanticipated trespassers</b>	No duty	Reasonable person
<b>Anticipated trespassers</b>	Warn or remediate (mandmade deathtraps)	Reasonable person
<b>licensees</b>	Warn or remediate (traps)	Reasonable person
<b>invitees</b>	Warn or remediate +duty to inspect	Reasonable person

## 8. 01.04 The Actual-Causation Element

### **Subpart C: The Actual-Causation Element = is the question for trier of facts**

- **The requirement for Actual causation is simply that there must be a strict, logical, cause-and-effect relationship between the (D)'s conduct and the (P)'s injury.**
- **Other labels for Actual causation:** 1) Causation-in-fact, 2) Factual causation, 3) direct causation.
- **"But For Test"** - But for the (D)'s breach of duty of care, the (P)'s injury would have not occurred.
  - **Ex:** (P) is a passenger on a bus. The bus driver was driving while texting and as a result got into a car accident and (P) gets hurt. "But for" the bus driver texting while driving, would the injury to (P) have occurred?
    - 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
- **Loss of Chance Situation** - when there is a loss of chance situation like in "CareStat" for actual causation, there are two ways to decide:
  - If the injury is "the loss of chance to survive," then the question is to decide is whether the losing "a chance" counts as a personal injury
  - If the injury is the "death," then the question is where one can say that causing a decreased probability of survival is the same as causing death.
- **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.
  - Where there are multiple necessary causes meaning more than one action had to occur in order for the (P) to be injured.
  - The combination of both of the acts caused the (P)'s injury, and each of the acts on its own would have not injured the (P)
  - **Ex:** 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: Is it a 'but-for' cause? **Answer: Each are "but for" causes for the Pedestrian injury.**
- **Multiple (D)s in the Multiple Necessary Causes** - Where two or more (D)s that have been negligent, but uncertainty exists as to which (D) caused (P)'s injury. The "but for" analysis, won't work because (P) would be unable to prove by preponderance of evidence which one of the (D) caused the (P)'s injury. Therefore, the burden of proof shifts to each (D) to prove that he did not cause the (P)'s injury.
- **Multiple Sufficient Causes** - "Twin fires doctrine" (D1) negligently sets a fire in one side of the town, and the (D2) negligently sets a fire on the other side of the town. The fire merged and along the way destroyed the (P)'s house. Thus, to protect the (P), the court would allow the actual causation to be satisfied where the "but-for" test is not satisfied because neither (D1) nor (D2) met the "but for" test.
  - But for the act of (D1), would the (P) would have been uninjured? No, the (D2)'s fire would have injured the (P)

- But for the act of (D2), would the (P) would have been uninjured? No, the (D1)'s fire would have injured the (P)

**Substantial Factor Test ( where several causes commingle and bring about an injury and any one alone would have been sufficient to cause the injury- it is sufficient if defendant's conduct was a "substantial factor" in causing the injury).**

- 
- 
- A cause can be a substantial factor without satisfying the “but for” test.
- **Example:** Two fires meet and burn a farm. Either fire alone would have done the damage without the other. Under the "but for" test, neither was the "cause" since, looking at either fire alone, the loss would have occurred without it. Rather than reach this result, the courts consider as causes all those things that were a "substantial factor" in causing the injury.
- **Example:** Two chemical companies both dump roughly equal ( 50/50) amounts of toxic chemicals into the ground which seep through the soil and contaminate a nearby residential well. The well water has 1000 ppm of the chemical. The resident drinks the water and dies. A dosage of 300 ppm is enough to injure and kill someone. Under the "but for" test, neither since, looking at either dump alone, the loss would have occurred without it. Rather than reach this result courts consider as causes all those things that were a "substantial factor" in causing the injury. So both liable in essence.

#### 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)

#### Cases for Actual Causation:

1. **Beswick v. Carestat** - Loss of chance situation. The (P) failed to establish the negligence case because the (P) failed to establish the actual causation. The (P)'s expert testified that the (P)'s husband had 34% chance of survival, and therefore, (P) failed to prove the actual causation by preponderance of evidence.
  - Though the "but for" could have applied in this case, the (P)'s husband had only 34% chance of survival, therefore, no negligence.
2. **Jarvis v. J.I. Case Co** - Actual causation was met because (P) was injured by multiple necessary cause by multiple (D)s, and the court held that there can be several causes in fact which combine, result in an injury, and become the actual cause.
3. **Kingston v. Chicago & Northwestern Railway** - Twin fire example or multiple sufficient cause, (P) was able to establish the actual causation despite of "but-for" test would not be established because (P)' property would have been destroyed from one of those fires set by (D)s.

4. *Summer v. Tice* - Multiple (D)s and in this case each (D) is an actual cause. (D1) and (D2) both negligently fire shotguns in (P)'s direction. P is hit by 1 pellet, but (P) cannot tell which gun fired the shot. Under the shifting of alternative cause approach, (D1) and (D2) will have to prove that the pellet was not theirs. If unable to do this, both (D1) and (D2) are liable

## 01.05 The Proximate-Causation Element

### *Subpart D: The Proximate-Causation Element*

9. **Proximate Causation** (the defendant is liable for all harmful results that are the normal incidents of and within the increased risk caused by defendant's act.... This is determined by: foreseeability test (often used), harm within the risk, and direct test (not often used).

#### Test for Proximate Causation

**1. Foreseeability Test (often used):** (If a particular harmful result was at all foreseeable from defendant's negligent conduct then defendant's negligent conduct is foreseeable even though there were **intervening forces**; HOWEVER, even if the result is foreseeable, the defendant is relieved/barred from liability if there are **superseding intervening force**.)

**Foreseeability test requires:** (1). a reasonably foreseeable result or type of harm and (2). **NO SUPERSEDING INTERVENING FORCE.**

**Intervening forces:** (is a new force which joins with the defendant's conduct to cause the plaintiff's injury. Intervening force can be human, animal, mechanical, or natural, such as a wind shift. It is considered intervening because it has occurred sequentially in time after the defendant's conduct).

**Example:** D is driving her sports car down a busy street at a high rate of speed when a P steps out into crosswalk in front of her. D has no time to stop, so she swerves to one side. **Her car hits a parked truck and bounces to the other side of the street, where it hits another parked vehicle,** propelling it into the street and breaking P's leg. D is liable despite the unusual way in which she caused the injury to the P. **All those other causes could be foreseeable intervening forces, which caused P injury.**

**Superseding intervening force:** (Highly improbable and extraordinary intervening forces are generally found superseding and preclude defendant from liability. The superseding force is one that serves to break the causal connection between defendant's initial negligent act and the ultimate injury, and itself becomes a direct immediate cause of the injury).

**Example:** D negligently blocks a road, forcing P to take an alternative road. Another driver negligently collides with P on this road, injuring him. Even though D is an actual (but for) cause of P's injury, the other driver's conduct is an unforeseeable intervening force because D's negligence did not increase the risk of its occurrence. Thus, the other driver is a superseding force that cuts off D's liability for his original negligent act.

**Eggshell Plaintiff Rule:** (while foreseeability of consequences is generally required to find liability courts make an exception and do not require that the type of personal injury suffered by a victim be foreseeable. Courts have consistently held that the defendant takes the plaintiff as he finds him).

**Example:** A tortiously bump B in the head, and that such a bump would ordinarily only cause a minor injury. B, however, has an eggshell-like head and the bump results in a catastrophic brain injury. A's bad luck at bumping the one individual vulnerable enough to suffer serious injury or death does not protect A from liability).

## **2. 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.

**3. Direct Causation Test ( not often used):** ( No intervening forces or causes from the defendant's conduct to the injury. Defendant's negligent conduct must be direct cause to Plaintiff's injury. SO If any new intervening force such as human, mechanical, or natural joins the defendant's action to cause the injury, then the defendant is not deemed to be the direct cause of Plaintiff's injury).

## **10. 01.06 The Damages Element**

### **Subpart E: The Damages Element**

#### **11. 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.



## 12. 01.07 Affirmative Defenses to Negligence

### Negligence: Defenses

#### Plaintiff's Negligence (Contributory and Comparative)

Note: PLAINTIFF BEARS THE BURDEN TO PROVE ALL 5 ELEMENTS of a NEGLIGENCE CLAIM  
- If plaintiff fails on just one element, defense wins!! HOWEVER, if Plaintiff does prove all 5 elements of her prima facie negligence claim, Defendant can still **win** if defendant can successfully assert an affirmative defense.

#### 1. *Contributory Negligence (Minority Jurisdictions)*

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. Example : A fails to put on her seatbelt while driving and is negligently hit by B's car. A's negligence in not wearing a seatbelt is not contributory negligence, since the failure to wear a seatbelt did not legally contribute to the accident which induced A's harm. This is so, even if the plaintiff suffers a greater injury as a result of not wearing the seatbelt.

#### 2. *Comparative Negligence (Majority Jurisdictions)*

1. Definition: reduces the Plaintiff's recovery by the percentage she is deemed responsible for causing her own injury.
2. **Pure comparative negligence**
  1. Definitions: Plaintiffs can recover some percentage from liable defendants regardless of the extent of their own negligence.
  2. Example: If Plaintiff is 60% responsible for an accident with defendant, Plaintiff can still recover 40 percent of the damages.
3. **Modified/Partial comparative negligence**
  1. Definition: Plaintiffs are allowed a partial recovery just as in pure comparative negligence, until the Plaintiff reaches a certain level of culpability for her own accident.
  2. Two types of Partial/ Modified Comparative Negligence depending on the jurisdiction:(1) A plaintiff is barred from recovery only when she is **more** negligent (**greater than 50% at fault**) than the defendant(s).

#### **For Example,**

if Plaintiff is 50% responsible for the accident, she can still recover 50% of her damages from the liable defendant(s). (2) A Plaintiff is barred from recovery when she is **equal to or more negligent (greater than or equal to 50%)** than defendant(s).

#### **For example:**

If plaintiff is 50% at fault she would be barred from recovery.

#### **3. 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/or 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 an 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.

## 02.01 Liability Relating to Health Care

### Health Care Liability

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

- Professional negligence
- Medical battery
- Informed consent

#### 1. 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 BUT WITH PROFESSIONALS
- 
- Duty
- Breach – standard of care (**Professional Standards: General practitioner (The knowledge, skill, and custom of practice among practitioners in the local community or if too small another general practitioner of similar size to this local community) Specialist (The knowledge, skill, and custom of practice among members of the specialty across the nation).**)
- Actual Causation
- Proximate causation
- Damages
- 
- Damages are necessary for negligence (but not medical battery)
- Consent issue is irrelevant here if it causes harm

#### 2. Medical Battery

- Medical battery
- 
- Intentional tort
- Elements of battery
- 
- Act

- Intent
- Causation (The result giving rise to liability must have been legally caused by the Defendant's act. **THIS IS NOT ACTUAL CAUSATION NOR PROXIMATE CAUSATION. BATTERY DOES NOT FOCUS ON THOSE ELEMENTS HERE**)
- 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.
- 
- 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.

### 3. Informed Consent

#### Informed Consent Actions

- 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
  - Requirements:
    - 
    - **1. A risk should have been disclosed.**
    - **2. The risk was not disclosed.**
    - **3. The patient would have made a different decision about treatment if the risk had been disclosed.**
    - **4. The patient was injured as a result.**

#### 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
    - Patent 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
- **4. ERISA pre-emption( HOWEVER, EVEN THOUGH WE WENT OVER THIS IN CLASS IT IS NOT A MAIN FOCUS AS THE OTHERS LISTED ABOVE. THIS MAY BE USED FOR THOSE WHO MAY SPOT ADDITIONAL ISSUES( FOR BONUS) THAT OTHERS MAY NOT SEE).**
  - 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.

## 13. 03.01 Intentional Torts

# 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.
- 
- **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.

### 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

### Elements of Battery

#### 1. Act by defendant

#### 2. Intent (On the part of defendant to bring about harmful or offensive contact to Plaintiff’s person).

#### 3. Causation ( defendant is liable not only for indirect contact but also direct contact).

**Ex. (this is an example of indirect touching): Defendant intending to set a trap, dug a hole in the road upon which Plaintiff was going to walk. Plaintiff fell in. Causation exists here.**

**4. Touching ( Indirect, as mentioned in the example above, Indirect can also be setting something in motion as mentioned above or direct touching)**

**5. Harmful or Offensive Contact ( Contact is harmful if it causes actual injury, pain, or disfigurement. Contact is offensive if it would be considered offensive by a reasonable person).**

**Ex. A taps B on the shoulder. This would not be considered as harmful nor offensive because a reasonable person in B's person should not consider A's conduct as Offensive nor harmful.**

**HOWEVER::: EXCEPTION**

- 
- *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)
- *Eggshell 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.

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 II noncompliance w/ an unlawful demand still assault, even if II 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.

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 π**

- 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 π to remain don't constitute FI
- Time irrelevant, *however*, amt of compensation reflects length
- **π must know of the confinement**
- 
- Restatement modifies; would find liability even when π 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 π**
- 
- Not rsbl if requires π to be heroic, endure excessive embarrassment or discomfort, or if π unaware of means of escape
- Can be large

#### 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 still 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 Δ 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 Δ harms 3rd party and π 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) Δ 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

#### **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 required 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 π'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 Δ liability.
- Def. is liable for damages incidental to the trespass
  - 
  - 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 they 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.

## **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 objection 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.